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**THE MARGIN OF APPRECIATION:
INTERPRETATION AND DISCRETION
UNDER THE EUROPEAN CONVENTION
ON HUMAN RIGHTS**

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Introduction

The meaning of the expression “margin of appreciation” is not immediately apparent to English-speaking lawyers and jurists since the French term from which it derives, *marge d'appréciation*, is more helpfully translated as “margin of assessment/appraisal/estimation”. Broadly speaking it refers to the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights. However, the term is not found in the text of the Convention itself, nor in the *travaux préparatoires*,¹ but first appeared in 1958 in the Commission's report in the case brought by Greece against the United Kingdom over alleged human rights violations in Cyprus.² Since then it has been adopted in numerous other Commission decisions and in over 700 judgments of the Court.³

A number of studies by jurists, lawyers, judges, and Strasbourg officials have attempted to describe the complex contours created in the Convention landscape by the doctrine and to identify fields of application and factors regulating its “bandwidth”.⁴ There is universal acknowledgment of when it first appeared, and broad consensus on several other core issues. First, in addition to Article 15, the doctrine has had a high profile in litigation relating to certain Convention rights – the right to property found in Article 1 of Protocol No. 1, the anti-discrimination provision of Article 14, and the personal freedoms enshrined in Articles 8 to 11 – but a lower profile with respect to others. Second, no simple formula can describe how it works. Third, in spite of the mountain of jurisprudence, its most striking characteristic remains its casuistic, uneven, and largely unpredictable nature. Fourth, while some have argued for the elimination of the doctrine altogether,⁵ most maintain that greater clarity, coherence and consistency in its application are required. But few have ventured to suggest how this might be achieved. The principal objective of this study is to make just such a proposal.

Opinion is divided over a range of other analytical issues. There is, for example, a lack of consensus over whether the doctrine embraces every kind of discretion by national institutions under the Convention, or relates only to certain types. This is linked to the question of whether it pervades the entire Convention or is restricted to specific provisions. Macdonald, for instance, maintains that "in theory there is no limit to the articles of the Convention to which the margin of appreciation could be applied for the Court has never imposed a limit".⁶ However, other commentators have pointed out that it has never been invoked in respect of Article 2 (the right to life), Article 3 (the right not to be subjected to torture or to inhuman or degrading treatment or punishment), or Article 4 (the right not to be held in slavery or servitude),⁷ and that it has had a very limited role in relation to Articles 5 and 6.⁸

Chapter 1

Jurisprudence on the core provisions

Most of the relevant literature adopts a familiar analytical method.⁹ Decisions of the Court and Commission are examined against specific provisions of the Convention in order to discover what kind of margin has been granted and what the determining factors have been. The latter have included whether or not the practice is common in other member states, the importance attributed to specific rights, the nature of (and grounds for) the interference, the text of the particular Convention provision, and the context – for example, whether there is an emergency or a particularly pressing and/or controversial public interest, whether the measure in question is one of a number of equally Convention-compliant alternatives, and whether or not technical expertise or detailed knowledge of local circumstances are required to make a sound judgment.¹⁰

This study will seek to move beyond this approach for two reasons. First, the literature employing this method is now so rich and complete that little more need be added to it except updating as new cases are decided. Since the most recent contributions within this paradigm are only a few years old, there seems little point in squandering the opportunity presented by this research in pursuit of such a marginal gain. But there is a second, and more important, reason for seeking a fresh approach. Adhering to the tram-lines of the Convention's provisions, and the associated case-law, risks reproducing the confusion the margin of appreciation has spawned, when the central purpose of legal scholarship should be to try to resolve such difficulties from first principles.

This monograph argues that the legitimate exercise of discretion by states under the Convention – the key issue raised by the margin of appreciation – hinges critically on the appropriate application of a framework of principles which enable the Convention to be properly interpreted. While

this is not the first time that such a link has been suggested,¹¹ an attempt will be made in what follows to pursue the logic of this inquiry with particular rigour in order to sustain the following conclusion. Although the Convention yields a complex pattern of discretion and constraint, this is capable of being more coherently understood than is generally recognised. The unpredictability noted by many commentators is, therefore, not an inherent characteristic of the margin of appreciation notion, but stems from the reluctance of the Court to spell out all the stages of the argument from interpretive principles to conclusions about state discretion.¹² It follows that if these links were made more explicit, the decisions themselves would become much more comprehensible and most, if not all, could be more easily defended.

However, before proceeding to develop this thesis it is necessary to consider the broad features of relevant Convention jurisprudence on the core provisions. Short summaries of some of the principal cases are offered in Appendix I as more detailed illustrations of how the doctrine has been applied in specific circumstances. For reasons which will be discussed below, the current study endorses the “narrow view” which means, amongst other things, that the margin of appreciation cannot strictly be said to operate beyond the confines of Article 15, from which it originated, and Articles 8 to 11, Article 14, and Article 1 of Protocol No. 1, to which it subsequently spread. Some further remarks are made later on the role of discretion in relation to other parts of the Convention.

I. Article 15

It has been clear since the earliest cases brought under the Convention that Article 15, which permits states to suspend all but a handful of rights¹³ “in time of war or other public emergency threatening the life of the nation”, is subject to a generous margin of appreciation on the grounds that the national authorities are better placed than the Strasbourg institutions to judge when this criterion has been fulfilled (the “better position rationale”).¹⁴ In the case brought in the 1950s by Greece against the United Kingdom over alleged violations of the Convention in Cyprus,¹⁵ the United Kingdom referred to the derogation it had entered and claimed that the civil unrest on the island met the Article 15 requirements. The

Commission concluded that the Strasbourg institutions were competent both to decide whether such a derogation was justified, and whether the measures invoked were limited to those “strictly required by the exigencies of the situation”.¹⁶ However, it added that, in determining the latter, “the Government should be able to exercise a certain measure of discretion” (*une certaine marge d'appréciation*).¹⁷ The issue received no further discussion and the dispute between Greece and the United Kingdom over the status of the island was resolved before the Committee of Ministers had time to consider the matter. A series of subsequent cases have confirmed that, although both the decision to derogate and the measures taken to combat an emergency are subject to a margin of appreciation, they remain justiciable at Strasbourg¹⁸ and, ultimately, it is for the Court to determine whether or not states have acted within “the exigencies of the situation”, giving appropriate weight to such relevant factors as the nature of the rights affected, the background circumstances, and the duration of the emergency.¹⁹

II. Articles 8 to 11

Articles 8 to 11 – which enshrine the rights to respect for private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of expression, and freedom of assembly and association – are drafted in a common form. The first paragraph states the right while the second lists a number of legitimate exceptions. Article 10 (2), for example, provides that the right to freedom of expression 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 margin of appreciation available to national authorities is, however, constrained by two factors found in the text of each of these provisions, and a third derived from one of the core principles of interpretation. First, it must be shown that the interference in question was necessary in a democratic society for one or more of these exceptions. It is not, however, clear when defendant states have the responsibility to prove

that this was the case, or litigants to show that it was not.²⁰ Second, the restriction must be in accordance with, or prescribed by, law²¹ and, third, proportionate to a pressing social need.²²

As with Article 15, although the text of Articles 8 to 11 suggests an objective test of necessity, the proportionality principle permits variable margins of appreciation. The scope of these in relation to each of these provisions is well documented²³ and their character is principally determined, in this context, by the assessment made at Strasbourg of the relative importance of the right and the exception in the specific circumstances, particularly in the light of any relevant common European standard. States have, for example, been allowed a wide margin of appreciation with respect to interferences with rights defended on national security grounds although this has not always been to their advantage.²⁴ Nor has the granting of a wide margin prevented the Strasbourg institutions from conducting thorough reviews of secret surveillance processes when these have been considered appropriate.²⁵ A broad margin has also been permitted with respect to the “protection of health or morals” on the grounds that these notions vary between member states. The few decisions on the protection of health have upheld practices such as compulsory participation by prisoners in cleaning cells,²⁶ the obligation upon soldiers to have their hair cut so that it does not touch their collars,²⁷ and the criminalisation of consensual adult sado-masochistic homosexual practices where the harm inflicted was deemed severe.²⁸ However, a further distinction has been drawn between the expression of sexuality in art or literature – where a broad margin of appreciation has been granted on the grounds that different societies have different views as to what is appropriate²⁹ – and the expression of sexuality in consensual adult non-sado-masochistic gay relationships, where there is now no margin of appreciation on this ground at all because the Court has taken the view that even a strong national abhorrence of such behaviour cannot prevail against the intrinsic importance of the right in question.³⁰ Variable margins of appreciation have also been granted in relation to the “prevention of disorder or crime” exception, often pleaded to justify interferences with the rights provided by Articles 8 and 10. Few generalisations can be made about these decisions, however, since the Court’s view of the proportionality of the official conduct, together with its assessment of the intrinsic

importance of the right and this particular public interest in the circumstances, have played critical roles in determining the outcome.³¹

III. Article 14

The text of the anti-discrimination provision found in Article 14 suggests that discrimination is an objective matter. But in the seminal *Belgian Linguistics* case the Court defined discrimination as a difference between categories of person in the exercise of Convention rights which has “no reasonable and objective justification”.³² This has given rise to a distinction between “different” treatment, which can be justified under the Convention, and “discrimination”, which would violate Article 14.³³ In a series of decisions four factors have emerged as guidelines for drawing the line. First, it must be shown that the treatment in question was less favourable than that received by other comparable groups, the identity of which will usually be determined objectively by the complaint itself. For example, if the alleged discrimination is based on gender, the comparator will be members of the opposite sex not suffering the same alleged disadvantage.³⁴ Secondly, it is for the state to show that, as a matter of fact supported by evidence, the practice is reasonable and rational. This will require reference to the policy goals which it is said to facilitate.³⁵ Thirdly, the effects of the treatment must be disproportionate in relation to the pursuit of the policy objective and must fail to strike “a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention”.³⁶

The second and third factors have provided the basis for variable margins of appreciation, and a fourth factor – whether the practice in question is regarded as non-discriminatory in other democratic states – has been “of major relevance” in determining their scope.³⁷ Since drawing the line between difference and discrimination involves matters of social policy, the width of the margin of appreciation “will vary according to the circumstance, the subject-matter and its background”.³⁸ The policy issue can, however, cut both ways. As Schokkenbroek points out, the Court has assumed certain kinds of differential treatment to be *prima facie* discriminatory – for example those based on sex,³⁹ religion,⁴⁰ illegitimacy,⁴¹ nationality⁴² – on the express or implicit grounds that they run counter to

major priorities of European social policy. The same is arguably true of race but the matter has yet to be fully litigated.⁴³

Less thoroughly discussed in the literature is the fact that state discretion arises at a number of different levels in this context, and is constrained by a variety of factors not found in relation to other provisions of the Convention. Since a breach of Article 14 can only be pleaded in respect of other rights and freedoms in the Convention, albeit even if none of these has been violated in any other way,⁴⁴ it, therefore, accommodates whatever kinds of discretion are associated with these other provisions. For example, the wide margin of appreciation permitted in respect of Article 1 of Protocol No. 1 “bears heavily on the Court’s examination of the discrimination issue.”⁴⁵

