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The Impact of the New Reforms as  
Introduced within the ECHR  
Framework – with Focus on the  
Extended Application of the Principle  
Of Subsidiarity

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# Preface

*'Wisdom is the realisation that knowledge is endless and that you can always learn something new from everyone'*

I would like to thank all that have contributed to this paper's completion. In no order what so ever, I would like to thank my grandma who noticed my love for reading and encouraged me from the early age of three to pursue law. I would like to thank all the teachers, lectures and professors that saw me through all the various stages of education, eventually leading me to this place in time. I would also like to dedicate my research to two of the most inspiring legal scholars, academics and advocates that inspired and encouraged me further on my path towards a career within the field of Law and Human Rights. Firstly, to the late Professor and Barrister Kevin Boyle; I am grateful to have studied under his leadership and he will always live on in all our hearts and memories. Secondly to the late Professor Ronald Dworkin, whom I never had the opportunity to meet but was immensely allowed the reward of studying his writings from my days as a law undergraduate and even now while completing this Master thesis, Thank you for all your writings and being an inspiration to us all. May your work continue to live on in your absence.

I would like to extend my warm gratitude to every person I have had the pleasure to meet during my academic years. You have all added your perspectives and perception of knowledge and information to me. I would also like to the pay tribute to the UK national and international legal order. As an academic, I spent the last eight healthy years within the UK's political, social and legal environment. It will therefore come as no surprise to some that my thesis paper holds more than a fair reference to the United Kingdom's way of running it lands, politically and legally. Although not majorly referenced, it is an occurring example within the paper and adequate source of analysis as well as illustration of some of the point made within the research.

# Abstract

This paper analyses the structural principles used to apply the European Convention on Human Rights and Fundamental Freedoms [hereafter the ECHR or Convention] 1950. It reviews some of principles and tools of application utilised by the Strasbourg court when adjudicating to discern the rationale behind the instrument. The main issue that the thesis tackles relates to looking at the principle of subsidiarity and its evolution into the European Convention of Human Rights and Fundamental Freedoms judicial system. The paper seeks to identify the manner in which the concept of subsidiarity is defined. It makes comparison of various definitions of the concept and evaluates the rationale as to why these materialise. It looks to illustrate and examine the application of subsidiarity in existing structures within the Convention system. Furthermore the paper looks to contrast existing definitions of subsidiarity within other legal systems to that of the European Convention of Human Rights and Fundamental structure.

Following on from this, there is commentary of the new reforms that seek to introduce the direct application of the principle of subsidiarity into the Convention system. The paper throughout will compare the historical application of this principle to that of the intended results of the new reforms. Therefore analysis of indirect versus direct subsidiarity will occur throughout. Furthermore analysis of the effects of the reforms is carried out to establish whether change is pending. Lastly the paper weighs the arguments for and against the direct application of the principle within the Convention system. Some contrast with existing as well as potential models of the application of subsidiarity will be discussed to paint an appropriate picture of the role that the principle may play in future human rights adjudication. An assessment of the role that the European Court of Human Rights plays and will continue to play in human rights protection application is also be examined.

The focus of the research paper is to determine whether the extended emphasis on applying the Convention through the subsidiarity principle is one that will enhance human rights protections. In the thesis there are findings that the concept of subsidiarity is one that is interchangeable dependent upon the characteristics of the body or individual making use of this

particular terminology. The paper therefore contends that the principle of subsidiarity is one that is vague and flexible. This flexibility in turn allows subsidiarity to become quite the popular instrument for change and reform as it is adaptable to whoever holds its presence to hand. The paper finds that subsidiarity is a necessary instrument for the relationship of the Strasbourg Court as well as High Contracting Parties to exist on an acceptable and amicable level. The concept is also useful in making sense of the obscurities and critiques previously faced by the Court in its role as a supervisory mechanism. Furthermore the paper makes it clear that the concept although flexible does have an unshakeable foundation. This basis which derives from the idea of human dignity is what makes it possible for the principle of subsidiarity to be a positive instrument of change for human rights protection. Both human rights and the concept of subsidiarity derive their basis in the moral idea of enhancing the individual dignity and prosperity. The conclusions therefore within the research paper are that the greater application of the principle of subsidiarity within the European Convention system is one that is of benefit and will serve to enhance the protection of rights for individuals.

# Abbreviations

AAQs	Availability Accessibility and Quality Benchmarks
COE	Council of Europe
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECHRR	European Human Rights Reports
EJIL	European Journal of International Law
EU	European Union
GC	Grand Chamber
ICMEU	International Committee of the Movement for European Unity
ICE SR	International Covenant of Economic, Social and Cultural Rights
ILEC	Independent League for European Cooperation
IJIL	International Journal of International Law
Int'l L.J	International Law Journal
HC	House of Commons
HRA	Human Rights Act
HRTF	Human Rights Trust Fund
NGOs	Non-Governmental Organizations
OUP	Oxford University Press
UDHR	Universal Declaration on Human Rights
UEF	Union of European Federalists
UEM	United Europe Movement
UK	United Kingdom
UN	United Nations
UN CAT	United Nations Convention against Torture Committee
VCLT	Vienna Convention on the Law of Treaties

# **1 Introduction**

The paper seeks to examine the structural framework behind the application of the European Convention on Human Rights and Fundamental Freedoms (1950) [hereafter the Convention]<sup>1</sup>. It looks to evaluate how the principle of subsidiarity assists bodies with the Council of Europe to promote greater rights implementation and protection. The paper starts out by defining the research question. It then moves on to describe some of the theoretical foundations surrounding the concept of subsidiarity. Subsidiarity can be defined as requiring the central authority to have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level. The thesis explores some of the different definitions of the concept to determine underlying foundation in order to understand how the concept can be of use within the Convention system.

The paper also looks at Convention's historical development and produces examples of the application of the underlying sense of subsidiarity already inherent within the Convention system and discusses some of the issues surrounding this. The paper then moves on to give a brief introduction of the history of the Convention and its supervisory mechanism. It looks specifically at the drafting process to discern the issues that were of importance there and the purpose this serves; is that the author is then able to compare whether the debate then as well as that of now share any commonalities in terms of the issues that dominated then the legal conversation and may well to continue to do so as well today.

Following on from this, the paper examines the evolution of the Convention and look closely into the status of the principle of subsidiarity with the Convention and responses as well as commentary on its applications. In this section, some case studies are included to illustrate some of the underlying issues faced by the Court and the High Contracting Parties. This serves the purpose of painting the picture of what the situation has been like and allows the author to draw conclusions of whether there are specific factors here that point towards the inevitability of a review of some kind or reform of the Convention, which in turn gave birth to the desire for the extended application of subsidiarity within the Convention system.

Moving on from analysing the existing illustrations of the principle of subsidiarity, the author explores the stages of review that serve to bring about the debate and focus of implementing greater application of the principle of subsidiarity within the Convention system.

This chapter looks into the Conference which brought upon the new reforms. There is also reference to other associational meetings that contributed to bringing about further changes. Detailed examination of the type of subsidiarity promoted within the reforms occurs. Analysis is then made of the impact subsidiarity within the new reforms. The chapter also discusses the strengths as well as weakness embodied within the reforms in relation to the application of the principle of subsidiarity. Finally the author presents her conclusions by summarising the main themes within the thesis. The paper reaches certain conclusions through the reiteration of the findings within the thesis but also through the provision of the authors own predictions. The chapter will then sum up the issues in a wider context by also pointing out some of the areas in which the author fails to reach concrete answers.

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<sup>1</sup> The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS no. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS no. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5 § 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose. The current number of member state of signatures and ratifications to the Convention and its Protocols come up to the total of 47.

## 1.2 Research Question

The main research question is examining the concept of subsidiarity within the Convention system. The theme central to the thesis is whether there is a distinction between protection of rights before subsidiarity becomes deeper ingrained within the realms of the Convention itself. The paper seeks to explore whether the direct reference to the principle within the European Convention offers increased access to rights protection through national implementation. Some comparison occurs of what the process is now and what it means for the European Convention on Human Rights and Fundamental Freedoms [hereafter the Convention]<sup>2</sup> to possess direct application of the principle of subsidiarity.

The research paper also seeks to establish where the need for the reforms derives and illustrate some of the factors that are contributory to inevitable change within the Convention system. The hypothesis within the research paper points to; ‘law being an interpretative art and within interpretive theory choices are often made case-by case; issue by issue, as lawyers and judges decide of which theory is most appropriate to resolve a particular problem at hand.’<sup>3</sup> The Strasbourg Court in their application of the Convention adhere to this through the ‘effectiveness principle’<sup>4</sup> by basing their decisiveness on the consideration of which tools or methods produce the most effective results and go from there. The hypothesis of the research paper points towards the potential of the subsidiarity principle as such a tool. The author aims to substantiate that direct application of the principle of subsidiarity allows for the achievement of the greatest human rights protection as well practical applicability of the Convention. Further more it works towards maintaining the application of the liberal democracy prefaced by all the members States within the Council of Europe. In other

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<sup>2</sup> *Ibid.* 1,

<sup>3</sup> Ian .C. Bartum – Constitutional Value Judgements and Interpretive Theory [2013] Scholarly Works Paper 700 pp.5

<sup>4</sup> *Artico v Italy* [1980] Para 33

words, subsidiarity as a guiding principle allows the resolving of human rights issues as they occur. The paper also reviews the implications of the structural application of the Convention using the subsidiarity principle. It will look to determine the approach taken by the Court towards the principle but also view the concept from the perspective of national authorities. There will be examination of whether the principle assists in determining some form of hierarchy in regards to which body hold authority in decision making matters relating to human rights adjudication. The author hopes to reach the conclusions that the principle of subsidiarity grants neither High Contracting Parties nor the European Court of Human Rights hierarchy in deciding matters relating to human rights adjudication. Rather, it seeks to offer balance, by awarding the responsibility of rights protection to both parties for the effective application of the Convention.

### **1.3 Theory**

The paper seeks to place arguments within the research in line with Dworkin's theory of law pertaining to theoretical foundations of justice. Before claims by legal theorist Ronald Dworkin, philosopher, Emmanuel Kant stated that; the pre-eminence of freedom ought to be the basis of political and juridical actions.<sup>5</sup> Other philosophers such as Aristotle follow by claiming equality as the basis for justice and essential for establishing public policies.<sup>6</sup> Dworkin's theory of law however goes further than these two to include freedom and equality as complementary and essential factors that must be central to the formation of public policy.<sup>7</sup> He lays this theory of justice as the foundation for political philosophy in understanding the normative construction of legal norms. The foundation to all public policy ought to factor on the right to equal respect.<sup>8</sup> Dworkin argues that; all human beings by virtue of being human acquire this right. He follows in the line of natural law theorists who view human beings as moral beings and insist that law normativity must reflect this.

According to Dworkin, the issue of individual rights makes sense only if these are necessary for what the notion of equality demands. In other words, political consideration of a legal norm in respect to rights should ask itself ‘whether such a right or policy is necessary to protect equality’. The paper also make use of Dworkin’s theory of justice when seeking to analyse the impact that reforms will have on rights protection within the European Human Rights context. A scholar once stated that ‘denial of justice is always procedural’ and that there is need for an international basis for procedural justice in spite of the celebration of varied legal cultures and disparities.<sup>9</sup> It is my quest to find our whether the subsidiarity principle as advocated within the new reforms allow for justice and to what extent.

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<sup>5</sup> Paul Guyer “Kant and the Experience of Freedom: Essays on Aesthetics and Morality”. Cambridge University Press, [1996]

<sup>6</sup> Roberts, William Rhys “Greek Rhetoric and Literary Criticism”, New York, Cooper Square, [1963] 1:13, 1373b

<sup>7</sup>B.Horizonte – Dworkin’s liberal egalitarianism [2006] Kriterion Vol 02 see also; A theory of Justice by Dworkin [1971] pp. 1 accessed via: [http://socialsciences.scielo.org/scielo.php?script=sci\\_arttext&pid=S0100-512X2006000200003](http://socialsciences.scielo.org/scielo.php?script=sci_arttext&pid=S0100-512X2006000200003)

<sup>8</sup> Dworkin, Ronald “The Original Position” [1975] pp3

## 1. Theoretical Foundations of the Subsidiarity

The principle of subsidiarity is said to provide an analytical description that assists in making sense of a variety of disparate features of the existing structure of international human rights law. Furthermore the concept assists in defining the interpretive discretion accorded to States; by defining the relationship of regional and international systems whilst offering the justification the necessity for international cooperation, assistance and if called for, intervention. A scholar referred to subsidiarity as one that can be marshaled to support virtually any vision from that of the European Union to supporting a future United States of Europe <sup>10</sup> As a structural principle, it integrates local, regional, national and international levels of social order based on a substantive vision of human dignity and freedom. The principle does so whilst protecting the pluralism amongst these levels.<sup>11</sup>

The first instances of subsidiarity within an international sphere are reflected within the European Union [hereafter the EU], which has ingrained the concept intrinsically within its framework. Authors that draw their work on the application of subsidiarity with the EU affirm the concept of subsidiarity as deriving from the Roman Catholic social doctrine in the 1931 encyclical letter *Quadragesimo Anno*, which stated: ‘Just as it is wrong to withdraw from the individual and commit to a group what private enterprise and industry can accomplish, so too it is an injustice, a grave evil and a disturbance of right order, for a large association to arrogate to itself functions that can be performed efficiently by smaller and lower societies.’ This is a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature the true aim of all social activity should be to help members of the social body, but never to destroy or absorb them.

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<sup>9</sup> Jan Paulsson “Denial of Justice in International Law”. Cambridge: Cambridge University Press, 2005. Pp.306

<sup>10</sup> Peterson, John, (1994) "Subsidiarity: A Definition to Suit Any Vision?" Parliamentary Affairs, Vol. 47, No. 1, January. p. 116.

<sup>11</sup> Ibid. 162, pp. 40

<sup>12</sup> Van Kersbergen, Kees and Bertjan Verbeek, (1994) "The Politics of Subsidiarity in the European Union." *Journal Of Common Market Studies*, Vol. 32; No. 2, June. Quoted from McOustra on pp. 221-222.

<sup>13</sup> Peterson, John, (1994) "Subsidiarity: A Definition to Suit Any Vision?" Parliamentary Affairs, Vol. 47, No. 1, January. p. 11.

