

Law

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The Formation of the Principle of Margin of Appreciation in the Practice of International Courts: A scientific and practical analysis

This article is based on a legal analysis of the case law of the European Court of Human Rights. It discusses the early application of the principle of margin of appreciation, which determines the basis for its application in the context of domestic law.

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The Court first used an understanding of this framework in the case of Greece vs. United Kingdom (Greece vs United Kingdom) (Greece v. United Kingdom, no. 176/56.), examined in 1958. The inter-state complaint filed by Greece against the United Kingdom related to how the United Kingdom managed Cyprus.¹ In its defense, the United Kingdom presented Article 15 of the Convention 2, arguing that the deviation from responsibilities was due to extenuating circumstances (a state of emergency). In the conclusion of the case, the Commission noted that in determining the degree of deviation from obligations caused by the complexity of the situation, States should be entitled to exercise the margin of appreciation (Howard C. Yourow. p. 16).

The principle of the margin of appreciation of States is again used in the case *Lawless vs Ireland* (Lawless v. Ireland, no. 332/57.), on which the European Court delivered its first judgment. In this document, the Commission, in a more or less lengthy analysis of the above principle, defined it in a certain way. The applicant in the case insisted that his arrest and further detainment were conducted without charge and without trial, which is a violation of the right to freedom and personal inviolability provided for in Article 5 of the Convention. In their defense, the authorities of Ireland claimed that the applicant's detention and arrest had been carried out on the basis of the Emergency Act of 1940.

In this case, the Court, in fact, had to answer two questions: 1) whether there was a state of emergency in Ireland at the time of the applicant's arrest and deprivation of his liberty; and 2) were his arrest and imprisonment measures that were strictly dictated by the severity of the state of emergency? During the judicial investigation, the chairman of the Commission presented his arguments, which are still considered to be the best formulation of the doctrine of the limits of freedom of discretion of states. In his speech before the Court, the Chairman of the Commission, Sir Humphrey Waldock, in particular, noted:

The question of whether to use exceptional measures in accordance with Article 15 is related to the problems of margins of appreciation and timing, which are very complex problems, and particularly complex in democratic societies ... The Commission agrees that the Government is obliged to strike a balance between the negative consequences asso-

¹ In the event of war or other extenuating circumstances threatening the life of the nation, any of the High Contracting Parties may take measures derogating from its obligations under this Convention only to the extent that this is due to the extreme circumstances, provided that such measures do not conflict with its other obligations under international law.

ciated with the temporary restriction of fundamental rights, on the one hand, and the possible worst consequences - on the other... Article 15 should be considered in the context of a special task that is the subject of its settlement, namely: in the context of the responsibility of the Government for maintaining order during war or any other public emergency threatening the life of the State. The concept of the discretion of the state is that the fulfillment by the government of these obligations is, in fact, a highly delicate process of assessing extremely complex factors and balancing conflicting approaches to understanding public interests; and that when the Commission of the Court is satisfied that the assessment of the Government is at least within the limits of the powers conferred by Article 15, then the interest of the public itself in an effective government and in the maintenance of order justifies the decision in favor of the legitimacy of the assessment of the government (Howard C. Yourow, p. 17.).

The third case, within which the Court within the framework of Article 15 turned to the doctrine of the limits of discretion of States, is the so-called Greek Case (Denmark, Norway, Sweden, the Netherlands v. Greece). In this case, four States parties to the Convention lodged a complaint against Greece in connection with the alleged violations of the Convention by the revolutionary government that came to power in 1967. The Greek authorities in this case also referred to their right to deviate from the provisions of the Convention provided for in Article 15.

In that case, the Commission rejected Greece's assertion that the state of emergency in the country threatened the life of the State and found a violation of the Convention. In the context of this case, a special opinion of one of the members of the Commission, Judge Susterhenn deserves attention. Disagreeing with the other judges, he stated that the essence of the doctrine of the limits of the discretion of states as follows:

“In discussing the existence of a state of emergency threatening the life of the state, the right to make a decision belongs to the state within its fair margins of appreciation. In considering such a decision of the Government, the Commission has no right to replace the respondent State and assume the functions of super-government. Instead, the Commission should examine whether the principle of margins of

appreciation applied by the government resulted from its illogical or willful actions (*Brannigan and McBride v. United Kingdom*, para 43).