IV. Article 1 of Protocol No. 1

Although the right to property was considered fundamental by the classical natural rights thinkers, by the time the Convention was drafted its status and limits had become more controversial. It was, therefore, not included in the main body of the treaty but appeared in the Protocol (now generally called Protocol No. 1 following the adoption of further protocols). The text of Article 1 of this Protocol is the product of a compromise, with the term “peaceful enjoyment of possessions” taking the place of the stronger “right to property”. Of all the rights in the Convention this is limited by the most wide-ranging restrictions, reflecting an awareness that the liberal democratic state may have legitimate grounds for interfering with private property in the interests of, for example, welfare, economic planning, and regulation.⁴⁶ These restrictions are of two kinds. According to the first paragraph, persons may legitimately be deprived of their possessions “subject to the conditions provided for by law and by the general principles of international law” (the *deprivation provision*). The second paragraph adds that this does not impair the right of the state to “enforce such laws as *it deems necessary* [italics added] to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties” (the *control provision*). Since the text of the deprivation provision, in common with similar clauses in Article 15 and Articles 8 to 11, neither suggests nor excludes an objective test, it was

open to the Strasbourg institutions to grant a margin of appreciation to states in identifying the public interest. In practice this has meant that there is a very wide discretion to interfere with private property provided reasonable compensation is paid to those who suffer as a result.⁴⁷ However, the general interest clause in the control provision clearly suggests a subjective test and by implication an even more generous margin of appreciation. According to Winisdoerffer⁴⁸, in its early case-law⁴⁹ the Court interpreted this to mean that states were the sole judges of the necessity of an interference, but later the principle of proportionality was incorporated.⁵⁰ In this context this requires reference to the circumstances of each case,⁵¹ with particular attention being paid to the avoidance of arbitrariness, the possibility of other alternatives for achieving the aim in question, the availability of procedural safeguards, and the consequences of the interference for those affected by it.⁵²

There has, however, been no attempt to specify what either the general or the public interest means in this context and, although the Court often uses the balance metaphor, the breadth of the Article 1 provisions effectively means that, in order to succeed, the applicant must show that a restriction provided by legislation was unreasonable.⁵³ As Winisdoerffer⁵⁴ points out, in practice the Court's review will, therefore, be limited to considering whether, in the abstract, an interference under the deprivation provision pursued a legitimate interest such as combating tax evasion,⁵⁵ promoting social justice,⁵⁶ or regulating agriculture and forestry.⁵⁷ Likewise, under the control provision, review at Strasbourg will be confined to determining whether, in the abstract, the aim was legitimate, for example, for the protection of morals,⁵⁸ the regulation of the sale of alcohol,⁵⁹ town and country planning,⁶⁰ protection of the environment,⁶¹ housing policy,⁶² and crime control.⁶³ It has been argued that the scope of state discretion, in relation to both the aim pursued and the proportionality of the measures introduced to achieve it, remains so large under both provisions that it is only in the most extreme cases that the Court is likely to decide that Article 1 of Protocol No. 1 has been violated.⁶⁴ But this is difficult to criticise, provided, as the Court expects, that those whose property is affected are compensated.

Chapter 2

Interpreting the European Convention

While the traditional case-law studies have been of great assistance in revealing how the margin of appreciation has been applied in specific contexts, there is now a need to identify types of discretion (or types of margin of appreciation) by distinguishing interpretive processes explicit and implicit in the Convention system. When the issue is cast in this light several issues emerge from the shadows. First, the general and abstract language of the text, and the fact that the overall purpose and meaning of the Convention require interpretation, make the exercise of discretion by both national authorities and the Court inevitable.⁶⁵ There can be no justification, therefore, for the view that states should be permitted no discretion whatever in interpreting their obligations.⁶⁶ Secondly, it becomes clearer that the parameters of the Court's discretion also need to be considered.⁶⁷ Thirdly, it is apparent that different kinds of discretion arise in different contexts, for different reasons, and under the auspices of the various interpretive principles discussed below.⁶⁸ This is not always clear in the case-law nor in the commentaries upon it. The margin of appreciation has, instead, been used by the Court as a substitute for careful and painstaking reasoning⁶⁹ which makes the impact of these principles explicit. Indeed, this is one of the principal sources of confusion in, and about, Convention jurisprudence on this matter. Fourthly, not every permissible exercise of judgment or choice by national authorities is self-evidently an instance of the "margin of appreciation" since, as a matter of history, the doctrine arose in a specific context for specific reasons.⁷⁰ Finally, the Strasbourg institutions tend only to refer to the margin of appreciation when a decision is finely balanced. Where they have no doubt about accepting or rejecting the state's case they tend to make no reference to it at all.⁷¹

The quest for answers to the fundamental question – what patterns of discretion and constraint are produced for national authorities and the Court by the processes of interpretation the Convention permits in the contexts raised by specific litigation – must begin with Article 31 (1) of the Vienna Convention on the Law of Treaties 1969. This provides that international conventions should be interpreted in good faith according to the ordinary meaning of their terms in their context and in the light of their overall object and purpose. Several core principles for the interpretation of the Convention flow from this “teleological principle”. Those which have a particular bearing upon the topic in hand are discussed below.⁷²

I. Effective protection

The principle of effective protection, which is inherent rather than explicit in the text, holds that, since the overriding function of the Convention is the effective protection of human rights rather than the enforcement of mutual obligations between States, its provisions should not be interpreted restrictively in deference to national sovereignty.⁷³ The Court has also expressed this idea in other terms, for example, restrictions upon rights should not undermine their “very essence”,⁷⁴ and the Convention should not be interpreted in a manner which leads to unreasonable or absurd consequences.⁷⁵ While the principle of effective protection in itself constitutes a potentially significant limitation upon state discretion, it does not exclude procedural and technical differences between states in the detailed implementation of Convention obligations – for example in their judicial, educational and electoral systems – provided the principle of proportionality is observed.⁷⁶ As Schokkenbroek maintains, although these differences could be said to lie within states’ margins of appreciation, it would be more accurate to use a term such as “implementation freedom” (or “implementation discretion”) which, for reasons which will be explained below, is not the same thing at all.⁷⁷

II. Legality

The principle of legality (or the rule of law), a foundational ideal of the Council of Europe, holds that state action should be subject to effective formal legal constraints against the exercise of arbitrary executive or

administrative power. The importance of this value is expressed in various ways throughout the text of the Convention. For example, Article 2 (1) provides that “everyone’s right to life shall be protected by law” while the right to liberty and security of the person enshrined in Article 5 is subject to a series of limited legitimate exceptions provided these are “in accordance with a procedure prescribed by law”. The right to a fair trial in Article 6 refers to adjudication by “an independent and impartial tribunal established by law”, and Article 7 prohibits conviction and punishment without law. As already noted, the restrictions on the rights to respect for private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of expression, and freedom of assembly and association found in the second paragraphs of Articles 8 to 11 are contingent upon being “prescribed by” or “in accordance with law” and “necessary in a democratic society”. Article 12 provides a “right to marry and found a family according to the national laws governing the exercise of this right”.

The task of defining what “law” means has, therefore, been one of the central tasks for the Strasbourg institutions⁷⁸ and in a series of cases on Articles 8 to 11, the Court identified four questions which provide just such a test:⁷⁹ does the domestic legal system sanction the infraction? is the relevant legal provision accessible to the citizen? is the legal provision sufficiently precise to enable the citizen reasonably to foresee the consequences which a given action may entail? does the law provide adequate safeguards against arbitrary interference with the respective substantive rights? The net effect is to limit the discretion of national executive and administrative bodies in favour of the discretion of national courts. Regrettably, the margin of appreciation concept is too crude to reflect this subtle allocation of responsibility. The “deference to national judicial authority” shown by the Strasbourg institutions has several consequences. First, what counts as “law” may vary between states. Domestic legal provisions may include, for this purpose, not only legislation but also judge-made law typical of common law jurisdictions,⁸⁰ international legal obligations applicable to the state in question,⁸¹ and a variety of “secondary” sources, for example royal decrees, emergency decrees, and certain internal regulations based on law.⁸² Secondly, it has been clear since not long after the Convention was promulgated, that an application

claiming that a national court has made an error of fact is inadmissible under the Convention.⁸³ Thirdly, on the grounds that they are best placed to judge, the Court and Commission permit national judicial authorities a broad discretion in interpreting domestic law and in determining whether or not national law-making procedures have been followed.⁸⁴ Fourthly, the degree of precision required of any given law will depend upon the particular subject-matter⁸⁵ and it is accepted that predicting consequences may require expert advice.⁸⁶ Laws which confer discretion on executive or administrative bodies must indicate its scope, although this may properly be found in administrative guidelines or instructions rather than in the legal text itself.⁸⁷ The Strasbourg organs have recognised that this is particularly necessary where a broad discretion is conferred upon the executive, especially where this is exercised in secret. For example, in a series of cases it has been decided that while secret surveillance can be justified under several of the exceptions in Article 8 (2), there must be adequate formal (though not necessarily judicial) controls which provide effective mechanisms to safeguard against arbitrary targeting or “fishing expeditions”.⁸⁸ It can, however, be argued that there should be a clearer presumption in favour of judicial supervision in such cases, and where this has not been instituted, the respondent state should be required to explain why.⁸⁹

III. Democracy

The principle of democracy, also a foundational ideal of the Council of Europe, tends to pull in the opposite direction to the principles of effective protection and legality. The Preamble to the Convention affirms that member states believe human rights and fundamental freedoms are best maintained by, amongst other things, “an effective political democracy”. Yet, paradoxically, democratic interests and the protection of human rights can conflict. Some rights theorists maintain that an individual right is a claim or an interest which, by nature, must take precedence over claims deriving from the collective interest.⁹⁰ Others suggest that, although the term “right” signifies a particularly important interest worthy of strong institutional protection, this does not of itself justify prioritising it over democratic considerations.⁹¹

Marks maintains that, while the conception of democracy found in the early jurisprudence of the Convention organs was “a starkly drawn contrast with ‘totalitarianism’”, this was later more subtly contrasted with the “absence of adequate safeguards against arbitrary exercises of power even by the more benign welfare state”.⁹² It has since been further refined to include such notions as the separation of powers and the principle of accountability.⁹³ The Court has recently declared that “democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.”⁹⁴ Both Court and Commission have also attempted to identify those Convention rights which are most central to democratic society, particularly in the context of litigation on Articles 8 (2) to 11 (2) which, as already indicated, include a “democratic necessity” test. Freedom of expression has consistently been singled out as particularly vital.⁹⁵ But, as Marks points out,⁹⁶ others have included the right of peaceful assembly,⁹⁷ freedom to form and join professional associations,⁹⁸ freedom from state indoctrination in education,⁹⁹ the right to a fair trial,¹⁰⁰ the right to personal liberty and security,¹⁰¹ freedom from arbitrary detention,¹⁰² and freedom of political association.¹⁰³ It has also been held that the “essential features” of democratic society include “pluralism, tolerance and broadmindedness”,¹⁰⁴ that “democracy does not simply mean that the views of a majority must always prevail”,¹⁰⁵ and that a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.¹⁰⁶ But, beyond this, little attempt has been made to articulate a distinctive theory of democracy¹⁰⁷ with the Strasbourg institutions instead choosing to concentrate upon the necessity of a given interference on public interest grounds in the context concerned.¹⁰⁸ Ideally the Court should have a coherent and consistent conception of the general relationship between rights, democracy and the public interest. But since the task of successfully constructing one is enormously difficult, with few insights from jurists and others to go on, it is perhaps not surprising that this is not the case.

IV. Commonality, autonomous and evolutive interpretation

The principle of autonomous interpretation, which maintains that some of the Convention’s key terms should be defined authoritatively by the Court

independently of how they may be understood by member states,¹⁰⁹ potentially restricts the discretion of the defendant state. However, in its turn, it is constrained by the principle of commonality which appears in four different forms in the Convention. First the “unity principle”, found in the Preamble, states that “the aim of the Council of Europe is the achievement of greater unity between its members” and that one of the methods by which this is to be achieved is “the maintenance and further realisation of human rights and fundamental freedoms”. Secondly, the “common understanding” principle maintains that one of the ways fundamental freedoms are best secured is through a “common understanding and observance” of human rights. Thirdly, the “common heritage principle” affirms that the Convention derives from the “common heritage of political traditions, ideals, freedom and the rule of law” of European countries. Fourthly, the “principle of evolutive or dynamic interpretation” enables the Court to abandon outmoded conceptions of how terms were originally understood as evidenced, for example, by the *travaux préparatoires*, and thereby to endorse significant and durable changes in the climate of public opinion in Europe.¹¹⁰ However, since the various manifestations of the commonality principle, even when combined, cannot justify rigid uniformity, they still leave an indeterminate scope for national variation in the interpretation of Convention obligations.

