Subsidiarity: a double-edged sword?

Seminar organised by the European Court of Human Rights

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The role of national authorities

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Strasbourg, Friday 30 January 2015

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President,
Members of the Judiciary,
Ladies and Gentlemen,

“At the turn of this new century, the legal landscape is dominated by imprecision, uncertainty and instability (…). Consequently, the objectives of imposing order on diversity without reducing it to homogeneity, and accepting pluralism without abandoning a common law for everyone and a single yardstick for justice and injustice might now appear unattainable…”2. This is how Professor Delmas-Marty described the situation in 2006. But as she urges us in the same text, we must not yield to pessimism, but strive to “to explore the possibilities of a form of law which successfully regulates complexity without eliminating it, by learning to transform this complexity into ‘ordered pluralism’”3. At the Council of Europe, beyond the thorny technical issues and legitimate but occasionally heated political debates, this would indeed appear to be the key challenge in sharing responsibilities between the European Court of Human Rights and the national authorities on the basis of the principle of subsidiarity4. According to this principle, the central authority, namely the European Court of Human Rights, should perform only those tasks that cannot be adequately performed at a more immediate, that is to say, national level. This functional principle, enshrined in the Court’s case-laws since 1968, ensures that fundamental rights are applied in compliance

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1 Text written in collaboration with Stéphane Eustache, judge of the Administrative Court and the Administrative Court of Appeal, special adviser to the Vice-President of the Council of State. The passages between square brackets were not read out.
3 M. Delmas-Marty, Les forces imaginantes du droit (III), Le pluralisme ordonné, Seuil, 2006, p. 28.
5 ECHR, Plenary Court, 23 July 1968, Case “relating to certain aspects of the laws on the use of languages in education in Belgium”, no.1474/62, Series A no.6, I.B. §10: “In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities
with European standards in a manner which is decentralised but heterogeneous, i.e. harmonised but not stereotyped.

The principles of subsidiarity and effectiveness are two sides of the same coin, the motto of which is set out in the Preamble of the European Convention on Human Rights: to ensure the “protection and further development” of fundamental rights. The national authorities – the administrative bodies, the justice system as well as the Government and Parliament – are primarily responsible for this task, and are themselves subject, where they fail in their obligations, to external European review by the European Court of Human Rights. In this context, subsidiarity refers to the idea of a review that is shared between the Court and the national authorities. Although its etymology emphasises the supplementary and ancillary nature of the Court's review, the term also highlights its definitive and supreme nature of the Court’s role, even when the review is exercised by the Grand Chamber. This implies a reciprocal duty of loyal cooperation for the States and the Court alike.

The theme of today’s seminar, “Subsidiarity: a double-edged sword?”, thus invites us to take stock, and then to put forward methods for improving the machinery underpinning this loyalty, without which the Convention would cease to be an effective and living instrument. I shall consider the component parts of this principle from the standpoint of the national authorities, before suggesting areas for improvement.

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I. Subsidiarity allows, through the combination of additional controls, a practical and effective implementation of European guarantees.

At the Council of Europe, implementation of these safeguards is “primarily” the task of the national authorities. The principle of subsidiarity does not define a division of exclusive and competing powers, as is the case in federal or quasi-federal organisations, but provides for decentralised domestic review followed, where such review falls short, by combined external review. Application of the Convention is thus a shared, albeit sequential, power. This structure corresponds to the two-fold aim of effectiveness and pluralism. “By reason of their direct and continuous contact with the vital forces of their countries”, the Contracting States remain best placed to enact suitable implementing measures and, where necessary, to adopt those restrictions imposed by the local context. It follows that

remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.”

7 “The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”, CEDH, Plenary, 7 December 1976, Handyside v. United Kingdom, no. 5493/72, § 48.
8 CEDH 9 October 1979, Airey v. Ireland, no. 6289/73, § 24.
9 CEDH 29 March 2006, Scordino v. Italy, no. 36813/97, § 140.
10 See, inter alia, Le principe de subsidiarité au sens du droit de la Convention européenne des droits de l’Homme, F. Sudre (ed.), Anthemis, 2014, p. 24; “the ‘functional’ specificity of the Convention principle compared to other applications encountered in positive law”; see also Follow-up to Interlaken, the principle of subsidiarity, Note by the Jurisconsult of the European Court of Human Rights, July 2010, p. 2.
the principle of subsidiarity applies to the national authorities as a whole, and in various ways, depending on whether or not they are judicial in nature.

