DIALOGUE BETWEEN JUDGES 2015

"Subsidiarity: a two-sided coin?"

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

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Dialogue between judges

Proceedings of the Seminar
31 January 2015

*"Subsidiarity:
a two-sided coin?"*

Strasbourg, January 2015

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Solemn Hearing
on the occasion of the opening of the judicial year 2015

Dean Spielmann

President
of the European Court of Human Rights

Welcome speech

Presidents, Ladies and gentlemen, Dear friends,

I am very pleased to see so many of you gathered here today for our traditional annual seminar.

Once again, your attendance illustrates your interest in this meeting between the European Court of Human Rights and the Supreme Courts of Europe. The presence amongst us of university scholars and Government Agents before the Court will, I am sure, contribute to the interest of the discussions this afternoon.

I should like to thank Judges Raimondi, Bianku, Nußberger, Sicilianos, Lemmens and Laffranque, who have organised the seminar with the assistance of Roderick Liddell.

We are fortunate enough to have two speakers here this year whom I have no hesitation in describing as exceptional, and it is an honour for me to welcome them: they are Sabino Cassese, judge at the Italian Constitutional Court, and Jean-Marc Sauvé, Vice-President of the French *Conseil d'État*. They have been friends of our Court for many years.

Every year our seminar gives us the opportunity to explore different aspects of the Convention system together. Last year we devoted our reflections to the implementation of the Court's judgments, whereas today we are going to examine a concept which comes into play at a stage prior to European scrutiny and lies at the heart of the Convention mechanism. I am of course talking about subsidiarity.

As you know, the term subsidiarity does not appear in the Convention. What it means is that the task of ensuring compliance with the European Convention on Human Rights falls firstly to the domestic courts, with the Court intervening only in the event of a shortcoming on the part of the domestic courts.

The judgments which refer to the subsidiary role of the Convention mechanism are very old, since the Court referred to that concept as early as 1968 in the *Belgian Linguistic* case. Since then the principle has been reaffirmed many times, to the point where it has become one of the keystones of our system. Subsidiarity is indeed at the heart of our relations with the national courts. At our bilateral meetings, be these in Strasbourg or the supreme courts, it is a central element of our discussions. It constitutes, in a way, a dividing line in the application of the Convention between the national courts and our Court. All this transpires from what we also call shared responsibility. This expression, which is more recent and is used increasingly frequently, is, fundamentally, only another way of talking about subsidiarity.

The principle of subsidiarity is embodied in the obligation to comply with certain rules, including procedural rules, the primary one being the obligation on the applicant to exhaust domestic remedies. The Court must respect the autonomy of the domestic legal systems, but on condition that the domestic courts apply the Convention properly. In any event, the proper application of the principle of subsidiarity contributes to the effectiveness of the system, since the division of powers between the domestic courts and the European Court reinforces the primary responsibility of the domestic courts and contributes to conferring on the domestic courts the role of principal actors in the protection mechanism. Respect for the rights contained in the Convention is therefore ensured by different actors, who, each according to their own role, enrich and strengthen the protection of human rights.

A corollary of subsidiarity is the margin of appreciation that leads our Court to impose limits on itself in the exercise of its scrutiny where it considers that the national authorities are better placed than the Court to resolve a dispute. However, whilst no one contests the merits of subsidiarity, we know that the margin of appreciation has its advocates and its critics. As our friend Laurence Burgorgue-Larsen recently lamented, in one of her insightful articles, "the national margin of appreciation is everywhere", including in Protocol No. 15. I am sure that the question of the margin of appreciation will be discussed today.

Lastly, the national authorities contribute to guaranteeing the proper application of the principle of subsidiarity, for example by providing for effective domestic remedies or examining the compatibility of draft laws with the Convention. The role that Government Agents may play in this respect is fundamental.

As I said in 2014, at the opening of the judicial year, we are witnessing more and more often, in our relations between domestic and international courts, the replacement of the pyramid structure by a network system.

Allow me to quote you, dear Jean-Marc Sauvé. In 2010, during a conference at the *Conseil d'État*, you looked back – and I quote – "without nostalgia on the charms of a bygone era in which the national judge lived in splendid isolation". You are absolutely right: the national judge is no longer alone. Today the actors of subsidiarity are many and varied. Many of them are assembled here today, alongside legal commentators and bloggers. This therefore promises to be an occasion of rich and lively debate.

I do not wish to delay so will now immediately give the floor to my colleague and friend Julia Laffranque, who has very kindly agreed to chair this seminar.

Thank you for your attention.

Julia Laffranque

Judge of the European Court of Human Rights

Presidents, Ladies and gentlemen, Dear friends,

I am very pleased to see so many of you gathered here today for our traditional annual seminar.

"But when the countries of the Council of Europe are looked at as a whole, the influence of the Strasbourg Court has been beneficial. ... Europe needs the Convention and Europe needs the Court. I have no hesitation in expressing my conclusion that Strasbourg is a powerful force for good." These are quite recent words of The Right Honourable the Lord Phillips of Worth Matravers, founding President of the Supreme Court of the United Kingdom, from his lecture at the Centre of European Law, Dickson Poon School of Law, King's College London, on 17 June 2014[01].

As of January 2015 there are in today's Europe many difficult challenges for and threats to the enjoyment of fundamental human rights. In such a context, the value of the European Convention on Human Rights cannot be over-emphasised; the European Court of Human Rights takes its mission seriously and will continue to do so in the future.

Yet the European Court of Human Rights cannot be solely responsible for enforcing human rights standards across Europe. Upholding human rights and the rule of law is not only the duty of the Strasbourg Court, it is also a national task – that of the legislature, the executive and the courts.

The Parliamentary Assembly of the Council of Europe (PACE), last year on international human rights day (10 December 2014), urged the States to match the "extraordinary contribution" and progress achieved by the Strasbourg Court by reinforcing the principle of subsidiarity and upholding European Convention standards better at national level[02]. PACE's Legal Affairs Committee has written about the "shared responsibility"[03] of the States, along with the Court, in order to implement the European Convention on Human Rights effectively.

01 http://www.kcl.ac.uk/law/newsevents/newsrecords/2013-14/assets/Lord-Phillips-European-Human-Rights--A-Force-for-Good-or-a-Theat-to-Democracy-17-June-2014.pdf (visited in March 2015).

02 See PACE web-site: Upholding human rights: a national task as well as one for the Strasbourg Court: http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5345&lang=2&cat=5; as well as Committee on Legal Affairs and Human Rights Report: The effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond, Rapporteur: Mr Yves Pozzo di Borgo, France, Group of the European People's Party; AS/Jur (2014) 33: http://website-pace.net/documents/19838/1041670/20141210-BeyondBrighton-EN.pdf/9b39d1d4-e9b2-44ea-baaa-901ced892426 (both visited in March 2015).

03 *Ibid.* (Report, p. 4, para 5).

The High-level Conference meeting in Brussels on 26 and 27 March 2015 on the initiative of the Belgian Chairmanship of the Committee of Ministers of the Council of Europe will be devoted to "Implementation of the European Convention on Human Rights, our shared responsibility"[04].

However, sharing responsibility for the protection of human rights is to be contrasted strongly with any idea of shifting responsibility. There are no outsiders or insiders within the Convention protection mechanism, subsidiarity should allow us all to contribute to building a stronger human rights regime in Europe, to the greater benefit of those who are protected by it.

Ladies and gentlemen, let me welcome you to the 2015 edition of the "Dialogue between judges", to this seminar entitled "Subsidiarity: a two-sided coin?", and express my hope that the year will continue more pleasantly than it has started in this part of the world.

One of the "cornerstones" ("*principes fondamentaux*") of the Convention system[05], subsidiarity is analysed in detail in the background paper for the seminar which you have all had the opportunity to peruse[06]. Subsidiarity has a mirror-image effect, it is two sides of the same coin; thus the order of our seminar's sub-headings could easily be switched round, with the role of the national authorities first and that of the Convention mechanism second. In any event there is inevitably a considerable degree of overlap between the two sides.

There is also some correspondence between this year's topic and the subjects that we have already addressed in previous seminars[07]. Subsidiarity, looking at it from different angles, has always been present in our discussions.

In fact the principle of subsidiarity in the Convention protection system has been gradually evolving. It was first developed in the longstanding case-law of the European Court of Human Rights[08], then it was addressed at the intergovernmental conferences and has been confirmed by the Brighton Declaration[09]. Only quite recently was it decided to enshrine the principle in the text of the preamble to the Convention: it will find its place there as soon as Protocol No. 15[10], which was opened for signature in June 2013, enters into force.

The idea of subsidiarity is also present in the advisory opinion procedure created by Protocol No. 16 to the Convention[11] with the potential for the Strasbourg Court to aid national courts in their consideration of Convention issues so that problems can be resolved at national level.

04 A similar conference, focusing on "Application of the European Convention on Human Rights and Fundamental Freedoms on national level and the role of national judges" was held in Baku from 24-25 October 2014, under the auspices of the Azerbaijani Chairmanship of the Committee of Ministers (May-November 2014). One of the main conclusions of another recent conference on the long-term future of the Convention system, held in Oslo on 7 and 8 April 2014, was that the reform process should not be limited to the Court, but include other organs of the Council of Europe, including the Committee of Ministers, and, not least, national implementation of the Convention rights; see Geir Ulfstein, "Closing the Conference – Summing up", The long-term future of the European Court of Human Rights, Conference Proceedings, Council of Europe 2014, p. 189, http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Proceedings-Oslo-2014.pdf (visited March 2015).

05 See Conférence devant le Conseil d'État Paris, 19 April 2010, Introductory speech by Jean-Paul Costa, http://www.echr.coe.int/Documents/Speech_20100419_Costa_Paris_FRA.pdf (visited March 2015), at p. 1.

06 Seminar to mark the official opening of the judicial year "Subsidiarity: a two-sided coin?" 1. The role of the Convention mechanism. 2. The role of the national authorities. Background paper, 30 January 2015. Prepared by the Organising Committee, chaired by Judge Laffranque and composed of Judges Raimondi, Bianku, Nußberger and Sicilianos, assisted by R. Liddell of the Registry. This paper, which does not reflect the views of the Court, is intended to provide a framework for the rapporteurs and a basis for the seminar discussions: http://www.echr.coe.int/Documents/Seminar_background_paper_2015_ENG.pdf (visited March 2015).

07 *E.g.*, among the most recent ones: Seminar - Dialogue between judges 2014: "Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?"; Seminar - Dialogue between judges 2012: "How can we ensure greater involvement of national courts in the Convention system?". Background papers of both seminars available at http://www.echr.coe.int/Pages/home.aspx?p=court/events/ev_sem&c= (visited March 2015).

08 *E.g.*, Case "*relating to certain aspects of the laws on the use of languages in education in Belgium*" (merits), 23 July 1968, § 10, Series A no. 6, and *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.

09 Adopted at the High-level Conference on the future of the European Court of Human Rights (Brighton, United Kingdom, 18-20 April 2012): http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH_2012_007_en.pdf (visited March 2015).

10 Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 24 June 2013, Council of Europe Treaty Series - No. 213.

11 Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 2 October 2013, Council of Europe Treaty Series - No. 214.

Allow me to go further back in history and just say something about the very origin of the principle of subsidiarity as such. The Latin term *subsidium or subsidiarius* seems to have had a military connotation, referring to fresh troops or reinforcements[12], but the notion as a principle for the organisation of society is usually attributed to the Catholic Church in the late nineteenth century. It can however be traced back to Aristotle and Saint Thomas Aquinas. Later on it was Althusius, a Calvinist theoretician, who expressed some thoughts about subsidiarity and federalism in order to maintain the autonomy of his city[13]. At broadly the same time libertarian ideas were being aired by those seeking to define the relationship between the State and the individual. In succeeding centuries Locke, Montesquieu and von Humboldt were concerned to limit the intervention of the State, with this concept being reflected in some national constitutions. Subsidiarity is a well-known principle in federal States.

Nevertheless it is Pope Leo XIII, in his *Rerum Novarum* of 1891, who is traditionally credited with establishing subsidiarity as a fundamental principle with the aim of curbing excessive State power while at the same time stressing the State's obligation to protect vulnerable persons[14]. Against a background of increasing totalitarianism Pius XI's *Quadragesimo Anno* in 1931 set out the classical statement of the "principle of subsidiary function" or "das Prinzip der Subsidiarität": "Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is injustice and at the same time a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do"[15].

Fast forward to 1985, when the European Charter of Local Self-Government was adopted in Strasbourg. Article 4 § 3 of this document embodies the principle of subsidiarity by stating that public responsibilities must generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should mean weighing up the extent and nature of the task and the requirements of efficiency and economy.[16]

In the meantime, there were discussions in the 1970s and 80s on institutional reform within what was then the European Communities, with to a certain extent a growing feeling that Europe should undertake a move towards the principle of subsidiarity. However, it was not until the Maastricht Treaty in 1992 that the principle was given formal status in the primary law of the EU[17]. The current formulation is to be found in Article 5 § 3 of the Treaty on European Union (consolidated version following the Lisbon Treaty)[18].

12 See Law Dictionaries and The Latin Lexicon: http://latinlexicon.org/definition.php?p1=2056951 (visited March 2015).

13 For the history of subsidiarity see Emil Kirchner, in *Encyclopedia of Democratic Thought*, Paul Barry Clarke, Joe Foweraker (eds.), New York: Routledge, 2001, pp. 688-691.

14 *Rerum Novarum*, Encyclical of Pope Leo XIII on Capital and Labor, Libreria Editrice Vaticana: http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html (visited March 2015).

15 *Qudragesimo Anno*, Encyclical of Pope Pius XI on Reconstruction of the Social Order to our Venerable Brethren, the Patriarchs, Primates, Archbishops, Bishops and other Ordinaries in Peace and Communion with the Apostolic See, and likewise to All the Faithful of the Catholic World, para 79, Libreria Editrice Vaticana: http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html (visited March 2015).

16 European Charter of Local Self-Government, Strasbourg, 15. October, 1985, Council of Europe Treaty Series - No. 122.

17 The Maastricht Treaty. Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community (and the Treaty on European Union). Maastricht, 7 February 1992. Article 3 b was to be inserted: '*The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.*'

18 Consolidated version of the Treaty on European Union, as adopted 2010/C/83/01 and as of March 2015 (Official Journal C 326, 26/10/2012 pp. 0001 ff.).

