The Strasbourg Court’s Variable Geometry – Theoretical Analyses of the Margin of Appreciation Doctrine

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1. Introduction

The concept of a margin of appreciation, which has been developed in the jurisprudence of the ECHR, suggests an ambit of discretion, “latitude of deference or error”,1 or “room for manoeuvre”,2 given to national authorities in assessing appropriate standards of the Convention rights, taking into account particular values and other distinct factors woven into the fabric of local laws and practice. It is akin to a standard of review3 or a doctrine of judicial self-restraint4 developed in the US Supreme Court’s jurisprudence. It may be argued that the pervasiveness of discourses on the variable scope of the margin of appreciation doctrine demonstrates that this doctrine is a salient example of how theories on national discretion are structurally incorporated into legal doctrines of international human rights.5

By undertaking theoretical inquiries into the nature and the function of the margin of appreciation doctrine, this chapter aims to ascertain any remaining sustainable rationale for the application of this doctrine in the ECHR context. The chapter starts with analysing the nature of this doctrine and the main strands of criticisms levelled at the modus operandi of this doctrine. It then provides analytical accounts of the circumstances in which this doctrine operates before turning to jurisprudential examinations of the controversy over interpretive disagreements and discretion. Finally, the chapter comes to defend the thesis that many differentiated elements of the notion of subsidiarity furnish the most coherent explanatory structure for the application of the

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4 O’Donnell, ibid., at 477.
5 Carozza, supra n. at 62.
margin of appreciation. The examinations here focus mainly on substantive elements of subsidiarity, including deference to legitimacy and respect for cultural diversity.

2. Determining the Nature of the Margin of Appreciation

2.1. The Margin of Appreciation as a Principle?

To consider this evaluative concept sophomorically as a rhetorical device for window-dressing does not do justice to the Strasbourg organs’ conscientious judicial policy. Cohen-Eliya and Porat contend that the margin of appreciation, together with proportionality, constitutes a “standard-based doctrine”.6 Indeed, some commentators describe it as an expression of the principle of good faith within the meaning of Article 31 of the Vienna Convention on the Law of Treaties, granting to a state the room to address hard cases.7

It ought to be seriously examined whether the margin of appreciation is an interpretive principle. Robert Alexy characterises principles as “optimization requirements”. According to him, “principles are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities at hand”.8 Greer argues that the margin of appreciation, together with proportionality and non-discrimination, forms the body of “secondary principles” of the ECHR. Within his conceptual framework, such secondary principles supplement the three “primary constitutional principles”: the “rights” principle; the “democracy” principle; and “the priority-to-rights” principle.9 According to him, the “legality” or “rule of law” principle, while otherwise worthy of being categorised as the fourth primary constitutional principle, is fully integral to each of the three principles.10 Seen in that light, the margin of appreciation is a principle that is an inevitable spin-off of the notion of balancing inherent in the Convention (between two clashing Convention rights or between a Convention right and a public purpose). According to Greer, the “rights principle” requires that in democracy, the Convention rights ought to be safeguarded by national courts and by the Strasbourg court through the medium of law. In his view, the

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6 Ibid., at 468.
7 Crema describes the concept of margin of appreciation is an expression of the principle of good faith within the meaning of Article 31 of the Vienna Convention on the Law of Treaties, granting to a state the room to address hard cases: L. Crema, “Disappearance and New Sightings of Restrictive Interpretation(s)”, (2010) 21 EJIL 681 at 699.
“democracy principle” demands that collective ends be sought after by democratically accountable national non-judicial organs. The “priority-to-rights principle” functions as the mediator between these two principles, requiring that the Convention rights “take procedural and evidential, but not conclusive, priority over the democratic pursuit of the public interest, according to the terms of given Convention provisions”.¹¹

While pointing to its potentially important analytical function, the present writer argues that the “unprincipled and confused” manner in which the relationship between Convention rights and public interest grounds is adjudicated upon is principally due to the failure by the Court to fully reflect on the implications of Greer’s “priority principle”. This latter constitutional principle, according to Greer, will impose a much more onerous burden of proof on respondent states to rationalise their meddling with individual persons’ rights.¹²

2.2. The Margin of Appreciation as a “Policy Standard”

Yet, more so than the concept of proportionality, there are many obstacles to claiming that a margin of appreciation is a ‘principle’. It is not that this is only an inferred “principle” of interpretation.¹³ The nub of criticisms is directed more at substantive issues. Properly analysed, the margin of appreciation doctrine is not equipped with the capacity to predict certain normative outcomes consistently, the capability often associated with a ‘principle’ or an interpretive criterion. This feature is evident in respect of the rhetorical function of the language of the margin of appreciation, which has not prevented the Court’s stringent scrutiny.¹⁴ The margin of appreciation doctrine used as a rhetorical tool is diametrically opposite to the idea of illocutionary function

¹¹ Ibid., at 697.
¹² Greer (2008), supra n. at 700.
¹³ It can be contended that though there is no explicit basis for this doctrine, its genesis owes much to the way in which the Convention rights is structured, in particular, in respect of the limitation and derogation clauses: J.A. Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law”, (2004/2005) 11 Colum.J.Eur.L.113 at 116.
¹⁴ See, inter alia, A v. Norway, Application No. 28070/06, Judgment of 9 April 2009; Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria; Times Newspapers Ltd (Nos 1 and 2) v.UK, Application Nos 3002/03 and 23676/03, Judgment of 10 March 2009; Gologus v. Romania, Application No 26845/03, Judgment of 27 January 2009; Simaldone v. Italy, Application No. 22644/03, Judgment of 31 March 2009. In some cases further intensified in reliance on such techniques as the less restrictive alternative doctrine: See S.H. and Others v. Austria, Application NO. 57813/00, Judgment of 1 April 2010, paras 69, 79 and 89; Hutten-Czapska v. Poland
that the language of legal terms is expected to undertake.\textsuperscript{15}

Principles or policies are not part of the law but are treated more as “extra-legal standards”.\textsuperscript{16} As part of his criticism of positivism, Dworkin stresses that many standards other than “rules” are operative within the legal order, including “principles, policies and other sorts of standards”. At times he employs the term “principles” generically to refer to the whole gamut of those standards other than rules.\textsuperscript{17} Nevertheless, \textit{stricto sensu}, principles are differentiated from policies. On one hand, a “policy” is defined as a “kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community”. On the other hand, a principle is described as “a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality”.\textsuperscript{18} In that sense, a principle is generated not simply by the Court’s utilitarian calculation of judicial economy or technical interests, but by the Court’s deliberations on what it considers to be the axiomatic moral rationales.\textsuperscript{19} The raison d’etre of principles is hence connected to the nature of judicial reasoning. The role of judicial reasoning in human rights adjudication is to provide a coherent set of arguments (based on such principles) to evaluate fundamental issues of political morality without surrendering itself to policies grounded on political power.\textsuperscript{20}

The distinction between principles and policies can nonetheless be collapsed if principles are read as stating social objectives, or by interpreting policies as stating

\textsuperscript{15} Wittgenstein considers uses of words as moves in language-games. According to him, words are not labels that can be pinned down to concrete objects, and their meaning can be determined by rules for their use: Endicott, supra n. at 946-947, and 949.

