Chapter 1

The European Court of Human Rights (later on referred as 'Court' or 'ECtHR') What is Left to the States' Margin of Appreciation?

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Abstract

The assessment of the functioning of the Strasbourg Court is two-faced. On the one hand, the Court is criticised for its activism in interpreting the Convention. The activism of the Court is proved by interpretations and other tools developed by the Court itself, such as the living instrument doctrine, the evolutive interpretation, setting positive obligations for the States, or the use of interim measures. On the other hand, it is recognised that the Court is aware of the limitations of its powers and tries to respect the decisions of domestic authorities and courts. Besides the restrictions and limitation provided by the Convention itself (like reservations and derogations), the Court has developed several doctrines and principles serving self-restraint. The most important are the European consensus, the principle of subsidiarity, and the emphasis on the fact that the Strasbourg Court is not a fourth instance court. The most often used argument is the margin of appreciation principle. When the Court respects the power of appreciation of the States, it exercises judicial self-restraint in that it does not use to the full extent its powers of supervision or review. Nevertheless, the Court has emphasised that the power of appreciation is not unlimited. The domestic margin of appreciation thus goes hand in hand with a European supervision. Despite all the advantages of the broad use of the margin of appreciation principle, several criticisms have been raised against the way the Court applies it. The doctrine is often considered controversial. A systematic and open

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debate on the advantages and the contradictions in the application of the margin of appreciation would improve the use of this tool.

Keywords: margin of appreciation, principle of subsidiarity, European consensus, judicial activism and self-restraint

1. The Impact of the Enlargement of the Council of Europe

The Convention and its Protocols are agreements under public international law; their observance and the protection of fundamental rights are primarily the tasks of the domestic legal mechanisms and national judicial systems. This is reflected in the Convention system's so-called 'subsidiary' character: the Court exercises its jurisdiction of review only after the exhaustion of domestic remedies. The Convention governs forty-six States, and there is no doubt that the entire legal framework of the Europe-wide protection of human rights – to quote Ronald St. John Macdonald, former judge of the Court – "rests on the fragile foundations of the consent of the Contracting Parties".[1]

The accession of former socialist countries to the Council of Europe and to the Convention led to a comprehensive reform of the Convention system and the ECtHR.

"The changes in East and South-East European countries are setting new tasks for the Council of Europe. They are forcing the Organisation to redefine the boundaries of Europe, to recall the fundamental preconditions for membership, to consider co-operation with non-European states, and to adapt the working methods inter alia of the Parliamentary Assembly to the new situation. (…) The Statute of the Council of Europe provides that the fundamental prerequisite for accession is that the candidate state be based on the rule of law, guaranteeing human rights and the fundamental freedoms."[2]

In 1998 Protocol No. 11 replaced the original two-tier structure comprising the Court and the Commission on Human Rights, sitting a few days per month, by a single full-time Court. This change put an end to the Commission's filtering function, and enabling applicants to bring their cases directly before the Court has radically transformed the system. The establishment of the right of individual petition and the – at last – compulsory nature of the Court's jurisdiction indisputably rank among the benefits of the reform. The fact that the mechanism is now purely judicial in nature is an undeniable improvement on the former system. The right of individual petition

1 Macdonald, 1993, p. 123.

2 Doc. 6629 1403-12/6/92-1-E, 16 June 1992 Information Report on the enlargement of the Council of Europe (Rapporteur: Mr Reddemann, Germany, Christian Democrat). Debated by the Assembly in Budapest on 30 June 1992. Hungary joined the Council of Europe on 6 November 1990.

and the compulsory jurisdiction of the Court no longer depend on decisions of the States – as underlined by the former President of the Court, Jean-Paul Costa.[3]

One of the strengths of the 1998 reform was to open access to the Court directly for individuals, which is unique in the case of international courts.[4]

2. Activism of the Court

The assessment of the functioning of the Court is two-faced. On the one hand, the Court is criticised for its activism, but on the other hand, it is recognised that the Court is aware of the limitations of its powers and tries to respect the decisions of domestic authorities and courts.

Arguments most often put forward to demonstrate the Court's activism are as follows.

