

THE “MARGIN OF APPRECIATION DOCTRINE” DEVELOPED BY THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT

The margin of appreciation doctrine is based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions. The margin of appreciation doctrine that has been established by the European Convention on Human Rights and its implementing bodies, gives the State Parties to the Convention the opportunity to strike a balance between the common good of society and the interests of the individual when they restrict rights. The underlying principle is that state authorities are in a better position than an international judge to decide the proper application of the Convention to specific contexts. The development of this concept is important to keep in mind as Turkey accedes to the European Union and comes under pressure to adhere to European standards.

ÖZ

Takdir hakkı doktrini, her toplumun, bireylerin hakları ile ulusal menfaatlerin ya da farklı ahlakî anlayış uyumsuzluklarının çözümünde belirli bir kapsamda takdir hakkına sahip olacağı prensibine dayanmaktadır. Avrupa İnsan Hakları Sözleşmesi organları tarafından geliştirilen Takdir Hakkı doktrini üye devletlere bireylerin temel haklarını sınırlandırırken kamu yararı ile bireylerin menfaatlerini dengeleme imkânı verir. Takdir hakkı doktrinin temelindeki prensip, Sözleşmenin belirli bir olaya

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uygulanmasında ulusal otoritelerin uluslararası yargıca göre daha iyi bir konumda olması gerçeğidir.

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Anahtar Kelimeler: *Takdir hakkı doktrini, Avrupa İnsan Hakları Sözleşmesi, uluslararası mahkeme kararları, bireylerin hakları ve ulusal menfaatler.*

I. INTRODUCTION

The margin of appreciation doctrine established by the Strasbourg bodies gives the State Parties to the Convention the opportunity to strike a balance between the common good of society and the interests of the individual when they restrict rights. The underlying principle is that state authorities are in a better position than an international judge to decide the proper application of the Convention to specific contexts and “to give an opinion on the exact content as well as on the ‘necessity’ of a restriction or penalty.”¹ This doctrine, which permeates the jurisprudence of the ECHR, is based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions.² The doctrine makes clear that the European Convention on Human Rights’ protection is secondary, or subsidiary, to the protection provided by the Contracting Party. Basically, the term ‘margin of appreciation’ refers to the discretion given to a government when it evaluates factual situations and applies the provisions enumerated in the Convention.³ Yutaka states that the margin of

¹ *Handyside v. United Kingdom*, Judgement of 7 December 1976, Series A No. 24 (1979-80) 1 EHRR 737, para. 48.

² Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 843 (1999).

³ As to the concept of the margin of appreciation in general, see A. T. Yutaka, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* (Intersentia, Antwerpen, Oxford, New York, 2002); C. Ovey and R. C. A. White, *JACOBS & WHITE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford Univ. Press, 2002); Harris, O’Boyle and Warbrick, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1995); *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* (MacDonald, Matscher and Petzold, eds, Martinus Nijhoff, 1993); M. Delmas-Marty, *THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS* (Martinus Nijhoff Publishers, 1992); N. Lavender, *The Problem of the Margin of Appreciation*, 4 EHRLR 380 (1997); J. G. Merills, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2nd ed., Manchester University Press, Manchester, 1993); Howard C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 3 Connecticut Journal of International Law 111 (1987); T. A. O’Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of*

appreciation refers to the “measure of discretion allowed the Member States in the manner in which they implement the Convention’s standards, taking into account their own particular national circumstances and conditions.”⁴ He then goes on to discuss the importance of the principle of proportionality as a balancing tool, stating that “the principle of proportionality has been conceived to restrain the power of state authorities to interfere with the rights of individual persons, and hence it should be regarded as a device for the protection of individual autonomy.”⁵ The principle of proportionality requires that any potentially justified interference with a right should be the minimum necessary to secure the legitimate aim of the measure.

Before we begin to explore the ‘margin of appreciation doctrine’ this article will explain the principle of subsidiarity in Section II, which is the underlying ground of the doctrine. Then the meaning and interpretation of the doctrine, the principle of ‘living instrument’ and evolving standards with regard to interpretation and application of the doctrine will be examined in Sections III, IV, V, and VI respectively. Because of their prime importance within the operation of the doctrine, the rights fundamental to democracy also will be examined in Section VII in the context of the margin of appreciation doctrine. Section VIII concludes.

II. THE PRINCIPLE OF SUBSIDIARITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Although it is not expressly mentioned, it should not be thought that the principle of subsidiarity is without a role in the organization and operation of the ECHR. The principle is implicit in the protection system established by the Convention. The ECHR’s task is to provide a supplementary remedy to those safeguards which domestic law offers to individuals. Therefore, as was expressed in one of the judgments of Strasbourg, “it is in no way the Court’s task to take the place of the competent national courts but rather to review the decisions they delivered in the exercise of their power of appreciation.”⁶ The role of the Convention institutions is to supervise the national protection of rights and freedoms guaranteed in the ECHR. In spite of the fact that the ECHR

Human Rights, 4 HRQ 474 (1982). For arguments to abandon the doctrine, see Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUMBIA JOURNAL OF EUROPEAN LAW 113 (2004).

⁴ Yutaka, *supra* note 3 at 2.

⁵ *Id.*

⁶ *Handyside v. United Kingdom*, Judgement of 7 December 1976, Series A No. 24 (1979-80) 1 EHRR 737, para. 50.

does not expressly mention the principle, the Court held that the protection offered by the Convention is subsidiary to that of national law. It stated that:

The Court points out that the machinery of protection established by the Convention *is subsidiary to the national systems* safeguarding human rights ... 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 (Article 26),⁷ (emphasis added).

In addition to the Court's judgment on the issue, a careful examination of provisions in the Convention enables us to see the implied subsidiary character of its mechanism. The combination of Articles 1, 13 and 35 clearly reflects the subsidiary character of the Convention. In this connection, the State Parties are obliged under Article 1 to secure the Convention rights and freedoms to everyone within their jurisdiction in any form that they freely choose. Article 13 clarifies the obligation of a State Party with regard to the enforcement of the rights and freedoms. It requires the availability of a remedy at the national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Its effect is thus to require the provision of a domestic remedy allowing the competent 'national authority' both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.⁸ Article 13 makes clear the State Parties' specific obligation as a requirement of the general obligation under Article 1. As expressed in the Silver case, the application of Article 13 in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 to secure directly to anyone within its jurisdiction the rights and freedoms set out in Section I.⁹ Article 35 completes the combination that reflects the subsidiary

⁷ Handyside v. United Kingdom, Judgement of 7 December 1976, Series A No. 24 (1979-80) 1 EHRR 737 para. 48. The court reached the same conclusion in the Belgian Linguistic Case, Judgements of 9 February 1967 and 23 July 1968, Series A Nos. 5 and 6 (1979-80) 1 EHRR 241-252 para. 10 (stating "...In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention."(emphasis added)).

⁸ Vilvarajah and Others v. the United Kingdom, Judgement of 30 October 1991, Series A, No. 215 (1993) 14 EHRR 248, para. 122.

⁹ Silver and Others v. UK, Judgement of 25 March 1983, Series A No.61 (1983) 5 EHRR 347, para. 113.

character of ECHR. Under this provision, a potential applicant has to exhaust all available and sufficient domestic remedies, which are capable of providing redress for the particular violation. Only when there is no remedy left at all, or the existing remedy is not effective, will the applicant be able to invoke the protection of the ECHR organs. The requirements of Articles 1, 13 and 26 taken together significantly reflect the subsidiary character of the Strasbourg mechanism.

Another reflection in the structure of the ECHR regarding subsidiarity is Article 53. This provision reads: “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.”¹⁰

This provision ensures that the higher level and more favorable human rights’ guarantees in the national law of State Parties cannot be weakened by reference to less effective provisions of the ECHR. Therefore, it is obvious that the ECHR is not intended to replace domestic guarantees nor is it to provide safeguards for rights and fundamental freedoms by ECHR guarantees only. In sum the Convention respects the more effective and better protection mechanisms of national laws. Article 41¹¹ also reflects the principle of subsidiarity. This provision requires that, where full reparation is not available under State Party national law, ‘just satisfaction’ can only be awarded by the Strasbourg machinery. The remedy and redress at the international level in Strasbourg will come into play only when the national legal system cannot provide full reparation. As a result, the protection system of Strasbourg is secondary to that of national legal mechanisms. The redress at Strasbourg is ‘just satisfaction’ – which includes the applicants’ legal costs and compensation for pecuniary and non-pecuniary damages. In the framework of subsidiarity, as we have examined it and according to the established case law of Strasbourg, it is the national authorities’ duty to promote and protect human rights and the fundamental freedoms of individuals.¹² The ‘margin of appreciation’,¹³ doctrine

¹⁰ I. Brownlie, *BASIC DOCUMENTS ON HUMAN RIGHTS* 399 (3rd ed., Oxford University Press, 1999).

