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Examining the 'Backlash' against the European Court of Human Rights in the United Kingdom

Martha Routen

In particular since *Hirst*, the UK has been a persistent critic of the European Court of Human Rights ('Court'). This contribution shall examine traditional aspects of the UK's legal system and Strasbourg case law in order to review the issues underlying the UK's accusation that the Court has expanded its jurisdiction beyond the original purpose of the European Convention on Human Rights. Furthermore, how the Court reacted thereto by shifting its focus from the substantive to the procedural following the Brighton Declaration: if convinced that the national decision-making body has performed an appropriate proportionality test and incorporated the relevant Strasbourg case law, the Court will abstain from inspecting the merits. This contribution shall demonstrate that, while this new approach may sometimes lead to unjustified leniency, it constitutes a justifable manner of endorsing the principle of subsidiarity in an effort to calm the backlash emanating from Contracting States.

Introduction

Following the two judgments by the European Court of Human Rights ('Court' or 'ECtHR') that made the former Prime Minister, David Cameron, feel 'physically ill',[1] Conservative Party pledged in their 2010 and 2015 manifestos[2] to break the formal link between British courts and the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR' or 'Convention'). Indeed, they argued that 'perverse consequences existed because of the UK's adherence to what some might argue is the world's most effective human rights system.[3] Some viewed and portrayed the ECHR as constantly on the brink of 'effectively declaring war on the British

[1] David Cameron in reaction to the *Hirst* judgment, see Hélène Mulholland and Allegra Stratton, 'UK may be forced to give prisoners the vote in time for May elections' *The Guardian* (1 Debruary 2011) <https://www.theguardian.com/society/2011/feb/01/prisoners-vote-may-elections-compensation-claims> accessed 13 November 2018.

[2] Conservative manifestos 2010 and 2015 at 79 <https://www.conservatives.com/~/media/Files/Manifesto2010> accessed 13 November 2018 and <https://www.bond.org.uk/data/files/Blog/ConservativeManifesto2015.pdf> accessed 13 November 2018, 60.

[3] See David Cameron's speech to the Centre for Policy Studies, 'Balancing freedom and security – a modern British Bill of Rights' *The Guardian* (26 June 2006) <https://www.theguardian.com/politics/2006/jun/26/conservatives.constitution> accessed 13 November 2018.

establishment' and consisting of judges with 'an addiction to power'.[4] However, tabloid newspapers and politicians have not been alone in voicing their dissatisfaction, as members of the UK's own judiciary have claimed that the Court has been 'unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Contracting States'[5] when interpreting the ECHR.[6] Indeed, they argue that the Convention was originally intended as a mere 'mission statement'[7] and 'safeguard against despotism'[8] in a joint effort to avoid the repetition of grievous human rights violations committed during World War II. Many in the UK thus criticise the Court for exceeding its competences by interfering with domestic issues and assuming an unwarranted legislative role. This contribution shall examine the reasons leading to this dissatisfaction by addressing aspects of the UK legal system as well as selected cases brought against the UK. Subsequently, it shall examine the manner in which the ECHR has reacted to this criticism within its jurisprudence in order to deal with the potentially destabilising hostility directed at its institution by the UK and other Contracting States.

1. Why was there backlash against the Court in the UK?

Over the past few decades, various judgments handed down by the European Court of Human Rights which dealt primarily with politically sensitive issues, namely national security, have caused increasing outrage within British politics, some of the judiciary and members of the public. The Court was accused of 'aggrandising its jurisdiction' far beyond the range that the drafters of the Convention had envisaged and of too readily substituting its rulings with decisions made by democratically elected representatives in the British Parliament.[9] The indignation escalated to the extent that, notwithstanding its legal obligation to abide by final judgments as per Article 46(1) ECHR ('Binding force and execution of judgments'), the UK Government refused to implement the *Hirst* judgment concerning prisoner voting rights. Although the increasing dissatisfaction towards the Court was in part shared with other other founding States[10] such as Belgium[11] and the Netherlands,[12] the UK was especially vocal in its criticism and played

[4] James Slack, 'The power-addict judges in Strasbourg HAD to let us deport Abu Hamza to keep Britain under their thumb' *Mail Online* (11 April 2012) <https://www.dailymail.co.uk/debate/article-2128135/Strasbourg-HAD-let-deport-Abu-Hamza-avoid-war-British-establishment.html> accessed 13 November 2018.

[5] Leonard Hoffman, 'The universality of human rights' (2009) LQR 416, 424.

