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HOW TO INTERPRET THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

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INTRODUCTION

The interpretation and application of the European Convention on Human Rights¹ is determined by the fact that on the one hand the Convention is an international treaty and thus subject to the classic international rules concerning treaty interpretation, while on the other hand, it is a treaty with a special character, so that the classic interpretation rules must often yield for rules and methods of interpretation and application that are intrinsic to the European Convention. In the sections to come, the principles of interpretation (1-9) and application (10-11) will be examined. Some of these rules can be applied by national courts when applying Convention standards.

1. VIENNA CONVENTION ON THE LAW OF TREATIES

The European Convention is an international treaty and as such is subject to the classic international rules concerning treaty interpretation as these are codified in the Vienna

¹ See R. BERNHARDT, "Thoughts on the Interpretation of Human Rights Treaties", in *Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda*, F. MATSCHER and H. PETZOLD (eds.), Köln, Carl Heymanns Verlag, 1988, 65-71; F. MATSCHER, "Methods of Interpretation of the European Convention", in *The European System for the Protection of Human Rights*, R.St.J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), Dordrecht, Martinus Nijhoff, 1993, 63-81.

Convention on the Law of Treaties². It shall therefore be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ (Art. 31 Vienna Convention). Accordingly, on some occasions the European Court may adopt and accept the ordinary meaning of particular words in the authentic texts of a provision in the European Convention, which it holds is not contradicted by the context of a sub-paragraph of the provision and which is moreover confirmed by the object and purpose of the provision³.

In view of the Vienna Convention, the European Convention is to be interpreted ‘teleologically’, i.e. on the basis of its ‘object and purpose’. Indeed, the Convention is an instrument, a means to achieve a certain goal and this objective is the protection of individual human beings and rights⁴ and the maintainance and promotion of the ideals and values of a democratic society⁵. Thus, in the absence of clear wording in the text of a Convention provision, essentially by referring to the object and purpose of the Convention, a right may be read into a Convention provision⁶. The European Court may use the ‘historical approach’ by relying on the ‘Travaux Préparatoires’ of the European Convention and its protocols⁷ as a supplementary means of interpretation, in order to confirm the meaning resulting from the application of Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to the aforementioned provision leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable (Art. 32 Vienna Convention). In practice, recourse to the ‘Travaux Préparatoires’ is very scarce⁸, due to the fact that the ‘Travaux’ are often silent or unclear, or due to rising importance of the evolutive interpretation of the European Convention in the light of present-day conditions. The reliance of the European Court to the object and purpose of the European Convention while interpreting the European Convention has in a number of cases been restricted because the Court held that it was bound by ‘the clear meaning’ of the text.⁹

The European Convention is also a treaty with a special character since it is a human rights treaty¹⁰. It has a *sui generis* character, in view of the fact that it differs from the classic, treaties which are based on mere reciprocal engagements between contracting States through the objective obligations it creates and the normative scope associated with these

² ECtHR, *Al Adsani v. UK*, Judgment of 21 November 2001, § 55.

³ ECtHR, *Luedicke, Belgem and Koc v. Germany*, Judgment of 28 November 1978, § 46 (ordinary meaning of ‘gratuitement’ and ‘free’ in Art. 6(3)(e) is not contradicted by the context of the sub-paragraph and is confirmed by the object and purpose of Art. 6).

⁴ ECtHR, *Soering v. UK*, Judgment of 7 July 1989, § 87.

⁵ ECtHR, *Zdanoka v. Latvia*, Judgment of 16 March 2006, § 98.

⁶ ECtHR, *Golder v. UK*, Judgment of 21 February 1975, § 36 (right of access to a Court).

⁷ See COUNCIL OF EUROPE, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights*, The Hague, Martinus Nijhoff, 1975-85.

⁸ ECtHR, *James a.o.*, Judgment of 21 February 1986, § 64; ECtHR, *Johnston a.o. v. Ireland*, Judgment of 18 December 1986, § 52.

⁹ ECtHR, *Shamayev a.o. v. Georgia and Russia*, Judgment of 12 April 2005, § 33.

¹⁰ ECtHR, *Al Adsani v. UK*, Judgment of 21 November 2001, § 5.

obligations¹¹. The classic interpretation rules under public international law must therefore on many occasions give way to a number of rules and methods of interpretation that are intrinsic to the European Convention and the Vienna Convention does not oppose that the European Convention is subject to its own rules of interpretation.

In the sections to come, following an explanation of the principle of subsidiarity, the general principles and theories which the European Court of Human Rights uses to substantiate its decisions when interpreting and applying the provisions of the European Convention on Human Rights will be examined.

2. SUBSIDIARITY

The principle of subsidiarity, which is confirmed in the case law of the European Court¹², is probably the most important of the principles underlying the Convention, and entails that primary responsibility for the effective protection of the Convention's rights and freedoms lies with the (national legal systems of the) Member States¹³. The principle also implies that in exercising its supervisory task, the European Court is as to substance subject to certain limits or is at least deemed to exercise a certain form of self-restraint¹⁴. It should, however be noted that the principle of subsidiarity does not water down the protection offered by Convention guarantees. For example, the less domestic courts explain the proportionality of an intrusion, the more freedom the Strasbourg Court may enjoy to examine the matter¹⁵.

The principle of subsidiarity comprises three crucial characteristics: (1) the European Convention is not exhaustive and the Contracting States are free to offer wider protection under national law; (2) the national authorities are generally better positioned than the Court at Strasbourg to assess the proper balance between the protection of the general interest of society and the protection of the individual rights of the individual seeking justice; (3) both characteristics determine the pursuit of common standards of human rights protection within the community of Contracting States: the necessity of effective protection of the rights and freedoms of a person can in certain circumstances lead to uniformity, but the

¹¹ ECtHR, *Mamatkulov and Askarov*, Judgment of 4 February 2005, § 100.

¹² ECtHR, *Shamayev a.o. v. Georgia and Russia*, Judgment of 12 April 2005, § 500.

¹³ M.E. Villiger, "The Principle of Subsidiarity in the European Convention on Human Rights", in *Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum Luzius Caflisch, M.G. Cohen* (ed.), Leiden, Brill, 2007, 625.

¹⁴ H. PETZOLD, "The Convention and the Principle of Subsidiarity", in *The European System for the Protection of Human Rights*, R.St.J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), Dordrecht, Martinus Nijhoff, 1993, 49.

¹⁵ M.E. Villiger, "The Principle of Subsidiarity in the European Convention on Human Rights", in *Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum Luzius Caflisch, M.G. Cohen* (ed.), Leiden, Brill, 2007, 636.

search for uniformity is by no means a basic objective of the European Convention¹⁶. The basic idea of the signatories to the ECHR to protect the rights and freedoms both nationally and at European level, is also illustrated in a number of other Convention provisions, such as Art. 1 and Art. 13 ECHR, Art. 35 ECHR, or Art. 41 ECHR.

3. EFFECTIVENESS

Since the European Convention is a mechanism for the protection of human rights, it is “of crucial importance” that it is interpreted and applied in a way in which these rights are not *theoretical or illusory*, but are *practical and effective*¹⁷. The principle of effectiveness¹⁸ is a key element to the realisation of the ‘object and purpose’ of the European Convention, and leads to an *extensive* interpretation of the rights –and thus also to an evolutive interpretation of the rights (infra)–, as well as to a *restrictive* interpretation of the limitations. These are two aspects of the same teleological vision, whereby the second aspect is a corollary of the first.

The requirement of an extensive interpretation of the Convention rights for example implies that the mere appointment of a lawyer prior to a lawsuit is insufficient, but that the assistance provided by the lawyer should as a whole be effective¹⁹. The intentional use of lethal violence by government agents should form the subject of a form of effective official investigation²⁰. A right based on Art. 11 ECHR would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association after its foundation without having to comply with the European Convention; the protection afforded by Art. 11 ECHR therefore not only relates to its creation but it lasts for an association’s entire life²¹. On the other hand, exceptions to, restrictions on, or interference with the rights guaranteed under the Convention must be strictly or narrowly interpreted²².

¹⁶ See ECtHR, *Tyrer v. UK*, Judgment of 25 April 1978, § 31 (whereby the ECHR is interpreted in the light of present-day conditions).

¹⁷ The first judgment in which this is expressly stated: ECtHR, *Airey v. Ireland*, Judgment of 9 October 1979, § 24 (with a reference to 4 previous judgments in which the principle was implicitly); ECtHR, *Mamatkulov and Askarov v. Turkey*, Judgment of 4 February 2005, § 121.

¹⁸ See A. MOWBRAY, “The Creativity of the European Court of Human Rights”, *Hum.Rts.L.Rev.* 2005, 57-79.

¹⁹ ECtHR, *Artico v. Italy*, Judgment of 13 May 1980, § 33 (where a violation of the right to legal aid under Art. 6(3)(c) ECHR was found because the legal aid lawyer appointed by the state was completely ineffective).

²⁰ ECtHR, *McCann, Farrell and Savage v. UK*, Judgment of 27 September 1995, § 161.

²¹ ECtHR, *United Communist Party of Turkey a.o. v. Turkey*, Judgment of 30 January 1998, § 33.

²² E.g. ECtHR, *Barthold v. Germany*, Judgment of 25 March 1985, § 43 (under Art. 10 ECHR); ECtHR, *Guzzardi v. Italy*, Judgment of 6 November 1980, § 98 (exceptions under Art. 5(1) ECHR); ECtHR, *Van Mechelen v. Netherlands*, Judgment of 23 April 1997, § 58 (exceptions to the rights of defense under Art. 6 ECHR).