\textsuperscript{16} Dworkin, R. (1977) \textit{Taking Rights Seriously} Duckworth at 35.

\textsuperscript{17} Id., at 22.

\textsuperscript{18} Id., at 22.

\textsuperscript{19} Indeed, it can be submitted that this ought to be the interpretive ethic of all monitoring bodies of human rights treaties: See G.Letsas, “Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer”, (2010) 21 EJIL 509 at 520 (arguing that “The Court’s interpretive ethic became one of looking at the substance of the human right at issue and the moral value it serves in a democratic society, rather than engaging in linguistic exercises about the meaning of words or in empirical searches about the intentions of drafters”).

\textsuperscript{20} It is to be recalled that Ronald Dworkin characterises the reasoning provided by the US Supreme Court as being of the kind that ensures that fundamental issues of political morality will be examined as issues of principles and not political power alone: R. Dworkin, A Matter of Principle, (Harvard Univ. Press, 1985) at 70.
principles. With regard to the differentiation of principles from rules, Dworkin contends that the former “states a reason that argues in one direction, but does not necessitate a particular decision”. In contrast, a rule tends to stipulate a discrete resolution because of its specificity and concrete character. Further, principles or policy standards are deemed to have the dimension of weight or importance, so that competing principles or policy standards are susceptible to evaluations in terms of their relative weight. In contrast, rules operate in an all-or-nothing manner, so that the conflict of rules is resolved by allowing one to supersede the other.

A policy standard has an advantage over a rule in two respects. First, a policy standard is considered more receptive than a rule to moral reasoning in the inclusive positivist sense. Second, it has a capacity of greater resilience. Rules may be changed, or fall into desuetude, when they drastically fail to dictate their normative outcomes, such as in the case where a contrary result continues to be yielded. In contrast, a policy standard is able to survive intact, even in cases where it cannot prevailingly or consistently provide a basis for a certain, normative outcome. Such an organic nature of the policy standard is evidenced by its capacity to metamorphose according to vicissitudes of social evolution.

Turning back to a margin of appreciation, it may be argued that this doctrine assists the Court’s complex adjudicative role in determining the meaning of “interpretive concepts” in the interaction of rules and principles (such as the principle of proportionality and evolutive interpretation) in specific cases. By locating concrete decisions in an overall balance of competing values and prognosticating latitudes of discretion that can be accorded to the member states, the doctrine of margin of appreciation helps pinpoint the Strasbourg Court’s shifting policy rationales underlying the “constitutional” structure of the ECHR’s legal order. In that sense, when placed

21 Id., at 22-23.
22 Id., at 26.
23 Id., at 24, and 26-27.
25 Id., at 35-36.
26 Letsas (2007), supra n. at 29-30.
28 I agree with George Letsas’s view that the ECHR rights can be comprehended as “constitutional”
in the spectrum that ranges from a purely descriptive pole to a purely evaluative one, it is geared toward the evaluative pole.\(^2^9\) It has a potential of serving as an analytical tool in such dialectic. In a nutshell, the margin of appreciation can be considered a \textit{policy standard} that emanates from the decisional choice of the Strasbourg Court.

\section*{3. Main Strands of Criticism against the Margin of Appreciation Doctrine}

The margin of appreciation doctrine has stirred much of controversy among the publicists. The fact that the doctrine lacks explicit legal basis in the Convention text reinforces the fear that the Strasbourg Court is jibing at its own power of review in favour of the national authorities’ discretion. The thrust of objections that are closely related to the Convention’s “constitutional” structure can be summarised in the following strands.

First, the margin of appreciation doctrine is criticised for its inconsistent and opaque modality of operation. The proponents of the certainty of legal rules charge the doctrine for vitiating the normative guidance of substantive rights provisions of the ECHR\(^3^0\) and fostering normative ambiguity. This holds true even if too much sacrifice to certainty would risk making judicial interpretation too formal.\(^3^1\) As a corollary of this normative erosion, there is a risk that the Convention standards may be inconsistently applied in the seemingly similar cases,\(^3^2\) leading to the asymmetrical standards of human rights.\(^3^3\)

Second, as threadbare as it may be, there is a criticism that the application of the doctrine introduces subjective, and relativist standards into treaty provisions of human rights treaties, formal sources of international law. This tendency would run counter to

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29. It is in that respect that the margin of appreciation is often compared to the European or German law concept of proportionality or to the English law notion of reasonableness. For the analytical account of the notion of reasonableness, see, for instance, MacCormick, \textit{supra} n. 2 at 162.

30. Shany \textit{supra} n. 20 at 937.

31. Compare the discussion on indeterminacies of legal rules in a domestic context, see Hart, \textit{supra} n. 29 at 131.

32. Benvenisti \textit{supra} n 35 at 844. See also Ni Aolain, \textit{supra} n 40 at 114, 119.

33. Benvenisti, id; and McGoldrick, \textit{HRLR} (check).
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the universal claim, “universalising project”, of human rights.\textsuperscript{34} In Z v. Finland, Judge Demire precisely noted that “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”.\textsuperscript{35} Such a tendency would risk generating judicial double standard,\textsuperscript{36} unfairness\textsuperscript{37} or bias.\textsuperscript{38} More worryingly, the Court seems altogether obtuse over such serious consequences.

Third, the unprincipled manner of applying the margin of appreciation is closely intertwined with the Strasbourg Court’s considerable degree of deference to national decisions in some cases. This is true especially when the doctrine is applied in such a lax manner as to be approximated to “the test for reasonableness [that] signifies little more than a lack of arbitrariness”.\textsuperscript{39} Without succumbing to legal scepticism, one might even contend that lurking beneath the application of the margin of appreciation doctrine is the presumptive Conventionnalité of national measures, which would weigh heavily on the onus of proof that individual applicants have to discharge. Setting aside the merit of such a contention, one cogent point is that an almost self-propelling manner in which the Court yields to decisional choices highlights its failure to grasp the importance of citizens’ participation in “effective deliberation” on collective decision-making,\textsuperscript{40} which forms an intrinsic attribute of democracy.\textsuperscript{41}

Fourth, as a corollary of the first feature, one cannot dissipate a more sinister omen in the constitutional dimension of the ECHR. Vagueness and indeterminacy of normative meaning that stultifies the rationality expectation seriously erodes the Court’s legitimacy.\textsuperscript{42} Similarly, Habermas argues that “the claim to legitimacy requires decisions that are…rationally grounded…so that all participants can accept them as rational decisions”.\textsuperscript{43} The weakening normative guidance may yield a corrosive effect

