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FLEXIBILITY, UNPREDICTABILITY AND CONTROL OF VICTIM STATUS ACCORDING TO ART. 34 ECHR IN RECENT CASES OF THE ECtHR

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SUMMARY

The present work has attempted to shed light in a comparative way on some interpretative and other elements that the European Court of Human Rights (ECtHR) obtains through its jurisprudence in cases concerning the status of victim. Each case is different. The arguments presented are different. For this reason, this work makes use of the principles of flexibility, unpredictability and evaluation of the victim status according to the "commands" of the case and of the society in which we live in order to better analyze and interpret the arguments under examination. The rigorous and restrictive interpretations of the past are calculable, but not necessarily used even in today's cases as we examine in the following two cases: M.A. and others v. France and M.A. and others v. Poland. The main result of the present work is that the facts are different but the topics in common remain the status of victim, the protection of human rights, and the right of access to justice as well as the criteria used by the ECtHR itself.

KEYWORDS

Art. 34 of the ECHR, ECtHR, victim status, flexibility, unpredictability, Art. 2, 3 of the ECHR, protection of human rights, reasonable and convincing evidence, margin of appreciation, questions of general interest.

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INTRODUCTION

The European Court of Human Rights (ECtHR) accepted the M.A. and others v. France case on 31 August 2023. A case that includes 261 women and men of various nationalities living in France and who voluntarily practice prostitution (sex workers). They were presented to the court because they complained against the French law n. 2016-444 of 13 April 2016 given that it introduced prostitution as a crime: "achat de relations de nature sexuelles" thus criminally sanctioning customers who are involved with people who practice prostitution and at the same time repealing the crime of racolage public.

According to the appellants, the French law in question violated Articles 2 and 3 of the ECHR given that clandestine prostitution and sex workers find themselves in a situation of isolation and endanger life and physical integrity, thus facilitating various types of violence with damage of customers who thus remain unpunished. The criminalization of people who use prostitution in purely private spaces also means the violation of the personal autonomy and sexual freedom of sex workers as a right guaranteed by Art. 8 of the ECHR[2].

The ECtHR held according to the admissibility of the case that the appellants can be considered victims according to Art. 34 of the ECHR[3] and due to the violations complained of. Given that they are not the direct recipients of the legislation in force and that it has not been applied to them as sex workers, they are not required to change their conduct.

Naturally, the decision allows us to say that we are amazed by the relevant approach that has been adopted, perhaps suitable and necessary in our days for the societies we live in and above all with regard to the control and verification of the victim status which until today the ECtHR has obtained various interpretations on this matter. From a judicial point of view, it is clear that the ECtHR was appropriate to attribute this "position" to the notion of victim. Despite the fact that it was rare and in cases very complex to adopt an autonomous decision, the admissibility of an appeal postponed a ruling on the matter to a later moment. The appellant should demonstrate that he/she is personally and directly concerned by a state act or omission that affects the rights protected by the ECHR or its protocols[4].

The content of the decisions obtained by the ECtHR (given that the previous and related jurisprudence on the matter was scarce if not non-existent on the subject) offers a definition of the victim as a collateral victim of a measure of a direct nature and against other subjects but not of the appellant. This is a broad notion, new in the rulings of the ECtHR and the outcome looks favorably for the protection of the rights that are guaranteed by the ECHR. The discussion was

[2]J.P. Costa, *La Cour europèenne des droits de l'homme. Des juges pour la libertè*. (ed. Dalloz, Paris, 2017). P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, *Theory and practice of the European Convention on Human Rights*. (Intersentia, Cambridge/Antwerp, 2018). A. Nussberger, *The European Court of Human Rights.* (Oxford University Press, Oxford, 2020). D. Kosař, J. Petrov, K. Šipulovà, H. Smekal, L. Lyhnànek, J. Janovský, *Domestic judicial treatment of European Court of Human Rights case law. Beyond compliance.* (Routledge, London & New York, 2020). F. Sudre, *La Convention europèennes des droits de l'homme.* (PUF, Paris, 2021). B. Rainey, W. Wicks, C. Ovey, *Jacbos, White and Ovey: The European Convention on Human Rights.* (Oxford University Press, Oxford, 2021). M.E. Villiger, *Handbook on the European Convention on Human Rights.* (ed. Brill, Bruxelles, 2023)

[3] P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, *Theory and practice of the European Convention on Human Rights*. (Intersentia, Cambridge/Antwerp, 2018).

4Buckley v. United Kingdom of 25 September 1996, parr. 56-59. Skubenko v. Ukraine of 06 April 2004.

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complex with the contrast created by the different standards regarding the control of the victim's status which are not based on objective and predictable criteria.

Within this framework we remember the A.M. and others v. Poland case of 16 May 2023 where the ECtHR has adopted a fairly restrictive line we can say by reading section 4 considering that the appeal has different standards for the control of admissibility assessment first of all ratione personae[5] and in the absence of criteria that seek to justify them thus risking turning into a decisive and inherent flexibility in the notion of the victim, i.e. an unpredictable factor in the outcome of appeals that makes history in Strasbourg.

