



The Problem Relating to the Margin of Appreciation Doctrine under the European Convention on Human Rights

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Abstract

The European Convention on Human Rights and the intergovernmental bodies it created under its auspices have long, quite rightly, been regarded as the most effective tools to protect individuals' fundamental rights and freedoms. Although perfect in many respects, yet those tools are still beyond meeting the ordinary people's expectations regarding complete remedies toward gross human rights violations. In addition to some other major defects, the European Convention also harbors an enormous obstacle before the full realization of human rights protection: the margin of appreciation doctrine. The author contends that the problem concerning the doctrine is that it has been assumed during the creation of the Convention that the States Parties to the Convention are the best protectors of human rights, and therefore, they should be given the right to implement it as they interpret it.

Keywords: Margin of appreciation doctrine, the European Convention of Human Rights, the Council of Europe, subsidiarity, right to derogation.

INTRODUCTION

Arguably, the most serious shortcoming of the human rights protection system introduced by the Council of Europe is the right the Convention on Human Rights re-

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² Human Rights Dimension of Turkey-EU Relations: the Impacts of the EU and the Council of Europe', *Journal of Strategic Insight*, Vol. 1, No. 3, Fall 2004;

³ The NGOs, Norm Creation and Human Rights', *Alternatives: Turkish Journal of International Relations*, Vol. 3, No. 1, Spring 2004, pp. 100-122;

⁴ Human Rights, the European Union and Turkey', *Alternatives: Turkish Journal of International Relations*, Vol. 2, No. 3&4, Fall&Winter 2003, pp. 63-90;

⁵ American Foreign Policy and September 11', *Perceptions: Journal of International Affairs*, Vol. VIII, No. 1, March-May 2003, pp. 193-212.

cognizes to the States Parties to derogate from their certain obligations under the Convention. According to this right, States Parties may abstain to apply the provisions of the Convention, as the Strasbourg institutions interpret them.

The origins of the doctrine could be found in the context of the continental legal systems' judicial review of administrative decisions; and it has been adopted by the organs of the Council of Europe.² In general, the doctrine of margin of appreciation is found in Article 15 of the Convention. The doctrine under review states that the authorities of each state party to the Convention should be allowed to exercise a certain measure of discretion in implementing the standards contained in the Convention. Arguably, it is designed to "balance the sovereignty of the state parties with the need to ensure the observance of the engagements" undertaken by States Parties to the Convention.³

However, it should first be noted that agreements and treaties ensuring protection of human rights frequently allow derogations from the rights in times of such extraordinary situations as public emergencies, war, and the like. The States Parties are given a wide range of appreciation to determine whether such a circumstance exists in their jurisdictions.

The European Convention on Human Rights is not the only agreement allowing such derogations. In addition to the Convention, the International Covenant on Civil and Political Rights (Article 4), the Convention Relating to the Status of Stateless Persons (Article 9), the Convention Relating to the Status of Refugees (Article 9), and the European Social Charter (Article 30) as well contain derogation clauses.⁴

Meanwhile, it should also be noted that the limitations to derogation under the International Covenant are much broader than those set by the European Convention. While, under the Covenant, no derogation is allowed from the rights protected by Articles 6, 7, 8, 11, 15, 16 and 18, the limitations to derogations under the European Convention include Articles 2, 3, 4 and 7 only.

A superficial examination of the rights from which both legal documents set limitations to derogation would result in that the International Covenant is superior to the European Convention. Both documents prohibit derogation from article guaranteeing right to life, and from articles prohibiting torture and slavery. However, it should be noted that the article protecting the right to life under the Covenant also prohibits genocide, which is not covered by the respective Convention article. Moreover, while Article 3 of the Convention prohibits slavery only, the International Covenant prohibits slave trade as well. In addition, the European Convention does not provide any limitation to derogation from rights contained in Articles 11, 15, 16, and 18, for which the International Covenant prohibits derogation:

Article 11 prohibits imprisonment for failure to fulfill contractual obligation.

Article 15 prohibits conviction for act or omission not a criminal offense under either national or international law at time it was committed. Also

² O., Gross, F. N., Aoalin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights', *Human Rights Quarterly*, Vol. 23, No. 3, 2001, p. 626.

