

PHD THESIS ABSTRACT

**THE NATURE OF THE MARGIN OF APPRECIATION
DOCTRINE IN THE CASE-LAW OF THE ECtHR, AS
REFLECTED BY CASES BROUGHT AGAINST HUNGARY**

Dóra Virág Dudás

Eötvös Lóránd University of Sciences
Doctoral School of State and Legal Studies

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Part One

Thesis subject, context, aims, hypothesis and questions

1. Thesis subject

This PhD thesis is about the elusive margin of appreciation doctrine, by which the European Court of Human Rights (hereinafter: the Court) determines, how much discretion States are to be afforded in interpreting their obligations under the European Convention of Human Rights (hereinafter: the Convention). The thesis does not intend to advance ideal features of the doctrine, but rather aims at describing the doctrine's real characteristics and dynamics, as it appears in the Court's case-law.

2. Research context

Hungary, by ratifying the Convention, assumed the obligation of maintaining a human rights protection regime which is in line with the Convention's standards. It assumed the obligation not to restrict human rights more than is permitted, and to protect and support rights as required by the Convention. The Convention is interpreted by the Court's case-law, and the case-law has developed the margin of appreciation doctrine, by which the Court decides on a case-by-case basis, how strictly it reviews the State's interpretation of a Convention obligation and how much room it leaves to local concepts, expertise or circumstances. Although the doctrine has characteristic features, they do not stand out clearly from the Court's decisions. Sometimes even the doctrine's name is used inconsistently. Moreover, no comprehensive study has been written about the doctrine in Hungarian to support domestic law-makers and legal practitioners in recognising their margin of appreciation afforded to them. Acquaintance of the doctrine is particularly crucial for judges, since the exhaustion of the domestic remedy is obligatory before turning to the Strasbourg Court, and it is for the national courts to set standards for the Convention's domestic application, and to express their views on these standards in their decisions, entering into a constructive dialogue with the Strasbourg Court.

3. Thesis aims

The main objective of the thesis is to identify key characteristics of the margin of appreciation doctrine and to develop the doctrine's definition in order to provide national role-players (especially courts) with detailed knowledge on the nature and operation of the elusive phenomenon and to enable them to recognise the extent of their discretion in restricting rights and their obligations to secure them. The author's ambition is to enhance awareness in order to promote further development of human rights protection.

The thesis devotes special attention to providing accurate and consistent Hungarian translations of the terminology used by the Court and by commentators, as it aims to set a solid linguistic basis for the use of the margin of appreciation doctrine and the communication about it in national context.

4. Thesis hypothesis and core questions

As research outcome, two distinct findings can be envisaged. The research may either prove that the margin of appreciation doctrine has serious shortcomings and is such an ill-defined and unstable concept that it is impossible to describe it for practical purposes. Or, the research may prove that the doctrine's characteristics can be well described and they constitute a meaningful legal concept which can be properly applied in its present form, without further clarification or development.

As might be expected, the second, more optimistic version has been chosen as a research hypothesis.

In order to test that hypothesis, the thesis addresses the following questions: What are the reasons for the uncertainty in labelling and conceptualising the doctrine? What are the social and legal frameworks and purpose of the doctrine? Where does it come from and where is it going to? In what contexts can it be applied? What can be regarded as its application and when does the Court apply different, though deceptively similar concepts? What is the doctrine's source and who is its addressee? What are its factors and how is it applied in relation to different human rights? What role does it play in the proportionality analysis and how does it appear in the Court's judgments? What terminology features it and how can it be defined precisely?

Part Two

Research Methodology

1. Research material

The most suitable approach for testing the hypothesis was to draw conclusions from existing information and knowledge, which entailed a ‘desk study’ of relevant literature and decisions. This was supplemented by some ‘field study’ within the Court in order to clarify the doctrine’s name and to reveal the background of certain judgments.

Two main sources of the research material were scientific literature and the Court’s case-law. Relevant literature was mainly available in the Court’s well-stocked library, in national academic libraries and on the Internet. The issue has been predominantly studied in English and some articles could also be found in French. The doctrine has received only limited attention by Hungarian authors, and only few comments have been published about it in Hungarian.

The exposition of the Court’s case law has been restricted to judgments which make specific reference to the margin of appreciation in relation to Hungary, as these judgments are properly representative of the case-law as a whole. Moreover, owing to their national context, they are able to provide national actors, in particular, administrative and judicial authorities, with deeper understanding of the doctrine than other decisions. The thesis systematically analyses all judgments made by the Court with regard to Hungary since its ratification of the Convention in 1992 up to the completion of the research in February 2013, which contain the expression of ‘margin of appreciation’ or a synonym. The methodological approach is critical content analysis based on preliminary theoretical findings. Word-by-word citation of the most relevant parts of judgments may facilitate in-depth understanding of the Court’s way of thinking and the related terminology.

