DE GRUYTER
OPEN

ICLR, 2014, Vol. 14, No. 1.

The algorithm of the margin of appreciation doctrine in light of the Protocol no. 15 amending the European Convention on Human Rights

Martin Kopa[1]

Faculty of Law, Palacký University Olomouc, Czech Republic
email: martin.kopa@upol.cz

KOPA, Martin. The algorithm of the margin of appreciation doctrine in light of the Protocol no. 15 amending the European Convention on Human Rights. *International and Comparative Law Review,* 2014, Vol. 14., No. 1, pp. 37–53. DOI: 10.1515/iclr-2016-0043.

Abstract: European Court of Human Rights applies the margin of appreciation doctrine in order to determine the level of its self-restraint and the latitude of free discretion of states when implementing their Convention obligations. The rationale behind this doctrine is that in certain cases, domestic bodies are in a better position than international judges to provide adequate protection to human rights. In this regard, they should be afforded a margin of appreciation. The Court subsequently only reviews, if the interferences contested by an individual fall within this margin or not. This doctrine was a subject of overwhelming critique because the European Court of Human Rights did not apply it transparently and consistently. Therefore the main goal of this article is to normatively construe an algorithm which could be taken into account by the European Court of Human Rights when applying the doctrine in order to prevent the mentioned critique.

Keywords: Margin of appreciation, European Convention on Human Rights, European Court of Human Rights, Subsidiarity, Proportionality

1. Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") is on the verge of a significant change. In June 2013, Protocol no. 15 amending the Convention left the port of Council of Europe in Strasbourg and started to sail towards the ports of signatures and ratifications by the individual member states.[2] If it comes into force because of

1 Department of Constitutional Law, Faculty of Law, Palacký University Olomouc, Czech Republic. This article is one of the outcomes of my doctoral research conducted at Palacky University. The usual disclaimer applies, meaning that the author alone is responsible for any errors that may remain and for the views expressed in the article.

2 As of 9 August 2014, it has been signed and ratified by 9 countries: Azerbaijan, Estonia, Ireland, Liechtenstein, Monaco, Montenegro, Norway, San Marino and Slovakia. It has not even been signed by 8 countries so far: Bosnia and Herzegovina, Croatia, Greece, Hungary,

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

its successful sailing trip between all 47 states, it will significantly impact the Convention. It will newly bring a reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble of the Convention. Specifically, under Article 1 of the Protocol no. 15, a new recital shall be added to the Preamble, which shall read: "*Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so* ***they enjoy a margin of appreciation****, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention*".

I will argue that this amendment of the Convention will require the European Court of Human Rights (hereinafter "the Court") to enhance its work with the doctrine of the margin of appreciation. Namely, the article will invite the Court to develop a clear algorithm which may be used in upholding the new spirit of the Convention's Preamble. Firstly, I will define what the margin of appreciation is and I will mention the mostly raised points of critique towards the doctrine. Secondly, I will briefly identify the concepts of the margin of appreciation which appear in the Court's case-law. Thirdly, I will identify certain factors which impact the decision on use of a specific concept of the margin of appreciation. And finally, the relationship between identified concepts and factors will allow me to construe a general algorithm of the margin of appreciation doctrine applicable in the decision-making of the Court.

2. The margin of appreciation doctrine and its critics

Over the years, many scholars and even the Court itself provided their definitions of what they thought the margin of appreciation was. The most-commonly referred to judgment in this regard is undoubtedly the *Handyside* case.[3] In the classic paragraphs no. 48 and 49 of this judgment, 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 these requirements [of morals] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. (…) Nevertheless, Article 10 para. 2 (…) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (…), 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 a European supervision.*" This judgment represents the core of the whole doctrine because it emphasizes the knowledge of Stras-

Latvia, Malta, Russia and Switzerland. The remaining 30 countries have signed the Protocol, but have not ratified it, yet.

3 *Handyside v. the United Kingdom*, No. 5493/72, 7 December 1976.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

bourg judges that they are in a worse position to decide on certain cases than domestic authorities. This position requires them to apply self-restraint, namely in deciding on what they consider to be necessary in democratic society, as the limitation clauses of Articles 8-11 of the Convention stipulate.

As far as academic definitions are concerned, I favor the words of the two last presidents of the Court. The current president Dean Spielmann wrote that: *"In applying this essentially judge-made doctrine, the Court imposes self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute. Various reasons for this have been put forward in legal writings, for example: the subsidiarity of the Strasbourg Court's review, respect for pluralism and State sovereignty, a lack of resources preventing the Court from extending its examination of cases beyond a certain level, the Court's inability to carry out difficult socio-economic balancing exercises, or the idea that the European Court of Human Rights is too distant to settle particularly sensitive cases."*[4] This definition of Dean Spielmann aptly describes the merits of the whole doctrine and substantive reasons for its application.