4. AUTONOMOUS MEANING

The notions or concepts used in the European Convention have an “autonomous meaning”²³ in relation to domestic law, in other words, these concepts have a specific European meaning²⁴, as the authority to interpret the Convention is granted to an international court set up for that purpose, namely the European Court (Art. 32 ECHR). Although concepts may have their origin in national law, their meaning does not necessarily coincide with the meaning that has been attached to identical or comparable provisions in the internal legal systems of the States. In other words, the European Court does not consider itself bound by the qualification under national law that would escape its supervision and wishes thus to confirm the independence of the European Convention (and its supervisory mechanism) with respect to the national legal systems.

Concepts with an autonomous meaning are, inter alia: ‘civil rights and obligations’ (Art. 6(1) ECHR)²⁵, ‘tribunal’ (Art. 6(1) ECHR)²⁶, ‘criminal charge’ (Art. 6(1) and (2) ECHR)²⁷, ‘penalty’ (Art. 7 ECHR)²⁸, ‘home’ (Art. 8 ECHR)²⁹, ‘association’ (Art. 11 ECHR)³⁰, ‘property’ (Art. 1 Protocol No. 1)³¹ and ‘victim’³² (Art. 34 ECHR).

The autonomous interpretation method leads to a harmonisation of the enforcement standards concerning fundamental rights in the various Member States (which is only one of the objectives of the European Convention)³³, and thus avoids that the level of protection would vary too much from country to country and that not only the legal uniformity but also the equality in law of the legal subjects of the various Member States would be jeopardised³⁴. The autonomous interpretation method is closely linked to the evolutive interpretation (infra) and with the principle of effectiveness (supra) and as such with a teleological interpretation.

²³ See G. LETSAS, “The Truth in Autonomous Concepts: How To Interpret the ECHR”, *E.J.I.L.* 2004, 279-305; F. SUDRE, “Le recours aux notions autonomes”, in *L’interprétation de la Convention européenne des droits de l’homme*, F. SUDRE (ed.), Brussels, Bruylant, 1998, 93-131.

²⁴ First applied in 1968: ECtHR, *Wemhoff v. Germany*, Judgment of 28 June 1968, §§ 18-19 and ECtHR, *Neumeister v. Germany*, Judgment of 28 June 1968, §§ 18-19 (on the notion ‘criminal charge’ in the sense of Art. 6(1) ECHR).

²⁵ ECtHR, *Ferrazzini v. Italy*, Judgment of 12 July 2001, § 24.

²⁶ ECtHR, *Jean-Louis Didier v. France*, Decision of 27 August 2002, § 3.

²⁷ ECtHR, *Phillips v. UK*, Judgment of 5 July 2001, § 35.

²⁸ ECtHR, *Jamil v. France*, Judgment of 8 June 1995, § 30.

²⁹ ECtHR, *Mguéladzé v. Georgia*, Judgment of 24 July 2007, § 80.

³⁰ ECtHR, *Popov a.o. v. Russia*, Decision of 6 November 2003.

³¹ ECtHR, *Former King of Greece a.o. v. Greece*, Judgment of 23 November 2000, § 60.

³² ECtHR, *Societatea de vânătătoare “Mistreţul” v. Romania*, Decision of 4 May 1999.

³³ F. MATSCHER, “Methods of Interpretation of the European Convention”, in *The European System for the Protection of Human Rights*, R.St.J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), Dordrecht, Martinus Nijhoff, 1993, 73.

³⁴ R. RYSSDALL, “Opinion: The Coming of Age of the European Convention on Human Rights”, *E.H.R.L.R.* 1996, 23.

5. EVOLUTIVE INTERPRETATION

The European Convention is a “living instrument”³⁵ which must be interpreted in the light of present-day conditions³⁶. The substance of the rights evolves in the case law by virtue of evolutive opinions in society, meaning that the terms and concepts used in the European Convention have to be interpreted in the light of the views in present-day democratic society and not from the viewpoint of 1950’s society, when the European Convention was adopted. The evolutive method of interpretation consequently leads to a diminished importance attached to the historical meaning of the European Convention and the Protocols, symbolised by the *travaux préparatoires* as an additional source of interpretation³⁷. The dynamic or evolutive interpretative method is one of the most important principles of interpretation of the European Convention, and its importance is drawn from the emphasis placed upon the object and purpose of the Convention. By failing to maintain a dynamic or evolutive approach, the European Court would run the risk of the Convention becoming a bar or impediment to improvement and innovation³⁸.

The evolutive or dynamic interpretive method has been applied by the European Court both to the material rights and freedoms included in the European Convention and the Protocols, for example Art. 3 ECHR³⁹, Art. 5 ECHR⁴⁰, Art. 6 ECHR⁴¹, Art. 8 ECHR⁴², Art. 2 Protocol No. 1⁴³ and Art. 3 Protocol No. 1⁴⁴.

In applying the evolutive or dynamic approach, the Strasbourg judges enter the borderline area between interpretation and modification of the European Convention by a judge. The evolutive method should therefore be applied with the greatest caution and requires thorough scrutiny. In making this assessment, increasing attention is paid to common European standards, derived from other European or international treaties or soft law that have been endorsed by a majority of the ECHR Member States or from other relevant convergent national and international case law, although as appears from Stras-

³⁵ See A. MOWBRAY, “The Creativity of the European Court of Human Rights”, *Hum.Rts.L.Rev.* 2005, 57-79; S.C. PREBENSEN, “Evolutive Interpretation of the European Convention on Human Rights”, in *Protecting Human Rights: The European Perspective*, P. MAHONEY, F. MATSCHER, H. PETZOLD and L. WILDHABER (eds.), Köln, Carl Heymanns Verlag, 2000, 1123-1137.

³⁶ ECtHR, *Lebedev v. Russia*, Judgment of 25 October 2007, § 71.

³⁷ F. MATSCHER, “Methods of Interpretation of the European Convention”, in *The European System for the Protection of Human Rights*, R.St.J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), Dordrecht, Martinus Nijhoff, 1993, 68.

³⁸ ECtHR, *Christine Goodwin v. UK*, Judgment of 11 July 2002, § 74.

³⁹ ECtHR, *Selmouni v. France*, Judgment of 28 July 1997, § 101 (the concept of torture).

⁴⁰ ECtHR, *Guzzardi v. Italy*, Judgment of 6 November 1980, § 95 (the concept of deprivation of liberty).

⁴¹ ECtHR, *Salesi v. Italy*, Judgment of 26 February 1993, § 19 (the notion of civil rights and obligations).

⁴² ECtHR, *Dudgeon v. UK*, Judgment of 22 October 1981, § 60 (sexual acts between homosexuals).

⁴³ ECtHR, *Leyla Şahin v. Turkey*, Judgment of 10 November 2005, §§ 136-137 (recognition that institutions of higher education existing at a given time come within the scope of the first sentence of Article 2 of Protocol No 1).

⁴⁴ ECtHR, *Matthews v. UK*, Judgment of 18 February 1999, § 39 (the concept of legislature).

bourg case law, the evolutive interpretation need not necessarily rely on an established consensus, but may also be based on an emerging or continuing international trend⁴⁵ (infra).

6. RULE OF LAW

The principle of rule of law⁴⁶ is explicitly mentioned in the Preamble to the ECHR, in which it is qualified as an element in the collective heritage of the European countries and is one of the fundamental principles of a democratic society and consequently inherently present in all the provisions of the European Convention⁴⁷.

Although the rule of law criterion was initially only sporadically used as an instrument to assess whether a restriction was foreseeable⁴⁸, in more recent Strasbourg case law it is also used as an independent, qualitatively stricter assessment standard, which to a certain extent is independent of the particulars of a case and is therefore an abstract assessment standard (although the link with the foreseeability requirement is still formally intact).

The principle of the rule of law and the principle of lawfulness not only require that a Member State observes and applies in a foreseeable and consistent manner the legal norms or regulations it has enacted, but it must also ensure the legal and practical conditions for their implementation. The obligation to uphold the legitimate trust of the citizens in the State and in the law, that is inherent to the rule of law, requires that Member States eliminate the dysfunctional provisions in their domestic legal system and rectify extra-legal practices⁴⁹. On the other hand, national courts should for example not under any circumstances be prepared to allow life-endangering offences to go unpunished. A prompt and effective response by the authorities in investigating the use of lethal force is essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts⁵⁰.

⁴⁵ ECtHR, *Christine Goodwin v. UK*, Judgment of 11 July 2002, §§ 84-85 (a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals).

⁴⁶ See P. WACHSMANN, "La prééminence du droit dans la jurisprudence de la Cour européenne des droits de l'homme", in *Le droit des organisations internationales. Recueil d'études à la mémoire de Jacques Schwob*, Brussels, Bruylant, 1997, 241-285; L. WILDHABER, "Democracy, Rule of Law, Terrorism and Human Rights", in *The European Court of Human Rights 1998-2006. History, Achievements, Reform*, L. WILDHABER (ed.), Kehl am Rhein, Engel Verlag, 2006, 228-245.

⁴⁷ ECtHR, *Broniowski v. Poland*, Judgment of 22 June 2004, § 154.

⁴⁸ Limitations to certain rights are possible provided they have a legal basis, which implies that the interference should have a basis in domestic law and that that law is accessible and predictable. Cf. ECtHR, *Sunday Times (n° 1) v. UK*, Judgment of 26 April 1979, §§ 47-49. Further refined inter alia in: ECtHR, *Silver a.o. v. UK*, Judgment of 25 March 1983, §§ 85-90.

⁴⁹ ECtHR, *Broniowski v. Poland*, Judgment of 22 June 2004, § 184.

⁵⁰ ECtHR, *Öneryildiz v. Turkey*, Judgment of 30 November 2004, § 96.