[6] (unamended text) (Council of Europe) 213 UNTS 222, ETS No 5, UN Reg No I-2889.

[7] Hoffmann (n 5) 417.

[8] Lord Sumption, 'The Limits of Law' (27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013) 7 <https://www.supremecourt.uk/docs/speech-131120.pdf> accessed 13 November 2018.

[9] Leonard Hoffman, 'The universality of human rights' (2009) LQR 416, 424.

[10] Although criticism has also been voiced by non-founding States such as Switzerland, see Astrid Epine, 'Zum Verhältnis von Völkerrecht und innerstaatlichem Recht in der Schweiz: status quo und aktuelle Diskussionslinien' (*Verfassungsblog* 9 December 2014) <https://verfassungsblog.de/zum-verhaeltnis-von-voelkerrecht-und-innerstaatlichem-recht-der-schweiz-status-quo-und-aktuelle-diskussionslinien/> accessed 13 November 2018.

[11] See eg Marc Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers' (2007) Inter-Am Eur Hum Rights 3, 3 ff.

[12] The Dutch politician Ivo Opstelten criticises judges at the Court for too readily overturning decisions taken by democratically elected representatives in domestic parliaments in the foreword to 'The European Court of Human Rights and its Discontents'; more generally on criticism from the Netherlands see Barbara Oomen, 'A serious case of Strasbourg-bashing? An

a key role in advancing certain reform changes to the Court during its six-month Chairmanship of the Committee of Ministers of the Council of Europe.

Apart from the *Hirst* case - which itself developed into an almost never-ending saga lasting until 2018 – there are notable cases that have arguably caused national outrage. For one, the *Abu Qatada* case prevented the UK Government from deporting the suspected terrorist to Jordan in 2012.[13] Yet this case is not alone as, there are number of similar cases relating to the deportation of non-nationals with criminal records. These cases occurred when judges in the UK were already subject to accusations of 'second-guess(ing) Parliament' when examining human rights standards against the Convention and Strasbourg case law.[14] Although not necessarily rooted in the Court per se rather than within the UK domestic sphere, the enactment of the Human Rights Act 1998 ('HRA 1998'), the individual right of petition to the Court and the ensuing recalibration of power between the UK Parliament and courts caused wide-spread criticism of the ECtHR. Furthermore, the widely differing views as to the purpose and extent of the Convention on the domestic plane and within Strasbourg could provide a possible explanation as to the backlash against the Court.

2. The Human Rights Act 1998

The role of the British courts and the importance of Parliament has changed considerably with the enactment of the HRA 1998 and the right of individual petition to the Court. Under the highly traditional and long-standing principle of parliamentary sovereignty, Acts of Parliament are considered the highest form of law. Judicial legislative review is thus not permitted and, in any event, largely obstructed due to the legislative process in general traditionally being regarded as non-justiciable. On a domestic level, differences are made between judicial legislative and judicial administrative review. While the former is, as already mentioned, incompatible with parliamentary sovereignty, the latter is permitted. However, apart from the exception of standards pertaining to 'Wednesbury unreasonableness', judicial administrative review is primarily concerned with procedure and legitimacy rather than substance. Thus, before the introduction of supranational European law (be it the Convention or European Union law which, for current purposes, need not be discussed), the UK courts had very little capacity to opinionate on the purpose or validity of legislation.

The HRA 1998, however, obliges the courts per Section 3(1) to examine the compatability of legislation with the Convention. In effect, courts are thus obliged to scrutinise and question Parliament's will when drafting the Act of Parliament in question, in order to conclude whether or not it can be deemed proportionate under the Convention. The Courts are thereby allocated increased substantive powers vis-à-vis Parliament than

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evaluation of the debates on the legitimacy of the European Court of Human Rights in the Netherlands' (2016) IJHR, 407.

[13] *Othman (Abu Qatada) v UK* App no 8139/09 (ECtHR 9 May 2012).

