



The Margin of Appreciation Doctrine and the European Court of Human Rights: The Inconsistent Application in the Interpretation of the Right to Freedom of Expression and the Right to Freedom of Thought, Conscience and Religion

Aduku Abdul Ainoko*

Introduction

The European Convention on Human Rights¹ and its protocols requires interpretation to be effective.² The European Court of Human Rights is entrusted with the responsibility to interpret and apply the Convention.³

Judgments of the European Court of Human Rights (ECHR) resonate in domestic court decisions on human rights. The jurisprudence of the Strasbourg Court has evolved into an indispensable 'source of inspiration' for judiciary in domestic courts in Europe and across the world.⁴ The decisions of the Strasbourg Court have the potential not only to set European standards for the protection and enforcement of human rights, but to set universal standards.⁵ In deciding cases before it, the Strasbourg Court adopt different interpretative techniques, such as the living instrument doctrine and the margin of appreciation doctrine to mention a few.

* Aduku holds an LLM in International Human Rights Law from the University of Liverpool and is a Commonwealth Shared Scholarship alumnus. He is also an attorney at Aleji O G & Partners, Nigeria.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) ETS 005, Rome, 4. XI. 1950 (hereinafter referred to as the Convention).

² B Rainey *et al*, *The European Convention on Human Rights* (6th edn, Oxford University Press 2014) 65.

³ ECHR (n1) art 32(1).

⁴ A-M Slaughter, 'A Typology of Transjudicial Communications' (1994) 29 URLR 99.

⁵ E Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 NYUJILP 843.

Margin of appreciation is one of the interpretative techniques of the Strasbourg Court.⁶ The doctrine of margin of appreciation has been developed through the case-law of the European Court of Human Rights.⁷ The application of this doctrine in the interpretation of Convention rights particularly the rights to freedom of expression, thought, conscience and religion by the European Court of Human Right have been inconsistent. The doctrine is traceable to cases where crucial interests of states are at stake, areas upon which the 'Convention organs' are hesitant to intrude.⁸ Margin of appreciation is a concept that refers to the room for manoeuvre that the European Court of Human Rights is prepared to give domestic authorities in fulfilling their obligations under the European Convention on Human Rights.⁹

In 'applying' the margin of appreciation doctrine, the Court restricts its power of judicial review and interpretation, 'accepting' that national authorities are best equipped and positioned to settle certain disputes.¹⁰ The doctrine has been described as complicated, because its precise definition and scope of application are unclear and it is challenging to ascertain how it is applied and the factors that influence its purview, that is to say that, there is no easy formula to describe how it works, as it is unpredictable and inconsistent.¹¹ Margin of appreciation was neither mentioned nor defined in the text of the European Convention on Human Rights.

The definition, meaning and the 'justifiability' of this doctrine are questionable.¹² The doctrine impairs universal and European standards and aspirations for the protection of human rights.¹³ The doctrine covers different practices that serve

⁶ D J Harris et al, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 5-17.

⁷ D Spielmann, 'Allowing the Right of Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review' (2012) CELS 2 <www.scribd.com/doc/84297501/Allowing-the-Right-Margin-the-European-Court-of-Human-Rights-and-the-National-Margin-of-Appreciation-Doctrine-Waiver-or-Subsidiarity-of-European-Revi#> accessed 17 April 2022.

⁸ Ibid.

⁹ S Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing 2000) 5.

¹⁰ Spielmann (n 7) 2.

¹¹ Greer (n 9) 5.

¹² D Shelton(ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 375.

¹³ Benvenisti (n 5) 843.

different purposes, thus 'complicating its relationship with' the concept of subsidiarity.¹⁴

The scope of the doctrine in the interpretation of the Convention has been questioned.¹⁵ Despite its regular use by the Strasbourg Court, there is inconsistency and incoherence in its application, and this complicates the need to balance uniform human rights standards and respect for diversity, which is the hallmark of the said doctrine. The article argues that a more consistent and coherent application of the doctrine is needed and concludes by making recommendations in that regard.

In this article, the nature and origin of the doctrine of margin of appreciation will be examined, followed by analysis of how the Strasbourg Court has inconsistently applied the doctrine of margin of appreciation to its interpretation of the right to freedom of expression, and the right to freedom of thought, conscience and religion. Analysis of this case law reveals the shifting justifications and scope of the doctrine.

