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The Doctrines of Margin of Appreciation and Evolutive Interpretation: A Review of the European Court of Human Rights

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ABSTRACT

The European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR) - the focus of this work - in its conceptualisation as a "living instrument" and a bulwark against human rights abuse in Europe, has been construed with different canons of interpretation by the European Court of Human Rights (the Strasbourg Court), including the doctrines of the Margin of Appreciation and the evolutive interpretation. This work aims to review the doctrines of the Margin of Appreciation and Evolutive Interpretation from the jurisprudence of the Strasbourg Court by attempting a foray into the debates emanating from the court's interpretative jurisprudence. It also interrogates how the ECHR is interpreted in the context of the Vienna Convention on the Law of Treaties (VCLT). The method adopted is doctrinal, with a critical and analytical approach that involves desk and library research. The work relies on primary and secondary materials such as relevant case laws of the Strasbourg Court, legislations, textbooks, journal articles, conference proceedings/papers, online documents, and news to critically evaluate the significance of the doctrines of the Margin of Appreciation and Evolutive Interpretation to the realisation of the objectives of the ECHR. The article investigates how the Strasbourg Court employs the doctrines of the margin of appreciation and evolutive interpretation in achieving the objectives and purpose of the ECHR. The work finds that regardless of their criticism as judge-made doctrines without normative basis, the doctrines of the Margin of Appreciation and Evolutive Interpretation as applied by the Strasbourg Court align with the rules of treaty interpretation as per the VCLT and, thus, remain the best canon of interpretations befitting for the ECHR. This is so considering that interpretation and applications of laws are undertaken in an ever-changing world that requires dynamic laws that could adapt to new situational contexts that are not initially contemplated at the time of treaty negotiations and formations.

Keywords: Margin of Appreciation; Evolutive Interpretation, European Convention on Human Rights, Strasbourg Court, Treaty Interpretation

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1. INTRODUCTION

Since there is no instrument in international law codifying and specifying the process of law-making, interpretation, and application (Klabbers, 2021, p. 24), recourse is often had to the Statute of the International Court of Justice (ICJ)[1], particularly Article 38(1), which listed "treaties" as the first source of international law (Spiermann, 2017) and has been described as the workaholic source of the international legal order (McNair, 1961). Hence, rules have evolved in customary international law on treaties' interpretation, effect, application, and validity (Briggs, 1979, pp. 471–472; Klabbers, 2021). These rules also have received recognition in Article 31 and 32 of the Vienna Convention on the Laws of Treaties 1969[2] (VCLT), making its provisions well established in international conventional and customary laws (Klabbers, 2021, pp. 28–29).

Treaties have been interpreted in three ways: textual, subjective, and teleological or objective interpretation. The textual approach as per Article 31(1) of the VCLT emphasises the ordinary and literary meaning of the texts. It has been esteemed as the primary tool of treaty interpretation (Sinclair and Sinclair, 1984, p. 115). The subjective approach of treaty interpretation also referred to as the supplementary means of interpretation as gleaned from Article 32 of VCLT, employs the initial intention of the parties from the preparatory work to interpret the treaty. The teleological or objective approach, as deciphered in Article 31(1) of VCLT, invokes the object and purpose of the treaty in interpreting it (Jacobs, 1969, pp. 318–319). It has been argued that the textual approach to treaty interpretation is the traditional approach with a restrictive effect and does not foresee the possibility of expansive or evolutive interpretation (Jacobs, 1969, p. 326; Sinclair and Sinclair, 1984). This school of thought also believes that the textual approach is the primary interpretative technique that should be given precedence over others except where it's utility leads to an absurd, ambiguous, and unreasonable result (Watts, et al., 1999, p 687).

Contrary to the above submissions, the practice and judgments of the ICJ and other international tribunals, however, reveal that none of the interpretative tools is placed on a higher pedestal above the other as they are often mutually and inclusively applied by courts to clarify and elucidate treaties without distinction as to which one is primary, secondary, or supplementary (Sinclair and Sinclair, 1984, p. 124). Moreover, there is no express provision in the VCLT clothing the textual approach with a restrictive effect, just as the assertion that the VCLT does not envisage an evolutive or expansive interpretation cannot hold water again (Sinclair and Sinclair, 1984, p. 116) because Article 31(1) of the VCLT, which is the most relevant provisions of the VCLT to this discussion, states that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose'.