V. Subsidiarity and review

Several norms in the Convention system indicate that the role of the Court is subsidiary to that of member states and is essentially one of review rather than that of final court of appeal or “fourth instance”.¹¹¹ Articles 1 and 13, respectively, make it clear that primary responsibility for securing the rights and freedoms provided by the Convention lies with national authorities, who also have the obligation to make effective remedies available. Applicants are also required by Article 35 to exhaust domestic enforcement procedures before petitioning the Court. One of the clearest illustrations of how these principles affect national discretion overlaps with the principle of legality since it concerns the discretion accorded domestic courts in fact-finding and in interpreting domestic law.¹¹² The principle of review is found most clearly in Article 19, which provides that “the observance of the

engagements undertaken by the High Contracting Parties shall be ensured by the European Court of Human Rights".¹¹³

VI. Proportionality

The principle of proportionality, in a sense the alter ego of the principle of effective protection, has had a pervasive influence throughout the Convention case-law where relationships between the various concepts, norms, interests, and rights which the Convention embodies have had to be determined.¹¹⁴ While it is not mentioned in the text at all, it is difficult to deny that it is an entirely legitimate judicial creation. Much of the debate about what it means has been conducted in the context of the restrictions upon the rights found in Articles 8 (2) to 11 (2).

In determining whether an interference with a right is proportionate, the impact upon the right in question, the grounds for the interference, the effects upon the applicant and the context are likely to be considered. Two particularly important factors in relation to the grounds for interference concern the importance of local knowledge and the difficulty of weighing competing policy goals objectively. But it is not always clear which party has the burden of proving that the interference has been proportionate. Various phrases have been used by the Court and Commission from time to time to express the idea that the rights in the Convention should take priority with the state carrying the burden of justifying the interference.¹¹⁵ For example, the grounds must be "relevant and sufficient",¹¹⁶ the necessity for a restriction must be "convincingly established",¹¹⁷ the exceptions should be narrowly construed,¹¹⁸ and the interference must be justified by a "pressing social need".¹¹⁹ While this, in principle, limits the scope for national discretion, the particular facts of any given case, and the circumstances prevailing in the given country at the time, may broaden it in practice.¹²⁰ On the other hand, other decisions refer to the need for a "balance" between rights and exceptions.¹²¹

VII. Harmonisation and pluralism

The application of all the principles discussed above is sometimes confused with two processes connected with the interpretation of the Convention –

harmonisation and the preservation of pluralism – which are not, strictly speaking, principles of interpretation themselves. In certain circumstances the principle of commonality may argue in favour of harmonisation, while the principles of democracy and subsidiarity may pull in the opposite direction. Although a common European practice may, therefore, provide strong reasons for limiting state discretion in a given case, it will rarely of itself be conclusive. For example, although this was not formally the way in which it was expressed, in the gay rights cases the Court could be said to have prioritised the principles of effective protection, review, and commonality (particularly evolutive interpretation), over those of subsidiarity and democracy because the particular interest at stake – consensual adult sexual relationships – was deemed particularly vital to personal well-being.¹²² The result has been that the decriminalisation of consensual adult gay sex has been harmonised throughout member states. However, since the expression of sexuality in art or literature has been considered a less vital personal interest (or a type of expression of lesser importance for pluralist democracy than political expression more narrowly defined), the weight of these principles has been reversed with the result that differences in practice have been tolerated in different states.¹²³ Harmonisation and pluralism are, therefore, the *political* results of a certain conception of state discretion generated by a particular *judicial* conception of the interaction between interpretive principles in certain contexts, rather than reasons themselves for such discretion.

Chapter 3

Interpretation and discretion

It is impossible to set out in the abstract how the principles of interpretation discussed above interact with each other. But it is clear that they suggest different patterns of discretion and constraint according to how they are mixed, weighed and applied in different contexts. As already indicated, two particular types of discretion, mistakenly confused for instances of the margin of appreciation, flow directly from given principles: “implementation discretion” from the principles of effective protection and proportionality, and “deference to national judicial authority” from the principle of legality. But in order to obtain a clearer picture of how the principles of interpretation produce different kinds of discretion and constraint beyond this, three different contexts need to be distinguished. First, the heartland of the margin of appreciation is to be found where decisions demarcating rights from the public interest or the needs of democracy have to be taken, because settling this relationship is a task which the principles of effective protection, democracy, legality, subsidiarity, review, commonality and proportionality suggest should be shared by courts (including the European Court of Human Rights) and national executive and administrative institutions. Secondly, the principles of effective protection, review, autonomous and evolutive interpretation, commonality, and legality, combine to suggest that the task of defining rights and obligations in the absence of public interest or democratic considerations is essentially judicial, and, more particularly, one for the European Court of Human Rights rather than for national courts. Therefore, strictly speaking, there can be no margin of appreciation at all in this context, notwithstanding the fact that the concept has mistakenly been used in it. Thirdly, there are various hybrid circumstances, involving primarily matters of definition combined with some public interest

considerations, which embody a complex mix of the elements found in the other two.

I. Rights, democracy and the public interest

The relationship between rights, democracy and the public interest is not straightforward. There are several rival theories of what the public interest means¹²⁴ but little literature on how these might relate to theories of rights.¹²⁵ The complexity is compounded by the fact that a flourishing human rights regime may itself be said to be in the “public interest”. Two different categories of public interest can be distinguished in the text of the Convention. First, there is the preservation of democracy under Article 15 which, as already noted, enables all but the absolute rights to be suspended in “time of war or other public emergency threatening the life of the nation”. Although this is clearly a species of public interest, the text does not expressly use this term. Secondly, various more specific public interests have to be weighed against rights in a variety of non-emergency contexts governed by Articles 8 to 11 and Article 1 of Protocol No. 1.

A. *Democracy in crisis: derogations under Article 15*

Applying the principles of interpretation discussed above, the following rationale for state discretion can be identified in relation to Article 15. First, while the text suggests an objective interpretation of both the justification for derogation and the appropriateness of the measures taken – determinable at Strasbourg under the review principle – the principles of democracy, subsidiarity, and proportionality imply a substantial measure of state discretion. This is because a real emergency places democratic authorities in a genuine dilemma between seeking to observe their normal Convention obligations and exercising their right, under Article 15, to derogate from these if the circumstances warrant it. Judging when these circumstances have arisen will usually not be easy and may involve weighing conflicting public interests in, on the one hand, a flourishing rights regime, and, on the other, in stability and order. The Convention cannot legitimately be interpreted to mean that the rights it enshrines should be upheld even if this risks the disintegration of any given national democracy as a result of restricting its capacity to tackle civil disorder

effectively. Any specific emergency may invite a range of proportionate responses and it is likely that choosing between them will not be easy. There are three principal reasons why this choice should be entrusted to national authorities. First, they are closer to the “coal face” and, therefore, in principle, better placed to make the appropriate decision (the “better position rationale” to which reference has already been made). Secondly, the choice is by nature political rather than judicial and may be highly controversial in the state in question. Thirdly, different responses may be justified in different emergencies in different states. While the case-law of the Court from *Ireland v. the United Kingdom*¹²⁶ onwards makes no explicit attempt to link the width of the margin of appreciation with different types of state (established democracy, fledgling democracy, revolutionary or repressive regime),¹²⁷ this is difficult to square with the Convention’s interpretive framework since the key element in legitimising a measure of state discretion in this context lies in the plausibility of the evidence that the *democratic* integrity of the state in question is genuinely threatened and cannot be defended without extraordinary measures.¹²⁸ Although there is, therefore, a clear justification for state discretion in relation to Article 15, a higher profile for the principle of democracy is required.

B. *Weighing rights and public interests*

Broadly the same rationale underpinning state discretion with respect to Article 15 also applies to Article 1 of Protocol No. 1 and to Articles 8 to 11. As far as Article 1 of Protocol No. 1 is concerned the process by which rights and the public interest should be weighed is straightforward, even if specific decisions are not. Although the assessment of the public interest is the critical factor, the legality requirement also imposes a procedural constraint upon interference with property rights. National executive and administrative action must, therefore, be set in a legislative context and be subject to domestic judicial review, with the principle of effective protection providing a justification for the expectation that compensation will be paid. Although the terms of such legislation may be wide, and the value of the compensation may vary, this is not necessarily illegitimate in this context given the principles of democracy and proportionality and the “better position rationale”.

However, three shortcomings in the Strasbourg jurisprudence have caused considerable conceptual confusion in the complex pattern of discretion and constraint generated by the principles of interpretation with respect to Articles 8 to 11. First, the Court and others have signally failed to draw a vital distinction: while some of the second paragraph limitations are clearly “public interests” in a “pure” sense – there can, for example, be no individual right to the essentially collective goods of “national security” or “territorial integrity” – others may be “public interests” or “individual rights” according to the circumstances. For example, the phrase “preventing the disclosure of information received in confidence” found in Article 10 (2) is capable of referring both to the public interest in the protection of confidences generally, and to the individual right that any specific confidence be respected. Even the phrase the “protection of the reputation or rights of others”, which *prima facie* suggests a range of purely individual rights, can involve public interest considerations. For example, since defamation is largely a matter of fact, the European Court of Human Rights has been reluctant to interfere with the judgment of domestic courts, providing it is convinced that domestic law draws an appropriate line between freedom of expression (an individual right) and unjustified damage to reputations (a violation of an individual right).¹²⁹ This can best be understood as an application of the principle of legality.¹³⁰ Nevertheless, wider scope for criticism of politicians than that available under domestic law has been permitted in certain circumstances by the Court on the grounds that there would otherwise be a danger of inhibiting the free expression which democratic politics require; clearly a public interest factor.¹³¹

Secondly, the Strasbourg institutions have implicitly recognised that the principles of democracy and subsidiarity suggest a measure of national executive or administrative discretion in assessing the “democratic necessity” of a particular public interest restriction upon a first paragraph right, albeit constrained by the principles of effective protection, review, commonality and proportionality. However, they have failed to appreciate that this is not true when conflicts between Convention rights and individual rights exceptions have to be resolved, as section II.B of this chapter will illustrate more fully.

Thirdly, there is confusion over whether the first paragraph rights, or the second paragraph public interest exceptions, should have priority, or whether they should be balanced against each other. As already intimated it is difficult to find a conclusive solution to this dilemma, either as a matter of political or legal theory, or by reference to the fundamental principles underpinning the Convention. However, it would be better if the Court were to select one or other of the available alternatives and stick to it, rather than making apparently arbitrary choices in the litigation before it. An appropriate way forward would be for a much clearer, although rebuttable, presumption to be made in favour of Convention rights, with the public interest exceptions construed narrowly.¹³² After all, it must surely be more than a matter of semantics that the Strasbourg system is concerned with the protection of human rights in a democratic context, rather than with the protection of democracy in a human rights context. States would then have a clearer burden of proving that the right in question ought to be restricted in the circumstances at issue for the sake of the public interest claimed. The implicit assumption made at Strasbourg that the Convention contains a hierarchy of rights, with some more central to democratic society than others, should also be more thoroughly and systematically articulated than is currently the case.¹³³

II. Defining rights and obligations

There are two particular circumstances under the Convention where determining the scope of rights and obligations does not, in principle, involve any national administrative or executive discretion. First, the absolute rights permit no discretion since, by definition, they cannot be absolute if their application varies. Secondly, the principles of effective protection, review, autonomous interpretation and commonality suggest that assessing the relationship between Convention rights, or between a Convention right and an "individual right exception" as found in Articles 8 to 11, requires the European Court of Human Rights to discharge the quintessentially judicial task of *defining* where one right begins and another ends. The absence of any scope for the formal calculation of the public interest excludes the possibility of any national executive or administrative discretion, although the principle of legality may permit some national judicial discretion.

