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The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence

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SOMMAIRE

1 INTRODUCTION

The present master thesis analyses the development and the current application of the principle of subsidiarity and the margin of appreciation doctrine in the European Court of Human Rights' (hereinafter: ECtHR) case law. After a brief introduction on the origin of the European Convention for the Protection of Human Rights and Fundamental Freedoms[1] (hereinafter: ECHR) and the ECtHR, the on-going reform process within the ECtHR will be presented. One of the aims of this reform process, defined by the Member States of the Council of Europe (hereinafter: CoE), is to strengthen the principle of subsidiarity and the margin of appreciation doctrine in the ECtHR's jurisprudence. The objective of this paper is to illustrate if and to what extent the ECtHR's jurisprudence has changed in light of the reform process. The case law developments will be described based on selected landmark cases.

[1] *European Convention for the Protection of Human Rights and Fundamental Freedoms, 04.11.1950, Rome. (Entry into force 3 September 1953, ETS No. 005).*

2 HISTORICAL BACKGROUND

Shortly after its creation in 1949 the CoE took up the drafting of the ECHR. Adopted in 1950 in Rome, the ECHR originally included a limited set of rights to be enforced by the ECtHR but it has been consecutively amended through additional protocols.[2]

The ECtHR started its first judicial year in 1959. In the original system, the European Commission on Human Rights examined the admissibility of cases. States as well as individuals alleging violations of the ECHR had to pass through the commission to bring a case before the ECtHR. In 1990, a major change in the original system occurred when Protocol No. 9[3] introduced the possibility for individuals to directly bring applications before the ECtHR. In 1994, Protocol No. 11[4] established the court as a single permanent court with compulsory jurisdiction and dissolved the European commission on human rights.

Individual complaints today constitute the majority of the court's workload. The judgements of the ECtHR are implemented by the concerned signatory states under supervision by the CoE. In the 1990s, many former east-bloc countries joined the CoE and thus gained access to the ECtHR, enlarging its clientele to around 800 million individuals. The enlargement of signatories to the ECHR as well as the possibility for individuals to directly bring applications before the ECtHR lead to a massive increase in applications, causing a major workload crisis at the ECtHR. Currently the court's yearly input of applications exceeds by far its output of decisions.[5]

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[2] *COUNCIL OF EUROPE, The Conscience of Europe. 50 Years of the European Court of Human Rights. London, Third Millennium Publishing Limited, 2010, p. 16-23.*
[3] *Protocol no. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 6.XI.1990. (Entry into force 1 November 1998, ETS No. 155).*
[4] *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. 11.V.1994. (Entry into force 1 November 1998, ETS No. 5).*
[5] *See, e.g. H. KELLER/ A. FISCHER/ D. KÜHNE, Debating the Future of the European Court of Human Rights after the Interlaken Conference. Two Innovative Proposals, European Journal of International Law 2010, p. 2-3.*

"The reason for the ever increasing backlog [at the ECtHR] are a combination of clearly inadmissible applications (more than 90% of all applications) and the vast number of applications deriving from the same structural cause as an earlier application (repetitive cases)."[6]

Although the Court has been able to increase its output in recent years by around 25%, problems are far from being solved and a further increase of the number of applications is already foreseeable.[7]

[6] *J.P. RUI, The Interlaken, Izmir and Brighton Declarations. Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights, Nordic Journal of Human Rights 2013, p. 31.*

[7] *L. CAFLISCH,* The Reform of the European Court of Human Rights. Protocol No. 14 and Beyond, Human Rights Law Review 2006, p. 405.

3 REFORM PROCESS

At the Inter-Ministerial Conference held in Rome in 2000 to celebrate the 50th anniversary of the Convention, the Steering Committee on Human Rights (hereinafter: CDDH[8]) was established to make suggestions for reforms of the current system. The CDDH's suggestions concerning the filtering of applications, implementation of the Court's judgements and measures at the national level, were included in its 2003 final report.[9] The conclusions of this report were integrated into Protocol No. 14[10] which entered into force in 2010. It contains the following main changes:[11]

- *Processing Applications of Limited Interest*: single judges (instead of a three judges committee) can declare applications inadmissible. Three judges committees can now decide cases unanimously if there is well-established case law of the Court. Decisions by single judges and three judge committees are final. This change is expected to have a positive effect on the workload crisis.
- *Additional Admissibility Criterion*: in order to be considered, applicants must have suffered a significant disadvantage (*de minimis praetor non curat*). This measure is also intended to help to reduce the Court's workload.
- *Encouragement of friendly settlement*
- *Strengthening the system of implementation of Judgements*

[8] *CDDH stands for "Comité directeur pour les droits de l'homme". It is the French name of the Steering Committee on Human Rights.*
[9] *L. CAFLISCH (note 7), p. 407.*
[10] *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. 13.V.2004. (Entry into force 1 June 2010, ETS No. 194).*
[11] *L. CAFLISCH (note 7), p. 407-412.*

A Resolution[12] of the Committee of Ministers, published simultaneously with the approval of Protocol No. 14 additionally introduced the "pilot-judgement" technique. The Court therein uses a judgement on a representative case caused by a systemic problem in order to issue recommendations to the concerned state through the Committee of Ministers of the CoE. Until the systemic problem is properly addressed within a time limit set by the Court all other cases concerning the same issue in the same state are suspended.[13]

Despite all these changes aiming at dealing with the caseload crisis, it soon became apparent that the measures introduced by Protocol No. 14 were on one hand necessary to ensure the ECtHR's "survival" but on the other hand by no means sufficient. In order to continue reflections on the long-term effectiveness of the ECtHR a "Group of Wise Persons" was appointed by the CoE in 2005.[14] In 2006, this "Group of Wise Persons" released its report,[15] containing a number of suggestions that have formed the basis of the subsequent reform process of the Convention system.

In 2010 the High Level Conference on the future of the ECtHR took place under the Swiss Chairmanship of the CoE in Interlaken. This meeting resulted in a declaration containing an Action Plan, taking up most of the measures proposed by the "Group of Wise Persons". The Action Plan is intended to serve as a roadmap for the long-term effectiveness of the Convention system.[16]

Among others, the Interlaken Declaration reconfirms the importance of the right of individual petition, calls for strengthening the ECHR's implementation at the national level and the creation of further filtering

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[12] *Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, adopted on 12 May 2004, 114th Session.*
[13] *L. CAFLISCH (note 7), p. 413.*
[14] *H. KELLER et al. (note 5), p. 4.*
[15] *Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, 15 November 2006, available at <https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2006)203&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>.*
[16] *J.P. RUI (note 6), p. 32-33.*

mechanisms, highlights the importance of ensuring quality and independence of the ECtHR and expresses the need for improving the supervision of the execution of judgments.[17]

The Interlaken Declaration also invites the ECtHR not to reconsider "questions of fact or national law that have been considered and decided by national authorities"[18] in light of the fact that it is not a fourth instance court. The High Level Conference thus invites the ECtHR to respect its subsidiary role *vis-à-vis* the national authorities within the Convention system.

The Jurisconsult of the ECtHR (*i.e.* "the person responsible for case law monitoring and preventing case law conflicts"[19]) published a comprehensive follow-up note on the Interlaken conference entirely dedicated to the principle of subsidiarity[20] thus indicating the importance of this principle within the current reform process.[21]

Within the context of the Convention system, the principle of subsidiarity means that "the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court [ECtHR]. The Court can and should intervene only where the domestic authorities fail in that task."[22]

The principle of subsidiarity within the Convention system is thus distinct from the principle of subsidiarity as applied and enshrined in European Union (hereinafter: EU) law.

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[17] *COUNCIL OF EUROPE, Reforming the European Convention on Human Rights. Interlaken, Izmir, Brighton and beyond, Directorate General for Human Rights and Rule of Law, available at <http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Compilation%20ReformECHR2014_en.pdf>, 2014, p. 33-38.*
[18] *COUNCIL OF EUROPE (note 17), p. 36.*
[19] *A. BUYSE, New Policy on Reports of Judgments and Decisions (12.06.2012), available at <http://echrblog.blogspot.ch/2012/06/new-policy-on-reports-of-judgments-and.html?m=1>.*
[20] *JURISCONSULT, Interlaken Follow-Up. Principle of Subsidiarity, 2010, available at <http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf>.*
[21] *J.P. RUI (note 6), p. 33.*
[22] *JURISCONSULT (note 20), p. 2.*

Within the quasi-federal system of the EU, subsidiarity is to be understood as "competitive subsidiarity" referring to the competing powers of the Union and its Member States in a system where EU law is used to further the political integration of the Member States. As the ECtHR does not possess supranational decision-making powers, subsidiarity within the Convention system is to be understood as "complementary subsidiarity" in the sense that the ECtHR only intervenes where national authorities are incapable of effectively guaranteeing the rights of the ECHR.[23]

As the entry into force of Protocol No. 15[24] introducing the principle of subsidiarity into the preamble is still pending, the principle of subsidiarity is not expressly mentioned in the ECHR or its additional Protocols. However, it finds its implicit legal basis in different Articles of the ECHR. Starting in the late 1960s, the ECtHR also confirmed its subsidiary role *vis-à-vis* the national authorities in its case law and further defined its relationship with national authorities.[25]

The declarations of the two Interlaken-follow-up high-level conferences in Izmir (2011) and Brighton (2012) both took up the principle of subsidiarity again and the Contracting States therein expanded their wishes towards the ECtHR. While the Izmir declaration invites the ECtHR to confirm its subsidiary role in its case law[26] the Brighton declaration encourages the Court to give great prominence to the margin of appreciation of national authorities in addition to the principle of subsidiarity.[27] Furthermore, the Brighton declaration asks for the principle of subsidiarity and the doctrine of the margin of appreciation to be included in the Preamble to the ECHR.[28] This demanded change of the preamble has been included in Article 1 of Protocol No. 15.

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[23] JURISCONSULT *(note 20), p. 2.*
[24] *Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 24.VI.2013. (Currently open for signatures).*
[25] JURISCONSULT *(note 20), p. 3.*
[26] COUNCIL OF EUROPE *(note 17), p. 66.*
[27] COUNCIL OF EUROPE *(note 17), p. 93.*
[28] COUNCIL OF EUROPE *(note 17), p. 93.*

In general, the Member States thus seem to call in these declarations for greater reluctance by the ECtHR to overturn the interpretations of the ECHR carried out by national courts.[29] In addition to the aim of ensuring the long-term effectiveness this demand is clearly also an expression of dissatisfaction of certain Contracting States with a number of unwelcome judgments rendered by the ECtHR. By demanding a more subsidiary ECtHR they thus also aim at regaining more discretion in their decisions.[30]

Optional protocol No. 16[31] constitutes the latest development in the reform of the Convention system and introduces the possibility for the highest courts and tribunals of signatory states to request the Court to give non-binding advisory opinions on the interpretation of the ECHR.[32] Advisory opinions by the ECtHR on specific cases are intended to help national courts and tribunals to avoid potential violations of the ECHR and thus also aim to reduce the caseload.

[29] *J.P. RUI (note 6), p. 37.*
[30] *See for instance D. SZYMCZAK, Rapport Introductif: le principe de subsidiarité dans tous ses états, in F. SUDRE, Le principe de subsidiarité au sens du droit de la Convention européenne des droits de l'homme, Droit & Justice nr. 108, Anthemis 2014, p. 36.*
[31] *Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 2.X.2013. (Currently open for signatures).*
[32] *COUNCIL OF EUROPE (note 17), p. 113.*

4 THE PRINCIPLE OF SUBSIDIARITY WITHIN THE CONVENTION

As mentioned before,[33] the principle of subsidiarity within the Convention system means that "the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court [ECtHR]. The Court [thus] can and should intervene only where the domestic authorities fail in that task."[34]

Although there is no express mention of this principle in the ECHR or in the preparatory documents to the ECHR's adoption, it is a fundamental principle underlying the very structure of the Convention system. According to its preamble, the ECHR has been construed to achieve a collective enforcement of the rights enshrined in it without taking the place of national human rights protection schemes. In the sense of a "complementary subsidiarity",[35] national and European human rights guarantees go hand in hand.[36]

There is also extensive reference to the principle of subsidiarity in the ECtHR's case law, starting with the *Belgian Linguistic Case*[37] in 1968,[38] stating that

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[33] *Chapter III Reform Process*
[34] *JURISCONSULT (note 20), p. 2.*
[35] *JURISCONSULT (note 20), p. 2.*
[36] *H. PETZOLD, The Convention and the Principle of Subsidiarity in R.ST.J. MACDONALD/ F. MATSCHER/ H. PETZOLD (eds.), The European System For the Protection of Human Rights, Martinus Nijhoff Publishers, 1993, p. 42-43.*
[37] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium,* apps. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECHR 23 July 1968 *Reports of Judgments and Decisions, Series A no. 6.*
[38] *M. O'BOYLE, The Role of Dialogue in the Relationship Between the European Court of Human Rights and National Courts in: Y. HAECK/ B. MCGONIGLE LEYH/ C. BURBANO-HERRERA/ D. CONTRERAS-GARDUNO, The Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak, Intersentia, 2013, p.92; H. PETZOLD (note 36), p. 49.*

> "[…] the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the *subsidiary nature* of the international machinery of collective enforcement established by the Convention. [emphasis added]"[39]

4.1 ORIGIN OF THE PRINCIPLE OF SUBSIDIARITY

Although there is no express reference to the principle of subsidiarity in the ECHR, it can still be derived implicitly from the following Articles of the Convention:

- The complementary nature of the Convention system is to be found among others in ***Art. 53 ECHR*** which ensures that more favourable national human rights guarantees shouldn't be limited by the standards set in the ECHR in order to ensure that the more favourable guarantee is applied.[40]
- ***Art. 1 ECHR*** obligates the Contracting States to secure the rights and freedoms in Section 1 ECHR to everyone within their national jurisdiction. The ECHR thus "lays down standards of conduct rather than uniform solutions"[41] leaving to each Contracting State a spectrum of choices for implementing within its own domestic legal order the rights and freedoms of the ECHR.[42]

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[39] *JURISCONSULT (note 20), p. 3.*
[40] *H. PETZOLD (note 36), p. 44.*
[41] *H. PETZOLD (note 36), p. 44.*
[42] *H. PETZOLD (note 36), p. 44; J. CHRISTOFFERSEN, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, Martinus Nijhof Publishers Leiden 2009, p. 359.*

- In order to give effect to Art. 1 ECHR, ***Art. 13 ECHR*** guarantees the right to an effective remedy before a national authority to enforce the substance of the Convention rights in whatever form they have been implemented in the corresponding domestic legal order. As is the case for Art. 1 ECHR, the ECtHR leaves the Contracting States broad freedom of choice on how to guarantee the effectiveness of remedies for violations of the Convention rights under Art. 13 ECHR.[43]
- ***Art. 35 ECHR*** defines that complaints are only admissible before the ECtHR after all domestic remedies have been exhausted in order to give states the opportunity to address the complained situation before a national court first. However, Article 35 ECHR requires a certain degree of flexibility in its application, requiring the existence of national remedies to be sufficiently certain in order to guarantee an effective remedy.[44]
- ***Art. 41 ECHR*** provides that just satisfaction to the injured party can only be afforded if the Contracting State doesn't allow for full reparation. "Thus, both the remedy [under Art. 13 ECHR] and the redress at international level are subsidiary, in that they can come into play only in the event of the domestic legal order not having fulfilled the primary role assigned to it by the Convention."[45]

4.2 THE PRINCIPLE OF SUBSIDIARITY IN THE ECTHR'S CASE LAW (PRE 2011)

The principle of subsidiarity within the Convention system can be divided into *procedural* subsidiarity and *substantive* subsidiarity. *Procedural* subsidiarity governs the responsibilities for safeguarding the Convention guarantees between the ECtHR and national authorities (*e.g.* Arts. 13 and

[43] *H. PETZOLD (note 36), p. 45; J. CHRISTOFFERSEN (note 42), p. 359-360.*
[44] *JURISCONSULT (note 20), p. 7.*
[45] *M. O'BOYLE (note 38), p. 93; H. PETZOLD (note 36), p. 48.*

35 ECHR). *Substantive* subsidiarity on the other hand, regulates the competency of assessment and review of the ECtHR.[46]

Other than the provisions governing the procedural subsidiarity (*i.e.* Arts. 1, 13, 35, 41 and 53 ECHR) the principle of subsidiarity is also applied concerning the rights and freedoms under section I ECHR in the form of the fourth-instance and the margin of appreciation doctrine. However, the ECtHR's use of the principle of subsidiary is limited by the ECHR's guarantee that its rights are effectively applied.[47]

Due to its prominence both in the ECtHR's case law and the declarations of the three High Level Conferences, the margin of appreciation doctrine will be treated separately (see below under V.)

The fourth instance doctrine, "as one of the practical manifestations of the principle of subsidiarity",[48] posits that the ECtHR "is not a court of appeal or a court which can quash rulings given by the courts in the States Parties to the Convention or retry cases heard by them".[49] According to this doctrine, developed in ECtHR case law, it is therefore not the function of the ECtHR to reconsider questions of fact or national law, as is also emphasized in the Interlaken Declaration. So-called fourth-instance applications are declared inadmissible by the ECtHR, on the ground of being manifestly ill-founded according to Article 35 § 3 ECHR.[50] Only in the event a decision by a national authority is unreasonable, clearly arbitrary or blatantly inconsistent with the fundamental principles of the Convention, the ECtHR may re-examine questions of fact or national law.[51] Where on the other hand national law is only ambiguous or unclear concerning certain measures, and national courts have not resolved this

[46] JURISCONSULT (note 20), p. 6 and H. PETZOLD (note 36), p. 49.
[47] JURISCONSULT (note 20), p. 7.
[48] JURISCONSULT (note 20), p. 11.
[49] JURISCONSULT (note 20), p. 9.
[50] JURISCONSULT (note 20), p. 9-12, M. O'BOYLE (note 38), p. 93 and H. PETZOLD (note 36), p. 50-51.
[51] JUDGE D. SPIELMANN, Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?, Center for European Legal Studies Working Paper Series, University of Cambridge Faculty of Law, 2012, p. 2.

ambiguity, the ECtHR also restrains the scope of the review of compliance of this measure with domestic law without imposing a solution.[52]

The fourth instance doctrine applies in general to all substantive provisions of the ECHR and irrespective of the legal sphere[53] to which the proceedings belong at domestic level. To decide if an application is dismissed as a fourth-instance application, the ECtHR proceeds on a case-by-case basis. A general threshold defining when to dismiss this kind of cases hasn't been established and probably can't ever be construed.

