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DISSERTATION

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"The Role of the Margin of Appreciation Doctrine in the Jurisprudence of the ECtHR".

Supervisor: Dr Costas Paraskeva

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Author: Matheos Antoniou

Contents

INTRODUCTION

The European Convention on Human Rights ('ECHR') was created as a "direct response"[1] to the atrocities of the Second World War[2]; with the aim of protecting human rights, the rule of law and promoting democracy[3]. Today the thousand decisions of the European Court of Human Rights ('ECtHR') clearly show that the Convention is "a success story without comparison"[4] in the history of European Public Law for human rights protection. However, while there is utility in crediting both the ECHR and its Contracting States with their dues for their undeniable contribution to the protection of human rights, there is also utility in giving some more thought about the natural order of things. In other words, one must not forget that when States submit themselves to the ECHR and the jurisdiction of the ECtHR, they often do so in order to enhance their own credibility as political systems that respect human rights[5]. Consequently, when the Convention interpretations by the ECtHR result in a fundamental erosion of State sovereignty, then States might wish to leave the ECHR – as their sovereignty-infringement 'cost' would be much higher than their political-credibility 'benefit'[6]. After all, why let a 'foreign' Court of human rights in Strasbourg second-guess the vital national policy decisions, when human rights can be simply protected by the national

[1] Bernadette Rainey, Pamela McCormick, and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (8th edn, OUP 2020) 3.
[2] Ibid. See also: Merris Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28 European Journal of International Law 763, 769.
[3] See further: Council of Europe, 'The Council of Europe 800 Million Europeans: Guardian of Human Rights, Democracy and the Rule of Law' <https://www.ecml.at/Portals/1/800_millions_en.pdf> 3 accessed 24 September 2022; and <https://www.equalityhumanrights.com/en/what-european-convention-human-rights> accessed 24 September 2022.
[4] Christoph Grabenwarter, 'The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights' (2014) 2014 ELTE Law Journal 101, 101. See further: Jeffrey Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 Columbia Journal of European Law 113, 114 (describing the ECHR as the most comprehensive system protecting human rights in the world).
[5] See further: Andreas Follesdal, 'Subsidiarity to the Rescue for the European Courts? Resolving Tensions Between the Margin of Appreciation and Human Rights Protection' (eds), *Join, or Die – Philosophical Foundations of Federalism* (De Gruyter 2016) 251, 258.
[6] Although admittedly such a scenario would be more difficult now due to the fact that most of the Contracting States of the ECHR are also Member States ('MSs') of the European Union ('EU') – which requires its MSs and EU candidate countries to protect human rights and essentially be parties to the Convention. However, this does not negate the possibility of a Contracting State leaving the ECHR, especially in light of Brexit.

courts, which are also in a better position to apprehend the importance of those national policies and ultimately strike a balance with human rights?

As a result of the aforesaid reality, it is imperative for the ECtHR to allow the Contracting States some leeway in protecting human rights nationally in order for them to choose to remain in the ECHR. This leeway is in any event embedded in the text of the ECHR itself, which accords a primary responsibility for the effective protection of the Convention rights to the national authorities themselves and not to the ECtHR[7]. Additionally, there may be other important reasons for granting the national authorities a certain latitude to protect human rights nationally; such as the fact that these authorities might be indeed better placed than the ECtHR to make decisions on various human rights matters as they are better informed or have more relevant expertise to do so. Those instances would accordingly justify a more lenient review on behalf of the ECtHR to the relevant decisions of the national authorities. However, there may be other occasions where the national authorities interfere with such an important aspect of a Convention right and to such an extent, that the ECtHR cannot simply allow the States to 'get away' with it as that would render the ECHR devoid of any practical significance. In those situations therefore, the Court would be equally justified in engaging in a more strict review of the particular decisions of the national authorities.

Against the above background, the ECtHR has found a "methodological tool"[8] to provide the required flexibility to the national authorities while at the same time retaining control for those cases where the State interference penetrates unreasonably or inadmissibly the core of the Convention rights. This legal tool, in the ECtHR's case law, has been termed as the Margin of Appreciation ('MoA'). The MoA essentially enables the Court to determine the intensity of its scrutiny[9], taking into account the sovereignty of the

[7] Article 1 of the ECHR states that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".
[8] Benedita Mac Crorie and Giulia Santomauro, 'The Margin of Appreciation of States in the European Convention on Human Rights and Additional Protocol No.15' (eds), *Aliens Before the European Court of Human Rights: Ensuring Minimum Standards of Human Rights Protection* (Brill Nijhoff 2021) 249, 249.
[9] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Council of Europe Publishing, Human Rights Files No. 17, 2000) 5.

Contracting States against their obligations under the Convention[10]. In that capacity, the MoA in some cases will be narrow, whereas in other cases will be wide. Where a narrow MoA is allowed, the Contracting States will not have much room to make their own choices as the ECtHR will very strictly review the justifications the States put forward as to why they have interfered with human rights. However, where a wide MoA is afforded, the ECtHR will show much restraint in assessing the reasonableness and necessity of a State's measure interfering with human rights.

The purpose of this Thesis is to ascertain the role or function of the MoA doctrine in the jurisprudence of the ECtHR[11]. Naturally, this task demands not only an examination of the particular ECtHR's case law pertaining to the MoA, but also a consideration of the scholarly writings that describe the said doctrine and the way the Court has been using it in its jurisprudence. The Thesis will therefore follow a 'black letter' or 'doctrinal legal research methodology', which is commonly utilized for those projects (such as the present one) that require research on authoritative sources – including treaties, precedents, and scholarly publications[12].

This Thesis is accordingly divided into six Sections. The first Section ('I') traces the origins of the MoA within the ECHR and introduces the reader briefly to the role of the doctrine in the framework of the Convention. The second Section ('II') enquires into the relationship of the MoA with two other important concepts of the Convention, namely subsidiarity and proportionality, which are seen by some legal scholars as being closely connected with the use of the MoA in the Court's case law. The third Section ('III') goes on to examine Strasbourg's case law on a number of important Convention Articles in which the MoA has been applied in order to test the accuracy of the above position presented in Section II regarding the close relationship of the doctrine with subsidiarity and proportionality. The fourth Section ('IV') delves deeper into the relationship between proportionality and the MoA and identifies the main factors that determine the particular

[10] Ronald Macdonald, 'The Margin of Appreciation' (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993) 83.
[11] Note that the word "role" is defined as: "A function that a person or thing typically has or is expected to have" – at: Albert Sidney Hornby, *Oxford Advanced Learner's Dictionary* (5th edn, OUP 1995) 1018.
[12] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 8, 14. See further the analysis of the various legal research methodologies in: Caroline Morris, *Getting a PhD in Law* (Hart Publishing 2011) 28-40.

scope of the MoA as set by the Court. The fifth Section ('V') assesses whether the MoA itself is truly justified as a doctrine or not. Finally, the sixth Section ('VI') discusses the potential role of the MoA in the ECtHR's future jurisprudence in light of the amending Protocol No. 15[13].

The general conclusion that will be reached by the author is that the function of the MoA doctrine in the jurisprudence of the ECtHR is indeed closely associated with the implementation of the principles of proportionality and subsidiarity, depending on the specific context that the MoA is being applied into. Moreover, the author will maintain that the justifications of the said doctrine are so important that significantly outweigh any of its criticisms. Ultimately, the author will argue that the MoA has a crucial future role to play in the ECtHR's jurisprudence for the further advancement of human rights protection in Europe. The particular future role, according to the author, will resemble even more the practical application of the principle of subsidiarity within the realm of the Convention.

I. THE MARGIN'S ORIGINS AND ROLE WITHIN THE ECHR

Despite that the term 'MoA' has been recently included in the Preamble of the ECHR under the amending Protocol No. 15 which entered into force on 1 August 2021[14], neither the original text of the Convention nor the preparatory work leading up to the drafting and adoption of the Convention made any reference to this term[15]. Accordingly, to discover the origins of the MoA within the ECHR system, we need to look into the ECtHR's case law, as this is indeed a "judge-made doctrine"[16].

The first cases that used the term 'MoA' within the ECHR regime involved Article 15 of the Convention, which allows a Contracting State to derogate from its obligations under

[13] Protocol No.15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 24.VI.2013) <https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf> 24 September 2022.
[14] Ibid.
[15] Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) 14 Cambridge Yearbook of European Legal Studies 381, 383.
[16] Ibid.

the ECHR in times of war or other public emergency[17]. More specifically, the origins of the MoA doctrine date back to the inter-State application of *Greece v the United Kingdom*[18] in which the European Commission noted that the respondent colonial government of Cyprus (United Kingdom)[19] was allowed "a certain measure of discretion"[20] in evaluating the proportionality of a derogating measure[21] in relation to the exigency in Cyprus at the time. The Commission maintained the same approach in the subsequent case of *Lawless v Ireland*[22], where it decided that "a certain discretion – a certain margin of appreciation – must be left to the Government [respondent State] in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention"[23]. Concerning now the ECtHR itself, the Court first *expressly* used the term 'MoA' in *Ireland v the United Kingdom*[24], in which it ruled that national authorities are allowed a "wide margin of appreciation" in the context of Article 15 "to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it"[25].

While the references to the MoA gradually spread in cases involving other Articles of the Convention (and not just Article 15)[26], it is broadly accepted that the seminal judgment[27] concerning the articulation of the rationale[28] and development[29] of the MoA was

[17] Article 15 provides that: "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".
[18] *Greece v the United Kingdom* (App. 176/56), Report of the European Commission of Human Rights, 26 September 1958.
[19] Ie the pre-independence administration.
[20] *Greece v the United Kingdom* (n 18) page 152.
[21] Ie In assessing the "extent strictly required" pursuant to Article 15.
[22] *Lawless v Ireland* (App. 332/57), Report of the European Commission of Human Rights, 19 December 1959.
[23] Ibid, at 82.
[24] *Ireland v the United Kingdom* (App. 5310/71), 18 January 1978.
[25] Ibid, para 207.
[26] For an overview of these cases see: Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 5-7.
[27] Koen Lemmens, 'The Margin of Appreciation in the ECtHR's Case Law' (2018) 20 European Journal of Law Reform 78, 84.
[28] Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 Current Legal Problems 49, 52.
[29] Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 163.

Handyside[30]. As Takahashi accurately observes, the judgment constitutes a "*cause célèbre*" and it is only through this decision that "it ha[d] become fairly justiciable to consider a margin of appreciation as a 'doctrine'"[31].

Handyside concerned a small book with information for teenagers which was to be distributed at schools, but which was found by the national courts of the UK to contain obscenities and so its distribution was prohibited and all copies were seized with the aim of protecting public morals. The ECtHR had to decide whether the prohibition and seizure could be acceptable under the provisions of Article 10 of the Convention which protect the right to freedom of expression[32]. In particular, the Court had to examine whether the said restriction of the right satisfied the requirements of Article 10(2), namely that it was (a) "prescribed by law", (b) pursued a 'legitimate *aim*' and (c) was "*necessary* in a democratic society"[33].

In the context of examining the acceptability of the restriction in *Handyside*, the ECtHR laid down its own observations and rationale concerning the MoA. More specifically, it pointed that "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights" and that the Convention "leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines"[34]. In applying this observation to Article 10(2) the Court ruled that it was impossible to find a uniform conception of morals across all the Contracting States as the

[30] *Handyside v the United Kingdom* (App. 5493/72), 7 December 1976.
[31] Yutaka Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasburg's Variable Geometry' (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 62, 68.
[32] Article 10 of the ECHR states:
"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, *for the protection of* health or *morals*, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for
maintaining the authority and impartiality of the judiciary.".
[33] See: Article 10(2) ibid. Note that the 'legitimate aim' in this case concerned the "*protection of…morals*".
[34] *Handyside* (n 30) para 48.

legal requirements of morality changed from time to time and from place to place[35]. For this reason, the ECtHR explained that the national public authorities, due to their direct and continuous engagement with the vital forces of their countries, were in a better position than the Court itself to give an opinion on the exact content of the requirements concerning morality in accordance with their national laws as well as on the "necessity" of a "restriction" intended to comply with the said morality requirements[36]. Consequently, the Court ruled that Article 10(2) left to the Contracting States a MoA – "given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force"[37].

However, the ECtHR clarified that Article 10(2) did not grant to the Contracting States an "unlimited power of appreciation" and that the Court itself retained its supervisory power to give the final ruling as to whether a 'restriction' is compatible with Article 10. This supervisory power concerned both the *aim* of the challenged measure[38] as well as its *necessity*[39]; and it covered "not only the basic legislation but also the decision applying it, even one given by an independent court"[40]. Ultimately, following the above train of thought, the Court emphasized that "it is in no way the Court's task to take the place of the competent national courts but rather to review…the decisions they [have] delivered in the exercise of their power of appreciation"[41].

In line with the above reasoning in *Handyside*, the MoA could be seen as a doctrine utilized by the ECtHR providing national authorities an amount of discretion in fulfilling their obligations under the Convention[42]. It has been aptly defined by Yourow as: "[T]he latitude of deference or error which the Strasbourg organ will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a

[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Recall the second requirement of Article 10(2) described above ie (b) whether the restriction pursued a 'legitimate *aim'*.
[39] Recall the third requirement of Article 10(2) described above ie (c) whether the restriction was "*necessary* in a democratic society".
[40] *Handyside* (n 30) para 49.
[41] Ibid, para 50.
[42] Jeffrey Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 Columbia Journal of European Law 113, 115.

national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees"[43]. It has moreover been described as a "doctrine of self-restraint"[44], a "breathing space"[45], a "room for manoeuvre"[46] and "the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws"[47]. The role of the MoA doctrine therefore seems to be that it equips the ECHR system with a legal tool which on the one hand provides the required flexibility to the Contracting States to resolve their domestic conflicts between individual human rights and national interests; while on the other hand allows the ECtHR to maintain the necessary control for those instances where the States fall below the required standard of protection set by the Convention.

II. THE RELATIONSHIP OF THE MARGIN WITH SUBSIDIARITY AND PROPORTIONALITY

The principles of 'subsidiarity' and 'proportionality' have a distinct role to play within the ECHR regime. Thus, before we engage in an analysis of the application of the MoA in ECtHR's case law, it is important to understand its connection with the said principles in order to equip ourselves with the necessary background knowledge to better apprehend the Court's MoA jurisprudence. At this stage, we will also briefly recall that the ECtHR has generally made a distinction between a narrow margin and a wide margin[48]. If a wide margin is afforded to the domestic authorities, then the Court will examine the choices made by those authorities rather superficially to see whether the result is not manifestly

[43] Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer Law International 1996) 13.
[44] Thomas O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 Human Rights Quarterly 474, 477
[45] Howard Charles Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (1987) 3 Connecticut Journal of International Law 111, 118.
[46] Greer (n 9) 5.
[47] Wing-wah Mary Wong, 'The Sunday Times Case: Freedom of Expression Versus English Contempt-of-Court Law in the European Court of Human Rights' (1984) 17 New York University Journal of International Law and Politics 35, 58. See similarly: John Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993) 151.
[48] Note that the wide/narrow distinction is further analyzed in Section IV of the Thesis.

unreasonable or disproportionate[49]. Conversely, if only a narrow margin is allowed, then the Court will carefully identify and weigh the interests at stake and decide for itself where the appropriate balance between conflicts and interests should have been struck[50]. As we shall see below, the distinction between a narrow and a wide margin becomes particularly important in the context of proportionality. This Section will however begin by considering the relationship between MoA and Subsidiarity.

