

THE THEORIES OF INTERPRETING THE EUROPEAN CONVENTION OF HUMAN RIGHTS – AS SHOWN IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT: *The European system of human rights protection is generally considered as a model of the effectiveness at the level of the international human right law. This general opinion expressed in the doctrine is mainly due to the current mechanism of protection of the rights guaranteed by the European Convention of Human Rights that enables an unique and permanent body, namely the European Court of Human Rights, to exercise an effective control upon the violations of the convention made by the Member States. Still, the doctrine is not very opened to the interpretations of the ECtHR given to the European Convention of Human Rights. In the following we shall present the main theories reflected in the ECtHR case-law as well the critics formulated by the doctrine.*

KEY-WORDS: *European Convention of Human Rights, European Court of Human Rights, theory, interpretation*

JEL CODE: *K 10, K 33*

The ECHR was drafted within the Council of Europe, a political organization founded in the aftermath of the Second World War in order to defend democracy, the rule of law, and human rights in Europe. The Convention opened for signature in Rome on 4 November 1950 and entered into force in September 1953. Since 1998, on the reform of the system by the Protocol No.11, the European Court of Human Rights (ECtHR) has had exclusive jurisdiction to receive individual application¹. The recognition of the right to individual application before the Court is compulsory for all Member States and the judgments of ECtHR are binding², a reason for the European system of protecting the human rights is considered a model of effectiveness in the international order of human

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¹ Drzemczewski A., „The European Human Rights Convention: Protocol No.11 – Entry Into Force and First Year of Application” in *Human Rights Law Journal*, No.21 (2000)

² Ryssdall R., „The Coming of Age of the European Convention of Human Rights” in *European Human Rights Law Review*, No.18 (1996)

rights law³. The effectiveness of the European Convention of Human Rights is manifested in many ways, both in the effect it has had on the domestic law and in the increasing number of applications being lodged before ECtHR that has generated a rich and extensive human rights case law, unique in international law.

Still, the effectiveness of the European system has been under threat from two directions. First, the Court became a “victim” of its own success⁴, having difficulties in managing the ever-increasing caseload. This is partly to do with the increased awareness of the right to individual application within Contracting States and partly with the enlargement to Eastern Europe, following the collapse of the Eastern block. Membership doubled within 14 years, from 23 in 1990 to 46 in 2004 and 47 in 2008. Secondly, the enlargement to Eastern Europe raised questions about the human rights record of the new Member States and the Court’s prospect of applying the same human rights standards to cases coming from the new members as those developed for the older western European one⁵.

Whereas for the problem of caseload, the solution was found in 2004 under the Reform of Protocol No.14, which opened for ratification in May 2004, and entered in force in June 2010, there are still some series of important jurisprudential issues that have been raised in relation to the interpretation of European Convention of Human Rights. The first is the worry that the judges of the European Court of Human Rights will exercise illegitimate judicial discretion if they interpret the Convention in a creative way. The second issue is the controversy over the interpretative methods actually used by the Court, in particular, the charge that these methods are not being applied with clarity or consistency of that they are themselves objectionable. The third and final issue has to do with the moral foundations of human rights more genetically and the extend to which the Court’s interpretation of the Convention rights conforms or should conform to them.

The literature on the interpretation of the European Convention of Human Rights is dominated by a general hostility towards judicial creativity on the part of ECtHR. The source of this hostility is not always clear. There are authors who argue that “the open textured language and the structure of the Convention leave the Court significant opportunities for choice in interpretation; and in exercising that choice, particularly when faced with changed circumstances and attitudes in society, the Court makes new law⁶. The same idea can be found in the following argumentation: “most substantive provisions of the Convention leave much room for different interpretations. They are therefore a source of judicial discretion⁷”. There are other authors who consider that the Court should take into account the intention of the drafters of the European Convention of Human Rights, otherwise the judges “risk judicial illegitimacy whenever they depart from an

³ See Bernhard R., “The Convention and domestic law” in Macdonald R, Matscher F., and Petzold H. (eds.) *The European System for the Protection of Human Rights*, 1993, p.25

⁴ See Dembour MB, “Finishin Off Cases: The Radical Solution to the Problem of the Expanding ECtHR caseload” in *European Human Rights Law Review*, No.5 (2002), p.604