A. *Absolute rights*

There are only four rights in the Convention which are absolute in the sense that their restriction or suspension can never be justified, even in a state of emergency: the right not to be tortured or to be inhumanly or degradingly treated or punished;¹³⁴ the right not to be held in slavery or servitude;¹³⁵ the right not to be convicted for conduct which was not an offence at the time it occurred¹³⁶ and the right not to have a heavier penalty imposed for an offence than the one applicable at the time the offence was committed.¹³⁷ It may be possible to argue about whether or not certain conduct amounts to “torture”. But to allow a state’s definition to prevail against that of the Court would be to introduce a degree of relativity which would not only be inconsistent with the plain meaning of the text of Article 3, but which would also be at variance with the absolute and universalist spirit of these provisions. This does not prevent the Court from taking account of relevant circumstances, the assessment made by domestic courts, and the opinion of medical experts.¹³⁸ It does mean, however, that the same circumstances must have the same consequences in other cases. This is why the Court in *Tyrer*, in effect, applied the principles of evolutive interpretation and commonality, to take into consideration whether judicially authorised corporal punishment had come to be regarded as degrading punishment in member states generally.¹³⁹

As Callewaert points out, given that these considerations also apply to Article 4, it is not surprising that in none of the three decisions on this provision has the Court made any reference to a margin of appreciation.¹⁴⁰ Although not absolute in the same sense, since it is subject to several wide-ranging restrictions and exceptions, the right to life in Article 2 is in an analogous position. The Court has not interpreted the “strictly necessary” clause to include a margin of state discretion in any of the three principal decisions on this provision either, in spite of “the fact that the domestic authorities may claim to be closer to the events at issue”.¹⁴¹ This is capable of being justified in terms of the principles of effective protection and autonomous interpretation which, in this context, suggest the need to avoid what would otherwise be the incongruity of permitting national variation in respect of the right to life but insisting on uniformity in respect of the lesser right to protection from degrading treatment.

B. *Reconciling conflicts between rights*

The Convention, like other human rights treaties, generally neither formally prioritises rights nor prescribes any particular method of resolving conflicts between them. Subject to the principles of interpretation, these tasks are, therefore, largely at the Court's discretion. However, one provision in particular expressly recognises the possibility that some rights should take precedence over others in specified circumstances. Article 6 (1) provides that the press and public may be excluded from trials, thereby interfering with the right to public trial, where, amongst other things, "the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". According to Harris, O'Boyle and Warbrick, "in the limited number of cases that have arisen" on this provision "there is no case in which margin of appreciation language is used and the Commission and the Court have made their own assessment of the need for a restriction without indicating that any discretion is left to the defendant state."¹⁴² The scope for national executive or administrative discretion is limited here on two counts. First, it is a matter for the courts to determine what the "interests of juveniles" and the "private life of the parties" require since these are individual rights involving no public interest element. Secondly, while the "interests of justice" could be interpreted to mean either the public interest in the process of achieving justice or the individual right of a particular party that litigation be settled in their favour, Article 6 (1) makes the application of this clause conditional upon the "opinion of the court", thereby excluding the possibility of administrative or executive discretion.

However, as already intimated, the Court and commentators have failed to appreciate that the reconciliation of the individual rights exceptions in the second paragraphs of Articles 8 to 11 with the rights enshrined in the first paragraphs of these provisions entails an exercise in judicial decision-making quite different from that relating to the public interest exceptions, and one which excludes the possibility of any national margin of appreciation in the strict sense. Take for example the phrase "maintaining the authority and impartiality of the judiciary" in Article 10 (2). While this is capable of referring to the integrity of the judicial branch of government (a public interest), it has been more frequently regarded by the Court as

meaning the rights of parties in litigation.¹⁴³ The Court has been prepared to permit only a narrow margin of appreciation here on the grounds that the domestic law and practice of member states reveal a “fairly substantial measure of common ground”¹⁴⁴ in how this expression is to be understood (an application of the principle of commonality). However, even if it is true as a matter of fact that there is a high level of consensus between member states on what this phrase means in relation to litigants’ rights (and more evidence to substantiate it would be welcome), the margin of appreciation is an inappropriate notion here since determining the relationship between these and other Convention rights should be a matter of autonomous judicial definition and not subject to national executive or administrative policy at all. The end result, however is the same: there is little scope for national variation.

III. Definition, democracy and the public interest

Some of the exercises in interpretation under the Convention involve the definition of rights and obligations with reference also to the demarcation of their boundaries from democracy and the public interest. This implies a measure of discretion on the part of national executive and administrative authorities, regulated by the Court in a subtly different manner from that considered in section I of this chapter. The main areas in which these issues arise concern the identification and determination of the scope of positive obligations, the determination of the scope of national executive and administrative discretion in relation to adjectival clauses in exceptions to rights, and the distinction between difference and discrimination.

A. *Identifying and fulfilling positive obligations*

While most of the obligations undertaken by states in acceding to the Convention are negative in character – they must refrain from activities which would violate rights – the Court has interpreted the text of certain provisions to mean that they must also act positively to protect rights. Such an extension of the requirements of the Convention inevitably reduces the scope of national executive and administrative discretion since it is no longer open to states to interpret their obligations in a manner which would exclude these extra responsibilities. The derivation of positive

obligations, which has been most prevalent in litigation on Articles 8 and 11, and Article 2 of Protocol No. 1, hinges entirely on the Court's autonomous interpretation of the terms of the Convention, allied with the principle of effective protection, and is not regulated by any ready-to-hand formula.¹⁴⁵ Nevertheless, a measure of discretion, subject to the principles of effective protection and proportionality, arises in relation to how a particular positive obligation is discharged.¹⁴⁶ Where states decide to provide a service which they are not required to do under the Convention – for example a system of public education – an obligation arises to manage it in a Convention-compliant manner, for example, by ensuring that it functions without discrimination.¹⁴⁷

B. Adjectival discretion in the definition of exceptions to rights

Subject to certain limits, the Court has been prepared to accord some discretion to national authorities in interpreting indeterminate adjectival terms found in the text – for example “reasonable”, “promptly”, etc. – and others appearing in the case-law, for example “arbitrary”, “excessive”. These issues arise most clearly in the context of Articles 5 and 6. In several cases the Strasbourg institutions have held that national authorities should be allowed a “certain margin of appreciation” in determining whether a particular arrest or detention violates the Convention for failing to fulfil the requirements of “reasonableness”, “promptness”, etc.¹⁴⁸ The rationale here is straightforward. These terms cannot be defined absolutely. Therefore, provided they have been applied according to the Convention's principles of interpretation, and depending upon the circumstances, a range of conduct may be deemed to comply with them which those closest to the coal face, the national authorities, are *prima facie* best placed to judge. For example in *Brogan v. the United Kingdom* the Court held that, while the struggle against terrorism could legitimately prolong the period of detention before terrorist suspects were brought before a judge, the “promptness” criterion should not be so flexible as to impair the “very essence” of the right to liberty.¹⁴⁹ In its view even the shortest period of detention experienced by the four applicants, four days and six hours, was excessive.¹⁵⁰ However, the development of three criteria for determining if a trial has taken place within a reasonable time – the complexity of the case, the applicant's conduct or behaviour, the manner in which the matter was

dealt with by the administrative and judicial authorities – has further restricted the scope of national discretion to determine what constitutes “reasonableness” in this context.¹⁵¹

C. *Difference and discrimination*

It has been argued that, since it involves determining the scope of rights in relation to public policy, the kind of state discretion permitted in the context of Article 14 is similar to that available under the public interest tests in Articles 8 (2) to 11 (2).¹⁵² But there are some subtle differences, apart from the fact that Article 14 does not contain a “prescribed by law” test. In the context of Articles 8 (2) to 11 (2) the state will typically admit an interference then seek to justify it according to one of the public interest exceptions. However, in claims that Article 14 has been violated, public policy serves as a test of whether or not certain treatment can be regarded as discriminatory *as a matter of definition*. States are accorded a measure of discretion in drawing this distinction subject to the limits indicated in Chapter 1.III. Strictly speaking, if states commonly regard a certain practice as discriminatory, a state which regards it merely as “different” enjoys no margin of appreciation at all. However, where state practice varies, the Court has rarely rejected claims that particular treatment should be classed as “different” rather than “discriminatory” providing some plausible connection with a legitimate policy objective can be identified.¹⁵³ But, the rationale for this does not involve the principle of democracy as with respect to Articles 8 (2) to 11 (2). It rests, instead, on the principles of subsidiarity and proportionality which, in this context, hold that where the distinction between difference and discrimination is hard to draw, there are no good reasons for substituting the Court’s preference for that of the defendant state, unless, according to the principle of commonality, a clearer and more objective distinction can be found in the practice of other states.

Conclusion

The following conclusions can, therefore, be drawn about the “margin of appreciation doctrine” in the case-law of the European Convention on Human Rights. First, it is questionable if it is really a “doctrine” at all since it could be said to lack the minimum theoretical specificity and coherence which a viable legal doctrine requires. It is, rather, a pseudo-technical way of referring to the discretion which the Strasbourg institutions have decided the Convention permits national authorities to exercise in certain circumstances. It is also misleading in so far as its use suggests that the various kinds of state discretion identifiable under the Convention have a common identity and rationale. Closer examination shows that this is not so. A good case can, therefore, be made for dispensing with this terminology altogether from the English language versions of the Court's judgments, and other texts where it might otherwise appear, in favour of terms such as “national executive, administrative and judicial discretion”. However, in view of the momentum the expression has gained over the years this is probably too much to hope for. Since the Convention inescapably makes discretion available to both the Court and to national authorities this cannot be a matter for criticism. It is more appropriate instead, therefore, to understand how and where discretion legitimately arises, which national institutions can exercise it, and to appreciate the variety of justifications for its existence and bandwidths.

Some types of discretion flow directly from one or more of the interpretive principles discussed in this study, for example “implementation discretion” from the principles of effective protection and proportionality and “deference to national judicial decision-making” from the principle of legality. But the key to the others lies in seeking to discover the various types yielded when the matrix of interpretive principles both inherent in, and expressed by, the Convention is applied. The key distinction lies between, on the one hand, the resolution of conflicts between rights and

democracy or the public interest, and, on the other, the definition of rights and obligations where the public interest is not a consideration, with a hybrid category straddling both. The former is the heartland of the “margin of appreciation”, and arguably the only place where the term should be used, if it is to be used at all. The principles of democracy, legality, subsidiarity, and proportionality give national democratic institutions a legitimate role in demarcating rights from public interests for several good reasons. First, since drawing such lines will involve weighing difficult and controversial matters concerning the collective interest, it is fundamentally political rather than judicial by nature. Secondly, national authorities are in a better position to obtain and assess local knowledge which the Court may either not have or the significance of which it may misjudge. Thirdly, there may be a range of equally defensible places where such lines could be drawn each of which may attract support from sections of public opinion in the state concerned, and some of which may be more appropriate in some member states than in others. For the Court to substitute its own conception of what is appropriate might, therefore, result in it taking sides in the resolution of genuine human rights/public interest dilemmas which are not amenable to any straightforward legal solution. However, to acknowledge this is not to offer states *carte blanche* in the determination of their obligations since their practices are reviewable at Strasbourg under the principles of effective protection, review, commonality, and proportionality. But the key to determining how these principles should operate lies in a clearer distinction being drawn between those exceptions to Articles 8 to 11 which can legitimately be regarded as public interests and those which should be considered individual rights, in the Court insisting on prioritising Convention rights over public interests, and in states being required to discharge the burden of proof by providing convincing evidence that the public interest should prevail over individual rights in specific circumstances.