The living instrument doctrine is a judicial interpretation method developed and applied by the Court to interpret the Convention in the light of contemporary conditions. As it was formulated: "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."[5]

A later formulation repeats the same more concisely: "The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today."[6]

A subsequent activist approach developed by the Court is the evolutive interpretation (or integrated approach). Here the Court integrates the interpretation of civil and political rights with the interpretation of economic, social, and cultural rights that are enshrined not in the Convention but in the European Social Charter. The *Sidabras and Džiautas v. Lithuania* case[7] dealt with the imposition of employment restrictions on former employees of the KGB and found violation. The Court cited and relied on Article 1 § 2 of the European Social Charter that provides: "With a view to ensuring the effective exercise of the right to work, the Parties undertake to protect

3 Costa 2009, 11–12.

4 ARTICLE 34 Individual applications: The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

5 *Tyrer v the United Kingdom*, 25 April 1978, § 31, Series A no. 26

6 *Bayatyan v Armenia* [GC], no. 23459/03, § 102, ECHR 2011

7 *Sidabras and Džiautas v Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII

effectively the right of the worker to earn his living in an occupation freely entered upon." This provision, retained word for word in the revised Charter of 1996, has been consistently interpreted by the European Committee of Social Rights (ECSR) as establishing a right not to be discriminated against in employment. The non-discrimination guarantee is stipulated in Article E of the revised Charter.[8]

Another proof of the Court's activism is how the Court gradually extended the negative obligations of the State to restrain interference to individual rights in the direction of putting positive obligations on the States. Positive obligations are when the State is required to act in order to secure for persons within its jurisdiction the rights protected by the Convention. In determining the scope of a State's positive obligations, says the Court, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual.[9]

Although it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made. Determining that question is especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention.[10]

In the first so-called 'pilot judgment' (*Broniowski v Poland [GC])* the claim aimed for compensatory land in respect of property abandoned because of boundary changes following the Second World War; the Court found violation, stating that by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. As regards the relation and the boundaries between the State's positive and negative obligations, according to the Court the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community.[11]

Furthermore, not an interpretational method but a specific procedure that might irritate the Member States is the application of interim measures under Rule 39 of the Rules of the Court. This special tool that does not have any ground in the Convention is a source of conflict with the States. In the relation of the Strasbourg Court and the national authorities an especially sensitive field is the use of interim measures that in the meantime might be of vital importance for the persons effected. Even though

8 "The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status."

9 *Özgür Gündem v Turkey*, no. 23144/93, § 43, ECHR 2000-III

10 *Ilaşcu and Others v Moldova and Russia* [GC], no. 48787/99, § 332, ECHR 2004-VII

11 *Broniowski v Poland* [GC], no. 31443/96, § 143, ECHR 2004-V

there are no provisions in the Convention on this subject, the *limited nature* of the scope of Rule 39 can be clearly seen from the Court's case law. It is only where there is an *imminent risk of irreparable damage* that the Court applies Rule 39.[12]

3. Restraints and Self-restraint

The Convention itself offers restrictions and limitations to the protection of human rights and this understandably affects the court's scope and limits its activism.

Article 57 of the Convention regulates the possibility of reservations: *"Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.*"

Article 15 makes possible derogations in emergency situations: *"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*"

No derogation is allowed from Article 2 (right to life), except in respect of deaths resulting from lawful acts of war, or from Articles 3 (prohibition of torture), 4 (paragraph 1: prohibition of slavery) and 7 (*nullum crimen sine lege*). These non-derogable rights are considered core rights. The other, non-absolute rights are equivalent, and may be limited, if necessary, but only in proportion to the need, and in the event of conflict with another fundamental right, they must be weighed (balanced) against one another.[13] In general, Article 2 and 3 cases are not part of the margin of appreciation discussion, as in these cases generally it is not the State which bears the burden of proof.

Furthermore, the activist interpretation of the Convention is counter-balanced by the European consensus doctrine, the principle of subsidiarity, and the margin of appreciation. The two latter are now formally recognised by Protocol No. 15 amending, among others, the Preamble of the Convention that now reads as follows: "*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 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.*"

12 *Mamatkulov and Askarov v Turkey* [GC], nos. 46827/99 and 46951/99, § 108, ECHR 2005-I
13 Izquierdo-Sans, 2021, p. 280.

As the Explanatory Report describes, "a new recital has been added at the end of the Preamble of the Convention containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law."[14] The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

Not only does the text of the Convention rest on the consent of the Contracting States, but the principles and standards applied by the Strasbourg Court also rely on a judge-made doctrine: the European consensus doctrine. This doctrine means that, in the case of consensus among the States, less discretion is left to the States; or, conversely, the less consensus there is, the wider the margin of appreciation left to the States. To maintain a balance between the European supervision of domestic violations human rights and respect for State sovereignty, the Strasbourg Court has developed the consensus doctrine. The autonomous interpretation of the Convention by the Court means that Convention concepts are to be regarded as parts of a self-governing legal system that must be interpreted independently from the legal systems of the Contracting States. Consensus should not necessarily mean the consent of all the parties affected. In the context of the Convention, it means rather "common ground" or "common denominator".

