

UCL – Current Legal Problems (CLP) lecture

Whither the Margin of Appreciation?

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The doctrine of the margin of appreciation may be regarded as being among the most prominent judge-made legal constructs in European human rights jurisprudence. It is an analytical tool that guides the European Court in its examination of the complaints raised under many, but not all, provisions of the Convention and its Protocols. It makes for a body of human rights law that accepts pluralism over uniformity, as long as the fundamental guarantees are effectively observed. Alongside its normative function, the doctrine pursues what may be termed a systemic objective. It devolves a large measure of responsibility for scrutinising the acts or omissions of national authorities to the national courts, placing them in their natural, primary role in the protection of human rights. It is therefore neither a gift nor a concession, but more an incentive to the domestic judge to conduct the necessary Convention review, realising in this way the principle of subsidiarity. Protocol No. 15, adopted in May 2013 and currently in the process of ratification by the 47 Contracting Parties, will add to the Preamble of the Convention references to both the margin of appreciation and subsidiarity. What are the implications of this reform for the Strasbourg Court? And for national courts?

Lord Neuberger,
[other personalities as appropriate]
Ladies and Gentlemen,

It is an honour and pleasure for me to take the floor this evening as the guest of the Faculty of Laws.

I am grateful to our hosts for giving me the opportunity to address you, and also for allowing me a wide margin of appreciation in the choice of theme. I chose that very subject for its significance in contemporary European human rights law.

I would like to preface my remarks with a brief personal tribute to an eminent legal scholar, a previous incumbent of the chair of international law at UCL, Professor Georg Schwarzenberger. He described himself as “European”.

He was one of many intellectuals who sought refuge in this country following the Nazi takeover in Germany in 1933. It was to this country's credit that it received so many of those

who fled the persecution of the Nazi regime. In Britain they found a tolerant, decent and open society where they could recover the freedom and dignity denied to them in Germany. And where, albeit not without difficulty, they could resume their careers and ultimately make a great contribution to British legal scholarship and university life.

Georg Schwarzenberger was a very distinctive voice in international law, and an important part of his enduring legacy is the journal *Current Legal Problems*, which he co-founded. He is also commemorated by an academic prize that is named after him, and which is awarded each year by the Institute of Advanced Legal Studies to a student in the Faculty of Laws of the University of London considered to be outstanding in the field of Public International Law.

I should add that he had as a student a man who made a great contribution to European human rights law, my former colleague Christos Rozakis who was part of the Commission and then the Court, of which he was Vice-President for many years. I will bring his name up again later on.

Coming now to my theme, let me explain at the outset where I wish to go, and how I intend to get there.

The “whither” in the title of my talk points towards the future. I must of course enter the usual *caveats* about predicting the future - futurology being quite a different professional calling to the law. So it will be a *possible* future, a *desirable* future, that I will endeavour to describe.

My point of departure lies in the past, however. Some brief consideration of the origins of the margin of appreciation is a good place to start.

That is not to suggest that looking at the past will reveal the future, much to the regret of we jurists for whom certainty, continuity and predictability are cherished notions. Yet it is instructive to recall the pedigree of the margin of appreciation, and so I would add a subtitle to my talk: *whence* the margin of appreciation?

This is well-worked ground, of course, excavated by many commentators. I will not be digging up any historical gems. The origins of the margin of appreciation can be traced back to the earliest days of the Convention mechanism, and more precisely to the 1956 inter-State case taken by Greece against the United Kingdom over the troubled situation on the island of Cyprus¹.

In its examination of the case, the European Commission of Human Rights considered Article 15 of the Convention, which permits, and sets out the procedure for, derogations by States from certain Convention obligations in time of emergency. The Commission considered that it was within its competence – and the parties agreed on this – to make its own assessment of the existence of a “public emergency threatening the life of the nation.”

Having summarised the various threats to public order and safety in Cyprus at the time, it concluded in the following terms:

“The Commission of Human Rights is authorised by the Convention to express a critical opinion on derogations under Article 15, but the Government concerned retains, within certain limits, its discretion in appreciating the threat to the life of the nation. In the

¹ *Greece v. United Kingdom*, application no. 176/56.

present case the Government of Cyprus² has not gone beyond these limits of appreciation.”

