

# DIALOGUE BETWEEN JUDGES 2015



## “Subsidiarity: a two-sided coin?”



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

# Dialogue between judges

Proceedings of the Seminar  
31 January 2015

*“Implementation of the judgments of the  
European Court of Human Rights:  
a shared judicial responsibility?”*

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**Dean Spielmann**  
**President**  
**of the European Court of Human Rights**

### Welcome speech

Presidents, Ladies and gentlemen, Dear friends,

I am very pleased to see so many of you gathered here today for our traditional annual seminar.

Once again, your attendance illustrates your interest in this meeting between the European Court of Human Rights and the Supreme Courts of Europe. The presence amongst us of university scholars and Government Agents before the Court will, I am sure, contribute to the interest of the discussions this afternoon.

I should like to thank Judges Raimondi, Bianku, Nußberger, Sicilianos, Lemmens and Laffranque, who have organised the seminar with the assistance of Roderick Liddell.

We are fortunate enough to have two speakers here this year whom I have no hesitation in describing as exceptional, and it is an honour for me to welcome them: they are Sabino Cassese, judge at the Italian Constitutional Court, and Jean-Marc Sauvé, Vice-President of the French *Conseil d’Etat*. They have been friends of our Court for many years.

Every year our seminar gives us the opportunity to explore different aspects of the Convention system together. Last year we devoted our reflections to the implementation of the Court’s judgments, whereas today we are going to examine a concept which comes into play at a stage prior to European scrutiny and lies at the heart of the Convention mechanism. I am of course talking about subsidiarity.

As you know, the term subsidiarity does not appear in the Convention. What it means is that the task of ensuring compliance with the European Convention on Human Rights falls firstly to the domestic courts, with the Court intervening only in the event of a shortcoming on the part of the domestic courts.

The judgments which refer to the subsidiary role of the Convention mechanism are very old, since the Court referred to that concept as early as 1968 in the *Belgian Linguistic* case. Since then the principle has been reaffirmed many times, to the point where it has become one of the keystones of our system. Subsidiarity is indeed at the heart of our relations with the national courts. At our bilateral meetings, be these in Strasbourg or the supreme courts, it is a central element of our discussions. It constitutes, in a way, a dividing line in the application of the Convention between the national courts and our Court. All this transpires from what we also call shared responsibility. This expression, which is more recent and is used increasingly frequently, is, fundamentally, only another way of talking about subsidiarity.

The principle of subsidiarity is embodied in the obligation to comply with certain rules, including procedural rules, the primary one being the obligation on the applicant to exhaust domestic remedies. The Court must respect the autonomy of the domestic legal systems, but on condition that the domestic courts apply the Convention properly. In any event, the proper application of the principle of subsidiarity contributes to the effectiveness of the system, since the division of powers between the domestic courts and the European Court reinforces the primary responsibility of the domestic courts and contributes to conferring on the domestic courts the role of principal actors in the protection mechanism. Respect for the rights contained in the Convention is therefore ensured by different actors, who, each according to their own role, enrich and strengthen the protection of human rights.

A corollary of subsidiarity is the margin of appreciation that leads our Court to impose limits on itself in the exercise of its scrutiny where it considers that the national authorities are better placed than the Court to resolve a dispute. However, whilst no one contests the merits of subsidiarity, we know that the margin of appreciation has its advocates and its critics. As our friend Laurence Burgorgue-Larsen recently lamented, in one of her insightful articles, “the national margin of appreciation is everywhere”, including in Protocol No. 15. I am sure that the question of the margin of appreciation will be discussed today.

Lastly, the national authorities contribute to guaranteeing the proper application of the principle of subsidiarity, for example by providing for effective domestic remedies or examining the compatibility of draft laws with the Convention. The role that Government Agents may play in this respect is fundamental.

As I said in 2014, at the opening of the judicial year, we are witnessing more and more often, in our relations between domestic and international courts, the replacement of the pyramid structure by a network system.

Allow me to quote you, dear Jean-Marc Sauvé. In 2010, during a conference at the *Conseil d'État*, you looked back – and I quote – “without nostalgia on the charms of a bygone era in which the national judge lived in splendid isolation”. You are absolutely right: the national judge is no longer alone. Today the actors of subsidiarity are many and varied. Many of them are assembled here today, alongside legal commentators and bloggers. This therefore promises to be an occasion of rich and lively debate.

I do not wish to delay so will now immediately give the floor to my colleague and friend Julia Laffranque, who has very kindly agreed to chair this seminar.

Thank you for your attention.



**Julia Laffranque**

**Judge of the European Court of Human Rights**

Presidents, Ladies and gentlemen, Dear friends,

I am very pleased to see so many of you gathered here today for our traditional annual seminar.

