

The Roles and Parallels of the Margin of
Appreciation Doctrine in Domestic Law

TABLE OF CONTENTS

1	Introduction	
1.1	More to the Margin	3
1.2	Supranational, Domestic and Deferential Margin Models	4
1.3	Conclusions	5
2	The Supranational Margin of Appreciation: Theory and Jurisprudence	
2.1	Introduction	6
2.2	Universality and Subsidiarity: Reconcilable?	8
2.3	The European Court's Approach to the Margin	11
2.3.1	Effect of Margin on State	12
2.3.2	Effect of Margin on Remainder of Europe	15
2.3.3	Triggers for the application of margin doctrine	17
2.3.4	Stages of Review	18
2.4	Conclusions	21
3	The Margin in the Domestic Context	
3.1	Introduction	22
3.2	The Mirror Principle and the Margin	23
3.3	Developing Areas of Margin Law	26
3.3.1	National Security and Derogations	26
3.3.2	Foetal Rights	28
3.3.3	Homosexual and Transgendered Rights	29
3.3.4	Blasphemy Law	31
3.4	Conclusions	32
4	Supranational and Domestic Principles of Deference	
4.1	Introduction	34
4.2	The Discretionary Area of Judgement and Rights Identification	35
4.3	Dialogue in the Domestic Sphere	38
4.4	Dialogue Between the United Kingdom and Strasbourg	39
4.5	Conclusions	40
5	Conclusions	
5.1	Involving the State	42
5.2	Towards Universality	43
	Bibliography	45

CHAPTER 1

INTRODUCTION

1.1 More to the Margin

The margin of appreciation is a doctrine crucial to the jurisprudence of the European Court of Human Rights. It enables the member states of the Council of Europe to retain a residual power in assessing legitimate justifications for rights infringements: when the margin is invoked, the operative question is no longer whether the state's actions be justified under the Convention, but instead merely whether the state has correctly balanced its own interests with the Convention rights of the individual.¹ While there are varied arguments as to the true utility of a deferential mechanism in a human rights court,² it cannot be doubted that the doctrine is ingrained into the European Convention on Human Rights to the extent that, as Lord Hope notes in *Kebilene*, its consideration has come to be “an integral part of the supervisory jurisdiction”.³

The question which this paper will attempt to draw a conclusion on is whether the allowance of a margin has any further relevance to the domestic laws of European states after a judgement has been handed down. This question will be answered in the context of the legal system of the United Kingdom, both by assessing the impact of the margin on our own jurisprudence and legislation, and by drawing comparisons between the doctrine and our own deferential frameworks.

1 Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primaty in the European Convention on Human Rights* (BRILL, 2009) 243

2 Takahashi *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (Intersentia, 2002) 229

3 *R v DPP ex parte Kebeline* [2000] 2 AC 326, 380

It is argued through this piece that to ignore the further potential of the margin doctrine creates a limited view of the doctrine, and fails to consider the larger contextual picture. When viewed through the lens of universality, the doctrine potentially provides a framework by which rights may be developed on the national level, in areas where it is inappropriate for Strasbourg to intervene. As such, utilisation of the margin does not represent a simple exercise in deference; rather it is a means of recognising the diversity of legal systems across Europe,⁴ along with the frequent lack of consensus on the limits of the Convention rights.⁵ These matters are often best left — but not ignored — to develop organically in the domestic sphere, with the oversight of the European Court. In the words of Hrvatin, “the margin left to the States Parties is not one of pure discretion. It is not mere deference to a national legislator, but rather something more”.⁶

1.2 Supranational, Domestic and Deferential Margin Models

The second chapter will begin by exploring the theoretical underpinnings of the division between universality and subsidiarity, concluding that the two are not necessarily antagonistic. It will go on to explore the attitude taken by Strasbourg towards the margin, concluding that what the Court expects and desires from the member states, among other things, is rights development within margins of appreciation. This allows for greater degrees of consensus to be reached, with which the Court may make increasingly progressive rulings.

The third chapter goes on to focus on these principles as they are applied in the domestic setting of the United Kingdom. First, the legal position of the margin doctrine will be explored — which, as

4 Power, *Conundrums of Humanity: The Quest For Global Justice* (Martinus Nijhoff, 2007) 38

5 Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, 2001) 397

6 European Court of Human Rights, 'Dialogue between Judges' (2010), 17

the courts have concluded, provides an exception to the mirror principle in allowing development beyond Strasbourg jurisprudence. Following this, various specific areas of law will be explored, within which notable developments have taken place, further demonstrating the importance of both domestic involvement and European oversight in developing legal rights protections. It will be concluded that progress made in this manner is often more politically viable and pragmatic, in contrast to absolute judgements made against the state made by Strasbourg.

The fourth chapter will explore the similarities and contrasts between the European margin doctrine and domestic forms of deference. This will aim to demonstrate that more progress is made in both the national and supranational settings through the use of dialogic inter-institutional rights discourse, rather than through the application of simple deferential measures. In this sense, political means of rights development are enabled, which has the overall effect of lessening the antagonism between democracy and rights supremacy.

1.3 Conclusions

Ultimately, it will be concluded that political, incremental and organic means of rights development as employed between the European Court of Human Rights and our domestic courts, all go towards demonstrating the efficacy of margin-like doctrines in setting the boundaries within which rights may be adequately developed. As a result, the margin should not be seen as a limiting factor on the universality of rights, but as a doctrine that potentially enables further European consensus and resulting developments in rights protections. The caveat to these conclusions is that an increased amount of clarity must be a feature of the Court's decisions where a margin is applied, if the member states are to utilise their jurisprudence in a meaningful way.

CHAPTER 2

THE SUPRANATIONAL MARGIN OF APPRECIATION: THEORY AND JURISPRUDENCE

2.1 Introduction

Two key elements are integral to the supranational application of the margin of appreciation doctrine. First, there are the broad theories behind the Convention, most notably the division between universality and subsidiarity, which must be explored as a precursor to any jurisprudential analysis. Second, there are the actual approaches used by the court in applying the doctrine, along with the teleological objectives we can draw from their judgements. This chapter will attempt to explore these objectives through the lens of universality and subsidiary, delineating a number of the guiding principles used to apply the margin. The aim of this exercise will be to demonstrate the ultimate potential utility of the margin in enabling and even encouraging the development of rights through domestic law.

Ordinarily, the margin doctrine is expressed in terms of limiting the Convention, in attempting to “balance the sovereignty of Contracting Parties with their obligations under the Convention”.⁷ This allows the Court to balance the substantive Convention rights with their textual justifications,⁸ and in a very limited sense, allow for different conceptions and definitions of rights across member states.⁹

7 MacDonald, ‘The Margin of Appreciation’ in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (Kluwer Law International, 1993), 85

8 Letsas, ‘Two concepts of the margin of appreciation’ (2006) 26(4) OJLS 705, 712

9 For example *Vo v France* (2005) 40 EHRR 12 (discussed in section 2.3.4)

These go hand in hand with traditional notions of subsidiarity, in allowing “some scope, albeit not unlimited, for properly functioning democracies to choose different solutions adapted to their different and evolving societies”¹⁰ and are clearly necessary given that the Convention is not an entrenched bill of rights, nor is Strasbourg a supreme court.¹¹

Notwithstanding, it will be concluded that if the notion of universality is to be provided with adequate weight, it can not be disregarded when it comes to examining the margin of appreciation: as Singh highlights, the doctrine can not simply be seen as a conclusory label.¹² The margin might be seen as a recognition that even if state policy is not currently in line with the Convention, this position will be changed best without the direct input of the Court. As Hrvatin highlights, “Even within the margin of appreciation,” a given state “has to make sure that its measures protect and promote human rights as much as possible.”¹³ In applying the margin, the Court arguably recognises that the state is in the best political position to play the major role in shoring up its domestic rights protections, which as noted in the third chapter is arguably a more pragmatic long term approach to furthering European consensus. This is spurred by the Court's primary desire 'to encourage states to bring their domestic law into conformity with the standards of the Convention',¹⁴ and can be considered a slow-burn approach towards universality.

