

The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases

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A. Introduction

“Margin of appreciation” refers to the power of a Contracting State in assessing the factual circumstances, and in applying the provisions envisaged in international human rights instruments.¹ Margin of appreciation is based on the notion that each society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions.² In this regard, the doctrine is analogous to the concept of judicial discretion, where a judge, in line with certain constraints prescribed by legislation, precedent or custom, could decide a case within a range of possible solutions. The role of discretion is indispensable not only for bridging the gap between the law and changing realities of dynamic social organisms, but also for answering the particular questions of a given case in the absence of overall enacted or case law. In other words, judges are entitled to exercise discretion to make fair decisions in a specific case, without being locked into a formula that might not be applicable to every scenario.

Similarly, margin of appreciation is designed to provide flexibility in resolving conflicts emerging from diverse social, political, cultural and legal traditions of Contracting States within the European context. Indeed, as shown below, one of the rationales behind the doctrine relates to the fact that national authorities are in a better position than the international judge to assess the concrete circumstances of a

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¹ YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 2 (2002); see also Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUMAN RIGHTS QUARTERLY 474, 475 (1982) (“[w]hile difficult to define, the margin of appreciation refers to the latitude allowed to the member states in their observance of the Convention”).

² See Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INTERNATIONAL LAW AND POLITICS 843 (1999).

case.³ Yet, the said discretion must be exercised in a fair and impartial manner that does not run counter to the standards set out by law, i.e., the potential abuse of discretion poses the main challenge in the legitimate application of the doctrine. Since law regulates the rights and duties of the individual members of a given society, principled exercise of the doctrine to furnish legal clarity is of extreme importance. An over-subjective and unprincipled application of discretion might not only dilute the concept of legal certainty, but also undermine the delicate structure of the European Convention system, the existence of which is dependent upon the willful cooperation of Member States.

This paper discusses whether or not Strasbourg organs have created principled criteria governing the use of the doctrine within the context of free speech and public morals. The reason for the assessment of the doctrine within the contours of free speech and public morals lies in the fact that the former, belonging to the first generation of civil and political rights, has a somewhat objective and principled character in Western democracies, on which there is a "European consensus."⁴ The latter, however, has a subjective and elusive nature. Put differently, although the various reflections of public morals might at times fall within the domain of free speech, its content refers to the moral and ethical standards of societies that might have diverse implications. This naturally makes a "European consensus" hardly possible in matters concerning morality. This contrast serves as a functional tool to construct parallels and divergences in the various applications of the doctrine, where the question of whether the Strasbourg organs have developed a consistent doctrine can be properly measured under the relevant case law.

The first part of the paper gives an overview of the doctrine and further examines how the doctrine has evolved within the European context. Part II focuses on the rationale behind the doctrine and discusses the legitimacy of the doctrine in light of its application to various forms of free speech. Part III covers one of the most problematic applications of the doctrine in matters concerning public morality, where Contracting States have a wide margin of appreciation. This part will discuss whether or not the "lack of European consensus" criterion is an elusive concept that might create a risk of abuse in the application of the doctrine. The paper concludes that while margin of appreciation today serves as a flexible instrument between the local necessities and the universal application of human rights, the imprecise and

³ Ireland v. UK, App. No. 5310/71, at para. 207 (Jan. 18, 1978), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=9&portal=hbkm&action=html&highlight=ireland%20%7C%20v.%20%7C%20united%20%7C%20kingdom&sessionId=1119211&skin=hudoc-en>.

⁴ As examined below, the existence or non-existence of a "European consensus" is a major criterion for Strasbourg organs in determining the need or scope of the margin of appreciation.

contradictory points might lead to its potential abuse that might endanger its future existence.

B. The Evolution of the Doctrine

The doctrine has its roots in the French *Conseil d'Etat jurisprudence* and in the administrative law of civil law jurisdictions.⁵ At the international level, the doctrine was first used within the framework of the European Convention system and was mostly developed by the Strasbourg organs. The margin of appreciation doctrine has been transplanted to the jurisprudence of other international human rights mechanisms. For instance, while the United Nations Human Rights Committee has implicitly employed the doctrine,⁶ Inter-American Court of Human Rights has expressly used it by referring to the judgments of the European Court of Human Rights.⁷ However, this paper will focus exclusively on the principles that govern the application of the margin of appreciation doctrine under the European Convention in general, and its specific application to freedom of expression in connection with public morals.⁸

The doctrine of margin of appreciation first came into play in the application of derogation clauses. In this connection, the doctrine was designed to respond to the concerns of Member States that international policies could threaten their national security.⁹ The first application of the doctrine came with the case of *Greece v. United*

⁵ R. St. J. Macdonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 83 (R. St. J. Macdonald, F. Mather, H. Petzold eds., 1993); *see also* Takahashi, *supra* note 1, at 2-3.

⁶ In *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, where discriminatory legislation targeting married Mauritian women was under consideration, the Human Rights Committee underlined the margin of states in regulating family life: "...the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions." Communication No. R.9/35 (2 May 1978), U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981), para. 9.2(b)(ii), *available at* <http://wwwserver.law.wits.ac.za/humanrts/undocs/session36/9-35.htm>.

⁷ *See* Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 (Jan. 19 1984) Inter-American Court of Human Rights (Ser. A) No. 4, paras. 56-59.

⁸ Due to the limited scope of the paper, the application of margin of appreciation to other Convention rights is not examined. However, for a comprehensive analysis of the doctrine *see* HOWARD CHARLES YUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996); *see also* Takahashi, *supra* note 1.

⁹ Benvenisti, *supra* note 2, at 845.

