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(«Принцип субсидіарності у практиці ЄСПЛ»)

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LIST OF ABBREVIATIONS

- CoE – Council of Europe
- Convention – the Convention for the Protection of Human Rights and Fundamental Freedoms
- ECHR (Court) – the European Court for Human Rights
- EU – European Union
- Member States – member States of the Council of Europe
- Protocol No. 15 – Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms
- States Parties – States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms

INTRODUCTION

Topicality

Proclaiming and standing for all the basic human rights the Convention along with the ECHR cannot be the only responsible for their implementation. The matter is that there exists a great number of societies, which differ in cultures, historical backgrounds, traditional values etc. The national authorities are therefore, deemed to be better placed to secure human rights of their citizens more effectively. What is more, the Court itself is simply incapable of coping with all the applications arising from violations of the Convention rights in different countries. That is why the principle of subsidiarity exists, aiming to find the balance between respect for local rules and diversity, and compliance with the common principles provided by supranational authority.

In particular, this principle is topical in the last few years, when the caseload of the ECHR has increased significantly and the Protocol No. 15 (proving the principle of subsidiarity) was enacted by the CoE. Robert Spano, a judge on the ECHR, asserts in his recent article that Strasbourg is entering into the "age of subsidiarity"[1]. Thus, the major relevance of these theses is to define why the subsidiarity is so important and suggest the ways of maximum compliance with this principle by the actors of the Convention system.

Degree of scientific development and novelty

The concept of subsidiarity and the origin of this principle have been defined by many authors, for example, Gabriel Füglistaler, Marisa Iglesias Vila, Dean Spielmann, Sabino Cassese, Jean-Marc Sauvé and others. The greatest contribution to this issue has made the ECHR itself in its case law and certain judges to the ECHR in their concurring and dissenting opinions. However, the questions of correlation of subsidiarity with the other principles of the Convention, as well as identification of particular categories of cases, where the Court applies subsidiarity are mostly referred to in this paper for the first time.

[1] Spano, Robert. Universality or Diversity of Human Rights? *Strasbourg in the Age of Subsidiarity*. 2014, July 10. https://doi.org/10.1093/hrlr/ngu021.

Objective and tasks

The main objective of this thesis is to determine the importance of the principle of subsidiarity and define how far the Court can go in analyzing cases under this principle.

In order to achieve a given objective this paper is aims to fulfil the following **tasks**:

- explain the origin of the principle of subsidiarity;
- clarify the concept of the principle of subsidiarity and its importance for the European human rights protection system;
- identify the correlation between the principle of subsidiarity and other principles, underlying the Convention;
- analyse existing methods of coping with the Court's workload and their effectiveness in terms of compliance with the principle of subsidiarity;
- define the categories of cases where the ECHR applies the principle of subsidiarity and analyse the character of such application.

Object and subject

The object of this paper is the ECHR case law and the subject is application of the principle of subsidiarity in those cases, the nature and patterns of such application.

Methodology of research

As the central question of this thesis is defining the conditions for the subsidiarity principle application in the ECHR case law, the main emphasis here is put on such case law analysis. A great amount of cases referring to subsidiarity should be looked through in order to find the criteria or the logic, which the Court uses when applying it.

For this problem, the best methodology of legal reasoning is induction. It is characterized by the fact that you start from the empirical facts that constitute a legal problem (ECHR cases) and then develop a general conclusion (conditions for the subsidiarity principle application/categories of cases where it is applied).

Deduction is less feasible here and is used only to find out the existing theoretical basis of interpretation of this principle and rules of its application in legal doctrine and other secondary sources.

These strategies of legal reasoning will reflect in the structure of thesis in the following way:

- firstly, some theoretical fundamental issues will be described using deductive strategy;
- then follows the analysis of ECHR case law on the matter of its application of subsidiarity; and
- after that certain criteria to define categories of cases where it is applied will be suggested.

The last two are a clear illustration of induction, which is aimed to be the key model of reasoning here.

Sources

The main sources of this paper are undoubtedly, the Convention and Protocols thereto in line with their interpretation by the ECHR. Convention forms the basis of this work, as it is the act of the highest legal force in the field, on which all other sources are based. Protocols No. 14 and No. 15 also play a major role here, as they are parts of the big reform process driven by the enormous Court's caseload and failure of the national authorities to act in accordance with the principle of subsidiarity.

The ECHR case law constitutes the biggest part of all sources here. Its analysis is crucial for achieving this thesis' objective and answering the question of how far the Court may go in analysing cases.

Apart from them the primary sources are CoE documents on subsidiarity, such as Interlaken, Izmir and Brighton Declarations describing this principle, annual reports of the ECHR, which show each year's workload and point on its reasons, among which subsidiarity is not the least, and others.

Particularly useful for this work were Sabino Cassese's and Jean-Marc Sauvé's papers for the Seminar on "*Subsidiarity: a double sided coin?*"[2], organised by the European Court of Human Rights and held in Strasbourg, 30 January 2015. These papers describe the meaning of subsidiarity, the role of national authorities and the Court according to this principle, Protocol No. 15 and many other concepts crucial for the current topic. Another source that pervades all this paper is Gabriel Füglistaler's thesis "The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence"[3]. This work gives a picture of the principle of subsidiarity from its origin to the most important changes in case law applying it.

Apart from mentioned above, there are also some secondary sources, needed to reveal the issue comprehensively. Among them, the *legal doctrine* serves a theoretical basis, providing the meaning and the interpretation of the principle of subsidiarity by different authors; *ECHR guides* on articles of the Convention characterise the attitude of the Court to deciding certain categories of issues; *preparatory materials and follow-up notes of the High Level Conferences* on subsidiarity depict the topicality of this principle and the need to include it into the Preamble of the Convention, etc.

All in all, this master thesis referrers to 123 sources. They are all used as of December 1, 2019.

Structure

This thesis consists of the introduction, four chapters, sixteen subchapters, the conclusion, the list of sources and appendix.

[2] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.

[3] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

CHAPTER I. THE ORIGIN OF THE PRINCIPLE OF SUBSIDIARITY

Article 1 of Protocol No. 15[4], not yet in force, added a new statement to the Preamble of the Convention. It provides the following: "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"[5].

Taken on the 24th of June, 2013 Protocol No. 15 was the first Council of Europe's documents to provide the principle of subsidiarity on paper. However, this core principle existed in the Convention mechanism from its very adoption in 1950 and evolved hand in hand with the Convention relations.

In order to better understand the meaning and purpose of subsidiarity let us take a look at its origin.

1.1. Subsidiarity in the Convention

Although there is no explicit mention of the principle of subsidiarity in the Convention, it can still be led out implicitly from the certain Articles of the Convention[6]. These are:

- **Article 53 of the Convention**, which points out the complementary nature of the ECHR system. This article states that more favourable national human rights or guarantees shouldn't be limited by the standards set in the Convention[7].
- **Article 1,** which obligates the High Contracting Parties to secure the rights and freedoms defined in Section I of the Convention to everyone

[4] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24.VI.2013. https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf.
[5] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015. p. 5. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.
[6] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 10. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[7] Ibid., p. 10.

within their national jurisdiction. The Convention thus sets certain standards of conduct rather than uniform solutions leaving to each State Party a range of choices for implementing the rights and freedoms of the Convention within its own national legal system[8].

- **Article 13,** in its turn, provides the right to an effective remedy before a national authority in order to enforce the substance of the Convention rights. Same as with Article 1, the Convention leaves the Contracting States broad freedom of discretion on how to secure the effectiveness of remedies for breaches of the Convention rights under Article 13[9].
- **Article 35** of the Convention provides that complaints are only admissible before the ECHR after all domestic remedies have been exhausted in order to grant states the primary opportunity to address the complained situation in the domestic court[10].
- At last, **Article 19** of the Convention establishes the role of the Court in the Convention system. It states as follows: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights…"[11].

It is clear from these provisions that from its very origin the Convention provided that the States Parties were **primarily responsible** for the securement of all the rights and guaranties mentioned therein. The Court, in its turn, was established just to **look after the States** when they are doing it. Hence, the ECHR was implied to be a secondary (subsidiary) mechanism in fulfilling the Convention rights.

[8] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 10. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[9] Ibid., p. 11.
[10] Ibid., p. 11.
[11] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. https://www.refworld.org/docid/3ae6b3b04.html.

At the same time, such an implicit reference to the principle of subsidiarity in the Convention turned out to be not enough for the effective operation of European human rights protection system, so that some further steps had to be implemented.

1.2. Subsidiarity in the ECHR case law

Besides the articles of the Convention, there is extensive reference to the principle of subsidiarity in the **ECHR case law**, starting with the Belgian Linguistic Case in 1968[12], stating that:

> In attempting to find out (…) whether or not there has been [a violation], the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. **In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the *subsidiary* nature of the international machinery of collective enforcement established by the Convention.** The national authorities 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[13].

So far there are 409 ECHR cases (in English) mentioning the word "subsidiarity"[14] according to the HUDOC database. One of the most common references to subsidiarity reads as follows, "the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are (…) in principle better placed than an international court to evaluate local needs and conditions"[15].

In *Varnava and Others v. Turkey* [GC], the Court stated that: "(…) **in line with the principle of subsidiarity**, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that **the domestic**

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[12] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 9. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

[13] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, apps. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, §10.

[14] Council of Europe. HUDOC database. https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22subsidiary%22],%22sort%22:[%22kpdate%20Descending%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}.

[15] *Hatton and Others v. the United Kingdom* [GC], app. no. 36022/97, ECHR 2003-VIII, § 97.

authorities, who are best placed to do so, act to put right any alleged breaches of the Convention"[16].

The Court applies subsidiarity in different categories of cases, to rights under different Articles of the Convention, from 1968 till now. Its application has evolved and even changed somehow through this time. Sometimes the ECHR's logic in invoking this principle seems rather confusing. However, it is the Court's case law and its logic (in applying subsidiarity) that form the basis of this work. Therefore, we will come back to this issue repeatedly.

1.3. Reform process

Although the principle of subsidiarity was always there in the Convention system and in the ECHR case law starting from 1968, the highest attention was drawn to it when the ECHR faced serious problems with its workload.

In order to understand the reasons for that and to follow the development of the subsidiarity principle we should look at the **historical background**.

The ECHR started its first judicial year back in 1959. According to the former system, the European Commission on Human Rights was authorized to examine the admissibility of cases. States or individuals alleging breaches of the Convention rights had to pass through the Commission ahead of bringing a case before the Court. In 1990, a major change in the former system took place when Protocol No. 9[17] introduced the possibility for individuals to bring applications directly before the ECHR. In 1994, Protocol No. 11[18] established the ECHR as a single permanent court with compulsory jurisdiction and dissolved the mentioned Commission[19].

So how did it happen that the Court faced serious challenges with its overloading? The matter is the majority of the Court's workload consists nowadays

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[16] *Varnava and Others v. Turkey* [GC], apps. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECHR 18 September 2009, §164.

[17] Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 6.XI.1990. (Entry into force 1 November 1998, ETS No. 155).

[18] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. 11.V.1994. (Entry into force 1 November 1998, ETS No. 5).

[19] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 2. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

from individual complaints. In the end of twentieth century, many former east-bloc countries joined the Council of Europe, thus gaining access to the ECHR. Accordingly, the latter has extended its clientele to nearly 800 million individuals. The enlargement of signatories to the Convention along with the possibility for individuals to bring applications directly before the Court lead to a massive increase in applications. This caused a **major workload crisis** at the ECHR. The Court's yearly input of applications exceeded greatly its output of decisions[20].

Annex 1 to this paper illustrates the numbers of applications allocated to a judicial formation from 1955 till 2010 (Graph No.1).

It shows that while in 1999 there have been 8,400 applications allocated, in 2010 their number jumped to an incredible 61,300 applications. This increase lead to the unbelievable workload of the Court, which in the end of 2010 amounted to nearly **140,000**[21] allocated applications pending before the Court. Annex 2, in its turn, depicts the Court's workload from 2005 till 2010 (Graph No.2).

The numbers included in both graphs are taken from the annual reports of the European Court of Human Rights[22]. Looking at them we can easily see how fast and high the number of applications increases each year.

Sending 60 thousands of applications a year to the ECHR is hardly compatible with the principle of subsidiarity. And hardly is the Court capable to deal with such an amount. While the Court's workload at the end of 2010 amounted to 140,000 applications, the number of judgements delivered by the Court in 2010 was 1,499[23]. Despite the fact that the judgement may concern more than one application, the

[20] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 2. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

[21] Annual Report 2010 of the European Court of Human Rights, Council of Europe, p. 13, https://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf.

[22] Annual Report 2005 of the European Court of Human Rights, Council of Europe; Annual Report 2006 of the European Court of Human Rights, Council of Europe; Annual Report 2007 of the European Court of Human Rights, Council of Europe; Annual Report 2008 of the European Court of Human Rights, Council of Europe; Annual Report 2009 of the European Court of Human Rights, Council of Europe; Annual Report 2010 of the European Court of Human Rights, Council of Europe; Annual Report 2011 of the European Court of Human Rights, Council of Europe.

[23] Annual Report 2010 of the European Court of Human Rights, Council of Europe, p. 14. https://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf.

situation has seemed unsolvable unless some changes to the ECHR system are implemented.

Hence, the current system demanded a comprehensive reform process. The latter was initiated at the Inter-Ministerial Conference taking place in Rome in 2000, where the Steering Committee on Human Rights (hereinafter: "CDDH") was established to make suggestions for reforms. The CDDH's suggestions regarding measures at the national level, implementation of the ECHR's judgements and filtering of applications were entered in its final report dated 2003. The conclusions of this report were inserted into Protocol No. 14[24], which entered into force in 2010[25]. It contains the following main changes:

- Processing applications of limited interest: single judges are now entitled to declare applications inadmissible, while three judges committees can decide cases unanimously if there is well-established case law of the ECHR in the matter. Decisions by these formations are final[26];
- Additional admissibility criterion: the application can be considered by the Court just in case the applicant has suffered a significant disadvantage[27];
- Encouragement of friendly settlement[28];
- Strengthening the system of implementation of Judgements[29].

Unfortunately, the mentioned changes turned out to be not enough in order to deal with the Court's caseload crisis[30]. This fact led to the understanding that nothing would work until the majority of cases currently referred to the Court are settled at the domestic level, in line with the principle of subsidiarity.

[24] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. 13.V.2004. (Entry into force 1 June 2010, ETS No. 194).
[25] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 4. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[26] Ibid., p. 4.
[27] Ibid., p. 4.
[28] Ibid., p. 4.
[29] Ibid., p. 4.
[30] Ibid, p. 5.

1.4. High Level Conferences on the future of the ECHR

In order to increase the Court's capacity the reform process continued through a set of High Level Conferences, where the subsidiarity principle was emphasized and the ways out of current situation were proposed.

The first of such conferences was held in Interlaken in 2010. This meeting resulted in a declaration containing an Action Plan "intended to serve as a roadmap for the long-term effectiveness of the Convention system"[31].

The Interlaken Declaration affirms, *inter alia*, the importance of the right to individual petition, calls for enhancing the implementation of Convention at the national level and the formation of additional filtering mechanisms. The High Level Conference also invites the ECHR to respect its subsidiary role in relation to the States Parties within the Convention system.

The Jurisconsult of the ECHR even published an extensive follow-up note on the Interlaken conference, which he entirely allotted to the principle of subsidiarity, thus indicating its crucial role within the current reform process[32].

According to that follow-up note, "the principle of subsidiarity means that the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task"[33].

The other High Level Conference on the Future of the European Court of Human Rights took place in **Izmir** on 26-27 April 2011. Izmir declaration emphasized the "subsidiary character of the Convention mechanism"[34], noted that "the admissibility criteria are an essential tool in (…) giving practical effect to the principle of subsidiarity"[35] and reiterated "the importance of execution of judgments invit[es] the Committee of Ministers to apply fully the principle of subsidiarity, by which the

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[31] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 12. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

[32] Ibid., pp. 5-6.

[33] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 2. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.

[34] High Level Conference on the Future of the European Court of Human Rights. *Izmir Declaration*. April 2011. p. 1, § 5. https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf.

[35] Ibid., p.2, § 4.

States Parties have the choice of means to conform to their obligations under the Convention"[36]. At last, the Izmir declaration invited the ECHR to "confirm in its case law that it is not a fourth-instance court, thus avoiding the re-examination of issues of fact and law decided by national courts"[37]. Hence, it invited the Court to affirm its subsidiary role in its cases.

And the last Conference discussing subsidiarity was held in **Brighton** on 19-20 April 2012. The Declaration adopted at this Conference pointed out a considerable progress that has already been achieved in matters of prioritising case processing and streamlining procedures, especially in relation to repetitive or inadmissible applications[38]. However, as noted in its Declaration, "other steps must be taken over the coming years in order to enhance the ability of the [Convention] system to address serious violations promptly and effectively"[39].

The Brighton Declaration also establishes a recital on the "interaction between the Court and national authorities"[40] (§§ 10-12). There it starts its reasoning by referring to the ECHR case law on the margin of appreciation. Afterwards it states that this case law "reflects that the Convention system is subsidiary to the (…) national level and national authorities"[41], and that "the margin of appreciation goes hand in hand with supervision under the Convention system"[42]. The Declaration mentions also that the ECHR is encouraged "to give great prominence to and to apply consistently these principles (subsidiarity and margin of appreciation) in its judgement"[43]. Eventually, the Declaration moves to the suggestion to embed "a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's

[36] High Level Conference on the Future of the European Court of Human Rights. *Izmir Declaration*. April 2011. p.6, Section H, § 2. https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf.
[37] Ibid., p.5, Section F, § 2, c).
[38] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 11. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.
[39] High Level Conference on the Future of the European Court of Human Rights. *Brighton Declaration*. April 2012. p. 8. https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.
[40] Ibid., p. 3-4.
[41] Ibid., p. 3.
[42] Ibid., p. 3.
[43] Ibid., p. 3.

case law"[44] in the Preamble to the Convention[45]. This suggestion ended up in the Article 1 of the Protocol No. 15 to the Convention, with which we started this chapter.

