

Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?

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Abstract

The doctrine of the national margin of appreciation is well established in the case law of the European Court of Human Rights. In applying this essentially judge-made doctrine, the Court imposes self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute. The areas in which the doctrine has most often been applied will be presented here, looking at various examples from case law. After a brief overview of the doctrine's origin, the analysis will focus on the situations in which the margin has been allowed or denied. Does it relate merely to factual and domestic-law aspects of a case? What is the scope of the margin of appreciation when it comes to interpreting provisions of the European Convention on Human Rights? What impact does an interference (whether disproportionate or not) with a guaranteed right have on the margin allowed? Is there a second-degree or 'reverse' margin of appreciation, whereby discretionary powers can be distributed between executive and judicial authorities at domestic level? Lastly it is noteworthy that Protocol No 14, now ratified by all Council of Europe Member States, enshrines in Article 12—at least to some extent—an obligation to apply a margin of appreciation. One essential

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question remains: by allowing any margin of a certain width, is the European Court simply waiving its power of review or is it attributing responsibility to the domestic courts in the interest of a healthy subsidiarity?

I. INTRODUCTION

IT IS WELL known that under Article 32 of the European Convention on Human Rights the Court's jurisdiction extends to all matters concerning the interpretation and application of the Convention and the Protocols thereto. The intention of the States was to make the Court the sole interpreter of this instrument whenever it was called upon. Prior to the lodging of an application, the rights guaranteed by the Convention have or have not been applied by the domestic authorities. Given that the Court can be seised of a case only after the exhaustion of domestic remedies,¹ it will inevitably take a retrospective look at a case in assessing whether or not the Convention has been breached.

The domestic margin of appreciation is a notion which refers to the room for manoeuvre that the European Court of Human Rights is prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights.² The doctrine thus mainly concerns the relations between the Court and the domestic legal orders. As one author points out, 'there is a consensus of legal opinion that the margin of appreciation is a tool of jurisprudential origin through which the European Court leaves the national authorities a certain autonomy in applying the Convention'. He explains that

in respect of those acts that may be covered by the doctrine, the margin of appreciation confers what appears to be a mild form of immunity, entailing a level of European review that is less intense than the review that the Court is entitled to perform on the basis of its 'full jurisdiction' under ... Article 32 of the Convention. Instead of being fully 'reviewable', so to speak, those acts will be scrutinised only if their effects 'overstep' the scope of the margin of appreciation left to national authorities.³

¹ Art 35 of the Convention reads as follows:

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

For a recent discussion concerning Luxembourg and the existence of an effective domestic remedy for the length of proceedings to be used before applying to the Court, see the judgment in *Leandro Da Silva v Luxembourg*, no 30273/07, 11 February 2010.

² S Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Human Rights Files, no 17 (Strasbourg, Council of Europe, 2000) 5.

³ J Callewaert, 'Quel avenir pour la marge d'appréciation?' in P Mahoney, F Matscher, H Petzold and L Wildhaber (eds), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal* (Cologne, Carl Heymanns, 2000) 149 [translation];

To quote Judge Malinverni's dissenting opinion in *Lautsi v Italy*:⁴

Whilst the doctrine of the margin of appreciation may be useful, or indeed convenient, it is a tool that needs to be handled with care because the scope of that margin will depend on a great many factors: the right in issue, the seriousness of the infringement, the existence of a European consensus, etc. The Court has thus affirmed that 'the scope of this margin of appreciation is not identical in each case but will vary according to the context.... Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned' [*Buckley v the United Kingdom*, 25 September 1996, § 74, *Reports of Judgments and Decisions* 1996-IV]. The proper application of this theory will thus depend on the importance to be attached to each of these various factors. Where the Court decrees that the margin of appreciation is a narrow one, it will generally find a violation of the Convention; where it considers that the margin of appreciation is wide, the respondent State will usually be 'acquitted'.⁵

The term 'margin of appreciation' is not to be found either in the text of the Convention⁶ or in the preparatory work. However, the doctrine is well established in the case law of the European Court of Human Rights. In applying this essentially judge-made doctrine, the Court imposes self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute.

La doctrine s'accorde à présenter la marge d'appréciation comme un outil d'origine jurisprudentielle permettant à la Cour européenne de laisser aux autorités nationales une certaine autonomie dans l'application de la Convention. Aux actes qui peuvent s'en réclamer, la marge d'appréciation confère ce qui apparaît à l'analyse, comme une forme atténuée d'immunité, entraînant un contrôle européen moins intense que celui que la Cour pourrait exercer au titre de la 'plénitude de juridiction' dont l'investit l'article 32 nouveau de la Convention. Au lieu d'être, en quelque sorte, entièrement 'révisables', ces actes ne le seraient plus que dans la mesure où leurs effets 'dépassent' le champ de la marge d'appréciation laissé aux autorités nationales.

⁴ *Lautsi v Italy* [GC], no 30814/06, 18 March 2011.

⁵ Dissenting opinion of Judge Malinverni, joined by Judge Kaladjieva; *Lautsi v Italy* (n 4).

⁶ See, however, the recent initiative of the Brighton Declaration (19–20 April 2012) to amend the Convention to mention the margin of appreciation doctrine specifically in the Preamble (see point 12(b) of the Declaration). The Declaration also calls for its application in the Court's examination of admissibility under Art 35 (see point 15(d) of the Declaration). In his earlier address to the meeting of the Ministers' Deputies on 23 February 2012, commenting on a draft of the Declaration in which it had been proposed actually to amend Art 35 to that effect, the President of the Court, Sir Nicolas Bratza responded:

Looking at what the United Kingdom is proposing—that is, a test based on the fact that the national courts have examined the Convention issues without manifestly erring in their application and interpretation of the Convention—it has to be said that we doubt whether it would be easy to apply. Moreover, as we point out in the preliminary opinion, this test reflects the Court's practice and how it sees the proper operation of the principle of subsidiarity as expressed in, for example, both the margin of appreciation and the fourth instance rule. That principle and these two distinct doctrines have often been confused in discussions about the Court's future. The Court has consistently stressed the value of these notions in its case-law. It understands the importance which Contracting Parties attach to them. *It is not however convinced that enshrining them in the Convention would serve any useful purpose.* This is particularly true of the margin of appreciation which by definition requires flexibility of application. (emphasis added)

Various reasons for this have been put forward in legal writings, for example: the subsidiarity of the Strasbourg Court's review, respect for pluralism and State sovereignty, a lack of resources preventing the Court from extending its examination of cases beyond a certain level, the Court's inability to carry out difficult socio-economic balancing exercises, or the idea that the European Court of Human Rights is too distant to settle particularly sensitive cases.⁷

This chapter will first present an overview of the doctrine's origin and then look at various examples from case law. Through this examination it should be possible to establish the extent of the margin, albeit in a rather approximate manner. After all, the term 'margin' refers usually to a residual area, the main core not constituting the margin and thus remaining within the Court's power of review.⁸ But as this study will show, in those situations where the Court imposes self-restraint in its task of interpretation, it is no longer the margin that is left to the national authorities, but in fact the main part of the interpretation work, with the Court simply retaining a margin of review. The notion is not therefore devoid of ambiguity.

When the Court waives its power of review—if indeed one may speak of a waiver—what exactly does it leave to the assessment of the national authorities? Merely the factual aspects of a case? And what about the domestic law? To what extent is the Court entitled to interpret domestic law, or even international law?

The margin of appreciation doctrine has given rise to numerous books and academic articles.⁹ It would not therefore be appropriate to present once

⁷ F Tulkens and L Donnay, 'L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?' (2006) *Revue de science criminelle et de droit pénal comparé* 3.

⁸ Jean-Paul Costa has observed as follows:

[U]n paramètre supplémentaire, important est *la marge nationale d'appréciation* laissée aux États. En réalité, la balance de la Cour s'efforce d'être la plus précise possible (on a pu parler de balance d'apothicaire). Mais il existe une marge de tolérance, ou d'approximation (comme pour les radars qui mesurent les excès de vitesse des voitures!). La marge d'appréciation reconnue aux États peut faire pencher la balance dans le sens de la non-violation d'un des articles 8 à 11.

See JP Costa, 'Les articles 8 à 11 de la Convention et le contrôle juridictionnel de la Cour européenne des droits de l'homme' (2005) 15 *Annales du droit luxembourgeois* 13, esp 19.

⁹ Among the numerous studies on the margin of appreciation, three works should be mentioned in particular: HC Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague, Kluwer Law International, 1996); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia, 2002); and E Kastanas, *Unité et diversité: notions autonomes et marge d'appréciation des États dans la jurisprudence de la Cour européenne des droits de l'homme* (Brussels, Bruylant, 1996). See also the following articles: W 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 F Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in honour of de Gerard J. Wiarda* (Cologne, Heymanns, 1988) 201; R St J Macdonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights' in G Arangio-Ruiz et al (eds), *Le droit international à l'heure de sa codification, Etudes en l'honneur de Roberto Ago* (Milan, Giuffrè, 1987) vol III, p 187 and by the same author, 'The

again a comprehensive study of the case law. More modestly, this chapter will seek to contribute to the debate surrounding the justification for the margin of appreciation doctrine: by allowing any margin of a certain width, is the European Court simply waiving its power of review or is it attributing responsibility to the domestic courts in the interest of a healthy subsidiarity?

To further the discussion, this chapter will first focus on the judge-made nature of the doctrine, briefly presenting the areas in which the margin of appreciation has most often been applied, with an overview of its origins. It will then examine the object and extent of the doctrine, dwelling on the significance of the proportionality principle. Reference will be made to recent developments concerning the adaptation of the margin to the separation of powers at domestic level. Lastly, it will be appropriate to look to the future, with particular consideration of the role of Protocol No 14 and its foreseeable impact on the subsidiarity of the European review mechanism.

