Europa Kolleg Hamburg
Institute for European Integration

**Study Paper**

**No 04/16**

# The Multi-Level System of Human Rights Protection: An Examination of the Margin of Appreciation and the Right to Life

Jennifer Hornibrook

December 2016

**Europa-Kolleg Hamburg**
**Institute for European Integration**

The *Europa-Kolleg Hamburg* is a private law foundation. The foundation has the objective of furthering research and academic teachings in the area of European integration and international cooperation.

The *Institute for European Integration*, an academic institution at the University of Hamburg, constitutes the organizational framework for the academic activities of the *Europa-Kolleg*.

The series Study Papers presents selected master theses of the Master Programme "Master of European and European Legal Studies" at the Europa-Kolleg Hamburg in cooperation with the University Hamburg. The views expressed in these papers are those of the authors only and do not necessarily reflect positions shared by the Institute for European Integration. Please address any comments that you may want to make directly to the author.

**Editor:**
Europa-Kolleg Hamburg
Institute for European Integration
Prof. Dr. Markus Kotzur, LL.M. (Duke) (managing director),
Dr. Konrad Lammers (research director)
Windmühlenweg 27
22607 Hamburg, Germany
**http://www.europa-kolleg-hamburg.de**

**Please quote as follows:**
Europa-Kolleg Hamburg, Institute for European Integration, Study Paper No 04/16,
http://www.europa-kolleg-hamburg.de

# The Multi-Level System of Human Rights Protection: An Examination of the Margin of Appreciation and the Right to Life

Jennifer Hornibrook*

**Abstract**

This thesis analyses the margin of appreciation as developed by the European Court of Human Rights with respect to the right to life as guaranteed under Article 2 of the ECHR. Due to concerns regarding national security the ECtHR developed the margin of appreciation as a doctrine to allow Member States a sufficient degree of latitude when it came to derogating from certain rights contained in the Convention. Throughout the jurisprudence of the ECtHR the doctrine began to be applied to other treaty provisions and thus other fundamental human rights. This development gave rise to the concern whether this doctrine could be considered to damage the obtainment of the aim of universal human rights standards. Furthermore, the immense influence of the ECtHR throughout the multilevel system of human rights protection resulted in the margin of appreciation being utilised by other international courts in diverse areas of international law. This analysis showed there is substantive proof that the margin of appreciation has had an influence on other international courts and tribunals and could in fact lead to differential human rights protection, legal uncertainty and hinder the obtainment of universal human rights standards. Through an extensive examination of the right to life it was demonstrated that, notwithstanding it's the hindering affect, the margin of appreciations use is not only justified but necessary in certain limited circumstances, given the current legal framework.

**Keywords:** The Margin of Appreciation Doctrine – Principle of Subsidiarity – Proportionality Principle – European Court of Human Rights – International Human Rights – Universal Standard of Human Rights - Cross-jurisdictional Comparative Approach – The Right to Life – Abortion – Euthanasia – Substantive Law

* This paper was originally submitted in June 2016 as a thesis for the degree "Master of Laws (LL.M.)" at the Europa-Kolleg Hamburg (supervisor: Prof. Dr. Markus Kotzur).

**Contact Information:**
Jennifer Hornibrook
Jennifer.hornibrook@gmail.com

TABLE OF CONTENT

**List of Abbreviations**

| | |
|---|---|
| AB | Appellate Body (of the WTO) |
| EU Charter | Charter of Fundamental Rights of the European Union |
| CFSP | Common Foreign and Security Policy |
| CJEU | Court of Justice of the European Union |
| Commission | (Former) Human Rights Commission |
| DSB | Dispute Settlement Body (of the WTO) |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| HRC | Human Rights Commission |
| IAmCtHR | Inter-American Court of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICJ | International Court of Justice |
| ITLOS | International Tribunal for the Law of the Sea |
| MS | Member States |
| TEU | Treaty on the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UNDHR | Universal Declaration of Human Rights |
| UNHRC | United Nations Human Rights Committee |
| USA | United States of America |
| WTO | World Trade Organisation |

## 1. Introduction

Human rights protection has developed over time at different rates, and has been spurred on by various events. The *Magna Carta* of 1215, which set limits on the powers of royal Government of England, the 1776 American *Declaration of Independence* and the 1789 French *Declaration des droits de l'Homme et de du citoyen* (Declaration of the Rights of Man and Citizen) are all considered to be milestones in the evolution of human rights law. The occurrence of such milestones can be traced chronologically up to what is considered to be modern human. Following the atrocities of two world wars there was a newfound outcry for recognition of a basic human rights standards.[1] This ideology was enshrined in the *United Nations Declaration of Human Rights* [hereinafter the UNDHR][2] which was adopted unanimously by General Assembly.[3] The *European Convention on Human Rights* [hereinafter the ECHR][4] was the first international treaty which dealt with the rights put forward in the UNDHR with a view to a functioning enforcement procedure.

Nowadays, human rights are guaranteed by means of numerous international treaties and regional legal instruments,[5] as well as by the

[1] Political Resolution of the Hague Congress (7–10 May 1948), Charter of Human Rights (9) – (12) http://www.cvce.eu/content/publication/1997/10/13/15869906-97dd-4c54-ad85-a19f2115728b/publishable_en.pdf (24 May 2016).

[2] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[3] Adopted by the General Assembly of the United Nations on the 10th December 1948 with 8 abstentions from: Belorussian Soviet Socialist Republic (SSR), Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, the Ukrainian SSR, and Yugoslavia.

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5.

[5] Eg: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Right (adopted 16 December 1966, entered into force 3

constitutions of individual states. These instruments and mechanisms create a multi-level system of human rights protection ranging from the national through to regional and international rights protection. These instruments seek to standardise human rights norms which is imperative for establishing universal human rights that are applicable across borders, and which apply regardless of differences in the culture and religion of the state concerned. Human rights treaties become meaningful, not when they are ratified or implemented, but rather when they are interpreted by judges, providing remedies to states and individuals alike.[6] Thus, disparities in the application of these treaties are problematic for several reasons. It leads to divergences in human rights protection and confusion as to the scope, meaning and application of particular rights. Such disparities often arise due to selective utilisation of judicial doctrines and general principles.

One example of such a doctrine is the margin of appreciation. This useful judicial device was developed by the European Court of Human Rights [hereinafter the ECtHR] to allow the Member States [hereinafter MS] to make certain derogations in order to protect their national security. This doctrine has been the subject of heated debate throughout both the international and European human rights sphere. Its application in areas of a sensitive, moral or ethical nature has proven to be quite controversial as it gives rise to the questions of whether the application of the margin of appreciation in such areas damages the obtainment of universal human rights standards. It is also relevant if it influences other international courts and tribunals whom operate in the same multi-level system, either in a positive or negative way. To examine this theory in more detail I will focus on the right to life, given its status as the most fundamental human

January 1976) 993 UNTS 3 (ICESCR); The Charter of Fundamental Rights of the European Union, 2012/C 326/2.

[6] Ní Aoláin, Fordham Int'l L.J. (1995) 19, p. 101 – 102.

right and examine whether the future accession of the European Union [hereinafter the EU] to the ECHR could solve a number of discrepancies and relieve some of the tension throughout the multilevel system of human rights protection, at least with regards to the two European systems.

## 2. The Origins of the Margin of Appreciation

### a. Overview

The margin of appreciation has been described as many things throughout its brief existence, such as; a doctrine, a principle, a valuable, [7] practical or interpretative tool[8] and even merely a practice.[9] Some academics consider the margin of appreciation to be the power of the contracting states while others hypothesise that it is the natural product of the distribution of powers between Convention institutions and national authorities, who share responsibility for enforcement.[10] In reality it is a technique employed by the Court which gives the MS the freedom to establish a certain threshold or standard of right that is to be applicable within their territory and the Court in turn cannot question the determinations made by the State but merely assess its implementation thereof with regards to its compatibility with the Convention.

The margin of appreciation has its deep-rooted origins in the French *Conseil d'État* jurisprudence, which referred to the "marge d'appréciation," as well as in the administrative law of Civil Law jurisprudence, namely that of continental Europe.[11] As already mentioned, the margin of appreciation initially emerged as a doctrine

[7] *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, ECHR 2012, Joint dissenting opinion of Judge Sajó, Lazarova Trajkovska and Vucinic; Spielmann, 2013 Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?, 13 December, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, p. 1, available at http://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf (24 May 2016).

[8] Gross & Ní Aoláin, Hum. Rts Q (2001) 23, p. 626.

[9] Neuman, The Irish Jurist (2013) 50(2), p. 4.

[10] Brems, Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht (1996) 56, p. 304.

[11] Nolte G., General Principles of German and European Administrative Law – A Comparison in Historical Perspective, Modern Law, The Modern Law Review (1994) 57 (2), p. 196.

utilised by the ECtHR in response to concerns of MS that international policies could jeopardise their national security and that they therefore should be afforded a certain margin or element of discretion when it came to such matters.

The origins of the margin of appreciation in the case law of the ECtHR can be traced back to the *Cyprus* case[12] where the Court expressed that the government should be able to exercise a 'certain measure of discretion' in assessing the extent strictly required by the urgencies of the situation.[13] This was further extended by the Commission in the case of *Lawless v Ireland*[14] to the MS ability to determine the existence of such a situation, and thus the margin of appreciation was born. It was given its first detailed mention in the case of *Ireland v the United Kingdom*[15] and the deferential attitude towards the MS was further cemented in *Brannigan and McBride*.[16] With each case the doctrine has further developed and the criteria relating to its scope and application has been discussed. The Court developed this doctrine due to the subsidiary nature of the ECHR and the ECtHR. Due to the framework in place it was not within their powers to impose policies or standards on the MS which could have the effect of damaging their national security. It is worth noting that during the time in which the ECtHR developed the doctrine there were ongoing conflicts throughout the MS which did in fact have the potential to seriously harm national security and the security of their citizens, such as the Troubles in Northern Ireland (1968 – 1998) and the conflicts that arose during Cyprus' struggle for independence and subsequent Turkish rule (from the 1950's onwards).

[12] *Greece v. the United Kingdom*, no. 176/56, 2 June 1956, Yearbook 2, 182 [hereinafter the *Cyprus* case].
[13] *Ibid*., § 152, § 176.
[14] *Lawless v. Ireland*, Commission report of 19 December 1959, B (1960-61), judgment of 1 July 1961, A 3.
[15] *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25.
[16] *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B

The use of the doctrine in its original context appears to be accepted, even by those most opposed to the doctrine, as necessary given that such matters may affect the general population in a given society. This holds true in so long as it is subject to the existence of minimal standards that pre-empt the decision of any particular society.[17]

The scope of the doctrine was later expanded to cover other areas whose potentially harmful activities, such as hate speech and racism, could also disrupt public order and security.[18] During the 1970s and 1980s the doctrine began to be utilised in an entirely different context than that originally intended, such as in the areas of non-discrimination,[19] freedom of expression,[20] the right to private and family life[21] and the right to life itself.[22] Although this evolution was also based on the notion of subsidiarity, it reflected a very different use of the doctrine which would have quite distinct effects on human rights protection. In following the decade this evolution reached its peak in the case of *Handyside* where the Court first applied the principle to a case concerning public morals and the freedom of expression under Article 10 ECHR. An examination of *Handyside*, along with the multitude of cases that followed, sets out criteria which the Court considers when applying the margin of appreciation doctrine, such as the presence of consensus, an examination of the better person rationale and a proportionality or fair balance test.

[17] Benevisti, NYUJ Int'l L. & Pol. (1998) 31, p. 847.
[18] *Ochensberger v. Austria*, no. 21318/93, 18 EHRR CD 170.
[19] Case *"relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (merits), 23 July 1968, Series A no. 6.
[20] *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24.
[21] *Rasmussen v. Denmark*, 28 November 1984, Series A no. 87.
[22] *A, B and C v. Ireland* [GC], no. 25579/05, ECHR 2010 [hereinafter *A, B & C*]; *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III [hereinafter *Pretty*].

## b. Criteria

### i. Subsidiarity

As already mentioned, it is irrefutable that the framework of the ECHR is based on the principle of subsidiarity.[23] The margin of appreciation is considered by some to be the manifestation of the subsidiary role of the Court and the subsidiary nature of the ECHR.[24] Throughout its jurisprudence the Court routinely points to the principle of subsidiarity[25] as justification for actions without which would perhaps be considered too lenient or deferential towards the MS.

In order to satisfy the principle of subsidiarity an issue must firstly be considered by the MS concerned before it can be reviewed by the ECtHR and, in some areas, decisions on standards are also to be left to the MS.

### ii. Consensus

In determining whether or not to grant a MS a margin of appreciation the Court considers whether or not a consensus exists within the given area. The ECtHR is of the view that a consensus exists when the vast majority of the MS share a common view on a certain issue. This definition of consensus differs greatly from the international definition[26] where consensus is said to exist only in the absence of explicit opposition.[27] This definition of consensus is also known within the Council of Europe [hereinafter the CoE] framework as it is used by institutions.[28]

---

[23] Article 35 (1) ECHR.

[24] Saul, Hum. Rts. L. Rev. (2015), p. 4.

[25] *Ireland v. the United Kingdom* (fn. 15), § 207; *Brannigan and McBride v. the United Kingdom* (fn. 16), § 43.

[26] Puppinck, IJLS (2013) 3(2), p. 168 - D. The ambivalent use of the notion of "consensus".

[27] H. Cassan, ''Le consensus dans la pratique des Nations Unies'', Annuaire français de droit international, 1974, Vol. 20, no. 20, pp. 456-485 quoted in: Puppinck (fn. 26), fn. 111.

[28] Rules of the Committee of Ministers. See CM/Del/Dec (92)472/44 and Annexe 19 quoted in: Puppinck (fn. 26), fn. 112.

The Courts adaption of the notion of consensus is permissible given the different framework within which it operates. It would not be efficient to require all MS to express an opinion on each matter that comes before the Court which may be on a sensitive, ethical or moral nature. In ascertaining whether a common view is shared by a substantial majority of the MS, the Court can then make determinations as to whether the State is acting reasonably and respecting the right in question to a standard that is generally accepted. The issue of consensus is particularly prevalent in cases of a moral or ethical nature since it is often the case that a consensus is not reached on such matters or that, despite the existence of a consensus, the Court feels it is inappropriate to impose the view of the majority of states on the minority.

### iii. The Better Person Rationale

Due the subsidiary nature of the ECHR and having regard to whether or not a consensus exists in the area the Court often justifies use of the margin of appreciation on the basis of *the better position rationale*.[29] This is a presumption made by the Court that the national authorities are in a better position and are better suited to judge the needs of their State due to their direct and continuous contact with the society and their needs.[30] It has been frequently expressed by the Courts[31] in such cases where they do not wish to impose their view over that of the national authorities and therefore wish to respect their sovereignty national democratic processes.

### iv. Fair Balance Test

Once it has been determined that the state is to be afforded a margin of appreciation in the respective area, the Court often turns to what has

[29] Steven Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights in Council of Europe Publishing Human Rights files no 17 (2000) fix tomorrow, p. 8.
[30] *Brannigan & McBride* (fn. 16) § 43; *Ireland v. the United Kingdom* (fn. 15) § 207.
[31] *Ibid* and also *Murphy v. Ireland*, no. 44179/98, § 67, ECHR 2003-IX.

become known as the fair balance or proportionality test. In doing so they consider whether the state has overstepped their margin of appreciation due to a lack of balancing of all interests concerned. In order to do this the ECtHR takes account of the national legislative process, official debates and even judicial review of the necessary measures to ascertain whether a fair balance has been struck.[32] The legislative process can be very relevant to the Courts assessment as it must be shown that the correct branch of government actually deliberated the issue[33] and that in doing so they sought to balance the interests in a substantive debate.[34] Some believe this examination leads the Court to determine that a fair balance has been struck by what the Court considers to be a democratic government due to their good faith effort to preserve human rights, even if it did not lead to actual human rights protection.[35]

**c. Assessment**

Evidently the doctrines use by the ECtHR is an entirely judicial creation which, until mid-2013,[36] had no legal basis in the ECHR framework. It was utilised by the Court to allow derogations from rights contained in the Convention in order for the MS to guarantee their national security. With time its use extended to other areas and to ensure correct use of the doctrine and to prevent potential abuses the Court needed to develop criteria and methods of assessment.

