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MARGIN OF APPRECIATION DOCTRINE AND ITS IMPACT ON INTERPRETATION OF LAW

The article deals with the doctrine of margin of appreciation of a state, developed by the European Court of Human Rights. It aims at providing theoretical background on the origin, scope of application and limits of margin of appreciation as well as its impact on human rights interpretation within the nation legal order.

The special attention is paid to the role of margin of appreciation doctrine in establishing the balance between sovereignty of the member states and supervisory function of the Strasbourg authorities, as well as its application as a principle of interpretation of difference categories of conventional rights and the rules used by the Court to evaluate the limits of margin of appreciation of domestic authorities. The conclusions of the article are grounded and illustrated by the case-law of the European Court of Human Rights.

Key words: human rights, interpretation of law, principles of interpretation, margin of appreciation doctrine, the European Court of Human Rights

The European choice of every country is measured, first of all, by its readiness and ability to ensure the compliance with European human rights standards recognised as one three pillars of the European values. Such standards are formed in case-law of the European Court of Human Rights resulted of its interpretation and application of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "the Convention"). According to M. de Salvia, the innovative element of the Convention is the establishment of "European public order outside the framework of national systems"[1], which is common for "European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law" (see Preamble of the Convention[2]).

At the same time, while interpreting human rights guaranteed by the Convention, the European Court of Human Rights proceeds from the key concepts and doctrinal approaches, developed by its case-law, where the "margin of appreciation" doctrine is among the most essential. Under the Ukrainian legislation the case-law of the Court shall be applied by national courts as the source of law (see the Laws of Ukraine "On implementation of judgments and application of the case-law of the European Court of Human Rights", 23.02.2006 (Art. 17), "On Restoring Confidence in the Judiciary in Ukraine", 08.04.2014 (Art. 3), "On governmental cleansing" (Lustration Law), 16.09.2014 (par. 7 (5) Art. 3). Meanwhile there is a lack of studies of such concepts and doctrines in Ukrainian legal science that complicates their application in the national legal system.

At the same time this issue is deeply explored in European theoretical and practical jurisprudence (M. O'Boyle, J. McBride, D. Gomien, D. Harris, R. Macdonald, H. Petzold, M. de Salvia, L. Zwaak, and others). Certain Ukraine researchers have highlighted the actuality of this field of studies in their publications (among them D. Hudyma, P. Rabinovych, S. Fedyk, G. Khrystova, S. Shevchuk etc). Recently N. Sevostianova has published one of the first Ukrainian articles fully dedicated to the problematic aspects of practical application of margin of appreciation doctrine in practice of the European Court of Human Rights[3]. So this article aims at providing more theoretical background on the origin, scope of application and limits of margin of appreciation doctrine as well as its impact on human rights interpretation within the

[1] Сальвиа, М. (2004). *Прецеденты Европейского Суда по правам человека. Руководящие принципы судебной практики, относящейся к Европейской конвенции о защите прав человека и основных свобод. Судебная практика с 1960 по 2002 г.* Санкт-Петербург: Издательство «Юридический центр Пресс», 12.

2 *Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) CETS No.: 005 <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT= 005&CL=ENG> (2015, July, 15).

[3] Севостьянова, Н. (2015). Проблемні аспекти практичного застосування доктрини свободи розсуду у практиці Європейського суду з прав людини. *European Political and Law Discourse, Vol. 2, Iss. 3.*

nation legal order.

In the sense of law of the Convention the margin of appreciation is used to indicate the principle of granting a certain freedom of domestic discretion. It means interpretation by the European Court of Human Rights of provisions of the European Convention in a particular type of cases taking into account a certain discretion granted to judicial authorities and officials of the member states under the Convention for their understanding and application of conventional provisions in order to ensure proper conditions for realisation and protection of human rights and freedoms, and achieve a balance between them (human rights and freedoms) and national interests[1].

The margin of appreciation of the states in regard to intervention into human rights is called a direct consequence of the principle of *subsidiarity* as one of the grounds for functioning of the European Court of Human Rights; provided that a minimum standard of human rights is observed, domestic authorities may enjoy a certain margin of discretion to find the means for intervention into human rights and to evaluate the consequences. The margin of appreciation doctrine has emerged as an attempt to find a balance between human rights protection by domestic authorities and uniform application of the Convention. Margin of appreciation plays the role of a modulator in relations between the domestic judicial system and international courts. In broad sense margin of appreciation gives the state discretion to choose the tactics of behaviour in relation to the rights envisaged by the Convention. Margin of appreciation gives a possibility to establish a *balance* between sovereignty of the member states and supervisory function of the Strasbourg authorities[2].