Therefore, we can see how much attention was paid to the principle of subsidiarity in the context of reforming Convention system and achieving better future to the ECHR.

1.5. Protocol No. 15

As has been previously mentioned, Article 1 of the Protocol No. 15 added a new recital to the Preamble of the Convention, which contained a reference to the principle of subsidiarity and the doctrine of the margin of appreciation[46]. In accordance with the Explanatory report to Protocol No. 15 this recital "is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law. In making this proposal, the Brighton Declaration also recalled the High Contracting Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention"[47].

As provided on the official website of the Council of Europe the "Protocol No.15 will enter into force as soon as all the States Parties to the Convention have signed and ratified it"[48]. So far only Bosnia and Herzegovina and Italy have not ratified it.

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[44] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, April 2012, p. 3. https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

[45] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 5. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.

[46] Council of Europe. *Reforming the European Convention on Human Rights*. Interlaken, Izmir, Brighton and beyond. Directorate General for Human Rights and Rule of Law. 2014. p. 109. https://rm.coe.int/reforming-the-european-convention-on-human-rights-interlaken-izmir-bri/1680695a9d.

[47] Council of Europe. *Explanatory Report* to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213). p. 1. https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf.

[48] Council of Europe. *European Convention*. Protocol No. 15. https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=.

CONCLUSION CHAPTER I

Following the origin of the principle of subsidiarity, we see that it is literally necessary for the Convention system to survive. Despite its existence from the very adoption of the Convention, it became really topical when the Court started to be overloaded with applications that could have been dealt with on the national level. That is when the Member States understood that subsidiarity is very much worth considering when reforming the current system. This resulted in the three High Level Conferences discussing the subsidiarity, which lead to the adoption of the Protocol No.15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms. The latter, in its turn, has for the first time fixed the principle of subsidiarity in the Convention.

CHAPTER II. THE MEANING OF THE PRINCIPLE OF SUBSIDIARITY

It is worth noting, for the beginning, that subsidiarity exists and has for a long time existed outside the Convention system. It "has a long and colourful history 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"[49].

Subsidiarity is defined differently in various legal documents and court decisions, by various institutions and scientists, in different times.

Even the Church's social doctrine identifies subsidiarity as one of the basic principles of human coexistence. Pope Benedict XVI wrote in his Encyclical "*Caritas in Veritate*" the following:

> Subsidiarity is first and foremost a form of assistance to the human person via the autonomy of intermediate bodies. Such assistance is offered when individuals or groups are unable to accomplish something on their own, and it is always designed to achieve their emancipation, because it fosters freedom and participation through assumption of responsibility. Subsidiarity respects personal dignity by recognizing in the person a subject who is always capable of giving something to others. (…) In order not to produce a dangerous universal power of a tyrannical nature, the governance of globalization must be marked by subsidiarity, articulated into several layers and involving different levels that can work together[50].

All these words are very topical in the context of the ECHR subsidiarity, taken that "human persons" are the States Parties and the "intermediate body" is the Court. However, before moving on to characterizing subsidiarity in the Convention system, we must consider its meaning in other legal contexts.

Accordingly, the subsidiarity can "act as a devolving mechanism in favour of lower authorities"[51], it can be the ground for substituting the lower level with the higher level, and it can be "the basis for the support provided by the higher level to the weaknesses of the lower level"[52].

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[49] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 8. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.
[50] Benedict XVI. *Caritas in Veritate.* Encyclical Letter. San Francisco: Ignatius Press. 2009. § 59.
[51] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 8. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.
[52] Ibid.

For example, "the legal system of the European Union, which has a quasi-State institutional structure and rule-making powers reinforced by the direct effect and precedence of EU law, corresponds to an integration model"[53]. Accordingly, subsidiarity in the context of the European treaties implies mostly a kind of **competitive subsidiarity**, referring to the competing powers of the Union and the Member States. Conversely, subsidiarity in the ECHR context reminds rather a kind of **complementary subsidiarity**: the Court's powers of review are confined to those cases where the domestic institutions are incapable of securing effective protection of the rights guaranteed by the Convention[54].

2.1. Subsidiarity according to Protocol No. 15

As mentioned above, Protocol No. 15 has inserted the principle of subsidiarity into the legal system of the Convention. This Protocol has been enacted in 2013, while the Convention dates back to 1950.

Therefore, the question arises whether this principle is new or somehow changed by the Protocol or it is simply the codification of a principle derived from the Convention system and established by the Court[55].

In this regard judge Villiger has noticed in his partly dissenting opinion in *Vinter and Others v. the United Kingdom* [GC] that "the principle of subsidiarity (is) underlying the Convention"[56]. Besides, we know from the previous chapter that subsidiarity existed simultaneously with the Convention from its very origin. So the principle is definitely not a new one.

When reading the text of the new Protocol, it is difficult to understand why deferential standards of review were introduced by it. In accordance with Sabino

[53] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 2. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[54] Ibid.
[55] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 4. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.
[56] Partly dissenting opinion of Judge Villiger in *Vinter and Others v. the United Kingdom* [GC], nos. 66069, 130/10 and 3896/10, 9 July 2013.

Cassese paper "Ruling indirectly. Judicial subsidiarity in the ECtHR"[57], the reason for that may have been, simply, **functionality** (for example to address Court's backlog, or a lack of resources for investigations or reviews of fact by the Strasbourg Court[58]). Alternatively, as Andreas von Staden wrote, the reason might have been "to **recognise the diversity** of national identities, or deference to sovereignty, to minimize restrictions, 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"[59].

The other view concerning the nature of this principle in Protocol No. 15 is that "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"[60].

To my mind, all of these assumptions are right to a greater or lesser extent. However, I would rather agree that the principle of subsidiarity was fixed and emphasized in the Protocol because of the current situation with backlog and the Court's lack of recourses to deal with it. Acting in accordance with the subsidiarity principle seemed to be one of the main tools in helping the Court proceed its work.

Another point in relation to subsidiarity, is that "this principle displays a long-standing and rather unsuccessful 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**"[61].

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[57] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 4. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.

[58] Andreas von Staden. *Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*. November 21, 2011. International Journal of Constitutional Law (I•CON). Vol. 10. Fall 2012. Jean Monnet Working Paper (NYU Law School), No. 10/11. pp. 24, 25. https://ssrn.com/abstract=1969442.

[59] Ibid., p. 1, p. 5 and p. 12.

[60] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, pp. 5-6. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.

[61] Ibid., p. 7.

The matter is that subsidiarity may somewhere be used to distribute powers along a vertical line, between the centre and the periphery. The main purpose of subsidiarity, in this context, is to dispense functions so that centralisation can be avoided, and to ensure an effective allocation of power. An example is European Union, since it regulates the distribution of powers between European and national authorities[62].

As Sabino Cassese states in his paper, cited above, "subsidiarity, as an instrument for avoiding centralisation, has been ineffective. 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"[63], but it was still unsuccessful.

Therefore, the concept of subsidiarity in Protocol No. 15 is new, as the context is new. It does not refer to rulemaking or adjudication, but to **judicial review**. The aim is not to distribute functions, "but to **check the uniformity of the application** of supranational principles and rules in national contexts"[64] and, of course, to enhance the Court's ability to perform its functions.

2.2. Subsidiarity as an indirect rule

Sabino Cassese, cited above, says that "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"[65].

He explains the notion of the indirect rule through its historical example. It turned out that it was the indirect rule to be instrumental to the expansion of the British Empire. The British could have governed their empire the same as the French did theirs, by replacing local authorities with their own metropolitan institutions. However, they

[62] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 7. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.
[63] Ibid.
[64] Ibid.
[65] Ibid., p. 9.

decided to govern by indirect rule, by superimposing certain general rules, institutions, procedure, and personnel of their own to local institutions and by letting them operate as usual. This kind of progressive, evolutionary process ensures tolerance and compatibility between different values and rules[66].

Governing by indirect rule in modern times seems more complicated, because supranational legal systems do not send personnel to order around national legal systems[67]. Nowaday, "legal orders 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"[68].

Angelika Nußberger in her Comments on Sabino Cassese's paper argues that using a phrase "indirect rule" in respect of the ECHR system is not correct. She proves her statement with the fact that "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"[69].

According to her, "the Convention system is not a two-tier-system, but a complex multi-layered mechanism"[70]. The ECHR interprets the Convention as a living instrument considering the emerging, existing or evolving European consensus. It is not a one-sided approach. Conversaly, the Court listens very carefully to the different legal voices of the States Parties[71].

As Angelika Nußberger affirms, calling the Court's task an "indirect rule" in the context of separation of powers is wrong. Its task is a far cry from "rule". The author proposes to 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

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[66] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 9. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.
[67] Ibid., p. 9.
[68] Ibid., p. 9.
[69] Angelika Nußberger. Comm*ents on Sabino Cassese's paper "Ruling indirectly – Judicial subsidiarity in the ECHR"*. p. 3. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Nussberger_ENG.pdf.
[70] Ibid., p. 3.
[71] Ibid., p. 3.

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 the meaning of "indirect rule" should be seen in the context of judicial dialogue"[72].

Anyhow, both authors, Angelika Nußberger and Sabino Cassese, agree that the key thing here is striking a balance between respect for local rules and compliance with the common principles. Hardly anyone can argue with that. What they argue about is whether those common principles are the "rule". Let us consider this issue. Beyond any doubt, The Convention principles have been voluntarily accepted by the States. However, they are the rule for each State ever ratifying the Convention because such is the nature of the latter. What is written in the Convention is a binding rule for every actor to whom it applies.

2.3. Striking a balance as a major task of subsidiarity

Striking the balance mentioned in a previous subchapter (between respect for local rules and diversity and compliance with the ECHR common principles) is, indeed, one of the major tasks in subsidiarity functioning.

Professor Delmas-Marty has said, "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"[73]. However, in the same text she urges us that we must not "resort to pessimism, but attempt to explore the possibilities of a form of law which successfully

[72] Angelika Nußberger. Comm*ents on Sabino Cassese's paper "Ruling indirectly – Judicial subsidiarity in the ECHR"*. p. 4. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Nussberger_ENG.pdf.
[73] M. Delmas-Marty. *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World.* Oxford, Hart, 2009.

regulates complexity without eliminating it, by learning to transform this complexity into ordered pluralism"[74]. This appears to be the key task in **sharing responsibilities** between the ECHR and the national authorities on the basis of the principle of subsidiarity.

As the Preamble to the Convention states, its aim is to ensure the "maintenance and further realisation" of fundamental rights[75]. The ECHR in its case law says, "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"[76]. So in order to ensure the maintenance and further realisation of fundamental rights, which are practical and effective, the Convention provides in Article 1 and 19 the responsibilities of national authorities and of the Court respectively. If any of them has not had the given obligations, pursuing this aim would be impossible. Hence, the whole Convention system would be useless. That is why it is highly important for every actor, namely the Contracting States, the Court and each individual, whose rights are protected under the Convention (potential ECHR applicant) to have equal understanding of this shared responsibility. The latter, in its turn, is nothing else, but the embodiment of the principle of subsidiarity.

According to this principle, the central authority, in our case the **European Court of Human Rights**, must perform only those functions that cannot be appropriately performed at a more immediate, which is, national level. This principle, enshrined in the Court's case law[77] since 1968, ensures that fundamental rights are secured in compliance with European standards in a manner that is decentralised[78].

It provides that the **national authorities**, namely the administrative bodies and the justice system, as well as the Government and Parliament, are primarily responsible

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[74] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 1. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.

[75] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. https://www.refworld.org/docid/3ae6b3b04.html.

[76] *Airey v. Ireland*, app. no. 6289/73, 9 October 1979, § 24.

[77] Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, apps. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECHR 23 July 1968 Reports of Judgments and Decisions, Series A no. 6, para 10.

[78] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, pp. 1-2. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.

for the securement of Convention rights, and are themselves subject, if they fail in their task, to external European review by the Court. Under this context**,** subsidiarity implies the concept of shared review by the ECHR 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"**[79].

Hence, both the Court and the states, as well as the Convention standards and the local diversity are equally important in the context of subsidiarity. Neither of them should prevail, but rather cooperate and strive to achieve a balance wherever possible.

2.4. The character of relations between the national and European safeguards due to the principle of subsidiarity

The principle of subsidiarity does not define an allocation of exclusive and competing powers, as the federal or quasi-federal organisations do. By contrast, it establishes decentralized domestic review followed, where this review falls short, by combined **external review**[80].

According to the Court's practice, "by reason of their direct and continuous contact with the vital forces of their countries"[81], the **Member States remain better placed** to enact suitable implementing measures and, where necessary, to pass those restrictions imposed by the local context[82].

Except with regard to the intangible and absolute rights, such as those enshrined in Article 3 of the Convention[83], the States Parties may legitimately put restrictions on

[79] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 2. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.
[80] Ibid., p. 2.
[81] *Handyside v. the United Kingdom*, app. no. 5493/72, 7 December 1976, § 48.
[82] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 2. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.
[83] *Chahal v. the United Kingdom*, app. no. 22414/93, 15 November 1996, § 79.

the exercise of Convention rights and, in doing so, they enjoy margins of appreciation[84].

Jean-Marc Sauvé in his speech named "Subsidiarity: a two-sided coin?"[85] defined certain categories of cases where these margins are narrow and where wide. According to him, the margins would rather be **narrow** in the cases regarding:

- "intimate rights"[86];
- "an essential aspect of the identity of individuals", such as the legal parent-child relationship[87];
- "the strong interest of a democratic society", for example freedom of expression in relation to debates of public interest[88], etc.

By contrast, the margins would rather be **wide** in cases concerning:

- "a choice of society"[89];
- "matters of general policy…, [concerning in particular] relations between the State and religions"[90];
- sensitive moral or bioethical issues[91] and so on.

Apart from mentioned above, the margins of appreciation, under a contextual criterion, would be rather **narrower**, where:

- there is no "common ground"[92], 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"[93].

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[84] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, pp. 2-3. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.
[85] Ibid.
[86] *Brunet v. France*, app. no. 21010/10, 18 September 2014, § 34.
[87] *Mennesson v. France*, app. no. 65192/11, 26 June 2014 § 80, ECHR (extracts).
[88] *Animal Defenders International v. the United Kingdom* [GC], app. no. 48876/08, 22 April 2013, § 102.
[89] *S.A.S. v. France* [GC], app. no. 43835/11, 1 July 2014, § 153.
[90] *S.A.S. v. France* [GC], app. no. 43835/11, 1 July 2014, § 129; *Lautsi and Others v. Italy* [GC], app. no. 30814/06, 18 March 2011; *Leyla Şahin v. Turkey* [GC], app. no. 44774/98, 10 November 2005, §§ 109-110.
[91] *A, B and C v. Ireland* [GC], app. no. 25579/05, 16 December 2010; S.*H. and Others v. Austria* [GC], app. no. 57813/00, 3 November 2011; *Haas v. Switzerland*, app. no. 31322/07, 20 January 2011.
[92] *Rasmussen v. Denmark*, app. no. 8777/79, 28 November 1984, § 40.
[93] *Mennesson v. France*, app. no. 65192/11, 26 June 2014, § 77, ECHR (extracts).

However, being narrow or wide the margin itself does not entail that the Convention law does not apply. The Court would anyway consider the case according to its individual circumstances and applying it scrutiny. The difference, though, is that in such a case it would take into account the scope of the margin of appreciation.

The principle of subsidiarity implies that the States adopt a double perspective when applying their margins of appreciation: national traditions and characteristics, as well as European standards and consensus. "These two factors should be taken into consideration when setting the democratic checks and balances, and this task falls primarily to the national legislatures"[94].

Hence, "**subsidiarity does not provide for the primacy** of national safeguards over European guarantees: on the contrary, it ensures their **complementarity** and interweaves them"[95].

2.4.1. National authorities obligations

Article 1 of the Convention implies that the Member States have a **negative obligation** to refrain, wherever possible, from infringing the Convention rights and freedoms. Besides, they also have a **positive obligation** to provide, in respect of the persons under their jurisdiction, conditions that comply with the standards of the Convention. Lastly, if a State has nevertheless failed to act in conformity with the above-mentioned obligations it must **remedy** such failure effectively and as soon as possible[96]. So, the principle of subsidiarity imposes on national authorities a whole set of obligations.

In other words, the national authorities are obligated to take affirmative action in enacting the needed **statutory and legislative measures** to secure effective and practical enjoyment of fundamental rights, and especially to **prevent** these rights from being infringed by third parties[97].

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[94] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, pp. 3-4. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.

[95] Ibid., p. 4.

[96] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 2. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.

[97] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 4. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.

Concerning "**positive obligations**"[98], they manifest themselves both at a substantive level, particularly in the area of protection of private life, as the ECHR confirmed in its *Von Hannover* judgment of June 2004[99]; and also at a procedural level, by requiring, as provided in *Assenov and Others v. Bulgaria*, that official, effective and in-depth investigations are held where there are well-founded allegations of inhuman and degrading treatment[100].

Furthermore, the national authorities undertake, according to Article 46 of the Convention, "to abide by the final judgment of the Court in any case to which they are parties"[101]. As Jean-Marc Sauvé, cited above, mentioned in his speech, since "any such judgment is merely declaratory in scope, it follows that the States are subject to a **triple "obligation of result"** where a breach is found: they must remedy its detrimental effects; put it to an end where it is ongoing; and prevent future violations"[102].

