

# THE INFLATION OF THE MARGIN OF APPRECIATION BY THE EUROPEAN COURT OF HUMAN RIGHTS

JAN KRATOCHVÍL\*

## Abstract

*The doctrine of the margin of appreciation, despite being repeatedly used by the European Court of Human Rights, is still to some extent mysterious. Given the doctrine's ambiguity, this article first endeavours to describe it and identify its different usages. It then argues that there is an inflation of the doctrine by its unnecessary application in a number of cases. This excessive use is considered to be unfortunate because the doctrine has a role to play in specifically circumscribed circumstances where it varies the strictness of scrutiny conducted by the Court. Based on the existent case law of the Court, the article provides a set of distinct tests that the Court can apply when invoking a particular margin of appreciation and argues for a predictable and consistent use of the doctrine.*

**Keywords:** margin of appreciation; European Court of Human Rights; case law; deference; level of scrutiny

## 1. INTRODUCTION

The case law of the European Court of Human Rights ('the Court') abounds with references to the margin of appreciation. Despite some severe criticism from scholars,<sup>1</sup>

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\* LL.M. (Nottingham), Ph.D (Prague), currently an assistant lawyer at the Registry of the European Court of Human Rights. I would like to thank all the persons that commented on earlier drafts of the paper, in particular Sergey Golubok and David Kosař. Needless to say all remaining omissions and errors remain mine. The views expressed in this paper are strictly my own. I would also like to thank the Fulbright Commission for their financial support enabling me to conduct research for this article. Email: jan.kratochvil@gmail.com.

<sup>1</sup> See, e.g., Brauch, Jeffrey A., 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', *Columbia Journal of European Law*, Vol. 11, No. 1, 2004–2005, pp. 113–150; Letsas, George, 'Two Concepts of the Margin of Appreciation', *Oxford Journal of Legal Studies*, Vol. 26, No. 4, 2006, pp. 705–732; Feingold, Cora S., 'The Doctrine of Margin of Appreciation and the European Convention on Human Rights', *Notre Dame Law Review*,

and also occasionally from individual judges of the European Court of Human Rights ('the Court'),<sup>2</sup> the margin of appreciation spreads into areas where its use was deemed unthinkable only a few years ago.<sup>3</sup> Nowadays, the Court applies it in its review of almost all Articles in the European Convention on Human Rights ('the Convention').<sup>4</sup>

Despite this development and the generous use of the margin of appreciation (also only 'margin'),<sup>5</sup> it is still very much veiled in a cloud of mystery. In 1993, Merrills noted that its application is 'fraught with difficulty'.<sup>6</sup> In 2000, Greer commented that 'no simple formula can describe how it works' and it has a 'casuistic, uneven, and largely unpredictable nature'.<sup>7</sup> In essence, it is not clear exactly when the margin of appreciation should be used or what its limits and contours are. In addition, the consequences of invoking it are far from predictable or precise. Yet, the Court's only scepticism towards the doctrine of the margin of appreciation that can be found in its case law, with the exception of some dissenting opinions, is its unease with it being used by national courts.<sup>8</sup> The overuse of the doctrine has recently been a matter of

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Vol. 53, 1977–78, pp. 90–106; and Stone, Thomas W., 'Margin of Appreciation Gone Awry: The European Court of Human Rights' Implicit Use of the Precautionary Principle in: *Fretté v. France* to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation', *Connecticut Public Interest Law Journal*, Vol. 3, No. 1, 2003–2004, pp. 218–236.

<sup>2</sup> See, e.g., Judge De Meyer in his dissenting opinion in ECtHR, *Z. vs Finland*, 25 February 1997, Application No. 22009/93: 'I believe that it is high time for the Court to banish that concept [of margin of appreciation] from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies'.

<sup>3</sup> For a comprehensive overview of the evolution of the doctrine, see Yourow, Howard Charles, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer, The Hague, 1996.

<sup>4</sup> See, e.g., under Article 2: ECtHR, *Budayeva vs Russia*, 20 March 2008, Application Nos. 15339/02; 11673/02; 15343/02; 20058/02 and 21166/02 or *Vo vs France* (Grand Chamber), 8 July 2004, Application No. 53924/00 and under Article 3: *M.C. vs Bulgaria*, 4 December 2003, Application No. 39272/98 and *Wilkinson vs the United Kingdom*, 28 February 2006, Application No. 14659/02. Moreover, the doctrine is spreading beyond the Court to other international judicial and quasi-judicial bodies. On the use of the doctrine outside the Court see Shany, Yuval, 'Toward a General Margin of Appreciation Doctrine in International Law?' *European Journal of International Law*, Vol. 16, No. 5, 2005, pp. 907–940. On uses of the doctrine by the European Committee of Social Rights see Cullen, Holly, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', *Human Rights Law Review*, Vol. 9, No. 1, 2009, pp. 61–93, at p. 88. Margin of discretion is also used in the WTO system: the appellate panel used it in the context of evaluating evidence in Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 5 April 2001, DSR 2001:VII, 3243, para. 161.

<sup>5</sup> Only in the first half of 2009 it was used 108 times by the Court in the judgments and decisions published in HUDOC.

<sup>6</sup> Merrills, J. G., *The Development of International Law by the European Court of Human Rights*, Manchester University Press, Manchester, 1993, p. 151.

<sup>7</sup> Greer, Steven, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 2000, p. 5.

<sup>8</sup> *A. and Others vs the United Kingdom* (Grand Chamber), 19 February 2009, Application No. 3455/05, para. 184: '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

some apprehension from individual judges of the Court. In *Egeland and Hanseid* Judge Rozakis said in his concurring opinion that the margin of appreciation is often used by the Court automatically and unnecessarily.<sup>9</sup> Indeed, the automatic use of the doctrine was already criticised by Feingold in 1977.<sup>10</sup>

The first aim of this article is to shed some light on the doctrine. By looking at examples of the Court's case law, different usages of the doctrine will be identified. The article will then show that, in many instances, the doctrine is used unnecessarily. Accordingly, one can rightly talk about an inflated use of the doctrine accompanied by a danger of it losing its value. Next, the article will deal with the need to set clear consequences for invoking the margin of appreciation. The article will conclude with suggestions for the Court on its use.

## 2. THE CONCEPT AND THE DIFFERENT USES OF THE DOCTRINE

According to Carozza, the margin of appreciation is rooted in subsidiarity.<sup>11</sup> In *Ireland vs the United Kingdom* the Court described the rationale for the margin of appreciation as '[b]y 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 and on the nature and scope of derogations necessary to avert it'.<sup>12</sup> This is a standard dictum to the present day.<sup>13</sup> Greer agrees that the main rationale of the doctrine is the 'better position rationale'<sup>14</sup> but identifies others as democracy (deference to democratic decision making in Member States), subsidiarity and proportionality.<sup>15</sup> However, he does not explain how deference flows from the principle of proportionality. He assumes that it is self-evident by saying that the former automatically flows from the latter.<sup>16</sup> Nevertheless, it is not at all clear, why applying the principle of proportionality

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the relations between the organs of State at the domestic level'. Similarly, Greer in 2000 expressed the opinion that the doctrine can have 'no direct domestic application' (Greer, *op.cit* note 7, p. 34).

<sup>9</sup> *Egeland and Hanseid vs Norway*, 16 April 2009, Application no. 34438/04, Concurring Opinion of Judge Rozakis.

<sup>10</sup> Feingold, *loc.cit* note 1, p. 96.

<sup>11</sup> Carozza, Paolo G., 'Subsidiarity as a Structural Principle of International Human Rights Law', *American Journal of International Law*, Vol. 97, No. 1, 2003, pp. 38–79, at p. 40. See also, Gerards, Janneke H., *Judicial review in equal treatment cases*, Nijhoff, Leiden/Boston, 2005, p. 166.

<sup>12</sup> *Ireland vs the United Kingdom*, 18 January 1978, Application No. 5310/71, para. 207.

<sup>13</sup> See e.g. *Zehentner vs Austria*, 16 July 2009, Application No. 20082/02, para. 57.

<sup>14</sup> Greer, *op.cit* note 7, p. 34.

<sup>15</sup> *Ibidem*, p. 23 and 24.

<sup>16</sup> *Ibidem*, p. 22 and 32.

necessarily entails deference.<sup>17</sup> Still, though, democracy is a valid rationale for an international court to give discretion to democratic States.

Most of the definitions of the doctrine concentrate on the deference that the doctrine provides to States. Yourow describes it as ‘freedom to act; manoeuvring, breathing or “elbow” room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare’ a violation of the Convention.<sup>18</sup> Arai-Takahashi talks about a ‘latitude a government enjoys’ in applying the provisions of a treaty.<sup>19</sup> Benvenisti similarly described it as a ‘certain latitude [each society has] in resolving the inherent conflicts between individual rights and national interests or among different moral convictions’.<sup>20</sup> Greer refers to a ‘room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations’ and ‘bandwidth’.<sup>21</sup> Merrills talks about an ‘area of discretion’.<sup>22</sup>

As these selected definitions show, the common feature here is a notion of space in which States can legally move. They also show that there is some uncertainty as to the uses of the doctrine. Some definitions refer to the application of the Convention, others to solving conflicts between rights and the public interest, and others to choices in fulfilling obligations. On a certain level of abstraction, any use of the doctrine can be described as deference. To be content with such a conclusion would not be very helpful, however, because one important question arises: deference with regards to what? The Court uses the doctrine in various circumstances that have different characteristics and consequently these uses must be described and analysed. This section will endeavour to identify the different uses of the doctrine in order to clarify the concept.<sup>23</sup>

<sup>17</sup> See also Letsas, who expresses scepticism about the use of the doctrine under the second paragraphs of Articles 8 to 11 in this way: ‘We have no prior theory of what falls within the states’ margin of appreciation, which we can use to find out what state acts (or omissions) amount to a violation. Rather, we use other tools, such as ‘balancing’ or the proportionality principle in order to find out the limits of the Convention rights’. Letsas, *loc.cit* note 1, p. 713.

<sup>18</sup> Yourow, *op.cit* note 3, p. 13.

<sup>19</sup> Arai-Takahashi, Yutaka, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*, Intersentia, Antwerpen/Oxford, 2002, p. 2.

<sup>20</sup> Benvenisti, Eyal, ‘Margin of appreciation, consensus, and universal standards’, *New York University Journal of International Law and Politics*, Vol. 31, No. 4, 1999, pp. 843–854, at p. 843.

<sup>21</sup> Greer, *op.cit.* note 7, p. 5.

<sup>22</sup> Merrills, *op.cit.* note 6, p. 151.

<sup>23</sup> Systematic research was undertaken regarding all 108 cases where the margin was mentioned by the Court from January to June 2009 and of those cases in 2009 (altogether 34 and of these 15 given in the second half of the year) where it was mentioned and which were given by the Court the importance level 1. That is cases, as explained on the HUDOC website, which ‘the Court considers make a significant contribution to the development, clarification or modification of its case law, either generally or in relation to a particular State’ (<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>).

