# Margin of Appreciation: an evaluation of its efficacy

The concept of the margin of appreciation (MoA) denotes the freedom accorded to the member states (MSs) of the Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) in discharging their primary duty; securing human rights within their jurisdiction.[1] The concept, instead of being clarified within 50 years of adjudication, it has been the subject of controversy amongst legal literature and judges as to its efficacy. That essay, after evaluating the arguments of its advocates and detractors, aims to provide an answer.

The concept's advocates proffer that is a means of reconciliation between respecting cultural diversity and establishing a human rights standard.[2] That does not appear inconsistent with the aim of the Convention, since in its Preamble is recognized that the means of maintaining and further realizing the Convention freedoms are; a 'common understanding and observance of the Human Rights' and an 'effective political democracy'.[3] A democracy is characterised by, inter alia, 'pluralism tolerance and

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[1] Convention for the protection of human Rights and Fundamental Freedoms (ECHR), art 1

[2] Kathleen A. Kavanaugh, 'Policing the margins: rights protection and the European Court of Human Rights' (2006) E.H.R.L.R. 422 < https://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad6ada6000001689f4ae3cea8d88f7a&docguid=ID6D631D028CD11DB99E79D1C5C1666AA&hitguid=ID6D631D028CD11DB99E79D1C5C1666AA&rank=2&spos=2&epos=2&td=2&crumb-action=append&context=3&resolvein=true>accessed 19 January 2019

[3] ECHR

broadmindedness'.[4] In pluralistic societies divergent views will exist and, as Hart placed it, will 'be acceptable (insofar as) the reasoned product of informed impartial choice'.[5]

Thus, ECHR norms are intended to be commonly respected and promoted via democratic dialogue and practices, rather than to eliminate cultural diversity.

The court achieves that by entrusting a MoA to the national authorities of the MSs since, due to their direct and continuous touch with the vital forces of the state, are better placed to evaluate the local needs and conditions (**Handyside v UK**).[6] Moreover, by having direct democratic legitimacy (**Hatton v UK**)[7] they are allowed to provide the initial assessment of necessity for an interference with a Convention right[8]. Such discretion is not unlimited; the court is empowered with the final ruling on the reconciliation of the interference with the convention.[9]

The aforementioned mechanism indicates the need that the court must exercise judicial restraint, as affirmed in **Cossey v UK**.[10] Such need is in conjunction with the notion of subsidiarity as incorporated in protocol 15; 'High Contracting Parties… have the primary responsibility to secure the (convention rights), subject to supervisory jurisdiction of the (ECtHR)'.[11]

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[4] Handyside v United Kingdom (1979-1980) 1 EHHR 737, para 49
[5] H. L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961), 200.
[6] Handyside (n 4), para 48
[7] Hatton v United kingdom (2003) 37 EHRR 28, para 97
[8] Handyside (n 4), para 48
[9] ECHR, art 46
[10] Cossey v United Kingdom (1991) 13 E.H.R.R. 622, Martens J at [3.6.3].
[11] ECHR, protocol 15

Nevertheless, the MoA –as reflected by the principle of subsidiarity- has not been used, as indicated in **A and others v UK**, merely as 'a tool to define relations between the domestic authorities and the ECtHR',[12] but also to achieve greater integration of the latter's jurisprudence within the domestic sphere of MSs.

Notably, MSs as primary guarantors of human rights have incorporated the ECHR into national legal order, albeit not completely.[13] Indicatively, UK courts as national authorities will review the observance of human rights domestically and in doing so will have to 'take into account' ECtHR jurisprudence.[14]

To that extend and despite that the ECtHR delivers judgements binding to states which are parties to a case before it, it has used the MoA, as 'an incentive to domestic judge(s)',[15] in order to implement the CDDH proposition. The committee encourages the court to actively facilitate the integration of Convention standards into the national legislative process as a 'preventive anticipation of possible violations'.[16]

