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**Polish attitude/contribution to the concept of the margin of appreciation**  
**Summary**

The concept or doctrine of the margin of appreciation is being considered as one of the most controversial instruments used in the interpretation and application of the European Convention on Human Rights and Fundamental Freedoms of 1950. Reviews about this doctrine range from affirming to the extremely critical, calling for its elimination from the Strasbourg jurisprudence. At the same time, as it is generally accepted, "the margin of appreciation underlies almost all major issues that appear before the European Court of Human Rights, regardless of whether the judgments mention it clearly or not" (in: A. Wiśniewski). This concept therefore remains a demanding but, at the same time, increasingly more often undertaken subject within the framework of studies devoted to the analysis of Strasbourg jurisprudence, which tendency is also being reflected in the growing interest in the subject of *margin* among Polish authors.

These insights, encountering the dual nature of the margin of appreciation, are also being mirrored in the works of the representatives of Polish jurisprudential doctrine. The theoreticians, in growing numbers addressing the issue of the doctrine of margin of appreciation, while recognizing rather unanimously the necessity of *margin* as a tool to ensure a degree of autonomy in the exercise of the powers of the authorities of the States - Parties to the Convention, at the same time indicate specific problems within its application.

Consequently, attention can be drawn to the three areas of problems related to the application of the doctrine of margin of appreciation, indicated by Polish law scholars; namely: 1) a possible contradiction of the doctrine with other principles underlying enforcement of the provisions guaranteed by the Convention; 2) its possible conflict with other methods of interpretation or judicial instruments applied by the Court, 3) the ambiguity of the margin of assessment manifesting itself in the various functions the doctrine may perform .

1) With regard to the first concern it could be pointed out that the doctrine of the margin of appreciation, considered as stemming directly from the subsidiarity and the situationality principles, may collide with the assumption about the universality of the human rights protection. Some of the authors remark that this fear is interlinked with the fact that by

applying the doctrine of margin of appreciation, the Strasbourg authorities consent to its possible result of varying the effect of enforcement of the same obligation in different states bound by the Convention. The emergence of the so called "double standards" of human rights protection is supposed to originate from the lack of clear and consistent criteria of applying the doctrine of *margin* (R. Mizerski). On the other hand, remaining scholars concentrate upon enlisting the conditions that need to be taken into consideration to grant the legitimate use of the doctrine of *margin*. These conditions include the nature of the rights that are subject to the restriction, the character of the obligation of the state, the existence of the so called legitimate aims of the restriction, the social context of the restriction, the existence of legislative consent within the states-parties to the Convention or of the common way of cultural functioning of the right or freedom under scrutiny (L. Garlicki).

2) The doctrine of margin of appreciation may also conflict not only with other principles underlying the conventional system of human rights protection, but also with other methods of interpretation used by the ECtHR. As it is being indicated by some of the authors, the doctrine of the margin of appreciation, recognized as a so-called specific method of interpretation of the Convention (as one of the extensions of the method of teleological interpretation), occupies in principle an antagonistic position against evolutionary and autonomous methods of interpretation. While its application is primarily based on the absence of a European consensus in the case (the common thread in most of the legal systems), the two other methods essentially rely on such a consensus. (C. Mik, A. Wiśniewski). The attention could also be drawn to the fact that in the face of the first argument (1) it could be validly suspected that the use of the doctrine could substantially modify the test of proportionality, and thus, impair the existence of the so-called fair balance that is being struck by the Court while balancing conflicting goods.

3) The Polish doctrine also raises doubts as to the nature of the margin of appreciation itself, namely whether the margin should be assigned as the interpretation method used in the ECtHR jurisprudence practice, or whether it is a different type of judicial instrument used by the Court. Some doubt whether the Court really "determines the meaning of a legal provision", because it exercises a supervisory role, that is as a "final" interpreter. Otherwise, the margin of assessment would then be a certain approach to the implementation and interpretation of the European Convention, or an assessment of the compliance with specific rules (...). Such an approach would mean that the margin is the so-called *review doctrine*, used by the ECtHR to determine and justify the intensity of the control considered appropriate in the case referred (Kapelańska-Pręgowska).

In this context it is also being noted that although the doctrine concerns the judicial determination of the scope of acceptable discretion in a given case, the concept of margin of appreciation remains in itself rather a manifestation of ideology of judicial self-restraint than

the ideology of judicial activity (judicial activism) that is conducive to evolutionary interpretation.

Therefore along with the view of the possible ambiguity of the margin of appreciation understood in the above way, the scholars indicate the various functions that the doctrine began to fulfill in the course of its development. For apart from admitting discretion, it also has a modifying role of the ECtHR's supervision over the implementation of obligations under the Convention and also serves a function of enabling the ECtHR to flexibly define its role in the process of applying the Convention at the interface between the competences of the Court and the power of sovereign States - Parties to the ECHR. Among the other functions of the concept of *margin* its function as an expression of respect towards result of the elections within the framework of democratic processes running in a given country and its function of respecting pluralism of values can also be perceived. However, it occurs that the *margin* ... also fulfills a rhetorical façade function as a substitute for authentic argumentation, justifying the ECHR's lack of unambiguous stances in controversial matters.

