Rodoljub Etinski*, Bojan Božović**

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The Interactions of the margin of appreciation and the legal systems as articulated by the ECtHR and the ECJ

Differences between the system of human rights law, as it is established by the European Convention on Human Rights and the system of EU law influence two courts — the European Court of Human Rights and the Court of the EU — to articulate differently the interaction between the margin of appreciation and corresponding legal systems. The two courts legitimize the margin by similar reasons but they shape it and see its functioning in the legal systems differently.

Key words: margin of appreciation, fair balance of interests, the European Convention on Human Rights, the EU law

Introduction

The margin of appreciation might be defined as a certain flexibility and adaptability which is at the disposal of the authority in exercising an obligation, including assessment of fact.[1] The definition should not mislead that the margin favors a State or an EU institution in relation with private persons. The margin of appreciation does not mean arbitrary power. It does not mean legal vacuum. The European Court of Human Rights (hereinafter: the ECtHR) and the EU Courts (hereinafter under the common name: the ECJ) have sought to exercise certain review over the margin and over acts done in the frames of the margin. They are active in shaping and limiting the margin. The margin affects a judicial review but it does not exclude the review completely. Contrary to many authors we do not think that a concept of deferral is the best explanation of the margin in all its aspects.

The concept was first formally accepted in the Commission's report in the case of *Greece v. The United Kingdom and Northern*

* Rodoljub Etinski, Professor, Faculty of Law of the Novi Sad University, Faculty of Law of the University of Donja Gorica, *e-mail*: Rodoljub.Etinski@hotmail.com

** Bojan Božović, Assistant, Faculty of Law of the University of Donja Gorica, *e-mail*: bojan.bozovic@udg.edu.me.

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[1] Most of the authors' views regarding the margin of appreciation in jurisprudence of the ECtHR has been expressed in an article „The Function of the Margin of Appreciation in the Jurisprudence of the ECtHR," published in *Noua Revistă de Drepturile Omului,* vol. 15, no. 3, 2019, 7–26.

Ireland (1958), in which Greece complained to the British authorities about alleged human rights violations in Cyprus. The Commission stated in the report that the respondent State must have, pursuant to Article 15 of the Convention, a „certain measure of discretion" (*une certaine marge d'appreciation*).

Law may function well without an explicit invocation of the margin of appreciation. In *Grand Satélite Digital* the ECJ informed that a directive did not contain provisions on detailed administrative rules for implementation of the obligation and that a Member State might have established an administrative procedure for the implementation in compliance with the fundamental freedoms.[2] Obviously, the Member States enjoyed certain margin of discretion in the implementation of the obligation. The ECJ did not mention the margin, but the Court limited it with the respect for fundamental freedoms. Two years later in another case, the ECJ referred to *Grand Satélite Digital* as a precedent for limiting the margin of appreciation by the fundamental freedoms.[3] The ECJ stated that the margin had been limited by fundamental freedoms in the previous case in spite of the fact that it was not mentioned in the previous case. Thus, the margin of appreciation explicates something which might be inherent to the general provision.

Some writers saw the origin of the doctrine of margin of appreciation in national legislations,[4] while others found it in international law.[5] It has been used in the jurisprudence of the European Commission of Human Rights (hereinafter: the HR Commission) and the ECtHR and then it has been transplanted into the jurisprudence of the ECJ. The doctrine is alive in other legal systems and may be found in jurisprudence of other international courts.[6] It may be said

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2 Case C-390/99 *Grand Satélite Digital*, Judgment of 22 January 2002, paras 27, 28.

3 Case C-60/03, *Wolff & Müller GmbH & Co. KG*, Judgment of 12 October 2004, para 30.

4 Eva Brems, „The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", *Zeitschrift für ausländisches öffentliches Recht und Völherrecht*, 1996, 240–314, at 240. Howard Charles Yourow, „The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence", *Connecticut Journal of International Law*, vol. 3, no. 1, 1987, 118.

5 Eirik Bjorge, „Been There, Done That: The Margin of Appreciation and International Law", *Cambridge Journal of International and Comparative Law*, vol. 4, no. 1, 2015, 183–187.

6 Ignacio de la Roasilla del Moral, „The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine", *German Law Journal*, vol. 7, no. 6, June 1, 2006, 611–624. Julian Arato, „The Margin of Appreciation in International Investment Law", *Virginia Journal of International Law*, vol. 54, no. 3, 2014, 559. Enzo Cannizzaro, „Proportionality and Margin of Appreciation in the Whaling Case: Reconciling Antithetical Doctrines", *The European Journal of International Law* Vol. 27 no. 4, 2016, pp. 1061–1069.

that the doctrine tends to become — or, indeed, might have even already become — a general legal doctrine.[7]

The employment of the doctrine by the ECtHR has always been supported by the Contracting Parties. The support was boosted by the dissatisfaction of some parties, especially the United Kingdom and the Russian Federation, with the way in which the ECtHR treats the national area of free assessment in its practice.[8] The Contracting Parties decided to insert the term „margin of appreciation" in the preamble of the ECHR through Article 1 of Protocol No. 15 from 2013. For the time being the Protocol has not entered into force.[9] The Protocol confirms the Contracting Parties have always intended to include a margin of appreciation in the application of the Convention. Equally, the Member States of the EU and EU institutions have always intended to have a margin of appreciation in the application of some rules of EU law. The phrase „margin of appreciation" has already appeared in texts of EU law.[10]

The ECHR and EU law make different legal environments. The ECHR, as the ECtHR has qualified it, is a constitutional instrument of the European public order in the field of human rights. All material provisions are homogenic by their subject matter — human rights. It consists of general, abstract, open-text provisions, which have been set down seventy years ago. The European consensus emerging from converging internal practices of the Contracting Parties has been used as an interpretative tool which inserts precise meanings in the general provisions. The process of adaptation of seventy-year-old provisions to social development has been running through the evolutive interpretation.

