

Application of Margin of Appreciation to The Regime of Human Rights

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Abstract

The European Court of Human Rights (ECtHR) has been established with the primary function to regulate those conducts which violate the human rights of the persons granted to them under the European Convention on the Human Rights (ECHR). The court is expected to apply these provisions in a uniform manner but the domestic authorities divert from the provisions of ECHR considering their practical parlances. Hence, the problem before ECtHR is related to how far the domestic authorities can take defense of principle of 'margin of appreciation' and what are the grounds on which this principle can be applied while considering the derogation of any human right of the convention. The paper will inquire into the cases which will suggest the relevance of 'margin of appreciation' in European context by addressing the following research questions: (i) How the 'margin of appreciation' has evolved in European legal framework?; (ii) What are the facets of 'margin of appreciation' in European jurisprudence?; (iii) What is the 'litmus test' for examining whether a margin amounts to a legitimate action or a violation of human rights? Henceforth, the objectives of the study are to examine the scope of 'margin of appreciation' in European human rights system and to study the implications in applying 'margin of appreciation' by ECtHR whereas the approach is analytical and descriptive involving qualitative methodology. The study engages the external desk-based research involving online desk research.

Keywords: Margin of Appreciation, European Court of Human Rights, European Convention on the Human Rights, European Consensus, Principle of Subsidiarity, Legitimate Aims, Democratic Society, Pressing Social Needs.

I. Introduction

*"In the absence of a European consensus, the Court has tended to reflect national law by applying a lowest common denominator approach or to accommodate variations in state practice through the margin of appreciation doctrine when deciding upon the meaning of a Convention guarantee."*¹

(Harris, O'Boyle & Warbrick *Law of the European Convention on Human Rights*)

The expression "margin of appreciation" refers to the space given for manipulation of human rights by Strasbourg organs. The doctrine gained its prominence in the light of judgments propounded by the European Court of Human Rights (ECtHR). However, it was later put on the ground that legal traditions and cultural practices do not assure uniform application of the provisions of the convention, hence, it is required to identify the lowest common denominator.

It becomes debatable whether the applicability of the human rights is universal or it is dominated by 'cultural relativism'. The underlying issue here is if applicability contains limitation in implementing any part of the human rights convention, then to what extent the derogation is permissible in the fundamental governance of the human rights law. Although this question seems easy to grasp but it is difficult to comprehend in exact terms. This happens because of the reason that the state parties often took the defense of 'local conditions' which take into consideration the practical parlance of their territories in implementing the provisions of the

convention. Hence the role of court becomes prominent here in assessing the state's performance and to see the change (margin) in the context as to how the states have applied the provisions of human rights protection in their domestic laws. The jurisprudential notion of the 'margin of appreciation' and its application in terms of 'cultural relativism' has been discussed in the case of *Handyside v. the United Kingdom*²:

"It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place which is characterized by a rapid and far-reaching evolution of opinions on the subject. Consequently, article 10(2) leaves to the Contracting States a margin of appreciation."

Hence, this paper endeavors to look into the implementation of 'margin of appreciation' in the governance of human rights protection. Furthermore, the significant contribution of the study provides the picture before the readers as to how domestic authorities should secure the rights of the convention in circumstances of change and how the ECtHR can promote domestic authorities' involvement in co-operation of the convention.

II. Conceptualisation of Margin of Appreciation

The principle of 'margin of appreciation' allows contracting states to defer from the notion of 'universality'. It's the product of judicial review process. 'Narrow space' is given to the states in order to maneuvering human rights. The states can choose the appropriate methods for complying with the human rights mentioned in the convention in their own territory by creating a justifiable margin. It has been elaborated in the case of *Powell and Rayner v. the United Kingdom*³ that "...State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention....".

However, this principle does not find its place in the convention but it has been widely accepted and recognized by the courts.

Yourow (1996) elaborates margin of appreciation in following terms:

"The latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees. It has been referred as the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws." While considering the doctrine, the court has to look into diverse range of factors. The reason of its incorporation in the domestic regime can be balanced by the public interest. For e.g. if it is fair and necessary for achieving the public interest, establishing rule of law in the state, then such relativist practice must be recognized by the courts.

