Margin of Appreciation and National Security

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1 Introduction

The European Union Court of Justice (CJEU) has in a few recent cases added to the understanding of the doctrine of margin of appreciation and its application in situations where national security is in danger. The doctrine has been developed within the framework of the European Convention of Human Rights (ECHR), but has importance also for the application of the European Union Charter of Human Rights. As the Union Member States are bound to both of the two conventions, and the rights, liberties and principles of the ECHR are binding for the European Union (EU) as well,¹ many tricky questions of competence and application have to be solved by the High European Courts.

The term margin of appreciation or marge d’appréciation, marge national, indicates the scope of national courts or their administrative authorities to applying their national law at their own discretion in fields covered by an international obligation. The term was first used in 1958, by the former European Commission of Human Rights in a matter of security. In the Greece v the United Kingdom case on the subject of Cyprus, the Commission found that article 15 of the ECHR allows a High Contracting Party to take measures derogating from the obligations of the Convention in time of war or public emergency threatening the life of a nation.² The Commission referred to the term again in the Lawless v Ireland case, 1961,³ and the European Court of Human Rights (ECtHR) first used the term in 1978, in the Ireland v the United Kingdom case;⁴ both cases concerned article 15.

In all those cases the European Bodies reminded the Parties that they may only derogate from the convention to the extent strictly required by the exigencies of the situation, and the ECtHR underlined that it is empowered to rule on whether the States have gone beyond the ‘extent strictly necessary by the exigencies of the crises’. The domestic margin of appreciation is thus accompanied by a European supervision.

The main conditions and parts of the doctrine of the margin of appreciation are present already in these first cases: the international convention in

¹ Treaty of European Union (TEU) art 6(1).
² Greece v the United Kingdom (1958) 31 CD 3 (vol I and II).
³ Lawless v Ireland no 3 (1961) Series A no 3.
⁴ Ireland v United Kingdom (1978) Series A no 25.
question shall contain obligations that are possible to derogate from or are not strictly framed; the obligations of the convention shall give rights to individuals; a judicial body shall supervise that the obligations are observed and decide cases where individuals are parties; and the High Contracting Parties may only derogate to the extent necessary – a margin supervised by the judicial body.

The application of the doctrine of margin of appreciation places the European judge at the nexus of the complexity of law and politics. It involves a balancing of the interests of states to freely decide about how to implement matters regulated by human rights conventions considering their domestic situation and the interests of individuals who have rights granted by the conventions. It is also about balancing rights of the conventions that may not be possible to attain simultaneously, and adding to that, by applying the margin of appreciation the judge of the ECtHR decides on what legal order should prevail in the situation, international law or national law or public law or private law; and to the judge of the European Union Court of Justice the balance includes also the question whether and how Union law should be applied.

2 The Doctrine of Margin of Appreciation as Elaborated by the European Court of Human Rights

An appropriate point of departure for analyzing the ECtHR case law that establishes the basis of the margin of appreciation doctrine is to remind about that international human rights law is a branch of international law that puts the individual at the centre. While classic international law is about horizontal rights and obligations between states, human rights law creates horizontal obligations between states to grant rights of individuals. Those rights are vertical, invested in the individuals, and directed against the state on whose territory they may be. The human rights law developed


6 The fact that the ECHR only creates obligations between states and not directly for persons prevents the convention from having so called Drittwirkung, i.e. quality to be applied to relations between private persons. However, the Parliamentary Assembly passed a Resolution 1165 (1998) stating that the right to private life and of freedom of expression should be