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Some Thoughts on the Limitation to Guarantees Enshrined in the European Convention on Human Rights

1 The Margin of Appreciation Doctrine

If an interference with a right guaranteed in Articles 8 to 11 of the Convention is established, an assessment is required to determine whether this interference is legitimate under paragraph 2 of the named provisions. We will not enlarge on the prerequisites "prescribed by law" and "legitimate aim pursued", even though it has to be said that these criteria are not always distinguishable in a clear way from the third and most important issue, the "necessity in a democratic society".

The first part of this essay will attempt to analyse how one goes about determining what is "necessary in a democratic society" with special regard to the, in this context unavoidable, margin of appreciation doctrine.[1] Judge Macdonald has described the concept of the

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[1] Just to be complete it has to be said, that the margin of appreciation doctrine is also part of the application of Articles 14 and 15 and Article 1 of Protocol No. 1. The use of the doctrine when dealing with positive obligations will be the theme of the second part of the essay.

margin of appreciation as "the primary tool of the Court".[2] When evaluating the necessity of a measure the Court regularly states that domestic courts are in principle in a better position than the international judge to give an opinion on the exact content of the requirements in regard to the pressing social need, which is implied by the necessity-test. However, the margin – used to balance the sovereignty of Contracting Parties with their obligations under the Convention – is not unlimited; the final assessment relating to the necessity of an interference has to be carried out by the Court itself or – in order to use the wording of the judgments – the margin of the domestic authorities "goes hand in hand with a European supervision".[3]

We will now turn to the criteria which determine the scope of margin. However, it has to be stated that while these criteria are well established, the Court does not always give a reason for applying or not applying a specific criterion.

When considering the *Dudgeon* case we can deduce, that the seriousness of an interference can narrow the scope of margin. The fact that "the present case concerns a most intimate aspect of private life"[4] or – as it is said in the same judgment – "an essentially private manifestation of the human personality"[5] is at stake, necessitates a more narrow margin be accorded to domestic legislation and jurisdiction as well. One might also like to refer to the *Eriksson* case, where "a fundamental element of family life"[6] was argued. More than one case can furthermore be quoted for the rule, that the States should not restrict the right in question to such an extent that the very essence of the right is impaired.[7] This means that if there is a margin of appreciation at all there, it can only be minute.

The view of the essence of a right as an absolute limit on limitations is mainly of German origin and also a current way to argue in

[2] See R. Macdonald, "The Margin of Appreciation", in: R. Macdonald et al. (eds), *The European System for the Protection of Human Rights* (Dordrecht, 1993) 83, at p. 83.

[3] Handyside v. UK, 7 December 1976, A/24, paragraph 49.

[4] Dudgeon v. UK, 22 October 1981, A/45, paragraph 52.

[5] Ibid., paragraph 60.

[6] Eriksson v. Sweden, 22 June 1989, A/156, paragraph 71.

[7] See as an early example Young, James and Webster v. UK,13 August 1981, A/44, paragraphs 52 and 55.

Switzerland, even if the usefulness of that concept is disputed, as by using the proportionality-rule one might reach the same result.[8]

Secondly, the scope of margin depends on the aim pursued by the government. Since its decision in the *Handyside* case the Court repeatedly stated, that the margin is wide, where morals are at issue, because it is an indisputable fact that "the view taken of the requirements of morals varies from time to time and from place to place".[9] This is also true if freedom of religion is used as a public interest in order to restrict the freedom of expression in the case of conflict between these fundamental guarantees. In this case the margin is equally wide because the views about the significance of religion differ widely.[10]

All cases which will be discussed now such as *Dudgeon*, *Mueller*[11] and *Otto Preminger-Institut* have as a common legitimate aim the protection of morals or religion. In this area the existence or the absence of a balance between arguments advocating for a wide or a narrow margin can be demonstrated in an exemplary way.

Thirdly, there must be an inquiry carried out in order to establish whether there is an European consensus about the necessity in a democratic society of the interference under review. This is done by comparing the legal systems and sometimes the public opinion of the Contracting States.

If there is an established or almost evolved consensus about the lack of necessity of an interference then the margin narrows and the balance of interests is likely to be struck in favour of the fundamental guarantee interfered with.

As a result, this leads to an evolutionary interpretation in the spirit of the Convention. By using this argument in the *Dudgeon* case (concerning the criminalisation of homosexual acts) the margin was narrowed and the case was decided in favour of the applicant. It may be stated here, that the consensus would in our opinion not have been necessary to reach that result, since employing the definition or autonomous interpretation of what constitutes a democratic

[8] Whether or not Article 8 includes an essence in the forementioned sense may well be left open here.

[9] Handyside judgment, supra note 3, paragraph 48.

[10] Otto-Preminger-Institut v. Austria, 20 September 1994, A/295-A, paragraph 50.

[11] Mueller and others v. Switzerland, 24 May 1988, A/133.

society – understood as an abstract term nearly without regard to the de facto consensus – would have resulted in the same conclusion.