Kingdom;¹⁰ however, the concept “discretion” was used instead of the term “margin of appreciation.” In that case, the Commission noted that the Contracting States “should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.”¹¹ The Commission first used the term in the *Lawless v. Ireland* case,¹² where the Strasbourg organs have clearly expressed that “in determining whether or not there is a public emergency threatening the life of the nation, Contracting States would have a certain margin of appreciation.”¹³ The first detailed mention about the margin of appreciation, however, was made in *Ireland v. UK*.¹⁴ The Court stated:

It falls in the first place to each Contracting State, with its responsibility for the life of [its] nation, to determine whether that life is threatened by a public emergency and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.¹⁵

¹⁰ *Greece v. United Kingdom*, App. No. 176/56, 2 YEARBOOK EUROPEAN COMMISSION ON HUMAN RIGHTS 174 (1959).

¹¹ *Id.*; PIETR VAN DIJK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 84 (3rd ed., 1998).

¹² *Lawless v Ireland*, App. No. 332/57, 2 YEARBOOK EUROPEAN COMMISSION ON HUMAN RIGHTS 318 (1960); see also Michael O’Boyle, *The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?*, 19 HUMAN RIGHTS LAW JOURNAL 23, 24 (1998).

¹³ *Lawless*, *supra* note 12, at paras. 28-30; Ronald Macdonald, a former judge of the European Court, notes that: “it is possible to say that the margin is probably at its widest when the Court is considering whether derogations are strictly required at a time of grave public emergency and at its narrowest when there is alleged violation of a person’s very private and personal life.” Ronald J. MacDonald, *The Margin of Appreciation in the jurisprudence of the European Court of Human Rights*, in INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOR OF ROBERTO AGO 187, 207 (1987).

¹⁴ *Ireland*, *supra* note 3.

¹⁵ *Ireland*, *supra* note 3, at para. 207.

The same train of thought was followed in *Brannigan and McBride*,¹⁶ which cemented the deferential attitude towards the Contracting Parties both with respect to their decisions concerning the presence of an emergency situation and to the necessary measures to avert that situation.¹⁷

The application of the doctrine has gradually become a fundamental part of the jurisprudence of Strasbourg Organs.¹⁸ In other words, the doctrine has subsequently been expanded and developed to cover other areas of the Convention. For instance, in *Belgian Linguistic*,¹⁹ where French-speaking parents challenged the educational system, which divided the country into four linguistic regions, the Court accepted a certain margin of appreciation enjoyed by Contracting Parties. The Court stated that “the right to education guaranteed by the first sentence of Article 2 of the Protocol (P1-2) by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals.”²⁰ Similarly, in *De Wilde, Ooms & Versyp v. Belgium (Vagrancy Case)*,²¹ the supervision of the detained applicant’s correspondence during his detention was not regarded as being a violation of Article 8. The Court ruled that “Belgian authorities did not transgress the limits of the power of appreciation which Article 8 (2) of the Convention leaves to the Contracting States.”²²

¹⁶ See *Brannigan and McBride v. the United Kingdom*, App. No. 14553/89, at para. 43 (May 26, 1993), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=brannigan%20%7C%20mcbride&sessionid=1119576&skin=hudoc-en>.

¹⁷ See Oren Gross and Fionnuala Ni Aolain, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUMAN RIGHTS QUARTERLY 625, 633 (2001).

¹⁸ See Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 638 (1999).

¹⁹ *Belgian Linguistic Case*, App. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (July 23, 1968), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Belgian%20%7C%20linguistic%20%7C%20case&sessionid=1119576&skin=hudoc-en>.

²⁰ *Id.* at para. 5.

²¹ *De Wilde, Ooms & Versyp v. Belgium*, App. No. 2832/66; 2835/66; 2899/66 (Jul. 18, 1971), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=De%20%7C%20Wilde&sessionid=1126384&skin=hudoc-en>.

²² *Id.* at para. 93.

The evolution of the margin of appreciation doctrine reached an important point in *Handyside*,²³ where upon the publication of the book, *The Little Red Schoolbook* the applicant was convicted on obscenity charges.²⁴ The Court, in this important judgment, did not find a violation of Article 10 on the ground that the state had a legitimate aim to protect morals. Although the Court vigorously stated that freedom of expression "is also applicable to those ideas and information that offend, shock, or disturb the State or any sector of the population,"²⁵ it held that:

...[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject.²⁶

It is true that in certain areas it is of extreme difficulty to find or create a common dominator among different societies. The European Court, when facing such delicate issues, prefers not to rule, particularly where a common European standard does not exist.²⁷ The concept of public morality constitutes the most obvious example of this.²⁸ Yet compared to the other areas of the Convention, there exists, to a certain extent, a consistency in the application of the doctrine with

²³ *Handyside v. United Kingdom*, App. No. 5493/72, at paras. 48-49 (Dec. 7, 1976), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Handyside&sessionid=1119576&skin=hudoc-en>.

²⁴ Takahashi, *supra* note 1, at 7.

²⁵ *Handyside*, *supra* note 23, at para. 49.

²⁶ *Handyside*, *supra* note 23, at para. 48.

²⁷ In *Cossey*, Judge Martens, in his dissenting opinion, rightly points out that "in my opinion States do not enjoy a margin of appreciation as a matter of right, but as a matter of judicial self-restraint. Saying that the Court will leave a certain margin of appreciation to the States is another way of saying that the Court - conscious that its position as an international tribunal having to develop the law in a sensitive area calls for caution - will not fully exercise its power to verify whether States have observed their engagements under the Convention, but will find a violation only if it cannot reasonably be doubted that the acts or omissions of the State in question are incompatible with those engagements. It is, therefore, up to the Court to decide, in every case or in every group of cases, whether a "margin of appreciation" should be left to the State and, if so, how much..." *Cossey v. United Kingdom*, App. No. 10843/84, at para 3.6.3 (Aug. 29, 1990), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Cossey&sessionid=1119576&skin=hudoc-en>; see also Schokkenbroek, *supra* note 32, at 31.