In the jurisprudence of the ECtHR, we note a relative consolidation of the principle of victim status according to Art. 34 of the ECHR[6] based on the legitimation of bringing an action as an autonomous notion which is independent of the rules of national law as well as the capacity to legitimize an action[7]. The notion is applied in a rigid, restrictive, inflexible manner and without excessive formalism, thus guaranteeing the practical and effective, non-theoretical and illusory exercise of the relevant individual appeal[8]. Article 34 and other provisions of the ECHR are interpreted in an evolutionary manner and according to the developments and needs of the society[9]. The notion of the victim is applied in a direct, indirect, partial way and: "(…) the doit exister un lien entre le querant et le préjudice qu'il estime avoir subi du fait de la violation alléguée (…)"[10]. The ECtHR has taken a position regarding the assessment of a victim status and the distribution of the burden of proof as well as the level of persuasiveness regarding the relevant elements that are brought to its table for evaluation, also depending on the specificity of the facts and nature of the violations as well as the related complaints in the rights at stake[11].

Within these principles and the general spirit of evaluation, not general but specific, the decision should be examined based on evaluations that come from the previous jurisprudential history of the ECtHR in the topic under investigation.

The methodology used in our paper is based on the jurisprudence of the ECtHR with a comparative manner and on some relevant articles of the ECHR. The topic of sex workers in the context of the ECtHR is addressed for the first time. Therefore, the Court does not directly consider sex workers as victims and for this reason this does not allow us to make use of relevant past judgments. Hence, we try to give to the specific case under analysis an autonomous character, independent from the rules relating to the affirmation of the victim that use guarantees of practical and effective exercise connected to the collective appeal as it has arisen and not to a case presentable as individual before its own jurisprudential seat. The position of the ECtHR shows

[5] Deyanov v. Bulgaria of 30 November 2010.

[6] B. Rainey, W. Wicks, C. Ovey, *Jacbos, White and Ovey: The European Convention on Human Right*s. (Oxford University Press, Oxford, 2021).

[7] *Lambert and others v. France* [GC] of 05 June 2015, par. 89. Mukhin v. Russia *of 14 December* 2021, par. 157. C. Jing, "The ECtHR's suitability test in national security cases: Two models for balancing human rights and national security". *Leiden Journal of International Law 36(2*), (2023): 295-312.

[8] *Stukus and others v. Poland of 1st April* 2008, par. 35. Gorraiz Lizarraga and others v. Spain of 27 April 2004, par. 35.

[9] Akdeniz and others v. Turkey of 4 April 2021, par. 56.

[10] *Akdeniz and others v. Turkey of 11 March* 2014, par. 21.

[11] N.D. and N.T. v. Spain [GC] of 13 February 2020, par. 85. S. Carrera, "The Strasbourg court judgement "N.D. and N.T. v Spain": a "carte blanche" to push backs at EU external borders?". *EUI RSCAS, 2020/21*, Migration Policy Centre, 2020.

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that now the court is mature to arrive at a profitable affirmation of the notion of victim using the relative elements that form and regulate such notion to an ever-evolving and global society.

THE M.A. AND OTHERS V. FRANCE CASE: *ACTIO POPULARIS* OR NOT?

The case under investigation was based on Art. 34 of the ECHR which does not confer a right to *actio popularis* according to par. 32 of the relevant decision[12]. Abstract complaints and provisions of law or administrative practice, which in reality in a general way directly or indirectly and potentially affect the rights of the person presenting their appeal, are not permitted[13]. As a consequence, with regards to the legitimacy to act[14], the appellant should have "suffered" and "directly affected" the measure that he/she contests and thus adopted against himself/herself[15]. It is not a principle to be included among the subjects who are included in the application of a provision of the law and in the absence of an application measure towards the person presenting the appeal. The object of the judgment according to the ECtHR: "(...) does not examine in abstract the compatibility of the measure with the Convention, but the way in which its application in the concrete case affects the rights of the appellant[16] on this point (…)", exceptions however are increasingly found[17].

Regarding the M.A. and others v. France case of the ECtHR: "(…) ruled out that the situation could be classified within the notion of direct victim, at least as traditionally interpreted. It noted how les requérants ne se plaignent pas d'une mesure individuelle qui, prise contre eux, aurait directement affecté leurs droits[18] (…) the direct victims, in the meaning recalled above, would be the recipients of the legislation in question, i.e. the "customers", in the event that they were convicted for having obtained sexual services for the payment of a fee (...) maintain that the law which criminally sanctions the use of prostitution constitutes a disproportionate interference with the right to private life, which also includes the right to sexual freedom[19] (…). The applicants in the case in question, however, do not as such fall within the scope of application of the provision; a fortiori, no application of it is made against them, nor would this be possible, as it does not prohibit the carrying out of the prostitution activity itself (...) excluding the possibility that in this case the appellants were indirect victims, as, according to their own perspective, they do not know that individuals here, like others, engage in prostitution, have the same quality of victim of the cells of others (...)"[20]. It is a type of quality that recognizes to those who are not recipients and to the extent contested that: "(...) the violation would cause harm or who would have a valid and

[12] Norris v. Ireland of 26 October 1998; Fèdèration Chrètienne des Tèmoins de Jèhovah's de France v. France of 6 November 2001.