“But when the countries of the Council of Europe are looked at as a whole, the influence of the Strasbourg Court has been beneficial. ... Europe needs the Convention and Europe needs the Court. I have no hesitation in expressing my conclusion that Strasbourg is a powerful force for good.” These are quite recent words of The Right Honourable the Lord Phillips of Worth Matravers, founding President of the Supreme Court of the United Kingdom, from his lecture at the Centre of European Law, Dickson Poon School of Law, King’s College London, on 17 June 2014<sup>01</sup>.

As of January 2015 there are in today’s Europe many difficult challenges for and threats to the enjoyment of fundamental human rights. In such a context, the value of the European Convention on Human Rights cannot be over-emphasised; the European Court of Human Rights takes its mission seriously and will continue to do so in the future.

Yet the European Court of Human Rights cannot be solely responsible for enforcing human rights standards across Europe. Upholding human rights and the rule of law is not only the duty of the Strasbourg Court, it is also a national task – that of the legislature, the executive and the courts.

The Parliamentary Assembly of the Council of Europe (PACE), last year on international human rights day (10 December 2014), urged the States to match the “extraordinary contribution” and progress achieved by the Strasbourg Court by reinforcing the principle of subsidiarity and upholding European Convention standards better at national level<sup>02</sup>. PACE’s Legal Affairs Committee has written about the “shared responsibility”<sup>03</sup> of the States, along with the Court, in order to implement the European Convention on Human Rights effectively.

01 <http://www.kcl.ac.uk/law/newsevents/newsrecords/2013-14/assets/Lord-Phillips-European-Human-Rights--A-Force-for-Good-or-a-Threat-to-Democracy-17-June-2014.pdf> (visited in March 2015).

02 See PACE web-site: Upholding human rights: a national task as well as one for the Strasbourg Court: <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5345&lang=2&cat=5>; as well as Committee on Legal Affairs and Human Rights Report: The effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond, Rapporteur: Mr Yves Pozzo di Borgo, France, Group of the European People’s Party; AS/Jur (2014) 33: <http://website-pace.net/documents/19838/1041670/20141210-BeyondBrighton-EN.pdf/9b39d1d4-e9b2-44ea-baaa-901ced892426> (both visited in March 2015).

03 *Ibid.* (Report, p. 4, para 5).



Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The principle of subsidiarity is also reflected in the Charter of Fundamental Rights of the European Union (Article 51)<sup>19</sup>. Whereas the EU concept places a limit on EU action where the EU goals in issue can be successfully achieved at local level, the Convention principle has a primarily positive perception in relation to the Contracting Parties.

And this brings us back to Strasbourg. Even though subsidiarity may be seen here, to a certain extent, as a limit to the Convention's supervisory mechanism, NGOs have expressed some concern, for example in connection with the Izmir Declaration, arguing that the principle of subsidiarity does not, however, mean that States can place inappropriate pressure on the Court with regard to its interpretation and application of the Convention<sup>20</sup>. Subsidiarity requires, above all, positive action on the part of the States to uphold the Convention guarantees; in fulfilling their duties in relation to the exhaustion of domestic remedies, national authorities are the primary guarantors of fundamental rights and freedoms.

It is relevant to conclude this brief presentation on the history and different notions of subsidiarity by referring to another Pope, to complete the circle, this time Pope Francis, who came to Strasbourg last November to speak to the European Parliament and the Council of Europe. In his speech, he pointed out that the Court represented the Conscience of Europe as regards human rights and dignity<sup>21</sup>. He also emphasised the centrality of the human person, who would otherwise be at the mercy of the latest trends and powers, and the central role of the ideals which have shaped Europe since its inception, such as peace, subsidiarity, reciprocal solidarity, and humanism based on respect for the dignity of the human person<sup>22</sup>.

Ladies and gentlemen, on behalf of the organising committee of the annual seminar, I would like to thank you for coming here today; I hope that your discussions are fruitful and I encourage in particular the domestic courts and judges to visit the Court in the future – our doors are always open for our colleagues. I will now give the floor to our eminent speakers.



Sabino Cassese

**Judge emeritus  
of the Constitutional Court of Justice, Italy**

## RULING INDIRECTLY JUDICIAL SUBSIDIARITY IN THE ECtHR\*

### 1. DEFERENTIAL STANDARDS OF REVIEW: FROM THE MARGIN OF APPRECIATION TO SUBSIDIARITY

The European Convention on Human Rights provides protection exceeding that ensured by national law, a protection that is based on certain common, shared, and therefore uniform principles (as is the case with European Union law<sup>01</sup>). This uniformity is balanced with respect for national identities, through the requirement of the prior exhaustion of national remedies (under Article 35(1) of the Convention, “the Court can only deal with the matter after all domestic remedies have been exhausted...”)<sup>02</sup> and the doctrine of the margin of appreciation (leaving a certain degree of discretion to national governments, “a mild form of immunity”<sup>03</sup>).

