The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights

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A. The Term "Margin of Appreciation Doctrine"

The margin of appreciation doctrine has been defined as "the breadth of deference the Strasbourg organs will allow to national legislative, executive and judicial bodies before they will disallow a national derogation from the Convention, or before they will find a restriction of a substantive Convention right incompatible with a State Party's obligations under the Convention"[1].

The term and concept derive from the domestic law context of administrative jurisdictions. In most systems, a distinction is made between a full review of administrative decisions interpreting undefined terms of law and a limited review of decisions taken in the exercise of a discretion allowed by law. In the latter case "all that is reviewed is whether the extent of the discretion has been exceeded and whether the discretion has been exercised in a manner conforming with the law"[2]. A good example is the

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[1] H.C. Yourow, The margin of appreciation doctrine in the dynamics of European human rights jurisprudence, 3 Connecticut Journal of International Law, 118 (1987).

[2] F. Matscher, Methods of Interpretation of the Convention, in: The European System for the Protection of Human Rights (R.St.J. Macdonald et al. [eds.], 1993), 63, 76; cf. G.J. Wiarda, Rechterlijke voortvarendheid en rechterlijke terughouding bij de toepassing van de Europese Conventie tot bescherming van de rechten van de mens (VUGA 1986), 14.

French system of judicial review of administrative action by the Conseil d'Etat. This body does not check whether the reasons given by the authorities actually did justify the measures taken, but whether, in the circumstances, they could in principle justify it[3].

Likewise in the system of the European Convention, for instance in the context of limitations of rights, it is in the first place for the states to assess the existence and extent of the necessity of an interference with a protected right. "The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate"[4].

However, the French and European doctrines do not have much more in common than a name and a similarity at first sight. While the French doctrine finds its justification in the characteristics of continental administrative law, the doctrine on the European level is the result of the dynamics of a supranational judicial protection system (cf. *infra*, D). As a result, it developed independently, without explicit reference to this "ancestry"[5].

Margin of appreciation doctrine is one of the principles guiding the interpretation of the Convention by the Court. As an interpretative guideline, it interacts mainly with the rule of evolutive interpretation, and with its counterpart, autonomous interpretation (cf. *infra*, D.2.c.).

The Court has not (yet) developed a general theory about the margin of appreciation doctrine.

It has to be noted from the outset that the specific facts and circumstances of each case play an important role in determining the exact scope of the margin of appreciation that will be accorded to the national authorities. It could be an interesting undertaking to ponder in each case the various elements that played a role in this respect and to try to determine the weight that was accorded to each of them[6].

This paper, however, does not aim at such an explanatory micro-analysis. Its purpose is rather to identify common elements and patterns emerging from the total body of the Court's case law.

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[3] F.G. Jacobs, The European Convention on Human Rights (Oxford 1975), 201.

[4] E.C.H.R., *Kokkinakis* judgment of 25.5.1993, Publications of the Court, Series A, No. 260-A, § 47.

[5] R.St.J. Macdonald, The margin of appreciation in the jurisprudence of the European Court of Human Rights, in: International law at the time of its codification, Essays in honour of Roberto Ago (Milano 1987), 187.

[6] Cf. H.C. Yourow, The margin of appreciation doctrine in the dynamics of European human rights jurisprudence (S.J.D. thesis, University of Michigan, 1993).

Section B provides a short overview of the different articles of the European Convention to which the margin doctrine has been applied as well as an introduction to the Court's rhetoric in this regard.

In Section C an analysis of the margin of appreciation doctrine is undertaken, concentrated on an attempt to isolate factors that lead to according a wide or a narrow margin of appreciation and to attach more or less weight to the margin that is granted. The focus is not on the exact role a particular factor played in a particular case (which is almost impossible to determine), but rather on the recurrence of the same factors in cases dealing with different subjects, under different articles of the Convention.

Through this procedure, a general picture of the margin of appreciation doctrine emerges. For the practician, this may be of help in trying to foresee how the Court will deal with the domestic margin of appreciation in any new case. On a more theoretical level, Section D of the paper relates the findings of the previous sections to the functions and roles of the margin of appreciation doctrine in the European human rights protection system.

B. Field of Application

For some time, it was thought that the application of the margin of appreciation doctrine would remain confined to the context of emergency situations (Article 15), non-discrimination cases (Article 14) and cases evaluating limitations of rights under § 2 of the articles 8 to 11. Gradually, however, the doctrine was expanded to all the rights protected in the Convention and its additional protocols. One of the judges of the Court acknowledged that "(t)he margin of appreciation is at the heart of virtually all major cases that come before the Court, whether the judgments refer to it explicitly or not"[7].

1. The first cases

The margin of appreciation doctrine was first affirmed in the case-law of the European Commission of Human Rights[8], in the context of emergency situations (Article 15).

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[7] Macdonald (note 5), at 187, 208.

[8] *Greek* Case, 12 Yb. Eur. Conv. on Human Rights, § 154: margin of appreciation is referred to as being "constant jurisprudence of the Commission", and in footnote 280: reference to *First Cyprus* Case (§ 136: "discretion in appreciating the threat to the life of the

As for the Court, the first case it ever decided, was *Lawless*, an Article 15-case. Although the margin of appreciation was not yet explicitly mentioned, it is clear that the Irish Republic was left an important margin. Instead of evaluating independently whether a state of emergency actually existed, the Court stated that "the existence at the time of a 'public emergency threatening the life of the nation' was reasonably deduced by the Irish Government from a combination of several factors"[9].

A margin of appreciation seems to have been accorded implicitly in a few other cases[10], before it was referred to explicitly for the first time in 1971 in *De Wilde, Ooms and Versyp*, in the context of the supervision of correspondence during detention for vagrancy[11]. The Court observed "that the competent Belgian authorities did not transgress in the present cases the limits of the power of appreciation which Article 8(2) of the convention leaves to the Contracting States: even in cases of persons detained for vagrancy, those authorities had sufficient reason to believe that it was 'necessary' to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others".

2. Articles 8 to 11: Necessity in a democratic society

The Court's reasoning within the limitation clauses of the articles 8 to 11 of the Convention, and especially the evaluation of the necessity of an interference in the light of a legitimate aim, developed into one of the favourite fields to use a margin of appreciation analysis. Apart from the issue of supervision of correspondence during detention[12], Article 8-cases,

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nation") and *Lawless* Case (§ 90: "a certain discretion – a certain margin of appreciation – must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation").

[9] E.C.H.R., *Lawless* judgment of 1.7.1961, Publications of the Court, Series A, No. 3, § 28.

[10] E.C.H.R., judgment "*relating to certain aspects of the laws on the use of languages in education in Belgium*" of 23.7.1968, Publications of the Court, Series A, No. 6, § 10; E.C.H.R., *Wemhoff* judgment of 27.6.1968, ibid., No. 7; E.C.H.R., *Delcourt* judgment of 17.1.1970, ibid., No. 11.

[11] E.C.H.R., *De Wilde, Ooms and Versyp* judgment of 18.6.1971, Publications of the Court, Series A, No. 12, § 93.

[12] E.C.H.R., *Golder* judgment of 21.2.1975, Publications of the Court, Series A, No. 18, § 45; E.C.H.R, *Silver* judgment of 25.3.1983, ibid., No. 61, § 98. Cf. E.C.H.R., *Boyle and Rice* judgment of 27.4.1988, ibid., No. 131, §74; and E.C.H.R., *Campbell* judgment of 25.3.1992, ibid., No. 233, § 45.

where margin analysis played a role, dealt with issues such as homosexuality[13], secret surveillance[14], public childcare[15], the expulsion of foreigners[16], housing legislation[17] and house searches[18].

Under Article 10 as well, margin analysis has been frequently used in all kinds of cases: regarding limitations of the freedom of expression for the protection of morals[19] or of the authority of the judiciary[20], regarding commercial speech [21], broadcasting limitations[22] and other issues[23].

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[13] E.C.H.R., *Dudgeon* judgment of 22.10.1981, Publications of the Court, Series A, No. 45, § 52; E.C.H.R., *Norris* judgment of 26.10.1988, ibid., No. 142, § 45 – 46.

[14] E.C.H.R., *Klass* judgment of 6.9.1978, Publications of the Court, Series A, No. 28, § 49; E.C.H.R., *Leander* judgment of 26.3.1987, ibid., No. 116, § 59; cf. K.C. Burke, Secret Surveillance and the European Convention on Human Rights, 33 Stanford Law Review, 1113 –1140 (1981).

[15] E.C.H.R., *Olsson* judgment of 24.3.1988, Publications of the Court, Series A, No. 130, § 83; E.C.H.R., *Olsson (No. 2)* judgment of 27.11.1992, ibid., No. 250, § 90; E.C.H.R., *Eriksson* judgment of 22.6.1989, ibid., No. 156, § 71; cf. E.C.H.R., *Margareta and Roger Andersson* judgment of 25.2.1992, ibid., No. 226, p. 35 – 36 (dissenting opinion Judge Lagergren).

[16] E.C.H.R., *Berrehab* judgment of 21.6.1988, Publications of the Court, Series A, No. 138, § 28; E.C.H.R., *Moustaquim* judgment of 18.2.1991, ibid., No. 193, § 43.

[17] E.C.H.R., *Gillow* judgment of 24.11.1986, Publications of the Court, Series A, No. 109, § 55.

[18] E.C.H.R., judgments *Funke, Crémieux and Miailhe* of 25.2.1993, Publications of the Court, Series A, Nos. 256-A, 256-B and 256-C; E.C.H.R., *Murray* judgment of 28.10.1994.

[19] E.C.H.R., *Handyside* judgment of 7.12.1976, Publications of the Court, Series A, No. 24, § 48; E.C.H.R., *Müller* judgment of 24.5.1988, ibid., No. 133, § 36, 43; E.C.H.R., *Open Door and Dublin Well Woman* judgment of 29.10.1992, ibid., No. 246, § 68.

[20] E.C.H.R., *Sunday Times* judgment of 26.4.1979, Publications of the Court, Series A, No. 30, § 59; E.C.H.R., *Weber* judgment of 22.5.1990, ibid., No. 177; E.C.H.R., *Observer and Guardian* judgment of 26.11.1991, ibid., No. 216; E.C.H.R., *Sunday Times (No. 2)* judgment of 26.11.1991, ibid., No. 217.

[21] E.C.H.R., *Barthold* judgment of 25.3.1985, Publications of the Court, Series A, No. 90; E.C.H.R., *Markt Intern Verlag GmbH and Klaus Beerman* judgment of 20.11.1989, ibid., No. 165, § 33; E.C.H.R., *Casado Coca* judgment of 24.2.1994, ibid., No. 285, § 50; E.C.H.R., *Jacubowski* judgment of 23.6.1994, ibid., No. 291-A, § 26.

[22] E.C.H.R., *Groppera Radio* judgment of 28.3.1990, Publications of the Court, Series A, No. 173; E.C.H.R., *Autronic AG* judgment of 22.5.1990, ibid., No. 178; E.C.H.R., *Informationsverein Lentia and others* judgment of 24.11.1993, ibid., No. 276.

[23] E.C.H.R., *Hadjianastassiou* judgment of 16.12.1992, Publications of the Court, Series A, No. 252, § 46 – 47 (disclosure of secret military information); E.C.H.R., *Chorherr* judgment of 25.8.1993, ibid., No. 266-B, § 31 (breach of the peace during a military ceremony); E.C.H.R., *Otto-Preminger-Institut* judgment of 20.9.1994, ibid., No. 295-A (seizure and forfeiture of a movie criticizing the christian creed).

With regard to defamation, the margin of appreciation is mentioned in some cases[24], but not in others[25]. The approach of the court, however, is in each case essentially the same: in the evaluation of the "necessity in a democratic society", the specific circumstances of each case play an important role (cf. *infra*).

An interesting feature of Article 10 is that its second paragraph starts with a general reference to the "duties and responsibilities" which accompany the exercise of the freedom of expression. In a recent case, the Court stated that where civil servants are concerned, this phrase assumes "a special significance, which justifies leaving to the national authorities a certain margin of appreciation"[26].

On the subject of Article 9, the freedom of religion, the Court spoke out only recently for the first time. The conviction of a Jehovah's witness for proselytism in Greece was found to violate Article 9 of the Convention. In its reasoning, the Court inserted a paragraph on the margin of appreciation: "The Court has consistently held that a certain margin of appreciation is to be left to the Contracting States in assessing the existence and extent of the necessity of an interference, but this margin is subject to European supervision"[27]. It is not surprising to find this phrase, regularly encountered in a free speech-context, in this case. The aspect of the freedom of religion concerned here, the freedom of confession of faith, is indeed particularly close to the freedom of expression protected in Article 10. Moreover, this is the kind of formulation the Court seems to use when it wants to indicate that the margin of appreciation can play a role in a certain context, even though in the case at hand this role is not very obvious. In this case, it was the Court's evaluation of the (dis)proportionality of the measure that determined the outcome. It is important to note that in this first case under Article 9, the Court thought it important to make reference to the domestic margin of appreciation, even though this was not necessary for its argumentation. It is legitimate to conclude that the mar-

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[24] E.C.H.R., *Lingens* judgment of 8.7.1986, Publications of the Court, Series A, No. 103; E.C.H.R., *Barfod* judgment of 22.2.1989, ibid., No. 149; E.C.H.R., *Oberschlick* judgment of 23.5.1991, ibid., No. 204; E.C.H.R., *Prager and Oberschlick* judgment of 26.4.1995.

[25] E.C.H.R., *Castells* judgment of 23.4.1992, Publications of the Court, Series A, No. 236; E.C.H.R., *Thorgeir Thorgeirson* judgment of 25.6.1992, ibid., No. 239; E.C.H.R., *Schwabe* judgment of 28.8.1992, ibid., No. 242-B; E.C.H.R., *Jersild* judgment of 23.9.1994, ibid., No. 298, § 31.

[26] E.C.H.R., *Vogt* judgment, 26.9.1995, § 53.

[27] E.C.H.R., *Kokkinakis* judgment (note 4), at § 47.

gin doctrine will play the same role in Article 9-cases as in the cases under the sister-articles 8 and 10.

The few judgments of the court concerning an interference with Article 11 of the Convention do not seem to fit very well in the picture that appears from the cases under articles 8 to 10.

With the exception of the most recent case of this kind, the domestic margin of appreciation is not mentioned[28]. In two of these cases the Court limits its power in a different way, normally characteristic for convention articles without a limitation clause (cf. *infra*): by examining whether the treatment strikes at the substance of the right[29].

In the *Sigurdur A. Sigurjónsson* judgment, this "substance" reasoning is limited to the context of the first paragraph of Article 11. The fact that the substance of the right is struck at only leads to the conclusion that there is an interference with the right. To determine whether this interference constitutes a violation, the Court uses the test under the second paragraph, mentioning the margin of appreciation in its proportionality analysis[30].

3. Articles 8–11: Positive obligations

A violation of an Article of the European Convention can consist of an action by the authorities that unduly interferes with a right. It can also be made up of a lack of action by the authorities where they have a positive duty to act in order to protect a right. The Convention organs recognized positive obligations to be inherent in Article 8 and in some other articles.

In evaluating whether a positive obligation has been violated, the Court uses margin analysis as one of its tools.

In this context the domestic margin of appreciation takes the shape of a national discretion to determine the means by which to protect a right. The Court stated for instance with regard to the "right to respect for the private and family life" (Article 8) that "especially as far as those positive

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[28] E.C.H.R., *Le Compte, Van Leuven and De Meyere* judgment of 23.6.1981, Publications of the Court, Series A, No. 43; E.C.H.R., *Young, James and Webster* judgment of 13.8.1981, ibid., No. 44; E.C.H.R., *Sibson* judgment of 20.4.1993, ibid., No. 258-A. All these cases deal with the issue of mandatory membership.

[29] E.C.H.R., *Young, James and Webster* judgment (note 28), violation; E.C.H.R., *Sibson* judgment (note 28), no violation.

[30] E.C.H.R., *Sigurdur A. Sigurjónsson* judgment of 30.6.1993, Publications of the Court, Series A, No. 264, § 41. This is a mandatory membership case as well.

obligations are concerned, the notion of 'respect' is not clear-cut (...), the notion's requirements will vary considerably from case to case"[31].

While the first impression from the Court's case-law was that the involvement of positive obligations was sufficient to account for a wide margin of appreciation, closer analysis showed that this was erroneous[32], and that the criteria influencing the scope of the margin are the same as in other cases (cf. *infra*, C).

Many cases being susceptible of an analysis in terms of an interference as well as of one in terms of a breach of a positive duty, the precise boundary between those categories is extremely difficult to define. The Court recognized this fact and stressed several times that its reasoning, including the role of the margin of appreciation, is essentially the same in cases involving infringements as in those involving positive obligations[33].

4. Article 14: Discrimination

In determining whether Article 14 has been violated, the Court applies a test that shows some similarity with that under paragraph 2 of the articles 8 –11. It looks for an objective and reasonable justification for the unequal treatment, as well as for a legitimate aim and a reasonable relation-

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[31] E.C.H.R., *Abdulaziz, Cabales and Balkandali* judgment of 28.5.1985, Publications of the Court, Series A, No. 94, § 67 and E.C.H.R., *Johnston and others* judgment of 18.12.1986, ibid., No. 112. Also E.C.H.R., *Marckx* judgment of 13.6.1979, ibid., No. 31, § 31; E.C.H.R., judgment of *X and Y* v. *the Netherlands* of 26.3.1985, ibid., No. 91, § 24; E.C.H.R., *Rees* judgment of 17.10.1986, ibid., No. 106, § 37; E.C.H.R., *Cossey* judgment of 27.9.1990, ibid., No. 184; E.C.H.R., *B.* v. *France* judgment of 25.3.1992, ibid., No. 232-C, § 63 (all Article 8 cases); E.C.H.R., *Plattform "Ärzte für das Leben"* judgment of 21.6.1988, ibid., No. 139, § 34; cf. regarding freedom of association: E.C.H.R., *National Union of Belgian Police* judgment of 27.10.1975, ibid., No. 19, § 39; E.C.H.R., *Swedish Engine Drivers' Union* judgment of 6.2.1976, ibid., No. 20, § 40 (all Article 11-cases).

