Whose Margin of Appreciation? Analyzing Its Significance in European Human Rights Jurisprudence

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Abstract

In legal theory but also in the case law of the European Court of Human Rights, there is an undisputed consensus that the margin of appreciation represents a certain "room for manoeuvre" that the Court grants to national authorities when assessing their behaviour before it is prepared to find that a violation of rights has indeed occurred. Moreover, it is often argued in legal theory that the margin of appreciation is a method of interpreting the Convention. Although these claims are widely accepted and well-founded, in recent years, various authors in legal theory have increasingly put forward assertions that the margin of appreciation has another "hidden" role in the Court's case law, namely, that it is a judicial tool through which the Court increasingly tries to create room for manoeuvre in decision-making. In this paper, the author will build on this theory of the margin of appreciation as a judicial tool aimed at giving the Court room for manoeuvre. The goal of the paper is to test the thesis on the margin of appreciation as a judicial tool aimed at leaving a certain maneuvering space for the Court itself in decision-making, using the method of conceptual analysis and the case study method. Following that, the author will approach the analysis of factors that provide an explanation for why the idea of leaving maneuvering space for the Court itself in decision-making and argumentation may be appealing to the Court.

Keywords: margin of appreciation, freedom of artistic expression, test of proportionality

Whose Margin of Appreciation?

Analyzing Its Significance in European Human Rights Jurisprudence

There seems to be a high degree of consensus in legal theory regarding the basic meaning of the term margin of appreciation, even though its definition has not been extensively elaborated. Numerous authors agree that the margin of appreciation represents a certain freedom in discretionary decision-making that the Court allows, or rather grants to Member States when it exercises its supervisory function in monitoring compliance with the Convention rights, which States have undertaken to respect.

Different authors describe this certain degree of freedom in different ways. Yourow (1996, p. 14) refers to the margin of appreciation as the discretion that is granted to Member States or the room for manoeuvre that the Court gives national authorities when assessing their behaviour before being ready to establish whether a violation of rights has indeed occurred. Similarly, Greer (2006, p. 222) states that it is room for manoeuvre that the Court in Strasbourg is willing to grant to Member States in fulfilling the obligations arising from the Convention. A similar description is provided by Callewaert (2000, as cited in Spielmann, 2012, p. 382) who emphasizes that the margin of appreciation is a judicial tool through which the Court grants Member States a certain degree of autonomy in applying the Convention. Kratochvíl (2011, p. 327), on the other hand, refers to the mentioned freedom as deference provided to States when the Court assesses whether the States have adequately fulfilled their obligations under the Convention.

Perhaps the best definition in this group of authors is provided by O'Boyle and Warbrick (2014, p. 11), who state that "the state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right". An identical claim is made by Brauch (2004, p. 113). Similarly, Takahashi (2002, p. 2) comments that when he talks about the margin of appreciation, he refers to the scope of action that is granted to a member state when it applies the provisions of the Convention at the national level.

Common to all these authors is that they start from the relationship between Articles 1 and 19 of the Convention. Article 1 of the Convention imposes an obligation on member states to guarantee certain rights and freedoms to all persons within their jurisdiction. These rights and freedoms can be implemented by Member States through various concrete measures, just as they can be limited in different ways and for different reasons under the conditions provided for by the Convention, and can also be limited or subject to specific legal procedures for their realization or protection (Matijašević & Alavuk, 2012). The Convention was never intended to create a uniform pan-European legal order in which every state would have identical laws and judicial practices to secure the rights of the Convention. Therefore, the authors of the Convention, as well as the Court itself, are aware that the different legal systems of the numerous European states may fulfil their international obligations under the Convention in different ways. It is here that the importance of Article 19 of the Convention, which regulates the jurisdiction of the Court, comes into play. Article 19 stipulates that the Court is established to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols". The task of the Court is therefore to determine whether the overall conduct of a State is in accordance with internationally established guarantees. The task of the Court is not to examine whether a Member State could have fulfilled its obligation in a better way or what the best way would be to fulfil a certain obligation.

