DEMOCRACY, DIVERSITY AND THE MARGIN OF APPRECIATION: A THEORETICAL ANALYSIS FROM THE PERSPECTIVE OF THE INTERNATIONAL AND CONSTITUTIONAL FUNCTIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

DEMOCRACIA, DIVERSIDAD Y MARGEN DE APRECIACIÓN: UN ANÁLISIS TEÓRICO DESDE LA PERSPECTIVA DE LAS FUNCIONES INTERNACIONALES Y CONSTITUCIONALES DEL TRIBUNAL EUROPEO DE DERECHOS HUMANOS

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ABSTRACT: This article discusses whether the margin of appreciation, as a tool to accommodate diversity and of respect of democratic choices adopted at the domestic level in the field of human rights, can be considered as the result of the combined roles of the European Court of Human Rights, both as an international court of human rights and a constitutional court within the subsidiary nature of the European Convention on Human Rights. From this perspective, and after an analysis of the ECtHR's legal nature, the main elements of the margin of appreciation doctrine and its impact on the Strasbourg court's legitimacy, as well as on the accommodation of diversity and the respect of decisions adopted by democratically elected national bodies within the ECHR system are discussed. Particular attention is given to the role of European consensus as a key factor in the establishment of the margin of appreciation that is given to states in the restriction of rights recognized by the Convention.

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RESUMEN: El presente artículo analiza en qué medida el margen de apreciación, en tanto que herramienta de regulación de la diversidad y de respeto de las decisiones adoptadas democráticamente a nivel nacional en materia de derechos humanos, puede ser considerado como el resultado de los distintos roles del Tribunal Europeo de Derechos Humanos; esto es, como un tribunal internacional de derechos humanos y un tribunal constitucional, en el marco de la naturaleza subsidiaria del Convenio Europeo de Derechos Humanos. Desde esta perspectiva, y tras un análisis de la naturaleza jurídica del TEDH, son presentados los principales elementos de la doctrina del margen de apreciación y su impacto en la legitimidad del tribunal de Estrasburgo, así como en la regulación de la diversidad y el respeto de las decisiones adoptadas por autoridades nacionales elegidas democráticamente en el sistema del CEDH. El artículo presta una atención especial al rol del consenso europeo como elemento clave en el establecimiento del margen de apreciación que se otorga los Estados en el marco de las restricciones de los derechos reconocidos por el Convenio.

KEYWORDS: Consensus, Democracy, Diversity, European Court of Human Rights, International constitutionalism, Judicial review, Legitimacy, Margin of appreciation, Subsidiarity

PALABRAS CLAVE: Consenso, Constitucionalismo internacional, Control jurisdiccional, Democracia, Diversidad, Legitimidad, Margen de apreciación, Subsidiariedad, Tribunal Europeo de Derechos Humanos

"*Sólo en el desorden somos concebibles*"
["Only in chaos are we conceivable"]

Roberto Bolaño, *2666*
[Translated by Natasha Wimmery]

I. INTRODUCTION

Contrary to what is mentioned about the chaos of the universe and human beings' conception in one of the notes that Hans Reiter (aka Benno von Archimboldi) finds in Ansky's notebook in *2666* - the unfinished masterpiece of Roberto Bolaño -, the relationships between the national legal orders and the European Convention on Human Rights (ECHR) cannot be conceived in chaos.

While it has been observed that the current multiplicity of overlapping legal orders and lack of any coherent governance in the current transnational legal world lead to the rise of divergences and contradictions (and to what, more generally, is considered as "the era of great disorder"),[1] a certain degree of coherence is required at the ECHR level within the context of the necessary equilibrium to be struck between uniformity and diversity in the integration of human rights in Europe.

Indeed, as provided by one of the recitals of its preamble, "the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of

[1] DELMAS-MARTY, M., *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Oxford/Portland, Oregon: Hart Publishing, 2009).

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human rights and fundamental freedoms".[2] Yet, diversity is an important characteristic of the Convention and a value that needs to be maintained.[3] While there is no explicit mention of respect for diversity in the text of the Convention, the tensions between uniformity and diversity are at the very heart of the ECHR system, which was precisely designed to accommodate diverse human rights regimes within a single framework.[4]

Therefore, preserving diversity while securing a uniform and effective observance of fundamental rights is a key challenge in the ECHR system. In this context, the margin of appreciation constitutes the main European Court of Human Rights' (ECtHR) tool to accommodate diversity.[5] This technique has been defined as the "deference to national bodies in the examination of whether a restriction of a convention right is acceptable or not".[6]

This deference is crucial for the role of the ECtHR as a human rights adjudicator considering the complex context in which judicial review by international courts takes place, as it inescapably raises the question of their democratic legitimacy.[7] More particularly, the ECtHR case-law arises the question of a possible challenge for democracy, as it might be considered as not sufficiently respecting the decisions adopted by democratically elected bodies at the domestic level.

Given this background, this article analyses how the margin of appreciation, as a tool to accommodate diversity in the field of human rights at the European level and of respect of democratic choices adopted at the national level, can be considered the result of the legal nature of the ECtHR as somewhere in between an international court of human rights and a constitutional court. Indeed, in order to contextualise the type of judicial review conducted by the European Court of Human Rights and the role that the margin of appreciation plays in it, the analysis is done by exploring the different functions performed by the Strasbourg court as an international court of human rights and a constitutional court within the subsidiarity nature of the Convention.

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[2] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at http://conventions.coe.int/treaty/en/treaties/html/005.htm (visited on 6 March 2015).

[3] VARJU, M., "European human rights law as a multi-layered human rights regime. Preserving diversity and promoting human rights", in: WETZEL, J. E. (ed.), *The EU as a "Global Player" in Human Rights?* (London/New York: Routledge, 2011), p. 55.

[4] *Ibid*., p. 59.