[32] Cf. N. Lawson, Positieve verplichtingen onder het EVRM: opkomst en ondergang van de 'fair balance' test, 20 NJCM-Bulletin (1995), 558 – 573 and 727 – 750.

[33] E.C.H.R., *W.* v. *the United Kingdom* judgment of 8.7.1987, Publications of the Court, Series A, No. 121-A, § 60; E.C.H.R., *B.* v. *the United Kingdom* judgment of 8.7.1987, ibid., No. 121-B, § 61; E.C.H.R., *R.* v. *the United Kingdom* judgment of 8.7.1987, ibid., No. 121-C, § 65; E.C.H.R., *Powell and Rayner* judgment of 21.2.1990, ibid., No. 172, § 41; E.C.H.R., *Keegan* judgment of 26.5.1994, ibid., No. 290, § 49; E.C.H.R., *Kroon and others* judgment of 27.10.1994, ibid., No. 297-C, § 31; E.C.H.R., *Hokkanen* judgment of 23.9.1994, ibid., No. 299-A, § 55; E.C.H.R., *Stjerna* judgment of 25.11.1994, ibid., No. 299-B, § 38; E.C.H.R., *Lopez Ostra* judgment of 9.12.1994, § 51.

ship of proportionality between means and goals. In this determination, the Court often grants the states a margin of appreciation[34].

Since Article 14 is not an autonomous provision, the variations in the margin of appreciation depend to a certain extent on the other articles invoked[35].

It was in *Rasmussen*, in an Article 14-context, that the Court made one of its rare general statements about its use of the margin of appreciation doctrine: "The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States"[36]. This statement, which was repeated in later cases[37], can be said to have general validity, transcending the discrimination context, as will appear from our analysis of elements influencing the scope of the margin of appreciation (*infra*, C).

With regard to gender discrimination, a heightened scrutiny seems to be used. The Court stated repeatedly that "(v)ery weighty reasons would have to be advanced before a difference of treatment on the grounds of sex could be regarded as compatible with the Convention"[38].

5. Article 1 of Protocol No. 1: Property protection

This Article contains three different rules. In the evaluation of each of these, the Court takes into account the domestic margin of appreciation of the member states. In general it can be said that the margin under Ar-

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[34] E.C.H.R., *Engel and others* judgment of 8.6.1976, Publications of the Court, Series A, No. 22, § 72; E.C.H.R., *National Union of Belgian Police* judgment (note 31), at § 49 and E.C.H.R., *Swedish Engine Drivers' Union* judgment (note 31), at § 47 (equal treatment of unions); E.C.H.R., *Abdulaziz, Cabales and Balkandali* judgment (note 31), at § 72.

[35] M. Delmas-Marty, The Richness of Underlying Legal Reasoning, in: The European Convention for the Protection of Human Rights (M. Delmas-Marty [ed.], 1992), 319, 335.

[36] E.C.H.R., *Rasmussen* judgment of 28.11.1984, Publications of the Court, Series A, No. 87, § 40.

[37] E.C.H.R., *Abdulaziz, Cabales and Balkandali* judgment (note 31), at § 78; E.C.H.R., *Lithgow and others* judgment of 8.7.1986, Publications of the Court, Series A, No. 102, 177; E.C.H.R., *Inze* judgment of 28.10.1987, ibid., No. 126, § 41.

[38] E.C.H.R., *Abdulaziz, Cabales and Balkandali* judgment (note 31), at § 78; E.C.H.R., *Schuler-Zgraggen* judgment of 24.6.1993, Publications of the Court, Series A, No. 263, § 67; E.C.H.R., *Burghartz* judgment of 22.2.1994, ibid., No. 280-B, § 27.

ticle 1 of the first Protocol is a wide one[39]. It has been argued that this reflects the view in Europe that the right to the enjoyment of one's possessions no longer belongs to fundamental rights[40].

Peaceful enjoyment of one's possessions (first sentence of § 1)

The Court's approach in this context consists of an inquiry as to whether a proper balance has been struck between the demands of the community's general interest and the requirements of protecting the fundamental rights of the individual. In this evaluation, the court takes into account a domestic margin of appreciation to determine which measures are necessary in the general interest[41].

Deprivation of one's possessions (second sentence of § 1)

It is often in checking whether a deprivation is in the "public interest" that a margin of appreciation is granted: "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and the remedial action to be taken"[42]. The Court "will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation"[43].

The attitude of the Court in this matter is in conformity with general international law. The practice of international litigation and arbitration

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[39] G. Cohen-Jonathan, La Convention européenne des droits de l'homme, 191 (Aix-Marseilles 1989); R.St.J. Macdonald, The Margin of Appreciation, in: The European System for the Protection of Human Rights (R.St.J. Macdonald et al. [eds.], 1993), 83, 118.

[40] J.G. Merrills, The development of international law by the European Court of Human Rights (Manchester 1988), 143, quoting P. van Dijk/G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights (Dordrecht etc. 1990), at 340.

[41] E.C.H.R., *Sporrong and Lönnroth* judgment of 23.9.1982, Publications of the Court, Series A, No. 52, § 69; E.C.H.R., *Wiesinger* judgment of 30.10.1991, ibid., No. 213, § 76.

[42] E.C.H.R., *James and others* judgment of 21.2.1986, Publications of the Court, Series A, No. 98, § 46; cf. E.C.H.R., *Hentrich* judgment of 22.9.1994, ibid., No. 296-A, § 39.

[43] E.C.H.R., *James and others* judgment (note 42), at § 46.

shows the same tendency to exercise only minimal control on the "public interest" argument invoked by a state, particularly with regard to nationalisation[44].

A similar reasoning is made concerning the standard of compensation[45]. Furthermore, a margin is also recognized in the assessment of the proportionality of the interference[46].

Control of the use of property (§2)

Here, the discretionary power of the national authorities is stated in the text itself: the state retains the power to "enforce such laws as it deems necessary to control the use of property in accordance with the general interest to secure the payment of taxes or other contributions or penalties". Consequently, it is not surprising that the Court recognizes a wide margin of appreciation "with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question"[47].

6. Emergency situations (Article 15)

The two court judgments involving Article 15 after the *Lawless* case (cf. *supra*) also relate to the situation in Northern Ireland. Compared to *Lawless*, these later judgments are a lot more explicit on the subject of the domestic margin of appreciation: "It falls in the first place 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. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emer-

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[44] Cohen-Jonathan (note 39), at 525.

[45] E.C.H.R., *Lithgow and others* judgment (note 37), at § 122.

[46] E.C.H.R., *Håkansson and Sturesson* judgment of 21.2.1990, Publications of the Court, Series A, No. 171-A, § 54.

[47] E.C.H.R., *Agosi* judgment of 24.10.1986, Publications of the Court, Series A, No. 108, § 52; *Mellacher and others* judgment of 19.12.1989, ibid., No. 169, §45; E.C.H.R., *Fredin* judgment of 18.2.1991, ibid., No. 192, § 51; cf. E.C.H.R., *Tre Traktörer AB* judgment of 7.7.1989, ibid., No. 159, § 62; E.C.H.R., *Allan Jacobsson* judgment of 25.10.1989, ibid., No. 163, § 55; E.C.H.R., *Gasus Dosier- und Fördertechnik GmbH* judgment, 23.2.1995, § 60.

gency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 leaves those authorities a wide margin of appreciation"[48]. There is of course still a European supervision: the Court checks whether the states have gone "beyond the extent strictly required by the exigencies of the crisis"[49]. At the same time, "the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation"[50].

In general, it can be said that the domestic margin of appreciation is wider under Article 15 than under most other articles of the European Convention[51].

7. Article 5: Right to liberty and security

Margin of appreciation analysis is certainly not generalized in an Article 5-context. Yet it is often implicitly present, and in some cases an explicit reference is made.

Article 5 § 1 (a) authorises deprivation of liberty in the case of "the lawful detention of a person after conviction by a competent court". This subparagraph "must be taken to have left the contracting states a discretion in the matter"[52].

Article 5 § 1(e) authorises deprivation of liberty in the case of "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants". In deciding whether an individual should be detained as a "person of unsound mind", the national authorities are to be recognised as having a certain margin of appreciation "since it is in the first place for the

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[48] E.C.H.R., *Ireland* v. *United Kingdom* judgment of 18.1.1978, Publications of the Court, Series A, No. 25, at § 207; E.C.H.R., *Brannigan and McBride* judgment of 26.5.1993, ibid., No. 258-B, at § 43.

[49] E.C.H.R., *Brannigan and McBride* judgment (note 48), at 43.

[50] Ibid.

[51] Cohen-Jonathan(note 39), at 191; Macdonald (note 5), at 187, 206; T.A. O'Donnell, The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights, Human Rights Quarterly 495 (1982).

[52] E.C.H.R., *Monnell and Morris* judgment of 2.3.1987, Publications of the Court, Series A, No. 115, § 47; cf. E.C.H.R., *Wemhoff* judgment (note 10) (implicitly); E.C.H.R., *Weeks* judgment of 2.3.1987, Publications of the Court, Series A, No. 114, § 50.

national authorities to evaluate the evidence adduced before them in a particular case"[53].

8. Article 6: Right to a fair trial

Express mention of the margin of appreciation in Article 6-cases is made only in relation to the right of access to the courts. The court recognizes that this right corresponds to a positive duty for the states: by its very nature, this right "calls for regulation by the state, regulation which may vary in time and in place according to the needs and resources of the community and of individuals". In these regulations, limitations of the right of access are permitted by implication, and the contracting states enjoy a margin of appreciation[54].

Other rights protected by Article 6 equally relate to positive duties and, as in positive obligation cases under articles 8 to 11, bring about a "wide discretion as regards the choice of the means"[55]. The Court shows some flexibility in the interpretation of the requirements of Article 6,1 in function of different national situations. For instance in two recent cases it stated that the obligation for the courts to give reasons for their judgments varies according to the nature of the decision as well as according to "the diversity of the submissions that a litigant may bring before the courts and the differences existing in the contracting stats with regard to statutory provisions, customary rule, legal opinion and the presentation and drafting of judgments"[56].

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[53] E.C.H.R., *Luberti* judgment of 23.2.1984, Publications of the Court, Series A, No. 75, § 27; Cf. E.C.H.R., *Winterwerp* judgment of 24.10.1979, ibid., No. 33, § 40; E.C.H.R., *X.* v. *the United Kingdom* judgment of 5.11.1981, ibid., No. 46, § 43.

[54] E.C.H.R., *Fayed* judgment of 21.9.1994, Publications of the Court, Series A, No. 294-B, § 65; E.C.H.R., *Lithgow and others* judgment (note 37), at § 194; E.C.H.R., *Ashingdane* judgment of 28.5.1985, Publications of the Court, Series A, No. 93, § 57; cf. E.C.H.R., *Golder* judgment (note 12), at § 38; *Airey* judgment of 8.10.1979, Publications of the Court, Series A, No. 32, § 26; E.C.H.R., *Tolstoy Miloslavsky* judgment, 13.7.1995, § 59.

[55] E.C.H.R., *Colozza* judgment of 12.2.1985, Publications of the Court, Series A, No. 89, § 30 (about the right to take part in person in the hearing). Cf. E.C.H.R., *Quaranta* judgment of 24.5.1991, ibid., No. 205, § 30 (about the right to free legal assistance); E.C.H.R., *Hadjianastassiou* judgment (note 23), at § 33 (about the right to have adequate time and facilities for the preparation of his defence); E.C.H.R., *Imbrioscia* judgment of 24.11.1993, Publications of the Court, Series A, No. 275, § 38 (about the right to defend himself in person or through legal assistance).

[56] E.C.H.R., *Ruiz Torija* judgment of 9.12.1994, § 29; E.C.H.R., *Hiro Balani* judgment of 9.12.1994, § 27.

Because paragraphs 2 and 3 of Article 6 contain detailed provisions for criminal cases, which have no equivalent for civil cases, the contracting states' latitude is greater when dealing with civil cases[57].

In some Article 6-cases where no "margin" or "discretion" is mentioned, it seems nevertheless to be implied in the logic of the Court's reasoning[58], for instance because many characteristic elements of the margin analysis occur, such as the criteria of consensus and hierarchy (cf. *infra*, C).

In many Article 6-cases, we find something that can be called the opposite of a domestic margin of appreciation: autonomous interpretation (cf. *infra*, D.2.c.). Because the same arguments that are often used to deny or restrict the margin of appreciation, are used to justify the autonomous interpretation of concepts of the Convention, many criteria that are characteristic of margin analysis can be found in these cases as well (cf. *infra*, D.).

9. Article 12: Right to marry

The right to marry and to found a family is protected "according to the national laws governing the exercise of this right".

Because the reference to the internal law of the member states is explicit in this Article, we cannot speak here of margin of appreciation as a "Court doctrine" (cf. Article 1 of the first Protocol, § 2). However, it is an important example of a margin of appreciation left to the member states. The European Court exercises a control over the limitations, to make sure that these do not impair the "essence" or "substance" of the right[59].

10. Article 2 of Protocol No. 1: Right to education

This Article imposes positive duties on the member states: "by its very nature", it "calls for regulation by the State, regulation which may vary in

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[57] E.C.H.R., *Dombo Beheer B.V.* judgment of 27.10.1993, Publications of the Court, Series A, No. 274, § 32.

[58] E.C.H.R., *Delcourt* judgment (note 10); E.C.H.R., *Piersack* judgment of 1.10.1982, Publications of the Court, Series A, No. 53; E.C.H.R., *Pretto and others* judgment of 8.12.1983, ibid., No. 71; E.C.H.R., *Axen* judgment of 8.12.1983, ibid., No. 72; E.C.H.R., *Sutter* judgment of 22.2.1984, ibid., No. 74.

[59] E.C.H.R., *F.* v. *Switzerland* judgment of 18.12.1987, Publications of the Court, Series A, No. 128; E.C.H.R., *Rees* judgment (note 31), at § 50; E.C.H.R., *Cossey* judgment (note 31), at § 43; E.C.H.R., *Johnston and others* judgment (note 31), at § 52.

time and place according to the needs and resources of the community and of individuals", (cf. the right of access to justice, *supra*).

The court makes sure that these regulations do not injure the substance of the right, and that they respect a just balance between the protection of the general interest of the community and individual rights[60].

11. Article 3 of Protocol No. 1: Right to free elections

According to the Court, "the primary obligation in the field concerned is not one of abstention or non-interference (...), but one of adoption by the State of positive measures to 'hold' democratic elections"[61]. In this connection, the states have a wide margin of appreciation[62].

12. Article 3: Prohibition of torture

In cases relating to Article 3, no mention is made of the domestic margin of appreciation, although the reasoning of the court is very similar to that in cases where it does recognize a margin, and many similar elements are found[63] (cfr. *infra*, in C.).

The absence of explicit mention does not necessarily mean that the doctrine plays no role. Yet it is legitimate to ask why margin of appreciation doctrine does not play an explicit role here. Maybe the court has never felt the need to introduce the margin because of the small number of cases it has had to deal with under this Article. Or maybe it considered this too dangerous a field to make room for a domestic margin of appreciation. After all, torture is the paradigmatical human rights violation and undoubtedly one of the most serious ones.

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[60] E.C.H.R., judgment "*relating to certain aspects of the laws on the use of languages in education in Belgium*" (note 10), § 5; E.C.H.R., *Campbell and Cosans* judgment of 25.2.1982, Publications of the Court, Series A, No. 48, § 41.

[61] E.C.H.R., *Mathieu-Mohin and Clerfayt* judgment of 2.3.1987, Publications of the Court, Series A, No. 113, § 50.

[62] Ibid., at § 52 and 54.

[63] Cf. 3 cases concerning corporal punishment: E.C.H.R., *Tyrer* judgment of 25.4.1978, Publications of the Court, Series A, No. 26; E.C.H.R., *Campbell and Cosans* judgment (note 60); E.C.H.R., *Costello-Roberts* judgment of 25.3.1993, Publications of the Court, Series A, No. 247-C; and a case concerning extradition to a U.S. state that has not only death penalty, but also the "death row phenomenon", E.C.H.R., *Soering* judgment of 7.7.1989, ibid., No. 161.

13. Article 4: Prohibition of slavery and forced labour

The situation under Article 4 is the same as that under Article 3.

The refusal of the Court to introduce margin analysis under Article 4 is very obvious in the *De Wilde, Ooms and Versyp* case, concerning detention of vagrants, including duty of work[64]. This 1971 case was the first one to make express mention of the margin of appreciation (cf. *supra*). However, it did so only in relation to Article 8, not in relation to Article 4.

Likewise, in *Van Der Mussele*, a case concerning the former Belgian system of unremunerated professional training for lawyers, the decision that Article 4 had not been violated was reached without mention of the domestic margin of appreciation[65].

14. Article 2: The right to life

Recently, the Court pronounced its first judgment on the subject of Article 2. The killing in Gibraltar by members of the British security forces of three members of the IRA suspected of involvement in a bombing mission was found to be a violation of Article 2. The Court stressed that Article 2 "ranks as one of the most fundamental provisions in the Convention" and that "(t)ogether with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe"[66]. The Court accordingly uses a very strict interpretation, which leaves the national authorities very little room for discretion.

15. Rhetoric

As the quotations from the Court's analysis given above show, the judges sometimes devote an entire paragraph or more to the domestic margin of appreciation. They may indicate that the margin in some situations is a wide one, or that it is particularly important. They may motivate their granting of a wide or narrow margin by pointing at the circumstances of the specific case or by appealing to general methods they claim to follow when applying margin analysis.

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[64] E.C.H.R., *De Wilde, Ooms and Versyp* judgment (note 11).

[65] E.C.H.R., *Van Der Mussele* judgment of 23.11.1983, Publications of the Court, Series A, No. 70.