A. If the Convention is to be applied correctly, the States must refrain from any unjustified or disproportionate interference in the exercise of the rights and freedoms guaranteed by it (1); however, they are also required to adopt all measures necessary for the effective and practical implementation of those rights (2).

1. Except with regard to the absolute and intangible rights, such as those protected by Article 311, the Contracting States may legitimately impose restrictions on the exercise of Convention rights and, in so doing, they enjoy margins of appreciation.

The extent of those margins is neither uniform nor unlimited, and it varies on the basis of a two-fold test. Firstly, under a substantive criterion focused on the nature of the rights, interests and stakes involved, these margins tend to be narrower where the protected rights are “intimate rights”12, where the interest at stake concerns “an essential aspect of the identity of individuals”, such as the legal parent-child relationship13, or where the issue has an impact on “the strong interest of a democratic society”, such as freedom of expression in relation to debates of public interest14. In contrast, the margins will tend to be wider where the issue at stake constitutes “a choice of society”, “matters of general policy…, [concerning in particular] relations between the State and religions”15 and also sensitive moral or bioethical issues16. In such cases the Court, in line with its own case-law, “has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question”17. Secondly, under a contextual criterion, the margins of appreciation will tend to be narrower where there is no “common ground”18, or “consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to the best means of protecting it”19. In those areas, the principle of subsidiarity implies judicial caution and circumspection on the part of the national authorities, comparable, in principle, to those displayed by the domestic courts with regard to the decisions taken by their national Parliaments.

However narrowly or widely defined, the issue of national margins of appreciation cannot be an area where the Convention law does not apply. “The solutions reached by the legislatures – even within [their] limits – are not beyond the scrutiny of the Court”20, that is, they must comply with European standards, and

11 See, in particular, CEDH 15 November 1996, Chahal v. the United Kingdom, NO. 22414/93, § 79.
12 CEDH 18 September 2014, Brunet v. France, no.21010/10, § 34.
14 CEDH, Grand chamber, 22 April 2013, Animal Defenders c/ United Kingdom, no.48876/08, §102.
15 See, for example, with regard to the prohibition of face concealment in public places: CEDH 1er July 2014, Grand chamber, SAS v. France, no.43835/11, § 129; with regard to the display of crucifixes in the classrooms of a State school: CEDH 18 March 2011, Grand Chamber, Lautsi v. Italy, no. 30814/06; wearing the Islamic headscarf in institutions of higher education: CEDH 10 November 2005, Grand Chamber, Leyla Sahin v. Turkey, no. 447774/98, §109-110.
16 See, for example, with regard to the regulation of abortion rights: CEDH, Grand chamber, 16 December 2010, A., B. and C. v. Ireland, no. 25579/05; the criteria for access to in vitro fertilisation: CEDH, Grand chamber, 3 November 2011 S.H. and Others v. Austria no. 57813/00; assisted suicide: CEDH 20 January 2011 Haas v. Switzerland, no. 31322/07.
19 CEDH 26 June 2014, Mennesson v. France, no. 65192/11, § 77.
20 CEDH 26 June 2014, Mennesson v. France, no. 65192/11, § 81.
the restrictions imposed cannot “impair [their] very essence”\textsuperscript{21}. \textbf{[It follows that when Parliaments enact legislation or executive bodies issue regulations, they must attempt to look beyond their own context and assess their national traditions from an external standpoint. In other words, we cannot contrast or distinguish the Contracting States’ perspectives and that of the Court in an organically water-tight manner.] The principle of subsidiarity implies that the States internalise a two-fold perspective when using their margins of appreciation: national characteristics and traditions, and also European standards and consensus. These two factors must be taken into consideration when setting the democratic checks and balances, and this task falls primarily to the national legislatures.}

\textbf{2. Thus, subsidiarity does not provide for the primacy of national safeguards over European guarantees: on the contrary, it ensures their complementarity and interweaves them.}

In so doing, subsidiarity is not merely a static and negative factor, but also acts as a dynamic and positive principle. On the one hand, the contextual component of the margin of appreciation opens the door to a gradual and concerted improvement in European standards, making the Convention a living instrument which is at the service of an exacting conception of the rule of law. On the other, the national authorities are required to take affirmative action in enacting the necessary statutory and legislative measures to ensure effective and practical enjoyment of fundamental rights, and particularly to prevent these rights being infringed by third parties\textsuperscript{22}. The theory of “positive obligations”\textsuperscript{23} now reaches deeply into the entire Convention field\textsuperscript{24}, both at a substantive level – especially in the area of protection of private life, as the Court reiterated in its Von Hannover judgment of June 2004\textsuperscript{25} – but also at a procedural level – by requiring, for example, that official, in-depth and effective investigations are held where there are “arguable” allegations of inhuman and degrading treatment\textsuperscript{26}.

