

## MARGIN OF APPRECIATION, CONSENSUS, AND UNIVERSAL STANDARDS

EYAL BENVENISTI\*

### I. INTRODUCTION: "MARGIN OF APPRECIATION" VS. UNIVERSALISM

Judgments of the European Court of Human Rights (ECHR) and of the Inter-American Court of Human Rights (IACHR) and views of the Human Rights Committee (HRC) resonate in numerous national decisions concerning human rights issues. Their jurisprudence has become an indelible source of inspiration for judges in national courts around the globe.<sup>1</sup> Prominent among these international human rights organs is the ECHR, whose jurisprudence enlightens not only national judges but also judges and committee members of the other international human rights organs.<sup>2</sup> The judicial output of the ECHR and the other international bodies carries the promise of setting universal standards for the protection and promotion of human rights.

These universal aspirations are, to a large extent, compromised by the doctrine of margin of appreciation. This doctrine, which permeates the jurisprudence of the ECHR,<sup>3</sup> is based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convic-

---

\* Visiting Professor of Law, Harvard University; Professor of Law, The Hebrew University of Jerusalem, Faculty of Law. I thank Kathryn Comerford for her comments on a previous draft. Thanks are also due to the Israel Science Foundation for a grant supporting the research on which this note is based.

1. See Anne-Marie Slaughter, *A Typology of Transjudicial Communications*, 29 U. RICH. L. REV. 99 (1994); Eyal Benvenisti, *National Courts and the International Law on Minority Rights*, 2 AUSTRIAN REV. INT'L & EUR. L. 1 (1997).

2. On the influence of the ECHR's jurisprudence on the IACHR and the HRC, see J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 17-21 (1993).

3. For comprehensive analyses of the margin of appreciation doctrine, see HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996); see also Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights* 56 ZAÖRV (HEIDELBERG J. INT'L L.) 240 (1996).

tions. Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights. If applied liberally, this doctrine can undermine seriously the promise of international enforcement of human rights that overcomes national policies. Moreover, its use may compromise the credibility of the applying international organ. Inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards.<sup>4</sup> Even more importantly, the rhetoric of supporting national margin of appreciation and the lack of corresponding emphasis on universal values and standards may lead national institutions to resist external review altogether, claiming that they are the better judges of their particular domestic constraints and hence the final arbiters of their appropriate margin. Thus, not only would universal standards be undermined, but also the very authority of international human rights bodies to develop such standards in the long run also may be compromised. International human rights organs, other than the ECHR, have largely succeeded in avoiding a systematic recourse to the margin of appreciation doctrine,<sup>5</sup> although the rationale underlying the doctrine has been endorsed implicitly

---

4. See Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 *FORDHAM INT'L L. J.* 101, 114, 119 (1995) (arguing that States more sympathetic to democratic principles are granted a wider margin).

5. However, references to it were made by the IACHR in I/A Court H.R., Proposed Amendments to the Naturalizations Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4184 of January 19, 1984, ser. A, no. 4, <<http://www1.umn.edu/humanrts/iachr/iachr.html>>, (approving "the margin of appreciation which is reserved to States when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with," (*id.* at para. 62)) and by the HRC: Hertzberg et al. v. Finland, U.N. GAOR Human Rights Comm., 37<sup>th</sup> Sess., Supp. No. 40 at 161, para. 10.3, U.N. Doc. A/37/40 (1982), <<http://www1.umn.edu/humanrts/undocs/undocs.htm>> (recognizing "a certain margin of discretion [that] must be accorded to the responsible national authorities" in deciding whether to broadcast discussions related to homosexual relations in national media). In the case of Lansman et al. v. Finland, U.N. GAOR Human Rights Comm., 58<sup>th</sup> Sess., Communication No. 671/1995 at para 10.5, U.N. Doc. CCPR/C/58/D/671/1995 (1996), which addressed Finnish development plans in an area used by the Sami minority, the HRC emphasized that its decision was *not* based on reference to a margin of appreciation.

in a few cases.<sup>6</sup> Even if these organs continue to shun the margin of appreciation, the influential European jurisprudence, with its liberal use of the doctrine, may compromise the global efforts of the other human rights bodies and of national judges to set universal standards.