Among the State authorities bound by these obligations the biggest role lies within the **courts.** They own the conventional attributes of judicial function, and are subjected to guarantees of impartiality and independence[103]. On a day-to-day basis, domestic courts "are the first, at all levels of jurisdiction, to conduct an indepth review of the domestic law's compatibility with the rights and freedoms guaranteed by the Convention"[104].

However, despite this particular role of the judiciary, the obligation enshrined in Article 1 of the Convention refers to **all State authorities** capable of influencing the lives and legitimate interests of everyone within their jurisdiction. It concerns both the

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[98] *Airey v. Ireland*, app. no. 6289/73, 9 October 1979; *Marckx v. Belgium*, app. no. 6833/74, 13 June 1979.
[99] *Von Hannover v. Germany*, app. no. 59320/00, 24 June 2004, § 57.
[100] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 4. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.
[101] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. https://www.refworld.org/docid/3ae6b3b04.html [accessed 13 December 2019].
[102] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 4. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.
[103] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 2. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[104] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 5. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.

legislative branch of the State (which should enact laws in conformity with the Convention) and the **executive** (whose role is to apply those laws in a manner compatible with the Convention and to issue regulations in the same spirit)[105].

Therefore, we may conclude that all national authorities (legislative, executive and judicial) have a certain range of obligations under the Convention and the principle of subsidiarity. These obligations have to be paid a special attention by the responsible authorities, since their performance is essential for the enjoyment of fundumantal human rights and for the functioning of Strasburg system.

2.4.2. The Court's obligations

According to the Convention (Article 19) the role of the Court is "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto"[106]. This role is performed through the judicial review of Convention rights violations committed by States Parties. However, in order for that review to take place a whole set of admissibility criteria should be satisfied. And even if they are, the Court may still refuse to review a case or some of its issues on the basis of the subsidiarity principle.

So we come back again to the essence of the subsidiarity principle and that of the Convention system: the States Parties have the primary responsibility to enshure the rights and freedoms defined in the Convention and the Protocols thereto, while the Court has a supervisory jurisdiction, applied only where certain requirement are satisfied.

However, despite the fundamental importance of the subsidiarity principle and the primary role of the States, the latter **should not be believed to have a free hand** as sovereign actors. The reason is that their sovereignty is to some extent illusory in this context. "Being subsidiary means that national authorities (mainly courts) must comply with some common, shared principles, as are those listed in the Convention

[105] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 5. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.

[106] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. https://www.refworld.org/docid/3ae6b3b04.html [accessed 13 December 2019].

and its Protocols. Being subsidiary also means being subject to a supervisory jurisdiction. 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 ECHR), but also to the other parties to the Convention (horizontal accountability)"[107].

Besides, it is no wonder, that the process of globalisation of human rights is associated with tensions between national governments and supranational authorities. However, the latter cannot stop or even reduce their efforts in setting global brakes on, and controls over national legal orders. Of course, their instruments are far from perfect, and sometimes result in ever more faults and "lacunae"[108], but the situation with human rights protection could be much worse in many societies if not for the supranational control.

"Human rights, democracy and the rule of law now face a crisis unprecedented since the end of the Cold War", stated the Secretary General of the Council of Europe in his Report of May 2014[109]. Therefore, it becomes **necessary to complement the controls from below with checks from above**[110].

CONCLUSION CHAPTER II

All the concepts described in this subchapter, i.e. indirect rule, judicial review and supervisory jurisdiction, are the manifestations of the principle of subsidiarity. They all explain the role of the ECHR in relation to the national authorities and somehow explain which functions each of them should or should not perform.

[107] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 11. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.
[108] Ibid., p. 12.
[109] 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.
[110] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 13. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.

Generally, the States Parties have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto. They are doing it by performing negative and positive obligations that correspond to the respective Convention rights. Namely, where a violation is found, they must put it to an end, remedy its detrimental effects and prevent future violations.

The European Court of Human Rights, in its turn, enjoys the supervisory jurisdiction and can, under certain conditions, review the fundamental human rights violations committed by the States Parties.

To conclude, the States Parties must secure Convention rights fully and effectively on the national level, but be aware that their actions are subject the Court's supervision. At the same time, the Court should thoroughly review the conformity of such states' actions with the requirements of the Convention, but it can do this only where the domestic authorities fail in their task. The limit to which the Court can or must intervene will be determined in the following sections based on the ECHR case law analysis.

CHAPTER III. CORRELATION BETWEEN THE SUBSIDIARITY AND OTHER PRINCIPLES UNDERLYING THE CONVENTION

The principle of subsidiarity is not the only basic principle underpinning the Convention. The Strasbourg system is guided by a whole set of other principles, which are the legal certainty, proportionality, margin of appreciation, the Convention as a 'living instrument', practical and effective rights, autonomous concepts, the fourth instance, positive obligations, rules of interpretation and many others. They all underpin the protection of Convention rights and have a major importance for the Convention system operation.

Certainly all of the principles interact between each other. Hence, they all influence the principle of subsidiarity to a greater or lesser extent. Some of them may even contradict to it. That is why it is of utmost importance to understand the correlation between them and, where needed, to draw a line. This would definitely help to have a better understanding of the meaning and aim of the subsidiarity.

3.1. Practical and effective rights

According to the Preamble of the Convention, it "aims at securing the universal and ***effective*** recognition and observance of the Rights therein declared"[111]. The ECHR in its case law reiterates that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"[112]. For example, the applicant in *Matthews v UK*[113] complained that as a resident of Gibraltar she had no right to vote in elections for the European Parliament. Applying this principle of practical and effective rights, the Court found that European legislation affected the population of Gibraltar in the same way as domestic legislation. That is why there was no reason why the United Kingdom should not be required to secure the right to vote

[111] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. https://www.refworld.org/docid/3ae6b3b04.html [accessed 13 December 2019].
[112] *Artico v. Italy*, app. no. 6694/74, 13 May 1980, § 33.
[113] *Matthews v. the United Kingdom* [GC], app. no. 24833/94, 18 February 1999.

under Article 3 of the Protocol No.1 (right to free elections) in relation to European legislation[114].

Concerning the subsidiarity, it affects and is affected by the principle of practical and effective rights in various forms:

From the one hand, subsidiarity and effectiveness are two sides of the same coin because they are both aimed at "maintenance and further realisation"[115] of fundamental rights[116]. The latter would never be real if not for the complementary character of the Convention system. As it was mentioned earlier, application of the Convention is a shared, though sequential, power. This structure corresponds to the aim of ***effectiveness*** and pluralism[117].

In particular, the national authorities being better placed to know the needs of the people and having far more recourses to influence them play the primary role in securement of fundamental human rights and freedoms. At the same time, the national authorities are subject to the external review by the ECHR where they fail to comply with their task. Thus, the main power of the principle of subsidiarity is in the *shared review and loyal cooperation* between the Court and the national authorities.

This is the very essence of the principle of subsidiarity and one can hardly disagree that without such concept the rights guaranteed by the Convention could be practical or effective. Therefore, **the principle of subsidiarity is one of the measures that make Convention rights practical and effective**.

From the other hand, effectiveness serves as a "**counterweight**" to the principle of subsidiarity. This approach addresses the requirement of exhaustion of national remedies.

We know that according to Article 35 of the Convention, which is one of the manifestations of the subsidiarity, the alleged victim can apply to the ECHR only after all domestic remedies have been exhausted. However, where failure by the ECHR to

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[114] Philip Leach. *Taking a Case to the European Court of Human Rights*. Oxford University Press, 2017.
[115] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. https://www.refworld.org/docid/3ae6b3b04.html.
[116] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 2. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.
[117] Ibid.

act would result in a denial of justice on its part, the Court can or is rather obliged to intervene in the role attributed to it by Article 19 of the Convention[118].

Therefore, according to the overall approach to the principle of subsidiarity mentioned above, the requirement to exhaust domestic remedies is not absolute. The Court has proven it in its case law, for example, in *Kornakovs v. Latvia*, where it summarised the following[119]:

> 142. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. **The existence of the remedies must be sufficiently certain**, in practice as well as in theory, failing which they will lack the requisite accessibility and **effectiveness**. Article 35 § 1 also requires that **the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law**, but not that recourse should be had to remedies which are inadequate or **ineffective** (see, among many other authorities, *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 76, ECHR 1999-IV)[120].

In its turn, in *Akdivar and Others v. Turkey* [GC] the Court noted as follows:

> the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that **it must take realistic account not only of the existence of formal remedies** in the legal system of the Contracting Party concerned **but also of the general legal and political context** in which they operate as well as the **personal circumstances of the applicants**[121].

Thus, we can see how the principle of effective and practical rights acts as a **counterweight** to the principle of subsidiarity, limiting its scope. In short, under the first one, applicants are not required to exhaust domestic procedural remedies, which are not objectively capable of providing adequate redress for their complaints[122].

This is how the Jurisconsult of the ECHR described the relationship between these two principles in the follow-up note on the Interlaken conference. Such a view is definitely worth considering; however, another approach may also be taken to this situation.

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[118] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 5. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[119] Ibid.
[120] *Kornakovs v. Latvia*, app. no. 61005/00, 15 June 2006, §142.
[121] *Akdivar and Others v. Turkey* [GC], app. no. 21893/93,16 September 1996, §§ 69.
[122] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 7. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.

By making an exception to the exhaustion of domestic remedies, the principle of practical and effective rights not only contradicts the subsidiarity, but also complements it. It helps to understand its essence properly. No wonder that the subsidiarity is not absolute, as well as many other things including some of the Convention principles. Thereby it is better suited to the needs of each individual situation and more capable of ***effectively*** protecting Convention rights.

Hence, we see that the principles of effectiveness and subsidiarity are at the same time complementary to one another, and to some extent even contradictory. They help us interpret each other properly and, what is the most important protect the rights guaranteed by the Convention. Neither *effective protection* is possible without the ECHR external review and loyal cooperation between the States and the Court; nor can the subsidiarity be applied properly without the limits imposed by the principle of effective rights.

3.2. The Convention as a 'living instrument'

The Convention is considered "***a living instrument to be read in the light of the notions currently prevailing in democratic States"***[123], as the ECHR has repeatedly held and also reiterates in its judgments[124].

According to this principle the role of the Court is to interpret the Convention in light of "***present day conditions and situations"***[125], rather than to try to assess what was intended by the drafters of the Convention (in the late 1040s). It therefore applies a dynamic, rather than historical approach[126].

This principle was applied, for example, in *Selmouni v France* [GC], where the Court took it into account in assessing the severity of the ill-treatment suffered by the applicant in police custody. The Grand Chamber stated that "certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture"

[123] *Van der Mussele v. Belgium,* 23 November 1983, app. no. 8919/80, § 32, *Stummer v. Austria* [GC], 7 July 2011, app. no. 37452/02, §118.
[124] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 80. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[125] *Tyrer v. the United Kingdom*, app. no. 5856/72, 25 April 1978, § 31; *Vo v. France* [GC], app. no. 53924/00, 8 July 2004, § 82).
[126] Philip Leach. *Taking a Case to the European Court of Human Rights*. Oxford University Press, 2017.

could be classified differently in future"[127]. It was influenced by the increasingly high standard being required in the area of the protection of human rights[128].

By virtue of a 'living instrument' principle, "the Court's position regarding the scope of a particular Convention right may evolve over the years or decades, with the result that a **specific matter hitherto left entirely to States' discretion may be called into question by the Court"**[129].

Therefore, the subsidiarity is affected by the 'living instrument' in a way that the issue being once held subsidiary and left for the States' discretion may one day become a matter of the Court's thorough review due to the major change in social relations or the new present day conditions.

For example, in most of the post-2011 cases concerning **Article 5** of the Convention[130] the ECHR reconfirmed the fundamental nature of this provision and either did not make or made only marginal reference to the principle of subsidiarity or the margin of appreciation doctrine, while not applying them to determine the outcome of the cases. Moreover, the Court continued to apply its **thorough scope of review** with regard to Article 5 due to its fundamental nature[131].

However, in *Austin and others v. UK*[132] the Court departed from its established practice and found that the State must be afforded "a degree of discretion"[133] in taking certain decisions.

The *Austin* case deals with the question of whether the confinement of a group of people in the surroundings of a demonstration within a police cordon for over 7 hours amounts to a deprivation of liberty under Article 5 of the Convention. According to the facts of the case, the police (although carefully prepared in advance) had been

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[127] *Selmouni v. France* [GC], 28 July 1999, app. no. 25803/94, § 101.
[128] Philip Leach. *Taking a Case to the European Court of Human Rights*. Oxford University Press, 2017.
[129] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 5. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[130] *Al-Jedda v. The United Kingdom* [GC], 7 July 2011, app. no. 27021/08; *S.T.S. v. The Netherlands*, 7 September 2011, app. no. 277/05; *Idalov v. Russia* [GC], 22 May 2012, app. no. 5826/03; *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], 13 December 2012, app. no. 39630/09; *Georgia v. Russia* [GC], 3 July 2014, app. no. 13255/07; *M.A. v. Cyprus*, 23 October 2014, app. no. 41872/10.
[131] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 25. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[132] *Austin and Others v. the United Kingdom* [GC], apps. no. 39692/09; 40713/09 and 41008/09, 15 March 2012.
[133] Ibid., § 56.

surprised by a huge crowd of people arriving unexpectedly early at the place of the demonstration, while thousands gathered in the surrounding streets. In such circumstances, the police decided to impose an absolute cordon blocking all exits from the area in order to prevent violence, the risk of injury to persons and damage to property. Such a situation lasted for nearly 7 hours[134].

A majority of 14 judges against 3 decided that this "**kettling**" did not amount to a deprivation of liberty. The ECHR reasoned its position by stating that the Convention is a ***living instrument that needs to be interpreted in the light of present-day conditions***, which include, among others, new challenges for police forces[135]. Eventually, the ECHR argued that "Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public"[136] provided the measure in question isn't arbitrary[137].

When reasoning its judgment, the ECHR states that "within the scheme of the Convention it is intended to be **subsidiary** to the national systems safeguarding human rights. (...) it requires cogent elements to lead [the ECHR] to depart from the findings of fact reached by the domestic courts"[138].

Therefore, we can see that the '***living instrument' approach makes*** the Court depart from its practice of thorough review with regard to Article 5 and ***refer to the subsidiarity*** principle when the circumstances of the case require so (even though it has never done it before).

Similarly, In *Bayatyan v. Armenia*[139] the ECHR found for the first time a violation of Article 9 of the Convention for convicting a conscious objector by referring to the existing European consensus in the matter as well as by applying the "***living***

[134] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. pp. 27-28. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[135] Ibid., p. 28.
[136] *Austin and Others v. the United Kingdom* [GC], apps. no. 39692/09; 40713/09 and 41008/09, 15 March 2012, § 56.
[137] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 28. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[138] *Austin and Others v. The United Kingdom* [GC], apps. no. 39692/09; 40713/09 and 41008/09, 15 March 2012, § 61.
[139] *Bayatyan v. Armenia* [GC], app. no. 23459/03, 7 July 2011.

instrument" approach[140]. The dissenting judge Gyulumyan[141] rightly pointed out that this decision breaches with the ECHR's longstanding approach not to recognise the right to exemption from military service for conscientious objectors and to leave it to the Contracting States' discretion to offer some kind of an alternative service. Hence, the ECHR extended the protection afforded under Article 9 and narrowed the discretion allowed to national authorities with regard to conscientious objection[142].

These two examples are only a small piece of evidence of how the 'living instrument' affects the application of the subsidiarity principle by the Court. They show that **subsidiarity** is not a static and negative factor, but rather acts as a **dynamic and positive principle**[143].

One can conclude that the ECHR's jurisprudence regarding the principle of subsidiarity has undergone important changes since its foundation. Using a very cautious approach in the beginning, the ECHR started to interpret the Convention ***more and more as a living instrument*** that needs to consider present day conditions and emerging European consensuses by enhancing the protection in a number of fields[144].

Such a correlation between these two principles has both, the negative and positive side. From the one hand, it is very good and rather just that the Court uses case by case approach and pays attention to the present day conditions while applying subsidiarity. But on the other hand, one can hardly predict whether this principle will be applied to his or her case because the Court sometimes departs from its established practice in line with the 'living instrument' approach.

Considering these contradictions, we should understand that despite the major importance of legal certainty and foreseeability for the Convention system, the

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[140] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. pp. 52. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

[141] Dissenting opinion of Judge Gyulumyan to *Bayatyan v. Armenia* [GC], app. no. 23459/03, 7 July 2011.

[142] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. pp. 27-28. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

[143] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 4. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.

[144] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 84. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

protection of fundamental rights would never be effective if not for the evolutive interpretation of the Convention.

Therefore, the Convention is and should always be considered a ***living instrument*** in order for the rights to be secured and for the same purpose a 'living instrument' approach should be taken into account when applying the principle of ***subsidiarity***.

3.3. Fourth-instance applications

As stated in Article 35 of the Convention, a case may only be referred to the Court when all domestic remedies have been exhausted. Once that has been done, the ECHR cannot, unless[145] it "act[s] as a court of third or **fourth instance**"[146], "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"[147].

The fourth instance doctrine posits that the **ECHR "is not a court of appeal or a court which can quash rulings given by the courts in the States Parties to the Convention or retry cases heard by them"**[148]. "Fourth-instance applications therefore stem from a **misapprehension on the part of the applicants** as to the Court's role and the nature of the judicial machinery established by the Convention"[149].

As stated the Jurisconsult in the Follow-up note on Interlaken Conference "when supranational machinery for human rights protection was established with access for individuals, it was inevitable that some applicants would misunderstand the role of the Court and the scope of its jurisdiction"[150].