Letsas describes two main uses of the doctrine: substantive and structural.<sup>24</sup> Substantive use addresses the relationship between individual freedoms and collective goals, while structural use addresses the limits or intensity of the review of the Court in view of its status as an international tribunal. He criticises both uses but especially the substantive one, which he describes as ‘either superfluous or question begging’.<sup>25</sup> Shany insists on a conceptually similar distinction between the use of the doctrine in norm-application and norm-interpretation.<sup>26</sup> Norm-application is similar to Letsas’s structural use in that international courts should respect the discretion of States in executing their international law obligations in different ways. Norm-interpretation refers to the ‘normative flexibility’ of the norms subject to the doctrine. At several points throughout his essay, Greer also distinguishes between uses of the doctrine in interpretation and implementation. He seems to take a stance that there is no need for the doctrine in norm-implementation as there the existence of States’ discretion is rather obvious.<sup>27</sup> Overall, Greer distinguishes between the following uses of the doctrine: (a) when the Court needs to strike a balance between public interests and individual rights, which he calls the ‘heartland of the “margin of appreciation”’;<sup>28</sup> (b) identifying and fulfilling positive obligations; and (c) in the interpretation of vague terms of the Convention such as ‘reasonable’ or ‘promptly’.<sup>29</sup> He argues that there is no place for the doctrine when a balance is being sought between two individual interests rather than between the public interest and individual rights. In this situation national authorities should not have any discretion.<sup>30</sup> Greer further suggests that we should dispense with the term in favour of ‘judicial discretion’ because for him the doctrine lacks ‘minimum theoretical specificity’ by being used in divergent circumstances and the term is misleading and more like ‘a pseudo-technical way of referring to the discretion which the Strasbourg institutions have decided the Convention permits national authorities to exercise in certain circumstances.’<sup>31</sup>

In summary, according to commentators the doctrine has two primary uses. The first use is as a doctrine of deference where the Court will not substitute the decisions of States on how to apply the Convention rights to concrete factual circumstances. The second use is to affect the definitions of the rights themselves and thus the extent of obligations put on States by the Convention.

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<sup>24</sup> Letsas, *loc.cit.* note 1, p. 706.

<sup>25</sup> *Ibidem*, p. 714.

<sup>26</sup> Shany, *loc.cit.* note 4, p. 910.

<sup>27</sup> Greer, *op.cit.* note 7, p. 15.

<sup>28</sup> *Ibidem*, p. 33.

<sup>29</sup> *Ibidem*, p. 30.

<sup>30</sup> *Ibidem*, p. 33.

<sup>31</sup> *Ibidem*, p. 32.

## 2.1. NORM APPLICATION

The doctrine started as a doctrine of deference to national authorities in evaluating whether concrete factual circumstances fitted a definition in the Convention. The former European Commission on Human Rights first mentioned the doctrine in the context of the permissibility of derogations under Article 15.<sup>32</sup> The Court used it for the first time in this way in *Ireland vs the United Kingdom*.<sup>33</sup> Here the doctrine conferred a presumption of rightness to a national decision to derogate from the Convention.

The first case when the Court actually used the doctrine (although at the time it called it the ‘power of appreciation’) was in the *Vagrancy* case. Belgian practice in limiting the freedom of correspondence of detained vagrants was found to be proportionate and not overstepping ‘the limits of the power of appreciation which Article 8(2) of the Convention leaves to the Contracting States’.<sup>34</sup> Thus, here the doctrine seems to affect the proportionality test used by the Court in evaluating the necessity of an interference with the right to correspondence. The doctrine was used in the same way in the seminal *Handyside* case.<sup>35</sup> The Court places a certain amount of trust in States to correctly apply the proportionality test in the concrete set of circumstances of the case. This is the distinctive feature of this use of the doctrine.

The margin of appreciation is used in a similar way when finding positive obligations. It affects the stringency of what are considered adequate measures taken by States in order to comply with their positive obligations. For example, in the well-known *Hatton* case, which concerned the obligation of States to protect the applicants from excessive night noise produced by a nearby airport,<sup>36</sup> the crux of the case lay in striking a ‘fair balance [...] between the competing interests of the individual and of the community as a whole’.<sup>37</sup> In striking this fair balance, States have a margin of appreciation. The Chamber employed a narrow margin and consequently found a violation of the Convention.<sup>38</sup> In contrast, the Grand Chamber effectively afforded the

<sup>32</sup> See Yourow, *op.cit.* note 3, p. 15.

<sup>33</sup> *Ireland vs the United Kingdom*, *supra* note 12, para. 207.

<sup>34</sup> *De Wilde, Ooms and Versyp vs Belgium*, 18 June 1971, Application Nos. 2832/66; 2835/66; 2899/66, para. 93.

<sup>35</sup> See especially *Handyside vs the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 54.

<sup>36</sup> Although the Court did not actually decide if it was a positive or a negative obligation, this case illustrates the point.

<sup>37</sup> *Hatton vs the United Kingdom*, 2 October 2001, Application No. 36022/97, para. 96, confirmed by the Grand Chamber in *Hatton vs the United Kingdom* (Grand Chamber), 8 July 2003, Application No. 36022/97, para. 98. This test was taken from *Powel and Rayner vs the United Kingdom*, 21 February 1990, Application No. 9310/81, para. 41.

<sup>38</sup> See especially the chamber in *Hatton vs the United Kingdom*, *supra* note 37, para. 97. In the Grand Chamber’s judgment the government contended that the Chamber ‘reduced [the margin of appreciation] to vanishing-point’ (*Hatton vs the United Kingdom* (Grand Chamber), *supra* note 37, para. 88).

State a wide margin of appreciation when it reviewed only the procedure of reaching the decision and as a result found no violation.<sup>39</sup>

The use of the doctrine in norm application essentially means that the Court will give a certain deference to the judgment of the State authorities (or whoever is responsible for the measure or decision in question) in the application of the Convention to a concrete set of facts. In other words, the Court, to a certain degree, defers to States in assessing, *inter alia*, whether the measure was proportionate, whether there was a pressing social need, whether the right balance was struck between competing interests, and whether the factual circumstances fall within a definition in the Convention.

In all these circumstances the Court seems to use the doctrine as a vehicle which influences the strictness of the requirements imposed on States. When the margin is narrow, the bar for finding a violation of the Convention is presumably set high and the ensuing obligation is more stringent. The margin works here like a bar in a high jump competition. The Court sets the bar at a certain height over which the State must jump in order to escape a violation. A narrow margin means that the bar is relatively high; a wide margin means an easy jump. The problem is, however, that we do not know what a State must do in order to satisfy the conditions of the Convention. To put it differently, we do not know the exact height of the bar. We only usually know that in some cases it is higher than in others. Yet, even that not always, as will be discussed below. The width of the margin is not always indicative of the strictness of the scrutiny applied. Moreover, the width of the margin is often not identified at all.

## 2.2. NORM DEFINITION

A different use of the doctrine can be distinguished when the margin affects the definition of a right or some question of principle and not the application of a principle to a set of facts.

The Court often uses the doctrine under Article 6 to convey the idea that the right of access to a court is not absolute. In *Petkovski* the margin of appreciation was used with regard to Article 6 to limit the right of access to a court: 'the 'right to a court' [...] is subject to limitations permitted by implication, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard'.<sup>40</sup> The margin of appreciation here directly affects the scope of the right to a court and thus the obligations of States under Article 6. In *Belev* the Court similarly invoked a

<sup>39</sup> *Hatton vs the United Kingdom* (Grand Chamber), *supra* note 37, para. 123 and 130.

<sup>40</sup> *Petkoski and Others vs Macedonia*, 8 January 2009, Application No. 27736/03, para. 41, in the same way in *Ferenc Rózsa and István Rózsa vs Hungary*, 28 April 2009, Application No. 30789/05, para. 20, *Ligue du monde islamique et Organisation islamique mondiale du secours islamique vs France*, 15 January 2009, Application Nos. 36497/05 and 37172/05, para. 49, *Brunet-Lecomte and Others vs France*, 5 February 2009, Application No 42117/04, para. 55 or *L'Erablière A.S.B.L. vs Belgium*, 24 February 2009, Application No. 49230/07, para. 35.

margin of appreciation in saying that the right to the execution of court decisions, an aspect of the right of access to a court, is not absolute.<sup>41</sup>

This use is, however, not limited only to questions of access to judicial remedies. In *Times Newspapers Ltd (Nos. 1 and 2)* the Court stated that ‘It is, in principle, for contracting States, in the exercise of their margin of appreciation, to set a limitation period’ on defamation lawsuits.<sup>42</sup> Consider also the use of the margin of appreciation in *Stec and Others*. There the question was whether the United Kingdom had violated the Convention by having different retirement ages for men and women. Being an issue of economic or social strategy, the United Kingdom had a wide margin of appreciation and the result was that the Convention does not prohibit distinctions in retirement age based on gender.<sup>43</sup> Thus, it is a matter of principle that is the outcome of the margin of appreciation analysis.

Admittedly, the distinction between the two uses of the doctrine mentioned so far is not clear cut. In *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others* the use of the margin seems to be borderline between norm application and norm definition. The Court stated that ‘States enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities’.<sup>44</sup> This suggests that the definition of the right does not purport to regulate relations between States and churches. But then the margin is used in the context of the application of freedom of religion to concrete factual circumstances in that States are relatively free to interfere with matters of religious communities if they consider that the factual circumstances call for it.

The distinction between norm application and norm definition eventually depends on the level of abstraction in question. In one extreme it can be argued that all uses of the doctrine are just the application of the Convention rights to the concrete circumstances of a case. Thus, when the Court finds, for example in *Stec and Others*, that the Convention does not prohibit different retirement ages, it can be argued that this is just an application of the prohibition of discrimination to a concrete set of facts. At the other end of the spectrum, even where a decision in the case is limited to a narrow set of facts, it can be argued that there is still a discernible principle. For example, in the *Obukhova* case, the question was whether it had been proportionate for Russia to prohibit the publishing of any articles about a traffic accident in which a judge had been involved and which was the subject of ongoing litigation.<sup>45</sup> The principle of the case can be said to be that States which do not have the *sub judice* rule

<sup>41</sup> *Belev and Others vs Bulgaria*, 2 April 2009, Application No. 16354/02, para. 57.

<sup>42</sup> *Times Newspapers Ltd (No. 1 and 2) vs the United Kingdom*, 10 March 2009, Application Nos. 3002/03 and 23676/03, para. 46.

<sup>43</sup> *Stec and Others vs the United Kingdom* (Grand Chamber), 12 April 2006, Application Nos. 65731/01 and 65900/01, para. 66. This approach was recently confirmed in *Andrle vs the Czech Republic*, 17 February 2011, Application No. 6268/08, para. 60.

<sup>44</sup> *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others vs Bulgaria*, 22 January 2009, Application Nos. 412/03 and 35677/04, para. 119.

<sup>45</sup> *Obukhova vs Russia*, 8 January 2009, Application No. 34736/03.



cannot completely prohibit information from being published about an ongoing case that is of public interest.

Therefore, to a certain degree, drawing the line between the use of the doctrine in norm application or norm definition is subjective. Nevertheless, there is still value in maintaining this important conceptual distinction. For example, in his discussion on cultural relativism, Donnelly distinguishes between variations in substance, interpretation and form.<sup>46</sup> By form he means variations in implementation and here he sees no problem *vis-à-vis* cultural relativism, yet, it is more problematic when we move to differences in interpretation.<sup>47</sup> This is one reason why the Court should be careful in using the margin in norm-interpretation.

Moreover, giving deference to States on a general question or a question of principle means that the Court loses some control over defining the exact contours of the rights in the Convention. It is questionable whether this is indeed a use of the doctrine justified by the subsidiarity principle. It is one thing that States are in a better position to evaluate factual circumstances arising in their country, but why should they be better placed than the Court to interpret their obligations under the Convention in general? It is the Court which is endowed with the power of interpreting the Convention, which indeed is the primary function of any judicial body.

At times this direction was the way the Court chose to go.

In some instances where the issue is more a question of a rule rather than its application, the Court does not resort to the margin of appreciation. For instance, in *Kozacıoğlu* the issue was whether States must, in the event of the expropriation of a listed building, take into account its historical and cultural value. Despite the government inviting the Court to afford it a margin of appreciation and its practice in other expropriation cases, there is no mention of the doctrine by the Court. Interestingly, the one dissenting judge saw this clearly not as a matter of principle but as a matter of application of the principle of adequate compensation and he would have left the State a wide margin of appreciation.<sup>48</sup>

The dissenting opinion of Judges Rozakis, Spielmann and Jebens in *Schalk and Kopf* can be similarly interpreted as a certain dismay with using the margin of appreciation in a norm definition situation. In that case, the majority used the margin in finding that ‘the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act any earlier’ than in 2010.<sup>49</sup> It was thus a matter of a definition of a right – Article 14 in conjunction with Article 8 did not require States to establish registered partnership of same-sex couples before 2010. The dissenting judges, however, noted that Austria had not advanced any argument to justify the

<sup>46</sup> Donnelly, Jack, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca/London, 2003, p. 93.