Roger Alford said that "the margin of appreciation is a key concept within ECtHR law and gives states discretion in questions of particular sensitivity. What is important, however, is that the margin of appreciation does not constitute a *carte blanche* to do as one wishes. As a common consensus emerges, particularly on issues of sensitivity or issues in relation to which the law may be in a transitional stage, the margin will become narrower until it is no longer acceptable for a state to operate in a manner inconsistent with the Convention rights as given effect by common

European practice. The margin of appreciation therefore decreases in size as common consensus increases.”⁴

Considering the primary role of domestic authorities, the ECtHR in case of *Greece v. U.K.*⁵ said that “the government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation”.⁶ So, there are two conditions which must be fulfilled in this case:

1. This principle only creates a margin and accordingly, each state is given some space to vary the applications of human rights depending upon peculiar conditions.
2. It’s not uniform always since it depends upon the matters whether any state has entered into treaty or not. So, the principle is susceptible to variations depending upon the nature and content of human rights.

Cohen-Eliya and Porat contend that the margin of appreciation, together with proportionality, constitutes a “standard-based doctrine”.⁷

It gives flexibility in the application of human rights standards in different society. It has come to the rescue by giving scope to the member states depending upon conditions of that state.

III. Margin of Appreciation: From The Mirror of European Court of Human Rights

3.1 Better position rationale

Articles are incorporated in the ECHR in common form. However, some are absolute in nature whilst others are qualified with the term ‘necessity’ which denotes the idea of proportionality. It allows variation in terms of applicability of margin of appreciation, either wide or narrow depending upon the situation. Hence, it depends upon the nature of the activity restricted and the aims for imposing restriction.

It was said by the President of the European Commission in *Lawless v. Ireland*⁸ that: “Once the Court or Commission is satisfied that the Government’s appreciation [interpretation] is at least on the margin of the powers conferred by Article 15, then the 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”

In *Handyside v. U.K.*⁹, the court was examining the issue whether “Little Red SchoolBook” violated the freedom of speech and expression on the ground of obscenity. The court pointed out that the machinery of protection established by ECHR subsidiary to national system of human rights’ convention leaves to every state the task of securing rights and liberties enshrined in the convention on one hand and to check whether something has obstructed the morals of the democratic society or not on the other hand. It was discussed that Article 10(2) of ECHR is not synonymous with indispensable. Although it leaves to the contracting states a margin of appreciation but it does not accommodate unlimited power of these states.

It is assumed that the initial assessment of reality of ‘pressing social needs’ has to be done by the state authorities. It differs from society to society or state to state. It has to be read within the context of pressing social needs.

Strict approach has been adopted in the *Handyside* case for securing the fundamental rights like freedom of expression, intimate aspects of private life and to examine the reasonableness

i.e. the proportionality test. Accordingly, the court laid down four questions for consideration of extent of a margin:

1. Is there pressing social needs for restriction?
2. If so, does the restriction correspond to the need?
3. If so, is it proportionate response to the need?
4. Are the reasons present by authorities relevant and sufficient?

The case laws of the ECtHR suggest that there should be reasonable connection between the means and aims to be realized. Further, it was also observed by the court that the manner of application of the doctrine depends on a numerous factors, which determine the scope of margin afforded to the national authorities. For e.g., comparative advantage of local authorities, degree of European consensus, nature of the conflicted interest and accordingly, the margin imposed should reflect the fair balanced approach. In cases where European consensus has achieved, the narrow margin would be permissible.

Further, in *Klass v. Federal Republic of Germany*¹⁰, Court emphasized upon the requirements for defending democratic society and individual rights which is inherent in the system of the Convention. In this context, court considered the Preamble of the Convention which states that "Fundamental Freedoms are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which (the Contracting States) depend".

Moreover, in other cases it has been held that the possible existence of alternative solution does not make any legislation invalid, it is upon the state to pick up the path because it's the policy of the state which indicates the recourse to be adopted, so it's not upon the court to determine whether legislation has some other recourse so long as there is no violation of any law or rights of the people. This position has been elucidated in case of *James & Ors. v. U.K*¹¹.

