

Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?

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[Opening formula]

My speech takes its title from an article I wrote two years ago, which was published as part of the Working Paper Series of the Centre for European Legal Studies at the University of Cambridge and subsequently in the Cambridge Yearbook of European Legal Studies.

This morning I will essentially follow the scheme of that article.

Some updating is necessary, however.

There have been important judgments from the European Court over the past two years that merit mention.

And, no less important, there has been agreement between States to amend the text of the Convention. As you know, Protocol no. 15, whose contents were agreed at the Brighton conference last year, was opened for signature in May of this year. I will devote part of this speech to the amendment to the Preamble of the Convention.

But let me begin with my title, for it makes my first point, which is that the margin of appreciation is something that is **allowed** to States by **the Court**.

As one commentator has put it: it is “a tool of jurisprudential origin through which the European Court leaves national authorities a certain autonomy in applying the Convention”.

The judicial provenance of the margin of appreciation is recognised by European States. Paragraph 12 of the Brighton Declaration “welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation”.

In cases where the margin of appreciation is relevant, it signals a less searching or intense review by the European Court than would otherwise be the case. To return to the same commentator (Professor Greer), he has described it as “a mild form of immunity”.

We may conceive it in terms of **judicial self-restraint**.

Where a margin is allowed, the Court will refrain from a “total” review of the substance of the case and accept the decision or assessment made by the domestic authorities, as long as (*solange dass*) it remains within proper limits. It is the Court that ascertains where exactly these limits lie in a given case – it is the Court that draws the margin.

The legal literature has propounded various explanations for the doctrine:

- that it is the natural product of the Court’s subsidiary jurisdiction;
- that it signifies respect for pluralism and State sovereignty (Waldock explained it as the means by which Strasbourg reconciles the international protection of human rights with the sovereign powers and responsibilities of democratic government)
- that it signals recognition by the Court of the inevitable limits to its institutional capacity, i.e. acceptance that it cannot consider every case in every detail;
- that a court, and *a fortiori* an international court, is not the ideal forum for arbitrating difficult choices of socio-economic policy;
- that the European Court is too distant to rule on cases of great sensitivity.

There is truth in each of these.

The focus of my speech is less the explanation of the margin of appreciation than the justification for the doctrine. Hence the question contained in my title.

Is the Court waiving its power of review - review being its *raison d’être*?

Or is it attributing a share of ultimate responsibility for safeguarding Convention rights to the domestic courts, and this in the interest of a healthy subsidiarity and the improved effectiveness of the Convention regime?

Let me begin with the *Handyside* case. It is not the earliest manifestation of the margin of appreciation, either in substance or in formulation, but it is the *locus classicus*.

I will not read out the passage in question – paragraphs 48-50. It will be familiar to many of you. But allow me some comments on it.

It is worth noting that the passage begins by recalling the subsidiary nature of the Convention machinery (at that time composed of the Commission, the Court and the Committee of Ministers).

It also answers the question “subsidiary to what?” To “the national systems safeguarding human rights”, and not, as some seem to think, to the political will or policy of the national authorities.

The passage provides the rationale for the margin – the authorities’ “direct and continuous contact with the vital forces of their countries” place them in a better position than the international judge to give an opinion on the exact content of the requirements of public morals (which was the issue in the case), and on the necessity of the measures taken to meet such requirements.

The initial assessment is for the competent national authority, and in making it a margin of appreciation is allowed. But that goes hand in hand with European supervision – the final assessment is for the Court.

Handyside concerned freedom of expression, of course – an Article 10 case.

Because of their similar structure and formulation, the margin of appreciation applies “naturally” to Articles 8, 9, 10 and 11. There are many examples of this under each provision. Of course it also figures in the case-law on other provisions – Article 14 for example, and all 3 articles of the first Protocol.

On the other hand, there are provisions to which it has no application, or very little. I refer here to the right to life, the prohibition of torture, the ban on slavery and forced labour, and the *ne bis in idem* rule as prime examples. These are imperative provisions, to be observed scrupulously and in full by States.

But let us return to the terrain of the margin of appreciation, and take up the crucial question of determining the breadth of the margin. As is clear from the Court’s practice, one is in the presence of several variable factors.

The first is the Convention provision concerned. I have already given an indication of where the margin does and does not arise.

This brings me to the second variable - the interests at stake in the case. Let us return to Article 10 and look at two classic cases in which the Court reached opposite conclusions. The first case is *Wingrove v. United Kingdom*, where the applicant complained that his film had not received authorisation for distribution because of its use of sacred imagery – in short, it was considered blasphemous. Drawing a parallel with the protection of morals, the Court considered that a wider margin was justified, and concluded that the authorities had not exceeded it.