(a) Margin and Subsidiarity

In the specific framework of the Convention, the principle of subsidiarity means that the task of ensuring respect for the ECHR rights lies first and foremost with the national authorities of the Contracting States rather than with the ECtHR[51]. However, the ECtHR can and should intervene where the national authorities fail in that task[52]. It therefore seems that the principle of subsidiarity is a two sided coin[53]: on the one hand limiting ECtHR's intervention by attributing the 'ECHR-rights-protection' role firstly to the domestic authorities; and on the other hand justifying ECtHR's intervention in the instances where the domestic authorities failed to preserve the protection of the rights enshrined in the Convention.

Relying on the above background while also recalling the Court's rationale in *Handyside*[54], it becomes immediately apparent that the MoA constitutes indeed a "doctrinal expression of the principle of subsidiarity in the Court's case law"[55]. After all, the ECtHR will only 'step in' by using the MoA doctrine in cases where the national

[49] Gerards (n 29) 166.
[50] Ibid, 167.
[51] Jurisconsult, 'Interlaken Follow-Up Principle of Subsidiarity' (Note from Jurisconsult, 8 July 2010) 2 <https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf> accessed 24 September 2022.
[52] Ibid.
[53] ECtHR, 'Subsidiarity: A Two Sided Coin?' (ECtHR Seminar Background Paper, 30 January 2015) para 44 <https://www.echr.coe.int/documents/seminar_background_paper_2015_eng.pdf> accessed 24 September 2022.
[54] In particular recall paras 48-50 of *Handyside* (n 30) analyzed in the previous section of this thesis.
[55] Oddny Mjoll Arnardottir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28 European Journal of International Law 819, 829.

Courts (or authorities) of the Contracting States have exceeded the acceptable limits of their discretion ie where they have went beyond the allowed margin of appreciation. This resembles the subsidiary nature of the ECtHR which is "one of review rather than that of final court of appeal or 'fourth instance'" [56]. Therefore, as the former ECtHR president Dean Spielmann potently explains extrajudicially, the MoA is "neither a gift nor a concession, but more an incentive to the domestic judge to conduct the necessary Convention review, realizing in this way the principle of subsidiarity"[57] .

Alongside with the above explanation, a number of legal scholars have argued that subsidiarity has been an inspiration for the ECtHR to develop its famous MoA doctrine[58], that MoA is a natural product of the principle of subsidiarity[59] or that it is even "perhaps the most striking example of subsidiarity"[60]. Another example of subsidiarity is of course the fact that the Strasbourg intervention takes place only once all other domestic remedies – ie all national appeal procedures concerning the challenged decision – have been exhausted or are non-existent[61]. Moreover the principle of subsidiarity is interlinked with Article 1 of ECHR (often termed as the 'principle of primarity'[62]) which provides that the primary responsibility for granting effective protection of the Convention rights vests with the national authorities, who must "secure [the Convention rights] to everyone within their jurisdiction"[63]. Hence, all – the MoA, the 'exhaustion-of-domestic-remedies'

[56] Greer (n 9) 19.
[57] Spielmann (n 28) 49; see also 63-64.
[58] Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 European Law Journal 80, 104.
[59] Herbert Petzold, 'The Convention and the Principle of Subsidiarity' (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993) 59.
[60] William Carter, 'Rethinking Subsidiarity in International Human Rights Adjudication' (2008) 30 Hamline
Journal of Public Law and Policy 319, 325.
[61] See Article 35(1) of ECHR which provides that: "The *Court may only deal with the matter after all domestic remedies have been exhausted,* according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken." For further analysis on this procedural subsidiarity feature see: Eva Brems, 'Positive Subsidiarity and its Implications for the Margin of Appreciation Doctrine' (2019) 37 Netherlands Quarterly of Human Rights 210, 212; and interestingly the reasoning of the ECtHR in: *Demopoulos and Others v Turkey* (App. 46113/99 et al), 1 March 2010, para 69.
[62] Gerards (n 29) 5.
[63] Article 1 of the ECHR states that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". For further analysis between primarity and subsidiarity see: Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 361.

requirement and the 'principle of primarity' – enable us to capture the essence of the principle of subsidiarity which accords a primary responsibility for ECHR rights protection to the Contracting States and then a secondary, supplementary or subsidiary responsibility to the ECtHR in case the Contracting States fail in that respect.

Despite however the importance of this principle in the ECHR, subsidiarity (similarly to the MoA doctrine)[64] was not mentioned in the Convention text prior to the amendment of Protocol No. 15[65]. This means that the subsidiarity principle was a 'judge-made construct' – just like the principle of 'Proportionality' which will be examined in the next subsection of the thesis.

(b) Margin and Proportionality

The principle of proportionality is a fundamental feature of human rights decision-making. In the Convention context, it was first introduced by the ECtHR in the *Belgian Linguistics Case*[66] and the Court has consistently maintained thereafter that "the principle of proportionality is inherent in evaluating the right of an individual person and the general public interests of society"[67]. This means in practice that a fair or reasonable balance must be achieved between these two competing interests[68]. In that respect, the principle of proportionality assesses both: (a) the means and side effects of state action which are affecting individual rights with (b) the desired outcome of the said state action which generally represents the collective interest of society[69]. Accordingly, the principle dictates that a proportionate balance must be attained between the means employed and the aim pursued. In *Dudgeon*[70], for example, the state used criminal law as a means to achieve the aim of regulating homosexual conduct for preserving public decency and the ECtHR held that the said means employed were disproportionate to the aim due to the

[64] Recall the first paragraph of Section 'I' of this thesis.
[65] Alastair Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 Human Rights Law Review 313, 319.
[66] *Belgian Linguistics Case* (App. 1474/62), 23 July 1968.
[67] Takahashi (n 26) 14.
[68] Ibid.
[69] See further the analysis in: Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 179-181.
[70] *Dudgeon v the UK* (App. 7525/76), 22 October 1981.

detrimental effects on the life of the homosexual applicant which led to an encroachment of his rights[71]. Taking this as well as other cases into account, Legg argues that proportionality in the ECHR context is represented as "a proportion between ends and means, and also as involving some sort of 'weighing' or balancing exercise"[72].

Having specified the use of the proportionality principle above, it should also be noted that although the ECtHR has not always applied the notion of proportionality consistently in its jurisprudence[73], there are some factors that are broadly taken into account by the Court as part of its 'proportionality test'. Such factors, Follesdal competently observes, are the legitimacy of the social objective pursued, the importance of the right, the consequences of the interference to the applicant, the necessity of the restriction and whether the reasons offered by the domestic authorities are relevant and sufficient[74].

Regarding now the relationship between the principle of proportionality and the MoA, Spielmann articulately argues that proportionality is "probably the most important - and even decisive - factor"[75] that impacts the MoA. He further agrees with Takahashi who acutely sees proportionality as the other side of the MoA[76] ie "the more intense the standard of proportionality becomes, the narrower the margin allowed to the national authorities"[77]. Thus, if a reasonable balance is found, the domestic authorities are deemed to remain within the boundaries of their MoA[78]. Hence the principle of proportionality and the MoA are bounded by a crucial reciprocal relation.

[71] Note however that at the time there was no argument put forward that the aim itself (concerning the regulation of homosexual conduct) was illegitimate in that particular case. See further the related analysis in: Legg (n 69) 179-180.
[72] Ibid, 181.
[73] Andreas Follesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights' (2017) 15 International Journal of Constitutional Law 359, 365.
[74] Ibid.
[75] Spielmann (n 15) 409.
[76] Ibid, 417; and Takahashi (n 26) 14.
[77] Takahashi (n 26) 14.
[78] Ibid.

(c) Margin, Subsidiarity and Proportionality

A final point that needs to be raised here regarding the connection of both the principles of proportionality and subsidiarity with the MoA, concerns the two notions of the MoA put forward by Letsas[79]. Letsas argued that in the ECHR system there are two concepts of the MoA doctrine: the Substantive Concept (which relates to proportionality) and the Structural Concept (which relates to subsidiarity)[80]. These concepts, according to Letsas, essentially reflect the two uses of the MoA term in ECtHR's case law.

The Substantive Concept relates to the use of the MoA term by the ECtHR in cases involving a balancing exercise between the competing interests of individual freedoms and collective goals. According to Letsas, the Substantive Concept is usually linked to the two following propositions. First, that domestic authorities are justified in taking measures in accordance with the law to advance collective goals; and second, that although such measures may interfere with the freedoms of an individual, such interference must not amount to an erosion of the individual's rights[81]. Thus, the Court's reference to the MoA in those cases concerning the Substantive Concept is intrinsically connected with the principle of proportionality as described in the previous sub-section.

The Structural Concept now relates to the use of the MoA term by the ECtHR in such a way in its case law as to address the limits or intensity of the review of the Court in view of its status as an international tribunal[82]. Under the Structural Concept, as Letsas describes, the ECtHR will not usually scrutinize substantively the national decisions but will instead defer to the State's decision upon the conviction that national judges are better placed to make decisions on sensitive human rights matters, relating for example to morality[83]. Thus, the Court's reference to the MoA in those cases concerning the Structural Concept is intrinsically connected with the principle of subsidiarity described at the beginning of this Section.

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[79] George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705.
[80] Ibid, 706.
[81] Ibid, 709-710.
[82] Ibid, 706.
[83] Ibid, 721.

Overall, therefore, it is seems that both the principles of proportionality and subsidiarity are closely linked with the MoA as used by the ECtHR. The following section will accordingly shed light on the application of the MoA in the Court's jurisprudence in an attempt to test the accuracy of Letsa's position[84] and identify the precise role of the doctrine within the ECHR.

III. THE APPLICATION OF THE MARGIN IN THE ECtHR's JURISPRUDENCE

As it was mentioned in the first Section of this thesis, the MoA was initially utilized in the context of Article 15 of the Convention[85]. Thereafter, however, the doctrine spread also into other Articles of the ECHR[86], to such extent that some argued it is at least theoretically possible for the MoA to be applied in all Convention-Articles for the Court has never imposed a limit[87]. This Section therefore aims to present a brief synopsis of some of the main case law concerning a number of important Convention Articles in which the MoA has been applied. The selection of these Articles was made having in mind the need to test Letsas position described above, as this would arguably enable us to identify the precise role of the doctrine in the ECtHR's case law.

Nonetheless, for the sake of clarity, it is expressly noted that the purpose of this Section is not to provide a comprehensive overview of all the situations in which the ECtHR uses the MoA, as this would simply be inappropriate due to the confines of space. Rather, the objective here is to present the general implementation of the MoA doctrine in some prominent articles of the Convention in order to reach some broader observations in relation to the application of the MoA in the ECtHR's jurisprudence[88]. These broader

[84] Ie concerning the Substantive and Structural use of the MoA.
[85] See second paragraph of Section I.
[86] See: Takahashi (n 26) 5-7.
[87] Greer (n 9) 6.
[88] Note however that there other ways to examine the application of the MoA doctrine in the Court's case law instead of using an article-by-article approach – see for example: Takahashi (n 31) 62, 69-78; and Yuval Shany, 'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee' (2018) 9 Journal of International Dispute Settlement 180, 185-188. Nevertheless, the author chose to follow an article-by-article approach as he considers that this allows for a more clear and structured review for the purposes of this thesis. As

observations will be presented in the last subsection of this section. First, however, this section will offer an analysis of each article or 'group of articles'[89] which will be divided into two smaller parts concerning: (i) some core case law of the specific article-category in relation to the MoA application and (ii) my observations in response to that particular case law.

(a) Article 15

As it was briefly seen in Part I of the thesis, Article 15 of the Convention allows the Contracting States to derogate from their obligations under the ECHR in times of war or other public emergency threatening the life of the nation[90]. It was also already seen that the first cases in which the MoA was applied portrayed the 'wide margin of appreciation' approach of the ECtHR in the context of this Article which allowed a wide discretion to the national authorities "to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it"[91]. Therefore, this Article-Category will be confined to present only the leading case on the application of the MoA which sums up eloquently the general approach of the Court in this area.

(a)(i) Core Case Law

The core case which sums up the general position of the ECtHR on the application of MoA on Article 15 is *Brannigan*[92].

In this case the two applicants were detained and questioned under the UK's anti-terrorist legislation for the respective duration of approximately 6 days 14 hours and 4 days 6

explained, this article-by-article approach does not concern all the Articles of the Convention (as this would be inappropriate due to the confines of space) but some important Convention Articles in which the MoA has been applied.

[89] For clarification purposes it is noted that some articles will be analyzed together where it is deemed that they share a special connection between them which makes it proper to categorize them as a 'group of articles'. Such a 'group of articles' will be examined in this section under a single unified 'article-category'.

[90] Recall the text of Article 15 at: (n 17).

[91] *Ireland v the United Kingdom* (n 24), para 207.

[92] *Brannigan & McBride v. the United Kingdom* (Apps. 14553/89 and 14554/89), 26 May 1993.

hours. As a result they argued that their rights to be presented before the court promptly, as enshrined in Article 5(3) of the Convention, had been violated. The respondent UK relied on Article 15 and in particular its derogation utilized on 23 December 1988.

The ECtHR stated that it "falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency"[93]. Accordingly, the Court confirmed that the Contracting States are in principle in a better position than the ECtHR itself to decide both on the presence of such an emergency and on the nature and scope of the measures (ie derogations) necessary to avert it[94].

The ECtHR however also ruled that the Contracting States do not enjoy an unlimited power of appreciation but that the Court retains its European supervisory role to "rule on whether inter alia the States have gone beyond the 'extent strictly required by the exigencies' of the crisis"[95]. Thus, in exercising its supervisory role the Court clarified that it would give the appropriate weight to such factors as the nature of the rights affected by the derogation, the circumstances leading to the emergency, and the duration of the emergency[96].

Nevertheless, the ECtHR emphasized that it is not the Court's role to substitute its view as to what measures were the most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the State which has a direct responsibility for establishing the balance between the implementation of effective measures to combat terrorism on the one hand, and the respect of individual rights on the other[97]. The Court therefore held that in the context of Article 15 "a wide margin of appreciation should be left to the national authorities"[98].

[93] Ibid, para 43.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Ibid, para 59.
[98] Ibid, para 43.

The above approach of the ECtHR in *Brannigan* was thereafter maintained in its subsequent case law[99].

(a)(ii) Observations

Two important observations can be made regarding this Article-Category.

The first and most obvious observation is that the ECtHR generally allows a wide MoA to the Contracting States in the context of Article 15. In fact, some argued that the MoA afforded to the States in this area is "probably at its widest"[100] and accordingly the Court has been criticized for not providing the appropriate 'European supervision' for human rights protection[101].

The second observation is that the provision of a 'generous' margin by the Court in the context of Article 15 exemplifies the Structural use of the MoA described by Letsas[102], which is closely connected to the principle of subsidiarity. In particular, the Structural use of the MoA is evident as the ECtHR essentially uses the doctrine to defer to the State's decision on the basis that the State is 'better placed'[103] than the Court to decide when the criteria for the utilization of Article 15 have been met. In this process, the Court effectively applies the principle of subsidiarity which accords a primary responsibility for ECHR rights protection to the Contracting States and then a secondary/subsidiary responsibility to the ECtHR in case the Contracting States fail in that respect. Hence, the category of Article 15 serves indeed as a good example of the Structural use of the MoA doctrine by Strasburg[104].