In *Lawless v. Ireland*¹², it was observed that "having regard to the high responsibility that a government bears to its people to protect them against any threat to the life of the nation; it is evident that a certain discretion - a certain margin of appreciation must be left to the government".

Talking about Article 15 of ECHR, it is often argued that it permits 'double derogation'. In *Ireland v. the United Kingdom*¹³ the ECtHR stated that:

"the national authorities are in principle in a better position than the international judge to decide both on the presence of... an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para 1 leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which [...] is responsible for ensuring the observance of the States' engagements [...] is empowered to rule on whether the States have gone beyond the extent strictly required by the exigencies of the crisis."

This is because a real emergency places democratic authorities in a genuine dilemma between seeking to observe their normal Convention obligations and exercising their right, under Article 15, to derogate from these if the circumstances warrant it.¹⁴ The decisions of national authorities create much significance due to political sensitivity in emergency situations. In such case, ECtHR needs to broaden the margin of appreciation for discovery of truth.

The ECtHR in *Brannigan and McBride v. U.K*¹⁵ discussed the relevant factors which are to be considered when examining the extent of margin and thus, court stated that 'the nature of the

rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation' are the relevant factors in such cases.¹⁶

In *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*¹⁷, the court decided that prohibiting distribution of journals to soldiers is disproportionate since it's not a threat to military security/discipline though the journals were critical to the military life.

In *Campbell v. U.K*¹⁸, the court rejected justification for opening and reading the letter in prison services on the ground that the prison authorities have right to open the letter only but not to read it.

Hence, we have seen that the court has tried to give emphasis upon the margin of appreciation by directing the domestic authorities to follow the minimum standards approach.

3.2 Narrow/Wide margin of appreciation

There are various cases in which court gives the idea as to what kind of margin should be justified. For instance, cases involving personal choices, personal identity (*Dickson case*)¹⁹, cases involving racial or ethnic discrimination or complex tasks ask for narrow margin of appreciation such as choice to become a genetic parent, issues of social strategy and needs. In these cases, the court respects the legitimate policy behind the rule/law. Hence, a fair balance is required between private and public interests and conventional rights/interests on the other hand.

Whereas case involving national security, public emergency, protection of morals or legislative implementation of social and economic policies demand for the wide margin of the appreciation. Also, State enjoys wide range of margin of appreciation in matters concerning education policy, establishment of schools and other educational institutions, matters related to election such as disqualification, conditions regulating right to vote etc. provided the conditions satisfy the proportionality test and reasonable nexus with the objective in any democratic society. In *Leander v. Sweden*²⁰, the ECtHR observed that the wide range of margin of appreciation can be permitted in cases of national security so as to secure the democratic society from the destruction and threat.

Through various case-laws, it is seen that the ECtHR permits the wide margin of appreciation in the cases where it becomes necessary to prevent the public disorder or the commission of the crime. Accordingly, in *Otto-Preminger-Institut v. Austria*²¹, the Court agreed to the provisions of the Austrian Penal Code which permitted seizure of a film considered to offend the religious sensibilities of Roman Catholics. It was with the objective to prevent the public disorder in the state. In *Parti Nationaliste Basque v. France*²², the court build its decision on the doctrine of proportionality and said the imposed restriction should be looked in a way so as to justify the relevant character of the restriction for pursuing the legitimate aim to which it is created.

It implies that the approach adopted by the court in such cases becomes more pertinent to ascertain whether the state authorities have acted rationally or whether the restriction/interference was reasonable or not within the meaning of Art. 11 of the Convention.

3.3 Principles concerning limitations & margin of appreciation

1. Principle of effective protection: It is inherent in the text convention and thus, it requires that it should serve the purpose of protecting the human rights rather than the enforcing mutual obligations. In *Malone v. U.K*²³ case, court held that there must be measured legal protection against arbitrary action by public authorities under article 8. If there is no transparency over discretionary actions, it indicates greater probability of arbitrariness, hence state must have

power to control it.

