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Pluralism, Deference and the Margin of Appreciation Doctrine

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Abstract: *In this article it will be argued that good use of the instrument of deference might help the EU courts to deal with the situation of pluralism that is currently visible in the European legal order. By means of deferential judicial review, the EU courts can pay due respect to national constitutional traditions and to national legislative and policy choices, thus preventing situations of real conflict. In addition, deference enables the EU courts to take into account the intricacies related to judicial review of norms drafted by co-equal institutions or by national elected bodies. Although the EU courts already make use of some form of deferential review, they may use the instrument in a clearer and more structured manner. As a basis for the development of a European 'doctrine of deference', a comparison will be made with the margin of appreciation doctrine devised by the European Court of Human Rights. Although this doctrine is certainly not fault-free, it offers a number of advantages in terms of clarity and controllability. If improved and adapted on the basis of theoretical notions of procedural democracy, the doctrine might be put to good use by the EU courts.*

I Introduction

It has now become widely accepted that the EU cannot be regarded as a single, hierarchical legal system in which there is complete supremacy of the legal rules created by the EU institutions[1] over national legislation and even over national constitutions.[2] Instead, EU constitutional scholars have come to regard the EU as a complex, pluralist legal order, in which there is close interaction and dialogue between the EU institutions and the national authorities, but no clear hierarchical relationship.[3] Indeed, the notion

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[1] The expression and prefix 'EU' will be used in this article, except for the situation in which specific reference is made to the European Community ('EC' or 'Community'). The term 'EU courts' is used to indicate both the European Court of Justice (ECJ) and the Court of First Instance; now the General Court.

[2] This was different at the end of the 1990s; eg J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) ch 9.

[3] See, eg, N. MacCormick, 'The Maastricht-Urteil: Sovereignty Now', (1995) 1 *European Law Journal* 259; I. Maher, 'Community Law in the National Legal Order: A Systems Analysis', (1998) 36 *Journal of Common Market Studies* 237; M. Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice', (1999) 36 *Common Market Law Review* 351; N. Walker, 'The Idea of Constitutional

of pluralism provides an adequate description of the current relationship between the legal orders within the EU.[4] At the same time, the recognition of the pluralist character of the European legal order evokes a multitude of practical and theoretical questions. If there is no hierarchical relationship between legal norms, new ways have to be found to solve conflicts between norms and to determine who is authorised to provide the final interpretation of such norms. Some contend that a solution can only be found in the recognition of one single principle or rule of priority.[5] Others have submitted that a presumption of supremacy of EU law should be accepted which can be rebutted by overriding national constitutional concerns.[6] And it has also been argued that pragmatic solutions of dialogue may be sufficient to deal with any practical problems arising.[7]

In this article, the theoretical debate on the need for one decisive principle to solve conflicts between the European legal orders will be left aside. Instead, the focus will be on one of the available practical remedies for the problems posed by constitutional pluralism.[8] It will be argued that good use of the instrument of 'deference', and more specifically of variability of the intensity of judicial review, might help supranational courts to avoid conflicts between norms arising from the different legal orders. By means of deferential review, the EU courts can pay due respect to national constitutional traditions and to national legislative and policy choices, thus preventing situations of real conflict. In addition, deference enables the EU courts to take into account the intricacies related to judicial review of norms drafted by co-equal European institutions, or by national elected bodies. Although the European Court of Justice of the European Union (ECJ) and the General Court already make use of some form of deferential or marginal review, and although some variation in the intensity of their review is already visible in European case-law, the EU courts might use the instrument in a much more clear and refined manner.

Based on this premise, this article will make an argument for the development of a consistent and structured 'doctrine of deference' to be used by the EU courts. To do so, general doctrines of deference and variability of intensity of review will first be related to the specific problematic constituted by judicial review in a pluralistic legal order

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Pluralism', (2002) 65 *Modern Law Review* 317; M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed), *Sovereignty in Transition. Essays in European Law* (Hart, 2003), 501; M. Poiares Maduro, 'Sovereignty in Europe: The European Court of Justice and the Creation of a European Political Community', in M.L. Volcansek and J.F. Stack Jr (eds), *Courts Crossing Borders. Blurring the Lines of Sovereignty* (Carolina Academic Press, 2005), 43.

[4] eg Walker, 'The Idea of Constitutional Pluralism', *ibid*, at 337. Other explanatory terms and notions also have some value, such as the notion of 'multi-levelness': F. Mayer, *The European Constitution and the Courts. Adjudicating European Constitutional Law in a Multilevel System*, Jean Monnet Working Paper 9/03, at 36–37, available at http://www.jeanmonnetprogram.org/papers/03/030901.html>, also mentioning a variety of other notions. However, the notion of pluralism will be used in this article since it is used in legal scholarship most frequently.

[5] eg W.T. Eijsbouts and L. Besselink, 'Editorial: "The Law of Laws"—Overcoming Pluralism', (2008) 4 *European Constitutional Law Review*, 395, at 397.

[6] See, eg, Kumm, *op cit* n 3 *supra*, at 375–376, formulating a set of constitutional principles providing a normative framework for the assessment of doctrines dealing with the relationship between the ECJ and the national courts. See more elaborately M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', (2005) 11 *European Law Journal* 262, at 297–298.

[7] cf MacCormick, *op cit* n 3 *supra*, at 265, stating that both national and EU courts should have regard to the consequences and impact of their judgments on the other legal order.

[8] There is clear need for such solutions; cf Eijsbouts and Besselink, *op cit* n 5 *supra*, at 396.

(section II). In section III, an analysis of the case-law of the EU courts will be provided in order to disclose the use these courts already make of the instrument of deference. Subsequently, in section IV, the case-law of the EU courts will be contrasted with the approach taken by the European Court of Human Rights (ECtHR). The ECtHR has devised and applied its well-known margin of appreciation doctrine as an instrument to negotiate between conflicting interests in a multi-layered legal order. Although the legal framework created by the European Convention on Human Rights is very different from that established by the European Union, the EU courts and the ECtHR experience partly overlapping problems related to pluralism.[9] For that reason, the doctrine of the margin of appreciation might provide an interesting example to the EU courts.[10] Finally, in section V it will be argued that the use of a 'margin of appreciation'-like instrument might be of great value for the EU courts. If such a doctrine is put to good use, and if account is taken of the difficulties the ECtHR has experienced in the application of the doctrine, it might provide a valuable instrument to accommodate some of the difficulties posed by the complex situation of constitutional pluralism.

II Pluralism, Judicial Review and the Need for Deference

A The Problem: Pluralism and the Position of the EU Courts

Generally, national courts, legislatures and governmental bodies appear to be quite willing to cooperate with the EU courts.[11] Many scholars have stressed that there are hardly any problems of non-conformity with the ECJ's and General Court's judgments.[12] However, the high overall level of compliance notwithstanding, various

[9] cf L.R. Helfer and A.M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Review* 273, at 285; see also at 287–288.

[10] cf D. Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe', (2003) 13 *Duke Journal of Comparative and International Law* 95, at 136, indicating that the approach of the ECJ is already similar to that of the ECtHR. It is argued here, however, that express recognition of such a doctrine might provide clarity and predictability in the ECJ's case-law and might bolster good relations between national courts and European courts.

[11] cf M. Shapiro, 'The European Court of Justice', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999), 321, at 326. However, Mayer has shown that there are still important national highest courts that do not or only rarely make preliminary references to the ECJ and thus do not make effective use of the most important instrument for interaction and cooperation between the European and the national court level: Mayer, *op cit* n 4 *supra*, at 4 ff. According to Mayer, this points to the potential for disobedience (at 22).

[12] cf Weiler, *op cit* n 2 *supra*, at 192 ff, and Helfer and Slaughter, *op cit* n 9 *supra*, at 292. See also B. De Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999), 177, at 193. The fact that close cooperation with the supranational bodies provides additional empowerment to national courts has often been noted to stimulate their willingness to accept European judgments and interpretations: K. Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', in A.M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds), *The European Court and National Courts—Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart, 1998), 227, at 242; W. Mattli and A.M. Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints', in Slaughter *et al*, *ibid*, 253, at 258; Weiler, *op cit* n 2 *supra*, at 197; Maduro, 'Sovereignty in Europe, *op cit* n 3 *supra*, at 51–52. See also A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004), at 21; A.M. Slaughter, 'Judicial Globalization', (2000) 40 *Virginia Journal of International Law* 1107. Further explanations have been found in the quality and persuasive force of the EU courts' reasoning (cf Helfer and Slaughter, *op cit* n 9 *supra*, at 307 ff, in particular at 318), in the gradual and incremental way in which these courts have developed their

national highest courts have indicated that they will not always be willing to follow the lead of the EU courts.[13] It appears that many, if not most, national (constitutional) courts regard their own national constitutions as the foundation for EU law.[14] In their view, the supremacy of EU law does not so much directly follow from EU law as well as from its voluntary acceptance by the national constitutional authorities.[15] The national constitutional courts usually accept the supremacy of EU law,[16] but they only do so on the condition that EU law does not violate fundamental constitutional values.[17] Highest national courts may decide to give precedence to their own national constitutional norms and principles if they find that EU law does not offer sufficient protection to fundamental rights or other constitutional norms that they consider of primary importance and value, or if they find that the EU institutions have acted severely *ultra vires*.[18] Even though such national 'disobedience' of the norm of supremacy of EU law may only rarely occur in practice, the shadow of its possibility is always there.[19]

The resultant relationship between national and EU courts has often been called one of judicial dialogue, meaning that national and EU courts respond to each other's pronouncements on a basis of mutual understanding and respect.[20] It is obvious,

judicial powers (Shapiro, *op cit* n 11 *supra*, at 324; R.B. Ahdieh, 'Between Dialogue and Decree: International Review of National Courts', (2004) 79 *New York University Law Review* 2045), in their recognition of the need for cooperation and deference (A.M. Slaughter, 'A Global Community of Courts', (2003) 44 *Harvard International Law Journal* 191, at 217), in the authority and neutrality of the European judges, and in a number of contextual and functional factors such as the relative cultural and political homogeneity of the polity, the economic nature of the European Communities and the empowerment by EU law of individual legal actors (Helfer and Slaughter, *op cit* n 9 *supra*, at 300, 312 and 335; Shapiro, *op cit* n 11 *supra*, at 328; Alter, *ibid*, at 238). To all probability it is the combination of all of these factors that really explains the present level of cooperation and acceptance; see Stone Sweet, *ibid*, at 20 ff.

[13] For an overview of relevant developments in both case-law and scholarship on the topic, see, eg, Weiler, *op cit* n 2 *supra*, at 288; Mayer, *op cit* n 4 *supra*, at 10 ff. Most recently, the German Federal Constitutional Court (*Bundesverfassingsgericht*) has stressed in its *Lisbon* judgment that the Member States remain the masters of the treaties and that the 'Constitution of Europe' remains a derived fundamental order (para 231). As a result, the Federal Constitutional Court retains the power to exercise both *ultra vires* review and identity review (ie the establishment of a violation of German constitutional identity, which may have the effect that Community law or Union law is declared inapplicable in Germany) (para 241). See *Bundesverfassungsgericht*, 2 BvE 2/08, Judgment of 30 June 2009, available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html (English translation provided by the German Federal Constitutional Court).

[14] See, in particular, the *Lisbon* judgment of the German Federal Constitutional Court, *ibid*, para 231.

[15] De Witte, *op cit* n 12 *supra*, at 199 ff. The German Federal Constitutional Court has named this the principle of openness towards European law (*Europarechtsfreundlichkeit*) (*Lisbon* judgment, *ibid*, para 225). This means that, in fact, there is no hierarchy between amongst Community courts and that the ECJ does not stand on top of a Community legal system; see J. Komárek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order', (2005) 42 *Common Market Law Review* 9, at 10.

[16] D. Chalmers and A. Tomkins, *European Union Public Law* (Cambridge University Press, 2007), at 201.

[17] *ibid*, at 201. See also the aforementioned *Lisbon* judgment, n 13 *supra*.

[18] Chalmers and Tomkins, *ibid*, at 204. See also De Witte, *op cit* n 12 *supra*, at 191 and 199 ff.

[19] Maduro, 'Contrapunctual Law', *op cit* n 3 *supra*, at 521. See also Mayer, *op cit* n 4 *supra*, at 20; Stone Sweet, *op cit* n 12 *supra*, at 91; Komárek, *op cit* n 15 *supra*, at 10.

[20] eg V. Skouris, 'The Position of the European Court of Justice in the EU Legal Order and its Relationship with National Constitutional Courts', (2005) *Zeitschrift für öffentliches Recht* 323, at 328; A.M. Slaughter, 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 99, at 112; Slaughter, 'Judicial Globalization', *op cit* n 12 *supra*, at 1108; Alter, *op cit* n 12 *supra*, at 232. For definitions and characteristics of 'judicial dialogue', see Slaughter, 'A Global Community of Courts', *op cit* n 12 *supra*, at 195 ff (referring in particular to 'constitutional cross-fertilisation' and 'constitutional

however, that the 'dialogue' between national and European courts is not really one between 'relative equals engaged in a common interpretative enterprise'.[21] None of the courts has the complete possibility to impose its will on the other, and each court will always have to search for creative and innovative solutions that will be acceptable to the other or that will persuade it to follow a set example.[22] Thus, as convincingly demonstrated by Ahdieh, each court can force the other to listen but not necessarily to act.[23] In Ahdieh's view, the interaction between the courts therefore can better be described in terms of judicial 'dialectics' than in terms of 'dialogue'.[24] Indeed, the notion of 'judicial dialectics' seems to capture more adequately the highly particular and dynamic distribution of power and interdependence between the national courts and the EU courts.[25]

Acceptance of the existence of this situation of judicial dialectics may prevent the occurrence of situations of real conflict between national and European courts. Effective dialectic review presupposes the existence and use of judicial instruments that can be used to bolster the cooperation and voluntary acceptance of interpretations and findings by both national and European courts.[26] On the level of the EU, a well-known vehicle for effective dialectic review is the preliminary rulings procedure of Article 234 EC.[27] This procedure enables the national courts to ask the ECJ for clarification of Community norms or, if need be, for invalidation. In formulating its reply, the ECJ can take legal and constitutional circumstances into account that are not only relevant for the EU, but also for the particular Member State that has raised the question. The ECJ may even do so by deciding *not* to answer certain parts of a preliminary question so as to leave the national authorities with sufficient discretion to design a solution that fits well with its specific national situation. The ECJ thus invites national courts to add their input to an interpretative partnership, which may not only enhance close collaboration, but also increase the court's legitimacy.[28]

The use of comparative methods of interpretation is another effective instrument of judicial dialectics. The EU courts frequently use comparative analyses as a basis for gap-filling and as a justification of novel interpretations of regulations or treaty

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borrowing' by national courts who build on each other's opinions on basis of mutual respect) and Ahdieh, *op cit* n 12 *supra*, at 2050 ff (describing judicial dialogue as a symbiotic relationship among judicial institutions who actively and voluntarily engage and cooperate with each other).

[21] L.R. Helfer, 'Forum Shopping for Human Rights', (1999) 148 *University of Pennsylvania Law Review* 285, at 349.

[22] Ahdieh, *op cit* n 12 *supra*, at 2068. See in the same vein Slaughter, *op cit* n 20 *supra*, at 125 and Komárek, *op cit* n 15 *supra*, at 10.

[23] Ahdieh, *ibid*, at 2035.

[24] Ahdieh, *ibid*, at 2035 and 2088 ff.

[25] Other terms have been conceived as well—De la Mare speaks, for example, of 'discourse' or 'discursive review': T. de la Mare, 'Article 177 in Social and Political Context', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999), 215, at 241. He reserves the term, however, specifically for the preliminary rulings procedure. The notion of 'dialectic review' seems to have a broader use, for which reason it will be used instead of alternative terms or notions.

[26] Ahdieh, *op cit* n 12 *supra*, at 2074 and 2077; cf also Slaughter, *op cit* n 20 *supra*, at 124–125.

[27] Alter, *op cit* n 12 *supra*, at 232; Weiler, *op cit* n 2 *supra*, at 193; see also A. Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', (2007) 1 *European Journal of Legal Studies* 1, at 6–7; Ahdieh, *op cit* n 12 *supra*, at 2157 and de la Mare, *op cit* n 25 *supra*, at 241 ff.