10 Mahoney, 'Universality Versus Subsidiarity in the Strasbourg Case Law on Free Speech', (1997) EHRLR 364, 369

11 Myjer, Mol et al 'Submitting a Complaint to the European Court of Human Rights: Eleven Common Misconceptions' in Erdal and Bakirci, *Article 3 of the European Convention on Human Rights* (OMCT, 2006)

12 Singh, 'Is there a role for the "margin of appreciation" in national law after the Human Rights Act?' [1999] EHRLR 15, 20

13 ECHR (no 6 above), 17

14 Sweeney, 'Margins of appreciation : cultural relativity and the European Court of Human Rights in the post-Cold War era' (2005) 54(2) ICLQ 459, 471

2.2 Universality and Subsidiarity: Reconcilable?

The universal protection of the European Convention on Human Rights has its source in Article 1, which states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Combined with the right to a domestic remedy embodied in Article 13, this enables a degree of subsidiarity in allowing “each community to decide democratically at local level” the extent to which Convention rights are protected.¹⁵ Hence, margin of appreciation is ordinarily viewed as a vessel of subsidiarity.¹⁶

Mahoney describes universality as being “what is so fundamental ... that it entails the same requirement for all countries whatever the variations in traditions and culture.”¹⁷ The primary quandary raised here is the primary source of the fundamental overriding rights which are claimed to have universal application and protection throughout Europe.¹⁸ To find a source for fundamental rights, the dubious notion of natural law is often invoked.¹⁹ It is far more appropriate to recognise that these rights arise from a consensus of common values and accepted limitations on the law, arising from the very traditions and cultures that the resulting rights ultimately conflict with.²⁰ This approach does not require an appeal to majoritarianism nor a recognition of cultural relativism: it is accepted that universal rights definitions must take place in a principled and thought-out manner,

15 Mahoney (no 10 above), 364

16 Sweeney (no 14 above) 473

17 *ibid*, 370

18 Rosenfeld, *The Identity of the Constitutional Subject* (Taylor & Francis, 2009) 256

19 Beyleveld, 'The concept of a human right and incorporation of the European Convention on Human Rights' (1995) *Win PL* 577, 579

20 Sloane, 'Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights', [2001] *VJTL* 530, 540

especially given that fundamental rights often contradict the desires of the majority.²¹

This does not preclude the fact that these rights must ultimately stem from a western, liberal version of society.²² This does not make them arbitrary or incorrect, any more than our democratic political version of society is arbitrary or incorrect; indeed it is clear that basing rights on our normative, liberal societal values gives them legitimacy rather than taking it away.²³ Moreover, it is clear that democracy must have its natural limits: Sir John Laws notes that to argue otherwise is to assert 'that public bodies should be allowed to be unreasonable and unfair, perhaps on the grounds that many of them, including of course the government, are democratically elected'.²⁴ As such, a recognition of subsidiarity becomes necessary and perhaps even fundamental in developing a universal conception of rights, that being a set of normative values which transcend temporal majority views. As Carozza highlights, subsidiarity “integrates international, domestic, and subnational levels of social order on the basis of a substantive vision of human dignity and freedom”.²⁵

While the margin of appreciation doctrine has a wide variety of justifications, they all stem from the need to allow the state into the arena of rights discourse; as the Court noted in *Roche*, for example, 'this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts'.²⁶ This is especially crucial when there is a lack of consensus between the member states, given that in these scenarios the European court has nowhere concrete to source its understanding of the Convention, leaving rights development to

21 Elser, 'On Majoritarianism and Rights', (1992) 1 EECR 19, 20

22 Khan, *A Theory of Universal Democracy* (Martinus Nijhoff, 2003) 173

23 Dworkin, R. 'The Model of Rules' (1967) 35 UCLR 22

24 Laws J. 'Law and Democracy' [1995] PL 72

25 Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 AJIL 38, 40

26 *Roche v United Kingdom* (2006) 42 EHRR 30 [120]

rightfully occur in the domestic sphere, as was the case in *Handyside* in which it was held that 'it is not possible to find ... a uniform European conception of morals'.²⁷ As a result, subsidiarity, along with the margin of appreciation, can be said to fuel universality, given that the ultimate sources of universal rights exist within the member states. Fundamentally, the Court appears to prefer this 'universality by consensus' approach, given that it directly gauges the “the scope of the margin of appreciation ... according to ... the existence or non-existence of common ground between the laws of the Contracting State”.²⁸

As Letsas notes however, “in a significant number of cases the Court's institutions have moved away from consensus towards the moral truth of the protected rights”²⁹ The difficulty with this approach is its attempt to evolve the Convention without the involvement of the state: Letsas describes this as a “hypothetical consensus” approach whereby the Court approximates how reasonable people would “agree to apply” human rights principles.³⁰ Given that the Court itself often attempts to avoid defining morality when it affords wide margins to states, it would appear that to utilise it in their own judgements would cause them to lose legitimacy. However this shortcoming is perhaps not as pronounced as it might appear, for a number of reasons. It is difficult to imagine a human rights court expressing its judgements whilst avoiding all language suggestive of basic morality. Letsas notes that the Court in *Engel* in discussing a particular law refers to its issues with 'the very nature of the offence';³¹ from this he infers a moral judgement by the Court. However such language is used in a European context, and if it is to be deconstructed, it must first be presumed that when the Court

27 *Handyside v United Kingdom* (1979) 1 EHRR 737 [48]

28 *Rasmussen v Denmark* (1985) 7 EHRR 371 [40]

29 Letsas 'The Truth in Autonomous Concepts: How To Interpret the ECHR' EJIL 15(2) 279, 297

30 *ibid*, 298

31 *ibid*

speaks of right and wrong, its meaning is only in relation to the Convention and the commonality between the member states.

Carozza highlights that 'the margin ... does not destroy the “universal” or “fundamental” character of the rights. It merely recognizes that the specification of general principles of human dignity in concrete political and social situations will very often require a complex and uncertain balance of values and the exercise of difficult choices of political morality'.³² As a tool of subsidiarity, it is therefore difficult to encapsulate the margin doctrine without reference to how it might aid in the further development of fundamental rights.

2.3 The European Court's Approach to the Margin

It has been argued that subsidiarity, where appropriate, is essential to the development of the Convention. It must be noted, however, that it is not just the margin that embodies this role. Judgements against the state, while binding internationally, leave a great deal of state autonomy in deciding how best to amend the law³³ — the appropriateness of which will be further explored in the third chapter.

The effects of the margin in reconciling the plurality of the various member states will be explored presently. This plurality manifests itself in a limitless variety of ways, including the particular priorities of a given government,³⁴ the dominant cultural, moral or religious characteristics of a given

32 Carozza (no 25 above) 43

33 Rens, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order', (2005) 40(3) TILJ 403, 404

34 *Ireland v UK* (1978) 2 EHRR 25

society,³⁵ and even the facets and implications of a local language.³⁶ A number of these divisions will be explored in determining the approach Strasbourg takes towards the margin doctrine, and it will be concluded to varying extents that each division stresses the importance of the role of the state in developing the Convention.

2.3.1 Effect of Margin on State

The first and arguably most important division inherent in the margin doctrine is between its effect on the state to which it is afforded, and its expected effect on the remaining signatories to the Convention, on whom decisions are not binding.

In the former scenario, the state is in the singular position of having already reached a conclusion on whether its conduct is justified under national law, given that applications to Strasbourg must be preceded by appeal as far as is possible in the national setting.³⁷ In the United Kingdom, since the implementation of the Human Rights Act, if these appeals do fail, this will normally suggest that the state does not consider the potential infringement to be in breach of the Convention, given the duty of Parliament to declare the Convention compatibility of legislation,³⁸ the duty of the courts not to act contrary to the Convention,³⁹ and the requirement that the courts must make a declaration of incompatibility where legislation can not be interpreted in line with the Convention⁴⁰ — the latter of which is unlikely to be followed by appeal to Strasbourg, given that the offending law will

35 *Muller v Switzerland* (1991) 13 EHRR 212

36 *Tammer v Estonia (No 2)* (2003) 37 EHRR 43

37 European Convention on Human Rights, Article 35

38 Human Rights Act 1998 s19

39 *ibid* s6(3)(a)

40 *ibid* s4(2)

ordinarily be amended without the need for international intervention.⁴¹ Thus, by the time an appeal reaches Strasbourg, the state is ordinarily in the position of either denying that a given right is invoked, or defending the limitation of a right as being justified under a codified exception under the Convention.