\textsuperscript{34} Benvenisti, id; and McGoldrick, HRLR (check).
\textsuperscript{35} Z v. Finland.
\textsuperscript{37} Shany supra n. 20 at 912.
\textsuperscript{38} Benvenisti supra n. 35 at 850; and Shany supra n 20 at 923-924.
\textsuperscript{40} J.S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations, (Oxford: Oxford University Press, 2000), at 22, 39, 53 and 168.
\textsuperscript{41} S. Wheatley, “Minorities under the ECHR and the Construction of a ‘Democratic Society’”, (2007) PL 770 at 780.
\textsuperscript{43} J. Habermas, Between Facts and Norms (Cambridge: Polity Press, 1996), at 198.
on the principle of non-discrimination and the rule of law, the two cardinal principles that shape the “constitutional” edifice of the ECHR. Excessive reliance on the judicial self-restraint rationale risks fostering a habit of non-accountability, and abdicating the supervisory role of the Strasbourg Court.

Fifth, the margin of appreciation doctrine, when its rational basis is rooted principally in deference to legitimacy of democratic governments, would pose a serious danger to minority rights protection. This may lead to a grave consequence of democratic majority deciding to deprive members of any minority of their fundamental rights. Clearly such an outcome “would be illegitimate because [it is] contrary to the foundational values of democracy itself”. Political or social minority members would be divested of means to redress injustice through democratic political procedures. That would signal a wrong message that the Court is abandoning its institutional role as the external guarantor against the “tyranny of the majority”. Indeed, it may be argued that the operation of the margin of appreciation doctrine and the very “balance” metaphor this doctrine implies have prevented the Court from playing a meaningful role in resolving majority/minority conflicts.

In a nutshell, the application of the margin of appreciation doctrine is considered handicapping the development of judge-made law, constituting an obstacle to elaborating international human rights norms. Further, directional ambiguity cumulatively brought about by the case-law may negatively impact upon the dignity of individual persons in concrete cases by failing to respect their autonomy. These points can be said to be rooted in the overall problem of the Court’s “haphazard method of

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46 Brauch argues that “The empty phrases concerning the states’ margin of appreciation – repeated in the court’s judgments for too long already – are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights”: Brauch, supra n. at 148.

47 Ibid.


49 Ibid.

50 Shany, supra n 20 at 922-923.

51 See Raz supra n 30 at 222.
adjudication”, which obfuscates two salient constitutional issues: (i) determining the normative scope of a Convention right (including its relationship with other conflicting Convention rights, and with public ends); and (ii) settling the institutional question of who should assume the final responsibility for this question (national v. European, and judicial or non-judicial organs, etc.). Viewed in that light, the Court’s task is to regain its role as a final arbiter of the Convention rights while fully tapping into its capacity to make a non-reviewable decision and judgment.

4. Analyzing the Circumstances in which the Margin of Appreciation may be Invoked

4.1. Overview

Lettas usefully distinguishes between the structural and substantive concepts of the margin of appreciation. The structural concept refers to the scope of discretion given to the national authorities on the basis of the structural relationship between the Strasbourg Court and the national authorities. This concept is closely intertwined with the principle of subsidiarity, one of the core issues that will be analysed below. Under this concept, one can refer to two undifferentiated elements: (i) deference to local legitimacy; and (ii) absence of expertise or knowledge on the part of the international judiciary in Strasbourg. On the other hand, Lettas contemplates that the “substantive concept of the margin of appreciation” refers to interpretive discretion given to the national authorities in assessing the conflict, or the appropriate balance to be struck between, an individual person’s right and the public interest as a whole. It ought to be noted that the requirement of fair balance is so ubiquitous in the case-law that some treat it as a “principle”.

Analytically, the main contours of debates on the margin of appreciation as a policy standard take shape in four processes: (i) the process of fact-finding and ascertainment of fact; (ii) the process of evaluating the parameters of human rights norms; (iii) the process of balancing between individual persons’ rights and the public purposes envisaged by a specific human rights norm, including the evaluation of the means to

achieve such desired social ends;\textsuperscript{55} and (iv) weighing in balance two competing rights and freedoms. The second process closely involves a profound question of interpretive disagreements over a specific human rights norm, which in turn gives rise to judicial discretion.

4.2. The process of fact-finding and ascertainment of fact

The first pattern of the operation of the margin of appreciation becomes apparent in relation to the discretion given to national or local authorities in ascertaining relevant facts because of their greater access to information and social forces at hand.\textsuperscript{56} In this phase, the comparative advantage of local administrative authorities in fact-finding corroborates the utilitarian calculation behind the application of the subsidiarity principle.\textsuperscript{57} The most salient examples would be the evaluation of a state of emergency that can authorize a member state to invoke the derogation clause under Article 15, or the assessment of appropriate evidence for criminal convictions. Clearly, the assertion that this phase is “value-free” or “ideologically neutral or free”\textsuperscript{58} is contestable. Further, the manner in which empirical data are amassed and the reconstruction of past reality undertaken can be prone to subjective evaluations. Still, by comparison, the assessment of the obscene pictures\textsuperscript{59} depends preponderantly on evaluative and subjective grounds.\textsuperscript{60}

4.3. The process of evaluating the parameters of human rights norms

The second phase is essentially the questions of interpreting a legal term and determining its meanings and normative parameters. Human rights laws, while providing “deontological constraints” and pulling judicial decisions in the direction of optimising rights, do not prescribe their content and ambit exhaustively.\textsuperscript{61} Indeed, despite inexorable increase in normative instruments and monitoring mechanisms of

\textsuperscript{55} Shany, \textit{supra} n. 24 at 917 and 935.
\textsuperscript{57} Shany, \textit{supra} n. 20, at 927.
\textsuperscript{58} Id., at 937.
\textsuperscript{60} Compare this, however, with E. Voyiakis, “International Law and the Objectivity of Value”, (2009) \textit{Leiden J. Int’l Law} 51.
international human rights law both at universal and regional level, it remains the case
that one of the most conspicuous weaknesses of the current human rights system is the
“lack of a thick normative content”, namely, indeterminacy and openness of human
rights concepts.\(^{62}\) Hence, there ineluctably remains a measure of interpretive latitude
for determining their scope and meaning, and for reconciling conflicting liberties if
clashes between rights occur. In the ECHR context, where the normative scope and
meaning of a human rights norm is indeterminate, the Strasbourg Court is receptive to
the argument that national authorities are better placed to ascertain concrete steps to
effectuate the abstract right.\(^{63}\) The problem of ambiguity of some human rights norms
remains unresolved not least because of the absence of “common social or moral order”
in Europe, which would serve as a metric for normative guidance.\(^{64}\) These issues will
be parsed more in-depthly in the following section.