[14] See Michael Howard as quoted in Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights', ssnr August 17, 2018: https://ecpr.eu/Filestore/PaperProposal/f99b79f8-cd8d-444b-985a-4a9dd5ac02b7.pdf, 8 accessed 28 February 2019.

prior to the HRA 1998 – an approach that would formerly have been constitutionally unacceptable in the UK.[15] Moreover, according to Section 4 of the HRA 1998, the UK Supreme Court may issue a 'Declaration of Incompatability' if it comes to the conclusion that UK legislation is incompatible with the Convention. Although such a declaration does not render the legislation invalid, it prompts Parliament to take action and potentially change the legislation. Furthermore, when inspecting legislation's standards against those of the Convention, the courts habitually take parliamentary debates into account, contravening UK tradition.[16]

Thus, the HRA 1998 grants the UK courts futher-reaching powers in the realm of human rights law than is customary under common law and parliamentary sovereignty. As such, politicians have referred to 'bringing rights home' when promoting the idea of withdrawing from the Convention and replacing the HRA 1998 with a British Bill of Rights, as they regard Strasbourg as gaining too much influence on domestic issues in this manner.

3. The Role of the ECHR

Besides this recalibration of power between the institutions, it appears that a further reason for the backlash against many rulings emanating from Strasbourg in the UK are the diverging opinions as to the original purpose and extent of the Covention and therefore similarly the legitimate range and competence of the Court. The Convention, which was drafted within the Council of Europe and opened for signing in 1950, came into force in 1953.[17] As previously stated, the Convention was at the time regarded rather as a safeguard against grievous human rights violations than a legally binding instrument entailing obligations.[18] The UK, which played a substantial role in the drafting process, was the first State to ratify the Convention and appears to have been unaware that it would develop such as to have a demonstrable impact on the domestic constitutional and legal system.[19] Hersch Lauterpacht, conversely, recognised halfway through the Convention's negotiations that the Court – 'freed from illogical and incongruous limitations'[20] – would have the authority to review legislative Acts of Parliament and harbour powers that would go 'substantially beyond (those) entrusted to the Supreme Court of the United States'.[21] However, it was under the aforementioned assumption in regard to the Convention's potential scope that the UK accepted the then optional right of individual petition to and jurisdiction of the Court in 1966[22] and continuously renewed the former.[23] Whilst the Court gained importance in the course of the 70s and issued many significant cases, the British contemporaneously became

[15] Janneke Gerards und Eva Brems, '*Procedural Review in European Fundamental Rights cases*' (Cambridge 2017) 17.
[16] ibid.
[17] Ed Bates, *The Evolution of the European Convention on Human Rights – From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford 2010) 5.
[18] Lord Sumption (n 8) 7.
[19] Ed Bates, 'British sovereignty and the European Court of Human Rights' (2012) LQR 382, 385.
[20] Eg no individual right of petition to the Court.
[21] Hersch Lauterpacht, *International Law and Human Rights* (Stevens 1950) 452-453.
[22] Bates (n 19) 393 ff.
[23] Bates, *The Evolution of the European Convention on Human Rights* (n 17) 12.

frustrated with the European Commission of Human Rights ('HR Commission').[24] Against the backdrop of the UK's conjecture in regard to the Convention's range of influence, the HR Commission and the UK disagreed on how the Convention was to be interpreted.[25] The issue was foreshadowed in *Applications of East African Asians v UK ('East African Asians')*[26] and subsequently climaxed in the seminal case *Golder v UK* ('*Golder*'),[27] which laid the foundations of the interpretive principles that would be employed by the Court.[28] In *Tyrer v UK ('Tyrer')*[29] the Court introduced the 'living instrument' approach, ie interpretation of the ECHR that places weight on present-day conditions in order to fulfil the abstract aim[30] of protecting the individuals' rights in a changing world.[31] The UK's dissatisfaction with this approach persisted and erupted anew in *Hirst v UK ('Hirst')*[32] more than two decades later.

Golder

In *Golder*, a prisoner had been denied access to consult his solicitor in order to discuss a potential libel suit against a prison officer and claimed a violation of his right of access to court pursuant to Article 6 ECHR ('Right to a fair trial').[33] As this right is not explicitly referenced in the relevant article, the legal question was whether the right is implied in Article 6 ECHR and should thus be read into it, or whether the enumerated obligations set upon the Contracting States in Article 6 ECHR are exhaustive.[34]

The UK Government submitted that the expressions enshrined in Article 6 ECHR such as 'fair and public hearing' clearly presuppose proceedings already pending before a court, and that the explicit mention of a right of access to a court in Articles 5(4) ('Right to liberty and security') and 13 ECHR ('Right to an effective remedy') rendered the omission thereof in Article 6 ECHR intentional.[35] It argued that the HR Commission had misconstrued the applicable rules of interpretation by paying heightened attention to the 'special nature' of the treaty as a human rights treaty. Further that, regardless of the merits of such a right as the one at issue, the question was what the Contracting Parties had decided on.[36] In essence, the UK Government argued that the HM Commission had interpreted the ECHR more like a domestic Bill of Rights rather than an international treaty imposing limitations on state sovereignty.[37] By implying the right in question, the

