



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

Subsidiarity: From Roots to Its Essence

Speech by Judge Julia Laffranque, president of the Organising Committee of the seminar traditionally held to mark the opening of the judicial year of the European Court of Human Rights

Mr. President, Ladies and gentlemen, dear colleagues,

„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 Rt Hon the Lord Phillips of Worth Matravers, founding President of the Supreme Court of the United Kingdom, in his lecture at the Centre of European Law, The Dickson Poon School of Law, King’s College in London on 17 June 2014.¹

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 continues to take its mission seriously now and 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, executive and courts.

Parliamentary Assembly of the Council of Europe, PACE has last year, on international human rights day, on the 10th of December 2014 urged the states to match the “extraordinary contribution” and progress done by the Strasbourg Court by reinforcing the principle of subsidiarity and upholding European Convention standards better at national level.² PACE’s Legal Affairs Committee has written about “shared responsibility”³ of the States along with the Court in order to implement the European Convention on Human Rights effectively.

The High-level Conference meeting in Brussels on 26 and 27 March 2015 at the initiative of the Belgian Chairmanship of the Committee of Ministers of the Council of Europe will be

¹ <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).

² 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).

³ *Ibid.* (Report, p. 4, para 5).

devoted to “Implementation of the European Convention on Human Rights, our shared responsibility”.⁴

However, sharing responsibility for the protection of human rights is to be contrasted strongly with any idea of shifting responsibility. There are no outsiders or insiders within the Convention protection mechanism, subsidiarity should allow us all to contribute to making for a stronger human rights regime in Europe, to the greater benefit of those who are protected by it.

Ladies and gentlemen, let me welcome you to 2015 edition of the “Dialogue between judges”, to the seminar titled “Subsidiarity: a two-sided coin?” and express my hope that the year will continue more pleasantly than it has started in this part of the world.

One of the "keystone" /"caractéristique fondamentale" of the Convention system⁵: subsidiarity is in detail analysed in the background paper of the seminar which you have all had time to familiarise with.⁶ Subsidiarity has a mirror-image effect, it is two sides of the same coin; for example, the order of the sub-titles of our seminar could easily be switched: first the role of national authorities and then that of the Convention mechanism could be treated, in any case inevitably there is a considerable degree of overlap between these two sides.

There is also some correspondence of this year’s topic with the subjects that we have already approached in previous seminars.⁷ Subsidiarity, looking at it from different angles, has always been present in our discussions.

In fact, the principle of subsidiarity in Convention protection system has been gradually evolving. First of all it was developed in the longstanding case law of the European Court of

⁴ A similar conference, focusing on “Application of the European Convention on Human Rights and Fundamental Freedoms on national level and the role of national judges” was held in Baku from 24-25 October 2014, under the auspices of the Azerbaijani Chairmanship of the Committee of Ministers (May – November 2014). One of the main conclusions of another recent conference on the long-term future of the Convention system, held in Oslo on 7 and 8 April 2014 was that the reform process should not be limited to the Court, but include other organs of the Council of Europe, including the Committee of Ministers, and, not least, national implementation of the Convention rights, see Geir Ulfstein, Closing the Conference. Summing up, Conference Proceedings, p. 189: <http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Proceedings-Oslo-2014.pdf> (visited in March 2015).

⁵ See Conférence devant le Conseil d’Etat Paris, 19 avril 2010, Intervention introductive de Jean-Paul Costa, Président de la Cour européenne des droits de l’homme Conseiller d’Etat honoraire http://www.echr.coe.int/NR/rdonlyres/20D3F764-49E8-4B74-BD51-BA728BEA379F/0/20100419_Discours_PresidentCosta_Conseil_d_Etat_Paris.pdf (visited in July 2011)

