



**Europa-Kolleg Hamburg**

Institute for European Integration

**Study Paper  
No 5/12**

**The problems relating to the  
margin of appreciation doctrine under the  
European Convention on Human Rights**

Tamar Zhordania

**Europa-Kolleg Hamburg  
Institute for European Integration**

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**Please quote as follows:**

Europa-Kolleg Hamburg, Institute for European Integration, Study Paper No 5/12,  
<http://www.europa-kolleg-hamburg.de>

## **The problems relating to the margin of appreciation doctrine under the European Convention on Human Rights**

Tamar Zhordania\*

### **Abstract**

*This thesis deals with the problems concerning the margin of appreciation doctrine, which entitles each Contracting Party of the ECHR to use a certain margin of discretion in order to resolve the confrontations between national interests and individual rights. It will discuss application of the doctrine in relation to Articles 8–11 and 15 and challenge the method of setting the scope of the margin, the link between the doctrine and the principle of proportionality, and the application of the doctrine by the CEECs.*

**key words:** ECHR, CEEC, margin of appreciation doctrine, principle of proportionality

\* This paper was submitted in June 2011 as a thesis for the degree „LL.M. European Legal Studies“ at the Europa-Kolleg Hamburg (supervisor: Prof. Dr. Matthias Klatt).

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## **List of Abbreviations**

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
CEEC	Central and Eastern European Countries
PKK	Workers' Party of Kurdistan

## 1. Introduction

The belief in human rights has never been absolute since its very creation, but what makes the concept of human rights so difficult to believe in? The answer to this question is more simple than it seems – most of the rights and freedoms guaranteed by the ECHR are not unquestionable; individuals are granted certain rights by the Convention, but under some circumstances the “state authorities are in a better position than international judge” to decide whether the rights guaranteed by the Convention were violated.<sup>1</sup> The doctrine that allows the states to “interfere” is called the “margin of appreciation”, which is not mentioned in the Convention itself, but has been developed by the case law of the ECtHR. Most commentators find the doctrine not coherent enough, which illustrates the need for a more precise clarification of the doctrine.<sup>2</sup>

The margin of appreciation doctrine was established by the Strasbourg organs and the idea behind it is as follows. The Contracting Parties of the Convention are given an opportunity to restrict certain rights guaranteed by the Convention in order to strike a fair balance between the community interest and the individual’s human rights. The doctrine is based on the above mentioned idea that in particular cases the state authorities are better placed than the international judge to decide on the issues, since the state authorities are better aware of those issues than the international judge. But this does not mean that the states have unlimited freedom; the “the doctrine goes hand in hand with a European Supervision”<sup>3</sup>. The doctrine is also very closely linked to the principle of proportionality, since the measures used while interfering must undergo the proportionality test, otherwise the state’s actions will be considered overstepping the margin.

As far as the scope of this margin is concerned, it always raises the following question:

*“How far is the Court authorized to go in scrutinizing the laws and practices of the Contracting Parties and measuring them against the convention?”<sup>4</sup>*

This thesis aims to discuss the role of the margin of appreciation doctrine, the technique of setting the scope of the margin by the ECtHR and the problems related to the doctrine. The first part of the thesis will concentrate on the analysis of the case law in relation to Articles 8–11 and 15, since these Articles contain the rights which are most often restricted by the national authorities. It will be followed by the discussion on the relation between the principle of proportionality and the margin of appreciation doctrine, the necessity of the proportionality test and the problems connected to it. After that the application of the doctrine by the CEECs will take place. This will lead the thesis to the part where the summary of the defense and the criticism of the doctrine will be illustrated, which will be followed by the conclusion.

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<sup>1</sup> ECtHR, app. no. 5493/72, *Handyside v. The United Kingdom*, [1976] 1 EHRR 737, para. 48.

<sup>2</sup> *Macdonald*, in: Macdonald/Matscher/Petzold (eds.), *Margin of Appreciation*, p.85.

<sup>3</sup> ECtHR, app. no. 5493/72, *Handyside v. The United Kingdom*, [1976] 1 EHRR 737, para. 23.

<sup>4</sup> *Merrills, J.G.*, *The Development of International Law by the European Court of Human Rights*, p. 151.

## 2. The origin and scope of the doctrine

This chapter discusses the issues concerning the necessity of the margin of appreciation doctrine. Since this term cannot be found in the text of the Convention as this is simply impossible to do without observing the case law of the ECHR, which developed the doctrine<sup>5</sup> and covered it in the first subchapter, while the second analyses the necessity to draw the line between the wide and the narrow margins of appreciation.

### 2.1. Development of the doctrine

The birth of the doctrine took place in the case brought by Greece against the United Kingdom, where Greece claimed that the UK violated the right granted by the Convention. The British referred to Article 15 (derogation in the time of emergency) and stated that the measures used by the UK against Cyprus met the requirements set in the above mentioned Article. This claim raised some questions, in particular the one concerning the “powers of the Commission when a State, invoking Article 15, departed from the obligations laid down in the Convention”<sup>6</sup>. The role of the Commission in this case was more recommendatory than binding, but it stated that it was necessary to grant the state concerned “a certain measure of discretion in assessing the extent strictly required by exigencies of the situation”.<sup>7</sup>

The more precise illustration of the margin of appreciation doctrine is shown by the Commission report on the *Lawless v Ireland* case, where it referred to “a certain discretion – a certain margin of appreciation” in order to determine the existence of the public emergency, i.e. special conditions under which it was allowed to derogate from its normal obligations under the Convention. It was the first time that the Commission used the term “margin of appreciation” and also to some extent defined this vague term as the tool of the national authorities to decide on both the presence of the state of emergency and on the measures necessary to avoid it.<sup>8</sup> But the judgment itself did not contain any reference to “margin of appreciation”, though it underlined that the Irish government took reasonable actions in order to overcome the situation of emergency.<sup>9</sup>

Gradually, the use of the doctrine spread to the other areas of the Convention. One of the examples is the *Belgian Linguistic Case*, where French native-speaking parents complained that the law which denied their children education in French violated their rights, guaranteed by the Convention, in particular Article 2 of Protocol No. 1 (Right to education), Article 8 (Right to respect for private and family life) and Article 14 (Prohibition of discrimination). In this case the Court did not refer to the doctrine itself,

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<sup>5</sup> Letsas, *Theory of Interpretation of the European Convention on Human Rights*, p. 80.

<sup>6</sup> Yourow, *The margin of appreciation doctrine in the dynamics of European Human Rights Jurisprudence*, p. 15.

<sup>7</sup> Council of Europe, *Yearbook of the European Commission on Human Rights 1958-1959*, at 176.

<sup>8</sup> European Commission of Human Rights, *Report of the Commission* app. no. 332/57, 19<sup>th</sup> December 1959, Series B no.1, p. 85.

<sup>9</sup> ECtHR, app. no. 332/57, *Lawless v. Ireland*, [1961] 1 EHRR 15, para. 28.

but stated that the right to education, because of its nature, is better regulated by the State.<sup>10</sup>

Though the above mentioned cases show that the doctrine has undergone a noticeable evolution, it reached the most significant point in case *Handyside v the United Kingdom*. The applicant had been convicted in England for publishing and distributing the English version of the book called “*The Little Red Schoolbook*”, which was specifically written for schoolchildren and contained a discussion of sexual issues; moreover, it encouraged them to follow some examples described in the book. The applicant claimed that the UK violated his right to freedom of expression. The ECtHR held that because of the peculiarity of the issue, in particular because of the diversity of the understanding of morality in each Contracting Party, the state authorities were in a better position than an international judge to estimate the necessity of the certain measure used against the applicant. It also added that Article 10(2) leaves Contracting States a margin of appreciation.<sup>11</sup>

The case which shares the nature of *Handyside*, i.e. concerns Article 10, but contains different features is the *Sunday Times* case. In this case, the *Sunday Times* newspaper published an article about the drug thalidomide and the consequences of the distribution of this drug. Moreover, the article criticized the law regulated this issue and encouraged the authorities to enhance the liability of the drug selling company, therefore asking the company to increase the amount of compensation paid to the victims. After the claim of the producers the British court decided to ban publication by the *Sunday Times*. The publisher of the newspaper, who considered the ban a violation of Article 10 of the Convention, then complained to the European Commission of Human Rights. The Commission stated that the injunction was a breach of the applicants’ rights to freedom of expression.<sup>12</sup> The Court took into account the Commission’s report and affirmed the existence of the violation of Article 10. Therefore, the case appeared a little different from the *Handyside* case, but it was *Handyside* where the Court pointed to the margin of appreciation as very closely linked to European supervision, stating that “the doctrine goes hand in hand with a European Supervision”<sup>13</sup> and thus “it suggests that the doctrine leaves intact the supervisory function of the European Court”.<sup>14</sup> It is obvious that in *The Sunday Times* case the Court applied its supervisory function and did not consider that in this case the State authorities were in a better position to decide whether the right was violated, mainly because it did not concern the “protection of morals” as in the *Handyside* case, where the difference between cultures gave the State an option to use a wide margin of appreciation. *The Sunday Times* case underlined the non-absolute feature of the discretion used by the Contracting States and the existence of wide and narrow margins of appreciation, which will be discussed below.

