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THE DOCTRINE OF MARGIN OF APPRECIATION IN THE EUROPEAN COURT OF HUMAN RIGHTS – STANDARDS AND APPLICATIONS

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ABSTRACT

The dynamic nature of the relationship between international institutions and national authorities in a human rights context is abundant with complexities. In order to surmount these complexities, and ensure that member states voluntarily accept the international standards of human rights, the margin of appreciation doctrine was formulated. Dubbed as a standard less, inconsistent doctrine by many, it has been criticized as to setting unpredictable and unstable precedents in the ECtHR. This paper offers an expansive analysis of the margin of appreciation doctrine. It ultimately stands in support of the same, while simultaneously acknowledging the flaws regarding its indistinct nature and application by the ECtHR. The paper credits the doctrine for a principle, although in need of development, as an important tool of interpretation and analysis of cases before the ECtHR. It all-in-all offers to the reader a historical analysis of the doctrine and offers a well-rounded determination of the same. Conclusively, the paper evaluates established standards for consistency in the application of the doctrine, and methods by which its position can be stabilized in the ECtHR.

Keywords: Margin of Appreciation, ECHR, ECtHR, Human Rights, discretion, consistency.

INTRODUCTION

The European Convention on Human Rights *(ECHR, or the 'Convention')*[2] lays the foundation of the freedoms and rights that all member states take on, in order to 'secure to

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[2]Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Council of Europe, 4 November 1950, ETS 5 (entered into force - 1953) *[ECHR]*.

everyone within their jurisdiction'.[3] Simultaneously, the ECHR also provides the mechanism to enforce these rights; through the European Commission on Human Rights *(the 'Commission'),* the European Court of Human Rights *(the 'Court', or the ECtHR),* and the Committee of Ministers of the Council of Europe.

The Court has only recently developed an appreciable body of jurisprudence of its own, while the Commission continues to be more active historically. The Doctrine of Margin of Appreciation *(the 'Doctrine', or MoA)* was firstly developed by the Commission, and since then has been used and interpreted by the Court. Due to the Court being the final authority when it comes to the interpretation of the ECHR, its comprehension of the Doctrine and the standards of its application and development are crucial for the equitable and consistent enforcement of the Convention.

The Doctrine itself however, has attracted a fair amount of criticism in terms of its inconsistent, incoherent application by member states, often presumed to be on the basis of what is most convenient for them. While difficult to define (with some authorities even stating that it is 'not capable of precise formulation'),[4] the Doctrine signifies the latitude granted to the member states in their interpretation of the ECHR. It is an expression of national sovereignty nested within the context of a union of countries that profess to have similar political goals and ideals.

Finding its origin in the European Court of Human Rights, the Doctrine emerges from the concept of subsidiarity,[5] which means that nation states comprising of the European Union (EU) are first, and at best, deemed to combat any issues of rights violations that could arise under the European Convention on Human Rights.[6]

Essentially, it comes into play when it is alleged that a member state of the EU has breached rights enlisted under the Convention that they were under an obligation to not violate. It

[3] Ibid, Art.1.

[4]Morrisson, *Margin of Appreciation in European Human Rights Law*, 6 REVUE DES DROITS DE L'HOMME (HUMAN RIGHTS J.) 263, 284 (1973).

[5]Davor Petric, *The Principle of Subsidiarity in the European Union: Gobbledygook Entrapped between Justiciabilty and Political Scrutiny: The Way Forward*, 6 ZAGREB L. REV. 287 (2017).

[6]Ibid.

means that a member State is allowed some latitude of discretion,[7] when it comes to taking administrative, judicial, or legislative measures within the scope of a right granted under the Convention, on the condition that this is supervised by the Court. MoA gives the Court an opportunity to account for the fact that States will have varying levels of interpretation of the Convention, given the vastly divergent social, cultural, political, and economic circumstances in each State. As per an observation by the Council of Europe, the doctrine of margin of appreciation grants to the ECtHR the flexibility essential for striking the right balance between the obligations of member states under the Convention, and their individual sovereignty.