It is beyond any doubt today that making criminal homosexual acts between consenting adults, not involving violence, is not in accord with tolerance, broadmindedness and minority protection which are referred to as principles of a democratic society.[12]

On the whole the margin of appreciation doctrine is unrenounceable, but as far as the scope of margin and its use in specific cases is concerned, it has suffered harsh criticism. There are even scholars who doubt whether the Court follows a method at all or whether it pursues a wholly casuistical approach.[13]

Using as an example the concept of European consensus it can be shown where the weaknesses as regarding the method of the Court lie. Just imagine what would happen if public opinion changed detrimentally towards homosexuality so that there was a downward evolution. Paul Mahoney is of the conviction shared by the present authors that in this case ceding to public opinion by reducing the human rights standard cannot be seriously considered.[14] This is because of the principles governing the interpretation of the Convention. If that is correct one has to admit that in this case the de facto consensus can not be considered as being decisive. Rather the Court has the duty to uphold the human rights standard against the evolving consensus leading downwards. Recognising that normative approach towards the necessity-test which gives weight not only to the de facto consensus of Contracting States, but rather to the abstract concept of a democratic society, one has inevitably to draw the conclusion that progressive interpretation, i.e. the task of developing higher human rights standards, should follow the same approach.

The same problem can be illustrated by presenting the Swiss concept of recognition of unwritten human rights. The Swiss Federal Tribunal accepted – because of the lack of a systematic bill of human

[12] It has to be admitted that in Sweden this discussion is particularly outdated, but one should remember that Modinos v. Cyprus, 22 April 1993, A/259), which confirmed the *Dudgeon* and the *Norris* judgments was decided only four years ago. See now the case of Laskey, Brown and Jagger v. UK.

[13] See e.g. C. Calliess, "Zwischen staatlicher Souveränität und europäischer Effektivität: Zum Beurteilungsspielraum der Vertragsstaaten im Rahmen der Art. 10 EMRK", (1996) 23 EuGRZ 293, at 296.

[14] P. Mahoney, "Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin", (1990) 11 HRLJ, 57, at 66-67.

rights in the constitution of 1874 – the concept of unwritten fundamental guarantees.[15] As conditions of recognition for unwritten human rights the Federal Tribunal determined the following: the right in question must be an indispensable element of a democratic state based on the rule of law or it must be a prerequisite to the exercise of other fundamental rights. In the decision denying the recognition of the right to obtain information from the government as an unwritten guarantee the Federal Tribunal added one more requirement for that recognition: the claimed guarantee should correspond to a widespread constitutional reality – one could call this a consensus in the formentioned sense – amongst the Cantons in Switzerland.[16]

Scholars – mainly Joerg Paul Mueller[17] – criticised the court's methodological view as being unconscious of its duty to protect the essentials of a democratic society.

The same criticism about the overestimated importance of the consensus when trying to develop human rights standards can be made about the jurisdiction of the European Court of Human Rights. This means that the Court does not rely sufficiently on teleological and evolutionary interpretation. It is obvious that this problem of methodology is closely linked to the proper understanding of the rôle of the Convention organs.

If the Court wants to do more than just recognise de facto legal changes, then it has to admit to using a normative method guided by the abstract term "democratic society". The fear has been expressed that this approach would weaken the Court by diminishing its legitimacy because of judicial activism, but considering the transsexualism-cases one has to admit that the pretended descriptive approach can weaken the position of the Court at least equally.[18] The limits of the descriptive approach can be seen when asking the question how many legal systems have to change so that an almost evolved consensus on a subject can be considered as established. In the cases

[15] For instance the freedom of expression is an unwritten fundamental right in Switzerland; cf. Arrêts du Tribunal Fédéral Suisse (ATF) 91 I 485. As an aside it may be said that a reform of the Swiss Federal Constitution is in progress including a bill of rights; see Feuille Fédérale (FF) I (1997), 1, for the draft version presented by the government.

[16] ATF 104 Ia 88.

[17] J.P. Mueller, *Elemente einer schweizerischen Grundrechtstheorie* (Berne, 1982), at 25.

[18] See L.R. Helfer, "Consensus, Coherence and the European Convention on Human Rights", Cornell Int'l L.J. 26 (1993), 133, 142-3 and 146-7.

Rees,[19] *Cossey*[20] and *B. v. France*[21] the Court had to decide whether the consensus amongst Contracting States had sufficiently evolved in order to recognise a right of transsexuals to have their documents altered or amended. It is significant that the Court pretended to follow a coherent practice - in its *B. v. France* judgment it decided that there was at that time no sufficiently broad consensus between the member States of the Council of Europe to persuade the Court to reach opposite conclusions to those in its *Rees* and *Cossey* judgments[22] - but it had to face dissenting opinions saying that the case B. v. France can only be considered as overruling the *Cossey* judgment.[23] The Court itself argued that the difference has to be explained by the fundamental difference between France and England in this field making the lot of transsexuals much harder in France than in England.[24]

There has been more credibility lost by adopting a descriptive approach compared to the normative one. Just as an aside it may be said that the European Court of Justice decided a case concerning dismissal because of changed sex in favour of a transsexual in 1996.[25] Advocate General Tesauro argued that the Court should follow social reality as swiftly as possible.[26] Certainly the European Court of Justice has a more integration-oriented self-understanding. It is also true that the quoted case has not been resolved on the basis of a specific fundamental guarantee. However, when considering the method of defining human rights guarantees used by the European Court of Justice one can see the same difference. This Court also refers to domestic legal orders using the comparative method, but before reaching the conclusion it clearly says that the guideline in defining the general principle which will be recognised as a human

[19] Rees v. UK, 17 October 1986, A/106.

[20] Cossey v. UK, 27 September 1990, A/184.

[21] B. v. France, 25 March 1992, A/232-C.

[22] Ibid., paragraph 48.

[23] Ibid., e.g. dissenting opinion of Judge Morenilla, at p. 73; see also Helfer, supra note 18, at 152, and L. Wildhaber, "The Right to Respect for Private and Family Life: New Case-Law on Article 8 of the European Convention on Human Rights", in: A.A. Cançado Trindade (ed.), The Modern World of Human Rights, Essays in honour of Thomas Buergenthal (San José, 1996) 103, 106.