EU law, however, is very different to begin with by the sheer volume of its legal norms. Furthermore, provisions of the EU law are heterogenic by their subject-matter. They cover an extremely diverse body of areas and vary in their form, scope and legal nature. The provisions of EU law are different by their technic characteristics. Some are general and abstract; others are precise and suitable for direct effect. The specification of the meaning of the general rules has been obtained not only through interpretation but primarily through secondary implementing legislation. The updating of the EU provisions

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7 See opposite views by Yuval Shany, „Toward a General Margin of Appreciation Doctrine in International Law?" *The European Journal of International Law* Vol. 16 no. 5, 2006, 907–940 and Bjorge E., *op. cit*., 181–190.

8 Jasna Omejec, „Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Evropskog suda za ljudska prava", Zagreb, 2013, 1273.

9 On 9 of December 2020 one ratification was missing for entering into force. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=jkh0VPXN.

10 See, for example, recital 4 of the preamble of Commission Regulation (EC) no 622/2008 of 30 June 2008 amending Regulation (EC) No 773?2004, as regards the conduct of settlement procedures in cartel casesa (Text with EEA relevance) Official Journal of the EU, 2008, L171/3.

has been performed rather through the process of legislation than by interpretation. The structure of the relations governed by EU law is different in comparison with the ECHR. EU law regulated relations between the EU institutions and the Member States, between the EU institutions and private persons as well as relations between the Member States and private persons. Besides, the jurisdiction of the ECtHR is limited to the control of effects of the ECHR to private persons. The competence of the ECJ amounts also to constitutional review over secondary acts.

All these differences have positioned the two courts differently towards the margin of appreciation.[11] The ECtHR has been very active in shaping the width of the margin. It has established the factors determining the width. The margin has been considered by the ECtHR in a continuing interaction with European consensus and the balance of competing interests. In different legal environment the ECJ has defined the limits of the margin. It considers also the balance of competing interests in connection with the margin but in a different way. The particular circumstances of a case have more weight in consideration of the relation between the balance of interests and the margin in jurisprudence of the ECtHR than in jurisprudence of the ECJ. Thus, the margin of appreciation appears in the jurisprudence of the ECtHR as a more flexible and dynamic concept. However, the two courts have identified identical or similar reasons of the appearance of the concept in their jurisprudences.

The phrase „margin of discretion" has been used sometimes in legal texts with the same meaning as „the margin of appreciation" and they will be used as synonyms in this article. The terms „margin of assessment" or „margin of manoeuvre" with the same meaning as „margin of appreciation" are rarely used in practice.

1. The reasons for the use of the margin of appreciation

Both courts allege same or similar reasons for the use of margin of appreciation. Two main reasons are the generality of law and the principle of subsidiarity. There are other reasons alleged only by the ECJ such as complexity of the matter or importance of the issue. The provisions of the ECtHR are very general and abstract. Many EU provisions are of the same quality. As such they leave some latitude to addressee in respect of performance of obligations. The principle of subsidiarity is laid down in Article 5 (3) of the Treaty on the EU

[11] See already presented views on different legal contexts and the margin of appreciation in Francisco Javier Mena Parras, „From Strasbourg to Luxembourg? Transposition the margin of appreciation concept into EU law", Paper No. 2015/7, Institute for European Studies (Université libre de Bruxelles), available at https://www.academia.edu/17852645/From_Strasbourg_to_Luxembourg_Transposing_the_margin_of_appreciation_concept_into_EU_law. Visited on 18. 02. 2021.

and it will be introduced in the preamble of the ECHR by Protocol no. 15. The principle leaves some legal space to the States to adjust performance of obligations to national moral, religious and other circumstances. The complexity of a matter and the importance of an issues are reasons connected more with assessment of facts than with a search for a suitable way to meet an obligation.

The HR Commission and the ECtHR have remarked early that the Convention itself leaves certain discretion with the Contracting Parties to the respect of implementation and application of the Convention. The observation is clearly visible in the *Belgian Linguistic case* of 1968. The HR Commission stated: „Article 14 ... 'is of particular importance in relation to those clauses' which 'do not precisely define the rights' which they enshrine, but 'leave States a certain margin of appreciation with regard to the fulfilment of their obligation', ... or 'up to a point leave it to the States to choose the appropriate means to guarantee a right'."[12] The HR Commission observed thus that there were clauses in the Convention which did not define precisely the rights, leaving a certain margin of appreciation with regard to the fulfilment of corresponding obligations and heightening that Article 14 was one of the limits.

A similar approach was taken in several other cases. For example, in the *X. v. Germany* from 1963, the HR Commission declared that it had „frequently held" that paragraph 2 of Articles 8 and 10 left the Contracting Parties „a certain margin of appreciation in determining the limits that may be placed on the exercise of the rights..." Or, the ECtHR stated in *Engel* that the Convention allowed the national authority „a considerable margin of appreciation" in certain aspect.[13] In the same case, referring to previous cases,[14] the ECtHR noted that paragraph 2 of Article 10, like paragraph 2 of Article 8 left the margin of appreciation to the Contracting States.[15] Further evidence of that understanding might be found in terminology used by the ECtHR. In some cases, the ECtHR used the term „power of appreciation", indicating that a Contracting Party was authorized to a certain level of discretion. Thus, in the „*Vagrancy*" case of 1971, the ECtHR observed that paragraph 2 of Article 8 left „the power of appreciation" to the Contracting Parties.[16] The same term „power of appreciation" was used in the *Golder* case[17] of 1975 and in the *Sunday*

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[12] Case „*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*" (app. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) or the *Belgian Linguistic* case, Judgment of 23 July 1968, 24.

[13] *Engel and others v. The Netherlands* (app. nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) Judgment of 8 June 1976, 27.

