AN OVERVIEW OF THE DOCTRINE OF MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE*

Abstract

The doctrine of Margin of Appreciation refers to the allowances accorded to national authorities by international judicial bodies or courts especially those in the realm of human rights in adjudication to take certain decisions which though may depart slightly or to a large extent from some certain norms established international conventions in the interest of national security, public safety, national emergency or some other domestic policy considerations in order to address the peculiar circumstances of that state or to advance the objective of the respective national authority. The doctrine of margin of appreciation appears to be an innovation of the European Court of Human Rights (ECtHR) which has greatly influenced other international human rights bodies such as the Inter American Court of Human Rights (IACHR). This doctrine is resorted to in legitimizing the decision or conducts of national authorities in the face of seemingly competing moral convictions or individual rights and national interest. This paper would explore the application, justification and criticisms of the doctrine as well as the approach of selected international courts to the doctrine. This paper concludes that despite the arguments advanced against the application of the doctrine, its proper application can promote positive synergy between national authorities and international bodies in the protection and enforcement of human rights. This work adopts Qualitative and Doctrinal method of research.

Keywords: Margin of Appreciation, European Human Rights Jurisprudence

1. Introduction

The European Convention on Human Rights (ECHR) is an international human rights treaty that protects the rights of everyone within the 47 states that belong to the Council of Europe. The Council was founded to protect human rights and the rule of law, and to promote democracy. The ECHR consists of Articles on the protection of basic human rights such as right to life, right to liberty etc. the interpretation and enforcement of the rights within the ECHR is done by the European Court of Human Rights (ECtHR). However, before an application is made to the Court, the applicant(s) must have exhausted every domestic option of attaining justice in their States' national courts.[1] The 'margin of appreciation' doctrine describes the allowance for manoeuvre that the ECtHR is willing to grant national authorities, in fulfilling their obligations under the ECHR. The doctrine was developed and applied by the ECtHR when assessing whether a member state has breached the Convention. It means that a member state is allowed a degree of discretion, subject to the Court's supervision, when it takes legislative, administrative or judicial action in the area of a Convention right. The doctrine allows the Court to consider the fact that the Convention will be interpreted differently in different member states, given their differing legal and cultural traditions. The margin of appreciation gives the Court the necessary flexibility to balance the sovereignty of member states with their obligations under the Convention.[2]

Though the doctrine was principally developed in the context of the ECHR/ECtHR system, it appears to have been applied beyond the European human rights system.[3] Thus, the doctrine also connotes an adjudicatory technique applied by international human rights court/bodies in assessing the legitimacy or compliance of the decisions or conduct of national authorities of a State Party against norms established in international conventions in cases of conflicts between national interest and individual rights or dilemmatic and competing moral convictions.[4] The doctrine is predicated on two basic pillars of judicial deference and normative flexibility. This

***By Muhammad Yasin ABDULMUMIN, LLB, LLM (Ilorin), BL,** Senior Associate, Babalakin & Co. His practice is focused on Dispute Resolution, Islamic banking and finance and general corporate and commercial advisory. Tel: 08070657618. Email: a21yasinammy@gmail.com.

[1]Dr Joelle Grogan 'The European Convention on Human Rights' 24 Jun 2022. Available at https://ukandeu.ac.uk/explainers/the-european-convention-on-human-rights/ Accessed on 23rd September 2022.

[2] S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe, 2000, p. 5.

[3] For example, the Inter-American Court of Human Rights (I/A CHR) has in one of its first Advisory Opinions accepted the doctrine in the context of the right of member states to regulate naturalization procedures: Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Inter-AmCtHR, Series A, No 4 (1984), at para. 58 (*'One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them'*). See also Hertzberg v Finland, UN Doc. A/37/40 (1982), at para. 10.3 ('*[P]ublic morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities'*).