[32] *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013.
[33] *Dickson v. the United Kingdom* [GC], no. 44362/04, § 83, ECHR 2007-V.
[34] *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, § 79, ECHR 2005-IX; *Alajos Kiss v. Hungary*, no. 38832/06, § 41, 20 May 2010.
[35] Ní Aoláin (fn. 6).
[36] Following the Brighton Declaration, which was adopted via Protocol 15 at a Parliamentary Assembly of the Council of Europe on the 24 June 2013, the margin of appreciation, along with the principle of subsidiarity, were added to the preamble of the ECHR.

These criteria are used by the Court selectively throughout its jurisprudence. The Courts selective use of these criteria is what gives rise to many questions and concerns, such as, does it lead to a lack of legal certainty, is the use of the margin compromising rights in general / human rights standards, in particular those rights which were previously non-derogable.

## 3. The Impact of the Margin of Appreciation

### a. Overview

The margin of appreciation has been widely debated and scrutinised since its inception into the jurisprudence of the ECtHR in 1956. Most of the discussion concerns the legal basis of the doctrine, its interference with the democratic process and sovereignty of the State and the practical implications for human rights protection.

There are those who believe that the ECtHR has not gone far enough in order to achieve its aims and that adherence to doctrines such as the margin of appreciation are to blame. They believe the Court should instead impose the ECHR as an overarching standard to be achieved by the MS. There are also those who accuse the Court of human rights imperialism,[37] and that by creating and using such doctrines they are carrying out judicial activism. Both allegations generate questions such as what is the aim of the ECtHR, could judicial doctrines be hindering its obtainment and whether, in carrying out its function, the Court could be said to overstep its mandate as set out in the ECHR. In order to ascertain the true nature and value of the margin of appreciation and to determine whether in fact it does impair human rights it is first necessary to consider the claims put forward by both sides. In doing so it is possible to gain a more comprehensive view as to the effect the margin may have and how it may be utilised to its full potential. Commentary in this field is not limited to academic writing but has been discussed by high profile judiciary outside the ECtHR in written judgments and expressions outside of their official capacity.

[37] Lord Dyson, 2014, The Extraterritorial Application of the ECHR: Now on a Firmer Footing, But is it a Sound One?, 30 January, University of Essex, p.2. Available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf (2 June 2016).

### b. Arguments in Favour of the Margin of Appreciation

One of the main underlying arguments in favour of the use of the margin of appreciation by the ECtHR is that, despite the progress that has been made since World War II in terms of European integration, there still exists considerable differences throughout the MS of the CoE in relation to societies perception of what is appropriate and what is considered to be both morally and ethically acceptable. This point was highlighted throughout the *Handyside* case discussed in Section 2 where it was found that there was a need for different applications given the case and context in which the doctrine is being applied.[38] It can therefore be surmised that the margin of appreciation reflects the cultural diversity present among the States parties in the CoE.[39] Stemming from which, it can be concluded that it is considered not only inappropriate but also impossible to impose an exclusive moral code to all MS.[40]

From a procedural prospective *Lord Reed*[41] has contended that the general nature of the rights enshrined in the ECHR necessitate the use of a margin of appreciation. The broad nature of these rights requires that they be guaranteed through a body of law enacted at domestic level which, in his view, allows for different ways of securing the same substantive right.[42] It can even be argued that the margin of appreciation is not a new doctrine or principle created by the ECtHR,[43] but that it in fact reflects traditional

[38] *Hatton and Others v. the United Kingdom* [GC],no. 36022/97, § 101, ECHR 2003-VIII; *Buckley v. the United Kingdom* Judgment of 25 September 1996, § 74 - § 77, Reports of Judgments and Decisions 1996-IV.
[39] Gross & Ní Aoláin (fn. 8), p. 627; Mahoney, Hum. RTS. L.J. (1998).18.
[40] *Vo v. France* [GC], no. 53924/00, § 76, ECHR 2004-VIII [hereinafter *Vo*].
[41] *Osborn -v- The Parole Board*, [2013] UKSC 61.
[42] *Ibid*., (fn. 37), § 56 - § 57.
[43] Note the origins in continental administrative law.

judicial unwillingness to interfere with determinations made by other branches of government.[44]

As mentioned in Section 1, one of the main contra arguments to the margin of appreciation is that it could hinder obtainment of universal human rights standards and damage human rights protection in the process. However, there are those who believe the contrary. They believe that the margin of appreciation is a useful tool which helps in the eventual realisation of such aims. Due to the framework in which European human rights are guaranteed there must be gradual progress towards this goal.[45] Given the subsidiary nature of the ECHR it also reasonable to believe that the Court utilises this doctrine not only because they feel it is necessary but that in doing so it avoids confrontation between the Court and the States parties to the ECHR.[46]

It is evident that most of the arguments in favour of the margin of appreciation consider the procedural, political and legal aspects of the framework within which it operates. Given the supranational nature of the ECtHR it is considered necessary to respect the democratic process of the States.[47] It is also contented by *Lord Hoffman* that, although human rights may be universal in abstraction, at the level of application the 'messy' details need a system which allows for a margin of appreciation.[48] He even goes so far as to suggest that it is not the place for the ECtHR to second guess domestic policy choices and the application of rights require

[44] Andrew Legg, The Margin of Appreciation in International Human Rights Law (Oxford University Press, Oxford, 2012), p 3.

[45] R. Macdonald, The Margin of Appreciation, in: (R. Macdonald, F. Matcher, H. Petzold (eds), The European System for the Protection of Human Rights (Dordrecht, Martinus Nijhoff, 1993), p. 123.

[46] *Ibid*.; Andrew Legg (fn. 44), p. 24,– although Legg does highlight that to afford a margin merely due to intrinsic nature of the relationship would be inappropriate.

[47] Gross & Ni Aolin (fn. 8), p. 628; Mahoney (fn. 39).

[48] Lord Hoffman, 2009, The Universality of Human Rights, 18 March, Judicial Studies Board Annual Lecture, p. 5.

both trade-offs and compromises which can only occur in the context of a given society and its legal system.[49] This reasoning could be said to embody the main arguments put forward by those who are in favour of the use of the margin of appreciation doctrine or who would be in favour of an even less involved role by the ECtHR in national affairs.

### c. Arguments Against the Margin of Appreciation

The arguments against the margin of appreciation are much more based on the substance of the issues to which the margin is applied and the practical implications as opposed to an examination of the political or legal justifications. The standardisation of human rights is considered to be central to the aim of universalised human rights.[50] Those opposed to the margin of appreciation believe that "its principled recognition of moral relativism, is at odds with the concept of universality of human rights" [51] and a liberal application therefore not only undermines international enforcement of human rights but also the credibility of the court or tribunal concerned. These sentiments are also reflected by the late *Judge De Meyer* when he ushered the Court to abandon the concept which he considered to be "as wrong in principle as it is pointless in practice" [52] and renounced the doctrine due to the relativism it implies.

The margin of appreciation, on its most basic level, refers to determinations made by MS regarding certain standards and considers these standards to be both decisive and well within their rights. Essentially it is a form of judicial deference which to some can amount to abdication of judicial responsibility.[53] This entire framework runs adjacent to the notion that judges have a duty to find and apply the best

[49] *Ibid*., p 8.
[50] Ní Aoláin (fn. 6), p. 1.
[51] Benevisti (fn. 17), p. 844.
[52] *Z v. Finland*, 25 February 1997, Partly Dissenting Opinion of Judge De Meyer, III, Reports of Judgments and Decisions 1997-I.
[53] Legg (fn. 44), p. 2.

moral understanding of human rights, irrespective of the diversity of views or laws within the legal systems of Europe.[54] Human rights exists to afford certain fundamental rights and freedoms to all and serves to protect those in society that could be considered to be most vulnerable. The margin of appreciation could therefore be argued to lack sufficient protection for such groups. Those who set the standards via political decisions, and even those in the judiciary, are often 'of the majority' and therefore reflect majority concerns and standards. Systems such as this do not guarantee proper consideration of, or protection of, minority issues.[55] Thus, the international sphere is their last resort and only avenue for redress and an application of the margin of appreciation essentially reverts the decision back to the State that allegedly violate the human right in the first place.

Application of the doctrine is also often linked to creating a lack of legal certainty and general confusion regarding entitlement to rights. This occurs due to disparity in the decision making of the Court which might not reflect the level of rights protection explicitly mentioned in the Convention. Application of the margin of appreciation varies depending on the context in which the case has arisen and is supposed to be determined on a case-by-case basis. This results in divergence in decisions of the Court as it holds different member states to varying standards and could be suggested to lead to a subsequent lessening of protection when violations do occur.[56] If this is true, there is certainly potential that the influential jurisprudence of the ECtHR could compromise global efforts of other human rights bodies which is a conceivable threat / concern for human rights enthusiasts.

[54] George Lestas, A Theory of Interpretation of the European Convention on Human Rights (Oxford University Press, Oxford, 2007) at Xi.
[55] Benevisti (fn. 17), p.848.
[56] Ní Aoláin (fn. 6), p. 102.

**d. Assessment**

It is evident that both sides have valid points rooted in both law and fact. In reality the ECtHR is limited by its jurisdiction as set out in Article 32 ECHR and therefore cannot overstep it by resorting to judicial activism to uphold the aim of securing universal and effective recognition, as set out in the Preamble.

Doctrines such as the margin of appreciation could be useful in order to allow the Court to hold different MS to varying standards due to their previous acceptance of certain acts or behaviours as morally acceptable. It permits States to be held to the same standard internationally as that which they operate domestically and prevents human rights protection from taking any steps backwards.

Nevertheless, it also does not usher the MS to take any steps forward in relation to their human rights protection. The MS should not be permitted to stagnate at the level of protection afforded at the time of the ratification of the ECHR but should instead be encouraged to raise their standards, in particular in areas with reoccurring alleged infringements.

## 4. Application: The role of the Margin of Appreciation in the Right to Life

### a. Overview: The Right to Life

As set out in Section 3.b and Section 3.c, there are many different views as to the positive and negative aspects of the margin of appreciation. In order to conduct a more in depth analysis of the potential benefits and disadvantages associated with the doctrine, this section will focus on an examination of the right to life as guaranteed by Article 2 of the ECHR, which is an area in which the margin has come to be of considerable use due to its imperative ethical nature.

I will focus on the right to life as it is one of the most fundamental provisions of the Convention[57] from which all other provisions flow[58] It enshrines one of the basic values of the democratic societies which make up the CoE[59] and is recognised by international human rights instruments as the most basic fundamental right.[60] It has been described by the Court to be "an inalienable attribute of the human beings and forms the supreme value in the hierarchy of human rights."[61] On its most basic level, Article 2 ECHR safeguards the right to life and sets limits upon circumstances

[57] *Makaratzis v. Greece* [GC], no. 50385/99, § 56, ECHR 2004-XI; *Guerrero v Colombia* Human Rights Committee, Decisions, U.N. Doc. CCPR/C/15/D/45/1979 (1982), [13.1].
[58] Legg (fn. 44), p. 205.
[59] *Makaratzis v. Greece* (fn. 57), § 56.
[60] *Inter alia*, African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, Article 4 "inviolable"; League of Arab States, Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force March 15, 2008, Article 5, Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, Article 6.
[61] *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 92 - § 94, ECHR 2001-II; *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324 [hereinafter *McCann*].

where a person may be justifiably deprived of their right to life.[62] Due to its very nature the right to life is the pinnacle of ethical and moral issues and its protection is an indispensable obligation of the MS. Nonetheless, what is considered to be an appropriate level of protection or intervention on behalf of the state varies considerably due to factors such as history, religion and culture.

The Court has considered Article 2 in relation to the States negative obligation for a range of issues, such as; the lethal use of force by the State armed forces or police [63]as part of anti-terrorist operations[64] and discussions on the positive obligations of States to implement effective criminal-law provisions,[65] inquiry requirements[66] and carry out effective investigations.[67]

When the ECHR was enacted the scope of the right to life was narrower and perhaps more easily defined than it is today. Due to scientific developments and changing public opinions procedures such as in vitro fertilisation, abortion and euthanasia have created a divide between the physical existence of life and its legal protection.[68] This divide has been the subject of great discussion by both academics and most importantly by Courts. The examination will therefore focus on abortion and

[62] Council of Europe, Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty, 28 April 1983, ETS 114.
[63] *Andreou v. Turkey*, no. 45653/99, 27 October 2009; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII.
[64] *McCann* (fn. 61), *Wasilewska and Kałucka v. Poland*, nos. 28975/04 and 33406/04, 23 February 2010.
[65] *L.C.B. v. the United Kingdom*, 9 June 1998, Reports of Judgments and Decisions1998-III, *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.
[66] *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, ECHR 2002-II; *Seidova and Others v. Bulgaria*, no. 310/04, 18 November 2010.
[67] *Şandru and Others v. Romania*, no. 22465/03, 8 December 2009; *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, ECHR 2011.
[68] Puppinck (fn. 26), p. 149.

euthanasia and its relation to the right to life. These are cases where the margin of appreciation is most often invoked due to its sensitive, moral and ethical nature and where an examination of the case law shows the real-life implications of applying the margin of appreciation and highlights the diverging opinions of the MS.

As already mentioned the right to life gives rise to both positive and negative obligations on behalf of the state in that they must not only refrain from taking one's life intentionally but also take appropriates steps to safeguard life.[69] It is therefore often argued by State's such as Ireland, Poland, Malta or Switzerland, to justify their strict rules relating to abortion or euthanasia, that they are merely complying with their positive obligations.

**b. Abortion**

The issue of abortion comes in to the discussion of the right to life as a result of the immense debate around and diverging opinions on when life begins. The Court initially refused to rule on the compatibility of abortion laws *in abstracto* under Article 2 ECHR[70] declaring most cases inadmissible due to a lack of *locus standi*. The Commission did however permit examination of such laws for breaches under Article 8[71] where the women were considered to have standing[72] and its scope has continued to be extended by the Court and considered under different articles of the Convention.

Under the ECHR the right to life is expressly guaranteed to "everyone". However, throughout the text of the Convention, preamble,

[69] *R.H v. Norway*, 19 May 1992, Series A no. 237-A; reaffirmed by the court in *L.C.B. v The United Kingdom* (fn. n65).
[70] X. v. Norway, no. 867/60, Collection 6, p. 34; Yearbook 4, 270; X. v. Austria, no. 7045/75, Decisions and Reports 7, 87.
[71] Brüggeman and Scheuten v. Germany, no. 6959/75, 12 July 1977, Decisions and Reports 10, p.116, § 59.
[72] *Vo* (fn. 40).

accompanying protocols and other human rights instruments to follow there is little to no guidance or definition offered as to what constitutes 'life', when it is said to begin and who is considered within the term "everyone" and therefore afforded protection by Article 2 ECHR.