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<sup>10</sup> ECtHR, *Belgian Linguistic Case*, app. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, [1968] 1 EHRR 252, para. 42.

<sup>11</sup> ECtHR, app. no. 5493/72, *Handyside v. The United Kingdom*, [1976] 1 EHRR 737, para 48.

<sup>12</sup> ECtHR, app. no. 6538/74, *The Sunday Times v. United Kingdom*, [1979] 2 EHRR 245, para. 68.

<sup>13</sup> ECtHR, app. no. 5493/72, *Handyside v. The United Kingdom*, [1976] 1 EHRR 737, para 23.

<sup>14</sup> *Dembour*, *Who Believes in Human Rights? Reflections on the European Convention*, p. 37.



Another case which caused a lot of discussion was the *Dudgeon* case. The applicant invoked Article 8 of the convention, claiming that the domestic law which considered the engagement of males in homosexual acts as a criminal offence was a violation of his right to a private life. The government of the UK argued that the interference was permissible as it was “necessary in a democratic society” (Article 8 (2) of the Convention). Since the term “necessary” in this context is quite vague the Court defined it in its judgment as the existence of a “pressing social need” and concluded that the interference by the State authorities was not within the margin of appreciation and built its argument on the basis that most Contracting Parties of the Council of Europe were of a tolerant opinion about sexual minorities and “no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied”.<sup>15</sup>

In the *Dudgeon* case, two important aspects were highlighted. The first was the convergence of the morality issues, i.e. the common understanding of the harmless nature of homosexuality, and the second and most important was the limit of the State interference when the case concerned the right to a private life, especially in the absence of “necessity” (which was also clarified by the judgment of the Court).<sup>16</sup>

The introduction to the most important cases related to the margin of appreciation doctrine leads the thesis to the more precise analysis of how the Court determines it and the scope of the margin of appreciation.

## 2.2. Setting the scope of the margin

The development of the margin of appreciation doctrine analyzed above illustrates the variation of the scope of the doctrine. In some cases the court refers to the wide margin of appreciation and vice versa. The difficulty with the doctrine mainly does not concern the existence of the doctrine itself, but the width of it in certain cases.<sup>17</sup> According to Letsas, there are two different types of cases in which the Court has found the State authorities to be in a better position to make an appropriate decision. The first condition is the absence of the consensus among the State Parties on some sensitive issues, in particular the restrictions which are connected to the public morals – basically, while interpreting the rights concerning the personal sphere (Articles 8-11). The second condition contains the cases where the Court grants the national authorities the margin of appreciation because they are considered “to be better placed to decide on politically sensitive issues”. This situation mainly concerns the right of the State to derogate in times of emergency (Article 15).<sup>18</sup> The characteristics of both factors will be discussed in more detail below.

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<sup>15</sup> ECtHR, app. no. 7525/76, *Dudgeon v. The United Kingdom*, [1981] 4 EHRR 149, para. 60.

<sup>16</sup> *Macdonald*, in: Macdonald/Matscher/ Petzold (eds.), *Margin of Appreciation*, p. 104.

<sup>17</sup> *Harris/O’Boyle/ Warbrick*, *Law of the European Convention on Human Rights*, p. 15.

<sup>18</sup> *Letsas*, *theory of Interpretation of the European Convention on Human Rights*, p.91-92.

### 2.2.1. The role of the “European Consensus”

The factor that plays the key role in determining the existence or non-existence of the margin of appreciation is the extent of the “European Consensus”.<sup>19</sup> The “European Consensus”, i.e. the “European Standard”, is basically the uniformity of the Contracting States’ attitude towards the rights guaranteed by the Convention, but because of the diversity of the Contracting Parties’ standards the consensus is difficult to achieve and therefore the lack of the “European Consensus” leads to the existence of the margin of appreciation doctrine and the determination of the broad and narrow margins of appreciation. Relevantly, the absence or the lack of the common denominator allows the States to use the broad margin of appreciation and by extending the national discretion, while the strong European standard would in contrast reduce the right of the Contracting Parties to apply the margin of appreciation as a justifiable tool for the restriction of the rights guaranteed under the Convention.<sup>20</sup>

Though the existence or non-existence of the “European Consensus” is a strong argument to justify the different scopes of the margin of appreciation, it is still not very clear how the Court finds whether a consensus exists in relation to a particular case. In determining the existence of a common approach the Court mainly looks at the practice of the Contracting Parties.<sup>21</sup>

The Court referred to the existence of the common standard among the Contracting Parties to be far from relevant in *Handyside v UK*. The Court did not give a reason for setting the narrow margin of appreciation in this case. Neither the fact that the book had been published and sold freely in other States nor the importance of the freedom of expression guaranteed by the Convention had an influence on the Court’s decision to widen a margin. The Court simply did not find a possibility to strike a balance between the Contracting States on the conception of morals.<sup>22</sup> The same structure was used by the Court in judging on other cases relevantly similar to *Handyside*. For example, in *Müller and Others v Switzerland*, an applicant claimed that the Swiss officials violated his right to freedom of expression by confiscating paintings, which was considered to be unacceptable by the recognized morals. The Court once again referred to the margin of appreciation and stated that the confiscation was justified as “necessary” for the protection of morals and the Swiss courts were fully entitled to hold the confiscation.<sup>23</sup>

The case *Otto-Preminger-Institut v Austria* was also one of the cases where State interference and the violation of the freedom of expression was justified by the Court, but it contained a slight difference from the two above mentioned cases. The interference was not justified on the basis of the “protection of morals”, but on the basis of the “protection of religion”. The Court in its judgment drew a similarity between

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<sup>19</sup> *De Londras / Kelly*, European Convention on Human Rights Act. Operation, Impact and Analysis, p. 153.

<sup>20</sup> *Macdonald*, in: *Macdonald/Matscher/ Petzold* (eds.), *Margin of Appreciation*, p p-84; *Yourow*, *The margin of appreciation doctrine in the dynamics of European Human Rights Jurisprudence*, p. 54.

<sup>21</sup> *Radačić*, *Zb. Prav. fak. Rij.* (2010), p. 606.

<sup>22</sup> ECtHR, app. no. 5493/72, *Handyside v. The United Kingdom*, [1976] 1 EHRR 737, para 48.

<sup>23</sup> ECtHR, app. no. 10737/84, *Müller and Others v Switzerland*, [1988] 13 EHRR 212, para. 43.

these two concepts. It stated that:

*“it is not possible to discern throughout Europe a uniform conception of the significance of religion in society”.*<sup>24</sup>

The Court again underlined the importance of the “protection of religion” as a reason for restricting the freedom of expression in the case *Wingrove v UK*; moreover, it even gave a preference to the “protection of religion” over the “protection of morals”, stating that religion is an even more vulnerable issue than morals.<sup>25</sup>

Of course not everything is justifiable under the terms of morals or religion and an example of this is a case already described as one of the cases that played a significant role in development of the doctrine – *Dudgeon v UK*. In this case, when it came to a choice between the “protection of morals” and the right to a private life the Court did not grant the Contracting Party a wide margin of appreciation since it considered that attitudes towards homosexuals had changed and in most states it was no longer perceived to be immoral behavior.<sup>26</sup> The judgment of this case raises a question concerning the balance between the two rights: right to freedom of expression and right to respect for private life. Is it possible that the ECtHR is more flexible when the subject relates to the right to freedom of expression than to the right to respect for private life? Because in the cases analyzed before the *Dudgeon v UK* case,<sup>27</sup> which concerned the freedom of expression against the “protection of morals”, states were usually granted the wide margin of appreciation, but when it came to the morality issues versus the right to a private life the Court gave a preference to the right to respect for private life and, therefore, narrowed the margin of appreciation to the Contracting State. Is it an imbalance between these two rights guaranteed by the ECHR? The case *Laskey, Jaggard and Brown v UK* can provide an answer to this question.