¹¹ “The Court’s decisions do not necessarily have the force of law in the legal systems of contracting states. Article 50 provides for cases in which the Court’s decisions are incompatible with decisions or measures taken by domestic judicial or other authorities and where the law of a state concerned allows only partial reparation to be made for the consequences of the decision or measure in question. The Court may, in such a situation, accord just compensation to the injured party.” A. Drzemczewski, *EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY* 5 (1983).

¹² In the *Winterwerp v. UK*, Judgement of 24 October 1979, Series A No.33 (1979-80) 2 EHRR 387 para. 46, the Court held on this issue that: “...the logic of the system of safeguard established

established by the Strasbourg's case law stems directly from the principle of subsidiarity.¹⁴ The Court stated in the case of *Open Door and Dublin Well Woman v. Ireland* that:

It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the state authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the "necessity" of a "restriction" or "penalty" intended to meet them."¹⁵ (emphasis added)

According to the margin of appreciation doctrine, the Convention, in the first place, leaves to each State Party the mandate of securing rights and freedoms guaranteed in the Convention within the domestic legal order.

III. THE ORIGIN, MEANING AND SCOPE OF THE DOCTRINE

It seems that the first international tribunal to have made recourse to the margin of appreciation in its jurisprudence is the European Court of Human Rights. Like all other legal rules which recognize or confer rights or impose

by the Convention sets limits upon the scope of this review. 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 The 'margin of appreciation doctrine' has been defined "...as the freedom to act; manoeuvring, breathing or "elbow" room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees. It has been defined as the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its law." Howard C. Yourow, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 13 (Springer 1996). However, the doctrine is still developing and to some extent is looking for a firm structural basis. See Stefan Sottiaux and Gerhard van der Schyff, *Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights*, 31 *HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW* 115 (2008).

¹⁴ *Handyside*, 1 EHRR 737 para. 48.

¹⁵ *Open Door and Dublin Well Woman v. Ireland*, Judgement of 29 October 1992, Series A No. 246(1993) 15 EHRR 244, para. 68.

limitations on them, they are subject to a continuing process of interpretation to determine their precise scope and application in ever-changing circumstances. The margin of appreciation doctrine initially responded to concerns of national governments that international policies could jeopardize their national security. This could explain the initial application of the doctrine in the context of derogations under Article 15 from treaty obligations due to self-proclaimed states of national emergency. This rationale, however, later was expanded to allow each country wide discretion to select policies that would regulate potentially harmful activities, such as incitement to violence or racist speech, by means befitting each State's unique circumstances and societal constraints.¹⁶

The application and enforcement of the Convention by the Court involves recourse to and application of the margin of appreciation doctrine and the development of standards for its application within the Convention's federal framework. The doctrine has been defined as "the latitude allowed to member states in their observance of the Convention," and as being "one of judicial review which governs the extent to which the Commission and the Court will scrutinize a complained-of practice."¹⁷ It has been defined as "one of the more important safeguards developed by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy."¹⁸ It implies therefore, "that special national contexts must be taken into account in reviewing restrictive measures"¹⁹ imposed by the state, in respect of the exercise and enjoyment by the individual of the rights and freedoms guaranteed under the Convention.

In *McGuinness*,²⁰ the applicant was an elected Member of Parliament ("MP") for the Mid-Ulster constituency in Northern Ireland in the General Election held on 1 May 1997. The applicant made known to his constituents during the electoral campaign that, in line with official Sinn Féin policy, he would not take the oath of allegiance to the British monarchy which MPs are required to swear as a condition of taking their seats in Parliament. Since he did not take the oath, the applicant could not take his seat. The applicant claimed in

¹⁶ Benvenisti, *supra* note 2.

¹⁷ O'Donnell, *supra* note 3, at 475.

¹⁸ Waldock, *The Effectiveness of the System Set Up by the European Convention of Human Rights*, 1 HRLJ 1, 9 (1980).

¹⁹ K.C. Burke, *Secret Surveillance and the European Convention on Human Rights*, 33 STANFORD LAW REVIEW 1113, 1136 (1981).

²⁰ *McGuinness v. United Kingdom*, App. No. 39511/98, Judgment of on 8 June 1999. *See also* *Buscarini and Others v. San Marino* (App. 24645/84), Judgment of 18 February 1999.

his complaint to the European Court of Human Rights that the requirement to take an oath of allegiance to the British monarch is an unjustified interference with his right to freedom of his religious beliefs and expression guaranteed by Articles 9 and 10, respectively.

The Strasbourg Court, noting that the applicant freely contested the election in complete knowledge of the fact that he could only take his seat in the House provided that he complied with the oath requirement and evinced a clear intention not to do so, decided that, the requirement that elected representatives to the House of Commons take an oath of allegiance to the reigning monarch can be reasonably viewed as an affirmation of loyalty to the constitutional principles which support, *inter alia*, the workings of representative democracy in the respondent State.²¹ In the Court's view, it must be open to the respondent State to attach such a condition, which is an integral part of its constitutional order, to membership in Parliament and to make access to the institution's facilities dependent on compliance with the condition. Therefore, the Court considered that the applicant could not claim with justification that the requirements had a disproportionate effect on his right to freedom of expression. It recalled that the oath requirement can be considered to be a reasonable condition attached to elected office having regard for the constitutional system of the respondent State. On the Article 9 complaint, The Court was of the view that the applicant was not required under the 1866 Act to swear or affirm allegiance to a particular religion on pain of forfeiting his parliamentary seat or as a condition of taking up his seat; neither was he obliged to abandon his republican convictions or prohibited from pursuing them in the House of Commons. In conclusion, the Court found that the applicant's complaints were ill founded and the case was inadmissible. Taking into account the Court's finding in *McGuinness* and given the degree of deference paid by the Strasbourg Court *vis-à-vis* the way in which Member States derogate from the Convention under Article 15, it is understandable that it would want to be cautious in overturning a Member State's conceptualization of what is necessary in a democratic society. However, a search for fundamental democratic values which will form the European public policy for examination of the margin of appreciation doctrine should identify and verify what the 'European democratic values' are seems to be necessary. This will serve to strengthen the efficacy and effectiveness of the conceptual framework within which the margin of appreciation is applied by furnishing a crucial insight into the more predictable and systematic *modus operandi* of the doctrine.²²

²¹ See also *Vogt v. Germany*, Judgment of 26 September 1995, Series A No. 323, paras. 28, 59.

²² See *Yutaka*, *supra* note 3, at 243.

The margin of appreciation doctrine was first used by the Commission in cases involving derogations by governments, in terms of Article 15.²³ In the case of *Greece v. UK*, the Commission, in relation to an emergency arising on the island of Cyprus, noted that the UK authorities “should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.”²⁴ In the *Lawless* case, the Commission stated that the respondent state had “a certain discretion – a certain margin of appreciation...in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.”²⁵ The first case in which the Court expressly relied on the margin of appreciation doctrine was *Ireland v. UK*. Here the Court gave the national authorities a “wide margin of appreciation” in deciding “both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.”²⁶

The doctrine was extended and developed beyond the emergency cases under Article 15. The first case referring to the doctrine outside the context of Article 15 was the Commission decision in *Iversen v. Norway*.²⁷ The case concerned a complaint of forced labor under Article 4. Subsequently the doctrine extended to the right to education as guaranteed under Article 2 of Protocol 1,²⁸ the right to correspondence of detained vagrants under Article 8,²⁹ the right to correspondence with a solicitor for a prisoner under Article 8,³⁰ to

²³ The Court has successfully utilized the jurisprudential concept called the ‘margin of appreciation’ doctrine to determine whether a particular law, or practice, or conduct of a Contracting Party puts that Party in violation of the Convention.

²⁴ App. No. 176/56, *Greece v. UK*, 14 December 1959, (1958-59), 2 Yearbook 174, 176.