The issue has come before the ECtHR in the case of *Vo v France*[73] where the Court examined whether the unborn child could be considered to be a person and is therefore protected under Article 2 ECHR. The Court, having found that there was clearly no European consensus on the scientific or legal definition of the beginning of life[74] and reiterated its view that the issue of when life begins comes within the margin of appreciation which the State enjoys in this area. It was therefore not necessary to make a determination whether the unborn child is a person under Article 2.[75] The Human Rights Commission [hereinafter the HRC] did express, however, that the unborn child could not be excluded from the protection of the right to life, and this *dictum* has carried through in the relevant jurisprudence of the ECtHR.[76]

It was clear from the case of *Vo* that the Court was not convinced that a European consensus on the beginning of life existed and that it was "neither desirable, nor even possible" given the current positions in the MS to make a definitive determination whether the unborn child is a person under Article 2 of the Convention.[77] It was therefore established that States were to enjoy considerable discretion in such matters and the

[73] *Ibid*.
[74] *Vo* (fn. 40), § 82, § 84.
[75] *Ibid., §* 82, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.
[76] *R.H v. Norway* (fn.6), *Brüggeman* (fn. 71); Boso v. Italy (dec.), no. 50490/99, ECHR 2002-VI; *X v. United Kingdom*, no-8416/79, Decisions and Reports 19, p. 244.
[77] *Vo* (fn. 40), § 85.

authorities needed to address these issues taking in to consideration the moral and philosophical differences present.[78]

### i. Ireland

The position of the right to life of the unborn in Ireland is rather special since it has been given protection on a constitutional level.[79] The right to life of the unborn has significance to the people of Ireland since the vast majority of the inhabitants of the Emerald Isle identify as Roman Catholic[80] and the traditional religious beliefs of Catholics in this regard are vested in the encyclical *Humanae vitae*.[81] The religious influence is visible not only in relation to abortion policy but also Ireland's recent acceptance of widespread contraceptive usage[82] and abolition of homosexuality as criminalised conduct, [83] both of which occurred in the 1990s.

In the Republic of Ireland abortions are illegal unless performed to save the life of the mother which is now regulated by the *Protection of Life During Pregnancy Act* 2013. The ban on abortions was introduced by referendum of the people of Ireland on the 7 October 1983,[84] upgrading its previous protection from statutory level.[85] There were further attempts

[78] *Ibid., §* 82 Discussed the European Group on Ethics in Science and New Technologies following opinion on the ethical aspects of research involving the use of human embryos in the context of the 5th Framework Programme (23 November 1998):
[79] Bunreacht na hÉireann, Article 40.3. 3°.
[80] According to Consensus figures 2011 collected by An Phríomh-Oifig Staidrimh 85% of the population of Ireland identify as Roman Catholic: http://www.cso.ie/en/statistics/population/populationclassifiedbyreligionandnationality2011/ (25 May 2016).
[81] Pope Paul VI, 1968, encyclical written, 25 July.
[82] *McGee v. A.G. & Anor* [1973] IESC 2; [1974] IR 284 (19 December 1973), fully liberalised by the legislative act *Health (Family Planning) (Amendment) Act*, 1992.
[83] *Norris v. Ireland*, 26 October 1988, Series A no. 142. Following on from this case the conduct was legalised with Criminal Law (Sexual Offences) Act, 1993, Article 5.
[84] Eight Amendment to the Constitution.
[85] Prior to the insertion of Article 40.3.3° the right to life of the unborn was protected under Offences against the Person Act 1861, s. 58, s. 59.

to strengthen the ban on abortion which failed[86] - two referendums which somewhat loosened the restrictions.[87] Throughout the negotiations and upon the ratification of the Lisbon Treaty, the Irish people were given a guarantee that it would not interfere with the protection of the right to life in Bunreácht na hÉireann.[88] Ireland has routinely been criticised for its strict rules regarding abortion from the international sphere[89] and has been brought before the ECtHR in thus regards on a number of occasions.

The most prominent case on abortion relating to Ireland is that of *A, B & C. v Ireland*[90] where the Court conducted an in-depth analysis of the beginning of life, the right to life, right to respect for private and family life and the right to an abortion. The Court relied heavily upon its reasoning in *Vo* in order to allow Ireland a margin of appreciation in terms of deciding whether or not abortion services were to be provided.[91] It was clear, however to emphasise that the margin of appreciation was not absolute,[92] and that once the decision was taken to allow for the provision of such services, a legal framework must be put in place which should be coherent and allow for different legitimate interests involved to

86 The Twelfth Amendment Bill in 1992, and the Twenty-fifth Amendment Bill in 2002.

87 The Thirteenth Amendment and the Fourteenth Amendment (both in 1992).

88 Protocol on the concerns of the Irish people on the Treaty of Lisbon, L60/131, 2.3.2013, Article 1- expressly mentions Article 40.3.3°.

89 Most recent Universal Periodic Review (UPR) of human rights included 262 recommendations, including recommendations by 18 United Nations member states to liberalise abortion law, January 2016, the United Nations (UN) Committee on the Rights of the Child conducted its combined third and fourth periodic review of Ireland's implementation of the UN *C*onvention on the Rights of the Child (UNCRC) calling for decriminalisation of abortion in all circumstances. Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/039/97/PDF/G1603997.pdf?OpenElement (17 May 2016).

90 *A, B & C* (fn. 22).

91 *Ibid., §* 249. And therefore dismissing the claim of the first two applicants.

92 *Ibid., §* 172.

be taken account of accordingly.[93] The Court in this case was influenced by a number of factors such as the moral and ethical implications of the issue which appear to be of paramount importance to the people of Ireland and therefore employed the *better position rationale*. They also took in to account the actions taken by the Irish government since the *Open Door Counselling* case,[94] and the fact that, to date, no agreement had been reached on much-needed reforms.[95]

While this case seems straight forward and in line with the Courts previous jurisprudence on such matters there are several observations to be made and distinctions to be drawn which could argue that a different approach should have been taken. In the case of *Vo,* the Court held that there existed no generally accepted standard relating to the gestational limit on the availability of abortion and, accordingly, this lack of consensus led to a wider margin of appreciation being given to the State. A distinction needed to be drawn between the beginning of life and abortion. It was clear in the case of *Vo* that consensus was lacking due to different time limits and therefore a common standard could not be deduced, however, with regards to abortion a consensus clearly exists throughout the States of the CoE.[96] Despite the existence of a consensus, the Court was adamant that this did not, by default, narrow the margin of appreciation to be afforded to a state.[97] Instead the Court opted to examine the fair balance test and decide whether Ireland had overstepped their already wide margin. It was found they did not, due to the in-depth discussions and attempts at balancing that had taken place on the national

[93] *Ibid.*, which Ireland was found to have breached in respect of the third applicant.
[94] *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, Series A no. 246-A.
[95] *A, B & C* (fn. 22), § 265.
[96] A, B & C (fn. 22), § 235.
[97] Ibid., § 236.

level. It was also considered justified as their actions appeared to be based on the profound moral views of the Irish people.[98]

Throughout this case the Court applied the criteria discussed in Section 2.b to its examination of the existence of a margin of appreciation and whether this margin had been overstepped. It examined the existence of a consensus,[99] applied the better person rationale and conducted a fairness / proportionality test.[100] The application of a proportionality test to an area in which MS are afforded a wide margin of appreciation demonstrates once again the subsidiarity nature of the ECHR and the supervisory role of the Court. The application of such criteria operates to remind the MS that a "margin remains a margin – it does not extend across the page".[101]

Although the Court has justified it's use of the better position rationale, some are of the opinion that the weight attached to the arguments of the State were unduly lenient in this case. The presumption that the State authorities were in a better position to judge local opinion appeared to apply *de facto*, without an in-depth consideration of the facts brought forward by the applicants regarding opinion polls and the outcome of attempted further constitutional restrictions. It also worth noting that the Court expressed the view that European and international consensus was much more significant than popular opinion of the people with regards to justification of a failure to protect human rights.[102] It is therefore paradoxical that, even though both popular opinion (as put forward by the applicants) and the European and international consensus were in favour of more liberal access to abortion services, the Court still granted a wide margin of appreciation to Ireland. This ambiguity has been highlighted by

[98] Ibid., § 240.
[99] Ibid., § 235.
[100] Ibid., § 239 - § 241.
[101] Spielmann (fn. 7), p.6/9.
[102] *A, B & C.* (fn. 22), § 170.

academics[103] and it was even mentioned in the partly dissenting opinion of *Judge Rozakis, Tulkens, Fura, Hirvela, Malinvernni* and *Poalelungi* that it is the first time that the Court has disregarded the existence of a European consensus on the basis of "profound moral views".[104]

The Courts application of the better position rationale and the proportionality test is undermined by the reasoning that a fair or proportionate balance can never be struck if the State recognises the unborn child as a person and thus having acquired the right to life.[105] It is not possible to balance the rights and interests of one person with the right to life of another. Therefore, as pinpointed by the ECtHR[106] the margin of appreciation afforded to the MS in question translates into a margin of appreciation for how the State balances the conflicting rights of the mother.[107] It therefore focuses merely on the States attempt to balance the rights and any discussions or debates carried out on the matter are taken in to consideration. It does not focus too much on the actual balance that has been struck and the substance of the right that still remains.

### ii. Poland

Poland, along with Ireland and Malta, has one of the most restrictive regulations regarding access to abortions in Europe. In Poland this is governed by *The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993*.[108] It is therefore no surprise that Poland, like Ireland, has been brought before the ECtHR numerous times regarding its regulations and the system it has

[103] Donnelly, Medico-Legal Journal of Ireland (2011) 17(1), p. 4.
[104] *A, B & C.* (fn. 22), Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni And Poalelungi, p. 87, § 9. Emphasis on the so-called ‚profound moral views' of the Irish people can be seen in § 230, § 232 ,§ 233.
[105] Puppinck (fn. 26), p. 167.
[106] *Vo* (fn. 40), § 75 - § 80.
[107] Puppinck (fn. 26), p. 167.
[108] Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży.

in place for what are considered to be alleged infringement of human rights under the ECHR.[109]

Throughout its case law the Court has consistently held that the State is to be afforded a margin of appreciation concerning the beginning of life.[110] In the case of *A, B & C* discussed in Section 4.b.i, the Court found that a consensus did in fact exist among the States in the CoE but that this did not, *per se*, narrow the margin of appreciation due to the sensitive, moral and ethical issues in question.[111] Throughout the case there was an in depth analysis as to whether the issue of abortion was really of such moral and ethical implications to warrant the granting of a wide margin of appreciation. Such an in-depth analysis was lacking in the cases of *R. R, P and S*, and *Tysiąc* where the Court opted for the margin as a default mechanism.

In spite of the lack of in-depth analysis the Court does however go on to consider in more detail what the margin of appreciation means in practice, reaffirming its stance on the meaning of the margin as set out in *Vo*[112] and the States obligations regarding its framework in *A.B & C*.[113] They considered the necessity for subsidiarity and applied the *better position rationale* in allowing the MS to make such determinations. The Court considered the role of medical professionals in such cases and concluded that they had professional obligations[114] and the margin of appreciation

[109] *R.R. v. Poland*, no. 27617/04, ECHR 2011; *P. and S. v. Poland*, no. 57375/08, 30 October 2012; *Tysiąc v. Poland*, no. 5410/03, ECHR 2007-I.
[110] *R.R. v. Poland*, *Ibid*., *§* 186; *P. And S. v. Poland*, *Ibid*., *§* 133; *Tysiąc V. Poland*, *Ibid., §* 74.
[111] *A, B & C* (fn. 22), § 236.
[112] *R.R. V. Poland* (fn. 109), § 186.
[113] *Ibid., §* 187, § 200; *P. And S. v. Poland* (fn. 109) § 99.
[114] *P. And S. v. Poland*, *Ibid*., § 133; ESC Decisions on the merits: *Federation of Catholic Families in Europe (FAFCE) v. Sweden*, Complaint No. 99/2013, § 70 - § 72.

afforded to the State is not so wide as to absolve them from their "uncontested professional obligations".[115]

In the aforementioned cases the Court consistently referred to the subsidiarity principle in holding that the MS was in a better position to decide on such matters and to balance the rights in question. The presence of consensus or the fundamental nature of certain rights was not considered necessary or of significant enough weight to displace the assumption that the State is the actor better placed to make such decisions.

### iii. The Netherlands

Since it has clearly been established by the Court in the case of *A, B & C* that the decision of whether to offer abortion services remains within the purview of the States, there are undoubtedly MS on the other end of the spectrum as compared to those in Ireland, Poland and Malta, namely, the Netherlands. In the Netherlands the act of feticide[116] is permissible up until birth.[117] It is clear that this position can be starkly contrasted to the systems of Ireland and Poland set out above for a number of reasons. It can be argued that such a liberal approach fails to respect the right to life, doesn't meet the requirements of the fair balance test and leads to legal and professional uncertainty for those in the medical profession; since it remained strictly illegal to euthanize a child under the age of 12 until the adoption of the Groningen Protocol in 2005.[118] Such a liberal approach to access to abortion services and lack of protection for the unborn which even extends beyond the normal gestation period could certainly be

[115] *P. And S. v. Poland, Ibid.*
[116] Definition available at http://definitions.uslegal.com/f/feticide/ (31 May 2016).
[117] See details in: Middeldorp et all, Fetal Diagn Ther. (2008) 23(2).
[118] Note in December 2013 the Belgian Parliament voted in favour of legislation allowing for euthanasia of all individuals regardless of age, subject to selected criteria. The Netherlands has considered following this development.

argued to be a breach of the MS positive obligation to protect the right to life.

### c. **Euthanasia**

Euthanasia is the act of taking life to relieve pain. It can be further subcategorised in to voluntary, non-voluntary and involuntary[119] - the distinction being necessary to determine its legality in different MS.[120] The main issue with euthanasia in modern times is that, unlike abortion, it is not considered to be a generally acceptable legal exception to the right to life.[121] Due to its moral and ethical implications, like abortion, the States are afforded a wide margin of appreciation when deciding on such matters. Throughout the MS of the CoE it therefore ranges from being completely illegal in France, Spain and the United Kingdom to active euthanasia being permitted in the Netherlands and Switzerland. This is problematic since, although the MS have a wide margin of appreciation in such areas, there still exists a positive obligation to protect the life of all individuals within your territory and thus the MS are not only permitted to restrict such activities but obliged to do so in order to prevent the arbitrary taking of a life.[122]

#### i. **The United Kingdom**

The act of euthanasia in the United Kingdom remains illegal and a 'right to die' exists only in so far as the removal of or refusal to undergo medical treatment. This was established throughout the case law of the national courts in cases where it was permitted for persons of sound mental capacity to forego treatment, even if the result would be death.[123]

---

[119] Jonathan Law, A Dictionary of Law 8th ed. (Oxford University Press, Oxford, 2015). Available at http://www.oxfordreference.com/view/10.1093/acref/9780199664924.001.0001/acref-9780199664924-e-4463?rskey=mxWx0H&result=2 (31 May 2016).

[120] *Lambert and Others v. France* [GC], no. 46043/14, § 9, ECHR 2015.

[121] Smyth, Irish Law Times (2012) 30, p. 262.

[122] *Haas v. Switzerland*, no. 31322/07, § 53, § 57, §58, ECHR 2011 [hereinafter *Haas*].

[123] *St George's Healthcare NHS Trust v S*, [1998] 2 WLR 936; *Ms B v An NHS Hospital Trust*, [2002] All ER 449, § 100.

The case of *Pretty v UK*[124] considered the position of euthanasia under the ECHR and whether a right to die existed. The Court determined that the Convention does not, and cannot without a distortion of its language, confer a right to die and, consequently, it does not afford an individual an entitlement to choose death rather than life.[125] They did not consider a blanket ban on assisted suicide to be disproportionate, especially considering the importance to be placed on the right to life and the positive obligation the State has to protect it.[126] It should be noted that despite the fact that both parties submitted arguments concerning the moral and ethical implications of euthanasia, along with submissions regarding consensus, the Court did not consider either aspect in detail.

