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The doctrine of the margin of appreciation as a tool of relativisation of freedom of religion. Some reflections on the jurisprudence of the European Court of Human Rights

Introduction

The role of the European Court of Human Rights (hereinafter: the Court) should essentially consist of establishing minimum standards for the protection of rights and freedoms laid down in the European Convention on Human Rights (hereinafter: the Convention). These standards in turn should serve for national authorities as a reference framework when adopting regulatory and limiting measures. However, the standard-setting function of the Court is to some extent undermined by the excessive use of the doctrine of margin of appreciation (hereinafter: MoA), which may prevent all persons under the jurisdiction of States parties to the Convention from enjoying the same level of human rights. Furthermore, the MoA "allows for preferential treatment of the state and majorities to the detriment of the protection of minorities and individual"[1]. This effect of the MoA is especially alarming with regard to freedom of religion that has always been of particular importance to minority groups.

The doctrine of MoA refers to the area of national authorities' discretion afforded by the Court with regard to the implementation of non-absolute rights and the derogation clause enshrined in Article 15 of the Convention. This discretion is, however, not unlimited as state's measures limiting the enjoyment of human rights are subject to the review of the Court. The rationale behind

[1] M. Lugato, *The "Margin of Appreciation" and Freedom of Religion: Between Treaty Interpretation and Subsidiarity*, "Journal of Catholic Legal Studies" 2013, vol. 52, p. 53.

leaving to national authorities some MoA is the fact that they have democratic legitimacy and are closer to their societies than an international court so they are considered to be better placed to evaluate local conditions and to determine whether there is a need to restrict a human right and how to strike a fair balance between conflicting interests. The doctrine of MoA is also justified by the subsidiary character of the Convention and its enforcement mechanism. In allowing to national authorities wide MoA, the Court recognizes "that its role is not to sit as a tribunal of fourth instance and that it is in one sense not as well positioned as the national legal institutions to assess many of the relevant factors"[2]. On the other hand, the application of the MoA by the Court has received (sometimes severe) criticism, since it has been regarded as manifestation of opportunism, lack of courage and even as renouncement of the Court's powers[3].

The MoA is especially wide when assessing the existence and extent of an interference with the right to freedom of religion. This is justified by the fact that it is not possible to discern throughout Europe a uniform conception of the significance of religion in a society and that the meaning or impact of the public expression of a religious belief differs according to time and context. Consequently, the rules in this sphere vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order[4]. The objective of this paper is to show that excessive application of MoA in cases concerning freedom of religion results in different levels of protection of this right, which in turn leads to relativisation of its very substance. Another preoccupying consequence of the overuse of the doctrine of MoA discussed in the paper is the Court's overemphasis of the role of principle of secularism in safeguarding the freedom of beliefs to all. It is stated that such an approach is detrimental to the enjoyment of religious freedom not only by religious minorities, but, due to increasing secularisation, to religious people in general.

Relativisation of the substance of freedom of religion due to the use of the doctrine of MoA. A case study

As it has been mentioned above, the broad MoA inevitably leads to relativisation of freedom of religion in the sense that the scope of protected manifestations of religion recognised by the Court is varied and depends on the

[2] W.A. Shabas, *The European Convention on Human Rights. A Commentary*, Oxford 2015, p. 438.

[3] M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2017, p. 297.

[4] *S.A.S. v. France*, 1 July 2014, no. 43835/11, § 130.

level of religiosity of a given society and/or the level of tolerance towards religion displayed by a given population. This negative effect of the broad MoA will be illustrated on the basis of the following case.

A Dutch municipality adopted some rules that prohibited ringing church bells between 11.00 pm and 7.30 am whose loudness exceeded 10db. The measure was imposed as a result of complaints made by some persons living near a church who claimed that ringing of the bell on Sundays at 7.15 am had been disturbing their night's rest. The parish affected by the restriction in question appealed against it to national courts, but without success so they brought their case to the Strasbourg Court alleging the violation of their right to manifest their religion. The Court held *inter alia* that due to variations "in national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain the public order" states parties should be allowed a certain MoA. It held therefore that the measure was justified in order to protect the night's rest of local residents[5] (*Shilder v. the Netherlands*).

