

Judge Yüksel's way: bad-faith regimes and the dangers of subsidiarity

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****E.H.R.L.R. 426*** Abstract

Faced with accusations of illegitimacy, the European Court of Human Rights has been moving for several years towards a new adjudication method, stressing the subsidiarity principle and the major role of domestic authorities in the protection of human rights. The limits of this approach when illiberal regimes are involved have barely been the subject of in-depth examination. In this venture, this article offers an analysis of the separate opinions written by the judge elected in respect of Turkey, Saadet Yüksel. It provides a substantiated presentation of the dangers raised by the "process-based review" and how it risks neutralising the action of the Court.

Introduction

As has been famously observed by former judge and president of the Court Robert Spano, the European Court of Human Rights (EctHR) is now in the "age of subsidiarity".¹ It practices a kind of judicial restraint which insists upon the subsidiarity of its control. According to this approach, the Court's task is to investigate whether the national authorities have sufficiently taken into account the criteria developed in the Court's case-law.² But the Court is also in the age of illiberalism. A number of states that adhere to the [European Convention on Human Rights](#) (ECHR) are engaged on a more or less "illiberal" or "authoritarian" path. With these terms, which I will use interchangeably, I simply want to designate those regimes which engage in large-scale violations of human rights, specifically political freedoms such as free criticism of government or the right to vote, as well as in the destruction of counter-powers, in particular by eroding the independence of the judiciary.³ One important characteristic of these regimes is that they act under colour of law, they don't fight their opponents with raw force but with "legal persecutions".⁴ Kim Scheppele's concept of "autocratic legalism"⁵ describes aptly this strategy. In this, these regimes are also "bad faith regimes": they invoke legal form and legal arguments to cover their authoritarian moves.

This is of tremendous importance for a system based upon subsidiarity, which depends entirely, as Judge Spano pointed out, on the good faith of the Member States.⁶ This danger has already been perceived, **E.H.R.L.R. 427*⁷ but this essay looks deeper in the issue. It offers a systematic analysis of how the principle of subsidiarity is exploited by Judge Yüksel, the judge elected in respect of the state which brings the most applications against it before the Court.⁸ The authoritarian nature of the Turkish regime has been well documented.⁹ Another point justifies focusing on Judge Yüksel: since joining the Court in 2019, she has published a significant number of separate opinions, mainly in cases dealing with her home state. These opinions are extremely revealing. They show how the idea of subsidiarity—or more broadly of respect toward the high contracting parties—can be used to insulate illiberal regimes from any meaningful control by the Court.

Of course, Judge Yüksel is not the only or the first judge to insist upon subsidiarity, which might be the most common argument to deny a violation of the Convention. Many judges, including Turkish judges, have argued before that domestic tribunals are in a better position to assess the case and that they should be trusted.¹⁰ But Judge Yüksel has taken the argument to a new level. She develops it with great care and in a large variety of situations. She shows concretely how the idea and the language of subsidiarity can be used to circumvent the Court's control.

It seems obvious that the principle of subsidiarity can only combine respect for the sovereignty of states with respect for human rights if it is part of a relationship of good faith with states that intend to protect human rights. The principle should not be applied to bad faith regimes. But this restriction to the principle is often mentioned without being elaborated.¹¹ This article tries to fill this gap. The first part recalls the main aspects of the "process-based review" that gives shape to the principle of subsidiarity. The second part analyses Judge Yüksel's separate opinions to offer a concrete view of the various ways to instrumentalise subsidiarity to cover authoritarian practices. Of course, nothing in this article should be interpreted as questioning Judge Yüksel's independence.

Subsidiarity and "process-based" review

The principle

The principle of subsidiarity and its implications for the Court is an ancient idea that has attracted new attention.¹² The idea that the Court must respect the national "margin of appreciation" has long been present in the case-law. It already appears in 1976 in the *Handyside* decision.¹³ However, the principle of subsidiarity has gained strength in recent years, particularly in connection with the accusations of illegitimacy launched against the Court from several States,¹⁴ including old members such as the United Kingdom (UK).¹⁵ Some recent declarations adopted by Member States of the Council of Europe could be perceived as expressing **E.H.R.L.R. 428* a certain distrust of the Court.¹⁶ Protocol No.15—which entered into force in August 2021—introduced into the [Preamble of the Convention](#) the principle of subsidiarity and the national margin of appreciation. The degree to which this context led to a withdrawal of the Court in favor of the decision of national authorities is debated.¹⁷ But it is certain in any case that the Court has taken a "procedural turn."¹⁸ It has gradually developed a new way of presenting its control, insisting upon the mention by national authorities of the criteria formulated by the Court.¹⁹ Judge Spano in particular placed great emphasis on this "process-based review" and its advantages. In the 2010s, he went to the UK to present this conception of the right method of adjudication and its presence in the case law, with the explicit objective of responding to the criticisms leveled in this country against the Court and the Court's legitimacy. He is neither the only nor the first to have defended this position, nor even to have traveled to England to do so.²⁰ But he has been the most influential proponent of this conception of subsidiarity. Before becoming the president of the Court in 2020, he presented his views with great detail and clarity, and his exposition of the issue became a major reference in the scholarly debate.²¹ It has been written that Judge Spano gave "the best outline and defence of these new

practices,"²² that he had on this issue "a major influence both in the scholarship and in the case-law,"²³ that he "embodied this new mainstream inside the Court."²⁴

Judge Spano describes process-based review as a part of a more "coherent" conception of subsidiarity.²⁵ The judge insists on an essential point: the principle of subsidiarity has two sides. It means that the ECtHR must respect national decisions, not easily question their assessments, but it also and perhaps above all **E.H.R.L.R. 429* means that it is first and foremost up to the national authorities to protect the rights guaranteed by the Convention.²⁶ These two faces of subsidiarity have been called "negative" and "positive subsidiarity."²⁷

Process-based review is a way to combine these two requirements. The ECtHR examines whether the national authorities, in particular the courts but also the parliaments, have taken account of the rights guaranteed by the Convention or, more precisely, whether they have taken account of the criteria for review developed in the case-law of the ECtHR. If they have sufficiently done so, the Court will avoid contradicting their substantive assessment.²⁸ In this sense, the principle of subsidiarity becomes more "coherent": it can be applied objectively, by examining the decision-making process of national authorities.

In the Court's early years, Judge Spano argued, the Court developed criteria for monitoring compliance with the rights guaranteed by the Convention, in particular when it came to reconciling two conflicting rights. Today, it only has to examine whether the national authorities have followed these instructions, whether they have referred to these criteria. The "substantive" phase has given way to a "procedural" phase, a "process-based review". The question for the Court is "whether the issue has been properly analyzed by the domestic decision-maker in conformity with already embedded principles and the states' obligations to secure Convention rights to people within their jurisdictions."²⁹ If that is the case, the Court will have little reason to substitute its own assessment for that of the national authorities.³⁰ Some examples from the Court's case-law are useful to grasp better this reasoning.

The *Palomo Sanchez* case may have been one of the first decisions to clearly adopt this method of adjudication.³¹ It dealt with a conflict between freedom of expression and the right to reputation. Recalling that domestic courts "are in a better position than an international court to determine how, at a given time, the right balance can be struck",³² the Court made clear that it would not too easily substitute its own assessment for the one of domestic judges:

"If the reasoning of the domestic courts' decisions concerning the limits of freedom of expression in cases involving a person's reputation is sufficient and consistent with the

criteria established by the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts."³³

The following year, in *Von Hannover v Germany (No.2)*, the ECtHR did not itself apply the criteria for reconciling freedom of expression and private life, but was content to verify that the domestic courts had balanced the relevant interests "in conformity with the criteria laid down in the Court's case law".³⁴ The Court pointed out in particular that the German Constitutional Court had "undertaken a detailed analysis of the Court's case law".³⁵ This method of adjudication has continued to spread ever since. A much-commented example dealt with the expulsion of aliens. In *Ndidi v Switzerland*, the Court considered that it was not necessarily up to it "to conduct the [Article 8](#) proportionality assessment afresh": when the **E.H.R.L.R. 430* domestic courts have "appl[ie]d the relevant human rights standards consistently with the Convention and its case law, [...] it is not for [the Court] to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities".³⁶

This reasoning applies not only to courts but also to parliaments.³⁷ In several decisions, the Court has ruled out the violation of the Convention on the ground that national parliaments had taken account of the Court's case-law when adopting a statute. Judge Spano noted that in *Hirst No.2*, the Court pointed out that the parliament did not appear to have seriously examined the conflict between divergent interests,³⁸ whereas in the case of *Animal Defenders International*, "It is clear [...] that the extensive examination by Parliament, taking into account the case law of the Strasbourg Court [...] as well as the in-depth analysis of the compatibility of the Act with the Convention, conducted by the domestic courts, were all crucial factors in the eventual findings by the majority of no violation."³⁹

In short, in this "procedural" phase, the Court is essentially interested in the reasoning of the national authorities, in the reference to the criteria developed in its case law. As the Court has repeated in numerous Turkish cases, "in order to assess whether the balancing in question was carried out in accordance with the criteria established by its case-law, it must essentially pay attention to the statement of reasons given by the national court."⁴⁰

This "control of the control", as the judge elected in respect of France, Mattias Guyomar puts it,⁴¹ has many advantages. It shows a system that has reached "maturity", in which the case law of the ECtHR has spread into the states, which fulfill their role as the main guarantors of the Convention's rights.⁴² As Judge Spano points out, this method responds to accusations of illegitimacy.⁴³ Furthermore, and perhaps above all, it aims to relieve the Court's congestion, by making states more accountable and by

reducing the control exercised by the Court.⁴⁴ Any attempt to reform the Convention's system and any strategic development in the case law must be seen with the Court's "notorious backlog"⁴⁵ as a background. The "procedural control" is very attractive in this context, since it implies to trust the domestic authorities, to let play the major role for the protection of human rights, and thus to ease the workload of the Court.

Despite its many advantages—and maybe *because* of its attractiveness—this approach must have some limits if the Court is not to relinquish its control entirely. *E.H.R.L.R. 431

The limits

The adjudication method advocated by Spano and other judges and scholars poses an obvious problem: it does not seem difficult to quote the criteria developed by the Court and to reach any decision. There is a risk that the Court's "procedural turn" appears to be a mere "linguistic turn", in the sense that it would constrain only the discourse of national authorities, and not the content of their decisions.

This problem has not gone unnoticed. In proclaiming this method of adjudication in line with the Brighton Declaration, the Copenhagen Declaration adopted six years later takes the trouble to point out: "Where a balancing exercise has been undertaken at the national level in conformity with the criteria laid down in the Court's jurisprudence, the Court has generally indicated that it will not substitute its own assessment for that of the domestic courts, *unless there are strong reasons for doing so*".⁴⁶ The whole question, however, is what these "strong reasons" are.