Moreover, the national authorities undertake, as stated in Article 46 of the Convention, “to abide by the final judgment of the Court in any case to which they are parties”. As any such judgment is merely declaratory in scope, it follows that the States are subject to a triple “obligation of result”\textsuperscript{27} where a breach is found: they must remedy its detrimental effects; put it to an end where it is ongoing; and prevent future violations. [Reparation must be made “in such a way as to restore

\begin{itemize}
\item \textsuperscript{21} CEDH 2 October 2014, \textit{Matelly v. France}, no. 10609/10, § 57.
\item \textsuperscript{22} In application of “the horizontal effect” of the Convention, which consists of “extending the enforceability of human rights to relations of individuals between themselves” (J.-P. Marguénaud, \textit{La Convention européenne des droits de l’Homme et le droit privé}. La documentation française, 2001, p. 77, quoted by F. Sudre, \textit{Droit européen et international des droits de l’Homme}, PUF, 11th edition, 2012, p. 265).
\item \textsuperscript{23} CEDH 9 October 1979, \textit{Airey v. Ireland}, no. 6289/73; CEDH 13 June 1979, \textit{Marckx v. Belgium}, no. 6833/74.
\item \textsuperscript{25} CEDH 24 June 2004, \textit{Von Hannover v. Germany}, no. 59320/00, § 57: “The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, mutatis mutandis, X and Y v. the Netherlands, judgment of 26 March 1985, Series A, no. 91, p. 11, § 23, Stjerna v. Finland, judgment of 25 November 1994, Series A no. 299-B, pp. 60-61, § 38; and Verliere v. Switzerland (dec.), no. 41953/98, ECHR 2001-VII). That also applies to the protection of a person’s picture against abuse by others (see Schüssel, cited above).”
\item \textsuperscript{27} See, on this point F. Sudre, "A propos de l’obligation d’exécution d’un arrêt de condamnation de la Cour européenne des droits de l’homme ", \textit{RFDA}, 2013, p. 103.
\end{itemize}
as far as possible the situation existing before the breach"\textsuperscript{28} through individual measures, and, where appropriate, the applicant must be paid any sums awarded by the Court under “just satisfaction” as provided for in Article 41. In accordance with the principle of subsidiarity, this reparation is only granted where “domestic law does not allow complete reparation to be made”. In addition, under the supervision of the Committee of Ministers, individual or general measures must be adopted in order to put an end to the violation found and to prevent its recurrence\textsuperscript{29}. Admittedly, the national authorities remain free to choose the most appropriate measures\textsuperscript{30} and the Court may not impose these on them – although it may put forward certain options, sometimes quite specifically, especially in the case of a structural violation\textsuperscript{31}, or even very specifically, where it considers only one measure to be appropriate\textsuperscript{32}, but, in any event, never in a binding manner. However, although they enjoy discretion in terms of execution, the States cannot leave the Court’s judgments without response, nor ascribe a merely “incantatory” quality to their declaratory nature\textsuperscript{33}. They are obliged to “take them into consideration”, without acting automatically or indifferently. In this respect, as the Conseil d’Etat expressly stated in a judgment of July 2014, where a violation found by the Court concerns an administrative sanction, the relevant national authorities are obliged, if an application to that effect is made to them and provided that the violation is continuing, to stay\textsuperscript{34}, in whole or in part, execution of the relevant sanction, taking account not only of “those interests that [they are] responsible for protecting, the grounds [for it] … and the seriousness of its effects”, but also “the nature and gravity of the failings found by the Court”\textsuperscript{35}. Thus, the principle of “Convention loyalty”\textsuperscript{36} which underlies the principle of subsidiarity is reflected in the hybridisation of the national and European forms of protection for fundamental rights.

B. The domestic courts have a particular status among the national authorities to which the principle of subsidiarity applies

1. The domestic courts, which have responsibility for giving effect to the right to an effective remedy enshrined in Article 13 of the Convention, contribute to effective compliance with European standards, and also to disseminating and deepening those standards.