[5] BREMS, E., "The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe", in: FORSYTHE, D. P. and McMAHON, P. C. (eds.), *Human Rights and Diversity : Area Studies Revisited* (Lincoln: University of Nebraska Press, 2003), p. 82.

[6] *Ibid.* In other words, as described by Steven Greer, this notion refers generally to the "room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights", *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2000), p. 5.

[7] von STADEN, A., "The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review", 10 (4) *I·CON* (2012), p. 1024.

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While there is an abundant academic literature on the doctrine of the margin of appreciation on the one hand, as well as on the status of the ECtHR on the other hand,[8] the connection between these two questions remains much less explored. It is precisely the intention of this article to bring some reflections on this topic from a legal theory perspective.

The structure of this article is as follows. In section II the legal position of the ECtHR is discussed, both from the perspective of the Court as an international court of human rights and a constitutional court, as well as the subsidiarity nature of the ECHR. Section III presents the main elements of the margin of appreciation as employed by the Strasbourg court. On the basis of the ECtHR's status and the different functions performed by the court, the most relevant features of the margin of appreciation doctrine[9] in that regard, are discussed. Particular attention is given to the role of consensus in determining the extent of the margin accommodation. Most importantly, this section critically analyses the impact of the use by the ECtHR of the margin of appreciation on the accommodation of diversity and the respect of choices taken at the national level within the ECHR system. The section also gives some reflections on the margin of appreciation doctrine as a legitimising tool for the Strasbourg court, as well as on the coherence of its case-law. Section IV concludes.

II. THE EUROPEAN COURT OF HUMAN RIGHTS: BETWEEN AN INTERNATIONAL COURT OF HUMAN RIGHTS AND A CONSTITUTIONAL COURT

Although built up as a regional sub-system of international law, it is possible to find some features of constitutionalisation in the European Convention on Human Rights system when looking to the functions performed by the Strasbourg Court. Indeed, these functions partly correspond to those functions performed by national constitutional courts. Although the ECtHR can be largely considered a constitutional court in its task of enforcing the implementation of human rights in Europe (1), this enforcement is however weakened by the subsidiary nature of the Convention (2).

1. The ECtHR as a (quasi-) constitutional court…

Established by an international treaty, the ECHR is the main regional human rights system in Europe. Compared to classic international treaties where actors are commonly States, the ECHR has a *sui generis* content as it concerns the protection of individuals *vis-à-vis* the State, a field of law traditionally reserved to constitutional law.[10] Indeed, in

[8] See, among others, the multiple references included in this article in that regard.

[9] While following the academic majoritarian approach of using the expression "doctrine" to refer to the concept of the margin of appreciation, this does not prevent from observing that the way in which the ECtHR uses this technique is not always consistent, see section III.3. below.

[10] POLLICINO, O., "A Further Argument in Favour of the Construction of a General Theory of the Domestic Impact of Jurisprudential Supranational Law. The Genesis and the First Steps of ECHR and EU Legal Orders", 3 (2) *Comparative Law Review* (2012), pp. 10-11.

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the Court's own words, "[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"".[11]

As for the role of the Strasbourg court, the ECtHR is a court of human rights whose primary function is "to try to ensure that a particular individual is not being oppressed by the state"[12] by the adjudication of individual complaints. However, precisely because of this *sui generis* content of the ECHR, it is submitted that the Strasbourg court can be considered a (quasi-) constitutional court, transcending its character as an international court of human rights. As a matter of fact, in the Court's view, the Convention is a "*constitutional instrument of European public order*" in the field of human rights.[13]

Given this background, and insofar as the Convention constitutes a catalogue of human rights similar to those at the national level, as well as the fact that the Strasbourg court does not grant any jurisdictional immunity to national constitutional law on its control of the respect of the rights enshrined in the Convention, Didier Maus has recently described the ECtHR as a supranational constitutional court.[14] This conclusion was the same as previously argued by other academics, such as Alec Stone Sweet, regarding the point that the Strasbourg court has a similar authority, jurisprudence, law-making capacities and impact on legal and political systems than those of national constitutional courts.[15]

Other signs of the constitutionalisation process of the role of the ECtHR can be found in some recent procedural developments, as the fact of grouping similar applications, the priority to serious violations applications, as well as the introduction of stricter admissibility criteria and the pilot judgement procedure.[16] Also, the recent introduction

[11] ECt.HR (Plenary) 18 January 1978, *Ireland v. The United Kingdom*, Appl. No. 5310/1971, http://www.echr.coe.int (visited on 6 March 2015), para. 239.

[12] McCRUDDEN, C., "Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared", 15 (2012-13) *Cambridge Yearbook of European Legal Studies* (2013), p. 406.

[13] See the judgements delivered by the Grand Chamber of the Court of 23 March 1995, *Loizidou v. Turkey* (preliminary objections), Appl. No. 15318/89), para. 75, 30 June 2005, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, Appl. No. 45036/98, para. 156 and 7 July 2011 *Al-Skeini and others v. The United Kingdom*, Appl. No. 55721/07, para. 141 (emphasis added), http://www.echr.coe.int (visited on 6 March 2015).

[14] MAUS, D., "La Cour européenne des droits de l'homme est-elle une cour constitutionnelle supranationale?", in: MARTENS, P., BOSSUYT, M., RIGAUX, M.-F. and RENAULD, B. (eds.), *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme: Liber amicorum Michel Melchior* (Limal: Anthemis, 2013), pp. 477-488.

[15] STONE SWEET, A., "Sur la constitutionnalisation de la Convention européenne des droits de l'homme: cinquante ans après son installation, la Cour européenne des droits de l'homme conçue comme une cour constitutionnelle", 80 *Revue trimestrielle des droits de l'homme* (2009), pp. 923-944.

[16] GREER, S., and WILDHABER, L., "Revisiting the Debate about "constitutionalising" the European Court of Human Rights", 12 *Human Rights Law Review* (2012), pp. 671-672.