Following the case of *R (on the application of Purdy) v Director of Public Prosecution*[127] the House of Lords established a committee to review the system in place in the United Kingdom, the same system that was challenged in the case of *Pretty*. The Commission on Assisted Dying published its report on the 12 of January 2012[128] where it found that the current system was inadequate and incoherent[129] and recommended that assisted suicide should be legalised, subject to criteria.[130]

If you take into consideration the report from the *Commission on Assisted Dying* alongside the decision in the case of *Pretty* and juxtapose them

[124] *Pretty* (fn. 22).
[125] *Ibid.*, *§* 49.
[126] *Ibid.*, *§* 76.
[127] Purdy, Regina (on the Application of) -v- Director of Public Prosecutions 4 All ER 1147 [hereinafter *Purdy*].
[128] The Commission on Assisted Dying "The current legal status of assisted dying is inadequate and incoherent..." (Magdalen House, London, 2011) available at http://www.demos.co.uk/files/476_CoAD_FinalReport_158x240_I_web_single-NEW_.pdf?1328113363 (31 May 2016).
[129] *Ibid.*, p. 19, p. 23, p. 299.
[130] Taking in to consideration all concerns highlighted in chapters 11 and 12 such as the person must be over 18, suffering from a terminal illness, expressed a clear wish to commit suicide and having been provided with all the medical care necessary to make an informed decision.

with the case of *A, B & C,* it is evident that different standards of review were met. In the case of *A, B & C* the Court found that despite overwhelming consensus, the moral and ethical considerations required a wide margin of appreciation to be given in determining whether services were to be provided. They did however determine that, in respect of the third applicant, there was a violation of Article 8 ECHR since it was unclear and uncertain as to how she could access an abortion due to failure to implement a sufficient framework. If this *argumentum* and level of in-depth examination had been applied in the case of *Pretty,* it could be contended that a violation of the Convention would have been found to have occurred due to the systems dissatisfactory and incoherent nature.

The issue has come again before the ECtHR in the case of *Nicklinson and Lamb v UK*[131] where both cases were declared inadmissible due to, *inter alia*, the first applicant's failure to show that developments since the case of *Pretty* meant that the ban was no longer a propionate interference and due to non-exhaustion of domestic remedies on behalf of the second applicant. The first applicant failed to highlight the concerns in the Commission on Assisted Dying's report which was established due to the House of Lord's own concerns that there was a lack of clarity and foreseeability in relation to how and when prosecution would occur.[132]

### ii. Switzerland

Switzerland has one of the most liberal laws with regards to assisted dying, both in the form of assisted suicide and euthanasia. Under Swiss law, assisting another person in ending their life is only considered a crime when committed for selfish reasons.[133] Notwithstanding their openness there have been several cases in which Switzerland has been brought before the ECtHR.

[131] *Nicklinson and Lamb v. the United Kingdom*, no.1787/15, no. 2478/15, 23 June 2015.
[132] *Purdy* (fn. 127), § 53 –§ 56.
[133] Article 115 of the Swiss Penal Code.

Most famously in the case of *Haas v Switzerland*[134] the Court considered the positive obligations on the State to protect the right to life and the framework which had been implemented. In doing so, the Court reiterated its stance that the State enjoyed a certain margin of appreciation when it comes to considering the different interests at stake, which of course would vary given the nature of issues and importance of the interests at stake.[135] They also considered, as an examination of consensus, that the majority of States attach more weight to the protection of an individual's life than to their right or wish to terminate it and that in this area the States enjoyed a 'considerable' margin of appreciation.[136] Even though the Court consistently highlighted the existence of the States margin of appreciation in this area, it did not prevent them from conducting an in depth examination of the rights in question and the framework within which they operate, which the Court failed to do in the case of *Pretty*.

The case of *Gross v Switzerland*[137] was considered to be potentially ground-breaking as it was the first case in which a State's position on assisted suicide was held to be incompatible with Article 8 ECHR. The Court made a distinction between the position it took in *Haas*, approaching the case instead from the perspective of a positive obligation on the State, and considered solely whether sufficient guidelines were in place.[138] In carrying out this examination the Court concluded that these guidelines were issued by a non-governmental organisation and therefore did not form part of Swiss law and subsequently a state of legal uncertainty existed in particular with regards to medical professionals.[139]

[134] *Haas* (fn. 122).
[135] *Ibid*., *§* 53.
[136] *Ibid*., *§* 55.
[137] *Gross v. Switzerland*, no. 67810/10, 14 May 2013.
[138] *Gross* (fn. 137), § 63.
[139] Ibid., § 66.

I referred to this decision as *potentially* ground-breaking as its actual impact on restricting the States margin of appreciation was only of a speculative nature. From the outset, the decision of the Court did not seek to limit the margin of appreciation of the State or recognise any right to die with dignity or with assistance but rather highlighted a lack of clear legal guidelines which both individuals and practitioners could both follow and rely upon in order to exert their rights, which followed its previous decision in *A, B & C*. The case was also only *potentially* ground-breaking as it was discovered on appeal[140] that the applicant had in fact obtained the lethal dosage and passed away 19 months before the case was heard by the ECtHR which, upon being uncovered, resulted in the case being declared inadmissible due to the applicant's abuse of right of application.[141]

### iii. Ireland

While Ireland has not come before the ECtHR regarding matters of this nature there has been considerable discussion around assisted dying on the national level. The prominent case on this matter is that of *Fleming v Ireland.*[142] The case is factually identical to that of *Pretty* and the Irish Supreme Court relied heavily on the decision of the ECtHR.[143] They invoked the wide margin of appreciation afforded to MS[144] and dismissed Mrs Flemings claim that any constitutional right to die existed. It has even been observed by some authors that, although the High Court addressed the matter with much sympathy for Mrs Fleming and expressed a great deal of emotion with regards to the situation, the Supreme Court was much less courteous in its treatment of the issue and did not carry out

[140] *Gross v. Switzerland* [GC], no. 67810/10, ECHR 2014.
[141] As per Article 35 § 3(a) of the Convention. The applicants clear intend to mislead the Court is set out in *Gross* (fn. 140), § 22 - § 24.
[142] *Fleming v Ireland* [2013] 2 I.L.R.M. 9 [2013] IESC 19.
[143] *Fleming v Ireland* (fn. 142), § 163.
[144] *Ibid.*, § 149 with reference to *Pretty* (fn. 22), § 74.

a thorough examination.[145] Following this decision there was speculation as to whether or not the case would be appealed to the ECtHR, given its factual similarities to the case of *Pretty* on which it had already adjudicated,[146] but within eight months of the Supreme Court's decision Mrs Fleming passed away.[147]

The extent to which any form of euthanasia is legal in Ireland is therefore limited to the withdrawal of life-support.[148] The right to life has been recognised in the Irish Courts as "the pre-eminent personal right"[149] but, it has been stated by *Justice Denham* that to preserve life at all costs does not in itself serve to protect the sanctity of, and therefore the right to, life.[150] This dictum however is restricted to cases concerning the withdrawal of life supporting medical treatment and cannot be construed in such a way as to permit a right to die.

Such cases often arise in rather tragic circumstances and one example of this is the recent case of *P.P -v- Health Service Executive*[151] where the Court was confronted with withdrawal of life support and protection of the right to life of the unborn within the same case. The Court followed the guidelines as set out in the aforementioned cases and the case was quickly brought to a conclusion. As already mentioned, such cases concern tragic personal events which those involved hope to resolve

[145] Susan Stefan, Rational Suicide, Irrational Laws: Examining Current Approaches to Suicide in Policy and Law (Oxford University Press, Oxford, 2016), p. 204 - 205.
[146] Article 35 (2) (b) debars the ECtHR from hearing cases factual similar to those upon which it previously adjudicated.
[147] Conor Feehan, "Right to Die" MS Sufferer Marie Fleming Has Passed Away, Irish News, Dec. 20, 2013. Available at http://www.independent.ie/irish-news/right-to-die-ms-sufferer-marie-fleming-has-passed-away-29855136.html (2 June 2016).
[148] The Irish Courts follow the general principle set out by Lord Browne Wilkinson in *Airedale NHS Trust v. Bland* [1993] AC 789 as seen in the cases re *A Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 73.
[149] *Ibid., A Ward of Court,* Denham J , § 331.
[150] *Ibid*., § 339.
[151] *P.P -v- Health Service Executive* [2014] IEHC 622.

quickly and in a somewhat discrete manner. It is of paramount importance that in such situations there are clear sets of rules and regulations in place as to how one vindicates their rights and seeks the relevant assistance. If such a system were already in place then it would not be necessary, as recently as the *P.P* decision in late 2014, to go to the High Court in order to vindicate one's rights in this area. It is fathomable that if such a case were to come before the ECtHR that questions would be raised regarding the framework implemented, how it balances the different interests, along with whether there is legal certainty pertaining to rights.

### iv. The Netherlands

In 2002 the *Termination of Life on Request and Assisted Suicide Act* came in to force. This act set out guidelines which had been developed throughout the Courts jurisprudence.[152] As already mentioned in Section 4.b.iii, late stage abortions were permissible under Dutch law and this gave rise to several issues concerning whether the withdrawal of treatment shortly after birth for children with severe abnormalities was also permissible and caused legal uncertainty for those involved. This was brought to public attention on two occasions in the mid-1990s[153] where two new-born babies were euthanized at the request of their parents. The doctors in both cases were found guilty by the Court but did not receive any punishment since they had complied with the general principles that had been developed by the Court, even though these principles were not intended to be applied to those under age at that time. This scenario would now of course be covered by the Groningen Protocol but the application of which also gives rise to many questions concerning the States positive obligations and a fair balance of rights.

[152] *Postma* Case Criminal Court Ruling, Leeuwarden 1973 no.183, Schoonheim, Nederlandse Jurisprudentie 1985 no. 106.

[153] *Prins* case Nederlandse Jurisprudentie 1996 no. 113 and Kadij case Tijdschrift voor Gezondheirsrecht 1996 no. 35.

**d. Assessment**

It is quite evident from the case law above that the use of the margin of appreciation in respect of the right to life results in quite diverging situations within the territory of the MS. A citizen's geographic location can determine whether they have access to medical services such as abortions or how freely they can seek to end their life in certain circumstances. During *Vo,* the Court found the lack of consensus to be a determining factor for affording a wide margin of appreciation, while in *A, B & C.* it was found not to be a determining factor due to 'profound moral reasons'. Since the case of *Vo,* the Court appears to have categorised certain issues as being of a sensitive, moral or ethical nature and therefore affording States a *de facto* wide margin of appreciation.[154] This leads to differential human rights standards across the MS and compromises any hope of establishing a universal human rights standard.

It clear however, that given the current legal framework, the ECtHR is required to utilise a doctrine such as the margin of appreciation. Due to the general nature of the rights guaranteed in the Convention and the MS strong opposition to harmonised standards in certain areas, it is necessary for the Courts to allow some element of discretion on behalf of the MS. It can be stated with a sufficient degree of certainty that the ECtHR needs to periodically review areas considered to be lacking in consensus, or of a moral or ethical nature, given the constant developments in both medical advancements and public opinion. As evidenced above, a default application of the margin of appreciation in all cases does not provide adequate protection for the rights in question and is leading to a lack of uncertainty regarding one's rights.

[154] *S.H. and Others v. Austria*, no. 57813/00, § 97, 1 April 2010. The State was afforded a wide margin since the matter "continues to give rise today to sensitive moral and ethical issues".

## 5. The Margin of Appreciation in International Courts and Tribunals

### a. Overview

Throughout the discussions regarding the margin of appreciation the issue continuously arises whether the margin of appreciation has an impact on international courts and tribunals and other areas of international law.

The impact the margin of appreciation can have on other international courts and tribunals should not be underestimated. It can have both positive and negative effects. For example, it can provide clear guidance for other international tribunals where issues of a sensitive nature are to be adjudicated upon, as it provides criteria throughout which they can determine whether a wide margin is to be allowed or whether a much more restrictive interpretation is necessary. While on the other hand there are those who believe that it can be damaging to developing countries whom might look to Europe or other jurisdictions for guidance on difficult matters of human rights.[155]

The aforementioned considerations are of particular importance for tribunals, such as the ECtHR and the Inter-American Court of Human Rights [hereinafter the IAmCtHR], where regional integration is also an aim and where these courts rely quite heavily on the consent of the states. In both the European and American system the Convention and the role of the Court is of a subsidiary nature and therefore the democratic processes within the state as well as their sovereignty must be respected.[156]

[155] Benevisti (fn. 17), 853.

[156] For further information on the relationship between the margin of appreciation and the democratic processes and sovereignty of the State please see Section 2.b.

The margin of appreciation has been an integral part of the rhetoric of the ECtHR since 1956[157] and its impact on other courts and tribunals can be easily deduced by means of a thorough examination of their jurisprudence. This section will focus on a selection of cases and decisions from various international courts and tribunals in order to discern whether and to what extent the margin has been accepted as a useful judicial tool and where it has not been accepted the reception it has received, along with the impact they perceive it will have on the protection of rights will be examined.

**b. The Court of Justice of the European Union**

There are a number of issues regarding the relationship between the ECtHR and the Court of Justice of the European Union [hereinafter the CJEU] that require discussion, such as the European Union's accession to the ECHR, the hierarchy of legal norms and the impacts this will have for the jurisdiction of both courts. This, however, will be discussed in further detail in Section 7.

This section will focus on the CJEU and its relationship with the margin of appreciation. The CJEU adjudicates on a range matters relating to, *inter alia*, the interpretation of the European Union treaties,[158] the review of legality of Union acts, applications for annulment of Union law and allegations of infringement of Union law.[159] It can therefore be distinguished in its mandate from the ECtHR in that it does not concern international human rights violations which were carried out by the State but rather encroachment of individual rights by a newly created

[157] *Greece v. The United Kingdom* (fn. 12).
[158] The Treaty on the European Union [hereinafter the TEU] and the Treaty on the Functioning of the European Union [hereinafter the TFEU].
[159] Article 267 and Article 267 TFEU.

supranational sovereign power.[160] Also, unlike international law, Union law has direct effect, confers on individuals justiciable rights[161] and is supreme to national laws.[162] The distinction regarding the supremacy or subsidiary nature of EU law is pertinent to the discussion on the margin of appreciation as it determines to which extent the MS still have a degree of flexibility in terms of implementation. Harmonisation is a concept of EU law whereby the EU creates common standards across the internal market. Once an area has been harmonised it limits the ability of the MS to legislate freely in this area as they are restricted by the limits imposed by the EU. As such, the use of a margin of appreciation type decision making within the EU is not required to the same extent as it is within the CoE framework due to the harmonised nature of EU law. Take for example the concept of a 'human embryo' which was somewhat defined and given limits by the CJEU[163] in relation to the application a specific directive.[164] It has been debated by some[165] that this definition, which is an autonomous concept of EU law, limits the ability of MS to adopt their own approach and thus the argument that no European consensus on the scientific and legal definition of the beginning of life is no longer valid and needs to be reviewed by the ECtHR.

It is evident from Section 2 and Section 4, that the primary use of the margin of appreciation is in cases concerning moral or sensitive issues. The CJEU is no different in its deference to the MS concerning matters of this nature. However, it should be noted that the cases in question often

[160] Dirk Ehlers, European Fundamental Rights and Freedoms (De Gruyter Rechtswissenschaften Verlags-GmbH, Berlin, 2007), p. 2 para. 3.
[161] *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1, p. 12, p. 13.
[162] *Costa v E.N.E.L*, Case 6/64, ECLI:EU:C:1964:66, p 594.
[163] *Oliver Brüstle v Greenpeace e.V*, C‑34/10, ECLI:EU:C:2011:669.
[164] Council Directive 1998/44/EC of 6 July 1998 on legal protection of biotechnological inventions, OJ 1998, L 213/13.
[165] Puppinck (fn. 26), p. 154, p. 155.

involve balancing of one of the four freedoms with the protection of public morals rather than the balancing of fundamental rights such as the right to life and right to respect for private and family life.