In this regard S. Fedyk stresses, the margin of appreciation doctrine somehow moderates the views of advocates of so called "strong sovereignty" who believe that the Court may not intervene into the sovereignty of the member states. The author explains that the Court's judgments in their substantive part are the core form of response of the Council of Europe's supervisory mechanism to the state's "improper" behaviour. As in practice it is impossible not to enforce these judgments due to political consequences of such step that would be adverse for the state, serious intervention into the sovereignty of the member states is obvious. Such intervention is not a violation of legal regulations, because the holder of sovereignty has previously agreed to voluntarily enforce the European Court's decisions, however, from the point of view of supporters of the absolute national independence such coercion is clearly inadmissible, as it constitutes a direct intervention into the state's domestic policy. Taking into account the significant role played in political life by advocates of "strong sovereignty" in the member states of the Council of Europe and specific historic conditions in which the Convention was signed, its authors envisaged a broad discretion of the domestic authorities for application of specific provisions of the instrument[3].

Summing up, P. Rabinovych and S. Fedyk highlight, that the margin of appreciation doctrine has emerged from the theory of *double jurisdiction*, according to which certain legal issues fall under two systems of law, domestic and international. Such approach to the operation of the domestic judicial and other authorities in the best way reconciles the effect of domestic legislation and provisions of international law. In view of this, international authorities perform a kind of a supervisory function with regard to decisions made by domestic authorities. This function is targeted to control the expediency and quality of application of international legislation by domestic authorities and the compliance of the provisions applied by domestic authorities to generally recognised international standards[4]. So the need for this doctrine is explained by the supranational role of the Council of Europe institutes; it is believed that those who adopted and reviewed the judgment on the national level can have a better vision of special aspects and requirements of the specific situation. Therefore, the doctrine is in fact equivalent to the presumption of compliance with the commitments contained in the Convention, and its potential effect is intended to

1 Рабінович, П.М., Федик, С.Є. (2004). *Особливості тлумачення юридичних норм щодо прав людини (за матеріалами практики Європейського суду з прав людини)*. Львів: Астрон, 40.

2 Аристова, К.С. (2012). *Принцип субсидиарности в деятельности Европейского суда по правам человека.* Москва, 10.

3 Федик, С. (2001). Доктрина меж національного (внутрішнього) оцінювання Європейської Конвенції про захист прав та основних свобод людини як вагомий чинник її тлумачення. *Вісник Львівського університету*, *36 (Серія Юридична).* <http://www.lawyer.org.ua/?w=p&i=67&d=364> (2015, July, 15).

4 Рабінович, П.М., Федик, С.Є. (2004). *Особливості тлумачення юридичних норм щодо прав людини (за матеріалами практики Європейського суду з прав людини)*. Львів: Астрон, 38.

reduce the burden of the proportionality test[1].

According to S. Shevchuk, margin of appreciation is similar to *the "political question" doctrine*, but in terms of operation of international jurisdictional authorities. To a certain extent the state is better placed than the European Court of Human Rights with regard to regulation of issues related to these rights and freedoms. This doctrine is also seen as a "space for a manoeuvre", "breathing sphere" or a "doctrine of self-restriction", "a borderline at which an international supervisory authority grants free choice of law adoption and enforcement to a member state" [2].

S. Shevchuk points at two important *elements of the margin of appreciation* doctrine defined by Prof. Y. Shany: 1) *respect by judges.* International courts must respect domestic authorities and their operation related to implementation of international commitments, which is carried out with a certain degree of discretion. Therefore, international courts must not substitute these authorities and should refrain (where possible) from reviewing their judgments, whole demonstrating determination for self-restriction; 2) *regulatory flexibility.* Provisions of international law, the application of which is governed by this doctrine, are estimating or unclear, regulate the behaviour of entities minimally, and leave a significant "sphere of legitimacy" in which the states are free to make decisions[3].

Originally the margin of appreciation doctrine is not explicitly defined in the Convention, or even in the documents which envisage the process of its discussion and adoption ("preparatory documents"), it was "discovered" by the Court in process of evaluative (expanded) interpretation of the Convention. For the first time the Court mentioned the discretion of domestic authorities in its decision in *Greece v. the United Kingdom* (26.09.1958)[4], which concerned human rights violations in Cyprus; in its report the Commission stated that "the government is in a better position than the Commission to assess the facts and act in the most acceptable manner to prevent the threat to the nation's existence. The Commission does not recognise the presumption of necessity of the measures taken by the government, although a certain margin of appreciation must be granted to it". The Commission defined the margin of appreciation as *the state's freedom to choose the means required to respond to the relevant situation*.

