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## **Comments on Sabino Cassese's paper "Ruling indirectly – Judicial subsidiarity in the ECHR"**

### **Introduction**

On behalf of the Court I want to thank you very much for presenting an inspiring and thought-provoking paper. It seems that "subsidiarity" is not only a difficult subject, but even a mythical one. Quoting from legal literature, you refer to subsidiarity as a "magic formula", "myth" and "fig leaf". That is not an area in which judges are especially experienced. Nevertheless, we are all called upon to deal with this concept – be it mythical or not – and to fill it with life in our daily work. If we imagine our dialogue as a bridge where European and national judges meet in the middle, both on our side and on your side the entry to the bridge might bear the sign "subsidiarity". But politically speaking it is clear that there are different interests at stake when this term is used. Federico Fabbrini even went so far as to talk of "the demands of the lower levels of government for self-rule and identity" on the one hand and "the pressure of the higher-tier jurisdiction toward shared-rule and equality" on the other hand.<sup>1</sup>

"Subsidiarity" is one of the most important concepts underlying the search for new organising principles in a more and more complex world where we learn that traditional concepts such as sovereignty are blurred and national legal systems are no longer autonomous closed boxes, but interact in many ways, on many levels and through the cooperation of many institutions. What we need are signposts or, still more, compasses, in what Delmas-Marty calls "ordering pluralism".<sup>2</sup>

For the purposes of the discussion I want to focus on two aspects of your paper: first, the impact on the Court's work that might be brought about by the entry into force of Protocol No. 15, and second the characterisation of the Court's jurisprudence as "indirect rule".

### **The impact of Protocol No. 15 on the Court's work**

Apart from the question whether margin of appreciation and subsidiarity are to be understood as different concepts – a question I unfortunately have no time to address here – you focus on the question whether the entry into force of Protocol 15 will have important

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<sup>1</sup> Federico Fabbrini, "The Margin of Appreciation and the Principle of Subsidiarity: A Comparison", iCourts Working Paper Series No. 15, 2015, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2552542](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552542), p. 6.

<sup>2</sup> M. Delmas-Marty, "Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World", Oxford, Hart, 2009.

consequences for the Court. Your answer is “Yes, it will” and you give four reasons for this. Let me take the opposite position in order to set the framework for the discussion.

First, you argue that the concept of margin of appreciation which has been developed by the Court has somehow been taken out of its hands as it is “no longer liable to be overruled”. Yes, I agree, but as it has been a characteristic feature of the Court’s jurisprudence for many decades in my view it would in any event be impossible to change it without causing an earthquake. A change would require the Court “to saw off the branch on which it is sitting” (if you will allow me the literal translation of a German proverb; the metaphor used in English “biting the hand that feeds you” does not convey exactly the same meaning).

Second, you see a danger as the principle of margin of appreciation could be “activated” by member States against the Court. They could claim before the Court to have the primary responsibility in securing the rights and freedoms defined in the Convention and the Protocols. In my view, they actually do have the primary responsibility in applying the Convention to cases brought before them.

Let’s take surrogate motherhood as a concrete example. We all know how difficult and sensitive it is to find adequate solutions to the problems involved. Before 2014 we had no jurisprudence on the issue. The task therefore fell first and foremost to the national authorities to define the rights involved. We have seen that the answers given to the problem – even in the light of the Convention – were very different.

With reference to the lack of European consensus and the difficult ethical questions raised, the Court, in its judgment in the case of *Mennesson v. France*<sup>3</sup> delivered in June 2014, generally granted a wide margin of appreciation, but stressed that it would be much narrower when it came to the legal parent-child relationship, which involved a key aspect of the individual’s identity. On that basis the Court did not find a violation of the parents’ rights to respect for their family life, but defined a minimum standard of protection concerning the children’s right to private life, i.e. the right to have their descent clearly established in law. With this first guiding principle on the interpretation of the Convention the matter was once again back in the hands of the national authorities. The German *Bundesgerichtshof* went further, in a judgment in December 2014<sup>4</sup>, and applied the principle to a homosexual couple. You might have seen that just this week a further judgment, against Italy, has been published concerning the placement in social-service care of a child born following a gestational surrogacy contract.<sup>5</sup> So this is an example of defining common standards in an area where the “authorities’ direct contact with the vital forces of their countries” (see *Handyside v. the UK*<sup>6</sup>) is especially important, but nevertheless common values enshrined in the Convention, especially children’s best interests, have to be applied. The relevant criteria are determined in the course of the dialogue between the national and European judges, a dialogue that would moreover be enhanced by the entry into force of Protocol No. 16.

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<sup>3</sup> *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts).

<sup>4</sup> BGH, decision of 10 December 2014 (XII ZB 463/13).

<sup>5</sup> *Paradiso and Campanelli v. Italy*, no. 25358/12, 27 January 2015.

<sup>6</sup> *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.

Let me summarise your third argument in your own words: “While the margin of appreciation doctrine has been and will be carved out by the Court, the content of the subsidiarity principle reaches the Court loaded, with its entire history and all of its ambiguities.” Yes, but it is still the Court which defines what to accept and what to reject and how to reformulate “the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to the Member States so as to implement a more robust and coherent concept of subsidiarity in conformity with Brighton and Protocol No. 15”, to quote my colleague Robert Spano.<sup>7</sup>

Last but not least, you refer to the “double interpretation” of the Convention taking into account the level of protection at the national level. I think we do not and cannot accept any “double interpretation” of the Convention. But what might be important in this context are the elements of the margin of appreciation doctrine that might be called “procedural”. Thus the Court scrutinises the extent to which human-rights aspects have been taken into account in the decision-making process at the national level. Generally it might be said that the more profound the human-rights discussion at the national level, the wider, as a rule, the margin granted.

So I would argue that after the entry into force of Protocol No. 15 subsidiarity and margin of appreciation will have a different status in the Convention system, but not necessarily a different content. And the Court will remain the master of interpretation.

### **Characterisation of the Court’s jurisprudence as “indirect rule”**

Let me now comment briefly on your characterisation of the Court’s jurisprudence as “indirect rule” and the comparison with the Roman and British Empire “superimposing some of their own general rules, institutions, procedure and personnel to local institutions and letting them operate as usual”. This is a surprising, but interesting parallel by which to highlight common organising principles. But let us not forget that the context could not be more different.

The Convention and its values are not imposed from “above”. They have been developed or voluntarily accepted by the States, who remain the masters of the Treaty.

The Convention system is not a two-tier-system, but a complex multi-layered mechanism.

The Court interprets the Convention as a living instrument taking into account the European consensus or the emerging or evolving European consensus. It is not a one-sided approach. On the contrary, the Court listens most carefully to the different legal voices of its member States.

You call the Court’s task “indirect rule” within the context of separation of powers. It is “indirect” certainly. But it is a far cry from “rule” as by a colonial power. We might rather draw a parallel with a form of rule by a navigation system in a car. The national judges are

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<sup>7</sup> Robert Spano, “Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity”, *Human Rights Law Review* 2014, p. 12.

the drivers; the direction is clearly indicated: “compatibility with the ECHR”. The Court’s judgments guide the way. The soft voice in the navigation system might say “turn right”, “turn left”, but the national judges could still decide to choose a different way leading to the same destination as they know the region better. Usually the navigation system would accept the choice and reset itself accordingly. But it may also warn that with the new direction chosen the destination will no longer be reached. So the soft voice will say “please turn around”. That’s how I would understand the meaning of “indirect rule” in the context of judicial dialogue.

You are right; nobody must be left “wandering in deserts of uncharted discretion”. But we hope that the Court’s navigation system will help national judges to find the way.