4.4. The process of balancing individual persons’ rights and public purposes,
including the process of assessing the means to achieve desired social ends
envisaged by a specific human rights norm

Arguably, the application of the margin of appreciation is most discernible and
tenacious in the third phase. The national authorities may be given latitudes of
discretion in ascertaining the means (types, suitability, proportionality etc) to attain
social objectives in a particular factual circumstance.\(^{65}\) This corresponds to the process
of what Greer\(^{66}\) terms as “structured balancing” between a right and a public good, or
of reconciling clashes between rights. Similarly, what Letsas describes as the
“substantive concept” of the margin of appreciation doctrine is set in motion to
rationalize the relationship between rights of individual persons and the collective
interests.\(^{67}\) The Strasbourg Court is obliged to furnish a reasoned judgment (rather than
a one-off flash of intuitions) that can rationalize particular outcomes of weighing the
rights of individual persons against public goods essential to the Convention’s

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\(^{62}\) P. Alston, “Introduction” to Human Rights, P. Alston (ed), International Library of Essays in Law and
Legal Theory, 1996), at xi and xii; Carozza, supra n. at 58-59 and 62.

\(^{63}\) In the context of minority rights protection, see Keller, supra n. 16 at 52-53.

\(^{64}\) Wheatley (2007), at 789. The line of argument is redolent of the hermeneutics’ postulation that the
pre-understanding of judges, which is shaped by “the shared topoi of an ethical tradition” serves to forge
“the flexible connections between norms and states of affairs” on the basis of “received, and historically
corroborated principles”: Habermas (1996), supra n. 26 at 200.

\(^{65}\) Shany supra n. 20 at 917 and 935. In this phase, for instance, the proportionality of incriminating
measure (penalty) may be assessed.

\(^{66}\) S. Greer, “ ‘Balancing’ and the European Court of Human Rights: A Contribution to the

\(^{67}\) Letsas (2006), supra n. 14 at 709.
“constitutional” order. The deferential approach is enhanced, where decisions entail complex policy or political issues that are closely bound up not merely with the demands of sovereignty, but with that of legitimacy of the national or local community. As noted by some commentators, the deployment of the variable margin as a means to adjust the intensity of its review is precisely related to the Court’s need to make a hard choice of political morality when grappling with a complex balance of values between community goals and individual persons’ rights.

Admittedly, deontological critics, including Dworkin who propose individual persons’ rights as “trumps”, may be averse to such an idea of balancing by placing special emphasis on the very nature of rights. It is submitted that the Strasbourg Court’s balancing, as a species of “constitutional rights reasoning”, ought to be corroborated by appropriate rationales that, while succumbing to deontological constraints, are designed to enhance the structure of autonomy.

4.5. The balancing between competing rights and freedoms

Fourth, the operational modality of the margin of appreciation can be discerned in respect of the balancing between rivalling rights and liberties. This operational sphere is not dissimilar to the cases in which the margin of appreciation is invoked to assess the reasonable or fair balance between an individual person’s right and common goods. Mowbray observes that “Balancing the rights at stake, as well as the gains and losses of the different persons affected by the process of transforming the States’ economy and legal system, is an exceptionally difficult exercise. In such circumstances, in the nature of things, a wide margin of appreciation should be accorded to the respondent State”.

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68 Letsas (2006), supra n. at 709. In the Refah partiisi case, the Strasbourg Court affirmed that “[p]luralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole”: The European Court of Human Rights, Refah partiisi (The Welfare Party) and Others v. Turkey, Judgment of 13 February 2003, para. 99.

69 Mowbray, supra n. at 316.

70 Ibid., at 316. See also Carozza, supra n. at 73.

71 The restrained review standard has been discerned in cases regarding town planning, social and economic policy issues, (including the transition from a community system to a free-market economy), the manner of taking cultural property into public ownership: Sporrong and Loennroth v. Sweden; Broniowski v. Poland; Kozacioglu v. Turkey.

72 See, for instance, R. Dworkin, “Even bigots and Holocaust deniers must have their say”, The Guardian, 14 February 2006 (concerning the highly controversial Danish cartoons lampooning Mohamed).


Ascertaining the relative weight of two opposing rights, which may necessitate inquiries into substantive moral justifications, is among the overarching “constitutional” questions of the ECHR. This is closely associated with the much more overarching issue of incapacity of human rights laws to delineate their normative content and scope, the issue related to above (ii).

Letsas’ “substantive concept of margin of appreciation” comes to light also in the dimension of assessing a conflict of two countervailing rights. For instance, such conflict of rights can be seen in case of limitations on access of biological parents to their children placed in foster parents’ custody, and in case of the need to constrain Holocaust denials, and other hate speeches. In the former case, the social-democratic ethos of national societies that place primacy on the wellbeing of children may contravene the right of natural parents to visit their children. In the latter case, given the special historical experience, it seems legitimate to be cautious and vigilant of the virulent and rampant dissemination of neo-Nazi or related publications in continental European countries, as compared with equivalents in the UK and Ireland.

5. Interpretive Disagreements, and Administrative and Judicial Discretion

In this section, inquiries will be made into how “interpretive disagreements” over the normative parameters (meaning and scope of application) of a specific human rights norm may impact upon the question of a margin of appreciation. First, the doctrine of a margin of appreciation can be described as a form of deference to local discretion exercised by the national authorities (administrators and judges) when determining the normative contents and requirements of domestic rules in the light of the requirements of the ECHR. The “mechanism” of deference by international judges to interpretive discretion made at local levels can be schematised as follows. National decision-making agents are exercising their own discretion when determining: (i) the meaning of the

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75 Note that within Dworkin’s conceptual framework, the notions of “equal concern” and “respect” figure as the lynchpin for resolving ties between conflicting rights or legal rules generally: R. Dworkin, “Do Liberal Values Conflict?”, in: R. Dworkin, M. Lilla and R.B. Silvers (eds), The Legacy of Isaiah Berlin (New York: New York Review of Books, 2001) 73, at 87. See also Beck, supra n. 48 at 223.


relevant national law under which an impugned measure has been taken; (ii) the compatibility of this measure with the requirement of that law; (iii) the normative parameters of the right under the ECHR at issue; and (iv) the conformity of the national law and measure with the requirements of the ECHR, be it domestically incorporated or not. At least, the Strasbourg judges’ deferential proclivity can be more rationalized with respect to the questions (i) and (ii) on the grounds of judicial economy and deference to local legitimacy. The international judges in Alsace’s capital may not be equipped with the technical capacity to deal with these question de novo. On the other hand, the questions (iii) and (iv) are, by their nature, more readily ascertainable by the judicial resources at Strasbourg. Setting aside that question, it ought not to be overlooked that when re-examining these questions at their own hand, the Strasbourg judges themselves are exercising their own adjudicative discretion over the normative contents and requirements of the specific right under the ECHR.