<sup>12</sup>This definition of subsidiarity contends that small social groups should be autonomous and sovereign in a pluralist society, yet united in a common morality which stresses duty and harmony. They should be assisted in their activities by a state which neither substitutes for social groups nor is shackled by their demands, but which serves the public good and provides legal order.<sup>13</sup>This theory of subsidiarity envisions that just as the individual realises her fulfillment in community with others, so do smaller communities realise their purpose in interactions with other groups. Therefore, it follows

## **2. The shared concept of Dignity between Human Rights and Subsidiarity**

The section will look further into the foundation of the theory of subsidiarity but does so by contrasting it with that of the human rights discourse. The purpose for this analysis is to determine what the principle of subsidiarity is able to offer in matters of human rights protection. Some reference is made of some of the issues within the theory of human rights. The author will however limit herself to discussing the human rights discourse generally as opposed to entering into a debate in the actual theoretical presuppositions. The rationale behind this is to make ensure that focus remains on the issues at hand and does not sway into the philosophical ongoing debates surrounding the notion of human rights. The concept of dignity has been inherent in human rights discussions always but the definition of what dignity entail is one that is yet to be solved. The paper aims to refer to dignity as a concept and does not divulge into the theoretical foundations surrounding these. Rather focus of the discussion surrounds the impact of dignity on the human rights discourse as well its relevance to the principle of subsidiarity.

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<sup>14</sup> Ken Endo, "The Principle of Subsidiarity: From Johannes Althusius to JacquesDelors," *Hokkaido Law Review*, XLIV/6 (1994): 553-652. accessed via [http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/15558/1/44\(6\)\\_p652-553.pdf](http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/15558/1/44(6)_p652-553.pdf)

<sup>15</sup> Ibid. 10, pp. 116

<sup>16</sup> Ibid. 10, pp. 118 see also; John Finnis - Natural Law and Natural Rights [1980]

<sup>17</sup> Ibid. 10, pp. 116

Individual dignity constitutes the cornerstone of the idea of human rights.<sup>18</sup> It is not coincidental that the guiding instrument<sup>19</sup> for human rights starts its provisions with the statement; ‘all human beings are born free and equal in dignity and rights. The theory of human rights as a discourse contains the inherent struggle between affirming universal substantive vision of human dignity on one hand and respect for the diversity and freedom of cultures on the other. There is ongoing debate as to the foundation and basis upon which human rights as a discourse rests universality or cultural relativism. The human rights discourse is strongly oriented towards the individual. The rights and freedoms framed within human rights instruments appear in terms of the rights due to each person as an individual human being, not by virtue of his or her status.<sup>20</sup> There are exceptions of course with the growing trend of collective and vulnerable groups’ rights. Some scholars view the principle of subsidiarity as a supporter for the human rights discourse because it is a conceptual tool that mediates both pluralism and uniformity for the common good in a globalised world.<sup>21</sup>

The notion of dignity is supposedly inherent and present irrespective of state and independent of any action or recognition by the state. Endo argues that the theory of subsidiarity also places dignity as the root basis for valuing the individual human person in a way that precedes, morally from any form of human association.<sup>22</sup> Nevertheless, the idea of human rights much like the principle of subsidiarity necessarily entails an affirmation of a degree of pluralism and diversity within society. Hence the underlying principle of equality in all human rights instruments.

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<sup>18</sup> Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in *The Concept Of Human Dignity in Human Rights Discourse* 111 (David Kretzmer & Eckart Klein eds., 2002);

<sup>19</sup> International Bill of Rights (Universal Declaration of Human Rights, hereafter the UDHR) [1948]

<sup>20</sup> *Ibid.* 17

<sup>21</sup> Paolo G Carozza – *Subsidiarity as a Structural Principle of International Human Rights Law*, *American Journal of International Law* [2003] 39 pp. 38 accessed via [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=984743](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984743)

<sup>22</sup> Ken Endo, *The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors*, 44 *Hokkaido Law. Review.* 2020 -, 2026 (1994).

Endo views the idea of subsidiarity also as deriving its foundations from the conviction that each human individual is endowed with an inherent and inalienable worth or dignity. The value of an individual person is therefore morally prior to state or any other social groupings. Following this line of reasoning all forms of society from family to state and international legal order ought to be at the service of the human person.<sup>23</sup> The end of such human associations must be the flourishing of the individual. There is a presupposition that the human person towards the flourishing is aimed is naturally social.<sup>24</sup> An assumption in Endo's theory is that the dignity of an individual requires relationships with others, in a variety of ways. Therefore, the value of the individual person as such as well as her fulfillment will be realised only in association with other people. This association in turn makes it possible for the individual to realise her or his inherent and primary value. The existence and end of the community is to help the individual flourish and to help her create the necessary conditions for her to reach her ultimate fulfilment.<sup>25</sup>

The way in which subsidiarity is defined falls in line with the human rights based approaches i.e. those used within towards development projects. Amartya Sen's capabilities approach is one such approach towards the right to development in that it focuses on the individual's freedom to participate in important, valued aspects of life.<sup>26</sup> This approach places 'humans' as central to development and consequently followed into the human rights framework, whereby UN institutions utilises similar conceptions to advocate the importance of public policy centering around the well-being of an individual and saw emergency of concepts i.e. the AAQs as essential elements of rights realisation.<sup>27</sup>

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<sup>23</sup> Ibid 22

<sup>24</sup> Ibid. 23

<sup>25</sup> Ibid. 24

<sup>26</sup> Amartya Sen 'Development as Capability Expansion' – Journal of Development Planning No.19 (1989) pp.41-58

<sup>27</sup> UN Committee on the ICESCR 'Implementation of the International Covenant on Economic, Social and Cultural Rights, GC No. 13 (1999) E/C.12/1999/10 accessed via: <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G99/462/16/PDF/G9946216.pdf?OpenElement>

<sup>28</sup> Ibid. 26, pp. 48-49

<sup>29</sup> Ibid. 19, UDHR [1948]

Arguably the principle of subsidiarity is a legal norm that recognises and protects our capacity to pursue the good in question by a pluralism of paths. If we look at the freedom of religion, as a human right, this is independent from the ability to manifest one's religion, whilst of course exercising this right would require association with others in kind. The recognition of subsidiarity as a legal norm suggests that the respect for diversity within the idea of human rights is really a function of the value of liberty.

Liberty in this context therefore is definable as the freedom of individuals and communities to seek common good necessary for a dignified human life. Subsequently the discourse of human rights and the theory of subsidiarity can both be summarised as ideas that advance an understanding of the common good as based in the totality of conditions necessary for a full and flourishing human life.<sup>28</sup> An illustration of this would be the interdependence, interrelation and indivisibility of rights which through international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights are indispensable for his dignity and the free development of his personality.<sup>29</sup>

## **1.4 Methodology**

The research focuses on four main aspects; a) Review of the historical evolution of the principles including that of subsidiarity governing the legal framework for the application of the Convention. It will explore the birth of the legal instrument, the Convention and the emergence of its supervisory mechanisms. Following on from that; b) it examines the existence of the principle of subsidiarity within the Convention pre reforms and illustrates some of the challenges and critique towards the structural framework of applying the Convention through illustrations of doctrines and case studies in the form of case law as well as analysis from juridical scholars on the matter.

The paper then; c) looks to identify the path towards reform through the analysis of the process that led to the current reforms underway. It looks into the way in which subsidiarity as a principle is introduced further into the Convention system. Finally, d) the paper analyses the current reforms and outcomes resulting from the Brighton Conference occurs to determine the extent to which subsidiarity as a principle is extended within the Convention. The make also discusses whether the purpose of a human rights document; in this case, the Convention can be met with subsidiarity as the structural principle of application. In this final section, analysis is made of the likely effects that the reforms might produce as well as some predictions and recommendations of the future development of the principle within the Convention system is explored.

## 2 Application of the Convention before the Reforms

This chapter relates to the development of the Convention historically and lays the foundation for some of arguments that materialise further within other chapters in the research paper. The aim of the historical background material points the reader towards understanding the development as well as history behind the introduction of the Convention. Furthermore, it lays foundation for establishing the purpose as well as the institutional setting surrounding the instrument as this arises from the establishment of the source of law itself, the Convention.

The end of the Second World War saw the birth of more international efforts towards cooperation and development due to the horrors witnessed that left most of Europe certain that an international effort to maintain and ensure peace was more than necessary. For the purposes of this paper, the establishment of the Council of Europe emerged from the then titled as the International Committee of Movements for European Unity emerged during a meeting in form of a Congress of Europe in 1948.<sup>30</sup> The meeting was pre eluded by a statement made in 1946 by then Prime Minister of the United Kingdom, Winston Churchill; who envisioned the building of United States of Europe which concerned itself with the development of a ‘Declaration of European Citizen Rights’.<sup>31</sup> This saw the start of a journey towards international cooperation between European States and the need for an international instrument governing such collaboration

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<sup>30</sup> The Liaison Committee of the Movements for European Unity was set up in Paris on 20 July 1947. It comprised the Independent League for European Cooperation (ILEC), led by Paul van Zeeland, the former Belgian Prime Minister, the Union of European Federalists (UEF), led by Henri Brugmans of the Netherlands, and Winston Churchill’s United Europe Movement (UEM). the decision, taken in Paris on 10 and 11 November 1947, to replace the Liaison Committee with an International Committee of the Movements for European Unity (ICMEU) It was later joined by the French Council for a United Europe, the ILEC, the Nouvelles équipes Internationales (New International Teams — NEI), the UEF and the UEM. See also: Gomien, Harris and Zwaak – *Law and Practice of the European Convention on Human Rights and the European Social Charter* [1996] pp.1 1

<sup>31</sup> Weil – *The European Convention on Human Rights Background, Development and Prospects* [1963] pp.22 accessed via <http://www.jstor.org/stable/756117>

<sup>32</sup> Volume One, Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly (11 May – 8 September 1949) The Hague: Martinius Nijhoff [1975] pp. 24

It should be pointed out that subsequent preparation for such an instrument indicate that whilst the aftermath of World War II encouraged the need for greater cooperation by European States in global matters such as the economy, when the issue of adding human rights to the agenda arose, the journey met with some reluctance. Winston Churchill prompted the issue of adding human rights to the agenda of the Council of Europe by remarks that;; ‘A European Assembly forbidden to discuss human rights would...be a ludicrous proposition to the world’.<sup>32</sup>

Despite the reluctance, ten High Contracting Parties in Rome nevertheless signed the ECHR in November 1950. The issue of human rights as part of the agenda of the Council of Europe appeared further when the question of whether a supervisory mechanism as a collective guarantee for the effective application of the Convention should be established.<sup>33</sup> There was division amongst those who saw the emergence of a collective guarantee in form of an international Commission and Court as threatening to national sovereignty and those who embraced it as necessary for the protection of rights.<sup>34</sup> Certain members within the Committee of Ministers were vocal in their objections. Lord Chancellor Jowett remarked that;; ‘we should not encourage our European friends to jeopardise our whole system of law, which we have built over the centuries in favour of some half-baked scheme to be administered by some unknown court.’<sup>35</sup> This struggle between interests of national sovereignty on one hand and human rights protection on the other continued<sup>36</sup> well after the ratification of the Convention and still dominates legal debate even today.

The drafting process of the Convention points to some of the struggles prominent and illustrates that the structural framework of the Convention played a material role in the debate then as it does now. The ECHR came into force in 1953 upon ratification by all the ten Signatory Parties. The Convention includes civil and political rights and forms a pan-European regime of human rights protection to which all member States to the Council of Europe [hereafter COE] are parties.<sup>37</sup>

### 3. The role of the Court as a supervisory mechanism

This sub section discusses the development of the Convention once it had come into force and looks to illustrate further the role played by the Convention and its supervisory bodies in developing the Council of Europe. The objective of the COE is to develop and protect common democratic principles throughout Europe i.e. the rule of law and human rights. For the Convention to successfully operate, there needed to be a supervisory mechanism. This came in the form of the European Court of Human Rights, [hereafter the Court] together with the Commission in 1958. The Court was inactive for the first three years as most cases' adjudication took place within the Commission<sup>38</sup> and it was not until 1961 that it deliberated over its first case.<sup>39</sup> The two part supervisory organs were later replaced by one supervisory mechanism; the European Court of Human Rights [hereafter the Court] in 1998 following the adoption of the Eleventh Protocol to the Convention.<sup>40</sup> The role of the Court as defined in article 19, ECHR is 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols hereto'. In other words, it acts as a supranational judicial review on the interpretation and application on the Convention.<sup>41</sup> Currently the Strasbourg Court is composed of 47 judges and is reflective of the membership of the countries in the Council of Europe<sup>42</sup> [hereafter the COE]. Additionally another judge will join to reflect the accession of the European Union to the ECHR.<sup>43</sup> An additional approximately 650 people work in Registry representing several professionals. Despite this large staff, however; the number of applications is huge. Indications of 60,000 new cases came to the Court in 2010, notwithstanding 40,000 cases of inadmissibility and judgments judged on the merits alone.<sup>44</sup>

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<sup>33</sup> Steven Greer – Constitutionalizing adjudication under the European Convention on Human Rights, *Oxford Journal of Legal Studies*, pp. 404

<sup>34</sup> Marks Susan "The European Convention on Human Rights and its Democratic Society" 66 *British Yearbook of International Law* [1996] 209- 238, pp. 214

<sup>35</sup> Wicks "The UK Government's Perceptions of the European Convention on Human Rights at the Time of Entry", *Public Law* [2000] pp. 445-446

<sup>36</sup> Lord Denning remarked in his writings - What next in Law? [1982] 'Do not let us be bound by decisions of judges who do not know our way of life nor anything of our common law'

<sup>37</sup> Hon. Mr. Justice John Murray "The Influence of the European Convention on Human Rights on Community Law, *Fordham International Law Journal* [2011] Vol 33 Issue 5, Article 3 pp. 1391

The problem of what is referred to as the docket crisis is one that has grown to be worrisome. If one looks to determine where the problem derives, arguably the factor that recurs is that of the enlargement of the Council of Europe. Another factor that is imminent in the crisis can be awarded to article 39 of the Convention. The provision within the Convention allows for individuals to apply directly to the Court for redress in matters of human rights infringements. Initially this provision is one that is celebrated as the Convention is the first treaty granting individuals a right of petition before a general human rights treaty<sup>45</sup>. However with the growing pressure faced by the Court, some concerns imply the provision to be a contributory factor.

### **a) The right to Individual Petitioning**

The right to individual petitioning as contained within the article 39 of the provision paved the way for an important aspect of the changing structure of International law by focusing on individual rights.<sup>46</sup> The importance of the right to individual petitioning is discussed further below in this subsection as well some of the concerns accompanying this in recent debates. It is prominently debated that the Strasbourg Court is now under pressure due to its enormous and ever growing workload. The backlog of cases and delays in adjudicating cases is portraying the Court as a victim of its own success.<sup>47</sup>

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<sup>38</sup> Former European Commission of Human Rights part of the two-part supervisory mechanism that was replaced by European Court of Human Rights

<sup>39</sup> This was the case of *Lawless v Ireland* (No.3) App. No. 332/57 on the 1<sup>st</sup> July 1961

<sup>40</sup> Protocol No.11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established thereby article 1, May 11, 1994, 2061-A2889 U.N.T.S 7 adopted but came into force 1998

<sup>41</sup> Article 32, ECHR (formerly known as Article 45)

<sup>42</sup> Article 20 of the Convention

<sup>43</sup> Jean Paul Costa (Former Judge and President of the European Court of Human Rights) – *Current Challenges for the European Court of Human Rights, Leiden Law School* [2011] – A Raymond and Beverly Sackler Distinguished Lecture in Human Rights

<sup>44</sup> *Ibid.* 43, pp.10

<sup>45</sup> *Ibid.*44,

<sup>46</sup> Wolfgang Friedmann – *The Changing Structure of International Law* [1964] Columbia University Press pp.40 - 44

There has been an increase in the requests for interim measures in order to prevent irreversible situations. The impact of this is a very harmful predicament for victims to find themselves in.<sup>48</sup> Victims' right for a fair and speedy trial before a judge is impaired by administrative difficulties.

