THE DOCTRINE OF THE «MARGIN OF APPRECIATION» IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

The main aim of this article is to discuss the essence and distinctive features of the margin of appreciation doctrine in the jurisprudence of the European Court of Human Rights. In accordance with Protocol No. 14, all Council of Europe member States have an obligation to apply a margin of appreciation.

It is worth mentioning that in the text of the Convention and in the preparatory work there is no such term as «margin of appreciation». Nevertheless, this doctrine is well established in the practice of the European Court of Human Rights (in the case of *Handyside v. the United Kingdom* etc.).

The guarantees enshrined in the European Convention on Human Rights are a minimum standard. The European Court of Human Rights doesn't define, how exactly the States must secure these rights. Thus, the member States enjoy the margins of appreciation, that is, the national authorities are better placed to settle a dispute than the Strasbourg institutions (so-called *the better position rationale*).

If different rights of the European Convention on Human Rights collide, the member States have a certain degree of discretion when deciding which right has priority. Furthermore, the member States enjoy a certain degree of discretion in the definition of such terms, as «national security» (paragraph 2of Articles 8, 9 and 11 of the European Convention on Human Rights) or «necessity in a democratic society» (Article 10 of the European Convention on Human Rights, according to that, it is allowed to restrict the freedom of expression, provided that it is necessary in a democratic society).

In the doctrine of the «margin of appreciation» such significant principles as effective protection, subsidiarity and review, permissible interferences with Convention rights, proportionality and the «European Consensus» standard are developed.

Keywords: margin of appreciation, effective protection, dynamic interpretation of human rights, proportionality, subsidiarity and review, European Consensus.

Introduction

Respect for and effective protection of human rights and freedoms are an integral part of law-governed, democratic state. That is the main obligation of every civilized European state. Thus, it is set down in Article 3 of the Constitution of Ukraine, that "the human being, his or her life and health, honour and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State".[2]

The European Court of Human Rights examines the national legislation on its accordance with agreed human rights standards. Its worth mentioning that human rights are basic capabilities of every person, which

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[2] Constitution of Ukraine [1996] at https://www.coe.int/t/dghl/cooperation/ccpe/profiles/ukraineConstitution_en.asp

are necessary to their being and development, recognized as universal, inalienable and equal for every human being and must be guaranteed by state to the extent of international standards.[3]

The States have positive and negative obligations under the European Convention on Human Rights (ECHR). A negative obligation requires states to abstain from human rights violations (e.g., the prohibition of torture – Article 3 of the Convention, deprivation of life – Article 2 etc.). A positive obligation requires states to take action to secure human rights. Thereby, positive obligations include social rights, economic and some cultural human rights: a right to work, right to rest and leisure etc.[4] Nowadays all provisions of the ECHR *de facto* contain «double» requirements for the states: to abstain from human rights violations, and positive obligations to their guaranteeing and protection.[5]

Hence, the states enjoy a certain margin of appreciation by securing human rights. It allows building so-called "bridge" between supranational and national legal human rights protection systems. The integration of different cultures furthers the evolution of human rights standards, helps to find a "fair balance" of interests and to reach a "consensus" at the European level.[6]

The doctrine of the margin of appreciation is well established and developed in the case law of the European Court of Human Rights. As pointed out by the President of the European Court of Human Rights Dean Spielmann, "it devolves a large measure of responsibility for scrutinizing the acts or omissions of national authorities to the national courts, placing them in their natural, primary role in the protection of human rights. It is therefore neither a gift nor a concession, but more an incentive to the domestic judge to conduct the necessary Convention review, realizing in this way the principle of subsidiarity".[7]

1. The essence and features of the margin of appreciation doctrine

The doctrine of the margin of appreciation gives priority to the state assessment of its own facts, actions, situations and any other events within its own jurisdiction. The European Court of Human Rights (the Court) emphasizes, that it is primarily for the national public authorities, in particular for the courts, to apply and interpret domestic law. For instance, in the *Edwards v. the United Kingdom* judgment of 16 December 1992, the Court underlined: "34. … It is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair"[8] (see also the *Vidal v. Belgium* judgment of 22 April 1992, para. 33,[9] the *Klaas v. Germany* judgment of 22 September 1993, para. 29, 30,[10] the *Rotaru v. Romania* judgment of 4 May 2000, para. 53,[11] the *Kopp v. Switzerland* judgment of 25 March, 1998, para. 59).[12] In the case of *Winterwerp v. the Netherlands* (1979) the European Court of Human Rights confirmed: "46. Whilst it is not normally the Court's task to review the observance of domestic law by the national authorities (see the *Ringeisen judgment* of 16 July 1971, Series A no. 13, p. 40, para. 97), it is otherwise in relation to matters where, as here, the Convention refers directly back to that law; for, in such matters, disregard of the domestic law entails breach of the Convention, with the consequence that the Court can and should exercise a certain power of review (see the decision of the Commission on the admissibility of Application no. 1169/61,