A study of the application of the principle of the limits of the margins of appreciation of States in the context of Article 15 of the Convention shows that issues relating to deviations from obligations, as well as the reasonableness of the decision as to their scope and compliance with the Convention, are part of the powers of the European Court, although States have a rather wide margin of appreciation. It is the Court that must assess whether the measures taken by the state were dictated by a strict need, related to the seriousness of the situation. In such cases, as indicated in the *Brannigan* case, the Court, exercising its powers in judicial review, should take into account such facts as the nature of the restricted rights, the circumstances that led to the state of emergency, and its duration (*Handyside v United Kingdom*, no 5493/72).

Thus, it can be stated that the principle of the limits of the margins of appreciation of the state began to be applied by the Court already in the 1950s. Initially, the Commission and the Court addressed this principle exclusively in those cases in which the respondent State invoked the right to deviate from its obligations under the Article 15 of the Convention. The following circumstance deserves attention: the application or consideration of the principle of the State's discretion from the very first cases of the European Court shows that already during the consideration of the first complaints the Court was aware that, based on the essence of the Convention, it cannot take the sole right to make decisions on all questions. From the earliest period of the Court's work, it has become apparent that the task of establishing common criteria for assessing human rights for a variety of socially diverse peoples creates a number of issues that only the authorities of participating States can answer. At the same time, the Court recognized that, as a guarantor of the international Convention for the Protection of Human Rights, it must assume the function of the issue of compliance with the requirements of the Convention for measures taken by the State within the limits of discretion.

From the point of view of the application of the principle of margin of appreciation, a crucial role was played by the *Handyside vs The United Kingdom* case (Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10),² examined by the Court in 1976. The case concerned the publication by the applicant of a book that was regarded by the authorities of the United Kingdom as contrary to morality, as a result of which it was seized, the circulation was destroyed by the police, and the ap-

2 cf. Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10.

plicant himself was found guilty of keeping obscene literature for personal gain. After that, the applicant lodged a complaint with the European Court, insisting, among other things, that bringing him to justice for the said book violated the right to freedom of expression provided for in Article 10 of the Convention. The court dismissed the applicant's complaint, finding that, having convicted him, the United Kingdom's authorities had not violated Article 10 of the Convention.

Before reaching a final conclusion, the Court turned to the principle of the state's margin of appreciation. Noting that there was a violation of the right protected by Article 10 of the Convention, the Court discussed whether the interference of the United Kingdom authorities was consistent with the criteria provided for in the second paragraph of Article 10 of the Convention. The said part of Article 10 states:

The exercise of these freedoms, imposing duties and responsibilities, may be subject to certain formalities, conditions, restrictions or sanctions that are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public order, for the prevention of disorder or crime, for protection of health and morals, protection of reputation or rights of other persons, prevention of disclosure of information received in confidence, or securing authority and impartiality of justice (Handyside v United Kingdom, no 5493/72, para. 48.).

According to the United Kingdom, interference with the applicant's rights under Article 10 of the Convention was necessary in a "democratic society" in order to protect morality, as indicated in the second paragraph of Article 10 of the Convention. The main task of the Court was to decide whether the measures taken by the United Kingdom were "necessary" to achieve the stated goal of protecting morality.

In this case, the Court in turn discussed several important principles for the interpretation and application of the Convention. First, the Court turned to the principle of subsidiarity, noting that "the protection mechanism established by the Convention is a subsidiary state system that protects human rights ... The Convention reserves for each participating State, first and foremost, the task of guaranteeing rights and freedoms, the institutions it creates contribute to this task, but they are only connected in disputed situations after all domestic protection has been exhausted." (Handyside v United Kingdom, no 5493/72, para. 48.)

The court also noted that in an era when the views on morality are rapidly and radically changing and largely dependent on the concrete times and the foundations of a particular society, local authorities are in a better position than international judges to assess both the specific content of the moral criteria, and what is “necessary” for their protection (*Handyside v United Kingdom*, no 5493/72, para. 49).

Further, having addressed to a principle of limits of freedom of the discretion of the states, the Court noted:

The primary assessment of the existence of an acute social need, which is the basis of the meaning of the term” necessity, “is vested in the domestic authorities. Therefore, Article 10 (2) leaves to the participating States certain limits of margins of appreciation. This margin of appreciation is granted to the legislator (“ prescribed by law “) and to the judicial bodies, including those called upon to interpret and enforce the laws ...