<sup>47</sup> By substance he means simply enumerations of rights on the most abstract level.

<sup>48</sup> *Kozacıoğlu vs Turkey*, 19 February 2009, Application No. 2334/03, Dissenting Opinion of Judge Maruste.

<sup>49</sup> *Schalk and Kopf vs Austria*, 24 June 2010, Application No. 30141/04, para. 106.

difference in treatment and relied mainly on their margin of appreciation. They opined that ‘in the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation’ and ‘[i]n indeed, it is only in the event that the national authorities offer grounds for justification that the Court can be satisfied, taking into account the presence or the absence of a common approach, that they are better placed than it is to deal effectively with the matter’.<sup>50</sup> The dissenters would therefore prefer to apply the margin to concrete factual situation pertaining in Austria at that time based on government’s arguments why they did not perceive that situation discriminatory.

In addition to these two most frequent uses of the doctrine there are other distinct uses, including the following.

### 2.3. CHOICE OF MEANS

When examining the use of the doctrine by the International Court of Justice, Shany makes a point that it is also being used in the sense that States have a certain freedom in choosing the means by which to comply with their obligations.<sup>51</sup> This concerns result-oriented obligations where States are free to choose the means by which to achieve the result. The Court has also mentioned the doctrine in this sense in several cases.

This use of the doctrine is most frequently applied in cases regarding positive obligations.<sup>52</sup> In *Fadeyeva*, the Court asserted that ‘where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State’s margin of appreciation’.<sup>53</sup> This serves as a prelude to its pronouncement that if the State fails to take a particular measure, which it might even be obliged to take under national law, a violation of the Convention does not necessarily follow because there might be other measures that the State took which were sufficient for fulfilling its positive obligations under the Convention. Here, the margin of appreciation only conveys the idea that the Court will not dictate which concrete practical measures the State must take in order to fulfil its positive

<sup>50</sup> *Ibidem*, Joint Dissenting Opinion of Judges Rozakis, Spielmann and Jebens.

<sup>51</sup> Shany, *loc.cit.* note 4, p. 935.

<sup>52</sup> But not exclusively. For a use in the context of negative obligations, see *Chorherr vs Austria*, 25 August 1993, Application no. 13308/87 or a recent similar case *Acik and Others vs Turkey*, 13 January 2009, Application No. 31451/03.

<sup>53</sup> *Fadeyeva vs Russia*, 9 June 2005, Application No. 55723/00, para. 96. For similar usage of the doctrine see from an older case law e.g. *X and Y vs the Netherlands*, 26 March 1985, Application No. 8978/80, para. 24 and from the newer case law *Budayeva vs Russia*, *supra* note 4, para. 134, *Karakó vs Hungary*, 28 April 2009, Application No. 39311/05, para. 19, *Greenpeace E.V. and others vs Germany*, 12 May 2009, Application No. 18215/06, *Beganović vs Croatia*, 25 June 2009, Application No. 46423/06, or *Manole and Others vs Moldova*, 17 September 2009, Application No. 13936/02, para. 100.

obligations. The Court will simply review whether the measures taken were adequate or appropriate.

This approach was explicitly endorsed by the Court in the *Colozza* case where the margin of appreciation was used in the same way in the context of compatibility of trial *in absentia* with Article 6. The Court stated that:

The Contracting States enjoy a 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 §1 in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved.<sup>54</sup>

Commenting on this case, Yourow points out that 'the margin of discretion language [...] is not strictly necessary to the decision'.<sup>55</sup> Indeed, that is a common feature of this use of the doctrine. In *Fadeyeva*,<sup>56</sup> the use of the margin in no way distracted the Court from providing its analysis as to the compatibility with the Convention.

Using the margin of appreciation in this category is akin to either one of the two uses mentioned above,<sup>57</sup> or it just means that the Court does not generally require a single measure that States must take in order to fulfil their obligations.<sup>58</sup> The latter use has little to do with varying degrees of deference afforded to States. It is just one general idea. Its core is related to deference but there is no bandwidth here that the Court can shrink or expand according to certain circumstances. It is thus doubtful if any useful purpose is served by invoking the doctrine in this context. It adds nothing to the analysis of the Court.

#### 2.4. OTHER USES OF THE DOCTRINE

Other commentators point to additional uses of the doctrine. Brems points to the *Luberti* case where the Court allowed the State a margin of appreciation in the evaluation of the facts.<sup>59</sup> This is, however, just another variation of the use in norm-application.

<sup>54</sup> *Colozza vs Italy*, 12 February 1985, Application No. 9024/80, para. 30.

<sup>55</sup> Yourow, *op.cit.* note 3, p. 77.

<sup>56</sup> And similarly for example in *Budayeva vs Russia*, *supra* note 4.

<sup>57</sup> Norm-application is apparent for instance in *Chorherr vs Austria*, *supra* note 52, where the question was if the arrest of the applicant who was disturbing a military ceremony by handing out leaflets and holding a placard that blocked the view of spectators was necessary in a democratic society under Article 10. Thus, it was a question of whether a freedom of expression was violated under the concrete set of facts.

<sup>58</sup> Although this may be rebutted as in *X and Y vs the Netherlands*, *supra* note 53 or *M.C. vs Bulgaria*, *supra* note 4, where the Court required criminalization of acts of sexual violence or *Beganović vs Croatia*, *supra* note 53, para. 71 and 80, where the Court required criminal prosecution for acts of serious physical violence amounting to ill-treatment under Article 3.

<sup>59</sup> Brems, Eva, 'The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights', *Zeitschrift für ausländisches öffentliches Recht*, Vol. 56, No. 1-2, 1996, pp. 240-314, at p. 251, *Luberti vs Italy*, 23 February 1984, Application No. 9019/80, para. 27.

Here, the deference does not pertain to any legal analysis such as the proportionality test but to the evaluation of evidence. The margin in this context expressly refers to a certain discretion that the national authorities have. In *Winterwerp*, in 1979, the Court used these words: ‘in deciding whether an individual should be detained as a “person of unsound mind”, the national authorities are to be recognised as having a certain discretion since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case’.<sup>60</sup> In 1984, in *Luberti*, the term ‘discretion’ becomes ‘margin of appreciation’.<sup>61</sup> It is obvious that the Court cannot re-evaluate the evidence heard by the national courts. However, there is no need to resort to the language of the margin of appreciation in this regard.

Greer describes yet another use of the doctrine. He claims that States enjoy discretion when interpreting or applying the vague adjectives used in the Convention such as ‘reasonable’ or ‘promptly’.<sup>62</sup> He gives the example of *Brogan*, where the question of whether detention lasting more than four days without the detainee being brought before a judge complies with Article 5(3), which requires that everyone arrested ‘shall be brought promptly before a judge’. However, this use of the doctrine is again mostly just deference being given on the matter of how to implement the Convention. If the promptness depends on the individual factors of each case, as the Court suggested,<sup>63</sup> then it will just vary in different circumstances and is for all practical purposes akin to the discretion States enjoy in applying the Convention to concrete factual circumstances.

To sum up, several uses of the doctrine have been identified, though it might be questioned whether they are each a distinct category. In any case, their common feature is a notion of deference. Deference afforded to States by the Court in various contexts. A presumption is that giving a State a margin of appreciation means giving it certain deference so that its actions or inactions are less likely to result in a violation of the Convention. Questions arise whether that is indeed true in all cases where the margin is invoked, that is, if the specific obligations of States in those cases are effectively less stringent and, secondly, how the margin precisely affects the stringency of the obligations. The next section will address the first issue and will critically examine the uses of the doctrine based predominantly on recent case law. It will show that in many cases the use of the margin is, in fact, redundant. Section 5, then, will deal with the second question and will try to identify any tests that the Court uses in affording States deference. It will be argued that the doctrine is often used superfluously and that the Court fails to make it clear what the consequences are of saying that there is a particular margin.

<sup>60</sup> *Winterwerp vs the Netherlands*, 24 October 1979, Application No. 6301/73, para. 40.

<sup>61</sup> *Luberti vs Italy*, *supra* note 59, para. 27.

<sup>62</sup> Greer, *op.cit.* note 7, p. 30.

<sup>63</sup> *Brogan vs the United Kingdom*, 29 November 1988, Application Nos. 11209/84; 11234/84; 11266/84; 11386/85, para. 61.

### 3. THE INFLATION OF THE MARGIN OF APPRECIATION

The inflation of the margin of appreciation in the Court's case law is demonstrated in several different situations. Their common denominator is that the margin is referred to even though it does not seem to serve any useful purpose under the circumstances. The following uses of the doctrine are, it is submitted, unhelpful: (a) mention of the margin which is unrelated to the reasons on which the case was decided; (b) the margin is mentioned but does not play any explicit role; (c) the habit of invoking a 'certain margin of appreciation'; (d) the margin mentioned only in the conclusion; and (e) inconsistency in the use of the margin. There is some overlap between these categories and they are indeed very closely related but it still seems useful to distinguish between them for analytical purposes because they all have some distinct features.

#### 3.1. UNRELATEDNESS OF THE MARGIN OF APPRECIATION TO THE COURT'S DECISION

The Court often invokes the margin unnecessarily because it decides the case on an issue unrelated to the doctrine. For instance, in *Connors* the Court contemplates various widths of the margin based on various criteria in the context of house evictions.<sup>64</sup> Then it goes on to say that the 'procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation'.<sup>65</sup> The decision in the case turns to the fact that there must be procedural safeguards in place if the eviction is to be proportionate and thus necessary.<sup>66</sup> The need for such a safeguard can be considered the bedrock of the margin. However, it is one thing to set out the strictness of the obligations the Convention puts on States with regard to housing policies but another to require a procedural safeguard in eviction orders. A reference to the margin of appreciation does not help the Court to find such a procedural obligation. Thus, for the reason on which the case was decided any reference to the margin was unnecessary. The Court simply found that Article 8 requires there to be certain procedural safeguards in cases of eviction.<sup>67</sup> This becomes even more obvious in *Cosic*, where no other analysis was undertaken except for finding that there were no procedural safeguards regarding the proportionality of the eviction order.<sup>68</sup>

In these examples, the Court invokes the margin unnecessarily and actually decides the case on an issue unrelated to the doctrine. Unfortunately, by invoking the margin, the Court avoids giving clear arguments as to why it interpreted the

<sup>64</sup> *Connors vs the United Kingdom*, 27 May 2004, Application No. 66746/01, para. 82.

<sup>65</sup> *Ibidem*, para. 83.

<sup>66</sup> *Ibidem*, paras. 92–95.

<sup>67</sup> Similarly, in *Zehentner vs Austria*, *supra* note 13 at para. 58.

<sup>68</sup> *Cosic vs Croatia*, 15 January 2009, Application No. 28261/06, paras. 21–23.

obligation in a certain way.<sup>69</sup> The margin mantra does not help to solve the issues presented. On the contrary, it actually seems to work as a smoke screen. The margin is invoked as if it somehow resolved the dispute, as if it is an aid to, and even decisive in, the interpretation of the Convention in that particular circumstance. However, it does neither in these cases. If the issue is answering a general question, such as whether the Convention requires procedural guarantees in evictions, the Court should answer it by using some reasoning (such as necessity or reasonability).

