



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

INTERLAKEN FOLLOW-UP

PRINCIPLE OF SUBSIDIARITY

Note by the Jurisconsult

1. In the Interlaken Declaration of 19 February 2010 the High Level Conference on the future of the European Court of Human Rights stated as follows:

“... PP 6 Stressing the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e. governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level;

...

The Conference

...

(2) Reiterates the obligation of the States Parties to ensure that the rights and freedoms set forth in the Convention are fully secured at the national level and calls for a strengthening of the principle of subsidiarity;

(3) Stresses that this principle implies a shared responsibility between the States Parties and the Court;

...”

Under the terms of the Action Plan attached to the Declaration:

“9. The Conference, acknowledging the responsibility shared between the States Parties and the Court, invites the Court to ... take fully into account its subsidiary role in the interpretation and application of the Convention;

...”

I. DEFINITION AND SCOPE OF THE PRINCIPLE OF SUBSIDIARITY

A. Definition of the principle of subsidiarity and its legal basis

2. The principle of subsidiarity is one of the fundamental principles underpinning the whole Convention system. It can have several different shades of meaning depending on the sphere in which it is being invoked: however, in the specific context of the European Court of Human Rights, it means that **the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task.**

3. Bearing in mind that the principle of subsidiarity is also one of the fundamental principles of European Union law, it is worthwhile comparing its meaning in the two systems. The concept of subsidiarity is not quite the same in the European Union and in the Convention, a fact which is hardly surprising if we consider the different nature of the two systems. The legal system of the European Union, which has a quasi-State institutional structure and rule-making powers reinforced by the direct effect and precedence of EU law, corresponds to an **integration** model. Accordingly, subsidiarity in the context of the European treaties implies above all a kind of **“competitive subsidiarity”**, referring to the competing powers of the Union and the Member States. By contrast, as the Convention does not provide for any supranational decision-making powers, the Court’s jurisdiction is strictly confined to supervising States’ conduct. This is therefore an internationalist approach far removed from the quasi-State model, and the legal system established by the Convention is based on **harmonisation**. Consequently, subsidiarity in this context is a kind of **“complementary subsidiarity”**: the Court’s powers of intervention are confined to those cases where the domestic institutions are incapable of ensuring effective protection of the rights guaranteed by the Convention.

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4. Unlike the treaties establishing the European Union, neither the Convention nor its Protocols¹ expressly mention the principle of subsidiarity. However, it features implicitly in the wording of Article 1 of the Convention, entitled “Obligation to respect human rights”, which provides:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.”

5. As to the Court’s role, it is defined in Article 19 of the Convention, entitled “Establishment of the Court”. Article 19, in so far as relevant, provides:

“To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights...”

6. In its case-law the Court has defined and elucidated the systemic relationship which exists between these two provisions, whereby **the machinery of complaint to the Court is subsidiary to national systems safeguarding human rights**. As far back as 1968, in the “Belgian language” case (*Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), 23 July 1968, “*The Law*”, §10, Series A no. 6), the Court ruled as follows:

“In attempting to find out in a given case, whether or not there has been [a violation of the provision relied upon], the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. **In so doing it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention.** The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.”

7. Much more recently, in the case of *Scordino v. Italy (no. 1)* ([GC], no. 36813/97, ECHR 2006-V, 26 March 2006), the Court held:

“140. Under Article 1 of the Convention, which provides: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’, **the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights.** This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention.”

¹ Further references in the text to the “Convention” will be taken to include the Protocols thereto, which form an organic part of it.

8. In *Varnava and Others v. Turkey* ([GC], nos. 16064/90 et al., ECHR 2009-..., 18 September 2009), the Court stated as follows:

“164. ...[I]n line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, **that the domestic authorities, who are best placed to do so, act to put right any alleged breaches** of the Convention.”

9. The subsidiarity principle is also backed up by a number of other considerations.

Firstly, the sovereign States remain the main actors in public international law, and the remaining actors (such as international organisations) derive their powers and legitimacy from them. It is for this reason that the Court, whose jurisdiction is limited by Article 19 to ensuring that the Contracting States observe their engagements under the Convention, may not overstep the boundaries of the general powers delegated to it by the States of their sovereign will. In keeping with this logic, it is the States who should be the first to address human rights issues which arise on their territory.