[4]For extensive discussion on the margin of appreciation doctrine, see Howard C. Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (1996); Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' 56 ZaorV (HEIDELBERG J. INT'L L.) 240 (1996); Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) *The European Journal of International Law* Vol. 16 no.5, p. 909-10.

principle of Judicial Deference requires international judicial bodies to respect the methodology adopted by national authorities/courts in the interpretation or execution of international conventions or norms because of the special advantage enjoyed by national authorities in terms of closer proximity to and better knowledge of the peculiar circumstance of their state. It also requires international courts to respect the decision of national authorities by not substituting their discretion with that of the international courts. Therefore, international judicial bodies are required to exercise judicial restraint in reviewing the decisions of national authorities.[5] The pillar of Normative Flexibility requires that national authorities should be accorded the freedom to apply certain international norms that are subject to this doctrine (norms that grants the latitude or discretion to states and do not require international uniformity). This category of norms only prescribes wide international standards within which states are free to act without prescribing any specific narrow guidelines. The effect of this is that the resultant outcome of states conducts would be varying yet compliant with the prescribed general standards stipulated by the applicable universal norm.[6] These two principles (of judicial deference and normative flexibility) should not be understood to mean that states are accorded total deference in all matters. The decisions of states are still subject to the scrutiny, supervision and review jurisdiction of international judicial bodies. For a state to be entitled to enjoy the application of the margin of appreciation, its discretion must have been exercised in good faith, the decision must also be reasonable and in compliance with the overall objectives of the governing international norm. Therefore, the principle of margin of appreciation does not totally preclude international judicial review of national decisions but operates to limit it.[7]

2. Legal Source of the Doctrine

The source of the authority of international court to apply this doctrine has been traced to the inherent judicial power granted to international court by their enabling statutes to prescribe rules and regulations to govern their practice and procedure.[8] It has also been linked with the power of the court to design methods to enable it to efficiently exercise its jurisdiction.[9] Also the power is said to be derived from the power of the court to determine the method of handling evidence and to make an objective assessment of the case.[10]

3. Sphere of Application of the Doctrine

It has been argued that the doctrine should be applied to certain scope of state conducts where the applicable norms are indefinite, uncertain, and open-ended or where the outcome of the application of the applicable is heavily fact dependent and susceptible to varying outcomes based on different facts. The proposition that the doctrine should be applied in assessing compliance with fact intensive norm has been justified on the basis that national authorities are more competent and better placed to assess their local factual circumstances in applying the international norm. This is in contradistinction with norm intensive interpretation situations in which international courts as the custodians of international law possess comparative competence in interpretation and application than national authorities. Whilst no margin should be granted in norm intensive interpretations scenarios, a wider margin should be granted to national authorities in cases involving fact-intensive norm application. Consequently, in order to prevent the abuse of international law by the arbitrary resort to the doctrine, an international court must assume the role of sole arbiter of determining situations where resort to the doctrine is appropriate.[11] There are three categories of uncertain, flexible, or un-delineated norms to which the doctrine of

[5] *Ireland v UK*, 2 EHRR 25, at 91–92 (1978); *James v UK*, 8 EHRR (1986) 123, at 1142–143 ('[T]he Court cannot substitute its own assessment for that of the national authorities'); *Karatas v Turkey* [1999] IV ECtHR 81, at 120 (Joint Partly Dissenting Opinion of Judges Wildhaber, Pastor Ridruejo, Costa and Baka) ('In the assessment of whether restrictive measures are necessary in a democratic society, due deference will be accorded to the State's margin of appreciation; the democratic legitimacy of measures taken by democratically elected governments commands a degree of judicial self-restraint'); Cf EC – *Measures Concerning Meat and Meat Products (Hormones)*, WTO WT/DS26/AB/R (1998), at para. 117 ('the applicable standard is neither de novo review as such, nor 'total deference', but rather the 'objective assessment of the facts').

[6] See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), available at http://www.un.org/icty/ pressreal/nato061300.htm at para. 50.; Donoho, 'Autonomy, Self-Government, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights', 15 Emory Int'l L Rev (2001) 391, at 457; Greer 'Constitutionalising Adjudication under the European Convention on Human Rights', 23 Oxford J Legal Studies (2003) 405, at 409.

[7] Yuval Shany, (Supra) Note 1 at 910-11.