In accordance with the fourth instance doctrine, the ECtHR exercises judicial self-restraint, particularly regarding factors such as the establishment of facts, the interpretation and application of domestic law or the admissibility and assessment of evidence before national courts.[54]

[52] *G. LAUTENBACH, The Concept of the Rule of Law and the European Court of Human Rights, Oxford University Press, 2013, p. 82.*
[53] *The fourth-instance doctrine has been applied among others to civil, criminal and taxation cases. JURISCONSULT (note 20), p. 11.*
[54] *JURISCONSULT (note 20), p. 11-12.*

5 THE MARGIN OF APPRECIATION DOCTRINE

"The doctrine of the margin of appreciation is a natural product of the principle of subsidiarity"[55] insofar as it allocates to national authorities the discretion to implement Convention guarantees through domestic regulations in different areas according to the needs and resources of the community and individuals within their territory.[56]

According to a definition used by many human rights scholars, the margin of appreciation doctrine "refers to the room for manoeuvre the judicial institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations".[57]

The margin of appreciation doctrine comes into play when a line is drawn between ECHR rights and legitimate public interest limitations. This is particularly important when it comes to weighing controversial political questions, allowing for equally defensible solutions, as opposed to purely technical legal issues. According to the principle of subsidiarity, national authorities are in a better and additionally in a democratically legitimised position to give answers to such political questions. National authorities therefore enjoy a certain margin of appreciation under the supervision of the ECtHR.[58]

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[55] *H. PETZOLD (note 36), p. 59.*
[56] *H. PETZOLD (note 36), p. 58.*
[57] COUNCIL OF EUROPE, The Margin of Appreciation, Themis competition submission, The Lisbon Network, 2008, p.1; ST. GREER, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, Human rights files No. 17, Council of Europe Publishing, 2000, p. 5; ST. GREER, The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?, *UCL Human Rights Law Review* 2010, p. 2; JUDGE D. SPIELMANN (note 51), p. 2. In other words, it is "the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws". H. CH. YOUROW, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, Martinus Nijhoff Publishers, 1996, p. 21-24; Y. ARAI, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, Intersentia, 2002, p. 13.
[58] *ST. GREER (note 57) 2010, p. 3.*

5.1 ORIGIN OF THE MARGIN OF APPRECIATION DOCTRINE

The margin of appreciation doctrine is an essentially judge-made doctrine, lacking reference in the ECHR and the drafting documentation. Nonetheless, it has been endorsed in over 700 ECtHR judgements by the end of the 1990s and is one of the most discussed aspects of the Convention system.[59]

By its very nature, the margin of appreciation cannot be described by a simple formula and despite the amount of jurisprudence and scientific literature on the topic "its most striking characteristic remains its casuistic, uneven, and largely unpredictable nature".[60] Due to its vague nature, opposing the universal nature of human rights, the margin of appreciation doctrine has been subject to extensive criticism, including the denial of its legitimacy while other authors underline that it is a necessary and legitimate principle of interpretation of the Convention.[61]

In 1958, this doctrine has been implicitly applied for the first time within the Convention system by the European Human Rights Commission in the *Greece v. The United Kingdom* case concerning a derogation clause in time of emergency (Art. 15 ECHR).[62] The first express mention of the margin of appreciation doctrine coincides with the first inter-state case brought before the ECtHR (*Ireland v. UK*[63]), also in the context of Art. 15 ECHR.[64] In the subsequent jurisprudence, the margin of appreciation doctrine has been extended to other, non-emergency related provisions,

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[59] P. MAHONEY, Marvellous Richness of Diversity or Invidious Cultural Relativism?, *Human Rights Law Journal* 1998, p. 2; ST. GREER (note 57) 2010, p. 1-2; JUDGE D. SPIELMANN (note 51), p. 2.
[60] *ST. GREER (note 57) 2010, p. 3; ST. GREER (note 57) 2000, p. 5.*
[61] *P. MAHONEY (note 59), p. 1.*
[62] *Greece v. the United Kingdom, (1958-59) 2 Yearbook of the European Convention on Human Rights, p. 172-197, app. no. 176/56.*
[63] *Ireland v. UK, Judgment of 18 January 1978, app. no. 5310/71, Reports of Judgments and Decisions, Series A no. 25.*
[64] Y. ARAI (note 59), p. 5-6.

including Arts. 5-6 ECHR, Art. 2 of the First Protocol,[65] Arts. 8-11 and Art. 14 ECHR in conjunction with other Convention Articles.

The *Handyside v. UK*[66] judgment in 1976 marked an important step in the development of the margin of appreciation doctrine.[67] The ECtHR therein states:

> "48. […] 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. […] Nevertheless, 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.
>
> Consequently, Article 10 para. 2 leaves to the Contracting States a *margin of appreciation*. This margin is given both to the domestic legislator ('*prescribed by law*') and to the bodies […] that are called upon to interpret and apply the laws in force. […]
>
> 49. Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, […] is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a *European supervision*. Such supervision concerns both the aim of the

[65] *Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20.III.1952 (entry into force 1 November 1998).*
[66] *Handyside v. UK, app. no. 5493/72, Judgment of 7 December 1976, Reports of Judgments and Decisions, Series A no. 24, emphasis and underlining added.*
[67] Y. ARAI (note 59), p. 8; J. CHRISTOFFERSEN (note 42), p. 247, 251.

> 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. […]
>
> 50. It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation. […] [emphasis added]."[68]

The *Handyside v. UK* judgment represents the prototype of the analysis of the margin of appreciation with respect to the standard "necessary in a democratic society"[69] as enshrined in Articles 8-11 ECHR and Art. 2 of Protocol IV ECHR.[70] Furthermore, the doctrine therein is extended to a general context, granting national authorities a margin of appreciation in balancing individual rights and interests of society as a whole.[71]

In the dynamics of the ECtHR's jurisprudence, the Strasbourg institutions consistently granted relatively wide margins to states in their pre-1979 case law. Thus, where state discretion was invoked to defend derogations from the Convention, the ECtHR only rarely found a violation of the ECHR in its early case law. This was particularly the case when a European consensus on the matter at hand was lacking.[72]

While the Strasbourg organs show a high degree of continuity in the application of the margin of appreciation doctrine in their pre-1979 jurisprudence mainly concerning Articles 8-11 ECHR, the doctrine has been applied to other groups of Articles from 1979 on.[73] With growing self-confidence, the Strasbourg organs have started affirming their

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[68] *Handyside v. UK (note 66), para. 48-50.*
[69] *St. GREER (note 57) 2000, p. 9.*
[70] *Protocol IV to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First protocol thereto, 16.IX.1963 (entry into force 1 November 1998).*
[71] *Y. ARAI (note 59), p. 8.*
[72] *H. CH. YOUROW (note 57), p. 54.*
[73] *H. CH. YOUROW (note 57), p. 24.*

supervisory role more assertively from 1979 on and showed "an increased willingness to uphold challenges to national [discretion]".[74] This development in the ECtHR case law can be explained by the fact that the ECtHR considers the Convention as a living instrument that needs to be interpreted in accordance with present day circumstances. Arising European consensus in different areas and general developments of law and social attitudes among ECHR member states thus influence the ECtHR's case law.[75]

5.2 GENERAL APPLICATION OF THE MARGIN OF APPRECIATION DOCTRINE

The ECtHR typically refers expressly to the margin of appreciation doctrine in the following four contexts:[76]

- ***Arts. 5-6: Due Process Rights***
  The "due process Articles" embrace Articles 5 (*right to liberty and security*) and 6 (*right to a fair trial*) ECHR. These two Articles contain exhaustive lists of situations in which State intervention is allowed or of minimal guarantees to be ensured by States, thus strongly limiting the States' margin of appreciation. Being "strong" rights, there are only very limited ways for Contracting States to justify interferences with these rights with their margin of appreciation.[77]
- ***Arts. 8-11: Personal Freedoms***
  The personal freedoms Articles encompass Articles 8 (*Right to respect for private and family life*), 9 (*Freedom of thought, conscience and religion*), 10 (*Freedom of expression*) and 11 (*Freedom of assembly and association*) ECHR. The margin of

[74] *H. CH. YOUROW (note 57), p. 56-57.*
[75] *Y. ARAI (note 59), p. 15.*
[76] Y. ARAI (note 59), p. 8-9; for a similar classification see H. CH. YOUROW (note 57), p. 21-24 or A. LEGG, The Margin of Appreciation in International Human Rights Law. Deference and Proportionality, Oxford University Press, 2012, p. 204.
[77] *A. LEGG (note 76) 2012, p. 210.*

appreciation is of particular importance and regularly applied in the context of alleged violations of Articles 8-11 ECHR. Each of these Articles has the same structure, stating the respective freedom in its first paragraph and the corresponding limitation clause in paragraph 2.

- ***Art. 14: Non-Discrimination***
  The ECtHR has repeatedly invoked the margin of appreciation doctrine in connection to Article 14 (*prohibition of discrimination*) ECHR, which is only applicable in conjunction with another Convention provision thus guaranteeing its enjoyment without discrimination on a number of grounds such as sex, race or religion. National authorities have repeatedly been granted a certain margin of appreciation in determining if a difference in treatment is to be classified as a discrimination within the meaning of Article 14 ECHR.[78]
- ***Art. 15: Derogation Clause***
  As stated before, the margin of appreciation doctrine has first been invoked in the context of a derogation of Convention provisions in a state of emergency.[79] Based on the assumption that national authorities are better placed than the Strasbourg institutions to determine if Article 15 ECHR applies in a given situation ("better position rationale") the margin of appreciation doctrine has been consistently applied in this context.[80]

Although certain authors point out that the margin of appreciation doctrine could theoretically be applied to any of the Articles of the ECHR it has never been invoked in respect to Arts. 2-4 or 7 ECHR.[81]

- ***Art. 2: Right to Life***
  Although Article 2 § 2 ECHR provides for exceptions in cases of absolute necessity, the margin of appreciation doctrine so far has

[78] *St. Greer (note 57) 2000, p. 11.*
[79] *Ireland v. UK (note 63).*
[80] *St. Greer (note 57) 2000, p. 8.*
[81] St. Greer (note 57) 2000, p. 6 and 27.

not been applied under this provision due to its fundamental nature. The exceptions listed under Art. 2 § 2 ECHR are thus different from those in Arts. 8-11 ECHR, which allow for the regular application of the margin of appreciation doctrine.[82]

- ***Art. 3: Prohibition of Torture***
  Art. 3 ECHR is due to its own wording and that of Art. 15 § 2 ECHR an absolute right without provisions for exceptions or possible derogation during public emergencies under Art. 15 ECHR.[83] "Such a degree of peremptoriness is difficult to reconcile with the flexibility inherent in the margin of appreciation".[84] Furthermore, the ECtHR notes in its case law that no local circumstances of Contracting States can be taken into account when applying Art. 3 ECHR.[85]
- ***Art. 4: Prohibition of Slavery and Forced Labour***
  In those cases in which the ECtHR dealt with the application of Art. 4 ECHR no reference has been made to the margin of appreciation as it is an absolute right[86] and as the legal classifications of slavery and forced or compulsory labour are in the exclusive power of the ECtHR.[87]
- ***Art. 7: No Punishment Without Law***
  Among the absolute rights of the ECHR not allowing for restriction or suspension is also Article 7 § 1 ECHR prohibiting convictions for acts or omissions that weren't considered a criminal offence at the time they were committed or the imposition of a heavier penalty than applicable at the time the criminal offence was committed.[88]

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[82] *J. CALLEWAERT, Is There a Margin of Appreciation in the Application of articles 2, 3 and 4 of the Convention?, Human Rights Law Journal 1998, p. 9; ST. GREER (note 57) 2000, p. 27.*
[83] *JURISCONSULT (note 20), p. 12; JUDGE D. SPIELMANN (note 51), p. 11; see e.g. Saadi v. Italy, Judgement of 28 February 2008, app. no. 37201/06.*
[84] *J. CALLEWAERT (note 82), p. 8.*
[85] *J. CALLEWAERT (note 82), p. 8 and ST. GREER (note 57) 2000, p. 27.*
[86] *JURISCONSULT (note 20), p. 12 and ST. GREER (note 57) 2000, p. 27.*
[87] *J. CALLEWAERT (note 82), p. 9.*
[88] *ST. GREER (note 57) 2000, p. 27.*

5.3 WIDTH OF THE MARGIN OF APPRECIATION

The question of how wide a margin of appreciation should be granted to national authorities when interpreting the ECHR is very controversial and even debated among ECtHR judges. However, legal scholars have come up with the following list of factors generally influencing the margin given to national authorities:[89]

- ***The provision invoked***: The width of the margin of appreciation depends on which type of provision is concerned (due process rights, personal freedoms, non-discrimination or the derogation clause).
- ***The interests at stake***: The width of the margin of appreciation also depends on the interests at stake, which are of particular importance in cases concerning Articles 8-11 ECHR. The ECtHR often varies the width of the margin of appreciation by balancing private and public interests involved in a case. If a private interest goes against an important public interest the margin tends to be wider. If an intimate and fundamental private interest is at stake, the margin tends to be narrower.
- ***The aim pursued by the impugned interference***: If an interference pursues an aim that has been recognised by the ECtHR case law or is listed in the ECHR itself, the margin of appreciation will be wider. Such aims include social and economic policies and national security concerns.
- ***The context of the interference***: When determining the margin of appreciation, the ECtHR usually takes into account the context of the interference. Historical contexts in particular, such as periods of societal transition, tend to widen the margin given to national authorities.
- ***The impact of a possible European consensus***: If there is a strong consensus among the Contracting States on certain issues, the margin of appreciation granted to States, which deal differently

[89] *JUDGE D. SPIELMANN (note 51), p. 9-31.*

with the issue at hand, will be narrower. Accordingly, where there is a diversity of practice and thus no consensus among the Contracting States, the margin of appreciation tends to be wider.

- ***The degree of proportionality of the interference***: When assessing the proportionality of an interference with a right, the ECtHR examines among others factors the interference's impact on the right, the grounds, the consequences for the applicant and its context. A measure impacting negatively on an individual right must always be justified by the respondent State and should be proportionate to the aim pursued and with no more interference than is necessary. The higher the degree of proportionality of the interference, the wider the margin of appreciation the ECtHR grants.
- ***The comprehensive analysis by superior national courts***: Recently, the ECtHR started to attach considerable weight to the comprehensiveness of the proceedings before superior national courts. If the restriction in question was thoroughly analysed in light of relevant ECtHR case law, the Court requires strong reasons to substitute its view for that of the domestic courts and thus tends to grant a wider margin of appreciation to the respondent State.

6 MARGIN OF APPRECIATION AND SUBSIDIARITY PRINCIPLE IN THE CASE LAW

To analyse the post-2011 ECtHR case law all Grand Chamber judgments plus all cases published in the *Reports of Judgments and Decisions*[90] starting from the 01.01.2011 have been screened for their use of the margin of appreciation doctrine and the principle of subsidiarity. This selection, including over 90 ECtHR judgments, is intended to feature the most important and thus influential decisions taken by the ECtHR. In the following section the pre-2011 application of both concepts will be described based on the literature on this topic and possible changes in the ECtHR's case law after 2011 will be highlighted.

The subsequent chapters will follow the same structure for each of the considered Articles. In a first section the pre-2011 application of the margin of appreciation doctrine and the principle of subsidiarity will be described for the Article at hand. The post-2011 judgments that reconfirm the pre-2011 application of these concepts will also be treated in the first section. In a second section, the post-2011 judgments that represent changes in the ECtHR's case law will be analysed.

The Articles are grouped as above in "Due Process Rights", "Personal Freedoms" and "Non-Discrimination" and each section on a group of rights will close with conclusive remarks on it.

[90] The judgments published in the *Reports of Judgments and Decisions* include the most important cases, selected by the Bureau (composed by President and Vice-Presidents of the Court and of the Section Presidents) following a proposition by the Jurisconsult.

6.1 DUE PROCESS RIGHTS

6.1.1 ARTICLE 5 ECHR (RIGHT TO LIBERTY AND SECURITY)

Article 5 ECHR defines the circumstances under which arresting and detaining an individual is lawful under the Convention. A detention is lawful if it is in compliance with national law that must be consistent with minimum European standards.

This "lawfulness" standard, required by each sub-paragraph of Art. 5 § 1 ECHR, is fulfilled if

- the arrest or detention is in conformity with substantive and procedural rules of national law,
- its judicial remedy is accessible, foreseeable, sufficiently certain and effective
- the interference with Article 5 ECHR isn't arbitrary
- and the continued detention is justified by relevant and sufficient reasons.[91]

Article 5 § 1 ECHR provides itself an exhaustive list containing six legitimate aims of an arrest or a detention[92] that need to meet the "necessity" requirement. This necessity requirement demands the existence of a pressing social need and proportionality with the aim pursued.[93] Article 5 ECHR enshrines a fundamental right of the Convention and the ECtHR therefore exercised strict review of decisions of national authorities resembling "a fully matured national appeals court"[94] in its pre-2011 case law.

[91] *Y. ARAI (note 57), p. 30.*
[92] *Y. ARAI (note 57), p. 20.*
[93] *COUNCIL OF EUROPE (note 57), p. 9.*
[94] *H. CH. YOUROW (note 57), p. 57 and 176.*

In the landmark case *Engel*[95] the ECtHR established the four so-called *Engel criteria* for the analysis of deprivation of liberty. Those criteria are the *type*, *duration*, *effects* and *manner of implementation* of the deprivation of liberty in question.[96]

As national authorities are seen to be better placed to assess conditions that lead to arrest and detention they were granted a certain margin of appreciation in this field in the pre-2011 ECtHR case law.[97] Particular factors that, according to the ECtHR's pre-2011 case law, likely widen the margin of appreciation under Article 5 ECHR are circumstances that involve "military service", "the evaluation of the mentally-ill" and "the need to revoke the parole of recidivists". General factors widening the margin are "considerations of national security or the prevention of crime".[98]

In most of the screened post-2011 cases concerning Art. 5 ECHR[99] the ECtHR reconfirmed the fundamental nature of this provision and either did not make or made only marginal reference to the principle of subsidiarity or the margin of appreciation doctrine without applying them to determine the outcome of the cases. Furthermore, the ECtHR continued to apply its thorough scope of review in regards to Art. 5 ECHR given its fundamental nature. Among others, the ECtHR confirmed the very strict standard concerning the State's compliance with the "speedily decision"

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[95] *Engel and Others v. Netherlands, Judgment of 8 June 1967, apps. nos. 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72, Reports of Judgments and Decisions, Series A no. 22.*

[96] *J.P. RUI (note 6), p. 41.*

[97] *Y. ARAI (note 57), p. 20, although the ECtHR didn't apply margin of appreciation considerations under Arts. 5 and 6 ECHR before 1979, see E. KASTANAS, Unité et Diversité: notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme, Bruylant Bruxelles, 1996, p. 25.*

[98] *Y. ARAI (note 57), p. 21.*

[99] *Al-Jedda v. The United Kingdom [GC], Judgment of 7 July 2011, app. no. 27021/08; S.T.S. v. The Netherlands, Judgment of 7 September 2011, app. no. 277/05; Creanga v. Romania [GC], Judgment of 23 February 2012, app. no. 29226/03; Schwabe and M.G. v. Germany, Judgement of 1 March 2012, app. nos. 8080/08 and 8577/08, paras. 75-86; Idalov v. Russia [GC], Judgement of 22 May 2012, app. no. 5826/03; El-Masri v. The Former Yugoslav Republic of Macedonia [GC], Jugdement of 13 December 2012, app. no. 39630/09; Del Rio Prada v. Spain [GC], Judgment of 21 October 2013, app. no. 42750/09; Georgia v. Russia [GC], Judgment of 3 July 2014, app. no. 13255/07; M.A. v. Cyprus, Judgment of 23 Octobre 2014, app. no. 41872/10.*

requirement under Art. 5 § 4 ECHR.[100] The strict standard applied can also be observed in the fact that the ECtHR didn't hesitate to assign the burden of proof to the respondent government,[101] to recognise that it has a certain power to review if national law has been observed[102] or to enforce a strict "quality of law" requirement under Art. 5 § 1 ECHR.[103]

With regards to the factors which tended to widen the margin of appreciation under Art. 5 before 2011, the ECtHR had to decide two cases concerning the detention of mentally ill persons.[104] The ECtHR therein confirmed its previous jurisprudence. The detention of persons of unsound mind has to fulfil three minimum conditions,[105] as defined among others in *Wintwerp v. Netherlands,*[106] in order to be lawful. These three criteria have been taken into account in the two post-2011 cases involving the detention of mentally-ill persons.[107] When deciding whether a person of unsound mind should be detained, States continue to enjoy a certain discretion[108] without causing a widening of the margin of appreciation compared to the ECtHR's previous case law.[109] Both cases resulted in the finding of a violation.