[28] For other reasons that explain the success of the preliminary rulings procedure as a dialectic mechanism, see in particular Alter, *ibid*, at 242 and 249, explaining the important role of the procedure in the 'power play' between higher and lower courts, a kind of competition that in itself bolsters the influence of the ECJ's judgments.

provisions.[29] By doing so, they implicitly indicate that they take the national legal orders seriously.[30] Although much criticism has been levelled at the use of the comparative method, it may be an important means to increase the persuasive or rhetorical force of the EU courts' judgments. In itself, such persuasive force is a vital element in a system of dialectic review, especially if it helps to convince national courts of the reasonableness and acceptability of the EU courts' interpretations and decisions.[31]

Finally, the instrument of deference or marginal review may be used to negotiate between potentially conflicting supranational and national interests.[32] Deferential review by the EU courts can be regarded as a sign of respect for the legitimacy of national regulative and judicial proceedings and as a token of consideration for national constitutional values and tradition. Hence, from the perspective of avoiding conflicts between supranational and national courts, deference is an important and interesting instrument. For that reason, the possibilities of this deferential review in a pluralist legal order will be explored in more detail in the next section.

B Why Deference?

As stated in section IIA, deference can be used as an instrument by the EU courts to avoid conflicts between the national and European legal orders. As long as national authorities act within their 'margin of discretion', the European authorities can respect their policy choices and their assessment of the need to take certain decisions. An important basis for such deference may be found in an argument that the ECtHR has aptly termed the 'better placed' argument.[33] A supranational court that has to decide about the appropriateness, necessity or reasonableness of national measures will often not be in the right position to do so, since it does not sufficiently know or understand the national circumstances or debates underlying the introduction of a certain measure or policy. Domestic authorities are usually better equipped to make such assessments, since they are likely to be more closely acquainted with national problems, (constitutional) traditions, sensitivities and debates. In principle it is not desirable (or doable) for the EU courts to second-guess the suitability or necessity of national decisions, especially if such decisions have been taken in highly complex policy areas or if they relate to sensitive issues that are prone to societal debate. Deference or marginal review is an excellent instrument to leave these decisions to the national authorities and to correct them only if they appear to be manifestly unreasonable or inappropriate.

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[29] cf J. Wouters, 'National Constitutions and the European Union', (2000) 27 *Legal Issues of Economic Integration* 48. Legal scholars have often criticised the use both courts make of this method; see, eg, De Witte, *op cit* n 12 *supra*, at 878. Nevertheless, it would appear that the rhetorical force of this instrument is very strong and the European courts really seem to succeed in convincing national states by using it (cf, eg, F. Ost, 'The Original Canons of Interpretation of the European Court of Human Rights', in M. Delmas-Marty and Ch. Chodkiewicz (eds), *The European Convention for the Protection of Human Rights* (Martinus Nijhoff, 1992), 283, at 312).

[30] About the importance of this, see also Komárek, *op cit* n 15 *supra*, at 30.

[31] See Slaughter, *op cit* n 20 *supra*, at 125. See, however, more critically, Alter, *op cit* n 12 *supra*, at 31, stating that such persuasive force is indeed of some importance, yet it cannot wholly explain the acceptance of ECJ doctrine. Indeed, it can be argued that persuasive force is only one of various elements explaining the success of the existing dialectic relationship between the European courts and the national courts.

[32] cf Maduro, 'Contrapunctual Law', *op cit* n 3 *supra*, at 534, stating that the increased discretion left to national courts by the ECJ is of particular importance if applied in areas of possible conflict with national constitutional law. Also see Ahdieh, *op cit* n 12 *supra*, at 2074.

[33] See section IVCc.

Deferential review also allows the EU courts to deal with a specific problem that is often overlooked in the context of supranational law. This problem concerns the typical position of any (constitutional) court in a legal system that is governed by the rule of law. Courts are independent institutions that derive their legitimacy mainly from the fact that they interpret and apply legal norms that have been adopted by democratically elected bodies. There is good reason to contend that the responsibility for drafting legislation and policy making primarily should be placed by bodies specifically designed and legitimised to do so. Important decisions should only be taken after a transparent procedure in which all affected actors (stakeholders) can effectively participate, in which alternative measures can be duly investigated and assessed, and in which real (political) debate is possible over the balance to be struck between conflicting interests.[34] Even though some of these elements are clearly present in judicial proceedings, a procedure before the courts cannot effectively substitute deliberative government. For that reason, courts should not substitute their own views for those of the legislature or a government agency too quickly.[35]

In a supranational legal system such as the EU, some debate is possible on the precise importance of the latter argument. The democratic legitimacy of the European legislative bodies is often questioned, for which reason some scholars have contended that it may be not such a bad idea to entrust the EU courts with strong powers of review.[36] However, an effective reply to this argument has been given by Ely, who has said that '. . . we may grant until we're blue in the fact that legislatures are not wholly democratic, but that isn't going to make courts more democratic than legislatures'.[37] In fact, there is hardly a good reason of (democratic) legitimacy to let the EU courts have the final say about policy decisions and political choices, rather than any other European institution. In addition, it is important to recall that the EU courts also have to position themselves in relation to *national* legislatures and government bodies, which evidently *do* have strong (direct or indirect) democratic legitimacy.[38] It is reasonable to expect that the European courts take due account of the fact that many of the legislative rules that they are presented with are the direct result of democratic deliberations, and of the fact that many policy decisions are at least checked and controlled by elected bodies.

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[34] Whether such values as openness, transparency and participation of affected actors (stakeholders) should preferably be protected and furthered in an architecture of 'new governance', 'constitutionalism', 'rule of law' or '*Rechtsstaat*', is of limited importance here (see for an overview G. de Búrca and J. Scott, 'Introduction: New Governance, Law and Constitutionalism', in G. de Búrca and J. Scott (eds), *Law and New Governance in the EU and the US* (Hart, 2006), 1, in particular at 2 ff). More relevant to the subject of this article is the relationship between political actors and the courts. Even in a setting of 'new governance', it is clear that the courts are less able than other actors to meet directly these important values—their task is primarily to 'police the borders' and check whether such values have been sufficiently guaranteed, not to substitute their own judgment for that of regulative or policy-making bodies (cf J. Scott and S.P. Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, Columbia Law School Public Law & Legal Theory Working Paper Group (Paper Number 07-146), at 9 and 12, available at http://ssrn.com/abstract=982281).

[35] On the value of a doctrine of deference in this respect, see A.L. Young, 'In Defence of Due Deference', (2009) 72 *Modern Law Review* 554, at 555. See however Scott and Sturm, *ibid*, at 5.

[36] cf E.T. Swaine, 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice', (2000) 41 *Harvard International Law Journa*l 1, at 63–64.

[37] J.H. Ely, *Democracy and Distrust* (Harvard University Press, 1980).

[38] cf J.H. Jans *et al*, *Europeanisation of Public Law* (European Law Publishers, 2007), at 152. See also J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff, 2009), at 249, explaining that the same reasoning may have inspired the ECtHR to develop its margin of appreciation doctrine.

Deference seems to provide a proper instrument for dealing with this particular problematic as well.

To summarise, it can be recalled that supranational courts such as the EU courts find themselves in a position that is even more complex than that of national (constitutional) courts. They have to deal with national courts that will balk if they feel that their national constitutional values are not taken sufficiently seriously. The EU courts have to review decisions taken by co-equal institutions or by national legislatures that have at least as much legitimacy to make political choices. And they have to take account of their distance to the situation in the Member States and the related difficulty in understanding and valuing national circumstances and considerations. To retain legitimacy and to stimulate voluntary compliance with their judgments and interpretations, the EU courts will therefore have to make the best possible use of the instruments available to enhance judicial dialectics. The instrument of deference, if put to good use, answers to all of these problems. For that reason, the instrument will be analysed in more detail in the next section.

C Systematising Deference—'Levels of Intensity'

The notions of 'deference' and 'marginal review' are well known in national (administrative) law, both in civil law systems and in common law systems. In short, their meaning is that a court that has to decide upon the appropriateness, necessity, reasonableness or justifiability of a certain measure or decision will not place itself in the position of the administrative body or legislator who has originally drafted it. The court will only superficially examine the case to see whether the decision-making process has passed off well and whether the outcome of the decision-making process is not unreasonable on face value. In national law, as well as in European law, a variety of standards of review have been developed to express such deferential or marginal review. Well known are such standards as 'manifest unreasonableness', 'arbitrariness', 'clear excess of the bounds of discretion' or 'manifest error'.[39] Although the precise judicial test resulting from such formulaic standards is not always clear, the formulas all clearly point in the direction of judicial restraint. The gist of deferential review is that a court is competent to invalidate a measure only if any reasonable person could see that it is not appropriate, reasonable, necessary or justifiable.

As explained in section IIB, notions of deference, marginal review and judicial restraint provide interesting starting points for judicial review in a pluralist legal system such as the EU. However, marginal review is not always desirable. In some situations a 'hard look' approach[40] or even rigorous judicial scrutiny may be called for. Deference is based on the premise that procedures for decision making and regulation are working faultlessly, that they are transparent, that they allow for effective participation of stakeholders, and that they are capable of generating reasonable outcomes (norms and decisions).[41] Many decision-making procedures lack such qualities or are at least deficient in one or more respects. If only deferential review is used

[39] See, eg, T. Tridimas, *The General Principles of EC Law* (Oxford University Press, 2nd edn, 2006), at 143.

[40] This label has been developed in the USA; it indicates a slightly more intensive judicial scrutiny than real marginal review (see *Motor Vehicle Manufacturers Ass'n v State Farm Mutual Automobile Insurance Co* 463 US 29 (1983), at 43); see more elaborately P. Craig, *EU Administrative Law* (Oxford University Press, 2006), at 476.

[41] cf M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999), at 31.

and if only such standards as 'manifest unreasonableness' or 'arbitrariness' are applied, unwanted procedural defects and flaws may not always be detected and corrected.[42] This is especially problematic if important interests, such as fundamental rights, are at stake. In such cases, courts must operate as 'gate-keepers', checking with reasonable care whether the demands of legitimacy, participation and accountability have been met.[43]

The argument that judicial restraint is not always appropriate and intensification of review is sometimes needed is well accepted in constitutional doctrine.[44] This means that there should be some kind of variability as regards the intensity of judicial review.[45] Indeed, intensity of review is often thought of in terms of a 'sliding scale', ranging from a very marginal deferential test to very strict or rigorous scrutiny.[46] Within this range it may be possible to pinpoint 'levels of intensity', such as a level of marginal review, a level of intermediate review, and a level of strict scrutiny.[47] Such levels of intensity can have clear and unambiguous consequences for the standards to be applied by the courts in examining a certain measure or policy choice and for the burden of proof.[48] For example, if the ECJ would have to decide about the suitability of a certain measure to further specific social aims, marginal review might imply that the individual applicant has to adduce clear and uncontested evidence to show that the measure will not and cannot have the desired effects, and that the ineffectiveness of the measure could readily have been foreseen by the legislator or government body.[49] Were a level of strict scrutiny to be chosen, different standards might apply. The burden of persuasion might then be placed with the responsible government body, which would have to demonstrate the adequacy of the measure as a means to obtain a certain goal by adducing conclusive evidence and by pointing out that the effectiveness of the instrument has been duly investigated in preparing the decision or regulation. The court may even require that, where a choice between different means existed for the government body, it should demonstrate that it has chosen the least restrictive means.[50] In addition, in applying strict scrutiny, the EU courts might use an *ex nunc* test, examining whether the practical application of the measure or decision really demonstrates its effectiveness, rather than *ex tunc* review, examining whether the decision-making bodies could expect the measure to be effective. Finally, strict scrutiny might imply that procedural guarantees and remedies are

[42] J.H. Gerards, *Judicial Review in Equal Treatment Cases* (Martinus Nijhoff, 2005), at 80.

[43] cf Scott and Sturm, *op cit* n 34 *supra*, at 2 and 6.

[44] See, with references, Gerards, *op cit* n 42 *supra*, at 80.

[45] cf Craig, *op cit* n 40 *supra*, at 657.

[46] cf J.H. Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', (2004) 51 *Netherlands International Law Review* 135, at 140 and, critically, J.C. Rutten, 'Elasticity in Constitutional Standards of Review: *Adarand Constructors Inc. v. Pena* and Continuing Uncertainty in the Supreme Court's Equal Protection Jurisprudence', (1997) 70 *Southern California Law Review* 591, at 634.

[47] Indeed, it is valuable to do so, since the 'sliding scale' model does not offer much in terms of clarity and predictability—see Rutten, *op cit* n 46 *supra*, at 634. See also J. Rivers, 'Proportionality and Variable Intensity of Review', (2006) 65 *Cambridge Law Journal* 174, at 203, distinguishing between a large, a moderate and a small degree of restraint.

[48] See Gerards, *op cit* n 42 *supra*, at 82 and 675 ff, developing a variety of standards of review to be used in equal treatment cases; Craig, *op cit* n 40 *supra*, at 468 ff, analysing the standards applied by the ECJ and the Court of First Instance.

[49] cf J. Snell, *Goods and Services in EC Law. A Study of the Relationship Between the Freedoms* (Oxford University Press 2002), at 174.

[50] cf Tridimas, *op cit* n 39 *supra*, at 212.

required to offer the affected person or organisation the opportunity to complain about a violation of their rights and interests.[51]

Distinguishing such 'levels' of intensity and defining clear standards of proof and judicial review that correspond to these levels is highly valuable from the perspective of predictability and transparency of judicial review.[52] National bodies and individuals will know what to expect in terms of burden of proof and standards of review if a certain measure or decision is taken. Furthermore, if national authorities know that the supranational courts' scrutiny is more intensive in particular situations, they may pay more attention to the quality of the decision-making process and to the reasonableness of the outcome. The responsibility for sound legislation and decision making is then placed where it belongs—with the legislature and the administrative authorities.

However, even though systematic use of levels of intensity may be considered to be desirable, it is difficult to achieve. To show the need for improvement of the EU courts' case-law on this point, the next section will provide an analysis of the way in which the EU courts determine the intensity of their review in cases in which the principle of proportionality is applied. This analysis is followed by a similar analysis of the case-law of the ECtHR, which will serve both as a contrast and as a source of inspiration for improvement.

III Intensity of Review in the EU Courts' Application of the Principle of Proportionality

A Introduction

The principle of proportionality constitutes a core principle for EU law.[53] It is often invoked before the EU courts, both in cases concerning EU regulation or policy and in cases about national norms or decisions.[54] Proportionality review is generally considered to demand the application of three subtests, namely the tests of suitability, necessity and proportionality *stricto sensu* (ie the test of the reasonableness of the balance struck between the various interests concerned).[55] All of these tests clearly demand an assessment to be made of policy considerations and political choices. The need for such assessment is sometimes said to make the principle rather ill-suited for judicial review.[56] It is difficult for judges, after all, to value the balance struck by

[51] *ibid*, at 194.

[52] cf Craig, *op cit* n 40 *supra*, at 471–472.

[53] cf J. Schwarze, *European Administrative Law* (Sweet & Maxwell, rev 1st edn, 2006), at 677 and 718–726, considering that there are reasons to state that, in the area of European law, the principle has constitutional status or even the status of a fundamental right. See also Tridimas, *op cit* n 39 *supra*, at 136–137 and Jans *et al*, *op cit* n 38 *supra*, at 146.

[54] cf Tridimas, *op cit* n 39 *supra*, at 137. See also Schwarze, *ibid*, at 681 and G. de Búrca, 'The Principle of Proportionality and its Application in EC Law', (1993) *Yearbook of European Law* 105, at 114–115.

[55] See generally O. Koch, *Der Grundsatz der Verhältnismaßigkeit in der Rechtsprechung des Gerichtshofs der Europäische Gemeinschaften* (Duncker & Humblot, 2003); F.G. Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law', in E. Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart, 1999), 1; de Búrca, *op cit* n 54 *supra*, at 112–113; Jans *et al*, *op cit* n 38 *supra*, at 148–149. Importantly, however, although all of the three sub-tests are recognised and used in European law, the ECJ appears to be rather ambiguous as regards their application. See, more elaborately, Koch, *ibid*, at 199 ff; see also Jans *et al*, *op cit* n 38 *supra*, at 148 and Tridimas, *op cit* n 39 *supra*, at 139 (arguing that really only two subtests are applied).