In the case *Laskey, Jaggard and Brown v UK* the applicants, who had been convicted by the national court for homosexual sado-masochist sex activities which were also recorded on video cameras,<sup>28</sup> claimed that the national court violated their right to respect for their private lives. The ECtHR judged that due to the significant injuries which were caused by such activities this case was far different from previously examined cases concerning homosexual activities like the *Dudgeon v UK* case and, therefore, underlined the existence of a wide margin of appreciation which the Contracting State had enjoyed in this case.<sup>29</sup> Hence, it can be concluded that with regards to the “protection of morals”, both rights guaranteed by the Convention (freedom of expression and right to respect for private life) are treated equally and appreciated by the ECtHR.

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<sup>24</sup> ECtHR, app. no. 13470/87, *Otto-Preminger-Institut v. Austria*, [1994] 19 EHRR 34, para. 50.

<sup>25</sup> ECtHR, app. no. 17419/90, *Wingrove v. The United Kingdom*, [1996] 24 EHRR 1, para 58.

<sup>26</sup> ECtHR, app. no. 7525/76, *Dudgeon v. The United Kingdom*, [1981] 4 EHRR 149, para. 60.

<sup>27</sup> *Handyside, Müller and Others v Switzerland, Otto-Preminger-Institut v Austria and Wingrove v UK*.

<sup>28</sup> The distribution was not the aim. ECtHR, app. nos. 21627/93; 21826/93; 21974/93, *Laskey, Jaggard and Brown v. The United Kingdom*, [1997] 24 EHRR 39, para. 9.

<sup>29</sup> *Ibid.*, para. 3.

The same concept is underlined in the judgment of the case *Rees v The United Kingdom*. The applicant was a transsexual who changed her name and also wanted to change the reference to her sex in her passport. According to domestic law this was not possible. The applicant complained that her right guaranteed under Article 8 had been violated. The ECtHR held that because of the “little common ground between the Contracting States” about transsexuality issues the states enjoyed a wide margin of appreciation and thus the Court did not find a violation of Article 8 of the Convention.<sup>30</sup>

The “European Consensus” on the “protection of morals” is simply impossible to find and is becoming even more difficult with the enlargement of the Council of Europe, but the main message is not to overestimate the morals and breach the principles of the Convention. The ECtHR tries to strike as fair balance between these issues as possible, but the non-existence of the common European standard still remains one of the most important problems facing the ECtHR. The margin of appreciation doctrine is supposed to serve as a tool which finds a solution for this problem, but some scholars do not consider the absence of the consensus as a problem. In *Brems*’s opinion the search for the European standard is not a relevant solution; it may lead to unnecessary conservatism and block the evaluative interpretation of the Convention.<sup>31</sup> *De la Rasilla del Moral* even thinks that the appreciation of the margin of appreciation doctrine is too marginal and one should not seek the “European Consensus” but should increase the margin of appreciation due to the effective and sustainable development of the human rights’ standards, which are based on a democratic cultural diversity.<sup>32</sup>

### 2.2.2 The scope of the margin in relation to the situations of emergency

As the analysis of the development of the margin of appreciation doctrine demonstrated, the doctrine was first used with regards to Article 15 ECHR – Derogation in time of emergency. The *Lawless v Ireland* judgment was one of the hallmark decisions. Gerard Lawless was an Irish citizen who was arrested in Ireland as a suspected member of the illegal Irish Republican Army. The applicant claimed that his detention for five months without a trial was a violation of his rights, in particular right to liberty (Article 5), right to a fair trial (Article 6) and right not to be punished without law (Article 7). The Irish officials emphasized their right to derogate under Article 15 of the ECHR as the reason for the prolonged arrest of the applicant. The Court in its judgment stated that the Irish government had not violated any of the applicant’s rights and fulfilled its obligations under Article 15, paragraph 3.<sup>33</sup> Hence, the State’s action was justified by the wide margin of appreciation which a Contracting Party enjoys in relation to Article 15.

Though the *Lawless v Ireland* case, because of its characteristics, was crucial with respect to the evolution of the margin of appreciation doctrine, *Ni Aolain* criticizes the Court’s judgment and calls it a failure of the Court with regard to the examination of the

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<sup>30</sup> ECtHR, app. no. 9532/81, *Rees v. The United Kingdom*, [1986] 9 EHRR 56, para. 37.

<sup>31</sup> *Brems*, Heidelberg Journal of International Law 56 (1996), p. 285.

<sup>32</sup> *De la Rasilla del Moral*, German Law Journal, p. 623.

<sup>33</sup> ECtHR, app. no. 332/57, *Lawless v. Ireland*, [1961] 1 EHRR 15, para. 48-49.

state emergency.<sup>34</sup> Granting the Contracting State the wide margin of appreciation under the justification that the time of emergency threatens the life of the nation was the easy retreat from scrutiny, but was also a quite dangerous step taken by the Court. The case of derogation in time of emergency is a very sensitive issue, since the measures used by the state while derogating from its obligations under the Convention can be very severe and unless they are lawfully applied they may cause a serious breach of certain rights the individual enjoys as a human being.

The case *Ireland v United Kingdom* illustrates this point. Ireland applied to the ECtHR claiming that the United Kingdom had violated Articles 3, 5, 6, 14 and 15 of the ECHR by setting an anti-terrorist regime which was followed by a significant number of arrests and the discriminative treatment of some detainees. The Court found that it is within each Contracting State's discretion to decide whether the "life of its nation" is threatened by a "public emergency" and the Court also underlined that it is up to Contracting States to decide how far it is necessary to go to overcome the danger and added that the states are in a better position to decide upon these issues.<sup>35</sup> Hence, on the basis of Article 15 (1) the Court left the Contracting State a wide margin of appreciation.

The judgment of this case leaves an impression that the Court and the Commission simply avoided the examination of a situation of emergency, which in accordance to Article 15 (1) is "strictly required" to exist and to threaten the life of the nation in order to justify the state's derogation from its obligations under the Convention. The fact is that the margin of appreciation found strong proponents in the Court, which considered the state generally "to be in a better position" to decide which measures should be taken against the situation of emergency. But this raises a question, which concerns the extent of the Court's involvement and a role with regard to the derogation in time of emergency.<sup>36</sup>

Another leading case illustrating the problematic feature of the situation of emergency is *Brannigan and McBride v the United Kingdom*. The applicants, Brannigan and McBride, were detained and questioned for several days under the UK's anti-terrorism legislation. They claimed that their rights to "be brought promptly before a judge" under Article 5 (3) of ECHR had been violated. The government of the United Kingdom pointed to its derogation of 1988, which took place a month before the applicants' detention, but the applicants argued that the State could not afford a wide margin of appreciation when the situation of emergency lasted for a relatively long period of time. The factor of time has led to another question, in particular: Could the State use a "permanent" situation of emergency as a tool for derogating its obligations under the Convention? Is not the main feature of the situation of emergency that it lasts for a short period of time? The Court seemed to be the one responsible to make clear this confusion, but in its judgment it ignored the problem of the time period and once again reaffirmed that the State was granted a wide margin of appreciation, since it was in a better position to decide on both

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<sup>34</sup> Ni Aolain, Fordham International Law Journal 19 (1995), p.111.

<sup>35</sup> ECtHR, app. no. 5310/71, *Ireland v. The United Kingdom*, [1978] 2 EHRR 25, para. 207.

<sup>36</sup> Ni Aolain, Fordham International Law Journal 19 (1995), p. 116.

the necessity of derogation and the measures used to overcome the situation of emergency.<sup>37</sup>

In the more recent case *Aksoy v Turkey* the applicant complained that he was tortured (violation of Article 3) and detained (violation of Article 5) without trial as a result of the government's assumption that he was a member of the PKK. The violation of Article 3 was found immediately. However, the Turkish authorities claimed that the violation of Article 5 was justified by the Contracting Party's right to derogate in time of emergency. In *Aksoy v Turkey* the Court did not change its attitude towards its previous judgments and once again justified the derogation of the Contracting Party as a means to prevent the threat to "the life of the nation", but one of the differences between this judgment and the previous ones was the fact that the Court defined more precisely why the State is "in a better position". According to the judgment, the better position of the states is caused by the fact that the States are in "direct and continuous contact with the pressing needs of the moment".<sup>38</sup>

What stands under the "pressing needs of the moment" is pretty simple to understand; it is a need to overcome the situation of emergency. The Court considers that the Contracting State has access to the local situation and is better aware of the necessity of the measures which should be taken in order to defend the "life of the nation". It is difficult to disagree with the first argument; the State is always more closely linked to its nation than any international body, but the second argument, which considers the State to be in a better position to decide upon the measures taken, does not seem as strong as the first one and therefore overlaps with the first argument, since the state authorities cannot justify using unnecessary and harmful measures, breaching the rights guaranteed under the Convention, by stating that it is closer to the nation.