[24] B. v. France, supra note 21, paragraphs 51 and 63.

[25] Case C-13/94 P. v S. and Cornwall County Council [1996] ECR I-2143.

[26] Ibid., Opinion of Advocate General Tesauro, [1996] ECR I-2149.

rights guarantee is found by evaluating these legal orders, not by adopting the view of the majority of them about human rights protection as the final result. The review of domestic legal systems supplies only a provisional result compared to what this Court turns it into.[27] Scholars have proposed to the Court of Human Rights that it should follow this example by using a value-oriented comparative method ("wertende Ermittlung europäischer Standards").[28]

The same structural problem - when asking about the significance of the de facto consensus - can be detected in the area of the sources of public international law. While public international customary law is characterised by the States practice - one might say a sort of consensus - this is not true for the general principles of law. One might add that the *opinio iuris vel necessitatis* presupposed when speaking about customary law is also a normative element.

The difference may be demonstrated by the issue of the prohibition of torture. The more normatively orient scholars describe this norm as a general principle of international law in order to avoid the question whether state practice is in accordance with that rule or principle. Others would try to define it as international customary law. The evolutive method can be seen as the middle position between these concepts.

As a conclusion, one might deduce that the more serious the interference with a fundamental guarantee enshrined in the Convention is, the less important should be the consensus-criterion in order to narrow the margin of appreciation. Only by using this concept of "necessity" and "margin" - which means pursuing the aim of achieving greater unity between member States and "ensuring that the Convention remains a living instrument", as Judge Martens says[29] - can the standard be developed or at least maintained, bearing in mind the increasing number of member States of the Convention.

Only by recognising that the underlying philosophy of the necessity-test is a normative one guided by the autonomous interpreta-

[27] See e.g. H.W. Rengeling, *Grundrechtsschutz in der Europäischen Gemeinschaft* (Munich, 1993), 224-5.

[28] K. Hailbronner, "Die Einschränkung von Grundrechten in einer demokratischen Gesellschaft", in: R. Bernhardt et al. (eds), *Völkerrecht als Rechtsordnung - Internationale Gerichtsbarkeit - Menschenrechte: Festschrift für Hermann Mosler* (Berlin, 1983) 359, at 376, and similarly A. Bleckmann, *Staatsrecht II - Die Grundrechte*, (4th edition Cologne, 1997), at 40-41.

[29] *Cossey* judgment, supra note 20, diss. op. of Judge Martens, 28.

tion of the Convention can one say that the concept of the margin and the concept of autonomous interpretation when determining the scope of a fundamental right, e.g. defining the term "civil rights" in Article 6 – are two sides of the same coin.[30]

Two sides of the same coin must not, however, mean, that the margin of appreciation doctrine, which – at least as far as Articles 8 to 11 are concerned – has its place in the concept of limitations, can be transferred to the definition of the scope of a right. Therefore it is false to use the doctrine of margin when defining the term "respect for ... private life" in Article 8 paragraph 1, that is to say that when defining the scope of a right the state is granted a margin. Rather the term "respect" has to be interpreted as autonomously as the term "civil right" in Article 6, even if as the Court says, it is not clear-cut.[31]

The interpretation of Article 6 is – in contrast to the current practice regarding the provisions including limitations, that is to say paragraphs 2 of Articles 8 to 11, – evolutive and very much oriented on the object and purpose of the treaty in the wording of Article 31 of the Vienna Convention on the Law of Treaties. This normative approach – somehow in contrast to the fact that the Court does not consider that it has to give an abstract definition of the concept of "civil rights and obligations" – has been criticised for example by a joint dissenting opinion in the *Feldbrugge* case. The minority would have liked to give more weight to the practice of the member States as an element of interpretation and was of the opinion that – since no common ground could be identified in the legal systems of the Contracting States regarding the civil or other character of social security entitlements – the Court should not have interpreted the term "civil rights" in such a progressive way.[32]

[30] Cf. e.g. W.J. Ganshof van der Meersch, "Quelques aperçus de la méthode d'interprétation de la Convention de Rome du 4 novembre 1950 par la Cour européenne des droits de l'homme", in: *Mélanges offerts à Robert Legros* (Brussels, 1985) 207, 210 and 215, but also the more cautious statement at 219. In addition, the argument that the separation of powers between the Court and the Contracting States as "legislators" advocates for a cautious interpretation when defining the scope of a right, does not have the same importance when limitation clauses are at issue.

[31] See e.g. Rees judgment, supra note 19, paragraph 37. This systematic argument is, considering the result, not far from what scholars have called a constitutional attitude; see e.g. C. Warbrick, "Federal Aspects of the European Convention on Human Rights", Michigan Journal of Int'l Law 10 (1989) 698, 722.

[32] Feldbrugge v. Netherlands, 29 May 1986, A/99, 27-28.

When deciding a case on two human rights guarantees in conflict the normative approach should also be used in order to control the scope of margin. The guideline can once more be seen in the concept of a democratic society. This can be shown when discussing the *Otto-Preminger* case. There it had to be decided whether an interference with the freedom of expression was justified because of the freedom of religion of others. Therefore, in this case one right was used as a legitimate aim in order to justify the interference with another guarantee of the Convention. The question was whether the seizure and forfeiture of a film involving a discussion of freedom of art and exposing the Catholic religion to ridicule, which was bound to offend the overwhelming majority of Catholics in the part of Austria concerned, was justified under Article 10 paragraph 2. The Court stated regarding this matter that there is little common ground amongst the member States about the significance of religion and therefore the margin is wide, as we have seen when discussing morals as a legitimate aim in the *Dudgeon* case as well. Using the normative approach one might nevertheless come to the result, that it was not only not necessary to interfere with the freedom of expression, but it would have been necessary in a democratic society to protect the freedom of expression against interference in order to preserve democracy including minority protection and tolerance, since the offended religion was that of the overwhelming majority of people living in the concerned region of Austria.[33] However, the Court held otherwise and considered the interference to be justified in contrast to the report of the Commission.