[66] E.C.H.R., *McCann and others* judgment, 27.9.1995, § 147.

Such indications will prove useful in our research in the next section.

Very often, however, the reference to the margin of appreciation is extremely short, using standard expressions such as "notwithstanding the state's margin of appreciation" or "having regard to the domestic margin of appreciation". Often also no reference to the doctrine is made, although it is clear that it plays a role underlying the Court's legal reasoning.

In the next section, those last categories of cases, where the Court is relatively mute on the subject are joined with the first category and studied together in an effort to map some patterns in the Court's jurisprudence.

C. Elements Influencing the Scope and Importance of the Margin of Appreciation Doctrine

In this section, the cases in which (explicit or implicit) margin analysis is found, are further analysed in an effort to isolate some of the factors that determine whether and to what extent a domestic margin of appreciation is taken into account in a particular case.

Nine different factors will be examined.

The Court itself indicated that certain elements are important, such as the ground of limitation under the second paragraph of the articles 8–11 (1), the importance of the right in question (2), and the consensus among the member states (4).

Other elements are the "field of policy" (3), the reference to other conventions (5), the existence of internal uncertainty or dispute about the norm or practice under examination (6), the "substance" criterion (7), the existence of a particular local situation (8), and the exceptional character of a situation (9).

It is evident that in any given case, several of these elements may interact, reinforcing or undercutting one another. It should also be understood that in a field like this one, which is in full development, conclusions can only be tentative. No criterion can be found that is applied in an entirely consistent manner. Nevertheless, all the criteria outlined in this section play a certain role in the determination of the margin of appreciation.

In view of the future, however, it is not self-evident that all the lines of thinking traced out in this section will be carried on unmodified. Some major changes are going on in the European human rights protection system. The consequences of the merger of the Commission and the Court, as planned by the 11th Protocol to the Convention, are not yet entirely foreseeable, but may be substantial. Not only the nature and num-

ber of the cases brought before the Court, but also the composition of the Court itself are likely to change in a way that may affect the margin of appreciation doctrine.

Meanwhile, the consequences of another small revolution are starting to be felt: that of the eastward expansion of the European system. The effect of the recent accession of a great number of Eastern European states to the Convention[67] will probably be felt in the Court's jurisprudence, through the changes in the composition of the Court as well as through the possibly different nature of the human rights problems that are encountered in these states.

In considering the various elements that affect the scope of the domestic margin of appreciation in the Court's jurisprudence so far, we will try to foresee how they may be affected by this evolution in the future.

1. Ground of limitation under paragraph 2 of the articles 8–11

In order to be justified under the second paragraph of the articles 8–11, an interference with a right must have a legitimate aim, from amongst those enumerated in this paragraph (cf. *supra*, C.1.). The Court stated several times that the scope of the domestic margin of appreciation is not identical in respect of each of the aims justifying restrictions on a right[68].

In fact, the Court has only addressed the aim of the protection of morals (with regard to both Article 8 and Article 10) and that of maintaining the authority and impartiality of the judiciary (with regard to Article 10). The most important other "legitimate aims" will equally be examined: national security, the rights and freedoms or reputation of others, the prevention of disorder or crime, and the economic well-being of the country.

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[67] Among the 38 member states of the Council of Europe, 14 are new member states from Central and Eastern Europe: Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, Czech Republic, Slovakia, Romania, Latvia, Albania, Moldova, Ukraine and the Former Yugoslav Republic of Macedonia. On 17.7.1995, 8 of these states had ratified the European Convention on Human Rights: Bulgaria, Hungary, Czech Republic, Slovakia, Poland, Romania, Slovenia and Lithuania.

[68] E.C.H.R., *Sunday Times* judgment (note 20), at § 59; E.C.H.R., *Dudgeon* judgment (note 13), at § 52.

a. The protection of morals

In 1976, many were shocked by the wide margin of appreciation attributed to the British government in the famous *Handyside* case. This case concerned the criminal prosecution under the Obscene Publications Act of the "Little Red Schoolbook", an advice manual for young people that included information about sexual matters. After an elaborate reasoning in which the margin of appreciation took a crucial place, the Court decided that this infringement on the freedom of expression did not violate the Convention[69]. It stated that "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era, which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them"[70].

In *Müller*, equally involving an interference with the freedom of expression to protect morals, the Court relied strongly on *Handyside*. The Court repeated the statement on the lack of a European conception of morals and decided that the conviction by the Swiss authorities of a painter for publishing obscene material and the confiscation of the paintings after an exhibition did not violate Article 10[71].

Open Door and Dublin Well Woman to the contrary did not follow *Handyside* and *Müller*. The injunction of the Irish Supreme Court restraining counseling agencies from providing pregnant women with information concerning abortion facilities abroad was found to violate Article 10. Although it is stated that "the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life"[72], the Court seems to attach more importance to its statement

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[69] E.C.H.R., *Handyside* judgment (note 19), at § 48.

[70] Ibid.; E.C.H.R., *Müller* judgment (note 19), at § 35; E.C.H.R., *Open Door and Dublin Well Woman* judgment (note 19), at § 68.

[71] E.C.H.R., *Müller* judgment (note 19).

[72] E.C.H.R., *Open Door and Dublin Well Woman* judgment (note 19), at § 68.

that the state's discretion is not "unfettered and unreviewable"[73] and not to grant the Irish government a particularly wide margin at all.

As regards cases under Article 8, the *Handyside* idea of a wide margin where the protection of morals is in issue, was followed in the homosexuality cases[74]. In some other cases, where the protection of morals was only one of the aims invoked, and where no controversial moral issues were concerned, the national authorities did not enjoy this wide margin[75].

b. Maintaining the authority and impartiality of the judiciary

A few years after *Handyside*, in the *Sunday Times* judgment, only the minority, in its joint dissenting opinion, adhered to the broad view of the margin of appreciation. This British case dealt with the prior censorship of some newspaper articles relating to the thalidomide-scandal, a matter which was still pending before the courts and falling for that reason under the British doctrine of contempt-of-court. The majority of the judges concluded that Article 10 had been violated. They cited part of their reasoning in *Handyside*, but they stressed the limits of the states' power of appreciation. The legitimate aim justifying the British interference in this case is not the protection of morals, but the protection of the authority of the judiciary. The Court stated that this is a far more objective notion. "The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. (...) Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation"[76].

Whether this is truly a more objective notion is highly debatable. In the joint dissenting opinion of nine judges, it was said that "(e)ven though there might exist a fairly broad measure of common ground between the Contracting States as to the substance of Article 6, it nevertheless remains the fact that the judicial institutions and the procedure can vary considerably from one country to another. Thus, contrary to what the majority of the Court holds, the notion of the authority of the judiciary is by no means divorced from national circumstances and cannot be determined in a uniform way." Probably the majority came up with this argument be-

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[73] Ibid.

[74] E.C.H.R., *Dudgeon* judgment (note 13), at § 52; E.C.H.R., *Norris* judgment (note 13), at § 45. However, other factors, leading to a restriction of the margin of appreciation, appeared to be stronger in the final evaluation.

[75] E.C.H.R., *Silver* judgment (note 12); E.C.H.R., *Olsson* judgment (note 15).

[76] E.C.H.R., *Sunday Times* judgment (note 20), at § 59.

cause they did not want to follow *Handyside*, which had been strongly criticized for giving too much room to the national authorities[77].

Anyway, contrary to the statement about the wide margin in connection with morals, which keeps recurring, the one about the narrow margin in the context of maintaining the authority and impartiality of the judiciary was never repeated in the Court's case-law[78].

c. National security

In the *Leander* case, under Article 8, the Court stated that "the margin of appreciation available to the respondent State in assessing the pressing social need in the present case, and in particular in choosing the means for achieving the legitimate aim of protecting national security, was a wide one"[79]. After determining that adequate and effective guarantees against abuse existed, the Court decided that Article 8 had not been violated by the use of information from a secret police register to assess a person's suitability for employment on a post of importance for national security. Commentators concluded from this judgment that in matters of secret surveillance, the domestic margin of appreciation is extremely wide. In balancing individual rights and general interests advanced to justify their restriction, the Court giving preference to the latter, seems to adopt a *raison d'état* approach[80].

In Article 10 cases where the legitimate aim of national security was invoked, the Court never said that the margin was wide. However in *Klass*, the Court saw no violation with regard to the German wiretapping system, although it found no sufficient judicial control[81], and in *Hadjianastassiou*[82], it accepted the conviction of an officer for disclosing secret

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[77] C.S. Feingold, The doctrine of margin of appreciation and the European Convention on Human Rights, 53 Notre Dame Lawyer 90 (1977); W.J. Ganshof Van Der Meersch, Le caractère 'autonome' des termes et la 'marge d'appréciation' des gouvernements dans l'interprétation de la Convention Européenne des Droits de l'Homme, in: Protecting Human Rights: The European Dimension 212 (F. Matscher/H. Petzold [eds.], 1988); Cohen-Jonathan (note 39), at 190.

[78] Cf. other cases where the legitimate aim was "the authority and impartiality of the judiciary": E.C.H.R., *Weber* judgment (note 20); E.C.H.R., *Observer and Guardian* judgment (note 20); E.C.H.R., *Sunday Times (No. 2)* judgment (note 20).

[79] E.C.H.R., *Leander* judgment (note 14), at § 59.

[80] Van Dijk/Van Hoof (note 40), 597.

[81] E.C.H.R., *Klass* judgment (note 14); cf. Burke (note 14), at 1131.

[82] E.C.H.R., *Hadjianastassiou* judgment (note 23).

information, although this was information of minor importance. It therefore appears that the margin of appreciation in these cases is a wide one.

The same thing cannot be said about the *Observer and Guardian* and *Sunday Times (no. 2)* cases[83], but there, national security was only one of the aims invoked to justify the injunction restraining the publication of some details from "Spy Catcher", together with that of maintaining the authority of the judiciary.

d. The rights and freedoms (or the reputation) of others

This ground of restriction does not seem by itself to influence the scope of the domestic margin of appreciation.

In the context of Article 8, this ground is sometimes invoked together with that of the "protection of morals", because it can be difficult to draw a rigid distinction between the two[84]. It is also invoked in the cases about children in care and adoption. However, in these cases, the policy field (*infra*, 3.) is a more relevant criterion.

In Article 10 cases, the "protection of rights and reputation of others" is invoked as a ground of restriction, but this seems to be without impact on the margin's scope. In defamation cases, the concrete circumstances play an important role. In cases concerning fair competition or media, the policy field (*infra*, 3.) is a relevant criterion.

In the context of Article 9 and Article 11, this limitation ground does not have any more impact.

However, the margin of appreciation seems to vary according to some characteristics of the persons protected by the interference with another person's right.

Age plays a role in cases about the protection of morals[85]. In *Handyside*, the Court attached particular importance to the intended readership of the "Schoolbook". It was aimed at children and adolescents aged from twelve to eighteen, and was easily within the comprehension of even the youngest of such readers. The book contained "sentences or paragraphs that young people at a critical stage of their development could have inter-

[83] E.C.H.R., *Observer and Guardian* judgment (note 20); E.C.H.R., *Sunday Times (No. 2)* judgment (note 20).

[84] E.C.H.R., *Dudgeon* judgment (note 13), at § 47; E.C.H.R., *Silver* judgment (note 12).

[85] Cf. R. Koering-Joulin, Public morals, in: The European Convention for the Protection of Human Rights (M. Delmas-Marty [ed.], 1992), 83, 87–89.

preted as an encouragement to indulge in precocious activities harmful for them or even to commit criminal offences"[86].

Accessibility to children equally played a role in *Müller*, the exhibition of obscene paintings having no admission charge or age limit[87].

Similarly, legislation against homosexual activities with minors was upheld, because the Court thought it necessary "to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth"[88].

In the context of defamation, the distinction between public and private persons seems to affect the width of the domestic margin of appreciation. "The limits of acceptable criticism are (...) wider as regards a politician as such than as regards a private individual"[89], and they "are wider with regard to the Government than in relation to a private citizen, or even a politician"[90]. This distinction is illustrated in *Barfod*, where the Court did not consider a journalist's conviction for defamation of two lay judges to be a violation of Article 10, because his article was not a criticism of the judges in their function, but rather "a defamatory accusation against the lay judges personally"[91]. In *Prager and Oberschlick*[92] to the contrary, a conviction for defamation against a judge was not judged to be a violation of Article 10 for the opposite reason: because of the general character of the statements they were seen as a threat to the public confidence in the judiciary.

e. The prevention of disorder or crime

Like the "protection of the rights of others", this criterion does not seem to have much impact on the scope of the domestic margin of appreciation.

In the context of Article 8, it is invoked in relation with prisoners' correspondence[93], extradition of foreigners[94], house searches[95] and wire tap-

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[86] E.C.H.R., *Handyside* judgment (note 19), at § 52.
[87] E.C.H.R., *Müller* judgment (note 19), at § 36.
[88] E.C.H.R., *Dudgeon* judgment (note 13), at § 62.
[89] E.C.H.R., *Lingens* judgment (note 24), at § 42.
[90] E.C.H.R., *Castells* judgment (note 25), at § 46.
[91] E.C.H.R., *Barfod* judgment (note 24), at § 35.
[92] E.C.H.R., *Prager and Oberschlick* judgment (note 24).
[93] E.C.H.R., *Silver* judgment (note 12); E.C.H.R., *Campbell* judgment (note 12).
[94] E.C.H.R., *Moustaquim* judgment (note 16).
[95] E.C.H.R., judgments *Funke, Crémieux and Miailhe* (note 18); E.C.H.R., *Murray* judgment (note 18).

ping [96]. In the context of Article 10, we find it in connection with the media[97], defamation[98], and breach of the peace[99].

In most of these cases, other criteria are more relevant in determining the scope of the domestic margin of appreciation.

Two cases form an exception: in *Klass*[100] in an Article 10-context and in *Murray*[101] in an Article 8-context, a wide margin seems to be granted to the national authorities because the crime they are fighting is terrorism. Thus it could be a matter of degree: Like the limitation ground of the protection of morals enlarges the national margin only when controversial moral issues are at stake, the ground of prevention of crime would only enlarge the margin when really serious crime is aimed at. In that case, the criterion comes very close to that of the "exceptional situation" (cf. *infra*, 9.)

f. The economic well-being of the country

This limitation ground has been invoked in connection with Article 8, concerning housing policy[102], extradition of foreigners[103], and house searches in a tax fraud context[104].

In these cases as well, other considerations have determined the scope of the domestic margin of appreciation.

g. Conclusion

Although the "legitimate aim" is a criterion that is indicated by the Court as influencing the scope of the margin of appreciation, this is true for only some of these aims.

Even in those cases, the influence of this criterion can often be connected to the similar but broader criterion of the policy field (*infra*, 3.), or to that of the European consensus (morals versus authority of the judiciary; cf. *infra*, 4.).

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96 E.C.H.R., *Klass* judgment (note 14).

97 E.C.H.R., *Groppera Radio* judgment (note 22); E.C.H.R., *Autronic AG* judgment (note 22).

98 E.C.H.R., *Castells* judgment (note 25).

99 E.C.H.R., *Chorherr* judgment (note 23).

100 E.C.H.R., *Klass* judgment (note 14).

101 E.C.H.R., *Murray* judgment (note 18), § 90 – 91.

102 E.C.H.R., *Gillow* judgment (note 17).

103 E.C.H.R., *Berrehab* judgment (note 16).

104 E.C.H.R., judgments *Funke, Crémieux and Miailhe* (note 18).

Inside the legitimate aim of "protection of rights and freedoms or reputation of others", some characteristics of the person whose rights, freedoms or reputation is being protected affect the width of the margin of appreciation. In this sense, the state seems to be granted wide powers to protect the morals of minors, to the detriment of other persons' rights to privacy and to free expression. Another application of this criterion is found in the area of defamation cases: the more "public" the person whose reputation asks for protection, the more limited the state's power to provide this protection often seems to be.

2. Hierarchy of rights

Like the nature of the aim of the restriction, the nature of the right is a factor that was indicated by the European Court as influencing the scope of the domestic margin of appreciation[105]. The idea is that the more important a right is, the smaller the margin granted to the national authorities to interpret or restrict it. The ultimate consequence of this line of reasoning is that with regard to the most important articles of the Convention, in particular the Articles 2 and 3, no margin is left to the national authorities (cf. *supra*).

a. Freedom of expression

As early as the *Handyside* case, the Court stressed the importance of this right: "The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued"[106]. Never-

[105] E.C.H.R., *Gillow* judgment (note 17), at § 55.
[106] E.C.H.R., *Handyside* judgment (note 19), at § 49.

theless, in that case, the United Kingdom was granted a wide margin of appreciation (cf. *supra*).

In *Sunday Times*, the margin was restricted. In this case, the Court's statement about the importance of freedom of expression is reinforced: "These principles are of particular importance as far as the press is concerned"[107].

This idea is further elaborated in cases such as *Lingens*[108], *Thorgeir Thorgeirson*[109], *Jersild*[110] and *Prager and Oberschlick*[111].

The *Castells* case concerned a member of Parliament who was convicted for insulting the government. The Court stated that freedom of expression is especially important for an elected representative of the people[112], and found a violation of Article 10.

Artists also "contribute to the exchange of ideas and opinions which is essential for a democratic society"[113]. Nevertheless, in *Müller*, a wide margin was granted the Swiss authorities, permitting the confiscation of obscene pictures. And very recently, the confiscation and forfeiture of a film criticizing Christian Religion was found to be within the Austrian authorities' margin of appreciation, without its artistic value even being considered by the European Court, although the importance of freedom of expression was mentioned[114].

In the context of commercial speech, the consideration in *Barthold* that "freedom of expression holds a prominent place in a democratic society" seems to have played an important role in deciding that the injunctions complained of were not proportionate to the legitimate aim pursued[115].