(Report of the Commission of 26 September 1958, page 138, emphasis added).

Moving on to the question whether the measures taken were strictly required by the exigencies of the situation, the Commission allowed to the colonial Government (of Cyprus) “*a certain measure of discretion*” in this regard (page 152). One must look to the French version of the decision in order to find the familiar formula, “*une certaine marge d’appréciation*”. Strasbourg had appropriated a phrase and a concept known to continental legal systems, and to public international law. Commenting on this first usage at Strasbourg, Professor Rosalyn Higgins thought that its clarity left something to be desired³ - a remark that has often been repeated since, I might add.

The Commission reverted to the point soon afterwards in the *Lawless* case⁴. More precisely, it came in a separate opinion of five Commission members, led by Sir Humphrey Waldock, who wrote:

“it is evident that a certain discretion - a certain margin of appreciation – must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.”

(Report of the Commission of 19 December 1959, page 85)

The Court itself did not appropriate the formula until the mid-1970s – one finds it used first in the judgment in the *Engel* case⁵ in 1976. But in a slightly different formulation it entered the Court’s vocabulary in the “Vagrancy” case five years earlier⁶. That was in the context of the right to respect for the privacy of one’s correspondence, guaranteed by Article 8. In a rather concise ruling on the point, the Court held that Belgium “did not transgress in the present cases *the limits of the power of appreciation* which Article 8 (2) ... of the Convention leaves to the Contracting States”⁷ (emphasis added).

That formulation, which I think is actually quite a good one, reappeared (as one of the lesser issues) in the *Golder* case in 1975. The Court reached the opposite conclusion on the applicant’s complaint under Article 8; even having regard to the authorities’ power of appreciation, the fact that the applicant was prevented from corresponding with a solicitor was an unjustified interference with his Article 8 rights⁸.

In the *Engel* case, the Court referred to the margin in relation to three provisions of the Convention: Article 5 (right to liberty and security), Article 14 (prohibition of discrimination), and Article 10 (freedom of expression).

Yet if the phrase was now on the Court’s lips, its rationale had yet to be articulated.

² Meaning the pre-independence administration.

³ “Derogations under Human Rights Treaties”, R. Higgins, in *The British Year Book of International Law* 1976-1977, Oxford.

⁴ *Lawless v. Ireland*, application no. 332/57.

⁵ *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

⁶ *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, Series A no. 12.

⁷ At § 95.

⁸ *Golder v. the United Kingdom*, 21 February 1975, § 45, Series A no. 18.

This came with the renowned *Handyside* judgment, given by the Plenary Court on 7 December 1976⁹. In his writings on the subject, Professor Arai-Takahashi has described the judgment as the *cause célèbre* and commented that it is only with *Handyside* that “it has become fairly justifiable to consider a margin of appreciation as a doctrine”¹⁰.

The celebrated passage, or *locus classicus*, begins, at paragraph 48, with a reference to the subsidiary character of the Convention machinery, a pairing of the two notions that will now be inscribed in the Preamble of the Convention by Protocol No. 15 (which I shall come to presently).

Let me point out however that the passage immediately answers the question *subsidiary to what exactly?* Not, as some would have it, to State authorities in a broad or general way on traditional sovereignty grounds. Rather, the Convention mechanism is subsidiary to the national systems safeguarding human rights. The point is crucial to a correct understanding of the margin of appreciation, its nature and its purpose. I refer here to a remark made by several of my Strasbourg colleagues in their joint dissenting in the *Mouvement Raelien*:

*“The doctrine of margin of appreciation is a valuable tool for the interaction between national authorities and the Convention enforcement mechanism; it was never intended to be a vehicle of unprincipled deferentialism.”*¹¹

There is in *Handyside* the clear idea of a sequence – in the scheme of the Convention, it is in the first place the task of the national authorities to secure the rights contained in it. And so, in the context of restricting the exercise of rights (here the right to freedom of expression protected by Article 10), it is for the national authorities to make the initial assessment.

What one also finds in paragraph 48 is the observation that there was not, at that time, a uniform European conception of morals. That idea of consensus - or in this case dissensus - is of course central to the operation in practice of the margin of appreciation.