Such a position has been emphasized in the Court's case law, and the Court itself has repeatedly stated that its task is not to determine what would be a better measure (Klass and others v. Germany, 1971/1978, §49) or the best measure (Ireland v. United Kingdom, 1971/1978, §214) to achieve a certain result but to determine whether the measure applied by a Member State is in accordance with the provisions of the Convention.

In that sense, Member States indeed have a certain degree of freedom when choosing different measures to implement for the purpose of realizing or legitimately restricting a certain right under the Convention. This freedom of the Member States, referred to in the Court's case law as the margin of appreciation, naturally arises from the way the control mechanism of the Convention is set up.

Although the main conclusion presented in the previous part of the presentation is not controversial, a certain number of contemporary authors have pointed out in recent decades that the margin of appreciation in the Court's case law has another side. Namely, there are authors who indicate that the Court increasingly uses the margin of appreciation as a kind of argument aimed at justifying its own decision. That is, the Court uses the margin of appreciation as an argumentative technique created to justify its own conclusion regarding the existence or non-existence of a violation.

MacDonald (1993) argues that the margin of appreciation is more of a justification than a method of interpreting the Convention, adding that when the Court says that a particular right has not been violated because the state acted within the margin of appreciation, it does not actually provide the reasons for its decision but simply expresses its conclusion, leaving the observer to guess the real reasons for such a decision (pp. 83–85). Similarly, Rabinder, Hunt, and Demetriou (1999) suggest that the margin of appreciation is a "conclusory label" that serves to conceal the basis on which the Court has reached a specific conclusion as to whether a violation has occurred (pp. 15–22). Kratochvíl (2011, p. 352) perhaps goes the furthest, pointing out that the margin of appreciation creates an atmosphere of a "legal realist paradise" where judges can decide however they wish, ultimately concluding that something is or is not within the margin of appreciation.

The author will subsequently test the thesis that the margin of appreciation increasingly represents a conclusory label or an argumentative technique by which the Court seeks to leave itself room for manoeuvre in the reasoning of its decisions through a practical test based on an analysis of case law.

The goal of the paper is to test the thesis on the margin of appreciation as a judicial tool aimed at leaving a certain maneuvering space for the Court itself in decision-making, using the method of conceptual analysis and the case study method. Following that, the author will approach the analysis of factors that provide an explanation for why the idea of leaving maneuvering space for the Court itself in decision-making and argumentation may be appealing to the Court.

Testing the Thesis

For the purpose of testing the claim that the margin of appreciation is an argument that the Court uses to justify its decision and create some manoeuvring space for itself in argumentation and decision-making, the author selected a group of cases related to freedom of artistic expression. The reasons for choosing this group of cases are primarily practical. Among the vast case law suitable for analyzing the margin of appreciation, the issue of freedom of artistic expression emerges as particularly suitable, firstly because there are relatively few of these cases, and secondly because these cases relate to Article 10 of the Convention, which has been recognized in earlier legal theory as one of the articles with which the Court most frequently resorts to the application of the margin of appreciation (Hutchinson, 1999, p. 644). For better clarity, the cases to be analyzed are divided into several subgroups, depending on the factors that the Court used in determining the width of the margin of appreciation and its impact on the decision of whether there is a violation of freedom of artistic expression.

The Intertwining of the Obligations Act and the Public Procurement Act

In this part, the connections between the norms of the positive contract law and PPA are identified and assessed. Although the provisions of PPA do not contain any express referral to the Obligations Act (Narodna skupština, 2020), they do contain concepts and institutions of civil law that implicitly refer to the application of the rules of OA. For instance, the PPA`s Art. 229 envisages the procedure before "regular courts" for tort claims under PPA, implicitly referring to civil courts to deal with issues of material compensation under routine rules of civil procedure.

