Annex to ‘Subsidiarity doesn’t win cases’

# On the ECtHR’s own statistics

I have gathered the Court’s own statistics in one dataset for easy presentation of summary statistics. The data are the statistics that are published yearly by the Court and contain information on pending cases and processed cases and whether cases have been processed administratively or judicially, and by which type of judicial formation. They have changed over the years as the Court has also changed its policies on statistics and its working methods. There are a couple of Statistical overviews for violations from different states 1959-2019 and simplified yearly ones which I have used to fill in a few blanks. A couple of blanks have also been filled in by the numbers on early cases and inadmissible ones given by Ed Bates in *the evolution of the european convention on human rights: From its inception to the creation of a permanent court of human rights* (2010). The bulk of the data is made up however by the Courts yearly statistics reports which have been published consistently since 2006, though unilateral declarations and friendly settlements have for example only been included since 2009.

# On the HUDOC searches

The data taken from the HUDOC database have been updated latest on 1.1.2022. These searches simply use the HUDOC’s own advanced search module and notes the information for each year in order to create simple descriptive statistics. In this dataset, and in general, I differentiate between ‘margin of appreciation’ keywords and ‘margin of appreciation’ searchwords. The keywords are allocated by the administrators of the HUDOC database, while searching for ‘margin of appreciation’ or ‘margin of discretion’ picks up all the cases where these phrases are mentioned somewhere in the judgment or separate opinion. All the empirical studies dealing with the margin of appreciation which are cited in this article rely on the searchword approach rather than the allocated keywords. It does not really make sense to make summary statistics on these searches in the usual way since they are not truly samples and are therefore used mainly for descriptive purposes in this article. Here are non-the-less some general information about the HUDOC dataset as of 1.1.2022.

|  |  |
| --- | --- |
| Total judgments | 24564 |
| Total decisions | 28867 |
| Total judgments mentioning the margin of appreciation | 2731 |
| Total decisions mentioning the margin of appreciation | 1928 |
| Total judgments and decisions with margin of appreciation key-word | 1097 |

Development of margin key-words and textual appearances over time in absolute numbers:

Development in margin key-words and textual appearances over time compared to number of judgments and decisions

# On the dataset of 21954 cases

Summary statistics

## Categorical variables

**Originating body:**

Court (Grand Chamber) 504

Court (Plenary) 205

Court (Chamber) 1282

Court (Fifth Section Committee) 510

Court (Fifth Section) 2055

Court (First Section Committee) 385

Court (First Section) 4181

Court (Fourth Section Committee) 407

Court (Fourth Section) 3300

Court (Second Section Committee) 475

Court (Second Section) 4477

Court (Third Section Committee) 679

Court (Third Section) 3494

**Respondent state**

Albania 78

Andorra 7

Armenia 102

Austria 452

Azerbaijan 158

Belgium 273

Bosnia and Herzegovina 61

Bulgaria 663

Croatia 406

Cyprus 82

Czech Republic 234

Denmark 56

Estonia 59

Finland 196

France 1065

Georgia 88

Germany 376

Greece 963

Hungary 508

Iceland 27

Ireland 43

Italy 2484

Latvia 143

Liechtenstein 9

Lithuania 196

Luxembourg 44

Malta 91

Monaco 2

Montenegro 46

Netherlands 206

Norway 52

Poland 1159

Portugal 354

Republic of Moldova 357

Romania 1366

Russia 2458

San Marino 15

Serbia 189

several 56

Slovakia 369

Slovenia 361

Spain 165

Sweden 193

Switzerland 212

The former Yugoslav Republic of Macedonia 154

Turkey 3430 Ukraine 1304

United Kingdom 642

**Year**

1960 1

1961 2

1962 1

1967 1

1968 3

1969 4

1970 4

1971 4

1972 4

1973 2

1974 2

1975 4

1976 12

1978 8

1979 10

1980 14

1981 14

1982 22

1983 30

1984 36

1985 21

1986 34

1987 63

1988 50

1989 49

1990 57

1991 142

1992 161

1993 109

1994 78

1995 58

1996 138

1997 210

1998 212

1999 193

2000 695

2001 888

2002 844

2003 703

2004 718

2005 1107

2006 156

2007 1504

2008 1545

2009 1625

2010 1502

2011 1161

2012 1095

2013 917

2014 893

2015 822

2016 903

2017 886

2018 824

2019 9

**Importance level**

Key cases 915

One 1450

Two 4556

Three 15033

**Separate opinions**

 No Yes NA's

18603 3350 1

## Numerical variables

**Number of decisions**

 Min. 1st Qu. Median Mean 3rd Qu. Max.