Origin and Nature of Margin of Margin of Appreciation as an Interpretative Technique

The doctrine of margin of appreciation can be traced to the European Commission of Human Rights' decision in the inter-state application, *Greece v United Kingdom*,¹⁶ in which the Commission held that the respondent Government should, in respect of Article 15 of the Convention, be afforded a 'certain measure of discretion'. Article 15 of the Convention provides for the possibility of derogations 'in time of war or other public emergency threatening the life of the nation...' However, such derogation(s) are strictly limited to the exigencies of the situation and must not be inconsistent with the state's obligations under international law.¹⁷

The European Commission of Human Rights in *Lawless v Ireland*¹⁸ held that 'margin of appreciation' should be given to states in determining the existence of a public danger threatening the life of the nation. The Strasbourg Court used the sobriquet

¹⁴ Shelton (n 12) 375.

¹⁵ Spielmann (n 7) 2.

¹⁶ Application No. 176/56 (1958) European Commission of Human Rights (*the Cyprus case*) par 136.

¹⁷ Art 15 of the Convention.

¹⁸ Application No. 3 (1960) EHRR 15.

‘margin of appreciation’ expressly for the first time in the case of *Ireland v United Kingdom*.¹⁹ The Court, in interpreting Article 15 of the Convention, held that: ‘The domestic margin of appreciation is thus accompanied by a European supervision’.²⁰

The Commission gave a foundational decision on the doctrine in *Handyside v United Kingdom*.²¹ The bone of contention was whether a conviction for possession and distribution of an obscene article could be justified under Article 10(2) of the Convention as a limitation on the freedom of expression that was necessary for the protection of morals. The Commission accorded the legislature and the national judges a margin of appreciation in assessing the above issues, subject to European Commission on Human Rights supervision.²²

It is deducible from the cases above and Article 15 of the Convention that the Strasbourg Court retains the power of review over the margin afforded to States. It is submitted here that, while Article 15 is clear enough to give discretion to States in times of ‘war’ or ‘public emergency’, the Convention is flawed for not providing definitions of ‘war’ or ‘public emergency’ and this automatically and unnecessarily widens the margin given to States, thus undermining the power of review retained by the Court and making the application of the doctrine inconsistent and incoherent.

This article submits that the margin granted to States is context-based and, therefore, it is difficult for the Court to apply the doctrine consistently.²³

Inconsistent Application of the National Appreciation Doctrine

A. Article 10 of the Convention

The *Handyside* case²⁴ marked the beginning of the development of the doctrine of national margin of appreciation in the jurisprudence of the Strasbourg Court (known then as the Commission). In this case, the applicant filed a complaint before the Commission complaining that his conviction for possessing, publishing and

¹⁹ [1978] 2 EHRR 25.

²⁰ *Ibid.*

²¹ [1976] 1 EHRR 737, para 48-49.

²² *Ibid.*

²³ *Schalk and Kopf v Austria* [2010] 53 ECHR 20.

²⁴ *Handyside case* (n 21) 737.

distributing obscene materials (*The Little Red Schoolbook*) violated his right to freedom of expression under Article 10 of the Convention.²⁵

The Commission considered whether the Government's actions breached the applicant's freedom of expression and right to peaceful enjoyment of property. It was held that the government's actions were justified in pursuance of the protection of the rights of others, in this case children, and therefore a permissible restriction of both rights.

The Commission, by a majority decision of thirteen votes to one, denied the applicant's claim and upheld his conviction, stating that the machinery of protection established by the Convention is subsidiary to the national systems of safeguarding human rights. It further stated that, in the absence of a common European standard on the concept of morals, States, by their direct and continuous contact with the reality on the ground, are in a better position than the Commission to determine the matter. The Commission emphasized that Article 10 (2) does not give the Contracting States an unlimited power of appreciation.²⁶

Whilst this judgment is lauded by many States for giving some discretion to States, especially in the absence of a common European standard. The concept of European consensus or common European standard is an approach used by the Strasbourg Court to give approval to the position adopted by a majority of the Contracting Parties to the European Convention of Human Rights in tackling human rights problems.²⁷ However, the decision in *Handyside* is controversial as the Commission did not state the limits nor scope of the margin given. Firstly, the Commission relied on factors, such as whether the interference was necessary in a democratic society and the absence of a common European standard and referred to the doctrine as the reason behind the decision. Secondly, the court did not state the limits or scope of the margin given.

²⁵ Ibid.

²⁶ Ibid.

²⁷ K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (1st edn, Cambridge University Press 2015) 9.

This indeterminacy undermined the review power of the Commission then and continues to undermine the review power of the Court today. The Court could be urged to provide limitations when the opportunity arises.