A human rights norm, which is often drafted deliberately in a general and ambiguous manner to accommodate multiple eventualities in the future, is riddled with the lack of sufficient clarity to enable its application in concrete cases. Such an open-ended norm encompasses: (i) an ill-defined or inherently ambiguous norm; and (ii) an inherently discretion-conferring norm. Even what prima facie appears not outright vague concept may not escape from a certain degree of interpretive disagreement. Confronted with such a scenario, the Court’s choice would be to defer to local discretion by invoking the notion of a margin of appreciation. Or the Court may compel itself to make its own “value-choice” among different solutions and to apply what it believes to be an

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78 Shany (2004) at 910. See the European Court of Human Rights, Odièvre v. France, Judgment of 13 February 2003, at para. 40; and Vo v. France, Judgment of 8 July 2004, para. 82 (recognizing that ‘the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention’).

79 For instance, see the notion of ‘protection of … morals’ under Article 8(2) ECHR. For the discussions on the German public law doctrine on indefinite norms (unbestimmte Begriffe), see Arai-Takahashi, Y (2000) ‘Administrative Discretion in German Law: Doctrinal Discourse Revisited’, (6) European Public Law 69.

80 This is what Shany describes as a ‘result-oriented norm’: Shany supra n. 20 at 917. When analyzing the theory of the margin of appreciation in the general context of international law, Shany argues that special features of the result-oriented norms are that: (i) these norms are indifferent to the manner in which a desired legal end is attained, insofar as its attainment is guaranteed; (ii) state authorities are given discretion over choice of means and manner of implementing such norms; and (iii) the path to the desired social/public end is uncertain: id. Examples of each of those ‘result-oriented norms’ include: (i) most economic, social and cultural rights (International Covenant on Economic, Social and Cultural Rights, Article 2(1) etc); (ii) environmental law norms, such as the Kyoto Protocol to the Framework Convention on Climate Change, Art 3(1); and (iii) EC directives—a procedure for promulgating result-oriented norms. See, for instance, Case C-69/90, Francovich v. Italy, [1991] ECR I-5357, at 5412.
“objective” standard that ought to be uniformly implemented across Europe. The pattern (ii) can be aptly exhibited by the doctrine of “autonomous concepts”, or that of evolutive interpretation, when the Court seeks to infer harmonised “legal truth” that transcends communal and local understanding.\textsuperscript{81}

With respect to those norms that are inherently indefinite, it ought to be remarked that all rules of law are, when chosen as standards of behaviour, vulnerable to indeterminacy in their application.\textsuperscript{82} A legal norm inherently entails what Waisman and Hart describes as an “open texture”.\textsuperscript{83} Further, both the first and second categories of legal norms ((i) and (ii) above) can be those that posit or encapsulate moral precepts.\textsuperscript{84} In essence, receptiveness of such indefinite or discretion-giving norms to a margin of appreciation is accountable by the nature of these norms that are intrinsically imbued with moral, political or other value-considerations.

Arguably, interpretive disagreement susceptible of discretion can be most saliently seen in the “dimension of fit” within Dworkin’s theoretical framework, that is, when judges cannot discriminate between competing legal arguments by reference to the requirement of conforming any legal argument to “the brute facts of legal history” (what he calls a threshold test of “fit”).\textsuperscript{85} Finnis argues that in a “hard case”, the requirements of moral soundness and fit leave more than one answer that is morally and legally “not wrong”,\textsuperscript{86} allowing leeway of discretion to those that interpret laws.\textsuperscript{87} In the two-tier dimensions of protecting fundamental rights in Europe (national and ECHR levels), this theoretical implication applies to the aforementioned process of ascertaining compatibility of a specific measure with the requirements of a national law and with that of the ECHR.

\textsuperscript{81} Letsas, supra n. at 52 and 55.

\textsuperscript{82} The first genre of legal norms is co-terminous with what Raz describes as “directed power” to indicate guided and limited power-conferring rules: J. Raz, Ethics in the Public Domain, OUP, 1994, Ch. 10.


\textsuperscript{84} This question is relevant to the debates on soft and hard positivism.

\textsuperscript{85} Dworkin, Law’s Empire (London: Fontana 1986) at 255. Dworkin considers that hard cases can be seen at least in three cases: (i) disagreement among lawyers; (ii) a lack of a clearly applicable proposition of law; and (iii) absence of determinate guidance from the legal record: W. Lucy, “Adjudication”, in: J. Coleman & S. Shapiro (eds), The Oxford Handbook of Jurisprudence & Philosophy of Law, (Oxford: OUP, 2002), 206, at 214.

\textsuperscript{86} Finnis, supra n. at 36.

\textsuperscript{87} According to Dworkin, “hard cases” are discernible in instances where “reasonable lawyers” disagree and “where no settled rule dictates a decision either way”: R. Dworkin, Taking Rights Seriously, (London: Duckworth, 1978) at xiv, 83.
Though not acknowledged by Dworkin himself, it is submitted that proneness to administrative and adjudicative discretion is (potentially) more pervasive in his concept of “dimension of substance” in which an interpretation must score well on the scale of moral value.\(^ {88}\)

Turning to positivist scholars, Raz recognises adjudicative discretion as inherent in, and logically necessary for judicial legislation. He contends that “legal rules which prescribe that the validity of other legal rules depend on certain moral or political considerations, actually function as power-conferring rules, granting to the judiciary limited and guided legislative power”.\(^ {89}\) In relation to “unregulated cases”, he claims that “judges do rely and should rely on their own moral judgement”.\(^ {90}\) According to him, “unregulated cases” susceptible of stronger judicial discretion arise either (i) when “the law applying to…[them] has gaps”;\(^ {91}\) (ii) when the relevant law is imbued with “intended or unintended indeterminacy of language and intention”;\(^ {92}\) or (iii) in case of “indeterminacy of…cases falling under two conflicting rules”.\(^ {93}\) Indeed, Raz accepts that the judicial power of reformulating and modifying the law can operate even when adjudicating “regulated cases”,\(^ {94}\) presumably on the basis that the law is essentially…

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\(^{89}\) J. Raz, Ethics in the Public Domain, OUP, 1994, Ch. 10. The effect of such power-conferring rules is to prescribe that judges should legislate new legal standards, whether by supplementing existing norms, or by modifying or nullifying them. He even goes so far as to mention that “[l]egal reasoning is an instance of moral reasoning”: J. Raz, Ethics in the Public Domain, (Oxford: Clarendon, 1994), at 324 (check again). He cautiously accepts that some legal standards embody moral and other values: J. Raz, Ethics in the Public Domain, (Oxford: Clarendon, 1994), at 227-8 (check again).