The previous president of the Court, Sir Nicolas Bratza, said in his speech at the European conference of presidents of parliaments: *"In many types of cases, the Court's approach is first to determine the appropriate margin of appreciation. There is no general formula for this – whether the margin is broad or narrow depends on a number of variables. The second stage is to establish whether or not the national authorities remained within that margin."*[5] In contrast to Dean Spielmann's definition, Nicolas Bratza disclosed how the Court formally applies it.

But one more thing needs to be pointed out and that is the relationship to the principle of proportionality. It was Yutaka Arai-Takahashi who wrote for the first time that: *"It is possible to consider the application of the principle of proportionality as the other side of the margin of appreciation."*[6]In other words, stricter standard of proportionality leads to narrower margin of appreciation for the state. And *vice versa*, less strict standard of proportionality widens the margin of appreciation the states enjoy.[7]

4 SPIELMANN, Dean. Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review? *CELS Working Paper Series*, 2012. pp. 2–3.

5 See BUYSE, Antoine. *Speech of Bratza and Candidates for New Judges* [online]. ECHR blog, 21 September 2012 [cit. 9 August 2014]. Available at <http://echrblog.blogspot.fr/2012/09/speech-of-bratza-and-candidates-for-new.html>.

6 ARAI – TAKAHASHI, Yutaka. *The Margin of Appreciation Doctrine and the Principle of Principle of Proportionality in the Jurisprudence of the ECHR*. Intersentia: Antwerp – Oxford – New York, 2002. p. 14

7 In Czech literature, see KOSAŘ, David, KRATOCHVÍL, Jan: Prostor pro uvážení (margin of appreciation, marge d'appréciation). In KMEC, Jiří, KOSAŘ, David, KRATOCHVÍL, Jan, BOBEK, Michal. *Evropská úmluva o lidských právech. Komentář.* Praha: C. H. Beck, 2012. pp. 90 – 91.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

My understanding of the margin of appreciation doctrine is a little different. I consider it important to incorporate the concepts of the margin of appreciation and external factors of the Court's decision-making which I will address in detail below. For that reason, I would define the margin of appreciation as an *ex post* self-restraint of the Court, justified by one of the external factors of the Court's decision-making, leading to deference of the Court to the state's judgment made within the framework of the afforded free discretion, especially in the application of the Convention to particular facts of the case.

The doctrine of margin of appreciation has faced a very powerful criticism.[8] Lord Lester of Herne Hill even famously noted that *"the concept of the "margin of appreciation" has become as slippery and elusive as an eel"*.[9] If we were to summarize the main objections against the use of the margin of appreciation, we may categorize them into several areas:[10]

a. Vagueness of the doctrine;
b. Inconsistency in the use of the doctrine by the Court - especially referring to the doctrine, although it is not actually applied in the case;[11]
c. Risk of manipulation of the identified factors and parameters – the margin of appreciation doctrine sometimes serves as an "excuse" or an "escape route" for the Court in the controversial cases;[12]
d. Lack of legal certainty – we may ask at the end of the day whether or not the doctrine amounts to a deprivation of justice?

8 See e.g. VAN DIJK, Pieter, VAN HOOF, G. J. H. Theory and Practice of the European Convention on Human Rights. 2nd ed. Haag: Kluwer Law International, 1990. p. 585; KRATOCHVÍL, Jan. The inflation of the Margin of Appreciation by the European Court of Human Rights. *Netherlands Quarterly of Human Rights*, 2011, no. 3. p. 324; BRAUCH, Jeffrey A. The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law. *Columbia Journal of European Law*, Vol. 11, No. 1, 2004–2005, pp. 113–150; STONE, Thomas W. Margin of Appreciation Gone Awry: The European Court of Human Rights Implicit Use of the Precautionary Principle in: Fretté v. France to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation. *Connecticut Public Interest Law Journal*, Vol. 3, No. 1, 2003–2004, pp. 218–236 and many others.

9 See BAKIRCIOGLU, Onder. *The Application of Margin of Appreciation Doctrine in Freedom of expression and Public morality cases*. *Germal Law Journal*, Vol. 8, No. 7, 2007, pp. 731–732.

10 See SPIELMANN, supra note 4, p. 28.

11 See e.g. *Connors* v. *the United Kingdom*, No. 66746/01, 27 May 2004, §§ 82 – 83 and §§92-95; *Cosic v. Croatia*, No. 28261/06, 15 January 2009, §§ 21–23; *Zehentner* v. *Austria,* No. 20082/02, 16 July 2009, § 58.

12 See e.g. *Otto-Preminger Institut v. Austria*, No. 13470/87, 20 September 1994, or *S. H. v. Austria*, No. 57813/00, 3 November 2011. See also ŠIKUTA, Ján. Doktrína "miery voľnej úvahy" (The Margin of Appreciation Doctrine) a judikatúra Európskeho súdu pre ľudské práva v Štrasburgu. *Justičná revue*, No. 8 – 9, 2012, pp. 955 et seq.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

e. Inability to create a uniform concept of human rights and a threat to the role of the Court in determination of an appropriate standard of human rights protection;[13]
f. Eventual threat to the universality of human rights and creation of matrix for moral relativism - the doctrine allows for double standards which may undermine the credibility of the Court.[14]

I share some of the critical points but I am predominantly a proponent of the margin of appreciation. The critical opinions towards the whole doctrine are usually based on the perception of international human rights protection as an opposite to a level of free discretion of states in this area. But I agree with John Merrils who points out that they are actually complementary.[15] In other words, where the discretion of states ends, there the international protection begins and *vice versa*.[16] Margin of appreciation may thus be regarded as a very useful instrument of vertical separation of powers between the Court and domestic authorities in the area of human rights protection.