[14] *De Wilde, Ooms and Versyp v. Belgium* (app. no. 2832/66; 2835/66; 2899/66), Judgment of 18 June 1971, para. 93, and *Golder v. The United Kingdom* (app. no. 4451/70), Judgment of 21 February 1975.

[15] De Wilde, Ooms and Versyp, *op. cit.*, 28.

[16] *Ibid.*, 34.

[17] Golder, *op. cit.*, para 45.

Times case[18] of 1979. Similarly, in *Wolff*[19] the ECJ states that it is apparent from the wording of the directive that the Member States have a wide margin of appreciation in determining the form and detailed rules governing the procedures under the directive. Or, in *Alliance of Conservatives and Reformists in Europe* the General Court remarks that the provisions at issue confer a wide margin of appreciation on the Parliament.[20]

Many obligations, as formulated in the ECHR and Protocols, are „obligation of results".[21] They require a Contracting Party to achieve a result, leaving the choice of means to the Contracting Party. Thus, in the *Hatton* case of 2003, the ECtHR stated: „Whilst the State is required to give due consideration to the particular interests, the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation."[22] The EU directives are a source distinguished by obligation of results. It is settled case law of the ECJ „that directives do not infringe the Treaty if they leave the Member States a sufficient wide margin of appreciation to enable them to transpose them into national law in a manner consistent with the requirement of the Treaty..."[23]

Another principal reason for the use of a margin of appreciation is the principle of subsidiarity.[24] The ECtHR has relied on the subsidiary character of the Convention system to justify margin of appreciation. It has referred to the better position of local authorities to assess a situation or to national diversity of certain factors as the justification of a certain margin of apperception in some provisions. In the *Belgian Linguistic* case, the Court states that „it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures

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18 *The Sunday Times v. The United Kingdom* (app. no. 6538/74), Judgment of 26 April 1979, para 59.

19 Case C-60/03, Wolff & Müller GmbH & Co. KG *op. cit.*, para 30.

20 Case T-107/19, Alliance of Conservatives and Reformists in Europe, Judgment 25 November 2020, para 190.

21 *LaCrand* (Germany v. United States of America), Judgment, I. C. J. Reports 2001, para 111. *Case concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of the ICJ of 20 April 2010, paras 186, 191.

22 *Hatton and Others v. The United Kingdom* (app. no. 36022/97), Judgment of 8 July 2003, para 123. *Fadeyeva v. Russia* (app. no. 55723/00), Judgment of 9 June 2005, para 96.

23 Case C-166/98, *Société Critouridienne de Distribution*, Judgment of 17 June 1999, para 19.

24 See critique in Federici Fabbrini, „Th Margin of Appreciation and the Principle of Subsidiarity: A Comparison, iCourts", Working Paper Series No. 15, 2015, available at http://jura.ku.dk/icourts/working-papers/ Visited on 18. 02. 2021.

with the requirements of the Convention."[25] In *Handyside*[26] in 1976, the ECtHR considered first the subsidiary character of the machinery of protection as established by the Convention, then the plurality of morals in the Contracting States and better position of national authorities to evaluate the facts and, after that, the Court concluded that paragraph 2 of Article 10 indeed left to the Contracting Parties a margin of appreciation which covered the case at issue.[27] The ECtHR opined that state authorities were in „direct and continues contact with the vital forces of their countries" and due to that reason they were in better position than the international judge to estimate factual and legal features of the case.[28] The argument of the better position of national authorities was repeated afterwards on numerous occasions.[29]

The ECJ has also used the argument of better position of local authorities for recognition of the margin of appreciation. In the context of public supply contracts, the ECJ states that „margin of appreciation is justified by the fact that the contracting authorities are placed to know which supplies they need and to determine the requirements necessary to achieve the desired result."[30] In another case the ECJ finds that the specific social and cultural features of each Member State have provided national authorities with a sufficient margin of appreciation to take appropriate measures concerning lotteries.[31] In other cases the ECJ states that moral, religious and cultural factors justify that national authorities have at their disposal a sufficient margin of appreciation to determine consumer protection and public order concerning gaming and betting.[32]

The argument of the complexity of a matter or of the importance of an issue was also used by the ECJ for recognizing the margin of appreciation. According to case law of the ECJ, EU institutions enjoy a broad margin of appreciation when evaluate complex economic situations.[33] The ECtHR considers also that the Contracting Parties have a broad margin in implementation of social and economic

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[25] Belgian Linguistic Case, op. cit., para 10.

[26] *Handyside v. The United Kingdom* (app. no. 5493/72) Judgment of 7 December 1976.

[27] *Ibid*., para 48.

[28] *Ibid*.

[29] Ireland v. The United Kingdom, op. cit., para 207. Hatton and Others v. the United Kingdom, *op. cit*., para 97;

[30] Case C-413/17, *Roche Lietuva' UAB*, Judgment of 25 October 2018, para 30.

[31] Case C-67/98, *Questore di Verona*, Judgment, Judgment of 21 October 1999, para 15.

[32] Case C-243/01, *Piergiorgio Gambelli and Others*, Judgment of 6 November 2003, para 63.

[33] Case C-150/94, *The United Kingdom v. the Council*, Judgment of 19 November 1998, para 49. Case C-337/09 P, *Zhejiang Xinan Chemical Industrial Group Co. Ltd*, Judgment of 19 July 2012, para 58. Case C-389/10 *P KME Germany AG*, Judgment of 8 December 2011, para 121.

policies.[34] The evaluation of complex data relating to pension schemes implies a wide margin of appreciation.[35] Having in view „the particularly sensitive and essential nature of the interests protected by Article 4 (1) (a) of Regulation No 1049/2002," the ECJ has recognized that a decision of an EU institution on the matter requires a margin of appreciation.[36] Article 4 (1) (a) of the Regulation concerning public access to document of EU institutions[37] obliges the EU institutions to deny access when it would undermine the public interest in the specified areas. Having in view that Article 4 (1) of the Regulation has quite specific and clear meaning, the margin comprises here primarily the assessment of fact or legal qualification of fact. Besides, interpreting EU law and answering questions referred by national courts, the ECJ has used to leave the assessment of facts to national courts.