## II. JUSTIFICATIONS OF THE DOCTRINE

In view of the potentially negative influence of the margin of appreciation doctrine on the goals of setting communal and global standards, it is important to understand why the European Commission and Court of Human Rights initially invented the doctrine and the current justifications for its continued existence. By analyzing its justifications, it may be possible to define its scope more accurately.

The margins doctrine initially responded to concerns of national governments that international policies could jeopardize their national security. This may explain the initial application of the doctrine in the context of derogations from treaty obligations due to self-proclaimed states of national emergency.<sup>7</sup> In such circumstances, “the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government’s appreciation.”<sup>8</sup> This rationale later was expanded to allow each country wide discretion to select policies that would regulate potentially harmful activities, such as incitement to violence<sup>9</sup> or racist speech,<sup>10</sup> by

---

6. See MERRILLS, *supra* note 2, at 19; Markus Schmidt, *Book Review*, 10 HARV. HUM. RTS. J. 333, 338 (1997) (interpreting the HRC decisions as based on the margin of appreciation rationale); Slaughter, *supra* note 1, at 106.

7. See Ni Aolain, *supra* note 4, at 112.

8. Sir Humphrey Waldock, the President of the Commission, in his argument before the Court in the case of *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. B) at 408 (1960-1961) (concerning national security measures under conditions of proclaimed national emergency).

9. See *Zana v. Turkey*, 1997-VII Eur. Ct. H.R. 2533, No. 57 (state has margin of appreciation in regulating what it conceives as incitement by Kurdish politician).

10. See *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994), *reprinted in* 15 Hum. Rts. L.J. 361 (1994) (margin transgressed in prosecuting a journalist for communicating racist messages).

means befitting each State's unique circumstances and societal constrains.<sup>11</sup>

The percolation of the doctrine into areas devoid of security consideration, such as the allocation and management of national resources,<sup>12</sup> length of national statutes of limitations,<sup>13</sup> or restriction of speech due to public morals,<sup>14</sup> reflected an altogether different philosophy, one which is based on notions of subsidiarity and democracy and which significantly defers to the wishes of each society to maintain its unique values and address its particular needs.<sup>15</sup> In more practical terms, the extension of the doctrine to non-security issues has been explained on grounds of judicial politics.<sup>16</sup>

---

11. See Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 48 (1995) ("[The doctrine] is particularly generous with regard to actions which domestic authorities regard as critical to the prevention of disorder or crime.").

12. See *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 9 at 32 (1986) (States enjoy wide margin of appreciation in determining the "public interest" in relation to the expropriation of property).

13. See *Stubbings & Others v. United Kingdom*, 1996-IV Eur. Ct. H.R. 1487, No. 18.

14. See the *Handyside Case*, 22 Eur. Ct. H.R. (ser. A) (1976); see also the comparable view of the HRC in Hertzberg, *supra* note 5.

15. See Case "Relating to Certain Aspects of the Laws on the Use of Languages in Belgium" 4 Eur. Ct. H.R. (ser. A) (1968). Although the Court did not explicitly espouse the Commission's use of the margins doctrine, it provided the rationale for its application: "In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterize the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role 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." *Id.* at 34-35. On the subsidiary nature of the European Convention, see also Herbert Petzold, *The Convention and the Principle of Subsidiarity*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 41 (R. St. J. MacDonald et al. eds., 1993); Brems, *supra* note 3, at 300-04. On the notion that democratic decision-making should be given due deference, see Paul Mahoney, *Marvelous Richness of Diversity or Invidious Cultural Relativism?* 19 HUM. RTS. L. J. 1, 2, 4 (1998).

16. See R. St. J. MacDonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM*, *supra* note 15, at 123 ("The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.").