Now we will turn to the structure of the necessity-test. The Court states that the arguments put forward by the government must be "relevant and sufficient". The measure taken must correspond to a "pressing social need" and has to be "proportionate to the legitimate aim pursued".

If one adopts the view – as expressed by Judge Macdonald – that the proportionality-test can be seen as a limitation of the margin of appreciation, then the pressing social need-test is submitted to the

[33] See P. Wachsmann, "La religion contre la liberté d'expression: sur un arrêt regrettable de la Cour européenne des droits de l'homme", RUDH 6 (1994) 441.

margin whereas the proportionality-test is not.[34] There are cases which seem to follow such a rule. Therefore one could assume that the pressing social need-test could be described as a general balance between the legitimate aim pursued and the fundamental right interfered with. This balance would be carried out on a relatively abstract level compared to proportionality in the narrow sense which would be defined as the proper balance between the same interests on a concrete level regarding the specific case. As an example might be seen the *Moustaquim* case[35] where it was basically established that there were serious reasons calling for an expulsion of the applicant and the general rule was that in cases where an alien has seriously prejudiced public order by committing crimes the expulsion is justified in order to assure the prevention of crime notwithstanding the family life of what local/domestic authorities would call an "average alien". In this particular case, however, the proportionality-test failed. The Court held that the authorities had not achieved a just balance between the applicant's interest in maintaining a family life and the public interest in the prevention of disorder in this specific case.

However, adopting that view one might be disappointed when learning that the proportionality-test is sometimes also expressly submitted to the margin of appreciation concept. This is particularly true for the case *Mueller v. Switzerland* and the *Otto Preminger* case.

In the *Mueller* case it had to be decided whether the seizure and the forfeiture of paintings showing sexual activities in order to protect morals were proportionate. And since there was no doubt that the showing of the same works of art in a less conservative part of Switzerland or elsewhere in a museum or gallery and if necessary setting an age-limit would have been no problem, the Court should have held that at least the forfeiture of the paintings for years was disproportionate.[36] But granting a very large – too large – margin it

[34] R. Macdonald, "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights", in: G. Arangio-Ruiz (ed.), *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (Milan, 1987) III 187, 201 and 205.

[35] Moustaquim v. Belgium, 18 February 1991, A/193.

[36] The Commission had reached this conclusion. See M.E. Villiger, *Handbuch der Europäischen Menschenrechtskonvention* (Zurich, 1993), no. 597, and S. Trechsel, in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Dordrecht, 1992) 241, 254-256.

considered the measure under review as being proportionate. The same was true for the film at issue in the *Otto Preminger* case. The measures taken entailed that the film could not be shown in Austria at all, even if the public in Vienna had not been offended by it being much more liberal than the Tyrolians. These decisions are wrong in our view.

The importance of the margin when considering proportionality can also be demonstrated also by analysing the terms used by the Court. Whereas in the *Otto Preminger* case the Court stated that the measures taken were "not disproportionate",[37] in other cases it required them to be "strictly proportionate" to the legitimate aim pursued.

Therefore, another concept has to be constructed. Departing from the claim that the expressions "measures corresponding to a pressing social need" and "measures proportionate to the legitimate aim pursued" are used nearly as synonyms, one might try to give reasons for this assumption. In several cases the necessity-assessment is described as inquiring about the pressing social need "and, in particular, whether the limiting measure is proportionate to the legitimate aim pursued".[38] This would mean that the application of the proportionality-rule is part of the pressing social need-test. One could even go further by stating that the pressing social need-test today is considered as being nothing else than the proportionality-test. "One cannot help observing that, relying on proportionality as a vital element of the phrase 'necessary in a democratic society', the Court tends more and more to concentrate on this important concept. The essential argumentation is often in the sense that an interference is not proportionate to the legitimate aim pursued and *therefore* is not necessary in a democratic society."[39]

As the core of the proportionality-test a balance must be struck – as the Court states – between competing interests; a fair balance between, on the one hand, the demands of the general interest of the community and, on the other hand, the requirements of the protec-

[37] Otto Preminger-Institut judgment, supra note 10, paragraph 57.

[38] See e.g. Open Door and Dublin Well Woman v. Ireland, 29 October 1992, A/246-A, paragraph 70.

[39] J. Cremona, "The Proportionality Principle in the Jurisprudence of the European Court of Human Rights", in: U. Beyerlin (ed.), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt* (Berlin, 1995) 323, 329.

tion of the fundamental rights. This balance can be a more general one as in the *Dudgeon* case where legislation without regard to specific cases is at issue, or a specific one as in the *Moustaquim* case where the general balance is struck more in favour of the public interest but in the specific case is outweighed by the interest in protecting the fundamental guarantee. The more general the balance is, the less distinguishable are the two questions whether a measure can be seen as pursuing a legitimate aim or whether this measure is proportionate. This is why Judge Matscher complained in *Dudgeon* about the majority of the Court first having acknowledged an aim as legitimate and then having denied its legitimacy by striking a balance between it and the fundamental guarantee in favour of the latter.[40] This opinion, however, misunderstands the concept in so far as the recognition of a aim as legitimate is based on an isolated view, whereas the decision whether that public interest should prevail presupposes a relative view about the items or concepts being weighed against each other.