Unlike the ECHR, the EU treaties were not founded upon the need for mutual recognition of fundamental rights but rather on the need to foster economic growth and create an internal market.[166] Therefore, it was not the aim of the EU to implement overarching standards upon the MS or to limit their sovereignty any more than was agreed upon in the provisions of the treaties. For this reason, the Court has regularly held that it is for the Member States to determine its own scale of values and the requirements of public morality, as long as they are carried out in accordance with the treaties[167] and are not carried out in an arbitrary or discriminatory way.[168] The CJEU has used a range of terminology in its application of margin of appreciation style decision making. For example, the Court recognised that the MS should be afforded 'a sufficient degree of latitude'[169] where certain factors, such as moral, religious and cultural aspects, crime, fraud or potential damage to an individual, are relevant.[170]

The Court reaffirmed this position in *Schindler* and took their acceptance of the doctrine one step further in the cases of *Zenatti* where it explicitly afforded the MS "a sufficient margin of appreciation".[171] The *locus classicus* concerning moral issues and deference to MS offered by the

[166] The Treaty of Rome 25 March 1957: preamble, Article 2, Article 3.
[167] *Regina v Henn and Darby*, Case C-34/79, ECLI:EU:C:1979:295, p. 3813, § 16.
[168] *Conegate Limited v HM Customs & Excise*, Case C-121/85, ECLI:EU:C:1986:114, § 16 - § 20.
[169] *H.M. Customs and Excise v. Gerhart and Jörg Schindler*, Case C-275/92, ECLI:EU:C:1994:119, § 61 [hereinafter *Schindler*]
[170]*Schindler*, *Ibid*., § 54, § 60; reaffirmed in *Questore di Verona v Diego Zenatti*, C-67/98 , ECLI:EU:C:1999:514, § 14 [hereinafter *Zenatti*]; *Läärä, Oy Transatlantic Software Ltd v Finnish State*, ECLI:EU:C:1999:435, § 14 [hereinafter *Läärä*].
[171] Ibid., § 15.

CJEU is the case of *Omega*.[172] It was held that the competent national authorities are to be allowed a 'margin of discretion' and that this margin must be within the limits imposed by the treaties.[173] The Court recognised that the concept of public policy is not equivalent in all MS and can vary over time, this is very much in line with the ECtHR doctrine of the margin of appreciation along with the concept that the convention is a 'living instrument'.[174] The Court also appeared swayed by the fact that the principle in question was human dignity. This principle is of fundamental importance throughout the entire EU, but in particular in Germany where the referring case originated. It is guaranteed as the first principle in their constitution[175] and has special significance given their history.

It is clear from the case law of the CJEU that the Court follows some form of the margin of appreciation, whether explicitly, as in the case of *Zenatti* or through what it deems to be a margin of discretion or a sufficient degree of latitude. In all cases the MS are granted the freedom to determine the values and morals to be protected within their territory and that, once this determination has been made, it must be carried out in accordance with the treaties, apply indistinctly, without discrimination and be necessary to obtain its objectives and protect consumers. [176]

---

[172] *Omega Spielhallen- und Automatenaufstellungs-GmbH v Germany*, C-36/02, ECLI:EU:C:2004:614.

[173] *Ibid*., § 31; *Van Duyn v Home Office*, C-41/74, ECLI:EU:C:1974:133. § 18; *Regina v Bouchereau*, C-30/77 , ECLI:EU:C:1977:172, § 34.

[174] *Tyrer v. the United Kingdom* (fn. 75), § 31.

[175] Grundgesetz für die Bundesrepublik Deutschland, Artikel 1.

[176] As per *Rewe v Bundesmonopolverwaltung für Branntwein*, C-120/78, ECLI:EU:C:1979:42; *Procureur du Roi v Benoît and Gustave Dassonville*, C-8/74, ECLI:EU:C:1974:82. *Stoß & Ors v. Land Baden‐Württemberg*, Joined Cases C‐316/07, C‐358/07 to C‐360/07, C‐409/07 and C‐410/07, ECLI:EU:C:2010:504, § 77 – § 78; *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, C‐409/06, ECLI:EU:C:2010:503 and most recently *Criminal proceedings against Sebat Ince*, C‐336/14, ECLI:EU:C:2016:72.

### c. Inter-American Court of Human Rights

In terms of international human rights courts or tribunals the IAmCtHR could certainly be considered a newcomer to international human rights protection, having only been established in 1979.[177] To date, the Courts case law has been dominated by gross human rights violations due to the struggles experienced by some of its developing countries with widespread corruption and lack of democracy.[178] It is clear that the use of the doctrine would not be appropriate in such cases as it would be paradoxical to afford leeway to a State which is charged with such gross human rights violations.

Nonetheless, there are a number of cases in which the IAmCtHR refer to the potential existence of a margin of appreciation or scenarios in which deference to the States is required. In *Canese*[179] the Court pointed out that there should be a 'reduced margin' for restrictions relating to political debates and matters of public interests[180] and in doing so confirmed its previous decisions on the matter with reference to cases from other jurisdictions along the same lines.[181] The *Advisory Opinion on the Naturalisation provisions of the Constitution of Costa Rica*[182] also acknowledged that it was up to the Member State, in this case Costa Rica,

[177] Established by the American Convention on Human Rights, Part II, Chapter VI Article 33, entry in to force 18 July 1978.

[178] See for example https://www.hrw.org/world-report/2015/country-chapters/mexico (31 May 2016) and extensive examination of human rights in Latin America can be found here http://www.du.edu/korbel/hrhw/researchdigest/latinamerica/latinamerica.pdf (31 May 2016).

[179] *Ricardo Canese v Paraguay*, *Canese Krivoshein v Paraguay*, Merits, reparations and costs, IACHR Series C No 111.

[180] *Ibid*., § 97.

[181] Case of *Herrera Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, IACHR Series C No 107, § 127; Case of *Ivcher Bronstein v Peru*, Merits, reparations and costs, IACHR Series C No 74.

[182] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, OC-4/84, Inter-American Court of Human Rights (IACHR), 19 January 1984.

to determine the standards for whether or not to grant nationality, as this was within their sovereign power.

The jurisprudence of the IAmCtHR is evolving on a case by case basis and there are several authors, who believe that with the growing number of ordinary as oppose to gross human rights violations we will see an increase in the use of the margin of appreciation by the IAmCtHR.[183]

**d. United Nations Human Rights Committee**

Given the wide scope of application of the International Covenant on Civil and Political Rights [hereinafter the ICCPR] and the First Optional Protocol, it is evident that a balancing of rights and the determinations of States would come in to question. From a practical point of view, it would be very problematic to implement an overarching moral standard applicable to all 115 States parties,[184] particularly when it comes to issues of a moral or sensitive nature.

This was addressed in *Hertzberg v Finland*[185] where the United Nations Human Rights Committee [hereinafter the UNHRC] acknowledged that public morals differ widely and there was no presence of a universally applicable moral standard.[186] The UNHRC therefore felt that a "certain margin of discretion"[187] need be given to the national authorities in question.

It appears from the jurisprudence of the UNHRC that the use of a margin of discretion (or appreciation) very much depends on the case at hand and

[183] D.Harris, Regional Protection of Human Rights: the Inter-American Achievement, 32 Chapter 2.4.b., in D. Harris & S. Livingston, The Inter-American System of Human Rights (Clarendon Press, Oxford, 1998).
[184] Current number of States parties to the ICCPR.
[185] *Hertzberg, Uit Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA (Organization for Sexual Equality) v. Finland*, Communication No. R.14/61, U.N. Doc. Supp. No. 40 (A/37/40) [hereinafter *Hertzberg*]
[186] *Ibid*., [10.3].
[187] *Ibid*.

the right in question. This can be seen from the 1992 case of *Länsman v Finland*[188] in which the UNHRC rejected the idea that the State's freedom to encourage or allow economic activity by enterprises was to be assessed with reference to any form of a margin of appreciation, but rather by reference to the obligations it has undertaken.[189] If the case of *Hertzberg* and *Länsman* are compared merely on a substantive basis it could be deduced that the UNHRC's willingness to grant a margin of discretion was heavily influenced by the sensitive, moral nature of the topic of homosexuality which was concerned in *Hertzberg*, as opposed to the non-moral, explicitly protected rights of minorities in *Länsman*.[190] The case of *Hertzberg* could even be considered a step backwards for the UNHRC given its earlier decision in *Toonen v Australia*[191] where it explicitly rejected the notion that moral issues were only the concern of domestic authorities as it would have the effect of limiting the scope of the Committee's scrutiny.[192]

It is therefore quite clear that the UNHRC does make use of the margin of appreciation doctrine in certain cases but its use is not limited in order to not encroach upon the sovereignty of the parties or interfere with their democratic processes.[193] It has even been suggested that the UNHRC does not expressly embrace the margin of appreciation as to do so might provide weak support for vulnerable groups such as religious minorities[194] and that the European courts are much more open to this

[188] *Länsman et al. v. Finland, Communication* No. 1023/2001, U.N. Doc. CCPR/C/83/D/1023/2001 (2005) [hereinafter *Länsman*].
[189] *Ibid.*, [9.4].
[190] *VDA & LMR v Argentina*, Communication No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
[191] *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).
[192] *Ibid.*, [8.6].
[193] *Bryhn v Norway*, Communication No. 789/1997, U.N. Doc CCPR/C/67/D/789/1997, [7.2] noted however that it is not bound by such democratic processes.
[194] Neuman (fn. 9), p. 5.

concept since religious persecution, for example, is not as common inside the CoE as it is outside.

Despite the fact there has been no express acceptance of the existence of the margin of appreciation within the framework of the UNHRC, States parties continue to make a case for deference, both explicitly and implicitly in a number of different areas, such as, implementation of obligations under the Covenant [195] and derogations on the grounds of national security.[196]

**e. International Court of Justice**

The International Court of Justice [hereinafter the ICJ] has considered whether to apply a margin of appreciation style doctrine in a few cases.[197] Like the UNHRC, the ICJ has also not openly adopted the margin of appreciation doctrine but this does not prevent states from seeking a 'margin of appreciation style' result or prevent the ICJ from passing a judgment with a margin of appreciation style impact.

In the *Nicaragua* case,[198] the Court held that the Treaty[199] that was in place between the United States of America [hereinafter the USA] and Nicaragua did not afford the parties absolute discretion in invoking its

[195] *Bryhn v Norway* (fn. 193), [4.4].

[196] *Vjatšeslav Borzov v. Estonia*, Communication No. 1136/2002, U.N. Doc. CCPR/C/81/D/1136/2002 (2004), [7.3] - the Court noted that although these were certain circumstances in which derogations are permitted for national security means, that this does not *ipso facto* leave the matter entirely to the discretion of the State.

[197] *Inter alia*, Oil Platforms (*Zslamic Republic of Iran v. United States of America*), Judgment, I. C. J. Reports 2003, p. 161 [hereinafter *Oil Platforms*]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I. C. J. Reports 2004, p. 136; Avena and Other Mexican Nationals (*Mexico v. United States of America*), Judgment, I. C. J. Reports 2004, p. 12 [hereinafter Avena].

[198] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14 [hereinafter *Nicaragua* case].

[199] Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua, 21 January 1956, 367 U.N.T.S. 3.

security exception.[200] This seems to indicate that, to some extent, the states do have some 'discretion' or 'margin' to which they are entitled to judge subjectively whether to invoke the security exception, pursuant to the relevant international laws in place. The view of the Court was confirmed in the follow-up case of *Gabcikovo / Nagymaros*[201] where the Court held that the State concerned is not the sole judge of whether the conditions of necessity have been met.[202]

The Court appeared to retreat from its somewhat acceptance of the doctrine in the *Oil Platforms case* where the USA sought a 'measure of discretion'[203] in determining the necessity and proportionality of their decision to resort to counter force. The Court rejected this argument, along with the idea that a margin of appreciation might exist, highlighting that international laws regarding self-defence are strictly objective and, therefore, there is no room for any measure of discretion. This regression on behalf of the Court was recognised in the separate opinion of *Judge Buergenthal*[204] and by numerous authors having reviewed the case law in light of *Judge Buergenthal*'s opinion.[205]

In the *Avena* case, with reference to its previous decision in the case of *LaGrand,*[206] the ICJ appeared to adopt a more hospitable approach to the application of a margin of appreciation / discretionary doctrine in stating that the USA were free to choose the means by which the cases in question would be reviewed or reconsidered, but clarified that such a

[200] *Nicaragua* case (fn. 198), § 222.
[201] Gabčíkovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7.
[202] *Ibid*., § 40.
[203] *Oil Platforms* (fn. 197), § 73.
[204] *Ibid*., Separate Opinion of Judge Buergenthal , p. 286, § 37.
[205] Shany, EJIL (2005) 16, p. 933.
[206] LaGrand (*Germany v. United States of America*), Judgment, I. C. J. Reports 2001, p. 466, § 128 (7).

freedom was not without qualification.[207] However, in the case of the *Wall in the Occupied Palestinian Territory* the Court dismissed Israel's argument regarding their right to self-defence[208] and thus, implicitly, rejecting the idea of discretion allowed on the part of Israel in determining the necessity of the measure of self-defence.[209]

It is clear from an examination of the ICJ jurisprudence that the cases involve the balancing of interests on a much larger scale and concern obligations to which the States have expressly bound themselves. It is for these reasons that they are not so forthcoming in granting a margin of appreciation or expressly accepting the existence of the doctrine, however, they do appear open to implementing a margin of appreciation style decision, where the facts of the case so permit.

### f. World Trade Organisation

Although World Trade Organisation [hereinafter the WTO] Law is subject to review by the WTO dispute settlement organs,[210] the review of the domestic law of its Members is still subject to debate. Given the nature of the WTO, it is considered appropriate that the Appellate Body [hereinafter AB] applies its deferential standard of review to the interpretation and application of national law by national authorities,[211] rather than the general international law interpretation of domestic law which constitutes a question of fact.[212] From these general guidelines it

[207] *Avena* (fn. 197), § 131; LaGrand (fn. 206), § 128 (7).
[208] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (fn. 197), § 142.
[209] Ibid., § 139 - noted that the threat in question which Israel claimed to exist originated from within the territory, as opposed to externally, and therefore they could not rely on Security Council resolutions 1368 (2001) and 1373 (200l).
[210] Understanding on rules and procedures governing the settlement of disputes, 1869 UNTS 401 Article 1, Article 2
[211] Wolfrum, Stoll, Kariser, WTO: Institutions and Dispute Settlement (Brill, Leiden, 2006), p 469, § 62, fn.168.
[212] *Ibid*., fn. 167.

can be deduced that the WTO AB hasn't adopted a systematic margin of appreciation doctrine which is applicable throughout its cases, and therefore, in cases where the doctrine does arise, it is judged on a case-by-case basis by the adjudicating body.

In spite of the lack of a systematic approach there are a series of cases throughout which the Dispute Settlement Body [hereinafter the DSB] and the AB have adopted a non-intrusive standard of review for discretionary determinations which are to be made by the national authorities of the Members.[213] Take for example in the case *EC – Bananas III (Ecuador)*[214] where the arbitrators found that Article 22.3 (b) and (c)[215] left a certain margin of appreciation to the complaining party in respect of evaluating certain factual elements of the case. This margin however was not intended to be unlimited and is subject to review by the Arbitrators.[216] What is interesting about this application of the margin of appreciation is that the Arbitrators go on to express that the review to be carried out can consider the facts objectively and whether it was plausible for the complaining party to come to the conclusion that they did.[217] This type of review is much more extensive than that invoked by the CJEU as it allows the relevant body to question the determinations made by the party

[213] *EC Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135[hereinafter *EC – Hormones*]; *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11 [hereinafter *US – Underwear*]; *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515 [*Argentina – Footwear (EC)*].

[214] Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V, p. 2237 [hereinafter *EC – Bananas III (Ecuador)*].

[215] (fn. 216), Article 22.3 (b) and (c).

[216] *EC – Bananas III (Ecuador)* (fn. 214), § 8.

[217] *Ibid*.

and not merely accept it at face value and examine its implementation in terms of obligations undertaken.

Further examples of this non-intrusive standard of review can be seen in the *Asbestos Case*[218] where the AB reaffirmed that it was undisputed that the WTO members have the right to determine the level of protection of health which they consider to be appropriate[219] and this approach is generally consistent with the GATT panel in the 1994 *Tuna* Case and the protection of morals as discussed *in United States - Gambling Case*.[220] The decisions of the WTO are therefore in line with other courts and tribunals in that it appears more open to allowing some sort of margin in cases which are of a more sensitive nature, such as public health standards.