One of the brightest examples in this regard is the Commission's ninth case (no. 9/55, *X. v. Germany*), where the applicant complained of failure to obtain a

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[145] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, p. 4. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.

[146] *Kemmache v. France* (no. 3), app. no. 17621/91, 24 November 1994, § 44.

[147] *Perlala v. Greece*, app. no. 17721/04, 22 February 2007, § 25.

[148] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 12. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

[149] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.

[150] Ibid., p. 9.

satisfactory decision in the civil proceedings he had brought in the German courts. In its decision of 23 September 1955 the Commission rejected the complaint, finding that "the alleged facts **[did] not amount to a violation of a right protected by the Convention**"[151].

Later on the Commission developed and elaborated upon the fourth-instance doctrine, which the Court adopted in its turn. The given **formula** sums up very laconically what the doctrine implies[152]:

> The Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to 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 (see, in particular, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). It is not the Court's role to assess itself the facts which have led a national court to adopt one decision rather than another. If it were otherwise, **the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action** (see *Kemmache v. France* (No. 3), judgment of 24 November 1994, Series A no. 296-C, p. 88, § 44)[153].

According to the Jurisconsult Follow-up note, cited above, the fourth-instance doctrine "was first articulated in relation to Article 6 § 1 of the Convention concerning the right to a fair trial. The fairness required by Article 6 § 1 is not substantive fairness, but **procedural fairness**, which, on a practical level, translates into **adversarial proceedings** in which submissions are heard from the parties and they are placed on an equal footing"[154]. The ECHR has proved this statement in its case law, namely in *García Ruiz v. Spain* in a following way:

> (…) the Court notes that the **applicant had the benefit of adversarial proceedings**. At the various stages of those proceedings he was able to submit the arguments he considered relevant to his case. The factual and legal **reasons** for the first-instance decision dismissing his claim **were set out at length**... The applicant may not therefore validly argue that this judgment lacked reasons, even though in the present case a more substantial statement of reasons might have been desirable[155].

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[151] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. pp. 9-10. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[152] Ibid., p. 10.
[153] *Perlala v. Greece*, app. no. 17721/04, 22 February 2007, § 25.
[154] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. pp. 9-10. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[155] *García Ruiz v. Spain* [GC], app. no. 30544/96, 21 January 1999, § 29.

Therefore, the fourth instance doctrine follows clearly from the provisions of the Convention (Articles 19, 35), is comprehensively interpreted in the Court's case law, and has quite a clear meaning. It explains when the ECHR can or cannot consider a case based on certain conditions. The question is how it relates to the principle of subsidiarity.

The Jurisconsult affirmed in the Follow-up note that "**the fourth-instance doctrine is one of the practical manifestations of the principle of subsidiarity"[156].** The ECHR, in its turn, adopted in relation to this doctrine an approach of **judicial self-restraint**. This self-restraint, according to him, is exercised in relation to the following categories:

a) the interpretation and application of domestic law;

b) the establishment of the facts of the case;

c) the substantive fairness of the outcome of a civil dispute (in the broad sense);

d) the admissibility and assessment of evidence at the trial;

e) the guilt or innocence of the accused in criminal proceedings[157].

As it is with the subsidiarity in general, the use of this doctrine is not without restrictions. By contrast, it is circumscribed by the principle of practical and effective rights. For example, usually the establishment of the facts of the case is a matter solely for the domestic courts, whose findings in this regard are binding on the ECHR. However, if a domestic decision is **clearly arbitrary**, the Court can and must call it into question[158]. The Court has proven it in *Sisojeva and Others v. Latvia* [GC] by stating the following:

> [The Court] reiterates that, in accordance with Article 19 of the Convention, its sole duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court or to substitute its own assessment for that of the national courts or other national authorities **unless and in so far as they may have infringed rights** and freedoms protected by the Convention (see, for example, *García Ruiz v. Spain* [GC], no.

[156] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 11. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[157] Ibid., p. 12.
[158] Ibid., p. 12.

30544/96, §§ 28-29, ECHR 1999-I). In other words, the Court cannot question the assessment of the domestic authorities **unless there is clear evidence of arbitrariness**[159].

Considering the above, we may conclude that the fourth instance doctrine is included in the notion of subsidiarity. The latter cannot be understood fully without the said doctrine. But at the same time fourth instance is ***only one of the manifestations of subsidiarity***. While it refers to the matters of domestic remedies exhaustion and prohibition to deal with errors of fact or law allegedly committed by national courts, the subsidiarity means much more than that. It provides that the national authorities have the primary responsibility to secure the Convention rights, and in doing so they are subject to the supervisory jurisdiction of the ECHR. Hence, the subsidiarity explains the role of the Court in relation to the national authorities, clarifies which functions each of them should or should not perform, links to the necessary existence of the 'effective remedy' in the domestic system etc.

The other conclusion that follows from this section is that the ***fourth instance doctrine is not absolute***. In this field, the ECHR always proceeds on a case-by-case basis, and there are lots of criteria to decide whether the fourth-instance is applied. This conclusion goes perfectly in line with the previously mentioned principles of practical and effective rights and the Convention as a 'living instrument', which again proves the close connection between these principles.

3.4. Margin of appreciation doctrine

Protocol No. 15[160], which included the principle of the subsidiarity into the Preamble of the Convention, did the same with the margin of appreciation doctrine. Moreover, these two concepts are stated in one sentence, which proves their close connection. Indeed, they both relate to the national authorities powers in securing Convention rights and to the Court's scope of jurisdiction in reviewing the alleged violations of those rights.

[159] *Sisojeva and Others v. Latvia* [GC], app. no. 60654/00, 15 January 2007, § 89.
[160] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24.VI.2013. https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf.

This is rather a tough task to distinguish these two concepts and to realize where each of them is to be applied. But after we deal with this question we will get a much better understanding of both of them.

Human rights scholars generally refer to the margin of appreciation doctrine as "the room for manoeuvre the judicial institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations"[161].

"This doctrine allocates to national authorities the discretion to implement Convention guarantees through domestic regulations in different areas according to the needs and resources of the community and individuals within their territory"[162].

As the Jurisconsult of the ECHR stated in the follow-up note on the Interlaken conference the margin of appreciation doctrine is "***another practical manifestation*** of the substantive aspect ***of the principle of subsidiarity"***[163].

According to this note, margin of appreciation comes into play, in particular, when considering the ***proportionality*** of a particular interference with a Convention right. The task of reviewing compliance with proportionality or necessity in a democratic society is the most difficult and the most dependent on the particular circumstances of the case. According to the concept of margin of appreciation "the national authorities, who are in direct and continuous contact with the vital forces of their countries, are best placed to assess the multitude of factors surrounding each particular situation"[164]. The ECHR has characterised the margin of appreciation as "***a tool to define relations between the domestic authorities and the Court"***[165].

One of the main issues concerning the margin of appreciation is what its scope is and what it depends on. The answer is to be found in the ECHR case law[166]. Accordingly, "the breadth of [the] margin varies and depends on a number of factors,

[161] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 14. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[162] Ibid., p. 14.
[163] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 12. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[164] Ibid., p. 14.
[165] *A. and Others v. the United Kingdom* [GC], no. 3455/05, 19 February 2009 § 184.
[166] Ibid., p. 14.

including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference"[167].

For example, the margin will tend to be relatively ***narrow*** where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights or where individual's existence or identity is at stake[168].

A ***wide*** margin is usually allowed to the State in relation to contentious societal issues such as laws relating to abortion[169], important public health issues such as a state's approach to home births[170], other sensitive moral or ethical issues[171], general measures of economic or social strategy[172] etc.

Another factor worth mentioning regarding the breadth of the state's margin of appreciation is the existence, or not, of the "***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"[173].

For example, in *Handyside v. the United Kingdom*, a case concerning the confiscation of a book which was considered obscene, the Court held as follows[174]:

> 48. …**it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals.** The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle ***in a better position*** than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. (…) Consequently, Article 10 § 2 leaves to the Contracting States a ***margin of appreciation***. This margin is given both to the domestic legislator… and to

[167] *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, 4 December 2008, § 102.
[168] *Parrillo v. Italy* [GC], app. no. 46470/11, 27 August 2015, § 24; *Hatton and Others v. the United Kingdom* [GC], app. no. 36022/97, 8 July 2003, § 102; *Dubská and Krejzová v. the Czech Republic* GC], apps. nos. 28859/11 and 28473/12, 15 November 2016, § 178.
[169] *A, B and C v. Ireland* [GC], app. no. 25579/05, 16 December 2010, § 232.
[170] *Dubská and Krejzová v. the Czech Republic* [GC], apps. nos. 28859/11 and 28473/12, 15 November 2016, § 184.
[171] *S.H. and Others v. Austria [GC]*, app. no. 57813/00, 3 November 2011, § 94; *Evans v. the United Kingdom* [GC], app. no. 6339/05, 10 April 2007, § 77; *Christine Goodwin v. the United Kingdom* [GC], app. no. 28957/95, 11 July 2002, § 85; *A, B and C v. Ireland* [GC], app. no. 25579/05, 16 December 2010, § 232.
[172] *Dubská and Krejzová v. the Czech Republic* [GC], cited above, § 179.
[173] *Van der Heijden v. the Netherlands [GC],* no. 42857/05, 3 April 2012, §§ 55-60; *Parrillo v. Italy* [GC], cited above, §169; *Dubská and Krejzová v. the Czech Republic* [GC], cited above, § 178.
[174] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. p. 14. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.

the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force[175].

In *Dubská and Krejzová v. the Czech Republic* [GC] (15 November 2016), the Court also stated that: "because of their **direct knowledge of their society** and its needs, the national authorities are in principle **better placed** than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice **unless it is "manifestly without reasonable foundation**"[176].

To conclude the above, there are some ***specific criteria***, which indicate the scope of states' margin of appreciation and are applied by the Court in its case law. However, these criteria are **not absolute** and, despite its importance, the margin of appreciation is never unlimited. The task of deciding eventually whether there has been a violation of the Convention or not always lies with the Court, which can disregard each of the mentioned criteria if the conditions for its application have changed or its usage is manifestly without reasonable foundation[177].

Sabino Cassese in his paper "Ruling indirectly – Judicial subsidiarity in the ECHR"[178] summarized that the margin of appreciation "has been criticised for its vagueness and incoherence, for being "a quirk of language", "an unfortunate Gallicism", "the most controversial 'product' of the ECHR"[179]. Jonas Christoffersen in his work "Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights" mentioned that "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, 1 July 2014 (wide margin of appreciation

[175] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. pp. 14-16. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[176] *Dubská and Krejzová v. the Czech Republic* [GC], cited above, § 179; see *Stec and Others v. the United Kingdom* [GC], apps, nos. 65731/01 and 65900/01, § 52.
[177] Note by the Jurisconsult of the Court. "*Interlaken Follow-up. Principle of Subsidiarity*". July 8, 2010. pp. 14-16. https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf.
[178] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.
[179] Ibid., pp. 2-3.

to leave room to the democratic process, in matters of general policy on which opinions may differ widely)"[180].

This is, indeed, the downside of the margin of appreciation doctrine, but at the same time this is an **inevitable result** of the Court's efforts to provide ***effective*** protection of each fundamental right on a ***case by case*** basis and in line with the ***Convention as a*** '***living instrument***' principle. Undoubtedly, the latter are crucial for the Convention system's effective operation, so the incoherence between some cases deciding on the scope of margin of appreciation is the least we can accept in order for the fundamental rights to be protected. Of course, this is true only in case that these incoherences are well reasoned by the Court.

Now, having an understanding of both, the margin of appreciation and the subsidiarity, let us try to draw the line between them. We already know that the Jurisconsult of the ECHR defined the first one as a manifestation of the second one. However, according to F. Fabbrini's work "The Margin of Appreciation and the Principle of Subsidiarity: **A Comparison**"[181], "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"[182].

Not that this view is wrong but it does not contradict to the fact that margin of appreciation is one of the characteristics of the subsidiarity. When the ***subsidiarity*** means that it is primarily for the Contracting States to decide on the measures necessary to secure Convention rights, the ***margin of appreciation*** sets the criteria of when the State has wide or narrow powers to choose such measures.

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[180] J. Christoffersen, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, Leiden-Boston, Martinus Nijhoff, 2009, pp. 236.

[181] Fabbrini, Federico, The Margin of Appreciation and the Principle of Subsidiarity: A Comparison (January 20, 2015). Mads Andenas, Eirik Bjorge, Giuseppe Bianco (eds), A Future for the Margin of Appreciation? (2015); iCourts Working Paper Series, No. 15. p. 9. https://ssrn.com/abstract=2552542.

[182] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 4. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.

Even the ECHR in its case law provides that, "**in accordance with the principle of subsidiarity (…), the Contracting States must enjoy (…) margin of appreciation**"[183].

Therefore, the margin of appreciation is an integral characteristic of the principle of subsidiarity. It has its specific goal in the context of defining the primary role of states in securing Convention rights. In particular, it clarifies the scope of their powers in choosing the measures for such securement. The subsidiarity, in its turn, is a wider concept pursuing much more goals, which were enumerated in previous sections.

3.5. Other Convention principles

There are many other principles, as stated in the introduction to this section, which influence the principle of subsidiarity. The ones that have the biggest importance have been described above. However, the list is far from being full.

For example, "***European consensus***" ***reasoning*** is to determine the extent of the margin of appreciation, which has not yet been applied regarding the most fundamental provisions of the Convention[184]. According to this principle, the lesser is the consensus, the wider is the margin of appreciation, and *vice versa*. Consequently, the European consensus has a direct effect on the scope of the State's powers in securing Convention rights. And the scope of such powers is one of the main characteristics of the principle of ***subsidiarity***.

Another principle worth mentioning is ***autonomous concepts***. A number of terms used in the Convention, such as the meaning of a civil right or criminal charge under Article 6, the meaning of 'association' under Article 11 and the notion of 'possession' under Article 1 of Protocol No. 1, are autonomous concepts[185]. It means that the primary role of national authorities in terms of enacting the necessary legislative measures to ensure fundamental rights is somehow restricted by this

[183] *I. v. the United Kingdom* [GC], app. no. 25680/94, 11 July 2002, § 65.
[184] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 81. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[185] Philip Leach. *Taking a Case to the European Court of Human Rights*. Oxford University Press, 2017.

principle. For example, the state may consider that only material assets constitute a possession under its legislation. However, it must secure to "every natural or legal person the peaceful enjoyment of his possessions"[186] as interpreted by the Convention. And the latter entails all the existing possessions and assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation"[187]. Hence, the ***subsidiarity*** granted to the States is limited, among others, by the principle of autonomous concepts**.**

The principle of ***positive obligations*** means that apart from refraining from interferences with Convention rights, the states have the obligation to take appropriate steps to safeguard those rights within their jurisdictions. In other words, their role is not only passive (not to violate), but also active (to take action to prevent violations). This principle is safe to be called another manifestation of the principle of ***subsidiarity***. It is one of the main tools, which help the states perform their primary role in securing the fundamental rights.

The principle of ***proportionality*** is also very closely connected to the principle of subsidiarity. It means that interferences with the substantive rights are only permitted if they are 'necessary in a democratic society', proportionate to the legitimate aim pursued and there is a 'pressing social need' for such interferences. In assessing proportionality, the states are allowed a certain margin of appreciation[188]. The matter is that the national authorities are better placed to decide on the necessity in a democratic society and to evaluate the individual circumstances of the case. They have much more tools for performing that task and therefore enjoy certain discretion. However, the Court may disagree with the state's decision on this matter, if it is arbitrary or manifestly incoherent with the Court's settled approach. This reminds us of the factors that influence the scope of states' powers according to the margin of appreciation doctrine, and consequently the ***subsidiarity*** principle.

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[186] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. https://www.refworld.org/docid/3ae6b3b04.html.
[187] Council of Europe/European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, 2019, p. 7. https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf.
[188] Philip Leach. *Taking a Case to the European Court of Human Rights*. Oxford University Press, 2017.

These are the examples of correlation between the subsidiarity and other Convention principles, which influence it the most. Such comparison helps to get a better understanding of each of them and to draw a line between different principles, which are often used interchangeably.

CONCLUSION CHAPTER III

This section was dedicated to the correlation between the subsidiarity and other principles underlying the Convention. In particular, the influence of the Convention as a 'living instrument', practical and effective rights, autonomous concepts, the fourth instance, margin of appreciation, positive obligations, proportionality and European consensus on the subsidiarity was examined. This resulted in the following conclusions:

- The principles of ***practical and effective rights*** and subsidiarity are to some extent complementary to one another, and to the other extent – contradictory. Effective protection of the rights may only be possible if the primary role in securing the Convention rights is performed by the States and this securement is subject to the ECHR external review (the principle of subsidiarity); and at the same time the subsidiarity should be applied with recourse to the limits imposed by the principle of effective rights (the requirement to exhaust domestic remedies is not absolute if the remedies are inadequate or ineffective);
- The subsidiarity is affected by the '***living instrument'*** in a way that the issue being once held subsidiary and left for the States' discretion may one day became a matter of the Court's thorough review due to the major change in social relations or new present day conditions. Hence, the subsidiarity is not a static and negative factor, but rather acts as a dynamic and positive principle.
- ***The fourth instance*** doctrine is included in the notion of subsidiarity, being one of its manifestations. It refers to the matters of domestic remedies

exhaustion and prohibition to deal with errors of fact or law allegedly committed by national courts etc.;

- The ***margin of appreciation*** is an integral characteristic of the principle of subsidiarity and also one of its manifestations. It defines the scope of the states' powers (states' discretion) in choosing the measures for securing substantive rights;
- "***European consensus***" ***reasoning*** influences the extent of the margin of appreciation as a manifestation of the subsidiarity, namely the lesser is the consensus, the wider is the margin of appreciation;
- The subsidiarity is limited by the principle of ***autonomous concepts***. It means that whatever meaning the state gives to one of the autonomous concepts in its legislation they must protect it in compliance with the autonomous meaning provided by the Convention and the Court;
- The principle of ***positive obligations*** is a one more manifestation of the principle of subsidiarity. It explains how the states should perform their role in securing the fundamental rights;
- The principle of ***proportionality*** is also very closely connected to the principle of subsidiarity. The national authorities enjoy certain degree of discretion and the margin of appreciation (as a manifestation of the principle of subsidiarity) in assessing the proportionality of interference with the Convention right.