[99] See for example: *Aksoy v. Turkey* (App. 21987/93), 18 December 1996, para 68.
[100] Ronald Macdonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights' (eds), *International Law at the Time of its Codification - Essays in Honour of Roberto Ago* (Giuffrè 1987) 187, 207.
[101] See generally: Oren Gross and Fionnuala Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 Human Rights Quarterly 625, 626-627, 635, and 648-649.
[102] Recall sub-section (c) of Section II and the analysis concerning Letsas work: Letsas (n 79).
[103] *Brannigan* (n 92) para 43.
[104] See: Letsas (n 79) 723.

(b) Articles 8-11

This Article-Category analyzes the application of the MoA in the group of Articles 8 through 11. The individual rights involved in this group are, respectively: the right to respect for private and family life[105], the right to freedom of thought, conscience and religion[106], the right to freedom of expression[107], and the right to freedom of peaceful assembly and association with others[108]. These Articles are examined jointly here as they share a common feature which makes it appropriate to examine them together under a single unified category. The common feature concerns the fact that these rights are not absolute under the ECHR, but all have a similar 'clause of exceptions'. This 'clause of exceptions' - which lies in the second paragraph of each of these Articles - allows the Contracting States to impose certain restrictions on the particular right which is listed in the first paragraph of the said Articles. Delving deeper, these restrictions on the respective rights of Articles 8-11 are allowed only if they are: (a) "prescribed by law", (b) pursue a 'legitimate *aim*'[109] and (c) are "*necessary* in a democratic society". Hence, as a result of the 'clause of exceptions', the Contracting States are granted a power to restrict the rights contained in Articles 8-11, provided of course the (a)-(c) requirements are met.

However, as it was seen in Section 'I' above[110], the ECtHR retains its supervisory authority to give the final ruling as to whether the State restriction is indeed compatible with the said requirements of the Convention. Among these requirements, the Strasbourg Court's assessment has been predominantly concerned with the third requirement ie "*necessary* in a democratic society"[111]. In particular, the Court has developed *two criteria* for examining whether the said third requirement has been met: (i) the reasons adduced by the State for justifying a restriction of a right must be both relevant and sufficient, and

[105] Article 8, ECHR.
[106] Article 9, ECHR.
[107] Article 10, ECHR.
[108] Article 11, ECHR.
[109] Note that the list of 'legitimate aims' is stated in the second paragraph of each of the Articles 8-11 and concerns commonly: the interests of public safety, the protection of public order, health or morals, and the protection of the rights and freedoms of others. It is only on these grounds that a restriction on a right can be considered to pursue a 'legitimate aim'.
[110] *Handyside* (n 30) para 48-50.
[111] Takahashi (n 26) 11.

most importantly, (ii) the '*necessity'* implies the existence of a 'pressing social need'[112]. The latter criterion of 'pressing social need' means that the restriction must be *proportionate* to the '*legitimate aim'* pursued[113]. In assessing whether there is such a 'pressing social need' domestic authorities are allowed a margin of appreciation[114].

The following part of this sub-section will accordingly look into the particular application of the MoA doctrine within the Strasburg's case law concerning Articles 8-11. For reasons of space and clarity, the author chose to present only two leading cases per Article which focus on the "*necessary* in a democratic society" requirement. The selection of the specific cases for each Article was made in an attempt to present the contrasting answers of the Court to the question whether the States have exceeded their allowed MoA or not. It will be shown that the said contrast in the Court's answers is the result of the Court's proportionality assessment of the restriction in relation to the legitimate aim pursued by the State. In other words, the specific cases will demonstrate that the ECtHR examines the extent at which the restriction is proportionate to the legitimate aim and if a reasonable or fair balance is found then the Court commonly rules that the domestic authorities have remained within their MoA[115]. Conversely, if the Court finds that the restriction is disproportionate in relation to the legitimate aim then the Court commonly rules that the national authorities have exceeded their MoA. Ultimately, the relevant analysis will enable us to distill some general observations regarding the implementation of the MoA on Articles 8-11 at the end of this sub-section in part (b)(ii).

(b)(i) Core Case Law

Starting with Article 8, an important case concerning the MoA application in this context is *Evans*[116]. Here the applicant had her eggs extracted for the purposes of in vitro fertilization. Subsequently, due to the presence of cancer, her ovaries were removed. Six embryos were created using her eggs and the sperm of her partner. After the applicant's

[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] This essentially confirms Takahashi's argument as correct - see: Takahashi (n 26) 14.
[116] *Evans v the UK* (App. 6339/05), 10 April 2007.

split with her partner, the applicant wished to use the frozen embryos that she created with her former partner to impregnate herself. Her former partner withdrew his consent for the applicant to use the embryos on the basis of a British law requiring the consent of both genetic parents for the implantation of embryos. The applicant claimed inter alia that the particular law allowing for the withdrawal of consent was violating her right to respect for her private and family life because she would be deprived of any opportunity to produce genetically related children. The competing interests that the British law was regulating in the instant case were, on the one hand, the applicant's right to respect for the decision to become a parent in the genetic sense, and on the other hand, her former partner's right to respect for his decision not to have a genetically related child with the applicant. In striking a balance between these competing interests, the law essentially did not accord a greater weight to the applicant's interest over her former partner's interest. The ECtHR explained that the central question was whether Parliament, in striking the balance at the point at which it did through the use of the particular law, had exceeded its allowed MoA[117]. In providing a negative answer to the said question, the Court ruled that the law had struck a fair balance between the competing interests and that there was accordingly no violation of Article 8[118].

In contrast with *Evans*, the ECtHR in *Dickson*[119] ruled that the interference with Article 8 amounted to a violation of the Convention. The case concerned prisoners' access to artificial insemination facilities. The applicants were a couple who complained that the refusal by the Secretary of State to allow the first applicant access to artificial insemination facilities whilst in prison constituted a breach of the applicants' right to private and family life, which included the right to respect for the applicants' decision to become genetic parents. Given the second applicant's age and the first applicant's release date, artificial insemination remained the only realistic hope for the applicants to have a child together. The UK government relied upon various public-interest justifications for

[117] Ibid, para 91. Note however that a 'wide' MoA was afforded in this case - see: Ibid, para 81.
[118] Ibid, para 92. Note also that the Court confirmed the existence of a narrow or restricted MoA in the context of Article 8 depending on the particular circumstances of the case - see: Ibid, para 77.
[119] *Dickson v the UK* (App. 44362/04), 4 December 2007.

its Policy, which effectively prevented the applicants' request from succeeding[120]. The ECtHR held that the particular Policy set the threshold so high against the applicants from the beginning, that there was no real balancing of the competing individual and public interests involved, but rather an absence of a proper proportionality analysis[121]. As the proportionality assessment had not been made, the Court ruled that the Secretary of State's decision fell "outside any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interest involved"[122].

Moving on to Article 9 of the Convention, an important case in which the ECtHR ruled that the interference was necessary in a democratic society was *Dahlab*[123]. Here the applicant, who was a public elementary school teacher, was prohibited from wearing Islamic headscarf in the performance of her teaching duties. The applicant claimed that the said prohibition violated her freedom to manifest her religion enshrined in Article 9(2). The Court found that the prohibition was justified for the legitimate aim of protecting the rights and freedoms of others, and namely the children in the field of public education. In particular, the Court considered that the veil could have a proselytizing effect, as it was imposed on women by the Koranic religion and it was difficult to be reconciled with the principle of equality between the sexes and thus with the message of tolerance, respect for others and equality, which in a democratic society the teachers were required to transmit to their students. Accordingly, in weighing the right of the applicant to manifest her religion against the need to protect the young students by preserving religious harmony, the Court found that the national authorities "did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable"[124]. There was ultimately no violation of Article 9.

[120] Such as the fact that public confidence in the prison system would be undermined if the punitive and deterrent elements of a sentence would be circumvented by allowing prisoners guilty of certain serious offences to conceive children - see: Ibid, para 75.
[121] Ibid, para 82
[122] Ibid, para 85. Note however that a 'wide' MoA was afforded in this case - see: Ibid, para 81.
[123] *Dahlab v. Switzerland* (App. 42393/98), 15 February 2001.
[124] Ibid, page 13. Note that the Court in this case left a 'certain' MoA, instead of a wide or a narrow one - see: Ibid, page 12.

The Court however reached a different decision concerning Article 9 in *Dogan*[125], namely that the interference on the relevant right was not necessary in a democratic society as it was not proportionate to the legitimate aim of protecting public order. The applicants were followers of the Alevi faith and maintained that their right to manifest their religion had not been adequately protected in domestic law as they were treated less favorably than the followers of the Sunni branch of Islam. More specifically, the applicants complained about the rejection of their requests to obtain the same level of religious public service provided to the majority of citizens, who adhered to the Sunni branch of Islam. The ECtHR considered whether the Turkish laws, under which the religious nature of the Alevi faith could not be recognized, constituted an interference under Article 9 and whether Turkey had overstepped its MoA. In providing a positive answer to both of these questions, the Court found that the actions of the national authorities towards the Alevi community were incompatible with the State's duty of neutrality and impartiality as well as with the right of religious communities to an autonomous existence. The Court thus held that the actions of the Turkish authorities were manifestly unjustifiable and disproportionate to the aim pursued and that the State had overstepped its MoA[126].

Proceeding now in our analysis to Article 10 of the ECHR, in the leading *Handyside*[127] itself, the ECtHR found that the relevant restriction on the freedom of expression – manifested through the prohibition and seizure of all copies of the 'obscene' publication in question – was 'necessary in a democratic society' as it was proportionate to the legitimate aim of the protection of morals. Given that there was no uniform conception of morals across all Contracting States, the ECtHR emphasized that the domestic authorities had a wide MoA to decide on the matter as they were 'better-placed' to do so than the Court. The Court however attached particular significance to the fact that the relevant publication was targeting children and that some parts of it could be interpreted, given the critical age of the children, as an encouragement for them to indulge into harmful activities or even commit particular criminal offences. Taking all these matters into

[125] *Izzettin Dogan and others v Turkey* (App. 62649/10), 26 April 2016.
[126] Ibid, paras 132 and 135. Note that the Court in this case left a 'certain' MoA, instead of a wide or a narrow one - see: Ibid, paras 112 and 132.
[127] *Handyside* (n 30).

account, the ECtHR ruled that the said restriction was proportionate; that the State had acted within the limits of its MoA; and that there was thus no violation of Article 10.

A different conclusion however was reached by the Court in *Springer*[128], as the restrictions there of Article 10 were deemed to have been disproportionate to the legitimate aim pursued. In that case the applicant-company complained that its right to freedom of expression had been illegally restricted by the injunctions granted by the national courts which prevented it from publishing two articles on the arrest and conviction of a German television actor on unlawful cocaine possession charges. The ECtHR ruled that the restrictions were not 'necessary in a democratic society' as the injunctions were disproportionate to the aim of 'protecting the reputation or rights of others'. In its analysis, the Court explained that, "despite the MoA enjoyed by the Contracting State, there was no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company's right to freedom of expression and, on the other hand, the legitimate aim pursued"[129]. The national authorities had accordingly overstepped their MoA and there was a violation of Article 10.

Reaching now Article 11, which is the final article of the Group-Category of Articles 8-11, the ECtHR in *Kudrevicius*[130] found that the State interference on the right to freedom of peaceful assembly was not disproportionate to the legitimate aims of 'protecting public order' and 'protecting the rights and freedoms of others'. The case involved a protest of a group of farmers against the Lithuanian government as the latter allegedly did not took adequate measures to protect their interests. The farmers blocked three major highways, causing stoppage of traffic. At the end of the demonstrations the government arrested and convicted a number of farmers for breaching public order in violation of the national criminal law. These farmers complained in turn that their convictions interfered with their right protected by Article 11(1). The ECtHR ruled that such interference was indeed 'necessary in a democratic society' as it was proportionate to the two legitimate aims

[128] *Axel Springer AG v Germany* (App. 39954/08), 7 February 2012.
[129] Ibid, para 110. Note that the Court in this case left a 'certain' MoA, instead of a wide or a narrow one - see: Ibid, paras 85-88.
[130] *Kudrevicius and others v. Lithuania* (App. 37553/05), 15 October 2015.

pursued concerning the 'prevention of public disorder' and the 'protection of the rights and freedoms of others', especially the right to move freely on public roads without restriction[131]. In reaching such decision, the Court emphasized that the States enjoy a wide MoA in their assessment of the necessity in taking measures to restrict a conduct as such of the protesters[132]. Consequently the Court accepted that the domestic authorities had not overstepped their wide MoA[133] by holding the applicants criminally liable for their conduct and there was no violation of Article 11.

An opposite conclusion however was reached by the ECtHR in the case of *Alekseyev*[134], as the interference here with Article 11(1) was not necessary in a democratic society as it was considered disproportionate to the three legitimate aims referred to by the Government, namely the protection of public safety and the prevention of disorder, the protection of morals and the protection of the rights and freedoms of others. In that case the applicant's requests to organize several gay pride marches in Moscow were rejected by the national authorities as in their view there was a risk of a violent reaction against the said marches degenerating into disorder and mass riots. The Court acknowledged that the States enjoyed a MoA to regulate such matters in their national jurisdiction. However, the Court explained that this "d[id] not dispense the Court from the requirement to verify whether in each individual case the authorities did not *overstep* their margin of appreciation *by acting arbitrarily or otherwise*"[135]. Accordingly, the Court found that the State did not engage in an acceptable assessment of the relevant facts and that the only factor taken into account by the national authorities was the public opposition to the event and the official's own views and morals[136]. The national authorities had therefore acted disproportionately or arbitrarily and overstepped their allowed MoA, leading ultimately to a violation of Article 11.

[131] Ibid, para 140.
[132] Ibid, para 156.
[133] Ibid, para 180.
[134] *Alekseyev v Russia* (App. nos. 4916/07, 25924/08 and 14599/09), 21 October 2010.
[135] Ibid, para 83.
[136] Ibid, para 85. Note that although the Court acknowledged that a wide MoA is left to the States in cases involving matters of 'public morality', the Court ruled that in the specific case the national authorities' claim to a wide MoA was unsuccessful - see: Ibid, paras 83 and 85.

(b)(ii) Observations

To begin with, the above case law confirms that the Court can sometimes allow a wide margin[137], other times a narrow margin[138], and yet other times a 'certain'/unclear or intermediate margin[139] in the context of the personal freedom rights protected by Articles 8-11. It is beyond the ambit of this sub-section however to engage in an analysis of the various factors that the ECtHR takes into account in determining the exact scope of the MoA, as such an analysis is the object of Section IV of the thesis.

The most important observation for the purposes of this sub-section, is that the Court in the specific cases concerning this category of Articles 8-11 has been predominantly occupied with examining whether the various restrictions on rights by the States were indeed 'necessary in a democratic society'. In doing so the ECtHR assessed whether these restrictions were proportionate to the legitimate aims pursued. Accordingly, in cases where a proportionate or fair balance had been struck between the said restrictions and aims, the Court commonly ruled that the States had remained within their MoA and in compliance with the ECHR[140]. By contrast, in cases where the restriction was deemed disproportionate to the legitimate aim, Strasburg found that States had overstepped their MoA and were therefore in breach of the Convention rights[141]. Hence, as a result of the above observations, it is submitted that Takahashi's argument is particularly convincing,

[137] For a wide MoA see for example: *Evans* (n 116), *Dickson* (n 119) and *Kudrevicious* (n 130).