Conclusion:

In some Article 10-judgments it is presented as a general rule that freedom of expression constitutes one of the essential foundations of a democratic society, exceptions to which must be narrowly interpreted, and

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107 E.C.H.R., *Sunday Times* judgment (note 20), at § 65.
108 E.C.H.R., *Lingens* judgment (note 24), at § 41.
109 E.C.H.R., *Thorgeir Thorgeirson* judgment (note 25), at § 63.
110 E.C.H.R., *Jersild* judgment (note 25), at § 31.
111 E.C.H.R., *Prager and Oberschlick* judgment (note 24), § 34.
112 E.C.H.R., *Castells* judgment (note 25), at § 42.
113 E.C.H.R., *Müller* judgment (note 19), at § 33.
114 E.C.H.R., *Otto-Preminger-Institut* judgment (note 23), at § 49.
115 E.C.H.R., *Barthold* judgment (note 21), at § 58.

that this is of particular importance in relation to the press[116]. However, it cannot be stated in general that "where (...) there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question"[117]. In some cases, the reference to the importance of the right appears to be rhetorical, because a wide margin is granted anyway.

It seems that only some manifestations of the freedom of expression occupy a high enough place in the Court's hierarchy to exercise a restricting influence on the domestic margin of appreciation. It is tempting to say, and it seems to result from the cases, that these are those manifestations which play an important role in a democratic society: freedom of the press, because an informed public opinion is a vital element of democracy, and freedom of political debate. In the interpretation of Macdonald, the standard of proof changes in these cases: "only by clearly demonstrating the necessity of a measure will the national authorities be held to have acted within their margin of appreciation"[118]. One of the most recent defamation judgments, *Prager and Oberschlick*, could be fitted into this "democracy" scheme. In this case, the conviction of a journalist and a publisher for defamation of a judge was held not to violate Article 10 and the margin of appreciation of the Austrian authorities was stressed. Although the Court mentioned the importance of the control of the functioning of the system of justice by the press in a democracy, it also stressed the importance of the public confidence in the judiciary. The Court seems to think that the defamatory statements in question, because of their excessive breadth and the absence of a sufficient factual basis, threatened this confidence. Essentially, the Court left it for the national authorities to decide what they judge most important in a democracy: unfettered freedom of the press or the protection of the public confidence in the judiciary. Thus this case would not deviate from the case-law which limits the special status of the freedom of expression to contexts where this freedom is vital for democratic society.

On the other hand, there still are cases concerning press situations in which the importance of this right is not mentioned and does not seem to

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[116] E.C.H.R., *Observer and Guardian* judgment (note 20), at § 59; E.C.H.R., *Sunday Times (No. 2)* judgment (note 20), at § 50.

[117] E.C.H.R., *Autronic AG* judgment (note 22), at § 61; *Informationsverein Lentia and others* judgment (note 22), at § 35.

[118] Macdonald (note 5), at 187, 203.

play a role[119]. This lack of consistency in the Court's reasoning may be due to the fact that the theory of margin of appreciation doctrine is not yet completely elaborated. Yet it may also mean that the hierarchy criterion is merely a rhetorical devise, while the concrete circumstances and context of each case are decisive[120].

b. Article 8: Private life/Home

In the case-law of the European Court, no statement can be found that would place the right to respect for private life as such in a privileged position, requiring strong protection and thus a restricted margin of appreciation. The Court does, however, grant this special status to the most intimate aspects of privacy.

Sexual life

In the homosexuality cases, the Court stated that "the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8"[121]. "The Convention right affected by the impugned legislation protects an essentially private manifestation of the human personality"[122]. In these cases, the domestic margin of appreciation was accordingly a narrow one.

Home

Another aspect of Article 8 that deserves special protection in the eyes of the Court, is the right to respect for peoples' home, "a right which is pertinent of their own personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Govern-

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[119] For example, E.C.H.R., *Barfod* judgment (note 24); E.C.H.R., *Weber* judgment (note 20).

[120] Cf. Macdonald (note 39), at 83, 86.

[121] E.C.H.R., *Dudgeon* judgment (note 13), at § 52; E.C.H.R., *Norris* judgment (note 13), at § 46.

[122] E.C.H.R., *Dudgeon* judgment (note 13), at § 60.

ment"[123]. Accordingly, the Court found that the restrictive Guernsey housing policy violated Article 8.

c. The right to a fair trial

The prominent place held by this right in a democratic society was mentioned in some judgments. In *Colozza*, this consideration seems to have influenced the conclusion that the practices complained of, a trial and conviction *in absentia* after a judgment that the accused was "untraceable after absconding", constituted a breach of Article 6 § 1[124]. However, rather than the importance of the right to a fair trial as such, the degree to which the right was denied may have determined the decision.

In other cases, however, the reference in question is found in a context where an essential role is played by the state's discretion to choose the means by which to satisfy the requirements of Article 6, and thus seems to be merely rhetorical[125].

d. Other rights

Freedom of religion

In its only case thus far interpreting Article 9, the Court stressed that "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it"[126]. This is a very strong affirmation, so that it can be supposed that the importance attached to the right influenced the finding of a breach.

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[123] E.C.H.R., *Gillow* judgment (note 17), at § 55.

[124] E.C.H.R., *Colozza* judgment (note 55), at § 32.

[125] E.C.H.R., *Delcourt* judgment (note 10), at § 25; E.C.H.R., *Pretto* judgment (note 58), at § 21; E.C.H.R., *Axen* judgment (note 58), at § 25; E.C.H.R., *Sutter* judgment (note 58), at § 26.

[126] E.C.H.R., *Kokkinakis* judgment (note 4), at § 31.

Freedom of association and the right to free elections

On occasion, the freedom of association[127] and the right to free elections[128] were said to be essential in a democratic society. However, this does not seem to have had an important influence on the outcome of those decisions.

e. Conclusion

To some extent a "hierarchy of rights" criterion may be relevant to determine the scope of the domestic margin of appreciation. However, it certainly does not apply in every case where a "high-rated" right is at issue.

Rather, an internal hierarchy inside the area of protection of those rights seems to exist, so that heightened scrutiny is only accorded to that aspect of the right that is especially valued.

In the case-law to date, only two such fields can be distinguished clearly: the most private elements of privacy, certainly including sexual relations and the home, but possibly other elements as well, and those expressions of free speech which play an important role in a democratic society.

Further case-law will have to be awaited before conclusions can be made with regard to the right to a fair trial and the freedom of religion.

3. Field of policy

In some fields of policy, the Court pays particular attention to the domestic margin of appreciation. These are fields where either the Court feels that the national authorities are better placed to appreciate the situation, or it judges that it is an area that is closely linked to national sovereignty or where it is especially important for a national government to be able to realize its program, or an area where a special regime applies.

This criterion partly overlaps with that of the "legitimate aim" of restriction (*supra*, 1.). In this context, we found that margin of appreciation doctrine plays a significant role in connection with controversial moral issues and in connection with "national security". Both can be redefined as policy fields, the former being one where national authorities are judged

[127] E.C.H.R., *Le Compte, Van Leuven and De Meyere* judgment (note 28), at § 65.
[128] E.C.H.R., *Mathieu-Mohin and Clerfayt* judgment (note 61), at § 47.

to be better placed than the international judge to appreciate local sensibilities, the latter being related to national sovereignty. However, what was said earlier about those issues will not be repeated here.

a. Special regime

Limitations of rights and freedoms are inherent in some contexts, such as an army or a prison. In such situations, the national authorities are given more leeway than usual in their interferences with the rights protected under the Convention.

One argument that could be made to justify this situation is that individuals in an army or prison situation can be presumed to "accept" the limitations of their freedoms related to that situation (to the extent that one voluntarily joins the army, or that a criminal can be said to accept prison sentence as a consequence of his crime).

Another argument is the close relationship of both military and detention situations with national security, so that the sovereignty argument (cf. *infra*, d.) is relevant.

The military margin

In cases relating to the army, the Court usually makes a remark about that "special situation", implying that military practices and regulation should be subject to a lower degree of scrutiny than other practices. This is an element that plays a role in the Court's appreciation, but without being decisive.

In *Engel*, a complaint about distinctions in disciplinary treatment between officers and ordinary servicemen was dismissed, whereby the remark was made that "(t)he hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere"[129]. Also, "(t)he proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline"[130]. In the civil world though, a similar situation would be called "class justice", and be considered a serious form of discrimination.

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[129] E.C.H.R., *Engel and others* judgment (note 34), at § 72.
[130] Ibid., at § 100.

In *Koster*, the Court decided that the lack of promptness in bringing the applicant before the military court did not comply with Article 5 § 3, "even taking into account the demands of military life and justice"[131].

In evaluating whether the interference with officer Hadjianastassiou's freedom of expression was disproportionate, the Court reasoned: "It is also necessary to take into account the special conditions attaching to military life and the specific 'duties' and 'responsibilities' incumbent on the members of the armed forces (...). The applicant, as the officer at the K.E.T.A. in charge of an experimental missile programme, was bound by an obligation of discretion in relation to anything concerning the performance of his duties"[132].

In the *VDSÖ* case, the refusal of the military authorities to distribute a particular magazine to the servicemen was found to violate Article 10. Although the Court repeated its rhetoric about the need for rules and discipline in the army[133], it shows a new determination to limit the cases where a "military margin" would be granted: "it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic state just as it must be in the society that such an army serves"[134].

Prison conditions

It is self-evident that certain interferences with human rights that would constitute serious violations in an ordinary context, can be acceptable in a penitentiary situation. Especially in relation to violations of Article 8, "regard has to be paid to the ordinary and reasonable requirements of imprisonment"[135]. The Court stated that "some measure of control over a prisoner's correspondence is called for and is not of itself incompatible with the Convention"[136] and that national authorities must be allowed a degree of discretion in regulating a prisoner's contact with his family[137].

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[131] E.C.H.R., *Koster* judgment of 28.11.1991, Publications of the Court, Series A, No. 221, at § 25; cf. E.C.H.R., *De Jong, Baljet and Van Den Brink* judgment of 22.5.1984, ibid., No. 77, § 52.

[132] E.C.H.R., *Hadjianastassiou* judgment (note 23), at § 46.

[133] E.C.H.R., *Vereinigung Demokratischer Soldaten Österreichs and Gubi* judgment of 19.12.1994, § 36.

[134] Ibid., § 38.

[135] E.C.H.R., *Golder* judgment (note 12), at § 45.

[136] E.C.H.R., *Silver* judgment (note 12), at § 98; E.C.H.R., *Campbell* judgment (note 12), at § 45.

[137] E.C.H.R., *Boyle and Rice* judgment (note 12), at § 74.

b. National authorities better placed to assess the situation

The statement that the national authorities are better placed than the Court to assess a particular situation, is often found in the Court's case-law. It is made either in cases where assessments of fact play an important role or in cases where it is important to evaluate general needs or tendencies in society. Examples of the first situation include the "medical margin" in determining whether a person is of unsound mind under Article 5 § 1 e (*supra*, B.5.a.), and the classification of allegedly defamatory statements as value-judgments and allegations of fact[138]. As examples of the second situation the "morality" cases can be cited, as well as, in the defamation context, the assessment of the "perceptions as to what would be an appropriate response by society to speech which does not (...) enjoy the protection of Article 10"[139].

Where factual issues are important, a certain deference to the judgment of the national authorities is indeed inevitable (cf. *infra*, D.2.b.). However, the appreciation of tendencies and needs in society may be a lot more ambiguous. If there is a majority and a minority view in society, government is likely to express the majority view. If the Court's attitude is one of deference, leaving the state a wide margin of appreciation, it risks in such cases forsaking one of the most important functions of human rights: the protection of minorities.

These are some characteristic examples:

Detention

Examining the sufficiency of the grounds on which a decision of redetention was based, the Court stated that "(i)n this area, as in many others, the national authorities are to be recognised as having a certain discretion since they are better placed than the international judge to evaluate the evidence in a particular case"[140]. The Court acknowledges that it is not equipped for the task of rehearing the detention proceedings, and therefore limits its examination to ensuring that the national authorities' decision was at all times supported by cogent evidence[141].

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138 E.C.H.R., *Prager and Oberschlick* judgment (note 24), § 36.
139 E.C.H.R., *Tolstoy Miloslavsky* judgment (note 54), § 24.
140 E.C.H.R., *Weeks* judgment (note 52), at § 49.
141 Merrills (note 40), at 50.

Children in care

"The Court recognises that, in reaching decisions in so sensitive an area, local authorities are faced with a task that is extremely difficult. To require them to follow on each occasion an inflexible procedure would only add to their problems. They must therefore be allowed a measure of discretion in this respect"[142].

In appreciating the concrete measures taken and arrangements made, a margin of appreciation is equally granted[143], "if only because (the Court) has to base itself on the case-file, whereas the domestic authorities have the benefit of direct contact with all those concerned"[144]. In one such case, Judge Lagergren, pleading for an increased domestic margin of appreciation, points at the difficulties for an international court that are inherent in this matter: "the necessity to make a delicate assessment related to a given moment and in a national context of complex psychological factors and to arrive at valid impressions of personalities and human relations" and the difficulty "to balance conflicting private interests and public obligations"[145].

Although the Court frequently stated that it has to do more than check whether the decision of the national authorities was taken "reasonably, carefully and in good faith", in fact that is all it does in those cases, because of its incapability of independent evaluation of the necessity to take the children into care[146].

Change of surname

In the *Stjerna* case, the Court considered that "the national authorities are in principle better placed to assess the level of inconvenience relating to the use of one name rather than another within their national society"[147].

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[142] E.C.H.R., *W.* v. *United Kingdom* judgment (note 33), at § 62; E.C.H.R., *B.* v. *United Kingdom* judgment (note 33), at § 63; E.C.H.R., *R.* v. *United Kingdom* judgment (note 33), at § 67.

[143] E.C.H.R., *W.* v. *United Kingdom* judgment (note 33), at § 60; E.C.H.R., *B.* v. *United Kingdom* judgment (note 33), at § 61; E.C.H.R., *R.* v. *United Kingdom* judgment (note 33), at § 65; *Olsson* judgment (note 15), at § 67; E.C.H.R., *Eriksson* judgment (note 15), at § 69.

[144] E.C.H.R., *Olsson (No. 2)* judgment (note 15), at § 90.

[145] E.C.H.R., *Margareta and Roger Andersson* judgment – partly dissenting opinion of Judge Lagergren (note 15), at p. 35 – 36.

[146] J.G.C. Schokkenbroek, Noot onder Olsson, 13 N.J.C.M.-Bulletin 381 (1988).

[147] E.C.H.R., *Stjerna* judgment (note 33), at § 42.

Deprivation of property

As explained *supra* (B.5.), the Court judges that, "(b)ecause of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the 'public interest'" in the sense of the second sentence of the first paragraph of Article 1 of the 1st Protocol[148], or "what measures are appropriate in this area".[149] Consequently, the margin of appreciation available to the national authorities is a wide one[150].

c. Important national policy

Especially in the economic sphere, the Court often takes account of a margin of appreciation because it recognizes that the member states need some breathing space to realize their policy in this domain.

The Court finds it "natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one"[151].

Critics, however, argue that by a very comprehensive apprehension of national prerogatives the balance between fundamental human rights and the general interest is tilting toward the latter, while the Convention in principle should give priority to the former[152].

Under Article 1 of the first Protocol

The Court granted a wide margin in "an area as complex and difficult as that of the development of large cities"[153] as well as in that of "social policy concerning the consumption of alcohol"[154]. Likewise, in the field of housing, "which in our modern societies is a central concern of social and economic policies", the legislature "must have a wide margin of appreciation both with regard to the existence of a problem of public con-

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148 E.C.H.R., *James and others* judgment (note 42), at § 46.

149 E.C.H.R., *Lithgow and others* judgment (note 37), at § 122; cf. in the context of the first sentence of the first paragraph of the Article: E.C.H.R., *Wiesinger* judgment (note 41), at § 76.

150 Ibid.

151 E.C.H.R., *James and others* judgment (note 42), at § 46.

152 A.-D. Olinga/C. Picheral, La théorie de la marge d'appréciation dans la jurisprudence récente de la Cour Européenne des Droits de l'Homme, R.T.D.H. 581 (1995).

153 E.C.H.R., *Sporrong and Lönnroth* judgment (note 41), at § 69.

154 E.C.H.R., *Tre Traktörer AB* judgment (note 47), at § 62.

cern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures"[155]. A (wide) margin of appreciation in the context of interferences with property rights was equally granted with regard to agricultural planning[156], environmental protection[157] and the prevention of tax evasion[158].

Under Article 8

Under Article 8, there was a case in which aircraft noise from Heathrow Airport was claimed to be a violation of the right to respect for the private life and the home. The Court reasoned that "(I)t is certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation"[159].

And in *Funke*, *Crémieux* and *Miailhe*, the consideration was made that in the field of the prevention of capital outflows and tax evasions, states encounter serious difficulties, so that they may consider it necessary to have recourse to measures such as house searches and seizures[160].

Under Article 10

In Article 10 cases, the Court stated that the margin of appreciation is "essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition"[161]. The same applies to advertising[162].

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155 E.C.H.R., *Mellacher and others* judgment (note 47), at § 45.
156 E.C.H.R., *Allan Jacobsson* judgment (note 47), at § 55.
157 E.C.H.R., *Fredin* judgment (note 47), at § 51.
158 E.C.H.R., *Hentrich* judgment (note 42), at § 39.
159 E.C.H.R., *Powell and Rayner* judgment (note 33), at § 44.
160 E.C.H.R., *Funke* judgment (note 18), at § 56; *Crémieux* judgment (note 18), at § 40; *Miailhe* judgment (note 18) at § 38.
161 E.C.H.R., *Markt Intern Verlag and Klaus Beerman* judgment (note 21), at § 33; E.C.H.R., *Jacubowski* judgment (note 21), at § 6.
162 E.C.H.R., *Casado Coca* judgment (note 21), at § 50.

d. Sovereignty concerns

Apart from the national security cases already mentioned (including the "special regime" cases), sovereignty concerns can be found in the area of immigration control.