In addition to the aforementioned referral, the applicability of the OA norms is also indicated by the compatibility of the definitions from PPA`s Art. 2 with the OA`s contract law concepts. First, in PPA`a Art. 2 the notion of the contract is omitted, implicitly referring to its general meaning given in OA. Likewise, the notions of "procurement of goods, provision of services and performance of works" from para. 2 to 6 of the same article equally apply to OA`s articles that regulate the sale contracts (Art. 454–451), lease (567–599), service (600–629), construction (630–647), transportation (648–685), etc. Furthermore, the terms that define persons involved in public procurement also have their counterparts in OA: the term "customer", which indicates public procurement body from PPa`s Art. 2 para. 1, is also found in OA`s Art. 600 – 647, which regulate service and construction contracts. Finally, this applies to the same term "bidder" from PPA`s Art.2 para. 8 and OA`s Art. 26 – 45 that regulate the conclusion of contracts.

These compatible notions and PPA`s vagueness shape a wider picture of the PPA norms within the contractual context. Some arguments in this respect can be found in OA as well. First, OA`s Art. 23 posits its norms as lex generalis for all matters of obligations law that are not regulated by other positive laws. This relationship lex generalis – *lex specialis* between the OA and PPA might be confirmed on the issue of the nullity and voidability of contracts: while the OA prescribes the general regime, PPA envisages special reasons and special administrative jurisdiction for such acts. In a similar vein, a compelling argument is given regarding damages caused by illegal actions of the contracting authority or other parties: the legislator omitted to tackle this issue in the special regime of PPA, and thus the general rules of OA should apply (Kozar, 2013, pp. 488–489).

From this point of view, the purpose of the PPA would be the establishment of a special contractual regime between public customers and commercial entities, which supplements and modifies the general contract law. Such new regimes are not novelties. For instance, similar special regimes are established between commercial entities in the OA`s Art 25 and Art. 18, para. 2, which intensifies the delivery of goods and services and the liability of commercial entities. This point of view should be equally pertinent to the theoretical classification of public procurement contracts in commercial law. The similarities between the special regime of relations between both commercial entities, on the one hand, and the regime of relations between the public contracting authority and commercial entities, on the other, would be reflected in the factual inequality of the contracting parties and increased civil liability. However, two important differences between these two regimes should not be underestimated. First, it would be wrong to equate public-law customers with commercial entities, because the supremacy of one party in this relationship is not only factual but also of a legal nature. Second, the risks, motives, and decision-making methods of the parties are different: public customers mainly do not act for lucrative purposes, they decide according to strict coercive procedural rules and are not burdened with the risk of failure. On the other hand, private business is focused on profit, enjoys contractual freedom and bears full risk for it. Therefore, the special contractual regime established under PPA should not be subsumed under those prescribed in OA.

The main traits of this special regime might be seen through the application of certain AO provisions. First of all, calls for bids and notices of public customers from numerous PPA provisions can be placed in the context of the general offer, formulary contracts and their general conditions from AO`s Art. 100, 142 and 143. In short, public customers, just like commercial entities that dictate the contents of formulary contracts, are in a superior position because they can limit the contractual freedom of the other party. That is why bidders should be granted concessions that the inferior party should enjoy, such as the interpretation of unclear provisions of the contract in their favour, the right of cancellation due to non-compliance with the purpose of the contract or good business practices, etc. In this vein, the AO stipulations on formulary contracts that treat general terms of business as supplements to a contract might be analogously applicable to customers` public acts. Secondly, in PPA`a Art. 94, the contracting authority is granted a superior position by being the only one authorized to demand from the bidder certain special means of securing the contract under this law, which deviate from the general rules on a down payment, waiver and a contractual penalty in AO`s Art. 79–83 and 270–276. Thirdly, the supremacy of contracting authorities is expressed by their powers for unilateral modification and termination, as well as for annulment of public procurement contracts in PPA`s Art. 154–163, 187 para. 8 and 226. These norms derogate or change the principle of equality between parties in AO`s Art. 103–153 that regulate the invalidity of contracts, bilateral contracts and the effects of contracts, especially regarding the rules of assignment, modification and termination of contracts, including rebus sic stantibus under AO`s Art. 133. According to PPA, the public customer is entitled to unilaterally change the contract if it was agreed upon or if it is necessary for the procurement of additional goods, services or works, due to unforeseen circumstances, change of contracting party, increase in the scope of procurement or replacement of subcontractors. The public customer is also authorized to unilaterally terminate the contract if circumstances arise that would significantly change its content if the contracting party should have been excluded from the procurement procedure, or because of violations of the EU norms. Fourth, the PPA norms enable a new ground for annulment of the public contract and the administrative jurisdiction that complements the applicable AO norms: Under PPA`s Art. 226 para. 2, the Republic Commission is authorized to annul the public procurement contract because of significant violations of PPA`s procedure. Such authority of the administrative organ is narrower in scope than the authority of civil courts to cancel a contract that is contrary to compulsory norms, public order and good customs, under OA`s general rule under Art. 103 para 1. These