\(^{90}\) J. Raz, The Authority of Law (Oxford: Clarendon, 1979) at 199 (check). In another context, he notes that “it is our normal view that judges use moral arguments…when developing the law”: J. Raz, The Authority of Law (Oxford: Clarendon, 1979) at 49.


\(^{93}\) J. Raz, The Authority of Law, (Oxford: Clarendon, 1979), at 193. Raz’s considerations about “unregulated cases” are similar to MacCormick’s. According to MacCormic, hard cases can be identified when courts are confronted with the following problems: (i) the problem of relevancy (the question relating to an applicable proposition of law in a specific case); (ii) the problem of interpretation (which interpretation applies in a concrete case, among a range of competing interpretations of pertinent propositions law); and (iii) the problem of classification (the question of actually applying the proposition of law to the concrete facts of the case): N. MacCormick, Legal Reasoning and Legal Theory (Oxford: Clarendon Press, 1978; rev. edn. 1993), at 68-9, 95, and 203.

\(^{94}\) Raz uses the term “regulated cases” to refer to “easy cases”: J. Raz, The Authority of Law, (Oxford: Clarendon Press, 1979), at 182; This marks a contrast to Dworkin and MacCormick, who confine such a power to the realm of hard case adjudication.
malleable.\textsuperscript{95}

A deeper insight into the nature of discretion as one of the underlying bases of a margin of appreciation can be obtained from Hart’s notion of “open-textured” rules. Hart explains that “[w]hichever device…is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an \textit{open texture}”.\textsuperscript{96} In a different work, he refers to “problems of the penumbra” or “a penumbra of uncertainty” that surround all legal rules, which make it hard to assert that the application of legal rules to specific cases is merely a matter of logical deduction or automation.\textsuperscript{97} Hart accepts that uncertainty and indeterminacy concerning the requirement of the law is inevitably susceptible to adjudicative discretion.\textsuperscript{98} In his view, if a legal norm lacks objective content (namely, an objectively correct answer to what the norm requires), then judges are given a scope of discretion to determine the content of the norm on the basis of extralegal

\textsuperscript{96} Hart, Concept of Law, at 127-8, emphasis in original?
\textsuperscript{97} H.L.A. Hart, “Positivism and the Separation of Law and Morals”, (1957) 71 Harv.L.Rev. 593 at 607-608. In case legal disputes raise a question of law concerning a rule’s open texture, “uncertainties as to the form of behaviour required by them may break out in particular concrete cases”: Hart, Concept of Law, at 126.
\textsuperscript{98} Hart observes that “In every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents”: Hart, Concept of Law, at 136.

In another work, he aptly observes that:

\begin{quote}
The point must be not merely that a judicial decision to be rational must be made in the light of some conception of what ought to be, but that the aims, the social policies and purposes to which judges should appeal if their decisions are to be rational, are themselves to be considered as part of the law in some suitably wide sense of “law” which is held to be more illuminating than that used by the Utilitarians.

(…)

…instead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judges’ choice are in a sense there for them to discover; the judges are only “drawing out” of the rule what…is “latent” within it.
\end{quote}

H.L.A. Hart, “Positivism and the Separation of Law and Morals”, (1957) 71 Harv.L.Rev. 593 at 612. However, he is careful in stating that to describe such judicial role of “drawing out” as judicial legislation “is to obscure some essential continuity between the clear cases of the rule’s application and the penumbral decisions”: ibid., at 612.
considerations, including moral and political values. Where moral norms lack objective standing, then the only way, according to Hart, to give effect to a legal norm entailing moral language is to construe it as guiding judges to exercise their “law-making discretion” in harmony with their “best understanding of morality”.

Returning to the ECHR, the Strasbourg Court has conceived and implemented its considered “interpretive strategy” in two opposing directions: (i) judicially active and pan-European uniform and autonomous approach (which includes an interpretive attempt by the judiciary, through its creative interpretation of existing express rules, to infer certain implicit rights, or “unenumerated rights” in the US constitutional discourse); and (ii) the approach of judicial self-restraint based on deference to local discretion. This is related to the core question of a treaty interpretation, the extent to which rules may be recognised as applicable to instances beyond the normative ambit contemplated by “intentionalists” or allowed by “textualists”. Utilitarian theory would explicate such an extension of rules to new cases as “judicial legislation”. Modern American theories term it “creative choice”. Still, Hart, not favouring any of such descriptions, suggests that any such normative extension be considered an outcome of a purposive and teleological attempt to elaborate on a normative scope of the rule that has been hitherto seen valid.

6. The Notion of a Margin of Appreciation as a Dimension of the Constitutional Principle of Subsidiarity

6.1. Overview

The margin of appreciation doctrine can serve diffuse functions to rationalize the vertical relationship between Strasbourg judges at international level and relevant authorities at national or local level (administrators implementing a specific measure in a concrete case, and the judiciary invoking national constitutional rights). Even so, the

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99 He argues that “if it is an open question whether moral principles and values have objective standing, it must also be an open question whether ‘soft positivist’ provisions purporting to include conformity with them among the tests for existing law can have that effect or instead, can only constitute directions to courts to make law in accordance with morality”: Hart, Concept of Law, at 253-254. See also Himma, supra n. at 145-146.

100 Hart, Concept of Law, at 253.


103 He contends that “the inclusion of the new case under the rule takes its place as a natural elaboration of the rule, as something implementing a ‘purpose’ which it seems natural to attribute…to the rule itself….”: H.L.A. Hart, “Positivism and the Separation of Law and Morals”, (1957) 71 Harv.L.Rev. 593 at 627. He adds that “inclusion of the new case under the rule will implement or articulate a continuing and identical purpose, hitherto less specifically apprehended”: ibid.
notion of a margin of appreciation, as an interpretive technique of adjudicative justification in a specific case, provides only “a very thin analytical basis” for a systematic politico-legal or constitutional structure. In essence, this doctrine is considered a dimension of the more comprehensive principle of subsidiarity.

At the root of the substantive discourse on international human rights law, the principle of subsidiarity embodies disparate, axiomatic and interwoven ideas of profoundly constitutional nature. The principle also functions as a crucial analytical vehicle for ascertaining divergent features of international human rights law. Most importantly, for the purpose of our analysis, this principle explains: (i) the nature and extent of “devolution of interpretive authority” that can (or ought to) be given to national authorities (the question of interpretive discretion, or a margin of appreciation); and (ii) the corresponding and ubiquitous question of the scope of judicial review along a sliding scale. The weight of the principle of subsidiarity in the discourse on a margin of appreciation is closely intertwined with its mediating role in finding an appropriate equilibrium between national constitutional protection systems on one hand, and regional or universal systems on the other. National constitutions which, as intrinsic national symbols of member states, synthesize three main fundamental values of sovereignty, local culture and political legitimacy are structurally polarized against a pan-European and cosmopolitan clamour for unitary standard-setting. Determining

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105 For the same view, see E. Brems, Human Rights: Universality and Diversity (2001) at 422; and Carozza, supra n. at 69.