On a day-to-day basis, they are the first, at all levels of jurisdiction, to conduct an in-depth review of the domestic law’s compatibility with the rights and freedoms guaranteed by the Convention. In particular, they ensure that the harmonisation of competing rights conducted by the legislature does not exceed the national margin of appreciation, the extent of which is assessed in the light of the criteria established by the Court. Thus, the Conseil d’Etat has, inter alia, examined whether the special rules on access to data permitting identification of a sperm or ova donor were compatible with the Convention\textsuperscript{37}. Where the Court finds a violation, the domestic courts also ensure, using their powers to make orders, that the administrative authorities

\textsuperscript{28} CEDH 31 October 1995, \textit{Papamichalopoulos and Others v. Greece}, no. 14556/89, §34.
\textsuperscript{29} See CEDH, Grand chamber, 13 July 2000, \textit{Scozzari and Giunta v. Italy}, no.39221/98, § 249; see, for a practically word-for-word repetition of this reasoning: CE, Sect., 4 October 2012, \textit{Baumet}, no. 328502, pt. 7.
\textsuperscript{33} "Déclaratoire ne signifie pas incantatoire ”, S. van Coester’s conclusions on CE, Ass., 30 July 2014, \textit{Vernes}, no. 358564.
\textsuperscript{34} See on this point, J. Lessi and L. Dutheillet de Lamothe, "Première encoche de la chose inconstitutionnellement décidée ”, \textit{AJDA}, 2014, p. 1929.
\textsuperscript{37} CE, Opinion, 13 June 2013, \textit{M. Molenat}, n°362981.
do their utmost to bring it to an end, if necessary by repealing a provision of domestic law. In addition, in developing their case-law, the domestic courts are obliged to “take into consideration” the Court’s judgments, although these are not binding erga omnes in the majority of legal traditions. In the majority of these traditions, however, the Court’s judgments enjoy genuine persuasive force, and even a fairly clear interpretative authority. This has been the case at the French Conseil d’État since 1996, although this significant but implicit change has gone largely unnoticed. Only very recently, the Conseil d’État had occasion, taking into account the Court’s relevant case-law and the positive obligations arising from it, to review the lawfulness of a ministerial circular on the issuing of certificates of nationality to children born abroad to a French person who has used a surrogacy agreement. When the Court’s case-law is taken into account in this loyal and attentive way, the criteria for interpreting the Convention are clarified in a consistent manner, although the Convention’s scope sometimes includes, transversally, situations calling for a range of legal classifications in domestic law. This is particularly so with regard to the right to a fair hearing and the concept of “possessions” within the meaning of Article 1 of Protocol No. 1, both of which have been defined broadly. In consequence, the principle of subsidiarity has been accompanied by

38 See, with regard to the quashing of the implicit refusal to repeal the Legislative Decree of 6 May 1939 on Monitoring of the Foreign Press, amending section 14 of the Press Freedom Act of 29 July 1881, and the order issued to the Prime Minister to repeal that legislative decree: Conseil d’État, 7 February 2003, GISTI, no. 243634; this judgment made it possible for the Conseil d’État to develop its case-law in favour of strengthening its judicial review in this area (Conseil d’État (full court), 2 November 1973, SA Librairie Masspero, no. 82590; Conseil d’État (Section), 9 July 1997, Association Ekin, no. 151064), following the Court’s judgment of 17 July 2001 in Association Ekin v. France, finding that those domestic provisions were in violation of Articles 10 and 14 of the Convention. This coincided with the analysis submitted by the Government Commissioner, Martine Denis-Linton, in her conclusions in the above-cited case of Association Ekin.

39 See, particularly with regard to German constitutional law: the obligation to take the Court’s judgments into due account (“Berücksichtigungspflicht”), BVerfGE, 2 BvR 1481/04, 14 October 2004, Görgülü, following the Court’s judgment in Görgülü v. Germany (no. 74969/01, no. 74969/01, 26 February 2004); with regard to French constitutional law: see Article 55 as interpreted by the Constitutional Council, no. 86-216 DC of 3 September 1986, Loi relative aux conditions d’entrée et de séjour des étrangers en France, cons. 6 (on this point, see S. von Coester’s conclusions on Conseil d’État (Section), 4 October 2012, Baumet, cited above).

40 The judgments of the European Court of Human Rights were only relatively binding: Conseil d’État, 24 November 1997, Ministre de l’économie et des finances v. société Amibu, no. 171929.

41 Conseil d’État (full court), 14 February 1996, Mauble no. 132369, with regard to whether Article 6 of the European Convention on Human Rights applied to the holding of public hearings before the Bar Council. In a judgment of 15 April 2011 concerning the system of police custody, the French Court of Cassation, sitting as a full court, explicitly recognised the interpretative authority of the Strasbourg Court’s judgments.

