THE INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: UNIVERSAL PRINCIPLE OR MARGIN OF APPRECIATION?

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I. INTRODUCTION

In an attempt to answer the question I have been asked to consider, I would like to begin by making the following three preliminary points. First, in my opinion, it embodies a false antinomy. Convention rights are both universal *and* legitimately subject to national margins of appreciation enabling them to be applied differently in different European states. Second, there is a reason for this: although Convention rights are expressed in sparse and abstract *universal* terms, it is not at all clear that there are objectively valid interpretations of what they mean at all relevant times and in all relevant places. On the contrary it could be said that all interpretations of Convention rights are on a continuum between: plausible/implausible, defensible/indefensible, legitimate/ illegitimate, and so on. While some interpretations are clearly implausible or indefensible, many are more or less plausible, defensible etc. Third, the interpretive task for judges is both conceptual and constitutional. By 'conceptual' I mean that interpreting the Convention involves defining what Convention rights mean and how they relate to each other and to the public interests by which they are expressly and implicitly limited. By 'constitutional' I mean that the Convention itself implicitly suggests that both this process and its outcome need not be the same at either the transnational level or at national levels.

In pursuing these themes I will concentrate exclusively on the Strasbourg dimension because, for reasons which will become apparent, while national courts may apply various functional equivalents of the

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margin of appreciation, these cannot in the strict sense be instances of the margin of appreciation itself.

II. THE MARGIN OF APPRECIATION DEBATE

The *margin of appreciation*, typically described as a 'doctrine' rather than a principle, refers to the room for manoeuvre the judicial institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations. However, the term is not found in the text of the Convention itself, nor in the *travaux préparatoires*.[1] It first appeared in 1949 in proposals made by the European Movement in the debate about the kind of transnational human rights institutions, processes and norms which should be created in post-war Europe. The term 'margin of appreciation' was adopted officially for the first time by the European Commission of Human Rights in its 1958 report in the case brought by Greece against the UK over alleged human rights violations during counter-insurgency operations in Cyprus.[2] By the end of the 1990s it had been endorsed by numerous other Commission decisions and by over seven-hundred judgments of the Court.[3] Also by then, as Juliane Kokott points out, the principled management of national margins of appreciation had become one of the most important and difficult tasks, not only under the Convention, but in every mature transnational system for the protection of human rights.[4]

The margin of appreciation doctrine has also inspired a vast literature, much more extensive than that relating to any other Convention principle or doctrine and, indeed, probably greater than that on any other single aspect of the Convention.[5] Most of the academic

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[1] HC Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer, the Hague/Boston/London 1996) 14.

[2] *Greece* v. *United Kingdom* (1956-57) 2 Y.B. 174.

[3] Editors' note, 'The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice'(1998) 19 *Human Rights Law Journal* 1.

[4] J Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Kluwer Law International, the Hague/London/Boston 1998) 234. See also Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *European Journal of International Law* 907.

[5] The most comprehensive are Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp/Oxford/New York 2002) and Yourow (n 1). Those published in the past ten

debate is devoted to describing the complex contours of the doctrine within the Convention landscape, and identifying both fields of application and factors regulating its 'bandwidth'. All commentators agree that no simple formula can describe how the margin of appreciation works and that, in spite of the mountain of jurisprudence and analysis, its most striking characteristic remains its casuistic, uneven, and largely unpredictable nature. Most commentators also recognize the following features. First, that in addition to Article 15, the margin of appreciation has maintained a high profile in litigation relating only to certain Convention rights – the right to peaceful enjoyment of possessions in Article 1 of Protocol 1, the anti-discrimination provision of Article 14, and the personal freedoms enshrined in Articles 8-11 – yet a lower profile with respect to other rights. Second, drawing lines between Convention rights and legitimate public interest limitations inevitably involves weighing difficult and controversial political questions, rather than addressing narrow technical legal issues. Third, national authorities are in a better position to obtain and assess local knowledge, which the Strasbourg Court may either lack altogether or misjudge. Fourth, there may be a range of equally defensible places where such lines could be drawn, each of which may attract support from sections of public opinion in the state concerned, and some of which may be more appropriate in some member states than in others. For the Court to substitute its own conception of what is appropriate may, therefore, result in it taking sides in national debates concerning the resolution of genuine human rights and public interest dilemmas which