[56] cf, eg, J.M. O'Fallon, 'Adjudication and Contested Concepts: The Case of Equal Protection', (1979) 54

policy-making bodies, or to gather sufficient factual information to be able to conclude that the goals of a measure could have been attained equally well by less intrusive means.[57] It is not surprising, therefore, that deferential review is often considered appropriate in cases in which the principle of proportionality has been invoked.[58] Nevertheless, there are also occasions in which the 'soft touch' approach is replaced by very strict scrutiny, especially cases concerning interference with fundamental rights.[59]

As a result, the European proportionality case-law constitutes a good object of analysis of the factors determining the intensity of the EU courts' review.[60] To illustrate the use of different levels of intensity in European proportionality review, this section will offer the results of an analysis that has been made of the way in which the EU courts have expressed themselves on the applicable level of intensity and on the factors determining their choice for a certain intensity of review. The analysis pertains to judgments of the ECJ and the General Court from January 2004 until May 2009 in which a plea regarding the principle of proportionality has been expressly addressed by the courts.[61] Decisions relating to penalties or other financial burdens have not been analysed, since the proportionality test then has a different character.[62] Thus, the analysis only dealt with cases in which proportionality has been invoked as a general principle for legislative or discretionary policy choices, either by national authorities (eg in the context of free movement of goods, provision of services, protection of fundamental rights, citizenship) or Community institutions (eg in the area of agriculture).

As a preliminary to the analysis provided in this section, it must be stressed that determination of the level of intensity of review does not appear to be an issue that the European courts play much express attention to.[63] The EU courts' variation of the intensity of review seems to have grown naturally and incrementally, rather than having been consciously introduced as a well-considered and useful judicial instrument. There is no sign of any clear judicial doctrine that explains the use of the levels of review and their consequences, nor are there any cases in which the ECJ has laid down a clear list of intensity determining factors. The ECJ does not even seem to distinguish expressly between different levels of intensity, although it evidently makes

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New York University Law Review 19, at 43 and T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing', (1987) 96 *Yale Law Journal* 943, at 973–974. See more specifically for the EU courts, de Búrca, *ibid*, at 107.

[57] cf de Búrca, *ibid*, at 108–109; J.H. Jans, 'Proportionality Revisited', (2000) 27 *Legal Issues of European Integration* 248; J. Snell, 'True Proportionality and Free Movement of Goods and Services', (2000) *European Business Law Review* 48, at 50–51; B. Schueler, 'Methods of Application of the Proportionality Principle in Environmental Law', (2008) 35 *Legal Issues of European Integration* 231, at 233–234.

[58] See, in particular, Snell, *ibid*, at 51.

[59] See section IIIBd.

[60] This is a well-known and carefully researched premise. For some important case-law analyses underlying this premise, see, eg, de Búrca, *op cit* n 54 *supra*, at 111 ff; Gerards, *op cit* n 42 *supra*, at 307 ff; Craig, *op cit* n 40 *supra*, at 704 ff; Tridimas, *op cit* n 39 *supra*, at 138 ff.

[61] The case-law analysis has been supplemented by a study of cases which are often mentioned in scholarly literature on the principle of proportionality or on intensity of judicial review; in particular Craig, *op cit* n 40 *supra*; Schwarze, *op cit* n 53 *supra*; Tridimas, *op cit* n 39 *supra*; Gerards, *op cit* n 42 *supra* (in the context of non-discrimination).

[62] It is then rather a test of excessiveness; cf Schwarze, *ibid*, at 861.

[63] cf Craig, *op cit* n 40 *supra*, at 472.

a difference between (very) marginal and (very) strict review.[64] This means that levels of review and intensity-determining factors had to be traced by looking closely for correspondence between certain factual or legal circumstances and the use of certain standards of review. As a result, the factors discussed in the remainder of this section are based on interpretation of the EU courts' case-law, rather than on clear expressions and statements by the EU courts about their relevance and meaning. However, even if, as a consequence, some of the classifications of the courts' case-law may be controversial, at least they may provide an indication and a basis for further analysis and debate.

B Factors Determining the Intensity of the EU Courts' Review

a) Nature of the Interests Impaired; Seriousness and Nature of the Interference

The nature of the interests harmed by the relevant measure or decision is one first important factor in determining the appropriate level of review. If a central Community interest has been impaired, such as free movement rights or the possibilities for interstate trade, the European courts will usually apply their strictest level of review.[65] This is especially true for cases brought by the European Commission against a Member State for non-compliance with Community rules.[66] Measures or decisions that impede the attainment of the overall aims of the EU are *a priori* considered unacceptable and undesirable by the courts and are generally assessed critically for their reasonableness and appropriateness. The EU courts in these cases demand 'overriding interests'[67] or 'imperative reasons relating to the public interest'[68] to be advanced in justification of such a measure or decision. They will assess the arguments presented by the national authorities in defence of the measure in great detail and they demand precise and convincing evidence to be advanced to establish the necessity of the derogating

[64] In particular Gerards, *op cit* n 46 *supra*; Gerards, *op cit* n 42 *supra*, at 357 ff; Craig, *op cit* n 40 *supra*, at 472, 477 and 479.

[65] Craig, *ibid*, at 704.

[66] cf *ibid*, at 704; Wouters, *op cit* n 29 *supra*, at 56; Tridimas, *op cit* n 39 *supra*, at 193. See, eg, Case C-36/02, *Omega Spielhallen* [2004] ECR I-9609; Case C-24/00, *Commission v France (vitamins and caffeine)* [2004] ECR I-1277; Case C-387/99, *Commission v Germany (vitamin preparations)* [2004] ECR I-3751; Case C-463/01, *Commission v Germany (German bottles)* [2004] ECR I-11705; Case C-41/02, *Commission v Netherlands (vitamins and minerals)* [2004] ECR I-11375; Case C-319/05, *Commission v Germany (garlic capsules)* [2007] ECR I-9811; Case C-444/05, *Stamatelaki* [2007] ECR I-3185; Case C-297/05, *Commission v Netherlands (identification and roadworthiness of vehicles)* [2007] ECR I-7467; Case C-161/07, *Commission v Austria (work permit exception certificates for self-employed)* (unreported); Case C-265/06, *Commission v Portugal (tinted film on car windows)* [2008] ECR I-2245; Case C-88/07, *Commission v Spain (medicinal herb products)* (unreported); Case C-169/07, *Hartlauer Handelsgesellschaft* (unreported).

[67] eg Case C-444/05, *Stamatelaki* [2007] ECR I-3185; Case C-297/05, *Commission v Netherlands (identification and roadworthiness of vehicles)* [2007] ECR I-7467; Case C-438/05, *Viking Line* [2007] ECR I-10779; Case C-341/05, *Laval* [2007] ECR I-11767; Case C-265/06, *Commission v Portugal (tinted film on car windows)* [2008] ECR I-2245; Case C-88/07, *Commission v Spain (medicinal herb products)* (unreported); Case C-169/07, *Hartlauer Handelsgesellschaft* (unreported).

[68] eg Case C-76/90, *Säger* [1991] ECR 4221; Case C-36/02, *Omega Spielhallen* [2004] ECR I-9609; Case C-463/01, *Commission v Germany (German bottles)* [2004] ECR I-11705.

measure.[69] In addition, the EU courts in these cases often mention the (hypothetical) availability of less intrusive means that might have been chosen as an alternative to the contested measure.[70]

However, this particular factor is not always of prevailing importance in determining the courts' intensity of review. If Community interests are affected by a measure adopted by one of the Community institutions, the courts do not always appear to apply intensive review.[71] This can be explained by the presence of other important intensity-determining factors, such as the general discretion the Community legislature has in regulating complex economic policy areas. This factor will be discussed in section IIIBc below.

In addition, the *degree* of interference with Community interests may be of importance to the intensity of the courts' review. It is obvious that the courts will apply their strictest scrutiny to clear expressions of national protectionism and overt forms of discrimination.[72] A classic example is the case about the German *Rheinheitsgebot*, in which the ECJ applied a very strict test because the national restrictions at stake were particularly far-reaching.[73] Another notorious case is the *British poultry* case, in which the ECJ suspected that limitations on the import of poultry were not so much introduced to combat animal disease (as had been pleaded by the British government), but to prevent the import of French turkey for the Christmas market (which threatened the British production).[74] In this case too, the ECJ was extremely strict in its review of the justification advanced by the government.

In line with this case-law the ECJ also seems to demand a stronger justification if a restriction of free trade is particularly serious, as in the situation in which an absolute prohibition is contested or a system of prior authorisation or licensing is maintained.[75] In those cases, the ECJ will usually not accept that there were no other, less restrictive means available to achieve the aims pursued.[76] On the other hand, in cases in which

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[69] eg Case C-319/05, *Commission v Germany (garlic capsules)* [2007] ECR I-9811; Case C-161/07, *Commission v Austria (work permit exception certificates for self-employed)* (unreported); Case C-88/07, *Commission v Spain (medicinal herb products)* (unreported).

[70] eg Case C-387/99, *Commission v Germany (vitamin preparations)* [2004] ECR I-3751; Case C-444/05, *Stamatelaki* [2007] ECR I-3185; Case C-161/07, *Commission v Austria (work permit exception certificates for self-employed)* (unreported); Case C-297/05, *Commission v Netherlands (identification and roadworthiness of vehicles)* [2007] ECR I-7467; Case C-319/05, *Commission v Germany (garlic capsules)* [2007] ECR I-9811; Case C-265/06, *Commission v Portugal (tinted film on car windows*) [2008] ECR I-2245.

[71] eg Joined Cases C-184/02 and C-223/02, *Spain and Finland v European Parliament and Council (self-employed drivers)* [2004] ECR I-7789, in which the court mentioned that the measure harmed freedoms central to Community law, such as the freedom to pursue an occupation and the freedom to conduct a business (para 51), but the measure was taken in the area of the common transport policy, in which the Community legislature enjoys wide discretion (para 56).

[72] cf Jans, *op cit* n 57 *supra*, at 253; Craig, *op cit* n 40 *supra*, at 706.

[73] Case 178/84, *Commission v Germany (Rheinheitsgebot)* [1987] ECR 1227, para 47.

[74] Case 40/82, *Commission v UK (Poultry)* [1982] ECR 2793, in particular paras 40 and 41; see also the opinion of AG Capotorti at 2845 and cf de Búrca, *op cit* n 54 *supra*, at 131–132. See also Sir Gordon Slynn, 'The Concept of the Free Movement of Goods and the Reservation for National Action under Article 36 EEC Treaty', in J. Schwarze (ed), *Discretionary Powers of the Member States in the Field of Economic Policies and their Limits under the EEC Treaty* (Nomos Verlagsgesellschaft, 1987), 17, at 21; de Búrca, *ibid*, at 139; Wouters, *op cit* n 29 *supra*, at 56.

[75] eg Case C-444/05, *Stamatelaki* [2007] ECR I-3185 (absolute exclusion of reimbursement of the cost of treatment provided in a private hospital in another Member State); Case C-319/05, *Commission v Germany (garlic capsules)* [2007] ECR I-9811, para 89; Case C-88/07, *Commission v Spain (medicinal herb products)* (unreported), para 91.

[76] Case C-444/05, *Stamatelaki* [2007] ECR I-3185, para 35.

there is no particularly serious interference with a European interest, less intensive scrutiny is sometimes applied, especially if the choice for restraint is supported by other intensity-reducing factors.[77]

Finally, if no (central) Community interest is at stake, but the contested measure or decision only affects national or individual interests (not being a fundamental right),[78] the EU courts usually leave the authorities with more leeway to decide.[79] This is visible especially when the aim or effect of the measure is to *further* Community interests, rather than to harm them. This is disclosed, for example, by the case-law regarding implementation of Community policies, such as the common agricultural policy or the policies on public health (in particular food additives), transport, road safety or animal welfare.[80] It does not appear to be of any real significance here whether the measure or decision has been adopted by a national body or a Community institution—if an implementation measure furthering Community interests has been adopted by the national legislature, the Community courts will rely on the deferential test as much as when the measure would have been introduced by the European Commission.[81]

It is thus clear that the nature of the aims and interests pursued and protected and the seriousness of the interference play an important role in the determination of the proper level of review by the EU courts.[82] At first glance the use of this factor may not seem to fit in well with the general reasons for variation in the intensity of review as expounded in section II of this paper. It has been explained there that, in theory, intensification of judicial review can be considered acceptable if there is objective reason to suppose that the decision-making process shows important defects which should be repaired by the judiciary. For the European courts, however, this does not seem to be the main reason to opt for a heightened level of review. The primary reason for variation in the level of review seems to be substantive in nature (ie related to the attainment of the EU's main goals), rather than procedural (ie related to flaws in the underlying decision-making processes).[83] However, in the particular European context it is quite understandable that the factor concerning the importance of the protected interests and the nature of the interference is used in this manner. The central objectives of the EC Treaty have always played a pivotal role in the EU courts' interpretation and application of Community law. In building the European legal order, it has been essential for the courts to

[77] See, eg, Joined Cases C-1/90 and C-176/90, *Aragonesa* [1990] ECR I-4151, in which the court held, with respect to a Spanish prohibition on advertisements for drinks with an alcohol content higher than 23%: 'A national measure such as that at issue restricts freedom of trade only to a limited extent since it concerns only beverages having an alcoholic strength of more than 23 degrees. In principle, the latter criterion does not appear to be manifestly unreasonable as part of a campaign against alcoholism' (para 17). In this case, the lack of a serious interference was combined with the lack of consensus on the prevention of alcoholism (see section IIIBb). See also Gerards, *op cit* n 42 *supra*, at 339.

[78] See section IIIBd.

[79] eg Case C-499/06, *Nerkowska* [2008] ECR I-3993.

[80] eg Case T-19/01, *Chiquita Brands International* [2005] ECR II-315; Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health* [2005] ECR I-6451; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA* [2005] ECR I-10423; Case C-504/04, *Agrarproduktion Staebelow* (unreported), Case C-326/05P, *Industrias Químicas del Vallés* (unreported), Case C-375/05, *Geuting* [2007] ECR I-7983; Case C-491/06, *Danske Svineproducenter* [2008] ECR I-3339; Case C-448/06, *cp-Pharma* (unreported), Case T-75/06, *Bayer Crop-Science et al* (unreported).

[81] For cases in which national measures were at stake, see, eg, Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health* [2005] ECR I-6451; Case C-491/06, *Danske Svineproducenter* [2008] ECR I-3339.

[82] See also de Búrca, *op cit* n 54 *supra*, at 148 and Tridimas, *op cit* n 39 *supra*, at 193.

[83] cf Craig, *op cit* n 40 *supra*, at 704.

'punish' both national and institutional behaviour that is contrary to the central aims of the EC Treaty, whilst encouraging decisions and measures furthering such objectives. Since the aims and objectives of the EC Treaty are relatively clear and even have been laid down in the text of the Treaty, this factor is easy to use as a basis for variation in intensity of review.[84]

b) Contra-Indication—Nature of the Protected Interests

i) Objectives on which there is no European Consensus

The EU courts highly value the aims that are central to the EU treaties, which means that they usually strictly scrutinise Community and national measures that would seem to hamper the realisation of these aims. There is, however, an important contra-indication to this. The EU courts will apply a more deferential test (though not a really marginal one) if the contested measure or decision is meant to further an interest on which there is no consensus within the EU.[85] This contra-indication is present, for example, if a national measure aims to protect public order or public policy, as in the German case of *Omega Spielhallen*.[86] This case concerned a Germany prohibition on laser games, which had as a consequence that an English company could not sell a franchise to a German company that planned to run a 'laserdrome'. On basis of the case-law discussed above, one would expect the ECJ to apply strict scrutiny in this case, since the impossibility to sell the franchise interfered with the fundamental Community freedom to provide services. Indeed, the court referred to the usual formula that ' . . . the concept of "public policy" in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly', and it stressed that 'public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'.[87] However, it then stressed that 'the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another', and it held that '[t]he competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty'.[88] The ECJ also underlined that conceptions on the precise way to protect a fundamental right, such as the right to human dignity, may differ between the various member states. The necessity of a certain measure could therefore not be assessed by establishing that the German prohibition on laser games was not shared by many other states: ' . . . the need for, and proportionality of, the provisions adopted are not excluded merely

[84] However, sometimes this is not really helpful for the court. See, eg, Case C-438/05, *Viking Line* [2007] ECR I-10779 and C-341/05, *Laval* [2007] ECR I-11767, in which the ECJ found on basis of the EC Treaty that the Community not only has an economic interest but also a social purpose, which meant that the provisions of the EC Treaty on free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy (*Laval*, paras 104–105; *Viking Line*, paras 78–79). This case thus disclosed a conflict between the aims of the treaty and did not provide any clue as to the proper level of intensity to be applied. In the end, the ECJ did not pay express attention to the question of intensity of review at all, probably because of the difficulties in harmonising the conflicting intensity determining factors.

[85] See de Búrca, *op cit* n 54 *supra*, at 128; Snell, *op cit* n 49 *supra*, at 215; Craig, *op cit* n 40 *supra*, at 708.

[86] Case C-36/02, *Omega Spielhallen* [2004] ECR I-9609. See also, eg, Case 41/74, *Van Duyn* [1974] ECR 1337, para 18 and Joined Cases C-65/95 and C-111/95, *Shingara and Radiom* [1997] ECR I-3343, para 30.