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by Protocol No. 16 amending the Convention of an advisory opinion procedure has to be considered as enhancing the Strasbourg court's constitutional role.[17]

However, there are some aspects that indicate that the Strasbourg court is not "*fully* constitutional".[18] Among other factors, not only does the ECtHR not have the power to annul national legislation, but also the implementation of its judgements is dependent both on the willingness and capacity of Member States, and the negotiation with the Committee of Ministers of the Council of Europe in the supervision of the execution of judgements.[19] Indeed, the duty of implementation of the ECtHR decisions has the character of an international law mechanism, which entails that there is no other way of enforcing the Court's judgements besides the moral and political pressure that might be applied by the Committee of Ministers.[20]

2. …within the context of the subsidiarity nature of the Convention

Previous considerations notwithstanding, it remains difficult to argue that the ECtHR, beyond its status of an international court of human rights, cannot by and large be also considered a constitutional court with regard to the protection of human rights at the European level. However, it must be taken into account that the task that it performs of ensuring the observance of the rights granted by the ECHR is nonetheless limited by the subsidiary nature of the Convention. Under the principle of subsidiarity, "the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court", which intervenes only "where the domestic authorities fail in that task".[21] This is a reflection of the primary role envisaged for states in international human rights law instruments.[22]

As has been observed, and differently from the conception of the principle of subsidiarity in the European Union context which implies a kind of "competitive

[17] Council of Europe, Committee of Ministers, *Report of the Group of Wise Persons to the Committee of Ministers* (2006), available at https://wcd.coe.int/ViewDoc.jsp?id=1063779 (visited on 6 March 2015), p. 81.
[18] SADURSKI, W., *Constitutionalism and the Enlargement of Europe* (Oxford: Oxford University Press, 2012), p. 46.
[19] GREER and WILDHABER, *supra* note 16, p. 674.
[20] SADURSKI, *supra* note 18, p. 47. For a more detailed analysis on why the ECtHR cannot be entirely regarded as a constitutional court from a technical point of view, see FLAUSS, J.-F., "La Cour européenne des droits de l'homme est-elle une Cour constitutionnelle?", 36 *Revue française de droit constitutionnel* (1998), pp. 711-728 and COSTA, J.-P., "La Cour européenne des droits de l'homme est-elle une Cour constitutionnelle?", in: *Mélanges en l'honneur de Jean Gicquel. Constitutions et pouvoirs* (Paris: Montchrestien, Lextenso editions, 2008), pp. 145-156.
[21] BERGER, V., *Principle of subsidiarity. Note by the Jurisconsult* (European Court of Human Rights. Interlaken follow-up, 8 July 2010), available at http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf (visited on 6 March 2015), p. 2.
[22] LEGG, A., *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012), pp. 61-62. For an analysis of the role of subsidiarity as a structural principle of international human rights law, see CAROZZA, P. G., "Subsidiarity as a Structural Principle of International Human Rights Law", 97 (1) *The American Journal of International Law* (2003), pp. 38-79.

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subsidiarity" (referring to the competing powers of the Union and the Member States), in the ECHR context, this principle refers to a "complementary subsidiarity", according to which the ECtHR's powers of intervention are limited to those cases where the domestic institutions are incapable of ensuring effective protection of the Convention rights.[23] This is consistent with the fact that Court's jurisdiction is strictly confined to supervising States' conduct, within the context of an internationalist approach, and the fact that the ECHR legal system is based on harmonisation and does not correspond to an integration model.[24]

Although not expressly mentioned in the original text of the Convention, the principle of subsidiarity is nonetheless implicit in several of its provisions.[25] The concept is also well established in the Strasbourg's court case-law, and has been recently confirmed in Article 1 of Protocol No. 15 amending the Convention, which adds a new recital at the end of the preamble mentioning the principle of subsidiarity, as well as the margin of appreciation that Member States enjoy to secure the rights granted by the ECHR, subject to the European supervision of the Court. While this new recital in the preamble does not but confirm the Court's case-law, it has been claimed by Judge Robert Spano writing extra-judicially that it could open a next phase in the life of the ECtHR's life, which might be defined as the "*age of subsidiarity*" and would be translated into the Strasbourg court's "engagement with empowering the Member States to truly "bring rights home".[26]

The principle of subsidiarity, which derives from the ECtHR position as an international court,[27] has two aspects: firstly, as a procedural or functional concept and, secondly, as a material or substantive one.[28] On the one hand, and according to Article 35 (1) of the Convention, the Strasbourg court may only deal with a complaint "after all domestic remedies have been exhausted, according to the generally recognised rules of international law". On the other hand, when reviewing whether a violation of the Convention has taken place in a given case, "the Court cannot disregard those legal and factual features which characterise the life of the society in the State [concerned]. In so doing *it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention*".[29] The task of the Strasbourg court is thus limited to ensure whether the national authorities have remained within the limits set by

[23] Berger, *supra* note 21, p. 2.
[24] *Ibid.*
[25] PETZOLD, H., "The Convention and the Principle of Subsidiarity", in: MACDONALD, R. St. J., MATSCHER, F., and PETZOLD, H. (eds.), *The European System for the Protection of Human Rights* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993), pp. 43-48.
[26] SPANO, R., Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, 14 (3) *Human Rights Law Review* (2014), p. 491.
[27] CHRISTOFFERSEN, J., *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden/Boston: Martinus Nijhoff Publishers, 2009), p. 229.
[28] PETZOLD, *supra* note 25, p. 60.
[29] ECt.HR (Plenary) 23 July 1968, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), Appl. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, http://www.echr.coe.int (visited on 6 March 2015), "The Law", para. 10 (emphasis added).