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The principle of subsidiarity is also reflected in the Charter of Fundamental Rights of the European Union (Article 51)[19]. Whereas the EU concept places a limit on EU action where the EU goals in issue can be successfully achieved at local level, the Convention principle has a primarily positive perception in relation to the Contracting Parties.

And this brings us back to Strasbourg. Even though subsidiarity may be seen here, to a certain extent, as a limit to the Convention's supervisory mechanism, NGOs have expressed some concern, for example in connection with the Izmir Declaration, arguing that the principle of subsidiarity does not, however, mean that States can place inappropriate pressure on the Court with regard to its interpretation and application of the Convention[20]. Subsidiarity requires, above all, positive action on the part of the States to uphold the Convention guarantees; in fulfilling their duties in relation to the exhaustion of domestic remedies, national authorities are the primary guarantors of fundamental rights and freedoms.

It is relevant to conclude this brief presentation on the history and different notions of subsidiarity by referring to another Pope, to complete the circle, this time Pope Francis, who came to Strasbourg last November to speak to the European Parliament and the Council of Europe. In his speech, he pointed out that the Court represented the Conscience of Europe as regards human rights and dignity[21]. He also emphasised the centrality of the human person, who would otherwise be at the mercy of the latest trends and powers, and the central role of the ideals which have shaped Europe since its inception, such as peace, subsidiarity, reciprocal solidarity, and humanism based on respect for the dignity of the human person[22].

Ladies and gentlemen, on behalf of the organising committee of the annual seminar, I would like to thank you for coming here today; I hope that your discussions are fruitful and I encourage in particular the domestic courts and judges to visit the Court in the future – our doors are always open for our colleagues. I will now give the floor to our eminent speakers.

19 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, pp. 391–407).

20 See Joint statement for the High Level Conference on the future of the European Court of Human Rights, Izmir, Turkey, 26-27 April 2011: http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Amnesty%20International%20-%20Joint%20NGO%20Statement.pdf (visited July 2011).

21 "Je pense particulièrement au rôle de la Cour européenne des droits de l'homme, qui constitue en quelque sorte la ''conscience'' de l'Europe pour le respect des droits humains.", Speech by Pope Francis to the Council of Europe, Strasbourg, 25 November 2014, p. 33; also available at: http://www.voltairenet.org/article186047.html (visited March 2015).

22 Speech by Pope Francis to the European Parliament, Strasbourg, 25 November 2014, p.13; also available at: http://w2.vatican.va/content/francesco/fr/speeches/2014/november/documents/papa-francesco_20141125_strasburgo-parlamento-europeo.html (visited March 2015).

Sabino Cassese

Judge emeritus
of the Constitutional Court of Justice, Italy

RULING INDIRECTLYJUDICIAL SUBSIDIARITY IN THE ECTHR*

1. DEFERENTIAL STANDARDS OF REVIEW: FROM THE MARGIN OF APPRECIATION TO SUBSIDIARITY

The European Convention on Human Rights provides protection exceeding that ensured by national law, a protection that is based on certain common, shared, and therefore uniform principles (as is the case with European Union law[01]). This uniformity is balanced with respect for national identities, through the requirement of the prior exhaustion of national remedies (under Article 35(1) of the Convention, "the Court can only deal with the matter after all domestic remedies have been exhausted...")[02] and the doctrine of the margin of appreciation (leaving a certain degree of discretion to national governments, "a mild form of immunity"[03]).

Both the prior exhaustion requirement and the margin of appreciation doctrine regulate the interplay between legal orders and ensure judicial dialectics. However, while the first is legal in character, because it is established in the Convention, the second has a judicial nature, because it is the product of the Court's case-law.

While the first has been accepted as a common principle in international law, the second, introduced in 1958 and established with the *Handyside* case of 1976, has been criticised for its vagueness and incoherence, for being "a quirk of language", "an unfortunate Gallicism", "the most controversial 'product' of the ECtHR"[04].

* Paper for the Seminar on "*Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities*", held to coincide with the ceremony marking the official opening of the judicial year of the European Court of Human Rights, 30 January 2015, Strasbourg.
The author expresses his gratitude to Giuliano Amato, Barbara Randazzo, Marta Cartabia and Marco Pacini for their comments on previous versions.

01 In the context of which this development was noticed by Judge Alberto Trabucchi ("*un droit …à une protection juridique qui dépasse les limites traditionnelles de leur système national*") in a famous note on the *Van Gend en Loos case* (now in "La formazione del diritto europeo", *Quaderni della Rivista di diritto civile*, no. 14, Padua, Cedam, 2008, pp. 171-177). See also M. Cartabia, "Fundamental Rights and the Relationship among the Court of Justice, the National Supreme Courts and the Strasbourg Court", in *50th Anniversary of the Judgment in Van Gend en Loos*, CJEU Conference Proceedings 13 May 2013, Luxembourg, Office des publications de l'UE, 2013, p. 156.

02 The related principle of due consideration by a domestic tribunal, introduced by Protocol No. 14 into Article 35 of the Convention (now Article 35(3)(b)) for the purpose of "ensur[ing] that every case receives a judicial examination whether at the national level or at the European level, in other words, to avoid a denial of justice. The clause is also consistent with the principle of subsidiarity, as reflected notably in Article 13 of the Convention, which requires that an effective remedy against violations be available at the national level" (*Korolev v. Russia* (dec.), no. 25551/05, 1 July 2010, First Section decision on admissibility).

03 See D. Spielmann, *Allowing the Right Margin. The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, Centre for European Legal Studies, University of Cambridge, Faculty of Law, Working Paper Series, February 2012, p. 2.

04 D. Spielmann, *Allowing the Right Margin*, op. cit., p. 28. A detailed account of the margin of appreciation as subsidiarity is available in J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Leiden-Boston, Martinus Nijhoff, 2009, pp. 236 ff. The margin of appreciation doctrine is subject to multiple interpretations by the Strasbourg Court, such as in the recent case of *S.A.S. v. France* [GC], no. 43835/11, ECHR 2014 (wide margin of appreciation to leave room to the democratic process, in matters of general policy on which opinions may differ widely).

Deferential principles originating in law and in case law are common to many composite legal orders, such as the World Trade Organization (WTO) and the European Union[05].

As regards the WTO, deferential standards of review are provided by Article 176 of the Anti-Dumping Agreement, which rules out *de novo* reviews and evaluations of facts, while the Dispute Settlement Body allows for a "margin of appreciation", for example in light of the gravity of the breach[06], and uses the "necessity test" and the "least restrictive test" as margin-of-appreciation techniques[07].

As for the European Union, the Treaty on the European Union (Article 5(3)) provides that "[u]nder the principle of subsidiarity... the Union shall not act only if and in so far as the objectives or the proposed action cannot be sufficiently achieved by the Member States, either at central level or at the regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

The European Court of Justice has recognised a margin of discretion for national governments, on the assumption that "specific circumstances which may justify recourse to the concept of public policy may vary from one country to another"[08], or when community rights must be balanced with national rights[09], such as in the context of freedom of expression, or simply because diversities exist between the nations[10].

2. PROTOCOL NO. 15

Returning to Strasbourg, Protocol No. 15 has embedded the principle of subsidiarity into the legal system of the European Convention on Human Rights. The most important question is: is this a new principle, or is it simply the codification of a principle derived from the system[11] or established by the Court?

To answer this question, it is necessary to consider the genesis of Article 1 of this Protocol. The subsidiarity principle was first mentioned, in passing, in the "declaration" of the High Level Conference held in Izmir on 26-27 April 2011 (para. A.3).

05 Y. Shany, "Toward a General Margin of Appreciation Doctrine in International Law?", in *European Journal of International Law*, 2005, vol. 16, no. 5, pp. 907 ff.

06 WTO/DS 222/ARB Canada – Export Credits and Loan Guarantees for Regional Aircraft (15 February 2003), para. 3.44.

07 F. Fontanelli, "Whose Margin is it? State discretion and judges' appreciation in the necessity quicksand", available at http://ssrn.com/abstract=1687216, DS 363 (2009).

08 CJEU, C-36/02, *Omega v. Oberbürgermeisterin* (14 October 2004), para. 31.

09 CJEU, C-421/70, *Frede Darmgard* (2 April 2009); C-112/00 *Eugen Schmidberger v. Austria* (12 June 2003), paras 81-82; C-71/02, *Herbert Karner v. Troostwijk* (25 March 2004), paras 50-53.

10 CJEU, C-41/74, *Yvonne van Duyn v. Home Office*, (4 December 1974), para. 18; C-244/06, *Dynamic Medien v. Avides Media* (14 February 2008), para. 44. See, in general, J. Schwarze, "Balancing EU Integration and National Interests in the Case-Law of the Court of Justice", in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Asser, The Hague, 2013, pp. 257 ff., and M. Cartabia, *Fundamental Rights, op. cit.* E. Benvenisti, "Margin of appreciation, consensus and universal standards", in *International Law and Politics*, 1999, vol. 31, p. 843 ff., writes that "where national procedures are notoriously prone to failure, most evident when minority rights and interests are involved, no margin and no consensus should be tolerated".

11 As noticed by Judge Villiger in his partly dissenting opinion in *Vinter and Others v. the United Kingdom* [GC], nos. 66069, 130/10 and 3896/10, ECHR 2013: "the principle of subsidiarity underlying the Convention". As a matter of fact, the principle of subsidiarity may be derived from Articles 1, 13 and 35 of the Convention.
According to F. Fabbrini, *The Margin of Appreciation and the Principle of Subsidiarity*. A Comparison, University of Copenhagen Faculty of Law, iCourts Working Paper Series, no. 15, 2015, p. 9, "whereas the Eu principle of subsidiarity and the ECHR doctrine of the margin of appreciation share a similar constitutional function, their legal nature and institutional focus is different"; "the principle of subsidiarity is to be interpreted as a neutral concept, which includes both a negative and a positive dimension, whereas the margin of appreciation must be seen as limited to the negative dimension only"; "the principle of subsidiarity is mainly addressed to the legislature … the margin of appreciation, instead, is mainly concerned with the exercise of jurisdiction by the ECHR …".

The declaration adopted at the following Conference, held in Brighton on 19-20 April 2012, contains a paragraph on the "interaction between the Court and national authorities" (see paras 10-12). The reasoning set out therein is rather tortuous. It commences by mentioning the Court's case law on the margin of appreciation. Then it states that this "reflects [the fact] that the Convention system is subsidiary" to the national level and national authorities, and that the margin of appreciation goes hand in hand with supervision under the Convention system. Third, the Court is encouraged to give great prominence to, and to apply consistently, the principles of subsidiarity and the margin of appreciation doctrine. Finally, the declaration jumps to a proposal to include, in the Preamble to the Convention, "a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law". In this respect, two points are unclear: was the margin of appreciation doctrine considered to be part of the principle of subsidiarity, or was it rather deemed to be a separate and different principle? Where were the grounds for the subsidiarity principle to be found: in the Court's case law, or in the Convention system?

As a result of the Brighton Conference, Article 1 of Protocol No. 15, not yet in force, added a new recital to the Preamble of the Convention: "the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights…".

The Explanatory Report to the Protocol states that the reference to the principle and the doctrine is "intended…to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law". The Opinion of the Court on the Draft Protocol expressed reservations on the text, but emphasised the drafters' intentions to not "alter either the substance of the Convention or its system of international, collective enforcement". It is well known that the new recital of the Preamble to the Convention was a compromise, which sought to take into account the British reaction to the ECtHR's judgment in the *Hirst* case, which concerned the voting rights of British prisoners[12].

Reading the text, it is difficult to establish why deferential standards of review were introduced by the new Protocol. The reason may have been, simply, functionality (for example to address case overload, or a lack of resources and expertise for investigations or reviews of fact by the Strasbourg Court[13]). Alternatively, to recognise the diversity of national identities; or deference to sovereignty, to minimize restrictions[14]; or deference to democracy, along the lines of those who believe that judicial review can be guided by subsidiarity "to enhance their specifically democratic legitimacy" and that "the margin of appreciation …is a main example of… a democratically informed standard of review"[15].

Let us consider whether the new recital is a sign of continuity or, on the contrary, traces a dividing line with the past.

First, subsidiarity and the margin of appreciation are addressed in the new recital as two different principles, as if they had different content. This will pose, for the Court, the difficult task of establishing the peculiarities of the first *vis-à-vis* the second.

12 E. Benvenisti, *The Law of Global Governance*, Academy of International Law, The Hague, 2014, p. 238.

13 A. von Staden, *Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review*, available at http://ssrn.com/abstract=1969442p. 24 – 25.

14 A. Follesdal, *The Principle of Subsidiarity as a Constitutional Principle in International Law*, New York University, Jean Monnet Working Paper 12/11, 2011, p. 26.

15 A. von Staden, *Democratic legitimacy*, op. cit., p. 1, p. 5 and p. 12.

Secondly, the fact that the Convention system relies on national systems, and that the latter must provide effective remedies to the parties whose rights are infringed, is part of the Convention. But the Convention – as interpreted by the Court – may, in several cases, provide protection that is additional to that ensured at the national level. For these cases, the Court had developed, as judge-made law, the margin of appreciation doctrine. This is a self-imposed restraint. However, from now on, both the subsidiarity principle and the margin of appreciation doctrine are imposed on the Court by the Convention. Both are now grounded on another source of law, that is not judge-made law, but Convention law. Until Protocol No. 15 was drafted, the margin of appreciation was afforded to member States by the Court. From Protocol No. 15 onwards, member States are *entitled* to have recourse to the principle of subsidiarity and to the margin of appreciation doctrine.

This change entails a significant number of consequences. The margin of appreciation doctrine – as a judge-made doctrine – was liable to be overruled. Now this is no longer possible, as the judge-made doctrine is enshrined in the Convention.

The new legal statement features a second peculiarity. Subsidiarity and the margin of appreciation can be "activated" by third parties (member States) "against" the Court: they can argue, before the Court, that they have the primary responsibility in securing the rights and freedoms defined in the Convention and Protocols.