³ *Ibid.*, p. 626.

⁴ L. A., Malone, *International Law* (2nd ed.), (Larchmont, NY: Emanuel, 1998), p. 131.

prohibits imposition of a heavier penalty than was applicable at time crime was committed.

Article 16 guarantees each person everywhere a right to recognition as a person before the law.

Article 18 protects rights of religious freedoms and prevents imposition of religion.⁵

As noted earlier, the primary legal basis to derogate from the obligations under the Convention and to exercise the right of margin of appreciation is Article 15 of the European Convention. First introduced by the Commission in 1956, the doctrine of margin of appreciation was initially applied to the cases that are somehow related to Article 15.⁶ This article permits States Parties to take measures derogating from their obligations under the Convention "in time of war or other public emergency threatening the life of the nation", so long as this measure are not inconsistent with their other obligations under international law.

Exceptions in the Right to Derogation under the European Convention

However, States Parties to the Convention do not have the right to derogate from Article 2, "except in respect of deaths resulting from lawful acts of war", from Article 3, which prohibits torture, inhuman or degrading treatment or punishment, and from Article 4, which prohibits slavery or servitude. No derogation from Article 7, which states that "no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed" and "nor shall have a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed", is permissible as well.

Article 15 (3) describes the procedure that the State Party intending to exercise the right to derogate from its some of obligations shall follow in case of derogation. This article states that State Party concerned "availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed".

Therefore, states are not completely free in exercising this right. First of all, Article 15 stipulates that a balance between the threat the State Party is facing and the right of individuals as guaranteed under the Convention must be maintained. Since human rights might be most vulnerable particularly in times of emergency, all measures taken by States Parties in the context of derogation are subject to judicial supervision by the European Court of Human Rights. It is also important to note that situations justifying derogation from the Convention should be regarded as exceptional and be viewed as temporary. The State Party concerned is, therefore, discouraged from exercising Article 15 to take excessive measures or to maintain emergency powers or institutions more than is necessary, since this would be contrary to the

⁵ *Ibid.*, pp. 132-133.

⁶ B. H., Weston, Falk, R. A., and A. A., D'Amato, *International Law and World Order*, (St. Paul, MN: West, 1980), p. 534.

primary objectives of the Convention, which is the promotion and protection of basic rights and freedoms.⁷

It is also essential under Article 15 that at least four criteria need to be met by States Parties seeking to derogate from Convention provisions:

- 1- The public emergency must be actual or imminent
- 2- Its effects must be felt by the whole nation
- 3- The continuance of the organized life of the community must be in danger
- 4- The crisis or danger must be exceptional in that "the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate."⁸

Application of the Doctrine as Understood by the Council of Europe's Organs

However, in spite of the limitations contained in the Convention to minimize the scope of the right of derogation from the Convention provisions, in fact, States Parties are still able to enjoy a wide margin of appreciation. Although not mentioned anywhere in the European Convention itself, the doctrine of margin of appreciation "has developed in the case law emanating from the Court" and the Commission⁹, and now, it is "at the heart of virtually all major cases that come before the Court, whether the judgments refer to it explicitly or not".¹⁰ As such, in the view of van Dijk and van Hoof, the doctrine of margin of appreciation is "to be compared to a spreading disease".¹¹

A general analysis of the case law demonstrates that the doctrine has been transformed from a "certain measure of discretion" to a "wide margin of appreciation".¹² This means that States Parties to the Convention have gained more flexibility in complying with the provisions of the Convention over the last three or so decades. It certainly undermines the reputation of the Court as the guard of fundamental rights and freedoms. That the doctrine has found a wider application could be attributed to the enlargement of the Council of Europe, which caused a diversification in the cases brought before the Court and increased demands among member states in the Council to more benefit from the doctrine. The Court is increasingly facing the dilemma of providing a stronger protection of human rights, and ensuring the observance of the rights by more States Parties. As a consequence, it opted a lax application of Convention provisions. Because of this, the doctrine of margin of appreciation has been criticized for inserting a subjective element into the interpretation of the European Convention, and for weakening the Court's authoritative position *vis-à-vis* national governments. Eventually, this may undermine the hope of ef-

⁷ BIHR (The British Institute of Human Rights), 'Submission to the Joint Committee on Human Rights Inquiry into Derogations from Convention Rights', Retrieved on 14.04.2004, from <http://www.bihr.org/pdfs/derogations%20submission.pdf>.