However, paragraph 2 of Article 10 does not provide unlimited power of margins of appreciation to participating States. The power of the Court, which is responsible for ensuring that these states fulfill their obligations (Article 19), includes making a final decision on whether any restriction or sanction complies with freedom of expression, as guaranteed by Article 10. Thus, the margins of appreciation for domestic authorities goes hand in hand with European control (*Open Door and Dublin Well Woman v. Ireland*, para. 68.).

The case of *Handyside v. United Kingdom* gave rise to a discussion of the principle of margin of appreciation in connection with the criterion “necessary in a democratic society” provided for in the second paragraphs of articles 8 to 11 of the Convention. It is in this case that the Court has outlined the specifics of the application of this principle and has made a very significant observation that States are not afforded absolute margin of appreciation and that the supervisory function of the Court extends to each individual case.

The following cases, in the course of which the Court identified and determined the main criteria for applying the principle of margin of appreciation, would allow us to show the patterns that were discovered in the application of this principle in practice.

The second paragraphs of articles 8 (Right of respect of private and family life), 9

(Freedom of thought, conscience and religion), 10 (Freedom of expression) and 11 (Freedom of assembly and association) contain a list of situations in which the rights provided for in the first paragraphs of the articles may be limited. When in the situations listed in the second paragraphs of the article, the restriction of rights and freedoms is allowed, the court is entitled to exercise certain degree of margins of appreciation.

The possibility of limiting rights or freedoms for the protection of morality is provided for in the second paragraphs of articles 8, 9, 10 and 11. In addition to the case of *Handyside v. The United Kingdom*, there are several other cases in which the Court has detailed the margin of appreciation of States in cases of protection of morality. In the case of *Open Door and Dublin Well Woman v. Ireland* (*Dudgeon v the United Kingdom*) the Court found a violation of Article 10 of the Convention, stressing that restricting the rights of pregnant women to information about the possibility of abortion abroad was incompatible with the requirements of Article 10 of the Convention. The Court also noted that the national authorities have wide margin of appreciation in the protection of morality, especially in cases affecting the moral aspects of human life.

A similar approach of the Court is also observed in other cases related to the protection of morality, but already in the context of Article 8. Thus, for example, in the case of *Dudgeon v. the United Kingdom* (*Sunday Times v. The United Kingdom*, para 59) the Court concluded that there is a European consensus on the basis of which the criminal prosecution of adult men for homosexual relations is a serious interference with privacy.

In the *Sunday Times v. United Kingdom* case, the subject of discussion was the possibility of applying restrictions to ensure the authority and impartiality of justice provided for only by Article 10. The Court noted that if in cases involving the defense of morality, States have much broader limits of discretion, "... the same can not be said for a much more objective concept, which is the authority of justice. The domestic legislation and practice of the participating States reveal considerably bigger common ground ... Accordingly, in this case, the wider scope of European supervision will correspond to the narrowing of the limits of the discretion of states." (*Klass and others v. Germany*, para 49)

In cases where the rights and freedoms of an individual are restricted in order to ensure economic well-being and public peace, the Court grants a wide margin of appreciation to States. For example, in the *Klass and others v. Germany* case, the Court observes:

As regards the definition of the conditions under which the monitoring system should operate, the Court points out that the legislature of the participating States has a certain right to its own margins of appreciation. It is, of course, not in the Court's power to replace the assessment given by the national authorities with its own assessment of what would be appropriate in this area (*Petrov v. Bulgaria*, para 55).

In cases concerning the prohibition of discrimination (Article 14), the Court, in determining the limits of margins of appreciation, adheres to the same principles as in cases relating to articles 8 to 11, requiring in each case of discriminatory treatment to be present objective and reasonable explanations, a legitimate aim and proportionate actions aimed at achieving the goal. Thus, in the case of *Petrov v. Bulgaria*, the Court reached the following conclusion:

Although in relation to married and unmarried couples, participating States are entitled to margins of appreciation in areas such as taxation, social security or social policy, the Court is nevertheless unclear about the discriminatory, differentiated approach to married couples and unmarried but living well-established family life partners, in particular, in connection with the possibility of telephone communication in cases where one of them is in custody.

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