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three grounds of cancellation apply to any violation of law and any breach of good faith in public procurement contracting as well.

Three Paintings, a Film, and a Play

Müller v. Switzerland (1984/1988) is the first case in which the Court discussed freedom of artistic expression. Joseph Müller, a well-known Swiss artist, exhibited three large-format paintings at an exhibition in 1981 under the title "Three Nights, Three Paintings". One of the controversial paintings depicted people in a sexual act with animals. On the same day, the competent judge, at the prosecutor's proposal, confiscated the controversial paintings and fined Müller and other organizers of the exhibition 300 Swiss francs for violating the ban on publishing obscene content, which was established to protect public morals.

Dissatisfied with the actions of the Swiss authorities, the artist appealed to the European Court of Human Rights. Assessing the circumstances of the case, the Court stated that the state has a *certain margin of appreciation* in deciding whether there is a social interest in limiting freedom of expression. In addition, the Court stated that the state has a margin of appreciation when assessing whether public morals have been violated in a specific case, provided that the restriction on freedom of expression is proportional to the purpose of protecting morals. The Court then took into account the content of the painting, agreeing with the Swiss authorities that the painting was indeed obscene.

Approaching the test of balancing conflicting interests (freedom of expression of the artist versus the need to protect public morals), the Court took into account several factors (see more about balancing in: Prlja, 2016). It was particularly important for the Court that the exhibition was open to the public, and that the paintings were displayed in an open space without any restrictions on entry. The Court also pointed out that admission was free, and the exhibition could be attended by people of all ages (1984/1988, §36). In light of all this, the Court concluded that due to the way the exhibition was organized (without any restrictions concerning the public), it could create a situation where public morals would be violated because people of average sensitivity could perceive it as deeply offensive. Therefore, the Court considered that the limitation of artistic freedom was in line with the standards of the Convention (1984/1988, §37). As we can see, in this balancing test, the Court gave the state a wide margin of appreciation and ultimately agreed with its ban, mainly because it considered that the degree of endangering public morals in this case was high and concrete, given that everything took place in a public and open space where any member of the public could find themselves.

The same factors were considered by the Court a few years later in the case of *Otto-Preminger-Institute v. Austria* (1987/1994), but this time with a completely opposite final conclusion.

In the case in question, there was a ban on the screening of the film "Council in Heaven", which depicts God as elderly and powerless, Jesus Christ as a mother's son with limited abilities, and the Virgin Mary as a licentious ringleader who, in collusion with the Devil, decides to send syphilis as a plague to Earth. A total of six screenings were planned. At the request of the public prosecutor, the competent court banned the film's screening, and the institute that organized the banned screening appealed to the European Court of Human Rights.

In deciding on this case, the European Court of Human Rights applied a balancing test to determine whether the Member State had exceeded its margin of appreciation when it banned the screenings. In this regard, the Court relied on the same factors as in the Müller case and focused its analysis on issues such as the degree of public endangerment, public access to screenings, age restrictions for those who could attend screenings, and so on. However, compared to the Müller case, the factual situation here was completely different. Namely, the institute as the screening organizer made sure to inform the public about the sensitive content of the film. The film was to be screened in a private cinema, and admission was prohibited for individuals under eighteen years old. In addition, entry to the screening was charged, and a total of six screenings were planned, mostly in late evening hours. Guided by the practice from the Müller case, a conscientious reader could assume that in this particular case, the Court should have concluded that the state had exceeded the margin of appreciation when it restricted artistic freedom by banning the screenings. There was no open-air display of sensitive content, nor could any part of the public "stumble" onto the screening and be exposed to content that could be considered offensive for that part of the public, as was the danger in the Müller case. However, the conscientious reader will be surprised to learn that despite all these precautions taken by the screening organizer, the Court concluded that the screening ban was justified (within the margin of appreciation of the respondent State). The Court justified its position with a blanket statement that the planned screenings were "sufficiently public" to cause offense to the public, which was predominantly of Catholic faith in those parts of Austria (1987/1994, §54).