However, the judgment on *Aksoy v Turkey* was one step forward taken by the Court. Even though it once again underlined the existence of a wide margin of appreciation with respect to the time of emergency, it admitted that the Turkish government had gone beyond its margin of appreciation and found the detention of the applicant for 14 days without access to a judicial officer incompatible with the reason for his detention.<sup>39</sup>

Though in the latter judgment the Court made a significant effort to shadow the shortcomings of the previous judgments on the same subjects, the State's margin of appreciation with regards to the "public emergency" issues stays one of the most problematic aspects of the doctrine. Some critics even question the strong position of the Court, since it considers itself to be in a "bad position" to decide what the nation needs and which measures should be taken in order to avoid the danger.<sup>40</sup> The existence of the margin of appreciation doctrine is essential for the efficient exercise of the rights guaranteed under the Convention and leaving some space to the Contracting Parties is justified as a tool which serves this purpose, but the State is not the ECtHR, which is

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<sup>37</sup> ECtHR, app. nos. 14553/89; 14554/89, *Brannigan and McBride v. The United Kingdom* [1993] ECHR 21, para. 43.

<sup>38</sup> ECtHR, app. no. 21987/93, *Aksoy v Turkey*, [1997] 23 EHRR 553, para. 68.

<sup>39</sup> *Ibid.*, para. 84.

<sup>40</sup> *Jones*, Public Law 1995, p. 435.

only occupied by human rights issues. The state has to take into account a number of policies that it is responsible for exercising and sometimes due to the coherent fulfillment of the political aims it “sacrifices” human rights, but the distinction must be made between the measures “strictly required by the exigencies of the situation” and the measures which go beyond the “strictly required” ones. To be more precise, the measures taken must be proportional to the aim achieved. Hence, the principle of proportionality and the margin of appreciation doctrine are very closely linked and the next chapter will analyze the link between these two and the problematic aspects caused by the failure of the proportionality test.

### **3. The link between the margin of appreciation doctrine and the principle of proportionality**

The principle of proportionality is an inherent component of the rule of law. In striking a balance between the general interests of the public and the protection of an individual’s human rights the principle of proportionality plays a key role, since it provides an approach to judicial review of a measure taken by the State government that restricts the fundamental right.<sup>41</sup> One of the judgments of the ECtHR defines that:

*“The Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.*<sup>42</sup>

According to *Arai-Takahashi*’s approach, the principle of proportionality can be considered the other side of the margin of appreciation doctrine. He underlines that the high intensity of the proportionality standard narrows the discretion given to the national authorities and only where the fair or reasonable balance is found are the State authorities considered to fall within their margin of appreciation. The principle of proportionality should be treated as a tool to ascertain whether the national governments went beyond their margin of appreciation or not.<sup>43</sup>

The proportionality principle does not dictate to the States that there is one particular measure which could be adopted or turn the State officials into the judges. It reminds the national officials that the Court enjoys the supervisory function and, thus, the intensive review still remains one of its responsibilities. The principle is used to test a measure taken by the State officials in respect of its legitimacy, suitability, necessity and proportionality in the narrow sense. To be more precise the principle asks the following questions: does the measure pursue a legitimate aim? Does it contribute to the purposes it served? Does it represent the least restrictive way for achieving the aim? Does the end justify the means?<sup>44</sup> These four aspects imply that the more severe the infringement is, the more compelling the legitimate aims pursued must be.<sup>45</sup>

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<sup>41</sup> *Fordham / de la Mare*, in: *Jowell / Cooper* (eds.), *Understanding Human Rights Principles*, p.27.

<sup>42</sup> ECtHR, app. no. 14038/88, *Soering v. The United Kingdom*, [1989] 11 EHRR 439. para. 89.

<sup>43</sup> *Arai-Takahashi*, *The margin of appreciation doctrine and the principle of proportionality in ECHR*, p.14.

<sup>44</sup> *Fordham / de la Mare*, in: *Jowell / Cooper* (eds.), *Understanding Human Rights Principles*, p. 28.

<sup>45</sup> *Van Dijk / Van Hoof*, *Theory and Practice of the European Convention on Human Rights*, p.537.

However, some critics do not believe that the principle of proportionality is meant to promote the absolute characteristic of the protection of human rights. The principle is criticized for not being clear enough to serve as a justification for a violation of such important rights as human rights. Some critics even call it an assault on human rights, since the principle is considered to be the other side of the margin of appreciation doctrine and a tool to justify lawless actions of the State. According to the criticism, as long as the principle of proportionality exists as a justifiable tool of the unnecessary wide margin of appreciation, the public interests will always prevail over the individual's human rights.<sup>46</sup>

In order to understand how effectively the proportionality principle works with respect to the margin of appreciation doctrine and why it is often criticized, the case law of the ECtHR concerning the proportionality issues will be discussed in more detail.

### 3.1. Principle of proportionality in non-derogating cases

Some judgments of the ECtHR received much criticism from some scholars, who argued that the Court “failed” the application to proportionality test while judging on the case, and one of the most criticized was the judgment of the *Otto-Preminger-Institut v Austria* case, which was briefly discussed above as one of the judgments where the Court decided to grant the State a wide margin of appreciation. The case was unique because it concerned the issues of religion rather than morals, but was identified with the cases concerning the morality issues, which raises the question whether this identification was right and whether the principle of proportionality was appropriately examined by the Court while judging on this case.

The applicant, the Otto-Preminger-Institut, was a private association under Austrian law and one of its activities include operating a movie theater called “Cinematograph” in Innsbruck, which announced the showing of the upcoming film *Das Liebeskonzil* (Council in Heaven), based on satirical tragedy. The film did not share the general opinion about Jesus Christ and the Virgin Mary and contained features of blasphemy and was thus confiscated and seized by the Austrian authorities, in compliance with the Austrian Penal Law.<sup>47</sup> The applicant complained that the confiscation and seizure was a violation of the freedom of expression, but the Court did not find a breach of Article 10 of the Convention and stated that the State's action was justified because the purpose was the protection of “the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons”. The Court held that the restriction of the right was justified under the “rights of others”.<sup>48</sup> As far as the measures “necessary in a democratic society” were concerned, the Court stated that, since the film could “shock, offend or disturb the State or any sector of the population”, the measures were considered to be “necessary in a democratic society”.<sup>49</sup> The estimation of the Court raises some questions which are linked to the proportionality principle, in

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<sup>46</sup> Tsakyrakis, Jean Monnet Working Paper 09/08 (2001), p. 11.

<sup>47</sup> Article 188: “disparage of a dogma, a lawful custom or a lawful institution of church or religious community”.

<sup>48</sup> ECtHR, app. no. 13470/87, *Otto-Preminger-Institut v. Austria*, [1994] 19 EHRR 34, para 48.

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



particular how legitimate the measures were and, even if they were legitimate, how suitable and necessary could they be considered and did the end justify the means?

The same concerns were shared by some judges while deciding on this case. In the end the Court's decision was not unanimous; three judges out of nine did not agree with the majority. The minority of the judges did not argue that the freedom of religion as "the right of others" could be a reason of justification for the restriction of the right to freedom of expression,<sup>50</sup> but they argued that the situation in this case could not be identified with the right to freedom of religion, since the latter has a different meaning from the one given in this case. The three judges stated that by allowing the movie theater to show the film, nobody's freedom of religion would be violated. Although someone's religious feelings could be hurt, "the Convention does not, in terms, guarantee a right to protection of religious feelings" and so the aim could not be considered fully legitimate.<sup>51</sup> Also, the measures adopted were far from being suitable because, firstly, the film was to have been shown in a movie theatre which was known to be unusual and did not attract a large public, and the audience would presumably include persons specifically interested in watching the film; secondly, the audience had an opportunity to get to know the concept of the movie beforehand;<sup>52</sup> and thirdly, persons under seventeen years of age were not allowed to enter the movie theater and thus could not be unconsciously affected by the consequences of watching the movie. Considering all the above mentioned facts, the judges *Palm, Pekkanen and Makarczyk* stated that the Austrian authorities could have taken less restrictive measures and the confiscation and the seizure of the movie did not belong to the least restrictive ones.<sup>53</sup> Thus three judges shared the "opinion that the seizure and forfeiture of the film in question were not proportionate to the legitimate aim pursued".<sup>54</sup>

The opinion of the judges in the minority offers a very precise examination of the proportionality test and thus seems more sensible than the whole judgment. Also, their arguments make it pretty obvious that the Court should not have identified the conception of morals with the religious feelings of others,<sup>55</sup> because the "feelings" are not a subject of protection, either under Article 9 or under Article 10 (2). The "feelings" are far beyond the protection under the Convention and how much somebody's feelings will be hurt depends on a certain individual; not everyone is equally sensitive, while the right to freedom of expression is a factual right and even if the "protection of feelings" is considered to be a legitimate aim, the measures which are adopted in order to achieve this legitimate aim should be suitable and necessary, but the confiscation or seizure do not seem either suitable or necessary. Showing a film in a movie theater which is very small and has only a specific audience cannot hurt anyone's religious feelings more than they are hurt everyday by the fact that not everyone shares their religious views.<sup>56</sup> Thus the measures taken could be less restrictive, for instance the State authorities could limit

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<sup>50</sup> *Otto-Preminger-Institut v. Austria*, Joint Dissenting Opinion of Judges Palm, Pekkanen and Makarczyk, para 2.