[8] L. Henkin, *International Law: Cases and Materials* (3rd edn, 1993), at 791; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US) [1992] ICJ Rep 3, at 113 (Order of 14 Apr. 1992; Dissenting Opinion of Judge El-Kosheri) (courts have inherent power to ensure the proper administration of justice).

[9] *Prosecutor v Bobetko*, Decision of 29 Nov. 2002 (ICTY, AC), at para. 15.

[10] Yuval Shany, (Supra) Note 1 at 911.

[11] Ibid at 913-14.

margin of appreciation are to be applied. They are standard type norms, discretionary type norms and result oriented norms.

Standard type norms

These are the categories of international norms which do not precisely delineate or stipulate a fixed mode of conduct, but provides general standards or yardsticks. Incidences of such standards include 'Public policy', 'good faith',[12] 'reasonable',[13] 'Necessity',[14] 'Proportionality', or 'Excessiveness'.[15] These norms are employed by legislators to cater for a variety of unforeseen circumstances and to inject flexibility into the law. The results of the application of these standards are fact dependent. Thus, different facts may lead to different outcomes despite application of the same standard norms. The possibility of achieving a universally uniform outcome is therefore absent. Therefore, a wider or narrower margin may be granted as dictated by the factual peculiarities of circumstances of each case.[16]

Discretionary norms

This refers to the international norms which grants discretion to national authorities to regulate certain sphere of its conducts however it best deems fit. An example of this is the stipulation of international diplomatic law which enables a state to reject the credentials of a diplomat without providing any reason or to declare a diplomat a *persona non grata* without disclosing any grounds.[17]Wider margin of appreciation is to be granted to national authorities by international courts when assessing compliance with such types of norms since the norms are not intended to achieve uniform conduct of the norm applying states.

Result oriented norms

These norms only regulate state conduct by stipulating certain outcomes which must be achieved but leaves a wide discretion to state in adopting the most suitable means or pathways to achieving those stipulated outcomes. Hence, different State Parties are free to adopt different means in arriving at the uniform outcome required by the relevant international norm. For instance, most economic and social human right treaties stipulates outcomes/goals that must be achieved by states and suggest a plethora of means from which signatory states are free to choose.[18]

4. Justifications of the Doctrine

There is a possible effect of the application of the doctrine in terms of its seeming opposition to the possibility of achieving uniform or universally acceptable human rights standards. It is necessary to probe the rationale for the invention of the doctrine in the first instance by the ECHR.[19] The doctrine was first introduced to assuage concerns raised by national governments that the (uncritical) application of certain international norms could compromise their national security. This was responsible for the initial application of the doctrine to allow State Parties to take reservations to certain international norms on grounds of national emergency, public policy, public safety or some other peculiar considerations.[20] In such circumstances, the confirmation of the government's appreciation by international courts is based on the interest of the domestic population as well as the government in the maintenance of internal law and order. Subsequently, the doctrine was applied to allow national authorities to adopt/implement policies to regulate some inherently harmful conduct such as incitement to violence,[21]racist

[12] Charter of the United Nations, 26 June 1945, 59 Stat. 1031, Art. 2(3); Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 311, Art. 26 (hereinafter VCLT).
[13] See, e.g., Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997, 36 ILM (1997) 700, Art. 5; Treaty Establishing the European Community (Consolidated Version), 24 Dec. 2002, OJ (2002) C 325/33, Art. 77; European Convention on Human Rights, 4 Nov. 1950, ETS 5, Art. 5(3).
[14] See, e.g., General Agreement on Tariffs and Trade, 30 Oct. 1947, 55 UNTS 194 (hereinafter GATT), Art. XX(b); International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171 (hereinafter ICCPR), Art. 19(3); Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12Aug. 1949, 75 UNTS 287, Art. 53
[15] See, e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159, Art. 221(a); Additional Protocol to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Art. 57(b).
[16] Yuval Shany, (Supra) Note 1 at 916.
[17] Vienna Convention on Diplomatic Relations, 18 Apr. 1961, 500 UNTS 95, Art. 9
[18] International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 UNTS 3 (hereinafter ICESCR), Art. 2(1). See also Johnston v Ireland, 9 EHRR (1987) 203, at 220; Mahoney, 'Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin', 11 *Hum Rts LJ* (1990) 57, at 79.
[19] Benvenisti, 'Margin of Appreciation, Consensus and Universal Values', 31 *NYU J Int'l L & Pol* (1999) 845
[20]Ibid.
[21] See *Zana v. Turkey*, 1997-VII Eur. Ct. H.R. 2533, No. 57 (state has margin of appreciation in regulating what it conceives as incitement by Kurdish politician).