With this in mind, an important question can be drawn as to the nature of the margin when it is allowed directly to a member state. It is posited by Singh that Strasbourg either considers it more appropriate for the state to decide on the actual limit of its interference with a given right, or that 'it has reviewed the decision and finds it to be justifiable' but for whatever reason opts to allow a margin of appreciation rather than making a ruling to this effect.⁴² It is submitted now that this is a false dichotomy, and either position is to some extent untenable.

The former view is a dominant view of the margin, however it can not truly be said that the court wholly allows the state to decide on the extent of its interference, for a number of reasons. For all intents and purposes, the decision has already been made and is, as Jones highlights, ordinarily able to be evaluated.⁴³ Indeed, in a large proportion of cases before Strasbourg the relevant decision *is* indeed evaluated before a margin is considered and the Court allegedly decides that it is inappropriate for it to 'substitute its judgement'.⁴⁴

41 Gearty, 'The Human Rights Act - an academic sceptic changes his mind but not his heart' (2010) 6 EHRLR 582, 584

42 Singh (no 12 above) 21

43 Jones, 'The devaluation of human rights under the European Convention' (1995) Aut PL 430, 435

44 Singh (no 12 above) 21

In such scenarios it is difficult to imagine the Court entirely disregarding their previous analyses upon coming to the realisation that the area of rights law falls within a given margin: if this were true it would be advantageous for the margin of appreciation to be the primary consideration for any rights issue it could potentially be available for. Moreover, if this were the case, the entire notion of proportionality would be precluded where a margin is allowed, given that this would again be under the state's remit. Ultimately as Hrvatin notes, “it is not enough for courts to find that a certain margin of appreciation exists ... the courts actually need to balance the interests pursued by the measure with the Convention right interfered with, taking into account the legitimacy of the goals pursued, the methods of regulation, the necessity of the measure, and its costs and benefits to society.” In doing so, the courts give greater meaning to the margin doctrine.

Naturally a number of cases, particularly those in which national security is a factor, involve a decision made with information that only the state is privy to. In the remainder of cases, however, it is clear that as argued by Jones, the Court has enough information and certainly enough expertise to make a good judgement;⁴⁵ thus to opt for the form of margin Singh describes⁴⁶ would devalue the rights in play. Thus it is clear that the margin must have a greater role to play in the grand scheme of Convention jurisprudence than as a simple deferential measure.

The alternative proposed by Singh is equally if not more unpalatable: the margin can not reasonably be seen as a purely justificatory measure on the part of the court in lieu of an actual decision. As Singh himself argues, this would prevent the court from fully elaborating the reasons they consider the breach justified⁴⁷ — and from a purely logical point of view, it makes little sense to even invoke

45 Jones (no 43 above) 435

46 Singh (no 12 above) 21

47 *ibid*

the margin if the state is already considered to be fully justified on the facts, save perhaps to spare the feelings of the appellant.

A third approach is therefore necessary in order to assess the effect of the margin to the state it is allowed to. As has been argued, the doctrine can neither be seen as purely justificatory, which would create redundancy and ambiguity, nor can it be a purely deferential approach, given the court's duty and tendency to make some assessment of each potential Convention infringement. One possibility is that the Court only *reserves* its power to pass judgement against a given state given that development of Convention rights in a given state might best occur within the domestic political sphere; an approach which is exemplified by the Court's approach to homosexual and transgendered rights. In *UK v Rees*, for example, the Court afforded a margin of appreciation on the basis that 'there is little common ground between the states in this area and ... the law appears to be in a transitional stage'.⁴⁸ Almost two decades later in *Goodwin v UK*, the Court considered that domestic rationales had developed to a sufficient extent to rule against the state.⁴⁹ As such, along with being a tool of subsidiarity, the margin creates a “range of permissible options” in the domestic sphere,⁵⁰ the most beneficial of which is positive rights development.

2.3.2 Effect of Margin on Remainder of Europe

The question of how the remainder of Europe is intended to apply the margin of appreciation provides further evidence for the latter conclusions on state involvement. Here there is no question that the allowance of a margin can be viewed as justificatory in any sense, given both the necessary

48 *UK v Rees* (1986) 9 EHRR 56

49 *Goodwin and I v UK* (2002) 35 EHRR 447

50 Mahoney, 'Judicial Activism and Judicial Self Restraint in the ECHR' (1990) 11 HRLJ 57, 78

emphasis on the specific context in the country to which it is given, and the corresponding lack of direct relevance to the remaining member states. It is of course possible to argue that the utility of the margin doctrine ends at the borders of the country to which it is given. For the United Kingdom, at the very least, this can not be the case. Our obligation to take Strasbourg jurisprudence into account holds no exception for areas of law under the margin⁵¹ — and indeed the margin has proved useful in assessing the boundaries within which rights discourse may take place: in *Re P* Baroness Hale considered that 'if the matter is within the margin of appreciation which Strasbourg would allow to us, then we have to form our own judgement'.⁵²

The effects which Strasbourg itself intends the margin to have on Europe as a whole is not so clear. While the majority of judgements are state-specific, decisions for which the doctrine is applied are ordinarily on the edges of what is considered acceptable under the Convention, and are often justified on the basis of a lack of clear consensus throughout Europe.⁵³ Moreover, the very need for a margin as a means of allowing potential rights infringements by virtue of their contextual legitimacy evidences the borderline nature of the issues involved. This can arguably be taken as an indication by Strasbourg that decisions which fall under the margin are not to be taken lightly by either the receiving state or the remainder of Europe. Thus margins potentially provide a threshold of varying width by which all member states may shore up their national law with regard to the Convention rights.

51 Human Rights Act 1998 s2(1)

52 *Re P* [2009] 1 AC 173, 213

53 Takahashi *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (Intersentia, 2002) 83

2.3.3 Triggers for the application of margin doctrine

The margin is further divided by the triggers for its application. In the *Cyprus* case, for example, the question was very much a matter of domestic competence: whether, on the facts, the state was 'competent to pronounce on the existence of a public danger'.⁵⁴ This model recognises to a greater extent the respective spheres of authority between rights and politics, especially given the variety of legal and political systems it applies to and must integrate itself with.

Through its development, the margin has become something more than a mere test of state competence. In allowing for a wider variety of cultural and religious considerations through its application to articles 8-11, it has branched out beyond respect for the competence of national bodies to make decisions given their close integration with their given state, towards exercising recognitions of cultural diversity with regard to the personal freedoms of Articles 8-11. In *Handyside*, for example, a predominant justification for the margin was that 'the requirements of morals varies from time to time and from place to place'.⁵⁵

It is accepted that cultural relativism embodies a number of dangerous ideas, as Sweeney rightly highlights.⁵⁶ However it is also clear that it is one thing to recognise moral diversity across Europe, and another to endorse or create it — contrary to Lord Lester's claim that the margin embodies 'the source of a pernicious variable geometry of human rights',⁵⁷ in reality it can only be said to be a recognition of this variance. Its utility here is in recognising issues too ingrained into a given society to be adequately reformed through a ruling against the state.

54 *Greece v UK* (1953) App No 156/56

55 *Handyside v United Kingdom* 1 EHRR 737

56 Sweeney (no 14 above) 460

57 Lester, 'Universality versus subsidiarity: a reply' 1 EHRLR (1998) 73, 76

As has already been argued in relation to the domestic effect of the margin doctrine, this recognition can not necessarily be said to connote permanent acceptance or deference on the part of Strasbourg. The Court in *Handyside* talks about our era being 'characterised by a rapid and far-reaching evolution of opinions' on the subject of morals;⁵⁸ it recognises the inevitability of further domestic development in this area, and thus arguably considers it prudent to allow the state to evolve itself within the margin it affords. This again goes towards highlighting the great importance of domestic involvement in developing the Convention towards a universal end.

2.3.4 Stages of Review

An important distinction is drawn by Gerards and Senden in relation to the divide in the Convention between the definitional and justificatory stages for each enumerated right.⁵⁹ Their argument pertains to the importance of separating these stages, and followingly allowing a margin of appreciation only for the justificatory stage. It is telling in this regard that a margin is never allowed where a right lacks a textual justification, as with Article 3 which proscribes torture and degrading treatment, even if a positive duty is created on the state⁶⁰ — in these cases, the Convention appears to recognise a minimum European standard which can be enforced directly by the Court without the necessary input of the state. Conversely, where a right is given certain textual exceptions, the input of the state immediately becomes a legitimate consideration.