National executive and administrative agencies should have no discretion at all when it comes to defining rights and obligations in the absence of a public interest or democratic element since the principles of legality, effective protection, autonomous interpretation, commonality, and review make this a judicial function, and one primarily for the European Court of Human Rights. This is particularly clear with respect to the handful of

absolute rights in the Convention. However, it is no less true, although much less clearly understood, where the resolution of conflicts between rights is concerned, including between those enshrined in the first paragraphs of Articles 8 to 11 and the individual rights exceptions in the second paragraphs of these provisions. It is difficult to deny that some “adjectival discretion” is legitimate under the Convention, but care needs to be exercised in order to ensure that national administrative and executive authorities are not permitted too much latitude in deciding what is “reasonable” etc. As for other hybrid categories where matters of definition combine with public interest considerations – such as in the identification of positive obligations and in relation to the distinction between difference and discrimination – the definitional question needs to be more clearly separated from the determination of the relationship between rights and democratic or public interest considerations.

Finally, although this discussion has focused exclusively on the European Convention it also has implications for national adjudication.¹⁵⁴ Since the “better position rationale” (which lies at the core of the margin of appreciation notion) is fundamentally a transnational device, the margin of appreciation can have no direct domestic application. Domestic courts will, instead, have to settle the scope of national executive and administrative discretion with respect to Convention rights according to the principles of effective protection, democracy, and proportionality. While reference to relevant practice in other states may not be inappropriate it is, however, unlikely to be conclusive.

Appendices

Appendix I. The margin of appreciation illustrated from some leading cases

Article 8

Dudgeon v. the United Kingdom, judgment of 22 October 1981, A 45

The applicant complained that the right to respect for his private life had been interfered with by the fact that the law in Northern Ireland criminalised homosexual activities in private between consenting adults. The Court held that there had been a violation of Article 8. While it accepted that there was widespread opposition in Northern Ireland to proposals by the United Kingdom government to de-criminalise homosexual activities between consenting males over 21, and that this had to be taken into account, this did not dispose decisively of the necessity question since the test was what was “necessary in a democratic society” and a democratic society was characterised by, amongst other things, tolerance and broadmindedness. The interference also had to be proportionate to a pressing social need, the assessment of which was within the state’s margin of appreciation subject to review at Strasbourg. The Court noted that the scope of the margin of appreciation is not the same with respect to each of the aims justifying restriction of a right and that, while in *Handyside* (see below) it had been held to be particularly wide in relation to the “protection of morals”, the nature of the activities in question also had to be considered. In a case such as this involving “a most intimate aspect of private life ... there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8 (2)” (paragraph 52). Such justifications as there were for criminalisation, principally the moral conservatism of Northern Irish society, were outweighed by the detrimental effects which the very existence of the relevant law could have upon the private lives of gay adult males in Northern Ireland. The fact that better understanding and increased tolerance had resulted in de-criminalisation in other member states could not be overlooked either.

Klass and others v. Germany, judgment of 6 September 1978, A 28

The applicants, a public prosecutor, a judge and three lawyers, claimed that Article 10 (2) of the Basic Law of the Federal Republic of Germany, and legislation passed under it (an Act of 13 August 1968, the “G 10”) violated Articles 6 (1), 8 and 13 of the Convention by making provision for interception of mail and telecommunications. The Court held that the provisions constituted an interference with the right to respect for private life under Article 8 and that powers of secret surveillance were tolerable under the Convention “only insofar as strictly necessary for safeguarding the democratic institutions” (paragraph 42). Nevertheless, after examination of the Basic Law, the “G 10” legislation, and the supervisory arrangements, it was unanimously decided that the interferences did not amount to a violation of the Convention. They were in pursuit of a legitimate aim (national security and the prevention of disorder and crime). Although acknowledging the existence of a domestic margin of appreciation, the Court was satisfied that an adequate balance had been struck between the rights of the individual and the needs of a democratic society, especially given technical advances in espionage and the development of European terrorism. Of particular concern was that the provisions in question contained adequate safeguards against abuse. But their precise characteristics depended on all the circumstances of the case, such as the nature, scope and duration of the impugned measures, the grounds required for ordering their activation, which authorities were competent to permit, carry out and supervise them, and the kind of remedy granted by national law. In this case the Court was satisfied that a series of limiting conditions had to be satisfied under G 10 before surveillance could be imposed and that the legislation laid down strict conditions regarding the implementation of surveillance measures and the processing of information thereby obtained. Initial control was effected by an official qualified for judicial office while overall supervision was entrusted to an independent Board of five members appointed by the Bundestag on a proportional basis, and to the G 10 Commission which consisted of three members appointed by the Board for the duration of the legislature. There was no evidence, the Court held, that the surveillance system in question had been improperly operated.

Article 9

Kokkinakis v. Greece, judgment of 26 September 1996, A 260-A

The applicant claimed that his arrest and prosecution for proselytising the Jehovah's Witnesses faith violated his rights under Articles 7, 9, and 10 of the Convention. Settling the matter under Article 9 the Court held that, although prescribed by law and notwithstanding the margin of appreciation, the treatment the applicant had received was not necessary in a democratic society for the protection of the rights and freedoms of others since he had merely been bearing witness to religious belief

rather than engaging in improper proselytism involving such things as pressurising people in distress or need, or using violence or brainwashing.

Article 10

***Handyside v. the United Kingdom*, judgment of 7 December 1976, A 24**

The applicant had been convicted in England in July 1971 under the Obscene Publications Acts 1959 and 1964 for publishing and distributing an English language edition of *The Little Red Schoolbook* and some 10 per cent of his stock had been seized. The book, originally published in Denmark but also freely available in translation in thirteen European countries, was aimed at schoolchildren between the ages of 12 and 18, was anti-authoritarian in tone, included sexually explicit information and advice, and encouraged the smoking of "pot". The Court held that the domestic margin of appreciation embraced the question of whether those who exercised their freedom of expression had discharged the "duties and responsibilities" required of them by Article 10 (2) and that the scope of these duties depended upon the prevailing circumstances and the technical means used to express the views in question. The Court could not find a uniform conception of morals in the domestic law of the various Contracting States because "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" (paragraph 48). It was held that, because of their "direct and continuous contact" with the "vital forces of their countries", State authorities were in a better position than an international judge to assess the "necessity" of a particular measure instituted in pursuit of the protection of morality by way of a "restriction" or "penalty" upon the right to freedom of expression (paragraph 48). But the requirements of proportionality and pressing social need had to be satisfied and domestic practice was subject to European supervision. The Court's supervisory function, which could in no way take the place of the national authorities, required it to pay particular attention to the principles characterising a democratic society, one of the essential foundations of which was freedom of expression, which encompassed not only information and ideas likely to be favourably received but also those which were offensive, shocking or disturbing to any sector of the population. It was also held that the margin of appreciation embraced the weight to be attributed to the failure of the authorities in Northern Ireland and Scotland to take similar action, the free circulation of the book in other European countries, the reputedly routine evasion of prosecution by other more serious forms of pornography in England and Wales, and the failure of the relevant authorities to limit themselves to imposing restrictions upon the book's distribution conditional upon the removal of the offending parts. Taking all these matters into consideration, and paying particular regard to the age of the target readership, the Court decided that

the state had acted within its margin of appreciation and that there had, therefore, been no violation of Article 10.

Lingens v. Austria, judgment of 8 July 1986, A 103

The applicant, a journalist, complained that his right to freedom of expression under Article 10 had been violated by his conviction and fine following a private prosecution for defaming the Austrian Chancellor, Bruno Kreisky, in two magazine articles. Lingens had accused Kreisky of protecting former members of the SS for political reasons and had criticised him for claiming that the Nazi hunter, Simon Wiesenthal, used “mafia methods”. Re-affirming the existence of a margin of appreciation subject to European supervision in respect of Article 10 (2), the Court decided that the conviction was disproportionate and, therefore, unnecessary in a democratic society to protect the reputations of others. It was held that “freedom of political debate is at the very core of the concept of democratic society” (paragraph 42) and that the limits of acceptable criticism are wider with respect to politicians than private individuals. While this does not mean that politicians have no right to protection from defamation in their public lives, the requirements of such protection have to be weighed against the open discussion of political issues. Although the content and tone of the articles were deemed to have been fairly balanced, some expressions were judged to have been likely to harm Mr Kreisky’s reputation. However, since the controversy had occurred around the time of the general election of October 1975 amidst speculation that the Chancellor’s party, the Austrian Socialist Party, would require the support of the Austrian Liberal Party whose leader, Friedrich Peter, had been exposed by Mr Wiesenthal as a former member of the SS, they were considered part of the permissible rough and tumble of political debate. The Court held that the “truth defence” provided by Austrian law to charges of this kind was impossible to fulfil in this instance since matters of opinion based upon undisputed facts were at issue, and that this requirement in itself was a violation of Article 10 of the Convention. The sentence imposed upon Lingens also amounted to a violation of Article 10, the Court concluded, since it could have discouraged both the applicant and other journalists from making similar criticisms in other contexts.

Article 11

United Communist Party of Turkey and others v. Turkey, judgment of 30 January 1998, Reports of Judgments and Decisions, No. 62

The applicants claimed that the dissolution of the United Communist Party of Turkey was a violation of their right to freedom of association under Article 11. The Court held that, although this measure was prescribed by law and pursued the legitimate aim of national security, the margin of appreciation is limited in relation to freedom of political association, and is accompanied by rigorous European

supervision embracing domestic law and judicial decisions, on account of the vital role played by political association in a democracy, and because democracy is the only political model contemplated by the Convention. The restrictions in Article 11 had, therefore, to be construed strictly. Only "convincing and compelling reasons" (paragraph 46) could justify restrictions on the freedom of association of political parties. However, in conducting its review, the task of the Court was not to substitute its own view for that of the national authorities, nor to discover merely if they had exercised their discretion "reasonably, carefully and in good faith". It must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued", whether the reasons adduced were "relevant and sufficient", and whether the national authorities had acted on an "acceptable assessment of the relevant facts" (paragraph 46). Having reviewed all the relevant facts and arguments, the Court held that the interference complained of was disproportionate to the aim pursued and, therefore, infringed Article 11 of the Convention.

Article 14

Belgian Linguistic Case, judgment of 23 July 1968, A 6

Some French-speaking parents in Belgium complained that their rights under Article 2 of Protocol No. 1 and Articles 8 and 14 of the Convention were infringed because the law effectively denied their children education in French. The Court held that a difference in treatment was not necessarily discriminatory provided a reasonable and objective basis could be found and a just balance had been struck between protecting the interests of the community and respecting fundamental rights. The principle of subsidiarity prevented the Court from assuming the role of the competent national authorities who had to make reasonably proportionate and non-arbitrary decisions taking all the relevant circumstances into account. The right to education did not entail a right to be educated in any particular language, providing education was available in at least one of the national languages of a given state. However, that part of Belgian law which precluded certain children from having access to French-speaking schools in certain "special status" communes, solely on the basis of their place of residence, violated Article 14 because it did not apply uniformly to families of both national languages and the relationship between the aim and the means employed was not proportionate.

Swedish Engine Drivers Union v. Sweden, judgment of 6 February 1976, A 20

The applicant trade union (to which some 20%-25% of eligible state railway employees belonged) claimed that the refusal of the Swedish National Collective Bargaining Office to enter into agreements with it, when it had negotiated agreements with the State Employees Union (to which the remaining 75%-80% of eligible railway employees belonged), constituted a breach of Articles 11, 13 and

14 of the Convention. The Court unanimously held that there had been no violation of the Convention. While it recognised that SNCBO policy “unquestionably results in several inequalities of treatment to the prejudice of the ‘independent’ unions such as the applicant” (paragraph 46) the Court accepted that this was based on the legitimate policy of concluding agreements with the most representative unions and was within the state’s “power of appreciation” (paragraph 47).