Cases concerning aliens who are not permitted to enter or stay in a member state, are often treated under the right to protection of family life, namely when these aliens' family is living in that member state. In assessing whether the interference with the right to protection of family life is "necessary in a democratic society", the Court, as in other Article 8-cases, takes into account the states' margin of appreciation. "In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens"[163]. This factor plays a role in the Court's reasoning, but it did not withhold it from finding violations of the Convention in all of the above-mentioned cases.

4. Consensus among the member states

A theme that recurs very frequently in margin of appreciation cases, is a comparison with the other member states of the Council of Europe. The Court itself indicated that the existence or non-existence of common ground between the laws of the contracting states is a relevant factor with regard to the scope of the margin of appreciation[164].

In general, the argument works – explicitly or implicitly – as follows: if a practice or regulation that a state claims to fall within its domestic margin of appreciation is not found in the legal system of any other member state, this practice or regulation is suspicious, and the margin of appreciation is likely to be restricted for this reason. If on the contrary, a practice or regulation is found in other member states as well, this will strengthen the national government's case.

This reasoning can only be explained by the fact that the European Convention on Human Rights is not considered to be a superstructure imposed on the contracting states from above, but a system of rules which are part of the common European heritage. It is because the European

[163] E.C.H.R., *Berrehab* judgment (note 16), at § 28; cf. E.C.H.R., *Abdulaziz, Cabales and Balkandali* judgment (note 31), at § 67; E.C.H.R., *Moustaquim* judgment (note 16), at § 43; E.C.H.R., *Beldjoudi* judgment of 26.3.1992, Publications of the Court, Series A, No. 234-A; § 74.

[164] For instance: E.C.H.R., *Rasmussen* judgment (note 36), at § 40.

system is supposed to be derived from the national systems of the member states that the comparative argument takes so much weight (cf. *infra*, D.2.b.).

Framers' intent?

In some cases, the reference to practices existing in the member states is very similar to a reference to the intent of the framers: if this practice was existing at the time the Convention was concluded, and there is no reason to assume that the contracting states intended to change it, it cannot possibly be a violation of the Convention. Especially in an early phase the Court seemed somewhat shy to take up its role as an autonomous international enforcement body, and it thus granted a margin of appreciation to the national authorities in their capacity of framers of the Convention[165]. But even in more recent cases, this reference to "what must have been the intent of the framers" is made. For example, the Court stated that "many member States of the Council of Europe have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts, and especially of their courts of cassation, for example deposit in a registry accessible to the public. The authors of the Convention cannot have overlooked that fact"[166].

Measuring the proportionality of an interference

In most cases though, comparative analysis is a – supportive or decisive – argument in the key part of the Court's reasoning, namely where it measures the proportionality or the reasonableness of an interference with a protected right.

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[165] E.C.H.R., *Wemhoff* judgment (note 10), at § 9; cf. E.C.H.R., judgment "*relating to certain aspects of the laws on the use of languages in education in Belgium*" (note 10), at § 3; E.C.H.R. *Van Droogenbroeck* judgment of 24.6.1982, Publications of the Court, Series A, No. 50, § 41. A similar reasoning seems to be implied in the judgment (note 10), where the argument that the system of the Belgian "procureur-generaal bij het Hof van Cassatie" taking part in the deliberations "dates back for more than a century and a half" (§ 36) is used to support the Court's judgment that there is no violation of Article 6 § 1, although the comparative argument here points in the other direction, since the Belgian legislation "does not seem to have any equivalent today in the other member States of the Council of Europe, at least in criminal cases" (§ 30).

[166] E.C.H.R., *Pretto* judgment (note 58), at § 26; E.C.H.R., *Axen* judgment (note 58), at § 31; E.C.H.R., *Sutter* judgment (note 58), at § 33.

For instance, in *De Wilde, Ooms and Versyp*, the Court judged that the duty to work imposed on persons held in detention for vagrancy did not exceed the "ordinary" limits within the meaning of Article 4 (3) (a) of the Convention, because, among other reasons, it was based on a general standard, "which finds its equivalent in several member States of the Council of Europe"[167].

Likewise, being struck of the register of the "Orde der Geneesheren" (the Belgian professional organisation for the medical profession), a measure which exists in the majority of the member states[168], does not constitute a degrading or inhuman punishment.

The Danish proceedings to contest paternity inside marriage, putting mother and husband in different positions, do not violate Article 14, because examination of the contracting states' legislation in this context shows that in most of them the positions of mother and husband differ[169].

In considering that the Swiss ban on unauthorised reception of transmissions from telecommunications satellites was a disproportionate measure, the Court took notice of "the fact that several member states allow reception of uncoded television broadcasts from telecommunications satellites without requiring the consent of the authorities of the country in which the station transmitting to the satellite is situated"[170].

The compulsory membership of a private law association for cab drivers in Iceland violates Article 11. "Compulsory membership of this nature (...) does not exist under the laws of the great majority of the Contracting States. On the contrary, a large number of domestic systems contain safeguards which, in one way or another, guarantee the negative aspect of the freedom of association, that is the freedom not to join or to withdraw from an association"[171].

Concerning procedures of name-changing, there is little common ground between the domestic systems of the countries of the Council of Europe, so those countries enjoy a wide margin of appreciation[172].

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[167] E.C.H.R., *De Wilde, Ooms and Versyp* judgment (note 11), at § 90.

[168] E.C.H.R., *Albert and Le Compte* judgment of 10.2.1983, Publications of the Court, Series A, No. 58, § 22.

[169] E.C.H.R., *Rasmussen* judgment (note 36), at § 41.

[170] E.C.H.R., *Autronic AG* judgment (note 22), at § 62.

[171] E.C.H.R., *Sigurdur A. Sigurjónsson* judgment (note 30), at § 35.

[172] E.C.H.R., *Stjerna* judgment (note 33), at § 39.

Neither does any common practice exist with regard to taking into account the behaviour of the owner of the goods in deciding whether or not to restore smuggled goods[173].

Recently, in judging that the dismissal of a school teacher because of her political activities violated the duty of loyalty owed by German civil servants constituted a breach of Article 10, the Court considered the fact that "at the material time a similarly strict duty of loyalty does not seem to have been imposed in any other member State of the Council of Europe" to be relevant[174].

Defining the scope of a right

Sometimes the comparative argument is used in defining the scope of a right.

For instance, Article 11 does not guarantee any particular treatment of trade unions or their members by the state, such as the right to be consulted: it cannot "be said that all the Contracting States in general incorporate it in their national law or practice"[175].

Article 1 of the 1st protocol is interpreted as incorporating the principle, found in the legal systems of the Contracting States, that the taking of property in the public interest should entail payment of compensation except in exceptional circumstances[176].

Consensus and evolution

The comparative argument often occurs in a context where an evolution is noticeable in the legislation of the member states.

Sometimes, a country that is "staying behind" is sanctioned. An example is the corporal punishment of birching on the Isle of Man, which was found to be degrading in the meaning of Article 3 of the Convention. The Court noted that in this case, it "cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field"[177]. The same phrase was used in *Soering*, where the fact that death penalty *de facto* no longer

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[173] E.C.H.R., *Agosi* judgment (note 47), at § 54.

[174] E.C.H.R., *Vogt* judgment of 26.9.1995, § 59.

[175] E.C.H.R., *National Union of Belgian Police* judgment (note 31), at § 38.

[176] E.C.H.R., *James and others* judgment (note 42), at § 54; E.C.H.R., *Lithgow* judgment (note 37), at § 120.

[177] E.C.H.R., *Tyrer* judgment (note 63), at § 31.

exists in time of peace in the contracting states, or is not carried out, brings death penalty under Article 3 of the Convention[178]. It is added that "(p)resent-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded"[179].

Another example is the former distinction in Belgian law between the "legitimate" and the "illegitimate" family. The Court noted that at the time when the Convention was drafted, such a distinction was regarded as permissible and normal in many European countries. However, "the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim '*mater semper certa est*'"[180].

An explicitly progressive viewpoint is taken in the context of gender discrimination: "it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention"[181]. It is remarkable that the criterion here is not that of the achievement in the laws of the member states, but that of their policy goals.

In other cases, where the evolution is seen as less distinctive or less uniform, the Court does not take the progressive viewpoint.

In *Engel and others*, it stated that "the respective legislation of a number of Contracting States seems to be evolving, albeit in various degrees, towards greater equality in the disciplinary sphere between officers, non-commissioned officers and ordinary servicemen", however, "inequalities are traditionally encountered in the Contracting States", and "(a)t the time in question, the distinctions attacked by the three applicants had their equivalent in the internal legal system of practically all the Contracting States"[182].

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[178] E.C.H.R., *Soering* judgment (note 63), at § 102.

[179] Ibid. at § 104.

[180] E.C.H.R., *Marckx* judgment (note 31), at § 41.

[181] E.C.H.R., *Abdulaziz, Cabales and Balkandali* judgment (note 31), at § 78; E.C.H.R., *Schuler-Zgraggen* judgment (note 38), at § 67; E.C.H.R., *Burghartz* judgment (note 38), at § 27.

[182] E.C.H.R., *Engel and others* judgment (note 34), at § 72.

Similarly, although the "laws of numerous contracting states have evolved or are evolving, albeit in varying degrees, towards the assumption by the public purse of the cost of paying lawyers or trainee lawyers appointed to act for indigent litigants"[183], the Belgian system of unremunerated professional training for lawyers was not a breach of Article 4.

Before deciding that marriage restrictions under Swiss law violated Article 12, the Court noted that similar restrictions had been abolished in other countries. However, it stated that "the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field – matrimony – which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit"[184].

Concerning advertising by lawyers, the Court remarked that "(t)he wide range of regulations and the different rates of change in the Council of Europe's member States indicate the complexity of the issue"[185]. Because of this complexity, the national authorities are best placed to determine the right balance (cf. *supra*, 3.c.)

On the subject of transsexuality, the Court found that some states had given transsexuals the option of changing their personal status, making this option subject to varying conditions, while in other states such an option did not exist. It concluded that "the law appears to be in a transitional stage"[186], and specifically kept open the possibility to change its case law in the future[187], when a sufficiently broad consensus between the member states will be found.

The transsexuality cases cast some doubt on the objective character of the consensus criterion. In *Cossey* (1990) the majority of the Court judged that the same diversity of practice and lack of common ground existed among the member states as at the time of *Rees* (1986). In the dissenting opinions, however, the same facts were interpreted in the opposite way: The joint partly dissenting opinion of judges Macdonald and Spielman reads: "We consider that since 1986 there have been, in the law of many of the member States of the Council of Europe, not 'certain de-

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183 E.C.H.R., *Van Der Mussele* judgment (note 65), at § 40.

184 E.C.H.R., *F.* v. *Switzerland* judgment (note 59), at § 33.

185 E.C.H.R., *Casado Coca* judgment (note 21), at § 55.

186 E.C.H.R., *Rees* judgment (note 31), at § 37; cf. E.C.H.R., *Cossey* judgment (note 31), at § 40; E.C.H.R., *B.* v. *France* judgment (note 31), at § 48.

187 E.C.H.R., *Rees* judgment (note 31), at § 47; E.C.H.R., *Cossey* judgment (note 31), at § 42.

velopments' but clear developments. We are therefore of the opinion that, although the principle of the States' 'wide margin of appreciation' was at a pinch acceptable in the Rees case, this is no longer true today"[188]. Judge Martens specified in his dissenting opinion that in 1990, legal recognition of gender reassignment was somehow made possible in fourteen member States, as opposed to five in 1986[189]. He concluded that the Court's refusal to accept these important societal developments as material was far from convincing and speculated that they were based on a policy to adapt its interpretation to relevant societal change in matters concerning family law and sexuality only if almost all member states have adopted the new ideas[190].

When in *B. v. France* (1992) the Court eventually found a violation of Article 8, it did so by distinguishing the French and English situations, in the meantime stating explicitly that although some changes had occurred, the consensus between the member states was not yet sufficiently broad[191]. Criticizing this judgment, it was said that the Court's reasoning is unpersuasive because it did not adhere to its own prior assessments of consensus evolution, and that "the Court leaves itself vulnerable to the charge that it manipulates the consensus inquiry to achieve an interpretation of the Convention that it finds ideologically pleasing"[192].

Isolated position based on moral standards

Under 1., it was noted that the reason why a wider margin of appreciation is granted where the "legitimate aim" is the protection of morals rather than the authority or impartiality of the judiciary, is the lack of a uniform European conception of morals, while according to the Court there exists more common ground on the subject of the authority or impartiality of the judiciary[193]. Thus, where a deviation from legal practices that are common to most member states is in principle suspicious, it is

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188 E.C.H.R., *Cossey* judgment (note 31), at p. 21.

189 Ibid., at 35.

190 Ibid., at 37.

191 E.C.H.R., *B.* v. *France* judgment (note 31), at § 48.

192 L.R. Helfer, Consensus, Coherence and the European Convention on Human Rights, 26 Cornell International Law Journal, 154 (1993).

193 E.C.H.R., *Handyside* judgment (note 19), at § 48; Cf. E.C.H.R., *Müller* judgment (note 19), at § 35 and E.C.H.R., *Open Door and Dublin Well Woman* judgment (note 19), at § 72; E.C.H.R., *Sunday Times* judgment (note 20), at § 59; cf. criticism in the dissenting opinion.

justified when it is based on specific moral conceptions. Uniformity in moral standards throughout Europe is not a goal of the Court[194].

For example, in the *Dudgeon* case, the Court noted that "what distinguishes the law in Northern Ireland from that existing in the great majority of the member States is that it prohibits generally gross indecency between males and buggery whatever the circumstances"[195]. But the Court acknowledges that differences of attitude and public opinion between Northern Ireland and Great Britain in relation to questions of morality exist and are a relevant factor. "The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland (...). Where there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities"[196]. Given the fact that in spite of this rhetoric, a violation was found in *Dudgeon*, the practical importance of this argument in the Court's reasoning is unclear.

In *Otto-Preminger-Institut*, the Court puts the conception of the significance of religion in society on the same level as a moral standard in this respect: "The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time"[197]. The Court continues to say that by the seizure and forfeiture of the film, the Austrian authorities did not overstep their margin of appreciation. It is possible that the difference between this outcome and that in *Dudgeon* suggests that the conception of the significance of religion is a more valuable moral standard

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[194] Merrills (note 40), at 146. The opposite view is taken by van Dijk and van Hoof, they claim that it is the duty of the Strasbourg organs to develop a uniform European conception of morals, since the term "morals" is frequently mentioned in the Convention. "That this term is interpreted in each individual case by reference to the national conceptions on this point is irreconcilable with a collectively guaranteed set of international norms like the Convention, at least in the long run"; van Dijk/van Hoof (note 40), at 603.

[195] E.C.H.R., *Dudgeon* judgment (note 13), at § 49.

[196] Ibid., at § 56.

[197] E.C.H.R., *Otto-Preminger-Institut* judgment (note 23), § 56.

in the eyes of the Court than the attitude *vis-à-vis* homosexuality. But this need not necessarily be the case, since the difference can be explained by the fact that *Dudgeon* dealt with the sexual life, part of the most protected nucleus of the privacy right, while the aspect of the freedom of expression concerned in *Otto Preminger* is the artistic expression, which the Court does not value especially highly (cf. *supra*, 2.a. and b.).

Extended or restricted comparison

In one case, the comparison was extended beyond the borders of the Council of Europe. After stating that "no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest [in the sense of Article 1 of the first protocol, *eb*] as outlawing compulsory transfer between private parties", the Court went on: "The same may be said of certain other democratic countries", and cited a judgment of the United States Supreme Court in support[198].

In one other case to the contrary, dealing with the Austrian broadcasting monopoly, the comparison was restricted to "European states of a comparable size to Austria"[199].

Evaluation

The Court's comparative approach has often been criticized for being too superficial[200]. Often it refers in general to the presence or absence of a consensus, in "the law" of "the member states"[201] without undertaking any thorough comparative research. For instance, in *Sunday Times*, the majority claimed that there existed a "fairly substantial measure of common ground"[202] in the area of the authority and impartiality of the judiciary, while the minority claimed the opposite. Neither side, however, re-

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[198] E.C.H.R., *James and others* judgment (note 42), at § 40. The Supreme Court judgment was *Hawaii Housing Authority* v. *Midkiff* 10' S.Ct.2321 (1984).

[199] E.C.H.R., *Informationsverein Lentia and others* judgment (note 22), at § 42.

[200] Macdonald (note 5) at 187, 201; id. (note 39), at 83, 84; P. Mahoney, Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin, 11 Human Rights Law Journal, 75 (1990); O'Donnell (note 51), at 482; van Dijk/van Hoof (note 40), at 603.

[201] W.J. Ganshof van der Meersch, Reliance, in the case-law of the European Court of Human Rights, on the domestic law of the states, 1 Human Rights Law Journal 20 (1980).

[202] E.C.H.R., *Sunday Times* judgment (note 20), at § 59.

ferred to the relevant legislation of the contracting states, so that it could be established "what degree of unity may or may not have existed"[203].

It is important that the Court conducts a profound and detailed comparative research. Like for margin analysis in general, the Court should elaborate a methodology for its consensus analysis, identifying criteria that play a role, in order to increase the transparency and predictability of its approach[204].

If the comparative approach is conducted carefully, it has the advantage of introducing an objective element[205] in the – generally very fluid – margin of appreciation analysis.

Even when the comparative inquiry is conducted very carefully, it must be born in mind that "the average level of protection afforded by member-states with respect to Convention rights is not necessarily a sure indication of the degree of protection required by the Convention itself"[206]. Sometimes an approach based on the European consensus may lead to conservatism, and may retard the evolutive interpretation of the Convention: if a consensus of national law and practice does not exist by the time a claim reaches Strasbourg, the Court will not create it from above[207]. It seems that "the circumstances would have to be highly exceptional for the European Court to declare a common practice or legislative policy of the Contracting States to be contrary to the Convention"[208]. The risk is present that the Court would "forfeit its aspirational role by tying itself to a crude, positivist conception of 'standards'"[209].