Both the prior exhaustion requirement and the margin of appreciation doctrine regulate the interplay between legal orders and ensure judicial dialectics. However, while the first is legal in character, because it is established in the Convention, the second has a judicial nature, because it is the product of the Court's case-law.

While the first has been accepted as a common principle in international law, the second, introduced in 1958 and established with the *Handyside* case of 1976, has been criticised for its vagueness and incoherence, for being “a quirk of language”, “an unfortunate Gallicism”, “the most controversial ‘product’ of the ECtHR”<sup>04</sup>.

\* Paper for the Seminar on “Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities”, held to coincide with the ceremony marking the official opening of the judicial year of the European Court of Human Rights, 30 January 2015, Strasbourg. The author expresses his gratitude to Giuliano Amato, Barbara Randazzo, Marta Cartabia and Marco Pacini for their comments on previous versions.

01 In the context of which this development was noticed by Judge Alberto Trabucchi (“un droit ...à une protection juridique qui dépasse les limites traditionnelles de leur système national”) in a famous note on the *Van Gend en Loos* case (now in “La formazione del diritto europeo”, *Quaderni della Rivista di diritto civile*, no. 14, Padua, Cedam, 2008, pp. 171-177). See also M. Cartabia, “Fundamental Rights and the Relationship among the Court of Justice, the National Supreme Courts and the Strasbourg Court”, in *50<sup>th</sup> Anniversary of the Judgment in Van Gend en Loos*, CJEU Conference Proceedings 13 May 2013, Luxembourg, Office des publications de l'UE, 2013, p. 156.

02 The related principle of due consideration by a domestic tribunal, introduced by Protocol No. 14 into Article 35 of the Convention (now Article 35(3)(b)) for the purpose of “ensur[ing] that every case receives a judicial examination whether at the national level or at the European level, in other words, to avoid a denial of justice. The clause is also consistent with the principle of subsidiarity, as reflected notably in Article 13 of the Convention, which requires that an effective remedy against violations be available at the national level” (*Korolev v. Russia* (dec.), no. 25551/05, 1 July 2010, First Section decision on admissibility).

03 See D. Spielmann, *Allowing the Right Margin. The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, Centre for European Legal Studies, University of Cambridge, Faculty of Law, Working Paper Series, February 2012, p. 2.

04 D. Spielmann, *Allowing the Right Margin*, op. cit., p. 28. A detailed account of the margin of appreciation as subsidiarity is available in J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primacy in the European Convention on Human Rights*, Leiden-Boston, Martinus Nijhoff, 2009, pp. 236 ff. The margin of appreciation doctrine is subject to multiple interpretations by the Strasbourg Court, such as in the recent case of *S.A.S. v. France* [GC], no. 43835/11, ECHR 2014 (wide margin of appreciation to leave room to the democratic process, in matters of general policy on which opinions may differ widely).

19 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, pp. 391–407).

20 See Joint statement for the High Level Conference on the future of the European Court of Human Rights, Izmir, Turkey, 26-27 April 2011: <http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Amnesty%20International%20-%20Joint%20NGO%20Statement.pdf> (visited July 2011).

21 “Je pense particulièrement au rôle de la Cour européenne des droits de l’homme, qui constitue en quelque sorte la “conscience” de l’Europe pour le respect des droits humains.”, Speech by Pope Francis to the Council of Europe, Strasbourg, 25 November 2014, p. 33; also available at: <http://www.voltairenet.org/article186047.html> (visited March 2015).

22 Speech by Pope Francis to the European Parliament, Strasbourg, 25 November 2014, p.13; also available at: [http://w2.vatican.va/content/francesco/fr/speeches/2014/november/documents/papa-francesco\\_20141125\\_strasburgo-parlamento-europeo.html](http://w2.vatican.va/content/francesco/fr/speeches/2014/november/documents/papa-francesco_20141125_strasburgo-parlamento-europeo.html) (visited March 2015).

Deferential principles originating in law and in case law are common to many composite legal orders, such as the World Trade Organization (WTO) and the European Union<sup>05</sup>.