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years or so include G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705; JA Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54 *International and Comparative Law Quarterly* 459; S Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing, Human Rights Files No. 17, Strasbourg 2000); MR Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 *International and Comparative Law Quarterly* 638; P Mahoney, J Callewaert, C Ovey, SC Prebensen, Y Winisdoerffer, J Schokkenbroek & M O'Boyle (Council of Europe internal seminar), 'The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice' (1998) 19 *Human Rights Law Journal* 1; N Lavender, 'The Problem of the Margin of Appreciation' (1997) *European Human Rights Law Review* 380; E Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 *Zeitschrift für Auslandisches Offentliches Recht und Volkrecht* 240; TH Jones, 'The Devaluation of Human Rights Under the European Convention' (1995) *Public Law* 430.

are not amenable to any straightforward legal solution. Fifth, as Jessica Simor and Ben Emmerson show, the width of the margin of appreciation will vary according to 'such factors as the nature of the Convention right in issue, the importance of the right for the individual, the nature of the activity involved, the extent of the interference, and the nature of the state's justification'.[6] Sixth, the degree of scrutiny at Strasbourg will range from 'extreme deference on issues such as social and economic policy and national security', to a more intense review in cases involving 'criminal procedure, intimate aspects of private life, or political debate on matters of public interest.'[7] Finally, the extent to which there may be a pan-European consensus on the relationship between a particular Convention right and a specific public interest may also govern the scope accorded to the margin of appreciation.

However, opinion is also divided over a range of other issues. Commentators disagree, for example, over whether the margin of appreciation doctrine embraces every type of discretion by national institutions under the Convention, or relates only to certain kinds. This is linked to whether it pervades the entire Convention or is restricted to specific provisions. Ronald St. John Macdonald, for instance, maintains that 'in theory there is no limit to the articles of the Convention to which the margin of appreciation could be applied for the Court has never imposed a limit'.[8] However, others have pointed out that the margin of appreciation has never been invoked with respect to Article 2, the right to life, Article 3, the right not to be subjected to torture or to inhuman or degrading treatment or punishment, or Article 4, the right not to be held in slavery or servitude, or subject to forced or compulsory labour.[9] Furthermore, it has had a very limited role in relation to Articles 5 and 6.[10] While some critics have argued for the elimination of the doctrine

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[6] J Simor & B Emmerson (eds), *Human Rights Practice* (Sweet & Maxwell, London 2000) para 1.084.

[7] ibid.

[8] RJ Macdonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights', in Anon (ed), *International Law at the Time of its Codification, Essays in Honour of Judge Roberto Ago* (Giuffrè, Milan 1987) 187-208, 192.

[9] J Callewaert, 'Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?' (1998) 19 *Human Rights Law Journal* 6, 6-9.

[10] J Schokkenbroek, 'The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1998) 19 *Human Rights Law Journal* 30, 34; Arai-Takahashi (n 5) 28 and 49.

altogether,[11] most commentators maintain that greater clarity, coherence and consistency in its application are required instead. Few, however, have ventured to suggest how this goal may be achieved.

III. CONSTITUTIONALISING THE MARGIN OF APPRECIATION

In my view the key to understanding the proper role of the margin of appreciation lies in a better grasp of the fact that it is one of the Convention's principles of interpretation and that it has a distinctive relationship with the others. In the process of litigation over the past few decades the Court has identified and applied about a dozen or so principles of interpretation, including the margin of appreciation.[12] These are not found in the text of the Convention itself but derive, directly or indirectly, from the 'teleological principle' which stems from Articles 31 to 33 of the Vienna Convention on the Law of Treaties 1969, and requires the text of international treaties to be interpreted in good faith according to the ordinary meaning of their terms in context—unless any special meaning was intended by the parties—and in the light of the overall object and purpose of the treaty in question. But, unlike most international treaties which are merely reciprocal agreements between states, the ECHR is a 'constitutional instrument of European public order in the field of human rights', which creates a 'network of mutual bilateral undertakings … [and] … objective obligations'.[13]

The principles of interpretation identified by the Court are as follows. Given the primary function of the ECHR the principle of 'effective protection of individual rights' requires rights to be interpreted broadly and exceptions narrowly. This is linked to the principle of 'non-abuse of rights and limitations' which seeks to protect rights from abuse of either the rights themselves or their limitations. However, the principles of 'implied rights and implied limitations' allow some scope for extensions of rights, and also inherent but not extensive limitations, to be read into the text. The principle of 'positive obligations' allows the

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[11] For example, in a partly dissenting opinion, Judge De Meyer stated that it was 'high time for the Court to banish that concept from its reasoning' because 'where human rights are concerned there is no room for a margin of appreciation which would enable the states to decide what is acceptable and what is not', *Z v. Finland* (1998) 25 EHRR 371 [III].