This doctrine has seen further development in the judgment in *Handyside v. the UK* (07.12.1976), where the Court stated as follows: "Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court…"[5].

The Court refers to margin of appreciation as to a *principle of interpretation* in case of some conventional rights. In its report on "*Greece v. the United Kingdom"*, the European Commission on Human Rights divided the conventional rights into three categories:

1) the first category includes the most strictly guaranteed rights, such as right to life (Article 2), prohibition of torture and inhuman or degrading treatment (Article 3), prohibition of slavery and forced labour (para. 1 of Article 4), and the principle of "no punishment without law" (Article 7). The Court does not apply the margin of appreciation to these rights established by the Convention. For example, the Court has defined exceptionally strict rules of implementation for Article 3: the state not only enjoys no margin of appreciation, but also must take all possible steps to prevent tortures or inhuman or degrading treatment;

2) the second category of rights includes such rights as right to respect to private and family life and

1 Федик, С. (2001). Доктрина меж національного (внутрішнього) оцінювання Європейської Конвенції про захист прав та основних свобод людини як вагомий чинник її тлумачення. *Вісник Львівського університету*, *36 (Серія Юридична).* <http://www.lawyer.org.ua/?w=p&i=67&d=364> (2015, July, 15).

2 Шевчук, С. (2007). *Судова правотворчість: світовий досвід і перспективи в Україні*. Київ: Реферат, 194.

3 Шевчук, С. (2007). *Судова правотворчість: світовий досвід і перспективи в Україні*. Київ: Реферат, 194.

4 *Greece v. the United Kingdom,* 26 September 1958, no. 176/56.

5 *Handyside v. the United Kingdom* 07 December 1976, no. 5493/72, § 48, 49.

personal correspondence (Article 8), freedom of religion (Article 9), freedom of expression (Article 10), and freedom of meetings and associations (Article 11). For these rights, margin of appreciation is possible within the frameworks established by the general conventional standard;

3) the third category consists of the rights for which the margin of appreciation may be granted only on condition of compliance with the requirements defined in Article 15 of the Convention[1]. According to P. Rabinovych and S. Fedyk, analysis of the European Court's case law gives grounds to believe that the concept of margin of appreciation may be applied if cases concern Articles 15, 14, 10 and 8 of the Convention, and Article 1 of Protocol No. 1 thereto[2].

Consequently, researchers believe that a significant share of uncertainty and relativity existing in the margin of appreciation doctrine *makes it impossible to explicitly determine the cases in which the court may apply it*. K. Degtiariov describes methods of classification of such cases offered by the commentators of the Convention (P. Mahoney), in particular, seven possible criteria that determine the scope for domestic margin of appreciation: 1) *existence or non-existence of common approach in democratic society*: this criterion is aimed to determine the existence of the European consensus; 2) *nature of the right guaranteed by the Convention (*this criterion was indicated by the Commission on Human Rights in its above mentioned report on *Greece v. the United Kingdom);* 3) *nature of the state's obligation;* 4) *purpose* for which the states in a certain way restrict the rights guaranteed by the Convention. For example, the Court traditionally allows a wide margin of appreciation with respect to the protection of morals; 5) *type of activity restricted.* When restricting an activity that impacts national security (threat of terrorism), the states may act in a wider framework than in other cases; 6) accompanying circumstances; 6) related circumstances; 7) direct text of the Convention[3].

Furthermore, textual pre-conditions for application of the principle of margin of appreciation include paragraph 1 of Article 35 of the Convention, which defines that "the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken". J. McBride believes that this Article stipulates the secondary "supervisory" nature of the Court's functions. Such provisions is absolutely expedient, because it not only protects the Court from an excessive amount of requests and allows it to focus on key aspects emphasised during the trial by domestic authorities, but it also encourages state law enforcement authorities to widely use the provisions of the Convention[4].

The doctrine has started to play a more active role since the adoption of Protocol No. 15 to the Convention in 2013. Article 1 of Protocol No.15 says: "At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention"[5].

