GABRIEL şi SC HUMANITAS SA în contradictoriu cu pârâtul LIVIU ANTONESEI. Ia act că pârâtul înţelege să solicite cheltuieli de judecată pe cale separată".

La fond, Liviu Antonesei a câştigat, va urma aproape sigur apelul. Cine are dreptate din perspectiva doctrinei în contenciosul cu Gabriel Liiceanu-Humanitas este evident. Dacă Antonesei ar pierde în ţară, este de aşteptat să obţină „dreptatea" la Strasbourg.

Alte situaţii care privesc echilibrul dintre dreptul la demnitate şi libertatea de exprimare sunt şi mai sensibile, şi mai dificil de tranşat. Este motivul pentru care anumite cauze judecate de Curtea Europeană a Drepturilor Omului merită o cât mai bună promovare. Este şi cazul speţei *Cicad c. Elveţiei*.

Un profesor al Universităţii din Geneva (W.O.) a coordonat şi scris prefaţa unei cărţi intitulată *Israel şi celălalt*. Pentru câteva enunţuri din carte, asociaţia Cicad, al cărei scop este combaterea antisemitismului şi apărarea imaginii statului Israel, l-a acuzat, în două articole, că „alunecă direct în antisemitism" şi „merge până la a exprima antisemitism propriu-zis". Profesorul W.O. a introdus o acţiune civilă împotriva Cicad (şi împotriva autorului respectivelor articole) reclamând atingerea adusă onoarei sale. În Elveţia a câştigat, Cicad a făcut plângere la CEDO.

Curtea Europeană a Drepturilor Omului a apreciat că prin condamnarea Cicad, statul elveţian nu i-a încălcat asociaţiei libertatea de exprimare. Judecăţile dezvoltate în această speţă sau reluate sunt de pus la inventar. O primă teză: întrucât drepturile garantate de articolele 8 şi 10 merită un respect egal, tema unei cereri nu poate varia în funcţie de cine a adus cazul la CEDO: în temeiul libertăţii de exprimare sau al demnităţii/ onoarei (§ 48). O altă observaţie la acelaşi paragraf: chiar şi în cazul în care o declaraţie este echivalentă cu o judecată de valoare, aceasta trebuie să se bazeze pe o bază faptică suficientă, fără de care ea ar fi excesivă. Ştim că discursul cu privire la chestiuni de interes general nu poate fi restricţionat fără motive imperioase. Temele care i-au pus faţă în faţă de W.O. şi Cicad erau de interes public. Totuşi, au afirmat judecătorii europeni, relevanţa publică a subiectului în cauză nu ar fi putut constitui un motiv suficient pentru a justifica defăimarea lui W.O. de către asociaţia reclamantă (§ 55).

Contează, subliniază CEDO, dacă ceea ce se reproşează persoanei calomniate are natura unei infracţiuni (§ 56). Nimeni nu poate fi eliberat de răspundere pentru acuzaţiile care nu au o bază faptică, iar un atac bazat pe hotărâri de valoare poate fi excesiv în absenţa vreunei baze factuale (§ 58). Apariţia susţinerilor vătămătoare pe un site (blog) afectează puternic reputaţia şi drepturile întrucât doar simpla introducere a numelui părţii interesate într-un motor de căutare permite să se ajungă la articolul incriminat (§ 60). Un drept la replică nu poate fi considerat o reparaţie adecvată pentru vătămarea adusă dacă acuzaţiile sunt repetate ulterior (§ 61).

Concluzia Curţii: punerea în balanţă a drepturilor concurente în cazul judecat demonstrează că „motivele introduse de instanţele elveţiene pentru a justifica ingerinţa în dreptul asociaţiei reclamante la libertatea de exprimare au fost „relevante şi suficiente" - în sensul articolului 10 § 2 din Convenţie (§ 63)". W.O. nu avea de ce să tolereze încălcarea onoarei sale prin acuzaţia gravă făcută de asociaţia reclamantă.

Cauza *Cicad c. Elveţiei* are o importanţă particulară pentru instanţele româneşti căci acestea au o prea mică experienţă în judecarea unor acuzaţii de antisemitism; conform unor cazuri, chiar prea puţină înţelegere.

NRDO

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The Function of the Margin of Appreciation in the Jurisprudence of the ECtHR

1. Introduction

"A certain measure of discretion" might be taken as a precursor of "the margin of appreciation." It appeared in the decision of the European Commission of Human Rights (hereinafter: the Commission) in the 1958 *Cyprus* case.[1] The case referred to, inter alia, Article 15 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention or the ECHR) which entitles the Contracting Parties to derogate the obligations under the Convention "in time of war or other public emergency threatening the life of the nation… to the extent strictly required by the exigencies of the situation." The Commission took the view that the Government of Cyprus was allowed "to exercise a certain measure of discretion" in assessing a "public emergency threatening the life of the nation" and "the extent strictly required by the exigencies of the situation".[2] However, the case was not a very typical example of the later usage of the margin of appreciation. The reason why the Commission had taken this view might lie in a concern to safeguard certain discretion for the State in a matter of the vital interest of a nation. That, however, was not how the margin of appreciation came subsequently to be understood.

There are different views concerning the origins of the margin of appreciation. Some saw the origin in national legislations[3], while others found it in international law.[4] The Commission and the European Court of Human Rights (hereafter: the ECtHR or the Court) have first explained the margin of appreciation by the specific characteristics of provisions of the Convention, then they provided it with an additional rationale and defined the factors which determine the breadth of the margin. Thus, they created a doctrine on the

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The authors are grateful to Professor Sanja Djajić for her comments and to PhD student Vuk Uskoković for his proofreading of the English text. Manuscript received on September 29, 2019.

1 *Greece v United Kingdom*, (app. no. 176/56), 1958, para 143; Yourow, Howard Charles, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence," *Connecticut Journal of International Law*, vol. 3, no. 1, 1987, p. 111-160, at 118. Feingold, Cora S., Doctrine of Margin of Appreciation and the European Convention on Human Rights, *Notre Dame Lawyer*, vol. 53, no. 1, 1977, p. 90-106, at 91.

2 Yourow, H. Ch., *op. cit*., p. 119, f. 24.

3 Eva Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights," *Zeitschrift für ausländisches* öffentliches *Recht und Völherrecht*, 1996, pp. 240 – 314, at 240. Yourow, H. Ch., *op. cit*., p. 118.

4 Bjorge, Eirik, "Been There, Done That: The Margin of Appreciation and International Law," *Cambridge Journal of International and Comparative Law*, vol. 4, no. 1, 2015, pp. 181-190.at pp. 183 – 187.

margin of appreciation.

Notwithstanding the specific characteristics of the doctrine, the substance of the margin of appreciation is not inherent only in the jurisprudence of the ECtHR. The doctrine has been spreading beyond the area of human rights through other fields of international law, into jurisprudence of other international courts[5] and may, in fact, tend to become — or, indeed, might have even already become—a general doctrine of international law[6].