Nonetheless, the calls for abolishing this doctrine became obsolete because of adoption of Protocol no. 15. However, the Court will now face a new challenge at the same time. It will have to reflect on the valid points of critique and attempt to improve the way it works with the margin of appreciation which will most probably become a part of the Convention text.

3. Concepts of the margin of appreciation doctrine

a. Norm application and norm definition concepts of the margin of appreciation

There are generally five different concepts of the margin of appreciation in the Court's case-law, depending on the perspective. The first pair of concepts consists of norm application concept and norm interpretation concept. Margin of appreciation afforded to the states in **norm application** means that the Court will apply self-restraint in respect of the domestic authorities' judgment on application of the Convention to a concrete set of facts of the case. In other words, the Court exercises deference to national authorities in evaluating whether concrete factual circumstances fitted the definition of the Convention right or freedom.[17]

13 See LEGG, Andrew. *The Margin of Appreciation in International Human Rights Law*. Oxford: Oxford University Press, 2012. pp. 50 et seq.
14 BENVENISTI, Eyal. Margin of appreciation, Consensus and Universal standards. *New York University International Law And Politics*, Vol. 31, No. 1999, p. 844.
15 MERRILLS, John G. *The Development of International Law by the European Court of Human Rights*. 2nd ed. Manchester: Manchester University Press, 1993. p. 174–175.
16 LEGG, *supra note* 13, p. 59. See also MAHONEY, Paul. Marvellous richness of diversity or invidious cultural relativism? *Human Rights Law Journal*, 1998, no. 1, p. 3.
17 KRATOCHVÍL, *supra note* 8, p. 330; SHANY, Yuval. Towards a General Margin of Appreciation Doctrine in International Law? *European Journal of International Law,* 2006, no. 5, p. 910.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

It may be even regarded as a structural concept, as defined by George Letsas,[18] because it is related to the fact that the Court is an international court. As such, it does not find a violation of the Convention if the state does not overstep the boundaries of its free discretion. Therefore domestic decisions are not subject to a full and detailed review. The Court refrains from making an unqualified judgment and sticks with the separation of powers outlined above. The norm application concept must be distinguished, however, from finding no violation simply because the merits of the case indicate that there was no breach of the Convention.[19]

A good example of the norm application concept may be found in the *Vagrancy case*.[20] Here the Court deferred to the proportionality assessment of domestic courts regarding the interference with the applicant's correspondence under Article 8 of the Convention. The Court namely observed: *"…that the competent Belgian authorities did not transgress in the present cases the limits of the power of appreciation which Article 8 (2) of the Convention leaves to the Contracting States: even in cases of persons detained for vagrancy, those authorities had sufficient reason to believe that it was "necessary" to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others."*[21]

On the other hand, margin of appreciation afforded to the states in **norm definition** means that the states have a room for maneuver in the very defining of a particular Convention right or freedom. Yuval Shany explains that the norm definition concept is related to international norms which are open-ended or unsettled.[22] He specifies that they are commonly standard-type norms, discretionary norms or result-oriented norms. An example of the first group may be the requirement of necessity in limitation clauses of Articles 8 -11 of the Convention. The second rule of Article 1 of Protocol no. 1 to the Convention providing that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law is a good example of a discretionary norm. And a typical result-oriented norm is the Article 6 of the Convention safeguarding the right to a fair trial. It does not specify how exactly are the states supposed to construe fair judicial systems, it only matters, in the end, if they really are fair as a whole in practice.

It is not easy to draw a line between these two concepts which may have been witnessed e.g. in the *Schalk and Kopf*[23] case concerning the marriages of homo-

18 LETSAS, George. Two Concepts of the Margin of Appreciation. *Oxford Journal of Legal Studies*, Vol. 26, no. 4, 2006, p. 705.

19 LETSAS, *supra note* 18, p. 707.

20 *De Wilde, Ooms and Versto v. Belgium,* No. 2832/66, 2835/66, 2899/66, 18 June 1971.