Protocol No. 16 to the Convention approved by the Committee of Ministers of the Council of Europe establishes rules that are supplementary to the Convention without amending it. According to D. Hudyma, it develops the principle of a margin of appreciation of states "under supervision" of the Court, because it entitles highest courts and tribunals of contracting parties to request the Court, in the language of proceedings in domestic courts, to give advisory opinions on "*questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto*"

1 Дегтярев, К. Свобода усмотрения государств в прецедентном праве Европейского Суда по Правам Человека <http://ilia.humanrightshouse.org/pluginfile.php/1374/ mod_resource/content/1/ Svoboda_ usmotrenia_gosudarstv.pdf> (2015, July, 15).

2 Рабінович, П.М., Федик, С.Є. (2004). *Особливості тлумачення юридичних норм щодо прав людини (за матеріалами практики Європейського суду з прав людини)*. Львів: Астрон, 40.

3 Дегтярев, К. Свобода усмотрения государств в прецедентном праве Европейского Суда по Правам Человека <http://ilia.humanrightshouse.org/pluginfile.php/1374/mod_resource/content/1/Svoboda_ usmotrenia_gosudarstv.pdf> (2015, July, 15).

4 Макбрайд, Дж. Принципи, що визначають тлумачення та застосування Європейської конвенції з прав людини. < http://www.judges.org.ua/article/seminar21-1.htm>

5 *Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms* (adopted 24 June 2103, entry into force when ratificated by Parties of Convention) CETS No.: 213. <http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf> (2015, July, 15).

in specific cases pending before them (Article 1). Although reasons shall be given for such advisory opinions, and such advisory opinions shall be communicated to the requesting court or tribunal and to the High Contracting Party to which that court or tribunal pertains (paragraphs 1 and 3 of Article 4), they shall not be binding (Article 5)[1].

In general, to sum up the introductory theses on the margin of appreciation doctrine in the Court's case-law, it would be relevant to list the key factors that underpin the creation and application of the "state's margin of appreciation" doctrine as defined by S. Shevchuk: 1) concept of legitimacy of domestic parliaments and governments who, rather than an international jurisdiction body, have primary responsibility for solving human rights issues; 2) high level of expertise for evaluation and proper resolution of issues by state authorities, advantage of domestic institutions that are better placed than the European Court in resolution of complicated or specific matters; 3) decision of the European Court of Human Rights in a specific case may upset the balance of competing interests existing in the country; 4) acknowledgement of cultural, ethnic and other differences between the Council of Europe member states; 5) dependence of the level of European consensus on the scope of matters considered – the higher is the level, the more likely is that these matters will be examined by the European Court rather than delegated to domestic authorities; 6) what kind of result is expected in balancing the scope of national interest with the nature of individual right (e.g., the state interest of protecting the national security must be balanced with protection of the right for respect to private life, and depending on such balancing the application of this doctrine to the state's action may be recognised as possible. However, it is necessary to bear in mind that the respondent state may not refer to this doctrine and justify the benefit of interest of national security, if this infringes the most fundamental rights, like, for instance, in case of prohibition of torture under Article 3 of the Convention)[2].

The *limits of domestic margin of appreciation* remain the key problematic aspect related to this principle. If the state has to ensure certain actions or a certain attitude to the conventional law, such freedom means that the state has a "choice of various methods" which must be applied with the purpose of efficient exercise of individual rights or to avoid arbitrary discrimination. "Limits of a margin of appreciation" enjoyed by the state, in particular, by its legislative authorities, government, judicial and other bodies are defined as *"certain"* and *"wide"*. In its turn, the Court has defined that the scope of domestic margin of appreciation may range depending on various factors, primarily the subject matter and grounds of the case. "Limits of a margin of appreciation" are wide predominantly in cases related to political organisation, economics, and social morals that characterise democratic society in the state. Regardless whether the limits of margin of appreciation are wide or not, the state's choice may still be subjected to evaluation by the Court, as the latter is authorised to consider any matters related to application and interpretation of the Convention. However, the Court may not, in any case, substitute competent domestic authorities. Its task rather means a review of challenged decisions of domestic authorities adopted by them while exercising a power of discretion. Hence, control by the Court and limits of margin of appreciation of domestic authorities are interconnected[3].