The Commission has been criticised for relying on the absence of European consensus to reach their decision in *Handyside* because there is no generally accepted definition of the *common European standard*.²⁸ This article submits that the resort to certain selective case law and international instruments to ascertain consensus in this case is vague and subjective. The Court always isolates certain case law and instruments relevant to the matter for consideration to ascertain the approval and position adopted by a majority of the Contracting Parties to the European Convention of Human Rights in tackling human rights problems. This European consensus interpretative approach is subjective as the Strasbourg Court rely on standards in domestic law to interpret the Convention, and the reason for this is that the essence of the Convention is to regulate domestic law.²⁹

The creation and application of this doctrine have been controversial with judges taking opposing views and divisions among the academic writers.³⁰

In *Sunday Times v UK*,³¹ the applicants published an article criticizing the law on the liability of pharmaceutical companies and calling upon Distillers to 'think again' about the offer of compensation to the thalidomide victims. Distillers brought an action, in which they sought an injunction under the law of contempt of court, to stop the newspaper from publishing the article.

The injunction was granted, the publisher complained to the Commission alleging that the injunction was a violation of Article 10 of the Convention. The Commission held by majority of eight votes to five that the injunction was a violation of the applicants' rights to freedom of expression, thus limiting the margin given to the

²⁸ L R Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 CILJ 133.

²⁹ G Van der Meersch, 'Reliance in the Case Law of the European Court of Human Rights on the Domestic Law of the State' (1980) 1 HRLJ 13, 15.

³⁰ A Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 634.

³¹ [1979] 2 EHRR 245.

UK. On the other hand, the minority in their joint dissent favoured a wider margin of appreciation to be given to the UK on the issue of the law of contempt of court and the necessity of the interference with the applicants' freedom of expression. The minority refuted the notion that the margin of appreciation is more limited with respect to the maintenance of the authority of the judiciary than with issues on morals.³² This article submits that there is inconsistency in the application of the doctrine here, as both the majority and minority of judges mentioned and applied the doctrine of margin of appreciation and decided in opposing ways. The Commission examined the relationship between the rights provided for in Article 10(1) and the limitations permitted under its subsection 2 and held that the right is superior and that the limitations must be interpreted in a restrictive manner.³³

This article submits that the Commission ought to have distinguished the peculiarities of common law states like the UK, where the authority of the judiciary is jealously guarded, from civil law jurisdictions. The above dissent clearly shows the controversies surrounding the scope of the margin given to states. It is recommended here that there is a need for diplomatic and constructive dialogue between the Strasbourg Courts and national authorities to find ways to arrive at a consistent and coherent application of the doctrine of margin of appreciation and to ensure that the cultural diversity, peculiarities and differences of Contracting Parties to the Convention are reconciled and balanced with their Convention responsibilities.

In *Egeland and Hanseid v Norway*,³⁴ the applicants were convicted and fined for publishing pictures taken in front of a court house of a woman convicted for aiding and abetting triple homicide. The applicants complained to the Strasbourg Court alleging violation of Article 10 of the Convention.

³² Mowbray (n 30) 643.

³³ *Ibid* 643, 644.

³⁴ [2009] 50 EHRR 2.

The Court held that the interference with freedom of expression was prescribed by law and pursued the legitimate aim of protecting privacy and safeguarding due process.³⁵

Judge Malinverni in a concurring opinion, criticised the decision of the Court which gave a 'wide' margin of appreciation. He stated that the margin ought to have been narrow as it would not change the decision of the Court (no violation of Article 10). To him, it would have been sufficient to hold that the interference had not overstepped the limits of the margin.³⁶ The Court is inconsistent again in applying the doctrine as both the majority and minority opinions applied the doctrine and arrived at conflicting decisions. It is recommended that for consistency in the application of the doctrine to be achieved, it must be used rarely, and it must not be extended in a way that will obstruct the development and protection of rights.

Conversely, Judge Rozakis in another concurring opinion, found that there had been no violation of Article 10, upholding the domestic decisions and stating that the respondent State be allowed a wide margin of appreciation in balancing the interests at issue. He further stated that the Court applied the margin of appreciation automatically, notwithstanding the fact that the case did not permit such an approach. He suggested that it is only in cases where the national authorities are in a better position to assess the issues that the Court should relinquish its power of assessment and limit itself to supervision.³⁷

The author is of the view that, while the concurring opinion of Rozakis is sound in stating that the margin should only be allowed in exceptional situations where national authorities are better placed to assess the issues, it is, however, still not clear what factors or circumstances are to be used to ascertain when national authorities are better placed than the Court to assess the issues.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

In *Oberschlick v Austria*,³⁸ the applicant journalist was convicted of defamation when he published criminal information laid against the secretary-general of the Austrian Liberal Party. The politician had advocated discrimination against immigrant families in relation to family allowances. The Court held that Article 10 had been violated, as the applicant had contributed to a public debate on sensitive and relevant political questions, and a politician who expressed himself in such a fashion should expect a strong reaction from the public and the media. The Court stated that a politician 'inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalist and the public...when he himself makes public statements...'³⁹

It is clear from the approach of the Court in the above case that on sensitive issues, such as freedom of the press, which are very important for a democratic society, the Court gives a narrow margin of appreciation to States.