### 3.2. THE COURT CONDUCTS ITS OWN ANALYSIS

In another set of cases the Court invokes the margin, sometimes wide, but then conducts its own analysis relevant to the case, such as proportionality. The margin has no explicit effect on that analysis. A useful example is the *Czarnowski* case, where the Court, in the context of an interference with the applicant's Article 8 rights, referred to the margin of appreciation four times. Yet, it is not clear from the case how the margin affected the Court's analysis or its outcome because the Court carried out its own proportionality analysis. The four uses of the doctrine, include:

- a) 'The Court observes that Article 8 of the Convention does not guarantee a detained person an unconditional right to leave prison in order to attend the funeral of a relative. It is up to the domestic authorities to assess each request on its merits. Its scrutiny is limited to consideration of the impugned measures in the context of the applicant's Convention rights, taking into account the margin of appreciation left to the Contracting States'.<sup>70</sup>

If we left out the last part of the last sentence nothing would be lost for the ensuing analysis.

- b) 'In determining whether an interference was 'necessary in a democratic society' the Court will take into account that a margin of appreciation is left to the Contracting States'.<sup>71</sup>

And yet the Court does not specify the kind of margin, its width or its relevance to the present circumstances. This is also true for the next mention of the doctrine:

<sup>69</sup> For more recent case law, see for example *Borzhanov vs Russia*, 22 January 2009, Application No. 18274/04, para. 60, where the Court stated 'in principle, imposition of a charge on an accused's property is not in itself open to criticism, having regard in particular to the margin of appreciation permitted under the second paragraph of Article 1 of the Protocol'. It then, however, required procedural safeguards for the accused concerning the seized property.

<sup>70</sup> *Czarnowski vs Poland*, 20 January 2009, Application No. 28586/03, para. 26.

<sup>71</sup> *Ibidem*, para. 27.

- c) ‘Looking at the circumstances of the events in question in the light of the case as a whole, and taking into account the margin of appreciation left to the respondent State, the Court observes that the applicant was serving a one-year prison term’.<sup>72</sup>
- d) In its conclusion, the Court once again invokes the margin as if it played some crucial role in its analysis. It seems to be saying that there has been a violation despite the margin afforded to the State. But as there is no previous discussion of the exact margin the State enjoys and its consequences, its mention in the conclusion is hardly illuminating. The Court could have safely left out the highlighted part of the sentence:

The Court concludes that, in the particular circumstances of the present case, *and notwithstanding the margin of appreciation left to the respondent State*, the refusal of leave to attend the funeral of the applicant’s father, was not ‘necessary in a democratic society’ as it did not correspond to a pressing social need and was not proportionate to the legitimate aims pursued.<sup>73</sup>

Another case in point is the Grand Chamber judgment in the case of *Gorzelik and Others*.<sup>74</sup> There, the margin was invoked by the Court in its assessment of the existence of a pressing social need to interfere with the applicants’ freedom of association. It stated that ‘It is in the first place for the national authorities to assess whether there is a “pressing social need” to impose a given restriction in the general interest’.<sup>75</sup> However, in one breath it asserts that “this does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith”.<sup>76</sup> Then follows a full analysis of whether there was a pressing social need to adopt the measures and whether they were proportionate. It is unclear how much, if any, deference was afforded to the national authorities.<sup>77</sup>

Even more telling is the case of *A. vs Norway* where the Court identifies a wide margin of appreciation that States have in balancing the freedom of the press with the protection of privacy. Nevertheless, this wide margin does not seem to affect the analysis at all and no obvious deference is given. The Court performs its balancing exercise and concludes that it

<sup>72</sup> *Ibidem*, para. 28.

<sup>73</sup> *Ibidem*, para. 33 (emphasis added).

<sup>74</sup> Followed, for example, in *Association of Citizens Radko & Paunkovski vs Macedonia*, 15 January 2009, Application No. 74651/01.

<sup>75</sup> *Gorzelik and Others vs Poland* (Grand Chamber), 17 February 2004, Application No. 44158/98, para. 96.

<sup>76</sup> *Idem*. The ‘relevant and sufficient’ test comes from the *Handyside vs the United Kingdom*, *supra* note 35, para. 50.

<sup>77</sup> Similarly, it is used in *Csánics vs Hungary*, 20 January 2009, Application No. 12188/06.

is mindful of the careful and thorough review carried out by the national courts of the various factors that are relevant under the Convention. However, there was not in the Court's view a reasonable relationship of proportionality between the interests relied on by the domestic courts in safeguarding *Fædrelandsvennen's* freedom of expression and those of the applicant in having his honour, reputation and privacy protected. The Court is therefore not satisfied that the national courts struck a fair balance between the newspaper's freedom of expression under Article 10 and the applicant's right to respect for his private life under Article 8, notwithstanding the wide margin of appreciation available to the national authorities.<sup>78</sup>

The allegedly wide margin is of no use to the State despite the Court acknowledging the careful and thorough review undertaken by the national courts.

Similarly, in *Egeland and Hanseid*, the Court, after a thorough discussion, declared the margin to be wide.<sup>79</sup> However, it seems that this did little to influence the Court's analysis. It conducted a full analysis which even prompted Judge Rozakis to point to this inconsistency between the width of the margin and the level of scrutiny conducted.<sup>80</sup> Indeed, it is telling that two judges found it necessary to attach a separate opinion to the case in which they opined that the State did not enjoy a wide margin of appreciation in such cases. They nevertheless were perfectly happy with the Court's analysis. Consequently, affording a wide margin had no effect on the Court's reasoning. The list of cases here could continue.<sup>81</sup>

These cases demonstrate that it is often doubtful whether invoking the margin of appreciation serves any purpose. It is hard to escape the perception that, by mentioning it, the Court only pays lip-service to the principle of subsidiarity. In other words, by reciting the mantra of the margin of appreciation it tries to assure States that it is not an active court but a deferential one. Whether that is indeed the case is unclear

<sup>78</sup> *A. vs Norway*, 9 April 2009, Application No. 28070/06, para. 74.

<sup>79</sup> *Egeland and Hanseid vs Norway*, *supra* note 9, para. 55.

<sup>80</sup> *Ibidem*, Concurring Opinion of Judge Rozakis at para. c).

<sup>81</sup> See e.g. *Petkoski and Others vs Macedonia*, *supra* note 40, para. 41, *Ferenc Rózsa and István Rózsa vs Hungary*, *supra* note 40, para. 20, *Guillard vs France*, 15 January 2009, Application No. 24488/04, *Ligue du monde islamique et Organisation islamique mondiale du secours islamique vs France*, *supra* note 40, para. 49, *Brunet-Lecomte et autres vs France*, *supra* note 40, para. 55, *L'Erablière A.S.B.L. vs Belgium*, *supra* note 40 at para. 35, *Roubies vs Greece*, 30 April 2009, Application No. 22525/07, para. 36, *Burdov vs Russia (No. 2)*, 15 January 2009, Application No. 33509/04, para. 99, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others vs Bulgaria*, *supra* note 44, or *Tatar vs Romania*, 27 January 2009, Application No. 67021/01. Other cases where it is not clear what use the margin was because the Court made its own analysis include: *Brede vs Germany*, 3 February 2009, Application No. 35198/05, *LIDO A.E. vs Greece*, 8 January 2009, Application No. 41407/06, *Şerife Yiğit vs Turkey*, 20 January 2009, Application No. 3976/05, *İmza vs Turkey*, 20 January 2009, Application No. 24748/03, *Vadacca vs Italy*, 10 March 2009, Application No. 9062/07, *Luminița-Antoaneta Marinescu vs Romania*, 31 March 2009, Application No. 32174/02, *Acik and others vs Turkey*, *supra* note 52 and *Masaev vs Moldova*, 12 May 2009, Application No. 6303/05. To this category also fall some seminal cases, like for instance *Kokkinakis vs Greece*, 25 May 1993, Application No. 14307/88 or *Sporrong and Lönnroth vs Sweden*, 23 September 1982, Application Nos. 7151/75 and 7152/75, paras. 69–74.



because the Court makes its own analysis regardless of whether or not the doctrine is invoked. The doctrine of the margin of appreciation does not help the Court to reach its conclusions, or in any case does not help explicitly, as discussed below.

### 3.3. A CERTAIN MARGIN OF APPRECIATION

A very common practice of the Court is to refer to ‘a certain margin of appreciation’ without identifying its width.<sup>82</sup> This practice is often a subset of the previous cases where the Court makes its own analysis. Of the 108 uses of the doctrine in the first half of 2009, the width of the margin was identified in only 34 cases. The rest mention ‘a certain margin of appreciation’ or simply ‘a margin of appreciation’ without an adjective.

The expression ‘a certain margin of appreciation’ was already used in *Sunday Times*, where the Court acknowledged that States have a certain margin of appreciation. Then it asserted that it must decide, in any event, whether ‘the “interference” complained of corresponded to a “pressing social need”, whether it was “proportionate to the legitimate aim pursued”’.<sup>83</sup> It conducted a careful proportionality analysis. In *Belev and Others*, the Court invoked ‘a certain margin of appreciation’ in saying that the right to the execution of court decisions, which is an aspect of the right of access to court, is not absolute.<sup>84</sup> It can be regulated by the State, which has a certain margin of appreciation in that regard. It seems to convey the simple idea, expressed in the next sentence, that not every failure to execute a judgment will amount to a violation of Article 6. However, there is no other use for the margin. In the following paragraphs the Court says that any restriction must pursue a legitimate aim and that there must

<sup>82</sup> See e.g. *Lappalainen vs Finland*, 20 January 2009, Application No. 22175/06, *Eerikäinen and Others vs Finland*, 10 February 2009, Application No. 3514/02, *Kudeshkina vs Russia*, 26 February 2009, Application No. 29492/05, *Löffelmann vs Austria*, 12 March 2009, Application No. 42967/98, *Gütl vs Austria*, 12 March 2009, Application No. 49686/99, *Lang vs Austria*, 19 March 2009, Application No. 28648/03, *Berková vs Slovakia*, 24 March 2009, Application No. 67149/01, *Sanoma Uitgevers B.V. vs the Netherlands*, 31 March 2009, Application No. 38224/03, *Weller vs Hungary*, 31 March 2009, Application No. 44399/05, *Todorova vs Italy*, 13 January 2009, Application No. 33932/06, *Kalkanli vs Turkey*, 13 January 2009, Application No. 2600/04, *İmza vs Turkey*, 20 January 2009, Application No. 24748/03, *Ancel vs Turkey*, 17 February 2009, Application No. 28514/04, *Errico vs Italy*, 24 February 2009, Application No. 29768/05, *Luminița-Antoaneta Marinescu vs Romania*, *supra* note 81, *Turnali vs Turkey*, 7 April 2009, Application No. 4914/03, *Masaev vs Moldova*, *supra* note 81, *Standard Verlags GmbH vs Austria (No. 2)*, 4 June 2009, Application No. 21277/05, *Kvasnica vs Slovakia*, 9 June 2009, Application No. 72094/01, *Benediktsdóttir vs Iceland*, 16 June 2009, Application No. 38079/06, *Bodrožić and Vujin vs Serbia*, 23 June 2009, Application No. 38435/05, *Sorguç vs Turkey*, 23 June 2009, Application No. 17089/03, *Stamouli and Others vs Greece*, 28 May 2009, Application No. 1735/07, *Association Solidarite des Français vs France*, 16 June 2009, Application No. 26787/07, *Grosz vs France*, 16 June 2009, Application No. 14717/06, *Kuliš and Różycki vs Poland*, 6 October 2009, Application No. 27209/03.

<sup>83</sup> *Sunday Times vs the United Kingdom*, 26 April 1979, Application No. 6538/74, para. 62.

<sup>84</sup> *Belev and Others vs Bulgaria*, *supra* note 41, para. 57.

be a reasonable relationship of proportionality between the means employed and that aim.<sup>85</sup> The Court undertook this analysis and no deference is apparent from it.

The sentence about a certain margin of appreciation is often succeeded by the assertion that, in the end, it is for the Court to determine whether the measure in question is compatible with the Convention.<sup>86</sup> Accordingly, the cases with ‘a certain margin of appreciation’ often fall into the category of the preceding section. However, there are reasons why this category deserves a special focus.