The Court recognized the better position - in principle - of the State authorities, compared to the international judge, to give an opinion on the exact content of the requirements of morals, and the necessity of any penalty or restriction intended to meet them. Whence their margin of appreciation, recognized both as regards Parliament and the judiciary.

In paragraph 49 the focus moves to the European level. The Contracting States’ power of appreciation is not unlimited, and the final ruling is that of the Court. “The domestic margin of appreciation thus goes hand in hand with a European supervision”. The Court’s task, then, is not “to take the place of the competent national courts but rather to review ... the decisions they delivered in the exercise of their power of appreciation”.

From that day to this, the margin of appreciation has figured in a great many cases (although I have not counted them!), and especially in those arising under the similarly-structured Articles 8-11 of the Convention which mandate a necessity analysis of interferences with the rights of individuals. It is no less prominent in the case-law under Article 14 of the

⁹ *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24.

¹⁰ “The margin of appreciation doctrine: a theoretical analysis of Strasbourg’s variable geometry”, Y. Arai-Takahashi, in *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge.

¹¹ *Mouvement raelien suisse v. Switzerland* [GC], no. 16354/06, ECHR 2012 (extracts). Joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić.

Convention. Indeed, the margin arises in relation to many of the rights enshrined in the Convention and its Protocols.

Yet it is not an all-embracing notion. There are domains of human rights law to which it has little application, or none at all. Such as Article 3 of the Convention. In the *Saadi* case, the Court ruled out in clear terms any idea of balancing, in the context of expulsion from the national territory, the risk of severe ill-treatment against the threat represented by an individual¹². To give another example, it is hard to see how it could have meaningful application to the right set out in Article 7 of the Convention embodying the *nullum crimen* and *nulla poena* principles. Or to the abolition of the death penalty under Protocol No. 13.

I will not dwell long on the “mechanics” of the margin. The manner of its application has come in for a fair deal of criticism, judicial and academic. One thinks of the famous counterblast of the Belgian judge Jan De Meyer, who said:

*“The empty phrases concerning the State’s margin of appreciation - repeated in the Court’s judgments for too long already - are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights. Such terminology, as wrong in principle as it is pointless in practice, should be abandoned without delay.”*¹³

Closer in time there was the following remark from Christos Rozakis, who, in a case against Norway, concluded his concurring opinion with the following remark:

*“I respectfully submit that in cases like the present case the Court should carefully reconsider the applicability of the concept of the margin of appreciation, avoid the automaticity of reference to it, and duly limit it to cases where a real need for its applicability better serves the interests of justice and the protection of human rights.”*¹⁴

Even those who count among the Court’s most loyal supporters have taken aim at the margin. Lord Lester, for example, described it as being “as slippery and elusive as an eel”¹⁵. It has been said by many a commentator that the Court’s handling of the margin lacks consistency. I do not deny that there is some substance in this critique, but let me recall here, with approval, the words of Professor Constance Grewe who said:

*“il n’appartient pas au juge de faire oeuvre de doctrine; les incohérences de sa jurisprudence préservent l’ouverture et obligent à persévérer dans la pensée complexe”*¹⁶

[“it is not the judge’s task to produce academic opinion – the inconsistencies of his case-law leave the door open, such that a complex thought process will have to be pursued”]

¹² *Saadi v. Italy* [GC], no. 37201/06, § 139, ECHR 2008.

¹³ *Z. v. Finland*, no. 22009/93, partly dissenting opinion of Judge De Meyer.

¹⁴ *Egeland and Hanseid v. Norway*, no. 34438/04, 16 April 2009, concurring opinion of Judge Rozakis. See further “Through the Looking Glass: An “insider’s” view of the margin of appreciation”, C. L. Rozakis, in *La Conscience des Droits: Mélanges en honneur de Jean-Paul Costa*, pp. 527-537, Paris.

¹⁵ “Universality vs. Subsidiarity: A reply”, A. Lester, (1998) 1 EHRLR, 73, 75.

¹⁶ “Quelques réflexions sur la fonction de juger à partir de l’arrêt Mamatkulov c. Turquie rendu par la CourEDH”, C. Grewe, in *Festschrift Christian Tomuschat*, p. 544. Article cited in “No consensus on consensus? The practice of the European Court of Human Rights”, L. Wildhaber, A. Hjartarson and S. Donnelly, HRLJ Vol. 33 No. 7-12, p. 262.

