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Subject Area - Law

Margin of Appreciation

The analogy of the doctrine of margin of appreciation reflects the rationale behind the separation of power and constitutional framework. Margin of appreciation is a means by which member states are conferred a privilege to balance between the rights of the individual with the rights of the public at large. When there is a conflict between the security of public with the individual human rights then it is for the state to determine whether it is within the margin of appreciation that they can violate that individual's human rights without being held liable for violation. In the case of *Goodwin v. United Kingdom*(1) the court held that the United Kingdom arguments for violation was not within the margin of appreciation and the fair balance inherent in the Convention tilted in favour of the applicant.

Margin of appreciation is the term that refers to margin between the governments justification to be excused from infringing human rights. This exception is delegated to member states under certain circumstances. Not all rights are subject to margin of appreciation(2). In *Harb v. His Majesty King Fahd Bin Abdu*(3) the applicant challenged the lawfulness of a private hearing, it was argued that the Article 6 of the ECHR were not incompatible as Article 6(1) permitted a hearing in private and the margin of appreciation should be extended to reflect the principle underlying state immunity.

To a large degree, there is a legitimate justification for the existence of the margin of appreciation, most of all it is necessary as a means of balancing between the human rights of individual citizen against the protection and safety of the public as a whole. If this balance did not exist, human rights would inevitably override the protection of public and pose great concern to the interest and security of the public. "In particular the press as a public watchdog are entitled to a high degree of protection.(4)"

In vast number of cases, courts have indicated that authorities have wide margin of appreciation. In the House of Lords case, *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department* (2004)(5) it was decided that Article 15(1) gives the authorities a wide margin of appreciation. This was clear evidence that where there is a pressing need for the security and protection of public the authorities possess a power of derogation to derogate from compliance with the human rights(6).

Conversely, in the *Chahal v United Kingdom* (1996)(7) European Court of Human Rights declared that Article 3 is the most fundamental right in a democratic society and "no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation(8)" This clearly demonstrates the conflict as to when margin of appreciation can and cannot be used as a justification for violation of human rights.

Arguably, there is evidence of pressing social and political needs for the rationale and necessity of margin of appreciation. Margin of appreciation is a necessary and prerequisite element of state privilege in the measures they take when confronted with human rights issues of an individual citizen or a group of citizens(9).

Nonetheless, the extent of margin of appreciation varies in accordance with the type of right the states authorities are interfering with and each case depended upon the circumstances and merits of the case. In *Pretty v. United Kingdom* [2002](10) it has been established by the ECtHR that "the national State's margin of appreciation is narrow as regards

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interferences in the intimate area of an individual's sexual life"(11); explicitly, this is referring to interference with Article 8 of the ECHR or the HRA 1998.

Further rationale was set out in R (on the application of Tangney) v. The Governor of HMP Elmley and Another [2005] (12) confirming that Strasbourg polices the boundaries between criminal and disciplinary charges, but it has to be appreciated that no two member states operate an identical penal disciplinary system and inevitably when dealing with fact specific situations in which the context is important each member state has some margin of appreciation(13). In other words, this coherently identifies that margin of appreciation is necessary for the smooth governance of a state in accordance with laws, norms and moralities of that specific state.

The legislator has a wide margin of appreciation in implementing social and economical policies and the legislator's judgement are respected as to what constitutes "in the public interest"; thus, in James v. United Kingdom (1986)(14) the ECtHR determined that national courts are better in balancing individual and community interest. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation(15).

On the contrary, Article 2 and 3 do not recognise a margin of appreciation as they are absolute rights and not subject to any limitations because right to life and protection from torture is most fundamental right than non-discrimination as the government can derogate from right to non-discrimination in the event of a public emergency threatening the life of the nation (Article 15)(16).

Broadly speaking, the ECtHR developed the margin of appreciation doctrine to enable states to balance conflicting fundamental rights. For example where there is a outstanding claim for a possession order, the claimant has a right to a fair hearing under Article 6 whereas, the defendant probably has a right to a respect for family home under Article 8. In this case, the two rights clashes but it is the court's duty to balance conflicting fundamental rights by using their power under margin of appreciation(17).

All qualified and limited right other than absolute rights under the HRA and the ECHR is subject to a range of restrictions. Restrictions provided under the Articles are similar between all the qualified and limited human rights and the restrictions have been applied in a similar way by the Commission and the ECtHR. The prescribed human rights may be restricted by limitations proscribed by law, which are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others(18). The ECtHR recognises that its role is to review and ensure that the decision of local bodies fall within the margin of appreciation as identified in Ahmad v. United Kingdom (1981)(19). Case law suggest that there are arguments for and against the existence of margin of appreciation.

However, to preserve a same level of human rights to each citizen there must be a provision enabling the state to draw a line between two or more conflicting right or the protection of the citizens of that state. There are more rationale behind

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