[3] О. В. Петришин та ін., 'Теорія держави і права. Підручник для студентів юридичних вищих навчальних закладів' (Харків: Право 2014) 297

[4] Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights' (Council of Europe: Human rights handbooks No. 7 2007) 10 – 14

[5] Mattbias Klatt, 'Positive obligations under the European Convention on Human Rights' [2011] ZaöRV 71 692

[6] Howard Charles Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (The Hague / Boston / London: Kluwer Law International 1996) 2

[7] Dean Spielmann, 'Whither the Margin of Appreciation?' [2014] UCL-CLP 1 at http://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf

[8] Edwards v. the United Kingdom, application no. 13071/87 [1992] at http://hudoc.echr.coe.int/eng?i=001-57775

[9] Vidal v. Belgium, application no. 12351/86 [1992] at http://hudoc.echr.coe.int/eng?i=001-57799

[10] Klaas v. Germany application no. 15473/89 [1993] at http://hudoc.echr.coe.int/eng?i=001-57826

[11] Rotaru v. Romania application no.28341/95 [2000] at http://hudoc.echr.coe.int/eng?i=001-58586

[12] Kopp v. Switzerland application no. 13/1997/797/1000 [1998] at http://hudoc.echr.coe.int/eng?i=001-58144

X v. Federal Republic of Germany, Yearbook of the Convention, vol. 6, pp. 520 – 590, at p. 588). … It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention "incorporates" the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection".[13]

Thus, the main task of the Court is to verify whether the effects of national legal interpretation are compatible with the ECHR. This applies, particularly, to the interpretation by courts of rules of a procedural nature, such as time-limits governing the filing of documents or the lodging of appeals that are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty.[14]

Moreover, the European Court of Human Rights regarding the interpretation of international law pointed out: "54. … It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, *inter alia*, the *Pérez de Rada Cavanilles v. Spain* judgment of 28 October 1998, *Reports* 1998-VIII, p. 3255, § 43). This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention"[15] (see also the *Korbely v. Hungary* judgment of 19 September 2008, para. 72[16] etc.).

In the case of *Slivenko v. Latvia* of 9 October 2003 the Court once again emphasized: "105. … it is for the implementing party to interpret the treaty, and in this respect it is not the Court's task to substitute its own judgment for that of the domestic authorities, even less to settle a dispute between the parties to the treaty as to its correct interpretation. Nor is it the task of the Court to re-examine the facts as found by the domestic authorities as the basis for their legal assessment. The Court's function is to review, from the point of view of the Convention, the reasoning in the decisions of the domestic courts rather than to re-examine their findings as to the particular circumstances of the case or the legal classification of those circumstances under domestic law".[17]

For the first time the doctrine of the margin of appreciation was recognized and discussed by the Court in the case "*Handyside v. the United Kingdom*".[18] In this case the applicant published the Schoolbook, which contained some obscene episodes that might encourage children to smoke spot, consume pornography and promote sexual activity. The British authorities decided to confiscate and destroy these books. However, the author complained that it was the violation of his right to freedom of expression under Article 10 of the ECHR. The British government pointed out, that such interference was justified as necessary in a democratic society for the purpose of protection of morals (Article 10 Para. 2 of the Convention).[19]

The European Court in turn underlined, that the Contracting Parties to the Convention, in the first place, must secure any Convention rights (in compliance with the subsidiarity principle). Moreover, there is no common understanding of the term "morals" in Europe. Thus, the Court stressed: "48. … The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. … Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context".[20]

Hence, the national courts have priority in determining the sense of morality within their own jurisdiction. Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is