Another significant reason for the appearance of the margin of appreciation in jurisprudence of the ECJ is its reliance in field of human rights to the practice of the ECtHR. Interpreting thus human rights in EU law, the ECJ has used to transpose the ECtHR's findings on the margin. In *Connolly*, the ECJ refers to the finding of the ECtHR that the States have certain margin of appreciation in assessing whether pressing social need exists for justifying restriction of the freedom of expression as well as in assessing whether the principle of proportionality is satisfied.[38]

2. Factors determining the width of the margin of appreciation

Having been consonant with respect to the reasons of the margin, the two courts differ however when they come to shaping and limiting the margin. Responding to arguments of the States concerning the existence of the margin of appreciation in cases which were similar in legal matter but different in fact, or commenting on its assessment of the margin in previous cases, the ECtHR gradually defined in successive cases the factors that determine the breadth

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34 Hatton and Others v. the United Kingdom, *op. cit*., para 97.

35 Case C-67/96, *Albany International BV*, Judgment of 21 September 1999, para 119. Case C-219/97, *Maatschappij Drijvende Bokken BV*, Judgment of 21. September 1999, para 109. Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens' Handelsonderneming BV*, Judgment of 21. September 1999, para 119.

36 Case C-266/05 P, *Jose Maria Sison*, Judgment of 1 February 2007, para 35. Case T-465/09, *Ivan Jurašinović*, Judgment of 3 October 2010, para 26. Case T-331/11, *Leonard Besselink*, Judgment of 12 September 2013, para 32. Case T-644/16, *ClientEarth*, Judgment of 11 July 2018, para 23. Case T-31/18, *Luisa Izuzquiza*, Judgment of 27 November 2019, para 64.

37 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

38 Case C-274/99 P, *Bernard Connolly*, Judgment of 6 March 2001, paras 41 49.

of the margin of apperception. The breadth could be understood as a scale of issues covered by the margin. Thus, the breadth is relevant for the issue whether the disputed matter falls under the margin. The factors are defined as general determinants of the width of the margin. However, their interplay may be different in each case, depending on particular circumstances of the case. Thus, the margin may be tailored according to specificities of each case. This may make the margin to be very flexible in ECtHR jurisprudence. It does not mean that the margins of standard width do not exist. For example, the ECtHR has repeatedly affirmed that the Contracting Parties enjoy wide margin in economic and social matters.

A short presentation of a process of establishing the determinants of the margin fallows. In the *Sunday Times* case of 1979, the ECtHR found that the scope of the domestic power of appreciation was „not identical as regards each of the aims listed in Article 10 (2) ...".[39] It ascertained thus a difference between two aims: protection of morals and maintaining the authority and impartiality of the judiciary. The ECtHR recalled its finding in *Handyside* about the variety and dynamics of moral views in the Contracting States which precluded the establishment of a fixed criterion with respect to morals. This time, however, with respect to the authority of the judiciary, the ECtHR found that the domestic law and practice in the Contracting States disclosed „a fairly substantial measure of common ground in this area".[40] A more extensive common ground implied, according to the ECtHR, „a more extensive European supervision" and „a less discretionary power of appreciation".[41] In fact, the ECtHR based the delineation of the breadth of the margin not so much on the difference of aims but on the existence of common ground between the Contracting States. Later, the ECtHR will use other terms of the same meaning such as „European consensus",[42] „broad consensus",[43] or „widespread consensus".[44] The common ground has become, over time, one of the most important determinants for the breadth of the margin of appreciation.

In the *Dudgeon* case of 1981, the ECtHR has gone a step further in defining the factors which determine the breadth of the margin. The case related to an interference of the States in a very sensitive matter of private life. The Responded State justified the interference by the protection of morals and invoked *Handyside* which left a wide margin

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[39] The Sunday Times v. The United Kingdom, *op. cit.*, para 59.

[40] *Ibid.*

[41] *Ibid.*

[42] *A, B and C v. Ireland* (App. No. 25579/05), Judgment of 16 December 2010, para 175.

[43] *Rohlena v. The Czech Republic* (app. No. 59552/08), Judgment of 27 January 2015, para 33, *M. S. S. v. Belgium, Greece* (App. No. 30696/09), Judgment 21 January 2011, para 251.

[44] *Micallef v. Malta* (app. No. *17056/06*) Judgment of 15 October 2009, para 31.

of appreciation in that respect.[45] The ECtHR replied, however, that not only the nature of the aim was of relevance for determining the breadth of the margin, but that the nature of the activities involved affected the scope of the margin.[46] Since the case concerned „a most intimate aspect of private life," the Court was of the opinion that only „particularly serious reasons" could justify the interference.[47]

Having summarized its previous practice on the issue, in the *S. and Marper* case of 2008 the ECtHR elaborated on the issue in a more extensive way. The Court stated: „The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (...). Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (...). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (...)."[48]

The elaboration of the margin of appreciation in *S. and Marper* is extensive but not exhaustive. Thus, for example, in the *Associated Society of Locomotive Engineers & Fireman* case of 2007 the ECtHR makes a difference between the issues of general policy, such as social and economic policies, where the margin of appreciation should be wide, and the issues of defense of the fundaments of democracy where the margin of the appreciation has „only a limited role".[49]

The ECJ has transferred certain findings of the ECJ relating to determinants of the width of the margin. In *Österreichischer Rundfunk* the ECJ refers to determinants as stated in *Leander v. Sweden* according to which the scope of the margin depends „not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved."[50] It was the interference to the right to privacy by publishing names of persons and their income received from public revenues. The ECJ found that the aim — monitoring proper use of public funds — was legitimate but the Court left to the national courts to decide whether the publication of names was necessary and unavoidable for reaching the aim.

