DEVELOPMENTS

The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine

By Ignacio de la Rasilla del Moral[*]

What song the Syrens sang, or what name Achilles assumed when he hid himself among the women, although puzzling questions are not beyond all conjecture.[1]

A. Introduction

What is so fundamental in terms of the protection of human rights in Europe that it requires the same standards for all countries and what, by contrast, would be better dealt with by each State's organs in line with *verbigratia* Michael Walzer's-related notion of "thick morality"?.[2] Where should the line be drawn between unity and diversity notwithstanding the resulting risk of human rights cultural relativism associated to the latter?. On what grounds could the axiomatic universality of human rights possibly be connoted in a continent which prides itself on possessing the most developed regional system for the protection of human rights world-wide in view of the resulting risk of legal contagion to other systems for the protection of human rights and, even, to general international law that such a practice can trigger?. At the end of the day, these are the sort of questions that the study of the margin-of- appreciation doctrine raises. The Trojan Horse-like character of the Strasbourg's judge-made margin-of-appreciation doctrine within the European human rights protection system has long since bothered human rights lawyers. Cases of reliance on this review doctrine have been generally criticised as denials of

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[1] Sir Thomas Browne *Urn- Burial* , initial quotation in *The Murders in the Rue Morgue* , Edgar Allan Poe (1841).

[2] *See*: WALZER, MICHAEL THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD (1994).. For an application of Walzer's notions to the doctrine of the margin of appreciation, *See*: A.,James Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54INTERNATIONAL COMPARATIVE LAW QUARTERLY, 459 (2005).

https://doi.org/10.1017/S2071832200004892 Published online by Cambridge University Press

justice for individuals, abdications by the Court of its duty of adjudication in difficult or sensitive issues or as a judicial diluting technique of the strict conditions laid down in the European Convention of Human Rights.[3] This line of criticism, aimed at what from the viewpoint of some occupants of the bench is seen as "a well established and legitimate part of the convention's jurisprudence",[4] has been reinforced by the entry of 21 new Eastern and Central European contracting parties to the Council of Europe following the 1989-1991 events. [5] With a current membership of 46 States, all of which have ratified[6] the 1950 Rome Convention,[7] it is further feared that the doctrine will increasingly become an open door for abusive limitations in the exercise of human rights in states who traditionally leaned towards human rights cultural relativism.[8] Against this background, I will briefly look into the technical criteria used by Strasbourg's judicial interpreters to factually implement this "much maligned notion"[9] or, as one commentator has put it, this "manière pseudo-technique d'évoquer le pouvoir discrétionnaire que les organes de Strasbourg ont estimé reconnu aux Etats par la Convention dans certains cas".[10] I will, secondly, provide a basic overview of the general doctrinal positions one can adopt regarding this long debated question.

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[3] *See*:Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUMAN RIGHTS LAW JOURNAL, 4, a para.1 (1998).

[4] *See*: McDonald, R.St.John, *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights*, in IL DIRITTO INTERNAZIONALE AL TEMPO DELLA SUA CODIFICAZIONE: STUDI IN ONORE DI ROBERTO AGO, Vol. III, 187, (Dott.A. Giuffrè Ed.,1987).

[5] Since November 1990, 21 countries of central and eastern Europe have acceded the Council of Europe (the most recent being Serbia and Montenegro in April 2003) *See*: http://www.coe.int/T/e/Com/about_coe/ (last visited 25 April 2006).

[6] The latest State to join the system was Monaco on the 5 October 2004, it ratified the ECHR in 30/11/2005. *See*: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=4/28/2006&CL=ENG (last visited 25 April 2006).

[7] 213 UNTS 221, ETS 5, UKTS 71 of 1953), signed at Rome 4 Nov. 1950; entered into force 3 Sept. 1953, Council of Europe (hereinafter ECHR).

[8] *See, supra*, note 2 at 461.

[9] *See, supra,* note 3 at 1.

[10] Steven Greer, *La Marge d'aprreciation: interprétation et pouvoir discrétionnaire dans le cadre de la convention europpéenne des droits de l'homme*,17 DOSSIERS SUR LES DROITS DE L'HOMME, Editions du Conseil de l'Europe(2000).