58 *Handyside v United Kingdom* 1 EHRR 737

59 Gerards and Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights (2009) 7(4) IJCL 619, 622

60 *Chahal v United Kingdom* 23 EHRR 413 [80]

If the margin doctrine provides a mechanism by which the state is permitted to decide how best to limit a right where necessary, it follows that the definitional stage ought to be reserved for Strasbourg, in line with the autonomous European interpretation of the Convention.⁶¹ This makes sense theoretically, given that, as recognised, the overall purpose of the Convention is the protection of universal rights. However, as Gerards and Senden highlight, this separation is not always followed strictly: there are a number of cases in which the definitional stage is not addressed, the applicability of the right is simply not explained, or the definitional and justificatory stages are seemingly merged through the reasoning of the court.⁶² While the precedential impact of this jurisprudence is arguably negative in its creation of ambiguity, its implications towards the margin doctrine are less clear.

The Court in *Vo v France* demonstrated the furthest departure to date from this theoretical division.⁶³ The case concerned, among other things, the applicability of Article 2, the right to life, with regard to a foetus; particularly the question of whether foetuses fall under the definition of the article. The court recognised that there is little European consensus on the ethics or legality of abortion, and in a manner true to the notion of state involvement, considered the question unanswerable, and in effect allowed a margin of appreciation at the definitional stage of rights review.⁶⁴

When a margin is given, it ought to primarily be clear exactly what it is being given for — thus in *Vo*,⁶⁵ while allowing a margin at the definitional stage was a departure from the norm, it is at least clear that Strasbourg has placed the definitional duty on domestic bodies. As Scott highlights, this has

61 Gerards and Senden (no 59 above) 629

62 Gerards and Senden (no 59 above) 630

63 *Vo v France* (2005) 40 EHRR 12

64 Gerards and Senden (no 59 above) 648

65 *Vo* (no 63 above)

provided 'an opportunity to reflect on the current English ... approach to the foetus'.⁶⁶ The same can perhaps not be so clearly stated when the stages of rights review are not properly demarcated or individually addressed.

Gerards and Senden suggest that the margin of appreciation loses much of its utility when applied at the definitional stage. While, in their view, *Vo* may be an arguably necessary and pragmatic exception to this rule, it is qualified that this can only be allowed as a very rare occurrence.⁶⁷ This exception has a fundamental theoretical importance, however: it demonstrates that, while it is certainly the duty of the court to elucidate rights definitions, it is not within their ambit of responsibility to create them from scratch⁶⁸ nor to limit them when Europe is not in consensus.

In practice, there is ordinarily little difficulty with the Court's approach to defining the Convention rights when there is a reasonable degree of consensus—but on the rare occasion where there is not, as in *Vo*,⁶⁹ the margin presents itself as a useful mechanism for allowing further development throughout Europe for highly political and controversial issues. As such, it is submitted that the margin ought not to be necessarily proscribed at the definitional stage; instead, its use is limited by its utility, which will rarely be substantial for matters of rights definition. Jones argues that this risks a 'lowest common denominator' approach to rights discourse across Europe⁷⁰ —however this is polemical labelling of a system which politically and pragmatically involves the state in the development of human rights across Europe.

66 Scott R, 'The English Fetus and the Right to Life', 11(4) EJHL 347, 349

67 Gerards and Senden (no 59 above)

68 Dijk et al, *Theory and practice of the European Convention on Human Rights* (Martinus Nijhoff Publishers, 1998) 77

69 *Vo* (no 63 above)

70 Jones (no 43 above)

2.4 Conclusions

Ultimately, when Jones highlighted the fact that the margin of appreciation doctrine lacked clear principles,⁷¹ he was largely correct — while a mostly consistent approach may be drawn from Strasbourg's jurisprudence, the divided purposes and principles highlighted in this chapter are strong evidence for the fact that the margin can at most only be said to be absolutely true to a few guiding values. These include the furtherance of the evolutive and dynamic Convention, the need for political and cultural pragmatism, the recognition of national and supranational spheres of competence and the ensuing drive for member states to develop their own conceptions of human rights in margins of appreciation.

To view the margin as giving unmetered discretion to the member states is obviously contrary to the purpose of the Convention: as van Dijk highlights 'the conduct of the contracting States has to be reviewed not for its conformity with national law and with the views of the national authorities, but for its conformity with the norms of the Convention'.⁷² It is submitted that even in allowing a degree of deference, the Court does not disregard this ultimate aim: through the margin doctrine, the member states retain a substantial role in developing rights. The following chapter will assess how the United Kingdom has played a role in this regard, and it will be concluded that its progress gives support to the view taken through the present chapter.

71 *ibid*

72 van Dijk et al, *Theory and Practice of the European Convention* (Martinus Nijhoff, 1998) 432

CHAPTER 3

THE MARGIN IN THE DOMESTIC CONTEXT

3.1 Introduction

The previous chapter aimed to demonstrate the relevance of the margin doctrine as viewed through the lens of universality, particularly with regard to allowing Convention rights to develop organically in the domestic setting without the use of sanctions and rulings against the state. For this model to work, it is intrinsically necessary that the member states utilise margins as a sphere for rights development. This chapter will focus on the approach taken towards the margin by the branches of government within the United Kingdom, as a demonstration of this model in practice.

In order to best illustrate this model, the legal position with regard to margins of appreciation will first be examined, particularly in relation to the domestic mirror principle under the Human Rights Act 1998. Following this, a number of key areas of law will be explored in which margins have been utilised to varying extents to develop and clarify domestic conceptions of rights protections, including national security, foetal rights, homosexual and transgendered rights, and blasphemy law. It will be concluded that the margin of appreciation often enables us to go beyond European precedent, despite the rulings in *Ullah*.⁷³ Moreover, it will be noted that legal and societal development often does take place within margins of appreciation, allowing rights to be developed without sudden and controversial legislative change.

73 *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323

3.2 The Mirror Principle and the Margin

Section 2 of the Human Rights Act provides that the courts should take into account any relevant Strasbourg jurisprudence in deciding a question in relation to a Convention right. In *Ullah*, Lord Bingham famously held that in relation to this, the domestic courts should keep pace with Strasbourg “no more but certainly no less”.⁷⁴ This judgement had a number of pragmatic justifications: the objective of providing no less protection relates directly to our international obligations. Moreover, going further than the European Court could result in different and arbitrary directions being taken with regard to Convention rights, particularly with regard to balancing individual freedoms with one another.

Difficulty arises, however, when we attempt to apply the mirror principle to margin of appreciation jurisprudence. As has already been discussed, these can neither be regarded as judgements absolutely for or against the state. Moreover, given that Strasbourg uses the doctrine to extend a degree of deference to the state insofar as how far it protects rights, to attempt to rely on these rulings as a benchmark suitable for the mirror principle creates something of a vicious circle, given that Strasbourg appears to use the margin to invite the state to formalise its own conception of human rights. It therefore appears logical to view margins of appreciation as capable of being used to develop rights protections further than Strasbourg, if only because in these cases Strasbourg chooses to allow the state to use its own good judgement, and does not formally make a ruling as to the true limit of a given right.

⁷⁴ *ibid*, 350

A similar line of reasoning was indeed followed by Lord Hoffman in *Re P*.⁷⁵ He acknowledged the judgement in *Ullah*⁷⁶ but noted that Lord Bingham's remarks “were not, however, made in the context of a case in which the Strasbourg court has declared a question to be within the national margin of appreciation”.⁷⁷ The result of this is profound: “the question is one for the national authorities to decide for themselves and it follows that different member states may well give different answers.”⁷⁸ Through *Re P*,⁷⁹ we not only see the margin of appreciation being endorsed as a mechanism for breaking free of the mirror principle, we also see it applied to provide a greater level of protection to the complainants than would perhaps have been enforced by Strasbourg.

It is clear that, as argued previously, if rights are to be most effectively aligned throughout Europe, this will best occur via margins of appreciation, with which Strasbourg has either indicated a disparity in member states' legal systems, or found a suitable justification for allowing rights to develop domestically. This is not the case where the Court has given a clear ruling either way: jurisprudence in these areas is unlikely to change or develop as rapidly as in margins of appreciation, thus developing it in the national setting may be beneficial to our own constitution, it adds less to our understanding of the European Convention.