Despite the richness or even abundance of literature in the field of the necessity-test, Stefan Trechsel - has - regarding specially the margin of appreciation concept - stated in 1996, that there reigned "foggy darkness" around it.[41] However, the Court's need for flexibility will probably to a certain extent resist the scholars' efforts in trying to find or give guidelines when carrying out the necessity-test. Judge Macdonald called for clearing the way to the development of a theoretical vision of the Court's function. But he also said that the Court may be tempted to use the margin in order to obscure the important distinction between reviewability and justifiability by preventing the articulation of the Court's reasons for not intervening in the domestic decision. The Court can "by giving as its reason for not intervening simply that the domestic decision is within the margin of appreciation - leave observers to guess the real reasons which it fails to articulate".[42] It tends to do this by reminding the readers of the fact, that the scope of European supervision "will vary

[40] See Dudgeon judgement, supra note 4, diss. op. of Judge Matscher, 33, and Open Door and Dublin Well Woman judgment, supra note 38, diss. op. of Judge Matscher, 38.

[41] S. Trechsel in his preface to H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dordrecht, 1996), xiii.

[42] R. Macdonald, supra note 2, 85.

according to the circumstances".[43] Becoming aware of the dangers of this perspective one might be tempted to adopt the view tending to the other extreme as expressed by Judge Wold in his dissenting opinion to the *Belgian Linguistic* case: "Every human right granted by the Convention must be the same in all the contracting member-States."[44]

2 Positive Obligations and Their Limitations

2.1 General

The doctrine of the "margin of appreciation", as we have seen, comes into prominence in the context of the second paragraphs of Article 8 to 11 of the Convention. The Strasbourg organs use to include that doctrine in their consideration of whether an interference with one of the rights may be justified as serving a legitimate aim and being necessary in a democratic society. When it comes to positive obligations, however, the Court departs from this method.

What is a positive obligation? A historical analysis of the circumstances that led to the adoption of the Convention would show that, in reaction to the totalitarianism displayed by the Nazi and Stalinist regimes, the instrument's primary purpose was the protection of individuals from governmental action prejudicial to their liberty. Accordingly the Court held from the beginning that rights like those enshrined in Article 8 of the Convention have as "object ... essentially that of protecting the individual against arbitrary interference by the public authorities".[45] The obligations imposed on states, from this point of view, were deemed to be negatory: States should not act to the detriment of their citizens' rights. Soon, however, scholars and the Strasbourg organs became aware of the narrowness of such a concept. Human rights, as they were put forward by *John Locke* and the framers of the 18th-century declarations,[46] were meant to be the

[43] See e.g. Otto-Preminger-Institut judgment, supra note 10, paragraph 50.

[44] Belgian linguistics Case, 23 July 1968, A/6, diss. op. of Judge Wold, 105.

[45] Belgian linguistic Case, supra note 44, 33.

[46] Such as the American *Declaration of Independence* of 1776, or the French *Déclaration des Droits de l'Homme et du Citoyen* of 1789.

justification of governmental power. Safeguarding the classical trilogy of life, liberty and property of citizens against others, they claimed, was the one and only purpose of government,[47] and at the same time the limit set to its power. This understanding of human rights as the constitutive elements of the state found its revival in the discussion on "Drittwirkung", a concept promoted by many writers on the Convention from its very beginning.[48] As far as we are concerned with the interpretation of the Convention at the Strasbourg level, it called for a duty of the states, founded in the rights of the Convention, to adopt those measures necessary to protect those rights from any undue interference by private third parties.[49]

2.2 The Court's Doctrine of Positive Obligations

The Court declined to take any part in dogmatic struggles, but steadily built up a jurisprudence on what it elected to call "positive obligations" and thus distinguished from the "essential" negatory function of the Convention's rights. In the *Marckx* case, it held that although the object of Article 8 "is 'essentially' that of protecting the individual against arbitrary interference by the public authorities (...), it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there

[47] J. Locke, *Two Treatises on Government*, Second Treatise, Chap. IX.

[48] See E.A. Alkema, Third-Party Applicability or "Drittwirkung", in: F. Matscher and H. Petzold (eds), *Protecting Human Rights: the European Dimension; Studies in Honour of Gérard J. Wiarda* (Cologne, 1988), 33, 36 for an overview.

[49] J.A. Frowein and W. Peukert, *EMRK-Kommentar* 2nd ed., (Kehl, 1996), N. 9-13 at Art. 1; P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Deventer, 1990), 15; J. Velu and R. Ergec, *La Convention Européenne des Droits de l'Homme* (Brussels, 1990), N. 93; L. Wildhaber and St. Breitenmoser, *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (Cologne, 1992), N. 74-94 at Art. 8;A. Bleckmann, "*Die Entwicklung staatlicher Schutzpflichten aus den Freiheiten der Europäischen Menschenrechtskonvention*", in: U. Beyerlin (ed.), *Recht zwischen Umbruch und Bewährung, Festschrift für Rudolf Bernhardt* (Berlin, 1995), 309; St. Breitenmoser, *Der Schutz der Privatsphäre gemäss Art. 8 EMRK* (Basel/Frankfurt am Main, 1986), 66-69; G. Malinverni, "*Les Fonctions des Droits Fondamentaux dans la Jurisprudence de la Commission et de la Cour Européennes des Droits de l'Homme*", in: W. Haller, A. Kölz, G. Müller and D. Thürer (eds), *Festschrift für Dietrich Schindler zum 65. Geburtstag* (Basel/Frankfurt am Main, 1989), 539; D. Murswiek, "*Die Pflicht des Staates zum Schutz vor Eingriffen Dritter nach der Europäischen Menschenrechtskonvention*", in: H.-J. Konrad (ed.), *Grundrechtsschutz und Verwaltungsverfahren. Internationaler Menschenrechtsschutz, Referate der 23. Tagung der wissenschaftlichen Mitarbeiter der Fachrichtung "oeffentliches Recht" 22.-26. Februar 1983 in Berlin*, 1985, 213; L. Wildhaber, "*Der Closed Shop in Strassburg*", in: P. Böckli, K. Eichenberger, H. Hinderling and H.P. Tschudi (eds): *Festschrift für Frank Vischer* (Zürich, 1983), 349.