The use of ‘a certain margin of appreciation’ is not only unhelpful, it actually creates more confusion. The case of *Sanoma Uitgevers B.V.* is testimony to that. Firstly, in this case the chamber of the Court, despite the margin left to the State, said that it must ascertain ‘whether the measure taken was ‘proportionate to the legitimate aims pursued’.<sup>87</sup> It conducted the proportionality analysis itself and there was no explicit deference in its analysis. Secondly, the case was decided four votes to three. The dissenting judges apparently wanted to apply a much narrower margin and referred to ‘the most careful scrutiny’ that the Court should have exercised.<sup>88</sup> Thus, there seemed to be a disagreement among the judges on the proper width of the margin, which is, however, not reflected in the judgment. Consequently, the reasoning lacks the transparency required of judicial decision making. Invoking ‘a certain margin of appreciation’ not only fails to shed light on the analysis but actually leads to split decisions.

Any usefulness of the doctrine in these cases, and also under category (b), discussed in the previous subsection, hinges on determining whether the analysis conducted by the Court, and so the strictness of obligations is affected by the margin. The doctrine can only be of use here if we accept that when the Court invokes the margin the minds of the judges are somehow geared towards deference. Yet, more importantly, if that is indeed the case then we have no idea what degree of deference if the Court does not explicitly say. We cannot know what exactly goes on in the judges’ minds and the Court only tells us that States have ‘a certain margin of appreciation’. However, what does ‘certain’ mean? There is no test attached to this kind of margin. The doctrine here only detracts from the clarity of the Court’s analysis. It certainly does not help States to predict their obligations, or individuals to predict their rights. So then the margin here is indeed the black box severely criticised by Brauch.<sup>89</sup> Once the case goes in nobody can be sure what will come out of it. If the margin here denotes some

<sup>85</sup> *Ibidem*, para. 60.

<sup>86</sup> E.g. *Barraco vs France*, 5 March 2009, Application No. 31684/05, para. 42, *Association Solidarite des Francais vs France*, *supra* note 82, *Grosz vs France*, *supra* note 82 or from older cases e.g. *Kokkinakis vs Greece*, *supra* note 81, para. 47.

<sup>87</sup> *Sanoma Uitgevers B.V. vs the Netherlands*, *supra* note 82, para. 54.

<sup>88</sup> *Ibidem*, Dissenting Opinion of Judge Power joined by Judges Gyulumyan and Ziemele.

<sup>89</sup> Brauch, *loc.cit.* note 1, p. 133. Brauch criticizes the doctrine as undermining the rule of law because of its unpredictability and compares it to a black box.

deference for the sake of clarity and transparency we should know what degree of deference. This issue will be discussed below in Section 5.

Moreover, it is submitted that even if the margin of appreciation in these cases stood for deference, it is still not used in a useful manner. Or better to say, its potential as described in Section 4 of this article would not be utilised. The margin of appreciation would simply be a synonym of deference. But why then use the doctrine when the Court can simply say that States enjoy deference in the matter in question?

### 3.4. THE MARGIN OF APPRECIATION MENTIONED ONLY IN THE CONCLUSION

There is a large set of cases where no width of the margin is identified and it is mentioned only in the conclusion.<sup>90</sup> A typical example goes like this: ‘In view of the above considerations *and notwithstanding Russia’s margin of appreciation*, the Court finds that there was a breach of Article 8’.<sup>91</sup> Another example is this ‘In the circumstances of the present case *and regard being had to the State’s margin of appreciation*, the Court is of the view that there was no violation of Article 8’.<sup>92</sup> As the margin does not feature anywhere in the Court’s analysis, hardly anything would be lost if the highlighted parts of the sentences are omitted. This is by no means a novel use. For example, the margin was unhelpfully referred to in a concluding sentence as early as in *Young, James and Webster* in 1981.<sup>93</sup>

Indeed, in these cases it would be even worse if the margin had any influence on the Court’s analysis. If it has not, then it is just a useless, though harmless, invocation of the doctrine. Yet, if it has some relevance then this means that the decision-making process lacks any transparency as mentioned above. The Court would then set the width of the margin and its consequences without disclosing a hint of what these are. Sometimes this would result in a violation and sometimes not.

<sup>90</sup> See e.g. *Uslu vs Turkey (no. 2)*, 20 January 2009, Application No. 23815/04, or *Hilgartner vs Poland*, 3 March 2009, Application No. 37976/06 (to the other result, namely no violation). *Marchenko vs Ukraine*, 19 February 2009, Application No. 4063/04, *Długołęcki vs Poland*, 24 February 2009, Application No. 23806/03, *Nolan and K. vs Russia*, 12 February 2009, Application No. 2512/04, *Saygılı and Falakaoğlu vs Turkey (no. 2)*, 17 February 2009, Application No. 38991/02, *Sergey Volosyuk vs Ukraine*, 12 March 2009, Application No. 1291/03, *Pipi vs Turkey*, 12 May 2009, Application No. 4020/03, *Gouveia Gomes Fernandes and Freitas E Costa vs Portugal*, 26 May 2009, Application No. 1529/08, *Rad vs Romania*, 9 June 2009, Application No. 9742/04.

<sup>91</sup> *Kuimov vs Russia*, 8 February 2009, Application No. 32147/04, para. 102 (emphasis added).

<sup>92</sup> *Ibidem*, para. 104 (emphasis added).

<sup>93</sup> *Young, James and Webster vs the United Kingdom*, 13 August 1981, Application Nos. 7601/76 and 7806/77, para. 65.

### 3.5. INCONSISTENCY IN THE USE OF THE MARGIN OF APPRECIATION

Similar cases exist where a margin is invoked in one case but not the other. In this way the Court itself proves that in these instances any mention of the margin must be redundant. When it is not necessary in one case, why is it necessary in another that deals with the same issue? Consider the following example of three cases.

In each case the applicant was convicted of failing to declare large amounts of lawfully acquired foreign currency when crossing the border. The Court found that by confiscating the money, the governments had violated the applicants' right to property because the confiscations, taken together with other penalties, could not be considered a proportionate interference with their property. Even though the results are the same, each case is different when it comes to the use of the margin of appreciation. In one case the Court mentioned that States enjoy a wide margin in assessing the proportionality of the second paragraph of Article 1 of Protocol No. 1 to the Convention.<sup>94</sup> In the second case, the Court did not mention the margin of appreciation at all, even though the respondent government had invited it to. The Court conducted its own proportionality test.<sup>95</sup> In the third case the Court again made no mention of the margin and found a violation.<sup>96</sup> However, a dissenting judge expressly referred to the margin, which in his view tipped the balance of proportionality in favour of the State. The question of whether or not the margin is used does not seem to matter at all at the end because the analysis in all three cases is roughly the same. Consequently, it is highly questionable whether the margin served any purpose in the one case where it was used. Overall, if there are similar cases and the margin is used in one and not in the other then it can hardly be necessary or indeed useful.

In summary, in the instances mentioned above, invoking the margin is unnecessary. At times it even creates confusion. Even the most general idea that when there is a margin there is some deference to national authorities is not valid in all circumstances. Moreover, even if that were the case, the use of the doctrine would still not be justified as it would be nothing more than a synonym of deference. By introducing the doctrine into international law, the European Court of Human Rights has somehow become set on a mission to use it as much as possible. This, however, comes at a cost. The Court fails to pay attention to whether its use is consistent or justified. There is an inflation of the doctrine in the Court's case law. This creates a sense that the margin of appreciation is nothing more than a recitation of a formula with a hollow content. However, that would be unfortunate as the margin can play a useful role in particular circumstances.

<sup>94</sup> *Grifhorst vs France*, 26 February 2009, Application No. 28336/02, para. 83.

<sup>95</sup> *Gabrić vs Croatia*, 5 February 2009, Application No. 9702/04.

<sup>96</sup> *Ismayilov vs Russia*, 6 November 2008, Application No. 30352/03.

#### 4. THE MARGIN OF APPRECIATION AS A USEFUL TOOL

As we have seen from the above, the doctrine of the margin of appreciation is in play when a case requires the Court to carry out a balancing exercise. This can include necessity and, within it, the proportionality test;<sup>97</sup> the existence of a pressing social need;<sup>98</sup> the striking of a fair balance;<sup>99</sup> the justification of different treatment in regard to discrimination;<sup>100</sup> or what kind of remedy satisfies the test of effectiveness. The Court does not itself carry out the balancing exercise in every case, but often gives some deference to the assessment done by national authorities. This deference is expressed by the margin of appreciation. The margin can then affect the test that the Court uses in assessing whether a violation occurred. This connection has been observed by some commentators.<sup>101</sup> Arai-Takahashi for instance noted: ‘The rigour with which the proportionality principle is applied corresponds to the width of margin of appreciation’.<sup>102</sup> Similarly, Arnardóttir observed that the margin of appreciation ‘affects the strictness of review’ and ‘in that sense referrals to the width of the margin of appreciation and the strictness of scrutiny may be used interchangeably’.<sup>103</sup>

This link between the margin and the strictness of scrutiny is present in many cases. Consider the classic pronouncement in *Otto-Preminger-Institut*: ‘The authorities’ margin of appreciation, however, is not unlimited. It goes hand in hand with Convention supervision, the scope of which will vary according to the circumstances’.<sup>104</sup> Or in *Ullmann*, where the Court stated that while the authorities enjoyed a ‘wide margin of appreciation, in particular when assessing the necessity of taking a child into care, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access’.<sup>105</sup> Again, an express link between the margin and the strictness of scrutiny was established.

However, the problem is that the margin itself does not help us to predict the level of scrutiny applied. In order to be transparent and predictable, we need to link a concrete level of scrutiny with a concrete width of the margin. For example, a wide margin could initiate a deferential scrutiny and a narrow margin a strict scrutiny. Indeed, there are some cases where the Court makes this link explicitly. For instance,

<sup>97</sup> See e.g. *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others vs Bulgaria*, *supra* note 44.

<sup>98</sup> See e.g. *Obukhova vs Russia*, *supra* note 45.

<sup>99</sup> See e.g. *Michael Theodosiou Ltd vs Cyprus*, 15 January 2009, Application No. 31811/04.

<sup>100</sup> See e.g. *Stec and Others vs the United Kingdom*, *supra* note 43.

<sup>101</sup> See e.g. Macdonald, Ronald St J. et al. (eds.), *The European system for the protection of human rights*, Martinus Nijhoff, Dordrecht/London, 1993, p. 84 or Gerards, *op.cit.* note 11, p. 166.

<sup>102</sup> Arai-Takahashi, *op.cit.* note 19, p. 204.

<sup>103</sup> Arnardóttir, Oddný Mjöll, *Equality and Non-Discrimination under the European Convention on Human Rights*, Martinus Nijhoff, The Hague, 2003, p. 60.

<sup>104</sup> *Otto-Preminger-Institut vs Austria*, 20 September 1994, Application No. 13470/87, para. 50.

<sup>105</sup> *Ullmann vs Germany*, 20 January 2009, Application No. 378/06.

in *Obukhova*, the Court afforded Russia only a narrow margin and said that the restrictions concerned call for the most careful scrutiny.<sup>106</sup> The narrow margin which the Court gave in these circumstances had the effect that the proportionality was evaluated more strictly. The State had a bigger burden to justify its interference. There was a clear link between the width of the margin and the strictness of scrutiny – called here ‘the most careful scrutiny’.

Using the varying widths of the margin to manoeuvre its scrutiny could be a very useful tool for the Court. Based on certain criteria that affect the width of the margin, the Court is able to sort out the more suspicious cases, where the margin is narrow, and subject them to stricter scrutiny.<sup>107</sup> Or, on the contrary, it can identify those cases where the States are indeed in a better position to evaluate the crux of the case and the Court’s supervision should be lenient. The following section will show that even though there are not currently any clear and consistent consequences of invoking a margin, there are a few exceptions on which the Court could build its practice.

