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THE DEVELOPMENT OF THE MARGIN OF APPRECIATION DOCTRINE: "AS THE MARGIN OF APPRECIATION HAS SHRUNK SO CONTROVERSY HAS GROWN" (DAVID CAMERON, SPEECH IN STRASBOURG, 25 JANUARY 2012).

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In order to analyse the statement of Prime Minister David Cameron in the following essay, it first needs to be clarified what the margin of appreciation is, where this concept comes from and how it is applied in the case-law of the European Court of Human Rights (ECtHR). Secondly, it seems important to agree on the meaning of "controversy": is it to be understood as a controversy between the Court and the governments of the member states of the Council of Europe following a controversial judgment of the Court or as a controversy in the public opinion in general about the role of the Court, which may lead to a decline in confidence in decisions of the Court? Thirdly, after the task of defining the key concepts, I will try to demonstrate that the margin of appreciation, contrary to the given statement, has not shrunk and I will underpin my argument with an overview of new developments in the concept of margin of appreciation and with references to some recent cases. Notwithstanding, it can be argued that controversy about the role of the Court has grown, but this might be connected to other structural issues, such as the backlog of cases or judgments which are unwelcome and controversial for some governments.

The margin of appreciation, a key concept applied by the Court in solving delicate cases where human rights are involved, cannot be found in the text of the Convention itself, but was developed through the jurisprudence of the Court.[1] In a nutshell, the application of the margin of appreciation leads to the conclusion that doubts about a violation should be resolved in favour of the state, if no consensus regarding the issue in question can be found among the member states and leaving space for considerations of particular national circumstances.[2]

Letsas suggests that the margin of appreciation doctrine refers to two distinctive concepts, a substantive one, where it decides about the relationship between individual freedoms and collective goals and a structural concept, where the margin of appreciation sets limits to the review of the Court taking into account state consensus and the related concept of subsidiarity.[3] This distinction explains why the concept of margin of appreciation finds its most frequent application in the context of rights codified in Art. 8-11 ECHR, where individual rights are balanced against permissible interferences resulting from concern for national security, protection of health or morals and public safety. Moreover, it applies to cases where the national authorities seem to be in a better position to take a decision, given that they are closer to the facts and given that they have a better insight into the public opinion on for example the *status quo* in a moral debate within their country. It is crucial in this context to note that the states, even in the second case, do not

[1] Other key concepts like *subsidiarity* or *living instrument* were likewise developed by the case-law of the Court.

[2] *Jacobs, White & Ovey*, The European Convention on Human Rights (2010), p. 79.

[3] *Letsas*, A Theory of Interpretation of the European Convention on Human Rights (2007), p. 80.

enjoy an absolute leeway and that the supervision of the court hangs over their head like a sword of Damocles, were they to exceed their margin.

Furthermore, the scope of margin of appreciation itself is not defined to a certain amount covering all cases in the same way, but varies according to the nature of the rights in the specific case, the balancing process and most of all the circumstances and context of the case.[4] Deduced from the case-law of the Court, the margin of appreciation is on the one hand likely to be narrow when *"fundamental values and essential aspects of private life"*[5] are at stake, on the other hand wider when the case touches upon morals[6], religion[7], national security[8] and town and country planning[9]. The reason why the Court grants a wider margin of appreciation in the first two domains is connected to the question of consensus within the member states of the Council of Europe: in *Lautsi and others v Italy*, a case dealing with the question of conformity of crucifixes in schoolrooms with the right to freedom of religion of non-believers, the Court acknowledges that in the majority of states there is no specific regulation about religious symbols in state schools and thus no consensus, no common ground.[10] Therefore and due to the perception of the crucifix as a *"passive symbol",* not violating the obligation of the state to remain neutral in religious questions, the Grand Chamber leaves the decision to the Italian authorities. A divergence in national laws or the absence of laws in most of the countries thus leads us to the conclusion that *"the nature and degree of importance of the individual interest is still in the process of being understood, recognized, and accepted."*[11]

This helps us to understand why the Court in these cases is unwilling or unable to decide: its role was defined by the High Contracting Parties as the "guardian" over the most serious human rights violations committed within the jurisdiction of the member states and as the sole interpreter of the Convention protecting these rights. Its role is not to act as a legislator creating new laws and taking policy decisions, as it is sometimes claimed by human rights activists trying to push forward certain developments. Here resides the connection to Cameron's controversy statement: if the Court exceeds its competences by engaging too much in judicial activism and by taking decisions without any reasonable connection to the text of the Convention, governments might react by not implementing these decisions and controversy will grow.[12] If we define controversy in this essay mainly as controversy between the governments of the member states and the Court, a "slimmer" margin of appreciation could lead to more controversy, but is not the only cause of a possible disagreement. Governments will never react joyfully to a judgment of the Court finding a violation committed within their sphere of responsibility. Hence, controversy derives from the inherent tension of the Court's supervising function and the governments' unwillingness to implement unwanted judgments they consider as an interference into their own affairs.