In the foregoing context, this work aims to investigate the significance of the doctrines of margin of appreciation and evolutive interpretation to the realisation of human rights norms such as the ECHR[3] by reviewing the jurisprudence of the European Court of Human Rights (the Strasbourg Court). The work revisit the question of whether these interpretative techniques, with the potential of creatively expanding the normative contour of the ECHR (Brems and Gerards, 2013) and treaty obligations of member states (Wessel, 2004, p. 149), will not amount to a capricious and obnoxious interpretation of the ECHR (Dzehtsiarou, 2011), offend the concepts of the universality of human rights (Brems, 2001; Greer, 2010) and the rule of law (Shany, 2005, p. 912), contradict the principles of treaty interpretations as enshrined in the (VCLT), oppose the intendment of the citizens of Europe and in the process impair the legitimacy of the Strasbourg court (Dzehtsiarou, 2011). In achieving this, the paper unpacks the debates and controversies emanating from the interpretative jurisprudence of the Strasbourg Court. It examines how the ECHR is interpreted in the light of the VCLT. The method adopted is doctrinal, with a critical and analytical approach that involves desk and library research. The work is bifurcated into five sections, commencing with an introduction in the first; section two revisits the principles of treaty interpretations enshrined in the VCLT and explores their interactions with the doctrine of evolutive interpretation. Sections three and four, respectively, investigate how the Strasbourg Court employs the doctrines of the margin of appreciation and evolutive interpretation in

[1] Statute of the International Court of Justice (Adopted 26 June 1945, entered into force 18 April 1946)
[2] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331
[3] European Convention for the Protection of Human Rights and Fundamental Freedom
(Adopted 4 November 1950, entered into force E September 1953).

achieving the objectives and purpose of the ECHR. Section five ends the work with concluding remarks.

2. THE VIENA CONVENTION ON THE LAW OF TREATIES (VCLT) AND THE DOCTRINE OF EVOLUTIVE INTERPRETATION.

The implication of the usage of the words "good faith", "ordinary meaning", "their context", and "object and purpose" in Article 31(1) of the VCLT is to create room for evolutive interpretation so that interpreters don't get restricted to the text of the treaty (Rogoff, 1996, pp. 568–569). Hence, the community effect of Articles 31 and 32 of the VCLT is a mutual and inclusive application of all interpretative approaches, thus making the traditional and restrictive approach to treaty interpretation outdated under the VCLT's regime (Jacobs, 1969, pp. 326–327). International tribunals have also shifted from a restrictive treaty interpretation approach to an evolutive interpretation (Lauterpacht, 1949, p.70). Impliedly, evolutive and expansive treaty interpretation has come to stay in international law (Orakhelashvili, 2003, p. 534). Illustratively, the ICJ in the maritime boundary dispute between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal, 1991)[4] upheld the underlining principles of flexible and evolutive interpretation of treaties against a restrictive or purely textual approach.

A further argument that has been advanced in justification of a restrictive approach towards treaty interpretation is that apart from Article 31(1) of the VCLT that recognised a textual approach as the first and primary treaty interpretation approach, Article 32 of the VCLT also recognises the intention of the parties. This is as contained in the preparatory work in clarifying the ordinary meaning of a treaty, especially where the application of the textual approach *simpliciter* may result in an absurd, ambiguous, and unreasonable outcome (Bernhardt, 1999, p.14). The challenge with this school of thought is that it fails to stipulate which intention of the parties should be considered as part of the preparatory work that should be relied on in treaty interpretation. The intention of new party members or old ones? During treaty negotiations, parties often register different intentions in different forms, written and unwritten, precise and ambiguous intentions, and poorly and properly documented ones, with the stronger parties having their way (Bernhardt, 1999).