speech,[22] considering the peculiarities of each state and its people.[23] However, the extension of the doctrine to other areas devoid of security considerations such as restriction of speech due to public morals,[24]is based on the need for every society to adopt any measures necessary to protect its specific ideals or traditions and culture.[25]Its application to areas devoid of security consideration has equally been justified on grounds of judicial politics.[26]

5. Justifications for the Application of the Doctrine

Comparative Advantage of National Authorities

A main argument in support of the margin of appreciation doctrine is the comparative advantage of national authorities over the international courts due to closer proximity and better familiarity with the complexities of the local circumstances where the international norms are sought to be applied. Though, both the national and the international judicial process are affected by constraints occasioned by limited access to all the relevant factual background as they both rely mainly on information supplied by the parties before them which are often biased, circumstantial dependent and tailored along interest. Due to institutional placements, other non-judicial administrators such as the (executive, legislature and other specialised agencies) often possess diverse expertise and more resources and therefore have more access to unbiased information obtained in non-adversarial circumstances during the performance of their duties. This information is obtained through constant monitoring and during policy implementation.[27] Therefore, the national judicial process applies the doctrine of margin appreciation locally in the sense that it would not ordinarily in the exercise of its supervisory jurisdiction over these other local authorities substitute their discretion with its own except in clearly deserving circumstances.[28] The same analogy is therefore applicable to international courts with even greater force because they are disadvantaged in comparison to the national courts, due to its lack of proximity and limited knowledge of the local circumstances.[29]International courts often also lack the resources and manpower available to the national courts. Also, national courts enjoy comparative advantage to the international courts in fact intensive/dependent norm application scenarios due to its closer proximity to the facts than their international counterparts, which often

[22] See *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994), reprinted in 15 *Hum. Rts. L. J*. 361 (1994) (margin transgressed in prosecuting a journalist for communicating racist messages).

[23] See Gregory H. Fox & Georg Nolte, Intolerant Democracies, 36 *HARV. INT'L L.J.* 1, 48 (1995) ('[The doctrine] is particularly generous with regard to actions which domestic authorities regard as critical to the prevention of disorder or crime.')

[24] See the Handyside Case, 22 Eur. Ct. H.R. (ser. A) (1976); see also the comparable view of the HRC in Hertzberg et al. v. Finland, U.N. GAOR Human Rights Comm., 37th Sess., Supp. No. 40 at 161, para. 10.3, U.N. Doc. A/37/40 (1982), http://www1.umn.edu/humanrts/undocs/ undocs.htm (recognizing 'a certain margin of discretion [that] must be accorded to the responsible national authorities' in deciding whether to broadcast discussions related to homosexual relations in national media).

[25] See Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Belgium' 4 Eur. Ct. H.R. (ser. A) (1968). Although the Court did not explicitly espouse the Commission's use of the margins doctrine, it provided the rationale for its application: 'In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterize the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention.' Id. at 34-35. On the subsidiary nature of the European Convention, see also Herbert Petzold, The Convention and the Principle of Subsidiarity, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 41 (R. St. J. MacDonald et al. eds., 1993); On the notion that democratic decision-making should be given due deference, see Paul Mahoney, Marvelous Richness of Diversity or Invidious Cultural Relativism? 19 *HUM. RTS. L. J*. 1, 2, 4 (1998).

[26] See R. St. J. MacDonald, The Margin of Appreciation, in THE EUROPEAN SYSTEM, supra note 15, at 123 ('The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.'*)*.

[27] Yuval Shany, (Supra) Note 1 at 919.