As we can see, all the factors endangering public morals that the Court found crucial for justifying the restriction of freedom of expression in the Müller case, which were not found now, were replaced by the cliché that the planned screenings were "sufficiently public". Thus, abandoning previously established tests that determine the margin of appreciation of the state and creating a new one that gives the state an even wider margin of appreciation. It seems that the Court used the phrase "sufficiently public to cause offence" to indicate that the mere existence of a publicly announced intention to screen the controversial film and the fact that the public was aware of this intention constitutes an offence to the public, even though no member of the public who could actually be offended will watch the film. This leads to the conclusion that in this specific case, the mere existence of an abstract danger of offending the public, that is, an abstract danger of endangering the object of protection, was sufficient for the Court.

However, even assuming that behind the vague platitude "sufficiently public" lies the Court's intention to protect the object of protection from abstract danger, the Court does not remain faithful to its own case law because, in the case of *Kar and others v. Turkey* (2000/2007), it offers a different solution.

Namely, in the case of *Kar and others v. Turkey*, several Turkish actors were convicted for participating in a play calling for an uprising against the Turkish army because the army was not Muslim enough. In justifying its judgment, which found a violation of freedom of expression, the Court cited two key arguments, including the fact that the play was performed only eight times, that the controversial message was expressed through the medium of theater, and therefore had limited potential to actually affect public security in Turkey (§46).

Thus, the Court was not satisfied with the standard of abstract danger. On the contrary, the Court stated that the risk of endangering public order was not sufficiently real to justify restricting freedom of expression. The Court also assessed the degree of publicity factor but deviated from the "sufficiently public" standard used in the *Otto Preminger* case. The Court cited the fact that the play was performed "only eight times" (i.e., two times more than the total planned screenings of the film in the previous case) and assessed it in such a way as to emphasize that the state had exceeded its margin of appreciation. Moreover, the Court was willing to disregard the fact that the play was performed in eight different cities across Turkey[1] and that the play received significant attention in national media.

It seems that, in this particular case, the Court found a violation of freedom of expression for reasons other than those stated in the judgment, and that it interpreted the margin of appreciation question tendentiously to avoid a situation where a violation of freedom of expression would be established due to the severity of the punishment. In this case, the actors were sentenced to five years in prison. Evidence supporting this claim can be found in later cases related to freedom of artistic expression, where the Court openly stated that it took into account the level and nature of

[1] While in the previous case, six film screenings were planned in a private cinema in a relatively small town in Austria.

the imposed punishment as a factor in assessing the exceeding of the margin of appreciation (see Eon v. France, 2010/2013; Mătăsaru v. Moldova, 2016/2019).

As we can see in the three presented cases, the Court was willing to interpret and use the same factors in different ways, expanding or narrowing the margin of appreciation as needed at that moment, rather than following the standards it had previously established. In other words, where previously established standards and factors did not lead to the conclusion that the Court intended, the Court was willing to disregard them.

Two Monuments

The last two cases to be analyzed in this paper to test the thesis that the Court often uses the margin of appreciation to leave itself some room for manoeuvre in decision-making concern the use of monuments as objects of expression within a performance aimed at criticizing something that the monument itself does not represent.