One of the qualitative requirements of the rule of law implies that in case of a restriction of a Convention right guarantees and effective control measures must also be embedded in the national law against arbitrary interferences by public authorities in the rights guaranteed by the ECHR, particularly if the bodies of the executive authorities as a result of or by virtue of the law have considerable discretionary authorities. It would be contrary to the rule of law, i.e. one of the basic principles of a democratic society enshrined in the ECHR, for a legal discretion granted to the executive to be expressed in terms of an unfettered power⁵¹. The latter is certainly the case if the State's authority is exercised secretly, in other words, if the risk of arbitrary action is evident⁵². The existence of adequate and effective safeguards against abuse, including in particular procedures for effective scrutiny by the courts, is all the more important since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it⁵³. The principle of lawfulness and the principle of rule of law, for example, imply that measures affecting fundamental human rights, even in the case of national security, must be subject to some form of adversarial proceedings before an independent body that has the competence to review the motives for the decision⁵⁴. The individual must after all be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of national security that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention⁵⁵. In the event of a dispute on civil rights and obligations or on the wellfoundedness of criminal proceedings, access to a court is a fundamental right⁵⁶.

With respect to the rights containing an escape clause, the use of the principle of the rule of law overlaps to a certain extent the criterion of necessity in a democratic society and provides the Strasbourg Court with an assessment standard, whereby the national margin of appreciation, contrary to its role in the necessity criterion, plays a lesser role or even none at all.

⁵¹ ECtHR, *Volokhy v. Ukraine*, Judgment of 2 November 2006, § 49.

⁵² ECtHR, *Malone v. UK*, Judgment of 2 August 1984, § 67.

⁵³ ECtHR, *Rotaru v. Romania*, Judgment of 4 May 2000, §§ 55, 59.

⁵⁴ ECtHR, *Al Nashif v. Bulgaria*, Judgment of 20 June 2002, § 123.

⁵⁵ ECtHR, *Liu and Liu v. Russia*, Judgment of 6 December 2007, § 59.

⁵⁶ *McElhinney v. Ireland*, Judgment of 21 November 2001, para; 33.

7. DEMOCRACY

The concept of democracy⁵⁷ is explicitly mentioned in a number of ways in the European Convention and in the interpretation of the Convention, the values associated with the concept of 'democracy' are used in a number of cases⁵⁸. The notion of democracy was included in the Preamble to the European Convention, which states that fundamental rights and freedoms are best protected through an effective political democracy. The concept of democracy is for example also visible in certain rights, and it also offers a restriction possibility with regard to certain rights and freedoms in the ECHR⁵⁹. The idea of democracy is therefore an essential part of the European public order.

In its case law the Strasbourg Court has posited more than once that democracy appears to be the only political model that contemplated by the European Convention and, consequently, the only model compatible with it⁶⁰. Although the conception of democracy in the early Strasbourg case law was a starkly drawn contrast with totalitarianism, this was, according to an observer in later case law, more subtly contrasted with the absence of adequate safeguards against arbitrary exercises of power even by more benign welfare states, which included such notions as the separation of powers and the principle of accountability⁶¹.

A number of Convention provisions have been identified in Strasbourg case law that are characteristic of a democratic society. A democracy is inter alia characterised by the recognition of the interests protected under the right to a fair trial (Art. 6 ECHR)⁶², the right to life (Art. 2 ECHR)⁶³, the prohibition of torture and inhuman and degrading treatment or punishment (Art. 3 ECHR)⁶⁴, the prohibition of slavery and forced labour (Art. 4 ECHR)⁶⁵, the freedom of thought, conscience and religion (Art. 9 ECHR)⁶⁶ and in exercising its functions in relation to education and to teaching, the State's obligation to respect the right of parents to provide their children with education and teaching in conformity with their own religious and philosophical convictions (Art. 2 Protocol No. 1)⁶⁷.

⁵⁷ See O.M. GARIBALDI, "On the Ideological Content of Human Rights Instruments: The Clause 'In a democratic society'", in *Contemporary Issues in International Law. Essays in honour of Louis B. Sohn*, T. BUERGENTHAL (ed.), Kehl am Rhein, Engel Verlag, 1984, 23-68; P. VEGLERIS, "Valeur et signification de la clause 'dans une société démocratique' dans la Convention européenne des droits de l'homme", *R.D.H.* 1968, Vol. I, 219; L. WILDHABER, *Human Rights and Democracy. Paul Sieghart Memorial Lecture 2001*, London, 22 November 2001, 13 p.

⁵⁸ ECtHR, *Soering v. UK*, Judgment of 7 July 1989, § 87.

⁵⁹ Art. 8 ECHR, Art. 9 ECHR, Art. 10 ECHR, Art. 11 ECHR and Art. 2 Protocol No. 4 provide that a restriction or interference can be justified only if it is shown that this is necessary "in a democratic society".

⁶⁰ ECtHR, *Refah Partisi (The Welfare Party) a.o. v. Turkey*, Judgment of 13 February 2003, § 86.

⁶¹ S. MARKS, "The European Convention on Human Rights and its 'Democratic Society'", *B.Y.I.L.* 1995-96, 211-212.

⁶² ECtHR, *Airey v. Ireland*, Judgment of 9 October 1979, § 24.

⁶³ ECtHR, *McCann, Farrell and Savage v. UK*, Judgment of 27 September 1995, § 147.

⁶⁴ ECtHR, *Soering v. UK*, Judgment of 7 July 1989, § 88.

⁶⁵ ECtHR, *Siliadin v. France*, Judgment of 26 July 2005, § 82.

⁶⁶ ECtHR, *Kokkinakis v. Greece*, Judgment of 25 March 1993, § 31.

⁶⁷ ECtHR, *Folgerø a.o. v. Norway*, Judgment of 29 June 2007, § 84.

With respect to the organisation of a democracy, the European Court clearly attaches great importance to the participation of citizens in policy. The right to vote and the right to stand for elections (Art. 3 Protocol No. 1) have repeatedly been described by the Court as a central or crucial element or a characteristic principle of a democracy⁶⁸. In a democracy the right to vote is not a privilege, rather universal suffrage is a basic principle⁶⁹. Moreover, in a democratic system a government is accountable first and foremost to the parliament⁷⁰. Secondly, the actions and omissions of governments should be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. The dominant position of governments necessitates that should they come under harsh criticism, they, above all, should display restraint before resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of their adversaries or the media⁷¹.

In a number of judgments the emphasis is placed on the fact that the freedom of expression has particular relevance if this is aimed at contributing to the development of the rule of law and democracy in certain Member States⁷². Political parties and other associations too play a very important role in a democratic system and restrictions with respect to political parties should therefore be strictly interpreted⁷³. In its case law, the Court has on numerous occasions affirmed that only convincing and compelling reasons can justify restrictions on the freedom of association (Art. 11 ECHR) and that all such restrictions are subject to rigorous supervision by the Court⁷⁴. The European Court has ascertained that policy measures in a number of former East Bloc countries aimed at curbing influences of a communist nature, are in accordance with the ECHR⁷⁵.

However, a democratic society as a whole – and therefore distinct from political aspects – is characterised by a certain tolerance, broadmindedness and pluralism⁷⁶. Freedom of expression (Art. 10 ECHR) is one of the essential foundations of a democratic society and one of the basic conditions for the progress of this societal vision and for each individual's self-fulfilment⁷⁷. The public has a right to be well informed on political solutions to conflicts

⁶⁸ ECtHR, *Hirst (n° 2) v. UK*, Judgment of 6 October 2005, § 58.

⁶⁹ ECtHR, *Hirst (n° 2) v. UK*, Judgment of 6 October 2005, § 59 (it is partly for this reason that a system where the right to vote was denied to all prisoners, regardless of the crime for which they were convicted and regardless of the length of the sentence, was regarded as a disproportionate restriction of Art. 2 Protocol No. 2).

⁷⁰ ECtHR, *Matthews v. UK*, Judgment of 18 February 1999, § 52.

⁷¹ ECtHR, *Castells v. Spain*, Judgment of 23 April 1992, § 46.

⁷² ECtHR, *Marônek v. Slovakia*, Judgment of 19 April 2001, § 56 (it concerned was a form of expression which was apparently made "in good faith, that the resolution of the problem was important for strengthening the rule of law in the newly born democracy").

⁷³ ECtHR, *Refah Partisi (The Welfare Party) a.o. v. Turkey*, Judgment of 13 February 2003, §§ 87.

⁷⁴ ECtHR, *Gorzeli v. Poland*, Judgment of 17 February 2004, § 88.

⁷⁵ ECtHR, *Rekvényi v. Hungary*, Judgment of 20 May 1999, § 41 (with regard to the obligation imposed on certain categories of public officials including police officers to refrain from political activities in order to depoliticise the services concerned and thereby to contribute to the consolidation and maintenance of pluralistic democracy).

⁷⁶ ECtHR, *Dudgeon v. UK*, Judgment of 22 October 1981, § 53.

⁷⁷ ECtHR, *Handyside v. UK*, Judgment of 7 December 1976, § 49.

in a democratic society and this requires that the public should be able to receive a variety of communications, messages or views, to choose between them and be able to form its own opinion on the basis of these different communications, messages or views expressed, for what sets democratic society apart is this pluralism of ideas and information⁷⁸. In a number of cases in which Turkey was convicted of a breach of Art. 10 ECHR, an essential point for the Court was that the publications subject to state interference actually appealed to find a solution to the Kurdish question by peaceful means⁷⁹. The press fulfils an essential role in a democratic society and acts as public watchdog by providing information on issues of serious public concern⁸⁰.

8. PROPORTIONALITY

The principle of proportionality⁸¹, according to which a reasonable relationship must exist or a fair balance must be struck between several competing interests, though not mentioned in the text of the European Convention itself, is nevertheless inherently present in the whole European Convention⁸². Restrictions of a fundamental right will be permitted in a number of situations on condition that the principle of proportionality is taken into account and there is a reasonable relationship between the seriousness of the restriction or interference of the fundamental right on the one hand and the gravity of the legitimate aim which has prompted the interference on the other. The more imperative the legitimate aim is, the fewer problems there will be in justifying the intervention. The principle of proportionality is part of a broader concept, by virtue of which it must be decided whether a fair balance was realised between the demands of the general interest of the community and the requirements of the protection of the fundamental rights of the individual⁸³. Moreover, a restriction, in addition to the fact that it must be proportional, should be relevant and sufficient to achieve the intended aim (pertinence criterion)⁸⁴. Consequently, the pertinence criterion is a separate criterion.