Secondly, in the absence of powers to intervene *directly* in the legal systems of the Contracting States, the Court must respect the autonomy of those legal systems (even more so than the Court of Justice of the European Union, which intervenes to a greater extent on account of the system of preliminary rulings).

Thirdly, by reason of their direct and continuous contact with the vital forces of their countries, the domestic authorities are better placed than an international court to assess the multitude of factors surrounding each case: it is therefore primarily for the former to identify and afford redress for possible infringements of human rights in each particular case.

Fourthly and lastly, it is the principle of subsidiarity which enables the Court to fully assume its function as a regulatory court as intended by the drafters of the Convention or, as the Interlaken Conference put it, “to concentrate on its essential role of guarantor of human rights and to adjudicate well-founded cases with the necessary speed, in particular those alleging serious violations of human rights” (point 2 of the Action Plan).

B. National bodies concerned

10. Article 1 of the Convention (see paragraph 4 above) implies that the Contracting States have a **negative obligation** to refrain, as far as possible, from infringing the rights and freedoms enshrined in the Convention. They also have a **positive obligation** to create, in respect of the persons within their jurisdiction, conditions which are in conformity with the requirements of the Convention; the scope of this obligation will vary depending on the case and the nature of the right in question. Lastly, if a State has

nevertheless failed in the above-mentioned obligations it must remedy the situation effectively, efficiently and as soon as possible.

11. Foremost among the State authorities bound by these obligations are the **courts**, as befits the role of the judiciary in a State based on the rule of law. The courts, which are invested with the conventional attributes of judicial function (*jurisdictio*, the power to pronounce the law, and *imperium*, the power to command), and are subjected in principle to guarantees of independence and impartiality, are best placed to ensure respect for the individual rights guaranteed by the Convention.

12. Despite this particular role of the judiciary, the courts do not have sole responsibility for ensuring respect for human rights at domestic level. The obligation articulated in Article 1 of the Convention applies to all State authorities capable of influencing the lives and legitimate interests of “everyone within their jurisdiction”. It applies both to the **legislative** branch of the State (which must enact laws in conformity with the Convention) and to the **executive** (whose task is to apply those laws in a manner compatible with the Convention and to issue regulations in the same spirit).

C. Limits of the principle of subsidiarity and related principles

13. Despite its importance, the principle of subsidiarity is **not absolute**, for three reasons.

14. Firstly, the subsidiarity principle is not the only fundamental principle underpinning the Convention. The Strasbourg system also rests on a second “pillar”, namely the principle that **rights must be effective**: the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see, among many other authorities, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). This principle serves as a “counterweight” to the principle of subsidiarity: where failure by the Court to act would result in a denial of justice on its part, rendering the fundamental rights guarantees under the Convention inoperative, the Court can and must intervene in the role attributed to it by Article 19 of the Convention.

15. Secondly, it is important to mention the principle of the **evolutive interpretation** of the Convention, according to which the latter is a “living instrument which must be interpreted in the light of present-day conditions” (see *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII). By virtue of this principle, the Court’s position regarding the scope of a particular Convention right may evolve over the years or decades, with the result that a specific matter hitherto left entirely to States’ discretion may be called into question by the Court.

16. Thirdly, the principle of subsidiarity itself is neither static nor unilateral. Under the influence of a whole host of factors – including the determination to apply the principle that rights must be effective as it is

perceived by the judges when they are considering the case – it oscillates between **judicial self-restraint** and **judicial activism**.

17. In the context of the Court, two types of subsidiarity can be identified: firstly, **procedural** subsidiarity, which governs the working relationship between the Court and the national authorities and the division of responsibility for action and intervention, and secondly, **substantive** subsidiarity, governing relative responsibilities for decision-making and assessment. The next two sections will look at each of these types of subsidiarity in turn.

