

One, None and One Hundred Thousand Margins of Appreciations: The *Lautsi* Case

Giulio Itzcovich*

Abstract

The second decision of the European Court of Human Rights in the *Lautsi* case on crucifixes in Italian state-school classrooms is almost entirely grounded on the margin of appreciation doctrine. This article describes the doctrine as developed by the European Court of Human Rights and, on the basis of the distinction between 'hard cases' and 'easy cases', attempts to show one counter-intuitive consequence of the doctrine. Taken seriously, the doctrine seems to imply that the European Court of Human Rights is the exemplar of a court that enjoys no discretion. This construction cannot be accepted. Two other reconstructions are more plausible: the margin of appreciation can be considered as a canon of interpretation or, alternatively, as a proportionality test. The present article argues that both reconstructions entail certain normative consequences for the way in which the European Court should have reasoned in the *Lautsi* case.

Keywords: margin of appreciation doctrine – proportionality test – methods of interpretation – European Court of Human Rights – *Lautsi v Italy*

* Researcher in Jurisprudence, University of Brescia. Comments are welcomed (itzcovich@jus.unibs.it). A first draft of this article was discussed at the workshop 'European Court of Human Rights and Margin of Appreciation: A dialogue with András Sajó and Giulio Itzcovich', at the Università Commerciale Luigi Bocconi, Milano. I would like to thank Oreste Pollicino, András Sajó, the other participants in the workshop and two anonymous peer reviewers of this article for their helpful comments.

1. The *Lautsi* Case

The two *Lautsi* judgments of the European Court of Human Rights (ECtHR) raised and addressed two distinct issues.¹ Firstly, a substantive issue. Whether the obligation to display the crucifix in state-school classrooms is compatible with freedom of thought, conscience and religion (Article 9 of the European Convention on Human Rights (ECHR)²); and whether it is compatible with the right of parents to ensure their children's education and teaching in conformity with their own religious and philosophical convictions (Article 2 Protocol No 1 of the ECHR). In short, whether the ECHR imposes an obligation upon the Contracting Parties to uphold confessional neutrality in education and teaching and, if so, what consequences follow from that obligation.

Secondly, a legitimacy issue. Who should have interpretative authority on the substantive issue? Which institution should be assigned the task of deciding on the content and scope of freedom of religion, the right to education and the state's duty of impartiality and neutrality? Should it be the democratically elected legislator or should it be the judiciary? If the latter case, should it be the domestic courts or the ECtHR?

As is well known, on 3 November 2009 a Chamber of the Second Section of the ECtHR answered the substantive question by unanimously holding that there had been a violation of the right to education of the applicants ('*Lautsi I*').³ According to the judgment, the ECHR requires the state to refrain from imposing 'beliefs, even indirectly, in places where persons are dependent on it or in places where they are particularly vulnerable.'⁴ 'The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory.'⁵ The crucifix has a prevalent religious meaning; it is a symbol of the predominant religion of the country and can be considered as a 'powerful external symbol' of the same kind as the Islamic headscarves in

1 For a detailed account of the case and an overview on the debate in legal doctrine and public opinion, see McGoldrick, 'Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?' (2011) 11 *Human Rights Law Review* 451; see also Zucca, 'Lautsi: A Commentary of the Grand Chamber Decision' (2012) *International Journal of Constitutional Law* (forthcoming); Panara, '*Lautsi v Italy*: The Display of Religious Symbols by the State' (2011) 17 *European Public Law* 139; Witte and Arold, 'Lifting High the Cross? Contrasting the New European and American Cases on Religious Symbols on Government Property' (2011) 25 *Emory International Law Review* 5; Pin, 'Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State' (2011) 25 *Emory International Law Review* 95; Chiassoni, *Diritti Umani, Sentenze Elusive, Clausole Ineffabili* (Rome: Aracne, 2011) at 30–44; Weiler, 'Editorial. Lautsi: Crucifix in the Classroom Redux' (2010) 21 *European Journal of International Law* 1; and Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty' (2010) 6 *European Constitutional Law Review* 6.

2 1950, ETS 5.

3 *Lautsi v Italy* Application No 30814/06, Merits, 3 November 2009.

4 *Ibid.* at para 48.

5 *Ibid.* at para 56.

the *Dahlab v Switzerland* and *Karaduman v Turkey* cases.⁶ The obligation to display it in state-school classrooms violates the negative freedom of religion of the pupils, as '[t]he presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion.'⁷ Moreover, the obligation can enter into conflict with 'sufficiently serious and consistent' convictions of the parents, and the disrespect for their beliefs cannot be justified, as it is incompatible with the state's duty of impartiality and neutrality.⁸

Lautsi I was reported to have caused the most widespread opposition in the history of the ECtHR: 'The political response to the Chamber's judgment in *Lautsi* is without precedent in European human rights terms. It caused a storm of political controversy in Italy and elsewhere in Europe.'⁹ In Italy, except on the far left, the ruling met the almost unanimous condemnation both of the Government and of the centre-leftist opposition. The Lautsi family was allegedly subjected to verbal abuse;¹⁰ during the television programme *La Vita in Diretta*, the Minister of the Defence La Russa shouted 'death to those people [the secularists] and to those fake international institutions [the ECtHR] that don't count for anything!' (and the interviewing journalist agreed).¹¹ In the European Union, the Parliament came close to adopting resolutions directly on the issue.

The Italian Government asked for the case to be referred to the Grand Chamber of the ECtHR for a rehearing. Several governments (Armenia, Bulgaria, Cyprus, Russian, Greece, Lithuania, Malta, Monaco, Romania and San Marino), non-governmental organisations (NGOs), members of the European Parliament and the distinguished Law Professor Joseph H. H. Weiler intervened in the proceeding.¹² They argued that the Convention had not been violated. No coercive process of indoctrination was taking place in Italian state-schools. The crucifix could be interpreted as a symbol of cultural identity, as well as a religious symbol. The state's duty of confessional neutrality should not be confused with the endorsement of secularism. Liberal neutrality is impossible, or it is not desirable: it is in itself the expression of a particular political ideology, a distinct 'conception of the good'. In any case, they argued, individual rights should be balanced with collective identities and the ECtHR

6 Ibid. at para 54.

7 Ibid. at para 55.

8 Ibid. at para 53.

9 See McGoldrick, *supra* n 1 at 470.

10 Open letter by Massimo Albertin and Soile Lautsi, PDF version of document downloaded 27 September 2012.

11 *Via i crocifissi da scuola - Ignazio La Russa scatenato*, 4 November 2009, <http://www.youtube.com/watch?v=goWDmbvNGr0#t=5m0s> [last accessed 27 September 2012].

12 Weiler, acting on a *pro bono* basis, presented the collective views of eight governments during the oral hearing before the Grand Chamber. The webcast of the hearing is available at: <http://www.youtube.com/watch?v=ioylyxM-gnM> [last accessed 27 September 2012].

is not in the position of striking that balance in a way that is binding and appropriate for all the Contracting Parties. Therefore, Italian authorities had not overstepped the bounds of their legitimate discretion in interpreting the ECHR.