While Lewis may raise a salient point in highlighting the potential divide between the Convention and our own constitutional rights protections,⁸⁰ citing dicta from Baroness Hale in which she states a preference for “rights defined by United Kingdom law within the parameters defined by

75 *Re P* [2009] 1 AC 173

76 *Ullah* (no 73 above)

77 *Re P* (no 75 above), 188

78 *ibid*, 188

79 *ibid*

80 Lewis, 'In *Re P* and others: an exception to the "no more, certainly no less" rule' (2009) Jan PL 43, 46

Strasbourg”,⁸¹ it must be remembered that s2 of the Human Rights Act does make Strasbourg jurisprudence directly relevant in domestic law. As such, it is important not to undermine the continued relevance of the Convention: if we are to use this jurisprudence to both develop our own law, it becomes impossible to adequately separate our domestic conception of rights from Strasbourg's to the extent Lewis appears to find reasonable.

Finally, it must be noted that, however beneficial greater domestic protection for human rights might be, the objective of the Human Rights Act is to “bring rights home”.⁸² In the case of established jurisprudence, what we appear to be bringing home is the recognised European view of the Convention. Where a margin is afforded, we are only able to bring home the boundaries in which human rights might be developed; in these cases, clarifications of domestic rights protections becomes not just beneficial but necessary, given the potential lack of clear precedent on a given issue. Given that it is largely impossible for the courts to apply the European margin domestically, they are forced to come to their own conclusions in light of their domestic expertise, and in such scenarios it makes more sense to develop greater protection within margins of appreciation, given the wider European objective of bringing rights protections towards a universal standard.

Whether or not the mirror principle is necessary is ultimately a question largely outside the scope of this piece, given that, as Lewis appears to recognise, it has more to do with domestic and less to do with universal European conceptions of rights.⁸³ What is clear is, whichever way this question is answered, the margin exception certainly does extend beyond the mirror rule. As a result, it must be

81 *Re P* (no 75 above), 204

82 Straw and Boateng, 'Bringing Rights Home: Labour's plans to incorporate the European Convention on Human Rights into UK law' (1996)

83 *Lewis* (no 80 above), 46

used to develop domestic conceptions of Convention rights with the immediate aim of deciding rights law, and the secondary aim of developing rights on a supranational scale, towards a universal standard.

3.3 Developing Areas of Margin Law

While *Re P*⁸⁴ is notable in that it confirms the nature of the margin exception to the mirror principle, it was certainly not the first case in which rights were developed in a margin of appreciation. As has already been noted, the evolutive Convention has depended on such domestic developments over the last half century, and there are many examples of the United Kingdom's contributions in this regard. A number of these developments will be explored in turn, with particular regard to their utilisation of margins afforded by Strasbourg.

3.3.1 National Security and Derogations

Strasbourg's stance when national security is a strong factor is typically to afford a large margin of appreciation, as is demonstrated in *Ireland v UK*.⁸⁵ The primary justification for this is straightforward: the state is in a better position both politically and with regard to domestic expertise and information. As highlighted in the previous chapter, however, this margin can not be taken as an indication that national security trumps human rights in a general sense: instead it merely moves the discussion to the national setting.

84 *Re P* (no 75 above)

85 *Ireland v UK* 2 EHRR 25

Historically, the domestic courts have taken a deferential approach towards national security. In 1985, *GCHQ*⁸⁶ demonstrated the willingness of the courts to take little more than the word of the government as sufficient evidence for the existence of a national security threat, which if legitimate would understandably trump less imperative trade union rights. In this case the Lords arguably made a value judgement, not by giving some weight to the judgement of the government on a matter of national security, but by giving it absolute weight. The Government only raised the issue of national security on appeal, a fact which none of the Lords even considered taking as evidence for its lack of significance towards the disputed decision. Despite this clearly inadequate ruling, had the case gone to Strasbourg it would have clearly been inappropriate for anything other than the usual wide margin of appreciation to be afforded. Strasbourg is not home to a European supreme court, and its political ambit only extends so far.

In the following twenty years there was a clear development within this margin, led by the domestic courts. In *A v Home Secretary*⁸⁷ the courts held a derogation to be unlawful despite an even greater potential threat to security. Lord Bingham had no concern for the political merit of the derogation, nor for the effectiveness of detention without trial in combating terrorism, focusing instead only on the evidence relevant to the legality of the derogation. Thus through this case, the gap left by the margin was filled by a sufficient degree in the national setting; this development was subsequently endorsed by the European Court in *A v UK*.⁸⁸

86 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

87 *A and others v Secretary of State for the Home Department* [2004] UKHL 56

88 *A and Others v United Kingdom* (2009) 49 EHRR 29

3.3.2 Foetal Rights

The right to life of unborn fetuses is an area in which a complete lack of consensus exists throughout Europe. This led to the extremely controversial case of *Vo v France* in which a margin was afforded at the definitional stage of rights review in Strasbourg.⁸⁹ This goes against conventional logic: in *R (on the application of S) v Chief Constable of South Yorkshire* Lord Steyn noted that the definitions of the Convention rights “should receive a uniform interpretation throughout member states, unaffected by different cultural traditions” while the margin only ought to be applied to the second, definitional stage.⁹⁰

How we ought to even approach uniformity without use of the margin is unclear. Certainly, a series of absolute rulings by the court either way would be infeasible, given the political ramifications of such an undertaking, especially given that abortion does not fit under the textual exceptions to Article 2.⁹¹ Gerards and Senden argue that “because of the specific nature of the right to life and the intense controversy surrounding the issue of abortion, this judgement may be considered an unrepresentative exception to the rule that no margin is given with respect to the definition of fundamental rights.”⁹² However to regard this ruling as merely an exception to the rule is to avoid its value in allowing states to develop our understanding of Article 2 in areas of contention which the Convention, in its current state, is perhaps unable to deal with.

89 *Vo v France* (2005) 40 EHRR 12

90 *R v Chief Constable of South Yorkshire* [2004] 1 WLR 2196, 2208

91 European Convention on Human Rights, Article 2

92 Gerards and Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights (2009) 7(4) IJCL 619, 648

Despite Lord Steyn's aforementioned assertion that uniformity is to be preferred with regard to rights definitions,⁹³ the United Kingdom does indeed take its own unique approach with regard to foetal rights. This has involved a political balancing exercise between the rights of the mother and those of the unborn child, resulting in, as Pattinson notes, a middle ground developed via “judicial deference to the political process”.⁹⁴ Thus use of the margin has allowed development which adequately balances rights uncontroversially, notably different from the current contentious status of abortion law in the United States.⁹⁵

3.3.3 Homosexual and Transgendered Rights

A great amount of domestic development has occurred over the past twenty years in relation to the rights of the homosexual and transgendered communities. In the advent of the Civil Partnership and Gender Recognition Acts, despite their potential symbolic shortcomings, the United Kingdom has all but created an equal status for all, regardless of sexual identity or preference.⁹⁶

These legislative developments occurred after the European Court rulings in the cases of *Goodwin v UK*⁹⁷ and *Karner v Austria*,⁹⁸ in which it was held that articles 8 and 12 had been violated in respect of, respectively, a lack of transgendered recognition, and prohibition against same sex couples forming a legal partnership. What is important in relation to these cases is the domestic developments

93 *R v Chief Constable* (no 90 above), 2208

94 Pattinson, *Medical Law and Ethics* (Sweet & Maxwell, 2006), 261

95 *ibid*

96 Wright, 'The tide in favour of equality: same-sex marriage in Canada and England and Wales' (2006) 20(3) *IJLPF* 249, 250

97 *Goodwin v United Kingdom* (2002) 35 *EHR*R 18

98 *Karner v Austria* (2003) 38 *EHR*R 528

which preceded them, given that twenty years earlier these matters were considered to be within the margin. In *Rees* the Court described homosexual and transgendered rights as having “little common ground between the states”, the law being “in a transitional stage”.⁹⁹

In the past two decades a number of important domestic changes have taken place. In *Goodwin* it was noted that there had been “dramatic changes brought about by developments in medicine and science in the field of transsexuality”, not least resulting in the NHS providing sex-change operations to those with gender dysphoria.¹⁰⁰ With regard to the development of homosexual rights, prior to the introduction of the Civil Partnership Act we have seen the equalising of the age of consent between heterosexual and homosexual couples,¹⁰¹ the allowance of homosexual couples to adopt,¹⁰² and the allowance of homosexuals to serve in the military.¹⁰³