### g. International Tribunal for the Law of the Sea

While the International Tribunal for the Law of the Sea has not embraced the margin of appreciation in its jurisprudence, some individual judges have advocated its adoption in limited circumstances.[221] It has been promoted as a well-known principle of international law[222] and utilised in the dissenting judgment of two other judges.[223]

---

[218] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243 [hereinafter the *Asbestos* case].

[219] *Ibid*., § 5; Shany (fn. 205), p. 928.

[220] United States – *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837, § 7.11 [hereinafter the *Tuna* case]; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475).

[221] Shany (fn. 205), p. 930.

[222] "Volga" (*Russian Federation v. Australia*), Prompt Release, Judgment, ITLOS Reports 2002, Separate Opinion of Judge Cot, § 14.

[223] Camouco (*Panamana v France*), Prompt Release, Judgment, ITLOS Reports 2000, Dissenting Opinion of Judge Anderson and Dissenting Opinion of Judges Wolfurn § 11.

I feel that the reasons which the International Tribunal for the Law of the Sea have not embraced that margin of appreciation are similar to those highlighted in the discussion of the ICJ in Section 5.e. Both tribunals / courts concern the application of international obligations to which the states have expressly bound themselves and most often, do not concern issues of a sensitive ethical or moral nature. In such instances deference to the States would not necessarily be forthcoming or considered appropriate given the nature of the obligations concerned.

**h. Assessment**

It is clear from an examination of the above cases and decisions that the margin of appreciation as developed by the ECtHR has had an influence on other international tribunals and courts. Its use in those tribunals or courts follows almost exclusively the criteria developed by the ECtHR for issues of a sensitive, ethical and moral nature and can be seen to be invoked more by those courts and tribunals which to some extent depend on the consent or willing cooperation of the States or Members in question, such as the IAmCtHR and the WTO. The margin of appreciation has evidently moved beyond application solely in the sphere of human rights having been applied in cases concerning trade and public international law obligations, however it remains of significant importance to human rights issues given the presence of different national standards. The use of the doctrine is much more limited where the States have expressly bound themselves to the obligations and the tribunal or court in question is of an over-arching nature and not too concerned with the willingness of States to cooperate and where their legitimacy or credibility is not in question.

## 6. Admissibility Criteria for the ECtHR

### a. Procedural Framework

From the examination set out in Section 3 and Section 4, it is indisputable that the margin of appreciation has the potential to severely hinder or damage human rights protection. Those whose rights may have been infringed on national level have the right to bring a case before the ECtHR, given they meet the admissibility criteria set out in Article 34 and Article 35 ECHR. A strict application thereof, particularly in an area in which States are traditionally granted a wide margin of appreciation, is likely to obstruct access to justice for those concerned and allow for human rights infringements to occur. Accordingly, throughout its jurisprudence, the ECtHR has highlighted the need to apply the admissibility criteria with some degree of flexibility and without excessive formalism, in relation to standing and exhaustion of domestic remedies.[224]

#### i. Standing

For individual applications, the most important criterion for the case to be admissible is establishing *locus standi*. As per Article 34 ECHR an individual can make an application only when they can claim to be 'a victim of a violation' of rights contained therein. Thus, the question arises what is a victim as envisioned in Article 34. The Court has consistently held that to be able to lodge a complaint pursuant to Article 34 a person, non-governmental organisation or group of individuals must be directly affected by the allegedly contravening measure.[225] The framework

[224] *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 76, 25 March 2014; *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13; *Akdivar and Others v. Turkey*, 16 September 1996, § 69, Reports of Judgments and Decisions 1996-IV.

[225] *Ireland v. the United Kingdom* (fn. 15), § 239-§ 40; *Eckle v. Germany*, 15 July 1982, Series A no. 51; *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28; *Open Door Counselling* (fn. 94), § 44 and the *locus classicus* on such matters *Burden v. the United Kingdom* [GC], no. 13378/05, § 33 ECHR 2008.

established by the ECHR is therefore not intended for *actio popularis* but strictly for those who can claim to be directly affected. The Court however has been quite open to the arguments put forward by a person, non-governmental organisation or group of individuals contending that they are in fact affected. It has developed a test which ascertains whether or not that person is directly affected by establishing if they are required to either alter their behaviour or risk being directly affected by the allegedly contravening measures.[226]

The importance of the ability to be able to show one is directly affected is pertinent in particular in relation to the right to life as it is difficult to establish who can be considered to be a victim in cases concerning abortion and euthanasia. Many of the early cases concerning abortion which were brought before the ECtHR were deemed inadmissible as the parties to the proceedings were not considered to be 'victims' within the meaning of Article 34 ECHR.[227] The Commission did however extend the scope of who can be considered a 'victim' under Article 34 to include fathers, given the fact they were so closely affected by the situation[228] which has been followed by the Court ever since.[229] It is also worth nothing however that determination of someone's ability to claim to be a victim at the stage of admissibility is just a determination whether they can claim to be a victim and not a determination of actual victim status in the context of the case in question.

[226] *Burden* (fn. 225), § 34; *Open Door Counselling* (fn. 94); *Norris* (fn. 83); *Bowman v. the United Kingdom*, 19 February 1998, Reports of Judgments and Decisions 1998-I; *Johnston and Others v. Ireland*, 18 December 1986, § 42, Series A no. 112.
[227] *Knudsen v. Norway*, no. 11045/84, 8 March 1985, Yearbook 28, 129; *X. v. Austria* (fn. 70) *X.. v. Norway* (fn. 70).
[228] *Paton v. the United Kingdom* no. 8416/78, (1981) 3 E.H.R.R. 408, § 2.
[229] Boso v. Italy (fn. 76), § 1.

### ii. Exhaustion of Domestic Remedies

To bring a case before the ECtHR an applicant must be able to show that they have exhausted all domestic remedies available to them.[230] The addition of such a requirement is an embodiment of the subsidiarity principle discussed in Section 2.b.i and reflects the subsidiary nature of the ECtHR. It allows the MS the opportunity to first deal with and remedy the matter at a domestic level and only then, once a final determination on the matter has been made, can the ECtHR hear the case. The Court has tended to favour a more flexible approach to the application of this rule. In some cases the Court has even been known to dismiss the States assertion that all domestic remedies had not been exhausted where the applicant clearly had not exhausted all avenues, for example they had not lodged a constitutional complaint which they were more than entitled to do.[231] They have recognised that the rule of exhaustion must take into account the individual circumstances of the case[232] and it has justified this approach on the grounds of fairness.[233] The Court does however recognises that it must not be too flexible with admissibility criteria so as to undermine or abolish the procedure established by the Convention[234] and to encroach upon the States sovereignty.

The Court is not only flexible with regards to application of the rule of exhaustion but it also determines, to some extent, what it considers to be a domestic remedy as per Article 35. The Convention sets forth, in Article 35 (1), that a domestic remedy is to be defined according to the generally recognised rules of international law. The Court has further elaborated upon this to clarify that domestic remedies must be of a legal nature[235]

[230] Article 35 (1) ECHR.
[231] *S.H. and Others v. Austria* [GC], no. 57813/00, § 47, ECHR 2011.
[232] *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 116, ECHR 2007-IV.
[233] *Kadlec and Others v. the Czech Republic*, no. 49478/99, 25 May 2004.
[234] *Ibid.*
[235] *Nielsen v. Denmark*, no. 343/57, 2 September 1959, Yearbook 2, 412.

and considered to be an effective and adequate remedy to the situation.[236] The remedy in question must have a realistic prospect of success[237] and applicants are thus not required to undertake frivolous actions merely to satisfy the conditions set out in Article 35 (1) ECHR.

**b. Assessment**

The Courts liberal approach to the admissibility criteria could be said to run counter to their strict adherence to the margin of appreciation doctrine. In certain circumstances the Court deems itself to have jurisdiction in cases which, on a literal interpretation of the Courts admissibility criteria, should have been declared inadmissible. According to the Court this practice occurs in order to uphold the aims of the Convention. It allows access to justice and prevents the MS from arbitrarily infringing rights contained in the Convention based on a procedural technicality. This could be considered counter to the margin of appreciation as it operates to encroach on the sovereignty of the MS and subordinate their system of domestic remedies: It puts aside the subsidiary principle which it adheres to rather strictly in other areas, such as the margin of appreciation.

It could also be said that the Courts approach to admissibility and standing works to complement their use of the margin of appreciation doctrine as it operates in favour of applicants claiming an infringement. It grants them an opportunity that would otherwise be unavailable and in doing so can also continue to supervise and exercise control over the margin of appreciation afforded in particular areas. As mentioned above, the Court justifies this behaviour in the interested of fairness and upholding the aims of the Convention.

[236] *Ibid; A, B & C* (fn. 22).
[237] *A, B & C* (fn. 22), § 147 - § 149.

## 7. The Relationship between the European Union and the European Convention on Human Rights

### a. Background

The relationship between the EU and the ECHR has been complicated from the very beginning. Within the EU and the CoE there are 28 States which must adhere to both systems simultaneous and guarantee both sets of rights to their citizens, albeit with some degree of overlap. Hence, what is the procedure to be followed when a confrontation arises between the two systems? For example, an act of the EU infringes a right guaranteed by the ECHR. Is either court competent to review the acts that take place within the framework of the other system and does the recent Lisbon Treaty have the answer to solving such problems.

Traditionally the EU has been subjected to criticism for what has been described as its 'lack of sympathy' for human rights issues.[238] Prior to the Lisbon Treaty, which made the Charter of Fundamental Rights of the European Union [hereinafter the EU Charter] binding on all the MS, human rights guarantees did not occupy any core of EU law. It had no basis in the treaties of the EU and was guaranteed through the construct of general principles in the jurisprudence of the CJEU,[239] as well as forming part of the unwritten rules upon which the Community was based.[240] The evolution of human rights protection within the EU has proven to be paramount to the ECtHR's treatment of issues relating to EU acts and MS and the degree of deference which it is willing to grant to it.

[238] Ehlers (fn. 160), p. 11 para 25.

[239] *Stauder v City of Ulm*, C-29/69, ECLI:EU:C:1969:57, p. 425, § 7.

[240] *Parti écologiste "Les Verts" v European Parliament*, C-294/83, ECLI:EU:C:1986:166, § 23; *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, C-415/05, ECLI:EU:C:2008:461, § 316.

## b. Competence of the ECtHR to Review EU acts

### i. Initial Findings

Initially the Commission declared requests concerning allegations of infringement against the [now] EU to be inadmissible on the basis of *ratione personae*.[241] Although the ECtHR is not restricted in its scope to considering the conformity of EU law with the rights contained in the Convention they have appeared to exercise a form a self-impose resistance.[242]

One of the first cases concerning the competence of the ECtHR to review the legality of EC law was that of *M & Co v Germany*[243] where the Commission reiterated its earlier stance that it was not the competent authority for the case but expressed the view that although the Convention does not prevent the MS from becoming a member of an international organisation such as the EU, they are still liable for any breaches that occur under the Convention as they could not merely bypass their responsibilities under the Convention by creating a supranational body and transferring powers to them.[244] It was considered to be compatible with the Convention so long as the system in question provides for 'equivalent protection' for fundamental rights. This case appears to be inspired the German Constitutional case of *Solange II*[245] in which the Bundesverfassungsgericht held that given the development of human rights protection within the Union, and so long as the protection was to be considered substantially similar to that provided by the German Basic Law, it would no longer decide on the applicability of secondary Community law and will not review them with reference to the standard contained in the Basic law. This approach has been followed by the

[241] *CFDT v. European Communities*, no. 8030/77, 10 July 1978, DR 13 p. 231.
[242] Kuhnert, Utrecht L Rev (2012) 2(2), p.179, S. 3.2.
[243] *M & Co v Germany*, no.13258/87 9 February 1990. Decisions and Reports 64, 138.
[244] *Ibid*.; *X v. Germany*, no. 235/56, 10 June 1958, Yearbook 2, p. 256.
[245] *Re Wünsche Handelsgesellschaft* (22 October 1986) BVerfGE, [1987] 3 CMLR 225.

ECtHR however it did highlight that it would be contrary to the purpose and object of the Convention for a MS to absolve themselves of their responsibilities under the Convention and that it is crucial for the Convention to "guarantee not theoretical or illusory rights, but rights that are practical and effective".[246]

The ECtHR therefore depended on an examination of the protection of human rights within the EU as evidenced in the case of *M & Co* and originating in the case of *Solange II*. This evolution not only encompasses the fact that the CJEU recognised human rights formed part of Community law as part of general principles and were part of the unwritten rules upon which the Community was based but also the fact that the CJEU refers extensively to the provisions of the ECHR[247] and the decisions of the ECtHR.[248] The Court appeared swayed by the fact that the EU not only secured fundamental rights but maintained control over their observance via the CJEU.

### ii. Bosphorus Airways v. Ireland

- Presumption of Equivalence

Prior to the case of *Bosphorus v. Ireland*[249] the ECtHR found that acts of supranational organisations, such as the EU, were justified once it could be provided that there existed an equivalent standard of human rights

[246] *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999-I; *Beer and Regan v. Germany* [GC], no. 28934/95, § 57, 18 February 1999; *Prince Hans Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII.

[247] *Inter alia*: *Hauer v Land Rheinland-Pfalz*, C-44/79, ECLI:EU:C:1979:290, § 17; Hoechst AG v Commission of the European Communities, C-46/87 and C-227/88, ECLI:EU:C:1989:337, § 18; *Commission v Germany*, C-249/86, ECLI:EU:C:1989:204, § 10.

[248] Criminal proceedings against X., C-74/95, ECLI:EU:C:1996:491, § 25 (Article 7); Lisa Jacqueline Grant v. South-West Trains Ltd, Case C-249/96 [1998] ECR I-621, § 33 - § 34 (Articles 8, 12 and 14); Connolly v. Commission of the European Communities, Case C-274/99 [2001] ECR I-1611, § 39 (Article 10); Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH, Case C-71/02 [2004] ECR I-3025, § 50 - § 51 (Article 10).

[249] *Bosphorus v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

protection within that organisation. The case of *Bosphorus* brought about a new dimension to the relationship between the ECtHR and the EU as a whole. It concluded, given a review of the development of human rights protection within the EU,[250] that an action taken by a State in compliance with its legal obligations as part of such an organisation[251] is justified in so long as the substantive guarantees offered and the mechanisms controlling observance are carried out in a manner at least equivalent to that which the Convention requires.[252] Throughout its examination the Court did recognise the differences that exist between the ECHR framework and that of the EU, for example access to the CJEU is indirect as opposed to appellate like the ECtHR. However, despite the existence of such differences they found that the protection of fundamental rights could be considered to be equivalent within EU law.[253]

- Rebuttable Presumption

There therefore appears to be a *presumption of equivalence* regarding the protection of human rights between the ECHR and the EU framework. It was held however that his presumption can be rebutted in circumstances where it is shown that the protection of rights was manifestly deficient.[254] Throughout the judgment there appears to be no definition of what the ECtHR would consider to be manifestly deficient and capable of rebutting the presumption. Throughout its examination, it determined that the presumption was not rebutted in this case as there had been no dysfunction of the mechanism. This appears to be the ECtHR examining the efficiency of the EU framework. This is a dangerous concept given the in-depth knowledge of EU law that is required to make such a factual

[250] *Bosphorus* (fn. 249), § 73 - § 84.
[251] *Ibid* § 156, § 157 - highlights that the State is still responsible for acts which fall outside of international legal obligations.
[252] *Ibid., §* 155.
[253] *Ibid., §* 160.
[254] *Ibid., §* 156.

determination such as this. We also get a further insight in to what exactly is meant by manifestly deficient in the *Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky And Garlicki* where it was said to establish a relatively low threshold.[255] It therefore appears, according to the decision in *Bosphorus,* that all future challenges to the protection of fundamental rights at European level would be declared inadmissible in so long as the applicant fails to show that there was some fault in the procedure that took place or that EU protection had declined in some way.