As regards the WTO, deferential standards of review are provided by Article 176 of the Anti-Dumping Agreement, which rules out *de novo* reviews and evaluations of facts, while the Dispute Settlement Body allows for a “margin of appreciation”, for example in light of the gravity of the breach<sup>06</sup>, and uses the “necessity test” and the “least restrictive test” as margin-of-appreciation techniques<sup>07</sup>.

As for the European Union, the Treaty on the European Union (Article 5(3)) provides that “[u]nder the principle of subsidiarity... the Union shall not act only if and in so far as the objectives or the proposed action cannot be sufficiently achieved by the Member States, either at central level or at the regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

The European Court of Justice has recognised a margin of discretion for national governments, on the assumption that “specific circumstances which may justify recourse to the concept of public policy may vary from one country to another”<sup>08</sup>, or when community rights must be balanced with national rights<sup>09</sup>, such as in the context of freedom of expression, or simply because diversities exist between the nations<sup>10</sup>.

## 2. PROTOCOL NO. 15

Returning to Strasbourg, Protocol No. 15 has embedded the principle of subsidiarity into the legal system of the European Convention on Human Rights. The most important question is: is this a new principle, or is it simply the codification of a principle derived from the system<sup>11</sup> or established by the Court?

To answer this question, it is necessary to consider the genesis of Article 1 of this Protocol. The subsidiarity principle was first mentioned, in passing, in the “declaration” of the High Level Conference held in Izmir on 26-27 April 2011 (para. A.3).

The declaration adopted at the following Conference, held in Brighton on 19-20 April 2012, contains a paragraph on the “interaction between the Court and national authorities” (see paras 10-12). The reasoning set out therein is rather tortuous. It commences by mentioning the Court’s case law on the margin of appreciation. Then it states that this “reflects [the fact] that the Convention system is subsidiary” to the national level and national authorities, and that the margin of appreciation goes hand in hand with supervision under the Convention system. Third, the Court is encouraged to give great prominence to, and to apply consistently, the principles of subsidiarity and the margin of appreciation doctrine. Finally, the declaration jumps to a proposal to include, in the Preamble to the Convention, “a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court’s case law”. In this respect, two points are unclear: was the margin of appreciation doctrine considered to be part of the principle of subsidiarity, or was it rather deemed to be a separate and different principle? Where were the grounds for the subsidiarity principle to be found: in the Court’s case law, or in the Convention system?

As a result of the Brighton Conference, Article 1 of Protocol No. 15, not yet in force, added a new recital to the Preamble of the Convention: “the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights...”.

The Explanatory Report to the Protocol states that the reference to the principle and the doctrine is “intended...to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law”. The Opinion of the Court on the Draft Protocol expressed reservations on the text, but emphasised the drafters’ intentions to not “alter either the substance of the Convention or its system of international, collective enforcement”. It is well known that the new recital of the Preamble to the Convention was a compromise, which sought to take into account the British reaction to the ECtHR’s judgment in the *Hirst* case, which concerned the voting rights of British prisoners<sup>12</sup>.

Reading the text, it is difficult to establish why deferential standards of review were introduced by the new Protocol. The reason may have been, simply, functionality (for example to address case overload, or a lack of resources and expertise for investigations or reviews of fact by the Strasbourg Court<sup>13</sup>). Alternatively, to recognise the diversity of national identities; or deference to sovereignty, to minimize restrictions<sup>14</sup>; or deference to democracy, along the lines of those who believe that judicial review can be guided by subsidiarity “to enhance their specifically democratic legitimacy” and that “the margin of appreciation ...is a main example of... a democratically informed standard of review”<sup>15</sup>.

Let us consider whether the new recital is a sign of continuity or, on the contrary, traces a dividing line with the past.

First, subsidiarity and the margin of appreciation are addressed in the new recital as two different principles, as if they had different content. This will pose, for the Court, the difficult task of establishing the peculiarities of the first *vis-à-vis* the second.

05 Y. Shany, “Toward a General Margin of Appreciation Doctrine in International Law?”, in *European Journal of International Law*, 2005, vol. 16, no. 5, pp. 907 ff.

06 WTO/DS 222/ARB Canada – Export Credits and Loan Guarantees for Regional Aircraft (15 February 2003), para. 3.44.

07 F. Fontanelli, “Whose Margin is it? State discretion and judges’ appreciation in the necessity quicksand”, available at <http://ssrn.com/abstract=1687216>, DS 363 (2009).

08 CJEU, C-36/02, *Omega v. Oberbürgermeisterin* (14 October 2004), para. 31.

09 CJEU, C-421/70, *Frede Darmgard* (2 April 2009); C-112/00 *Eugen Schmidberger v. Austria* (12 June 2003), paras 81-82; C-71/02, *Herbert Karner v. Troostwijk* (25 March 2004), paras 50-53.