In the Convention case-law, the margin of appreciation has taken on various manifestations. It pertains to matters such as the Court respecting the facts as established by the domestic courts or their interpretation of domestic law, and also to determining the content of Convention rights. To give a topical example, the recognition of same-sex relationships, in 2001 the Court said in the *Mata Estevez* case, in relation to the term “family life” in the context of Article 8:

*“despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation”*¹⁷

By 2010 the Court was ready to revisit this position in the *Schalk and Kopf* case. It surveyed the national and international developments in the intervening period and held that it would be “artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8.”¹⁸

For my purpose this evening, summed up in the word “whither”, I intend to concentrate on the *Handyside* scenario, that is to say where the margin arises when determining whether an interference with rights can be regarded as “necessary in a democratic society”. I think that here, by dint of repetition in the case-law, the components of the margin are relatively settled. True, it is a creature of case-law, a judge-made legal construct, a point that drew comment in the recent - and may I say excellent - report of the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill. The Joint Committee saw “a difficulty, in that the “margin of appreciation” as a general concept, rather than as an explicit qualification of specific rights, is not strictly defined, with the result that its application is at the sole discretion of the Court”¹⁹.

It is of course correct that the margin is nowhere written down in treaty law, and that while the patterns are, I believe, quite clear in the case-law, its application is only predictable to a certain degree. That is the nature of the beast, though. In its essence it is sensitive to the legal and factual context of each case. Determining its span is not a prelude to the exercise of judgment in a case, but intrinsic to it. The margin of appreciation is not a fixed unit of legal measurement. But it is not applied at the Court’s pleasure either. As you will know, the European Court of Human Rights is not formally subject to a system of binding precedents, which is the mainstay of the common law. But the Court does – indeed must – recognize the value of precedent, and the importance of jurisprudential consistency.

This brings me to Protocol No. 15.

The Protocol is no far-reaching measure of reform, but rather a modest package.

It is Article 1, amending the Preamble to the Convention, that catches the eye.

I will also mention Article 5 of the Protocol. This reverses in part one of the amendments introduced in 2010 by Protocol No. 14 - Article 35 para. 3(b) to the Convention, allowing the Court to reject applications for lack of a significant disadvantage to the applicant. In its original – and still current – version, two safeguards were added, namely (i) that respect for human rights does not require examination of the case and (ii) that the case had been duly considered by a domestic tribunal. I have previously suggested that, to a certain extent at

¹⁷ *Mata Estevez v. Spain (dec.)*, no. 56501/00, ECHR 2001-VI

¹⁸ *Schalk and Kopf v. Austria*, no. 30141/04, § 94, ECHR 2010.

¹⁹ At paragraph 35 of the report.

least, this second safeguard implicitly enshrined an obligation to apply the margin of appreciation, encouraging the examination of a case by the domestic courts in the light of Convention principles. With Protocol 15, the second safeguard will disappear, the States having taken the view that the other safeguard was broad enough to guard against a denial of justice.

In contrast Article 1 of Protocol 15 is expressly about the margin of appreciation and subsidiarity. I would like to say something about the background to it. All of the contents of Protocol No. 15 were agreed at Brighton – the drafters of the Protocol only had to translate these points of political consensus into precise treaty language. As regards the margin of appreciation, the Brighton Declaration provided:

“11. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation.

12. The Conference therefore:

a) Welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments;

b) Concludes that, for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court’s case law should be included in the Preamble to the Convention and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013, while recalling the States Parties’ commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention;”

The Court was not convinced, before or during the Brighton Conference, that this was a useful amendment of the Convention. The then-President, Sir Nicolas Bratza, told the delegates that the margin was “a variable notion which is not susceptible of precise definition” and that the Court had “difficulty in seeing the need for, or the wisdom of, attempting to legislate for it in the Convention”.