[87] Para 30.

[88] Para 31.

because one Member State has chosen a system of protection different from that adopted by another State'.[89] The national authorities thus did not have to demonstrate that the prohibition was really 'indispensable' as a means to protect human dignity and public order. In addition, the ECJ did not pay express attention to the question whether the prohibition was effective as a means to protect human dignity and whether it met the general requirement of proportionality. All of these assessments were left to be made by the national authorities, which the ECJ considered to be better placed to estimate which measures were really needed to meet the essentially national standards of protection of human dignity. Thus, the review applied by the ECJ can rightly be considered to be deferential.

Similar examples of restraint can be found in cases in which sensitive fundamental rights or socially contested national issues and values are at stake, as in cases about the necessity of restricting gambling and lotteries,[90] the prevention of alcohol abuse,[91] protection of public morality,[92] national security,[93] protection of the rights of the child,[94] and sometimes even protection of public health[95] and road safety.[96] In many of these cases, the deference shown by the EU courts is witnessed by the fact that they do not *a priori* reject intrusive measures such as licensing systems, which they normally regard as serious interferences warranting intensive scrutiny (see section IIIBa).[97] In addition, the courts show themselves quite critical about the existence and effectiveness of possible alternative and less intrusive measures.[98] Even the government's obligation to show the appropriateness and necessity of a certain measure proves to be less difficult to bear in these cases.[99] Finally, in a large number of preliminary rulings concerning measures with objectives on which there is no European consensus, the ECJ

[89] Para 38.

[90] eg Case C-275/92, *Schindler* [1994] ECR I-1039, in which the ECJ held that national authorities need to have a sufficient degree of latitude to determine what is required ' . . . in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield' (para 61); see also, more elaborately, Case C-124/97, *Läärä* [1999] ECR I-6067, paras 36–39 and Joined Cases C-338/04, C-359/04 and C-360/04, *Placania* [2007] ECR I-1891, para 46.

[91] eg Case C-434/04, *Ahokainen and Leppik* [2006] ECR I-9171, paras 32–33, concerning the prevention of alcohol abuse. Cf also Craig, *op cit* n 40 *supra*, at 709.

[92] eg Case 34/79, *Henn and Darby* [1979] ECR 3795, para 15 and Case 121/85, *Conegate* [1986] ECR 1007, para 14.

[93] eg Case C-285/98, *Kreil* [2000] ECR I-69, para 24; see also Case C-83/94, *Leifer* [1995] ECR I-3231 and Case C-70/94, *Werner* [1995] ECR I-3189. See further Gerards, *op cit* n 42 *supra*, at 310 ff and 337 ff.

[94] Case C-244/06, *Dynamic Medien Vertriebs GmbH* (unreported), para 44.

[95] Case C-141/07, *Commissio Germany (supply of medicinal products)* (unreported), para 51.

[96] Case C-110/05, *Commission v Italy (motorcycle trailers)* (unreported), para 65. For overviews of the older case-law from which this trend appears, see in particular de Búrca, *op cit* n 54 *supra*, at 128 ff.

[97] Joined Cases C-338/04, C-359/04 and C-360/04, *Placania* [2007] ECR I-1891.

[98] eg Case C-141/07, *Commission v Germany (supply of medicinal products)* (unreported), para 58 (' . . . the approach upheld by the Commission [the alternative measure, JHG] . . . is likely to undermine the unity and balance of the system for the supply of medicinal products to hospitals in Germany and, consequently, the high level of public health protection which the Federal Republic of Germany seeks to achieve').

[99] *ibid*, para 66 (' . . . whilst it is true that it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions').

leaves it to the national court to decide on the necessity and appropriateness of a particular national measure to achieve the aims pursued.[100]

It may be derived from the analysed case-law that a clear lack of European consensus on important fundamental rights or on essential social values may trump the all-important rule that strict scrutiny is applied to measures harming inter-state trade or other vital European interests. It must be stressed, however, that the courts do not consistently appear to apply this factor. For example, as Wouters has shown, the ECJ has sometimes regarded national linguistic policy as closely related to national identity and culture.[101] In the *Groener* case, the ECJ implicitly seemed to allow Ireland significant latitude to support and promote the Irish language by means of the requirement for each tenured teacher at a public institution to have knowledge of Irish.[102] By contrast, in a number of cases relating to language requirements in Belgium, the ECJ showed far less deference.[103] Similar inconsistencies can be observed in the ECJ's case-law regarding national security.[104] It may therefore be concluded that the factor of national consensus can be of relevance to the determination of the EU courts' intensity of review, but it is not entirely clear to what extent it influences the intensity of its review, nor how it inter-relates with other intensity-determining factors.

ii) Objectives on which there is no Scientific Consensus

The ECJ has also sometimes stressed the latitude of the national authorities to assess the necessity and proportionality of certain measures because of a lack of *scientific* consensus.[105] An increasing number of cases concern limitations on trade in food stuffs (eg food with added vitamins or minerals) or measures aimed at the protection of the environment. In one of these cases (*Commission v Denmark*), the ECJ held that:

> . . . discretion relating to the protection of public health is particularly wide where it is shown that uncertainties continue to exist in the current state of scientific research as to certain substances, such as vitamins, which are not as a general rule harmful in themselves but may have special harmful effects solely if taken to excess as part of the general nutrition, the composition of which cannot be foreseen or monitored.[106]

The national authorities are thus left with some leeway because of the lack of scientific consensus on the objectives pursued and the suitability and necessity of certain measures to attain such objectives. However, in the very same case of *Commission v Denmark* the court has also formulated detailed standards to be met by the state as regards the proof of necessity and the required level of detail of the risk assessments underlying the relevant measures and decisions.[107] This means that the court in fact left

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[100] eg Joined Cases C-338/04, C-359/04 and C-360/04, *Placania* [2007] ECR I-1891, para 58; Case C-244/06, *Dynamic Medien Vertriebs GmbH* [2008] ECR I-505, para 52.

[101] Wouters, *op cit* n 29 *supra*, at 52 ff.

[102] Case C-379/89, *Groener* [1989] ECR 3967.

[103] Case C-369/89, *Piageme I* [1991] ECR I-2971 and Case C-85/94, *Piageme II* [1995] ECR I-2955; for a discussion of these cases, see Wouters, *op cit* n 29 *supra*, at 52.

[104] As mentioned above, the ECJ generally offers the states some discretion in deciding about the need for measures to protect national security, but sometimes no particularly marginal assessment can be seen in such cases (eg Case C-367/89, *Richardt* [1991] ECR 4621); see further de Búrca, *op cit* n 54 *supra*, at 134–135 and Gerards, *op cit* n 42 *supra*, at 338, n 462.

[105] cf Craig, *op cit* n 40 *supra*, at 706.

[106] Case C-192/01, *Commission v Denmark* [2003] ECR I-9693, para 43. See also Case C-41/02, *Commission v Netherlands (vitamins and minerals)* [2004] ECR I-11375.

[107] Paras 45–47. See also eg Case C-41/02, *Commission v Netherlands (vitamins and minerals)* [2004] ECR I-11375, paras 47–54.

far less discretion than in cases such as *Omega*.[108] An explanation for this might be found in the fact that the difficulty in deciding about the reasonableness of a limitation in cases about the precautionary principle is not so much the absence of 'moral' consensus between the Member States, as well as the lack of scientific agreement on the risks to public health or the environment. In assessing such risks, the ECJ does not find itself in a position that is very different from that of the national courts.[109] This is different in cases where there is a lack of consensus about the importance of a certain right or fundamental interest, since the national authorities may really be in a better position to value the need for protection of such interests than the European courts are. Nevertheless, this does not provide a completely satisfactory explanation. The argument of scientific controversy is sometimes used by the court in cases about Community measures as a reason to show deference towards the Community institutions.[110] Most probably, the argument for deference is then not only supported by a lack of (scientific) consensus, but also by other factors in favour of marginal review, such as the existence of widely formulated legislative powers.[111]

c) Discretionary Powers

Another factor that is predictive for the intensity of the EU courts' review is the scope of the competences and powers of the relevant government institutions.[112] This factor is of particular relevance with regard to measures or decision taken by the Community institutions.[113] The Community institutions generally have wide discretionary powers as regards legislation.[114] In the field of administrative application of regulatory norms, the degree and nature of discretion is variable. Sometimes such discretion merely concerns the factual assessment that is needed to decide whether the conditions for application of a specific regulation are met.[115] In other cases, discretionary powers stretch to deciding whether or not a certain action will really be taken—a situation which Craig has termed 'classical discretion'.[116] Finally, as Craig has explained, even if the regulation does not contain any express or meaningful discretion, some measure of discretion may exist if the regulation is cast in general terms and requires interpretation to be applied in a concrete case.[117]

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[108] cf Craig, *op cit* n 40 *supra*, at 706; Tridimas, *op cit* n 39 *supra*, at 225.

[109] Gerards, *op cit* n 42 *supra*, at 335. See, however, Lord Slynn, who has correctly argued that even here the 'better placed' argument may be of some value, since the national authorities can usually better judge the national eating habits and the need to prohibit certain additives to prevent people from exceeding the maximum amounts (*op cit* n 74 *supra*, at 22).

[110] eg Case C-448/06, *cp-Pharma* (unreported), para 28, in which the court stated that discretion was all the more justified with regard to a file which ' . . . is particularly complex since it raises questions which are delicate and controversial from a scientific viewpoint', and pointed at the ongoing scientific uncertainty and divergent scientific opinions on the topic. Different from the cases about the precautionary principle, however, the court in this case really relied on the findings of the European Commission and did not exercise any kind of rigorous scrutiny.

[111] See section IIIBc.

[112] cf de Búrca, *op cit* n 54 *supra*, at 118.

[113] cf Craig, *op cit* n 40 *supra*, at 668–669.

[114] Although it must be remarked that the discretion may be limited to some extent by the division of competence between the Community and the Member State, by fundamental rights, and by general principles such as the principle of subsidiarity.

[115] Craig has termed such discretion 'jurisdictional discretion': Craig, *op cit* n 40 *supra*, at 433.

[116] *ibid*, at 434.

[117] *ibid*, at 433.

As an intensity-determining factor, the use of the degree of discretion can be explained by the 'better placed' argument mentioned in section II. Legislative organs are generally better equipped than the courts to take difficult political decisions, to assess complex sets of conflicting interests and to investigate all kinds of possible solutions and measures. Similarly, if the legislature has considered that administrative discretion is necessary to meet the specific aims of a certain regulation, for example because a certain agency is well suited to gather relevant facts or to formulate a policy for the application of certain rules, there is good reason for the court to respect the decisions resulting from the exercise of such powers.[118] It is therefore not surprising that the existence of wide regulatory or administrative discretion has such a great impact on the intensity of review by the European courts. If the relevant Community provisions grant wide discretionary powers to the institutions, and especially if the exercise of such powers requires political choices and complex economic or social assessments to be made, the European courts usually consider this to constitute a good reason for deference.[119]

The specific reasons given by the EU courts themselves for deference vary from case to case. Although the courts most often mention the factors of political choice and the necessity of making complex social and economic assessments, they sometimes also refer to particular difficulties, such as the need for highly technical assessments,[120] or the difficulties in legislating on questions which are delicate and controversial from a scientific viewpoint[121]. The EU courts only rarely refer to the formulation of the relevant regulative norms as a basis for marginal review.[122] More often, the courts stress in general that the Community legislature has a broad discretion corresponding to the political responsibilities given to it by the relevant EC provisions.[123] For example, in the *Chiquita* case, the Court of First Instance held that its judicial review ought to be limited, ' . . . especially if, in establishing a common organisation of the market, the Council is required to reconcile divergent interests and thus to select options within the context of the policy choices which are its own responsibility'.[124]

The effect of the very marginal test in *Chiquita* was that the Court of First Instance really only established that the Council had weighed the relevant interests and that the applicant had not proved that the measures were manifestly inappropriate. The burden of proof thus was clearly placed with the disadvantaged party. The Court of First Instance did not at all pay attention to the reasonableness of the balance struck by the Community legislature, nor to the necessity of the measure.[125] In other cases, too, the recognition of broad discretionary powers mostly results in very marginal tests. This is clear from the use of formulas such as the test of 'manifest unreasonableness' or

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[118] *ibid*, at 472.

[119] eg Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health* [2005] ECR I-6451, para 52; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA* [2005] ECR I-10423, para 69; Case C-266/05P, *Sison* [2007] ECR I-1233, para 33.

[120] eg Case C-326/05P, *Industrias Químicas del Vallés* [2007] ECR I-6557, para 75.

[121] eg Case C-448/06, *cp-Pharma* (unreported), paras 28–30 (mentioning the situation where the need for restrictive measures is not supported by conclusive scientific evidence).

[122] See, however, Case C-266/05P, *Sison* [2007] ECR I-1233, paras 36–37 (referring to the very general criteria set out in a regulation and pointing at the preparatory documents from which it appeared that a broad discretion for the Council was envisaged).

[123] eg Case T-19/01, *Chiquita Brands International* [2005] ECR II-315, para 228 (referring to the common agricultural policy and Arts 34 and 37 EC); Case C-375/05, *Geuting* [2007] ECR I-7983, para 44.

[124] *Chiquita Brands International*, *ibid*, para 228.

[125] For a somewhat comparable approach, see Case C-375/05, *Geuting* [2007] ECR I-7983.

'manifest error', as well as from the very concise and rather formal reasoning by the EU courts. In many cases, the courts merely state that no evidence has been submitted from which it appears that a measure is manifestly inappropriate or unnecessary, and in most cases they do not pay any express attention to the weight and nature of the interests harmed by the contested measure or decision.[126]

The factor of discretion is used in particular in cases concerning the validity of Community measures. Nonetheless, it is also sometimes visible in cases about national measures. An example is the case of *Danske Svineproducenter*, in which the ECJ accepted that the Member States must be recognised to have a clear margin of discretion since the applicable directive did not lay down specific technical requirements as regards animal transport.[127] This finding may be explained by the fact that the national legislature in this case really operated as an extension of the Community legislature. The formulas that are normally used by the courts in the context of Community regulatory acts were therefore applied to national legislation. Interestingly, however, the national legislation was subjected to the substantive standards applying to national legislation, ie the requirements of necessity and proportionality rather than the standards of manifest inappropriateness or manifest error. Although the ECJ finally concluded that the national measures corresponded to these standards, the standards themselves were purportedly somewhat stricter than those applied to 'real' Community measures. Thus, there may still be some difference between the margin of discretion allowed to Community institutions and to national institutions.

In the case of *Dankse Svineproducenter*, another explanation for the ECJ's heightened review might be found in the risk that national measures harm inter-state trade, which is in itself an argument for stricter scrutiny. The ECJ mostly does not pay express attention to the existence of such conflicting factors. Usually, it just silently heightens the intensity of its review, which means that it takes a closer look at the overall reasonableness of the measure. Another example of this can be found in the case of *ABNA*, concerning a Community measure that imposed an obligation on animal feed producers to provide highly detailed information about all the feed materials and their amount in feeding-stuffs.[128] According to the feed producers, the measure seriously affected their economic interests as it obliged them to disclose the formulas for the composition of their products. They thereby ran the risk of those products being used as models by the customers, the manufacturers not being able to benefit of the investments made in terms of research and innovation. The ECJ mentioned the broad discretion enjoyed by the Community legislature and referred to the test of manifest inappropriateness as the relevant standard.[129] Subsequently, however, it looked critically at the need to adopt such an intrusive measure and it finally concluded that no necessity for it could be established in the case.[130] The resultant test was clearly more intensive than that used in, for example, the *Chiquita* case. The most likely explanation for this can be found in the ECJ's express reference to the serious impact of the

[126] There are some cases in which the test is rather more elaborate; even then, however, the test closely follows the lines of the relevant measure and its legislative history—see, eg, Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health* [2005] ECR I-6451, paras 55 ff.

[127] Case C-491/06, *Danske Svineproducenter* [2008] ECR I-3339, para 38.

[128] Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA* [2005] ECR I-10423.

[129] *ibid*, para 69.

