

THE MARGIN OF APPRECIATION, CONSENSUS, MORALITY AND THE RIGHTS OF THE VULNERABLE GROUPS

Dr. sc. Ivana Radačić, viši asistent
Institut društvenih znanosti Ivo Pilar
Zagreb

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Sažetak

POLJE SLOBODNE PROCJENE, KONSENZUS, MORAL I PRAVA RANJIVIH SKUPINA

Doktrina polja slobodne procjene jedna je od najkontraverznijih kreacija Europskog suda za ljudska prava, koja po mišljenju mnogih znanstvenika ometa razvoj univerzalnih standarda ljudskih prava. Sud je najčešće koristi kako bi se pozvao na mišljenje državnih vlasti o tomu što zaštita konvencijskih prava zahtijeva, kada ne postoji konsenzus, ili kada se vlasti pozivaju na zaštitu morala kao razlog za miješanje u konvencijska prava.

U ovom se članku kritizira takva upotreba doktrine, analizom interpretacije konsenzusa i morala u praksi Suda. Autorica tvrdi da pozivanje na mišljenje države u slučajevima kada ne postoji zajednički pristup među državama članicama ili kada se relevanto pitanje tiče (seksualnog) "morala", predstavlja zapreku za učinkovitu zaštitu prava ranjivih skupina, jer je uvjetuje prihvatanjem od strane većine država, odnosno većine unutar države. Autorica smatra da Sud ne bi trebao davati državama polje slobodne procjene da odluče o tomu koje standarde Konvencija nameće, već samo kako implementirati te standarde. Kod određivanja standarda, Sud bi se trebao voditi vrijednostima ravnopravnosti, autonomije i dostojanstva, a ne konsenzusom, što pretpostavlja traganje i osporavanje isključenosti i nepovoljnosti.

Ključne riječi: *polje slobodne procjene, konsenzus, moral, prava ranjivih skupina.*

1. Introduction

The doctrine of the margin of appreciation is one of the most controversial developments of the European Court of Human Rights. It has been criticised widely as a means of preventing development of universal human rights standards.¹ The Court has most often used the doctrine to defer to the state's judgment on what the protection of Convention rights require where it finds no consensus on the issue, or where the government invokes the protection of morality as the reason for interference with Convention rights, in which cases the Court simply declares that there is no consensus on moral issues.

In this article the author criticises such a use of the doctrine, examining the ways consensus and morals that have been interpreted by the Convention organs. It will be argued that deference to the state's judgment when there is a lack of a common approach among the member states on the relevant issue, or when the issue concern (sexual) 'morality' presents an obstacle for the effective protection of Convention rights, particularly the rights of vulnerable groups,² as it conditions the protection of (their rights) with the acceptance by the majority of the states or the majority within the state. Furthermore, it will be argued, that the Court should never give the states the margin of appreciation to decide what standards the Convention imposes, but only in respect of how to implement these standards. In determining the standard, the Court should be guided by the values of autonomy, equality and human dignity, on which international human rights law is based,³ rather than on the question of consensus. When the rights of vulnerable groups are at issue, the questions of exclusion and disadvantage need to be addressed, namely, 1. whether the interests and perspectives of the vulnerable groups are omitted or misrepresented in the challenged norm or policy; 2. whether the omission or misrepresentation produces or perpetuates the disadvantage of these groups, and 3. how to change the norm or policy so as not to perpetuate or produce exclusion and disadvantage.⁴

1 E Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1998-1999) 31 *New York University Journal of International Law and Politics* 843; G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 4 *Oxford Journal of Legal Studies* 705; Lord Lester of Herne Hill, 'Universality versus Subsidiarity: A Reply' (1998) *European Human Rights Law Review* 73.

2 In this category I place national, racial and sexual and gender minorities such as Roma, homosexuals, transsexuals, as well as politically less powerful groups, such as women.

3 See the Preamble of Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), and note that the European Convention on Human Rights was adopted as the first step for the collective enforcement of rights protected by the Declaration (as proclaimed in Preamble of the European Convention European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No 005, 213 UNTS 221 (ECHR)).

4 These questions are built upon the main feminist method of asking the 'woman question'. For the 'woman question' see K Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829.

2. *Justification and the meaning of the doctrine*

The doctrine of the margin of appreciation is an expression of the principle of subsidiarity, which is one of the main interpretative principles of the Convention.⁵ While this principle, as reflected in Articles 1 and 35 of the Convention, refers to a procedural priority of domestic over international enforcement of human rights,⁶ it was given a more extensive meaning by the Convention organs. The Convention organs have advocated the idea that national authorities have a normative priority over international authorities. In other words, they have held that state organs have a greater legitimacy or are better placed than an international body to decide on human rights issues 'due to their direct and continuous contact with vital forces of their society.'⁷ This normative conception of subsidiarity has led to the development of the doctrine of the margin of appreciation.⁸

In addition to the principle of subsidiarity, the democratic principle of separation of powers, according to which the Court has to exercise restraint in interpreting the Convention, so as not to overtake the task of elected representatives and thus undermine the principles of democracy, has been frequently invoked as a justification of the doctrine.⁹ Finally, the doctrine of the margin of appreciation has been seen as necessary to protect the values of cultural diversity of the European countries.¹⁰ However, as will be shown below, deferring to the state's judgement when there is no consensus or in cases concerning the protection of morals undermines, rather than enhances, these goals.