B. The Margin-of-Appreciation Doctrine in the Light of its Principled Standards

I. Introduction

As it is well known, by ratifying the ECHR, a Contracting Party undertakes the obligation under Article 1 "to secure to everyone within their jurisdiction" a set of rights and freedoms enshrined in the subsequent 18 articles (Section I) plus those other rights and freedoms contained in Protocols Nos. 1, 4, 6 and 7, as amended by Protocol No. 11, should it decide (as is often the case)[11] to ratify them as well. Although there is no limit "*a priori*"[12] to the articles to which this doctrine (well-known to domestic law, but which has been developed by the Strasbourg's organs "*ad hoc*" without being mentioned anywhere in the Convention) can be applied, it has, in fact, explicitly been used in conjunction with a number of the ECHR's specific provisions, while others have traditionally been left out of its domain of application.[13]

Leaving aside its less frequent application to the right to derogate in time of emergency under Article 15 -where the doctrine's origins lie-[14] and to the prohibition of discrimination embodied by Article 14,[15] in the majority of cases, the doctrine has been used in connection to those articles in the Convention that have "accomodation" or "limitation clauses". All of them derogable articles in time of emergency according to Article 15, Articles 8 (private and family life), 9 (freedom of religion), 10 (freedom of expression), 11 (freedom of assembly and association) of the ECHR and Article 2 of the 4th Protocol (freedom of movement and residence) have in common that they allow the State party to breach its negative obligation of

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[11] *See*: AndrewClapham, *Symbiosis in International Human Rights Law: the Ocalan Case and the Evolving Law on the Death Sentence* , 1 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE , 475(2003).

[12] *See* e.g. : 1)C Morrison, *The Margin of Appreciation in European Human Rights Law*,6 REVUE DE DROITS DE L'HOMME (HUMAN RIGHTS JOURNAL), 286 (1967); 2) ThomasA. O'Donnel, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 No.4 HUMAN RIGHTS QUARTERLY 474, 477 (1982);3) *See*, *supra* note 4 at 192.

[13] *Verbigratia* articles 2, 3 and 4 and most elements of article 5 and 6. *See*: Johan Callewaert, *Is There a Margin of Appreciation in the Application of Articles 2,3 and 4 of the Convention?*19 HUMAN RIGHTS LAW JOURNAL 6,and Jeroen Schokkenbroek, *The Basis, Nature and Application of the Margin-of-.Appreciation Doctrine in the Case-Law of the European Court Rights-General Report* 19 HUMAN RIGHTS LAW JOURNAL. 30, 34 (1998)

[14] For a specific analysis, *see*: Michael Boyle, *The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?* 19 HUMAN RIGHTS LAW JOURNAL 23 (1998)

[15]For a specific analysis, *see*: Jeroen Schokkenbroek, *The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation* 19 HUMAN RIGHTS LAW JOURNAL.20 (1998).

non interference in individual liberty under a set of conditions established in the corresponding 2nd paragraph of each of them. Those conditions are, first, that the interference be "prescribed by law" (Arts. 9, 10,11) or "in accordance with the law" (Arts. 8 and 2 of the 4thProt); secondly, that its aim(s) is/are legitimate under the provision (the precise wording varies from one article to another; i.e. as far as Article 12 is concerned, any of the following would be considered a legitimate aim: "the interest of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights or freedoms of others"), and thirdly, and common to all limitation clauses in the ECHR, that the interference be "necessary in a democratic society" for the pursuance of a legitimate aim under the convention. While this leads the Court in practice to conduct a contextually-based proportionality test from which the width of the margin of appreciation is derived, it is worth noting that the "democratic society" proviso constitutes a remarkable example of how the Court can legally flesh out a political concept through case-law.[16]