In performing this role, but especially as regards applications under Article 34, the Court has repeatedly emphasised that it is not a further court of appeal from the rulings of national courts, i.e., it is not a fourth instance court simply examining whether the rulings of those courts were in some respect in error.

An example of this approach and effort is: "The Court has said on numerous occasions that it is not called upon to deal with errors of fact or law allegedly committed by the national courts, as it is not a court of fourth instance, and that it is not called upon to reassess the national courts' findings, provided that they are based on a reasonable assessment of the evidence."[15]

And in a Hungarian case: "The Court (…) is not competent to rule formally on compliance with domestic law, other international treaties or EU law (…). It is

14 Explanatory Report to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213) § 7.

15 *Dimitar Yordanov v Bulgaria*, no. 3401/09, 6 September 2018, § 47

therefore primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary, in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (…). Furthermore, the Court should not act as a fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (…)."[16]

4. The margin of Appreciation – Doctrine and Practice

Margin of appreciation has also been referred to as power of appreciation, legal discretion, deference, and latitude. The fields of latitude allowed to the States under the margin of appreciation doctrine can be classified in two main groups, depending on their justifications.

Firstly, differing local circumstances may justify it (originally mostly in matters of morals). The main argument was that national authorities are in principle in a better position than the international judge to decide.

Secondly, lack of European consensus enlarges the sphere of action of the States. It became a consistently used doctrine in the jurisprudence of the Strasbourg Court that the Convention leaves a power of appreciation to the Contracting States.

The margins doctrine initially responded to the concerns of national governments that international policies could jeopardise their national security. This may explain the initial application of the doctrine in the context of derogations from treaty obligations due to self-proclaimed states of national emergency. In such circumstances, the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation. This rationale was later expanded to allow each country wide discretion to select policies that would regulate potentially harmful activities, such as incitement to violence or racist speech.[17]

As Judge Macdonald summarised, "the margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention."[18]

The principle of subsidiarity and the margin of appreciation accorded to national authorities are necessarily interlinked. They call for shared responsibility with the

16 *Somorjai v Hungary*, no. 60934/13, 28 August 2018, § 53
17 Benvenisti, 1999, p. 843.
18 Macdonald, 1993, p. 123.

national judiciary.[19] The legal concept of the margin of appreciation was first expressly defined in the *Handyside* case (authorities confiscated a book aimed at schoolchildren with allegedly obscene content).

The Court pointed out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. The Court notes at this juncture that the adjective 'necessary' is not synonymous with 'indispensable'. It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.

Nevertheless, the Court emphasised that the power of appreciation is not unlimited. The domestic margin of appreciation thus goes hand in hand with European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every person. In the concrete free speech case, the Court underlined that, subject to paragraph 2 of Article 10 (Art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance, and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued. The margin of appreciation is linked to the idea of democracy, emphasising that the Convention system must respect the democratic systems of the Contracting States.[20]

19 Izquierdo-Sans, 2021, p. 277.

20 *Handyside v the United Kingdom*, 7 December 1976, § 48, Series A no. 24

The principle of subsidiarity gives primacy to the implementation of Convention rights by national authorities. The latter entails a degree of deference to their assessment as to whether measures affecting rights that are not absolute are consistent with those rights.

"The object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".[21] The emphasis on rights and freedoms being practical and effective is designed to ensure that their object and purpose is realised and this may also make it is essential to be prepared to look beyond the text of individual provisions in order to establish their meaning.

The margin doctrine sits halfway between the uniform application of the Convention and domestic protection of human rights. In other words: European supervision is combined with the national margin of appreciation. When the Court respects the power of appreciation of the States, it exercises judicial self-restraint in that it does not use to the full extent its powers of supervision or review.

The doctrine has a territorial and a temporal scope. Under the 'territorial' scope, the Court allows room for a margin of appreciation because of the territorial relativity of public morals. Under the 'temporal' scope of the doctrine, the Court recognised the significance of legislative evolution within the States, like the changing attitudes of the States towards questions of morals.