In *Hassan v. the United Kingdom*[110] the ECtHR confirmed that the ECHR is also applicable outside of the territory of the Contracting States if they exert effective control over the territory in question, as held previously in

[100] *Idalov v. Russia (note 99), para. 154-158; M.A. v. Cyprus (note 99), para. 160-171; S.T.S. v. The Netherlands (note 99), para. 47-50.*
[101] *Creanga v. Romania (note 99), para. 89, El-Masri v. The Former Yugoslav Republic of Macedonia (note 99), para. 151-153.*
[102] *Creanga v. Romania (note 99), para. 101.*
[103] *Del Rio Prada v. Spain (note 99), para. 123-132.*
[104] *X v. Finland, Judgement of 8 January 2013, app. no. 34806/04; Stanev v. Bulgaria [GC], Judgement of 17 January 2012, app. no. 36760/06.*
[105] *(1) Individuals must be reliably shown to be of unsound mind (2) The mental disorder must be of a kind or degree warranting compulsory confinement (3) The validity of continued confinement must be conditional upon the persistence of such a disorder. Winterwerp v. Netherlands, Judgment of 24 October 1979, app. no. 6301/73, Reports of Judgments and Decisions, Series A no. 33, para 39.*
[106] *Winterwerp v Netherlands (note 105).*
[107] *X v. Finland (note 104), para. 149-171; Stanev v. Bulgaria (note 104), para. 145-160.*
[108] *X v. Finland (note 104), para. 150; Stanev v. Bulgaria (note 104), para. 155.*
[109] *Y. ARAI (note 57), p. 22-26; E. KASTANAS (note 97), p. 62.*
[110] *Hassan v. The United Kingdom [GC], Judgment of 16 September 2014, app. no. 29750/09.*

Al-Jedda[111] and *Al-Skeini.*[112] In the *Hassan* case the ECtHR departed from its jurisprudence in *Al-Jedda* in not finding the detention of a prisoner of war in Iraq in violation of Art. 5 § 1 ECHR despite the fact that the United Kingdom didn't rely on a derogation under Art. 15 ECHR to justify the detention. The ECtHR, in the words of the four dissenting judges, *accommodates*[113] the respondent government as requested by it[114] by disapplying its obligations under Article 5 ECHR in favour of the provisions of international humanitarian law (hereinafter: IHL) as enshrined in the Third and Fourth Geneva Convention. As this change in the case law concerns the reconciliation of IHL and the ECHR and thus doesn't relate to the principle of subsidiarity or the margin of appreciation doctrine it will not be considered in more detail.

6.1.2 CHANGES IN THE ECTHR POST-2011 CASE LAW CONCERNING ART. 5 ECHR

The *Austin and others v. UK*[115] case deals for the first time with the question of whether the confinement of a group of people in the surroundings of a demonstration within a police cordon for over 7 hours amounts to a deprivation of liberty under Art. 5 ECHR. The confinement took place at the occasion of an announced anti capitalism and globalisation demonstration in London. Based on the experience from previous similar demonstration, the police undertook wide-ranging preparations, among others the deployment of nearly 6000 police officers to ensure public security.

However, despite careful preparations, the police had been surprised by a large crowd of over 1500 people arriving earlier than expected at the place of the demonstration, while thousands gathered in the surrounding streets.

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[111] *Al-Jedda v. The United Kingdom (note 99).*
[112] *Al-Skeini and Others v. The United Kingdom [GC], Judgment of 7 July 2011, app. no. 55721/07.*
[113] *Partly dissenting opinion to Hassan v. The United Kingdom (note 110) of judge Spano joined by judges Nicolaou, Bianku and Kalaydjeva, para. 18.*
[114] *Hassan v. The United Kingdom (note 110), para. 99.*
[115] *Austin and Others v. the United Kingdom* [GC], Judgment of 15 March 2012, app. no. 39692/09; 40713/09 and 41008/09.

In these circumstances, the police decided to impose an absolute cordon blocking all exit routes from the area in order to prevent violence, the risk of injury to persons and damage to property. Despite several attempts to release the confined people, the police was only able to do so 7 hours after the cordon has been imposed. The first applicant (Ms Austin) was a peaceful protester while the second and third applicants were passers-by.

A majority of 14 against 3 judges decided that the so-called "kettling" crowd-control technique doesn't amount to a deprivation of liberty. The ECtHR started its reasoning by stating that the ECHR is a living instrument that needs to be interpreted in the light of present-day conditions, which include new challenges for police forces in the Contracting States. Thus, the ECtHR argues that "Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public [...]"[116] provided the measure in question isn't arbitrary. In addition, the Court found that "[...] the police must be afforded a degree of discretion in taking operational decisions".[117]

Then, the ECtHR turned to the question of whether "kettling" amounts to a restriction or deprivation of liberty, which according to its case law is a question of intensity and not of nature or substance. Before taking into account the concrete situation of the case, the ECtHR underlined that, according to its case law, the public-interest of a measure has no bearing in defining whether a person has been deprived of his liberty.[118]

The ECtHR then examined the four *Engel* criteria of *type*, *duration*, *effects* and *manner of implementation* of the measure to determine if it amounts to a deprivation of liberty. It found that the criteria of *duration* and *effect* of the measure in question "[...] point towards a deprivation of liberty"[119]. However, the ECtHR found that there was "[…] no reason to

[116] *Austin and Others v. The United Kingdom (note 115), para. 56.*
[117] *Austin and Others v. The United Kingdom (note 115), para. 56.*
[118] *Austin and Others v. The United Kingdom (note 115), para. 58.*
[119] *Austin and Others v. The United Kingdom (note 115), para. 64.*

depart from the [national] judge's conclusion [...]"[120] that in the circumstances the police had neither alternative nor less restrictive means at hand to deal with the situation. By taking into account the extraordinary context of the case and the lack of alternatives measures, the majority's analysis of the criteria *type* and *manner of implementation* led them to conclude that the measure did not amount to a deprivation of liberty.[121]

Finally, the ECtHR pointed out that the specific context and particular facts of any measure always need to be taken into account when deciding if it amounts to a deprivation of liberty. Therefore it "[...] cannot be excluded that the use of containment and crowd-control techniques could [...] give rise to an unjustified deprivation of liberty in breach of Article 5 § 1"[122] and that the Austin case is thus "exceptional".[123]

The Austin judgment has been heavily criticised by three dissenting judges[124] and a number of scholars.[125] Firstly, the ECtHR's prominent and extensive mention of the principle of subsidiarity[126] when applying the general case law principles in the Austin case is very unusual in the case law relating to Art. 5 ECHR.[127]

Despite the fundamental nature of the right to liberty and in contrast to the very limited references to the principle of subsidiarity in pre-2011 Art. 5 ECHR cases, the ECtHR justifies that it doesn't conduct its own assessment of the facts in the *Austin* case by referring extensively to the principle of subsidiarity. The majority's analysis of the *Engel* criteria thus hasn't been based on a full assessment of the facts and lacks the thorough

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[120] *Austin and Others v. The United Kingdom (note 115), para. 66.*
[121] *Austin and Others v. The United Kingdom (note 115), para. 64-66.*
[122] *Austin and Others v. The United Kingdom (note 115), para. 60.*
[123] *Austin and Others v. The United Kingdom (note 115), para. 68.*
[124] *Joint dissenting opinion of judges Tulkens, Spielmann and Garlicki in Austin and Others v. The United Kingdom (note 115).*
[125] Among others *see* J.P. RUI (note 6), p. 40-41; B. PASTRE-BELDA, La Cour Européenne des droits de l'homme – Entre promotion de la subsidiarité et protection effective des droits, *Revue Trimestrielle des Droits de l'Homme* 2013, p. 251 *et seq.;* F. SUDRE, Le recadrage de l'office du juge européen, in : F. SUDRE, Le principe de subsidiarité au sens du droit de la Convention européenne des droits de l'homme, Droit & Justice nr. 108, Anthemis 2014, p. 256-257.
[126] *Austin and Others v. The United Kingdom (note 115), para. 61.*
[127] *See also B. PASTRE-BELDA (note 125), p. 268 and J.P. RUI (note 6), p. 40-41.*

and independent review exerted by the dissenting judges as typical for Art. 5 ECHR cases.[128] Furthermore, the majority states, that "[…] in normal circumstances it requires cogent elements to lead it to depart from the findings of facts reached by the domestic courts"[129] which is a novelty in Art. 5 ECHR cases. Even though the ECtHR recalls that it is not constrained by the findings of facts or legal conclusions of the domestic courts as to whether a measure amounts to a deprivation of liberty it nevertheless embraces these findings completely. By not conducting a full assessment of the facts, as usual in Art. 5 ECHR cases, the majority thus acts in a subsidiary manner *vis-à-vis* the domestic authorities.

By contrast to the majority opinion, the dissenting judges found in their own assessment of the facts that the measure was applied indiscriminately in as far as "[…] the police prioritised effectiveness in their operation […] by keeping everyone inside the cordon"[130] and that this was therefore disproportionate. However, the majority opinion applied what some authors[131] call an outer, procedural approach based on the national court's findings instead of exercising the usual close scrutiny when assessing the existence and the proportionality of a deprivation of liberty. Hence, the breach with the previous jurisprudence results in the fact that the ECtHR subordinates for the first time its own scrutiny to the findings of the domestic courts for the sake of the principle of subsidiarity.

By relying solely on the assessment of the domestic authorities and granting them more discretion, the ECtHR reduces the thoroughness of its review of the measure in question.

In addition to the use of the principle of subsidiarity, the dissenting judges furthermore criticised that "[…] the majority's opinion can be interpreted as implying that, if it is necessary to impose a coercive and restrictive measure for a legitimate public-interest purpose, the measure does not

[128] *Joint dissenting opinion of judges Tulkens, Spielmann and Garlicki (note 124), para. 8 et seq.*
[129] *Austin and Others v. The United Kingdom (note 115), para. 61.*
[130] *Joint dissenting opinion of judges Tulkens, Spielmann and Garlicki (note 124), para. 10.*
[131] *J.P. RUI (note 6), p. 41.*

amount to a deprivation of liberty".[132] Given, that the ECtHR has never taken into account the purpose of a measure in order to define if Art. 5 ECHR is applicable, it is striking that the majority analysed the four *Engel* criteria in light of the context of the case.[133] In the pre-2011 jurisprudence the ECtHR only considered the context to assess whether a deprivation of liberty was justified under Art. 5 § 1 ECHR. Some scholars go as far as to argue that the ECtHR uses the "context" in which action is taken by the authorities as a new fifth criterion in the *Austin* judgment to define if the measure in question amounts to a deprivation of liberty.[134] By concluding that it depends on the context if a measure amounts to a deprivation of liberty, the ECtHR thus re-introduces through the backdoor the possibility that a Contracting State can present a confinement as a measure required by a strong public interest. That way, as was the case in the judgment at hand, domestic authorities can now avoid that a confinement is being classified as a deprivation of liberty under Art. 5 ECHR. This constitutes a strong deviation from the Court's pre-2011 case law.

The deviation from its case law is all the more apparent by taking into account the 2010 *Gillan and Quinton*[135] case concerning the search of passers-by in the context of a demonstration. The ECtHR therein finds:

> "[…] Although the length of time during which each applicant was stopped and searched did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. [The applicants] were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of

[132] *Joint dissenting opinion of judges Tulkens, Spielmann and Garlicki (note 124), para. 3.*
[133] *B. PASTRE-BELDA (note 125), p. 267.*
[134] *J.P. RUI (note 6), p. 39.*
[135] *Gillan and Quinton v the United Kingdom, Judgment of 12 January 2010, app. no. 4158/05.*

> a deprivation of liberty within the meaning of Article 5 § 1".[136]

As the case was mainly concerned with Art. 8 ECHR, the ECtHR however didn't determine whether the search in question amounted to a breach of Art. 5 ECHR. It is nevertheless noteworthy that the element of coercion in *Austin* is, in the words of the dissenting judges, "much higher", than in *Gillan and Quinton*. The dissenting judges additionally criticised the lack of reference to *Gillan and Quinton* in the *Austin* judgment.

In the judgments after *Austin*, the ECtHR underlined the "exceptional circumstances"[137] in this case. Additionally, the element of coercion has been invoked again in the subsequent *M.A. v. Cyprus*[138] case to find a deprivation of liberty in breach of Art. 5 ECHR. In the *M.A. v. Cyprus* the ECtHR referred to the *Austin* judgment when it held that "[...] the question whether there has been a deprivation of liberty is very much based on the particular facts of a case".[139] In the *Nada v. Switzerland*[140] judgment the ECtHR reconfirmed that the context of a measure is an important factor to take into account when deciding if it amounts to a deprivation of liberty. By contrast, in Article 2 ECHR cases the Court held that "while remaining fully aware of [the] context, the Court's approach must be guided by the [principle that the Convention] requires that its provision be interpreted and applied so as to make its safeguards practical and effective".[141] Lastly, the ECtHR referred again to the fact that difficulties in policing modern societies must be taken into account by granting a certain discretion in operational choices and that no impossible or disproportionate burden should be put on the authorities in this regard.[142]

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[136] *Gillan and Quinton v the United Kingdom (note 135), para. 57.*
[137] *M.A. v. Cyprus (note 99), para. 192.*
[138] *M.A. v. Cyprus (note 99), para. 193.*
[139] *M.A. v. Cyprus (note 99), para. 186.*
[140] *Nada v. Switzerland [GC], Judgment of 12 Septembre 2012, app. no. 10593/08, para. 226.*
[141] *Al-Skeini and others v. The United Kingdom (note 112).*
[142] *Finogenov and others v. Russia, Judgment of 4 June 2012, apps. no. 18299/03 and 27311/03, para. 209; Dordevic v. Croatia, Judgment of 24 October 2012, app. no. 41526/10, para. 139.*

The case law after the *Austin* judgment therefore generally seems to confirm the new reasoning started therein.

6.1.3 ARTICLE 6 ECHR (RIGHT TO A FAIR TRIAL)

Article 6 ECHR obliges the Contracting States to ensure fair trial in both civil and criminal proceedings. More specifically, Art. 6 § 1 ECHR contains, in addition to an implicit right of access to courts, the right to a fair hearing and the right to trial within a reasonable time. Article 6 § 2 ECHR enshrines the right to presumed innocence in criminal cases and Art. 6 § 3 ECHR includes among others the right to adequate time and facilities for the preparation of the defence, the right to defend oneself or to legal assistance and the right to call and cross-examine witnesses.

The court consistently held hat the right to a fair trial holds a prominent place in a democratic society[143] and interpreted the key concepts of Article 6 ECHR such as "criminal charge", "civil rights and obligations", "tribunal" or "witness" as autonomous concepts of the ECHR, granting only minimal or no discretion at all to States.[144]

Although Article 6 ECHR, as an inherently positive obligation for States, permits by implication some discretion as to the means to fulfil this obligation, the States' margin of appreciation therein is to be distinguished from that applied in Articles 8-11 ECHR due to its implied nature in Article 6 ECHR cases.[145]

National authorities enjoy a wide discretion in the choice of means designed to ensure compliance with Art. 6 § 1 ECHR, which emphasizes the importance of achieving results rather than prescribing means within the Convention system.[146]

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[143] *See among others Jones and others v. The United Kingdom, Judgment of 2 June 2014, apps. nos. 34356/06 and 40528/06, para. 187.*
[144] *COUNCIL OF EUROPE (note 57) 2008, p. 7.*
[145] *COUNCIL OF EUROPE (note 57) 2008, p. 8; J. CHRISTOFFERSEN (note 42), p. 299.*
[146] *Y. ARAI (note 57), p. 34.*

6.1.3.1 RIGHT OF ACCESS TO COURTS

Most of the cases in the ECtHR's pre-2011 case law involving the margin of appreciation doctrine relate to the right of access to courts,[147] which was first recognised in the *Golder*[148] judgment in 1975. The right of access to courts is not expressly defined in Article 6 ECHR but is an inherent guarantee inferred from Art. 6 § 1 ECHR. This right is therefore subject to limitations permitted by implication.[149] However, the ECtHR asserts that the guarantee of the right to a court must be both *practical* and *effective*.[150] The ECtHR consistently defended the recognition of the margin of appreciation in its pre-2011 jurisprudence on the basis that the Member States regulate the access to courts in different ways and that there is thus no consensus to be enforced.[151] In this regard, the ECtHR also made reference to the non-substitution principle, as different Contracting States have different social needs among their citizens and the national authorities are best placed to assess them.[152]

Whether or not national authorities have overstepped their margin of appreciation depends on three criteria:

- The limitation must not restrict or reduce the access in such a way or to such an extent that the *very essence* of the right is impaired.
- The limitation must pursue a *legitimate aim.*
- There must be a reasonable relationship of *proportionality* between the means employed and the aim sought to be achieved.

The notion *very essence* encompasses the requirements of *accessibility* and *foreseeability*. This means that the conditions of the access to courts must be available and readily accessible for concerned individuals.

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147 *Y. ARAI (note 57), p. 35.*
148 *Golder v. UK, Judgment of 21 February 1975, app. no. 4451/70, Reports of Judgments and Decisions, Series A no. 18.*
149 *Golder v. UK, (note 148), para. 36-38; H. CH. YOUROW (note 57), p. 79.*
150 *Y. ARAI (note 57), p. 36; H. CH. YOUROW (note 57), p. 79.*
151 *Y. ARAI (note 57), p. 43.*
152 *Y. ARAI (note 57), p. 43, 47.*

Furthermore, these conditions need to be sufficiently clear and coherent although sometimes requiring the help of a lawyer. The *very essence* requirement is also closely associated or included in the proportionality assessment.[153]

The Strasbourg organs first exerted self-restraint in examining the *very essence* requirement and then proceeded to more scrutiny in this regard, showing a stronger willingness to conduct a stringent proportionality test. The Strasbourg organs were effectively taking into account the *very essence* requirement since the late 1990s.[154] From the late 1990s on there has also been a seemingly deliberate decline in references to the notion of margin of appreciation.[155]

The proportionality test has been interpreted as requiring a direct, necessary and adequate link between the legitimate objective and the restriction on the right to access to a court.[156]

In four areas, the ECtHR applies judicial self-restraint and grants national authorities some discretion in the pre-2011 case law. In cases concerning issues of "national security" or policy choices in the field of "national fiscal policy" the ECtHR usually broadened the margin of appreciation. Where "persons of unsound mind" are involved the ECtHR tended to apply a minimalist proportionality standard and a wide margin of appreciation. The fourth area where the ECtHR grants some leeway to the Contracting States is in the application of "immunity rules" for certain categories of public officials.[157]

[153] *Y. Arai (note 57), p. 36-37.*
[154] *Y. Arai (note 57), p. 31-32.*
[155] *Y. Arai (note 57), p. 42.*
[156] *Y. Arai (note 57), p. 41.*
[157] *Y. Arai (note 57), p. 43-46.*

In the screened post-2011 cases[158] concerning the right of access to courts the ECtHR reconfirmed its willingness to autonomously interpret key concepts such as "civil rights" and even extended guarantees so far only granted in criminal law proceedings also to civil proceedings.[159] Generally, the ECtHR confirms that the right to the courts is not absolute and may be subject to limitations by implication, granting States a certain margin of appreciation as long as the right stays practical and effective.[160]

The ECtHR also continued to grant States a certain discretion in cases concerning "national fiscal policy" as was the case pre-2011.[161]

6.1.3.2 RIGHT TO A FAIR HEARING

In addition to the inherent right to access to courts, Art. 6 § 1 ECHR enshrines the general right to a fair hearing. The fairness of a hearing is measured by the character of the proceedings, the nature of the dispute, the manner of dealing with evidence and the public pronouncement of judgments.[162] As is the case in general for Art. 6 ECHR, the Contracting States have a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the right to a fair hearing.[163]

Article 6 § 2 ECHR, guaranteeing the right to be presumed innocent, enshrines a particular aspect of the right to a fair hearing. It imposes requirements in respect of *inter alia* the premature expressions by the trial

[158] *Stanev v. Bulgaria (note 104); Boulois v. Luxembourg [GC], Judgment of 3 April 2012, app. no. 37575/04; Segame SA v. France, Judgment of 7 September 2012, app. no. 4837/06; Oleksandr Volkov v. Ukraine, Judgment of 27 May 2013, app. no. 21722/11; Stichting Mothers of Srebrenica and others v. The Netherlands, Decision of 11 June 2013, app. no. 65542/12; Dilipak and Karakaya v. Turkey, Judgment of 4 March 2014, apps. nos. 7942/05 and 24838/05; Jones and others v. The United Kingdom (note 143).*
[159] *Dilipak and Karakaya v. Turkey (note 158), para. 76-95.*
[160] *Stanev v. Bulgaria (note 104), para. 229-230; Jones and others v. The United Kingdom (note 143), para 186-187; Stichting Mothers of Srebrenica and others v. The Netherlands (note 158), para. 139.*
[161] *Segame SA v. France (note 158), para. 59.*
[162] *Y. ARAI (note 57), p. 48.*
[163] *See among others Idalov v. Russia (note 99), para. 174.*

court or by other public officials of a defendant's guilt.[164] Article 6 § 3 ECHR enumerates the minimum rights of everyone charged with a criminal offence, as another specific aspect of the right to a fair hearing under Art. 6 § 1 ECHR.