In contrast, the Polish Supreme Court held in a similar case that bell ringing intended to call parishioners to the service of worship has been an accepted religious practice for centuries, it cannot therefore be regarded as unlawful disturbance of peace, public order or night's rest, even if under some circumstances the loudness of the bells exceeds the amount of noise admissible under the applicable legislation[6]. Were the Strasbourg Court to apply the reasoning advanced in *Shilder* to the hypothetical case brought by a Polish citizen submitting that the excessively loud bell ringing amounts to violation of their right to respect for their home as enshrined in Article 8 of the Convention, it would admittedly have to rule against the applicant. Ringing the Angelus bell at 6 am in the morning is after all a traditional manifestation of religion in Poland and according to the doctrine of MoA, when resolving conflicts between freedom of religion and other interests, the Court should take account of these deep-seated national traditions.

The above juxtaposition of the judgment in *Shilder v. the Netherlands* with a hypothetical case against Poland where, assuming that the Court is consistent, similar reasoning is applied, shows that the use of the MoA in similar cases may lead to the result that religious people who happen to live in a predominantly secular environment may receive less protection than their coreligionists who happen to live in a country where religious traditions are (still) alive. On the other hand, following this reasoning people who live in a more religious country are expected by the Court to tolerate interferences with their rights that occur as a "side-effect" of a religious practice (for example, being woken up by church bells on early Sunday morning) to a greater

[5] *Shilder v. the Netherlands* (dec.), 12 October 2012, no. 2158/12, § 22.

[6] Judgment of the Supreme Court of the Republic of Poland of 31 January 2018, IV KK 475/17.

extent than people affected by the same religious practice who live in a more secular country.

Admittedly, there may be a core of the right to freedom of religion which is protected by the Court regardless of the tradition of a given society, i.e. a certain absolute minimum that is immune even to the MoA. For instance in *Lachiri v. Belgium*, despite confirming the doctrine of MoA, the Court held that punishing an applicant that appeared in a court of law in the capacity of a civil party to a criminal proceeding for donning a headscarf in contravention of national regulations that prohibited wearing a head covering during a court hearing amounted to the breach of Article 9[7]. Nevertheless, given the traditionally restrictive interpretation of Article 9 by the Court, this "core" or "absolute minimum" is rather narrow. It seems to cover only the manifestations of religion "in a recognised form" where there is no apparent conflict with rights and freedoms of others or community interests or where the restriction of freedom of religion amounts to a blatant discrimination[8].

Use of the doctrine of MoA as a sign of respect for national models of State and Church relations

The wide MoA in cases concerning freedom of religion is also justified by the lack of consensus within the member states of the Council of Europe on an appropriate model of the delicate relations between state and religious communities. The idea underlying the doctrine of MoA is therefore to ensure respect for the variety of constitutional arrangements concerning Church-State relations. As a consequence, both secular and Christian traditions of a given state have been accepted by the Court as a ground for justifying an interference with freedom of religion. While interferences based on the idea of secularism have been regarded by the Court as justified primarily in cases concerning wearing religious clothing, interferences based on the special position of Christianity have been recognised as legitimate in the field of education. Nevertheless, it should be noted that MoA accorded to national authorities is wider where they rely on the principle of secularism than in cases where they invoke the Christian tradition of their country. This is due to the fact that secularism is presumed to be compatible with the role of the state as the "neutral and impartial organiser of the exercise of various religions, faiths and beliefs"[9].