42 Conseil d’État, 12 December 2014, Association juristes pour l’enfance, no. 367324, X. Domino’s conclusions.

43 See, particularly with regard to the functioning of the regional audit offices: Conseil d’État, 30 December 2003, M. Beausoleil et Mme Richard, no. 251120, following the Court’s admissibility decision of 7 October 2003 in Richard-Dubarry v. France (no. 53929/00); with regard to the functioning of jurisdictional organs of professional associations: Conseil d’État (full court), 14 February 1996, Mauble, no. 132369, following the Court’s judgment in Diennet v. France (26 September 1995, Series A no. 325-A); with regard to the functioning and organisation of the independent administrative authorities: Conseil d’État (full court), 3 December 1999, Didier, no. 207434. See, on this point, GAJA, 19th ed., Dalloz, no. 101. See also, with regard to whether legalising acts are compatible with Article 6 § 1 of the Convention: Conseil d’État, 23 June 2004, Société Laboratoires Genevrier, no. 257797; Conseil d’État (Opinion), 27 May 2005, Provins, no. 277975, and now Constitutional Council, no. 2013-366 QPC (preliminary ruling on constitutionality), of 14 February 2014.

44 See, particularly as regards the extensive interpretation of this concept in tax law: Conseil d’État, 19 November 2008, Société Getecom, no. 292948. Existing claims (Stran Greek Refineries and Stratis Andreadis v. Greece, 9 December 1994, Series A no. 301-B), but also those which are inexistant but amount to a “legitimate expectation” (Draon v. France [GC], no. 1513/03, 6 October 2005) are included in this concept, provided that their proprietary interest has a “sufficient basis in national law” (Kopecký v. Slovakia [GC], no. 44912/98, ECHR 2004-IX). See, in the light of that case-law, concerning the final nature of sums paid to the victim of a medical error on the basis of case-law that is no longer in force: Conseil d’État, 22 October 2014, Centre hospitalier de Dinan, no. 368904.
a strengthening of the review conducted by the national courts (especially in the areas of immigration law and “internal measures” within prisons\textsuperscript{45}), but also by an increase in their powers to make orders, especially in interlocutory appeals where there exists a clear and present threat to an individual’s life\textsuperscript{46}.

2. The authority of the Court’s case-law vis-à-vis the supreme national courts is based on the quality of the dialogue that it maintains with them.

As stated in the first paragraph of Article 35 of the Convention, a case may only be referred to the Court once all domestic remedies have been exhausted. Once that has been done, the Court cannot, unless it “act[s] as a court of third or fourth instance”\textsuperscript{47}, “deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention”\textsuperscript{48}. For the same set of facts, and assuming that the criteria established in the Court’s case-law have been complied with, there must exist “strong reasons [for the Court] to substitute its own view for that of the domestic courts”\textsuperscript{49}. In any event, execution of its judgments cannot render domestic judicial decisions unenforceable, nor does it confer a right to have them re-examined\textsuperscript{50}. [Indeed, there is “an imbalance between administrative decisions, which are continually open to challenge, and judicial decisions, [which] cannot be changed”\textsuperscript{51}, except where ad hoc proceedings exist. In France, although such proceedings were introduced to the criminal law by an Act of 15 June 2000\textsuperscript{52}, this is not the case for civil\textsuperscript{53} or administrative law\textsuperscript{54}. In addition, where it is provided for, and in line with the Committee of Ministers’ recommendation\textsuperscript{55}, re-examination must only be used in “exceptional circumstances.”

\textsuperscript{45} See, on this point: with regard to the transfer of a prisoner from one type of prison (“maison centrale”) to another ("maison d’arrêt"): Conseil d’État (full court), 14 December 2007, Boussouar, no. 310100; with regard to reclassification of employment: Conseil d’État (full court), 14 December 2007, Planchenault, no. 290420; with regard to a prisoner’s placement under the regime of security rotations: Conseil d’État (full court), 14 December 2007, Payet, no. 306432; with regard to a measure placing a prisoner in solitary confinement: Conseil d’État, 17 December 2008, Section française de l’observatoire international des prisons, no. 293786; with regard to a decision to transfer prisoners between prisons of the same type, subject to their freedoms and fundamental freedoms being in issue: Conseil d’État, 27 May 2009, Miloudi, no. 322148 and Conseil d’État, 13 November 2013, Puci, no. 355742; with regard to a prisoner’s request to change prison, subject to his or her freedoms and fundamental freedoms being in issue: Conseil d’État, 13 November 2013, Agamemnon, no. 3378720; with regard to prisoners’ visiting rights: Conseil d’État, 26 November 2010, Ministre d’État, Garde des sceaux, ministre de la justice v. Bompard, no. 329564; with regard to the decision to place a prisoner who was subject to the restricted regime in a so-called “closed doors” detention sector: Conseil d’État, 28 March 2011, Garde des sceaux, ministre de la justice v. Bennay, no. 316977.