The ECtHR examined criminal cases more strictly and closely than civil cases pre-2011.

An area where States were granted some discretion is in the admissibility of evidence. This self-restraint is based on the non-substitution principle, which lets national courts, presumed to be better placed, to decide what evidence to admit while the ECtHR's role is limited to scrutinising the overall fairness of proceedings. Furthermore, the guarantee that judgments are publicly pronounced, inherent to the right to a fair hearing, has an express limitation allowing restrictions *inter alia* in the interest of morals, public order, national security or where publicity would prejudice the interests of justice. However, this express limitation is to be distinguished from the ones in the second paragraph of Arts. 8-11 ECHR because restrictions on the public pronouncement of judgments are to be applied only in the interests of morals, public order or national security and where *strictly necessary*.[165]

Before as well as after 2011, the ECtHR has limited itself to an overall assessment of proceedings.[166] Furthermore, it consistently held that nothing in the letter or spirit of Art. 6 ECHR prevents a person from waiving his right to a fair trial as long as this waiver is established in an unequivocal manner and attended by minimum safeguards.[167] Concerning the right to be presumed innocent enshrined in Art. 6 § 2 ECHR, the two

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[164] *Allen v. The United Kingdom [GC], Judgment of 12 July 2013, app. no. 25424/09, para. 93; Karaman v. Germany, Judgment of 7 July 2014, app. no. 17103/10, para. 41.*

[165] *As opposed to the numerous interests allowing for restrictions listed and the wording necessary in a democratic society under the second paragraphs of Arts. 8-11 ECHR. See Y. ARAI (note 57), p. 48-51.*

[166] *Idalov v. Russia (note 99); Margus v. Croatia [GC], Judgment of 27 May 2014, app. no. 4455/10.*

[167] *Y. ARAI (note 57), p. 49; Idalov v. Russia (note 99), para. 172; Natsvlishvili and Togonidze v. Georgia, Judgment of 8 September 2014, app. no. 9043/05, para. 91.*

post-2011 judgments[168] don't reveal any changes regarding the scrutiny applied by the ECtHR.

6.1.3.3 RIGHT TO TRIAL WITHIN A REASONABLE TIME

The right to trial within a reasonable time, parallel to the one guaranteed under Art. 5 § 3 ECHR, substantiates the importance the ECHR attributes to the prompt administration of justice.[169] The only post-2011 judgment concerning the right to trial within a reasonable time under Art. 6 § 1 EHCR confirms the ECtHR's strong and stringent measuring of the reasonableness of the length of hearing, leaving national authorities with very little if any discretion.[170]

6.1.4 CHANGES IN THE ECTHR POST-2011 CASE LAW CONCERNING ART. 6 ECHR

Concerning "immunity rules", the ECtHR broadened the leeway concerning the conditions on the exercise of immunity in its 2014 *Jones and others v. The United Kingdom*[171] judgment. In this judgment concerning a civil torture claim against a State official, the ECtHR extended "State immunity" to include "State officials' immunity" in such cases. It reached this decision having regard *inter alia* to the lack of consensus in public international law and the *aim* as well as *proportionality* of the granted immunity.[172] Furthermore, the ECtHR declared inadmissible the complaint of the foundation *Stichting Mothers of Srebrenica*[173]. This foundation complained that the Netherlands' courts declined jurisdiction to hear their claim against the United Nations (hereinafter: UN) for their alleged failure to prevent the Srebrenica massacre because of the UN's immunity.

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[168] *Allen v. The United Kingdom (note 164); Karaman v. Germany (note 164).*
[169] *Y. ARAI (note 57), p. 51.*
[170] *Svinarenko and Slyadnev v. Russia [GC], Judgment of 29 April 2013, apps. no. 32541/08 and 43441/08.*
[171] *Jones and others v. The United Kingdom (note 143).*
[172] *Jones and others v. The United Kingdom (note 143), para 213.*
[173] *Stichting Mothers of Srebrenica and others v. The Netherlands (note 158).*

Following a trend at European level, the ECtHR extended the interpretation of Article 6 § 1 ECHR in *Stanev v. Bulgaria*[174] as guaranteeing anyone who has been declared partially incapable a direct access to a court to seek restoration of his or her legal capacity.[175] The Court thus narrowed the States' margin of appreciation regarding cases involving "persons of unsound mind".

In the *Othman v. The United Kingdom*[176] judgment, the ECtHR for the first time found that an expulsion would be in violation of Article 6 ECHR. The ECtHR decided that the real risk that evidence obtained by torture of third persons will be admitted at the applicant's trial after his expulsion amounts to a flagrant denial of justice. In the context of the fight against terrorism in which States have a legitimate interest to deport non-nationals whom they consider to be threats to national security, the ECtHR applied a very stringent test of the fairness of a hearing in this judgment.[177] This is all the more noteworthy as national security grounds usually broaden the scope of the States' discretion.[178]

In the 2011 *Nejdet Sahin and Perihan Sahin v. Turkey*[179] ECtHR Grand Chamber judgment a 10-judge majority granted wide discretion to the Turkish authorities. The applicants' son, an army pilot, died in May 2001 when his plane crashed in Turkey while transporting troops. The parents unsuccessfully applied for the monthly survivors' pension payable under the Turkish Anti-Terrorism Act. They applied to the ordinary administrative court, which declined jurisdiction, after which their case was referred to the Supreme Military Administrative Court, which the Jurisdiction Disputes Court adjudged to be competent. For the ordinary courts there was a causal link between the crash and the fight against terrorism (a necessary condition for the entitlement to the pension in

[174] *Stanev v. Bulgaria (note 104).*
[175] *Stanev v. Bulgaria (note 104), para. 245.*
[176] *Othman (Abu Qatada) v. The United Kingdom, Judgment of 9 May 2012, app. no. 8139/09.*
[177] *Othman (Abu Qatada) v. The United Kingdom (note 176), para. 184, 260.*
[178] *Y. ARAI (note 57), p. 58.*
[179] *Nejdet Sahin and Perihan Sahin v. Turkey [GC], Judgment of 20 October 2011, app. no. 13279/05.*

question) whereas the military court found no such link. In the fourteen cases brought by the victims' families of the same plane crash, the ordinary administrative courts found a link between the plane crash and the fight against terrorism.

The applicants therefore complained to the ECtHR that two different courts came to different conclusions based on the same facts. The majority opinion found these conflicting findings not to be in violation of the right to a fair hearing under Art. 6 § 1 ECHR based on the non-substitution principle and the fact that the Supreme Military Administrative Court's interpretation wasn't manifestly arbitrary.[180] The majority made extensive reference to the principle of subsidiarity, stating that it is primarily for the national authorities to resolve problems of interpretation of domestic legislation and that, save in the event of evident arbitrariness, it is not the Court's role to question their interpretation of domestic law.[181] Furthermore, the majority opinion stated that legal certainty must be pursued with due respect for the decision-making autonomy and independence of the domestic courts, in keeping with the principle of subsidiarity and the fourth-instance doctrine at the basis of the Convention system.[182]

Another important point in the majority's reasoning is the fact that the conflicting decisions in the present case are linked to the organisational structure of the Turkish court system in which (although not expressly stated in this judgment) a wide margin of appreciation is granted in order not to impose a non-existing European standard.[183]

Given the fundamental nature of the principle of legal certainty, the rule of law and Article 6 ECHR in general, the ECtHR's strong self-restraint is unusual. The seven dissenting judges accordingly employ a very strong wording in their dissenting opinion. They argue that the present case constitutes a flagrant malfunctioning of the Turkish judicial system due

[180] *Nejdet Sahin and Perihan Sahin v. Turkey (note 179), para. 88- 96.*
[181] *Nejdet Sahin and Perihan Sahin v. Turkey (note 179), para. 49-50.*
[182] *Nejdet Sahin and Perihan Sahin v. Turkey (note 179), para. 84-88.*
[183] *Nejdet Sahin and Perihan Sahin v. Turkey (note 179), para. 68.*

to the lack of an effective mechanism for harmonising the case law between the ordinary and the military administrative courts. They furthermore complain that, "if justice is not to degenerate into a lottery, the scope of litigants' rights should not depend simply on which court hears their case".[184]

In *Al-Khawaja and Tahery v. The United Kingdom*[185] the ECtHR departed from its previous position according to which, where a witness cannot be cross-examined and the conviction is based on hearsay as the sole or decisive evidence, the rights protected under Article 6 ECHR will be violated.[186] The "sole or decisive" rule thus lost its absolute character. The right to call and cross-examine witnesses, as a particularly important aspect of the right to a fair trial, is singled out under the minimum rights of an accused in criminal proceedings under Article 6 § 3 ECHR. It demands that witness statements be made at a public hearing in the presence of the accused with a view to adversarial argument. The sole and decisive rule is thus to be understood as an exception to the rule that hearsay evidence is prohibited in order to ensure the fairness of proceedings.

In contrast to the more general right to a fair hearing under Art. 6 § 1 ECHR where the ECtHR always restricted itself to examine the overall fairness of proceedings, Art. 6 § 3 ECHR calls for a more stringent and in-depth examination of the fairness of a hearing. In the 2011 *Al-Khawaja and Tahery* judgment, the ECtHR for the first time allowed national authorities the discretion to balance the public and private interests under Art. 6 § 3 ECHR. Deviating from its previous case law, the ECtHR limited itself to conducting only an overall examination of the fairness of the proceedings. Hence, the ECtHR introduced "an exception to what is

[184] *Joint Dissenting Opinion of juges Bratza, Casadevall, Vajic, Spielmann, Rozakis, Kovler and Mijovic to Nejdet Sahin and Perihan Sahin v. Turkey (note 179), para. 17.*
[185] *Al-Khawaja and Tahery v. The United Kingdom [GC], Judgment of 15 December 2011, apps. nos. 26766/05 and 22228/06.*
[186] *Joint partly dissenting and partly concurring opinion of Judges Sajo and Karakas to Al-Khawaja and Tahery v. The United Kingdom (note 185), p. 68.*

already the exception"[187] by allowing counterbalancing factors that are not to be evaluated by the ECtHR "so far removed from the trial proceedings"[188] to relativize the formerly absolute "sole or decisive rule".

While some observers[189] as well as the concurring judge Bratza[190] acknowledge that the judgment at hand constitutes a change in the ECtHR's case law, they see it as a positive example of a functioning dialogue between the ECtHR and domestic courts. They emphasize that the new "counterbalancing" approach rightly takes into account national safeguards, ensuring the fairness of proceedings and moves away from a rigid jurisprudence.

When looking at this decision not only with regard to the admissibility of hearsay evidence but in the wider context of the evolution of the ECtHR's case law since 2011, it constitutes however another example of softening up a formerly absolute rule, allowing national courts more leeway when applying ECHR provisions.

6.1.5 CONCLUSIVE REMARKS ON THE DUE PROCESS RIGHTS

Overall, the ECtHR confirmed its strict standards and wide scope of review in most of the post-2011 cases concerning Art. 5 ECHR. The Court generally made only very limited references to the principle of subsidiarity and the margin of appreciation in continuation of its pre-2011 case law. In contrast to this general tendency, the ECtHR accommodates in *Hassan v. the United Kingdom*[191] the respondent government by disapplying its obligations under Article 5 ECHR in favour of the provisions of IHL.

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[187] *Joint partly dissenting and partly concurring opinion of Judges Sajo and Karakas to Al-Khawaja and Tahery v. The United Kingdom (note 185), p. 66.*
[188] *Al-Khawaja and Tahery v. The United Kingdom (note 185), para. 154.*
[189] J. ELLIOTT-KELLY, Al-Khawaja and Tahery v United Kingdom, *European Human Rights Law Review* 2012, No 1, p. 81 *et seq*; O. MICHIELS, Le principe de la prevue unique ou déterminante, *Revue Trimestrielle des Droits de l'Homme*, 2012, No 91, p. 693 *et seq*.
[190] *Concurring opinion of Judge Bratza to Al-Khawaja and Tahery v. The United Kingdom (note 185).*
[191] *Hassan v. The United Kingdom (note 110).*

On the other hand, the reasoning used in the *Austin*[192] judgment constitutes a dangerous precedent in regard to the protection of individuals regarding their right to liberty as enshrined in Art. 5 ECHR as it forsakes said protection in favour of more discretion towards Contracting States. By concluding that it depends on the context if a measure amounts to a deprivation of liberty and by refraining from conducting its own independent assessment of the facts for the sake of subsidiarity, the ECtHR thus moved away from the well-established case law with consequences yet to be established.

Regarding Article 6 ECHR, the ECtHR found for the first-time a violation concerning an expulsion case in *Othman v. The United Kingdom*[193] and a majority of judgments confirmed prevalent case law. However, the ECtHR awarded unusual discretion to national authorities in two cases. In *Nejdet Sahin and Perihan Sahin v. Turkey*[194] the ECtHR abstained in the name of subsidiarity from enforcing legal certainty endangered by the very nature of the organisational structure of the Turkish court system. In *Al-Khawaja and Tahery v. The United Kingdom*[195] the ECtHR abandoned for the first time the "sole or decisive rule" protecting defendants against hearsay evidence and ensuring a fair trial.

Considering the above findings one can observe a clear development of the ECtHR's case law towards more subsidiarity. Within this tendency the ECtHR did not refrain from deviating from well-established case law and to soften up strict concepts.

6.2 ARTS. 8-11: PERSONAL FREEDOMS

The personal freedoms enshrined in Arts. 8-11 ECHR all share the same structure. In the first paragraph of each of these articles the rights

[192] *Austin and Others v. The United Kingdom (note 115).*
[193] *Othman (Abu Qatada) v. The United Kingdom (note 176).*
[194] *Nejdet Sahin and Perihan Sahin v. Turkey (note 179).*
[195] *Al-Khawaja and Tahery v. The United Kingdom (note 185).*

guaranteed are defined and the second paragraph lies down under which conditions an interference with these rights is justified.[196]

An interference with the guarantees under Arts. 8-11 ECHR is unjustified unless it is:

1) in "accordance with the law",
2) has a "legitimate aim" and
3) is "necessary in a democratic society".[197]

The "in accordance with the law" requirement asks that the measure in question should have a legal basis in domestic law. However, it also refers to the quality of the law in question and requires the law to be accessible to the person concerned and foreseeable as to its effects.[198]

The "legitimate aims" capable of justifying an interference with the guarantees are exhaustively listed under the respective second paragraph of Arts. 8-11 ECHR.

In the 1983 *Silver and Others v. UK judgment*[199], the ECtHR enumerated the following four principles inherent to the "necessary in a democratic society" requirement.

1) The adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".
2) The Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but

[196] *ST. GREER (note 57) 2000, p. 9; COUNCIL OF EUROPE (note 57) 2008, p. 4.*
[197] *C. OVEY, The Margin of Appreciation and Article 8 of the Convention, Human Rights Law Journal 1998, p. 10.*
[198] *See among others Mennesson v. France, Judgment of 26 June 2014, app. no. 65192/11, para. 57; Y. ARAI (note 57), p. 61-62.*
[199] *Silver and Others v. The United Kingdom, Judgment of 25 March 1983, apps. nos. 5947/72, 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Reports of Judgments and Decisions, Series A no. 61.*

it is for the ECtHR to give the final ruling on whether they are compatible with the ECHR.

3) The phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued".
4) Those paragraphs of Articles of the ECHR, which provide for an exception to a right guaranteed are to be narrowly interpreted.[200]

The breadth of the margin generally depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference.[201] In addition, the reasons brought forward by States to justify interferences with the personal freedoms need to be both "relevant" and "sufficient".[202]

As a general rule, where there is a consensus within the Member States of the Council of Europe or where States have to undertake a balancing exercise between competing private and public interests or different Convention rights their margin of appreciation tends to be wider pre-2011. The choice how to ensure their positive and negative obligations generally also falls within the margin of appreciation of the Contracting States.[203]

In a first period of case law between the ECtHR's foundation and 1979, the Court usually granted a margin of appreciation when Contracting States asked for it. After that, the ECtHR was more assertive in its jurisprudence and exerted a stronger review in the personal freedom Articles.[204]

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[200] *Silver and Others v. The United Kingdom (note 199), para. 97.*
[201] *COUNCIL OF EUROPE (note 57) 2008, p. 4.*
[202] *Y. ARAI (note 57), p. 61-63.*
[203] *Y. ARAI (note 57), p. 85.*
[204] *H. CH. YOUROW (note 57), p. 180.*

6.2.1 ARTICLE 8 (RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE)

Article 8 ECHR protects the right to respect for one's private and family life, one's home and correspondence. Under this provision, States have both a negative obligation not to interfere with the rights enshrined and a positive obligation to guarantee effective enjoyment of these rights.[205] For both negative and positive obligations the ECtHR allows a certain, but not unlimited, margin of appreciation. The choice how to ensure the positive and negative obligations however falls within the margin of appreciation of the Contracting States.[206]

The "legitimate aims" capable of justifying an interference with the guarantees under Art. 8 ECHR comprise interests of *national security*, *public safety*, the *economic wellbeing* of the country, the *prevention of disorder or crime*, the *protection of health or morals* and the *protection of the rights and freedoms of others*.