As a consequence, in cases where Christian tradition is invoked by the Government the Court carries out a more scrupulous examination of whether the state struck a fair balance between the conflicting interests than in cases

[7] *Lachiri v. Belgium*, 18 September 2018, no 3413/09.
[8] E.g. *Ivanova v. Bulgaria*, 12 April 2007, no. 52435/98.
[9] E.g. *Leyla Şahin v. Turkey* [GC], 10 November 2005, no. 44774/98, § 107.

where the principle of secularism is at stake[10]. For instance, in *Folgarø and Others v. Norway* the Court afforded the national authorities a wide MoA in deciding about the place and importance of education in religion in school curriculum[11]. Nevertheless, despite recognising the wide MoA, the Court examined in detail the syllabus of the course in religion taught in Norwegian schools and the complicated system of obtaining an exemption therefrom, which led it to the conclusion that the arrangements in question were incompatible with the state's role as "a neutral organiser". In contrast, in *Lautsi v. Italy* the Court (Grand Chamber) held that the decision of national authorities on mandatory displaying of crucifixes in classrooms in principle falls within their MoA, since there is no consensus within the members of the Council of Europe about this issue[12]. Moreover, the Court held that the display of crucifixes does not amount to indoctrination and does not result in coercing any behaviour so it affects neither the parents' right to have their convictions respected in the field of education nor the students' freedom of religion. Given the "preponderant visibility" the authorities conferred on the country's majority religion in the school environment[13], it is however doubtful that the mandatory display of crucifixes in state schools or offices is compatible with the principle of state neutrality. The opposing view is sustainable only when one assumes that among the state-parties to the Convention there is no consensus with regard to the meaning of neutrality towards religion so that the judgment in *Lautsi* is justified in the light of the doctrine of MoA as there is no consensus with regard to the meaning of neutrality towards religion[14].

It should also be noted that the judgement in *Lautsi* is contradictory with the reasoning of the Court in *Dahlab v. Switzerland* where it was held that the prohibition on wearing a headscarf by a school teacher was justified by the need to safeguard the neutral character of school environment and to prevent teachers from influencing the beliefs of young children[15]. If one assumes that wearing religious clothing by a teacher on a voluntary basis is inconsistent with the neutrality of the state and capable of improper influencing the beliefs of impressionable pupils, this must be all the more true with regard to the display of religious symbols mandated by the State. Such inconsistencies are the inevitable result of the application of the MoA[16].

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[10] S. Berry, *Religious Freedom and the European Court of Human Rights "Two Margins of Appreciation"*, "Religion and Human Rights" 2017, no. 12, p. 202.

[11] *Folgerø and Others v. Norway* [GC], 29 June 2007, no.15472/02.

[12] *Lautsi v. Italy* [GC], 18 March 2011, no. 30814/06), § 70.

[13] Ibidem, § 71.

[14] M. Lugato, op. cit., p. 62.

[15] *Dahlab v. Switzerland* (dec.), 15 February 2001, no. 42393/98.

[16] S.A. Fernández Parra, *El margen nacional de apreciación y el contenido de la libertad de pensamiento conciencia y religión en el Convenio Europeo de Derechos Humanos*, "Eunomía. Revista en Cultura de la Legalidad" 2019, no. 17, p. 86.

The use of MoA in the context of secular states led the Court not only to endorsing the imposed limitations to freedom of religion but even to defining the scope of freedom of religion in the light of the principle of secularism. This is especially visible in cases concerning the ban on wearing the headscarves by pupils and students. According to the Court, the issue of wearing of religious symbols at school is a matter that falls within the ambit of relations between state and religious communities. The Court observed that in France, Turkey and Switzerland the constitutional principle of secularism is one of the foundations of the Republic and noted that the defence of this principle is important especially at schools. For this reason the Court concluded that attitudes contrary to the principle of secularism cannot be regarded as a manifestation of a religion and therefore are not protected under Article 9.1 of the Convention. Having regard to the MoA which should be afforded to State parties when it comes to establishing delicate relations between states and religious communities, the Court held that "freedom of religion, as recognised this way and limited by the requirements of secularism seems legitimate in terms of values underlying the Convention"[17].