Having set the first component of the legal stage where the application of the doctrine takes place in most of the cases, one can now pass to examine the loosely principled standards developed by the Court in the application of this doctrine in the understanding that they are critical to the enforcement of the Convention.[17] But before doing so, it is worthwhile to recall the purported subsidiary character of the machinery of protection established by the ECtHR in light of the already mentioned Article 1 of the European Convention, as it was explicitly stated in the *Handyside* Case,[18] which articulation of the doctrine remains the basis of all subsequent approaches,[19] notwithstanding, in the Court's view, the mandate contained in Article 19 by which the Court should "ensure the observance of the engagements undertaken by the High Contracting Parties". Although it should be noted that the Court has repeatedly stated that the margin of appreciation "goes hand in hand with European supervision", and there is not, therefore, a "domaine reservée de l'Etat" as far as the review powers of the EctHR are concerned, the principle of subsidiarity plays, in this context, the role of a hinge between the ECHR and the state organs of the Contracting States and constitutes, therefore, the first domino to fall in the explanatory discourse of a doctrine which has been characterized as an

[16] *See* : Kastanas, Elias, *Unité et diversité: notion autonomes et marge d'appreciation dans la jurisprudence de la cour européenne de droits de l'homme*, Bruylant, 1999

[17] *See*, *supra,* note 12.

[18] *See*: *Handyside v. The United Kingdom* of7 Dec.1976, No. 24, 1 EHRR 523.

[19] *See, supra,* note 4 at 191.

https://doi.org/10.1017/S2071832200004892 Published online by Cambridge University Press

"attempt, albeit an imperfect one", to structure the area of friction between international supervision and national sovereignty.[20]

II. Principled Standards

Although a proper analysis of the parameters in applying the doctrine used by the Court would be best observed through a detailed examination of all the relevant case-law,[21] such an undertaking would greatly exceed the scope of this work. In noting that there is not a clearly delimited general theory developed by the Court in this respect so far, but merely referential paragraphs in various judgments in which the Court procures an explanation of how it operates in practice, I will provide, instead, a brief critical overview of the criteria the Court has regularly applied in determining the scope of the margin of appreciation. Not providers of "hard and fast rules"[22] these indicators are seen rather as legitimate pointers, although of relative value, of the main principles governing the functionally-oriented use of this doctrine by the Strasbourg's Court.

Firstly, the subject-matter of the protected right commonly appears to be taken into account by the Court as an influencing factor in deciding the width of the margin of appreciation at the cross-roads between community interests and individual liberty. The Court provided a good example of this in the *Handyside*[23] case, and reiterated it in *The Sunday Times,*[24] when it stated that freedom of expression constitutes one of the essential foundations of a democratic society and that, accordingly, every limitation imposed on it must be proportionate to the legitimate aim pursued. Should a narrower margin of appreciation[25] be allowed when the right is considered as fundamental, one would be confronted with a hierarchy of

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[20] *See, supra,* note 13 at 35.

[21] *See*: 1) MacDonald, R.St.John , *The Margin of Appreciation*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS,83 (MacDonald et al. eds., 1993) 2) Eva BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY (2001). 3) H.C.YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996); and the several contributions to *The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice*, 19 HUMAN RIGHTS LAW JOURNAL 1 (1998).

[22] *See*: P. VAN DIJK AND G.J.H. VAN HOOF THEORY AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS, 3rd Ed., 87 (1998).

[23] *See, supra,* note 18.

[24] *Sunday Times* Case, 26 April 1979,No.30, 2 EHRR 245.

[25] *See, supra,* note 12.

rights in the application the Strasbourg interpreters' make of the convention through the margin-of appreciation doctrine.

While there is no obstacle in admitting than some rights can be regarded as essential foundations of a democratic society or, if preferred, can be vertically conceived or hierarchically understood, this should not interfere with the Court's ability to perceive the whole set of rights horizontally in dealing with one of the rights not commonly labelled as pertaining to the category described. Notwithstanding the fact that other, more or less diffuse, patterns regarding the case-law have been identified in this respect (i.e .the state is generally accorded more discretion with respect to restrictions on property rights), one cannot avoid a certain critical legal unease in echoing some or other recurrent general rule abstracted from the case-law. If you put yourself in the shoes of an overburdened judge (ideally inspired by the self-comforting pursuit of justice) would you still give the same credit to the reflection according to which as a judge (confronted to the actual facts of the case) you are expected to accord more discretion to the state because the particular case deals with i.e. restrictions on property rights? At the end of the day, this amounts to an *interrogatio* central to this subject-matter: what weights more in the judge's reasoning; a pattern patiently induced from previous jurisprudence by a disciplined army of legal commentators or the actual facts of the case upon which the judge is asked to render a judgment?

