DIALOGUE BETWEEN JUDGES 2024

Revisiting subsidiarity in the age of shared responsibility

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Dialogue between judges 2024

Dialogue between judges

Proceedings of the Seminar
24 January 2024

Revisiting subsidiarity in the age of shared responsibility

TABLE OF CONTENTS

SOLEMN HEARING OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR

Síofra O'Leary

President of the European Court of Human Rights

WELCOME SPEECH

Presidents of Constitutional and Supreme Courts, Distinguished speakers, Colleagues, former colleagues and friends,

It gives me great pleasure to welcome you all to our annual seminar which precedes the official opening of the Strasbourg judicial year.

I will keep my intervention brief given the interesting guest speakers who await you and because I will have the honour of addressing you later this evening.

We are approaching the 75th anniversary of the Convention and the 20th anniversary of these judicial seminars, whose purpose was and remains to gather together national superior court judges for an afternoon of reflection and exchange, constructive and, where necessary, critical.

Let me express my thanks to this year's Organising Committee: Judges Elósegui and Sabato, who have acted as co-Chairs, assisted by Judges Harutyunyan, Yuksel and Pavli. The proceedings this afternoon will be conducted by Judges Derenčinović and Arnardóttir, whom I also thank.

A lot of work has gone into the preparation of today's Seminar, and I would like to thank my colleagues and the guest speakers for their investment of time and energy over the last months.

Within the Registry team, thanks are due to Stefano Piedimonte and Rachael Kondak, from my cabinet, assisted by Valerie Schwartz and Tatiana Kirsanova.

Subsidiarity, in one form or another, has been a recurrent theme at this annual seminar. This is hardly surprising given the vital role it plays in judicial system based on shared responsibility.

As a tribute to one of my predecessors, Jean-Paul Costa, who sadly passed away last year, it's useful to reconvey the message with which he opened the 2010 seminar:

"The position of treaties in the hierarchy of legal instruments may vary from country to country. However, the Convention, a multilateral instrument for the collective enforcement of rights, occupies a special place. National judges must interpret it, apply it, ensure that it prevails over rules or practices that are incompatible with it. The more they do so, the less our Court will have to intervene, other than to act as a final rampart as its founding fathers intended."

Following the entry into force of Protocol n° 15 in 2021, the Convention now contains an express reference to subsidiarity. But the protocol, it should be stressed, merely incorporated long-standing principles, deeply embedded in the Convention, as reflected in the Belgian Linguistics case which dates from 1968.

Subsidiarity as expressed in the Convention comprises two elements:

- an obligation for the States to implement the Convention guarantees, this being mainly an obligation of result rather than means, and
- an obligation for the Court to allow the national authorities to have the fullest opportunity to address a Convention complaint, however grievous, before it can examine the matter itself.

These obligations are reflected in several articles of the Convention and have been explained through decades of case-law and accompanied by effective outreach in the form of the Court's admissibility guide, which was highly innovative when it was first published.

As regards the most important procedural manifestation of subsidiarity - the obligation to exhaust effective domestic remedies - I think an eloquent and up to date explanation of why national remedies and courts are so important is provided in a Grand Chamber judgment from last year, Communauté genevoise d'action syndicale (CGAS) v. Switzerland.

The applicant trade union had sought authorisation to hold a public event during the first phase of the Covid-19 pandemic. A series of measures restricting public gatherings interfered with its right to peaceful assembly. However, the applicant had abandoned its authorisation request, had not sought to rely on one of the exemptions for which the domestic law provided and had not challenged before the Swiss courts the interference with its Convention right.

In its judgment the Court noted that the pandemic had presented States with the challenge of protecting public health while guaranteeing respect for every person's fundamental rights. It emphasised that:

"[…]in this unprecedented and highly sensitive context, it was all the more important that the national authorities were first given the opportunity to strike a balance between competing private and public interests or between different rights protected by the Convention, taking into consideration local needs and conditions and the public-health situation as it stood at the relevant time."

In CGAS v. Switzerland – in which the Court rejected the complaint as inadmissible - we also see recognition of another important facet of subsidiarity; namely the fact that national authorities have direct democratic legitimation in so far as the protection of human rights is concerned and that, through their direct and constant contact with stakeholders, the State authorities are in principle better placed than an international court to assess local needs and context.

But subsidiarity also presupposes that your courts act as faithful guardians of Convention rights before any deference is accorded them. You are the first, but not necessarily the final, arbiter of human rights protection. Subsidiarity makes sense only if national courts engage, fully and in good faith, with the protection of Convention rights and freedoms. The Court's role can then remain truly subsidiary and its intervention rather exceptional.

Today we hope that you will engage in discussion of the road we have travelled regarding the principle of subsidiarity. We also hope that during our discussions we can look to the future. What is the role of the process-based review in this context and how do we see it developing in the years ahead? In the fourth session the ball will be in your court, as we focus on the views of and suggestions from national judiciaries.

Like subsidiarity, dialogue is essential in a system based on shared responsibility. It is also a source of judicial enrichment and a pleasure to see so many old friends and acquaintances in Europe's Human Rights Building.

I hand the floor to my colleagues, Judges Elósegui and Sabato, who will introduce the Seminar and the speakers on behalf of the Organising Committee.

I wish you all a very productive and fruitful afternoon of discussions.

Peggy Ducoulombier

Professor,
University of Strasbourg

THE IMPACT OF PROTOCOL NO. 15 ON SUBSIDIARITY

I should like to begin by thanking President O'Leary and the members of the Seminar's organising committee, particularly Judges Elósegui and Sabato, for the invitation to address this distinguished assembly on the impact of Protocol No. 15 on subsidiarity. It is an honour to do so.

Protocol No. 15 generated considerable controversy on account of its introduction of an amendment to the Preamble to the Convention, inserting therein the concept of subsidiarity as a guiding principle for the functioning of the European system[1], and – even more so – the national margin of appreciation, a doctrine created by the treaty bodies[2].

Drafted in 2013 following the Brighton Conference[3], which was marked by distrust towards the Court on the part of certain States Parties to the Convention, Protocol No. 15 has been described as continuing the "repositioning"[4] of the European Court of Human Rights in response to case-law that was perceived by certain States as being overly intrusive and insufficiently respectful of their margin of appreciation – in other words, of their sovereignty.

Thus, in assessing the impact of Protocol No. 15 on subsidiarity, there is an inherent criticism of a possible adverse impact on the procedural and substantive aspects of the principle, which might have led to restraint - or even withdrawal – by the Court when faced with the discontent expressed by those States. With the benefit of hindsight, I would question the reality of this impression, particularly given that, while the source of the concepts of subsidiarity and margin of appreciation has changed and the message that certain States wished to send was clear[5], it is the European Court which remains the master of their interpretation[6].

---

1 See a reference to this principle as early as in the "Belgian linguistic case" of 1968. See also ECHR, *Austin and Others v. the United Kingdom* [GC],15 March 2012, § 61: "... Subsidiarity is at the very basis of the Convention...".

2 Last paragraph of the Preamble to the Convention, added by Protocol No. 15: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervision of the European Court of Human Rights established by this Convention".

3 19-20 April 2012.

4 Frédéric Sudre, "Le recadrage de l'office du juge européen", in *Le principe de subsidiarité au sens de la Convention européenne des droits de l'Homme*, Frédéric Sudre (ed..), Brussels, Nemesis, Anthemis, 2014, pp. 239-64. Shortly after Protocol No. 15 was drafted, the present speaker also challenged the inclusion of the margin of appreciation in the Preamble and even criticised certain judgments for their contribution to what she considered a calling into question of established case-law. Permit me to refer to Peggy Ducoulombier, "*Animal Defenders International v. United Kingdom: victory of institutional dialogue or unjustified deference to the principles of British law?*", European Journal of Human Rights, 2014/1, pp. 3-28. In 2021 F. Merloz spoke instead of a "compromise text", while stressing the risks that this Protocol entailed. See Florence Merloz, "Entrée en vigueur du Protocole no 15 à la Convention européenne des droits de l'homme : le Protocole de l'ère de la subsidiarité ", RTDH 2021/04, pp. 807-27.

5 On attempts by the States to exert influence through High-Level Declarations, see Jon Fridrik Kjølbro "State Parties' Wish to Influence the Court's Application of the Principle of Subsidiarity and the Margin of Appreciation by Means of High-Level Declarations", in *Liber Amicorum Robert Spano*, Limal, Anthemis, 2022, pp. 351-60.

6 As the Court pointed out in its Opinion on the draft Copenhagen Declaration, "Considerations of subsidiarity do indeed affect the nature and the intensity of the Court's supervision in a given case, but it retains the power to give the final ruling on whether there has been a breach of Convention rights. This is precisely reflected in the wording of Article 1 of Protocol No. 15".

In assessing the impact of Protocol No. 15 on subsidiarity, we must not limit ourselves to the period after 1 August 2021, that is, the date on which the Protocol entered into force, although it is after this date that specific references to the text appear. One example is the Grand Chamber judgment in *Grzęda v. Poland* (15 March 2022), which is important in that it links subsidiarity to shared responsibility, in a context of threats to judicial independence at national level[7].

We must also take into consideration the years 2012-2013, which mark the beginning of the "era of subsidiarity", to use the words of Robert Spano[8]. Indeed, we should even take the chronological starting point for our assessment to be 2010[9], and the Interlaken Process[10], when the idea of shared responsibility[11], emerged, and the entry into force of Protocol No. 14.

The Court's contribution to discussions on its future has mostly been couched in the language of shared responsibility for protecting the Convention (as was already clear from its preliminary opinion on the organisation of the Brighton Conference[12], so as to combat the risk that the notion of subsidiarity would be misused or that the Court's review might be limited by external pressure. The post-Brighton conferences[13], including the Reykjavik[14], Summit of Heads of State and Government, confirmed this balanced view of subsidiarity, reiterating the States' obligations in applying the Convention and executing the Court's judgments[15].

This timeframe also makes it possible to situate the case-law in another context, that of the Court's need to manage its caseload[16], illustrating the multifaceted way in which the principle of subsidiarity has been used[17]. This leads me to consider, first, its procedural aspect, by saying a few words about the prior exhaustion of domestic remedies[18].

7 Although in that judgment the Court emphasised a positive aspect of subsidiarity, in other cases reference to this principle may go against the applicant, where the Court considers, for instance, that he or she ought to exhaust a new domestic remedy. See ECHR, *Vlad v. Romania* (dec.), 15 November 2022, where the Court also emphasised the management of its caseload, or ECHR, *Olkhovik and Others v. Russia* (dec.), 22 February 2022 (see also, in contrast, ECHR, *Lidiya Nikitina v. Russia*, 15 March 2022, in which the Court held that the remedy was inaccessible to the applicant). But this line of case-law is not new.

8 Robert Spano, "Universality or Diversity of Human Rights, Strasbourg in the Age of Subsidiarity", Human Rights Law Review, 2014, 14(3), pp. 487-502.

9 We could go back to 2004, and the emergence of the pilot-judgment procedure. See ECHR, *Broniowski v. Poland* [GC], 22 June 2004, which marked the European Court's wish to "renationalise" certain disputes, in the spirit of subsidiarity and shared responsibility. In this connection, while its impact is open to dispute, the 2017 Grand Chamber judgment in *Burmych and Others v. Ukraine*, reflects this idea perfectly, incorporating as it does the Committee of Ministers in the game of shared responsibility.

10 Florence Merloz rightly points out that the negotiations concerning Protocol 15 took place in this timeline, prior to the Brighton Conference, while also noting the particular context in which that conference was held. F. Merloz, *op. cit.*

11 Point 3 of the Interlaken Declaration.

12 Point 4 and the conclusions of the Opinion. See also its Opinion on draft Protocol No. 15, through the reference to the fact that the principles enshrined in the Preamble are be understood in accordance with the way they have been developed by the Court in its case-law. See also the Presidents' contributions and speeches to subsequent High-Level Conferences.

13 In particular, the Brussels Declaration of 2015.

14 See Appendix IV: "Underlining the importance of the principle of subsidiarity and the margin of appreciation for the implementation of the Convention at the national level by the High Contracting Parties, reinforced by the entry into force of Protocol No. 15, as well as the notion of shared responsibility between the High Contracting Parties, the Court and the Committee of Ministers to ensure the proper functioning of the Convention system; also recalling that executive, national and local authorities, national courts and national parliaments bear responsibility for implementing the Convention and complying with the Court's judgments".

15 See, to this effect, the Court's Opinion on the draft Copenhagen Declaration, which states that the principle of subsidiarity is to be "understood as the responsibility of States to comply with their human rights obligations subject to the supervision of the Court".

16 The controversial Grand Chamber judgment in *Burmych and Others v. Ukraine* clearly illustrates the tension between the Court's different roles and the difficulty in dealing with a repetitive caseload arising from failure to execute a pilot judgment. Permit me to refer to Peggy Ducoulombier, "Enough is Enough! A brief comment on the ECHR's case *Burmych and Others v. Ukraine*, 12 October 2017', in *L'exécution des arrêts et décisions de la Cour européenne des droits de l'Homme, Pratiques et perspectives* après la fin du processus d'Interlaken, Ch. Giannopoulos (ed.), Paris, Pedone, 2022, pp. 73-83.

17 It is clear from the speeches given since 2004 at the start of the judicial year by the Court's successive Presidents that subsidiarity has been consistently used to call for better execution of its judgments and changes to the institution's working methods, with a view to reducing the arrival of new cases at European level.

18 Indeed, Protocol No. 15 has had a direct impact on the time-limit for lodging an application, which passed from six to four months.

The requirement of exhaustion of remedies serves as a reminder of the applicant's role in the give and take of shared responsibility, since although subsidiarity requires States to provide effective remedies for complaints of violations of the Convention, it is incumbent on applicants to exhaust those remedies properly, so that the States can address their complaints through these routes and avoid attempts to have the Court assume the role of a first-instance court.

It is not clear whether the Court is, in this sphere, stricter towards applicants today than in the past[19].

The case-law on the exhaustion of domestic remedies has indeed been developed and clarified, as the working paper for today's seminar points out, but the Court continues to uphold its general principles in this area[20].

For example, the rule that an applicant need not exhaust more than one remedy if he or she has properly exhausted an effective one[21]. Similarly, while the Court examines of its own motion whether the time-limit for lodging the application has been complied with, it has not yet yielded to the appeals of some of the member States regarding an ex officio analysis of the exhaustion criterion in cases communicated to Governments[22]. Such a development would contribute to strengthening subsidiarity, since without proper exhaustion of remedies the Court cannot benefit from the scrutiny carried out by the domestic courts[23], but it would upset the balance of procedural obligations between the applicants and the respondent Government[24]. astly, to the applicants' advantage, the Court maintains the principle that complaints based on a violation of the Convention must be raised before the domestic courts at least in substance[25], although

19 See Liz Glass, "The Age of subsidiarity. The ECHR's approach to the admissibility requirement that applicants submit their Convention complaint before domestic courts', *NQHR*, 2023, vol. 41(2), pp. 75-96. The study questions the reality of point 32 of the Copenhagen Declaration, which welcomed the [Court's] "continued strict and consistent application of the criteria concerning admissibility and jurisdiction", including "requiring applicants to be more diligent in raising their Convention complaints domestically". The Brighton Declaration had already called for strict application of the admissibility criteria (point 14). The author's findings are nuanced, and it appears that she has found only a few cases, against the United Kingdom, in which the Court showed greater strictness. For instance, she considers that the *Vučković and Others v. Serbia* judgment of 25 March 2014 is in line with the principles of the previous case-law. See also Lewis Graham, "Strategic admissibility decisions in the European Court of Human Rights", *International and Comparative Law Quarterly*, vol. 69, January 2020, pp. 79-102. In his view, the Court may have used the admissibility criteria strategically, in order to influence relations with the United Kingdom. However, while these examples are interesting in the context of the drafting of Protocol No. 15, they can also be explained by specific national situations (the need for the Court to emphasise the importance of the *HRA* in a context of constant calling into question of the text), and do not allow for general conclusions. Indeed, there are also cases, such as *Pavlov and Others v. Russia* (11 October 2022), in which the Court has shown some flexibility. The Court did not declare inadmissible the applications of certain individuals who had nonetheless not exhausted remedies at a higher instance, on the grounds that the State had been given an opportunity to respond to the complaints raised in an action brought by other applicants in a similar situation. This fact showed that all of the applicants could have pursued their action; furthermore, declaring certain applications inadmissible for non-exhaustion of remedies would not have prevented the Court from examining the case.