The margin of appreciation was discussed in connection with the general issues of deference and standard of review.[7] The doctrine was criticized as a juridical opportunism or a retreat before sensitive issues.[8] It was seen as a threat to the universal standards of human rights.[9] According to an opinion, the practice that the ECtHR it simultaneously applies the doctrine and still reviews a national measure or decision deprives the doctrine of predictability and clarity. [10] It was argued that there was an inflation in the use of the doctrine.[11]

Inflated or not, the use of the doctrine by the ECtHR has always been supported by the Contracting States. In 2013 they decided to insert the term "margin of appreciation" in the preamble of the ECHR through Article 1 of Protocol No. 15 from 2013. For the time being the Protocol has not entered into force.[12]The Protocol resolved the issue whether the Contracting States have intended to get a margin of appreciation in the application of the Convention. Having in view specific characteristics of the provisions of the Convention, it might be presumed that the States have always wanted to have certain discretion in the application of the Convention, but now it is quite obvious that it has been the intention of the Parties.

The text will explore the function on the margin of appreciation in the following context. The principle substantive question submitted to the Court usually is whether an act or a failure of a Contracting State is in compliance with an article of the Convention. The Court interprets the Convention to answer to the question. Since the Convention is an

5 De la Roasilla del Moral, Ignacio, "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine," *German Law Journal*, vol. 7, no. 6, June 1, 2006, pp. 611-624, Arato, Julian, "The Margin of Appreciation in International Investment Law," *Virginia Journal of International Law*, vol. 54, no. 3, 2014, pp. 545-578 at 559. Cannizzaro, Enzo, "Proportionality and Margin of Appreciation in the Whaling Case: Reconciling Antithetical Doctrines", *The European Journal of International Law* Vol. 27 no. 4, 2016, pp. 1061–1069.

6 See opposite views by Shany Yuval, "Toward a General Margin of Appreciation Doctrine in International Law?" *The European Journal of International Law* Vol. 16 no.5, 2006, pp. 907 – 940 and Bjorge, Eirik, *op. cit*., pp. 181-190.

7 Alcover, Maria, "Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation," *World Trade Review*, vol. 14, no. 4, October 2015, p. 733-736.

8 Wisniewski, Adam, "On the Theory of the Margin of Appreciation Doctrine," *Polish Review of International and European Law*, 2012, pp. 63-84 at 64.

9 Benvenisti, Eyal, "Margin of Appreciation, Consensus, and Universal Standards"*, New York University Journal of International Law and Politics*, vol. 31, no. 4, 1999, pp. 843-854.

10 Gerards, Janneke, "Pluralism, Deference and the Margin of Appreciation Doctrine," *European Law Journal*, vol. 17, no. 1, January 2011, pp. 80-120, at 106.

11 Kratochvil, Jan, "The Inflation of the Margin of Appreciation by the European Court of Human Rights," *Netherlands Quarterly of Human Rights*, vol. 29, no. 3, 2011, pp. 324-357.

12 In October 2019 two ratification were missing for entering into force. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213

international treaty, the Court applies the rules on interpretation of international treaties as they are laid down in Article 31 – 33 of the Vienna Convention on the Law of Treaties.[13] Having in view the great generality and abstractness of provisions and that the provisions are applied to unlimited number of different situations and to different circumstances, the interpretation is a demanding and complex legal venture. Relying on the provisions on interpretation of international treaties, the Court endeavors to ascertain what is the will, or at least, what is the prevailing will of the Contracting States concerning a disputed issue. The Court explores thus all various expression of the will of the States, including the text of an article of the Convention and Protocols, the context, the preamble, the preparatory works, other relevant international treaties, the comparative practice of the States, the documents of the Council of Europe or other international organizations, etc. The Court consults also its previous practice, its case law. It is possible, and it has indeed happened at times, that all the case law and all the various expressions of the will of States do not contain information specific enough to enable the Court to answer the submitted question. The solutions available to the Court are then the margin of appreciation or judicial activism. These are contrary solutions. The margin of appreciation is considered as judicial restraint in the interpretation of law. Judicial activism is understood as the creation of law.[14] In the case of absence of any common will of the Contracting States, the Court can leave the issue to be resolved by each Party separately, or the Court can itself resolve the issue. In this sense, the margin of appreciation might be defined as the scale of different possible answers to a specific issue, the scale which is allowed by the interpretative sources, including the provisions of the Convention, the comparative practice etc.

Our exploration of the margin of appreciation and of judicial activism in the answers given by the Court will focus on the following three questions as particularly suitable for a profounder understanding of the margin of appreciation: whether Article 8 of the Convention imposes an obligation to the Contracting States to adjust their legal systems to the needs of postoperative transsexuals regarding the change of their sexual identity; which sort of protection against pollution is required by Article 8; and whether Article 3 of the Convention obliges the Contracting Parties to provide the possibility of review and release for people sentenced to life imprisonment. Before the analysis of the relevant cases from the Court's practice, the text will present how the Court has so far developed the margin of appreciation.

2. The basic explanations of the doctrine

The Commission and the Court have observed early that the Convention itself leaves certain discretion to the Contracting States in respect of implementation and application of the Convention. The observation is clearly visible in the *Belgian Languistic* case of

13 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (app. no. 45036/98), Judgment of 30 June 2005, para 100; *Mamatkulov and Askarov v. Turkey* (app. nos. 46827/99 and 46951/99), Judgment of 4 February 2005, para 39; *Saadi v. the United Kingdom* (app. no. *13229/03*), Judgment of 28 January 2008, paras 26-28; *Marguš v. Croatia* (app. no. *4455/10*), Judgment of 27 May 2914, para 35.

14 Popović, Dragoljub, "Prevailing Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights," *Creighton Law Review*, vol. 42, 2009, pp. 361 – 396.

1968. The Commission of Human Rights (hereafter: the Commission) stated: "Article 14 … 'is of particular importance in relation to those clauses' which 'do not precisely define the rights' which they enshrine, but 'leave States a certain margin of appreciation with regard to the fulfilment of their obligation', 'authorize restrictions on, or exceptions to the rights guaranteed' or 'up to a point leave it to the States to choose the appropriate means to guarantee a right'." [15] The Commission observed thus that there were clauses in the Convention which did not define precisely the rights, leaving a certain margin of appreciation with regard to the fulfilment of corresponding obligations.

A similar approach was taken in several other cases. For example, in the *X. v. Germany* from 1963, the Commission declared that it had "frequently held" that paragraph 2 of Articles 8 and 10 left the Contracting States "a certain margin of appreciation in determining the limits that may be placed on the exercise of the rights…" Or, the Court stated in *Engel* that the Convention allowed the national authority "a considerable margin of appreciation" in certain aspect.[16] In the same case, referring to previous cases[17], the Court noted that paragraph 2 of Article 10, like paragraph 2 of Article 8 left the margin of appreciation to the Contracting States.[18] Further evidence of that understanding might be found in terminology used by the Court. In some cases, the Court used the term "power of appreciation", indicating that a Contracting Party was authorized to a certain level of discretion. Thus, in the "*Vagrancy*" case of 1971, the Court observed that paragraph 2 of Article 8 left "the power of appreciation" to the Contracting States.[19] The same term "power of appreciation" was used in the *Golder* case[20] of 1975 and in the *Sunday Times* case[21] of 1979.

Many obligations, as formulated in the Convention and Protocols, are "obligation of results".[22] They require a Contracting Party to achieve a result, leaving the choice of means to the Contracting Party. Thus, in the *Hatton* case of 2003, the Court stated: "Whilst the State is required to give due consideration to the particular interests, the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation."[23]

The margin of appreciation was seen also as a kind of judicial self-restraint.[24] In

15 Case "*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*" (app. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) or the *Belgian Linguistic* case, Judgment of 23 July 1968, p. 24.