Concerns emerged of the increased use of the procedure within article 39, claiming that applicants who fail to gain desired effects within national jurisdictions use the mechanism to get the Court's attention. The result of this is pointed out by a scholar who states that, in such situations, the Court ceases to act as second guarantor of human rights and instead finds itself in a more crucial and exposed frontline position.<sup>49</sup> Others attributed the increase in more use of the right to individual petitioning to the enlargement of the Council of Europe. The enlargement saw the accession of former central eastern European countries recovering from the aftermaths of a Communist era, who also at the time of accession were deemed not up to the expected standards of democracy and the rule of law as required by the Council of Europe<sup>50</sup>. The effect this in turn has had is that systemic problems within these countries are now brought to the attention of the Court by nationals within these jurisdictions because of the possibility for redress available that perhaps was not as imminent before these countries acceded into the Council of Europe. This has led some scholars to view that Court as becoming increasing constitutional in its role as a supervisory mechanism.<sup>51</sup>

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<sup>47</sup> Marie Benedict Dembour – Finishing of Cases; The Radical Solution to the Problem of the Expanding European Court of Human Rights Caseload, *European Law Review* [2002] No.5 pp 604

<sup>48</sup> Delayed materialisation of the right to a fair and public hearing with a reasonable time as stated within relevant provisions within the Convention

<sup>49</sup> Harmsen Robert, 'The European Convention of Human Rights after Enlargement' (2001) 5 *International Journal of Human Rights* 18 § 29

<sup>50</sup> Sadurski, Wojciech, 'Partnering with Strasbourg: Constitutionalisation of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments', *Human Rights Law Review* (2009) 9 (3) pp.397-453

<sup>51</sup> *Ibid.* 50

<sup>52</sup> Steven Greer – Constitutionalizing adjudication under the European Convention on Human Rights, *Oxford Journal of Legal Studies* 405 [ 2003] pp. 406 – 07

<sup>53</sup> See Murray - *The Influence of the European Convention of Human Rights on Community Law*, *Fordham International Law Journal* [2011] Volume 33 Issue 5 , Article 3 pp141 5

## **b) The Bilateral Function of the Court**

This section looks at the difficulty faced by the Strasbourg Court in role of balancing the notion of individual justice with that of bringing about uniform standards amongst the European public order

The role of the Court emerges in two parts; firstly, it offers individuals justice as a source of redress for victims whose rights within the Convention have been infringed. Secondly, it serves as a source of constitutional justice by safeguarding and developing rules within the Convention.<sup>52</sup> The Court has the purpose of bringing about uniform standards of rights protection across Europe.<sup>53</sup> This is the consensus doctrine; whereby the Courts seeks to maintain minimum standards of rights protection across Europe and base such considerations by examining the Convention right in question before them.<sup>54</sup> The Court also functions within an international framework and must operate within the bounds of international law. It also has duties reflecting those similar to a constitutional court.<sup>55</sup> This is a claim brought on by its use of the consensus doctrine when seeking to harmonise minimum standards of rights protection within the European public order. The consensus doctrine has resulted in allowing the Courts to increasing impact on domestic legal orders through its judgments.

The Court is increasingly criticised as acting rather like a fourth instance court. The fourth instance doctrine is one that is best understood in conjunction with article 6 (1) of the Convention. In other words, the Court when deciding admissibility of a case, it must review the issue of fairness in procedural terms. The issue of procedural fairness relates to the concept of equal arms whereby on a practical level, adversarial proceedings occur on an equal footing, no one party should be unfairly disadvantaged.<sup>56</sup> It is through application of article 6(1) in conjunction with article 35 that criticism of the Court acting as a fourth instance has emerged. Further critique of the Court in this respect derives the content within provision 3 5(3) of the Convention. The provision makes it clear that; ‘the Court shall declare inadmissible applications submitted under the right to individual petitioning if it considers such applications to be incompatible

with the provisions of the Convention and the Protocols thereto and should review these as an abuse of the right of individual petition.<sup>57</sup> It is from this provision that national authorities insist that the Court makes it clear that it is not a fourth instance court that squashes rulings given by the domestic courts. It is this increasing deliberation and adjudication on major constitutional controversies involving rights within Contracting Parties<sup>58</sup> that bore the need for the above reminder towards the Court.

The Strasbourg Court in their judicial precedent<sup>59</sup> seem to indicate an differing stance of what their role as a supervisory mechanism. The case law dictates the Convention's interpretation as a constitutional instrument of the European public order.<sup>60</sup> By this, they indicate that the Convention portrays the special character as a treaty for the collective enforcement of human rights and fundamental freedoms; which creates over and above a network of mutual bilateral undertakings, objective obligations which in the words of the preamble benefit from a 'collective enforcement'.<sup>61</sup> The Court adheres therefore towards this public order by standardizing the balance between judicial review and deference to the domestic lawmakers.

The Court is adamant in contending that its two main objectives when applying the Convention arguably are seeking harmonisation through the principle of commonality, which materialises in uniform standards of principles that allow for effective human rights protection.

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<sup>54</sup> Stated by Court in *Tyrer v UK* [1978] Para 15 whereby: they examined the intrinsic nature of the punishment at issue and realm of protection of article 3, ECHR

<sup>55</sup> Ernst Ulrich Petersmann – *Human Rights, International Economic Law and Constitutional Justice* 19 *European Journal of International Law* 769 [2008] pp. 777 - 78

<sup>56</sup> See *Garcia Ruiz v Spain* GC [1996] App. No 30544/96 Para 28 – 29

<sup>57</sup> *Perlata v Greece* no. 17721/04 [2007] Para 25

<sup>58</sup> *Ibid.* 113 *Fordham* pp. 1417

<sup>59</sup> *Loizidou v Turkey* [1995]

<sup>60</sup> *Ibid.* 56, Para 27

<sup>61</sup> *Ibid.* 57

The secondary aim arguably is that of pluralism whereby democracy, subsidiarity and variety is maintained.<sup>62</sup> The pursuit of both these aims whilst applying the Convention is what has led to the development of greater critique towards the supervisory mechanism. The balancing of these two objectives is a difficult task and some view the methods of the Court as inconsistent and obscure.<sup>63</sup> This common critique is evident in regards to the application and interpretation of the margin of appreciation doctrine, which allows for the objective of pluralism.

It is through the exercise of these main responsibilities that the Court has gradually received increasing criticism. The two major critiques are judicial activism on one hand and excessive self-restraint on the other. In the first critique, two main arguments exist, on one hand national judicial systems feel unsupported by the Court when adjudication on domestic matters. On the other hand, High Contracting parties feel that certain matters remain the responsibility of their governments and Parliament. The two claims can be translated into a approaching the issue of human rights as a discourse from differing perspectives. High Contracting parties take the stance of cultural relativism by approaching human rights protection in a manner that allows each national jurisdiction to decide what constitutes a human rights problem or issue. The Court however seems to approach the issue of human rights from a universal perspective. In other words, the case law of the Court indicates an acceptance of a minimum level and standard of uniform rights, this approach could very well explain the eagerness of the Court to encompass human rights matters in extended matters that may not have previously been labeled as being human rights oriented. On the other hand, the theory of evolutionary interpretation by the Court might indicate that the human rights discourse is ever growing and changing. This in turn indicates that society, international as well as regional wise is placing more issues and questions in the realm of human rights tying the Court to address such issues as human rights concerns.

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<sup>62</sup> Ibid.58, pp. 20-21

<sup>63</sup> Ibid. 59, pp. 5

Nevertheless irrespective of the rationale as to why the Court has developed and applied the Convention in recent year. By failing to support decisions taken at national level, Contracting Parties feel that the Court acts as a fourth instance court, acting outside its mandate and thus exercising judicial activism by going beyond set parameters of its power.

The rationale for increased critique towards the Strasbourg Court emerged post 2001 when the fight against terrorism became priority to many of the High Contracting Parties. Furthermore, the economic crisis has led to a shift in priority from human rights development to place it on economic policies. The aftermath of 2001 has also resulted in a spread in Euro-centrism, which calls for a reduction in the popularity in the human rights discourse. It is harder for recipients' within national borders to accept the Court's point of view which is to treat 'all human beings as equal' especially towards the unpopular categories i.e. prisoners, criminals, asylum seekers, migrants and people belonging to minorities.<sup>64</sup> This poses the difficult but much relevant question of 'how may one reconcile the basic elements of the European system i.e. the right to individual petition within the requirements of an efficient but speedy justice.'<sup>65</sup>

National authorities on the other hand refer to this implicit reference of principle of subsidiarity inherent within the Convention as justification of the discretion accorded to States to interpret and implement human rights. There is an insistence on their part that, the principle of subsidiarity inherent within the provisions arguably provides a basis for determining the appropriate limits of that latitude requiring justification of any intervention and assistance.<sup>66</sup>

It would seem that critique from High Contracting Parties derives from the requirement that the process of bringing about uniform standards of human rights protection and seeking harmonisation within Europe should be gradual. This seems particularly relevant if one looks at the legal framework of International law, in particular that of the Convention whose foundation is dependent upon the consent of High Contracting Parties.<sup>67</sup>

In other words, the speed in which changes and developments of rights is occurring at the hands of the Court, is startling to national authorities who do not feel part of such a process. Debatably, national authorities feel like bystanders in a system to which they are equally entitled to take part in and dictate in matters of direction and implementation. The issue seems to come down to balance. Human rights protection and implementation within the Convention requires these form both actor, the Court and High Contracting Parties. The issue of balance between the Court and national authorities seems particularly important if provided by the principle of subsidiarity for the effective application of the Convention. It is apparent that the aim of effecting rights within the Convention is not achievable through the Court alone. Furthermore while States may be in a better position to deliver the first line of protection, they at times require the guidance and support of the Court in doing so.

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<sup>64</sup> Ibid.43, Jean Paul Costa pp. 12

<sup>65</sup> Ibid.65, Jean Paul Costa pp.15

<sup>66</sup> Paolo G Carozza – Subsidiarity as a Structural Principle of International Human Rights Law, American Journal of International Law [2003] 39 pp. 69

<sup>67</sup> Helen Fenwick – Civil Liberties and Human Rights, London, Cavendish Publishing Ltd [2005] pp34 -35

### **3 Exercise and Development of Subsidiarity through the European Court Case Law**

This chapter complements the previous section by illustrating the relationship between the Court and High Contracting Parties and some of the issues that accompany this. Furthermore the chapter outlines the role played by national authorities in applying the Convention. This section of the thesis also explores the way subsidiarity as a principle embeds within the Convention system. In other words, it seeks to examine some of the ways in which subsidiarity as a principle exists currently with the ECHR. There are two types of the principle of subsidiarity that manifest within the Convention. Firstly there is procedural subsidiarity; referring to the working relationship between the Court and national authorities regarding the division of responsibility for action and intervention. Secondly, there is substantive subsidiarity; that governs the relative responsibility for decision-making and assessment.<sup>68</sup> The chapter discusses both. Before doing so however an introduction into the main bodies responsible for the application of the Convention is warranted and some points of reference towards the relation enjoyed by these parties will be explored.

The responsibility for human rights protection within the ECHR framework subsists between the supervisory mechanism, the Court and the High Contracting parties. Within the Convention, Article 1 and 13 of the Convention lays primary responsibility for securing rights and freedoms provided for in the Convention with domestic authorities together with the obligation to make effective remedies available.<sup>69</sup>

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<sup>68</sup> Ibid. 60, Para 22

<sup>69</sup> Steven Greer – *The Margin of Appreciation; Interpretation and Discretion under the European Convention on Human Rights* , Human Rights Files No.17 [2000] pp 19-20

The provisions of article 1, 13 together with that of article 35 are vital in the discussion below as they possess the inference implicit within the Convention towards the subsidiarity as a guiding principle. Also within the same instrument, we find the purpose of the supervisory mechanism stated within Article 19 as one that complements the role of High Contracting Parties through review by the Court and allows for ‘the observance of the engagements by the domestic authorities of the rules contained within the Convention’. The subsection below will review how this relationship materialises through the principle of subsidiarity.

## **1. Procedural Subsidiarity through the Admissibility Criteria**

The chapter highlights further the relationship between the supervisory mechanism and the High Contracting Parties. The debate in this section highlights the role that article 35 plays as manifestation for the existing principle of subsidiarity within the Convention. Article 35 of the Convention states; ‘ the Court may only deal with the matter after all domestic remedies have been exhausted according to the generally recognised rules of International Law and within a period of six months from the date on which final decision was taken.’<sup>70</sup> The rule contains the obligation to exhaust all domestic remedies and forms part of international customary law.<sup>71</sup> The provision embodies the principle of subsidiarity and grants national authorities the primary right in implementing the Convention. It allows national authorities the opportunity to prevent or put right the alleged violations of the Convention.<sup>72</sup> Article 35 embodies what can be referred to as the implicit reference towards the principle of subsidiarity. By implicit, the author is referring to the fact that the provision makes no specific reference to the concept of subsidiarity. Nevertheless, once read, the provision is the embodiment of what the concept of subsidiarity is all about.

The rule within the provisions of article 35 is procedural in nature as it requires victims who wish to claim redress for rights violation to so national first and exhaust all required domestic procedures before moving on to apply to the Strasbourg Court for redress.