20 On other matters of jurisdiction and admissibility, the Court has even shown openness. See ECHR Centre for Legal Resources on behalf of *Valentin Câmpeanu v. Romania* [GC], 17 July 2014, in which the Court accepted an application lodged by an NGO on behalf of another person, in the light of the particular circumstances of the case; or ECHR *Moreira Ferreira v. Portugal* (no. 2) [GC], 10 July 2017, in which it held that it had jurisdiction to examine a case which might nonetheless have appeared to encroach on the role of the Committee of Ministers, responsible for monitoring the execution of the Court's judgments.

21 See, for example, ECHR, *O'Keeffe v. Ireland* [GC], 28 January 2014, § 109: "... if there are a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required".

22 See, for example, Judge Bošnjak in his dissenting opinion in ECHR, *Sanchez v. France* [GC], 15 May 2023, point 2, or Judges O'Leary and Koskelo in their joint concurring opinion in ECHR, *Fabian v. Hungary* [GC], 5 September 2017, point 5. On this subject, see. Georges Ravarani, "L'épuisant épuisement des voies de recours internes", in *Liber Amicorum Robert Spano*, Limal, Anthemis, 2022, pp. 587-602.

23 In this sense, see the above-cited opinion of Judges O'Leary and Koskelo.

24 For reasons of legal certainty, however, the Court examines of its own motion the question of the time-limit for lodging an application.

25 For a recent example, see ECHR, *Humpert and Others v. Germany* [GC], 14 December 2023, § 151: "The Court reiterates that the purpose of the exhaustion rule is to afford a Contracting State the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it. It is true that under the Court's case-law it is not always necessary for the Convention to be expressly invoked in domestic proceedings, provided that the complaint is raised 'at least in substance'. This means that the applicant must raise legal arguments to the same or like effect on the basis of domestic law, in order to give the national courts the opportunity to redress the alleged breach. However, as the Court's case-law bears out, to genuinely afford a Contracting State the opportunity of preventing or redressing the alleged violation requires taking into account not only the facts but also the applicant's legal arguments for the purposes of determining whether the complaint submitted to the Court has indeed been raised beforehand, in substance, before the domestic authorities. That is because 'it would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument'...". On this subject, see Mattias Guyomar, "Le grief invoqué 'en substance' : de l'art d'être funambule", in *Liber Amicorum Robert Spano*, Limal, Anthemis, 2022, pp. 305-14.

it is possible to find examples showing greater firmness vis-à-vis applicants[26], even approaching the requirement of a formal reliance on the Convention[27] (as, for example, in *Lee v. the United Kingdom*, decision of 7 December 2021[28]).

For several years the case-law has demonstrated the Court's wish to highlight the importance of procedural subsidiarity[29]. It reminds applicants of their obligation to have given the State a genuine opportunity to remedy the complaint raised before the Court[30], including by "allowing the national courts to develop [fundamental] rights by means of interpretation"[31], and by adapting the choice of the most appropriate domestic procedural means to the complaint before it[32]. The Grand Chamber's case-law in 2023 contains several examples[33] of this. To take just one, I would cite the Grand Chamber's judgment in the case of *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, which overturned the Chamber's finding on the admissibility of the application. The case concerned the consequences of Federal Ordinance COVID-19 no. 2 on the right to hold demonstrations. In the light of that Ordinance, the applicant association had decided not to organise a march on 1 May and, having been informed that authorisation for a static demonstration would not be accepted, it had taken no further action. However, it lodged an application with the Court, alleging a violation of its freedom to demonstrate, relying on the concept of potential victim – the prohibition on demonstrating being accompanied by a criminal penalty[34] – and arguing that it should be exempt from the requirement to exhaust domestic remedies on the grounds that these were ineffective. This judgment shows a reasoned approach (which some might consider restrictive) to the concept of potential victim in relation to the question of exhaustion of remedies[35]. Some might consider that Protocol No. 15 has had an impact here, comparing - as the dissenting judges do - this position with that taken by the Grand Chamber in the case of *S.A.S. v. France* (1 July 2014), but it seems to me that this

26 The split in the Grand Chamber in *Vučković and Others v. Serbia* (25 March 2014), *Radomilja and Others v. Croatia* (20 March 2018) or, more recently, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* (27 November 2023), demonstrated that the interpretation adopted, which was unfavourable to the applicants, was not immediately obvious and could be regarded as strict. However, while the Court must interpret the admissibility requirements without excessive formalism, flexibility must not slip into laxity.

27 Which, moreover, does not guarantee that remedies have actually been exhausted if the complaints have not been sufficiently developed domestically. In analysing this criterion, the Court takes into account the facts and legal arguments deployed at national level. In essence, a complaint has two elements: the factual allegations and the legal arguments. However, the possibility of relying specifically on the Convention in domestic law is increasingly reflected in the case-law by a requirement that the applicant justify his or her failure to do so, thus calling into question the reality of the principle that it must be relied on in substance. This appears to be a "default" principle, intended to adapt to the organisation of the national legal order and the place of the Convention within it.

28 For an earlier example, see ECHR, *Hickey v. the United Kingdom* (dec.), 4 May 2010.

29 An increasing number of judgments have examined in detail the manner in which the complaints were raised at national level, in order to ascertain whether those submitted to the Court are being raised for the first time, referring extensively and specifically to the arguments used in the pleadings at national level and in the application to the Court.

30 ECHR, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], cited above, § 164: "... the Court considers that the applicant association failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, namely, to prevent or put right eventual Convention violations through their own legal system...", emphasis added.

31 See, for example, ECHR, *Vučković and Others v. Serbia* [GC] cited above, § 84: "... where legal systems provide constitutional protection of fundamental human rights and freedoms, it is in principle incumbent on the aggrieved individual to test the extent of that protection and allow the domestic courts to develop those rights by way of interpretation". See also ECHR, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], cited above, § 159. Moreover, mere doubts as to the effectiveness of a remedy do not exempt an applicant from this obligation.

32 See, for example, the recent decision in ECHR, *Asociación De Abogados Cristianos v. Spain* (dec.), 9 November 2023.

33 See, for example, *Humpert and Others v. Germany*, cited above; *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, cited above; *Fu Quan S.R.O. and Grosam v. the Czech Republic*, 1 June 2023; and *L.B. v. Hungary*, 9 March 2023. In all five cases the Court upheld the Government's objection (including, in three cases, against the Chamber's position) and the case of *Humpert and Others v. Germany*, in which the Court held that the complaint of discrimination was not raised domestically, was relinquished by the Chamber). The *Grosam* judgment is also interesting in that the Grand Chamber reassessed the Chamber's wrongful recharacterisation of a complaint raised by the applicant under Article 2 of Protocol No. 7 (the fact of being unable to obtain review of the decision, entailing the question whether the disciplinary tribunal was the highest tribunal – an exception to the right, provided for under Article 2 of Protocol No. 7) into a complaint involving Article 6 (whether the disciplinary tribunal was an independent and impartial tribunal within the meaning of Article 6). Since the president of the association was not an applicant before the Court, the fear of criminal sanctions could not be used to support recognition of potential victim status, since the penalty did not apply to legal persons.

34 Since the president of the association was not an applicant before the Court, the fear of criminal sanctions could not be used to support recognition of potential victim status, since the penalty did not apply to legal persons.

35 Although the applicant associatio

comparison is not entirely convincing, in that the actions required of the applicants in order to start the domestic litigation phase were not of the same order. In the one case, the applicant had to risk a criminal fine by committing an offence; on the other, the applicant association had to apply for an exemption, and then challenge its refusal before the courts. This would have enabled the compatibility of the Federal Ordinance with higher-ranking law, including the Convention, to be reviewed by way of a preliminary ruling, demonstrating the existence of a remedy that ought to have been exhausted.

To turn briefly now to substantive subsidiarity: here too, the criticism is that the Court is today more timid towards States than in the past, because of the context in which Protocol No. 1536. was drafted. Thus, an "organised retreat"37 is allegedly perceptible on the Court's part, resulting, among other things, in a general (and undue) deference towards the national authorities, through the national margin of appreciation and the development of process-based review38.

Once again, I believe that the reality is much more complex39. Thus, the Court did not wait for Protocol No. 15 before being open to the States' arguments in certain cases, such as those concerning the entry and residence of aliens on their territory. Nonetheless, even in this highly sovereign and sensitive area, the Court imposes strict substantive and procedural obligations on the national authorities40. While some lines of case-law may have evolved, the drafting of Protocol No. 15 has not led to a general practice of granting a wide margin of appreciation to the States41. Numerous judgments have developed the protection of fundamental rights, such as the Grand Chamber judgment in *Fedotova and Others v. Russia* of 17 January 2023, to name but one.

Beyond a few cases in which the impact of the political context cannot be ignored[42], the effectiveness of the Convention system is not necessarily measured by the extent to which the Court finds against the respondent States. Just as it must be accepted that the disagreement one may feel on reading such or such a decision or judgment does not imply that they are not justifiable in the light of the principles of interpretation of the Convention[43], a finding of no violation does not necessarily mean that the Court has failed to fulfil its role, but may quite simply mean that the State has succeeded in striking the right balance between the protection of the applicant's rights and the general interests that it pursues.

Nor is it surprising, after more than 60 years of existence and the gradual appropriation into domestic law of both its method of reasoning and the content of its case-law, that the Court should re-think its relationship with the national authorities and particularly the courts, illustrating the level of maturity reached by the European system. This is shown by process-based review, which does not prevent the Court from reassuming control if it considers that the balance of interests has not been properly struck44. The trust that has been developed with the domestic courts is not blind, and even where the Court finds no

36 See, for example, Laurence R. Helfer, Erik Voeten, 'Walking back human rights in Europe?', *EJIL*, 2020, 31(3), pp. 797-827, based on an analysis of the separate opinions of the Court's judges.

37 Odny Mjöll Arnardóttir, "Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the ECHR's Case Law on the Margin of Appreciation', *ESIL Conference paper series*, Paper no. 4/2015, September 2015.

38 Here, I refer to the "review of the review" and not to the proceduralisation of rights. On this subject, see, in particular, Robert Spano, "The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law", *Human Rights Law Review*, 2018/18, pp. 473-494.

39 In this sense, see also Odny Mjöll Arnardóttir, op. cit.; Alec Stone Sweet, Wayne Sandholtz, Mads Andenas, "The Failure to Destroy the Authority of the European Court of Human Rights: 2010-2018", *The Law and Practice of International Courts and Tribunals*, 21/2022, pp. 244-77.

40 For example, with regard to the risk that an expulsion will entail a violation of Articles 2 or 3 (see, among many examples, ECHR, *K.I. v. France*, 15 April 2021) or lead to a judgment against the State where, in the context of Article 8, the national courts have not balanced the competing interests by applying the criteria in the European case-law (see, for example, ECHR, *I.M. v. Switzerland*, 9 April 2019).

41 Although the Court may emphasise that its subsidiary role affects the margin of appreciation to be afforded to the States (but without further specification). See ECHR, *Thörn v. Sweden*, 1 September 2022, § 48.

42 Here again, this is the case for the United Kingdom, or in certain cases where the Court's attention is drawn by numerous State third-party interveners to the sensitivity of the issue for States, essentially in the area of migration.

43 For example, although the Grand Chamber's decision in M.N. and Others v. Belgium of 5 May 2020 may be criticised for having failed to increase access to the European Court for vulnerable persons, it was nevertheless justified in the light of the existing case-law principles on the concept of jurisdiction. Permit me to refer to Peggy Ducoulombier, "Coup d'arrêt à l'extension de la juridiction extraterritoriale des États parties à la Convention européenne des droits de l'Homme (obs. sous Cour eur. dr. h., Gde Ch., décision, *M. N. et autres c. Belgique*, 5 mai 2020)", *RTDH* 2021/125, pp. 77-96.

44 Compare ECHR, *Von Hannover no. 2* [GC] and *Axel Springer AG v. Germany* [GC], 7 February 2012.

violation, this is usually only after a thorough analysis of the domestic courts' reasoning45. Thus, this process-based review is never cut off from substantive review and is not necessarily restricted in scope. The Grand Chamber judgment in *Macatė v. Lithuania* of 23 January 2023, in which the Court analysed the legislative process in detail, before finding an absence of legitimate aims and a violation of Article 10, demonstrates the potential of process-based review, far removed from any idea of a "discount-rate" review. In addition, this review becomes fully meaningful when the domestic courts fail to heed the Court's methodology. In such cases, the failure to conduct a balancing exercise of the interests at stake enables the Court to conclude, without difficulty, that there has been a violation of the Convention.

Thus, if States satisfy the fundamental requirements of the rule of law and if the domestic courts apply the Court's methodology and case-law, there is no reason for the Court to substitute its own assessment for that of the national authorities and courts, whose direct link to the vital forces of their countries it has always reiterated. If this is not the case, then the Court will naturally take over, as Judge Spano pointed out in his concurring opinion in the *Mehmet Hasan Altan* and *Sahin Alpay v. Turkey* judgments of 20 March 201846.

Thus, it seems difficult to conclude that Protocol No. 15 will lead to a general regression in the case-law or to the transformation of subsidiarity into renunciation, even if certain decisions can always be criticised as regards their conclusion or reasoning[47].

This is not to deny the context in which this Protocol came into existence, but to emphasise that the developments in various aspects of subsidiarity, such as the closer attention paid to it in the European case-law, form part of a long-term reflection on the functioning and role of the Court, both inside and outside the institution. It seems to me that subsidiarity, understood as shared responsibility (an interpretation accepted since the Interlaken Declaration), leads to a refocusing of the Court's functions rather than to a repositioning of its case-law, and results from pragmatic and theoretical self-restraint as much as external political constraint. The Court operates in legal, political, economic and social contexts which influence its case-law, and it goes without saying that an international court cannot be detached from these realities if it is to preserve the effectiveness of its case-law and its democratic legitimacy. An understanding of the various forms taken by the principle of subsidiarity extends beyond Protocol No. 15 itself and is influenced by these contexts, in which different problems take priority at different times, from managing an increased caseload to dissatisfaction in certain States, and now an undermining of the very foundations of democracy in others. However, it is the Court which decides the impact that declarations, texts and contexts will have on the way in which it perceives and applies the principle of subsidiarity. In this respect, the Court's case-law has always been consistent: it is primarily for the States to apply Convention rights and, if they fail in this task, then the Court will not hesitate to intervene, pointing out that subsidiarity ultimately serves only one objective: that of the effective protection of human rights.

45 See Patrick Wachsmann, " Le 'Von Hannover non-substitution principle' à l'épreuve de la jurisprudence de la Cour européenne des droits de l'homme. Sur la conditionnalité de l'octroi d'une marge d'appréciation élargie en matière de liberté d'expression", in Liber *Amicorum Robert Spano*, Limal, Anthemis, 2022, pp. 747-58.

46 See the concurring opinion of Judge Spano, joined by Judges Bianku, Vučinić, Lemmens and Griţco in ECHR *Şahin Alpay v. Turkey and Mehmet Hasan Altan v. Turkey*, 20 March 2018, points 2 and 3: "When the member States fulfil their Convention role by applying in good faith the general principles deriving from the Court's case-law, the principle of subsidiarity implies that the Court may defer to their findings in a particular case. ... Member States demonstrate with their actions, in particular the reasoning provided by national courts, whether deference is due under the principle of subsidiarity".

47 In this connection, one area in which an interpretation that is "regressive" in relation to the previous case-law may seem to be emerging concerns Article 6. However, this does not necessarily translate into findings that there has been no violation of the Convention. See, to that effect, ECHR, *Beuze v. Belgium* [GC], 9 November 2018.

Julia Hänni

Judge,
Swiss Federal Supreme Court

CONSTITUTIONAL REVIEW AND EXHAUSTION OF DOMESTIC REMEDIES

1. OVERVIEW AND OBJECTIVE

The requirement to exhaust domestic remedies is of direct concern to you, as judges of the highest courts. Yours is a key role in the operation of the European human rights mechanism.