The issue of the execution of the judgments of the European Court of Human Rights pursuant to Article 46 of the Convention will not be discussed in this study. The scope of the margin afforded to the States in this respect has been developed in the Court's recent case law, especially in relation to pilot judgments.¹⁰

Margin of Appreciation' in R St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht, Nijhoff, 1994) 83; E Brems, 'The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights' in (1996) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240; Lambert, 'Marge nationale d'appréciation et contrôle de proportionnalité' (n 11) 63. The proceedings of a seminar entitled 'The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice' were published in a special issue of the (1998) *Human Rights Law Journal* 1 f—with contributions by Paul Mahoney, Johan Callewaert, Clare Ovey, Søren Prebensen, Yves Winisdoerffer, Jeroen Schokkenbroek and Michael O'Boyle; Tulkens and Donnay, 'L'usage de la marge d'appréciation' (n 7); S Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?' (2010) *UCL Human Rights Review* 1; P Gallagher, 'The European Convention on Human Rights and the Margin of Appreciation' in University College Dublin, *UCD Working Papers in Law, Criminology and Socio-Legal Studies*, Research Paper No 52/2011; and most recently C Rozakis, 'Through the Looking Glass: An "Insider"'s View of the Margin of Appreciation' in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa* (Paris, Dalloz, 2011) 526. Lastly, mention should be made of the relevant chapters in the following monographs: S van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux* (Brussels, Bruylant and Publications des facultés universitaires Saint-Louis, 2001) ch V, p 483; G Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, foreword by D. Spielmann (Oxford, Oxford University Press, 2007; reprinted 2010) ch 4, p 80 (a contribution entitled 'Two Concepts of the Margin of Appreciation', which had previously been published in the (2006) *Oxford Journal of Legal Studies* 705); and L Garlicki, 'The European Court of Human Rights and the "Margin of Appreciation" Doctrine. How Much Discretion is Left to a State in Human Rights Matters?' in Cheng-Yi Huang (ed), *Administrative Regulation and Judicial Remedies* (Taipei, Taiwan, Institutum Iurisprudentiae Academia Sinica, 2011) 53.

¹⁰ *Greens and MT v the United Kingdom*, nos 60041/08 and 60054/08, §§ 103–22, ECHR 2010 (extracts); and *Ananyev and Others v Russia*, nos 42525/07 and 60800/08, §§ 179–240, 10 January 2012.

II. NATIONAL MARGIN OF APPRECIATION: AN ESSENTIALLY JUDGE-MADE DOCTRINE

A. Origins of the Doctrine

The origins of the doctrine¹¹ date back to 1958, the year before the Court was established. It was the former European Commission of Human Rights which, in its decision of 26 September 1958 concerning the inter-State application *Greece v the United Kingdom* on the subject of Cyprus, held that the respondent government should, in respect of Article 15 of the Convention, be able to exercise a ‘certain measure of discretion’ (*une certaine marge d’appréciation*).¹² Briefly, Article 15 contains the following first paragraph:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

In the case of *Lawless v Ireland*, a case that gave rise to the first judgment of the European Court of Human Rights on 1 July 1961,¹³ the Commission once again referred to the ‘margin of appreciation’ afforded to States in determining the existence of a public danger threatening the life of the nation. As to the Court itself, it was in the case of *Ireland v the United Kingdom* (18 January 1978)¹⁴ that it first *expressly* used the term ‘margin of appreciation’.¹⁵ Addressing the interpretation of Article 15, the Court found as follows:

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 emergency

¹¹ See P Lambert, ‘Marge nationale d’appréciation et contrôle de proportionnalité’ in F Sudre (ed), *L’interprétation de la Convention européenne des droits de l’homme* (Brussels, Nemesis, 1998) 63.

¹² Application no 176/56, *Yearbook of the European Convention on Human Rights*, vol 2, pp 174 and 176.

¹³ *Lawless v Ireland* (no 3), 1 July 1961, Series A no 3.

¹⁴ *Ireland v the United Kingdom*, 18 January 1978, § 207, Series A no 25.

¹⁵ For earlier implicit references to the doctrine, see, in respect of Art 14 of the Convention, the Case ‘*relating to certain aspects of the laws on the use of languages in education in Belgium*’ (merits), 23 July 1968, § 10 of point IB, Series A no 6, and in respect of Art 8 § 2 of the Convention, *De Wilde, Ooms and Versyp v Belgium*, 18 June 1971, § 93, Series A no 12 (where the Court used the term ‘power of appreciation’).

and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para 1 leaves those authorities a wide margin of appreciation.

Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Article 19), is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis (Lawless judgment of 1 July 1961, Series A no 3, p 55, para 22, and pp 57–59, paras 36–38). The domestic margin of appreciation is thus accompanied by a European supervision.

The origins of the doctrine can thus be traced back to cases concerning the vital interests of the nation—an area in which the Convention organs were reluctant to go further. The combating of terrorism has recently given rise to an 'up-dated' or 'reverse' application of the margin of appreciation doctrine, as will be shown later.

B. Applications of the Doctrine

The Court has developed the doctrine mainly when addressing the various permissible restrictions on rights and freedoms. In its *Handyside* judgment of 7 December 1976¹⁶ concerning freedom of expression and its limits, the Court made the following observations in applying the margin of appreciation doctrine:

48. The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (judgment of 23 July 1968 on the merits of the 'Belgian Linguistic' case, Series A no 6, p 35, para 10 in fine). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26).

... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.... Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.

Consequently, Article 10 para 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (*Engel and others* judgment of 8 June 1976, Series A

¹⁶ *Handyside v the United Kingdom*, 7 December 1976, Series A no 24.

no 22, pp 41–42, para 100; cf., for Article 8 para 2, *De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no 12, pp 45–46, para 93, and the *Golder* judgment of 21 February 1975, Series A no 18, pp 21–22, para 45).

49. Nevertheless, Article 10 para 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.

...

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

The restrictions on the rights provided for by Articles 8 to 11 of the Convention (private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of association) call 'naturally' for the application of a margin of appreciation.¹⁷ By establishing such restrictions, which are admittedly limited in number, these provisions lead the European Court to look at the justification for an interference and to consider whether it is proportionate or disproportionate. The same applies to the implied limitations in Article 3 of Protocol No 1, which guarantees free elections. Article 1 of Protocol No 1 to the Convention is the only provision which expressly enshrines a discretionary power of the national authorities. More will be said about that later. However, even in that context the margin will not be unlimited, because an arbitrary or disproportionate interference will entail a violation of the Article.

Another example concerns Article 9 of the Convention, which guarantees freedom of thought, conscience and religion. In respect of the wearing of the Islamic headscarf in Turkish universities, the Court found as follows in its *Leyla Şahin* judgment of 10 November 2005:¹⁸

109. Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance (see, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek*, cited above, § 84, and *Wingrove v the United Kingdom*, judgment of 25 November 1996, *Reports* 1996-V, pp 1957–58, § 58). This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially (as

¹⁷ Tulkens and Donnay, 'L'usage de la marge d'appréciation' (n 7) 7.

¹⁸ *Leyla Şahin v Turkey* [GC], no 44774/98, ECHR 2005-XI.

the comparative-law materials illustrate—see paragraphs 55–65 above) in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society (see *Otto-Preminger-Institut v Austria*, judgment of 20 September 1994, Series A no 295-A, p 19, § 50), and the meaning or impact of the public expression of a religious belief will differ according to time and context (see, among other authorities, *Dahlab v Switzerland* (dec), no 42393/98, ECHR 2001-V). Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order (see, *mutatis mutandis*, *Wingrove*, cited above, p 1957, § 57). Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context (see, *mutatis mutandis*, *Gorzelik and Others*, cited above, § 67, and *Murphy v Ireland*, no 44179/98, § 73, ECHR 2003-IX).

Furthermore, the Court has been developing the doctrine in other areas, venturing into ‘new territories’.¹⁹ According to its case law, the doctrine extends to procedural rights and in particular under Article 6. For example, as regards a refusal to submit a preliminary question to a constitutional court or to the Court of Justice of the European Union, the Court has displayed considerable tolerance. In *Ernst v Belgium* the Court found as follows in its judgment of 15 July 2003:²⁰

74. The Court first observes that the Convention does not guarantee, as such, a right to have a case referred by a domestic court for a preliminary ruling to another domestic or international court. It would also reiterate its case-law to the effect that the ‘right to a court’, of which the right of access is one aspect, is not absolute, but is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see, among other authorities, the judgment in *Brualla Gómez de la Torre v Spain*, 19 December 1997, *Reports* 1997-VIII, p 2955, § 33). The right to bring a case before a court through a preliminary ruling mechanism cannot be absolute either, even where legislation reserves a legal domain for the exclusive review of a particular court and imposes an unconditional obligation on other courts to refer any related questions to it. As the Government argued, it is part of the operation of a such a mechanism that a court must ascertain whether it can or must submit a preliminary question, ensuring that the question is one to be resolved in order to settle the dispute before it. That being said, it cannot be excluded that, in certain circumstances, a refusal by a domestic court that is called upon to rule at last instance might breach the principle of fair proceedings, as provided for in Article 6 § 1 of the Convention, in particular where such a refusal is found to be arbitrary (see *Dotta v Italy* (dec), no 38399/97, 7 September

¹⁹ ‘*de nouvelles contrées*’: Tulkens and Donnay, ‘L’usage de la marge d’appréciation’ (n 7) 10.

²⁰ *Ernst and Others v Belgium*, no 33400/96, 15 July 2003 (unofficial translation).

1999, unreported, and *Predil Anstalt SA v Italy* (dec), no 31993/96, 8 June 1999, unreported).²¹

However, as will be shown later, the Court has been far more reluctant to accept a margin of appreciation where non-derogable rights are at stake. The right to life or the prohibition of torture are hardly conducive to the application of a margin of appreciation.

III. OBJECT AND SCOPE OF THE DOCTRINE

Having identified the areas in which the margin of appreciation doctrine has been most commonly used, its object and scope will now be examined.

The object first of all. According to the case law, there are two realms that typically fall within the margin of appreciation of the national authorities and the domestic courts in particular, namely questions of fact and of domestic law.