<sup>51</sup> *Ibid.*, para. 6.

<sup>52</sup> *Ibid.*, para. 8.

<sup>53</sup> *Ibid.*, 10.

<sup>54</sup> *Ibid.*, 11.

<sup>55</sup> ECtHR, app. no. 13470/87, *Otto-Preminger-Institut v. Austria*, [1994] 19 EHRR 34 para 50.

<sup>56</sup> *Tsakyrakis*, Jean Monnet Working Paper 09/08 (2001), p. 11.

the time period of showing the film, which would have decreased the number of persons having an access to this movie and fewer people's religious feelings would have been hurt.

Another judgment which also highlighted the problem concerning the assessment of proportionality was the case of *Hatton and Others v The United Kingdom*. The applicant Hatton and his neighbors complained that the noise caused by night flights deprived them of sleep; thus they claimed that the government policy on flights at Heathrow violated their right under Article 8 of the Convention. The Court stated that in this case the State enjoyed a wide margin of appreciation, since it was in a better position to decide upon the social and economic policies.<sup>57</sup> The Court faced the conflicting views whether the margin of appreciation had to be applied, since on the one hand the government claimed that, because the case concerned matters of general policy,<sup>58</sup> they should be granted a wide margin of appreciation, and on the other hand, the applicants argued that their right to sleep was so important that the States were not allowed to use a wide margin.<sup>59</sup>

The Court did not find that the State authorities overstepped their margin of appreciation; it did not consider that the officials struck a fair balance between the individuals affected by the noise and the interests of others<sup>60</sup> and of the community as a whole. Thus the Court stated that Article 8 had not been violated.<sup>61</sup>

As in the *Otto-Preminger-Institut v Austria* case and also in *Hatton and Others v. United Kingdom* the Court's decision was not unanimous; five judges disagreed with the majority and stated that the violation of Article 8 had taken place and defended their opinion with several arguments connected to the failure of the proportionality test. The judges questioned the issue of legitimacy; they even compared this case to the case *Dudgeon v. the United Kingdom*, trying to prove that the right to respect for private and family life was violated equally in both cases and thus there was a need to find a legitimate aim in order to justify the violation.<sup>62</sup> According to the judgment the legitimate aim was to protect the interests of the passengers and the economic welfare of the county. Five judges did not consider that the restriction of the night flights would have caused inconvenience to passengers, thus they stated that it cannot be legitimate to outweigh the right of the passengers by downgrading the rights of the people affected by the plane noise, because they belong to the minority the Court cannot.<sup>63</sup> Also, in the opinion of the judges, the issues of economic welfare were not described clearly enough by the government, which argued that the reduction of the night flights could negatively

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<sup>57</sup> ECtHR, app. no. 36022/97, *Hatton and Others v. United Kingdom*, [2003] ECHR 709, para. 97.

<sup>58</sup> The State official claimed that the countries economic welfare could be affected by the restriction of night flights.

<sup>59</sup> ECtHR, app. no. 36022/97, *Hatton and Others v. United Kingdom*, [2003] ECHR 709, para. 103.

<sup>60</sup> Under the "interests of others" was meant the interest of the passengers, who could be affected by the restriction of the night flights. (*Hatton v UK*. Para. 126).

<sup>61</sup> ECtHR, app. no. 36022/97, *Hatton and Others v. United Kingdom*, [2003] ECHR 709, para. 129-130.

<sup>62</sup> *Ibid.*, para. 9.

<sup>63</sup> *Hatton and Others v. United Kingdom*, Joint Dissenting Opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, para. 14.

affect the economy of the country, but did not give a clear overview of the “specific indications of the economic cost of eliminating specific night flights”.<sup>64</sup>

To summarize the above discussed cases and the concerns related to the principle of proportionality as the other side of the margin of appreciation doctrine, it would be fair to say that these cases belong to the minority in a sense that in a majority of the judgments the Court estimates the proportionality test sufficiently, but the cases highlighted here prove that there is still room for improvement. The restrictions on human rights under Articles 8–11 require these restrictions to be “necessary in a democratic society”, and unless the proportionality test is applied the nature of the restriction is impossible to find. As *Eissen* underlines, there is a very little space between “necessity” and proportionality.<sup>65</sup> Since the margin of appreciation doctrine and the principle of proportionality are so closely linked to each other, the failure of the proportionality test by the Court automatically leads to the illegitimate wide margin of appreciation and this of course always results in criticism of the margin of appreciation doctrine.

### 3.2 Principle of proportionality in derogating cases

It is considered that the proportionality should be limited to the rights which have the “accommodation clauses” – Articles 8–11.<sup>66</sup> But what about Article 15, which states that the Contracting Parties can derogate in time of emergency? This Article contains the requirement of the proportionality principle itself, since the measures which the State uses while derogating from its obligations should be “strictly required by the exigencies of the situation” and these measures must be consistent with the State’s obligations under international law. This simply means the “strictly required measures” can be identified with “necessary in a democratic society” (Articles 8–11); the distinction between these two is that Article 15 requires the more active scrutiny. The Court defined the meaning of “absolutely necessary” as a situation when:

*“a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether state action is necessary in a democratic society.”*<sup>67</sup>

Thus the “strictly required” measures can be associated with the “absolutely necessary” ones. As *Eissen* notes, in the case of Article 15 the principle of proportionality is “thinly veiled” in comparison to Articles 8–11 of the Convention.<sup>68</sup>

Thus, Article 15 states that when the Contracting States derogate from their obligations under the convention the derogation should take place only “in time of war or other public emergency threatening the life of the nation” and therefore in order to justify the measures taken by the State the derogation should serve the legitimate aim, which in

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<sup>64</sup> Ibid., para. 18.

<sup>65</sup> *Eissen* in: Macdonald / Matscher / Petzold (eds.), *The European System for the Protection of Human Rights*, p. 126.

<sup>66</sup> *Rivers*, in: *Tsagourias* (ed.), *Transnational Constitutionalism*, p. 112.

<sup>67</sup> ECtHR, app. no. 18984/91, *McCann and Others v United Kingdom*, [1995] 21 EHRR 97, para.149.

<sup>68</sup> *Eissen* in: Macdonald / Matscher / Petzold (eds.), *The European System for the Protection of Human Rights*, p. 125.

this case can be defined as protection of the public from the threat which is caused by “war or other public emergency”. The meaning of a war is simple to understand, but what is the situation of “other public emergency”? In the judgment of *Lawless v. United Kingdom* the Court defined “other public emergency” as:

*“An exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.”*<sup>69</sup>

Unless the situation of emergency is precisely examined by the Court it cannot decide upon the legitimacy of the use of a wide margin of appreciation by the States. Only after the situation of public emergency is examined by the Court can it start arguing how “strictly required” the measures taken by the government were in order to achieve the legitimate aim. The problem in this case is that the ECtHR is not a “fourth instance”<sup>70</sup> and even though the domestic margin of appreciation goes hand in hand with a European Supervision, the ECtHR cannot revise the judgment of the domestic court fundamentally and thus cannot be in a position to decide whether the situation of the emergency really existed or whether it was exaggerated by the national authorities in order to justify the derogation from their obligations under the Convention. This means that the Court cannot fairly decide whether the measures applied by the States were “strictly required by the exigencies of the situation”.