16 *Engel and others v. The Netherlands* (app. nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) Judgment of 8 June 1976, p. 27.

17 *De Wilde, Ooms and Versyp v. Belgium* (app. no. 2832/66; 2835/66; 2899/66), Judgment of 18 June 1971, para. 93, and *Golder v. The United Kingdom* (app. no. 4451/70), Judgment of 21 February 1975.

18 *Ibid*., p. 28.

19 De Wilde, Ooms and Versyp, *op. cit*. p. 34.

20 Golder*, op. cit*., para 45.

21 *The Sunday Times v. The United Kingdom* (app. no. 6538/74), Judgment of 26 April 1979, para 59.

22 *LaCrand* (Germany v. United States of America), Judgment, I. C. J. Reports 2001*,* para 111. *Case concerning Pulp Mils on the River Uruguay* (Argentina v. Uruguay), Judgment of the ICJ of 20 April 2010, paras 186, 191.

23 *Hatton and Others v. The United Kingdom* (app. no. 36022/97), Judgment of 8 July 2003, para 123. Fadeyeva v. Russia (app. no. 55723/00), Judgment of 9 June 2005, para 96.

24 Tsarapatsanis, Dimitrios. "The Margin of Appreciation Doctrine: A Low-Level Institutional View," *Legal Studies*, vol. 35, no. 4, 2015, pp. 675-697.

the *Ireland v. The United Kingdom* case of 1978, the Court articulates the doctrine as "the limits on the Court's powers of review".[25] In his dissenting opinion to the judgment in the *Cossy* case of 1990 judge Martens was quite explicit. He explains that "States do not enjoy a margin of appreciation as a matter of right, but as a matter of judicial self-restraint".[26] He adds further: "Saying that the Court will leave a certain margin of appreciation to the States is another way of saying that the Court - conscious that its position as an international tribunal having to develop the law in a sensitive area calls for caution - will not fully exercise its power to verify whether States have observed their engagements under the Convention, but will find a violation only if it cannot reasonably be doubted that the acts or omissions of the State in question are incompatible with those engagements. It is, therefore, up to the Court to decide, in every case or in every group of cases, whether a 'margin of appreciation' should be left to the State and, if so, how much. For this decision various factors may be relevant and will, at the end of the day, have to be balanced".[27]

The margin of appreciation was understood also as the grant of discretion given by the Court to national authorities with respect to the implementation and application of the Convention.[28] In this sense a document titled "The Margin of Appreciation" and posted on the web site of the Council of Europe begins with: "The term 'margin of appreciation' refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights".[29]

The explanation of the margin of appreciation as a kind of judicial self-restraint deserves a small supplement. The Court has never relinquished fully its power of review. It has always maintained a supervision over the exercise of the margin of appreciation. This should not be obscured even by the Court's own somewhat restrained pronouncements on the matter. Thus, in a case the Court stated: "…it should be observed that a State's choice of a specific criminal-justice system, … is in principle outside the scope of the supervision the Court …, provided that the system chosen does not contravene the principles set forth in the Convention."[30] In other words, if we may interpret the quoted statement, the choice of a specific criminal-justice system falls under the margin of appreciation, but the compliance of the system with the principle of the Convention remains under the supervision of the Court.

As stated above, the margin of appreciation is governed now by Protocol No 15, whose Article 1 inserts at the end of the preamble of the Convention a new recital which reads: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in

25 *Ireland v. The United Kingdom* (app. no. 5310/71), Judgment of 18 January 1978, para 207.

26 *Cossey v. The United Kingdom* (app. no. 10843/84) Judgment of 27 September 1990, Dissenting Opinion of Judge Martens, para 3.6.3.

27 *Ibid*.

28 Yourow, H. Ch., *op. cit*., p. 118. Bjorge, Eirik *op. cit*., p. 182. de la Roasilla del Moral, Ignacio, *op. cit*., 611, Eva Brems, *op. cit*., 240. Kratochvil, Jan, *op. cit*., 327.

29 https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

30 *Kafkaris v. Cyprus* (app. no. 21906/04), Judgment of 12 February 2008, para 99.

this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,." Thus, the doctrine created by the Commission and the Court has been accepted by the State Parties and inserted into the text of the Convention.

3. The additional rationale of the doctrine: Subsidiarity, better position of national authorities and cultural diversity

Besides the basic explanations of the margin of appreciation, the Court provided additional rationale of the doctrine in its subsequent cases. These additional grounds were consolidated in *Handyside*[31] in 1976. The Court was asked to decide whether a criminal punishment of the editor of "The Little Red Schoolbook" under the Obscene Publications Acts could be justified by paragraph 2 of Article 10, that is by the protection of morals. The book was published in Denmark, Belgium, Finland, France, Germany, Greece, Iceland, Italy, the Netherlands, Norway, Sweden, Switzerland and several non-European countries.[32] The Court considered first the subsidiary character of the machinery of protection as established by the Convention, then the plurality of morals in the Contracting States and better position of national authorities to evaluate the facts and, after that, the Court concluded that paragraph 2 of Article 10 indeed left to the Contracting Parties a margin of appreciation which covered the punishment of the editor.[33]

Referring to the *Belgian Linguistic* case, the Court underlined in *Handyside* that the international machinery of protection is subsidiary to the national systems of human rights protection. In the *Belgian Linguistic* case, the Court states that "it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention."[34] Closely related to that is the argument on the better position of national authorities. In *Handyside* the Court opined that state authorities were in "direct and continues contact with the vital forces of their countries" and due to that reason they were in better position than the international judge to estimate factual and legal features of the case.[35] The argument of the better position of national authorities was not invoked first time in *Handyside,* and it was indeed repeated afterwards on numerous occasions.[36] Further, the Court notes the absence of "a uniform European conception of morals" and that "the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject.".[37]

31 *Handyside v. The United Kingdom* (app. no. 5493/72) Judgment of 7 December 1976.
32 *Ibid*., para 11.
33 *Ibid*., para 48.
34 Belgian Linguistic Case, *op. cit*., para 10.
35 Handyside, *op. cit*., para 48.
36 Ireland v. The United Kingdom*, op. cit*., para 207.
37 Handyside, *op. cit*., para 48. *Müller and Others v. Switzerland* (app. no. 10737/84) Judgment of 24 May 1988, para 35.

4. The European supervision over the margin of appreciation

The Court, however, has never renounced its supervisory jurisdiction over the margin of appreciation. This jurisdiction has been confirmed by Protocol No 15. The supervision of the Court comprises several issues, such as whether the margin of appreciation exists regarding a disputed act or a failure of a State, what is the breadth of the margin and, consequently, whether the act of failure falls under the margin of appreciation and whether the margin is used in objective and reasonable way.

Thus, having in view the margin of appreciation as implicated by paragraph 2 of Article 8 in the *X. v. The United Kingdom* case of 1970, the Commission stated that it had "ultimately duty to judge whether or not the interference complained of exceeded the margin of appreciation left to the authorities in such cases…" Or, in the *D.G.P.N.V. v. the Netherlands* of 1973 the Commission observed that the Contracting States had a certain margin of appreciation in determining the limits of the right to expression but that they decisions remained open for supervision. In the *X. Y. and Z. v. Belgium* of 1977, in view of the margin of appreciation concerning paragraph 2 of Article 10, the Commission stated that the margin was not unlimited and that the organs of the Convention were "empowered to control the extent of the restrictions imposed and review the exercise of that discretion… "

The margin of appreciation and its limits as determined by the Court in one case does not remain constant and unchangeable. The Court is looking to its case law, to the development of the comparative practice of States or to new treaties to ascertain whether the margin of appreciation has been changed.