This may be contrasted with the very different analysis in the case of *Goodwin v. United Kingdom*, concerning the protection of journalists’ sources. Press freedom is strongly protected by Article 10, in light of the importance of the fourth estate in a free and democratic society. Accordingly, the margin is circumscribed, and restrictions on the press are subject to the most careful scrutiny by the European Court. There was in this case a violation of the Convention.

We see here a sort of sliding scale, which adjusts the boundaries of State discretion according to the type of expression and the manner in which ideas are expressed. This can also be understood in light of the two aims protected by Article 10. One is general or societal – free speech is an integral feature of a democratic system. It follows that the scope to regard a restriction on it as necessary in a democratic society must be narrow.

The second dimension is more personal – freedom of expression as a means of self-fulfilment. The Court has permitted a somewhat broader margin here, although not a broad margin as such.

Let us look as well to Article 8 of the Convention. In the area of respect for private and family life, which are very broad concepts, the margin of appreciation features prominently in the Court’s analysis. The governing principles are clear:

- where a particularly important facet of an individual's existence or identity is at stake, the margin will be restricted;
- where there is no consensus among European States either as to the relative importance of the interest at stake, or the best means of protecting it, and particularly where it concerns sensitive moral or ethical issues, the margin will be wider;
- the margin will usually be wide if the State is required to strike a balance between competing private and public interests.

In my article, I gave the contrasting examples of the *Evans* and *Dickson* case, both of them against the United Kingdom. In *Evans*, the applicant's complaint was that she could not proceed with the implantation of frozen embryos, this being her only chance of bearing a child, since her former partner no longer consented. Here were two extremely important and sensitive rights in direct conflict. The balance between them was struck not by any court, but directly by Parliament, which had made the consent of the male an essential precondition. For the Court, although a different balance – more favourable to the applicant – might have been struck, that was not decisive.

Instead – and this really is the key to the whole concept - the decisive question was whether Parliament had remained within its margin. It found that it had done so, noting the absence of consensus in Europe in support of the applicant's arguments, and that the rules had been very clearly explained to her at the outset of the procedure. The balance struck by the legislator between the competing interests was accepted as fair.

It was the absence of any real or fair balancing in the *Dickson* case that led the Court to find a violation of the applicant's rights. This case also concerned assisted procreation – Mr Dickson was a prisoner serving a long sentence who wished to have recourse to artificial insemination in order to have a child with his wife. They feared that she would be too old to conceive if they had to wait until his eventual release. The Court found that the administrative policy which governed the matter was structured in such a way that a proper balancing of the competing rights and interests was not possible. Prisoners had to reach a very high standard of exceptionality in order to obtain permission from the authorities – this did not leave room for the required proportionality assessment in any individual case. Nor was there any evidence that in setting the policy there had been any assessment in a general way of the relative weight of the interests engaged, or the overall proportionality of the policy. This failure to achieve a fair balance, whether at the individual or the general level, took the situation outside of the State's margin of appreciation, in violation of Article 8.

There is a more general point to emphasise here, that one might call the procedural aspect of the margin of appreciation. It is implicit in the very term used, “appreciation”. The competent domestic authority, which may be a court, or parliament, or the administration, must engage in a process of appreciation, or assessment of the rights and interests at stake.

For courts, no less should be expected. I recall that the Convention is part of the domestic law of all of the Contracting States – it is no longer an external or foreign body of law. The role of the domestic judge in the Convention system is essential, having the potential to act within a shorter timeframe and with the full panoply of judicial tools to safeguard human rights. By adopting the methodology that has been developed by the European Court in its case-law, the domestic court can lead Strasbourg to accept that the situation remains within the relevant margin of appreciation. Let me give as an example of this the judgment last year in *Von Hannover v. Germany (No. 2)*. The applicant, who needs no introduction, returned to Strasbourg with further complaints arising out of the publication of photographs in celebrity

magazines in Germany. This gave the Court the occasion to consider the manner in which the domestic courts had examined her complaints. The conclusion is worth quoting in full:

124. The Court observes that, in accordance with their case-law, the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken.

125. The Court also observes that the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the Von Hannover judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law.

126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.

Similar considerations are included in the Court's reasoning in more recent cases such as *Mouvement Raëlien v. Switzerland*, and *Aksu v. Turkey*, both of them decided by the Grand Chamber.