106 Carozza, supra n. at 55-56, and 62.
the right balance in such a dichotomised setting helps rationalise and adjust the necessary degree of international cooperation and intervention in matters that occur within national sovereign jurisdictions.\textsuperscript{108}

It can be contended that irrespective of whether it is explicitly mentioned in a treaty provision, the notion of subsidiarity is inherent in any decision-making process of international human rights law,\textsuperscript{109} or international law in general. The institutional dimension of this notion mirrors the allocation of power and competence between international judiciary and national sovereign authorities. However, the principle of subsidiarity, just as much as the margin of appreciation, entails not only an institutional or technical dimension, but more crucially, a substantive dimension that provides an evaluative yardstick for assessing the interwoven ideas about individuals, society, state and international organisation.\textsuperscript{110} Indeed, to argue that this notion’s rationales are rooted only in technical and institutional functions would impoverish our debates.\textsuperscript{111} Similarly, we cannot reduce bounds of our discourse by approximating this notion to attributes of national sovereignty.\textsuperscript{112} The notion of sovereignty, albeit highly relevant, fails to resolve an “anxious dialectic between universal and particular” or to provide any substantive rationale for diverging functions of the margin of appreciation.\textsuperscript{113} Viewed in that way, the principle of subsidiarity, more than the principle of sovereignty, entails the capacity to meet the opposing ends. It can embrace both the universalising aspirations of human rights and relative autonomy of national and local communities.\textsuperscript{114} Carozza explains that by assuming such a paradoxical function, “subsidiarity seeks to overcome the bind of modernism that Koskenniemi laid out – the problem of basing international order on some substantive conception of the good without succumbing to the temptation of authoritarianism”.\textsuperscript{115}

\textsuperscript{108} Carozza, supra n. at 40.
\textsuperscript{110} Carozza, supra n. at 42.
\textsuperscript{111} Carozza, supra n. at 52.
\textsuperscript{113} Carozza, supra n. at 64. Indeed, diversity is explained by the idea of sovereignty more as a consequence of the autonomous equality of states: ibid., at 67.
\textsuperscript{114} Carozza, supra n. at 68.
\textsuperscript{115} Ibid., at 68. See also his other assetion that “Its [subsidiarity’s] paradoxical quality helps keep alive the unceasing tension between the competing ideals of belonging to a particular and affirming a universal unity and helps avoid the collapse of international law into either the romanticism of the nation-state or the ideological abstraction of ‘pure’ internationalism”: ibid., at 68.
Next, this section firstly provides a brief account of the institutional and technical dimension of the principle of subsidiarity. Many elements of this are already analysed above in relation to the debates on the processes in which a margin of appreciation comes into play. Hence, inquiries here will be abridged so as to avoid any repetition. Analyses then turn to two salient, substantive and “constitutional” rationales of this principle: deference to national and local legitimacy; and recognition of cultural diversity.

6.2. Subsidiarity as a Constitutional Principle Underlying the Application of a Margin of Appreciation

First, the margin of appreciation doctrine can be portrayed as the institutional dimension of subsidiarity regarding the distribution of powers between the supranational judiciary and national authorities. What Letsas calls the “structural concept of the margin of appreciation” discussed above demonstrates that the notion of subsidiarity resides in a vertical relationship between the international human rights tribunal in Strasbourg and national constitutional mechanisms for safeguarding fundamental rights.

Second, the principle of subsidiarity alludes to the more technical consideration of judicial economy, which is essentially buttressed by the rationale of distributive justice. Against the backdrop of an exponential number of applications and a chronic backlog of cases, the Court is bound, based on utilitarian calculation, to heed the consideration of judicial economy, so as to allocate its limited judicial resources equitably. No doubt, any society that relies on those utilitarian rationales ought to heed

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118 The gist of this concept is that ‘the Court's power to review decisions taken by domestic authorities should be more limited than the powers of a national constitutional court or other national bodies that monitor or review compliance with an entrenched bill of rights’: Letsas (2006), supra n. 14 at 721.
119 Id., at 720.
the fundamental right of everyone not to be disadvantaged in distribution of social goods and opportunities. In the light of a “resource gap” in collecting and analyzing evidence or other empirical data, such a utilitarian rationale bolsters the Strasbourg judges’ decision to endorse the national authorities’ fact-finding and to ascertain a state of emergency. Beyond technical realms, this rationale can be applied to assessing substantive issues, such as the scope of positive obligations that can be inferred from a particular right, and policy choices concerning a socio-economic measure. It is also related to an ontological question such as who should benefit from a specific right, including the freedom from discrimination under the ECHR.

6.3. Deference to Local Legitimacy

On a substantive dimension, the notion of subsidiarity embodies the idea of deference to, and, recognition of, national legitimacy, when the Strasbourg Court itself is patently aware of the lack of its democratic accountability. By applying the margin of appreciation, the Strasbourg Court is expressing this substantive element of subsidiary, endorsing “an open and fair process of public deliberation” at a national level. Here, the notion of a margin of appreciation as a façade of this substantive dimension of the subsidiary principle serves as a solvent against “unfounded” judicial activism of international adjudications, signifying the Court’s willingness to hold joint “ownership” of the juridical tasks with the national authorities and incrementally facilitating “normative internalization” of the ECHR standards by domestic courts. In their dissenting opinion in Karatas v. Turkey, Judges Wildhaber, Pastor Ridruejo, Costa and Baka observed that “the democratic legitimacy of measures taken by democratically

122 Compare Letsas, supra n. at 113.
123 Shany, supra n. 24 at 918.
124 The European Court of Human Rights, Ireland v. UK, Judgment of 28 January 1978, Series A, No. 25, para. 214 (asserting that the Court’s evaluation must be made not with the advantage of hindsight but from the standpoint of the conditions prevailing at the time of emergency) Shany argues that the ex post facto nature of attributing state responsibility for violations of vague, primary norms might be perceived as a manifestation of “dubious legitimacy”: Shany, id., at 918.
125 See, for instance, ECtHR, Tătar v. Romania, 27 January 2009, para. 108.
127 Wheatley (2007), supra n. 18 at 790.
elected governments commands a degree of judicial self-restraint”. Cohen-Eliya and Porat positively portray the function of the margin of appreciation, at least in its formative years, as reinforcing the legitimacy of the Strasbourg Court. Indeed, already in Victorian England, Jeremy Bentham intimated the constitutional constraint on the right of judges to annul laws enacted by the Parliament. Judicial deference is understood as a form of judicial restraint that debar international judges from examining de novo and second-guessing the decisions reached by national authorities. However, an appeal to deference to local legitimacy loses persuasive force when the constitutional edifice for national legitimacy is disturbingly shaky and morally questionable. Sadurski’s concept of “democracy-plus” suggests that democracy should be predicated not only on correct procedures, but also on substantive values, such as human dignity, liberty and equal concern for all, in order to be “fully legitimate”. This is why not merely the authoritarian regimes, but also states whose democratically elected governments abuse rights of a member of a minority (tyranny of the majority), epitomise inherent democratic deficit, leaving little ambit for the margin of appreciation.