II. PROCEDURAL SUBSIDIARITY

A. Rule of exhaustion of domestic remedies

18. The procedural aspect of the principle of subsidiarity is reflected in Article 35 of the Convention, which provides:

“1. The Court may only deal with the matter **after all domestic remedies have been exhausted**, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

19. In other words, applicants must first give the authorities in the State in question – and in particular, the courts – the opportunity to put right the situation complained of under the Convention. Only when the authorities have failed definitively in that task may the person concerned apply to the Court. Article 35 § 1 is closely linked to Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated **shall have an effective remedy before a national authority** notwithstanding that the violation has been committed by persons acting in an official capacity.”

20. Hence, States are obliged to establish effective remedies in their respective legal systems so that they can themselves provide redress for all kinds of violations of the Convention. Article 35 § 1 is therefore based on the premise that there exists, in the State concerned, a remedy which is effective and efficient in principle and of which applicants are required to make use. If the person in question obtains adequate redress – for instance, in the form of financial compensation commensurate with the seriousness of the alleged violation – the application to the Court loses its *raison d'être*. Only where this is not the case can he or she apply to Strasbourg.

21. The Grand Chamber of the Court stated in *Burden v. the United Kingdom* ([GC], no. 13378/05, ECHR 2008-...):

“42. The European Court of Human Rights is intended to be subsidiary to the national systems safeguarding human rights (...) and it is appropriate that the national

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courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries.”

22. In line with the overall approach to the principle of subsidiarity outlined above, the requirement to exhaust domestic remedies is not absolute. In *Kornakovs v. Latvia* (no. 61005/00, 15 June 2006), the Court summarised the principles governing its application as follows:

“142. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are **normally available and sufficient** in the domestic legal system to enable them to obtain redress for the breaches alleged. **The existence of the remedies must be sufficiently certain**, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that **the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law**, but not that recourse should be had to remedies which are inadequate or ineffective (see, among many other authorities, *Tanrikulu v. Turkey* [GC], no. 23763/94, § 76, ECHR 1999-IV).

143. The Court also points out that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, **the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies** (*ibid.*, § 82).

144. Lastly, the Court reiterates that Article 35 § 1 provides for a distribution of **the burden of proof**. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, for example, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1211, § 68).”

23. We can see how the principle that rights must be effective acts as a counterweight to the principle of subsidiarity, limiting its scope. Thus, applicants are not obliged to exhaust domestic procedural remedies which

are not objectively capable of providing adequate redress for their complaints. For instance, the Court has ruled that a remedy which would not bear fruit in sufficient time was neither adequate nor effective (see *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 47, Series A no. 222). On the other hand, it is not enough for applicants to lodge a complaint, application or appeal with the court or other competent authority. Firstly, they must raise, **at least in substance**, the complaints they intend to make subsequently before the Court and, secondly, they must observe the reasonable procedural requirements laid down in the law of the country concerned. Accordingly, if a remedy does not succeed owing to the applicant's failure to comply with the formal requirements or time-limits laid down by domestic law, and if there are no special circumstances absolving him or her from complying, domestic remedies will be deemed not to have been exhausted.

B. Impact of the Court's judgments

24. The principle of subsidiarity also features implicitly, albeit to a lesser degree, in Article 46 § 1 of the Convention, which provides:

“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”

25. Of course the Court may, in some circumstances, indicate to the respondent State certain measures to be taken in order to comply with a judgment. It may also apply the so-called “**pilot-judgment**” procedure, indicating general measures where there is a structural or systemic problem with regard to observance of a particular Convention right (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, §§ 189-194, ECHR 2004-V, 22 June 2004). Similarly, the execution by States of the Court's judgments is monitored by the Committee of Ministers of the Council of Europe; what is more, Protocol No. 14 has given the Court itself some additional powers to supervise execution of its own judgments (see Article 46 §§ 3-5 of the Convention). However, as a general rule, the State against which the Court has given judgment remains free to choose the means by which it complies with the judgment.

