

Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights

Janneke Gerards*

ABSTRACT

Fundamental rights standards in Europe diverge as a result of differences in legal traditions, constitutional values and historical developments. The European Court of Human Rights therefore faces the challenge of having to balance the need for uniform and effective rights protection with respect for diversity. It is often thought that the famous margin of appreciation doctrine is the Court's main tool in finding this balance. This article shows, however, that the Court's application of the doctrine has made it into a rather empty rhetorical device. This appears to be different for the Court's use of incrementalism, which increasingly appears to have replaced the margin of appreciation doctrine as an instrument to reconcile European protection of fundamental rights and national diversity. The article concludes by showing how the Court could further benefit from this strategy of incrementalism, while still maintaining a role for the margin of appreciation doctrine.

KEYWORDS: fundamental human rights, margin of appreciation doctrine, incrementalism, European Convention of Human Rights, European Court of Human Rights

1. INTRODUCTION

The ways in which constitutions protect fundamental rights reflect national constitutional values, national traditions and legal culture. As is well known, for example, the German *Grundgesetz* expressly mentions human dignity as a core principle that must be respected by all public authorities;¹ the Dutch constitution is peculiar for its detailed provisions about the right to education;² the Swedish constitution stresses the great value of freedom of expression;³ the Irish constitution expresses the

* Professor of Fundamental Rights Law at the Montaigne Centre for Rule of Law and Administration of Justice of Utrecht University, The Netherlands (j.h.gerards@uu.nl).

1 See Article 1 of the German Basic Law (*Grundgesetz*).

2 Article 23 of the Dutch Constitution (*Grondwet*).

3 This is apparent from the fact that the Freedom of Expression Act (*Yttrandefrihetsgrundlag*) is given constitutional status. Cf. Cameron and Bull, 'Sweden' in Gerards and Fleuren (eds), *Implementation of the*

importance of the traditional family and the right to life;⁴ the fundamental law of Hungary reflects strongly national values,⁵ and so on. Such differences seem hard to reconcile with the notion of universality of fundamental rights. If it is, in the end, the national constitution that determines to what extent and how fundamental rights are protected, the level of protection of such rights will differ between States. In an increasingly united Europe, which is characterised by easy cross-border traffic and interaction between the States, such diverging standards of fundamental rights protection are difficult to accept. Nevertheless, they are there, and many hold on to the idea of a national constitutional identity that is reflected in national constitutional values.⁶

Within this setting, the European Court of Human Rights (ECtHR or ‘Court’) is entrusted with the task of developing and maintaining minimum standards of fundamental rights protection for the Council of Europe.⁷ In doing so, the Court cannot simply choose a maximalist approach, striving for the highest possible level of protection of fundamental rights in all 47 Convention States. Such an approach would be irreconcilable with the States’ strong desire for respect for their national constitutional values and policy choices.⁸ In 2015, this was confirmed in the Brussels Declaration, in which the government leaders expressed their ambivalent expectations of the Convention and the Court. They reaffirmed the objective of the Convention and the Council of Europe ‘to develop the common democratic and legal space founded on respect for human rights and fundamental freedoms’.⁹ Yet, at the same time, they reiterated ‘the subsidiary nature of the supervisory mechanism established by the Convention and in particular the primary role played by national authorities . . . and their margin of appreciation in guaranteeing and protecting human rights at national level’.¹⁰

European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law. A Comparative Analysis (2014).

4 See, in particular, Article 40.3.3 of the Constitution of Ireland.

5 On this, see in particular, Fröhlich and Csink, ‘Topics of Hungarian Constitutionalism’ [2012] *Tijdschrift voor Constitutioneel Recht* 424.

6 Much has been written on this, see, for example, Cloots, *National Identity and the European Court of Justice* (PhD thesis, University of Leuven, 2013).

7 Cf. McGoldrick, ‘A Defence of the Margin of Appreciation Doctrine and an Argument for its Application by the Human Rights Committee’ (2016) 65 *International & Comparative Law Quarterly* 21 at 36–7.

8 On the strength of this desire, see extensively, for example, Popelier, Lambrecht and Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-dynamics at the National and EU Level* (2016).

9 Brussels Declaration, adopted at the High-Level Conference on the future of the European Court of Human Rights, 27 March 2015. See also the Brighton Declaration, adopted at the High-Level Conference on the future of the European Court of Human Rights, 18–20 April 2012, CDDH(2012)007 at para 1.

10 Brussels Declaration, *ibid.* See also—more strongly—the Brighton Declaration, *ibid.* at para 11. For further analyses, see, for example, Spano, ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’ (2014) 14 *Human Rights Law Review* 487; and Mowbray, ‘Subsidiarity and the European Convention on Human Rights’ (2015) 15 *Human Rights Law Review* 313.

Consequently, the Court must steer a careful course between respecting national values and providing for effective protection of individual fundamental rights. Sometimes it seems as if it can never make the right choices.¹¹ Nevertheless, against all odds, the Court often succeeds in ‘ordering pluralism’.¹² Different explanations have been given for this, which partly have been found in the Court’s judicial strategies.¹³ Over time, these strategies have developed. The importance of certain approaches has decreased and other tactics have taken their place. For example, whilst the Court has traditionally concentrated on the substantive assessment of justifications and balancing review, nowadays it has been shown to often rely on ‘procedural’ review, focusing on the quality of the national judicial and parliamentary process of decision-making.¹⁴

In this light, this article aims to address the relevance of two strategic instruments for establishing effective standards for fundamental rights protection in a diverse Europe: the margin of appreciation doctrine and ‘incrementalism’.¹⁵ Based on a qualitative analysis of the Court’s case law in two recent years,¹⁶ the argument is made that while the margin of appreciation doctrine potentially may be a very important doctrine, the Court’s application has made it into a substantively rather empty rhetorical device (Section 2). The article continues to show that this is different for incrementalism, which increasingly seems to have replaced the use of the margin of appreciation doctrine as a primary instrument to deal with the need to reconcile European standard setting and national diversity (Section 3). In Section 4, this article examines how the Court could use the two strategic instruments to its advantage in having to deal with diverging fundamental rights standards in Europe.

11 See further, Popelier, Lambrecht and Lemmens, *supra* n 8.

12 For this notion, see Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World* (trans. Norberg, 2009).

13 For example, Helfer and Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ (1997) 107 *Yale Law Review* 273; and Gerards, ‘The Paradox of the European Convention on Human Rights and the European Court of Human Rights’ Transformative Power’ (2017) 4 *Kutafin University Law Review* 315.

14 For example, Gerards and Brems, *Procedural Review in European Fundamental Rights Cases* (2017); and Popelier and Van de Heyning, ‘Subsidiarity Post-Brighton: Procedural Rationality as Answer?’ (2017) 30 *Leiden Journal of International Law* 5.

15 See also Çalı, ‘From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights’ in Arnardóttir and Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection. Rethinking Between the ECHR, EU, and National Legal Orders* (2016) 144; and Iglesias Villa, ‘Subsidiarity, Margin of Appreciation and International Adjudication Within a Cooperative Conception of Human Rights’ (2017) 15 *International Journal of Constitutional Law* 393.

16 About 350 randomly selected level 1 and 2 judgments and decisions of the Grand Chamber and the Chambers of the Court have been studied over two recent years: 1 May 2012 to 1 May 2013 and 1 May 2016 to 1 May 2017. This selection allowed for an in depth and qualitative analysis of cases, as well as for detecting changes in the use of strategies by the Court. To enhance readability of the text, not all instances in which a certain line of reasoning occurred are discussed in this article; usually, only the most representative examples of a certain development are referred to in footnotes. A full list of analysed cases is on file with the author.

2. THE DEMISE OF THE MARGIN OF APPRECIATION DOCTRINE

A. Diversity and Deference: The Theoretical Functions of the Margin of Appreciation Doctrine

Legal scholars and theoreticians have embraced the Court's margin of appreciation doctrine as an important means to find a middle ground when legal traditions and cultures interact or collide.¹⁷ The doctrine's underlying—and usually unexpressed—idea is that a distinction can be made between the definition of fundamental rights and the possibilities for limitations of these rights.¹⁸ The ECtHR's point of departure is that the definition of fundamental rights must be the same for all individuals living in the Council of Europe.¹⁹ The notion of a shared and uniform minimum standard of fundamental rights protection expresses the idea of universal human rights, which need to be recognised and protected throughout Europe. For example, if reproductive rights are recognised as part of the right to privacy and family life for Austria, the same must be true for Ukraine, and if an individual can derive a right to recognition of his new gender after gender transformation from Article 8 ECHR in France, the same must be true for Italy.