In *Lingens v Austria*,⁴⁰ the applicant complained that his right to freedom of expression had been violated by his conviction and fine following a private prosecution for defaming the Austrian Chancellor, Bruno Kreisky, in two magazine articles. Lingens had accused the Chancellor of protecting former members of the SS for political reasons and had criticised him for claiming that the Nazi hunter, Simon Wiesenthal, used 'mafia methods'. The Court affirmed the existence of a margin of appreciation, subject to European supervision, in respect of Article 10(2), but held that the conviction was disproportionate to protect the reputation of a public figure and, therefore, unnecessary in a democratic society. The Court concluded that the conviction of Lingens amounted to a violation of Article 10.⁴¹

From this decision, it is clear, that a narrow margin of appreciation was given. However, the decision of the Court hinged on some surrounding circumstances, such as the nature of the right involved; the proportionality of the conviction and fine to the alleged defamation; and the importance of right to freedom of expression

³⁸ [1994] 19 EHRR 389.

³⁹ *Ibid.*

⁴⁰ [1986] 8 EHRR 407.

⁴¹ *Ibid.*

in a democratic society. The above factors most times are best adjudged on a case-by-case basis, and this makes the doctrine of margin of appreciation more unpredictable and inconsistent.

In *Zana v Turkey*,⁴² the applicant (the former mayor of Diyarbakir), was sentenced for comments made in an interview with journalists. In the interview, he stated that he supported the PKK national liberation movement; however, he condemned the massacres carried out by the PKK. He further stated that ‘anyone can make mistakes, and the PKK kill women and children by mistake’. The Court took note of the fact that the interview coincided with atrocious attacks carried out by the liberation movement on civilians in southeast Turkey, where there was extreme tension at the material time. Considering these remarks as supporting the PKK, which was described as a “national liberation movement” by the former mayor of Diyarbakir (one of the cities considered to be most important and influential in south-east Turkey), the Court held that they had to be regarded as likely to exacerbate an already explosive situation in that region. The Court concluded that there was no violation of Article 10.⁴³

From the facts of the case above, it can be submitted that the Court gave Turkey a wide margin of appreciation. And this can be said to be based on the peculiar circumstances of protecting lives and properties, territorial integrity and sovereignty of Turkey, which were all at stake in the above case. The Court gave Turkey a wide margin as it presumed the state to be in a better position to grapple with such sensitive issues concerning its people and statehood.⁴⁴

B. Article 9 of the Convention

In *Kokkinakis v Greece*,⁴⁵ the applicant who had converted from the Christian Eastern Orthodox Church to become a Jehovah’s witness was convicted of proselytism by the Greek authorities. He brought a complaint to the Commission alleging violation of Article 9 of the Convention. The Commission unanimously found a violation.

⁴² [1999] 27 EHRR 667.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ [1994] 17 EHRR 397.

The Commission examined whether there was an interference, whether the interference was prescribed by law, whether it had a legitimate aim and whether it was proportional and, as such, necessary in a democratic society.⁴⁶ It stated that freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention.⁴⁷ It was held that the measure complained of was prescribed by law and that it was in pursuit of a legitimate aim.

The Commission observed that a 'certain' margin of appreciation is afforded to Contracting States, but the margin is subject to European supervision. It thereafter examined whether the measure taken at the national level was justified in principle and proportionate. It was noted that the Greek courts did not sufficiently specify how the accused had attempted to convince his neighbour by improper means. It was held that the contested measure does not appear to have been proportionate to the legitimate aim pursued.⁴⁸

It is submitted here that the Commission did not specify the scope of the limit given to the respondent in this case, it only observed that a 'certain' margin is to be afforded the Contracting States. There is inconsistency in the application of the doctrine here as, despite giving the Contracting State margin, the Commission found a violation and emphasised its supervision. The Commission relied on factors like proportionality of the interference by the Contracting State to a legitimate aim in democratic society to arrive at its conclusion to limit the margin given. This article recommends that the Court should, on a case-by-case basis, clearly state the extent of the margin given, and avoid the use of the term 'certain' margin.