A third peculiarity is that, while the content of the margin of appreciation doctrine has been and will continue to be carved out by the Court, the content of the subsidiarity principle reaches the Court loaded with its entire history and all of its ambiguities.

Finally, with the margin of appreciation becoming a legislative doctrine, doubt may be cast on the fact that a double interpretation can still be envisaged by the Court, for countries that provide less protection at the national level and for countries that provide more[16].

I will make one last point in relation to subsidiarity. This principle displays a long-standing and rather unsuccessful[17] tradition in rulemaking and in adjudication. In the context of the Convention system, it was introduced to regulate neither the first nor the latter of these, but rather to regulate judicial review. It is addressed to the Court, as the Convention's main actor; and judicial subsidiarity is different from legislative or administrative subsidiarity.

Subsidiarity has been used to distribute functions along a vertical line, between the centre and the periphery. In this context, the main purpose of subsidiarity is to allocate functions so that centralisation can be avoided, and to ensure an efficient allocation of power. An example is Article 118 of the Italian Constitution: this article provides that administrative tasks are to be allocated among municipalities, provinces, regions and the central government in accordance with the principle of subsidiarity. The same is true for the principle of subsidiarity in the context of the European Union, in which it regulates the distribution of functions between European and national authorities.

Subsidiarity, as an instrument for avoiding centralisation, has not been effective. Some attempts have been made to make it work by "proceduralising" it (e.g. by requiring the advice of lower levels of government before rules can be issued by the higher levels[18]).

The use of subsidiarity in Protocol No. 15 is new, because the context is new. It does not apply to rulemaking or adjudication, but to judicial review. The purpose is not to allocate functions, but to check the uniformity of the application of supranational principles and rules in national contexts. The only precedent of which I am aware, as to this type of application of the principle of subsidiarity, is that enshrined in Article 51 and in the Preamble to the Charter of Fundamental Rights of the European Union (2010/C 83/02).

16 On the double standard, see J.-L. Flauss, "Faut-il transformer la Cour européenne des droits de l'homme en juridiction constitutionnelle?", in Dalloz, 2003, p. 1639, ft. 2, and L. Favoreu, "Corti costituzionali nazionali e Corte europea dei diritti dell'uomo", in *Rivista di diritto costituzionale*, 2004, n. 1, pp. 8-9.

17 P. Craig, *Subsidiarity, a Political and Legal Analysis*, University of Oxford, Legal Research Paper Series, no. 15, April 2012.

18 M. Cartabia, "Unione europea, sussidiarietà e diritti fondamentali", in P. Donati (ed.), *Verso una società sussidiaria*, Bologna, Bononia University Press, 2011, pp. 121-141.

3. "COMPETING ASPIRATIONS TOWARDS UNITY AND DIVERSITY"[19]: SUBSIDIARITY AS INDIRECT RULE

We must now turn to the principle of subsidiarity as such. Subsidiarity "has a long and colourful history"[20] and possesses at least thirty different meanings. For this reason, it has been referred to as a programme, a magic formula, an alibi, a myth, a fig-leaf, an aspiration[21]. Subsidiarity was "the word that saved the Maastricht Treaty"[22]. It has been written that subsidiarity "cannot on its own provide legitimacy or contribute to a defensible allocation of authority between national and international institutions e.g. regarding human rights law"[23].

The function of subsidiarity is less unclear, as this principle is caught in a tension with the principle of universality[24], to "affirm internationalism…without the temptation for a super-state or other centralized global authority"[25]. Subsidiarity has many faces: it acts as a devolving mechanism in favour of lower authorities, it is the ground for substituting the lower level with the higher level, and it is the basis for the support provided by the higher level to the weaknesses of the lower level.

Subsidiarity is one of the many applications of a fundamental organisational principle: indirect rule. This principle is as important as the separation of powers. While the latter operates horizontally, the former operates vertically.

Whenever different legal systems integrate and lose their exclusivity[26] – no matter what kind of integration occurs –, they assume a set of common general principles and are endowed with a reviewing court; indirect rule is instrumental to avoid collisions, by "ordering pluralism"[27] and by putting together "planets and the universe"[28].

Indirect rule was instrumental first to the establishment of the Roman Empire and then to the expansion of the British Empire. The British could have ruled their empire as the French did theirs, by replacing local institutions with their own metropolitan institutions. Instead, they chose to govern by indirect rule, by super-imposing some of their own general rules, institutions, procedure, and personnel to local institutions and letting them operate as usual. This kind of adaptive, evolutionary process ensures compatibility and tolerance between different values and rules.

Governing by indirect rule in contemporary times is more difficult, as supranational legal systems superimpose only rules, institutions and procedures; they do not send persons to command national legal systems.

19 J. H. Elliott, "A Europe of Composite Monarchies", in *Past and Present*, 1992, p. 71.

20 T. Horsley, "Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?", in *Journal of Common Market Studies*, 2012, vol. 50, no. 2, p. 268.

21 S. Cassese, "L'aquila e le mosche. Principio di sussidiarietà e diritti amministrativi nell'area europea", in *Foro italiano*, 1995, October, V, pp. 373 ff.

22 D. Z. Cass, "The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community", in *Common Market Law Review*, 1992, vol. 29, no. 1, pp. 1107 ff.

23 A. Follesdal, *The Principle*, *op. cit.*, p. 31.

24 E. Benvenisti, *The Law*, *op. cit.*, pp. 207, 233 ff. and 238.

25 P.G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, Notre Dame Law School Scholarly Works, 2003, no. 564, p. 78 (also in *American Journal of International Law*, 2003 and, in Italian, in P. G. Grasso (ed.), *Europa e Costituzione*, Napoli, ESI, 2005, pp. 129 ff).

26 On legal orders losing their character of legal monads and their exclusivity, see E. Cannizzaro and B. I. Bonafè, "Beyond the archetypes of modern legal thought. Appraising old and new forms of interaction between legal orders", in M. Maduro, K. Tuori and S. Sankari (eds.), *Transnational Law. Rethinking European Law and Legal Thinking*, Cambridge, Cambridge University Press, 2014, pp. 78 ff., esp. pp. 95-96.

27 M. Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World*, Oxford, Hart, 2009.

28 B. Simma and D. Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law", in *European Journal of International Law*, 2006, vol. 17, no. 3, pp. 483 ff.

Legal orders lose their exclusivity, overlap, and must strike a balance between two sets of competing values: on the one hand, respect for local rules and diversity, and on the other, compliance with the common principles incorporating, in the decision-making process, those interests that are formally excluded and constrain national sovereignty[29].

Indirect rule and its applications must act as shock absorbers, to avoid collisions between converging legal orders. Therefore, they must remain open enough to be worked out over time, and to be adjustable to different conditions. Attempts to establish a precise catalogue and taxonomy of the applications of indirect rule are destined to fail. Fluidity and flexibility[30] are the rule.

4. DEFINING AND CONSTRAINING SUBSIDIARITY

Where does the higher law end, and where does national law begin? It is important to respond to this question by defining and constraining subsidiarity, to ensure achievement of the Convention's objectives, to reduce the risk of domination by the Court and Convention bodies – which can abuse their flexibility – and to protect both the Court and Convention bodies with respect to more powerful States[31]. Neither the Court nor the Contracting Parties (and their respective domestic courts) should be left "wandering in deserts of uncharted discretion"[32].

First, in which areas does the subsidiarity principle apply? The answer is clear: only where there are shared, concurring competences, and therefore where both levels, the national and the supranational, have equal possibilities of action; it applies only "in areas which do not fall within [the Union's] exclusive competence", as established by Article 5(3) of the Treaty on European Union. This dividing line is blurred for a purely internal reason: it is difficult, for unitary legal orders, as are national orders, to recognise certain rights only in some circumstances but not in others. For example, how could a national government and its citizens tolerate that the right to a hearing be protected in certain areas, and not in others, simply because the second fall within the exclusive competence of national authorities? In other words, different sectors and areas within any single national legal order are interconnected and communicate with one another; and citizens are in search of the best protection possible. This is the reason why the impact of European Union law extends to areas and matters other than those upon which the Union has a direct bearing[33].

Second, when can the subsidiarity principle be invoked? Again, the answer should be clear: only "in connection with those articles of the Convention that have 'limitation clauses'"[34], and not where "absolute rights" (e.g. the right to life: Article 2; or prohibition of torture: Article 3) are guaranteed[35].

Third, can subsidiarity be subject to different interpretations, giving way to narrow/wide and double applications, as is the case with the margin of appreciation doctrine? If – as concluded in the previous pages – subsidiarity is part of a larger *genus* of institutional arrangements called indirect rule, and if indirect rule is a flexible device *par excellence*, the answer to this question is necessarily in the affirmative.

29 F. de Witte, "*Sex, Drugs & EU Law: the Recognition of Moral and Ethical Diversity in EU Law*", in *Common Market Law Review*, 2013, vol. 50, pp. 1552 ff.

30 P. G. Carozza, *Subsidiarity*, *op. cit.*, p. 79.

31 A. Follesdal, *The Principle*, *op. cit.*, p. 29.

32 US Supreme Court, *Exxon Shipping Co. v. Baker*, 2008, 128 S. Ct. 2605, n. 7 – 219, citing M. Frankel, Criminal Sentences: *Law Without Order* (1973).

33 A. von Bogdandy et al., "Solange ribaltata. Proteggere l'essenza dei diritti fondamentali nei confronti degli Stati membri dell'UE", in *Rivista trimestrale di diritto pubblico*, 2012, no. 4, pp. 4-5.

34 I. Rasilla del Moral, "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine", in *German Law Journal*, 2006, June, No. 6, p. 613.

35 G. Raimondi, "Corte di Strasburgo e Stati: dialoghi non sempre facili", interview by Diletta Tega, in *Quaderni costituzionali*, 2014, n. 2 June, p. 463; see also G. Raimondi, "La dichiarazione di Brighton sul futuro della Corte europea dei diritti dell'uomo", in Associazione italiana dei costituzionalisti, *Rivista telematica giuridica*, 2012, n. 3.

Fourth, how can the principle of subsidiarity be translated into practice[36], and how can "brakes" be introduced, to make the subsidiarity principle effective? The European Union provides a good example with Protocols 1 and 2 to the Lisbon Treaty (respectively, political controls and judicial controls). These brakes, however, are not entirely effective[37].

As a flexible tool, subsidiarity can have a varying impact, depending upon the distinctive features of each national legal order. For example, those that do not have a written constitution are more exposed to the percolation of supranational law. The United Kingdom has been obliged to adapt, with the *Human Rights Act* 1998.

One final point on defining and restraining subsidiarity is a *caveat*. It should not be believed that, where supranational authorities have a subsidiary role, sovereign States have a free hand. Sovereignty is illusory for four reasons. Being subsidiary means that national authorities (mainly courts, in our case) must comply with some common, shared principles, as are those listed in the Convention and its Protocols. Being subsidiary also means being subject to a supervisory jurisdiction and court. Subsidiarity makes State action discretionary *vis-à-vis* the higher law and subordinate, as is the case for national administrative authorities and judicial review. Finally, being part of a collective agreement, national authorities are not only accountable to the higher bodies (in our case, the ECtHR), but also to the other parties to the Convention (horizontal accountability).

5. CONCLUSION: TO WHAT CAN SUBSIDIARITY LEAD?

To what can subsidiarity lead the European Convention on Human Rights? What developments can be foreseen?

One possible development is a potential restraint on the ECtHR[38], by limiting its jurisdiction, for example by endowing it with a power of review that is limited only to patent violations of the Convention, for example, that which occurred in the *Bosphorus* case ("if the protection of Convention rights is manifestly deficient": para. 156).

A second development that can be envisaged is the introduction by national political bodies or national courts of external controls on the implementation of the subsidiarity principle, in defence of their "territories", as defined by the subsidiarity principle.

A third development is that the role of national courts as judges of the Convention will be enhanced, following the example of the European Union judicial system. Along those lines, national courts could become, at least functionally, part of the judicial branch of the Council of Europe's legal system, acting if they are delegated with the task of reviewing the conventionality of national decisions, with the Strasbourg Court entitled to act as a guiding body through a system of preliminary reference[39].

While all three developments could lower the number of cases brought before the Strasbourg Court, none should be accepted as a means to revive national interests against the obligations accepted with the signing of the Convention. The process of globalisation of human rights has witnessed, and will continue to witness, tensions between national governments and supranational bodies.

36 P.G. Carozza, *Subsidiarity*, *op. cit.*, p. 79.

37 P. Craig, *Subsidiarity*, *op. cit.*

38 T. Horsley, *Subsidiarity*, *op. cit.*, pp. 267 and 281.

39 One must also consider the consequences of the Union's participation in the Convention and the impact of Protocol No. 16, which provides for the issuance of "advisory opinion[s] on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto".

However, it cannot reduce its efforts to set global brakes on, and controls over, national legal orders. Over time, these display ever more faults and "lacunae", as they are instruments that are far from perfect. "Human rights, democracy and the rule of law now face a crisis unprecedented since the end of the Cold War", wrote the Secretary General of the Council of Europe in his May 2014 Report[40]. Therefore, it becomes necessary to complement the controls from below (popular elections) with checks from above.

A second reason for not allowing the revival of the protection of pure national rights in Europe is that human rights are not guaranteed only in this area of the world, but are rather part of a general set of global rules, under the aegis of the United Nations. How could Europeans then escape control by Strasbourg-based supranational institutions, while being subject to other international treaties such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the UN Convention against Torture, and to such global institutions in charge of confining and promoting democracy, the rule of law and human rights, as the United Nations, the United Nations Democracy Fund, and many more ancillary institutions? How could Europe remain behind the Organization of American States (and the American Convention on Human Rights, with the Inter-American Court of Human Rights), and the Economic Community of West African States (with the African Court on Human and Peoples' Rights), whose protection of human rights has, in many countries, been incorporated in national law, also ensuring judicial remedies for private parties?

40 *State of Democracy, Human Rights and the Rule of Law in Europe*, 14th Session of the Committee of Ministers, Vienna, 5-6 May 2014, p. 5.