The doctrine of the margin of appreciation has not been applied in a consistent manner. Most frequently it has been used as a tool of limiting the Court's power of review in light of its role as an international court. When the Court uses the doctrine in this manner, it either simply defers to the judgment of the national authorities, or it relies on their judgment heavily but not exclusively. In addition to the use of the doctrine as a tool of limiting the scope of the Court's review, the Court has on occasions

5 The other two are the principle of effectiveness and the principle of balancing between individual rights and communal interests.

6 Principle of subsidiarity, as reflected in Articles 1, 13 and 35 of the Convention, means both that the states have the obligation to secure the Convention rights within their domestic sphere and that they must be given the opportunity to redress any individual violations of the Convention rights before they are brought before an international tribunal.

7 *Handyside v UK* (App no 5493/72) (1976) Series A no 24.

8 The distinction between procedural and normative concept of subsidiarity can be traced to G Letsas, *A Study on the Interpretation of the European Convention on Human Rights* (PhD thesis, UCL 2005).

9 P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57. For a critique see E Benvenisti, *supra* note 1.

10 P Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism' (1998) 19 *Human Rights Law Journal* 1; E Brems 'The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights' (1996) 56 *Zeitschrift Fur Ausländisches Öffentliches Recht Und Völkerrecht* 240.

used the doctrine to express its opinion on the balance between the individual rights and communal interests,¹¹ in which cases the principle of proportionality has played a prominent role.¹² The Court, thus, sometimes refers to the margin of appreciation after undertaking review, in a conclusion on whether a right was violated, stating that a right has been violated if the state overstepped the margin,¹³ or that it was not because the state acted within the margin.¹⁴ This inconsistent approach has been criticised by many commentators, who have described the doctrine as ‘a substitute for coherent legal analysis of the legal issues at stake’,¹⁵ and as a ‘tool of avoiding responsibility to articulate reasons for ... decisions.’¹⁶

3. Development and the use of the doctrine of the margin of appreciation

The doctrine of the margin of appreciation was first developed in the context of Article 15 (the derogation clause). The Court has been reluctant to review whether derogation of the Convention rights is justified, on the basis that national authorities are ‘better placed’ to assess the exigencies of a particular situation.¹⁷ Outside of this context, the doctrine has been applied most often in assessing the necessity of interference with the qualified rights,¹⁸ as well as Article 14 (non-discrimination norm),¹⁹ and in assessing the existence and the scope of positive obligations. In other words, the doctrine has been applied whenever a balancing of interests between individual rights and the community interest was involved. In addition, the doctrine

11 Letsas terms such a use of the doctrine as a substantive concept of the margin of appreciation, which addresses the relationship between individual rights and collective goals. He differentiates this concept from what he calls the structural concept of the margin, which refers to the use of the margin as a tool limiting the scope of the Court’s review, in light of its role as an international court. Letsas, *supra* note 1.

12 Arai-Takashi defines the doctrine as the other side of the principle of proportionality. Z Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002).

13 *Van Kück v Germany* (App no 35968/97) ECHR 2003-VII, paras 84-85.

14 *Janowski v Poland* [GC] (App no 25716/94) ECHR 1999-I, para 35; *Evans v UK* [GC] (App no 6339/05) ECHR 2007-.

15 Lord Lester of Herne Hill, *supra* note 1.

16 RStJ Macdonald, ‘The Margin of Appreciation’ in F Matscher and H Petzolds (eds), *The European System for Protection of Human Rights* (Martinus Nijhoff, The Hague 1994).

17 *Greece v UK* (App no 176/56) (1959) 2 Yearbook 174, 176 (EComHR).

18 Qualified rights are rights which contain what can be termed ‘general public interests limitations’, allowing states to interfere with rights in pursuit of other legitimate purposes, primarily of a collective nature (examples of which are listed in a non-exhaustive manner), provided that interference is in accordance with law and necessary in democratic society. The most well-known qualified rights are those contained in Articles 8 to 11 of the ECHR.

19 Under this article, different treatment of individuals in analogous situations (or same treatment of individuals in significantly different situations) can be justified provided there is objective and reasonable justification.

has been applied in interpreting certain vague Convention terms such as ‘persons of unsound mind’ in Article 5(1)(e) (right to liberty and security), as well as in cases involving the discretion of national authorities in an assessment of facts, such as an assessment of evidence in the context of Article 6 (right to a fair trial) of the Convention.