[12] S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, Cambridge 2006) Ch 4.

[13] *Ireland v UK* (1980) 2 EHRR 25 [239]; *Austria v Italy* (1961) 4 YB 116, 138.

Court to interpret the ECHR in a manner which imposes obligations upon states actively to protect Convention rights rather than merely the negative obligation to avoid violating them. Armed with the principle of 'autonomous interpretation' the Court can define some of the Convention's key terms in order to prevent states conveniently re-defining their way around their obligations, for example, by preventing crimes being re-designated as merely 'administrative infractions'. Similarly, the principle of 'evolutive/dynamic interpretation' enables outmoded conceptions of original definitional terminology to be abandoned where significant, durable, and—according to the principle of 'commonality'—pan-European changes in the climate of European public opinion have occurred, for example that homosexuality and transsexualism are aspects of private life requiring respect from public authorities. The twin principles of 'subsidiarity' and 'review' indicate that the role of the Court is subsidiary to that of member states and is limited to determining whether the Convention has been violated rather than acting as a final court of appeal. The principle of 'proportionality', closely allied with the margin of appreciation, limits interference with Convention rights to that which is least intrusive in pursuit of a legitimate objective. Pervasive in the ECHR are the closely related principles of 'legality', the 'rule of law', and 'procedural fairness'—which seek to subject the exercise of public power to effective, formal legal constraints in order to avoid arbitrariness—and the principle of 'democracy', which assumes that human rights flourish best in the context of a democratic political institution coupled with a tolerant social climate.

The Convention's principles of interpretation, as I have previously argued,[14] are essentially constitutional since they address two distinct and quintessentially constitutional questions: the 'normative question' of *what* a given Convention right means including its relationship with other rights and collective interests, and the 'institutional question' of *which* institutions – judicial/non-judicial, national/European – should be responsible for providing the answer. While the received opinion is that the principles of interpretation fall into no particular order and are non-hierarchical, I have also argued that this is not true. In fact they fall into two distinct categories, primary and secondary, with the clear hierarchical relationship that these terms

[14] Greer (n 12) Ch 4.

suggest. This conclusion follows from the Convention's overall object and purpose as an international treaty for the protection of certain designated individual rights and fundamental freedoms from violation by contracting states in the context of the principles of democracy and the rule of law. It is not, in other words, an international treaty for the protection of democracy in the context of human rights and the rule of law, nor a treaty for the protection of the rule of law in the context of democracy and human rights. This apparently banal observation has important implications, not least for improving how the role of the margin of appreciation might be understood.

The central constitutional issue raised by the Convention is how its basic purpose can be realised institutionally. This is more fundamental than the distribution of competence between national institutions, on the one hand, and the European Court of Human Rights on the other since the function of national non-judicial bodies differs under the Convention from that of both national courts and the European Court of Human Rights which together share similar, though not identical, responsibilities. The central constitutional question therefore becomes – how can responsibility for rights protection and the democratic pursuit of the public interest be distributed between judicial and non-judicial institutions each acting in accordance with the rule of law? To answer it, while remaining faithful to the teleological principle, requires a re-arrangement of the primordial soup of principles of interpretation, and a re-structuring, but not a substantive revision, of the orthodox principle of *effective protection of human rights,* as well as the principles of *legality* or *rule of law* and the principle of *democracy*.

This restructuring produces three primary constitutional principles each exercised according to the principle of legality, procedural fairness and rule of law, to which the remaining principles of interpretation are subordinate. One primary constitutional principle, the 'rights' principle, holds that, in a democratic society, Convention rights should be protected by national courts and by the European Court of Human Rights through the medium of law. Another primary constitutional principle, the 'democracy' principle, maintains that, in a democratic society, collective goods/public interests should be pursued by democratically accountable national non-judicial public bodies within a framework of law. The third primary constitutional principle, the principle of 'priority to Convention rights', mediates the relationship between the other two by insisting that Convention rights take

procedural and evidential, but not conclusive substantive, priority over the democratic pursuit of the public interest, according to the terms of given Convention provisions. Providing the role of the principle of legality is recognised as being integral to these three primary constitutional principles, little of consequence results from counting them as three rather than four. The function of the remaining principles of interpretation, which are subordinate to the three or four primary principles, is to provide a complex web of overlapping support. For example, the principles of subsidiarity, positive obligations and non-discrimination, all mediate between the 'rights' 'democracy' and 'priority' principles. The principles of proportionality and strict or absolute necessity, on the other hand, determine the strength of the 'priority' principle within different contexts. The principles of review, commonality, evolutive, dynamic, and autonomous interpretation derive from the 'rights' principle, while the margin of appreciation doctrine, strictly interpreted, supports the 'democracy' principle.