Thus, differences in national fundamental rights standards become relevant only in the stage of the assessment of limitations. It is well known that restrictions on most Convention rights can be justified by the need to protect public interests or the rights and interests of others, provided they meet certain conditions.²⁰ One of the rationales of the margin of appreciation doctrine is that, in principle, the national authorities are best placed to assess the necessity and appropriateness of restrictions and limitations.²¹ Not only do they have better access to factual information about the need for such restrictions, but also they are generally in a better position to evaluate how a certain national measure or decision relates to national constitutional values and legal traditions. For this reason, the Court is generally willing to leave a certain amount of discretion to the States in determining the reasonableness of interferences with the Convention rights. Similar to the administrative law doctrines of deference, a margin of appreciation then means that the Court will relatively easily

17 For example, Delmas-Marty, *supra* n 12 at 44; Glenn, *Legal Traditions of the World*, 4th edn (2010) at 380; Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80 at 86; Iglesias Villa, *supra* n 15 at 407; and McGoldrick, *supra* n 7 at 32.

18 For more details, see, for example, Brems and Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013).

19 Nickel, *Making Sense of Human Rights*, 2nd edn (2007) at 36; Çalı, 'The Purposes of the European Human Rights System: One or Many?' (2008) *European Human Rights Law Review* 299; Gerards, 'The Prism of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 173; and Agha (ed.), *Human Rights between Law and Politics: The Margin of Appreciation Doctrine in Post-National Contexts* (2017) at 3.

20 See the sources mentioned in *supra* n 18.

21 See already the *Belgian Linguistic* case Applications Nos 1474/62 et al., Merits and Just Satisfaction, 23 July 1968, at para LB.10. For more on this argument, see, for example, Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry' in Føllesdal et al. (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (2013) 62 at 69 et seq.; and Føllesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights' (2017) 15 *International Journal of Constitutional Law* 359. Another important starting point is that a court should not too easily substitute its own views for those of the legislature or a government agency: see further Gerards, *supra* n 17 at 86; and Young, 'In Defence of Due Deference' (2009) 72 *Modern Law Review* 554 at 555.

accept the reasons and arguments advanced by the government, except where they are clearly unconvincing or disclose arbitrary decision-making.²²

If States would be granted the same margin of appreciation in all cases, the supervision of the Court would always be restrained. This would result in a rather empty concept of fundamental rights and a relatively low overall level of protection.²³ The strength of the margin of appreciation doctrine is, therefore, in its flexibility.²⁴ The Court has always emphasised that there is an important difference between a 'wide' and a 'narrow' margin of appreciation, even if this does not translate into very clear standards of review.²⁵ Generally, it can be said that a wide margin of appreciation results in a test of manifest unreasonableness or arbitrariness.²⁶ By contrast, when the Court accords a narrow margin of appreciation, it requires that a justification for a restriction be convincingly established and it strictly assesses the quality and persuasiveness of the justification advanced by the government. The Court may also demand that the aims of the restriction could not have been achieved by less restrictive means,²⁷ and it strictly scrutinises the national decision-making processes.²⁸

Hence, the margin of appreciation doctrine is of great use for the Court.²⁹ First, and most importantly, it allows the Court to address the tension discussed in Section 1.³⁰ The margin of appreciation doctrine applies only to the review of reasonableness, not to the definition of the scope of rights.³¹ Accordingly, the Court's

22 Cf. Çalı, supra n 15 at 148; and Agha, supra n 19 at 4. This has been termed the 'structural margin of appreciation' by Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705 and Arai-Takahashi (2013), *ibid.* It must be admitted, though, that the real meaning of the margin of appreciation is still 'very much veiled in a cloud of mystery': see Kratochvíl, 'The inflation of the margin of appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324 at 325. Nevertheless, determining the amount of deference appears to be the generally accepted as well as most theoretically sound reading of the doctrine: see Kratochvíl, *ibid.* at 329; and, for example, Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57.

23 Gerards, supra n 17 at 87.

24 Macdonald, 'The Margin of Appreciation' in Macdonald et al. (eds), *The European System for the Protection of Human Rights* (1993) 83 at 123; Arai-Takahashi (2002), supra n 21 at 236; Ostrovsky, 'What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals' (2005) 1 *Hanse Law Review* 47 at 58; Delmas-Marty, supra n 12 at 44–5; Glenn, supra n 17 at 380; and Føllesdal, supra n 21 at 364–5.

25 Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009) 267; and Gerards, supra n 17 at 105.

26 See, for example, *Communist Party of Russia v Russia* Application No 29400/05, Admissibility and Merits, 19 June 2012, at para 116.

27 The Court has once again stressed this in *X and Others v Austria* Application No 19010/07, Admissibility, Merits and Just Satisfaction, 19 February 2013 (Grand Chamber) at paras 140 and 141. For more examples, see Gerards, supra n 17 at 106.

28 For example, *El-Masri v FYR Macedonia* Application No 39630/09, Admissibility, Merits and Just Satisfaction, 13 December 2013 (Grand Chamber), at para 155; *Erdoğan Gökçe v Turkey* Application No 31736/04, 14 October 2014, Admissibility, Merits and Just Satisfaction, at paras 36 and 45 et seq.; *Mandet v France* Application No 30955/12, 14 January 2016, Admissibility and Merits, at para 52 et seq.

29 See also Agha, supra n 19.

30 *Ibid.*

31 Cf. Greer, 'Universalism and Relativism in the Protection of Human Rights in Europe: Politics, Law and Culture' in Agha (ed.), *Human Rights between Law and Politics: The Margin of Appreciation Doctrine in Post-National Contexts* (2017) 29.

autonomous and uniform definition of the Convention rights remains unaffected by the doctrine.³² By contrast, when the Court has to assess the necessity of restrictions of these rights, the doctrine can help it determine the degree to which it will heed specific national standards and circumstances. When limitations are closely related to deeply held constitutional values or divisive issues, the Court can use the doctrine to defer to the national authorities' views.³³ But if the fundamental right at stake is really important, and the Court considers a uniform and high standard of protection to be more significant than the need to respect diversity, it can apply more intensive review. This flexibility makes the margin of appreciation a well-suited strategic instrument to deal with matters of pluralism or diverging national fundamental rights standards.³⁴

Secondly, insofar as the scope of the margin is translated into relatively clear standards of review and the factors determining the scope of the margin are well established, the doctrine helps the Court provide clarity and predictability regarding its review of national measures.³⁵ In turn, this is attractive for national authorities, because it makes it easier for them to anticipate the Court's approach, avoid Convention violations from occurring and thereby heed their primary responsibility to protect the Convention rights.

B. The Margin of Appreciation as a Purely Rhetorical Device

(i) Introduction

The margin of appreciation doctrine has to be applied with great care in order to realise the two advantages mentioned above, that is, helping the Court deal with divergent national standards and views while protecting fundamental rights at a sufficiently high level, and contributing to the predictability of the Court's standards. This means the scope of the margin has to correspond to a certain intensity of review, which has observable effects for the standards and criteria to be applied and the burden of proof. The factors determining the intensity of review have to be applied consistently and in a logical manner, and if they point in different directions, they have to be evenly balanced.

On all of these counts, there appears to be a gap between the normative ideal and the Court's practice.³⁶ A recent quantitative study of the references to the margin of appreciation over the past five years has shown that the Court is referring to the

32 With a few notable exceptions, such as the famous case *Vo v France* Application No 53924/00, Admissibility, Merits and Just Satisfaction, 8 July 2004 (Grand Chamber). See also Letsas, *supra* n 22.

33 For example, Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (2006) at 224; Arai-Takahashi (2002), *supra* n 21 at 235; Mahoney, *supra* n 22 at 12; Ostrovsky, *supra* n 24 at 57; and various contributions (in particular, by Greer, Tsarapatsanis and Goldini and Marshall) to Agha, *supra* n 19.

34 See the sources mentioned *supra* n 17 and in particular Agha, *supra* n 19.

35 See further Gerards, 'Intensity of Judicial Review in Equal Treatment Cases' (2004) 51 *Netherlands International Law Review* 135; and McGoldrick, *supra* n 7 at 26. See also Kratochvíl, *supra* n 22 at 244.

36 See earlier, for example, Kratochvíl, *supra* n 22; and Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Human Rights Files No 17 (2000) at 5.

doctrine ever more often.³⁷ A more qualitative analysis shows, however, that such references in many cases are rather empty. This section shows there is a lack of clarity on the function of the margin of appreciation doctrine for the Court's review, there is confusion on the determination of the scope of the margin to be accorded, and the doctrine is seldom translated into clear standards of review.

(ii) *The puzzling function of the margin of appreciation doctrine*

Different from what might be expected, the margin of appreciation is not standardly used as an indicator for the amount of deference the Court will pay to the national authorities.³⁸ This is logical for most cases on Articles 2 and 3, since these provisions have an absolute nature and therefore do not allow for reasonableness review, nor for any deference to be paid to the national authorities.³⁹ However, the Court also does not mention the margin of appreciation doctrine in many cases where it expressly assesses the proportionality or reasonableness of an interference; for example, when examining the justification for interferences with the freedom of expression or the right to respect for one's private life.⁴⁰

In other cases, the Court mentions the margin of appreciation only at the very end of its considerations, concluding that a restriction is or is not sufficiently justified and necessary and (therefore) remains or does not remain within the margin of appreciation of the State.⁴¹ The margin of appreciation is sometimes even made part of

37 Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?', iCourts Working Paper Series No 100 (2017), available at: ssrn.com/abstract=2993222 [last accessed 19 June 2018] in particular 17 et seq.

38 See also Kratochvíl, *supra* n 22 at 338.

39 This is not to say that, in relation to these Articles, the Court never pays deference to the national authorities. For example, in some cases on Articles 2 and 3, the Court has indicated that the standard for effectiveness of investigations is 'less exacting' (for example, *Bakanova v Lithuania* Application No 11167/12, Merits and Just Satisfaction, 31 May 2016, at para 67) or a certain degree of deference may be shown to the State because of the Court's subsidiary role (for example, *Armani Da Silva v United Kingdom* Application No 5878/08, Admissibility and Merits, 30 March 2016 (Grand Chamber), at para 259; and *Mustafić-Mujić and Others v Netherlands* Application No 49037/15, Admissibility, 30 August 2016, at paras 108, 125). In addition, there may be a margin of appreciation where positive preventive measures are concerned (for example, *Mikhno v Ukraine* Application No 32514/12, Admissibility, Merits and Just Satisfaction, 1 September 2016, at para 127; *Wenner v Germany* Application No 62303/13, Merits and Just Satisfaction, 1 September 2016, at para 61; *Cevrioğlu v Turkey* Application No 69546/12, Admissibility, Merits and Just Satisfaction, 4 October 2016, at para 55). Surprisingly, moreover, even in some negative obligations cases concerning Article 3 ECHR, for example, cases on lifelong sentences, the Court has left a margin of appreciation to the States: see, in particular, *T.P. and A.T. v Hungary* Applications Nos 37871/14 and 73986/14, Merits and Just Satisfaction, 4 October 2016, at para 44.

40 For some examples in the 2012–2013 sample of case law, see *Tatár and Fáber v Hungary* Applications Nos 26005/08 and 26160/08, Admissibility, Merits and Just Satisfaction, 12 June 2012; *Herrmann v Germany* Application No 9300/07, Merits and Just Satisfaction, 26 June 2012 (Grand Chamber); *Kurić and Others v Slovenia* Application No 26828/06, Admissibility, Merits and Just Satisfaction, 26 June 2012 (Grand Chamber) (as for Article 8). For the 2016–2017 sample see, for example, *Geotech Kancev GmbH v Germany* Application No 23646/09, Admissibility and Merits, 2 June 2016 (as for Article 11); *Brambilla and Others v Italy* Application No 22567/09, Merits, 23 June 2016; *Ziembiński v Poland (No 2)* Application No 1799/07, Admissibility, Merits and Just Satisfaction, 5 July 2016; *K2 v United Kingdom* Application No 42387/13, Admissibility, 7 February 2017; *Mitzinger v Germany* Application No 29762/10, Admissibility, Merits and Just Satisfaction, 7 February 2017.

41 For the 2012–2013 sample see, for example, *Butt v Norway* Application No 47017/09, Admissibility, Merits and Just Satisfaction, 4 December 2012; and *M.K. v France* Application No 19522/09,

the proportionality test.⁴² In cases where the margin of appreciation doctrine is used in this way, or when it is completely omitted, it does not serve any substantive purpose, since there is then no clear connection between determining the margin of appreciation, establishing the appropriate level of intensity of review and the actual review of the proportionality of the interference.

(iii) *Confusion about the margin's scope*

If the margin of appreciation is actually determined before the proportionality review is carried out, the Court's judgments do not always clearly delineate the scope of the margin of appreciation.⁴³ Clarity is lacking, for example, where the Court mentions that there is 'a certain' margin of appreciation, without explaining the reasons for this;⁴⁴ where it mentions the margin of appreciation without specifying its scope;⁴⁵ where it refuses to indicate if a certain ground of discrimination is 'suspect';⁴⁶ or where it mentions that in its case law on a certain topic the margin of appreciation 'has been narrowing', without explaining the consequences for the margin in the present case.⁴⁷

In other cases, the Court lists some possibly relevant factors without deciding what the actual scope of the margin of appreciation should be.⁴⁸ It may occur, for example, that the Court considers that the case is about an important right, which would justify a narrower margin of appreciation, but it also mentions some reasons

Admissibility and Merits, 18 April 2013. For the 2016–2017 sample see, for example, *Magyar Helsinki Bizottság v Hungary* Application No 18030/11, Admissibility, Merits and Just Satisfaction, 8 November 2016 (Grand Chamber) at para 200 and *Olafsson v Iceland* Application No 58493/13, Admissibility and Merits, 16 March 2017, at para 62. For an analysis of earlier examples, see Kratochvíl, supra n 22 at 342.

42 For example, *Khamtokhu and Aksenchik v Russia* Applications Nos 60367/08 and 961/11, Merits, 24 January 2017 (Grand Chamber) at paras 78–79 and 82–86; *Tek Gıda İş Sendikası v Turkey* Application No 35009/05, 4 April 2017, Admissibility, Merits and Just Satisfaction, at paras 36, 42–46. See Macdonald, supra n 24 at 85; and Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007) at 87–89; some authors have embraced this approach, for example, Spielmann, 'Allowing the Right Margin. The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) 14 *Cambridge Yearbook of European Studies* 381; and Iglesias Villa, supra n 15 at 407. See further, Goldini and Marshall, 'The Prisoner's Dilemma. The Margin of Appreciation as Proportionality or Recognition?' in Agha, supra n 19 at 113.

43 See also Kratochvíl, supra n 22 at 347–8.

44 For example, *Enver Aydemir v Turkey* Application No 26012/11, Admissibility, Merits and Just Satisfaction, 7 June 2016, at para 81.

45 *T.P. and A.T. v Hungary* Applications Nos 37871/14 and 73986/14, Merits and Just Satisfaction, 4 October 2016, at paras 44–45; *K.S.*; and *M.S. v Germany* Application No 33696/11, Admissibility and Merits, 6 October 2016, at para 42.

46 *British Gurkha Welfare Society and Others v United Kingdom* Application No 44818/11, Admissibility and Merits, 15 September 2016, at para 88.

47 *Polyakova and Others v Russia* Applications Nos 35090/09 et al., Admissibility, Merits and Just Satisfaction, 7 March 2017, at para 89.

48 For example, *Schweizerische Radio- und Fernsehgesellschaft SRG v Switzerland* Application No 34124/06, Admissibility, Merits and Just Satisfaction, 21 June 2012, at paras 52–53; *Catan and Others v Moldova and Russia* Applications Nos 43370/04, 8252/05 and 18454/06, Admissibility, Merits and Just Satisfaction, 19 October 2012 (Grand Chamber), at para 140; *M.K. v France* Application No 19522/09, Admissibility and Merits, 18 April 2013; *Biržietis v Lithuania* Application No 49304/09, 14 June 2016, Admissibility, Merits and Just Satisfaction, at para 55; *Baka v Hungary* Application No 20261/12, Merits and Just Satisfaction, 23 June 2016 (Grand Chamber), at paras 158–159, 162–165; and *Osmanoğlu and Kocabaş v Switzerland* Application No 29086/12, Admissibility and Merits, 10 January 2017, at paras 87–89, 95.

to justify a wider margin of appreciation.⁴⁹ It is then up to the reader to decide if the resulting margin of appreciation is a wide one or a narrow one, or one somewhere in between.