The Court extensively articulated the doctrine for the first time in *Handyside v UK*.²⁰ In that case the Court examined whether the applicant’s conviction for disseminating an ‘obscene’ publication and the confiscation of copies of the publication in question (a book of a liberal outlook containing information on sexual and other issues intended for children and adolescents) were necessary in a democratic society for the protection of morals within the meaning of Article 10(2) (freedom of expression). In reviewing the necessity of these restrictions the Court held:

*by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of moral] as well as on the ‘necessity’ of a ‘restriction’ and ‘penalty’ ... intended to meet them ... Consequently, Article 10(2) leaves to the Contracting States a margin of appreciation.*²¹

The Court continued to explain that the margin of appreciation is not unlimited:

*The Court, which is, together with the Commission, responsible for ensuring the observance of those States engagements, is empowered to give the final ruling on whether the ‘restriction’ is reconcilable with the freedom of expression protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.*²²

However, despite this qualification, the Court simply deferred to the state’s judgment on how moral is to be defined and what measures can legitimately be taken in order to protect it, on the basis that there was no uniform conception of morality in the member states. This is the Court’s general approach: when it decides that the margin should be wide, it defers to the state’s judgment, and finds no violation of the Convention.

4. Factors influencing the width of the margin of appreciation

The width of the margin of appreciation depends on a number of factors: the nature of the right in question; the nature of the activities in question and their importance for the individual; the nature of the aims pursued and whether they

20 *Handyside v UK*, supra note 7.

21 *Ibid*, para 48.

22 *Ibid*, para 49.

concern general social and economic policies; the nature of the duty; the text of the Convention; the surrounding circumstances; and the existence of common grounds among member states, or in comparative or international law, or in public opinion.²³ The margin is generally narrower in the following circumstances: where the right is fundamental for democracy and the rule of law (such as freedom of expression, freedom from discrimination on the basis of sex and race, right to respect most fundamental aspects of private life, such as physical and moral integrity),²⁴ where the activity is of the most intimate nature (such as sexual activity); and where there is consensus on the issue.

On the other hand, it is generally wider when property rights are at issue; when the restrictions pursue the aims of the protection of national security, morality or religious feelings of others; where socio-economic policies, including planning policies are at issue; where positive obligations that would impose significant burdens on the community are at issue; and where there is a lack of consensus on the issue. The most relevant factor seems to be the existence or non-existence of consensus.

5. Consensus

Consensus is one of the main interpretative tools of the Court, connected both to the doctrine of the margin of appreciation and to the evolutive interpretation.²⁵ In deciding what present-day developments require in terms of interpreting Convention rights and whether the margin given to the state should be narrow or wide, the Court generally, looks at whether a consensus exists on the issue in question. However, what constitutes a consensus is not defined in a consistent manner.²⁶

Most often the Court looks at the practices of the member states to determine the existence of a consensus.²⁷ Where the Court finds divergence in approaches among member states, it usually leaves the state a wide margin of appreciation and finds

23 See E Brems, *Human Rights: Universality and Diversity* (Kluwer Law International, The Hague 2001) 357-380; P van Dijk and GJH van Hoff, 'The margin of appreciation' in *Theory and Practice of the European Convention on Human Rights* (Kluwer Law International, The Hague 1998) 82-97.

24 There is no margin with respect to negative obligations under unqualified rights, and a very narrow margin with respect of positive obligations under these rights. See for example *Siliadin v France* (App no 73313/01) ECHR 2005-; *MC v Bulgaria* (App no 39272/98) ECHR 2003-VII.

25 Evolutive interpretation is an expression of the principle of effectiveness, according to which the Convention is a living instrument to be interpreted in light of present-day requirements. See *Tyrer v UK*, (App no 5856/72) (1978) Series A no 26, where the approach was first expounded.

26 Helfer identifies three distinct factors on which the Convention organs have relied in determining consensus: legal consensus, evidenced by the domestic law, international treaties or regional legislation; expert consensus; and European public consensus. LR Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 *Cornell International Law Journal* 133.

27 *Dudgeon v UK* (App no 7525/76) (1981) Series A no 45; *Rees v UK* (App no 9532/81) (1986) Series A no 106; *Cossey v the UK* (App no 10843/84) (1990) Series A no 184; *Sheffield and Horsham v UK* (App nos 22985/93 and 23390/94) ECHR 1998-V.

no violation of the Convention, sometimes even when there is a directly relevant international instrument on the issue.²⁸ For example, in *Chapman v UK*, in which the applicants, travellers, challenged the refusal of planning permissions to station caravans on the land they owe, the Court gave states a wide margin of appreciation, due to a lack of a common approach, despite the existence of a number of international documents... 'imposing obligations to protect special needs of minorities and their security, identity and lifestyle and improve housing situation of Roma'.²⁹ The Court held that 'emerging international consensus' is not 'sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting states consider desirable in any particular situation'.³⁰ Similarly, in *Frette v France*, where the applicant challenged a refusal of authorisation to adopt, which he claimed was based on his homosexual lifestyle, the Court left state a wide margin of appreciation in light of a lack of a common approach among member states on the issue of homosexual adoption, despite the existence of international instruments prohibiting discrimination on the grounds of sexual orientation.³¹

Sometimes, however, the Court looks at progressive developments in comparative and international law as an indication of a consensus. For example, in *Marckx v Belgium*, the case challenging a failure to automatically recognise in law the ties between a mother and a child born out of wedlock, the Court looked at the developments in international law in respect of distinguishing between 'legitimate' and 'illegitimate' children to define the standard of treatment.³² In light of these developments, the Court narrowed the state's margin, even though the conventions it referred to were only ratified by a few member states at the time of the judgment.³³ Similarly, in the case of *Siliadin v France*, which challenged a lack of adequate criminal provisions prohibiting domestic servitude, the Court held that effective deterrence requires criminalisation of acts prohibited by Article 4, referring to standards imposed by ILO and UN conventions, even though none of the member states has criminalised specifically slavery and domestic servitude,³⁴ at the time in question.