The rule bases its purpose on the assumption reflected within article 13 of the Convention; that domestic legal orders provide an effective remedy for the violations of the Convention rights.<sup>73</sup> Applicants must avail themselves of any procedural means, starting with those within their domestic jurisdiction.<sup>74</sup> Article 35 rules however do allow for some degree of flexibility as illustrated by adjudication of case law pertaining to this provision within the Court. The notion of procedural subsidiarity contained within article 35 is one that interplays with the principle of effectiveness. The principle of effectiveness<sup>75</sup> is one that requires the Convention to be effective in theory and practice. The Court therefore allows room for flexibility due to the objective of protecting human rights.<sup>76</sup> In other words, despite the existence of article 35(1) that obliges applicants to exhaust domestic procedures, adherence to the rule contained in the provision is flexible and allows the Court to rule on the effectiveness of the domestic remedies as provided by the national authorities.<sup>77</sup> The impact of this interplay reflects further within article 46(1) of the Convention. The article obliges High Contracting Parties to abide by the final judgments of the Court in any cases to which they are party. This is particularly relevant whereby there is a systemic or structural problem, with regard to the observance of a particular Convention right. Especially if the structural issue is capable of producing a de fact erga omnes effect, which requires the participation of all branches of State for an effective remedy.<sup>78</sup>

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<sup>70</sup> European Convention on Human Rights Key Case Law; *Exhaustion of Domestic Remedies*, Article 35 (1) of the Convention updated 28/04/2006 pp. 1

<sup>71</sup> The Interhandel Case (Switzerland v United States) Judgment of 21 March 1989

<sup>72</sup> Selmouni v France GC No.25803/94 ECHR [1999 –V] Para 74

<sup>73</sup> *Ibid.* 67, pp. 2

<sup>74</sup> Cardot v France No.11069/84 [1991] Para 34

<sup>75</sup> Artico v Italy 13 May [1980] Para 33

<sup>76</sup> Ringeisen v Austria [1971] Series A No. 13 Para 89

<sup>77</sup> *Ibid.* 73, Para 23 see also Pine Valleys Development Ltd and Others v Ireland [1991] Para 47 where the Ct held that; a remedy that would not be fruit in sufficient time was neither adequate nor effective'

The importance of article 35 is that it allows for the distribution of proof between the applicant and the respondent State. Respondent State claiming non-exhaustion must satisfy to the Court that the remedy was effective and available in theory and practice. It has to be accessible and capable of providing redress in respect to the applicant's complaints and offer reasonable prospects of success.<sup>79</sup> The Court reviews adherence to the rule within article 35(1) through regard of the particular circumstances of each individual case.<sup>80</sup>

Consequently, the Court takes realistic account of the existence of formal remedies in the legal system of the Contracting Party concerned. It also reviews the general legal and political context in which they operate.<sup>81</sup> Article 35 is illustrative of the complex relationship that the Court and national authorities' enjoy. So while article 1 and 13 together with article 35 of the Convention lay the primary responsibility for securing rights with domestic authorities thus embodying what is referred to as the implicit reference to the principle of subsidiarity within the Convention. Article 35 arguably go further by observing the purpose of article 19, which allows for review of the action or omission taken by Contracting Parties when implementing the Convention domestically.

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<sup>78</sup> Ibid 67, Para 26

<sup>79</sup> Ibid. 75,

<sup>80</sup> Oosterwijck v Belgium [1980] Series A. No.40 pp. 17-18 Para 35

<sup>81</sup> Akdivar v Turkey [1996] pp. 1211 Para 69 , Isayeva and Others v Russia [2005] Para 152-1 53

## **2. Substantive Subsidiarity within the Margin of Appreciation**

This section looks to examine further the relationship between the Court and High Contracting Parties. It discusses another rule contained within the Convention that lays the basis for the principle of subsidiarity and looks to review the role awarded High Contracting Parties through the implicit application of subsidiarity when applying and implementing the Convention.

Article 1 of the Convention places primary responsibility for the implementation of the Convention with High Contracting Parties; the result is that States enjoy a certain margin of appreciation that gives them the discretion to decide the choice of means to be utilised in its domestic legal system for the performance of their obligations under the Convention. The margin of appreciation doctrine illustrates the manifestation of the substantive subsidiarity as applied in limitation and derogation cases. Arguably, it is the cornerstone of the Convention's respect for diversity of the Nations within the Council of Europe's human rights system. The scope of the margin of appreciation makes a clear example of the structural incorporation of the local discretion into legal doctrines of international human rights law.<sup>82</sup> Some scholars view the doctrine as essential in avoiding confrontations because it allows for the flexibility in balancing the interest of maintaining the Sovereignty of Member States whilst complying with their obligations under the Convention.<sup>83</sup> Arguably, the margin of appreciation doctrine is the tool that defines relations between the domestic authorities and the Court.<sup>84</sup> The rights contained within the Convention are divisible into two categories, absolute rights and non-absolute therefore limited rights. The absolute rights are those that High Contracting Parties must be in compliance with always and are non-derogable under Article 15.<sup>85</sup> Article 15 relates to the right of State Parties to derogate from some of the rights contained within the Convention in matters of national emergencies relating to the security of the Nation.

The first category of non-absolute rights can be divided into rights that are

non-absolute due to the nature of the right in question and those rights whereby the extent of the limitation is laid down within the provisions relating to that particular right. An example of such a right where limitation is contained within is that of article 2. This provision refers to the right to life and states that “everyone’s right to life shall be protected by law”. The sub paragraph of this right lays down conditions upon which infringement of this right is not contrary to principles within the Convention.<sup>86</sup> It states that “no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”. Finally there is conditions of the circumstances in which the right may be legally restricted.

The second group of non-absolute rights is where the right itself is limited due to the nature of the right. The margin of appreciation doctrine is concerned with these rights. Examples of such rights are contained within article 8 – 11 but are not limited to only these rights as rights within the subsequent rights within the Protocols of the Convention also may follow the same structure and there become defined as limited due to their very nature.<sup>87</sup> Article 8 relates to the right to respect for private and family life. Article 9 refers to the freedom of thought, conscience and religion. Article 10 in turn points to the freedom of expression. Finally article 11 relates to the freedom of assembly and association. The structure of such rights is similar; whereby the provision starts by stating the right itself. The sub paragraph then lays down conditions for any form of interference and lastly the acceptable conditions for justification of interference of any such right. The margin of appreciation is applicable here because, interference of the rights occurs by High Contracting Parties and it

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<sup>82</sup> see Carozza – Subsidiarity as a Structural Principle of International Human Rights Law, *American Journal of International Law* [2003] 39 pp. 68

<sup>83</sup> Helen Fenwick – *Civil Liberties and Human Rights* [2005] pp. 36

<sup>84</sup> *A and Others v UK*, GC Judgement App. No. 3455/05 [2009] Para 184

<sup>85</sup> Interlaken follow-up, principle of subsidiarity. Note by the Jurisconsul, European Court of Human Rights (2010): Principle of Subsidiarity, Interlaken Follow-Up, Doc. 3188076 of 8 July 2010

<sup>86</sup> *Ibid.* 82

<sup>87</sup> *Ibid.* 83

is up to the relevant Party to then be able to determine when to interfere with a right but also have a satisfactory justification for doing so. The formula for the Court not to find a violation of such a right usually is; that a State Party has to provide satisfactory answers to all three elements of the right. The three elements are as following, firstly; Is the interference in accordance with the law, secondly; is this interference in pursuit of a legitimate aim and lastly; is it necessary in a democratic society. It is worth mentioning that in most of these cases, the third and last category is one that is most difficult for State Parties to prove to the Court as satisfactory and mostly leads to the finding of a violation. In assessing this, the Court looks to consider national as well as local particularities of the case and looks to determine if a consensus exists on the specific issue amongst Contracting States.<sup>88</sup>

The Court recognises the importance of the doctrine as illustrated in the Handyside judgement<sup>89</sup> whereby they held that ‘domestic authorities are better placed than an international court to interpret domestic law in correspondence with obligations under the Convention.’<sup>90</sup> However the court has also go on to maintain that doctrine is one that goes hand in hand with European supervision and that final determination of the obligations under the Convention rests with the Strasbourg Court. It is this analysis of the margin of appreciation that has over the years led to dissatisfaction within High Contracting Parties, who view the Courts methods in supervising the doctrine as inconsistent and obscure.<sup>91</sup>

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<sup>88</sup> Handyside v UK [1976] Para 48 European Court of Human Rights Journal

<sup>89</sup> *Ibid.* 88, Handyside v UK [1976] Para 23 - 24

<sup>90</sup> *Ibid.* 89, Para 22-23 see the Belgian Linguistic Case, July [1968] Para 10 – Court holds; that the machinery of the protection established by the Convention is subsidiary to the national systems safeguarding human rights’.

<sup>91</sup> Steven Greer – The Margin of Appreciation; Interpretation and Discretion under the European Convention on Human Rights [2000] pp. 5

<sup>92</sup> The Convention as a Subsidiary Source of Laweech by Michael O’Boyle, **Deputy Registrar of the European Court of Human Rights, Sp, 1-2 October 2010** *Delivered at the conference on subsidiarity, 1-2 October 2010 in Skopje see the Committee on Legal Affairs and Human Rights, Contribution to the Conference on the Principle of Subsidiarity, Skopje, 1-2 October 2010 “Strengthening Subsidiarity: Integrating the Strasbourg Court’s Case law into National Law and Judicial Practice”* Presentation by Mr Christos Pourgourides, Chairperson of the Committee on Legal Affairs and Human Rights (AS/Jur), Parliamentary Assembly of the Council of Europe accessed via [http://assembly.coe.int/CommitteeDocs/2010/20101125\\_skopje.pdf](http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf)

<sup>93</sup> Hirst v UK No.2, GC Judgement App. No. 74025/01 [2005]

The relationship between the Court and national authorities through the manifestation of subsidiarity allows the Convention to act as the central nerve system by which common legal standards are set which permeate the legal orders of the Contracting States in its role as primary protectors of human rights.<sup>92</sup>

### **a) Limitation of the Margin of Appreciation Doctrine Case Study 1 – Hirst**

This sub-section looks into Hirst<sup>93</sup>; a case illustrative of the limitations of the margin of appreciation doctrine. The case is important because it highlights some of the challenges faced by the Court in applying implicit subsidiarity. The case exemplifies the critique posed by some High Contracting Parties towards the Court and shows the path towards need for reform within the European Human Rights system. In the section some details of the case are present as well as the Court's analysis together with other commentary and critique born out of the executed judgment.

Hirst was a convicted prisoner for manslaughter on grounds of diminished responsibility, a defence under UK law for the crime of murder. He complained that the bar by section 3 of the Representation of the People Act 1983 of convicted prisoners from voting in parliamentary or local elections, issued proceedings was incompatible with the European Convention on Human Rights. He urged the High Court to declare the rule as incompatible under section 3 of the Human Rights Act.<sup>94</sup> The case went as far as exhausting all domestic remedies, deliberation within the UK Supreme Court revealed not to find the automatic blanket ban as inconsistent with the HRA. The case went on the Strasbourg Court highlighting the right to vote for convicted prisoners and related to obligations within article 3, Protocol No.1 of the Convention [hereafter article 3]. The provision contains obligations for High Contracting Parties to hold elections in order to ensure the free expression of the opinion of people.

The Court has found the rule to imply individual rights pertaining to the right to vote and the right to stand for election.<sup>95</sup> In this particular case, the Court agreed that the right as contained within article 3 was not absolute and left room for implied limitations and opportunity for the Contracting Parties to exercise the doctrine of margin of appreciation, indeed a wide one.<sup>96</sup> They concluded that given the variety in electoral systems and wealth of differences in historical developments, cultural diversity and political thought, each Contracting Party should mould the right into their own democratic vision.<sup>97</sup> The Court also pointed out that the last review of whether in exercising this doctrine, requirements of the right, in this case, article 3 uphold, lies with the supervisory mechanism. It is up to the Court to ensure the restrictions on a right do not impair the essence or deprive the right of its effectiveness and that restrictions pursue a legitimate aim and not considered as disproportionate.<sup>98</sup>

Following the line of reasoning, what is interesting is that the Court held that; the restriction on convicted prisoners losing their right to vote pursues a legitimate aim representing retribution and deterrence. It however found that an automatic blanket ban imposed on all prisoners was arbitrary in the effects. It relayed concerns of the national piece of legislation<sup>99</sup>, by referring to it as a blunt instrument that strips prisoners of their Convention right to vote and does so indiscriminately.<sup>100</sup> The Court therefore found a violation of the rights as contained in article 3, Protocol 1 of the Convention<sup>101</sup>. It found that the lack of distinguishing between different kinds of prisoners, nature or gravity of crime or sentence of offence to result in such a general, automatic and indiscriminate restriction on a vitally important Convention right. It viewed such a restriction as falling outside any acceptable margin of appreciation, however wide that margin might be.<sup>102</sup>

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<sup>94</sup> The **Human Rights Act 1998** [hereafter the HRA] is the domestic legislation through which the Convention has been incorporated with the UK domestic legal order. **S. 4 (2) of the HRA** reads: *'If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility'*.

<sup>95</sup> Ibid. 90, Hirst Para 56- 57

<sup>96</sup> Ibid. 95, Hirst Para 60 - 61

<sup>97</sup> Ibid. 96, Hirst Para 61

<sup>98</sup> Ibid. 97, Hirst Para 62 see Mathieu – Mohin and Clerfayt v Belgium [1987] Series A No, 113 pp. 23 Para 52

Critique of the judgment was evident firstly the dissenting opinion of one of the judges. Judge Jean Paul Costa argued that, ‘if the Court accepts the wide margin of appreciation to decide on aims of any restriction, limitation or even outright ban on the right to vote.’<sup>103</sup> It appears inconsistent if it later decides to reduce that margin when it came to assessing proportionality of the measure of restricting universal suffrage, which in itself is a democratic idea and therefore aspiration as a goal for Europe.<sup>104</sup> The reality that Hirst illustrates is that an implied theoretical wide margin of appreciation exists within the Convention.

Nevertheless, by finding a violation of the right, the Court deprives Contracting Parties of all margin and all means of appreciation.<sup>105</sup> Other critique materialised within the respondent State whereby the Head of State promised to uphold the views of the British people over those of the Strasbourg Court<sup>106</sup>. Others have not been as diplomatic and in response to the judgment called for an outright defiance of the Court’s judgement.<sup>107</sup> It did not help matters that subsequent case law<sup>108</sup> regarding similar issues before the Court is receiving the same executed judgments.

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<sup>99</sup> Section 3A of the Representation of the People Act 1983, 1983 Chapter 2

<sup>100</sup> Ibid. 98, Hirst pp. 17 Para 82

<sup>101</sup> Protocol No. 01 to the Convention, Paris 20. III. [1952] Article 3 relates to Right to free elections and reads: The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions, which will ensure the free expression of the opinion of the people in the choice of the legislature.

<sup>102</sup> Ibid. 100, Hirst Para 82

<sup>103</sup> Hilbe v Lichtenstein [1999] ,ECHR 1999-IV

<sup>104</sup> Dissenting Opinion of Jean Paul Costa in Hirst Judgement of the Grand Chamber Para 5

<sup>105</sup> Ibid.104, Para 9

<sup>106</sup> House of Commons, Question Time – Response from David Cameron on Wednesday 24 October [2012] H. C. Debs. 23 May 2012, col. 1127 accessed via: <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121024/debtext/121024-0001.htm>

<sup>107</sup> Letter to Daily Mail ( a national tabloid) newspaper by Jack Straw (Shadow Justice secretary and Lord Chancellor) and David Davis (Minister of Parliament) accessible via: <http://www.telegraph.co.uk/news/uknews/law-and-order/9287633/We-must-defy-Strasbourg-on-prisoner-votes.html>

<sup>108</sup> Greens and MT V UK App. No. 6004 1/08 7 App. No. 60054/08 / Scoppola v. Italy (No. 3), Application No. 126/05 [2012]

The Court has again attempted to maintain the relationship between itself and Contracting Parties on the matter. It therefore concedes that; ‘the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners’ voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction.<sup>109</sup> In the same instance, however it has gone on to maintain that it will still be the role of the Court to examine whether, in a given case, this result achieved and whether the wording of the law, or the judicial decision complies with Article 3 of Protocol No. 1.<sup>110</sup> The aftermath of this judgment is one that has further cemented the relationship between Strasbourg and some Contracting Parties as fragile at the best. This case is particularly important also because the respondent state within these proceedings, the United Kingdom also held the Chair for the Council of Europe at the time when the new reforms were proposed and established. Presumably the case may have warranted a specious mode of action for reforms to take place within the Council of Europe in order to avoid similar circumstances as those highlighted by the case above.