First and foremost, the national authorities must be given the possibility of remedying an alleged violation of human rights precisely before the matter is brought before the European Court of Human Rights. Secondly, the Court must be able to refer back to the national courts in its judgments, as its interpretation of the Convention will rely on the opinions of the highest national courts, taking into account the specific circumstances in a given member State.

In other words, the Convention system will not work if the national constitutional courts do not take the lead in making it work. That is a fundamental principle.

It will thus be necessary, for the purposes of this paper, to identify specifically the procedural tasks vested in the highest courts. It is their role to provide a remedy for violations of the Convention in the very place where those violations have occurred, in the domestic context.

2. EXHAUSTION OF DOMESTIC REMEDIES

With the passage of time, member States have increasingly incorporated the Convention into their respective constitutional orders through legislation and case-law. The Court has, by way of response, been applying the requirement to exhaust domestic remedies much more strictly. While it has become, one might say, easier for would-be applicants to complain of a violation of the Convention at the national level, Strasbourg also imposes a heightened obligation on them to do so.

But first of all, what does it mean to exhaust domestic remedies? It may at first sight seem straightforward to ascertain whether the available national remedies have been used.

However, one cannot overlook the Court's detailed case-law in this area. Under Article 35 § 1 of the Convention, the Court will examine, mainly on the basis of the following three criteria, a member State's objection that domestic remedies have not been exhausted:

1. The applicant must have used at least one of the available remedies, in accordance with the requirements of domestic law.
2. However, (only) remedies that are effective have to be used; and other significant reasons for not exhausting remedies may exceptionally be relied upon.
3. A complaint alleging a violation of the Convention must have been raised in that context, at least in substance

It therefore has to be ascertained whether the applicant has given the highest court *every opportunity to examine* whether the facts at issue are compatible with the Convention. That is precisely the purpose of these three criteria. The domestic court must have been in a position, as a result of the proceedings before it, to prevent or provide redress for the violation alleged[1]. However, if a constitutional court has had the possibility of ruling on a violation of the Convention but has not done so, this will not be held against the applicant. From the Convention perspective, remedies will be considered exhausted.

If, in such a situation, the European Court of Human Rights has to examine an application on the merits without the matter having been considered by the national bodies, this runs counter to the idea that it is primarily for the national courts to determine whether the facts are compatible with the Convention. The machinery established by the Convention is subsidiary to national systems for the protection of human rights. The Court must be able to act on the basis of a primary assessment by a higher domestic court.

From the Convention perspective the relevant domestic remedies therefore have to be accessible[2] and effective[3] for the purpose of putting right an alleged violation of the Convention. As long as domestic remedies are effective they will be covered by the requirement to exhaust domestic remedies and prior access to the national Constitutional Court will be guaranteed.

But how do the member States ensure that their highest court will give prior consideration to an alleged violation of the Convention?

This requires, as has been said, accessible and effective remedies for litigants – and a corresponding practice of the highest courts. Some examples will now be considered.

3. INCORPORATING THE CONVENTION INTO CONSTITUTIONAL ORDERS

3.1 Orders with constitutional courts

In Spain it is the task of the Constitutional Court, on the basis of Article 10, paragraph 2, of the Constitution, to examine rights and freedoms "in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on the same matters ratified by Spain", and therefore also in accordance with the Convention (*Recurso de amparo*)[4]. Unlike the Spanish Constitution, the German Basic Law does not incorporate the Convention, which is given the rank of a statute. However, in its practice the German Constitutional Court uses the European Convention as an aid to interpretation. Fundamental rights are interpreted in the light of the Convention. The Convention is thus integrated into the examination of constitutional complaints (*Verfassungsbeschwerde*)[5], and must be relied on in that context for the purposes of exhausting remedies, as is the case for the *amparo* procedure in Spain.

1 See the finding in *Gäfgen v. Germany* [GC], no. 22978/05, § 142, 1 June 2010, and later in *Parrillo v. Italy* [GC], no. 46470/11, § 87, 27 August 2015. This becomes even clearer in the English version: "Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States, of preventing or putting right the violations alleged against them" (*Parrillo*, § 87).

2 See the early finding in *Sejdovic v. Italy* [GC], no. 56581/00, § 46, 1 March 2006, and *Paksas v. Lithuania* [GC], no. 34932/04, § 75, 6 January 2011; for the European Court of Human Rights more generally, see Practical Guide on Admissibility Criteria 2023, § 118.

3 See *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 73, 25 March 2014, referring to *Akdivar and Others v. Turkey*, no. 21893/93, § 67; see also *Vučković*, cited above, § 69, referring to Article 13 of the Convention.

4 See, for example, *Cuenca Zarzoso v. Spain*, no. 23383/12, §§ 24 and 25, 16 January 2018.

5 See BVerfGE 111, 307, and *Görgülü*, §§ 317 et seq.

In principle, access to a Constitutional Court is not an effective remedy if it is reserved for the authorities. This has led various member States to bring their systems into line. In the case of France, with the introduction of the preliminary reference on constitutionality (*question prioritaire de constitutionnalité* or "*QPC*", in 2010), referral to the *Conseil constitutionnel* (Constitutional Court) is no longer reserved for the political[6] institutions. On the contrary it is now open to individuals, through this procedure, to challenge the constitutionality of applicable legislation in the course of a dispute. The court which examines the request then has to ascertain whether the impugned legislation is applicable to the dispute, whether the provision has already been declared constitutional by the Constitutional Council and whether the matter is "of a serious nature"[7].

This procedure affords a legal remedy that is now sufficiently available to everyone concerned. In addition, courts are obliged to refer the preliminary question if the conditions are met. It should be noted, in addition, that the preliminary question goes to whether the legislation itself is compatible with the Constitution. A provision declared unconstitutional will be repealed[8]. A declaration of unconstitutionality will be made to the advantage of the individual initiating the preliminary reference procedure[9].

From the perspective of the Convention, therefore, an applicant is only obliged to raise a preliminary question in cases where the national legislation itself is criticised for being incompatible with the Convention. However, if the matter concerns only an interpretation that is at odds with the Convention, not the legislation itself, it should not have to be raised in the context of the remedies to be exhausted for the purposes of the Convention.

The mere existence of a constitutional court does not therefore suffice for the exhaustion of domestic remedies to include such an avenue. Procedural subsidiarity should be applied flexibly.

3.2 Direct reliance on Convention in ordinary appeals

In many member States there is no separate constitutional court. The possibility of relying on a violation of the Convention is afforded through ordinary remedies: individuals may in principle rely on the Convention in the various domestic courts at all levels.

Reliance on the Convention is quite natural in systems where it takes precedence over national law, including the Constitution, as in the Netherlands[10]. In other countries, legislation provides for the primacy of the Convention. This is the case, for example, in Norway, where the Convention is incorporated into domestic law by the Law on the Strengthening of the Position of Human Rights in Norwegian Law. Under section 3 of that Law, the provisions of incorporated human rights conventions prevail in the event of conflict with provisions of national legislation[11].

6 Article 61-1 of the French Constitution; Institutional Law no. 2009-1523 of 10 December 2009 on the application of Article 61-1 of the Constitution.

7 Art. 23-2 thus inserted in the Institutional Act on the Constitutional Council.

8 Article 62 of the French Constitution.

9 Decision no. 2024-1096, QPC of 12 June 2024.

10 Article 93 et seq. of the Netherlands Constitution. In accordance with Article 94 thereof, national law may not be applied if it is not compatible with the provisions of an international treaty. See e.g. Hoge Raad, Urgenda, 20 December 2019, § 5.6.1: the Dutch courts must interpret the provisions of the Convention as the European Court did, relying on the latter's methodology of interpretation.

11 Act on the Strengthening of the Position of Human Rights in Norwegian Law (Human Rights Act) of 21 May 1999 [as amended on 1 August 2021]; LOV-1999-05-21-30.

If, on the other hand, there is no corresponding provision in the Constitution or in legislation – as is the case in a large number of member States – it will again be the practice of the highest courts which makes it possible to ensure that the Convention come before them first.

In Switzerland, which has no separate constitutional order, federal laws and international law are binding on the Federal Supreme Court (Article 190 of the Constitution). Verifying the conformity of federal laws with the Constitution does not therefore fall within its remit. The Federal Supreme Court does, however, ensure an initial access for questions of compatibility with the Convention. According to the so-called *PKK (Workers' Party of Kurdistan)* line of case-law, the Federal Supreme Court reviews the compatibility of federal laws with the Convention. This means that a case will not be declared well-founded by Strasbourg without a prior national assessment[12].

The European Court considers that the Convention may also be entrenched in a member State even though (whilst binding as a matter of international law) it is not explicitly stipulated as binding in the national legal order. In the United Kingdom, the Convention is given effect by the Human Rights Act (HRA). Any court, when deciding on a matter related to the Convention rights incorporated into domestic law by the HRA, is obliged to take into account (but is not formally bound by) the case-law of the Court. In practice, however, this means that the national courts follow the Court's interpretation, unless there is a particular reason not to do so.

While there is therefore no formal link between the Strasbourg Court and its counterparts in the UK's domestic constitutional order, neither through domestic law nor in Supreme Court practice, there is nevertheless a "collaborative engagement"[13], a working relationship, between them.

The bottom line is that the European Court will take account not only of formal binding effects, but also of collaborative engagements; these are intended to be effective (Article 35 § 1 ECHR).

4. BEST PRACTICE OF CONSTITUTIONAL COURTS

In the context of this increased entrenchment of the Convention in the constitutional orders of the member States, the Court has considerably increased the requirements for the exhaustion of domestic remedies under Article 35 § 1 ECHR. But what specific tasks arise from this for the constitutional courts? This question will be examined using some current examples.

4.1 Use of a remedy in accordance with the formalities of national law

States are free to impose formal requirements on appeals in accordance with their historically developed legal systems[14]. In principle, therefore, domestic remedies are considered not to be exhausted where the court of last instance has declined to hear the appeal on formal grounds.

12 Federal Supreme Court judgment (ATF) 125 II 417. In the recent case-law of Public-Law Divisions I and II of the Swiss Federal Supreme Court, which most often deal with constitutional issues, the essential provisions of the Convention have priority over statutes (ATF 125 II 417) and priority of application over the Constitution (ATF 139 I 16 point. 5.3).

13 See Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights*, Palgrave 2018, p. 188.

14 See for example *Vučković and Others v. Serbia* (preliminary objection; note 3), § 72.

Dialogue between judges 2024

The formal requirements must not, however, render the right of appeal devoid of substance, failing which remedies will nevertheless be exhausted. In my own member State, there are, in particular, heightened requirements for claiming violations of fundamental rights (as compared to ordinary statute law)[15], that is to say that the existence of a violation must be demonstrated. The Government have already acknowledged before the Court in some cases that the conditions had been applied too strictly. Domestic remedies are therefore exhausted, in particular where the highest court has not ruled on the merits but has applied the formal requirements for the examination of the appeal too restrictively from the Strasbourg perspective. This means that national procedural requirements must not be applied too rigidly in order to safeguard subsidiarity.

4.2 Alleged violation of Convention to be raised "in substance" before domestic courts

Article 35 § 1 ECHR requires that complaints intended to be submitted to Strasbourg at a later stage must have been raised with the appropriate national body, at least in substance. In more recent judgments, the Court has required valid reasons for a failure to expressly cite Convention arguments in the domestic proceedings, as the Court held in the *Vučković* case (*Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, 25 March 2014[16]).

As has been seen, applicants may also have raised their complaint of a Convention violation "in substance". For example, it may be a matter of relying on equivalent provisions in national law or "domestic law arguments to the same or like effect" as one or more Convention provisions[17]. While the expression "in substance" had previously been used generally, it has become stricter: for example, on a factual level, it is not enough to complain about acts of torture committed only *in police custody* when complaints are made before the Court about acts of torture committed both in police custody and *in prison*[18].

From a legal standpoint, the Court has no power to substitute itself for the applicant and formulate new complaints simply on the basis of the arguments and facts advanced (see *Grosam v. the Czech Republic* [GC], no. 19750/13, § 91, 1 June 2023). Consequently, if an applicant argues, in the domestic context, that disciplinary measures examined by an assize court require a second level of jurisdiction in criminal matters, the question whether the assize court is an independent tribunal (Article 6 § 1 ECHR) cannot be central to the subsequent proceedings before the Court. In the Unseen case (*Unseen ehf. v. Iceland* (dec.), no. 55630/15, 20 March 2018), the applicant's company had been obliged to provide data without the applicant's having been heard beforehand. While the applicant had complained of a lack of legal basis in the domestic proceedings, he argued before the Court that Article 6 ECHR had been violated. The application was declared inadmissible because the legal arguments had strayed too far from those which had initially been advanced. As the Court stated in Fu Quan (*Fu Quan s.r.o. v. the Czech Republic* [GC], no. 24827/14, 1 June 2023), the applicant is always required to raise before the domestic courts a complaint which he or she may intend to submit to the Court at a later stage[19]. Such judgments and decisions have accorded national proceedings considerably more importance and responsibility than they had previously been given under the Convention system.

15 Section 106(2) of the Federal Supreme Court Act.

16 Also cited above (note 3), see in particular para. 83 et seq.

17 See *Paulet v. the United Kingdom*, no. 6219/08, § 49, 13 May 2014. See also *N.M.T., J.B.B. and L.B.A v. Spain*, no. 17437/90, 8 December 1993 (Commission).

18 *Aslan v. Turkey*, no. 38940/02, § 2, 1 June 2006.

19 See *Fu Quan, S.R.O. v. the Czech Republic* [GC], no. 24827/14, § 172, 1 June 2023.

4.3 Only remedies that are effective have to be used

As has been seen, only remedies that are effective need to have been used in the domestic proceedings. Recent practice has significantly reinforced the requirements for the applicant to demonstrate that using a remedy would be "obviously futile"[20].

In Türkiye there had long been no possibility for individuals to apply to the Constitutional Court. When an applicant lodged an application with the Court after the creation of a new constitutional complaint and argued that such a remedy was not effective, the Court declared the application inadmissible: the Constitutional Court, by virtue of the binding nature of its decisions (Article 153 § 6 of the Turkish Constitution), now has the power to make good a violation[21].

Conversely, from the Convention perspective, can a system which does not allow individuals direct access to the Constitutional Court constitute an effective remedy within the meaning of Article 35 § 1? In Italy, the constitutional order does not provide for a right of individuals to apply directly to the *Corte Costituzionale*[22]. Constitutional issues can only be submitted by the courts hearing the merits of a case and then only if the legislation itself is not compatible with the Constitution[23]. In the leading case of *Parrillo* (*Parrillo v. Italy* [GC], no. 46470/11, ECHR 2015), which concerned hitherto unexamined issues relating to human reproduction, the majority concluded that, from the Convention perspective, indirect referral of a question to the Constitutional Court could not be included among the domestic remedies to be exhausted, as "[o]nly a court ... ha[d] the *possibility* of making a reference to the Constitutional Court" (emphasis added)[24].

A minority of judges – including the "national judge" – considered, however, that this was one of the remedies that should in principle have been exhausted, as according to the Constitutional Court's case-law a potential applicant had the right to have the matter adjudicated by that court. However, as the *Corte Constituzionale* had also decided that a court was required to refer a preliminary question only if there was well-established Strasbourg case-law, the minority were able to follow the majority's solution; as the case undeniably concerned a novel question, the applicant could not have been required to seek a ruling from the Constitutional Court[25].