In the pre-2011 case law the ECtHR has been willing to grant a certain discretion in a number of particular fields where national authorities traditionally enjoy a margin of appreciation. For instance in the field of "family relationships" - where the ECtHR mainly deals with issues such as access to, custody and adoption of children or the treatment of children born out of wedlock - the tendency has been to give a wide margin of appreciation to the national authorities in assessing the best interests of children. In the fields of issues concerning "homosexuals" and "transsexuals" the ECtHR showed restraint to impose standards and granted a wide discretion to national authorities to regulate issues such as the recognition of a post-operative transsexual or the recognition of family and marriage of homosexual persons. Concerning the "rights of prisoners" to family life, the ECtHR grants the Contracting States wide discretion in organising their penitentiary system because of the underlying public safety considerations.[207] Considerations of morals,

[205] *Y. ARAI (note 57), p. 60; A. LEGG (note 76), p. 211-212; C. OVEY (note 197), p. 10.*
[206] *Y. ARAI (note 57), p. 85.*
[207] *C. OVEY (note 197), p. 11-12; Y. ARAI (note 57), p. 63-82.*

national security and the prevention of disorder or crime are general policy grounds that tend to widen the accorded margin of appreciation.[208] Where a particularly important facet or an essential aspect of an individual's existence or identity is at stake, the margin of appreciation allowed to the State will be restricted.[209]

In the screened post-2011 cases[210] the ECtHR continues to narrow the accorded margin of appreciation where an essential aspect of an individual's identity is at stake or where a corresponding European consensus exists.[211] The 2011 *S.H. and Others v. Austria judgment*[212] is an example where the ECtHR had to balance a lacking European consensus concerning artificial procreation (which is in addition a sensitive moral and ethical issue) against the particular important facet of the applicant's existence to have the possibility to have children. In this case the ECtHR concluded that the afforded margin of appreciation must be a wide one.

Where domestic authorities undertake a balancing exercise between competing private and public interests or different Convention rights and therein take into account the ECtHR's case law, the accorded margin of appreciation continues to be wide post-2011.[213] In addition, where the balancing exercise was undertaken in conformity with the criteria laid down in the case law, the ECtHR would need strong reasons to substitute

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[208] *Y. ARAI (note 57), p. 82-84.*
[209] *See among others Fernandez Martinez v. Spain [GC], Judgment of 12 June 2014, app. no. 56030/07, para. 123 et seq.; COUNCIL OF EUROPE (note 57) 2008, p. 4.*
[210] *Haas v. Switzerland, Judgment of 20 January 2011, app. no. 31322/07; Von Hannover v. Germany (No. 2) [GC], Judgment of 7 February 2012, apps. nos. 40660/08 and 60641/08; Aksu v. Turkey [GC], Judgment of 15 March 2012, apps. nos. 4149/04 and 41029/04; Kuric and Others v. Slovenia [GC], Judgment of 26 Junes 2012, app. no. 26828/06; Hristozov and Others v. Bulgaria, Judgment of 13 November 2012, apps. nos. 47039/11 and 358/12; Michaud v. France, Judgment of 06 December 2012, app. no. 12323/11; Zorica Jovanovic v. Serbia, Judgment of 26 March 2013, app. no. 21794/08; Söderman v. Sweden [GC], Judgment of 12 November 2013, app. no. 5786/08; X v. Latvia [GC], Judgment of 26 November 2013, app. no. 27853/09; Nusret Kaya and Others v. Turkey, Judgment of 22 April 2014, apps. nos. 43750/06, 43752/06, 32054/08, 37753/08 and 60915/08; Fernandez Martinez v. Spain (note 209); Mennesson v. France (note 198).*
[211] *See among others Mennesson v. France (note 198), para. 79-80.*
[212] *S.H. and Others v. Austria [GC], Judgment of 3 November 2011, app. no. 57813/00.*
[213] *See among others Aksu v. Turkey (note 210), para. 62-74; COUNCIL OF EUROPE (note 57) 2008, p. 4.*

its view for that of the domestic courts.[214] Furthermore, the choice of the means to secure compliance with the Convention obligations remains within the Contracting States' margin of appreciation.[215]

The only judgment concerning one of the particular fields where national authorities traditionally enjoy a margin of appreciation concerns an issue regarding transsexualism. In *Hämäläinen v. Finland*[216] the married male applicant underwent gender reassignment surgery. Thereafter she was only allowed to obtaining an identity card indicating her gender as female if she and her wife turned their marriage into a registered civil partnership. The ECtHR's case law in this field has evolved in the past decade and has led to a narrowing of the margin of appreciation regarding issues of transsexualism and the finding of a right to legal recognition of gender reassignment surgery.[217] However, the Contracting States still enjoy a wide margin of appreciation as to the form this legal recognition takes and which consequences it entails.[218] The ECtHR thus found no violation in the present judgment.

6.2.2 CHANGES IN THE ECTHR POST-2011 CASE LAW CONCERNING ART. 8 ECHR

In *Oleksandr Volkov v. Ukraine*[219] the ECtHR has for the first time ordered the reinstatement in post of a person, in this case a Ukrainian Supreme Court judge, whose dismissal was found contrary to Art. 6 § 1 and 8 ECHR. When taking into account that the ECtHR has been very reluctant to order individual remedies in the past and either ruled that the finding of a violation in itself constitutes just satisfaction or at most awarded a certain amount of compensation, this judgment constitutes a

[214] *See among others Von Hannover v. Germany (No. 2) (note 210), para. 107.*
[215] *See among others Von Hannover v. Germany (No. 2) (note 210), para. 104.*
[216] *Hämäläinen v. Finland [GC], Judgment of 16 July 2014, app. no. 37359/09.*
[217] *Y. ARAI (note 57), p. 72-74; Hämäläinen v. Finland (note 216), para. 68-72.*
[218] *Hämäläinen v. Finland (note 216), para. 68-72.*
[219] *Oleksandr Volkov v. Ukraine (note 158).*

significant step towards acting in a less subsidiary manner *vis-à-vis* the Contracting States.[220]

In *Van Der Hejden v. The Netherlands*[221] a 10 judges majority found no violation of Art. 8 ECHR for the domestic authorities' refusal to grant the applicant testimonial privileges in criminal proceedings against her long-term *de facto* partner and father of her two children. The majority found this interference with her right to family life to be proportionate even though her refusal to testify resulted in her being imprisoned for 12 days. The seven dissenting judges as well as some scholars[222] rightly point out, that the present judgment is erroneous for two main reasons.

Firstly, it constitutes a deviation from preceding case law concerning the use of the notion of "family life". This notion has an autonomous meaning under the Convention and encompasses in addition to families based on marriage also other *de facto* relationships as the one the applicant and her long-term partner had.[223] Deviating from its previous case law, the ECtHR decided that the applicant's right to respect for her family life and thus access to testimonial privileges is subject to the formality of registering her relationship.[224] By referring extensively to the principle of subsidiary,[225] the ECtHR granted the domestic authorities a particularly wide margin of appreciation.

Secondly, the ECtHR majority takes the view, that the current judgment involves two competing *interests*: the public interest in the protection of family life from State interference, and the public interest in the prosecution of serious crime.[226] This is erroneous, as some of the dissenting judges rightly point out. In reality the balancing in the current judgment should be between the the applicant's *right* to family life, which

[220] *See Concurring opinion of Judge Yudkivska to Oleksandr Volkov v. Ukraine (note 158).*
[221] *Van Der Hejden v. The Netherlands [GC], Judgment of 3 April 2012, app. no. 42857/05.*
[222] *See for instance B. PASTRE-BELDA (note 125), p. 269; F. SUDRE (note 125), p. 244.*
[223] *Van Der Hejden v. The Netherlands (note 221), para. 50.*
[224] *Joint dissenting opinion of Judges Casadevall and Lopez Guerra to Van Der Hejden v. The Netherlands (note 221).*
[225] *Van Der Hejden v. The Netherlands (note 221), para. 55-57.*
[226] *Van Der Hejden v. The Netherlands (note 221), para. 62.*

is competing with the *public interest* in the prosecution of serious crime. This approach amounts to downgrading the right guaranteed under Art. 8 § 1 ECHR to a public interest. In the words of the dissenting judges, this balancing exercise is thus "[…] quite simply contrary to the spirit and letter of Art. 8 ECHR […] and a worrying departure from the Court's previous case-law".[227]

In the *Van Der Hejden judgment* the ECtHR accepts an important limitation on the rights guaranteed under Art. 8 ECHR. Through this self-restraint, the ECtHR reduces the level of protection of this Convention guarantees.

In general, many of the screened post-2011 judgments have been decided based on the width of the margin of appreciation accorded to the Contracting States. This has led to a number of decisions with strong minorities,[228] which corresponds however to a tendency in line with the ECtHR's pre-2011 case law. This tendency can among others be explained by the fact that the intensity of review under Art. 8 ECHR is generally slightly weaker than for instance under Art. 10 ECHR. The ECtHR therefore relies more strongly on the margin of appreciation when assessing proportionality under Art. 8 ECHR.[229]

In the judgments *S.H. v. Austria*[230] and *Hristozov and Others v. Bulgaria*[231], where sensitive ethical and moral questions as well as societal choices were at stake, the ECtHR was willing to give a very wide margin of appreciation without decisively taking into account the existence of a European consensus. Despite the strong criticism expressed

[227] *Joint dissenting opinion of Judges Tulkens, Vajic, Spielmann, Zupancic and Laffranque to Van Der Hejden v. The Netherlands (note 221).*
[228] *Hristozov and Others v. Bulgaria (note 210) 4:3 decision; X v. Latvia (note 210) 8:9 decision; Nusret Kaya and Others v. Turkey (note 210) 5:2 decision; Fernandez Martinez v. Spain (note 209) 8:9 decision.*
[229] *Y. ARAI (note 57), p. 72-74, 87-92.*
[230] *S.H. and Others v. Austria (note 212).*
[231] *Hristozov and Others v. Bulgaria (note 210).*

concerning these judgments[232] and the degree of deference towards the domestic authorities the ECtHR exerts therein, it is not possible to clearly distinguish a deviation from case law compared to the pre-2011 jurisprudence in these judgments.

6.2.3 ARTICLE 9 (FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION)

Article 9 ECHR guarantees the right to freedom of thought, conscience and religion and protects both the right to hold a belief (internal aspect) as well as the right to express these beliefs by way of worship, teaching, practice, observance and others (external aspect). However, the protection under Art. 9 ECHR doesn't go as far as to protect every act that is allegedly motivated or inspired by a religion or belief. The internal aspect of the freedom of thought, conscience and religion is the core aspect of this right and not subject to the exceptions listed under Art. 9 § 2 ECHR.[233]

To determine if an interference with Art. 9 ECHR is justifiable, the ECtHR examines whether it is "prescribed by law", has a "legitimate aim"[234] and is "necessary in a democratic society", as is the case for Articles 8, 10 and 11 ECHR. Given the importance of this guarantee, the review whether an interference complies with the guarantees enshrined in the outer aspect of Art. 9 ECHR, will be subject to a particularly scrupulous review and heightened standard of proportionality. However, the Contracting States enjoyed a certain margin of appreciation, going

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[232] *J. P. MARGUENAUD, L'accès à des traitements expérimentaux gratuits refusé aux cancéreux en phase terminale, Revue trimestrielle des droits de l'homme 2013, p. 945 et seq; F. SUDRE (note 125), p. 44 et seq. Partly dissenting opinion of judge Kalaydjieva to Hristozov and Others v. Bulgaria (note 210); Dissenting opinion of judge De Gaetano joined by judge Vucinic to Hristozov and Others v. Bulgaria (note 210); Joint dissenting opinion of judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria to S.H. and Others v. Austria (note 212).*

[233] *Y. ARAI (note 57), p. 93; S. C. PREBENSEN, The Margin of Appreciation and Articles 9, 10 and 11 of the Convention, Human Rights Law Journal 1998, p. 13 et seq.*

[234] The legitimate aims under Art. 9 § 2 ECHR are: the interests of public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others.

hand in hand with European supervision, in assessing the necessity and the extent of a restriction under this provision both before and after 2011.[235]

One of the fields where the ECtHR granted national authorities a certain discretion is the organisation of their system of national churches and the collection of church taxes. Another field where the Contracting States enjoy a certain margin of appreciation concerns military service and more specifically the acceptance of conscientious objectors and the availability of an alternative kind of service.[236]

In the screened post-2011 judgments[237] the ECtHR mostly continues to apply a very stringent examination of interferences with Art. 9 ECHR. Given the general dearth of Art. 9 cases before and after 2011 that invoke the margin of appreciation doctrine it is however difficult to make general observations in this regard.[238]

6.2.4 CHANGES IN THE ECTHR POST-2011 CASE LAW CONCERNING ART. 9 ECHR

In *Bayatyan v. Armenia*[239] the ECtHR found for the first time a violation of Art. 9 ECHR for convicting a conscious objector by invoking the existing European consensus in the matter as well as by applying the "living instrument" approach.[240] The dissenting judge Gyulumyan[241] rightly pointed out that this decision breaches with the ECtHR's long-standing approach not to recognise the right to exemption from military service for conscientious objectors and to leave it to the Contracting

[235] *Y. ARAI (note 57), p. 94-95.*
[236] *Y. ARAI (note 57), p. 95-98.*
[237] *Francesco Sessa v. Italy, Judgment of 3 April 2012, app. no. 28790/08; Eweida and Others v. The United Kingdom, Judgment of 15 January 2013, apps. nos. 48420/10, 59842/10, 51671/10 and 36516/10; Magyar Kereszteny Mennonita Egyhaz and Others v. Hungary, Judgment of 8 April 2014, apps. nos. 70945/11, 23611/12, 41150/12, 41463/12, 41553/12, 54977/12 and 56581/12.*
[238] *Y. ARAI (note 57), p. 100.*
[239] *Bayatyan v. Armenia [GC], Judgment of 7 July 2011, app. no. 23459/03.*
[240] *Bayatyan v. Armenia (note 239), para. 102-103.*
[241] *Dissenting opinion of Judge Gyulumyan to Bayatyan v. Armenia (note 239).*

States' discretion to offer some kind of an alternative service.[242] Hence, the ECtHR extended the protection afforded under Art. 9 ECHR and diminished the discretion allowed to national authorities in the field of conscientious objection.[243]

The applicant in *S.A.S. v. France*[244], a woman who wears the burqa and niqab in accordance with her faith, complained that the French law prohibiting anyone to conceal their face in public places violates, among others, her right to respect for her private life under Art. 8 ECHR and her right to freedom to manifest her religion under Art. 9 ECHR.

After finding an interference with the applicant's rights under both Art. 8 and 9 ECHR, the ECtHR proceeds to the usual examination of the conventionality of the interference by verifying whether this interference is "prescribed by law", pursues one or more of the legitimate aims set out in Art. 8 § 2 and 9 § 2 ECHR and is "necessary in a democratic society".

The interference, being itself a law, clearly fulfils the "prescribed by law" criteria. The examination of the legitimate aims is however particularly noteworthy in this judgment as the ECtHR departs from its usual practice "[…] to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to 11 of the Convention".[245] The ECtHR, after a detailed examination of all the aims brought forward by the respondent State, comes to the conclusion that it is "[…] able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier".[246] Secondarily, the ECtHR finds that the interference also pursues the legitimate aim of addressing public safety concerns posed by face veiling.

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[242] *Y. ARAI (note 57), p. 98.*
[243] *See also W. JEAN-BAPTISTE, La reconnaissance du droit à l'objection de conscience par la cour européenne des droits de l'homme, Revue Trimestrielle des Droits de l'Homme 2012, p. 671 et seq.*
[244] *S.A.S. v. France [GC], Judgment of 1 July 2014, app. no. 43835/11.*
[245] *S.A.S. v. France (note 244), para. 114.*
[246] *S.A.S. v. France (note 244), para. 122.*

Regarding the public safety aim of the interference, the ECtHR finds that the law in question can't be considered necessary in a democratic society given the absence of a general threat to public safety and the impact of the law on women such as the applicant who wish to wear the full-face veil for religious reasons.[247] Concerning the aim to secure sociable conditions of "living together" the ECtHR first observes that the government attaches much weight to this aim and that it falls within the powers of the State to secure conditions whereby individuals can live together in their diversity.[248] After expressing its concern regarding certain Islamophobic remarks that marked the debate preceding the adoption of the law in question, the ECtHR finds that the protection of the principle of interaction between individuals that is necessary in a democratic society constitutes a choice of society. As choices of society form part of general policy decisions, on which opinions may reasonably differ, the ECtHR holds that the role of the domestic policy-maker should be given special weight. Finally, taking into account an alleged lack of a European consensus on the matter and having regard in particular to the wide margin of appreciation afforded to the respondent State the Court finds that the interference can be regarded as proportionate to the aim pursued and thus "necessary in a democratic society".[249] By way of this detailed and carefully balanced reasoning the ECtHR finds a non-violation of both Art. 8 and 9 ECHR.

[247] *S.A.S. v. France (note 244), para. 139.*
[248] *S.A.S. v. France (note 244), para. 141.*
[249] *S.A.S. v. France (note 244), para. 153-159.*

This judgment received much attention and has been strongly criticized by many observers[250] as well as the two dissenting judges.[251]

The first main criticism shared by most observers concerns the legitimate aim of "protecting the living together". Even though the majority opinion points out that the "[…] enumeration of the exceptions […] listed in art. 9 § 2 is exhaustive and their definition is restrictive"[252] they accept the protection of the right of others to "living together" as a *de facto* new legitimate aim. Scared by its own audacity to introduce this *innovative* new legitimate aim,[253] the majority opinion however admits, that the notion of "living together" is flexible and lends itself for potential abuse and thus requires a careful examination of the necessity of the interference in question. By exercising strong judicial self-restraint, the majority opinion nevertheless accepted the respondent State's arguments in favour of this new aim.

The second criticism concerns the "abyssal"[254] margin of appreciation granted to the domestic authorities in this judgment. The breadth of the

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[250] *See among others G. GONZALEZ/ G. HAARSCHER, Consécration jésuitique d'une exigence fondamentale de la civilité démocratique? Le voile intégral sous le regard des juges de la Cour européenne, Revue Trimestrielle des Droits de l'Homme 2015, p. 219 et seq.; C. RUET, L'interdiction du voile intégral dans l'espace public devant la Cour européenne : la voie étroite d'un équilibre, La Revue des droits de l'homme 2014, Actualités Droits-Libertés, available at <http://revdh.revues.org/862>; V. CAMARERO SUAREZ, La Sentencia del TEDH en el caso S.A.S. c. Francia : un analisis critico, Revista General de Derecho Canonico y Derecho Eclesiastico del Estado 2015; K. BLAY-GRABARCZYK, Une certaine retenue face à un choix de société – l'épilogue européen de la loi interdisant la dissimulation du visage dans l'espace public, Revue des droits et liebertés fondamentaux 2014, available at < http://www.revuedlf.com/cedh/une-certaine-retenue-face-a-un-choix-de-societe-lepilogue-europeen-de-la-loi-interdisant-la-dissimulation-du-visage-dans-lespace-public>; R. MCCREA, The French ban on public face-veiling : enlarging the margin of appreciation, EU Law Analysis 2014, available at <http://eulawanalysis.blogspot.ch/2014/07/the-french-ban-on-public-face-veiling.html>; E. BREMS, S.A.S. v. France as a problematic precedent, Strasbourg Observers 2014, available at <http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent>; S. OUALD CHAIB / L. PERONI, S.A.S. v. France : Missed Opportunity to Do Full Justice to Women Wearing Face Veil ; Strasbourg Observers 2014, availablet at <http://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil>.*

[251] *Joint partly dissenting opinion of judges Nussberger and Jäderblom to S.A.S. v. France (note 244).*

[252] *S.A.S. v. France (note 244), para. 113.*

[253] *G. GONZALEZ/ G. HAARSCHER (note 250), p. 223-225.*

[254] *G. GONZALEZ/ G. HAARSCHER (note 250), p. 228.*

margin of appreciation in the present judgment is, to say the least, noteworthy for a number of reasons.

Firstly, many arguments drawn from the international and comparative law, the intervening NGOs as well as a large number of national and international human rights actors clearly point out that the impugned interference is disproportionate to the aim pursued and that the aim itself calls for a close scrutiny by the ECtHR. This close scrutiny is hardly compatible with a wide margin of appreciation.