5. The factors which determine the breadth of the margin of appreciation

Responding to arguments of the Responded States concerning the existence of the margin of appreciation in cases which were similar in legal matter but different in fact, or commenting on its assessment of the margin in previous cases, the Court defined the factors that determine the breadth of the margin of apperception. The breadth could be understood as a scale of issues covered by the margin. Thus, the breadth is relevant for the issue whether the disputed matter falls under the margin.

In the *Sunday Times* case of 1979, the Court found that the scope of the domestic power of appreciation was "not identical as regards each of the aims listed in Article 10 (2) …".[38] It ascertained thus a difference between two aims: protection of morals and maintaining the authority and impartiality of the judiciary. The Court recalled its finding in *Handyside* about the variety and dynamics of moral views in the Contracting States which precluded the establishment of a fixed criterion with respect to morals. This time, however, with respect to the authority of the judiciary, the Court found that the domestic law and practice in the Contracting States disclosed "a fairly substantial measure of

38 *The Sunday Times v. The United Kingdom* (app. no. 6538/74), Judgment of 26 April 1979, para 59.

common ground in this area".[39] A more extensive common ground implied, according to the Court, "a more extensive European supervision" and "a less discretionary power of appreciation".[40] In fact, the Court based the delineation of the breadth of the margin not so much on the difference of aims but on the existence of common ground between the Contracting States. Later, the Court will use other terms of the same meaning such as "European consensus",[41] "broad consensus",[42] or "widespread consensus".[43] The common ground has become, over time, one of the most important determinants of the breadth of the margin of appreciation.

In the *Dudgeon* case of 1981, the Court has gone a step further in defining the factors which determine the breadth of the margin. The case related to an interference of the States in a very sensitive matter of private life. The Responded State justified the interference by the protection of morals and invoked *Handyside* which left a wide margin of appreciation in that respect.[44] The Court replied, however, that not only the nature of the aim was of relevance for determining the breadth of the margin, but that the nature of the activities involved affected the scope of the margin.[45] Since the case concerned "a most intimate aspect of private life", the Court was of the opinion that only "particularly serious reasons" could justify the interference.[46]

Having summarized its previous practice on the issue, in the *S. and Marper* case of 2008 the Court elaborated on the issue in a more extensive way. The Court stated: "The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (…). Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (…). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (…)."[47]

The Court has usually considered the margin interpreting Articles 8 – 11, 14, 15 of the Convention and Article 1 of Protocol No. 1. We will show below that the margin was used also in interpreting Article 3. Thera are however provisions which are formulated so precisely, such as paragraph 1 of Article 4 or Article 7 of the Convention, that they most probably exclude any margin of appreciation.

The elaboration of the margin of appreciation in *S. and Marper* is extensive but

39 *Ibid*.
40 *Ibid*.
41 *A, B and C v. Ireland* (App. No. 25579/05), Judgment of 16 December 2010, para 175.
42 *Rohlena v. The Czech Republic* (app. No. 59552/08), Judgment of 27 January 2015, para 33, *M.S.S. v. Belgium, Greece* (App. No. 30696/09), Judgment 21 January 2011, para 251.
43 *Micallef v. Malta* (app. No. *17056/06*) Judgment of 15 October 2009, para 31.
44 *Dudgeon v. The United Kingdom* (app. no. 7527/76), 22 October 1981, para 52.
45 *Ibid*.
46 *Ibid*.
47 *S. and Marper v. The United Kingdom* (app. no. 30562/04 and 30566/04), Judgment of 4 December 2008, para 102.

not exhaustive. Thus, for example, in the *Associated Society of Locomotive Engineers & Fireman* case of 2007 the Court makes a difference between the issues of general policy, such as social and economic policies, where the margin of appreciation should be wide, and the issues of defense of the fundaments of democracy where the margin of the appreciation has "only a limited role".[48]

It was said that the common ground, or in other words European consensus, has become one of the most important factors that determine the breadth of the margin. The assertion has, however, to be qualified by something which could be named as the "vital interest" of nation. In past times, during the nineteenth and at the beginning of the twentieth century, there reigned the doctrine that the "vital interest" of nations were within their exclusive domains and therefore not subject to international arbitrations. The ECtHR is far from that doctrine, but it has considered the possibility that very particular national interests might override the European consensus. Two examples will be presented.

In *A, B and C v. Ireland*, the Court finds that "the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of Irish people as to the nature of life (…) and as the consequent protection to be accorded to the right to life of the unborn"[49] makes the opposite widespread consensus among the Parties without relevance in the case. The Court does not consider that this consensus decisively narrowed the broad margin of appreciation of Ireland and states: "A finding that a failure to provide abortion for social reasons breached Article 8 would bring a significant detriment to the Irish public which had sought to protect pre-natal life."[50]

In *Republican Party of Russia v. Russia*, the Court considered that practice in the Contracting Parties reflected a consensus that regional parties should have been allowed to be established. But, the Court found that notwithstanding this consensus, a different approach may be justified where special historical or political considerations exist which render a more restrictive practice necessary.[51] The Court had in mind the instability of the newly established democratic political system in Russia in the first decade of its existence, when it was facing threats from separatist, nationalist and terrorist forces.[52]

6. The margin of appreciation and the fair balance of interests

The search for the fair balance between the interests of individual and the general interest of community "is inherent in the whole of the Convention".[53] The concept of the fair balance includes the weighing of conflicting interests of the individuals and the community.[54] Thus, the sleep disturbances caused by night flights at Heathrow airport is an interference in private life which is not comparable by its weight with that of the

48 *Associated Society of Locomotive Engineers & Fireman* v. The United Kingdom (app. no. 11002/05), Judgment of 27 February 2007, para 46.
49 *A, B and C v. Ireland, op. cit.,* para 241
50 *Ibid.,* para 236.
51 *Republican Party of Russia v. Russia* (App. No. 12976/07), Judgment of 11 April 2011, para 126.
52 *Ibid*., 127.
53 *Rees v. The United Kingdom* (app. no. 9532/81), Judgment of 17 October 1986, para 37.
54 *Hatton and Others v. The United Kingdom* (app. no. 36022/97), Judgment of 8 July 2003, para 125.

criminal measures against Mr. Dudgeon.[55] That resulted in a wider margin of appreciation in *Hatton* than in *Dudgeon*. Or, in Christine Goodwin the Court stated: "[T]he stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety."[56] This finding resulted in a narrowing of the margin of appreciation. On the other hand, "the profound moral views of Irish people" on pre-natal life outweighed the interests of individuals for abortion for social reasons.[57] Ascertaining whether the right balance has been struck, the Court explores which possibilities are at disposal of both sides to satisfy better the protected interests of individuals. Thus, the adjustment of the legal system to needs of the postoperative transsexuals was much less demanding enterprise in France than in the United Kingdom. Consequently, striking the fair balance between the interest of individuals and the general interest of community was not the same in the two countries.[58] Since the prices of houses around Heathrow airport were not diminished, the families affected by night flights could have solved their problems by selling their houses and moving in another part of London. Such a possibility was not available to Mrs. Fadeyeva, who lived in a flat which was not her property.[59] To move away from the steel plant, she should carry a large financial burden. Besides, the Court found that the British authorities acted with much more diligence concerning the noise problem than the Russian authorities concerning the air pollution problem. Due these reasons, the Court concluded that the fair balance had been struck in *Hatton*, but not in *Fadeyeva*.

