



UCL POLICY BRIEFING – OCTOBER 2014

AUTHOR

Eleni Frantziou
UCL Laws
eleni.frantziou.12@ucl.ac.uk

EDITORS

Dr Uta Staiger
Deputy Director
UCL European Institute
u.staiger@ucl.ac.uk +44(0)20 7679 8737

Sarah Chaytor
Head of UCL Public Policy,
Office of the UCL Vice-Provost (Research)
s.chaytor@ucl.ac.uk

A partnership between the UCL European Institute, UCL Public Policy, the UCL Institute for Human Rights and the UCL Centre for Law and Governance in Europe.

KEY CONCLUSIONS:

- The margin of appreciation plays an important role in **ensuring the application of human rights** in the ECHR system;
- The margin of appreciation provides an important means of **coordination and cooperation** between national and European law.
- Recent developments mean that the margin of appreciation is likely to acquire a **codified presence** in the Convention's Preamble in the future;

The margin of appreciation doctrine in European human rights law

Summary

This policy briefing discusses one of the most prominent legal constructs in European human rights law: the margin of appreciation doctrine of the European Court of Human Rights, which is used to allow states room for manoeuvre in the manner in which they apply some of the provisions of the European Convention on Human Rights ('ECHR' or 'Convention'). The margin of appreciation has defined not only the Court's case law, but also its relations with the member states and the way in which the Convention is applied nationally. This policy briefing provides an overview of:

- the content and functions of the margin of appreciation doctrine;
- its origins in the Court's case law;
- the likely future of the margin of appreciation doctrine.

Introduction

The doctrine of the margin of appreciation is regarded as one of the most prominent judge-made legal constructs in European human rights jurisprudence. It has influenced the reasoning of the European Court of Human Rights (ECtHR), and has largely defined the Court's relations with the 47 states bound by the European Convention. It ensures that a minimum level of human rights protection is met in all contracting states, while at the same time allowing some scope for differentiation in light of the particularities of each jurisdiction. This briefing:

- outlines the concept and functions of the margin of appreciation doctrine;
- reviews its origins in the Court's case law
- provides some insights into its likely future, in light of more recent developments.

The content, functions, and origins of the Margin of Appreciation

What is the margin of appreciation?

The margin of appreciation doctrine is an **analytical tool utilised by the ECtHR in its assessment of those provisions of the Convention and its Protocols that require balancing with other**

rights, or need to be weighed up against other aspects of the public interest. It devolves this balancing exercise in large measure to national courts, thus recognising both their crucial role as the first available forum for the protection of human rights, and their expertise regarding matters pertaining to national law.

It is difficult to describe the reach and functioning of this doctrine with precision. It is important to highlight that the margin of appreciation does not provide blanket exceptions in the application of rights. Rather, it ensures that human rights under the Convention system develop in a pluralistic pattern, which is mindful of national contexts, as long as the minimum floor set by the Convention is effectively protected.

The margin of appreciation is a “valuable tool devised by the Court itself to assist it in defining the scope of its review, [...] it is a variable notion which is not susceptible of precise definition”.

Sir Nicolas Bratza, former President of the European Court of Human Rights

When does the margin of appreciation apply?

The margin of appreciation has not been used in respect of all human rights protected under the Convention system. While in theory there are no limits to its application, **the Court has not used it in the assessment of the absolute rights** enshrined in Articles 2-4 ECHR, which respectively protect: the right to life; the freedom from torture and from inhuman or degrading treatment or punishment; and the freedom from slavery, servitude and compulsory labour. These are rights that attract a high degree of scrutiny on the part of the ECtHR and no limitations can be placed on their exercise.

Rather (although it has not been expressly confined to these rights), the margin of appreciation is most illustratively employed in respect of **the qualified rights of the Convention** (Articles 8-11 ECHR). These protect, respectively:

- **the right to private and family life;**
- **the freedom of thought, conscience and religion;**
- **the freedom of expression; and**
- **the freedom of association.**

All of these provisions acknowledge the possibility of limitations to the protected right, where such limitations are carried out “as prescribed by law” or “in accordance with the law”, meet a legitimate aim, and are “necessary in a democratic society”. A degree of subsidiarity, i.e. a requirement to take national standards into account, can be inferred from the wording of these provisions. The margin of appreciation is also prominent in the assessment of Article 14, which enshrines the right not to be discriminated against in the exercise of Convention rights.

Origins of the margin of appreciation in the Court’s case law

It would be misleading to suggest that the margin of appreciation doctrine is applied consistently in every case, as individual circumstances are crucial to the proper application of human rights. However, while it is not technically bound by its own precedent, the ECtHR does in practice respect it. The application of the margin of appreciation follows principles established over many years, going back to its earliest cases¹.

The rationale of the margin of appreciation was first articulated in the *Handyside* judgment, in 1976². There, the ECtHR made clear that a sequence is involved in the process of securing human rights: an assessment of the compatibility of national measures with the Convention is first made by **national courts**; and subsequently a review of this assessment is undertaken by the **ECtHR** (if needed). Crucially, the Court acknowledged that **national authorities are better placed to assess the content of limitations based on contextual considerations** (for instance, public morals) as well as the degree to which the limitations imposed are necessary.