Secondly, the French law touches on an intimate right of members of a small minority within the respondent State's society and can't be considered to fall in the same category as general policies that regulate for instance the relationship between the State and religious institutions. As the ECtHR's role is to protect individuals and minorities from disproportionate State interference imposed by a democratic majority the granting of a wide margin of appreciation is misplaced.

Lastly, and probably most controversially, the majority opinion construes a fictive lack of European consensus to justify the broad margin of appreciation. The majority chose to ignore the fact that 45 out of 47 Member States of the Council of Europe did not implement legislation to restrict the wearing of a full-face veil in public. Belgium being the only other State that opted for a ban while discussions in other States are on-going, the ECtHR considers that the question of the wearing of the full-face veil in public is "[…] simply not an issue at all in a certain number of Member States, where this practice is uncommon".[255] This led the Court to conclude that there is no consensus. In other words, instead of assessing whether there is a consensus to ban the wearing of a full-face veil in public, the majority opinion ignored the consensus among 45 Contracting States to abstain from interfering in this field and construed a *dissensus* in Europa not to ban the full-face veil.[256]

[255] *S.A.S. v. France (note 244), para. 156.*
[256] *G. GONZALEZ/ G. HAARSCHER (note 250), p. 227.*

In the *S.A.S. v. France* judgment, the majority opinion mobilises a very careful balancing act between societal choices and the individual freedom to express one's religious beliefs. However, this careful approach can't hide the fact that the ECtHR seems to resign, in the name of the principle of subsidiarity, from its supervisory role *vis-à-vis* the domestic authorities. This accommodating approach is furthermore very much in line with the demands last voiced at the Brighton conference.[257] To conclude in the words of the dissenting judges, the majority opinion thus "[…] sacrifices concrete individual rights guaranteed by the Convention to abstract principles".[258]

6.2.5 ARTICLE 10 (FREEDOM OF EXPRESSION)

Article 10 ECHR enshrines the fundamental freedom of expression that forms, according to the ECtHR's constant jurisprudence, one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Given the proximity to the democratic political process of the freedom of expression, it is afforded a strong protection and the Strasbourg organs exert a stringent review of interferences with it. The exceptions listed under Art. 10 § 2 ECHR must be construed strictly and the need for any restrictions must be established convincingly.

An interference is only justified if it is "prescribed by law", pursues a "legitimate aim"[259] and is "necessary in a democratic society". In assessing whether an interference is necessary the domestic authorities have a certain margin of appreciation.[260]

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[257] *G. GONZALEZ/ G. HAARSCHER (note 250), p. 225.*
[258] *Joint partly dissenting opinion of judges Nussberger and Jäderblom to S.A.S. v. France (note 244), para. 2.*
[259] *Under Art. 10 ECHR the legitimate aims are: Interests of national security, territorial integrity and public safety, the prevention of disorder and crime, the protection of health or morals, the protection of the reputation or rights of others, the prevention of the disclosure of information received in confidence and the maintenance of the authority and impartiality of the judiciary.*
[260] *Y. ARAI (note 57), p. 101-102; S. C. PREBENSEN (note 233), p. 14-16.*

The scope of the margin of appreciation granted under Art. 10 ECHR depends on a number of factors such as "[…] the nature of the legitimate aim pursued, the scope, duration and effect of restricting measures as well as the nature of the expression, be it moral, commercial, artistic or political".[261] Among the particular grounds that affect the ambit of the margin of appreciation are "moral considerations", "commercial speech and advertisement", "the special role of the "press" as well as cases involving "elected representatives and political expression in general". Regarding "moral considerations" the ECtHR recognises, that the requirements of morals vary from country to country or even within a country between regions. National authorities therefore enjoy a wide margin of appreciation in the assessment of morals. In cases concerning the restriction of "commercial speech and advertisement" as opposed to political expression, the national authorities also traditionally enjoy some discretion as they are seen to be better placed to assess the necessity of restrictions of strictly commercial expressions in their respective societies. When dealing with interferences with the freedom of "press" or the "political expression" particularly by "elected representatives" the ECtHR tends to apply a very close scrutiny and to reduce the discretion of the national authorities.[262]

Generally, "[…] the Strasbourg organs are […] more prepared to apply a heightened standard of proportionality under Art. 10 ECHR than in relation to other Convention rights, curbing the latitudes of national discretion".[263] Therefore, even where particular policy grounds or factors widening the margin of appreciation are involved, the ECtHR exerted a very high standard of review in its pre-2011 case law.[264]

[261] *Y. ARAI (note 57), p. 101.*
[262] *Y. ARAI (note 57), p. 101-128; A. LEGG (note 76), p. 214.*
[263] *Y. ARAI (note 57), p. 136.*
[264] *Y. ARAI (note 57), p. 136.*

In the majority of the screened post-2011 judgments[265] the ECtHR confirmed its willingness to conduct a thorough proportionality assessment. Furthermore, the ECtHR reemphasized in several post-2011 judgments the special role of the press and its vital function as a "public watchdog".[266] The Court also affirms that the acceptable criticisms regarding politicians are wider than regarding private individuals and that there is little scope for restricting freedom of expression in the area of political speech or debate, particularly for elected representatives of the people.[267]

6.2.6 CHANGES IN THE ECTHR POST-2011 CASE LAW CONCERNING ART. 10 ECHR

In the *Animal Defenders International v. The United Kingdom*[268] judgment, the applicant NGO complains that its campaign TV spot advocating against the use of animals in commerce, science and leisure was prohibited on the basis of the British law banning political advertising in both radio and television. Deviating from its previous case law established in *VgT v. Switzerland*[269] and *TV Vest v. Norway*[270] and by enlarging the margin of appreciation granted to domestic authorities, a 9:8 majority found no violation of Art. 10 ECHR. The judgment was particularly criticised firstly for the widening of the margin of appreciation in the ambit of a guarantee as fundamental as Art. 10 ECHR

[265] *Otegi Mondragon v. Spain, Judgment of 15 March 2011, app. no. 2034/07; RTBF v. Belgium, Judgment of 29 March 2011, app. no. 50084/06; Editorial Board of Pravoye Delo and Shtekel v. Ukraine, Judgment of 5 May 2011, app. no. 33014/05; Heinisch v. Germany, Judgment of 21 July 2011, app. no. 28274/08; Axel Springer AG v. Germany [GC], Judgment of 7 February 2012, app. no. 39954/08; Centro Europa 7 S.R.L. and Di Stefano v. Italy [GC], Judgment of 7 June 2012, app. no. 38433/09; Ahmet Yildirim v. Turkey, Judgment of 18 December 2012, app. no. 3111/10.*

[266] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine (note 265), para. 64; Axel Springer AG v. Germany (note 265), para. 79; Centro Europa 7 S.R.L. and Di Stefano v. Italy (note 265), para. 131.*

[267] *Otegi Mondragon v. Spain (note 265), para. 50.*

[268] *Animal Defenders International v. The United Kingdom [GC], Judgment of 22 April 2013, app. no. 48876/08.*

[269] *VgT Verein gegen Tierfabriken v. Switzerland, Judgment of 28 June 2001, app. no. 24699/94, Reports of Judgments and Decisions, ECHR 2001-VI.*

[270] *TV Vest AS and Rogaland Pensjonistparti v. Norway, Judgment of 11 December 20008, app. no. 21132/05.*

and secondly for the unjustified deviation from established case law in favour of the domestic authorities.[271]

While the ECtHR found in its *VgT v. Switzerland* judgment that the general prohibition on political advertising is not necessary in a democratic society and thus violates Art. 10 ECHR, it came to the opposite conclusion in the present judgment. This is all the more notable as the *Animal Defenders International* judgment concerns "public interest speech" that is particularly protected under the ECHR raised by an NGO that exercises a public watchdog role of similar importance to that of the press.[272]

The close review these elements call for is only difficult to reconcile with the widened margin of appreciation that was granted in the present judgment.

Despite the initial finding that "[…] the margin of appreciation to be accorded to the State in the present context is, in principle, a narrow one"[273] the ECtHR moved on to attach considerable weight to the exacting and pertinent reviews exerted by both parliamentary and judicial bodies in the UK in the present case. Finding then that the lack of European consensus in the matter *could* allow a somewhat wider margin of appreciation to the domestic authorities the ECtHR concludes without further justification that in the present case the lack of consensus actually *does* widen the margin of appreciation.[274]

The approach taken by the ECtHR risks to introduce a distinction between interferences that originate directly from legislation and those that don't.

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[271] *P. DUCOULOMBIER, Animal Defenders International v. the United Kingdom: institutional dialogue victory or undue deference towards British law principles?, European Journal of Human Rights 2014, p. 3 et seq; F. SUDRE (note 125), p. 260-261 ; Joint dissenting opinion of judges Ziemele, Sajo, Kalaydjieva, Vucinic and De Gaetano to Animal Defenders International v. The United Kingdom (note 268); Dissenting opinion of judge Tulkens, joined by judges Spielmann and Laffranque to Animal Defenders International v. The United Kingdom (note 268).*

[272] *Animal Defenders International v. The United Kingdom (note 268), para. 102-103.*

[273] *Animal Defenders International v. The United Kingdom (note 268), para. 104.*

[274] *Animal Defenders International v. The United Kingdom (note 268), para. 123; See also P. DUCOULOMBIER (note 271), p. 14.*

Furthermore, the existence of less restrictive measures to achieve the same goal were not considered as it used to be the case in previous Art. 10 ECHR judgments.[275] The current judgment therefore leaves the impression that the ECtHR uses the margin of appreciation in order not to interfere with the choice of the national legislator.

In the *Mouvement Raëlien Suisse v. Switzerland*[276] judgment the applicant, a non-profit association, complains that its poster campaign has not been authorised by the authority of the City of Neuchâtel, a decision later upheld by the regional and national courts. The poster in question displays pictures of extra-terrestrials' faces, a pyramid together with a flying saucer and the earth. In addition, it featured the sentences "the message from extra-terrestrials" and "science at last replaces religion" as well as the address of the association's website and a French phone number. In any case, the content of the posters as such was not the reason relied on to withhold the authorisation for the campaign. Instead, the domestic authorities justified their refusal with the fact that the Raelian Movement engaged in and promoted activities such as paedophilia, incest or human cloning that were immoral and contrary to public order. In addition, the national authorities argued that the website promoted on the poster contained a link to the website of Clonaid, which offers specific services in the area of cloning contrary to Swiss law. A number of judicial proceedings involving members of the application association have also contributed to the refusal in question.[277]

The ECtHR Grand Chamber followed the Chamber in finding no violation of Art. 10 ECHR with a very narrow 9:8 majority. The ECtHR attached particular importance to the wide margin of appreciation of the domestic authorities and their detailed reasoning in line with the ECtHR case law concerning Art. 10 ECHR.

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[275] Y. ARAI (note 57), p. 129-130.
[276] Mouvement Raëlien Suisse v. Switzerland [GC], Judgment of 13 July 2012, app. no. 16354/06.
[277] Mouvement Raëlien Suisse v. Switzerland (note 276), para. 14-18.

As the existence of an interference with Art. 10 ECHR and its prescription by law serving a legitimate aim were undisputed, the main question to be determined was the necessity of the interference in a democratic society. Before determining the breadth of the margin of appreciation the ECtHR reiterates that "[…] the present case is singular in the sense that it raises the question whether the national authorities were required to permit the applicant association to disseminate its ideas through a poster campaign by making certain public space available to it for that purpose".[278]

The ECtHR thereafter argues that the poster campaign is not of political nature as it draws the viewer's attention to the association's activities and has a certain proselytising function. Even though the Court admits that the association's speech also falls outside the commercial advertising context it concludes without adducing any further reason that it is nevertheless closer to commercial speech than to political speech. Being closer to commercial speech, a field where the ECtHR traditionally allowed more discretion to the national authorities, the margin of appreciation is thus widened.

The margin of appreciation in the present judgment is furthermore widened as the association's activities concern matters that are liable to offend intimate personal convictions within the sphere of morals or, especially, religion. By invoking the principle of subsidiarity and reiterating that the local authorities are closer to the realities of their countries the ECtHR finds that it is within their discretion to examine whether a poster satisfies certain statutory requirements.[279]

Taken all-together the ECtHR concludes that the domestic authorities enjoy a wide margin of appreciation and that only serious reasons could lead it to substitute its own assessment for that of the national authorities. The following review of the national reasoning is then restricted to a summary control of the scrutiny and not the reasoning exerted by the national courts. The ECtHR further emphasized that the limited scope of

[278] *Mouvement Raëlien Suisse v. Switzerland (note 276), para. 57.*
[279] *Mouvement Raëlien Suisse v. Switzerland (note 276), para. 61-66.*

the interference influenced its decision to find the interference to be proportional to the aim pursued.

Finally, the ECtHR emphasized that the five national authorities which examined the case gave detailed reasons for their decisions and referred to the ECtHR's case law in the area of freedom of speech. The Court finally concluded on the basis of the foregoing arguments that there were "[…] no serious reasons to substitute its own assessment for that of the Federal Court".[280] Accordingly, it concluded that there has been no violation of Art. 10 ECHR.

This judgment has been strongly criticised by different observers[281] as well as by the 8 dissenting judges in three comprehensive separate opinions[282] attached to the judgment.

The criticism mainly focuses on two aspects of the judgment that are closely linked: firstly the classification of the type of speech in question as "[…] closer to commercial speech than to political speech *per se*"[283] and secondly the breadth of the margin of appreciation accorded to the domestic authorities.

Introducing by way of a "patchwork of reasons"[284] a hybrid type of speech, which is neither commercial nor political but allowing a greater margin of appreciation constitutes "[…] a new standard running counter to the Court's well-established case law and diminishes the protection of

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[280] *Mouvement Raëlien Suisse v. Switzerland (note 276), para. 67-77.*

[281] *J.P. RUI (note 6), p. 43 et seq.; P. MUZNY, La liberté d'expression des idéeaux par voie d'affichage sur le domaine public ne vaut pas pour tous, Revue Trimestrielle des Droits de l'Homme 2013, p. 697 et seq; G. GUILLEMIN, Case Law, Strasbourg : Mouvement Raelien Suisse v Switzerland, Of Aliens and Flying Saucers, Strasbourg Observers 2012, available at : <http://strasbourgobservers.com/2012/07/31/case-law-strasbourg-mouvement-raelien-suisse-v-switzerland-of-aliens-and-flying-saucers>; F. SUDRE (note 125), p. 260.*

[282] *Joint dissenting opinion of judges Tulkens, Sajo, Lazarova Trajkovska, Bianku, Power-Forde, Vucinic and Yudkivska to Mouvement Raëlien Suisse v. Switzerland (note 276); Joint dissenting opinion of judges Sajo, Lazarova Trajkovska and Vucinic to Mouvement Raëlien Suisse v. Switzerland (note 276); Dissenting opinion of judge Pinto de Albuquerque to Mouvement Raëlien Suisse v. Switzerland (note 276).*

[283] *Mouvement Raëlien Suisse v. Switzerland (note 276), para. 62.*

[284] *Joint dissenting opinion of judges Tulkens, Sajo, Lazarova Trajkovska, Bianku, Power-Forde, Vucinic and Yudkivska (note 282), para. 2.*

speech, without offering compelling reasons".[285] It is thus hardly a convincing way to justify a wide margin of appreciation. Furthermore, the fact that neither the association itself nor its website are banned as such in Switzerland doesn't support the finding that the impugned interference is necessary in a democratic society. In fact, refusing the prior authorisation to use a publicly accessible forum such as billboards displaying posters because the ideas displayed are not favourably received by the domestic authorities amounts to state censorship contrary to Art. 10 ECHR and the governmental obligation of neutrality.[286]

Under the pretext of a wide margin of appreciation the ECtHR fails to conduct an appropriate analysis of the reasons put forward by the national authorities, accepting a number of reasons that "[…] taken separately, might not be capable of justifying the impugned refusal"[287] to legitimise the interference.[288] The margin of appreciation was thus misused as a "vehicle of unprincipled deferentialism"[289] to the domestic authorities.

This deferential approach and the outer, procedural control of the necessity of the interference further allowed the ECtHR to satisfy itself that the national authorities acted in *good faith*, an approach rejected in its previous case law.[290]

Some observers argue that the impact of the present judgment on the future Art. 10 ECHR case law will be limited due to the singularity of the circumstances.[291] That being said, the reasoning employed in the present judgment is far from being an isolated incident and should not be underestimated. This judgment is a clear example of the ECtHR's new approach to act in a strictly subsidiary manner *vis-à-vis* the national authorities and to give unprecedented prominence to the principle of

[285] *Joint dissenting opinion of judges Sajo, Lazarova Trajkovska and Vucinic (note 282).*
[286] *Joint dissenting opinion of judges Tulkens, Sajo, Lazarova Trajkovska, Bianku, Power-Forde, Vucinic and Yudkivska (note 282), para. 11; G. GUILLEMIN (note 281).*
[287] *Mouvement Raëlien Suisse v. Switzerland (note 276), para. 72.*
[288] *J.P. RUI (note 6), p. 46.*
[289] *Joint dissenting opinion of judges Sajo, Lazarova Trajkovska and Vucinic (note 282).*
[290] *J.P. RUI (note 6), p. 46; Joint dissenting opinion of judges Sajo, Lazarova Trajkovska and Vucinic (note 282).*
[291] *P. MUZNY (note 281), p. 712 et seq.*

subsidiarity and the margin of appreciation doctrine. Following this new approach, the Court doesn't stop from deviating from its own case law and to rely on patchy argumentation. As confirmed by some of the observers, this approach is very much in line and assumedly influenced by the demands voiced in the three declarations of Interlaken, Izmir and Brighton.[292]

6.2.7 ARTICLE 11 (FREEDOM OF ASSEMBLY AND ASSOCIATION)

Article 11 ECHR enshrines the two interlinked but distinct rights of freedom of peaceful assembly and freedom of association. The word "association" is thereby to be understood as having an autonomous meaning within the ECHR. The right of peaceful assembly, as a *lex specialis* to the right to freedom of expression enshrined in Art. 10 ECHR constitutes a fundamental right in a democratic society and one of its foundations. As is the case for Arts. 8-11 ECHR, any interference with the guarantees under Art. 11 ECHR can only be justified if it is "prescribed by law", has a "legitimate aim"[293] and is "necessary in a democratic society". The exceptions set out under Art. 11 § 2 ECHR are to be construed strictly and the Contracting States have only a limited margin of appreciation in determining whether an interference is necessary in a democratic society. In addition to the common legitimate aims under the second paragraphs of Arts. 8-10 ECHR, Art. 11 § 2 ECHR expressly mentions the lawfulness of restrictions of this guarantee on members of the armed forces, the police or the administration of the State.[294]

The fields where the ECtHR traditionally widened the scope of the margin of appreciation granted to nation authorities include cases concerning issues of "national security" or "public safety and prevention of disorder" as well as cases involving the regulation of specific rights of "trade

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[292] *See J.P. RUI (note 6), p. 43; G. GUILLEMIN (note 281).*
[293] *For Art. 11 ECHR the legitimate aims encompass the interest of national security or public safety, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others.*
[294] *Y. ARAI (note 57), p. 138-139; S. C. PREBENSEN (note 233), p. 16-17.*

unions". It is however difficult to establish clear trends, given the dearth of pre-2011 cases concerning Art. 11 ECHR complaints.[295]

In the screened post-2011 judgments[296] the ECtHR confirmed its previous jurisprudence. It continued to narrow the margin of appreciation where core aspects of Art. 11 ECHR were concerned[297] and the absence of a European consensus widened the leeway given to Contracting States also post-2011.[298] In addition, the jurisprudence in fields such as "trade unions"[299] where domestic authorities traditionally enjoyed a margin of appreciation remains unchanged.

