Introduction on subsidiarity Strasbourg 2nd June 2016

For members of the European Court of Human Rights and a group of presidents of supreme courts of member states of the European Union

Ladies and gentlemen,

The organisation of this meeting asked me to prepare an introduction of 10 minutes on the principle of subsidiarity under the European Convention. This principle is so general, and has so many aspects that it can be compared to a huge many-headed monster. Asking me to discuss this principle fully in 10 minutes would be inhuman treatment. Of course you would never ask me to do such thing. I will try to make a practical and functional limitation, by focusing on some aspects that are relevant for the position of the national courts and for their relation with the European Court.

By way of introduction, let me very briefly mention what I see as the essential meaning of the principle of subsidiarity, which was originally not explicitly mentioned in the convention nor in Protocols. But from several rules in the convention, it can be inferred that there is a division of tasks between the European Court and the national authorities in guaranteeing fundamental rights. Of course it is practically impossible for the court here to deal with all human rights disputes in all the contracting states. Therefore, the Convention is based on the starting point that it is the primary responsibility of the authorities of a contracting state, legislative executive and judicial, to safeguard human rights. National authorities have to do their homework. Therefore, an application to the Court is only possible after local remedies in the responsible state have been fully used. This is a procedural aspect that falls under the term subsidiarity. A question of machinery. The question who has to act when.

In the Netherlands, we see a threat to this self evident aspect of the principle. The largest government party has proposed to change the Dutch constitution, in such a way that the national courts have to apply national legislation even if that would violate the Convention. The idea behind this proposal is that the legislator is the natural authority to decide whether legislation is in conformity with international law. From the perspective of separation of powers, this is not so natural in my view. And the legislator makes general rules, and cannot give a solution for specific individual cases in which application of a generally acceptable law leads to a violation of the Convention. The proposal in my view completely neglects the principle of subsidiarity. Every individual case in which application of Dutch national legislation would, according to a citizen, lead to a violation of the Convention, should be directly brought before this Court, as there would be no effective possibility to bring such disputes before the national courts.

What does procedural subsidiarity mean for the role of the national courts, supposing they are allowed to apply the Convention under their own constitution? I would be glad to hear your views regarding this question.
In my view, procedural subsidiarity implies that national courts have to make every possible effort to apply the Convention, and to give at least as much protection as the Strasbourg Court would give. Therefore, they have to faithfully apply the case-law of this Court, at least as a minimum standard. This also means that national judges must be well informed of this case-law, including the most recent decisions. What if the national court is not certain whether the European Court would accept the result that would follow form application of national law? If the national court gives an interpretation of the Convention which is too broad in the view of the European Court, the State is not entitled to bring the case before this court. Therefore, sometimes I hear national judges say that in case of doubt they prefer to give a limited interpretation to the Convention, as the individual concerned still has the possibility to bring the case before this Court. In dubio pro stato, so to say. But is that attitude compatible with the principle of subsidiarity? Shouldn't the national judge take responsibility himself?

The term subsidiarity is also used to express a more substantive concept. I am referring to the case-law of the European Court which often leaves the contracting states a certain margin of appreciation, and in some fields a wide margin of appreciation. This is based on the starting point that the national authorities are placed in a better position than the international judge to give an opinion on issues as the necessity and proportionality of a restriction on a Convention right.[1] What does that mean for the test the national courts have to apply under the Convention? Let me give an example from our own Dutch experience in tax cases. The European Court has held that a distinction in tax legislation is not discriminatory, as long as it is not "manifestly without reasonable foundation".[2] Our Supreme Court faithfully follows that formula. Under our present constitution, we have to apply national legislation unless it is contrary to the Convention. And in deciding whether national legislation contradicts the Convention, we follow the Strasbourg case-law. But we have been criticized by academics who argue that the margin of appreciation implies that the national courts, by reason of their direct and continuous contact with the situation in their countries, should apply a stricter test than the European Court. A stricter test is not forbidden by the Convention, as follows form article 53. But is it required by the Convention? And how strict should it be, what would be the criterion for this stricter test? How could the case-law of the European Court give guidance in the contracting States, if their national authorities would be required to apply a stricter test than the Court itself? What would be the consequences for an exchange network between supreme national courts and the European Court? What should we exchange with the Court if we were to apply different standards? It would be interesting to hear how you approach these questions.

Personally, I would prefer a situation in which the interpretation followed by the European Court is regarded as a uniform minimum standard, and therefore is also valid for the contracting states. That there will not be aspects of interpretation which are left to the national authorities, who then can argue that the Court should stay away from there. The Brighton declaration is based on a shared responsibility of the contracting states and the Court. A shared responsibility in applying the same rules.

Sharing also means interaction, which can be increased. We see valuable initiatives for that purpose, for instance the 16th protocol and the exchange network; both are subjects on the agenda today. The mental distance between the Strasbourg and the national supreme courts can be further diminished by meetings and conferences like the one we are having today. I compliment the hosts here for the organisation of this meeting. Such joint conferences fit more in a network structure than in a dogmatic vertical relation, although the final judicial word is left to this Court as supervisor. Perhaps we can discuss now, or at a later date, how we think of future conferences and other meetings: how frequently should they be held, what kind of subjects should we discuss, and what can be the role of the national supreme courts in these conferences? Can we create and reflect a feeling of partnership, in which the opinions of the European Court are not regarded in the perspective of "we" and they"? This would certainly encourage national acceptance of the case-law of the Court.

Ladies and gentlemen, I hope that by means of this introduction I have given you the basis for a valuable and interesting discussion on the principle of subsidiarity. Thank you.

[1] ECtHR 7 December 1976, Handyside vs. United Kindom, nr. 5493/72, par. 48.
[2] ECtHR 7 juli 2011, Stummer vs. Austria, no. 37452/02, par. 89.