[130] *ibid*, paras 83–85.

obligation for the economic interests of manufacturers, which were close to property rights.[131] The precise interaction between the conflicting factors, however, remains unclear.

d) Fundamental Rights

Finally, the EU courts' review can be intensified if a fundamental right of an individual has been interfered with.[132] It has already been mentioned that the EU courts' assessment of a case may be stricter if important economic interests of manufacturers have been seriously interfered with, even if Community legislature generally has broad discretion to regulate the issue.[133] Normally, however, strict scrutiny is almost exclusively limited to cases concerning fundamental rights as recognised on the basis of the common traditions of the Member States and the case-law of the ECtHR.[134] A classic example is the case of *Familiapress*, concerning an Austrian prohibition on the distribution of newspapers and magazines containing crossword puzzles.[135] The result of the prohibition was that a German publisher could not distribute a weekly magazine in Austria. The ECJ held that the Austrian prohibition did not only harm inter-state trade, but it also interfered with the publisher's freedom of expression. Although it did not expressly state that this should be cause for intensified review, and it even left the final decision on necessity and proportionality of the prohibition to the national courts, the ECJ formulated very clear and strict standards of review. Implicitly, thus, the interference with a fundamental right seems to have led the ECJ to apply a heightened standard of review.[136]

Even if a fundamental right is at stake, however, it seems clear that the EU courts will not always regard this as a reason for intensified review. The courts rather seem to apply a kind of 'core right' doctrine, which means that they only intensify the level of review if the very essence of a certain fundamental right has been affected. By using this doctrine the courts seem to copy some elements of the margin of appreciation doctrine that has been developed by the ECtHR.[137] The scope of this margin differs from case to case, depending on the interests and rights that are at stake.[138] The effect of this is clearly visible in the case of *Karner*, which concerned restrictive Austrian legislation on misleading advertisements.[139] The ECJ found that this legislation affected the freedom of expression and it stressed that this freedom constitutes one of the pillars of democratic society. However, referring to the case-law of the ECtHR on commercial expression, it considered that:

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[131] *ibid*, para 82.

[132] cf de Búrca, *op cit* n 54 *supra*, at 146.

[133] See section IIIBc; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA* [2005] ECR I-10423. Cf de Búrca, *ibid*, at 123.

[134] This situation differs from that analysed in section IIIBa, which concerned measures that were protective of fundamental rights and thereby harmed Community interests. In those cases the effect of the presence of fundamental rights is contrariwise—the Member States are afforded more discretion to protect these interest and, consequently, the court's test is rather marginal in character. This section concerns the opposite situation, in which national or Community measures clearly harm individual fundamental rights. See also Craig, *op cit* n 40 *supra*, at 672.

[135] Case C-368/95, *Familiapress* [1997] ECR I-3689, para 24.

[136] For other examples, see in particular Craig, *op cit* n 40 *supra*, at 672–673.

[137] See section IVCd.

[138] *ibid*.

[139] Case C-71/02, *Karner* [2004] ECR I-3024, para 51.

> [w]hen the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising.[140]

Thus, the EU courts will only apply intensified review if the measure actually and seriously affects an important fundamental right.[141] In practice, such cases are rare.

C Conclusion

The case-law analysis provided in this section has disclosed that the EU courts do indeed vary the intensity of their review. In determining the level of intensity, they sometimes expressly refer to arguments such as the 'better placed' argument, but they also implicitly make use of other arguments for variation. It has been mentioned, for example, that the EU courts' review is intensified if essential fundamental rights have been affected or if the national measures under scrutiny impede the achievement of the central aims and objectives of the Community. It is also clear that the EU courts sometimes use the possibilities for variation in intensity of review to solve particular problems of pluralism. The EU courts tend to apply deferential review if the aim of a certain measure is to protect individual interests that are considered to be of great importance on the national level, or on which there is no clear European consensus. Even if such a measure harms Community interests, respect for national traditions and constitutional values implies that the EU courts will not readily strike it down.

This means that the seeds for a European 'doctrine of deference' are already there. However, it is submitted that much better results could be achieved if the courts would use the possibilities of variable intensity of review far more systematically and structurally.[142] The present approach towards the levels of intensity seems to be rather haphazard and random. Both EU courts often mention formulas or standards associated with a certain intensity of review, but they do not really explain why a certain level of intensity is applied or what the choice for this level entails in terms of burden of proof or standards of review.[143] In addition, it is far from clear what the resulting level of review should be if intensity-determining factors pull in different directions.

Improvement of the legal reasoning of the EU courts on this issue is desirable, particularly against the background of the debate about constitutional pluralism and judicial review of legislation and policy decisions.[144] Contentedly, some inspiration as regards the possibilities of variable intensity of review can be found in the doctrine of the margin of appreciation as developed by the ECtHR. That is where this article will turn now.

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[140] Para 51.

[141] See for a similar example Case C-491/01, *British American Tobacco* [2002] ECR I-11453, paras 123, 149 and 153, in which the court applied a marginal test to an interference with property rights.

[142] cf Craig, *op cit* n 40 *supra*, at 471.

[143] *ibid*, at 469–470.

[144] *ibid*, at 472; Craig argues that it is necessary for the Community courts to find some principled basis for distinguishing the areas where they are willing to engage in more intensive factual scrutiny from those where they are not.

IV The Margin of Appreciation Doctrine of the ECtHR as a Source of Inspiration

A Introduction

Although the value of the margin of appreciation doctrine to the case-law of the ECtHR is sometimes questioned, it is widely accepted that the doctrine constitutes an important instrument for the ECtHR to accommodate its complex role as an international human rights court. Of course, the position of the ECtHR is different from that of the EU courts. Where the ECJ has developed a doctrine of supremacy and where its judgments in the preliminary reference procedure have *erga omnes* effect,[145] such a high level of penetration in the national legal orders is not visible in the context of the European Convention on Human Rights (the convention).[146] Although the ECtHR's decisions are binding, this is only so for the parties to the case decided by the court.[147] Furthermore, the ECtHR itself has stressed that there is no direct effect, let alone supremacy, of the convention provisions in the national legal orders.[148] As is true for all international law, the way the convention and the decisions of the ECtHR are implemented in national law is determined by the national constitutions.[149] In addition, even if the ECtHR has made clear that it has the ultimate power to protect the rights laid down in the convention,[150] it has not at all claimed that any degree of transfer of sovereignty has taken place.[151] At least formally, this means that the harmonising effect of the convention and the judgments of the ECtHR cannot be as obvious as that of EU legislation and the decisions of the ECJ.[152] It also means that the ECtHR to a lesser extent than the EU courts has to deal with the specific problematic of constitutional

[145] cf Rosas, *op cit* n 27 *supra*, at 16–42.

[146] cf D. Nicol, 'Lessons from Luxembourg: Federalisation and the Court of Human Rights', (2001) 26 *European Law Review—Human Rights Survey* HR/1, at HR/3 and Helfer and Slaughter, *op cit* n 9 *supra*, at 297.

[147] Art 46 of the European Convention on Human Rights.

[148] cf C. Warbrick, '"Federal" Aspects of the European Convention of Human Rights', (1989) 10 *Michigan Journal of International Law* 698, at 699. Nonetheless, the ECtHR has observed that the convention is more than 'just' an international convention (Application No 5310/71, *Ireland v UK (IRA Case)* Series A No 25, para 25; see Nicol, *op cit* n 146 *supra*, at HR/11).

[149] See expressly Application No 8793/73, *James and Others v UK* Series A No 98, para 84, where the court stressed that there is no obligation to incorporate the convention into domestic law and reiterated that '. . . neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention'. Cf G. 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. Of course there is supervision on the execution of the judgments of the ECtHR by the Committee of Ministers, but this supervision is one of persuasion rather than of real force; cf Warbrick, *ibid*, at 705. Although this might seem to be an important difference between the EU legal order and the convention legal order, this may be nuanced to a certain extent by the fact that EU law, too, relies to a large extent on the constitutional arrangements of the EU Member States, albeit in a rather different manner; on this, see Wouters, *op cit* n 29 *supra*, at 33.

[150] cf Application No 6538/74, *Sunday Times v UK* Series A No 30, para 59; see also Warbrick, *op cit* n 148 *supra*, at 719.

[151] To the contrary, the court tends to stress its subsidiary position and the primary responsibility of the states to guarantee the rights protected by the convention. See recently also, eg, Application No 46598/06, *Branko Tomašić v Croatia* (unreported) 15 January 2009, paras 73–74.

[152] cf Helfer and Slaughter, *op cit* n 9 *supra*, at 297. See also Nicol, who has indicated that '[o]n the spectrum of federalism . . . the Court of Human Rights . . . would sit somewhere between a classical international tribunal and the European Community's Court of Justice': Nicol, *op cit* n 146 *supra*, at HR/3.

pluralism, since this problematic is the particular result of the existence of two different legal orders that both lay a claim to final authority.

Such obvious differences notwithstanding, it is possible to detect important similarities between the ECtHR and the EU courts.[153] In practice, the convention is increasingly regarded as part and parcel of each national legal order.[154] The impact of the ECtHR's interpretations reaches far beyond the individual case at hand.[155] By defining positive obligations for the state parties as regards the enforcement of the convention, the ECtHR has influenced national policy and legislation with an increasing directness.[156] In recent years, it has even resorted to giving recommendations to the states to solve violations of the convention or to prevent future violations from occurring.[157] This does not mean an actual change in the legal or constitutional position of the convention or of the ECtHR.[158] It does mean, however, that its position is more similar to that of the EU courts than might seem to be the case if the legal situation were taken at face value.[159]

The increasing embeddedness of the convention in the national legal orders also appears to bring along some discussions of a pluralistic nature.[160] In particular the German Federal Constitutional Court (*Bundesverfassungsgericht*) has stressed that, even though it will normally follow the lead of the ECtHR, its own national constitution will remain the final test for application of the convention.[161] In recent years,

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[153] cf Nicol, *ibid*, at HR/3.

[154] Warbrick noted already in 1989 that '. . . [t]he European practice surprises because it interprets the Convention in a way which carries the provisions of the treaty so deeply into the legal systems of the member States, favoring a European standard over diverse national ones': Warbrick, *op cit* n 148 *supra*, at 699. See also Nicol, *ibid*, at HR/19 ('Gradually familiarity bred acceptance among national polities . . . '). It is sometimes even derived from this factual development that the interpretations provided by the ECtHR could be regarded as generally binding; see, in particular, S. Beljin, '*Bundesverfassungsgericht* on the Status of the European Convention of Human Rights and ECHR Decisions in the German Legal Order. Decision of 14 October 2004', (2005) 1 *European Constitutional Law Review* 553, at 558–559, referring to the reasoning provided by the German Federal Constitutional Court in the *Görgülü* case (*Bundesverfassungsgericht* 2 BvR 1481/04 of 14 October 2004).

[155] See further J.H. Gerards, 'Judicial Deliberations in the European Court of Human Rights', in N. Huls, M. Adams and J. Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings. Judicial Deliberations and Beyond* (T.M.C Asser Press, 2009), 407, at 410 ff; L.R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Stuctural Principle of the European Human Rights Regime', (2008) 19 *European Journal of International Law* 125.

[156] cf Nicol, *op cit* n 146 *supra*, at HR/15 ff. For an elaborate analysis of the various ways in which the ECtHR has given indirect effect to the convention, see Christoffersen, *op cit* n 38 *supra*, at 367 ff.

[157] See, eg, Application No 71503/01, *Assanidze v Georgia* ECHR 2004-II and Application No 27527/03, *L v Lithuania* (unreported) 11 September 2007. This is further illustrated by the development of the instrument of 'pilot-judgments'. In these judgments, the court does not limit itself to finding a violation of the convention, but it also indicates with some precision which measures should be taken on the national level to compensate, repair or, if possible, end a violation; see, eg, Application No 31443/96, *Broniowski v Poland* ECHR 2004-V; Application No 23032/02, *Lukenda v Slovenia* ECHR 2005-X; Application No 35014/97, *Hutten-Czapska v Poland* (unreported) 19 June 2006. See also Helfer, *op cit* n 155 *supra*, at 146 ff.

[158] In fact, the result of the ECtHR's approach is that national courts are empowered rather than weakened, since the ECtHR increasingly regards them as the primary enforcers of convention rights; see Nicol, *op cit* n 146 *supra*, at HR/18.

[159] cf Helfer and Slaughter, *op cit* n 9 *supra*, at 297.

[160] cf Helfer, *op cit* n 155 *supra*, at 130.

[161] *Bundesverfassungsgericht* 2 BvR 1481/04 of 14 October 2004. See in particular H.J. Papier, 'Execution and Effects of the Judgments of the European Court of Human Rights from the Perspective of German National Courts', (2006) 27 *Human Rights Law Journal* 1, at 2; M. Hartwig, 'Much Ado About Human

moreover, some leading scholars have openly doubted the mandate and legitimacy of the ECtHR to decide cases about fundamental rights.[162] This means that the ECtHR still has to struggle for the acceptance of its decisions and that its legitimacy is fragile. Careful attention to national sensitivities and differences still is an essential key to success.

Even though the EU courts and the ECtHR are totally different courts that operate in different contexts, there are thus sufficient similarities between them to make a comparison worth wile of the ways in which they deal with problems of pluralism. In this regard, it is valuable to recall that the ECtHR has noted early in its existence that a notion of judicial deference is essential to a court that finds itself in a supranational position:

> . . . the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.[163]

It is clear from these considerations that it is mainly the classic argument of subsidiarity that has inspired the ECtHR to develop its famous margin of appreciation doctrine.[164] The doctrine is based on the premise that it should primarily be left to the states to secure the rights protected by the convention—the ECtHR should only intervene if it is clear that they have not succeeded in doing so.[165] In addition, it transpires from the case that the court does not find itself well- to substitute a national legislature's opinion for its own.[166] It has also often been argued in defence of the doctrine that adequate protection of fundamental rights can be achieved in a variety of ways, so that it is certainly not always reasonable to proclaim that the ECtHR's approach is the only correct one.[167] It is important to guarantee fundamental rights in a way that matches the differences between national traditions and perceptions and that allows for cultural variation.[168] At the same time, the ECtHR must be watchful that fundamental rights

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Rights: The Federal Constitutional Court Confronts the European Court of Human Rights', (2005) 6 *German Law Journal* 869, at 875; see also Gerards, *op cit* n 155 *supra*, at 411.

[162] See most recently Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture (19 March 2009), in particular paras 23 and 38.

[163] Application No 1474/62, *Belgian Linguistics Case* Series A No 6, para I.B.10. See also Christoffersen, *op cit* n 38 *supra*, at 248.

[164] See in particular Application No 5493/72, *Handyside v UK* Series A No 24, para 48. Cf Helfer, *op cit* n 155 *supra*, at 128–129 and Christoffersen, *ibid*, at 229.

[165] See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), at 83. This also has practical advantages, as stressed by Helfer and Arai-Takahashi—if domestic judges and authorities act as 'first-line defenders' of convention rights, this will enhance judicial expediency and efficiency on the level of the ECtHR. Having regard to its limited resources, such a division of labour is of great value to the ECtHR: Helfer, *op cit* n 155 *supra*, at 128 and Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

[166] cf Arai-Takahashi, *ibid*, at 240.

[167] Gerards, *op cit* n 42 *supra*, at 168; see also Helfer, *op cit* n 155 *supra*, at 134; Arai-Takahashi, *op cit* n 165 *supra*, at 241; Warbrick, *op cit* n 148 *supra*, at 716.

[168] See Arai-Takahashi, *ibid*, at 235; Lord Hoffmann, *op cit* n 162 *supra*; S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006), at 224.

are guaranteed at a proper level and that cultural relativism is avoided.[169] In this area of tension, a margin of appreciation doctrine is a useful and flexible tool to determine the intensity of review of interferences with fundamental rights.[170] For that reason, the doctrine and its application will further be analysed in this section in some detail. First, a general overview will be provided of the operation of the doctrine (section IVB). Thereafter, the various factors determining the scope of the margin will be discussed (section IVC).

B Effects of the Margin of Appreciation Doctrine

Just like the ECJ and the Court of First Instance, the court uses a sliding scale model of intensity of review. Although it does distinguish between a 'narrow margin', a 'certain margin' and a 'wide margin', these formulas cannot be regarded as indicating specific 'tests' or 'levels' that result in a certain apportionment of the burden of proof or in an exact set of standards of review.[171] Nevertheless, there is a relatively clear difference between a wide margin and a narrow one. If a wide margin is allowed to the national authorities, the court usually only superficially and rather generally examines the choices made by the national authorities to see whether the result is (clearly) unreasonable or disproportionate, or places an excessive burden on the applicant.[172] The burden of proof to show that a national measure is unjustified is then often placed with the applicant parties.[173] In addition, the court frequently applies a rather

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[169] See, eg, P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?', (1998) 19 *Human Rights Law Journal* 1, at 12 and A. 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 57.

[170] R. St. J. Macdonald, 'The Margin of Appreciation', in R. St. J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993), 83, at 123; Arai-Takahashi, *op cit* n 165 *supra*, at 236; Ostrovsky, *ibid*, at 58.