Judge Spano's off-the-bench writings give some indication. It will always be necessary, he explains, to ensure that the national decisions which refer to the criteria developed by the Court have done so in a "reasonable" manner: "The Court consequently retains in every case the final say on whether the result arrived at domestically is fraught with unreasonableness, regardless of the reasoning deployed by the national decision-maker".⁴⁷ The Court is thus always able to review the "substantive findings" of national authorities. In short, the idea is in no way to give "*carte blanche* to States Parties in their choice of measures and means that restrict Convention rights, even where a balancing of interests has taken place at the domestic level".⁴⁸ So this conception of the "principle of subsidiarity by the European Court of Human Rights has nothing to do with taking power away from the Court".⁴⁹

But how does it work in practice? A clue given by Judge Spano deals with the general nature of a political regime:

"States that do not respect the rule of law [...] and do not ensure the impartiality and independence of their judicial systems, oppress political opponents or mask prejudice and hostilities towards vulnerable groups or minorities, cannot expect to be afforded deference under process-based review".⁵⁰

At the time he wrote this essay, Judge Spano was directly confronted with the exploitation that could be made of the principle of subsidiarity by authoritarian regimes. The *Mehmet Hasan Altan* case concerned a journalist held in pre-trial detention on unfounded charges. By six votes to one, the Court found a violation of art.5(1) and [art.10 of the Convention](#). In his dissenting opinion, the Turkish ad hoc judge relied heavily on the principle of subsidiarity,⁵¹ which prompted Judge Spano to take up the pen to answer him. Joined by all the other judges of the section except one, he took up a certain number of formulas from the two essays I just mentioned, in order to emphasise that the principle of subsidiarity did "not in any way limit the Court's competence to ultimately review" the national decisions.⁵² Therefore, my aim here is certainly not to point out a problem that would have escaped Judge Spano and the other promoters of a judicial restraint based on subsidiarity. But the fact remains that this trend of jurisprudence is in tension with the protection of human rights against autocratic states. As Mikael Rask Madsen writes, the **E.H.R.L.R. 432* "procedural turn made the Court somewhat hesitant when engaging with the new, and in some instances very serious, human rights situations developed in recent years in countries such as Hungary and Turkey".⁵³

It seems indeed that the danger has been underestimated. First, the underestimation is linked to the degree to which subsidiarity fits into two current major concerns of the Court, namely the accusation of illegitimacy and the backlog of applications. The last concern is especially strong with regard to authoritarian regimes, where the scale of human rights violations threatens the very functioning of the Court. Subsidiarity is not only a tool for the protection of human rights, but also an instrument which makes it possible to lighten the burden of the Court. The Court may be tempted to invoke this principle not for the sake of human rights or out of respect for national sovereignty, but in order to survive in the face of the flood of applications.⁵⁴ The Court could feel a pressure to entrust national authorities with the protection of the Convention despite the human rights violations in the state, or more precisely *because* of their large number. As Judge Küris writes, there is a risk "that a member state can escape responsibility for violating the Convention *en masse*, since the Court may be flooded with complaints against that state to such an extent that it becomes unable to cope with them and decides not to examine them".⁵⁵ In such a situation, the Court might be tempted to "turn its head and pretend that it just doesn't see".⁵⁶

Second, the danger might also be underestimated because it has not received the scholarly attention it deserves. The disadvantages and difficulties of process-based

review have been analysed,⁵⁷ for instance the insufficient guidance it gives to domestic authorities,⁵⁸ the insufficient protection of minorities,⁵⁹ and above all the risk of an excessive retreat of the Court.⁶⁰ Compelling research has been conducted on the challenges raised by illiberal within the Council of Europe.⁶¹ But not enough scholarly attention has been given to the specific danger raised by process-based review with regard to authoritarian regimes that pretend to follow the guidelines formulated by the Court.⁶² In the scholarship, the situation of bad faith regimes has been considered mainly from the perspective of [art.18 of the Convention](#).⁶³ This case-law does indeed express a rejection of deference towards domestic authorities. But the occasional and reluctant⁶⁴ use of [art.18](#) against the most egregious and "flagrant"⁶⁵ acts of authoritarian regimes should not divert from the risk of a daily diversion of process-based review by these same authorities. Too often, the possible exploitation of subsidiarity reasoning by autocratic regimes is mentioned in passing, without further elaboration. Judge Nussberger starts her study of procedural review with a quote that shows how "good faith" is central to any assessment of procedure.⁶⁶ Judge Spano's reasoning is based on the fact that states **E.H.R.L.R. 433* apply "in good faith the general principles deriving from the Court's case-law".⁶⁷ But what happens when a regime engages in a vast enterprise of destruction of freedoms by trying to keep up appearances? What arguments are used to cover the tracks? It is not hard to imagine that the Court will be confronted with jurists a little shrewder than the ad hoc judge in the *Mehmet Hasan Altan* case, who openly adopted the language of the regime by denouncing on three occasions the "horrible" (in French: *'ignoble'*) character of the attempted coup.⁶⁸ The arrival of Judge Yüksel at the ECtHR shows this very well. In what follows, I propose to have a closer look at the form that this danger can take.

Judge Yüksel's use of subsidiarity

The process of electing a replacement for Judge Karakaş took almost three years. Several lists submitted by Turkey were rejected because all the candidates did not fulfil the required criteria.⁶⁹ On its fourth attempt, the Turkish government managed to have its list validated, and Saadet Yüksel was elected by the Parliamentary Assembly. An NGO described immediately her close relationship with the Turkish government.⁷⁰

On 1 July 2019, Judge Yüksel took office. She joined the second section, chaired by Judge Spano until he took over as president of the Court. In five years, Judge Yüksel has attached no less than thirty-three separate opinions to judgments of the Court in cases relating to Turkey, which gives a fairly precise idea of her positions on certain issues.⁷¹ Before examining the content of her opinions, several general **E.H.R.L.R. 434* observations can be made. First, the vast majority of Judge Yüksel's separate

opinions appear in Turkish cases. With respect to other Member States, I have identified only one individual opinion,⁷² and four cases in which she joined a collective dissenting opinion.⁷³ Then, she writes almost systematically in cases concerning the arrest and pre-trial detention of journalists or political opponents. Finally, she writes alone most of the times, at least for now.

This does not mean, however, that the positions expressed by Judge Yüksel should be ignored. First, her line of argumentation is very attractive: it refers to popular themes and pressing concerns such as respect for national sovereignties, judicial restraint on the part of the European Court, and attempts to reduce its caseload. The appeal that Yüksel's stance could exert on other Court's members should therefore not be underestimated. Second, in its many separate opinions, Judge Yüksel elaborates arguments that can be used by other judges elected to the Court from lists provided by illiberal regimes.⁷⁴ Third, the fact that most opinions are individual or dissenting opinions does not imply that Judge Yüksel is isolated. An attempt to evaluate Judge Yüksel's real influence on the Court would require to focus not on her separate opinions, but on all the decisions rendered by the Court with the collaboration of this judge since her arrival at the Court. This would exceed the scope of this paper, but some examples where Judge Yüksel's views might have prevailed will be found below, for instance regarding the assessment of domestic legal remedies.⁷⁵ Furthermore, Dilek Kurban's recent and extensive research shows that the Court has often adopted vis-à-vis Turkey a stance that is very well in line with the positions of Judge Yüksel that I will describe below.⁷⁶ Finally, whatever the extent of the danger Judge Yüksel's opinions pose for the Court, their study allows us to better understand the problematic confrontation of subsidiarity with bad faith regimes.

In general, the separate opinions of Judge Yüksel do not offer a blatant and systematic protection of the Turkish government. But they do provide, in a much finer way, support for the authoritarian drift that has been in place for several years in Turkey. In many ways, these opinions indeed show why a system designed for bona fide states is not suitable for bad faith regimes. If the Court does not remain vigilant, the "procedural phase" threatens to become a system where all you have to do is pay lip service to the Court's case law to receive a *carte blanche* and blithely violate the Convention. The analysis of Judge Yüksel's separate opinions shows first that the logic of subsidiarity constrains more the expression of domestic authorities than the sense of their decisions. If they quote sufficiently the case-law of the Court, they can present any violation as a mere assessment of facts or of domestic law. Second, Judge Yüksel's opinions show more generally that it is easier to argue in favor of subsidiarity and mutual trust than to denounce the bad faith of a High Contracting Member. ***E.H.R.L.R. 435**

Instrumentalising subsidiarity

The classical "process-based review" conception works in two stages: a sufficient consideration at the national level of the criteria developed in Strasbourg triggers an increased deference to domestic authorities. The risk that this approach raises in the face of authoritarian regimes is illustrated by Judge Yüksel at both stages.

Conceptualising violations as bad explanations

The idea of a process-based review has been very well received by Judge Yüksel.⁷⁷ As she explained in a recent case, the Court should not operate a substantial control of proportionality. It should not enquire whether a less restrictive mean was available. The Court should rather investigate whether "the legislator [or the national tribunals] weighed up the competing interests at stake."⁷⁸ This approach opens a lot of argumentative possibilities in favor of the decisions of domestic authorities.

From her first separate opinion, a few months after her arrival at the Court, Judge Yüksel set the tone. In the *Nejdet Atalay* case, the applicant had been convicted for having taken part in the funeral of four PKK (Kurdistan Workers' Party) activists which, according to the Turkish judges, had given rise to a demonstration of support for the PKK. Considering that the simple fact of hanging photos of the deceased over one's jacket could not be considered a call for violence, the Court perceived a violation of [art.10 of the Convention](#). Judge Yüksel did not contest this violation. Her first separate opinion is not a dissent, but a concurring opinion. It is all the more revealing. In its judgment, the Court underlined that it was the poor *reasoning* of the Turkish decisions which produced the violation. The characterisation of the facts was not convincing: a link should have been established between the applicant and certain slogans expressed during the demonstration. Judge Yüksel made no secret that the facts of the case could have allowed a conviction: "if the Court had engaged in an analysis of the substance of the facts in question, I doubt that the conclusion would have been the same".⁷⁹ The violation of the Convention was only provoked by "the insufficiency of the reasoning of the domestic judge". It is for this reason, and only for this reason, Judge Yüksel stressed, that "the national authorities did not satisfy the criterion of necessity drawn from the principle of proportionality" and that the restriction was therefore not "necessary in a democratic society".⁸⁰

The message is clear: with a more careful reasoning, judges are allowed to make the same decision. This approach is at work in several opinions of Judge Yüksel. In the *Mehdi Tanrikulu* case, the Court identified a violation of [art.10](#) in the suspended prison sentence imposed upon the publisher of a book about the PKK. The Court explicitly implemented the "process-based review". It pointed out that the domestic courts had not used the criteria developed in the Court's case law: "the examination carried out by the domestic courts in this case does not seem to have taken into account all the principles established in [the Court's] case law under [Article 10 of the Convention](#)".⁸¹

Judge Yüksel, joined by the judge elected in respect of Slovenia, took up the pen to insist on this point: "we wish to emphasize that this violation is procedural in nature". Nothing indicates that the solution would have been the same if the Turkish courts had given better reasons for their decision: "we do not wish to speculate on the outcome that would have been given to this case at the domestic level if the authorities had engaged in a balancing in accordance with the criteria established by the case-law of the Court".

**E.H.R.L.R. 436* ⁸²

The adoption of the "process-based review" leads Judge Yüksel to describe violations of the Convention as mistakes in the statement of reasons, and she is sometimes very close to declaring that it would have been enough for the Turkish courts to better justify their decision. This approach is particularly blatant in the *Kılıçdaroğlu* case. This political figure, president of the main opposition party, had made very critical remarks against the prime minister at the time, Recep Tayyip Erdoğan. Kılıçdaroğlu had been ordered to compensate the Turkish leader for this harm to his honour. The ECtHR perceived a violation of freedom of expression, on the grounds that the Turkish courts were content to denounce the outrageous nature of the remarks. They did not take sufficient account of the context, of the fact that the diatribe of a politician, delivered in parliament against political leaders, was at issue. They failed to "examine whether the context of the case, the public interest and the intention of the person who made the impugned remarks justified the possible use of a degree of provocation or exaggeration."⁸³ The Court, however, did not merely say that this question should have been asked. It also indicated the answer, emphasising that the statement was part of a debate of general interest, and that its "caustic" form was not enough to deprive it of protection.