The same is true where the Court mentions in one paragraph that States have a certain margin of appreciation, yet the exceptions provided for in the Convention are to be interpreted narrowly and the need for such exceptions must be convincingly established.⁵⁰ Sometimes the Court may eventually provide some clarity by adopting a rather stricter or more lenient approach in its actual review of the facts of the case, but the question then remains unaddressed why the factors pointing in the direction of a stricter review have trumped the factors pointing towards a more lenient review, or the other way around.⁵¹

Moreover, in hardly any case does the Court pay attention to all of the intensity-determining factors distinguished in its case law.⁵² In some cases, it refers to just one of the many relevant factors, without addressing the others.⁵³ Most often, however, it relies on a precedent based approach, which means it accords the respondent State a certain margin of appreciation because it has already done so in earlier cases on a similar topic.⁵⁴ Admittedly, it would be very burdensome for the Court to have to address all possibly relevant intensity determining factors in each and every judgment. Especially if certain factors are less relevant to the case at hand, or if usually a certain margin is left in certain type of cases, it is understandable that the Court does not

49 For example, *Vistiņš and Perepjolkins v Latvia* Application No 71243/01, Admissibility and Merits, 25 October 2012 (Grand Chamber), at paras 113 and 119; *Bernh Larson Holding AS and Others v Norway* Application No 24117/08, Admissibility and Merits, 14 March 2013, at para 159; *Van Colle v United Kingdom* Application No 7678/09, Admissibility and Merits, 13 November 2012, at para 93; *Fürst-Pfeifer v Austria* Applications Nos 33677/10 and 52340/10, Admissibility and Merits, 17 May 2016, at paras 39–40; *Aldeguer Tomás* Application No 35214/09, Admissibility and Merits, 14 June 2016, at paras 81–82, 90; *British Gurkha Welfare Society and Others v United Kingdom* Application No 44818/11, 15 September 2016, Admissibility and Merits, at para 81; and *Khamtokhu and Aksenchik v Russia* Applications Nos 60367/08 and 961/11, Merits, 24 January 2017 (Grand Chamber), at paras 78–79.

50 *Sommer v Germany* Application No 73607/13, Admissibility, Merits and Just Satisfaction, 27 April 2017, at para 55.

51 For example, in *Taddeuci and McCall v Italy* Application No 51362/09, Admissibility, Merits and Just Satisfaction, 30 June 2016, at paras 88 and 89, the Court referred to some reasons to allow for a wider margin of appreciation, while in para 89 it mentioned precedents in which a stricter margin of appreciation had been left; in para 93, it turned out that the Court would follow the latter precedents, yet it did not explain the reasons for doing so.

52 For classic reviews, see, for example, Brems, ‘The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights’ [1996] *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240; and Arai-Takahashi (2002), *supra* n 21.

53 For example, *Chabauty v France* Application No 57412/08, Admissibility and Just Satisfaction, 4 October 2012 (Grand Chamber), at para 50; *H. v Finland* Application No 37359/09, Admissibility, Merits and Just Satisfaction, 13 November 2012, at paras 49 and 64; and *Kaas GL v Turkey* Application No 4982/07, Admissibility and Merits, 22 November 2016, at para 49.

54 For the 2012–2013 sample of case law, see, for example, *Communist Party of Russia v Russia* Application No 29400/05, Admissibility and Merits, 19 June 2012, at paras 108–110; and *Maksymenko and Gerasymenko v Ukraine* Application No 49317/07, Admissibility, Merits and Just Satisfaction, 16 May 2013. For the 2016–2017 sample, see, for example, *SIA AKKA/LAA v Latvia*, Application No 562/05, Admissibility, Merits and Just Satisfaction, 12 July 2017, at paras 69 and 75; *A.H. and Others v Russia*, Applications Nos 6033/13 et al., Admissibility, Merits and Just Satisfaction, 17 January 2017 (Grand Chamber), at para 407; and *Paradiso and Campanelli v Italy* Application No 25358/12, Admissibility and Merits, 24 January 2017 (Grand Chamber), at para 184.

address this issue in great depth. Nevertheless, the focus on a limited number of factors may create the impression that the Court is not always entirely even-handed in determining the intensity of its review.⁵⁵ Moreover, there are confusing cases in which it announces that ‘a certain’ margin of appreciation is left, based on a number of factors or a line of previous cases, but later in the judgment it turns out that, in reality, the margin of appreciation is rather more narrow or wide.⁵⁶

Lastly, there are cases in which the Court addresses the scope of the margin at different points in its judgment without there being a really clear function for its doing so,⁵⁷ or where it leaves different margins to the respondent State in relation to different aspects of one particular interference (such as the prohibition of a demonstration).⁵⁸ Again, this may create considerable confusion as to the exact scope of the margin of appreciation. More generally, it may be concluded from the Court’s practice that, in many cases, there is no clear connection between the factors determining the scope of the margin and the actual margin applied.

(iv) *Unclear consequences for standards of review*

Even if the Court determines the scope of the margin of appreciation before embarking on the test of reasonableness, it hardly ever clarifies the consequences of the margin for the standards of review.⁵⁹ In practice, it may happen that the stated scope of the margin and the actual intensity of review diverge.⁶⁰ Sometimes a wide margin is left, but the Court’s actual review is relatively strict, for example, because it applies

55 For example, *Krone Verlag GmbH v Austria* Application No 27306/07, Admissibility and Merits, 19 June 2012, at para 49, where the Court referred to the need for a wide margin of appreciation in cases of conflicting rights, but not to the importance of the right at stake (the freedom of expression).

56 For example, *Reznik v Russia* Application No 4977/05, Admissibility, Merits and Just Satisfaction, 4 April 2013, at paras 42 and 44. See also *Biao v Denmark* Application No 38590/10, Merits and Just Satisfaction, 24 May 2016 (Grand Chamber), at paras 93, 114 and 138, whereas in para 93 the Court mentions that different intensity determining factors play a role and ‘a certain’ margin may be left, while in paras 114 and 138 it turns out that the test will be very strict, it remains unclear which reasons have determined this outcome.

57 For example, *Paradiso and Campanelli v Italy* Application No 25358/12, Admissibility and Merits, 24 January 2017 (Grand Chamber), at paras 181–184 and 192–195; this could be explained by the fact that the first set of considerations form part of the ‘General Principles’ section of the Court’s judgment and the second set of considerations relates to the application to the present case, yet it is confusing, then, that the Court starts its second set by explaining that ‘it must first determine the breadth of the margin of appreciation to be accorded to the State in this area’ (which it already did in paras 181–184).

58 For example, *Lashmankin and Others v Russia* Applications Nos 57818/09 et al., Admissibility, Merits and Just Satisfaction, 7 February 2017, for example, at paras 417 (wide margin in relation to restrictions on location, time or manner of demonstrations), 434 (narrow margin in relation to general bans on certain locations), 445 (wide margin in relation to notification time-limits), 465 (wide margin in relation to choice of means in ensuring public order), resulting in the conclusion that the interferences with the freedom of assembly were not necessary in a democratic society (para 477). See similarly *A.P., Garçon and Nicot v France* Applications Nos 79885/12 et al., Merits and Just Satisfaction, 6 April 2017, at paras 121–125 (leaving a narrow margin in regard to gender transformation cases), and para 143 (holding without further explanation that the State has a wide margin of appreciation in relation to another aspect of the case).

59 See critically on this also Christoffersen, *supra* n 25 at 267 et seq. and Kratochvíl, *supra* n 22 at 335.

60 See also Kratochvíl, *ibid.* at 337.

rather exacting procedural standards.⁶¹ In other cases, the Court mentions that a narrow margin is left, but in fact its test is rather lenient and permissive.⁶²

Furthermore, there are many cases in which the Court restricts itself to stating that there is 'a certain' margin of appreciation.⁶³ Clearly, this provides little insight into the intensity of review to be applied or the related standards of review. This is even more so in cases where the Court does not mention the margin of appreciation at all in conducting reasonableness review.⁶⁴

Even in the rare cases in which the Court translates the margin of appreciation into standards of review, these standards usually are not very clear. The Court may merely state, for example, in very general terms that a wide margin means that it has to apply a fair balance test.⁶⁵ The other way around, it may occur that the Court uses a deferential standard of review—such as a standard of 'arbitrariness'—without actually mentioning the margin of appreciation.⁶⁶ Again, this demonstrates that the margin of appreciation doctrine does not bear any real significance for the Court's review of reasonableness, in that it does not have any measurable impact on the standards it uses in assessing that reasonableness.

(v) Conclusion

There certainly are some cases in which the intensity determining function of the margin of appreciation doctrine is expressed and the doctrine helps the Court find a

61 For the 2012–2013 sample of case law, see, for example, *Horváth and Kiss v Hungary* Application No 11146/11, Admissibility, Merits and Just Satisfaction, 29 January 2013; and *Panteliou-Darne and Blantzoura v Greece* Applications Nos 25143/08 and 25156/08, Admissibility and Merits, 2 May 2013. For the 2016–2017 sample, see, for example, *B.K.M. Lojistik Tasimaçilik Ticaret Limited Sirketi v Slovenia* Application No 42079/12, Admissibility, Merits and Just Satisfaction, 17 January 2017; and *Lashmankin and Others v Russia*, supra n 57 at paras 417–418.

62 See, for example, *Animal Defenders International v United Kingdom* Application No 48876/08, Admissibility and Merits, 22 April 2013 (Grand Chamber), where this inconsistency was criticised by five of the dissenting judges (see Joint Dissenting Opinion of Judges Ziemele and others).