[13] Winterwerp v. the Netherlands application no. 6301/73 [1979] at http://hudoc.echr.coe.int/eng?i=001-57597
[14] Miragall Escolano and Others v. Spain application no. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98 [2000] at http://hudoc.echr.coe.int/eng?i=001-58451
[15] Waite and Kennedy v. Germany application no. 26083/94 [1999] at http://hudoc.echr.coe.int/eng?i=001-58912
[16] Korbely v. Hungary application no. 9174/02 [2008] at http://hudoc.echr.coe.int/eng?i=001-88429
[17] Slivenko v. Latvia application no. 48321/99 [2003] at http://hudoc.echr.coe.int/eng?i=001-61334
[18] Handyside v. the United Kingdom application no. 5493/72 [1976] at http://hudoc.echr.coe.int/eng?i=001-57499
[19] European Convention on Human Rights [1950] at http://www.echr.coe.int/Documents/Convention_ENG.pdf
[20] Handyside v. the United Kingdom application no. 5493/72 [1976] at http://hudoc.echr.coe.int/eng?i=001-57499

given to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to construe and apply the laws in force.[21] The Court emphasized, however, that Article 10 Para. 2 didn't give the States an unlimited power of appreciation. The European Court of Human Rights with the Commission are responsible for ensuring the observance of the States' engagements (Article 19), and the Court is empowered to give the final decision on whether a "restriction" or "penalty" is reconcilable with freedom of expression as guaranteed by Article 10 of the ECHR. "49. … The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court"[22].

In this case the European Court of Human Rights argued that the Court's supervisory functions obliged it to pay a great attention to the principles characterizing a "democratic society". Freedom of expression constitutes one of the most fundamental principles of such a society, which furthers its progress and the development of every person. Herewith, paragraph 2 of Article 10 provides not only the "information" or "ideas" that regarded as inoffensive, but also those that offend, shock or disturb the State or any sector of the population. These are the requirements of pluralism, tolerance and broadmindedness, which are the foundations of the conception of a "democratic society". It means, particularly, that every "formality", "condition", "restriction" or "penalty" imposed in this field must be proportionate to the legitimate aim pursued.[23]

In addition, the exercise of freedom of expression undertakes "duties and responsibilities" the scope of which depends on the situation and the technical means. In the present case the European Court stressed, that it wasn't the Court's task to take the place of the national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation. Thereby, the Court had to decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of "interference" they had taken were relevant and sufficient under Article 10 Para. 2 of the Convention. Consequently, the European Court of Human Rights concluded that there hadn't been a breach of Article 10 of the ECHR.[24]

So, as points out Dean Spielmann, in applying the margin of appreciation "judge-made" doctrine, the Court imposes self-restraint on its power of review and accepts that domestic authorities are best placed to settle a dispute.[25] There are many reasons for this, for instance: respect for pluralism and State sovereignty, the Court's failure to carry out difficult socio-economic balancing exercises, the subsidiarity of the European Court of Human Rights' review, a shortage of resources precluding the Court from extending its examination of cases beyond a certain level, a Court's distance to settle particularly sensitive cases etc.[26]

At the same time, as emphasizes the judge of the European Court of Human Rights Rozakis, the application of the margin of appreciation doctrine by the Court mustn't be automatic. In the case of *Egeland and Hanseid v. Norway* (2009) concerning the taking of photographs of a convicted person and their publication in the press, judge Rozakis expressed the concurring opinion. The Court concluded that there had been no violation of Article 10 of the ECHR, thus, the respondent State was granted a wide margin of appreciation in balancing of the conflicting interests (namely, the interest of freedom of expression against the interests of privacy). However, judge Rozakis underlined: "(a) … the concept of the margin of appreciation has any meaning whatsoever in the present-day conditions of the Court's case-law, it should only be applied in cases where, after careful consideration, it establishes that national authorities were really better placed than the Court to assess the "local" and specific conditions which existed within a particular domestic order, and, accordingly, had greater knowledge than an international court in deciding how to deal, in the most appropriate

[21] Ibid, Para. 48
[22] Ibid, Para. 49
[23] Ibid, Para. 49
[24] Ibid, Para. 49, 50, 59
[25] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 2–3
[26] See, for example, F. Tulkens and L. Donnay, 'L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?', [2006] Revue de science criminelle et de droit pénal comparé 3–23

manner, with the case before them. Then, and only then, should the Court relinquish its power to examine, in depth, the facts of a case, and limit itself to a simple supervision of the national decisions, without taking the place of national authorities, but simply examining their reasonableness and the absence of arbitrariness."[27] Moreover, Rozakis stressed: "(b) … the mere absence of a wide consensus among European States concerning the taking of photographs of charged or convicted persons in connection with court proceedings does not suffice to justify the application of the margin of appreciation. This ground is only a *subordinate* basis for the application of the concept, if and when the Court first finds that the national authorities are better placed than the Strasbourg Court to deal effectively with the matter. If the Court so finds, the next step would be to ascertain whether the presence or absence of a common approach of European States to a matter *sub judice* does or does not allow the application of the concept."[28] So, in this case judge Rozakis concluded that the European Court of Human Rights demonstrated the automaticity of reference to the margin of appreciation doctrine and pointed out, that this doctrine had to be duly limited to cases where a real need for its applicability better served the interests of justice and the protection of human rights.[29]