Moreover, reliance on preparatory work could also cause difficulty in interpreting the treaty when a dispute involves new parties that join the treaty and, thus, are not a party to the preparatory work. Experience from different treaties has shown that the number of parties joining most multilateral treaties after the treaty has come into force usually exceeds the number of initial negotiating states. For instance, the United Nations (UN) Charter[5], with an initial 50 party states (United Nations, n.d.-b), now has 193 members (United Nations, n.d.-a). The ECHR, with an initial 12 high contracting states (The European Convention on Human Rights, n.d.), now boasts 46 members (Council of Europe, n.d.). A reliance on preparatory work will, thus, be disadvantageous to the new joining members; hence, the need to make recourse to evolutive interpretation. Moreover, if treaty ratification itself is evolutive to accommodate new contracting states, then why not the interpretation to meet up with contemporary developments and realities of the new states? (Bernhardt, 1999, pp. 14–15). While the following section continues with this discussion through the Margin of Appreciation doctrine, section four resumes the discussion on the principle of evolutive interpretation from the jurisprudence of the Strasbourg Court.

3. THE DOCTRINE OF THE MARGIN OF APPRECIATION AND THE ECHR

Although the doctrine of the Margin of Appreciation was a brainchild of the Strasbourg Court (Legg, 2012; Spielmann, 2012; Arai-Takahashi, 2002), it has gained recognisance in other international tribunals(Arato, 2013; Bjorge, 2015; Shany, 2005) and human rights treaty bodies (Cullen, 2009; UNHCR, 2005, p. 32), just as arguments have been advanced for its application in all UN judicial and quasi-judicial institutions (Bantekas and Oette, 2020; Shany, 2005). It should be noted that though the doctrine of Margin of Appreciation has received legislative enactment through Protocol 15 of the ECHR (2014), purporting to add the doctrine to the preamble of the ECHR, it is initially not a statutory

[4] Case concerning the Arbitral Award of 3l July 1989 (in respect of the Maritime Boundary between Guinea-Bissau and Senegal), 1991 ICJ Reports 53, 69 et seq., 72
[5] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16

right under the ECHR (Stella v. Italy, 2014)[6]; it is instead a judicial doctrine endorsed by states and developed by the Strasbourg Court to enable it to exercise a supervisory and subsidiary role to national courts of high contracting states (Cot, 2013). While George (2018) criticised the doctrine of the Margin of Appreciation for enabling the Strasbourg Court to defer on the normative contour of the ECHR and by implication become a threat to the ability of the court to decide cases with consistency and guarantee victims' protection against abuse by powerful states (George, 2018, p. 308); other scholar contends that the doctrine of the Margin of Appreciation is significant to human rights protection in Europe because it provides a platform for European human rights norm integration in a world where norm fragmentation renders human rights regimes ineffective (Arai-Takahashi, 2013, pp. 104-1–5). Tripkovic (2022) argued that the adaptation of the doctrine of the Margin of Appreciation for the Strasbourg Court should be applauded because the doctrine makes the application of the ECHR 'context-sensitive' in a pluralistic Europe where 'domestic understanding of human rights' norms needed to be mainstreamed into norm interpretation and application (Tripkovic, 2022, p. 234). Its application was originally in the context of derogation (Lavrysen, 2018; A and Others v. UK[7]), and limitations of rights (Bakircioglu, 2007; Kratochvíl, 2011) but has now evolved into an interpretative technique employed for expanding the substantive and procedural obligations of ECHR (Arnardottir, 2014; Skinner, 2014) as a living instrument (Bratza, 2014). Its significance and essential ingredients were lucidly established in the *locus classicus* case of Handyside v. UK (1976)[8], where the Strasbourg court, among others, states that it is a margin donated to domestic lawmakers and judges that "goes hand in hand with European supervision." Impliedly, no matter how wide the margin might be, it is not absolute and ubiquitous, as the Strasbourg Court has a supervisory power to restrict, delineate, and redefine its use and contour (Hirst v UK[9]; Alajos Kiss v. Hungary, 2008[10]).