### **b) Limitation of the Margin of Appreciation Doctrine Case Study 2 – The Othman Case**

This sub-section illustrates another case study that offers insight into the complex task performed by the Strasbourg Court and the effects this has on its relationship with High Contracting Parties. The case is particularly important because it also illustrates the limits that the existing manifestation of the principle of subsidiarity has in the current Convention system.

This is a case<sup>111</sup> that concerned the deportation of a terror suspect from the UK to Jordan, Mr. Othman. Othman entered the UK as a refugee who received temporal stay of four years. He later applied for indefinite leave to remain and it was pending this that he later was arrested on suspicion for terrorism and served with an order for deportation.

He challenged this order on the basis that should he return to Jordan, he feared facing torture and retrial for charges of terrorism to which he already had been convicted absentia in Jordan. He claimed a violation of article 3<sup>112</sup> and 6 of the Convention. This article of the Convention concerns the right to be promptly brought before the judge for a fair and impartial hearing into your case.

The Court in this case held that ‘it is a legitimate aim for Contracting Parties to take a firm stand against those who contribute to terrorist acts.’<sup>113</sup> It went on to state that it is however not its function to review whether an individual is in fact such a threat. Its task is to consider whether the individual’s deportation would be compatible with his or her rights under the Convention.<sup>114</sup> The Court noted the nature of article 3 as absolute and not weighable against the reasons put forward for the expulsion.<sup>115</sup> When examining whether the applicant would face a real risk of ill-treatment in Jordan, the Court reviewed the general human rights situation in the country and the particular circumstances of the applicant. The picture painted by NGOs and UN bodies was consistent and disturbing. UN CAT committee described the practice of torture as widespread and routine in its report to the Court.<sup>116</sup> The Court in this case, however found that deportation would not be contrary to article 3 of the Convention as long as effective safeguards such as diplomatic assurances were in place. In this particular respect, the UK and Jordan have gone ahead to sign a diplomatic agreement for this particular case.<sup>117</sup> Advancement in the case is that upon ratification, the applicant in this case has hinted at possible voluntary return to Jordan.<sup>118</sup>

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<sup>109</sup> Ibid. 102, see *Scoppola v. Italy* (No. 3), Application No. 126/05 [2012] Para 102

<sup>110</sup> Ibid. 109

<sup>111</sup> *Othman (Abu Quatada) v UK* App. No. 8139/09 [2012]

<sup>112</sup> Article 3 of the Convention relates to the Prohibition of torture, inhumane and degrading treatment

<sup>113</sup> Ibid.112, Para 183

<sup>114</sup> Ibid.113, Para 184

Further issues of dissatisfaction by there again the United Kingdom, who are the respondent State in the issue, arose however, when the Court then turned its attention towards compatibility of the deportation with article 6 of the Convention. The Court held that a violation of Article 6 would occur if deportation occurs because this in turn would place the applicant in a situation of denial of procedural justice. The Court labeled this denial of justice as “flagrant” by applying a stringent test of unfairness. They defined flagrant as denial of justice that goes beyond mere irregularities or lack of safeguards in the trial procedures. The inclusion of torture is an example of such denial that might result in a breach of Article 6 as if occurring within the Contracting State itself.<sup>119</sup>

The concern was that the applicant had been convicted absentia on charges of terrorism. Evidence supporting the charges was testimony obtained from his co-defendants through the method of torture. They reiterated the importance of the trial process as the cornerstone for the rule of law. They held that torture evidence is damaging to such a process and tainting towards the reputation of any court that admits it. They established that “no legal system based upon the rule of law can countenance the admission of evidence that has been obtained by such a barbaric practice as torture.”<sup>120</sup> Therefore, for these reasons, the Court concluded that the deportation would be incompatible with the rights contained within article 6 of the Convention.

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<sup>115</sup> Ibid.1 14, Para 185 see Saadi v Italy GC App. No. 37201/06 Para 125 & 138 [2008]

<sup>116</sup> Ibid.115, Para 187 see Para 156 for the UN CAT Report

<sup>117</sup> Jordan No. 1 (2013) Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan London, 24 March 2013 signed on the 24 April 2013 but not yet ratified, accessed via:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/192197/treaty.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192197/treaty.pdf)

<sup>118</sup> The Guardian Newspaper 10<sup>th</sup> May 2013 accessed via:  
<http://www.guardian.co.uk/world/2013/may/10/abu-qatada-jordan-treaty-ratified>

<sup>119</sup> Ibid.116, Para 263 - 265

<sup>120</sup> Ibid.1 19, Para 267

This case is significant because it is the first case whereby the Court has found that expulsion of respondent State would be contrary to article 6 rights within the Convention. It is illustrative of the ways in which human rights adjudication by the Court has developed to extend into matters previously considered as domestic, such as the right for states to decide who to receive in their territory. Development of migrant rights has been imminent within articles 2 and 3 and this case is illustrative of how article 6 can also contribute to developing rights for this group. Human rights defenders might praise this development but the acknowledgement from High Contracting parties towards this development is one that is in indignation. The case is illustrative of the concern by national authorities that the Court is acting as a fourth instance court whereby parties within national jurisdiction dissatisfied with decisions seek appeal to the Court using the Convention in matters that should remain national concerns. This claim is consistent with issues pertaining to immigration law; whereby an emergence of rights for immigrants and asylum seekers are materialising through adjudication on other concerns before the Court.

### **c) The Right to an effective remedy – Combined efforts for procedural and substantive subsidiarity**

This sub-section highlights the role that subsidiarity plays in encouraging national systems to effectively implement measures that allow for rights protection in practice. It will discuss the rule contained within article 13 of the Convention and outline its usefulness in assisting national authorities in the role.

Article 13 states that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”. It embodied victim’s right to an effective remedy upon infringement of their rights under the Convention. Early interpretation of article 13 by the ECtHR is narrow, illustrated by the reluctance for the Court to mandate the incorporation of the Convention within domestic orders or demand that ‘effective’ translates to judicial remedies.<sup>121</sup>

More recently, however the court has aimed to deliver individual justice; thereby delivering human rights adjudication in a manner whereby it insists on every genuine victim receiving redress or remedy, whatever the bureaucratic cost, and despite the likely impact that such a judgment may have on the conduct or practice in question.<sup>122</sup> This has translated in article 13 materialising as a guarantee of one of the most fundamental principles of a democratic society.<sup>123</sup> This is the right to an effective remedy. Despite its attempts to full interpret and make use of the provision, some scholars find the Court's reluctance or unwillingness to identify specific remedies as impeding the process of speedy and full compliance of the execution of their judgements.<sup>124</sup> Other scholars see the potential development of article 13 as still high especially through further interpretation of other rights.<sup>125</sup> The Court for instance could define the type of investigations or compensatory relief required for differing Convention violations and create standards that must be satisfied for domestic remedies to qualify as effective.<sup>126</sup>

The Court has in recent years extended its interpretation of the article to require specific, certain types of remedies provided by national authorities for them to satisfy the 'effective' criteria.<sup>127</sup> It has stated that article 13 requires the government to carry out a rigorous and independent scrutiny of the applicant's claims.<sup>128</sup> It analyses the satisfaction of the effectiveness criteria through a detailed scrutiny of the domestic measures in place. Ironically complaint of heavy burdens and workload on judicial systems have not deterred the Court from placing a duty on State Parties to ensure through organisation that domestic judicial systems can meet the requirements of article 13.<sup>129</sup>

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<sup>121</sup> Laurence Helfer – *Redesigning the ECHR- 'Embeddedness as a deep structural principle of the European Human Rights Regime* , EJIL [2008] Volume 19 No.1 pp 147 see also *Swedish Engine Drivers Union v Sweden* [1984] Para 50

<sup>122</sup> *Ibid.* 121, pp. 139 See also Greer at 191

<sup>123</sup> *Conka v Belgium* App. No. 5 1564/99 Para 83

<sup>124</sup> *Ibid.* 121, pp. 147; see also European Commission for Democracy through Law (Venice Commission) Up. No. 209/2002 [2002] accessed via [http://www.venice.coe.int/webforms/documents/CDL-AD\(2002\)034.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2002)034.aspx)

The Court acknowledges adequate redress as essential to decrease individual applications through article 34. More importantly, it has stated the importance of the provision in enhancing the principle of subsidiarity. Article 13 requires the reshaping of national systems to increase the likelihood of human rights as remedied at home. This the Court acknowledge as essential in tackling its own problem of heavy workload due to the increase in individual applications.<sup>130</sup>

Scholars<sup>131</sup> have recommended for article 13 to require ‘effective’ to encompass judicial remedies. This would grant jurisdiction to all domestic courts to consider complaints about the violation of Convention standards and provide individuals with complaints procedures.<sup>132</sup> The Group of Wise Persons has previously recommended adoption of a protocol that obligates Member States to introduce domestic legal mechanisms and offer redress for damage resulting from any violation of the Convention.<sup>133</sup> The issue of access to an effective remedy is essential in the ensuring that rights are tackled locally within national jurisdictions. This access would is essential for the full realisation of the principle of subsidiarity within the Convention system. National access to remedies affords a more immediate avenue for redress for victims whose rights have been infringed. The Court in its adjudication of the provision is not always consistent as it goes as far as requiring certain measures to be taken but then falls short of specifying

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<sup>125</sup> C. Ovey and R. White; Jacobs and White on the European Convention of Human Rights pp. 471

<sup>126</sup> Ibid.121, pp. 155

<sup>127</sup> *Cobzaru v Romania* [2007] App. No. 482 54/99 Para 82; in this the Court stressed the importance of the right to life and the prohibition or torture to require a thorough and effective investigation capable of identifying and punishing those responsible for the acts of ill treatment’.

<sup>128</sup> Ibid.126

<sup>129</sup> *Schutte v Austria* [2007] App. No. 18015/03 Para 36

<sup>130</sup> *Kudla v Poland* [2000] Ap. No. 302 10/96 Para 158

<sup>131</sup> Steven Greer – *The European Convention on Human Rights ; Achievements, Problems and Prospects* [2006] Cambridge University Press pp. 281

<sup>132</sup> Ibid. 128

<sup>133</sup> Group of Wise Persons set up by the Action Plan under the Third Summit of Heads of States, Council Of Europe [2005], Para 24 - referred to a mechanism that would remedy systemic or structural shortcomings in law or practice by State.

what those measures ought to amount to. Some scholars as mention previously may view this as failing on part of the purpose of the Court. However an explanation of this reluctance may surround some of the issues previously pointed to in the earlier chapters of the thesis, whereby the Court is wary of its success and does not wish to assert itself or its authority through reaching farther than the Convention and its drafters intend. This may risk alienation between the High Contracting parties and the Court. Note that, as stated before, the purpose of the Convention cannot be met by either the Court itself or the High Contracting parties alone; rather it requires cooperation between the two actors.

An illustration of this point is visible through Court case law whereby it has found that; new legislation enacted by the government to remedy widespread and systemic delays in judicial proceedings, itself violated the Convention.<sup>134</sup> It is such manifestation of the right to an effective remedy is what has prompted the Court to expand its modern interpretation of the provision and specify the type of remedy that national governments must provide to individuals whose rights they have violated.<sup>135</sup> National authorities are in a position to implement domestic measures that ensure more immediate access of remedies for its nationals. The Court however is needed to determine the compliance of such measures with the rights as contained within the Convention.

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<sup>134</sup> *Scordino v Italy* No.0 1 GC [2006] In this case; issue of remedy for the infringement had been settled by legislation and not judicially) This is turn resulted in less compensation for claimants and the matter was further complicated by the retrospective principle within Italian law which is not absolute but had been applied as being so in this particular case. (Claimants were offered less compensation for loss of property than previously awarded by the repealed legislation)

<sup>135</sup> *Assembly debate* on 28 September 2000 (30th Sitting) (see Doc. 8808, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Jurgens). Systemic human rights violations and problems in longstanding Convention Member States , Resolution 1226 – Parliamentary Assembly of the Council of Europe, Execution of Judgements of the European Court of Human Rights [2000] Para 7 *Text adopted by the Assembly* on 28 September 2000 (30th Sitting) accessed via [http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/ERES\\_1226.htm](http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/ERES_1226.htm)

## 4 The Extended Application of the Principle of Subsidiarity within the Reforms

This chapter sets out to outline the path towards reform by looking at some of the background material that eventually led to the Brighton reforms examined within the thesis research. As the former chapters have outlined, the workload of the Court as well the relationship between Contracting Parties and the Court dictated a need for review. There prompted a need for improvement in the interaction of the Parties responsible for ensuring the effective application of the Convention. The extended application of the principle of subsidiarity is inherent within the new reforms as the instrument to improve the operation of bodies within Council of Europe in their aim of rights protection. The chapter will examine the reforms as well as the concept of the principle of subsidiarity to determine whether this is possible.

The first formal step toward reform occurred during the Third Summit of Heads of State<sup>136</sup>, whereby a Working Group<sup>137</sup> was set up to specifically address some of the difficulties brought to light and propose workable solutions. The new proposals presented in a report<sup>138</sup> to the Committee of Ministers aimed at enhancing the effective functioning of the judicial control mechanism, the ECtHR. The first proposal encouraged greater flexibility of the procedure for reforming the judicial machinery.<sup>139</sup> There was a call to establish a judicial filtering system<sup>140</sup> to help deal with the increasing amount of applications to the Court through the right to individual petition and establishment of the pilot judgment scheme<sup>141</sup>. Proposals called for advisory opinions<sup>142</sup> to act as a form of increased cooperation between the Court and national courts. Additionally the proposals called for enhancement of the Court's case law in State Parties<sup>143</sup>.