The statement cited above shows the Court's concern about the defence of the principle of secularism in France. However, it should be noted that the principle of secularism is not explicitly covered by the provisions of the Convention. For this reason its defence as a fundamental value i.e. regardless of whether under circumstances of a given case it fulfils the role of fostering equal protection of freedom of religion and belief for all concerned[18], remains beyond the purview of the Court's jurisdiction. Indeed, the freedom of religion

[17] *Kervanci v. France*, 4 December 2008, no. 31645/04, § 72.

[18] This statement should be understood as the reference to and endorsement of the so called the "liberal-pluralist" conception of the principle of secularism (See: J. Maclure and C. Taylor, *Secularism and freedom of conscience*, Cambridge 2011, p. 27 et seq.). Under this conception state neutrality and "functional agnosticism" are not ends in themselves; they are worthy of legal protection because they ensure respect for equal moral value of the individual autonomy and the possibly wide protection of freedom of conscience and religion to all concerned. In other words, the legitimacy of secularism lies in its purpose of enabling the equal realisation of various conceptions of the good life without favouring or promoting any of them. The adherents of this conception perceive both religious and non-religious beliefs as an enriching and important element of cultural heritage of a country. Consequently, they are prone to permit religious distinctiveness and diversity in public space. The "liberal pluralist" conception stands in opposition to the "republican" conception of secularism under which secular arrangements are viewed as a primary instrument for achieving social integration defined as "allegiance to a common civic identity and the collective pursuit of the common good" (ibidem, p. 31). The proponents of this conception (mis)perceive religiosity as a "radical" attitude that is disruptive to the public order, and integration of minorities, as well as counterproductive to the realisation of human rights (G. Du Plessis, *The European Struggle with Religious Diversity: Osmanoğlu and Kocabas – v. Switzerland*, "Journal of Church and State" 2018, vol. 60(3), p. 508). For this reason, they argue that the attainment of national unity and social cohesion requires the effacement or neutralization of religion, ethnicity and other identity markers from public space, regardless of whether they are exposed on the initiative of public authorities or individuals.

as enshrined in Article 9 is to be regarded as "an independent international guarantee" whose interpretation should in no way be bound by national ideas and values[19]. Nevertheless, due to the use of the doctrine of MoA the principle of secularism has been put by the Court on a pedestal in the sense that the Court permitted the substance and scope of the freedom of religion to be determined by that principle or even "to be subordinated" to it[20]. In *Kervanci* the Court should have restrained itself to examining whether the prohibition of wearing headscarves during physical education classes was justifiable in the light of Article 9.2. The reference of the Court to the secular character of the state and the use of the MoA were superfluous and even counterproductive as it prevented the appropriate examination of the proportionality of the measure in question.

Doctrine of MoA as a mechanism of endorsement of national social policies

National authorities also enjoy a wide MoA when deciding on measures aimed at striking a fair balance between the competing interests of the individual and the community. In this context the MoA permits states to determine the appropriate weight to be given to competing interests. The scope of the MoA, however, varies according to circumstances of a given case and depends on various factors, especially on the nature of a right or freedom of others that clashes with freedom of religion. For instance, in *Eweida and Others v. United Kingdom* the Court found the breach of the applicant's right to manifest her religion by visibly wearing a cross, which clashed with her employer's "wish to project a certain corporate image"[21]. According to S. Berry, the Court's disagreement with the national authorities' assessment of this conflict can be explained by the fact that the employer's interest did not have the character of a human right. The MoA was wider in cases of other applicants in *Eweida* where more fundamental issues were at stake such as rights of homosexuals or safeguards of gender equality[22]. Furthermore, national authorities enjoy a wide MoA when they pursue general societal goals, including integration policies. According to the Court, in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.

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[19] Ch. Grabenwarter, *European Convention on Human Rights: Commentary*, Munich 2014, p. 235.

[20] S.A. Fernández Parra, op. cit., p. 89.