In exercising its supervisory power over the utility of the Margin of Appreciation by the high contracting states, the Strasbourg Court evaluates whether an urgent social need has arisen to necessitate the invocation of the doctrine and, more specifically, whether the element of proportionality has been satisfied by the interfering state (Skinner, 2014; Tsakyrakis, 2009). This proportionality test becomes necessary to ensure that states do not exceed and abuse the margin granted to them in implementing and enforcing the provisions of the ECHR (Spielmann, 2012; Arai-Takahashi, 2002). In assessing whether the interference was proportionate, recourse is often had to the "fair balance" (Christofferson, 2009) needed to be struck between the different competing variables. Hence, the Strasbourg Court is often faced with complex and complicated situations that demand it to determine which interest to protect; the sovereign right of the high contracting state that has been donated a Margin of Appreciation to implement the ECHR or that of the individual citizens whose rights are protected under the ECHR? (Christofferson, 2009). Thus, in Schindler v. United Kingdom (2013)[11], the Strasbourg Court held that restricting the parliamentary franchise to citizens with a close connection with the UK is a fair balance. In A, B, and C v. Ireland (GC)[12], the Strasbourg Court determined a fair balance concerning abortion. In Parrilo v. Italy (GC) (2015)[13], the Strasbourg Court was confronted with striking a fair balance about donating embryos for scientific research. Other cases where a need to strike a fair balance between the parties in the Strasbourg Court includes Couturon v. France (2015)[14], and Chitos v. Greece (2015)[15].

In deciding whether the fair balance has been struck, the Strasbourg Court often recourse to the interfering states' domestic measures to confirm if there are equivalent protections and, after that, weigh such equivalent protections with the ones offered by the ECHR to arrive at a decision (Fernandez-Martinez v. Spain, 2014[16]; Nicklinson v. UK, 2015)[17]. Hence, the court's jurisprudence has recorded instances where states have been held to violate the doctrine of the Margin of Appreciation

[6] Stella v. Italy, A. 49169/09 and 10 other applications
[7] A and Others v. UK [GC], A. 3455/05, para 173
[8] Handyside v. UK (1976) 1 EHRR (1979–80) 737, para 48
[9] Hirst v. UK (No. 2) [GC], A. 74025/01, para 82
[10] Alajos Kiss v. Hungary, A. 38832/06, (27 March 2008) para 42
[11] Schindler v. United Kingdom, A. 19840/09 (7 May 2013)
[12] A, B and C v. Ireland (GC) A. 25579/05, para 23
[13] Parrilo v. Italy (GC) 46470/11 (27 August 201
[14] Couturon v. France 24756/10 (25 June 2015)
[15] Chitos v. Greece 51637/12 (4 June 2015)
[16] Fernandez-Martinez v. Spain [GC], A. 56030/07, paras 123–153, (12 June 2014)
[17] Nicklinson v. UK, A. 2478/15 (16 July 2015)

(Kratochvíl, 2011) for exceeding the margin afforded, for lack of fair balance, or on the grounds of disproportionality (Popelier and Van De Heyning, 2014). States are usually granted a narrow Margin of Appreciation with a heavy burden to adduce justifiable reasons for the allowance of the restriction if the victims are members of any vulnerable group (Shtukaturov v. Russia)[18]. This has been the attitude of the Strasbourg Court in restrictions about gender (Abdulaziz, Cabales and Balkandali v. the UK, 1985)[19], sexual orientation (EB v. France)[20], mental disability, (Alajos Kiss v. Hungary, 2008)[21] and race (DH and Others v. the Czech Republic)[22].

Another factor taken into consideration by the Strasbourg Court in determining the Margin of Appreciation is any common consensus or imminent values among member states to the ECHR (Legg, 2012; Dzehtsiarou, 2011). The effect of an acceptable consensus by the Strasbourg Court is that it narrows the Margin of Appreciation afforded states, depending on whether it is a strong consensus (Spielmann, 2012, pp. 18–25). Thus, in Schalk and Kopf v. Austria (2010)[23], the right to same-sex marriage was not afforded to a party for lack of consensus and has since been a subject of critique for not being used to expand the scope of the rights of marriage and family life under the ECHR to meet up with emerging circumstances (Hamilton, 2013).