4.4 Exception: major reasons for not exhausting remedies

Lastly, the requirement to exhaust remedies may exceptionally be waived on account of extraordinary (factual) circumstances[26], in line with the principle of effectiveness. However, such exceptions are rarely allowed in practice. In the case of CGAS (*Communauté genevoise d'action syndicale [SGAS] v. Switzerland [GC],* no. 21881/20, 27 November 2023), the applicants, who had intended to organise a demonstration, applied directly to the Court, without bringing proceedings before a national authority, after the adoption of the second COVID-19 regulation. Referring to another demonstration-related case, they argued that the Federal Supreme Court would have refused to give a ruling on their complaint on the ground that there was no "current interest"[27]. In the majority's view, the applicants should have done more to exhaust domestic remedies. The Court reiterated that the existence of mere doubts as to the prospects of success of a particular remedy which was not obviously futile was not a valid reason for failing to use this avenue of redress[28]. The minority

20 Vučković and Others v. Serbia (preliminary objection; note 3), § 74.

21 See Mehmet Hasan Altan v. Turkey, no. 13237/17, § 132, 20 March 2018; Koçintar v. Turkey (dec.), no. 77429/12, §§ 41-44, 1 July 2014.

22 See sections 23 and 24 of the Law of 11 March 1953, no. 87, entitled "Norme sulla costituzione e sul funzionamento della Corte costituzionale".

23 The judges of the ordinary courts must interpret domestic law in a manner which respects human rights. Where such an interpretation is impossible they are bound to raise a question of constitutionality before the Constitutional Court; see *Parrillo* (note 1), § 89; see also the partly concurring opinion of Judges Casadevall, Raimondi, Berro, Nicolau and Dedov in *Parrillo* (note 1), § 4.

24 *Parrillo* (see also note 1), § 101.

25 See partly concurring opinion of Judges Casadevall, Raimondi, Berro, Nicolaou and Dedov, *Parrillo* (note 1), §§ 5 et seq.

26 See, for example, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 116-122, 13 November 2007.

27 *Communauté Genevoise d'action syndicale (CGAS) v. Switzerland,* no. 21881/20, § 153, 27 November 2023.

28 *Communauté Genevoise d'action syndicale (CGAS) v. Switzerland* (see note 27), § 164.

of judges, referring to the actual circumstances of the pandemic, argued that requesting and obtaining an exemption from the prohibition of public gatherings seemed purely theoretical[29]. The Court was not divided as to whether domestic remedies should in principle be used before an application was lodged with it – or as to whether the review of legislation could be carried out on an interlocutory basis. However, it was divided as to whether, at the relevant time, there had been an effective remedy for a violation of the Convention in the member State concerned. It made an assessment of the Federal Supreme Court's case law at that particular stage of the pandemic, this being decisive for the issue of exhaustion of domestic remedies[30].

5. CONCLUSION

The foregoing observations reflect an essential rule stemming from the principle of subsidiarity. This principle is expressed as follows by the Court: subsidiarity imposes "[a] shared responsibility between the States Parties and the Court" and "national authorities and courts must interpret and apply domestic law in a manner which gives full effect to the Convention" (*Grzęda V. Poland* [GC], no. 43572/18, § 324, 15 March 2022). Most Convention issues are addressed at the national level, whether through legislation, practice or judicial decisions.

This not only gives applicants the possibility of raising violations in the first place in the national system, but also implies specific tasks and *increased responsibility* for the constitutional courts of the member States. These tasks include the effective monitoring of compliance with the provisions of both the Convention and domestic law, the integration of Strasbourg jurisprudence into the interpretation of domestic procedural law, and the adoption of strategies for resolving a conflict between domestic law and an interpretation of the Convention.

In this sense both legal orders (international and domestic) pursue the same goal (implementation of human rights) and mutually complement each other[31]. Consequently, the review of procedural subsidiarity from the perspective of the Convention and the exhaustion of domestic remedies is also a golden rule[32], one which must be applied with some flexibility to accommodate the nuances of the various constitutional orders of the member States[33].

Questions of judicial practice – indeed best practice – in the Convention system are thus very often at the heart of an examination as to whether domestic remedies have been exhausted. I have endeavoured to bring some examples and suggestions to your attention on this subject. Thank you.

29 *Communauté Genevoise d'action syndicale (CGAS) v. Switzerland* (note 27), joint dissenting opinion of Judges Bošnjak, Wojtyczek, Mourou-Vikström, Ktistakis and Zünd, §§ 9 et seq.

30 See *Communauté Genevoise d'action syndicale (CGAS) v. Switzerland*, joint dissenting opinion of Judges Bošnjak, Wojtyczek, Mourou-Vikström, Ktistakis and Zünd (note 29), §§ 7, 9 et seq.

31 See European Commission for Democracy through Law (Venice Commission), Report on the implementation of international human rights treaties in domestic law and the role of the Courts, 11 October 2014, § 114. See also Venice Commission, Revised report on individual access to constitutional justice, adopted by the Venice Commission at its 125th Plenary Session (online, 11-12 December 2020), §§ 192 et seq., 196 et seq.

32 See European Court of Human Rights, Practical Guide on Admissibility Criteria, 2023, § 108: "The exhaustion rule may be described as one that is golden rather than cast in stone".

33 See *Ringeisen v. Austria*, no. 2614/65, § 89, 16 July 1971; *Lehtinen v. Finland* (dec.), no. 39076/97, § 1, 14 October 1999; and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 87, 9 July 2015.

Dialogue between judges 2024

Fiona de Londras

Professor of Global Legal Studies,
Birmingham Law School, University of Birmingham

PROCESS-BASED REVIEW IN THE 'AGE OF SUBSIDIARITY'

Esteemed members of the judiciary, colleagues.

I would like to start by thanking President O'Leary and the members of the organising committee, particularly Judges Elósegui and Sabato, for the honour of inviting me to join you here today.

In the short time that is available to me, I will speak to the Court's development of 'process-based review', rooting it in concerns relating to subsidiarity, and exploring its implications for national legislative and judicial decision making. Having briefly outlined process-based review, I will proceed to make three suggestions for your consideration.

First, I will suggest that process-based review has the potential to enhance subsidiarity in a way that meaningfully supports the "shared responsibility" of Convention and national institutions for the implementation of the European Convention and protection of individual rights.

Second, I will suggest that whether this is successful will depend largely on the quality of national deliberation, including judicial engagement with the Convention.

Third, I will suggest that some tensions framed through the lens of subsidiarity cannot be resolved through process-based review, and that awareness of this is key to ensuring that the European Court of Human Rights does not unduly erode its proper role as the primary interpreter and ultimate adjudicator of the Convention.

PROCESS-BASED REVIEW

In straightforward terms, 'process-based review' refers to the Court's practice of "relying on the quality of national decision-making in the review of justifications for interferences with Convention rights".[1] As much of the foundational case law is outlined in the background note to our seminar today, I will not rehearse it here. Suffice to say that if Convention principles have adequately been taken into account in domestic decision-making processes, it is generally considered that the Convention is effectively embedded and was given appropriate weight so that the Court in Strasbourg will afford significant deference to the domestic authorities' views on Convention compatibility. In other words, the decision as to whether there has been a substantive violation of Convention rights will be informed – sometimes to a considerable degree – by whether the Convention played a part in domestic decision-making processes, including whether domestic courts considered the Convention and this Court's jurisprudence when assessing the matter in respect of which an application has been made.

1 Janneke Gerards, "Procedural Review by the ECtHR: A Typology", in Janneke Gerards et Eva Brems (dir.), *Procedural Review in European Fundamental Rights Cases* (2017; Cambridge University Press).

Clearly, process-based review is most applicable in cases where there is a clear question as to whether the interference complained of is permissible under the limitations articulated in Convention provisions and interpreted and applied over decades of the Court's jurisprudence. It is thus to be expected that the procedural approach has been particularly noticeable in questions relating to Articles 8, 9, 10, 11, and Article 1 of Protocol 1. In large part, as you will know, these are among the articles where there is the greatest controversy about what some call 'judicial activism' and others, including me, characterise as the evolution of the Convention through dynamic interpretation taking social, legal, and scientific developments into account.

While scholars such as Leonie Huijbers have noted that process-based review is, in some ways, a continuation of the Court's established concern with procedure evident in cases relating to positive obligations under Articles 2 and 3, due procedure as it applies to Article 6, and the right to an effective remedy under Article 13,[2] I think it is right to say that process-based review engages with process in a different way. Rather than ask the substantive question of whether a complainant has been afforded the process to which she is entitled as a bearer of Convention rights, the Court taking a process-based approach to review asks whether national authorities have made a decision *in the right way* and uses the response to inform its answer to the substantive question of compliance with the Convention.

According to former President of the Court, Robert Spano, this represents a "shift of the Court's primary methodological focus from its own independent assessment of the 'Conventionality' of the domestic measure towards an examination of whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded principles and the States' obligations to secure Convention rights". In this, I think that Spano must be right when he writes "process-based review is the mechanism by which the Court implements the principle of subsidiarity in practice".[3]

PROCESS-BASED REVIEW AND ENHANCING SUBSIDIARITY

On this reading, the turn to process-based review can be understood as a kind of completion of the process of embedding the Convention in national law. In doing so it most obviously enacts subsidiarity in a 'negative' way, i.e. by restraining the Strasbourg court through dispersing of decision-making 'downwards' towards national authorities. I will shortly argue that it also distributes decision-making positively, i.e. towards Strasbourg, although that distribution is perhaps less 'obvious'.

While signature, ratification, and domestic incorporation of the Convention achieved a kind of doctrinal embedding, it is argued that process-based review enables substantive embeddedness. This in turn, it is argued, increases domestic engagement with the Convention leading to enhanced rights protection for individuals, effectiveness for the Convention, and legitimacy for the Convention institutions.

Process-based review can thus be seen alongside the developments discussed in our earlier session by Professor Ducoulombier as part of a broader move to greater effect to the principle of subsidiarity and its key underpinning assumption: that national authorities are the primary guarantors of Convention rights, and that the Strasbourg Court is to be selective about when it will step in.

Importantly, process-based review brings into sharper focus parliamentary engagement with the Convention, underlining in supranational adjudication what we all know in national constitutional arrangements: that serious engagement with human rights by legislatures is both critical to effective rights protection, and reflective of the roles and responsibilities of legislatures within national constitutional structures.

2 Leonie Huijbers, *Process-Based Fundamental Rights Review* (2019 ; Cambridge University Press).

3 Robert Spano, "The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18 *Human Rights Law Review* 473.

Dialogue between judges 2024

Rights are not only for courts

This does not mean that there is a 'right' and a 'wrong' way to make law, or that the Convention requires or prefers one approach to parliamentary process over another. There is plenty of space for variation in practice across the Council of Europe without deviation from the central principle that legislatures are bound by the European Convention on Human Rights.

THE NEED FOR ROBUST NATIONAL PROCESSES

This brings me to the second suggestion I wish to make today: that the success of process-based review, and indeed of all the long-standing and more recently developed manifestations of subsidiarity, largely depends on the robustness of national processes. Like all meaningful expressions of respect and trust, subsidiarity rests on relationships and behaviours.

If, as I have already said, the new age of subsidiarity is an attempt to disperse the capacity to decide about rights more effectively across national and Council of Europe institutions, domestic institutions must be willing to be robust in carrying out their functions. By this I mean courts must engage thoroughly with the Convention and its jurisprudence, and that they must recognise and treat that as a binding limit to what the state may do; as the delineation between proportionate and disproportionate interferences with Convention rights.

In other words, the age of subsidiarity and the turn to process-based review recognises and reinforces the shared responsibility of national and international institutions for the Convention but it does not constitute a move away from the basic proposition that regardless of *who* decides, the Convention remains a hard limit on *what* can be decided. As a matter of international law, and (in almost all cases) of domestic law, legality requires compliance with the Convention.

It cannot, thus, be the case that the *mere* discussion of Convention law during parliamentary processes (even if lengthy and detailed), or performative engagement with Strasbourg case law in domestic courts, is sufficient to satisfy the aspiration towards subsidiarity that in principle underpins process-based review. Process-based review properly involves qualitative questions. To borrow from Eva Brems, "a review of the quality of domestic process is best conceived as a review of domestic human rights scrutiny"[4]. Was the European Convention engaged with accurately and in good faith? Did the outcome emerge from a process in which effective deliberation and consideration of proportionality was evident? Did the domestic court take due account of ECHR jurisprudence, explain its handling of that jurisprudence, and reason in accordance with the principles of adjudication laid down in Strasbourg case law? *And even then*, was the outcome broadly within the Margin of Appreciation to which states are entitled? Even if it was, does the application before this Court suggest that the time is ripe for it to revisit current understandings and principles?

As this suggests, the role of national courts is of real importance in ensuring shared development and application of the Convention and effective rights protection. That said, it cannot be the case that the Strasbourg Court would never closely scrutinise a matter that has already received robust national consideration, or even that it would never disagree with the national court's outcome following robust processes at the national level. Comity, shared responsibility, and subsidiarity do not demand absolute deference of this kind.

National authorities may sometimes misapply or misunderstand the law, they may reach an unreasonable conclusion as to proportionality, or their deliberations may reveal uncertainty about, inconsistency within, or unsuitability of existing Convention law. In some cases, of course, national authorities

4 Eva Brems, "The Logics of Procedural-Type Review by the European Court of Human Rights", in Gerards et Brems (dir.), *Procedural Review in European Fundamental Rights Cases* (CUP).

may even knowingly and expressly make decisions that are inconsistent with the Convention either because of disagreement with the Convention or because a source of law with supremacy within the domestic legal system could not be interpreted in a manner consistent with it. In such circumstances, the Court might apply strict scrutiny notwithstanding a Convention-engaged national process. To do so is not to reject process-based review, undermine subsidiarity, or show a lack of comity to national institutions and processes. Subsidiarity is not an injunction to the Court in Strasbourg to take its hands off the Convention, but rather to be hands on *where appropriate*. In other words, it distributes decision-making both negatively (away from Strasbourg) and positively (towards Strasbourg).

THE RISKS TO THE COURT

This brings me to my third suggestion; that the turn towards process-based review brings some risks for the Court of which it ought to be aware.

Supporting the more meaningful embedding of the Convention in domestic systems in a spirit of shared responsibility is not the only purpose of, or reason for, the turn to process-based review and broader intensification of subsidiarity-enhancing practices.

While the Court no doubt has normative and organisational interests in national institutions taking more ownership over the Convention, it is also conscious of a radical challenge numerous states have posed for some years now. While I would characterise that as a challenge of sovereignty, others might deem it a challenge of accountability. In either reading, the question posed is the same: "who gets to decide whether 'we' can do what 'we' determine 'we' ought to do?". Or, put in a way that is, perhaps, more common in my adopted country, the United Kingdom, "why should a foreign court get to tell us what we can and cannot do?".

The turn to enhanced subsidiarity, including process-based review, aligns in time with the intensification of states' expressions of concern about the Court and its 'expansion' of the Convention. Indeed, Andreas Follesdal and Geir Ulstein capture the moment very well when they write "One explanation [for the turn to subsidiarity] may be prominent political parties' general calls to renationalize authority from international institutions, further fueled (sic!) by perceptions that the ECHR protects bad people, criminals in particular, and hinders the defense of democracies under threat"[5].

Even when we are considering the potentially fruitful effects of the turn to process-based review, we must be cognisant of this context and the risks that it produces of intensified criticism from states. I say this not because the broader context ought to lead the Court to be more and more deferential to national authorities, but because it ought to harden the Court's resolve to step in *even where* national authorities have engaged with the Convention if it considers it necessary to do so.

I have already suggested situations in which I think such necessity can be established: where the national authorities have manifestly erred in their interpretation or application of the Convention, where they have expressly decided to act in contravention of the Convention, and where the case reveals a need for further development of Convention standards. This course has echoes of what was earlier proposed by the CDDH.

5 Andreas Follesdal et Geir Ulstein, "The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?" EHIL: Talk! 22 février 2018. https://www.ejiltalk.org/the-draft-copenhagen-declaration-whose-responsibility-and-dialogue/

Dialogue between judges 2024

There is a real risk that, in a context of hostility towards the Court, process-based review could morph into a 'hands off' approach for states that do not consider themselves—and perhaps are not generally regarded as—countries 'in need of' close international supervision.[6] It strikes me as critical that this does not happen. As well as the obvious legitimacy-related challenge of treating different states differently based on generalised assumptions about the quality of their decision-making processes, thus exacerbating what Başak Çalı has called "variable geometry" in human rights protection,[7] I offer three arguments against excessive commitment to process-based review to close my remarks..