may be positive obligations inherent in an effective 'respect' for family life".[50] The applicants' complaint in this case had been that, under the laws of Belgium, a mother had to declare her recognition of her child born out of wedlock in order to establish a family relationship under the law. And even then the status of the child was still inferior to the status of a so-called "legitimate" child. The Court proposed that "when a State determines in its domestic legal system the régime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies (...) the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2".[51] It accordingly found the Belgian State in violation of Article 8.

This reasoning is worth a moment's consideration. What it seems to say is: first, that the citizen's right to respect for his private life implies that there is an obligation imposed on the State to respect that private life in whatever behaviour it displays, for instance in legislation, and second, that a State may have a wide margin of appreciation in its choice of means to secure that respect, but that it will be invariably found in violation of paragraph 1 of Article 8 if it fails to secure anything which the Court finds to be inherent to the notion of "respect". So far, so convincing. But why should there be no need now for an examination under paragraph 2? Why should the State not be able to avail itself of a justification for its failure to respect the private life of its citizens by means of legislation in the same manner as it may do when it fails to show that respect by tapping people's telephones?[52]

No reason is given by the Court in *Marckx*. And it seems to us that the Court trapped itself in constructing an unwarranted barrier between the notions "interference" and "positive obligation". In the *Airey* case, concerning the applicant's inability under Irish law to

[50] Marckx v. Belgium, 13 June 1979, A/31, 15.

[51] Ibid., 15.

[52] See, e.g., Klass and others v. FRG, 6 September 1978, A/28.

have her separation from a battering husband enforced, the Court "does not consider that Ireland can be said to have 'interfered' with Mrs. Airey's private or family life"[53] and went on to find a violation of the State's positive obligation to provide for adequate protection for Mrs. Airey's privacy. Paragraph 2 of Article 8, however, does not provide a method for examining "interference with private life". It concerns interference with the citizen's *right* to have his private life *respected*. The wording of the Convention imply that breaches of negative and of positive duties can both be deemed "interferences".

The consequences of the *Marckx* ruling were not evident as long as the Court was inclined to find violations in every case brought to its attention of positive obligations inherent to Article 8. In *X and Y. v. The Netherlands*, the Court referred to the *Airey* case and added that "these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves".[54] The challenge only came with the case of *Abdulaziz, Cabales and Balkandali*. The husbands of the three applicants were not admitted to residence in the United Kingdom, where the applicants had a right to dwell. One of the complaints was that this constituted a violation of Article 8., in that the State had, by refusing to admit the husbands to its territory, failed to respect the right to cohabitation that forms part of family life. The Court recalled "that, although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life (...). However, especially as far as those positive obligations are concerned, the notion of 'respect' is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (...)".[55] Accounting for the fact that the applicants were free to enjoy their

[53] Airey v. Ireland, 9 October 1979, A/32, 17.

[54] X and Y. v. the Netherlands, 26 March 1985, A/91, 11.

[55] Abdulaziz, Cabales and Balkandali v. UK, 28 May 1985, A/94, 33-34.

family life in their respective home countries, the Court found no violation of Article 8.

If there are any doubts as to what the Court meant when it offered the Convention's notion of "respect" to the appreciative power of the Contracting States, we may find confirmation in the *Rees* judgment. Referring to the problem of the legal status of transsexuals, the Court held: "It would ... be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting States enjoy a wide margin of appreciation."[56] A margin, we must note, to decide on the scope of what may be meant by "respect to private and family life", not a margin to appreciate the necessity of an interference.[57]

In *Rees*, the Court completed what may be deemed its standard procedure for the positive obligations test: "In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (...). In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to 'interferences' with the right protected by the first paragraph – in other words is concerned with the negative obligations flowing therefrom."[58]

Again identifying "interferences" with the breach of "negative obligations", the Court thus placed the whole examination of the question whether a positive obligation had been violated in rather an indiscriminate stew within paragraph 1; flavoured with some elements taken out of the context of paragraph 2. The *Rees* rules governed all

[56] Rees judgment, supra note 19, paragraph 37.

[57] We cannot follow Bleckmann, supra note 49, 318, in seeing a margin of application mainly granted for the "how" and not so much for the "whether" of a positive obligation. This was the starting point in Marckx, but the doctrine's application in this line of cases has dramatically changed its impact when the need arose to deny claims to positive obligations without any recourse to paragraph 2 of Article 8.