28 *Chapman v UK* [GC] (App no 27238/95) ECHR 2001-I. See also *Coster v UK* [GC] (App no 24876/94) ECHR 18 January 2001; *Jane Smith v UK* [GC] (App no 25154/94) ECHR 18 January 2001; *Lee v UK* [GC] (App no 25289/94) ECHR 18 January 2001; *Beard v UK* [GC] (App no 24882/94) ECHR 18 January 2001.

29 *Ibid.*, para 39.

30 *Ibid.*

31 *Frette v France*, (App no 36515/97) ECHR 2002-I. The Court's approach to adoption of children by homosexuals has changed in *E.B. v France* [GC] (App no 43546/02) ECHR 2008-, where there was no reference to the margin of appreciation.

32 *Marckx v Belgium* (App no 6833/74) (1979) Series A no 31.

33 Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children; The European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock. *Ibid.*, para 41.

34 *Siliadin v France* (App no 73313/01) ECHR 2005. The Court looked at the Forced Labour Convention; the Supplementary Convention on the Abolition of Slavery and Slave Trade and Institutions and Practices Similar to Slavery; and the Convention on the Rights of the Child (para 51).

Yet sometimes the Court refers to the ‘evolution of social attitudes’ as an indication of a consensus.³⁵ For example, in *MC v Bulgaria*, a case challenging ineffectiveness of rape laws and prosecutorial practices, the Court held that the evolution of social attitudes towards equality of sexes requires that every form of non-consensual sex is criminalised as rape, including cases where the victim does not physically resist, although not many member states have taken this approach.³⁶

Finally, in some cases the Court simply states that there is no consensus without analysing the practices of member states or international law. This is generally the approach in cases where rights interfere with the aim of the protection of morals. In such cases the Court simply declares that there is a lack of a common conception of morals, without analysing the practices of member states or international and comparative law standards on the issue in question.³⁷

Thus, the Court’s approach to determining consensus and likewise to the application of the doctrine of the margin of appreciation has not been consistent. It is difficult to discern the factors that influence the Court’s approach.³⁸ The Court has not consistently defined consensus even in respect of the same subject matters. This is best exemplified in a series of ‘transsexual cases’ against the UK challenging its failure to recognise in law the post-operative sex of a transsexual.³⁹ In the first such case, *Rees v UK*, the Court gave the state a wide margin of appreciation in light of ‘little common ground between the Contracting States in this area’ and found no violation of the Convention.⁴⁰ Four years later in *Cossey*, the Court noted new developments in the member states and international law since the *Rees* judgment (focusing in particular on the Resolution on Discrimination against Transsexuals adopted by the Parliamentary Assembly of the Council of Europe and Recommendation 1117 on the Conditions of Transsexuals adopted by the Committee of Ministers).⁴¹ However, it held that these instruments reveal ‘the same diversity of practice among member states’ and accordingly that ‘it cannot at present be said that a departure from the Court’s earlier decision is warranted in order to ensure that the interpretation of Article 8 on the point at issue remains in line with present-day conditions’.⁴² The Court however noted that ‘since the Convention always has to be interpreted and applied in the light of current

35 In cases where emphasis is placed on ‘changing social conditions’, the Court may or may not look in addition at the laws and practices of the member states and international developments.

36 *MC v Bulgaria* (App no 39272/98) ECHR 2003-VII.

37 These cases are discussed in the subsequent section.

38 A general observation can be made that the Court is less concerned with the lack of a common approach in cases involving obligations to protect women from violence, than in those involving reproductive or sexual rights (as these implicate ‘morality’).

39 The applicants argued a violation of Articles 8 (right to respect for private and family life, home and correspondence), 12 (right to marry) and 14 (non-discrimination).

40 *Rees v UK*, supra note 27.

41 *Ibid*, para 40.

42 *Cossey v UK*, supra note 27, para 40.

circumstances, it is important that the need for appropriate legal measures in this area should be kept under review'.⁴³ Eight years later, in *Sheffield and Horsham v UK*, the Court, examining a comparative study submitted by Liberty, held:

*The Court is not fully satisfied that the legislative trends ... suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender.*⁴⁴

Holding that 'transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States',⁴⁵ the Court found no violation.⁴⁶

The Court finally changed its approach in *Christine Goodwin v United Kingdom* and *I v United Kingdom*.⁴⁷ In these two almost identical judgments, the Court first noted that it must have regard to 'the changing conditions within the respondent State and within Contracting States generally' and respond to any 'evolving convergence as to the standards to be achieved'.⁴⁸ In a section entitled 'the state of any European and international consensus' the Court argued, referring to a comparative study by Liberty (emphasising in particular the developments in New Zealand and Australia) that there was a 'continuous international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals' that justifies departing from its previous case-law even though there was still 'a lack of common approach as to how to address the repercussions which the legal recognition of a change of sex may entail'.⁴⁹ The Court held that 'the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising' and that in accordance with the principle of subsidiarity the states have a wide margin of appreciation.⁵⁰ However, the margin was given in respect of 'resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status',

43 Ibid, para 42.

44 *Sheffield and Horsham v UK* (supra note 27) para 57.