Rasmussen v. Denmark, judgment of 28 November 1984, A 87

The applicant, who had been ordered to pay maintenance for his divorced wife and her two children, sought to dispute the paternity of one child but was refused leave by a court because the statutory time-limit had expired. He claimed breach of Articles 6, 8 and 14 on the grounds that women were not subject to such time-limits. The Court held that a difference in treatment is discriminatory only if it has no objective and reasonable justification by failing to pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the aim and the means employed. The national authorities have a margin of appreciation – the scope of which will vary according to the circumstances, the subject matter and the background – in assessing whether, and to what extent, differences in otherwise similar situations justify different treatment in law. A relevant factor may be whether or not there is common ground between contracting states. The Court unanimously rejected the application on the grounds that, although the details of comparable arrangements differed from state to state, most differentiated between men and women on this matter and the law in Denmark was proportionate and pursued a legitimate aim since the interests of the child provided one reason for the different time-limits. While the applicant’s case was being considered by the Commission, the law in Denmark was changed, making the time-limits the same for men and women because, amongst other things, of increases in the number of working women with children and of men winning custody cases. But the Court held that this did not mean that the applicant had been treated in a discriminatory manner.

Article 15

The Cyprus case (Greece v. the United Kingdom) (1958-59) 2 Yearbook of the European Convention on Human Rights 174-179

Greece complained about alleged violations of the Convention by the United Kingdom in Cyprus. The United Kingdom responded by referring to the derogation it had entered under Article 15 and claimed that the civil unrest there fulfilled the relevant requirements. The Commission declared itself competent to decide whether such a derogation was justified, and whether the measures invoked were limited to those “strictly required by the exigencies of the situation” as provided by Article 15. However, it added that, in respect of the latter, “the Government should

be able to exercise a certain measure of discretion" (*certain margin d'appréciation*). The issue received no further discussion and the dispute between Greece and the United Kingdom over the status of the island was resolved before the Committee of Ministers had time to consider the matter.

***Lawless v. Ireland*, Commission report of 19 December 1959, B (1960-61), judgment of 1 July 1961, A 3**

The applicant claimed that his detention without trial under emergency powers in the Republic of Ireland because of his suspected involvement with the IRA (then actively engaged in terrorist activities in border areas of Northern Ireland) violated his rights under Articles 5, 6 and 7 of the Convention. Prior to his detention the Irish government had notified the Secretary General of the Council of Europe that it wished to derogate from the Convention under Article 15 although the precise provisions were not specified (Report, paragraph 72). While the Commission's report refers to the margin of appreciation (see summary on p. 203), it adds little of substance to the remarks made in the Cyprus case. The judgment of the Court, on the other hand, contains no reference to it at all but instead states that an emergency was "reasonably deduced by the Irish government from a combination of factors" (paragraph 28). The Court upheld the derogation on the grounds that "the life of the nation" was threatened by the IRA, a secret army engaged in unconstitutional activities determined to use violence to achieve its objectives both inside and outside the national territory, and actively engaged in an escalating terrorist campaign in Northern Ireland in 1956 and 1957. Having considered relevant Irish law, the Court also deemed the internment of the applicant to be proportionate in the circumstances.

***The Greek Case (Denmark, Norway, Sweden and the Netherlands v. Greece)*, Commission report of 5 November 1960, 12 Yearbook of the European Convention on Human Rights (1969)**

Following a *coup d'état* in Greece in 1967, the military government suspended certain constitutional provisions and notified the Secretary General of the Council of Europe that it wished to derogate from the Convention under Article 15. In a case brought by Denmark, Norway, Sweden and the Netherlands, the Commission held that, although both constitutional and revolutionary governments enjoy a margin of appreciation in relation to Article 15, the burden in the present application lay with the Greek military government to prove that derogation was justified (p. 73). Having carefully considered the evidence, the majority was not satisfied that the two-year period of political instability preceding the coup was so serious as to threaten the life of the nation. Nor was it convinced that disorder following the coup could not have been adequately handled by ordinary measures.

Ireland v. the United Kingdom, judgment of 18 January 1978, A 25

In 1976 Ireland applied to the Court complaining that the United Kingdom was in breach of Articles 3, 5, 6, 14 and 15 of the Convention in having instituted in Northern Ireland an anti-terrorist regime of internment without trial which, it was alleged, operated in a discriminatory manner and which had resulted in the ill-treatment of some detainees. Although the existence of an emergency justifying a derogation under Article 15 was not in dispute, the existence of a wide margin of appreciation was confirmed on the grounds that “by reason of their direct and continuous contact with the pressing needs of the moment the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it” (paragraph 207). However, the Court added that this discretion was subject to review at Strasbourg according to the criterion that states must not exceed what is “strictly required by the exigencies” of the situation. On the substantive issue the Court held that “five techniques” of sensory deprivation to which some of the detainees had been subjected amounted to inhuman and degrading treatment, but, contrary to the Commission’s view, did not constitute torture. They were, therefore, in violation of Article 3 which is non-derogable even in an emergency.

Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, A 258-B

The applicants were detained and questioned under the United Kingdom’s anti-terrorist legislation for periods of 6 days 14 hours and 4 days 6 hours respectively. They complained that their rights under Article 5 (3) to be brought promptly before a judicial authority had been violated. The United Kingdom government relied on its derogation of 23 December 1988. The Court affirmed the existence of a wide margin of appreciation, both in relation to the decision to derogate and the measures taken as a result, justified by the “better position rationale” (paragraph 43) and subject to European supervision where appropriate weight would be given to such relevant factors as the nature of the rights affected, the circumstances, and the duration of the emergency. But it was not held that it is the role of the Court to substitute its view as to what measures were most appropriate or expedient since the Government has direct responsibility for striking the proper balance between taking effective action and respecting individual rights.

Article 1 of Protocol No. 1

Sporrong and Lönnroth v. Sweden, judgment of 23 September 1982, A 52

The applicants complained that the length of the periods during which their property in Stockholm had been subject to expropriation permits (23 years in Sporrong’s case and 8 in Lönnroth’s) accompanied by prohibitions on construction (25 years in Sporrong’s case and 12 in Lönnroth’s) infringed their rights under

Article 1 of Protocol No. 1. The Court held that, although technically the permits had not “deprived” the owners of their property, their capacity to use and dispose of it had been significantly reduced in practice. While the prohibitions on construction were deemed to constitute measures relating to the control of property within the second paragraph of Article 1, the expropriation permits were regarded as constituting an interference with the peaceful enjoyment of property under the first paragraph. A majority of 10:9 held that, taking both measures together in the context of planning and re-development of Sweden’s capital city, a fair balance had not been struck between the interests of the community and the rights of the applicants because the latter “bore an individual and excessive burden which could have been rendered legitimate only if they had had the possibility of seeking a reduction of the time-limits or of claiming compensation” (paragraph 73). Applying the same test as that used by the majority, eight of the nine dissentients concluded that, given the wide margin of appreciation available in such cases, there had been no violation of Article 1 of Protocol No. 1.

***Lithgow and others v. the United Kingdom*, judgment of 8 July 1986, A 102**

The applicants claimed that the nationalisation of their property under the Aircraft and Shipbuilding Industries Act 1977 resulted in a violation of their rights under Article 1 of Protocol No. 1 because the compensation they had received was grossly inadequate and discriminatory. The Court held that the obligation to pay compensation in such circumstances derived from a condition implicit in Article 1 of Protocol No. 1 as a whole, and not from the “public interest” clause which concerned the justifications and motives for taking the property and not its value as such. Although the value of compensation was relevant to whether or not a fair balance had been struck between the interests of the community and the rights of the applicants, Article 1 did not guarantee a right to reimbursement of the full market value since this may not be in the public interest where economic reform or social justice is involved. Given their direct knowledge of the society concerned, and that decisions to enact nationalisation legislation commonly involved issues on which there was a range of opinion within any democratic society, the national authorities were in a better position than an international tribunal to judge what was appropriate in the circumstances and therefore had a wide margin of appreciation. Only when the award of compensation was without reasonable foundation would the Court, in its review, impugn the decision. A majority of the Court held that this was not the case here.

***Phocas v. France*, judgment of 23 April 1996, Reports of Judgments and Decisions, 1996-II, No. 7, 519**

The applicant complained that his right to peaceful enjoyment of his property had been violated by the duration of restrictions imposed (from 31 July 1965 to 22 January 1982) in respect of a road improvement scheme. The Court decided

that there had been no violation of Article 1 of Protocol No. 1. While states enjoy a “wide margin of appreciation in order to implement their town-planning policy” (paragraph 55), it was held that a fair balance had been struck between the interests of the community and the rights of the individual because the applicant had had the opportunity to sell his property to the local authority at a price determined by an expropriations judge but had failed to do so within the specified time limit.

Appendix II. Council of Europe documentation

Yearbook of the European Convention on Human Rights, Vols. 1- , 1959- , Martinus Nijhoff Publishers, The Hague/London/Boston. Contains selected decisions of the European Commission of Human Rights; summaries of the judgments of the European Court of Human Rights; and the human rights (DH) resolutions of the Committee of Ministers.

European Commission of Human Rights

Collection of decisions of the European Commission of Human Rights, Vols. 1-46, 1960-1974, Council of Europe

Decisions and reports (DR), Vols. 1- , 1975- , Council of Europe

European Court of Human Rights

Series A: Judgments and decisions, Vols. 1-338, 1961-1995, Carl Heymanns Verlag, Cologne

Series B: Pleadings, oral arguments and documents, Vols. 1-104, 1961-1995, Carl Heymanns Verlag, Cologne

Reports of judgments and decisions, 1996- , Carl Heymanns Verlag, Cologne

Committee of Ministers

Collection of resolutions adopted by the Committee of Ministers in application of Articles 32 and 54 of the European Convention on Human Rights, 1959-1989, 1993, Council of Europe. (*This collection is updated by means of supplements published at approximately annual intervals.*)

Gazette – Committee of Ministers from January 1999

Internet

Council of Europe's Web site: <http://www.coe.int>

Human Rights Web, Directorate of Human Rights: <http://www.humanrights.coe.int>

European Court of Human Rights: <http://www.echr.coe.int>

Committee of Ministers of the Council of Europe: <http://www.cm.coe.int/>

Notes

- 1 H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague/Boston/London: Kluwer, 1996) p. 14.
- 2 *The Cyprus Case (Greece v. the United Kingdom)* (1958-59) 2 *Yearbook of the European Convention on Human Rights*, 172-197.
- 3 Editors' note, "The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice" (1998) 19 *Human Rights Law Journal* 1.
- 4 The most comprehensive are Yourow, *op. cit.* and Y. Arai, "The Margin of Appreciation Doctrine in the Jurisprudence of the European Convention on Human Rights" (unpublished PhD thesis submitted to the University of Cambridge, 21 April 1998). Others include P. Mahoney *et al.*, "The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice" (1998) 19 *Human Rights Law Journal* 1-36; N. Lavender, "The Problem of the Margin of Appreciation" [1997] 4 *European Human Rights Law Review* 380-390; E. Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" (1996) 56 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 240-341; T.H. Jones, "The Devaluation of Human Rights Under the European Convention" (1995) *Public Law* 430-449; R.St.J. Macdonald, "The Margin of Appreciation" in R.St.J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht/Boston/London: Martinus Nijhoff, 1993) 83-124 and "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights" in A. Clapham and F. Emmert (eds.), *Collected Courses of the Academy of European Law: Vol. 2, Book 2 – The Protection of Human Rights in Europe* (Dordrecht/Boston/London: Martinus Nijhoff, 1990) 99-161, and "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights" in *Le droit international à l'heure de sa codification, Études en l'honneur de Roberto Ago (International Law at the Time of its Codification, Essays in Honour of Roberto Ago)* (Milan: Giuffrè, 1987) 187-208; H.C. Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence" (1987) 3 *Connecticut Journal of International Law* 111-159; T.A. O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights" (1982) 4 *Human Rights Quarterly*