There lies the difference with the approach adopted by Judge Yüksel. While she points to the flaws in the reasoning of domestic judges, she seems to clearly indicate that a small formal correction would have sufficed to convict the applicant without violating freedom of expression. Indeed, she insists, "politicians must avoid using coarse, demeaning, humiliating and contemptuous language about their opponents".⁸⁴ Therefore, she explains, "if the domestic courts' decisions and the present judgment had entered into a discussion and assessed the substance of the applicant's statements" using the criteria developed in the Strasbourg Court's case-law, "I doubt that my conclusion would have been the same as to whether the boundaries of the protection afforded by Article 10 were exceeded".⁸⁵ Therefore, Judge Yüksel stressed, "the Court should have found only a *procedural* violation of Article 10".⁸⁶

The same reasoning was at work in a very high-profile case: the detention of Osman Kavala, accused of having attempted to overthrow the government and the constitutional order during the Gezi park protests. Considering that there were no plausible reasons to suspect him of having committed these offences, the Court found a violation of art.5(1) of the Convention. Judge Yüksel agrees with this finding of violation but emphasises

again and with great clarity that it was only the reasoning of the national decisions that posed a problem, "the lack of reasoning and lack of application of the proportionality standard" by the domestic courts. Therefore, explains the judge, "I believe that there has been a violation of Article 5 § 1, on the procedural ground stemming *merely* from the lack of adequate reasoning provided by the domestic courts."⁸⁷

The main point, conveyed by the word "merely", is extremely clear: a "procedural" violation is only a mistake in the statement of reasons. It is less serious. For this very reason, Judge Yüksel repeatedly objected to the award of a sum of money by way of just satisfaction. In general, this reluctance to compensate the applicant is a constant in the separate opinions of Judge Yüksel. Even when she agrees to perceive a violation of the Convention, she frequently opposes compensation, on the ground that the declaration of violation⁸⁸ or the possibility of reopening the proceedings under domestic law⁸⁹ were sufficient. Sometimes, she considers the amount too high compared to the sums awarded in other cases.⁹⁰ At this stage of my **E.H.R.L.R. 437* argument, the important point is that she sees in the "merely" procedural nature of the violation a reason not to award a remedy: "in view of the purely procedural nature of the violation of [Article 10](#) found by the Court, a declaration of violation would in itself have provided sufficient just satisfaction for any non-pecuniary damage suffered by the applicant".⁹¹

Judge Yüksel's position seems to be that the Turkish authorities could continue on the same path as long as they take care to cite more extensively the case law of the ECtHR. Some opinions read like instructions for domestic courts. In the *Dickinson* case, which concerned a work of art found to be offensive to Prime Minister Erdogan, Judge Yüksel considered that the Turkish courts had struck a careful balance between freedom of expression and the right to reputation. Faced with the majority of the Court which deemed the reasoning insufficient, Judge Yüksel listed the criteria to which it will be appropriate to refer on the next occasion.⁹²

Now, the important point is that the citation of these criteria constrains the domestic courts much less than the supporters of the process-based review seem to believe. In the *Mehmet Hasan Altan* case, Judge Spano underlined that the Court retains its full power of review, but all his reasoning is based on the way in which the member states demonstrate, in particular through "the reasoning provided by national courts",⁹³ their taking into account of the case law of the ECtHR. Nevertheless, the balance between two divergent interests does not oppose quantified sums. The criteria developed by the Court—for example, when freedom of expression confronts the right to respect for private life: the contribution to a debate of general interest, the prior conduct of the person concerned, etc.⁹⁴—make it possible to rationalise somehow the reasoning, to organise the discussion, but they cannot be "applied" to reach objectively the one right answer. There is therefore a risk that national authorities will cite the Court in a "cosmetic" way, without this changing the ultimate sense of their decisions.

Strasbourg case law can be quoted to support a wide variety of findings, as shown by Judge Yüksel's references to the notion of "responsible journalism", which leads her to leniency towards the arrest of journalists.⁹⁵ One can emphasise, citing the, the extended freedom of expression that journalists must enjoy, and at the same time approve of the long imprisonment of an author who casts doubt on the official discourse concerning the failed coup d'état.⁹⁶ In view of the strong protection that the Court grants to political speech, such approach illustrated for sure the "unreasonable" enforcement of Strasbourg criteria mentioned by Judge Spano.⁹⁷ No other member of the Court joined Judge Yüksel's opinion in the *Dickinson* case. But the ineliminable possibility of supporting any opinion with extracts taken from the Court's jurisprudence remains, and the identification of the "unreasonableness" might not always be so obvious.

In the case of *Nurcan Bayraktar v Turkey*, the judge elected in respect of Belgium, Frédéric Krenc, wrote a concurring opinion which seems to warn of this danger. In this judgment delivered by a chamber including judge Yüksel, the Court found a violation in the restrictions imposed upon a divorced woman before she can remarry. Maybe influenced by judge Yüksel—an assumption that is impossible to prove—the Court was very cautious in analysing the domestic judgments. The Turkish tribunal, it wrote, "does not appear to have taken into account the aspects of the case bearing on the applicant's private life in weighing *E.H.R.L.R. 438 up the various interests at stake".⁹⁸ Judge Krenc denounced this timidity, this excess of deference towards domestic authorities:

"I am concerned by the words "does not appear". When it examines the reasoning of national courts, the Court must take an explicit position on that reasoning in the light of Convention requirements. It cannot dwell at the level of appearances. While it is true that the Court cannot take the place of the national authorities and courts, which make the primary decisions, it nevertheless has, as ultimate arbiter of the Convention, a duty to state clearly whether or not the reasoning of the national decisions before it is compatible with the Convention. In the present case, it is patently obvious from the Family Court's judgment (the reasoning of which is cited in paragraph 8 of the judgment) that that court did not take into consideration the aspects of the case bearing on the applicant's private life. I believe that the Court ought to have been more emphatic and clearer on this point."⁹⁹

This alert raised by a judge at the ECtHR is both reassuring and worrying. It shows that the risk of subsidiarity's diversion does not go unnoticed, but it also reveals that this risk exists. There can be a tendency, within the Court, to stop at appearances and be content with some vague assertions in the reasons given by national tribunals.

Conceptualising domestic law and factual assessment as a national issue

Moreover, national authorities do not need to twist the Court's jurisprudence. They may also insist on questions of fact or of domestic law. In this regard, it is undoubtedly much more difficult for the Court to assess the "unreasonable" nature of the national assessment. According to the logic of process-based review, the use by domestic judges of the standards developed in Strasbourg must lead to the recognition of a wide margin of appreciation. The ECtHR must be reluctant to allow its assessment of the facts or of domestic law to prevail over that of national judges. But, in the hands of domestic authorities in an authoritarian regime, such reasoning can lead to a circumvention of the Convention. The opinions of Judge Yüksel show this well, when she is reluctant to question the assessment of the national authorities as to the existence of a "plausible suspicion" to place an opponent in pre-trial detention.¹⁰⁰ In the political context of Turkey, she argues, it would be advisable to be less demanding about the plausibility of the suspicions which justify a pre-trial detention.¹⁰¹ Faced with a sufficiently carefully formulated reasoning by the national courts, "serious reasons" are needed to contradict their assessment, explains Judge Yüksel in a formula that echoes the "strong reasons" of the Copenhagen declaration.¹⁰² And it appears that she is quite reluctant to identify such reasons. In the case of *Başer and Özçelik*, for instance, the Court found a violation in the insufficiently justified suppression of immunity during the prosecution of two judges. In the Court's opinion, the judgment of the Turkish tribunal, "which is laconic and refers solely to the legal provision in question, lacked sufficient reasoning and failed to provide protection from arbitrariness in the context of the judges' detention in connection with the offences allegedly committed during the exercise of their duties."¹⁰³ But Judge Yüksel, here as elsewhere,¹⁰⁴ refuses to question the arguments advanced by Turkish authorities, however thin and pretextual they may be: "It is important to highlight that according to its **E.H.R.L.R. 439* case-law, the Court has only limited power to deal with alleged errors of fact or law committed by the national courts, which have primary responsibility for interpreting and applying domestic law".¹⁰⁵ Therefore, Judge Yüksel concludes, "there are no circumstances that may require derogation from the principle of subsidiarity in the present case".¹⁰⁶

Regarding more specifically the questions of facts, the same approach leads to the same result. Look at the case of *Mehmet Zeki Doğan*. At the age of 24, he was sentenced to life imprisonment for membership of an armed terrorist organisation. Considering that his conviction was based on self-incriminating statements made without the assistance of an attorney, the ECtHR found a violation of [art.6](#).¹⁰⁷ The trial was reopened and the same sentence was imposed. In *Mehmet Zeki Doğan (No.2)*, the Court found again a violation, because the conviction was decisively based upon incriminating statements made by other defendants without the assistance of counsel.¹⁰⁸ In a dissenting opinion together with a colleague, Judge Yüksel defends a conception of subsidiarity that would paralyse the Court: "Bearing in mind the importance of this fundamental principle, we are of the opinion that the majority's reasoning in the present case extends beyond the

Court's supervisory jurisdiction and encroaches on the margin of appreciation afforded to States by engaging in an assessment of the facts and evidence".¹⁰⁹ This case shows how one is prone to defer to the assessment of an authority ... when one agrees with it. Judges Yüksel and Derenčinović insist that it "is not for the Court to determine the weight to be attached to particular evidence, its admissibility, or the way in which it should be assessed," but they immediately explain that in their judgment the evidence used by the national tribunals were perfectly convincing.¹¹⁰

An important example of Judge Yüksel's use of subsidiarity for the assessment of facts is given by the encrypted messaging application "Bylock." In the wake of the *Coup d'état* attempt, the mere use of this application was considered by the Turkish authorities as a proof of involvement. It served as a basis for thousands of investigations,¹¹¹ prosecutions and convictions.¹¹² In the case of *Akgün*, the Court established that the sole use of Bylock was not enough to establish a plausible suspicion to have committed an offense. A pre-trial custody justified with this isolated circumstance was a violation of [art.5 of the Convention](#).¹¹³ This solution was confirmed in further cases.¹¹⁴ Besides, in the case of *Yüksel Yalçınkaya*, the Grand Chamber ruled that the membership of an armed terrorist organisation (a crime in Turkish law) could not be deduced from the use of Bylock. A conviction justified solely or decisively by this circumstance extended the scope of the offense in an unforeseeable manner and violated [art.7 of the Convention](#).¹¹⁵

In each case, Judge Yüksel wrote separately to defend the probative nature of the use of Bylock.¹¹⁶ Invoking the principle of subsidiarity, she insists that the Court should defer to the factual assessment of national authorities: "in the absence of arbitrariness or manifest irrationality of their conclusions, it is primarily up to them to assess the credibility of the facts and information."¹¹⁷ The Court should not dispute that Bylock was used exclusively by members of a criminal organisation, if domestic tribunals have said **E.H.R.L.R. 440* so. Judge Yüksel even finds specific reasons to reinforce the deference towards national authorities in this matter: the state of emergency after the Coup d'état attempt¹¹⁸ and the "novel issue of electronic evidence".¹¹⁹

A last illustration of the dangers of subsidiarity with regard to an authoritarian state is the case of *Ahmet Hüsrev Altan*, relating to the pre-trial detention for several years of a renowned journalist and writer, critic of the Erdogan regime. For Judge Yüksel, "it is not normally for the Court to substitute its own assessment of the facts for that of the domestic courts, which are better placed to assess the evidence adduced before them". Turkish judges indeed have "undeniable experience [...] in relation to the history and former coups that had taken place in Turkey".¹²⁰ If they considered, after a well-reasoned examination which takes account of the case law of the ECtHR, that there were plausible suspicions that the applicant had committed an offence, how could the Court of Strasbourg question their assessment? If it convinced the majority of the Court,

this use of the principle of subsidiarity with regard to an authoritarian regime would leave the hands entirely free to sufficiently astute national authorities. Indeed, it is never easy to accuse someone of lying, especially a High Contracting Party to an international treaty. This leads us to the broader issue of bad faith.