[138] Although none of the cases of this sub-section involved a narrow MoA per se, the case law has nonetheless confirmed the existence of a narrow MoA in the context of Articles 8-11 depending on the particular circumstances of the case - see for example the analysis in: *Evans* (n 116) para 77. Moreover, for examples involving specifically a narrow MoA in the context of Articles 8-11 see for example: *Dudgeon* (n 70) [concerning Article 8]; *Lingens v Austria* (App. 9815/82), 8 July 1986 [concerning Article 10]; and *United Communist Party of Turkey and Others v Turkey* (App. 19392/92), 30 January 1998 [concerning Article 11].

[139] For a 'certain'/unclear or intermediate MoA see for example: *Dahlab* (n 123), *Dogan* (n 125) and *Springer* (n 128). Also note that the terms "unclear" or "intermediate" MoA have been used here taking into account Gerards' analysis in: Gerards (n 29) 172.

[140] See: *Evans* (n 116), *Dahlab* (n 123), *Handyside* (n 30) and *Kudrevicius* (n 130).

[141] See: *Dickson* (n 119), *Dogan* (n 125), *Springer* (n 128) *and Alekseyev* (n 134). Note however that the particular connection between proportionality and the margin may not be *expressly* evident throughout the whole of the Court's case law. However, the said connection is confirmed by the results of the various cases, since when the national authorities had *overstepped their MoA* they were typically found in breach of the Convention - and 'overstepping the margin' meant that the interference was not proportionate or that there was a failure to strike a fair balance.

as proportionality could truly operate as a device to ascertain whether the States have overstepped their MoA[142].

Moreover, relying on the preceding observations, it could also be said that the above utilization of the margin by the ECtHR in the context of Articles 8-11 resembles accurately the Substantive use of the MoA described by Letsas, which involves a balancing exercise between the competing interests of individual freedoms and collective goals[143]. Therefore, the use of the MoA by the Court in the above context is indeed visibly closely linked to the principle of proportionality[144].

(c) Article 14

This Article-Category analyzes the application of the MoA in the context of the anti-discrimination provision provided by Article 14[145]. The text of the article essentially states that the rights and freedoms of the Convention shall be enjoyed by everyone without any form of discrimination. The Court explained that discrimination is the difference between classes of persons in the exercise of their Convention rights which bears "no reasonable and objective justification"[146]. This gave rise to a distinction between "different treatment", which was justifiable under the Convention, and "discrimination", which would be in violation of Article 14[147]. Accordingly, the Court has established four main factors which would enable it to reach a conclusion as to whether a treatment amounted to a legally acceptable "different treatment" or to an illegal and unacceptable "discrimination"[148]. The said four factors are analyzed in the next paragraph.

[142] As analysed at the beginning of this sub-section (b) of Section III: Takahashi (n 26) 14.
[143] Recall sub-section (c) of Section II and the analysis concerning Letsas work: Letsas (n 79).
[144] Ibid. See also: Letsas (n 79) 710-711.
[145] Article 14 provides that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".
[146] *Belgian Linguistics Case* (n 66) para 10.
[147] Greer (n 9) 11.
[148] Ibid.

Firstly, in order for the treatment to amount to "discrimination", the particular treatment in question must be less favorable than that received by other comparable groups[149]. For example, if the alleged discrimination is based on age, the comparator will be members of different age not suffering the same alleged disadvantage. Secondly, the State has the onus of proving that the treatment is reasonable by reference to the policy goals which it is aimed to facilitate[150]. If the State provides such sufficient evidence supporting the reasonableness of the treatment in relation to the policy objectives, then the treatment may not be regarded as "discrimination". Thirdly, the effects of the treatment must be proportionate in relation to the said policy goals. It must thus achieve a fair balance between the interests of the community and the rights guaranteed by the Convention[151]. If it does, the treatment may not amount to "discrimination". The fourth and final main factor concerns the question whether the treatment in question is considered as non-discriminatory in other democratic societies. If it does, then the said treatment may not be regarded as "discrimination".

Given that the second and third factors involve an assessment by the ECtHR as to whether the particular treatment is proportionate to the relevant policy goals, the Court has commonly provided different answers to the question whether the States have exceeded their MoA or not. The following two cases serve to illustrate this point.

(c)(i) Core Case Law

The first case that will be presented in this Article-Category is *Markin*[152]. Here the applicant brought a claim before the Court complaining that he had been discriminated against on grounds of sex. At the material time, the applicant was a military serviceman and a single parent with a new-born child. He applied for three years' parental leave and his request was rejected because three years' parental leave was available only to female military personnel according to the Russian law. The Court found that the exclusion of

[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] *Konstantin Markin v Russia* (App. 30078/06), 22 March 2022.

male personnel from parental leave compared to female military personnel could not be justified by a reference to maintain the operational effectiveness of armed forces. There was, in other words, no reasonable relationship of proportionality between the restriction and the legitimate aim of protecting national security. The Court further explained that the law effectively imposed a blanket restriction which was automatically applicable to all servicemen, irrespective of their position in the army, the availability of a replacement or their individual situation. Thus the Court ruled that "such a general and automatic restriction applied to a group of people on the basis of their sex must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 14"[153].

In *Stec*[154] however, the ECtHR ruled that the State remained within the limits of its MoA and there was consequently no violation of the Convention. Here the applicants complained that the difference in State pensionable age between men and women in the United Kingdom amounted to discrimination on the grounds of sex. The Court decided otherwise. It held that the difference in treatment was not discriminatory as it was implemented to correct the financial inequality between men and women. In particular the Court accepted that the reason for introducing a different age for obtaining State pension for men and women (65 for men and 60 for women) was to compensate women for the fact that they generally tended to spend longer periods of time than men out of paid employment and looking after children. It was thus harder for women to receive the necessary number of 'working years' to build up their required National Insurance contributions. Accordingly, the ECtHR found that the difference in State pensionable age between men and women continued to be reasonably and objectively justified until such time as social and economic changes removed the need for special treatment for women. Therefore, the Court emphasized that the "State's decisions as to the precise timing and means of putting right the inequality were *not so manifestly unreasonable as to exceed the wide margin of appreciation* allowed it in such a field"[155].

[153] Ibid, 148.
[154] *Stec and others v the UK* (App. no 65731/01 and 65900/01), 12 April 2006.
[155] Ibid, para 66. Note also that the Court confirmed that the scope of the MoA will vary according to the circumstances, the subject matter and the background- see: Ibid, para 52.

(c)(ii) Observations

As it is apparent from the preceding analysis of this Article-Category, the use of the MoA by the ECtHR in the context of Article 14 is similar to that of Articles 8-11 and reflects accordingly the Substantive use of the MoA as described by Letsas[156]. In other words, the ECtHR is involved in a balancing exercise between the different treatment and the policy goals in question to decide whether the States have exceeded their MoA or not. When a reasonable relationship of proportionality is achieved between the two then the Court finds that the States have remained within their MoA[157]; and vice versa[158]. Hence, the use of the MoA by the Court in the context of Article 14 is closely linked with the principle of proportionality.

(d) Article 1 of Protocol 1

This final Article-Category concerns Article 1 of Protocol 1 which enshrines in its first paragraph the right to property. However, according to both the first paragraph[159] and the second paragraph[160] of that Article, the State can impose limitations in the exercise of the said right. These limitations are grounded on the 'public interest'[161] or 'general interest'[162] and allow the State to interfere with the right to property for various reasons that are beneficial to society, such as the collection of taxes or the general economic planning for the nation. The ECtHR has consistently maintained that the States enjoy a wide MoA in identifying the 'public interest' or 'general interest' and thus to interfere

[156] Recall sub-section (c) of Section II and the analysis concerning Letsas work: Letsas (n 79). Also recall the observations concerning Articles 8-11 in part (b)(ii) of sub-section (b) of Section III.
[157] See for example: *Stec* (n 154).
[158] See for example: *Markin* (n 152).
[159] The first paragraph of Article 1 of Protocol 1 provides that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the *public interest* and *subject to the conditions provided for by law and by the general principles of international law*".
[160] The second paragraph of Article 1 of Protocol 1 states: "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the *general interest* or to secure the payment of taxes or other contributions or penalties".
[161] Recall the first paragraph of Article 1 of Protocol 1 above.
[162] Recall the second paragraph of Article 1 of Protocol 1 above.

with the right to property[163]. It was even argued that the scope of State discretion in relation to both the aim pursued and the proportionality of the measures implemented to achieve it remains so large that "it is only in the most extreme cases that the [ECtHR] is likely to decide that Article 1 of Protocol 1 has been violated"[164]. Therefore, this Article-Category will be confined to present only one central case on the application of the MoA which essentially reflects the general approach of the Court in this area.

(d)(i) Core Case Law

In *Lithgow*[165] the applicants argued that the nationalization of their property following domestic law violated their right to property as the compensation which they received was grossly inadequate and discriminatory. The Court explained that the obligation to pay compensation derived from an implicit condition in Article 1 of Protocol 1 read as a whole, rather from the public interest requirement per se[166]. Additionally, regarding the particular standard of compensation, the Court clarified that the said Article did not guarantee a right to full compensation in all occasions, since that might have undermined the public interest in cases where economic reform or social justice measures were involved[167]. Strasbourg confirmed that domestic authorities, due to their direct knowledge of their society and its needs and resources, were in principle in a better position than the ECtHR itself to assess what measures were appropriate in this area[168]. Accordingly the Court emphasized that the domestic authorities enjoyed a wide MoA[169] in making their assessment and held by majority that there was no violation of Article 1 of Protocol 1.

[163] Greer (n 9) 13.
[164] Ibid, citing: Yves Winisdoerffer, 'Margin of Appreciation an Article 1 of Protocol No. 1' [1998] Human Rights Law Journal 18, 19.
[165] *Lithgow and Others v the UK* (Apps. 9006/80 et al), 8 July 1986.
[166] Ibid, para 109.
[167] Ibid, para 121.
[168] Ibid, para 122.
[169] Ibid, para 122.

(d)(ii) Observations

As already stated, the ECtHR generally allows a wide MoA to the Contracting States in the context of Article 1 of Protocol 1. The wide-MoA approach is based on the better-placed rationale which was also evident in the context of Article 15 as described above. Moreover, similarly to Article 15 observations[170], the 'generous' margin by the Court in this area of Article 1 of Protocol 1 illustrates the Structural use of the MoA described by Letsas[171], which is closely connected to the principle of subsidiarity.

(e) Broader Observations

Relying on the preceding analysis and on the observations of each Article-Category in particular, it is submitted that the most important broader observation that can be made here is the following. The function of the MoA doctrine in the jurisprudence of the ECtHR is closely associated with the implementation of the principles of proportionality and subsidiarity, depending on the specific context that the MoA is being applied into.

Concerning the MoA's application in the contexts of Article 15 and Article 1 of Protocol 1, the MoA's function resembles generally and more evidently the implementation of the principle of subsidiarity[172]. In other words, the Court relies on its subsidiary position and on the 'better-placed' rationale of the national authorities to allow a wide MoA to the States[173]. It thus accords a primary responsibility for rights protection to the States and then a secondary, subsidiary responsibility to the ECtHR in case the States fail in that respect. The overall approach therefore of the ECtHR in the contexts of Article 15 and Article 1 of Protocol 1 reflects broadly the Structural use of the MoA described by Letsas[174].

Regarding the MoA's application in the contexts of Articles 8-11 and Article 14, the margin's role mirrors generally and more evidently the implementation of the principle of

[170] Recall the observations concerning Articles 15 in part (a)(ii) of sub-section (a) of Section III.
[171] Recall sub-section (c) of Section II and the analysis concerning Letsas work: Letsas (n 79).
[172] Recall sub-section (a) of Section II and the analysis concerning Subsidiarity.
[173] See: *Brannigan* (n 92) and *Lithgow* (n 165).
[174] Recall sub-section (c) of Section II and the analysis concerning Letsas work: Letsas (n 79).

proportionality[175]. In other words, the Court is engaged in a proportionality assessment between the competing individual rights and collective interests. Accordingly, in cases where a proportionate or fair balance has been struck between the interference with the personal right and the societal aims pursued, the Court commonly rules that the States have remained within their allowed MoA and in compliance with the ECHR[176]. Conversely, in cases where the interference with the personal right is deemed disproportionate to the societal aim, the Court usually finds that the States have overstepped their allowed MoA and are therefore in breach of the Convention[177]. Hence, the application of the margin in the contexts of Articles 8-11 and Article 14 reflects broadly the Substantive use of the MoA described by Letsas[178].

In relation now to the scope of the MoA in the contexts of Articles 8-11 and Article 14, it is apparent that the ECtHR has sometimes allowed a wide margin[179], other times a narrow margin[180], and yet other times a 'certain'/unclear or intermediate margin[181]. Regardless of the above scope-related observations however, it should be clarified that the mere fact that the MoA is held by the ECtHR to be wide in some contexts does not necessarily mean that the States cannot overstep that wide margin[182]. This could happen though only where the restriction is deemed as unreasonable or extremely disproportionate[183]. Thus, leaving aside the said unreasonable and extremely disproportional interferences, when the MoA afforded to the States is a wide one, it is evidently more unlikely for the ECtHR to reach a verdict of 'ECHR-violation' as the Court applies a 'weaker' or more lenient proportionality test. Put differently: the wider

[175] Recall sub-section (b) of Section II and the analysis concerning Proportionality.
[176] See: *Evans* (n 116), *Dahlab* (n 123), *Handyside* (n 30), *Kudrevicius* (n 130), and *Stec* (n 154).
[177] See: *Dickson* (n 119), *Dogan* (n 125), *Springer* (n 128), *Alekseyev* (n 134), and *Markin* (n 152).
[178] Recall sub-section (c) of Section II and the analysis concerning Letsas work: Letsas (n 79).
[179] For a wide MoA see for example: *Evans* (n 116), *Dickson* (n 119) and *Kudrevicious* (n 130).
[180] For a narrow MoA see for example: *Dudgeon* (n 70), *Lingens* (n 138) and *United Communist Party of Turkey and Others v Turkey* (n 138). See moreover the analysis concerning the variations in scope in: *Evans* (n 116) para 77; and *Stec* (n 154) para 52.
[181] For a 'certain'/unclear or intermediate MoA see for example: *Dahlab* (n 123), *Dogan* (n 125) and *Springer* (n 128). Also note that the terms "unclear" or "intermediate" MoA have been used here taking into account Gerards' analysis in: Gerards (n 29) 172.
[182] As was the case for example in: *Dickson* (n 119).
[183] Ibid. Also see: Greer (n 9) 13, citing: Winisdoerffer (n 164) 18-19.

the MoA, the weaker the ECtHR's proportionality test to the Contracting States[184]; and vice versa[185]. For this reason, the scope[186] of the MoA in the Court's jurisprudence is an important aspect concerning the Court's proportionality assessment in the case at hand. It is therefore crucial to understand which factors are affecting the scope of the MoA – and accordingly the following Section ('IV') deals precisely with this matter.

IV. DETERMINING THE SCOPE OF THE MARGIN

As indicated in the previous Section, the Court sometimes allows a wide margin, other times a narrow margin, and yet other times a 'certain'/unclear or intermediate margin. Gerards accurately observes that where the MoA is wide, the Court follows a weak proportionality review; where the MoA is narrow, the Court follows a strict proportionality review; and where the MoA is left unspecified or unclear[187], the Court follows a more or less neutral in intensity proportionality review[188]. The scope[189] of the margin is thus directly connected to the level of intensity in the Court's proportionality review and for this reason it is important to identify the factors that are affecting the said scope.