63 Many examples can be given; for the 2012–2013 sample of case law, see, for example, *Kurić and Others v Slovenia* Application No 26828/06, Admissibility, Merits and Just Satisfaction, 26 June 2012 (Grand Chamber), at para 387 and *Eweida and Others v United Kingdom* Applications Nos 48420/10 et al., Admissibility, Merits and Just Satisfaction, 15 January 2013, at paras 84 and 88. For the 2016–2017 sample, see, for example, *K.S. and M.S. v Germany* Application No 33696/11, Admissibility and Merits, 6 October 2017, at para 42 and *Lupeni Greek Catholic Parish and Others v Romania* Application No 76943/11, Merits and Just Satisfaction, 29 November 2016 (Grand Chamber), at paras 89 and 102. For earlier examples and criticism, see Kratochvíl, supra n 22 at 340–1.

64 For example, *Ramadan v Malta* Application No 76136/12, Admissibility and Merits, 21 June 2016, where the Court concluded that the national decision was 'not arbitrary' (para 89)—a very lenient standard—without even mentioning the margin of appreciation doctrine; see similarly in *Király and Dömötör v Hungary* Application No 10851/13, Admissibility, Merits and Just Satisfaction, 17 January 2017, at para 66. In other cases, the intensity of the Court's review remains unclear overall, such as in the Article 10 case of *Brambilla and Others v Italy* Application No 22567/09, Merits, 23 June 2016.

65 For the 2012–2013 sample, see for example, *Communist Party of Russia v Russia* Application No 29400/05, Admissibility and Merits, 19 June 2012, at paras 110 and 116; *El-Masri v Former Yugoslav Republic of Macedonia*, supra n 28 at para 155. For the 2016–2017 sample, see, for example, *Dubská and Krejzová v Czech Republic* Applications Nos 28859/11 and 28473/12, Merits, 15 November 2016 (Grand Chamber), at para 184; *Karapetyan and Others v Armenia* Application No 59001/08, Admissibility and Merits, 17 November 2016, at paras 46–47.

66 For example *K2 v United Kingdom* Application No 42387/13, Admissibility, 7 February 2017, at para 49.

balance in hard cases or cases concerning divisive issues.⁶⁷ The case law analysis presented above, however, demonstrates that the Court's application of the margin of appreciation doctrine is rather far removed from its theoretical objectives. In many cases the doctrine is not used as an instrument to determine the strictness and standards of review and the factors determining the scope of the margin are obscure. In fact, the analysis shows that the margin of appreciation has developed into a ritual formula: some cases aside, it hardly makes a difference to the test of proportionality if the margin of appreciation is or is not mentioned.⁶⁸

Thus, the Court seems to have passed the stage where the margin of appreciation is really important for mitigating the tension between respect for national differences and the need to respect fundamental rights, and for providing clarity to the national authorities on the standards to be used. Instead, it has moved on to using other instruments to give shape to the notions of subsidiarity and effective protection, as is discussed in the next section.

3. CASE-BASED REVIEW, INCREMENTALISM AND THE CREATION OF GENERAL PRINCIPLES

A. The Double Function of the Court: Individual Redress and Interpretation of the Convention

The Court has always emphasised that the Convention has entrusted it with a double task.⁶⁹ The Court's primary role is to decide on individual applications and offer redress in the individual case before it.⁷⁰ The States are allowed and encouraged, but not obliged to draw broader inferences from these judgments.⁷¹ As a consequence,

67 For the 2012–2013 sample, see, for example, *Mouvement Raëlien Suisse v Switzerland* Application No 16354/06, Merits, 13 July 2012, at paras 59–66; *Hristozov and Others v Bulgaria* Applications Nos 47039/11 and 358/12, Admissibility and Merits, 13 November 2012, at paras 118–124. For the 2016–2017 sample, see, for example, *Karácsony and Others v Hungary* Applications Nos 42461/13 and 44357/13, Merits and Just Satisfaction, 17 May 2016 (Grand Chamber), at paras 143–146; *Dubská and Krejzová v Czech Republic*, supra n 65 at paras 178 et seq.; *Wolter and Sarfert v Germany* Applications Nos 59752/13 and 66277/13, Admissibility and Merits, 23 March 2017.

68 Even judges within the Court have criticised the automaticity of invoking the doctrine: see the concurring opinion of Judge Rozakis to *Egeland and Hanseid v Norway* Application No 34438/04, Merits, 16 April 2009. See also Kratochvíl, supra n 22 at 326 and 337 (speaking of the 'margin mantra'); Spielmann, supra n 42; McGoldrick, supra n 7 at 37.

69 See further Gerards, supra n 14 at section 2.1. See also De Londras, dubbing this the 'dual functionality' of the Court: De Londras, 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights' (2013) *European Human Rights Law Review* 38; Harmsen, 'The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights' in Christoffersen and Madsen (eds), *The European Court of Human Rights between Law and Politics* (2011) 119 at 131.

70 Articles 34 and 46 ECHR. This is generally regarded as the most important function of the Court; in more detail, with many references, see Gerards and Glas, 'Access to Justice in the European Convention on Human Rights system' (2017) 35 *Netherlands Quarterly of Human Rights* 11.

71 Article 46 ECHR; cf Klein, 'Should the binding effect of the judgments of the European Court of Human Rights be extended?' in Mahoney (ed.), *Protecting Human Rights: The European Perspective* (2000) 705, at 706; Ress, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order' (2005) 40 *Texas International Law Journal* 359 at 374.

the assessment of the Court is limited to the facts of the case.⁷² Simultaneously, the Court has accepted that its role is not only to apply the Convention in individual cases, but also, more generally, to elucidate and develop the meaning of the rights protected by the Convention.⁷³ The Court accordingly also aims to provide for more abstract and general definitions and standards, which can be applied regardless of the facts and circumstances of the individual case. Moreover, the Court has consistently repeated that it will not depart, without good reason, from precedents laid down in previous cases.⁷⁴ Consequently, well-established principles and standards developed in the Court's case law can be said to have *res interpretata*.⁷⁵

This double function of the Court helps it respond to the often conflicting obligations the Court has to meet. As is clear from the analysis presented in this section, the Court tends to work towards setting clear, uniform and well-defined criteria defining the minimum standard of human rights, while still taking account of diversity and local conditions in the application of such standards in the individual case.

B. Incrementalism and Case-Based Review as a Judicial Strategy to Deal with Diverging Standards

(i) Incrementalism

If the Court has to address a relatively new and potentially sensitive and divisive subject matter, such as the right to assisted suicide or the right to abortion, it acts in a very cautious, incremental and circumscribed manner.⁷⁶ In the case of *Tysi c v Poland*, for example, which was one of the very first cases on abortion, the Court kept itself from giving a far-reaching judgment about the content of the right to personal autonomy and the possibilities for limitation.⁷⁷ Instead, the Court restricted its judgment to the facts of the case, avoiding the moral issues at stake, and found a violation of the Convention purely on the basis of the lack of legal remedies open to the applicant. The Court almost seemed to dip its toe in the water to test its temperature.⁷⁸ In subsequent cases, it continued to tread very carefully and slowly, trying not to immerse itself in the deep and cold waters of abortion regulation too quickly. Nevertheless, in each of the cases decided, it went one step further and it clarified its

72 The Court has always accepted this: see *Sunday Times v United Kingdom* Application No 6538/74, Merits, 26 April 1979, at para 65.

73 For example, *Ireland v United Kingdom* Application No 5310/71, Merits, 18 January 1978, at para 154.

74 On the Court's use of precedent, see further, for example, Lupu and Voeten, 'Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 *British Journal of Political Science* 413.

75 This was expressly recognised by the Parliamentary Assembly of the Council of Europe in 2000 (PACE Resolution 1226/2000, *Execution of Judgments of the European Court of Human Rights*, 28 September 2000, at para 3) and by the government leaders in the Interlaken High Level Declaration of 19 February 2010, at para 4. See also Gerards and Brems, *supra* n 14 at section 3.2; Bodnar, 'Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for Other States than Those which were Party to the Proceedings' in Haack and Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (2014) 223.

76 On the Court's use of incrementalism, see also Gerards, *supra* n 19 at 180–2 (with further examples).

77 Application No 5410/03, Merits and Just Satisfaction, 20 March 2007. Indeed, the Court did not even provide an unambiguous definition of the kind of right to be protected under Article 8: see paras 105–108.