The margin of appreciation varies from subject to subject. In some cases, the Court will allow a wide margin, and in some cases, it will be interpreted in a narrow sense. A wide margin implies that a state is afforded more leeway and discretion in determining the implementation of a policy or the extent of derogation from a standard stipulated in the Convention. Much of the Court's interpretation of the doctrine stems from the general standard or consensus between countries on the subject matter in question.[8] If there is a determined consensus on how a member state of the EU addresses a particular matter, then the state is allowed a narrow margin of appreciation from the ascertained consensus.

To put it succinctly, the doctrine is an exercise of judicial self-restraint on part of the Courts as they appear to under enforce rights granted by the Convention. The doctrine results from the urgency to balance the sovereignty of a state and the legitimacy of international institutions against the authority of unelected international judges.

NATURE AND ORIGIN OF THE MARGIN OF APPRECIATION

An often-overlooked consideration in the assessment of the Doctrine is the fact that it is wholly a product of the Strasbourg Court, and there is no mention of it in the ECHR itself.

[7]Oskar Holmer, *Decoding the Margin of Appreciation doctrine in its use by the European Court of Human Rights*, JURIDISKAINSTITUTIONEN, UNIVERSITY OF STOCKHOLM (2013). Available at: http://www.diva-portal.org/smash/get/diva2:661681/FULLTEXT01.pdf

[8]Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*,HUMAN RIGHTS FILES. NO. 17, COUNCIL OF EUROPE PUBLISHING (2001) (ISBN 92-871-4350-1).Available at: https://www.echr.coe.int/librarydocs/dg2/hrfiles/dg2-en-hrfiles-17(2000).pdf

The origin of MoA can be dated back to the case of *Lawless v. Ireland*,[9]a case involving Article 15[10] of the Convention regarding derogation in time of emergency. The case included the questionable indefinite detention without trial of an alleged previous member of the Irish Republican Army, following which the first case filed against a country in the ECtHR was heard. The Court had to determine whether there existed an emergency situation in Ireland which justified the invocation of Article 15 and the subsequent suspension of certain Articles of the Convention. It was then the first time the Court used the term 'margin of appreciation', stating that a certain latitude must be granted to the State, having regard of the responsibility of a government of safeguarding its citizens against any threats.

The reasoning offered by the Court was based on the nature of the Convention being an international law document. By virtue of Article 1,[11] which put the responsibility on the States of securing rights granted under the Convention, the Court inferred that the foremost obligation fell on the State organs themselves, and the Court and Commission would not fill in their shoes. Their tasks would be limited to examine the decision of the domestic organs and align them with the values of the Convention, and in doing so, some discretion would be granted to the government.

This approach was used again in the case of *Handyside v. U.K.,*[12]in which the applicant was ultimately fined for publishing a book deemed to be obscene in the State of U.K. The Court reiterated that the mechanisms of the Convention were only subsidiary to the national system, and determinations regarding the limitation of rights were to be taken by the domestic courts. The intended effect of the Convention was ultimately to support member states in ensuring that their internal domestic systems are in harmonious consonance with the standards stipulated in the Convention,[13] and therefore, the role of the ECtHR would be limited to reviewing this decision, rather than taking an entirely new decision on the case itself and placing themselves in the shoes of the national authorities.

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[9]*Lawless v. Ireland*, Judgment of 1 July 1961, European Court of Human Rights, *Series A*, No. 3, para.9.

[10] Supra Note 2, Art.15.

[11] Supra Note 2, Art.1.

[12]*Handyside v. U.K.*, Judgement of 29 October 1971,European Court of Human Rights,*Series A*, No. 24, para 19.

[13]*Handyside*, p.48.