45 Ibid, para 58.

46 The Court's majority had begun to shift progressively from twelve votes to three in 1986 in *Rees v UK* (supra note 27) to eleven votes to nine in 1998 in *Sheffield and Horsham v UK* (ibid).

47 *Christine Goodwin v UK* [GC] (App no 28957/95) ECHR 2002-VI; *I v UK* [GC] (App no 25680/94) ECHR 11 July 2002. Both judgments were delivered unanimously.

48 *Christine Goodwin v UK* (ibid) para 84.

49 Ibid, para 85.

50 Ibid.

and not in respect of securing the recognition in law of the new gender status.⁵¹

This approach to consensus and the doctrine of the margin of appreciation has a potential for achieving a more inclusive jurisprudence which would respect the rights of the members of vulnerable groups. It shows sensitiveness to the context, and engages in empathic reasoning⁵² that displays an understanding of disadvantage, which is necessary for protecting the rights of disadvantaged groups and addressing discrimination and disadvantage that they face.

In this case, the Court asked the ‘question of exclusion and disadvantage’. It asked whether the challenged measure failed to take into account the perspective of transsexuals, what the effects of the omission are (whether they perpetuate or produce the disadvantage) and how to take the perspective of transsexuals into account. In answering these questions, the Court looked at the progressive developments in international and comparative law which document the disadvantage of transsexuals, rather than conditioning the answer upon the acceptance of the majority of member states.

Such an approach is very important from the perspective of the protection of the rights of vulnerable groups, as in respect of the rights of these groups, a common approach among the member states is usually more slowly developed as opposed to the cases involving classic civil and political rights. However, it has generally not been applied in the cases involving ‘moral issues’, which have most often been the cases concerning sexual and gender mores and reproductive self-determination, i.e. issues which concern the rights of sexual and gender minorities and women.

6. Protection of morals

In cases where rights were interfered with for the protection of morals, or which were seen as involving ‘moral’ issues, the Court has tended to give states a wide margin of appreciation.⁵³ In many of these cases the wide margin was justified on account of the absence of a consensus, even though there was in fact a common

51 Ibid.

52 L Henderson, ‘Legality and Empathy’ (1986-1987) 85 Michigan Law Review 1574

53 In this category of cases we could place cases concerning sexual education: *Handyside v UK* (supra note 7); unconventional homosexual sex activities: *Laskey, Jaggard and Brown v UK* (App nos 21627/93, 21826/93 and 21974/93) ECHR 1997-I; adoption of children by homosexuals prior to *EB v France* (supra note): *Frette v France* (supra note 31) rights of transsexuals in respect to parenting a child conceived by IVF: *X, Y and Z v UK* (App no 21830/93) ECHR 1997-II; and prior to *Christine Goodwin v UK* (supra note 47), recognition of new sex identity of transsexuals and their right to marry (discussed above); as well as reproductive self-determination cases: *X v UK* (also cited as *Patton v UK*) (dec) (App no 8416/78) (1980) 3 EHRR 408 (EComHR); *RH v Norway* (dec) (App no 17004/90) (1992) 73 DR 155 (EComHR); *Boso v Italy* (dec) (App no 50490/99) ECHR 2002-VII; *Open Door and Dublin Well Woman v Ireland* (App nos 14234/88 and 14235/88) (1992) Series A 246-A; *Brüggemann and Scheuten v Germany* (App no 6959/75) (1997) 3 EHRR 244 (EComHR); *Tysiāc v Poland* (App no 5410/03) ECHR 2007-; *D v Ireland* (dec) (App no 26499/02) ECHR 28 June 2006, *Vo v France* [GC] (App no 53924/00) ECHR 2004-VIII.

approach among the member states, or international instruments on the issue.⁵⁴ The approach seems to depend rather on how unconventional the activity in question is (according to the dominant norm): the less conventional it is in view of majority standards, the less likely it is that the Court will find a violation.

In cases concerning women's reproductive self-determination, the Convention organs have consistently held that states enjoy a wide margin of appreciation in regulating terminations of pregnancy on account of there being no consensus in 'such a delicate area'.⁵⁵ In *RH v Norway*, for example, the Commission concluded that there was no consensus on abortion with, national laws on abortion 'differing considerably', even though only a few member states had restrictive abortion laws at the time of the decision.⁵⁶

The Court also found the existence of a common approach among member states to be irrelevant in *Handyside v UK*.⁵⁷ The fact that the book in question circulated freely in most of the member states (as well as in other parts of the UK, except England) did not convince the Court that the margin should be narrower with respect to the UK (and neither did the importance of the freedom of expression for a democratic society). The most important factor which was said to justify the interference was that 'it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals.'⁵⁸ This was also a determinative factor in finding that an interference with the freedom of expression was justified in *Müller and Others v Switzerland*,⁵⁹ *Otto-Preminger-Institut v Austria*,⁶⁰ and *Wingrove v UK*.⁶¹

The lack of a common conception of morals was less relevant in *Dudgeon v UK*, which concerned a challenge to the criminalisation of male homosexual sexual activities in Northern Ireland.⁶² The Court explained that the scope of the margin is affected not only by the nature of the aim of the restriction, but also by the nature of the activities involved. It held that the fact at issue was 'a most intimate aspect of private life', and distinguished this case from the *Handyside*.⁶³ The Court also placed emphasis on the fact that the great majority of the members states did not criminalise such behaviour in finding that there was no pressing social need for doing so in Northern Ireland.