[171] On the problematic translation from margin of appreciation into standards of review, see elaborately Christoffersen, *op cit* n 38 *supra*, at 265 ff and N. Lavender, 'The Problem of the Margin of Appreciation', (1997) 4 *European Human Rights Law Review* 380, at 387 ff.

[172] A classic example of deferential review is the case of Application No 8793/73, *James and Others v UK* Series A No 98, in which the court allowed the national authorities a wide margin of appreciation in the context of property regulation. This wide margin corresponded to a lenient test of necessity, the court explaining that '[i]t is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way' (para 51). For other examples, see Application No 8777/79, *Rasmussen v Denmark* Series A No 87, para 41; Application No 36515/97, *Fretté v France* ECHR 2002-I, para 42; Application No 69498/01, *Pla and Puncernau v Andorra* ECHR 2004-VIII, para 46; Application No 73049/01, *Anheuser-Busch Inc v Portugal* (unreported) 11 January 2007, para 83; Application No 59894/0, *Bulgakov v Ukraine* (unreported) 11 September 2007; Application No 35991/04, *Kearns* v *France* (unreported) 10 January 2008, paras 80–84. See further Gerards, *op cit* n 42 *supra*, at 155; P. 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, at 78 and 87.

[173] See, eg, Application No 18215/06, *Greenpeace eV and Others v Germany* (unreported) 12 May 2009 (decision). In this case the applicants complained of the refusal by the German government to take specific measures against car manufacturers in order to reduce respirable car dust emissions of diesel vehicles. The ECtHR held that it has a fundamentally subsidiary role in this type of case. Bearing this role in mind, it held that '. . . the applicants have not shown—and the documents submitted do not demonstrate—that the Contracting State, when it refused to take the specific measures requested by the applicants, exceeded its discretionary power . . . '.

procedural test in these cases—if it finds that the case has been carefully assessed and decided by the national authorities, it will mostly not find a violation.[174] By contrast, if a narrow margin is left, the court generally closely considers the facts of the case, carefully determining the interests at stake and deciding for itself where the balance between the conflicting interests should have been struck. The national authorities then bear the burden to show that the limitation of rights was based on careful and objective assessment of facts and interests and, more generally, that it was reasonable.[175] Furthermore, in most of these cases the court applies a strict test of necessity or subsidiarity, often mentioning the availability of less intrusive measures to underpin its judgment that the interference cannot be held to be justified, or criticising the lack of possibilities for individualised judgments on the national level.[176] Finally, the court in many cases requires additional procedural safeguards to be afforded by domestic law.[177]

The general line in the application of the margin of appreciation doctrine thus seems to be relatively clear. However, the practical application of the margin of appreciation doctrine is often appraised much more critically.[178] First of all, there does not always appear to be a close correspondence between the language of deference and the actual test applied by the court. It all too often occurs that the court elaborately reasons that a wide margin of appreciation should be left to the state, but it then carefully assesses the facts of the case to find out which interests were at stake and what weight should be accorded to these interests.[179] In the end the court may decide how these interests should be balanced, comparing the outcome of the national procedures with the result it considers to be the most desirable. If the national decision does not agree with the court's preferred outcome, it will find a violation of the convention regardless of the wide scope of the national margin of appreciation. Such a lack of correspondence between the margin of appreciation and the actual review of the measures or decisions can be regarded as a serious shortcoming, since it renders some of the possible advantages of the doctrine (predictability, clarity) simply non-existent. The same is true for the fact that the court frequently just mentions the margin of appreciation test and some factors determining its width, without explaining what the precise scope of the margin in the concrete case should be.[180] Some scholars have even argued that the court

[174] Eg Application No 36515/97, *Fretté v France* ECHR 2002-I, para 42; Application No 11810/03, *Maurice v France* (unreported) 6 October 2005, paras 118 ff; Application No 6339/05, *Evans v UK* (unreported) 10 April 2007, paras 83 ff; Application No 75201/01, *Grušovnik v Slovenia* (unreported) 9 June 2009 (decision). However, even a procedural test, combined with a wide margin of appreciation, may result in a finding of a violation; see, eg, Application No 44362/04, *Dickson v UK* ECHR 2007-VIII, para 85.

[175] See, eg, Application No 66746/01, *Connors v UK* (unreported) 27 May 2004, para 94. See also Application No 35082/04, *Makhmudov v Russia* (unreported) 26 July 2007.

[176] Eg Application No 13914/88, *Informationsverein Lentia v Austria* Series A No 276, paras 39 and 42; Application No 39293/98, *Fuentes Bobo v Spain* (unreported) 29 February 2000, para 49; Application Nos 30562/04 and 30566/04, *S and Marper v UK* (unreported) 4 December 2008, paras 119–120.

[177] eg *S and Marper v UK*, *ibid*, paras 103–104.

[178] For a conceptual analysis of the problems related to the court's application of the doctrine, see in particular Letsas, *op cit* n 165 *supra*, at 80 ff.

[179] For some recent examples, see Application No 69498/01, *Pla and Puncernau v Andorra* ECHR 2004-VIII; Application No 76900/01, *Öllinger v Austria* (unreported) 29 June 2006; Application No 34438/04 *Egeland and Hanseid v Norway* (unreported) 16 April 2009; Application No 28070/06 *A v Norway* (unreported) 9 April 2009.

[180] See eg Application No 6303/05, *Masaev v Norway* (unreported) 12 May 2009, in which the court first stated that, according to settled case-law, it leaves 'a certain margin of appreciation'. It continued to state

often uses the doctrine not so much as an instrument to determine the intensity of its review, but rather as an alternative formulation for finding a violation: If the court finds the interference to be unjustifiable, it will also find that the domestic authorities have transgressed their margin of appreciation.[181]

However, it would be unfortunate to discard the doctrine purely for reason of its inconsistent and sloppy use. If applied well, the doctrine might prove to be an interesting and important instrument to negotiate between the interests concerned with national and supranational decision-making and the interest of protecting fundamental rights on a sufficiently high level. For that reason, it is still valuable to analyse the factors used by the court to determine its intensity of review.

C Determining the Scope of the Margin of Appreciation

a) Introduction

In contrast to the ECJ, the ECtHR has often expressly listed the various factors that are relevant in determining the scope of the margin of appreciation and, consequently, the intensity of its review. The court itself gave the following overview of relevant factors in *S and Marper v UK*:[182]

> A margin of appreciation must be left to the competent national authorities . . . The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights . . . Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted . . . Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider . . . [183]

These general considerations do not, however, provide much clarity on the meaning of the named factors, which are broadly and rather vaguely formulated. In what follows, an attempt will therefore be made to shed some light on the interpretation of the various factors and their interaction. Hereinafter, three main factors will be distinguished: the 'common ground' factor (section IVCb), the 'better placed' argument (section IVCc) and the nature of the affected right or interest (section IVCd). In the academic literature on the margin of appreciation doctrine, many more factors have

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that '[i]n order to determine the scope of the margin of appreciation in the present case the Court must take into account what is at stake, namely the need to maintain true religious pluralism' (para 24). However, it did not conclude whether this means that the margin of appreciation should be wide or narrow, or something in between. As a result, the reader should derive any notion as to the applicable intensity of review from an interpretation of the substantive parts of the judgment, which is not how the margin of appreciation should work. See also Application No 29492/05, *Kudeshkina v Russia* (unreported) 26 February 2009, where the court only mentioned that 'a certain margin' should be left, without clarifying the scope of the margin in the particular case.

[181] See already MacDonald, *op cit* n 170 *supra*, at 85. Letsas has described this use as implying 'substantive concept' of the doctrine, which should not be confused with the 'structural concept' that primarily indicates the limits or intensity of review: Letsas, *op cit* n 165 *supra*, at 81. See, eg, Application No 34753/03, *Phull v France* ECHR 2005-I; Application No 21277/05, *Standard Verlags GmbH v Austria (No 2)* (unreported) 4 June 2009, para 54; in both cases the court found no violation of the convention since the national authorities remained within their margin of appreciation.

[182] Application Nos 30562/04 and 30566/04, *S and Marper v UK* (unreported) 4 December 2008.

[183] Para 102. An even more elaborate version can be found in Application No 66746/01, *Connors v UK* (unreported) 27 May 2004, para 82.

been distinguished, such as the character and weight of the aims pursued, the character of the state obligations, the seriousness of the interference[184] and the context of the interference.[185] In the case-law practice of the ECtHR, however, these additional factors appear to be closely related to the three main factors distinguished in this article.

b) The Common Ground Factor

According to the ECtHR, one of the most important intensity determining factors is the existence or lack of a 'common ground'.[186] In determining the scope of the margin of appreciation the ECtHR often refers to the existence or non-existence of a general consensus (or common ground) within the Council of Europe regarding the subject of the case at hand.[187] Generally, the use of the common ground factor means that the court will leave a wide margin of appreciation if there is no, or hardly any, consensus between the European states. There is well-known case-law of the court on the difference between such aims as the 'protection of morals' and 'maintaining the authority and impartiality of the judiciary'. The court considered in its classic *Handyside* case that it is not possible to find in the domestic law of the various contracting states a uniform European conception of morals, and it held that the view taken by the national legislation of the requirements of morals varies from time to time and from place to place.[188] For that reason it found that national authorities are in principle in a better position than the international judge to given an opinion on the exact content of these requirements.[189] In its later *Sunday Times* judgment, the court held that '[p]recisely the same cannot be said of the far more objective notion of the "authority of the judiciary"'.[190] It found that the domestic law and practice of the states revealed a fairly substantial measure of common ground in this area. Accordingly, it concluded that a more extensive European supervision could be considered reasonable.[191]

The use of the common ground factor can easily be explained from the perspective of subsidiarity and the need to take decisions at the European level that are acceptable to

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[184] If an interference with a fundamental right is very serious or even irreversible, the court expects stronger and more compelling reasons to be advanced in justification; see, eg, *Connors v UK*, *ibid*, para 86; Application Nos 46720, 72203/01 and 72552/01, *Jahn and Others v Germany* (unreported) 30 June 2005, para 94. The court mostly combines the factor of the nature or seriousness of the interference with the factor of the importance of the right concerned, or it considers the seriousness of the interference primarily in its substantive review of the balance struck by the national authorities. For that reason, this factor will not be independently discussed in this section.

[185] See in particular Arai-Takahashi, *op cit* n 165 *supra*, at 206 ff.

[186] cf Judge Malinverni, concurring opinion in the case of Application No 34438/04, *Egeland and Hanseid v Norway* (unreported) 16 April 2009, para 6.

[187] For some recent examples, see Application No 59894/00, *Bulgakov v Ukraine* (unreported) 11 September 2007, para 43(c); Application No 44362/04, *Dickson v UK* ECHR 2007-VIII, para 78; Application Nos 30562/04 and 30566/04, *S and Marper v UK* (unreported) 4 December 2008, para 102. The ECtHR also often refers to the common ground argument in cases concerning the meaning and scope of the convention provisions—it is then used as an interpretive instrument, rather than as an intensity-determining factor (see recently, eg, Application No 3453/97, *Demir and Baykara v Turkey* (unreported) 12 November 2008, paras 65–86). The specific case-law relating to the common ground argument as an interpretative instrument will not be discussed in the context of this article.

[188] Application No 5493/72, *Handyside v UK* Series A No 24, para 47.

[189] *ibid.* See also, eg, Application No 17419/90, *Wingrove v UK* ECHR 1996-V, para 58; Application No 21830, *X, Y and Z v UK* ECHR 1997-II, para 44; Application No 44179/98, *Murphy v Ireland* ECHR 2003-IX, para 67.

[190] Application No 6538/74, *Sunday Times v UK* Series A No 30, para 46.

[191] *ibid*.

the states. A clear lack of European consensus implies that there will be hardly any support for the ECtHR to provide a far-reaching judgment on a sensitive issue. This is different if there is clear evidence of European agreement on a certain issue. The court can then easily follow the general opinion prevailing in the European states, which may enhance the legitimacy and acceptability of its judgments. Conversely, the lack of a European consensus may justify a wide margin,[192] since the court may then not feel empowered to take a critical 'second look' at the national measure or decision. As an intensity-determining factor in a pluralist legal order, the common ground factor is clearly attractive.[193] In addition, it seems rather easy to establish the existence or lack of a common ground in an objective manner. The ECtHR itself often refers to comparative law materials or to international legal instruments and soft law from which the presence or lack of a common ground clearly appears.[194] Nevertheless, the use of the common ground factor is much criticised, especially since it is far less easy to establish a the presence of a European consensus than it is made to appear.[195] First, it is very difficult to determine the amount of convergence or agreement needed to speak of a real 'common ground'. In some cases, the court has held that no complete unanimity is required, but that 'clear and uncontested evidence of a continuing international trend' will suffice to narrow the margin of appreciation.[196] Other cases would seem to indicate, however, that much more than a trend is needed.[197] Another important difficulty is that the results of any comparative analysis may be interpreted in a variety of ways.[198] The ambiguity to which the factor may give rise is witnessed by the case of *Egeland and Hanseid*, which concerned the Norwegian prohibition of the publication of photographs of a convicted person on her way out of the court building.[199] The majority of the chamber that decided the case held that it could not be said that there was a European consensus on the need to leave this issue to the self-regulation by the press, since similar prohibitions existed in Cyprus, England and Wales, while legal restrictions

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[192] See Application No 44362/04, *Dickson v UK* ECHR 2007-VIII, para 78; Application No 35991/04, *Kearns v France* (unreported) 10 January 2008, paras 74 and 83. In rare cases, however, it is precisely the existence of a European consensus that points to a wide margin of appreciation, namely in the situation that there is general agreement that interference with a certain convention right is acceptable. See, eg, Application No 5100/71, *Engel and Others v Netherlands* Series A No 22, para 72; Application No 36536/02, *B and L v UK* (unreported) 13 September 2005, para 36.

[193] cf P. Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law', in G. Canivet, M. Andenas and D. Fairgrieve (eds), *Comparative Law Before the Courts* (BIICL, 2004), 135, at 146–147; P.G. Carozza, 'Propter Honoris Respectum: Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights', (1998) 73 *Notre Dame Law Review* 1217, at 1227.

[194] For recent examples, see, eg, Application No 21132/05, *TV Vest AS & Rogaland Pensjonistparti v Norway* (unreported) 11 December 2008, para 67 (referring to a comparative survey produced by the respondent government) and Application No 3545/04, *Brauer v Germany* (unreported) 28 May 2009, para 40 (referring to a European convention which is in force in respect of 21 Member States of the Council of Europe (but not in the respondent state) as a basis for finding a European consensus).

[195] eg Ostrovsky, *op cit* n 169 *supra*, at 58; Carozza, *op cit* n 196 *supra*, at 1233.

[196] Application No 28957/95, *Christine Goodwin v UK* ECHR 2002-IV, para 85. See also Application No 44306/98 *Appleby v UK* ECHR 2003-VI, para 46.

[197] See, eg, Application No 31253/96, *McElhinney v Ireland* ECHR 2001-XI; Application No 37112/9, *Fogarty v UK* ECHR 2001-XI.

[198] cf Mahoney, *op cit* n 193 *supra*, at 147.

[199] Application No 34438/04, *Egeland and Hanseid v Norway* (unreported) 16 April 2009. For another example, see Application No 44362/04, *Dickson v UK* ECHR 2007-VIII, para 81, in which the Grand Chamber gave a different interpretation to the fact that more than half of the contracting states allow for conjugal visits for prisoners than the Chamber did in its earlier judgment in the case (18 April 2006).

also applied in Austria and Denmark.[200] The majority held that the competent authorities therefore should be accorded a wide margin of appreciation.[201] Concurring judge Malinverni, however, interpreted the same comparative data as meaning that in fact only four states imposed a prohibition. In his view this meant that there was sufficient common ground as to accord the state only a limited margin of appreciation.[202]

The obvious difficulties in the application of the common ground method may damage the appearance of objectivity and legitimacy that is often associated with its use. Even though the existence of a European common ground is an important factor for the court in determining the need for deference, it evidently has to use this factor with great prudence.

c) The Better Placed Argument

As explained in section IVCa, the court often leaves a wide margin of appreciation to the states because they are in a better position to assess the necessity, suitability or overall reasonableness of a limitation of fundamental rights.[203] Some of the judges of the ECtHR have even contended that the 'better placed argument' should be the only factor to be taken into account in deciding about the margin of appreciation.[204] The factor is of special relevance with respect to measures based on complex social or economic assessments[205] or measures relating to particularly sensitive or difficult issues.[206] It has been stressed already that courts (and supranational courts in particular) are not as well equipped as legislative or administrative bodies to make complex political, social or economic assessments or to take a decision as regards the most desirable balance to be struck between competing interests.[207] The ECtHR has mentioned this rationale in particular if measures are taken in specific contexts, such as general preventive policy in the field of health care or environmental disasters,[208] and immigration law and policy.[209] In those areas it is not only the equipment of the

[200] Para 54.