<sup>136</sup> The Third Summit of Heads of States and Government of the Member States of the Council of Europe (Warsaw) 16 -17 May 2005 accessed via <https://wcd.coe.int/ViewDoc.jsp?id=860063&Site=COE>

<sup>137</sup> Group of Wise Persons set up by the Action Plan under the Third Summit of Heads of States, Council Of Europe [2005] accessed via [http://www.coe.int/t/dcr/summit/200505\\_1\\_7jlan\\_action\\_en.asp](http://www.coe.int/t/dcr/summit/200505_1_7jlan_action_en.asp)

<sup>138</sup> Report to the Committee of Ministers of the Group of Wise Persons , CM [2006] 203 15 November 2006 accessed via <https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM>

<sup>139</sup> Ibid.138, Para 1

<sup>140</sup> Ibid.139, Para 2

<sup>141</sup> Ibid.140, Para 7

<sup>142</sup> Ibid.141, Para 4

<sup>143</sup> Ibid.142, Para 3

The proposal that prompts relevance here is the extension of the duties of the Commissioner for Human Rights. The Working Group proposed that the Commissioner leads the assistance machinery at national level, by building a network of national and regional ombudsmen and national human rights institutions [hereafter NHRIs]. This network in turn could then work together to reduce the Court's workload with the active support of the Commissioner.<sup>144</sup> A draft Protocol<sup>145</sup> emerged which aimed to incorporate some of the changes mentioned within the report. Although drafting process occurred a year before the presentation of this report to the Committee of Ministers, ratification of this Protocol did not occur until after the Interlaken Conference. I will therefore go through some of the issues raised there before returning to discuss the impact of Protocol no.14 as mentioned.

#### **4.1 Implicit inference towards the enhancement of subsidiarity through the Interlaken and Izmir processes**

The Interlaken<sup>146</sup> Conference is the first conference aimed at completing an action plan targeting the reform towards the Convention and its supervisory machinery. During this, there is reiteration of the right to individual petition as the cornerstone of the Convention system. However, there is expressed concern that the increase in its use is reflection for the need for reform pursuing greater and more effective implementation of the Convention at national level. The action plan within the Interlaken Declaration [hereafter the Declaration] drawn during the Conference discussed introduction of new legal remedies of general or specific nature to offer redress and effective remedy to persons who faced violations of their rights and freedoms<sup>147</sup>. There was discussion of ensuring greater awareness of the Convention and its system in an effort to ensure that its application procedure and admissibility is properly utilised by applicants. There was consideration of implementing a filtering procedure of whereby a single judge could review applications and admissibility cases<sup>148</sup>.

The Declaration expressed concern of the increasing repetitive applications and encouraged the facilitation of friendly settlements and adoption of unilateral decisions through the pilot judgment scheme. The discussion carried on to the need for clear and predictable standards of the

pilot scheme discussed together with the issue of whether the single judge responsible for the filtering system could also handle repetitive cases. There was a request for State Parties to cooperate with the Council of Europe and solve any structural problems revealed by any judgment.<sup>149</sup> The action plan reiterated the need for shared responsibility of the Convention between the Court and High Contracting Parties. It encouraged the Court to avoid acting as a fourth instance court in matters considering questions of fact or national law that have already been discussed by national authorities. It expressed the need for the Court to apply uniform and rigorous criteria concerning the admissibility and jurisdiction by taking into account its subsidiarity role when interpreting and applying the Convention.<sup>150</sup>

The Interlaken Conference initially aimed to propose solutions for the pending problems faced by the Council of Europe and its bodies which include the European Court of Human Rights as well as the Committee of Ministers which comprises of all the Heads of States for all High Contracting Parties within the Council of Europe. By its commencement however, the tone of the discussion seemed to have shifted slightly to focus on ensuring that the Court understood its role as one that is subsidiary as established by the Convention. Emphasis was placed on the recognition of the role that national authorities play in guaranteeing and protecting human rights at national level as essential and key in the effective implementation of the instrument.<sup>151</sup>

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<sup>144</sup> Ibid. 143, Para 9

<sup>145</sup> Protocol No. 14 to the Convention of the European Convention of Human Rights and Fundamental Freedoms adopted May 2004 but entered into force 01 June 2010 upon ratification by Russia ( 3 months after the Interlaken Conference) accessed via [http://conventions.coe.int/Treaty/en/Treaties/Html/14\\_94.htm](http://conventions.coe.int/Treaty/en/Treaties/Html/14_94.htm)

<sup>146</sup> High Level Conference on the Future of the European Court of Human Rights chairmanship by the Swiss Government on the 19 February 2010 accessed via [http://www.coe.int/t/dghl/standardsetting/conferenceizmir/INTERLAKEN%20DECLARATION%20final\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/conferenceizmir/INTERLAKEN%20DECLARATION%20final_en.pdf)

<sup>147</sup> Ibid. 146, Para 1

<sup>148</sup> Ibid. 147, Para 6

<sup>149</sup> Ibid. 148, Para

Three months after the Interlaken Declaration, Protocol no. 14<sup>152</sup> came into force and held some but not all of the proposed changes as discussed previously. The Protocol established the filtering system, allowing a single judge to deal with clearly inadmissible applications. It created a new admissibility criterion that allowed judges to declare inadmissible cases whereby applicant has not suffered a significant disadvantage. It also put in place measures to deal with repetitive cases.<sup>153</sup> The content of the Protocol no,14 does indicate that at this stage of the reforms, subsidiarity was important within the discussions but not the main focus of what constituted as essential reforms regarding the Convention and its supervisory mechanism.

If then one moves on to review the second stage towards reforms through the Izmir<sup>154</sup> Conference. It also indicates a focus on seeking to evaluate the progress made by both the Interlaken Declaration and Protocol No.14 of the Convention. The Izmir Declaration recognised the extraordinary contribution of the ECtHR towards the protection of human rights.<sup>155</sup> It makes reference to the principle by stating that the subsidiarity character of the Convention constitutes a fundamental and transversal principle that both the Court and State Parties must take into account.<sup>156</sup> It then goes to make clear its objective which is to review the effectiveness of both the Interlaken Declaration as well as the Protocol no.14. The text of the Izmir Declaration implies a greater focus of the debate

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<sup>150</sup> Ibid. 143, Para 9 pp. 5

<sup>151</sup> Ibid. 144, Para 6

<sup>152</sup> Protocol No. 14 to the Convention of the European Convention of Human Rights and Fundamental Freedoms adopted May 2004 but entered into force 01 June 2010 upon ratification by Russia ( 3 months after the Interlaken Conference)

<sup>153</sup> Factsheet – May 2010, Council of Europe Press Division *Protocol No.14, Reform of the European Court of Human Rights* pp. 2

<sup>154</sup> High Level Conference on the Future of the European Court of Human Rights – organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe, Izmir, Turkey 26 -27 April 2011 accessed via [www.coe.int/Izmir](http://www.coe.int/Izmir)

<sup>155</sup> Ibid. 148, Para 3

<sup>156</sup> Ibid. 149, Para 5

to surround issues of whether greater reform towards the Convention system is needed. Whilst reference of the principle of subsidiarity is inherent, the focus seems to lie with noting concern of the extent of problems pending such as the continuing increase in the number of applications brought before the Court. It expresses particular concern to the increase in the number of interim measures requested in accordance with Rule 39 of the Rules of the Court, since the Interlaken Conference,<sup>157</sup> as this affects the workload of the Court<sup>158</sup>. The Izmir Declaration can be defined to be a stamp of record taking note of the inefficiencies and flaws within the Convention system. Arguably it serves the purpose of highlighting the inevitability and need for reform to occur on a more concrete basis. The Declaration does so by acknowledging that provisions introduced by Protocol No.14 solely will not allow for a balance between the incoming cases and output of ensuring effective treatment of the growing applications and underlying urgency of adopting measures.<sup>159</sup>

The Izmir Declaration main role was to affirm the need for bodies within the Council of Europe to act and make feasible reforms that can allow the Convention and its supervisory mechanism to function in a manner that is effective and clear. The observations in this chapter point towards a system with flaws despite inhabiting a certain level of the principle of subsidiarity. The Izmir Declaration is key towards the discussion of the principle of subsidiarity because it points out the deficiencies within a system that holds some degree of balance due to existence of some implicit mode of subsidiarity with the Convention. It makes it clear that the implicit form of subsidiarity existing within the Convention system is one that requires improvement.

A factor established by the Izmir Declaration is in reference to the admissibility criteria as an essential tool in managing the Court's caseload and giving practical effect to the principle of subsidiarity.<sup>160</sup> The use of the language relating directly to the principle infers a need for greater clarity.

Analysis of the Declaration points to the claim that perhaps due the lack of explicit reference of the principle with the Convention; the Court as well as High Contracting Parties fail to benefit. It would seem here that a lack of implicit reference to subsidiarity within the Convention is acceptable by at least national authorities to be inherent in increasing some of the problems faced by the Convention's supervisory mechanism.

This can be inferred from its follow up report, whereby the Declaration makes it clear that the Court is not a fourth instance court and that treatment of requests for interim measures must take place in full conformity with the principle of subsidiarity.<sup>161</sup> There is encouragement for the Court to apply fully all admissibility criteria and rules regarding the scope of its jurisdiction. This obligation placed on the Court by High Contracting Parties to give full effect to the admissibility criteria in accordance with the principle *deminimis non curat praetor*<sup>162</sup> strengthens the author's claim that implicit reference to the principle of subsidiarity is a factor.

The need for States to remind the supervisory mechanism not concern itself with trivial matters and thus confirm through its case law that is not a fourth instance court; by avoiding the re-examination of issues of facts and law decided by national courts<sup>163</sup> presumes that an explicit reference of the principle within the Convention would be enough to ensure that Courts need not be reminded of their role in comparison to that of the national authorities.

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<sup>157</sup> Ibid. 150, Para 7

<sup>158</sup> Ibid. 151, Para 12

<sup>159</sup> Ibid. 152, Para 3 under the Sub-heading The Conference

<sup>160</sup> Ibid. 153, Para 4 under the Sub-heading The Conference

<sup>161</sup> Ibid. 154, Para 3 under the Sub-heading The Follow Up Plan

An analysis of the Izmir Declaration does indicate the approach towards subsidiarity as political from the perspective of the Committee of Ministers. In the next chapter greater exploration of subsidiarity will occur. This in turn will go back to examining whether the explicit reference of the principle of subsidiarity is capable of producing the desired results as proclaimed during the Izmir Conference. Perhaps the actual understanding and approach of the concept of subsidiarity also plays a role in determining the outcome results. Before doing so, however, the next chapter will look to examine the new reforms as introduced through the Brighton Conference and determine the extent in which subsidiarity as a principle is included and extended.

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<sup>162</sup>The admissibility criteria contained within Protocol No. 14; the provision narrows the scope of the Convention to exclude minor damage the victim can readily make good.  
<sup>163</sup>Ibid. 162, Para 2 (a) (b) (c) under the Sub-heading The Court

## **5 Explicit Introduction of the Principle of Subsidiarity through the Brighton Conference**

This chapter discusses the next stage of reform that continues from where the Izmir Declaration ends and constitutes the third and final stage of current reforms headed for the Convention and its supervisory machinery.

The Brighton Declaration<sup>164</sup> reiterated the shared responsibility of both High Contracting Parties and the Court in the realisation and effective implementation of the Convention, underpinned by the principle of subsidiarity. It also recognised that the Convention reflects the principle of equality amongst States.<sup>165</sup> The Declaration encourages State Parties to work in partnership with the Court, drawing on the important work of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe as well as the Commissioner for Human Rights and other institutional bodies of the COE and in cooperation with civil society and NHRIs.<sup>166</sup> It acknowledges the positive results achieved so far by Protocol No.14, however reflects on the need for further measures to ensure the Convention system remains effective in protecting rights of over 800 million people within Europe.<sup>167</sup>

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<sup>164</sup> High Level Conference on the Future of the European Court of Human Rights – organised within the framework of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe, Brighton, UK 18 -20 April 2012 accessed via [http://hub.coe.int/2012041\\_9-brighton-declaration](http://hub.coe.int/2012041_9-brighton-declaration)

<sup>165</sup> Draft Group on the Draft Declaration for the High Level Conference on the Future of the ECtHR – Secretariat of the Committee of Ministers , 12 April 2012

<sup>166</sup> Ibid. 159, Para 4

<sup>167</sup> Ibid. 160, Para 6

<sup>168</sup> Ibid. 161, Para 15 (c) changes to admissibility criteria under article 35 (3) (c) increase the threshold of the level required to be defined as significantly disadvantaged thereby amounting to a victim

<sup>169</sup> Laurence R Helfer – The Burdens and Benefits of Brighton , European Society of International Law June 08 2012 Volume 01 Issue 1

The new reforms introduce some hard law<sup>168</sup> provisions that give greater deference to national authorities. The changes within the admissibility criteria are contained in the new draft Protocol No.15. The Protocol once adopted will be binding upon ratification by all Members of the Council of Europe. They also subtly suggest that the Court refrains from scrutinising national governments for the sake of maintaining consistency in the application of the margin of appreciation doctrine. This part of the proposals are non-binding but do complement the changes in hard law aimed at decreasing the applications and thereby issues upon which the Court may adjudicate.<sup>169</sup> Within the Brighton debate there was discussion of increasing the of transparency within the Convention system by the including guiding principles of the Convention i.e. the principle of subsidiarity and the doctrine of the margin of appreciation as developed by the Court's case law in the pre-amble of the Convention.

It is important to note this particular objective as previously in the former chapters, it seems clear that the Court as supervisory machinery dictates the guiding principles of the Convention.<sup>170</sup> Arguably within the previous section of the thesis, there has been mention of the Court eagerness to determine and apply what the Court perceive to be guiding principles of the Convention as derived from the text of the Convention. The success in developing some of these guiding principles has made for basis of certain critiques towards the Court. It is therefore worth comparing the exercise of this role of determining what guiding principles to include in the Convention as key in appeasing critiques who view the Court as revolutionary when they take it upon themselves to include principles that are not necessarily visible within the Convention or its text.

Following in the line of the Izmir and Interlaken Declarations, the Brighton Declaration considered the systemic issues as identified by the Court and called for various ideas to be out forward taking into account the legal, practical and financial implications. It also within the same paragraph referred to the principle of equality of States.

An example of an existing measure in response to the above statement is the Human Rights Trust Fund<sup>171</sup>; which offers financial support to Members of the Council of Europe who undertake activities aimed at ensuring the effective implementation of the Convention within domestic orders. Additional proposals within the Declaration include the building on the Pilot scheme through the review of the advisability and modalities of such a procedure. The pilot procedure is whereby a group of applicants that allege the same violation against the respondent State receive such a determination that is applicable to the whole group.<sup>172</sup> The Declaration urged the Court to consult State Parties when considering the application of a broader interpretation of the concept of ‘well established case law’ within the meaning of article 28 (1), so as to adjudicate more cases under a Committee procedure. There was also contemplation of consulting with civil society on whether to introduce online procedure for applications to the Court.<sup>173</sup>

In conclusion, the Brighton Declaration deems it necessary to evaluate the fundamental role and nature of the Court. It indicated the desire for that the Court to move towards a position whereby it focuses its efforts on serious, widespread violations systemic and structural problems and important questions of interpreting and applying the Convention. The impact of this is that it will then remedy fewer violations and deliver fewer judgements.<sup>174</sup> The Declaration also stipulates the underlying factor which is that such focus of the Court is feasible only if greater protection of rights occurs at national level. This focus on shifting the role of the Court towards an administrative and partly constitutional in nature purpose, is what prompts the author to label the notion of subsidiarity introduced within the reforms as political in nature. By political, the author refers to the insistence by national authorities for the Court to allow greater deference to them in matters of human rights protection and implementation.