6.2.8 CONCLUSIVE REMARKS ON THE PERSONAL FREEDOMS

The margin of appreciation doctrine continues to play a particularly important role in the realm of the personal freedoms enshrined in Articles 8-11 ECHR. Each of the rights enshrined in those Articles lists the conditions under which interferences are justified. This is a strong indicator for the fact that these rights, by their nature, cannot be guaranteed unreservedly. A personal freedom of one individual can only be guaranteed as far as it doesn't interfere with the rights of another individual and thus often requires the domestic authorities to undertake a balancing exercise between competing rights. In addition, the national authorities regularly need to weigh the individual freedom against the interest of their society in general. The personal freedom guarantees enshrined in the ECHR thus provide fertile ground for disagreement and competing interpretations of the Convention provisions. They also

[295] *Y. ARAI (note 57), p. 139.*
[296] *Egitim Ve Bilim Emerkcileri Sendikasi v. Turkey, Judgment of 25 September 2012, app. no. 20641/05; Sindicatul „Pastorul Cel Bun" v. Romania [GC], Judgment of 9 July 2013, app. no. 2330/09; Vona v. Hungary, Judgment of 9 July 2013, app. no. 35943/10; The National Union of Rail, Maritime and Transport Workers v. The United Kingdom, Judgment of 8 April 2014, app. no. 31045/10.*
[297] *Egitim Ve Bilim Emerkcileri Sendikasi v. Turkey (note 296), para. 47.*
[298] *The National Union of Rail, Maritime and Transport Workers v. The United Kingdom (note 296), para. 86; Sindicatul „Pastorul Cel Bun" v. Romania, (note 296), para. 171.*
[299] *Sindicatul „Pastorul Cel Bun" v. Romania, (note 296), para. 133.*

involve policy grounds where opinions in democratic societies can reasonably differ.

These are factors that are strongly reflected in the ECtHR's case law. Only a few of the judgments have been decided unanimously, but often they feature a strong dissenting minority of judges.

Two of the ECtHR's post-2011 judgments, *Oleksandr Volkov v. Ukraine*[300] (Art. 8 ECHR) and *Bayatyan v. Armenia*[301] (Art. 9 ECHR), introduce noteworthy evolutions of the Court's case law. The recognition of the right to "conscious objection" in the *Bayatyan* case somewhat diminishes the Contracting States' discretion under the freedom of thought, conscience and religion enshrined in Art. 9 ECHR. In the *Oleksandr Volkov* judgment, the ECtHR didn't hesitate to go beyond its fundamentally subsidiary role to reinstate a Ukrainian Supreme Court judge who has been unlawfully dismissed.

Besides these, from the perspective of the protection of human rights, positive developments, it is clearly identifiable that the stronger trend in the ECtHR's post-2011 case law goes towards a more subsidiary role of the Court and more discretion for the national authorities to the detriment of the protection of individual rights. As part of this current approach, the ECtHR has repeatedly used the margin of appreciation doctrine to justify its large degree of deference to the national authorities. The *Van der Hejden v. The Netherlands*[302] (Art. 8 ECHR), *S.A.S. v. France*[303] (Art. 9 ECHR), *Animal Defenders International v. The United Kingdom*[304] as well as the *Mouvement Raëlien Suisse v. Switzerland*[305] (Art. 10 ECHR) judgments are exemplary for this trend. In addition, one cannot but notice that this trend is very much in line with the demands voiced at the three

[300] *Oleksandr Volkov v. Ukraine (note 158).*
[301] *Bayatyan v. Armenia (note 239).*
[302] *Van Der Hejden v. The Netherlands (note 221).*
[303] *S.A.S. v. France (note 244).*
[304] *Animal Defenders International v. The United Kingdom (note 268).*
[305] *Mouvement Raëlien Suisse v. Switzerland (note 276).*

conferences in Interlaken, Izmir and Brighton, as other observers also point out.[306]

6.3 ART. 14: NON-DISCRIMINATION

6.3.1 PROHIBITION OF DISCRIMINATION

Art. 14 ECHR enshrines the prohibition of discrimination and provides a non-exhaustive list of banned grounds for discrimination such as sex, race, colour or religion. Violations of the prohibition of discrimination under Art. 14 ECHR can only be invoked if the violation in question falls within the protected sphere of one of the substantive rights of the ECHR. The prohibition of discrimination is thus complementary and has no independent standing.[307]

States are inescapably confronted with situations where they need to differentiate between different (groups of) individuals. Thus, not every difference of treatment is contrary to the prohibition of discrimination under Art. 14 ECHR. In order to be justified, differences in treatment must pursue a "legitimate aim" by means that are proportional to the aim pursued.[308] To assess if a measure amounts to a "difference in treatment" contrary to Art. 14 ECHR the ECtHR applies the "analogous situation test". This test is used to determine if persons who are in analogous situations are treated differently or if persons who are in sufficiently different situations are treated equally. In order to fulfil the conditions of this test, individuals must show that they are treated differently and less favourably compared to individuals in analogous situations and that the difference in treatment therefore amounts to a "discrimination" under Art. 14 ECHR.[309]

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[306] *J.P. RUI (note 6); G. GUILLEMIN (note 281); G. GONZALEZ/ G. HAARSCHER (note 250); B. PASTRE-BELDA (note 125).*
[307] *Y. ARAI (note 57), p. 165-166.*
[308] *J. SCHOKKENBROEK, The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, Human Rights Law Journal 1998, p. 20.*
[309] *Y. ARAI (note 57), p. 167-168; ST. GREER (note 57), 2000, p. 11.*

Pre-2011 the Contracting States have enjoyed a certain margin of appreciation, depending on the circumstances, the subject matter and its background, when assessing whether differences in treatment are justifiable. An important factor, which influences the width of the margin, is the existence or non-existence of a consensus among the Contracting States. The existence of a European consensus thereby tends to narrow the margin of appreciation.[310]

Furthermore, the ECtHR applies a very strict standard of proportionality and decisively narrows or excludes any margin of appreciation if a difference of treatment is based on one of the "suspect categories". These suspect categories were developed over time in the ECtHR's case law and include "sex", "race", "nationality", "religion" and "illegitimacy" in a very evolving approach, taking into account changing social realities. In such cases the ECtHR did not hesitate to impose the burden of proof for the necessity of the difference in treatment to domestic authorities.[311]

In the screened post-2011 judgments[312] the ECtHR continued to apply its strict standard of review and special consideration of the traditional "suspect categories".

6.3.2 CHANGES IN THE ECTHR POST-2011 CASE LAW REGARDING ART. 14 ECHR

In its post-2011 case law the ECtHR reconfirmed and somewhat enlarged its protection against discrimination on grounds of "sexual orientation" under Art. 14 ECHR. In both the 2013 *Vallianatos and Others v.*

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[310] *J. SCHOKKENBROEK (note 308), p. 20-21; Y. ARAI (note 57), p. 168; COUNCIL OF EUROPE (note 57) 2008, p. 6.*

[311] *J. SCHOKKENBROEK (note 308), p. 21-22; Y. ARAI (note 57), p. 169-175.*

[312] *Kiyutin v. Russia, Judgment of 10 March 2011, app. no. 2700/10; Laduna v. Slovakia, Judgment of 13 December 2011, app. no. 31827/02; Bah v. The United Kingdom, Judgment of 27 September 2011, app. no. 56328/07; Konstantin Markin v. Russia [GC], Judgment of 22 March 2012, app. no. 30078/06; Van Der Hejden v. The Netherlands (note 221), I.B. v. Greece, Judgment of 3 October 2013, app. no. 552/10; Hämäläinen v. Finland (note 216).*

Greece[313] and the *X and Others v. Austria*[314] judgments, the ECtHR explicitly applied the same heightened degree of scrutiny as in cases concerning discrimination on the grounds of "sex", one of the traditional "suspect categories". Thereby it reduced the national authorities' margin of appreciation. Furthermore, the ECtHR imposed the burden of proof on the respondent Government to show the necessity of the differential treatment and required particularly convincing and weighty reasons to justify the difference in treatment of the applicants based on their sexual orientation.[315]

In the *X and Others v. Austria* judgment the ECtHR found a violation of Art. 14 ECHR in conjunction with Art. 8 ECHR for not allowing second-parent adoption for an unmarried homosexual couple, while unmarried heterosexual couples had this possibility. This judgment is noteworthy in so far as it only grants a narrow margin of appreciation for a difference in treatment in a field such as adoption law where States usually enjoy a wide margin. Through a combination of a strict review of proportionality, the finding of a questionable lack of consensus in the matter as well as a strong use of the "living instrument" approach a 10:7 majority finally found a violation.[316] Given the close decision and the strong criticism voiced by the 7 dissenting judges it remains however open how this judgment will influence the future jurisprudence in this field.

In the *Vallianatos and Others v. Greece* judgment the ECtHR found a violation of Art. 14 ECHR in conjunction with Art. 8 ECHR for the creation of a civil partnership, which is not open to homosexuals. By doing so it recognised that if a form of "public engagement" other than marriage exists in a Contracting State, the access of homosexual couples to it nowadays constitutes a minimum condition of family life as

[313] *Vallianatos and Others v. Greece [GC], Judgment of 7 November 2013, apps. nos. 29381/09 and 32684/09.*
[314] *X and Others v. Austria [GC], Judgment of 19 February 2013, app. no. 19010/07.*
[315] *X and Others v. Austria (note 314), para. 99, 141; Vallianatos and Others v. Greece (note 313), para. 77, 85.*
[316] *Joint partly dissenting opinion of judges Casadevall, Ziemele, Kovler, Jociene, Sikuta, De Gaetano and Sicilianos to Vallianatos and Others v. Greece (note 313).*

enshrined in Art. 8 ECHR.[317] Despite the fact that the ECHR does not guarantee a right to a civil partnership the ECtHR found a violation of the prohibition of discrimination for guaranteeing this right in a discriminatory manner. The ECtHR also discarded the Greek legislator's argument that the aim of the law in question was to regulate the status of children born outside marriage by providing an alternative legally recognised union in addition to marriage. This judgment is a strong example of the ECtHR's new willingness to conduct an effective and in-depth control of proportionality as well as to decisively narrow the margin of appreciation granted to national authorities in cases concerning differences in treatment based on sexual orientation.

The ECtHR confirmed its previous approach to exert a stringent review in Art. 14 ECHR cases and even extended the protection against discrimination where the difference in treatment is based on sexual orientation.

6.4 ARTS. 2-4 AND 7: NON-DEROGATORY RIGHTS

6.4.1 ARTICLE 2 (RIGHT TO LIFE)

Article 2 ECHR enshrines the fundamental right to life. The right to life not only prohibits the intentional and unlawful taking of life by States through their agents but additionally puts a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.[318] In regard to the procedural aspect of the right, Article 2 ECHR requires States to conduct a prompt and effective official investigation into alleged breaches of this provision.[319] However, positive

[317] *A. DANIS-FATOME, Le droit des couples à un „engagement public", Revue Trimestrielle des Droits de l'Homme 2014, p. 749.*
[318] *Saso Gorgiev v. The Former Yugoslav Republic of Macedonia, Judgment of 19 July 2012, app. no. 49382/06, para. 41; Centre for legal resources on behalf of Valentin Câmpeanu v. Romania [GC], Judgment of 17 July 2014, app. no. 47848/08, para. 130.*
[319] *Al-Skeini and others v. The United Kingdom (note 112), para. 163; Finogenov and others v. Russia (note 142), para. 267; Mehmet Sentürk and Bekir Sentürk v. Turkey, Judgment of 9 April 2013, app. no. 13423/09, para. 99; J. CHRISTOFFERSEN (note 42), p. 518-519.*

obligations are not to impose an excessive burden on the States and the choice of means to ensure these obligations fall within the States' margin of appreciation before and after 2011.[320]

In its second paragraph, Article 2 ECHR describes the situations where the use of force, which may result as an unintended outcome in the deprivation of life, is permitted. The use of force must be "no more than absolutely necessary" which indicates that a stricter and more compelling test of necessity must be employed than that normally applicable for the "necessity test" under paragraphs 2 of Articles 8 - 11 ECHR.[321]

Therefore, the Court did not allow any margin of appreciation regarding this provision before 2011.[322] In all the screened post-2011 ECHR judgments[323] concerning Art. 2 ECHR the Court continued to subject alleged breaches to the most careful scrutiny. Art. 2 ECHR also continues to enjoy its particular importance post-2011 as one of the most fundamental provisions from which no derogation under Art. 15 ECHR is permitted.

An aspect that, due to a lack of European consensus, continues to fall within the State's margin of appreciation in the ECtHR's post-2011 case law is the issue of when the right to life begins.[324] The lack of European consensus had also been invoked when the ECtHR refused to acknowledge a right to die under Art. 2 ECHR in the 2002 *Pretty v. UK*[325]

[320] *Finogenov and others v. Russia (note 142), para. 209; Saso Gorgiev v. The Former Yugoslav Republic of Macedonia (note 318), para. 44.*
[321] *Giuliani and Gaggio v. Italy [GC], Judgment of 24 March 2011, app. no. 23458/02, para. 175-176; Finogenov and others v. Russia (note 142), para. 210.*
[322] *J. CALLEWAERT (note 82), p. 9, COUNCIL OF EUROPE (note 57) 2008 , p. 8.*
[323] *Giuliani and Gaggio v. Italy* (note 321); *Al-Skeini and others v. The United Kingdom* (note 112); *Finogenov and others v. Russia* (note 142); *Saso Gorgiev v. The Former Yugoslav Republic of Macedonia* (note 318); *Mehmet Sentürk and Bekir Sentürk v. Turkey* (note 319); *Hristozov and others v. Bulgaria* (note 210); *McCaughey and others v. The United Kingdom*, Judgment of 16 October 2013, app. no. 43098/09; *Georgia v. Russia* (note 99); *Centre for legal resources on behalf of Valentin Câmpeanu v. Romania* (note 318); *Mocanu and others v. Romania* [GC], Judgment of 17 Septembre 2014, apps. nos. 10865/09, 45886/07 and 32431/08.
[324] *Mehmet Sentürk and Bekir Sentürk v. Turkey* (note 319), para. 107; A. LEGG (note 76), p. 205-206.
[325] *Pretty v. The United Kingdom, Judgment of 29 July 2002, app. no. 2346/02, Reports of Judgments and Decisions, ECHR 2002-III; A. LEGG (note 76), p. 206.*

judgment.[326] In *Figenov and others v. Russia*[327], the ECtHR was furthermore prepared to grant the domestic authorities a margin of appreciation for the military and technical aspects of a hostage rescue operation. However, the ECtHR applied different degrees of scrutiny to different aspects of the operation as it did in its pre-2011 case law and found a violation of Art. 2 ECHR.[328]

6.4.2 ARTICLE 3 (PROHIBITION OF TORTURE)

Article 3 ECHR prohibits in absolute terms torture as well as inhuman or degrading treatment and punishment. According to the ECtHR's case law there is no room for balancing the rights protected by Art. 3 ECHR against other rights or any public interest as inherent to the margin of appreciation doctrine. In addition, no derogation from Art. 3 ECHR under Art. 15 ECHR is permitted.[329]

Underlining its absolute prohibition, the ECtHR held in the 1978 *Tyrer v. The United Kingdom*[330] judgment that "no local requirement relative to the maintenance of law and order would entitle any of [the Contracting States] to make use of a punishment contrary to Article 3".[331] Furthermore, the legal classification of an act or omission as falling within the scope of Article 3 ECHR lies within the exclusive power of the ECtHR.[332]

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Art. 3 ECHR and the assessment of this minimum is relative depending on the circumstances of the case in question. The scope of inhuman or degrading treatment is therefore subject to the circumstances

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[326] COUNCIL OF EUROPE *(note 57) 2008, p. 8.*
[327] *Finogenov and others v. Russia (note 142).*
[328] *Finogenov and others v. Russia (note 142), para. 210-216 and 266.*
[329] COUNCIL OF EUROPE *(note 57) 2008, p. 8; Chahal v. The United Kingdom, Judgment of 15 November 1996, app. no. 22414/03, Reports of Judgments and Decisions 1996-V, para. 81.*
[330] *Tyrer v. The United Kingdom, Judgment of 25 April 1978, app. no. 5856/72, Reports of Judgments and Decisions, Series A no. 26.*
[331] *Tyrer v. The United Kingdom (note 330), para. 38.*
[332] *J.* CALLEWAERT *(note 82), p. 8.*

of the case, as it was pointed out in the *Soering v. UK*[333] landmark judgment.[334]

Similar to Art. 2 ECHR, the prohibition of torture includes a procedural limb. Where an individual makes a credible assertion that he has suffered treatment infringing Art. 3 ECHR at the hands of agents of the State, this provision requires by implication that there should be an effective official investigation capable of leading to the identification and punishment of those responsible.[335]

Furthermore, the prohibition of torture entails the positive obligation for States to take measures designed to ensure that individuals within their jurisdiction are not subjected to treatment contrary to Art. 3 ECHR.[336] However, this positive obligation is to be interpreted in such a way as not to impose an excessive burden on the authorities.[337]

In the screened post-2011 judgments[338] concerning Art. 3 ECHR the ECtHR continued to underline its fundamental and non-derogatory nature. The ECtHR also repeatedly found that even in difficult circumstances arising from terrorism or strong migratory influx, States

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[333] *Soering v. The United Kingdom, Judgment of 07 July 1989, app. no. 14038/88, Reports of Judgments and Decisions, Series A no. 161, para. 89.*
[334] *A. LEGG (note 76) 2012, p. 207-208.*
[335] *See among others Durdevic v. Croatia, Judgment of 19 October 2011, app. no. 52442/09, para. 83; J. CHRISTOFFERSEN (note 42), p. 518-519.*
[336] *See among others Dordevic v. Croatia (note 142), para. 138.*
[337] *See among others O'Keeffe v. Ireland [GC], Judgment of 28 January 2014, app. no. 35810/09, para. 144.*
[338] *M.S.S. v. Belgium and Greece [GC], Judgment of 21 January 2011, app. no. 30696/09; Durdevic v. Croatia, (note 335); R.R. v. Poland, Judgment of 28 November 2011, app. no. 27617/04; Stanev v. Bulgaria (note 104); V.C. v. Slovakia, Judgment of 8 February 2012, app. no. 18968/07; Hirsi Jamaa and others v. Italy [GC], Judgment of 23 February 2012, app. no. 27765/09; Othman (Abu Qatada) v. The United Kingdom (note 176); Idalov v. Russia (note 99); Dordevic v. Croatia (note 142); Svinarenko and Slyadnev v. Russia (note 170); Hristozov and others v. Bulgaria (note 210); El-Masri v. The Former Yugoslav Republic of Macedonia (note 99); Vinter and others v. The United Kingdom [GC], Judgment of 9 July 2013, apps. nos. 66069/09, 130/10 and 3896/10; Sabanchiyeva and others v. Russia, Judgment of 6 September 2013, app. no. 38450/05; Gutsanovi v. Bulgaria, Judgment of 15 October 2013, app. no. 34529/10; Janowiec and others v. Russia [GC], Judgment of 21 October 2013, apps. nos. 5508/07 and 29520/09; O'Keeffe v. Ireland (note 337); Trabelsi v. Belgium, Judgment of 4 September 2014, app. no. 140/10; Mocanu and others v. Romania (note 323); Harakchiev and Tolumov v. Bulgaria, Judgment of 8 October 2014, apps. nos. 15018/11 and 61199/12.*

cannot be absolved of their obligations under Art. 3 ECHR, having regard to the absolute character of this provision.[339]

6.4.3 CHANGES IN THE ECTHR POST-2011 CASE LAW REGARDING ART. 3 ECHR

The ECtHR's post-2011 Article 3 ECHR jurisprudence has undergone some notable changes concerning the principle of subsidiarity and the margin of appreciation doctrine. In the 2013 *Vinter and Others v. UK*[340] judgment, the ECtHR for the first time held that, where domestic law does not provide any mechanism or possibility for review of a life sentence, this is firstly incompatible with Article 3 ECHR and secondly the incompatibility on this ground already arises at the moment of the imposition of the whole life sentence.[341] This finding has been confirmed in the subsequent *Harakchiev and Tolumov v. Bulgaria*[342] judgment. This development in the ECtHR's jurisprudence represents a narrowing of the State's longstanding margin of appreciation in designing their criminal justice system.[343] The ECtHR justified this new finding with the clear support in European and International law for the principle that all prisoners be offered the possibility of rehabilitation and the prospect of release and the new emphasis in European penal policy on the rehabilitative aim of imprisonment, even for those serving life sentences.[344] The form of the review of the life sentence however stays within the margin of appreciation of the States. In the light of the new European consensus on the aim of penal policy the ECtHR enforced its view that the lack of a mechanism or a possibility for review of life sentences amounts to a violation of Art. 3 ECHR from the moment of the imposition of the sentence. Notwithstanding its subsidiary role *vis-à-vis* the domestic authorities, the ECtHR accordingly substituted its own view

[339] *M.S.S. v. Belgium and Greece (note 338), para. 223; Hirsi Jamaa and others v. Italy (note 338), para. 122; Trabelsi v. Belgium (note 338), para. 117-118.*
[340] *Vinter and others v. The United Kingdom (note 338).*
[341] *Vinter and others v. The United Kingdom (note 338), para. 122.*
[342] *Harakchiev and Tolumov v. Bulgaria (note 338).*
[343] *Vinter and others v. The United Kingdom (note 338), para. 104.*
[344] *Harakchiev and Tolumov v. Bulgaria (note 338), para. 245.*

for that of the national authorities and narrowed their margin of appreciation.