The point is not limited to national courts. It is clear from the case-law that the legislative process can be very relevant to the margin of appreciation. In the *Dickson* case, the Court noted that since the policy at issue in that case was an executive one rather than a legislative one, it meant that Parliament had not deliberated on the matter. A similar point was made in the *Hirst (No. 2)* case, about prisoner voting. The Court considered that there was no evidence that Parliament had ever sought to weigh up the competing interests, or to assess the proportionality of the blanket ban on voting by convicted prisoners. At most, there had been implicit consideration, but no substantive debate on the continued justification of the ban in light of modern-day penal policy and current human rights standards. This shortcoming counted against the respondent State.

Despite allowing a wide margin in the case, the ban was found to fall outside it.

In contrast, when examining the situation in Italy, the Court saw evidence of the legislature's concern to adjust the voting ban to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender. This is the case *Scoppola (No. 3)*, where the Court clarified that States may leave the issue of disenfranchisement to the judicial process, which is the system in some countries.

Or the legislature may take it on itself to determine the appropriate balance via legislation.

But balancing there must be. One might say that just as the Convention embraces the notion of "quality of law", it also expects a certain "quality of legislative process", one that is properly informed and duly deliberate.

I return to the considerations that determine the breadth of the margin.

Briefly, the aim of the interference in question is relevant to the analysis. The Court has acknowledged that where it is a matter of reconciling competing Convention rights, the margin will usually be wide, as for example in the *Odièvre* case (right of the birth mother to conserve her anonymity versus the right of the applicant to know her origins).

But it is not always so. In the recent case of *X v. Austria*, where the applicants complained that second-parent adoption is not permitted for same-sex couples, one of the Government's arguments was that the margin should be wide because adoption entails striking a careful balance between the interests of all the persons involved in the procedure. The Court did not accept this, holding that where persons are treated differently on grounds of sexual orientation, the margin is narrow, and the State must put forward particularly serious reasons (*probatio diabolica?*)

In contrast, the case-law allows a wide margin when it comes to social and economic policy, for example in the area of social security (*Stec v. UK, Carson v. UK*), or in relation to property rights for example (*Jahn v. Germany* – the exceptional circumstances of German reunification).

The Court's review will be of less intensity, but a margin remains a margin – it does not extend across the page.

And of course the other variables are part of the equation. Take for example the case *Konstantin Markin v. Russia*. The applicant, a member of the armed forces, complained that parental leave was only granted to female officers – men were denied the opportunity to take leave to raise their children. Examining the case under Article 14, the Court allowed a margin of appreciation regarding the organisation of the military, and indeed accepted that it should be a wide one. But since the case raised the issue of sex discrimination, the Government were required to put forward particularly serious reasons. This it failed to do – the judgment scrutinises and rejects each and every argument of the Government, in what is one of the Court's strongest statements on the equality of the sexes.

I come now to the role of consensus. It is here that the concept of the margin of appreciation links to another fundamental principle of interpretation – the Convention as a living instrument. In a nutshell, there is a relationship of inverse proportionality between a State's margin of appreciation in a particular area and the degree of consensus that can be discerned through comparative and/or international law. The matter is not free of controversy, but I maintain that reference to consensus serves to legitimise the Court's new reading of the Convention, and facilitates the reception of this into the domestic system.

Examples abound of judgments in both senses, i.e. of judgments where the Court developed its reading of the Convention in line with the standards already applied by many States and reflected in international instruments; and cases where the absence of such a consensus dissuaded the Court from doing so.

But there is no hard and fast rule. The lack of a strong consensus in Europe regarding the recognition of gender reassignment did not ultimately restrain the Court from ruling in favour of Christine Goodwin in 2002. The Court attached less importance to the lack of evidence of a common European approach, and referred instead to the clear and uncontested evidence of a continuing international trend towards increased social acceptance and legal recognition of transsexualism.

Likewise in the *Hirst (No. 2)* judgment, the Court remarked that even if no common European approach could be discerned to the issue of voting by prisoners, that could not in itself be determinative of the issue.

Conversely, even with an ostensibly very strong consensus in Europe regarding the availability of abortion, the Court determined in *ABC v. Ireland* that this did not decisively narrow the margin of appreciation enjoyed by the domestic authorities. Instead, it reasoned that since the Court had already (in the case *Vo v. France*) taken the view that there is no consensus in Europe regarding the nature and status of the embryo, indicating that States retain a margin of appreciation in this regard, that same margin arose when it came to striking a balance between the rights of the unborn and those of the mother.