However, in *Laskey, Jaggard and Brown v UK* the Court found the conviction

54 If we take Helfer's classification, in these cases the Court examines European public opinion in order to determine existence or a absence of a consensus: supra note 26.

55 *X v UK*; *RH v Norway*; *Boso v Italy*; *Open Door and Dublin Well Woman v Ireland*; *Brüggemann and Scheuten v Germany*; *Tysiāc v Poland*; *D v Ireland*, *Vo v France*. All cited supra note 53.

56 *RH v Norway* (supra note 53).

57 Supra note 7.

58 *Handyside v UK* (supra note 7) para 49.

59 *Muller v Switzerland* (App no 10737/84) (1988) Series A no 133.

60 *Otto-Preminger-Institut v Austria* (App no 13470/87) (1991) Series A no 295-A.

61 *Wingrove v UK* (App no 17419/90) ECHR 1996-V.

62 *Dudgeon v UK* (App no 7525/76) (1981) Series A no 45).

63 *Ibid*, para 52.

of the applicants for the consensual adult homosexual sadomasochistic sex activities justified as necessary for the protection of health or morals, even though this case also concerned the most intimate aspects of private life.⁶⁴ The Court distinguished this case from *Dudgeon* in that this case concerned activities which inflict physical harm, which the state 'is unquestionably entitled to regulate, through the operation of criminal law'.⁶⁵ The fact that the activities involved willing adults in a private controlled environment and that they did not result in any serious injury⁶⁶ did not convince the Court that the conviction of the applicants might not have been 'necessary in democratic society'.⁶⁷ Moreover, it did not matter that some other non-sexual activities, such as boxing, were not criminalised, which suggests that the determinative factor was their unconventional (homo)sexual nature rather than the harm involved.⁶⁸ The purpose of the criminalisation was the enforcement of conventional sexual morality. The Court affirmed this enforcement, even though the enforcement of this sexual 'morality' through criminalisation of sadomasochistic sex was arguably itself immoral from the perspective of human rights as it punished the applicants for expressing themselves sexually in a way that might be found distasteful by some, but which did not involve violation of other people's rights (as the activities did not harm anyone who did not consent to them).⁶⁹ Thus, the Court failed to ask the 'question of exclusion and disadvantage.'

While the Court might have feared legitimately to impose 'sexual morals' in terms of appropriate sexual behaviour, in cases where it has deferred to the state's concept of morals, the Court has actually imposed a dominant concept of morality

64 *Laskey, Jaggard and Brown v UK* (supra note 53).

65 *Ibid*, para 43.

66 The Court found it relevant that they *might* have caused serious injury. This is contrary to the Court's general approach in which it limits its role to the assessment of the facts of the cases, defining its task as narrowly as possible.

67 The Court has even expressed doubt about whether it could be held that the activities belong to the sphere of private life, since the activities involved a number of people, the recruitment of new 'members', the provision of several specially equipped chambers, and the shooting of many videotapes which were distributed among the 'members'. It did not examine the question further since it was not disputed by the parties that the activities fell within the scope of 'private life'.

68 The applicants also argued that they were singled out for prosecution because they were homosexuals and supported this claim by the judgment in *R v Wilson* [1996] CrAppR 241 (CA) where the similar behaviour of heterosexual married couple was not considered to merit criminal punishment. The Court simply dismissed this argument. For a comparison of these cases, see M Weait, 'Harm, Consent and the Limits of Privacy' (2005) 13 *Feminist Legal Studies* 97. In addition to this claim of differential application of the law, another claim of discrimination on the basis of sexual orientation could be made. It could be argued that criminalisation of sadomasochistic sex constitutes indirect discrimination on the grounds of sexual orientation, since much more homosexuals than heterosexuals engage in such sexual practices. A measure which has discriminatory effect should not be justified on account of the protection of morals. It is difficult to see how public morals are served by discriminating against the minority.