## 5. THE STRICTNESS OF SCRUTINY – IN SEARCH OF A TEST

Coming to a consensus on what the consequences of referring to the margin are has been a point of disagreement within the Court since the beginnings of the doctrine. In *Sunday Times* the nine dissenters argued that the Court’s ‘supervision is concerned, in the first place, with determining whether the national authorities have acted in good faith, with due care and in a reasonable manner when evaluating those facts and circumstances’.<sup>108</sup> They would have given the State a broader margin and would not have found a violation. Ten years later, in a different context in *Markt Intern Verlag*, the sides had changed. This time the majority found no violation, concluding that the Court ‘should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered the restrictions to be necessary’.<sup>109</sup> The deference here is quite substantial and the test seems to have been ‘reasonability’.<sup>110</sup> The dissenters in this case wanted stricter scrutiny. They chastised the majority, arguing that

<sup>106</sup> *Obukhova vs Russia*, *supra* note 45, para. 22.

<sup>107</sup> A similar strategy is used by the European Court of Justice, which, when applying the proportionality test, gives different degrees of deference based on certain criteria. See Gráinne de Búrca, ‘The Principle of Proportionality and its Application in EC Law’, *Yearbook of European Law*, Vol. 13, 1993, pp. 105–150, at p. 147 and Tridimas, *The General Principles of EU Law*, Oxford University Press, Oxford, 2006, p. 173.

<sup>108</sup> *Sunday Times vs the United Kingdom*, *supra* note 83, Joint Dissenting Opinion of Judges Wiarda, Cremona, Thór Vilhjálmsson, Ryssdal, Ganshof van der Meersch, Sir Gerald Fitzmaurice, Bindschedler-Robert, Liesch and Matscher, para. 8.

<sup>109</sup> *Markt Intern Verlag GmbH and Klaus Beermann vs Germany*, 20 November 1989, Application No. 10572/83, para. 37.

<sup>110</sup> A similar test of reasonability was present in another controversial case of *Müller and Others vs Switzerland*, 24 May 1988, Application No. 10737/84, para. 36.

By claiming that it does not wish to undertake a re-examination of the facts and all the circumstances of the case, the Court is in fact eschewing the task, which falls to it under the Convention, of carrying out ‘European supervision’ as to the conformity of the contested ‘measures’ ‘with the requirements’ of that instrument.<sup>111</sup>

They wanted to undertake the proportionality analysis themselves. These two examples only show that there are no clear consequences of finding a margin of appreciation or even its particular width as we will see in this section. It also shows that this ambivalence has a negative effect on the interpretation of the Convention and leads to split decisions.

Unfortunately, in most cases where no width of the margin was identified, there was no concrete test that the Court used in deciding whether a violation of the Convention had occurred. In *Handyside* the ‘test’ spelled out by the Court was ‘whether the reasons given by the national authorities to justify the actual measures of ‘interference’ they take are relevant and sufficient’.<sup>112</sup> Since then the Court has used this formula generously,<sup>113</sup> but it hardly amounts to a test. The Court used it originally when interferences with Convention rights were a result of a national court’s decision and thus the question of reviewing the decisions of national courts arose. Then, it has spread to an evaluation of interferences with the rights under Articles 8–11 by national authorities in general.<sup>114</sup> However, this ‘test’ of the ‘relevant and sufficient reasons’ says only that the reasons must fit the test of necessity spelled out under the second paragraphs of Articles 8–11. ‘Relevant’ presumably means that the reasons can be taken into account under the second paragraph in the first place. ‘Sufficient’ seems to mean that the interference would than be allowed under paragraph 2.<sup>115</sup> Yet, that can be answered ultimately only by carrying out the proportionality analysis. That is how it is used in *Handyside* as well as in other judgments, including those where a wide margin is identified.<sup>116</sup> In any event, it does not operationalise the proportionality test

<sup>111</sup> *Markt Intern Verlag GmbH and Klaus Beermann vs Germany*, *supra* note 109, Joint Dissenting Opinion of Judges Gölcüklü, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo and Valticos (footnotes omitted).

<sup>112</sup> *Handyside vs the United Kingdom*, *supra* note 35, para. 50.

<sup>113</sup> Yourow, *op.cit.* note 3, p. 122 says that it is ‘a consistent formula for analysis for the entire sub-set of limitations clauses under Articles 8–11’.

<sup>114</sup> See e.g. *S. and Marper vs the United Kingdom*, 4 December 2008, Application Nos. 30562/04 and 30566/04, para. 101.

<sup>115</sup> See also *Sunday Times vs the United Kingdom*, *supra* note 83, paras. 63, 65 (‘To assess whether the interference complained of was based on “sufficient” reasons which rendered it “necessary in a democratic society”...’) and 67.

<sup>116</sup> See e.g. *Wemhoff vs Germany*, 27 June 1968, Application No. 2122/64, para. 12 from the older cases and *S. and Marper vs the United Kingdom*, *supra* note 114, in the newer Grand Chamber’s jurisprudence (at para. 114 together with para. 118) and *Sanoma Uitgevers B.V. vs the Netherlands*, *supra* note 82 or *Ullmann vs Germany*, *supra* note 105, where the margin was wide.

or add anything to the Court's analysis. Invoking the margin sometimes results in a large degree of deference,<sup>117</sup> other times hardly any at all.

Consequently, when the width of the margin is not spelled out the consequences of the margin are unclear. This goes back to the observation above concerning a 'certain margin of appreciation'. The question is whether the situation is better when the width is identified or, in other words, whether there are clear consequences of invoking either a wide or narrow margin. We will have a look at these two possibilities in turn, starting with the case of a wide margin.

### 5.1. WIDE MARGIN OF APPRECIATION

Intuitively, when the margin is wide there should be substantial deference to States. However, that is not always the case. Sometimes the Court affords States a wide margin of appreciation but nevertheless conducts its own careful analysis.<sup>118</sup> One striking example from its recent case law is *S. H. and Others vs Austria* where the declared margin afforded to the State was wide while the actual analysis suggests a very narrow margin.<sup>119</sup> The Court used tests such as finding that the disputed measure 'cannot be considered the only or the least intrusive means of achieving the aim pursued',<sup>120</sup> or that it 'requires, in the Court's view, particularly persuasive arguments by the Government'.<sup>121</sup> In other cases the Court mentions a wide margin without any workable test. For instance, in the decision in *Martikan*, the Court refers to the wide margin of appreciation States have in choosing a cut-off date for when a new piece of legislation supersedes an older one. The test used seems to be that the distinction cannot be 'arbitrary or otherwise incompatible with the requirements of Article 14 of the Convention'.<sup>122</sup> If it was just arbitrary, that would be a clearly workable, if highly deferential test. The test of incompatibility with the requirements of Article 14, though, is no test at all.

In all these cases it is unclear what effect, if any, the margin has on the Court's analysis. Presumably the Court will be more lenient with the State in cases where a wide margin is given. Nevertheless, how exactly or what test it then uses is completely

<sup>117</sup> See e.g. *Serife Yigit vs Turkey*, 20 January 2009, Application No. 3976/05.

<sup>118</sup> See e.g. *A. vs Norway*, *supra* note 78 and *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others vs Bulgaria*, *supra* note 44. Other cases where it is unclear how the wide margin affected the analysis include *Times Newspapers Ltd (No. 1 and 2) vs the United Kingdom*, *supra* note 42, *Gologus vs Romania*, 27 January 2009, Application No. 26845/03, *Bizău vs Romania*, 27 January 2009, Application No. 26852/03, *Simaldone vs Italy*, 31 March 2009, Application No. 22644/03 or *Belev and Others vs Bulgaria*, *supra* note 41, para. 90.

<sup>119</sup> *S. H. and Others vs. Austria*, 1 April 2010, Application No. 57813/00, para. 69.

<sup>120</sup> *Ibidem*, para. 76.

<sup>121</sup> *Ibidem*, para. 89.

<sup>122</sup> *Martikan vs Slovakia*, 17 March 2009, Application No. 50184/06.



shrouded in mystery.<sup>123</sup> One cannot escape the idea that the margin is indeed a black box.<sup>124</sup> In fact, these cases show that the doctrine is not only a black box where it is unclear what takes place inside, but not even the size of the box – small or large – matters. Fortunately, there are some cases of a wide margin of appreciation where a distinct test is present.

In the seminal case of *Stec and Others* the Grand Chamber identified a wide margin of appreciation enjoyed by States in the different treatment of pension allowances based on gender.<sup>125</sup> The ensuing analysis stressed the question of whether the UK's policy was 'manifestly without reasonable foundation'.<sup>126</sup> The same test was used in another and more recent Grand Chamber judgment concerning alleged discrimination.<sup>127</sup> The test of 'manifestly without reasonable foundation' or sometimes 'reasonability' is present in many other cases where a wide margin of appreciation existed.

A test of this kind is commonly used in right-to-property cases.<sup>128</sup> In *James and Others* the Court used the 'manifestly unreasonable' test in a situation where a wide margin was given to the legislature's judgment as to what was 'in the public interest' in a case of deprivation of property.<sup>129</sup> The 'reasonability' and 'manifestly unreasonable' tests were both used in some cases of compensation for expropriation under Article 1 of Protocol No. 1 where the margin was also wide.<sup>130</sup> Unfortunately, the test of reasonability is more often mentioned just in passing and it does not seem to play much of a role in the Court's analysis.<sup>131</sup> Moreover, in other cases of compensation no mention of reasonability is present and it is not obvious what benefit the State derived from its purportedly wide margin of appreciation.<sup>132</sup> Once again there is a lack of consistency in the Court's approach.

<sup>123</sup> See also, *Teziela vs Poland*, 13 January 2009, Application No. 35785/07, *Górkiewicz vs Poland*, 13 January 2009, Application No. 41663/04, *Burdov vs Russia (no. 2)*, *supra* note 81, *Velizhanina vs Ukraine*, 27 January 2009, Application No. 18639/03, *Protopapa vs Turkey*, 24 February 2009, Application No. 16084/90. Some important cases like *Hatton vs the United Kingdom*, *supra* note 37, also fall into this category.

<sup>124</sup> *Brauch*, *loc.cit.* note 1, p. 133.

<sup>125</sup> *Stec and Others vs the United Kingdom*, *supra* note 43, paras. 52 and 66.

<sup>126</sup> *Ibidem*, paras. 52 and 65.

<sup>127</sup> *Stummer vs Austria* (Grand Chamber), 7 July 2011, Application No. 37452/02, paras. 101 and 109.

<sup>128</sup> See e.g. *Kozacioğlu vs Turkey*, *supra* note 48, para. 53 or *Moskal vs Poland*, 15 September 2009, Application No. 10373/05, para. 61 and those quoted below.

<sup>129</sup> *James and Others vs the United Kingdom*, 21 February 1986, Application No. 8793/79, para. 46.

<sup>130</sup> *Michael Theodosiou Ltd vs Cyprus*, *supra* note 99, para. 92. This test was based on *Papachelas vs Greece*, 25 March 1999, Application No. 31423/96, paras. 48–49 and originally *Lithgow and Others vs the United Kingdom*, 8 July 1986, Application no. 9006/80, paras. 122, 129 and 132. See also *Antonopoulou and Others vs Greece*, 16 April 2009, Application No. 49000/06, para. 41.

<sup>131</sup> See e.g. *Axioglou vs Greece*, 12 March 2009, Application No. 45145/06.

<sup>132</sup> See e.g. *Scordino vs Italy (no. 1)* (Grand Chamber), 29 March 2006, Application No. 36813/97 or *Ramadhi and 5 Others vs Albania*, 13 November 2007, Application No. 38222/02.