Turning a blind eye to bad faith

Nowadays, governments that intend to destroy liberal democracy do not resort to the naked exercise of violence, but to legal instruments.¹²¹ Such regimes act often in bad faith: the goals they announce are not the ones they pursue. In such a context, Judge Yüksel's opinions show what the Court's case law would look like if it yielded to the temptation to stop at appearances, to take at face value the legal procedures such as the ones implemented in Turkey. Judge Yüksel rejects vehemently any accusation of bad faith directed against domestic authorities and she turns a blind eye to legal camouflage. Such arguments can be effective because it is never easy to call someone a liar, and it is especially hard for the Court to do so: "the whole structure of the Convention rests on the general assumption that public authorities in the member states act in good faith."¹²²

Take again the case of Mehmet Zeki Doğan. After the Court found a violation for the use of an incriminating statement made in the absence of an attorney, Turkish judges justified the same penalty of life imprisonment with other statements obtained under the same conditions. To describe this conduct, Judge Yüksel and one colleague insist on the "the *sincere* effort on the part of the national judicial authorities to act in accordance with the Convention".¹²³ In the same vein, Judge Yüksel strongly criticises the findings of bad faith made by the ECtHR with regard to the Turkish authorities. Take the case of publisher Ragıp Zarakolu, who was jailed despite the absence of any element "sufficient to persuade an objective observer that [he] may have committed a terrorism-related offense".¹²⁴ Judge Yüksel admits that his detention was not justified, but she feels the need to strongly reject the idea that it was "arbitrary": "The examination of the circumstances of the case does not reveal any element of bad faith or deception from the authorities". *E.H.R.L.R. 441¹²⁵

The most solemn way for the Court to establish the bad faith of a Member State is the abuse of power provided for in [art.18 of the Convention](#).¹²⁶ It is no surprise that Judge Yüksel systematically opposes the infamous decisions of violation of [art.18](#), in which the Court finds that the Turkish authorities invoked alleged offenses as pretexts to stifle the opposition or the press. The Court, however, does not easily hand down such decisions.¹²⁷ It sometimes rules that the pursuit of a hidden purpose has not been sufficiently established.¹²⁸ At other times, it dispenses with the difficult examination of the aims pursued by the Turkish authorities, on the ground that it has already established the violation of [art.5](#) or [art.10 of the Convention](#).¹²⁹

But when the Court does establish a misuse of power,¹³⁰ Judge Yüksel writes to reject this reasoning. For instance, she explains that the arrest and detention of Osman Kavala without valid reason does not in itself demonstrate that the objective was to silence him. In its judgment, the Court pointed out that the applicant "acknowledges having played an active part in the demonstrations organised in Gezi Park in so far as they were conducted peacefully, that he recognises having provided assistance to the non-violent demonstrators, and that he does not deny that he had talks with individuals who played an important role in these events".¹³¹ The way in which Judge Yüksel seems to sum up this passage is remarkable: "As the majority noted, the applicant is an activist who played an important role in the Gezi Park events".¹³² Therefore, explains judge Yüksel, and in view of the seriousness of these events, one cannot too easily conclude that his arrest was a misuse of power.

Judge Yüksel's refusal to recognise a violation of [art.18](#) in the case of *Selahattin Demirtaş* is indicative of a more general voluntary blindness towards autocratic legalism. The approach consists in stopping at the legal form, without taking into account the political context. In finding a violation of [art.18](#), the Court had taken into account, in particular, the observations of the Venice Commission on the lack of independence of Turkish judges, since the President of the Republic or members of his party appoint all members of the "Supreme Council" responsible for managing their careers.¹³³ In her opinion, Judge Yüksel regrets that the majority criticizes the changes made "by a referendum which was accepted by a sovereign nation".¹³⁴ In the same judgment, the Court criticised the revision of the constitutional guarantee of immunity, described as an "*ad hominem*" revision, designed to attack elected representatives of the opposition.¹³⁵ Judge Yüksel prefers to see it as a simple modification of the procedure.¹³⁶ Judge Yüksel also closes her eyes to the stratagems which consist in multiplying the procedures to escape the control of the Court. Here again, the *Selahattin Demirtaş* case is a good example, especially since on this point, Judge Yüksel is for once joined by another member of the Court, the judge elected from a list provided by the illiberal government of Hungary. On the very day on which a decision by a Turkish tribunal was to lead to the applicant's release, the public prosecutor had requested that Mr Demirtaş be remanded in custody in the context of another procedure. For the Court, the circumstances showed that the Turkish **E.H.R.L.R. 442* authorities were less interested in his involvement in specific criminal acts than in keeping him in detention.¹³⁷ The Court therefore ordered the immediate release of the applicant.

The dissenting judges use formalistic reasoning to oppose the release of the applicant. As Judge Spano pointed out in his essays, an essential mechanism of the principle of subsidiarity is the requirement of exhaustion of domestic remedies.¹³⁸ This condition of admissibility makes sure that national courts were put in a position to protect the rights

guaranteed by the Convention. A bad faith regime can use this aspect of the principle of subsidiarity to thwart the Court. It suffices to open at regular intervals a new pretextual procedure which will make it possible to affirm that the finding of a violation established by the Court should have no consequences on the current detention of the applicant, which is based on another procedure which has not yet been examined by the Court. As the Court pointed out in another Turkish case where a new period of detention began as soon as a court ordered the applicant's release:

"accepting that this decision ended the applicant's detention, even though his release is not possible, would be tantamount to allowing the law to be circumvented. Indeed, if that were the case, the judicial authorities could continue to deprive people of their liberty simply by initiating new criminal investigations for the same facts". ¹³⁹

Judge Yüksel did not react to this last observation, but she endorses this ploy in the *Selahattin Demirtaş* case. She opposes the order to release the applicant, since his second detention is being examined before the Turkish courts: "the correct course of action would be to defer to the authority of the domestic courts in line with the principle of subsidiarity". ¹⁴⁰ Judge Yüksel's reasoning completely disarms the Court in the face of the proliferation of prosecutions: since the basis for the applicant's detention is no longer that which has been examined by the Court, it cannot order his release. ¹⁴¹

This refusal to see the bad faith of domestic authorities, this decontextualised assessment of the successive lawsuits obviously have consequences for the assessment of the proper execution of the judgment. This appears crudely in the case of Osman Kavala. On 10 December 2019, the Court declared that Kavala's detention violated the Convention and ordered his immediate release. ¹⁴² On 18 February 2020, the Assize Court in Istanbul pronounced his acquittal and ordered his release. The very same day, the public prosecutor requested the detention of Kavala on the basis of a new procedure. Acquitted on the charge of attempting to overthrow the government (art.312 of the Criminal Code), Kavala was now accused of an attempt to overthrow the constitutional order (art.309 Criminal Code). ¹⁴³ When the Committee of Ministers, considering that Turkey refused to abide by the Court's judgment, referred the question to the Court pursuant to [art.46\(4\) of the Convention](#), the Turkish government responded that Turkey had complied with the *Kavala* judgment. The new detention of Osman Kavala had nothing to do with the previous one. Neither the Committee of Ministers nor the Court, explained the Turkish government, had the right to meddle in ongoing domestic legal proceedings. Quoting the new paragraph in the preamble to the Convention, the government argued that "in the circumstances of the case, the fact of instituting proceedings under Article *[E.H.R.L.R. 443](#) 46 § 4 amounted to a breach of the Convention system, which was based on the principles of subsidiarity and the margin of appreciation, as set out in Protocol No.15". ¹⁴⁴

The answer of the Grand Chamber deserves a long quote:

"in the absence of other relevant and sufficient circumstances, a mere reclassification of the same facts cannot in principle modify the basis for those conclusions, since such a reclassification would only be a different assessment of facts already examined by the Court. Were it otherwise, the judicial authorities could continue to deprive individuals of their liberty simply by opening new criminal investigations in respect of the same facts. Such a situation would amount to permitting the law to be circumvented and might lead to results incompatible with the object and purpose of the Convention". ¹⁴⁵

"Circumventing the law" is an act of bad faith, and it is not surprising that the Court immediately recalls the violation of [art.18](#) established in the *Kavala* judgment. ¹⁴⁶ The ulterior purpose to silence Osman Kavala as a human-rights defender must be kept in mind when one analyses the successive lawsuits brought against him. As a result, the *Kavala* judgment "vitiates" any posterior charges related to the same events. Henceforth,

"in the absence of other relevant and sufficient circumstances capable of demonstrating that Mr Kavala had been involved in criminal activity, any measure, especially one depriving him of his liberty, on grounds pertaining to the same factual context, would entail a prolongation of the violation of Mr Kavala's rights as well as a breach of the obligation on the respondent State to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention". ¹⁴⁷

Therefore, it does not matter whether the new detention is "technically speaking", as the Turkish government puts it, ¹⁴⁸ based upon a new charge. The Court "must look behind appearances and investigate the realities of the situation": "[a] mere reclassification of the same facts cannot in principle modify the basis for the conclusions of the initial judgment". ¹⁴⁹ This "realistic" examination of the facts is precisely what Judge Yüksel would abandon in favor of an exclusive focus on "technicalities". Such an approach would disarm the Court, it would render it blind toward autocratic legalism. In a lone and short dissent of seven lines, Judge Yüksel shows the close relationship between [arts 18](#) and [46](#). The assessment that the Turkish authorities acted in bad faith led to the recognition of an abuse of power in 2019, and it leads in 2022 to the conclusion that Turkey did not comply with the judgment. Conversely, since Judge Yüksel refuses to see an ulterior purpose in Kavala's first arrest, she refuses also to see his second arrest as a problem regarding the execution of the judgment. The new procedure against Kavala has nothing to do with the one analysed by the Court in 2019, and should have been the object of a new application rather than a proceeding under [art.46\(4\)](#). ¹⁵⁰

Judge Yüksel also supports another way of exploiting subsidiarity to circumvent the Court's control. Once again, the stratagem is based on the alleged good faith of the

Turkish authorities, and in particular of the constitutional court. This attitude, it should be stressed, is shared by the whole Court. In order, probably, to contain the flood of applications which would otherwise fall upon it, the Court pretends to take seriously the various legal remedies which exist in Turkey, even when their ineffectiveness seems **E.H.R.L.R. 444* obvious.¹⁵¹ But Judge Yüksel goes further: she presents the Constitutional Court as an interlocutor to whom the greatest respect should be granted in the interest... of a greater protection of human rights.¹⁵² As Dilek Kurban put it, resistance to the Court is "disguised behind conciliatory gestures and mistaken for cooperation."¹⁵³ This strategy is not new: invoking human rights to cover human rights violation is a distinctive feature of authoritarian regimes.¹⁵⁴

Here, the mechanism is as follows: a journalist or a political opponent is arrested on the basis of unfounded accusations. After he spent a year or more in prison, the constitutional court rules that there were insufficient reasons for his pre-trial detention and awards him a small sum of money. Consequently, it is argued that the applicant cannot qualified as a victim anymore. The victim status being denied, the ECtHR should declare the application inadmissible. Judge Yüksel has defended this scheme three times.

In the *Selahattin Demirtaş* case, the constitutional court ruled that the length of the applicant's detention in the first proceedings was not justified and awarded him a sum of €6,500. According to judge Yüksel, this acknowledgment of the violation of the applicant's rights and this reparation were sufficient: "given the importance of the subsidiarity principle, which lies at the heart of the Convention, it is my belief that the applicant can no longer claim to be the victim of a violation of Article 5 § 3 of the Convention".¹⁵⁵

In the *Murat Aksoy* case, a journalist had been locked up for more than a year on the grounds that he belonged to the organisation of Fethullah Gülen. After his release, the Constitutional Court ruled that there was insufficient evidence for this pre-trial detention and awarded him €4,500. For Judge Yüksel, the applicant therefore no longer had victim status. To rule otherwise, she explained, is tantamount to violating the principle of subsidiarity, to disrespecting the constitutional court which, for its part, is striving to apply in Turkey the standards developed by the European Court of Human Rights.¹⁵⁶ The decision to declare the application inadmissible "would have been more appropriate given the subsidiary role played by the Court and [...], in my opinion, would have better served to strengthen the judicial dialogue between the Court and the Constitutional Court for better protection of fundamental rights in Europe".¹⁵⁷

A few months later, Judge Yüksel repeated this reasoning and was joined by the judge elected in respect of the Czech republic. In the *İker Deniz Yücel* case, the Turkish Constitutional Court had awarded €4,000 to the Turkish correspondent of the

German newspaper *Die Welt*, due to his unjustified pre-trial detention for more than a year. Rather than declaring the application inadmissible, the Court found several violations of the Convention and awarded an additional sum of €12,300. In their partly dissenting opinion, Judges Yüksel and Pejchal invited the Court to show more respect for "subsidiarity" and for the "judicial dialogue" which will "advance the protection of fundamental rights in Europe".¹⁵⁸ The idea that national courts would integrate the principles developed in Strasbourg and defend human rights without the European Court having to intervene is diverted into an obligation for the Court to look away in face of human rights *E.H.R.L.R. 445 violations. According to Judges Yüksel and Pejchal, the principle of subsidiarity allows a state to lock up critics of the government for a year, as long as a court subsequently renders a decision which cites the ECtHR and attributes a small sum of money in compensation for moral damage.¹⁵⁹ Judge Yüksel's reasoning shows where would lead a blind application of the subsidiarity principle towards authoritarian regimes: with a few formal tricks, the national tribunals devoted to the government could cover its actions. The Court would remain silent and leave a free hand to the authoritarian regime in the name of a "better protection of fundamental rights in Europe".¹⁶⁰

Conclusion: double standard as lesser evil?