On 18 March 2011, the Grand Chamber held, by 15 votes to 2, that there had been no violation of the Convention (*Lautsi II*).¹³ According to the Court, Italy had acted ‘within the limits of the margin of appreciation’ left to the state in ensuring the right of parents in education and teaching.

It comes as no surprise that the *Lautsi* judgments of the ECtHR have attracted great scholarly attention as well as the attention of the public and the mass media, as they are part of an increasingly intense debate on the place of religious symbols in the public domain.¹⁴ Starting from the 1980s, the question of whether crucifixes should be present in state-school classrooms has been the subject of great controversy in Europe and has been brought before the supreme courts of several states. Different authorities—the legislators, the courts, the school administrators—have decided the matter in different ways.¹⁵

The attention of the public has mainly focused on the substantive issue of the case: does freedom of religion imply the state’s neutrality in religious matters and, if so, what consequences for the presence of religious symbols in the classroom should be inferred from the duty of denominational neutrality? Is the content of freedom of religion and the right to education fixed, rigidly established and universally binding, or should it be sensitive to the context, varying from time to time and from country to country? As it is often the case in human rights adjudication, the discussion on the substantive issue has involved the legitimacy issue: should the ECtHR be entrusted with the task of evaluating the relations between state and church in each member state of the Council of Europe? If the content and scope of freedom of religion and the right to education is sensitive to the context, who is better placed to evaluate what the context requires?

One might say that in *Lautsi I* the ECtHR has given a ruling on the substantive issue—the duty to exhibit the crucifix in state-school classrooms is *prima facie* incompatible with the rights of parents in education and teaching taken

13 *Lautsi and Others v Italy* Application No 30814/06, Merits, 18 March 2011.

14 See Rorive, ‘Religious Symbols in the Public Space: In Search of a European Answer’ (2009) 30 *Cardozo Law Review* 2669.

15 As reported in *Lautsi II*, supra n 13, while in the majority of the member states of the Council of Europe the question is not governed by any specific regulations, in some the exhibition of the crucifix is expressly forbidden (Macedonia, France and Georgia) and in others it is expressly allowed or even prescribed (Italy, Austria, certain German *Länder*, Switzerland and Poland). The duty to display the crucifix, however, is quite uncommon. It has been struck down by the Swiss Federal Court in 1990 and by the German Constitutional Court in 1995; in 1993, the Polish Constitutional Court ruled that the possibility of displaying crucifixes in state school classrooms is compatible with the Constitution given that such display is not compulsory; in 2008, the Romanian Supreme Court held that the decision to display religious symbols should be a matter for the community formed by teachers, pupils and pupils’ parents; and in 2009, the Spanish High Court of Justice of Castile and Leon held that the schools should remove the crucifixes if they received an explicit request from the parents of a pupil.

together with freedom of thought, conscience and religion—and that *Lautsi II* has given a ruling on the legitimacy issue: it is not for the Court to definitely ascertain such incompatibility, as national authorities are better placed to evaluate, all things considered, whether crucifixes should be present in state-school classrooms.

In what follows I will not approach the substantive issue of the case, nor will I address the legitimacy issue (not from a normative viewpoint, at least). I am not interested here in the question of what the Court should have decided, nor in the question of whether it was for the Court to rule on matters such as this. I will approach the *Lautsi* case from a different perspective—the perspective of the analysis of legal reasoning.

I will try to reflect on the way in which the ECtHR justified its decisions on the substantive and the legitimacy issues. Seen from the perspective of the analysis of legal reasoning, it seems that *Lautsi II* is quite remarkable. While *Lautsi I* is maybe a questionable but carefully argued judgment, *Lautsi II* is based almost exclusively on the margin of appreciation doctrine. Apart from two supporting arguments for justifying its decision (no indoctrination policy is occurring in Italy and the crucifix is essentially a ‘passive symbol’¹⁶), the Court relied entirely on the notion that the Contracting Parties have a wide margin of appreciation (with regard to compliance with the duty to ‘respect’ the convictions of the pupils’ parents,¹⁷ with regard to the decision to perpetuate a tradition,¹⁸ with regard to the place of religion in education and teaching,¹⁹ with regard to the cultural meaning of the crucifix²⁰). The phrase

16 The crucifix is an ‘essentially passive [religious] symbol’ as the obligation to hang it in state schools is different from the duty to actively participate in a religious ceremony or ritual (ibid. at para 72). Note, however, that the Court did not explain why the crucifix on the wall is not a ‘powerful external symbol’ within the meaning of the decision in *Dahlab v Switzerland* 2001-V.

17 The Court stated, *Lautsi II*, supra n 13 at para 61, that the requirements of the notion of ‘respect’ for parents’ religious and philosophical convictions ‘vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States’, and therefore ‘the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention’.

18 In assessing the argument of the Italian Government according to which the presence of crucifixes in state school classrooms corresponds to a tradition which the Italians consider important to perpetuate, the Court held, ibid. at para 68, that ‘the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State.’

19 ‘The fact remains that the Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents,’ and ‘[t]he Court therefore has a duty in principle to respect the Contracting States’ decisions in these matters, including the place they accord to religion.’ See ibid. at para 69.

20 The Court acknowledged, ibid. at para 66, that the crucifix ‘is above all a religious symbol’ and, ibid. at para 71, ‘undoubtedly refers to Christianity’, but added, ibid. at para 68, with a patent contradiction, that ‘[a]s regards the Government’s opinion on the meaning of the crucifix. . . it is not for the Court to take a position regarding a domestic debate among domestic courts’, that is, the Italian *Consiglio di Stato* and the Court of Cassation.

‘margin of appreciation’ recurs with great frequency in the judgment. For the reasons outlined below, this concept is both interesting and puzzling.

2. The Margin of Appreciation Doctrine

The concept of margin of appreciation is not peculiar to the jurisprudence of the ECtHR, but is a well-established notion in European administrative law: in France it is known as *marge d’appréciation*, in Italy as *marginè di discrezionalità*, in Germany as *Ermessensspielraum*. It means that, in certain matters, the law recognises the discretionary powers of the administrative and political bodies; therefore, the standards of judicial review should be constructed in a way that respects this necessary autonomy, the ‘room for manoeuvre’ of the public authorities.²¹ The courts should not replace the independent evaluations made by other authorities, if they have not overstepped the boundaries of their legitimate discretion.