26. On this point it is important to note that all the branches of State power may be involved in this task (and, generally speaking, should be). Hence, it is in the first place for parliaments and national governments to make such amendments as may be needed to the laws and regulations in force in order to prevent a recurrence of similar breaches of the Convention. Sometimes – and highly commendably – the legislature takes pre-emptive action to prevent a ruling against the country in question in Strasbourg when the Court has found a violation against another Contracting State. This is what could be termed the “*de facto erga omnes effect*” of the Court's

judgments. In addition, the Interlaken Conference expressly invited States to “tak[e] into account the Court’s developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system” (point 4 c) of the Action Plan).

III. SUBSTANTIVE SUBSIDIARITY

A. Fourth-instance applications

27. In the Action Plan attached to its Declaration the Interlaken Conference “invites the Court to ... avoid reconsidering questions of fact or national law that have been considered and decided by national authorities, in line with its case-law according to which it is not a fourth instance court” (point 9).

28. Mention should be made in this connection of a particular category of individual applications to the Court which are commonly referred to as “fourth-instance” applications. This term is somewhat paradoxical as it refers to what the Court *is not*: it is not a court of appeal or a court which can quash rulings given by the courts in the States Parties to the Convention or retry cases heard by them. Fourth-instance applications therefore stem from a **misapprehension on the part of the applicants** as to the Court’s role and the nature of the judicial machinery established by the Convention.

29. The expression “fourth-instance application” does not feature in the Convention, but was coined by the Convention institutions (that is, the Court and, before 1 November 1998, the European Commission of Human Rights). The relevant provision of the Convention is Article 35 § 3, which provides:

“The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, **manifestly ill-founded**, or an abuse of the right of individual application;”

30. Fourth-instance applications fall under the heading of manifestly ill-founded applications, although the latter category is much wider.

31. When supranational machinery for human rights protection was established with access for individuals, it was inevitable that some applicants would misunderstand the role of the Court and the scope of its jurisdiction. It is hardly surprising, therefore, that a fourth-instance application featured among the first dozen or so cases brought before the Commission immediately after its establishment, in 1955. The application in question was the Commission’s ninth case (no. 9/55, *X. v. Germany*), in which the applicant complained of his failure to obtain satisfaction in the

civil proceedings he had brought in the German courts. In its decision of 23 September 1955 the Commission rejected the complaint using an overall formula, simply finding that “the alleged facts [did] not amount to a violation of a right protected by the Convention”.

32. The Commission subsequently developed and elaborated upon the fourth-instance “doctrine”, which the Court adopted in its turn. The following formula sums up very neatly what the doctrine entails (see *Perlala v. Greece*, no. 17721/04, 22 February 2007):

“25. The Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, in particular, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). It is not the Court’s role to assess itself the facts which have led a national court to adopt one decision rather than another. If it were otherwise, **the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action** (see *Kemmache v. France (No. 3)*, judgment of 24 November 1994, Series A no. 296-C, p. 88, § 44).”

33. The fourth-instance doctrine – which can in principle extend to all the substantive provisions of the Convention – was first articulated in relation to Article 6 § 1 of the Convention concerning the right to a “fair trial”. The “fairness” required by Article 6 § 1 is not “substantive” fairness (a borderline concept in legal and ethical terms which can only be applied by the trial judge), but “procedural” fairness, which, on a practical level, translates into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing. The Grand Chamber spelled this out in *García Ruiz*, cited above:

“28. In so far as the applicant’s complaint may be understood to concern assessment of the evidence and the result of the proceedings before the domestic courts, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. ...

29. In the light of the foregoing considerations, the Court notes that the applicant **had the benefit of adversarial proceedings**. At the various stages of those proceedings he was able to **submit the arguments he considered relevant** to his case. **The** factual and legal **reasons** for the first-instance decision dismissing his claim **were set out at length**. In the judgment at the appeal stage the *Audiencia Provincial* endorsed the statement of the facts and the legal reasoning set out in the judgment at first instance in so far as they did not conflict with its own findings. The applicant may not therefore validly argue that this judgment lacked reasons, even though in the present case a more substantial statement of reasons might have been desirable.”