First, the age of subsidiarity cannot be an age of statis or sovereignty. For it to remain relevant, the Convention must continue to evolve progressively with the social, political, cultural, and legal evolution of our continent. If the age of subsidiarity and its embrace of process-based review results in a Court that takes too great a step back, the Convention's essential character as a dynamic instrument of international human rights law may be lost. No longer a living instrument, it would be an artefact. For it to fulfil its function, the Court must continue to be a Court. Moreover, it must continue to be the *superior authority* on the meaning of the Convention and the engine for its continued development. This is not inconsistent with subsidiarity. It is integral to it. It would mean the Court embracing its role vis-à-vis the Convention and stepping away from any (wrongly) perceived function as a court of fourth instance.

Second, the people of Europe need this Court to continue to undertake substantive review. We know that we cannot rely on domestic processes alone to secure effective protection of individuals' Convention rights. Parliamentary processes are not effectively representative and never have been, so even the most robust legislative process marginalises, excludes, ignores, or impugns. Populism is spreading across the Continent, putting law and law-making into the hands of actors often content to embrace and enact anti-constitutionalist commitments. Human rights are routinely demonised as for the criminal, the dangerous, and the woke. Prison populations are rising, police violence is widespread, discrimination and exclusion remain endemic, poverty and social exclusion continue to divide and limit us. War has come to Europe once more. If the Convention was to be "a beacon to those at the moment in totalitarian darkness" upon its foundation, the Court is a beacon of hope for millions of people still. For the work the European Court of Human Rights does is not only about the distribution of power between states and institutions. It is about the limitation of power for the benefit of individuals and the ability to hold states to account through application to this Court. Even recognising the need for pragmatism and to maintain and build legitimacy among states parties, we ought not to allow process to replace substance; comity to trump rights protection.

Third, taking too great a step back in the name of subsidiarity and process-based review would not satisfy the Court's sharpest critics in any case. Rather, it would be a false economy, with the Court retreating from substantive adjudication but remaining the subject of intense critique and attempted delegitimisation.

As I said earlier, for many the 'problem' with the Court is not really what it decides, how it decides, or how it develops the Convention. It is that it decides at all. It is that there is an external body that can tell states what they may and may not do. The most vociferous critics of the Court reject the proposition that a so-called 'foreign court' should have any role in informing or determining 'domestic' decisions, not only because of its alleged foreignness but also because of the counter-majoritarian nature of judicial decision-making. They devalue that counter-majoritarianism as central to human rights law and adjudication because it frustrates, slows down, or exposes the human rights harms produced by their preferred policies and laws. They criticise the Court because they cannot control it. And they continue to criticise it even when the

6 Robert Spano has suggested closer supervision may still be required for states "that do not respect the rule of law…do not ensure the impartiality and independence of their judicial systems, oppress political opponents or mask prejudice and hostilities to-wards vulnerable groups or minorities". Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18 *Human Rights Law Review* 473, p. 493.

7 Başak Çalı, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights in Oddný M Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in European Human Rights Protection: Rethinking Relations between the ECHR, EU and National Legal Orders* (Routledge 2016).

Court exhibits changed behaviours, shows greater deference, and makes only very rare findings of violation against critics' home state. Unlike their domestic legislation (or in some cases their constitutions), states cannot simply change the Convention to make lawful the actions they wish to take. That is, understandably, frustrating. It is also of the essence of human rights law, which does and must limit states' actions and restrain them in their choices.

Alice Donald has described persistent political hostility to the Court in the UK despite increased subsidiarity and reduced findings of violation as a 'paradox'[8]. One might go a step further, and ask whether it reveals the potential trap of making increasing concessions to a state party whose appetite for sovereignty cannot be sated and has more to do with domestic political currents than with the arrangement of authority within the Council of Europe. Once we are forthright about that, we can see clearly that no amount of subsidiarity will satisfy such critics' concerns, for those concerns go to the very heart of the international system of supervision. We can thus temper the turn to process-based review and support the Court in continuing its work of substantive adjudication *even if* that adjudication results in adverse findings or requires us to revisit domestic political or legal decisions.

CONCLUSION

The turn to process-based review in this new age of subsidiarity is, then, broadly to be welcomed, but we must be realistic about what it means and embrace it only to the extent that it does not undermine the Court and the Convention. If it is meaningfully to bolster subsidiarity it will operate as an instrument of dialogue, respect, and comity, empowering and enabling domestic courts, legislatures, and executives to engage more effectively and more deeply with the Convention, and the European Court of Human Rights to scrutinise and engage and still to interpret, evolve, and develop the Convention text.

This approach to process-based review will not silence all critics of the Court. Indeed, in some cases it may amplify them, especially if—as must be the case for the procedural turn to be taken seriously—the Court were to find that a national decision-making process was not adequately robust and did not attract significant deference, thus opening the Court up to accusations of disrespecting the national process.

To sound a cautionary note, then, there is an obvious risk that in trying to avoid any such outcome the Court would take the procedural turn too far, effectively turning itself into an administrative court, engaged simply with procedural matters and retreating from its constitutionalist capacity and proper function within the transnational ecosystem within which the Convention sits[9]. Were that to happen we would find ourselves in an age of nationalisation and abdication, rather than an age of subsidiarity.

8 Alice Donald, "Earning Deference from Strasbourg: Has the UK Got the Message?", U.K. Const. L. Blog (6th December 2022) https://ukconstitutionallaw.org/2022/12/06/alice-donald-earning-deference-from-strasbourg-has-the-uk-got-the-message/

9 See further Eva Brems, "Procedural protection: an examination of procedural safeguards" in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013; CUP).

Dialogue between judges 2024

Michal Bobek

Judge, Supreme Administrative Court of the Czech Republic

SUBSIDIARITY: A VIEW FROM A NATIONAL JUDICIARY

For a national judge who, when engaging with the Convention, is likely to look for answers to specific questions on Convention rights in a limited amount of time rather than indulging in structural meditation, the traditional understanding of the principle of the subsidiarity of the Convention's protection has always been narrow and procedural. It can be summed up as the requirement to exhaust all domestic remedies under Article 35 § 1 of the Convention, potentially coupled with the "no fourth instance" maxim, translating into default deference to the facts and to the interpretation of national law as established by domestic courts. Knowledgeable judicial readers might perhaps start making substantive connections as well, linking subsidiarity to the margin of appreciation doctrine, or potentially to the advent of Article 13 and the right to an effective remedy before domestic courts.

The post-Interlaken and then the post-Protocol No. 15 world saw not only the birth of a new paragraph of the Convention's Preamble but also a boom in various conceptualisations of what that addition might mean for the Convention system. Having been invited to such an illustrious forum, I felt compelled to catch up on my reading on the topic. I cannot claim that I have re-emerged from this endeavour with a better understanding of what exactly the notion of subsidiarity means within the Convention system at present, in addition or in contrast to what has been the case for some time. My reading has, however, reassured me that I am not alone in grappling with the exact meaning of that ubiquitous – in recent discourse on the Convention – yet notably imprecise notion.

My job today is to offer some reflections on subsidiarity in the age of shared responsibility from the vantage point of national courts to stimulate further discussion. I shall proceed by dwelling on three issues. First, I shall make a few remarks on the notion of subsidiarity itself. Second, I shall offer several, rather disorganised speculations as to what that notion might hold for domestic courts. Third, I shall conclude with the theme of shared responsibility, or rather the unfortunate scenarios of its absence in cases of systemic deficiencies within some States Parties, and what that means for the subsidiarity principle.

1) SUBSIDIARITY: WHAT IS IN A NAME?

There might be at least three layers to the notion of subsidiarity: institutional, procedural and substantive.

In its institutional dimension, subsidiarity as the shared responsibility among States Parties and the Convention organs for effective protection of Convention rights has arguably been the structural principle of the Convention system for some time. Primary protection of fundamental rights is provided by domestic courts, drawing on their respective national catalogues of fundamental rights interpreted in the light of the Convention, on the one hand, and relying on the Convention to be the safety net and ultimate check

of minimum standards throughout Europe (Article 53 of the Convention), on the other. The Convention protection is subsidiary (in the sense of being complementary) to domestic protection – at least with regard to those systems offering effective domestic protection of fundamental rights.

That institutional subsidiarity has logical consequences for the procedural design of access to the Court – the type and scope of review carried out before the Court under the heading of **procedural** subsidiarity. The main tenets of this concept include exhaustion of all domestic remedies before one is allowed to bring a claim to Strasbourg; default deference to the facts and the interpretation of national law as established by the domestic courts; and limitation of the scope of the claim to what has been brought before the domestic courts, so that the possibility of a domestic "self-remedy" before the case proceeds to Strasbourg remains open.

However, into this traditional world Protocol No. 15 introduced the last recital of the Convention Preamble, containing an explicit reference to the principle of subsidiarity and the margin of appreciation. Was that addition simply consecrating the status quo, or was it supposed to mean more? Views differ, from the mere "codification" of the extant institutional arrangements, which had purely been made more visible, to the dawn of a new age of subsidiarity. It is legitimate to assume that if subsidiarity has been given such a prominent and explicit place in the Convention text itself, it must mean something more at present.

But that is where the problems begin. What exactly is that "something more" and where would that lead the Strasbourg system? If subsidiarity is to be pushed further, to the **substantive** level of Convention interpretation and application as well, how can it be made to work as a (justiciable, understandable and hence predictable) governing principle, in a system the very vocation and legitimacy of which is built on overcoming localism and creating one common European core of human rights? Does that mean just a "minimal core" within that common European core – at least within the qualified, non-absolute rights granted under the Convention? Can such an abstract principle like subsidiarity even really operate on its own, without transposition into any clear institutional or procedural arrangements?

The 2015 Judicial Seminar *Subsidiarity: A Two-Sided Coin?*, the proceedings of which are available online[1], provided an excellent introduction to these difficult questions. Allow me therefore simply to add several unsorted footnotes to those rich debates, in particular regarding subsequent approaches to the more substantive visions of subsidiarity that have been put forward.

First, at the level of terminology, the one common denominator to the notion of subsidiarity (or lack thereof) in the Convention system in recent years has been complaints regarding the case-law of the Court. Some of these criticisms have been more successfully disguised than others. The notion of subsidiarity has become the universal umbrella for various shades of disagreement. Issues span the outcomes of individual cases; the perceived lack of judicial deference to national choices and solutions, including criticism of the Court playing a "fourth instance" role in some cases; the Court's disregard for the interpretation of national laws as captured by the domestic authorities, leaving its own authority to interpret national laws on rather shaky grounds; and the general sensation of too much "judicial activism" in pushing Convention rights too far, in particular under the head of the positive obligations of the States Parties. Subsidiarity has thus become a proxy for a wide range of debates for which other, more pertinent notions might normally have been used, most notably "self-restraint". That makes useful debate on subsidiarity difficult. Each person in the room is likely to project different meanings onto that particularly imprecise notion, based on their (dis) agreement with other undisclosed variables.

1 https://www.echr.coe.int/documents/d/echr/dialogue_2015_eng

Second, the more intuitive understanding of subsidiarity concerns the allocation of responsibility for governing or regulating certain matters[2]. That nonetheless means that once the appropriate level of governance is activated, the other level(s) do(es) not deal with the same matter[3]. Can such a principle be transposed to subsequent judicial review of the very same case? There, subsidiarity can hardly mean principled allocation of competence, but rather inner selectivity: the higher layer leaves some considerations out and/or becomes deferential, either explicitly (invoking margin of appreciation and the absence of European consensus) or implicitly (by not taking up the case at all for a decision on merits). But the higher level cannot state "I am not dealing with this case at all because of subsidiarity". Again, such a situation in judicial structures is called "self-restraint" or "deference", generally not subsidiarity. However, the correlating, essentially discretionary choices entail the problem of selectivity, potentially spilling over into accusations of double standards: why exercise deference in one case but not another?

Third, when seeking to imbue the ubiquitous subsidiarity within the Convention system with meaning, the dual purpose with which it was originally discussed might pull in somewhat different directions: was that purpose more functional (as a docket control tool for an overburdened Court) or rather normative or ideological (as wishing to make at least some Convention rights more local and modular)? The origins of the use of the notion were couched rather in terms of shared responsibility, underlining the responsibilities of the domestic authorities as a way of unburdening the Court[4]. However, a parallel – and later more dominant – stream of discussion started focusing on subsidiarity as an ideological enterprise, which is supposed to mean a substantive change in the approach of the Court itself.

Fourth, within that latter stream, a novel approach has been proposed in a series of articles by Robert Spano. The initial "qualitative, democracy-enhancing approach"[5] has been further articulated with the help of diachronic differentiation of the Court´s approach, calling the later phase a "procedural embedding phase", within which a "process-based review"[6] of national regulatory choices shall feature more prominently. Certainly, the stipulation of a higher degree of deference to national legislative and judicial choices is unlikely to be welcomed with hostility by the States Parties. At a practical level, however, I do wonder how far the "process-based review" can be detached from the substantive one. As far as deference to domestic legislative choices is concerned, how much value *per se*, without at least some substantive scrutiny, can be placed on the fact that national authorities or parliaments have deliberated on an issue for a long time, with extensive debates in the legislative procedures[7]? That might perhaps be the critical or outright cynical reaction of a Central European, but a lengthy parliamentary debate is hardly automatically conclusive of a substantive outcome compatible with the (values of the) Convention.

Moreover, there is a deeper, conceptual issue with such a proposition. If John Ely is still to be believed, the moral justification and foundation of constitutional review – perhaps even a fortiori at an international level – are to serve as a counter-majoritarian check, both protecting the "discrete and insular minorities"[8] unable to secure their voice and promote their interests in the majoritarian democratic forum, and keeping the channels of political change open [9]. However, what structural justification does a court

2 See, generally, Andreas Føllesdal, "Survey Article: Subsidiarity" (1998) 6 *The Journal of Political Philosophy* 190, and Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97 *American Journal of International Law* 38.

3 Such as when a decision is taken on who shall act within the European Union pursuant to Article 5(3) of the Treaty on European Union (TEU) read in conjunction with Protocol (No 2) on the Application of Principles of Subsidiarity and Proportionality.

4 See, for instance, Alastair Mowbray, "The Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights?" (2010) 10 (3) *Human Rights Law Review* 519, at 521. For further details and the genealogy of the notion, see equally Alastair Mowbray, "Subsidiarity and the European Convention on Human Rights" (2015) 15 *Human Rights Law Review* 313.

5 Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14 *Human Rights Law Review* 487.

6 Robert Spano, "The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18 *Human Rights Law Review* 473.

7 See *Animal Defenders International v. United Kingdom* [GC], no. 48876/08, § 108, 22 April 2013, and *S.A.S. v. France* [GC], no. 43835/11, § 154, 1 July 2014. See also, for example, *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, 20 June 2017, and *L. B. v. Hungary* [GC], no. 36345/16, 9 March 2023.

8 As one of the most famous judicial footnotes in history put it in *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

9 John Hard Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass., Harvard University Press, 1980) 103.

enjoy when it is enforcing double majoritarian views, both at the international level (stemming from the European consensus, that is, embracing the choice of a majority of States), but apparently also at the national level, giving deference to national majoritarian choices? Majorities able to translate their will into national legislation are perhaps not the most obvious candidates for international protection.

Fifth and finally, the jury might still be out on whether the Convention system has indeed just entered a new world of subsidiarity or whether there is in fact a dissonance between political and scholarly calls and genuine jurisdictional practice, with the latter remaining largely stable. Empirical studies appear to reach varying conclusions, with the more recent ones suggesting that not much has in fact changed[10]. That is nonetheless hardly surprising: again, without any distinct institutional, procedural or even substantive transposition, a notably imprecise principle such as subsidiarity – whatever it might entail – is difficult to operationalise[11].

2) WHAT IS IN THE NAME FOR DOMESTIC COURTS?

In spite of its origins, the notion of subsidiarity of the Convention system need not be limited to a negative dimension ("the Court shall not"). Shared responsibility implies a positive mandate for the domestic authorities as well (they "shall … ensure compatibility with the Convention as interpreted by the Court")[12]. While of course all domestic authorities have their role to play in that regard, I shall now focus in particular on domestic courts.