[13] *Aksu v. Turkey* [GC], of 15 March 2012, par. 50).

[14] F. Voeffray, *L'actio popularis ou la dèfense de l'intèrêt collectif devant les juridictions internazionales.* (ed. Graduate Institute Publications, Genève, 2014).

[15] Tãnase v. Moldova [GC], of 27 April 2010, par. 104).

[16] Naumenko and Sia Rix Shipping v. Latvia, of 23 June 2022, par. 56;

[17] L.B. v. Hungary [GC], 9 March 2023, par. 130.

[18] M.A. and others, op. cit., par. 36.

[19] Chocholač v. Slovakia, of 7 July 2022, par. 53. Beizaras and Levickas v. Lithuania, of 14 January 2020, par. 109. Van Kuck v. Germany of 12 June 2003, par. 78.

[20] M.A. and others, op. cit., par. 37.

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personal interest in seeing it brought to an end (...)"[21]. Indirect victims include joint victims and other individuals who are related to the victim and have suffered violations and detrimental effects of the violation or have a personal interest in its cessation[22]. The issue concerns the legitimation which concerns the status of victim of a subject who complains as indirect victim who finds himself/herself under particular factors which give the suffering of the appellant a distinct character which respects the actual loss which also considers inevitable the relatives of a person and under serious violations of human rights. According to the ECtHR, this type of violation: "(…) lies in the violations and in the behavior of the authorities faced with the situation that has been reported to them (…)"[23].

As regards the indirect victim, the violation is the product that is created against another subject and the subject who presents the appeal suffers a relative damage as a consequence which manages to show that the interested party puts an end to it. This type of status is recognized to the relatives of deceased and missing subjects even before the introduction of the appeal with the aim of assessing the relevant circumstances regarding the death and/or disappearance[24]. The notion puts an end to violating others and is always interpreted expansively. This type of interest is not noticed even in the case of French sex workers. The plaintiffs are not close relatives of their customers and are complaining of a violation independent of the one alleged by the customers themselves.

Within this context the ECtHR attempted to assess whether the applicants' position falls within the notion of future or potential victim. When we talk about potential victim we are referring to a type of violations that derive directly from a law or provision of a general nature and in the absence of individual measures for their application: "(...) and when the appellants are forced to modify their conduct under penalty of being criminally prosecuted or are part of a category of people who risk being directly affected by the law or the general provision (...)"[25]. Potential victims also include appellants who were not able to demonstrate precisely whether the legislation deemed to be in conflict with the ECHR was less applied to them and whether it involved secret surveillance measures which were not known to the interested parties. The ECtHR spoke to us about the principle of effectiveness to derogate the ordinary procedural rules also allowing the individual to claim to be a victim: "(...) from the mere existence of secrets and of a law that allows secret measures without having to allege that these measures have actually been applied (…)"[26]. As regards the future victim, the ECtHR has excluded judicial decisions that are likely to jeopardize the rights claimed by natural persons and applicants, even those who are part of associations. Thus the future victim is confused with the potential victim given that the hypotheses of potential and future victims can complain about a violation not yet consummated and the appellant must: "(...) produce reasonable and convincing indicators regarding the probability of carrying out such violation for what concerns him personally since simple suspicions or conjectures are not sufficient for the purpose (...) rejecting for incompatibility

[21] Vallianatos and others v. Greece [GC], of 07 November 2013, par. 47.

[22] Hibbert v. The Netherlands of 26 January 1999. D. v. Germany of 15 March 1984.

[23] Cakici v. Turkey of 08 July 1999, par. 98ss. Hamiyet Kaplan and others v. Turkey of 13 September 2005, par. 67.

[24] Varnava and others v. Turkey [GC] of 18 September 2009, par. 112.

[25] Tănase v. Moldova [GC], of 27 April 2010, par. 104.

[26] Klass and others v. Germany of 06 September 1978, parr. 33-34. Rotaru v. Romania of 04 May 2000, par. 35.

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ratione parsonae various appeals with which some individuals intended to censure in abstracto the national regulations on abortion (...) or the hypotheses in which it is censored the legitimacy of expulsion or extradition measures not yet carried out due to conflict with the prohibition of torture and inhuman or degrading treatment (...)"[27].

A notion that applies despite the absence of a measure that is adopted against the subject who presents the appeal and despite the fact that the latter provides: "(…) a reasonable and convincing evidence of the likelihood that a violation affecting them personally would occur; mere suspicion or conjecture is insufficient in this respect (...)[28]. The status of potential victim is mainly recognized in three types of cases: (1) when the secret nature of surveillance measures[29] or processing of personal data[30] prevents the appellant from know with certainty if and when he was subjected to such measures; (2) when, even prior to the implementation of measures such as the expulsion or extradition of foreigners[31] (...) or the confiscation of assets[32] (…) there are no circumstances which indicate that such measures are no longer executable or that the authorities have given up to carry them out; and, finally, (3) where national legislation, despite not having been applied to an individual, forces the latter to change his or her conduct, under threat of a criminal sanction. This hypothesis was found, for example, with reference to laws that criminalized homosexuality[33] or that forced a lawyer to provide information to the authorities, in violation of his obligation to professional secrecy[34] (…) or to legislation that prohibits the use of the veil in France in public (...)"[35].