Secondly, the legitimate aim or aims pursued by the restriction, or by the non-compliance with a positive obligation, to ensure the right in question is also identified as one of the factors that influences how the Court commonly applies the doctrine of the margin of appreciation. In weighing the community interest, it has been noted that the margin of appreciation is generally wider when the rights of others are at stake.[26] Although this seems to be the case, it is legitimate to ask oneself whether the measures aim at maintaining, for instance the authority and impartiality of the judiciary affect less directly the rights of others due to their social abstract configuration than, the protection of morals or the limitations of speech on grounds that they are offensive to believers.[27] Nonetheless, although also dependent on the intrinsic weight of the community interest served –as remarkably present in cases of national security[28]- and of the policy context where the contested

[26] *See, supra,* note 15at 35-36.

[27] *See*: Soren C. Prebensen, *The Margin of Appreciation and Articles 9, 10 and 11 of the Convention* 19 HUMAN RIGHTS LAW JOURNAL 13, 17 (1998).

[28] *See*: Eur. Court H.R., *Klass v. Germany*, Judgment of 6 September 1978, Series A, No.28 , 49 and Eur. Court H.R , *Leander v. Sweden*, Judgment of 26 March 1987, Series A, No.116, 59.

measures take place,[29] it should be noted that the so-called "European consensus" standard plays an important role in its effective determination.

Thirdly, the "European Consensus" standard, a generic label used to describe the Court's inquiry into the existence or non-existence of a common ground, mostly in the law and practice of the member States of the Council of Europe, has played a key-role in the wider or narrower character the application of the margin of appreciation adopts in practice. Broadly speaking, 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 deligitimize attempts to part ways with them. Against this background, the non-existence of a European consensus on the subject-matter will be normally accompanied by a wider margin of appreciation accorded to the State in question. The European consensus criterion has, however, been criticized on different accounts, including the lack of profound and detailed comparative research on which it pretends to be based or because by "tying itself to a positivist conception of standards" the Court would be forfeiting "its aspirational role".[30]

It should also be noted that the use of the European consensus standard is currently further compromised by the flow of new state parties to the Convention and the resulting risk of dilution of ECHR's standards. This stated, it is interesting to note, that in some instances, as the in case of *Christine Goodwin*,[31] the Court has gone beyond the comparison of the law and practice of European States (which in that case did not meet the requirements set by previous jurisprudence related to the phenomenon of transsexualism) to refer to the existence of an international trend favourable to the phenomenon in question. Should the fact that the Court has done so, in this concrete case by referring *ex-profeso* to New Zealand and Australia's domestic jurisprudence, be seen as a recognition by the ECtHR of the continuing cultural links existing between these two state members of the Commonwealth and the United Kingdom? Would the Court have considered the jurisprudence of Australia and New Zealand if it had been reviewing a case involving a Polish citizen against Poland's denial to ensure her right to private life in accordance with Article 8 of the ECHR? While the last two questions were admittedly made *ab absurdum* one could, however, legitimately wonder whether the attitude of the Court in attaching consideration, after a long list of negative precedents, to the

[29] *See, supra,* note 28 at 35.

[30] MacDonald, R.St.,John, *The Jurisprudence of the European Court of Human Rigths,*in ACADEMY OF EUROPEAN LAW COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, Volume I, Book 2, 95, 124 (1992).