2. Determination of the width of the margin of appreciation

The width of the margin allowed for the interpretation of the European Convention on Human Rights depends on many factors, *inter alia* on the interests at stake, the context of the interference, the impact of a possible consensus in such matters, the provision invoked, the aim pursued by the impugned interference, the degree of proportionality of the interference and the comprehensive analysis by superior national courts.[30]

Hence, a certain margin of appreciation (the width of the State's discretion) depends on specific human rights. Thereby, on the one hand, by securing absolute rights (the right to life, freedom, prohibition of torture, slavery and forced labor, prohibition of retrospective legislation, the *ne bis in idem* rule), the margin of appreciation is limited and virtually inexistent. And, on the other hand, the states enjoy a wide margin of appreciation, e.g. in order to assess an exceptional situation for the purpose of Article 15 of the Convention[31] (Derogation of human rights in time of emergency, particularly, in time of war or other public emergency threatening the life of the nation), in respect of Article 1 of Protocol No. 1 (protection of property and prohibition of deprivation of possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law). So, Article 1 of Protocol No. 1 refers to national discretion, providing that States have the right to enforce such laws as *it deems necessary* to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[32]

Consequently, as pointed out by the Court in the case of *Dickson v. the United Kingdom* (2007), "78. .., where a particularly important facet of an individual's existence or identity is at stake (such as the choice to become a genetic parent), the margin of appreciation accorded to a State will in general be restricted. Where, however, there is no consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities' direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. … There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights. …".[33]

Herewith, the absolute nature of the prohibition of torture was acknowledged by the Court in a counter-terrorism context, *inter alia*, in the *Othman (Abu Qatada) v. the United Kingdom* judgment of 17 January 2012

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[27] Egeland and Hanseid v. Norway application no. 344308/04 [2009] 'Concurring opinion of judge Rozakis' at http://hudoc.echr.coe.int/eng?i=001-92246

[28] Ibid., (b)

[29] Ibid., (d)

[30] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 11

[31] Ibid., 11

[32] European Convention on Human Rights [1950] at http://www.echr.coe.int/Documents/Convention_ENG.pdf

[33] Dickson v. the United Kingdom application no. 44362/04 [2007] at http://hudoc.echr.coe.int/eng?i=001-83788

concerning an applicant who faced deportation to Jordan, the European Court stressed:" 184. .., as part of the fight against terrorism, States must be allowed to deport non-nationals whom they consider to be threats to national security. It is no part of this Court's function to review whether an individual is in fact such a threat; its only task is to consider whether that individual's deportation would be compatible with his of her rights under the Convention. … 185. .., it is well-established that expulsion by a Contracting State … engages the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion. 186. … However, it not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment."[34] At the same time, the Court regards to the following factors: the terms of the assurances; person who gives the assurances (central government or local authorities of the receiving State); legality of the treatment provided by the assurances in the receiving State; whether they are given by a Contracting State; the length and strength of bilateral relations between the sending and receiving States; objective verification of the compliance with the assurances through diplomatic or other monitoring mechanisms; the existence of an effective system of protection against torture in the receiving State; the previous ill-treatment of the applicant in the receiving State; examination of the assurances' reliability by the domestic courts of the sending/Contracting State.[35]

If different rights of the ECHR collide, for instance, the right to respect for private and family life (Article 8) and the right to freedom of expression and information (Article 10), these rights deserve equal respect. Accordingly, the margin of appreciation should be the same in both cases. Thus, in the *Axel Springer AG v. Germany* judgment of 7 February 2012, the Court stated: "88. Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts."[36] These criteria are as follows: the contribution made by photos or articles in the press to a debate of general interest (the publication can concerns political issues or crimes and sporting issues or performing artists); the role or function of the person concerned and the subject of the report and/or photo (e.g., facts, which contribute to a debate in a democratic society, relating to politicians in the exercise of their official functions and reporting details of the private life of an individual who does not exercise such functions); the behavior of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication (however, it can't serve as a definitive argument for the deprivation of the party concerned of all protection against publication of the report or photo at issue); the way in which the information was obtained and its veracity; the way of photo or report's publication and the manner of its representation; the extent of the dissemination of the report and photo (national or local newspaper, its circulation); the nature and severity of the sanctions imposed (in assessing the proportionality of an interference with the exercise of the freedom of expression).[37]