⁸ *Ibid.*

⁹ Gross and Aolain, 2001, p. 625

¹⁰ R. S. J., Macdonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights', In *International Law at the Time of Its Codification –Essays in Honour of Roberto Ago*, 1987, p. 208.

¹¹ Van P., Dijk, and van G. J. H., Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed.), (Deventer, Boston: Kluwer Law and Taxation Publishers, 1990), p. 594.

¹² Gross and Aolain, 2001:p. 630.

fective regional supervision and enforcement of rights guaranteed by the European Convention. The Court, considering the doctrine, opted for more vague standards that increase the flexibility of States in observing the rights, rather than trying to adopt rules based on strict requirements.¹³ The use of the margin of appreciation doctrine has also been criticized "for allowing the Court to abdicate its responsibility to articulate reasons for intervening in the case at hand and ruling in favor of the respondent government".¹⁴ Moreover, fears have been noted that the Court, in the context of margin of margin of appreciation doctrine, has "emptied many of the strict conditions laid down in the Convention of their strengths in the exercise of judicial self-restraint".¹⁵ The doctrine is also attacked that it "runs risks, given the Court under Article 19 to ensure that the Member States observe their engagements". As a result, "[t]oo liberal an application of the doctrine in favor of the respondent State will in the long run undermine the Court's claim to be the authoritative institution for interpretation and appreciation of the Convention".¹⁶

In fact, the doctrine is a logical consequence of the subsidiarity principle embodied in the European Convention. Since the role of the Convention system is subsidiary to domestic legal systems, it is the states parties to the Convention that function as the primary protectors of human rights. Accordingly, the Court's control and supervision is also to be seen as subsidiary to the primary task of states. Therefore, the doctrine of margin of appreciation should be seen as the reflection of the subsidiarity and cultural diversity. In a sense, the Convention system assumes that national authorities are in a better position than the Council organs to effectively reconcile individual rights with national interests.¹⁷ It seems, therefore, that the Council organs clearly recognize the sovereign right of States Parties, and their dominant position in global politics.

The doctrine was being applied to Article 15 type of questions at the beginning. However, over the time, the Court and the Commission have widened the scope of the application of the doctrine so as to cover some other certain provisions of the Convention. Both organs began applying the doctrine to Articles 8, 9, 10 and 11.¹⁸ The rights guaranteed under the Articles, for which the use of the doctrine has been allowed, are those that have to be protected in a democratic society. The articles guarantee the rights to private and family life, to freedom of thought, conscience and religion, to freedom of expression, and to freedom of peaceful assembly respectively. It has been observed that the doctrine has been invoked in contentious and sensitive issues that would likely fall into the competence of national authorities, and somehow touch with sovereignty and national interests. Therefore, the Convention bodies have showed their decisiveness, when dealing with procedure, while having referred to the doctrine of margin of appreciation, when dealing with the matters of substantive rights.¹⁹ However, the margin granted to the States Parties is considera-

¹³ *Ibid.*, p. 629.

¹⁴ *Ibid.*, p. 629.

¹⁵ H. J., Steiner, and P., Alston, *International Human Rights in Context: Law, Politics, Morals*, (Oxford: Clarendon Press, 1996), p. 631.

¹⁶ *Ibid.*, p. 632.

¹⁷ Gross and Aolain, 2001, p. 627

¹⁸ Weston et. al., 1980, p. 536

¹⁹ Retrieved from <http://www.leeds.ac.uk/law/hamlyn/echr/htm>, on 03.05.2004.

bly variable in the sense that "the closer you get to the core values of democracy, the narrower the margin will be". Therefore, for example, regarding the freedom of expression, a narrow margin will be allowed for interference with political expression. To the contrary, interference with artistic expression on the grounds of morality will find a much wider margin of appreciation. In other words, it could be argued that a democratic society cannot restrict the pure enjoyment of democracy; however, it can decide "within reason where art crosses over the line of obscenity or blasphemy".²⁰ However, even a narrow margin might devastate the very basis of democracy and its core institutions. Therefore, the exercise of margin of appreciation constitutes a great challenge to the democratic fabric of Europe.