Gerards potently argues that in the ECtHR's case law there are three main factors that have the most impact on the scope of the MoA: (a) the 'common ground' factor, (b), the 'better placed' factor and (c) the nature and importance of the Convention right at stake[190]. These factors will be briefly analyzed separately in the following three sub-sections. Additionally, a fourth sub-section provides a short discussion concerning the

[184] See: Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 International and Comparative Law Quarterly 21, 26. Recall also Takahashi's analysis concerning MoA and Proportionality in sub-section (b) of Section II of the Thesis.
[185] That is: the narrower the MoA, the stricter the proportionality review, and thus the greater the probability of the Court finding a violation of the Convention right.
[186] That is: whether the MoA is wide, narrow or intermediate.
[187] That is: a 'certain' or intermediate MoA.
[188] Gerards (n 29) 172.
[189] That is: whether the MoA is wide, narrow or intermediate.
[190] See: Gerards (n 29) 172 - 194; and Gerards (n 58) 107-113.

approach of the Court in cases where the various factors are in conflict – pointing simultaneously at different directions.

(a) The 'Common Ground' Factor

The first intensity-determining factor concerning the Court's review is whether or not there is a common ground or a 'European consensus'[191] between the Contracting States on a specific right or related aspect of the Convention. In particular, if there seems to be no consensus among the States on a certain matter, the Court will typically leave a wide MoA to the States; whereas if such a consensus does exist, the Court may usually decide that there is no need to afford a wide MoA. The next two cases exemplify the above distinction.

In *Wingrove*[192] the applicant was refused a certificate of distribution of his film as it was deemed by the national authorities to be blasphemous and shocking to the religious beliefs of the Christian population. Although the Court acknowledged that the application of blasphemy laws in European countries had become increasingly rare and that such laws were even repealed in some States, it went on to clarify that there was no sufficient common ground to conclude that restrictions imposed on blasphemous materials were unnecessary in a democratic society. Thus the Court explained that a wide MoA should be afforded to the particular State as there was no European consensus on the need to protect the religious convictions and feelings of persons. The Court accordingly held that there was no violation of Article 10 by the national authority's refusal to grant a certificate of distribution to the said applicant.

An opposite outcome however was reached by the Court in *Sunday Times*[193]. Here the national authorities issued an injunction restraining a newspaper from publishing an article on the basis that it would constitute a contempt of court. The core of the respondent-government's argument was that the said injunction was necessary for the

[191] For specific reference to the term 'European consensus' see for example: *Evans* (n 116).
[192] *Wingrove v the United Kingdom* (App. 17419/90), 25 November 1996.
[193] *Sunday Times v the United Kingdom (No.1)* (App. 6538/74), 26 April 1979.

aim of maintaining the authority and impartiality of the judiciary. The Court ruled that the said aim did not justify the provision of a wide MoA to the State as there was a fairly substantial European common ground concerning the notion of the 'authority' of the judiciary. The Court found therefore in its analysis that the prohibition of the said expressions by the State amounted to a violation of Article 10.

(b) The 'Better Placed' Factor

As seen in the analysis of Section I and Section III, the ECtHR may leave a wide MoA to the States due to the fact that they are in a better position than the Court to assess the necessity, suitability or overall reasonableness of an interference with human rights[194]. Naturally therefore, the better-placed argument is usually utilized by the Court to grant a wide MoA in cases concerning moral and ethical issues as well as socio-economic policy issues[195]. In relation to the sphere of morals in particular, the Court often links the better-placed argument with the lack of a European consensus by explaining that: precisely because there is no European common ground on a matter, national authorities may be better placed than the Court to decide on that matter. Moreover, regarding the sphere of socio-economic issues, the Court commonly finds that such issues often involve complex impact-assessments of the measures on the public interest and so should be best left out to the national authorities which are better placed to deal with those matters. The following two cases serve as examples of the Court's approach.

In *Schalk and Kopf*[196] a male couple's application to conclude a marriage was refused by the national authorities as same-sex marriage was not allowed by national law. The Court explained that despite the growing tendency in a number of Contracting States towards the legal recognition of same-sex relationships, there was still little common ground

[194] Concerning the application of the 'better placed' argument see: *Handyside* (n 30) para 48; *Brannigan* (n 92) para 43; and *Lithgow*(n 165) para 122. See further: Gerards (n 29) 177; and Gerards (n 58) 110.
[195] Note that the 'better-placed' argument is also utilized by the Court to grant a wide MoA in other situations, such as when the issue concerns the interpretation of national law and establishing of facts. See for example: *Pla and Puncernau v Andorra* (App. 69498/01), 13 July 2004. For the sake of space and clarity however, a further analysis of these other situations has been intentionally avoided.
[196] *Schalk and Kopf v Austria* (App. 30141/04), 24 June 2010.

between the States in this area. As a consequence, the Court ruled that national authorities were in a better position than the Court to deal effectively with the matter. The Court thus confirmed the wide MoA allowed to the States in areas involving morally and ethically sensitive issues, such as same-sex marriage. It ultimately ruled that there was no violation of Article 14 taken in conjunction with Article 8.

A similarly wide MoA was afforded in *Da Conceicao Mateus and Santos Januario*[197] in the sphere of austerity measures introduced in response to the 2008 economic crisis. In that case a number of pensioners requested from the ECtHR to decide that the cuts imposed on certain of their pension entitlements (holiday and Christmas bonuses) as a result of certain austerity measures had breached their rights under Article 1 of Protocol 1. In assessing the reasonableness of these cuts, the Court ruled that the national authorities, due to their direct knowledge of their society and its needs, were better placed than the Court to appreciate what is in the public interest on social or economic grounds. Thus, the Court explained that it would generally respect the legislature's policy choice unless it was manifestly unreasonable. Accordingly the Court emphasized that States enjoyed a wide MoA when the issue concerned measures of economic or social policy and an even wider MoA when the issue involved an assessment of the priorities as to the allocation of limited state resources. The Court therefore rejected the applicants' request and held that there was no violation of the Convention.

(c) The Nature and Importance of the Convention Right at Stake

The third main factor that impacts the scope of the MoA is the nature and importance of the Convention right at stake. In principle, the Court will allow a narrow MoA in situations where the essence or core of an ECHR right is affected; and a wider MoA in situations where a less important or peripheral aspect of the Convention right is at stake. Gerards potently argues that the differentiation in the scope of the MoA by the Court in relation to 'core' rights and 'peripheral' rights can be understood from a 'subsidiarity'[198]

[197] *Da Conceicao Mateus and Santos Januario v Portugal* (App. 62235/12), 8 October 2013.
[198] That is: relating to the principle of subsidiarity as analyzed in Section II of the Thesis.

perspective[199]. More specifically, "the more important a certain right, the more reason there is for European supervision on the respect for that particular right"[200]. Two examples are given to demonstrate the said Court's approach to core and peripheral rights.

In *Animal Defenders International*[201] the ECtHR had to assess whether a restriction of political expression by an NGO violated Article 10 of the ECHR. The Court considered that the restriction involved the 'core' of Article 10 as the freedom of political expression was at the very center of effective political democracy and NGOs played accordingly the role of public watchdogs – drawing attention to matters of public interest. The Court thus allowed only a narrow MoA to the State and went on to exercise a strict proportionality review in relation to the interference and the legitimate aim pursued. Despite the above however, the majority of the Court ultimately found that the specific restriction was proportionate (and was thus no violation of Article 10), after taking into account the particular circumstances of the case. Therefore, this case serves also as an illustration of the fact that, although the MoA may be limited in some cases and thus the proportionality review strict, the Court may still find no violation of the Convention if this is justified in the case at hand[202].

In contrast with the above case which involved a core aspect of Article 10, the Court in *Sekmadienis*[203] dealt only with a peripheral aspect of the said Article. In particular, the peripheral aspect of Article 10 involved the freedom of commercial expression[204]. As such, the Court explained that the specific commercial expression did not contribute to any matters of public interest. The Court had therefore no difficulty in allowing a wide MoA to the State and in applying a more lenient proportionality review. Ultimately, the Court found no violation of Article 10 as a result of the relevant interference with that right.

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[199] Gerards (n 29) 188.
[200] Ibid.
[201] *Animal Defenders International v the United Kingdom* (App. 48876/08), 22 April 2013.
[202] Note however, as indicated above in sub-section (e) of Section III, that the narrower the MoA, the stricter the proportionality review, and thus the greater the probability of the Court finding a violation of the Convention right.
[203] *Sekmadienis v Lithuania* (App. 69317/14), 30 January 2018.
[204] That is: a certain advertisement which had the purely commercial purpose of advertising a clothing line.

(d) Conflicting Factors

In the previous sub-sections of this section it was seen that the Court takes into account various factors before concluding as to the scope of the margin in a given case. In situations where these factors point altogether in one direction[205], the Court should have no difficulty in providing an answer in relation to the said scope. There are however a lot of examples in the ECtHR's jurisprudence in which the Court is faced with conflicting factors ie factors that simultaneously point at different directions. Gerards acutely observes that the Court has utilized essentially two ways to solve the 'appropriate-scope' conundrum in those cases[206]. The first way is by weighing the various factors and deciding accordingly[207]. The second (and most commonly used) way is by leaving a 'certain' MoA – which essentially means that the Court is simply abstaining from making a real choice about the scope and rather goes on directly to make an assessment concerning the proportionality of the particular restriction. In those situations[208], Gerards articulately explains, the intensity of the Court's proportionality assessment will be more or less neutral[209]. The following two cases are examples of the above practice of the Court.

Perincek[210] is an example of the first way utilized by the Court to solve the 'appropriate-scope' conundrum, which involves weighing the various conflicting factors and then deciding accordingly. The case concerned the public statements of a political activist who was subsequently convicted by a national court for publicly denying the Armenian genocide. The ECtHR found that there was insufficient European consensus on the requirement to criminalize genocide denial[211] (which justified a wide MoA) but at the same time the case involved a core aspect of freedom of expression[212] (which justified a narrow MoA). Additionally the nature of the applicant's statements had little impact on

[205] That is: they all suggest that the MoA should be either narrow or wide.
[206] Gerards (n 29) 194-196.
[207] That is: granting the particular scope suggested by the most important (among the rest) factor.
[208] That is: concerning the second way utilized by the Court to solve the 'appropriate-scope' conundrum in situations where there are conflicting factors.
[209] Gerards (n 29) 172 and 196.
[210] *Perincek v Switzerland* (App. 27510/08), 15 October 2015.
[211] Ibid, paras 255-257.
[212] Ibid, para 241.

the community whose interests the State aimed to protect[213] (which justified a narrow MoA). The Court solved the 'appropriate-scope' conundrum by removing the 'European consensus' factor out of the equation (as it was deemed as not particularly important in the specific case at hand) and by granting a narrow MoA since all the remaining factors supported such a conclusion.

In *Aldeguer Tomas*[214] however the Court reached no conclusion as to the 'appropriate-scope' conundrum, but left instead an unspecified MoA. The case involved an applicant's complaint of having been discriminated against on the ground of his sexual orientation in that he was denied a survivor's pension following the death of his partner, with whom he had lived in a *de facto* marital relationship[215]. The Court acknowledged that a difference in treatment based on sexual orientation justified a narrow MoA[216], but also explained that the case concerned a matter closely linked to the State's financial resources and so the State was in a better position to appreciate what was in the public interest which simultaneously justified a wide MoA[217]. Moreover the Court noted that the case involved an area where there was no European consensus and consequently the States enjoyed a wide MoA[218]. Nonetheless, the Court made no real choice as to the specific scope of the MoA, but went instead directly on making a proportionality assessment of the particular interference[219]. There was consequently no clarity in the exact intensity of the Court's proportionality test, but it could be arguably said that the said assessment reached a more or less intermediate or neutral level of intensity[220].

[213] Ibid, paras 252-254.
[214] *Aldeguer Tomas v Spain* (App. 35214/09), 14 June 2016.
[215] Note that the national law allowing same sex marriage entered into force after the death of the applicant's partner.
[216] *Aldeguer Tomas* (n 214), para 81.
[217] Ibid, para 82.
[218] Ibid.
[219] Ibid, paras 83-91.
[220] For other examples of unspecified margins see: *Kokkinakis v Greece* (App. 14307/88), 26 September 1996; and *Klass and Others v Germany* (App. 5029/71), 6 September 1978; in which he Court however did not even engage in the process of identifying expressly the various factors affecting the scope of the MoA, but rather simply referred to a 'certain' margin or discretion.

V. ASSESSING THE MARGIN

Having examined in the above Sections the role of subsidiarity and proportionality in the operation of the MoA as well as the various factors that are affecting the scope of the MoA, in this Section we now turn to provide an assessment of this doctrine. In assessing the margin, we will look at the main arguments both in favour and against the doctrine. The central arguments in favour are presented in sub-sections (a) and (b) below; whereas the broad criticisms of the doctrine in sub-sections (c) and (d). Ultimately, the last sub-section (e) offers a weighing of the main justifications and critiques of the MoA and concludes as to whether the doctrine is truly justified or not.

(a) Better Position Argument

The first and perhaps most obvious justification for grating States a MoA is that national authorities can reach better decisions on various matters involving human rights interferences because they are better informed and have more relevant expertise than the ECtHR to do so[221]. As it was seen in the previous Section, this is particularly evident where the cases concern moral and ethical issues as well as socio-economic policy issues[222]. Therefore, allowing the States a broad margin to reach their own decisions on human rights issues in those cases seems to be both well-justified and prudent.

Conversely however, the ECtHR itself may be in a better position than the national authorities to deal with some other cases concerning human rights protection. In particular, the Court may be in a better position than the national authorities to assess whether there is an emerging consensus across the Contracting States on a particular right and to offer accordingly a superior decision protecting such a right. In other words, the ECtHR is in a position to survey the laws of the Contracting States independently using the emerging consensus doctrine and reach superior results for human rights protection by aggregating the views in numerous countries[223]. National authorities are not in an

[221] Shai Dothan, 'Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies' (2018) 9 Journal of International Dispute Settlement 145, 147.
[222] Recall the analysis of the 'Better Placed' Factor presented in Section IV of the Thesis.
[223] Dothan (n 221) 147-148.

institutional position to engage effectively with such an exercise[224]. Thus, the fact that the ECtHR can allow only a limited margin to the States when there is a clear emerging consensus, can lead to the enhancement of human rights protection in Europe. This is because the Court in such cases[225] will closely engage in a stricter proportionality test and find a violation of the ECHR in those instances where the States in question have fell below the Convention threshold[226]. Therefore, the MoA offers valuable assistance in the Court's task of ensuring a minimum standard of human rights protection in Europe.

Relying on the preceding paragraphs of this sub-section, it seems that the MoA doctrine enables both the national authorities and the ECtHR to effectively deal with human rights when they are respectively in a better position to do so or when one has a comparative institutional advantage[227] over the other to do so. Accordingly, when the ECtHR considers that the national authorities are better suited to deal with a particular human rights issue, it will afford a wide MoA[228]; and where it is of the opinion that the Court itself is better equipped to handle a case, it will allow only a narrow MoA[229]. Hence, the 'better position' rationale is a strong argument to justify the use of the MoA in the Court's jurisprudence.

(b) <u>Democratic Legitimacy Argument</u>

The second important justification for grating States a MoA is that national authorities are more legitimate decision-makers than the ECtHR because they are making their decisions through elected and democratically accountable bodies, whereas the Court has no democratic accountability[230]. Thus, the argument goes, societies should be left some latitude in adopting social arrangements that best reflect their wishes, values and

[224] Ibid.
[225] That is, in cases involving a narrow MoA, which is justified on the basis of the emerging consensus.
[226] Recall, for example, *Sunday Times* (n 193).
[227] McGoldrick (n 184) 33.
[228] Commonly in the cases involving moral and ethical issues as well as socio-economic policy issues.
[229] Usually in the instances where there is an emerging consensus among the Contracting States.
[230] Dothan (n 221) 147.

interests, as expressed through democratic processes[231]. Therefore, on the face of the democratic deficit argument that surrounds the ECtHR, the provision of the MoA to the Contracting States seems to be justified.