⁷⁸ ECtHR, *Çetin a.o. v. Turkey*, Judgment of 13 February 2003, §§ 57, 61- 64.

⁷⁹ ECtHR, *Yaşar Kemal Gökçeli v. Turkey*, Judgment of 4 March 2003, § 38.

⁸⁰ ECtHR, *Bergens Tidende a.o. v. Norway*, Judgment of 2 May 2000, § 49.

⁸¹ See Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerpen, Intersentia, 2002, 300 p.; J. CHRISTOFFERSEN, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Leiden, Martinus Nijhoff, 2009, 690 p.; S. GREER, "'Balancing' and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate", *Cambridge L.J.* 2004, 412-434; J. MCBRIDE, "Proportionality and the European Convention on Human Rights", in *The Principle of Proportionality in the Law of Europe*, E. ELLIS (ed.), London, Hart Publishing, 1999, 23-36.

⁸² ECtHR, *Öcalan v. Turkey*, Judgment of 12 May 2005, § 88.

⁸³ ECtHR, *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, § 69.

⁸⁴ ECtHR, *Dudgeon v. UK*, Judgment of 22 October 1981, § 54 (the justification advanced by the respondent State for the prohibition of homosexuals relations between adults, was relevant but not sufficient to retain the legislation).

The proportionality principle can be viewed as the reverse side of a State's margin of appreciation (*infra*). The stricter the principle of proportionality is applied, the narrower the margin of appreciation left to the discretion of the Contracting States. Proportionality testing is considered as a correction and restriction of the State's margin of appreciation⁸⁵.

The principle of proportionality or the fair balance test are, depending on the Convention provision in question, used, among other things, in connection with the necessity testing in the context of the classic escape clauses relating to the right to privacy (Art. 8 ECHR), the freedom of religion (Art. 9 ECHR), the freedom of expression (Art. 10 ECHR), the freedom of assembly and association (Art. 11 ECHR) and the freedom of movement (Art. 2 Protocol No. 4), but also with regard to differently formulated (limitations in) other articles, such as the right to liberty and security (Art. 5 ECHR), the right to marry and to found a family (Art. 12 ECHR), the non-discrimination principle (Art. 14 ECHR) and the right to property (Art. 1 Protocol No. 1), as well as the derogation clause (Art. 15 ECHR) and the inherent rights, whereas a stricter version is used with respect to the right to life (Art. 2 ECHR)⁸⁶. In order to determine whether a State is bound by a positive obligation in a certain case, an assessment of whether there is a proper balance between the general interest of society and the interest of the individual applicant(s), must be made. The issues at stake do not usually relate to cases in which there is a conflict between individual freedom and harsh government action, but to the question of where exactly the boundary between conflicting group or individual interests lies in normal and civilised governmental management of society. The weighing usually relates to conflicts between individual interests of persons or groups of persons vis-à-vis higher legitimate interests such as the environment, the maintenance of the fish stock, the construction of roads and the expansion of harbours or airports, the levy of taxes and duties that may serve the general public interest⁸⁷.

In the context of the proportionality testing it is occasionally examined whether a similar result could have been achieved by means of alternative and lighter measures⁸⁸. If a State

⁸⁵ F. MATSCHER, "Methods of Interpretation of the European Convention", in *The European System for the Protection of Human Rights*, R.St.J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), Dordrecht, Martinus Nijhoff, 1993, 79.

⁸⁶ Even with absolute rights regular use is made of elements of proportionality. These serve as a method of interpretation to better define a specific condition for the application of a treaty right. In Art. 4 ECHR, after first stating that no one shall be held in slavery or servitude (§ 1) and that no one shall be required to perform forced or compulsory labour (§ 2), the third paragraph states *inter alia* that "any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention" and "any work or service which forms part of normal civic obligations" cannot be regarded as forced labour. In a Belgian case this wording has led the European Court de facto to perform a proportionality assessment, whereby it has balanced the societal interests linked to the Belgian *pro bono* system and the restriction resulting from it in respect of trainee lawyers. ECtHR, *Van der Mussele v. Belgium*, Judgment of 23 November 1983, § 37.

⁸⁷ E.g. ECtHR, *Hatton a.o. v. UK*, Judgment of 8 July 2003, §§ 119, 121-126 (noise nuisance from aircraft versus socio-economic airport policy).

⁸⁸ E.g. ECtHR, *Olsson (n° 1) v. Sweden*, Judgment of 24 March 1988 (a complete ban parental access rights between mother and child may be necessary in the interest of the health of the child, but if through a limitation of the parental access rights the same result can be achieved, then this is more appropriate); ECtHR, *Campbell v. UK*, Judgment of 25 March 1993, § 48 (possibility of opening of correspondence of prisoners deemed disproportionate; the argument of the respondent State that this was motivated by fear of presence of prohibited items in the letters, was dismissed under the argument that the prison authorities had had the option to proceed with the opening of the correspondence in the presence of the detainee).

has adapted its legislation since the restriction or interference such that its legal subjects are granted a wider legal protection, this may, it is true, indicate that the original situation was disproportional, but this fact alone does not form a decisive argument to establish a violation of the European Convention⁸⁹. It is therefore insufficient to merely demonstrate that in casu alternative and less far-reaching methods can be used or that they are even applied in one or more of the other Contracting States to achieve the same objective, to provoke a conviction⁹⁰. The use of this technique or doctrine can be considered as one of the most objective forms of proportionality testing.

In testing the proportionality of measures, the judicial practice in other Contracting States is sometimes taken into account as a relevant factor (comparative or consensus method) (infra). Usually the judicial practice of the other Contracting States is invoked to justify an approach that deviates from the position taken by the respondent State, whereas in a minority of cases the absence of a European consensus with respect to certain aspects may form a restrictive factor in the interpretation of the European Convention. The comparative method is occasionally combined with the evolutive method (supra). Factors such as morals and national security that are closely linked to the special environment of national societies may perhaps be less open to evolutive interpretation than the factors of a more technical and economic nature.

9. REFERENCE TO INTERNATIONAL STANDARDS

The European Court has no jurisdiction to rule on alleged violations of international treaties (other than the European Convention and its protocols) and general principles of international law⁹¹, but it is obliged to take into account the relevant principles of international law⁹² that are applicable in the particular sphere, while interpreting the European Convention. It cannot examine the principles or the international instrument concerned and then

⁸⁹ ECtHR, *Inze v. Austria*, Judgment of 28 October 1987, § 44 (from the simple finding that meanwhile amendments to inheritance law have been proposed by a respondent Government, it cannot be inferred that the previous rules were contrary to the European Convention, but it is an indication that there were other means available to the respondent State to achieve the aim of the protection of agriculture).

⁹⁰ ECtHR, *Mellacher a.o. v. Austria*, Judgment of 19 December 1989, § 53. But see ECtHR, *Chahal v. UK*, Judgment of 15 November 1996, §§ 131-133 (where, in order to establish a violation of Art. 5(4) ECHR, attention was paid to the methods in Canada, where judges were allowed to assess sensitive security information, which allow on the one side to meet legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice).

⁹¹ ECtHR, *Calheiros Lopes a.o. v. Portugal*, Decision of 3 June 2004 (alleged violation of general principles of international law); ECtHR, *J.F. v. France*, Decision of 20 April 1999, § 3 (alleged violation of Art. 1 European Social Charter); ECommHR, *Gestra v. Italy*, No. 21072/92, Decision of 16 January 1995, *D&R*, 80-A, 89.

⁹² see F. TULKENS and S. VAN DROOGHENBROECK, "Le *soft law* des droits de l'homme est-il vraiment si *soft*? Les développements de la pratique interprétative récente de la Cour européenne des droits de l'homme", in *Liber Amicorum Michel Mahieu*, X (ed.), Brussels, Larcier, 2008, 505-526.

find autonomous violations of the said principles or instruments. They can only be used as a tool in the interpretation of the Convention and the protocols.

In practice, there is a clear tendency of the Court to make reference to other relevant human rights treaties or instruments that have been adopted both under the auspices of or within the Council of Europe⁹³ and by other international institutions and organs⁹⁴, irrespective whether they are binding or not⁹⁵ and irrespective whether the respondent State concerned is a party to a treaty or convention or not⁹⁶. In view of the fact that the European Convention is interpreted in the light of the public international law in general, references to judgments of other international judicial or quasi-judicial bodies⁹⁷ and international treaties and instruments which are sometimes not immediately or directly related to international human rights can be found more frequently in the case-law of the European Court⁹⁸.

10. MARGIN OF APPRECIATION

10.1. Definition

The term margin of appreciation⁹⁹ indicates the policy freedom or discretion available to States, subject to European supervision, when they take legislative, executive or judicial action, in view of their specific political, economic, social and cultural situation, with regard to the way they will implement the rights and freedoms under the ECHR and with regard to the evaluation of factual situations.¹⁰⁰ The national margin of appreciation is therefore

⁹³ ECtHR, Dickson v. UK, Judgment of 4 December 2007, §§ 20, 31 (European Prison Rules); ECtHR, Kalashnikov v. Russia, Judgment of 15 July 2002, § 97 (reports ECPT).

⁹⁴ ECtHR, Pini a.o. v. Romania, Judgment of 22 June 2004, §§ 139, 144 (UN Convention on the Rights of the Child).

⁹⁵ ECtHR, Öneriyıldız v. Turkey, Judgment of 30 November 2004, §§ 59, 71, 90, 93 (recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly).