The more recent of the two is the case of Handzhiyski v. Bulgaria (2014/2019). In this case, the applicant (a local political activist from Bulgaria) believed that his right to freedom of expression was violated because his political-artistic performance was labelled as vandalism by the national authorities, and he was fined in a misdemeanour procedure for placing a Santa Claus hat and a gift bag with the word "resignations" written on it on the monument of the founder of the Bulgarian Social Democratic Party.[2]

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[2] Namely, during the anti-government demonstrations that shook Bulgaria (around Christmas time), the monument to the founder of the Bulgarian Social Democratic Party (erected during communism) appeared one morning painted in red and white, resembling Santa Claus. The applicant took advantage of this situation, went to the monument, put a Santa Claus hat on the head of the monument, and placed a bag in front of it with the word "Resignations" written on it. Alluding to the fact that people want the ruling party's resignations for Christmas, a party that is the successor to the Social Democratic Party whose founder is embodied in the monument in question.

In conducting the proportionality test, the European Court of Human Rights took into account the following factors: that the applicant was not violent nor did he damage the monument, that the performance was aimed at criticizing the authorities, and that the performance was not intended to disparage what the monument represents (§51–52). The Court concluded that, considering the margin of appreciation enjoyed by the Member State, the punishment of the applicant constitutes a violation of his freedom of expression.

Similar circumstances occurred in the case of *Sinkova v. Ukraine* (2011/2018), in which the applicant was given a suspended sentence in a criminal proceeding because she and her art group, as a protest against irrational gas consumption in Ukraine, used the eternal flame of the "Eternal Glory" monument to fallen fighters in the struggle against fascism to fry eggs.

Just like in the Bulgarian case, the applicant was not violent, nor did she damage the monument. Her performance was aimed at criticizing the Ukrainian authorities and did not involve disparaging what the monument itself represents. However, unlike the Santa Claus case where the Court found that the punishment of the applicant in a misdemeanour proceeding was an unjustified restriction of freedom of expression, in this case, the Court found that punishing the Ukrainian artist in a criminal proceeding did not constitute a violation of freedom of expression. It is interesting to note that in the Sinkova case, the Court did not address the issue of the width of the margin of appreciation, nor did it mention that instrument even once.

Why Does the Court Need Room for Manoeuvre in Decision-Making?

To answer this question, it is necessary to understand the position of the judge as a reasonable human being approaching the act of judgment, but also the position of the Court as an international judicial body that functions in a certain legal and political context. As stated in the abstract, the author will use the conclusion to provide arguments that the margin of appreciation is a judicial tool through which the court increasingly tries to create room for manoeuvre in decision-making, which requires the conclusion to be divided into two segments dealing with the personal and institutional context of decision-making.

On the Personal Context of Decision-Making

The last two cases (which relate to two different decisions regarding the treatment of two different monuments) were intentionally placed in the paper immediately before the part where the author deals with possible factors influencing the Court's need to create manoeuvring space for itself when making a decision. These two cases represent a kind of psychological test "planted" for the careful reader. The author invites the reader to put aside their legal identity regarding these two cases and turn to introspection and answer for themselves the question (without legal analysis, but intuitively) whether they consider the Court's decisions in these two cases to be fair? Should both actions be treated the same way? Was it justified to punish the Bulgarian activist for putting a Santa Claus hat on the monument to the founder of the Social Democratic Party? Would it be justified if frying eggs on the eternal flame for freedom fighters remained unpunished? The author believes that most readers will intuitively feel that frying eggs on the eternal flame is a "greater sin‟ than placing a Santa Claus hat on the monument to the Bulgarian politician. The author of this paper feels the same way. Why do we share this feeling when the mathematical addition of relevant factors suggests that the cases are similar enough? It seems we do so because our personal moral understanding perceives the monument to the fallen fighters in the battle against fascism as a greater "sanctity" than the monument to the politician. If we have such a feeling, it is logical that the judges have it as well. And if they do, isn't it natural for them to act on it?

Particularly, one should not lose sight of the fact that judges themselves, as individuals, are political actors who are very aware of their political role, in the sense that they also have political preferences regarding what human rights should look like (Abbott et al., 2000, p. 44). They have their sense of justice, their ethical and moral views that come into play in the judicial decision-making process. In certain borderline situations, the Court's decision will depend on the judges' personal feeling of how it is necessary to rule. Evidence of such court behaviour can be found in the case of *Guzzardi v. Italy*. In that case, the Court explicitly stated in the reasoning of the judgment that it sometimes faces a situation where classifying a question into one of several possible categories, which then determines the judgment of the matter, is not an easy task, especially in borderline cases where there seem to be several equally reasonable solutions and the choice between them is a matter of pure opinion (Guzzardi v. Italy, 1976/1980, §93).