10 CJEU, C-41/74, *Yvonne van Duyn v. Home Office*, (4 December 1974), para. 18; C-244/06, *Dynamic Medien v. Avides Media* (14 February 2008), para. 44. See, in general, J. Schwarze, “Balancing EU Integration and National Interests in the Case-Law of the Court of Justice”, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Asser, The Hague, 2013, pp. 257 ff., and M. Cartabia, *Fundamental Rights*, op. cit. E. Benvenisti, “Margin of appreciation, consensus and universal standards”, in *International Law and Politics*, 1999, vol. 31, p. 843 ff., writes that “where national procedures are notoriously prone to failure, most evident when minority rights and interests are involved, no margin and no consensus should be tolerated”.

11 As noticed by Judge Villiger in his partly dissenting opinion in *Vinter and Others v. the United Kingdom* [GC], nos. 66069, 130/10 and 3896/10, ECHR 2013: “the principle of subsidiarity underlying the Convention”. As a matter of fact, the principle of subsidiarity may be derived from Articles 1, 13 and 35 of the Convention.

According to F. Fabbrini, *The Margin of Appreciation and the Principle of Subsidiarity. A Comparison*, University of Copenhagen Faculty of Law, iCourts Working Paper Series, no. 15, 2015, p. 9, “whereas the Eu principle of subsidiarity and the ECHR doctrine of the margin of appreciation share a similar constitutional function, their legal nature and institutional focus is different”; “the principle of subsidiarity is to be interpreted as a neutral concept, which includes both a negative and a positive dimension, whereas the margin of appreciation must be seen as limited to the negative dimension only”; “the principle of subsidiarity is mainly addressed to the legislature ... the margin of appreciation, instead, is mainly concerned with the exercise of jurisdiction by the ECHR ...”.

12 E. Benvenisti, *The Law of Global Governance*, Academy of International Law, The Hague, 2014, p. 238.

13 A. von Staden, *Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review*, available at <http://ssrn.com/abstract=1969442>p. 24 – 25.

14 A. Follesdal, *The Principle of Subsidiarity as a Constitutional Principle in International Law*, New York University, Jean Monnet Working Paper 12/11, 2011, p. 26.

15 A. von Staden, *Democratic legitimacy*, op. cit., p. 1, p. 5 and p. 12.

Secondly, the fact that the Convention system relies on national systems, and that the latter must provide effective remedies to the parties whose rights are infringed, is part of the Convention. But the Convention – as interpreted by the Court – may, in several cases, provide protection that is additional to that ensured at the national level. For these cases, the Court had developed, as judge-made law, the margin of appreciation doctrine. This is a self-imposed restraint. However, from now on, both the subsidiarity principle and the margin of appreciation doctrine are imposed on the Court by the Convention. Both are now grounded on another source of law, that is not judge-made law, but Convention law. Until Protocol No. 15 was drafted, the margin of appreciation was afforded to member States by the Court. From Protocol No. 15 onwards, member States are *entitled* to have recourse to the principle of subsidiarity and to the margin of appreciation doctrine.

This change entails a significant number of consequences. The margin of appreciation doctrine – as a judge-made doctrine – was liable to be overruled. Now this is no longer possible, as the judge-made doctrine is enshrined in the Convention.

The new legal statement features a second peculiarity. Subsidiarity and the margin of appreciation can be “activated” by third parties (member States) “against” the Court: they can argue, before the Court, that they have the primary responsibility in securing the rights and freedoms defined in the Convention and Protocols.

A third peculiarity is that, while the content of the margin of appreciation doctrine has been and will continue to 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.

Finally, with the margin of appreciation becoming a legislative doctrine, doubt may be cast on the fact that a double interpretation can still be envisaged by the Court, for countries that provide less protection at the national level and for countries that provide more<sup>16</sup>.

I will make one last point in relation to subsidiarity. This principle displays a long-standing and rather unsuccessful<sup>17</sup> tradition in rulemaking and in adjudication. In the context of the Convention system, it was introduced to regulate neither the first nor the latter of these, but rather to regulate judicial review. It is addressed to the Court, as the Convention’s main actor; and judicial subsidiarity is different from legislative or administrative subsidiarity.

Subsidiarity has been used to distribute functions along a vertical line, between the centre and the periphery. In this context, the main purpose of subsidiarity is to allocate functions so that centralisation can be avoided, and to ensure an efficient allocation of power. An example is Article 118 of the Italian Constitution: this article provides that administrative tasks are to be allocated among municipalities, provinces, regions and the central government in accordance with the principle of subsidiarity. The same is true for the principle of subsidiarity in the context of the European Union, in which it regulates the distribution of functions between European and national authorities.