69 See C Nowlin, 'The Protection of Morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2002) 24 *Human Rights Quarterly* 264.

enforced by the majority against the minority,⁷⁰ a morality which justifies the infringement of human rights of those who do not accept it. This is contrary to the Court's role as a human rights institution. Moreover, it is also contrary to the goal of preserving cultural diversity, as it undermines cultural diversity within the country. Finally, deferring to the state's concept of morals in situations like these, might undermine rather than enhance democracy, as the minority against whom the 'morals' are enforced usually does not have an effective voice in the political processes.⁷¹

Hence, the Court should not automatically defer to the concept of morality defined by the state, or by a majority of the states, but should define morality in accordance with the values of the Convention (in particular the values of autonomy, equality and human dignity). As argued by Nowlin, 'where no harm to others is involved and the harm to participants is consensual, the basic human right to determine one's "self", or the ... right of individual to "live his or her life as he or she may choose", cannot be restricted in the name of legal moralism.'⁷² Reference in the Convention to protecting public morals should thus be construed to mean respect for the moral rights of others.⁷³ The freedom to express one self could thus be legitimately interfered with only when the exercise of this freedom violates the rights of others, and not on account of majoritarian preferences. This is the morality that the Court should endorse, as it is consistent with the idea of universal human rights based on the principles of autonomy, equality and human dignity.

7. Conclusion

The Court is a human rights institution whose task is to secure the respect for minimum standards which protect human dignity, autonomy, and equality of all people under the jurisdiction of the member states. Deference to the state's margin of appreciation in cases where the Court finds no consensus on the issue in question, or where the government invokes the protection of morality as the reason for interference with Convention rights, undermines the exercise of the Court's task as it conditions the rights of the members of the vulnerable groups by the acceptance of the majority of the states, or the majority within the state. Such a use of the doctrine also does not serve the goals that the doctrine is supposed to protect, as it undermines cultural diversity within the states, and does not correct systematic deficiencies of democratic processes.

This does not mean that the doctrine of the margin of appreciation should not have a place in the international supervisory system of human rights, but only that it should

70 By minority I mean not only traditional minorities, such as ethnic or religious, but also 'political outcasts' and less powerful members of the society, whether or not they constitute a minority in terms of numbers.

71 S Fredman, 'Human Rights Transformed: Positives Duties and Positive Rights' [2006] Public Law 498.

72 Nowlin (supra note 69) 282.

73 Ibid, 286.

not be applied in a manner that shields the conduct of the state from supervision and justifies violation of the rights of minorities on the basis of majoritarian preferences. Hence, while states should enjoy the margin of appreciation in respect of choosing the means to secure the human rights standards imposed by the Court, they should not have discretion in respect of choosing whether or not to implement these standards in light of the interests of majority of states or within the state.⁷⁴ The Court should always undertake a review of a challenged action or omission and never simply defer to the state's judgment. Review should be heightened, rather than lenient, in cases which concern the conflict between majorities and minorities.⁷⁵ The Court's assessment should be guided by the values of autonomy, equality and human dignity, which presupposes searching for, and challenging, exclusion and disadvantage of vulnerable groups.

The diversity or uniformity of state practices, or the lack of uniform conception of morality, should not be a relevant consideration in enforcing (universal) human rights. Not enforcing human rights because of a lack of a consensus (because the majority does not lead the lifestyle of the applicant or does not suffer her problems) is contrary to the principle of equality on which human rights are based. Therefore, the Court should give less significance to the (non-)existence of a common approach among the member states and to the lack of a consensus on conception of morals, and look instead at the international human rights instruments or progressive developments in comparative jurisprudence on the issue in question, as the latter are usually more sensitive to disadvantage of vulnerable groups. This has been the approach of the Court more recently and it is to be hoped that the Court will continue to apply it in a consistent manner, including when rights are interfered with for the protection of morals.⁷⁶ Such an interpretation of the margin of appreciation would be in accordance with the principle of effectiveness and the evolutive approach to interpretation.

It could be argued that the shift of focus from the question of consensus (among member states) to the questions of exclusion and disadvantage, does not take into account the political constraints within which the Court operates, or that it would undermine representative democracy or the cultural diversity of Europe, or the authority of the Court (which, it has been argued, are served by the use of consensus as an interpretative principle). However, shifting the approach does not have these consequences. As the members of disadvantaged minorities or less powerful groups have not been given an effective voice in political processes, asking the 'question of exclusion and disadvantage' might enhance democratic ideals, by remedying systematic deficiencies of democratic processes in accordance with the role that international human rights bodies are supposed to serve. Moreover, cultural diversity might also be enhanced by asking the 'question of exclusion and disadvantage', as it

⁷⁴ Hence, while the state could choose means to secure recognition in law of the post-operative transsexual, it cannot choose whether or not to do so.

⁷⁵ Benvenisti (supra note 1).

⁷⁶ *Christine Goodwin v UK* (supra note 47); *I v UK* (supra note 47); *MC v Bulgaria* (supra note 36); *Siliadin v France* (supra note 34).

would promote respect for the cultural values of minorities (provided that they do not result in violation of rights of others). Furthermore, the authority of the Court might be served by having consistent decision-making tools (asking ‘the question of exclusion and disadvantage’), rather than deferring to the state’s will. Asking the ‘question of exclusion and disadvantage’ is not an impossible task: the marginalisation and disadvantage of certain groups have long been documented in international human rights discourse, and group-specific human rights law can elucidate many of the issues.