21 Ibid., § 93.

22 SHANY, *supra note* 17, p. 910.

23 *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

sexual couples. The majority used the norm definition concept of margin of appreciation and came to the conclusion that Austria did not have an obligation to adopt the relevant regulation of homosexual marriages before 2010.[24] But the dissenting judges noted that Austria relied on its margin of appreciation while failing to provide any argument justifying the difference in treatment of homosexual couples. In the opinion of the judges Rozakis, Spielmann and Jebens, Austria should not have been afforded any latitude of discretion in the absence of such a justification. They thought that the margin of appreciation could be afforded only if the state provided reasons for the interference with the applicants' rights under the Convention. It is thus clear that these judges would prefer the norm application concept of the margin of appreciation.[25]

I am of the opinion, that the relationship between these two concepts requires clarification. The most efficient way of doing so would be to abandon the definition concept. I fully agree with the academic critique of this concept. It leads to the Court losing control over defining the exact contours of the rights in the Convention to an extent not justified by the principle of subsidiarity.[26] George Letsas accurately describes the definition concept as related to the issue of limitability of Convention right. However, it does not provide an answer to a question if a particular interference is admissible or not. He therefore describes this concept as either *"superfluous or question begging"*.[27]

It has to be stressed that the margin of appreciation is directly inter-connected with the principle of proportionality and it should be applied with regard to this inter-connection. But definition concept goes one step backwards to the very definition of Convention obligations where proportionality has no effect. In addition, it was mentioned in the *Handyside* judgment that: "*The domestic margin of appreciation thus goes hand in hand with a European supervision*".[28] Definition concept of the margin of appreciation doctrine runs against these principles and for that reason, it should be abolished. Some of the critical opinions mentioned above would accordingly lack substance, if the Court used the norm application concept only.

b. Wide, certain and narrow margin of appreciation

If we focus on the breadth of the margin of appreciation afforded to the states when implementing their Convention obligations, there are three main concepts that the Court uses – wide, narrow and a "certain" margin of appreciation.

The wide margin of appreciation means that the Court applies self-restraint to the highest possible extent. Accordingly, the proportionality standard is low.

24 *Schalk and Kopf*, *supra note* 23, §§ 105–106.
25 KRATOCHVÍL, *supra note* 8, p. 333.
26 Ibid., p. 332.
27 LETSAS, *supra note* 18, p. 714.
28 *Handyside*, *supra note* 3, § 49.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

In such a case, the Court does not act as yet another instance above domestic courts and it sticks to the principle of subsidiarity. The role of the Court is only one of a safety measure against the domestic authorities exceeding the "spectrum of legitimate differences".[29] The Court affords wide margin of appreciation mainly in cases where there is no consensus among the member states of Council of Europe on certain issues, especially if it is a sensitive one.[30] Other typical areas where the Court uses the wide margin of appreciation are:

- national security;[31]
- public emergency;[32]
- protection of morals;[33]
- social and economic areas of law;[34]
- searching for a fair balance between conflicting Convention rights or public interests.[35]

If the margin of appreciation afforded to the state is wide, then it is up to the applicant to submit arguments that the state nonetheless exceeded it. The most commonly used standard that the applicant's argumentation would have to reach is that the contested interference is *"manifestly without reasonable foundation"*.[36] If the applicant succeeds in proving that the actions of state clearly lack reasonable grounds the Court will find a violation of the Convention. In such a case, the state would overstep its margin of appreciation despite its wideness.

On the other hand, narrow margin of appreciation leads to a high standard of proportionality that the interference with Convention rights has to meet. The Court is deferent to domestic authorities' decision to the lowest possible extent. The states are practically deprived of their right to a certain degree of legitimate differences and the Court now adopts its role of a unifier.[37] There are also several areas where the narrow margin of appreciation typically appears:

29 BARINKA, Roman. Evropská úmluva o lidských právech a doktrína margin of appreciation: teoretické dimenze problému. *Právník*, 2005, No. 10, p. 1080.

30 See e.g. *Vo v. France [GC],* No. 53924/00*,* 8 July 2004 where the Court declined to decide on the beginning point of life (§ 82).

31 *Klass v. Germany*, No. 5029/71, 6 September 1978, § 49.

32 *Brannigan and McBride v. the United Kingdom*, No. 14553/89 and 14554/89*,* 25 May 1993, § 41.

33 *Handyside*. *supra note* 3, §§ 48-49.

34 *Broniowski v. Poland [GC]*, No. 31443/96, 22 June 2004. § 182 and § 187.

35 *Odièvre v. France [GC]*, No. 42326/98, 13 February 2003, § 46. Here the domestic authorities attempted to balance right of the applicant to know her origin and right of her mother to keep the circumstances of the applicant's birth and her own identity in secret.

36 See e.g. *James and others v. the United Kingdom*, No. 8793/79, 21 February 1986, § 46, *A. and others v. the United Kingdom,* No. 3455/05, 21 February 2009, § 174, *Immobiliare Saffi v. Italy*, No. 22774/93, 28 July 1999, § 49; See also KRATOCHVÍL, supra note 8, pp. 348-350.