[24] ibid 286.
[25] Bates, *The Evolution of the European Convention on Human Rights* (n 17) 286.
[26] ECtHR 14 December 1973 (unreported at the time but printed in (1994) 15 HRLJ 215).
[27] (1975) Series A no 18.
[28] George Letsas, 'Strasbourg's interpretive ethic: lessons for the international lawyer' (2010) EJIL 509, 515.
[29] (1978) Series A no 26.
[30] The distinction between abstract and concrete intentions is taken from Ronald Dworkin, *A Matter of Principle* (Oxford 1985) ch 2.
[31] George Letsas, 'The truth in autonomous concepts: how to interpret the ECHR' (2004) EJIL 279, 299; also in 'Strasbourg's interpretive ethic' (n 28) 536-537.
[32] App no 74025/01 (ECtHR 6 October 2005)
[33] *Golder* (n 27) 25.
[34] ibid.
[35] *Golder* (n 27) 32-33.
[36] Bates, *The Evolution of the European Convention on Human Rights* (n 11) 297.
[37] ibid.

Court would be overstepping a line and assuming a legislative role.[38]

The Court agreed with the HR Commission's view and ruled in favour of the Applicant. In reference to the Vienna Convention on the Law of Treaties ('VCLT') that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,[39] it agreed with the HR Commission that, as a human rights treaty aimed towards the protection of the individuals' rights rather than governing obligations between sovereign States, the Convention's object and purpose was closely linked to the rule of law and effective rights protection.[40] Were the right in question to be understood as applying exclusively to proceedings already initiated before a court, States could – hypothetically speaking – arbitrarily discard of their courts.[41] Thus, an interpretation according to Article 31(1) VCLT lead to the right of access to court.[42] It adamantly stated that the interpretation was reached pursuant to Article 31(1) VCLT without needing to resort to 'supplementary means of interpretation' as envisaged by Article 32 VCLT.[43]

Tyrer

On the facts, the teenaged Applicant in *Tyrer* had been subjected to judicial corporal punishment on the Isle of Man for assaulting a fellow schoolmate.[44] The legal issue was whether the measures in question amounted to inhumane and degrading treatment in the sense of Article 3 ECHR.[45] Unconvinced by the UK Government's argument that the punishment at issue was not in violation of the ECHR because 'it did not outrage public opinion in the Island', the Court famously held that 'it must also recall that the Convention is a *living instrument* which (…) must be interpreted in the light of present-day conditions'.[46]

These cases taken in combination demonstrate the divergence of opinion between the UK and the Court: whilst the Court regards the Convention as a 'living instrument' that is intended to protect enforceable human rights as appropriate considering the current political and social climate, voices within the UK regard it foremost as a safeguard against grievous human rights violations. This issue came to light especially in regard to cases concerning the deportation of suspected terrorists, as the UK regarded the Court's far-reaching adjudication in the area of national security which deeply rooted in state sovereignty as judicial activism which went far beyond what the drafters of the Convention had in mind.

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[38] ibid.
[39] 1155 UNTS 331, Article 31(1).
[40] *Golder* (n 27) 33-34. Although the VCLT was not in force at the time, the Court regarded Article 31(1) VCLT as codifying general principles of international law, see *Golder* (n 27) 29.
[41] *Golder* (n 27) 35.
[42] ibid 36.
[43] *Golder* (n 27) 36.
[44] *Tyrer* (n 29) 9-11.
[45] ibid 28.
[46] ibid 31.

4. The Deportation of Suspected Terrorists

As the UK is often unwilling or unable to prosecute suspected terrorists, its counterterrorism strategy has instead been their deportation.[47] However, the ECHR restricts the circumstances in which the UK may do so.[48] While the foundations for these restrictions were laid in *Soering v UK* ('*Soering*')[49] and *Chahal v UK* ('*Chahal*'), the UK's frustration intensified when the Court denied that national security considerations could impact the absolute nature of Article 3 ECHR when applied extraterritorially, even in times of terrorist threats.