The striking of the right balance between the interests of individual and the public interest of community is closely interrelated with the issues of the margin of appreciation. The finding whether the fair balance was struck can be relevant for ascertaining whether the margin of appreciation was overstepped.[60]

7. The functioning of the margin of appreciation in the three specific groups of cases

The first two groups of cases relate to Article 8 of the Convention. The third group concerns Article 3. The first group consists of the cases where the Court investigated the existence of a positive obligation of the State to adapt their legal systems to the needs of the postoperative transsexuals. The second group includes two cases where the Court explored duties of the States with respect to the consequences of the pollution of the environment to the right to privacy. The third group of cases comprises cases in which the

55 *Ibid*., para 123.
56 *Christine Goodwin v. The United Kingdom* (app. no. 28957/95) Judgment of 11 July 2002, para 77.
57 A, B and C v. Ireland*, op. cit.*
58 *B. v. France* (app. no. 13342/87) Judgment of 25 March 1992, para 51.
59 *Fadeyeva v. Russia* (app. no, 55723/00), Judgment of 9 June 2005.
60 Hatton, *op. cit*. para 129.

court examined a positive obligation of the States with respect the possibility of review and release for life-sentence prisoners. The analysis will show that the margin of appreciation is not a static but rather an evolving one, and will endeavor to sketch this evolution with respect to certain factors. Furthermore, it will cast light on the relationship between the margin of appreciation and the fair balance of interests.

7.1 The cases concerning the adjustment of the legal system to the needs of post-operative transsexuals

The issue was whether the term "respect" in Article 8 of the Convention included a positive obligation of a Contracting Party to make changes in their legal systems to enable legal adjustment for the individuals who changed gender. The Court was asked to answer the question in several cases between 1986 and 2014. In spite of certain legal developments in the majority of the Contracting Parties towards legal recognition of the new sexual identity of the post-operative transsexuals, the Court found that there were not enough commonalities in the comparative practice concerning a number of specific relevant issues to declare the existence of a European consensus. Thus, the Parties have enjoyed wide margin of apperception concerning these issues. In two cases, *B. v. France* and *Christine Goodwin,* a failure of the Responded States to strike a fair balance of interests outweighed the missing common ground. In *Christine Goodwin* the margin of appreciation was narrowed, but it will continue to cover some issue, as it is shown in *Hämäläinen*.

Having found in the *Rees* case of 1986 that there was "little common ground between Contracting States in this area" and "the law appears to be in a transitional stage", the Court stated that this was an area in which the Contracting Parties enjoyed a wide margin of appreciation.[61] It added that the existence of a positive obligation has to be grounded on the fair balance that has to be established between the general interest of the community and the interests of the individual.[62] The Court noted the readiness of national authorities to mitigate the conditions of persons of the changed gender, but it considered that a change in the birth record system, as demanded by the applicant, would undermine the system's historical integrity, and in other ways would "have important administrative consequences and would impose new duties on the rest of the population".[63] Thus, according to the Court's understanding, the fair balance might have been reached by incidental adjustments to the existing system, while the change of the system as a whole remained in the margin of appreciation of the Respondent State.[64] Being conscious of the seriousness of the problems of transsexual persons and the changes that were occurring in the area, the Court advised that the matter should have been kept under review "having regard particularly to scientific and societal developments".[65]

Four years later in the *Cossey* case 1990, the Court was of the opinion that, although certain legal documents of the EU and the Council of Europe encouraged harmonization of laws and practice in this field, little common ground existed between the Contracting

61 *Rees v. The United Kingdom* (app. no. 9532/81), Judgment of 17 October 1986.
62 *Ibid*.
63 *Ibid*., para 42.
64 *Ibid*.
65 *Ibid*., para 47.

Parties and, thus, they continued to enjoy a wide margin of appreciation.[66] Having in view that no significant scientific development occurred in the meantime, the Court concluded that the circumstances did not demand a departure from the decision in *Rees*.[67]

The change happened in the *B. v. France* case of 1992 and was brought about by a different constellation of interests, or, to put it more precisely, by a different relationship between the general and individual interests. Having in view many specific legal issues concertning the adjustment of the legal system to the needs of post-operative transsexuals, the Court ascertained that sufficiently broad consensus between the Contracting Parties has not been achieved and the Court remained in that respect in line with *Rees* and *Cossey*.[68] The Court found, however, that there were "noticeable differences between France and England with reference to their law and practice on civil status, change of forenames, the use of identity documents, etc."[69] It seems that the differences made less complicated and demanding for France to make adjustment. The Court ascertained, also, that "the inconveniences complained of by the applicant in this field reach a sufficient degree of seriousness to be taken into account for the purposes of Article 8".[70] The Court concluded that "even having regard to the State's margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual (see paragraph 44 above) has not been attained, and there has thus been a violation of Article 8".[71]

In 1998 in the *Sheffield and Horsham* case, the Court did not again find enough common ground of legal development between the Contracting States to eliminate the margin of appreciation.[72] Liberty, a non-governmental organization based in London submitted written observation informing that the majority of Member States of the Council of Europe were going towards giving full legal recognition to gender reassignment.[73] Liberty informed that "out of thirty-seven countries analysed, only four (including the United Kingdom) do not permit a change to be made to a person's birth certificate in one form or another to reflect the re-assigned sex of that person".[74] Since the comparative survey did not indicate the existence of common approaches to "the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender", the Court was of the opinion that the legal development was not characterized by enough commonalities in respect to more specific issues to be taken as a common ground which would disqualify the margin of appreciation.[75] Comparing facts of the case with facts in *B. v. France*, the Court did not find that the failure of the authorities to recognise the applicants' new gender gave

66 *Cossey v. The United Kingdom* (app. no. 10843&84) Judgment of 27 September 1990, para 40.
67 *Ibid*.
68 B. v. France, *op. cit*., para 48.
69 *Ibid*., para 51.
70 *Ibid*., para 62.
71 *Ibid*., para 63.
72 *Sheffield and Horsham v. The United Kingdom* (app. nos 22985/93 and 23390/94) Judgment of 30 July 1998, para 58.
73 *Ibid*., para 35.
74 *Ibid*.
75 *Ibid*., para 57.

"rise to detriment of sufficient seriousness as to override the respondent State's margin of appreciation in this area".[76]

The change happened again in the *Christine Goodwin* case in 2002. The common ground between the Contracting States had not as yet emerge, but the Court noted "a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".[77] It might be little surprising that the Court attributed more importance to the continuing international trend then to the lack of a common European approach.[78] The change was caused by a new appraisal of the fair balance between the general interest of the community and the interest of post-operative transsexuals. The importance of the historical integrity of the birth record system, which had been highly valued in *Rees*, was now diminished.[79] The 2000 Report of the Interdepartmental Working Group established by the Secretary of State for the Home Department helped the Court to find that the problems concerning birth registration, access to records, family law, affiliation, inheritance, employment, social security and insurance were not so much compelling.[80] On the other hand, much more weight was attributed to the suffering of individuals than in *Rees, Cossey,* and *Sheffield and Horsham*. Thus, the Court found that there were no significant factors of public interest that outweigh the interest of the applicant.[81] On the other hand, the Court underlined the importance of the principle of personal autonomy in the interpretation of Article 8 and stated: "In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved."[82] The Court concluded that the matter did not fall within the margin of appreciation, "save as regards the appropriate means of achieving recognition of the right protected under the Convention".[83] Thus the issue of the existence of a positive obligation of a Contracting Party to adjust the legal system to the needs of post-operative transsexuals has been moved outside of the margin of appreciations. The choice of means for fulfilment of the obligation has remained in the margin.