One might recall the Italian law on the establishment and functioning of the Constitutional Court: ‘The review of constitutionality of legislation shall abstain from any political evaluation and control over the exercise of Parliament’s discretionary power.’²² Or one might recall the political question doctrine of the United States Supreme Court, which was first formulated in *Marbury v Madison*: ‘The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.’²³ In both cases and in several others the legal culture has developed doctrinal instruments—*interna corporis*, *justizlose Hoheitsakte*, *actes de haute administration*—in order to express the notion that certain kinds of decisions must be immune from judicial scrutiny or, alternatively, can be subject to limited judicial review according to less exacting, more deferential standards. Indeed, in national law as well as in European law a variety of standards of review has been developed in order to express this principle of judicial deference: ‘Well known are such standards as ‘manifest unreasonableness’, ‘arbitrariness’, ‘clear excess of the bounds of discretion’, ‘manifest error’. Although the precise judicial test resulting from such

21 Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006) at 222; and Yourow, *The Margin of Appreciation Doctrine in the Dynamic of European Human Rights Jurisprudence* (Dordrecht: Martinus Nijhoff, 1996) at 13. On the origins and development of the doctrine, see Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002).

22 Article 28, L. 11 March 1953, No 87, G.U. 14 March 1953, No 62.

23 *Marbury v Madison* 5 U.S. (1 Cranch) 137, 170 (1803).

formulaic standards is not always clear, the formulas all clearly point in the direction of judicial restraint.²⁴

The European Convention does not explicitly provide for the doctrine of the margin of appreciation. It was initially proposed by the European Commission of Human Rights,²⁵ then it was introduced by the ECtHR in the 1961 *Lawless v Ireland (No 3)* case²⁶ and it was further developed in the 1976 leading case of *Handyside v United Kingdom*.²⁷ In the jurisprudence of the ECtHR, the doctrine has gradually obtained significant relevance and is now generally considered as one of its most characteristic features. Every textbook and scholarly article dealing with the methods of interpretation of the Convention reserves special attention for the margin of appreciation doctrine.²⁸ Already in 1980, Sir Humphrey Waldock, former President of the ECtHR, described the doctrine as 'one of the more important safeguards developed by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy'.²⁹ Arguments based on the notion that the Contracting Parties enjoy a wide margin of appreciation in implementing the Convention are among the most recurrent and typical in the case law of the ECtHR. It seems that by the end of the 1990s over 700 of its judgments had endorsed the margin of appreciation doctrine³⁰ and, since then, references to the margin of appreciation have constantly increased, prompting commentators to speak of an 'inflation' of the doctrine.³¹

As mentioned, *Lautsi II* is remarkable as it is almost entirely based on the margin of appreciation doctrine, but it is not extraordinary. On the contrary, it is quite common that the Court rejects the applicant's complaint by holding that the matter falls within the margin of appreciation of the respondent state.

The doctrine establishes a method for supervising the decisions of national authorities. It demands deference and self-restraint on the part of the ECtHR and it is based, first and foremost, on the principle of subsidiarity. The

24 Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80 at 85, making reference to Tridimas, *The General Principles of EC Law*, 2nd edn (Oxford: Oxford University Press, 2006) at 143.

25 *Greece v United Kingdom* (1958-9) 2 Yearbook 174 (*Cyprus* case).

26 A 3 (1961); 1 EHRR 15 (1940 Emergency Act empowering the Irish Government to arrest and detain persons without trial when necessary to preserve peace and public order).

27 A 24 (1976); 1 EHRR 737 (seizure and destruction of the 'Little Red Schoolbook' under the Obscene Publications Act 1959).

28 See, for example, Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007); Jacobs, White and Ovey, *The European Convention on Human Rights*, 5th edn (Oxford: Oxford University Press, 2010) at 78 ff.; and Gerards, supra n 24.

29 Waldock, 'The Effectiveness of the System Set Up by the European Convention on Human Rights' (1980) 1 *Human Rights Law Journal* 1 at 9.

30 Editor's Note, 'The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice' (1998) 19 *Human Rights Law Journal* 1.

31 Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324.

underlying idea is that the Contracting Parties have agreed upon a set of uniform but minimal standards of human rights protection, or they have agreed upon a set of vague, open-ended and flexible standards: in any case, they have not agreed upon a fixed and settled model of society. As almost every controversy can be framed as involving a conflict between fundamental rights, or between fundamental rights and public interest, the ECtHR should stick to an unpretentious understanding of its role. It is not for the Court to decide on every possible question concerning human rights protection: different institutions in different states can conceivably reach different but lawful decisions on the meaning of human rights, and the Court should acknowledge that it cannot always substitute its own assessment for that of the national authorities.³² As one commentator put it, '[f]or the Court to substitute its own conception of what is appropriate might . . . result in it taking sides in the resolution of genuine human rights/public interest dilemmas which are not amenable to any straightforward legal solution'.³³ On the contrary, 'the Court should act as a force contributing to the preservation of that "marvellous richness" of [cultural and ideological] diversity [among the Contracting Parties] or, at least, should not undermine it by seeking to impose rigidly uniform solutions valid for all the different democratic societies'.³⁴

When the national authority whose appreciation must be safeguarded is the parliament or the government, this line of reasoning can be reinforced by considerations concerning the duty to respect the principle of democratic legitimacy: 'the democratic legitimacy of measures taken by democratically elected governments commands a degree of judicial self-restraint'.³⁵ When the national authority is a domestic court, the respect of the margin of appreciation can be conceived as a precondition for judicial dialogue expressing the willingness to enter into a fruitful and cooperative relationship with national judges. The ECtHR is not a final court of appeal or 'fourth instance'.³⁶ If its jurisdiction has to be effective, then the Court should strive to gain the confidence, respect and collaboration of the domestic courts.

Indeed, the doctrine of the margin of appreciation can be justified on a principled basis (subsidiarity and democracy) but also on instrumentalist

32 *James v United Kingdom* A 98 (1986); 8 EHRR 123, at para 46.

33 Greer, *supra* n 21 at 224.

34 Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 *Human Rights Law Journal* 3.

35 *Supra* n 13, at Joint Partly Dissenting Opinion of Judges Wildhaber, Pastor Ridruejo and Baka; *Karataş v Turkey* 1999-IV; see also Wildhaber, *The European Court of Human Rights 1998-2006: History, Achievements, Reform* (Kehl: Engel, 2006) at 95: 'national authorities enjoy an area of discretion which derives from their role in the expression of the democratic will of their people.'

36 Petzold, 'The Convention and the Principle of Subsidiarity', in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) at 41.

arguments and pragmatic considerations.³⁷ Seen from this perspective, the doctrine appears to be a useful tool for the management of legal pluralism, a device for avoiding antinomies between norms arising from different legal orders, an ‘important instrument to negotiate between the interests concerned with national and supranational decision-making’.³⁸ The doctrine is a ‘lubricant in the working of the Convention’, as it ‘gives the flexibility needed to avoid damaging confrontations between the Court and the Contracting Parties over their respective spheres of authority’.³⁹ By adjusting on a case by case basis the width of the margin of appreciation, the ECtHR is able to negotiate between conflicting supranational and national interests and, in so doing, it attempts to achieve greater acceptance of its decisions and to increase the degree of authoritativeness and effectiveness of its jurisdiction—‘the Court will continue to build its authority incrementally and cautiously, retaining the margin doctrine, pinning it to the security of the consensus principle, and reserving unhesitatingly autonomous interpretation’.⁴⁰

Given the *rationale* of the doctrine based on subsidiarity, democracy and dialogue, it follows that ‘[t]he scope of this margin of appreciation is not identical in each case but will vary according to the context’.⁴¹ However, deference to the judgments of national authorities is especially appropriate in two kinds of cases.