A. Facts and Law

The assessment of the facts falls in the first place to the domestic authorities and courts. The Court will not normally interfere with findings of fact or interpretation of national law unless they are of an obviously arbitrary character. In the *Klaas* judgment of 22 September 1993²² the Court pointed out as follows:

[T]hat it is not normally within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them (see, *inter alia*, the *Edwards v the United Kingdom* judgment of 16 December 1992, Series A no 247-B, p 12, para 34, and the *Vidal v Belgium* judgment of 22 April 1992, Series A no 235-B, pp 32–33, paras 33–34).²³

Questions of fact or domestic law (or even international law) thus, in principle, fall outside the Court's review. *In principle*, because even for such questions the Court reserves the right to review, on the fringe, the assessment made by the domestic courts and authorities. As regards domestic law, and according to well-established case law, the Court is constantly

²¹ Concerning the refusal to submit a preliminary question to the European Court of Justice, see D. Spielmann, 'La prise en compte et la promotion du droit communautaire par la Cour de Strasbourg' in *Les droits de l'homme en évolution: Mélanges en l'honneur du professeur Petros Pararas* (Sakkoulas, Bruylant, 2009) 455. See, for a recent judgment, *Ullens de Schooten and Rezabek v Belgium*, nos 3989/07 and 38353/07, 20 September 2011.

²² *Klaas v Germany*, 22 September 1993, Series A no 269.

²³ *Klaas* (n 22) § 29 of the judgment.

reiterating that its task, under Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the High Contracting Parties. It is primarily for the national authorities, notably the courts, to interpret and apply domestic law.²⁴ This holds true also for the interpretation of private instruments, for example clauses in wills, provided that the domestic court's assessment is not unreasonable or arbitrary, or blatantly inconsistent with the fundamental principles of the Convention. The Court found as follows in its *Pla and Puncernau v Andorra* judgment of 13 July 2004,²⁵ concerning the exclusion of an adopted child from inheritance as a result of a judicial interpretation of the testator's intent:

46. On many occasions, and in very different spheres, the Court has declared that it is in the first place for the national authorities, and in particular the courts of first instance and appeal, to construe and apply the domestic law (see, for example, *Winterwerp v the Netherlands*, judgment of 24 October 1979, Series A no 33, p 20, § 46; *Iglesias Gil and AUI v Spain*, no 56673/00, § 61, ECHR 2003-V; and *Slivenko v Latvia* [GC], no 48321/99, § 105, ECHR 2003-X). That principle, which by definition applies to domestic legislation, is all the more applicable when interpreting an eminently private instrument such as a clause in a person's will. In a situation such as the one here, the domestic courts are evidently better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute submitted to them and the various competing rights and interests (see, for example, *De Diego Nafría v Spain*, no 46833/99, § 39, 14 March 2002). When ruling on disputes of this type, the national authorities and, in particular, the courts of first instance and appeal have a wide margin of appreciation.

Accordingly, an issue of interference with private and family life could only arise under the Convention if the national courts' assessment of the facts or domestic law were manifestly unreasonable or arbitrary or blatantly inconsistent with the fundamental principles of the Convention.

As regards domestic legislation, the Court reiterated the following principle in its *Miragall Escolano* judgment of 25 January 2000:²⁶

33. ... that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts of appeal and of first instance, to resolve problems of interpretation of domestic legislation (see, *mutatis mutandis*, the *Brualla Gómez de la Torre* judgment cited above, p 2955, § 31, and the *Edificaciones March Gallego S.A.* judgment cited above, p 290, § 33).

The role of the Court is limited to verifying whether the effects of such interpretation are compatible with the Convention.

²⁴ See, among many other authorities, *Rotaru v Romania* [GC], no 28341/95, § 53, ECHR 2000-V; *Kopp v Switzerland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, § 59.

²⁵ *Pla and Puncernau v Andorra*, no 69498/01, ECHR 2004-VIII.

²⁶ *Miragall Escolano and Others v Spain*, nos 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98, ECHR 2000-I.

Moreover, as the Court pointed out in its *Korbely* judgment of 19 September 2009²⁷ concerning domestic and international law:

72. Furthermore, the Court would reiterate that, in principle, it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v Germany* [GC], no 26083/94, § 54, ECHR 1999-I).²⁸

A wide discretion is also left to Contracting States concerning the organisation of their legal systems as such:

The Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved. In particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial.²⁹

B. Interpretation of the Convention and Width of the Margin

How wide should the margin of appreciation be when it comes to interpreting the provisions of the European Convention on Human Rights? The question is a controversial one, even within the Court. This can be seen from three examples: one dissenting opinion of Judge De Meyer and two more recent concurring opinions of Vice-President Rozakis and Judge Malinverni.

In his partly dissenting opinion appended to the *Z v Finland* judgment of 25 February 1997,³⁰ in a case concerning medical secrecy, Judge De Meyer commented as follows:

III. In the present judgment the Court once again relies on the national authorities' 'margin of appreciation'.

I believe that it is high time for the Court to banish that concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies.

²⁷ *Korbely v Hungary* [GC], no 9174/02, 19 September 2008.

²⁸ Compare the Chamber judgment in *Kononov* (*Kononov v Latvia*, no 36376/04, § 110, 24 July 2008). This case gave rise to a Grand Chamber judgment: *Kononov v Latvia* [GC], no 36376/04, ECHR 2010.

²⁹ *Sejdovic v Italy* [GC], no 56581/00, § 83, ECHR 2006-II.

³⁰ *Z v Finland*, 25 February 1997, *Reports of Judgments and Decisions* 1997-I.

It is possible to envisage a margin of appreciation in certain domains. It is, for example, entirely natural for a criminal court to determine sentence—within the range of penalties laid down by the legislature—according to its assessment of the seriousness of the case.

But where human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not.

On that subject the boundary not to be overstepped must be as clear and precise as possible. It is for the Court, not each State individually, to decide that issue, and the Court's views must apply to everyone within the jurisdiction of each State.

The empty phrases concerning the State's margin of appreciation—repeated in the Court's judgments for too long already—are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights.

Such terminology, as wrong in principle as it is pointless in practice, should be abandoned without delay.

Judge Rozakis expressed more nuanced comments in his concurring opinion appended to the *Egeland and Hanseid v Norway* judgment of 16 April 2009³¹ concerning photographs taken of a convicted person and their publication in the press. The Court found that there had been no violation of Article 10, endorsing the domestic decisions that the respondent State had to be allowed a wide margin of appreciation in balancing the interests at issue. According to Judge Rozakis, the Court had applied the margin of appreciation concept automatically, even though the case did not permit such an approach. For him, it should only be in cases where the national authorities are really better placed to assess the 'local' and specific conditions that the Court should relinquish its power of assessment and limit itself to a simple supervision of the national decisions.³²

³¹ *Egeland and Hanseid v Norway*, no 34438/04, 16 April 2009.

³² Judge Rozakis' opinion reads as follows:

[I]t should only be applied in cases where, after careful consideration, it establishes that national authorities were really better placed than the Court to assess the 'local' and specific conditions which existed within a particular domestic order, and, accordingly, had greater knowledge than an international court in deciding how to deal, in the most appropriate manner, with the case before them. Then, and only then, should the Court relinquish its power to examine, in depth, the facts of a case, and limit itself to a simple supervision of the national decisions, without taking the place of national authorities, but simply examining their reasonableness and the absence of arbitrariness.

In that judgment the Court based its findings on a lack of consensus in such matters. That reasoning is also criticised by Judge Rozakis as follows:

Furthermore, it is my opinion that the mere absence of a wide consensus among European States concerning the taking of photographs of charged or convicted persons in connection with court proceedings does not suffice to justify the application of the margin of appreciation. This ground is only a *subordinate* basis for the application of the concept, if and when the Court first finds that the national authorities are better placed than the Strasbourg Court to deal effectively with the matter. If the Court so finds, the next step would be to ascertain

Judge Malinverni's concurring opinion appended to the same judgment, *Egeland and Hanseid*, concerns for its part the *width* of the margin to be allowed. His main criticism concerns the fact that the Court, in that judgment, had afforded a 'wide' margin of appreciation. Taking two factors as his starting point—the existence of a European consensus and the significance of the right at issue—Judge Malinverni arrives at the conclusion that in that case the Court should have allowed the Norwegian authorities only a limited margin of appreciation, which could have led to the same result, namely the finding that there had been no violation of Article 10 of the Convention. It would have been sufficient to observe that the interference had not overstepped the limits of the margin.³³

In order to determine the width of the margin allowed for the interpretation of the Convention, the following factors have been identified by legal writers: the provision invoked, the interests at stake, the aim pursued by the impugned interference, the context of the interference, the impact of a possible consensus in such matters, the degree of proportionality of the interference and the comprehensive analysis by superior national courts.

i. The Provision Invoked

As pointed out above, the Court grants considerable room for manoeuvre to States in order to assess an exceptional situation for the purposes of Article 15 of the Convention. A situation threatening the life of the nation is better assessed by the national authorities. The Court can hardly substitute its own opinion for that of national intelligence services. Similarly, in

whether the presence or absence of a common approach of European States to a matter *sub judice* does or does not allow the application of the concept.

³³ Judge Malinverni's opinion reads as follows:

12. If we consider these two criteria—the existence of a European consensus and the importance of the right in issue—it follows that, in the instant case, the Court ought to have accorded the Norwegian authorities a limited margin of appreciation.

13. With regard to the first criterion, there is in fact little unanimity within the member States of the Council of Europe concerning the prohibition on taking photographs of individuals who have been charged or convicted. By the Court's own admission, only four States have imposed a prohibition: in addition to Norway, these are Denmark, Cyprus and the United Kingdom (England and Wales) (see paragraph 54 of the judgment).

14. As to the second criterion, the freedom in issue here is the freedom of the press, which plays an essential role in a democratic society, as the Court itself acknowledges (see paragraph 49).

15. Contrary to what one might think, the fact of allowing only a limited margin of appreciation does not necessarily lead to a finding that there has been a violation of the Convention. It is enough that the interference found does not exceed this margin.

a quite different area, that of respect for private property, the margin of appreciation is particularly wide given that the very wording of Article 1 of Protocol No 1 expressly refers to national discretion, providing that States have the right to enforce such laws *as it deems necessary* to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. The margin is thus particularly wide in both these very different areas.

On the other hand the margin of appreciation is virtually inexistent when it comes to the non-derogable rights (right to life, prohibition of torture, prohibition of slavery and forced labour, prohibition of retrospective legislation, the *ne bis in idem* rule).³⁴ The margin of appreciation has no role here. For example, whether or not facts found to be established attain the level of severity to attract the protection of Article 3, prohibiting torture and inhuman and degrading treatment, cannot fall within the margin of appreciation.