\textsuperscript{46} See, particularly with regard to prisoners’ rights: Conseil d’État (order), 22 December 2012, Section française de l’observatoire international des prisons, no. 364584.

\textsuperscript{47} CEDH 24 November 1994, Kemmache v. France, no.12325/86, § 44.


\textsuperscript{49} CEDH 7 February 2012, Grand chamber, Von Hannover v. Germany, no. 40660/08, § 107.

\textsuperscript{50} CEDH, Grand Chamber, 30 June 2009, VGT v. Switzerland, (no.2), n032772/02, §89. See also: CE 11 February 2004, Chevrol, no. 257682.


\textsuperscript{53} Court of cassation, Social Division, 30 September 2005, no. 04-47130.

\textsuperscript{54} CE, Section, 4 October 2012, M. Baumet, no.328502.

\textsuperscript{55} Recommendation no. R (2000)2 of the Committee of Ministers to the member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted by the Committee of Ministers on 19 January 2000.
and subject to the proviso that it is “the most efficient, if not the only, means of achieving restitutio in integrum”\textsuperscript{56}.]

However, although the principle of subsidiarity has governed the European system of protection for fundamental rights since its inception, it must not give rise to such complexity that its effectiveness would be reduced or even compromised. This requirement obliges the States Parties and the Court to engage in ongoing permanent discussion on improving the machinery for its implementation.

II. Placing subsidiarity at the service of effectiveness has become a shared high-priority objective, and several levers must be applied to achieve it.

In line with the Interlaken (2010), Izmir (2011) and Brighton (2012) Declarations, the European system for the protection of fundamental rights has entered a new phase in its development, just at the moment when the so-called “age of subsidiarity”\textsuperscript{57} is beginning. This requires collaborative and fruitful research into new tools for implementing the principle of subsidiarity, which will be referred to explicitly in the Preamble to the Convention once Protocol No. 15 has entered into force.\textsuperscript{58} [Co-ordination between national and European protection systems, which are themselves constantly developing, is necessary to maintain a balance between unity and diversity, but its complexity must not result in a de facto neutralisation of the right of individual petition, nor to abandonment of European standards.] Thus, in the dialogue between the national authorities and the Court, loyalty should not indicate either automatic alignment or systematic mistrust; on the contrary, it presupposes an art of collaborative convergence and a spirit of mutual goodwill. Dialogue must be both dialectic (that is, constructive, through progress on both sides) and conclusive (in that the Grand Chamber’s judgments are acknowledged to have maximum persuasive authority and even genuine interpretive authority). Nothing would be more damaging to the protection of rights and to their legal certainty than exacerbated, drawn-out and fundamental disagreement between the national courts and the European Court of Human Rights. It is for this reason that we need clearer and more effective procedures and rules, at several levels, for how this dialogue is to be conducted.

A. Firstly, upstream and as a preventive measure, the national authorities must include a systematic, formalised and in-depth analysis of compatibility with the European safeguards when drafting new texts. This preliminary analysis could be included in the preparatory documents or in the impact studies which accompany draft laws and regulations, and must appear

\textsuperscript{56} The Recommendation of 19 January 2000 lays down two conditions: on the one hand, the injured party must continue to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening; and, on the other hand, the judgment of the Court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.


\textsuperscript{58} Protocol No. 15 was opened for signature by the High Contracting Parties on 24 June 2013. A bill authorising ratification of this protocol was registered with the Presidency of the French Senate on 2 July 2014. To date, 23 States Parties have signed it. “This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all of the High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol…” (Article 7 of the Protocol).
clearly in the reasoning for individual judicial decisions. It is from this perspective that the Court will assess, where necessary, the quality of proceedings and the underlying legislative choices, as it was able to do in the Animal Defenders case. This stress test requires the Contracting States to have an in-depth and up-to-date knowledge of the Court’s case-law. However, it also implies, in return, an effort to provide explanations for and continuity in the interpretation of the Convention. In this respect, the national authorities expect the Court to take positions which are stable and coherent and to provide solid case-law positions, so that they can rule with certainty on the situations submitted to them without running the risk of subsequent disavowal. The domestic courts must also be able to appropriate their margins of appreciation without hesitation or self-censorship. In which areas do these margins of appreciation exist? In particular, in which are they excluded or very limited? The national courts have very specific expectations on these issues.