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[12] A and Others v UK [GC], A. 3455/05, para 184.
[13] A Kovler and O Chernishova, 'The June 2013 Resolution 21 of the Russian Supreme Court – A Move Towards Implementation of the Judgments of the ECtHR' (2013) 33 HRLJ 263
[14] Human rights act 1998, c 42, s 2
[15] Spielmann, 'Whither the Margin of Appreciation', 67 Current Legal Problems (2014) 49, at 49.
[16] Steering Committee for Human Rights, CDDH Report on the Longer-Term Future of the System of the European Convention On Human Rights (CDDH Report), Doc CDDH(2015)R84 Addendum I, 11 December 2015, paras 38 and 41 < www.coe.int/t/DGHL/STANDRADSETTING/CDDH/REFORMECHR/CDDH(2015)R84_Addendum%20I_EN-Final.pdf.> accessed 20 January 2019
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The court, as shown in **X v SoS for the HD**, has attained that aim by deferring to the assessment of the national authorities presupposed, that national courts will properly police the limits.[17] Significantly, the ECtHR is reluctant to interfere with the initial assessment if the restriction imposed has a legal basis, pursues a legitimate aim and is the result of a genuine and reasonable effort to balance the competing interests; the need to protect convention rights and the needs of the society.[18]

Specifically, the court in **McDonald v UK** granted a wide MoA to national courts and refrained from substituting 'its own assessment of the merits of the contested measure', including its review of proportionality, since no 'compelling reasons for doing so' existed.[19] In qualifying the existence of such reasons the ECtHR will consider whether national courts have carefully applied the its jurisprudence in reviewing the prohibition.[20]

Furthermore, the court has expanded that expectation to legislators, albeit in a different manner; the court 'will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation'.[21]

As stated in **Shindler v UK,** once policymakers have 'sought to weigh the competing interests and to assess the proportionality' of the interference[22] , and as in **Garib v the Netherlands**, were 'concerned to limit any detrimental effects'[23] the ECtHR will award a wider MoA.

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[17] X and another v Secretary of State for the Home Department [2004] UKHL 56, para 176
[18] S. Foster, 'Human Rights and Civil Liberties', 3rd edn [2011], p 66
[19] McDonald v. United Kingdom, Appl. no. 4241/15, (20 May 2014, para. 57)
[20] Animal Defenders v. United Kingdom, Appl. no. 48876/08, (22 April 2013, para 115)
[21] MGN v. United Kingdom, Appl. no. 39401/04, (18 January 2011, para 119)
[22] Shindler v. United Kingdom, Appl. no. 19840/09, (7 May 2013, para 117)
[23] Garib v. the Netherlands, Appl. no. 43494/09, (23 February 2016, para 126)

Therefore, by allowing a wide discretion to national authorities, rewarding their 'exacting and pertinent consideration' of ECtHR jurisprudence, the court has used the MoA as a mechanism for creating an erga omnes partes effect of its judgments.[24]

On the other hand, its detractors argue that the reliance on such a legally imprecise doctrine has devalued Convention rights and freedoms. Notably, Judge De Meyer's delineation, in **Z v Finland,** of the MoA as 'unnecessary circumlocutions', and that ought to 'be abandoned without delay'[25] reflects the dissatisfaction that has caused.

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Indeed, the unpredictability of the doctrine due to the various combinations of the factors that determine its width cannot be disregarded. Specifically, one of the matters considered is the importance and nature of the right guaranteed; for instance, prohibition of inhuman and degrading treatment is regarded as a peremptory norm (jus cogens) and no treaty can legitimate any derogation. Moreover, the absence of a uniform European conception on a matter-as in **Handyside**; absent European consensus on morals- accords a wide MoA.[26]

Nevertheless, the importance of the matter to the individual- as in **Dungeon v UK**, whereby national law prohibited consensual sexual intercourse between homosexual males; an activity concerning 'a most intimate aspect of private life'- has limited the discretion afforded to MSs.[27] Similarly, the ECtHR will also consider the type of the