The absolute nature of the prohibition of torture was solemnly reasserted by the Court in a counter-terrorism context. In the major case of *Saadi v Italy* of 28 February 2008,³⁵ concerning an applicant who faced deportation to Tunisia, the Court found as follows (§ 138):

Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule (see the case-law cited in paragraph 127 above). It must therefore reaffirm the principle stated in the *Chahal* judgment (cited above, § 81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees (see *Chahal*, cited above, § 80 and paragraph 63 above). Moreover, that conclusion is in line with points IV and XII of the guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (see paragraph 64 above).

³⁴ See, however, concerning Art 2, *Finogenov and Others v Russia*, nos 18299/03 and 27311/03, 20 December 2011. The case concerned the storming of a building where hostages were held and the Court held that '[i]t is prepared to grant [the domestic authorities] a margin of appreciation, at least in so far as the military and technical aspects of the situation are concerned, even if now, with hindsight, some of the decisions taken by the authorities may appear open to doubt.' (para 213)

³⁵ *Saadi v Italy* [GC], no 37201/06, ECHR 2008.

Concerning more particularly the virtual inexistence of the national margin in respect of diplomatic assurances, the Court explained as follows (§ 148):

Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.³⁶

However, concerning the right to education, which is not a non-derogable right, the Court is willing to grant a margin of appreciation. For example, the Court did not find a violation in the *Lautsi and Others v Italy* judgment.³⁷ The case concerned crucifixes in classrooms of an Italian state school. In the Court's view States enjoy a margin of appreciation in their efforts to reconcile the exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.³⁸ The Court therefore has a duty to respect the States' decisions in such matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination.³⁹ The Court thus decided as follows:

that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools ... speaks in favour of that approach.

This margin of appreciation, however, goes hand in hand with European supervision (see, for example, *mutatis mutandis*, *Leyla Şahin*, cited above, § 110), the Court's task in the present case being to determine whether the limit mentioned in paragraph 69 above has been exceeded.

The impact of the consensus argument will be observed again later.

Finally, and concerning the relationship between respect for private life and freedom of expression, the Court has recently made clear in relation to the margin of appreciation that the outcome of the application should not,

³⁶ On diplomatic assurances see G Malinverni, 'Extradition, expulsion et assurances diplomatiques', in *Liber Amicorum Antonio La Pergola*, 2nd edn (Lund, Juristförlaget, 2009) 205; and H Dipla, 'The Contribution of the European Court of Human Rights to the Absolute Ban of Torture. The Practice of Diplomatic Assurances' in D Spielmann, M Tsirlis and P Voyatzis (eds), *The European Convention on Human Rights, A Living Instrument, Essays in Honour of Christos L. Rozakis* (Brussels, Bruylant, 2011) 155. See also the recent judgment in *Othman (Abu Qatada) v the United Kingdom*, no 8139/09, §§ 186 f, 17 January 2012.

³⁷ *Lautsi and Others v Italy* [GC] (n 4).

³⁸ *Lautsi and Others v Italy* [GC] (n 4) para 69 of the judgment.

³⁹ *Ibid.*

in principle, vary according to whether it has been lodged under Article 10 by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of the article. Indeed, as a matter of principle these rights deserve equal respect.⁴⁰

ii. Interests at Stake

The issue of the interests at stake arises especially in the context of the limitations to Articles 8 to 11 (private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association). In these areas the Court has applied the margin of appreciation doctrine. The extent of this concession to the national authorities will vary according to the interests at stake. It is interesting to compare two cases concerning freedom of expression that were decided in 1996: *Wingrove* and *Goodwin*. The *Wingrove* case concerned a refusal to grant approval for the distribution of a film that was considered blasphemous; the *Goodwin* case concerned the protection of journalists' sources.

In the *Wingrove* judgment of 25 November 1996,⁴¹ the Court found that there had been no violation of Article 10 of the Convention, explaining that a wider margin of appreciation was generally available in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion.⁴² As in the field of morals, there was no uniform European conception of the requirements of protection against attacks on religious convictions.⁴³ The Court added that the State authorities were in a better position than the international judge to set such requirements and to decide on the necessity of a restriction.⁴⁴

By contrast, in the *Goodwin* judgment of 27 March 1996⁴⁵ the Court found that there had been a violation, deciding that, having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure had on the exercise of that freedom, such a measure could not be compatible with Article 10 unless it was justified by an overriding requirement in the public interest.⁴⁶ Limitations on the confidentiality of journalistic sources called for the most careful scrutiny by the Court.⁴⁷

⁴⁰ *Axel Springer AG v Germany* [GC], no 39954/08, § 87, 7 February 2012; and *Von Hannover v Germany (no 2)* [GC], nos 40660/08 and 60641/08, § 106, 7 February 2012.

⁴¹ *Wingrove v the United Kingdom*, 25 November 1996, *Reports of Judgments and Decisions* 1996-V.

⁴² *Wingrove* (n 41) § 58 of the judgment.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Goodwin v the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II.

⁴⁶ *Goodwin* (n 45) § 39 of the judgment.

⁴⁷ *Goodwin* (n 45) § 40 of the judgment.

On the one hand, there is a wide margin for religious and moral questions; on the other, a very narrow margin for questions of general interest presented and discussed by the press. The appropriate width of margin thus follows a sliding scale which fixes the boundaries according to the type of speech and the manner in which the ideas are expressed.⁴⁸

The Court's case law can thus be read in the light of the two aims protected by freedom of expression. The main aim relates to the role played by freedom of expression in a democratic society. Freedom of expression is thus regarded as the necessary vehicle to enable each person to participate in the life of the democracy. The second aim is more individualistic: freedom of expression furthers an individual's self-fulfilment. Since the restrictions in the first context are likely to affect the democratic process as such, the margin of appreciation will be very narrow. It is not the same in the second context, where the margin will be broader. As the Court pointed out in *Goodwin*:⁴⁹

As a matter of general principle, the 'necessity' for any restriction on freedom of expression must be convincingly established ... Admittedly, it is in the first place for the national authorities to assess whether there is a 'pressing social need' for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued.

In the area of private and family life, an area protected by Article 8 of the Convention, the Court has used a similar method, taking into account the interests at stake. In its recent *Evans v the United Kingdom* judgment,⁵⁰ concerning an obligation to obtain the father's consent for the preservation and implantation of fertilised eggs, the Court summed up the issue

⁴⁸ See P Mahoney, 'Universality versus Subsidiarity' (1997) *European Human Rights Law Review*, 364, especially p 378: 'One can infer from Strasbourg case law on free speech generally that different kinds of speech enjoy different levels of protection, with journalistic speech—the public watchdog—coming very near the top end of the sliding scale and artistic speech somewhat lower down the scale'. This author also includes in the top category the case of *Jersild* concerning the conviction and fining of a television journalist for complicity in disseminating racist remarks (see *Jersild v Denmark*, 23 September 1994, series A no 298). For a critique of the case law see Lord Lester of Herne Hill, 'Universality versus Subsidiarity: A Reply' (1998) *European Human Rights Law Review* 73, esp 80:

I respectfully submit that [the] extreme degree of judicial restraint involves abdicating from the task of discerning and articulating the criteria appropriate to the difficult problems raised by this type of case, where free expression is in conflict with popular and deeply-felt local sentiments about good taste, public decency, and personal faith.

⁴⁹ *Goodwin* (n 45) § 40; see also *Ernst and Others v Belgium*, no 33400/96, 15 July 2003.

⁵⁰ *Evans v the United Kingdom* [GC], no 6339/05, ECHR 2007-IV.

of the width of the margin of appreciation in this Article 8 context as follows:

77. A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see, for example, *X and Y v. the Netherlands*, 26 March 1985, §§ 24 and 27, Series A no 91; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no 45; *Christine Goodwin v. the United Kingdom* [GC], no 28957/95, § 90, ECHR 2002-VI; see also *Pretty*, cited above, § 71). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports of Judgments and Decisions* 1997-II; *Fretté v France*, no 36515/97, § 41, ECHR 2002-I; *Christine Goodwin*, cited above, § 85; see also, *mutatis mutandis*, *Vo*, cited above, § 82). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights (see *Odièvre*, §§ 44–49, and *Fretté*, § 42).

In the *Leander v Sweden* judgment⁵¹ concerning the applicant's exclusion from the public service, the Court did not find a violation because the applicant had been regarded as a national security risk. A wide margin of appreciation was granted to the State precisely because the case concerned national security:

59. However, the Court recognises that the national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life.

There can be no doubt as to the necessity, for the purpose of protecting national security, for the Contracting States to have laws granting the competent domestic authorities power, firstly, to collect and store in registers not accessible to the public information on persons and, secondly, to use this information when assessing the suitability of candidates for employment in posts of importance for national security.

Admittedly, the contested interference adversely affected Mr. Leander's legitimate interests through the consequences it had on his possibilities of access to certain sensitive posts within the public service. On the other hand, the right of access to public service is not as such enshrined in the Convention (see, inter alia, the *Kosiek* judgment of 28 August 1986, Series A no 105, p 20, §§ 34–35), and, apart from those consequences, the interference did not constitute an obstacle to his leading a private life of his own choosing.

⁵¹ *Leander v Sweden*, 26 March 1987, series A no 116.

The adjudication of interests very often involves the balancing of these interests. Recent case law has tended to accord particular weight to this balancing exercise. In the *Evans* case, cited above,⁵² the Court found as follows:

90. As regards the balance struck between the conflicting Article 8 rights of the parties to the IVF treatment, the Grand Chamber, in common with every other court which has examined this case, has great sympathy for the applicant, who clearly desires a genetically related child above all else. However, given the above considerations, including the lack of any European consensus on this point ..., it does not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to have a genetically related child with her.

91. The Court accepts that it would have been possible for Parliament to regulate the situation differently. However, as the Chamber observed, the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article.