⁵ See Leuprecht P., “Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement”, in *Transnational Law and Contemporary Problems*, No.8 (1998), p.313

⁶ Mahoney P., “Marvellous Richness of Diversity or Invidious Cultural Relativism” in *Human Rights LawJournal*, No.2 (1998), p.19, Mahoney P., “Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: two sides of the same coin”, in *Human Rights Law Journal*, No.11 (1990), p.57

⁷ De Blois M., “The Fundamental Freedom of the European Court of Human Rights” in Lawson R., de Blois M. (eds.), *The Dynamics of the Protection of Human Rights in Europe*, 1994, p.51

interpretation based on the intent of the Convention's drafters"⁸. The same concern has been raised by some judges of ECtHR⁹. In these authors' view, the creative interpretation of the judges of ECtHR marks a case for illegitimate judicial discretion. As a consequence, the judges not only go beyond pre-existing law whenever they exercise choice in interpretation but also that by doing so they act illegitimately and should therefore show some restraint.

Another idea that is recurrent in the literature of interpreting the European Convention of Human Rights is that regarding the inconsistency or obscurity of the methods used by the ECtHR, most notably the *margin of appreciation doctrine*. The term "margin of appreciation" refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention)¹⁰. The legal basis of the doctrine may be found in the jurisprudence, not only that of the French *Conseil d'état*, which has used the term "marge d'appréciation", but also that of the administrative law system within every civil jurisdiction. The most sophisticated and complex doctrines of administrative discretion have been developed in Germany¹¹, but the German theory of administrative discretion (Ermessensspielraum) is much narrower than the margin of appreciation as used in the Convention and EC law. At international law level, the first recourse to the margin of appreciation doctrine has occurred in the jurisprudence of the European Court of Human Rights.

Given the diverse cultural and legal traditions embraced by each Member State, it was difficult to identify uniform European standards of human rights. Therefore, the Convention was envisaged as the lowest common denominator¹². While the issue of deference to the sovereignty of each Member State continues to be raised, the enforcement of the Strasbourg organs' undertaking ultimately depends on the good faith and continuing cooperation of the Member States¹³. Consequently, the process of realising a "uniform standard" of human rights protection must be gradual because the entire legal framework rests on the fragile foundations of the consent of the Member States. The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Member States and enables the Court to balance the sovereignty of Member States with their obligations under the Convention¹⁴.

In order to fully understand the concept of the margin of appreciation, we must first and foremost analyse the interpretive processes within the Convention system, as the Strasbourg organs have developed a number of principles that have assisted them in determining the scope of the Convention rights and the legality of any interference. These

⁸ Helfer L., "Consensus, Coherence and the European Convention of Human Rights", in Delmas-Marty M. (ed.), *The European Convention for the Protection of Human Rights*, 1991, p.238

⁹ Cf. the dissenting Opinion of Judge Matscher, *Ozturk v. Germany (1984)*

¹⁰ Greer S., *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe, 2000, p. 5

¹¹ Nolte, G., *General Principles of German and European Administrative Law – A Comparison in Historical Perspective*, Modern Law Review Limited, Blackwell Publishing, Oxford, 1994

¹² Jacobs & White, *The European Convention on Human Rights*, Oxford, 2006, p. 52-54; Chiriță, R., *Convenția europeană a drepturilor omului*, CH Beck, Bucharest, 2007, p.9-17

¹³ Waldock, H., *The Effectiveness of the System set up by the European Convention on Human Rights*, Human Rights Law Journal, Oxford, 1980

¹⁴ Fenwick, H., *Civil Liberties and Human Rights*, Cavendish Publishing Limited, London, 2005, p.34-37

principles can be extracted from two key paragraphs to be found in the first case where the Court has discussed the margin of appreciation - *Handyside*¹⁵. In this case, the Court examined whether the forfeiture of the Little Red School Book on grounds of obscenity violated freedom of expression: "The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (23 the "Belgian Linguistic" case, July 1968, para.10 in fine). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted. 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. The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Art. 10 para.2, is not synonymous with "indispensable" (Articles 2 para.2 and 6 para.1), the words "absolutely necessary" and "strictly necessary" and, in Article 15 Para. 1, the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (Art.4 para.3), "useful" (the French text of the first paragraph of Article 1 of Protocol No. 1), "reasonable" (Articles 5 para.3 and 6 para.1) or "desirable". 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. Consequently, Art.10 para.2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.