Nevertheless, there are some who have disputed the correctness of the above democratic legitimacy argument concerning the national authorities and maintained that granting a MoA to the States is problematic[232]. This is because the States may not be truly the best possible representatives of their citizens, especially so because in a democracy often the interests of the majority prevail over the interests of the minorities who nonetheless still need protection of their human rights[233]. From this perspective, it would be wise to leave the task of human rights protection predominantly to the ECtHR rather than allowing the States a MoA, as the latter option might lead to an insufficient protection of the human rights of the minorities at the domestic level. Hence, the democratic legitimacy argument in support of the MoA doctrine may not be entirely convincing from a minority-lens. This view is further analyzed in the next sub-section which presents the first significant criticism of the MoA.

(c) Impeding the Universality of Rights Critique

The first important criticism of the MoA relates to the potential negative influence of the doctrine on setting communal and global standards for human rights protection[234]. Delving deeper, given that the MoA doctrine allows each State to implement its own standards in the context of human rights protection[235], which may relate for example to morality[236], the MoA essentially recognizes moral relativism which is at odds with the

[231] Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 European Journal of International Law 907, 920.
[232] See generally: Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 New York University Journal of International Law and Politics 843.
[233] Ibid.
[234] Ibid, 844-845.
[235] Recall sub-section (b) of Section IV and the analysis of the 'Better-Placed' Factor, as a result of which the States are commonly afforded a wide MoA.
[236] Recall that a wide MoA is allowed to the States in the context of morals.

concept of the universality of human rights[237]. Consequently, if the MoA is applied liberally, it may substantially undermine "the promise of international enforcement of human rights that overcomes national policies"[238]. Additionally, it may damage the credibility of the ECtHR since it can allow for the emergence of inconsistent human rights applications in seemingly similar cases as a result of the different margins which will undoubtedly raise concerns about judicial double standards[239]. Moreover, the lack of a tuned emphasis on universal standards may lead Contracting States to resist the external review of the ECtHR altogether, claiming that they are the better judges to reach a final decision on their appropriate margin[240]. Hence, the MoA not only impedes the protection of universal human rights standards, but also undermines the very authority of the ECtHR to develop such standards in the long run[241].

Setting his above critique into context, Benvenisti maintains that the MoA is inappropriate when conflicts between majorities and minorities are examined; as such conflicts typically result in restrictions on the rights of the minorities[242]. This is evident, he argues, when the political rights of the members of minority groups are curtailed through restrictions on free speech[243] or when their educational opportunities are restricted by the State[244]. In those situations, according to Benvenisti, the MoA essentially reverts these difficult policy questions back to national institutions which were *ab initio* unable to take properly into account the rights of the minorities in their decisions[245]. Therefore, the MoA in those instances practically "assists the majorities in burdening politically powerless minorities"[246]. This is why, Benvenisti suggests, there should be no MoA when minority rights and interests are involved[247].

[237] Benvenisti (n 232) 844. Note that the notion of universality of human rights assumes that there is a core 'good'/right which is superior to, and prevails over, the cultural and moral differences of States.
[238] Ibid.
[239] Ibid.
[240] Ibid.
[241] Ibid.
[242] Ibid, 847.
[243] Benvenisti cites as an example: *Zana v Turkey* (App. 18954/91), 25 November 1997; (where the ECtHR held that the State had a MoA in regulating what it conceived as incitement by Kurdish politician).
[244] Benvenisti cites as an example: *Belgian Linguistics Case* (n 66).
[245] Ibid, 853.
[246] Ibid, 847.
[247] Ibid, 854.

In similar lines with Benvenisti, other authors have argued that the MoA leads the Court to make decisions to the disadvantage of minorities, instead of reaching decisions protecting the universal human rights of these groups. Hwang[248] for example argues that this is particularly visible in the case of *S.A.S. v France* [249], in which the ECtHR allowed a wide MoA and upheld the 'burqa bans' imposed by France[250] on the basis that they protected 'the rights and freedoms of others' in accordance with the French principle of 'living together'[251]. Hwang maintains that, although the decision seems prima facie to be enhancing the pluralism of Contracting States[252], in reality the case leads to the support of majoritarianism[253] to the detriment of the religious rights of minorities[254]. Therefore, Hwang concludes, the wide MoA in this context constitutes a threat not only to minority's rights, but to the very notion of universality of human rights[255].

Despite the above analysis however, there are authors who do not see the MoA as a threat to the rights of the minorities. Ghantous for example cogently argues that using the MoA is not equivalent to escaping from the obligation of justifying the interference with human rights[256]; whereas Tripkovic convincingly holds that the MoA does not allow the ECtHR to succumb to majoritarianism but rather the doctrine acknowledges that

[248] Shu-Perng Hwang, 'Margin of Appreciation in Pursuit of Pluralism? Critical Remarks on the Judgments of the European Court of Human Rights on the 'Burqa Bans'' (2020) 20 Human Rights Law Review 361.
[249] *S.A.S. v France* (App. 43835/11), 1 July 2014.
[250] Note that in this case France prohibited the wearing of full-face veils in public (often described as 'Burqa Ban'); which veils were inter alia part of the Muslim religious tradition. Accordingly the bans of the veils affected the religious rights of the Muslim minority groups.
[251] Note that France claimed that the concealment of the face in public places fell short of the "minimum requirement of civility that [was] necessary for social interaction" and that accordingly the State had to "secure the conditions whereby individuals [could] live together in their diversity" - see: *S.A.S. v France* (n 249) para 141.
[252] As it allows each State to implement their own social policies and so by respecting those separate and distinct social policies the ECtHR enhances pluralism and preserves State sovereignty.
[253] That is, deference to the will of the majority.
[254] Hwang (n 248) 369-374.
[255] Ibid, and 379. See similarly: Raffaella Nigro, 'The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil' (2010) 11 Human Rights Review 531; and Lord Lester of Herne Hill QC, 'The European Convention on Human Rights in the New Architecture of Europe: General Report' (eds), *Proceedings of the 8th International Colloquy on the European Convention on Human Rights* (Council of Europe 1995) 227, 236-237. Note also that other authors described the MoA as "a spreading disease" - see: Yutaka Arai, 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights' (1998) 16 Netherlands Quarterly of Human Rights 41, 61 citing: Pieter van Dijk and Fried van Hoof, Theory and Practice of the European Convention on Human Rights (Kluwer, 2nd ed, 1990) 604.
[256] Marie Ghantous, 'Freedom of Expression and the "Margin of Appreciation" or "Margin of Discretion" Doctrine' (2018) 31 Revue Quebecoise De Droit International 221, 227.

domestic decisions are often the result of an exceptionally detailed examination of the social, ethical and legal implications, in which process the interested minority groups have commonly opportunities to make relevant representations[257]. After all, we must not forget that the flexibility of the MoA allows the ECtHR to avoid damaging confrontations with the States over their respective spheres of authority and thus enables the Court to balance the sovereignty of the States with their obligations under the ECHR[258].

In support of the above views of the proponents of the MoA[259], Ostrovsky potently explains that the MoA does not compromise the universality of human rights, but on the contrary it fortifies the said universality[260]. In particular, the MoA aids the ECtHR in determining whether a universal (or European) core right is actually being threatened[261]. In providing this 'aid', the MoA allows cultural or moral relativism into the Convention, but only to the point where it does not hinder the protection of the core universal rights[262]. In other words, the MoA enables the ECtHR "to draw a line around core rights, differentiating those activities or behaviors which are clearly protected from those which may not be as readily protected"[263]. Taking the cases of burqa bans as an example, Ostrovsky acutely observes that although the core aspect of the right to freedom of religion is protected, "the veil is not necessarily seen as a core (universal) element of religion to justify its protection in all circumstances"[264]. Rather, Ostrovsky maintains, the core universal values are preserved and protected in large part due to the application of the MoA[265]. It could be said therefore that the MoA accommodates variations among States in their interpretation of rights, while simultaneously preserving the core 'European' values they reflect, which core values are akin to universal rights[266]. Hence,

[257] Bosko Tripkovic, 'A New Philosophy for the Margin of Appreciation and European Consensus' (2022) 42 Oxford Journal of Legal Studies 207, 226.
[258] Ronald Macdonald, 'The Margin of Appreciation' (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993) 123.
[259] As stated in the preceding paragraph.
[260] Aaron Ostrovsky, 'What's So Funny about Peace, Love, and Understanding - How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimizes International Human Rights Tribunals' (2005) 1 Hanse Law Review 47, 57.
[261] Ibid.
[262] Ibid.
[263] Ibid.
[264] Ibid.
[265] Ibid.
[266] Ibid.

understood from this paradigm, the MoA enables a universal conception of human rights (ie core rights) to be applied over national conceptions of such rights and accordingly fortifies indeed the universality of human rights.

In addition to the above views in support of the MoA, the author sees a wider and perhaps more significant argument in favour of the said doctrine. Those who argue for the abolishment of the MoA in the area of minority rights[267] ignore or underestimate one simple but important reality. That an activist or 'tyrannical' ECtHR trying to impose its own conception of 'universal minority rights'[268] on all the Contracting States – whose cultures, traditions and policies vary from one another[269] – would not only operate against the free democracies of those nations ,but could also possibly lead the said States to leave the Convention. This is a foreseeable possibility as such an oppressive approach of the Court would be infringing the fundamental principle of State Sovereignty that States are so eager to protect. How would the ECtHR then be able to protect these 'universal minority rights' with no member States left to the ECHR system? And consequently, with no member States left to the system, how would the Court be able to protect the human rights of the rest of the individuals in Europe who would be the prevailing majority? Would this be an effective way to ensure human rights protection? Evidently not; and this is why the 'universality of rights' critique presented in this sub-section cannot legitimately support an abolition of the MoA, neither in the area of minority rights nor otherwise.

(d) Rule of Law Critique

The second main criticism of the MoA, is that the doctrine "threatens the rule of law"[270]. More specifically, the criticism holds that the MoA is so vague that its unpredictability in

[267] Such as Benevisti (n 232) 854.
[268] Note however that those 'universal minority rights' would be qualified rights (eg Articles 8-11), not absolute rights (ie Articles 2-4), and as such they would still have to be balanced against the wider interests of society or against the conflicting rights of the majority.
[269] Especially in the context of moral and ethical issues as well as socio-economic policy issues. Recall sub-section (b) of Section IV.
[270] Jeffrey Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 Columbia Journal of European Law 113, 121.

judicial decision-making is inconsistent with the principle of legal certainty and thus contrary to the basic rule of law requirements of reasonable clarity and relative stability[271]. This is why some have even questioned the MoA's ability to be labelled as a 'doctrine', since it allegedly lacks "the minimum theoretical specificity and coherence which a viable doctrine requires"[272], and so "to call it a 'doctrine' [for them] seems unduly charitable"[273]. To fully apprehend this criticism, we need to define precisely the particular point from which this vagueness or lack of clarity of the MoA derives[274]. The next paragraphs of this sub-section are accordingly devoted to this purpose.

In its *Schalk and Kopf* judgment the Court stated that "the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background" [275]. Without doubt, the said flexibility and variability of the doctrine may be beneficial in the instances where the scope of the MoA is sufficiently defined and allows therefore clear standards of review to emerge[276], providing clarity and predictability[277]. However, this clarity and predictability is not always evident in the jurisprudence of the ECtHR; especially in the situations where the Court is faced with conflicting factors in relation to the scope of the MoA[278]. Such an example was the case of *Aldeguer Tomas*[279] seen in the previous Section, in which the Court, being faced with opposing factors, reached no conclusion as to the 'appropriate-scope' conundrum; but left instead an unspecified MoA[280] and went on to make an indeterminate-level-of-intensity

[271] Ibid, 123-124; and Dominic McGoldrick, 'Affording States a Margin of Appreciation: Comparing the European Court of Human rights and the Inter-American Court of Human Rights' (eds), *Towards Convergence in International Human Rights Law* (Martinus Nijhoff 2016) 323-365.
[272] Greer (n 9) 32.
[273] Follesdal (n 5) 254.
[274] Note however that for the sake of space and clarity this sub-section will only focus on the main rule of law concerns which relate to the conflicting factors regarding the scope of the MoA. There are nevertheless other areas in the application of the doctrine which raise rule of law concerns. For an apt synopsis see: Andreas Follesdal, 'International Human Rights Courts and the (International) Rule of Law: Part of the Solution, Part of the Problem, or Both?' (2021) 10 Global Constitutionalism 118, 132-133.
[275] *Schalk and Kopf v Astria* (n 196) para 98.
[276] Recall that when the scope of the MoA is determined as 'wide' by the ECtHR, the said Court will follow a more lenient proportionality review to the State's interference with the right; whereas when the said scope is determined as 'narrow', a more strict proportionality review will follow.
[277] Gerards (n 29) 196.
[278] Recall sub-section (d) of Section IV, in which it was explained that 'conflicting factors' mean factors that simultaneously point at different directions concerning the scope of the MoA ie some of them suggest that the MoA should be 'wide' while others that it should be 'narrow'.
[279] *Aldeguer Tomas* (n 214).
[280] Termed as a 'certain' MoA - see: sub-section (d) of Section IV.

proportionality assessment of the particular interference. Moreover, this 'conflicting-factors-uncertainty' may also exist in situations where the Court ultimately solves the 'appropriate scope' problem by weighing the various opposing factors – as such a weighing exercise is not carried in accordance with pre-determined and well-established criteria which would allow individuals to make ab initio a reasonable estimation about the possible approach of the Court to the issue[281]. This confusion about the determination of the MoA's scope along with the unclear standards of proportionality review is indeed regrettably evident in a significant number of cases of the Court[282], which leaves the doctrine exposed to the purported validity of the said criticisms concerning the rule of law.

As a result of the above ambiguous approach of the ECtHR in the cases involving conflicting-factors, various authors have argued that the MoA is an "inconsistent instrument whose practice lacks uniformity"[283]. After all, "the interplay between these factors makes it difficult to predict how the Court will decide the margin question in any given case"[284]. Thus, affording the States with such a doctrine raises "concerns of legal certainty, predictability and coherence"[285]; and "leave[s] open the possibility of rather arbitrary decision-making"[286].

However, regardless of the criticisms of the preceding paragraph surrounding the rule of law critique, a number of authors argue that these criticisms "are not insurmountable"[287]. Instead, the ECtHR can overcome the said criticisms by articulating carefully and clearly

[281] See for example: *Perincek* (n 210) and the discussion in sub-section (d) of Section IV.
[282] For an overview of the case law see: Janneke Gerards, 'Margin of Appreciation, Incrementalism and the European Court of Human Rights' (2018) 18 Human Rights Law Review 495, 502-506.
[283] Carolina Chagas, 'Balancing Competences and the Margin of Appreciation: Structuring Deference at the ECtHR' (2022) 16 Vienna Journal on International Constitutional Law 1, 5. See similarly: Francisco Parras, 'Democracy, Diversity and the Margin of Appreciation: A Theoretical Analysis from the Perspective of the International and Constitutional Functions of the European Court of Human Rights' (2015) 29 Revista Electrónica de Estudios Internacionales 1, 15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595092> accessed 24 September 2022.
[284] Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 Modern Law Review 671, 687-688.
[285] Kristin Henrard, 'A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy Environment: A Call for an Alternative Model of International Supervision' (2012) 4 Yearbook of Polar Law 365, 372.
[286] Michael Hutchison, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 International and Comparative Law Quarterly 638, 641.
[287] Follesdal (n 247) 133.

the conditions under which it will identify the proper scope of the MoA in the case of conflicting factors[288]. Such an approach, it is submitted, would provide both individuals and national authorities with the appropriate legal tools to make a reasonable estimation about the way in which the ECtHR would likely approach the various conflicting factors in a given case. Hence, if the Court provides indeed a set of pre-determined and well-established criteria pertaining to the appropriate scope of the MoA in cases of conflicting factors, it will comply with the basic rule of law requirements and legal certainty for which it has been criticized.