²⁸ *Handyside*, *supra* note 23.

respect issues concerning public morals. Indeed, the Court, when dealing with public morals, generally submits that Contracting States have a wide margin of appreciation, and defers to the national authorities' judgments. However, the aim of the paper is to illustrate the imprecise and contradictory points in the application of the doctrine.

C. The Rationale Behind the Doctrine

The European Convention, when adopted, was built on diverse economic, cultural, and legal traditions enjoyed by the member states. The Convention, as a result, was designated as the lowest common denominator. The need to respect Contracting States' competence and sovereignty compelled Strasbourg organs to depend on this doctrine,²⁹ for the enforcement of the whole convention system depends on "good faith" and "continuing cooperation" of the Contracting States.³⁰ The doctrine has been developed in an attempt to strike a balance between national application of human rights and the uniform application of Convention system.

Initially, margin of appreciation was based on the idea that Convention bodies were not to exceed their mandate, nor encroach upon the primary duty of Member States to protect the rights and freedoms enshrined in the European Convention. The doctrine attempted to draw a line between the judicial mandate of national authorities and the domain in which Strasbourg organs were permitted to implement their policies.³¹ For example, Convention organs were not to interfere with the discretion and independent assessment exercised by States and were to refrain from acting as an appeal tribunal.

This is also consistent with the principle of subsidiarity, an inherent quality of the European system. In other words, since the main responsibility of ensuring the rights provided in the European Convention rests with the Contracting States, and the role of the Strasbourg organs is limited to ensure whether the relevant authorities have remained within their limits, margin of appreciation fits into this subsidiary role.³² In *Belgian Linguistic*,³³ the Court clearly noted that it could not assume the role of the national judicial authorities, for otherwise it would lose sight

²⁹ See Hutchinson, *supra* note 18, at 647.

³⁰ Macdonald, *supra* note 5, at 123.

³¹ See Takahashi, *supra* note 1, at 237.

³² See Jeroen Schokkenbroek, *The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 19 HUMAN RIGHTS LAW JOURNAL 30, 31 (1998).

³³ *Belgian Linguistic Case*, *supra* note 19.

of the subsidiary nature of the Convention system; thus, Contracting Parties were free to choose the proper measures in those matters governed by the Convention. The Court ensured that the review was merely concerned with ensuring whether such measures were in line with Convention requirements.³⁴

The rationale behind the principle of subsidiarity, on the other hand, was explained as follows:

[B]y reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty"... [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.³⁵

Apart from the central argument that national authorities could, in principle, better understand the complexities of a conflict and apply the relevant norms accordingly than that of an international judge, the problem of caseload burdening the Court should also be taken into consideration. i.e., the notion of judicial economy also led the Court to assume a less intrusive role in its supervisory functions.

However, it must be stressed that margin of appreciation does not grant the national authorities an uncontrolled power, i.e., despite the subsidiary role of the Court, margin of appreciation goes hand in hand with European supervision.³⁶ "The Court is responsible for ensuring the observance of state engagements and empowered to give the final ruling on whether a restriction is compatible with the rights guaranteed by the Convention."³⁷ Such an evaluation unquestionably considers whether national authorities exercised their discretion in good faith and in accordance with the letter and spirit of the Convention.

³⁴ Belgian Linguistic Case, *supra* note 19, at para. 10.

³⁵ Handyside, *supra* note 23, at para. 48.

³⁶ Handyside, *supra* note 23, at para. 49.

³⁷ Handyside, *supra* note 23, at para. 48.; *see also* CLARE OVEY AND ROBIN C.A. WHITE, EUROPEAN CONVENTION ON HUMAN RIGHTS 285-86 (2002).

Having said this, the following points constitute the main difficulties. First, how far should the doctrine be employed to determine whether a given right under the European Convention has been violated? Similarly, what criteria should be employed to check the scope and legitimacy of the State margin? The key question is whether Strasbourg Organs have established solid criteria for the application and legitimacy of the doctrine. These questions will now be addressed in light of the right to freedom of expression in relation to public morals.

D. The Various Applications of the Doctrine under the Right to Freedom of Expression

I. In General

The right to freedom of expression is not only of vital importance for democratic societies, but it is also crucial for the enjoyment of many other rights provided in the Convention.³⁸ In its first paragraph, Article 10, similar to a number of other articles in the Convention,³⁹ provides the substantive right, and, envisages the limitations that a state may invoke to limit the right in its second paragraph.⁴⁰ The restrictions are envisaged, among others, "for the interests of national security, territorial integrity, for the protection of public order, health, morals, or for the protection of the rights and freedoms of others."⁴¹ However, when a Contracting Party imposes restrictions upon the exercise of freedom of expression, the right must not be rendered meaningless. Besides, the restrictions should be "provided by law;" "proportionate," and "necessary in a democratic society," and only be imposed for the "specified aims."⁴²

³⁸ See DONNA GOMIEN, *SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 78 (1998).

³⁹ Such as Article 8, 9 and 11 of the Convention, Article 1 of Protocol No. 1, Article 2 of Protocol No. 4 and Article 1 of Protocol No. 7. See DONNA GOMIEN, DAVID HARRIS AND LEO ZWAAK, *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER* 273 (1999).