⁹⁶ ECtHR, Marckx v. Belgium, Judgment of 13 June 1979, § 41 (Convention on the Legal Status of Children born out of Wedlock).

⁹⁷ ECtHR, Mamatkulov and Askarov v. Turkey, Judgment of 4 February 2005, §§ 46-48, 117, 124 (International Court of Justice, Inter-American Court of Human Rights).

⁹⁸ ECtHR, Korbely v. Hungary, Judgment of 19 September 2008, § 81 (ICTY Statute, ICTR Statute and ICC Statute).

⁹⁹ See Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp, Intersentia, 2002, 300 p.; S. GREER, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, 2000, 60 p.; R.St.J. MACDONALD, "The Margin of Appreciation", in *The European System for the Protection of Human Rights*, R.St.J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), Dordrecht, Martinus Nijhoff, 1993, 83-124. See also: X. (eds.), "The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice", *H.R.L.J.* (Special Issue) 1998, 1-36.

¹⁰⁰ The margin of appreciation doctrine is rooted in the case law of the French *Conseil d'Etat* and in administrative law of continental legal systems. In international law, it was first used and developed by the Strasbourg Court. The concept cannot be found in the ECHR or in the *Travaux Préparatoires*, but was included in the proposals of the European Movement. B. SIMPSON, *Human Rights and the End of Empire. Britain and the Genesis of the European Convention*, Oxford, Oxford University Press, 2004, 676-677.

nothing more than the amount of latitude left to national authorities once the appropriate level of review has been decided by the Court¹⁰¹. By means of the margin of appreciation theory, a certain discretionary authority is introduced into the European Court's evaluation, in particular where sensitive aspects of socio-economic politics or morals are involved, for which there is no European consensus.

The subsidiary character of the Strasbourg supervisory mechanism (*supra*) forms the legal basis for the margin of appreciation theory, such that the doctrine of the national appreciation margin has its origins in the European Convention itself¹⁰². The doctrine reflects the primordial role the national (judicial) organs are deemed to play in the protection of the rights and freedoms in the European Convention. The theory of the margin of appreciation can be viewed as the natural product of the division of powers between the European Court and the national judicial institutions¹⁰³. It is likewise the expression of 'judicial self-restraint'.

10.2. Evolution

The Strasbourg Court¹⁰⁴ implicitly applied the margin of appreciation doctrine for the first time in the context of the right to education (Art. 2 Protocol No. 1) and the non-discrimination principle (Art. 14 ECHR) with regard to a complaint on the grounds of alleged unequal treatment between French and Dutch speakers with respect to the language of instruction in schools. In the Belgian Linguistic Case (1968) the Court, referring to the subsidiary nature of the supervisory mechanism, indicated that the Member States have a certain margin of discretion in assessing whether their educational system implied a certain acceptable or unacceptable distinction in treatment under Art. 14 ECHR¹⁰⁵. It was not until 1971 (the Vagrancy case) before the European Court began to make explicit reference to the theory of the margin of appreciation, this time with regard to the right to freedom of correspondence (Art. 8 ECHR). In the aforementioned Belgian case that related to the freedom of correspondence of detained vagrants, the Court argued that the competent Belgian authorities "did not transgress in the present case the limits of the power of appreciation which Art. 8(2) of the Convention leaves to the Contracting Parties for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others"¹⁰⁶.

¹⁰¹ R.ST.J. MACDONALD, "The Margin of Appreciation", in *The European System for the Protection of Human Rights*, R.ST.J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), Dordrecht, Martinus Nijhoff, 1993, 83.

¹⁰² ECtHR, *Handyside v. UK*, Judgment of 7 December 1976, § 48 and ECtHR, *Sunday Times (n° 1) v. UK*, Judgment of 26 April 1979, § 59.

¹⁰³ P. MAHONEY, "Marvellous Richness of Diversity or Invidious Relativism?", *H.R.L.J.* (Special Issue) 1998, 3.

¹⁰⁴ The margin of appreciation doctrine was first developed in the case law of the Commission. E.g. ECommHR, *Greece v. UK*, No. 176/56, Decision of 2 June 1956, *Yearbook*, Vol. II, 176..

¹⁰⁵ ECtHR, *Belgian Linguistic Case*, Judgment of 23 July 1968, §§ 5, 10.

¹⁰⁶ ECtHR, *De Wilde, Ooms and Versyp v. Belgium*, Judgment of 18 June 1971, § 93.

The margin of appreciation theory was further refined in the *Handyside* case (1976), in which the central question was whether interference in the applicant's right to freedom of expression as a result of a conviction for the publication of a so-called obscene school book intended for teenagers was justified in the light of the escape clause under Art. 10(2) ECHR. In this case the Strasbourg Court held that the national governments have a margin of appreciation in their evaluation of whether a certain measure "is necessary in a democratic society" in particular since there was a "pressing social need" justifying the restriction or interference in the interest of "morals":

"[I]t is not possible to find in the domestic law of the various Contracting States a uniform European concept 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 characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [...]. It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion 'necessity' in this context"¹⁰⁷.

The former does not mean that the discretion is unlimited. As the Court held:

"Nevertheless, Article 10 para. 2 [...] does not give the Contracting States an unlimited power of appreciation. The Court, which [...] is responsible for ensuring the observance of those States' engagements (Article 19) [...], is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10 [...]. The domestic margin of appreciation thus goes hand in hand with a European supervision"¹⁰⁸.

The *Handyside* case is considered as the key judgment with regard to the application of the doctrine of the margin of appreciation in conjunction with the "necessity in a democratic society". The requirement that a restriction of a basic right has to be necessary in a democratic society occurs again in the so-called limitation or escape clauses of Art. 8 ECHR (right to privacy), Art. 9 ECHR (freedom of religion), Art. 10 ECHR (freedom of expression), Art. 11 ECHR (freedom of assembly and association) and Art. 2 Protocol No. 4 (freedom of movement)¹⁰⁹.

The European Court finally broadened the application of the margin of appreciation doctrine to the *full* context of the Convention, repeatedly emphasising in this regard that governments have a margin of appreciation in evaluating whether a balance between the

¹⁰⁷ ECtHR, *Handyside v. UK*, Judgment of 7 December 1976, § 48.

¹⁰⁸ ECtHR, *Handyside v. UK*, Judgment of 7 December 1976, § 49.

¹⁰⁹ ECtHR *Chassagnou a.o. v. France*, Judgment of 29 April 1999, § 75.

rights of the individual and the interests of society has been taken into account when imposing a restriction on a Convention right. Currently, the margin of appreciation is at the heart of virtually all major cases that come before the Court, whether the judgments refer to it explicitly or not. By positioning the margin of appreciation theory within a global balancing act, the doctrine was thus expanded to all Convention rights, such as Art. 5(1) ECHR (regarding the question of whether a person is of unsound mind and may as such be detained)¹¹⁰, Art. 6 ECHR (in evaluating the restrictions of the right of access to a court)¹¹¹, Art. 14 ECHR (in evaluating to what extent differences in otherwise similar situations justify a different treatment)¹¹², Art. 3 Protocol No. 1 (e.g. in evaluating the restrictions to the right to vote and to stand for elected)¹¹³, with the exclusion of the non-derogable rights¹¹⁴.

10.3. Application

The scope of application of the national margin of appreciation, i.e. the moment and the way in which the national margin of appreciation is applied, cannot or can scarcely be defined, since, by nature, it is contextually bound¹¹⁵. The interaction between the elements and factors involved makes it indeed difficult, if not virtually impossible to determine clear application principles¹¹⁶.

Nevertheless, as appears from analysis of case law, the margin of appreciation doctrine is on the whole applied in the following main situations or categories, depending on the nature and the content of the Convention provisions in question, whereby account must be taken that the distinction between some situations or categories is not always clear and in some cases even overlaps. Although the area of application of the margin of appreciation doctrine is partially clarified in the case law, it is more difficult to obtain a clear picture of the precise degree of evaluation freedom granted to the national authorities by the European Court. Much depends on the question of whether the national authorities are in a better position than the European Court to form an opinion on the need for a measure that has a negative impact on the Convention rights.

¹¹⁰ E.g. ECtHR, *Luberti v. Italy*, Judgment of 23 February 1984, § 27.

¹¹¹ E.g. ECtHR, *Osman v. UK*, Judgment of 28 October 1998, § 147.

¹¹² E.g. ECtHR, *Petrovic v. Austria*, Judgment of 27 March 1998, § 38.

¹¹³ E.g. ECtHR, *Gitonas a.o. v. Greece*, Judgment of 1 July 1997, § 39.

¹¹⁴ The non-derogable rights are: the right to life (Art. 2 ECHR), the prohibition of torture (Art. 3 ECHR), the prohibition of slavery (Art. 4(1) ECHR), the prohibition of retroactive application of criminal law (Art. 7 ECHR), the right not to be tried or punished twice (Art. 4 Protocol No. 7.) and the prohibition of the death penalty (Art. 1 Protocol No. 6 and Protocol No. 13).

¹¹⁵ R.St.J. MACDONALD, "The Margin of Appreciation", in *The European System for the Protection of Human Rights*, R.St.J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), Dordrecht, Martinus Nijhoff, 1993, 85.

¹¹⁶ Critics argue essentially that the theory is useless and vague when it is applied. According to one author, the theory shows a disappointing lack of clarity. E.g. S. GREER, *The European Convention on Human Rights. Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, 223; R.St.J. MACDONALD, "The Margin of Appreciation", in *The European System for the Protection of Human Rights*, R.St.J. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), Dordrecht, Martinus Nijhoff, 1993, 85.

10.3.1. Restrictions on rights in which the margin of appreciation can be applied

Provisions that require a balancing of interests or proportionality testing

The margin of appreciation doctrine is applied in cases in which the Convention provision imposes a balancing of interests and/or proportionality testing between the individual interests of the applicant and the general interest of society.