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<sup>170</sup> Ibid. 162, Para 12 (b)

<sup>171</sup> The Human Rights Trust Fund was set up in March [2008] by the Norway as founding contributor. UK, Germany, Finland and the Netherlands are other Members of the Council of Europe that have joined – it aspires to have all COE Members join voluntarily.

<sup>172</sup> Ibid. 164, Para 20 (d)

<sup>173</sup> Ibid. 165, Para 20 (f) & (g)

<sup>174</sup> Ibid. 166, Para 30 – 33

This urgency to gain greater national deference indicates the support of approaching subsidiarity within the Convention as a concept in favour of pluralism. By pluralism, the author is referring to the idea that, the reforms introduced indicate the need for national authorities to place their own approach and perspective when defining as well as implementing rights as contained within the Convention. If one then recalls the existence of multiple countries within the Council of Europe who all have varying legal, political and cultural settings, it seems inevitable that pluralism in standards of human rights protection in the context of the European system will emerge.

Some criticism emerges towards this understanding and application of the principle of subsidiarity; which emphasises its favouritism of pluralism. Some scholars contend the need for some uniformity in the interpretation and application of human rights norms as a condition for the realisation of the rule of law. The Court in performing its role attempts exactly this as stated in earlier sections of the paper. The encouragement of pluralism undermines the stability and predictability necessary for a well-ordered system that sets justice by ensuring the like cases are treated alike and that legal norms progress with reasonable certainty.<sup>175</sup> The outcome of the Brighton Declaration therefore is worth some scrutiny to determine the extent that subsidiarity as a principle is intend to operate as guiding principle within the Convention.

### **a) Post Brighton Declaration**

This section will discuss the outcome of the three conferences put together and review some of the legal material that has derived from the Brighton Declaration. The Declaration is soft law this means it is operational as guiding material but needs strengthening in legal meaning through drafts of legally into binding documents. This section will review whether such steps in response to the Brighton Declarations and analyse the content of any such measures to analyse impact.

The Outcome of the Brighton Declaration materialised in two Draft Protocols. The Working Group<sup>176</sup> mandated with addressing the deadlines for achieving results is already underway in its work. It started by creating and supervising two drafting groups; the first Draft Group<sup>177</sup> engaged in the analysis of the national implementation of the Interlaken and Izmir Declarations and the evaluations of Protocol No.14 and on the impact of these on the Courts situation.

The findings of the Draft Group were somewhat worrisome as several problems are still evident.<sup>178</sup> There is failure for States to execute ECtHR judgments partially due to lack of political will as evidenced by Italy in its response to the Hirsi and Others judgment by continuing to deport individuals to Libya, and Russia's failure to carry out investigations in response to related judgments in *Isayeva v Russia*.<sup>179</sup>

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<sup>175</sup> Laurence R Helfer - Redesigning the European Court of Human Rights; Embeddedness as a deep structural principle of the European Regime European Journal of International Law [2008] Vol. 19 No.01, pp.78

<sup>176</sup> Steering Committee for Human Rights – Follow Up to the High Level Conference (18-19 April) Document prepared by Secretariat on its 75<sup>th</sup> Meeting Tuesday 19 – 20 June 2012 Council of Europe , CDDH ,009, Agora Building Room G 03 accessed via [http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH\(2012\)014%20E%20Reference%20document%2076th%20meeting%20November%202012.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH(2012)014%20E%20Reference%20document%2076th%20meeting%20November%202012.pdf)

<sup>177</sup> (1) (GT – GDR – A) Drafting Group A

Nearly all States within the report have difficulty executing pilot judgments and addressing other systemic Convention violations and States are demonstrating serious limitations in their ability to devise effective implementation measures and coordinating complex layers of responsible parties.<sup>180</sup> An example is Italy's lengthy proceedings in courts, whereby 1155 cases a violation of article 6.1 occurred.<sup>181</sup> Other barriers impede the ability of complainants to access effective national remedies such as statutory prohibitions against reopening domestic proceedings.<sup>182</sup> There is a failure on Parliaments and judiciary in the countries to incorporate ECHR case law into their work, at worst state organs directly contravene ECHR decisions. There is further failure to establish specific domestic structures aimed at implementing the Convention such as NHRIs. States make use of existing structures who in many cases are ill equipped to handle the continuous flow of ECHR related tasks. The impact this has is that when addressing issues, the structures have vague mandates, overlapping responsibilities<sup>183</sup> and are limited in their ability to offer effective remedy and redress. This serious failure to correct systematic human rights violations, or to integrate the Convention and ECtHR case law into regular judicial and parliamentary practices not only amount to bureaucratic debacles, they result in serious human rights problems and add to the increase in individual applications to the Court.<sup>184</sup> The role of the Draft Group A is to highlight some of the shortcomings of the existence mechanisms of protection for rights and paint a valid picture of the extent of concerns as expressed to enable proper procedures to be crafted awarding effective solutions. This is something that they have carried well.

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<sup>178</sup> National Implementation of the Interlaken Declaration, -Perspectives of European Civil Society on national implementation of ID and Action Plan: Czech, Hungary, Italy, Russia and Poland - Document submitted by Open Society Justice Initiative to the CCDH, Committee of Experts on the reform of the Court (DH – GDR) 2012 009 Para 9

<sup>179</sup> see *Abuyeva v Russia* Judgement [2010] Para 238 -241

<sup>180</sup> *Ibid.* 178, Para 19

<sup>181</sup> *Ibid.* 180, Para 20, see; ECHR Violation by Article and State; 1959 -2011

<sup>182</sup> *Ibid.* 181 , Para 29 note : Czech Republican; the Constitutional Court lacks the power to review prosecutorial authorities' substantive reasons and justification for bringing charges against an individual

<sup>183</sup> *Ibid.* 182, Para 40 – 50

<sup>184</sup> *Ibid.* 183, Para 61

## **b) Explicit reference to the Principle of Subsidiarity within Draft Protocols No.15**

The Working Group also supervises Draft Group B<sup>185</sup> tasked with drafting legal instruments to implement Committee of Ministers decisions taken further to the Brighton Conference. Their first task was to draw up Draft Protocol. The Draft Protocol No.15<sup>186</sup> refers to subsidiarity and the margin of appreciation to be contained within the Pre-amble of the Convention.

Article 1 of the Protocol makes explicit states that the primary responsibility to secure rights lies with national authorities subject to the supervisory jurisdiction by the Court in accordance with the principle of subsidiarity in conjunction with the margin of appreciation doctrine. This explicit reference affirms that subsidiarity and, to a certain extent, the related doctrine of a “margin of appreciation,” as developed by the Court require that the Strasbourg Court plays a complementary role to domestic court decisions and legislation: states have the duty to integrate Convention standards, as interpreted by the Court, within their own legal systems. In other words, the principle of subsidiarity has two aspects: one procedural, requiring individual to go through all the relevant procedures at national level before seizing the Court, and the other substantive, based on the assumption that states are, in principle, better placed to assess the necessity and proportionality of specific measures that may interfere with certain rights.<sup>187</sup>

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<sup>185</sup> Drafting Group B (GT – GDR-B)

<sup>186</sup> Draft Protocol No.15 to the European Convention of Human Rights, Report of Rapporteur; Mr Christopher Chope – draft opinion adopted unanimously by the Committee in Paris March 2013 Doc.13093 D.P amending the ECHR, January 19<sup>th</sup> 2013 Committee on Legal Affairs and Human Rights accessed via [http://www.assembly.coe.int/Communication/ajdoc1\\_1\\_2013.pdf](http://www.assembly.coe.int/Communication/ajdoc1_1_2013.pdf)

<sup>187</sup> Committee on Legal Affairs and Human Rights, Report On the Draft Protocol No. 15 to the European Convention on Human Rights Rapporteur: Mr Christopher Chope, United Kingdom, European Democratic Group pp.3-4 accessed via [http://www.assembly.coe.int/Communication/ajdoc1\\_1\\_2013.pdf](http://www.assembly.coe.int/Communication/ajdoc1_1_2013.pdf)

<sup>188</sup> Ibid. 187, Para 2 (iii)

<sup>189</sup> Ibid. 188, Para 15 (a) & (c)

The Protocol further indicates greater need for subsidiarity in its other reforms. It incorporates the amendment of article 35 (3) (b) of the Convention which relates to the significant disadvantage admissibility criteria.<sup>188</sup> It does so by prompting the deletion of the present admissibility requirement, in Article 35, paragraph 3, (b), of the Convention, which specifies that no case be rejected under the criterion of absence of ‘significant disadvantage’ if it has not been duly considered by a domestic court. Further amendments to the admissibility criteria, include the shortening, from six to four months, of the time-limit within which an application can be brought before the Court after all domestic remedies have been exhausted, as stipulated in Article 35, paragraph 1, of the Convention.<sup>189</sup> There was discussion of a need to adopt a priority policy where focus of the Court is on the most important and serious cases and adoption of working methods that streamline procedures for the handling of inadmissible and repetitive cases while maintaining appropriate judicial responsibility.<sup>190</sup>

All the reforms incorporated within the draft Protocol are largely targeted at the reform of the supervisory mechanism itself or its application of the Convention. This in turn indicates an urgent the need to reform and critique the manner in which the Court has been applying the European Convention which some scholars argue is misleading to the public because it suggests that reform of the Court alone is needed.<sup>191</sup> It is this approach of viewing the new reforms that manifests the introduction of the principle of subsidiarity within the Convention as a political maneuver. There is ongoing debate in the context of viewing subsidiarity as a political principle. As previously mentioned the concept is not one that is new within the European Convention system. However despite its practice by the Court, note should be made that subsidiarity is yet to be defined in exact terms. Consequently the concept is not able to provide procedures for evaluating how the principle should be applied in future policy deliberation. The principle offers no indication of which body is to be responsible for tackling what human rights issues. Rather it serves to explain the existing complexities surrounding international systems such as that of the European Convention system of rights protection.

## 5.2 Reconciling the principle of subsidiarity with the human rights protection within the ECHR

This section reviews the principle of subsidiarity within the ECHR framework and relates this specifically to perspectives adopted by bodies within the Council of Europe's human rights system. The chapter seeks to evaluate what impact if any the explicit reference to the principle of subsidiarity will have on the application of the Convention. It will distinguish the definition of the principle held by the Court as well High Contracting Parties in relation human rights adjudication. The section also highlights the temporal status as mediator attached to the principle and analyses some of arguments supporting this.

Within the ECHR framework, the principle of subsidiarity is one that developed through the interpretation of the Convention rules by the Court, it is not before been mentioned specifically in the legal instrument itself. The concept is implicit in the wording of article 1 of the Convention that states; 'High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention. Subsequent case law<sup>192</sup> within the Court defines the principle as one that describes the systemic relationship the Court and State Parties with reference to both article 1 and article 19 of the Convention.<sup>193</sup> The principle of subsidiarity in the context of the European Human Rights system is definable as complimentary.<sup>194</sup> It invokes the right for the Court to intervene but only in case whereby domestic authorities are incapable of ensuring effective protection of rights guaranteed within the Convention.<sup>195</sup>

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<sup>190</sup> Ibid. 181, Para 20 (b) (i) & (ii)

<sup>191</sup> "The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process", Conclusions of the AS/Jur's Chairperson, Mrs. Herta Däubler-Gmelin, of the hearing held in Paris on 16 December 2009, document AS/Jur (2010)06 at: [http://assembly.coe.int/CommitteeDocs/2010\\_0/20100121\\_ajdoc06%202010\\_0.pdf](http://assembly.coe.int/CommitteeDocs/2010_0/20100121_ajdoc06%202010_0.pdf).<sup>192</sup> Scordino v Italy (no.1) GC App. No. 36813/97 ECHR [2006] Ct makes reference to 'subsidiarity character as articulated in article 13 and 35 (1) of the Convention'

The principle is aided by the structure of International law that holds States as primary subjects and affirms the subjectivity of natural persons in International law as being dependent upon State consent.<sup>196</sup> An illustration of this is in the Bankovich<sup>197</sup> case whereby the subordination of rights of individuals came secondary to the structural rules within International law pertaining to jurisdiction.

Due to the development of the concept, more parties are seeking to define and own the concept on their own terms and models. Evidently the principle is desired due to its flexibility in allowing for a balanced yet acceptable approach in matters of conflict resolutions. By this, the author is not stating that the principle provides for all or any answers when faced difficult questions. Rather it would seem that the principle is vital in pointing towards a procedure by which to resolve complex structural issues. It provides for an understanding as why complex scenarios might exist and goes on to offer varied paths towards resolving such issues. If one then reviews the relationship between the Court and national authorities in rights protection. If one adds the notion of State Sovereignty into the mix, limited power exists for the Court to intervene in the legal systems of Contracting Parties. Thus States must be the ones to first address human rights issues arising on their territory. Despite this, the extent of the principle of subsidiarity especially as indicated in the reforms one that is limited.

When reviewing the reforms it appears that differing approaches towards the notion of subsidiarity exist between the High Contracting parties and the Court. National authorities arguably would define the concept in a political manner.

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<sup>193</sup> Ibid. 185, Para 140

<sup>194</sup> Interlaken Follow-Up Note by Jurisconsult on the Principle of Subsidiarity Para

<sup>195</sup> Ibid. 186 Para 3 see also; Varnava and Others v Turkey GC no.16064/90 [2009]

<sup>196</sup> Ibid. 188 Para 8

<sup>197</sup> Bankovich and Others v Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom App. No. 52207/99 [2001]

<sup>198</sup> Hansard's, vol. 884, 16 Jan.1975, col. 859 & col. 862 and Hansard's, vol. 843, 17 Oct. 1972, cols.141-142.

From an economic point of view, some scholars label this to be what then transforms into political subsidiarity. By this the term subsidiarity refers to decision making occurring as close to an individual as possible. It is this belief that that decisions should be taken, where possible, at the lowest level compatible with efficiency<sup>198</sup> that labels the definition political as regional authority points towards the State as the decision making. Supporters of political subsidiarity which would include High Contracting parties within the Council of Europe would claim that this definition awards more legitimacy to the decision and the decision maker as they are in a position to assess better the circumstances pertaining to the issue at hand and in the local context surrounding the issue itself.<sup>199</sup> This contradiction and difference in defining and applying the concept of subsidiarity leads to undermining the value of the principle in the eyes of some scholars. Some would argue that this distinction in the concept that incurs this level of flexibility that labels the term as vague and arguably see any adoption of this principle as one that parties, in particular political parties, adopt in the hope to mould it and give it any meaning they desire.<sup>200</sup>

Endo goes as further in providing a rationale for the desire for political parties in particular to defend the principle of subsidiarity by stating that this is done also as a defence of their institutional prerogatives. In other words national authorities seek to place decision making at domestic level and see the principle as a tool that can assist in achieving this.<sup>201</sup> This way of approaching the concept some scholars refer to as a form of negative subsidiarity, whereby member states assert that authority lies primarily with them and seek to apply the principle for the purposes of limiting the competences of the international body in relation to that of the national entities.