²⁵ *Lawless v. Ireland*, Commission Decision, Series B (1960-61), at 82.

²⁶ *Ireland v. UK*, Judgement of 18 January 1978, Series A No. 25; (1979-80) 2 EHRR 25, para. 207.

²⁷ App. No. 1468/62, *Iversen v. Norway*, Decision of 17 December 1963, 6 Yearbook 278, 330 (1963).

²⁸ *Belgian Linguistic Case*, Judgements of 9 February 1967 and 23 July 1968, Series A Nos. 5 and 6; (1979-80) 1 EHRR 241.

²⁹ *De Wilde, Ooms & Versyo (Vagrancy case) v. Belgium*, Judgement of 18 June 1971, Series A No. 12; (1979-80) 1 EHRR 372.

³⁰ *Golder v. UK*, Judgment of 21 February 1975, Series A No. 18, (1979-80) 1 EHRR 524.

Article 5 taken together with Article 14³¹, and to the right to free expression under Article 10,³² and so on.

IV. THE CONVENTION AS A 'LIVING INSTRUMENT'

The Strasbourg Court began the articulation of this key methodology in the well-known *Tyrer* case and held that “the Convention is a living instrument... which must be interpreted in the light of the present day conditions.”³³ The development of the ‘living instrument’ principle is the sign of Court’s interpretation of the Convention in such a creative way as to cover situations that would not have been foreseen by the drafters working in the late 1940s against a backdrop of the fascist atrocities before and during the Second World War, and the emerging totalitarian communist regimes of the Soviet Union and its European satellite states.³⁴ However, as the Court does little justification or elaboration of the ‘living instrument’ doctrine and given the benefit of hindsight, since the doctrine was to become the basis of considerable judicial creativity, it would have been beneficial if the Court in *Tyrer* had expanded upon the reasons for its adoption of such a doctrine.³⁵

In the *Tyrer* case³⁶ the applicant was a fifteen-year-old United Kingdom citizen, resident in the Isle of Man. He had been sentenced by a juvenile court to three strokes of the birch for an assault occasioning actual bodily harm, contrary to the Manx law. The Court, in determining whether the administration of such a punishment was degrading and contrary to Article 3 of the ECHR, recalled the living instrument principle.³⁷ Accordingly the Court could not but be influenced

³¹ *Engel and others v. Netherlands*, Judgment of 8 June 1976, Series A No. 22, (1979-80) 1 EHRR 647.

³² *Handyside*, 1 EHRR 737.

³³ *Tyrer v. UK*, Judgment of 25 April 1978, Series A No. 26; (1980) 2 EHRR 1, para. 31.

³⁴ See A. Mowbray, *The Creativity of the European Court of Human Rights*, 5 HUMAN RIGHTS LAW REVIEW 57 (2005). For more on preparation work of the Convention, see THE COLLECTED EDITION OF THE ‘TRAVAUX PRÉPARATOIRES’ OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (The Hague: Martinus Nijhoff, 1975).

³⁵ *Id.*

³⁶ *Tyrer*, 2 EHRR 1.

³⁷ *Id.* para. 31 (the Convention must be interpreted in the light of present-day conditions); see *Marckx v. Belgium*, Judgment of 13 June 1979, Series A No.31 (1979-80) 2 EHRR 330, paras. 19, 41; *Airey v. Ireland*, Judgment of 9 October 1979, Series A No. 32, paras. 14, 15, 26; and, as the most recent authority, *Mamatkulov and Askarov v. Turkey*, Judgment of 4 February 2005, para. 121.

‘by the developments and commonly accepted standards in the penal policy of Member States of the Council of Europe.’³⁸ The Court found that the UK was in violation of Article 3 of the ECHR.

The Turkish Government, in *Loizidou v Turkey*,³⁹ regarding the applicant’s complaints about interference with her property located in northern Cyprus, contended that its declaration, in 1987, recognizing the competence of the former Commission and original Court,⁴⁰ was expressly restricted to actions taking place within the territorial boundaries of Turkey, therefore asserting that the applicant’s complaints were inadmissible. The Court, on the other hand, applying the living instrument principle, not only to the substantive provisions of the Convention, but also to the provisions which govern the operation of the Convention’s enforcement machinery, such as Articles 25 and 46, and stating that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago, concluded that Turkey’s purported territorial restrictions were invalid but again with a little explanation.

Furthermore, the Court has used the evaluative interpretation as an element of the “democratic necessity” test. The Court asserted that it has the power to update the Convention and to respond to the developing attitudes and needs of the ‘democratic society.’ The Court, therefore, held that Member States were under an obligation to comply with developing standards. The Court has defined the sources from which it deduces the existence of “evolved” common standards. These are (a) legislation of the Member States of the Council of Europe; (b) international instruments in which the Member States of the Council of Europe participate, even where the respondent state is not a party to them.⁴¹ The Court, in a number of cases, has unambiguously determined the direction of the evolution in standards, which has been especially important in the light of criticism and fears expressed in this regard.⁴² It should be borne in mind that the ‘living instrument’ doctrine has enabled the Court to creatively update the interpretation of a number of Convention articles in varied situations and it has also been used as a tool to determine the width of margin of

³⁸ Tyrer, 2 EHRR 1.

³⁹ *Loizidou v Turkey* (Preliminary Objections) Serial A 310; (1995) 20 EHRR 99.

⁴⁰ Under Articles 25 and 46 of the pre-Protocol 11 Convention.

⁴¹ *Marckx v. Belgium*, Judgement of 13 June 1979, Series A No. 31; (1979-80) 2 EHRR 330, para. 41.

⁴² P. Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HRLJ 57, 66-68 (1990).

appreciation left to the State Party. One of the keys to the success of the ECHR, which has remained the “jewel in the crown”⁴³ among other international human rights instruments, both regional and global, has been its flexibility in being a ‘living instrument’ enjoying a recursive relationship with national legislation, yet leaving to each individual party the discretion of implementing the rights enshrined in it.⁴⁴

V. THE INTERPRETATION, APPLICATION AND ROLE OF THE DOCTRINE

In light of the doctrine, the Court has seen the Strasbourg bodies play a role subsidiary to that of the several national legal systems, as has been demonstrated in frequent judgments, for ‘it is for national authorities to make initial assessment’ of whether a particular action or law is in conformity with the Convention and in so doing they are entitled to a certain margin of appreciation.⁴⁵ As it is aware of the variability and diversity of local conditions and the sensitivities of the Contracting Parties, the Court has reiterated that it “cannot disregard those legal and factual features which characterize the life of the society in the State which...has to answer for the measure in dispute.”⁴⁶ Nor can it “assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention.”⁴⁷ The margin of appreciation doctrine has been developed in an attempt to strike a balance between national views of human rights and the uniform application of Convention values. The doctrine also takes into account particular cultural and social conditions within national societies.⁴⁸ The Court has stated that “the national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention,”⁴⁹ and that

⁴³ C. Lalumiere, *Human Rights in Europe: Challenges for the Next Millennium*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* (R. Macdonald, F. Matscher and H. Petzold eds, Dordrecht: Martinus Nijhoff, 1993).

⁴⁴ V. D. Bojkov., *National Identity, Political Interest and Human Rights in Europe: The Charter of Fundamental Rights of the European Union*, 32 *NATIONALITIES PAPERS* 2 (2004).

⁴⁵ Handyside, 1 EHRR 737 para. 48.

⁴⁶ Belgian Linguistic Case, Judgements of 9 February 1967 and 23 July 1968, Series A Nos. 5 and 6 (1979-80) 1 EHRR 241-252, para. 10.

⁴⁷ *Id.*

⁴⁸ Yutaka, *supra* note 3, at 3.

⁴⁹ Belgian Linguistic Case, 1 EHRR 241-252 para. 10.

“review by the Court concerns only the conformity of these measures with the requirements of the Convention.”⁵⁰

The doctrine was best expressed in its proper perspective by the Court when it concluded that “it falls in the first place to the Contracting State, with its responsibilities for the ‘life of its nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so how far it is necessary to go in attempting to overcome the emergency.” In this regard, Article 15(1) leaves those authorities a wide margin of appreciation.⁵¹ However national authorities are in principle in a better position than an international judge to decide, interpret and apply the laws in force.⁵² Nevertheless, the states do not enjoy an unlimited power in this respect. The Court is responsible for ensuring the observance of the states’ engagements, (Article 19). It is empowered to rule whether the states have gone beyond the ‘extent strictly required’ by the exigencies of the crisis⁵³ or “to give a ruling whether a restriction or penalty is reconcilable” with any alleged infringement of the rights and freedoms guaranteed under the Convention.⁵⁴ In referring to the doctrine as being “accompanied by a European supervision” the Court concluded that “such supervision concerns both the aim of the measure challenged and its ‘necessity’.” This covers not only the basic legislation but also the decisions applying it, even one given by an independent court.⁵⁵ The Court has emphasized that its task is in no way “to take the place of the competent national courts but rather to review the decisions they delivered in the exercise of their power of appreciation.”⁵⁶ This review is not limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith but is also subject to the Court’s control with regard to the compatibility of the State’s conduct with the engagements it has undertaken under the Convention. The Court is critical in determining the scope of the rights and freedoms guaranteed under the Convention. The doctrine is like a pivot around which the several rights, freedoms, duties and obligations of the parties are drawn. The court is the final interpreter and arbiter by way of reviewing the state’s action and conduct and its duty is to redress any alleged

⁵⁰ *Id.*

⁵¹ Ireland v. UK, Judgment of 18 January 1978, Series A No. 25 (1979-80) 2 EHRR 25, para. 207.

⁵² Handyside, 1 EHRR 737, para. 48.

⁵³ Ireland v. UK, 2 EHRR 25, para. 207.

⁵⁴ Handyside, 1 EHRR 737 para. 49.

⁵⁵ *Id.*

⁵⁶ *Id.*

imbalance that may arise between the competing interests of the individual and the state.

The margin of appreciation doctrine has been criticized on the grounds that it invariably leads to a finding which is favorable to the respondent state and that this threatens the continued viability of the Convention.⁵⁷ Another criticism is that it is increasingly difficult to control and objectionable as a legal concept because of the absence of clear standards for its use.⁵⁸ It seems that such criticism raises issues which should be addressed. However, the critics may have failed to give due weight to the fact that the Convention is a 'living instrument' which has to be applied in a supranational context, embracing several legal, political and economic systems, social and cultural habits and customs, and a range of other relevant factors such as philosophical and ideological beliefs. As such the doctrine must reflect flexibility if it is to be accommodated within the complex textual differences in the Convention and give the latter true meaning and effect. The criticisms have forgotten the fact that, although the Convention contains wide, vague and sometimes imprecise proscriptions intended to regulate, limit and restrict state action and conduct, it has nonetheless set out certain criteria, guidelines and standards such as 'necessary in a democratic society', and 'prescribed by law.' These assist the Court in giving effect to the Convention when interpreting and applying the provisions. The criticism forgets that all judicial bodies do exercise a certain degree of discretion and self-restraint and that the jurisprudence of the Court, including the doctrine, has to emerge, evolve and develop, and also to gain acceptance, respect and credibility from each and every Contracting Party in the community within which it operates. Critics have not recognized that the doctrine has been interpreted and applied not in the abstract but in concrete circumstances. Resort has been made to acceptable aids to interpretation such as the Vienna Convention on Treaties, and other international legal principles as the Convention is an international instrument.

VI. EVOLVING STANDARDS REGARDING THE SCOPE, INTERPRETATION AND APPLICATION OF THE DOCTRINE

The decisions of the Court have revealed that the extent to which a state may limit and restrict the rights and freedoms guaranteed by the Convention depend on the latitude allowed to a state in the exercise of its margin of appreciation. In determining this latitude, the Court has successfully evolved

⁵⁷ O'Donnell, *supra* note 3, at 476-77.

⁵⁸ Rosalyn Higgins, *Derogations Under Human Rights Treaties, 1976-77* BRIT. Y.B. INT'L L. 281, 315 (1976-77). *See also* George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD JOURNAL OF LEGAL STUDIES 705 (2006).

and developed a standard based on an examination of the laws, practices, attitudes and perceptions of the Member States of the Council of Europe in a search for consensus – or a lack of consensus – and of the international community where appropriate. The adoption and application of this standard is thus crucial in assessing permissible and impermissible state action and conduct regarding the exercise of the State's rights, duties and obligations under the Convention. This is exemplified in such cases as the *National Union of Belgian Police* case.⁵⁹ Here the Belgian government had refused to engage in consultation with the complainant union, as it did with other unions, on the grounds that Belgian legislation only required the government to consult with a certain class of unions: those which were open to all municipal employees. The complainant union did not qualify under this criterion. The Court found that Article 11 of ECHR did not guarantee any particular treatment of trade unions. It observed that State Parties to the Convention did not, in general, incorporate any right to consultation for all unions and concluded that such a right was not an element necessarily inherent in the specific right guaranteed. What would be inferred, said the Court, was a right that a union be heard and that Article 11 certainly leaves each state a free choice of the means to reach this end.⁶⁰ The absence of a consensus among Member States in this case thus permitted the state a wide margin of appreciation.

In the *Engel and Others* case,⁶¹ the applicants alleged that the government had violated Article 14 of the Convention by giving out different punishments to soldiers depending upon rank. The Court, in upholding the government's action, resorted to and applied the consensus standard as reflected in its observations therein, when it stated that such inequalities are traditionally encountered in the Contracting States and are tolerated by international humanitarian law. In this respect, the European Convention allows the competent national authorities a considerable margin of appreciation.⁶²

In the *Handyside* case⁶³ the applicant alleged that the British Government's action in convicting him of publishing obscene material and seizing copies of it had infringed his right to freedom of expression under Article 10 of the ECHR.

⁵⁹ *The National Union of Belgian Police v. Belgium*, Judgment of 22 October 1975, Series A, No. 19 (1979-80) 1 EHRR 127.

⁶⁰ *Id.*, para. 39.

⁶¹ *Engel and Others v. The Netherlands*, Judgement of 8 June 1976, Series A No.22 (1979-80) 1 EHRR 647.

⁶² *Id.* para. 72.

⁶³ *Handyside*. 1 EHRR 737.

Although acknowledging that there was an infringement of the applicant's rights as alleged, the British Government sought to justify its action by invoking the accommodation clause of Article 10. The clause allows restrictions that are 'necessary in a democratic society' for the protection of morals. The seizure of the material was temporary pending the outcome, and similar provisions for seizure existed in the domestic law of many of the Member States.⁶⁴ However, despite the submission that the book was allowed to be published in many Member States, the Court concluded that there was an absence of consensus among the states as to what constituted morality by noting that:

It is impossible to find in the domestic law of the various Contracting States a uniform European conception of morals. 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 opinion on the subject.⁶⁵

The Court simply posed an absence of consensus to the applicants' assertion of consensus. This absence of consensus (which was in accordance with the Court's earlier jurisprudence) would inevitably lead to the conclusion that the government had wide latitude in the measures it took to protect morals. Accordingly, it justified the action taken in this instance. This counter position is reflected in the Court's comparative assessment of the Member States' conduct in this field. The Contracting States have each fashioned their approach in the light of the situation in their respective territories; they have regard, *inter alia*, for the different views prevailing there about what is demanded for the protection of morals.⁶⁶

The decisions so far referred to were resolved in favor of the state whose action was contested by the applicants but it does not follow that the Court was biased, or applied the wrong principles of law, or arrived at a manifestly erroneous assessment of the facts. On the contrary, the Court has made every effort to develop and crystallize the doctrine as harmoniously and coherently as possible within acceptable limits.

In the *Marckx* case⁶⁷ the applicant, an unmarried mother, claimed on behalf of her infant child and herself, that the law in Belgium on the maternal

⁶⁴ *Id.* para. 57.

⁶⁵ *Id.* para. 48.

⁶⁶ *Id.* para. 57.