In *Lautsi and others v Italy*,⁴⁹ the Grand Chamber held unanimously that there was no breach of Article 9 and Article 2 of Protocol 1 of the Convention, through the display of crucifixes in the classrooms of State schools attended by the first applicant's sons. The Court observed that in the absence of consensus amongst the member States

⁴⁶ Ibid para 40-46.

⁴⁷ Ibid para 31.

⁴⁸ Ibid para 46-50.

⁴⁹ [2010] EHRR 42.

concerning religious symbols in public schools, States were accorded a wide margin of appreciation to determine the issue in line with domestic traditions.⁵⁰

This article submits that the decision of the Court is unreasonable as the respondent was given a wide margin simply because of the absence of European consensus, without reasonably considering the faith, religion and beliefs of the applicant.

In *Otto-Preminger-Institut v Austria*,⁵¹ the applicant operated, in Innsbruck, an 'art house' cinema and proposed to show a film titled *Das Liebeskonzil*⁵² which contained production of a controversial nineteenth-century play with the same title. The play portrayed some leading figures of the Christian faith and religion in an extremely negative and derogatory manner. On the complaint of a local diocese Roman Catholic Church, which was acting on behalf of the overwhelming majority of Tyroleans, criminal proceedings were brought against the applicant.

The proceedings were successful and thereafter the Regional Court ordered the seizure and forfeiture of the movie. The applicant complained that the above action violated Article 10 of the Convention.⁵³

The Court observed that based on the lack of a European consensus on the significance of religion in contemporary societies, a 'certain' margin of appreciation be accorded to the respondent in determining whether the measures complained of were necessary to protect the religious beliefs of the Tyroleans. The Court concluded that the seizure and forfeiture could be justified under Article 10(2) of the Convention and therefore no violation of the applicant's right under the Convention.⁵⁴

This article asserts that the Court gave reasons for according the respondent margin, but did not state the scope of the margin. It is recommended that the Court state the margin given to Contracting States in every case and avoid using the term 'certain' margin to further forestall inconsistency in the application of the doctrine of

⁵⁰ Ibid.

⁵¹ [1995] 19 EHRR 34.

⁵² (Council in Heaven) in English.

⁵³ *Otto-Preminger Institut* case (n 51).

⁵⁴ Ibid para 47-50.

appreciation. It is further submitted here that the Strasbourg Court should avoid giving states margin of appreciation to decide the standards for protection, the margin given is better confined to how to implement the standards.

In *Wingrove v United Kingdom*,⁵⁵ the Strasbourg Court in a unanimous decision upheld the legality of the British Authorities' refusal to licence the distribution of the applicant's allegedly blasphemous movie, adopting the majority approach in *Otto-Preminger Institut*.

The Court upheld the Authorities' refusal to categorise the video as being within the confines of the State's margin of appreciation concerning expressions on religious beliefs.⁵⁶ Hence the Court accorded the UK a wide margin of appreciation as there exists no European Consensus. It is recommended that instead of focusing on European consensus the Court should be more concerned with core values like equality, autonomy and dignity of persons.

This article submits that the decision of the Court to accord the UK margin is sound: on sensitive issues, like religious beliefs, States are better placed to assess; however, the Court, for the umpteenth time, did not spell out the limits or confines of the margin given to states.

Lord Lester criticised the above decision in *Wingrove*, describing the judgment as a 'timorous ruling'. He condemned the philosophical, jurisprudential and logical basis for protecting political expression and media freedom ahead of artistic and cultural expression, to him the distinction between the two is 'arbitrary and unworkable'. He further submitted that national agencies are given 'considerable latitude' by the Strasbourg Court in determining what measures are necessary to protect the rights to freedom of thought, conscience and religion as contained in Article 9 of the Convention.⁵⁷

⁵⁵ [1997] 24 EHRR 1.

⁵⁶ *Ibid* para 50 and 58.

⁵⁷ Lord Lester QC, 'Universality versus Subsidiarity: A Reply' (1998) EHRLR 73-77.

In his dissenting judgment, Judge De Meyer questioned the necessity of the British law of blasphemy.⁵⁸ Lohmus J in another dissenting judgment, held that the interference was unnecessary as the members of the society whose feelings the authorities claimed to protect, have not called for such interference. He also argued that the interference was based on the opinion of the authorities, and that the aim of the interference was to protect the Christian faith alone and not other beliefs.⁵⁹

This article argues that irrespective of the reasonableness and soundness of the above dissents, with respect to sensitive issues like religious belief, States are better placed to make the assessment. The Court intervening in such situations could lead to non-enforcement and disregard for the judgment of the Court.