The importance of national judicial engagement with the Convention can hardly be overstated. Domestic courts taking their obligations under the Convention seriously are the most efficient guarantors of timely protection of fundamental rights. Naturally, that does not mean that the domestic authorities always get it "right", and that the Court's overall European supervision is no longer necessary. It simply means that national courts should be incentivised not only to adopt the language, but also to think and reason in terms of the protection of European rights.

At the structural level, promoting the discourse on rights before (lower) domestic courts is not dissimilar to the way that constitutional courts, carrying out specialised and concentrated individual constitutional review modelled on the Karlsruher *Verfassungsbeschwerde*, have been seeking to embed constitutionality and fundamental rights discourse into the legal reasoning given by and presented before ordinary courts. Such a diffuse "early warning and solution system" should have the effect not only of ensuring timely and effective protection of individual rights, but also of flagging up and potentially "pre-discussing" the thorny issues of a case before it advances for its ultimate settlement to the respective court of last instance, *in casu* the Court. Moreover, if lower courts already engage with human rights, the likelihood of a subsequent reversal of their findings is reduced[13].

On a symbolic level, the same mission, similar language, and shared concerns foster (judicial) comity. Regardless of whether that phenomenon is ultimately called a network, a dialogue, a *(Ver)Bund* or subsidiarity, deference and respect for each other form trust and alliances. The Superior Courts Network, launched in 2015, helps to institutionalise that feeling.

10 See Helga Molbæk-Steensig, "Subsidiarity Does Not Win Cases: A Mixed Methods Study of the Relationship Between Margin of Appreciation Language and Deference at the European Court of Human Rights" (2022) *Leiden Journal of International Law* 1, challenging earlier findings made by M.R. Madsen, on which R. Spano based the empirical part of the claim about the advent of the "age of subsidiarity" in Spano (cited above, note 6) at 481-482.

11 By way of analogy, within the EU system, subsidiarity became the buzzword with the Treaty of Maastricht. However, it was only the Treaty of Lisbon and its Protocol No 1 that arguably gave that organisational ideal at least some teeth, by opening a (procedural) space of contestation for the national parliaments in the name of subsidiarity.

12 See, among other authorities, Eva Brems, "Positive Subsidiarity and Its Implications for the Margin of Appreciation doctrine" (2019) 37 (3) *Netherlands Quarterly of Human Rights* 210.

13 As suggested on the basis of empirical findings in Jan Kratochvíl, "Subsidiarity of Human Rights in Practice: The Relationship Between the Constitutional Court and Lower Courts in Czechia" (2019) 37 (1) *Netherlands Quarterly of Human Rights* 69.

On a rather **practical** or pragmatic level, the Court has made great strides in aiding national engagement with its case-law and rendering the great quantities of Strasbourg case-law more readily accessible to national practitioners, *inter alia*, by

a) introducing and keeping a section on "general principles" of interpretation of given Convention rights, effectively providing summaries that may easily be applied by national authorities in further cases ;

b) providing a more checklist- or guidance-based approach to a number of rights, helping to structure and to provide pointers for national application ;

c) assigning levels of importance to individual cases in the HUDOC database and flagging up key cases, both of which are helpful to national practitioners when attempting to come to grips with a new area or question, or navigating an area with abundant but sometimes not entirely uniform case-law; and ;

d) operating the ECHR Knowledge Sharing Platform, a magisterial work with guides to the individual articles, factsheets on key themes and an updates section providing an indispensable hub for anybody wishing to apply the Convention.

There is no disguising that the elephant in the room when it comes to greater domestic engagement with the case-law of the Court is the issue of language. Admittedly, the Court has neither influence over this matter nor the budget to address it. Even though, for example, the Office of the Czech Agent before the Court does a stellar job in making select Court decisions – in particular those rendered against the Czech Republic – accessible in the Czech language[14], the truth remains that for the more specific questions typically posed by an actual file on a judicial desk, a search in HUDOC becomes inevitable. That in turn might present an issue for users not well-versed in either English or French, highlighting the importance of language if a European legal system is ever to be genuinely able to claim its own internal domestic applicability[15].

There are other elements that might be within the reach of the Court. For instance, I certainly agree that proper and convincing reasons for a judicial decision must be given in full. Equally, there are indeed different national preconceptions of what constitutes a proper judicial decision, typically based on the "self-projection" of national standards at the European level. However, even if one is not promoting those "cryptic, Cartesian"[16], judgments, there are some advantages to being concise. From the point of view of national practitioners, some of the more recent jurisprudential production of the Court's Grand Chamber, in particular, is not an especially inviting read. It essentially involves printing out a booklet containing a novel and then spending one's afternoon trying to pinpoint the actual finding of the Court, located somewhere around §§ 326-330, or even § 425. Such a luxury cannot always be afforded for academics, let alone judges.

Beyond such important practical matters, however mundane they might be, could (more **substantive**) visions of subsidiarity, especially those outlined in the first section of this contribution, induce domestic courts in general to engage more robustly with the Convention and the case-law of the Court?

The domestic status of the Convention remains a matter for the constitutional arrangements of States Parties. The duty to apply the Convention internally is for most national courts an obligation imposed primarily by the national constitution, potentially coupled with the case-law of the national constitutional court (within those States Parties that have one), often tying the interpretation of a national

14 In a dedicated database at: http://eslp.justice.cz/justice/judikatura_eslp.nsf/webSpreadSearch

15 Could EU law, for instance, have ever realistically insisted on its own direct effect within the legal systems of its member States (starting with the judgment of 5 February 1963, Van Gend & Loos, EU:C:1963:1 in relation to Treaty provisions, but then above all with regard to secondary EU law) if all the binding legal texts, including the case-law of the Court of Justice of the European Union (CJEU), were not available in all the official languages of the Union?

16 A charge laid at the door of the CJEU by J.H.H. Weiler in "Epilogue: The Judicial Après Nice" in Gráinne de Búrca and J.H.H. Weiler (eds), *The European Court of Justice* (Oxford, Oxford University Press, 2001) 225, and repeated since by many academics dealing with the reasoning of the Court of Justice.

bill of rights to the Convention and the case-law of the Court. Therefore, the duty to uphold and safeguard fundamental rights as guaranteed by the Convention is likely to be already an obligation stemming from national (constitutional) law. Certainly, the same obligation can equally be categorised under the heading of "positive subsidiarity". However, to a more critical observer – again assuming no further institutional or jurisprudential developments implementing the notion of subsidiarity in one way or another –, it may not be immediately obvious what the introduction of the notion of subsidiarity into the Convention Preamble brings for national courts.

First, "process-based review", "the non-substitution principle"[17] and the potentially broader "margin of appreciation" all sound alluring on paper. Since they are all, however, rather shorthand terms for the deference or self-restraint exercised by the Court in some cases, but not necessarily in others, they do not offer much in terms of foreseeability as a clear jurisdictional criterion. There are indeed cases in which a national court engaged with the Convention and the Court has shown deference to national choices. There are nonetheless also cases where the national courts engaged with the Convention, but the Court subsequently disagreed, whether because their analysis was found wanting, because a different balance of what might be necessary in a democratic society was identified by the Court, or because the Court simply changed its view. Lastly, there are equally cases in which the Convention was not at all discussed at the national level, but the choice and balance reached domestically were accepted by the Court as compatible with the Convention.

This is not to suggest that the Court should abdicate its review and responsibility in certain cases or areas of law. There is not – and nor should there be – "a Convention-free zone" naturally within its (reasonably construed) scope of application. The suggestion rather is that the implicit promise to the national courts, immanent in the various codenames for self-restraint listed above, namely "do this and you are on the safe side", does not add much to the domestic rule "you are under the obligation to respect the Convention and the case-law of the Court".

Second, if indeed the "subsidiarity" shown by the Court to the domestic courts means (occasional) deference and self-restraint, do the latter really need to know where and when the Court will eventually be deferential? Is that "healthy" and conducive to taking human rights seriously and to the fullest? The problem of *ex ante* promised "free space" is that it might be quickly mistaken for "no supervision", and a sense of entitlement, where there had better be none. Furthermore, (unclear) promises create (unclear) expectations and eventually (clear) frustration. But that is in no way a novel problem, nor one limited to the Convention. Equally within domestic judicial systems, the lower level always has a problem with the alleged or real absence of due deference shown to them by the higher level: administrative authorities complain about administrative courts; lower administrative courts complain about the national supreme administrative court; supreme courts complain about too intrusive a review by the national constitutional courts; and eventually all of them, but particularly the last court in the domestic chain of available remedies, take issue with the Court.

Third, will Protocol No. 16 and the advisory opinion mechanism established thereunder be a tool for enhancing the national courts' engagement with the Convention and, in this sense, (positive) subsidiarity of the Convention system, as stated in the Preamble to Protocol No. 16? Or rather, are they already? Contemporary experience[18] might be viewed as mixed. As the Court has pointed out, the aim of the advisory procedure is neither to transfer the individual case before the Court and assess it there (individual review), nor to allow for an abstract review of national legislation (abstract review)[19]. As the

17 See, for example, *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, 7 February 2012, and *MGN Limited v. the United Kingdom*, no. 39401/04, 18 January 2011.

18 See in particular Síofra O´Leary, "Advisory Opinions and Judicial Dialogue Strasbourg-Style" (2022) 59 SI *Common Market Law Review* 87.

19 Paragraph 10 of the Explanatory Report to Protocol No. 16, further emphasised in *Decision on a request for an advisory opinion under Protocol No. 16 concerning the interpretation of Articles 2, 3 and 6 of the Convention – Request by the Supreme Court of the Slovak Republic* of 14 December 2020, § 18, Request no. P16-2020-001.

rich Luxembourg practice in preliminary reference procedures demonstrates, the borderline between those inadmissible cases and a "question of principle relating to the interpretation or application of the ... Convention" is frequently a matter of (re)formulation. However, with such a narrowly defined scope of advisory opinions, together with the competence to ask for advisory opinions only being vested in the "[h]ighest courts and tribunals of a High Contracting Party" (Article 1 of Protocol No. 16), the internal dynamics and space of the contestation which come with a request for a preliminary ruling– also by the lower courts of a member State – are unlikely to materialise in advisory opinions[20].

Moreover, how much positive and *ex ante* involvement with the Convention would be achieved if domestic courts could take the convenient shortcut of simply asking a question directly, instead of being obliged to reason with the Convention and to remedy the domestic shortcomings themselves before the case potentially proceeds to an external point of control before the Court[21]? Intriguingly, contemporary experience might imply that instead of *ex ante* involvement with the Convention, the advisory opinion procedure could serve as an *ex post* clarification avenue for domestic execution of judgments already rendered by the Court[22]. Finally, the issue of double references (to Strasbourg and to Luxembourg) or even triple references (to the national constitutional court in some legal systems) remains open, potentially making some States Parties, in particular those with powerful, Karlsruhe-style constitutional courts, more hesitant before signing and then ratifying Protocol No. 16. It is one matter to be "subsequently corrected" by the Court, after one has had one's say; it is quite another to be bypassed altogether by a national (ordinary) court, in particular if one was previously the human rights gatekeeper in a national system.

Fourth and finally, in terms of making the Convention and the case-law of the Court a living reality before national courts, in particular lower courts, one should not overlook the synergic, positive contribution made in the past years by the Luxembourg Court via the bridge of Article 52(3) of the Charter of Fundamental Rights of the European Union. For instance, in rule-of-law cases, but also when developing novel instruments in the area of freedom, security and justice (in particular on judicial cooperation in criminal matters, but also international protection), the case-law of the Strasbourg Court has always been the first port of call and an ongoing source of inspiration, as well as control. In this way, indirectly through the gates of Article 267 of the Treaty of the Functioning of the European Union (TFEU), States Parties that are also member States of the Union have constantly been reminded of their obligations under the Convention, with the case-law of the Court of Justice thus increasing that instrument's reach.

3) SHARED RESPONSIBILITY, EQUALITY AND DYSFUNCTIONALITY

As repeatedly emphasised throughout the seminar today, subsidiarity is connected to shared responsibility. Subsidiarity in the sense of deference and self-restraint shown in Strasbourg rests on the taking up and realisation of that "shared responsibility" by the given State Party. Or, put differently, restraint requires trust.

20 Certainly not in those States Parties that have designated just one court. The situation might be different with others, such as Romania, which has designated fifteen courts of appeal in addition to the Constitutional and Supreme Court (the High Court of Cassation of Justice).

21 This neatly demonstrates one of the previously outlined dissonances in the aims of introducing the notion of subsidiarity into the Convention system. If the aim of "subsidiarity" in establishing Protocol No. 16 was seen as to functionally unburden the Court (in this sense see also O´Leary, note 18 above, at 89), then the logic of an ex ante and timely solution to a problem that is bound to occur later in repetitive litigation before the Court certainly makes sense. However, if "subsidiarity" were to be understood as incentivising the national courts to engage more with the Convention and the case-law of the Court by themselves, as primary guardians of compatibility with the Convention, then advisory opinions would not necessarily be a step in that direction.

22 See O´Leary (note 18 above) 93-94, noting that two of the five advisory opinions rendered in the first five years since the entry into force of Protocol No. 16 arose out of national difficulties in executing judgments already handed down by the Court.

But who to trust and why? In his above-cited academic contributions, Robert Spano went as far as to tackle head-on the underlying issue of potential "double standards" and selectivity, stating clearly that "States that do not respect the rule of law … cannot expect to be afforded deference under process-based review"[23].

Rule-of-law backsliding and even outright crisis in some member States, together with the rise in illiberal populism, have presented both European systems – the Strasbourg and Luxembourg ones – with unprecedented questions. A key structural problem has been how to accommodate objective diversity in terms of quality of the rule of law within an international structure that is based on the (sovereign) equality of its member States/States Parties. Can some members be treated more equally than others, without creating several parallel regimes within one organisation? How much can the material notion of equality be accommodated within the formal, not to say formalised, diplomatic structures of an international organisation?[24] ?

A connected problem, which is perhaps more acute within the EU system than that of the Convention, is the exact trigger point for a member to be subject to differentiated treatment: who shall determine that a State Party is not (or no longer) to be trusted and hence should be afforded no deference and not have the benefit of a "process-based review"? And how shall they do so? Moreover, as history teaches us, democracies and the rule of law seldom die in one big crash, with one Rubicon being suddenly crossed, but rather in a series of seemingly smaller steps, or even from a thousand little cuts. Being able to tell if "one is there yet" might not be possible even for someone with the benefit of hindsight, much less for a contemporary observer or, a fortiori, a participant with a stake in the matter.

Complex as they are, these problems should not distract from the immense importance played by both European systems – the Convention in particular but also the European Union – in keeping some problematic States Parties in what might hopefully still be labelled the "orbit" of human rights, allowing them to land again one day. In the meantime, the Convention and the EU Charter can be said to be fulfilling the roles of an "auxiliary constitution"[25]. Such a state of affairs naturally puts immense pressure on the Court and its resources. It not only means no deference within a "process-based review", however the vision of subsidiarity is framed; it also forces the Court to reverse further elements of procedural or even institutional subsidiarity, and has seen it starting to act, for a lack of shared responsibility and efficient domestic remedies, essentially as a first-instance substitute court[26]. Exercising reverse subsidiarity (hopefully temporarily) to offset a want of local responsibility is a daunting task for an international court; but few in this room today are likely to disagree with its being of primordial importance.

Lastly, let us conclude with a peek into one possible future. Assuming that there should indeed be an acknowledged "multi-channel review" under the Convention, and that such a process could be reconciled with the equality of States Parties, when and how would (previously problematic) States be admitted back into the "process-based review" – or rather "substance-light" – channel, with the Court showing initial deference to their domestic choices? Would it be once a new government is in place? That new government, in re-establishing what it understands to be the rule of law, might be forced to break a few eggs along the way. Would such an (for some arguably necessary) "transitional sin", or rather a series

23 Spano (note 6 above) at 493.

24 See also my Opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, EU:C:2021:403, point 154.

25 Term used with regard to the EU Charter and in particular the Convention in Hungary by Antal Berkes, András Jakab and Pál Sonnevend in "Hungary: A Half-Hearted Look at the Charter", in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart, Oxford, 2020) 197, at 222-223.