 0.000 1.000 1.000 1.599 2.000 21.000

**Inadmissible decisions**

 Min. 1st Qu. Median Mean 3rd Qu. Max.

 0.0000 0.0000 0.0000 0.1171 0.0000 6.0000

**Non\_violation decisions**

 Min. 1st Qu. Median Mean 3rd Qu. Max.

 0.0000 0.0000 0.0000 0.2361 0.0000 11.0000

**Violation decisions**

 Min. 1st Qu. Median Mean 3rd Qu. Max.

 0.000 1.000 1.000 1.246 2.000 12.000

**Number of state wins**

 Min. 1st Qu. Median Mean 3rd Qu. Max.

 0.0000 0.0000 0.0000 0.3532 1.0000 11.0000

**Percent state win**

 Min. 1st Qu. Median Mean 3rd Qu. Max. NA's

 0.00 0.00 0.00 17.60 33.33 100.00 1979

## Dummy variables:

**Margin key-word**

 Min. 1st Qu. Median Mean 3rd Qu. Max. NA's

0.00000 0.00000 0.00000 0.03726 0.00000 1.00000 1

**Margin Searchword**

 Min. 1st Qu. Median Mean 3rd Qu. Max.

0.00000 0.00000 0.00000 0.08509 0.00000 1.00000

# On the 202 Key and Level 1 cases

## On the determination of which cases to include in this sample:

The sample includes all cases in the Key- or Level 1 importance category where the margin of appreciation is mentioned at least once. Searching the HUDOC database with a textual search for ‘margin of appreciation’ yielded 298 search-word cases, while using the database’s keyword search yielded 165 cases. After removing any doublets and non-cases from the list, the final list ended up with just 202 cases.

The complete list of cases is here:

|  |  |  |  |
| --- | --- | --- | --- |
| **Cases** |  D.l. V. Bulgaria |  Libert v. France |  S.j. V. Belgium |
|  Ališić and others v. Bosnia and herzegovina, and others |  Davydov and others v. Russia |  Lindheim and others v. Norway |  Söderman v. Sweden |
|  Grudić v. Serbia |  De souza ribeiro v. France |  Lopes de sousa fernandes v. Portugal |  Sabanchiyeva and others v. Russia |
|  Guberina v. Croatia |  De tommaso v. Italy |  Lozovyye v. Russia |  Sace elektrik ticaret ve sanayi a.ş. V. Turkey |
|  Hamidovic v. Bosnia and herzegovina |  Del río prada v. Spain |  Lupeni greek catholic parish and others v. Romania | Şahin alpay v. Turkey |
|  Kurić and others v. Slovenia |  Delfi as v. Estonia |  M.d. And others v. Malta |  Sargsyan v. Azerbaijan |
| Lekic v. Slovenia |  Dubská and krejzová v. The czech republic |  M.l. And w.w. V. Germany | Satakunnan markkinapörssi oy and satamedia oy v. Finland [gc] |
| Medžlis islamske zajednice brčko and others v. Bosnia and herzegovina, |  Dubská and krejzová v. The czech republic |  M.n. And others v. San marino |  Schatschaschwili v. Germany |
| Paunović and milivojević v. Serbia |  E.s. V. Austria |  Magyar helsinki bizottsãg v. Hungary |  Scoppola v. Italy (no. 3) |
|  Sašo gorgiev v. "the former yugoslav republic of macedo |  Ebrahimian v. France |  Magyar jeti zrt v. Hungary |  Sigurður einarsson and others v. Iceland |
|  Topčić-rosenberg v. Croatia |  Eğitim ve bilim emekçileri sendikasi v. Turkey |  Magyar keresztény mennonita egyház and others v. Hungar |  Sindicatul "păstorul cel bun" v. Romania |
|  Zubac v. Croatia |  Elberte v. Latvia |  Manole and "romanian farmers direct" v. Romania |  Sitaropoulos and giakoumopoulos v. Greece |
|  Öcalan v. Turkey (no. 2) |  Erla hlynsdóttir v. Iceland |  Maskhadova and others v. Russia |  Strand lobben and others v. Norway |
|  Österreichische vereinigung zur erhaltung, stärkung und |  Eweida and others v. The united kingdom |  Mehmet şentürk and bekir şentürk v. Turkey |  Svinarenko and slyadnev v. Russia |
|  Özgürlük ve dayanişma partisi (ödp) v. Turkey | Fábián v. Hungary [gc] |  Meier v. Switzerland |  Taddeucci and mccall v. Italy |
|  A and b v. Norway |  Fabris v. France |  Mennesson v. France |  Tahirov v. Azerbaijan |
|  A.n. V. Lithuania |  Fernández martínez v. Spain |  Merabishvili v. Georgia |  The national union of rail, maritime and transport work |
|  Adyan and others v. Armenia |  Fernandes de oliveira v. Portugal |  Michaud v. France |  Vallianatos and others v. Greece |
|  Ahmet yildirim v. Turkey |  Frăsilă and ciocîrlan v. Romania |  Mihalache v. Romania |  Vasiliauskas v. Lithuania |
|  Ahrens v. Germany |  Frumkin v. Russia |  Molla sali v. Greece |  Velyo velev v. Bulgaria |
|  Aksu v. Turkey |  G.i.e.m. S.r.l. And others v. Italy |  Moreira ferreira v. Portugal (no. 2) |  Vilnes and others v. Norway |
|  Al-dulimi and montana management inc. V. Switzerland gc |  Garib v. The netherlands |  Morice v. France |  Vinter and others v. The united kingdom |
|  Al-dulimi and montana management inc. V. Switzerland ss |  Gas and dubois v. France |  Mouvement raëlien suisse v. Switzerland |  Vistiņš and perepjolkins v. Latvia[gc] |
|  Altay v. Turkey (no. 2) |  Guðmundur andri ástráðsson v. Iceland |  Murray v. The netherlands |  Vistiņš and perepjolkins v. Latvia |
|  Animal defenders international v. The united kingdom |  Guimon v. France |  Murtazaliyeva v. Russia |  Vona v. Hungary |
|  Armani da silva v. The united kingdom |  Hämäläinen v. Finland | Naït-liman v. Switzerland [gc] |  Winterstein and others v. France |
| Avotiņš v. Latvia [gc] |  Haldimann and others v. Switzerland |  Nada v. Switzerland |  X and others v. Austria |
|  Bédat v. Switzerland |  Harakchiev and tolumov v. Bulgaria |  National federation of sportspersons' associations and  |  X v. Latvia |
| Béláné nagy v. Hungary [gc] |  Herrmann v. Germany |  Natsvlishvili and togonidze v. Georgia |  X v. Turkey |
|  Babar ahmad and others v. The united kingdom |  Hristozov and others v. Bulgaria |  Navalnyy v. Russia |  Y.y. V. Turkey |
|  Baka v. Hungary |  Hutchinson v. The united kingdom |  Nazarenko v. Russia |  Yefimenko v. Russia |
| Bărbulescu v. Romania [gc] |  Ilbeyi kemaloğlu and meriye kemaloğlu v. Turkey |  Nicolae virgiliu tanase v. Romania |  Z.a. And others v. Russia |
|  Bayev and others v. Russia |  Ilias and ahmed v. Hungar'y |  Novruk and others v. Russia |  Zaieţ v. Romania |
|  Becker v. Norway |  Ilnseher v. Germany |  Nusret kaya and others v. Turkey |  Zolotas v. Greece (no. 2) |
|  Beghal v. The united kingdom | Izzettin dogan and others v. Turkey |  O'keeffe v. Ireland | Laurus invest hungary kft and others v. Hungary |
|  Biao v. Denmark |  J. And others v. Austria | Osmanoğlu and kocabaş v. Switzerland | Stichting mothers of srebrenica and others v. The netherlands |
|  Bittó and others v. Slovakia |  Janowiec and others v. Russia |  O'sullivan mccarthy mussel development ltd v. Ireland | Willcox and hurford v. The united kingdom |
|  Björk eiðsdóttir v. Iceland |  Jones and others v. The united kingdom |  Paradiso and campanelli v. Italy | A.p., garçon and nicot v. France |
|  Burmych and others v. Ukraine | Károly nagy v. Hungary[gc] |  Paradiso and campanelli v. Italy [gc] |  Boulois v. Luxembourg |
|  C.a.s. And c.s. V. Romania | Károly nagy v. Hungary |  Parrillo v. Italy |  Cengiz and others v. Turkey |
|  Carvalho pinto de sousa morais v. Portugal | Karácsony and others v. Hungary [gc] |  Pentikäinen v. Finland |  Di trizio v. Switzerland |
|  Catan and others v. The republic of moldova and russia |  Khamtokhu and aksenchik v. Russia |  Perinçek v. Switzerland | Güzelyurtlu and others v. Cyprus and turkey [gc] |
|  Centro europa 7 s.r.l. And di stefano v. Italy |  Khoroshenko v. Russia |  Petropavlovskis v. Latvia |  I.b. V. Greece |
|  Chabauty v. France |  Koch v. Germany |  Piechowicz v. Poland |  Jeunesse v. The netherlands |
|  Chitos v. Greece |  Kocherov and sergeyeva v. Russia |  R.b. V. Hungary |  Kotov v. Russia |
|  Communist party of russia and others v. Russia |  Konstantin markin v. Russia |  Ramos nunes de carvalho e sã v. Portugal |  Kotov v. Russia[gc] |
|  Correia de matos v. Portugal |  Kudrevičius and others v. Lithuania |  Regner v. The czech republic |  Mutu and pechstein v. Switzerland |
|  Couderc and hachette filipacchi associés v. France |  L.h. V. Latvia |  Rohlena v. The czech republic |  S.a.s. V. France |
|  Creangă v. Romania |  López ribalda and others v. Spain |  Roman zakharov v. Russia |  Tarantino and others v. Italy |
| Cumhuriyet halk partisi v. Turkey |  Lambert and others v. France |  Rooman v. Belgium |  The church of jesus christ of latter-day saints v. The united kingdom |
|  X v. Finland |  Wenner v. Germany |  Ruslan yakovenko v. Ukraine |  Van der heijden v. The netherlands |