[28] ibid

[29] Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR', 19 *Florida State U L Rev* (1991) 1, at 7 ('[O]utcomes derived from our adversarial judicial system or the negotiation that occurs in its shadows are inadequate for solving many human problems'); H.C. Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (1996), at 14; Mahoney, supra note 50, at 76; *Chevron, USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984), at 843–845 ('[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency'); *Associated Provincial Picture Houses, Ltd v Wednesbury Corp* [1948] 1 KB. 223, at 230; HCJ (High Court of Justice) 389/90 *Dapei Zahav Ltd v Broadcasting Authority*, 35(1) PD 421, at 440–441 (Supreme Court of Israel) ('The question is not what the court would have done in the concrete circumstances, but whether a reasonable administrative authority would have conducted itself like the public official conducted himself') (unofficial translation).

situates and adjudicates away from the states.[30]The limited familiarity of international court to the local circumstances where international norms would be applied may lead to the misapplication of international norms to local circumstances which may greatly affect the legitimacy and acceptance of the decisions of international courts within the states.[31] The above should not be misconstrued to mean that national decision making process is left within the exclusive preserve of the national authorities as doing so may devastate the rule of international law or that national conduct is shielded from the prying review by international courts. Rather, it connotes that national authorities are granted a certain degree of deference and allowance by international courts in such a way that international decision-making process is imbued with sufficient local participation and content of national authorities of a State Party.[32]

Elected Representative Governance Factor

Unlike other elected non-judicial administrators (such as legislators and executives), judges at both the national court and international courts are not elected representative of the people. Hence, they may be said to possess limited legitimacy to render decisions that affect the social conditions of the people.[33] Rather, those decision should be made by elected representatives of the people through an all-inclusive public participatory process because the people have the rights to determine how their affairs are coordinated.[34] This argument also applies to international courts when adjudicating on norms that affect a State Party internally or the social conditions of its people as opposed international norms whose effects transcends the boundary of any one state. In essence, a wider margin of appreciation should be granted in relation to norms that affect only a State Party internally and its people whilst a narrower margin would be allowed in respect of state conduct that affects other State Parties. This is consistent with the notion of sovereignty of states, right to self-determination and the need to maintain mutual co-existence of states at the international arena. Examples of norms that affect a country internally are human rights norms whilst norms prohibiting the use of unprovoked force or aggression to another state are an example of norms whose effect transcends the boundary of a state.[35]

Exercise of Caution in Interpreting Ambiguous Norms

Owing to stiff sanctions which often results from the breach some international norms, international courts are required to exercise caution and restraints in interpreting and applying norms that prescribe vague and ambiguous legal standards.[36] Therefore, a wider margin of appreciation should be granted in favour of State Parties in such cases. This is based on the lotus principle that states are permitted to do all things except those expressly prohibited.[37]

[30] *Handyside v UK*, 1 EHRR 737 (1976), at 753–754; *Ireland v UK*, 2 EHRR 25, at 91–92 (1978) (state authorities are better situated than international judges to appreciate domestic conditions).

[31] Yuval Shany, (Supra) Note 1 at 919.

[32] ibid

[33] At the national level, separation of powers considerations also militates against excessive intrusiveness on the part of the judiciary in the business of government. See, Sprigman, 'Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis', 59 *U Chicago L Rev* (1992) 1645, at 1667–1668; Starr, 'Judicial Review in the Post-Chevron Era', 3 *Yale J of Regulation* (1986) 283, at 308, 312.

[34] See *Hatton v UK*, 37 EHRR (2003) 611, at 634 ('The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions'). Marks, 'The European Convention on Human Rights and its 'Democratic Society', 66 BYIL (1995) 209, at 219. The classical exposition of this rationale is found in the arguments made by the European Human Rights Commission President, Sir Humphrey Waldock, before the ECtHR in *Lawless v Ireland*, ECtHR, Series B, No 1 (1960–1961), at 408 ('[T]he 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'); Waldock, 'The Effectiveness of the System Set Up by the European Convention on Human Rights', 1 *Hum Rts LJ* (1980) 1, at 9.

[35] The practice of allowing wider margins of appreciation in specific human rights type legal arrangements comprising democratic regimes fits this analysis well: Ni Aolain, 'The Emergence of Diversity: Differences in Human Rights Jurisprudence', 19 *Fordham Int'l LJ* (1995) 101, at 114, 119.