Indeed, this case did not deal with freedom of artistic expression, but case law shows (as our hidden psychological experiment suggests) that the Court faces borderline questions when deciding on freedom of artistic expression as well. In such borderline situations, judges make their decisions guided not only by legal logic and methods of legal interpretation *but also by their understanding of what is morally or socially justified*.

Thus, the decision-making process on sensitive topics should presuppose not only an abstract formal legal system expressed through the functioning of the institution but also the role of the judge as an individual who, in their actions, represents a reasonable being with their own political, ethical, and social views. The judge, as a mediator between individual moral views and general interests, should represent the resultant of these relationships, which is the refuge and the final result of the process itself, the very act of judging. Behind every judgment, therefore, stands the assumption of the act of judgment carried out by an individual, *a rational being* capable of transcending the particularity of individual inclinations, as well as the utilitarianism of group specificity, and making a decision that would satisfy the sense of the legal process and practice.

Therefore, the act of balancing conflicting rights and interests between the individual and the community, which the Court as an institution (see Christoffersen, 2015) performs when deciding whether the restriction of a right was proportional to the legitimate purpose for which it is restricted, is preceded by an individual test of balancing that judges, as reasonable beings, perform according to their legal, ethical, and social understandings.

This individual act of judgment is in fact a mental process in the judge's mind that precedes decision-making, and as such, it usually remains hidden from the public. The public receives the judgment with the reasoning provided by the Court as an institution and a collective of all judges in the majority who made the decision. Only exceptionally can we witness this individual decision-making process when a judge provides their separate opinion alongside the joint judgment to the public.

Therefore, in the first place, the judges themselves as social beings, in their act of individual judgment, leave room for their own social, moral, and other views that influence the formation of the final assessment of the existence or non-existence of a violation or the width of the margin of appreciation.

On the Institutional Context of Decision-making

Just as an individual judge functions in a certain social and political context, so does the Court as an institution. In numerous cases, the Court has emphasized that the Convention is *a living instrument* that must be interpreted in light of today's conditions, and that the Court cannot fail to take into account the development of events on a particular issue related to human rights, nor can it ignore the generally accepted standards that have developed in the meantime. The Court first used this concept of the Convention as a living instrument in the case of *Tyrer v. United Kingdom* (1972/1978). Thus, the Court has shown that it is sensitive to the social context in which it fulfils its role and cannot disregard objectively existing social factors (and the change of these factors) as they condition the problems put before the Court and ultimately require the Court to make some sort of decision.

Just as it is aware of its social role, the Court is also very aware of its political position. It should not be overlooked that the European Court of Human Rights is an international judicial body established by an international treaty to which states have acceded based on free consent. It does not have a legitimate monopoly on physical coercion behind it, and it cannot force states to obey its decisions factually. Its decisions are sanctioned only by political means within the Council of Europe. The Court is, therefore, in a delicate position that is not purely legal but is also political. It must be aware of the political arrangement within which it operates.

The political nature of the Court's action is manifested on several levels. Firstly, the Court operates in the field of international law, which is inevitably linked to politics, as every international legal argument is, among other things, a political argument (Koskenniemi, 2009, p. 8). In making decisions, especially those dealing with sensitive issues, the Court dealing with the protection of human rights must constantly weigh between two political values. On the one hand, it must justify the trust of the states that have transferred part of their jurisdiction to it, while at the same time, it must justify the trust of the public for whose rights protection it was founded.

In this balancing act, the Court necessarily needs certain room for manoeuvre when making decisions. The complexity of the issues faced by the Court, the number of "borderline" questions (which can be resolved in one way or another), the need to justify the trust of both states and individuals... All these factors, in conjunction with the social and political arrangement in which the court as an institution operates, and with the social and moral values of the judges themselves as social beings, make many decisions neither purely legal nor strictly “mathematical” and often based not only on legal arguments but also on the moral and social views of the actors involved in decision-making.