92. The Grand Chamber considers that, given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention.

By contrast, in the *Dickson* case,⁵³ concerning a refusal to grant a prisoner's request for artificial insemination so that he could become a father, the Court found that there had been a violation of Article 8 of the Convention on the basis of the following reasoning:

82. ... The Court considers that even if the applicants' Article 8 complaint was before the Secretary of State and the Court of Appeal, the Policy set the threshold so high against them from the outset that it did not allow a balancing of the competing individual and public interests and a proportionality test by the Secretary of State or by the domestic courts in their case, as required by the Convention (see, *mutatis mutandis*, *Smith and Grady*, cited above § 138).

...

84. ... the Court does not consider that the statistics provided by the Government undermine the above finding that the Policy did not permit the required proportionality assessment in an individual case.

...

85. The Court therefore finds that the absence of such an assessment as regards a matter of significant importance for the applicants (see paragraph 72 above) must be seen as falling outside any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interests involved. There has, accordingly, been a violation of Article 8 of the Convention.

⁵² *Evans v the United Kingdom* [GC] (n 50).

⁵³ *Dickson v the United Kingdom* [GC], no 44362/04, § 82, ECHR 2007-XIII.

The role of the domestic procedure should briefly be emphasised here. The national authorities are certainly allowed some leeway, but they have to remain within the human rights protection framework. It is thus essential to ensure an effective national procedure that permits the balancing of interests. In recent case law the Court has thus focused on the procedural requirements of the provisions relied upon by applicants. Concerning an eviction from a flat, the Court confirmed its case law,⁵⁴ for example, in the *Ćosić v Croatia* judgment of 15 January 2009,⁵⁵ as follows:

21. In the present case, the Court notes that when it comes to the decisions of the domestic authorities, their findings were limited to the conclusion that under applicable national laws the applicant had no legal entitlement to occupy the flat. The first-instance court expressly stated that while it recognised the applicant's difficult position, its decision had to be based exclusively on the applicable laws. The national courts thus confined themselves to finding that occupation by the applicant was without legal basis, but made no further analysis as to the proportionality of the measure to be applied against the applicant. However, the guarantees of the Convention require that the interference with an applicant's right to respect for her home be not only based on the law but also be proportionate under paragraph 2 of Article 8 to the legitimate aim pursued, regard being had to the particular circumstances of the case. Furthermore, no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia's obligations under the Convention (see *Stanková v. Slovakia*, cited above, § 24).

22. In this connection the Court reiterates that the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation has come to an end (see *McCann v. the United Kingdom*, no 19009/04, § 50, 13 May 2008).

23. However, in the circumstances of the present case the applicant was not afforded such a possibility. It follows that, because of such absence of adequate procedural safeguards, there has been a violation of Article 8 of the Convention in the instant case.

Similarly, in its *Paulić v Croatia* judgment of 22 October 2009,⁵⁶ also concerning eviction from a flat, a violation was found for the simple reason that the domestic courts had not examined the proportionality of the impugned measure:

45. In the circumstances of the present case the civil court ordered eviction of the applicant from his home without having determined the proportionality

⁵⁴ *McCann v the United Kingdom*, no 19009/04, 13 May 2008.

⁵⁵ *Ćosić v Croatia*, no 28261/06, 15 January 2009.

⁵⁶ *Paulić v Croatia*, no 3572/06, 22 October 2009.

of the measure. Thus, it has not afforded the applicant adequate procedural safeguards. There has, therefore, been a violation of Article 8 of the Convention in the instant case.

iii. Aim Pursued by the Impugned Interference

In order to determine the width of the margin of appreciation, the Court also takes into account the aim pursued by the impugned interference. As we have already seen, if the aim pursued concerns national security the margin will be a wide one. It will also be wide when it comes to social and economic policies. The case law under Article 1 of Protocol No 1 is of particular relevance here.

In its *James and Others v the United Kingdom* judgment of 21 February 1986,⁵⁷ the Court found it ‘natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one’.⁵⁸ In *Stec and Others v the United Kingdom*,⁵⁹ the Court afforded a wide margin of appreciation in a case concerning differences between men and women as regards entitlement to social security benefits for accidents at work. The Court has followed the same approach in cases concerning property rights after German reunification.⁶⁰ In *Jahn and Others*⁶¹ the Court thus found that:

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 as to the existence of a problem of public concern warranting measures of deprivation of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities, accordingly, enjoy a certain margin of appreciation.

Furthermore, the notion of ‘public interest’ is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation (see *James and Others*, cited above, p 32, § 46; *The former King of Greece and Others*, cited above, § 87; and *Zvolský and Zvolská v the Czech Republic*, no 46129/99, § 67 *in fine*, ECHR 2002-IX). The same applies

⁵⁷ *James and Others v the United Kingdom*, 21 February 1986, Series A no 98.

⁵⁸ *James and Others v the United Kingdom* (n 57) § 46 of the judgment.

⁵⁹ *Stec and Others v the United Kingdom* [GC], no 65731/01, ECHR 2006VI.

⁶⁰ *Jahn and Others v Germany* [GC], nos 46720/99, 72203/01 and 72552/01, ECHR 2005-VI. Compare *Althoff and Others v Germany*, no 5631/05, 8 December 2011.

⁶¹ *Jahn and Others* (n 60) § 91 of the judgment.

necessarily, if not *a fortiori*, to such radical changes as those occurring at the time of German reunification, when the system changed to a market economy.

iv. Context of the Interference

The context of the interference, and in particular the historical context, especially at a time of transition, is normally taken into account by the Court. A good example can be found in *Ždanoka v Latvia*⁶² concerning the disqualification of persons from standing in parliamentary elections on account of their active participation in a party that had been involved in an attempted *coup d'état*. The Court afforded a wide margin of appreciation in that case:

121. The impugned restriction introduced by the Latvian legislature by way of section 5(6) of the 1995 Act, precluding persons from standing for Parliament where they had 'actively participated' in the activities of the CPL between 13 January 1991 and the date of that party's dissolution in September 1991, must be assessed with due regard to this very special historico-political context and the resultant wide margin of appreciation enjoyed by the State in this respect ...

v. Impact of the Consensus

The notion of consensus, in the context of the European Convention on Human Rights, is generally understood as a basis for the evolution of Convention norms through the case law of the European Court of Human Rights.⁶³ This notion was identified for the first time in *Tyrer v the United Kingdom*,⁶⁴ where the Court found that judicial corporal punishment was a degrading punishment within the meaning of Article 3 of the Convention and indicated that it could not 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.⁶⁵ To express the inherent dynamic nature of the Convention, the Court described it in that judgment as a '*living instrument which ... must be interpreted in the light of present-day conditions*'.⁶⁶ The Preamble to the Convention states that it was adopted with a view, in particular, to the *further realisation* of human rights and fundamental freedoms. It is thus clear that the substantive content of the

⁶² *Ždanoka v Latvia* [GC], no 58278/00, ECHR 2006-IV.

⁶³ See A Kovler, V Zagrebelsky, L Garlicki, D Spielmann, R Jaeger and R Liddell, 'The Role of Consensus in the System of the European Convention on Human Rights' in *Dialogue between Judges, European Court of Human Rights* (Strasbourg, Council of Europe, 2008) 15.

⁶⁴ *Tyrer v the United Kingdom*, 25 April 1978, Series A no. 26.

⁶⁵ *Tyrer v the United Kingdom* (n 64) § 31 of the judgment.

⁶⁶ *Ibid.* See D Spielmann, M Tsirli and P Voyatzis (eds), *The European Convention on Human Rights: A Living Instrument. Essays in Honour of Christos L. Rozakis* (Brussels, Bruylant, 2011).

rights and freedoms enumerated by the Convention is not cast in stone and that it must evolve in line with progress in the legal, social and scientific fields.⁶⁷ An evolutive interpretation of the Convention allows its norms to be adapted to the new challenges created by the complex development of European societies.⁶⁸ The quest for establishing a consensus concerns both the evolution of domestic law and the practice of Contracting States but extends also to international instruments. Indeed, in defining the meaning of terms and notions in the text of the Convention, the Court can and must take into account elements of international law other than the Convention and the interpretation of such elements by competent organs. The consensus emerging from specialised international instruments may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.⁶⁹

The notion of consensus also reflects the delicate balance that has to be struck in the relationship between the Strasbourg system and domestic systems, which must go ‘hand in hand’—a well-known formula taken, *mutatis mutandis*, from *Handyside v the United Kingdom*.⁷⁰ It confers a certain legitimacy on new developments and facilitates their reception in domestic legal orders. It encourages the Court to be bold or, on the contrary, restrained in its interpretation of the Convention. In other words, the broader the consensus surrounding an issue, the narrower the margin of appreciation available to governments.⁷¹

Whilst it may be said that the Court is more inclined to show self-restraint in the absence of a consensus,⁷² the adoption of innovative solutions to questions on which there is no consensus may, on the contrary, be

⁶⁷ See ‘The Role of Consensus’ (n 63).

⁶⁸ See D Popović, ‘Le droit comparé dans l’accomplissement des tâches de la Cour européenne des droits de l’homme’ in L Caflisch (ed), *Liber amicorum Luzius Wildhaber: Human Rights, Strasbourg Views* (Kehl, Engel, 2007) 371. For a case concerning the failure to recognise a foreign adoption decision, see *Wagner and JMWL v Luxembourg*, no 76240/01, ECHR 2007-VII (extracts). See also, *Christine Goodwin v the United Kingdom* [GC], no 28957/95, § 85, ECHR 2002-VI.

⁶⁹ See *Demir and Baykara v Turkey* [GC], no 34503/97, § 85, 12 November 2008; *Bayatyan v Armenia* [GC], no 23459/03, § 102, 7 July 2011.

⁷⁰ *Handyside v the United Kingdom*, 7 December 1976, § 49, Series A no 24.

⁷¹ L Wildhaber, ‘La place et l’avenir de la Convention européenne des droits de l’homme’, speech given in Istanbul on 19 May 2004; published in *Bulletin des droits de l’homme*, Institut Luxembourgeois des droits de l’homme, no 11/12 (2005), 51. See ‘The Role of Consensus’ (n 63).