In an illuminating essay published in 2018, Başak Çalı observed the Court's recognition that "some states' formal commitment to the Convention may be a façade hiding bad faith circumvention of the Convention by domestic authorities."¹⁶¹ She identified a "variable geometry" in Strasbourg's case law, the Court being prone to identify bad faith and art.18 violation by some states, while adopting an attitude of enhanced deference vis-à-vis other states.¹⁶² Of course, such a "double standard" easily lends itself to criticism. The deference shown by the Court towards the British authorities following the numerous reproaches formulated against it in this country has been the subject of several criticisms. Judge Pinto de Albuquerque, among others, has warned of "the serious risk that the Convention is applied with double standards".¹⁶³

But being attentive to this danger does not mean turning a blind eye to bad faith regimes. Double standard is too often described as an evil in itself without further thinking.¹⁶⁴ But a difference in treatment is justifiable—and might even be mandatory—when there is a difference in situation.¹⁶⁵ Political regimes that are engaged in a systematic destruction of political rights and democracy are in such a different situation. As Judge Spano wrote, "it is a fact of life that states have not progressed or are not progressing in the same manner when it comes to the embedded status of Convention law".¹⁶⁶ To put it more clearly, "The diversity of the countries under the jurisdiction of the European Court of Human Rights is not of the Court's own doing".¹⁶⁷ Applied to

States like Turkey—States that violate massively the Convention but try to keep up the appearance—the "process-based review" would paralyse the Court.

Writing about the blind formalism with which the Court assessed fake legal remedies especially in Turkey,¹⁶⁸ Mikael Rask Madsen observed that "the consequence of too much legal diplomacy is that **E.H.R.L.R. 446* deteriorating legal systems in member states, and what in some instances might be termed captured courts, are allowed to operate as if they represent the rule of law".¹⁶⁹ The principle of subsidiarity implies a position of trust and respect towards Member States. As diplomacy, it is "premised on the existence of good faith between willing participants".¹⁷⁰ But being aware of this aspect is not an absolute protection against manipulation. In September 2020, judge Robert Spano, at that time president of the ECtHR, attracted huge critique for an official visit in Turkey. Invited by his colleague at the Court, Saadet Yüksel, he accepted an honorary doctorate from a university that had fired hundreds of academics during the purges ordered by the government, and posed for photographs with public officials associated with Turkey's ongoing political repression.¹⁷¹

This was a bad exercise of judicial diplomacy, because it pretended to ignore reality. By acting as if he were visiting an ordinary country, rather than a regime in full authoritarian drift, Judge Spano damaged the image of the Court and endangered its authority.¹⁷² In its case-law, the Court runs the same danger if it stops at the legal appearance of autocratic moves. The careful study of Judge Yüksel's separate opinions clearly shows how the diplomacy of subsidiarity could be diverted in such a direction.

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Footnotes

- 1 R. Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14(3) H.R.L.R. 487–502.
- 2 R. Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) *Human Rights Law Review* 480.
- 3 For an overview of the scholarship that strives to refine the concepts and to classify these regimes, see T. Hochmann, "Fifty Shades of Democratorship" (2019) 169 *Pouvoirs* 19.

- 4 S. Levitsky and L. Way, "The Rise of Competitive Authoritarianism" (2002) 13(2) *Journal of Democracy* 58.
- 5 K. Scheppele, "Autocratic Legalism" (2018) 85 *University of Chicago Law Review* 545.
- 6 R. Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) *H.R.L.R.* 494.
- 7 See B. Çalı, "Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights?" (2018) 35 *Wisconsin International Law Journal* 237, 269; M.R. Madsen, "The Narrowing of the European Court of Human Rights?" (2021) 2 *European Convention of Human Rights Law Review* 199, 206.
- 8 In 2023, 34.2% of pending applications allocated to a judicial formation were filled against Turkey. See <https://www.echr.coe.int/documents/d/echr/stats-pending-2024-bil> [Accessed 26 June 2025].
- 9 See recently D. Arslantas and A. Kaiser, "The 'Competitive Authoritarian' Turn in Turkey: Bandwagoning Versus Reality" (2022) *Third World Quarterly*, available at <https://www.tandfonline.com> [Accessed 26 June 2025].
- 10 See already *Akdivar v Turkey [GC] (App. No.21893/93), judgment of 16 September 1996*, dissenting opinion of Judge Gölcüklü at [3].
- 11 Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) *H.R.L.R.*, 488; M. Guyomar, "La Cour européenne des droits de l'homme, garante du respect du principe de proportionnalité: le 'contrôle du contrôle'" (2020) 24 *Justice Actualités* 17.
- 12 Judge Spano's essays have been very influential: Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14(3) *H.R.L.R.* 487–502; Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) *H.R.L.R.* 488. But see also, among many others, O. Arnardóttir, "Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the ECtHR's Case Law on the Margin of Appreciation", in *European Society of International Law, Conference Paper Series, No.4/2015*; J. Gerards, "Procedural Review by the ECtHR: A Typology" in J. Gerards and E. Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge: Cambridge University Press, 2017), pp.127–160; E. Brems, "The 'Logics' of Procedural-Type Review by the European Court of Human Rights" in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017), pp.17–39; E. Brems, "Positive subsidiarity and its implications for the margin of appreciation doctrine" (2019) 37 *Netherlands Quarterly of Human Rights* 210.

- 13 *Handyside v United Kingdom* (App. No.5493/72), judgment of 7 December 1976 at [48].
- 14 See P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights* (Cambridge: Intersentia, 2016); J. Petrov, "The populist challenge to the European Court of Human Rights" (2020) 18(2) *International Journal of Constitutional Law* 476.
- 15 See M.R. Madsen, "The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash" (2016) 79 *Law and Contemporary Problems* 141, 170; E. Bates, "UK Withdrawal From the ECHR ("BrECHRit"): From Taboo to Tenable?" (2024) 5(1) *European Convention on Human Rights Law Review* 24.
- 16 High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 2012, available at <https://www.echr.coe.int> [Accessed 26 June 2025]; Copenhagen Declaration on the reform of the European Convention on Human Rights system, 2018, available at <https://www.echr.coe.int> [Accessed 26 June 2025]. See L. Glas, "From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?" (2020) 20 *H.R.L.R.* 125, 128; J. Kjølbrot, "State Parties' Wish to Influence the Court's Application of the Principle of Subsidiarity and the Margin of Appreciation by Means of High-Level Declarations" in J. Kjølbrot, S. O'Leary and M. Tsirli (eds), *Liber Amicorum Robert Spano* (Limal: Anthemis, 2022), p.351.
- 17 Some authors identified an increase in judicial restraint: M.R. Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?" (2018) 9(2) *Journal of International Dispute Settlement* 199; Ø. Stiansen and E. Voeten, "Backlash and Judicial Restraint: Evidence from the European Court of Human Rights" (2020) 64 *International Studies Quarterly* 770; L. Helfer and E. Voeten, "Walking Back Human Rights in Europe" (2020) 31 *European Journal of International Law* 797. But see A. Stone Sweet, W. Sandholtz and M. Adenas, "The Failure to Destroy the Authority of the European Court of Human Rights" (2022) 21 *Law and Practice of International Courts and Tribunals* 244; P. Wachsmann, "Le Von Hannover non-substitution principe à l'épreuve de la jurisprudence de la Cour européenne des droits de l'homme" in *Liber Amicorum Robert Spano* 758; H. Molbæk-Steensig, "Subsidiarity does not win cases: A mixed methods study of the relationship between margin of appreciation language and deference at the European Court of Human Rights" (2023) 36 *Leiden Journal of International Law* 86.
- 18 See for instance Oddny Mjöll Arnardóttir, "The 'procedural turn' under the European Convention on Human Rights and presumptions

of Convention compliance" (2017) 15 International Journal of Constitutional Law 9; Brems, *"The 'Logics' of Procedural-Type Review by the European Court of Human Rights"* in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017), p.17; Gerards, *"Procedural Review by the ECtHR: A Typology"* in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017), p.127.

19 An author has called this approach the 'newest' formulation of due deference. B. Çalı, "To me, fair friend, you can never be old": ECHR at 70" (2021) 81 ZaöRV 895, 905.

20 Then President of the Court, Dean Spielmann did the same. See D. Spielmann, "Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?" (2012) 14 Cambridge Yearbook of European Legal Studies 381 (revised version of a paper presented first in Luxembourg but then in Cambridge); D. Spielmann, "Whither the Margin of Appreciation?" (2014) 67 Current Legal Problems 49 (lecture at University College London in 2014).

21 Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14(3) H.R.L.R. 487; Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) H.R.L.R. 473–494. As he puts it himself, his 2014 piece "interestingly provoked extensive scholarly debate." Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) H.R.L.R. 481.

22 M.R. Madsen, "The Narrowing of the European Court of Human Rights?" (2021) 2 European Convention of Human Rights Law Review 199.

23 D. Spielmann and P. Voyatzis, *"Jge de la subsidiarité ou ère de la retraite ordonnée? Pour la subsidiarité bien comprise"* in *Liber Amicorum Robert Spano* 672.

24 L. Burgorgue-Larsen, *Les 3 Cours régionales des droits de l'homme in context* (Paris: Pedone, 2020), p.346 (my translation). A good part of the contributions to the *Liber Amicorum* prepared for his departure from the Court relate to the topic of process-based review. See J. Kjølbrot, S. O'Leary and M. Tsirli (eds), *Liber Amicorum Robert Spano* (Anthemis, 2022).

25 Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14(3) H.R.L.R. 490. See also T. Kleinlein, "The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution" (2019) 68 International and Comparative Law Quarterly 91, 101.

- 26 Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14(3) H.R.L.R. 491. See also Brems, "The 'Logics' of Procedural-Type Review by the European Court of Human Rights" in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017), p.22.
- 27 See Brems, "Positive subsidiarity and its implications for the margin of appreciation doctrine" (2019) 37 Netherlands Quarterly of Human Rights 210.
- 28 See J. Gerards, "The European Court of Human Rights and the national courts: giving shape to the notion of 'shared responsibility'" in J. Gerards and J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law* (Cambridge: Intersentia, 2014), p.54; Kleinlein, "The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution" (2019) 68 International and Comparative Law Quarterly 93.
- 29 Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) H.R.L.R. 480.
- 30 Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) H.R.L.R. 487.
- 31 See B. Çalı, "Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights?" (2018) 35 Wisconsin International Law Journal 237, 258.
- 32 *Palomo Sanchez v Spain* [GC] (App. No.28955/06), judgment of 12 September 2011 at [54].
- 33 *Palomo Sanchez* [GC] (App. No.28955/06), judgment of 12 September 2011 at [57].
- 34 *Von Hannover v Germany* (No.2) [GC] (App. No.40660/08), judgment of 7 February 2012 at [107].
- 35 *Von Hannover v Germany* (No.2) [GC] (App. No.40660/08), judgment of 7 February 2012 at [126].
- 36 *Ndidi v United Kingdom* (App. No.41215/14), judgment of 14 September 2017 at [76]. See also *Veljkovic-Jukic v Switzerland* (App. No.59534/14), judgment of 12 July 2020; and F. Krenc, "L'autorité de la Cour européenne des droits de l'homme et de sa jurisprudence à l'aune de la subsidiarité et de la marge nationale d'appréciation" in K. Blay-Grabarczyk and L. Milano (eds), *Les soixante-dix ans de l'adoption de la Convention européenne des droits de l'homme: enjeux et perspectives*, (Paris: Pedone, 2021), p.60.

- 37 See M. Saul, "Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights" (2016) 20 *International Journal of Human Rights* 1077.
- 38 Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14(3) H.R.L.R. 499; *Hirst v United Kingdom (No.2) [GC] (App. No.74025/01)*, judgment of 6 October 2005 at [79].
- 39 Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14(3) H.R.L.R. 498. See *Animal Defenders International v United Kingdom [GC] (App. No.48876/08)*, judgment of 22 April 2013 at [114]–[116]. See also *Parrillo v Italy [GC] (App. No.46470/11)*, judgment of 27 August 2015 at [188]; and Krenc, "L'autorité de la Cour européenne des droits de l'homme et de sa jurisprudence à l'aune de la subsidiarité et de la marge nationale d'appréciation" in Blay-Grabarczyk and Milano (eds), *Les soixante-dix ans de l'adoption de la Convention européenne des droits de l'homme: enjeux et perspectives*, (2021), p.58.
- 40 *Öğrü v Turkey (App. Nos 60087/10, 12461/11 and 48219/11)*, judgment of 19 December 2017 at [66] (my translation). See also *Kaos GL v Turkey (App. No.4982/07)*, judgment of 22 November 2016 at [57].
- 41 Guyomar, "La Cour européenne des droits de l'homme, garante du respect du principe de proportionnalité: le 'contrôle du contrôle'" (2020) 24 *Justice Actualités* 16. The formula seems to have been forged by Professor Fulchiron in connection with the control exercised by the French Supreme Court in civil law (*Cour de cassation*). See H. Fulchiron, "Grandeurs et servitudes du contrôle de proportionnalité" (2016) *Recueil Dalloz* 2496; H. Fulchiron, "Le contrôle de proportionnalité: questions de méthode" (2017) *Recueil Dalloz* 656.
- 42 See O. Arnardóttir, "Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the EctHR's Case Law on the Margin of Appreciation" in *European Society of International Law, Conference Paper Series*, No.4/2015, at p.21.
- 43 Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) H.R.L.R. 486.
- 44 Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) H.R.L.R. 494.
- 45 H. Keller and C. Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments" (2015) 26 *European Journal of International Law* 829.

- 46 Copenhagen Declaration, 2018, at p.28. Emphasis added.
- 47 Spano, "The Future of the European Court of Human Rights—
Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3)
H.R.L.R. 488. See also Guyomar, "La Cour européenne des droits de
l'homme, garante du respect du principe de proportionnalité: le 'contrôle
du contrôle'" (2020) 24 Justice Actualités 17.
- 48 Spano, "The Future of the European Court of Human Rights—
Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3)
H.R.L.R. 493.
- 49 Spano, "The Future of the European Court of Human Rights—
Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3)
H.R.L.R. 492.
- 50 Spano, "The Future of the European Court of Human Rights—
Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3)
H.R.L.R. 493.
- 51 *Mehmet Hasan Altan v Turkey (App. No.13237/17), judgment of 20
March 2018*, partly dissenting opinion of Judge Ergül at [2] and [24].
- 52 *Mehmet Hasan Altan (App. No.13237/17), judgment of 20 March 2018*,
concurring opinion of Judge Spano, joined by judges Bianku, Vučinić,
Lemmens and Gričco at [3].
- 53 Madsen, "The Narrowing of the European Court of Human
Rights?" (2021) 2 European Convention of Human Rights Law Review
186.
- 54 D. Kurban, "Authoritarian Resistance and Judicial Complicity: Turkey
and The European Court of Human Rights" (2024) 35 European Journal
of International Law 355, 365.
- 55 *Turan v Turkey (App. Nos 75805/16 and 426 others), judgment of 23
November 2021*, partly dissenting opinion of Judge Küris at [38].
- 56 See *Ahmet Hüsrev Altan v Turkey (App. No.13252/17), judgment of 13
April 2021*, partly dissenting opinion of Judge Küris at [20].
- 57 See especially A. Nussberger, "Procedural Review by the ECHR: View
from the Court" in Gerards and Brems (eds), *Procedural Review in
European Fundamental Rights Cases* (2017), pp.166–172.
- 58 Gerhards, "Procedural Review by the ECtHR: A Typology" in Gerards
and Brems (eds), *Procedural Review in European Fundamental Rights
Cases* (2017), p.159.
- 59 E. Demir-Gürsel, "The limits of the European Court of Human Rights
vis-à-vis contestation and authoritarianism: concluding observations"
in H. Philipp Aust and E. Demir-Gürsel (eds), *The European Court
of Human Rights, Current Challenges in Historical Perspective*
(Cheltenham: Elgar Publishing 2021), p.250.
- 60 See for instance Madsen, "The Narrowing of the European Court of
Human Rights?" (2021) 2 European Convention of Human Rights Law

- Review 186; Stiansen and Voeten, "Backlash and Judicial Restraint: Evidence from the European Court of Human Rights" (2020) 64 International Studies Quarterly 770; Voeten, "Walking Back Human Rights in Europe" (2020) 31 European Journal of International Law 797.
- 61 See for instance Petrov, "The populist challenge to the European Court of Human Rights" (2020) 18(2) International Journal of Constitutional Law 476; B Çalı, "Autocratic Strategies and the European Court of Human Rights" (2021) 2 European Convention on Human Rights Law Review 11.
- 62 But see Kurban, "Authoritarian Resistance and Judicial Complicity: Turkey and The European Court of Human Rights" (2024) 35 European Journal of International Law 355.
- 63 See Çalı, "Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights?" (2018) 35 Wisconsin International Law Journal 263; C. Heri, "Loyalty, Subsidiarity and Article 18 ECHR: How the ECtHR Deals with Mala Fide Limitations of Rights" (2020) 1 European Convention on Human Rights Law Review 25.
- 64 See *Sabuncu v Turkey* (App. No.23199/17), judgment of 10 November 2020, partly dissenting opinion of Judge Küris at [9].
- 65 Çalı, "'To me, fair friend, you can never be old': ECHR at 70" (2021) 81 ZaöRV 895" 911.
- 66 Nussberger, "Procedural Review by the ECHR: View from the Court", in Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017), p.161, quoting US Supreme Court, *Shaughnessy v United States ex. Rel. Mezei*, 345 U.S. 206 (1953), Jackson dissenting, at 224: "if put to the choice, one might well prefer to live under Soviet substantive law applied *in good faith* by our common law procedures than under our substantive law enforced by Soviet procedural practices" (my emphasis).
- 67 *Mehmet Hasan Altan v Turkey* (App. No.13237/17), judgment of 20 March 2018, concurring opinion of Judge Spano, joined by Judges Bianku, Vučinić, Lemmens and Gričco at [2] (emphasis added). On the "presumption of good faith" that goes along with the principle of subsidiarity, see Demir-Gürsel, "The limits of the European Court of Human Rights vis-à-vis contestation and authoritarianism: concluding observations" in Philipp Aust and Demir-Gürsel (eds), *The European Court of Human Rights, Current Challenges in Historical Perspective* (2021), p.254.
- 68 *Mehmet Hasan Altan v Turkey* (App. No.13237/17), judgment of 20 March 2018, partly dissenting opinion of Judge Ergül at [14], [20], [23].
- 69 PACE, 5 October 2017, <https://pace.coe.int/en/files/24039/html>; PACE, 3 October 2018, <https://pace.coe.int/fr/files/25074/html>; <https://pace.coe.int/en/files/25074/html>

stockholmcf.org/turkeys-third-list-of-candidates-to-replace-judge-karakas-on-ecthr-rejected/ [Accessed 26 June 2025].

70 Nordic Monitor, "Erdogan manages to install his choice as new European Court of Human Rights judge", 14 April 2019, <https://nordicmonitor.com/2019/04/erdogan-managed-to-plant-his-choice-as-a-judge-at-the-european-court-of-human-rights/> [Accessed 26 June 2025].

See L. Burgorgue-Larsen, "Actualité de la Convention européenne des droits de l'homme" (2020) *Actualité Juridique Droit Administratif* 160.

71 A note on methodology: to my knowledge, there is no search tool for separate opinions on the HUDOC website. Assuming that separate opinions are always reported as those of "judge X" (or "judges X and Y") I searched for the terms "juge Yüksel" (in French) and "judge Yüksel" (in English), as well as "juges Yüksel / judges Yüksel" and "et Yüksel / and Yüksel". Admittedly, this leaves aside the potential opinions signed by more than two judges, where judge Yüksel's name is not the first or the last one. I trust this only concerns a trivial number of judgments (if any). Here is the list of the 33 separate opinions published by judge Yüksel in cases against Turkey (as of 6 February 2025). When I quote from an opinion not available in English, the translation from French is mine. *Nejdet Atalay v Turkey* (App. No.76224/12), judgment of 19 November 2019 (concurring opinion of Judge Yüksel, in French only); *Kavala v Turkey* (App. No.28749/18), judgment of 10 December 2019 (partly concurring and partly dissenting opinion of Judge Yüksel); *Baş v Turkey* (App. No.66448/17), judgment of 3 March 2020 (partly dissenting opinion of Judge Yüksel); *Mehdi Tanrikulu v Turkey* (App. No.9735/12), judgment of 5 May 2020 (joined partly concurring opinion of Judges Bošnjak and Yüksel, partly dissenting opinion of Judge Yüksel, in French only); *Ragip Zarakolu v Turkey* (App. No.15064/12), judgment of 15 September 2020 (concurring opinion of Judge Yüksel, in French only); *İşçi v Turkey* (App. No.67483/12), judgment of 20 October 2020 (concurring opinion of Judge Yüksel, in French only); *Kılıçdaroğlu v Turkey* (App. No.16558/18), judgment of 27 October 2020 (partly concurring and partly dissenting opinion of Judge Yüksel); *Sabuncu v Turkey* (App. No.23199/17), judgment of 10 November 2020 (partly concurring opinion of Judge Yüksel); *Şık v Turkey* (No.2) (App. No.36493/17), judgment of 24 November 2020 (partly concurring and partly dissenting opinion of Judge Yüksel); *Pişkin v Turkey* (App. No.33399/19), judgment of 15 December 2020 (partly dissenting opinion of Judge Yüksel); *Selahattin Demirtaş v Turkey* (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020 (partly dissenting opinion of Judge Yüksel joined by Judge Paczolay, partly concurring and partly dissenting opinion of Judge Yüksel); *Dickinson v Turkey* (App. No.25200/11), judgment of 2

February 2021 (partly concurring and partly dissenting opinion of Judge Yüksel, in French only); *Murat Aksoy v Turkey* (App. No.80/17), *judgment of 13 April 2021* (partly dissenting opinion of Judge Yüksel, in French only); *Ahmet Hüsrev Altan v Turkey* (App. No.13252/17), *judgment of 13 April 2021* (dissenting opinion of Judge Yüksel); *Kerestecioğlu Demir v Turkey* (App. No.68136/16), *judgment of 4 May 2021* (partly dissenting opinion of Judge Yüksel, in French only); *Öğreten and Kanaat v Turkey* (App. Nos 42201/17 and 42212/17), *judgment of 18 May 2021* (partly concurring opinion of Judge Yüksel, in French only); *Tercan v Turkey* (App. No.6158/18), *judgment of 29 June 2021* (joined partly dissenting opinion of Judges Pejchal and Yüksel, in French only); *Akgün v Turkey* (App. No.19699/18), *judgment of 20 July 2021* (dissenting opinion of Judge Yüksel, in French only); *Mehmet Çiftçi v Turkey* (App. No.53208/19), *judgment of 16 November 2021* (partly dissenting opinion of Judge Yüksel, in French only); *Turan v Turkey* (App. Nos 75805/16 and 426 others), *judgment of 23 November 2021* (partly concurring opinion of Judge Yüksel); *Ilicak v Turkey* (No.2) (App. No.1210/17), *judgment of 14 December 2021* (partly dissenting opinion of Judge Yüksel, in French only); *İker Deniz Yücel v Turkey* (App. No.27684/17), *judgment of 25 January 2022* (joined partly dissenting opinion of Judges Pejchal and Yüksel, in French only); *Taner Kılıç v Turkey* (No.2) (App. No.208/18), *judgment of 31 May 2022* (partly concurring opinion of Judge Yüksel, in French only); *Kavala v Turkey* [GC] (App. No.28749/18), *judgment of 11 July 2022* (partly dissenting opinion of Judge Yüksel); *Başer and Özçelik v Turkey* (App. Nos 30694/15 and 30803/15), *judgment of 13 September 2022* (partly dissenting opinion of Judge Yüksel); *Yüksekdağ Şenoğlu v Turkey* (App. Nos 14332/17 and 12 others), *judgment of 8 November 2022* (joined partly dissenting opinion of Judges Kjølbro and Yüksel, in French only); *Telek v Turkey* (App. Nos 66763/17 and 2 others), *judgment of 21 March 2023* (partly dissenting opinion of Judge Yüksel, in French only); *Demirtaş and Yüksekdağ Şenoğlu v Turkey* (App. Nos 10207/21 and 10209/21), *judgment of 6 June 2023* (dissenting opinion of Judge Yüksel, in French only); *Osman and Altay v Turkey* (App. Nos 23782/20 and 40731/20), *judgment of 18 July 2023* (joint dissenting opinion of Judges Yüksel and Derenčinović, in French only); *Yüksel Yalçinkaya v Turkey* [GC] (App. No.15669/20), *judgment of 26 September 2023* (joined partly dissenting opinion of Judges Ravarani, Bårdsen, Chanturia, Jelić, Felici and Yüksel, partly dissenting opinion of Judge Yüksel); *Mehmet Zeki Dogan v Turkey* (No.2) (App. No.3324/19), *judgment of 13 February 2024* (joint dissenting opinion of Judges Yüksel and Derenčinović); *Parildak v Turkey* (App. No.66375/17), *judgment of 19 March 2024* (partly dissenting opinion of Judge Yüksel,

- in French only); *Yüksek v Turkey* (App. No.4/18), judgment of 22 October 2024 (dissenting opinion of Judge Yüksel).
- 72 *Exécutief van de Moslims van België v Belgium* (App. Nos 16760/22 and 10 others), judgment of 13 February 2024 (concurring opinion of Judge Yüksel, in French only).
- 73 *Kurt v Austria [GC]* (App. No.62903/15), judgment of 15 June 2021 (joint dissenting opinion of Judges Turković, Lemmens, Harutyunyan, Elósegui, Felici, Pavli and Yüksel); *Avci v Denmark* (App. No.40240/19), judgment of 30 November 2021 (joint dissenting opinion of Judges Pejchal, Ranzoni and Yüksel); *KK v Denmark* (App. No.25212/21), judgment of 6 December 2022 (joint dissenting opinion of Judges Kjølborg, Koskelo and Yüksel); *Nealon v United Kingdom [GC]* (App. Nos 32483/19 and 35049/19), judgment of 11 June 2024 (joint dissenting opinion of Judges Ravarani, Bošnjak, Chanturia, Felici and Yüksel).
- 74 The potential multiplication of such judges at the Court is a raising concern. See L. Burgorgue-Larsen, "Actualité de la Convention européenne des droits de l'homme" 160; C. Madelaine, "Face à la crise de l'État de droit, repenser le processus de sélection des juges à la Cour EDH: un placebo ?" (2023) *Revue des droits et libertés fondamentaux* 23.
- 75 See *Öztirak v Turkey* (App. No.46472/19), decision of 26 March 2024.
- 76 See Kurban, "Authoritarian Resistance and Judicial Complicity: Turkey and The European Court of Human Rights" (2024) 35 *European Journal of International Law* 355.
- 77 See her contribution to Spano's Festschrift: S. Yüksel, "Interplay Between the Principle of Rule of Law and the Process-Based Review" in *Liber Amicorum Robert Spano* 771–780.
- 78 *Exécutief van de Moslims van België v Belgium* (App. Nos 16760/22 and 10 others), judgment of 13 February 2024 (concurring opinion of Judge Yüksel at [5]).
- 79 *Nejdet Atalay v Turkey* (App. No.76224/12), judgment of 19 November 2019 (concurring opinion of Judge Yüksel).
- 80 *Nejdet Atalay* (App. No.76224/12), judgment of 19 November 2019 (concurring opinion of Judge Yüksel).
- 81 *Mehdi Tanrikulu v Turkey* (App. No.9735/12), judgment of 5 May 2020 at [33].
- 82 *Mehdi Tanrikulu* (App. No.9735/12), judgment of 5 May 2020 (joined partly concurring opinion of Judges Bošnjak and Yüksel).
- 83 *Kılıçdaroğlu v Turkey* (App. No.16558/18), judgment of 27 October 2020 at [64].
- 84 *Kılıçdaroğlu* (App. No.16558/18), judgment of 27 October 2020 (partly concurring and partly dissenting opinion of Judge Yüksel at [6]).

- 85 *Kılıçdaroğlu (App. No.16558/18), judgment of 27 October 2020* (partly concurring and partly dissenting opinion of Judge Yüksel at [6]).
- 86 *Kılıçdaroğlu (App. No.16558/18), judgment of 27 October 2020* (partly concurring and partly dissenting opinion of Judge Yüksel at [7] (emphasis added)).
- 87 *Kavala v Turkey (App. No.28749/18), judgment of 10 December 2019* (partly concurring and partly dissenting opinion of Judge Yüksel at [4] (emphasis added)).
- 88 *Mehdi Tanrikulu (App. No.9735/12), judgment of 5 May 2020* (partly dissenting opinion of Judge Yüksel); *Kılıçdaroğlu v Turkey (App. No.16558/18), judgment of 27 October 2020* (partly concurring and partly dissenting opinion of Judge Yüksel at [7]); *Dickinson v Turkey (App. No.25200/11), judgment of 2 February 2021* (partly concurring and partly dissenting opinion of Judge Yüksel).
- 89 *Pişkin v Turkey (App. No.33399/19), judgment of 15 December 2020* (partly dissenting opinion of Judge Yüksel).
- 90 *Tercan v Turkey (App. No.6158/18), judgment of 29 June 2021* (joined partly dissenting opinion of Judges Pejchal and Yüksel); *Mehmet Çiftçi v Turkey (App. No.53208/19), judgment of 16 November 2021* (partly dissenting opinion of Judge Yüksel).
- 91 *Mehdi Tanrikulu (App. No.9735/12), judgment of 5 May 2020* (partly dissenting opinion of Judge Yüksel). See also *Kılıçdaroğlu (App. No.16558/18), judgment of 27 October 2020* (partly concurring and partly dissenting opinion of Judge Yüksel at [7]).
- 92 *Dickinson (App. No.25200/11), judgment of 2 February 2021* (partly concurring and partly dissenting opinion of Judge Yüksel at [3]).
- 93 *Mehmet Hasan Altan v Turkey (App. No.13237/17), judgment of 20 March 2018* (concurring opinion of Judge Spano joined by Judges Bianku, Vučinić, Lemmens and Gričco at [3]); Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) H.R.L.R. 492.
- 94 See for instance *Von Hannover v Germany (No.2) [GC] (App. No.40660/08), judgment of 7 February 2012* at [108f].
- 95 *Şık v Turkey (No.2) (App. No.36493/17), judgment of 24 November 2020* (partly concurring and partly dissenting opinion of Judge Yüksel at [5f]); *Ahmet Hüsrev Altan v Turkey (App. No.13252/17), judgment of 13 April 2021* (dissenting opinion of Judge Yüksel at [16]).
- 96 *Ilıcak v Turkey (No.2) (App. No.1210/17), judgment of 14 December 2021* (partly dissenting opinion of Judge Yüksel)..
- 97 Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) H.R.L.R. 488.

- 98 *Nurcan Bayraktar v Turkey* (App. No.27094/20), judgment of 27 June 2023 at [56].
- 99 *Nurcan Bayraktar* (App. No.27094/20), judgment of 27 June 2023 (concurring opinion of Judge Krenč at [5]).
- 100 *Demirtaş v Turkey* (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020 (partly concurring and partly dissenting opinion of Judge Yüksel at [15]).
- 101 *Akgün v Turkey* (App. No.19699/18), judgment of 20 July 2021 (dissenting opinion of Judge Yüksel).
- 102 *Ilıcak v Turkey* (No.2) (App. No.1210/17), judgment of 14 December 2021 (partly dissenting opinion of Judge Yüksel at [6]).
- 103 *Başer and Özçelik v Turkey* (App. Nos 30694/15 and 30803/15), judgment of 13 September 2022 at [158].
- 104 *Ilıcak v Turkey* (No.2) (App. No.1210/17), judgment of 14 December 2021 (partly dissenting opinion of Judge Yüksel at [6]): "in my opinion, the assessment made by the Constitutional Court cannot be considered arbitrary, and I therefore find it difficult to conclude that there are serious grounds for contradicting the assessment made by this high court"; *Demirtaş and Yüksekdağ Şenoğlu v Turkey* (App. Nos 10207/21 and 10209/21), judgment of 6 June 2023 (dissenting opinion of Judge Yüksel); *Osman and Altay v Turkey* (App. Nos 23782/20 and 40731/20), judgment of 18 July 2023 (joint dissenting opinion of Judges Yüksel and Derencinovic at [5]).
- 105 *Başer and Özçelik* (App. Nos 30694/15 and 30803/15), judgment of 13 September 2022 (partly dissenting opinion of Judge Yüksel at [5]).
- 106 *Başer and Özçelik* (App. Nos 30694/15 and 30803/15), judgment of 13 September 2022 (partly dissenting opinion of Judge Yüksel at [6]).
- 107 *Mehmet Zeki Doğan* (App. No.38114/03), judgment of 6 October 2009.
- 108 *Mehmet Zeki Doğan* (No.2) (App. No.3324/19), judgment of 13 February 2024 at [98].
- 109 *Mehmet Zeki Doğan* (No.2) (App. No.3324/19), judgment of 13 February 2024 (joint dissenting opinion of Judges Yüksel and Derenčinović at [4]).
- 110 *Mehmet Zeki Doğan* (No.2) (App. No.3324/19), judgment of 13 February 2024 (joint dissenting opinion of Judges Yüksel and Derenčinović at [6]–[7]).
- 111 See *Yüksel Yalçınkaya v Turkey* [GC] (App. No.15669/20), judgment of 26 September 2023 at [22].
- 112 See "European Court gives notification to Türkiye of 1,000 applications concerning convictions for terrorism offences based on use of ByLock", Press release issued by the Registrar of the Court, 18 December 2023, ECHR 358 (2023).
- 113 *Akgün* (App. No.19699/18), judgment of 20 July 2021 at [173].