The most controversial aspect of this model concerns the existence and role of the priority-to-rights principle. Formalists may conclude that because the Court has never expressly acknowledged it, there can be no reason for believing it exists. Yet a close reading of Convention jurisprudence reveals that both this principle, as well as the model from which it derives, have implicitly been applied by the Court on many occasions while on others they have not.[15] Arguably the coherence of the Strasbourg case law would be improved if the Court were to observe this principle and accompanying model more consistently. A strong version of the priority-to-rights principle can be derived from the prohibitive principles found in Articles 3, 4(1), and 7(1). These rights are often said to be 'absolute' because the principles from which they derive are not expressly restricted and the rights themselves cannot be suspended even in time of war or public emergency threatening the life of the nation. This is not, however, an appropriate designation because, in interpreting these provisions, the Strasbourg institutions have – although not always with good reason – resorted to the principle of implied limitations. The relevant rights have, therefore, as a matter of definition, been interpreted subject to inherent public interest exceptions. But the formal structure of these provisions, allied with the constitutional model presented here, means that the

[15] Greer (n 12) Ch 5.

relationship between the rights and their implicit restrictions should not be achieved simply by 'ad hoc balancing', nor by directly applying the principle of proportionality, but, first, by ensuring that certain universal minimum standards are observed and, then by permitting limitations only at the margins.

Strong versions of the priority-to-rights principle are also found in Articles 2 and 15 which require, respectively, that the use of force which results in interferences with the right to life should be 'no more than absolutely necessary', and that derogations from all but the non-derogable rights should only occur 'in time of war or other public emergency threatening the life of the nation', and that, even then, only to 'the extent strictly required by the exigencies of the situation'. Here again the relationship between the rights concerned and the public interests which may limit them, is not achieved through balancing, nor through the application of the principle of proportionality, but rather through the requirement that justifications for interference cross a high evidential threshold of 'absolute' or 'strict' necessity.

The priority principle is weakest in relation to Article 1 of Protocol 1 which provides a right to the peaceful enjoyment of possessions limited by 'the public interest … subject to the conditions provided for by law and by the general principles of international law', which also entitles states to 'control the use of property in accordance with the general interest'. A version of 'intermediate strength' however applies *prima facie* to Article 4(2) and (3), and to Articles 5 and 6 where the right to be free from forced or compulsory labour, the right to liberty and the right to fair trial, are all more formally defined than any other Convention rights and are subject, in the case of Article 4(2) and (3) and Article 5, to a series of narrowly conceived express restrictions. However, although the principle of implied restrictions has affected the way in which these rights have been defined, the formal structure of these provisions, and the Convention's inherent constitution, require these rights to be given both procedural and evidential precedence, though not as strongly as in the context of Articles 3, 4(1) and 7(1).

Another version of the priority principle of 'intermediate strength' applies to Articles 8-11 where the rights in question take procedural and evidential priority over broadly expressed collective goods. Whether or not there has been an 'interference' is, for example, formally considered before the question of its justification, which is in turn filtered through a series of tests: 'prescribed by law', 'democratic

necessity', pursuit of a specific 'legitimate purpose', and 'proportionality to a pressing social need'. While these tests may present less demanding thresholds than is the case with the strong versions of the 'priority' principle, the structure of Articles 8-11, together with the Convention's primary and secondary constitutional principles, make clear that the respective rights are presumed to take precedence over collective goods unless a strong case can be made out otherwise. Thus, in spite of the language sometimes used by the Strasbourg institutions in these circumstances, rights and public interests are not *prima facie* equal variables to be weighed in a balance. The scales are loaded, yet not conclusively, in favour of rights.[16]