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45 *Dudgeon v. The United Kingdom* (app. no. 7527/76), Judgment of 22 October 1981, para 52.

46 *Ibid*.

47 *Ibid*.

48 *S. and Marper v. The United Kingdom* (app. no. 30562/04 and 30566/04), Judgment of 4 December 2008, para 102.

49 *Associated Society of Locomotive Engineers & Fireman* v. The United Kingdom (app. no. 11002/05), Judgment of 27 February 2007, para 46.

50 Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk*, Judgment 20 May 2003, para 83.

Having in view such a formulation of proportionality, it might be said that the ECJ considered that the margin in the case was rather narrow than wide.

3. The limits of a margin of appreciation

In different EU legal environment, the margin of appreciation has appeared in various branches. Zglinsky identified more than 24 domains of EU Law in which the ECJ used the margin.[51] In such circumstances the ECJ has established certain general limits to the margin.[52] Having in mind homogeneity of the ECHR system, it might be very difficult that the issue of the limits, as addressed by the ECJ, appears in that system. Th exception might be Article 14 of the ECHR, which limits, as we see above in the *Belgian Linguistic case*, the margin of appreciation inherent to other material provisions of the ECHR. It seems that the ECJ has not developed a mechanism for fine graduation of the margin which relies on particularities of each case, as it was done by the ECtHR. Rather, it has established certain types of margin like „narrow margin," „wide margin" and „certain margin" and a degree of its review has adjusted to the type.[53]

Human rights or, in terminology of EU law, fundamental rights make the first limit. The margin of appreciation cannot justify an act contrary to fundamental rights. In *Wachauf* 1989, the ECJ observes that the margin of appreciation left by the Community regulations to the Member States was sufficiently wide to enable them to apply these rules consistently with fundamental rights.[54] In another case the ECJ states that the margin of discretion which the Member States enjoy in matters of social policy cannot frustrate a fundamental principle of EU law or a provision of that law.[55] The fundamental rights may exclude a margin of appreciation in certain matters. Thus, it is settled case law of the General Court that the Council does not enjoy any margin of appreciation when it determines legal or factual preconditions for the application of fund-freezing sanctions to persons, groups or entities.[56] Another limit of the margin is drown at

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[51] Jan Zglinsky, „The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law", *Common Market Law Review*, vol 55, 2018, 1357.

[52] See James A. Sweeney, „A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights", *Legal Issues of Economic Integration*, vol 34, no. 1, 2007, 27–52.

[53] Janneke Gerards, „Pluralism, Deference and the Margin of Appreciation", *European Law Journal*, vol 17, no. 1, 2011, 105.

[54] Case 5/88 *Hubert Wachauf*, Judgment 13 July 1989, para 22. Case C-2/92, *The Queen v Ministry of Agriculture, Fisheries and Food*, Judgment of 24 March 1994, para 14.

[55] Case C-176/12, *Association de médiation sociale*, Judgment of 15 January 2014, para 27.

[56] Case T-341/07, *Jose Maria Sison*, Judgment of 23 November 2011, para 57.

the fundamental freedoms guaranteed by the founding treaties. In *Wolff* the ECJ warns that the Member States must observe the fundamental freedoms guaranteed by the Treaty in applying wide margin of appreciation which streams from the wording of Article 5 of Directive 96/71.[57]

The pursuance of the margin of appreciation should not undermine very essence of a provision and deprive it of effectiveness. This might be said to constitute a third limit. However, this limit appears also in jurisprudence of the ECtHR. Having transposed the finding of the ECtHR from its case law that the Contracting States enjoy wide margin of appreciation in imposing conditions on the right to vote, the ECJ handovers the limits of the margin as established in case law of the ECtHR. Thus, the ECtHR has repeated in several cases that the conditions might not be defined in a way to impair the very essence of the right to vote or to deprive it of effectiveness.[58] In another context, the ECJ states that a minimum level of protection required by an instrument cannot be avoid by pursuing the margin of appreciation.[59] Connected with this is that the pursuance of the margin of appreciation should not prevent achievement of a result required by EU law. In *Adenele*r the ECJ observes that the Member States have a margin of appreciation in the matter at hand, but that they are required to guarantee the result imposed by Community law.[60] Referring to *Adeneler*, the ECJ states that the margin of discretion has limits and that it cannot go so far to compromise the objective or the practical effect of EU instrument.[61] Similarly, in *Tas-Hagen* the ECJ informs that the Member States enjoy a wide margin of appreciation in respect of certain criteria but that they are oblige to comply with the limits imposed by Community law at the same time.[62]

4. The functioning of the margin of appreciation in jurisprudence of the two courts

Both courts have considered the interaction between the margin of appreciation and the balance of competing interests, but not in the same way. The search for the fair balance between the interests of individual and the general interest of community „is inherent in

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57 Case C-60/03, Wolff & Müller GmbH & Co. KG, *op, cit*, para 30.

58 Case C-145/04, *Spain v. Commission*, Judgment of 12 September 2006, para 94.

59 Case C-454/15, *Jürgen Webb-Sämann*, Judgment of 24 November 2016, para 35.

60 Case C-212/04, *Konstantinos Adeneler*, Judgment of 4 July 2006, para 68.

61 Joined Cases C-378/07 to C-380/07, *Kiriaki Angelidaki*, Judgment of 23 April 2009, para 83. Case C-578/08, *Rhimou Chakroun*, Judgment of 4 March 2010, para 43. Case C-251/11, *Martial Huet*, Judgment of 8 March 2012, para 43. Joined Cases C-356/11 and C-357/11, *O, S Maahanmuuttovirasto*, Judgment of 6 December 2012, para 74. Case C-558/14, *Mimoun Khachab*, Judgment of 26 April 2016, para 25.