⁶⁷ *Marckx v. Belgium*, Judgment of 13 June 1979, Series A No.31, (1979-80) 2 EHRR 330.

affiliation of an illegitimate child, on his family relationships, and on his patrimonial rights infringed her own and her child's rights under Article 8 of the Convention. Thus she sought redress. The Court decided in favor of the applicant and her child. It remarked that while "support and encouragement of the traditional family is in itself legitimate and even praiseworthy,"⁶⁸ it could not be given at the expense of the illegitimate family which was equally protected by Article 8. The Court again reiterated that the Convention "must be interpreted in the light of present day conditions"⁶⁹ and that it could not but 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, in company with the relevant international instruments."⁷⁰ The Court's approach in evolving a clear and discernible standard in its recourse to the doctrine was again exemplified and discussed in the *Sunday Times* case.⁷¹ In this case a British court had banned the publication by The Sunday Times newspaper of a major expose of the thalidomide litigation which had been pending for over ten years in the British courts. The government defended the injunction on the basis that it was necessary for "maintaining the authority and impartiality of the judiciary" under the accommodation clause of Article 10. The Court decided in favor of the applicants. The Court pointed to the margin of appreciation as complementary to European supervision in covering not only the basic legislation but also the decisions applying it. Such supervision is not limited to whether a respondent state exercised its discretion reasonably, carefully and in good faith. The court articulated once again the comparative and consensus approach to the standard that should be applied when giving effect to the doctrine. Again, the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10(2). The *Handyside* case concerned the 'protection of morals.' The view taken by the Contracting States of the 'requirements of morals' varies from time to time, and from place to place, especially in our era. State authorities are in principle in a better position than an international judge to give an opinion on the exact content of these requirements. The same cannot entirely be said for the far more objective notion of the authority of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention (including

⁶⁸ *Id* para. 40.

⁶⁹ *Id* para. 41.

⁷⁰ *Id*.

⁷¹ *Sunday Times v. United Kingdom*, Judgement of 26 November 1991, Series A No.217, (1992) 14 EHRR 229.

Article 6) which have no equivalent as far as ‘morals’ are concerned.⁷² In the *Sunday Times* case, the Court then concluded accordingly, that a more extensive European supervision corresponds to a less discretionary power of appreciation.⁷³

In the *Dudgeon* case,⁷⁴ the Court embarked upon an extensive discussion of the doctrine and its interpretation and effect within the context of Article 8 of the ECHR. The applicant alleged that the United Kingdom had violated his right to private life, protected by Article 8, by maintaining laws making it a criminal offence for consenting males to engage in homosexual acts in private. These laws, enacted in 1861 and 1885, were still in force in Northern Ireland, although not in the rest of the United Kingdom. The government in its defense argued that the alleged breach of Article 8 was permissible interference because it was ‘necessary in a democratic society’ for the protection of morals, or the rights of others under that Article’s accommodation clause. Although it was agreed that the aims were permissible, as advocated by the government, the principal question that still remained was whether the challenged legislation was ‘necessary in a democratic society’ to meet those aims.

In its approach to the problem of democratic necessity, the Court first of all, in *Dudgeon* unlike in previous cases, sought to interpret the relevant aspect of the accommodation clause of the Article as well as to identify and emphasize the nature of the right allegedly infringed. The Court interpreted ‘necessary’ as implying the existence of a ‘pressing social need’⁷⁵ for the interference, not just that it should be ‘reasonable.’ It then concluded that not only the aim of the interference, but also the nature of the activities⁷⁶ and, *a fortiori*, the right restricted, would necessarily affect the scope of the doctrine⁷⁷ within a democratic society, the hallmarks of which are pluralism, tolerance and broadmindedness. The Court then proceeded to apply these principles and in so doing ruled that the UK was in breach of its obligations under Article 8 of the Convention. It concluded that the restrictions were not within the government’s margin of appreciation, on the basis that most of the Member States of the

⁷² *Id.* para. 59.

⁷³ *Id.*

⁷⁴ *Dudgeon v. United Kingdom*, Judgement of 22 October 1981, Series A No.45 (1982) 4 EHRR 149.

⁷⁵ *Id.* para. 51.

⁷⁶ *Id.* para. 52.

⁷⁷ *Id.*

Council of Europe no longer considered it appropriate to criminalize homosexuality. The Court further offered that there was no evidence that harm would be caused to morals in Northern Ireland. In so finding the Court stated:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance of homosexual behavior to the extent that in the great majority of the Member States of the Council of Europe it is 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; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States. In Northern Ireland itself the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent. No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.⁷⁸

VII. CONVENTION RIGHTS FUNDAMENTAL TO DEMOCRACY

One of the other evolving standards produced by the Court in determining the scope of the margin of appreciation is its attempt to identify and assess the nature and quality of a particular right and the extent to which that right is fundamental in a democratic society. A careful analysis of the Strasbourg case law suggests that certain rights are singled out as belonging to ‘fundamental rights in a democratic society’ and therefore placing them in a higher position in the hierarchy of rights. Hence, the margin of appreciation allowed to national authorities tends to narrow in cases involving ‘fundamental rights’ requiring a more stringent standard of proportionality.⁷⁹

The political theory literature and the Convention and its case law reveal that freedom of expression, freedom of assembly and association, and free election rights are all hallmarks of democracy. Without these rights there will be no proper, functioning, democracy. Therefore, it will be beneficial to look at the scope of margin of appreciation in those fundamental rights more closely.

A. The Right to Freedom of Expression

⁷⁸ Dudgeon, 4 EHRR 149, para. 60.

⁷⁹ See Yutaka, *supra* note 3, at 246.

Freedom of expression is protected by Article 10 of the Convention.

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The right to freedom of expression is regarded as a fundamental guarantee by all regional and universal human rights instruments. The question is why freedom of expression is considered valuable. One of the answers to this question is that it is valuable because freedom of expression offers a medium for finding the truth. Judge Holmes stated in the *Abrams* case that the power of ideas is the best test of truth; in this way an idea will enter into a market of ideas where it will be open to competition.⁸⁰ Another reason, which explains the importance of freedom of expression, is the notion of democracy. Democracy requires that ideas should be freely circulated, imported and exported.⁸¹ The basis of democracy is the idea of consent to, and participation in, government. Freedom of expression which is essential to both participation in and consent to government is one of democracy's preconditions.⁸² Freedom of expression is important in the context of effective political democracy, and it plays a central role in the protection of the other rights under the Convention.⁸³ The connection between democracy and freedom of expression was recognized by the Court, for the first time, in the *Handyside* case.⁸⁴ The Court here determined the

⁸⁰ *Abrams v. United States*, 250 U.S. 616 (1919).

⁸¹ ABD YÜKSEK MAHKEMESİ KARARLARINDA İFADE ÖZGÜRLÜĞÜ [FREEDOM OF EXPRESSION IN U.S. SUPREME COURT DECISIONS] 8 (Z. Arslan, ed., Liberal Düşünce Topluluğu, 2003).

⁸² *Merrills*, *supra* note 3, at 122.

⁸³ D. Feldman, *CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES* 547 (Oxford, 1993).

⁸⁴ *Handyside*, 1 EHRR 737, para. 49.

characteristics of a democratic society to be ‘pluralism’, ‘tolerance’ and ‘broadmindedness.’ According to the Court, the purpose of freedom of expression is to allow the exchange of information and opinions.

Freedom of expression is subject to restrictions. Article 10(1) provides expressly that states may require the licensing of broadcasting, television or cinema enterprises. Article 10, (like its counterpart Articles 8, 9 and 11), in its second paragraph, provides that states may restrict the right to freedom of expression in pursuit of one of the legitimate aims specified. This is when the restriction is prescribed by law and necessary in a democratic society. However, these restrictions must be narrowly interpreted and the need for the restriction must be convincingly established.⁸⁵ The margin of appreciation, in restricting the freedom of expression, will vary depending on the purpose and nature of the limitation and the subject matter in question.⁸⁶ For example, there is a wider margin of appreciation with respect to issues of morality and commercial speech, but a narrower margin of appreciation with respect to political speech.⁸⁷ The Court gives a higher level of protection to expressions that contribute towards social and political debate, criticism and information but a lower level of protection to artistic and commercial expression.⁸⁸

The Court considers political debate to be at the core of the concept of a democratic society. Therefore, freedom of expression has a particular importance for elected political representatives. To give an example, the Court found a violation of Article 10 when a Basque opposition senator was convicted for writing an article critical of the government.⁸⁹ However, politicians have wide protection regarding their freedom of expression; so, the limits of acceptable criticism are wider for a politician than for a private individual. This is particularly the case when the criticism appears in the press, since the press is one of the best means by which the public can hear the ideas of political leaders.⁹⁰

⁸⁵ *Ahmet and others v. UK*, Judgment of 2 September 1998, (2000) 29 EHRR 1, para. 55.

⁸⁶ JACOBS & WHITE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 3, at 278.

⁸⁷ P. Leach, *TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS* 166 (Blackstone Press, London, 2001).