First, in cases that deal with one of the several accommodation and derogation clauses of the Convention. Here the Court often accepts that it might not be the most reliable authority in evaluating what are the ‘interests of morals’, ‘public order’, ‘national security’, or what is necessary for ‘the economic well-being of the country’, ‘the prevention of disorder or crime’, ‘the protection of health or morals’, and that it is perhaps not best suited to deciding what is a ‘public emergency threatening the life of the nation’ under Article 15 ECHR, as in such matters its judgments run the serious risk of being merely apologetic or ineffective. Thus, in these cases the Court often accepts that, ‘by reason of their direct and continuous contact with the vital forces of their countries,

37 Macdonald, ‘The Margin of Appreciation’, in Macdonald, Matscher and Petzold, supra n 36 at 122–123; Yourow, supra n 21; Helfer and Slaughter, ‘Towards a Theory of Effective Supranational Adjudication’ (1997) 107 *Yale Law Journal* 273 at 316; Wilkins, ‘International Human Rights and National Discretion’ (2002) 6 *Journal of Ethics* 373; and Gerards, supra n 24.

38 Gerards, supra n 24 at 107. On the margin of appreciation and legal pluralism, see also Delmas-Marty and Izorche, ‘Marge nationale d’appréciation et internationalisation du droit. Réflexions sur la validité formelle d’un droit commun pluraliste’ (2000) 52 *Revue internationale de droit comparé* 753.

39 Macdonald, supra n 37 at 122–23.

40 Yourow, supra n 37 at 196.

41 *Buckley v United Kingdom* 1996-IV; 23 EHRR 101, at para 74; cf. *Rasmussen v Denmark* A 27 (1984); 7 EHRR 371 at para 40: ‘The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or nonexistence of common ground between the laws of the Contracting States.’

State authorities are in principle in a better position than the international judge to give an opinion on the exact content' of the Convention.⁴²

Secondly, the standard of review of the ECtHR is less strict and the margin of appreciation of national authorities is wider when there is no 'European consensus' on the substantive issue of the case. The scope accorded to the margin depends on 'the extent to which there may be a pan-European consensus on the relationship between a particular Convention right and public interest.'⁴³ When the question raised before the ECtHR is decided in different ways in different countries, the Court usually accepts that there is room for reasonable disagreement. Different interpretations of human rights can be equally legitimate, and the Contracting Parties enjoy the wide margin of appreciation that they, in fact, already exercise.

Sometimes, however, when human rights are at stake, deference to the judgments of national authorities might be inappropriate. The right to life, the prohibition of torture, slavery or servitude and the principle of *nulla poena sine praevia lege poenali* are 'absolute' rights under Article 15(2) of the ECHR: rights whose restriction or suspension can never be justified even in a state of emergency. With regard to the negative obligation of refraining from the violation of absolute rights, it seems that the Contracting Parties have no margin of appreciation whatsoever. Moreover the margin of appreciation doctrine is usually accompanied by a necessary *caveat*, the almost formulaic phrases 'nevertheless the Convention does not give the Contracting States an unlimited power of appreciation' and 'the domestic margin of appreciation thus goes hand in hand with a European supervision.'⁴⁴

Indeed, the argument from subsidiarity, brought to its extreme conclusions, would call into question the point of having the European Convention and a common standard of human rights protection.⁴⁵ The argument from democracy cannot but affect the legitimacy of judicial review—it is the famous 'counter-majoritarian difficulty' affecting domestic constitutional adjudication as well as international courts. And the need for dialogue, the search for authority and the quest for collaboration with the national judges, for their part, are all pragmatic considerations that differ sharply from the kind of principled argumentation upon which the constitutional courts are usually expected to rely.

42 *Handyside*, supra n 27 at paras 48–49.

43 Greer, supra n 21 at 224. On the slippery notion of European consensus, see Letsas, supra n 28.

44 *Handyside*, supra n 27 at para 49; see also *Lautsi II*, supra n 13 at para 68: 'reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention'; and para 70: 'This margin of appreciation, however, goes hand in hand with European supervision.'

45 See the criticism of Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *International Law and Politics* 843 at 852: 'By resorting to this device, the court eschews responsibility for its decisions. But the court also relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality.'

Therefore the margin of appreciation doctrine holds that the ECtHR should respect the legitimate scope of discretion of the national authorities, but cannot dismiss its duty 'to ensure the observance of the engagements undertaken by the High Contracting Parties',⁴⁶ that is, apply the Convention and ascertain the violations of human rights.

3. The Margin of Appreciation in Theory: Hard Cases and Easy Cases

After having provided this sympathetic or at least charitable account of the margin of appreciation doctrine, it is time to investigate it from the perspective of legal theory and theory of legal argumentation. Seen from a theoretical perspective, the doctrine of the margin of appreciation is puzzling, as it seems to imply at least one counterintuitive consequence. Taken seriously, it implies that the ECtHR is the extraordinary exemplar of a judge that enjoys no discretion: a judge that, as Montesquieu put it, finally realises the Enlightenment project of the judge as *bouche de la loi*.⁴⁷

In order to illustrate the point, it is useful to be reminded of the distinction between 'hard cases' and 'easy cases'. The distinction has been subject to much controversy in legal theory: it is central in the famous Hart-Dworkin debate which, for the past four decades, has preoccupied—some might say obsessed⁴⁸—Anglo-American legal philosophy. According to Hart, 'there is a limit, inherent in the nature of language, to the guidance which general language [and thus also general rules] can provide'. Due to the 'open texture' of every natural language, there are 'plain cases . . . to which general expression are clearly applicable' along with hard cases, borderline cases, in which 'something in the nature of a choice between open alternatives must be made'.⁴⁹ Especially when the legislator has set up vague and very general standards such as 'fair rate', 'reasonable' and 'due process', the law is indeterminate (or underdeterminate) and the interpreter enjoys a certain scope of discretion. 'The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of the circumstances, between competing interests which

46 Article 19 ECHR.

47 Montesquieu, *De l'esprit des lois* (1748), Book XI, Chapter VI: 'The national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour.'

48 Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed', in Ripstein (ed.), *Ronald Dworkin* (Cambridge: Cambridge University Press, 2007) 22. According to some authors, legal positivism is committed to the thesis that a distinction exists between cases where the law can simply be understood and applied and cases where the issue is not determined by the existing legal standards: see Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) 14–45; and Marmor, *Interpretation and Legal Theory*, 2nd edn (Oxford: Hart, 2005) at 95 ff.

49 Hart, *The Concept of Law*, 2nd edn (Oxford: Oxford University Press, 1997) at 126f.

vary in weight from case to case.⁵⁰ When the law is vague or it is silent, the judge must create the rule to be applied to the case. ‘Here’, writes Hart, ‘at the margin of rules . . . the courts perform a rule-producing function.’⁵¹ At the margin of rules, one might say, begins the margin of appreciation of the interpreter.

Hart held that ‘all rules have a penumbra of uncertainty where the judge must choose between alternatives.’⁵² The judge works, so to say, in the penumbra of the law.⁵³ When the case is not governed by a settled rule of law, he must fill the gaps, clarify the ambiguities and develop new law. Obviously when the judge is engaged in this work in the penumbra, he will try to demonstrate that the law clearly states that the case must be decided in a certain way. The judge will not claim the paternity of the decision, he will try to disguise his discretion or, in other words, he will try to inscribe the decision in the law by making it acceptable to its audience as a legal decision, not a political or moral decision. But a detached observer—an observer who nonetheless understands the rules of the game—will immediately recognise that the law left enough room for two possible outcomes of the case and that therefore a supplementary effort in legal argumentation is required in order to justify, to ‘legalise’, the otherwise discretionary decision. The judge is working in the penumbra.

In contrast, easy cases are those in which the judge does not enjoy discretion. They fall not in the penumbra of a given provision or statute, but in its core. The choice facing the judge is clear-cut: either to apply the law as it is, or to modify (violate?) the existing law. It is a matter of moral choice, not a matter of legal reasoning. Legal reasoning is always possible, but in easy cases its scope and depth is limited—in *claris non fit interpretatio*. Generally speaking, if in an easy case the judge engages in a deep and careful argumentation, it is precisely because he is trying to transform it into a hard case, in order to exercise discretion. To transform an easy case into a hard case requires a great argumentative effort on the part of the judge; otherwise, his decision will simply be perceived as being *contra legem*, outside the law.

Conversely, the judge can surreptitiously discharge the duty to provide a convincing argument for the decision in a hard case by simply stating that in fact the case is quite easy. As shown by the doctrine of the margin of appreciation, the judge can discharge that duty by stating that it is not for the court

50 Ibid. at 135.

51 Ibid.

52 Ibid. at 12; see *ibid.* at 123: ‘Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules.’

53 A famous reference in this regard is US Supreme Court, *Griswold v Connecticut* 381 U.S. 479 484 (1965) at 484–6: ‘specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance’, such as the right to privacy that is contained in the penumbra of the First, Third, Fourth and Fifth Amendments.

to decide such a difficult and controversial issue, as the matter falls within the margin of discretion of some authority other than the court.

Hart's distinction between hard cases and easy cases has been criticised by those (legal realists and critical legal studies scholars) who argue that every legal case involves discretionary choices—eg because in order to distinguish between easy and hard cases we must have first interpreted the law, and interpretation is an intrinsically discretionary and value-laden enterprise.⁵⁴ Hart's distinction has also been criticised by those (formalists) who argue that the judge never enjoys discretion because every legal case is governed by the law: the existing legal standards should determine the outcome of every legal case.

However, even the most prominent supporter of the latter view, Ronald Dworkin, maintains that often judges 'have decisions to make, not already made by others for them' and that they 'must reason or make judgments of one sort or another in making these decisions.'⁵⁵ Dworkin rejects a 'strong' notion of discretion according to which in hard cases judges create new law and should thus act and reason as 'deputy legislators' by balancing, as Hart put it, 'between competing interests which vary in weight from case to case.'⁵⁶ But there is no need to accept such a strong notion of discretion—namely the idea that sometimes judges must create new law, applying extra-legal standards to resolve the case at hand—in order to admit the distinction between hard cases and easy cases. The distinction does not necessarily imply a theory of the nature of law and judicial law making, as it can be constructed on the kind of arguments that judges should provide in order to decide hard cases and easy cases. In easy cases it is assumed that the law can simply be understood and applied straightforwardly and therefore no legal argumentation is necessary in order to justify the decision; in hard cases the judge is required to use his or her judgment and therefore must provide arguments to support the decision of interpreting the law in a certain way and applying a certain rule of law.

Now, if we take this distinction between hard cases and easy cases and try to apply it to the jurisprudence of the ECtHR, we find that if the margin of appreciation doctrine has to be taken seriously, the ECtHR would be an extraordinary exemplar of a judge that does not possess discretion—even in the weakest Dworkinian sense of the word 'discretion'. The ECtHR would be a judge, so to speak, that works in the light, not in the penumbra. Why is that so? Because, as we have seen in the previous paragraph, according to the doctrine of the margin of appreciation it is not for the court to decide upon the cases in which there is room for reasonable disagreement on the content and applicability of a certain human right; it is for the legislator and not for the

54 Guastini, *L'interpretazione dei documenti normativi* (Milano: Giuffrè, 2004) at 36 ff.

55 Dworkin, 'Judicial Discretion' (1963) 60 *Journal of Philosophy* 624; and Dworkin, supra n 48 at 31 ff.

56 Ibid. at 82; Hart's quote from *The Concept of Law*, supra n 49 at 135.

court to exercise discretion. Thus in hard cases no particular argumentative effort is required on the part of the ECtHR, as the Court should simply respect the legitimate discretion of the Contracting Parties. The Contracting Parties would have never attributed to the Court the task of solving hard cases: the discretionary choice on how to settle those cases would fall within their margin of appreciation, i.e. within the domain of national sovereignty. As Joseph Raz put it, ‘there might be a legal system which contains a rule that whenever the courts are faced with a case for which the law does not provide a uniquely correct solution they ought to refuse to render judgment. In such a system there would be no judicial discretion.’⁵⁷

If the margin of appreciation doctrine were to be taken seriously, the international rights regime established by the ECHR would represent an example of the legal system imagined by Raz: a legal system in which the courts, like the old *Tribunal de cassation* under the system of *référé législatif*,⁵⁸ would be denied the power of adopting discretionary decisions.⁵⁹

4. Restrictive Interpretation or Balancing Test?

The conclusion reached in the last paragraph is obviously untenable. Even if one is disposed to admit the theoretical possibility of easy cases, it is clear that almost every case decided by the Court is a hard one. These are cases in which the ECHR cannot simply be understood and straightforwardly applied but in which a decision must be made between competing claims which are reasonable and *prima facie* well grounded; a decision in which, therefore, the adjudicator should provide sound reasons.

Although the doctrine of the margin of appreciation is applied frequently, there are hundreds of cases in which the Court reached a decision on the substantive issue; in most of these cases the Court exercised discretion and

57 Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 *Yale Law Journal* 823 at 845.

58 The obligation to refer to the legislator whenever the judge considers it necessary to interpret a law (*référé législatif*) was created by the French National Assembly in 1790, but its historical origins date back to the *Ancient Régime* and to the 1667 *Ordonnance civile* of Louis XIV. The *référé législatif* was abandoned by the beginning of the nineteenth century. See Alvazzi del Frate, ‘The Origins of the Référé Législatif and the Cahiers de Doléances of 1789’ (2009) 2 *Poteri pubblici e mercati*, available at: <http://www.istituzionipubbliche.it/index.php?option=com.content&task=view&id=25&Itemid=10> [last accessed 27 September 2012].

