Conference "75 years of the ECHR and the judges of the administrative jurisdiction"

Supreme Administrative Court of the Republic of Poland, Warsaw, 1-2 October 2025

Panel: Scope and limits of the margin of appreciation exercised by administrative judges

I

The European Convention on Human Rights is rightly recognised as the beginning of a new era, as a beacon for the protection of human rights. It is considered to be the most effective system in the world to enforce human rights[1]. Nevertheless, on its 75th anniversary, the European Court of Human Rights once again steers the European Convention on Human Rights in troubled waters. The European Court of Human Rights is one of the crystallisation points of the dispute over "judicial activism vs. judicial restraint"[2]. While one side welcomes its legal development as progress, the other side questions the legal basis of some of the innovations and complains about interferences with the sovereignty of the State Parties[3].

The German constitution, the Basic Law, is almost as old as the Convention. Both were written out of the same spirit and against the same historical background and can therefore be considered legal siblings. Both also owe their development and great importance to the two neighbouring courts located in Strasbourg and Karlsruhe, which have proven to be strong and assertive companions. Thus, in its jurisprudence, the Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*) has, from the outset, provided a high standard of protection with a wide coverage of all branches of the legal system[4]. It was only relatively late, however, that the case-law of the European Court of Human Rights in Strasbourg received greater attention through important decisions in Germany[5]. The European Convention on Human Rights is not directly applicable in Germany and ranks as an international treaty transformed into German law below the Constitution. The Federal Constitutional Court has nevertheless established in several decisions an obligation to take account of the

[1] Schiedermair, ZRP 2025, p. 97; Kulick, in: HK-EMRK, 5th edition 2023, Art. 34 para. 1.
[2] For supporting documents, see Jung, FS-Stein, p. 976.
[3] See, for example, Nußberger, Zu viel Europa?, APuZ of 8 September 2017.
[4] Mayer, in: Karpenstein/Mayer (eds.), EMRK, 3rd edition 2022, Einleitung para. 68.
[5] Mayer, in: Karpenstein/Mayer (eds.), EMRK, 3rd edition 2022, Einleitung para. 69 et seqq.

jurisprudence of the European Court of Human Rights. The text of the Convention and the case-law of the European Court of Human Rights serve, at the level of constitutional law, as interpretative aids in order to determine the content and scope of fundamental rights and guarantees under the rule of law contained in the Basic Law, provided that this does not lead to a restriction or reduction of the level of protection of fundamental rights under the Basic Law, which is not intended by the Convention itself (see article 53).[6] That obligation on the German courts to take account may relate to the determination of the scope of protection of a fundamental right, but also to the review of proportionality[7].

The administrative courts are also bound by these principles and observe the Convention in their daily judicial practice, for example in migration law[8], but also in other fields of law.[9] In the light of that obligation to take account, there is no room for the administrative courts to apply the margin of appreciation in the context of national jurisprudence. The obligation to take account applies unconditionally and is not at the discretion of the courts. The considerations applied by the European Court of Human Rights in the context of the margin of appreciation are not tailored to this constellation, but serve to determine and limit the standard of review of the Court.

II

With Protocol No. 15 to the European Convention on Human Rights[10], which entered into force, the State Parties have now explicitly enshrined and emphasised the principle of subsidiarity and the margin of appreciation conferred on them in the preamble to the Convention[11].

With the doctrine of "margin of appreciation", the European Court of Human Rights takes into account, for the European Convention on Human Rights, the different cultural and legal traditions of the Member States. The doctrine is anchored in the principle of subsidiarity of the Convention's system with regard to the Member States'

---

[6] Rulings of the Federal Constitutional Court (BVerfGE, *Entscheidungen des Bundesverfassungsgerichts*) 111, 307 [ECLI:DE:BVerfG:2004:rs20041014.2bvr148104].
[7] BVerfG, decision of 4 February 2010 - 2 BvR 2307/06 [ECLI:DE:BVerfG: 2010:rk20100204.2bvr230706]; Mayer, in: Karpenstein/Mayer (eds.), EMRK, 3rd edition 2022, Einleitung para. 84; BVerfGE 128, 326 (374 et seq., 393 et seq.) - ECHR preventive detention.
[8] Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 111, 223.
[9] BVerwGE 178, 176 [ECLI:DE:BVerwG:2023:290323U10C2.22.0].
[10] https://www.lto.de/recht/justiz/j/egmr-beschwerde-frist-verkuerzt-15-zusatzprotokoll (only available in German).
[11] Nettesheim, in: HK-EMRK, 5th edition 2023, Preamble para. 6 et seq.