37 BARINKA, *supra note* 29, pp. 1086–1087.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

- cases concerning an identity or the very existence of an individual,[38]
- protection of authority of judiciary,[39]
- positive obligations arising out of absolute rights, such as right to life or right not to be subject to torture or inhuman and degrading treatment,[40]
- racial or ethnic discrimination,[41]
- intimate aspects of private life.[42]

If the margin of appreciation afforded to the state is narrow, then the burden of proof shifts from the applicant to the state.[43] It will be usually up to the Government Agent to show that the contested interference was justified by "*very weighty reasons*" or "*convincing and compelling reasons*".[44]

The concepts of wide and narrow margin of appreciation are thus extremely important from the methodological point of view because they distribute the burden of proof between the parties to the proceedings before the Court and they set standards which the parties have to meet to make their case efficiently.

The last concept that I would like to analyze in this part is that of a "certain" margin of appreciation. As far as the intensity of review is concerned, "certain" margin of appreciation is supposed to stand in the middle between the wide and narrow one. However, this concept does not allow us to find out what the actual breadth of the margin of appreciation is. The standard of proportionality can also be no other than "certain". In addition, this concept is the most often used one – the statistics in HUDOC disclose that the Court uses "certain" margin of appreciation in almost a half of all cases where the margin of appreciation is invoked.[45]

38 *S. and Marper v. the United Kingdom [GC],* No. 30562/04 a 30566/04, 4 December 2008, § 125.

39 *Sunday Times v. the United Kingdom*, No. 6538/74, 26 April 1979, § 67

40 See e.g. *Pretty v. the United Kingdom*, No. 2346/02, 29 April 2002.

41 *D. H. v. the Czech republic*, No. 57325/00, 13 November 2007; *Horváth and Kiss v. Hungary*, No. 11146/11, 29 January 2013.

42 *Dudgeon v. the United Kingdom*, No. 7525/76, 22 October 1981, § 52.

43 See KRATOCHVÍL, *supra note* 8, s. 350.

44 See e.g. *Refah Partisi (Welfare Party) and others v. Turkey [GC],* No. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, § 100 and §§ 132-135; *X v. Austria [GC]*, No. 19010/07, 19 February 2013. § 99 and §§ 106–107.

45 In 2010, the Court used the margin of appreciation 134 times. The concept of a "certain" margin of appreciation was used in 66 of them (in 49, 3% cases). In 2011, the Court used the margin of appreciation 140 times. The concept of a "certain" margin of appreciation was used in 74 of them (in 52, 9% cases). In 2012, the Court used the margin of appreciation 166 times. The concept of a "certain" margin of appreciation was used in 77 of them (in 46, 4% cases). And in 2013, the Court used the margin of appreciation 181 times. The concept of a "certain" margin of appreciation was used in 73 of them (in 40, 3% cases). In average, the Court used the concept of a "certain" margin of appreciation in 47, 2% of all cases where it used the margin of appreciation doctrine in the last four years.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

I have the same position towards the concept of a "certain" margin of appreciation as to the definition concept mentioned above. It is fundamentally flawed and I believe that it is also a source of many of the critical opinions which point out the vagueness, ambiguousness and legal uncertainty that it creates. It does not allow for the distribution of burden of proof as the other two concepts do and blurs the choice of standards which ought to be met to make one's case, be it an applicant or the Government. Jan Kratochvíl made a fitting analogy as he compared the margin of appreciation to a high jump.[46] If the margin of appreciation is wide, the bar for the state to jump over is pretty low. Narrow margin of appreciation means that the bar is much higher and makes it hard for the state to overcome it. But with the "certain" margin of appreciation, no one knows how high the bar is. Therefore the state as a high jumper cannot even adapt the way it runs towards the bar. For these reasons, I would suggest that the Court ceases to use the concept of "certain" margin of appreciation.

To summarize, the Court should only work with the norm application concept of the margin of appreciation which leads to deference of the Court to the application of the Convention to a concrete factual background. Such margin of appreciation may be either wide or narrow which is vital for setting the relevant proportionality standard and distribution of the burden of proof between the applicant and the Court. These conclusions will be methodologically crucial for the construction of the margin of appreciation algorithm below.

4. Factors impacting the decision on which concept of the margin of appreciation ought to be used

Having established the applicable concepts of the margin of appreciation, one certainly comes to a question: How do I find out which of these concepts to use?

Andrew Legg provides an in-depth analysis of the so-called second order reasons which impact the decision on which concept of the margin of appreciation should be used.[47] These second order reasons may be described as external factors of the Court's decision-making. They are external because they don't necessarily deal directly with the very merits of the case, i.e. whether facts of the case indicate that a certain human right was violated or not. These external factors rather provide systemic reasons for the Court's decision which lie outside the core of the merits of the case, and in particular, they influence the strictness of the Court's scrutiny.[48]

In academic articles and the case-law of the Court, one may identify a high number of these factors. For reasons of economy, I will abstract them and catego-