26 See, generally, *Akdivar and Others v. Turkey* [GC], no. 21893/93, 16 September 1996, and more recently a number of cases concerning Poland (for a review see, for example, Raffaele Sabato, "An Authority Balanced, But Not Divided – Judicial Appointments and Protection of Judicial Independence Under Article 6 § 1 of the European Convention on Human Rights" in *Liber Amicorum Robert Spano* (Limal, Anthemis, 2022)). The latter strand of cases demonstrates a stronger approach emerging in the Court, which on 8 February 2022 granted interim measures in the case of *Wróbel v. Poland* (no. 6904/22), ordering the State Party to ensure that no decision in respect of disciplinary proceedings against Mr Wróbel be taken by the Disciplinary Chamber of the Supreme Court (which had already been declared in previous judgments not to constitute an "independent and impartial tribunal established by law") until the final determination of his complaints by the Court.

thereof, be compatible with the Convention, given the now detailed body of case-law documenting all the things a government cannot do with a judiciary or a constitutional system[27]? Or should a reset button be pressed, with the noble ends being allowed to justify the means? In terms of cases to come, will the Court be obliged to open deeper drawers of its case-law from twenty or so years ago, relating the process of transition in Central and Eastern Europe, revisiting job dismissals and premature terminations, criminal prosecutions, lustration laws, restitutions and other similar issues long believed to be over? Those are matters for the future – and potentially another Judicial Seminar.

27 For a further discussion, see Michal Bobek, Adam Bodnar, Armin von Bogdandy and Pál Sonnevend (eds), Transition 2.0: *Re-establishing Constitutional Democracy in EU Member States* (Nomos, Baden-Baden, 2023).

Dialogue between judges 2024

SOLEMN HEARING OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR

Dialogue between judges 2024

Síofra O'Leary

President of the European Court of Human Rights

OPENING ADDRESS

Distinguished Presidents of Constitutional and Supreme Courts, Chair of the Ministers' Deputies, Secretary General of the Council of Europe, Commissioner for Human Rights, Excellencies, Ladies and Gentlemen,

At Court and Council of Europe level, 2023 was marked by a historic fourth summit. In their Reykjavik Declaration, the 46 Heads of State and Government reaffirmed: "[t]heir deep and abiding commitment to the European Convention on Human Rights and the European Court of Human Rights as the ultimate guarantors of human rights across our continent, alongside our domestic democratic and judicial systems".[1]

Tonight, I have the honour of delivering this address on behalf of the 45 Convention Judges by whom I am flanked.

I address you not merely in your capacity as national superior court judges but also as Convention judges, to whom it primarily falls to ensure that your national authorities comply with the obligations to which they have sovereignly subscribed by ratifying the European Convention on Human Rights.

We are conscious that you have travelled from far and wide and are grateful that your presence here tonight is testimony to your own commitment to the soon to be 75-year-old Convention system.

We meet at a time when that system – whose character is at once fragile and resilient – is again being called into question. And yet, paradoxically, we are ever more conscious, as we survey the situation in Europe and on the world stage, of the need to safeguard the three fundamental principles which underpin this system - democracy, the rule of law and human rights - whatever the legal basis relied on.

After providing you with a brief overview of our judicial activity in 2023 (I), I would like to touch on a societal problem which continues to be too vividly and brutally reflected in our case-law and from which none of our societies appear to be immune (II). I will then extract some key themes from four landmark judgments handed down last year (III) before introducing you to our keynote speaker, Commissioner Reynders, who we warmly welcome to the Human Rights Building (IV).

***

(I)

As 2024 dawned, the number of applications pending before the Court, although high (68,450), has decreased significantly, compared to the close of 2022 (when over 74,000 applications were pending).

1 Reykjavík Declaration, Summit of the Council of Europe United around our values, 16-17 May 2023, p. 4.

In the past year the Court dealt with 38,260 applications and handed down judgments in respect of 6,900 of them (a 66 % increase on 2022). Approximately 6,400 applications were decided by Committees of three judges; while Single-judges dealt with a further 25,834 applications. Over 16, 600 applications were communicated to respondent States.

75% of pending applications originate from the same five States I listed last January, namely Türkiye (23,400 applications), the Russian Federation (12,450), Ukraine (8,750), Romania (4,150) and Italy (2,750).

Fortunately, the past year ushered in some new developments and even green shoots.

Firstly, the number of applications pending against the Russian Federation when its membership ceased has been reduced from over 17,000 to 12,450. Additional Committees, operational across all five Sections, have adopted judgments or decisions concerning 5,300 applications and communicated a further 9,400.

Secondly, thanks to greater recourse to Committees and successful use of the friendly settlement procedure, the Italian docket has fallen from 3, 531 to 2,750 applications.

Finally, in September, the Grand Chamber handed down a judgment in a leading case against Türkiye. It identified violations of Articles 7 and 6 § 1 of the Convention stemming from a systemic problem in cases tried in the aftermath of the attempted coup d'état.[2] A first batch of 1,000 follow-on applications, of which there are approximately eight thousand, has since been communicated.

In 2023 we engineered the necessary quantitative and qualitative shift in judicial work at Chamber and Committee levels. This is with a view to allowing Chambers more time and space to deal with the new and complex legal questions raised in many of the cases pending before them, while ensuring that Committees can increase judicial output and expedition where the existing well-established case-law and a given case so permit.

2023 was also a year characterised by procedural reflections and reforms.

A new Practice Direction sought to clarify the manner in which third parties can intervene in cases pending before the Court.[3] Five years after the entry into force of Protocol No. 16, the Court updated its guidelines for domestic courts considering whether to request an advisory opinion.[4] The Rules of Court now also contain a new rule on the treatment of highly sensitive documents. This responds to calls from High Contracting Parties, some of which had been involved in previous cases where the question of such access arose.[5]

Rule 28, which governs recusal, was clarified and consolidated following a consultation with stake-holders. A new Practice Direction issued last week seeks to ensure greater transparency and confirms the paramount importance attached to the independence and impartiality of the justice rendered by this Court.[6]

Which leaves me just a few, but very necessary, minutes to devote to interim measures.

When issuing interim measures, which it does in exceptional cases where there is an imminent risk of irreparable harm, the Court exercises its jurisdiction to ensure observance of the engagements undertaken by the High Contracting Parties in the Convention and Protocols thereto, in accordance with Article 19 of the Convention.

2 *Yüksel Yalçinkaya v. Türkiye [GC], no. 15669/20, 26 September 2023.*

3 European Court clarifies third-party intervention (coe.int).

4 Updated Guidelines on implementation of advisory opinion procedure under Protocol No. 16 to the Convention (coe.int)

5 See, for instance, *Al Nashiri v. Poland*, no. 28761/11, §§ 17 40 and 360-376, 24 July 2014, and *Yam v. the United Kingdom*, no. 31295/11, §§ 79-83, 16 January 2020. See also Press release ECHR 296 (2023) 30.10.2023 "European Court introduces new rules on highly sensitive documents – new Rule 44F and amended Rule 33 § 1".

6 See Press release.

It is important to recall that a failure by a respondent State to comply with interim measures undermines the effectiveness of the right of individual application guaranteed by Article 34 of the Convention. It also undermines the formal undertaking of the State in question in Article 1 to protect the rights and freedoms set forth in the Convention

When issuing interim measures, which it does in exceptional cases where there is an imminent risk of irreparable harm, the Court exercises its jurisdiction to ensure observance of the engagements undertaken by the High Contracting Parties in the Convention and Protocols thereto, in accordance with Article 19 of the Convention.

It is important to recall that a failure by a respondent State to comply with interim measures undermines the effectiveness of the right of individual application guaranteed by Article 34 of the Convention. It also undermines the formal undertaking of the State in question in Article 1 to protect the rights and freedoms set forth in the Convention[7].

Last year, I expressed grave concern that some Contracting States are prepared to flout international rule of law requirements, disregarding the issuance of interim measures and seeking to undermine the authority of the Court by questioning its jurisdiction to so issue.

Today, our concern should be heightened. This is because the criticism previously directed at this Court is now, in certain quarters, redirected at national judges. National judges who act in accordance with the rule of law, perform their essential judicial role, comply with their fundamental obligations under national law, the Convention system or other instruments of international law and uphold the right to effective judicial protection, preserving individual rights to physical integrity, liberty and life itself.

Responding to recent attacks on what he referred to as the "European legal order" – to which you, we and the members of the CJEU here present all belong – the President of the French Conseil Constitutionnel emphasised this month that:

"The notion of the rule of law underpins the entire European approach, whether at continent-wide level ... in the context of the European Convention … or at European Union level. Let us not lose sight of the stability, credibility and influence that the European dimension confers on our countries."[8]

Showing contempt for judicial decisions adopted by independent and impartial courts, whether at national or international level, is never the solution in a democratic State governed by the rule of law.

The binding nature of interim measures does not of course mean that the Court does not listen to those who call on it to review its decision-making processes. Nor does it mean that it is not attuned to attempts by parties on either side to instrumentalise the Court. Consultations are ongoing on clearer codification of the Court's well-established case-law on Rule 39, greater transparency has been introduced in decision-making since last December and a revised Practice Direction, clarifying the Rule 39 process will be published once the consultation and codification are complete.[9]

Finally, returning to the Reykjavik Declaration, I thank wholeheartedly your States for having translated political support for the Convention system and the values it upholds into the provision of more sustainable financing. As we, the Judges of this Court, had so clearly indicated, this is necessary to enable us to exercise our judicial mission.

***

(II)

7 See, for example, *K.I. v. France*, no. 5560/19, §§ 115 – 116, 15 April 2021.

8 https://www.conseil-constitutionnel.fr/actualites/ceremonie-de-voeux-du-president-de-la-republique-au-conseil-constitutionnel-4.

9 See Press release ECHR 308 (2023) 13.11.2023 "Changes to the procedure for interim measures (Rule 39 of the Rules of Court)".

Before turning to some of this year's jurisprudential landmarks, I would like to turn a spotlight on cases which address endemic and pervasive forms of violence, too often shielded from the glare of the law and public exposure. This is because of where the violence occurs or the feelings of fear and shame it seeks to instil. Its victims are silent members of our own communities, perhaps even of our own families, with geography, age, social class or education providing no form of protection or immunity.

I am of course referring to domestic and gender-based violence.

Over the last two decades, starting with *Opuz v. Türkiye,*[10] the Court has developed a rich body of case-law pursuant mainly to Articles 2, 3, 8 and 14 of the Convention, which seeks to protect and compensate individual victims and contributes to greater awareness of the legal mechanisms and responses required at national level to combat and prevent this type of violence.[11]

The Court's work has incited and informed the leadership of the Council of Europe in this field, whether through the indefatigable work of GREVIO or the Istanbul Convention,[12] to which 39 Council of Europe States are now parties. Following ratifications by Moldova, the United Kingdom and Ukraine in 2022, the EU itself[13] ratified the Convention last year. It was joined two weeks ago by Latvia.

Year on year do we see in the cases pending before us a positive shift in patterns of private behaviour and State action in their regard? Sadly not, or not enough.

In 2023, in cases involving Bulgaria and Georgia, the Court found violations of either Articles 2 or 3 of the Convention, combined with Article 14, against the backdrop of a systemic failure by the relevant State authorities to address gender-based violence.[14] These cases follow on from judgments against the same two States,[15] as well as other judgments against Italy and Croatia, in 2022[16]. Last year we also handed down judgments highlighting the secondary victimisation of a 12 year old orphan who had complained of sexual abuse,[17] or the authorities' failure to protect a victim of domestic violence and ensure continued contact with her children. The blocking of contact had been used to compound and replace the previous physical abuse.[18]

Often in public discourse on domestic and gender-based violence one finds references to vulnerability and comparisons with the treatment of ethnic or minority groups. Yet the victims of domestic and gender-based violence are not born vulnerable. They are rendered vulnerable, on their journey from girl to womanhood, by the imbalanced social structures into which they are born, by the law and by law-makers, and by attitudes and patterns of behaviour in their regard which are ignored, permitted or endorsed by society, including the State.

In the cases I have referenced and the hundreds pronounced in previous years, our focus has been, and must remain the actions and omissions of State authorities. Many of these cases are complex. This is by virtue of their nature, the occurrence of violence in the private domain and the competing rights of the accused. But the relatively simple legal question which confronts us remains that framed by the Court in Opuz over 15 years ago:[19] were the applicants accorded equal and sufficient protection before the law?

***

10 *Opuz v. Türkiye,* no. 33401/02, ECHR 2009.

11 *See Kurt v. Austria [GC],* no. 62903/15, 15 June 2021, and the authorities cited therein.

12 Convention on preventing and combating violence against women and domestic violence (CETS No. 210). GREVIO is the Group of Experts on Action against Violence against Women and Domestic Violence.

13 See European Union declaration, 28.06.2023.

14 *A.E. v. Bulgaria,* no. 53891/20, 23 May 2023 and *Gaidukevich v. Georgia,* no. 38650/18, 15 June 2023.

15 *Y and Others v. Bulgaria,* no. 9077/18, 22 March 2022, and *A and B v. Georgia,* no. 73975/16, 10 February 2022.

16 See, for example, *M.S. v. Italy*, no. 32715/19, 7 July 2022, and *J.I. v. Croatia*, no. 35898/16, 8 September 2022.

17 *B. v. Russia,* no. 36328/20, 7 February 2023.

18 *Luca v. Republic of Moldova*, no. 553451/17, 17 October 2023.

19 *Opuz*, cited above, §§ 199-200.

(III)

Turning to the over 6, 900 applications leading to judgments last year, rest assured that at this late hour I will highlight only four, all chosen for the broader themes they illustrate.

In *Fedotova and Others v. Russia* the Grand Chamber found a violation of the respondent State's positive obligations under Article 8 due to the absence of any form of legal recognition of same-sex partnerships.[20]

Consolidating its existing case-law on the subject,[21] the Court recognised that the margin of appreciation accorded States Parties relates to the form of legal recognition required – which does not have to extend to marriage - and to the content of protection, which nevertheless has to be adequate.

The need to ensure recognition and effective protection of the private and family life of same-sex couples was firmly located in the values of a "democratic society" promoted by the Convention, foremost among which are pluralism, tolerance and broadmindedness. It would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of rights by a minority group were made conditional on its being accepted by the majority.

Au cours des mois qui ont suivi, les chambres ont été amenées à adopter des arrêts dans la même lignée, exigeant une protection effective des couples homosexuels, dans des affaires dirigées contre la Roumanie, l'Ukraine, la Bulgarie et la Pologne[22].

In relation to Article 10, and the protection afforded by the latter to whistle-blowers, the Grand Chamber seised the opportunity in *Halet v. Luxembourg*[23] to refine and clarify the relevant principles.

The applicant had disclosed several hundred tax documents to a media outlet which subsequently published them to draw attention to advantageous tax agreements concluded between the private company for which he worked and the respondent State. He was dismissed by his employer, subjected to a criminal fine and refused a whistle-blower defense by the national courts.

The detailed and technical reasoning of the Grand Chamber is not food for a solemn hearing. I refer to the judgment to draw attention to the relevant considerations which arise in relation to the public interest in whistle-blowing cases and the fine-tuning of the balancing exercise to be conducted by national authorities in those cases. The Court indicated that account should be taken of the detrimental effects of disclosure taken as a whole, in so far as they may affect private interests (whether those of an employer or third party) and public ones (encompassing the wider economic good and citizens' confidence in the fairness and justice of a State's fiscal policies).

Given that the new EU Whistle-Blowing Directive refers to the relevant criteria established in the case law of this Court, *Halet* is a leading Convention judgment in a field which will no doubt see further, developing synergies in the case-law of the two European Courts.[24]

Moving to Chamber judgments and decisions, at a time when the Court is unjustifiably criticised for failing to take account of the difficulties faced by States in the fight against terrorism, it is worthwhile highlighting the judgment in Pagerie v. France.[25]

20 *Fedotova and Others v. Russia,* nos. 40792/10, 30538/14 and 43439/14, 17 January 2023.

21 See, *inter alia, Oliari and Others v. Italy,* nos. 18766/11 and 36030/11, 21 July 2015 and *Orlandi and Others v. Italy,* nos. 26431/12 and 3 others, 14 December 2017.