[36] Prisoners of War (Eritrea Claim 17) (*Eritrea v Ethiopia)(partial award*), 42 *ILM* (2003) 1083, at 1092 (Claims Commission) (grave charges against a state must be supported by a high level of certainty). An analogy could even be drawn to the notion that ambiguous criminal legislation should be construed in favour of the accused. See, Statute of the International Criminal Court, 17 July 1998, UN Doc. A/ CONF.183/9 (1998), Art. 22(2).

[37] The argument can also be linked to the Lotus principle that '[r]estrictions upon the independence of States cannot therefore be presumed': Lotus (*France v Turkey*) [1927] PCIJ Rep, Series A, No 10, at 18 While the breadth of the Lotus theory has been subject to much justified criticism (see, e.g., J Pauwelyn, Conflict of Norms in Public International Law (2003), at 154), the basic thrust of the doctrine – i.e., that states retain a residual freedom to act in areas not regulated by international law (sometimes described as a principle of subsidiarity) – still seems valid.

Promotes Inter-judicial Cooperation and Judicial Politics

The feeling by national governments of State Parties that their views influence the direction of international decisions (especially as it pertains to them) may improve the mutual cooperation and confidence between the national authorities of State Parties and the international or regional courts. In other words, respect and deference to views of national authorities would improve the acceptance of and legitimacy of the decisions of international authorities. Furthermore, the perceived division of labour between the national and international authorities may create a sense of partnership and foster efficiency. A manifestation of such synergy would be the easier enforcement and acceptance of international judgments and the prevention of unhealthy confrontations between national authorities of State Parties and international courts.[38]

6. Criticisms of the Doctrine

May Encourage the Discrimination of Minority Groups

The margin of appreciation should only be granted to national authorities in respects of norms which affects the whole population of a state equally. However, since the national institutions and internal democratic process are often controlled by the majority, an incautious or injudicious application of the doctrine to national institutions may operate exclusively to serve the interest of the majority at the peril of the outnumbered and outvoted minority. Whereas, international courts are supposed to protect and guarantee the interests of the helpless minority who may be unable to obtain adequate protection from the majority controlled national institutions of contracting states. The point being made is that no margin of appreciation should be allowed when national institutions take steps that arbitrarily discriminate against the minority.[39]

Militating Against the Achievement of Universal Human Rights Standards

The operation of the doctrine may frustrate the aspiration and promise of the achievement of uniform international human rights standards. Also, the relativistic application of the doctrine may support an allegation of judicial double standards. A possible effect of resort to the doctrine is promotion of the excesses associated with those advancing absolute relativism/pluralism in the human rights, which may prompt states not only to resist external review altogether, but to also contend that no external yardsticks could be employed to measure the appropriateness of their conduct and that only the state is the final arbiters of the appropriateness of its own actions. This would not only undermine the integrity of international institutions but would also frustrate the efforts and promise of promoting and enacting universal human rights standards.[40]

Stunting the Development of Development of International Judicial Precedence

Continuous adjudication by international courts would lead to the development of judge made law (case law) which would in turn operate to develop the international human right norms. This is more so in the areas of international law that for ideological or pragmatic purposes requires uniform international application such as economic and human rights law. Also, resort to the doctrine may promote non accountability of national authorities to the international community.[41] However, there is a flip to this argument in that may lead to foster the unsuitable application of precedents to subsequent cases. What may amount to just, proper, or appropriate measure in one case may be grossly unjust, improper, or inappropriate in another. Each case ought to be considered on its own merit. Every case has its peculiarity and the uncritical application of precedent would lead to stagnation and injustice.[42] It must also be observed that the resort to the doctrine does not imply that international judicial bodies would not develop universal uniform standards over time which would reduce or eliminate the margin to be granted over to states. For instance, the ECtHR approach is to gradually narrow down the areas of margin granted to states while simultaneously collating and developing European wide standards from which states are not allowed to depart.[43]

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[38] MacDonald, 'The Margin of Appreciation', in MacDonald et al., supra note 25, at 83, 123 ('The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Contracting States...'). Of course, to some degree all law is politics: Mensch, 'The History of Mainstream Legal Thought', in D Kayris (ed.), *The Politics of Law: A Progressive Critique* (2nd edn, 1998), at 13, 33.