[24] Animal Defenders (n 19) para 116
[25] Z v Finland (1998) 25 E.H.R.R. 371.
[26] Handyside (n 4) para 48
[27] Dungeon v UK (1982) 4 EHRR 149, para 52

activity restricted. In **Lingens v Austria** the need to protect the political speech has limited the MoA, since is at the 'very core of the concept of democratic society' upon which-inter alia- the ECHR is built on.[28]

Over and above that, matters over which reasonable divergent opinions exist, within the ambit of democratic debate, has inclined the court to award a greater MoA. In **James v UK,** the views of the elected legislature that landlords ought to be allowed to purchase the freehold estate of the land in order landlords not to unjustly enrich, despite the losses sustained by the former, was accepted by the ECtHR.[29] Notably, other political parties did not share that view.

Additionally, the court accords a wide MoA over matters that the MSs are assumed to have special knowledge. In **Klass v Germany** such a matter was the adoption of a surveillance system for national security reasons.[30]

Finally, the court will consider the nature of the interference and the aim pursued. Specifically, The ECtHR will review the necessity of the interference; in **Olsson v Sweden** was upheld that the notion of necessity implies that the restriction corresponds and is proportionate to a pressing social need[31].

In **Sporrong v Sweden** it was stated that the element of proportionality is inherent in the Convention as a whole and requires a fair balance to be struck between the demands of the general interest of the community and the need of protection of individual's rights.[32] The court has found that arbitrary and indiscriminate bans (**Hirst v**

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[28] Lingens v Austria (1986) 8 EHRR 407, para 42
[29] James v United Kingdom 1986 8 EHRR 123
[30] Klass v Germany (1979-80) 2 EHRR 214, para 46
[31] Olsson v Sweden (1998) 11 EHRR 259
[32] Sporrong and Lonnroth v Sweden (1983) 5 EHRR 35, para 61

**UK**)[33], inappropriate reasons for interference (**Stafford v UK**),[34] lack of adequate procedural safeguards such as access to impartial judiciary (**Klass v Germany**)[35] are disproportionate and thus outside the acceptable MoA.

Moreover, the ECtHR's limited ability 'to elucidate, safeguard and develop the rules instituted by the Convention',[36] due to its inherent subsidiary role, has fed the arguments of its detractors. The limitations are confined in the following considerations. Primarily, a few cases are admitted by the ECtHR due to the strict requirements of admissibility. The Court may deal with the matter once; inter alia, all domestic remedies are exhausted, the application is not the same- further information exist- as a matter already examined, a case is not manifestly ill-founded.[37]
Furthermore, petitions are deemed inadmissible to the extent that individuals have not established the necessary locus standi. The court has indicated, in **McCann and Others v UK** that whereas a person is not adversely affected by national practices it shall not examine in abstracto the compatibility ( of such practices) with the requirements of the Convention'. [38]

Additionally, the ECtHR has the ability to provide advisory opinions on legal questions concerning interpretation of Convention rights. Nevertheless, an opinion shall not be

[33] Hirst v United Kingdom (2006) 42 EHRR 41
[34] Stafford v United Kingdom (2002) 35 EHRR 32
[35] Klass (n 29)
[36] Ireland v United Kingdom Series A no 25 (1978), para 154.
[37] ECHR, art 35
[38] McCann and Others v United Kingdom Series A no 324 (1995), para 153

instituted on any matter that the court might have to consider once other proceedings under the Convention have been initiated.[39]

Therefore, despite that the court resorts to obiter dicta[40] or broader statements of principle[41], its limited constitutional role and the MoA's inherent inconsistency hampers the necessary concretization of its norms, which would facilitate their implementation by the MSs.