Referring to Christine Goodwin the Court has repeated in later cases that "[W]hile affording a certain margin of appreciation to States in this field, it has held that States are required, in accordance with their positive obligations under Article 8, to recognise the change of gender undergone by post-operative transsexuals through, *inter alia*, the possibility to amend the data relating to their civil status, and the ensuing consequences".[84]

The Court narrowed thus the margin of appreciation in *Christine Goodwin*. But, how much was the margin narrowed? That might be gauged in the *Hämäläinen* case. In the

76 *Ibid*. para 58.
77 Christine Goodwin, *op. cit*., para 85.
78 *Ibid*.
79 *Ibid*., para 87.
80 *Ibid*., para 91.
81 *Ibid*., para 93.
82 *Ibid*., para 90.
83 *Ibid*., para 93.
84 *Hämäläinen v. Finland* (app. no. 37359/09) Judgment of 16 July 2014, para 68, *X v. The Former Yugoslav Republic of Macedonia* (app. no. 29683/16) Judgment of 17 January 2019, para 5.

Hämäläinen case of 2014 the issue appeared in connection with the recognition of the same sex marriages. The Finnish Transsexual Act allows the change of gender status and identity number to the person who is not married, or if married under consent of the spouse. Ms Hämäläinen was married and as her spouse did not give consent, her request for the change was rejected.[85] An option of divorce, at disposition of the applicant, was contrary to her religious convictions. She was not also to accept the registered partnership. The issue was thus whether the Finnish non-recognition of the same sex marriage contravenes to the Finish obligation to recognize the change of identity, as the obligation was formulated in Christine Goodwin? Having ascertained that there was no any European consensus on same-sex marriages nor any consensus as how to deal with gender recognition in the case or pre-existing marriages, the Court observed that "the margin of appreciation to be afforded to the respondent State must still be a wide one".[86] How much wide? The Court stated: "This margin must in principle extend both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests."[87] The Court weighed all the interests involved, including the interest of the applicant and of the spouse and the general interest. Having in view the options afforded by the Finnish law to the applicant, the Court found that the fair balance of interest had been struck in the case and, consequently there was no breach of Article 8.[88]

Now, if we read together *Christine Goodwin* and *Hämäläinen* we can see that the obligation of legal recognition of a new gender identity of a post-operative transsexuals is not an unlimited obligation and remains under control of the fair balance of interests test.

7.2 Cases concerning the pollution of the environment and the right to privacy

There are many cases concerning the pollution of the environment and the right to privacy. The analysis is limited to *Hatton* and *Fadeyeva*. The cases point at the significance of the fair balance of interest in connection with the margin of appreciation. The complexity of the issue can be guessed from the fact that in *Hatton* the chamber and the Grand Chamber gave different answers to the question. The Court investigated in *Hatton* the substantive side of the matter—the balance of interests — together with the procedural side — the procedure that should give due weight to interests of the individuals. In that case the Court faced the issue of the factors which determined the breadth of the margin in contrary ways.

The question in *Hatton* was whether the 1993 Government's measure governing the night flights at the Heathrow airport violated the right to respect for private and family life? The applicants submitted that, after the 1993 scheme was introduced, the level of noise caused by aircraft taking off and landing at Heathrow airport between 4 a.m. and 7 a.m. increased significantly. They contended that they found it difficult to sleep after 4 a.m., and

85 Hämäläinen*, op. cit*., paras 13 and 14.
86 *Ibid*., paras 74 and 75.
87 *Ibid*. para 75.
88 *Ibid*. paras 76 – 89.

impossible after 6 a.m. In January 1993, the government published a Consultation Paper regarding a proposed new scheme for regulating night flights at the three main airports serving London: Heathrow, Gatwick and Stansted. The Consultation Paper set up four objectives of the review being undertaken (so far as Heathrow was concerned): to revise and update the existing arrangements; to introduce a common night flights regime for the three airports; to continue to protect local communities from excessive aircraft noise levels at night; and to ensure that competitive influences and the wider employment and economic implications were taken into account. In a section entitled "Concerns of local people", the Consultation Paper referred to arguments that night flights should be further restricted or banned altogether.[89] But, the applicants contended that sleep prevention has never been the subject of adequate scientific study. They submitted that basic factual information was needed to support an increase in night flights under the 1993 scheme, and that it was not assembled by the Government.

The Court considered that in a case such as the present one, involving State decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinize the decision-making process to ensure that due weight has been accorded to the interests of the individual. The Court observed that the submitted question might be considered under paragraph 1 of Article 8 as an exploration of a positive obligation of the State to take measures to secure the applicants' right to private and family life or under paragraph 2 of the Article and as an investigation of the justification of the interference in the right. Concerning that the Court stated: "In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance."[90]

The Court was faced with conflicting views as to the breadth of the margin of appreciation to be applied: on the one hand, the Government claimed a wide margin on the ground that the case concerned matters of general policy, whereas, on the other hand, the applicants claimed that where the ability to sleep is affected, the margin is narrow because of the "intimate" nature of the right protected. Considering the issue, the Court found that the sleep disturbances were not comparable by their weight with the criminal measure considered in *Dudgeon* which required "an especially narrow scope" of the margin.[91]

It seems that the Chamber and the Grand Chamber did not differ so much with respect to the margin of application but rather as to whether fair balance was struck from a chiefly procedural point of view. The Chamber stated: "in the absence of any serious attempt to evaluate the extent or impact of the interferences with the applicants' sleep patterns, and generally in the absence of a prior specific and complete study with the aim of finding the

89 *Hatton and Others v. The United Kingdom* (app. no. 36022/97), Judgment of 8 July 2003, para 36.
90 *Ibid.*, para 104.
91 *Ibid*., para 123.

least onerous solution as regards human rights, it is not possible to agree that in weighing the interferences against the economic interest of the country – which itself had not been quantified – the Government struck the right balance in setting up the 1993 Scheme."[92] The Grand Chamber disagreed. It referred to the fact that the authorities had constantly monitored the situation, that they performed "a series of investigations and studies carried out over a long period of time," that the applicants and other were informed about the measure, had opportunity to express their views and had the access to the court in the case of ignoring the views.[93] Thus, the Grand Chamber found that the authorities did not overstep their margin of appreciation by failing to strike a fair balance of interest.[94]