Within this jurisprudential framework the ECtHR was based and inspired and in our case in investigation it stated that: "(...) les personnes qui, tels les requérants, s'adonnent à la prostitution, ne se trouvent pas obligées de changer de comportement "sous peine de poursuites" du fait de cette législation (…)"[36]. In fact, the appellants are not the recipients of the rule, because it is the clients who are the victims who suffer the consequences given that they are forced to change their behavior, that is, not to resort to sexual services after the relevant payment of a pre-established amount or not and in order to avoid the relevant criminal sanction.

[27] Fèdèration Chrètienne des Tèmoins de Jèhovah's de France v. France of 6 November 2001. X. Norway of 29 May 1961. Bedjaoudi v. France of 07 March 1992.

[28] Shortall and others v. Ireland of 19 October 2021, par. 48. Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], of 17 July 2014, par. 101

[29] *Big brother watch and others v. The United Kingdom* [GC], of 25 May 2021, par. 467. Centrum för Rättvisa v. Sweden [GC], of 25 May 2021, par. 167

[30] Ekimdzhiev and others v. Bulgaria of 11 January 2022, par. 377. H. Danya, "Issues of Surveillance in Bulgaria: Violation of Article 8 of the European Convention on Human Rights". *Human Rights Brief 25 (2)* (2022): 4ss.

[31] Soering v. the United Kingdom, of 97 July 1989, par. 91

[32] The Holy Monasteries v. Greece of 9 December 1994, par. 65.

[33] *Dudgeon v. United Kingdom* of 20 October 1981, par. 41. Norris v. *Ireland*, of 26 October 1988, par. 32-33.

[34] *Michaud v. France*, of 6 December 2012, par. 51.

[35] *S.A.S. v. France* [GC] of 1st July 2014, par. 57. A. Elia, "Searching for a "legitimate" aim to limit freedom to express and manifest religion and belief: Some reflections about the European Court of Human Rights Case on S.A.S v. France (Grand Chamber)". *Civitas Europa 2015/2 (n. 35)*, (2015): 274ss.

[36] M.A. and others, op. cit., par. 38.

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Thus, it is excluded that the victim status of the appellants reminded by the ECtHR has: "(…) le caractère "direct" des effets de la législation litigieuse sur la situation de la catégorie de personnes à laquelle appartient un requérant doit s'apprécier avec une certaine souplesse (...)"37.

The ECtHR observed that although the law does not refer to themselves prohibits the use of prostitution since it sanctions clients it thus creates a factual situation where sex workers directly suffer its effects and the criminalization of sexual services poses the related implication: "(…) suppose l'implication des personnes prostituées (…)"[38]. Following this path, the ECtHR tries to clarify what exactly it means and the related consequences, especially when the appellants' approach exposes clandestinity and isolation to risks for one's life, psychophysical integrity and also limits sexual freedom[39]. Thus, it is concluded that the appellants can be considered as victims according to Art. 34 of the ECHR[40] and are justified in the violations they suffer[41].

SOME COMPARATIVE POSITIONS THROUGH THE ECtHR JURISPRUDENCE: TEST OF PLAUSIBILITY

The ECtHR has reached various conclusions that deserve to be explored further. Above all, it considered and formulated the following principle based on two previous cases: "(…) la Cour considère ainsi que des personnes qui allèguent que leurs propres droits au titre de la Convention sont affectés par une loi peuvent dans certaines circonstances se dire victimes d'une violation de ces droits alors même que la loi en question ne régit pas directement leur conduite, dès lors que cette loi génère une situation dont ils subissent directement les effets dans la jouissance de ces droits (...)"[42].

Therefore, according to the ECtHR, they are collateral victims of a situation when the rule of law that directs towards them other subjects does not produce a situation that is capable of entering or being part of the enjoyment of rights that is addressed but presents the same the appeal to Strasbourg. One of the precedents mentioned also did not justify this type of conclusion. As we saw in the Vallianatos and others v. Greece case: "(…) the applicants were homosexual couples, permanently cohabiting, who complained of discrimination in the enjoyment of the right to family life. In particular, they criticized the fact that a law had introduced the "covenant of common life", reserving it only for heterosexual couples. The court had observed how, despite not being addressees of the legislation, the applicants were directly affected by it and, therefore, had an interest in challenging it. In that case, however, the legitimacy to complain about a law which was not addressed to one was evident, precisely because this exclusion was the object of the violation complained of (...)"[43]. It is difficult however to find similarities and justifications of the formulation of the principle stated above.

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[37] M.A. and others, par. 39. and in the same spirit see also the case: Gorraiz Lizarraga and others v. Spain of 27 April 2004, par. 35: "(…) there must be a sufficiently direct link between the applicant and the harm which they consider they have sustained on account of the alleged violation (…)".

38M.A. and others, op. cit., par. 42.

[39] M.A. and others, op. cit., par. 43.

[40] F. Sudre, *La Convention europèennes des droits de l'homme.* (PUF, Paris, 2021).