Finally, it should be noted that Polish legal theorists generally do not question the indispensable character of the margin of appreciation in the context of implementing and concretizing the Convention's provisions, regarding the specific character of the Convention, which as a source of obligations for its parties, guarantees rights to the third parties, such as private entities (subsidiarity principle) . Not without significance is also the fact that the national authorities are in a privileged position as to the assessment of national conditions for the implementation of the Convention's provisions ( doctrine of restraint ). Some (e.g. L. Garlicki and A. Wiśniewski) also stress that another important role of the *margin* is to take into account the pluralism of values within societies encompassed by Conventional mechanisms of human rights protection. Ultimately, for those reasons the representatives of the Polish doctrine, recognizing the aforementioned threats of the doctrine of the margin of appreciation, refrain at prescribing caution in its application to prevent its function as a merely rhetorical figure justifying excessive interference with the rights guaranteed by the Convention. Such a preventive function, that could allow the proper application of the margin of assessment, could be served by the two following measures: i.e. limiting the use of doctrine only to the countries with democratic legal system and the exercise of the state's discretion in good faith.

Consequently, the above-mentioned conclusions justify the turn towards analyzing the case-law. The outlook on the enforcement of the doctrine could thus verify the legitimacy of the objections raised against the doctrine. Appeals to (what should be emphasized) differently understood margin of assessment appear first of all in the judgments of administrative courts, the tendency that seems to be in accordance with the historical origins of the doctrine in the

so-called administrative recognition. The common courts also refer to the margin of assessment, albeit to a lesser extent.

Therefore, the doctrine of the margin of appreciation is first of all evoked by courts while assessing the actions of the state authorities in the situation of the so-called decision-making freedom (*luzu decyzyjnego*), i.e. situations, in which a legal provision permits the classification of a given factual state based on certain criteria of an evaluative or gradual nature.

It is also assumed that the margin results from the legal regulation itself and that acting under conditions of a broad, certain or explicit margin of assessment is an expression of the competence conferred to that body. There is also a tendency to admit the body a greater margin of appreciation when, in the opinion of the court, the given provision does not raise interpretative doubts or if there are grounds for applying the limitation clause in relation to a given right. Accordingly, the above means that the limitation of a given right met the court's test proportionality. Operating in the conditions of the margin of assessment is therefore not arbitrary in the sense that the criteria indicated by the authority in the justification of its choice of measure within the situation of the margin of assessment (permitted by the legal provision) are subject to the *ex post* verification.

However, the main issues in which the courts refer directly to the doctrine of the margin of assessment developed on the basis of the case law of the European Court of Human Rights are matters concerning social and economic rights, and thus concerning the positive obligations of the state towards citizens. What is more, the courts also evoke the margin of assessment in the cases of decoding the concept of interest, both legal and public. The margin of assessment also occurs during the instance review, when the higher court determines the discretionary character of a given factual or legal decision of a lower court, for example in the area of the assessment of evidence. The margin of assessment is also referred to as a justification for actions conditioned by factors of an evaluable nature of other entities than state authorities, e.g. to medical qualifications or to employers in terms of presenting the reasons for terminating an employment relationship that are not being related to an employee.

In the jurisprudence of the Constitutional Tribunal, the appeal to the margin of assessment is (obviously) being made in the case of interpreting the constitutional provisions; therefore when assessing whether the provision of the Constitution which grants the legislature a discretion as to the choice of measures for its implementation, the Tribunal only states whether the margin was exceeded or not in a given situation. This means the assessment as to whether the action (restriction of any law or good, primarily for the sake of public interest) in the conditions of this freedom was lawful (constitutional). In most of the cases, the Tribunal refers to the *margin* primarily by evoking the understanding of the concept of margin of appreciation developed by the ECtHR. What is more, the Tribunal much more often than administrative and common courts, while recalling the case law of the ECtHR, states ultimately that even if the given country/authority is granted with a certain margin of

appreciation in similar cases, that *margin* was exceeded in a specific case considered, usually alongside referring to the disproportionate nature of the restriction made, thus by pre-weighting protected goods.

Summing up the nature of the judicature of Polish courts, the following tendencies might be pointed out: 1) the width of the court's discretion granted to state authorities depends on the clarity of the provisions (whether or not there are interpretational doubts); 2) the margin of assessment functions in jurisprudence as an ambiguous concept, meaning once the doctrine of the national authorities' actions assessment in the conditions of a certain freedom or discretion in applying the Convention – at other times denoting the concept of margin of appreciation, understood as a construction which allows the ECtHR to take this discretion into account when supervising the implementation by States Parties of their obligations under the Convention; sometimes the margin functions as a collision rule, and sometimes as a purely rhetorical figure; 3) the margin of appreciation understood as the discretion of the authorities is recognized in Polish jurisprudence as delineated by the legal provisions themselves; 4) in the end, the tendency of Polish courts (that was visible primarily at the initial stages of applying the doctrine of the margin of appreciation by the ECtHR) to invoke the margin of appreciation when justifying granting the state authorities greater discretion in exercising their competences.