

Margin of Appreciation

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An overview of the Strasbourg Court's margin of appreciation doctrine.

The margin of appreciation is a doctrine that the European Court of Human Rights has developed when considering whether a member state has breached the Convention. It means that a member state is permitted a degree of discretion, subject to Strasbourg supervision, when it takes legislative, administrative or judicial action in the area of a Convention right.

The doctrine allows the Court to take into account the fact that the Convention will be interpreted differently in different member states, given their divergent legal and cultural traditions. As the Council of Europe has observed, the margin of appreciation gives the Court the necessary flexibility to balance the sovereignty of member states with their obligations under the Convention.

Margin of Appreciation and European Supervision

The Court first explained the margin of appreciation in *Handyside v United Kingdom* (1976). In that case, the Court had to consider whether a conviction for possessing an obscene article could be justified under Article 10(2) as a limitation upon freedom of expression that was necessary for the protection of morals. The Court noted:

By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements [of morals] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them ... Nevertheless, Article 10(2) does not give the contracting states an unlimited power of appreciation. The Court which ... is responsible for ensuring the observance of those states' engagements, 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 European supervision.

The margin of appreciation will be considered in cases involving the proportionality of interferences with qualified rights (Articles 8-11) as well as in other situations where rights have to be balanced or interferences justified. As the Court noted in *Schalk & Kopf v Austria* (2010), "the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background".

Narrow Margin of Appreciation

The member state is given only a narrow margin of appreciation in cases where:

- A particularly important facet of an individual's **identity or existence** is at stake (*Evans v UK*).
- The justification for a restriction is the protection of the **authority of the judiciary** (*Sunday Times v UK* (1979)). In that case, the Court held that "the domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area".

- The rights protected by Article 2 and Article 3 of the Convention are **absolute rights**, generating obligations for member states which cannot be balanced either against other rights or against the pursuit of any legitimate interest. However, the lack of consensus among member states may influence the Court's opinion that the matter is best left to individual states (*Pretty v UK* (2002)).
- **Racial or ethnic discrimination** is implicated. For example, in *D.H. v the Czech Republic* (2007), the Court held that the margin of appreciation could not serve to justify racial or ethnic segregation in education.
- An “**intimate aspect of private life**” is at stake under Article 8. In such cases, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate (*Dudgeon v UK* (1981)).

Wide Margin of Appreciation

A member state's margin of appreciation is generally wide in the following categories of cases:

- Cases of **public emergency** (Article 15). The decision to derogate from the Convention in “times of war or other public emergency threatening the life of the nation” is justiciable at Strasbourg but subject to a wide margin of appreciation (*Brannigan & McBride v UK* (1993)).
- Cases involving **national security**. In *Klass v Germany* (1978), the Court granted German authorities a measure of discretion in preparing a system of secret surveillance in the fight against terrorism, which was necessary in a democratic society in the interests of national security and crime prevention.
- Cases involving the “**protection of morals**” (see Articles 8-11), given that this notion varies between member states (*Handyside v UK*).
- Cases involving **legislative implementation of social and economic policies** (*Hatton v UK* (2003)).
- Cases where there is **no consensus within the member states** of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues (*Evans v UK* (2007)).
- Cases where the state is required to **strike a balance** between competing interests or Convention rights (*Evans v UK*).

The case law on the margin of appreciation reveals that a certain degree of deference is already given to the judgment of national authorities when they weigh competing public and individual interests, in view of their special knowledge and responsibility under domestic law. The Court pays close regard to the particular requirements of the society in question; in situations where a violation is found, it clearly explains the nature of the incompatibility with the Convention and leaves it to the national authorities to devise a more Convention-complaint system.

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