46 KRATOCHVÍL, *supra note* 8, s. 330.
47 LEGG, *supra note* 13, p. 17.
48 Ibid., pp. 18–23.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

rize them all in the table below.[49] Importance of the limited right to an individual, nature of the Convention obligation or existence of a common ground between European countries appear the most often.[50] But in the past decades, all the academics did not attempt to systemize these factors and analyze the relationships between them. I have come across the first attempt to do so in the Czech commentary on the Convention where these factors are divided into general and special ones.[51] That is the first starting point for us. The second starting point is the distinction that Andrew Legg made, because he identifies three general second order factors leading to the application of the margin of appreciation doctrine. And within these three general factors, he identifies those that widen the margin of appreciation and those which narrow it.[52]

To effectively summarize various factors impacting the decision on which concept of the margin of appreciation ought to be used, which were identified by academic authors and the Court, we may put them all in the following table:

	Democratic Legitimacy and Participation	Current state practice and other international law influences	Expertise and competence	Unclassifiable factors
Widening factors	1. the choice of legislature between two conflicting rights of individuals or between a private and a public interest; 2. nature of the pursued aim	1. lacking legal consensus; 2. consensus in favor of the state; 3. deference to decisions of other international bodies and institutions	1. national security; 2. protection of children; 3. health care; 4. educational needs; 5. organization of police and public administration; 6. area of economy; 7. morals and ethics	

Table continues on the next page

49 Various factors are named e.g. in: MAHONEY, *supra note* 16, pp. 5–6; OVEY, Clare. The Margin of Appreciation and Article 8 of the Convention. *Human Rights Law Journal*, 1998, Vol. 19, No. 1, pp. 10–11; PREBENSEN, Søren C. The Margin of Appreciation and Articles 9, 10 and 11. *Human Rights Law Journal*, 1998, Vol. 19, No. 1, pp. 14–15; WINISDOERFFER, Yves. Margin of appreciation and Article 1 of Protocol no. 1. *Human Rights Law Journal*, 1998, Vol. 19, No. 1, pp. 18–19; SCHOKKENBROEK, Jeroen. The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights. *Human Rights Law Journal*, 1998, Vol. 19, No. 1, pp. 34–35. In the Czech literature see BARINKA, *supra note* 29, pp. 147–164; KRATOCHVÍL, *supra note* 7, s. 91; KOSAŘ, David. Krok č. 5: Test nezbytnosti v demokratické společnosti. KMEC, Jiří, KOSAŘ, David, KRATOCHVÍL, Jan, BOBEK, Michal. *Evropská úmluva o lidských právech. Komentář.* Praha: C. H. Beck, 2012. p. 116.

50 As far as the Court's case-law is concerned, see notably *A, B and C v. Ireland [GC]*, No. 25579/05, 16 December 2010. § 174–185; or *S. and Marper*, supra note 38, §§ 87–93 etc.

51 KRATOCHVÍL, *supra note* 7, s. 91.

52 LEGG, *supra note* 13, pp. 69–174.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

Narrowing factors	1. democratic right (e.g. right to stand in election); 2. issue of minorities and vulnerable groups; 3. insufficient debate on the issue in the Parliament and the society generally; 4. application of too general and ill-conceived provisions of domestic law unrelated to an intended purpose; 5. other issues of the rule of law; 6. importance of the limited right to an individual; 7. importance of the limited right to a society: basic values of democratic society	1. consensus in favor of the applicant	1. procedural issues; 2. reasonableness of the length of the proceedings; 3. legal interpretation	
Widening/ narrowing factors depending on the case	1. nature of the state's obligation			1. text of the Convention; 2. seriousness of the interference; 3. circumstances of the case (emergency vs. ordinary situation)

These are, by and large, the factors that may be found in doctrinal works and the case-law of the Court. They are categorized into three general factors:

a) democratic legitimacy and participation,
b) current state practice and other international law influences, and
c) expertise and competence of domestic bodies.

In these three areas, the Court should generally apply the norm application concept of the margin of appreciation. Its breadth is then specified by either widening or narrowing special factors. But this generates one more "million-dollar" question. How do we actually establish the breadth of the margin of appreciation afforded to the state in a particular case?

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

In many cases, the narrowing and widening factors obviously conflict. For example, in the *Odièvre case* mentioned above, one may identify the widening factor of the choice of legislature between two conflicting rights and a narrowing factor of importance of the limited right to an individual. In the seminal case of *A, B and C*,[53] the Court also faced a conflict of several special factors. In arguing for the use of the narrow margin of appreciation, the applicants relied on the importance of the limited right, seriousness of the interference[54] and the practice of European states in their favor.[55] The third applicant added a factor of the rule of law because of an insufficient legal regulation of access to abortion.[56]

In their attempt to persuade the Court to use the wide margin of appreciation, the Irish Government relied on the moral and ethical nature of the problem, the "Irish context" of the case and a lacking consensus on the issue of the beginning of life for the purposes of protection under Article 2 of the Convention.[57]

Resolving such conflicts is not an easy issue and the Court has never laid down any rules on how to do so. Jan Kratochvíl even believes that there are no such rules and that the conflicts have to be resolved on the basis of the particular factual background of a concrete case.[58]

But for the sake of transparency, non-arbitrariness and persuasiveness, I am of the opinion that such rules may be set. It must be borne in mind that the breadth of the margin of appreciation is inter-connected with the standard of proportionality. It is the other side of the same coin. Therefore the conflict of several factors may be resolved with the same methodology that we use to to find the appropriate standard of proportionality – balancing.