2. Principle of Subsidiarity: State authorities are on the better position than international judge to adjudge the ground realities of the prevailing situation. States should themselves decide democratically what is appropriate. That's why role of the court is limited and thus, secondary to the extent when there is any dispute. There are two important aspects of this principle which are as follows:
 - a. It explains the nature and extent of margin of appreciation delegated to the domestic authorities and how they interpret the convention's provisions
 - b. It carves out the sphere in which judicial authority can exercise its power to the limited extent.²⁴

Furthermore, the principle of subsidiarity makes the rationale basis for distributive justice to the persons falling under the conventional regime so that their rights can be secured from the unnecessary interference. Carozza argues that the principle assumes a delineation of a "conceptual territory in which unity and plurality interact, pull at one another, and seek reconciliation".²⁵ This principle can attune culturally specific and socially milieu understandings of ECHR standards.

By this principle, court established the rule of 'self-restraint'. It was held in the case of *Petkoski and Others v. Macedonia*²⁶ that "right to a court is subject to limitations permitted by implication, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard".

In case of *Z and others v. U.K*²⁷, the Court stated that the right to access to courts "may be subject to legitimate restrictions such as statutory limitations period, security for costs orders, regulations concerning minors and persons of unsound mind".

3. Permissible interference with conventional rights: It suggests that the provisions of the convention envisaged the sufficient element of control over relevant decision-maker so as to avoid arbitrary actions/exercise. Hence, the state action is justified when it satisfies three conditions:
 - a. Prescribed by law/in accordance with law: The derogation must be backed by the law and it should fulfill the requirement of 'rule of law' in the society.
 - i. Accessibility: Person who is likely to be affected should have access and information about any shift from the conventional provisions. Breach of this condition was discussed in the case of *Silver v. U.K*²⁸, where the court held that the restrictions of prisoners' correspondence could be cleaned through law i.e. the Prisoners Act. However, in present case, the non-legal restrictions through order of Secretary of State were not in accordance with the article 8 of the ECHR and they are not prescribed by the law also.
 - ii. Requirement of Certainty: Law should be sufficiently clear to govern the individual's future conduct. Apart from it, there should be proper means so that people can be well-versed with the law. It has discussed in the case of *Sunday Times v. U.K*²⁹ that the law should be precise and unambiguous. Person should be able to know or foresee the consequences which certain actions must entail. Hence, law should be fairly determinable, although absoluteness is not necessary in this regard.
 - b. Legitimate Aims: The ECHR lists a number of legitimate aims allowing a claim-right to be interfered with, as per law and necessity in the democratic set-up. In *Sunday Times* case³⁰, the Court stated: 'what is necessary is more than what is desirable or reasonable, although it need not be indispensable. Hence, this requirement demands for the proper purpose to

which margin of appreciation is allowed and it says that there should be legitimate aims of the state within the context.

In case of *Czarnowski v. Poland*³¹ the court said that "...notwithstanding the margin of appreciation left to the respondent State, the refusal of leave to attend the funeral of the applicant's father, was not 'necessary in a democratic society' as it did not correspond to a pressing social need and was not proportionate to the legitimate aims pursued."

- c. Necessary in democratic society: Interference in human rights must justify this requirement. EctHR has put much emphasis upon the right to freedom of speech and expression and in this context, the court in *Lingens v. Austria*³² said:

"Freedom of press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention".

4. Principle of Proportionality emanates from pressing social needs: Courts should take care that restrictions must not unnecessarily interfere with the rights of the people. There should be reasonable relationship between objective and means to attain that objective.

The articles 8-11 of ECHR use the phrase "in accordance with the law" (Art. 8) or "prescribed by law" (Arts. 9, 10, 11); meets one of the legitimate aims; and is "necessary in a democratic society" which signifies the need of 'proportionality' doctrine.

In case of *Van Kuck v Germany*³³ the Court considers the extent of margin of appreciation and it was found that the reasonable nexus between the interests of the private health insurance company and the interests of the individual was not sought by the German authorities. It was held that the authorities overstepped the margin of appreciation afforded to them under paragraph 2 of Article 8.