⁴⁰ See Kevin Boyle, *Freedom of Expression and Restriction on Freedom of Expression*, in *ASIA-EUROPE INTERGOVERNMENTAL HUMAN RIGHTS WORKSHOP 2* (Unpublished, 2002).

⁴¹ See Ovey and White, *supra* note 37, at 278.

⁴² Ovey and White, *supra* note 37, at 278; see also *Olsson v. Sweden*, App. No. 00010465/83, at paras. 67-68 (Mar. 24, 1988), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=Olsson&sessionid=1119576&skin=hudoc-en>.

As expressed in *the Observer and Guardian*,⁴³ "Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions, which, however, must narrowly be interpreted and the necessity for any restrictions must be convincingly established."⁴⁴ Similarly, in *Sunday Times*,⁴⁵ the Court noted the principle that "the right to freedom of expression is the rule and its limitations are the exceptions"⁴⁶ The Court went on to say that the right is not to be balanced with the competing principles, but "it is merely subject to certain limitations, which must be narrowly construed."⁴⁷

However, the breadth and importance of the right concerned is perhaps best illustrated in the well-known and often quoted *Handyside*⁴⁸ case:

Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.⁴⁹

The Court in this groundbreaking decision underlines the importance of pluralism, tolerance, and broadmindedness, as the prerequisites of a true democracy, the realization of which is highly dependent on the effective enjoyment of the right to

⁴³ *Observer and Guardian v. The United Kingdom*, App. No. 13585/88 (Nov. 26, 1991), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Observer%20%7C%20Guardian&sessionId=1119576&skin=hudoc-en>.

⁴⁴ *Id.* at para 59.

⁴⁵ *The Sunday Times v. United Kingdom*, App. No. 6538/74 (Apr. 26, 1979), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Sunday%20%7C%20Times&sessionId=1119576&skin=hudoc-en>.

⁴⁶ *Id.* at para. 65.

⁴⁷ *Id.*; see also Boyle, *supra* note 40, at 2.

⁴⁸ *Handyside*, *supra* note 23.

⁴⁹ *Handyside*, *supra* note 23, at para. 48.

freedom of expression.⁵⁰ As noted earlier, freedom of expression is not absolute but subject to certain limitations. For any expression that runs counter to the existing social or religious structure of a given society might have adverse impacts upon the rights of the other members of that society. The role of the national authorities, in this context, is to strike a balance between the demands and interests of the different sections of society and the maintenance of State authority and individual rights without damaging the core of the right concerned.⁵¹

The doctrine of margin of appreciation becomes relevant whenever a case requires the evaluation of the "weight of the various interests at stake."⁵² The fundamental importance of freedom of expression inspired the Convention bodies to assume more intrusive standards of review due to the existence of the so-called European consensus as to the implications of the right. Yet, although the Court tends to grant less margin to the national authorities to restrict free speech, it is sensitive to certain forms of speech that might have detrimental effects to other balancing interests, such as the rights of others. For instance, hate speech or issues relating to public morals are sensitive areas where the Court is inclined to defer to national judgments. However, as noted earlier, the main difficulty is to obtain a general view of the doctrine, i.e., although from the case law it is somewhat possible to observe a pattern, there is still no consistency in application of the doctrine.⁵³ For the purpose of this paper, such divergences provide us a valuable yardstick against which the legitimacy of the doctrine can be properly measured. It is to be remembered that the validity of any legal doctrine, as Moral notes, is dependent upon its precision and coherence.⁵⁴ Let us now briefly examine the application of the doctrine to some forms of free speech to compare how it is applied to cases of public morals, which, compared to the former, could be more elusive.

⁵⁰ For more information about the relationship between democracy and freedom of information see Kevin Boyle, *Freedom of Expression and Democracy*, in HUMAN RIGHTS A EUROPEAN PERSPECTIVE 211-19 (Liz Heffernan and James Kingston eds., 1994).

⁵¹ See Ovey and White, *supra* note 37, at 280.

⁵² See Dijk and Hoof, *supra* note 11, at 85.

⁵³ In this context, Yves Winisdoerffer asserts that "...One may, on the basis of the existing case-law, regret that the Court does not carry out more thorough examination of the purpose of contested interferences with the right guaranteed... The doctrine of the margin of appreciation also contributes to the difficulty of evaluating where to situate the bounds of Article... The Contracting States as well as individual applicants who come before the Court are the hostages of a case-by-case assessment, the outcome of which is difficult to predict..." Yves Winisdoerffer, *Margin of Appreciation and Article 1 of Protocol No. 1*, 19 HUMAN RIGHTS LAW JOURNAL 18, 20 (1998).

⁵⁴ See Ignacio de la Rasilla del Moral, *The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine*, 7 GERMAN LAW JOURNAL 611, 622 (2006).

II. *The Scope of the Doctrine under Article 10*

The scope and width of margin of appreciation may vary from case to case. Similarly, the scope of the doctrine under Article 10 cannot be determined in a clear-cut manner; for there are a number of elements involved, including the type of the legitimate aim pursued, the content, the duration and effect of the limitations, and the nature of the expression involved, be it moral, political, artistic or commercial. Also, there exists a hierarchy of rights according to which the width of the doctrine differs.⁵⁵ This holds true for the various applications of the right to freedom of expression. For instance, as illustrated below, the margin of states is much narrower when the criticism of the government is involved while the margin is much broader in restricting hate speech.