In light of the above prospect, Gerard rightly argues that it would be "unfortunate to discard the doctrine purely for reason of its inconsistent and sloppy use"[289]. In line with this perspective, it is additionally submitted that the reasons provided in this sub-section relating to the rule of law cannot conclusively indicate the abolishment of the MoA as the only solution to the 'lack-of-clarity' problem which arises some times in the application of the doctrine[290]. This argument is reinforced further if we take into account the justifications and positive features of the MoA discussed in sub-sections (a) and (b) of this Section.

(e) Is the MoA Doctrine Justified?

In assessing the MoA[291] we find that there are two important justifications for it. First, that the doctrine enables both the national authorities and the ECtHR to effectively deal with human rights when they are respectively in a better position to do so or when one has a comparative institutional advantage over the other to do so. The second main justification for grating States a MoA is that democratically accountable national authorities are more legitimate decision-makers than the ECtHR and so should be left

[288] Ibid; Nicholas Lavender, 'The Problem of the Margin of Appreciation' (1997) 4 European Human Rights Law Review 380, 390; and Martin Kopa, 'The Algorithm of the Margin of Appreciation Doctrine in Light of the Protocol No. 15 Amending the European Convention on Human Rights' (2014) 14 International and Comparative Law Review 37, 50-53.
[289] Gerards (n 58) 107.
[290] It is noted that the 'lack-of-clarity' problem predominantly arises in the context of conflicting factors discussed above.
[291] Relying on the preceding analysis of this Section.

with some latitude in adopting social arrangements that best reflect their wishes, values and interests. The above two points are indeed strong arguments to justify the continuation of the MoA in the Court's jurisprudence.

On the contrary, the two eminent critiques, pertaining to the universality of human rights and the rule of law, cannot justify an abolition of the MoA. First, it cannot be legitimately supported that the doctrine (due to its inherent deference to local values) runs counter to the notion of universality of human rights, because the core (universal) element of the various human rights is evidently protected and retained by the MoA. Moreover, without the flexibility and space afforded to the Contracting States by the MoA, it is possible that the said States might wish to leave the Convention and remain themselves the ultimate arbiters of human rights protection in line with their own cultures, traditions and policies. Therefore, in reality, it is the lack of a MoA that would threaten truly the concept of universality of human rights that the ECtHR aims to protect; and not the existence of the MoA. Furthermore, although the second critique of the doctrine relating to the rule of law may have some element of validity, still, the lack of clarity in the instances of conflicting factors regarding the scope of the MoA is not an insurmountable problem. It can rather be resolved if the ECtHR establishes carefully and clearly the conditions under which it will identify the proper scope of the MoA in the face of conflicting factors. Hence, the two main critiques cannot really justify an abolition of the MoA doctrine.

As a result of the above weighing of the main justifications and critiques of the MoA, the author is of the opinion that the existence of the MoA is both well-justified and necessary. In any way, to argue otherwise is no longer a realistic option as the MoA has been recently included for the first time in the ECHR itself under the amending Protocol No. 15 which entered into force on 1 August 2021. It seems therefore that with the ratification of the said protocol, the Contracting States have agreed that the MoA is here to stay. The question that arises next is what would be the future role of the doctrine following its incorporation to the Convention. This answer I seek to answer in the next and final Section of the Thesis.

VI. THE FUTURE OF THE MARGIN

In order to be able to provide a defensible view on the future role of the MoA in the ECtHR's jurisprudence, this Section needs first to analyze what led to the adoption of the amending Protocol No. 15 as well as what were the precise changes to the ECHR concerning the MoA. It then needs to look at the case law of the Court to see whether there are any relevant observations to be made in this context, while also identifying any related responses of the legal community. Relying on the above framework, the Section will ultimately be able to present the author's view regarding the future of the MoA. This Section is accordingly divided into the three following sub-sections concerning: (a) The Route to Protocol 15 Adoption; (b) Case Law Observations and Legal Community Responses; and (c) The Future Role of the Margin.

(a) The Route to Protocol 15 Adoption

The adoption of Protocol 15[292] was the compiling result of a number of separate but interrelated events across time. It all started with the accession of several new Contracting States of the Council of Europe in the 1990s along with the enforcement of Protocol 11 in 1998 which inter alia provided the right to individual applicants to launch direct complaints before the ECtHR[293]. The said combination of the rise of Contracting States with the right to individual petition led to an explosive rise of the caseload of the ECtHR[294] – essentially turning the Court into a major crisis[295].

[292] Note that Protocol 15 was adopted on 16 May 2013 by the Committee of Ministers, was opened for signature on 24 June 2013 and entered into force on 1 August 2021.

[293] Note that before Protocol 11 the Contracting States had the option to allow or disallow individual petitions by their citizens, whereas after the enforcement of the said Protocol the relevant option was abolished and the right to individual petition became mandatory and binding on all Contracting States. Moreover, before Protocol 11 there were restrictions to the right to appear before the ECtHR as the Committee of Ministers retained the power to decide whether or not a case would be referred to the Court. Protocol 11 removed that power from the Committee and applicants obtained the right to bring cases directly before the Court without the previous restrictions. For further analysis see: Vaughne Miller, 'Protocol 11 and the New European Court of Human Rights' (1998) House of Commons Research Paper 98/109 <https://researchbriefings.files.parliament.uk/documents/RP98-109/RP98-109.pdf> accessed 24 September 2022.

[294] See further: Jon Petter Rui, 'The Interlaken, Izmir and Brighton Declarations' (2013) 31 Nordic Journal of Human Rights 28, 30.

In addition to the abovementioned workload crisis, the ECtHR slid further into a "perceived legitimacy crisis"[296]. The latter crisis was the outcome of both the introduction of positive obligations[297] on Contracting States and the utilization of evolutive interpretation[298] on ECHR rights[299]. Delving deeper, the Court used the concept of positive obligations to introduce such obligations of a positive nature that were not included in the text of the Convention. It also used the principle of evolutive interpretation in order to expand the ambit of certain rights of the Convention. The above approach of the ECtHR in the said two areas was understood in a number of Contracting States as "an unjustified attempt by the Court to broaden its scope of review"[300].

Taking the UK as an example, Lord Hoffman was severely critical of the above approach of the Strasbourg Court and argued that the said subsidiary Court should not second-guess the decisions of the national authorities concerning human rights protection[301]. He further criticized the ECtHR for not allowing an adequately wide enough MoA to the Contacting States and noted that the said Court was "unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States"[302]. For him, the ECtHR "considere[d] itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe"[303]. He maintained however that the Court lacked

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[295] Ibid – Rui also cites the Steering Committee's Opinion on the matter: Steering Committee for Human Rights, 'Opinion on the Issues to be Covered at the Interlaken Conference' (2009) 019 Addendum I (Strasbourg 1 December 2009) para 4 (which stated that "[if] no decisive action [was] taken to solve the [backlog] problem, the entire system [was] in danger of collapsing").

[296] Patricia Popelier and Catherine Van De Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) 30 Leiden Journal of International Law 5, 5.

[297] Positive obligations under the ECHR refer to the obligations of the State to take the necessary measures to actively safeguard the human rights enshrined in the Convention.

[298] The principle of 'Evolutive Interpretation' allows the ECtHR to interpret the Convention dynamically in light of the present day conditions. This practically means that if important social, technical or other changes have occurred since the latest precedent on a matter, then the said case-law should change accordingly in order to keep the ECHR 'alive' as a 'living instrument'.

[299] Popelier and Van De Heyning (n 296) 5-6.

[300] Ibid, 6.

[301] See: Lord Hoffmann, 'The Universality of Human Rights' (2009) Judicial Studies Board Annual Lecture <https://www.judiciary.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf> accessed 24 September 2022.

[302] Ibid, para 27.

[303] Ibid, para 27.

constitutional legitimacy to perform such a role and thus the approach of Strasburg was utterly unjustified[304].

Moreover the tide of discontent against the ECtHR was not limited to the academic or legal world, but was also stretched into politics. In the UK this was notably evident following the Court's judgment in *Hirst*[305], which found the UK in violation of the Convention for blocking all the voting rights of prisoners. The judgment naturally gave rise to opposing opinions from within the UK Parliament, questioning the legitimacy of the ECtHR to decide on such socially sensitive matters as the Court was viewed as lacking the necessary democratic impetus to make such choices[306]. Furthermore the said discontent against the ECtHR was not confined to the UK, but expanded also in other Contracting States. In Italy for example, there was an outburst of criticisms[307] following the Court's *Lautsi*[308] judgment which found the mandatory exhibition of crucifix in Italian schools in violation of the Convention[309]. Both of these cases demonstrated that the more the Court progressed into interfering with socially and culturally sensitive issues, the more the voice of national criticisms became louder and louder; and thus the more the so called 'legitimacy' crisis of the ECtHR grew larger and larger.

Given that the various criticisms of the ECtHR pertaining to its legitimacy extended to the national governments, media and civil society of some Member States[310]; and given that the increasing workload threatened the very effectiveness of the Court to guard human rights protection in Europe[311]; Strasbourg engaged in a process of reforming the Convention. Against that background, the principle of subsidiarity and the MoA became

[304] Ibid, paras 38-39. Note that the 'lack-of-constitutional-legitimacy' argument concerned mainly the composition of the Court and the selection method of Strasburg judges.
[305] *Hirst v UK* (App. 74025/01), 6 October 2005.
[306] See for example: House of Commons (HC), Deb 10 February 2011, Vol 523, Column 493 (Mr David Davis MP commenting: "First, is the requirement to give prisoners the vote sensible, just, right and proper? Secondly, who should decide? Should it be the European Court of Human Rights, or this House on behalf of the British people?") <https://hansard.parliament.uk/commons/2011-02-10/debates/11021059000001/VotingByPrisoners> accessed 24 September 2022.
[307] See for example: Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty' (2010) 6 European Constitutional Law Review 6.
[308] *Lautsi v Italy* (App. 30814/06), 3 November 2009.
[309] Note that this judgment was subsequently overruled by the ECtHR's Grand Chamber judgment in: *Lautsi v Italy* (App. 30814/06), 18 March 2011.
[310] Carla Zoethout, 'Margin of Appreciation, Violation and (in)Compatibility: Why the ECtHR Might Consider Using an Alternative Mode of Adjudication' (2014) 20 European Public Law 309, 322.
[311] Rui (n 294) 30-32.

important focal points of the said reform[312]. More specifically, the Interlaeken Declaration in 2010 emphasized the "fundamental role which national authorities…must play" vis-à-vis the "subsidiary nature" of the ECtHR[313]; and called for "a strengthening of the principle of subsidiarity"[314]. This 'mandate' was reinforced in the subsequent Brighton Declaration in 2012 which invited the Committee of Ministers to prepare an amending instrument in order to include the concepts of subsidiarity and MoA in the Preamble of the Convention for reasons of "transparency and accessibility"[315] – which was interpreted as "a means to restore confidence in the functioning of the ECtHR"[316]. Consequently, the outcome of the Brighton Declaration was the drafting of Protocol 15[317].

Protocol 15 makes specific reference to the subsidiarity principle and to the MoA doctrine in its Preamble[318]. The Protocol was described as a product of a compromise between the two parallel needs of alleviating the ECtHR from its backlog crisis, while also soothing the national anxieties pertaining to the Court's activism in the context of the perceived legitimacy crisis[319]. Moreover, given that the two concepts of subsidiarity and MoA were well-established in the Court's case law, some argued that the said Protocol was not a "far-reaching measure of reform, but rather a modest package"[320]. Others however saw the express references to these concepts as an invitation to the ECtHR to "develop a more robust and coherent concept of subsidiarity"[321] as well as an incentive to

[312] Oddny Mjoll Arnardottir, 'The Brighton Aftermath and the Changing Role of the European Court of Human Rights' (2018) 9 Journal of International Dispute Settlement 223, 225.
[313] High Level Conference on the Future of the European Court of Human Rights, 'Interlaken Declaration' (19 February 2010) 1 <http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 24 September 2022.
[314] Ibid, 2.
[315] High Level Conference on the Future of the European Court of Human Rights, 'Brighton Declaration' (19–20 April 2012) 3 <http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 24 September 2022.
[316] Popelier and Van De Heyning (n 296) 7.
[317] Ibid.
[318] Protocol 15 states that: "Affirming that the High Contracting Parties, in accordance with the principle of *subsidiarity*, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a *margin of appreciation*, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".
[319] Nikos Vogiatzis, 'When "Reform" Meets "Judicial Restraint": Protocol 15 Amending the European Convention on Human Rights' (2015) 66 Northern Ireland Legal Quarterly 127, 147.
[320] Spielmann (n 28) 56.
[321] Robert Spano, 'The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect?' (2015) 33 Nordic Journal of Human Rights 1, 4.

refine the principles concerning the application of the MoA in its jurisprudence[322]. The question that arises next therefore is what is the relevant response of the ECtHR to the inclusion of subsidiarity and MoA in ECHR's Preamble? And furthermore, how does the legal community view any such response of the Court?

(b) Case Law Observations and Legal Community Responses

As a starting point it should be noted that even before the coming into force of Protocol 15[323], the Brighton Declaration crystalized the fact that the 'excessively interventionist' ECtHR judgments were met with 'hostility' in the Contacting States[324]. This is why a more intensive application of the MoA "became a political necessity for the ECtHR"[325]. In light of the above reality, some legal scholars attempted to investigate the ECtHR's case law before and after Brighton Declaration to see how the Court 'responded' to the said 'MoA-enlargement' necessity.

Madsen was the first to undertake a quantitative investigation[326] of the ECtHR's case law[327]. In his analysis he found that after Brighton Declaration the Court sought indeed to restrain itself from interfering to the decisions of the national authorities[328]. In particular, the evidence suggested that there was a decrease in the number of pending cases before the ECtHR[329] combined with an increase in the number of judgments that referred to the MoA[330]. Moreover the data illustrated that the use of the MoA had risen noticeably when the cases involved controversial substantive rights, such as those found in Articles 3 and

[322] Ibid, 6.
[323] Recall that Protocol 15 was adopted on 16 May 2013 by the Committee of Ministers, was opened for signature on 24 June 2013 and entered into force on 1 August 2021.
[324] Dothan (n 221) 150.
[325] Ibid.
[326] Note that Quantitative Research is the process of collecting and analyzing numerical data; and can be used to identify patterns.
[327] Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 Journal of International Dispute Settlement 199.
[328] Ibid, 201 and 221.
[329] Ibid, 207 (the said decrease, according to Madsen, was the "consequence of the dismissal of a very significant number of pending cases").
[330] Ibid, 210.