After all, Aharon Barak wrote that: *"Balancing is central to life and law. It is central to the relationship between human rights and the public interest, or amongst human rights. Balancing reflects the multi-faceted nature of the human being, of society generally, and of democracy in particular."*[59]Balancing exercise between the factors impacting the decision on which concept of the margin of appreciation should be used therefore seems to be perfectly fit.

53 *A, B and C, supra note* 50.
54 Ibid., § 174.
55 Ibid., § 174–175.
56 Ibid., § 177–179.
57 Ibid., § 185.
58 KRATOCHVÍL, *supra note* 7, s. 91–92.
59 BARAK, Aharon. *Proportionality. Constitutional Rights and Their Limitation.* Cambridge: Cambridge University Press, 2012. p. 344.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

In practice, what one needs to conduct proper balancing, is a **balancing formula**.[60] Robert Alexy[61] probably came up with the most transparent one which may lead us to reviewable and persuasive conclusions. His balancing formula has three stages:

1. Establishing the degree of non-satisfaction of, or detriment to, a first principle (a factor in our case) – the interference may be "light", "moderate" or "serious".
2. Establishing the importance of satisfying the competing principle (a factor in conflict in our case) – likewise it may be "low", "medium" or "high".
3. Establishing whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former. More specifically, if the interference is light and the importance of competing principle is high, then the competing principle outweighs the first principle. And even more specifically with respect to the topic of this part of the article, if a narrowing factor is limited seriously and importance of satisfying the widening factor is low, then the narrowing factor outweighs the widening factor.

There are certainly other options how to resolve the conflict between special factors (e.g. the so-called *ex ante* argument; quantitative solution where more factors of one kind outweigh the factors of another group; balancing formulas *in dubio pro libertate* or *in dubio pro iustitia*). But the Alexy's balancing formula is the most fitting one because it may allow the Court to clearly explain why a certain concept of the margin of appreciation was chosen or not.

To sum up, we identified several factors impacting the choice of the margin of appreciation concept. We categorized them into general ones and special ones. The special ones may have either a widening or narrowing nature. The conflicts between these two groups of factors may be resolved by using the balancing method. Namely, the Alexy's balancing formula may be used in order to find out which concept of the margin of appreciation should be applied.

5. Construction of the algorithm

In the previous parts of the article we defined what the margin of appreciation was. We identified its applicable concepts. And we came to the conclusion on how to choose a particular concept on the basis of relevant factors. But now, let us build on these conclusions and construe the margin of appreciation algorithm which could be applied by the Court in practice.

60 See e.g. KOSAŘ, David. Conflicts between Fundamental Rights in the Jurisprudence of the Constitutional Court of the Czech Republic. In BREMS. Eva (ed.). *Conflicts Between Fundamental Rights*. Antwerpy – Oxford – Portland: Intersentia, 2008. pp. 347–378.

61 ALEXY, Robert. Balancing, Constitutional Review and Representation. *International Journal of Constitutional Law*, 2005, No. 4, p. 575.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

The algorithm might consist of the following four stages which I will describe in detail below:

1. Is there a reason to apply one of the three general factors of the margin of appreciation doctrine?
2. What special factors of the margin of appreciation doctrine are involved?
3. Do the identified special factors lead to the use of wide margin of appreciation or narrow margin of appreciation?
4. Did the state exceed its margin of appreciation?

All the four steps of the margin of appreciation algorithm certainly require a brief commentary.

In the first step, the Court should be asking generally whether there are reasons to apply the margin of appreciation doctrine whatsoever. The doctrine should not be mentioned at all, if the Court is not really about to apply it. Therefore the Court firstly has to establish that it is, in a particular case, in worse position than a domestic judge to decide on the issue as described in the *Handyside* case. An indication of this may be one the general factors of the margin of appreciation doctrine. In other words, the margin of appreciation should be afforded if domestic bodies are in a better position to decide on the case for reasons of democratic legitimacy and participation, current state practice and other international law influences or their expertise and competence.

In practice, the general factors may be even identified by a clear presence of some of the special factors. But the main purpose of the first step is to make sure that the margin of appreciation will not be used as a mere phrase in the beginning of the Court's reasoning. If the Court does not plan to apply the doctrine with all its components, it should refrain from mentioning the margin of appreciation at all. That may be the case where the Court will decide the case solely applying the "classic" five-stage test, not deferring to the state's decisions in the analysis of necessity in democratic society.[62]

Once the Court decides to follow the path of the margin of appreciation, it ought to identify what special factors are at stake in a given case. The Court should "brainstorm" what special factors appear and what is their nature, i.e. if they are widening or narrowing and whether there is a conflict between them.