The main difficulty in determining the scope of the doctrine stems from the fact that many cases involve various decisive variables. For instance, while freedom of the press, due to its importance for democratic societies, constitutes a factor narrowing the national discretion, the element of public or private morality generally keeps the margin wide.⁵⁶ Therefore, merely general principles can be withdrawn from the case law of the Convention, i.e., it is not possible to identify hard and fast rules governing the doctrine.⁵⁷

The existence or non-existence of a European common ground between the law and practice of Contracting Parties appears to play a key role in determining the width of the margin. Indeed, as Moral rightly points out, "the existence of similar patterns of practice or regulation across the different State members will legitimize a wider margin of appreciation for the State that stays within that framework and delegitimize attempts to part ways with them."⁵⁸ This point was also clearly underlined in the case of *Rasmussen*.⁵⁹

⁵⁵ See *id.* at 615-16.

⁵⁶ Takahashi, *supra* note 1, at 102.

⁵⁷ See Dijk and Hoof, *supra* note 11, at 87.

⁵⁸ de la Rasilla del Moral, *supra* note 54, at 617.

⁵⁹ See Ovey and White, *supra* note 37, at 285-86. However, the said European consensus criterion was subjected to criticism on different accounts, including the argument that the concept of European consensus was based on an insufficient comparative research, or that "by tying itself to a positivist conception of standards," the Court is abandoning its supervisory role. See Moral, *supra* note 55, at 617.

...[T]he Contracting States enjoy a certain “margin of appreciation” in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. ... The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States....⁶⁰

As noted above, the Court’s main rationale is based on the assumption that national authorities are better placed to assess the case, particularly when there is no consensus among the States Parties.⁶¹ This assumption, however, regardless of the existence of common ground, does not apply to cases where the violation of a certain right is very obvious.⁶² It is proper now to have a closer look at the application of the doctrine to certain forms of freedom of expression.

1. *Political Speech*

It is common knowledge that democracies cannot function properly unless it is freely scrutinized by its members. Since political speech constitutes one of the fundamental requirements of democratic societies, the Court hardly grants margin of appreciation to the States Parties. Similarly, the Court affords less protection to the politicians and other main public figures than to average citizens when they are

⁶⁰ Rasmussen v. Denmark, App. No. 8777/79, at para. 40 (Nov. 28, 1984), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Rasmussen&sessionid=1119576&skin=hudoc-en>.

⁶¹ See George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD JOURNAL OF LEGAL STUDIES 705 (2006). Gross and Aolain argue that in emergency situations national authorities should not be granted a wide margin of appreciation on the assumption that they are in a better position than the international judge. They convincingly note that “a crisis mentality can seize a whole nation and transform an otherwise peaceful community into a ‘nation in arms.’ In the process, constitutional structures may be ignored. Governmental efficiency and expediency become paramount, and fundamental constitutional principles may come tumbling down when the trumpets of emergency blow.” Therefore, in the application of Article 15 of the Convention, the Court must accord the narrowest margin to the derogating state. See *supra* note 17, at 639-43. However, as the Court made it clear on several occasions when it exercises its supervision the Court gives “appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.” See Brannigan and McBride, *supra* note 16, at para. 43.

⁶² Jeroen Schokkenbroek, *The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation*, 19 HUMAN RIGHTS LAW JOURNAL 20, 21 (1998).

targeted as a result of the exercise of the right to freedom of expression. In the case of *Lingens*,⁶³ where the applicant published two articles criticizing the former Austrian Chancellor, the Court, after emphasizing the role of the freedom of expression in democratic societies, stated that:

Freedom of the press ... affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders... The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance. No doubt, Article 10 para. 2 enables the reputation of others to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.⁶⁴

The margin is much narrower when such criticisms target the Government. The Court, in *Castells*,⁶⁵ noted that free political debate constitutes the heart of a democratic society, and thus "the limits of permissible criticism are wider with regard to the Government, by virtue of its dominant position, than in relation to a private citizen, or even a politician."⁶⁶

⁶³ *Lingens v. Austria*, App. No. 9815/82 (July 8, 1986), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Lingens&sessionid=1119576&skin=hudoc-en>.

⁶⁴ *Id.* at para. 42.

⁶⁵ *Castells v. Spain*, App. No. 11798/85 (Apr. 23, 1992), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Castells&sessionid=1119576&skin=hudoc-en>.

⁶⁶ *Id.* at para. 46.

However, Strasbourg organs have a consistent policy to grant press the widest protection.⁶⁷ For instance, in *Goodwin v. UK*,⁶⁸ the claim made by the United Kingdom that it was necessary to compel a journalist to disclose his sources of information was rejected by the Court. By applying a very narrow margin of appreciation, the Court found a violation of the Convention.⁶⁹

2. Criticism of the Judiciary

Although Article 10 (2) authorizes limitations to maintain the authority and impartiality of the judiciary, Contracting States must produce reasonable and solid justifications to justify the limitations on freedom of expression which targets the judiciary.⁷⁰ The crucial point is whether the statement is within the acceptable limits of criticism relating to matters of public concern that contributes to a public debate, or is it merely personal, destructive or unjust. In the second scenario, the Court, in order to maintain confidence in judiciary, grants a wide margin to the national authorities.⁷¹ In the case of *Worm v Austria*,⁷² the Court recognized the existence of common ground with respect to the characteristics of judiciary, which, in comparison with public morals, keeps the national margin narrower.⁷³ Similarly, in *Sunday Times*,⁷⁴ the Court held that unlike the concept of morals, the notion of the

⁶⁷ See *Lingens*, *supra* note 63, at para. 41; see also *Castells*, *supra* note 65, at para. 43. The incidents followed the publications of the cartoons of Muhammad in the Danish newspaper, *Jyllands-Posten*, showing how elusive the demarcation between freedom of speech/press and hate speech could be. For a detailed analysis see Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 CASTELLATIONS 72 (2007). See also Eric Heinze, *Viewpoint Absolutism and Hate Speech*, 69 THE MODERN LAW REVIEW LIMITED 543 (2006).