Angelika Nußberger

Judge of the
European Court of Human Rights

COMMENTS ON SABINO CASSESE'S PAPER "RULING INDIRECTLY – JUDICIAL SUBSIDIARITY IN THE ECHR"

INTRODUCTION

On behalf of the Court I want to thank you very much for presenting an inspiring and thought-provoking paper. It seems that "subsidiarity" is not only a difficult subject, but even a mythical one. Quoting from legal literature, you refer to subsidiarity as a "magic formula", "myth" and "fig leaf". That is not an area in which judges are especially experienced. Nevertheless, we are all called upon to deal with this concept – be it mythical or not – and to fill it with life in our daily work. If we imagine our dialogue as a bridge where European and national judges meet in the middle, both on our side and on your side the entry to the bridge might bear the sign "subsidiarity". But politically speaking it is clear that there are different interests at stake when this term is used. Federico Fabbrini even went so far as to talk of "the demands of the lower levels of government for self-rule and identity" on the one hand and "the pressure of the higher-tier jurisdiction toward shared-rule and equality" on the other hand[01].

"Subsidiarity" is one of the most important concepts underlying the search for new organising principles in a more and more complex world where we learn that traditional concepts such as sovereignty are blurred and national legal systems are no longer autonomous closed boxes, but interact in many ways, on many levels and through the cooperation of many institutions. What we need are signposts or, still more, compasses, in what Delmas-Marty calls "ordering pluralism"[02].

For the purposes of the discussion I want to focus on two aspects of your paper: first, the impact on the Court's work that might be brought about by the entry into force of Protocol No. 15, and second the characterisation of the Court's jurisprudence as "indirect rule".

THE IMPACT OF PROTOCOL NO. 15 ON THE COURT'S WORK

Apart from the question whether margin of appreciation and subsidiarity are to be understood as different concepts – a question I unfortunately have no time to address here – you focus on the question whether the entry into force of Protocol 15 will have important consequences for the Court. Your answer is "Yes, it will" and you give four reasons for this. Let me take the opposite position in order to set the framework for the discussion.

01 Federico Fabbrini, "The Margin of Appreciation and the Principle of Subsidiarity: A Comparison", iCourts Working Paper Series No. 15, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552542, p. 6.

02 M. Delmas-Marty, "Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World", Oxford, Hart, 2009.

First, you argue that the concept of margin of appreciation which has been developed by the Court has somehow been taken out of its hands as it is "no longer liable to be overruled". Yes, I agree, but as it has been a characteristic feature of the Court's jurisprudence for many decades in my view it would in any event be impossible to change it without causing an earthquake. A change would require the Court "to saw off the branch on which it is sitting" (if you will allow me the literal translation of a German proverb; the metaphor used in English "biting the hand that feeds you" does not convey exactly the same meaning).

Second, you see a danger as the principle of margin of appreciation could be "activated" by member States against the Court. They could claim before the Court to have the primary responsibility in securing the rights and freedoms defined in the Convention and the Protocols. In my view, they actually do have the primary responsibility in applying the Convention to cases brought before them.

Let's take surrogate motherhood as a concrete example. We all know how difficult and sensitive it is to find adequate solutions to the problems involved. Before 2014 we had no jurisprudence on the issue. The task therefore fell first and foremost to the national authorities to define the rights involved. We have seen that the answers given to the problem – even in the light of the Convention – were very different.

With reference to the lack of European consensus and the difficult ethical questions raised, the Court, in its judgment in the case of *Mennesson v. France*[03] delivered in June 2014, generally granted a wide margin of appreciation, but stressed that it would be much narrower when it came to the legal parent-child relationship, which involved a key aspect of the individual's identity. On that basis the Court did not find a violation of the parents' rights to respect for their family life, but defined a minimum standard of protection concerning the children's right to private life, i.e. the right to have their descent clearly established in law. With this first guiding principle on the interpretation of the Convention the matter was once again back in the hands of the national authorities. The German Bundesgerichtshof went further, in a judgment in December 2014[04], and applied the principle to a homosexual couple. You might have seen that just this week a further judgment, against Italy, has been published concerning the placement in social-service care of a child born following a gestational surrogacy contract[05]. So this is an example of defining common standards in an area where the "authorities' direct contact with the vital forces of their countries" (see *Handyside v. the UK*[06]) is especially important, but nevertheless common values enshrined in the Convention, especially children's best interests, have to be applied. The relevant criteria are determined in the course of the dialogue between the national and European judges, a dialogue that would moreover be enhanced by the entry into force of Protocol No. 16.

Let me summarise your third argument in your own words: "While the margin of appreciation doctrine has been and will be carved out by the Court, the content of the subsidiarity principle reaches the Court loaded, with its entire history and all of its ambiguities." Yes, but it is still the Court which defines what to accept and what to reject and how to reformulate "the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to the Member States so as to implement a more robust and coherent concept of subsidiarity in conformity with Brighton and Protocol No. 15", to quote my colleague Robert Spano[07].

03 *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts).
04 BGH, decision of 10 December 2014 (XII ZB 463/13).
05 *Paradiso and Campanelli v. Italy*, no. 25358/12, 27 January 2015.
06 *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.
07 Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", *Human Rights Law Review* 2014, p. 12.

Last but not least, you refer to the "double interpretation" of the Convention taking into account the level of protection at the national level. I think we do not and cannot accept any "double interpretation" of the Convention. But what might be important in this context are the elements of the margin of appreciation doctrine that might be called "procedural". Thus the Court scrutinises the extent to which human-rights aspects have been taken into account in the decision-making process at the national level. Generally it might be said that the more profound the human-rights discussion at the national level, the wider, as a rule, the margin granted.

So I would argue that after the entry into force of Protocol No. 15 subsidiarity and margin of appreciation will have a different status in the Convention system, but not necessarily a different content. And the Court will remain the master of interpretation.

CHARACTERISATION OF THE COURT'S JURISPRUDENCE AS "INDIRECT RULE"

Let me now comment briefly on your characterisation of the Court's jurisprudence as "indirect rule" and the comparison with the Roman and British Empire "superimposing some of their own general rules, institutions, procedure and personnel to local institutions and letting them operate as usual". This is a surprising, but interesting parallel by which to highlight common organising principles. But let us not forget that the context could not be more different.

The Convention and its values are not imposed from "above". They have been developed or voluntarily accepted by the States, who remain the masters of the Treaty.

The Convention system is not a two-tier-system, but a complex multi-layered mechanism.

The Court interprets the Convention as a living instrument taking into account the European consensus or the emerging or evolving European consensus. It is not a one-sided approach. On the contrary, the Court listens most carefully to the different legal voices of its member States.

You call the Court's task "indirect rule" within the context of separation of powers. It is "indirect" certainly. But it is a far cry from "rule" as by a colonial power. We might rather draw a parallel with a form of rule by a navigation system in a car. The national judges are the drivers; the direction is clearly indicated: "compatibility with the ECHR". The Court's judgments guide the way. The soft voice in the navigation system might say "turn right", "turn left", but the national judges could still decide to choose a different way leading to the same destination as they know the region better. Usually the navigation system would accept the choice and reset itself accordingly. But it may also warn that with the new direction chosen the destination will no longer be reached. So the soft voice will say "please turn around". That's how I would understand the meaning of "indirect rule" in the context of judicial dialogue.

You are right; nobody must be left "wandering in deserts of uncharted discretion". But we hope that the Court's navigation system will help national judges to find the way.

Jean-Marc Sauvé[01]

Vice-President of the Conseil d'État, France

President, Members of the Judiciary, Ladies and Gentlemen,

"As we begin the 21st century, the legal landscape is dominated by imprecision, uncertainty and instability… In consequence, the goals of imposing order on diversity without reducing it to an identikit format, and of accepting pluralism without abandoning the principle of one law for everyone and a single yardstick for justice and injustice might now appear unattainable…"[02]. Thus did Professor Delmas-Marty describe the situation in 2006. As she urges us in the same text, however, we must not yield to pessimism, but attempt "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"[03]. At the Council of Europe, and setting aside 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 subsidiarity[04]. Under this principle, the central authority, namely the European Court of Human Rights, should perform only those tasks that cannot be appropriately performed at a more immediate, that is, national level. This functional principle, enshrined in the Court's case-law[05] since 1968, ensures that fundamental rights are applied in compliance with European standards in a manner which is decentralised but heterogeneous, *i.e.* harmonised but not stereotyped.

Subsidiarity and effectiveness are indeed two sides of the same coin, the motto of which is set out in the Preamble to the European Convention on Human Rights: to ensure the "maintenance and further realisation"[06] of fundamental rights[07]. The national authorities – the administrative bodies and the justice system, alongside 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 reflects the concept of shared review by the Court and the national authorities. Although its etymology underlines the supplementary and ancillary nature of the Court's supervision, the term also highlights the definitive nature of the Court's role and, where review is exercised by the Grand Chamber, its supreme authority. For the Contracting States and the Court alike, this implies a reciprocal duty of loyal cooperation.

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01 Text written with the assistance of Stéphane Eustache, judge of the Administrative Court and the Administrative Court of Appeal, special adviser to the Vice-President of the *Conseil d'État*. The passages between square brackets were not read out.

02 M. Delmas-Marty, *Les forces imaginantes du droit* (III), *Le pluralisme ordonné*, Seuil, 2006, pp. 7-8.

03 M. Delmas-Marty, *Les forces imaginantes du droit* (III), *Le pluralisme ordonné*, Seuil, 2006, pp. 7-8.

04 See, in particular, the debate between Lord Hoffmann and Robert Spano: Lord Hoffmann, "The Universality of Human Rights", *Judicial Studies Board Annual Lecture*, 19 March 2009, and Robert Spano "Universality or Diversity of Human Rights?, Strasbourg in the Age of Subsidiarity", *Human Rights Law Review*, 2014, 0, pp. 1-16, Oxford University Press.

05 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 rôle 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 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."

06 Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

07 "The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective", *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32.

The theme of today's start-of-year seminar, "Subsidiarity: a two-sided coin?", 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.

I. BY COMBINING COMPLEMENTARY FORMS OF REVIEW, SUBSIDIARITY ALLOWS THE EUROPEAN SAFEGUARDS TO BE APPLIED TANGIBLY AND EFFECTIVELY

At the Council of Europe, implementation of these safeguards is "primarily"[08] 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[09], 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"[10], 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 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 3[11], 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 relationship[13], 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 interest[14]. 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 issues[16].

08 *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 140, ECHR 2006 V.

09 See, *inter alia*, *Le principle 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.

10 *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.

11 See, in particular, *Chahal v. the United Kingdom*, 15 November 1996, § 79, Reports of Judgments and Decisions 1996 V.

12 *Brunet v. France*, no. 21010/10, § 34, 18 September 2014.

13 *Mennesson v. France*, no. 65192/11, § 80, ECHR 2014 (extracts).

14 *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 102, ECHR 2013 (extracts).

15 See, for example, with regard to the prohibition of face concealment in public places: *S.A.S. v. France* [GC], no. 43835/11, § 129, ECHR 2014 (extracts); the display of crucifixes in the classrooms of a State school: *Lautsi and Others v. Italy* [GC], no. 30814/06, ECHR 2011 (extracts); wearing the Islamic headscarf in institutions of higher education: *Leyla Şahin v. Turkey* [GC], no. 44774/98, §§ 109-110, ECHR 2005 XI.

16 See, for example, with regard to the regulation of abortion rights: *A, B and C v. Ireland* [GC], no. 25579/05, ECHR 2010; the criteria for access to in vitro fertilisation: *S.H. and Others v. Austria* [GC], no. 57813/00, ECHR 2011; assisted suicide: *Haas v. Switzerland*, no. 31322/07, ECHR 2011.

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 the restrictions imposed cannot "impair [their] very essence"[21]. [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.

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[22]. The theory of "positive obligations"[23] now reaches deeply into the entire Convention field[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[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[26].

17 *S.A.S. v. France* [GC], no. 43835/11, § 154, ECHR 2014 (extracts).

18 *Rasmussen v. Denmark*, 28 November 1984, § 40, Series A no. 87.

19 *Mennesson v. France*, no. 65192/11, § 77, ECHR 2014 (extracts).

20 *Mennesson v. France*, no. 65192/11, § 77, ECHR 2014 (extracts).

21 *Matelly v. France*, no. 10609/10, § 57, 2 October 2014.

22 In application of "the horizontal effect" of the Convention, which consists in "extending the enforceability of human rights to relations of individuals between themselves" (J.-P. Marguénaud, *La Convention européenne des droits de l'Homme et le droit privé*, La documentation française, 2001, p. 77, quoted in F. Sudre, *Droit européen et international des droits de l'Homme*, PUF, 11th edition, 2012, p. 265).

23 *Airey v. Ireland*, 9 October 1979, Series A no. 32, and *Marckx v. Belgium*, 13 June 1979, Series A no. 31.

24 See on this point *Les grands arrêts de la Cour européenne des droits de l'Homme*, PUF, 5th ed., 2003, p. 24.

25 *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004 VI : "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)."

26 *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998 VIII.

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"[27] here 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 as far as possible the situation existing before the breach"[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[29]. Admittedly, the national authorities remain free to choose the most appropriate measures[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[31], or even very specifically, where it considers only one measure to be appropriate[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[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[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"[35]. Thus, the principle of "Convention loyalty"[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.

27 On this point, see F. Sudre, "A propos de l'obligation d'exécution d'un arrêt de condamnation de la Cour européenne des droits de l'homme", RFDA, 2013, p. 103.

28 *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330 B.

29 See *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000 VIII; for a practically word-for-word repetition of this reasoning, see *Conseil d'État* (Section), 4 October 2012, *Baumet*, no. 328502, pt. 7.

30 *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31.

31 *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004 V.

32 *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005 IV.

33 "Déclaratoire ne signifie pas incantatoire", S. van Coester's conclusions in *Conseil d'État* (full court), 30 July 2014, Vernes, no. 358564.

34 On this point, see J. Lessi and L. Dutheillet de Lamothe, "Première encoche de la chose inconventionnellement décidée", AJDA, 2014, p. 1929.

35 Conseil d'État (full court), 30 July 2014, Vernes, no. 358564, pt. 5.

36 F. Sudre, "A propos de l'obligation d'exécution d'un arrêt de condamnation de la Cour européenne des droits de l'homme", RFDA, 2013, p. 103.