[41] B. Rainey, W. Wicks, C. Ovey, Jacbos, *White and Ovey: The European Convention on Human Rights.* (Oxford University Press, Oxford, 2021).

[42] M.A. and others, op. cit., par. 42.

[43] *Vallianatos and others v. Greece* ([GC], of 7 November 2013, par. 49.

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In this spirit we also recall the Open Door and Dublin Well Woman v. Ireland case of 1992 relating to a judicial injunction which imposed a ban on two non-governmental organizations from providing support information to women going abroad and for abortions. The non-governmental organizations together with two women filed an appeal with complaints of violation of the freedom to receive information according to Art. 10 of the ECHR. The ECtHR stated that: "(…) belong[ed] to a class of women of child-bearing age which may be adversely affected by the restrictions imposed by the injunction (...)"[44]. In reality the ECtHR did not take into consideration the application of the test of the victim as a potential one and asked for reasonable and above all convincing evidence for the possibility of a violation suffered such as for example the fact that the two appellants were pregnant and they asked for more information regarding the possibility of abortion and the requests were rejected also due to the injunction in question.

This type of precedent that was taken into consideration was followed by a series of subsequent cases, demonstrating in our opinion inspiration from national law relating to the dissemination and sharing of ideas and related information. Although it has not been clarified that the terms in question can present complaints of a legislative, executive, and judicial measure directed towards others and as sources of indications for the notion of the victim and what our case under investigation really offers us.

We recall the Otto-Preminger-Institut v. Austria case of 1994, where according to the ECtHR: "(...) the appellant complained, pursuant to Art. 10 of the Convention, the seizure and subsequent confiscation of a film declared blasphemous by the authorities. Despite not being the owner of the film, the victim status was recognized to the association, noting how the confiscation had the effect of making it impossible for it even to show the film in its cinema in Innsbruck or, indeed, anywhere in Austria (…)"[45]. In the Tanrikulu, Cetin, Kaya and others v. Turkey case of 2001: "(...) the appellants contested the ban on the distribution of a newspaper in a certain region of the country. The court recognized the status of victims to those, among them, who were journalists, holding that "la mesure litigieuse a de réelles répercussions sur la façon dont les huit requérants suscités exercent leur fonction de journaliste". The appellants were acting as readers of the newspaper, the "indirect" consequences of the measure were not considered sufficient, as it was concluded that "[l]e seul fait que ces derniers en subissent des effets indirects-d'ailleurs comme tous les lecteurs du quotidien résidant dans la région-ne saurait suffire pour les qualifier de "victimes"(…)"[46]. It is understood that the essential criterion for the status of victim who complains about the measures that are adopted against other subjects is the existence of certain and precise, real repercussions regarding the enjoyment of the right by the person/s who have requested the relevant appeal.

In our case this principle was not continued as is clearly understood. Even in the Akdeniz v. Turkey case of 2014, it was stated that: "(…) le seul fait que le requérant-tout comme les autres utilisateurs en Turquie des sites en question-subit les effets indirects d'une mesure de blocage

[44] *Open Door and Dublin Well Woman v. Ireland of 29 October* 1992, par. 33.
[45] *Otto-Preminger-Institut v. Austria of 20 September* 1994, par. 40.
[46] *Tanrikulu, Cetin, Kaya and others v. Turkey of 6 November* 2001.

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(…) ne saurait suffire pour qu'il se voie reconnaître la qualité de "victime" (…)[47] the conclusion could have been different if the sites in question did not have merely commercial purposes (the dissemination of music), but were indispensable for the individual's participation in debates of general interest (...)"[48]. In the Dimitras and others v. Greece case of 2017, the ECtHR: "(…) had found that the applicants had not been sanctioned under the legislation in question; furthermore, the fact that, like all Greek voters, they were prevented from accessing the electoral polls in the fifteen days preceding the elections was not considered sufficient to make them victims of the violation of the right to receive information, guaranteed by art. 10 (...)"[49]. Continuing with the Akdeniz and others v. Turkey case of 2021: "(…) the victim status was recognized to the appellant journalist, as the injunction prevented her from receiving and publishing information regarding events relevant to public opinion (…)[50] as for the other appellants, instead, they were equated with the generality of citizens subjected to the ban (...)[51] without there being any particular circumstances demonstrating, for example, that they had attempted to publish works on the subject and that this possibility had been denied to them (...)"[52].

From previous jurisprudence it is understood that it is not necessary for the measure adopted against other subjects to have precise repercussions in the sphere of the victim. The alleged victim should be able to demonstrate that he/she has a personal and individual interest in contesting this measure which comes from belonging to a certain category of the interested party who is generally attributed.

As regards our case under investigation (M.A. and others v. France) the recognition of the status of victim seems to justify the complaint that relates to Art. 8 of the ECHR[53]. The prohibited conduct of the French law relating to sexual relations after payment of an amount agreed between the parties creates a real direct consequence on the sphere of the appellants who see the possibility of providing the relevant services which are part of said activities reduced and have their own interest in do it by distinguishing the generality of the population.