DIFFICULTIES WITH THE MARGIN OF APPRECIATION

There are various recognized problems with the margin of appreciation doctrine, the most common one being the uncertainty and inconsistency as to the width of margin that the Court deems fitting in any given circumstance. The Court often had to weigh certain fundamental freedoms against each other, which turns out to be counterintuitive to the purpose of the Convention. For example, in the case of *Dudgeon v. U.K,*[14]wherein the criminalization of homosexual conduct was questioned, the court had to weigh two factors against each other: Article 8 of the Convention that deals with the protection of morals, which generally calls for a wider margin, against the fundamental right to respect of private life, which is adjudged with a narrower margin. Such conflicts force the Court to assign relative weights to these factors and makes definitive predictions about the width of the latitude granted to states even more difficult.

Another problem with the application of the doctrine is that the very usage of it leaves open the probability of it being manipulated to exercise arbitrary decision-making, or decisions which leave logical analysis and application of the Convention out of the picture. Lord Lester goes as far as saying that under the garb of exercising judicial restraint while granting wider margins to member states, the Court in essence shirks off its responsibility to preserve and protect rights granted under the Convention.[15]

THEORITICAL BASIS FOR THE USE OF MOA - UNIVERSALISM AND CULTURAL RELATIVSM

The concept of universalism is established on the estimation that if all humans are equal, then the rights that they are entitled to by virtue of being a human are identical, regardless of the culture that they are born into,[16] Cultural relativism on the other hand, argues that the concept of human rights stems from western liberal ideologies and has little value outside of that context. According to this idea, no universal moral principles exist, and that it is unjustifiable to impose upon one state, the values and systems of social justice that have been derived from an entirely different society with varying cultures and practices. There are noticeable

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[14]*Dudgeon v. UK*,,Judgement of 22 October 1981, European Court of Human Rights, *Series A*, No. 45.

[15]Lester, *The European Convention on Human Rights in the New Architecture of Europe, in Proceedings of the 8th International Colloquium on the European Convention on Human Rights (1996)*, p.227.

[16] J Shestack, *The philosophical foundations of human rights,* in SYMONIDES (ED) HUMAN RIGHTS: CONCEPTS AND STANDARDS (Ashgate /Dartmouth Aldershot).

complexities in both these ideologies and the effort to balance them against each other. However, it is seen that the rhetoric of cultural relativism is increasingly being used by politicians in order to suppress their own people,[17] as they use their culture for failing to comply (even partially) with the standards of the Convention.

The Court, in *Handyside's*[18]case, opined that it was not possible to harmonize the conception of morals in all contracting states, and therefore they need to be granted a certain margin of appreciation. This reasoning however, attracted considerable criticisms from legal scholars of the time. Lord Lester opined that the usage of a standard less doctrine such as MoA will lead to a 'variable geometry' of human rights, and will always be at odds with the universality of human rights.[19] The purpose and the promise of the Convention, of setting a universal standard for the promotion and protection of human rights are largely compromised by MoA[20]. The conjecture seems to be the doctrine of margin of appreciation stems from the concept of cultural relativism. This approach however, would be unstable, especially now that the Court will have to deal with the varying cultural practices of new Contracting Parties, and would be compelled to accept practices which could potentially threaten principles which have painstakingly been built up over the years by the Convention and the Court.

However, when we assess the usage of doctrine by the Court in past 20 years, it can be seen that the basis of application of MoA is nowhere justified by the concept of cultural relativism. In the case of *Tammer v. Estonia,*[21]a journalist was convicted for insulting a public figure. The Court held in favour of the State. While acknowledging that there was an interference with the applicant's right to free speech, it was justified, as the interference was prescribed by law, and was necessary in a democratic society. In the case of *Janowski v. Poland,*[22]another journalist was convicted for insulting two municipal guards in a public space. The Court held in favour of the state, reasoning that the interference with the applicant's right was justified

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[17] Donnelly, *Universal Human Rights in Theory and Practice*(NEW YORK CORNELL UNIVERSITY PRESS 1989) 119; Higgins, *Problems and Processes in International Law*(OUP OXFORD 1994) 96.