34. In its judgment in *Pla and Puncernau v. Andorra* (no. 69498/01, ECHR 2004-VIII, 13 July 2004), the Court stated as follows:

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“46. On many occasions, and in very different spheres, the Court has declared that **it is in the first place for the national authorities, and in particular the courts of first instance and appeal**, to construe and apply the domestic law (see, for example, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 20, § 46; *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 61, ECHR 2003-V; and *Slivenko v. Latvia* [GC], no. 48321/99, § 105, ECHR 2003-X). ... In a situation such as the one here, the domestic courts are evidently better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute submitted to them and the various competing rights and interests (see, for example, *De Diego Nafría v. Spain*, no. 46833/99, § 39, 14 March 2002). When ruling on disputes of this type, the national authorities and, in particular, the courts of first instance and appeal have a wide margin of appreciation...”

35. The fourth-instance doctrine applies irrespective of the legal sphere to which the proceedings belong at domestic level. It applies, *inter alia*, to the following:

- (a) civil cases (*García Ruiz and Pla and Puncernau*, cited above) ;
- (b) criminal cases (*Perlala*, cited above, and *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V, judgment of 12 May 2000) ;
- (c) taxation cases (*Dukmedjian v. France*, no. 60495/00, § 71, 31 January 2006) ;
- (d) cases concerning social issues (*Marion v. France*, no. 30408/02, § 22, 20 December 2005) ;
- (e) administrative cases (*Agathos and Others v. Greece*, no. 19841/02, § 26, 23 September 2004) ;
- (f) cases concerning voting rights (*Ādamsons v. Latvia*, no. 3669/03, § 118, 24 June 2008) ;
- (g) cases concerning the entry, residence and removal of non-nationals (*Sisojeva and Others v. Latvia* ([GC], no. 60654/00, ECHR 2007-II, 15 January 2007).

36. The fourth-instance doctrine, then, is one of the practical manifestations of the principle of subsidiarity. The approach taken by the Court in relation to this doctrine is one of “**judicial self-restraint**” (see paragraph 15 above). This self-restraint is exercised in particular with regard to the following:

- (a) the establishment of the facts of the case;
- (b) the interpretation and application of domestic law;
- (c) the admissibility and assessment of evidence at the trial;
- (d) the substantive fairness of the outcome of a civil dispute (in the broad sense);
- (e) the guilt or innocence of the accused in criminal proceedings.

37. All the Court’s formations – including at times the Grand Chamber – are called upon to examine fourth-instance applications. However, most of

the applications are declared inadmissible *de plano* by a single judge or a committee of three judges (Articles 27 and 28 of the Convention).

38. As we have seen in relation to the principle of subsidiarity in general, the application of this doctrine is not without limits, but on the contrary is circumscribed by the principle that the rights guaranteed by the Convention must be effective. For instance, as a general rule, the establishment of the facts of the case and the interpretation of domestic law are a matter solely for the domestic courts and other authorities, whose findings and conclusions in this regard are binding on the Court. However, where a domestic decision is clearly arbitrary on these points, the Court can and must call it into question. In *Sisojeva and Others*, cited above, the Court held:

“89. ... [The Court] reiterates that, in accordance with Article 19 of the Convention, its sole duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court or to substitute its own assessment for that of the national courts or other national authorities unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, for example, *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I). In other words, the Court **cannot question the assessment of the domestic authorities unless there is clear evidence of arbitrariness**, which there is not in the instant case.”

39. In this sphere the Court always proceeds on a case-by-case basis, and it will never be possible to establish a stable and immovable threshold defining where fourth-instance cases begin or end.

B. Margin of appreciation

40. Another practical manifestation of the substantive aspect of the principle of subsidiarity is the “margin of appreciation” doctrine. In order to better understand the nature and scope of the margin of appreciation, we need to classify the subjective rights guaranteed by the Convention. All these rights fall into one of two categories:

(a) **Absolute** rights, which tolerate no exceptions or derogations. There are relatively few of these; we are talking about the prohibition of torture and inhuman or degrading treatment (Article 3 of the Convention), the prohibition of slavery and servitude (Article 4 § 1), freedom of thought, conscience and religion, but only to the extent that it relates to the person’s *innermost sphere* (Article 9 § 1), the prohibition of imprisonment for debt (Article 1 of Protocol No. 4), the prohibition of the expulsion and *refoulement* of nationals (Article 3 of Protocol No. 4) and the prohibition of the collective expulsion of aliens (Article 4 of Protocol No. 4). In addition, for those States which have ratified Protocol No. 13, the prohibition of the death penalty is also absolute in nature.