62 Case C-192/05, *Tas-Hagen*, Judgment of 26 October 2006, para 36. Case C-499/06, *Halina Nerkowska*, Judgment of 22 May 2008, para 38.

the whole of the Convention".[63] The concept of the fair balance includes weighing of conflicting interests of the individuals and the community.[64] The fair balance of interests might be seen as a variant of the principle of proportionality, which is highly respect in both legal systems. The common position of the two courts is that the margin of appreciation determines a latitude which an authority enjoys in weighing competing interests. The ECtHR has taken position also that a significant disbalance of interests may deprive a margin of appreciation of its importance. It seems also that in weighing competing interests the ECtHR attributes greater attention to particular circumstances of a case than the ECJ. Lastly, in the jurisprudence of the ECtHR the factor which changes the width and content of the margin is a European consensus as emerging from converging internal practices of the Contracting Parties. Similar practice has not been developed in jurisprudence of the ECJ.[65] The analysis which follows will show how the margin of appreciation which the Contracting Parties enjoy in criminal matters in the ECHR system was changing over the time under the influence of developments in penology, and of international and domestic comparative practices. It will present an interaction between the margin of appreciation which the Contracting Parties enjoy with respect to positive obligations under Article 8 of the ECHR and the balance of interests which is dependent upon particular circumstances of the cases. This brief analysis will discover the dynamic nature of the interaction. Then, it will cast some light on the corresponding practice the ECJ and in what it differs from the ECtHR.

In several cases between 1978 and 2013, the HR Commission and the ECtHR explored whether Article 3 of the ECHR, which prohibited torture, inhuman and degrading treatment and punishment, had imposed a positive obligation on the Contracting Parties to enable review and reducibility of the life sentence. The replies to the question have changed over the time alongside with developments in penology, in both internal and international practice as well as with the development of case law. The ECtHR referred to the margin of appreciation in the matters in criminal justice in the last case 2013, but the margin has existed from the beginning. Since the beginning in 1978 the HR Commission had at its disposal the 1975 Reports on the Treatment of Long-Term Prisoners of the European Committee on Crime Problems, Resolution (76) 2 on the Treatment of Long-Term Prisoners of the Council of Europe and certain decisions of the constitutional courts of Germany and Italy. All sources directed towards positive answer. Over the time the number of sources increased and their messages become clearer and more

[63] *Rees v. The United Kingdom* (app. no. 9532/81), Judgment of 17 October 1986, para 37.

[64] Hatton and Others v. The United Kingdom, *op. cit.*, para 125.

[65] Certain unclear traces might be found. See Jan Zglinsky, *op. cit.*, 1364.

precise. The Rome Statute has been adopted in 1998. The Council of Europe adopted two relevant recommendations in 2003. In 2013 majority of 32 Contracting Parties adopted internal laws providing temporal reviews after a minimal period which varied from country to country between 10 and 30 years. In *Weeks*[66] 1978, the ECtHR found that the achievement of the legitimate aim of punishment, such as the rehabilitation of an offender and the protection of society against repetition of the crime, was relevant for conditional release of a prisoner sentenced to life imprisonment. Such continuing development was gradually reflected in case law.

At the beginning in *Kotalla*[67] of 1978, the HR Commission did not answer in explicit way but implied a negative answer. It took into account the 1975 Report, the Resolution (76) 2 and decisions of the constitutional courts of two Contracting Parties, but noted that it did not find a provision in the ECHR which required positive answer. Since the Dutch law provided the possibility of review, the issue was not of decisive importance. The ECtHR began to change its position in 2001. The Decision in *Nivette* of 2001 has disclosed the conviction of the ECtHR that the sentence to life imprisonment without any possibility of early release might be contrary to Article 3.[68] Such understanding was repeated in *Einhorn* in the same year.[69] The two cases happened in the context of extradition. In the last case, the ECtHR referred to previous cases, including *Week*. Denial of a possibility of review of life sentence was treated as a possible breach of Article 3 in both cases. In the *Kafkaris*[70] of 2008, the ECtHR found that a national law which provided a possibility of review and release of a life prisoner, even on parole and without designating a minimal period after which the review was possible, was accordance with Article 3. Five years later in 2013 in *Vinter and Others*,[71] the ECtHR has gone much further in narrowing the margin. Referring to the margin of appreciation in the criminal matters, the ECtHR stated that the time and form of review was in the frame of margin but not fully. It added that the comparative and international law material have converged towards a requirement of review no later than twenty-five years after the imposition of a life sentence. If the law of a Contracting Party did not satisfy the requirement, the Contracting Party was in a breach of Article 3. The time-limit of 25

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66 *Weeks v. the United Kingdom* (app. no. 9787/82) Judgment of 2 March 1987, para 47.

67 *Kotalla v. the Netherlands* (app. no. 7994/77) Decision of the Commission of 6 May 1978

68 *Nivette v. France* (app. no. 44190/98) Decision of the Court of 3 July 2001.

69 *Einhorn v. France* (app. no. 71555/01) Decision of the Court of 16 October 2001.

70 *Kafkaris v. Cyprus* (app. no. 21906/04) Judgment of 12 February 2008, para 97.

71 *Vinter and Others v. The United Kingdom* (app. no. 66069/09, 130/10 and 3896/10) Judgment of 9 July 2013.

years was found in Article 110 of the Rome Statute of the International Criminal Court. Besides, Article 3 was interpreted as requiring reducibility of life sentence based on the progress in rehabilitation and the prospect of release if sufficient progress was achieved. The ECtHR considered it as axiomatic that a prisoner could not be detained without legitimate penological grounds which include punishment, deterrence, public protection and rehabilitation and that the relation between the grounds was changing over the time. Thus, having started in 1978 from very broad margin with respect to the review of life sentence, the ECtHR has arrived to a narrow margin, leaving outside the time-limit of review and substance of reviewing procedure.

