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"Revisiting subsidiarity in the age of shared responsibility"

Subsidiarity: a view from a national judiciary

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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.

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

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.

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

[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.

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 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

[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. the 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.

[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.

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.

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.

[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.

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 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.

[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.

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 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

[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.

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.

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[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

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[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.

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 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).