Nevertheless, Art.10 para.2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression. 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."

The first principle – the effective protection, inherent in the text, holds that, since the overriding function of the Convention is the effective protection of human rights rather than the enforcement of mutual obligations between States, its provisions should not be interpreted restrictively in deference to national sovereignty¹⁶.

The principle of subsidiarity means that the state should itself decide democratically what it's appropriate for *itself*¹⁷. The principle of review states that the role of the Court is not one of final court of appeal or "fourth instance"¹⁸. Therefore, the main

¹⁵ *Handyside v. The United Kingdom*, judgment of 7.12.1976, § 48-49

¹⁶ Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer, 1998, p. 74

¹⁷ Clayton, R., Tomlinson, H., *The Law of Human Rights*, Oxford, 2000, p. 285

¹⁸ Macdonald, R.St.J., Matscher, F., Petzold, H., *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Dordrecht, 1993, p.41

responsibility of ensuring the rights provided in the Convention rests with the Member States, and the role of the Strasbourg organs is limited to ensure whether the relevant authorities have remained within their limits¹⁹. There is an obvious tension between subsidiarity and universality – the idea of insisting on the same European protection for everyone, by the developing of common standards.

Many of the rights contained in the Convention are conditional and may interfere with particular circumstances. However, these permitted infringements must possess certain characteristics if they are to be accepted within the Convention and its case-law, namely, they must be prescribed by law or in accordance with law; they must have legitimate aims; they must be necessary in a democratic society.

This first characteristic contains three requirements. First of all, any provisions that interfere with Convention rights must impose a sufficient element of control over the relevant decision-maker so as to avoid the exercise of arbitrary action²⁰. Thus, in the *Malone* case²¹, the Court held that there must be a measure of legal protection against arbitrary interference by public authorities with the right in Art.8, especially where a power of the executive is exercised in secret and the risk of arbitrariness is evident. The second requirement – accessibility, insists that a person who is likely to be affected by the rule should have access to it. A breach of this requirement was evident in the *Silver* case²² involving the regulation of prisoners' correspondence via administrative guidance produced by the Secretary of State for the Prison Service. The Court held that most of the restrictions on prisoners' correspondence could be gleaned from the content of the formal law (the Prison Act 1952 and the Prison Rules 1964). However, those restrictions contained only in non-legal and non-published Standing Orders were not in accordance with law within Art.8 (2). The third requirement – certainty, means that the law should be sufficiently clear to allow individuals to govern their future behaviour. Thus, in the *Sunday Times* case²³, it was held that a law had to be formulated with sufficient precision to enable the citizen to regulate his conduct: that person must be able – if need be with appropriate advice – to foresee, up to a reasonable degree - given the circumstances, the consequences which a certain action may entail. Those consequences need not, however, be foreseeable with absolute certainty.

The Convention lists a number of legitimate aims, allowing the claimed right to be interfered with, provided it was prescribed in accordance with the law and necessary in a democratic society to do so²⁴. Any interference with the above Convention rights has to accord to such a legitimate aim and the Member State must show that the relevant legal provision pursued one of the aims laid down in the Convention, and was genuinely applied to the applicant in a particular case. Thus, a legitimate aim cannot be a pretext for a measure taken for another improper purpose, as noted in Art.18.

The third characteristic means that it is not enough that the State interferes with the applicant's rights for a legitimate purpose; the Court must also be satisfied with the

¹⁹ See Schokkenbroek, J., *The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 19 Human Rights Law Journal 30, 31 (1998)

²⁰ Foster, S., *Human Rights and Civil Liberties*, Longman, 2003, p. 44

²¹ *Malone v. The United Kingdom*, judgment of 02.08.1984.

²² *Silver v. The United Kingdom*, judgment of 23.03.1983.

²³ *Sunday Times v. The United Kingdom*, judgment of 26.04.1979.

²⁴ Janis M., Kay, R., Bradley, A., *European Human Rights Law. Texts and materials*, Oxford, 2000, p.146-164.

restriction and consider it necessary given the circumstances. This involves the Court making a qualitative decision regarding the merits of the relevant domestic legal provision and its application. Moreover, the Court insists that there is a strong objective justification for the law and its application. For example, although it might be useful or convenient to have a law that prohibits the publication of material likely to cause offence or annoyance to the majority of society, it would not for that reason alone be „necessary” to have such a law. In *Handyside*, the Court ruled that the word „necessary” meant that there must be a „pressing social need” for the interference²⁵.