The reasons for the Court granting the widest margin of appreciation to States Parties in Article 15 related questions are not explicitly indicated in the Court's judgments. Nevertheless, these reasons seem to include; (1) the recognition of the difficulty in replicating the conditions that the government faced in dealing with the emergencies of the time while recognizing the need for swift action in case of an emergency that might have left little time for deliberation, (2) considerations of the Court's legitimacy to interfere with the issues closely related to the core of national sovereignty. Some of the issues related to emergency may fall into the very heart of a State's autonomy. Consequently, these cases raise sensitive and complicated questions, (3) the realization of the Convention system's objectives substantially depends on the cooperation of States, especially given that there is on effective enforcement mechanism. These considerations lead to the conclusion that national governments, bearing the primary responsibility for protecting human rights, are in a better position to maintain a balance between the situation concerning the matters of human rights and democracy, and the nation's particular needs and demands. However, since their decisions and actions are subject to "European supervision", the protection of human rights is double-checked. This assumption simply caused the application of very wide margin of appreciation in Article 15 related claims.²¹

However, this assumption needs to be critically reviewed and evaluated. Gross and Aolain rejects this assumption, and state that it is up to the Court "to assume primary responsibility for the protection and safeguarding of human rights under the European Convention", and therefore, "it is the Court, not the state, that acts as the protector of the Convention".²² This implies that States Parties to the Convention should not be granted a wide margin of appreciation.

Examples on the Application of the Margin of Appreciation Doctrine

There is a considerable amount of case law with regard to the exercise and application of the margin of appreciation doctrine. The Convention system, considering the need for struggling terrorism in particular, has granted a wide margin of appreciation to national governments in restricting human rights and fundamental freedoms.²³

²⁰ W., Fuhrmann 'Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights', *Brigham Young University Law Review*, Vol. 2000, No. 3, 2000, p. 830.

²¹ Gross and Aolain, 2001, p. 637

²² *Ibid.*, p. 641.

²³ T., Akilloğlu, 'Terör ve İnsan Hakları' [Terror and human rights], *İnsan Hakları Merkezi Dergisi*, Vol. 3, No. 3, 1995, pp. 17-26.

The first case to be reviewed in this regard is *Brogan v. United Kingdom*. In the UK, the Prevention of Terrorism Act introduced in 1984 authorized a constable's arrest without warrant of a person who is suspected to be involved with acts of terrorism in Northern Ireland.

Four persons, who were arrested and detained in 1984 and 1985 under the 1984 Act, filed a complaint against the UK with the Commission. The applicants argued before the Commission that the UK had violated the provisions of Article 5 of the Convention. The Commission, in its report in 1987, concluded that two provisions of Article 5 had been violated. It forwarded the case to the European Court of Human Rights.

The British Government has drawn attention to the existence of difficult circumstances in Northern Ireland, in particular the threat posed by terrorism. Subsequently, the government informed the Secretary General of the Council of Europe on 22 August 1984 that it was withdrawing its notice of derogation under Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The applicants argued that they were neither charged nor brought before a court during their detention, and that Article 5(1) had been violated by the UK Government. They also noted that they had been detained for seven days, and there was no acceptable reason for that long detention, and claimed that they have been the victims of Article 5 (3) as well.

In its conclusion, the Court stated that none of the applicants was neither brought 'promptly' before a judicial authority or released 'promptly' following his arrest. Although it was undoubted that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community from terrorism, it was not sufficient to ensure compliance with the provisions of Article 5 (3). Thus, there has been a breach of Article 5(3) in respect of all four applicants.