[31] *See*: *Christine Goodwin v. The United Kingdom*, 11 July 2002, para. 90.

existence of an international trend could possibly have been influenced by the fact that the arrival of the 21st century has given a new boost to the Court's own perception that is must maintain a "dynamic and evolutive approach" as a failure to do so would "risk rendering it a bar to reform of improvement."[32] Should a new "21st factor" be now included among the criteria used by the Court in the application of the margin-of-appreciation doctrine? While the commentator would do well in not trying to generalize about what constitutes but a minor consideration in the legal short-cut used by the Court to depart from its previous jurisprudence, it is worthwhile pointing out that the "international trend" factor remains a disputable *ab origine* on various grounds. To focus on the most evident areas: it is far from clear why the practice of non-contracting parties should be of any relevance at all in determining the level of protection accorded at the European level; the great risk of manipulative relativity that ensues from the selection of the countries' practice itself cannot go unnoticed either.

A number of other pointers or pseudo-parameters have been pointed out. However, given their minor relevance in comparison to those already mentioned, I will deal with them in more general terms. First, it has been noted that in some instances the "specific textual analysis"[33] of the limitation clause derives into a narrower or wider margin of appreciation by the Court to the national authorities. The *Handyside* case, where the Court noted the peculiar wording of Article 10.2 which states that the exercise of the rights enshrined by its first paragraph "carries with it duties and responsibilities", is an example of how the phrasing of the articles can be used as a supplementary argument in according a wider margin of appreciation. Second, it has been suggested that the rationale of the "(in-principle)-better rationale-position" of the national authorities to give an opinion on the exact content of certain requirements of the Convention has traditionally played a greater role, at least as far as some limitation clauses are concerned, when there is a positive duty of action incumbent on the state, as opposed to the classic negative duty of non-interference in individual liberty, and despite the fact that the Court does not, seemingly, employ a dissimilar approach in dealing with both types of obligations.[34]

While one should distinguish between other limitations on the Court's review where the convention does not prescribe any particular course of action (as

[32] *See, supra,* note 31 at para.74.

[33] *See, supra,* note 12 at 489.

[34] *See*: Clare Ovey, *The Margin of Appreciation and Article 8 of the Convention in The Doctrine of the Margin under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practices* 19 HUMAN RIGHTS LAW JOURNAL 10 (1998) .

verbigratia obligations of result ruled by implementation freedom) and the actual application of the margin-of-appreciation doctrine as far as positive obligations incumbent on states are concerned,[35] it would be for a comprehensive analysis of the case law concerning the actual interplay of the doctrine with every specific provision. This analysis would show how the boundaries between both types of obligations lend themselves to precise definition, and is part of a broader effort to squeeze out from these primary sources a precise principled-interpretative framework that the Court would ideally adopt as its own.

Third, a greater latitude has arguably been accorded in emergency situations as revealed, in particular by the application of the doctrine to situations staking out the competencies between governments and the ECHR involving Article 15. Despite the fact that this is the provision which lies at the origin of the doctrine, the doctrine has been applied to it in a relative few instances. The general "better position rationale" of the national authorities is supplemented here "by reason of their direct and continuous contact with the pressing needs of the moment" as was stated by the Court in the *Ireland v. United Kingdom*[36] judgment. This greater leeway accorded to states seems to be a late reflection of the latin adage "*salus populi suprema lex est.* [37] Fourth, it is also worthwhile noting the importance that the seriousness of the interference can have in narrowing the scope of the margin of appreciation allowed as exemplified in the *Dudgeon case*,[38] and the extent to which this has been seen to be closely related to three interrelated factors epitomized in the *Buckley* case: [39] the nature of the convention right at issue, together with its importance for the individual and the nature of the activities concerned.[40]

B. A General Stock-taking of Doctrinal Viewpoints

Having seen an overview of a variety of technical criteria doctrinally squeezed out from the Strasbourg's jurisprudence by which the doctrine of the margin of appreciation, as developed by the guardian of the ECHR, purports to operate in

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[35] *See, supra*, note 13.

[36] *Ireland v. United Kingdom*, 18 January 1978, No.25, 2 EHRR 25.

[37] *See, supra,* note 14.

[38] Eur. Court H.R., *Dudgeon v. U.K.*, Judgment of 22 October 1981, Series A, No. 45, para. 52.

