

# The margin of appreciation doctrine law constitutional administrative essay

[Law](#)



The doctrine has been commonly used in connection to articles of the ECHR that contains a 'second paragraph'. Amongst others, Article 8 (rights to private and family life) and Article 10 (freedom of expression) are both derogable articles in time of emergency and have in common that it allows the State party to breach its negative obligation of non-interference in individual liberty corresponding to conditions in the second paragraph. The jurisprudence of the European Courts of Human Rights ('the Court') is the first source of help to the margin of appreciation. However, arguably the Court is also the main source of the problems relating to the margin of appreciation doctrine. The value of the Strasbourg's judge-made margin of appreciation doctrine as developed and used by the Court is often questioned and the application of this Trojan Horse-like doctrine is sometimes criticised. Even occasionally criticism aroused from the body of the Court itself where individual judge for example, Judge De Meyer in his dissenting opinion in *Z v Finland*[3] where he stated that it is time for the Court to do without this doctrine in its reasoning. Because Convention rights are expressed in a very minimal and abstract universal terms, interpretation of those right can vary according to time and place. Further, there are no clear given objective interpretation of what they mean. It is therefore undeniable to say that the first major problem since the early days of this doctrine lies in terms of how the Convention will be interpreted. Because of the lack of proper 'definition' of the rights under the Convention, member States are therefore given the freedom, although not an unlimited one, to interpret the Convention according to their capability which will differ according to individual states. The Court has been very unclear as to how

and when the doctrine will apply and the margin had been widened or limited without proper guidance or reasoning as to how the Court reached that decision. An example of this, in relation to Article 10, can be seen in *Otto-Preminger-Institut v Austria*[4]. The applicant (a private non-profit arts cinema) argued that its rights under Article 10 had been violated, by the confiscation of their film, under Austrian law. The majority considered and dropped the argument that there was a clash between the cinema's rights under Article 10 and the public interest in the prevention order under Article 10(2). The argument was then revived without proper justification to support its conclusion. The Court being in the position to decide whether there was potential threat to public order is also questionable. The assessment of that risk is indisputably a police matter and so it should be up to the Austrian police to decide whether to ban the movie or not. But the entire report of the Court's judgement offered that there was no evidence that the screening presented a risk to public order. This then leads to the fact that the lines between Convention rights and legitimate public interest limitations inevitably involve balancing difficult and controversial political questions. Therefore, national authorities will be at a better position to grasp and assess the local situation rather than the Court. The Court may lack that knowledge or misjudge it altogether. Further, because the Court make its decisions involving a specific alleged violation by using the information given by the parties, these limits the Court's judicial perspectives, its sources of further information and international judges can potentially misapply the law to the facts or set unrealistic legal standards. Instead, the Court should be providing an 'interpretation' of the ECHR instead of deciding whether the

margin to be applied in that case is wide or narrow. Most of the academic debate involves the complexity of the doctrine within the landscape of the Convention. They all agree that there is no formula to describe how the doctrine works and despite the large number of jurisprudence and analysis of this area, the most striking characteristic is its uneven and largely unpredictable nature[5]. If the member states are to utilise their jurisprudence in a purposeful way, the Court's decisions where a margin is applied has to feature a higher magnitude of clarity. Besides, recently the over usage of this doctrine had concerned from individual judges of the Court. Judge Rozakis, in *Egeland and Hanseid v Norway*,[6]stated in his concurring opinion that the doctrine is often used automatically and unnecessarily by the Court. Indeed in 1977, *Feingold*[7]also criticised the automatic use. The Court needs to balance the interests pursued by the measure with the Convention right that was interfered. Merely finding the existence of a certain margin of appreciation is not enough. By taking in account criteria such as the legitimacy of the goals pursued, methods of regulation, the necessity of the measure, and its effects to society, a greater meaning will be given to the doctrine. Therefore for the justification of a wide or narrow margin, the nature of the right involved is an important factor. As seen in *The Sunday Times v The United Kingdom (No. 1)*[8]where the Court stated that the principle of the doctrine already embodied in its jurisprudence has to be taken into account and applied in consideration of national judicial system. However, the difference between the two systems is too wide and so is the standards adopted in exercising that right under Article 10 to be connected by that principle. Legitimately, the influence of

the doctrine is arguably only until the borders of the country to which is given. If so, the role of the doctrine is extents only to the country that the dispute originates from. However, at least for the UK, this will not be the case. This is because the UK has an obligation, under s. 2 of the Human Rights Act 1998 (HRA 1998), to take into the Strasbourg jurisprudence with no exception for areas of law under the margin of appreciation. Perhaps instead of the need for greater subsidiarity, there should be greater provisions to increase state obligation to consider the Court's jurisprudence. Further contribution that supports the inadequacy of this doctrine is the argument that it encourages non-uniform, subjective or relativist exercise of the Convention thereby contrary from the conduct administering quality of legal rules and disrupting their authority and understood fairness, for example the expectation that all similar cases will be treated alike[9]. The doctrine arguably play a part in the destruction of the boundaries of legality and might support the approach of international law as non-law i. e. the loose system of non enforceable principles where there are little if not at all constraints on state power. Accordingly, the doctrine has been portrayed as a crafty method to facilitate powerful state from avoiding the objective rule of international law[10]. This will then be in direct contradiction with the main purpose of the Convention. Even though the Strasbourg's decisions are binding, this is only applicable to the parties of the case decided by the Court[11]. Further the Court itself underlined the omitted direct effect of the Convention, let alone its supremacy. In this sense affected parties of a alleged breach of Convention rights has to first have the capability and resource to apply to the Strasbourg Court in order to bring their case. So far,