"There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide (…). There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision."[22]

Two risks relate to the interlinked doctrines. The first risk is *minimalism*. International law and international judicial organs based on the consent of the Contracting States determine the minimum level of human rights protection. This applies to the Court as well. Lack of a European consensus and the consequent discretion or margin-of-appreciation doctrine open the way for the minimum-level approach. However, well-established democracies have also failed on a number of occasions to comply with these 'minimum-level standards'. The problem to be discussed here is how a 'minimal standard' Strasbourg jurisprudence influences the national courts, including constitutional courts.

The second risk is *relativism*. The question that lies beyond the balancing of European standards and domestic particularities is whether the protection of human rights may vary from country to country as public morals vary? How far does the

21 *Magyar Helsinki Bizottság v Hungary* [GC], no. 18030/11, 8 November 2016, § 155
22 *Hirst v the United Kingdom (no. 2)* [GC], no. 74025/01, 6 October 2005, § 61

influence of cultural relativism and the shifting nature of what we call contemporary values stretch?

In *Rasmussen v. Denmark*, the Court showed its flexibility regarding application of this doctrine: "The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States."[23]

The conceptualisation of human rights cannot be independent from cultural traditions and is determined by the given historical context. Although the standards used by courts necessarily vary when decisions are taken on the grounds of differing circumstances, the excessive flexibility of those standards undermines the credibility of judicial decisions. This might be the case when, at the interplay of consensus and discretion, the common ground and margin of appreciation criteria are both flexible and varying.

5. Margin of Appreciation and National Jurisprudence: An Example

The influence of an international human rights court is basically inspirational for the national courts. This can be well exemplified by the impact of the Court on the then newly founded Hungarian Constitutional Court.

The Convention influenced the constitutional review and the interpretation of the Hungarian Constitution. The Constitutional Court referred to the Convention even before its ratification by Hungary. "In the first, formative period of constitutional jurisdiction in Hungary, however, referring to a given provision of the Convention was much more a demonstration of considering and searching for 'European standards', it was aimed more at linking up Hungarian legal thinking to 'European norms' than to use this international instrument in its proper role in the course of constitutional review."[24]

For the contrary effect of permissive Court decisions, one can refer to cases such as *Rekvényi v Hungary*.[25] In *Rekvényi*, the Court "showed understanding for the transitional period of consolidation of democracy" – as Luzius Wildhaber, at the time President of the Court stated in a comment on the judgment.[26] The Court accepted that in Hungary members of the armed forces, the police and security services were prohibited from joining any political party and from engaging in any political

23 *Rasmussen v Denmark*, 28 November 1984, § 40, Series A no. 87
24 Sólyom, 2000, p. 1317.
25 *Rekvényi v Hungary* [GC], no. 25390/94, ECHR 1999-III.
26 Wildhaber, 2006, p. 35.

activity. Unfortunately, the case did not have an evolving but an erosive effect on the jurisdiction of the Hungarian Constitutional Court. In the following years, the Constitutional Court, referring to the judgment of the Court in several consecutive decisions, definitely relaxed the domestic constitutional standards. This went against the original philosophy of the Hungarian Constitutional Court regarding transition. It had firmly stated in that connection that the unique historical circumstances of the transition and the given historical situation could be taken into consideration, but that "the basic guarantees of the rule of law [could not] be set aside by reference to historical situations …"[27]

The Hungarian Constitutional Court, departing from its earlier interpretation, in 2000 set the limits of freedom of expression[28] and freedom of assembly according to *Rekvényi*:[29] "The Court determined the social causes justifying the restriction by taking into account the particular features of Hungarian history, as did the European Court in *Rekvényi v Hungary.*"[30]

In its earlier decisions, the Constitutional Court had consistently assessed the historical circumstances (most often the change in the political regime taken as a fact) by acknowledging that such circumstances might necessitate some restriction on fundamental rights, but it had never accepted any derogation from the requirements of constitutionality based on the mere fact that the political regime had changed. Legislation justified by the change in the political regime and the restrictions contained in such laws had to remain within the limits of the Constitution in force. In the decision in question, the Constitutional Court adopted the terms used by the ECtHR in *Rekvényi*: "Regard being had to the margin of appreciation left to the national authorities in this area, the Court finds that, especially against this historical background, the relevant measures taken in Hungary in order to protect the police force from the direct influence of party politics can be seen as answering a 'pressing social need' in a democratic society."[31]

Thus, the decision of the Court – unintentionally – had an impact that lowered the standards the Constitutional Court had previously applied.