Another aspect which is considered by the ECtHR is that the individuals' rights are curtailed to the certain extent if it is necessary for securing collective interests. It is also known as the 'the less restrictive alternative doctrine'. Hence, states should adopt those methods first which are less restrictive of individuals' rights but at the same time, they are capable of achieving the legitimate goal desired and in case, it's not possible to adopt this way then only collective goals can be preceded over the individuals' rights. On the same alignment, it was held by the court in the case of *Hatton v. United Kingdom*³⁴ that "States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights."³⁵

3.4 Interrelationship between margin of appreciation and proportionality

1. Significance of rights' importance arises when convention rights have been characterized as a fundamental by the court e.g., right to fair trial, freedom of speech and expression etc. In that case, court looks into the approach adopted by the court whether the margin was necessary or not.
2. Objectivity of restriction in question, court distinguish between the objectivity of nature of authority of judiciary and subjective nature of protection of morals, then court refers to domestic means.
3. When there is consensus in law, court will interfere to hold that margin of appreciation is not permitted or there will be narrow margin because margin refers to the slight difference

from agreed standards. Like in case of *Marckx v. Belgium*³⁶, the court acknowledged the emerging European consensus of the treatment of illegitimate children and struck down the distinction of law between legitimate and illegitimate family for preventing the discrimination to illegitimate children.

IV. Concerns and Issues of Margin of Appreciation

It was argued, many a times that the ECHR was adopted for realizing the uniform progressive development of human rights throughout the continent. But, this doctrine brings out the subjective notion into picture in the light of 'relativist standards'. In *Z v. Finland*³⁷, Judge Demire observed that: "I believe that it is high time for the court to banish that concept [of margin of appreciation] from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies". The doctrine is being criticized for its misty functioning. It has been seen that the doctrine is being misused by the states many a times on account of non-consistent with the provisions of the convention.

Further, it has been seen many a times that inconsistency may constitute danger to the rule of law in the country. Since, this doctrine does not find its mention in the ECHR hence state parties enjoy the discretionary power to exercise it which may be likely to lead abuse of the human rights of the concerned persons, if it does not satisfy the principle of proportionality in the given circumstances. Hence, it is often said that this practice undermines the value of rights of the people.

Lord Lester criticizes this approach and said that "The danger of continuing to use the standard less doctrine of the margin of appreciation is that, especially in the enlarged Council of Europe, it will become the source of a pernicious, variable geometry of human rights, eroding the *acquis* of existing jurisprudence and giving undue deference to local conditions, traditions, and practices".³⁸

Since, it is the primary duty of the states to inquire whether margin can be exercised considering the nature and extent of the situation and whether particular right is absolute or subject to some limitation. Sometimes, states permits margin when it is required for the majority, however critics argue that it constitutes threat to the rights of the minority. Hence, considering this blind incongruity, there is an urgent need to secure the aspirations of human rights jurisprudence.

V. Conclusion

The doctrine of margin of appreciation has emerged as an 'analytical tool' by allowing the states for maneuvering the human rights in order to implement the provisions of the convention under peculiar circumstances. Its basic objective is not to secure the interests of the government rather to secure the minimum standards of human rights. The doctrine has its roots in the jurisprudence of 'ethical notions' that cultural diversity should be respected and thus, recognized. Hence, on the same line, the paper presents various instances in which margin of appreciation was exercised by the state parties, be it wide or narrow in its scope. ECtHR laid down various principles in the light of common standards of convention, rule of law so to preserve the sanctity of the democracy and violation of the human rights of the persons. The paper concludes, by saying, that the doctrine of margin of appreciation has various connotations for which the interpretative meaning is being given by the ECtHR. It has been seen that court by referring the margin of appreciation tries to defer the power on national authorities. However, it is argued that state authorities have to endorse the minimum standards incorporated in the ECHR. In some cases, wide margin of appreciation is permitted, hence, it is required that the court should promote the ideals of the convention by establishing a fair balance between the two conflicting interests i.e. of states' power to impose a margin and the human rights of the persons. Whereas

lack of common European consensus and variance in the culture emerge as a burden for ECtHR to consider the determinacy of the margin permitted. Hence, the court should review such cases very carefully by allowing the margin only to those where it is required to pursue the legitimate aims by accommodating the interests of the minority too. Further, it is required that court should be cautious in reviewing that the margin should not create permanent impairment of the human rights of any section of person. Hence, it is hoped that the findings of this paper would help the academicians and researchers to further develop the ideas as to why and what kind of principles should be laid down by the countries for establishing the common denominator with specific content.

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