Subsidiarity, as an instrument for avoiding centralisation, has not been effective. Some attempts have been made to make it work by “proceduralising” it (e.g. by requiring the advice of lower levels of government before rules can be issued by the higher levels<sup>18</sup>).

The use of subsidiarity in Protocol No. 15 is new, because the context is new. It does not apply to rulemaking or adjudication, but to judicial review. The purpose is not to allocate functions, but to check the uniformity of the application of supranational principles and rules in national contexts. The only precedent of which I am aware, as to this type of application of the principle of subsidiarity, is that enshrined in Article 51 and in the Preamble to the Charter of Fundamental Rights of the European Union (2010/C 83/02).

### 3. “COMPETING ASPIRATIONS TOWARDS UNITY AND DIVERSITY”<sup>19</sup>: SUBSIDIARITY AS INDIRECT RULE

We must now turn to the principle of subsidiarity as such. Subsidiarity “has a long and colourful history”<sup>20</sup> and possesses at least thirty different meanings. For this reason, it has been referred to as a programme, a magic formula, an alibi, a myth, a fig-leaf, an aspiration<sup>21</sup>. Subsidiarity was “the word that saved the Maastricht Treaty”<sup>22</sup>. It has been written that subsidiarity “cannot on its own provide legitimacy or contribute to a defensible allocation of authority between national and international institutions e.g. regarding human rights law”<sup>23</sup>.

The function of subsidiarity is less unclear, as this principle is caught in a tension with the principle of universality<sup>24</sup>, to “affirm internationalism...without the temptation for a super-state or other centralized global authority”<sup>25</sup>. Subsidiarity has many faces: it acts as a devolving mechanism in favour of lower authorities, it is the ground for substituting the lower level with the higher level, and it is the basis for the support provided by the higher level to the weaknesses of the lower level.

Subsidiarity is one of the many applications of a fundamental organisational principle: indirect rule. This principle is as important as the separation of powers. While the latter operates horizontally, the former operates vertically.

Whenever different legal systems integrate and lose their exclusivity<sup>26</sup> – no matter what kind of integration occurs –, they assume a set of common general principles and are endowed with a reviewing court; indirect rule is instrumental to avoid collisions, by “ordering pluralism”<sup>27</sup> and by putting together “planets and the universe”<sup>28</sup>.

Indirect rule was instrumental first to the establishment of the Roman Empire and then to the expansion of the British Empire. The British could have ruled their empire as the French did theirs, by replacing local institutions with their own metropolitan institutions. Instead, they chose to govern by indirect rule, by super-imposing some of their own general rules, institutions, procedure, and personnel to local institutions and letting them operate as usual. This kind of adaptive, evolutionary process ensures compatibility and tolerance between different values and rules.

Governing by indirect rule in contemporary times is more difficult, as supranational legal systems superimpose only rules, institutions and procedures; they do not send persons to command national legal systems.

19 J. H. Elliott, “A Europe of Composite Monarchies”, in *Past and Present*, 1992, p. 71.

20 T. Horsley, “Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?”, in *Journal of Common Market Studies*, 2012, vol. 50, no. 2, p. 268.

21 S. Cassese, “L’aquila e le mosche. Principio di sussidiarietà e diritti amministrativi nell’area europea”, in *Foro italiano*, 1995, October, V, pp. 373 ff.

22 D. Z. Cass, “The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community”, in *Common Market Law Review*, 1992, vol. 29, no. 1, pp. 1107 ff.

23 A. Follesdal, *The Principle*, op. cit., p. 31.

24 E. Benvenisti, *The Law*, op. cit., pp. 207, 233 ff. and 238.

25 P.G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, Notre Dame Law School Scholarly Works, 2003, no. 564, p. 78 (also in *American Journal of International Law*, 2003 and, in Italian, in P. G. Grasso (ed.), *Europa e Costituzione*, Napoli, ESI, 2005, pp. 129 ff).

26 On legal orders losing their character of legal monads and their exclusivity, see E. Cannizzaro and B. I. Bonafè, “Beyond the archetypes of modern legal thought. Appraising old and new forms of interaction between legal orders”, in M. Maduro, K. Tuori and S. Sankari (eds.), *Transnational Law. Rethinking European Law and Legal Thinking*, Cambridge, Cambridge University Press, 2014, pp. 78 ff., esp. pp. 95-96.

27 M. Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World*, Oxford, Hart, 2009.

28 B. Simma and D. Pulkowski, “Of Planets and the Universe: Self-Contained Regimes in International Law”, in *European Journal of International Law*, 2006, vol. 17, no. 3, pp. 483 ff.