B. Secondly, where a thorny question arises with regard to interpretation, the national authorities must themselves attempt to show openness, even extraversion, by incorporating the content of European standards and elements of comparative law from the 47 States Parties into their debates. Through documented analysis, they must substantiate the existence, or not, of a European consensus, since this analysis is at the heart of the reasoning of the national courts and the Court. Such analysis must not lead to a systematic abandonment of specific national features, or to an automatic adoption of majority or, a fortiori, minority standards. More often than not, given the multiplicity of assessment criteria, this analysis will take the form of evaluating the degree of convergence between the various national systems. On this point, the States expect the Court to be transparent in its use of the available data on comparative law and to explain the scale for assessing consensus and identifying its emergence: when and how does a consensus appear? What is its content? While these are sensitive and open-ended questions, more precise benchmarks would certainly be appreciated.

C. Thirdly, in accordance with their positive obligations, the national authorities must secure tangible and effective protection of the Convention safeguards against any form of public inertia or any interference by a third party in the exercise of a right. In this respect, the States are particularly attentive to the manner in which the Court specifies the nature and scope of these positive obligations, and how it reconcile them with the principle of subsidiarity and, where appropriate, with the existence of a national margin of appreciation or a European consensus. On the basis of which criteria does the Court identify a positive obligation? How much latitude do the States enjoy in implementing their positive obligations? What form does the Court’s supervision take, depending on whether it identifies interference or a failure to comply with a positive obligation? It would be helpful if these points were to be clarified.

D. Fourthly, where the national courts and the European Court differ in their assessment, the national authorities must engage in a loyal and constructive dialogue. Where this divergence arises from a decision by a lower court, the relevant national supreme court must play its role as a regulator in full, by explicitly applying the interpretation criteria identified in the Strasbourg Court’s established case-law. This domestic dialogue between lower and supreme courts occasionally provides an opportunity to specify the relevant criteria for weighing up the differing interests at stake, as the Von Hannover v. Germany judgments showed. In exceptional cases, however

59 CEDH, Grand chamber, 22 April 2013, Animal Defenders v. United Kingdom, no.48876/08, §116.
60 By a judgment of 24 June 2004, Von Hannover v. Germany (no. 59320/00, ECHR 2004-VI), the Court held that the German courts had not struck a fair balance between the protection of private life and freedom of expression.
the national supreme court may itself decide not to comply with a Chamber judgment and, in so doing, invite the national authorities to request a referral to the Grand Chamber on the basis of Article 43 of the Convention. This, for example, enabled a dialogue to be opened on the compatibility of a national provision on hearsay evidence with paragraphs 1 and 3 of Article 6. In any event, once the Court has ruled in a Grand Chamber judgment, the debate must then be closed.

E. Fifthly, the national authorities must seek to promote this high-level dialogue

**expeditiously and pre-emptively.** In this connection, Protocol No. 16 envisages the introduction of an advisory opinion procedure before the Grand Chamber, in order to clarify the Convention’s provisions and thus provide additional guidance in preventing violations of them. [This optional procedure, to be activated on the initiative of the “highest national courts” when a case is pending before them, is directly inspired by the mechanism set out in Article 43. It does indeed concern “questions of principle relating to the interpretation or application of the rights and freedoms

61 On the ground, in particular, that the contested photographs did not concern a debate of general interest and that the criterion of spatial isolation used by those courts was insufficient to ensure effective protection of the applicant’s private life. Additional photographs having been published, the Federal Court of Justice, in a judgment of 6 March 2007 (no. VI ZR 51/06), and subsequently the Federal Constitutional Court, in a judgment of 26 February 2008 (no. 1 BvR 1606/07), took up the assessment criteria identified by the Strasbourg Court in its judgment of 24 June 2004. In a Grand Chamber judgment of 7 February 2012, *Von Hannover v. Germany* (no. 2) ([GC], nos. 40660/08 and 60641/08, ECHR 2012), the Strasbourg Court found that “in accordance with their case-law, the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life” (§124). The Court also noted that “the national courts explicitly took account of [its] relevant case-law” (§125). The *Von Hannover* (no. 2) judgment of 7 February 2012 was subsequently confirmed by the *Von Hannover v. Germany* (no. 3), judgment (no. 8772/10, 19 September 2013).