Therefore, a caveat must be suggested, a warning on the use of international standards: while respect for national or other communities' distinct legal traditions on the part of a European court should be welcomed as an instance of judicial self-restraint, reducing the level of protection afforded by domestic courts on the grounds of lower minimum standards in the absence of consensus is not acceptable.

There is another danger of the double-edged consensus concept to be mentioned. It is doubtful whether consensus means unanimity, or a practice accepted by a large

27 Hungarian Constitutional Court decision no. 11/1992. Reproduced in English in Sólyom & Brunner, 2000, 221.

28 Hungarian Constitutional Court decisions nos. 13/2000 and 14/2000 (the latter extensively citing the *Rekvényi* judgment).

29 Hungarian Constitutional Court decision no. 55/2001.

30 Hungarian Constitutional Court decision no. 13/2000.

31 Hungarian Constitutional Court decision no. 14/2000. The cited part of Rekvényi is paragraph 48.

majority of the States. As mentioned earlier, in the context of the Convention it means rather 'common ground' or 'common denominator'. Even if application of the Convention does not require acceptance of the universal character of the human rights protected therein, a certain 'hard core' of human rights should be defended even against the majority or the consensus – like the unalterable basic rights (*unabdingbarer Grundrechtsstandard*) in Germany.

6. Exhaustion of Domestic Remedies as an Essential Part of Subsidiarity

Article 35(1) of the ECHR clearly defines the admissibility criteria for the applications submitted to the Court: "*The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken.*"

According to the principle of subsidiarity it is the responsibility of the contracting States to remedy violations of the ECHR. Therefore, all domestic remedies should be exhausted, including the constitutional complaint if it is considered by the ECtHR to be an effective remedy. The rule of exhaustion of domestic remedies assumes – reflected in Article 13 of the ECHR, with which it has close affinity– that there is an effective remedy available in respect of the alleged breach. The rule is therefore an indispensable part of the functioning of this system of protection.[32] The ECtHR applies the rule with flexibility and without 'excessive formalism'. The effectiveness of a domestic remedy such as the constitutional complaint is not an eternal category, but for the sake of legal certainty the case law of the ECtHR should be consistent. The available remedy should be practical and effective, not theoretical or illusory.[33]

In more general terms, it is a principle of international law that the protection of human rights should be carried out by national governments. National remedies are perceived as more effective than international ones because they are easier to access, proceed more quickly and require fewer resources than making a claim before an international body. The range of domestic remedies is quite broad, from making a case in court to lodging a complaint with administrative agencies.

Applicants are only required to exhaust domestic remedies that are available and effective. In determining whether any remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case. Account must be taken not only of formal remedies available, but also of the

32 *Vučković and others v Serbia (preliminary objection) (GC)*, Nos. 17153/11 and 29 others, 25 March 2014, § 69

33 *Airey v Ireland*, 9 October 1979, Series A no. 32

general legal and political context in which they operate as well as the personal circumstances of the applicant.

As regards the burden of proof where the Government claims non-exhaustion, the defendant State bears the burden of proving that the applicant has not used a remedy that was both effective and available at the relevant time. The availability of any such remedy must be sufficiently certain in law as well as in practice. According to the terminology used by the ECtHR it should offer reasonable prospects of success.

Once the Government has proved that there was an appropriate and effective remedy available to the applicant, it is for the latter to show that the remedy was in fact exhausted. Alternatively, the applicant may prove that the domestic remedies were inadequate and ineffective in the circumstances of the case or that there existed special circumstances absolving the applicant from the requirement. In these cases, there is no need to first address the national mechanisms if it can be convincingly demonstrated that there are, in effect, no local remedies available.

The ECtHR examines the accessibility and effectiveness of the domestic remedy following a case-by-case approach. Based on the Court's own requirements as to effectiveness of national remedies in protecting these rights, substantive access to justice requires that such justice is delivered in a timely, transparent, independent, and flexible manner (that is, without excessive formalism), and with sufficient legal certainty.

There is an ongoing debate within the ECtHR itself and in the academic literature on the application of the exhaustion principle and its constitutive elements such as accessibility and effectiveness.

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7. Challenges for the Application of Margin of Appreciation

Despite all the advantages of the broad use of the margin of appreciation principle, several criticisms have been raised against the way the Court applies it. The doctrine is often considered controversial. A review of the critical observations follows.

Some commentators argue that the principle is applied almost automatically, without carrying out a substantive assessment of the fundamental rights involved.