Without entering into the well-trodden general debate on universalism versus relativism in human rights jurisprudence, I seek in this note to delineate the boundaries of the doctrine by emphasizing some of the inherent deficiencies of the democratic systems. My argument is that while resort to the margins doctrine may be justified in certain matters that affect the general population in a given society,<sup>17</sup> the doctrine is inappropriate when conflicts between majorities and minorities are examined. In such conflicts, which typically result in restrictions exclusively or predominantly on the rights of the minorities, no deference to national institutions is called for; rather, the international human rights bodies serve an important role in correcting some of the systemic deficiencies of democracy. Thus, a wide margin of appreciation is appropriate with respect to policies that affect the general population equally, such as restrictions on hate speech (which are aimed at protecting domestic minorities),<sup>18</sup> or statutes of limitations for actions in tort.<sup>19</sup> On the other hand, no margin is called for when the political rights of members of minority groups are curtailed through, for example, restrictions on speech or on association,<sup>20</sup> when their educational opportunities are restricted by the State,<sup>21</sup> or when the allocation of resources creates differential effects on the majority and the minority.<sup>22</sup> Acquiescing to the margin of appreciation of national institutions in the latter cases assists the majorities in burdening politically powerless minorities.

---

17. Subject, of course, to the existence of universal minimal standards that preempt the decisions of any particular society.

18. See *Jersild*, *supra* note 10.

19. See *Stubbings*, *supra* note 13.

20. For curtailment of speech of minority speakers, see *Zana*, *supra* note 9. But see *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1, No. 62 (in policing political parties, states enjoy “only a limited margin of appreciation, which goes hand in hand with rigorous European supervision”). For examples of interference with political rights of minorities in post-Communist countries, see *Benvenisti*, *supra* note 1, at 21-23.

21. See *Belgian Linguistic Case*, *supra* note 15 (tolerating most policies restricting education possibilities in the language of minority residents).

22. See the HRC’s view in *Lansman*, *supra* note 5. The Finnish development plans affecting Sami herdsmen had been endorsed by the European Commission of Human Rights. *Id.* at para. 6.8.

### III. MARGIN OF APPRECIATION AND MINORITY RIGHTS

There are often several groups within each community that tend to be persistently outvoted and, hence, under-represented in the political process. They are the “discrete and insular minorities”<sup>23</sup> who are in a very real sense political captives of the majority. These groups usually would include members of ethnic, national, or religious communities who have been, and are, numerically inferior to the rest of the population.<sup>24</sup> In addition to questioning their different culture and tradition, members of the majority often also question the loyalty of these groups, and concerns with potential irredentism or secessionism are rife. Absent political influence and faced with prevalent resentment, minorities rely upon the judicial process to secure their interests.<sup>25</sup> But because the national judicial process – itself dominated by judges of the majority – may fail to protect them, international judicial and monitoring organs are often their last resort and only reliable avenue of redress.

In addition to those “traditional” minorities, other “political outcasts” consist of groups of individuals whose unique situation or needs differentiate them from the rest of the society. They may seek society’s recognition and respect, such as in the case of homosexuals.<sup>26</sup> They may seek different, “special”

---

23. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

24. Compare Capotorti’s widely accepted definition of minorities as “[a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.” Francesco Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, 78.XIV.1 U.N. Doc. E/CN.4/Sub.2/384/Rev.1 at 96 (1979).

25. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). See also Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L. J. 1287 (1982); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Owen M. Fiss, *The Supreme Court, 1978 Term - Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

26. For the reconceptualization of sexual minorities as entitled to international recognition, see James D. Willets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International And Comparative Law Perspective*, 60 ALB. L. REV. 989 (1997); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual*

treatment and a disproportionately large share of public expenditure, such as in the case of persons with disabilities.<sup>27</sup> They may also seek better procedural guarantees of due process in criminal trials.<sup>28</sup>

The margin of appreciation doctrine may be theoretically justified as a means to promote democracy within communities. But whenever minorities exist, democracy is prone to undermine their interests. Majorities often monopolize political power with little more than half of the votes and thus use the democratic processes as means to secure their interests at the expense of the minority.<sup>29</sup> In view of this inherent deficiency in the democratic system, national policies warrant no deference when minority rights and interests are implicated.

Certain societies may try to prevent skewed majority-minority power relations by setting up effective domestic institutional and judicial guarantees that could compensate the numerical inferiority of the minority. To the extent such guarantees are effective, deference to their outcomes, through the margins doctrine, may be called for. Indeed, such deference could offer an incentive for heterogeneous communities to establish such procedures and thereby avoid external rebuke. But when these domestic guarantees are non-existent or fail – and no margins should be tolerated here – international institutions must react with resolve.