In *Leyla Sahin v Turkey*,⁶⁰ the applicant complained to the Strasbourg Court, claiming a violation of her right to manifest and practise her religion. She alleged that the prohibition of female students wearing the Islamic headscarf, covering their head and throat, while attending examinations and classes at Istanbul University was a breach of Article 9 of the Convention.

The Grand Chamber held that the restrictions were prescribed by law and pursued legitimate aims of protecting the rights and freedoms of others and preserving public order. The Grand Chamber further observed that the Turkish constitutional principle of secularism was the paramount consideration underlying the ban on the wearing of religious symbols in universities.⁶¹

The Court went further to examine whether the measure employed in the instant case was proportional to the legitimate objectives pursued by the interference. The Grand Chamber held that the national authorities of Turkey were better placed than an international court to evaluate local needs and conditions on the relevant matter in the instant case. It was observed that, based on the margin of appreciation

⁵⁸ *Wingrove* case (n 55) par 4.

⁵⁹ *Ibid* para 3 and 4

⁶⁰ [2004] 98 ECHR 108.

⁶¹ *Ibid* para 116.

afforded States in this sphere, the interference was justified in principle and proportionate to the aim pursued.⁶²

This article submits that the Court gave Turkey a wide margin in this case, whereas in some cases, for instance *Sunday Times*, the margin was narrow and the decisions are the same: this portrays inconsistency in the application of the margin.

Judge Tulkens, in her dissent, contested the reasons given for the restriction on the applicant's freedom to wear Islamic headscarf at the University. The reasons to her were irrelevant and insufficient. She further argued that mere wearing of the headscarf is different from extremism and that the applicant did that with her free will.⁶³

The refusal by the authorities to provide a Buddhist prisoner with a vegetarian diet, as contained in the teachings of his belief, was held to breach Article 9 by a majority decision in *Jakobski v Poland*.⁶⁴ The Court here limited the margin of appreciation given to the respondent state and held that the authorities failed to balance the interests of the prison authorities and those of the applicant.⁶⁵

Justification of the Margin of Appreciation

The doctrine has been greeted with series of criticisms.⁶⁶ Lord Lester of Herne Hill described the doctrine as 'slippery and elusive'.⁶⁷ It has been described as vague;⁶⁸ the doctrine has been applied inconsistently by the Strasbourg Court; in some cases, the doctrine is used as a reason for the Courts decision, without the Court actually applying it.⁶⁹

⁶² Ibid para 119-123.

⁶³ Ibid para 10 and 12.

⁶⁴ [2012] 55EHRR 8.

⁶⁵ Ibid para 54.

⁶⁶ J Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 3 NQHR 324.

⁶⁷ O Bakircioglu, 'The Application of Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8 GLJ 731-732.

⁶⁸ M Kopa, 'The Algorithm of the Margin of Appreciation Doctrine in Light of the Protocol No. 15 Amending the European Convention on Human Rights' (2014) 14 ICLR 38.

⁶⁹ *Connors v United Kingdom* [2005] 40 EHRR 9; M Marochini, 'The Interpretation of the European Convention of Human Rights' (2014) 51 ZRPFUS 74.

The doctrine is determined by some unstable and incoherent factors and it serves as a justification for the Court in contentious cases.⁷⁰ It lacks 'legal certainty',⁷¹ it has altered uniform human rights standards and is a threat to the duty of the Strasbourg Court in determining human rights protection standards.⁷²

The doctrine has been criticised as a threat to universal human rights standards that allows for double standards and undermines the credibility of the Strasbourg Court.⁷³ The inconsistent application of the doctrine of margin of appreciation has led academics to criticise the doctrine as a 'tool of avoiding responsibility to articulate reasons for ... decisions'⁷⁴ and as 'a substitute for coherent legal analysis of the legal issues at stake'.⁷⁵

Margin of appreciation obstructs the effective protection of the Convention rights, particularly the rights of vulnerable groups, as the protection of the rights of such group is contingent on acceptance by a majority of the State or within the state.⁷⁶

This article lauds the above criticism of the doctrine, nonetheless, it is submitted here that it has played a significant role in balancing the conflict between uniform and established human right standards and the diversity among the members of the Council of Europe. This view is supported by Yourow, who posited that the margin is an instrument used by the Strasbourg Organs to weigh and balance claims and state differences, especially regarding the necessity for state action under the right to private and family life, right to freedom of thought, conscience and religion, right to freedom of expression and the right to freedom of assembly and association (Articles 8-11) of the Convention.⁷⁷

⁷⁰ See *Otto-Preminger* case.