[21] *Eweida and Others v. United Kingdom*, 15 January 2013, nos. 48420/10, 59842/10, 51671/10 and 36516/10, § 94.

[22] S. Berry, op. cit., p. 205.

The alleged conflict between freedom of religion and the rights of homosexuals was a subject-matter of the case lodged Ms Ladele, another applicant in *Eweida and Others*. She was a civil office registrar who lost her job as a result of her refusal to agree to be designated as a registrar of civil partnerships of same-sex couples. The Court found legitimate the aim of the authorities to ensure that the municipality provides "a service which was not merely effective in terms of practicality and efficiency, but also one which complied with the overarching policy of being an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others"[23]. It transpires from the above that the aim of public authorities went beyond the endeavour to provide a well-functioning civil registry services to same-sex couples. They also intended to influence the convictions of the officers by requiring them to adopt a docile attitude towards their policy, which resulted in the conscientious objection of the applicant. The legitimate aim of ensuring the services of the registry office to same-sex couples could also be achieved even if some employees of the registry office were exempted from processing their cases. This is corroborated by the fact that such exemptions were granted by other municipalities.

What is not less important, since there was no instance of a (threat) of denial of services on the part of the registry office in question, no concrete right of a gay or lesbian person was violated or even threatened. It has therefore rightly been noted that under the circumstances of the case, the rights of homosexual couples are only "abstract" or potential. For this reason, it would be more appropriate for the Court to balance the right of the applicant with the right of her employer to manage their staff. However, it is unlikely that as a result of such a balancing test the Court could have found that the dismissal of Ms Ladele was proportionate to the legitimate aim pursued and that article 9 was not violated[24]. By applying the doctrine of MoA in this case, the Court sacrificed the concrete right of the applicant and endorsed the authorities' considerations of political correctness. It may be argued against this ruling that in a pluralist, open-minded and tolerant society the Court claims to defend due respect should be guaranteed for both interests, i.e. the same-sex couples' "need for legal recognition and protection of their relationship"[25] and the right to conscientious objection to making a contribution to solidifying an institution one considers contrary to God's will. Indeed, MoA should not be so wide as to permit national authorities to impose on citizens a belief or conviction merely because this belief or conviction is regarded as politically correct.

[23] *Eweida and Others v. United Kingdom*..., § 105.

[24] E. Sychenko, *Individual Labour Rights as Human Rights: the contributions of the European Court of Human Rights to worker's rights protection*, Alphen aan den Rijn 2017, p. 157.

[25] *Eweida and Others v United Kingdom*..., § 105.

Another landmark case where MoA was afforded to national authorities with regard to a general social policy is the above-mentioned judgment in *S.A.S. v France*. The case concerned the ban on wearing religious apparel that fully covers the person's face (full-face veils) in public places. In applying the doctrine of MoA, the Court agreed with the respondent government that the limitation on the freedom of religion served a legitimate aim of ensuring the observance in the society of the rules of "living together". This aim in turn falls into the scope of "rights and freedoms of others" under Article 9.2. In particular the Court accepted the argument that "the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier". Furthermore, "the Court (…) can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question"[26]. The Court also noted that the question whether or not it should be permitted to wear the full-face veil in public places constitutes "a choice of society"[27]. Under these circumstances the Court held it had a duty to exercise a degree of restraint in its review of Convention compliance, otherwise it would embark on assessing a balance that had been struck by means of a democratic process within the society in question, which is not the Court's task[28].