---

*Orientation*” in *Euro-American Law and Society*, 83 CALIF. L. REV. 3 (1995); David A. Catania, *The Universal Declaration of Human Rights and Sodomy Laws: A Federal Common Law Right to Privacy For Homosexuals Based on Customary International Law*, 31 AM. CRIM. L. REV. 289 (1994); Markus Dirk Dubber, Note, *Homosexual Privacy Rights Before the United States Supreme Court and the European Court of Human Rights: A Comparison of Methodologies*, 27 STAN. J. INT’L L. 189 (1990).

27. On the rights of persons with disabilities as human rights, see, e.g., Dieter Giesen, *A Right to Health Care?: A Comparative Perspective*, 4 HEALTH MATRIX 277 (1994); Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987).

28. On the characterization of the accused as a minority group with limited political influence, see generally Alex Stein, *Evidential Rules for Criminal Trials: Who Should be in Charge?* in *JUDGING CRIMINAL TRIALS* (forthcoming, 1999).

29. For numerous examples of this prevailing attitude, see generally DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* Ch. 2 (1985).

One of the main justifications for an international system for the protection of human rights lies in the opportunity it provides for promoting the interests of minorities. This system is an external device to ameliorate some of the deficiencies of the democratic system. Such external mechanisms are not susceptible to the concerns of domestic governments as much as internal decision-makers are. Whereas “national” interests (defined as such by majority-controlled institutions) often prevail in national courts,<sup>30</sup> they may be deemed less compelling when reviewed by detached external decision-makers. To grant margin of appreciation to majority-dominated national institutions in such situations is to stultify the goals of the international system and abandon the duty to protect the democratically challenged minorities. Therefore, not only must the doctrine be rejected in such cases, but also an altogether different policy is needed. Echoing *Carolene Products*’ famous footnote,<sup>31</sup> international human rights institutions should look closely at “statutes [and other policies] directed at particular religious, or national, or racial minorities,” and examine “whether prejudice against discrete and insular minorities may . . . call for a correspondingly more searching judicial inquiry.”<sup>32</sup>

#### IV. MINORITIES, MARGINS, AND THE CONSENSUS

A more searching judicial inquiry, without recourse to the margins rhetoric, will clear the way for more effective international protection of minorities in matters concerning the allocation of resources or of burdens. For example, national plans to reduce grazing areas crucial for maintaining the culture of the Sami minority in Finland<sup>33</sup> should be scrutinized strictly, rather than granted deference simply because they are majority decisions. The case is different when the majority-minority conflict is not related to the allocation of resources, but instead involves conflicting moral values, such as with respect to equality regardless of sexual orientation, or to the compatibil-

---

30. See Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT’L L. 159 (1993).

31. See *supra* note 23.

32. *Id.*

33. See Lansman, *supra* note 5.

ity of certain religious practices with the prevailing majority values. In determining these conflicts, a closer look would not produce better informed decisions. The adjudicating organ must either adopt a moral standard or defer to a relativistic approach based on a comparative analysis. The ECHR has opted for the latter approach by developing the doctrine of consensus. This doctrine, coupled with the margins doctrine, poses another serious obstacle to the international protection of minority values. In the jurisprudence of the ECHR, consensus is inversely related to the margins doctrine: the less the court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins the court is prepared to grant to the national institutions.<sup>34</sup> Minority values, hardly reflected in national policies, are the main losers in this approach.

The ECHR's consensus doctrine enjoys considerable support among legal commentators.<sup>35</sup> The supporters, while critical of the vague process of identifying consensus,<sup>36</sup> allude to the political constraints within which the court operates and choose to highlight its bright side. Thus, the consensus doctrine has been portrayed as a sophisticated mechanism to prod nations to update their policies gradually to emerging new

---

34. On the link between the margins doctrine and consensus, see Yourow, *supra* note 3, at 443-45; Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication* 107 *YALE L.J.* 273, 316-17 (1997); Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 *CORNELL INT'L L.J.* 133, 141 (1993); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 *HASTINGS L.J.* 805, 862-863 (1990). Brems identifies several other elements that shape the extent of the margin in any given case. See Brems, *supra* note 3, at 256. Mahoney identifies another list of elements. See generally Mahoney, *supra* note 15.