16 On the double standard, see J.-L. Flauss, “Faut-il transformer la Cour européenne des droits de l’homme en juridiction constitutionnelle?”, in Dalloz, 2003, p. 1639, ft. 2, and L. Favoreu, “Corti costituzionali nazionali e Corte europea dei diritti dell’uomo”, in *Rivista di diritto costituzionale*, 2004, n. 1, pp. 8-9.

17 P. Craig, *Subsidiarity, a Political and Legal Analysis*, University of Oxford, Legal Research Paper Series, no. 15, April 2012.

18 M. Cartabia, “Unione europea, sussidiarietà e diritti fondamentali”, in P. Donati (ed.), *Verso una società sussidiaria*, Bologna, Bononia University Press, 2011, pp. 121-141.



Legal orders lose their exclusivity, overlap, and must strike a balance between two sets of competing values: on the one hand, respect for local rules and diversity, and on the other, compliance with the common principles incorporating, in the decision-making process, those interests that are formally excluded and constrain national sovereignty<sup>29</sup>.

Indirect rule and its applications must act as shock absorbers, to avoid collisions between converging legal orders. Therefore, they must remain open enough to be worked out over time, and to be adjustable to different conditions. Attempts to establish a precise catalogue and taxonomy of the applications of indirect rule are destined to fail. Fluidity and flexibility<sup>30</sup> are the rule.

#### 4. DEFINING AND CONSTRAINING SUBSIDIARITY

Where does the higher law end, and where does national law begin? It is important to respond to this question by defining and constraining subsidiarity, to ensure achievement of the Convention's objectives, to reduce the risk of domination by the Court and Convention bodies – which can abuse their flexibility – and to protect both the Court and Convention bodies with respect to more powerful States<sup>31</sup>. Neither the Court nor the Contracting Parties (and their respective domestic courts) should be left “wandering in deserts of uncharted discretion”<sup>32</sup>.

First, in which areas does the subsidiarity principle apply? The answer is clear: only where there are shared, concurring competences, and therefore where both levels, the national and the supranational, have equal possibilities of action; it applies only “in areas which do not fall within [the Union's] exclusive competence”, as established by Article 5(3) of the Treaty on European Union. This dividing line is blurred for a purely internal reason: it is difficult, for unitary legal orders, as are national orders, to recognise certain rights only in some circumstances but not in others. For example, how could a national government and its citizens tolerate that the right to a hearing be protected in certain areas, and not in others, simply because the second fall within the exclusive competence of national authorities? In other words, different sectors and areas within any single national legal order are interconnected and communicate with one another; and citizens are in search of the best protection possible. This is the reason why the impact of European Union law extends to areas and matters other than those upon which the Union has a direct bearing<sup>33</sup>.

Second, when can the subsidiarity principle be invoked? Again, the answer should be clear: only “in connection with those articles of the Convention that have ‘limitation clauses’”<sup>34</sup>, and not where “absolute rights” (e.g. the right to life: Article 2; or prohibition of torture: Article 3) are guaranteed<sup>35</sup>.

Third, can subsidiarity be subject to different interpretations, giving way to narrow/wide and double applications, as is the case with the margin of appreciation doctrine? If – as concluded in the previous pages – subsidiarity is part of a larger *genus* of institutional arrangements called indirect rule, and if indirect rule is a flexible device *par excellence*, the answer to this question is necessarily in the affirmative.

Fourth, how can the principle of subsidiarity be translated into practice<sup>36</sup>, and how can “brakes” be introduced, to make the subsidiarity principle effective? The European Union provides a good example with Protocols 1 and 2 to the Lisbon Treaty (respectively, political controls and judicial controls). These brakes, however, are not entirely effective<sup>37</sup>.

As a flexible tool, subsidiarity can have a varying impact, depending upon the distinctive features of each national legal order. For example, those that do not have a written constitution are more exposed to the percolation of supranational law. The United Kingdom has been obliged to adapt, with the *Human Rights Act 1998*.

One final point on defining and restraining subsidiarity is a caveat. It should not be believed that, where supranational authorities have a subsidiary role, sovereign States have a free hand. Sovereignty is illusory for four reasons. Being subsidiary means that national authorities (mainly courts, in our case) must comply with some common, shared principles, as are those listed in the Convention and its Protocols. Being subsidiary also means being subject to a supervisory jurisdiction and court. Subsidiarity makes State action discretionary *vis-à-vis* the higher law and subordinate, as is the case for national administrative authorities and judicial review. Finally, being part of a collective agreement, national authorities are not only accountable to the higher bodies (in our case, the ECtHR), but also to the other parties to the Convention (horizontal accountability).