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the ECHR, in accordance with its position as a supervisory court rather than a court of fourth instance.[30]

Therefore, national authorities are not only the first but also the best placed to deal with complaints regarding the Convention rights and provide remedies.[31] The principle of subsidiarity consequently refers to a chronological or procedural priority, as well as a normative priority of domestic control over international control.[32]
Finally, the subsidiary nature of the Convention is also reflected by the fact that the ECHR only harmonises the law of Contracting States around a minimum standard of protection, without pursuing an absolute uniformity of national rules.[33]

III. THE MARGIN OF APPRECIATION AS A RESULT OF THE ECTHR'S STATUS

The way that the ECtHR employs the margin of appreciation concept is an illustration of the different functions performed by the ECtHR and the way it enforces the implementation of human rights upon national authorities. In this regard, the margin of appreciation has to be understood as a manifestation of the principle of subsidiarity, whose function it is to adjust the intensity of the ECtHR review on the conformity of the measures adopted by the national authorities with the requirements of the Convention (1). By doing so, the approach of the Strasbourg court is consistent with the functions it performs as both an international court of human rights and a constitutional court. When considering the margin of appreciation as a tool for the accommodation of diversity and respect of decisions adopted by democratically elected bodies in the ECHR system, the existence or lack of a European consensus is a key element regarding the harmonisation role of the Convention (2). Finally, this section analyses some incoherencies of the recent ECtHR case-law, particularly regarding the European consensus factor in the margin of appreciation doctrine, which may undermine the constitutional role of the Strasbourg court (3).

1. The margin of appreciation as a manifestation of the principle of subsidiarity

The doctrine of the margin of appreciation, which suggests an ambit of discretion, "latitude of deference" or "room for manoeuvre" given to national authorities in

[30] HAVERKORT-SPEEKENBRINK, S., *European Non-Discrimination Law. A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Cambridge: Intersentia, 2012), p. 251, with a reference to The Margin of Appreciation report by the Lisbon Network, available at http://www.coe.int/t/dghl/cooperation/lisbonnetwork (visited on 6 March 2015).
[31] LETSAS, G., "Two Concepts of the Margin of Appreciation", 26 (4) *Oxford Journal of Legal Studies* (2006), p. 722.
[32] *Ibid.*
[33] BREMS, E., *Human Rights: Universality and Diversity* (The Hague/Boston/London: Martinus Nijhoff Publishers, 2001), p. 360, with a reference to EVRIGENIS, D., "Recent case-law of the European Court of Human Rights on articles 8 and 10 of the European Convention on Human Rights", 3 *Human Rights Law Journal* (1982), pp. 138-139.

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assessing appropriate standards of the ECHR rights,[34] is a manifestation of the material or substantive aspect of the principle of subsidiarity.[35]

Indeed, related to the normative priority given to national authorities as part of the principle of subsidiarity, the margin of appreciation is based on the idea that "[b]y 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 [the requirements of the Convention]".[36] In accordance with the primary role of the national authorities to secure the rights enshrined in the Convention, the task of the ECtHR is limited to intervene only when it is clear that they have failed in doing so.[37]

The rationale of the margin of appreciation is therefore closely interlaced with the complementary nature of the Convention vis-à-vis national constitutional systems of protection of human rights.[38] On its conceptual linkage with the notion of subsidiarity, Yutaka Arai-Takahashi argues that the margin of appreciation should be understood within the constitutional dimension manifested by the principle of subsidiarity and, more particularly, "its mediating role in finding an appropriate equilibrium between national constitutional protection systems on one hand, and regional or universal systems on the other".[39]

However, these two notions should not be used interchangeably, as Béatrice Pastre-Belda has maintained. On the one hand, the scope of application of both notions is different. While the principle of subsidiarity applies *vis-à-vis* all ECHR rights, its recognition is not systematically followed by the grant of a margin of appreciation to national authorities: firstly, since no discretion can be granted concerning absolute rights and, secondly, because rights which are not absolute and that, therefore, allow restrictions, do not necessarily imply a margin of appreciation.[40] On the other hand, both notions are not applied simultaneously: the subsidiary nature of the Convention implies that national authorities are responsible for ensuring that ECHR rights are not violated in the first place, whereas the margin of appreciation intervenes only at an subsequent stage, as an instrument of judicial review allowing the Strasbourg court to modify the extent of its proportionality review.[41] It is true that both notions might be

[34] See ARAI-TAKAHASHI, Y., "The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry", in: FOLLESDAL, A., PETERS, B., and ULFSTEIN, G. (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press, 2013), p. 62, as well as the sources cited therein.
[35] BERGER, *supra* note 21, p. 14. See also PETZOLD, *supra* note 25, p. 59, who describes the margin of appreciation as a "natural product of the principle of subsidiarity".
[36] ECt.HR (Plenary) 7 December 1976, *Handyside v. The United Kingdom*, Appl. No. 5493/72, http://www.echr.coe.int (visited on 6 March 2015), para. 48 (emphasis added).
[37] GERARDS, J., "Pluralism, Deference and the Margin of Appreciation Doctrine", 17 (1) *European Law Journal* (2011), p. 104.
[38] ARAI-TAKAHASHI, *supra*, note 34, pp. 62-63.
[39] *Ibid.*, pp. 90-91.
[40] PASTRE-BELDA, B., "La Cour européenne des droits de l'homme, entre promotion de la subsidiarité et protection effective des droits", 94 *Revue trimestrielle des droits de l'homme* (2013), p. 266.
[41] *Ibid.*, p. 265.