[39] EYAL BENVENISTI (Supra) Note 16 at 847; See United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

[40] EYAL BENVENISTI (Supra) Note 16 at 844; See Fionnuala Ni Aolain, The Emergence of Diversity: Differences in Human Rights Jurisprudence, 19 *FORDHAM INT'L L. J.* 101, 114, 119 (1995) (arguing that States more sympathetic to democratic principles are granted a wider margin).

[41] Furtado, Jr, 'Guess Who's Coming to Dinner? Protection for National Minorities in Eastern and Central Europe under the Council of Europe', 34 *Columbia Hum Rts L Rev* (2003) 333, at 365.

[42] Yuval Shany, (Supra) Note 1 at 923.

[43] ibid

Clash of Interest

There is also the concern that national authorities accord absolute paramountcy to their national interest (whilst paying little attention to the interest of other states and the international community) and this impacts on their conduct and application of international norms. This is point becomes apparent in cases of conflicts between domestic and international norms in the regulations of state conduct. It should be noted however, that just like the national authorities, international courts also have their deep-seated inherent interest and biases which impacts on their interpretation and mode of adjudications. The preference of one set of biases over another is apolitical decision which merits serious consideration. One could argue therefore that the application of objective considerations such as comparative advantages in expertise, fact finding capacity, access to resources, proximity in determining when a resort to margin is appropriate and to what extent is a more accurate and efficient yardstick.

Furthermore, the impression that there is an acute contradiction between national interest and international norms seems over bloated because international norms are a creation of sovereign states to accommodate the interest of sovereign states. Therefore, international norms only complement national interest and do not act to sabotage it.[44]

Trans-Boundary Effect of Resort to the Doctrine

Another argument raised against the application of the doctrine is the attribution of responsibility in cases where the conduct of one state affects another state. More particularly, this point relates to the determination of state which should bear the brunt of normative ambiguity warranting the application of the doctrine. This is because the appreciation of the doctrine to the acting state (in protection of its interest) may affect the interest of the recipient state. Conversely, the denial of margin of appreciation to the acting state may jeopardise its interest whilst protecting the interest of the recipient state. The denial of the margin doctrine to a state merely because it affects the interest of another state could produce unpalatable consequences. For instance, where State A in self-defence responds to State B's unprovoked aggression to State A with a little more than the proportional force. Denying State A any margin of appreciation may produce a chilling effect that would discourage State A from responding to future attacks. This would encourage other states to lunch unprovoked aggression to state A. This argument also would also occasion a restriction on conduct of states contrary to the Lotus principle.[45]

Application to Paramount Norms of International Law

It has been argued that the doctrine of margin of appreciation should not be applicable to *Jus Cogens* norms due to their pre-eminence in international law. It is believed that the application of this doctrine to those norms would jeopardize the important values and these norms seek to protect in international law. This argument seems to be predicated on the belief that the precise precincts of these *Jus Cogens* norms are clearly ascertainable, whereas, they are not. In fact *Jus Cogens* norms (such as the prohibition of the prohibition of the use of force or right to self-determination) are among the norms whose precise scope are difficult to delineate. However, due to the harsh consequences that follow a finding of the violation of these norms, the application of the margin doctrine is even more appropriate to them. This is because international courts need to take extra caution when dealing with these norms so as to forestall rash decisions which would not only result in unwarranted sanction but also diminish the confidence in the international legal processes.[46]

7. Case Law on Application of the Doctrine by the European Court of Human Rights

The doctrine had been applied in many decisions of the ECtHR.[47] Also, the jurisprudence of the court has occasioned a tremendous influence on other international human rights courts throughout the globe.[48] An instance of the application of the doctrine by the ECHR can be seen in the case of *Handyside v. UK***.**[49] In that case, the court was called upon to determine the legality of an administrative decision of the British authorities prohibiting the circulation of a teenage guide book which was alleged to be offensive to public morals (in seeming contradiction of the right to freedom of expression guaranteed by the applicable norm). In upholding the decision of the British authorities, the Court held that the decision constituted a lawful restriction on the right to freedom of expression, the court delineated in clear terms the precincts of the doctrine as follows;