While evaluating whether it exists such a „pressing social need” or not, national authorities are allowed a margin of appreciation. It is in fact the evaluation of democratic necessity that has spawned the most significant principles of interpretation – the principle of proportionality²⁶.

The doctrine of proportionality is at the heart of the Court’s investigation into the reasonableness of the restriction. Although the Court offers a margin of appreciation to the Member State and its institutions, the Court’s main role is to ensure that the rights laid down in the Convention are not interfered with unnecessarily²⁷. The principle of proportionality requires that there be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective²⁸. The different versions of the proportionality test appear to reflect various standards of review in different contexts. The strict approach set out in *Handyside* is appropriate where fundamental rights are at stake (such as freedom of expression or intimate aspects of private life) and consists in a four questions test:

- Is there a pressing social need for some restriction of the Convention?
- If so, does the particular restriction correspond to this need?
- If so, is it a proportionate response to that need?
- In any case, are the reasons presented by the authorities, relevant and sufficient?

In other cases, the Court uses the phrase “a reasonable relationship between the means and the aim sought to be realised” or “a fair balance” between the general and individual interests at stake (such as property rights). Furthermore, it has been held that the possible existence of alternative solutions does not make legislation unlawful under the right to property; and that it is not for the Court to consider whether legislation represents the best way of dealing with the problem or whether the legislative discretion should have been exercised in another way²⁹.

De facto, the Court appears to take account of a number of factors when deciding whether an interference with Convention rights is proportionate or not. The extent to which the interference restricts the right is important. The Court will regard interference as disproportionate if it impairs the very essence of the right³⁰, if the justification for the interference cannot be proved. For example, in the *Vereinigung Demokratischer Soldaten*

²⁵ Gordon, R., Ward, T., Eicke, T., *The Strasbourg Case Law*, Sweet & Maxwell, London, 2001, p.1125-1138.

²⁶ Lawson, R. A., Schermers, H. G., *Leading cases of the European Court of Human Rights*, Ars Aequi Libri, Nijmegen, 1997, p. 28-42.

²⁷ Bîrsan, C., *Convenția Europeană a Drepturilor Omului*, vol. 1, All Beck, Bucharest, 2005, p.796.

²⁸ Clayton, R., Tomlinson, H., *The Law of Human Rights*, Oxford, 2000, p. 278.

²⁹ *James and others v. The United Kingdom*, judgment of 21.02.1986.

³⁰ Case "*Relating to certain aspects of the laws on the use of languages in education in Belgium*" v. Belgium, judgment of 09.02.1967.

Österreichs und Gubi case³¹, the Court decided that prohibiting the distribution of a journal to soldiers was disproportionate because the contents of the articles were not a serious threat to military discipline (even though they were critical of military life).

When dealing with interferences except those brought to property rights, the Court has often decided the question of proportionality by asking whether a particular measure could be achieved by a less restrictive means. For example, in the *Campbell*³² case, the Court rejected the justification for opening and reading all correspondence between prisoners and their solicitors, pointing out that the prison service could open, but not read, to see if they contained illicit enclosures. When the interrelationship between the proportionality and the margin of appreciation comes to be considered, the following factors appear to be important³³: firstly, the significance of the right in question as the Court has stated that some Convention rights have been characterised as fundamental (such as the right to a fair trial³⁴ or to private life³⁵ or to freedom of expression³⁶), secondly, the objectivity of the restriction in question as, in *Sunday Times*, the Court distinguished between the objective nature of maintaining the authority of the judiciary (which left a narrower margin of appreciation for the state) and the subjective nature of the protection of morals, where the Court should defer to domestic views³⁷, thirdly, when there was a consensus in law and practice among the Member States as, in the *Marckx* case³⁸, the Court acknowledged an emerging consensus about the legal treatment of illegitimate children and struck down inheritance laws which discriminated against them.

The Court interprets the Convention as a living document, often applying a teleological reading to the text based on observed consensus rather than the intent of the drafters. But without a clear understanding of how to define consensus, the Court risks illegitimacy with this approach³⁹. The “European Consensus” standard is a generic label used to describe the Court’s inquiry into the existence or non-existence of a common ground, mostly in the law and practice of the Member States.

