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"The Impact of Protocol No. 15 on subsidiarity"

Speech by Peggy Ducolombier

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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

[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.

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].

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

[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."

[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

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].

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]. Lastly, to the applicants' advantage, the Court maintains the principle that complaints based on a violation of the Convention must be raised before

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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.

[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.

the domestic courts at least in substance[25], although 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

[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.

[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).

[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.

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 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. 15[36] 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 review[38].

Once again, I believe that the reality is much more complex[39]. 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 authorities[40]. 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 States[41]. 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

[35] Although the applicant association complained in abstracto about the regulations, it ought to have attempted to raise an objection of illegality in the context of an appeal against the decision refusing to derogate from the ban on demonstrations.

[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.

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 struck[44]. The trust that has been developed with the domestic courts is not blind, and even where the Court finds no violation, this is usually only after a thorough analysis of the domestic courts' reasoning[45]. 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 2018[46].

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

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

[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.

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.