Amongst other things this model disciplines the margin of appreciation doctrine in two ways. First, the Convention's primary constitutional principles suggest there is no genuine substantive margin of appreciation at all on the part of national non-judicial institutions as far as the *definition* of Convention rights and their interface with each other are concerned. This does not, however, exclude the possibility of what might be called 'implementation discretion', for example on the mechanics of trial processes, and over how adjectives and adverbs such as 'reasonable' and 'promptly', which appear in various Convention provisions, are applied. This approach does not, however, imply that national legislative, executive, and administrative bodies should renounce attempts to understand what Convention rights mean, nor should they refuse to delineate their boundaries. These tasks are clearly, and inescapably, encompassed by the democracy principle. What it does mean is that where the definition of a Convention right is disputed, the matter must be resolved authoritatively by national courts, and ultimately by the European Court of Human Rights, *with no genuine margin of appreciation accorded national non-judicial bodies at all*. Second, where the exercise of a Convention right and a public interest conflict, the Court's main responsibility is not merely to permit an ad hoc balancing exercise

[16] A similar view is taken by Emerson who argues that, in the US context, conflicts between constitutional rights and national security should be mediated with a presumption in favour of the constitutional right. The burden of proof should rest on the government to show a 'direct, immediate, grave and specific' threat, courts should view government claims with 'healthy scepticism' formulating and applying hard and fast rules rather than loose balancing tests, and, even where the government case is substantiated, rights should be restricted only to the narrowest extent, TI Emerson, 'National Security and Civil Liberties' (1982) 9 *Yale Journal of World Public Order* 78, 85.

by judicial and non-judicial authorities at the national level. Instead the Court must ensure that the priority-to-rights principle has been properly observed by these authorities according to the terms of the Convention provision(s) at issue. Consequently, this also involves a balancing exercise. But this is a form of structured or weighted balancing rather than the ad hoc balancing usually envisaged in the Strasbourg jurisprudence and the literature.

In order to understand this point more fully the relationship between the margin of appreciation and the proportionality principle must be more carefully considered. There are two problems with the way in which the Court currently understands proportionality. First, because the priority-to-rights principle has not been consistently recognised at Strasbourg, there is uncertainty about whether the applicant or the respondent state has the burden of proving that the interference in question has, or has not been, proportionate. Some frequently-used phrases in the Strasbourg jurisprudence support the view that the government has the burden of establishing that a specific interference is proportionate. For example, the grounds for interfering with a Convention right must be: 'relevant and sufficient',[17] the necessity for a restriction must be 'convincingly established',[18] or 'convincing and compelling',[19] the exceptions should be narrowly construed,[20] the interference must be justified by a 'pressing social need,'[21] and public policy should be pursued in the 'least onerous way as regards human rights'.[22] However, confusion has been created by other decisions which have opted instead for a 'fair balance' between Convention rights and the 'general interests of the community' without offering any particular

[17] *Ernst v Belgium* (2004) 39 EHRR 724 [104]; *Krone Verlag GmbH & Co KG (No. 2) v Austria* (2004) 39 EHRR 906 [42]; *Nikula v Finland* (2004) 38 EHRR 944 [44].
[18] *Société Colas Est v France* (2004) 39 E.H.R.R. 373 [47]; *Tele 1 Privatfernsehgesellschaft MBH v Austria* (2002) 34 EHRR 181 [34]; *Autronic AG v Switzerland* (1990) 12 E.H.R.R. 485 [61]; *Weber v Switzerland* (1990) 12 E.H.R.R. 508 [47].
[19] *Refah Partisi (Welfare) Party v Turkey* (2003) 37 E.H.R.R. 1 [135]; *ÖZDEP v Turkey* (2001) 31 EHRR 674 [44].
[20] *Société Colas Est v France* (2004) 39 EHRR 373 [47]; *Sunday Times v United Kingdom* (1980) 2 EHRR 245 [65].
[21] *The Observer and The Guardian v United Kingdom* (1992) 14 EHRR 153 [71].
[22] *Hatton v United Kingdom* (2002) 34 EHRR 1 [97] (Chamber judgment).

indication of how procedurally this should occur.[23] The second problem is that the Court uses the doctrine of the margin of appreciation and the principle of proportionality to resolve conflicts between Convention rights when the task is more properly one of definition. While this may appear to be an overly subtle distinction it is, on the contrary, one with enormous juridical and political implications for the whole Convention system. The difference between 'defining' Convention rights to resolve conflicts between them, and 'balancing' them against each other according to the margin of appreciation doctrine and the principle of proportionality is that, as I have already indicated, under the former, there is no real scope for discretion on the part of national non-judicial authorities.