The following line of cases illustrates dynamic of interaction between the margin and the balance of interests. In period between 1984 and 2014 the ECtHR was working out an answer to the question of whether the term „respect" in Article 8 of the ECHR imposes a positive obligation to a Contracting Party to change its legal system and thus to enable the persons who changed gander to get legal adjustment. The concepts of common ground, the margin of appreciation and the fair balance of interest played significant roles in the answer. The ECtHR considered also the scientific and medical information but did not attribute to them decisive weight. The change of interactions of the three factors determined the outcome of the cases. The common ground or European consensus in the sense of there being enough level of commonalities of internal legal systems of the Contracting Parties had never been reached in the considered period. The internal laws were in transition moving towards legal recognition of the change of gender but they had never reflected enough uniformity in respect to the specific issues in the cases. The absence of common ground in *Rees*[72] 1986, *Cossey*[73] 1990, *Sheffield and Horsham*[74] 1998, is spite of certain legal and scientific development, was a reason for the ECtHR to recognize a wide margin of appreciation that justified inactivity of the Contracting Party and excluded a breach of Article 8. Having in view facts in the three cases i. e. the level of suffering of the applicants and the activities of the Contracting Party to mitigate it, the ECtHR was satisfied by the achieved balance of interests. In *B. v. France*[75] case of 1992, different facts however reflected a disbalance of interests. The adjustment of a legal system to the needs of post-operative transsexuals was a less demanding endeavor in France than in the United Kingdom. The level of suffering of the applicant was sufficient degree of seriousness. In

[72] Rees v. The United Kingdom, *op. cit*.

[73] *Cossey v. The United Kingdom* (app. no. 10843&84) Judgment of 27 September 1990, para 40.

[74] *Sheffield and Horsham v. The United Kingdom* (app. nos 22985/93 and 23390/94) Judgment of 30 July 1998, para 58.

[75] *B. v. France* (app. no. 13342/87) Judgment of 25 March 1992.

spite of the wide margin of appreciation, the failure of the Respondent State to strike a fair balance of interest resulted in a breach of Article 8. In *Christine Goodwin*[76] 2002 internal development in the Contracting Parties did not converge enough with respect to the issues at hand. The ECtHR noted however a continuing global international trend towards legal recognition of the new sexual identity of post-operative transsexuals. It noted the developments that happened in the United Kingdom. Besides, the ECtHR reevaluated the constellation of interests and this time found a disbalance. Thus, the Court concluded that the matter had not been covered by the margin of appreciation at the time, except the means of the implementation of the right. Thus, the margin has been reduced to the issue of implementation of the right of a post-operative transsexual to legal recognition of a new sexual identity. The obligation of a Contracting Party to enable legal recognition of a new sexual identity was moved outside the margin. The issue of the relation between the margin and the balance of interests appeared again in *Hämäläinen*[77] 2014. The question was whether the non-recognition of the same sex marriage contravened the obligation to recognize the change of identity. The ECtHR stated that the margin left amounts to the appraisal of whether a fair balance was reached between competing interests. Having considered various possibilities at the disposal of the applicant to arrange her family relations, the ECtHR found that the fair balance was reached and excluded a breach of Article 8.

The following case illustrates the possible uncertainty in measurement of the width of the margin. The parties disputed in *Hatton*[78] (chamber 2001 and the Grand Chamber 2003) about the width of the margin of appreciation of the Contracting Parties with respect to their positive obligations under Article 8 to protect private and family life against environmental intrusions. The issue was closely connected with the weighing of competing interests — the right to sleep as an aspect of privacy and health on the one hand and the general economic interest in air traffic. The question was whether the 1993 Government's measure governing the night flights at the Heathrow airport violated the right to respect for private and family life? The previous case law confirmed that Article 8 imposed substantive and procedural obligations on the Contracting Parties and that the width of a margin of appreciation depended on several factors including nature of affected right. The chamber and the Grand Chamber departed. The Chamber found that the Respondent had not done enough in

[76] *Christine Goodwin v. The United Kingdom* (app. no. 28957/95) Judgment of 11 July 2002, para 77.

[77] *Hämäläinen v. Finland* (app. no. 37359/09) Judgment of 16 July 2014. The issue appeared again in *X v. The Former Yugoslav Republic of Macedonia* (app. no. 29683/16) Judgment of 17 January 2019.

[78] *Hatton and Others v. The United Kingdom* (app. no. 36022/97), Judgment of 2 October 2001. *Hatton and Others v. The United Kingdom* (app. no. 36022/97), GCh. Judgment of 8 July 2003.

procedural sense to struck a fair balance of interest and thus violated Article 8. Having in view a wide margin of appreciation which the Contracting Parties enjoyed in economic matters, the Grand decided that the procedural activities of the Respondent were covered by the margin of appreciation. Minority of judges in the Grand Chamber dissented attributing much more weight to the right to sleep and narrowing thus the width of the margin of appreciation.

The practice of the ECJ does not disclose flexibility and dynamism concerning the interaction between the margin and the balance of interests which we have seen in the practice of the ECtHR. In the case of *Parliament v. Council* concerning the legality of the Directive on the family reunification, the Parliament raised the issue of the balance of competing interests in the context of the possibility left by Article 8 of the Directive that the Member States defer the unification for two or three years.[79] The ECJ considered that the margin of appreciation, left by Article 8 of the Directive to the Member States, was not contrary to the right to family life, as guaranteed by Article 8 of the ECHR, but motivated by desire that the unification occurred under favorable conditions in the sense that a sponsor had enough time to prepare accommodation conditions.[80] The Council referred to widespread comparative practices which were consonant with Article 8 but the ECJ did not comment the issue.