Soering/Chahal Principle

In *Soering*, the Court held that if the UK extradited the Applicant who was suspected of murder in Virginia (USA), the 'deathrow phenomenon' it would thereby expose him to would cross the threshold of Article 3 ECHR.[50] Thus, Article 3 ECHR could have extraterritorial effect.[51] In *Chahal*, a case concerning the deportation of a foreign national suspected of terrorist involvement, the Court acknowledged the difficulties faced by States in protecting their communities from terrorism, but rejected the Government's argument that Article 3 ECHR entails an implied limitation in deportation cases when such removal was required on national security grounds.[52] It thus confirmed that, as soon as deportation would expose the individual to a 'real risk' of torture in the receiving State, the deportation would breach Article 3 ECHR.[53]

Saadi v Italy ('Saadi')

In the aftermath of 9/11 and 7/7, the UK exercised its right to intervene in *Saadi*, requesting the Court reconsider its strict approach in *Chahal* and allow national security interests to be weighed against the 'real risk' the Applicant may face upon extradition.[54] The Court, however, reaffirmed the absolute character of Article 3 ECHR.[55]

Othman (Abu Qatada) v UK ('Qatada')

In 2012, the UK was prevented from extraditing high-profile suspected terrorist Abu Qatada to Jordan.[56] In its judgement, the Court clarified when a Memorandum of Understanding ('MOU') between States can alleviate the 'real risk' of behaviour that

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[47] Mark Elliott, 'United Kingdom: The "war on terror," UK-style – The detention and deportation of suspected terrorists' (2010) I•CON 131, 132.
[48] ibid.
[49] App no 14038/88 (ECtHR 07 July 1989).
[50] ibid 111.
[51] ibid 91.
[52] *Chahal v UK,* 15 November 1996, Reports of Judgments and Decisions 1996-V, paras 79-81.
[53] ibid 74.
[54] [GC] App no 37201/06 (ECtHR 28 February 2008) paras 117-122; the UK also intervened in *Ramzy v Netherlands* (striking out) App no 25424/05 (ECtHR 20 July 2010) and *A v Netherlands* App no 4900/06 (ECtHR 20 July 2010).
[55] *Saadi* (n 54) para 138.
[56] See *Othman (Abu Qatada)* (n 13).

would otherwise preclude extradition, as well as its 'tentative' jurisprudence[57] regarding under which circumstances subjecting an individual to the risk of an unfair trial by extradition would breach Article 6 ECHR. It further defined 'flagrant denial of justice' and stated that the same burden of proof applies as in regards Article 3 ECHR cases, against which the UK had tried to argue.[58] On the facts, it concluded that the MOU between the UK and Jordan alleviated the 'real risk' of torture, but that the sentences already passed on the Applicant in absentia amounted to a 'flagrant denial of justice'.[59]

Post 9/11

Consequently, as most of the foreign nationals the UK suspect of terrorist involvement originate from States in which they would face a 'real risk' of treatment contrary to Articles 3 and 6 ECHR, the UK is prevented from extraditing them pursuant to the *Soering/Chahal* principle,[60] which, as confirmed in *Saadi*, equally applies in times of an alleged[61] threat to the life of the nation and precludes national interests as an influencing factor. Despite the UK's best efforts to conquer the so-called 'war on terror' by passing the 'most draconian legislation Parliament has passed in peacetime in over a century',[62] human rights and the Court allegedly continuously 'stopped (Britain) from (deporting terrorist suspects) to their own countries'.[63] Furthermore, the UK's subtle attempt in *RB (Algeria) v. Home Secretary*[64] to de facto raise the threshold of risk precluding deportation to a State was overturned by the Court in *Qatada*.[65]

5. The 'Backlash' Against the Court

The strong reaction to cases such as those discussed above has been referred to as 'backlash'. The concept of 'backlash' is used to refer to resistance exercised against ICs by Contracting States which constitutes more fundamental defiance aimed at the regime itself, thus exceeding mere criticism in regard to the development of the law within the boundaries of the system (also referred to as 'pushback').[66] While the latter is effected,