For many of these developments European supervision and intervention was necessary, although the reform that took place was undeniably incremental and fitting with the evolving domestic political reality: in *Smith v UK*, for example, the Court noted that it is now the case that 'negative attitudes to homosexuality are insufficient, of themselves' to justify exemption of homosexuals from the military.¹⁰⁴ Hugely significant to the enactment of the Civil Partnership Act was the minimal amount of controversy or backlash which resulted from it¹⁰⁵ — which speaks a great deal about the willingness of the populace as a whole in accepting progressive values developed at an acceptable

99 *United Kingdom v Rees* (1986) 9 EHRR 56

100 *Goodwin* (no 97 above), 452

101 Sexual Offences (Amendment) Act 2000 s1

102 Adoption and Children Act 2002 s49(1)(a)

103 BBC, 'UK Gays win military legal battle', <news.bbc.co.uk/1/hi/uk/458714.stm>

104 *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 [102]

105 *Stychin, 'Not (Quite) a Horse and Carriage'* (2006) 14 FLS 79, 83

pace. These incremental changes were arguably enabled by the margin afforded in *Rees*.¹⁰⁶

3.3.4 Blasphemy Law

Before its eventual repeal, the common law offence of blasphemy occupied an interesting position in the law. The offence, originating in the 16th century, was seldom invoked over the past century, and only protected the Church of England.¹⁰⁷ In recent years it has only manifested itself as a fetter on freedom of expression, as the cornerstone of the offence of blasphemous libel.¹⁰⁸ As a result, it obviously had conceptual difficulty reconciling itself with the Convention, given its lack of legitimacy in limiting freedom of expression, and its inherent arbitrariness.

In *Wingrove*, the European Court held that the use of blasphemous libel as a justification for refusing to classify a film was proportionate and fell within the United Kingdom's margin of appreciation.¹⁰⁹ The Court reaffirmed its judgement from the *Lemon* case, in which they held that there was a legitimate aim: “the offence of blasphemous libel as it is construed under the applicable common law in fact has the main purpose to protect the right of citizens not to be offended in their religious feelings by publications”.¹¹⁰ The importance of this is the fact that the United Kingdom still maintains its state religion, which, while arguably anachronistic, is unlikely to be departed from. This is evidence both for the likelihood of offence, as specified by the Court, and for the political sensitivity of the issue. A ruling against the state in such a scenario may, for all intents and purposes, be taken as a European indictment of one of the more traditional and deep-seated aspects of our

106 *Rees* (no 99 above)

107 Gofur, 'Blasphemy reconsidered' (2008) 19(3) ELR 54, 55

108 Oliva, 'The legal protection of believers and beliefs in the United Kingdom' (2007) 9(1) ELJ 66, 72

109 *Wingrove v UK* 24 EHRR 1

110 *Gay News Ltd and Lemon v United Kingdom* (1982) 5 EHRR 123

state.

As a result, it is clear that while the Court recognised the potential problems with the law of blasphemy, it also noted the political pragmatism in allowing the offence to diminish of its own accord in the domestic sphere. Thus the Court afforded a margin of appreciation, and in the following years the law of blasphemy was further limited by the courts¹¹¹ and eventually repealed by Parliament,¹¹² with very little controversy.

3.4 Conclusions

It is clear that the margins allowed by the European Court have often been utilised in domestic law for the purposes of advancing rights protections, subject to a certain degree of European supervision. While there are a myriad of reasons given by Strasbourg for employing the doctrine, it is clear that the Court recognises this potential for development within the margin — and as demonstrated this has proved to be an effective means of allowing rights to develop organically with little political controversy or issues of competence. Only recently have the domestic courts officially recognised the potential of the margin in enabling such developments: however it is submitted that the judgements in *Re P*¹¹³ will have little further substantive effect on the already established *de facto* domestic position with regard to the margin.

The ultimate benefit of this approach for the European Convention is in strengthening the potential universality of rights, in ensuring that the United Kingdom plays its role in raising minimum

111 *Green v The City of Westminster Magistrates' Court* [2007] EWHC 2785

112 Criminal Justice and Immigration Act 2008 s79

113 *Re P* (no 75 above)

standards of protection whilst enabling the European Court to avoid overstepping its boundaries. As already discussed, margins of appreciation provide the ideal sandbox for such developments, given their identification from the offset as areas in which there is little or no consensus.

CHAPTER 4

SUPRANATIONAL AND DOMESTIC

PRINCIPLES OF DEFERENCE

4.1 Introduction

In the advent of the Human Rights Act 1998 we have seen a more nuanced form of deference emerge between the courts, the executive and Parliament, allowing for inter-institutional dialogue to take place and rights discourse to evolve with the input of both judicial and democratic organs of state. This is a necessary development, given the intrinsic antagonism between human rights and democratic politics, especially in a state such as the United Kingdom where rights are not given absolute legal supremacy over democracy.

This same division is even more obvious in the relationship between the state and the European Court of Human Rights. As noted Strasbourg does not represent a supranational court of appeal, and has no power to amend or repeal domestic laws. As a result, the necessity of a dialogic relationship becomes even more pronounced, in allowing for democracy to run its course, whilst maintaining adequate protection for human rights. It will be argued that the margin of appreciation embodies this role, and as a result has striking similarities to domestic doctrines of deference. Thus while there is no home for a domestic margin of appreciation, the courts can be argued to follow similar lines of reasoning in allowing deference to democratic autonomy, which has demonstrably led to a more pragmatic development of civil rights.

4.2 The Discretionary Area of Judgement and Rights Identification

Following the enactment of the Human Rights Act, there has been a significant amount of discussion about whether a domestic margin of appreciation would ever be appropriate. As Pannick highlights, “just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are circumstances in which the legislature and the executive are better placed to perform those functions.”¹¹⁴

As such, in recent years a 'discretionary area of judgement' has emerged, within which the courts consider certain matters of policy best left to Parliament. Lord Hope in *Kebilene* considered that "in some circumstances it will be appropriate for the courts to ... defer, on democratic grounds, to the considered opinion of the elected body".¹¹⁵ The question of immediate interest is how closely this means of deference mirrors the margin doctrine, and concurrently how far it might enable further development of rights protections. While Hunt correctly assesses that “some of the underlying ideas that inform the margin ... when it may not be appropriate for a judicial decision-maker to interfere with the decision of a primary decision-maker ... would inevitably have some role to play in judicial review under the HRA”,¹¹⁶ its application to the legislature is of primary interest given its potential influence over rights development.

114 Pannick, 'Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment' (1998) PL 545, 549

115 *R v DPP ex parte Kebilene* [1999] [2000] 2 AC 326, 381

116 Hunt, 'Why Public Law Needs Due Deference' in Bamforth and Leyland, *Public Law in a Multi Layered Constitution* (Hart, 2003) 345

Pannick identifies a number of factors which may give rise to this deferential measure: these include the nature of the right, the social, economic and political elements of the issue, the extent of the court's expertise and the constitutional importance of the matter.¹¹⁷ Naturally many of these justifications are far less potent in the domestic setting than they might be in Strasbourg, given that the domestic courts have both more expertise in domestic law and more democratic and political legitimacy in reviewing law and public actions.

In the advent of the Human Rights Act however, particularly with the availability of sections 3 and 4 of the Human Rights Act, which comprehensively enable Convention-friendly interpretation of legislation and declarations of incompatibility, it is perhaps questionable why any notion of Parliamentary deference is necessary from the offset. While section 4 provides only that a court “may” make a declaration incompatibility, it would seem nonsensical to fail utilise this provision where applicable on the grounds of deference, given its lack of legal effect other than enabling a minister to amend the legislation, along with the concurring section 6 duty of the courts to act compatibly with the Convention.