When the Steering Committee on Human Rights (the CDDH) took up the task later that year (2012), it worked its way through several formulations until it came up with the final one. The Court was following the exercise closely, and, in one of the first acts of my own presidency, decided to make an intervention in the negotiations. This took the form of a comment addressed to the CDDH conveying the Court’s concern. While this text, which was communicated by letter to the CDDH, has not been published, I would quote the following passage:

“As an attempt to encapsulate the margin of appreciation in a few words [the proposed formulation] is incomplete. For this reason it cannot be considered a “reference” to a concept that, as demonstrated by numerous decided cases, varies widely in its relevance and consequence from one context to another. It is a concept

subject to careful judicial calibration in the cases in which it arises. There is a complex interplay between it and other legal principles that have been derived in the case-law. The margin of appreciation is not, as the above draft would suggest, a given or a constant in every case. To state or suggest otherwise in the Preamble would be likely to raise doubt or uncertainty as to the use of the concept in future. The reference in the above draft to the supervisory jurisdiction of the Court is not sufficient to bring the text into line with the legal reality of the margin of appreciation.”

The comment went on to suggest that the drafters remain with the wording of the Brighton Declaration – “the doctrine of the margin of appreciation as developed in the Court’s case-law”. It explained:

“the key point with this phrase is that it duly recognises the provenance of the margin of appreciation. By simply cross-referring to the Court’s case-law, it would achieve the neutrality inherent in the notions of transparency and accessibility. This would dispel any doubt as to the intention behind the amendment or as to its possible effect on the implementation of the Convention by the domestic authorities.”

The CDDH considered the Court’s comment, but decided to keep its draft unchanged. It did however clarify the meaning of the new preambular paragraph in the explanatory report, which reads that States “intended ... to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law”²⁰.

The Court was then formally consulted by the Committee of Ministers on the final text of the Protocol. It replied:

*“That stated intention coincides with the suggestion that the Court made at the end of its comment to develop the text further. The intended meaning can therefore be said to be in line with the relevant terms of the Brighton Declaration (in particular paragraph 12b, read along with paragraphs 10, 11 and 12a). As the Court indicated in its comment to the CDDH, there clearly was no common intention of the High Contracting Parties to alter either the substance of the Convention or its system of international, collective enforcement.”*²¹

I think one can conclude from this that while, with Protocol No. 15, the margin of appreciation will no longer be a pure creature of the case-law, its insertion into the Convention was achieved in a low-key way. I think it worth repeating the point that it was clearly not the intention of the High Contracting Parties to “legislate” (and in doing so control) the margin of appreciation that is such a familiar device in European human rights law.

I turn now to the present, and will make some comments on current practice. I will limit myself to the Court’s recent case-law, this being as much as time will permit this evening.

I said a little earlier that the principles underpinning the application of the margin are settled. Yet there is still scope for a little novelty. In the present state of the case-law, it is still a matter of discretion for European States as to whether to grant formal recognition to same-sex relationships, and if they do, they have discretion as to the exact status conferred (*Gas and Dubois*). One might describe this as “the margin within the margin”.

²⁰ Explanatory Report to Protocol No. 15, paragraph 7.

²¹ Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights, adopted on 6 February 2013.

One might coin another term to do with the margin of appreciation. I refer here to the “Pirate Bay” case²². The applicants in this case complained under Article 10 that they received a prison sentence and were ordered to pay a large sum of damages upon their conviction for running the Pirate Bay website allowing users to share copyright protected digital material. In its decision the Court considered that the activity in question did not enjoy the same level of protection as political speech, meaning a wider margin for the authorities. A wide margin was also justified where the authorities have to balance competing rights - Article 10 versus the protection of property rights under Article 1 of the First Protocol. The Court said:

“It follows that the nature of the information at hand, and the balancing interest mentioned above, both are such as to afford the State a wide margin of appreciation which, when accumulated as in the present case, makes the margin of appreciation particularly wide”

This rare combination might be called all “a margin upon a margin”.

Overall, the recent case-law at Strasbourg follows the lines laid down in many cases over many years. The Court continues to allow a wide margin of appreciation to the domestic authorities where they are called upon to strike a balance between individual rights. See for example the case of *Eweida and Others*, where only Ms Eweida (who worked for a famous airline company) succeeded before the Court. Regarding the other applicants the Court recognized weighty countervailing considerations, namely the safety of patients and non-discrimination against same-sex couples. The margin therefore remained wide as regards them.