⁶⁸ *Goodwin v. United Kingdom*, App. No. 17488/90 (Mar. 27, 1996), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Goodwin&sessionid=1126384&skin=hudoc-en>.

⁶⁹ *Id.* at para. 39; for more information on press freedom see Janice Brabyn, *Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions*, 69 THE MODERN LAW REVIEW LIMITED 895 (2006).

⁷⁰ See *Ovey and White*, *supra* note 37, at 288.

⁷¹ See *Barfod v. Denmark*, App. No. (Feb. 22, 1989), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Barfod&sessionid=1126384&skin=hudoc-en>.

⁷² *Worm v. Austria*, App. No. 83/1996/702/894 (Aug. 29, 1997), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=9&portal=hbkm&action=html&highlight=Austria&sessionid=1126384&skin=hudoc-en>.

⁷³ *Id.* at para. 49; see also *Takahashi*, *supra* note 1, at 119.

⁷⁴ *Sunday Times*, *supra* note 45.

authority of judiciary is objective, and "the domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area."⁷⁵

3. *Hate Speech*

Although all types of expression, including those that incite hatred or violence, are covered by Article 10 (1), States are accorded a wide margin of appreciation in restricting the speech that conflicts the fundamental premises of a democratic society.⁷⁶ This phenomenon can be explained with the bitter experiences Europe suffered in the second half of the last century.⁷⁷ Accordingly, Strasbourg organs have upheld restrictions on this type of speech.⁷⁸ In *Kuhnen*,⁷⁹ for instance, where the applicant was convicted due to his attempt to reinstitute the National Socialist Party (NSDAP), the Commission found his conviction justified. However, in the well-known case of *Jersild*,⁸⁰ a journalist had been convicted for conducting an interview with a group of young racists in which they made abusive and

⁷⁵ Sunday Times, *supra* note 45, at para. 59.

⁷⁶ This approach is also in line with Article 17 of the Convention which reads "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

⁷⁷ For a detailed study on hate speech see generally Kevin Boyle, Ensuring freedom, ensuring protection: Guarding against hate speech in human rights law and national European legislation (Nov. 27, 2003), <http://www.smed.no/konferanse03/boyle.doc>; see generally ERIC BARENDT, FREEDOM OF SPEECH (2001).

⁷⁸ Societies take different measures to respond hate speech in accordance with their historical experiences. As a result of the Second World War, the European approach towards free speech and its limitations is considerably different from that of the United States. Following the horrors of the Holocaust, European States have been more vigilant against the harm that might emerge out of an unleashed form of speech. For instance, denial of the Holocaust has been an important problem in Europe. Consequently, certain European countries have enacted legislation prohibiting and criminalizing such speech, the legitimacy of which was accepted by the Strasbourg organs. See Jonathan Cooper, *Hate Speech, Holocaust Denial and International Human Rights Law*, 1999 EUROPEAN HUMAN RIGHTS LAW REVIEW 593, 596 (1999). In the United States, on the other hand, hate speech is regarded as a price society has to pay to safeguard freedom of expression—it is a form of speech that falls under the protection of the First Amendment. See Stephan L. Newman, *Liberty, Community, and Censorship: Hate Speech and Freedom of Expression in Canada and the United States*, 32 AMERICAN REVIEW OF CANADIAN STUDIES 369 (2002).

⁷⁹ *Kuhnen v. Federal Republic of Germany*, 56 EUROPEAN COMMISSION ON HUMAN RIGHTS DECISIONS AND REPORTS 205 (1988).

⁸⁰ *Jersild v. Denmark*, App. No. 15890/89 (Sep. 23, 1994), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Jersild&sessionid=1126384&skin=hudoc-en>.

derogatory remarks against minorities. Although the Court found the aim of the Government to protect its minorities against racial discrimination by convicting the youths involved legitimate, it did not find the penalties imposed on the media necessary in a democratic society for the protection of the rights of others. This case is quite important in illustrating how the Court balances conflicting interests within a democratic society.

As can clearly be observed from this brief overview, there exists a European common ground with respect to political speech and the requirements of a democratic and open society. This enables the Court to impose higher standards of human rights by narrowing the margin of Contracting States.

4. *Freedom of Expression and Public Morals*

In matters concerning public morals, Strasbourg organs tend to grant a wide margin of appreciation to Contracting Parties in assessing the need to interfere with the exercise of freedom of speech for the protection of morals.⁸¹ As noted above, the existence of common features among States Parties provide an objective basis for the Court to exercise its role properly. However, as the Court emphasizes, “the nature and requirements of morals vary from one country to another, from one region to another.”⁸² Therefore, the lack of a uniform conception of morals provides a legitimate justification for the Court to evade its supervisory role. True, public morals vary from one country to another; however, should the Court completely abandon its supervisory role, or rather impose the universal requirements of human rights? Further, assuming that the approach of the Court is right, does the Court have a predictable pattern in its case law in matters concerning public morals?

Let us answer these questions in light of some important decisions. In the above-mentioned *Handyside*⁸³ case, the Court, by taking into account that the book was aimed at children and there was no uniform concept of public morality, made it clear that States enjoyed a wide margin of appreciation in assessing the need to interfere with the exercise of freedom of expression. However, the Court in the same case extended the protection of Article 10 to such expressions that “offend”,

⁸¹ See Soren C. Prebensen, *The Margin of Appreciation and Articles 9, 10 and 11 of the Convention*, 19 HUMAN RIGHTS LAW JOURNAL 17 (1998).

⁸² Muller and Others v. Switzerland, App. No. 10737/84, at para. 16 (May 24, 1988), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Muller&sessionid=1126384&skin=hudoc-en>.