⁸⁸ JACOBS & WHITE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 3, at 279.

⁸⁹ *Castells v. Spain*, Judgment of 23 April 1992, Series A No. 236, (1992) 14 EHRR 445.

⁹⁰ *See Oberschlick v. Austria*, Judgment of 23 May 1991, Series A No. 204, (1994) 19 EHRR 389, para. 58.

In *Oberschlick v. Austria*, the applicant journalist was convicted of defamation when he published criminal information laid against the secretary-general of the Austrian Liberal Party. Here the politician had advocated discrimination against immigrant families in relation to family allowances. The Court found that Article 10 had been violated, as the applicant had contributed to a public debate on an important political question, and a politician who expressed himself in such a way should expect a strong reaction from journalists and the public. The Court stated that a politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.”⁹¹

The Court gives a narrow margin of protection to expression which becomes a vehicle for the dissemination of hate speech and violence, especially in situations of political conflict and tension. In *Zana v. Turkey* the applicant, the former mayor of Diyarbakir, was sentenced for remarks made in an interview with journalists. In the interview he stated that “I support the PKK national liberation movement; on the other hand, I am not in favor of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake.” The Court bore in mind that the interview coincided with murderous attacks carried out by the PKK on civilians in southeast Turkey, where there was extreme tension at the time. Regarding these remarks as giving support to the PKK – described as a “national liberation movement” – by the former mayor of Diyarbakir (the most important city in south-east Turkey), the Court stated that they had to be regarded as likely to exacerbate an already explosive situation in that region. Therefore The Court found no violation of Article 10.⁹² However, it seems that the Court’s judgment in *Surek and Ozdemir v. Turkey*⁹³ contradicts its finding in *Zana v. Turkey*, which was that expressions which incite violence and hate speech have narrow protection. In *Surek and Ozdemir v. Turkey* the applicants published an interview with a leader of the Kurdistan Workers’ Party (“the PKK”), a terrorist organization. This appeared in a review of which the

⁹¹ *Id.*

⁹² *Zana v. Turkey* (App. 18954/91), Judgment of 25 November 1997, (1999) 27 EHRR 667, paras. 60-62; for other Turkish freedom of expression cases which involves the element of terrorism and violence, see *Ceylan v. Turkey*, (App. 23556/94); *Surek v. Turkey*, (No. 1) (App. 26682/95); *Surek v. Turkey*, (No. 2) (App. 24122/94); *Surek v. Turkey*, (No. 4) (24762/94); *Erdogdu and Ince v. Turkey*, (Apps. 25067/94 and 25068/94); and *Okcuoglu v. Turkey*, (App. 24246/94), Judgments of 8 July 1999, (2000) 30 EHRR 73.

⁹³ *Surek and Ozdemir v. Turkey*, (App. 23927/94), Judgment of 25 November 1997, (1999) 27 EHRR 667.

applicants were owner and editor, respectively. The applicants were convicted of publishing the declarations of terrorist organizations and disseminating separatist propaganda through the medium of the review. The published interview contained words and expressions such as: “the war will go on until there is only one single individual left on our side,” “there will be no single step backwards,” “the war will escalate” and “our combat has reached a certain level. Tactics have to be developed which match that level.” The interview also referred to the tactics which the PKK would use to combat the state. Because it is very difficult not to view these sentences as an encouragement to further violence, the Court here found no violation of Article 10.

B. The Right to Freedom of Assembly and Association

Freedom of peaceful assembly and association with others is guaranteed by the Article 11 of the Convention which reads:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Freedom of assembly and association is one of the pillars of a democratic society. Democracy is concerned with respecting individuals and giving attention to their claims. So permitting people to express their concerns by demonstrating or forming interest groups are means to a democratic end. In addition, acting with like-minded people in pursuit of goals that are socially acceptable contributes to the self-realization of the individual.⁹⁴ For these reasons the freedom of assembly and association, like the freedom of expression, is regarded as a fundamental right for the proper functioning of democracy.⁹⁵ One of the prerequisites of the right is that the assembly must be peaceful. Article 11 does not protect assemblies with violent intentions which

⁹⁴ Merrills, *supra* note 3, at 125.

⁹⁵ United Communist Party of Turkey and others v. Turkey, Judgement of 30 January 1998, (1998) 26 EHRR 121, para. 25.

result in public disorder. However, an assembly that includes a real risk of a violent counterdemonstration, where the violence is outside the control of the organizers, will still be regarded as within the guarantee of Article 11.⁹⁶ The right to freedom of assembly and association is connected to the right to freedom of expression and the right to freedoms of thought, conscience and religion. The Court in, *Chassagnou and others v. France*, stated that rights under Articles 9 and 10 would be of very limited scope if there were no guarantee of the right to share beliefs and ideas in community with others, especially through associations of individuals.⁹⁷ As it was expressed by the Court, one of the aims of the right to freedom of peaceful assembly and association is the freedom to hold opinions and to receive and impart information and ideas.⁹⁸

The *Ezelin* case⁹⁹ was the first case in which the Court found a breach of the right of peaceful assembly. Here the applicant was a lawyer (avocat) and the chairman of the Guadeloupe Bar. He complained that the French courts had imposed a disciplinary penalty on him by way of a reprimand. The sanction was because he had taken part in a demonstration protesting the use of the Security and Freedom Act and had not expressed his disapproval of insults against the judiciary that were uttered by other demonstrators. The Commission here contended that a disciplinary penalty, based on an impression to which Mr Ezelin's behavior might have given rise, was not compatible with the strict requirement of a 'pressing social need' and so was not regarded as necessary in a democratic society.¹⁰⁰ The Court, agreeing with the Commission, decided that the freedom to take part in a peaceful assembly is of such importance that it cannot be restricted in any way, so long as the person concerned does not himself commit any reprehensible act. As Ezelin himself had not committed any such act during the demonstration, the penalty imposed on him could not be considered to be necessary in a democratic society.¹⁰¹

⁹⁶ *Christians Against Racism and Facism v. UK* (App. 8440/78) Decision of 16 July 1980, para. 4.

⁹⁷ *Chassagnou and others v. France*, Judgment of 29 April 1999, (2000) 29 EHRR 615, para.100.

⁹⁸ *Ahmet and others v. UK*, Judgment of 2 September 1998, (2000) 29 EHRR 1, para. 70.

⁹⁹ *Ezelin v. France*, Judgment of 26 April 1991, Series A, No. 202, (1992) 14 EHRR 362.

¹⁰⁰ *Id.* para. 50.

¹⁰¹ *Id.* para.53.

In *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*¹⁰² the applicant association was founded on 14 April 1990. Its aims, according to its statute and program, were to “unite all Macedonians in Bulgaria on a regional and cultural basis” and to achieve “the recognition of the Macedonian minority in Bulgaria.” According to the applicants’ submissions before the Court, the main activity of the applicant association was the organization of celebrations to commemorate historical events of importance for Macedonians in Bulgaria. Its statute stated that the organization would not infringe upon the territorial integrity of Bulgaria and that it “would not use violent, brutal, inhuman or unlawful means.”¹⁰³ In 1990 Ilinden applied for registration. The Bulgarian courts, after examination of the statute and program, refused registration for the reason that the applicant association’s purposes were directed against the unity of the nation, that it advocated national and ethnic hatred, and that it was dangerous to the territorial integrity of Bulgaria. Several requests of other applicant associations for meetings and assemblies had been previously refused by the authorities for the reason that the applicant association was not a legitimate organization. Most importantly, the applicant association was a separatist group which sought the secession of the region of Pirin from Bulgaria. The applicants submitted that the ban on the meetings they organized in commemoration of certain historical events, and the attitude of the authorities at the relevant time, was aimed at suppressing the free expression of ideas at peaceful gatherings. As such they amounted to an interference with their rights under Article 11 of the Convention. The Court considered that while past findings of national courts, which have screened an association, are undoubtedly relevant in the consideration of the dangers that its gatherings may pose, an automatic reliance on the very fact that an organization has been considered anticonstitutional – and refused registration – could not justify, under Article 11, Paragraph 2 of the Convention, a practice of systematic bans on the holding of peaceful assemblies.¹⁰⁴ The Court reiterated that the fact that a group of people calls for autonomy, or even requests secession of part of the country’s territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country’s territorial integrity and national security.¹⁰⁵ The Court in conclusion stated that, in circumstances where there was no real

¹⁰² *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Apps. 29221/95 and 29225/95, Judgment of 2 October 2001.