[39] Eur. Court H.R., *Buckley v. U.K.*, Judgment of 25 September 1996, Reports of Judgments and Decisions 1996-IV, 16, para. 74.

[40] *See*, *supra,* note 13.

practice, one can pass to identify some possible broad doctrinal positions regarding the subject matter. In doing so, I will first list the two radically opposed doctrinal views on the question, and proceed next to identify a likely shared common doctrinal ground. Firstly, those who see it as a source of a "pernicious variable geometry of human rights",[41] a constant defeat for the universal standards of the Convention, and call into question its own "legitimacy as a tool of interpretation of a human rights instrument"[42] would tend to recall that the ECtHR is not constrained by the principle of *stare decisis* and ask, consequently, for its minimum use by the Strasbourg's jurisprudence. In its claim of uniform standards through the consecration of conventional autonomous notions so as to supersede local risk of sclerosis, this position finds inspiration, in a beacon-like democratic European society, among others, as referential lodestar for the progress of member States towards a greater respect for human rights.[43]

One can find also support for this view from a world-wide comparative perspective, on the ground that the universal aspirational role traditionally played by the ECtHR jurisprudence is "to a large extent compromised" by its use of the doctrine.[44] What would then replace the functional role played by this interpretational mechanism would be for judges and creative doctrinal scholarship to answer.[45] In the second place, one can identify a general group composed by those authors for whom the marginal appreciation doctrine stands as a solid and, by all means, legitimate tool for interpreting the ECHR. These authors[46] ground their position on several rationales ranking, although not necessarily in a cumulative or exhaustive fashion, from its consideration as an "inherent restraint on legitimate interpretation"[47] or its role for the protection of "legitimate cultural

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[41] *See* Lord Lester of Herne Hill, QC. "The European Convention on Human Rights in the New Architecture of Europe: General Report". *Proceedings of the 8th International Colloquy on the European Convention on Human Rights* (Council of Europe) (1995), at 236-237, cited in Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUMAN RIGHTS LAW JOURNAL, 4, a para.1 (1998), at 1.

[42] *See, supra,* note 3.

[43] *See*, *supra*, note 16.

[44] *See*: Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards* 31 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 843 (1998-1999).

[45] For an attempt in this sense, see: Michael R. Hutchinson *The Margin of Appreciation Doctrine in the European Court of Human Rights* 48 INTERNATIONAL COMPARATIVE LAW QUARTERLY 638 (1999).

[46] *For* an early defence, *see*: Rosario Sapienza,*Sul Margine d'Apprezzamento Statate nel Sistema della Convenzione Europea dei Diritti del Uomo* LXXIRIVISTA DI DIRITTO INTERNAZIONALE 571 (1991).

[47] *See, supra*, note 3.

variety"[48] to the due recognition of the democratic processes that inform *sine qua non* the domestic background to which the Court differs when it applies the doctrine. Philosophically-underpinned understandings of the social exigencies within an organized political community [49] or simply pragmatic definitions of it as "more a principle of justification than interpretation"[50] have also been put argumentatively forward by the defendants of the doctrine.

While this almost Manichean-like doctrinal scenario should not obscure the important differences of opinion that can emerge within each camp (as *verbigratia* on whether the legal basis of the doctrine is the text of the convention itself or is, in contrast, a voluntary exercise of judicial self-restraint by the court)[51], a third and intermediate position which the majority of authors broadly catalogued in first and second place would seemingly concur to is the consideration of the fact that a more explicit delimitation of the still ill-principled-standards that govern the Court's application of the margin-of-appreciation doctrine would procure greater consistency and transparency in this domain and would therefore ameliorate the effective application of this "elusive concept".[52] Indifferent to whether this conclusion is achieved by some out of the consideration of the margin of appreciation doctrine as the "necessary jurisprudential grease in the enforcement mechanisms provided by the Convention"[53] or, as Pufendorf would have put it, because "men cannot help choosing the lesser of two evils", it should be noted that although that new judicially set framework would arguably allow the Court to round the corners of its previous jurisprudence, it would not, however, preclude it from going beyond an ideally conceived framework through the refinement of new flexible interpretative criteria regarding this subject matter. The obvious reason for this is that the convention is a living instrument to be applied to an ever-evolving social environment and, as it is well known, the Court is not bound, for better or worse, by the principle of *stare decisis.*

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[48] *See, supra*, note 3.