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confused concerning their effects, since the principle of subsidiarity entails that national authorities enjoy some latitude when they intervene in the first place.[42] However, it must be taken into account that at the moment of their intervention, national authorities do not always know exactly the extent of their margin of appreciation, which will be fixed by the ECtHR only when applying its review, considering the context of the case.[43]
The function of the margin of appreciation is thus to adjust the intensity of its review on the conformity of the measures adopted by the national authorities with the requirements of the Convention.[44] As it results from its case-law, while exercising its supervisory jurisdiction, "it is in no way the Court's task to take the place of the competent national courts but rather to review under Article […] the decisions they delivered *in the exercise of their power of appreciation*".[45] In this sense, the extent of the margin of appreciation and the strictness of review are directly interconnected, a narrow margin of appreciation indicating a strict scrutiny while a wide one rather indicates a lenient scrutiny.[46]

This is generally reflected on whether the ECtHR finds a violation of the Convention in a given case. As Judges Malinverni and Kalaydjieva have affirmed in their joint dissenting opinion to the *Lautsi and others v. Italy* famous decision, "[w]here the Court decrees that the margin of appreciation is a narrow one, it will generally find a violation of the Convention; where it considers that the margin of appreciation is wide, the respondent State will usually be "acquitted"".[47]

The scope of the margin of appreciation, however, depends on the context of each case and cannot be defined in the abstract.[48] According to the Strasbourg court's case-law, its extent can vary for various reasons, as the provision invoked, the aim pursued by the impugned interference and the context of the interference, the existence of a European consensus in the field or the comprehensive analysis by superior national courts.[49]

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[42] *Ibid.*
[43] *Ibid.*, pp. 265-266.
[44] ARNARDÓTTIR, O. M., *Equality and Non-Discrimination under the European Convention on Human Rights* (The Hague/London/New York: Martinus Nijhoff Publishers, 2003), p. 60.
[45] ECt.HR (Plenary), *Handyside*, *supra*, note 36, para. 50 (emphasis added). Although this landmark judgement is often used (as it is done here) as a starting point to analyse the margin of appreciation in the ECtHR's case- law, it does not constitute however the first decision where the Court first relied on this notion, see the references contained in the analysis on the origin and development of this "doctrine" in ARAI-TAKAHASHI, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp/Oxford/New York: Intersentia, 2002), pp. 5-8.
[46] ARNARDÓTTIR, *supra* note 45, p. 60.
[47] Dissenting opinion of Judge Malinverni joined by Judge Kalaydjieva (translation) in *Lautsi and others v. Italy*, ECt.HR (GC) 18 March 2011, Appl. No. 30814/06, http://www.echr.coe.int (visited on 6 March 2015), para. 1.
[48] MACDONALD, R. St. J., "The Margin of Appreciation", in: MACDONALD, R. St. J., MATSCHER, F., and PETZOLD, H.R. (eds.), *supra* note 25, p. 85.
[49] SPIELMANN, D., "Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?", 14 (2011-2012) *Cambridge Yearbook of European Legal Studies* (2012), pp. 392-411. Dean Spielmann also includes the degree of proportionality of the interference as a factor affecting the width of the margin of appreciation. However, the relation between these two concepts seems to work reversely, in that sense

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2. Consensus, margin of appreciation and international judicial review

Among the particularities of the context surrounding each case which impact the scope of the margin of appreciation, the existence or lack of common ground between the laws of the Contracting States is probably the most relevant factor when considering how the ECtHR accommodates diversity while enforcing the implementation of human rights. As results from the Strasbourg court's case-law, in those situations where the Court finds that there is no consensus among Contracting States on a matter touching upon a human right, it usually concludes that national authorities enjoy a wide margin of appreciation, while this margin will be decisively narrowed if the Court finds a common ground on the question at stake. [50] This consensus does not have to be "overwhelming",[51] but a convergent view of "a majority of States",[52] the Court referring to the existence or non-existence of a "common ground between the laws of the Contracting States".[53]

By widening the margin of appreciation that national authorities in principle enjoy in situations where there is no European consensus and, thus, exercising a less strict European supervision, the ECtHR takes into account the existing diversity among Contracting States and "refrains from playing its harmonising role, preferring not to become the first European body to "legislate" on a matter still undecided at European level".[54] Differently from the European Union, the Convention, as Eva Brems has observed, "is not considered to be a superstructure imposed on the contracting states from above, but a system of rules which are part of the common European heritage" and derived from the national systems of the European states, which explains the capital role that the European common ground factor plays in the ECtHR's case-law.[55]

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that the margin of appreciation constitutes a component of the proportionality review, the variable extent of the former affecting the scope of the latter, see RIVERS, J., "Proportionality and discretion in international and European law", in: TSAGOURIAS, N., (ed.), *Transnational Constitutionalism. International and European Models* (Cambridge: Cambridge University Press, 2007), p. 110. In a similar view, Françoise Tulkens and Luc Donnay draw a distinction between the intensity of the review (the margin of appreciation) and the object of the review (proportionality), while acknowledging that such distinction might be not always easy to draw in practice, see "L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?", (1) *Revue de sciences criminelle et de droit pénal comparé* (2006), p. 23.

[50] See the joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungid in *A, B and C v. Ireland*, ECt.HR (GC) 16 December 2010, Appl. No. 25579/05, http://www.echr.coe.int (visited on 6 May 2014), para. 5.

[51] MURRAY, J. L., "Consensus: concordance, or hegemony of the majority?", in: *Dialogue between judges*, European Court of Human Rights, Council of Europe, (2008), p. 36.

[52] ECt.HR, 24 June 2010, *Schalk and Kopf v. Austria*, Appl. No. 30141/04, http://www.echr.coe.int (visited on 6 March 2015), para. 105.

[53] ECt.HR, 28 November 1984, *Rasmussen v. Denmark*, Appl. No. 8777/79, http://www.echr.coe.int (visited on 6 March 2015), para. 40.

[54] Joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungid in *A, B and C v. Ireland*, *supra* note 51, para. 5.

[55] BREMS, E., "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", 56 *Zeitschrift fur ausldndisches offentliches Recht und Volkerrecht* (1996), pp. 276-277.