In other contexts, a similar test was carried out to determine whether a judgment was 'devoid of reasonable foundation'.<sup>133</sup> In the case of *Benet Czech, spol. s r.o.* the Court, giving the State a wide margin of appreciation to conduct a criminal investigation that included seizure of the applicant company's assets, ruled that it would respect the State's judgment unless it was manifestly unreasonable.<sup>134</sup> The Court then limited its analysis only to finding whether the State's actions were not manifestly unreasonable.<sup>135</sup>

The 'manifestly unreasonable' test is also partly present in the Grand Chamber's judgment in *A. and Others vs the United Kingdom* where the Court had the opportunity to apply the doctrine in its original context, which is Article 15. It held that national authorities have a wide margin of appreciation in assessing both a presence of a public emergency and on the nature and scope of the measures necessary to avert it.<sup>136</sup> The test declared by the Court was that of 'manifestly unreasonable'.<sup>137</sup> The Court applied this test to the first question of whether a public emergency existed. Despite some doubts, it deferred to the national authorities. This seems to be a well-conducted application of the deferential test in practice. When the Court reaches the second question, however, the test suddenly becomes quite strict: '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'.<sup>138</sup> The Court justifies this with the fact that the measures concerned the right to liberty – 'a fundamental Convention right'.<sup>139</sup> This looks like a fair application on the principle of proportionality: the importance of the right is weighed against the necessity of the measures. However, the way in which that test is linked to the wide margin mentioned by the Court just before in the preceding sentence is left unclear. We see somehow a misfit between the proclaimed test and the actual analysis under the second issue.

The case of *Immobiliare Saffi* is a similar example where the Grand Chamber identified a wide margin of appreciation in striking a fair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights in controlling the use of property in accordance with the general interest under paragraph 2 of Article 1 of Protocol No. 1.<sup>140</sup> In applying the proportionality test in spheres such as housing, the Court 'will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly

<sup>133</sup> See e.g. *National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society vs the United Kingdom*, 23 October 1997, Application No. 21319/93, para. 80.

<sup>134</sup> *Benet Czech, spol. s r.o. vs the Czech Republic*, 21 October 2010, Application No. 31555/05, para. 40.

<sup>135</sup> *Ibidem*, paras. 41, 42, 45, 47 and 50.

<sup>136</sup> *A. and Others vs the United Kingdom*, *supra* note 8, para. 173.

<sup>137</sup> *Ibidem*, para. 174.

<sup>138</sup> *Ibidem*, para. 184.

<sup>139</sup> *Idem*.

<sup>140</sup> *Immobiliare Saffi vs Italy* (Grand Chamber), 28 July 1999, Application No. 22774/93, para. 49.

without reasonable foundation'.<sup>141</sup> Interestingly, however, this test plays no role in the ensuing analysis. The Court performs a balancing exercise itself, even though, arguably, with some deference to the State.<sup>142</sup> One is left wondering what the use of spelling out a precise deferential test is, when the Court performs its own balancing exercise and does not use the test.<sup>143</sup>

From the above case law, it is possible to conclude that the common test, if any, in cases where there is a wide margin of appreciation is 'manifestly without reasonable foundation' and in specific cases, simple reasonability. And yet, once the Court has spelled out the test, it could make better use of it or at least be more explicit in using it. It is quite striking that the Court does not follow the test when it is spelled out because this could ease the Court's work considerably by making it unnecessary to conduct a detailed analysis. In any case, it can be observed that these tests are perfectly workable and used by many courts around the world and the Court could make full use of it with the caveat mentioned below.

## 5.2. NARROW MARGIN OF APPRECIATION

Practice seems to be fairly consistent in cases of a narrow, or what is sometimes called 'limited',<sup>144</sup> margin of appreciation. When there is a narrow margin in the context of government interferences with rights, the Court says that States must produce 'very weighty reasons' in order to justify the interference. This test effectively shifts the burden of proof onto the government. It is used widely in the context of Article 14 but also in other instances.<sup>145</sup>

In *United Communist Party of Turkey and Others*, in the context of the limits of freedom of association of political parties, the Court held that States have only a limited margin of appreciation, that 'only convincing and compelling reasons can justify restrictions on such parties' freedom of association' and that there will be 'rigorous European supervision'.<sup>146</sup> Here, the doctrine usefully conveys the idea of a presumption of incompatibility, which the government must rebut if it is to prevail.

<sup>141</sup> *Ibidem*, para. 49. Identically in *Antonopoulou and Others vs Greece*, *supra* note 130, para. 57.

<sup>142</sup> See *Immobiliare Saffi vs Italy*, *supra* note 140, para. 54.

<sup>143</sup> Similarly in *'Bulves' AD vs Bulgaria*, 22 January 2009, Application No. 3991/03.

<sup>144</sup> See e.g. *Tebieti Mühafize Cemiyeti and Israfilov vs Azerbaijan*, 8 October 2009, Application No. 37083/03, para. 67.

<sup>145</sup> Under Article 14 see *Abdulaziz, Cabales and Balkandali vs the United Kingdom*, 28 May 1985, Application Nos. 9214/80, 9473/81 and 9474/81, para. 78. From the newest case law see *Andrejeva vs Latvia* (Grand Chamber), 18 February 2009, Application No. 55707/00, para. 87. See also Arnardóttir, *op.cit.* note 103, p. 141, who observes that narrow margin in Article 14 cases requires the states to produce 'very weighty reasons' to justify the different treatment.

<sup>146</sup> *United Communist Party of Turkey and Others vs Turkey*, 30 January 1998, Application No. 19392/92, para. 46. Recently confirmed in *Tebieti Mühafize Cemiyeti and Israfilov vs Azerbaijan*, *supra* note 144, para. 67.

In other cases of a narrow margin, no test is identified but it is obvious that the Court has conducted a thorough and careful analysis of the case. For instance, in *Orban and Others* the Court identified a narrow margin of appreciation in limiting the freedom of press to communicate ideas of general interest.<sup>147</sup> It then conducted a rigorous proportionality analysis and found a violation of the Convention.<sup>148</sup> In *Société de Conception de Presse et d'Édition et Ponson* the Court identified a narrow margin of appreciation and stated that '[t]he Court will accordingly proceed to a careful examination of the proportionality of the measure at issue to the aim pursued.'<sup>149</sup> And that is what the Court did.

In *Glor* the Court devoted a separate heading to identifying the width of the margin under Article 14. It concluded that, in cases of distinction based on disability, the margin is significantly reduced.<sup>150</sup> A very careful analysis followed, which included an evaluation of whether other measures were available that would achieve the same aim but would not undermine the right to such a degree.<sup>151</sup> Thus, here it seems that the test was whether the measure was indispensable in achieving the legitimate aim.

Consequently, when a narrow margin is identified, the Court makes a full and thorough analysis. Moreover, words like 'a careful scrutiny' or 'very weighty reasons' indicate that the scrutiny seems to be intensified. It can be doubted whether one can talk of any deference at all in cases of a narrow margin of appreciation. It rather seems that the label 'narrow margin' flags up those most suspicious cases where there is effectively a presumption of a violation of the Convention, compared with cases without a margin which will come before the Court without any presumption.

### 5.3. WHY THERE SHOULD BE A TEST

The preceding sections of this article have shown that there is much inconsistency and ad-hockery in the use of the margin of appreciation by the European Court of Human Rights. This often results in an eclectic case-by-case analysis by the Court. There are no rules governing when the margin is used and what the consequences are. Consequently, the decisions of the Court can hardly be said to be based on a principle

<sup>147</sup> *Orban and others vs France*, 15 January 2009, Application No. 20985/05, para. 45.

<sup>148</sup> Similarly in *Women On Waves and Others vs Portugal*, 3 February 2009, Application No. 31276/05 or more recently in *Kiyutin vs Russia*, 10 March 2011, Application No. 2700/10.

<sup>149</sup> *Société de Conception de Presse et d'Édition et Ponson vs France*, 5 March 2009, Application No. 26935/05, para. 55 (author's own translation). Identically in the broadly similar case decided on the same day: *Hachette Filipacchi Presse Automobile et Dupuy vs France*, 5 March 2009, Application No. 13353/05.

<sup>150</sup> *Glor vs Switzerland*, 30 April 2009, Application No. 13444/04, para. 84.

<sup>151</sup> *Ibidem*, para. 94. This approach was confirmed in the Grand Chamber judgment of *Sejdić and Finci vs Bosnia and Herzegovina* (Grand Chamber), 22 December 2009, Application Nos. 27996/06 and 34836/06, para. 48. Even though in this case the Court did not explicitly say that the margin was narrow it is obvious that it was (see especially at para. 44: '[...] where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible [...]').

or a rule-based decision-making process. This helps to build a judicial environment akin to a legal realist paradise where judges can decide cases on whatever preferences they have. This is a serious problem. Fuller famously argued that consistency in decision making based on rules is fundamental to any legal system.<sup>152</sup> The current lack of clarity in the use of the margin is also detrimental for several specific reasons.

Firstly, as has been already alluded to, the lack of clarity causes a lack of predictability in the outcome of the Court's decision making.<sup>153</sup> This is not helpful for the States or for the applicants. It also undermines the principle of legal certainty which is considered important by the Court itself.<sup>154</sup>

Secondly, the Court is currently flooded with applications.<sup>155</sup> One suggested way of dealing with this is to try to decrease the number of applications the Court receives. Many of the measures suggested by the Report of the Group of Wise Persons to the Committee of Ministers<sup>156</sup> (the 'Wise Persons Report') have direct relevance to the consistency and predictability of the Court's decisions.

A natural, and arguably the best, way to protect human rights is when they are protected at the national level. Then there would be no need for international supervision. In this regard, Tomuschat argues for better use of national systems that would implement individual petitions for human rights violations.<sup>157</sup> The need for better human rights protection at the national level and better implementation of the Court's case law is also one of the key points of the ongoing discussions on the reform of the Convention system.<sup>158</sup> However, in order to better implement the Convention standards at the domestic level, the national courts and other institutions must be much more certain of the standards laid down by the Convention. The Court's decision making must therefore be much more consistent and predictable.<sup>159</sup>

Another measure suggested by the Wise Persons Report is to enhance the authority of the Court's case law. Inconsistency and unpredictability hardly helps to achieve this

<sup>152</sup> See Fuller, Lon L., *The Morality of Law*, Yale University Press, New Haven, 1969, pp. 33–41.

<sup>153</sup> This was already criticised by Brauch, who noted that '[s]everal of the key rule of law elements would certainly apply to judicial decision making. One is clarity. [...] Second is predictability.' Brauch, *loc. cit.* note 1, p. 125.

<sup>154</sup> See e.g. *Sergey Zolotukhin vs Russia*, 10 February 2009, Application No. 14939/03, para. 78.

<sup>155</sup> 'In September 2008 the pending applications totalled 100,000. Each month around 2,300 new applications are filed, whereas the Court can only handle an average of 1,500 a month'. 'Advisory report on the application of Protocol no. 14 to the European Convention on Human Rights and Fundamental Freedoms', *Netherlands International Law Review* Vol. 56, No. 1, 2009, pp. 71–92, at p. 75. For a recent discussion of this fundamental problem in the Court's functioning see also Wolfrum, Rüdiger and Deutsch, Ulrike (eds.), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, Springer, Berlin, 2009.

<sup>156</sup> Report of the Group of Wise Persons to the Committee of Ministers; Committee of Ministers, 979bis Meeting, 15 November 2006, CM(2006)203.

<sup>157</sup> In Wolfrum and Deutsch (eds.), *op.cit.* note 155, p. 16.

<sup>158</sup> See High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, Action Plan, point B and the preambular paragraph 6.

<sup>159</sup> In this context the Interlaken Declaration also '[s]tresses the importance of ensuring the clarity and consistency of the Court's case-law'. *Ibidem*, p. 2.

aim. If it is not clear upon which principle a case was decided, national courts will be unable to follow it unless it is a case with completely identical facts.

Thirdly, using standard tests linked to specific widths of the margin would also help the Court to deal more directly with its caseload. In cases of a wide margin of appreciation it would be more expeditious to apply the test of ‘manifestly without reasonable foundation’ than to undertake a full balancing analysis. In cases of a wide margin, much less analysis and reasoning would be required of the Court.