This concerns Art. 8 ECHR (right to privacy), Art. 9 ECHR (freedom of religion), Art. 10 ECHR (freedom of expression), Art. 11 ECHR (freedom of assembly and association) and Art. 2 Protocol No. 4 (freedom of movement). Then again, in assessing an interference in the right to property (Art. 1 Protocol No. 1), the Contracting State must maintain a fair balance between the requirement of promoting the general interest and the protection of the fundamental rights of the individual and this fair balance test applies both to the 'enjoyment clause' (Art. 1, first sentence)¹¹⁷, as well as to the 'deprivation clause' (Art. 1, second sentence)¹¹⁸ and the 'regulation clause' (Art. 1(2))¹¹⁹. In assessing the prohibition of discrimination (Art. 14 ECHR), upon establishing prior thereto that the distinction in treatment is aimed at realising a lawful aim and that the distinction is pertinent to achieving that aim, the means utilised (making a difference in treatment) is examined to determine whether it is apparently proportionate to the intended lawful aim, and that the proportionality criterion is only fulfilled if there is a reasonable balance between the protection of the general interest and the impairment of the individual rights of the European Convention¹²⁰.

Proportionality analysis also comes into play in evaluating whether derogation measures taken by the respondent State are strictly necessary in the light of the seriousness of the public emergency declared by the government (Art. 15 ECHR)¹²¹.

Finally, proportionality testing occurs in analysing whether an inherent or implicit limitation of a Convention right or freedom is acceptable. This is the case, among other things, with respect to the right to a fair trial, at least certain aspects (Art. 6(1) ECHR)¹²², the right to marry (Art. 12 ECHR)¹²³ and the right to free elections (Art. 3 Protocol No. 1)¹²⁴.

¹¹⁷ ECtHR, *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, § 69.

¹¹⁸ ECtHR, *Aka v. Turkey*, Judgment of 23 September 1998, § 44.

¹¹⁹ ECtHR, *Velosa Barreto v. Portugal*, Judgment of 21 November 1995, § 36.

¹²⁰ ECtHR, *Petrovic v. Austria*, Judgment of 27 March 1998, § 38.

¹²¹ ECtHR, *Ireland v. UK*, Judgment of 18 January 1978, § 207.

¹²² ECtHR, *Osman v. UK*, Judgment of 28 October 1998, § 147 (right of access).

¹²³ ECtHR, *Cossey v. UK*, Judgment of 27 September 1990, § 46.

¹²⁴ ECtHR, *Gitonas a.o. v. Greece*, Judgment of 1 July 1997, § 39.

Provisions worded in vague terms

The margin of appreciation doctrine is relevant in evaluating vague terms and expressions that occur in many of the Convention provisions, such as: the term ‘persons of unsound mind’ (Art. 5(1)(e) ECHR)¹²⁵, ‘respect’ for private life, family life, home and correspondence (Art. 8(1) ECHR)¹²⁶, ‘morals’ (Art. 8(2) ECHR, Art. 9(2) ECHR, Art. 10(2) ECHR, Art. 11(2) ECHR and Art. 2(2) Protocol No. 4)¹²⁷, ‘public emergency threatening the life of the nation’ (Art. 15(1) ECHR)¹²⁸ and ‘public interest’ (Art. 1 Protocol No. 1)¹²⁹.

Provisions entailing positive obligations

The majority of the Convention rights, as appears from the case law, not only entail a duty to abstain but also positive obligations¹³⁰. The Court does however stress that States may first themselves decide the way in which and the means they intend to employ to comply with these obligations and they enjoy a certain margin of appreciation. But in imposing a restriction on the right to access to a court (Art. 6 ECHR) the essence of that Convention right may not, for instance, be affected¹³¹. A reasonable degree of proportionality between the means used and the intended aim must be taken into account¹³².

With respect to certain rights that entail positive obligations, the margin of appreciation takes, as it were, the form of organisational freedom in respect of the Contracting States in regulating certain areas of competence of governmental care (organisation of the judicial system, structuring the educational system and organisation of the election system)¹³³. In the case of other forms of positive obligation, for example, in the context of Art. 8 ECHR, among other things, with regard to the placement of minors (where a concrete assessment is made whether the State has taken appropriate and measures in order to secure

¹²⁵ ECtHR, *Luberti v. Italy*, Judgment of 23 February 1984, § 27.

¹²⁶ ECtHR, *Cossey v. UK*, Judgment of 27 September 1990, §§ 37, 40.

¹²⁷ ECtHR, *Handyside v. UK*, Judgment of 7 December 1976, § 48.

¹²⁸ ECtHR, *Aksoy v. Turkey*, Judgment of 18 December 1996, § 68.

¹²⁹ ECtHR, *National and Provincial Building Society a.o. v. UK*, Judgment of 23 October 1997, §§ 80-81.

¹³⁰ E.g. ECtHR, *Belgian Linguistic Case*, Judgment of 23 July 1968 (with regard to Art. 2 Protocol No. 1); ECtHR, *Marckx v. Belgium*, Judgment of 13 June 1979, §§ 31, 53, 61 (with regard to Art. 8 ECHR); ECtHR, *Airey v. Ireland*, Judgment of 9 October 1979, §§ 25 (with regard to Art. 6 ECHR) and 32 (with regard to Art. 8 ECHR); ECtHR, *Young, James and Webster v. UK*, Judgment of 13 August 1981, § 49 (with regard to Art. 11 ECHR); ECtHR, *A. v. UK*, Judgment of 23 September 1998, § 22 (with regard to Art. 3 ECHR); ECtHR, *Osman v. Turkey*, Judgment of 28 October 1998, §§ 115-116 (with regard to Art. 2 ECHR); ECtHR, *Vgt Verein gegen Tierfabriken v. Switzerland*, Judgment of 28 June 2001, § 45 (with regard to Art. 10 ECHR).

¹³¹ ECtHR, *Airey v. Ireland*, Judgment of 9 October 1979, § 25.

¹³² ECtHR, *Ashingdane v. UK*, Judgment of 28 May 1985, § 57.

¹³³ E.g. ECtHR, *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, § 59 (with regard to the examination of restrictions on the right of access to court ex Art. 6 ECHR); ECtHR, *Matthews v. UK*, Judgment of 18 February 1999, § 63 (with regard to Art. 3 Protocol No. 1); ECtHR, *Efstathiou v. Greece*, Judgment of 18 December 1996, §§ 28-29 (with regard to Art. 2 Protocol No. 1).

for example, the reunification of parents and children¹³⁴), there is again less question of organisational freedom, but the margin of appreciation is more closely linked to the concrete proportionality testing.

10.3.2. Restrictions on rights in which the margin of appreciation cannot or can only scarcely be applied

A considerable number (of elements of) Convention provisions are described in such detailed terms that there is scarcely any scope for balancing and thus margin of appreciation. For instance, the margin of appreciation doctrine plays no role with regard to most aspects of the right to personal liberty (Art. 5 ECHR) and the right to a fair trial (Art. 6 ECHR) (but see *supra*). Both Convention provisions play a crucial role as requirements of the rule of law. The nature and the importance of the rights included in the Convention provisions in a state governed by the rule of law consequently leave little scope for experiments or diversity on the substance of the provisions by the individual Contracting States. The rights ensured under both provisions assure a number of specific procedural guarantees, the application conditions of which are described in detail in both articles. The formulation of both rights accordingly leaves no scope for differences of opinion per state on the method of implementation of these guarantees¹³⁵. On the other hand, it is the task of the European Court to monitor the observance of these specific conditions and it is scarcely tenable to maintain that the argument whereby the domestic court is better placed to judge, would be applicable to issues relating to compliance with procedural guarantees. The rule, also to be found in escape clauses, prescribing that a restriction of a right or freedom (Art. 8-11 ECHR and Art. 2 Protocol No. 4) must be prescribed by or in accordance with the law is another example of an instance where the margin of appreciation is irrelevant.

10.3.3. Rights and cases in which the margin of appreciation plays no role

The theory of margin of appreciation plays no part in assessing certain rights and freedoms or aspects of rights and freedoms in the context of the European Convention. For example, there is no margin of appreciation when it concerns the non-derogable rights¹³⁶. Such rights and freedoms are deemed to be so fundamental that they have been drafted in strict wording that allows no margin of appreciation whatsoever¹³⁷, even to the extent

¹³⁴ ECtHR, *Eriksson v. Sweden*, Judgment of 22 June 1989, § 71.

¹³⁵ P. MAHONEY, "Marvellous Richness of Diversity or Invidious Relativism?", *H.R.L.J.* (Special Issue) 1998, 5. The above explains why in the assessment of the term 'reasonable time' (ex Art. 6 ECHR) there is no possibility of state discretion.

¹³⁶ See *supra*, note 114.

¹³⁷ J. CALLEWAERT, "Is there a Margin of Appreciation in the application of Articles 2, 3 and 4 of the Convention?", *H.R.L.J.* (Special Issue) 1998, 8-9.

that these rights entail positive obligations. The existence of or possibility of a reference to the State's margin of appreciation would lead, after all, to the unacceptable consequence that the provisions in question would leave room for national discretion or balancing of interests in the application of these rights. Therefore, the principle of proportionality will not be used with regard to the prohibition of torture, inhuman or degrading treatment or punishment (Art. 3 ECHR)¹³⁸.

The margin of appreciation doctrine plays no role whatsoever in determining the facts in a certain case, but only in the later evaluation of these same facts. The theory of the margin of appreciation of a state may consequently only play a role once the facts have been ascertained with sufficient clarity by the European Court. Problems in gathering evidence may as a consequence not be formulated in terms of margin of appreciation for a state¹³⁹.