This standard has played a key-role in the wider or narrower character the application of the margin of appreciation adopts in practice. Generally speaking, the existence of similar patterns of practice or regulation across the different Member States will legitimize a wider margin of appreciation for the State that stays within that framework and delegitimize attempts to part ways with them⁴⁰.

Against this background, the non-existence of a European consensus on the subject-matter will be normally accompanied by a wider margin of appreciation accorded to the State in question. The European consensus criterion has, however, been criticized on different accounts, including the lack of profound and detailed comparative research in which it claims to reside. Sometimes, a country that “stays behind” is sanctioned.

³¹ *Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria*, judgment of 19.12.1994.

³² *Campbell v. The United Kingdom*, judgment of 25.03.1992.

³³ Clayton, R., Tomlinson, H., *op.cit.*

³⁴ *Delcourt v. Belgium*, judgment of 17.01.1970.

³⁵ *Dudgeon v. The United Kingdom*, judgment of 22.10.1981.

³⁶ *Handyside v. The United Kingdom*, judgment of 07.12.1976.

³⁷ *Muller v. Switzerland*, judgment of 24.05.1988.

³⁸ *Marckx v. Belgium*, judgment of 13.06.1979.

³⁹ See L. R. Helfer, *op.cit.*

⁴⁰ *Rasmussen v. Denmark*, judgment of 28.11.1984.

In *Marckx*, the Court analysed the former distinction in Belgian law between the “legitimate” and “illegitimate” family. The Court noted that at the time when the Convention was drafted, such a distinction was regarded as permissive and normal in many European countries. However, the Court can only be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, at a similar pace with the relevant international instruments, towards a full juridical recognition of the legal maxim “*mater simplex certat*”. Nevertheless, in *Handyside*, where the “legitimate aim” was the protection of morals – the reason why a wider margin of appreciation was granted – was the lack of a European conception of morals.

With regard to these methods described above, there are authors who have complained that very often the Court’s use of the margin of appreciation doctrine masks the real basis for its decision⁴¹. In reading the Court’s judgements, one often forms the impression that the doctrine of the margin of appreciation is a device used to defer to the judgement of national authorities, particularly when the legal issue before the Court is politically sensitive and there is likely to be significant political opposition by the respondent state to the Court declaring violation.

The third and final issue arising in the context of the interpretation of the European Convention of Human Rights is an increasing controversy regarding the nature and the scope of the rights embodied in the Convention. The cases that have come before the ECtHR in the recent years have posed serious interpretative challenges. Does the right to life under art.2 of the European Convention of Human Rights include the right of a terminally ill patient to end her life?⁴² Does the right to private life under art.8 of the European Convention of Human Rights include the right to sleep at night free from airplane noise?⁴³ Does the right to property under art.1 Protocol No.1 of the European Convention of Human Rights entitle the former King of Greece to claim compensation for the expropriation of royal property following a referendum on the abolition of the monarchy?⁴⁴

As a conclusion to those presented above, we must observe that there are frequent oppositions to the creative way in which the judges of ECtHR interpret the European Convention of Human Rights, oppositions that lead to the conclusion that the Court exercises an illegitimate judicial discretion in the act of interpreting the Convention. The interpretative methods used by the Court are also considered in the doctrine as “slippery and elusive as an eel”⁴⁵, not to mention the increasing controversy regarding the nature and the scope of the rights embodied in the Convention, controversy to lead to strange claims before the ECtHR. It was not our purpose to criticise the judicial activity of the ECtHR, but we would like to emphasize that the original intention of the authors of the European Convention of Human Rights was outpassed by the judges of the European Court.

⁴¹ See Macdonalds R., “The Margin of Appreciation” in Macdonald, R., Matscher F., and Petzold H. (eds.), *The European System for the Protecting of Human Rights*, 1993

⁴² *Pretty v. United Kingdom*, Judgement of 29 April 2002, Reports 2002-III

⁴³ *Hatton v. United Kingdom* (Chamber), Judgement of 2 October 2001

⁴⁴ *Former King of Greece v. Greece*, judgement of 23 November 2000, Reports 2000 - XII

⁴⁵ Lord Lester of Herne Hill, “Universality Versus Subsidiarity: A Reply”, 1 *European Human Rights Law Review* (1998), p.73

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