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[57] See *RB (Algeria) v Home Secretary* [2009] UKHL 10 at 141 (Lord Phillips).
[58] *Othman* (*Qatada)* (n 13) 260.
[59] ibid 262.
[60] Elliott (n 47) 133.
[61] The UK was the only Contracting State to enter into a derogation under Article 15 ECHR following 9/11.
[62] Adam Tomkins, 'Legislating against terror: The Anti-terrorism, Crime and Security Act 2001' (2002) PL 205, 205.
[63] Theresay May before the general election in 2017: Christpopher Hope and Gordon Rayner, 'Theresa May: I'll tear up human rights laws so we can deport terrorists' *The Telegraph* (6 June 2017) <https://www.telegraph.co.uk/news/2017/06/06/theresa-may-will-not-let-human-rights-act-stop-bringing-new/> accessed 13 November 2018.
[64] [2009] UKHL 10.
[65] Elliott (n 47) 139.
[66] See Mikael Rask Madsen and others, 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) Int J Law Context 197, 199-200; Wayne Sandholtz and others, 'Backlash and international human rights courts' in (Brysk/Stohl eds), *Contracting Human Rights: Crisis, Accountability, and Opportunity* (Cheltenham 2018) 159; Ximena Soley and Silvia Steiniger, 'Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights' (2018) Int J Law Context 237, 240; David Caron and Esme Shirlow, 'Unpacking the Complexities of Backlash and Identifying its Unintended Consequences'

for example, by criticism of or non-compliance with specific judgments, the nature of the former extends past a certain threshold of antagonism and is put into effect by, for example, withdrawing or threatening to withdraw from the court's jurisdiction.[67] In comparison to the very limited consequences of pushback, the aspired consequence of backlash is to minimise the (procedural or substantial) powers of the institution itself.[68]

Pushback to Backlash

Up until the early 2000s, dissatisfaction towards the Court from within the UK manifested in adverse reactions such as threatening not to renew the individual petition system in the 70s,[69] critical comments by politicians or the judiciary,[70] and above all the prolonged non-compliance with *Hirst*. Applying the aforementioned categories, these reactions can, however, be categorised as mere pushback within the boundaries of the system. It was not until the Court decided upon politically sensitive spheres such as prisoner voting rights and national security that the situation escalated. Some commentators name *Hirst* as the trigger that initiated the crusade involving the Conservatives pledging to withdraw from the Convention in their 2010 and 2015 manifestos and eventually culminating, encouraged by criticism from other Contracting States, in the 2012 Brighton Declaration[71] – two actions that can be categorised as backlash, again in application of the aforementioned categories.

The Brighton Declaration

The Brighton Declaration,[72] a highly influencial declaration adopted by all 47 Contracting States after a High Conference at the initiative of the UK Chairmanship of the Committee of Ministers of the Council of Europe in 2012 built on the Interlaken and Izmir Declarations and aimed primarily at tackling the Court's case backlog issue. Since the 90s when the Court opened up to the whole of Europe (apart from Belarus), it has become increasingly overwhelmed by numerous (mostly unfounded) applications being made by approximately 800 million people from 47 jurisdictions.[73] The declaration thus further supports an array of measures that had already been put in place in an effort to

(*EJIL: Talk!* August 25 2016) <https://www.ejiltalk.org/unpacking-the-complexities-of-backlash-and-identifying-its-unintended-consequences/> accessed 13 November 2018.

[67] Sandholtz and others (n 66) 213.

[68] Madsen and others (n 66) 206.

[69] Bates, 'British sovereignty and the European Court of Human Rights' (n 13) 393 ff.

[70] Although the dissatisfaction within the senior judiciary was not homogeneous, see Ed Bates, 'The Senior Judiciary on 'Strasbourg' – More Supportive Than Some Would Have You Believe' (*UK Constitutional Association* 28 May 2015) <https://ukconstitutionallaw.org/2015/05/28/ed-bates-the-senior-judiciary-on-strasbourg-more-supportive-than-some-would-have-you-believe/> accessed 13 November 2018.

[71] cf Sandholtz and others (n 66) 160; Madsen and others (n 66) 213; Mikael Rask Madsen, 'The Challenging Authority of the European Court of Human Right: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) Law & Contemp Probs 141, 144.

[72] <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 13 November 2018.

[73] Ed Bates, 'The Brighton Declaration and the "meddling court"' (UK Human Rights Blog 22 April 2012) <https://ukhumanrightsblog.com/2012/04/22/the-brighton-declaration-and-the-meddling-court/> accessed 28 February 2019.

increase the Court's efficacy, such as the successful implementation of Protocol 14[74] (which, due to resistance from Russia, did not come into force until 2014 despite being completed in 2004). It furthermore introduced the possibility of the Court being able to deliver advisory opinions,[75] a feature that was later introduced by Protocol 16 to the Convention,[76] which entered into force in 2018.