2. Research methods

Overlapping theoretical and empirical research methods have been applied. Combining these two main approaches permitted a comprehensive analysis of the margin of appreciation doctrine, since theoretical considerations determine the sphere of pragmatic research, while case-law analysis leads to new theoretical findings or at least to some adjustment of

preliminary ideas.

Descriptive approach is predominant to the evaluative accounts in the thesis, since such core questions should be addressed like: ‘What is the content of the doctrine and how does it operate?’ If the doctrine’s nature and dynamics were sufficiently clear and well known, it would not be necessary to describe it, but it would be enough to evaluate it. However, since the very aim of the research is to clarify the doctrine’s characteristics, descriptive questions should predominate. Evaluative approach is applied, however, in comparing various theoretical views, and, to some greater extent, in the case-law analysis.

Part Three

Thesis structure and synopsis, scientific results and their potential uses

1. Thesis structure

Chapter One examines the notion and name of the margin of appreciation doctrine. Chapter Two sets its social and legal framework, embedding the doctrine in the context of the European ‘cosmopolitan legal order’. Chapter Three explores the doctrine’s origins and evolution. Chapter Four identifies its different usages. Chapter Five considers cases in which the Court does not apply the doctrine but the supervisory power of the Court is restricted by other means or where the margin of appreciation is mentioned superfluously. From the next chapter on, the thesis focuses on the very use of the doctrine. Chapter Six identifies the source and the addressees of the margin of appreciation. Chapter Seven explores the doctrine’s relevant factors. Chapter Eight examines the relationship between the doctrine and various Convention rights. Chapter Nine explores the assessment of proportionality, the primary procedural context of the doctrine’s application. On the basis of preliminary theoretical considerations, Chapter Ten analyses the Court’s judgments which refer to the margin of appreciation in a Hungarian context. Chapter Eleven summarises the tentative conclusions drawn from the analysed cases. Lastly, Chapter Twelve draws the thesis’ final conclusions about the margin of appreciation doctrine, and seeks to give it a concise definition, as it could be derived from the Court’s practice.

2. Synopsis

The preliminary setting of the thesis is the contradiction which lies in the fact that the margin of appreciation can be regarded as a ‘doctrine’ for its widespread and well recognised use as a judicial decision making guidance in the Court’s case-law and the fact that its concept is vague, blurred and ambiguous. The concept’s vagueness is also reflected by the uncertainty of the doctrine’s name both in English and in the translations to other languages (including the Hungarian). Sometimes it is not clear whether a certain term refers to the doctrine’s application or not. However, neither the Court nor domestic role-players make any genuine effort to unify the terminology, a reasonable expectation with regard to an important legal doctrine. The thesis reviews a number of applied name variants, and argues in favour of the English name of ‘margin of appreciation’ and its Hungarian translation of *‘mérlegelési mozgástér’*.

Unfortunately, identifying the most suitable name cannot provide in itself a sufficient understanding on the doctrine’s nature and operation. The context and methods of the doctrine’s use should also be examined. With this regard, the thesis first explores the social and legal framework as well as the origins and evolution of the doctrine, and it then reviews the doctrine’s application, distinguishing it from other restrictions of the Court’s supervisory power and from the doctrine’s ‘inflation’, that is, useless or inadequate reference to the margin of appreciation.

The social and legal framework of the doctrine can be identified as a ‘cosmopolitan legal order’, which has emerged in the ‘zone of liberal peace’ of the Council of Europe. Key interlocking elements of this legal order are national courts, the Strasbourg Court and the Convention, the latter being regarded as the European cosmopolitan constitution. The European cosmopolitan legal order develops through a cooperative and competitive dialogue between national courts and the Strasbourg Court about the application of the Convention as a ‘living instrument’. By this dialogue national courts play significant role in ensuring the observation of human rights. In this context, the margin of appreciation doctrine can be seen as a necessary product of the division of powers between the role-players of the cosmopolitan legal order, providing the Court with flexibility in assessing what requires decision-making at a local level and when it is necessary to use its central governing (supervisory) power. The Court’s decision in this regard should be communicated in its judgments with utmost clarity. However, such clarity is not always apparent. Therefore, it is for the national courts to indicate in their decisions if they do not understand something or they cannot share the views

of the Court. The thesis presumes that national courts are ready to assume their role in ensuring observance of the Convention rights and to enter into a dialogue with the Court about the doctrine. For this, however, they need to acquire detailed knowledge about the very nature and operation of the margin of appreciation.

Detecting the origins and exploring the evolution of the margin of appreciation, the thesis points out that the Court-created doctrine can be derived from classic methods of national judicial review of administrative discretion. Gradually the doctrine spread into the sphere of nearly all rights protected by the Convention, and by now has become one of the Court's most significant interpretative tools. The concept of the margin of appreciation has also been incorporated in the Convention's Preamble.

Summing up relevant scientific views on the doctrine and confronting them with the case-law, the thesis comes to the conclusion that the primary context of the doctrine's application is the analysis of proportionality which is to be carried out as part of the necessity test applicable to human rights restrictions. A further important context in which the doctrine arises is the field of positive obligations. In the context of proportionality analysis the doctrine can be applied structurally or substantively. In case of structural application, the Court heightens or lowers the standard of measure of the proportionality analysis, usually adding the 'wide' or 'narrow' adjectives to the 'margin'. The Court only abdicates its supervisory power in exceptional cases, which can also be regarded as a structural application. In case of a substantive application, the Court carries out a normal proportionality assessment, using the common 'fair balance' standard, but in this balancing exercise factors of the margin of appreciation are taken into consideration in favour of the State or the applicant. In such cases, the Court usually qualifies the term 'margin' with the adjective 'certain'. Moreover, the substantive application of the margin of appreciation doctrine can be split into the sub-categories of classic, weak, inverted and mixed applications, depending on which party is supported by the 'margin' and whether a favourable decision derives from that margin to the supported party. The other relevant field of the doctrine's application with regard to positive obligations concerns in principle the choice of means aiming at fulfilment of the obligation. In this case the 'margin' does not normally attract any adjective, and its scope is determined by the 'effectiveness' of the measures applied.

Recognition of various contexts and methods of the doctrine's application disproves the widely held view that the doctrine should always lead to deference to the respective States. It can alleviate the concerns that by the use of the doctrine cultural relativism would win against the universality of human rights.

Shedding light on the various fields of the doctrine's application illuminates the purpose and way of its use in the Court's practice. In order to be able to easily recognise the doctrine's application, it is important to distinguish it from other restrictions of the Court's supervisory power and from the doctrine's 'inflationary' use, when the Court invokes the margin of appreciation unduly or superfluously. From the range of other restrictions of the Court's supervisory power, the legislature's freedom of implementation and the national courts' discretion are sometimes confused with the doctrine's application. The use of the doctrine is most typically superfluous when a margin is not relevant to the decision or when the Court neither grants deference nor it takes into consideration any factor of margin of appreciation in the proportionality assessment.

After having delimited the scope of the doctrine's application, distinguishing it from the cases of non-application, the thesis can start to examine more closely: who leaves the margin to whom, on the basis of what factors and in what kind of procedure?

As direct source of the margin of appreciation, the Court can be identified, while the margin's indirect source is the Convention. Altogether, as source, the Court's case-law is recommended to be referred to. The addressee of the margin is the legislature in case of a legislative act and the national courts in case of a judicial decision. As far as non-normative administrative decisions are concerned, although in their case the final decision is made by a court, the margin's addressee remains the executive branch of government, while administrative courts are remedial forums similar to the Strasbourg Court, for which their duty is to apply the doctrine in examining the administrative decisions' compliance with the Convention. However, the Court does not always specify which branch of government is addressed by the doctrine. For the Court it is irrelevant which competent State body ensures the observance of the Convention, therefore it prefers using the general notions of 'State' or 'competent national authorities' as addressee. However, it is important for national role-players to know which of them is bound or supported by the Court's decisions. This can be properly recognised from the Court's judgments.

The thesis proceeds by identifying factors of the margin of appreciation in order to clarify the reasons for the addressee's limitation or discretion. These factors are elements taken into consideration by the Court when using the doctrine in its structural or substantive sense. The factors are grouped according to two different approaches. The first approach aims at identifying reasons explicitly manifested in the Court's judgments, and recognises the following factors: nature of protected right, nature of regulated activities, nature of interference, surrounding circumstances and common ground. The second approach aims at

distinguishing between first and second order reasons, and as second order reasons identifies three factors: democracy, consensus and expertise. It correlates these factors, analyses them in the case-law, and recognizes that they can support either the State or the applicant and may come into conflict with each other. It also points out that the consensus (common ground) factor is rather vague.

In the following chapter the thesis catalogues the most important Convention rights from the ‘absolute’ rights to the ‘strong’, ‘qualified’ and ‘weak’ ones, in order to explore how the nature of rights and types of cases can affect margin of appreciation. It proves that weaker rights allow more scope to the margin of appreciation doctrine than stronger ones.

Finally, the thesis takes a closer look into the doctrine’s primary procedural context, the proportionality analysis, which can be influenced by factors of margin of appreciation. These factors, depending on the importance and context of the right in question, can modulate the intensity of the proportionality assessment (structural application) or can be simply taken into account in the ‘fair balancing’ exercise (substantial application).

The above considerations served as a theoretical basis for the analysis of judgments relating to Hungary which referred to a margin of appreciation. In-depth analysis of the relevant case-law puts theoretical findings in practical context for the purpose of their better understanding, and it serves to illuminate any errors in the preliminary findings. Case-law analysis may endorse a better understanding of the doctrine’s nature and operation by offering insightful empirical observations. Collaborative academic and empirical research provides sufficient knowledge on the margin of appreciation doctrine, so we can attempt to give it a precise definition.

Having summarised the findings of the research, the PhD thesis proposes a definition of the margin of appreciation doctrine as follows:

‘Margin of appreciation’ is a Strasbourg Court-created legal doctrine applicable in the context of decisions relating to Convention rights, by which the Court, taking into account local circumstances, at times consensus of the Contracting States, the nature of rights and activities concerned and the fundamental need for democracy, reviews with lowered or heightened rigour the proportionality of the States’ interference with individual rights, assesses the proportionality with the common ‘fair balance’ standard but taking into account democratic, consensus or expertise related considerations, or leaves freedom to the States in complying with their positive obligations as long as their measures applied are efficient.

To sum up, the thesis comes to the conclusion that the margin of appreciation doctrine is neither a ‘black box’ from which one can never know what comes out, nor is it a ‘slippery

eel', but its operation displays well-identifiable characteristics, the knowledge of which might greatly contribute to the recognition of freedoms and responsibilities by national institutions who should operate a human rights protection regime in conformity with the Convention.

3. Scientific results and their potential uses

This is the first PhD thesis:

- to analyse the margin of appreciation doctrine comprehensively in Hungarian language;
- to focus on the needs of national role-players;
- to discuss the uncertainty about the doctrine's name thoroughly;
- to set up the doctrine's Hungarian terminology;
- to analyse the Court's Hungary-related case-law in relation to the doctrine;
- to clearly differentiate between the doctrine's structural, substantive and positive obligation-related applications;
- to introduce the notions of classic, weak, inverted and mixed substantial applications;
- to offer the margin of appreciation doctrine a comprehensive definition.

The findings of the thesis may be used in university, legislator and legal practitioner training, and may have particular importance in training of judges, who play prominent role in the enforcement of the Convention. The research findings can also provide legal representatives with useful knowledge to improve their effectiveness in domestic proceedings and before the Strasbourg Court. Knowledge on the margin of appreciation doctrine may facilitate role-players of the domestic protection regime to recognise their limits and obligations in properly ensuring human rights. As a consequence, national protection may improve and the Court's workload may decrease. Furthermore, an inter-court dialogue about the doctrine may increase and positively influence the Court's case-law. Finally, the thesis' findings may stimulate scientific debate on the doctrine and may serve as a basis for further research, which further enhances human rights development.

Part Four
List of Publications

Dr. Dudás Dóra Virág: *Néhány szó a bírósági nyelvhasználatról*. Magyar Jog, 2005/9, 554-548; Bírák Lapja, 2007/2, 74-78.

Dóra Virág Dudás: *Harmonization of Asylum Law in the European Union – National Perspective*. In: Conference Papers of the Seminar on Current Asylum Issues and Human Rights, 17-18 April 2007, Jablonna, Poland, 66-69.

Dudás Dóra Virág: *Augustin Gordillo: An Introduction to Law*. Magyar Jog, 2007/9, 571-572.

Dóra Virág Dudás: *Dublin Regulation or Readmission Agreements?* Dignitas, the Slovenian Journal of Human Rights, Thematic Issue on Selected Case-Law on Asylum and Immigration in Europe, July 2008, 127-130.

Dóra Virág Dudás: *Hungarian State Practice in Determining Subsidiary Protection Applications of Afghan Asylum Seekers*. Conference Reader of Conference on asylum related questions regarding Afghanistan, Vienna, 31.03/01.04.2011, 55-61.

Dudás Dóra Virág: *Mérlegelési jogkörben hozott közigazgatási határozatok bírósági vizsgálata az emberi jogok korlátozása esetén releváns mérlegelési mozgástér fényében*. Fundamentum (Forthcoming 2014).

Dudás Dóra Virág: *Az Emberi Jogok Európai Egyezményének 6. Cikke, avagy a tisztességes eljáráshoz való jog a strasbourgi bíróság gyakorlatában*. Bírák Lapja (Forthcoming 2014).