As regards complaints that have to do with Articles 2 and 3 of the ECHR[54], the law under evaluation creates "réelles répercussions" regarding physical integrity and private life. But is it so? In previous decisions these types of consequences are defined directly. The impossibility of providing information according to the express ban leads to the confiscation of the films of those who intended to show them. The only consequence of French law is that prostitution activity takes place clandestinely. The risk that leads to greater violence by clients towards sex workers as a direct consequence of the law in question is proven in re ipsa. Therefore, the ECtHR asked for proof of a real direct consequence which was satisfied with a consequence of the measure that was not precise but certainly plausible. This path shows that it is sufficient to establish the precise notion of the status of victim.

[47] Akdeniz v. Turkey of 11 March 2014, par. 24.
[48] Akdeniz v. Turkey, op. cit., par. 28.
[49] *Dimitras and others v. Greece of 4 July* 2017, par. 31.
[50] *Akdeniz and others v. Turkey of 4 May* 2021, par. 70.
[51] Akdeniz and others v. Tureky, op. cit., par. 72.
[52] *Akdeniz and others v. Turkey, op. cit.,* par. 73.
[53] Madonia v. Italy of 06 February 2004, parr. 10-14. B. Rainey, W. Wicks, C. Ovey, *Jacbos, White and Ovey: The European Convention on Human Rights.* (Oxford University Press, Oxford, 2021).
[54] B. Rainey, W. Wicks, C. Ovey, *Jacbos, White and Ovey: The European Convention on Human Rights.* (Oxford University Press, Oxford, 2021).

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This path is not so new. In the Grande Oriente case, a Masonic association which complained about a regional law which imposed a candidacy for public office by declaring membership in a secret association such as the Masonic lodges, sanctioning the relative incompatibility between this type of membership and the appointment in office. In particular: "(...) the government had contested the association's victim status, noting that the law was not directed against it and did not affect its freedom to carry out its activity, guaranteed by Art. 11 of the ECHR (…). The law in question affected the life of the association, as it implied the "risk" that some of its members, in order to avoid incompatibility, would abandon the association, as well as due to the possible "loss of prestige" that it resulted (…)"[55]. In the Grande Oriente d'Italia case of Palazzo Giustiniani (n. 29) v. Italy of 2007: "(...) such a declaration obligation was discriminatory. It was similarly held that the appellants possessed the victim status, due to the possible "negative repercussions" of the law in question on the association's activity (…)"[56].

In the M.A. and others v. France case the ECtHR accepted the plausible consequences that support its possibility as reasonable evidence. The difference between the factual situations as well as the rights requested and the interests at stake are clear and precise, satisfying the plausibility test, requiring more and more precise evidence in the case of the possibility of an alleged violation. It is noted that the widespread interests are referable to a specific category of subjects and is not sufficient for whether or not the entity can claim itself as a victim and the related violations suffered by the subjects[57].

A.M. AND OTHERS V. FRANCE AND A.M. AND OTHERS V. POLAND CASES. TESTS OF DISCRETION AND CRITERIA FOR THE STATUS OF VICTIMS

As we have understood from the previous paragraphs, the ECtHR has tried not to eliminate but to place in second line the connection of the standard with the verification of the connection that it is a "proof" necessary for the recognition of the status of victim. It is perhaps due to a new reality between the appellant and the violation which is presented as a complaint before the appeal presented. For the protection of human rights, the relevant work is desirable and borne by the ECtHR. It is not sensational that these are subjects who are recipients of a legislative provision where the ECtHR not only insists on the simple plausibility of the consequences, but has requested concrete, precise, convincing evidence of the relative probability of a future violation as a test of the potential victim.

Within this context we recall from the ECtHR a slightly earlier case where the appellants complained about Articles 3 and 8 of the ECHR[58] and the decision of the Polish Constitutional Court which denied the rule that allowed therapeutic abortion when the woman knows about malformations of her fetus that she carries in her womb. In the A.M. and others v. Poland case of 16 May 2023, the ECtHR stated that: "(…) as women of child-bearing age, they had been affected by the changes to the legislative framework as they had had to adjust their conduct in the most

[55] Grande Oriente d'Italia di Palazzo Giustiniani v. Italy of 02 August 2001, par. 15.
[56] Grande Oriente d'Italia di Palazzo Giustiniani (n. 2) v. Italy of 31 May 2007, par 20.
[57] Association de dèfense des interets du sport v. France of 10 April 2007.
[58] B. Rainey, W. Wicks, C. Ovey, *Jacbos, White and Ovey: The European Convention on Human Rights.* (Oxford University Press, Oxford, 2021).

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intimate sphere of personal life (...)[59] de facto obliged to carry a pregnancy to term even in the event of possible malformations[60] (...) recognized that in Open Door and Dublin Well Woman the notion of "direct link" had been defined in particularly broad terms (...) without providing a real reason, it held that although the appellants were in fact exposed to the risk of pregnancies with fetal malformations, in this case the class of persons who can claim to be "victims" of such a violation must necessarily be much narrower (...)61, however, the reason why it should be so is missing. Thus, by combining the test in question with that of the potential victim (…) there was reasonable and convincing evidence of the likelihood that a violation would occur in the future. In this regard, he noted that women who claimed to have pathologies involving risks of fetal malformations had not provided evidence in this regard[62]; the applicants who had proven to be pregnant had not demonstrated that malformations had been diagnosed (...)[63] and that the rest of the applicants had limited themselves to alleging that, desiring a pregnancy, the impossibility of accessing the therapeutic abortion, if necessary, caused them anxiety and worry (...)"[64]. It is understood that the appellants have not provided sufficient evidence as to the possibility of infringement occurring in their future.