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'État* 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[37]. Where the Court finds a violation, the domestic courts also ensure, using their powers to make orders, that the administrative authorities do their utmost to bring it to an end, if necessary by repealing a provision of domestic law[38]. In addition, in developing their case-law, the domestic courts are obliged to "take into consideration"[39] the Court's judgments, although these are not binding *erga omnes*[40] 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[41]. 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[42]. [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[43] and the concept of "possessions" within the meaning of Article 1 of Protocol No. 1[44], both of which have been defined broadly. In consequence, the principle of subsidiarity has been accompanied by a strengthening of the review conducted by the national courts (especially in

37 *Conseil d'État* (Opinion), 13 June 2013, *M. Molenat*, no. 362981.

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'Etat*'s 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 Maspero*, 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, *Maubleu* 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, *Maubleu*, 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. Existent claims (*Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, Series A no. 301 B), but also those which are inexistent 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.

the areas of immigration law and "internal measures" within prisons[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[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"[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"[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"[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[50]. [Indeed, there is "an imbalance between administrative decisions, which are continually open to challenge, and judicial decisions, [which] cannot be changed"[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[52], this is not the case for civil[53] or administrative law[54]. In addition, where it is provided for, and in line with the Committee of Ministers' recommendations[55], re-examination must only be used in "exceptional circumstances" and subject to the proviso that it is "the most efficient, if not the only, means of achieving *restitutio in integrum*"[56].]

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'Etat, 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.

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.

47 *Kemmache v. France* (no. 3), 24 November 1994, § 44, Series A no. 296 C.

48 *Perlala v. Greece*, no. 17721/04, § 25, 22 February 2007.

49 *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012.

50 *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, § 89, ECHR 2009. See also: *Conseil d'État*, 11 February 2004, *Chevrol*, no. 257682.

51 J. Lessi and L. Dutheillet de Lamothe, "Première encoche de la chose inconventionnellement décidée", AJDA, 2014, p. 1929.

52 On this point, see R. de Gouttes, "La procédure de réexamen des décisions pénales après un arrêt de condamnation de la ECHR", *Mélanges G. Cohen-Jonathan*, Bruylant, 2004, p. 563.

53 Court of Cassation, Social Division, 30 September 2005, no. 04-47130.

54 *Conseil d'État* (Section), 4 October 2012, *M. Baumet*, no. 328502.

55 Recommendation Rec(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.

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.

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"[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[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 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*[59]. 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.

57 Robert Spano "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", *Human Rights Law Review*, 2014, 0, 1-16, Oxford University Press.

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).

59 *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 116, ECHR 2013 (extracts).

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 Strasbourg 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 reconciles 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[60].

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, 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).

In exceptional cases, however, 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[61]. 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 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.]

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 (Al-Khawaja and Tahery v. the United Kingdom [GC], nos. 26766/05 and 22228/06, ECHR 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.

62 Explanatory Report on Protocol No. 16, p. 6.

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.

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.

Is subsidiarity a "two-sided coin"? 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.

65 Conference on the Future of the European Court of Human Rights, Brighton Declaration, April 2012, p. 5.
66 Conference on the Future of the European Court of Human Rights, Brighton Declaration, April 2012, p. 5.

Paul Lemmens

Judge of the
European Court of Human Rights

REPLY TO THE STATEMENT BY MR JEAN MARC SAUVÉ

Mr Vice-President, it is an honour for me to briefly react to your statement. I might begin with a few words about the judicial protection provided by the domestic courts and the European Court. I would then like to go on to outline some of the "tools for implementing the principle of subsidiarity". Finally, I shall conclude with a number of comments on the specific role played by the domestic courts in implementing the Convention.

1. Judicial protection provided by the domestic courts and the European Court

a. Common tasks, common challenges

The domestic courts and the European Court have basically the same objectives. Each of them has a responsibility not only as regards the protection of fundamental rights (guaranteed by the national constitutions, the Charter of Fundamental Rights [for matters coming under European Union law] and the Convention) but also, more broadly in terms of defending the rule of law and democracy.

At the present time, human rights, the rule of law and democracy are no longer such undisputed concepts as they were, for instance, in Western Europe just after the Second World War. In fact the Convention emerged precisely during that post-war period. On the contrary, human rights, democracy and the rule of law are threatened values[01]. The courts are not exempted from this process. We are facing common challenges, and we need a common response.

b. Different powers and different characteristics

For all the similarities between the national courts and the European Court, there are also some differences. Let me just mention a number of them.

First of all, the territorial context is different. The relevant territory for domestic courts is that of a nation State or a subdivision thereof; for the European Court it is the whole territory covered by 47 States, all with their own histories, cultures and traditions, and their own specific economic situations.

The legislative framework is also different. The national courts must implement an enormous range of national laws (except perhaps the Constitutional Courts, inasmuch as they "only" apply the constitution); the framework for the European Court is "only" the Convention, an instrument which "only" concerns fundamental rights.

01 The Secretary General of the Council of Europe has spoken of an "erosion of the fundamental rights" (S*ituation of democracy, human rights and the rule of law in Europe*, report prepared by the Secretary General of the Council of Europe, SG(2014)1–Final, Strasbourg, 2014, 5).

Finally, their powers are different. Some of the national courts have "full jurisdiction" and can therefore lay down the law and create legal relations among private individuals or between a public authority and private individuals; the European Court, on the other hand, must confine itself to reviewing the decisions of the domestic authorities, particularly the national courts, and cannot take decisions on the merits of the cases on which the applications brought before it are based.

c. Complementarity between national and European protection

As regards the protection of fundamental rights, there is, as you very rightly point out, "complementarity" between the national and European safeguards. The importance of this fact cannot be overemphasised. I would take the view that the concept of "shared responsibility" corresponds to a reality which is both factual and legal. This is particularly true of judicial protection: the national courts provide the "primary" protection, for which they have a fairly wide range of resources at their disposal; the European Court then plays a "subsidiary" role, ensuring that the European standard is complied with throughout Europe[02]. The national courts cannot do without the European Court, and vice versa. Therefore, the "subsidiarity" concept, which should appear in the Preamble to the Convention once Protocol No. 15 has come into force, only covers some of the reality, which becomes clearer if we use the broader term of "shared responsibility".

2. Tools for implementing the principle of subsidiarity – the role of the national courts

You have described the results of your reflections on a number of "tools for implementing the subsidiarity principle". In fact you suggest a number of clarifications and improvements to the rules of conduct for dialogue between the national courts and the European Court. You query the Court on a number of points. Time does not permit me to react to all these points. I should just like to answer a few of them which relate specifically to the role of the national courts, in the light of the provisions of the Convention and the case-law of the European Court.

I shall draw a distinction here between the interpretation of the Convention and its application.

A. Interpretation of the Convention

You mentioned the efforts which the national courts sometimes have to expend in interpreting the provisions of the Convention in areas in which the European Court does not yet have well-established case-law. In such cases the national courts must break new ground. The issues arising generally relate to the scope of the Convention's provisions. This gives the courts an opportunity to consolidate the Convention's status as a "living instrument", a prerequisite for ensuring that it continues to provide citizens with concrete and effective protection.

I fully agree with you that the courts must endeavour to include in their analysis not only the relevant parts of the European Court's case-law but also, naturally as far as is humanly possible, various aspects of comparative law. As you point out, the presence or absence in this context of a European consensus may be a relevant factor. I do not know if you can expect the European Court to provide pointers as regards the methodology for achieving a possible consensus. The Court does its best, helped along by its small research division. However, I wonder whether certain national courts specialising in particular fields might be better placed than the Court to conduct such analyses.

02 Re. the concept of subsidiarity, see R. SPANO, "Universality or Diversity of Human Rights. Strasbourg in the Age of Subsidiarity", HRLR, 2014, 1-16; and F. SUDRE (dd.), *Le principe de subsidiarité au sens du droit de la Convention européenne des droits de l'homme*, Anthemis, Limal, 2014.

B. Implementation of the Convention

I now come to the implementation of the Convention by the national courts. I would like to react to two topics which you mentioned, namely supervision of compliance with positive obligations and the margin of appreciation.

1. Supervision of compliance with positive obligations

You have rightly pointed out that the Convention comprises both negative obligations (prohibition of arbitrary interference with fundamental rights) and positive obligations (obligation to adopt positive measures). Both types of obligation are incumbent on the public authorities. This means, logically, that the national courts may be invited to decide either on the compatibility with the Convention of an interference by a public authority in a plaintiff's exercise of one of his fundamental rights, or on the adequacy of the measures taken by the relevant public authorities to protect his or her fundamental rights.

You have invited the European Court to be clearer in its criteria for establishing the existence (and extent) of a positive obligation. As you know, this is a question of balancing competing interests. The authority public must strike a "fair balance" between the public interest and the interests of the individual concerned. The Convention does not impose any disproportionate burdens on the authority. The national courts may be invited to decide whether the balance has been upset by the public authority's inertia. If so, the difficult question arises of what measures should be imposed.

These are difficult issues for any court. But the problem is perhaps less daunting than it may seem for the national court. In a situation which may potentially give rise to a positive obligation issue, the national courts must first of all implement the national legal provisions concerning the subject matter with which they have to deal, for example environmental protection regulations. It is only if the plaintiff's claim is not admitted on the basis of such national provisions and if he complains that the latter do not provide sufficient protection for one of his fundamental rights, for instance the right to protection of private life and the home, that the national court will have to assess whether the legislature had the obligation under the Convention to afford individuals such as the plaintiff greater legal protection. I am of the opinion that it is only in fairly borderline cases that the national courts will themselves have to balance competing interests.

2. Margin of appreciation

The margin of appreciation is a notion that continues to raise questions. It has been the object of many books and articles. Last year, the President of our Court, Dean Spielmann, devoted a lecture to the subject, which has since been published[03].

i. The margin of appreciation doctrine

Like Dean Spielmann, I think it is important, for a proper understanding of the notion, to go back to its origins. The margin of appreciation doctrine was established in the *Handyside* case. That case was about the criminal conviction of a publisher for having published the "Little Red Schoolbook", a book for children and adolescents, considered to be an obscene publication.

03 D. SPIELMANN, "Whither the Margin of Appreciation?", CLP, 2014, 49-65.

The Court's reasoning with respect to the margin of appreciation is in fact very simple. The Court starts by pointing out that "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights", and that "the Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines" (see *Handyside v. the United Kingdom*, 7 December 1976, § 48, series A no. 24). This is, already at that time, the idea of a shared responsibility. The Court then notes that "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals", and that, to the contrary, "the view taken by their respective laws of the requirements of morals varies from time to time and from place to place" (*ibid*.). The Court concludes that Article 10 § 2, which allows for restrictions of freedom of expression for the protection of, among other things, morals, "consequently ... leaves to the Contracting States a margin of appreciation" (*ibid*.).

But this is not the end of the reasoning. The Court hastens to add that "Article 10 § 2 does not give the Contracting States an unlimited power of appreciation. The Court, which ... is responsible for ensuring the observance of those States' engagements ..., is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision" (*ibid*., § 49). That supervision takes the form of a review: "it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation" (*ibid*., § 50).

It seems to me that the national margin of appreciation and European supervision, in the sense of a review of the decision taken at the national level, are two sides of the same coin. There is a margin of appreciation because the supervision by the European Court is of a review type only, and vice versa. The Convention does not impose uniform standards throughout Europe with regard to the protection of morals. Neither does it prohibit in an absolute way measures restricting freedom of expression in the name of the protection of morals. It is therefore not for the European Court to dictate that there is a need to take action against the Schoolbook, or to say how far such action can or must go. This is a matter left to the appreciation of the domestic authorities. The European Court can only review the decision they have taken in the exercise of that discretion. The review implies that the Court examines whether or not the domestic authorities went too far, or in other words whether or not they overstepped their margin of appreciation, thereby entering a forbidden area. This amounts essentially to checking the proportionality of the interference.

You invite the European Court to clarify in which areas a margin of appreciation exists, and in which areas there is no margin or only a very limited margin. I cannot speak here for the Court, but I would like to put forward my personal views on this issue. In my opinion, States enjoy a "margin" of appreciation whenever there is something to "appreciate", and conversely, they cannot claim any "margin" of appreciation where there is nothing to "appreciate". In other words, where choices – policy choices – can be made, there is room for the domestic authorities to make them, and the European Court will respect the choices thus made, at least up to a certain point. This is the system as regards restrictions of fundamental rights by State action, where the Convention allows for interferences, provided that they satisfy a number of conditions. It is also the system governing positive obligations, since the Convention does not impose on the States any precise obligation to act[04]. Where, by contrast, the Convention imposes an absolute prohibition, such as the prohibition of torture or other ill-treatment, there is no room for appreciation.

04 It is questionable, precisely because of the existence of a margin of appreciation, whether the European Court would be able to oblige States to opt for the "least onerous" measure, where more than one option is open. It seems that the State should always enjoy a margin of appreciation and that it is sufficient that, in balancing the competing interests, it arrives at a "fair" balance (which is not necessarily the "best" balance for the individual concerned). This is the message that seems to result from, e.g., *Hatton v. the United Kingdom*, where the Chamber held that "that States (were) required to minimise, as far as possible, the interference with (Article 8) rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights" (*Hatton and Others v. the United Kingdom*, no. 36022/97, § 97, 2 October 2001), but where it was overruled by the Grand Chamber, which was satisfied that the State had not failed to strike a "fair balance" between the rights of the individuals involved and the conflicting interests of others and of the community as a whole (*Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 129, ECHR 2003 VIII).

ii. Scope of the margin of appreciation

Then there is the question of the scope of the margin of appreciation: is it wide or narrow? Initially, the European Court's answer was simple: in *Dudgeon v. the United Kingdom*, it explained that the scope of the margin of appreciation depended on the nature of the aim invoked to justify a restriction on a fundamental right, on the one hand, and on the nature of the fundamental right involved, on the other (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 52, Series A no. 45)[05]. This seems quite logical: the two elements refer to the two interests that are put on the scales when the domestic authorities and later the European Court search for a fair balance. It seems that the European Court did nothing more than simply to underline that the domestic authorities, including the domestic courts, and the European Court itself should take these two interests into account and attribute to them their respective, justifiable weight[06]. That is part of the proportionality test.