#### 5. CONCLUSION: TO WHAT CAN SUBSIDIARITY LEAD?

To what can subsidiarity lead the European Convention on Human Rights? What developments can be foreseen?

One possible development is a potential restraint on the ECtHR<sup>38</sup>, by limiting its jurisdiction, for example by endowing it with a power of review that is limited only to patent violations of the Convention, for example, that which occurred in the *Bosphorus* case (“if the protection of Convention rights is manifestly deficient”: para. 156).

A second development that can be envisaged is the introduction by national political bodies or national courts of external controls on the implementation of the subsidiarity principle, in defence of their “territories”, as defined by the subsidiarity principle.

A third development is that the role of national courts as judges of the Convention will be enhanced, following the example of the European Union judicial system. Along those lines, national courts could become, at least functionally, part of the judicial branch of the Council of Europe's legal system, acting if they are delegated with the task of reviewing the conventionality of national decisions, with the Strasbourg Court entitled to act as a guiding body through a system of preliminary reference<sup>39</sup>.

While all three developments could lower the number of cases brought before the Strasbourg Court, none should be accepted as a means to revive national interests against the obligations accepted with the signing of the Convention. The process of globalisation of human rights has witnessed, and will continue to witness, tensions between national governments and supranational bodies.

29 F. de Witte, “Sex, Drugs & EU Law: the Recognition of Moral and Ethical Diversity in EU Law”, in *Common Market Law Review*, 2013, vol. 50, pp. 1552 ff.

30 P. G. Carozza, *Subsidiarity*, op. cit., p. 79.

31 A. Follesdal, *The Principle*, op. cit., p. 29.

32 US Supreme Court, *Exxon Shipping Co. v. Baker*, 2008, 128 S. Ct. 2605, n. 7 – 219, citing M. Frankel, *Criminal Sentences: Law Without Order* (1973).

33 A. von Bogdandy et al., “Solange ribaltata. Proteggere l'essenza dei diritti fondamentali nei confronti degli Stati membri dell'UE”, in *Rivista trimestrale di diritto pubblico*, 2012, no. 4, pp. 4-5.

34 I. Rasilla del Moral, “The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine”, in *German Law Journal*, 2006, June, No. 6, p. 613.

35 G. Raimondi, “Corte di Strasburgo e Stati: dialoghi non sempre facili”, interview by Diletta Tega, in *Quaderni costituzionali*, 2014, n. 2 June, p. 463; see also G. Raimondi, “La dichiarazione di Brighton sul futuro della Corte europea dei diritti dell'uomo”, in *Associazione italiana dei costituzionalisti, Rivista telematica giuridica*, 2012, n. 3.

36 P.G. Carozza, *Subsidiarity*, op. cit., p. 79.

37 P. Craig, *Subsidiarity*, op. cit.

38 T. Horsley, *Subsidiarity*, op. cit., pp. 267 and 281.

39 One must also consider the consequences of the Union's participation in the Convention and the impact of Protocol No. 16, which provides for the issuance of “advisory opinion[s] on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto”.



However, it cannot reduce its efforts to set global brakes on, and controls over, national legal orders. Over time, these display ever more faults and “lacunae”, as they are instruments that are far from perfect. “Human rights, democracy and the rule of law now face a crisis unprecedented since the end of the Cold War”, wrote the Secretary General of the Council of Europe in his May 2014 Report<sup>40</sup>. Therefore, it becomes necessary to complement the controls from below (popular elections) with checks from above.

A second reason for not allowing the revival of the protection of pure national rights in Europe is that human rights are not guaranteed only in this area of the world, but are rather part of a general set of global rules, under the aegis of the United Nations. How could Europeans then escape control by Strasbourg-based supranational institutions, while being subject to other international treaties such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the UN Convention against Torture, and to such global institutions in charge of confining and promoting democracy, the rule of law and human rights, as the United Nations, the United Nations Democracy Fund, and many more ancillary institutions? How could Europe remain behind the Organization of American States (and the American Convention on Human Rights, with the Inter-American Court of Human Rights), and the Economic Community of West African States (with the African Court on Human and Peoples’ Rights), whose protection of human rights has, in many countries, been incorporated in national law, also ensuring judicial remedies for private parties?



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**Judge of the  
European Court of Human Rights**

## 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>01</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>02</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 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.

01 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.

02 M. Delmas-Marty, “Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World”, Oxford, Hart, 2009.

40 *State of Democracy, Human Rights and the Rule of Law in Europe*, 14<sup>th</sup> Session of the Committee of Ministers, Vienna, 5-6 May 2014, p. 5.