The already mentioned case *Brannigan and McBride v the United Kingdom* illustrates the point discussed above. As a reminder of the facts of the case, the two applicants claimed that their rights under Article 5 (3) of ECHR had been violated since they were detained and questioned for several days under the UK’s anti-terrorist legislation, but the State officials claimed that due to the State derogation which took place two months earlier, the applicants could be detained. Though the Court held that the margin of appreciation should be narrower when the emergency becomes permanent,<sup>71</sup> the use of a wide margin of appreciation by the State is still justified, and once again the Court found the State authorities to be in a better position than the international judge “to decide on the presence of such an emergency and on the nature and scope of derogations necessary to avert it”.<sup>72</sup> The decision was not unanimous and several judges disagreed with the majority. Judge *Martens* stated that the Court did not examine the objective ground for derogating (legitimate aim)<sup>73</sup>; judge *Matscher* referred to the non-existence of the legitimate aim more precisely and stated that derogation should have a temporal feature.<sup>74</sup> Judge *Martens* further challenged the judgment of the Court and argued that the measures adopted by the State officials could be less restrictive and were not “strictly required by the exigencies of the situation”. It is obvious that the emergency cases require even stricter examination of the principle of proportionality

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<sup>69</sup> ECtHR, app. no. 332/57, *Lawless v. Ireland*, [1961] 1 EHRR 15, para. 28.

<sup>70</sup> *Harris / O’Boyle / Warbrick*, Law of the European Convention on Human Rights, p. 15.

<sup>71</sup> ECtHR, app. nos. 14553/89; 14554/89, *Brannigan and McBride v. The United Kingdom* [1993] ECHR 21, para. 42.

<sup>72</sup> *Ibid.*, para 43.

<sup>73</sup> ECtHR, app. nos. 14553/89; 14554/89, *Brannigan and McBride v. The United Kingdom* [1993] ECHR 21, Concurring opinion of Judge Martens para 4.

<sup>74</sup> ECtHR, app. nos. 14553/89; 14554/89, *Brannigan and McBride v. The United Kingdom* [1993] ECHR 21, Concurring opinion of judge Matscher, para 4.

than the non-emergency cases, since in the case of emergency the consequences are usually more severe, but unless the burden lies with the State to demonstrate why the derogation took place and why the measures adopted were “strictly required”, the proportionality test will never be appropriately applied by the Court and thus it might lead to an illegitimately wide margin of appreciation enjoyed by the States.<sup>75</sup>

The absence of proportionality was not the only problem raised by judge *Martens*, who in his opinion on the judgment referred to another problem of the margin of appreciation doctrine; he stated that the Courts should not continue judging on the basis of precedents which took place decades ago. He underlined that in those times all the Contracting Parties of the Convention were States which had been democracies for a long time, fully aware of the importance of the individual’s human rights and the consequences of giving “too wide power of detention to the executive”, but after the “accession of Eastern and central European States that assumption has lost its pertinence”.<sup>76</sup> In the next chapter the thesis will challenge judge Martens’ opinion and will analyze the effect of the enlargement on the margin of appreciation doctrine.

#### **4. The enlarged Council of Europe and the margin of appreciation doctrine**

In 1990 the CEECs started joining the Council of Europe. The first country from the CEECs which became a Member State of the Council of Europe was Hungary. Gradually, the other CEECs followed the example of Hungary and currently 21 CEECs are Contracting Parties of the ECHR. The enlargement of the Council of Europe raised a question concerning the adaptation to the universal human rights by the new Member States, since they were in a process of becoming democratic countries after being totalitarian ones. One of the main concerns was connected to the margin of appreciation doctrine, in particular whether it would be possible to avoid the misuse of a wide margin of appreciation by the new Contracting Parties. According to the Realists’ approach, the interest of the CEECs which entered the Council of Europe was not the protection of human rights but the benefits which these countries could get from the membership. In particular, membership is considered to be a step towards accession to the EU, which means benefitting from the political and economic advantages.<sup>77</sup>

##### **4.1 The “misunderstanding” of the doctrine by the CEECs**

The new Member States faced some difficulties while understanding the basic concept of the margin of appreciation doctrine and the situations when they could apply a wide margin of appreciation. One of these cases was *Varbanov v Bulgaria*, where the State authorities violated the applicant’s right to liberty, guaranteed by Article 5 of the

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<sup>75</sup> *Ni Aolain*, Fordham International Law Journal 19 (1995), p. 116.

<sup>76</sup> ECtHR, app. nos. 14553/89; 14554/89, *Brannigan and McBride v. The United Kingdom* [1993] ECHR 21, Concurring opinion of Judge Martens para 3.

<sup>77</sup> *Dembour*, Who Believes in Human Rights? Reflections on the European Convention, p. 45.

convention. They claimed that

*“the authorities should be afforded a certain margin of appreciation in the assessment of the medical condition of a person believed to be of unsound mind and in respect of the need for a compulsory examination”.*<sup>78</sup>

The Court did not even discuss the margin of appreciation issue and held that the State authorities violated the applicant’s right under Article 5.<sup>79</sup> The case *RD v Poland* was similar. The applicant complained that the State authorities violated his right to a fair trial under Article 6 of the Convention, because he was not allowed to have a legal assistant in the court proceedings. While the State claimed that the court had not gone beyond its margin of appreciation, which was left to the domestic courts in such matters,<sup>80</sup> the ECtHR as in a previous case did not take into account the national authorities’ attempt to widen the margin of appreciation and held that there was a violation of Article 6.<sup>81</sup>

In the two above mentioned cases the Court tried to ignore a claim of the states to enjoy a margin of appreciation and just referred to a violation without pointing to the non-existence of the margin of appreciation, while in the judgment of the case *Ilowiecki v Poland* they found it necessary to define that the States do not enjoy the “margin of discretion” in relation to Article 5.<sup>82</sup> These cases point out how unwilling the new members were to follow the demands of the Convention and thus tried to find a “solution” in a misuse of the margin of appreciation doctrine.

#### **4.2. Article 10 as the most violated right by the CEECs**

As far as the Articles where the use of a margin of appreciation is permissible are concerned, Article 10 was the most frequently violated by the new Contracting Parties. The reason for this was usually the fact that the States were newly democratized and thus could not easily accept one of the main features of a democratic country, which is a free press.

In the case *Dalban v Romania*, the applicant was a journalist who complained that his conviction was a violation of Article 10 of the convention. The applicant wrote an article where he raised some questions concerning the illegal actions of the chief executive of a State-owned agricultural company and a Senator. The Court in its judgment underlined that although the press fulfills a democratic role in society it must not overstep certain bounds, thus stating that in such cases the States enjoy a certain margin of appreciation, which is due to the interests of a democratic society.<sup>83</sup> However, on the level of proportionality the Court found that convicting Mr Dalban of a criminal offence did not pursue a legitimate aim and, accordingly, decided that the applicant’s

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<sup>78</sup> ECtHR, app. no. 31365/96, *Varbanov v Bulgaria*, [2000] ECHR 457, para. 41.

<sup>79</sup> *Ibid.*, para. 61.

<sup>80</sup> ECtHR, app. no. 29692/96; 34612/97, [2001] ECHR 868, para. 41.

<sup>81</sup> *Ibid.*, para. 51.

<sup>82</sup> ECtHR, app. no. 27504/95, *Ilowiecki v Poland*, [2001] ECHR 575, para. 78.

<sup>83</sup> ECtHR, app. no. 28114/95, *Dalban v Romania*, [2001] 31 EHRR 39, para. 49.

right under Article 10 had been violated.<sup>84</sup> In this judgment the Court made an attempt to make the new Contracting Parties more aware of what the margin of appreciation doctrine really is. It underlined that though under Article 10 the States are granted a certain margin of appreciation, it does not give them the right to take unnecessary measures to pursue an aim. The conviction of a journalist for expressing his negative opinion about State officials could not serve a legitimate aim.

The more obvious example of the misuse of the margin of appreciation doctrine and the violation of Article 10 by the new Contracting Party is the case *Feldek v Slovakia*. Feldek wrote an article about the Minister for Culture and Education of the Slovak Republic, Dušan Slobodník. In this article the applicant described the involvement of the Minister in fascist activities during the Second World War and the article was called “For a better picture of Slovakia – without a minister with a fascist past”. The applicant was sued for defamation on the basis that he had not investigated the facts concerning the participation of the Minister in fascist activities. The ECtHR as in a previous judgment reaffirmed that the States enjoy a certain margin of appreciation with regard to Article 10, and also underlined the existence of the legitimate aim, which was the protection of “the reputation or rights of others” (Article 10. para.2).<sup>85</sup> However, the Court held that the interference by the State was not “necessary in a democratic society” and thus decided that the applicant’s right to freedom of expression had been violated.<sup>86</sup> The most interesting aspect of the case was the fact that the Court took into account the applicant’s statement that his article was crucial for the further democratization of Slovakia and held that the article was written:

*“in good faith and in pursuit of the legitimate aim of protecting the democratic development of the newly established State of which the applicant was a national.”<sup>87</sup>*

This means that the Court openly differentiated between the old member states of the Council of Europe and the new ones. The Court would not make a reference to a “legitimate aim of protecting the democratic development” of a State which had been democratic for a long time. It took into account the newly born democracy of the country and thus found it necessary to support the applicant’s statement.