However, the next step leads us to shed light on the question of whether the assertion that the margin of appreciation has shrunk can be uphold. Two recent events seem to negate this claim: the judgment of the Court in the case *Von Hannover v Germany*[13] and the text of Protocol No. 15. In *Von Hannover v Germany*, a case dealing with the frequent problematic of balancing the right to privacy (Art. 8 ECHR) against the right to freedom of expression (Art. 10 ECHR), the Court seems to take a shift towards more room for manoeuvre of the national courts: *"(107) Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case law, the Court would require strong reasons to substitute its view for that of the domestic courts."*

[4] *Jacobs, White & Ovey*, p. 326.
[5] *X and Y v Netherlands*, (App. 8978/80), 26 March 1985.
[6] *Handyside v United Kingdom*, (App. 5493/72), 7 December 1976 and *Otto-Preminger-Institut v Austria*, (App. 13470/87), 20 September 1994.
[7] *Şahin v Turkey*, (App. 44774/98), 10 November 2005 and *Lautsi and others v Italy* (App. 30814/06), 18 March 2011.
[8] *Klass and others v Germany*, (App. 5029/71), 6 September 1978.
[9] *Gillow v United Kingdom*, (App. 9063/80), 24 November 1986.
[10] Only the Former Yugoslav Republic of Macedonia, France and Georgia explicitly forbid any religious symbols in schools and only Austria, Poland, certain regions in Germany and certain communes in Switzerland prescribe the presence of crucifixes.
[11] *Jacobs, White & Ovey*, p. 329.
[12] The outcome of such a controversy very often does not favour human rights, but might lead to counterproductive laws.
[13] *Von Hannover v Germany (No. 2)*, (App. 40660/08 and 60641/08), 7 February 2012.

The Court undergoes a change in his jurisprudence, because it not only emphasizes the role of subsidiarity and the importance of human rights protection by national courts at the level closest to the violation, but also limits its own supervision to cases where the balancing was apparently not in conformity with the Court's standards.[14] As long as national authorities do their homework to the satisfaction of the Court, the Court in turn will refrain from any intervention.[15] This development can be interpreted as a sign for the Court's willingness to include member states more in the decision-making process rather than limiting their leeway and margin of appreciation.

Another argument against the Court's interest in limiting the margin of appreciation of the member states is of structural origin: the massive inflation in the number of cases in recent years led to a huge backlog of cases. Consequently, the Court would shoot itself in the foot if it would try to widen its scope for making decisions by limiting the states' margin of appreciation and claiming jurisdiction over even more delicate cases linked to political, moral and ethical considerations.

A further indication of the continuing importance of the margin of appreciation doctrine can be found in Protocol No. 15, Article 1, which mentions the term "margin of appreciation" for the first time ever in an official document and is supposed to be added to the Preamble of the Convention. It certainly is in the interest of the member states and their governments to enshrine the margin of appreciation in the Preamble of the Convention in order to give them more power against the Court and therefore the value of the margin of appreciation as a doctrine would be increased by this act. Even if it lies within the competence of the Court to define a certain margin of appreciation in the specific case, the will of the member states to uphold this doctrine becomes clear by the act of its codification and should be considered by the Court.

In addition to these two recent developments, three recently decided cases prove that the Court's willingness to uphold a wide margin of appreciation depends on the circumstances of the case and does not seem to limit the state's policy discretion. In *Lautsi and others v Italy* the Grand Chamber, as mentioned earlier in this essay, was very reluctant to set a precedent in cases dealing with religious issues. Traditional and moral foundations of this case in a state like Italy, where the historically strong position of the Catholic Church as the majority religion of the citizens was preserved until today, go somehow beyond legal reasoning and peak in an exclusively political decision of whether crucifixes should be placed in schoolrooms or not. In another case, *Stübing v Germany*,[16] the Court had to decide on the conformity of the German Criminal Code considering incest as a criminal offence with the applicant's right to private life (Art. 8 ECHR). Although the margin of appreciation is supposed to be more limited when the prohibition invades one of the most intimate spheres of private life like sexual autonomy, the Court reiterated that where no consensus in Europe could be found and *"(60) (…) particularly where the case raises sensitive moral or ethical issues, the margin will be wider."* The last case to be mentioned in supporting the thesis that the margin of appreciation has not shrunk but depends on the special circumstances of the case itself, *Scoppola v Italy*,[17] touches upon the hotly disputed question,[18] especially in the UK, of whether to give prisoners a right to vote. The Court, like in many other cases, starts with a comparative approach of looking at the legislation of the different member states of the Council of Europe and filters out three different solutions to the question: countries with no restriction on the right of convicted prisoners to vote, countries automatically depriving all convicted prisoners of their right to vote[19] and countries with a system where this depends on certain variables like the type of offence. The Court comes to the conclusion that Italy, falling under the third category where a conviction does not automatically result in a loss of the right to vote, acted within its margin of appreciation.

[14] Before this decision the Court always underlined its supervisory function by stressing its possible intervention even in cases where the member state enjoys a wide margin of appreciation.

[15] However, on the same day, the Court decided differently in the case *Axel Springer AG v Germany*, (App. 39954/08), 7 February 2012. Therefore the underlying intention of the decision in *Von Hannover v Germany* needs to be treated with some caution.

[16] *Stübing v Germany*, (App. 43547/08), 12 April 2012.

[17] *Scoppola v Italy (No. 3)*, (App. 126/05), 22 May 2012.

[18] See the previous decision *Hirst v UK (No. 2)*, (App. 74025/01), 6 October 2005.

[19] The UK falls under this category.

To sum up, the statement of Prime Minister Cameron at his speech in Strasbourg seems to lack any empirical evidence and was probably driven by populist motivations resulting from the ongoing debate in the UK about the role and legitimacy of the ECtHR, especially in the light of judgments concerning disputed topics such as prisoners' voting rights and extraditions of suspected terrorists.

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