The Court also considered Article 50 of the Convention "stating that in event of violation, if the internal law of a respondent state 'allows only partial reparation', the Court's decision shall 'afford just satisfaction to the injured party'. The applicants sought exemplary damages because of the 'conscious and flagrant' character of the breaches of the Convention, suggesting assessment on the basis of 2,000 sterlings per hour for each hour of wrongful detention". Following the decision of the Court, rather than revising the Prevention of Terrorism Act or the practice of non-judicial supervision of extended detention, the UK Government lodged derogation under Article 15 of the Convention on grounds of public emergency. The Court held that the derogation by the UK was justified under Article 15 and subsequently, the detention of suspected terrorists in Northern Ireland without judicial control was justified by the public emergency. The Court stated that it fell to each state party to determine when the life of the nation was threatened by a public emergency, and what measures were to be taken to overcome the emergency.²⁴

It should be noted that the UK Government forwarded its request to the Council of Europe's bodies to be granted a margin of appreciation following the decision of the Court concerning *The Brogan Case*, while it had initially withdrawn its notice of

²⁴ Steiner and Alston, 1996, pp. 601-610.

derogation. Notwithstanding this inconsistent attitude of the Government, the Court did not hesitate to decide that the UK Government was eligible to exercise a margin of appreciation:

*Having regard to the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, the Court takes the view that the Government have not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.*²⁵

In a similar case, *Murdock v. United Kingdom*, the applicant complained that, although a life prisoner in Northern Ireland convicted of an offense unconnected with terrorism, he did not benefit from the release procedures under the Good Friday peace agreement. The Court declared the application inadmissible, reasoning as follows:

*The Court recalls that the 1998 Act was passed as part of ongoing peace process in Northern Ireland which seeks to bring an end to the conflict in that region. There is a clear connection between that peace process and the application of release procedures to persons convicted of offenses related to that conflict....The Court further notes the sensitive nature of the ongoing peace process and the complexity of the security situation which it seeks to resolve. Consequently, it would accord to the Government a wide margin of appreciation in the measures perceived as necessary in the pursuit of that process. In light of the above considerations, the Court concludes that the alleged difference in treatment may be justified as a proportionate measure with objective and reasonable justification.*²⁶

The doctrine of margin of appreciation is not simply a hypothetical phenomenon; instead, emergencies, where the doctrine has found place for application, constitute a class of cases coming before the Court and the Commission that deal with issues concerning the application of Article 15. In particular, cases concerning emergencies related to terrorist acts are used by States Parties to make derogations under Article 15. The jurisprudence of the Court in this regard evolved around petitions brought against two countries, the United Kingdom and Turkey. Both have long suffered from widespread separatist terrorist acts. In order to combat terrorism, those two countries maintained a state of emergency in their territories. On the other hand, both countries demanded a margin of appreciation be granted by the Strasbourg institutions as well. The United Kingdom has had a continuous derogation connected with Northern Ireland conflict since 1971. As a result, Northern Ireland has experienced a state of emergency for a period of thirty years. Turkey has invoked Article 15 of the European Convention for most of the period between June 1970 to May 1987. Derogations under Article 15 have been re-invoked in Turkey in August 1990.²⁷ It is interesting to note that Turkey had not been eager to access to the EU (European Community, at that time) until 1987. At that time, it abandoned the derogations under Article 15 of the Convention, and recognized the compulsory jurisdiction of the

²⁵ *Ibid.*, p. 610.

²⁶ G., Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights', *Human Rights Quarterly*, (Vol. 24, No. 3, 2002, p. 742.

²⁷ Gross and Aolain, 2001, pp. 645-646.

European Court. The interesting point is that Turkey applied for full membership to the EU very soon. However, the European Community rejected Turkey's application in 1989. Shortly after, Turkey re-invoked derogations under Article 15.

There are a number of cases concerning freedom of expression, freedom of association, and freedom of thought with regard to the application of the margin of appreciation doctrine. In 1994, in *Otto-Preminger-Institute v. Austria*, the Court decided by 6 votes to 3 that the seizure and forfeiture of a blasphemous film did not violate the freedom of expression.

The film was presented by the applicant association as a satirical tragedy. "Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanism of oppression is investigated" in the play.