In contrast, and in keeping with a long line of cases, the margin is narrow under Article 14 when it comes to differences of treatment based on sex or sexual orientation. Or – and it comes in effect to the same thing – if States are to remain within their margin must put forward very weighty reasons in order to justify such different treatment. I refer for example to the *Konstantin Markin* case²³. The applicant complained that as a male army officer he was not permitted to take paid parental leave. The Grand Chamber acknowledged a “certain” margin of appreciation” in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment, and it allowed a wide margin in relation to national security and the armed forces. Following robust and critical scrutiny of the reasons given by the respondent State for the situation, the Court held that “the general and automatic restriction applied to a group of people on the basis of their sex must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be...”²⁴

In relation to sexual orientation, the Grand Chamber judgments in *X v. Austria* and *Vallianatos v. Greece* confirm the intensity of the Court’s review in this area, and the strong demands of proportionality principle, i.e. that the Government must show that it was necessary, in order to achieve its aim, to exclude certain categories of people from the scope of application of the provisions at issue. That is a very heavy burden of proof, difficult to discharge.

²² *Neij and Sundi Kolmisoppi v. Sweden* no. 40397/12, 19 February 2013

²³ *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012 (extracts).

²⁴ At § 148.

I would note as well how the factor of an applicant's vulnerability affects the State's margin of appreciation. In the recent *Horváth and Kiss* judgment²⁵, the Court reiterated the following point drawn from an earlier Hungarian case²⁶:

"If a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question."

It is another type of case that I wish to place emphasis on this evening, typified by the *Von Hannover (No. 2)* judgment²⁷. The applicant (who needs no introduction – indeed her fame was the source of the problem) complained once more at Strasbourg that German law failed to afford her the necessary level of protection of her private life, which continued to be on display in the pages of society magazines. This was therefore a case of conflicting Convention rights – the applicant's right under Article 8 versus freedom of the press under Article 10. As it reasoned towards its conclusion, the Grand Chamber stated that it should not, in theory, make a difference to the applicable margin of appreciation whether the case was brought under the one or the Article – the margin should in theory be the same.

It continued:

"Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts" (para. 107)

And indeed it did not find strong reasons to reach a different view. First, the Court was satisfied that:

"the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. ... [T]hey attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken." (para. 125)

Moreover:

"the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the Von Hannover judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law." (para. 126)

In finding no violation of the Convention, the Grand Chamber was unanimous. I might add that a third case taken by the same applicant also led to a finding of non-violation²⁸.

On the same day, the Court also decided the *Axel Springer* case²⁹. The origin of the case was the same – intrusive press coverage of a person in the public eye (a German TV actor). The

²⁵ *Horváth and Kiss v. Hungary*, no. 11146/11, 29 January 2013.

²⁶ *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010.

²⁷ *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012

²⁸ *Von Hannover v. Germany (no. 3)*, no. 8772/10, 19 September 2013.

²⁹ *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012.

complaint was taken by the press this time, though, and it was successful. Having scrutinized in some detail the decisions of the domestic courts that which had imposed a penalty on the applicant, the Grand Chamber ruled that

“the grounds advanced by the respondent State, although relevant, are not sufficient to establish that the interference complained of was necessary in a democratic society. Despite the margin of appreciation enjoyed by the Contracting States, the Court considers that there is no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company’s right to freedom of expression and, on the other hand, the legitimate aim pursued.” (para. 110).

It was not a unanimous finding. Five judges disagreed, and it was the margin of appreciation that divided them from the majority. They wrote:

“...[N]one of the grounds which would justify a review by this Court of the judgments of the domestic courts are present in this case. The domestic courts did not fail to balance the conflicting interests or to apply the relevant criteria in doing so. They made no manifest error of appreciation; nor did they fail to consider all the relevant factors.”

And they concluded:

“Analysing the same facts and using the same criteria and same balancing approach as the domestic courts, the Grand Chamber came to a different conclusion, giving more weight to the protection of the right to freedom of expression than to the protection of the right to privacy. But that is precisely what the case-law of this Court has established is not our task, that is, to set ourselves up as a fourth instance to repeat anew assessments duly performed by the domestic courts.”

Let me add a third example, again from the Grand Chamber. It is the case *Aksu v. Turkey*, which the Court decided in March 2012³⁰. Very briefly the case was taken by a man of Roma origin who took exception to comments about the Roma that were included in academic or educational publications. The books had been published or part-financed by the Ministry of Culture. His civil proceedings against the authors were rejected domestically.