Standards on these issues vary amongst different countries. It is not the Court’s role to replace national views with a uniform standard, but rather to coordinate the protection of human rights in light of the differences encountered amongst the 47 member states. It is however important to note that the principle of **proportionality**, (i.e. whether the national measures are appropriate and do not go beyond what is necessary to meet a specific objective), has a clear impact on the application of the margin of appreciation doctrine. Another relevant consideration for the Court, which has acquired increasing importance over the years, is an individual’s **vulnerability**, which can impact the degree to which a particular measure affects them personally.

Present challenges and future prospects for the Margin of Appreciation

Challenges

The margin of appreciation has not been uncontroversial. The Court has been criticised for referring to it almost automatically in its case law, and thus at times deferring to national standards without carrying out a substantive assessment of fundamental rights. Secondly, the margin has been described as being “as slippery and elusive as an eel”³ and criticised for its unclear nature and its unpredictability⁴.

These criticisms are to some extent justified. However, further **mechanisms have been developed to predict and assess the application of the margin of appreciation** within the Court’s practice. Most illustratively, there is a ‘margin within the margin’. Even where the Court sets a minimum standard, such as the necessity to recognise same-sex relationships, it leaves the **manner** in which that standard is implemented to national authorities.

¹ See *Greece v United Kingdom*, application no. 176/56, ECtHR 26 September 1958.

² *Handyside v United Kingdom*, application no. 5493/72, ECtHR 7 December 1976.

³ A Lester, “Universality vs. Subsidiarity: A reply” (1998) 1 EHRLR 73, 75.

⁴ See Joint Committee on the Draft Voting Eligibility (Prisoners) Bill.

Prospects for future development

Embedding the margin of appreciation into the text of the Convention's Preamble: Protocol No 15

The adoption in May 2015 of Protocol No 15 to the Convention will add explicit references to both the margin of appreciation and to the principle of subsidiarity to the Convention's Preamble, once the Protocol comes into force⁵. This is important because the margin will cease to be purely founded in case law and will become **embedded in the text of the Convention**. This is likely to have implications for the future development of the margin of appreciation.

Article 1 of Protocol No 15 provides that the following text will be added to the final paragraph of the Convention's Preamble:

"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

However, it is clear from the **explanatory report** to the Protocol that this addition is intended to remain "consistent with the doctrine of the margin of appreciation as developed by the Court in its case law"⁶. In other words, both the margin of appreciation itself and consideration of its origins will continue to be important in the future.

Emphasising 'dialogue' between national and European courts: the Brighton Declaration

The **Brighton Declaration of April 2012** placed significant emphasis on the margin of appreciation and its future development. The Declaration describes the European Convention on Human Rights as a successful **system of protecting human rights** comprising: policies, laws, and courts, both at the national and at the supranational levels. It makes clear that the **margin of appreciation provides the link between those levels**: it dictates their respective jurisdictions and ensures that their role in the protection of human rights in Europe is recognised.

Codifying the margin of appreciation may thus have important positive features: it encourages national courts to seek to comprehend and to apply the Court's case law and can drive better understanding of the Convention's working model and of the Court's practice at the national level. **The margin of appreciation is thus a form of dialogue between the courts, which can lead to enhanced protection of human rights throughout Europe in the future.**

BACKGROUND

The 'Britain & Europe' Seminar Series is a collaborative attempt by UCL Laws, the UCL European Institute, the UCL Institute for Human Rights and the UCL Centre for Law and Governance in Europe, which seeks to shed light on the contentious relationship between the United Kingdom on the one hand, and the European Union and the Council of Europe on the other. The Series deals with several recent developments prone to affecting this relationship, with a special focus on their legal dimension. As such, it aims to provide a platform for informed public debate regarding Britain's position – as well as its future – in Europe.

The eighth seminar of the Series for 2013-14 was held at the UCL Faculty of Laws on 8 May 2014 and was entitled 'Whither the Margin of Appreciation?'. The seminar, which also formed part of the Current Legal Problems Lecture Series 2013-14, was given by the President of the European Court of Human Rights, Dean Spielmann. It was chaired by Lord Neuberger of the UK Supreme Court.

President Spielmann's lecture is forthcoming in Volume 67 of **Current Legal Problems**.

A **transcript of the lecture** is also available to download.

Conclusion

The margin of appreciation plays an important systemic role in the application of the European Convention on Human Rights. It fulfills the ECtHR's objective of supervising the review of human rights provisions conducted by domestic courts and allows for an effective sharing of human rights responsibilities between the national and supranational levels.

Recent developments show that the margin of appreciation is regarded by both the ECtHR and the countries that have signed up to the Convention as a crucial linking point between their respective systems of human rights protection. These developments also encourage national courts to make the most of the balancing powers that the margin of appreciation doctrine grants them, paving the way for further dialogue with the ECtHR in the future.

⁵ The Protocol will come into force three months after the day on which all contracting states have signed and ratified it. To date, 29 states have signed the Protocol and 10 states have both signed and ratified it. The ratification process differs amongst contracting states.

⁶ Council of Europe, 'Explanatory Note to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms' CETS No. 213, para 7, available at www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf

