THE MARGIN OF APPRECIATION OF NATIONAL JUDGES ON ISSUES COVERED BY JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS (Meeting organized by the Bingham Centre for the Rule of Law and the U,K. Supreme Court with the collaboration of Italian Council of State – London, November 28 th, 2014) -

by **Filippo Patroni Griffi**

Relationship between National Law and Conventional Law of Human Rights

Until the constitutional reform of 2001, the European Convention of Human Rights had been regarded **as conventional International law**, under article 10 of the Constitution. Therefore, unlike the EU Law, the Convention could not be applied directly in domestic law. At the same time National Courts could not refuse to apply domestic law which was supposed to conflict with the Convention. Courts could only refer to the Convention as a guideline for the interpretation of domestic law, in order to provide an interpretation of it consistent with the Convention. In addition to this, the Italian Constitutional Court often stressed that domestic constitutional principles usually go hand in hand with Human Rights as set out in the Convention, so that the Constitutional Court could be seen as a guarantor both of the Constitution and the Convention, within an integrated system of protection of human rights.

With the constitutional reform of 2001, art. 117 provided that the State and the Regions exercise their Legislative power in the respect of the Constitution and **with the constraints deriving from** EU and **international obligations**.

Thus, according to the Constitutional Court's case-law (so called **"Twin Judgments"** no. 348 and 349 of 2007), the Convention can be placed at an intermediate level, in our system of sources of law, between the Constitution and "ordinary law" (which mostly consists of Acts of Parliament). As a consequence, if a national Judge states that domestic law is in contrast with the Convention, he must act as follows:

first, he must try to interpret domestic law so as to make it Convention-compliant; if that is not possible, he must refer the question to the Constitutional Court inferring that art. 117 has been violated. In this sense, we would say that the Convention (and its rules) act as a "*norma interposta*", that is to say a parameter which allows to evaluate to what extent domestic law is consistent with rules "deriving from international obligations" and therefore with the rules of the Convention; if this is not the case, and domestic law is not consistent with such rules, article 117 has been violated.

The Constitutional Court stated that:

a) the conventional rule must be read as interpreted by the European Court;

b) it is allowed to verify whether the rule, as interpreted by the Court, is consistent with other constitutional values (in the same way it does when balancing different values within the scrutiny of constitutionality with regard to domestic law). In that case, I would say that the conventional rule or principle, if consistent with Constitution, through art. 117 is regarded at

the same level as a constitutional rule or principle, to be balanced with other constitutional rules and principles if in conflict with them;

c) even after the Treaty of Lisbon and the adhesion of EU to the Convention, the abovementioned situation has not changed (see *inter alia* C.C. sent. No. 80/2011), the mechanism of direct non-application (of contrasting domestic rule) being confined to the field of EU law.

Here we are to the point of the doctrine –or, according to some Authors, of the technique – of the margin of appreciation (other terminology used are also "margin of deference" or "discretionary area of judgment").

The margin of appreciation in the European Court's case law

1. As we know, the "margin of appreciation" is a principle which was established by the European Court of Human Rights ("Court") in the **leading case *Handyside v. United Kingdom*** (5493/72, decided on 7 December 1976) regarding Article 10 of the Convention

2. The case concerned the publication of *Little Red Schoolbook*, where there was a chapter which discussed sexual behaviour in explicit terms, which the UK authorities considered in violation of the *Obscene Publications Act*. In that case, the Court stated:

[**It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals.** The view taken by their respective laws of the requirements of morals **varies from time to time and from place to place,** especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. **By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge** to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them, so it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context. Consequently, Article 10 para. 2 (art. 10-2) **leaves to the Contracting States a margin of appreciation**. This margin is given both to the domestic legislator ("prescribed by law") and to the authorities, judicial amongst others, that are called upon to interpret and apply the laws in force. Nevertheless, Article 10 para. 2 (art. 10-2) **does not give the Contracting States an unlimited margin of appreciation. The Court**, which, together with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 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 (art. 10). **The domestic margin of appreciation thus goes hand in hand with an 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, including those given by an independent court (paras 48-49).

3. The Court reasoned that, despite the fact that in some matters States have a certain freedom (margin of appreciation) to decide what complies with social interests, the Court is entrusted with the task of supervising how such freedom is exercised, particularly in relation to **necessity** and **proportionality** of the limitations on the rights of individuals.

4. In order to fully understand the concept of "margin of appreciation", we must first recognize that – as often highlighted by the Court – the Convention is a "living instrument", which is

to be interpreted in the light of present day conditions.[1] Human rights are indeed a product of culture and their understanding may evolve along with material and spiritual changes in society. In the Belgian Linguistic case no.2 (1979), the Court stated that:

"The national authorities remain free to choose between different measures which they consider appropriate in those matters governed by the Convention. Review by the Court concerns only the conformity of those measures with the requirements of the Convention".

5. The doctrine of the margin of appreciation has been applied by the Court in several cases, often with results and **statements which may appear in contradiction to one another**[2]; but we must consider that this doctrine has no codified rules and relies on case-law principles influenced by the sensitiveness of the Court and by floating circumstances and considerations related to the historical time.

6. The elements which characterize the doctrine of the margin of appreciation must be regarded in the general context of the **relations between Courts** operating at international or supranational level and National Courts. The key issues can be summarized as follows:[3]

a) **Deference** - The general context is represented by what is commonly called **judicial dialogue** -perhaps better expressed as "necessary judicial interactions" (De Vergottini)- due to concurring jurisdictions on the same or similar matters. Judicial dialogue is a form of "transjudicial communication" (Slaughter), defined by the Courts themselves, aiming at the so-called Judicial comity and based on the principle according to which "courts in one jurisdiction should respect and demonstrate a degree of deference to the law of other jurisdictions, including the decisions of judicial bodies operating in the jurisdiction" (Y.Shany). The first key word is therefore "deference";

b) **Subsidiarity**: National Courts are in "the better position" to guarantee the protection of human rights with special reference to National culture and traditions[4];

[1] M. D. Evans, *Manual on the wearing of religious symbols in public areas* (Council of Europe Manuals), 2008, pp. 41-42.

[2] I refer to two judgments by the Grand Chamber related to the same matter of ban on prisoners' voting. In the case *Hirst v. United Kingdom,* (October 6th, 2005) the Court found a violation of the right to free elections in relation to a blanket ban on British prisoners exercising the right to vote. According to the Court, a provision establishing an automatic and general blanket ban, regardless of the sentence imposed, of the type and gravity of the crimes committed, and of personal circumstances, is to be considered disproportionate in relation to the aim. Whereas, in the case *Scoppola v. Italy,* (May 22th, 2012), the ban on prisoners' voting was considered lawful because, in Italy, the ban on voting does not indiscriminately affect all detainees, but only some categories – and in particular those found guilty of crimes against public administration or the administration of justice, or those convicted to a sentence of three or more years of imprisonment. In other words, the ban on public office (which includes the ban on voting rights) is not general, automatic, or indiscriminate as in the *Hirst* case.

[3] According to Thomas Hammarberg, *Dialogue between judges, European Court of Human Rights, Council of Europe,* 2012, p. 32: "Criticisms about *'judicial activism'* or arbitrariness have really not been fair. The approach has been serious. The judges have not introduced just personal ideas; they explore whether there is a consensus on such cases in the superior courts in the member States; they analyse decisions of other international jurisdictions; and they take into account, when relevant, treaty developments in the United Nations".

[4] This often leads the Court to express in its rulings that "by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide" on limitations to fundamental rights"

c) (but) **Supervision** – The Court allows a margin of manoeuvering to National Courts by resorting to doctrines of deference and subsidiarity but the Court reserves to itself the role of supervision and monitoring of the concrete application of the margin of appreciation granted to national authorities and their courts. In order to do that, **the Court relies on consensus and proportionality (and/or necessity)**:

c1) The Court, indeed, first assesses whether a **consensus** on a specific principle has emerged in domestic jurisdictions of Member States, often considering national Supreme Courts judgments. Consensus does not mean unanimity. If there is no strong dissenting voice among Member States and a precise trend can be ascertained, consensus can be established even if all the legal systems in question do not explicitly agree on an issue;

c2) **by the tests of necessity and proportionality** the Court respectively verifies that the domestic rule involved is necessary to pursue **"a general interest"** and that the margin of appreciation exercised by the national Court is proportionate to the consideration of the "general interest" recognized as such, as long as this does not lower the protection ensured by the national Court below a **minimum standard of protection** as defined by the European Court.

7. In a sense, the concept of "margin of appreciation" mirrors the concept of "consensus". The rule established and applied by the Court is that "consensus" and "margin of appreciation" are inversely proportional to each other, while "consensus" and "power of control by the Court over domestic systems" are directly proportional to each other. In other words, the Court considers that it can impose on States a certain level of protection of a fundamental right only to the extent that such level of protection is already recognized by a great number of Member States or, at least, there is a clear trend in that direction.[5] In this view, the so-called principle of "substantive subsidiarity", (Article 53 of the Convention) is crucial, because it leaves space for specific national solutions and thereby fosters acceptance - and decreases the likelihood of destructive conflicts - within the Convention system. By applying Article 53, the Court sets the *minimum* standards it requires as necessary and provides national courts and legislators with options for balancing competing rights.

8. Without entering into the specifics of the various areas where the "margin of appreciation" applies, we can say that the Court recognizes a wide "margin of appreciation" in the field of the fight against terrorism and organized crime, which is largely left to Member States to regulate as they deem appropriate. In this area, the only boundaries can be found in the disproportionate character of the measures adopted. As P. Craig said, **"Proportionality is relevant when deciding whether the limitation *(of human right)* really is necessary in a democratic State"[6]**.

[5] According to the concurrent opinion of Judge Rozakis in the judgment *Lautsi vs. Italy*, Grand Chamber, 18 March 2011: "*It should be observed here, while we are on the subject of a consensus, that the Court is a court of law, not a legislative body. Whenever it embarks on a search for the limits of the Convention's protection, it carefully takes into consideration the existing degree of protection at the level of the European States; it can, of course, afford to develop that protection at a level higher than the one offered by a specific respondent State, but on condition that there are strong indications that a great number of other European States have already adopted that degree of protection, or that there is a clear trend towards an increased level of protection*".

[6] Even in relation to such measures, however, the Court is hesitant to challenge national authorities. For instance, the Court has accepted some serious restrictions under Italian law in relation to personal and property rights even if undertaken on the ground of evidence based on circumstances and not on the basis of a final conviction. The so-called preventive measures, indeed, do not relate to the commission of a specific unlawful act but to a pattern of behaviour defined by law as conduct indicating the existence of a danger to society. This occurred in *Labita c. Italia* (6 April 2000, paras 194-195) with respect to personal restriction measures, as well as in the cases *Raimondo* (judgement

9. More particularly **significant** examples, among many, are the following **cases**:

a) generally speaking, a wide margin of appreciation is granted in **matters concerning moral**, such as in the case Stuebing, where the Court accepted the applicant's conviction by the German judges for an incestuous relationship, in relation to article 8; in this field, the principle of margin of appreciation has been invoked also by the Italian Constitutional Court in June 2014 (no. 170), in a case concerning the so-called "divorce imposed" by the change in gender of a spouse while pending the marriage, in order to refuse the protection under article 8 and 12 of the Convention, even though the law has been considered in conflict with a rule (art. 2) of the Italian Constitution and consequently quashed;

b) a margin of appreciation, related to national traditions, has been granted to UK in the case Countryside Alliance (2009) with regard to the prohibition of hunting wild animals with dogs, even though limitative of the use that an owner could make of his land;

c) a margin of appreciation has been recognised in relation to the prohibition of **heterologous insemination**, provided for by the Austrian legislation (whereas the Italian Constitutional Court held as unconstitutional such a prohibition in judgment no. 162/2014);

d) a margin of appreciation has been granted to France in relation to the **prohibition to wear integral veil**, on the ground that there was no definite such trend in European countries and by considering that such a prohibition could be reasonably justified because that kind of clothing could undermine social relations which are essential in a democratic society (Grand Chamber, 1° July 2014)

10. On the opposite side, we must pay attention to the fact that the Court holds that there are **unilimitable rights**, that is to say rights which do not tolerate any margin of appreciation, especially those which refer to traditional freedoms as applied in the eastern democracies[7].

11. In the highly influential **Declaration of Brighton**,[8] there are some suggestions and proposals which aim at reinforcing substantive subsidiarity and the role of supervision of the Court related to the margin of appreciation granted to Member States and to their Courts. Following that Declaration the principle of subsidiarity and the margin of appreciation have been written into the preamble to the Convention[9],[10].

22/2/1994), *Bocellari e Rizza* (partial decision 28 October 2004) and *Morabito* (final decision 7 June 2005), upon seizure and confiscation of assets.

[7] See, for instance, case Zdanova v. Lettonia 17 giugno 2004, applic. No. 58278/2000.

[8] This is the final document issued at the High Level Conference meeting on the future of the Court, at Brighton on 19-20 April 2012, at the initiative of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe.

[9] *See* these **extracts from the Declaration of Brighton** (High Level Conference on the Future of the European Court of Human Rights):

11. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court

The margin of appreciation in the case-law of Italian Courts

Finally we will review how the doctrine of margin of appreciation has sometimes been mentioned and applied, as a legal principle, by domestic courts in Italy: the Constitutional Court, the Council of State, the Supreme Court. Here **the key point** is represented by the definition of the relevant reason of public (general) interest which is able to justify a limitation of the right within the margin of appreciation granted to the national Court.

Constitutional Court

The first case is particularly relevant because of the contrast between European and National Court. The case was brought by some Italian nationals, who lived and worked for many years in Switzerland before retiring to Italy. On their return to Italy the Italian welfare authority (Inps) decided to re-adjust their **pension claims** to take into account the low contributions they had paid while working in Switzerland. The applicants brought proceedings to contest this method of calculating their pension rights, but their claims were dismissed by Italian judges following the enactment of Law no. 296 of December 2006, which endorsed the Italian welfare authority's interpretation of the relevant legislation.

The Italian nationals then decided to lodge an application to the European Court. In its judgment (*Case Maggio and Others v. Italy*, judgment 31.5.2011), the European Court concluded that Law no. 296/2006, by endorsing the State's position to the applicants' detriment while pending the case before the national judges, violated Article 6 of the Convention (right to a fair trial, equality of arms as interpreted by the European Court), there **not existing any compelling reason** to justify the State's decisive intervention in the outcome of proceedings to which it was a party.

Following the European Court's decision, the case was once again referred to the Constitutional Court, claiming the violation of the Convention and the contrast with art. 117 of the Constitution. Nevertheless the Constitutional Court, in its judgment no. 264 of 2012, while taking into account the ECHR finding, held that the appellant had no legitimate expectation for his pension to be

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is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.
12. The Conference therefore:
a) Welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments;
b) Concludes that, for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013, while recalling the States Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention.

[10] **See these extracts from the Declaration of Brighton**:
15. The Conference therefore:
d) Affirms that an application should be regarded as manifestly ill-founded within the meaning of Article 35(3)(a), *inter alia*, to the extent that the Court considers that the application raises a complaint that has been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case law of the Court including that on the margin of appreciation as appropriate, unless the Court finds that the application raises a serious question affecting the interpretation or application of the Convention; and encourages the Court to have regard to the need to take a strict and consistent approach in declaring such applications inadmissible, clarifying its case law to this effect as necessary.

calculated in line with the previous arrangements. This was because **the challenged law was inspired by the principles of equality and solidarity, which prevailed within the balancing of constitutional interests** (given that contributions paid in Switzerland were four times lower than those paid in Italy, contributions into line with disbursements were indeed used for equalizing the system and support a sustainable balance within the pension system). The Constitutional Court pointed out that Article 53 of the Convention allows specific national solutions in situations where rights specified in the Convention are contradictory and there is a need, belonging to national courts or legislators, to balance the competing rights. The justification of the Constitutional Court reveals indeed **a real contrast with the European Court** by resorting to the **counterlimits technique** in order to refuse the application of the European Court's judgment. One might even wonder whether the exploitation of the margin of appreciation implies a proper balancing of values and interests different from the ones considered by the right affected (right to a fair process). Probably the margin of appreciation *does* imply the possibility to take into account constitutional values and interests in order to assess the compelling reason for a limitation of the right to a fair process. **But the very point** is to what extent European and National Courts are respectively allowed to engage in this balancing operation, in order to avoid that the "general interest", which allows to limit the right, results into a generic "national interest" undermining the spirit of the Convention.

A second issue dealt with by the Constitutional Court concerned a **case of retroactive law**: the Court (no. 92/2014) stated, on the basis of the margin of appreciation, that retroactive laws may not be in violation of the right to a fair process if they aim at ensuring equality amongst citizens and predictability in the application of law, which may both be regarded as "reasons of general interest".

Council of State

Another case concerned a proceeding before the Council of State. Ms Lautsi's children attended a state school in Italy where each classroom had a *crucifix on the wall*. The Lautsis wished to bring up their children without religion and asked for the crucifixes to be removed from the school, which was a public property. The school refused to do so. This led to a series of legal decisions before Italian administrative Courts and the European Court. Italian Courts rejected the claim and applied the principle of the margin of appreciation, arguing that the crucifix was a cultural, not a religious symbol, and that "secularism" does not have a uniform and constant dimension but rather it is a concept which varies according to traditions, cultures and state organization (Consiglio di Stato, section VI, judgment 13.02.2006 n° 556). The European Court of human rights endorsed this solution by making a broad application of the principle of the margin of appreciation: it accepted that the provision of the European Convention can be interpreted differently by different States, resulting in different ways of implementing the same rights and freedoms even with special regard to religious symbols (*Lautsi vs. Italy*, Grand Chamber, 18 March 2011).

Another case brought before the Council of State dealt with the state of **emergency related to the earthquake** in Abruzzo. A decree of the government defining the territories involved, whose population was granted some economic benefits, was challenged before the administrative judge by a local community not included in the decree; while pending the case, the decree itself was enacted by the Parliament as a Law. The case could not be challenged before the Council of State any more,

being the validity of Acts of Parliament scrutinized by the Constitutional Court. The Council of State refused to refer the question to the Constitutional Court, assuming that the Act of Parliament was consistent with the Convention because there was a sufficient reason of general interest (to deal appropriately with the emergency) justifying the interference of the law with a pending proceeding.

Supreme Court (or Corte di Cassazione)

Dealing with the right to compensation for a violation of the **right to trial within a reasonable time** derived from the Italian internal remedy (the so called Pinto Act), the Court held that the national Legislator is free to choose an internal remedy which is consistent with the legal tradition and the standard of living in the country concerned, even if the method of calculation provided for in domestic law does not correspond exactly to the criteria established by the European Court (Corte di Cassazione, no. 478/2011 and no. 22772/2014). According to the Supreme Court, indeed, the margin of appreciation indeed allows it to award amounts which – though being lower than those awarded by the European Court, if only not "ridiculous" – are not unreasonable.

Conclusions - The margin of appreciation and a clear substantive subsidiarity approach **could help** in reducing the risk of human rights being perceived as rules dictated by an external body rather than as achievements and projects of one's own system and culture.[11] In other words, a real substantive subsidiarity may contribute to transform the Court into a sort of European Constitutional Court of rights and freedoms, whose judgments might be readily accepted and loyally implemented. In order to reach such a result, **substantive subsidiarity should no longer be seen as an abstract concept, but should rather be based on the "minimum standard"** approach and on a fair scrutiny of proportionality. In other words, through its fair development and implementation, the Court would no longer create uniform human rights standards all over Europe, but would limit itself to stepping in where minimum standards are not respected.

On the other hand, subsidiarity and the margin of appreciation **cannot be seen as a tool to deny in practice the crucial universality (or universalism) of human rights**. That is to say, the acknowledgement of a margin of appreciation must be regarded as a fostering of dialogue among Courts and between Courts and Parliaments, not as an alibi to create national spheres relating to human rights within a view of nationalism that is –or should be considered to be- inconsistent with the history of Europe or especially its projected future.

The doctrine of the margin of appreciation, if correctly and fairly applied as a *multipurpose* technique, may **balance the demand for universal protection of human rights, on one hand, and the constitutional pluralism of National States, on the other**, while definitely fostering a progressive convergence on the matter.

Three **crucial points seem to still be open**:

a) to what extent and on which grounds the margin of appreciation can be granted to national authorities and to their Courts;

[11] *See* para. 7.

b) which Court (European or National) is definitely entitled to assess the correct implementation of the margin of appreciation;

c) whether and to what extent the margin of appreciation, if not recognised by the European Court, may be counterbalanced by resorting to an application of counter-limits by National Courts.