Another negative feature of the comparative approach is the fact that it is based on the majority principle. A state finding itself in a minority position is not always just "staying behind"; it might have good reasons, cultural or other, to wish to maintain that position. Although this problem was recognized in *F.* v. *Switzerland* (cf. *supra*), it remains a fact that the consensus principle establishes a presumption against such a state, and makes it carry a heavy burden of proof if it wants to resist adaptation to the majority. Thus the consensus approach may hamper one of the func-

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[203] Macdonald (note 5), at 187, 201.

[204] Cf. the attempt to synthetize the principles emerging from the case law into a framework in Helfer (note 192), 155–165.

[205] Therefore it meets with the approval of Ganshof van der Meersch (note 77), at 214; cf. Macdonald (note 5), at 200; O'Donnell (note 51), at 480.

[206] Burke (note 14), at 1133.

[207] Yourow (note 1), at 150.

[208] Mahoney (note 200), at 75.

[209] Macdonald (note 39), at 124.

tions of margin of appreciation analysis: the accomodation of cultural relativist claims (cf. *infra*, D.d.).

It will be interesting to study the evolution of the consensus principle in the Strasbourg jurisprudence in the wake of the extension of the membership of the Convention with the "Eastern European" states. Can the comparative argument be applied to those new member states without changes, given that they do not participate to the same extent as the other states in the common European heritage which underlies the Convention? How to interpret a situation where almost all of the new member states have a regulation in common that provides a lesser level of protection than that which the majority of the other member states provide? Given the power of their number, there is clearly no European consensus in such a case, so that the Court would normally grant a wide domestic margin of appreciation. Two objections can be made against such a scenario: First, this could lead to a downward levelling of the human rights protection in Europe, to the detriment of the people of the other member states, and second, this would defy the whole purpose of the accession of new members to the Convention, which is to raise human rights standards in those countries to the same level as that of the other member states.

5. Reference to other conventions

Like the comparative analysis, reference to other conventions is used to point at an international consensus.

Broader than the Council of Europe

Sometimes this consensus is somewhat wider than that among the member states of the Council of Europe.

In *Engel*, reference was made to the Geneva Convention relative to the Treatment of Prisoners of War, where inequalities in treatment between officers and servicemen are tolerated[210].

In *Powell and Rayner*, a factor in deciding that the United Kingdom had not exceeded its margin of appreciation regarding the noise at Heathrow Airport was that the provisions of its legislation "are comparable to

[210] E.C.H.R., *Engel and others* judgment (note 34), at § 72.

those of the Rome Convention of 1952 on Damage Caused by Foreign Aircraft to Third Parties on the Surface"[211].

In support of its claim that a growing measure of common ground had emerged on the international level regarding the negative aspect of freedom of association, the Court referred to the Universal Declaration, the European Community Charter of the Fundamental Social Rights of Workers, a recommendation of the Parliamentary Assembly of the Council of Europe, the practice of the Committee of Independent Experts supervising the implementation of the European Social Charter and of the Governmental Committee of the European Social Charter, and the practice of the Freedom of Association Committee of the Governing Body of the International Labour Office[212].

Only (part of) the member states of the Council of Europe

In other cases, the consensus concerns only (part of) the member states of the Council of Europe.

An example, regarding the legal status of extramarital children, is the Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children[213], and the European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock[214]. With regard to this last Convention, it was stated in 1981, when only ten member states of the Council had signed it, and four ratified it (Belgium, the state whose legislation was under attack was not one of them), that this small number was not as significant as the mere existence of the treaty, which "denotes that there is a clear measure of common ground in this area amongst modern societies"[215]. In 1987, when it was in force in respect of nine member states, including Austria, the state whose legislation was at issue, it was said that "(v)ery weighty reasons would (...) have to be advanced before a difference of treatment on the ground

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211 E.C.H.R., *Powell and Rayner* judgment (note 33), at § 44; at the time of the judgment, this convention had been ratified by thirty-six states, including four members of the Council of Europe, but not the United Kingdom (§ 15).

212 E.C.H.R., *Sigurdur A. Sigurjónsson* judgment (note 30), at 35.

213 E.C.H.R., *Marckx* judgment (note 31), at § 41, this Convention was drawn up by ten states, of which at the time eight had signed it, and four ratified it.

214 Ibid., at § 41; E.C.H.R., *Inze* judgment (note 37), at § 41.

215 E.C.H.R., *Marckx* judgment (note 31), at § 41.

of birth out of wedlock could be regarded as compatible with the Convention"[216].

In the *Autronic AG* case, the Court supported its decision that the Swiss restrictions on reception of satellite transmissions were disproportionate by a reference to the European Convention on Transfrontier Television, signed within the Council of Europe[217].

In deciding in *Cossey* that the same diversity of practice existed as at the time of the *Rees* judgment with regard to the legal status of transsexuals, the Court referred to a Resolution on Discrimination Against Transsexuals by the European Parliament (i.e. the legislative assembly of the European Union) and to a recommendation by the Parliamentary Assembly of the Council of Europe[218]. Both documents call for additional legal protection for transsexuals, but the Court remarked that the reports accompanying them reveal the existing diversity of practice. Contrary to the opinion of the minority[219], in this case "the Court construed the regional legislation as an invitation to European states to harmonize their laws, rather than evidence of a consensus evolution"[220].

6. Internal uncertainty/dispute

Another argument that is often used in connection with that of the international consensus, is the fact that the contested legislation is not so firm itself, either because it has been changed since the time the conflict arose[221], or because it is under review[222] or a source of debate[223], or because it is no longer being enforced[224] or because it is not implemented in

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[216] E.C.H.R., *Inze* judgment (note 37), at § 41. This is the same standard that is used with regard to gender, cf. *supra*.

[217] E.C.H.R., *Autronic AG* judgment (note 22), at § 62.

[218] E.C.H.R., *Cossey* judgment (note 31), at § 40.

[219] Ibid., at 43 (dissent Judges Palm, Foighel and Pekkanen) and 36 (dissent Judge Martens).

[220] Helfer (note 192), at 149.

[221] E.C.H.R., *Engel and others* judgment (note 34), at § 72; E.C.H.R., *Van Der Mussele* judgment (note 65), at § 40; E.C.H.R., *Rasmussen* judgment (note 36), at § 41.

[222] E.C.H.R., *Marckx* judgment (note 31), at § 41; E.C.H.R., *Johnston and others* judgment (note 31), at § 75; E.C.H.R., *Inze* judgment (note 37), at § 44; E.C.H.R., *Casado Coca* judgment (note 21), at § 54.

[223] E.C.H.R., *Sunday Times* judgment (note 20), at § 60; E.C.H.R., *F.* v. *Switzerland* judgment (note 59), § 36. In the context of Article 5, Velu and Ergec state that the margin of appreciation is particularly wide where there is a jurisprudential controversy; J. Velu/R. Ergec, La Convention Européenne des droits de l'homme, Brussels 1990, 256.

[224] E.C.H.R., *Dudgeon* judgment (note 13), at § 60.

the same manner throughout the country[225]. In this argument, internal oppositional forces join the international consensus, thus reinforcing it, and marginalizing the contested legislation even more.

However in *Mathieu-Mohin and Clerfayt*, the fact that the Belgian parliamentary system was incomplete and provisional made the margin of appreciation in regulating the elections all the greater[226]. This illustrates how internal uncertainty can be interpreted in the opposite way as well: since one of the functions of the margin of appreciation is to give states time to adjust to the impact of changes, it would be strange if recognition of the need for change were itself to provide grounds for criticism[227].

In this last context, the Court has the possibility to grant a margin to the new Eastern European member states, in view of the fact that it takes some time to adjust an entire legal system which used to be based on completely different assumptions than the Western one, to such an elaborate and exacting treaty as the European Convention on Human Rights. If it chooses to do so, however, it will have to make sure that the demand for leniency is well-founded, that the margin accorded does not affect the essence of any right, that it does not have the effect of reducing the standards for the other countries and that it is limited in time.

7. "Substance" or "essence" of a right

In relation to articles of the Convention which do not contain a limitation clause, the Court often uses a "substance" test: interferences with a right can never go so far as to touch its substance or essence. This substance test at the same time marks the limits of the state's margin of appreciation.

It is the standard test in the context of the right to marriage (cf. *supra*, B.5.c.) and the freedom of education (cf. *supra*, B.5.d.), and it played a role in the only case judged thus far regarding the right to free elections[228].

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225 E.C.H.R., *Vogt* judgment (note 174), § 59.
226 E.C.H.R., *Mathieu-Mohin and Clerfayt* judgment (note 61), at § 57.
227 Merrills (note 40), at 156.
228 E.C.H.R., *Mathieu-Mohin and Clerfayt* judgment (note 61), at § 52.

The essence test is also very frequent in cases regarding the right of access to courts[229]. Under Article 5 § 3, it is used to assess the requirement of promptness[230].

Although Article 11 of the Convention contains a limitation clause in its second paragraph, the usual three step test is often replaced by a substance test (cf. *supra*, B.1.d.)[231].

In one Article 8-case, the Court came close to using the essence test, stating that "essential aspects of private life are at stake"[232].

Although the "substance test" is a very useful concept, it has not been much elaborated upon so far in Court's jurisdiction. One of the reasons is that a great number of the cases deal with interferences with one of the articles containing a limitation clause, for which another – elaborate – method of analysis exists. Another reason may be that most of the human rights violations brought before the European Court have been rather "small" violations, which did not touch on the substance of the rights. Since the European Convention expresses the common values of the Western european states (cf. *infra*, D.b.), the substance of the rights is not a matter of dispute among them and was in many cases guaranteed even before the Convention came into force. The participation in the European human rights system of states which do not necessarily share this common background may throw a new light on the substance test in the future.

8. Local situations

Sometimes the Court allows for a deviation from the European standard in order to take into account a particular local situation that is not found in the other member states.

With regard to the legislation about linguistic education, such a situation was found in Belgium, "a plurilingual state comprising several linguistic areas"[233].

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[229] E.C.H.R., *Ashingdane* judgment (note 54), at § 57; E.C.H.R., *Lithgow and others* judgment (note 37), at § 194; E.C.H.R., *Fayed* judgment (note 54), at § 65.

[230] E.C.H.R., *Koster* judgment (note 131), at § 24; E.C.H.R., *Brogan and others* judgment, of 29.11.1988 Publications of the Court, Series A, No. 145-B, at § 59.

[231] In one of the earlier cases, the essence test seems to be implied in the criterion that something is "indispensable for the effective enjoyment" of the right: E.C.H.R., *National Union of Belgian Police* judgment (note 31), at § 38.

[232] E.C.H.R., *X and Y* v. *the Netherlands* judgment (note 31), at § 27.

[233] E.C.H.R., judgment "*relating to certain aspects of the laws on the use of languages in education in Belgium*" (note 10), at § 12.

In the eyes of the court, some policy fields are always related to local situations or cultural and historical traditions and may therefore "legitimately vary according to the country and the era", such as the setting and planning of the school curriculum[234], the law on matrimony[235], or the rules governing the legal profession[236].

Some aspects of the legal system of a member state may be very peculiar or unusual without necessarily violating the Convention. That such aspects are long-existing seems to strengthen their legitimacy[237].

However, in *Sunday Times*, the Court discredited the common-law institution of contempt of court as a violation of the freedom of expression of Article 10, although there were serious indications that the authors of the Convention had this law in mind when they introduced the notion of "the protection of the authority and impartiality of the judiciary" as an aim justifying an interference with the freedom of expression in paragraph 2 of Article 10[238].

A local situation can consist of a public opinion. The Court, however, does not allow governments to take into account public opinion to the same extent in all cases. In the context of the protection of morals, the views prevailing in a society are a factor that legitimately influences a state's policy[239].

With regard to the interpretation of the concept "degrading punishment" in Article 3 to the contrary, the opposite is true: the fact that corporal punishment did not outrage public opinion on the Isle of Man did not mean it was not a breach of the Convention, because "it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves".

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234 E.C.H.R., *Kjeldsen, Busk Madsen and Pedersen* judgment of 7.12.1976, Publications of the Court, Series A, No. 23, § 53.

235 E.C.H.R., *F.* v. *Switzerland* judgment (note 59), § 33.

236 E.C.H.R., *Casado Coca* judgment (note 21), at § 54.

237 E.C.H.R., *Delcourt* judgment (note 10), at § 36, concerning the participation of the Procureur Général at the Belgian Court of Cassation in the deliberations of that Court: "While it is true that the long standing of a national legal rule cannot justify a failure to comply with the present requirements of international law, it may under certain conditions provide supporting evidence that there has been no such failure".

238 E.C.H.R., *Sunday Times* judgment (note 20), at § 60, cf. dissenting opinion, § 10.

239 E.C.H.R., *Handyside* judgment (note 19), at § 57; E.C.H.R., *Dudgeon* judgment (note 13), at § 56; *Müller* judgment (note 19), at § 36; E.C.H.R., *Otto-Preminger-Institut* judgment (note 23), at § 56.

Likewise, corporal chastisement is not excluded from the category of "degrading punishment" simply because it is traditional in Scottish schools and appears to be favoured by a large majority of parents[240].

These decisions seem to indicate the limits of the "margin area". If culturally determined opinions exist on the subject of what constitutes a degrading punishment, the Court does not exclude these from being taken into account. However, the leeway that is accorded to local opinion, does not go so far as to permit questioning the human rights norm itself in one of its vital components: the norm categorically forbids degrading punishment, so local opinion favouring admittedly degrading punishment will not be taken into account.

In a different context, the precedence given to legitimate children in attribution of hereditary farms on intestacy in Austria was found to violate the Convention, regardless of the opinion of the rural population which, according to the Court, "merely reflects the traditional outlook"[241].

These considerations may be indicative of the reaction of the Court in case it is confronted with an interference in a right in one of the new member states which is defended by a showing of the general acceptance of the practice by the public. To the extent that this public acceptance can be interpreted as the result of a lack or inadequacy of human rights awareness in that society, the Court will be unwilling to accept the argument.

9. Exceptional situations

In some situations, the Court is willing to grant "exceptional powers" to the national authorities. In Article 15-cases, the domestic margin of appreciation is substantially wider (cf. *supra*, A.6.).

It is not clear, however, if a wider margin is granted in exceptional situations outside Article 15. Such an exceptional situation could be the fight against terrorism. In *Klass*, the Court seems to widen the margin for this purpose[242]. In the words of Judge Evrigenis, the principle of comprehensive control by the European Court was breached by this judgment. Having regard to the special features of the case, the court limited itself to

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[240] E.C.H.R., *Campbell and Cosans* judgment (note 60), at § 29.
[241] E.C.H.R., *Inze* judgment (note 37), at § 44.
[242] E.C.H.R., *Klass* judgment (note 14), at § 48 – 49.

an external control, otherwise relying on the presumed lawfulness of the State authorities' conduct[243].

In *Brogan*, however, the Court refused to adopt the same approach, much to the discontent of Judge Martens, for whom it is "quite compatible with the Convention system for a State to invoke the requirements of combatting terrorism in order to justify fixing at a longer duration than would be acceptable under ordinary circumstances the period during which a person arrested on a reasonable suspicion of involvement in acts of terrorism may be detained without being brought before a judge"[244].

It should be pointed out that the recognition of a category of "extraordinary situations" outside Article 15 poses a risk of undercutting the requirements of this Article. It is incompatible with the Convention's structure based on a clear-cut distinction between normal situations and emergency situations[245].

D. Functions and Significance of the Margin of Appreciation Doctrine

It has been stated that "if the margin of appreciation did not exist, some other 'doctrine' would take its place. The only difference would be that it would bear a different label, such as deference, discretion or respect"[246]. For several reasons, a tool is needed that allows the European institutions to give some leeway to the national authorities.

A first set of reasons are encountered in most judicial systems (1.): the problem of the interpretation of vague and general notions (a), the limited control of policy decisions (b), and the issue of judicial restraint (c). Although these questions are inherent in the judicial function as such, an examination of the role they play in the case-law of the European Court of Human Rights will show that this role is largely influenced by the position of the Court as a supranational body.

The second set of reasons justifying the margin of appreciation doctrine are precisely related to the particular position of the Court (2.).

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[243] D. Evrigenis, Recent case-law of the European Court of Human Rights on articles 8 and 10 of the European Convention on Human Rights, 3 Human Rights Law Journal, 138–139 (1982).

[244] E.C.H.R., *Brogan and others* judgment (note 230), dissenting opinion of Judge Martens, § 12.

[245] van Dijk/van Hoof (note 40), at 587 – 588.

[246] Macdonald (note 39), at 124.

There is some inevitable tension between the centralized human rights enforcement system established by the European Convention and the national sovereignty of the European states (a).

The relation between those states and the Convention cannot be understood without having in mind that the European human rights protection system is derivative from and subsidiary to the national systems (b).

In the supranational context, problems of interpretation of a particular nature are found (c). Two such problems that bear a close relationship to the margin of appreciation are studied here: the question of the autonomous interpretation of legal terms and that of evolutive interpretation.

The final paragraph (d) deals with the relation between the margin of appreciation doctrine and cultural relativism of human rights. Cultural relativist claims constitute a major challenge for human rights lawyers today. Depending on how they are dealt with, the body of international human rights norms may be seriously threatened, or it may to the contrary be enriched and its application and enforcement may be furthered. From within the limited European context, the possibilities offered by the margin of appreciation doctrine as a tool to accomodate cultural relativist claims will be examined.

1. Elements related to the judicial function in general

a. Interpretation of vague and general notions

In the very beginning of the development of the idea of a domestic margin of appreciation, the European Commission for Human Rights, which was the initial promotor of the doctrine, linked the concept with that of the interpretation of vague and general concepts. "Sometimes the Convention uses expressions or ideas which, in themselves, have no exact and generally accepted meaning and which cannot be given such a meaning by process of interpretation. Such provisions leave States a certain margin of appreciation with regard to the fulfilment of their obligations. If a measure taken by a State is within this margin, it is generally in accordance with the Convention; if it exceeds it, there is a violation"[247].