Treating the case as one of positive obligations, the question was whether the domestic courts should have upheld his civil claim, awarded him damages and banned the publications. Once more, this involved a balancing exercise. The Court said:

“If the balance struck by the national judicial authorities is unsatisfactory, in particular because the importance or the scope of one of the fundamental rights at stake was not duly considered, the margin of appreciation accorded to the decisions of the national courts will be a narrow one. However, if the assessment was made in the light of the principles resulting from its well-established case-law, the Court would require strong reasons to substitute its own view for that of the domestic courts”

This last point is, of course, taken directly from the *Von Hannover* judgment. But the Court immediately added: *“which consequently will enjoy a wider margin of appreciation”*.

By the largest of majorities, the Court found no violation of the Convention.

This is, I think, a clear stance of principle at Strasbourg and it demonstrates what one may call the systemic objective of the margin of appreciation. Rather than Strasbourg deferring to the national authorities, or stopping short in its review, it devolves to the domestic level a

³⁰ *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, ECHR 2012.

measure of responsibility for ensuring observance of human rights. In *Aksu*, the Court added the rider that “this presupposes that an effective legal system [is] in place and operating for the protection of the rights [concerned]”. There are certain Contracting States where that presupposition is open to doubt, but there can be no doubt about it as regards the United Kingdom.

The margin of appreciation is neither a gift nor a concession, therefore, but instead an incentive to national courts to conduct the requisite Convention review, to balance competing rights, to weigh up rights against other aspects of the public interest, to scrutinize the proportionality of interferences with human rights. It follows that the European Court’s task in such circumstances is to supervise the review conducted by the domestic courts – a European review going hand in hand with the domestic review.

Allow me to quote once again from the Brighton Declaration, where it reads:

“The Conference ... expresses the determination of the States Parties to ensure effective implementation of the Convention at national level by taking the following specific measures insofar as relevant:

...Enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention, having regard to the case law of the Court, in conducting proceedings and formulating judgments; and in particular enabling litigants, within the appropriate parameters of national judicial procedure but without unnecessary impediments, to draw to the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court”

Of course, this is already long achieved in the United Kingdom, which can be held up as a model in terms of subsidiarity thanks to the Human Rights Act. The courts in this country are well equipped to discharge their primary role in safeguarding the fundamental rights that are major and defining element of the European ideal.

Although, as I said earlier, the eye-catching element in the Brighton Declaration was the agreement to amend the Preamble to the Convention, for me the stronger, more purposeful element in that text is the passage I have just quoted. It looks ahead to a healthy future for human rights across Europe. The Convention system has been hailed as a ground-breaking and uniquely influential international mechanism for protecting the individual. The emphasis is on the word “system”, of which the European Court is a part. But what is a flagship without a fleet?

The future imagined at Brighton is one where the centre of gravity of the Convention system can be lower than it is today, closer in time and in space to all Europeans, and to all those under the protection of the Convention. That would be a stronger, more effective system, a more vigorous and responsive system. I would like to draw on a speech given at the annual judicial seminar in Strasbourg earlier this year by Professor Alec Stone Sweet. He noted that the Convention is no longer a species of international law, but is actually national law in all Contracting States, directly enforceable in the domestic courts. And he referred to “a Community of courts, a pan-European, rights-based Commons ... In this common judicial space, no court at any level can fulfill its rights-protecting missions without the support and cooperation of other courts.”

There is, I believe, understanding and approval of this point across Europe today. It is the dominant theme of our Court’s dialogue with the Supreme Courts and Constitutional Courts of the member States of the Council of Europe. It is through the best and joint endeavours of

the national judge and the European judge, whose action goes hand in hand, that the Convention, Europe's great charter, can make good its promise of liberty and rights.

At the Interlaken conference in 2010, where the process of Convention reform began, the Conference Declaration derived from the principle of subsidiarity the notion of shared responsibility between the States Parties and the Court for protecting human rights. As I hope I have shown, this the Court can foster via the margin of appreciation. The signals from the flagship, I hope, are sufficiently clear for all to steer by.

My conclusion then is that the margin of appreciation, so familiar at Strasbourg, is of our past, our present and our future.

Thank you.