8[331]. Following the 'revelation' of the above information, Madsen cogently inferred that the Court could not be seen as operating in a "splendid isolation from politics", but was rather "receptive to political signals – either in the form of declaratory documents or critical discourse"[332].

In line with the above quantitative findings, other authors who engaged in a qualitative analysis[333] of the Court's case law reached such conclusions that essentially confirmed the abovementioned change of approach by the ECtHR concerning the MoA. Arnardottir, for example, found in his investigation of the Court's post-Brighton jurisprudence that the MoA was used by the ECtHR to manage "the divi[sion] of labour within the European system for the protection of human rights"[334]. In other words, the MoA was used to facilitate the allocation of tasks between the ECtHR and the national authorities. Therefore, if the national authorities had applied the proportionality test adequately in tune with ECtHR's established jurisprudence, the ECtHR would generally be reluctant to intervene and substitute the decision reached by the national authorities on the issue[335]. In this respect, Arnardottir cogently argues, the new approach of the ECtHR concerning the MoA could be described "as a presumption of Convention compliance for the outcome of the domestic proportionality assessment"[336]; akin to the *Bosphorus*[337] presumption of equivalent human rights protection[338] which regulates the relationship between the ECtHR and the Court of Justice of the European Union (CJEU)[339]. Thus, so long as the national authorities followed a 'decent' proportionality assessment, Strasburg would not

[331] Ibid, 214-215.
[332] Ibid, 221.
[333] Note that Qualitative Research involves collecting and analyzing non-numerical data, such as texts; and can be used to understand concepts and gather further insights.
[334] Arnardottir (n 312) 233.
[335] Ibid, 233.
[336] Ibid, 230.
[337] *Bosphorus v Ireland* (App. 45036/98), 30 June 2005.
[338] Note that the *Bosphorus* rebuttable presumption of equivalent human rights protection between the EU and the ECHR holds that 'so long as' the EU provides at least an equivalent protection to human rights as the ECHR, ECtHR would not 'interfere' into EU's legal regime. This presumption can be rebutted if in a particular case the ECtHR found that the protection of human rights was "manifestly deficient" - see: Ibid, para 156. For indicative literature on the topic see eg: Christina Eckes, 'Does the European Court of Human Rights Provide Protection from the European Community? – The Case of Bosphorus Airways' (2007) 13 European Public Law 47; and Paul De Hert and Fisnik Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and after the European Union's Accession to the European Convention on Human Rights' (2012) 13 German Law Journal 874.
[339] Arnardottir (n 312) 233.

interfere into that assessment[340]. As such, the new approach sits in strike contrast with the traditional (ie pre-Brighton) approach of the ECtHR – under which the said Court used the MoA doctrine to adjust the intensity of its proportionality assessment depending on the scope of the margin[341]. Hence, the aforementioned qualitative analysis of the Court's case law confirms that after Brighton Declaration the Court sought indeed to restrain itself from overly-interfering to the decisions of the national authorities.

Similarly with the above, legal scholars talk about a new procedural-approach of the ECtHR to the MoA following the Brighton Declaration. In particular, it is widely acknowledged that the ECtHR engages now in a "so-called procedural review (or reasonable decision-making) approach to the margin of appreciation"[342]. This means that the Court conducts an external analysis of the national authority's decision at hand and if the said decision is found to be reasonable and proportionate then the Court refrains from evaluating the merits of the case[343]; which equates to a "great widening"[344] of the MoA. This MoA-"paradigm shift" on Strasburg's behalf extends to both the factual assessments as well as the legal assessments of the national authorities concerning the Convention rights[345]. The said "procedural rationality review" implies that the ECtHR takes the quality of the relevant decision-making procedure of the national authorities as a decisive factor for evaluating whether the national interference with human rights was proportional, thereby avoiding an intense substantive review[346]. Thus, if the domestic decision was the outcome of a comprehensive, evidence-based, process that took into account the ECtHR's case law, then the Court will in principle accept the said decision[347]. Therefore, there seems to be indeed a move from 'substantive' to 'procedural' review in

[340] Ibid.
[341] Recall that where there was a wide MoA, the Court followed a lenient proportionality review; and where there was a narrow MoA, the Court followed a strict proportionality review.
[342] Cristina Izquierdo-Sans, 'The National Margin of Appreciation in the Reform of the Strasbourg System' (eds), *Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Springer Nature 2021) 277, 283.
[343] Ibid, 283.
[344] Ibid, 284.
[345] Rui (294) 54.
[346] Popelier and Van De Heyning (n 296) 9-10.
[347] Ibid, 11.

the ECtHR's case law on the MoA[348], which "results [unavoidably] in a wide margin of appreciation"[349].

Taking into account the preceding analysis of this sub-section, there is apparently a wide consensus in the legal community regarding the observation that there is a shift in the ECtHR's jurisprudence pertaining to the MoA as a result of the Brighton Declaration[350]. Thus, it is safe to infer that, following the enforcement of Protocol 15 and the execution of Brighton's order to include the MoA and subsidiarity in the ECHR's preamble, Strasbourg has entered a new era, correctly termed as the "age of subsidiarity"[351]. This phrase connotes of course the new approach of the ECtHR which aims at "empowering the Member States to truly 'bring rights home'"[352]. From a more cynical perspective however, the enforcement of Protocol 15 could be translated as a constraint on the authority and power of Strasbourg to interfere in the domestic jurisdictions of the Member States[353]. In any case, it would be utterly unfounded to suggest that the inclusion of the MoA on ECHR's preamble "is of no legal significance"[354] or has only a "minimal"[355] legal significance, as the Strasbourg jurisprudence demonstrates otherwise.

[348] See further: Oddny Mjoll Arnardottir, 'Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation' (European Society of International Law: Conference Paper Series, 10-12 September 2015) Conference Paper No. 4/2015 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709669> accessed 24 September 2022; and Ian Cram, 'Protocol 15 and Articles 10 and 11 ECHR - The Partial Triumph of Political Incumbency Post-Brighton?' (2018) 67 International and Comparative Law Quarterly 477.

[349] Ingrid Leijten, 'The Strasbourg Margin of Appreciation: What's in a Name?' (*Leiden Law Blog*, 8 April 2014) <https://leidenlawblog.nl/articles/the-strasbourg-margin-of-appreciation-whats-in-a-name> accessed 24 September 2022.

[350] Recall that the Brighton Declaration called for the inclusion of the MoA doctrine and the subsidiarity principle in the Preamble of the ECHR.

[351] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights Law Review 487, 491.

[352] Ibid.

[353] Federico Fabbrini, 'The Margin of Appreciation and the Principle of Subsidiarity: A Comparison' (2015) iCourts Working Paper Series, No. 15, 13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552542> accessed 24 September 2022.

[354] Linos-Alexandros Sisilianos, *European Convention on Human Rights* (2nd ed, Nomiki Vivliothiki 2017) 35.

[355] Matthew Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 Human Rights Law Review 745, 749.

(c) The Future Role of the Margin

Taking into account the previous parts of this Section, it is submitted that, at least for the foreseeable future, the MoA will continue to be increasingly cited in the Court's case law while the latter will progressively defer to the decisions of the national authorities – provided that these have performed an adequate proportionality assessment – in line with the new 'age of subsidiarity'. This new age will accordingly bring us closer to the 'Structural use' of the MoA in the ECtHR's jurisprudence that was described by Letsas, rather than to the 'Substantive use' of the concept[356]. In other words, a wide margin will be effectively afforded to the States while the Court will be steadily confined within the limits of its supervisory, subsidiary role. Hence, the future role of the MoA in Strasbourg will remind us more of the implementation of subsidiarity principle.

Moreover, the said widening of the MoA in line with the ECtHR's subsidiary position will be arguably the best policy choice for the sake of the Convention system and for human rights protection in general. Delving deeper, one must not forget that "we do not live in an era of optimism for Europe's supranational institutions"[357]. In light of Brexit, the rule of law collapse in Hungary and Poland, as well as the rise of populism across Europe as a response to terrorism and migration[358], it is not an exaggeration to argue that "nationalism threatens to undermine the legitimacy of even firmly entrenched supranational institutions like the ECtHR"[359]. Therefore, in the face of nationalism, the ECtHR cannot afford leaving its backlog crisis and perceived legitimacy crisis unresolved[360]. That is why 'bringing rights back home'[361] is crucial for the tackling of the above crises; and the new 'procedural' turn of the MoA[362] will be a significant step towards that direction. After all, this is what is needed to keep Contracting States 'on board' of the ECHR – taking into account that human rights are generally better guarded if States are within rather than outside the Convention.

[356] Recall subsection (c) of Section II and subsection (e) of Section III.
[357] Clare Ryan, 'Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights' (2018) 56 Columbia Journal of Transnational Law 467, 472.
[358] Not to mention the invasion of Russia in Ukraine.
[359] Ryan (n 357) 472-473.
[360] Recall subsection (a) of Section VI.
[361] Referring to the need to strengthen further the position of the national authorities as the primary enforcers of the Convention, as expressed in Spano (n X) 491.
[362] Referring to the so-called 'procedural rationality review' explained in the previous sub-section.

At this point it should also be noted that some authors describe that the new 'procedural rationality review' of the ECtHR pertaining to the MoA, is part of a broader shift of the Court towards constitutionality[363]. In particular, it was already observed by the legal world that the ECtHR had turned to perform functions that were comparable to those performed by the national Constitutional Courts of the Contracting States[364]. As an example, the Court had gone beyond the simple identification of wrong individual decisions to the wider identification of structural defects of the laws[365]. Moreover, the recent adoption of Protocol 16[366], which enabled the provision of advisory opinions by the ECtHR on ECHR matters at the request of the national courts[367], was another event that strengthened the "quasi 'constitutional' role" of the ECtHR[368]. Along with the above developments, a number of authors potently argued that the model of 'unrestricted' individual justice[369] was no longer a viable option for the ECtHR in light of its backlog crisis[370]. Thus, the turn of the ECtHR towards the model of constitutional justice, whereby the Court would make a selection of its caseload based on the seriousness or significance of the cases, would serve the overall protection of human rights better[371].

[363] Arnardottir (n 348) 21-23.

[364] Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' (Yale University, 2008) 15 <http://works.bepress.com/alec_stone_sweet/14/> accessed 24 September 2022. For further analysis as to the Constitutional characteristics and functions of the ECHR and ECtHR see: Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about 'constitutionalising' the European Court of Human Rights' (2012) 12 Human Rights Law Review 655, 667-672.

[365] See generally: Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9 Human Rights Law Review 397. Here also note the contribution of the pilot judgment procedure which enabled the Court to deal with large-scale systemic human rights problems in the Contracting States. See further: Lize Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice' (2016) 34 Netherlands Quarterly of Human Rights 41; and Costas Paraskeva, 'Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights' (2007) 3 Human Rights Law Commentary <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/pilotjudgmentprocedure.pdf> accessed 24 September 2022.

[366] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 2.X.2013) <https://www.echr.coe.int/Documents/Protocol_16_ENG.pdf> accessed 24 September 2022.

[367] Comparable to the EU preliminary ruling procedure; albeit with differences that escape the purpose of this Thesis.

[368] Sisilianos (n 354) 17.

[369] The model of individual justice holds that the ECtHR exists mainly to offer redress for ECHR violations for the benefit of the particular individual applicant. See further: Greer and Wildhaber (n 364) 663.

[370] Ibid, 656-658, 664-666, and mainly 686.

[371] Ibid, 670-672 and mainly 686.

Therefore, against this background, the *new procedural turn* of the MoA doctrine[372] could be seen as facilitating a broader *constitutional turn* where the Court is taking more control over its docket and choosing the cases that 'deserve' the most attention[373], while giving more leeway to those national authorities who faithfully implement the Convention principles[374]. On that understanding, the new procedural turn under the MoA could contribute indeed to the development of a more 'mature constitutional system' for the better overall protection of human rights[375].

Following the previous train of thought of this sub-section, the author maintains that, as a result of its new procedural turn, the MoA in the foreseeable future will play an enabling role in two important dimensions for human rights protection. Firstly, the MoA will keep the Contracting States on board of the Convention system through increased deference to national authorities' decisions. This will consequently advance human rights protection, as human rights are generally better guarded if States are within rather than outside the Convention. Secondly, the MoA will allow the ECtHR to embrace even more its 'modern' constitutional function by taking more control over its docket and choosing the cases that require the utmost attention. This will consequently advance human rights protection, as the model of 'unrestricted' individual justice is no longer a viable option for the ECtHR in light of its backlog crisis; and thus the model of constitutional justice[376] would serve better the overall protection of human rights. Relying on the above, the author concludes that the future role of the MoA in the ECtHR's jurisprudence will be that of an 'enabler' for the further advancement of human rights protection in Europe.

[372] That is, following Brighton Declaration, and post-Protocol 15 adoption.
[373] Where for example there has been a breakdown in the national system for the protection of human rights.
[374] Arnardottir (n 348) 21.
[375] On this see: Ibid, 23.
[376] Recall that the model of constitutional justice authorizes the Court to focus exclusively on those priorities that require the utmost attention, such as where there has been a breakdown in the national system for the protection of human rights.

CONCLUSION

The role of the MoA doctrine, as described in Section I of the Thesis, was to equip the ECHR system with a *legal tool* which *on the one hand provided* the required flexibility to the Contracting States to resolve their domestic conflicts between individual human rights and national interests; while *on the other hand allowed* the ECtHR to maintain the necessary control for those instances where the States fell below the required standard of protection set by the Convention.

Section II of the Thesis offered a brief background to the principles of proportionality and subsidiarity which were seen by some legal scholars as being closely connected with the use of the MoA in the Court's case law. Section III went on to examine Strasbourg's case law on a number of important Convention Articles in which the MoA has been applied in order to test the accuracy of the position expressed in Section II regarding the relationship of the doctrine with proportionality and subsidiarity. The general conclusion reached by the author in Section III confirmed that the function of the MoA in the jurisprudence of the ECtHR was indeed closely associated with the implementation of the principles of proportionality and subsidiarity, depending on the specific context that the MoA was being applied into. More specifically, the MoA's application in the contexts of Article 15 and Article 1 of Protocol 1 resembled broadly the implementation of subsidiarity; whereas the MoA's application in the contexts of Articles 8-11 and Article 14 mirrored broadly the implementation of proportionality.

Section IV delved deeper into the relationship between proportionality and the MoA. In particular, the Section specified that the scope[377] of the margin was directly connected to the level of intensity in the Court's proportionality review. Thus, the Section explained that when the ECtHR allowed only a narrow MoA to the Contracting States, it performed a stricter proportionality review of the relevant national decision, and there was consequently a greater probability for the Court to reach an ECHR-violation verdict; and

[377] That is: whether the MoA is wide, narrow or intermediate.

vice versa[378]. Therefore, in light of the importance of the MoA in the Court's proportionality assessment, the Section was devoted to the examination of the particular factors that were affecting the scope of the said doctrine.

Section V assessed the most important arguments both in favour and against the MoA and maintained that the justifications of the said doctrine were so important that significantly outweighed any of its criticisms.

Ultimately, in Section VI, the author argued that in light of the amending Protocol 15 the MoA has a crucial future role to play in the ECtHR's jurisprudence for the further advancement of human rights protection in Europe. The particular future role, according to the author, will resemble even more the practical application of the principle of subsidiarity within the realm of the Convention.

[378] That is, when the ECtHR afforded a wide MoA to the Contracting States, it performed a more lenient proportionality review of the relevant national decision, and there was consequently a smaller probability for the Court to reach an ECHR-violation verdict.

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