A basis for the evolution of Convention norms through the case-law of the European Court of Human Rights is the notion of consensus. [38]For the first time it was pointed out in the case of *Tyrer v. the United Kingdom* (1978), where the Court found, that "the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of "degrading punishment"".[39] The matter was that the Attorney-General for the Isle of Man argued that the judicial corporal punishment at issue in this case was not in breach of the ECHR since it did not outrage public opinion in the Island. However, the Court

[34] Othman (Abu Qatada) v. the United Kingdom application no. 8139/09 [2012] at http://hudoc.echr.coe.int/eng?i=001-108629
[35] Ibid, Para. 189
[36] Axel Springer AG v. Germany application no. 39954/08 [2012] at http://hudoc.echr.coe.int/eng?i=001-109034
[37] Ibid, Para. 90 – 95
[38] A. Kovler, V. Zagrebelsky, L. Garlicki, D. Spielmann, R. Jaeger and R. Liddell, 'The role of consensus in the System of the European Convention on Human Rights', in Dialogue between Judges, European Court of Human Rights (Strasbourg: Council of Europe 2008) 15
[39] Tyrer v. the United Kingdom application no. 5856/72, Para. 35 [1978] at http://hudoc.echr.coe.int/eng?i=001-57587

stressed, that even assuming that local public opinion could have an incidence on the interpretation of the concept of "degrading punishment" under Article 3, the Court did not regard it as established that judicial corporal punishment was not considered degrading by those members of the Manx population who favoured its retention: it might well be that one of the reasons why they viewed the penalty as an effective deterrent was precisely the element of degradation which it involved. Moreover, the Court pointed out that a punishment did not lose its degrading character just because it was believed to be, or actually was, an effective deterrent or aid to crime control. The Court emphasized that it was never permissible to have recourse to punishments which were contrary to Article 3, whatever their deterrent effect might be. Thus, the Court concluded that the judicial corporal punishment inflicted on the applicant had amounted to degrading punishment within the meaning of Article 3 of the Convention.[40]

In the *Tyrer v. the United Kingdom* judgment of 25 April 1978 the principle of evolutive or dynamic interpretation was also established. The Court recalled that "the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions".[41] It means that the substantive content of the rights and freedoms secured by the Convention must evolve in line with progress in the legal, social and scientific fields.[42] For example, in the case of *Christine Goodwin v. the United Kingdom* (2002) the Court emphasized: "85. … In the later *case of Sheffield and Horsham*, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."[43]

The notion of consensus reflects "the delicate balance that has to be struck in the relationship between the Strasbourg system and domestic systems, which must go "hand in hand" – a well-known formula taken, *mutatis mutandis*, from Handyside v. the United Kingdom".[44] If there is no consensus within the member States of the Council of Europe on the issues at stake, the margin of appreciation will be wider, and *vice versa*. Thus, in the *Evans v. the United Kingdom* judgment of 10 April 2007 the Court stressed: "77. A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. … Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. … "[45]

Herewith, as emphasize Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi in the joint partly dissenting opinion in the case of *A, B and C v. Ireland* (2010), "5. According to the Convention case-law, in situations where the Court finds that a consensus exists among European States on a matter touching upon a human right, it usually concludes that consensus decisively narrows the margin of appreciation which might

[40] Ibid, Para. 31, 35

[41] Ibid, Para. 31

[42] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 18

[43] Christine Goodwin v. the United Kingdom application no. 28957/95 [2002] at http://hudoc.echr.coe.int/eng?i=001-60596

[44] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 18

[45] Evans v. the United Kingdom application no. 6339/05 [2007] at http://hudoc.echr.coe.int/eng?i=001-80046

otherwise exist if no such consensus were demonstrated. This approach is commensurate with the "harmonizing" role of the Convention's case-law. Indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence. The harmonizing role, however, has limits. One of them is the following: in situations where it is clear that on a certain aspect of human rights protection, European States differ considerably in the way that they protect (or do not protect) individuals against conduct by the State, and the alleged violation of the Convention concerns a relative right which can be balanced – in accordance with the Convention – against other rights or interests also worthy of protection in a democratic society, the Court may consider that States, owing to the absence of a European consensus, have a (not unlimited) margin of appreciation to themselves balance the rights and interests at stake. Hence, in those circumstances the Court refrains from playing its harmonizing role, preferring not to become the first European body to "legislate" on a matter still undecided at European level."[46]

