2 The Margin of Appreciation in Strasbourg and Luxembourg

The core of the European human rights culture is arguably founded in the doctrine of margin of appreciation. Indeed, the margin of appreciation is common to both the European Convention on Human Rights (ECHR) and European Union (EU) legal orders when it comes to the adjudication of fundamental rights. This doctrine finds its origin in the ECHR and the terminology was accepted by the Court of Justice of the European Union (CJEU). From there it has migrated to Inter-American human rights law and the Human Rights Commission of the United Nations.1 As put by Aharon Barak, there is no consensus as to its exact nature.2 The margin of appreciation doctrine has been much analysed. However, this has been done almost solely in the context of the ECHR – and perhaps for a reason. Very few theoretical analyses exist regarding its use in EU law, and many of those that do exist use the European Court of Human Rights (ECtHR) case law as a point of reference. This chapter is divided into three sections: The first section makes some general points on the doctrine of margin of appreciation. The second section focuses on the doctrine of margin of appreciation in the Strasbourg legal order. The third section analyses the development of this doctrine in the EU legal order.

2.1. General Points on the Margin of Appreciation Doctrine

Is the concept “margin of appreciation” illusive and ill-equipped as a legal doctrine? It has, through numerous rulings of the Strasbourg Court (ECtHR), gained a strong doctrinal status. However, its doctrinal status and appropriate role is not undisputed. In some ways it has gained a mystic aura – and perhaps it is appropriate to say that it is a concept in a serious need of demystification.

The exact nature and ambit of the doctrine remains a frequent topic of analysis for academics. However, as seen in the subsequent chapters, disagreement

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1 A. Barak, Proportionality – Constitutional Rights and their Limitations (CUP, 2012) at p. 418.
2 Ibid.
exists, both in terms of that nature and ambit, but also in respect of the appropriateness of using the doctrine of margin of appreciation in adjudication of human rights. Before looking further into that debate, it is appropriate to look into how the doctrine has emerged through the case law of the European Court of Human rights, and also how its application has gained a strong foothold irrespective of the sometimes very harsh critique.

The doctrine of margin of appreciation has been applied extensively by the Strasbourg Court, in particularly in cases related to limitations of fundamental rights by the contracting parties to the Convention. In EU law, the margin of appreciation doctrine has a different status, as it has not been used nearly as frequently, thoroughly or systematically by the Court of Justice as it has by its sister court in Strasbourg. Furthermore, the academic debate, by EU law scholars, has only to a very limited extent dealt with the margin of appreciation doctrine. In EU law, the debate has in fact mainly focused on the principle of proportionality. As it appears clearly from the CJEU case law, this principle is central when it comes to the adjudication of EU fundamental rights. As we shall see, the entry into force of the Lisbon Treaty may increase the development of the margin of appreciation in the EU legal order. In that respect Article 4(2) TEU may be of particular relevance.

Generally speaking, it is important to keep in mind that there is a strong linkage between the doctrine of margin of appreciation and the principle of proportionality. Both notions can for instance be said to concern the factual and normative information whose existence allows for a limitation on fundamental rights. Also, these two concepts may be said to relate to the intensity of judicial review. Interestingly, in his seminal book on ‘proportionality’, Aharon Barak draws a comparison between the doctrine of margin of appreciation and the principle of proportionality (what he calls the “zone of proportionality”). According to Barak, the notion of the zone of proportionality examines the constitutionality of a limitation on a human right from a national standpoint. “It determines the framework of factual and normative data from which the legislator may derive a valid limitation on a human right. The doctrine of ‘margin of appreciation’ examines the constitutionality of the limitation of a right from the standpoint of the international community. It determines the framework of factual and normative data whose existence allows the international community to provide considerable weight to the factual and normative determination made by contracting state actors.” He continues by stating that the zone of proportionality reflects the balancing conducted at the national level between the public interest and individual human rights. It is derived from the principle of the separation of powers and is

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5 Ibid., p. 420.