(b) **Rights which are not absolute** and which may be subject to restrictions. This category encompasses the vast majority of Convention rights. Moreover, however paradoxical it might appear, the right to life – the most fundamental right and a prerequisite to the exercise of all the other rights – is not absolute, as Article 2 § 2 of the Convention enumerates cases in which deprivation of life may be justified.

41. The rights that are not absolute can in turn be subdivided into two groups:

(a) Those for which the possible restrictions are explicitly laid down in the corresponding Articles of the Convention (for instance, Article 2 § 2 in relation to the right to life, Article 4 § 3 in relation to the prohibition of forced or compulsory labour, Article 5 § 1 in relation to the right to liberty, and so forth).

(b) Those which are not absolute owing to their nature, although this is not expressly stated in the Convention. In such cases we talk about **implicit limitations**. Typical examples are most of the guarantees of Article 6 of the Convention concerning the right to a fair trial.

42. Within the group of provisions which refer explicitly to the restrictions authorised, a particular sub-group of four Articles can be identified: Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association). All these Articles have the same structure: the first paragraph articulates the fundamental right in question, while the second paragraph lays down the circumstances in which the State may restrict the exercise of that right. The wording of the second paragraph is not wholly identical in each case, but the structure is the same. For example, in relation to the right to respect for private and family life, Article 8 § 2 provides:

“There shall be no interference by a public authority with the exercise of this right except such as is **in accordance with the law** and is **necessary in a democratic society** in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 2 of Protocol No. 4 (freedom of movement) also belongs to this category, as its third paragraph follows the same model.

43. When the Court is called upon to examine interference by the public authorities with the exercise of one of the above-mentioned rights, it always analyses the issue in three stages. If there has indeed been “interference” by the State (and this is a separate issue which must be addressed first, as the answer is not always obvious), the Court seeks to answer three questions in turn:

(a) Was the interference in accordance with a “law” that was sufficiently accessible and foreseeable?

(b) If so, did it pursue at least one of the “legitimate aims” which are exhaustively enumerated (the list of which varies slightly depending on the Article)?

(c) If that is the case, was the interference “necessary in a democratic society” in order to achieve that aim? In other words, was there a relationship of proportionality between the aim and the restrictions at issue?

44. Only if the answer to each of these three questions is in the affirmative is the interference deemed to be compatible with the Convention. If this is not the case, a violation will be found.

45. In practice, the task of reviewing compliance with the third criterion – proportionality or “necessity in a democratic society” – is the most difficult, the most delicate and the most dependent on the particular circumstances of the case. This is where the principle of subsidiarity, in the form of the **margin of appreciation** doctrine, comes directly into play. The concept of margin of appreciation is based on the principle, outlined above, according to which the national authorities, who are in direct and continuous contact with the vital forces of their countries, are best placed to assess the multitude of factors surrounding each particular situation. The Court has described the margin of appreciation as a “tool to define relations between the domestic authorities and the Court” (*A. and Others v. the United Kingdom* [GC], no. 3455/05, § 184, ECHR 2009-...).

46. The scope of States’ margin of appreciation will vary considerably depending on the circumstances, the nature of the right protected and the nature of the interference (see the judgment *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 102, 4 December 2008). In that connection the Court takes into consideration, firstly, national and local particularities and, secondly, whether or not there is consensus on the specific issue between the Contracting States, or at least similarities between their legal systems. For instance, in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), a case concerning the confiscation of a book which was considered obscene, the Court held as follows:

“48. The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ... The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted...

These observations apply, notably, to Article 10 § 2. In particular, **it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals**. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to

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give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. ...

Consequently, Article 10 § 2 leaves to the Contracting States a **margin of appreciation**. This margin is given both to the domestic legislator ... and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force..."