Although the margin of appreciation doctrine is a very useful tool used by the Court when balancing between rights and weighing up individual rights against public interest, it is a method that other international courts consider, in general, irrelevant. It is not by accident that international courts and tribunals not only do not accept but refuse to apply a margin of appreciation. Critics of the Strasbourg Court

propose rather to conduct an objective analysis of the Member States' responsibility based on the provisions of the Convention.[34]

Further critics describe it as an 'empty rhetorical device'[35], creating legal uncertainty that is overly dependent on the context.[36] All these features contribute to the unpredictability of the Court's jurisprudence. The definition, meaning, and the 'justifiability' of this doctrine are questionable. The doctrine impairs universal and European standards and aspirations for the protection of human rights. Despite its regular use by the Strasbourg Court, there is inconsistency and incoherence in its application, and this complicates the need to balance uniform human rights standards and respect for diversity, which is the hallmark of the said doctrine.[37]

The analysis of the margin's practice has recently focused on the connection between the margin of appreciation and the quality of the decision-making of the national authority. This argumentation emphasises that in case of deference it is a wrong way of arguing by proceduralism instead of balancing. The *Animal Defenders* case[38] (a very controversial 9 to 8 ruling) is based on the allegation of violation of Article 10 (freedom of expression) of the Convention, regarding a statutory prohibition of paid political advertising on radio and television. The case was brought to the ECtHR after one of the TV campaigns from Animal Defenders International (a non-governmental agency) was banned by the Broadcast Advertising Clearance Centre in the United Kingdom and its attempts to have this administrative decision revoked in the national courts (both the High Court and the House of Lords) were dismissed. The Court not only praised the extensive deliberation and its quality, but also asserted that the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation. Chagas rightly assumes that the reasoning of the ECtHR while applying the margin of appreciation lacked precision in explaining the use of all factors and how they influence the intensity of the Court's review (it was not clear if they were reasons explaining the margin or the merits of the case). "The impact of such inconsistencies is perceived even more from the clear mismatch between granting a narrow margin and not thoroughly analysing the merits by being deferential to the national authorities' interpretations."[39] The Court makes an external assessment of the procedure without or instead of addressing the merits of the case.[40]

Unfortunately, these concerns proved to be well-founded. In a Grand Chamber judgment, the Animal Defenders approach was applied in reverse. In the case of *L.*

34 Born et al., 2020, p. 77.
35 Gerard, 2018.
36 Garcia Roca, 2021, p. 273.
37 Ainoko, 2022, pp. 91–111.
38 *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts)
39 Chagas, 2022, p. 10.
40 Izquiedro-Sans, 2021, p. 284.

B. v Hungary[41] the Grand Chamber of the Court applied the general measures doctrine developed in *Animal Defenders* to find that the Hungarian legislative policy of publishing the personal data of taxpayers who were in debt violated Article 8 of the Convention. The Court criticised the quality of the parliamentary review conducted at the domestic level and the balance struck by national authorities between the competing individual and public interests. The dissenting judges (Judges Wojtyczek and Paczolay) disagreed with both the Court's approach and the outcome of the case, deploring that finding a violation was based on alleged shortcomings in the Hungarian Parliament's review of the measure. In his concurring opinion, Judge Kūris was highly critical of the approach taken by the Grand Chamber, who invalidated the measure based not on an analysis of its merits, but because it had not been preceded by proper parliamentary debate. As Judge Kūris rightly underlined the use of the 'quality of the parliamentary review' yardstick substituted the examination of the issue raised by the applicant. In *Animal Defenders* the quality of parliamentary and judicial review served as an additional argument in favour of a finding of no violation, while in *L.B. v Hungary* it became the decisive factor in finding violation. It can just be hoped that the *Animal Defenders* approach will not be extended further.

8. Conclusions

The decisions of the Strasbourg Court have the potential not only to set European standards for the protection and enforcement of human rights, but to set universal standards.

Finding balance between the evolutive interpretation of the Convention and limitations on judicial powers, the Court could use margin of appreciation as an important argumentative framework. It makes it possible to have a balanced relationship with the sovereign Member States. The use of this tool is not accepted without criticism: uncertainty regarding the function, the scope, consequences and, moreover, inconsistencies of the margin of appreciation principle has been pointed out. However, the ECtHR could make broad use of it, due to the context of the Convention, and the historical and legal setting of the Strasbourg Court. To further develop this principle, it would require addressing systematically and openly the uncertainties and contradictions in the application of the margin of appreciation.

41 *L.B. v Hungary* [GC], no. 36345/16, 9 March 2023

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