The European Court considered whether the seizure is permissible under the conditions set by Article 10 (2), and consequently concluded that the interference had the "legitimate aim" of protecting the rights of others to freedom of religion. The Court eventually determined that the seizure could be considered "necessary in a democratic society". Since there was no uniform perception of the significance of religion even within a single country, "a certain margin of appreciation is to be left to the national authorities in assessing the existence and extent of necessity of such interference". Therefore, the Court held that the Austrian authorities had acted within their margin of appreciation in this case. Three judges dissented, stating that because the association pre cautioned against offense to viewers, and the showing of the film was available to a paid audience only, the seizure and forfeiture were not necessary in a democratic society.²⁸

In another similar case, *United Christian Broadcasting Ltd v. United Kingdom*, the applicant complained that it had not been allowed to bid for a national radio broadcasting license, due to a prohibition on religious and political organizations contrary to its rights under Articles 9 and 10. The Court declared the application inadmissible, stating that

*[it] is well-established that the Court's case law under Article 9 of the Convention that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on the freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. The Court does not consider that the restriction in question, the object of which is to avoid discrimination can be said to be arbitrary or to fall outside the State's margin of appreciation.*²⁹

In *Sheffield and Horsham v. the United Kingdom*, two transsexuals, "both of whom had been registered male at birth but had successfully undergone sex re-assignment surgery and treatment", alleged that the refusal of the UK Government to give legal recognition to their status as women constituted violations of Articles 8, 12 and 14 of the European Convention.

The Commission declared the application admissible and expressed the opinion that there had been a violation of Article 8 in both cases. However, the Court held by

²⁸ Steiner and Alston, 1996, pp. 612-614.

²⁹ Gilbert, 2002, pp. 742-743.

eighteen votes to two that there had been no violation of Article 12 and, unanimously that there had been no violation of Article 14. It also decided that there had been no violation of Article 8, for which the Commission found a violation, by eleven votes to nine.

In deciding so, the Court was not satisfied with that there was any common European approach to the problem, and concluded that the UK could still rely on a margin of appreciation "to defend its continuing refusal to recognize a new legal gender for the post-operative transsexual".³⁰

Although the cases reviewed above are noteworthy in the context of the margin of appreciation doctrine, Handyside case is probably the most significant one for understanding the application of the doctrine. Scholars writing on the issue of derogations under the European Convention have frequently made reference to that case.

Handyside, a UK citizen who owned a publishing home, had advertised in 1971 and was about to publish "The Little Red Schoolbook", an English translation of a Danish book published in a number of countries. As such, it was meant to serve as a reference for schoolchildren. It was generally on education and teaching, while ten percent of the book dealt with such sexual matters as masturbation, intercourse, contraceptives, homosexuality, pornography and venereal disease in an instructive fashion. The book drew adverse reaction from such circles as schools, churches and parents' groups.

Before publication, the government authorities seized all found copies of the book, acting under the 'Obscene Publication Acts'. Handyside was convicted of a violation of the Acts, fined, and ordered that all books be destroyed. After exhausting all domestic remedies, in 1972, Handyside filed an application against the UK before the Commission, alleging several violations of the Convention. The Commission concluded that there had been no violation of the Convention. Nonetheless, it referred the case to the Court in 1976. The Court held that there had been no breach of the Convention.

The Court, after reviewing the book and the evidence before the English courts, concluded that the English judges had a basis for finding that the book would have a negative impact on the morals of the readers between ages 12 and 18.

This implies that it is no way the Court's task to take the place of the national courts but rather to review the decisions those courts delivered in the exercise of their authority of appreciation.³¹

In the case of *Rekveyni v. Hungary* brought before the Court in 1999, it was claimed that Article 11 (2) of the European Convention has been breached by Hungarian authorities. Rekveyni, a resident in Hungary, file a complaint against the Hungarian Government before the European Court, alleging that national legal measures had been too restrictive on the political activities of the police officials. However, the Court held that there had been no breach of the provisions of the Convention in the case, stating that the limitations the Hungarian Government imposed were necessary

³⁰ A., Davies, 'Transsexuals and the European Convention on Human Rights', *Nottingham Law Journal*, Vol. 7, No. 1, 1998, pp. 70-72.