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Also, as employed by the Court, the concept of European consensus echoes the international nature of the Court and has to be considered as a persuasive legitimising tool, insofar as it is founded on the decisions made by democratically elected national bodies.[56] In that regard, and as it has been pointed out but some of the judges of the Strasbourg court, "the democratic legitimacy of measures taken by democratically elected governments commands a degree of judicial self-restraint"[57] and, in this context, "it is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions".[58]

The ECtHR's approach can be therefore seen as an illustration of the special role that the Strasbourg court recognizes to the domestic legislator and, more largely, of democratic legitimacy as an external factor for the margin of appreciation concept within the Convention system.[59] Given this background, and as a result of the subsidiary nature of the Convention, deference to national decision-making in the form of the margin of appreciation doctrine is to be welcomed since it protects democratic self-government at the domestic level.[60]

However, where there is a European consensus, the Strasbourg court can develop its harmonising role. As it appears from the ECtHR's case-law, "[s]ince the Convention is first and foremost a system for the protection of human rights, the Court must […] have regard to the changing conditions in Contracting States and respond […] to any emerging consensus as to the standards to be achieved".[61] This is consequent with the idea that "the Convention is a living instrument which […] must be interpreted in the light of present-day conditions",[62] in which is founded the principle of evolutive interpretation of the Convention.[63] However, in correspondence with the ECtHR's position as an international court within the subsidiary nature of the Convention, this evolutive or dynamic interpretation of the ECHR should be pursued only when there is "a sufficient basis in changing conditions in the societies of the Contracting States".[64]

[56] See DZEHTSIAROU, K., "Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights", (3) *Public Law* (2011), pp. 534-553.
[57] Joint partly dissenting opinion of Judges Wildhaber, Pastor Ridruejo, Costa and Baka in *Karatas v. Turkey*, ECt.HR (GC) 8 July 1999, Appl. No. 23168/94, http://www.echr.coe.int (visited on 6 March 2015).
[58] Joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in *Hirst v. The United Kingdom* (No. 2), EC.tHR (GC) 6 October 2005, Appl. No. 74025/01, http://www.echr.coe.int (visited on 6 March 2015), para. 6.
[59] LEGG, *supra* note 22, pp. 75-79.
[60] von STADEN, *supra* note 7, p. 1042.
[61] ECt.HR (GC) 18 January 2001, *Chapman v. The United Kingdom*, Appl. 27238/95, http://www.echr.coe.int (visited on 6 March 2015), para. 70.
[62] ECt.HR, 25 April 1978, *Tyrer v. The United Kingdom*, Appl. 5856/72, http://www.echr.coe.int (visited on 6 March 2015), para. 31.
[63] See more in detail DZEHTSIAROU, K., "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", 12 (10) *German Law Journal* (2011), pp. 1730-1745.
[64] Joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in *Hirst*, *supra* note 58, para. 6.

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When the existence of a European common ground narrows the domestic margin of appreciation, the fact remains that, as suggested by Eva Brems, the consensus approach might prevent the margin of appreciation's function as a tool for the accommodation of diversity in regard to those States finding themselves in a minority position while having good reasons, based on cultural, economic or other contextual factors, to wish to maintain their position.[65] Consequently, in these cases, a consensus approach can have a negative impact in the dimension of the margin of appreciation as a tool for the respect of democratic national choices.

However, this approach is consistent not only with the principle of evolutive interpretation of the Convention, but also with the mention included in the preamble, mentioned above, according to which the objective of the Council of Europe is the achievement of a greater unity between its members and that one of the methods by which this aim is to be pursued is the maintenance and further realisation of human rights. Indeed, as it has been observed - and in accordance with the (quasi-) constitutional character of the Strasbourg court - "one of the paramount functions of the [ECtHR] case-law is to *gradually create a harmonious application of human rights protection*, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence".[66]

In addition, the national authorities' discretion is never unlimited and "*goes hand in hand with European supervision*",[67] even in those cases in which the Court grants national authorities a wide margin of appreciation,[68] which can result inter alia from the absence of a European consensus.[69] In that sense, as the former Vice-President of the Court, Judge Rozakis, has observed, "[i]t is one thing to consider that the absence of a consensus does not allow the Court to "legislate" on the matter, it is another thing to surrender unconditionally its decision-making prerogative to the national authorities".[70]

In this context, the margin of appreciation plays a leading role in the Strasbourg court's challenge of finding a balance between unity and the "marvellous richness of diversity"[71] within the ECHR framework. As a flexible tool of accommodation of diversity,[72] which does not prevent the Court from fulfilling its task of ensuring an equal respect of the rights granted by the ECHR, the margin of appreciation is a

[65] BREMS, *supra* note 34, pp. 419-420.
[66] Joint party dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungid in *A, B and C v. Ireland*, *supra* note 50, para. 5 (emphasis added).
[67] ECt.HR (Plenary), *Handyside*, *supra*, note 36, para. 49 (emphasis added).
[68] See ECt.HR (Plenary), *Ireland v. The United Kingdom*, Appl. No. 5310/71, http://www.echr.coe.int (visited on 6 March 2015), para. 207.
[69] See ECt.HR (GC), *Lautsi*, *supra* note 47, paras. 61-62 and 69-70 (emphasis added).
[70] ROZAKIS, C., "Through the Looking Glass: An "Insider"'s View of the Margin of Appreciation", in: *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa* (Paris: Dalloz, 2011), p. 536.
[71] MAHONEY, P., "Marvellous Richness of Diversity or Invidious Cultural Relativism?", 19 (1) *Human Rights Law Journal* 1-6 (1998), pp. 1-6.
[72] On the links between diversity and flexibility in the margin of appreciation doctrine, see VARJU, *supra* note 3, pp. 58-62.