- 474-496; C.S. Feingold, "The Doctrine of Margin of Appreciation and the European Convention on Human Rights" (1977-78) 53 *Notre Dame Lawyer* 90-107; C.C. Morriison, "Margin of Appreciation in European Human Rights Law" (1973) 6 *Revue des Droits de l'Homme* 263-286.
- 5 For example, in a partly dissenting opinion, Judge De Meyer stated that it was "high time for the Court to banish that concept from its reasoning" because "where human rights are concerned there is no room for a margin of appreciation which would enable the states to decide what is acceptable and what is not" (*Z v. Finland*, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, 323, paragraph III).
 - 6 R.St.J. Macdonald (1987), *op. cit.*, p. 192.
 - 7 J. Callewaert, "Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?" (1998) 19 *Human Rights Law Journal* 6-9.
 - 8 J. Schokkenbroek, "The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights" (1998) 19 *Human Rights Law Journal* 30-36, 34; Van Dijk and Van Hoof, *Theory and practice of the European Convention on Human Rights* (The Hague/London/Boston: Kluwer, 1998) 86; Arai, *op. cit.*, pp. 28 and 49.
 - 9 Two notable exceptions are P. Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism" (1998) 19 *Human Rights Law Journal* 1-6 and J. Schokkenbroek, *op. cit.*
 - 10 See, e.g., Mahoney, *op. cit.*, pp. 5-6; Schokkenbroek, *op. cit.*, pp. 34-35; Brems, *op. cit.*, pp. 257-293.
 - 11 See for example Yourow (1996), *op. cit.*, Chapter 4; Arai, *op. cit.*, Chapter 11; Mahoney, *op. cit.*, pp. 1-4; Schokkenbroek, *op. cit.*
 - 12 A recent example of an underdeveloped, but nonetheless encouraging, attempt to do just this can be found in *United Communist Party of Turkey and others v. Turkey*, judgment of 30 October 1998, Reports of Judgments and Decisions, 1998-I, 1, paragraphs 28-29.
 - 13 The right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3); the right not to be held in slavery or servitude (Article 4 (1)); the right not to be convicted for conduct which was not an offence

under national or international law at the time it occurred (Article 7 (1)); and the right not to have a heavier penalty imposed for an offence than the one applicable at the time the offence was committed (Article 7 (1)).

- 14 For further details see M. O'Boyle, "The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle" [1998] 19 *Human Rights Law Journal* 23-29; Arai, *op. cit.*, Chapter 10; Yourow (1996), *op. cit.*, pp. 15-21.
- 15 *The Cyprus Case, op. cit.*, 174-9
- 16 Article 15 (1).
- 17 *The Cyprus case, op. cit.*, p. 176.
- 18 *Lawless v. Ireland*, Commission report of 19 December 1959, Series B (1960-61) p. 82, judgment of 1 July 1961, A 3; *The Greek Case (Denmark, Norway, Sweden and the Netherlands v. Greece)*, Commission report of 5 November 1960, 12 *Yearbook* (1969) pp. 72-76; *Ireland v. the United Kingdom*, judgment of 18 January 1978, A 25, paragraph 207; *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, A 258-B, paragraph 43; *Aksoy v. Turkey*, 18 December 1996, Reports of Judgments and Decisions, 1996-VI, 2260, paragraph 68.
- 19 *Brannigan and McBride, ibid.*; *Aksoy, ibid.*
- 20 See S. Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Strasbourg: Council of Europe Human Rights Files No. 15, 1997) 14-17.
- 21 See Chapter 2.II.
- 22 *Handyside v. the United Kingdom*, judgment of 7 December 1976, A 24, paragraphs 48-50; *Silver v. the United Kingdom*, judgment of 25 March 1983, A 61, paragraphs 97-98; *Lingens v. Austria*, judgment of 8 July 1986, A 103, paragraphs 37-41. See also section III.6.
- 23 See, for example, Yourow (1996), *op. cit.*, Chapter 3.C.; Arai, *op. cit.*, Chapters 4-7. Other studies have focused on the limitation clauses across the range of these provisions. See, for example, Greer, *op. cit.*; F.G. Jacobs, "The 'Limitation Clauses' of the European Convention on Human Rights" in A. de Mestral, *The Limitation of Human Rights in Comparative Constitutional Law* (Cowansville: Les Éditions Yvon

- Blais Inc., 1986) 21-40; B. Hovius, "The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?" (1985) 17 *Ottawa Law Review* 213-61.
- 24 For example in *Ochsenberger v. Austria* (Appl. No. 21318/93) the Commission held that the prohibition of Nazi views in Austrian law was justified under Article 10 (2) in the interests of national security, territorial integrity and the prevention of disorder and crime whereas in *Vereniging Weekblad "Bluf!" v. the Netherlands*, judgment of 9 February 1995, A 306 the Court held that the banning of an issue of a left-wing magazine containing an out-of-date confidential security service report could not be justified under the national security exception to Article 10 (2).
- 25 See, for example, *Klass v. the Federal Republic of Germany*, judgment of 6 September 1978, A 28; *Leander v. Sweden*, judgment of 26 March 1987, A 116; Greer, *op. cit.*, pp. 18-23.
- 26 Appl. No. 8231/78, *X v. the United Kingdom*, D R 28 (1982) 5.
- 27 See, e.g. Appl. No. 8209/78, *Peter Stutter v. Switzerland*, D R 16 (1979) 166.
- 28 *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, Reports of Judgments and Decisions, 1997-I, 120.
- 29 Handyside, *op. cit.*; *Müller v. Switzerland*, judgment of 24 May 1988, A 133.
- 30 *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, A 45; *Modinos v. Cyprus*, judgment of 22 April 1993, A 259; *Norris v. Ireland*, judgment of 26 October 1988, A 142.
- 31 See Greer, *op. cit.*, pp. 29-32.
- 32 *Belgian Linguistic Case*, judgment of 23 July 1968, A 6, paragraph 10.
- 33 See, for example, *Swedish Engine Drivers Union v. Sweden*, judgment of 6 February 1976, A 20, paragraph 47.
- 34 *Abdulaziz, Cabales, Balkandali v. the United Kingdom*, judgment of 28 May 1985, A 94, paragraph 74.
- 35 *Ibid.* paragraphs 74-83.
- 36 *Belgian Linguistics Case*, *op. cit.*, pp. 34-35.

- 37 J. Schokkenbroek, "The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation" (1998) 19 *Human Rights Law Journal* 20, 21.
- 38 *Rasmussen v. Denmark*, judgment of 28 November 1984, A 87, paragraph 40.
- 39 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment, *op. cit.*, paragraph 78; *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, A 263, paragraph 67; *Burghartz v. Switzerland*, judgment of 22 February 1994, A 280-B, paragraph 27; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, A 291-B, paragraph 24; *Van Ralte v. the Netherlands*, judgment of 21 February 1997, Reports of Judgments and Decisions 1997-1, 173, paragraph 39. However, a difference in treatment between the sexes in the time-limits for bringing paternity proceedings was not regarded as discriminatory in *Rasmussen*, because such differences were common throughout member states at the time and expressed a legitimate policy objective related to the protection of the interests of the child (*ibid.*, paragraph 41).
- 40 See, for example, *Hoffman v. Austria*, judgment of 23 June 1993, A 255-C, paragraph 36; *Canea Catholic Church v. Greece*, judgment of 16 December 1997, Reports of Judgments and Decisions 1997-VIII, 2843, paragraph 47.
- 41 *Marckx v. Belgium*, judgment of 13 June 1979, A 31, *op. cit.*, paragraphs 48, 62 and 65; *Inze v. Austria*, judgment of 28 October 1987, A 126, paragraph 41.
- 42 *Gaygusuz v. Austria*, judgment of 16 September 1996, Reports of Judgments and Decisions, 1996-IV, 1129, paragraph 42. A distinction is, however, drawn between citizens of the European Union and those from outside (*Moustaquim v. Belgium*, judgment of 18 February 1991, A 193, paragraph 49; *C v. Belgium*, judgment of 7 August 1996, Reports of Judgments and Decisions 1996-III, 915, paragraph 38).
- 43 See Schokkenbroek, *op. cit.*, p. 22.
- 44 *Belgian Linguistics Case*, Com. Rep., (1965) B.3, paragraph 400; *Inze v. Austria*, *op. cit.*, paragraphs 43-47. Where it has decided that the applicant's rights under other provisions of the Convention have been violated, the Court will only consider whether Article 14 has been breached if "a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case" (*Airey v. Ireland*, judgment of 9 October 1979, A. 32, paragraph 30; *Dudgeon*, judgment, *op. cit.*, paragraph 67.)

- 45 Schokkenbroek, *op. cit.*, p. 22; *James and others v. the United Kingdom*, judgment of 21 February 1986, A 98, paragraph 77; *Lithgow and others v. the United Kingdom*, judgment of 8 July 1986, A 102, paragraph 77; *Gillow v. the United Kingdom*, judgment of 24 November 1986, A 109, paragraph 66.
- 46 For a detailed account of the pre-1990 central cases see R.St.J. Macdonald (1990), *op. cit.*, pp. 139-156.
- 47 Y. Winisdoerffer, "Margin of Appreciation and Article 1 of Protocol No. 1" [1998] *Human Rights Law Journal* 18-20, 20.
- 48 *Ibid.*
- 49 *Handyside*, judgment, *op. cit.*, paragraph 62; *Marckx v. Belgium*, judgment, *op. cit.*, paragraph 64.
- 50 *Mellacher and others v. Austria*, judgment of 19 December 1989, A 169, paragraph 47.
- 51 *Hentrich v. France*, judgment of 22 September 1994, A 296-A, paragraphs 45-49.
- 52 *Ibid.*
- 53 Winisdoerffer, *op. cit.*, p. 18; R.St.J. Macdonald (1990), *op. cit.*, p. 145.
- 54 Winisdoerffer, *ibid.*
- 55 *Hentrich v. France*, judgment, *op. cit.*, paragraph 39.
- 56 *James and others*, judgment, *op. cit.*, paragraph 47.
- 57 *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, A 171-A, paragraph 44; *The Holy Monasteries v. Greece*, judgment of 9 December 1994, A 301-A, paragraph 69.
- 58 *Handyside*, judgment, *op. cit.*, paragraph 62.
- 59 *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, A 159, paragraph 57.
- 60 *Allan Jacobson v. Sweden*, judgment of 25 October 1989, A 163, paragraph 57.
- 61 *Pine Valley v. Ireland*, judgment of 29 November 1991, A 222, paragraph 57.
- 62 *Mellacher and others v. Austria*, judgment of 19 December 1989, A 169, paragraph 47.