Later on, the European Court brought in other criteria such as, for instance, whether or not there is a European consensus. The effect has been that legal consequences were attached to the margin of appreciation. The margin of appreciation became the subject of separate discussions, under a separate heading, in the Court's judgments[07], sometimes even the (apparently) sole reason for rejecting a complaint[08]. As you mentioned, the margin of appreciation has sometimes wrongly been understood as an area where the Convention does not apply ("zone de non-droit conventionnel"). Speaking personally again, I wonder whether these case-law developments have not complicated things rather than clarifying them. Should it come as a surprise that the notion of the margin of appreciation has been criticised as a "hackneyed phrase" implying an unjustified "relativism"[09]? For my part, I find the existence as such of a margin of appreciation self-evident, but I wonder to what extent it has any normative implications. The almost holy notion of the margin of appreciation could be de-mystified. And it would in my opinion be better to shift the attention to the principle of proportionality and its implications[10].

iii. The margin of appreciation: an issue for the domestic courts?

A final comment on the margin of appreciation. You discussed this notion in the context of subsidiarity from the point of view of the national courts.

05 See also *Gillow v. the United Kingdom*, 24 November 1986, § 55, Series A no. 109.

06 The weight to be given to the competing interests by the domestic court should obviously reflect the evaluation made by the legislature, where relevant.

07 See *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 85-88, 7 February 2012; *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, §§ 104-107, ECHR 2012; *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, §§ 59-66, ECHR 2012 (extracts).

08 See *Eweida and Others v. the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, § 106, ECHR 2013 (extracts).

09 See J. DE MEYER, partly dissenting opinion attached to Z v. *Finland*, 25 February 1997, *Reports of Judgments and Decisions* 1997 I.

10 The link between the margin of appreciation and the justification of the proportionality of an interference was emphasised by the European Court in *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (no. 31045/10, § 87, ECHR 2014).

I wonder whether the margin of appreciation is something the domestic courts should really be concerned about. Let me quote from the judgment of the European Court in *A. and Others v. the United Kingdom*: "The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level" (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 184, ECHR 2009). The doctrine works at the European level, just as the theory of separation of powers works at the domestic level. At the latter level, courts generally do not substitute their views for those of the administrative authorities, as they respect the discretionary power which these authorities enjoy. But does that mean that, when taking decisions, the administrative authorities should constantly ask themselves how wide the scope of subsequent judicial review might be? I do not think so. In the same vein, I do not think that the domestic authorities, including domestic courts, should have to wonder how wide the margin of appreciation would be if the case ever ended up in Strasbourg. This is an issue that arises only in the context of the review carried out by the European Court, not at an earlier stage. At the domestic level, the courts should be concerned with the correct interpretation and application of the law, nothing less, and nothing more.

3. Specific role of the domestic courts in the implementation of the European Convention

A. What is expected from the domestic courts?

What does the European Court's case-law say about the role to be played by the domestic courts, from the point of view of the European Convention?

I will not discuss the requirements following from Article 13 of the European Convention, which concern the "effectiveness" of domestic remedies for alleged violations of human rights. Rather, I would like to mention some elements which, in the case-law of the European Court, have been mentioned within the framework of the discussion of the national margin of appreciation.

The European Court regularly states that in exercising its control it "has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the appropriate provision of the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts" (see, for example, *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 119, ECHR 2008). This is in fact the key message to the domestic courts.

The principles embodied in each of the provisions of the Convention can be found in the European Court's judgments, very often under a separate heading ("Principles"). They concern the interpretation and the application of the Convention. Sometimes the European Court sets out very detailed standards, for instance regarding the factors to be taken into account for the purpose of solving a conflict between freedom of expression and the right to respect for private life (see *Axel Springer AG v. Germany* ([GC], no. 39954/08, §§ 85-88, 7 February 2012), and *Von Hannover v. Germany* (no. 2) ([GC], nos. 40660/08 and 60641/08, §§ 104-107, ECHR 2012)). Sometimes, the Court acknowledges that the subject matter is one in which policy choices have to be made by the domestic authorities and it merely sets out a sort of "road map" for these authorities. This has happened for instance in the case of *X v. Latvia* ([GC], no. 27853/09, ECHR 2013), which concerned the steps to be taken in order to give proper weight to the "best interests of the child" in cases concerning international child abduction[11]. That judgment, like others, is an illustration of the "proceduralisation" of the Convention rights[12]. Indeed, where the margin of appreciation is wide, the risk for arbitrary decisions has to be offset by procedural safeguards.

The European principles have to be applied within a specific factual context. It is here that the proper assessment of the facts comes into play. Let us take, for instance, a freedom of expression case. As regards the attempt to strike a fair balance between competing interests, the European Court's case-law attaches importance to a number of factors, such as for instance the nature of the speech involved: does the expression in question contribute to a debate of general interest or not? The answer to that question requires an assessment of the facts of the case. It is primarily for the domestic authorities, in particular the domestic courts, to make that assessment. Where the assessment is reasonable and well-motivated, the Court will in general not substitute its assessment for that of the domestic courts.

B. Dialogue between domestic courts and the European Court

Finally, I would like to comment on a few issues that you raised about the "dialogue" between the domestic courts and the European Court.

1. Domestic case-law as a an interpretational element for the European Court

It is clear that the European Court is influenced by developments taking place at the domestic level. I do not have to dwell upon this. Let me simply recall, as an example, that the Court takes account of the case-law of domestic courts in order to ascertain whether there is an emerging consensus in Europe on issues that may have a bearing on the proper interpretation of the Convention[13]. Where there is no such consensus, this is an element that usually plays in favour of a wide margin of appreciation of each of the States.

2. The authority of Strasbourg case-law for the domestic courts

More controversial is the question to what extent domestic courts are bound to follow the case-law of the European Court, and to what extent they can refuse to follow that case-law.

11 A similar approach was followed in *Tarakhel v. Switzerland* ([GC], no. 29217/12, ECHR 2014 (extracts)), in which the European Court explained which sort of checks the domestic courts of the Member States of the European Union should undertake within the framework of so-called "Dublin returns", in order to make sure that asylum seekers will not be sent to another Member State where they would run the risk of being received in conditions that amount to ill-treatment prohibited by Article 3.

12 See O. DE SCHUTTER and F. TULKENS, "Rights in Conflict : the European Court of Human Rights as a Pragmatic Institution", in E. BREMS (ed.), *Conflicts Between Fundamental Rights*, Intersentia, Antwerp, 2008, (169), 203-215; K. PANAGOULIAS, *La procéduralisation des droits substantiels garantis par la Convention européenne des droits de l'homme,* Bruylant, Brussels, 2011 ; E. DEBOUT, "La procéduralisation des droits", in F. SUDRE (ed.), *o.c.,* 265-300.

13 See, for example, *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 387, ECHR 2012 (extracts); *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013 (extracts).

a. The principles

i. Execution of a judgment by the courts of the respondent State

A judgment handed down against a given State has to be executed in that State. This is an obligation that follows from Article 46 § 1 of the Convention. For the respondent State, the judgment is "*res judicata*". All the organs of that State, including the courts, are bound by the judgment.

It should be recalled that even where the execution of a judgment requires the adoption of measures by the legislature, the courts may have a special responsibility pending developments in the legislative process. Where their constitutional system so permits, they may be under an obligation to set aside the application of domestic law found to violate the Convention[14].

Things can become complicated when, as in the original proceedings at the domestic level, the domestic courts have to take into account, in addition to the fundamental rights of the party which won the case in Strasbourg, the rights and interests of other parties[15]. In such situations, the settlement of the case at domestic level does not follow directly on from the judgment of the European Court, but it should at all events be compatible with it.

ii. Giving effect to a judgment handed down against a given State, in the legal order of another State

As a court for Europe, the Strasbourg Court is called upon to give authoritative interpretations of the Convention: "… (I)ts judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties …. Although the primary purpose of the Convention system is to provide individual relief, (the Court's) mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States ….[16]"

The Convention is binding in all of the States Parties to it. Given the European Court's role in providing an authoritative interpretation of the Convention, its judgments have an effect extending beyond the parties in the cases in which they have been handed down. In that sense, they can be considered to constitute "*res interpretata*" for the domestic courts, to use an expression coined by Jacques Velu[17].

b. The exception

Exceptionally, a domestic court can refuse to follow the European Court's case-law. This is acceptable only when such refusal is based on good reasons. I fully agree with the characterisation you give to such a dialogue: it must be a loyal and constructive one.

14 See, *e.g., Fabris*, cited above, § 75.

15 See, *e.g.,* German Constitutional Court, 14 October 2004, *Görgülü*, 2 BvR 1481/04, BVerfGE 111,307-322.

16 See *Konstantin Markin v. Russia* [GC], no. 30078/06, § 89, ECHR 2012 (extracts).

17 See, e.g., J. VELU, "Considérations sur quelques aspects de la coopération entre la Cour européenne des droits de l'homme et les juridictions nationales", in *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal – Protecting Human Rights : The European Perspective. Studies in Memory of Rolv Ryssdal*, Carl Heymanns, Cologne, 2000, (1511), 1520-1524.

A good example is the dialogue between the Supreme Court of the United Kingdom and the European Court on the use of hearsay evidence, that is evidence provided by a witness who is not present at the criminal trial and who cannot therefore be questioned by the defence. A Chamber of the European Court decided, on the basis of the Court's established case-law, that the use of testimony by an absent witness had violated the accused's right to a fair trial[18]. Thereupon, the Supreme Court, in another case, handed down a judgment in which it explicitly disagreed with the Chamber's reasoning, arguing that the latter had underestimated certain procedural guarantees existing in English law[19]. The filtering panel of the Grand Chamber of the European Court was aware of the existence of that judgment when it examined the request by the United Kingdom Government for a rehearing of the first case. It accepted the request, in order to give the Grand Chamber the opportunity to react to the decision of the Supreme Court. The Grand Chamber took into account the opinion of the Supreme Court, adapted its own case-law, and came to the conclusion that there had been no violation of the right to a fair trial[20]. Later, the application lodged by the person accused in the second case was also rejected[21].

I also agree with you that once the Grand Chamber has clearly decided an issue, it should be considered settled. If not, the Convention system would be seriously weakened. And I do not think that this would be in the interests of the citizens of Europe.

4. Conclusion

At last year's opening of the judicial year of the European Court, Andreas Vosskuhle, President of the German Constitutional Court, described the relationship between the European constitutional courts and the European Court of Human Rights as a "mobile" or an "ensemble of balanced parts", and rejected the idea of a relationship in the form of a "pyramid" or a hierarchical relationship. I fully agree with that description.

The protection of human rights is based on the search for a fair balance between the fundamental rights of the individuals and the interests of the society in which they live. National courts and the European Court should assist each other in finding the right solutions. While it is for the European Court to set the minimum standards, the national courts have the responsibility to apply these standards in their legal order, as part of the applicable legal framework. The success of the whole system lies in the degree of cooperation between both types of courts. A "shared responsibility", indeed.

18 See *Al-Khawaja and Tahery v. the United Kingdom*, nos. 26766/05 and 22228/06, 20 January 2009.

19 See *Supreme Court, R. v. Horncastle and Others*, [2009] UKSC 14, judgment of 9 December 2009.

20 See *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011.

21 See *Horncastle and Others v. the United Kingdom*, no. 4184/10, 16 December 2014.

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

Dean Spielmann

President
of the European Court of Human Rights

Opening address

Presidents of Constitutional Courts and Supreme Courts, President of the Parliamentary Assembly, Secretary General of the Council of Europe, Excellencies, Ladies and gentlemen,

I would like to thank you personally and on behalf of all my colleagues for kindly attending this solemn hearing for the opening of the judicial year of the European Court of Human Rights. Your presence here bears witness to your respect and esteem for our Court and we are very grateful for your support.

Today's hearing is a particularly momentous occasion for me. It is the last time I will be addressing you in these circumstances. It is still too soon to draw final conclusions and the challenges that lie ahead in 2015 are considerable, but let us, nevertheless, as we embark upon this new judicial year, take stock of what we have achieved. Our achievements are impressive.

In 2014 the Court gained further ground in its control over the flow of cases submitted to it. The exceptionally positive trend that I previously reported for 2012 and 2013 has been confirmed over the past year. In total, in 2014, the Court ruled in over 86,000 cases. The number of cases disposed of by a judgment remains high: 2,388, compared to 3,661 the previous year. At the end of 2013 there were some 100,000 applications pending. That figure was down by 30% at the end of 2014, standing at 69,900. This is a far cry from the astronomical figure of 160,000 pending applications in September 2011, which gave cause for concern about the very survival of the system.

The single-judge procedure, stemming from the implementation of Protocol No. 14, the increasingly frequent recourse to pilot judgments, but above all the modernisation and streamlining of our working methods, lie at the heart of those achievements. We have come a long way but cannot stop there. I firmly believe that the model we have been using for single-judge cases has not exhausted its full potential. Applying the same tried and tested methods, we will now have to tackle the repetitive cases. In dealing with such cases it is important to bear in mind, where the complaint is well-founded, that the applicant should be able to obtain redress as quickly as possible. This should be possible with the methods we are currently introducing.

Ultimately – and I hope this will be the case in the near future – our Court should no longer be burdened by repetitive cases. This will enable us to devote all our efforts to the most problematic and serious matters.

While my observations on the Court's activity have been particularly positive, it must nevertheless be said that the Court cannot act alone. Even if we introduced the most sophisticated resolution mechanisms, that would not suffice to stem the flow of cases coming before the Court. For it is incumbent upon the States themselves to be proactive in resolving structural and endemic problems. The question of repetitive cases is of course related to that of the execution of judgments. One cannot overestimate the importance of the Council of Europe's Committee of Ministers with its task of supervising the execution of the Court's judgments. It is not only the Court's credibility that is affected by failure to execute judgments, it is also that of the Committee of Ministers. This goes to the heart of the principle of shared responsibility between the Court and the States. And that is why I commend the initiative of Belgium to organise, in connection with its chairmanship, on 26 and 27 March in Brussels, a major intergovernmental conference which will precisely address this question. I hope that all the stakeholders in the system will take part in this event, at the highest level.