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paradigmatic manifestation of the ECtHR's enforcement of the implementation of human rights in the dimension of its combined roles of an international and a constitutional court, as well as of the subsidiary nature of the Convention.[73]

In this regard, this tool can be considered, according to what has been suggested by Mireille Demas-Marty, as the "key to ordering pluralism", in that sense that "on the one hand, it expresses the centrifugal dynamic of national resistance to integration" and "on the other, since the margin is not unlimited but bounded by shared principles, it sets a limit, a threshold of compatibility that leads back to the centre (centripetal dynamic)".[74] Similarly, Michel Rosenfeld has argued that this technique "allows for striking an optimum equilibrium between convergence and divergence in a transnational or international setting".[75]

Also, the margin of appreciation concept plays a key role regarding the standards of democracy in Europe. As it has been suggested, this tool allows for the respect by the ECtHR of the policy choices made at the national level as long as they act within their margin of discretion,[76] which can be justified by the democratic deficit in the operation of international judicial bodies that have to review decisions adopted by democratically elected national authorities,[77] sometimes in very sensitive issues at the national level. In this context, as reaffirmed by its recent judgement in the case *S.A.S. v. France*, the Court (emphasizing "the fundamentally subsidiary role of the Convention mechanism") considered that "[t]he national authorities have direct democratic legitimation and are […] in principle better placed than an international court to evaluate local needs and conditions", and consequently stated that particularly "[i]n matters of general policy, on

[73] In a similar view, see ULFSTEIN, G., "The European Court of Human Rights as a Constitutional Court?", *PluriCourts Research Paper No. 14-08*, available at http://ssrn.com/abstract=2419459 (visited on 6 March 2015), p. 5, as well as GARCÍA ROCA, J., "Soberanía estatal *versus* integración europea mediante unos derechos fundamentales comunes: ¿cuál es el margen de apreciación nacional?", in: GARCÍA ROCA, J., and FERNÁNDEZ SÁNCHEZ, P. A. (eds.), *Integración europea a través de derechos fundamentales: de un sistema binario a otro integrado* (Madrid: Centro de Estudios Políticos y Constitucionales, 2009), pp. 37-38.

[74] DELMAS-MARTY, *supra* note 1, p. 44. For an overview of the "ordered" legal pluralism theory, see BAUMGÄRTEL, M., STAES, D., and MENA PARRAS, F. J., "Hierarchy, Coordination, or Conflict? Global Law Theories and the Question of Human Rights Integration", 2 (3) *Journal européen des droits de l'homme / European journal of Human Rights* (2014), pp. 337-340.

[75] ROSENFELD, M., "Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism", 6 (3-4) *International Journal of Constitutional Law* (2008), p. 416.

[76] GERARDS, *supra* note 37, p. 85.

[77] See SHANY, Y., "Toward a General Margin of Appreciation Doctrine in International Law?", 16 (5) *EJIL* (2006), pp. 919-921. While this argument may not be applicable as regards the deference towards the decisions of national courts - which are neither formed of directly-elected individuals -, national courts remain nonetheless better placed than the Strasbourg court to secure the rights enshrined in the Convention. Therefore, as it is the case regarding the decisions adopted by the other national authorities, "[i]n exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on", ECt.HR (GC) 7 February 2012, *Axel Springer v. Germany*, Appl. 39954/08, http://www.echr.coe.int (visited on 6 March 2015), para. 86.

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which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight".[78]

In that regard, the functions performed by the ECtHR as both an international court of human rights and a constitutional court, as well as the conception of the margin of appreciation as a tool to accommodate diversity and of respect of democratic national choices are not mutually exclusive but complementary, since "the purpose of the High Contracting parties in concluding the Convention was […] to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a *common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law*".[79]

3. The recent ECtHR case-law on European consensus and the margin of appreciation: a step back?

Previous considerations notwithstanding, it remains nonetheless true that the Court has sometimes made an inconsistent and unpredictable usage of the margin of appreciation doctrine regarding several different aspects, which include, among others, the unrelatedness of the margin of appreciation to the Court's decision, its different application in similar cases, the confusion about the determination of the margin's scope or its unclear consequences for standards of review.[80]

This critical remark can also be extended to the recent case-law linking the extent of the margin of appreciation to the existence or absence of a common ground between the laws of the Contracting States. For instance, in its decision on *A, B and C v. Ireland*, despite admitting that "there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law",[81] the Court stated that this consensus did not decisively narrow the broad margin of appreciation of the State.[82] In that regard, the ECtHR affirmed that "this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests", as "there was no European consensus on the scientific and legal definition of the beginning of life".[83] Consequently, in the Court's view, "[s]ince the rights claimed on behalf of the

[78] ECt.HR (GC) 1 July 2014, *S.A.S. v. France*, Appl. 43835/11, http://www.echr.coe.int (visited on 8 March 2015), para. 129.
[79] European Commission on Human Rights, Decision as to the admissibility of Appl. No. 788/60, *Austria v. Italy*, http://www.echr.coe.int (visited on 6 March 2015) (emphasis added).
[80] See KRATOCHVÍL, J., "The Inflation of the Margin of Appreciation by the European Court of Human Rights", 29 (3) *Netherlands Quarterly of Human Rights* (2011), pp. 324-357 and GERARDS, J., "Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights", in: CLAES, M., and DE VISSER, M. (eds.), *Constructing European Constitutional Law*, forthcoming (Oxford: Hart, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344626 (visited on 6 March 2015).
[81] ECt.HR (GC), *A, B and C v. Ireland*, *supra* note 50, para. 235.
[82] *Ibid.*, para. 236.
[83] *Ibid.*, para. 237.