### iii. Problems with the Bosphorus Approach

The decision in Bosphorus has cataclysmic effects to human rights protection within Europe. It sets a double standard which distinguishes between the parties of the ECHR whom are also Members of the EU and non-EU members. It permits deviations to the rights set forth in the Convention for States which are Members of the EU in carrying out their legal obligations which would perhaps not be permissible were it carried out by a non-EU party.

Although the Court addressed the differences in mechanisms in the decision of *Bosphorus*, it did so from a very superficial point of view. It relied greatly on the notion that the CJEU maintains control of the application of Community law by national courts through the preliminary referencing proceedings[256] without considering the practical implications that the national courts are not required to make a reference in each case. Access to the CJEU is therefore much more limited than to the ECtHR. The binding nature of the decisions of both courts also differs greatly. The ECtHR makes concrete decisions of incompatibility based on cases brought before them, decisions which are binding upon the parties as per

[255] *Bosphorus* (fn. 249), Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky And Garlicki ,§ 4.
[256] Article 263, TFEU.

Article 46 ECHR. While the CJEU makes determinations on the interpretation of EU law *in abstracto* and although their judgments are binding *res judicata* the national court remains competent in the case and makes the final decision based upon the determination of law received from the CJEU. The differences in both systems is stark and it is not difficult to see where the EU system may fail to protect human rights and why the ECtHR should not allow for such overriding presumptions, both in favour of MS and supranational organisations such as the EU.

It is therefore important that the finding of equivalence is not final or absolute in any way and the ECtHR ensured that it is liable for review in light of any relevant changes in fundamental rights protection.[257] The presumption of equivalence also only occurs in relation to a States strict international legal obligations and it is still responsible for acts where they have discretion that fall under the Convention.[258]

The Court appears to justify the presumption of equivalence as a necessity for interpreting the Convention in light of other relevant rules and principles of international law applicable[259], such as Article 31 (3) (C) of the Vienna Convention on the Law of Treaties, and therefore requires only comparable as opposed to identical protection in the interest of international cooperation. The Court recognises the need for international cooperation and the proper functioning of international

[257] *Bosphorus* (fn. 249), § 155.

[258] inter alia, *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994, Series A no. 288; *Procola v. Luxembourg*, Judgment of 28 September 1995, Series A no. 326; *Hornsby v. Greece* (Article 50), 1 April 1998, Reports of Judgments and Decisions 1998-II; *Pafitis and Others v. Greece*, Judgment of 26 February 1998, Reports 1998-I; Matthews v. the United Kingdom [GC], no. 24833/94, ECHR 1999-I; *S.A. Dangeville v. France*, no. 36677/97, ECHR 2002-III; *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III.

[259] *Bosphorus* (fn. 249), § 150.

organisations and accepts that compliance with obligations arising therein are to be considered a legitimate general-interest objective.[260]

The presumption of equivalence could also, to some extent, be considered to be the ECtHR allowing the EU a margin of appreciation with regards to how it achieves the aims and objectives as set out in the Convention. This is considered by some to be going beyond what is necessary in order to respect the autonomy of the EU legal order[261] and leads to further disrupt the multi-level system of human rights protection.

### c. Post Lisbon: EU Accession to the ECHR

Prior to the enactment of the Lisbon Treaty it was not possible for the EU to accede to the ECHR since it lacked express legal personality.[262] This declaration was key for the EU to be capable of acceding to the ECHR, which is now required by Article 6 TEU.

In theory, once the EU accedes to the ECHR its actions are subject to the review of the ECtHR in terms of compatibility with its Convention obligations just like any other of the High Contracting Parties. The technicalities of the situation remain in the hypothetical since, six and a half years following entry in to force of the Lisbon Treaty, an agreement has still not been reached concerning EU accession to the ECHR. This is due to the continuous tension between the two European frameworks, and in particular the two Courts. In December 2014, the CJEU delivered its opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and

[260] *Ibid.*
[261] Paris, The Irish Jurist (2014) 51(1), p. 67.
[262] Opinion of the Court of 28 March 1996, 2/94, ECLI:EU:C:1996:140, § 34, § 35. Now contained in Article 47 TEU.

Fundamental Freedoms[263] finding it incompatible with EU law. It highlighted several problems with the agreement, such as:

The agreement did not require for the ECHR to be coordinated with the EU Charter which the CJEU felt it should. The co-respondent mechanism set out in the draft agreement risks adversely affecting the division of powers between the EU and its MS.[264] It also took issue with the fact that as the agreement now stands the ECtHR would be empowered to rule on the compatibility of certain acts, actions or omissions performed in the context of the CFSP,[265] which is something that is outside the prevue of the CJEU under the current treaty framework.[266] Throughout the recent opinion the Court is highly influenced by the lack of consideration for the 'special characteristics of the EU and EU law' contained in the draft agreement and the need for the EU to not be treated as if it were any other High Contracting Party in order to preserve the special features of Union law.[267] The opinion of the CJEU clearly illustrates the continued existence of tension between both frameworks which is prolonged by the EU's resistance to external review of acts by the ECtHR and the imposition of potentially higher standards of human rights protection than already encompassed within the EU legal system.

This generates discussion as to whether the accession agreement can be drafted in a way in which the CJEU would consider it compatible with EU law or whether the threat of external review and control is too strong and furthermore uncertain to allow for a positive opinion concerning accession. Many academics were positive that EU accession to the ECHR

[263] Opinion of The Court 18 December 2014, 2/13, ECLI:EU:C:2014:2454.
[264] *Ibid*., § 224, § 225.
[265] Opinion of The Court (fn. 263), § 254.
[266] Article 275 TFEU
[267] Declaration on Article 6(2) of the Treaty on European Union, annexed to the Final Act of the Intergovernmental Conference.

would solve the ongoing friction between the two systems[268] without giving an in-depth consideration of the concessions that would be required from both sides. Some have even suggested that were the EU to accede to the ECHR then the ECtHR would permit the CJEU a certain margin of appreciation and that they would remain the supreme authority for the application and interpretation of EU law.[269]

In my view it is redundant to even consider whether or not the CJEU would still remain the supreme authority with regards to interpretation of EU law, as any agreement to the contrary would be incompatible with the Treaties.[270] It also worth noting that the margin of appreciation (as developed by the ECtHR), although utilised to some extent by the CJEU,[271] is contrary to the autonomous nature of EU law.[272] At present it could certainly be argued that, without EU accession to the ECHR, there exists a margin of appreciation in within the ECtHR framework in relation to acts carried out by EU MS subject to their legal obligations. The question remains whether this margin of appreciation will continue to exist following EU accession to the ECHR and, if so, why is it necessary for the EU to accede at all. Accession to the ECHR should be motivated by a desire to obtain a certain norm or standard in human rights protection and not as part of a political move or 'window dressing exercise'.[273]

Undoubtedly the EU does have special characteristics given the fact it is not a State. This mere fact is contrary to the concept of international Agreements or Treaties which are traditionally intended for use by States or 'nations' as set out in the preamble of the VCLT and Article 2 (1)

[268] Kuhnert (fn. 242), p. 189.
[269] Paris (fn. 261), p. 71.
[270] As per Article 344 the MS are permitted to submit questions of interpretation or application to the settlement procedures therein.
[271] As set out in Section 5.b.
[272] As established in the case of *Costa* (fn. 162).
[273] To borrow the phrase from Ní Aoláin (fn. 6), p. 105.

VCLT definition of a Treaty. It is therefore self-evident that an entity possessing legal personality, such as the EU, would be susceptible to different considerations and power struggles than that of a Nation State when considering acceding to an international treaty with an enforcement mechanism in the form of a court or tribunal. It runs the risk of undermining the status the EU has developed for itself as an autonomous legal order[274] which has direct effect[275] and requires the MS to set aside any provision of national law which is incompatible with Union law.[276] It would require consideration of the compatibility of acts of the institutions with the provisions set forth not only in the founding Treaties of the EU but also the ECHR. I am therefore not certain that a draft agreement can resolve the issues currently preventing the EU accession to the EHCR with a degree of certainty to obtain a positive opinion from the CJEU. I am also not certain that EU accession to the ECHR serves to further human rights protection within Europe. Given the continued struggle for power between the two courts and the immense compromises that will need to be undertaken by one or both sides in order to reach an agreement is likely to continue even beyond EU accession and continue to be the focus of the matter, as opposed to human rights protection.

[274] *Costa* (fn. 162).
[275] *Van Gend en Loos v Nederlandse Administratie der Belastingen*, ECLI:EU:C:1963:1
[276] *Amministrazione delle finanze dello Stato / Simmenthal*, C-106/77, ECLI:EU:C:1978:49.

## 8. Conclusion

Throughout this thesis, I have sought to examine the influence the margin of appreciation has on human rights protection across the multi-level system. I have tried to deduce whether it could be said with a sufficient degree of legal certainty that the margin of appreciation has a negative impact on the achievement of the international human rights goal of universal human rights standards and whether this impact can be considered to have influenced the other actors in the multi-level systems. In order to demonstrate this with regards to a concrete example I focused my examination on the right to life, in particular on discussions relating to abortion and euthanasia. In doing so I could determine whether the application of the margin of appreciation in relation to the right to life lead to different levels of protection across MS and therefore different justiciable rights for individuals.

The origins of the margin of appreciation, as set out in Section 2, illustrate clearly the need for the doctrine at the time in which it was introduced into the jurisprudence of the ECtHR. The extension of the margin of appreciation beyond this scope, in the case of *Handyside*, demonstrates a different philosophy than that embodied in its original usage, one based on subsidiarity as opposed to necessity.

The use of particular doctrines or principles is common practice in international courts or tribunals. However, the degree of deference to the MS embodied in the margin of appreciation is quite profound and goes beyond what is usually considered necessary in order to respect the sovereignty and democratic processes of a State. It is therefore understandable that the margin of appreciation has come under scrutiny for potentially compromising achievement of the goal of universal human rights and influencing other human rights actors across the multi-level system, as exhibited in Section 4 and Section 5 respectively.

The margin of appreciation began its existence as a measure of last resort in matters concerning national security and has since developed into the Courts *de facto* position regarding all matters of a sensitive, moral or ethical nature, as clearly demonstrated in the examination of the right to life in Section 4.d. Its use in such matters undoubtedly results in differentiated human rights protection across borders along with lack of legal certainty for those involved.

The degree of deference that the ECtHR is willing to grant extends beyond solely the MS actions by taking in to consideration their other legal obligations, as required by Article 31 (3) (c) of the VCLT. In doing so it has hesitated in adjudicating on reviewing the legality of certain EU acts for compatibility with the provisions of the Convention. It developed an approach which rested upon the presumption of equivalence of human rights protection within the EU framework, a framework which did not have any explicit human rights protection until the EU Charter became binding in 2009 following the entry in to force of the Lisbon Treaty. The Court went even further in placing the burden of proof for rebutting the presumption squarely on the applicant requiring them to show the protection received within the EU framework had been manifestly deficient, without offering a detailed explanation as to what such a deficiency would entail. The accession of the EU to the ECHR had the potential of solving the discrepancies between at least the two European systems to provide some level of substantively comparable protection. This development has however encountered difficulties due to the CJEU rejection of the draft accession agreement, highlighting several issues which, at present, have no feasible solution.

Having regard to the above findings, it is possible to assert that the margin of appreciation as used by the ECtHR does severely hinder an individual's access to justice along with critically compromising the

achievement of the aim of universal human rights. Nonetheless, there are situations in which its use is not only justified but necessary in order to obtain at least a minimum standard of human rights protection. Given the historical background of inter-state relations throughout Europe and the gross human rights violations that occurred throughout both World Wars it is understandable that following the end of World War II the States felt the need to bind, not only themselves, but also their neighbouring states to a certain level of human rights protection. The creation of an international organisation such as the CoE and a functioning appellate court such as the ECtHR is a result of compromises from all sides and most importantly, the continuation of which depends solely on the consent and participation of the MS. It is therefore understandable that the ECtHR must give the MS a certain degree of latitude with fundamental issues related to sovereignty, for example. This notion therefore justifies the creation of the margin of appreciation in its original context and cannot be considered as the ECtHR compromising its own objectives and aims. Furthermore, the cultural diversity of the Members along with their rooted traditions should be respected by such international organisations, whose existence they pre-date when express compromises on such matters have not been made. This respect should not however go so far as to allow severe infringement of a certain right or group of individual's rights.

I therefore find the use of the margin of appreciation justified to a certain extent, even beyond the scope of application set out in *Lawless*. I agree with *Lord Hoffman*'s statement that at the level of application there are 'messy details' which cannot be dealt with in the abstract discussion of universal human rights however, this does not mean that the human rights that are adhered to can be the result of compromises and trade-offs on the domestic level, as *Lord Hoffman* also suggested. Achievement of universal human rights is therefore required to be gradual in order to

allow both those in power and the citizens to develop along with the law and changing public opinion. The standards implemented and the degree of deference should therefore be routinely revised to keep the standards up to date with current needs and existing opinions. The rights guaranteed in the Convention should also be further elaborated upon in the form of binding legal instruments which allows for the eventual realisation of substantive rights guarantees in the Convention. This is necessary since the use of the margin of appreciation is not only justified in some cases but required by the Court given the current legal framework within which it operates and the general nature of the rights which it serves to protect.

The situation as it stands at present is perfectly reflected in the concurring opinion of *Judge Rozakis* where he respectfully submitted that

"…the Court should carefully reconsider the applicability of the concept of the margin of appreciation, avoid the automaticity of reference to it, and duly limit it to cases where a real need for its applicability better serves the interests of justice and the protection of human rights." [277]

[277] *Egeland and Hanseid v. Norway*, no. 34438/04, 16 April 2009, Concurring Opinion of Judge Rozakis, (d).

**Bibliography**

Benevisti E., Margin of Appreciation, Consensus, and Universal Standards, NYUJ Int'l L. & Pol. 31, 843;

Brems E., The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht (1996) 56, 230;

Donnelly S., A, B and C v Ireland: A Commentary, Medico-Legal Journal of Ireland (2011) 17(1), 43;

Ehlers D., European Fundamental Rights and Freedoms (De Gruyter Rechtswissenschaften Verlags-GmbH, Berlin, 2007);

Greer S., The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights in Council of Europe Publishing Human Rights files no 17 (2000);

Gross & Ní Aoláin, From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights, Hum. Rts Q (2001) 23, p.625;

Harris D. & Livingston S., The Inter-American System of Human Rights (Clarendon Press, Oxford, 1998);

Kuhnert K., Bosphorus – Double standards in European human rights protection?, Utrecht L Rev (2012) 2(2), 177;

Law J., A Dictionary of Law 8th ed. (Oxford University Press, Oxford, 2015);

Legg A., The Margin of Appreciation in International Human Rights Law (Oxford University Press, Oxford, 2012);

Lestas G., A Theory of Interpretation of the European Convention on Human Rights (Oxford University Press, Oxford, 2007);

Macdonald, Matcher & Petzold (eds), The European System for the Protection of Human Rights (Dordrecht, Martinus Nijhoff, 1993);

Mahoney P., Marvellous Richness of Diversity or Invidious Cultural Relativism?, Hum. RTS. L.J. 19 (1998);

Middeldorp *et al*., Selective feticide in monoamniotic twin pregnancies by umbilical cord occlusion and transection, Fetal Diagn Ther. (2008) 23(2);

Neuman G., Human Rights and Constitutions in a Complex World, The Irish Jurist (2013) 50(2), p.1;

Ní Aoláin F., The Emergence of Diversity: Differences in Human Rights Jurisprudence, Fordham Int'l L.J. (1995) 19, p. 100;

Nolte G., General Principles of German and European Administrative Law – A Comparison in Historical Perspective, Modern Law, The Modern Law Review (1994) 57 (2), p. 191.