⁷¹ Kopa (n 68) 38.

⁷² A Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press 2012) 50.

⁷³ Benvenisti (n 5) 844.

⁷⁴ R St. J Macdonald, 'The Margin of Appreciation' in F Matscher and H Petzolds (eds), *The European System for Protection of Human Rights* (Martinus Nijhoff 1994).

⁷⁵ Lord Lester (n 57) 73.

⁷⁶ I Radacic, 'The Margin of Appreciation, Consensus, Morality and the Rights of the Vulnerable Groups' (1991) 31 ZPFR 600-601.

⁷⁷ H C Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff 1996) 195-196.

The margin of appreciation has been described as useful and necessary as it serves as 'jurisprudential grease' in the enforcement mechanisms provided by the Convention.⁷⁸ It reconciles state differences and their commitment to the protection and enforcement of rights under the Convention.

The doctrine has been described as a safeguard for reconciling the operation of the Convention and the sovereignty of Contracting Parties.⁷⁹ Similarly, it has been described as legitimate, as it reflects values⁸⁰ that are well established in the Convention.⁸¹ The doctrine has been lauded as providing an avenue to articulate and protect a multi-cultural democracy as it is unreasonable to impose standards at the expense of regional legitimacy and cultural diversity.⁸²

However, the doctrine has been described as 'imprecise'.⁸³

The Scope of the Margin of Appreciation

A cursory look at the jurisprudence of the Court in the application of the doctrine on Articles 9 and 10 of the Convention, reveals inconsistency in its use. This article submits that the doctrine is necessary and useful in balancing and reconciling State diversity and sovereignty and their commitment under the Convention. However, the issue or bone of contention lies in ascertaining when, where and how to apply the doctrine to the facts of a case.⁸⁴

To understand the complexities surrounding the evasive scope of the margin of appreciation given to States in the above-discussed cases on Articles 9 and 10, it is apposite to examine some factors identified by the Court and commentators. These factors include common European standard, the protection of fundamental rights

⁷⁸ T A O'Donell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 HRQ 474, 496.

⁷⁹ Sir Humphrey Waldock, 'The Effectiveness of the Systems set up by the European Convention on Human Rights' (1980) 1 HRLJ 1, 9.

⁸⁰ Examples of such values are subsidiarity, democracy, cultural diversity and dynamic interpretation of the Convention.

⁸¹ P Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 HRLJ 1.

⁸² Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the European Court of Human Rights* (Intersentia 2002) 249.

⁸³ T H Jones, 'The Devaluation of Human Rights under the European Convention' (1995) PL 430, 449.

⁸⁴ P G Carozza, 'Uses and Misuses of Comparative Law in International Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights' (1998) 73 NDLR 1217, 1220.

(nature of the rights), the article invoked,⁸⁵ legitimacy and aim of the interference, proportionality of the interference, surrounding circumstances⁸⁶ and principle of subsidiarity.

A. European Consensus

The absence of a common European standard is one of the factors the Court have used to justify giving states a margin of appreciation.⁸⁷ Generally, the existence of European consensus limits the margin given to states, and the absence of such will leads to a wide margin.⁸⁸ However, the margin given in the *Handyside* case was wide, and that in *Sunday Times* case was limited, even though there was no European consensus on the issues before the Court in both cases.

Similarly, in *Kokkinakis*, *Otto Preminger* and *Wingrove*, there was a finding of absence of European consensus. Nonetheless, the Court limited the margin in *Kokkinakis* and found a violation; whereas, in the *Wingrove* and *Otto Preminger* cases, a wide margin was given to states and it was held that the interference was within the margin given. This article submits that there is inconsistency in the jurisprudence of the Court in the application of the margin to Articles 9 and 10. It is further submitted here that this indicates that other factors affect the margin given to states more than the absence of a common European standard. It is recommended that instead of focusing on European consensus, the Court should be more concerned with core values like equality, autonomy, dignity of persons and the development of human rights.

B. Protection of Fundamental Rights

Some rights are categorised as necessary by the Court in a democratic society, for example, in the *Sunday Times* case, the margin given to the respondent was narrow in a bid to protect the freedom of expression and the press in a democratic political

⁸⁵ Donnell (n 78) 474-496.

⁸⁶ J Gerrards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 (1) ELJ 80; Spielmann (n 7) 11.