78 See further Gerards, *supra* n 14 at section 5.3.3.

stand on yet another issue, thus gradually building a system of more general standards and principles to be applied in later cases. In the case of *A, B and C v Ireland*, the Court even accepted that, although Article 8 could not be interpreted as conferring a right to abortion, a prohibition of abortion sought for reasons of well-being or health comes within the scope of the right to respect for one's private life and, accordingly, Article 8 of the ECHR.⁷⁹ By now, it is clear that all States at the least should provide for informed consent in abortion cases; for second opinions; for sufficient involvement of women in the decisions being taken; for clear, accessible and foreseeable legislation; for reliable and prompt information about access to abortion; and for an effective judicial remedy.⁸⁰

In a series of judgments on assisted suicide and euthanasia, the Court has chosen the same approach. It developed its interpretation of Article 8 from 'not excluding' that a right to assisted suicide could be covered by the right to personal autonomy in 2002, to unreservedly and clearly accepting the applicability of Article 8 to such cases in 2011.⁸¹ In an incremental, yet effective way, the Court thereby has covered the sensitive terrains of abortion and euthanasia, gradually providing a higher level of protection.⁸² In the same vein, the Court seems to have chosen incrementalism in imposing positive obligations on the States to provide for legal recognition of relationships between same-sex couples,⁸³ as well as in cases on a right to access to information under Article 10 of the ECHR.⁸⁴ In all such cases, the value for the Court

79 Application No 25579/05, Admissibility, Merits and Just Satisfaction, 16 December 2010 (Grand Chamber), at para 214. See also *P. and S. v Poland* Application No 57375/08, Admissibility, Merits and Just Satisfaction, 30 October 2012, at para 96.

80 See the cases mentioned in the previous footnotes.

81 Cf. *Pretty v United Kingdom* Application No 2346/02, Admissibility and Merits, 29 April 2002, at para 67 and *Haas v Switzerland* Application No 31322/07, Merits, 20 January 2011, at para 51. See also *Koch v Germany* Application No 497/09, Admissibility, Merits and Just Satisfaction, 19 July 2012, at para 52. In a 2013 case, a Chamber of the Court even went one step further, stating that the right to end one's life actually falls within the scope of protection of Article 8 of the Convention (*Gross v Switzerland* Application No 67810/10, Admissibility, Merits and Just Satisfaction, 14 May 2013, at para 60). In line with the need to respect diverging standards, however, it has mostly left it to the national authorities to be decided when and under which conditions assisted suicide could be permitted (in particular, *Koch*, *ibid.* at paras 69–71). These cases paved the way for a more principled stand in cases on ending life-sustaining treatment, in particular *Lambert v France* Application No 46043/14, Admissibility and Merits, 5 June 2015 (Grand Chamber) and (as an application of that judgment) *Gard and Others v United Kingdom* Application No 39793/17, Admissibility, 27 June 2017.

82 See also Brems and Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 176 at 197; and Iglesias Villa, *supra* n 15 at 405.

83 This is witnessed by the gradual approach taken in the line of cases ranging from *Schalk and Kopf v Austria* Application No 30141/04, Admissibility and Merits, 24 June 2010; and *X v Austria* Application No 19010/07, Admissibility, Merits and Just Satisfaction, 19 February 2013 (Grand Chamber), *via Vallianatos and Others v Greece* Applications Nos 29381/09 and 32684/09, Admissibility, Merits and Just Satisfaction, 7 November 2013 (Grand Chamber), to more recently (and still very strongly case based) *Oliari and Others v Italy* Applications Nos 18766/11 and 36030/11, Admissibility, Merits and Just Satisfaction, 21 July 2015, and (less strictly case based) *Taddeucci and McCall v Italy* Application No 51362/09, 30 June 2016, Admissibility, Merits and Just Satisfaction. On this development, see also in-depth Koffeman, *Morally Sensitive Issues and Cross-Border Movement in the EU* (2015).

84 See most recently *Magyar Helsinki Bizottság v Hungary* Application No 18030/11, Admissibility, Merits and Just Satisfaction, 8 November 2016 (Grand Chamber), in which the Court clarified the general principles that slowly emerged from a longer line of (sometimes seemingly inconsistent) judgments, summed up in paras 127 et seq.

clearly is in the possibility to change position if its approach is met with strong national criticism, without losing face and while still retaining a relatively high level of protection of Convention rights—if only because certain procedural obligations are imposed on the States.

(ii) *Review of national application of general principles*

Once incrementalism has done its work, the Court may make use of its results by listing the ‘general principles’ it has developed in its case law.⁸⁵ These general principles are based on the outcomes of *ad hoc* balancing in previous cases, which the Court has tested and found to be sufficiently acceptable and broadly applicable to serve as general standards in later case law. Often the Grand Chamber brings together the lines the various Chambers have drawn in their case law.⁸⁶ In doing so it may confirm, clarify, refine or revise a standard previously formulated,⁸⁷ or it may opt for a harmonised approach when there are (seemingly) conflicting precedents.⁸⁸ Sometimes also a Chamber may distil some important general principles and

85 For some examples out of many, see (for Article 1 and Article 2 First Protocol) *Catan and Others v Moldova and Russia* Applications Nos 43370/04, 8252/05 and 18454/06, Admissibility, Merits and Just Satisfaction, 19 October 2012 Grand Chamber; (for Article 2) *Aydan v Turkey* Application No 16281/10, Admissibility, Merits and Just Satisfaction, 12 March 2013; (for Article 3 in expulsion cases) *H. and B. v United Kingdom* Application Nos 70073/10 and 44539/11, Admissibility and Merits, 9 April 2013; (for Article 4) *C.N. v United Kingdom* Application No 67724/09, Admissibility, Merits and Just Satisfaction, 13 November 2012; (for Article 5) *Radu v Germany* Application No 20084/07, Admissibility and Merits, 16 May 2013; *J.N. v United Kingdom* Application No 37289/12, Admissibility, Merits and Just Satisfaction, 19 May 2016 (Grand Chamber); (for Article 6) *Wallishauser v Austria* Application No 156/04, Admissibility, Merits and Just Satisfaction, 17 July 2012; *A.N. v Lithuania* Application No 17280/08, Admissibility, Merits and Just Satisfaction, 31 May 2016; (for Article 8, family life) *B. v Belgium* Application No 4320/11, Admissibility, Merits and Just Satisfaction, 10 July 2012; and *Fourkiotis v Greece* Application No 74758/11, Admissibility, Merits and Just Satisfaction, 16 June 2016; (for Article 8, forced sterilisations) *N.B. v Slovakia* Application No 29518/10, Admissibility, Merits and Just Satisfaction, 12 June 2012; (for Article 8, evictions) *Bagdonavicius and Others v Russia* Application No 19841/06, Admissibility, Merits and Just Satisfaction, 11 October 2016; (for Article 10) *Animal Defenders International v United Kingdom* Application No 48876/08, Admissibility and Merits, 22 April 2013 (Grand Chamber).

86 For example, *Scoppola v Italy (No 3)* Application No 126/05, Grand Chamber, Merits, 22 May 2012, at para 96; *Herrmann v Germany* Application No 9300/07, Merits and Just Satisfaction, 26 June 2012 (Grand Chamber); *De Souza Ribeiro v France* Application No 22689/07, Merits and Just Satisfaction, 13 December 2012 (Grand Chamber); *J.K. and Others v Sweden* Application No 59166/12, (Grand Chamber) Merits and Just Satisfaction, 23 August 2017 (Grand Chamber), at paras 77 et seq.

87 For example, *Buzadji v Republic of Moldova* Application No 23755/07, Admissibility, Merits and Just Satisfaction, 5 July 2016, at paras 92 et seq.; *Muršić v Croatia* Application No 7334/13, Grand Chamber, Admissibility, Merits and Just Satisfaction, 20 October 2016 (Grand Chamber), at paras 91 et seq.; *A. and B. v Norway* Applications Nos 24130/11 and 29758/11, Admissibility and Merits, 15 November 2016, at paras 105 et seq.; *Lupeni Greek Catholic Parish and Others v Romania* Application No 76943/11, Grand Chamber, Merits and Just Satisfaction, 29 November 2016 (Grand Chamber), at paras 117–118; *Paposhvili v Belgium* Application No 41738/10, Admissibility, Merits and Just Satisfaction, 13 December 2016 (Grand Chamber), at paras 181–182; *Hutchinson v United Kingdom* Application No 57592/08, Merits, 17 January 2017 (Grand Chamber), in particular paras 59 et seq.; *De Tommaso v Italy* Application No 43395/09, Admissibility, Merits and Just Satisfaction, 23 February 2017 (Grand Chamber), at para 151.