No other instance demonstrates the intricacy and dynamism of the Margin of Appreciation order than its application in regulating religious dresses and activities. The "Burqa ban" on the wearing of religious attires designed to conceal faces in public places imposed only by France and Belgium, thus far, is a case in point here (Beaman, 2015). The Strasbourg Court was provided with the opportunity to adjudicate on the Burqa ban in SAS v. France (2014)[24], where the court found that there was yet to be a European consensus on the utility of a complete religious face veil in public places. Regardless of this finding, the Strasbourg Court, relying on the Margin of Appreciation granted to France, held that the Burqa ban in France was proportionate and justifiable to preserve the conditions of "living together" to protect and actualise the rights and freedom of others in public (Marshall, 2015). Also, in Mann Singh v. France (2008)[25], the Strasbourg Court, on the grounds of public safety per Article 9(2) of ECHR and having regard to the margin afforded France, has earlier held that MS Silk, contrary to his religious norms, will have to show his photograph on his driving license bareheaded to the authorities to confirm the identity of the driver or ownership of the vehicle.

Noticeable from the preceding, especially the case of Schalk and Kopf v. Austria, is that while the Strasbourg Court accommodates common consensus in applying the doctrine of the Margin of Appreciation, it does not allow the lack of such consensus to hinder it from applying the ECHR as a living instrument, especially where the act of interference or restriction is proportionate to the aim being pursued. Hence, with the doctrine of Margin of Appreciation as applied in the SAS v. France case comes room for judicial innovation and activism (Mahoney, 1990).

4. THE PRINCIPLE OF EVOLUTIVE INTERPRETATION AND THE ECHR

The Strasbourg Court is unique because, unlike other international tribunals, most of its cases are initiated by individual applicants seeking to enforce their human rights under the ECHR. Also, the court creates institutions that interact and function within it rather than seeking to regulate inter-state entanglement like other international tribunals (Popovic, 2009). Rather than serving as a contract between member states, the ECHR is a law-making instrument that puts in place a normative framework for the human rights protection of European citizens. It is because of these unique features that the Strasbourg Court opts for an evolutive interpretative technique to be able to achieve the objectives and purpose of the ECHR effectively (Wemhoff v. Germany, 1968)[26]. The Strasbourg Court consequently adopted the principle of effectiveness as espoused by the International Law Commission to interpret the ECHR (Lavrysen, 2018). By implication, evolutive interpretation aids the Strasbourg

[18] Shtukaturov v. Russia, A. 44009/05, para 95.30141/04 (24 June 2010
[19] Abdulaziz, Cabales and Balkandali v. the UK, A. Nos. 9214/80; 9473/81; 9474/81, (1985) para 78
[20] EB v. France [GC], A. 43546/02, para 94
[21] Alajos Kiss v. Hungary, A. 38832/06, (27 March 2008) para 42
[22] DH and Others v. the Czech Republic [GC], A. 57325/00, para 182.
[23] Schalk and Kopf v. Austria 30141/04 (24 June 2010). For a critique see F Hamilton
[24] SAS v. France A.43835/11, paras 106–159 (1 July 2014)
[25] Mann Singh v. France A. 24479/07 (13 November 2008)
[26] Wemhoff v. Germany (1968) 2 Eur Court HR, para 8

Court in doing away with a restrictive approach (Minelli v. Switzerland, 1983)[27] and relying on a progressive approach deployed to protect human rights depending on different circumstances. In this manner, the court judicially and innovatively expands the contour of the rights in the ECHR by widening its scope to fit new and contemporary developments (Soering, 1989)[28].