This reasoning was rejected by a minority of six judges. They considered that it departed from the Court's established methodology. In their eyes, there was a strong consensus in Europe in favour of a more permissive regime than the one allowed under the Irish constitution. They stated: "We believe that this will be one of the rare times in the Court's case-law that Strasbourg considers that such consensus does not narrow the broad margin of appreciation of the State concerned".

Having surveyed the contours of the margin of appreciation, my next point concerns the impact of the proportionality principle. This can prove to be the most important – perhaps even the decisive – factor in a case that features the margin of appreciation. Being closely linked to the principle of effective protection, the proportionality principle constitutes the strongest bulwark against the over-use of the margin of appreciation doctrine. By failing to respect proportionality, a State can effectively forfeit the "benefit" of the margin. To put it another way, the margin is sometimes referred to as the margin of error. Viewed in this way, failure to respect proportionality is too serious an error to allow to pass. See, as an example, the *Axel Springer* case, decided on the same date as the *Von Hannover (No. 2)* case, but finding a violation of the applicant company's freedom of expression. The majority found that, despite the margin of appreciation, there was no reasonable relationship of proportionality between the restrictions imposed by the national courts and the applicant's rights under Article 10. That lack of proportionality was the "strong reason" for the European Court to substitute its view for that of the domestic courts.

That is as much as I will say for now about the margin of appreciation in the Court's case-law.

The final point I wish to raise concerns Protocol No. 15. The most eye-catching element in the new protocol is the insertion of a new paragraph in the Preamble of the Convention, reading as follows:

"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,"

As I mentioned earlier, the decision in principle was taken at the Brighton conference.

The Brighton Declaration states that "for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case-law should be included in the Preamble to the Convention".

This was a very pale reflection of a UK-Swiss proposal that had been made some months before, which was to amend the admissibility criteria so that the Court would only accept cases where the national court had made an obvious error. That idea was rejected by many States.

One may be tempted to think that the amendment is of limited significance – a mere rhetorical flourish, or form of window-dressing. But that would be incorrect, of course. In this renowned institute for the study of public international law I need hardly recall that, under the Vienna Convention on the Law of Treaties, the preamble to a treaty is an integral part of the instrument and thus is relevant to its interpretation.

The Preamble, in its present version, articulates certain fundamental precepts that the Court has drawn upon when interpreting the substantive provisions of the Convention:

- The rule of law – *Golder* (access to court); *Malone* (the accessibility and foreseeability of law);
- Effective political democracy – *United Communist Party of Turkey*; *Matthews*;
- Collective enforcement – *Ireland v. UK*; *Mamatkulov*.

The Court intervened twice during the drafting process. Its first intervention was *proprio motu*. The Court sent a comment to the Chair of the Steering Committee on Human Rights in November last year, when the text that was ultimately agreed was circulating in draft form. The Court was concerned that the wording was not fully consistent with the decision taken at Brighton, which envisaged a “reference”. The draft seemed to suggest that the margin was a given or a constant in every human rights case, which it is not. The Court’s view was that the formulation – even with the reference to the Court’s supervisory jurisdiction – did not reflect the legal reality of the margin of appreciation.

We suggested that the text of the Brighton Declaration would be preferable, which refers to the margin of appreciation “as developed in the Court’s case-law”.

The Court’s second intervention came towards the end of the process, when the Steering Committee had completed its task and the draft protocol had been referred to the Court and to the Parliamentary Assembly for an opinion. On this point the Court noted that although the draft had remained the same, States had chosen to clarify their intentions in the explanatory report, which states that “it is intended ... to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case-law”. We accepted that this “coincided” with the drafting proposal we had made earlier. And we acknowledged that the formulation retained represented a compromise among States in order to reach agreement on the Protocol as a whole.

Without prejudging - or even predicting – how exactly the Court will interpret the new provision when the time finally comes, the signs so far are that it will not be regarded as modifying the basis of the Court’s review, laid down in the case-law of many years.

Let it not be overlooked that the new paragraph also brings the term subsidiarity into the Convention, a fact that the Court has welcomed. That it does so is consistent with the essential thrust of the reform process – the Interlaken process – which takes as its major premise the need to improve the protection of human rights at the domestic level. This is the only sustainable way to alleviate the huge pressure on the European mechanism, which, I recall, is subsidiary to the national mechanisms, by original design and by practical necessity.

Ladies and Gentlemen,

Famous and familiar as it is, the margin of appreciation will I think be a perennial source of discussion and dissent, in the Court, in the academy, and indeed in every forum where human rights are inquired into.

I have presented this morning some personal thoughts on this fascinating, inexhaustible subject that is deeply ingrained in European human rights law. I look forward now to your contributions or questions about it.