[18] Supra Note 12.

[19] A. Lester, *'Universality versus subsidiarity: a reply'*1 EUROPEAN HUMAN RIGHTS LAW REVIEW (1998) 73, 76.

[20] E Benvenisti, *'Margin of Appreciation, Consensus and Universal Standards'*(1999) 31 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW.

[21]*Tammer v Estonia*, Judgement of 6 February 2001, European Court of Human Rights, App.41205/98.

[22]*Janowski v Poland*, Judgement of 21 January 1999, European Court of Human Rights, App.25716/94.

and necessary in a democratic society, in order to attain the legitimate aim of preventing public disorder.

It can now be seen that the Court does not justify the use of the Doctrine by suggesting that free speech and expression is not a universal value in a certain state for some cultural or historical reason. In fact, the doctrine is invoked when the interference in an individual's right is justified by a good faith concern in furtherance of the collective interest of the public. The way that the doctrine has been used in recent years shows that the Court pays attention to the facts and circumstance of each case, in order to make sure that the latitude granted to the State is checked in order to guarantee compliance to the Convention. Therefore, by not taking a relativistic approach, the usage of the doctrine does not undermine the standards set forth in the Convention, but proves to be a beneficial tool for accommodating local differences with a largely universal model of human rights.

EMERGING STANDARDS IN THE JURISPRUDENCE OF THE ECtHR

Through analysis of recent case laws, three standards identified by the author Thomas A. O'Donnell, materialize with regard to the determination of granting a wide or narrow margin of appreciation.[23] It is seen that these standards are applied singly, as well as in conjunction with each other depending on the case and Article in question. These standards however, are examined with the exclusion of derogations under Article 15 of the Convention, as the cases under it as starkly different and are analyzed independently.

A. Consensus in Law and Practice among Member States

By this standard, it is understood that the Courts shall examine the consensus of member states on a certain freedom granted under the Convention, and only allow a narrow margin when there is a considerable consensus among States. This was first enunciated in the case of *Sunday Times v. United Kingdom*,[24] wherein the ECtHR held that a 'more extensive European supervision corresponds to a less discretionary power of appreciation.'

This approach is stable, in the sense that it makes sure that there is a certain consistency of application derived from the common practice of the member states. In the case of *Marckx v.*

[23] Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, HUMAN RIGHTS QUARTERLY, JHUP, Fall, 1982, Vol. 4, No. 4 (Fall, 1982), pp. 474-496.

[24] *Sunday Times v. United Kingdom*, (Sunday Times Case), Judgment of 26 April 1979, European Court of Human Rights, *Series A*, No. 30.

Belgium,[25] the ECtHR found a widespread consensus on the position of member states on the legal position and treatment of illegitimate children, and consequently declared the discriminatory Belgian inheritance laws as null and void. Belgium argued that this was a mere interference with the rights granted under the Convention as it was a cultural practice shared amongst various other member states. The Court rejected this contention, and held that the ECHR has to be interpreted in the right of progressive and modern circumstances, and the law cannot be upheld merely on the basis of a similar practice being carried out in other states.

This standard does seem to have promise in ensuring consistency, but has only faulted once in its application, in the cases of *Handyside* and *Sunday Times.* The Court in *Handyside* held that regardless of the Complainant's book not being banned in other member states, the book would remain to be banned in the United Kingdom, as it is impossible to find similar moral standards in all member states. This inevitably led to the conclusion that the Court will grant the state a wide margin when it comes to the protection of morals. In the *Sunday Times* case, concerning an injunction placed on an article published in the complainant newspaper, the state justified this limitation by stating that it was necessary for 'maintaining the authority and impartiality of the judiciary', but the Court disagreed and stated that there is a consensus among states on the objective notion of authority and impartiality of the judiciary, and this is the distinguishing factor between this case and *Handyside.* Since both these cases were concerning Article 10 of the Convention, reconciling them is a challenge. However, it can be seen that the Court did not wholly rely upon consensus while granting a narrower margin, but also the fact that free press is an essential element of a democratic system.