However, although most of the provisions of the Brighton Declaration are uncontroversial,[77] it was nevertheless the first declaration that directly criticised the quality of judgments and judges in Strasbourg and aimed at reform, its main message being that national authorities (be they courts or parliaments) should play a stronger role in interpreting and developing the Convention.[78] As a result, references to the principle of subsidiarity and the doctrine of the margin of appreciation were inserted into the preamble to the Convention.[79] The subsequent High Conferences in Brussels and Copenhagen also resulted in Declarations that did not, however, include many novel aspects.[80] Neither the UK's draft of the Brighton Declaration, nor the Danish draft of the Copenhagen Declaration – both of which contained more drastic measures than the final versions entailed and aimed at drastically decreasing the Court's powers – were implemented.[81]

Criticism from Other Contracting States

Apart from the apparent wish for strong reform from the Danes, dissatisfaction has surprisingly also emanated from other founding States,[82] such as Belgium[83] and the Netherlands.[84] However, the reforms following the Brighton Declaration seemed to

[74] Protocol No 14 to the ECHR, SEV Nr.194 https://www.coe.int/de/web/conventions/full-list/-/conventions/rms/0900001680083711.
[75] See para 12 of the Brighton Declaration.
[76] Protocol No 16 to the ECHR, CETS214.
[77] Ed Bates, 'The Brighton Declaration and the "meddling court"' (UK Human Rights Blog 22 April 2012) <https://ukhumanrightsblog.com/2012/04/22/the-brighton-declaration-and-the-meddling-court/> accessed 28 February 2019.
[78] Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) JIDS 199, 200; Oddný Mjöll Arnardóttir, 'The Brighton Aftermath and the Changing Role of the European Court of Human Rights' (2018) JIDS 223, 224.
[79] Protocol No 15 to the ECHR, CETS 213, 24.VI.2013.
[80] Geir Ulfstein and Andreas Follesdal, 'Copenhagen – much ado about litte?' (EJIL: Talk! 14 April 2018) <https://www.ejiltalk.org/copenhagen-much-ado-about-little/> accessed 13 November 2018.
[81] The Danish draft of the Copenhagen Declaration was referred to be driven not by 'States' lack of respect for human rights, but the Court's interference in domestic politics (…)', Andreas Follesdahl and Ulfstein, Geir: The Draft Copenhagen Declaration: Whose Responsibility and Dialogue? (*EJIL: Talk!* 22 February) <https://www.ejiltalk.org/the-draft-copenhagen-declaration-whose-responsibility-and-dialogue/> accessed 13 November 2018.
[82] Although criticism has also been voiced by non-founding States such as Switzerland, see Astrid Epine, 'Zum Verhältnis von Völkerrecht und innerstaatlichem Recht in der Schweiz: status quo und aktuelle Diskussionslinien' (*Verfassungsblog* 9 December 2014) <https://verfassungsblog.de/zum-verhaeltnis-von-voelkerrecht-und-innerstaatlichem-recht-der-schweiz-status-quo-und-aktuelle-diskussionslinien/> accessed 13 November 2018.
[83] See eg Marc Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers' (2007) Inter-Am Eur Hum Rights 3, 3 ff.
[84] See criticism by Dutch politician Ivo Opstelten (n 12); more generally on criticism from the Netherlands see Barbara Oomen (n 12).

primarily represent an 'odd, informal alliance' between the UK and Russia as the two most outspoken critics of the Court.[85] Russia even adopted legislation granting the Russian Constitutional Court the power to declare judgments of human rights bodies 'impossible to implement' if it stood in contradiction to the Russian Constitution,[86] which the Russian Constitutional Court took advantage of in respect to *Anchugov and Gladkov v Russia*.[87]

6. The Court's Reaction

According to a recently published analysis of resistance to ICs, the ICs can deploy various techniques to preemptively avert or mitigate the effect of pushback or backlash.[88] These include, inter alia, exercising 'legal diplomacy' (ie exercising caution in delivering judgements by taking potential political and financial consequences for Contracting States into consideration), extensive and or comparative legal reasoning,[89] or developing doctrines of subsidiarity to allow deference to national courts.[90]

Reacting to the 'Pushback'

Prior to the culmination of the Contracting States' dissatisfaction in the Brighton Declaration, various techniques as described in the aforementioned analysis can be discerned in the Court's actions. For example, in its 'sleeping beauty'[91] phase during its first decade, the Court decided on a limited amount of cases and when it did, it did so in a state-friendly, legally diplomatic way,[92] in order to establish itself as a legitimate court and secure States' cooperation.[93] Furthermore, in *Hirst*, the Court exceptionally[94] relied on international, specifically Canadian and South African, case law.[95] It has also recently been argued that the Court employs 'incrementalism' when faced by a relatively new and potentially sensitive issue, ie that it avoids giving a broad statement on the substantive right per se by limiting its ruling to the facts of the case and then incrementally clarifying its position in subsequent case law,[96] such as in *A, B & C v Ireland*.[97] Here, the Court held that Ireland's extremely restrictive abortion laws were