Among those stakeholders are the national parliaments, whose role is of particular importance. They can intervene in two ways: upstream, by scrutinising the compatibility of bills before parliament with the European Convention on Human Rights and our Court's case-law; and downstream, by ensuring that any legislative amendments rendered necessary by our judgments are adopted. It is quite rare for us to be able to establish direct contact with national parliaments and, in that connection, my speech before the Swiss Federal Parliament, on 9 December, remains an exceptional event. However, I would make two positive observations: firstly, that an increasing number of national parliaments have set up commissions to ensure the proper execution of the Court's judgments; secondly, that the Parliamentary Assembly of the Council of Europe constitutes a crucial and effective relay between the Court and the national parliaments. Allow me to pay tribute to the unrelenting action of my compatriot and friend, Anne Brasseur, President of the Assembly, who is an ardent advocate of an increased role for the Parliamentary Assembly in the execution of our judgments, and who has made a considerable contribution to the strengthening of its relations with the Court. The Parliamentary Assembly has, more than ever, been playing the role of amplifier of our judgments. We are grateful for its support.

Of course, it is mainly with the other national and international courts that we have been pursuing our dialogue in 2014. I will not enumerate here all the meetings that have been held. However, I would like to mention the visit of a few days that we received from our sister institution on the American continent, the Inter-American Court of Human Rights. I am pleased to note the ever-closer relationship that has been built up, over the years, between our two courts. In 2015 we will receive a delegation from the International Court of Justice. These meetings reflect our idea of an international court that is open and receptive to other courts. This is surely the best antidote to avoid becoming stuck in one's ways …

As regards national courts, I have already had many opportunities to express the importance that I attach to Protocol No. 16, the protocol of dialogue with the highest courts of our member States. To date, sixteen States have already signed it. I hope that 2015 will be the year of the ten ratifications which are required for its entry into force. To foster dialogue with supreme courts is at the forefront of my concerns. That is why I intend to set up, in 2015, an information exchange network, which will enable all supreme courts to have a point of contact within our Court, through our Jurisconsult, who will be able to provide them with information about our case-law as and when they need it. This will not be a one-sided dialogue and we will also have the benefit of the various resources made available by their respective research departments. So even before Protocol No. 16 enters into force, this network of shared research will facilitate the application of the European Convention on Human Rights by national supreme courts.

As is usual on this occasion, mention must be made of the leading cases that have been decided over the past year. What are the most noteworthy cases from 2014?

First of all, and by way of introduction, I am sure you recall that last year I expressed, on this very occasion, my concern about the events taking place in Ukraine. This region of Europe has not been spared over the past months and this has had a direct impact on the activity of our Court, which is currently examining three inter-State applications lodged by Ukraine against the Russian Federation, as well as a very large number of individual applications against either State. The current crisis on our European continent shows the extent to which, in such circumstances, the need for strong European justice is crucial.

As regards, more specifically, the cases heard in 2014, I would observe that increasingly sensitive matters have been coming before our Court. Applicants and States have expected us to take a position on infinitely complex matters. To mention only a few examples, one was the question of State responsibility for sexual abuse perpetrated in State-run schools in Ireland (the case of *O'Keeffe*, 28 January 2014); another was the French ban on the concealment of one's face in public, in the *S.A.S.* case of 1 July 2014; there was also the question of the legal effects of a change of gender on pre-existing marriages, in *Hämäläinen v. Finland* (16 July 2014). I could cite many more examples, given the considerable variety of questions put to our Court. This is proof of the extraordinarily living nature of the European Convention on Human Rights.

With there being no consensus on some of these issues, and with certain cases concerning totally new questions of society, our Court bears a particularly heavy responsibility, since, as you know, our findings will be scrutinised not only by the parties to the dispute, but also by the supreme courts of the member States, by the media and by public opinion, sometimes far away from the country concerned by the judgment.

States tend to accuse us of activism when we find against them, while applicants reproach us for showing restraint if we do not find a violation. To provide the best possible response, our Court necessarily treads a narrow path. We face a constant challenge as regards the acceptability of our decisions. This question is all the more sensitive as our legitimacy is conferred on us by the States that we find against, and our position is therefore far from easy. We do not follow a particular judicial strategy, but it goes without saying that we do think about how our judgments will be received. However, such considerations are circumscribed by our obligation to ensure compliance with the European Convention on Human Rights. The rhythm imposed by our Court is not necessarily the same as that of the member States. Sometimes we go further and advance more quickly. But not always and not systematically. It even happens – and this is increasingly the case –that, in applying the Convention, domestic courts are already ahead of us. Such superimposing of different rhythms which play out simultaneously and independently of each other can be compared to the use of polyrhythms, well known to musicians, and of which a celebrated example can be found in the "Sacrificial Dance" from Igor Stravinski's "The Rite of Spring". The rhythmic structure is the starting point in the "The Rite of Spring", not so much because of its predominance over the other musical parameters, but because it organises the rest. One hundred or so years ago Stravinski thus invented a new tempo. In the European Court of Human Rights and in the national courts, we each have our own rhythms that we strive to play together, with our living instrument, the Convention.

A recent example, in a French case, illustrates a situation in which our Court was asked to settle a new question and to impose its tempo. The question was a highly sensitive one, because it related to a procreation technique not hitherto addressed, namely, recourse to surrogacy arrangements, which is prohibited in France. Our Court did not find a violation of the Convention on account of the ban on surrogacy arrangements in France. In the cases in question, which have been much commented upon, the Court focused on the interests of the child, and the violation of the Convention that it then found was based exclusively on its consideration of the right of children to respect for their private life, as everyone must be able to establish the substance of his or her identity, and in particular the legal parent-child relationship with a genetic parent.

Such cases show that the Court seeks first and foremost to ensure compliance with the Convention without interfering in the national debate. In choosing not to request the referral of that case to the Grand Chamber, the French Government have proved that the decision adopted was acceptable.

The other case that I would like to point out illustrates once again the prudence of our approach in the most sensitive matters: the case of *Tarakhel v. Switzerland*, concerning the return of a family of asylum-seekers to Italy. The question of migratory flows has arisen in many of our States. The solutions that we seek to establish in response to complex issues must be in keeping with our principles, particularly humanitarian considerations. In *Tarakhel* the Court thus took the view that there would be a violation of the Convention if the Swiss authorities returned the applicants to Italy without having first obtained individual guarantees that they would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

The *Tarakhel* case is very different from cases relating to surrogacy arrangements or from those concerning children who were sexually abused in religious schools in Ireland. However, in all these cases the specific situation of the children has been taken into account and has guided the Court in its decision. These examples undoubtedly reflect the duty which the Court constantly endeavours to fulfil, namely to protect the weakest and most vulnerable.

It is also for that reason that the Court has been known for several years now by the expression "The Conscience of Europe". This is the title of a book about our Court with which many of you are familiar. We were thus particularly proud to have heard this expression used by His Holiness Pope Francis during his speech to the Council of Europe on 25 November. It was seen as an encouragement to pursue our mission, serving the cause of human rights protection in Europe.

With that in mind, I am sure you will not be surprised, as I draw to a close, if I refer to the opinion given on 18 December by the Court of Justice of the European Union on the proposed accession of the European Union to the Convention. Let us be clear: the disappointment that we felt on reading this negative opinion mirrored the hopes that we had placed in it – hopes shared widely throughout Europe.

In deciding that the Union would accede to the European Convention on Human Rights, the drafters of the Lisbon Treaty clearly sought to complete the European legal area of human rights; their wish was that the acts of EU institutions would become subject to the same external scrutiny by the Strasbourg Court as the acts of the States. They wanted above all to ensure that a single and homogenous interpretation of human rights would prevail over the entire European continent, thereby securing a common minimum level of protection. The opinion of the Court of Justice does not render that plan obsolete; it does not deprive it of its pertinence. The Union's accession to the Convention is above all a political project and it will be for the European Union and its member States, in due course, to provide the response that is called for by the Court of Justice's opinion.

For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to a supranational institution.

Our Court will thus continue to assess whether State acts, whatever their origin, are compliant with the Convention, while the States are and will remain responsible for fulfilling their Convention obligations.

The essential thing, in the end, is not to have a hierarchical conception of systems that would be in conflict with each other. No, the key is to ensure that the guarantee of fundamental rights is coherent throughout Europe.

For, let us not forget, if there were to be no external scrutiny, the victims would first and foremost be the citizens of the Union.

Ladies and Gentlemen,

I would like to have ended my speech at this juncture, but there is something else I am compelled to mention. What I have to say concerns the events earlier this month, in France, our Court's host country, when two of our fundamental values came under attack: the right to life and the right to freedom of expression.

For over 50 years now our Court has been defending freedom of expression. A freedom that is applicable to ideas that "offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'" – to quote the wording that dates back to the *Handyside* judgment.

Our Court even invented an expression that is now celebrated worldwide: "journalists are the watchdogs of democracy". It was natural that in such circumstances the Court should join in the movement which proliferated, throughout the world, to show solidarity with the victims of the attacks: among them journalists, policemen, and citizens who were killed because they were Jews. I am convinced that the States, in their response to those acts, whether at a national or an international level, will ensure that human rights are preserved. To quote Nicolas Hervieu, one of the shrewdest observers of our case-law, writing a few days ago: "To pursue the fight against terrorism while upholding fundamental rights is not a luxury, but a condition of effectiveness and a compelling necessity. Any renouncement of our democratic values would only lead to defeat. And the terrorists would be the winners".

Mr Francisco Pérez de los Cobos, President of the Constitutional Court of the Kingdom of Spain

You come from a country which has suffered heavily as a result of terrorism, and the Constitutional Court of which you are President has played a key role in Spain's transition to a democracy. I have mentioned here this evening the acceptability of our judgments. Among the recent examples of the perfect reception of a leading decision, the exemplary manner in which Spain implemented our judgment in the *Del Río Prada* case is to be commended. I welcomed that response on this very occasion last year.

Your presence here is a great honour for us and it is with pleasure that I now kindly invite you to take the floor.

Excmo. Sr. D. Francisco Pérez de los Cobos Orihuel

President of the Constitutional Tribunal, Spain

President of the European Court of Human Rights, Members of the Court, Excellencies, Ladies and Gentlemen,

As a European citizen and as President of the Spanish Constitutional Court, it is a great honour for me to have been invited to this solemn ceremony for the opening of the judicial year of the European Court of Human Rights, thus giving me the opportunity to address you on this occasion.

1. THE EUROPEAN SYSTEM OF HUMAN RIGHTS PROTECTION: CORNERSTONE OF EUROPEAN IDENTITY

It is with some emotion that I take the floor because I am fully aware of how indebted we are, as European citizens, to this institution which has made a key contribution to the construction and development of the European system of human rights protection.

When, upon the ruins of the Second World War, the founding fathers of the Council of Europe signed in Rome, on 4 November 1950, the European Convention on Human Rights, whose 65th anniversary we are celebrating this year, they took a ground-breaking step in the conception of instruments of human rights protection. They did not merely issue a solemn statement, in line with the Universal Declaration of Human Rights of 1948, nor did they simply proclaim a set of superior shared values – such as democracy, respect for liberties or the rule of law – but also, precisely displaying with some eloquence their commitment to the recognition of those rights and the assertion of those values, they set up – restricting national sovereignty – an international court tasked with ensuring respect by the States parties for the fundamental rights they had recognised.

This was a revolutionary gamble, waging as it did on a system that was to guarantee the effectiveness of rights and one that has proved successful. Never have rights and public liberties been better protected in Europe. With the benefit of the considerable body of case-law of the Strasbourg Court, the Europe of rights of which those founding fathers dreamed has now become a tangible reality and its democratic principles are a common touchstone for us all.

The most telling sign that the European system for the protection of human rights is a living system is undoubtedly its capacity to adapt. It is very much a work in progress, as evidenced by the successive reforms of the Convention, which have greatly contributed to keeping it dynamic and to further improvement. These reforms, testimony as they are to the system's adaptability to its specific demands and needs and to the social and political changes in the outside world, are first and foremost an illustration of the level of stringency with which the Court carries out its own task of safeguarding rights. A task which – as President Spielmann is keen to point out – has as its cornerstone the right of individual petition, open to 800 million potential litigants. The right of individual petition is thus the instrument through which the Court has developed its own jurisprudence and the content of the rights enshrined in the Convention, while making the protection of those rights concrete and effective. Those rights, which are embodied in the protection afforded to each citizen, are thus secured through the Court's adjudication and supervision.

This, President, is what makes the European human rights protection system great. It is a system which, in my view, is the cornerstone of European identity and I believe this is worth emphasising at times such as these when Europe is undergoing a political crisis and our fellow citizens are still having to contend with the devastating effects of the latest economic crisis. There is nothing more telling or revealing about European political identity than our shared goal to make the safeguarding of human rights – the practical and effective protection of those rights – the very foundation of our political order.

As has been rightly pointed out, the human rights protection system to which the Rome Convention has given full legitimacy goes hand in hand with the fruitful and deep-rooted European school of thought which has for many years sought to make this old continent an area of political liberties while pleading for a philosophical and political conception of the person that relies on full recognition of human dignity. Today, our instruments, successors to a legacy which we are keen to claim as our own, are built on the *homo dignus* and the rights inherent therein, forming the basis and purpose of the system as a whole. Democratic dignity is the assertion of the unique, universal and irreplaceable value of each individual as such and is therefore the basic source of his or her fundamental rights. It is no coincidence that the other great European benchmark for the protection of human rights – the Charter of Fundamental Rights of the European Union, whose political importance for the Union is undeniable – reaffirms in its very first lines the inviolability of human dignity which – I quote – "must be respected and protected" (Article 1). This shared vision of the equal dignity of all human beings is, in my view, what is most valuable about the European spiritual and moral heritage.

2. INFLUENCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS IN SPAIN

Undoubtedly, the importance of the European Convention on Human Rights and the case-law developed by this Court in interpreting and applying the Convention – an importance recognised by all – has been felt, and even experienced, all the more keenly by countries such as mine which have undergone democratic transition processes as recently as within the last few decades. For us, the Court's case-law, especially during the early years of the new democratic regime, was an outstanding benchmark and a paramount instrument of democratisation.

Spain ratified the European Convention on Human Rights on 26 September 1979, only a few months after the entry into force of the 1978 Spanish Constitution, itself largely inspired by the Convention.