Sales and Ekins claim that 'the practical effect of this ... is to create major political pressure for government and Parliament to amend statutes to accommodate the courts' views. It would take exceptional circumstances for government and Parliament to proceed to say that legislation is to stand even though it has been found to violate human rights'.¹¹⁸ This is given as a reason for the courts to take the discretionary area of judgement seriously, given the power they now yield through section 4 at the expense of democracy. However, if a violation of human rights is a powerful enough reason for the Government to consistently act upon the declarations of the courts despite having no

117 Pannick (no 84 above), 550

118 Sales and Ekins, 'Rights-consistent interpretation and the Human Rights Act 1998' (2011) 127 LQR 217, 230

legal duty to do so, it is questionable why the political power afforded to the courts via section 4 is necessarily unwarranted or unnecessary, especially given that this power was originally conferred by Parliament in recognition of the courts' expertise in identifying rights issues.¹¹⁹ As Schooten and Sweeney argue, it is possible that “historical respect for Parliamentary supremacy has slowed the speed by which the judiciary can fully respect human rights”.¹²⁰

Ultimately, it is clear that further deference is unnecessary: section 4 allows the courts to adequately identify a given rights issue, but stops short of allowing them to prescribe a remedy in lieu of Parliament.¹²¹ Thus, it perhaps only seems appropriate for deference to be paid by the court insofar as deciding whether or not to apply section 3 or section 4 of the Human Rights Act in the event of incompatible legislation. Going any further than this would arguably provide an unnecessary double layer of deference.

As a result, when Laws LJ claimed in *International Transport Roth* that 'greater deference is to be paid to an Act of Parliament',¹²² his words seemed to amount to little more than a re-affirmation of Parliamentary sovereignty. While Laws claims that deference is a means 'by which the courts resolve the tension between parliamentary sovereignty and fundamental rights',¹²³ this seems to ignore the impact of the clear framework set out by sections 3 and 4 of the Human Rights Act. The following case of *Ghaidan v Godin-Mendoza* paid proper attention to this: the Court held, giving an appropriate degree of deference to Parliament, that section 3 could only be used when it is possible to 'go with

119 Kavanagh, *Constitutional review under the UK Human Rights Act* (Cambridge University Press, 2009) 124

120 Schooten and Sweeney, 'Domestic judicial deference and the ECHR in the UK and Netherlands' (2003) 11(1)

TFLR 439, 443

121 Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge University Press, 2011) 49

122 *International Transport Roth v Home Secretary* [2003] QB 728 [83]

123 *ibid* [75]

the grain of the legislation'.¹²⁴ As such, Parliamentary sovereignty is preserved by the Act itself, rather than by unnecessary deferential measures.

4.3 Dialogue in the Domestic Sphere

As Leigh and Masterman note, the Human Rights Act model “avoids making the judges the final arbiters of Convention rights issues in the UK.”¹²⁵ Under section 4 of the Act, the courts may make a declaration of statutory incompatibility with the Convention, but may not repeal or amend it beyond the remit of their s3 interpretative powers. These declarations have the sole legal effect of enabling a fast-track procedure by which ministers may amend offending legislation.¹²⁶

As such, section 4 declarations have less legal force even than a judgement by the European Court of Human Rights: while remedying the law is made a simpler process, especially given that so far no declarations have been ignored, the courts are not considered suited to the task of remedying significant rights violations. Obviously this would be an even less appropriate duty for Strasbourg, who can only rely on the United Kingdom's international obligations to ensure their rulings are remedied in domestic law.¹²⁷ As a result, both the domestic and supranational courts are effectively tasked with identifying rights issues, while the domestic legislature has the major role of harmonising these issues with the law. This marks the starting point of an institutionally defined dialogic relationship between the courts and the legislature, analogous to the Canadian system in which 'the judicial decision causes a public debate in which the Charter values play a more prominent role than

124 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [121]

125 Leigh and Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing, 2008), 114

126 Human Rights Act 1998 s10

127 European Convention on Human Rights, Article 46

they would if there had been no judicial decision'.¹²⁸

The usage of section 4 is obviously vital to this model of dialogue, which must be used in lieu of any alternative form of deference: as Klug notes, 'to give proper effect to the dialogue model requires a rehabilitation of s.4. It requires judges to have the confidence to issue a declaration of incompatibility whenever it is "not possible" to apply s.3 and where they deem legislation —any legislation —to be incompatible with Convention rights'.¹²⁹ Thus while rights-issue identification can potentially occur within the walls of Parliament, and is positively required under the Human Rights Act before legislation may be passed, it remains the function and duty of the courts to undertake this task.

4.4 Dialogue Between the United Kingdom and Strasbourg

If, as has been argued, the margin doctrine embodies something more than a mere acquiescence to the state, instead providing a legal framework for future developments in domestic rights protections, it can thus be seen as a quintessential mechanism through which dialogue may take place. This has the potential to create an ideal balance between democracy and rights on the supranational level.

Much of the language used in reference to the margin doctrine already points towards this conclusion. Tulkens highlights its role as “modulator in the relationship between an international court and the national courts”,¹³⁰ while Lord Hoffman noted in *Re P*, in exploring the ambit of the margin that “the 1998 Act allows for the possibility of a dialogue between Strasbourg and the courts

128 Hogg and Bushell, 'The Charter Dialogue between Courts and Legislatures' (1997) 35 OHLJ 75

129 Klug, 'Judicial Deference under the HRA 1998' (2003) 2 EHRLR 125, 130

130 European Court of Human Rights, 'Dialogue Between Judges' (2010), 8

of the United Kingdom”.¹³¹

As noted already, in the majority of cases Strasbourg attempts a full exploration of rights issues before allowing a margin of appreciation; as argued, this fact stands as evidence for the fact that the margin is in part intended to enable domestic development based on the Convention interpretation carried out by the Court. However, as Gerards and Senden note, this discussion does not always adequately and systematically deal with the substantive rights issues before moving on to explore the margin: often the margin is allowed only after one or neither of the definitional or justificatory stages of rights review.¹³² With the objective of dialogue, this is not ideal: given that Strasbourg stands as the authority on the Convention, its judgements ought to be a starting point for national rights development. Hoffman in *Re P* notes that the margin enables the United Kingdom to go beyond the rights protections provided by Strasbourg,¹³³ however in the absence of complete and systematic review on their part, this exception may lead to member states going in varying and arbitrary directions with regards to rights development—a potentiality which does little to advance the notion of universality.

4.5 Conclusions

Ultimately, it is clear that deferential measures have a residual role to play in rights discourse, however the positive elements of this are the emerging dialogic mechanisms which enable both the courts and the legislatures to play a key role in developing rights, in a manner which takes advantage

¹³¹ *Re P* [2009] 1 AC 173 [35]

¹³² Gerards and Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights (2009) 7(4) IJCL 619, 622

¹³³ *Re P* (no 131 above) 188

of the appropriate input of politics and democracy. The role of the courts can be most clearly summarised as a duty to provide a clear and methodical analysis and judgement of rights violations, while the duty of the legislature is to remedy the law where necessary.

In order to achieve this objective, the domestic courts must utilise section 4 of the Human Rights Act to its fullest potential.¹³⁴ For Strasbourg, the margin doctrine provides the ideal theoretical means of creating dialogue with the state, although this can only take place after the relevant issues have been identified: ultimately, the substantive issues must be identified by the Court before they can be considered and deliberated. As MacDonald notes, “If the Court gives as its reason for not interfering simply that the decision is within the margin of appreciation of national authorities, it is really providing no reason at all but is merely expressing its conclusion not to intervene, leaving observers to guess the real reasons which it failed to articulate.”¹³⁵

134 Klug (no 129 above)

135 MacDonald, ‘The Margin of Appreciation’ in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (Kluwer Law International, 1993), 85

CHAPTER 5

CONCLUSION

5.1 Involving the State

It has been argued through this piece that the margin has more value than merely as a deferential tool. This value is embodied in its potential to enable both politically legitimate domestic development of rights protections, its encouragement of inter-institutional dialogue and its recognition of contextual and temporal anomalies with our present understanding of the Convention. The solution to these anomalies, as has been argued, is the original basis for universality: a high degree of consensus among the member states. Achieving this consensus requires reforms Strasbourg is unable to mandate on its own, either due to political sensitivity, lack of information or lack of competence. As such, the margin places the impetus back on the state, allowing it to develop its rights protections with further European oversight.