- 63 *Vendittelli v. Italy*, judgment of 18 July 1994, A 293-A, paragraph 38.
- 64 Winisdoerffer, *op. cit.*, p. 19.
- 65 As others, for example Mahoney, *op. cit.*, p. 2, have also observed. For general studies of the role of discretion in law see K. Hawkins (ed.), *The Uses of Discretion* (Oxford: Clarendon Press, 1992) and D. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1990).
- 66 As observed by Mahoney, *op. cit.*, p. 1 and Schokkenbroek, *op. cit.*, p. 35.
- 67 Mahoney, *op. cit.*, p. 2.
- 68 Schokkenbroek, *op. cit.*, pp. 30-36 also distinguishes between the margin of appreciation and other kinds of discretion, but for different reasons.
- 69 As noted by others, for example Lord Lester of Herne Hill, QC, "The European Convention on Human Rights in the New Architecture of Europe: General Report", *Proceedings of the 8th International Colloquy on the European Convention on Human Rights* (Strasbourg: Council of Europe, 1995) 227, 236-37; R.St.J. Macdonald (1993), *op. cit.*, p. 124.
- 70 Schokkenbroek, *op. cit.*, pp. 31-34.
- 71 *Ibid.*, p. 34.
- 72 General discussions of the principles of interpretation relating to the Convention can be found in F. Ost, "The Original Canons of Interpretation of the European Court of Human Rights" in M. Delmas-Marty and C. Chodkiewicz (eds.), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions*, (Dordrecht/Boston/London: Martinus Nijhoff, 1992) 238-318; F. Matscher, "Methods of Interpretation of the Convention" in R.St.J. MacDonald, *et al.* (eds.), *op. cit.*, pp. 63-81; Van Dijk and Van Hoof, *op. cit.*, Chapter II.
- 73 See Van Dijk and Van Hoof, *ibid.*, pp. 74-76.
- 74 See, for example, Brems, *op. cit.*, pp. 289-290.
- 75 Ost, *op. cit.*, p. 304.
- 76 Schokkenbroek, *op. cit.*, p. 32.

- 77 *Ibid.*
- 78 Schokkenbroek, *op. cit.*, p. 33. See also Greer, *op. cit.*, pp. 9-13.
- 79 *Huvig v. France*, judgment of 24 April 1990, A 176-B, paragraphs 26-35; *Kruslin v. France*, judgment of 24 April 1990, A 176-B, paragraphs 27-36; *Malone v. the United Kingdom*, judgment of 2 August 1984, A 82, paragraphs 66-68; *Leander*, judgment, *op. cit.*, paragraphs 50-52; *Silver*, *op. cit.*, paragraphs 85-88; *Sunday Times v. the United Kingdom*, judgment of 26 April 1979, A 30, paragraphs 46-49.
- 80 *Malone*, judgment, *op. cit.*, paragraph 66; *Sunday Times*, judgment, *op. cit.*, paragraph 47. However, this is not by any means confined to common law jurisdictions. See the extensive discussion about French case-law in *Kruslin*, judgment, *op. cit.*, paras 28-29 and about German case-law in *Barthold v. the Federal Republic of Germany*, judgment of 25 March 1985, A 90, paragraph 46 and in *Markt Intern Verlag GmbH and Klaus Beerman v. Germany*, judgment of 20 November 1989, A 165, paragraphs 28-30.
- 81 See *Groppera Radio AG v. Switzerland*, judgment of 28 March 1990, A 173, paragraphs 65-68 and especially the dissenting judgment of Judge Bernhardt.
- 82 See *De Wilde, Ooms and Versyp* (the "Vagrancy cases"), judgment of 18 June 1971, A 12, paragraph 93; Appl. No. 101761, *X v. the Netherlands*, Coll 8 (1962) 1, 4; Appl. No. 1983/63, *Wallace v. the Netherlands*, Yearbook VIII (1965) 228, 246 and 264; Appl. No. 7736/76, *X v. Switzerland*, D R 9 (1970) 206, 207; Appl. No. 7308/75, *X v. the United Kingdom*, D R 16 (1979) 32, 34-35.
- 83 *X v. the Federal Republic of Germany*, No 254/57, (1957) 1 YB 150, 152.
- 84 *Kruslin*, judgment, *op. cit.*, paragraph 29; *Barthold*, judgment, *op. cit.*, para 48. In *Campbell v. the United Kingdom*, the Court held that "it is not, in principle, for the Court to examine the validity of secondary legislation. This is primarily a matter which falls within the competence of national courts.." (judgment of 25 March 1992, A 233, paragraph 37). However, where the Court decides that the law itself violates the Convention, it will not hesitate to include relevant court decisions in its review of the necessity and proportionality of an impugned measure (*Kokkinakis v. Greece*, judgment of 25 May 1993, A 260-A, paragraph 47).
- 85 *Herczegfalvy v. Austria*, judgment of 24 September 1992, A 242, paragraph 68; *Sunday Times*, judgment, *op. cit.*, paragraph 49. In *Herczegfalvy* the Court held

that such specifications were particularly important where, as in this case, a psychiatric patient under detention alleged improper interference with correspondence, since such persons were "frequently at the mercy of the medical authorities so that their correspondence is their only contact with the outside world." (*op. cit.*, paragraphs 89-91).

- 86 *Groppera*, judgment, *op. cit.*, paragraph 68.
- 87 *Silver*, judgment, *op. cit.*, paragraph 88; *Herczegfalvy*, judgment, *op. cit.*, paragraph 89; *Observer/Guardian*, judgment of 26 November 1991, A 217, paragraph 65 and in *Sunday Times*, judgment of 26 November 1991, A 217, paragraph 63; *Kruslin*, judgment, *op. cit.*, paragraph 33; *Malone*, judgment, *op. cit.*, paragraphs 67 and 68.
- 88 *Leander*, judgment, *op. cit.*, paragraph 51; *Malone*, judgment, *op. cit.*; *Kruslin*, judgment, *op. cit.*; *Leander*, judgment, *op. cit.*; *Klass*, judgment, *op. cit.*; *Kopp v. Switzerland*, judgment of 25 March 1998, Reports of Judgments and Decisions, 1998-II, 524; *Halford v. the United Kingdom*, judgment of 25 June 1997, Reports of Judgments and Decisions, 1997-III, 1004.
- 89 See Greer, *op. cit.*, pp. 22-23.
- 90 See, for example, R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).
- 91 See, for example, J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).
- 92 S. Marks, "The European Convention on Human Rights and its 'Democratic Society'" (1995) 66 *British Yearbook on International Law*, 209-238, 211.
- 93 *Ibid.*, p. 212.
- 94 *United Communist Party of Turkey v. Turkey*, judgment, *op. cit.*, paragraph 45.
- 95 *Lingens*, judgment, *op. cit.*, paragraph 42; *Observer/Guardian*, judgment, *op. cit.*, paragraph 59; *Thorgeirson v. Iceland*, judgment of 25 June 1992, A 239, paragraph 63; *Castells v. Spain*, judgment of 23 April 1992, A 236, paragraph 46.
- 96 *Marks*, *op. cit.*, pp. 213-214.
- 97 *H v. Austria*, Appl. No. 15225/89, Commission, EHRR Commission Supplement No. 1, CD 70. In spite of considerable efforts by the author of this study and the

editors of this series, no record of this case can be found other than that contained in the European Human Rights Reports.

- 98 *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, A 43, paragraph 65.
- 99 *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, A 23, paragraph 53.
- 100 *Delcourt v. Belgium*, judgment of 17 January 1970, A 11.
- 101 *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, A 12, paragraph 65.
- 102 *Winterwerp v. the Netherlands*, judgment of 24 October 1979, A 33, paragraph 39.
- 103 *United Communist Party of Turkey v. Turkey, op. cit.; Socialist Party and others v. Turkey*, judgment of 25 May 1998, Reports of Judgments and Decisions, 1998-III, 1258, paragraph 50.
- 104 *Handyside*, judgment, *op. cit.*, paragraph 49.
- 105 *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, A 44, paragraph 63.
- 106 *Ibid.*
- 107 A notable exception has been the Schermers opinion in the Commission's decision in Appl. Nos. 14234/88 and 14235/88 *Open Door Counselling Ltd and Dublin Well Woman Centre*, report of 7 March 1991, A 246, pp. 64-66.
- 108 See Greer, *op. cit.*, pp. 14-17.
- 109 Ost, *op. cit.*, p. 305.
- 110 Ost, *op. cit.*, pp. 302-303; Matscher, *op. cit.*, pp. 68-70; P. Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" [1990] 11 *Human Rights Law Journal* 57, 62-66.
- 111 H. Petzold, "The Convention and the Principle of Subsidiarity" in R.St.J. Macdonald *et al.* (eds.), *op. cit.*, pp. 41-62.

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- 114 M.-A. Eissen, "The Principle of Proportionality in the Case-Law of the European Court of Human Rights" in R.St.J. Macdonald *et al.* (eds.), *op. cit.*, pp.125-146; J. McBride, "Proportionality and the European Convention on Human Rights" in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) 23-35.
- 115 See especially the partly dissenting opinion of Judge Martens in *Observer/Guardian*, judgment, *op. cit.*, paragraph 11.2.
- 116 *Ibid.*, paragraph 72.
- 117 *Autronic AG v. Switzerland*, judgment of 22 May 1990, A 178, paragraph 61; *Weber v. Switzerland*, judgment of 2 May 1990, A 177, paragraph 47; *Barthold*, judgment, *op. cit.*, paragraph 58.
- 118 See *Klass*, judgment, *op. cit.*, paragraph 42; *Sunday Times* (1979), judgment, *op. cit.*, paragraph 65.
- 119 See e.g. *Observer and Guardian*, judgment, *op. cit.*, paragraph 71.
- 120 *Lingens*, judgment, *op. cit.*, paragraph 43. *Ezelin v. France*, judgment of 26 April 1991, A 202, paragraph 51; *Sunday Times* (1991), judgment, *op. cit.*, paragraph 50.
- 121 See, for example, *Klass*, judgment, *op. cit.*, paragraph 59; *Gaskin v. the United Kingdom*, judgment of 7 July 1989, A 160, paragraph 40; *Barfod v. Denmark*, judgment of 22 February 1989, A 149, paragraph 29.
- 122 *Dudgeon*, judgment, *op. cit.*; *Norris*, judgment, *op. cit.*; *Modinos*, judgment, *op. cit.*
- 123 *Handyside*, judgment, *op. cit.*; *Müller*, judgment, *op. cit.*
- 124 See, e.g., Held, *The Public Interest and Individual Interests* (New York: Basic Books Inc., 1970).

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- 126 *Op. cit.*
- 127 O'Boyle, *op. cit.*, p. 26.
- 128 See also *United Communist Party of Turkey v. Turkey*, where it was held that democracy "appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it" (judgment, *op. cit.*, paragraph 45).
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- 132 As the Court was prepared to do in *Autronic*, *op. cit.*, paragraph 61; *Weber*, judgment, *op. cit.*, paragraph 47; *Barthold*, judgment, *op. cit.*, paragraph 58; *Klass*, judgment, *op. cit.*, paragraph 42; *Sunday Times* (1979), judgment, *op. cit.*, paragraph 65.
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- 145 C. Ovey, "The Margin of Appreciation and Article 8 of the Convention" (1998) 19 *Human Rights Law Journal* 10-12, 10; Schokkenbroek, *op. cit.*, p. 32; Harris *et al.*, *op. cit.*, pp. 19-22.
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- 148 *X v. the Netherlands*, Appl. No. 2894/66, 6 October 1966 (1966) *Yearbook* 564, 568; *Winterwerp*, judgment, *op. cit.*, paragraph 49; *Weeks v. the United Kingdom*, judgment of 2 March 1987, A 114, paragraph 50.
- 149 Judgment of 29 November 1988, A 145-B, paragraph 62.
- 150 *Ibid.*
- 151 Arai, *op. cit.*, p. 61. See, for example, *Neumeister v. Austria*, judgment of 27 June 1968, A 8, paragraphs 20-21; *H v. France*, judgment of 24 October 1989, A 162-A, paragraphs 50-59.
- 152 Harris *et al.*, *op. cit.*, p. 467.
- 153 An exception is *Hoffman v. Austria*, judgment, *op. cit.*
- 154 Practically all States Parties to the European Convention on Human Rights have incorporated it into their domestic law. But this has happened in the United Kingdom only recently. For a brief guide to this legislation see S. Greer, "A Guide to the Human Rights Act 1998" (1999) 24 *European Law Review* 1-21.

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