To achieve the above purpose, states are required to cooperate so that the Convention's human rights provisions are enforced with different yardsticks depending on the different circumstances in the different high-contracting states (Artico v. Italy, 1980)[29]. In this manner, obligations are also created for private individuals to implement the Convention's provisions (X and Y v. Netherlands, 1985)[30]. It jealously protects individuals' rights by interpreting the exceptions and limitations in the ECHR narrowly. States are prevented from not fulfilling their obligations under the Convention, just as public interest litigation is allowed to invoke the provisions of the ECHR in human rights protection (Van der Mussele v. Belgium, 1983)[31]. Hence, in Fairfield and Others v. United Kingdom (2005)[32], the Strasbourg Court held that relatives of a deceased victim could institute cases about the violations of the deceased right to life under Article 2 of ECHR. The doctrine of evolutive interpretation did not limit state obligations to their territory, it held them responsible for violations outside their immediate jurisdiction. In Al-Skeini and Others v. United Kingdom (2011)[33], the Strasbourg Court held that states' jurisdiction extends to territories under their control even if such states are not member states of the ECHR. The doctrine has also evolved from giving declaratory judgments to actionable judgments (Jackson, 2006, pp. 783–784).

The preceding implied that the ECHR is not restrictive in approach but rather evolutive and progressive, taking cognisance of contemporary developments in each European state and applying different strokes to different folks (Tyrer v. United Kingdom, 1978)[34]. It does not achieve this by ignoring consensus and imposing a self-serving will on people; it embraces European consensus in protecting certain rights once such consensus strongly emerges.

5. FINDINGS AND CONCLUDING REMARKS

This work started with an exploration of the interaction between the general principles of treaty interpretation as per the VCLT and the doctrine of evolutive interpretation per the ECHR and finds that the doctrine of evolutive interpretation as applied by the Strasbourg Court is not normatively alien to the VCLT as it is within the riverbank of Article 31(1), which provide for the need to expand the scope of treaties during interpretation to achieve their objectives and purpose. The work thereafter revisits the doctrine of the Margin of Appreciation and finds that it is a suitable technique for the Strasbourg Court if it will continue to function as a living instrument and bulwark against human rights abuse and impunity in continental Europe. This is so because the doctrine affords the Strasbourg Court the platform to mainstream European consensus into norm interpretation and application; ensure that the ECHR remain relevance in the face of changing societal norms and values without a formal amendment process that could be at times prove abortive. This ultimately ensure that the interpretation and application of the ECHR do not become static with insensitive and outdated results in an ever-changing world where cultural values and norms are subject to change.

The significance and outcome of the utility of the principle of evolutive interpretation in the jurisprudence of the Strasbourg Court was also examined in the final part of the work with findings that it serves the cause of justice and achieves the objectives and purpose of the ECHR, particularly considering that unlike other regional human rights system where the dispute settlement procedure are designed to be inter-state, the European human rights system enable individual victims to have their human rights matters entertained by the Strasbourg Court in a manner that empower the court to judicially review the decisions of national courts. Thus, applying different strokes to different folks through the instrumentalities of the doctrines of the margin of appreciation and evolutive

[27] Minelli v. Switzerland (1983) 4 Eur Court HR
[28] Soering (1989) 14 Eur Court HR,
[29] Artico v. Italy (1980) 4 Eur Court HR
[30] X and Y v. Netherlands (1985) 4 Eur Court
[31] Van der Mussele v. Belgium (1983) 13 Eur Court HR (ser A), para 15
[32] Fairfield and Others v. United Kingdom [2005] VI Eur Court HR 4
[33] Al-Skeini and Others v. United Kingdom [2011] 53 Eur Court HR 18
[34] Tyrer v. United Kingdom (1978) 2 Eur Court HR

interpretation remains the best method to maintain this unique feature of the European human rights system. Overall, the work finds that the doctrines of the margin of appreciation and evolutive interpretation are unique and suitable for the ECHR as applied by the Strasbourg Court, just as they are of normative basis and on four with the VCLT principles of treaty interpretation.

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AUTHORS' DECLARATIONS AND ESSENTIAL ETHICAL COMPLIANCES

Author's Contributions (in accordance with ICMJE criteria for authorship)

This article is 100% contributed by the sole author. He conceived and designed the research or analysis, collected the data, contributed to data analysis & interpretation, wrote the article, performed critical revision of the article/paper, edited the article, and supervised and administered the field work.

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