It is self-evident that notions such as "necessary in a democratic society" (Articles 8–11, § 2), "public interest" (Article 1 of protocol no. 1) or

[247] E.C.H.R., case *"relating to certain aspects of the laws on the use of languages in education in Belgium"*, report of the Commission of 24.6.1965, Publications of the Court, Series B, No. 3, 306.

even "deprivation of liberty"[248] (Article 5) allow for different interpretations. Such vague and general notions are frequent in legal language in general, and especially in the context of fundamental laws, such as constitutional texts, and such as the European Convention. According to Wiarda, human rights in general are a subject that by its nature cannot be formulated in a precise way[249]. Not only would it be very difficult, it would not even be practical to try to avoid general concepts. Because these texts are meant to govern a vast area of situations, and because they are intended to remain unchanged for a very long period of time, vague notions are very useful. They permit for instance variations of interpretation in time ("evolutive interpretation", cf. *infra*) and in space. The margin of appreciation doctrine concerns variations of meaning in space, and not surprisingly it finds expression through some of those vague and general notions of the Convention.

However, the vague and general character of those notions is not the reason for using the margin of appreciation doctrine. If the Court granted a domestic margin of appreciation in every case involving a vague or general notion, it would never be able to set a European standard, and thus its function would be completely undermined. In many instances, the Court prefers to give its own, "autonomous" interpretation of a concept (cf. *infra*).

Professor Sapienza[250] develops a theory that overcomes this objection by narrowing the category of "vague and general notions" the margin of appreciation doctrine is connected with. He is not referring to those notions with vague or uncertain meaning that are common to any language and in particular to the legal language. According to Sapienza, the margin of appreciation doctrine is the answer of the Convention system to another, more specific, problem known in all legal systems: that of the so-called "undeterminate expressions". Such expressions can only find concrete normative meaning through the formulation of value judgments beyond the mere interpretation of the normative text. The vagueness of these expressions is characterized by the reference they make to extra-juridical rules or values. At the moment of their application, these extra-juridical elements have to be identified and a "political" choice has to be

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[248] Cf. J.G.C. Schokkenbroek, De margin of appreciation-doctrine in de jurisprudentie van het Europees Hof, in: 40 Jaar Europeees Verdrag voor de Rechten van de Mens (A.W. Heringa/J.G.C. Schokkenbroek/J. van der Velde [eds.], 1990), 52.

[249] Wiarda (note 2), at 6.

[250] R. Sapienza, Sul margine d'apprezzamento statale nel sistema della Convenzione Europea dei Diritti del'Uomo, 74 Rivista di Diritto Internazionale 571–614 (1991).

made. Examples of undeterminate expressions in the European Convention are the concepts of "necessary in a democratic society for the protection of morals" and "public emergency threatening the life of the nation"[251].

In the internal legal systems of the member states, theoretical concepts approaching that of "undeterminate expressions" are the "unbestimmte Rechtsbegriffe" in Germany[252] and the "general clauses" or "standards" in many other states. According to Sapienza, general clauses are found in almost all constitutions. They are unavoidable because they assure the necessary opening of the legal system to evolutive elements of the social fact that these systems intend to regulate, through a reference mechanism that permits a direct grip and a constant communication with the value systems that are gradually affirmed in society[253].

Although this is a phenomenon known in every legal system, it presents some special characteristics in an international context, which will be examined *infra* (2).

b. Limited ("marginal") control of policy decisions

The origin of the margin of appreciation concept lies in internal administrative law (cf. *supra*, A.). In determining the extent of permissible judicial control on the decisions of the executive branch of government, it is agreed in many countries that only the legality of these decisions can be checked, not the merits. Interference with "administrative discretion" is only allowed on grounds of unreasonableness. In Belgium, this test is called "marginale toetsing/appréciation marginale" (marginal appreciation).

In the rhetoric of the European Court, we often find the analogous reasoning that the control by the Court is limited, and that the policy decisions are to be taken by the national authorities. This is expressed in phrases such as "It is not, however, for the Court to substitute its own view for that of the national legislature as to what would be the most appropriate policy in this regard"[254].

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[251] Ibid., 599; cf. concerning "necessary in a democratic society": J.A. Frowein, Der europäische Grundrechtsschutz und die nationale Gerichtsbarkeit (Berlin 1983), 15–16.

[252] Cf. A. Bleckmann, Der Beurteilungsspielraum im Europa- und im Völkerrecht, EuGRZ 485–495 (1979).

[253] Sapienza (note 250), at 601.

[254] E.C.H.R., *Fayed* judgment (note 54), at § 81.

The same unwillingness to engage in control of the merits of decisions underlies the granting of a specially wide margin of appreciation in policy fields that are considered for some reason or other to be particularly important (cf. *supra*, C.3.c.).

c. Judicial restraint

In their relation to the political power, all courts, especially constitutional courts, face the difficulty of determining their position on the line between judicial activism and judicial restraint. The margin of appreciation doctrine is often explained as an expression of judicial restraint by the European Court.

In the Preamble to the European Convention the belief is expressed that "those Fundamental Freedoms which are the foundation of justice and peace in the world (...) are best maintained (...) by an effective political democracy". In a democratic system, judicial review establishes some limits on democratic discretion. However, the judges themselves have no democratic legitimacy. Therefore it is proper for them to show some deference to the wishes of the people, expressed by their representatives in Parliament. In a pluralistic democratic society, there is not one answer in matters regarding human rights, but a whole spectrum of differing but acceptable opinions. There is also the profound belief that the choice within that spectrum is not for the judicial authorities, but for the representatives of the people to make[255]. In the context of the European human rights system, the representatives of the people are the national legislatures.

Although judicial restraint is a concept that the European Court shares with the national courts, its exercise of restraint is influenced by its position as an international tribunal[256]. A position of restraint is one that assumes that the contracting states did not want to take up more obligations than those that can be derived with certainty from the text of the Convention[257].

Judicial restraint may also express a Court strategy aimed at self-preservation. Especially in the early years[258], it was felt that the position of the European Court of Human Rights was not as firm as that of a national

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[255] Mahoney (note 200), at 81.

[256] Dissenting opinion Judge Martens in E.C.H.R., *Cossey* judgment (note 31), at 28.

[257] Wiarda (note 2), at 7.

[258] Cf. C.C. Morrisson, Jr., Margin of Appreciation in European Human Rights Law, Revue des Droits de l'Homme 283 – 284 (1973).

constitutional court. The European Court cannot function without the cooperation of the member states. States which are displeased with the Court's judgment may delay its execution, or not comply with it at all. In the worst case, a state might choose not to recognize the jurisdiction of the Court or the right of individual petition anymore, or even withdraw from the Convention[259]. If the Court adopted a too activist approach, it would risk losing the confidence of the member states, and thus undercut its own position[260]. Therefore, the margin of appreciation is sometimes justified as a pragmatic tool[261] in the gradual realization of the goal of a uniform European standard of human rights protection[262].

While the granting of a wide margin of appreciation can be viewed as an expression of judicial restraint, in other cases, where the Court either narrowed the margin of appreciation or did not mention it at all, it adopted an activist approach. As is often the case in domestic constitutional courts, the Court sometimes split along ideological lines on these issues[263]. In this respect, the changes in the Court's composition resulting from the expansion as well as from the structural reorganisation of the European human rights protection system may be the key to foretelling the Court's future attitude.

2. Elements related to the particular position of the European Court of Human Rights

a. National sovereignty versus international human rights protection

Very few international treaties interfere with the sovereignty of the contracting states to the same extent as the European Human Rights Convention and its protocols. In this perspective, the domestic margin of appreciation is used to counterbalance this interference, returning some control to the national authorities.

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259 Helfer (note 192), at 137.

260 Velu/Ergec (note 223), at 59.

261 Cf. Burke's speculation that the *Klass* decision may be an expression of a sense of "Realpolitik", an attempt to conciliate the German government; id. (note 14), at 1135.

262 Macdonald (note 39), at 123.

263 Cf. Merrills (note 40), at 215; C.C. Morrisson, Jr., The Dynamics of Development in the European Human Rights Convention System (Dordrecht etc. 1981), 3–27.

Human rights law in public international law

International human rights law occupies a special position in public international law. Traditionally, international law was based on relations between sovereign states. It only seldom involved individuals or domestic courts. International human rights protection, however, does not fit into this traditional picture because it penetrates into the very heart of the "sanctuary" of sovereignty: the relations between the state institutions and the population, i.e. between two of the traditional constitutive elements of the state[264].

International human rights law can be said to be the most important example of a category of newer international law, which is directly concerned with individuals (another important example is found in commercial law). Since this new kind of international law has to be respected on the domestic level, domestic courts and other state agencies assume the first responsibility for its implementation[265]. International enforcement systems are subsidiary and, in the human rights context, often virtually non-existent.

The European Convention in international human rights law

It is mainly the enforcement mechanism, based on the Commission and the Court, which makes the European system unique in international human rights law. With regard to most human rights treaties, the absence of any real enforcement prospect makes it possible for states which do not seriously intend to comply with the norms, to subscribe when they perceive this to be in their interest (usually for reasons associated with public opinion)[266]. Not so for the obligations undertaken in the European Convention. Real enforcement brings about real intrusion in the sovereign domain of the national states.

The margin of appreciation can be interpreted as a concession to national sovereignty. It "helps the Court show the proper degree of respect for the objectives that a Contracting Party may wish to pursue, and the trade-offs that it wants to make, while at the same time preventing unnec-

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[264] J.A. Carrillo Salcedo, Souveraineté des Etats et droits de l'homme en droit international contemporain, in: Protecting Human Rights: The European Dimension (F. Matscher/H. Petzold [eds.], 1988), 91, quoting Prof. Virally.

[265] Sir Robert Jennings, Human rights and domestic law and courts, in: Protecting Human Rights: The European Dimension (note 264), 299.

[266] R. Falk, Human rights and state sovereignty (New York 1981), 33.

essary restrictions on the fullness of the protection which the Convention can provide"[267].

It is not surprising to see that in some policy fields which are especially closely linked to sovereignty concerns, such as national security (cf. *supra* C.1.c.) or immigration policy (cf. *supra* C.3.d.) a wide margin of appreciation is recognized.

As J.G. Merrills puts it, "the margin of appreciation is a way of recognising that the international protection of human rights and sovereign freedom of action are not contradictory but complementary. Where the one ends, the other begins"[268].

b. The European system is derivative from and subsidiary to the national systems

The margin of appreciation doctrine expresses a view of friendly relations between the national legal systems and the European system. National authorities are not only the authors of human rights violations, against which the European bodies have to protect the people. They are also the first locus of enforcement of the rights that are protected in the European Convention. This view is linked to that of the Convention as a body of rules which are not fundamentally opposed to any rule in the internal legal systems of the member states. Rather, these human rights rules are derived from the "common law" of those states.

The European system is derivative from the national systems

With the European Convention, the member states of the Council of Europe created a mechanism for collective enforcement of certain of the rights stated in the Universal Declaration (Preamble to the Convention, last paragraph). These rights, however, were not experienced as something new and external, but rather as an expression of shared values already underlying the legal systems of the member states.

In the last paragraph of the Preamble to the European Convention, the signatory governments identify themselves as "the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law". Thus the Convention was inspired by the "common law" constituted by the general body

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[267] Macdonald (note 39), at 123.
[268] Cf. Merrills (note 40), at 157.

of the national laws of the contracting states[269]. Therefore it is not paradoxical to see the Court, while performing its task of checking the conformity of domestic law with the Convention, rely on domestic law (the consensus approach). Although this rule cannot be elevated to the level of a general doctrine without endangering the aims of the Convention, it is in a sense an expression of "due recognition" of the national law's contribution to the Convention rule[270].

This homogeneity of the common background of the member states is an important element distinguishing regional human rights protection systems from that at the world level. The so-called "universal covenants have arisen against a background consisting of a great number of diverse and often contradictory human-rights conceptions and 'philosophies' connected with States influenced by different political, economic and social traditions and conditions"[271]. Although a lot of energy has been devoted by anthropologists and others to trying to discover at least germs of all human rights in all of the world's cultures, those findings have always been controversial. Since the very concept of "law" is susceptible of divergent cultural interpretations, it is very difficult to find more than a few legal principles which are common to all the countries of the world. A "Common Law of Mankind" able to serve as a model and a source of interpretation in universal human rights protection can only gradually, if at all, be attained[272].

In that respect it may be wise for the European Court of Human Rights not to focus too much on the non-western elements that characterize, to different extents, the backgrounds of the new member states. Rather their participation in the European human rights protection system should be soundly founded on those elements they share with the other member states.

The European system is subsidiary to the national systems

Contrary to, for instance, the rules emanating from the European Union, the European Convention on Human Rights does not want to

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269 Ganshof van der Meersch (note 201), at 15.

270 Ibid., 24 – 25.

271 R. Bernhardt, Thoughts on the interpretation of human rights treaties, in: Protecting Human Rights: The European Dimension (note 264), 66.

272 U. Scheuner, Comparison of the jurisprudence of national courts with that of the organs of the Convention as regards other rights, in: Human rights in national and international law (A.H. Robertson [ed.], 1968).

replace the national laws. No absolute uniformity of national rules is aimed at[273]. The Convention "merely establishes a standard for the protection of rights which it guarantees, while leaving States free, firstly, to go beyond this standard[274] and, secondly, to select the legal ways and means of protecting them. On the basis of these features, one could describe the convention as an instrument which harmonises the law of Contracting States around a minimum standard of protection"[275].

Article 1 of the Convention, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention" establishes the member states (legislative, executive and judicial authorities) as the primary guarantors of the effective enjoyment of human rights. Article 13 guarantees the right to an effective remedy before a national authority to everyone whose rights and freedoms set forth under the Convention have been violated. Article 26 contains the principle that a complaint can only be brought before the Convention organs after exhaustion of all domestic remedies. This rule makes the priority sanction of human rights a matter for the national legal system. The control by the Commission and the Court is thus of a subsidiary nature[276]. The principle of "dual jurisdiction" of both domestic and international law is one of the bases of the margin of appreciation doctrine. "Bearing in mind that the national judge may have jurisdiction (depending on the particular status of the Convention in the relevant internal law), to apply the Convention, and bearing in mind that he will of necessity have to make a decision before the organs of the Convention are called upon to decide the case (in accordance with Article 26, all domestic remedies have been exhausted), it appears reasonable to take account of the view which that national judge came to, particularly as he may have a better knowledge of certain situations (as the Court has from time to time observed)[277].

The understanding that the national authorities are generally in a better position than a supranational court to strike the balance between the pub-

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[273] Cf. Merrills (note 40), at 146.

[274] Article 60 of the Convention states that nothing in the Convention shall be construed as limiting or derogating from any human rights guarantees in the laws of the Convention states. Thus it is always the broadest guarantee that prevails.

[275] Evrigenis (note 243), at 137–138.

[276] Cf. H. Petzold, The Convention and the Principle of Subsidiarity, in: The European system for the protection of human rights (R. St. J. Macdonald/F. Matscher/H. Petzold [eds.], 1993), 41–62.

[277] Delmas-Marty (note 35), at 331.

lic interest and individual rights (cf. *supra*, C.3.b.) is an important element underlying the subsidiarity principle. According to Sapienza's theory (cf. *supra*, D.A.1.), a margin of appreciation is necessary when the Court is confronted with "undeterminate expressions" in the Convention text, necessitating an "external" basis for its decision, like factual elements or value judgments. When dealing with factual elements, it will often be impossible for the Court to substitute its own evaluation for that of the domestic courts, not only because in the lapse of time since the domestic evaluation changes in the factual situation may have occurred, but also because the national authorities have an overview of the context in which the facts are to be assessed. When value judgments are at stake, the Court according to Sapienza does not have a standard that enables it to prefer one value system to another, so that it cannot do much more than check whether the national authorities' decision was a reasonable one[278]. While Sapienza thus makes no distinction between factual judgments and other judgments for the application of the margin of appreciation, Wiarda's opinion[279] is that a wide margin is inevitable in factual judgments, but that it should be narrowed with relation to value judgments. The standard by which to judge between value systems is that of the European consensus. Van Dijk and Van Hoof go a lot further. They think that the margin of appreciation doctrine should be limited to the establishment of facts, and that even there its application is justified only in so far as the national authorities are in so much better a position to judge on these facts that such an establishment cannot be made independently by the Strasbourg organs. The application of the margin doctrine to questions of law should in principle be excluded, unless the factual elements predominate over the aspect of lawfulness[280]. These authors seem not to accept the subsidiarity of the Court's power. They argue that in the final analysis, the Strasbourg organs are the only competent bodies to conduct the weighing of interests involved in the Convention[281].

Especially where the Convention has direct effect in the internal legal order, the "first tier" human rights enforcement provided by the domestic courts will often provide a satisfactory remedy, making recourse to the second, European, tier unnecessary[282]. Once the European Commission

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278 Sapienza (note 250), at 605 – 606.
279 Wiarda (note 2), at 15.
280 van Dijk/van Hoof (note 40), at 585, 605.
281 Ibid., at 601.
282 Petzold (note 276), at 61– 62.

and Court will be merged into one body, the role of the domestic courts as the first tier in a two-tier system will become even more clear.

In summary, the margin of appreciation is the "natural product" of the distribution of powers between the Convention institutions and the national authorities, who share the responsibility for enforcement. The primary responsibility is with the member states, but the last word is for the Court[283].

c. Elements of interpretation in the supranational context

A wide range of problems can be encountered in the process of interpreting international conventions, some characteristic of legal interpretation in general, others determined by the international context. It is beyond the scope of this paper to attempt to give an overview of these issues here. Instead, only two elements that are in frequent interaction with the margin of appreciation doctrine will be examined.

The principle of autonomous interpretation is antithetic to margin analysis: where autonomous interpretation is used, there is no place for a domestic margin of appreciation.

The principle of evolutive interpretation to the contrary, is analogous to the margin of appreciation. Where the margin of appreciation allows for variations of interpretation in space, evolutive interpretation allows for variations in time.