⁷² It should be noted, eg, that in *Evans v the United Kingdom* ([GC] (n 50)) the Court made the following finding:

77. ... Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.

perceived as a sign of judicial activism.⁷³ The case law is full of examples where the Court has relied on the existence of a consensus to justify a dynamic interpretation of the Convention. In its judgment in the *Dudgeon v the United Kingdom*⁷⁴ case, concerning the existence of laws which had the effect of making certain homosexual acts between consenting adult males criminal offences, it expressed the following view:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.⁷⁵

In its judgment *L and V v Austria*⁷⁶ concerning the age of consent for homosexual relations between male adolescents and adult men, the Court commented as follows:

In the present case the applicants pointed out, and this has not been contested by the Government, that there is an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations.⁷⁷

However, the Court generally takes the view that where there is no common European approach it is unable to impose a given solution on the respondent State.⁷⁸ This was the case in the judgment of *T v the United Kingdom*:⁷⁹

[T]here is not yet a commonly accepted minimum age for the imposition of criminal responsibility in Europe.... Moreover, no clear tendency can be ascertained from examination of the relevant international texts and instruments ... The Court does not consider that there is at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility.... The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention.

It adopted a similar line of reasoning in the case of *Odièvre v France*.⁸⁰

47. ... most of the Contracting States do not have legislation that is comparable to that applicable in France, at least as regards the child's permanent inability to establish parental ties with the natural mother if she continues to keep her identity

⁷³ See, eg, *Christine Goodwin v the United Kingdom* [GC] (n 68).

⁷⁴ *Dudgeon v the United Kingdom*, 22 October 1981, Series A no 45, pp 23–24, § 60.

⁷⁵ *Dudgeon* (n 74) § 60 of the judgment.

⁷⁶ *L and V v Austria*, nos 39392/98 and 39829/98, ECHR 2003-I.

⁷⁷ *L and V v Austria* (n 76) § 50 of the judgment.

⁷⁸ Eg *Fretté v France*, no 36515/97, ECHR 2002-I; *Odièvre v France* [GC], no 42326/98, ECHR 2003-III; and *Schwizgebel v Switzerland*, no 25762/07, §§ 92–94, ECHR 2010.

⁷⁹ *T v the United Kingdom* [GC], no 24724/94, 16 December 1999, §§ 71–72 of the judgment.

⁸⁰ *Odièvre v France* [GC], no 42326/98, ECHR 2003-III.

secret from the child she has brought into the world. However, ... some countries do not impose a duty on natural parents to declare their identities on the birth of their children and ... there have been cases of child abandonment in various other countries that have given rise to renewed debate about the right to give birth anonymously. In the light not only of the diversity of practice to be found among the legal systems and traditions but also of the fact that various means are being resorted to for abandoning children, the Court concludes that States must be afforded a margin of appreciation to decide which measures are apt to ensure that the rights guaranteed by the Convention are secured to everyone within their jurisdiction.

In *Vo v France*⁸¹ the Court observed as follows:

84. At European level, ... there is no consensus on the nature and status of the embryo and/or foetus ..., although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person—enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom ... —require protection in the name of human dignity, without making it a ‘person’ with the ‘right to life’ for the purposes of Article 2.

Lastly, the Court took the view in *Evans v the United Kingdom*⁸²—concerning the destruction of frozen embryos following the withdrawal of consent by the gamete provider to the use of those embryos for medically assisted procreation—that:

92. ... given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention.

A clear trend or a mere emerging consensus, is most of the time not enough. For example, concerning gamete donation for the purpose of *in vitro* fertilisation, the Court held in *SH v Austria*:⁸³

96. The Court would conclude that there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilisation, which reflects an emerging European consensus. That emerging consensus is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development

⁸¹ *Vo v France* [GC], no 53924/00, ECHR 2004-VIII.

⁸² *Evans v the United Kingdom* [GC] (n 50).

⁸³ *SH and Others v Austria*, [GC], no 57813/00, 3 November 2011.

within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State.⁸⁴

However, in certain cases the absence of a common legal approach has not prevented the Court from observing the existence of a general trend. Thus in its *Christine Goodwin* judgment of 11 July 2002,⁸⁵ concerning the absence of legal recognition of a sex change and the inability for a post-operative transsexual to marry someone of the opposite sex, the Court found as follows:

85. The Court observes that in the case of *Rees* in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition (see § 37). In the later case of *Sheffield and Horsham*, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

In *Hirst v the United Kingdom*⁸⁶ concerning the exclusion of convicted prisoners from voting in parliamentary and municipal elections, the Court made the following comments:

81. As regards the existence or not of any consensus among Contracting States, the Court notes that, although there is some disagreement about the legal position in certain States, it is undisputed that the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote. It may also be said that the law in the United Kingdom is less far-reaching than in certain other States. Not only are exceptions made for persons committed to prison for contempt of court or for default in paying fines, but unlike the position in some countries, the legal incapacity to vote is removed as soon as the person ceases to be detained. However, the fact remains that it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is

⁸⁴ See, however, the joint dissenting opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria.

⁸⁵ *Christine Goodwin v the United Kingdom* [GC] (n 68).

⁸⁶ *Hirst v the United Kingdom (no 2)* [GC], no 74025/01, ECHR 2005-IX.

imposed or in which there is no provision allowing prisoners to vote. Even according to the Government's own figures, the number of such States does not exceed thirteen. Moreover, and even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue.

The Court nevertheless found, in *A, B and C v Ireland* (16 December 2010),⁸⁷ despite the fact that amongst a majority of member States of the Council of Europe there was a consensus in favour of authorising abortions on broader grounds than those accorded by Irish law, that the wide margin of appreciation available to the Irish government was not decisively narrowed as a result.⁸⁸ The margin of appreciation accorded to a State's protection of the unborn necessarily translated into a margin of appreciation of similar breadth when it came to balancing the rights of the unborn with conflicting rights of the mother.⁸⁹

Hence, the existence or absence of a consensus may play an important role, but without necessarily being decisive in all cases.⁹⁰ As Judge Rozakis

⁸⁷ *A, B and C v Ireland* [GC], no 25579/05, ECHR 2010.

⁸⁸ *A, B and C v Ireland* (n 87) §§ 233–36 of the judgment.

⁸⁹ *Ibid.*, § 237 of the judgment. For criticism of these findings, see the joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, points 5 and 6:

5. According to the Convention case-law, in situations where the Court finds that a consensus exists among European States on a matter touching upon a human right, it usually concludes that that consensus decisively narrows the margin of appreciation which might otherwise exist if no such consensus were demonstrated. This approach is commensurate with the 'harmonising' role of the Convention's case-law: indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence. The harmonising role, however, has limits. One of them is the following: in situations where it is clear that on a certain aspect of human rights protection, European States differ considerably in the way that they protect (or do not protect) individuals against conduct by the State, and the alleged violation of the Convention concerns a relative right which can be balanced—in accordance with the Convention—against other rights or interests also worthy of protection in a democratic society, the Court may consider that States, owing to the absence of a European consensus, have a (not unlimited) margin of appreciation to themselves balance the rights and interests at stake. Hence, in those circumstances the Court refrains from playing its harmonising role, preferring not to become the first European body to 'legislate' on a matter still undecided at European level.

6. Yet in the case before us a European consensus (and, indeed, a strong one) exists. We believe that this will be one of the rare times in the Court's case-law that Strasbourg considers that such consensus does not narrow the broad margin of appreciation of the State concerned.

⁹⁰ It should be pointed out, moreover, that there may be disagreement between judges as to the existence of a consensus. See the dissenting opinion of Judge Malinverni, joined by Judge Kaladjieva, in *Lautsi v Italy* (n 4):

In the present case it is by relying mainly on the lack of any European consensus that the Grand Chamber has allowed itself to invoke the doctrine of the margin of appreciation (see para 70). In that connection I would observe that, besides Italy, it is in only a very limited number of member States of the Council of Europe (Austria, Poland, certain regions of

has put it lucidly, proposing even to disentangle the ‘consensus’ factor from the application of the margin of appreciation: ‘It is one thing to consider that the absence of a consensus does not allow the Court to “legislate” on the matter, it is another thing to surrender unconditionally its decision-making prerogative to the national authorities.’⁹¹

Moreover it is possible to look into the reasons for the existence or absence of a consensus in terms of finding a solution to the problem.⁹² Whilst it is easier to identify a consensus in the light of State practice (legislation, case law, administrative practice), the absence of a consensus may have a variety of reasons (for example significant divergence in practices, lack of official positions on very new issues).

vi. Impact of Proportionality Principle

What is the impact of a measure’s proportionality—or absence thereof—on the margin afforded? This is probably the most important—and perhaps even decisive—factor. Being closely linked to the principle of effective protection, the proportionality principle constitutes the strongest bulwark against the over-use of the margin of appreciation doctrine.⁹³ In order to assess the proportionality of an interference with a right, it is appropriate to examine its impact on that right, the grounds, the consequences for the applicant and the context. As regards the grounds for the interference, the importance of the local circumstances and the difficulty of objectively

Germany (*Länder*)—see para 27) that there is express provision for the presence of religious symbols in State schools. In the vast majority of the member States the question is not specifically regulated. On that basis I find it difficult, in such circumstances, to draw definite conclusions regarding a European consensus.

⁹¹ Rozakis, ‘Through the Looking Glass’ (n 9) 536.

⁹² This question was raised by Judge Finlay Geoghean in her concurring opinion appended to *A, B and C v Ireland* (n 87):

6. ... The facts available to the Court only relate to the legislation in force. The Court had no facts before it relating to the existence or otherwise of a legal protection for or right to life of the unborn or any identified public interest arising out of profound moral values in relation to the right to life of the unborn in any of the majority Contracting States. Further, and importantly, there were no facts before the Court which, in my view, permit it to deduce that the abortion legislation in force in the majority Contracting States demonstrates either a balance struck in those Contracting States between relevant competing interests, or the existence of a consensus amongst those Contracting States on a question analogous to that in respect of which the margin of appreciation under consideration relates i.e. the fair balance to be struck between the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives protected by Article 8 of the Convention.

⁹³ Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l’homme* (n 9); and P Muzny, *La technique de proportionnalité et le juge de la Convention européenne des droits de l’homme. Essai sur un instrument nécessaire dans une société démocratique* (Presses universitaires d’Aix-Marseille, 2005).

assessing the respective weight of conflicting aims play a major role. It is for the State to justify the interference. The grounds must be ‘relevant and sufficient’, the need for a restriction must be ‘established convincingly’, any exceptions must be ‘construed strictly’ and the interference must meet ‘a pressing social need’.