⁶ Seminar to mark the official opening of the judicial year Subsidiarity: a two-sided coin? 1. The role of the Convention mechanism. 2. The role of the national authorities. Background paper, 30 January 2015, 1. Prepared by the Organising Committee, chaired by Judge Laffranque and composed of Judges Raimondi, Bianku, Nußberger and Sicilianos, assisted by R. Liddell of the Registry. This paper which does not reflect the views of the Court is intended to provide a framework for the rapporteurs and a basis for the seminar discussions: http://www.echr.coe.int/Documents/Seminar_background_paper_2015_ENG.pdf (visited in March 2015)

⁷ E.g. out of most recent ones: Seminar - Dialogue between judges 2014: "Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?"; Seminar - Dialogue between judges 2012: “How can we ensure greater involvement of national courts in the Convention system?”. Background papers of both seminars available at http://www.echr.coe.int/Pages/home.aspx?p=court/events/ev_sem&c= (visited in March 2015).

Human Rights⁸, then it was addressed at the intergovernmental conferences and has been confirmed by the Brighton declaration.⁹ Only rather recently it has been foreseen to include the principle into the text of the preamble of the Convention: it will find its place there as soon as the Protocol No. 15,¹⁰ which was opened for signature in June 2013, will enter into force.

The idea of subsidiarity is also present in the advisory opinion procedure created by Protocol No. 16 of the Convention¹¹ with the potential for the Strasbourg Court to aid national courts in their consideration of Convention issues so that problems are resolved at national level.

Allow me to go further back in history and just say something about the very origin of the principle of subsidiarity as such. The Latin term *subsidiarius* seems to have had a military connotation, referring to fresh troops or reinforcements¹², but the notion as a principle for the organization of society is usually attributed to the Catholic Church in the late 19th century. It can however be traced back to Aristotle and Thomas Aquinas. Later on it was Althusius as a Calvinist theoretician who expressed some thoughts of subsidiarity and federalism in order to maintain the autonomy of his city.¹³ At broadly the same time libertarian ideas were aired by those seeking to define the relationship between State and the individual. In succeeding centuries Locke, Montesquieu and von Humboldt were concerned to limit the intervention of the State, with this concept being reflected in some national constitutions. Subsidiarity is well-known principle to federal States.

Nevertheless it is Pope Leo XIII in his “*Rerum Novarum*” of 1891 who is traditionally credited with establishing subsidiarity as a fundamental principle with the aim both to curb excessive State power while at the same time stressing the State’s obligation to protect vulnerable persons.¹⁴ Against a background of increasing totalitarianism Pius XI’s “*Quadragesimo Anno*” in 1931 set out the classic statement of the “principle of subsidiary function” or das “Prinzip der Subsidiarität”: “Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is injustice and at the same time a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do”.¹⁵

⁸ E.g. Judgment of the Court of 23. July 1968, “*Belgian Linguistic*”, § 10, Series A no. 6, p. 35 and of 7. December 1976, *Handyside v. United Kingdom*, no. 5493/72, § 48; ECHR 1976-5.

⁹ Adopted at the High-level Conference on the future of the European Court of Human Rights (Brighton, United Kingdom, 18-20 April 2012): http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH_2012_007_en.pdf (visited in March 2015).

¹⁰ Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 24. June 2013, Council of Europe Treaty Series - No. 213.

¹¹ Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 2. October 2013, Council of Europe Treaty Series - No. 214.

¹² See Law Dictionaries and The Latin Lexicon: <http://latinlexicon.org/definition.php?p1=2056951> (visited in March 2015).

¹³ About history of subsidiarity see Emil Kirchner, in *Encyclopedia of Democratic Thought*, Paul Barry Clarke, Joe Foweraker (eds.), New York: Routledge, 2001, pp. 688-691.

¹⁴ *Rerum Novarum*, Encyclical of Pope Leo XIII on Capital and Labor, Libreria Editrice Vaticana: http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_1-xiii_enc_15051891_rerum-novarum.html (visited in March 2015).

¹⁵ *Quadragesimo Anno*. Encyclical of Pope Pius XI on Reconstruction of the Social Order to our Venerable Brethren, the Patriarchs, Primate, Archbishops, Bishops and other Ordinaries in Peace and Communion with the Apostolic See, and likewise to All the Faithful of the Catholic World, para 79, Libreria Editrice Vaticana: http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html (visited in March 2015).