³¹ Steiner and Alston, 1996, pp. 615-617.

in a democratic society. In reaching this conclusion, members of the Court have made reference to the recent political and socio-economic transformation that took place in the country. Accordingly, the fact that Hungary has recently overthrown its totalitarian regime, and thus, that it was experiencing a transition period, were obstacles before reaching the conclusion that the restrictions spelled out in the applicant's petition were in fact violations of the Convention provisions.³²

As a relevant opinion, Diamond states that the result derived from the use of margin of appreciation doctrine is that "the Court does not assume responsibility to deal with complex areas of socio-ethical policy such as corporal punishment, and leaves such matters to the discretion of the States parties of the Council of Europe. Therefore, it could be argued that a measure to restrict corporal punishment may fall within the principle and it might be a legitimate exercise of social policy by States Parties".³³

What is the Problem?

The problem with the margin of appreciation doctrine, as it is exercised under the European Convention and the decisions of the European Court of Human Rights is not the recognition of derogation from the obligations under certain circumstances. The problem is that each State Party is given discretion to determine whether derogation from its obligations is necessary, which considerably harms the uniformity of the Convention law. To clarify the matter, the following question should be asked: is it possible to grant derogation to regional authorities in a unitary state? In other words, could the authority of Province A of the Country X decide that some certain derogations from national law are necessary to maintain the order in Province A?

The answer is clearly no. Such an authority given to a province in a certain country would damage the uniformity of the national law, and the integrity of the country. However, such derogations are conceivable in the context of Strasbourg organs, as the Council of Europe is not viewed by its members as a separate strong institution having a superior authority than its members have. It is rather seen as a common platform, and a reflection of cooperation among member states. Therefore, states, within the Council of Europe, are feeling to act freely to a certain extent. The logical consequence of this stance of member states toward the Council of Europe is that they feel that they should be given a certain margin of appreciation in determining whether the conditions they are experiencing are justified grounds for limiting the exercise of the rights and freedoms they have already guaranteed under the European Convention. Thus, it could be argued that the shortcomings discussed in this section do not stem from the Council or its subsequent bodies themselves, but from the States' perceptions concerning the rights to be protected and the methods to safeguard these rights.

³² R., Harmsen, 'The European Convention on Human Rights after Enlargement', *International Journal of Human Rights*, Vol. 5, No. 4, 2001, p. 31.

³³ P., Diamond, 'Is Corporal Punishment Contrary to the European Convention on Human Rights', *Education and the Law*, Vol. 11, No. 1, 1999, p. 50.

CONCLUSION

The Council of Europe, which has in its inception aimed at bringing Western European countries that were known as respectful for human rights into a common platform, and protecting the rights and fundamental freedoms of individuals within the jurisdictions of its member states, has been, to a large extent, successful in realizing this objective until 1990s. It has demonstrated a substantial progress over the course of last five decades in comparison to other regional international human rights regimes. It first adopted legally binding human rights treaties. Then, it created two significant legal bodies, the European Commission on Human Rights and the European Court of Human Rights, to supervise the human rights practices of member states. Those two were too significant in the sense that they were the first international body admitting claims of human rights violations from individuals. Therefore, for the first time, individuals have found an effective way to seek remedy for the violations of their rights.

However, as already noted, this situation has continued until 1990s. From this date on, the Council began admitting former Soviet Bloc countries, which were not sufficiently democratic at that time, without taking the admission criteria into consideration. This created serious problems that have over the time undermined the Council's ability to effectively deal with human rights violations. As a consequence, the Council's prestige and image as the protector of human rights and fundamental freedoms in Europe has seriously been wounded.

In this study, both the problems caused by the enlargement of the Council, and those caused by the Council's characteristics as an international intergovernmental organization have been evaluated. It has been demonstrated that the enlargement has remarkably undermined the Council's legitimacy in the minds of European people and its efficiency in dealing with human rights matters. Moreover, because the Council is not a truly supranational organization, member states did not submit their sovereign rights to the organization. As such, protection of human rights remained in the hands of member states. Therefore, member states are still enjoying a wide margin of discretion, when dealing with human rights issues