Autonomous interpretation

Legal terms are in principle submitted to autonomous interpretation by the Court. This means that although the same terms may occur in internal law, they are not necessarily given the same meaning. The Court thus elaborated its own concept of what is a "criminal charge" and what are "civil rights and obligations" and "witnesses" under Article 6[284]. In particular, the first two examples mentioned had a tremendous impact, be-

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[283] Mahoney (note 200), at 81.

[284] About the concept of "criminal charge": E.C.H.R., *Neumeister* judgment of 27.6.1968, Publications of the Court, Series A, No. 8; § 18; E.C.H.R., *Engel and others* judgment (note 34), at § 81; E.C.H.R., *Deweer* judgment of 27.2.1980, Publications of the Court, Series A, No. 35, p. 23; E.C.H.R., *Adolf* judgment of 26.3.1982, ibid., No. 49, p. 15; E.C.H.R., *Öztürk* judgment of 21.2.1984, ibid., No. 73, § 50; E.C.H.R., *Campbell and Fell* judgment of 28.6.1984, ibid., No. 80.

cause they are the key concepts to the field of application of Article 6. Respect for due process was thus required by the Court in procedures which under internal law were considered to be of an administrative nature, and to which the member states, when signing the Convention, could not have expected the Convention would ever be applied.

Other examples of autonomous interpretation include the concept of the "home" in Article 8, which extends to business premises[285], and the concept of "possessions" in Article 1 of the first protocol, which is not limited to physical goods[286].

An exception to the rule of autonomous interpretation is made in those cases where the text of the Convention refers directly to internal law. What is a "lawful arrest or detention" in the sense of Article 5, for instance, is judged primarily according to the law of the member state[287]. It was remarked *supra* that the references to internal law contained in Article 12 and in Article 1 of the first Protocol amount to an explicit grant of a margin of discretion to the state.

Even without such textual references to internal law, autonomous interpretation relies to a certain extent on the common denominator in the legal traditions of the various contracting states[288]. It was argued that when a generally accepted meaning of a term exists, with the varities among the member states being limited to details, the Court is bound to adopt this meaning[289]. According to Judge Matscher, autonomous interpretation should always, and to a greater extent than is actually done, refer to a

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About the concept of "civil rights and obligations": E.C.H.R., *König* judgment of 28.6.1978, ibid., No. 27, § 88 – 89; E.C.H.R., *Benthem* judgment of 23.10.1985, ibid., No. 97; E.C.H.R., *Feldbrugge* judgment of 29.5.1986, ibid., No. 99.

About the concept of "witness" in Article 6 § 3 (d): E.C.H.R., *Bönisch* judgment of 6.5.1985, ibid., No. 92, § 31– 32; E.C.H.R., *Kostovski* judgment of 20.11.1989, ibid., No. 166, § 40; E.C.H.R., *Asch* judgment of 26.4.1991, ibid., No. 203, § 25; E.C.H.R., *Vidal* judgment of 22.4.1992, ibid., No. 235-B, § 33.

285 E.C.H.R., *Niemietz* judgment of 16.12.1992, Publications of the Court, Series A, No. 251-B, § 30.

286 E.C.H.R., *Gasus Dosier- und Fördertechnik GmbH* judgment (note 47), § 53.

287 Matscher (note 2), at 72.

288 Cf. E.C.H.R., *Engel and others* judgment (note 34), at § 82; E.C.H.R., *Öztürk* judgment (note 284), at § 53; E.C.H.R., *König* judgment (note 284), at § 89; cf. E.C.H.R., *Feldbrugge* judgment (note 284), at § 29; E.C.H.R., *Deumeland* judgment, of 29.5.1986, Publications of the Court, Series A, No. 100, § 63.

289 H. Mosler, Problems of Interpretation in the Case Law of the European Court of Human Rights, in: Essays on the development of the international legal order in memory of Haro F. Van Panhuys (F. Kalshoven/P.J. Kuyper/J.G. Lammers [eds.], 1980), 162.

common denominator of domestic legislation of the member states[290]. For the majority of the Court, this question remains more open[291].

That a comparative inquiry should play a role in autonomous interpretation as it does in margin analysis, is not surprising, since autonomous interpretation and margin of appreciation are opposites on the same line: "The greater the margin of national appreciation the less the Court will be tempted to impose an autonomous interpretation of the provisions in point should there not be a consensus on the issue. Where the Court thinks it right to adopt a common or majoritarian view it will reduce the margin of appreciation and adopt an autonomous view"[292].

How should a distinction be made between legal terms susceptible of autonomous interpretation and "indeterminate expressions" giving room for margin analysis? This is one of the difficult tasks of the Court. Specific questions about the desirability of autonomous interpretation of specific terms express the general issue which is at the heart of the margin of appreciation debate, namely the extent to which the Court should establish uniform standards of enforcement of fundamental rights.

Evolutive interpretation

The Court explicitly considers the Convention to be a living instrument[293]. Rather than adopt a historical method, focussing on the "Framers' intent", the Court interprets the concepts used in the Convention in the light of today's society[294]. It has been argued that such an evolutive interpretation is essential with regard to human rights treaties, because of their vocation to provide a continuing framework for the protection of individual rights and liberties. While the original meaning may be decisive for some other kinds of treaties, it cannot determine human rights treaties, less they would risk becoming progressively ineffective with time[295].

In discerning the changes that have occurred, consensus analysis plays an important role. The Court evaluates European thought and practice

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290 E.C.H.R., *König* judgment (note 284), dissent Judge Matscher, p. 29 – 33.

291 F. Ost, The Original Canons of Interpretation of the European Court of Human Rights, in: The European Convention for the Protection of Human Rights (M. Delmas-Marty [ed.], 1992), 307.

292 Ibid., at 306.

293 E.C.H.R., *Tyrer* judgment (note 63), at § 31.

294 Matscher (note 2), at 68.

295 Mahoney (note 200), at 65.

and may decide on this basis that a practice that used to be acceptable in the past, constitutes a human rights violation today. It would not be reasonable, however, to oblige all the member states to evolve in the same way. The margin of appreciation provides part of the conceptual framework necessary for thinking about these difficult questions[296]. It helps balance need for progress in the Convention's net of protection against the respect for the domain of the national authorities[297].

d. Cultural relativism of human rights

Cultural relativism in general

One of the "hot topics" in human rights theory today, is the contestation of the universality of human rights. It is a fact that human rights, and especially civil and political rights (which are the rights protected in the European Convention), were historically the result of a Western movement of thought (Enlightenment, Humanism), and that they reflect a Western vision of the world: atomistic, individualist, secular etc. Representatives of non-Western cultures take this constatation as a starting point to make a claim of cultural relativism of human rights.

Cultural relativism of human rights has been defined as "the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society"[298].

"Cultural" differences among the contracting states of the European Convention

Most of the member states of the Council of the Europe are among those Western countries whose values determined the body of international human rights instruments. Furthermore, the intention of the drafters of the European Convention was precisely to reflect those cultural, political and legal elements that are shared by the contracting states and underly their legal systems.

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[296] Merrills (note 40), at 157.

[297] Mahoney (note 200), at 84.

[298] F. Teson, International Human Rights and Cultural Relativism, 25 Virginia Journal of International Law 870 (1985).

Nevertheless, it cannot be denied that apart from this common background, important differences exist among the contracting states.

From the legal point of view, there is the combination of common law and civil law, of unitary and federalist states etc. The status of the Convention itself differs among the contracting states, some incorporating it in their domestic law, others not.

With regard to religion, different christian sects are represented. The history of the religious wars fought in Europe teaches us not to underestimate the oppositions among the views of these sects. Moreover, with Turkey, Islam is present in the Council of Europe.

Politically speaking, all contracting states are supposed to be democracies today. A commitment to democracy characterizes the European Convention. But several states experienced dictatorship in their recent past, and the new Eastern-European members only just emerged from a communist regime.

In terms of culture in general, all Europeans are aware of the differences between Latin, Germanic, Anglo-Saxon, Nordic and Slav mentalities.

The Eastern European member states developed separately from Western Europe during at least 50 years. Some of these countries have experienced for centuries influences that are completely foreign to Western Europe (for instance by being part of the Ottoman Empire). This is bound to have profoundly affected their societies' structures, value judgments etc.

Economically speaking, all contracting states have a market economy today, but differences exist with regard to the state's role in counterbalancing market forces. Moreover, many of the contracting states are members of the common market of the European Union, which sets the non-members somewhat apart in this respect.

Margin analysis criteria and cultural relativism

The doctrine of margin of appreciation is largely designed to take these differences into account. In the examination of the criteria used in margin of appreciation analysis, this is expressed in the "local situations" criterion (C.8.), and to some extent in the respect for important national policies (C.3.c.). The consensus approach (C.4.) implies in a certain way a negation of cultural relativism, which is not surprising since it is used to limit the margin of appreciation. The contradiction between the consensus approach and the cultural relativist approach is illustrated by the situation of a single state deviating in its legislation or practice from the Eu-

ropean standard, and justifying this deviation with cultural arguments. A cultural relativist approach would interpret the isolated position of that state as an illustration of the particularity of its cultural tradition. The more distinct and profound a cultural element is, the more care should be taken before it is rejected in favour of uniformity. In a consensus approach to the contrary, the isolated position of the state is suspect. Instead of strengthening the credibility of the claim, it weakens it. Especially if other contracting states used to have the same practice or legislation but changed it, the Court will impose the majority solution.

Qualitative and quantitative distinctions among cultural relativist claims

Cultural relativist claims are made with varying strength and scope. Jack Donnelly[299] distinguishes four quantitative measures. Radical cultural relativism holds that culture is the sole source of the validity of a moral right or rule, as opposed to radical universalism, which holds that culture is irrelevant for this purpose. Strong cultural relativism claims that culture is the principal source of validity of a moral right or rule, but accepts universal human rights standards as a check on potential excesses of relativism. Weak cultural relativism accepts universality of human rights, but recognizes culture as an important source of the validity of moral rights and rules, and relativity as a check on potential excesses of universalism.

Donnelly also distinguishes three qualitative measures: cultural relativity may concern the substance of lists of human rights, the interpretation of individual rights and the form of implementation of particular rights.

Other scholars make similar distinctions[300].

With regard to the European Convention, Donnelly's quantitative distinction is hard to apply. It cannot be denied that the framers of the Convention regarded the common culture of the contracting states as one

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[299] J. Donnelly, Universal Human Rights in Theory and Practice (Ithaka 1989), 109–110.

[300] Cf. D.L. Donoho, Relativism in International Human Rights (paper, Harvard Law School, 1989), 20–21: three levels of specificity: 1) shared, fundamental human rights values as expressed in general, abstract rights; 2) the specific elements required to satisfy the shared values underlying these general abstract rights, including their specific content and interpretative meaning; 3) the forms of social mechanisms by which such values may be protected and implemented.

of the principal sources of European human rights. Because of their "common denominator" approach, however, this view does not make them strong cultural relativists. But it does give credit to the claims of some contracting states in some circumstances that their cultural particularities should be taken into account. Because the common background idea is grounded in reality, no need exists for these states to make claims of strong relativism. The concept of a "margin" of appreciation fits into a weak relativist position, in which the role of national cultures is merely corrective, a limited counterbalance to the general universalist rule.

Concerning the qualitative distinction, the European Court made it very clear that the substance of the rights can never be impeded upon (cf. C.7.). The variations which the margin of appreciation allows for, are restricted to the realms of interpretation and implementation.

The new member states and cultural relativism

Earlier (C.8.) reference was made to the hypothesis of a different attitude towards human rights among the Eastern European public. It was suggested that the Court, in the line of its present jurisprudence, is likely to interpret this as a "staying behind" of the public opinion in relation to the legal changes, to be remedied by increasing human rights awareness in society.

But what if the differences in attitude and opinion appear to be so deeply ingrained that a "catching up" cannot be realized in one generation? Will the European Court insist on a progressive attitude and on using the exact same human rights standards in all the countries under its jurisdiction, neglecting the gap between law and society, or between national and international legal standards? Or will the Court use its margin of appreciation doctrine as a tool to temporarily accomodate real cultural differences among its member states, risking thereby to slow down the human rights progress among the new members?

If this question arises, it will be a tough one to solve ...

Extrapolation to the world level

To what extent can the margin of appreciation doctrine, in its capacity as a tool to accomodate cultural relativist claims, be extrapolated to the world level of human rights protection?

By the "world level" reference is made to all the institutions, bodies and procedures in which human rights decisions are taken by the "world com-

munity", including a hypothetical equivalent of the European system. That those decisional procedures are generally not judicial, does not mean there can be no room for a margin of appreciation doctrine. Whenever a determination is made about the violation of human rights, an element of deference to national instancies is possible, as well as a serious weighing of their culturally-based arguments.

The most important differences in this respect between the universal and the European level seem to be the absence of a real universal enforcement system and the different quantity and quality of cultural differences.

In the absence of a strong universal system for the enforcement of human rights, the role of the states as first guardians of those rights is even more important than in the European context. It can be argued that therefore they should be given some credit, in the form of a cultural margin. Also, the decision-making bodies on the universal level generally enjoy less recognition and support than the European Court and Commission eventually acquired. Therefore a deferential attitude may be justified by motives of self-preservation.

The primarily western background of international human rights law, which created a connection between European legal and value systems and the European Convention, is responsible for the wide gap existing between many non-western cultures and the universal human rights treaties. The wideness of this gap makes for claims of strong cultural relativism, often affecting even the substance of the lists of human rights. The margin of appreciation doctrine cannot accomodate these radical claims.

On the other hand, it may be doubted whether it is desirable to accomodate them. While different interpretations and applications of rights may be accepted, as well as differences in prioritization or hierarchies of rights, there must be a limit to the divergencies that can be tolerated, less the whole notion of "human" rights loses its meaning. In this respect, it may be interesting to use the concept of an inviolable core or "substance" of each right.

Some of the other criteria used by the European Court in its margin analysis must, however, be rejected in the universal context.

The consensus argument, with its inherent risk of a cultural majority oppressing a cultural minority, is justifiable in the European context only because of the similar political, legal, cultural and socio-economic conditions in the member states. Nevertheless, a comparative analysis of the evolution of the legal systems of countries with similar background (a limited consensus criterion) can be useful to avoid one of the main risks of a cultural relativist approach: its conservative tendency.

The hierarchical argument assumes that there is agreement among the member states about the hierarchy. In the universal context, where more substantial differences exist among the states, the hierarchy of rights is likely to be one of the main points of disagreement. It is a field in which variations can be allowed.

An additional problem at the world level is that of the correct interpretation of cultural elements. Since human rights usually protect people against their government, a conflict of interests arises when it is left to the government to decide on the validity of cultural arguments that would justify interferences with human rights. Moreover, in heterogeneous societies, or societies in transition, even neutral experts may find it very hard to give an objective account of cultural values and practices.

It should also be noted that although a "margin of appreciation" analysis can be a helpful tool to promote respect for different cultures inside the international system for the protection of human rights, it can never provide the whole solution. In order to really respect different cultures, institutional arrangements have to be made in order to make sure that all voices are heard. One of the requirements is a higher degree of representativity of the bodies that make human rights decisions.

E. Conclusion

Some authors claim that the margin of appreciation doctrine seriously threatens the Convention's ability to protect human rights, undermining the independence and ultimate decision-making power of the Commission and the Court[301]. This is surely a very exaggerated and pessimistic view.

In spite of a long tradition of applying the margin of appreciation doctrine, the Court has in many cases interpreted the Convention in an extensive and innovative way. It has been argued that it is precisely because of the acceptance of a domestic margin of appreciation that the Court has been able to do this without excessive protest from the contracting states[302].

Furthermore, the margin of appreciation doctrine performs a useful role inside the human rights protection system of the European Conven-

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[301] Feingold (note 77), at 106; cf. Burke (note 14), at 1129–1130; T.H. Jones, The devaluation of human rights under the European convention, Public Law 430 – 449 (1995).

[302] Schokkenbroek (note 248), at 58.

tion. It provides an elegant solution for the tension existing in a supranational judicial system between national and European legal rules, so that it is not necessary to completely subordinate one to the other[303].

It is, however, important to control the use of the margin of appreciation doctrine to avoid it becoming a door through which arbitrariness and uncertainty would enter the European Convention. On the basis of the cases in which it has been applied up to today, it seems possible to elaborate a methodology and some clear standards to be used by the Court when performing margin analysis. However, because flexibility is an essential element of the margin of appreciation, absolute predictability is out of the question. The concrete circumstances and context of each case will always remain very important in determining the margin of appreciation.

Two important warnings that were made in doctrine deserve to be mentioned:

First, margin of appreciation may not lead to the Court eschewing independent determination of the facts and the law, because then "decisions by European authorities are likely to become mere ratifications of national action based on trust that member-states have exercised their discretion reasonably"[304]. As early as 1973, Morrisson stated that it was vital to the continued healthy usage of the margin of appreciation concept to develop the practice of routinely gathering and assessing as much evidence in each case as possible before deciding to invoke margin of appreciation[305]. In the Court's rhetoric it is frequently mentioned that the domestic margin of appreciation goes hand in hand with a European supervision. This European supervision should always be performed responsibly.

Second, the Court should not use margin of appreciation as a merely pragmatic substitute for a thought-out approach to the problem of the proper scope of review[306]. This risk is present if margin of appreciation prevents the articulation of the reasons for deference in any particular case. Margin analysis can be a very good tool for the Court, but it is not an end or a justification in and of itself.

It is appropriate to add a third warning. The combined effects of the expansion of the European human rights protection system and of the structural changes at the Court level risk to make it even more difficult

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303 Delmas-Marty (note 35), at 320.
304 Burke (note 14), at 1134.
305 Morrisson, Jr. (note 258), at 285.
306 Macdonald (note 39), at 84, 124.

to distinguish clear lines in the case-law. Yet especially as regards the participation of new member states, the use made of the margin of appreciation doctrine may be important in accompanying the transition. It is therefore vital that the judges in Strasbourg agree upon the role of the doctrine and upon the tests and criteria by which it is governed.