## On the coding of the 202-sample

The coding of the 202 cases took place using the qualitative analysis program MAXQDA, and then transferred to Excel and R for statistical analysis.

### Narrow, Wide or just the Margin

For the initial coding of whether a margin mentioned was wide or narrow I relied on the following terminology for automatic coding, but with every code checked qualitatively to ensure that notions such as “not a wide margin” were not coded as ‘wide’ but rather as ‘narrow’ margins.

|  |  |
| --- | --- |
| variable | what it includes - OR variables |
| All Margin | margin of appreciation, margin of discretion, certain margin, + all search terms related to wide or narrow margin |
| Wide margin | Wide margin, wider margin, margin should be wide, margin will be wide, margin is wide, margin wide, margin wider, wide discretion |
| Narrow margin | narrow margin, narrower margin, reduced margin, margin should be narrow, margin should be reduced, margin will be narrow, margin will be reduced, margin is narrow, margin is reduced, margin narrow, margin narrower |

The vast majority of margin-mentions did not contain any information on its width, and the use of the ’narrow’ margin terminology was particularly rare.



There were big differences in how often the margin was used in any one case. On average a margin of appreciation case mentions the doctrine 5,2 times, but there are notable outliers such as *Correia de Matos v Portugal* where the doctrine is mentioned no less than 50 times.



### Who is using the margin

For the coding of which actors use the margin, this was done by hand using the headlines in the judgments as an indicator since in a few cases the submissions by the applicants were reported under the same headlines as the submissions by the respondent state, making automation unreliable. For example: *Österreichische vereinigung zur erhaltung, stärkung und schaffung v. Austria.*



Court-actors whether the majority or separate opinions by judges were by far the most frequent users of margin of appreciation language. And yet there were 29 cases in the sample where the Court did not mention the margin. In 22 of these it did not engage with a subsidiarity argument at all. These cases were:

|  |
| --- |
| CASE OF CENTRO EUROPA 7 S.R.L. AND DI STEFANO v. ITALY |
| CASE OF MERABISHVILI v. GEORGIA |
| CASE OF RAMOS NUNES DE CARVALHO E SÃ v. PORTUGAL |
| CASE OF AHMET YILDIRIM v. TURKEY |
| CASE OF CENGIZ AND OTHERS v. TURKEY |
| CASE OF GÜZELYURTLU AND OTHERS v. CYPRUS AND TURKEY |
| CASE OF CREANGA v. ROMANIA |
| CASE OF BABAR AHMAD AND OTHERS v. THE UNITED KINGDOM |
| CASE OF JANOWIEC AND OTHERS v. RUSSIA |
| CASE OF WILLCOX AND HURFORD v. THE UNITED KINGDOM |
| CASE OF DEL RÍO PRADA v. SPAIN |
| CASE OF CASE OF ÖSTERREICHISCHE VEREINIGUNG ZUR ERHALTUNG, STÄRKUNG V AUSTRIA |
| CASE OF L.H. v. LATVIA |
| CASE OF SVINARENKO AND SLYADNEV v. RUSSIA |
| CASE OF ROHLENA v. THE CZECH REPUBLIC |
| CASE OF SCHATSCHASCHWILI v. GERMANY |
| CASE OF MAGYAR JETI ZRT v. HUNGARY |
| CASE OF FERNANDES DE OLIVEIRA v. PORTUGAL |
| CASE OF GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND |
| CASE OF SIGURÐUR EINARSSON AND OTHERS v. ICELAND |
| CASE OF Z.A. AND OTHERS v. RUSSIA |
| CASE OF KAROLY NAGY v. HUNGARY |

### On the coding of the use of the margin

This coding necessarily includes a measure of interpretation, but the categories have been attempted made as clear as possible to limit the impact of subjective understandings.