But now let us fast forward to 1985 when the European Charter of Local Self-Government was adopted in Strasbourg. Article 4 para 3 of this document embodies the principle of subsidiarity by stating that public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.¹⁶

In the meantime, there were discussions in the 1970s and 80s on institutional reform within what was then the European Communities and to a certain extent a growing feeling that Europe should undertake a move towards the principle of subsidiarity. However, it was not until the Maastricht treaty adopted in 1992 that the principle was given formal status in the primary law of the EU.¹⁷ The current formulation is to be found in Article 5 para 3 of the Treaty on European Union (consolidated version following the Lisbon Treaty).¹⁸ 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).¹⁹ 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 primarily a positive perception in relation to the Contracting parties.

Et ceci nous amène de retour à Strasbourg. Bien que la subsidiarité puisse être vue ici, dans une certaine mesure, comme une limite au mécanisme de contrôle de la Convention, les ONG ont fait connaître leur préoccupation, par exemple en lien avec la déclaration d'Izmir, en considérant que le principe de subsidiarité ne justifiait pas, par comparaison, que les états exercent une pression inappropriée sur la Cour eu égard à son interprétation et à l'application de la Convention.²⁰ La subsidiarité exige par-dessus tout une action/obligation positive des États pour préserver les garanties de la Convention et pour le maintien des exigences concernant l'épuisement des voies de recours internes, les autorités nationales sont les premiers garants des droits et libertés fondamentaux.

¹⁶ European Charter of Local Self-Government, Strasbourg, 15. October, 1985, Council of Europe Treaty Series - No. 122.

¹⁷ The Maastricht Treaty. Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community (and the Treaty on European Union). Maastricht, 7. February 1992. Article 3 b was to be inserted: *'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'*

¹⁸ Consolidated version of the Treaty on European Union, as adopted 2010/C/83/01 and as of March 2015 Official Journal C 326 , 26/10/2012 pp. 0001 ff.

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

²⁰ The principle of subsidiarity does not, by contrast, justify states placing inappropriate pressure on the Court with regard to its interpretation and application of the Convention, 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 in July 2011).

Il est intéressant de terminer cette petite présentation sur l'historique et les différentes notions de la subsidiarité en se référant à un autre pape, afin de fermer le cercle, cette fois-ci au pape François, qui s'est rendu à Strasbourg en novembre dernier pour rencontrer le Parlement européen et le Conseil de l'Europe. Dans son discours, il rappela que la Cour représente la conscience de l'Europe en ce qui concerne les droits et la dignité de l'homme.²¹ Il réaffirma par ailleurs la centralité de la personne humaine qui se trouverait autrement à la merci des modes et des pouvoirs du moment ainsi que le rôle central des idéaux qui ont façonné l'Europe depuis ses débuts, tels que la paix, la subsidiarité, la solidarité réciproque, un humanisme centré sur le respect de la dignité de la personne humaine.²²

Mesdames et messieurs, au nom du comité organisateur du séminaire annuel, je vous remercie tous d'être venu aujourd'hui, je vous souhaite des débats fructueux et j'encourage en particulier les tribunaux et les juges nationaux à rendre visite à la Cour dans le futur, nos portes sont ouvertes pour nos collègues. Maintenant, donnons la parole aux éminents orateurs.

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. », Discours du pape François au Conseil de l'Europe, Strasbourg (France), 25 novembre 2014, p. 33 ; also available at: <http://www.voltairenet.org/article186047.html> (visited in March 2015).

²² Voir discours du pape François au Parlement Européen, Strasbourg, 25 novembre 2014, p.13 ; also available at: http://w2.vatican.va/content/francesco/fr/speeches/2014/november/documents/papa-francesco_20141125_strasburgo-parlamento-europeo.html (visited in March 2015).