⁸³ *Handyside*, *supra* note 23.

“shock,” or “disturb.” Despite this vigorous language, protection was not afforded to the book, which contained 26 pages of scientific information about sex. Further, while the Court asserted that there was no uniform concept of morality between Contracting States, with all due respect, it did not duly take into account that the same book was published in several States, including Belgium, France, Germany, Greece, Italy and Sweden, which might well have been an indication of the existence or, at least, emergence of a common ground in this particular matter.

On the other hand, in *Dudgeon*,⁸⁴ where the criminalization of homosexual acts in Northern Ireland was at issue, the Court, by using the same line of reasoning, reached a different conclusion. This time the Court observed a marked change in the decriminalization of homosexual acts in Europe:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behavior to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States...⁸⁵

It is difficult to reconcile this judgment with *Handyside*,⁸⁶ for the factors seem to be similar. Indeed, the Court might have easily reached an opposite conclusion by the same train of thought. More importantly, this case illustrates that even in delicate matters concerning public morals, the Court may assume a leading role to affect the legislation of Contracting States.

⁸⁴ *Dudgeon v. The United Kingdom*, App. No. (Oct. 22, 1981), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Dudgeon&sessionId=1126384&skin=hudoc-en>.

⁸⁵ *Id.* at para. 60.

⁸⁶ *Handyside*, *supra* note 23.

In *Muller*,⁸⁷ the Court acknowledged that freedom of expression also includes artistic expression, even though its manifestation offends, shocks, or disturbs. Yet, in that case the Court did not find the seizure of the paintings depicting sexual acts, including homosexuality and bestiality, as a violation of Article 10. The Court noted that it could not “confine itself to considering the impugned court decision in isolation; it must look at them in the light of the case as a whole, including the paintings involved and the context in which they are exhibited.”⁸⁸ The facts that the exhibition was free of charge and open to public, without an age limit or a warning about the content of paintings, might explain the reason why the Court granted a broad margin of appreciation to Swiss authorities. However, since the confiscation of an artist’s paintings is a serious measure to adopt, the question whether the tests of proportionality and necessity were applied properly is open to controversy.

In *Otto-Preminger*,⁸⁹ the Court held that the confiscation of the film *Das Liebeskonzil*, which was about the alleged absurdities of the Christian creed, did not amount to a violation of Article 10:

... [W]hoever exercises the rights and freedoms enshrined in the first paragraph of ... Article [10] ... undertakes "duties and responsibilities". Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights,⁹⁰ and which therefore

⁸⁷ *Muller and Others*, *supra* note 82.

⁸⁸ *Muller and Others*, *supra* note 82, at para. 32.

⁸⁹ *Otto-Preminger-Institut v. Austria*, App. No. 13470/87 (Sep. 20, 1994), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=1126384&skin=hudoc-en>.

⁹⁰ “The protection of the rights and freedom of others” and “public order” also constituted the main focus in two controversial headscarf cases, *Dahlab v. Switzerland* and *Sahin v. Turkey*. This time, however, the national authorities considered headscarf as a political/religious message which could threaten the secular structure of the states concerned as well as to the “rights of others” and “public order.” In both cases, the Court found the measures undertaken by the Swiss and Turkish governments justified under the legitimate aim of Article 9 (2). Again, the Court accorded a broad margin of appreciation partly because there was little or no European consensus as to whether the right to wear headscarf was within the right to religious freedom. See *Leyla Sahin v. Turkey*, App. No. 44774/98 (June 29, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Leyla%20%7C%20Sahin&sessionid=1126384&skin=hudoc-en>; *Dahlab v. Switzerland*, App. No. 42393/98 (Feb. 15, 2001), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=42393/98&sessionid=1126384&skin=hudoc-en>. For a detailed analysis of the cases see Aaron A.

do not contribute to any form of public debate capable of furthering progress in human affairs. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any "formality", "condition", "restriction" or "penalty" imposed be proportionate to the legitimate aim pursued...⁹¹

However, this case differs from *Muller* in that there was a bulletin placed in a number of display windows (also distributed to the members of the institution *Otto-Preminger*) describing the film and setting an age limit (17). The Court, however, did not attach due importance to the said measures aimed at protecting the uninformed, young or religious people. Therefore, the Court did not follow its pattern, which brings the consistency of its approach into question.

Moreover, in cases concerning artistic expression, the Court has still not given a reasonable rationale for affording more protection to political expression than to the artistic expression. Indeed, while artistic expression might also well contribute to a public debate, Contracting States have a wider margin of appreciation in its restriction. However, as the Commission noted in *Muller*:

Typically it is in undemocratic societies that artistic freedom and the freedom to circulate works of art are severely restricted. Through his creative work the artist expresses not only a personal vision of the world but also his view of the society in which he lives. To that extent art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day.⁹²

Ostrovsky, *What's So Funny About Peace, Love, and Understanding?: How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals*, 1 INTERNATIONAL LAW 47, 54-56 (2005).

⁹¹ *Id.* at para. 49.

⁹² See Lord Lester of Herne Hill, *Universality versus Subsidiarity: A Reply*, 1998 EUROPEAN HUMAN RIGHTS LAW REVIEW 73, 76 (1998).

As it is well known, orthodox views may only be affected or proven to be false only if radical or contradicting views are allowed to be freely expressed.⁹³ That is not to say that the national authorities can never invoke to limitations to protect other interests. On the contrary, this is possible under the Convention system. Yet, a delicate balance should be struck between the protection of the rights of the others and holders of the dissident opinions, who are, in general, more vulnerable.