The dissenting judge Villiger criticises this development in *Vinter and Others v. UK*[345] among others because the "[…] general and abstract application of Article 3 to the present case [doesn't easily square] with the principle of subsidiarity underlying the Convention, not least when […] issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement"[346] and thus lie within the discretion of the Contracting States.

A second development in the ECtHR's post-2011 jurisprudence in relation to the principle of subsidiarity is to be found in *M.S.S. v. Belgium and Greece*[347]. This case concerns an Afghan national who fled his country out of fear of reprisals from the anti-government forces as he worked as an interpreter for the international air force personnel stationed there. The applicant entered the EU *via* Greece and then moved on to Belgium where he applied for asylum. As Greece under the Dublin Regulation is responsible for any asylum seeker entering the EU through their territory, the Belgian authorities ordered the applicant to leave the country to Greece. On his arrival there he was immediately placed in detention for four days. After his release he was equipped with an asylum-seekers' card and thereafter lived in the street, having no means of subsistence.

This case marks an important development regarding the Court's subsidiarity *vis-à-vis* both the Belgian and the Greek authorities.

The first novelty introduced by this judgment is the finding of a violation of Art. 3 ECHR by the Belgian authorities for returning the applicant to Greece according to the Dublin II regulation. The *M.S.S.* judgment has a potentially important impact on the Common European Asylum System, as it reintroduces a strong control of conventionality in European asylum

[345] *Vinter and others v. The United Kingdom (note 338).*
[346] *Partly dissenting opinion of Judge Villiger to Vinter and others v. The United Kingdom (note 338).*
[347] *M.S.S. v. Belgium and Greece (note 338).*

matters by the ECtHR and reinforces the human rights protection in this field.[348]

A second important development introduced by the judgment is the finding of a violation of Art. 3 ECHR by Greece for the living conditions of the applicant amounting to inhumane treatment; a situation shared by thousands of other asylum seekers. Furthermore, the ECtHR for the first time recognised asylum seekers as a vulnerable group. Both elements will potentially influence the future ECtHR jurisprudence in asylum matters and enlarge the protection under Art. 3 ECHR.[349]

The third change is the one most related to the principle of subsidiarity. In the *M.S.S.* judgment the ECtHR found the applicant's potential *refoulement* to be in violation of Art. 13 ECHR in conjunction with Art. 3 ECHR. The ECtHR thus found that Greece offered no effective remedy as required by Art. 13 ECHR against the applicant's potential *refoulement*, but did not assess whether the potential *refoulement* would violate Art. 3 ECHR taken alone. The ECtHR thereby departs from its usual approach and for the first time subordinates itself to the national authorities concerning the assessment of the applicant's "arguable claim"[350] of the risk that his *refoulement* would be in breach of Art. 3 ECHR taken alone.

The usual approach of the ECtHR in similar cases has been to examine in a first step whether the applicant's *refoulement* back to Afghanistan would subject him to treatment contrary to Art. 3 ECHR alone. This followed the rationale that, if the ECtHR found that the *refoulement* would violate Art. 3 ECHR taken alone, this finding would prevent the Contracting State from actually expelling the applicant. In its usual approach, the ECtHR would then only in a separate second step examine the risk of *refoulement* under Art. 3 ECHR in conjunction with Art. 13

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[348] *C. RAUX, La politique d'asile de l'union européenne dans le viseur de la Cour Européenne des Droits de l'Homme, Revue Trimestrielle des Droits de l'Homme 2011, p. 124-130; G. CLAYTON, Asylum Seekers in Europe: M.S.S. v Belgium and Greece, Human Rights Law Review 2011, p. 759-761.*

[349] *C. RAUX (note 348), p. 1037-1041; G. CLAYTON (note 348), p. 765-770.*

[350] *M.S.S. v. Belgium and Greece (note 338), para. 297.*

ECHR to assess as well the effectiveness of the available remedies against violations of Art. 3 ECHR.

The usual approach could therefore firstly lead to finding a violation of Art. 3 ECHR alone and secondly finding an additional violation of Art. 13 ECHR in conjunction with Art. 3 ECHR for the lack of effectiveness of the available remedies.[351] If the ECtHR had found that a *refoulement* of the applicant in *M.S.S.* would amount to a violation of Art. 3 ECHR taken alone, the Greek authorities would have been prevented from returning him to Afghanistan. The sole finding of a violation of Art. 13 ECHR in conjunction with Art. 3 ECHR on the other hand wouldn't be able to prevent his expulsion. Or as the dissenting Judge Villiger puts it: "[Expecting to prevent the applicant's deportation] would be overstretching the potential of a complaint under Article 13".[352]

In *M.S.S. v. Greece*, the ECtHR holds in deviation of its usual approach that "it is in the first place for the Greek authorities […] themselves to […] assess the risks to which [the applicant] would be exposed in Afghanistan".[353] Thus, the ECtHR is not conducting its own assessment under Art. 3 ECHR in this new approach and is acting strictly subsidiary to the Greek authorities. This way of proceeding is new in the context of Art. 3 ECHR. It was therefore classified as "*innovatory*"[354] by the dissenting Judge Villiger and leads to the situation, that the Greek government is free to conduct its own assessment of whether the deportation of the applicant back to Afghanistan would amount to a violation of Art. 3 ECHR. This is particularly noteworthy as the ECtHR found that the applicant did not have any effective remedies available to him in Greece that would prevent his expulsion. The domestic authorities can potentially find that he can be deported to Afghanistan despite the widely documented malfunctioning of the Greek asylum system and the situation in Afghanistan, which are repeatedly noted in this judgment.[355]

[351] *Concurring opinion of Judge Villiger to M.S.S. v. Belgium and Greece (note 338).*
[352] *Concurring opinion of Judge Villiger to M.S.S. v. Belgium and Greece (note 338).*
[353] *M.S.S. v. Belgium and Greece (note 338), para. 298.*
[354] *Concurring opinion of Judge Villiger to M.S.S. v. Belgium and Greece (note 338).*
[355] *See M.S.S. v. Belgium and Greece (note 338), para. 193, 315 or 318.*

If the Greek authorities in their own assessment find the applicant's return to Afghanistan not to be in breach of Art. 3 ECHR, he would then have to go through the whole Greek judicial system again and will potentially have to bring his complaint again before the ECtHR.

This judgment has also implications for future cases regarding *refoulement* issues, leaving the domestic authorities the leeway to proceed to a deportation despite the finding of a violation of Art. 13 in conjunction with Art. 3 ECHR. By acting in such a subsidiary manner *vis-à-vis* the national authorities,[356] the ECtHR has set a dangerous precedent in the realm of one of the most fundamental provisions of the Convention. Judge Villinger accordingly chose a strong wording in his separate opinion: "I am all in favour of the principle of subsidiarity, but I think here is the wrong place to apply it. […] Subsidiarity does not permit [an Article 3 ECHR complaint] to be "downgraded" so that it is no longer independently examined".[357]

6.4.4 ARTICLE 4 (PROHIBITION OF SLAVERY AND FORCED LABOUR)

Article 4 ECHR prohibits in absolute terms slavery, servitude and forced or compulsory labour and thus enshrines one of the fundamental values of democratic societies without provisions for exceptions or derogation under Article 15 ECHR.[358]

According to the ECtHR's case law, the term "forced or compulsory labour" means in accordance with the corresponding Convention of the International Labour Organisation "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[359]

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[356] *C. RAUX (note 348), p. 1043.*
[357] *Concurring opinion of Judge Villiger to M.S.S. v. Belgium and Greece (note 338).*
[358] *Stummer v. Austria [GC], Judgment of 7 July 2011, app. no. 37452/02, para. 116.*
[359] *Stummer v. Austria (note 358), para. 117.*

The only post-2011 case regarding Art. 4 ECHR concerns an Austrian prisoner who complains that the prison work performed by him amounted to "forced or compulsory labour" because he wasn't free to do it and because it was without affiliation to the old-age pension system. He argued that European standards had changed to such an extent that prison work without affiliation to the old-age pension system could no longer be regarded as work required to be done in the ordinary course of detention falling under Art. 4 § 3 ECHR. The Court's case law concerning prison work is scarce and the only decision in this connection goes back to 1968.[360] Despite the significant developments in the field of penal policy including the recognition of the principle of normalisation of prison work and a majority of Contracting States who affiliate working prisoners to the old-age pension system, the ECtHR did not find a violation of Art. 4 ECHR. The Court based its decision on the insufficient consensus among Contracting States.[361]

The ECHR is considered a living instrument to be read in the light of the notions currently prevailing in democratic States, as the ECtHR has repeatedly held and also reiterates in the judgment at hand.[362] Particularly in connection with Article 4 ECHR, as a fundamental right and one of the four non-derogatory provisions of the ECHR, the "lacking European consensus" reasoning of the ECtHR is striking. The main function of the "European consensus" reasoning is to determine the extent of the margin of appreciation, which so far hasn't been applied regarding the most fundamental provisions of the ECHR. Furthermore, the question of whether the applicant was subject to "forced or compulsory labour" is one of legal qualification within the exclusive power of the ECtHR and as such does not lend itself to grant States a margin of appreciation.[363] In this judgment the ECtHR failed to ensure that Article 4 ECHR offers a practical and effective guarantee and didn't adapt the interpretation of

[360] *Twenty-One Detained Persons v. Germany, Commission decision of 6 April 1968, apps. nos. 3134/67, 3172/67 and 3188-3206/67.*
[361] *Stummer v. Austria (note 358), para. 130-134.*
[362] *Stummer v. Austria (note 358), para. 118.*
[363] *J. CALLEWAERT (note 82), p. 9.*

Article 4 ECHR to present-day conditions. Or as the dissenting Judge Tulkens puts it: "The flexibility inherent in the margin of appreciation is admittedly an essential factor, but […] it must go hand in hand with European supervision. Such supervision was lacking in the present case".[364]

6.4.5 ARTICLE 7 (NO PUNISHMENT WITHOUT LAW)

Article 7 ECHR enshrines an essential element of the rule of law, occupies a prominent place in the ECHR and allows no derogation under Art. 15 ECHR. It prohibits arbitrary prosecution, conviction and punishment as well as the retrospective application of the criminal law to an accused's disadvantage. Furthermore, it enshrines the fundamental principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*).[365] States are generally free to determine their own penal policy as long as they comply with the requirements of Article 7 ECHR. In its post-2011 case law, the ECtHR continues to grant States discretion in the choice of means as long as they comply with the strictly prescribed aim to guarantee that no punishment shall be imposed without an underlying law. [366] The concept of a "penalty" in this provision is furthermore an autonomous concept of the ECHR and the ECtHR readily imposed its own interpretation of domestic law in the 2013 *Del Rio Prada v. Spain*[367] judgment.

6.4.6 CONCLUSIVE REMARKS ON THE NON-DEROGATORY RIGHTS

Theoretically, the application of the margin of appreciation doctrine within the ECHR isn't limited to any set of provisions but is practically unapplied for the four non-derogatory rights.[368] The post-2011 case law

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[364] *Partly dissenting opinion of Judge Tulkens to Stummer v. Austria (note 358).*
[365] *Maktouf and Damjanovic v. Bosnia and Herzegovina [GC], Judgment of 18 July 2013, apps. nos. 2312/08 and 34179/08, para. 66; Del Rio Prada v. Spain (note 99), para. 77.*
[366] *Maktouf and Damjanovic v. Bosnia and Herzegovina (note 365), para. 75.*
[367] *See Joint partly dissenting opinion of judges Mahoney and Vehabovic to Del Rio Prada v. Spain (note 99).*
[368] *J. CALLEWAERT (note 82), p. 6-9; ST. GREER (note 57) 2000, p. 6, 27.*

generally confirms the ECtHR's strict standards under the non-derogatory provisions and even contains some extensions of the protection afforded, such as in Article 3 ECHR (*Vinter and Others v. UK*[369], *Harakchiev and Tolumov v. Bulgaria*[370]). However, one can notice the *novel* and *innovatory* application of the principle of subsidiarity and the margin of appreciation doctrine in the realm of the non-derogatory Articles 3 ECHR (*M.S.S. v. Greece and Belgium*[371]) and 4 ECHR (*Stummer v. Austria*[372]). These two judgments might potentially be significantly influential and their impact on the ECtHR's case law should therefore be closely observed.

[369] *Vinter and others v. The United Kingdom (note 338).*
[370] *Harakchiev and Tolumov v. Bulgaria (note 338).*
[371] *M.S.S. v. Belgium and Greece (note 338).*
[372] *Stummer v. Austria (note 358).*

7 CONCLUSION

The analysis of the ECtHR's post-2011 judgments shows that the Court has changed its use of the principle of subsidiarity and the margin of appreciation doctrine compared to its jurisprudence before 2011. Before 2011 the margin of appreciation doctrine played only a marginal role in the field of the "due process rights". After 2011 the ECtHR did not hesitate to deviate from established case law and to defer to the national authorities' assessment in this field. With regard to "personal freedoms", the ECtHR also pursued a strong degree of deference to the national authorities and carefully avoided to challenge their decisions. As a consequence, the Court overturned formerly absolute rules[373] and weakened the protection in the field of fundamental guarantees such as the right to liberty[374] as well as the freedom of religion[375] and freedom of expression.[376] Taken together, this new approach is very much in line with the demands voiced at the three High Level Conferences. Notwithstanding this trend to granting more discretion to national authorities in these two areas, the ECtHR limited the national discretion in a few cases.[377] This was specially the case in the *Bayatyan v. Armenia*[378] judgment where the ECtHR recognised a right to conscientious objection because of the European consensus in the matter.

Regarding the "non-derogatory rights", the principle of subsidiarity seems to have gained relevance. The implications of *M.S.S. v. Greece and Belgium*[379], where the ECtHR demonstrated more deference to national authorities to the detriment of the protection of individual rights without further explanations are potentially worrying. In the *Stummer v. Austria*[380]

[373] *Al-Khawaja and Tahery v. The United Kingdom (note 185).*
[374] *Austin and Others v. The United Kingdom (note 115).*
[375] *S.A.S. v. France (note 244).*
[376] *Animal Defenders International v. The United Kingdom (note 268); Mouvement Raëlien Suisse v. Switzerland (note 276).*
[377] *Othman (Abu Qatada) v. The United Kingdom (note 176); Oleksandr Volkov v. Ukraine (note 158); Bayatyan v. Armenia (note 239).*
[378] *Bayatyan v. Armenia (note 239).*
[379] *M.S.S. v. Belgium and Greece (note 338).*
[380] *Stummer v. Austria (note 358).*

judgment the ECtHR gave more weight to the national authorities' discretion than to the applicant's protection under Art. 4 ECHR. In addition, the ECtHR chose not to adapt the interpretation of this provision to present day conditions, which rendered its protection ineffective. However, in the majority of the "non-derogatory rights" cases after 2011, the ECtHR upheld its high standards and has even somewhat extended the protection afforded by them.[381] This was also the case in the field of the "prohibition of discrimination".[382]

Summing up, one can conclude that the ECtHR's jurisprudence regarding the principle of subsidiarity and the margin of appreciation doctrine has undergone important changes since its foundation. Applying a very cautious approach in the beginning, the ECtHR started to interpret the ECHR more and more as a living instrument that needs to take into account present day conditions and emerging European consensuses by extending the protection in a number of fields. The demand for more subsidiarity voiced by some Contracting States can be seen as a legitimate call to order for the ECtHR to respect its fundamentally subsidiary role.[383] However, this call to order shouldn't lead the ECtHR to hide behind and misuse the principle of subsidiarity and the margin of appreciation doctrine to avoid unwelcome interferences with the Contracting States. The post-2011 instrumentalisation of these two concepts, which has led to a diminishment of the protection of individual rights in certain cases is thereby particularly worrying for a Court that institutionalises the "conscience of Europe"[384] and the last line of European human rights defence.

[381] *Vinter and others v. The United Kingdom (note 338); Maktouf and Damjanovic v. Bosnia and Herzegovina (note 365).*
[382] *X and Others v. Austria (note 314); Vallianatos and Others v. Greece (note 313).*
[383] *D. SZYMCZAK (note 30), p. 35-37.*
[384] F. TULKENS, Conclusions générales in: F. SUDRE, Le principe de subsidiarité au sens du droit de la Convention européenne des droits de l'homme, Droit & Justice nr. 108, Anthemis 2014, p. 407.

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This paper analyses the development and the current application of the principle of subsidiarity and the margin of appreciation doctrine in the European Court of Human Rights' (ECtHR) case law.

The ECtHR is currently undergoing a reform process to ensure its long-term effectiveness and overcome a working-load crisis. During this reform process, the Member States of the Council of Europe met at three High-Level Conferences in Interlaken, Izmir and Brighton where they called for a strengthening of the principle of subsidiarity and the margin of appreciation doctrine. This paper illustrates based on post-2011 ECtHR land-mark judgments how and to what extent the Court's jurisprudence has changed after the Interlaken Conference in 2010.

Ce mémoire analyse le développement et l'application actuelle du principe de subsidiarité et de la doctrine de la marge d'appréciation dans la jurisprudence de la Cour Européenne des Droits de l'Homme (CEDH).

La CEDH est actuellement soumise à un processus de réforme visant à assurer son efficacité à long terme et à surmonter sa crise de charge de travail. Pendant ce processus, les Etats Membres du Conseil de l'Europe se sont réunis lors de trois conférences de haut niveau à Interlaken, Izmir et Brighton où ils ont revendiqué le renforcement du principe de la subsidiarité et de la marge d'appréciation. Ce mémoire démontre, sur la base des jugements clés de la CEDH énoncés après 2011, comment et dans quelle mesure la jurisprudence de la Cour a changé après la conférence d'Interlaken en 2010.