The Court, it seems, has not defined what it means by ‘manifestly without reasonable foundation’. In one case it described the test of ‘manifestly unreasonable’ in these words: ‘the unreasonableness of this conclusion is so striking and palpable on the face of it’.<sup>160</sup> It is likely, though, that the Court’s approach is not totally unconnected with the deferential reasonableness tests used in some national jurisdictions. For instance, in England, in the context of administrative law, the ‘*Wednesbury reasonableness*’ standard refers to situations when courts will not interfere unless the agency’s decision was ‘so unreasonable that no reasonable authority could ever have come to it’.<sup>161</sup> The US Supreme Court uses a similar test called the rational basis test in situations of lenient review. There, the plaintiff must show that the government acted irrationally, meaning that no rational person would choose such a policy.<sup>162</sup> Accordingly, in these cases, the Court’s task would be to simply consider whether any reasonable person faced with the issue in question would have taken the approach the State authorities did in that case.

Fourthly, in view of the argument of the present article, if the consequences are clear, it will, in turn, influence the instances where the doctrine is used. The Court would not be able to utter the words ‘margin of appreciation’ here and there any longer because such an utterance would have clear consequences. This would also prevent the inflation and thus a diffusion of the doctrine.

On the other hand it might be opined that with its current approach the Court retains a precious flexibility. By the lack of rules governing when the margin should

<sup>160</sup> *Khamidov vs Russia*, 15 November 2007, Application No. 72118/01, para. 174.

<sup>161</sup> *Associated Provincial Picture Houses vs Wednesbury Corporation* [1948] KB 223. At times the deference was put even more blatantly: Poole quotes Lord Diplock’s reformulation of the test as ‘so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it’ (Poole, Thomas ‘The Reformation of English Administrative Law’, *Cambridge Law Journal*, Vol. 68, No. 1, 2009, pp.142–168, p. 143).

<sup>162</sup> For instance in *Nordlinger vs Hahn* the Supreme Court spelled out the test as follows: ‘The appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational’. *Nordlinger vs Hahn*, 112 S.Ct. 2326 (1992) at 2332 (citations omitted). For introduction to different levels of scrutiny and accompanying tests used by the US Supreme Court see Van Geel, Tyll, *Understanding Supreme Court opinions*, Pearson/Longman, New York, 2007, p. 86, Gerards, *op.cit* note 11, p. 388–401 and Goldberg, Suzanne B., ‘Equality without Tiers’, *Southern California Law Review*, Vol. 77, 2003–2004, pp. 481–583.

be used and the lack of tests resulting from its use, the Court is able to react to various sets of facts and make sure that rigid rules do not produce unjust results. However, the tests and criteria for the selection of tests can be designed to accommodate the required level of flexibility. Moreover, using a defined test does not mean that the Court could not depart from it or, when possible, devise a new test fit for the particular circumstances. Strict rules and excessive formalism can also cause problems. Even more so in a human rights context, where the balance between deciding every case correctly and strictly following a rule or a precedent and thus upholding the stability and predictability of the law has a different optimal point, closer to deciding every case correctly, than in other areas of the law.<sup>163</sup> Still the predictability of the law, even as regards human rights, is an important value and it is undoubtedly better for almost all decisions to be predictable and the rule to be set aside or, preferably, further developed only in exceptional cases, which could be justified by a purposive reading of the Convention as a human rights treaty.

## 6. SUGGESTIONS FOR THE COURT

There are two ways for the Court to move forward from the current situation. It will either make the doctrine of the margin of appreciation history or it will develop it further and make good use of it. Both of these solutions have their advantages and disadvantages and people can reasonably disagree. What, however, does not seem reasonable is to continue with its black box magic. It only undermines the predictability of the Convention and eventually the authority of the Court.

If the Court decides that it wants to continue to use the doctrine, it should firstly stop using it automatically but only when it serves a clear purpose and, secondly, it should establish clear criteria for when the margin is to be used and the tests that follow from it.

Currently, three tests or levels of scrutiny seem possible. In cases of a wide margin of appreciation, the scrutiny would be lenient and amount to the review of whether or not the national authorities' actions or inactions were manifestly unreasonable. In cases of a narrow margin of appreciation, the scrutiny would be the highest. The burden of proof would be transferred onto the State and the test would amount to the presentation of 'very weighty reasons' for the action or inaction of the government, which should be indispensable for furthering an important aim. Between these two would be an area without any margin, where a normal level of scrutiny would be applied. The Court would conduct its own analysis of proportionality,<sup>164</sup> adequacy or whatever may be controlling for the case.

<sup>163</sup> For an introduction to the discussion about this tension in the law see Schauer, Frederick, *Thinking Like a Lawyer*, Harvard University Press, Cambridge, 2009, pp. 29–35 and 41–44.

<sup>164</sup> For an argument and an example of non-subjective and rational proportionality test see Alexy, Robert, 'Balancing, Constitutional Review, and Representation', *International Journal of*

There is some practice supporting this approach. For instance, even though Article 14 cases normally include a margin, this is not always so. And in those cases where no margin is mentioned, the Court usually conducts its own proportionality analysis.<sup>165</sup> Compared with the wide margin, the scrutiny is higher and compared with the narrow margin, the scrutiny is lower. In other words, to use the image of a bar in a high jump competition mentioned earlier, a wide margin means a low bar, a narrow margin means a high bar, and where no margin is mentioned the bar is in the middle. Regarding the criteria according to which a case would fall into one of these categories, the Court could use its current case law as a starting point and gradually make it more consistent and precise.<sup>166</sup>

However, the question remains as to whether this dichotomy (or trichotomy) of the margin would not unduly restrain the Court and make its analysis inflexible. Yet, firstly, it seems, that the Court itself is usually content with the dichotomy of a narrow and a wide margin.<sup>167</sup> It is, thus, questionable whether there is a perceived need for more widths of the margin of appreciation. Secondly, developing different widths of the margin in between is not, of course, being ruled out – on the condition that these would always be connected with workable tests so that the consequences of invoking a margin are clear.

The lowest height of the bar is currently whether the State's conduct in pursuing a legitimate aim is 'manifestly without reasonable foundation', and the highest the 'indispensability' of its conduct for an important purpose, as was used in some of the cases of a narrow margin. In between there could be, for instance, the 'appropriateness' or 'reasonability' in pursuing an important aim. However, it must be remembered that the pool of possible tests is not infinite. Consequently, the number of different widths is also limited. Moreover, there is usually some trade off between flexibility on one side and consistency and predictability on the other.

The argument in this article has been that the Court is, at present, leaning too much towards the flexibility side of the spectrum and more consistency is needed in its case law. The more levels of the margin there are, the harder it is to establish predictability criteria upon which to assign the State a concrete margin in a concrete

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*Constitutional Law*, Vol. 3, No. 4, 2005, pp. 572–581.

<sup>165</sup> See e.g. *Sidabras and Džiautas vs Lithuania*, 27 July 2004, Application Nos. 55480/00 and 59330/00.

<sup>166</sup> There are several studies on the criteria that influence the width of the margin. From earlier works see e.g. Mahoney, Paul, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?', *Human Rights Law Journal*, Vol. 19, No. 1, 1998, pp. 1–6, at p. 5 and from recent works see e.g. Spielmann, Dean, '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?', *Actes de la Section des Sciences Morales et Politiques*, Vol. XIII, 2010, pp. 203–255 at p. 241. In the context of Article 14 see especially the comprehensive study by Arnardóttir, *op.cit.* note 103, Chapter 5.

<sup>167</sup> See e.g. *Stec and Others vs the United Kingdom*, *supra* note 43, where in para. 52 the Court pondered whether in the case of different treatment based on sex in social sphere the margin was narrow (as usually in case of a different treatment based on sex) or wide (as usually in cases regarding social policy). At the end it chose the wide margin (para. 66).



case. Thus, even though we might have well-identified tests with every different width of the margin, we would not have predictable criteria for their selection and we would, in effect, be back at the current stage of a lack of consistency and predictability of Court's judgments.

Lastly, as mentioned above, these tests do not need to be set in stone. After all, the Court is not formally bound by its case law. It can decide otherwise if the application of the tests would lead to an undesirable result in a concrete case. Of course, clear and convincing reasons would have to be given for such a deviation from settled practice. If the need arises, the Court could always develop its case law and establish a different test better suited to the particular circumstances.<sup>168</sup>

As a last note, a word of caution is necessary regarding the most lenient test of a wide margin. It should be used carefully by the Court and in well-circumscribed circumstances. Yourow criticises a weak review as 'encouraging the Court to side-step its responsibility as the ultimate interpretative authority in the Convention system'.<sup>169</sup> He goes on to say that '[t]he essence of the international control mechanism may evaporate if there is in fact no effective check upon national power'.<sup>170</sup> In an even more critical tone, Davidov argues in the context of human rights adjudication in Canada that deference is incompatible with constitutional rights as it undermines them.<sup>171</sup> Others point to an abdication of the powers of enforcement under the Convention and that by applying the margin of appreciation the 'Court has extended to Member States *unlimited* discretion to restrict the enumerated [Articles 8–11] rights'.<sup>172</sup> This last quote, however, goes too far. Even if the test in cases of a wide margin is one of manifestly unreasonable, there is still, albeit admittedly a lenient one, an overview and States can still fail the test.<sup>173</sup> It nevertheless underlines the point that a wide margin should not be overused.

## 7. CONCLUSION

The attractiveness of the doctrine or margin of appreciation is irresistible. It can be a convenient way to dispose of cases. The Court can, by resorting to the margin, justify

<sup>168</sup> For the practice of the Court in developing its case law see especially Mowbray, Alastair, 'An Examination of the European Court of Human Rights' Approach to Over-Ruling Its Previous Case Law', *Human Rights Law Review*, Vol. 9, No. 2, 2009, pp. 179–201.

<sup>169</sup> Yourow, *op.cit.* note 3, p. 181.

<sup>170</sup> *Idem.*

<sup>171</sup> See Davidov, Guy, 'The Paradox of Judicial Deference', *National Journal of Constitutional Law*, Vol. 12, No. 2, 2001, pp. 133–164.

<sup>172</sup> Feingold, *loc.cit.* note 1, p. 95 (emphasis in the original).

<sup>173</sup> See e.g. *Budayeva vs Russia*, *supra* note 4, where the government did not take any measure to fulfil its positive obligations to protect life under Article 2. See also *Suljagić vs Bosnia and Herzegovina*, 3 November 2009, Application No. 27912/02, where the legislation under Article 1 of Protocol No.1 was considered within the margin of appreciation but there was a violation due to the fact that it was not honoured by the state.

why it must defer to national authorities and why it does not need to analyse the issue in much detail. The justification of the doctrine has a sound basis and the margin of appreciation has a role in the decision making of an international tribunal. Even within the framework of human rights there is room for manoeuvre for governments and national courts. If the Court starts to grapple with the tiniest details and technicalities, it risks trivialising itself and the whole human-rights movement.<sup>174</sup> However, the current inflation of the use of the margin only diffuses the concept and undermines its rationale.

This article has often chastised the Court for not being consistent. Yet, it must be admitted that with the surreal amount of cases that the Court processes it is probably too much to expect absolute consistency. Still, much of the inconsistency stems from the cloud of mystery surrounding the doctrine. This article has tried to shed some light on the doctrine and to suggest consequences of using the margin of appreciation. The main argument was that the Court should establish clear tests to be applied once a certain width of the margin of appreciation has been declared.

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<sup>174</sup> See in this context Koskeniemi, Martti, 'The Politics of International Law – 20 Years Later', *European Journal of International Law*, Vol. 20, No. 1, 2009, pp. 7–19, at p. 14, whose argument shows that human rights language cannot solve details. I agree with that contention, however, I do not believe that it makes human rights irrelevant in all circumstances as seems to be Koskeniemi's argument. I take it rather as a warning for human rights courts to be occupied with tiny details. Apart from that human rights language has answers to many important issues.