¹⁰³ *Id.* para. 10.

¹⁰⁴ *Id.* para. 92.

¹⁰⁵ *Id.* para. 97.

foreseeable risk of violent action or of incitement to violence, or any other form of rejection of democratic principles, a ban was in the Court's view not justified under Paragraph 2 of Article 11 of the Convention. The Court found that the authorities overstepped their margin of appreciation and that the measures banning the applicants from holding commemorative meetings were not necessary in a democratic society, within the meaning of Article 11 of the Convention.¹⁰⁶

The Strasbourg Court in *Le Compte, van Leuven and De Meyere v. Belgium*¹⁰⁷ ruled that public law associations fall outside the scope of Article 11. The applicants in this case were medical doctors who had been subject to disciplinary punishments by the Belgian *Ordre des medecins* which was a public professional association. The applicants complained that the obligation to join the *ordre* inhibited their freedom of association. The Court, like the Commission, unanimously found no breach of Article 11. The professional associations, established and governed by public law, were part of the regulatory framework and had the duty to ensure the maintenance of professional standards in the public interest.¹⁰⁸ Therefore, the right to freedom of association applies only to private law organizations.

One of the associations to have been given an important weight and protection by the Convention bodies is the political party. The Strasbourg bodies in recent times have received quite a number of applications from the political parties of Turkey. The first of these cases was *United Communist Party of Turkey v. Turkey*.¹⁰⁹ The Court here established the principles which it has applied in subsequent political party cases. The applicant political party was formed in June 1990, and intended to participate in the upcoming general election. It submitted its constitution and program to the Principal State Council at the Court of Cassation for registration. The Council applied to the Constitutional Court for the dissolution of the applicant party. The grounds relied upon by the Council were that the party used the word "communist" in its name, that its activities were likely to undermine the territorial integrity and unity of Turkey and that it was the successor of a previously dissolved party.

¹⁰⁶ *Id.* paras. 111-112.

¹⁰⁷ *Le Compte, van Leuven and De Meyere v. Belgium*, Judgment of 23 June 1981, Series A, No.43, (1982) 4 EHRR 1.

¹⁰⁸ JACOBS & WHITE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 3, at 292.

¹⁰⁹ *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30 January 1998, (1998) 26 EHRR 121. On the political right aspect of Article 11, see H. Cullen, *Freedom of Association as a Political Right*, 24 EUROPEAN LAW REVIEW 30 (1999).

The particular concern of the Council was the applicant's advocacy of the rights of the Kurdish population of Turkey, and a solution to the conflict between the Turkish State and the Kurds. Both Convention institutions rejected the respondent state's contention that Article 11 did not apply to political parties. Turkey's argument was based on the specific mention of trade unions in Article 11.¹¹⁰ Another issue, which the Commission and the Court both considered, was the relationship between the right to freedom of expression and the right to freedom of assembly and association.¹¹¹

The role of political parties in a democracy was a crucial part of the reasoning by both Commission and Court. Unless a political party can be shown to be in support of undemocratic means for achieving its ends, it must be allowed to exist. As a result of the high priority placed on political pluralism as an element of a democratic society, and the role of political parties in supporting pluralism, the Court decided that restrictions on Article 11 with respect to political parties are to be subject to strict scrutiny. The margin of appreciation enjoyed by states is therefore reduced with respect to such restrictions.¹¹² The Court was of the view that, since there was no evidence that the applicant party intended to engage in violent or undemocratic means in pursuing its aims, the ban was not necessary in a democratic society. According to the Court, political pluralism is part of the nature of a democratic society, and the existence of political parties reflecting all the views of the population is necessary to support pluralism, including, in particular, the possibility of opposing officially sanctioned ideas.¹¹³

However, the *Refah Partisi*¹¹⁴ case saw an interesting outcome from the Strasbourg bodies. It is the first political party case in which the Court found no violation of Article 11 since the case of the German Communist party, half a century earlier. The Refah Partisi, unlike the United Communist Party, was a well-established party and indeed in power when the dissolution proceedings started. The decisions of both the Turkish Constitutional and Strasbourg Courts were based on speeches made by the leaders, and some of the members, of the party. The main ground for dissolution was Refah's intention to establish a

¹¹⁰ *United Communist Party of Turkey and Others v. Turkey*, 26 EHRR 121, para. 132.

¹¹¹ *See Id.* para. 147.

¹¹² *Id.* para. 135.

¹¹³ *Id.* para. 136.

¹¹⁴ *Refah Partisi (Welfare Party) v. Turkey* (App. 41340/98), Chamber Judgment of 31 July 2001, (2002) 35 EHRR 3, para. 43.

plurality of legal systems based on differences in religious belief. They wished to establish Islamic Law, a system of law that was seen by the Strasbourg bodies as incompatible with democracy. The Court here stated that although political parties are entitled to campaign for changes in legislation or to the legal or constitutional structures of the state, they could only enjoy the protection of Article 11 if the means used to those ends were lawful and democratic, and the proposed changes themselves were compatible with democratic principles.¹¹⁵ The Strasbourg Court in this case granted a wide margin of appreciation to the State party in contradiction with its previous political party cases.

C. The Right to Free Elections

The main feature of democracy is the right of people to elect their rulers. In contemporary democracies the medium for electing rulers is the free election. Article 3 of Protocol 1 guarantees the right to free election: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the people in the choices of the legislature.”

Article 3 of Protocol 1 requires, therefore, that laws should be made by a legislature responsible to the people. As referred to in the Preamble to the Convention, free elections are a condition of ‘effective political democracy.’ This may also be found in the concept of a democratic society, which runs through the Convention.¹¹⁶ The Court established that since Article 3 of Protocol 1 enshrines a characteristic principle of democracy, it is accordingly of prime importance in the Convention system.¹¹⁷ The Court, in the *Bowman* case, stressed that there is a strong connection between Article 10, which is another benchmark of democracy, and Article 3 of Protocol 1: “free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system.”¹¹⁸ Unlike the majority of other Convention rights, Article 3 of Protocol 1, by requiring the Member State to hold democratic elections, is primarily concerned with a positive obligation.

¹¹⁵ JACOBS & WHITE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 3, at 294.

¹¹⁶ *Id.* at 331.

¹¹⁷ *See ibid.* *See also* Merrills, *supra* note 3, at 114. For the cases on this issue, *see* *Matthews v. UK* (App. 24833/94), Judgment of 18 February 1999, (1999) 28 EHRR 361, para.42; *United Communist Party of Turkey and others v. Turkey* (App.19392/92) Judgment of 30 January 1998, (1998) 26 EHRR 121, para. 45.

¹¹⁸ *Bowman v. UK*, Judgment of 19 February 1998, Reports 1998-1(1998) 26 EHRR 1, para. 42.

The Court looked at the scope and significance of Article 3 of Protocol 1 when it first interpreted it in the case of *Mathieu-Mohin and Clefayt*.¹¹⁹ The applicants were French-speaking Belgian parliamentarians who lived in a Flemish district of Brussels. Because of the constitutional arrangements in Belgium, they were unable to participate in the decision-making of the Flemish Council. They therefore complained that their exclusion from the Flemish Council violated Article 3 of Protocol 1. The Court here approved the Commission's finding that the provision included the right of universal suffrage.¹²⁰ Therefore, this right includes the right to vote and the right to stand for election.¹²¹ Although the right to participate in government is fundamental to democracy, the Court expressed the view that constitutional arrangements in the Contracting States can make the right to vote and to stand for election subject to various conditions. Therefore, the right is not an absolute one.¹²² In the case of *Zdanoka v Latvia*,¹²³ the applicant complained about her disqualification from standing for election to parliament, on the ground that she had actively participated in the Communist Party of Latvia (hereafter "the CPL"), which amounted to a breach of her right to stand for election guaranteed by Article 3 of Protocol No. 1; the government argued that the interference was legitimate. Having failed to obtain a majority on the Supreme Council in the democratic elections of March 1990, the CPL and the other organizations listed in section 5(6) of the Parliamentary Elections Act, had decided to take the unconstitutional route of setting up a Committee of Public Safety, which attempted to usurp power and to dissolve the Supreme Council and the legitimate government, thus abandoning democracy. Referring to its reasoning in *Refah Partisi*, the Court considered that no-one should be authorized to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society.¹²⁴ However, the Court found a violation of Article 3 of Protocol 1, as the applicant had never been accused of having been secretly active within the CPL after the latter's dissolution. Nor had she sought

¹¹⁹ *Mathieu-Mohin and Clefayt v. Belgium*, Judgment of 2 March 1987, Series A, No. 113 (1998) 10 EHRR 1.