Paris M., Paving The Way: Adjustments of Systems and Mutual Influences Between the European Court of Human Rights and European Union Law Before Accession, The Irish Jurist (2014) 51(1), 59;

Puppinck Dr G., Abortion and the European Convention on Human Rights, IJLS (2013) 3(2), 142;

Saul M., The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments, Hum. Rts. L. Rev. (2015), 1;

Shany Y., Toward a General Margin of Appreciation Doctrine in International Law?, EJIL (2005) 16, 907;

Smyth C., Late Stage Abortion for Foetal Abnormality and Euthanasia: Two Sides of the Same Coin? – Part II, Irish Law Times (2012) 30, 259;

Stefan S., Rational Suicide, Irrational Laws: Examining Current Approaches to Suicide in Policy and Law (Oxford University Press, Oxford, 2016);

Wolfrum, Stoll, Kariser, WTO: Institutions and Dispute Settlement (Brill, Leiden, 2006).

- **List of Documents**

Council Directive 1998/44/EC of 6 July 1998 on legal protection of biotechnological inventions, OJ 1998, L 213/13. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998L0044&from=EN (6 June 2016);

Dyson (Lord Dyson), 2014, The Extraterritorial Application of the ECHR: Now on a Firmer Footing, But is it a Sound One?, 30 January, University of Essex;

Feehan C., "Right to Die" MS Sufferer Marie Fleming Has Passed Away, Irish News, 20 December 2013 2013. Available at http://www.independent.ie/irish-news/right-to-die-ms-sufferer-marie-fleming-has-passed-away-29855136.html (6 June 2016);

Hoffman (Lord Hoffman), 2009, The Universality of Human Rights, 18 March, Judicial Studies Board Annual Lecture;

Spielmann, D. 2013 Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?, 13 December, Max Planck Institute for Comparative Public Law and International Law, Heidelberg available at: http://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf (6 June 2016);

Report of the Commission on Assisted Dying (Magdalen House, London, 2011), available at http://www.demos.co.uk/files/476_CoAD_FinalReport_158x240_I_web_single-NEW_.pdf?1328113363 (6 June 2016).

## List of Cases

- **International**

### Inter-American Court of Human Rights

- Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84, Inter-American Court of Human Rights (IACrtHR), 19 January 1984.
- Bronstein v Peru, Ivcher Bronstein v Peru, Merits, reparations and costs, IACHR Series C No 74.
- Canese v Paraguay, Canese Krivoshein v Paraguay, Merits, reparations and costs, IACHR Series C No 111.
- Herrera-Ulloa v Costa Rica, Herrera Ulloa v Costa Rica, Preliminary Objections, Merits, Reparations and Costs, IACHR Series C No 107.

### International Court of Justice

- Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I. C. J. Reports 2004, p. 12.
- Gabčíkovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7.
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136.
- Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.
- Oil Platforms (Zslamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports 2003, p. 161.
- LaGrand (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p. 466.

### International Tribunal for the Law of the Sea

- Camouco (Panamana v France), Prompt Release, Judgment, ITLOS Reports 2000, Dissenting Opinion of Judge Anderson and Dissenting Opinion of Judges Wolfurn.

- Volga (Russian Federation v. Australia), Prompt Release, Judgment, ITLOS Reports 2002, Separate Opinion of Judge Cot.

**United Nations Human Rights Committee**

- Bryhn v Norway, Communication No. 789/1997, U.N. Doc CCPR/C/67/D/789/1997 (1999).
- Guerrero v Colombia Human Rights Committee, Decisions, U.N. Doc. CCPR/C/15/D/45/1979 (1982).
- Hertzberg, Uit Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA (Organization for Sexual Equality) v. Finland, Communication No. R.14/61, U.N. Doc. Supp. No. 40 (A/37/40).
- Länsman et al. v. Finland, Communication No. 1023/2001, U.N. Doc. CCPR/C/83/D/1023/2001 (2005).
- Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).
- VDA & LMR v Argentina, Communication No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
- Vjatšeslav Borzov v. Estonia, Communication No. 1136/2002, U.N. Doc. CCPR/C/81/D/1136/2002 (2004).

**World Trade Organisation**

- Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515.
- Decision by the Arbitrators, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V, p. 2237.
- European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243.

- United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475).
- United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837.
- United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11.

➢ **European**

**Court of Justice of the European Union**

- Amministrazione delle finanze dello Stato / Simmenthal, C-106/77, ECLI:EU:C:1978:49.
- Commission v Germany, C-249/86, ECLI:EU:C:1989:204.
- Conegate Limited v HM Customs & Excise, Case C-121/85, ECLI:EU:C:1986:114.
- Costa v E.N.E.L, Case 6/64, ECLI:EU:C:1964:66.
- Criminal proceedings against Sebat Ince, C‑336/14, ECLI:EU:C:2016:72.
- Criminal proceedings against X., C-74/95, ECLI:EU:C:1996:491.
- H.M. Customs and Excise v. Gerhart and Jörg Schindler, Case C-275/92, ECLI:EU:C:1994:119.
- Hauer v Land Rheinland-Pfalz, C-44/79, ECLI:EU:C:1979:290.
- Hoechst AG v Commission of the European Communities, C-46/87 and C-227/88, ECLI:EU:C:1989:337.
- Grant v South-West Trains, C-249/96, ECLI:EU:C:1998:63.
- Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, C-415/05, ECLI:EU:C:2008:461.
- Läärä, Oy Transatlantic Software Ltd v Finnish State, ECLI:EU:C:1999:435.
- Oliver Brüstle v Greenpeace e.V, C‑34/10, ECLI:EU:C:2011:669.
- Omega Spielhallen- und Automatenaufstellungs-GmbH v Germany, C-36/02, ECLI:EU:C:2004:614.
- Opinion of the Court of 28 March 1996, (2/94) ECLI:EU:C:1996:140.

- Opinion of The Court of 18 December 2014, 2/13, ECLI:EU:C:2014:2454.
- Parti écologiste "Les Verts" v European Parliament, C-294/83, ECLI:EU:C:1986:166.
- Procureur du Roi v Benoît and Gustave Dassonville, C-8/74, ECLI:EU:C:1974:82.
- Questore di Verona v Diego Zenatti, C-67/98 , ECLI:EU:C:1999:514.
- Regina v Bouchereau, C-30/77 , ECLI:EU:C:1977:172.
- Regina v Henn and Darby, Case C-34/79, ECLI:EU:C:1979:295.
- Rewe v Bundesmonopolverwaltung für Branntwein, C-120/78, ECLI:EU:C:1979:42.
- Stauder v City of Ulm, C-29/69, ECLI:EU:C:1969:57.
- Stoß & Ors v. Land Baden‑Württemberg, Joined Cases C‑316/07, C‑358/07 to C‑360/07, C‑409/07 and C‑410/07, ECLI:EU:C:2010:504
- Van Duyn v Home Office, C-41/74, ECLI:EU:C:1974:133.
- Van Gend en Loos v. Nederlandse Administratie der Belastingen, C-26/62, ECLI:EU:C:1963:1.
- Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim, C‑409/06, ECLI:EU:C:2010:503.

**European Court of Human Rights**

<u>The margin of appreciation:</u>

- A, B and C v. Ireland [GC], no. 25579/05, ECHR 2010.
- Alajos Kiss v. Hungary, no. 38832/06, 20 May 2010.
- Animal Defenders International v. the United Kingdom [GC], no. 48876/08, ECHR 2013.
- Brannigan and McBride v. the United Kingdom, 26 May 1993, Series A no. 258-B.
- Buckley v. the United Kingdom judgment of 25 September 1996, Reports of Judgments and Decisions 1996-IV.
- Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (merits), 23 July 1968, Series A no. 6.
- Dickson v. the United Kingdom [GC], no. 44362/04, ECHR 2007-V.
- Greece v. the United Kingdom, no. 176/56, 2 June 1956, Yearbook 2, 182.
- Handyside v. the United Kingdom, 7 December 1976, Series A no. 24.

- Hatton and Others v. the United Kingdom [GC],no. 36022/97, ECHR 2003-VIII.
- Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, ECHR 2005-IX.
- Ireland v. the United Kingdom, 18 January 1978, Series A no. 25.
- Lawless v. Ireland, Commission report of 19 December 1959, B (1960-61), judgment of 1 July 1961, A 3.
- Mouvement raëlien suisse v. Switzerland [GC], no. 16354/06, ECHR 2012.
- Murphy v. Ireland, no. 44179/98, ECHR 2003-IX.
- Ochensberger v. Austria, no. 21318/93, 18 EHRR CD 170.
- Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-III.
- Rasmussen v. Denmark, 28 November 1984, Series A no. 87.
- Z v. Finland, 25 February 1997, Partly Dissenting Opinion of Judge De Meyer, III, Reports of Judgments and Decisions 1997-I.

The Right to life:

- A, B and C v. Ireland [GC], no. 25579/05, ECHR 2010.
- Andreou v. Turkey, no. 45653/99, 27 October 2009.
- Boso v. Italy (dec.), no. 50490/99, ECHR 2002-VI.
- Brüggeman and Scheuten v. Germany, no. 6959/75, 12 July 1977, Decisions and Reports 10, p.100.
- Giuliani and Gaggio v. Italy [GC], no. 23458/02, ECHR 2011.
- Gross v. Switzerland, no. 67810/10, 14 May 2013.
- Gross v. Switzerland [GC], no. 67810/10, ECHR 2014.
- Haas v. Switzerland, no. 31322/07,ECHR 2011.
- L.C.B. v. the United Kingdom, 9 June 1998, Reports of Judgments and Decisions1998-III.
- Lambert and Others v. France [GC], no. 46043/14, ECHR 2015.
- Makaratzis v. Greece [GC], no. 50385/99, ECHR 2004-XI.
- McCann and Others v. the United Kingdom, 27 September 1995, Series A no. 324.
- Nachova and Others v. Bulgaria [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII.
- Norris v. Ireland, 26 October 1988, Series A no. 142.
- Nicklinson and Lamb v. the United Kingdom, no.1787/15, no. 2478/15, 23 June 2015.

- Open Door and Dublin Well Woman v. Ireland, 29 October 1992, Series A no. 246-A.
- Osman v. the United Kingdom, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.
- P. and S. v. Poland, no. 57375/08, 30 October 2012.
- Paul and Audrey Edwards v. the United Kingdom, no. 46477/99, ECHR 2002-II.
- Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-II.
- R.H v. Norway, 19 May 1992, Series A no. 237-A.
- R.R. v. Poland, no. 27617/04, ECHR 2011.
- S.H. and Others v. Austria, no. 57813/00, 1 April 2010.
- Şandru and Others v. Romania, no. 22465/03, 8 December 2009.
- Seidova and Others v. Bulgaria, no. 310/04, 18 November 2010.
- Streletz, Kessler and Krenz v. Germany [GC], nos. 34044/96, 35532/97 and 44801/98,ECHR 2001-II.
- Tyrer v. the United Kingdom, 25 April 1978, Series A no. 26.
- Tysiąc v. Poland, no. 5410/03, ECHR 2007-I.
- Vo v. France [GC], no. 53924/00, ECHR 2004-VIII.
- Wasilewska and Kałucka v. Poland, nos. 28975/04 and 33406/04, 23 February 2010.
- X. v. Austria, no. 7045/75, Decisions and Reports 7, 87.
- X. v. Norway, no. 867/60, Collection 6, p. 34Yearbook 4, 270.
- X v. United Kingdom, no-8416/79, Decisions and Reports 19, p- 244.

Admissibility Criteria:

- Akdivar and Others v. Turkey, 16 September 1996, Reports of Judgments and Decisions 1996-IV.
- Beer and Regan v. Germany [GC], no. 28934/95, 18 February 1999.
- Knudsen v. Norway, no. 11045/84, 8 March 1985, Yearbook 28, 129.
- Bosphorus v. Ireland [GC], no. 45036/98, ECHR 2005-VI.
- Bowman v. the United Kingdom, 19 February 1998, Reports of Judgments and Decisions 1998-I.
- Burden v. the United Kingdom [GC], no. 13378/05, ECHR 2008.

- CFDT v. European Communities, no. 8030/77, 10 July 1978, DR 13 p. 231.
- D.H. and Others v. the Czech Republic [GC], no. 57325/00, ECHR 2007-IV.
- Eckle v. Germany, 15 July 1982, Series A no. 51.
- Egeland and Hanseid v. Norway, no. 34438/04, 16 April 2009, Concurring Opinion of Judge Rozakis.
- Hornsby v. Greece (Article 50), 1 April 1998, Reports of Judgments and Decisions 1998-II.
- Ireland v. the United Kingdom, 18 January 1978, Series A, no. 25.
- Johnston and Others v. Ireland, 18 December 1986, Series A no. 112.
- Kadlec and Others v. the Czech Republic, no. 49478/99, 25 May 2004.
- Klass and Others v. Germany, 6 September 1978, Series A no. 28.
- M & Co v Germany, no.13258/87 9 February 1990. Decisions and Reports 64, 138.
- Matthews v. the United Kingdom [GC], no. 24833/94, ECHR 1999-I.
- Nielsen v. Denmark, no. 343/57, 2 September 1959, Yearbook 2, 412.
- Norris v. Ireland, 26 October 1988, Series A no. 142.
- Open Door and Dublin Well Woman v. Ireland, 29 October 1992, Series A no. 246-A.
- Pafitis and Others v. Greece, Judgment of 26 February 1998, Reports 1998-I.
- Paton v. the United Kingdom no. 8416/78, (1981) 3 EHRR 408.
- Prince Hans Adam II of Liechtenstein v. Germany [GC], no. 42527/98, ECHR 2001-VIII.
- Procola v. Luxembourg, Judgment of 28 September 1995, Series A no. 326.
- Van de Hurk v. the Netherlands, Judgment of 19 April 1994, Series A no. 288.
- Vučković and Others v. Serbia (preliminary objection) [GC], nos. 17153/11 and 29 others, 25 March 2014.
- Waite and Kennedy v. Germany [GC], no. 26083/94, ECHR 1999-I.
- Ringeisen v. Austria, 16 July 1971, Series A no. 13.
- S.A. Dangeville v. France, no. 36677/97, ECHR 2002-III.
- S.H. and Others v. Austria [GC], no. 57813/00, ECHR 2011.
- X. v. Austria, no. 7045/75, Decisions and Reports 7, 87.
- X v. Germany, no. 235/56, 10 June 1958, Yearbook 2, p. 256.

- X v. Norway, no. 867/60, Collection 6, p. 34Yearbook 4, 270.

**European Committee on Social Rights**

- ESC Decisions on the merits: Federation of Catholic Families in Europe (FAFCE) v. Sweden, Complaint No. 99/2013.

➢ **National Courts**

**Germany**

- Re Wünsche Handelsgesellschaft (22 October 1986) BVerfGE, [1987] 3 CMLR 225.

**Ireland**

- A Ward of Court (withholding medical treatment) (No. 2) [1996] 2 IR 73.
- Fleming v Ireland [2013] 2 I.L.R.M. 9 [2013] IESC 19.
- McGee v. A.G. & Anor [1973] IESC 2[1974] IR 284.
- P.P -v- Health Service Executive [2014] IEHC 622.

**The Netherlands**

- Postma Case Criminal Court Ruling, Leeuwarden 1973 no.183, Schoonheim, Nederlandse Jurisprudentie 1985 no. 106.
- Prins case Nederlandse Jurisprudentie 1996 no. 113.
- Kadij case Tijdschrift voor Gezondheirsrecht 1996 no. 35.

**The United Kingdom**

- Airedale NHS Trust v. Bland [1993] AC 789.
- Ms B v An NHS Hospital Trust, [2002] All ER 449.
- Osborn -v- The Parole Board, [2013] UKSC 61.

- Purdy, Regina (on the Application of) -v- Director of Public Prosecutions 4 All ER 1147.
- St George's Healthcare NHS Trust v S, [1998] 2 WLR 936.