The western European Contracting Parties do not violate human rights less often than central and eastern European ones, but the difference is the measures applied while using a wide margin of appreciation. For instance, in the case of the right to freedom of expression, the western European countries usually do not use more severe measures than confiscation or seizure of the material, which expresses the lawless opinion, while as the analysis of the above mentioned cases shows the new members of the Council of Europe go further than confiscation or seizure. However, it justifies judge Martens’ opinion that the effectiveness of the margin of appreciation doctrine has been downgraded since the CEECs joined the Council of Europe. But on the other hand, the CEECs are on the path of democratic development and, gradually, they might appreciate

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<sup>84</sup> Ibid., para 50.

<sup>85</sup> ECtHR, app. no. 29032/95, *Feldek v Slovakia*, [2001] ECHR 463, para. 58.

<sup>86</sup> Ibid., 88-89.

<sup>87</sup> Ibid., 84.

human rights more than they do now. Thus, the proposal to eliminate the margin of appreciation doctrine because of the enlargement of the Council of Europe does not sound relevant, but judge Martens is not the only one who criticizes the doctrine. In the next chapter the evaluation of the defense and criticism of the doctrine will take place.

## 5. Justification versus criticism

The first part of this chapter aims to underline already discussed arguments for the justification of the doctrine. In the second part the analysis of the most important problems will take place, which will challenge the effectiveness of the doctrine.

### 5.1. The defense of the doctrine

#### 5.1.1 The “absence of a consensus” argument

As was mentioned in the first chapter, in determining the scope of the margin of appreciation the absence of a “common ground” plays an important role. The use of this factor by the Court can be explained by the subsidiary nature of the ECtHR, which has to take decisions at the European level which are acceptable for the Contracting Parties. Accordingly, if the ECtHR provides a judgment on a sensitive issue which it is not very familiar with, it might lead to undesirable consequences and thus weaken the belief of the states and the citizens in the fairness and lawfulness of the Court’s judgments.<sup>88</sup>

#### 5.1.2 The “better position rational” argument

The Court refers to the “better position rationale” of the national authorities in almost every case where it affirms a wide margin of appreciation enjoyed the State. This argument is considered to be very strong if it is correctly applied since the national administrative and legislative bodies are better placed than the ECtHR to decide on certain national issues. Judge *Rozakis* even argues that the “better placed” factor is so important that the Court should not seek the other justifications and immediately affirm the existence of a wide margin of appreciation.<sup>89</sup>

#### 5.1.3 The “democracy” argument

The main argument which is used while defending the margin of appreciation doctrine is the fact that the Convention is a “living instrument”, which “must be interpreted in the light of present day conditions”.<sup>90</sup> One of the commentators argues that since the Convention is a “living instrument” it has to be in adjustment with the national democratic interests, but it does not mean that the Convention loses its supranational

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<sup>88</sup> Gerards, European Law Journal 2011, p. 109.

<sup>89</sup> ECtHR, app. No. 34438/04, *Egeland and Hanseid v. Norway*, [2009] ECHR 622; Dissenting of Judge Rozakis, para. 4.

<sup>90</sup> ECtHR, app. No. 5856/72, *Tyrer v. The United Kingdom*, [1978] 2 EHRR 1, para.31.



nature.<sup>91</sup> The issue of democracy is supposed to be a strong argument for the existence of the doctrine. The court while “defending” the doctrine stated that:

*“Democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.”*<sup>92</sup>

As *Greer* notes, the ECHR system protects human rights in a democratic context, rather than democracy in a human rights context.<sup>93</sup>

#### **5.1.4 Summary of the justification**

One might say that the justification of the doctrine seems to be very persuasive, but the criticism which follows it weakens the strong factors pointed out by the defendants of the doctrine and shows the very problematic aspects of it, which are usually hidden by the proponents.

### **5.2 Criticism of the doctrine**

The doctrine is subject of severe criticism and one of the harshest critics of the doctrine is judge *De Meyer*, who writes in his dissenting opinion in *Z v Finland* that:

*Where human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not.*<sup>94</sup>

He argues that the States should not be allowed to determine what is acceptable and what is not.<sup>95</sup> Moreover, he considers the terminology to be wrong and “pointless in practice” and demands the immediate abandonment of the doctrine.<sup>96</sup>

Judge *De Meyer*’s criticism is very general. But the further criticism will point out the lack of the doctrine by referring to certain problems which hinder the coherent application of the doctrine.

#### **5.2.1 Absence of the “European Consensus” – non-justification**

The Court in the *Handyside v the United Kingdom* judgment stated that:

*“It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals”.*

The Court therefore found the States to be in a better position to decide whether certain action is compatible with the morals or not.<sup>97</sup> This approach can be strongly criticized,

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<sup>91</sup> *Tümay*, Ankara Law Review 2008, p.214.

<sup>92</sup> *Communist party, of Turek and Others v. Turkey*, para. 45.

<sup>93</sup> *Greer*, Council of Europe Publishing 2000, p. 26.

<sup>94</sup> ECtHR, app. No. 22009/93, *Z v Finland*, [1997] 25 EHRR 371, Dissention opinion of Judge De Meyer, para. 9.

<sup>95</sup> *Ibid.*, para. 10.

<sup>96</sup> *Ibid.*, para. 12.

<sup>97</sup> ECHR, app. no. 5493/72, *Handyside v. The United Kingdom*, [1976] 1 EHRR 737, para 48.

because the moralistic preferences of the majority always prevail over the interests of the minority. People who enjoy reading books containing sexual advice or who like watching pornographic movies should not be deprived from doing the harmless things they like because the majority considers it unacceptable. Also, people who are atheists should not stop expressing their controversial opinions in different ways because it offends the religious feelings of the majority and the transsexuals who change their name should not be denied changing the reference to their sex in a passport because it offends the institution of marriage.<sup>98</sup> The majority versus minority problem developed by the doctrine underlines the existence of the utilitarian theory in human rights according to which human rights are far from absolute and they can easily be sacrificed for the “common good”,<sup>99</sup> i.e. single individuals are weaker than society and the majority’s wish stands above the orthodoxy of human rights. The Court has defined a concept of morality as the majority’s prevalence over the minority and thus it does not serve the aim of preserving cultural diversity, since cultural diversity does not aim to render the development of the culture. Thus the individual’s rights should be restricted if he violates the rights of others, but not on the base of the majority’s preferences.<sup>100</sup>

It is also possible to agree with *Benvenisti*, who calls the margin of appreciation doctrine a “recognition of moral relativism”, since the doctrine undermines the belief that the international enforcement of human rights can prevail over national policies.<sup>101</sup> The “consensus” doctrine “coupled with the margins doctrine” seriously questions the protection of minority values and they might be considered to be the ones always losing, since national politics will always protect majority values.<sup>102</sup> Thus, the approach which hinders the minority’s rights cannot serve to promote human rights.<sup>103</sup> Therefore, the use of a wide margin of appreciation in the cases which concern the balance between majority and minority should be restricted.<sup>104</sup>

The doctrine also raises the question whether the Court tries to set the universal and autonomous law, or whether the Convention reflects the sum of national law. The Contracting States diverge from each other because of cultural reasons; the Court is not in a good position to assess whether the “consensus” on a certain issue really exists in a particular country or not.<sup>105</sup> This means that the Court can easily be misled by the national authorities, stating that because of cultural diversity the country finds certain facts unacceptable, while it may be that the nationals of the country are not affected by this fact at all. This means that sometimes it is even not the “majority versus minority” case, but the case that the majority’s opinion on a certain matter can be different from the one the State authorities might try to prove in the Court. Thus, the absence of the tool with the help of which the Court would be able to assess the cultural situation of the country weakens the concept of the margin of appreciation doctrine.

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<sup>98</sup> *Letsas*, Theory of Interpretation of the European Convention on Human Rights, p. 18.

<sup>99</sup> *Dembour*, Who Believes in Human Rights? Reflections on the European Convention, p. 68.

<sup>100</sup> *Radačić*, Zb. Prav. fak. Rij. (2010), p. 610-611.