¹²⁰ App.2728/66, *X v. Federal Republic of Germany*, Decision of 6 October 1967, (1967) 10 Yearbook 336.

¹²¹ Apps. 6745-46/76, *W, X, Y and Z v. Belgium*, Decision of 30 May 1975, 18 Yearbook 244.

¹²² *Mathieu-Mohin and Clefayt v. Belgium*, 10 EHRR 1, para. 52.

¹²³ *Zdanoka v Latvia*, App. No 58278/00, Judgment of 17 June 2004.

¹²⁴ *Id.* para. 79.

to re-establish that party in its previous totalitarian form, and had never been investigated for, or convicted of, any offence.¹²⁵

In a democracy, the attainment of the right to free elections may only be achieved with the participation of political parties. However, the question of individuals in a political party complaining of violation of the right to free elections when the party has been dissolved was determined in the *Zdanoka* case by the Court under Article 11, rather than the free election article. The Court avoided addressing the question of whether the right to form and maintain a political party falls within the scope of Article 3 of Protocol 1.¹²⁶ According to the Court, states are not obliged to introduce a specific system of elections, so they enjoy a wide margin of appreciation in the choice of voting system. On the interpretation of the word 'legislation,' the Court stated that it does not necessarily mean only the national parliament; it has to be interpreted in the light of the constitutional structure of the state in question.¹²⁷ Here the Court found that a regional council had sufficient competence and powers to make it a constituent part of the Belgian legislature. This was an important finding as it enabled the Court to bring the regional council within the scope of the Article 3 of Protocol 1. The status of the European Parliament was looked at in the *Matthews* case.¹²⁸ The UK government here argued that the European Parliament should be excluded from the scope of Article 3 on the ground that it is a supranational, rather than a national, representative organ. Analyzing the power of the European Parliament, the Court rejected the government's argument, concluding that the European Parliament is part of the legislature of Gibraltar and within the scope of Article 3 of Protocol 1. On the question of the method of appointing the legislature, the Convention supplies only general guidance. It simply provides that the elections shall be 'free,' 'at reasonable intervals,' by 'secret ballot,' and under conditions that will ensure the free expression of the opinion of the people.

VIII. CONCLUSION

The Court has evolved the 'margin of appreciation' doctrine to give meaning, effect and reality to the wide, vague and imprecise provisions of the Convention. Such vague clauses would have allowed a Contracting Party

¹²⁵ *Id.* para. 98.

¹²⁶ JACOBS & WHITE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 3, at 338. Further detailed discussion of the Turkish political party cases is contained in Ch. 5.

¹²⁷ *Mathieu-Mohin and Clefayt v. Belgium*, 10 EHRR 1, para. 53.

¹²⁸ *Matthews v. UK* (App. 24833/94) Judgment of 18 February 1999 (1999) 28 EHRR 361.

unlimited and unbridled conduct based on its own experience and interpretation without the meaningful participation of the competent and authoritative bodies of the Convention to interpret and apply them.

The Strasbourg bodies have held that restrictions on fundamental rights enjoy different levels of the margin of appreciation depending on which of the aims enshrined in the subject article they are designed to promote. In matters of national security especially, Contracting States enjoy a wide margin of appreciation. In addition, a broader margin of appreciation is also permitted in matters concerning the protection of morals. Where the Strasbourg bodies decide that there is no widespread standard moral ethos between Member States, it gives a wide margin to national authorities. The width of the margin of appreciation may depend on many things, and the Court has over the years offered a selection. However, it cannot be legitimate for this to be determined by the Court's prior perception of the respondent state. Other sources of information may be usefully used during the course of a judgment, and perhaps ought to be used more often.

The margin of appreciation doctrine is the concept by which the Convention derives its force, meaning and effect. The margin of appreciation doctrine seeks to strike a fair balance between the demands of the general interest of the community and public order on the one hand, and the requirements of the protection of the individual rights and freedoms on the other, within the context and framework of the Convention. In arriving at such a balance the scope of a state's right to limit and restrict the rights and freedoms of the individual will necessarily be determined.

Two emerging and evolving standards in the interpretation and application of the doctrine have manifested themselves, namely: a) the comparative survey or 'European Consensus'; and b) the rights that are 'fundamental to a democratic society' approach. The former seems to have displayed a pattern of consistency, uniformity and coherence with signs of it becoming fully entrenched in the systems and accepted by the community of states as a whole. Where the Court finds a European Consensus, it gives the Member State a narrow margin of appreciation. Also, where the matter is related to rights fundamental to democracy, namely freedom of expression and freedom of association and assembly, especially if it includes a political aspect, the state has a narrow margin of appreciation. However, where morals are at issue, the Strasbourg organs enable the state with a wide margin of appreciation.

The margin of appreciation doctrine, established by the Strasbourg bodies, gives the State Parties to the Convention the opportunity to strike a balance

between the common good of society and the interests of the individual, when considering restricting rights. Another Convention tool for managing the tension between national power and international supervision is the concept of 'democratic necessity,' which is found in a number of the articles. The concept can be defined as being that certain rights, guaranteed by the Convention, may only be restricted by the domestic authorities within the limits of what is necessary in a democratic society. This concept requires that national standards for restrictions should be compatible with the European standards set out by the Convention institutions and common practices of European states. This concept will be of great discussion in the future as Turkey moves closer to Europe while it goes through the European Union accession process over the coming years.

BIBLIOGRAPHY

- ABD YÜKSEK MAHKEME KARARLARINDA İFADE ÖZGÜRLÜĞÜ [FREEDOM OF EXPRESSION IN U.S. SUPREME COURT DECISIONS] 8 (Z. Arslan, ed., Liberal Düşünce Topluluğu, 2003).
- Benvenisti, Eyal, *Margin of Appreciation, Consensus, and Universal Standards*, 31 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 843 (1999).
- Brauch, Jeffrey A., *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUMBIA JOURNAL OF EUROPEAN LAW 113 (2004).
- Brownlie, I, BASIC DOCUMENTS ON HUMAN RIGHTS 399 (3rd ed., Oxford University Press, 1999).
- Burke, K.C., *Secret Surveillance and the European Convention on Human Rights*, 33 STANFORD LAW REVIEW 1113 (1981).
- Cullen, H., *Freedom of Association As a Political Right*, 24 EUROPEAN LAW REVIEW 30 (1999).
- Drzemczewski, A., EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY (1983).
- Delmas-Marty, M., THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS (Martinus Nijhoff Publishers, 1992).

Harris, O'Boyle and Warbrick, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1995).

Higgins, Rosalyn, *Derogations Under Human Rights Treaties, 1976-77* BRIT. Y.B. INT'L L. 281, 315 (1976-77).

Lavender, N., *The Problem of the Margin of Appreciation*, 4 EHRLR 380 (1997).

Letsas, George, *Two Concepts of the Margin of Appreciation*, 26 OXFORD JOURNAL OF LEGAL STUDIES 705 (2006).

Merills, J. G., *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2nd ed., Manchester University Press, Manchester, 1993).

Mowbray, A. *The Creativity of the European Court of Human Rights*, 5 HUMAN RIGHTS LAW REVIEW 57 (2005).

O'Donnell, T.A. *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HRQ 474 (1982).

Ovey, C. and R. C. A. White, *JACOBS & WHITE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Oxford Univ. Press, 2002).

Sottiaux, Stefan, and Gerhard van der Schyff, *Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights*, 31 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 115 (2008).

THE COLLECTED EDITION OF THE 'TRAVAUX PREPARATOIRES' OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (The Hague: Martinus Nijhoff, 1975).

THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS (MacDonald, Matscher and Petzold, eds, Martinus Nijhoff, 1993).

Waldock, *The Effectiveness of the System Set Up by the European Convention of Human Rights*, 1 HRLJ 1 (1980).

Yourow, Howard C., *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 3 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 111 (1987).

Yourow, Howard C., THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (Springer 1996).

Yutaka, A. T., THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (Intersentia, Antwerpen, Oxford, New York, 2002).