[49] *See*: Lord Marclay of Clashfern, *The Margin of Appreciation and the Need for a Balance,* in PROTECTION DES DROITS DE L'HOMME: LA PERSPECTIVE EUROPÉENNE, MÉLANGES À LA MÉMOIRE DE ROLV RYSSDAL, 837, (Carl Heymanns Verlag, 2000).

[50] *See*: MacDonald, R. St. John, *The Margin of Appreciation* in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, 83, (MacDonald et al. eds., 1993).

[51] *See, supra*, note 13 at 30.

[52] *See, supra*, note 41.

[53] *See, supra*, note 12 at 496.

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Therefore, althought the theoretical specificity and coherence required by any legal doctrine[54] would surely be enhanced (and not the least because this would allow for a more conceptually-based criticism by publicists and judges themselves) if the boundaries were more clearly delimited by the Court itself in its future case-law, it cannot be ignored that the anxieties relieved by such an undertaking, on both sides of the doctrinal spectrum, would not be but the prelude of new debates over a doctrine that mirrors an intrinsic tension within an European Convention alternatively conceived as an a fundamental instrument for the protection of human rights in Europe and as a mechanism within the political framework of the underlying European integration process.

C. Conclusion

Finally, the debate on the necessity of refining the conceptualization of the margin of appreciation doctrine by the Court should, at least, give a brief notice of the doctrinal voices who herald the doctrine is ready to be extrapolated to the world level, whether to the human rights field [55]or more generally to international law itself. [56] In the first case, the doctrine has been purported "as a means of introducing flexibility in universal human rights standards in response to non-Western particularist human rights discourse".[57] In defence of this position, it is noted that limitation clauses addressing community interests -although not a pre-condition of the concession of a margin of appreciation as already seen- can also be found in UN texts. As for the second position, the extrapolation of the doctrine to general international law has been recently put forward on the basis of a purported variety of world-wide case-law sources (included the jurisprudence of the International Court of Justice) and a disparate array of policy arguments. Standard-type norms, discretionary norms and result-oriented norms are, furthermore, identified as the most suitable ones for sheltering this technique in the international realm. Without any pretension of engaging in a discussion of any of these positions,[58] it should, however, be noted, in rounding off this brief "survol de la question", that

[54] *See, supra*, note 10 at 35.

[55] *See, supra* note 21.

[56]*See*: Yuval Shany, *Towards and General Margin of Appreciation Doctrine in International Law?*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 907 (2006).

[57] *See, supra*, note 21.

[58] For an opposite view against its extrapolation to other systems of human rights protection because "not only would universal standards be undermined, but also the very authority of international human rights bodies to develop such standards in the long run also be compromised", *see, supra*, note 44.

whichever theory of interpretation or review the ECtHR currently employs or can come up with in the future must necessarily be compatible with the basic underpinning of political theory on which the Convention is grounded: political democracy as the best system of government for ensuring respect of fundamental freedoms and human rights as featured in the Preamble of the Convention and commonly identified as one of the purposes of the ECHR in the light of Article 31 of the 1969 Vienna Convention.

While the margin-of-appreciation doctrine can be seen as a good judicial tool and, perhaps, even a necessary one, for harnessing pernicious trends towards stringent homogeneity in the European realm, it cannot be simply ignored that the cultural base of this technique of flexibility in the application of human rights standards in specific cases is, by definition, a democratic cultural diversity. Any attempt, therefore, to build in the well-trodden practice of the ECtHR in this respect so as to extrapolate the doctrine of the margin of appreciation to other legal spheres would do well to take into account this European "common heritage of political traditions, ideals, freedom and the rule of law"[59] from which the ECHR originally springs and which constitutes, on all accounts, the precondition of its otherwise functionally imposed legitimacy.

[59] *See*: the Preamble of the ECHR available at: http://www.echr.coe.int/echr.