systems of human rights protection. The European Court of Human Rights recognises that national political decision-makers in the Member States are, in principle, in a better position than an international judge to assess the concrete needs and conditions of restrictions on human rights guarantees.

The margin of appreciation is granted to the Member States by the European Court of Human Rights, in particular for assessing the democratic need to restrict human rights. The margin thus relates to the various aspects of the principle of proportionality. The specific nature of the objective pursued, as well as the nature and significance of the respective rights defined in the Convention, have an influence on the density of the review. In addition, it is of relevance whether a question can be objectively assessed or is rather – like questions of morality and custom – subjectively shaped. Another important criterion in this respect is the existence of a "European consensus". A more recent line of case-law of the European Court of Human Rights[12] also proceduralises[13] judicial review. The "margin of appreciation" is thus also determined by the quality of the examination of the European Convention on Human Rights' guarantees and the weighing of the interests concerned by the national legislature, the body applying the law and the national court[14].

III

As already shown, no margin of appreciation exists for the administrative courts when taking account of the case-law of the European Court of Human Rights. This is not an unusual situation for the German courts.

The density and power of review exercised by the administrative courts in Germany is highly developed. This fact builds on our Constitution and the jurisprudence of the Federal Constitutional Court. The right to effective legal protection guaranteed in article 19 (4) of the Basic Law requires a complete judicial review of the law from a legal and factual point of view against executive acts of state power.

Courts, however, cannot review acts of parliament in terms of content, but are bound by it. The legislature has a very broad scope for political assessment, decision-making and action. The Federal Constitutional Court also recognises that the legislature has a

[12] Nusser, in Bergmann/Dienelt (eds.), EMRK, 15th edition 2025, Art. 8 para. 8.
[13] Voßkuhle, RdA 2015, p. 336 (341), Schorkopf, ZaöRV 2022, p. 19 (18), with reference to European Court of Human Rights (ECtHR), judgment of 22 April 2013 – Application No. 48876/08 –.
[14] Nusser, in Bergmann/Dienelt (eds.), EMRK, 15th edition 2025, Art. 8 para. 8.

wide scope for action. It is not the task of the courts, not even of the Federal Constitutional Court, to examine whether the directly democratically legitimated legislature has reached the most appropriate, reasonable or just solution in each case. As a matter of principle, it is for the legislature itself to decide on the nature, extent and time at which the tasks of the state are to be performed[15]. This concerns the assessment and evaluation of the "political situation concerning the respective issue" as well as the prognosis of what effects a legal regulation will have. These considerations are very similar to those of the European Court of Human Rights in the context of its margin of appreciation doctrine. The Federal Constitutional Court also recognises the prerogative of the Parliament in determining the fundamental weightings and decisions of politically and socially relevant and often controversial issues.

Full judicial review therefore concerns only the interpretation and application of democratically legitimated acts of parliament. The courts have the competence to review and correct the administration in the interpretation of the law, the determination of facts and the application of the law. Being bound by administrative findings of fact or assessments is just as inadmissible as a general limitation of judicial review powers to a tenability check[16]. This does not mean that there are no discretionary decisions. Actually, a very differentiated jurisprudence on the exercise of discretion exists.

The essence of the exercise of a discretion of the authorities is to compare and weigh up the relevant circumstances of the case for the purpose of choosing the legal consequence[17]. In its review of the administrative decision, the administrative court must respect that margin of discretion. It is not entitled to substitute its own assessment for the one of the administration. On the contrary, the court's examination is subject only to the existence of an error in the exercise of discretion.