<sup>101</sup> *Benvenisti*, New York University Journal of International Law and Politics 1998-1999, p. 844.

<sup>102</sup> *Ibid.*, 851.

<sup>103</sup> *Ibid.*, 853.

<sup>104</sup> *Ibid.*, 850.

<sup>105</sup> *Yorow*, The margin of appreciation doctrine in the dynamics of European Human Rights Jurisprudence, p. 194-195.

Thus the determination of the existence or non-existence of the common ground is worthy of greater attention and as Judge *Malinverni* stated in his concurring opinion on a judgment of the *Egeland and Hanseid v Norway* case, the Court should carefully examine whether the common ground between the states really exists.<sup>106</sup> Otherwise the ECHR's standards will continue to weaken, which will lead to the complete diversification of the Contacting Parties.<sup>107</sup>

### 5.2.2 Questioning Article 15 of the Convention

As has been mentioned in previous chapters, the Court in its judgments considered the national authorities to be in a better position to decide whether the state of emergency exists and also which measures to apply to overcome this emergency.<sup>108</sup> But it seems that by giving the Contracting Parties the option to derogate, the Court gave up some competences which belonged to it. It has to remember that its main obligation is to defend human rights and not the government's preferences and until the States have the guaranteed right under the Convention to derogate from their obligations, the human rights absoluteness will always be questioned and signing the human rights convention will be a "window-dressing exercise".<sup>109</sup> Thus the prerogative of the Convention is to claim on an absolute nature of human rights, while by introducing the margin of appreciation doctrine as a tool of justification for the State's derogation, the Court itself pointed to a weakness of the Convention.

The problem is not the fact that the States can determine the existence of the public emergency, but the fact that the Court granted the Contracting Parties a wide margin of appreciation for choosing the measures which they consider to be appropriate.<sup>110</sup> When the ECtHR cannot accurately investigate the facts, since it is not a "fourth instance", the possibility that it will be misled is quite high. The public emergency is a very tricky issue; the State might easily prove that the measures were "strictly required by the exigencies of the situation" since the Court is in a bad position to estimate the "exigencies of the situation".

*Michaelsen* goes even further in his criticism of the doctrine and notes that the Court is in a better position than the national authorities to decide not only on the scope of the derogations, but also on the presence of the public emergency. He draws attention to the threat of terrorism as a justifiable tool for derogation and questions the fact that the Contracting Parties are given discretion to decide whether the threat of terrorism really exists or not. Thus he considers that since terrorism is an international problem, the international bodies are in a better position than the States to decide on the existence of terrorism as a threat to "the life of the nation".<sup>111</sup>

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<sup>106</sup> ECtHR, app. No. 34438/04, *Egeland and Hanseid v. Norway*, [2009] ECHR 622, Concurring opinion of Judge Malinverni, para. 8.

<sup>107</sup> *De la Rasilla del Moral*, German Law Journal, p p. 617.

<sup>108</sup> *Ireland v United Kingdom*, 78-79; *Brannigan and McBride v United Kingdom* para 41.

<sup>109</sup> *Ni Aolain*, Fordham International Law Journal 19 (1995), p. 105.

<sup>110</sup> *Çakmak*, Uluslararası Hukuk ve Politika 2006, p.28.

<sup>111</sup> *Michaelsen*, in: Gani/ Mathew (eds.), Fresh Perspectives on the 'War of Terror', p. 118.

The absence of the “majority against minority” question is found not only in relation to non-derogation cases, but also in derogation ones. Giving the States a wide margin of appreciation to decide upon taking measures to overcome the public emergency is very dangerous, since it is very likely that they might “use excessive measures against minorities in order to satisfy the majority’s sense of security”.<sup>112</sup>

### 5.2.3 Absence of clear reasoning

The Court can also be “blamed” for not giving a clear reasoning in its judgments as to why it grants Contracting Parties a certain margin of appreciation. As *Macdonald* notes, if the only reason for the non-interference of the Court is the fact that the national authorities enjoy a margin of appreciation, it means that the Court provides no reason at all.<sup>113</sup> The Court does not make its own assessment of the need for the restriction, but only makes reference to the discretion left to the State.<sup>114</sup> Recent judgments also underline that the Court refers to an argument that, according to case law, in certain cases the States are granted a wide margin of appreciation, but does not explain what the precise width of the margin in the concrete case should be.<sup>115</sup>

The reasonability of the Court’s judgment depends very much on the application of the proportionality test, and *Letsas* argues that the cases where the Court failed to use the proportionality test should be considered a failure of the Court’s reasoning for its decision.<sup>116</sup>

### 5.2.4 The response to the criticism

As all the above mentioned arguments illustrate that the doctrine is facing some very important problems, the proponents of the doctrine consider that the criticism is based on the misconception that the doctrine gives national governments a wide discretion and argue that the doctrine aims to expend the discretion of the national courts by limiting the discretion of the national executive and administrative bodies.<sup>117</sup>

## 6. Conclusion

The following conclusions can be drawn from the discussion on the margin of appreciation doctrine. It is a good tool for avoiding confrontations between the ECtHR and Contracting Parties, but it seriously questions the importance of human rights and the Convention. Firstly, from the case analysis it is obvious that the States try to go beyond their margins in order to protect their interests, which are often not the ones the doctrine is meant for. Secondly, the Court, which is supposed to supervise the Contracting Party in order to avoid the consequences caused by the illegal actions of the State, does not always make use of its supervisory functions. After developing the case

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<sup>112</sup> *Letsas*, Theory of Interpretation of the European Convention on Human Rights, p. 19.

<sup>113</sup> *Macdonald*, in: *Macdonald / Matscher / Petzold* (eds.), *Margin of Appreciation*, p. 85.

<sup>114</sup> *Harris / O’Boyle / Warbrick*, *Law of the European Convention on Human Rights*, p. 219.

<sup>115</sup> ECtHR, app. No. 6303/05, *Masaev v Moldova*, [2009] ECHR 774, para. 24.

<sup>116</sup> *Letsas*, Theory of Interpretation of the European Convention on Human Rights, p. 6.

<sup>117</sup> *Greer*, Council of Europe Publishing 2000, p.16.

law which underlines the concept of the doctrine, the Court often simply makes reference to the case law and affirms the existence of a wide margin of appreciation, without making a precise examination of a width of the margin in a concrete case. Thirdly, it is impossible to disagree with Greer, who thinks that the critics often associate the national courts with the State government. Critics usually call it a right of the governments to widen their discretion since the situation in some Contracting States gives them the right to think so. This mainly concerns the Eastern and Central European Member States of the Convention, the countries where the rule of law still does not take its rightful place and thus the courts are associated with the governments. Therefore, granting these national courts a wide margin of appreciation simply means that this “wide margin” will be used by the governments. Some proponents of the doctrine would argue that the interests of the CEECs which joined the Council of Europe was not a violation of the rights granted by the Convention, but the better protection of them. As a response to this the Realists’ approach, discussed in Chapter 3, can be used, and say that the membership of the CEECs was mainly based on the perspective of EU accession, i.e. political and economic interests. Thus the margin of appreciation doctrine, which gives them the considerable degree of latitude, can be considered a serious threat to the protection of human rights in these countries.

On the other hand, none of the above described concerns mean that the problems cannot be solved and that the elimination of the doctrine is required. The idea behind the doctrine is still strong and persuasive if it is correctly understood and interpreted – especially when there is no “European Consensus” between the Contracting Parties on a certain issue. Though it causes an imbalance between the majority and minority, the issue itself is so peculiar that the non-satisfaction of the majority can lead to worse consequences.<sup>118</sup> Thus if the absence of the “European Consensus” is correctly applied, the doctrine can still appear to be very useful and might be a good justification for the restriction of Articles 8–11. But as far as Article 15 is concerned, in relation to the State’s derogation the margin must be as narrow as possible, despite the fact that the national authorities are better placed than international bodies; they might overestimate the national interests and thus violate human rights. Also, CEECs cannot always be considered a threat to the Convention, since despite the difficulties the development of the democratic values in these countries is still underway.

It is obvious that the coherent implementation of the doctrine is hindered by some problems, but the fact is that the doctrine does not have an alternative, since the elimination of the doctrine cannot be considered as a solution to the problem. Hence, the ECtHR should use its supervisory functions more actively and make use of the proportionality test when it is possible in order to strike a fair balance between the individuals’ rights and freedoms and the demands of the public interests.

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<sup>118</sup> For example, if a gay person is allowed to serve in the armed forces, he might be discriminated against and badly treated by his colleagues and this will have a worse effect on his physiology than the deprivation of his right to serve in the armed forces.

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