59 Note that the margin of appreciation doctrine ‘taken seriously’ is not at all meant to be a faithful description of the ECtHR’s approach. As is well known, the ECtHR often resorts to dynamic and evolutive interpretation and, according to its critics, it sometimes indulges in judicial activism. See, for example, *Christine Goodwin v United Kingdom* 2002-VI; 35 EHRR 447, at para 103 (right to marry of transsexuals): ‘the range of options open to a Contracting State [does not include] an effective ban on any exercise of the right to marry. The margin of appreciation cannot extend so far.’ *Hirst v United Kingdom (No 2)* 2005-IX; 42 EHRR 849, at para 82 (prisoners’ voting rights): ‘while the Court reiterates that the margin of appreciation is wide, it is not all-embracing.’

provided arguments—they were not easy cases. And no one would sincerely maintain that the ECtHR does not enjoy discretion. But if the doctrine, once it is taken seriously, seems to imply that the ECtHR is the exemplar of a judge who enjoys no discretion, a judge that is the *bouche de la loi*, then, given that in fact the ECtHR enjoys discretion, it follows that the doctrine of the margin of appreciation cannot be taken seriously. Or, to put it differently: the doctrine must be taken seriously, as it is one of the most important argumentative tools developed by the case law of the ECtHR, but it cannot and should not be taken for what it says explicitly. It is not a tool for distributing discretionary powers ('appreciation') between the ECtHR and the Contracting Parties; it is not based on the notion that a margin of appreciation of the states already exists and that the Court should simply respect it, limiting itself to the role of 'saying the law as it is' without exercising discretion.

It seems that there are (at least) two possible ways of providing an alternative reconstruction of the margin of appreciation doctrine.⁶⁰ By alternative reconstruction I mean that it is possible to provide an explanation of the kind of interpretative and argumentative operations that the doctrine implies without having recourse to the debatable notion that the margin of appreciation is 'the natural product of the distribution of powers' between the ECtHR and the Contracting Parties 'serv[ing] to delineate the dividing line' of their shared responsibility for human rights enforcement.⁶¹

First, the doctrine of the margin of appreciation can be considered as a canon of restrictive interpretation of the rights guaranteed by the ECHR and as a canon of extensive interpretation of the derogation and accommodation clauses.

One might argue that there are several good reasons why an international treaty such as the European Convention should be interpreted restrictively. The arguments presented above—subsidiarity, democracy and pragmatic concerns of the need to avoid conflicts with the Contracting Parties and gradually to build consensus and trust—point in this direction and certainly have some merit. They are all substantive reasons for self-restraint on the part of the Court. Restrictive interpretation is reasonable if the Convention is seen, first and foremost, as an exceptionally demanding and far-reaching international treaty between sovereign states. If that is so, then the question that the Court should in the first place be asking when interpreting the Convention 'is not: have this person's human rights been violated? But rather: did the State

60 Similar, although different, distinctions between two uses of the margin of appreciation have been made by Greer, *supra* n 21 (definition of rights and obligations/resolution of conflicts between rights and public interest); Letsas, *supra* n 28 at 80 ff. (substantive concept/structural concept); Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2006) 16 *European Journal of International Law* 907 (norm application/norm definition); and Kratochvíl, *supra* n 31 (norm application/norm definition).

61 Mahoney, *supra* n 34 at 2.

breach its international law duties under the ECHR?⁶² One could follow Judge Fitzmaurice's famous dissenting opinion in the *Golder* case (1975) in arguing that 'the cry of the judicial legislator... has little or [no justification] in the domain of the inter-state treaty or convention based on agreement and governed by that essential fact'; it can be maintained that 'a cautious and conservative interpretation' is required 'as regards any provisions the meaning of which may be uncertain, and where extensive constructions might have the effect of imposing upon the contracting States obligations they had not really meant to assume.'⁶³

However, one could also follow the stance taken in the *Golder* case by the Commission, and argue that 'the overriding function of [the] Convention is to protect the rights of the individual and not to lay down as between states mutual obligations which are to be restrictively interpreted having regards to the sovereignty of these states. On the contrary, the role of the Convention and the function of its interpretation is to make the protection of the individual effective.'⁶⁴

In fact, a general canon of restrictive interpretation would not be appropriate, or it would even be dangerous, if the European Convention were to be conceived, as it generally is, as a European Bill of Rights. This is the way in which the ECtHR and European legal scholarship tend to reconstruct the nature of the obligations embodied in the Convention. According to Orakhelashvili, 'it is currently part of the conventional wisdom... that the European Convention contains obligations implicating the "public order" of Europe, which are of an objective nature and protect the fundamental rights of individuals rather than the interests of contracting states.'⁶⁵ Already in 1961 the Commission expressly stated in the *Pfunders* case that 'the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.'⁶⁶

In *Ireland v United Kingdom*, the Court held that '[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network

62 Letsas, *supra* n 28 at 83.

63 A 18 (1975); 1 EHRR 524 at Separate Opinion of Judge Sir Gerald Fitzmaurice, para 37(c).

64 Report of the Commission in *Golder v United Kingdom* (1971) 14 YB 416 (1971), at para 57.

65 Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *European Journal of International Law* 529 at 531.

66 *Austria v Italy* 4 YB 112 at 140 (1961). As the respondent state, Italy was a Party to the Convention at the time of the alleged violation, it is not relevant that at that moment the applicant state, Austria, had not ratified the Convention and was not a Party when the violation took place.

of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement”:⁶⁷

According to this conception of the Convention, the point of the Convention is not to give rise to reciprocal legal relations between sovereign states, but to set up a European system of human rights protection. If the Convention must be interpreted according to its purpose, then a restrictive interpretation should be ruled out: ‘a restrictive interpretation of the individual rights and freedoms guaranteed by the European Convention on Human Rights would be contrary to the object and purpose of the treaty’, as the European Commission maintained in the *East African Asians* case of 1973.⁶⁸

Thus, the margin of appreciation doctrine can be seen as establishing a principle in favour of restrictive interpretation of the provisions establishing individual rights (the restrictive interpretation that dare not speak its name, one might suggest) and extensive interpretation of the provisions establishing derogations and limitations to such rights. It is worth noting, however, that this reconstruction would imply that there is a contradiction between the generally accepted theory of the nature of the obligation embodied in the Convention and the interpretative techniques adopted by the ECtHR: a contradiction between what the Court says and what the Court does.