88 For example, *Idalov v Russia* Application No 5826/03, Admissibility, Merits and Just Satisfaction, 22 May 2012 (Grand Chamber) at paras 117–133; *Magyar Helsinki Bizottság v Hungary* Application No 18030/11, Admissibility, Merits and Just Satisfaction, 8 November 2016 (Grand Chamber), at para 133.

standards from the Court's previous case law.⁸⁹ Such general principles serve an important function for the Court's case law. In an increasing number of cases, the Court first lists or quotes the relevant general factors and principles, and then assesses whether the national authorities have complied with them.⁹⁰ It may then show deference to the national authorities' findings if it is clear they have taken the principles carefully into account.⁹¹ By contrast, if it appears they have omitted to do so, or they have misapplied the criteria to the facts of a case, it may find a violation of the Convention.⁹²

The Court's practice of formulating general standards or principles and its tendency towards 'procedural review', however, do not mean the end of case-based decision-making. In many cases, the Court continues to apply its standards to the facts of the case, and it does so in an individualised and case-sensitive manner. This also allows the Court to use 'distinguishing' techniques in order to disapply, slightly change or adapt the standards when such is needed in light of the specific circumstances of the case.⁹³ If particular national (constitutional) values are at stake, or if it turns out that a case relates to a sensitive issue of socio-economic rights, such concrete review offers much room for manoeuvre. This means a slightly different decision can be reached to take account of national interests or recent changes made in national legislation or policy.⁹⁴ Hence, individualised application of general standards allows the Court to defer to the national authorities where national constitutional

89 For example, *James, Wells and Lee v United Kingdom* Applications Nos 25119/09, 57715/09 and 57877/09, Admissibility, Merits and Just Satisfaction, 18 September 2012, at paras 191–195.

90 See further Gerards, 'Procedural Review by the ECtHR: A Typology' in Gerards and Brems, *Procedural Review in European Fundamental Rights Cases* (2017) 127–160; Çalı, supra n 15 at 155.

91 For the 2012–2013 sample, see, for example, *Chabauty v France* Application No 57412/08, Admissibility and Just Satisfaction, 4 October 2012 (Grand Chamber), at paras 51–52; and *PETA Deutschland v Germany* Application No 43481/09, Admissibility and Merits, 8 November 2012. For the 2016–2017 sample, see, for example, *Travas v Croatia* Application No 75581/13, Admissibility and Merits, 4 October 2016; and *Hiller v Austria* Application No 1967/14, Admissibility and Merits, 22 November 2016, para 52. See also Spielmann, supra n 42; and Gerards, *ibid.* at 150.

92 For the 2012–2013 sample, see, for example, *Plesó v Hungary* Application No 41242/08, Admissibility and Merits, 2 October 2012; and *OOO Ipress and Others v Russia* Applications Nos 33501/04 et al., Admissibility, Merits and Just Satisfaction, 22 January 2013. For the 2016–2017 sample, see, for example, *Reichman v France* Application No 50147/11, Admissibility, Merits and Just Satisfaction, 12 July 2016; *OOO Izdatelskiy Tsentr Kvartirnyy Ryad v Russia* Application No 39748/05, Admissibility and Merits, 25 April 2017, at para 46. For further analyses, see, for example, Gerards, supra n 90 at 154; and Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 *Human Rights Law Review* 745.

93 Examples mainly can be found in the 2016–2017 sample: see, for example, *Simić v Bosnia and Herzegovina* Application No 75255/10, Admissibility, 15 November 2016, at para 35; *Karapetyan and Others v Armenia* Application No 59001/08, Admissibility and Merits, 17 November 2016, at para 58; *Ojei v The Netherlands* Application No 64724/10, Admissibility, 14 March 2017, at paras 35 et seq.

94 A famous example is the 'hearsay' case law, in which the Court clarified the position it had taken in a line of case-based judgments in *Al-Khawaja and Tahery v United Kingdom* Applications Nos 26766/05 and 22228/06, Merits and Just Satisfaction, 15 December 2011 (Grand Chamber), after which numerous judgments followed in which the new standards were applied, which led to some uncertainty about the general principles. This was solved in *Schatschaschwili v Germany* Application No 9154/10, Merits and Just Satisfaction, 15 December 2015 (Grand Chamber), but again further refinement can be seen in more recent cases. For some examples, see *McKevitt and Campbell v United Kingdom* Applications Nos 61474/12 and 62780/12, Admissibility, 6 September 2016; and *Constantinides v France* Application No 76438/12, Strike Out, Admissibility and Merits, 6 October 2016.

values, legal traditions or sensitive issues are concerned, without having to change the general principles determining the minimum level of protection required.⁹⁵ It appears that the Court does not need any margin of appreciation doctrine to do so: fact-specific decision-making leaves just as much leeway to the national authorities.

(iii) Case-based refinement of general principles

Finally, in some cases the Court works in an opposite direction of that of 'incrementalism' and gradual recognition of general principles. It then starts off a new line of case law by defining a general principle, and only later applies and refines it by application in concrete cases. A famous case in point is that on assistance by a lawyer during police interrogations.⁹⁶ In the *Salduz* case, the Court head-on confronted the question if such assistance must be offered.⁹⁷ It provided for rather elaborate reasoning on the importance of such assistance for the rights of the suspect and it held that such assistance should, in principle, always be offered.⁹⁸ The States responded to this judgment in different ways,⁹⁹ causing many new cases to be brought. As a result, the Court has had to deal with numerous post-*Salduz* cases in which it has had to clarify, revise and refine the meaning of its first judgment.¹⁰⁰ In deciding on these cases, the Court once again relied on its particularised, case-based approach, taking into account the precise circumstances of every applicant and only gradually lifting the remaining uncertainties regarding the judgment in *Salduz*. Eventually, it appeared from all these concrete applications that the previously established general standards were not sufficiently workable and clear. For that reason, the Court in *Ibrahim* chose to reformulate and refine the general standards, taking due account of the difficulties that had been demonstrated in the individual cases.¹⁰¹ This example discloses a certain search for reflective equilibrium in that it shows a continuous movement from

95 For example, *Eweida and Others v United Kingdom* Applications Nos 48420/10 et al., Admissibility, Merits and Just Satisfaction, 15 January 2013.

96 There are more examples of this approach, although they are relatively rare: see, for example, *Hirst (No 2) v United Kingdom* Application No 74025/01, Merits and Just Satisfaction, 6 October 2005 (Grand Chamber); *Kafkaris v Cyprus* Application No 21906/04, Merits and Just Satisfaction, 12 February 2008 (Grand Chamber); *Rantsev v Cyprus and Russia* Application No 25965/04, Admissibility, Merits and Just Satisfaction, 7 January 2010. With the exception of *Rantsev*, these cases formed the starting point for long lines of judgments specifying and detailing the general principles established in these judgments on, respectively, the right to vote for prisoners and irreducible life sentences.

97 *Salduz v Turkey* Application No 36391/02, Merits and Just Satisfaction, 27 November 2008.

98 *Ibid.* at para 55 ('as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right').

99 See the national reports in Gerards and Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law. A Comparative Analysis* (2014).

100 For example, *Diriöz v Turkey* Application No 38560/04, Admissibility and Merits, 31 May 2012; *Carine Simons v Belgium* Application No 71407/10, Admissibility, 28 August 2012; and *Sirghi v Romania* Application No 19181/09, Admissibility, Merits and Just Satisfaction, 24 May 2016. The Court has even opened a fact sheet on the issue: see www.echr.coe.int/Documents/FS_Police_arrest_ENG.pdf [last accessed 19 June 2018].

101 *Ibrahim and Others v United Kingdom* Applications Nos 50541/08 et al., Merits and Just Satisfaction, 13 September 2016 (Grand Chamber), at para 257.

definition of general principles to refinement in individual cases, to redefinition of general principles, and further refinement in individual cases.¹⁰²

(iv) *Conclusion*

It is easy to see why the Court generally favours an incremental and case-based approach. Not only does such an approach fit well with the double task of the Court, providing general as well as individual justice, but it also has advantages from a strategic perspective. A gradual, step-by-step approach allows the Court to test the water before formulating general principles. If strong national opinions or values are at stake, a strongly fact-based approach enables the Court to take such national values into account in deciding on individual cases without setting too strong a precedent. The effect is that the Court, even without using the margin of appreciation doctrine, can be as deferential as it thinks is necessary. It is equally clear, though, that a strongly case-based and gradual approach has important disadvantages in terms of predictability and legal certainty, since general standards may remain unclear for a rather long time.¹⁰³ For that reason, it is also understandable that the Court sometimes sits down to bring its case-based criteria together in a logical and coherent set of general principles. These principles provide for clarity, but they also form the basis for a new line of cases, in which the Court may apply them in a case-sensitive manner. The same is true where the Court first provides a general interpretation (as it did in the *Salduz* case) and then starts refining this in a set of similar cases. It is exactly this continuous interplay between the general and the specific that makes this approach into such a successful tool, since it helps develop a certain and cognisable standard of protection, while still offering sufficient leeway to take account of diverging national values.