This ratification was of particular significance because Article 10.2 of the Constitution provides that the fundamental rights and civil liberties enshrined in the Constitution must be interpreted in the light of the international human rights treaties and agreements ratified by Spain. Therefore, following the ratification of the Rome Convention all the *acquis* of this Court's case-law concerning the rights enshrined in the Convention became an essential hermeneutical canon for the construction of the Spanish constitution.

This canon, to which, from our earliest judgments, we have accorded "decisive importance" (STC 22/1981, F.J 3), has proved extremely fruitful for the Spanish Constitutional Court's task of interpretation. Over the past 35 years since it was set up, it has continually and consistently referred to the case-law of the European Court of Human Rights so as to define the content of the rights enshrined in the 1978 Constitution.

It would be hard to fully do justice to the scope of this permeating influence. In purely quantitative terms it has resulted in over 500 judgments of the Spanish Constitutional Court which expressly draw inspiration from Strasbourg. The figures for our case-law concerning *amparo* appeals show that, according to the available studies, approximately 60% of all judgments include references to Strasbourg jurisprudence. In qualitative terms, going more into substance, the results are no less impressive: such crucial rights as equality before the law and non-discrimination[01] (Article 14 of the Spanish Constitution, the "SC"), the right to respect for private and family life[02] (Article 18.1 of the SC), the right to the secrecy of communications[03] (Article 18.3 of the SC), freedom of expression[04] (Article 20.1 of the SC), freedom of assembly and association[05] (Article 21 of the SC), the right to a fair trial, with all its safeguards[06] (Article 24.2 of the SC), the right to defend oneself[07] (Article 24.2 of the SC) or to be presumed innocent[08] (Article 24.2 of the SC), have been defined by our case-law in accordance with the guidelines from Strasbourg.

This overview shows that the Spanish Constitutional Court has taken very seriously the necessary dialogue, as required by Article 10.2 of the Constitution, with the international human rights conventions and agreements and with the organs by which they are guaranteed, and that it has discharged, in an effective manner, the task of reception that was called for by that precept. In this sense then, it is appropriate to say that the Spanish Constitutional Court has espoused the principle of the "binding effect of interpretation" taken from the case-law of the European Court of Human Rights.

The result of this influence and, in general terms the greater internationalisation in the interpretation of the Constitution by the Constitutional Court has given rise, I believe, to a sound and *avant-garde* case-law on fundamental rights. In its turn it has permeated the ordinary courts by establishing in Spain a high and effective level of human rights protection. It is obvious that this situation alleviates the Strasbourg Court's own workload for, through the principle of subsidiarity, it transforms our courts, whether ordinary or constitutional, into the natural and efficient custodians of the rights enshrined in the Rome Convention and the Protocols thereto.

As time passes and our own case-law develops, this task of reception of European case-law has become increasingly dialogue-based and less unilateral, to the point where numerous episodes could well be consigned to a "code of best practice" in matters of dialogue between courts.

I would like to recall one particularly significant episode, concerning the protection of the right to private life and to the secrecy of communications, which gave rise, in the form of a noteworthy interaction, to a succession of judgments by our two courts. The first sequence of the case in question was the judgment of this Court in *Valenzuela Contreras v. Spain*, of 30 July 1998, where the Court found against my country, finding that the regulations on telephone tapping, which were general in nature and incomplete in regulating the conditions of interception, proved inadequate. The Court identified a problem with the quality of the law, which did not clearly establish the cases and conditions in which telephone tapping was allowed, and it found admissible the applicant's complaint about a violation of his right to respect for his private life (Article 8 of the Convention).

01 STC 22/1981, 2 July; or STC 9/2010, 27 April (*hereafter STC = judgment of the Spanish Constitutional Court*)
02 STC 119/2001, 24 May; or STC 12/2012, 30 January.
03 STC 49/1996, 26 March; or STC 184/2003, 23 October.
04 STC 62/1982, 15 October; or STC 371/1993, 13 December.
05 STC 195/2003, 27 October; or STC 170/2008, 15 December.
06 STC 167/2002, 18 September; or STC 174/2011, 7 November.
07 STC 37/1988, 3 March; or STC 184/2009, 7 September.
08 STC 303/1993, 25 October; or STC 131/1997, 15 July.

This Strasbourg case-law was fully assumed by the Spanish Constitutional Court, a few months later, in judgment STC 49/1999 of 5 April 1999, which invalidated the inadequate Spanish legislation, finding it incompatible with Article 18.3 of the Spanish Constitution. However, the Constitutional Court also indicated that the incorporation, by the ordinary courts, of the criteria derived from Article 8 of the Convention, in line with the interpretation of the European Court of Human Rights, would enable, even if the failings of the legislation persisted, the right to the secrecy of communications to be upheld.

A few years later – in 2003 to be precise – the Court found against Spain once again in the case of *Prado Bugallo*, essentially on the same grounds of defective quality of law as that which had led to its first judgment. In spite of the amendment of the legislation in question – section 579 of the Spanish Criminal Procedure Act in its 1988 version – the same shortcomings as those found in the previous text persisted: the offences that could authorise telephone tapping were not clearly defined, such interception was not limited in time, and there were no precautions concerning the manner of making recordings or safeguards to ensure that the intercept evidence reached the defence and the judge intact. While the Court did admit that Spanish case-law – that of the Constitutional Court and, above all, of the Supreme Court – had largely supplemented the legislation in the light of its own jurisprudence, that improvement had taken place after the facts of the case and the defective quality of the law once again led to a judgment against Spain.

The final sequence of this saga can be found in the decision of 25 September 2006 dismissing the *Abdulkadir Coban* application and thus heralding a significant change of attitude with regard to Spain and complaints concerning the quality of its legislation. Even though the impugned shortcomings were still present, the Court took into account the work of the Constitutional Court – of which it cited seven judgments – and of the Supreme Court in order to supplement the relevant legislation, attaching thereto the safeguards established by the Strasbourg case-law, and thus, in that case, rejected the applicant's complaints. In that decision the Court found as follows: "Even though a legislative amendment incorporating into domestic law the principles deriving from the Court's case-law would have been desirable, as the Constitutional Court has itself constantly indicated, the Court finds that section 579 of the Criminal Procedure Act, as amended by the ... Act ... and supplemented by the case-law of the Supreme Court and Constitutional Court, lays down clear and detailed rules, in principle establishing with sufficient clarity the scope and conditions of exercise of the authorities' discretion in such matters". Consequently, despite the persistence of the legislative shortcomings, the Strasbourg Court took into account the incorporation through case-law of the safeguards emanating from its own decisions and concluded that the relevant legislation, as thus supplemented, no longer breached the Convention.

Similar interaction can be found in connection with a subject that is of particular interest to the European Court, since it engages the Court's own authority. I refer to the execution of its judgments.

It is well known that the Rome Convention does not determine the manner in which States must execute the judgments of the Court and the Spanish legislator has not, in spite of a number of calls by our domestic courts, adopted any specific procedure for that purpose.

Spanish constitutional jurisprudence has been proactive in guaranteeing the effective execution of Strasbourg's judgments finding a violation of certain of the human rights protected by the Convention, and has thus partly made good the shortcomings of Spanish legislation in this area. Thus, in judgment 245/1991 of 16 December 1991, the Constitutional Court upheld the applicants' *amparo* appeal and declared null and void the criminal proceedings that had been found, in the *Barberá, Messegué and Jabardo* judgment, to be in breach of fair trial safeguards (Article 6 ECHR). It took the view that this finding of a violation had to have a genuine and effective impact on the right to liberty of the applicants, who, following the trial in question, were serving a prison sentence.

In the same vein, the Constitutional Court supported an interpretation of the Criminal Procedure Act in order to ensure that criminal convictions could be reviewed by the criminal court itself for the purpose of giving effect to judgments of the European Court of Human Rights (STC 240/2005, of 10 October 2005). This position, already asserted by the Criminal Division of the Supreme Court in a decision of 29 April 2004, has now been clearly established by an agreement of that Division to the effect that "for as long as the legal system has no express statutory provision for the effective implementation of judgments given by the European Court of Human Rights determining a violation of the fundamental rights of a person convicted by the Spanish courts, the application for review under Article 954 of the Code of Criminal Procedure will serve such purpose" (Supreme Court decision of 5 November 2014).

Appeals to the legislator by the domestic courts – both constitutional and ordinary – seem to have finally borne fruit as a bill is now before the Spanish Parliament which includes an express provision on the review of final criminal judgments when required by a judgment of the Strasbourg Court.

3. THE SYSTEM AT THE CROSSROADS: THE SO-CALLED "MULTI-LEVEL" PROTECTION OF FUNDAMENTAL RIGHTS

Mr President, the multi-level dimension of the European human rights protection system is now undoubtedly the main challenge for us. A challenge which tests the system's consistency and therefore its own legitimacy in safeguarding rights and fundamental freedoms.

Let us be frank here: if there is one thing which characterises this so-called "multi-level" protection model, it is the fact that it is complex and sophisticated. Last year on this very occasion Andreas Voßkuhle, President of the German Federal Constitutional Court and a good friend of mine, compared that model to a singular work of art, the mobile. On top of the rights recognised in national constitutions are those enshrined in the European Convention on Human Rights and, additionally today, in the member States of the European Union, those proclaimed by the EU Charter of Fundamental Rights. These are superimposing declarations of rights, each relying on the jurisdiction of a court which purports to be its ultimate interpreter.

For all our attempts to minimise the issue, the normative instruments in question are dissimilar and the rights secured therein do not always fully coincide – nor, in some cases, do the interpretations by the various courts. Unavoidably, there have been and will be discrepancies between the various case-law and this will inevitably result in differing levels and standards of protection.

Added to this diversity and relative substantive heterogeneity, the procedural issues are complex: during a single set of proceedings issues of unconstitutionality may be raised before the Constitutional Court, requests for preliminary rulings may be made before the Court of Justice of the European Union and, in the near future, we hope, requests for preliminary rulings of a discretionary non-binding nature may be submitted to the European Court of Human Rights. These are all courts which should, as part of the same system, interact with each other, but which, above all – of course – naturally tend to defend their own jurisdiction.

It is therefore hardly surprising that all this may generate a sense of confusion, or sometimes unease, among our fellow citizens, who fully understand the essential nature and universal vocation of human rights but who find it hard to accept that the content and level of protection vary depending on the court which is responsible for dealing with the case, and that there is no certainty as to which one will adjudicate on that case or when, nor, once the judgment is handed down, as to whether it will be appropriately executed.

This unease of citizens is also, quite often, shared by judges in the ordinary courts who, on account of this multi-level system, have seen their role strengthened and position redefined vis-à-vis their own Constitutional Court. All too often judges are faced with conflicting loyalties and they find themselves at a crossroads with regard to substance and/or procedure, not knowing which way to turn. How is the judge supposed to act when there is some doubt in national law not only as to constitutionality but also as to conformity with both EU law and with the European Convention on Human Rights? What supervisory organ should the judge call upon when he finds that there are different levels of protection in the case-law of his own constitutional court, in the European Court of Human Rights and in the Court of Justice of the European Union? What procedural avenue should be followed: question of unconstitutionality, question for a preliminary ruling, or perhaps both?

The lack of clear and applicable guidelines as regards the connection between both the various protection standards and the different procedural choices generates a worrying sense of uncertainty, compounded by the likely risk of an undesirable increase in the length of the proceedings. The lack of legal certainty and unreasonable delays may well end up undermining the legitimacy of the system.

Sometimes I wonder whether, out of pride in the complexity and sophistication of our model, which lends itself so well to doctrinal hair-splitting and self-referencing debate, we might not have overlooked the ultimate beneficiaries of our protection – those who are the sole justification for our existence and work – the citizens or, more generally, individuals who are the holders of rights and freedoms. As was very clearly stated at a seminar in Madrid by the Advocate General of the Court of Justice of the European Union and Emeritus President of the Spanish Constitutional Court, Pedro Cruz Villalón, the citizens are not responsible for the fact that the European human rights protection system is a multi-level one. The complexity of the system must not burden those whom it seeks to protect and still less limit their right to the effective protection of their rights and freedoms.

The crisis triggered by the recent opinion of the Court of Justice of the European Union on the EU's accession to the Rome Convention will probably prove to be beneficial, because ultimately it will make each stakeholder face up to its own responsibilities. The EU's accession to the European Convention on Human Rights, which – let us not forget – is provided for in the treaties themselves (Article 6.2 of the Treaty on the European Union) will be a landmark in the completion of the system and for the legitimacy and credibility of the Union. However, it needs to take place in the right conditions – to generate solutions rather than new conflicts. Turning a blind eye to problems has never been a way of solving them and there are limits to judicial activism that should not be ignored. The political moment has arrived because the system's problems call for in-depth political decisions which depend directly on those who, within democratic systems, have the task of representing the citizens.

Until such decisions are adopted, I am sure that we, as stakeholders in this complex situation, will proceed with the necessary sensitivity and intelligence in order to avoid or minimise any problems, as we are indeed required to do by our commitment to the protection of human rights. The principles of subsidiarity and institutional balance, and due deference for the role of the other body – which have always guided our action – must, if possible, be strengthened because they form the best guarantee of preventing and avoiding conflict. But when it does occur – conflict being inherent in the very functioning of the system –, experience shows that dialogue conducted humbly, knowledge of each other and empathy are the best means by which to address it.

In the aftermath of the First World War, Thomas Stearns Eliot, a young American poet fascinated by European culture, described the old continent as a "Waste Land", an "Unreal City / Under the brown fog of a winter dawn / A crowd flowed over London Bridge, so many / I had not thought death had undone so many…". The fact that, nearly a hundred years later, our image of Europe is quite different, is largely because, shortly after the atrocities of the Second World War, a handful of visionaries decided to proclaim "Never again!" and, in order to make this a reality, built up a system for the protection of human rights which defines us today as Europeans.

The recent attacks in Paris, which I firmly condemn – in Spain we are all too familiar with the pointless agony caused by terrorism –, highlighted the fragility and vulnerability of our system, which defends itself with difficulty against fanaticism and terror. However, at the same time, those attacks have shown its strength: the strong will of our fellow citizens to live together, with a firm and common desire to reaffirm and stand up for our values, our freedoms and our rights. It is on our shoulders – on those of us all – that this serious responsibility lies today.

Thank you for your attention.