Ukrainian authors believe that the following should be included into the *rules* used by the Court to evaluate the limits of margin of appreciation of domestic authorities:

− law enforcement body of the member state must review the applicant's complaint about infringement of his/her rights established in the Convention even if such rights are not guaranteed under domestic legislation;

− when resolving whether a right guaranteed by the Convention has been infringed, law enforcement body of the member state must take into account not only domestic legislation, but also generally recognised international standards, i.e. apply the same provisions as are applied by the Court;

− law enforcement body may interpret provisions of the Convention more broadly only if such

1 Гудима, Д. (2013*).* Чи існує взаємозв'язок між підтриманням авторитету Страсбурзького суду та звуженням можливостей на звернення до нього? <http://www.c50.com.ua/article/chy-isnuye-vzayemo zvyazok-mizh-pidtrymannyam-avtorytetu-strasburzkogo-sudu-ta-zvuzhennyam-mo> (2015, July, 15).

2 Шевчук, С. (2007). *Судова правотворчість: світовий досвід і перспективи в Україні*. Київ: Реферат, 199-200.

3 Андрущенко, К (2013). Концепція «margin of appreciation» та обсяг свободи розсуду держав. *Міжнародна юридична науково-практична Інтернет-конференція «Стратегія і тактика правових реформ: виклики сучасності»*. <http://legalactivity.com.ua/index.php?option=com_content&view= article&id=475%3A050313-10&catid=61%3A2-0313&Itemid=76&lang=ru> (2015, July, 15).

provisions envisage encompassing local factors during adoption of a decision on ensuring the rights guaranteed by the Convention;

− acknowledging in certain cases the right of authorities of the respondent state to a wider margin of appreciation, the Court must, when reviewing the case, verify the motivation and substantiation of the decisions adopted by these authorities;

− if the domestic law enforcement authority exercises a wide margin of appreciation with respect to the Convention's provisions that do not grant such a margin of appreciation, the Court must adopt a decision in the case independently, without taking into consideration the position of law enforcement bodies of the respondent state.

P. Rabinovych and S. Fedyk note that the effect and scope of the said rules are questionable, since bringing the whole variety of the Court's case law to a "common denominator" is practically impossible. However, they believe that these rules will be the best compromise between positions of applicants and respondents in the cases that to some extent are related to the margin of appreciation concept [1].

The above rules again emphasise the Court's verification of all factual circumstances in the case that primarily includes verification of compliance by authorities with the following requirements: intervention by the state into human rights must be envisaged by law, must pursue a legitimate purpose, and be necessary in democratic state [2]. For example, Articles 8 to 11 of the Convention that are most often analysed during consideration of the domestic margin of appreciation doctrine, contain a closed list of the guaranteed rights which the Court will take into account. With regard to all rights, this includes public order, health and morals, rights and freedoms of other persons, and, additionally, civil security if freedom of thought, conscience and religion is concerned, national security, prevention of disorder or crime if the rights stipulated in Articles 8 and 10-11 are concerned, economic well-being of the country in terms of respect for private and family life, and, finally, territorial integrity, protection of reputation of others, prevention of disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary, in case of restriction of freedom of thought expression[3]. In its judgement in *Dudgeon v. the United Kingdom* (22.10.1981)[4], the Court stated that "…it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them. However, their decision remains subject to review by the Court…". The case of *Sunday Times (*26.04.1979*)*[5] makes it clear that margins of appreciation with regard to a specific legitimate purpose that allows the restriction of rights may vary. From the Court's judgement in the *Handyside* case the Government has concluded that margin of appreciation of authorities is wider, if protection of public morals is concerned [6].

The problem of interpretation of "limits of margin of appreciation" has become crucial as the number of the parties to the Convention has grown to 47 states, which has generally upset the stable situation that had existed before the accession to the Convention in the mid-1980s of a number of Central and Eastern European countries, where the "margin of appreciation" was often seen as a kind of an indulgence for various types of offences that were conveniently explained by the "difficult heritage of the totalitarian regime" and uncompleted legal reforms, which obviously encouraged the practice of so called double standards. To avoid the practice of double standards, the Court in its rulings reminded about *the proportionality test which must be carried out in case of application of the "margin of appreciation" principle* (judgment in the *X and Y v. Netherlands* (26.03.1985)[7], *Stankova v. Slovakia* case (09.10.2007)[8], *Shvydka v. Ukraine* (30.10.2014)[9] etc.).

1 Рабінович, П.М., Федик, С.Є. (2004). *Особливості тлумачення юридичних норм щодо прав людини (за матеріалами практики Європейського суду з прав людини)*. Львів: Астрон, 40.

2 Аристова, К.С. (2012)/ *Принцип субсидиарности в деятельности Европейского суда по правам человека.* Москва, 22-23.

3 Дубовис, Н.А. (2011). Пределы свободы усмотрения государства при определении целей и средств ограничения права собственности в рамках уголовно-процессуальных отношений. *Аспирантский вестник Поволжья*, *7-8,* 85.