[44] Ibid at 924
[45] Ibid at 925
[46] See, Espiell, 'Self-Determination and Jus Cogens', in A Cassese (ed.), UN Law/Fundamental Rights: Two Topics in International Law (1979) 167; Frowein, 'Jus Cogens', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law* (1997), iii, 65, at 67.
[47] See *Engel v Netherlands*, 1 EHRR 647 (1976); Golder, supra note 29; *De Wilde v Belgium*, 1 EHRR 373 (1971); *Mellacher v Austria*, 12 EHRR (1990) 391; Goodwin v UK, 22 EHRR (1996) 123; *Smith v UK*, 29 EHRR (2000) 493; *Pretty v UK*, 35 EHRR (2002) 1; *Dudgeon v UK*, 4 EHRR (1982) 149; *Lehideux v France*, 30 EHRR (2000) 665.
[48] Ibid Note 1
[49] 1 EHRR 737 (1976), at 753–754

> Article 10(2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force [cites omitted]. Nevertheless, Article 10(2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (art. 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.[50]

In that case, the court accorded the British authorities the appropriate margin and deferred to the discretion of the state authorities in finding that the restriction placed by the authorities constituted a legitimate restriction on the right to freedom of expression. Essentially, the Court usually adopts three tests in assessing the propriety of the application of the doctrine. First, where the factual circumstances requiring the application of an international norm are such that they could be better understood by the national authorities than the international courts, a wider margin of appreciation would be granted in deference to the national authorities.[51] Secondly, in situations where there is no European wide consensus on a particular issue, a wider margin of appreciation is accorded to each state. Conversely, where there is a European wide consensus, little or no margin is allowed.[52] Lastly, in determining the extent of the margin to be granted, the importance of national interest involved weighed against the individual rights and priority are often accorded to the national interest or security over the authority of the courts to enforce the rights of litigants.[53] The rationale for this may not be farfetched. Individuals could only enjoy rights when the corporate existence, security of the state or its population is protected and guaranteed. Therefore, the State as a foundation must first be organized before individuals can employ the state machinery to enforce their rights.

8. Conclusion

The principal benefit of the application of margin of appreciation is that it promotes domestic acceptance by state parties of decisions of international or regional human rights Courts and accord states a sense of partnership and participation in the international decision-making process. The doctrine now seems to be enjoying a wider acceptance incrementally amongst international courts in international human rights adjudication. It should be noted that despite the exit of the United Kingdom from the European Union, the Country remains a member of the Council of Europe and a party to the ECHR and its compliance with the Convention is still subject to the review of the ECtHR.[54]

[50]Ibid., at 22–23

[51]See *Sunday Times v UK* (1980) 2 EHRR 245, at para. 59.

[52] For criticism of the Court's emphasis on consensus, see Benvenisti, supra note 16, at 851–852; Helfer, 'Consensus, Coherence and the European Convention on Human Rights', 26 *Cornell Int'l LJ* (1993) 133, at 141–142; Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Justice', 73 *Notre Dame L Rev* (1998) 1217; Yuval Shany (Supra) Note 1 at p. 927, Note 121 questions the appropriateness of reliance upon consensus among states parties as an independent criterion for determining the need to apply the doctrine. However, resort to comparative study might be useful in asserting the determinacy of specific norms and in refuting claims that certain social arrangements are inevitable.

[53] See Leander v Sweden, 9 EHRR (1987) 433, at para. 59 ('[T]he national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life'*)*. Note also that the Court held that no margin of appreciation exists at all in cases alleging torture or inhuman or degrading treatment or punishment*: Chahal v UK*, 23 EHRR (1997) 413, at 457.

[54] Amar Ali, 'European Convention on Human Rights (ECHR) Does it Still Apply After Brexit?' 12th April 2021 (Lexology) available at https://www.lexology.com/library/detail.aspx?g=7e0577d5-e617-471a-8e00-5c964741965c Accessed on 23rd September 2022.