4. CONCLUSION

The ECtHR has to answer many questions of interpretation and application of fundamental rights that are answered by constitutional courts on the domestic level. The parallel between the ECtHR and a constitutional court is therefore easily drawn.¹⁰⁴ Yet, it is evident that the Court's position is different from that of national constitutional courts—the Court has a supranational character and it is required to play a subsidiary role. Moreover, the Court must set minimum standards of fundamental rights protection for 47 States with very different legal and constitutional systems and with potentially divergent views on the meaning and importance of certain rights. Only few national constitutional courts find themselves in a similar position.

102 See further Gerards, 'The European Court of Human Rights' in Jákab et al. (eds), *Comparative Constitutional Reasoning* (2017) 237.

103 Moreover, the Court may find it difficult to steer its case law in the right direction ('hard cases make bad law'): see Gerards, *supra* n 19.

104 For example, Alkema, 'The European Convention as a Constitution and its Court as a Constitutional Court' in Mahoney et al. (eds), *Protecting Human Rights: The European Perspective – Studies in Memory of Rolv Ryssdal* (2000) 41; Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161; Greer, *supra* n 33 at 172–3; Greer and Wildhaber, 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 655 at 667–9; and Gerards, *supra* n 102.

To meet these challenges, some have argued that the Court's constitutional role should be strengthened.¹⁰⁵ A filtering mechanism should be introduced to permit the Court to select only those cases which would allow it to give solid Convention interpretations or which could lead to further development and refinement of its previous case law.¹⁰⁶ This should result in 'extensively reasoned [judgments] which establish the jurisprudential principles with a compelling clarity'.¹⁰⁷ Others find such a constitutional role for the ECtHR undesirable, since many individual applications do not relate to complex constitutional rights issues, but concern obvious violations of Convention rights for which individual redress must be offered.¹⁰⁸ As long as there are no adequate remedies in some of the States available to solve these issues, and as long as such violations continue to exist, there must be an external instrument where individuals can seek protection and which can serve to make others aware of the problems in the States.¹⁰⁹

Apparently, thus, the Court will have to continue combining the functions of being a constitutional court and offering individual redress.¹¹⁰ On the one hand, given the need to protect the Convention regardless of place of residence, it is crucial that a supranational court can set minimum standards. On the other hand, the role of the Court cannot be limited to setting general standards. If a State happens to violate the standards defined by the 'constitutional' ECtHR, there is still a need for an external mechanism for control and correction, as well as for a remedy for victims of such violations. Moreover, Section 3 has shown that the Court actually needs the plurality and diversity of a large body of individual cases in order to give shape to its constitutional role. Indeed, the Court has been able to develop its incremental approach precisely because it receives so many different cases each year. Based on the facts of each case, it has managed to build a formidable set of general principles, standards and criteria, which are often of high quality and can easily be relied on by national authorities. The Court's approach further allows it to apply these standards in such a way as to take due account of national diversity and national constitutional values, without losing the generality and importance of these standards. This advantage would be lost if the Court were competent to decide on a smaller number of carefully selected cases only.

There is thus a good reason to cherish the present situation in which the Court deals with all incoming individual complaints on a case-by-case basis, while providing for sufficiently 'constitutional' principles based on long lines of case law. This means the Court should use its newest tool, the upcoming advisory opinions procedure, carefully. Protocol 16, once it enters into force on 1 August 2018, will allow the

105 See, in particular, Alkema, supra n 104; Wildhaber, supra n 104; and Greer and Wildhaber, supra n 104. For an overview of the debate, see Harmsen, supra n 69 at 128.

106 See, for example, Greer and Wildhaber, supra n 104 at 685–6.

107 Wildhaber, supra n 104 at 164.

108 In more detail on this debate, see Gerards and Glas, supra n 70.

109 See further Gerards, supra n 19; and Çalı, supra n 19. See also the comments made by the Council of Europe's Steering Committee for Human Rights (CDDH) in its *Final Report on Measures Requiring Amendment of the European Convention of Human Rights*, Strasbourg, 15 February 2012, CDDH(2012)R74 Add 1, App IV.

110 For similar proposals, see, for example, Egli, supra n 70. 'Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism?' (2007) 17 *Journal of Transnational Law and Policy* 1.

highest national courts to suspend a pending case and refer a question of interpretation of the Convention to the Court to be answered by means of a (non-binding) advisory opinion.¹¹¹ Although it might seem to be useful to have the Court answer such interpretative questions in a general and abstract fashion, it might be problematic if the Protocol would invite the Court to provide for broad and general principles right away.¹¹² As discussed in Section 3.B.iii, just as happened after the judgments in cases such as *Salduz*, national authorities start looking for gaps and loopholes in the Court's reasoning right away, or they may simply balk at a certain advice if it is too general or too principled in nature. Surely the Court could provide for refinement and nuance in subsequent individual cases, but it might be more difficult to do so without loss of face.¹¹³

It would be preferable, therefore, if the Court would employ both the current procedure and Protocol 16 to make the most of the combination of setting 'constitutional' standards and applying such standards in individual cases. Not every case is well suited to take a small new step on new terrain—some cases may be atypical and non-representative, others may not allow to answer an interpretative question sufficiently clearly, and yet other cases do not evidently relate to Convention rights.¹¹⁴ Moreover, deciding each case on the facts, without giving it any prior thought, might lead the Court towards defining a set of standards that it possibly would not have reached if it would have reflected on them in an earlier stage. For that reason, filtering, or perhaps rather 'screening'¹¹⁵ of individual cases to assess their relevance appears to be essential. The Court already has important instruments at its disposal to do so.¹¹⁶ The filtering section of the Court could use the Court's priority policy, which allows it to decide on urgent and important cases more quickly, to pick those cases which seem to be representative and which would allow it to use its incremental approach in a sensible manner.¹¹⁷ Likewise, in relation to Protocol 16, the Court could carefully select only those requests for advice that allow it to further refine or re-define certain standards, without having to enter entirely unexplored terrain. After having developed a sufficiently clear set of standards to be applied by national

111 Much has been written on this Protocol already: see, for example, Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal' (2014) 21 *Maastricht Journal of European and Comparative Law* 630; Thorarensen, 'The Advisory Jurisdiction of the ECtHR under Protocol No. 16: Enhancing Domestic Implementation or a Symbolic Step?' in Arnardóttir and Buysse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders* (2016) 79.

112 For an overview of other pros and cons, see, in particular, the CDDH's Final Report (App V), supra n 109.

113 For a number of other disadvantages of a 'pick and choose model', see the CDDH Final Report (App V), supra n 109 at 55.

114 See further Gerards, supra n 19, proposing to declare cases which do not really pertain to Convention rights issues inadmissible; cf. also De Londras, supra n 69 at 42.

115 Cf. Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' (2002) 21 *Penn State International Law Review* 101 at 108.

116 See also Egli, supra n 110.

117 For the priority policy, see Rule 41 of the Rules of Court. The working methods of the Court's filtering section are shortly described in a factsheet, see: echr.coe.int/Documents/Filtering_Section_ENG.pdf [last accessed 19 June 2018].

authorities, it could easily dispose of similar cases by using a procedural approach or by leaving such issues to be decided by a single judge formation or a Committee, thus making clear that there is no legal importance to such cases. This would allow the Court to make optimal use of the combination of case-based decision-making and constitutional standard-setting, as well as allow it to heed individual and national interests in a balanced manner, both before and after it has formulated general principles.

But what, then, of the margin of appreciation doctrine? Does this doctrine no longer have a function for the ECtHR except as a rhetoric device and makeweight, as it would seem to appear from Section 2.B?¹¹⁸ No: even in a system dominated by incrementalism and reflective equilibrium, the doctrine still has a role to play as a 'sensible pragmatic legal doctrine'.¹¹⁹ If the Court has to decide cases on the merits, the question as to the intensity of its review still arises—case-based review may be very strict and intensive, but it may also be superficial and lenient. The function of the margin of appreciation doctrine is to help the Court decide on the intensity of its review and to do so in a predictable and well-structured fashion. The legal certainty created by proper application of the doctrine is of great value in a highly case-based system. Moreover, the margin of appreciation doctrine still has a role to play in helping the Court respect national diversity, especially when it has to decide on the proportionality and necessity of concrete interferences.¹²⁰ Ideally, therefore, the Court would revise its approach towards the margin of appreciation and restore its original function and meaning.¹²¹ In combination with its approach of incremental standard-building, this would allow the Court to really be the final arbiter in fundamental rights cases, even in a Europe of diverging fundamental rights standards.

118 Cf. Kratochvíl, *supra* n 22 at 354.

119 Agha, *supra* n 19 at 11.

120 *Ibid.*

121 For some possibilities to improve its use, see Gerards, *supra* n 17 at 115 et seq. See also Kratochvíl, *supra* n 22 at 354–5.