47. In *Mentzen v. Latvia* ((dec.), no. 71074/01, ECHR 2004-XII, 7 December 2004), a case concerning the transcription of foreign names into the official language of the respondent State, the Court observed:

"... In determining whether [the balance between the competing interests of the individual and the community as a whole] has been struck, the Court must ... take into account the margin of appreciation left to the State in the sphere concerned. The process whereby surnames and forenames are given, recognised and used is a domain in **which national particularities are the strongest and in which there are virtually no points of convergence between the internal rules of the Contracting States**. This domain reflects the great diversity between the member States of the Council of Europe. In each of these countries, the use of names is influenced by a multitude of factors of an historical, linguistic, religious and cultural nature, so that is extremely difficult, if not impossible, to find a common denominator. Consequently, the **margin of appreciation which the State authorities enjoy in this sphere is particularly wide...**"

48. In other situations the scope of the margin of appreciation may be much narrower. In its judgment in *Demir and Baykara*, cited above, concerning civil servants' freedom of association, the Court held:

"119. As to the necessity of such interference in a democratic society, the Court reiterates that lawful restrictions may be imposed on the exercise of trade-union rights by members of the armed forces, of the police or of the administration of the State. However, it must also be borne in mind that the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining in such cases whether a 'necessity' – and therefore a 'pressing social need' – within the meaning of Article 11 § 2 exists, **States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision** embracing both the law and the decisions applying it, including those given by independent courts (see, for example, *Sidiropoulos and Others v. Greece*, 10 July 1998, § 40, *Reports* 1998-IV). The Court must also look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it were 'relevant and sufficient'. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the appropriate provision of the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, for example, *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 51, ECHR 2002-II)."

49. Similarly, in *Stoll v. Switzerland* ([GC], no. 69698/01, ECHR 2007-XIV, 10 December 2007), concerning a journalist's freedom of expression, the Court stated:

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“105. Where freedom of the ‘press’ is at stake, the authorities have only a limited margin of appreciation to decide whether a ‘pressing social need’ exists (see, by way of example, *Editions Plon v. France*, no. 58148/00, § 44, third sub-paragraph, ECHR 2004-IV).”

In the case of *Dickson v. the United Kingdom* ([GC], no. 44362/04, ECHR 2007-XIII), the Court stated, in the context of Article 8, that the margin of appreciation accorded to national authorities will usually be a wide one where they are required to strike a balance between competing private and public interest or Convention rights. However, where the necessary weighing of these interests and assessment of proportionality is not or cannot be done, the matter will fall outside the State’s margin of appreciation (see § § 77-85).

50. The margin of appreciation doctrine applies not just to the Articles mentioned above, but also to the other provisions of the Convention – and to implicit limitations not embodied in the text of the Article in question. Thus, for instance, in the context of Article 6 § 1 of the Convention concerning the right to a fair trial (one component of which is the right of access to a court), the Court held in *Cudak v. Lithuania* [GC], no. 15869/02, 23 March 2010):

“55. ... the right of access to a court secured by Article 6 § 1 of the Convention is **not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State.** In this respect, the Contracting States enjoy a certain **margin of appreciation**, although the final decision as to the observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation of the right of access to a court will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 98, ECHR 2001-V; and *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 33, ECHR 2001-XI).”

51. It is clear that, despite its importance, the margin of appreciation is never unlimited, and that the task of deciding ultimately whether or not there has been a violation of the Convention always lies with the Court.

52. Furthermore, the Court, as the supreme guardian of the Convention, is quite often called upon to make corrective adjustments to the interpretation of the text by the national authorities. Hence, for instance, with regard to freedom of expression, the domestic courts have frequently interpreted too widely the restrictions permitted by the second paragraph of Article 10, with the result that the Court has had to remind them on several occasions that the freedom articulated in the first paragraph must always remain the general rule and that restrictions are the exception to the rule (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1991-I, 21 January 1999).

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53. To conclude, reference should be made to Article 53 of the Convention, which provides:

“Nothing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.”

This Article, which is not very well known, encourages States to go beyond the minimum standards arising out of the Convention and Strasbourg case-law.