The issue of the relation of the of balance of interests and the margin of appreciation was touched upon several other cases. Referring to the margin of appreciation which an authority enjoys in assessing whether the principle of proportionality was satisfied, as it was defined in case law of the ECtHR, the ECJ explored proportionality as established in *Connolly*. Mr Connolly, a member of the staff of the Commission made a serious breach of the Staff Regulation by publishing without permission of superiors a book criticizing the work of the EU on monetary policy. Mr Connolly was dismissed and pensioned. The ECJ found that the breach consisted not only of publishing dissent opinion without permission but also of insulting the members of the Commission and challenging the fundamental aspects of Community policies. The breach destroyed thus a mutual trust and disenabled continuation of employment.[81] The judgment does not disclose whether the ECJ considered how Mr. Connolly was affected by the forced pension.

In *Kadi* and *Al Barakaat* the margin of appreciation and in the balance of interests were considered in the context of the restriction of the right to property by personal sanctions of the UN Security Council. Attaching proper weight to the aim of the restriction — global struggle against terrorism — the ECJ did not question the

[79] Case C-540/03, *European Parliament v. Council,* Judgment of 27 June 2006, para 91.
[80] *Ibid*., para 98.
[81] Case C-274/99 P, Bernard Connolly, *op. cit.*, para 62.

importance of averting negative consequences.[82] However, the ECJ found that even the aim of such importance could not have justified disrespect for fundamental rights. The same issue appeared in similar context in *Pye Phyo Tay Za*. As a son of a father who was among leading business figures associated with the Myanmar regime, Mr Pye Phyo Tay Za was under a fund freezing sanction, imposed by the Council. The ECJ observed that a balance had been maintained between the general interest and the applicant's interest in the contested regulation.[83] The general interest was exerting pressure on the Myanmar regime to cease massive violation of human rights. Concerning the applicant's interest, the ECJ was satisfied by the fact that the contested regulation empowered the Member States to authorize the release of certain frozen funds for the satisfaction of basic needs of the applicant and members of his family and by the fact that the applicant was provided with effective remedy.

It seems thus that the ECJ pays less importance to weighting competing interests by investigating whether the fair balance of interests has been struck. Contrary to the ECtHR, the ECJ considers the issue more at the abstract level of legal provision than on the level of specific circumstance of the case at hand.

Conclusions

The margin of appreciation refers to the „room for maneuver" that allows the ECtHR and ECJ to leave a certain area of freedom to national authorities in assessing how to approach complex legal, economic, financial, social, ethical and other issues in different areas of life; whether, and if so, to what extent, to interfere with the rights and freedoms guaranteed by the Convention or other EU and international sources of law under such complex circumstances. This national area of freedom (discretion) will not be examined by the ECtHR and ECJ and will not enter it. However, it is not defined and „does not guarantee a reserved domain of state authorities". The doctrine of the area of free assessment has always been considered by both courts as a „means of determining the relationship between domestic authorities and the courts" depending on the circumstances of each particular case.

The margin of appreciation and judicial activism are part and parcel of the interpretative practice of the ECtHR and ECJ. Where the interpretative sources, including the text of the Convention and Protocols, other international and European law sources, the decisions of the Council of Europe, European Union or other international organizations, the comparative practice, the case law or even scientific

[82] Joined Cases C-402/05 P and C-415/05 P, *Kadi*, Judgment of 3 September 2008, para 361.

[83] Case T-181/08, *Pye Phyo Tay Za*, Judgment of 19 May 2010, para 164.

sources provide the courts with information precise enough to enable it to answer the submitted question, there exists no margin of appreciation, but only exceptionally. The absence of sufficiently precise information, derived from the mentioned sources, leaves the discretionary power of the Contracting States to give their own answers to the question. The absence of sufficiently precise information in one moment does not mean the absence forever. Emerging new comparative practices can narrow the margin. And the action of both courts goes in exactly that direction, as we could see from previous examples from case law.

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Rodoljub Etinski, PhD
Bojan Božović, master

Interakcije polja slobodne procene i pravnih sistema kako su ih uobličili ESLJP i ESP

Velike razlike između pravnog sistema ljudskih prava, ustanovljenog Evropskom konvencijom o ljudskim pravima i pravnog sistema Evropske unije uticale su na dva suda — Evropski sud za ljudska prava i Evropski sud pravde — da drugačije uspostave međudejstvo polja slobodne procene i odgovarajućih pravnih sistema. Polje slobodne procene je inherentno opštim pravnim pravilima i njeme se označava prostor koji pravno pravilo ostavlja adresatu u pogledu izvršavanja obaveza, uživanja prava ili vršenja nadležnosti. Opštost prava je prvi razlog pojave polja slobodne procene. Drugi razlog je načelo supsidijarnosti, prema kome su nacionalni nivoi vlasti pogodniji za ocenjivanje ispravnosti vršenja obaveza od međunarodnog ili evropskog nivoa jer su bolje upoznati sa lokalnim prilikama i potrebama. Dva suda su saglasna u pogledu razloga koji opravdavaju polje slobodne procene. Oni se slažu i u pogledu toga da polje slobodne procene nije lišeno njihovog nadzora. Dva suda kontrolišu da li postoji polje slobodne procene u konkretno slučaju, kolika je njegova širina, da li akt u pitanju spada u to polje i da li je subjekat vršio svoja ovlašćenja u tom polju saglasno nekim drugim pravnim načelima, kao što je, na primer, načelo ravnoteže interesa.

Koncept polja slobodne procene prenet je iz prakse Evropskog suda za ljudska prava u praksu Evropskog suda. Razlike između dva pravna sistema utiču da dva suda različito oblikuju ovaj koncept i da on ima različite funkcije u dva sistema. Evropski sud za ljudska prava izgradio je taj koncept kao veoma fleksibilan tako da postojanje i širina polja zavisi od više faktora među koje spada i evropski konsenzus. Tako, postojanje evropskog konsenzusa o nekom pitanju isključuje ili sužava polje slobodne procene u pogledu tog pitanja. Koncept koji koristi Evropski sud pravde je manje fleksibilan.

Ključne reči: polje slobodne procene, pravična ravnoteža intersa, Evropska konvencija o ljudskim pravima, pravo EU.