35. Critics include R. St. J. MacDonald and Paolo G. Carozza. MacDonald argued that by this approach the Court "forfeit[s] its aspirational role by tying itself to a crude, positivist conception of 'standards' . . . and prevents the emergence of a coherent vision of the Court's function." MacDonald, *supra* note 16, at 124. See also Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 *NOTRE DAME L. REV.* 1217, 1228 (1998) ("Surely the Convention did not mean to efface all national differences in the name of uniformity, but instead to set a minimum level of compatibility.").

36. See, e.g., Helfer, *supra* note 34, at 154-65.

standards while still respecting their domestic processes.<sup>37</sup> In other words, the judges are portrayed as holding firm the compass of morality, guiding the communal ship towards more enlightened standards, yet taking into account the prevailing winds and sea conditions. The consensus rationale, it is suggested, is but a convenient subterfuge for implementing the court's hidden principled decisions. The rather vague process through which consensus is actually being identified only supports such an explanation.<sup>38</sup>

Even if we trust these judges at the helm, the doctrine they use is flawed. It is flawed from a theoretical perspective and harmful from a practical one. From a theoretical perspective, this doctrine can draw its justification only from nineteenth-century theories of State consent. Given the importance of State sovereignty, the only way to impose on State parties newly evolving duties is by resorting to the notion of emerging custom, or "consensus." By resorting to this device, the court eschews responsibility for its decisions.<sup>39</sup> But the court also relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality. Its decisions reflect a respect of sovereignty, of the notion of subsidiarity, and of national democracy. It stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities.

The consensus rationale is also flawed from a practical perspective. The question is whether this doctrine is an optimal device to promote human rights given political constraints. One wonders to what extent it is really possible to envision credible threats by member States to challenge the court's authority in reaction to unpopular judgments. One

---

37. As Helfer and Slaughter suggest, "[a]s a result [of the link between the consensus approach and the margins doctrine] the ECHR is able to identify potentially problematic practices for the contracting States before they actually become violations, thereby permitting the States to anticipate that their laws may one day be called into question. In the meantime, a State government lagging behind in the protection of a certain right is allowed to maintain its national policy but is forced to bear a heavier burden of proof before the ECHR - whose future opinions will turn in part on its own conception of how far the 'trends' in European domestic law have evolved." See Helfer & Slaughter, *supra* note 34, at 317.

38. Therefore, suggestions to clarify the process of defining the consensus would be counter-productive.

39. See MacDonald, *supra* note 16, at 124.

wonders also to what extent that threat is actually open to abuse by those who wish to justify the perpetuation of ossified and untenable positions. What is certain is that in terms of the allocation of resources, this policy puts quite a heavy burden on the advocates of the promotion of individual and minority rights who must spread their resources among the diverse national institutions in their effort to promote human rights. Only if they succeed in a sufficient number of jurisdictions will the court be convinced that the status quo has changed and react accordingly. Such a policy cannot be said to be promoting human rights, especially not minority rights.

The "consensus" argument is particularly problematic when viewed from outside of Europe. Its influence can seriously undermine the efforts of national judges in other developed and developing countries to find external support for enforcing human rights within their domestic legal system. With global consensus barely being reached on basic issues, such as gender equality and child labor, the consensus rhetoric could stifle the efforts to promote universal standards. Recourse to the ECHR jurisprudence outside its jurisdiction becomes a risky tactic for the human rights advocate. Other international human rights organizations wisely have avoided this approach thus far. They must continue to caution themselves against being drawn to this way of analyzing the issues they face.

## V. CONCLUSION

International human rights courts and organs emerged after it became clear that national democratic institutions were not immune to gross violations of human rights. External supervision was deemed a necessary complement to domestic guarantees against abuses by domestic majorities. The doctrine of margin of appreciation, especially when coupled with the consensus rationale, essentially reverts difficult policy questions back to national institutions, in complete disregard of their weaknesses. Considerations of democracy and subsidiarity do merit such a *renvoi*, but only when the national procedures can be trusted, namely when the policies in question affect the existing majority of citizens or when effective domestic guarantees offset the numerical inferiority of the minorities. But where national procedures are notoriously prone to

failure, most evident when minority rights and interests are involved, no margin and no consensus should be tolerated. Anything less than the assumption of full responsibility would amount to a breach of duty by the international human rights organs.