[58] *Rees* judgment, supra note 19, paragraph 37.

further cases of positive obligations arising under Article 8.[59] The same method was applied to cases arising under Article 11.[60] No positive obligations have yet been identified by the Court under Article 9 and 10 of the convention.[61]

2.3 The Alternative Approach

The Court's jurisprudence has given rise to some criticism. Correctly, it has been remarked by the now Vice-President of the Court that its approach to positive obligations amounts to a revival of the doctrine of "implicit limitations" of the rights protected by the Convention.[62] A different method of examination should, according to the court, be applied in cases involving negative respectively positive obligations. But do these kinds of obligations really so fundamentally differ as to legitimate such a difference in treatment? We think not. Rather, it must be acknowledged that it is impossible to clearly distinguish so-called "positive" from "negative" obligations. An example may be illuminating:

A Finnish citizen named "Stjerna" wanted to dispose of that bright name. He felt that his Finnish neighbours had difficulty with grasping its pronunciation, and that they preferred to invent nicknames for him of which he did not approve. He thought that this problem might be resolved if he could change his name to "Tavaststjerna". We do not know whether this is really easier to pronounce for Finnish tongues, but the chosen name definitely had the advantage of belonging to an old and well-known family.

The aspiring Mr. Tavaststjerna applied to the Finnish authorities to have his name changed accordingly. The latter in compliance

[59] Gaskin v. UK, 7 July 1989, A/160; Powell and Rayner v. UK, 21 February 1990, A/172; Cossey judgment, supra note 20; B. v. France judgment, supra note 21; Kroon and others v. Netherlands, 27 October 1994, A/297-C; Hokkanen v. Finland, 23 September 1994, A/299-A; Stjerna v. Finland, 25 November 1994, A/299-B; Stubbings and others v. UK, 22 October 1996, Reports 1996-IV, 1487; X, Y and Z. v. the United Kingdom v. 22 April 1997.

[60] Plattform "Aerzte für das Leben" v. Austria 21 June 1988, A/139; Gustafsson v. Sweden 25 April 1996, Reports 1996-II.

[61] In the cases of Leander v. Sweden, 26 March 1987, A/116, 29 and Gaskin, supra note 59, 21, the Court held that "Article 10 does not embody an obligation on the State concerned to impart such information".

[62] *Abdulaziz, Cabales and Balkandali*, supra note 55, conc. op. of Judge Bernhardt, 47; approving L. Wildhaber and St. Breitenmoser, *Internationaler Kommentar zu Europäischen Menschenrechtskonvention*, supra note 49, no. 55 at Article 8.

with Finnish law engaged in a thorough assessment of Mr. Stjernas need to get rid of his name and decided that no such need could be evidenced and that therefore he would not be granted a name change. Mr. Stjerna took refuge with the Convention under Article 8. The Court, after having established that a person's name does concern his or her private life, stated: "The refusal of the Finnish authorities to allow the applicant a new surname cannot, in the view of the Court, necessarily be considered an interference in the exercise of his right to respect for his private life, as would have been, for example, an obligation on him to change surname."[63] Two questions now come to my mind: First, if the Court just can "not necessarily" find an interference, why does it follow from that that there actually has not *been* an interference and that consequently the unshaped "positive obligations"- test will be applied? Is there a presumption in favour of the vagueness of that test? Secondly, when the State sets up legal machinery - including a sophisticated registration system that makes it virtually impossible for people to use another surname even in private than the one written in their official documents - and then forbids someone to have his name changed in this machinery - why is that not an "interference"? After all, it is perfectly conceivable that the State leaves its citizens free to use any name they want to use, and even renounces setting up any compulsory registration system. That is actually the situation in the United Kingdom.[64]

In his famous dissenting opinion in *Cossey*, Judge Martens had already developed a similar view. In advocating the overruling of *Rees*, he maintained: "The very essence of Mr. Rees' complaints was not the refusal to alter the register of births or to issue birth certificates whose content and nature differ from those in the birth register; the very essence of his complaints was that the *legal system* in force in the United Kingdom (...) was inconsistent with his rights under Article 8 of the Convention."[65] The legal system that defined gender exclusively by applying biological criteria, he stated, should have been considered a continuous interference, and then "it would have become decisive whether the United Kingdom had convincingly es-

[63] *Stjerna* judgment, supra note 59, paragraph 38.

[64] Ibid., paragraph 30.

[65] *Cossey* judgment, supra note 20, diss. op. of Judge Martens, 26.

tablished that its maintenance of that system met the requirements of paragraph 2 of Article 8".

Even the Court, it must be said, became aware of the fact that there is no clear divide between negative and positive obligations. In the case of *Keegan v. Ireland*, the applicant's daughter, born a few months after Mr. Keegan's separation from his former girlfriend, had been handed over for adoption without the applicant having an opportunity to intervene or even to know about that proceeding. In the report of the Commission, we read: "the applicant is arguing in effect not that the State should refrain from acting but rather that it should take steps to ensure adequate recognition and protection of the rights of natural fathers in respect to their children born out of wedlock".[66] There follows due reference to, and application of, the Court's *Rees* rules. But in the Court's judgment, we find a new text-element in addition to those rules, to this day repeated in other relevant cases:[67] "However, the boundaries between the State's positive and negative obligations (...) do not lend themselves to precise definition. The applicable principles are, none the less, similar."[68] This time, the Court took the freedom to find an interference in "the fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent".[69]

In the case of Mr. Stjerna, if we may come back to it, a dissenting minority of the Commission wrote: "we conclude that the refusal to let the applicant change his name from 'Stjerna' to 'Tavaststjerna' amounted to a lack of respect for his private life".[70] They then applied the test outlined in paragraph 2 and so followed an approach that we would like to advocate here. This approach has been offered by Judge Bernhardt in his dissenting opinion in the *Abdulaziz, Cabales and Balkandali* case and finds support in Judge Wildhaber's

[66] Keegan v. Ireland, 26 May 1994, A/290, Annex (Opinion of the Commission), paragraph 51.

