



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

Subsidiarity: from Roots to Essence

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

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 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 2014.¹

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 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.² PACE’s Legal Affairs Committee has written about the “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 on 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 building 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 the 2015 edition of the “Dialogue between judges”, to this seminar entitled “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 “cornerstones” (“*principes fondamentaux*”) of the Convention system⁵, subsidiarity is analysed in detail in the background paper for the seminar which you have all had the opportunity to peruse.⁶ Subsidiarity has a mirror-image effect, it is two sides of the same coin; thus the order of our seminar’s sub-headings could easily be switched round, with the role of the national authorities first and that of the Convention mechanism second. In any event there is inevitably a considerable degree of overlap between the two sides.

There is also some correspondence between this year’s topic and the subjects that we have already addressed 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 the Convention protection system has been gradually evolving. It was first developed in the longstanding case-law of the European Court of Human Rights⁸, then it was addressed at the intergovernmental conferences and has been

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”, The long-term future of the European Court of Human Rights, Conference Proceedings, Council of Europe 2014, p. 189, <http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Proceedings-Oslo-2014.pdf> (visited March 2015).

⁵ See Conférence devant le Conseil d’État Paris, 19 April 2010, Introductory speech by Jean-Paul Costa, http://www.echr.coe.int/Documents/Speech_20100419_Costa_Paris_FRA.pdf (visited March 2015), at p. 1.

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. 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 March 2015)

⁷ E.g., among the 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 March 2015).

⁸ E.g., *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), 23 July 1968, § 10, Series A no. 6, and *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.

confirmed by the Brighton Declaration.⁹ Only quite recently was it decided to enshrine the principle in the text of the preamble to the Convention: it will find its place there as soon as Protocol No. 15,¹⁰ which was opened for signature in June 2013, enters into force.

The idea of subsidiarity is also present in the advisory opinion procedure created by Protocol No. 16 to the Convention¹¹ with the potential for the Strasbourg Court to aid national courts in their consideration of Convention issues so that problems can be 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 *subsidium* or *subsidiarius* seems to have had a military connotation, referring to fresh troops or reinforcements¹², but the notion as a principle for the organisation of society is usually attributed to the Catholic Church in the late nineteenth century. It can however be traced back to Aristotle and Saint Thomas Aquinas. Later on it was Althusius, a Calvinist theoretician, who expressed some thoughts about subsidiarity and federalism in order to maintain the autonomy of his city.¹³ At broadly the same time libertarian ideas were being aired by those seeking to define the relationship between the 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 a well-known principle in 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 of curbing 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 classical 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

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 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 March 2015).

¹³ For the 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_l-xiii_enc_15051891_rerum-novarum.html (visited 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 March 2015).

Fast forward to 1985, when the European Charter of Local Self-Government was adopted in Strasbourg. Article 4 § 3 of this document embodies the principle of subsidiarity by stating that public responsibilities must generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should mean weighing up the extent and nature of the task and the 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, with 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 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 § 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 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.²⁰ 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

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 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).

regards human rights and dignity.²¹ 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.²²

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.

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 (visited March 2015).