We highlighted the A.M. and others v. Poland case to show the difference between the standards that are used in the two cases. On the one hand, it is noted that the risk of hypothetical violence perpetrated by third parties is considered plausible in the M.A. and others v. France case. On the other hand, the proof necessary for fetal malformations in the A.M. and others v. Poland case is an approach that is not in the same scale as the one against France. In the French case the ECtHR asked for precise and convincing evidence for a further consequence. We can imagine and understand that studies and statistical data are requested for the connection between violence against sex workers and the criminalization of clients' conduct and/or even the precise exposure of applicants to individual cases and episodes of violence. The evaluation of the status of victim in a risk assessment refers to this path regardless of the fact that in different cases the plausibility and probability in the case of violence against sex workers are confirmed statements of: "(…) selon les dires des requérants, l'incrimination des clients de la prostitution qu'il opère pousse les personnes prostituées à la clandestinité et à l'isolement, ce qui les exposerait à des risques accrus pour leur intégrité physique et leur vie (…)"[65]. Instead, in the case against Poland, not only reasonable but also precise evidence is requested regarding the relative risk, not so much present but also future.

Naturally, there is a coherence that is not only strange but also unfair. For sick fetuses this is plausible for the future, however for sex workers it is only precise and nothing else. Are we talking about "discrimination" and/or a failure of the ECtHR without style? And/or maybe the different standards in determining victim status are just not justified? The ECtHR stated that the determination of the victim status of subjects who complain of a general ban is achieved through a certain conduct which, also based on previous jurisprudence, depends on: "(…) d'une appréciation des circonstances de chaque affaire, en particulier de la nature et de la portée de la

[59] A.M. and others v. Poland of 16 May 2023, par. 75.
[60] A.M. and others v. Poland, op. cit., par. 76.
[61] A.M. and others v. Poland, op. cit., par. 78.
[62] A.M. and others v. Poland, op. cit., par. 80.
[63] A.M. and others v. Poland, op. cit., par. 81.
[64] A.M. and others v. Poland, op. cit., par. 82.
[65] A.M. and others v. France, op. cit., par. 53.

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mesure litigieuse et de l'ampleur des conséquences (...) de pareille mesure (...)"[66]. Insisting on the argument that "merely hypothetical risks" are not sufficient[67].

The application of this type of criteria in contrast with the decisions cited between and against France and Poland certainly remains obscure and perplexing of interpretation. Abandonment, rectius lowering of the standard is necessary according to each case under investigation such as that of abortion that it is not unreasonable to wait to appeal to Strasburg after the start of pregnancy and after a diagnosis of malformation of one's fetus. The issue was also addressed by the ECtHR in another case in the past: Ternovszky v. Hungary of 2010. In this case appeals presented by women who complained about the absence of an *ad hoc* legislature that allowed them to receive the relevant health care to give birth at home and not in hospital[68].

In particular in the Ternovszky v. Hungary case it was observed that the applicant: "(…) was pregnant at the time of the introduction of the application and inclined to give birth at home and therefore considered that this was sufficient to confer on her victim status without any particular measure being applied, simply by virtue of the existence of the contested legislation (…)"[69]. In the Kosaite-Čypienė and others v. Lithuania case of 2019 the ECtHR followed an even more bland and, we can say, standard path. Specifically, the appellants complained about a dissuasion of national legislation for healthcare professionals to provide home healthcare. These are women who could become pregnant and who had obtained such assistance and a woman who gave birth but also the woman who claimed that despite the fact that she was not in the stage of pregnancy "(...) was of child-bearing age and was planning to conceive and to give birth at home (…)"[70]. In this case the status of the alleged victim was recognized reaching the conclusion that: "(...) is not disputed that she belonged to a category of women-namely, those of child-bearing age-that may be adversely affected by the restrictions imposed by the prohibition on the provision of medical assistance during home births (...)"[71]. The exclusion that the appeal constituted an *actio popularis* by contesting the current legislation in an abstract manner was sufficient.

The application test concerned the possibility of being negatively affected by a measure and understanding why women of childbearing age and in a state of pregnancy cannot demonstrate complaints regarding the abrogation of the possibility of accessing a therapeutic abortion, maintaining that the relative risk as less than the precise diagnosis can be materialized in a concrete way. It should be taken into consideration that the current state of practice is difficult to obtain a precautionary measure according to art. 39 of the regulation and which obliges the state authorities to allow the related therapeutic abortion.