CHAPTER IV. PRACTICAL PROBLEMS RELATED TO THE PRINCIPLE OF SUBSIDIARITY

4.1. Measures strengthening the subsidiary role of the ECHR

The first major problem in relation to the principle of subsidiarity is a great caseload of the ECHR, which is mostly composed of applications on similar structural matters, which the States Parties refuse to settle themselves. And the wrong understanding of subsidiarity by such states is not the last cause of this problem.

As has been mentioned earlier in line with the enlargement of signatories to the Convention and the possibility for individuals to bring applications directly before the ECHR the latter faced a ***major workload crisis***. The European community understood that in order for the Court to proceed its work something should be done immediately. This is when the reform process began.

Protocol No. 14 introduced some solutions to tackle the current problems. These were, for example, adding a significant disadvantage as a new admissibility criterion, encouraging friendly settlement, strengthening the system of implementation of Judgements etc.

One of the most powerful solutions was the ***"pilot judgement" technique***. It was introduced by a Resolution 12 of the Committee of Ministers, published simultaneously with the approval of Protocol No. 14[189].

The "pilot judgment" procedure is a method inserted by the ECHR in order to deal with numerous applications regarding the same structural or systemic problem at the national level, by obliging the respondent State to undertake to resolve such a problem. These so-called "repetitive" applications constitute a large part of the Court's workload. Apart from deciding on whether there has been a breach of the Convention, a pilot judgment indicates the systemic or structural problem and points out which measures the Government should take to solve it[190].

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[189] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 5. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

[190] ECHR. *Understanding the Court's statistics.* March 2019. p. 10. https://www.echr.coe.int/Documents/Stats_understanding_ENG.pdf.

In accordance with the pilot judgement procedure, "the Court aims (…) to identify the dysfunction under national law that is at the root of the violation; to give clear indications to the respondent state as to how it can eliminate this dysfunction; and to bring about the creation of a domestic remedy capable of dealing with similar pending cases"[191].

The pilot judgment procedure is intended to facilitate effective provision by respondent states of individual and general measures necessary to conform to the Court's judgments. Moreover, it induces the national authorities to resolve large numbers of individual cases concerning the same structural problem at the domestic level, reinforcing ***the principle of subsidiarity***, underpining the Convention system[192].

Let us have a look on the specific example of a pilot judgement and its effectiveness as a means to deal with the Court's workload. First, it must be emphasized that almost **23%** of the pending cases as of 2016 concerned Ukraine[193]. It was at the top of all countries in overloading the ECHR with the applications. In its turn, one of the most widespread problems referred to in those cases was systemic non-execution of national judgments, which clearly violated Article 13 of the Convention. This situation lasted for many years. Eventually, the Court decided in 2009 to render its first pilot judgment concerning this issue. More than half of its judgments against Ukraine between 2004 and 2009 had concerned non-enforcement of final decisions[194].

The Court chose the case of Yuriy Nikolayevich Ivanov, who had not been get the lump-sum pension, to which he was entitled after retirement from the Ukrainian Army. At that moment, more than 1400 similar cases were pending before the ECHR. Hence, the latter affirmed that this situation would require complex general measures, which needed to be outlined under the supervision of the Committee of Ministers. Similar pending applications were ***adjourned for a period of one year***, giving Ukraine

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[191] Pilot Judgments. *Open Society Justice Initiative.* February 2012. p. 1. https://www.justiceinitiative.org/uploads/967cae8f-e205-40ab-baac-4c4cfe05d14d/echr4-pilots-20120227.pdf.

[192] Ibid., p. 1.

[193] Annual Report 2016 of the European Court of Human Rights, Council of Europe, p. 193. https://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf.

[194] Eline Kindt. *Non-execution of a pilot judgment: ECtHR passes the buck to the Committee of Ministers in Burmych and others v. Ukraine.* October 26, 2017. https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/

time to settle the situation and provide redress to the individuals concerned, to create a domestic remedy to deal with further probable victims and to launch the necessary reforms at the domestic level. The ECHR warned that it would be forced to re-open examination of these pending cases in case Ukraine fails to take the necessary measures[195].

Unfortunately, the Ukrainian government failed to execute this judgment, so the Court resumed the examination of pending cases, which has grown into a major obstacle for the Court's future functioning[196]. The *Ivanov* pilot judgement approach turned out to be ineffective. The Court had to invent something better, which it did in the case *Burmych and Others v. Ukraine* [GC] in 2017. This was also a pilot judgement, but it offered a firmly new approach of dealing with this issue. It provided the following:

> 155. The Court observes that it runs the risk of operating as part of the Ukrainian legal enforcement system... This is **not compatible with the subsidiary role,** which the Court is supposed to play in relation to the High Contracting Parties under Article 1 and Article 19 of the Convention, and runs directly counter to the logic of the pilot-judgment procedure developed by the Court[197.]

The ECHR explained that the dual purpose of the pilot judgment technique is on the one hand to decline the threat to the effective functioning of the Convention system and on the other hand to settle the underlying issue domestically, including granting redress to all actual and potential victims. Bearing in mind that it has been dealing with these cases for sixteen years, the Court concluded that there is nothing to gain nor will justice be served if it proceeds finding violation after violation in a series of similar cases[198]. It noted as follows:

> 193. As stated in the Brighton Declaration, the Court shares with the Contracting States "responsibility for realising the effective implementation of the Convention, underpinned by the fundamental ***principle of subsidiarity***". However, the Court's competence as defined by Article 19 of the Convention and its role under Article 46 of the Convention in the context of

[195] Eline Kindt. *Non-execution of a pilot judgment: ECtHR passes the buck to the Committee of Ministers in Burmych and others v. Ukraine.* October 26, 2017. https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/.
[196] Ibid.
[197] *Burmych and Others v. Ukraine* [GC], apps. nos. 46852/13 et al., 12 October 2017, § 155.
[198] Eline Kindt. *Non-execution of a pilot judgment: ECtHR passes the buck to the Committee of Ministers in Burmych and others v. Ukraine.* October 26, 2017. https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/.

> the pilot-judgment procedure do not extend to ensuring the implementation of its own judgments. Nor can the Court be converted into a body supervising execution of judgments[199].

Thus, the ECHR decided that since execution is the central point here and the problem is mainly of a political and financial nature, the non-execution of the *Ivanov* pilot case is now ***the responsibility of the Committee of Ministers[200].***

Hence, the Court decided to "***strike 12,148 applications out*** of the Court's list of cases pursuant to Article 37 § 1 (c) of the Convention and transmit them to the Committee of Ministers in order for them to be dealt with in the framework of the general measures of execution of the above-mentioned *Ivanov* pilot judgment"[201]. This resulted in the considerable fall in pending applications before the ECHR.

However, the ***effectiveness*** of the pilot judgement approach is rather problematic. The matter is that this technique implies that respondent states are willing and have the capacity to respond adequately to the pilot judgment[202]. Of course, this is not always true, which *Ivanov* judgment clearly proves.

The other drawback is that pilot judgement technique is considered a major challenge to the right to individual application, which is the cornerstone of the European human rights system[203]. Its essence is that "until the systemic problem is properly addressed within a time limit set by the Court all other cases concerning the same issue in the same state are suspended"[204].

I any case, while choosing between the Court's caseload and the problems caused by pilot judgement approach, the latter is definitely the lesser of two evils. Court's caseload means its ability to function and pilot judgements make this ability possible.

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[199] *Burmych and Others v. Ukraine* [GC], apps. nos. 46852/13 et al., 12 October 2017, § 155.
[200] Eline Kindt. *Non-execution of a pilot judgment: ECtHR passes the buck to the Committee of Ministers in Burmych and others v. Ukraine.* October 26, 2017. https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/.
[201] *Burmych and Others v. Ukraine* [GC], apps. nos. 46852/13 et al., 12 October 2017, § 155.
[202] Pilot Judgments, Open Society Justice Initiative, February 2012, p. 2. https://www.justiceinitiative.org/uploads/967cae8f-e205-40ab-baac-4c4cfe05d14d/echr4-pilots-20120227.pdf.
[203] Eline Kindt. *Non-execution of a pilot judgment: ECtHR passes the buck to the Committee of Ministers in Burmych and others v. Ukraine.* October 26, 2017. https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/.
[204] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 5. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

According to the Annual Report 2018 of ECHR one of the reasons for the considerable fall in pending applications is the striking-out of a large number of cases following the *Burmych and Others v. Ukraine* case[205]. If in 2016 applications against Ukraine constituted 22,8% (18,150 pending applications)[206] of the Court's workload, in 2018 their number has fallen to 12,9% (7,250 pending applications)[207].

This shows that despite all the drawbacks and risks, the pilot judgement procedure turned out to be a rescuer of the ECHR. However, it is not the only tool helping the Court to cope with its overloading. As mentioned earlier, there are other measures included in the reform process to improve Court's efficiency. They are the following:

1) declaring inadmissible or striking out of the Court's list of cases by a Single-Judge formation, Committee or a Chamber, ***without any further procedural steps***[208];
2) encouraging ***friendly settlement*** procedure or ***unilateral declarations***, both of which result in considering an application as resolved and striking it out of the list of cases[209];
3) shortening from six to four months the ***time limit*** within which an application must be made to the Court (due to Protocol No. 15, which is not yet in force);
4) adding a requirement that a case in which the applicant has not suffered any ***significant disadvantage*** will be inadmissible;
5) etc.

Turning back to the graphs No. 1 and No. 2 discussed above, which depict the situation with the Court's backlog before 2011 it is worth mentioning how it has

[205] Annual Report 2018 of the European Court of Human Rights, Council of Europe, p. 14. https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf.
[206] Annual Report 2016 of the European Court of Human Rights, Council of Europe, p. 193. https://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf.
[207] Annual Report 2018 of the European Court of Human Rights, Council of Europe, p. 169. https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf.
[208] ECHR. *Understanding the Court's statistics*. March 2019. p. 11. https://www.echr.coe.int/Documents/Stats_understanding_ENG.pdf.
[209] Ibid.

changed following the reform process. Accordingly, the Court's workload from 2011 till 2018 is featured in the Annex 3 to this paper (Graph No. 3).

As it shows, the Court's workload at the end of 2018 amounted to nearly 56,350[210] allocated applications, while in 2011 there were 151,600[211] of them.

Considering the influence of the abovementioned measures, it is the following: in 2018, more than 3,000 cases were resolved either by ***settlement or by unilateral declarations***, a 34% increase from the previous year[212]. There has also been a 15% decrease in the number of Chamber cases, which are the most complex ones. As a corollary, the number of cases assigned to ***Committees*** has increased by 14% and the number of cases assigned to a ***single judge*** – by 10%[213].

At the same time, the Annual Report 2018 of the ECHR says, "analysis of the pending applications shows that it is the structural situation in certain countries that really increases the Court's workload, giving rise to a huge volume of applications. It is important to emphasise that they are not particularly difficult applications in legal terms. **The Court has developed very efficient working methods to deal with them. However, the fact is that the cases in question should primarily be settled at the domestic level, in line with the principle of subsidiarity**"[214].

The wording "structural situation in certain countries" reminds of the pilot judgement procedure, and probably this very tool will help solving some of those "situations" in the nearest future. The Court should not deal with the matters that constantly arise in certain countries, while the latter ignore them. Neither it is the part of any Contracting State's legal system, nor has it the recourses needed to decide such an amount of cases.

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[210] Annual Report 2018 of the European Court of Human Rights, Council of Europe, p. 170, https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf.

[211] Annual Report 2011 of the European Court of Human Rights, Council of Europe, p. 154, https://www.echr.coe.int/Documents/Annual_report_2011_ENG.pdf.

[212] Nino Jomarjidze, Philip Leach. *What future for settlements and undertakings in international human rights resolution?* April 15, 2019. https://strasbourgobservers.com/2019/04/15/what-future-for-settlements-and-undertakings-in-international-human-rights-resolution/.

[213] Annual Report 2018 of the European Court of Human Rights, Council of Europe, p. 8, https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf

[214] Ibid.

This all leads us to the very essence of the principle of subsidiarity. Underlying the Convention, it means that all the rights and freedoms defined therein must be secured primarily on the national level, while the ECHR plays only a subsidiary (a secondary) role.

The majority of problems influencing Court's workload come from the States Parties' misunderstanding of this principle; while the measures mentioned above serve as instruments to prevent the negative consequences of such misunderstanding and to strengthen the subsidiary role of the Court.

Considering all the above, both the Court and the Member States should consider the major importance of the principle of subsidiarity and follow wherever possible the measures reducing the Court's workload. As the graphs from the Annual Reports of the ECHR show, those measures are very effective, even necessary for the European human rights system to operate.

The Court cannot become a "slave" of the countries, whose national authorities refuse to solve their internal systemic problems. Hence, in order for everyone to have a right to an effective remedy, each Member State should understand and act in accordance with the true meaning of the ECHR principle of subsidiarity and the Court, in its turn, is encouraged to use pilot judgements and other similar measures to approve its subsidiary role.

4.2. Classification of issues in respect of which the Court does or does not apply the principle of subsidiarity

The other practical problem with regard to the subsidiarity principle is defining how deep the Court can analyse the decisions of national authorities in terms of establishing the facts of the case, interpreting national legislation, deciding on the fairness of domestic courts' rulings etc.

It is important to answer this question by defining and constraining subsidiarity in order to ensure achievement of the Convention's objectives, to decline the risk of

domination by the ECHR and Convention bodies and to protect both of them with respect to more powerful States[215].

"Neither the Court nor the Contracting Parties (and their respective domestic courts) should be left wandering in deserts of uncharted discretion"[216]. Therefore, they have to know the answers.

In particular, **when does the subsidiarity principle apply** and **how far the Court may go in applying it**?

Concerning the first issue, the answer is when there are **shared, concurring competences**, and therefore where both levels, the national and the supranational, have equal possibilities of action[217]. Besides, it applies, "in connection with those **articles** of the Convention that **have 'limitation clauses'**"[218], and not where absolute rights (e.g. prohibition of torture: Article 3) are guaranteed[219].

Concerning the second question the answer is not really evident. There can be different methods to classify issues where the ECHR uses subsidiarity. On the one hand, we can see how much it differentiates its approach in relation to various ***Articles of the Convention.*** On the other hand, we can observe some system in referring to this principle with regard to ***various categories of cases*** (e.i. cases where strong interest of a democratic society, sensitive moral issues or important public interest is at stake etc.).

For the beginning let us consider the Court's attitude to its subsidiary role with regard to absolute rights violations. As mentioned above, the subsidiarity principle is not extensively invoked concerning such rights. One of the cases worth mention here is ***El-Masri v. the former Yugoslav Republic of Macedonia***, regarding, among others, Article 3 of the Convention.

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[215] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 10. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.

[216] 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).

[217] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, p. 10. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.

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

[219] Sabino Cassese. "Ruling indirectly Judicial subsidiarity in the ECtHR". *Seminar on "Subsidiarity: a double sided coin? 1. The role of the Convention mechanism; 2. The role of the national authorities", Strasbourg, France, 30 January 2015*. Vol. 13. 2015, pp. 10-11. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.

The applicant in the instant case is a German national, who was travelling to Skopje, and had been stopped at the border by the Macedonian authorities. Later he was held in detention, interrogated repeatedly, refused in any contacts, threatened, beaten severely, stripped and sodomised with an object. After that he was placed in a nappy and dressed in a dark blue short-sleeved tracksuit. Then, shackled and hooded, and subjected to total sensory deprivation, he was forcibly marched to a CIA aircraft, which was surrounded by Macedonian security agents who formed a cordon around the plane. When on the plane, the applicant was thrown to the floor, chained down and forcibly tranquillised. While in that position, the applicant was flown to Kabul (Afghanistan) where he was held captive for five months[220].

Hence, the applicant claimed before the ECHR that his right under Article 3 of the Convention was violated by the respondent State's **torture and inhuman and degrading treatment** during and following applicant's extraordinary rendition to CIA[221].

The Court, in its turn, noted that "the applicant's allegations are contested by the Government on all accounts. Having regard to the conflicting evidence submitted by the parties, the firm denial of the Government of any involvement of State agents in the events complained of, the Court considers that an issue arises as to the ***burden of proof*** in this case and in particular as to whether it should shift from the applicant onto the Government"[222].

Then the Court has made a reference to the principle of subsidiarity, stating the following:

> ***it is sensitive to the subsidiary nature of its role*** and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. (…) Nonetheless, where allegations are made under Article 3 of the Convention the Court must apply a "***particularly thorough scrutiny***". (…) In other words, in such a context the Court is prepared to be ***more critical of the conclusions of the domestic courts***. (…) In examining them, the Court may take into account the quality of the domestic proceedings and any possible flaws in the decision-making process[223].

[220] Legal Summary of *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], app. no. 39630/09, 13 December 2012. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-7324%22]}.
[221] Ibid.
[222] *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], app. no. 39630/09, 13 December 2012, § 154.
[223] Ibid., § 155.