62 The individual phases are: (i) the identification of the right, including positive aspects of the right; (ii) the identification of the interference; (iii) consideration of whether the interference is prescribed by law, including both the internal and external (Convention) understanding of 'law'; (iv) determining what objectives are sought to be protected by the interference; and (v) deciding whether the interference is 'necessary in a democratic society', i.e. whether the state gives, and gives evidence for, relevant and sufficient reasons for the interference and those reasons are proportionate to the limitation of the applicant's enjoyment of his right. See HARRIS, D. J., O'BOYLE, Michael, WARBRICK, Colin et al. *Law of the European Convention on Human Rights*. 3rd ed. New York: Oxford University Press, 2014. p. 521.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

Only full identification of the relevant special factors will allow the Court to conduct proper balancing in the third stage of the whole algorithm.

The third phase is central to the outcome of applying the algorithm. This is where proportionality comes in as the other side of the margin of appreciation. It is the Court's task to carry out the balancing exercise. As I outlined above, the best instrument to balance the conflicting factors is the Alexy's balancing formula. The result of its application may be either the use of wide margin of appreciation or its narrow counterpart. The Court has to set out the reasons for its choice of the margin of appreciation concept clearly in order for the compliance with it to be tested later. The burden of proof will also be distributed depending on the conclusion of the Court in this stage of the test.

In the final fourth step of the algorithm, the Court has to analyze if the breadth of the margin of appreciation afforded to the state has or has not been exceeded by the state's interference. As I wrote earlier, if the margin of appreciation is wide, it will be up to the applicant's argumentation to prove that it is "manifestly without reasonable foundation". If, on the other hand, it is narrow, then the Government's justification will have to satisfy the Court that its breadth was not overstepped by providing very weighty reasons for the interference. If either of them fails, the Court will rule against them. Namely, if the margin is wide and the applicant fails to prove that the contested interference lacks reasonable foundation, the limits of the state's discretion will be complied with and there will be no violation of the Convention found by the Court. Contrarily, if the margin is narrow and the Government fails to prove that it complied with its boundaries by submitting very weighty reasons for the interference, the Court will have to find that the margin of appreciation was exceeded and the applicant's right violated.

That is what the general structure of the margin of appreciation algorithm may look like. It takes into account and gives appropriate emphasis to the various factors influencing the eventual breadth of the margin of appreciation which may be clearly, transparently and persuasively determined.

6. Conclusions

In conclusion, I would just like to provide a reader with a bigger picture and think outside the margin of appreciation algorithm box for a second. The margin of appreciation doctrine is still used the most in connection with Articles 8–11 of the Convention and their second paragraphs containing the limitation conditions. The Court usually uses a five stage test mentioned above to find if these provisions were violated by the state or not. One must ask - how do the margin of appreciation algorithm and the five-stage test come together?

Once again we may refer to the relation of the margin of appreciation and proportionality. That comes into consideration in the final stage of the five-stage

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).

test where the Court has to deal with necessity of the interference in the democratic society, provided that the case falls within the scope of one of the Convention articles, and there was an interference made in accordance with law pursuing a legitimate aim. If the Court gets to the final fifth stage, then that is where it should be asking the first question of the margin of appreciation algorithm. If it does not find reasons to defer to the state on the basis of one of the general factors, it may proceed with an analysis of proportionality not affording any margin of appreciation to the state. It would be assessed whether the interference corresponds to a pressing social need and whether it is proportionate to the legitimate aim pursued.[63]

But if the Court finds reasons to afford the state with a degree of free discretion, it should follow the algorithm and take into account all the relevant factors which will point to the direction of wide or narrow margin of appreciation. Compliance with the breadth of the margin of appreciation may be subsequently verified using the relevant standards.

Before the adoption of the Protocol no. 15, the Court faced a dilemma. It either had to acknowledge the critical voices and abolish the whole doctrine or it could enhance the way it is applied.[64] But now, abolishing the doctrine is no longer an option. The Court will now have to constructively address the criticism bearing in mind that consistency in decision making based on transparent rules is fundamental to any legal system.[65] The general margin of appreciation algorithm that I construed above may serve as a handy instrument for the Court to do so.

The application of the algorithm requires further study and research, indeed. For example, how may it be applied with regard to the positive obligations? And what about special areas of protection such as prohibition of discrimination, right to personal liberty, right to a fair trial or even the environmental rights? It is conceivable that these areas may require modifications to the general margin of appreciation algorithm.

Nevertheless, I believe that its form presented in this article may serve as a good starting point for such a research and mainly, for the Court to use the complex doctrine of margin of appreciation effectively, transparently and consistently. That would be the best answer to the strong criticism which the whole doctrine has faced in the recent years.

63 See e.g. *Olsson v. Sweden (no. 1)*, No. 10465/83, 24 March 1988, § 67.

64 KRATOCHVÍL, *supra note* 8, s. 354.

65 FULLER, Lon. *The Morality of Law*. New Haven: Yale University Press, 1969. pp. 33–41.

ISSN 1213-8770 (print), ISSN: 2464-6601 (online).