where the doctrine was applied, there are about 33 cases where the Court decided that there was no violation of Article 8 and similarly for cases of violation. Correspondingly, only a scarce 2 cases where there was violation of Article 10 and likewise only 2 cases of violation of this Convention right. Thus, without the proper capabilities, the person affect will find it difficult to apply to the Court. If this is the case, then the use of the doctrine serves no important purposed because there will not be any chance for the margin of appreciation to be applied if there are no cases to start with. Taking all this into account, the criteria and capability of the Court to apply the ambit of the doctrine does indeed calls for essential improvement. However, on the other hand, there seems to be more arguments for the doctrine to be continued in view that it is more important and this can overlook the somewhat minor flaw of the margin of appreciation doctrine. The use of the margin of appreciation in relation to Article 8 and Article 10 of the ECHR can be better seen in term of the usefulness of this margin and the arguments that the doctrine should indeed remain in the jurisprudence of the ECHR. Although there is the argument of inadequate certainty in the law-interpretation and law-application[12], some distinctive basis exists as to how and when the Courts will apply the doctrine. This is further justified by the underlying reasons as to why the margin is needed. Firstly, the subject matter of the protected right seems to be the factor affecting the decision of the Court; while balancing community interests and individual liberty. A good example was provided by the Court where it described that right to freedom of expression under Article 10 is one of the fundamental infrastructures of a democratic society and hence, any interference must be proportional to the

legitimate aim pursued. This was provided for in the abovementioned case of Handyside[13] and was repeated in The Times Newspaper[14] case. When the right is a fundamental one, should a narrower margin of appreciation be allowed? Conceivably, one should approach the hierarchy of rights in the application the Court make of the Convention through the margin of appreciation doctrine. Arguably the guideline was indeed already provided for by the provision of Article 8(2); where the interference has to be 'in accordance with the law' and Article 10(2) requires it to be 'prescribed by law'; meets one of the legitimate aims and is 'necessary in a democratic society'. The term 'necessary' implies a proportionality test and 'necessary in a democratic society' illustrated the need for a balance between individual and society's needs. The doctrine is then brought in to ensure proportionality where it allows for flexibility in the limit of the doctrine. In The Sunday Times, the Court established that what is necessary is more than what is desirable or reasonable. Therefore it can be said that the importance of the rights are directly proportional to the justification required. Definitely, the more the important the rights in system of the Convention are, the more convincing the reasons required to justify a restriction on them will be. This is arguably one of the 'guideline' provided to the Member States in deciding when and how will the Court limit or expand the margin. In Dickson v The United Kingdom[15] concerning alleged breach of Article 8 where the applicant's request for artificial insemination in prison was denied, the Court held that where a particularly important feature of an individual's existence or identity is at stake, the margin of appreciation accorded, in this case to the UK, will generally be a restricted one. Contrastingly, where there is no general

agreement within the Member States, the margin will be wider. This can be seen in *Evans v The United Kingdom*[16]concerning Article 8 as well. There usually will be a wide margin given if the State is called to balance between private and public interests or Convention rights. Additional guideline includes the need for protection of morals where the States have been allowed a wide margin on the grounds that this notion varies between Member States. The most relevant case where the Court has determined the margin of appreciation in context of public morals justification is in the abovementioned case of *Handyside v The United Kingdom* where there was no breach of Article 10 on the ground that there was a legitimate aim to protect morals. There was no identifiable uniform comprehension of morals in the domestic laws of the Member States because of the terms vary from time and place. This is where the margin of appreciation doctrine comes into action and is indeed living up to its role. The same approach was followed in cases under Article 8 where in *Dudgeon v The United Kingdom*[17]the Court decided that the laws in North Ireland criminalising homosexual activities in private life was a violation of rights of the Convention, on the observed conformity within the Europe that sodomy laws were a serious violation of privacy. More applications of the doctrine while taking into account requirements such as the authority of the judiciary, the prevention of disorder and crime, the interest of national security and economic well being of the country and the need to protect the right and freedom of others proves that the Court decides when and how the doctrine will apply is not all the ambiguous. The States can use these ' guidelines' as a yardstick to measure if their own action will constitute a breach or not. The inconsistency