E. Conclusion

The legitimacy of the margin of appreciation has been subject to controversy since its emergence; it has been questioned whether the doctrine can be regarded as a principle or merely a practical tool for the Convention bodies to evade their supervisory functions.⁹⁴ While some critics advocate the abolition of the doctrine,⁹⁵ most are concerned about its inconsistent application by Strasbourg organs. The latter are also concerned about the absence of a detailed and systematic justification for the usage of the doctrine. It is also argued that over emphasis on the doctrine would result in losing sight of the aim of creating a harmonious system at the European level. Put differently, deference to local values and "cultural relativism" runs counter to the notion of the universality of human rights.⁹⁶ In this context, Lord Lester voices the above mentioned concerns very boldly:

The concept of the "margin of appreciation" has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake... The danger of continuing to use the standardless doctrine of the margin of appreciation is that... it will become the

⁹³ See D. J. HARRIS, M. O'BOYLE, C. WARBRICK, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 377 (1995).

⁹⁴ See Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism*, 19 *HUMAN RIGHTS LAW JOURNAL* 1 (1998); see also Takahashi, *supra* note 1, at 230.

⁹⁵ The opponents of this doctrine claim that the usage of this doctrine undermines the very basis of human rights, since it deprives the individual of enjoying his/her rights to which he/she is entitled. Moreover, it has been used by the Strasbourg organs as a justification for their "lax review." The unsystematic and vague nature of the doctrine was also found to be running counter to the effective implementation of Convention rights, which should be interpreted in a clear and precise manner. See Takahashi, *supra* note 1, at 233; see also Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 907 (2005).

⁹⁶ *Id.*; "[m]argin of appreciation with its principled recognition of moral relativism, is at odds with the concept of universality of human rights." Benvenisti, *supra* note 2, at 844.

source of a pernicious "variable geometry" of human rights, eroding the "acquis" of existing jurisprudence and giving undue deference to local conditions, traditions, and practices.⁹⁷

The need for the articulation of solid and foreseeable criteria is not only crucial for the future existence of the doctrine but also for the legal certainty as well, without which the confidence in European Convention system cannot be maintained.

However, it should be kept in mind that States Parties increasingly incorporate the European Convention into their domestic legal systems, i.e., a more harmonized judicial system will prevail in the near future among the Member States. In other words, the margin of appreciation doctrine, to a certain extent, might lose its importance in the near future, for the absence of a European common ground in certain areas will no longer be an obstacle for the Court to exercise its supervisory function effectively. Nevertheless, today the doctrine can be used as an effective tool for the better enforcement of Convention rights, because the rich legal and cultural tradition of Member States of Council of Europe presents considerable difficulties in the harmonious application of the Convention rights. This is true particularly given that the diversity of legal and cultural traditions of Council of Europe Members has been enriched with the participation of former socialist countries. In this respect Macdonald notes that:

...The intention of the drafters of the Convention was not that each Contracting State would have uniform laws but that there would be a European standard which, if violated, would give redress to the Members of the Contracting State...[T]he margin of appreciation is a useful tool in the eventual realization of a European-wide system of human-rights protection, in which a uniform standard of protection is secured. Progress towards that goal must be gradual, since the entire legal framework rests on the fragile foundations of the consent of the Contracting Parties. The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and

⁹⁷ Lord Lester of Herne Hill, QC, *The European Convention on Human Rights in the New Architecture of Europe: General Report*, in PROCEEDINGS OF THE 8TH INTERNATIONAL COLLOQUY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 227 (1995); Mahoney, *supra* note 94, at 1.

enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.⁹⁸

The argument that in the near future there will be a more harmonious European order does not mean that the legal and cultural traditions of the Contracting Parties would be identical and there would be no need to resort to the doctrine at all. However, it should not be surprising to observe an emergence of more harmonious European standards, the absence of which, at the present juncture, prevents the Court from truly exercising its functions, particularly in delicate matters such as public morals. It is to be noted that although the importance of the doctrine might relatively diminish with the emergence of common standards in Europe, the doctrine would still be relevant with respect to non-normative aspects of judicial process such as the evaluation of the facts and evidence in a given case.⁹⁹

Moreover, despite the need for universal understanding of human rights, there will inevitably be differences between Contracting States, where the doctrine might serve as a flexible tool to overcome certain difficulties in the implementation of the Convention. Thus, the doctrine should be refined in a manner which draws the boundaries of the national discretion and the role of the European Court in a more clear fashion. No doubt, since every case has a completely different nature, an ultimate form of the scope of the doctrine cannot be realistically drawn. However, there exists a possibility of creating a solid frame, or rather, firm criteria that might allow States parties and the applicants concerned to foresee the possible outcome of a given case.

⁹⁸ Macdonald, *supra* note 5, at 123.

⁹⁹ Some opponents of the doctrine go even further claiming that the distinction between fact-finding and application of law should be abolished, and Strasbourg organs should also intervene in the fact-finding mission. This approach seems to be problematic since it overlooks the fact that the main responsibility for guaranteeing human rights rests, in the first place, with the national authorities, and the role of the Strasbourg organs is subsidiary. Indeed, the drafters of the European Convention did not envisage the Court as a fourth instance of appeal from national court decisions. Moreover, the case-load of the Court should also be taken into account; particularly given the fact that the judgments of the Court are not delivered promptly, such a fact-finding role of the Court should only be considered in cases of extraordinary importance. See *Belgian Linguistic*, *supra* note 19, at para. 10; see also Herbert Petzold, *The Convention and the Principle of Subsidiarity*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 49 (R. St. J. Macdonald, F. Matscher, H. Petzold eds., 1993); Takahashi, *supra* note 1, at 233.