All in all, this standard of searching for a consensus among member states is an assured way of deciding the latitude granted to a member state. When there is a wide consensus among states, the margin granted to them shall be narrow, and when there is no consensus, the margin should be wide. This method, if used with caution and objectivity, can curb the misuse of the doctrine.

B. Rights Fundamental to a Democratic Political System

While using this standard, the Court has made a reference to a specific Article in the Convention and described it as being fundamental in a democratic political system. When this

[25] *Marckx v. Belgium*, Judgment of 13 June 1979, European Court of Human Rights, *Series A*, No. 31.

determination is made, a narrow margin of appreciation is granted to the state. By this logic, while the Convention at its core has the goal to maintain a democratic society, the Court picks some rights over the others, by virtue of them being *more* fundamental to a democracy.

In the *Danish Sex Education Case*,[26]there was an objection by the parents of school children against the curriculum of the Education Ministry, which instructed that sex education shall be a vital part of all the syllabi taught in schools across the country. They alleged violation of a certain protocol which stated that instructions given to students must be in conformity with the religious and philosophical values of the parents. The Court held in favor of the government, and stated that the intent of the protocol is to prevent indoctrination, and as long as the instructions are objective and factual, the objection would not stand. The Court recognized that pluralism is a core value of the Convention, but the government's need to increase awareness in the nation and prevent unwanted pregnancies took precedence.

The Court also made a very strong statement regarding the freedom of speech and expression in the *Handyside* case, stating that 'utmost attention should be paid to the principles characterizing the rights fundamental to a democratic society, and freedom of expression is one of the essential foundations.' The Court however, decided that when this freedom is balanced against the morals of the society, it is fair to interfere with it in order to safeguard social harmony in the state. A much stronger analysis of the position of freedom of expression was offered in the *Sunday Times* case, in specific reference to the freedom of press. This ruling indicated that freedom of press is especially valued when it comes to the preservation of democracy.

In the case of *Klass v. Germany*,[27]a German statute which permitted secret surveillance in the name of national security was challenged by the complainant, as it was a violation of Article 8 of the Convention. The Court upheld the law, stating that it was strictly necessary to interfere with the rights granted by the Convention in order to safeguard the democracy, and that exceptional conditions existed in the state of Germany which warranted such extreme measures.

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[26] Kjeldsen, *Busk Madsen and Pederson v. Denmark* (Danish Sex Education Case), Judgment of 7 Dec. 1976, European Court of Human Rights, *Series A*, No. 23.

[27]*Klass v. Germany* (Klass Case), Judgment of 6 Sept. 1978, European Court of Human Rights, *Series A*, No. 28.

Contrary to the consensus standard, this standard seems to be more unstable in its application by the Court, as it becomes troublesome to draw out a set of principles in order to ensure predictability. It is difficult to make an objective assessment with this standard, as one can never fully elaborate upon the Court's deduction of which rights prove to be more fundamental than others.

C. Specific Textual Analysis

At present, there exist only two cases in which the Court has specifically delved into the text of the Convention and the statutes involved in the determination of the latitude granted to states under MoA.

In the case of *Golder v. United Kingdom,*[28] the state denied a prisoner the right to consult with his solicitor. The prisoner then alleged a violation of his right to correspondence under Article 8. The state argued that the infringement was allowed owing to the accommodation clause in Article 8, but the Court rejected this argument stating that the language of the Article was restrictive (*There shall be no interference*), and stated that the usage of the accommodation clause was not within the margin of appreciation granted to the state.

In *Handyside,* by contrast, the Court took note of the different introductory language in the accommodation clause of Article 10:

"[W]hoever exercises his freedom of expression undertakes "duties and responsibilities" (Art. 10, ? 2) . . . . The Court cannot overlook [these] when it enquires ... whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society.""