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foetus and those of the mother are inextricably interconnected […], the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother".[84]

This decision was severely criticised by several judges in a joint partly dissenting opinion, who affirmed that the Court had "disregarded the existence of a European consensus on the basis of "profound moral views" [of the Irish people as to the nature of life and therefore as to the need to protect the life of the unborn]", and that "to consider that [these profound moral views] can override the European consensus, which tends in a completely different direction, is a *real and dangerous new departure in the Court's case-law*".[85]

This "new departure" in the Court's case-law seems to have been confirmed in its decision on *S.H. and others v. Austria*, regarding the prohibition of the use of ova from donors and sperm from donors for in vitro fertilisation,[86] as well as more recently in its judgement on *S.A.S. v. France*, on the question of banning the full-face veil.[87] The recent trend of the Strasbourg court's to not take into account or not recognize the existence of a European consensus on the question at stake (and therefore keeping the broad margin of appreciation that States might be accorded and applying a less close supervision of the relevant national measures) is very regrettable, as it seems to indicate that the Strasbourg judges are more and more pragmatically guided by political considerations in very sensitive issues from a moral and ethical point of view, making the ECtHR's life easier *vis-à-vis* national criticisms by disregarding its constitutional functions and the harmonising role of its case-law.

IV. CONCLUSION

By discussing the margin of appreciation doctrine from the perspective of the different functions performed by the Strasbourg court and the way that it enforces the implementation of human rights, this article has provided an analysis of this technique as the main tool to accommodate diversity and respect democratic national choices in the context of the judicial review by the ECtHR of decisions adopted by domestic authorities at the ECHR level.

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[84] *Ibid.*

[85] Joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungid, para. 9 (emphasis added). For a more in-depth critical analysis of this case, see, among others, MENA PARRAS, F. J., "La sentencia A, B y C contra Irlanda y la cuestión del aborto: ¿Un "punto de inflexion" en la jurisprudencia del Tribunal Europeo de Derechos Humanos en material de consenso y margen de apreciación nacional?", 8 *Anuario de Derechos Humanos* (2012), pp. 115-124.

[86] See the Joint dissenting opinion of Judges Tulkens, Hirvelä, Lazarova, Trajkovska and Tsotsoria (from para. 7) as compared to the position of the Court (from para. 93), ECt.HR (GC) 3 November 2011, *S.H. and others v. Austria*, Appl. 57813/00, http://www.echr.coe.int (visited on 6 March 2015).

[87] See comparatively paras. 155 and 156 of the judgement, *supra* note 79 and paras. 19 and 20 of the Joint partly dissenting opinion of Judges Nussberger and Jäderblom.

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In that regard, the use of the margin of appreciation is a paradigmatic manifestation of the ECtHR's position somewhere in between an international court of human rights and a constitutional court, as well as of the subsidiary nature of the Convention. In the context of the accommodation of diversity that the margin of appreciation provides, the existence of a European consensus is a key factor that the Court has traditionally taken very seriously into account in fulfilling its mission to gradually create a harmonious application of human rights protection within the ECHR system.

Also, from the dimension of the interactions between the European Court of Human Rights and domestic authorities which have the primary role to secure the rights enshrined in the Convention, it has been argued that the respect of democratic choices adopted at the national level as one of the foundations of the margin of appreciation concept in the Convention system allows for the necessary deference towards the measures taken by domestic authorities, the ECtHR not acting as a "legislator" at the pan-European level in those situations where a European consensus is not at hand.

In that sense, in consistence with the Strasbourg court's legal nature, the margin of appreciation is a major tool for the balance between the choices to be made at the national and the supranational level in the ECHR system[88] and, more largely, for the accommodation of diversity and the respect of decisions adopted by democratically elected bodies at the pan-European level.

While its sometimes erratic application does not necessarily discredit the benefits of this doctrine, the incoherencies of the ECtHR's case-law are certainly regrettable. In that regard, a more coherent approach of this doctrine should be welcomed since the introduction of an excessive flexibility in the use of the tool runs counter to the principle of legal certainty, a principle which no legal technique should circumvent in the resolution of conflicts between interacting and overlapping legal systems. Also, an incoherent approach of the margin of appreciation might undermine the consideration of this notion as a "solvent against "unfounded" judicial activism of international adjudications"[89] and, thus, the legitimacy of the Court. In addition, the recent trend in the Court's case-law on the link between the existence of a European consensus and the scope of the margin of appreciation has to be criticised, as it undermines the constitutional functions that the Court performs, as well as the harmonising role of its case-law.

This is particularly relevant in light of the recent developments of the European Convention on Human Rights system. Indeed, the proposed inscription of the margin of appreciation in the preamble of the Convention by Protocol No. 15 adopted after the Brighton Declaration constitutes the first restriction in the ECHR history to the Court's intervention, whose mission still is to ensure the protection and development of the rights granted by the Convention.[90] Consequently, it is essential that the margin of

[88] In a similar vein, see GERARDS, *supra* note 37, p. 107.
[89] ARAI-TAKAHASHI, *supra* note 34, p. 95.
[90] TULKENS, F., « La Cour européenne des droits de l'homme et la Déclaration de Brighton. Oublier la réforme et penser l'avenir », (2) *Cahiers de droit européen* (2012), p. 341.

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appreciation doctrine is used in a more consistent manner not only to assure the principle of legal certainty and reinforce the legitimacy of the Strasbourg court, but also in order for it to keep performing its role of a (quasi-) constitutional court, as well as its status of the "centre of gravity of human rights in Europe".[91]

[91] HERVIEU, N., *Cour européenne des droits de l'homme: Bilan d'étape d'un perpétuel chantier institutionnel*, Lettre « Actualités Droits-Libertés » du CREDOF, 3 septembre 2013, available at http://revdh.org/2013/09/03/cedh-perpetuel-chantier-institutionnel (visited on 6 March 2015). The expression of "centre of gravity of human rights in Europe" ("centre de gravité de l'Europe des droits de l'homme") has been recently used by the President of the Court, M. Dean Spielmann, in his opening address to the seminar held in Strasbourg on 31 January 2014 entitled "Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?", before the Court's solemn hearing for the opening of the judicial year of 2014, text available at http://echr.coe.int/Documents/Dialogue_2014_ENG.pdf (visited on 6 March 2015), p. 5.

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