The Grand Chamber's judgment in this particular case, in that it concludes, contrary to the Chamber's judgment of 2 October 2001, that there was no violation of Article 8, seemed to Judges Costa, Ress, Türmen, Zupančič, and Steiner to deviate from the developments in the case-law and even to take a step backwards. They think that it gives precedence to economic considerations over basic health conditions in qualifying the applicants' "sensitivity to noise" as that of a small minority of people. The trend of playing down such sensitivity – and more specifically concerns about noise and disturbed sleep – runs counter to the growing concern over environmental issues all over Europe and the world. The Judges noted, "a simple comparison of the above-mentioned cases (*Arrondelle*, *Baggs* and *Powell and Rayner*) with the present judgment seems to show that the Court is turning against the current".[95] Although they might agree with the judgment when it states: "the Court must consider whether the State can be said to have struck a fair balance between those interests [namely, the economic interests of the country] and the conflicting interests of the persons affected by noise disturbances", the fair balance between the rights of the applicants and the interests of the broader community must be maintained. The margin of appreciation of the State is narrowed because of the fundamental nature of the right to sleep, which may be outweighed only by the real, pressing (if not urgent) needs of the State. Incidentally, the Court's own subsidiary role, reflected in the use of the "margin of appreciation", is itself becoming more and more marginal when it comes to such constellations as the relationship between the protection of the right to sleep as an aspect of privacy and health on the one hand and the very general economic interest on the other hand.[96]

In the *Fadeyeva* case of 2005, the question submitted to the Court was whether a failure of national authorities to protect Mrs. Fadeyeva from air pollution, which was produced by a local iron smelter, violated her right to private life under Article 8. The issue was whether the State had a positive duty to take measures to protect the applicant. The Court found that "the State did not offer the applicant any effective solution to help her move away from the dangerous area. Furthermore, although the polluting plant in issue operated in breach of domestic environmental standards, there is no indication that the State designed or applied effective measures which would take into account the interests

92 *Hatton and Others v. The United Kingdom* (app. no. 36022/97), Judgment of 2 October 2001, para 106.
93 *Hatton and Others v. The United Kingdom* (app. no. 36022/97), Judgment of 8 July 2003, para 128.
94 *Ibid*., para 129.
95 *Hutton and Others v. The United Kingdom*, Grand Chamber, Joint dissenting opinion of Judges Costa, Ress, Türman, Zupančič and Steine, para 5.
96 *Ibid.*, para 17.

of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels."[97] Consequently, the Court concluded that "despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life."[98]

7.3. Cases concerning release of life-sentence prisoners

The Commission and the Court explored whether Article 3 imposes a positive obligation to the Contracting Parties to enable a review of the life sentence prisoners and if the purpose of punishment was achieved, the release in many cases between 1978 and 2013. The margin of appreciation was narrowing over the times due to growing European consensus concerning the issue.

Having in view his bad physical and mental health, Mr. Kotalla, who was sentenced to life imprisonment, claimed that his further detention in prison was in breach of Article 3. Investigating legal grounds of the claim in the *Kotalla* case[99] of 1978, the Commission explored whether life sentence itself was by itself contrary to Article 3, whether irreducibility of the life imprisonment was incompatible with the Article, and whether further detention of the applicant, having in view his physical and mental illness, violated Article 3. At that time the capital punishment was not yet prohibited and nobody considered life sentence as opposite to Article 3. Concerning the second issue the Commission observed that the General Report on the Treatment of Long-Term Prisoners, prepared by the Sub-Committee No XXV of the European Committee on Crime Problems in 1975 "considered that 'it is inhuman to imprison a person for life without any hope of releasé' and that 'nobody should be deprived of the chance of possible release'".[100] The Commission observed also that Resolution (76) 2 on the Treatment of Long-Term Prisoners adopted by the Committee of Ministers of the Council of Europe recommended to the Member States to "adapt to life sentences the same principles as apply to long-term sentences and to ensure that a review of sentences with a view to determining whether or not a conditional release can be granted should take place if not done before, after eight to fourteen years of detention and be repeated at regular intervals ."[101] The Commission noted further that the German Federal Constitution Court and the Italian Constitutional Court considered that prisoners punished by the life imprisonment should have a legal possibility of conditional release by means other than an act of grace.[102] The Commission then stated, however, that it recognized the desirability of such solution in criminal justice, but that it did not find any provision of the Convention, including Article 3 that requires such solution.[103] It seems that Commission thought then that irreducibility of life imprisonment was not in a breach of Article 3. Facts of the case disclosed, however, that the Dutch law had foreseen a possibility of release of

97 *Fadeyeva v. Russia* (app. no. 55723/00), Judgment of 9 June 2005, para 133.
98 *Ibid*., para 134.
99 *Kotalla v. the Netherlands* (app. no. 7994/77) Decision of the Commission of 6 May 1978
100 *Ibid*., p. 240
101 *Ibid.*
102 *Ibid*.
103 *Ibid*.

persons sentenced to life imprisonment and that Mr. Kotalla was not left without hope. Concerning physical and mental illness of the applicant, the Commission established that the Dutch authorities provided the applicant with attention and medical care and thus satisfied the requirements of Article 3.[104] This finding implied an understanding on the part of the the Commission that Article 3 required national authorities to provide a life sentence prisoner with adequate medical care.

In the *Nivette* case of 2001, in the context of extradition of Mr. Nivette to California, the Court considered "whether the applicant is at risk of being sentenced to life imprisonment in California without any possibility of early release." The consideration was done in connection with Article 3, but there was no explanation how the question was relevant for Article 3. There is a partial decision in the same case from 14 December 2000 which is not accessible at the web portal of the Court and which maybe contains an exploitation. In any case the Decision of 2001 reflects the conviction of the Court that the sentence to life imprisonment without any possibility of early release would be contrary to Article 3.[105]

A very restrained explanation was given in the same context of extradition again in 2001 in the *Einhorn* case.[106] Invoking the same documents referred to in *Kotalla*, i.e. the General Report on the Treatment of Long-Term Prisoners, prepared by the Sub-Committee No XXV of the European Committee on Crime Problems and Resolution (76) 2 on the Treatment of Long-Term Prisoners adopted by the Committee of Ministers of the Council of Europe, the Court found that these documents were not without relevance.[107] Referring to *Nivette* and two other cases the Court stated that it was not "excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention".[108] The two other cases (*Weeks* and *Sawoniuk*) referred to by the Court had little to say on the issue. The *Weeks* case demonstrated the opinion of the Court that the achievement of the legitimate aim of punishment, such as the rehabilitation of an offender and the protection of society against repetition of the crime, was relevant for conditional release of a prisoner sentenced to life imprisonment. [109] In *Sawoniuk* case the Court stated that whether a failure of national authorities to provide the necessary medical care to prisoners constituted inhuman treatment depended "on the particular circumstances of the case, including the age and state of health of the person concerned as well as the duration and nature of the treatment and its physical or mental effects".[110]

In the *Kafkaris v. Cyprus* of 2008, the Court reiterated that irreducible life sentence raised an issue under Article 3.[111] Having analyzed its case law, the Court established that a national law, which secured the possibility of review of a life sentence that could result

104 *Ibid*., p. 241.
105 *Nivette v. France* (app. no. 44190/98) Decision of the Court of 3 July 2001.
106 *Einhorn v. France* (app. no. 71555/01) Decision of the Court of 16 October 2001.
107 *Ibid*., para 27.
108 *Ibid*.
109 *Weeks v. the United Kingdom* (app. no. 9787/82) Judgment of 2 March 1987, para 47.
110 *Sawoniuk v. the United Kingdom* (app. no. 63716/00) Decision of the Court of 29 May 2001, p. 15.
111 *Kafkaris v. Cyprus* (app. no. 21906/04) Judgment of 12 February 2008, para 97.