Summary

THE MARGIN OF APPRECIATION, CONSENSUS, MORALITY AND THE RIGHTS OF VULNERABLE GROUPS

The doctrine of the margin of appreciation is one of the most controversial developments of the European Court of Human Rights, which, in view of many scholars, impedes the development of universal standards of human rights. The Court has most often used it to defer to the state's judgment on what the protection of Convention rights requires if there is no consensus on this issue, or if the government invokes the protection of morality as the reason for interference with Convention rights.

The author criticises such a use of the doctrine examining the ways consensus and morals have been interpreted in the case-law. The author argues that deference to the state's judgment in case there is a lack of a common approach among the member states on the relevant issue, or when the issue concerning the (sexual) 'morality', presents an obstacle for the effective protection of the rights of vulnerable groups, due to the fact that it conditions their protection with the acceptance by the majority of the states or the majority within the state. It is maintained that the Court should never allow to the states a margin of appreciation to decide what standards the Convention imposes except in cases when the states decide on implementation of these standards. In determining the standard, the Court should be guided by the values of autonomy, equality and human dignity, rather than by the issue of consensus, which presupposes searching for and challenging the exclusion and disadvantage of vulnerable groups.

***Key words:** margin of appreciation, consensus, morals, rights of vulnerable groups.*

Zusammenfassung

ERMESSENS- ODER BEURTEILUNGSSPIELRAUM, KONSENS, MORAL UND DIE RECHTE DER SCHUTZBEDÜRFTIGEN PERSONENGRUPPEN

Die Ermessensdoktrin zählt zu den meist bestrittenen Entwicklungen des Europäischen Gerichtshofs für Menschenrechte. Nach Ansicht einiger Autoren, beeinträchtigt dies auch die Entwicklung der allgemeinen Normen der Menschenrechte. Diese Doktrin wird vom Gerichtshof meistens dann angewandt, wenn kein Konsens darüber besteht, was der Schutz der Konventionsrechte benötigt, oder wenn die Regierung als Grund des Eingriffs in die Konventionsrechte den Moralschutz geltend macht. In der vorliegenden Arbeit übt die Autorin Kritik über eine solche Anwendung der genannten Doktrin, indem sie die Auslegung von Konsens und Moral in der Rechtsprechung ausarbeitet. Wie sie behauptet, im Falle dass kein Konsens erreicht wird, und keine gemeinsame Einstellung der Mitgliedstaaten besteht, oder wenn es um (sexuelle) Moral geht, sei das Ermessen der Mitgliedstaaten ein Hindernis für den effizienten Schutz der Rechte von schutzbedürftigen Personengruppen, weil dafür entweder eine Mehrheit von Staaten, oder eine Mehrheit innerhalb des jeweiligen Mitgliedstaates erforderlich ist. Aus diesem Grunde sollte es der Gerichtshof nicht den Mitgliedstaaten überlassen, über die von der Konvention verhängten Normen Entscheidungen zu treffen, mit der Ausnahme der Implementierung dieser Normen. Darüber hinaus sollte der Gerichtshof bei der Feststellung dieser Normen von Werten wie Autonomie, Gleichheit und menschliche Würde, statt von Konsens geleitet werden, weil dieser Fragen der Ausschließung und Benachteiligung schutzbedürftiger Personengruppen mit sich bringt.

Schlüsselwörter: Ermessens- oder Beurteilungsspielraum, Konsens, Moral, Rechte der schutzbedürftigen Personengruppen.

Riassunto

I MARGINI DI APPREZZAMENTO, CONSENSO, MORALITÀ E DIRITTI DEI GRUPPI VULNERABILI

La dottrina relativa al concetto del libero apprezzamento rappresenta una delle creazioni più controverse della Corte europea dei diritti dell'uomo, la quale secondo l'opinione di numerosi studiosi ostacola lo sviluppo di *standards* universali dei diritti dell'uomo. Il più frequente uso che ne fa la Corte è volto a richiamare i pareri delle autorità statali sul contenuto della tutela dei diritti convenzionali, laddove manchi un consenso oppure qualora le autorità invochino la protezione di valori morali al fine di interferire nei diritti convenzionali.

Nel presente lavoro, mediante un'analisi dell'interpretazione del consenso e della morale nella giurisprudenza della Corte, viene criticato siffatto uso della dottrina.

L'autrice sostiene come il richiamo al parere dello Stato, nei casi in cui non esista un approccio comune agli Stati membri, oppure quando la questione rilevante concerne la «morale» (sessuale), rappresenti un impedimento ai fini di un'efficace tutela dei diritti dei gruppi vulnerabili; giacché la stessa viene condizionata dal suo accoglimento da parte della maggioranza degli Stati ovvero da parte della maggioranza all'interno dello Stato. L'autrice ritiene che la Corte non dovrebbe dare agli stati margini di libero apprezzamento per stabilire quali *standards* siano imposti dalla Convenzione, bensì permettere di stabilire unicamente le modalità di recepimento di tali *standards*. Nel determinare gli *standards*, la Corte dovrebbe seguire i valori dell'eguaglianza, dell'autonomia e della dignità, anziché del consenso, il che presuppone la ricerca e la resistenza all'emarginazione ed all'inadeguatezza.

Parole chiave: *margini di libero apprezzamento, consenso, morale, diritti dei gruppi vulnerabili.*