This point can be demonstrated by two examples, one related to freedom of expression, the other to the right of access to a court. The use of the proportionality principle as the decisive factor is particularly well illustrated by the judgment in *Cumpănă and Mazăre* (17 December 2004)⁹⁴ concerning the conviction of journalists, together with their disqualification from professional activities, for defamation:

120. Although the national authorities’ interference with the applicants’ right to freedom of expression may have been justified by the concern to restore the balance between the various competing interests at stake, the criminal sanction and the accompanying prohibitions imposed on them by the national courts were manifestly disproportionate in their nature and severity to the legitimate aim pursued by the applicants’ conviction for insult and defamation.

121. The Court concludes that the domestic courts in the instant case went beyond what would have amounted to a ‘necessary’ restriction on the applicants’ freedom of expression.

122. There has therefore been a violation of Article 10 of the Convention.

Similarly, any disproportionate interference with the right of access to a court entails a violation of Article 6 of the Convention, as shown in the *Kart v Turkey* judgment of 24 April 2008:⁹⁵

The right of access to a court secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v Germany* [GC], no 26083/94, § 59, ECHR 1999-I). The right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration

⁹⁴ *Cumpănă and Mazăre v Romania*, no 33348/96, 17 December 2004.

⁹⁵ *Kart v Turkey* [GC], no 8917/05, § 79, ECHR 2009; see also, eg, *Kemp and Others v Luxembourg*, no 17140/05, 24 April 2008.

of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court ...

vii. Comprehensive Analysis by Higher National Courts

Pursuant to a recent trend in the jurisprudence of the European Court of Human Rights, judicial self-restraint should prevail in the event that higher national courts have analysed in a comprehensive manner the precise nature of the impugned restriction, on the basis of the relevant Convention case law and principles drawn therefrom. The Court would need strong reasons to differ from the conclusion reached by those courts in substituting its own views for those of the national courts on a question of interpretation of domestic law and in finding, contrary to their view, that there was arguably a right recognised by domestic law.⁹⁶

In the recent judgments of *Springer*⁹⁷ and *Von Hannover (no 2)*⁹⁸ the Court held:

Where the balancing exercise between [Articles 10 and 8] has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case law, the Court would require strong reasons to substitute its view for that of the domestic courts.⁹⁹

Asking herself if Strasbourg or the Supreme Court is supreme, Baroness Hale proposes in a recent article as follows:

[W]here it was necessary to strike a balance between competing Convention rights, the Court should be particularly cautious about interfering with the way in which the national courts have struck the balance when they have been applying the Convention principles and have reached a decision which is 'on its face reasonable and not arbitrary'.¹⁰⁰

As said, recent Strasbourg case law seems to meet this concern.¹⁰¹

⁹⁶ *Roche v the United Kingdom* [GC], no 32555/96, § 120, ECHR 2005-X. See also *MGN Limited v the United Kingdom*, no 39401/04, § 150, 18 January 2011. See also the Background Paper for the Seminar 'How to Ensure Greater Involvement of National Courts in the Convention System?' (prepared by Judges Tulkens, Bianku, Raimondi, Nußberger, Laffranque and Sicilianos, assisted by R Liddell, 27 January 2012).

⁹⁷ *Axel Springer AG v Germany* [GC] (n 40).

⁹⁸ *Von Hannover v Germany (no 2)* [GC] (n 40).

⁹⁹ *Springer* (n 40) § 88 and *Von Hannover (no 2)* (n 40), § 107. See also *Palomo Sánchez and Others v Spain* [GC], nos 28955/06, 28957/06, 28959/06 and 28964/06, 12 September 2011.

¹⁰⁰ B Hale, 'Argentoratium Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) *Human Rights Law Review* 65, 77.

¹⁰¹ See also N Bratza, 'The Relationship Between the UK Courts and Strasbourg' (2011) *European Human Rights Law Review* 505, 511.

IV. SECOND-DEGREE OR 'REVERSE' MARGIN OF APPRECIATION: DISTRIBUTION OF POWERS BETWEEN DOMESTIC AUTHORITIES

Is there a second-degree or 'reverse' margin of appreciation, whereby discretionary powers can be distributed between executive and judicial authorities at domestic level? A case recently heard by the Grand Chamber raises the issue in a rather atypical manner. This brings us back to the subject of derogations in time of emergency and counter-terrorism measures. In the case of *A and Others v the United Kingdom*, on which the Court ruled on 19 February 2009,¹⁰² the applicants complained that they had been detained in high-security conditions for an indeterminate period under legislation providing for the pre-charge detention of foreign nationals who were, as certified by the Secretary of State, suspected of involvement in terrorist activities. The applicants also brought proceedings to challenge the legality of the Derogation Order of November 2001. Those proceedings ended with a judgment handed down on 16 December 2004 by the House of Lords,¹⁰³ which found that there was an emergency threatening the life of the nation, but that the detention regime did not rationally address the threat to security and was a disproportionate response to that threat. The majority found, in particular, that there was evidence of United Kingdom nationals also being involved in Al-Qaeda networks and that Part 4 of the 2001 Act was therefore unjustifiably discriminatory against foreigners. The House of Lords thus granted a quashing order in respect of the Derogation Order and a declaration under section 4 of the Human Rights Act. The legislation in question nevertheless remained in force until it was repealed by Parliament in March 2005. Interestingly, the respondent government criticised the Lords' assessment in the Strasbourg proceedings. The Court found that there had been a violation of various provisions of Article 5 of the Convention, thus endorsing the position of the House of Lords. In the unusual circumstances of the case, where the highest domestic court had examined the issues relating to the State's derogation and had concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considered that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or had reached a conclusion which was manifestly unreasonable.¹⁰⁴ Struck by the fact that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from Al-Qaeda, the Court nevertheless accepted that it was for each government, as the

¹⁰² *A and Others v the United Kingdom* [GC], no 3455/05, ECHR 2009.

¹⁰³ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

¹⁰⁴ *A and Others v the United Kingdom* [GC] (n 102) § 174 of the judgment.

guardian of their own people's safety, to make their own assessment on the basis of the facts known to them.¹⁰⁵ The Court therefore found that weight should attach to the judgment of the United Kingdom's executive and Parliament on this question, together with the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency.¹⁰⁶ The Court accordingly shared the view of the majority of the House of Lords, finding as follows:¹⁰⁷

184. When the Court comes to consider a derogation under Article 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were 'strictly required'. In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse (see, for example, *Brannigan and McBride*, cited above, §§ 48–66; *Aksoy*, cited above, §§ 71–84; and the principles outlined in paragraph 173 above). The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level. As the House of Lords held, the question of proportionality is ultimately a judicial decision, particularly in a case such as the present where the applicants were deprived of their fundamental right to liberty over a long period of time. In any event, having regard to the careful way in which the House of Lords approached the issues, it cannot be said that inadequate weight was given to the views of the executive or of Parliament.

The Court found that the House of Lords had been correct in holding that the impugned powers were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as measures concerned with national security.¹⁰⁸ The legislation at issue was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals.¹⁰⁹ The choice by the government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists.¹¹⁰ As the House of Lords had found, there was no significant difference in the potential adverse impact of detention without charge

¹⁰⁵ *A and Others v the United Kingdom* [GC] (n 102) § 180 of the judgment.

¹⁰⁶ *A and Others v the United Kingdom* [GC] (n 102) § 180 of the judgment.

¹⁰⁷ *A and Others v the United Kingdom* [GC] (n 102).

¹⁰⁸ *A and Others v the United Kingdom* [GC] (n 102) § 186 of the judgment.

¹⁰⁹ *A and Others v the United Kingdom* [GC] (n 102) § 186 of the judgment.

¹¹⁰ *A and Others v the United Kingdom* [GC] (n 102) § 186 of the judgment.

on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.¹¹¹ As to the argument that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals, the Court noted that it had not been provided with any evidence which could persuade it to overturn the conclusion of the House of Lords that the difference in treatment was unjustified.¹¹² In conclusion, the Court found, like the House of Lords, that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals.¹¹³

In the words of one commentator:¹¹⁴

Engaging here in an exercise of legal surrealism, the Court upheld the position of the House of Lords, against the British Government, considering that it was bound in principle to follow the findings of the highest domestic court on the question of the proportionality of the applicants' detention, unless it could be established that those findings were unreasonable or contrary to the Convention and the Court's jurisprudence. In order to verify that this was not the case and to be able to find, in its turn, that the derogating measures were disproportionate, in that they discriminated unjustifiably between non-nationals and British citizens, the Court considerably developed its redeployment of the domestic margin of appreciation in favour of the domestic court. After pointing out that the national margin doctrine had always been meant as a tool to define relations between the domestic authorities and the Court, it thus innovated here in finding that this doctrine could not have the same application to the relations between the organs of State at the domestic level. This doctrinal adjustment thus enabled the Court to espouse a strong position of the House of Lords to the effect that the question of proportionality was ultimately

¹¹¹ *A and Others v the United Kingdom* [GC] (n 102) § 186 of the judgment.

¹¹² *A and Others v the United Kingdom* [GC] (n 102) § 189 of the judgment.

¹¹³ *A and Others v the United Kingdom* [GC] (n 102) § 190 of the judgment.