⁸⁷ See *Handyside* case, *Otto-Preminger* case, *Kokkinakis* case and *Lautsi* case.

⁸⁸ *Sunday Times* Case and *Handyside* case.

system. However, a similar provision was invoked in the *Handyside* case, but wide margin was given.

This article submits that the standards used by the Court to determine the relevance or essence of rights are not clear. For example, in the *Leyla Sahin* case, Turkey was given a wide margin and no violation of right to religion was found. The right to freedom of thought, religion and conscience is equally an essential right.

C. Legality and Proportionality of interference

This presupposes the legitimacy and proportionality of the interference in light of surrounding circumstances. In all the cases considered in this article, the Court examined whether there was an interference, the aim of the interference, and the proportionality of such interference to the aim pursued. In the *Leyla Sahin* case, secularism was found to be a legitimate aim and, as such, a wide margin was given to Turkey and its unreasonable measure was held to be proportional.

Similarly, the protection of the religious beliefs of the majority was held to be a legitimate aim necessitating a wide margin being given to the respondents in the *Wingrove* and *Otto Preminger* cases. However, religious beliefs were played down by the Court in the *Leyla Sahin* and *Lautsi* cases.

In all the cases discussed, proportionality of the interference with the aim of the interference was considered. For example, in the *Jakobski* case, the interference was held to be excessive to the aim pursued and, as such, the margin given to Poland was narrow and a violation was upheld.

Conclusion

The doctrine margin of appreciation as one of the interpretative techniques of the Strasbourg Court, has played a pivotal role balancing the uniform and established human right standards and the diversity among the members of the Council of Europe.

The application of this doctrine in the interpretation of Convention rights particularly the rights to freedom of expression, thought, conscience and religion by the European Court of Human Rights as illustrated have been inconsistent.

There is a need for coherence in the application of the doctrine of margin of appreciation.⁸⁹⁻⁹⁰ This will further entrench the use and relevance of the doctrine in the jurisprudence of the Strasbourg Court.

As shown from the analysis of the case-law above, it is worth noting that for consistency in the application of the doctrine to be achieved, it must be used rarely, and it must not be extended in a way that will obstruct the development and protection of rights. Letsas calls this 'inflation'.⁹¹

The Court has been criticised for not specifying the scope of the limit given to the States in the cases examined, it only observed that a 'certain' margin is to be afforded the Contracting States. To cover this gap it is recommended here that the Court should, on a case-by-case basis, clearly state the extent of the margin given, and avoid the use of the term 'certain' margin,⁹² and give detailed and unambiguous reasons and factors that determine the scope of the margin given.⁹³

It is further submitted here that the Strasbourg Court should avoid giving states a margin of appreciation to decide the standards for protection. Rather, the margin given is better confined to how to implement the standards. The Court should be more concerned with core values like equality, autonomy and human dignity⁹⁴ instead of European consensus.⁹⁵

⁸⁹ This view is supported by O'Donnell, who advocated for 'clear and principled standards for its use', see O'Donnell (n 78)474-496.

⁹⁰ L Fuller, *The Morality of Law* (Yale University Press 1969) 33-41.

⁹¹ *Z V Finland* [1998] 25 EHRR, dissent of Judge Meyer who contended that where human rights are concerned states should not be given discretion; G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 120-130.

⁹² See *Otto Preminger* case for example.

⁹³ J Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation in the Case-Law of the European Court of Human Rights' (1998) 19 HRLJ 30, 36.

⁹⁴ Preamble of the Convention indicates that these values underline the very essence of international human rights law.

⁹⁵ Kopa (n 68) 600.

Furthermore, this article recommends regular and continuous dialogue between the Strasbourg Court and the national authorities to ensure that the cultural diversity, peculiarities and differences of Contracting Parties to the Convention are reconciled and balanced with their Convention responsibilities. This will give the Court more legitimacy to intrude when necessary to impose duties that are necessary for the effective protection and development of rights. This will further develop the complementary nature of the margin of appreciation doctrine, as postulated by Merrills.⁹⁶

When Protocol no. 15,⁹⁷ amending the Convention, comes into force, it will establish expressly the controversial doctrine of margin of appreciation. It is on this note that I conclude that the above recommendations be added to subsequent protocols to provide for coherence, transparency and consistency in the application of the doctrine.

⁹⁶ J G Merills, *The Development of International Law by the European Court of Human Rights* (2nd edn, Manchester University Press 1993) 174,175.

⁹⁷ Convention for the Protection of Human Rights (Protocol 15).