The use of MoA in this case is premised on the assumption that there is a divergence of opinion on the issue of wearing full-face veils in public places. Nonetheless, it should be noted that only Belgium and France explicitly prohibited wearing this garment, whereas in the other states the issue remained unregulated. For this reason, the argument that there is a consensus against banning the wearing of full-face veils in public places advanced by some authors is at least sustainable[29]. Furthermore, it is difficult to agree with the Court's accepting the "far-fetched and vague"[30] concept of "living together" as a legitimate ground for limiting the freedom of religion, as it is not explicitly covered by any of the provisions of the Convention. It should rather be noted that according to the general rule applicable to the interpretation of the provisions regulating fundamental rights, restrictions on their exercise should be regarded as exceptions. For this reason legitimate grounds listed in limitation claus-

[26] *S.A.S. v. France*..., § 122.
[27] Ibidem, § 130.
[28] Ibidem, § 154.
[29] Ó Celador Angón, *Orígenes histórico-constitucionales del principio de la laicidad*, Valencia, p. 273 et seq.
[30] *S.A.S. v. France*..., dissenting opinion, § 5.

es, including Article 9.2 of the Convention, should be interpreted narrowly[31]. In giving protection to the alleged right to social space that makes the communication easier, the Court endorsed the overt intolerance towards manifestations of religion that causes discomfort of the prejudiced majority[32]. The judgment in *S.A.S.* may also be read as a dangerous approval of forced assimilationist policies against minority groups[33]. It shows unequivocally that an excessive use of the doctrine of MoA "allows almost complete deference to the State, which has the potential to undermine the religious freedom of minorities"[34]. What is more, the reliance on the nebulous concept of "living together" coupled with the doctrine of MoA may encourage other states to introduce bans on anything that makes the majority feel uncomfortable[35].

In *S.A.S.* the Court also seems to implicitly have departed from the precedence established in the case *Ahmet Arslan and Others v. Turkey* concerning the punishing the applicant for wearing religious clothes in public places. In this case the Court did not rely on MoA but conducted more rigorous examination of the proportionality of the measure in question. Contrary to the submission of the Government that the interference was necessary for upholding the principle of secularism and that it pursued the legitimate aim of preventing the acts of provocation, proselytism and religious propaganda, the Court emphasised that the applicants' behaviour did not amount to a threat to public order or to the rights and freedoms of others. Given that the applicants were wearing religious clothes on the public streets rather than in a public establishment, for example, in a public school, the principle of state neutrality was not at stake[36].

Conclusion

The excessive use of the doctrine of MoA in cases regarding freedom of religion gave rise to the distortion of the substance of this right and led to some inconsistencies in the jurisprudence of the Court. Moreover, in cases where the Court affords the MoA it does not at least as a rule conduct a rig-

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[31] W.A. Shabas, op. cit., p. 436.

[32] E. Brems, *S.A.S. v. France as a problematic precedent*, "Strasbourg Observers", June 9, 2014, https://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/ (accessed: 21.03.2021).

[33] H. Yusuf, *S.A.S v France: Supporting 'Living Together' or Forced Assimilation*, "International Human Rights Law Review" 2014, no. 3(2), https://strathprints.strath.ac.uk/49528/ (accessed: 19.03.2021).

[34] S. Berry, op. cit., p. 207.

[35] L. Vickers, *Conform or be confined: S.A.S. v France*, „Oxford Human Rights Hub", 8 July 2014, http://ohrh.law.ox.ac.uk/conform-or-be-confined-s-a-s-v-france/ (accessed: 2.04.2021).

[36] *Ahmet Arslan and Others v Turkey*, 23 February 2010, no. 41135/98, § 49 et seq.

orous examination of the proportionality of the interference with the individual's freedom. Contrary to the approach of the Court it is stated that the substance, scope and limits of freedom of religion should not, at least as a matter of principle, hinge upon secular or confessional character of a state. The Court should rather interpret the substance and scope of protection of this freedom in a more uniform manner. In such a way, the Court would establish clear minimal standards for the uniform protection of this right within the jurisdiction of all states parties to the Convention.