These interpretations imply that the difference in wording accommodation clauses can have an effect on the latitude granted to the state. However, it has been observed that this standard has only been used as a last resort, in order to further strengthen the reasoning of the Court.

THE MARGIN OF APPRECIATION AND ARTICLE 15

Article 15 of the ECHR allows a member state to derogate from various Articles in the Convention when there is a 'public emergency threatening the life of the nation'. Two notable cases have been decided by the ECtHR under this Article.

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[28] *Golder v. United Kingdom* (Golder Case), Judgment of 21 Feb. 1975, European Court of Human Rights, *Series A*, No. 18.

In the case of *Lawless v. Ireland,*[29]the applicant had been imprisoned without trial on the suspicion of him being a part of the IRA, and the sole question before the Court was to determine whether the derogation was permissible as under Art. 15. It laid down that the Irish government had 'reasonably deduced' the existence of a public emergency while taking into consideration three factors:

i. A situation of crisis or
ii. exceptional and imminent danger
iii. which affects the whole population
iv. and constitutes a threat to the organized life of the community of which the State is composed.[30]

In the case of *Ireland v. United Kingdom,*[31] the Court held in favor of the United Kingdom, when Ireland had alleged grievous violations of human rights by Britain in their treatment of prisoners of the IRA. The Court acknowledged the existence of an emergency which justified a larger margin of appreciation which was granted to them.

The special character of cases which are categorized under Article 15, especially ones with strong political connotations and pervasive impact on world politics, as well as the concern that the member state will not follow the decision granted by the Court, force it to grant a wider margin in these cases. It is therefore reasonable to assume that when it comes to Article 15 of the Convention, the ECtHR will almost always grant wide latitude to the member state in assessing an alleged violation of the Convention.

CONCLUSION

The doctrine of margin of appreciation as used and developed by the European Court has admittedly been precarious in its application. The ECtHR is granted wide discretion while interpreting cases requiring an analysis of margin of appreciation. Therefore, it is a common perception that standards for its application need to be set, in order to strike a balance between the adherence of the Convention and the specific and individual needs of member states.

[29]Supra Note 9.

[30]Supra Note 9.

[31]*Ireland v. United Kingdom*, Judgment of 18 Jan. 1978, European Court of Human Rights, *Series A*, No. 25.

The major concern among legal scholars has been the use of it without principled standards, however it has been shown that setting universal standards for its application would be counterproductive to the goal it is trying to achieve.

This however, does not mean that its application continues to be unpredictable, and this can be seen with how the Court has evolved its jurisprudence and has increased the predictability of its application. The ECtHR's continued recognizance of the doctrine has not come about to be a deterioration in the standards of the Convention, or the creation of a relativistic approach in the Court. This is not to say that the doctrine is without flaws, but the use of it has indeed presented itself as a beneficial tool for accommodating municipal differences within a universal human rights standard in the EU.

This paper has traced out three standards that the Court has expressed through case law. *Firstly*, the Court checks the practice among other member states, and if a consensus on the issue is found, it grants narrower latitude by the margin of appreciation. *Secondly*, the ECtHR defines and gives priority to rights fundamental to a democratic and political system, and after these have been determined, goes on to offer a narrow margin of appreciation to the member state. *Thirdly*, the specific language of the text, the accommodation clauses in particular, prove to be an important tool of interpretation for the Court when the cases before them get unusually obscure. *Lastly*, it has been observed that when it comes to Article 15 of the Convention, the Court has granted the widest possible latitude to the state. Along with these standards, the Court has also repeatedly used the principle of proportionality while assessing the infringement of an individual freedom granted under the Convention, between the means employed to interfere with the freedom, and the aim of the measures.

The doctrine is indeed a vital concept which will continue to stabilize and develop in the jurisprudence of the ECtHR, and offers the necessary leeway to the Court to be flexible in applying the vague and broad language of the Convention. Subject to its usage as a clear and principled doctrine, it can become a reliable doctrine in the enforcement of the Convention.