It sometimes happens that in cases in which rights and freedoms are at issue to which the theory of the margin of appreciation may normally speaking be applied, in view of the fact that they fall within one of the above-mentioned categories, still no mention is made of a national margin of appreciation. These cases have a common characteristic in that the presence or absence of a breach of the right or freedom concerned was clear or evident in the eyes of the European Court. An example of such a situation concerns the numerous cases in which, in the view of the European Court, there was a clear violation of Art. 8 ECHR (protection of private and family life, home and correspondence) and/or Art. 1 Protocol No. 1 (protection of property) as a result of houses and even entire villages being burned down in south east Turkey by Turkish security forces¹⁴⁰.

10.4. Factors determining the extent of the margin of appreciation

The margin or scope of appreciation of the national governments can, according to the case law, vary¹⁴¹. In its case law, the European Court does not at any point provide a clear overview of the factors that determine the extent of the margin of appreciation with respect to the Contracting States. The scope of the margin of appreciation that is left to the Contracting States will, according to the case law, vary according to elements such as the nature of the relevant right or freedom, the importance of the right or freedom in ques-

¹³⁸ ECtHR, *Saadi v. Italy*, Judgment of 28 February 2008, § 127. Nonetheless, the principle of fair balance has been relevant in some case-law. See e.g. ECtHR, *Soering v. UK*, Judgment of 7 July 1989, § 89 (where an individual may be extradited where the danger of ill-treatment abroad sufficiently diminishes).

¹³⁹ ECtHR, *Klaas v. Germany*, Judgment of 22 September 1993 (different versions of the facts adduced by the respondent State and by the applicant, without the European Court making reference to and relying on the margin of appreciation).

¹⁴⁰ E.g. ECtHR, *Mentes a.o. v. Turkey*, Judgment of 28 November 1997, § 73 (clear violation of Art. 8 ECHR following the burning of a complete village in South Eastern Turkey by Turkish security forces); ECtHR, *Akdivar a.o. v. Turkey*, Judgment of 16 September 1996, § 88 (clear violation of Art. Protocol No. 1. 1 following the burning of a house with household in South Eastern Turkey by Turkish security forces).

¹⁴¹ This has been said for the first time in: ECtHR, *Engel a.o. v. Netherlands*, Judgment of 8 June 1976, § 72. Further: ECtHR, *K. and T. v. Finland*, Judgment of 27 April 2000, § 135.

tion to the applicant, the nature of the activity that is involved in the case¹⁴², the nature of the justification on account of the State¹⁴³ and the presence of a clear consensus within the countries in the Council of Europe¹⁴⁴. The impact of these factors is nevertheless only relative, which may result in one factor leading to the strengthening or the neutralization of another factor.

10.4.1. Presence or absence of a European consensus

In certain cases the Strasbourg Court allows a wider and in others a narrower margin of appreciation. In cases where there is a clear *consensus* (common ground)¹⁴⁵ within the countries of the Council of Europe with regard to a certain issue, this will result in a more restricted margin of appreciation and to a stricter evaluation by the European Court of the alleged interference¹⁴⁶. The existence of a large diversity of legal approaches within the member States with regard to the settlement of a certain problem can again lead to a wider margin of appreciation¹⁴⁷.

The latter is, for instance, the case in issues on which there are different views within society and which are associated with matters of an ethical or morally sensitive nature, such as the beginning of life or the wearing of a headscarf. In a French case, the European Court held that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a living instrument which must be interpreted in the light of present-day conditions, given that, firstly, the issue of such protection has not been resolved within the majority of the member States themselves and in France in particular, where it is the subject of debate, and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life¹⁴⁸.

A wider margin of appreciation results in the conclusion that the application of a common standard leads to different results in different Contracting States. In other words, the

¹⁴² ECtHR, *Rasmussen v. Denmark*, Judgment of 28 November 1984, § 40.

¹⁴³ ECtHR, *Sunday Times (n° 1) v. UK*, Judgment of 26 April 1979, § 59.

¹⁴⁴ ECtHR, *Rasmussen v. Denmark*, Judgment of 28 November 1984, § 40.

¹⁴⁵ See P.G. CAROZZA, "Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights", *Notre Dame L. Rev.* 1997-98, 1217-1237; L.R. HELFER, "Consensus, Coherence and the European Convention on Human Rights", *Cornell Int'l L.J.* 1993, 133-165; A.W. HERINGA, "The 'Consensus-Principle'. The role of 'common law' in the ECHR case law", *M.J.* 1996, 108-145; L. WILDHABER, "The Role of Comparative Law in the Case-Law of the European Court of Human Rights", in *The European Court of Human Rights 1998-2006. History, Achievements, Reform*, L. WILDHABER (ed.), Kehl am Rhein, Engel Verlag, 2006, 186-195.

¹⁴⁶ ECtHR, *Rasmussen v. Denmark*, Judgment of 28 November 1984, § 40.

¹⁴⁷ The mere fact that a country does not conform to a European common denominator is not enough to establish a violation of the European Convention, particularly when the subject of the dispute is closely linked to cultural and historical traditions. See ECtHR, *F. v. Switzerland*, Judgment of 18 December 1987, § 33.

¹⁴⁸ ECtHR, *Vo v. France*, Judgment of 8 July 2004, §§ 82, 84.

same facts that constitute a Convention breach in one Contracting State could constitute a legitimate restriction or interference of that same Convention right in another Contracting State. In a Turkish case, the absence of a uniform conception concerning the regulation of the wearing of religious symbols in educational institutions was also established, in view of the diversity of the approaches taken by national authorities on the issue. It is, after all, not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. The foregoing prompted the European Court to state accordingly that the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context¹⁴⁹.

A European consensus can be derived on the basis of an exercise in legal comparison of national law and legal practice or on the grounds of existing international treaties and other texts. A case against Iceland involved a complaint concerning compulsory membership of a professional organisation for taxi drivers. According to the applicant, this was a breach of the freedom of association (Art. 11 ECHR). In its judgment the Strasbourg Court stated that such obligatory membership does not exist in the vast majority of the Contracting States and that according to a number of international texts there is a growing consensus, also at international level, in favour of the assertion that the freedom of association also implies the freedom not to join an association. The exceptional situation in Iceland would therefore, according to the European Court, have to withstand rigorous testing in the context of the escape clause of Art. 11 ECHR. It was ruled in this context that the compulsory membership was imposed by law, whereby a refusal to join would most probably lead to revocation of the applicant's license to drive a taxi. He was accordingly subject to a form of coercion which, as was observed earlier, is rare within the community of member States. The obligatory membership should consequently be considered as incompatible with Art. 11. It was finally held that, despite Iceland's margin of appreciation, the compulsory membership was disproportional and consequently constituted a breach of Art. 11 ECHR¹⁵⁰.

10.4.2. Nature of the aim sought with the interference

The scope of the margin of appreciation can vary according to the nature of the legitimate aim pursued under that is invoked by the respondent State to justify the restriction of the Convention right. For instance, the European Court has accepted a wider margin

¹⁴⁹ ECtHR, *Leyla Şahin v. Turkey*, Judgment of 10 November 2005, § 109.

¹⁵⁰ ECtHR, *Sigurður A. Sigurjónsson v. Iceland*, Judgment of 30 June 1993, § 41.

of appreciation where restrictions serving to protect national security are concerned¹⁵¹ or in cases in which the decision to interfere or restrict is taken in the context of a public emergency or if urgent state action is necessary¹⁵². The differentiated margin of appreciation, according to the nature of the legitimate for restriction, can best be illustrated in the context of the case law concerning freedom of expression (Art. 10 ECHR). The importance of freedom of expression is emphasised in numerous judgments¹⁵³, as a result of which the national margin of appreciation was restricted. Grounds for restriction such as the protection of morals and national security have in the past nevertheless led to (more) limited European supervision and thus to a broader margin of appreciation for member States¹⁵⁴, albeit that with respect to both legitimate aims, the European Court has in relatively recent past on occasion clearly exercised a stricter supervision¹⁵⁵. The legitimate ground for restricting the protection of the authority and the impartiality of the judiciary, despite regular reiterations in Strasbourg case law that an interference motivated on that ground should be subject to a thorough and strict supervision¹⁵⁶, for a long time¹⁵⁷ found favour in the eyes of the Court¹⁵⁸. It would seem rather, in view of the foregoing, that the desire and will of the European Court to exercise an in-depth supervision fluctuates over time. The Court says that in evaluating the margin of appreciation, account is taken of the nature of the legitimate for restriction but its judgments tell a somewhat different story and give the impression that the evaluation is ultimately not very straightforward, a fact that is simultaneously injurious to the consistency of case law and consequently to the legal certainty of the member States' subjects¹⁵⁹.

10.4.3. Nature of the right or of the activities of the applicant

The margin of appreciation can be influenced by the nature of the right or freedom. States are generally granted a broader margin if restrictions to the right to property (Art. 1

¹⁵¹ ECtHR, *Leander v. Sweden*, Judgment of 26 March 1987, § 59.

¹⁵² ECtHR, *Brannigan and McBride v. UK*, Judgment of 26 May 1993, § 43 (with regard to Art. 15 ECHR); ECtHR, *X. v. UK*, Judgment of 5 November 1981, § 41 (with regard to the urgent detention of a mentally ill person under Art. 5(1)(e) ECHR).

¹⁵³ ECtHR, *Handyside v. UK*, Judgment of 7 December 1976.

¹⁵⁴ With regard to the *protection of morals*, see e.g. ECtHR, *Müller a.o. v. Switzerland*, Judgment of 24 May 1988; with regard to the legitimate aims of *national security/protection of public order*, see e.g. ECtHR, *Chorherr v. Austria*, Judgment of 25 August 1993.

¹⁵⁵ With regard to the *protection of morals*, see e.g. ECtHR, *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992 and ECtHR, *Scherer v. Switzerland*, Judgment of 25 March 1994; with regard to the legitimate aims of *national security/protection of public order*, see e.g. ECtHR, *Observer and Guardian v. UK*, Judgment of 26 November 1991.