61 In a Chamber judgment (Al-Khawaja and Tahery v. the United Kingdom, nos. 26766/05 and 22228/06, 20 January 2009), the European Court of Human Rights held that the applicant’s convictions had been based solely or to a decisive degree on the statements of witnesses whom the applicant had been unable to examine or have examined and, consequently, that there had been a violation of Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention. By a judgment of 22 May 2009, R. v. Horncastle ([2009] EWCA Crim 964), the UK Court of Appeal unanimously dismissed the appeals of four defendants who had been convicted on the basis of statements of absent victims, on the ground, in particular, that the Convention did not create any absolute right to have witnesses examined and that the balance struck by the 2003 Criminal Justice Act was legitimate and consistent with the Convention. By a judgment of 9 December 2009, R. v. Horncastle ([2009] UKSC 14), the Supreme Court of the United Kingdom unanimously upheld the above-mentioned decision by the Court of Appeal. In that judgment, Lord Phillips stated that, although domestic courts were required by the Human Rights Act 1998 to “take account” of the Strasbourg jurisprudence in applying principles that were clearly established, on rare occasions, where a court was concerned that the Strasbourg judgment did not sufficiently appreciate or accommodate some aspect of English law, it might decline to follow the judgment. He considered that the Court’s judgment of 20 January 2009 was such a case. Following all of these judgments, the case of *Al-Khawaja v. the United Kingdom* was referred to the Grand Chamber of the European Court of Human Rights. By a judgment of 15 December 2011, the Grand Chamber stated that “even where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1, where a conviction is based solely or decisively on the evidence of absent witnesses”. However, “because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales... and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards”. “The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place”. The Grand Chamber considered that the procedural safeguards contained in the 1988 and 2003 Acts were, in principle, “strong safeguards”, and that in this case, Mr Al-Khawaja’s rights had not been breached.
defined in the Convention or the Protocols thereto”. While those opinions would not be binding, the interpretation they contain would nonetheless be “analogous in [their] effect to the interpretative elements set out by the Court in judgments and decisions”\(^{62}\). If the hoped-for benefits, especially greater fluidity in the dialogue between courts, are to be achieved, then a two-fold criterion must be met. On the one hand, the “highest national courts” must enable the Court to appreciate the utility of their request and respond to it, by indicating specifically and in detail the relevant elements of the legal and factual situation\(^ {63}\). At the same time, the Court, which will have discretion\(^ {64}\) in whether or not to accept a request for an opinion, must not be too strict in filtering requests, provide reasons for any refusal to examine the merits of a request, and, where it does agree to examine a request, grant it priority.

Lastly, although my comments have concerned only the role of the national authorities and their expectations, I believe that it is crucial to combine any initiatives concerning those authorities with continued reform of the Court’s internal functioning. As the Brighton Declaration\(^ {65}\) emphasised, considerable progress has already been made in prioritising case processing and streamlining procedures, particularly with regard to inadmissible or repetitive applications. Thanks to those efforts, the number of pending applications fell by 22% in 2013 and by 28% between January and November 2014.

However, other steps must be taken over the coming years in order to “enhance the ability of the [European] system to address serious violations promptly and effectively”\(^ {66}\). In this connection, perhaps a possibility should be created, under the supervision of the Court and of the Committee of Ministers, to send applications back to the domestic courts where there has been a failure to comply with the Court’s clear and consistent case-law. Such a procedure would make it possible to lighten the Court’s workload and empower those courts. An amendment to the Convention to this effect should be envisaged.

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Is subsidiarity a “double-edged sword”? Yes, if we understand this expression to mean that subsidiarity is based on a comprehensive and dialogue-based sharing of responsibility between the national authorities and the Court. No, if we seek through this approach to oppose two visions of fundamental rights, one national and the other European, given that common standards can exist only if they are rooted in national practices, and, equally, no effective and dynamic protection is possible without external review, entrusted to an international Court. In reality, these two aspects of subsidiarity are entwined on the same side of the coin of fundamental rights, with one – the national aspect – prominently in the foreground, and the other – the European aspect – in the background, not hidden, but in a supervisory role and acting as an ultimate safety net.

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\(^{63}\) The explanatory report on Protocol No. 16 refers to the following factors: “the subject matter of the domestic case and relevant findings of fact made during the domestic proceedings, or at least a summary of the relevant factual issues; the relevant domestic legal provisions; the relevant Convention issues, in particular the rights or freedoms at stake; if relevant, a summary of the arguments of the parties to the domestic proceedings on the question; if possible and appropriate, a statement of its own views on the question, including any analysis it may itself have made of the question”.

\(^{64}\) A five-judge panel of the Grand Chamber will rule on whether to accept a referral request.

\(^{65}\) Conference on the Future of the European Court of Human Rights, Brighton Declaration, April 2012, p. 5.