The full codebook is here:

|  |  |  |
| --- | --- | --- |
| Type | Subtype | Explanation |
| 1. Empty and partially empty  |
|   | 1.a. Empty - also simply concluding remarks | Any case in which the margin is mentioned, but where there does not appear to be any engagement with it in the argument in connection with which it is mentioned. This category also includes situations where the margin is simply used as a conclusion. It is not unusual for a case to first contain margin-arguments in other categories than this one, and then end with an empty margin.  |
|   | 1.b. Balance between individual and society | Any case where the interference with a human right has a legitimate aim contains a balancing between individual and society, therefore this type of argument constitutes a type of empty mention of the margin. |
|   | 1.c. Explaining the margin | A margin-mention that does not apply the margin directly, but rather describes how it is to be applied in general or in the present case. Often contains a reference to existing caselaw or the description can be taken directly from another judgment. |
| 2. Anti-margin mentions  |
|   | 2.a. margin not applicable/misrepresented in present case | An argument that the margin is not or should not have been applied in the present case. Also includes cases in which one actor at the Court criticises another for their reliance on the margin. |
|   | 2.b. Notwithstanding the margin | The margin as something that may be relevant to the case, but which nonetheless cannot justify the situation. Related to 5.c. but incorporates a dichotomy-argument which 5.c. doesn't. Does not necessarily contain the word 'notwithstanding'. |
| 3. Margin as Scope  |
|   | 3.a. Scope of right | An argument that the right in question generally has a wide or narrow margin. |
|   | 3.b. Scope of situation | An argument that the width of the margin is determined by the specific type of case being treated - whether wide or narrow. Different from 5.c. in that the argument is not that the type of situation is particularly interfering or that the legitimate aim is particularly important, but rather that the width of the margin in these types of cases has already been determined in established caselaw. |
| 4. Margin for domestic institutions  |
|   | 4.a. Sovereignty and democratic legitimacy argument | An argument that the width of the margin should be determined by the quality/lack of quality of the debate at the domestic level as well as statements that the theme in question falls exclusively within the sovereignty of the state.  |
|   | 4.b. Domestic Courts | An argument that the width of the margin is determined by the existence and/or quality (or lack thereof) of the treatment of the case by national courts.  |
|   | 4.c. procedural general | General arguments that the margin should be determined by the quality (whether high or low) of the procedural protections at the domestic level. |
| 5. Margin as part of the proportionality assessment  |
|   | 5.a. Balancing between individuals | This category includes arguments that the margin is determined by the requirement that the state balances the rights and interests of several (specific) individuals - so not between individuals and the more vaguely determined 'societal interests' or other legitimate aims. |
|   | 5.b. European consensus | This category includes any incorporation of a European consensus argument as determination of the width of the margin, whether to argue that such a consensus is absent or present.  |
|   | 5.c. Interference versus legitimate aim | This category includes statements on vulnerability and importance of the right for the applicants, and the existence/absence of attempts at mitigating the interference, but also statements on the importance of the legitimate aim, including national security arguments. |
| 6. Margin as better placed argument  |
|   | 6.a. Policy/economic/scientific choices where reasonable minds may differ | An argument that the case concerns a theme on which reasonable minds may differ for policy reasons or because the situation at hand deals with legislature implementing social or economic policies. This category also includes cases where 'delicate moral' concerns are cited in favour of granting a (wide) margin. |
|   | 6.b. Pragmatic better placed argument | Any argument for the determination of the width of the margin on the basis that national authorities are better placed because of access to information or intimate knowledge- often applied in cases on family life and the removal of children from parental care. |
| 7. Other |  | Margin-usages that do not appear to fit into any of the other categories. This includes cases where the margin discussed relates to internal relationships in the respondent state (margin afforded to experts, prosecutors etc.) and cases where the margin is an element in determining relationships with other international bodies than the ECtHR.  |