4 *Dudgeon v. the United Kingdom,* no. 7525/76, Judgement of 22 November 1981.

5 *Sunday Times v. the United Kingdom,* no. 6538/74, Judgement of 26 April 1979.

6 *Handyside v. the United Kingdom, 7 December 1976, Series A, no. 4.*

7 *X and H v. the Netherlands,* no. 8978/80, Judgment (Merits and Just Satisfaction), 26 March 1985, par. 24

8 *Stankova v. Slovakia,* no.7205/02. Judgment of 9 October 2007.

9 *Shvydka v. Ukraine,* no. 17888/12, *Judgement* (Merits and Just Satisfaction), 30 October 2014, par. 34, 41.

As mentioned above, the scope of margin of appreciation is significantly affected by the existence of so called *"European consensus"* on the matters investigated by the Court. According to K. Degtiariov, the concept of European consensus is the essential argument which may allow a court not to use the margin of appreciation. This concept is rooted in the Preamble to the Convention; the principle of European unity is defined as an aim of the Council of Europe pursued for achievement of unity between the member states. One of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms. Therefore, if the Court concludes that a common approach has been established in Europe on a given matter, the Court takes this approach in its decision and does not give a margin of appreciation to the state[1]. In *Hamalainen v. Finland* (16.07.2014) the Court noted that "…In implementing their positive obligation under Article 8 the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. 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 the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights"[2].

In *Evans v. the United Kingdom* (10.04.2007), the Court stated: "…. Given that there was no international or European consensus with regard to the regulation of IVF treatment, the use of embryos created by such treatment, or the point at which consent to the use of genetic material provided as part of IVF treatment might be withdrawn, and since the use of IVF treatment gave rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, the margin of appreciation to be afforded to the respondent State must be a wide one"[3]. The Court's attitude to this or that question may also be impacted by arguments of the applicant, the applicant's attorney and non-governmental organisations active in the relevant field. The most illustrative example of transition from margin of appreciation to finding an international consensus is a series of cases related to transsexuals.

Some authors believe that even if all requirements are met the likelihood of abuse by the state of its margin of appreciation is high. Evaluation of legitimacy of margin of appreciation used in a specific case is the responsibility of the Court, although there are no clear criteria for such evaluation, which has become the reason for criticism of the margin of appreciation doctrine itself. The key argument of opponents of this concept is that is brings *a subjective element* into the process of interpretation of the Convention provisions by the European Court of Human Rights. Criticism also exists in situations where the European Court of Human Rights uses the margin of appreciation as an immediate guarantee for compliance with the principle of subsidiarity. Far too often the Court avoids defining the limits of margin of appreciation and thus fully delegates the resolution of this or that matter to the states. In its turn, this results into unequal protection of human rights [4].

Nevertheless, it is necessary to agree that due to existence of the margin of appreciation principle the Court ensures the maximum correspondence of its judgments not only to generally recognised European standards, but also to the specific situation in which the right was infringed. This principle facilitates making decisions by the Court in a certain type of cases related to balancing the interests of the applicant and the respondent (since a right is often not recognised as infringed in view of a generally accepted standard in the specific country, although from the perspective of the norm (standard) of other country it is considered infringed), and contributes to production of a more or less uniform position on protection of individual rights with respect to which the conventional provisions grant the margin of appreciation to the states[5]. Summing up the conclusions of the article, we would like to highlight that the concept of margin appreciation, along with its purpose, scope and limits shall be taken into consideration by national

1Дегтярев, К. Свобода усмотрения государств в прецедентном праве Европейского Суда по Правам Человека. <http://ilia.humanrightshouse.org/pluginfile.php/1374/mod_resource/content/1/Svoboda_ usmotrenia_ gosudarstv.pdf>.

2 *Hämäläinen v. Finland* [GC], no. 37359/09, Judgment (Merits and Just Satisfaction), 16 July 2014, par. 67.

3 *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 10 April 2007, par. 59.

4Аристова, К.С. (2012). *Принцип субсидиарности в деятельности Европейского суда по правам человека.* Москва, 25-26.

5 Рабінович, П.М., Федик, С.Є. (2004). *Особливості тлумачення юридичних норм щодо прав людини (за матеріалами практики Європейського суду з прав людини).* Львів: Астрон, 37.

legislative authorities as well as judiciary which have to apply the Convention and the case-law of European Court of Human Rights as a source of law.

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