- 114 *Taner Kılıç v Turkey (No.2) (App. No.208/18), judgment of 31 May 2022; Parildak v Turkey (App. No.66375/17), judgment of 19 March 2024 at [81].*
- 115 *Yüksel Yalçinkaya [GC] (App. No.15669/20), judgment of 26 September 2023 at [271].*
- 116 *Akgün (App. No.19699/18), judgment of 20 July 2021 (dissenting opinion of Judge Yüksel); Taner Kılıç (No.2) (App. No.208/18), judgment of 31 May 2022 (partly concurring opinion of Judge Yüksel); Yüksel Yalçinkaya [GC] (App. No.15669/20), judgment of 26 September 2023 (partly dissenting opinion of Judge Yüksel); Parildak (App. No.66375/17), judgment of 19 March 2024 (partly dissenting opinion of Judge Yüksel).*
- 117 *Akgün (App. No.19699/18), judgment of 20 July 2021 (dissenting opinion of Judge Yüksel at [23] and [27]).*
- 118 *Yüksel Yalçinkaya [GC] (App. No.15669/20), judgment of 26 September 2023 (partly dissenting opinion of Judge Yüksel at [3]).*
- 119 *Yüksel Yalçinkaya [GC] (App. No.15669/20), judgment of 26 September 2023 (partly dissenting opinion of Judge Yüksel at [2]).*
- 120 *Ahmet Hüsnü Altan v Turkey (App. No.13252/17), judgment of 13 April 2021 (dissenting opinion of Judge Yüksel at [5] and [9]).*
- 121 K. Scheppele, "Autocratic Legalism" (2018) 85 University of Chicago Law Review 545–583; Çalı, "Autocratic Strategies and the European Court of Human Rights" (2021) 2 European Convention on Human Rights Law Review 18.
- 122 *Khodorkovskiy v Russia (App. No.5829/04), judgment of 31 May 2011 at [255]. See Sabuncu v Turkey (App. No.23199/17), judgment of 10 November 2020 (partly dissenting opinion of Judge Küris at [6]); Kavala v Turkey [GC] (App. No.28749/18), judgment of 11 July 2022 at [169]. See E. Demir-Gürsel, "The limits of the European Court of Human Rights vis-à-vis contestation and authoritarianism: concluding observations" in Philipp Aust and Demir-Gürsel (eds), *The European Court of Human Rights, Current Challenges in Historical Perspective* (2021), p.254.*
- 123 *Mehmet Zeki Doğan (No.2) (App. No.3324/19), judgment of 13 February 2024 (joint dissenting opinion of Judges Yüksel and Derenčinović at [2] (emphasis added)).*
- 124 *Ragıp Zarakolu v Turkey (App. No.15064/12), judgment of 15 September 2020 at [45].*
- 125 *Ragıp Zarakolu (App. No.15064/12), judgment of 15 September 2020 (concurring opinion of Judge Yüksel at [7]).*
- 126 For an overview of [art.18](#), see V. Tzevelekos, "The United Kingdom's Presumption of Derogation from the ECHR Regarding Future Military Operations Overseas: Abuse of Rights, Articles 17 and 18 ECHR, and

à la carte Human Rights Protection" (2019) 22 Austrian Review of International and European Law 137, 163–173. See also the seminal case *Merabishvili v Georgia [GC]* (App. No.72508/13), judgment of 28 November 2017.

- 127 See *Ahmet Hüsrev Altan v Turkey* (App. No.13252/17), judgment of 13 April 2021 (partly dissenting opinion of Judge Küris).
- 128 *Sabuncu v Turkey* (App. No.23199/17), judgment of 10 November 2020; *Şik v Turkey* (No.2) (App. No.36493/17), judgment of 24 November 2020; *Ahmet Hüsrev Altan v Turkey* (App. No.13252/17), judgment of 13 April 2021.
- 129 *Iker Deniz Yücel v Turkey* (App. No.27684/17), judgment of 25 January 2022; *Taner Kılıç v Turkey* (n° 2) (App. No.208/18), judgment of 31 May 2022.
- 130 *Kavala* (App. No.28749/18), judgment of 10 December 2019; *Demirtaş v Turkey* (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020.
- 131 *Kavala* (App. No.28749/18), judgment of 10 December 2019 at [148].
- 132 *Kavala* (App. No.28749/18), judgment of 10 December 2019 (partly concurring and partly dissenting opinion of Judge Yüksel).
- 133 *Demirtaş* (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020 at [434].
- 134 *Demirtaş* (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020 (partly concurring and partly dissenting opinion of Judge Yüksel at [28]).
- 135 *Demirtaş* (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020 at [269].
- 136 *Demirtaş* (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020 (partly concurring and partly dissenting opinion of Judge Yüksel at [8]). See also *Demir v Turkey* (App. No.68136/16), judgment of 4 May 2021 (partly dissenting opinion of Judge Yüksel).
- 137 *Demirtaş* (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020 at [433].
- 138 Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14(3) H.R.L.R. 500; Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) H.R.L.R. 486.
- 139 *Murat Aksoy v Turkey* (App. No.80/17), judgment of 13 April 2021 at [63]. See also *Atilla Taş v Turkey* (App. No.72/17), judgment of 19 January 2021 at [77].
- 140 *Demirtaş* (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020 (partly dissenting opinion of Judge Yüksel joined by Judge Paczolay at [7]).

- 141 *Demirtaş (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020* (partly dissenting opinion of Judge Yüksel joined by Judge Paczolay at [9]): "the majority's conclusion under Article 46 of the Convention does not appear to have been aimed at putting an end to a violation that has been found to exist, given that the Grand Chamber was not called upon to examine the applicant's second detention from the point of view of [Article 5 of the Convention](#), a question that is, I repeat, pending before the Constitutional Court."
- 142 *Kavala (App. No.28749/18), judgment of 10 December 2019* at [240].
- 143 See *Kavala [GC] (App. No.28749/18), judgment of 11 July 2022* at [24] and [157].
- 144 *Kavala [GC] (App. No.28749/18), judgment of 11 July 2022* at [127]. Judge Yüksel insisted on this part of the preamble in *Şenoğlu v Turkey (App. Nos 14332/17 and 12 others), judgment of 8 November 2022* (joined partly dissenting opinion of Judges Kjølbrot and Yüksel at [42]).
- 145 *Kavala [GC] (App. No.28749/18), judgment of 11 July 2022* at [143].
- 146 *Kavala [GC] (App. No.28749/18), judgment of 11 July 2022* at [144].
- 147 *Kavala [GC] (App. No.28749/18), judgment of 11 July 2022* at [145].
- 148 *Kavala [GC] (App. No.28749/18), judgment of 11 July 2022* at [161].
- 149 *Kavala [GC] (App. No.28749/18), judgment of 11 July 2022* at [162].
- 150 *Kavala [GC] (App. No.28749/18), judgment of 11 July 2022* (partly dissenting opinion of Judge Yüksel).
- 151 *Köksal v Turkey (App. No.70478/16), decision of 6 June 2017*. See Ö. Bilgili, "The Controversial Position of the European Court of Human Rights towards the Large-Scale Human Rights Crisis in Turkey in the 'Age of Subsidiarity'" (Master Thesis, University of Strasbourg, 2019); Demir-Gürsel, "The limits of the European Court of Human Rights vis-à-vis contestation and authoritarianism: concluding observations" in Philipp Aust and Demir-Gürsel (eds), *The European Court of Human Rights, Current Challenges in Historical Perspective* (2021), p.253; Madsen "The Narrowing of the European Court of Human Rights?" (2021) 2 European Convention of Human Rights Law Review 201; Çalı, "'To me, fair friend, you can never be old': ECHR at 70" (2021) 81 ZaöRV 912; Kurban, "Authoritarian Resistance and Judicial Complicity: Turkey and The European Court of Human Rights" (2024) 35 European Journal of International Law 370–371.
- 152 For a praise of the Turkish constitutional court "striving to apply faithfully the Court's case law," see *Yüksekdağ Şenoğlu v Turkey (App. Nos 14332/17 and 12 others), judgment of 8 November 2022* (joined partly dissenting opinion of Judges Kjølbrot and Yüksel at [43]).
- 153 Kurban, "Authoritarian Resistance and Judicial Complicity: Turkey and The European Court of Human Rights" (2024) 35 European Journal of International Law 383.

- 154 On this question see *C. Bob, Rights as Weapons* (Princeton: Princeton University Press, 2019), pp.27, 65; F. Mégret, "Human Rights Populism" (2022) 13 *Humanity* 240.
- 155 *Demirtaş v Turkey* (No.2) [GC] (App. No.14305/17), judgment of 22 December 2020 (partly dissenting opinion of Judge Yüksel joined by Judge Paczolay at [5]).
- 156 *Murat Aksoy v Turkey* (App. No.80/17), judgment of 13 April 2021 (partly dissenting opinion of Judge Yüksel at [5]): "*la présente affaire n'est rien de plus qu'un exemple de la volonté des juges de la Cour constitutionnelle de suivre et d'appliquer les normes de la Cour*" ("the present case is nothing more than an example of the will of the judges of the Constitutional Court to follow and apply the standards of the Court").
- 157 *Murat Aksoy v Turkey* (App. No.80/17), judgment of 13 April 2021 (partly dissenting opinion of Judge Yüksel at [10]).
- 158 *Yücel v Turkey* (App. No.27684/17), judgment of 25 January 2022 (joined partly dissenting opinion of Judges Pejchal and Yüksel at [5]).
- 159 Based on a passage from an isolated admissibility decision, Judge Yüksel developed a theory according to which the Court should only recognise the victim status when the sum awarded by the national courts is less than 30% of the sum which the Court would have awarded as just satisfaction. See *Murat Aksoy v Turkey* (App. No.80/17), decision of 13 April 2021 (partly dissenting opinion of Judge Yüksel at [6], which refers to *Becova v Slovakia* (App. No.23788/06), judgment of 18 September 2007). However, this case (which Yüksel erroneously calls *Becova v Slovenia*, and to which she attributes an erroneous application number) did not concern arbitrary detention but the reasonable time requirement under art.6. Furthermore, the Court mentioned the 30% figure without making a principle of it, and the Court added that the Slovak tribunal had also ordered that the case be judged as soon as possible, and that such had indeed been the case.
- 160 *Murat Aksoy v Turkey* (App. No.80/17), judgment of 13 April 2021 (partly dissenting opinion of Judge Yüksel at [10]).
- 161 Çalı, "Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights?" (2018) 35 *Wisconsin International Law Journal* 269.
- 162 See also F. de Londras and K. Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights" (2015) 15(3) *Human Rights Law Review* 523; Ø. Stiansen and E. Voeten, "Backlash and Judicial Restraint: Evidence from the European Court of Human Rights" (2020) 64 *International Studies Quarterly* 770.
- 163 *Hutchinson v United Kingdom* [GC] (App. No.57592/08), judgment of 17 January 2017 (dissenting opinion of Judge Pinto de Albuquerque

- at [38]). See also *Animal Defenders International v United Kingdom* [GC] (App. No.48876/08), judgment of 22 April 2013 (joined dissenting opinion of Judges Ziemeles, Sajó, Kalaydjieva, Vučinić and De Gaetano).
- 164 See for instance K. Dzehtsiarou, "Key Challenges for the Next Era of the European Court of Human Rights" in *Kjølbro, O'Leary and Tsirli (eds), Liber Amicorum Robert Spano* (2022), p.215.
- 165 In the context of [art.14 of the Convention](#), see for instance *Thlimmenos v Greece* (App. No.34369/97), judgment of 6 April 2000: "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."
- 166 Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) H.R.L.R. 493.
- 167 Çalı, "Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights?" (2018) 35 Wisconsin International Law Journal 237 274.
- 168 See *Köksal v Turkey* (App. No.70478/16), decision of 6 June 2017.
- 169 Madsen, "The Narrowing of the European Court of Human Rights?" (2021) 2 European Convention of Human Rights Law Review 206.
- 170 Spano, "Primus Inter Pares, but More Pares than Primus!—Recollections of a Former President of the European Court of Human Rights" (2023) 4(1) ECHR Law Review 19: "It must be made clear that judicial diplomacy of this kind, to be beneficial, is premised on the existence of good faith between willing participants."
- 171 See M. Jégo, "Le juge européen Robert Spano à Istanbul, entre flagornerie et esquivé", *Le Monde*, 9 September 2020.
- 172 See D. Kurban, "Why Robert Spano should resign as President of the ECtHR" (9 September 2020), *Verfassungsblog*, <https://verfassungsblog.de/why-robert-spano-should-resign-as-president-of-the-ecthr/> [Accessed 26 June 2025]; H Kaplankaya, "European Court President Spano's Visit to Turkey and its Repercussions" (28 September 2020), *Strasbourg Observers*, <https://strasbourgobservers.com/2020/09/28/european-court-president-spanos-visit-to-turkey-and-its-repercussions/> [Accessed 26 June 2025].