Even if there is no consensus on the appropriate model of the relations between state and religious communities, there *is* a consensus enshrined in Article 9 that freedom of conscience, religion and belief should be protected regardless of national traditions or political context. This is all the more important given, on the one hand, the increasing secularisation and its concomitant insufficient sensitivity to religious needs of some citizens and cultural diversification of European societies resulting in growing number of members of less known or "exotic" religions, on the other. As a result freedom of religion will arguably become even more strictly related to minority groups than it was the case in the past or than it is the case now. The use of MoA should therefore be restricted to the issues that are not covered by freedom of religion as guaranteed in the Convention, in particular to regulation of 'supererogatory privileges' religious people may enjoy in some countries, such as the possibility of receiving religious education at public schools, displaying religious symbols in public buildings, celebrating religious holidays as national holidays or protection of their religious sentiments by means of criminal law.

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Summary

The doctrine of the margin of appreciation as a tool of relativisation of freedom of religion. Some reflections on the jurisprudence of the European Court of Human Rights

Keywords: human rights, the doctrine of margin of appreciation, restrictions on freedom of religion, the principle of secularism, religious attire, principles of "living together".

The objective of the paper is to determine the implications for the interpretation of Article 9 of the European Convention on Human Rights resulting from the Court's affording to national authorities the wide margin of appreciation when deciding whether in a given case there is a need to limit the exercise of freedom of religion. The use of the doctrine of margin of appreciation in such cases is justified both by the lack of an all-European consensus as to the proper model of relations between the state and religious communities and by divergences of views and traditions concerning the importance and impact of religion in the society. In consequence, the Court holds that restrictions on freedom of religion on grounds of the principle of secularism, which in some countries has a rank of a constitutional principle of the political system, are compatible with the Convention. This is the case eve where establishing a link between the restriction of this kind with any of the legitimate aims outlined in Article 9.2 of the Convention is highly disputable, if not impossible. Moreover, the excessive use of the doctrine of margin of appreciation in this context makes the protection level of freedom of religion contingent on prevailing (not always rational and free from prejudice)views and attitudes towards some forms of manifestation of religious beliefs. This outcome, however, is difficult to reconcile with values underlying the Convention and the need for minority protection.

Streszczenie

Doktryna marginesu swobody jako mechanizm relatywizacji prawa do wolności religii Kilka refleksji na kanwie orzecznictwa Europejskiego Trybunału Praw Człowieka

Słowa kluczowe: prawa człowieka, doktryna marginesu swobody, ograniczenia wolności religii, zasada świeckości, ubiór religijny, zasada współżycia w społeczeństwie „living together".

Celem niniejszego artykułu jest ustalenie skutków dla wykładni i stosowania art. 9 Europejskiej Konwencji Praw Człowieka wynikających z przyznania przez Trybunał władzom krajowym szerokiego marginesu swobody przy rozstrzyganiu, czy w danym przypadku zachodzi konieczność ograniczenia wolności religii. Stosowanie doktryny marginesu swobody w tego rodzaju sprawach Trybunał uzasadnia, wskazując na brak ogólnoeuropejskiego konsensusu w kwestii prawidłowego modelu wzajemnych relacji państwa i wspólnot wyznaniowych, na rozbieżności poglądów i tradycji dotyczących roli oraz znaczenia religii w danym społeczeństwie. W konsekwencji Trybunał uznaje za zgodne z Konwencją ustanawianie ograniczeń wolności religii ze względu na konieczność poszanowania zasady świeckości, mającej w niektórych państwach rangę konstytucyjnej zasady ustrojowej, przy czym ma to miejsce także w przypadkach, gdy wykazanie powiązania tego rodzaju ograniczeń z którymkolwiek z celów przewidzianych w art. 9 ust. 2 Konwencji jest wysoce dyskusyjne. Ponadto nadmierne stosowanie doktryny marginesu swobody w omawianym kontekście prowadzi do uzależnienia poziomu ochrony wolności religii od dominujących w danym społeczeństwie (nie zawsze racjonalnych i wolnych od uprzedzeń) postaw wobec niektórych form uzewnętrzniania przekonań religijnych, co trudno pogodzić zarówno z aksjologią Konwencji, jak i z wymogami ochrony mniejszości.