Therefore, having regard to the absolute character of the rights enshrined in Article 3 of the Convention, the Court has not only assigned the burden of proof to the respondent government, but also has emphasized its sensitive attitude to the subsidiarity when these rights are at stake. Such sensitivity means that the Court would apply a particularly thorough scrutiny to the review of domestic courts conclusions.

Another Article, in relation to which, the Court either does not make or makes only marginal reference to the principle of subsidiarity due to its fundamental nature is **Article 5**. It defines the circumstances, under which detaining and arresting an individual is lawful under the Convention[224].

In most of the cases concerning this article, the ECHR applies its thorough scope of review. It has a certain authority to review if national law has been observed or to enforce a strict "quality of law" requirement under Article 5 § 1 of the Convention[225].

One of the cases depicting the attitude of the Court to the principle of subsidiarity with regard to the alleged violations of Article 5 is *Creanga v. Romania*. It is a case concerning failure to follow statutory procedure for detention of suspect. The applicant claimed that he was kept in a national anticorruption service's room guarded by armed gendarmes from 9.40 a.m. to 11 p.m. and had not been permitted to leave that room. Moreover, it had not been possible for him to contact his family or his lawyer. Lastly, he claimed that threats had been made that he would not see his family again as he was to be placed in pre-trial detention. He had not been informed until around 1.15 to 1.30 a.m. of the next day that a warrant for his pre-trial detention had been issued[226].

The Court expressed its view on this point in a following way:

> [It] reiterated that… where the events in issue lie within the ***exclusive knowledge of the authorities***, as in the case of persons ***under their control in custody***, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of

[224] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. pp. 24-25. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

[225] Ibid., p. 25.

[226] Legal Summary of *Creanga v. Romania* [GC], app. no. 29226/03, 23 February 2012. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-104%22]}.

proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation[227].

While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, the position is different in relation to cases where failure to comply with such law entails a breach of the Convention. This applies, in particular, to cases in which Article 5 § 1 of the Convention is at stake and ***the Court must then exercise a certain power to review whether national law has been observed***[228].

The "***quality of the law***" requirement is interpreted in the case *Del Río Prada v. Spain.* It is stated there that "the "***quality of the law***" implies that where a national law authorises a deprivation of liberty, it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness. Where deprivation of liberty is concerned, it is essential that the domestic law define clearly the conditions for detention"[229].

Therefore, we can observe that the Court imposes a very high standard to be complied with by national authorities regarding Article 5 of the Convention. At the same time, the Court itself exercises a strong power of review.

However, the Court is not as sensitive to its ***subsidiary role*** with regard to Article 5 as it is to Article 3 of the Convention. Sometimes it does refer to it when considering alleged violations of the right to liberty and security (Article 5) and fully accepts findings of fact reached by the domestic courts. For example, this regards the case of ***Austin and others v. UK,*** cited above.

This was the first case in which the Court had considered the application of Article 5 § 1 in respect of the "kettling" or containment of a group of people by the police on public-order grounds[230]. The Court had to decide whether such a confinement of for over 7 hours amounted to a deprivation of liberty. When answering this question the ECHR stated the following:

61. The question whether there has been a deprivation of liberty is based on the particular facts of the case. In this connection, the Court observes that within the scheme of the Convention it is intended to be subsidiary to the national systems safeguarding human rights. Subsidiarity is at the very basis of the Convention, stemming as it does from a joint reading of

[227] *Creanga v. Romania* [GC], app. no. 29226/03, 23 February 2012, § 189.
[228] Ibid., § 101.
[229] *Del Río Prada v. Spain* [GC], app. no. 42750/09, 21 October 2013, § 125.
[230] Legal summary of *Austin and Others v. the United Kingdom* [GC], apps. nos. 39692/09, 40713/09 and 41008/09, 15 March 2012. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-64%22]}.

> Articles 1 and 19. The Court must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them. Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts[231].

Then the Court concluded that considering the specific and exceptional facts of the instant case, there had been no deprivation of liberty within the meaning of Article 5 § 1 of the Convention[232].

The *Austin* judgment has been heavily criticised by three dissenting judges[233] and a number of scholars. They stated that the ECHR's prominent and extensive mention of the principle of subsidiarity when applying the general case law principles in the *Austin* case is very unusual in relation to Article 5 of the Convention[234].

Despite the fundamental nature of the right to liberty and in contrast to the very limited references to the principle of subsidiarity in previous case law on Article 5, the ECHR justifies that it doesn't conduct its own assessment of the facts in the *Austin* case by referring extensively to the principle of subsidiarity[235].

Even though the Court "recalls that it is not constrained by the findings of facts or legal conclusions of the domestic courts as to whether a measure amounts to a deprivation of liberty it nevertheless embraces these findings completely"[236].

Therefore, we may **conclude** that the Court's attitude to its subsidiary role regarding violations of Articles 3 and 5 is very sensitive. Applying the principle of subsidiarity in cases regarding them, it states that while usually the primary role in interpreting and applying domestic law lies with the national authorities, the Court must take over this role if the state fails to conduct any investigation of the problem at

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[231] *Austin and Others v. the United Kingdom* [GC], apps. nos. 39692/09, 40713/09 and 41008/09, 15 March 2012, § 61.
[232] Legal summary of *Austin and Others v. the United Kingdom* [GC], apps. nos. 39692/09, 40713/09 and 41008/09, 15 March 2012, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-64%22]}.
[233] Joint dissenting opinion of judges Tulkens, Spielmann and Garlicki in *Austin and Others v. The United Kingdom* [GC], apps. nos. 39692/09, 40713/09 and 41008/09, 15 March 2012.
[234] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 29. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[235] Ibid., p. 29.
[236] Ibid., p. 30.

stake. Although such role is not typical of the ECHR, it has no choice, given the principle of subsidiarity. As stated earlier in this paper, the Court can and must intervene where the state fails to perform its functions. A particularly thorough scrutiny, according to the Court's practice, has to be applied in relation to the alleged violations of Articles 3 and 5 of the Convention because of the fundamental nature of the rights enshrined therein. However, if the state itself conducts a thorough and comprehensive assessment of the facts (as in *Austin* case, cited above), the Court is free to use its findings and proceed with an overall compliance of these facts with the standards of the Convention.

Except with regard to the absolute and intangible rights, the States Parties may legitimately impose limits on the exercise of Convention rights and, in doing so, they enjoy margins of appreciation[237]. So let us consider where these margins are wide and the Court extensively refers to the principle of subsidiarity, and *vice versa*.

It would be helpful for this purpose to divide the ECHR case law into different categories of cases. These are the cases concerning:

1) matters of general policy

The ECHR affirms that "as long as ***choices of society form part of general policy decisions***, on which opinions may reasonably differ, the role of the ***domestic policy-maker should be given special weight"***[238].

This statement is extracted from the case *S.A.S. v. France*, which concerns ban on wearing religious face covering in public. Such a ban raised issues with regard to the right to respect for the private life (Article 8 of the Convention) of women who wished to wear the full-face veil for reasons relating to their beliefs; and as long as they were required to wear this clothing by their religion, it particularly raised an issue with regard to the freedom to manifest one's religion or beliefs (Article 9)[239].

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[237] Jean-Marc Sauvé. "The role of the national authorities". *Seminar on "Subsidiarity: a double sided coin", Strasbourg, France, 30 January 2015*. Vol. 11. 2015, pp. 2-3. https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf.

[238] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 54. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

[239] Legal Summary of *S.A.S. v. France* [GC], app. no. 43835/11, 1 July 2014.

Taking into account the aim to secure sociable conditions of "living together", which falls within the powers of the State to provide conditions whereby individuals can live together in their diversity; the special weight of the role of domestic policy-maker; an alleged lack of a European consensus on the matter and the wide margin of appreciation afforded to the respondent State the Court found no violation of both Articles 8 and 9 ECHR[240].

The ECHR has also emphasised the fundamentally ***subsidiary role*** of the Convention mechanism, ***where questions concerning the relationship between State and religions are at stake***[241]**.**

Another illustrative case is *Lautsi and Others v. Italy*. It concerns the display of crucifixes in the classrooms of a State school and a State's obligation to ***respect the right of parents to ensure education*** and teaching of their children in conformity with their own religious and philosophical convictions. The applicant in the present case claimed that such a display infringed the principle of secularism and violated her right to educate children.

The ECHR, in its turn, stated that "the requirements of the notion of "respect" vary considerably from case to case, given the diversity of the practices followed. As a result, the Contracting States enjoy a ***wide margin of appreciation*** in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals"[242].

The Court also added that a crucifix on a wall was an essentially *passive symbol* that could not have an influence on pupils; the presence of crucifixes was not associated with compulsory teaching about Christianity and the applicant had retained in full her right as a parent to advise her children and guide them on a path in line with her own philosophical convictions. Accordingly, the ECHR decided that the authorities had acted within the limits of the margin of appreciation left to the respondent State in the

[240] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 54. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[241] *S.A.S. v. France* [GC], app. no. 43835/11, 1 July 2014, § 129.
[242] *Lautsi and Others v. Italy* [GC], app. no. 30814/06, 18 March 2011, § 61.

context of its obligation to respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions[243].

Considering all the above, the Court concluded that there was no violation of Article 2 of Protocol No. 1 of the Convention[244].

The same concerns wearing the Islamic headscarf in institutions of higher education, referred to in the ECHR case of *Leyla Şahin v. Turkey*. The Court reiterated that "where questions concerning the **relationship between State and religions** are at stake, on which opinion in a democratic society may reasonably differ widely, **the role of the national decision-making body must be given special importance**"[245]. Therefore, "in delimiting the extent of the margin of appreciation in the present case, the Court has given regard to what is at stake, namely the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society"[246]. Consequently, the Court found no breach of Article 9 of the Convention in the case.

Of course, matters of general policy regard not only relations between State and religion. Among others, they are also referred to in cases considering respect for private life (Article 8).

For example, in *Hatton and Others v. the United Kingdom* [GC] the applicants complained that the level of noise from aircraft taking off and landing during the night violated their rights under Article 8 of the Convention. The Court, considering this claim, reiterated that the primary role in matters of general policy belongs to the domestic policy-maker and that "the margin of appreciation available to the legislature ***in implementing social and economic policies*** should be a wide one"[247].

Therefore, we can see that where matters of general policy are at stake (in particular those concerning relations between State and religion) the Court would most likely refer to its subsidiary role and the State's wide margin of appreciation, giving

[243] Legal summary of *Lautsi and Others v. Italy* [GC], app. no. 30814/06, 18 March 2011. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-592%22]}.
[244] *Lautsi and Others v. Italy* [GC], app. no. 30814/06, 18 March 2011.
[245] *Leyla Şahin v. Turkey* [GC], app. no. 44774/98, 10 November 2005, § 109.
[246] Ibid., § 110.
[247] *Hatton and Others v. the United Kingdom* [GC], app. no. 36022/97, 8 July 2003, § 97.

national authorities' decision a special weight. However, dissenting judges in *S.A.S. v. France* described this situation in a following way: "the majority opinion thus (…) sacrifices concrete individual rights guaranteed by the Convention to abstract principles"[248].

2) strong interest of a democratic society

This criterion is usually applied in relation to the freedom of expression and especially, debates of public interest. As the Court reiterates in its case law "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest"[249].

However, little scope does not always mean that the Court would find a violation in the appropriate case. The same concerns limited subsidiarity or narrow margin of appreciation. A great example here would be the case of *Animal Defenders International v. The United Kingdom.*

There the applicant NGO complained that its campaign TV spot advocating against the use of animals in commerce, science and leisure was prohibited by the British law banning political advertising in both radio and television[250].

The Court recalled that there is little scope for limitations on debates on questions of public interest and added that such questions include the protection of animals. "The margin is also narrowed by the strong interest of a democratic society in the press exercising its vital role as a public watchdog"[251].

But despite this initial finding the ECHR moved on to take into consideration the exacting and pertinent reviews applied by both judicial and parliamentary bodies in the UK in the instant case[252].

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[248] Joint partly dissenting opinion of judges Nussberger and Jäderblom to *S.A.S. v. France* [GC], app. no. 43835/11, 1 July 2014, § 2.
[249] *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], app. no. 32772/02, 30 June 2009, § 92.
[250] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 59. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[251] *Animal Defenders International v. the United Kingdom* [GC], app. no. 48876/08, 22 April 2013, § 102.
[252] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 60. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

Accordingly, the Court considered it important that the prohibition was ***specifically circumscribed*** to address the precise risk of distortion the State sought to avoid with the minimum impairment of the right of expression. It only applied to paid, political advertising and was confined to the most influential and expensive media (radio and television). Besides, there was ***no European consensus*** on how to regulate paid political advertising in broadcasting[253].

Finding the lack of consensus, which allowed a wider margin of appreciation to the domestic authorities the ECHR, concluded that there was no violation of Article 10 of the Convention.

Hence, the Court is not tied with its own practice concerning the scope of restrictions in different categories of cases. Considering them, it moves on to weight other circumstances of the case as well as other criteria affecting that scope (like the European consensus in the present case).

3) important public interest

This issue particularly concerns the interest of the State in the area of public health. For example, it is evident in the case *Dubská and Krejzová v. the Czech Republic*, which concerns preventing health professionals from assisting with home births.

According to the facts of the case the applicants wished to give birth at home with the assistance of a midwife, but health professionals were prohibited to assist with home births under Czech law. Therefore, in practice, the applicants had the choice between giving birth at home unassisted or delivering in hospital. The first applicant gave birth to her child at home unaided while the second applicant delivered her child in a maternity hospital. In their applications to the ECHR, Dubská and Krejzová complained of a violation of Article 8 (respect for private life) in that Czech law did not allow health professionals to assist them with giving birth at home[254].

[253] Legal Summary of *Animal Defenders International v. the United Kingdom* [GC], app. no. 48876/08, 22 April 2013. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-7454%22]}.

[254] Legal Summary of the ECHR case *Dubská and Krejzová v. the Czech Republic* [GC], apps. nos. 28859/11 and 28473/12, 15 November 2016. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-11283%22]}.

When deciding this case, the Court reiterated the fundamentally ***subsidiary role*** of the Convention system and recognised that "it is primarily the responsibility of the national authorities to make the initial assessment as to where the fair balance lies in **assessing the need for an interference in the public interest with individuals' rights under Article 8** of the Convention. Accordingly, in adopting legislation intended to strike a balance between competing interests, States must in principle be allowed to determine the means which they consider to be best suited to achieving the aim of reconciling those interests"[255].

Then the Court affirmed that "while the question of home birth does not as such raise acutely sensitive moral and ethical issues (as in *A, B and C v. Ireland*, cited above), it can be said to touch upon an **important public interest in the area of public health**. Moreover, the responsibility of the State in this field necessarily implies **a broader boundary for the State's power to lay down rules** for the functioning of the health-care system"[256].

Therefore, the ECHR extensively applies the principle of subsidiarity and allows the States a wide margin of appreciation when the issue at stake concerns an important public interest.

4) sensitive moral or bioethical issues

This goes, for instance, with regard to the regulation of abortion rights, referred to in *A, B and C v. Ireland.* The applicants in this case complained that their rights under Article 8 (respect for private life) were violated by putting restrictions on obtaining an abortion.

The Court stated here the following:

> where there is no 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, ***particularly where the case raises sensitive moral or ethical issues, the margin will be wider***. By reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion,

[255] *Dubská and Krejzová v. the Czech Republic* [GC], apps. nos. 28859/11 and 28473/12, 15 November 2016, §§ 175-176.
[256] Ibid., § 182.

not only on the "exact content of the requirements of morals" in their country, but also on the necessity of a restriction intended to meet them[257].

Hence, where sensitive moral or ethical issues are at stake the Court tends to apply the principle of subsidiarity and a wide margin of appreciation.

5) intimate rights of the individual

This issue is very closely related with the previous one. Accordingly, it also allows for the subsidiarity use and implies broad discretion of national authorities. The example case is *Parrillo v. Italy,* concerning prohibition of embryo donation for scientific research.

The applicant sought to donate the embryos, which she got from *in vitro* fertilization, to a stem-cell research, but she was refused on the grounds that this type of research was banned and punishable as a criminal offence in Italy[258]. Ms Parrillo considered it to violate her right to respect for private life guaranteed by Article 8 of the Convention and therefore applied to the ECHR.

Firstly, the Court has pointed that "the applicant's ability to exercise a conscious and considered choice regarding the fate of her embryos concerns ***an intimate aspect of her personal life*** and accordingly relates to her right to self-determination"[259].

Secondly, the ECHR has made a reference to the ***principle of subsidiarity***, stating that the primary legal parameter to consider when deciding on matters related to research on embryos *in vitro*, is the domestic law of the member State concerned[260].

Furthermore, considering this case the Court has analysed Council of Europe and European Union materials on this matter, which "confirm that the domestic authorities enjoy a ***broad margin of discretion to enact restrictive legislation*** where the destruction of human embryos is at stake, having regard, *inter alia*, to the ***ethical***

[257] *A, B and C v. Ireland* [GC], app. no. 25579/05, 16 December 2010, § 232.
[258] Legal Summary of *Parrillo v. Italy* [GC], app. no. 46470/11, 27 August 2015. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-10848%22]}.
[259] *Parrillo v. Italy* [GC], app. no. 46470/11, 27 August 2015, § 159.
[260] Ibid., § 24.

and moral questions inherent in the concept of the beginning of human life and the plurality of existing views on the subject among the different member States"[261].

Therefore, in cases regarding intimate rights of the individual, the same as in those regarding other moral or ethical issues, the Court acts in accordance with its subsidiary role and gives a broad discretion to the States.