German administrative law distinguishes administrative discretion from administrative margins of appreciation when interpreting and applying indefinite legal terms. The legal grant of such margins of appreciation to the administration requires justification under German constitutional law. There must be specific reasons. Such specific reasons are recognised for the assessments of examinations,

[15] Voßkuhle, in: Huber/Voßkuhle (eds.), GG, 8th edition 2024, Art. 93 para. 43 with further references.
[16] Schmidt-Aßmann, in: Dürig/Herzog/Scholz (eds.), GG, as of: October 2024, Art. 19 (4) para. 183.
[17] Eyermann, VwGO, 16th edition 2022, § 114 para. 24.

certain decisions of expert or pluralistic bodies, which are free from instructions and for individual cases of prognoses based on overall political, economic, social or cultural contexts[18]. Finally, a further area, which is of particular material importance, concerns the regulatory and planning discretion[19].

Characteristic of these cases is a review that is limited to certain steps and that only comprehends the decision of the administrative authorities. The court may not substitute its own assessment for the one of the administrative authority.

In addition, the Federal Constitutional Court recognises the administration's own margins of appreciation, which may result from the objective functional limits of the jurisprudence. The Federal Constitutional Court has recognised this when a legal provision requires non-legal professional assessments, while there are still no generally accepted scientific standards and methods for assessment. It is true that the courts must determine the state of scientific knowledge in the context of review of the full establishment of facts. However, they are neither able nor obliged to independently close gaps in scientific knowledge and to place research orders. If, in such cases, it is therefore not possible objectively to determine conclusively whether the administrative authority's response to the technical question is correct or incorrect, the court must examine only the tenability of the authority's assumptions[20].

IV

I would like to turn briefly to constitutional law. Like the European Court of Human Rights, the Federal Constitutional Court does not see itself functionally as a "supreme instance of appeals on points of law". It does not subject the final and binding decisions of the other courts to a general substantive examination, but limits its review to errors in the legal assessment of the facts, which reveal a fundamentally erroneous view of the significance of a basic right. The application also of constitutional law is therefore primarily a matter for the administrative courts. These examine constitutional law in the context of the rest, the so-called ordinary law. If the

[18] Geis, in: Schoch/Schneider (eds.), Verwaltungsrecht, as of: November 2024, VwVfG § 40 para. 149 et seqq.
[19] Geis, in: Schoch/Schneider (eds.), Verwaltungsrecht, as of: November 2024, VwVfG § 40 para. 198 et seqq. and 213 et seqq.
[20] BVerfGE 149, 407 para. 20 et seq.

significance of a basic right is fundamentally disregarded in doing so, it will only lead to annulment if the scope of the basic rights is of some importance[21].

However, the more severe the impairment of basic rights in the individual case is, the more intensive is the review of the judicial decision before the constitutional court.[22]

What is the direct comparison of this constitutional review with the principles established by the European Court of Human Rights?

For the Federal Constitutional Court, the focus is not on "procedural rationality" in the legislative procedure, that is to say, the involvement of different interest representatives and a substantive weighing process. This is of primary importance only if it reinforces the basic rights. The substantive substance of the fundamental rights issue is decisive[23]. Similarly, the question whether opinions on a matter can reasonably differ widely within society is only sporadically mentioned as a factor which leads to the recognition of a scope for weighing and action on the part of the democratically legitimated legislature[24]. In this respect, the case-law of the European Court of Human Rights takes greater account of the own function of the democratically elected legislature as a "forum of the nation"[25]. The legislature and not the courts have the task of bringing together different views on an appropriate and fair balancing of interests in the representative legislative procedure to a decision.

[21] Fundamentally, see BVerfGE 18, 85; Chamber Rulings of the Federal Constitutional Court (BVerfGK, *Kammergerichtsentscheidungen des Bundesverfassungsgerichts*) 4, 243 para. 34; Voßkuhle, RdA 2015, p. 336 (340 et seq.).
[22] Asche, Die Margin of Appreciation, p. 45 et seqq.
[23] See, on this point, Schorkopf, ZaöRV 2022, p. 19 (30).
[24] BVerfGE 108, 282 para. 47.
[25] Müller/Drossel, in: Huber/Voßkuhle (eds.), GG, 8th edition 2024, Art. 38 para. 31.