6.4. Recognition of Cultural Diversity

Again on a substantive level, the idea of subsidiarity implies a demarcation of a “conceptual territory in which unity and plurality interact, pull at one another, and seek reconciliation”. When the ECtHR is invoking the notion of a margin of appreciation, this notion, manifesting itself as a dimension of the principle of subsidiarity, serves as a metaphor that funnels into “constitutional” discourse a more profound dialogue about implications of international and supranational human rights discourse on different national societies, their identities, and diverse cultural values they espouse. This notion can accommodate culturally specific and socially contextualised understandings of ECHR standards. It may be argued that, without need to draw on the principle of subsidiarity, the very idea of human rights as such already affirms a degree of pluralism and diversity in society. Such a “constitutional” premise implied by the notion of

131 Ibid., at 468.
132 J. Bentham, A Fragment on Government (F.C. Montague ed., 1891), at 221, Chapter IV, para. XXXII.
133 Letsas (2006), supra n. at 722.
135 Greer supra n. 22 at 420; and Shany supra n 20 at 921.
136 Carozza, supra n. at 52.
137 For this discussion in respect of the principle of subsidiarity, see Carozza, supra n. at 79.
138 Carozza, supra n. at 47.
subsidiarity is most succinctly confirmed by the Court’s repeated emphasis on the principle of “pluralism, tolerance and broadmindedness”. \(^{139}\) and on its affiliated notion of religious pluralism and democracy. \(^{140}\) In this sphere, one may contend that the margin of appreciation, as interpretive leeway given to local decision-making agents, serves as a more nuanced but sensible conceptual device than a politically charged rhetoric of cultural relativism in ascertaining legitimacy of applying singular human rights constructs in culturally enriched Europe. \(^{141}\) Surely, this rationale predicated on plurality of cultural contexts is connected to the foregoing debates on the question of legitimacy, and “ownership” of human rights decision-making. \(^{142}\)

Any discourses on international human rights law entails intensively locating an appropriate intersection between “a communicable common good” of normative standards desired to be uniformly implemented on one hand, and national and local particularities fully reflected on domestic constitutional projects on the other. \(^{143}\) Lurking behind such a quest is the search for “an equilibrium between unity and diversity” that would allow the formation of a common normative framework on international human rights while accommodating respect for fundamental values manifested in national constitutional decision-making. \(^{144}\)

When ascertaining the compatibility with the ECHR requirement of a national measure deemed as a manifestation of sensitive cultural values in a specific society, the Court’s

\(^{139}\) In the *Handyside* case, the Court stated that:

Subject to paragraph 2 of Article 10, it [freedom of expression] is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.


\(^{141}\) Carozza, supra n. at 62.

\(^{142}\) Ibid.

\(^{143}\) I owe the term “communicable common good” to Carozza, supra n. at 58, n. 118.

\(^{144}\) For a discussion in the EU law context, see Carozza, supra n. at 53.
reliance on a margin of appreciation suggests its overarching, “ethical decentralizing” rationale against the conformist trend. Here, the idea of cultural diversity is recognised as among essential social goods in human rights decision-making. This helps assure national authorities that a normative objective contemplated in each of the Convention rights can be attained without entailing strict uniform standards.

7. Conclusion
The margin of appreciation, as an interpretive doctrine that is an outcome of the Strasbourg judges’ practical reason, cannot function as a fixed benchmark in moral space. It can be considered a fruit of the Strasbourg judges’ process of deliberation, which is aimed to optimise the protection of rights among a plethora of competing values. As such, the doctrine’s operative sphere is set against the backdrop of the need to balance between the relevant reasons for action. It is submitted that such balancing forms part of the Court’s reflective practical reasoning.

Apart from the notion of subsidiarity, it can be contended that the operation of the doctrine of a margin of appreciation is rationalised largely by the intrinsic notion of “normative contestability” of human rights, the notion that is rooted in the ethical theory of value-pluralism, which provides an alternative to absolutist/relativist dichotomised thinking. Still, the doctrine’s operability does not hinge on the cogency of the value-pluralists’ claim that one can postulate two or more conflicting values of equal validity. Nor does it turn on their adjunct postulate that in some circumstances, the incompatibility of such opposing values of equal importance is rooted in their incommensurability.

145 Sweeney, id., at 472-474.
Habermas’ model of deliberative democracy (democracy as “a legally mediated form of political integration”)\(^\text{150}\) is receptive to a diverse European cultural landscape. More crucially, it demands that any individual person be able to flourish meaningfully in his/her private and public autonomy.\(^\text{151}\) This is an incremental approach to constructing the common platform of human rights, while taking into account plurality of cultural particularities. Such an approach is precisely what is (or ought to be) envisaged by the application of the margin of appreciation. Set against the background of European deliberative democracy,\(^\text{152}\) or the democracy as an “interpretive” or “integrated” concept of value,\(^\text{153}\) the margin of appreciation doctrine, if comprehended more than as an expedient product of practical reasoning, would help form Habermas’ notion of a “normative consensus”. Its sustainable rationale resides in its capacity to facilitate the reconciliation of competing ideologies and other values espoused by divergent national and ethnic groups, inculcating the moral rationale for tolerating “others”\(^\text{154}\).


\(^{151}\) Habermas (1996), supra n. 26 at 419.

\(^{152}\) The concept of deliberative democracy involves “an attempt to institutionalize discourse as far as possible as a means of public decision making”: R. Alexy, “Balancing, Constitutional Review, and Representation”, (2005) 3 Int’l J. Consti. L. 572, at 579. Likewise, Voyiakis highlights the importance of “[d]ebates genuinely focused on discovering truth”. He notes that such debates “resemble less a group of perspectives battling out until one of them dominates than a process of constant reformulation of each perspective in the light of the other until a mutually satisfactory equilibrium is reached….”: Emmanuel Voyiakis, “International Law and the Objectivity of Value”, (2009) 221 Leiden JIL 51 at 76.

\(^{153}\) R. Dworkin, “Hart’s Postscript and the Character of Political Philosophy”, (2004) 24 OJLS 1, at 9, 14-18 and 23. He postulates that the concept of legitimacy operates in a community that takes “integrity” as central to politics. He asserts that “a general commitment to integrity expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligations”: R. Dworkin, Law’s Empire, (Oxford: Hart, 1986), at 216.

\(^{154}\) Habermas (2003)a, supra n. 95 at 3-4.