¹⁵⁶ ECtHR, *Sunday Times (n° 1) v. UK*, Judgment of 26 April 1979.

¹⁵⁷ In a Belgian case, the Court did at last perform a thorough and rigorous review, though the legitimate aim invoked by the Belgian State didn't seek to protect the authority and impartiality of the judiciary but the the reputation or the rights of others. Cf. ECtHR, *De Haes and Gijssels v. Belgium*, Judgment of 24 February 1997.

¹⁵⁸ E.g. ECtHR, *Barfod v. Denmark*, Judgment of 22 February 1989 and ECtHR, *Prager and Oberschlick v. Austria*, Judgment of 26 April 1995.

¹⁵⁹ E.g. E.H. RIEDEL, "Die Meinungsfreiheit als Menschenrecht und ihre Verbürgung durch die Europäische Menschenrechtskonvention. Ansätze zu einer internationalen Menschenrechtsordnung", in *Mainungsfreiheit. Grundgedanken und Geschichte in Europa und USA*, J. SCHWARTLÄNDER and D. WILLOWEIT (eds.), Strasbourg, Engel Verlag, 1986, 275-299.

Protocol No. 1) are concerned than when restrictions to the right of freedom of expression (Art. 10 ECHR) are involved. In the majority of the cases relating to the right to property, the Strasbourg Court grants the respondent State a wide margin of appreciation, whereas with regard to the freedom of expression the Court almost invariably stresses the importance of a free press in a democratic society.

The importance of the right or freedom concerned (or the activities concerned) for the well-being of the applicant can also affect the extent of the margin of appreciation and hence to the European supervision. If the activities of the applicant relate to the essence of the right concerned or the right is of decisive importance for the well-being of the applicant, the national margin of appreciation will be narrower. In a British case, the European Court, in determining the scope of the margin of appreciation allowed to the State, emphasised the importance of a right to respect for the home with a view to the personal security and the well-being of the applicants¹⁶⁰, whereas in another case, on granting a wider evaluation margin to the State, the European Court stated that the contested interference claimed by the applicant did not form an obstacle to the applicant leading a private life of his own choosing¹⁶¹. The scrutiny of the European Court will especially be stricter and the national appreciation margin narrow if it concerns restrictions that relate to intimate aspects of the private life of persons, such as maintaining sexual contacts in private between consenting adults¹⁶² and the parental rights and the access of parents to children in care, whereas the national margin of appreciation is wide(r) with respect to the decision of the authorities to place children into care¹⁶³.

In the event two rights or freedoms in the ECHR or in one of the Protocols collide, the European Court also grants the States, that must reconcile these two fundamental rights, a wide margin of appreciation¹⁶⁴.

10.4.4. General constitutional policy, socio-economic policy, agricultural policy, environmental policy, housing policy, fiscal policy, spatial and urban planning policy

The general policy context, to which the interference or the restriction relates, plays a certain role in determining the scope of margin of appreciation. If the contested measure forms part of a more general (and legitimate) socio-economic and fiscal policy, a spatial and urban planning policy, an agricultural, housing or the environmental policy, then the Contracting State (national legislature) generally disposes of a wider margin of appreciation.

¹⁶⁰ ECtHR, *Gillow v. UK*, Judgment of 24 November 1986, § 55.

¹⁶¹ ECtHR, *Leander v. Sweden*, Judgment of 26 March 1987, § 59.

¹⁶² ECtHR, *Dudgeon v. UK*, Judgment of 22 October 1981, § 52.

¹⁶³ ECtHR, *K. and T. v. Finland*, Judgment of 12 July 2001, § 155.

¹⁶⁴ ECtHR, *Evans v. UK*, Judgment of 10 April 2007, §§ 77 (right of women to become mothers vs. right of men not to become a father).

The importance of this factor is noticeable in some cases concerning the right to property (Art. 1 Protocol No. 1, alone or in combination with Art. 14 ECHR)¹⁶⁵, the freedom of expression with regard to competition and commercial advertising (Art. 10 ECHR)¹⁶⁶, albeit that the margin is more restricted if the freedom of expression is not purely commercial and forms part of a broader discussion of public interest¹⁶⁷, and the right to private and family life with respect to spatial and urban planning and environmental policy (Art. 8 ECHR)¹⁶⁸. In such cases it may be assumed that national governments are, owing to their direct and continuous contact with the vital forces of their respective countries, generally better positioned to take account of a set of local factors and to judge local needs and conditions¹⁶⁹.

For instance in a case concerning measures to be taken to restrict noise nuisance caused by aircraft, it was certainly not, in its own words, the European Court's task the national authorities' assessment by regardless whatever other opinion as to what the best policy should be in this difficult social and technical sphere. In this case, this is an area on which the Contracting States enjoy a wide margin of appreciation¹⁷⁰. In cases in which a state finds itself in a period of transition between an earlier and new regime or state structure, these countries are granted a wide margin of appreciation in taking transitional measures that restrict a right or freedom¹⁷¹.

11. FOURTH INSTANCE DOCTRINE

The European Court is not a court of appeal or a court of "fourth instance" with respect to the decisions taken by domestic courts¹⁷². The European Court's task is limited to guaranteeing that the Contracting States fulfil their obligations under the European Convention (in accordance with Art. 19 ECHR) and hence to determining whether decisions made under national law comply with the European Convention¹⁷³.

¹⁶⁵ ECtHR, *Mellacher a.o. v. Austria*, Judgment of 19 December 1989, § 45 (housing policy); ECtHR, *Gasus Dosier- und Fördertechnik GmbH v. Netherlands*, Judgment of 23 February 1995, § 60 (tax policy); ECtHR, *Stec a.o. v. UK*, Judgment of 12 April 2006, §§ 52 and 66 (social policy).

¹⁶⁶ ECtHR, *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, Judgment of 20 November 1989, § 33.

¹⁶⁷ ECtHR, *Hertel v. Switzerland*, Judgment of 25 August 1998, § 47 (information was part of discussion about health risks due to the use of microwave ovens).

¹⁶⁸ ECtHR, *Gillow v. UK*, Judgment of 24 November 1986, § 56 (housing policy); ECtHR, *Powell and Rayner v. UK*, Judgment of 21 February 1990, § 44 and ECtHR, *Hatton a.o. v. UK*, Judgment of 8 July 2003, 2003, §§ 100-101 (reduction of aircraft noise leading to nuisance for residents).

¹⁶⁹ ECtHR, *Handyside v. UK*, Judgment of 7 December 1976, § 48.

¹⁷⁰ ECtHR, *Hatton a.o. v. UK*, Judgment of 8 July 2003, §§ 100-101.

¹⁷¹ ECtHR, *Kopecky v. Slovakia*, Judgment of 28 September 2004, §§ 37-38 (transition from communist to democratic regime).

¹⁷² ECtHR, *Baumann v. Austria*, Judgment of 7 October 2004, § 49.

¹⁷³ ECtHR, *Kemmache v. France (n° 3)*, Judgment of 24 November 1994, § 44.

The Court may not therefore intervene on the basis of claims that domestic legal institutions have made an ‘error of fact’ or an ‘error of law’, unless it believes that the errors or transgressions may have led to a violation of the European Convention¹⁷⁴. Complaints claiming that a domestic court should have reached a different decision will be declared inadmissible as being manifestly illfounded. The interpretation and application of domestic substantive and procedural law is primarily the preserve of the national courts and tribunals¹⁷⁵.

Article 6 ECHR guarantees the right to a fair hearing, but it does not lay down any rules on the admissibility of evidence or the way it should be assessed. The decision to admit or refuse evidence is consequently a matter which must be regulated by national law and it is, in principle, up to national courts to assess the evidence presented¹⁷⁶. The European Court will not therefore review the facts as these have been ascertained by the domestic court, unless it has drawn arbitrary consequences from the evidence¹⁷⁷. It is not, in principle, the task of the European Court to assess itself the facts which have led a national court to take one decision rather than another and to thus replace the judgment of the national courts by its own¹⁷⁸. In this context the Court will not therefore assess whether witness’ statements were accepted as evidence in the proper manner, but rather it will investigate whether the proceedings as a whole, including the way evidence was gathered, were fair¹⁷⁹.

CONCLUSION

The European Court has, in conformity with Article 32 of the European Convention, the task of interpreting the Convention. On the one hand it is interpreting the European Convention, being an international treaty, in accordance with the international rules on the interpretation of treaties enshrined in the Vienna Treaty on the Law of Treaties, while on the other hand, its allegiance to traditional public international law has not deterred the Court from developing a number of original methods of interpretation and application for the European Convention. While over the years the European Court has developed a voluminous case law on the principles of interpretation and application it uses, its case law

¹⁷⁴ ECtHR, *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, § 28.

¹⁷⁵ ECtHR, *Baumann v. Austria*, Judgment of 7 October 2004, § 49.

¹⁷⁶ ECtHR, *Schenk v. Switzerland*, Judgment of 12 July 1988, §§ 45-46.

¹⁷⁷ ECtHR, *Van Mechelen v. Netherlands*, Judgment of 23 April 1997, § 50.

¹⁷⁸ ECtHR, *Kemmache v. France* (n° 3), Judgment of 24 November 1994, § 44.

¹⁷⁹ ECtHR, *Doorson v. Netherlands*, Judgment of 26 March 1996, § 67.

is very casuistic and it is therefore very difficult – if not impossible – to deduce clear rules as to the exact appliance of these rules and principles. Overall, through the use of certain Convention-specific techniques (evolutive and autonomous interpretation) the Court has mostly been able to detach itself from the meaning of the original 1950 Convention text and has been able to give protective effect (principle of effectivity) to the rights and freedoms under the European Convention, while being careful – through the use of other techniques, such as the doctrine of the margin of appreciation, to be (perceived as) moderate in its decision-making.