Moreover the reluctance of the court to bifurcate the scope and justification of an interference ,as well as the overuse of the doctrine even in cases where, as De Meyer observes in **X, Y and Z v UK**; a mere reference that the respondent State had not "acted arbitrarily or unreasonably or failed to strike a balance between the respective interests involved would have justified the interference, have empowered its critics.[42]

Particularly, in **Molka v Poland** the court assumed that the case would attract the protection of article 8 and found it unnecessary to determine that applicability, since the case was inadmissible on other grounds.[43] Similarly, in **Laksey v UK** the court assumed the applicability of the convention on the contested measure, since the litigants did not dispute it.[44]

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[39] ECHR, art 47
[40] Nikitin v Russia ECHR 2004-VIII (2004), paras 44 and 60
[41] Al-Nashif v Bulgaria Appl no 50963/99 (2002), para 137
[42] De Meyer in X, Y and Z v United Kingdom (1997) 24 E.H.R.R. 143
[43] Mólka v. Poland, appl. no. 56550/00, 11 April 2006
[44] Laskey Jaggard and Brown v. United Kingdom, appl no. 21627/9, (19 February 1997)

Therefore, the aggravated imprecision of the doctrine due to the ECtHR's aforementioned reluctance may incline MSs to follow their own paths outside its guidelines.

A highly critisised feature of the MoA is the search for a European Consensus. The existence of a European Consensus will, most likely, limit the MoA accorded to MSs, although it is not a determinative factor (**Hirst v UK No 2**).[45] Its conceptual basis appears legitimate since aims to reflect the voices of democratic societies. Particularly, it is regarded as a safeguard 'to prevent any rapid and arbitrary development of the Convention rights'[46] and to ensure that 'legal developments keep pace with, but do not leap ahead of, societal changes within Europe'.[47] Thus the search for consensus puts 'a sensible limit on judicial creativity and judge-made law'.[48]

Conversely, the ambiguous inferences drawn from its operation have supported the view that its existence, allows the court to push back to national authorities the difficult tasks concerning sensitive social issues. Indicatively, in **Cossey** the court upheld a lack of consensus on the rights of transsexuals, despite the Council of Europe's

[45] Hirst v UK (No. 2) [GC], A. 74025/01, para 81
[46] N Bratza, Evidence to UK Joint Committee on Human Rights, 13 March 2012, HC 873-iii, Q 140.
[47] N Bratza, 'Living Instrument or Dead Letter – the Future of the ECHR' (2014) EHRLR 124
[48] P Mahoney, 'Judicial Activism and Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 HRLJ 57

recommendation that Member States "… enact provisions on transsexuals' right to change sex"[49] and, indeed, that right's recognition in 14 MSs.[50]

Furthermore, Martens J. in his dissenting opinion in **Cossey** argued that the consensus may be used so as a 'collectivity oppresses an individual' and urged the court 'not to yield too readily to arguments based on a country's cultural and historical particularities'.[51] His proposition is consistent with the democratic value of protecting minorities from abuses of those in dominant positions (**Young v UK**).[52]
Interestingly, whether the expected accession of the EU into the ECHR will clarify or trouble the waters even more remains to be seen…

That essay illustrated that the ECtHR deteriorates the inherent inconsistency of the MoA, due to its limited constitutional role and its reluctance to separate scope and justification of an interference in some cases. Consequently, a call shall be addressed to it, to hand down clear and understandable judgments and provide convincing interpretations of the Convention.[53] Necessarily, the ECtHR and MSs must both fully meet their engagements under the Convention in order to safeguard the institutional balance that the MoA has achieved, as a mediator, between the idea of universal

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[49] Report of the Legal Affairs Committee, Eur. Parl.Ass. Deb. 21st Sess. Doc. 6100 (1989) (Text of Recommendation 1117 adopted by the Assembly on September 29, 1989).
[50] Terrance Walton, "A Measure of Appreciation" (1992) 4 N.L.J. 1202, p 1203
[51] Cossey (n 10), para 18
[52] Young, James and Webster v United Kingdom Appl no. 7601/76, (13 August 1981), para 63
[53] Janneke Gerards and Hanneke Senden, 'The structure of fundamental rights and the European Court of Human Rights' uwe Bristol <https://academic.oup.com/icon/article-abstract/7/4/619/733737>accessed 10 January 2019

human rights and leaving space for reasonable disagreement, legitimate differences, and cultural diversity.[54]

Thus the MoA's lack of clarity is a price to pay in order to achieve widespread agreement of a common human rights regime across the MSs.

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