issue can be further justified by the argument that there should be judicial deference where the Strasbourg Court should grant Member States a certain degree of yielding and respect their discretion as to how they perform their obligations under the Convention. Thus, the exercise of that discretion and independent evaluation should not be replaced by the Court[18]. Instead of reviewing national decisions, the Court should focus instead on the exercise of judicial restraint. In *James and Others v The United Kingdom*[19], it was established that the Court cannot substitute national authorities with its own assessment[20]. Apart from that the international norms subjected to the doctrine have been described as open ended or unsettled[21]. These provide limited conduct guidance and preserve an important zone of legality allowing States to operate freely. Accordingly, different yet lawful decisions regarding the application of the same norm can be reached. For example the UK may provide for rights under Article 8 differently from, for example France. This is likewise for other provisions of the Convention i. e. Article 10. Thus, the margin of appreciation plays an important role here where the exercise of judicial deference can be facilitated by the construction of international norms in an ambiguous manner. The application across several situations involving the different Member States can never accomplish uniformity since they are either necessarily circumstances dependent or objectively non-uniform. As a result, there are bound to be differences in practice of the State's application of the norm. Accordingly, those distinctions would be better addressed by a refined margin of appreciation rule where the margins will be wider or narrower as appropriate. There should not be an across-the-border refusal of the doctrine. Apart from that, Status as a ' living

instrument' means that by not setting a permanent boundary as to what constitutes a breach and what does not, the Convention can be interpreted accordingly to the needs at the specific time that they are raised. This is because what is acceptable now may not be something that the state was willing to accept before. For example, the idea of same sex partnerships is slowly being recognised in the society and the State, being the representatives of the people, is also accepting this norm. If the Court decided previously that a definite boundary of a wide margin of appreciation is given, the guideline given to the states in interpreting Article 8 may now potentially breach human rights accorded to individuals that are involved in same sex partnerships. On the other hand, international courts arguably will be less democratically accountable than their domestic counterpart. Hence, some leeway should be given to the society in adopting social arrangements which reflect the wishes, values and interests of the people, expressed through democracy. The exemplary comment of this rationale is made by Sir Humphrey Waldock, the President of the European Human Rights Commission in *Lawless v Ireland*[22]. He argued that "[T]he interest which the public itself has in effective Government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation". If rights are to be coordinated throughout Europe, it will illustriously come about via the doctrine of margin of appreciation where the Court has either found a justification for allowing domestic development of rights or there is a difference in the Member States' jurisdiction. The ultimate potential of the margin of appreciation is perhaps enabling and even encouraging the development of rights through domestic law. Arguably to

prevent exploitation of the doctrine which could result in the undermining of the rule of the Convention, the judicial ' gatekeeper' role is vital. It is widely accepted that the doctrine is an important instrument for the Court to make room for its complex role as an international human rights court. If the doctrine is applied well, it is indeed a useful and flexible tool that the Court can use to adjudicate between, on one hand, the conflicting interests concerned with domestic and international decision making and for a high level protection of individual rights, on the other. In addition, the predictability and clarity of the Court's approach when deciding fundamental rights cases can be improved. Accordingly, the State will know when they are given much leeway to take certain decisions and, by contrast, when will it be subjected to close scrutiny. Addressing the debate as to whether the doctrine is in need of a greater subsidiarity, one should note that the universal protection of the Convention rights is embodied in Article 1 which states that " the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention[23]". Together with this is the right to domestic remedy provided by Article 13. This facilitates a degree of subsidiarity in allowing each State to decide constitutionally at a local level as to the extent of protection of the Convention rights. Thus, the doctrine itself is ordinarily seen as a vessel of subsidiarity. However, it is clear that democracy must have its natural limits. Sir John Laws viewed that to argue otherwise is to warrant that unreasonableness and unfairness should be granted to the States, perhaps on the reasoning that they are democratically elected[24]. As such, recognition of a greater subsidiarity is indeed necessary and perhaps even

crucial in developing a universally accepted conception of right, being a body of normative values which goes beyond temporal majority views. As highlighted by Carozza, subsidiarity " integrates international, domestic, and sub national levels of social order on the basis of a substantive vision of human dignity and freedom[25]". Therefore, it would be agreeable that the doctrine as it is today may be in need of a more extended subsidiarity. Perhaps, if proper guidance is given by the Court as to the appropriate and acceptable steps that are allowed, the state then can at least be assured of the boundaries of the margin. However to be able to do so, the state has to be in direct contact with the ECtHR at the time of emergency. This however will increase the already overloaded burden of the Court considering the amount of cases that they have to handle. One possible step that can be assisting is perhaps the need for a general margin of appreciation. Under this argument, the Court should analyse international law norms as introducing a minimal side constrains upon State conduct. This is a theory developed by R Nozick[26]. This will accord the States with reasonable ' zones of legality' (a position by the Lotus[27]principle that what is not prohibited is permissible). Thus, the narrowing of the margin of illegality could minimise interference of the international community with state conduct through restrictive interpretation of international norms. Despite the ambiguity as the use of the doctrine by the Court, it is established that the margin of appreciation doctrine still is a major and vital part to the Court. In order to keep in check the activities of state authorities and courts, the doctrine is perhaps the best way the Court can make sure that member state applies convention accordingly with the situations that they face. Therefore, in this sense, the

role of the doctrine is still recognised and is still of substantial importance to the European Court of Human Rights whenever its use is called for. (Total: 3,476 words)