22 *See Buhuceanu and Others v. Romania,* nos. 20081/19 and 20 others, 23 May 2023; *Maymulakhin and Markiv v. Ukraine,* no. 75135/14, 1 June 2023; *Koilova and Babulkova v. Bulgaria,* no. 40209/20, 5 September 2023; *Przybyszewska and Others v. Poland,* nos. 11454/17 and 9 others, 12 December 2023.

23 *Halet v. Luxembourg [*GC], no. 21884/18, 14 February 2023.

24 Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law, OJ 2019 L305/17, recital 33.

25 *Pagerie v. France,* no. 24203/16, 19 January 2023.

The case raised the issue whether sufficient procedural safeguards had attached to a lengthy preventive curfew imposed on a radicalised Islamist during the state of emergency declared in France following terrorist attacks, some of which had been coordinated by ISIL, from 2015 onwards.

Finding no violation of Article 2 of Protocol No. 4, the Chamber emphasised that:

"The Court is acutely conscious of the difficulties associated with the fight against terrorism […]. Thus, in the area of the fight against terrorism, the Convention requires the member States to take preventive measures to protect the lives of the population in the event of a real and immediate risk of attack […] and also to secure effective safeguarding of the protected rights […]. The Court reiterates that it is primarily for the national authorities to strike the sometimes delicate balance between protection of the public and the safeguarding of rights, in accordance with the principle of subsidiarity. Nonetheless, this balancing exercise is subject to European supervision, a task entrusted to the Court."»[26]

The final judgment I will refer to – *Wałęsa v. Poland*[27] – and its aftermath, mark an important inflection point. It follows multiple violations found in a series of previous cases challenging the impact of judicial reforms initiated in the respondent State in 2017.[28] The objective of those judgments, whether the violations rested on Articles 6, 8, 10 or even 18, has been to protect the national judiciary against unlawful external influence, from the executive, the legislature or from within the judiciary itself.

In *Wałęsa*, the Court had recourse to its pilot judgment procedure, whose dual purpose is to reduce the threat to the effective functioning of the Convention system and to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of Convention rights in the national legal order.

The Chamber found violations of Articles 6 and 8 of the Convention in the case brought by the applicant, the former leader of Solidarność. He had suffered the reversal, ten years on, by a Chamber of the Supreme Court of a final defamation judgment in his favour, following an appeal by the Prosecutor General. The Court regarded the latter appeal as "an abuse of the legal procedure by the State authority in pursuance of its own political opinions and motives".[29]

The interrelated systemic problems identified by the Court entailed repeated breaches of the fundamental principles of the rule of law, separation of powers and the independence of the judiciary. When deciding to apply the pilot judgment procedure, the Court emphasised that the state of continued non-compliance with the Convention had been perpetuated by the Constitutional Court's recent judgments, which in parallel had contested the primacy of EU law and the binding effect of CJEU judgments.

The judgment in *Wałęsa v. Poland* is a reminder that where the common values underpinning the Convention are openly challenged, common values which derive from Europe's common constitutional heritage, both European courts assist directly and indirectly in their defence, in defence of the other European system and in defence of independent and impartial national constitutional and supreme courts.[30]

It is also a judgment which speaks to the possibility of change. Soon after its delivery, notice was received by the Court from the respondent State of its "will and determination to implement ECHR judgments, particularly those regarding the principles of the rule of law and independence of the judiciary."[31]

26 *Ibidem*, §§ 147-150.

27 *Wałęsa v. Poland,* no. 50849/21, 23 November 2023.

28 *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021; *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022; *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021, *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021, *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022; *Żurek v. Poland*, no. 39650/18, 16 June 2022; *Tuleya v. Poland*, nos. 21181/19 and 51751/20, 6 July 2023; *Juszczyszyn v. Poland*, no. 35599/20, 6 October 2022.

29 *Wałęsa*, cited above, § 254.

30 See the Speech "EUnited in Diversity II – The Rule of Law and Constitutional Diversity: Perspectives from the European Court of Human Rights", The Hague, the Netherlands, 31st August – 1st September 2023, and, for concrete examples, *Tuleya*, cited above, § 264; Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v. Openbaar Ministerie*, EU:C:2022:100, §§ 79-80 or, recently, Case C-718/21 *L.G. v. Krajowa Rada Sądownictwa* EU:C:2023:1015.

31 See the Statement of 15 December 2023.

***

(IV)

While I have thus far only referred to the ongoing conflict in Ukraine, other cold and active conflicts persist within the Convention legal space. Looking East, we see brutality and aggression playing out daily on our screens and in other people's streets and lives.

As we face into the turbulence of 2024, the opening words of the United Nation's Charter carry particular resonance.

Our forebearers sought to save succeeding generations from the scourge of war, reaffirm faith in human rights, respect international law, promote social progress and practice tolerance. Now is surely not the time for our generation, on whom so much has been bestowed, to renege on these promises to the generations which succeed us.

Commissioner Reynders, I started and finished my address with references to the rule of law and common European values. This struck me as an appropriate springboard from which to introduce you as our keynote speaker.

In the Reykjavik Declaration the EU is identified as the main institutional partner of the Council of Europe in political, legal, and financial terms.

As EU Commissioner for Justice you have promoted the rule of law as a central component of the common DNA of both organisations.[32] Before the PACE you recently addressed EU accession to the Convention. Your annual Rule of Law reports, which survey EU and accession States, have focused, quite correctly, on the record of the States surveyed when it comes to execution of this Court's judgments.

It is heartening to see, whether in the recent work of the Commission or the CJEU, greater attention finally being paid to the vital contributions of the Venice Commission, GRECO[33] or CEPEJ,[34] alongside the judgments of this Court, to the defence of democracy and the rule of law..

Commissioner Reynders, the judicial members of Europe's legal order and other guests are eager to hear your words and I now invite you to take the floor.

32 See the speech at the Parliamentary Assembly of the Council of Europe, 12.10.2023.

33 Group of States against Corruption.

34 European Commission for the Efficiency of Justice.

Didier Reynders

European Commissioner for Justice

President of the European Court of Human Rights, Judges of the European Court of Human Rights, Presidents of the Constitutional Courts and Supreme Courts, President of the Ministers' Deputies, Secretary General of the Council of Europe, Secretary General of the Parliamentary Assembly, Excellencies, Ladies and gentlemen,

Thank you for inviting me to speak at today's solemn hearing in my capacity as European Commissioner for Justice.

As Jacques Delors pointed out here in Strasbourg nearly thirty years ago, when addressing the Parliamentary Assembly of the Council of Europe, we cannot forget that it was with the Council of Europe that it all began.

The European Convention on Human Rights came into force in 1953, more than seventy years ago, and it is the cornerstone of the Council of Europe's legal system.

Determined not to repeat the errors of the past, our predecessors who put so much effort into setting up the Convention and the legal system of the European Union were driven by a commitment to protect common values, namely the rule of law, fundamental rights and democracy.

Even today, the Convention constitutes a major achievement for human rights protection, allowing as it does individuals to lodge their case directly before an international court.

For many applicants, the Strasbourg Court is a ray of hope in the face of injustice.

Furthermore, the Court does not merely rule on individual cases.

Through its case-law, it clarifies and develops the rules established by the Convention, thus ensuring that they are complied with throughout the whole of the Council of Europe's legal order. The Court also ensures that the Convention remains a living instrument, adapted to the protection of rights in changing societies.

Your work is therefore essential to ensure the protection of the rule of law and fundamental rights across the European continent.

In May last year, the Heads of State and Government met at the Reykjavik Summit to renew their commitment to the Council of Europe's values and principles, and to give further direction to its work.

As President von der Leyen stated at the Summit, we wish to strengthen the democratic foundations of the European Union. And we are very much looking forward to the Union acceding to the European Convention on Human Rights as soon as possible.

Indeed, the Union's accession to the Convention is not just a legal obligation under the Lisbon Treaty. It would also represent a major achievement for the protection of fundamental rights and for the strengthening of ties between the European Union and the Council of Europe.

COMPLEMENTARITY BETWEEN THE CHARTER AND THE CONVENTION

As you know, the European Union's legal system in the area of fundamental rights is based on the Charter, and on the complementarity between it and the Convention.

While these two instruments have their own characteristics, they are both essential in order to ensure the protection of fundamental rights in the European legal space.

It is therefore not unheard of for EU bodies and the European Court of Human Rights to address the same questions concerning the rule of law, sometimes in respect of the same country, even if those questions manifest themselves in different ways.

The Strasbourg Court's recent judgment in Wałęsa v. Poland, which you have just mentioned Madam President, is a good case in point.

A final judgment given by a domestic court in Mr Wałęsa's favour was reversed nine years later by the Polish Supreme Court's Chamber of Extraordinary Review, on an extraordinary appeal.

In 2021 the European Court of Human Rights had already ruled that that Chamber of Extraordinary Review was not an "independent and impartial tribunal established by law".

In its Wałęsa judgment, the Court found a violation of the right to an independent tribunal and of the principle of legal certainty.

Having regard to the systemic nature of the violations it had found, the Court also applied its pilot-judgment procedure to the case, and held that Poland was to take adequate measures to put an end to the systemic violations of the Convention identified by it.

As the Court noted in its judgment, the European Commission had also criticised the extraordinary review procedure before this particular Chamber of the Polish Supreme Court in its proposal to trigger the so-called "Article 7 of the Treaty on European Union" procedure, aimed at determining whether there was a clear risk of a serious breach of the rule of law by Poland.

Furthermore, in a judgment of December last year, the Court of Justice of the European Union held, in the context of a reference for a preliminary ruling, that, given the manner in which judges of the Chamber of Extraordinary Review were appointed, a panel of its judges did not constitute a "court or tribunal" within the meaning of Article 267 of the Treaty on the Functioning of the European Union.

In support of its findings, the Luxembourg Court relied on the case-law of the European Court of Human Rights.

Thus, we can see that a dialogue also exists, and that a complementarity has developed between the two organisations, and particularly between the two Courts.

THE COMMISSION'S RULE OF LAW REPORT

However, it is always preferable to prevent rule-of-law crises before they arise and have to be resolved by the courts.

The European Commission's annual Rule of Law Report is a tool which aims to prevent such crises.

The fourth edition of the Report was published last July. As in the past, it was the result of close cooperation between the Commission, the Council of Europe and its bodies.

It is now settled practice that, in the Rule of Law Report, we examine the national rules of the Member States through the lens both of EU law, in particular the case-law of the Luxembourg Court of Justice, and of European standards, such as the recommendations of the Committee of Ministers, the opinions of the Venice Commission or GRECO and, of course, the judgments of the European Court of Human Rights.

The 2023 Report included recommendations for each Member State. These recommendations are aimed at encouraging the States to launch the necessary reforms.

Where applicable, our recommendations also refer to the European standards developed by the Council of Europe. This is particularly true for the composition of councils for the judiciary, whatever name they go by.

Following the announcement by President von der Leyen in her 2023 State of the Union address, this year the Commission will open the Reports to those candidate countries which are making the most progress in rule-of-law terms in their EU accession process, namely Albania, Montenegro, North Macedonia and Serbia.

By inviting those countries to participate in the yearly Report, the European Union is re-emphasising the importance it places on European standards across the entire continent.

The Report allows us to enter into dialogue with the Member States. Two-thirds of the recommendations we made in 2022 were wholly or partially implemented.

Advances in the rule of law can also be made through constitutional reforms, as was the case recently in the Grand Duchy of Luxembourg concerning the National Judicial Council, the majority of whose members will henceforth be judges elected by their peers, and the independence of the judiciary, in particular of the public prosecutor's office.

I will also, in the Commission's name, be opening a structured dialogue on the implementation by Spain of our recommendation related to the National Council for the Judiciary.

Dialogue always comes first.

We are currently engaged in dialogue with the new Polish government about the reforms to be implemented with a view, in particular, to re-establishing judicial independence.

When dialogue is not enough, the Commission uses the other tools at its disposal.

I have already mentioned Article 7 of the Treaty on European Union. Procedures in respect of Poland and Hungary are ongoing before the European Council.

We are bringing infringement procedures before the Court of Justice of the European Union, seeking, if necessary, the imposition of penalty payments.

More recently, we have been able to implement mechanisms linking respect for the rule of law or the Charter of Fundamental Rights to European funding paid to the Member States. The conditionality mechanism was relied upon when suspending funding to Hungary.

The Recovery and Resilience Plans adopted after the height of the COVID-19 pandemic contain obligations to introduce reforms, particularly in the fields of justice and the fight against corruption; the payment of funding is conditional on such steps. This is why no Recovery Plan payments have yet been made to Hungary and Poland, as they have not carried out the necessary reforms.

Funding of certain cohesion programmes has also been frozen for non-compliance with the Charter of Fundamental Rights.

The aim is not to punish, but to encourage reforms. If they are carried out, the budgetary measures can be lifted.

I should like now to talk about another issue, that of compliance with the judgments of your Court.

As President O'Leary recently observed: "In a State governed by the rule of law ... judgments of national courts must be executed without exception and in a timely manner. The same requirement applies to the judgments issued by the Strasbourg Court ..."

I wholeheartedly agree.

For the last two years, the Rule of Law Reports have also contained, for each Member State, an overview of the implementation of the key cases of the European Court of Human Rights. And this will of course be the case for this year's Report as well.

ROBUST NATIONAL JUDICIAL SYSTEMS ARE ESSENTIAL

Generally speaking, the national courts are at the forefront in the fight against arbitrary decisions, discrimination or abuse of authority. They are called upon to give full effect to the rights set out in the Convention.

This is why it is essential to have robust national judicial systems which can withstand pressure.

When the system is working well, the protection of human rights should be satisfactorily secured at the national level. However, we know that this is not always the case.

That is why we also need robust, effective and independent institutions at the European level, such as the European Court of Human Rights, to promote and protect those values.

Ladies and gentlemen,

As your Court has pointed out, the rule of law is inherent in all the Articles of the Convention, and the Convention itself is based on that principle. It is compliance with the rule of law which confers on the actions of public authorities the legitimacy required in a democratic society.

The values which underpin the Convention, and the Charter of Fundamental Rights, are universal.

However, we can see that they are subjected to numerous and constantly changing challenges.

We see it in our Rule of Law Reports: every Member State could do better, in one way or another, and we make recommendations to them all, even if the scale of the risk differs from one State to another.

We also see it in the developments of the case-law of the European Court of Human Rights, for example regarding the independence of the judiciary.

And, far more seriously, we have been painfully reminded of the importance of these core values by the war of aggression being waged by Russia against Ukraine.

The inter-State cases pending before the Court against Russia, or the more than 7,400 individual applications concerning the events which occurred in the context of the invasion of Crimea or following the attack of February 2022 also attest to the importance of these core values.

The European Commission is fully committed to supporting Ukraine. We are contributing to the start-up costs of the Register of Damage created by the Council of Europe. We are monitoring the implementation of the sanctions imposed against Russia by the European Union, and are working in close cooperation with the International Criminal Court, the Ukrainian Prosecutor General, the Member States and Eurojust to ensure that the international crimes committed in Ukraine do not go unpunished.

CONCLUSION

Ladies and gentlemen,

Over the past judicial year, the European Court of Human Rights has once again delivered a number of key judgments which have enriched the European legal space.

Over the coming judicial year, your Court will once again be called upon to rule on questions that are central to the rule of law, the protection of human rights, and democracy.

I wish you all the best for your work to come, and I thank you again for having invited me today.

Dialogue between judges 2024

PHOTOS

PREVIOUS DIALOGUES BETWEEN JUDGES

- Dialogue between judges - 2023
- Dialogue between judges - 2022
- Dialogue between judges - 2021
- Dialogue between judges - 2020
- Dialogue between judges - 2019
- Dialogue between judges - 2018
- Dialogue between judges - 2017
- Dialogue between judges - 2016
- Dialogue between judges - 2015
- Dialogue between judges - 2014
- Dialogue between judges - 2013
- Dialogue between judges - 2012
- Dialogue between judges - 2011
- Dialogue between judges - 2010
- Dialogue between judges - 2009
- Dialogue between judges - 2008
- Dialogue between judges - 2007