Actually, the ECtHR has tried, through the jurisprudence used in this regard, to decide on the status of victim while maintaining a certain margin of discretion as the majority of the sentences of the ECtHR always inspire. The exercise of discretion comes from the existence of the relevant issues of an interest which is general and which: "(...) arise in particular where an

[66] *Akdeniz and others v. Turkey, op. cit.,* par. 57; *Cengiz and others v. Turkey*, of 1st December 2015, par. 49

[67] *Schweizeriasche Radio-und Fernsehgesellschaft and others v. Switzerland*, of 12 November 2019, par. 72

[68] *Ternovszky v. Hungary of 14 December* 2010, par. 21

[69] Ternovszky v. Hungary, op. cit., par. 21

[70] Kosaite-Čypienė and others v. Lithuania of 04 July 2019, par. 61.

[71] Kosaite-Čypienė and others v. Lithuania, op. cit., par. 70.

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application concerns the legislation or a legal system or practice of the defendant state (...)"[72]. Whether to appeal more or less from the ECtHR is a subjective matter that is based on each individual case. If this is a criterion, it seems to be taken into consideration in the Polish case. It is emphasized that discretion is not part of an arbitration that reasonably justifies the evidence that must be collected and evaluated. But these are different standards of evaluation, monitoring, control of a direct character that connects between the victim and the violation and that the choice is applied which depends on non-subjective but purely objective criteria such as the gravity, for example, of the situation, the need to express an urgent opinion, the interests at stake, the preventive and protective function of the notion of victim as a potential victim also in the near future.

CONCLUSION

The main conclusions that emerge from the above analysis are the following:

1. The conduct of the ECtHR complies with principles that are sanctioned by its own jurisprudence and the ascertainment of the victim's status with a flexible way and perhaps according to the elements that each case presents it seems to be assessable and without a general notion of the victim.
2. The principle of flexibility also has objective criteria as its basis, which can be assessed in light of the circumstances which are peculiar to each concrete case, and which thus justify the application of a standard that is rigorous, stringent or not. For example, in the Câmpeanu case, the exception of the general principles in the matter of ascertaining the status of victim, and the basis of gravity of the violation, were justified as a case of extreme vulnerability of the appellant and in absence of subjects, who are suitable and interested in represent their interests.
3. In the cases we have noted so far it seems that there are objective criteria that justify the relevant approaches, whether stringent or not. Elements that emerge from the reasons for decisions. The risk of flexibility is desirable in human rights matters by taking into consideration the particular circumstances of each case, thus, resolving that the unpredictable element of the outcome of the appeals calls on the ECtHR to reach one or the other possible result. This type of situation seems incompatible with the principle of legal certainty, and: "(...) while it is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (…)" .
4. The plurality, diversity of standards as well as the refusal to follow a precedent as referred to by the appellants is a reason for appropriate measures. The unexpected event is also incompatible with the principle of the right to individual appeal to the ECtHR recognized in Art. 34 of the ECtHR and guaranteed in effective and practical as well as illusory and theoretical terms. It is implied that the conformity of the jurisprudence itself with the right of access to justice according to Art. 6 of the ECHR and the possibility of

72*Micallef v. Malta* [GC], of 15 October 2009, par. 46

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clearly knowing the conditions of admissibility of appeals is a possibility that is applied in an unpredictable way and has an excessive and formalistic basis.

5. In sum, the interventions of the Grand Chamber clarify that the criteria justify the application of one or the other standard and leave the ECtHR a margin of discretion to take into consideration the specific case in concrete but also allowing the appellants to thus predict the outcome of the own appeals. This is a not hasty conclusion but inspired by the cases under consideration given the different criteria obtained in two different cases and within a short period of time.

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SANTRAUKA

LANKSTUMAS, NENUSPĖJAMUMAS IR AUKOS STATUSO KONTROLĖ PAGAL EŽTK 34 STRAIPSNĮ NAUJAUSIOSE EŽTT BYLOSE

Šiame darbe siekiama palyginamuoju būdu atskleisti kai kuriuos aiškinamuosius ir kitus Europos Žmogaus Teisių Teismo (EŽTT) jurisprudencijoje naudojamus elementus bylose, susijusiose su nukentėjusiojo statusu. Kiekviena byla yra unikali, joje pateikiami skirtingi argumentai. Dėl šios priežasties darbe remiamasi lankstumo, nenuspėjamumo bei nukentėjusiojo statuso vertinimo principais, atsižvelgiant į bylos aplinkybes ir visuomenę, kurioje gyvename, siekiant išsamiau analizuoti ir interpretuoti nagrinėjamus argumentus. Griežti ir riboti ankstesnių laikotarpių aiškinimai yra apskaičiuojami, tačiau jie nebūtinai taikomi ir nagrinėjant šiuolaikines bylas. Pagrindinė šio darbo išvada yra ta, kad faktinės aplinkybės skiriasi, tačiau pagrindinė tema – nukentėjusiojo statusas, žmogaus teisių apsauga, teisė kreiptis į teismą ir EŽTT taikomi kriterijai – išlieka bendra.

REIKŠMINIAI ŽODŽIAI

EŽTK 34 straipsnis, EŽTT, nukentėjusiojo statusas, lankstumas, nenuspėjamumas, EŽTK 2 ir 3 straipsniai, žmogaus teisių apsauga, pagrįsti ir įtikinami įrodymai, valstybių nuožiūros laisvė, bendrojo intereso klausimai.