Alternatively the margin of appreciation doctrine can be seen as prescribing a balancing test between the rights of the individual as established by the Convention and the collective goals, interests and identities expressed by national authorities. This is the second possible reconstruction of the doctrine: the margin of appreciation as the outcome of a balancing judgement—what George Letsas calls the ‘substantive’ concept of margin of appreciation.⁶⁹ This interpretation of the margin of appreciation is shared by many scholars who maintain that ‘the resolution of conflicts between rights and democracy or the public interest’ is ‘the heartland of the “margin of appreciation”, and arguably the only place where the term should be used, if it is to be used at all.’⁷⁰ According to many, the margin of appreciation is the ‘other side’ of the principle of proportionality: ‘The more intense the standard of proportionality becomes, the narrower the margin allowed to national authorities. If a reasonable or fair balance is found, the national authorities are considered to remain within the bounds of appreciation.’⁷¹

67 *Ireland v United Kingdom* A 25 (1978); 2 EHRR 25, at para 239.

68 Report of the Commission in *East African Asians v United Kingdom* DR 13 (1973); 3 EHRR 76, at para 192.

69 Letsas, *supra* n 28, distinguishes between two uses of the margin of appreciation doctrine. The ‘substantive’ one addresses the relationship between individual rights and collective goals and is an instantiation of the doctrine of proportionality. The ‘structural’ one addresses the limits of the ECtHR’s review and amounts to the claim that the Court should defer to the judgment of the national authorities, based on ideas of subsidiarity and state consensus.

70 Greer, *supra* n 21 at 32 f.

71 Arai-Takahashi, *supra* n 21 at 14; Mowbray, ‘A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights’ (2010) 10 *Human Rights Law Review*

This way of reconstructing the doctrine is fully compatible with a conception of the Convention as a European Bill of Rights. Indeed, balancing is the typical way in which national constitutional courts are used to approach and solve the conflict between fundamental rights and public interests.⁷² ‘the practice of limiting rights by balancing them against conflicting public policy objectives is in fact a near universal feature of the structure of constitutional rights throughout the contemporary world.’⁷³ It should be noted, however, that the legitimacy of balancing has often been questioned in constitutional theory and jurisprudence. To some authors the idea of balancing the public interest against personal claims seems incompatible with the categorical and deontological nature of fundamental rights: a consequence of a ‘methodological error in the self-understanding of the constitutional court’, according to Jürgen Habermas, as ‘in the final instance, only rights can be trump in the argumentation game.’⁷⁴ The metaphor of balancing, Dworkin argues, ‘threatens to destroy the concept of individual rights’⁷⁵ because, if someone has a right, a collective goal or interest cannot be a sufficient justification for denying him his due. To other authors balancing appears to be questionable as a means for judicial self-empowerment that opens the door for arbitrary and unpredictable decisions and increases legal uncertainty.⁷⁶

If these criticisms are sound they also concern the doctrine of the margin of appreciation, once it is reconstructed as implying a balancing judgement between individual rights and public interests. So, according to Judge Jan De Meyer, ‘where human rights are concerned, there is no room for a margin of

289 at 316, distinguishes the principle of fair balance and the margin of appreciation doctrine: the latter is deployed as a means of altering the intensity of its assessment of the fair balance achieved between community goals and the rights of applicants.

72 See Pino, *Diritti e interpretazione. Il ragionamento giuridico nello Stato costituzionale* (Bologna: Il Mulino, 2010) at Chapter VII; Cohen-Eliya and Porat, ‘American Balancing and German Proportionality: The Historical Origins’ (2011) 8 *International Journal of Constitutional Law* 263; Cohen-Eliya and Porat, ‘Proportionality and the Culture of Justification’ (2011) 59 *American Journal of Comparative Law* 463; and Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 73.

73 Gardbaum, ‘Limiting Constitutional Rights’ (2007) 54 *UCLA Law Review* 789.

74 Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press, 1996) at 253 ff, and 259 (emphasis by author), making implicit reference to the famous thesis of Ronald Dworkin, ‘rights as trumps’: see Dworkin, supra n 48 at XI: ‘Individual rights are political trumps held by individuals’. Dworkin, ‘Rights as Trumps’, in Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984) at 153: ‘Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole. See also Dworkin, ‘It is Absurd to Calculate Human Rights According to a Cost-Benefit Analysis’, *The Guardian*, 24 May 2006. Balancing was defended against Habermas’ criticism notably by Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) at 388 ff; see also Alexy, ‘On Balancing and Subsumption. A Structural Comparison’ (2003) 16 *Ratio Juris* 433. On the Habermas-Alexy debate, with direct bearing of the interpretation of the ECHR, see Greer, supra n 21 at 203–13.

75 Dworkin, supra n 48 at 199.

76 Guastini, ‘Ponderazione: un’analisi dei conflitti tra principi costituzionali’ (2006) 26 *Ragion pratica* 151.

appreciation which would enable the States to decide what is acceptable and what is not'; the margin of appreciation doctrine is incompatible with the nature of fundamental rights because it implies 'relativism'.⁷⁷ According to Steven Greer, the 'most striking characteristic' of the doctrine 'remains its casuistic, uneven, and largely unpredictable nature'⁷⁸ and, according to Jeffrey A. Brauch, the margin of appreciation is a standardless, unpredictable doctrine, incompatible with the rule of law.⁷⁹

5. Back to *Lautsi*

To summarise, the margin of appreciation doctrine is not a tool for distributing discretion between the ECtHR and the Contracting Parties, and it is not an instrument for limiting, let alone eliminating, the discretion that the Court enjoys and exercises. The margin of appreciation doctrine can be reconstructed in two alternative ways. First, it can be considered as analogous to a general canon of restrictive interpretation of the Convention: this would be coherent with a conception of the Convention as an international treaty establishing mutual obligations between the Contracting Parties, and would imply that the Convention only establishes minimal standards of human rights protection within the Council of Europe. The ECtHR should intervene only in clear cases of human rights violation; for the rest, the Contracting Parties should be free to act within their unfettered margin of appreciation, alias sovereignty. Secondly, the doctrine can be reconstructed as prescribing a balancing judgment. The Court would be free to interpret the Convention even in a broad, liberal and evolutive way, as it sometimes does, but when the national authorities limit and/or violate the rights of individuals, the Court should evaluate whether such limitations or violations are justified by their legitimate margin of discretion, alias public interest.

This reconstruction has interesting consequences for the way in which we should assess the *Lautsi II* judgment of the ECtHR. Conceptual reconstruction is the necessary premise for candid and reasoned normative evaluation. We

77 *Z v Finland* 1997-I, at Partly Dissenting Opinion of Judge De Meyer. See analogously Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705 at 731 ('the Court's case law on consensus and public morals under the structural concept of the [margin of appreciation] doctrine is in clear violation of anti-utilitarian liberal principles under both interest-based and, even more so, reason-blocking theories of rights.')

78 Greer, supra n 21 at 5.

79 Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 *Columbia Journal of European Law* 113 at 151 ('the Court has used this judicially created tool to the exclusion of the text, of legal analysis, and indeed of the rule of law. It has taken on the role of a supranational legislature making policy judgments for the nations of Europe, judgments that lack basic rule of law requirements of clarity, predictability, equality, and non-arbitrariness.') For similar criticisms, see infra n 86.

must abandon the notion of a margin of appreciation that pre-exists the judgment of the Court, a margin of appreciation that the Court should respect by applying the law as it is, without exercising discretion. Once we have got rid of this confusing and mystifying idea, we will be able to assess the arguments provided by the Court in a more objective way, that is, independently of our convictions about the substantive and the legitimacy issues of the case.