¹¹⁴ JP Marguénaud, 'Chronique internationale. Droits de l'homme. Cour européenne des droits de l'homme' (2009) *Revue de science criminelle et de droit pénal comparé* 675 [translation]:

Se livrant ici à un exercice de surréalisme juridique, la Cour prend fait et cause pour la Chambre des lords, contre le gouvernement britannique, en estimant devoir en principe suivre les conclusions de la haute juridiction sur la question de la proportionnalité de la détention des requérants à moins qu'on puisse établir que ces conclusions étaient déraisonnables ou contraires à la Convention et à la jurisprudence européennes. Or, pour vérifier que tel n'était pas le cas et pour pouvoir conclure, à son tour, que les mesures dérogatoires étaient disproportionnées en ce qu'elles opéraient une discrimination injustifiée entre étrangers et citoyens britanniques, elle amplifie considérablement son travail de redéploiement de la marge nationale d'appréciation en faveur du juge interne. Après avoir rappelé que la marge nationale est depuis toujours perçue comme un moyen de définir les rapports entre les autorités et la Cour, elle innove en effet en précisant que cette théorie ne trouve pas à s'appliquer de la même manière aux rapports entre les organes de l'Etat au niveau interne. Cet ajustement théorique lui permet alors de reprendre spectaculairement à son compte une forte affirmation de la Chambre des lords suivant laquelle la question de la proportionnalité relève en dernière instance du domaine du judiciaire particulièrement lorsque des justiciables ont subi une longue privation de leur droit fondamental à la liberté.

a matter for the courts, particularly in a case where claimants had been deprived of their fundamental right to liberty over a long period of time.

V. PROTOCOL NO 14 AND AN OBLIGATION TO USE THE MARGIN

One could argue that Protocol No 14 enshrined in its Article 12, at least to a certain extent, an obligation to use the margin of appreciation.

Under Article 12 of the Protocol, Article 35, paragraph 3, of the Convention was amended to read as follows:

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

...

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

It could be submitted that this provision represents a general endorsement of the margin of appreciation doctrine, which is thus now expressly enshrined in the Convention, encouraging the examination of a case by the domestic courts in the light of Convention principles.¹¹⁵ Read in the light of Article 1 of the Convention, which imposes an obligation to respect human rights, it could reasonably be argued that the new provision thus embodies the subsidiarity principle that was recently invoked at the Izmir Conference (26–27 April 2011),¹¹⁶ following the Interlaken Conference on the future

¹¹⁵ This was the author's personal view in 'En jouant sur les marges. La Cour européenne des droits de l'homme et la théorie de la marge d'appréciation nationale: Abandon ou subsidiarité du contrôle européen?' in *Actes de la Section des Sciences Morales et Politiques* de l'Institut Grand-Ducal, vol XIII (Luxembourg, Institut Grand-Ducal, 2010) 203, 241–42 and (2010) *Journal des Tribunaux-Luxembourg* 117, 127. For a full discussion concerning this issue, see S Greer, 'The New Admissibility Criterion' in S Besson (ed), *The European Court of Human Rights after Protocol 14: Preliminary Assessment and Perspectives* (Geneva, Schulthess, 2011) 35. Be that as it may, the Member States at Brighton (see also n 6) took the view that 'Article 35(3)(b) of the Convention should be amended to remove the words "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal"; the Committee of Ministers was invited to adopt the necessary amending instrument by the end of 2013 (Brighton Declaration of 19–20 April 2012, point 15(c)).

¹¹⁶ See the Izmir Declaration: Preamble point 5, 'subsidiary character of the Convention mechanism'; Declaration point 4, 'giving practical effect to the principle of subsidiarity'; then under the 'Follow-up Plan', in particular, as regards the right of individual petition, point A 1 advocates that cases must be dealt with 'in accordance with the principle of subsidiarity'; as regards the implementation of the Convention at domestic level, in point B 1(a) the Conference invites the States Parties to '[e]nsure that effective domestic remedies exist, ..., providing for a decision on an alleged violation of the Convention'; and concerning the Court, in point F 2(c)

of the European Court of Human Rights (18–19 February 2010).¹¹⁷ As Jean-Paul Costa pointed out at the Interlaken Conference, the system of the European Convention on Human Rights was designed to be subsidiary in nature.¹¹⁸ About thirty judgments and decisions have now applied this new admissibility criterion.¹¹⁹ Recent case law seems, however, to promote a more pragmatic approach, by endorsing the view that the purpose of this ‘second safeguard’ clause is to avoid the denial of justice, but does not require the ‘complaint’ as brought before the European Court to have previously been ‘duly considered by a domestic tribunal’.¹²⁰

the Conference invites the Court to ‘[c]onfirm in its case law that it is not a fourth-instance court, thus avoiding the re-examination of issues of fact and law decided by national courts’.

¹¹⁷ See point 2 of the Interlaken Declaration (19 February 2010): the Conference ‘[r]eiterates the obligation of the States Parties to ensure that the rights and freedoms set forth in the Convention are fully secured at the national level and calls for a strengthening of the principle of subsidiarity’. See also PP 6 and part B. § 4 of the Action Plan.

¹¹⁸ JP Costa, Opening address by the President of the European Court of Human Rights in *Proceedings of the High-Level Conference on the Future of the European Court of Human Rights*, Interlaken, 18–19 Feb. 2010, (Strasbourg, Council of Europe, 2010) 21.

¹¹⁹ See, in particular *Korolev v Russia* (dec), no 25551/05, ECHR 2010:

Article 35 § 3 (b) does not allow the rejection of an application on the grounds of the new admissibility requirement if the case has not been duly considered by a domestic tribunal. Qualified by the drafters as a second safeguard clause (see Explanatory report, § 82), its purpose is to ensure that every case receives a judicial examination whether at the national level or at the European level, in other words, to avoid a denial of justice. The clause is also consonant with the principle of subsidiarity, as reflected notably in Article 13 of the Convention, which requires that an effective remedy against violations be available at the national level.

In the Court’s view, the facts of the present case taken as a whole disclose no denial of justice at the domestic level. The applicant’s initial grievances against the State authorities were considered at two levels of jurisdiction and his claims were granted. His subsequent complaint against the bailiff’s failure to recover the judicial award in his favour was rejected by the district court for non-compliance with domestic procedural requirements. The applicant failed to comply with those requirements, not having resubmitted his claim in accordance with the judge’s request. This situation does not constitute a denial of justice imputable to the authorities.

As regards the alleged breaches of domestic procedural requirements by those two courts, the Convention does not grant the applicant a right to challenge them in further domestic proceedings once his case has been decided in final instance (see *Tregubenko v Ukraine*, no. 61333/00, 21 October 2003, and *Sitkov v Russia* (dec.), no. 55531/00, 9 November 2004). That these complaints were not subject to further judicial review under domestic law does not, in the Court’s view, constitute an obstacle for the application of the new admissibility criterion. To construe the contrary would prevent the Court from rejecting any claim, however insignificant, relating to alleged violations imputable to a final national instance. The Court finds that such an approach would be neither appropriate nor consistent with the object and purpose of the new provision.

The Court concludes that the applicant’s case was duly considered by a domestic tribunal within the meaning of Article 35 § 3 (b).

¹²⁰ See *Elita Fernandez v France* (dec), no 65421/10, 17 January 2012; *Holub v Czech Republic* (dec), no 24880/05, 14 December 2010.

VI. CONCLUSION

One author has written that ‘the domestic margin of appreciation is the most controversial “product” of the European Court of Human Rights’.¹²¹ Criticised by some as a ‘quirk of language’¹²² or ‘an unfortunate Gallicism’,¹²³ praised by others as a ‘legitimate principle of interpretation of the Convention’,¹²⁴ the margin of appreciation is undoubtedly the doctrine most commented upon in academic writings. The doctrine certainly has its weaknesses: a degree of vagueness, or even a certain incoherence in the Court’s reliance on the margin of appreciation,¹²⁵ a risk of manipulation of the identified factors and parameters and the resulting—albeit inevitable—lack of legal certainty.¹²⁶ This uncertainty can be attributed to the wealth and selectivity of the choice of parameters, a temptation to ‘play with the margins’ (a temptation for both the domestic and the European court), and the adjustment of the width of the margin to the circumstances of the case. However, among the parameters, there is one that offers more legal certainty: the parameter of proportionality, which as an interpretational guide may be regarded as the ‘other side of the coin’ in relation to the margin doctrine.¹²⁷

The margin of appreciation does not therefore guarantee ‘a reserved domain’ for State authorities. It allows an apportionment of case assessment in the interest of well-established subsidiarity, subject to the ultimate review of the European Court of Human Rights. This subsidiarity is demonstrated through the requirement for the applicant to exhaust domestic remedies and the requirement for the domestic authorities to make available effective remedies, two requirements that are particularly reflected in Article 12 of Protocol No 14, which provides for consideration by a domestic tribunal

¹²¹ Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l’homme* (n 9) 527.

¹²² Lambert, ‘Marge nationale d’appréciation et principe de proportionnalité’ (n 11) 63.

¹²³ Lord Hoffmann, Judicial Studies Board Annual Lecture ‘The Universality of Human Rights’, 19 March 2009: ‘an unfortunate Gallicism by which Member States are allowed a certain latitude to differ in their application of the same abstract right’.

¹²⁴ P Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’ (1998) *Human Rights Law Journal* 1.

¹²⁵ P Lambert, ‘La Cour européenne des droits de l’homme à l’épreuve de quelques critiques...au fil du temps. (En marge du cinquantième anniversaire de son installation)’ (2010) *Revue trimestrielle des droits de l’homme* 5, 13.

¹²⁶ For a critique of the freedom of expression case law, see Lord Lester of Herne Hill, ‘The European Court of Human Rights after 50 Years’ (2010) *European Human Rights Law Review* 461, 474:

[A]lthough the Court’s case law includes landmark judgments explaining and applying the fundamental right to free expression, it has often been closely divided, and its reasoning has always suffered from a use of ad hoc balancing under the margin of appreciation doctrine which lacks legal certainty and adherence to clear principles.

¹²⁷ Yutaka Arai-Takashi, *The Margin of Appreciation Doctrine* (n 9) 14.

as a safeguard vis-à-vis the new Article 35 inadmissibility criterion. As the Court has held on numerous occasions:

This margin of appreciation goes hand in hand with a European supervision, embracing both the law and the decisions applying it.¹²⁸

To quote Judge Rozakis once again, it is essential to ‘avoid the automaticity of reference to it, and duly limit it to cases where a real need for its applicability better serves the interests of justice and the protection of human rights’.¹²⁹

¹²⁸ See, eg, *Leyla Şahin v Turkey* (n 18) § 110; this wording can be traced back to *Handyside* (n 16), which uses ‘legislation’ rather than ‘law’, as do a number of subsequent judgments.

¹²⁹ *Egeland and Hanseid v Norway*, no 34438/04, 16 April 2009, Concurring opinion of Judge Rozakis.