However, as the Court cannot impose its morality or its idea of the political or social arrangement that a state should follow, nor can it publicly admit in its judgment that it was guided by moral arguments at the expense or in the absence of legal ones, the Court is forced to somehow legally explain and argue its decisions motivated by these

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factors. The Court does precisely that by skillfully using the margin of appreciation, which in recent times in case law has increasingly become an argumentative technique aimed at leaving the Court itself freedom in legal argumentation.

Conclusion

I began the paper with a thesis that has emerged in recent legal theory, according to which the margin of appreciation has a dual role in the case law of the European Court of Human Rights: the first role is to grant member states a certain space for manoeuvre in fulfilling their obligations under the Convention; the second "hidden" role of the margin of appreciation lies in the fact that the Court itself creates maneuvering space for itself by applying the margin of appreciation.

To test this thesis, a group of cases related to freedom of artistic expression was selected. Applying the case study method, the author used specific cases to exemplify the Court's readiness to split and reshape various factors that influence the margin of appreciation, often attributing a completely opposite meaning to that which these factors played in some earlier cases. In this way, the Court expands or narrows the margin of appreciation not only for the Member State but also for itself in order to leave room for manoeuvring space for its argumentation within such a reshaped (sometimes even tendentious) margin of appreciation, leading to a conclusion acceptable to the Court itself. Sometimes it is crucial for the Court that the expression was openly public (Muller and others v. Switzerland, 1984/1988), and sometimes the Court is satisfied with the expression being "sufficiently public" (Otto-Preminger-Institut v. Austria, 1978/1994). The Court sometimes finds the existence of abstract danger sufficient to consider the expression as potentially harmful to the object of protection (1978/1994), and when it does not suit its purposes, insists that the danger of harming the object of protection must be real enough (Kar and others v. Turkey, 2000/2007).

In the end, it was necessary to explain the reasons the Court needs to create maneuvering space for itself in decision-making. Among many possible reasons, the author emphasized and justified those he believes to be crucial. In this sense, the paper highlighted that both the personal and institutional context in which judges and the Court operate naturally imply that social, political, and even moral factors, which are not always legally definable, must be taken into account when making a decision following a balancing test. For this reason, hiding these factors behind the idea of the margin of appreciation appears as a useful argumentative technique in the Court's practice.

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Čije polje slobodne procene? Analiza njenog značaja u evropskoj praksi u oblasti ljudskih prava

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Sažetak

U pravnoj teoriji ali i praksi Evropskog suda za ljudska prava postoji nenarušen konsenzus prema kome polje slobodne procene predstavlja određeni „manevarski prostor" koji Sud daje nacionalnim vlastima prilikom procene njihovog ponašanja pre nego što je spreman da utvrdi da je do povrede prava zaista i došlo. Takođe, najčešće se u teoriji sreću i tvrdnje prema kojima je polje slobodne procene metod tumačenja Konvencije. Mada su ove tvrdnje sa razlogom rasprostranjene, u poslednje vreme u pravnoj teoriji sve češće se sreću i tvrdnje različitih autora prema kojima polje slobodne procene ima još jednu „skrivenu" ulogu u praksi Suda, to jest da je po sredi sudski alat kojim sud sve češće pokušava da samom sebi stvori manevarski prostor u odlučivanju. U ovom radu, autor će se nadovezati na tezu o polju slobodne procene kao sudijskom alatu koji je usmeren na davanje manevarskog prostora samom sudu. Cilj rada je da se metodom konceptualne analize i metodom studije slučaja testira teza o polju slobodne procene kao sudijskom alatu usmerenom na to da se samom sudu ostavi određeni manevarski prostor u odlučivanju. Nakon toga, autor će pristupiti analizi faktora koji pružaju objašnjenje iz kog razloga sudu može biti primamljiva ideja da samom sebi ostavi manevarski prostor u odlučivanju i argumentaciji.

Ključne reči: polje slobodne procene, sloboda umetničkog izražavanja, test proporcionalnosti