If the doctrine is reconstructed as a canon of restrictive interpretation, then the Court could not justify its decisions by simply referring to the margin of appreciation of the national authorities. In order to fulfil the duty to provide reasons for its judgments, the Court should express what are the boundaries of the allegedly violated human right: the right should be interpreted in a strict way, but its strict meaning should nonetheless be clearly expressed by the Court.

In *Lautsi II*, the Court has failed to comply with this duty for two reasons. Firstly, it is questionable whether the Court has interpreted the right of parents in education and teaching in a restrictive way: the Court held that the state's duty to respect the parents' philosophical and religious convictions concerns not only the content of school curricula but also the organisation of the school environment.⁸⁰ Moreover, the Court held that the requirement of respect means more than to 'acknowledge' or 'take into account': 'in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State.'⁸¹

Secondly, and most importantly, if we maintain that the Court has interpreted the rights of parents and freedom of religion in a restrictive way, then there might still be some doubt on the content and scope of such 'strict' rights. On a literal reading of the judgment it would seem that they would be violated only in the case of a policy of indoctrination occurring in state-school classrooms and in the case of a non-passive symbol (such as the compulsory participation of pupils in religious ceremonies). However, it is doubtful whether this is the correct interpretation of the judgment: the Court has failed to state clearly what is the positive content of the rights at stake.

It is particularly remarkable that the Court has maintained that freedom of thought, conscience and religion 'is in principle the *lex specialis*' in relation to the parents' right to respect their philosophical and religious convictions.⁸² As Lorenzo Zucca notes, in *Lautsi II* '[s]ecularism is demoted from an overarching principle of the constitutional state to one possible philosophical conviction amongst others. This suggestion is deeply problematic.'⁸³ The state's duty of impartiality and neutrality, instead of being one possible consequence of

80 *Lautsi II*, supra n 13 at para 63.

81 *Ibid.* at para 61.

82 *Ibid.* at para 59.

83 Zucca, supra n 1, observing that '[i]n its short paragraphs of assessment, the Court mentions the margin of appreciation 8 times . . . once again the reasoning is virtually non-existent'.

religious freedom (Article 9 ECHR) and the prohibition of discrimination (Article 14 ECHR), becomes a legitimate but subjective belief of the pupils' parents. More than resorting to restrictive interpretation, it seems that the Court has simply decided to focus on the parents' rights in education and teaching in order not to apply other *prima facie* relevant Convention provisions.

But *Lautsi II* deserves even greater criticism if the doctrine of the margin of appreciation is interpreted as expressing a balancing judgment. In that case, the notion of 'margin of appreciation' would provide no independent or self-sufficient argument: the need to respect the margin of appreciation of the national authorities would not be an argument at all, as it would coincide with the result of a balancing reasoning.⁸⁴ The Court should take into account the rights of the individuals, on the one side, and the collective goals, on the other, and it should establish which one must prevail, under what circumstances, for what reasons. Otherwise the Court would engage in a *petitio principii*: the proposition to be proven (that public interest outweighs the rights of individuals) would already be assumed in the premises of its reasoning (national authorities enjoy a wide margin of appreciation).

The ECtHR does not state clearly what is the content and scope (strict as it might be) of the rights concerned and it does not state clearly for what reasons and under what circumstances the public interest must prevail over individual rights. Therefore, in *Lautsi II* (and in other judgments of the Court⁸⁵) the margin of appreciation is not a canon of restrictive interpretation, after all, nor is it the outcome of a balancing judgment. The margin of appreciation is something different: it is identical to a fully discretionary and unreasoned judgment of *non liquet*. By simply dismissing the case, the Court avoids touchy issues and discharges the duty to present reasons.⁸⁶

Either because legitimacy concerns militate for the strict construction of the Convention or because the Court simply avoids ruling on the substantive issue recognising the overriding legitimacy of the national authorities, the margin

84 This is the reason why Letsas, *supra* n 28, criticises what he calls the 'substantive' concept of margin of appreciation: 'References to the doctrine in particular judgments are either superfluous or question begging' and, in the case law of the ECtHR, '[t]he balancing between the various conflicting interests takes place *ad hoc*, in the absence of a normative theory [of political morality]'.
85 See, for example, *Müller and Others v Switzerland* A 113 (1988); and *Otto-Preminger-Institut v Austria* A 295-A (1994).

86 Most commentators complain about the lack of coherent application of the doctrine in the case law of the ECtHR: see, for example, Macdonald, *supra* n 37 at 124 (warning against 'the dangers of selective justification which pragmatism condones'); Fenwick, Masterman and Phillipson, 'The Human Rights Act in Contemporary Context', in Fenwick, Masterman and Phillipson (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007) at 6 ('almost complete failure to examine in any meaningful way the proportionality of restrictions upon individual rights'); Yourow, *supra* n 37 at 195 (the margin of appreciation is a 'quicksilver notion'); and Sottiaux and Van Der Schyff, 'Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights' (2008) 31 *Hastings International and Comparative Law Review* 115 at 156 ('unpredictable application of the doctrine').

of appreciation doctrine systematically blurs the boundaries between substantive and legitimacy issues. By doing so, the margin of appreciation doctrine transforms a hard case into an easy case—a case that does not require argumentation—or it transforms a legal case into a political matter—a case that is not for the Court to decide. Far from compelling the Court to be an exemplar of the *juge bouche de la loi*, the doctrine ‘helps to build a judicial environment akin to a legal realist paradise where judges decide on whatever preferences they have’;⁸⁷ far from limiting the discretionary powers of the Court in favour of the autonomy of the Contracting Parties, the doctrine appears to be a tool for multiplying discretion. As Judge Martens convincingly pointed out in a dissenting opinion, ‘[i]t is . . . up to the Court to decide, in every case or in every group of cases, whether a “margin of appreciation” should be left to the State and, if so, how much.’⁸⁸ Thus, the doctrine grants flexibility of law making and law enforcement by means of totally unpredictable and groundless *ad hoc* decisions. The universal standards set out in the Convention and in other human rights declarations go hand in hand with a sort of neo-medieval *iurisdictio*—the adjudication of legal pluralism—and, as in Pirandello’s novel,⁸⁹ one might conclude that there are one, none and eventually one hundred thousand margins of appreciation.

87 Kratochvíl, *supra* n 31 at 352.

88 See *Cossey v United Kingdom* A 184 (1990); 13 EHRR 622, at Dissenting Opinion of Judge Martens, para 3.6.3.

89 Pirandello, *One, No One, and One Hundred Thousand* (1st edn 1926; Marsilio Publishers, 1992 (trans)).