[67] *Hokkanen; Stjerna; Kroon and Others; X, Y and Z v. the United Kingdom* judgments, supra note 59.

[68] *Keegan*, supra note 66, paragraph 49.

[69] The opposite constellation could be stated in the *Gaskin* judgment, supra note 59: The refusal of the authorities to grant Mr. Gaskin access to the files evidencing his placements in care during his childhood was qualified as an interference by the Commission, whilst the Court handled the case as concerning positive obligations.

[70] *Stjerna* judgment, supra note 59, partly diss. op. of Mr. Trechsel, Mr. Ermacora, Mrs. Thune, Mr. Rozakis and Mr. Nowicki, 76.

concurring opinion in *Stjerna*: "In my view, it would be preferable to construe the notion of 'interference' so as to cover facts capable of breaching an obligation incumbent on the state under Article 8 paragraph 1, whether negative or positive. Whenever a so-called positive obligation arises the Court should examine, as in the event of a so-called negative obligation, whether there has been an interference with the right to respect for private and family life under paragraph 1 of Article 8, and whether such interference was 'in accordance with the law', pursued legitimate aims and was 'necessary in a democratic society' within the meaning of paragraph 2."[71]

There is, we think, just one kind of obligation on States under the Convention: That in setting up, in administrating, in adjudicating and in enforcing legal order, they always have to display a behaviour that respects the rights enshrined in that instrument. The function of human rights may be described under different aspects; we may consider their negatory, constitutional, institutional or protective functions. But it is unwarranted to conclude from those functions that under the Convention, there are different kinds of obligations on States divided along those same lines. I can see no reason to make any difference. Considering the practical difficulty in drawing a clear line at all, only the application of the interference – justification approach including paragraph 2 is able to ensure a consistent and reliable interpretation of the Convention. This goes, may we add, not only for Article 8, but for all of the rights secured under the Convention, for every human right's correlate is the duty of the State to respect that right.

It might come as some surprise, but the Court itself has adopted the interference approach in two cases where the rights in question clearly were construed to have a protective function and not a negatory one. One of these cases is *Keegan*, quoted above. The other is the case of *Young, James and Webster*, the so-called "closed-shop" case. In both of these cases, the immediate actions prejudicial to the applicant's rights under the Convention had been performed not by State authorities, but by third parties. In *Keegan*, it was the applicant's former girlfriend that had placed their child up for adoption without the father's consent. In the "closed-shop"-case, the employer

[71] Ibid., conc. op. of Judge Wildhaber, 67.

of Messrs. Young, James and Webster fired them because they had refused to join a trade union. None the less in both cases, the Court held the States responsible for an *interference* with the applicants rights under Article 8 respectively 11 of the Convention, for the reason that the States, *qua legislatore*, had *permitted* this behaviour. As the Court put it in *Young, James and Webster*: "Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis."[72]

One could think that, at least in all cases that involve infringements on applicant's right's by legal actions of third parties, the Court would stick with these precedents and use the interference approach. It seems, however, that the quoted judgments were not much more than inadvertent sidesteps. For in a very similar case that recently arose under Article 11 of the Convention the Court returned to the "positive obligations" method. In *Gustafsson*, it held: "The matters complained of by the applicant, although they were made possible by national law, did not involve a direct intervention by the State. The responsibility of Sweden would nevertheless be engaged if those matters resulted from a failure on its part to secure to him under domestic law the rights set forth in Article 11 of the Convention (...). Although the essential object of Article 11 is to protect the individual against arbitrary interferences by the public authorities with his or her exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights."[73]

2.4 Concluding Remarks on Positive Obligations

One may wonder why the Court to this day refuses to adopt the rather unproblematic interference approach in favour of the vague "positive obligations" theory. The problem is not disposed of by the Court's acknowledgment that "the applicable principles are broadly

[72] *Young, James and Webster* judgment, supra note 7, paragraph 49.

[73] *Gustafsson* judgment, supra note 60, paragraph 45.

similar".[74] There may be some similarity as to the interests and basic notions involved, but it is certainly a big difference in method between the systematic step-by-step procedure called for under the respective second paragraphs and the foggy general weighing preferred by the Court. Even if it is true that the result may be the same in most cases,[75] there remains a difference in the duplicability and predictability of its judgments.

Perhaps this is intended. Judge MacDonald's words in respect of the "usefulness" of the application of the margin of appreciation doctrine have already been referred to.[76] The "positive obligations" doctrine, too, may be a means of the Court to protect itself; to reserve its freedom to find in every case the solution it deems to be the most appropriate.[77] In the case of *Plattform Ärzte für das Leben*, the Court explicitly remarks that it "does not have to develop a general theory of the positive obligations which may flow from the Convention".[78]

This is sound procedure as far as the Court wants to avoid to put forward rules and tests that it does not need in the actual case. It should not be a reason, though, to conceal the necessary rules that have governed the actual cases behind a veil of fog. We lawyers need some hints to enable us to fulfil that paramount task identified by Justice *Holmes*: to make reliable predictions as to how the Courts will rule in future cases. There should be, we think, some difference between a Court of Justice and the Delphic Oracle.

[74] *Powell and Rayner* judgment, supra note 59, paragraph 41.

[75] Cf. *Stjerna* judgment, supra note 59, conc. op. of Judge Wildhaber, 67.

[76] Supra note 42.

[77] G. Malinverni, supra note 49, 560; G. Ress, "Die 'Einzelfallbezogenheit' in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte", in: R. Bernhardt et al. (eds), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler* (Berlin, 1983), 719.

[78] *Plattform "Aerzte für das Leben"* judgment, supra note 60, paragraph 31.