in release of the prisoner in any legal form, satisfied Article 3.[112] The Court found that this was the case "even in the absence of a minimum term of unconditional imprisonment and even when the possibility of parole for prisoners serving a life sentence is limited."[113] It observed also that the system of sentence review and release arrangements was outside the scope of the supervision the Court, provided that the chosen system did not disregard the principles of the Convention.[114]

Five years later in 2013 in the case *Vinter and Others*[115], the Court went a step forward. Having in view "the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice," the Court stated that the form and time of review is a matter of a Contracting State.[116] But, the Court continued: "This being said, the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter". [117] It concluded that where national law did not provide the possibility of such a review, a life sentence would not satisfy requirements of Article 3.[118] The Court found that in the majority of the Members of the Council of Europe, i.e. in 32 countries, there existed a mechanism for reviewing the sentence after the prisoner had served a minimum period which varied from country to country and was between 10 and 30 years.[119] The Council of Europe documents, including Resolution 76 (2) of 1976, Recommendation 2003(23) on the management by prison administrations of life sentence and other long-term prisoners, Recommendation 2003(22) (on conditional release) were not so precise in their requirements in respect of minimum period when the review had to be possible, but clarified the purposes of criminal punishment and required that a review as early as possible for determination whether the purpose were realized for all prisoners including life sentence prisoners.[120] The Court had in view also, inter alia, Article 110 of the Rome Statute of the International Criminal Court which provided that when a person had served 25 years of a sentence of life imprisonment, the ICC will review the case to determine whether the sentence should be reduced. Obviously, the finding of the Court in Kafkaris of 2008 that national law was in accordance with Article 3 "even in the absence of a minimum term of unconditional imprisonment and even when the possibility of parole for prisoners serving a life sentence is limited" was not now valid and consequently the margin of appreciation has been narrowed.

112 *Ibid*., para 98.
113 *Ibid*.
114 *Ibid*., para 99.
115 *Vinter and Others v. The United Kingdom* (app. no. 66069/09, 130/10 and 3896/10) Judgment of 9 July 2013
116 *Ibid*. para 120.
117 *Ibid*.
118 *Ibid*. para 121.
119 *Ibid*., para 68.
120 *Ibid*. paras 60 – 64.

8. Conclusions

The margin of appreciation and judicial activism are part and parcel of the interpretative practice of the Court. Where the interpretative sources, including the text of the Convention and Protocols, other international law sources, the decisions of the Council of Europe or other international organizations, the comparative practice, the case law or even scientific sources provide the Court with information precise enough to enable it to answer the submitted question, there exists no margin of appreciation, but only exceptionally. The absence of sufficiently precise information, which can be derived from the mentioned sources, leaves the discretionary power of the Contracting States to give their own answers to the question. The absence of sufficiently precise information in one moment does not mean the absence forever. Emerging new comparative practices can narrow the margin.

Such interpretative practice might be seen as the adjustment of Articles 31 – 33 of the Vienna Convention on the Law of Treaties to special characteristics of human rights provisions. The use of other international law sources is in line with Article 31, paragraph 3 (c) which requires an interpreter to take into account any rule of international law which is applicable to the issue. Having in view that the Court is satisfied with enough converging practices of the majority of the Contracting States, the use of the comparative practice might rely on Article 32, since the International Law Commission considered subsequent practice of some parties in the application of a treaty as supplementary means of interpretation.

A measure of creativity is inherent in the interpretations. It is manifested in particular in collating information from less precise sources, such as the preamble of a treaty, or from the object and purpose of a treaty, or from the principles underlying a treaty, etc. Thus, for example, the ECtHR found that the fair balance of the interests of individuals and the general interest of community is inherent in the whole text of the Convention. Really, the prohibition of the abuse of rights in Article 17 of the Convention as well as the limitations of some rights justify the finding of the balance of interest as inherent to the Convention. However, the text of the Convention does not include a clause of "the fair balance of interests" and it might be said thus the clause is a product of the creative interpretation. The margin of appreciation and the fair balance of interests are closely interrelated.

It is not easy to find evidence of judicial activism in the practice of the ECtHR beyond certain creativity in the interpretation, although the line between the interpretation of law and the creation of law might easily be blurred. But, as long as the Court finds reasons for its decisions in interpretative sources, including its previous practice, the Court remains on the terrene of interpretation. It is the case also when the Court finds that the Convention guarantees a right or imposes an obligation which had not been envisaged originally by the Contracting States during the negotiations of the Convention. The margin of appreciation, the autonomous concepts or the evolutive interpretation are thus only the explanations of the interpretative practice of the ECtHR.

Elena LAZĂR*

L'impact de l'intelligence artificielle sur les relations de travail à la lumière du système CEDH

L'intelligence artificielle (IA) a pour but de créer des machines capables de simuler de l'intelligence, en vue de remplacer l'humain dans certaines de ses actions cérébrales. C'est dans le programme d'une conférence scientifique organisée à Dartmouth (USA) que le terme « intelligence artificielle » fut utilisé pour la première fois[1].

Toutefois, il n'existe pas à l'heure actuelle de définition communément admise de l'intelligence artificielle, mais on peut quand même la décrire comme un ensemble de sciences, de théories et de techniques dont le but est d'améliorer la capacité des machines à réaliser des tâches requérant des facultés cognitives.

De nos jours, les machineries dotées de l'IA pouvant imiter le comportement humain sont capables d'un apprentissage automatique perceptuel et seront utilisées dans les systèmes experts, dans les systèmes de commandement militaire, dans l'aide au diagnostic et aux décisions, dans l'évaluation des risques, dans la gestion financière et même exprimer des émotions artificielles et seront capables de résoudre des problèmes complexes.

Du logiciel SIRI d'Apple, aux voitures autonomes, drones ou même sous-marins, l'intelligence artificielle n'arrête pas de progresser, fait qui montre l'actualité d'un tel sujet. Et c'est cette actualité-là qui génère des lacunes juridiques s'agissant de la règlementation de l'intelligence artificielle au niveau de la communauté des Etats. Il n'existe pas de cadre juridique qui prévoie une procédure à suivre par les autorités étatiques pour évaluer l'impact de l'IA sur les droits de l'homme.

Tous ces évolutions soulèvent de nouvelles questions quant à leurs implications pour les droits de l'homme et la dignité humaine et, souvent, la délimitation des frontières entre l'être humain et un système IA.

C'est dans ce contexte que Thorbjorn Jagland a affirmé que l « 'intelligence artificielle (IA) va révolutionner notre manière de vie. Dans des domaines tels que la médecine, les communications et les transports, les nouvelles opportunités abondent. Mais les conséquences des progrès de l'IA sur la démocratie, les droits de l'homme et l'État de droit restent à clarifier »[2].

S'agissant du domaine des droits de l'homme, en vue de respecter les obligations positives et procédurales leur incombant au titre de la Convention européenne des droits de l'homme (CEDH), les États devraient appliquer les mesures nécessaires pour protéger

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Manuscris primit la 25 septembrie 2019.

1 https://www.welcometothejungle.co/fr/articles/intelligence-artificielle-quel-impact-sur-le-monde-du-travail, site consulté le 30 juillet 2019.

2 https://www.coe.int/en/web/artificial-intelligence/home, site consulté le 28 août 2019.