[201] Para 55.

[202] Concurring opinion of Judge Malinverni (para 14).

[203] The other way around, the court has also sometimes indicated that the margin of appreciation will only play a limited role if the case does not concern an area of general policy, on which opinions within a democratic society may reasonably differ widely and in which the role of the domestic policy maker should be given special weight. See, eg, Application No 11002/05, *Associated Society of Locomotive Engineers & Firemen (ASLEF) v UK* ECHR 2007-III, para 46.

[204] cf Judge Rozakis, dissenting opinion to the case of Application No 34438/04, *Egeland and Hanseid v Norway* (unreported) 16 April 2009.

[205] See, eg, Application No 8793/73, *James and Others v UK* Series A No 98, para 46; Application Nos 10522/83, 11011/84, 11070/84, *Mellacher and Others v Austria* Series A No 169, para 45; Application No 20348/92, *Buckley v UK* ECHR 1996-IV, para 74; Application No 66746/01, *Connors v UK* (unreported) 27 May 2004, para 82; Application Nos 46720/01, 72203/01, 72552/01, *Jahn and Others v Germany* (unreported) 30 June 2005, para 91; Application No 13378/05, *Burden v UK* (unreported) 29 April 2008, para 60.

[206] Or a combination of both; see, eg, Application No 11810/03, *Maurice v France* (unreported) 6 October 2005, paras 116–117.

[207] On this rationale, applied to the special deference the ECtHR appears to pay to national legislatures, see S. Marks, 'The European Convention on Human Rights and its "Democratic Society"', (1995) 66 *British Yearbook of International Law* 209, at 219 ff.

[208] eg Application No 23800/06, *Shelley v UK* (unreported) 4 January 2008 (decision); Application No 48939/99, *Öneryildiz v Turkey* ECHR 2004-XII, para 107; see also Application No 15339/02, *Budayeva and Others v Russia* (unreported) 20 March 2008, para 135.

[209] See Arai-Takahashi, *op cit* n 165 *supra*, at 210. A classic example is Application No 9214/80, *Abdulaziz,*

national legislative and administrative authorities that is reason for the court to allow the states a wide margin of appreciation, but also the fact that it is for the states to regulate and control the entry and residence of aliens or to make operational choices in terms of priorities and resources.

A wide margin is also left in cases pertaining to the protection of 'morals'. Especially in the cases relating to sensitive or moral issues, the 'better placed argument' is closely related to the 'common ground factor'.[210] Precisely *because* there is hardly any consensus as regards certain issues, the ECtHR finds that the national authorities are better equipped than itself to decide about the reasonableness or appropriateness of certain measures.[211] For this reason, the court, for example, leaves a wide margin of appreciation in cases concerning sensitive issues such as adoption or in vitro fertilisation treatment;[212] in cases requiring a difficult balance to be struck between conflicting fundamental rights and interests;[213] in cases demanding highly technical and specialist expertise;[214] or in cases where specific historical circumstances (such as a recent transition to democracy) make it difficult for the court to understand the need for certain restrictions.[215] In addition, the court has often held that it is in the first place for the national authorities to construe and apply domestic law, which means that the court will usually pay deference if a case primarily relates to questions of interpretation, fact-finding or valuation of evidence.[216]

Cabales and Balkandali v UK Series A No 94, para 67. For a more recent example, see Application No 48321/99, *Slivenko v Latvia* ECHR 2003-X. It is remarkable, though, that the court does not mention at all the margin of appreciation doctrine in its case-law on expulsion of long-term immigrants. In fact, it seems to apply a rather strict test in these cases. See, eg, Application No 54273/00, *Boultif v Switzerland* ECHR 2001-IX; Application No 46410/99, *Üner v Netherlands* (unreported) 18 October 2006; Application No 42034/04, *Emre v Switzerland* (unreported) 22 May 2008. In the case of Application No 1638/03, *Maslov v Austria* (unreported) 23 June 2008, concerning the expulsion or a minor, the court even held that 'very serious reasons' were required in justification, which clearly indicates a very strict test, probably mainly inspired by the seriousness of the interference. In other immigration cases, the factors determining the margin of appreciation seem to be merged with the factors used to examine the proportionality of a certain measure; see, eg, Application No 16351/03, *Konstantinov v Netherlands* (unreported) 26 April 2007.

[210] See, eg, Application No 44774/98, *Leyla Sahin v Turkey* ECHR 2005-XI, para 109; see also Application No 6339/05, *Evans v UK* ECHR 2007-IV, para 77; Application No 27058/05, *Dogru v France* (unreported) 4 December 2008, para 63.

[211] cf Arai-Takahashi, *op cit* n 165 *supra*, at 206–207 and Letsas, *op cit* n 165 *supra*, at 94.

[212] eg Application No 21830/93, *X, Y and Z v UK* ECHR 1997-II, para 44; Application No 36515/97, *Fretté v France* ECHR 2002-I, para 41; Application No 61564/00, *Elli Poluhas Dödsbo v Sweden* ECHR 2006-I, para 25; Application No 6339/05, *Evans v UK* ECHR 2007-IV, paras 77 ff; Application No 35991/04, *Kearns v France* (unreported) 10 January 2008, para 74.

[213] For the latter situation, see, eg, Application No 25088/94, *Chassagnou v France* ECHR 1999-III, para 113; Application No 6339/05, *Evans v UK* ECHR 2007-IV, para 77; Application No 33932/06, *Todorova v Italy* (unreported) 13 January 2009, para 71. On this, see also J. Bomhoff, '"The Rights and Freedoms of Others": The ECHR and its Peculiar Category of Conflicts Between Individual rights', in E. Brems (ed), *Conflicts between Fundamental Rights* (Intersentia, 2008), 619.

[214] cf Arai-Takahashi, *op cit* n 165 *supra*, at 213. See, eg, Application No 20022/92, *Anne-Marie Andersson v Sweden* ECHR 1997-IV, para 36.

[215] Application No 25390/94, *Rekvényi v Hungary* ECHR 1999-III, paras 46 and 48; Application No 43278/98, *Velikovi and Others v Bulgaria* (unreported) 15 March 2007, paras 179–180; see also, *mutatis mutandis*, Application No 33629/06, *Vajnai v Hungary* (unreported) 8 July 2008, paras 49 ff.

[216] For a classic example, see Application No 6301/73, *Winterwerp v Netherlands* Series A No 33, para 46; see more recently, eg, Application No 69498/01, *Pla and Puncernau v Andorra* ECHR 2004-VIII, para 46. See also Arai-Takahashi, *op cit* n 165 *supra*, at 239 and Christoffersen, *op cit* n 38 *supra*, at 276.

d) Importance of the Affected Right

The ECtHR has often stated that the nature of the convention right and its importance for the individual are of great importance to the scope of the margin of appreciation.[217] In principle, the margin of appreciation will be narrow if the essence or 'core' of one of the convention rights is affected.[218] The court has given much attention to the definition of the core of certain convention rights, even though it has omitted to provide clear and general criteria to determine which elements of rights belong to the core and which elements should be considered rather peripheral in nature. Basing itself on the general objectives of the convention, the court has found that there are two main concepts underlying the convention: the maintenance and promotion of the ideals and values of a democratic society,[219] and human dignity and human freedom.[220] The closer a certain aspect of a right is related to these central concepts, the more important it is considered to be. It is precisely because restrictions of such rights might endanger the achievement of the convention's objectives that the court finds strict scrutiny to be justified.

Many examples of this 'core-periphery approach' can be found in the case-law about freedom of expression and freedom of assembly. According to the ECtHR there is a clear connection between effective political democracy and respect for minorities and the realisation of human rights and fundamental freedoms.[221] In turn, the freedom of expression and the freedom of assembly and association (especially the freedom to form political parties) are of prime importance to a well-functioning democracy: ' . . . [O]ne of the principle characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence'.[222] In this light it is not surprising that the ECtHR almost always strictly reviews limitations of political expression and press publications relating to subjects of general interest;[223] that it only accepts the dissolution of political parties if the national government has provided

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[217] See the general formula quoted section IVCa.

[218] eg Application No 6339/05, *Evans v UK* ECHR 2007-IV, para 77; Application No 44362/04, *Dickson v UK* ECHR 2007-VIII, para 78; Application Nos 30562/04, 30566/04, *S and Marper v UK* (unreported) 4 December 2008, para 102. Cf Arai-Takahashi, *op cit* n 168 *supra*, at 227.

[219] For a good overview of the court's case-law in this respect, see Application No 1543/06, *Bączkowski and Others v Poland* (unreported) 3 May 2007, paras 61 ff (' . . . the Convention was designed and aimed to promote and maintain the ideals and values of a democratic society'). See also in particular Marks, *op cit* n 207 *supra*, at 210 ff.

[220] See, eg, Application No 2346/02, *Pretty v UK* ECHR 2002-III, para 65 ('The very essence of the Convention is respect for human dignity and human freedom').

[221] See the case-law mentioned in n 219 *supra*; see also Application Nos 52562/99, 52620/99, *Sørensen and Rasmussen v Denmark* ECHR 2006-I, para 58. Interestingly, the court has consistently allowed the states a wide margin of appreciation in cases concerning the organisation of their electoral systems. See in particular Application No 9267/81, *Mathieu-Mohin and Clerfayt v Belgium* Series A No 113, paras 52 and 54; see also Application No 24839/94, *Bowman v UK* ECHR 1998-I, paras 42–43; Application No 74025/01, *Hirst v UK (No 2)* ECHR 2005-IX, para 61; Application No 10226/03, *Yumak and Sadak v Turkey* (unreported) 30 January 2007, para 61.

[222] Application No 19392/92, *United Communist Party of Turkey v Turkey* ECHR 1998-I, para 57; see also Application No 41340/98, *Refah Partisi and Others v Turkey* ECHR 2003-II, para 86. See also Marks, *op cit* n 207 *supra*, at 212–213.

[223] For classic examples see Application No 6538/74, *Sunday Times v UK* Series A No 30 and Application No 13585/88, *Observer and Guardian v UK* Series A No 216, para 59. More recent examples are Application No 22678/93, *Incal v Turkey* ECHR 1998-IV para 46; Application No 26958/95, *Jerusalem v Austria* ECHR 2001-II, para 36; Application No 33629/06, *Vajnai v Hungary* (unreported) 8 July 2008, para 51; Application No 37374/05, *Társágág A Szabadságjogokért v Hungary* (unreported) 14 April 2009, para 26.

compelling and inescapable reasons to do so;[224] and that it requires convincing arguments to justify limitations on meetings of associations or demonstrations.[225] Conversely, the ECtHR often leaves a wider margin of appreciation if only the periphery of the freedom of speech has been affected. It has held, for example, that the sensation press hardly ever contributes to a debate of general interest, since it publishes mainly gossip and human interest articles featuring people's private lives.[226] The court in this context generally leaves the national authorities much latitude to restrict the freedom of expression to protect the right to reputation or the right to privacy. Likewise, the court does not apply intensive scrutiny to restrictions of commercial expressions (such as television or radio commercials), except when such expressions are really political in character or contribute to a debate about a topic of general interest.[227]

In the same line, the ECtHR has devised a 'core' for a number of rights that are not so much closely related to democracy, as well as to the concepts of personal autonomy and human dignity. Article 8 of the convention (family life, private life and housing), has been given a very wide scope in the court's case-law—the provision covers issues as divergent as the right to assisted suicide to the right to be protected against environmental pollution.[228] Within this wide range of rights, the court has distinguished a (rather fuzzy) core of rights that are really considered of essential importance to the individual. In general, the court has held that measures that affect 'the most intimate' or 'sensitive' aspects of someone's life, such as someone's sexuality[229] or identity,[230] should generally be carefully scrutinised for their reasonableness and objectivity.[231] By contrast, the ECtHR has held that general policy measures affecting individual interests that are not closely connected to the core of the right to private or family life can be reviewed much more marginally.

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[224] eg Application No 19392/92, *United Communist Party of Turkey v Turkey* ECHR 1998-I, para 57; see also Application No 41340/98, *Refah Partisi and Others v Turkey* ECHR 2003-II, para 86.

[225] eg Application No 74989/01, *Ouranio Toxo and Others v Greece* ECHR 2005-X, para 36; Application No 35082/04, *Makhmudov v Russia* (unreported) 26 July 2007 para 63. See also H. Fenwick, 'The Right to Protest, the Human Rights Act and the Margin of Appreciation', (1999) 62 *Modern Law Review* 491, at 492.

[226] Application No 59320/00, *Von Hannover v Germany* ECHR 2004-VI, paras 65–66. See also Application Nos 66910/02 and 71612/01, *Société Prisma Presse v France* (unreported) 1 July 2003 (decision) and, more recently, Application No 12268/03, *Hachette Filipacchi Associés ('Ici Paris') v France* (unreported) 23 July 2009, para 40.

[227] See, eg, Application No 10572/83, *markt intern Verlag GmbH and Klaus Beermann v Germany* Series A No 165, para 33; Application No 38743/97, *Demuth v Switzerland* ECHR 2002-IX; Application No 44179/98, *Murphy v Ireland* ECHR 2003-IX, para 67. For examples of intensified review of restrictions of commercial speech in a political context, see Application No 25181/94, *Hertel v Switzerland* ECHR 1998-VI, para 47; Application No 24699/94, *VgT Verein gegen Tierfabriken v Switzerland* ECHR 2001-VI, paras 69–72. See elaborately on this M. Hertig Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?', (2006) 6 *Human Rights Law Review* 53, at 74 ff.

[228] On this, see, eg, J.H. Gerards, 'Fundamental Rights and Other Interests—Should it Really Make a Difference?,' in E. Brems (ed), *Conflicts between Fundamental Rights* (Intersentia, 2008), 655, at 659 ff.

[229] See in particular Application No 7525/76, *Dudgeon v UK* Series A No 45, para 52; Application Nos 33985/96, 33986/96, *Smith and Grady v UK* ECHR 1999-VI, para 89; Application Nos 42758/98 and 45558/99, *KA and AD v Belgium* (unreported) 17 February 2005; Application No 29002/06, *Schlumpf v Switzerland* (unreported) 8 January 2009, para 104.

[230] eg Application No 58757/00, *Jäggi v Switzerland* ECHR 2006-X, para 37.

[231] Such core rights may still be of very different sorts, varying from the prohibition on unwarranted disclosure of medical information (eg Application No 22009/93, *Z v Finland* ECHR 1997-I, paras 95–96) to the right to live in one's own house (eg Application No 9063/80, *Gillow v UK* Series A No 109, para 55).

D Conclusion and Criticism

The previous discussion of the various factors determining the scope of the margin of appreciation may serve to illustrate that the margin of appreciation case-law of the ECtHR is more refined and detailed than the case-law of the EU courts. The ECtHR has developed a relatively clear doctrine that is consistent with its views on its role as a supranational court and with the objectives of the convention. In line with its theoretical underpinnings, the ECtHR distinguishes different factors that may influence the scope of the margin. Overall, it can be said that the ECtHR thereby uses the possibilities of variation in the intensity of its review to its advantage, especially by expressly determining the margin of appreciation in each and every individual case on the basis of a rather clear set of intensity-determining factors.[232] Its flexibility makes the doctrine very attractive as an instrument to negotiate between the court's task to protect human rights as effectively as possible, and its need to respect national sovereignty and make its judgments acceptable for national authorities. Since the court has really applied the doctrine in every case under review, it also has had the opportunity to use it to enhance the predictability and clarity of its approach. It is well known to all Member States, for example, that the ECtHR will very strictly scrutinise limitations to press freedom if the relevant expression concerns a subject of general interest, whereas the national authorities will also be aware that there is more room for manoeuvre if the expression relates to morals or other subjects on which opinions in the Member States may reasonably differ. Especially in a complex and pluralist world, such clarity about the extent of the latitude that is left to the national level is extremely valuable.

This is not to say, however, that the ECtHR's application of the doctrine should be uncritically adopted as a standard for all supranational courts. As mentioned in section IVB, the court does not consistently apply the doctrine as an instrument to determine the intensity of its review of national measures and decisions. Another important setback is that it has omitted to provide much clarity as to the inter-relationship of the various intensity-determining factors.[233] There does not seem to be a single standard that helps the court decide if intensity-determining factors pull in different directions. If a measure severely impedes an important right, in an context where there is no common ground, the intensity-determining factors do not indicate an inevitable answer to the question what margin of appreciation would be called for (although the court often applies 'intermediate scrutiny' in this kind of case).[234] Problems may also arise if an important right is interfered with in an area in which the national authorities are clearly better placed than the court is to assess the necessity of restrictive measures.[235]

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[232] There are some examples of cases in which the doctrine is not mentioned at all (eg Application No 31675/04, *Codarcea v Romania* (unreported) 2 June 2009; Application No 36936/05, *Szuluk v UK* (unreported) 2 June 2009). The reasons for this are not clear.