But sometimes it is difficult to find a consensus. It can be identified in the light of State practice (case-law, legislation, administrative practice); the absence of a consensus may have different reasons (e.g., lack of official positions on very new issues, significant divergence in practices etc.).[47]

The principle of proportionality, which is closely linked to the principle of effective protection, has a significant influence throughout the Convention case-law and it is an entirely legitimate judicial creation. The most of debate about what the principle of proportionality means is conducted in the context of the restrictions on the rights guaranteed by Articles 8 (2) to 11 (2) of the ECHR.[48] The assessment of the proportionality of an interference with a right requires the examination of its impact on the right, the grounds for the interference, the consequences for the litigant and the context (the importance of the local circumstances and the difficulty of objective assessment of the interests at stake). The state must justify such interference. Herewith, the grounds must be "relevant and sufficient", the need for a restriction – "established convincingly", any exceptions must be "construed strictly" and the interference must meet "a pressing social need".[49]

Thus, in the *Waite and Kennedy v. Germany* judgment of 18 February 1999, the Court found: "59. The Court recalls that the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[50]

In the *Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria* (1994) case, concerning the prohibition of distribution of a journal to soldiers, the Court emphasized: "49. … These articles were written in a critical or even satirical style and were quick to make demands or put forward proposals for reform, yet they did not call into question the duty of obedience or the purpose of service in the armed forces. Accordingly the magazine could scarcely be seen as a serious threat to military discipline. It follows that the measure in question was disproportionate to the aim pursued and infringed Article 10".[51]

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[46] A, B and C v. Ireland application no. 25579/05 [2010] at http://hudoc.echr.coe.int/eng?i=001-102332

[47] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 22

[48] Steven Greer, 'The margin of appreciation: interpretation and discretion under the European Convention on Human Rights' (Strasbourg: Council of Europe Publishing, Human rights files No. 17 2000) 20

[49] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 22

[50] Waite and Kennedy v. Germany application no. 26083/94 [1999] at http://hudoc.echr.coe.int/eng?i=001-58912

[51] Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria application no. 15153/89 [1994] at http://hudoc.echr.coe.int/eng?i=001-57908

Conclusions

The margin of appreciation doctrine (margin of state discretion) is well established and elaborated in the practice of the European Court of Human Rights. It allows the competent national authorities to enjoy a certain degree of discretion in assessing the facts, actions, situations and any other events within their national jurisdiction. Thus, the doctrine of the margin of appreciation gives priority to the state assessment of its own situation when securing the rights enshrined in the European Convention on Human Rights. It promotes the development of uniform human rights standards, the achievement of a 'fair balance' of different interests at stake.

The European Court has developed a number of principles that determine the scope of the Convention rights and the legality of any interference. The principle of subsidiarity and review means, that the mechanisms for human rights protection established by the European Convention is subsidiary to the national human rights protection system. The Court becomes involved in this process only after all domestic remedies have been exhausted. Herewith, the margin of appreciation available to national authorities goes hand in hand with a European supervision (*mutatis mutandis* rule). So, the main task of the European Court of Human Rights is to ensure whether the domestic authorities have remained within the limits of their discretion and whether the Convention rights are protected effectively. It depends on the specific right in question and on the sphere of life in which the right is at stake. Thereby, absolute rights reduce the degree of state discretion, and conversely.

The principle of the effective protection represents one of the most significant function of the European Convention on Human Rights, that is the effective protection of human rights instead of the mutual obligations' enforcement between States.

The principle of proportionality requires that the domestic authorities strike a fair balance between the competing public and private interests at stake. Consequently, the European Court evaluates such factors as the importance of the interests at stake; the objectivity of the restriction in question; the existence of a consensus among the Member States of the Council of Europe on the specific issue at stake.

The "European Consensus" refers to the existence or inexistence of a common ground, view of the concerned issues in the law and practice of the States. If there is no consensus within the Member States on the issues in question, the States enjoy a wide margin of appreciation. If the consensus exists, the margin will be narrow. Hence, the "European Consensus" furthers the dynamic interpretation of the European Convention on Human Rights.

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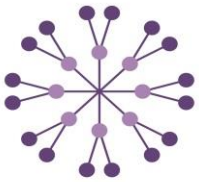

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