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The ideological approach towards the concept from the perspective of the Court differs from that perceived by the high contracting parties. Both entities understand the concept to be one that allows for the distribution of authority. The language and content of the reforms however seems to suggest that this is a position that both parties are clear on. Further analysis into the implication of the reforms suggest an differing approach whereby the Court could resort to applying its own understanding of the role that the principle of subsidiarity plays in promoting and ensuring rights protection. Such an understanding is likely to be judicial in nature due to the role attached to the Court and its judges. If one reviews the manner in which the Court applies the Convention, more than one principle is used; an example would be the principle of effectiveness.<sup>203</sup>

This principle requires the Convention to be applied in a manner that is effective in theory and practice. The effect then is that if the adhering to the principle of subsidiarity results in a denial of justice, rendering rights and guarantees under the Convention as inoperative; the Court can and must intervene through the role attributed to it within article 19 of the Convention.<sup>204</sup> Following on from the principle of effectiveness is the principle of evaluative interpretation. This refers to the Convention as a 'living instrument' that must be interpreted in the light of modern day conditions'.<sup>205</sup>

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<sup>199</sup> Kees Van Kersbergen and Bertjan Verbeek, "The Politics of Subsidiarity in the European Union," *Journal of Common Market Studies*, Vol. 32, No. 2 (June 1994): 215-236. Quoting the *Economist* from July, 1992  
Arguing in the EU,"

<sup>200</sup> Ibid.190, pp. 220

<sup>201</sup> Ian Cooper, "The Watchdogs of Subsidiarity: National Parliaments and the Logic of *Journal of Common Market Studies* Vol. 44, No. 2 (2006) 28 1-304)

<sup>202</sup> Ken Endo, "Subsidiarity and its Enemies: To What Extent is Sovereignty Contested in the Mixed Commonwealth of Europe?" European University Institute, Robert Schuman Centre for Advanced Studies, European Forum Series, RSC No. 2001/24 (2001): pp.6

<sup>203</sup> *Artico v Italy* 13 May [1980] Para 33

<sup>204</sup> Ibid. 203, Para 13

This way of interpreting the Convention has resulted in the Courts intervention in specific matters previously left entirely to States' discretion. With the new reforms placing the principle of subsidiarity at the forefront as a guiding principle of application of the Convention, the Court's stance on how to apply this may change slightly to reflect the reforms but cannot does so at the expense of undermining other equally important principles of guidance within the Convention.

The prediction of the author is that a judicial definition of the concept of subsidiarity is inevitable as the Court will have to elaborate more on what the principle entails following on from where the national authorities have aimed to lead the effect of this principle. By judicial subsidiarity, a scholar that best describes this would be Andreas Føllesdal, who points to the notion of judicial subsidiarity through dividing the purpose of the principle in three different categories: liberty, justice, and efficiency<sup>206</sup>. His first purpose of the concept which points towards liberty refers to the notion of minimal intervention by state in the life its citizens and ties in with the theory of subsidiarity which places the role of local and other human associations as existing only for the sole purpose of ensuring the flourishing of an individual.<sup>207</sup>

The type of subsidiarity that he describes here is one that Følledals refers to as proscriptive in nature. This means that in relation to the ECHR framework, such a concept is one desired by political parties, whereby high contracting parties can choose to limit the scope of intervention by the Strasbourg Court in domestic matters.<sup>208</sup>

The second purpose of subsidiarity which is justice offers more interaction between the state and its individuals. In other words, the state must act in a manner that benefits its citizens and this perhaps is the common reflection of subsidiarity whereby communication in form of political debate and participation occurs between the central and local entities, which it must be emphasised are made up of individuals and place the wishes of the individual at the fore front of any debate<sup>209</sup>.

The final manner in which Follesdal then reviews the purpose of subsidiarity as a concept to apply is that of ensuring efficiency. In other words, a cost benefit analysis is made to determine whether a decision pending is best decided at local level or at a higher level and the results producing the most efficient results determine which entity to carry out such decision making.<sup>210</sup> Follesdal's understanding of the subsidiarity concept is one that is in alignment with Endo's definition of positive definition.

This would support the idea that the international level of human association should exist to bring about uniform standards and only seek to intervene after assessing and reaching the conclusion that local and regional levels of human associations are unable to fulfill the task of maintaining the dignity of individuals.<sup>211</sup>

The differing approaches towards the notion of subsidiarity indicate an inevitable struggle once more between the Court and High Contracting parties. The use of inevitability is supported by the fact that States seem to want to use the principle as one that asserts their sovereignty over the authority of the Court. However, as one views the understanding of the Court of the principle, it is likely that for the Court to carry out its function, it must view and define the principle of subsidiarity as one that prefaces intervention and assistance when local, regional and central authorities fail in their duty to protect rights.

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<sup>205</sup> Vo v France GC App. No. 53924/00 [2004] Para 82

<sup>206</sup> Andreas Føllesdal, "Subsidiarity," *The Journal of Political Philosophy*, Vol. 6, No. 2 (June 1998): 118-120.; Ken Endo, "The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors," *Hokkaido Law Review*, XLIV/6 (1994): 553-652.

<sup>207</sup> Ibid. 206, pp. 118

<sup>208</sup> Ibid. 207, pp. 118

<sup>209</sup> Ibid. 208, pp. 123-124

<sup>210</sup> Ibid. 209, pp. 11

## **6 Observations - The Impact of the Introduction for greater Application of Subsidiarity**

This chapter looks to summarise the main themes within the thesis in order to determine what impact the new reforms as introduced by the Brighton Conference will have on the future human rights adjudication within the European system. This chapter seeks to explore some of the effects, as well as predictions of what can be expected of the practical application of subsidiarity further within the Convention system.

The reforms recognise the importance of the role of the Court and importance of maintaining the right for individual petitioning as the cornerstone of the Convention.<sup>212</sup> If one however reads the language used in the drafting of the reform changes, it contains some structural imbalance. Member States receives all the benefits of the Declaration in form of ‘dismissal of more applications and a more deferential review of those considered on the merits re human rights protections. The language of the text and its practical implications is one that is inspirational at best in the context of human rights protections. The commitment towards domestic implementation materialises in targetable terms.<sup>213</sup> Illustration is that States are required to consider taking steps, consider measures so far as is relevant and encourage their adoption.<sup>214</sup>

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<sup>211</sup> Ibid.210, pp.118

There is a lack of corresponding obligation on the part of Member States in shouldering the burdens of fully implementing the Convention and ECtHR jurisprudence in national legal systems.<sup>215</sup> It has been identified within the reforms themselves that; mechanisms need to exist that allow national governments to remedy violations at home. This in turn obviates the need for individuals to seek relief on international level and can restore countries to a position in which the Court's deference to national decision –making holds merit. The lack of hard law to supplement this expression of concern makes it difficult to embrace the potential that the principle of subsidiarity within the reforms might have. It is difficult to imagine the success of the reforms, if imbalance exists in legal instructions, as this implies the effecting of practical measures as optional by national authorities as primary implementation actors of the Convention.

The reforms also propose the continued application of the 'pilot judgment' as a way to deal with the increasing workload of the Court. The 'pilot judgment' scheme refers to the already established practice by the Court to use the first application as a test case for similar applications with similar claims in response to the same respondent State. Some mention is made of assessing the impact of this procedure. Nevertheless, the new changes do not elaborate on the legitimacy and effectiveness of such a mechanism. No do they set any timeframe as to indicate the temporal status of this procedural until such time that it is functions at a legitimate level and corresponds with notions of transparency and accountability. The procedure allows a single judge to make judgments in cases similar of nature by using the platform of one such case, does appear problematic in some ways. Firstly, by using the first application, such an applicant gains privileged status as the Court takes into account the applicants' individual circumstances.

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<sup>212</sup> Ibid.164, Para 1-2

<sup>213</sup> Ibid. 212,

<sup>214</sup> see Para 7(9) (c) of the Brighton Declaration

<sup>215</sup> Ibid. 213,

The pilot judgment procedure fails to take into account that one application does not reflect all the factual and legal issues raised by a violation. It does not allow for speedy justice as similar applications are in stasis<sup>216</sup> or consider that variety in remedy might apply. The proposals for measures whereby the Court concentrates on identifying potential systemic violations through i.e. the pilot procedure as well the filtering system and the new power to provide advisory opinions indicates a desire by High Contracting parties for the Court to become more administrative in character.

The principle of subsidiarity is clear in the way it defines relationships between local human associations and regional, national and international human associations. In the context of the Council of Europe's human rights system, more efforts to enact hard law that offers an effective balance between the national authorities and the supervisory mechanism is still pending. The outcome of the reforms so far is less than satisfactory, nevertheless, as of yet, not all proposals within the Brighton Declaration have yet passed or reached the deadline on implementation. This leaves room for drafters mandated with the reforms to include more legal rules aimed at affirming the High Contracting Parties role in being effective in the role as first line defenders. This is a requirement for the principle of subsidiarity to be properly operated in practice, subsequently paving way for greater human rights protection. The manifestation of the principle within the reforms as being political is supported by this lack of balance in reforms. Targeted efforts should be placed on both the actors responsible for applying and implementing the Convention. The reforms so far indicate more efforts are needed for the principle of subsidiarity to have the greatest impact. On the other hand, the approach of the principle within political realms through the Committee of Ministers might indicate that the intention for the subsidiarity is indeed to award more deference to national authorities in matters pertaining to human rights and minimise the influence of the Court in domestic concerns.

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<sup>216</sup> Ibid. 173, pp. 154 - See Registrar of the European Court of Human Rights, approx. 800 cases were pending awaiting the outcome of the Pinto case relating to the lengthy proceedings in Italian courts re application of the Pinto Law.

## **6.1 The Future for Human Rights Protection within the European system - Summary / Recommendations**

This section seeks to highlight the manner in which the new reforms can be reconciled with the functions performed by the supervisory mechanism of the Convention. There are recommendations of how to compliment both actors responsible for effecting human rights protection. Additionally there is exploration of the need to maintain an international European Court of Human Rights and the necessity for judicial review in order to ensure procedural justice. The section looks to determine that a separation into what constitutes human rights concerns or Convention based issues is not easily discerned. The demand therefore by national authorities within the reforms to refrain from influencing on domestic concerns is one that is difficult for the Court to abide by.

The Court when applying the Convention do so in way that reflects modern day conditions. If the case law resulting form the Court's adjudication is any indication, such circumstances mean that human rights and what falls within their realms is constantly evolving. Add the request by national authorities for the Court to distinguish between international and national concerns when adjudicating a human rights issue, the whole debate becomes increasingly more complex and harder to determine. This section seeks to bring the issues involved in this discussion to a more simplified level, that which is concerned with affording individuals with justice in situations whereby their rights have been infringed. It looks to assess how one can reconcile the notion of justice with the greater application of subsidiarity within the Convention system.

In this particular case, as the thesis is concerned with subsidiarity in the structural sense, focus is on the procedural aspect of what constitutes justice. Some reference to substantive justice is inevitable as the two forms of justice go hand in hand, however the author seeks to approach the debate mainly from the standpoint of what subsidiarity means for procedural justice.

The underlying principle and definition of procedural justice does require that administrative action is scrutinised and held accountable to a certain standard. In the context of the ECHR, review of the decisions and actions taken by local and national governments regarding human rights protection must remain subject to scrutiny from others, who better than the supervisory mechanism placed in charge of this very function.

In identifying the future of the supervisory mechanism, firstly acceptance of change is key. In fact, the principle of subsidiarity within the reforms pending plays a significant role in bolstering the Council of Europe mechanisms to ensure effective remedy by national governments at home. This in turn minimises the need for individuals to make use of the right for individual petitioning to seek relief at international level. It is evident that the new reforms seek to provide greater deference to national decision making regarding rights protection through subsidiarity. Validity of this principle is only achievable through measures that ensure effective and practical implementation of the Convention within domestic legal orders.

The implementation of such measures within domestic systems would then give birth to the principle of embeddedness<sup>217</sup>. The principle of embeddedness is able to act as complimentary to subsidiarity by strengthening its effects. States can choose to incorporate direct embeddedness whereby the Convention as a treaty is incorporated into domestic law. An illustration is the UK, who incorporated the Convention directly into their legal system through a Parliamentary Act.<sup>218</sup>

Alternatively, the Convention could be indirectly entrenched within domestic systems through its application. In other words, dispute resolution decisions can be implemented without the government having to take any action. An autonomous enforcement of the Convention would occur whereby national courts could enforce international judgments against their own governments.

National authorities ought to utilise the principle of subsidiarity through the concept of embeddedness. An establishment of a body tasked specifically with the implementation of the Convention as well as execution of ECtHR judgments is essential. NHRIs can play a vital role as a separate body mandated with this specific task. The Human Rights Trust Fund can assist in monitoring and supervising implementation of amendments to systemic structures that breed gross violations. The HRTF is crucial in designating financial assistance towards national systems, in need of funds for effective legal, compliance with Convention standards. Furthermore, consultation with all members of society to review the outcome and impact of reforms should occur. The impact that embeddedness as a complimentary principle to subsidiarity serves is that Convention rights become fully domesticated and compliance with international law and national law converges.<sup>219</sup>

Evidently, the application of subsidiarity as a principle does not offer an exact formula; rather it seeks to restore balance amongst competing concerns of complex human rights problems. Subsidiarity is a general principle that must function alongside other principles within the international legal framework. The principle seeks to balance both the idea of non-interference and that of intervention or assistance. Whilst it does express a presumption in favour of the freedom of smaller and local forms of association, thereby encouraging the idea of pluralism within human rights protection. It also leaves room for the larger community to assist the local associations in achieving the common good whether such intervention takes place through interference or assistance is inconsequential. Balancing of interests is at the heart of the principle.<sup>220</sup>

When applied correctly, the principle does not appear to alter the existence nor the role that the European Court of Human Rights ought to play in rights protection. In fact it seems to encourage that international mechanisms remain to offer guidance, assistance and if necessary intervention when local remedies fail or are non-existent. The principle although clear in its preference for plurality at local level, thereby offering national authorities priority in rights protection, it does not undermine the importance played by an international tribunal in reviewing the input by domestic authorities in the role of implementing rights protection.

In relation to the future of the Convention as well as its supervisory mechanism in protecting rights, if applied respectively and in a cooperative manner, the principle of subsidiarity will go a long way in effecting the implementation of the Convention. In turn, successful implementation will translate into greater embeddedness of the Convention within domestic legal orders. This in turn should pave the way for the greater protection of rights through practical implementation at home within reach and through local and national judicial systems.

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<sup>217</sup> Laurence R Helfer - Redesigning the European Court of Human Rights; Embeddedness as a deep structural principle of the European Regime *European Journal of International Law* [2008] Vol. 19 No.01 pp. 132

<sup>218</sup> The Human Rights Act 1998

<sup>219</sup> *Ibid.* 217, pp. 133

<sup>220</sup> *Ibid.* 219, pp.79

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