[233] See also M.R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', (1999) 48 *International and Comparative Law Quarterly* 641.

[234] This situation occurred in Application No 21132/05, *TV Vest AS & Rogaland Pensjonistparti v Norway* (unreported) 11 December 2008. In other cases, the court just left 'a certain margin of appreciation'. Although it did not make particularly clear what this means, it can be imagined that this indicates some form of heightened scrutiny; see, eg, Application No 13470/87, *Otto-Preminger-Institut v Austria* Series A No 295-A, para 50; Application No 69698/01, *Stoll v Switzerland* ECHR 2007-XIV, paras 106–107.

[235] For examples of this, see Application No 2346/02, *Pretty v UK* ECHR 2002-III; Application No 52562/99, 52620/99, *Sørensen and Rasmussen v Denmark* (unreported) 11 January 2006, para 58 (strict scrutiny because of the importance of the right at stake, regardless of the lack of consensus and the better placed argument); Application No 54934/00, *Weber and Seravia v Germany* (unreported) 29 June 2006, para 106

The ECtHR tends to solve such dilemma's by simply stopping short of making a real choice.[236] It often contents itself by mentioning a number of relevant factors (sometimes even expressly noting the conflict), and it then continues to examine the case without providing any clarity as to the scope of the margin of appreciation and the applicable level of intensity.[237] This is problematic, since it is precisely in these cases of conflicting factors that it is important to know about the proper intensity of review. Indeed, no doctrine of deference is really useful without a standard that can help to choose between conflicting intensity-determining factors. Although the comparison with the ECtHR's doctrine can be helpful to identify the possibilities of a real 'doctrine of deference', the development of a workable doctrine of deference for the ECJ therefore really requires an additional step to be taken, namely the development of such a standard. That is what the final section of this article will endeavour to do.

V Conclusion—Developing a 'Doctrine of Deference' for the EU Courts

Variation in the intensity of review by supranational courts such as the EU courts and the ECtHR can be extremely valuable in helping these courts to deal with the problems posed by a pluralist legal order. The 'judicial dialectics' in a pluralist legal order demand careful and respectful cooperation between national and supranational courts and other powers of government. As explained in section II, such voluntary cooperation may be facilitated and enhanced in a variety of ways, but in particular by systematic use of the possibilities of 'deference'. In normal circumstances, supranational courts must accept that the national authorities (legislative, administrative and judicial) are best equipped and legitimised to draft legislation, take decisions and pronounce judgments, since they are best acquainted with the national circumstances, debates and sensitivities. For that reason, judicial review on the supranational level should start from a position of deference. Supranational courts should limit themselves to examining if the national institutions have acted in a manifestly

('fairly wide margin of appreciation' in a case on secret surveillance in the interest of national security); Application No 15948/03, *Soulas and Others v France* (unreported) 10 July 2008, para 38 (in which the ECtHR finally settled on an intermediate level of review ('une marge d'appréciation assez large')).

[236] eg Application No 2346/02, *Pretty v UK* ECHR 2002-III, para 71, in which the court mentioned that, even though the case concerned a very important right, there were reasons to adopt a different approach. It did not, however, explain what these reasons were and how large the resulting margin of appreciation should be. Even some of the judges of the ECtHR have shown themselves critical about this aspect of the application of the doctrine. For example, in the case of Application No 34438/04, *Egeland and Hanseid v Norway* (unreported) 16 April 2009, dissenting Judge Malinverni stated that it is essential that the case-law of the court establish clear, objective and specific criteria that make it possible to determine in which scenarios the court must show self-restraint (dissenting opinion Judge Malinverni, para 4). Vice-President of the Court Rozakis in his dissenting opinion to the case criticised the majority for having applied the doctrine with an unwarranted level of automaticity, stating that '[o]ne can really wonder, when reading . . . the judgment, what is really left to the margin of appreciation invoked by the Court, and how different the judgment would have been if no reference to the concept had been made' (dissenting opinion Judge Rozakis, para c).

[237] An important example is the case of Application No 36022/97, *Hatton v United Kingdom* ECHR 2003-VIII, a case about sleep disturbance caused by night flights at Heathrow Airport. Although a large part of the judgment was devoted to identifying the relevant intensity-determining factors, the court did not reach a conclusive judgment on the issue (compare paras 101 and 129). For similar examples, see Application No 2346/02, *Pretty v UK* ECHR 2002-III; Application No 23960/02, *Zeman v Austria* (unreported) 29 June 2006, para 33; Application No 19009/04, *McCann v UK* (unreported) 13 May 2008; Application No 36919/02, *Armonière v Lithuania* (unreported) 25 November 2008, paras 38 ff.

unreasonable or arbitrary manner, and they should be reluctant to substitute the national views with their own. By showing deference, or by leaving a wide margin of appreciation, the European courts can confirm their respect for national procedures and decisions. In turn, such articulated supranational respect may enhance the compliance of national authorities with European judgments, since it is then evident that national values and choices will only be interfered with if there is good reason to do so.

In section II it has also been explained that there may sometimes be good reason for a supranational court to intensify its review of national measures or decisions. Indeed, it appears from the analyses provided in the previous sections that such intensification is clearly visible in the supranational courts' case-law. The ECtHR often allows national authorities a wide margin of appreciation, which results in quite relaxed judicial scrutiny, but, in the end, it considers that it is its own task to guarantee the objectives of the convention in an effective manner. If core rights have been affected or if convention rights have been seriously impaired, the ECtHR will examine the facts and arguments advanced in favour of certain restrictions and limitations more closely. In similar vein, the ECJ appears to apply stricter scrutiny in those cases in which national measures or decisions are at stake that impede the realisation of the central objectives of the EU treaty, such as the realisation of an internal market or the free movement of goods, services, workers or capital.

Thus, variation in the intensity of review already seems to be an accepted and well-used judicial instrument for the European supranational courts. Nevertheless, it can be argued that the instrument can be used far more effectively, especially by the EU courts (but also by the ECtHR). As analysed in section III, the EU courts do indeed appear to vary the intensity of their review, but their case-law hardly discloses a systematic and structured approach towards the instrument of deference. Different from the ECtHR, the ECJ nor the General Court have elaborated a single doctrine underlying their use of deference or marginal review. The EU courts often mention elements of marginal review or give some general reasons for the application of marginal or intensive review, but they tend to do so in highly formulaic considerations that hardly seem to have any substantive content. In addition, in cases where terms and notions of deference are used, the real standards of review frequently seem to disclose a quite intensive test, or the other way around. In the end, the EU courts' case-law leaves its observer with the impression of a rather haphazard application of the notion of deference.

For the case-law of the ECtHR this is somewhat different. The ECtHR has developed its margin of appreciation doctrine at an early stage and it has clearly explained its theoretical foundations. It has made out that a margin of appreciation should be left to the states since the national authorities are usually better placed than the international judge to assess the necessity and suitability of certain measures and policies, and since national opinions on the protection of certain values and rights may reasonably vary. On the other hand, the ECtHR has held that it is just as capable as national courts to give judgment on the interpretation of the convention and it has stated that it takes its task to protect the core values of the convention very seriously. Even more importantly, the court reiterates the doctrine and its background in almost every case placed before it and it commonly explains the reasons why the various factors result in a particular scope of the margin of appreciation in each individual case. As has been argued in section IV, this makes the doctrine into a very flexible tool that may moreover provide useful information to the national authorities as to their room for manoeuvre.

As a judicial instrument to negotiate with problems of pluralism, it is therefore very attractive indeed.

The margin of appreciation doctrine as developed by the ECtHR may constitute an important example for the EU courts. There is no good reason why these courts should not develop their own 'doctrine of deference' to be consistently and systematically applied in all cases before them. Such a doctrine of deference may find its basis in the arguments and reasons expounded in section II and shortly summarised above. Ideally, the doctrine of deference should involve a choice between three different levels of intensity of judicial review. The EU courts should distinguish between marginal review, strict scrutiny and intermediate review. These levels of review should be translated in clear substantive standards of review and in clear requirements as to the apportionment of the burden of proof. Such standards and requirements may differ for the various types of cases to be reviewed, but for each of these issues some basic criteria might easily be thought of. For cases about the general principle of proportionality, for example, it has already been mentioned that the burden to demonstrate the necessity and suitability of certain measures might be placed with the defendant institutions if a strict test is applied, whereas marginal review might imply that the applicant shows persuasive evidence to the effect that the measure is clearly superfluous or ineffective.

Just as importantly, the EU courts' doctrine of deference should include a number of factors that can be used to determine the appropriate level of review. It has been concluded in sections III and IV that both the EU courts' case-law and the case-law of the ECtHR already disclose a variety of relevant examples. Though formulated differently, the factors applied by the EU courts and the ECtHR appear to be highly similar. The ECtHR as well as the EU courts accept that clear and serious impairment of the central objectives of either the convention or the EC and EU treaties constitutes a convincing argument to intensify judicial review. In addition, all European courts have found that there is good reason to show deference if a case concerns issues of socio-economic policy which demands complex assessments of fact to be made, or if a case concerns moral or ethical issues on which the opinions within the various states may reasonably differ. In addition, though related, the EU courts attach much weight to the extent of the discretionary powers of the competent authority or institution (a factor that the ECtHR does not appear to pay real attention to)—if discretionary powers are wide, the EU courts usually find that marginal review is in place.

All of these factors may indeed be relevant to determine the proper intensity of review. More problematic is the question how the EU courts should decide on the appropriate level of review in cases in which intensity-determining factors are pulling in different directions. Controversies may arise, for example, if national measures intended to protect important constitutional values or complex socio-economic interests (such as the right to life or central aspects of the social security system) seriously hamper fundamental interests (such as the right to personal autonomy or the right to property). Should the EU courts in these cases exercise restraint, or should they be willing to apply strict judicial review? Unfortunately, the present case-law of both the Strasbourg and the Luxembourg courts does not disclose a single standard or criterion to select the proper level of review in such cases. All courts seem to be inclined to avoid a clear approach or answer in these cases, often limiting themselves to stating that some conflicting factors are present. This is unsatisfactory, especially since it is precisely in these cases that clarity and predictability of the supranational approach is desirable.

A way out of this quandary can be found by looking for inspiration in classical theories of procedural democracy.[238] According to these theories, important decisions requiring value judgments or specific expertise should normally be made by the legislature and the executive, given their democratic legitimacy and their instruments and equipment to assess and balance social, economic and political interests.[239] Arguably, both national and European legislative and administrative procedures are designed to optimise the quality and legitimacy of decision making and they contain important systems of checks and balances. Even if decisions are taken that appear to be wrong or undesirable, a variety of mechanisms is available in every well-functioning democratic system to repair them.[240] This means that courts should normally be reluctant to intervene, even if the outcomes of the decision-making process seem misconceived or undesirable.

At the same time, it must be recalled here that the picture of the legitimacy and quality of legislative and administrative procedures and their self-corrective force is highly idealistically coloured. Many questions are possible as to the ability of the legislature and the executive to 'reach the right answer',[241] while even more doubts may exist as to the actual democratic legitimacy of legislatures and (especially) the administration. In particular in the context of the EU, complaints about the 'democratic deficit' are difficult to reconcile with the general starting point of judicial reliance on the quality and legitimacy of democratic decision making. It is precisely for that reason that judicial control of legislation and administrative decisions is considered valuable.

According to procedural democracy doctrine, an all-important criterion to decide on the reasonableness of intrusive judicial control is whether the legislative or administrative procedure really can be suspected to be defective to the extent that even its own corrective mechanisms cannot be trusted any more and to the extent that the quality and legitimacy of the outcomes of the process must be doubted.[242] In his well-known book *Democracy and Distrust*, John Hart Ely has indicated a number of signs that may raise the suspicion of problematic flaws in the normal decision-making procedures.[243] If such signs are present, and if they really raise the suspicion that the decision-making procedures might be corrupt or defect, there is reason for intensive judicial review.

The first indication of malfunction is that core elements of the process itself are neglected or misapplied. If fundamental constitutional values and rights such as electoral rights or the freedom of expression are impaired by certain measures or decisions, this may negatively affect the functioning of the procedural system as a whole.[244] Such measures or decisions should be scrutinised for their reasonableness with great care. The second indication for distrust is offered by the outcomes of a decision-making process. If the rights or interests of specific groups are systematically prejudiced, it is probable that there is a defect in the procedure that makes it rather easy for the legislature to neglect these interests or to attach insufficient value to them.[245]

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[238] In particular Ely, *op cit* n 37 *supra*; see also J. Waldron, 'The Core of the Case Against Judicial Review', (2006) 115 *Yale Law Journal* 1346, at 1386 ff.

[239] cf Young, *op cit* n 35 *supra*, at 566; see also Rivers, *op cit* n 47 *supra*, at 199; Waldron, *ibid*, at 1386–1387.

[240] cf Tushnet, *op cit* n 41 *supra*, at 31; Waldron, *ibid*, at 1361–1362 and 1388.

[241] cf Young, *op cit* n 35 *supra*, at 570.

[242] For a somewhat comparable approach, see Young, *op cit* n 35 *supra*, at 564.

[243] Ely, *op cit* n 37 *supra*).

[244] *ibid*, at 103 and ch 5.

[245] *ibid*, at 103 and ch 6.

It certainly seems possible to adapt this theory to the situation of the European courts so as to provide them with some guidance as to the determination of their level of review. In particular, Ely's two main indications should be supplemented with an indication concerning fundamental individual rights such as human dignity or personal autonomy and core constitutional objectives. The procedural theory does not state that careful judicial attention is warranted if such interests or objectives are harmed. Building on the theory, however, it may be submitted that (serious) interferences with such essential rights and objectives may also raise a suspicion of flaws or defects in the decision-making process.[246] After all, in such cases it may be assumed at the least that certain fundamental interests have not been given sufficient weight in the decision-making process. In those cases, there may be good reason for careful judicial scrutiny.[247] The same can be said if a measure or decision has been taken that clearly violates one of the central objectives underlying the relevant legal order.[248] For the EU courts this means that intensification of review is justifiable if a measure affects the fundamental freedoms or if it runs counter to the interests of a free internal market.

Building on this theory, the general approach to be taken by the EU courts could be the application of a marginal test. Only if there is objective reason to suspect that the decision-making process was taunted by essential flaws and defects, the test may be intensified to strict scrutiny. Such objective reasons present themselves in the shape of a clear interference with fundamental individual or procedural rights, or in the shape of a violation of fundamental Community interests, which are factors that are already taken into account by the EU courts at present.

Other factors that are often mentioned by the EU courts seem to be of less relevance from this perspective. Neither the scope of the discretionary powers of a legislative or administrative body, nor the factor relating to the need to make complex socio-economic assessments is really pertinent to determining the intensity of review, since deference is already considered to be the rule, rather than the exception.

Nevertheless, the 'better placed' argument, the argument of discretionary powers and the argument of consensus may still be of some importance. Even if a case in principle calls for careful judicial scrutiny because of the objective presence of intensity-increasing factors, there may be reasons why the *supranational* court is less well equipped to take the assignment. If a case concerns sensitive moral or ethical issues on which opinions may well differ; if a case is closely related to national constitutional values; or if a case is difficult to decide since it requires highly technical or scientific assessments to be made, some degree of deference is almost unavoidable—especially if the measures are taken in the exercise of (wide) discretionary powers. It is in these cases that the intermediate level of review can be used, which may be regarded as a 'second look' approach. Intermediate review requires the validity and trustworthiness of the national decision-making process to be tested on a procedural plane, and on a substantive plane it may be a bit more demanding than a purely marginal test in terms of the required quality and convincingness of the arguments underlying the decision. It must be admitted that it will not be easy to draft such intermediate tests, but their

[246] cf Rivers, *op cit* n 47 *supra*, at 205.
[247] *ibid.*
[248] *ibid.*

development is greatly to be preferred over the present situation in which simply no answer at all is provided to the question as to the proper level of review in these 'in between' cases.

In conclusion, it may be said that the EU courts (as well as the ECtHR) could greatly improve their use of the possibilities of the instrument of deference by expressly referring to a doctrine of deference. If such is done along the lines drawn above, it is to be expected that the doctrine can be used well in dealing with the complex position of a supranational court in a pluralist European legal order. To meet the current and future challenges that seem to lie ahead of the EU courts, this is certainly no luxury.