A further benefit to this model is its potential efficiency. As Arden highlights, given the huge number of applications for rights violations, “the Strasbourg Court should, at least until matters improve, seek to focus on the more important cases and leave the cases which are less important to be dealt with by the national courts”.¹³⁶ One mechanism for this would be “an amendment to the Convention is necessary to impose on Contracting States an obligation to allow an applicant to have a matter reopened in the domestic courts if the Strasbourg Court so requires”.¹³⁷ This proposal would further the notion of dialogue to the extent that margins could be properly considered in due

¹³⁶ European Court of Human Rights, 'Dialogue between Judges' (2010), 27

¹³⁷ *ibid*, 28

time by the domestic courts—it is admitted that the present system is not wholly ideal, in which a further rights violation is necessary before an issue can be reopened.

One problem which must be addressed is the clarity with which the margin is applied. As Hunt highlights,¹³⁸ MacDonald has noted that 'the doctrine ... has on occasion permitted the Court's evasion of its responsibility to articulate the reasons why its intervention in particular cases may or may not be appropriate'.¹³⁹ A potential remedy for this is a system similar to the United Kingdom's Human Rights Act, under which the court has a duty to identify Convention incompatibilities in statutes to Parliament. It is possible that if the European Court had a declaration mechanism without legal effect, the potential for further dialogue would be greatly enhanced.

5.2 Towards Universality

The model described is not perfect, and obviously requires further changes to the operation of the European Court. Certainly rights issues must be explored in full before any margin is even considered: as Gerards and Senden note, considering use of the margin too early often precludes substantive rights discussion, which in turn gives the domestic organs of state little to work with in developing domestic rights.¹⁴⁰ The entire margin paradigm as explored in this piece depends upon adequate identification of rights issues by the Court, which as noted is sometimes not carried out to the fullest extent.

138 Hunt (no 116 above) 348

139 MacDonald, R. 'The Margin of Appreciation' in MacDonald, Matscher, and Petzold, *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1994) 83

140 Gerards and Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights (2009) 7(4) IJCL 619, 622

Ultimately, a model in which the margin not only allows deference but enables rights development is, it is submitted, particularly desirable. This may potentially offset the limitations the European Court faces, being a supranational body with less political influence and competence than domestic courts, which leaves its ability to properly protect fundamental rights partially limited. At the core of the Convention is a pervasive desire to build upon the universality of the contained rights, which ultimately must fuel itself through domestic rights development. For this to be enabled, the margin of appreciation is indisputably necessary.

BIBLIOGRAPHY

BOOKS

- Bamforth and Leyland, *Public Law in a Multi Layered Constitution* (Hart, 2003)
- Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, 2001)
- Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primacy in the European Convention on Human Rights* (Bril, 2009)
- Dijk et al, *Theory and practice of the European Convention on Human Rights* (Martinus Nijhoff Publishers, 1998)
- Erdal and Bakirci, *Article 3 of the European Convention on Human Rights* (OMCT, 2006)
- Kavanagh, *Constitutional review under the UK Human Rights Act* (Cambridge University Press, 2009)
- Khan, *A Theory of Universal Democracy* (Martinus Nijhoff, 2003)
- Leigh and Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart Publishing, 2008)
- Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge University Press, 2011)
- Matscher and Petzold, *The European System for the Protection of Human Rights* (Kluwer Law International, 1993)
- Pattinson, *Medical Law and Ethics* (Sweet & Maxwell, 2006)
- Power, *Conundrums of Humanity: The Quest For Global Justice* (Martinus Nijhoff, 2007)
- Rosenfeld, *The Identity of the Constitutional Subject* (Taylor & Francis, 2009)
- Takahashi, *The margin of appreciation and the principle of proportionality in the jurisprudence of the ECHR* (Intersentia, 2002)

ARTICLES

- Beyleveld, 'The concept of a human right and incorporation of the ECHR' (1995) Win PL 577
- Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 AJIL 38
- Dworkin, 'The Model of Rules' (1967) 35 UCLR 22
- Elser, 'On Majoritarianism and Rights', (1992) 1 EECR 19
- European Court of Human Rights, 'Dialogue between Judges' (2010)
- Gearty, 'The Human Rights Act - an academic sceptic changes his mind but not his heart' (2010) 6 EHRLR 582
- Gerards and Senden, 'The Structure of Fundamental Rights' (2009) 7(4) IJCL 619
- Gofur, 'Blasphemy reconsidered' (2008) 19(3) ELR 54
- Hogg and Bushell, 'The Charter Dialogue between Courts and Legislatures' (1997) 35 OHLJ 75
- Hunt, 'Why Public Law Needs Due Deference' in Bamforth, *Public Law in a Multi Layered Constitution* (Hart, 2003)
- Jones, 'The devaluation of human rights under the European Convention' (1995) Aut PL 430
- Klug, 'Judicial Deference under the HRA 1998' (2003) 2 EHRLR 125

Laws, 'Law and Democracy' [1995] PL 72

Lester, 'Universality versus subsidiarity: a reply' 1 EHRLR (1998) 73

Letsas 'The Truth in Autonomous Concepts: How To Interpret the ECHR' EJIL 15(2) 279

Letsas, 'Two concepts of the margin of appreciation' (2006) 26(4) OJLS 705

Lewis, 'In Re P and others: an exception to the "no more, certainly no less" rule' (2009) Jan PL 43

MacDonald, 'The Margin of Appreciation' in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (Kluwer Law International, 1993)

Mahoney, 'Judicial Activism and Judicial Self Restraint in the ECHR' (1990) 11 HRLJ 57

Mahoney, 'Universality Versus Subsidiarity in the Strasbourg Case Law on Free Speech', (1997) EHRLR 364

Myjer, Mol et al 'Submitting a Complaint to the European Court of Human Rights: Eleven Common Misconceptions' in Erdal and Bakirci, *Article 3 of the European Convention on Human Rights* (OMCT, 2006)

Oliva, 'The legal protection of believers and beliefs in the United Kingdom' (2007) 9(1) ELJ 66

Pannick, 'Principles of interpretation of Convention rights under the Human Rights Act' (1998) PL 545

Ress, 'The Effect of Decisions and Judgments of the European Court of Human Rights', (2005) 40(3) TILJ 403

Sales and Ekins, 'Rights-consistent interpretation and the Human Rights Act 1998' (2011) 127 LQR 217

Schooten and Sweeney, 'Domestic judicial deference and the ECHR' (2003) 11(1) TFLR 439

Scott, 'The English Fetus and the Right to Life', 11(4) EJHL 347

Singh, 'Is there a role for the "margin of appreciation" in national law after the Human Rights Act?' [1999] EHRLR 15

Sloane, 'Outrelativizing Relativism', [2001] VJTL 530

Straw and Boateng, 'Bringing Rights Home' (1996)

Stychin, 'Not (Quite) a Horse and Carriage' (2006) 14 FLS 79

Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights' (2005) 54(2) ICLQ

Wright, 'The tide in favour of equality: same-sex marriage in Canada and England and Wales' (2006) 20(3) IJLPF 249

CASES

A and Others v United Kingdom (2009) 49 EHRR 29

A and Others v Secretary of State for the Home Department [2004] UKHL 56

Chahal v United Kingdom 23 EHRR 413

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374

Gay News Ltd and Lemon v United Kingdom (1982) 5 EHRR 123

Ghaidan v Godin-Mendoza [2004] 2 AC 557

Goodwin and I v UK (2002) 35 EHR 447

Goodwin v United Kingdom (2002) 35 EHR 18

Greece v UK (1953) App No 156/56

Green v The City of Westminster Magistrates' Court [2007] EWHC 2785

Handyside v United Kingdom (1979) 1 EHR 737

International Transport Roth v Home Secretary [2003] QB 728

Ireland v UK (1978) 2 EHR 25

Karner v Austria (2003) 38 EHR 528

Muller v Switzerland (1991) 13 EHR 212

R v Chief Constable of South Yorkshire [2004] 1 WLR 2196

R v DPP ex parte Kebeline [2000] 2 AC 326

R v Special Adjudicator ex parte Ullah [2004] 2 AC 323

Rasmussen v Denmark (1985) 7 EHR 371

Re P [2009] 1 AC 173

Roche v United Kingdom (2006) 42 EHR 30

Smith and Grady v United Kingdom (2000) 29 EHR 493

Tammer v Estonia (No 2) (2003) 37 EHR 43

UK v Rees (1986) 9 EHR 56

Vo v France (2005) 40 EHR 12

Wingrove v UK 24 EHR 1