6) compatibility of domestic law with the Convention

This question is expressly identified in *A. and Others v. the United Kingdom*, a case concerning indefinite detention of foreign nationals suspected of involvement in terrorism[262]. The Government in this case "contended that States have a fundamental right under international law to control the entry, residence and expulsion of aliens and its actions were acceptable under Article 5 § 1 (f)"[263].

However, the applicants objected that "the Government should be precluded from raising a defence to the complaints under Article 5 § 1 based on the exception in sub-paragraph 5 § 1 (f), on the ground that they did not pursue it before the domestic courts"[264].

The Grand Chamber, in its turn, stated the following:

> the Court is intended to be ***subsidiary*** to the national systems safeguarding human rights. It is, therefore, appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries[265].

This point illustrates, *inter alia*, that "the principle that an applicant must first make use of the remedies provided by the national legal system before applying to an international court is an important aspect of the machinery of protection established by the Convention"[266]. However, the main point here is that due to the principle of

[261] *Parrillo v. Italy* [GC], app. no. 46470/11, 27 August 2015, § 180.
[262] Legal Summary of *A. and Others v. the United Kingdom* [GC], app. no. 3455/05, 19 February 2009. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-1647%22]}.
[263] *A. and Others v. the United Kingdom* [GC], app. no. 3455/05, 19 February 2009, § 146.
[264] Ibid., § 153.
[265] Ibid., § 154.
[266] *Burden v. the United Kingdom* [GC], app. no. 13378/05, 29 April 2008, § 42.

subsidiarity, the national authorities should initially determine compatibility of domestic law with the Convention and the Court should take their view into account.

7) substantive fairness of the outcome of a dispute and establishment of the facts of the case

These matters, as well as the majority of other aspects under Article 6 of the Convention, are subject to the Court's review only in exceptional circumstances, for example where the impugned decision (of a domestic court) is manifestly arbitrary. More often the ECHR would limit itself to an overall assessment of proceedings.

What is more, the ECHR usually refers to the principle of subsidiarity when refusing to assess the fairness of the outcome of a dispute or to establish the facts of the case.

One of the cases to illustrate this is *Nejdet Sahin and Perihan Sahin v. Turkey.* It regards divergences in case-law of separate, autonomous and hierarchically unconnected administrative and administrative-military courts[267].

The applicants complained to the ECHR that two different courts (ordinary administrative courts and military administrative courts) came to different conclusions based on the same facts. The Court decided that these conflicting findings did not amount to the violation of the right to a fair hearing under Article 6 § 1 of the Convention based on the non-substitution principle and the fact that the Supreme Military Administrative Court's interpretation wasn't manifestly arbitrary. The majority made extensive reference to the principle of subsidiarity[268], stating the following:

> 84. (...) it is the Court's duty to ensure that this principle [of good administration of justice] is upheld when it considers that the fairness of the proceedings or the rule of law require it to intervene to put a stop to the uncertainty created by conflicting judgments pronounced by different courts on one and the same question. The legal certainty it then aims to achieve must nevertheless be pursued with due respect for the decision-making autonomy and independence of the domestic courts, ***in keeping with the principle of subsidiarity*** at the basis of the Convention system.

[267] Legal summary of *Nejdet Sahin and Perihan Sahin v. Turkey* [GC], app. no. 13279/05, 20 October 2011. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-341%22]}.

[268] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 40. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.

88. Just as it is not for the Court to act as a court of third or fourth instance and review the choices of the domestic courts concerning the interpretation of legal provisions and the inconsistencies that may result, nor is it its role, it would like to emphasise, to intervene simply because there have been conflicting court decisions.

89. For the Court, where there is no evidence of arbitrariness, examining the existence and the impact of such conflicting decisions does not mean examining the wisdom of the approach the domestic courts have chosen to take[269].

Then the ECHR concluded that it was not the Court's role to seek a solution to the impugned conflict of case-law *vis-à-vis* Article 6 § 1 of the Convention and that individual petition to the Court could not be used as a review mechanism for rectifying inconsistencies in the decisions of the different domestic courts[270]. Hence, the Court found no violation of Article 6 § 1 in the present case.

Another important judgment in this regard is *Moreira Ferreira v. Portugal* (no. 2). The applicant in this case complained that the Supreme Court had misinterpreted the ECHR judgment, in breach of Articles 6 § 1 of the Convention. The matter was that the Supreme Court delivered a judgment dismissing a request for the reopening of a criminal judgment which had been lodged by the applicant following a judgment delivered by the ECHR[271].

The question in the instant case was whether the reasons provided for the judicial decision given by the Supreme Court complied with the standards of the Convention.[272] When answering this question the Court provided the following:

It is not for the Court to deal with alleged ***errors of law or fact committed by the national courts*** unless and in so far as they may have infringed rights and freedoms protected by the Convention[273].

(…) a domestic judicial decision cannot be qualified as arbitrary to the point of prejudicing the fairness of proceedings unless no reasons are provided for it or if the reasons given are based on a ***manifest factual or legal error*** committed by the domestic court, resulting in a "***denial of justice***[274].

98. Having regard to the ***principle of subsidiarity***..., the Court considers that the Supreme Court's refusal to reopen the proceedings as requested by the applicant was not

[269] *Nejdet Sahin and Perihan Sahin v. Turkey* [GC], app. no. 13279/05, 20 October 2011, § 84-89.
[270] Legal summary of *Nejdet Sahin and Perihan Sahin v. Turkey* [GC], app. no. 13279/05, 20 October 2011. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-341%22]}.
[271] Legal summary of *Moreira Ferreira v. Portugal (no. 2)* [GC], app. no. 19867/12. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-11652%22]}.
[272] *Moreira Ferreira v. Portugal (no. 2)* [GC], app. no. 19867/12, 11 July 2017, § 86.
[273] Ibid., § 83.
[274] Ibid., § 85.

> arbitrary. The Supreme Court's judgment provides a sufficient indication of the grounds on which it was based. Those grounds fall within the domestic authorities' margin of appreciation and did not distort the findings of the Court's judgment[275].

Hence, as it is evident from the above mentioned judgments there are very high requirements for the case to be subject to the ECHR review in regard to fairness of the outcome of a dispute and establishment of the facts of the case. These requirements are a "manifestly arbitrary" decision of a domestic court, "manifest factual or legal error", a "denial of justice", etc. If these requirements are not met, the Court would abstain from detailed supervision in line with the principle of subsidiarity.

8) evaluation of evidence

Admissibility of evidence is one of the areas where States are granted quite a wide discretion. The Court numerously reiterates in its case law, that

> it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, ***it does not lay down any rules on the admissibility of evidence*** as such, which is therefore primarily a matter for regulation under national law. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair[276].

In determining whether the proceedings as a whole were fair, regard must be had to the following factors:

- whether the rights of the defence have been respected, in particular, whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use;
- the quality of the evidence;
- the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy;
- whether the evidence was supported by other material (*Bykov v. Russia* [GC], § 89; *Jalloh v. Germany* [GC], § 96);

[275] *Moreira Ferreira v. Portugal (no. 2)* [GC], app. no. 19867/12, 11 July 2017, § 98.
[276] *Khan v. the United Kingdom*, app. no. 35394/97, 12 May 2000, § 34.

- whether it was decisive for the outcome of the criminal proceedings (*Gäfgen v. Germany* [GC], § 164)[277].

However, a special approach is applied in respect of the use in criminal proceedings of ***evidence obtained in breach of Article 3***. The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction (*Jalloh v. Germany* [GC], §§ 99 and 105)[278].

Another ambiguous issue here concerns a ***hearsay as an evidence***. Article 6 §§ 1 and 3 (d) of the Convention contains a presumption against the use of hearsay evidence against a defendant in criminal proceedings. However, the admission of a hearsay as evidence (even as a sole or decisive one) will not automatically result in a breach of Article 6 § 1. This would only require the Court to subject the proceedings to the most searching scrutiny[279].

This is clearly illustrated in *Al-Khawaja and Tahery v. The United Kingdom*[280], where the ECHR found no violation of Article 6 (concerning *Al-Khawaja* case), despite the facts that a witness could not be cross-examined and the conviction was based on hearsay as the sole or decisive evidence. The Court in this case allowed national authorities the ***discretion to balance the public and private interests*** under Article 6 § 3 of the Convention. Deviating from its previous case law, the ECHR limited itself to conducting only an overall examination of the fairness of the proceedings[281]. Thus, it introduced "an exception to what is already the exception"[282] by allowing counterbalancing factors that are not to be assessed by the ECHR "so far removed from

[277] Council of Europe/European Court of Human Rights. *Guide on Article 6 of the European Convention on Human Rights.* 2019. p. 37.
[278] Ibid, p. 38.
[279] Council of Europe/European Court of Human Right. *Guide on Article 6 of the European Convention on Human Rights.* 2019. p. 81.
[280] *Al-Khawaja and Tahery v. The United Kingdom* [GC], apps. nos. 26766/05 and 22228/06, 15 December 2011
[281] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 41. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[282] Joint partly dissenting and partly concurring opinion of Judges Sajo and Karakas to *Al Khawaja and Tahery v. The United Kingdom* [GC], apps. nos. 26766/05 and 22228/06, 15 December 2011.

the trial proceedings"[283] to relativize the formerly absolute sole or decisive rule. This is deemed to be a positive example of a dialogue between the ECHR and domestic courts[284] and a good ***example of how the principles of subsidiarity, effectiveness and living instrument work and correlate***.

9) ordering specific remedies

This issue is especially emphasised in *Oleksandr Volkov v. Ukraine*[285], where the ECHR has for the first time ordered the reinstatement in post. It concerned a Ukrainian Supreme Court judge, whose dismissal was found contrary to Article 6 § 1 and 8 of the Convention[286].

When taking into account that the ECHR "has been very reluctant to order individual remedies in the past and either ruled that the finding of a violation in itself constitutes just satisfaction or at most awarded a certain amount of compensation, this judgment constituted a significant step towards acting in a ***less subsidiary manner*** vis-à-vis the Contracting States"[287].

As the ECHR itself pointed in the instant judgement, "in many cases where the domestic proceedings were found to be in breach of the Convention, the Court has held that the most appropriate form of reparation for the violations found could be the ***reopening of the domestic proceedings*** (see, for example, Huseyn and Others v. Azerbaijan, nos. 35485/05, 45553/05, 35680/05 and 36085/05, § 262, 26 July 2011, with further references)"[288].

However, having regard to the nature of the violations in this case (independent and impartial tribunal, legal certainty, the right to be heard by a tribunal established by law etc.) and the necessity of introducing general measures for reforming the system of judicial discipline, the Court considered that there were no grounds to assume that

[283] *Al-Khawaja and Tahery v. The United Kingdom* [GC], apps. nos. 26766/05 and 22228/06, 15 December 2011, § 154.
[284] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. pp. 41-42. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[285] *Oleksandr Volkov v. Ukraine*, app. no. 21722/11, 9 January 2013.
[286] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 48. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[287] Ibid., p. 48-49.
[288] *Oleksandr Volkov v. Ukraine*, app. no. 21722/11, 9 January 2013, § 206.

the applicant's case would be retried in accordance with the principles of the Convention in the near future. In these circumstances, the Court could not accept that the applicant was left in a state of uncertainty as regards the way in which his rights should be restored. The Court considers that by its very nature the situation found to exist in the instant case ***does not leave any real choice as to the individual measures*** required to remedy the violations of the applicant's Convention rights. ***Having regard to the very exceptional circumstances of the case and the urgent need to put an end to the violations*** of Articles 6 and 8 of the Convention, the Court held that the respondent State shall secure the applicant's reinstatement to the post of judge of the Supreme Court at the earliest possible date[289].

Ganna Yudkivska, a judge from Ukraine, has given a concurring opinion to this case, stating the following:

> Given the paramount importance of the independence of the judiciary, which lies at the heart of the whole system of human rights protection, ***the Court has made a careful analysis of the whole context of the problem*** before reaching a conclusion on the measures requested.
>
> (...) therefore the order to reinstate the applicant to the post of Supreme Court judge is fully in keeping with the Court's role as a body empowered "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". It is also in compliance with the standards developed in international law[290].

Hence, even though the Court has not ordered such remedies in its previous cases, doing so in relation to Oleksandr Volkov goes perfectly in line with the principles of effective and practical rights and the Convention as a living instrument. A departure from the principle of subsidiarity, in its turn, is well justified by the specific circumstances of the instant case.

10) political speech vs. speech in commercial matters or advertising

As it implies from the name of this subchapter, the attitude of the Court to these kinds of speech is different. Let us consider such attitude by comparing the case *Mouvement Raëlien Suisse v. Switzerland* and *Ceylan v. Turkey*.

[289] *Oleksandr Volkov v. Ukraine*, app. no. 21722/11, 9 January 2013, §§ 207-208.
[290] Concurring opinion of Judge Yudkivska to *Oleksandr Volkov v. Ukraine*, app. no. 21722/11, 9 January 2013.

The first, ***Mouvement Raëlien Suisse v. Switzerland,*** concerns speech in commercial matters and advertising. This case is about a ban on displaying advertising poster in public owing to immoral conduct of publishers and reference to proselytising Internet site. The applicant's poster campaign has been denied in authorisation by national authorities due to the fact that the poster (featuring pictures of extraterrestrials' faces and a flying saucer) displayed the movement's website address, while this movement promoted pedophilia, incest and cloning, which are prohibited by Swiss law.

The ECHR reiterated that the margin of appreciation in assessing interference with the freedom of expression goes hand in hand with a European supervision. The breadth of such margin, according to the Court, "varies depending on (...) the type of speech at issue. Whilst there is **little scope** under Article 10 § 2 of the Convention for restrictions on **political speech** (see *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999-IV), a **wider** margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend **intimate personal convictions** within the sphere of **morals or, especially, religion** (see *Murphy*, cited above, § 67). Similarly, States have a **broad** margin of appreciation in the regulation of speech in **commercial matters or advertising"**[291]**.**

The Court then defined that the management of public billboards in the context of poster campaigns that are not strictly political **may vary from one State to another**. Thus, as it stated, it could not "interfere with the choices of national and local authorities, which are closer to the realities of their country, for it would thereby lose sight of the **subsidiary nature** of the Convention system"[292]. Besides, it concluded that the question whether a poster satisfies certain statutory requirements "**falls within the margin of appreciation** afforded to States, as the authorities have certain discretion in granting authorisation in this area"[293].

[291] *Mouvement raëlien suisse v. Switzerland* [GC], app. no. 16354/06, 13 July 2012, §§ 59-61.
[292] Ibid., § 64.
[293] Ibid., § 65.

Some scholars, as well as dissenting judges share the view that under the pretext of a wide margin of appreciation the Court failed to conduct a proper analysis of the reasons put forward by the national authorities[294], accepting the reasons, which "taken separately, might not be capable of justifying the impugned refusal"[295] to legitimise the interference. The margin of appreciation was therefore "misused as a vehicle of unprincipled deferentialism"[296] to the domestic authorities[297].

In any case, this judgment is a clear example of the ECHR's new approach to act in a **strictly subsidiary manner** in relation to the national authorities and to give unprecedented prominence to the margin of appreciation doctrine[298]**.**

The second case on this matter is *Ceylan v. Turkey*, regarding political speech. The applicant wrote an article entitled 'The time has come for the workers to speak out – tomorrow it will be too late' in a weekly newspaper published in Istanbul. He was convicted by national authorities of inciting the people to hostility and hatred by making distinctions based on ethnic or regional origin or social class.[299] However, Mr Ceylan considered that such conviction amounted to an infringement of his right to freedom of expression, as guaranteed by Article 10 of the Convention.

> The Court affirmed that there is **little scope** under Article 10 § 2 of the Convention **for restrictions on political speech or on debate on matters of public interest**. Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion[300].

Then, taking into account that the applicant's article did not encourage the use of violence or armed resistance and that the penalty imposed on him was too severe the

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[294] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 65. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[295] Ibid., § 72.
[296] Joint dissenting opinion of judges Sajo, Lazarova Trajkovska and Vucinic to *Mouvement raëlien suisse v. Switzerland* [GC], app. no. 16354/06, 13 July 2012.
[297] Füglistaler Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*. Vol. 110. 2016. Université de Lausanne. p. 65. https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF.
[298] Ibid., p. 64.
[299] Legal Summary of *Ceylan v. Turkey* [GC], app. no. 23556/94, 8 July 1999.
[300] *Ceylan v. Turkey* [GC], app. no. 23556/94, 8 July 1999, § 34.

Court decided that there was a violation of Article 10 of the Convention on the part of State.

Considering these two case, we see how the Court approaches restrictions of freedom of speech. It refers to its subsidiary role and wide margin of appreciation where commercial speech or advertising is at stake and, conversely, narrows the margin and does not apply the subsidiarity when deciding upon the political speech limitations.

11) core aspects of freedom of association

In cases concerning core aspects of freedom of association the ECHR usually does not refer to the principle of subsidiarity and uses narrow margin of appreciation.

A case *Egitim Ve Bilim Emerkcileri Sendikasi v. Turkey* would be a good example here. It regards the dissolution of a trade union for supporting right to education in a mother tongue other than the national language. In its statutes the union defended "the right of all individuals in society… to receive democratic, secular, scientific teaching free of charge *in their mother tongue*".

The State authorities regarded the term "mother tongue" in the statute as incompatible with their Constitution and, therefore, initiated court proceedings to dissolute the union. These proceedings amounted to interference with the union's exercise of the right to freedom of association, preventing it from collectively or individually pursuing the aims set forth in its statutes[301].