Before drawing some conclusions I'd like to illustrate these very abstract ideas with an example familiar to anyone acquainted with Convention jurisprudence. In *Otto-Preminger-Institut v Austria*, the applicant, a private non-profit arts cinema in Innsbruck, complained that its freedom of expression under Article 10 of the Convention had been violated by the official seizure and confiscation under Austrian law, of the film, *Das Liebeskonzil (Council in Heaven)*, which depicted God, Christ and the Virgin Mary in an unflattering and sometimes obscene manner.[24] Screenings were open to members of the public over seventeen years of age, and the cinema's advertising warned that the film caricatured the Christian creed. A majority of the European Court of Human Rights held that the cinema's right to freedom of expression had not been violated by the seizure and confiscation, while the minority held that it had.

The central issue in this case can be characterised in three ways. Although neither the majority nor minority considered this possibility, it can be seen, first, as a clash between two manifestations of the right to freedom of association and assembly on the part of the cinema and those who wanted to see the film, and the right of outraged Christians to demonstrate against it outside the premises. But only if there were reasonable grounds for believing that screening the film would have presented a serious risk to public order could it legitimately have been

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[23] *Grande Oriente d'Italia di Palazzo v Italy* (2002) 34 EHRR 629 [25]; *Piermont v France* (1995) 20 EHRR 301 [77]; *Klass v Germany* (1994) 18 EHRR 305 [59]; *Barfod v Denmark* (1991) 13 EHRR 493 [29]; *Gaskin v United Kingdom* (1990) 12 EHRR 36 [40].

[24] (1995) 19 E.H.R.R. 34.

banned under the 'prevention of disorder' exception to Article 11. Second, it can be seen, as a clash between the cinema's right to freedom of expression under Article 10(1) and the public interest in the prevention of disorder under Article 10(2), which the majority considered and dropped, but later revived without adequate justification to support its conclusion. If the screening of the film had presented a credible threat to public order, the Austrian police and other relevant non-judicial public authorities would have had a judicially reviewable margin of appreciation in deciding whether to ban it, since assessing the risk of public disorder is indisputably a police matter. However, the 'priority-to-rights' principle requires that the right to freedom of expression should prevail unless a defence such as this is supported by cogent and compelling evidence. In this case, no evidence whatsoever that screening the film would have presented a risk to public order was offered in the entire report of the Court's judgment. Therefore, in the absence of such evidence, no margin of appreciation was available to the Austrian non-judicial public authorities on this ground. Third, the central issue in this case can more credibly be characterised as a clash between two Convention rights, the right to freedom of expression, on the one hand, and the right to freedom of thought, conscience and religion on the other. The key issues then become how these rights are defined, ultimately a matter for the Strasbourg court alone, and how the appropriate definition can be applied to the facts of the case, a responsibility shared with national judicial and non-judicial authorities.

As the European Court of Human Rights has held in other cases, the right to freedom of expression can be understood to include the freedom to criticise religious beliefs, unless it becomes abusive or gratuitously offensive towards those who hold them. Conversely, and by necessary implication, the scope of the right to freedom of thought, conscience and religion, in a democratic society, does not include the right to be free from criticism. But it does include the right to be free from gratuitously offensive criticism. Determining whether or not this line has been crossed is a matter, in the first instance, for national non-judicial public authorities. But since, in a democratic society which respects the rule of law, this decision should be subject to review by domestic courts, strictly speaking only the domestic courts have a 'margin of appreciation'.

Therefore where, as in the *Otto-Preminger* case, a particular form of expression is on the borderline between what constitutes acceptable

and unacceptable criticism of a particular religion or its adherents, the case for permitting it is stronger if viable ways of limiting its impact upon those likely to be offended can be found, short of banning it entirely. Since there *were* other alternatives in this case, for example the age restriction on attendance and the public warning, the minority decision is, therefore, more consistent with the Convention's underlying constitutional principles than the majority's, regardless of what one may think about the artistic merits of the film itself.

IV. CONCLUSION

I would like to finish by drawing the following three brief conclusions. First, the margin of appreciation doctrine is integral and essential to the Convention's system of constitutional-interpretive principles. Second, it will never be brought under the kind of control some commentators wish because the interpretation of the Convention is not an objective matter. There will, in other words, sometimes be scope for substantial differences of informed professional opinion on what Convention rights mean and how they should be applied. Third, the best that can be hoped for is that the margin of appreciation is confined within acceptable limits, mainly by appreciating its subordination to the Convention's primary constitutional principles and also its relationship with other secondary principles, particularly proportionality. In this way Convention rights are, and should be, both universal and capable of being interpreted and applied differently in varying national contexts.