



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

Opening of the Judicial Seminar 2024

“Revisiting subsidiarity in the age of shared responsibility”

Introductory speech by Síofra O’Leary

26 January 2024

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.”¹

Following the entry into force of Protocol n° 15 in 2021, the Convention now contains an express reference to subsidiarity.² 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 1968.³

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*.⁴

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.”

¹ J.-P. Costa, *Dialogue between Judges*, 2010, p. 5.

² Protocol n° 15 entered into force on 1 August 2021. See also, for expressions of subsidiarity in the Convention provisions, Article 1 (High Contracting Parties must secure to everyone within their jurisdiction the rights and freedoms set out in the Convention), Article 13 (States must provide an effective remedy for violations of the Convention rights and freedoms), Article 35 § 1 (requirement that domestic remedies be exhausted) or Article 53 (Contracting States may go further than the Convention in the protection offered).

³ See *Belgian Linguistic* (merits), judgment of 23 July 1968, Series A no. 6, p. 35 § 10 *in fine*.

⁴ *Communauté genevoise d’action syndicale (CGAS) v. Switzerland* [GC], no. 21881/20, § 163, 27 November 2023. See also from the Grand Chamber in 2023, *Fu Quan, s.r.o. v. the Czech Republic* [GC], no. 24827/14, 1 June 2023, on the applicants’ obligation to exhaust domestic remedies, this time as to complaints under Article 1 of Protocol No.1 and in response to arguments concerning the principle of *jura novit curia*.

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.⁵

But subsidiarity also presupposes that your courts act as faithful guardians of Convention rights before any deference is accorded them.⁶ 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.

⁵ See, among many other authorities, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V § 78; *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 98, 25 October 2012; and *Garib v. the Netherlands*, § 137.

⁶ Lauterpacht et al, 'The Proposed European Court of Human Rights', (35) *Transactions of the Grotius Society* (1949), p. 34.