The Court regarding this matter stated the following:

> Whilst referring to the general principles that are enshrined in its relevant case-law in matters of freedom of association (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, §§ 88-93, ECHR 2004-I, and the references cited therein, and *Association Rhino and Others v. Switzerland*, no. 48848/07, § 61, 11 October 2011), the Court reiterates that the right enshrined in Article 11 includes ***the right to form an association***. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning[302].

It can be seen from the Court's case-law that it has repeatedly referred to the ***direct relationship that exists between democracy, pluralism and freedom of***

[301] Legal Summary of *Egitim Ve Bilim Emerkcileri Sendikasi v. Turkey*, app. no. 20641/05, 25 September 2012.
[302] *Egitim Ve Bilim Emerkcileri Sendikasi v. Turkey*, app. no. 20641/05, 25 September 2012, § 47.

association, and it has established the principle that only convincing and compelling reasons can justify restrictions on freedom of association[303].

> Consequently, in determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a ***limited margin of appreciation***, which goes hand in hand with ***rigorous European supervision*** embracing both the law and the decisions applying it, including those given by independent courts[304].

Hence, being an essential element of democracy and pluralism, freedom of association is subject to the considerable scrutiny and comprehensive review of the case by the ECHR, despite the principle of subsidiarity.

Taking into consideration all the cases stated above **we may conclude** in what categories or concerning which Articles the ECHR applies the principle of subsidiarity extensively and when it is very sensitive to its subsidiary role.

In particular, **the sensitivity in this matter** concerns those articles of the Convention, where absolute or intangible rights are guaranteed (Article 3). In relation to cases regarding right to liberty and security (Article 5) the Court usually makes only marginal reference to subsidiarity and, as in case of Article 3, tends to review the circumstances of the case in a rather thorough manner. Besides, there are also some categories of cases where the subsidiry role of the ECHR is limited. These are the cases concerning strong interest of a democratic society, political speech as an aspect of the freedom of speech, some core aspects of freedom of association etc.

And conversely, the ECHR acts in a **more subsidiary manner** in relation to:

- matters of general policy (in particular those concerning relations between State and religion);
- important public interest (for example in the area of public health);
- sensitive moral or bioethical issues;
- intimate rights of the individual;
- commercial speech or advertising as aspects of the freedom of speech;
- compatibility of domestic law with the Convention;
- substantive fairness of the outcome of a dispute;

[303] *Egitim Ve Bilim Emerkcileri Sendikasi v. Turkey*, app. no. 20641/05, 25 September 2012, § 48.
[304] Ibid., § 49.

- establishment of the facts of the case;
- evaluation of evidence;
- ordering specific remedies and so on.

However, the analysis of case given above proves that many of these categories contain certain exclusions, when the ECHR departs from its established practice and applies or refuses to apply subsidiarity due to the specific circumstances of cases. Anyway, this established practice in relation to the subsidiarity exists and the national authorities, as well as the Court should know it and take it into account. Therefore, in case of departure from such practice, the ECHR should reasonably justify its logic and mostly it really does so.

CONCLUSION CHAPTER IV

As follows from the above, there two main problems related to the principle of subsidiarity: a great caseload consisting of applications on similar structural matters, which the States Parties refuse to settle themselves and the lack of understanding of how far the Court may go in applying this principle.

Concerning the first one, the Court admits that it cannot operate as part of the Member States' legal enforcement systems, while their national authorities refuse to solve internal systemic problems. Therefore, each State Party should understand and act in accordance with its primary role in ensuring fundamental rights and the Court is encouraged to use pilot judgements and other similar measures to approve its subsidiary role.

Concerning the second problem, we should understand that the Court's application of the principle of subsidiarity is nor chaotic, neither absolutely corresponds to a certain established practice. This principle is extensively referred to where there are shared, concurring competences and it is rather limited in relation to absolute or intangible rights. Besides, there are particular categories of cases, pointed out above, where the ECHR acts in a less or more subsidiary manner and allows the states a certain scope of discretion.

However, even where the national margin of appreciation is wide and the subsidiarity is extensive, this does not mean that the Convention law does not apply to such categories cases. "The solutions reached by the legislatures – even within [their] limits – are not beyond the scrutiny of the Court"[305]. Given this affirmation and the impact of other basic principles (living instrument, effectiveness, European consensus) on the Court, the latter sometimes departs from its established practice on the use of subsidiarity. But such a practice still exists (although not absolute) and should be taken into account by all the actors of Convention system.

Considering all the above, both the Court and the Member States should understand the meaning, know the features of application and consider the major importance of the principle of subsidiarity in order to provide effective protection for the Convention rights and freedoms.

[305] *Mennesson v. France*, app. no. 65192/11, 26 June 2014, § 81

CONCLUSION

In this master thesis I have made the following conclusions.

The principle of subsidiarity has quite a complicated history. It has existed from the adoption of the Convention in 1950 underlying its very essence, which is seen in Articles 1, 19, 35, 53, etc. However, this principle became particularly important in the beginning of this century when the Court' ability to cope with its caseload was under threat. The number of States Parties has increased, causing a significant amount of applications pending before the ECHR. Its yearly input of applications outweighed greatly its output of decisions. This is when the European community started the reform process of the Convention system with an emphasis on the principle of subsidiarity. It resulted in the three High Level Conferences discussing the subsidiarity, which lead to the adoption of the Protocol No.15. The latter has for the first time fixed the principle of subsidiarity in the Convention.

The meaning of the principle of subsidiarity, according to the Protocol No.15 is that "the High Contracting Parties have the primary responsibility to secure the rights and freedoms defined in the Convention and the protocols thereto (…), subject to the supervisory jurisdiction of the European Court of Human Rights"[306]. This refers us to the so-called shared responsibility of the State and the Court. Accordingly, the first has to perform both, negative and positive obligations that correspond to each respective Convention right. Where a violation is found, they must put it to an end, remedy its detrimental effects and prevent future violations. The ECHR, in its turn, enjoys the supervisory jurisdiction and can, under certain conditions, review the fundamental human rights violations committed by the States Parties.

The principle of subsidiarity is related to a number of concepts such as an "indirect rule", "judicial review", "supervisory jurisdiction", "shared responsibility", etc. They all explain the role of the ECHR in relation to the national authorities and which functions each of them should or should not perform.

[306] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24.VI.2013. https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf.

An important part of this paper concerned the relation between the principle of subsidiarity and other basic principles of the Convention. It is topical here because it explains why the Court's application of subsidiarity does not constitute an absolute rule, but conversely, is changing from to time and contains many exclusions.

In particular, such principles as the Convention as a 'living instrument', practical and effective rights, autonomous concepts, the fourth instance, margin of appreciation, positive obligations, proportionality, European consensus and others cooperate with the principle of subsidiarity in different ways. This cooperation has a big influence on the Court's final judgment and formation of the case law.

For example, the subsidiarity is affected by the 'living instrument' in a way that the issue being once held subsidiary and left for the States' discretion may later become a matter of the Court's thorough review due to the new present day conditions. The margin of appreciation, as well as the fourth instance doctrine are the manifestations of subsidiarity and show, among others, how this principle works. European consensus influences the extent of the margin of appreciation so that the lesser is the consensus, the wider is the margin of appreciation (the more subsidiarity to the states).

Apart from the Convention principles there are other things that have a major influence on the Court's application of subsidiarity. The first is a great overloading of the ECHR with applications and its effect on the right to an effective remedy; and the second is the depth of the Court's analysis of cases due to their category.

Concerning a great overloading, it mostly comes from failure of States Parties to solve their internal systematic and structural problems with human rights protection. The Court admits that it cannot operate as a part of such states' legal enforcement systems and, therefore, it encourages them to use such measures as a friendly settlement or unilateral declarations and tends to simplifies its work itself where possible (by Single-Judge formation or Committee's striking out certain cases, etc.).

One more measure to cope the Court's backlog is pilot judgement procedure, which turned to be one of the most effective in this regard. It deals with numerous applications concerning a similar systematic or structural problem at national level, by obliging the respondent State to undertake to resolve such a problem. For example, in

Burmych and Others v. Ukraine, where the problem of systemic non-execution of national judgments was referred, the Court has stricken 12,148 applications out of the Court's list of cases and transmitted them to the Committee of Ministers. This resulted in the considerable fall in pending applications before the Court.

Concerning the depth of the Court's review it depends, among other, on the category of case at issue. In some of them the ECHR would make an extensive reference to the subsidiarity and fully accept the findings of domestic courts, and in others it would take over the primary role usually atteched to the national authorietis and review the facts of the case with particular scrutiny.

For example, the Court is very sensitive to its subsidiary in relation to absolute or intangible rights, like those under Article 3 of the Convention. Besides, the subsidiarity would be rather limited where strong interest of a democratic society, freedom of political speech or core aspects of freedom of association are at stake.

However, when the case concerns matters of general policy, important public interest, sensitive moral or bioethical issues, intimate rights of the individual, compatibility of domestic law with the Convention, evaluation of evidence or other similar issues the ECHR would rather act in a more subsidiary manner.

At the same time, these categories are not absolute and can have certain exclusions. The matter is that independent on the category of case, the Convention law always applies in full, the Court considers the circumstances of each individual case and the other principles may overweight the usually subsidiary approach of the Court (like the existing European consensus against the established practice, etc.). In any case, there are certain regularities in application of the principle of subsidiarity by the Court, which should be taken into account by all the actors of the Convention system.

To conclude with, this master thesis emphasizes an essential role of the principle of subsidiarity for the effective operation of the European human rights protection system. According to this principle, the states must secure Convention rights fully and effectively on the national level, and the Court should thoroughly review the conformity of such states' actions with the requirements of the Convention, where domestic authorities fail in that task.

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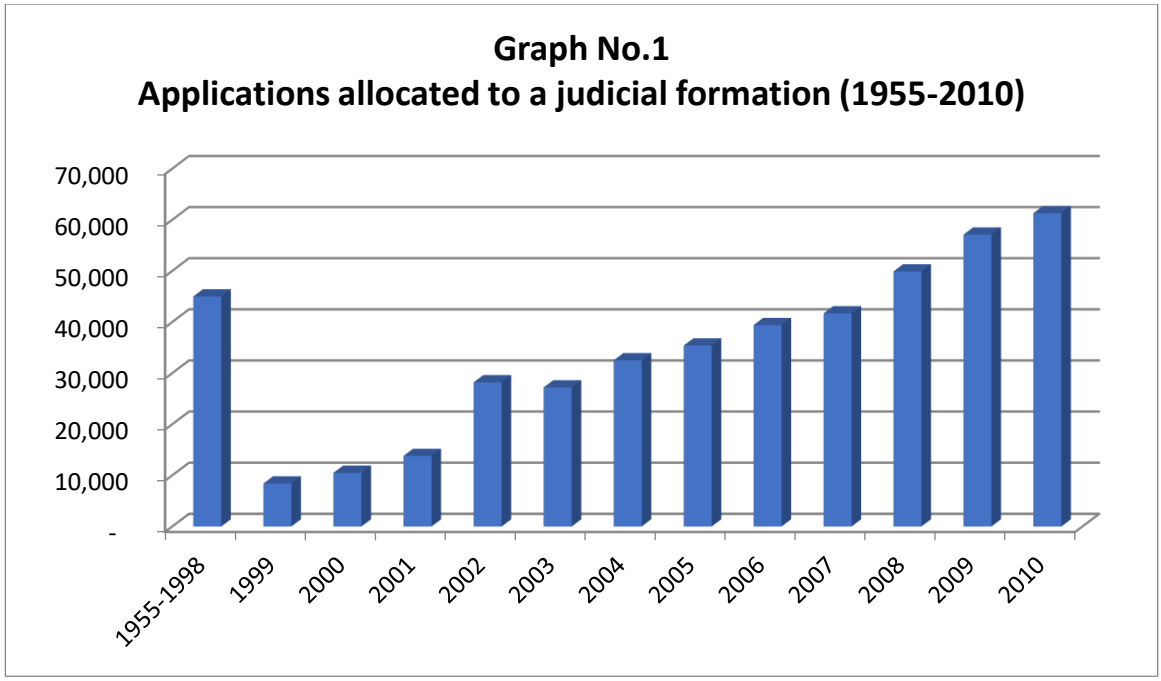
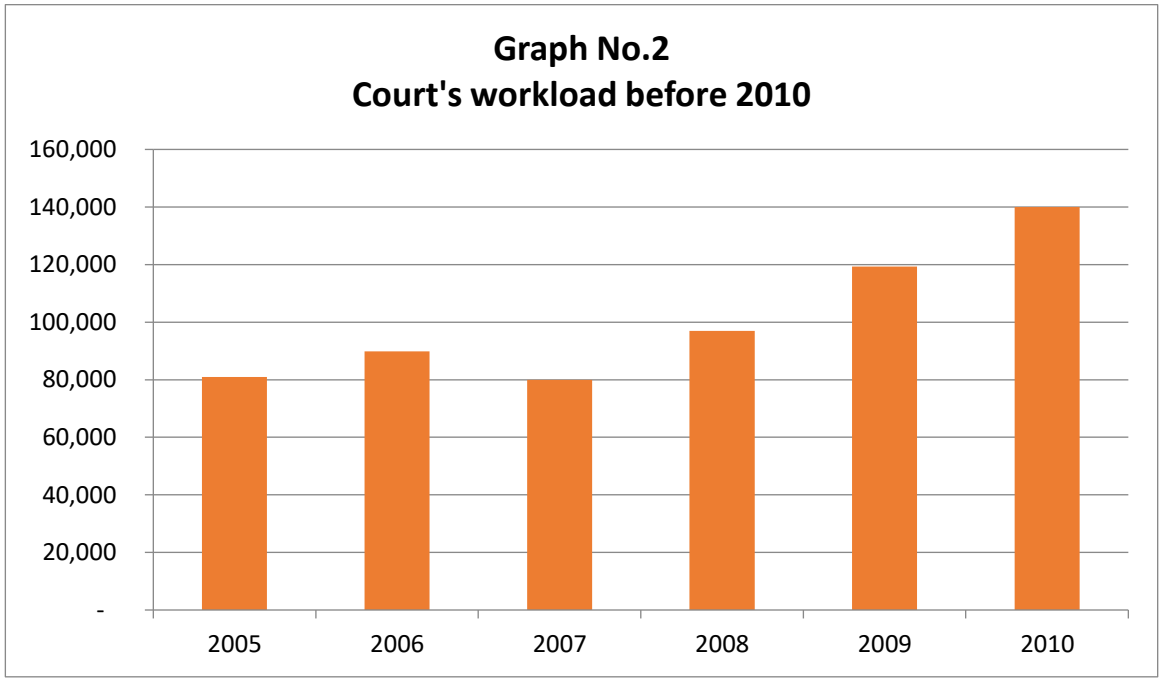
APPENDICES

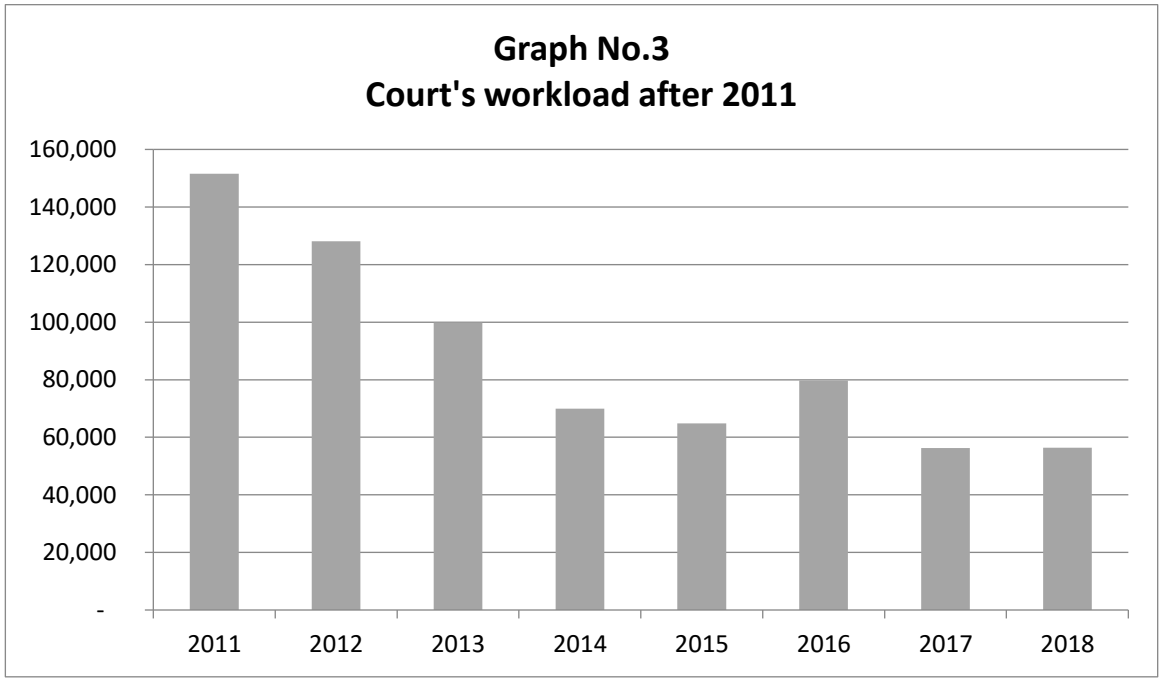
Annex 1



Annex 2


Graph No.2
Court's workload before 2010
160,000
140,000
120,000
100,000
80,000
60,000
40,000
20,000
-
2005
2006
2007
2008
2009
2010

Annex 3


Graph No.3
Court's workload after 2011
160,000
140,000
120,000
100,000
80,000
60,000
40,000
20,000
-
2011
2012
2013
2014
2015
2016
2017
2018