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[85] Madsen, 'Cold War Legal Diplomacy' (n 71) 169-170.
[86] Federal Law No.7-FKZ of December 14, 2015, on Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation.
[87] App nos 11157/04 and 15162/05 (ECtHR 4 July 2013).
[88] ibid 212.
[89] See eg *Banković and Others v Belgium and Others* Dec no 52207/99 (ECtHR 12 December 2001).
[90] Madsen and others (n 66) 212.
[91] Jochen Frowein, 'European Integration through Fundamental Rights' (1984) U Mich JL 5, 8.
[92] Eg in its first case *Lawless v Ireland (no 1)* (1960) Series A no 1.
[93] Madsen, 'Cold War Legal Diplomacy' (n 71) 148.
[94] Opposing its 'transnationalist reputation', the Court seldom relies on judgments by other courts (Erik Voeten, 'Borrowing and Non borrowing among International Courts' [2010] J Legal Stud 547, 547.)
[95] *Hirst* (n 32) 35-39, perhaps in an endeavour to 'improve' and legitimise the highly political judgment (cf Erik Voeten, 'Borrowing and Non borrowing among International Courts' (2010) J Legal Stud 547, 550). which, however, the dissenting judges did not find convincing (see Joint Dissenting Opinion of judes Wildhaber, Costa, Lorenzen, Kovler and Jebens at *Hirst* (n 32) para 6).
[96] Jannecke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) Hum Rts L Rev 495, 507-508.
[97] ibid 508.

justifiable and Convention compliant.[98] It based its ruling on an alleged consensus within Ireland in regard to the abortion regime that was 'based (…) on profound moral and ethical values' which trumped European consensus tending towards a much more liberal regime.[99] This reasoning may seem contrary to the Court's stance in *Tyrer* and *Dudgeon*[100] that the Convention is a 'living instrument', but serves a more diplomatic function.[101]

Reacting to the Backlash

Since the Brighton Declaration, the Court has demonstrated a tendency of increasingly employing a 'democracy-enhancing approach'[102] to proportionality assessments, in an attempt to attribute responsibility to national authorities and thus respect the principle of subsidiarity.[103] To an extent, this approach mirrors the Court's stance on its jurisdiction vis-à-vis European Union law as defined in *Bosphorus*[104]: If the national bodies guarantee the same level of protection by conscientiously balancing the competing interests at stake, the Court need not repeat the entire process *à nouveau*.[105] As such, despite its controversial nature of said approach,[106] the Court has been progressively granting (partial) deference to decisions of domestic parliaments or courts if it is convinced that the national authority has sufficiently debated the issue.[107] This method has been termed 'procedural proportionality review'[108] and constitutes a development of the 'systemic' rather than the 'normative' margin of appreciation.[109] This technique is not new – the Court has continuously employed the doctrine of the margin of appreciation in its jurisprudence in order to accommodate the fact that Convention

[98] *A, B & C v Ireland* App no 25579/05 (ECtHR 16 December 2010).
[99] ibid 185.
[100] *Dudgeon v UK* App no 7525/76 (ECtHR 24 February 1983).
[101] Fiona De Londras and Kanstantsin Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, A, B & C v Ireland, Decision of 17 December 2010' (2013) ICLQ 250, 258 f.
[102] Robert Spanó, 'Universality or Diversity of Human Rights – Strasbourg in the Age of Subsidiarity' (2014) Hum Rts L Rev, 487, 487; Janneke Gerards und Eva Brems (n 15) 2; Gerards (n 96) 497.
[103] Gerards and Brems (n 15) 92.
[104] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* App no 45036/98 (ECtHR 30 June 2005).
[105] Arnardóttir, 'The Brighton Aftermath' (n 78) 233; *Bosphorus* (n 104).
[106] see eg George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) OJIL 705, 720 f; However, in favour of the Court conducting procedural proportionality review eg: Janneke Gerards, 'The Prism of Fundamental Rights' (2012) Eu Const L Rev 173, 197 and Merris Amos, 'Separating human rights adjudication from judicial review' (2007) EHRR 679, 696 f.
[107] Patricia Popelier and Catherine Van de Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) LJIL 5, 10.
[108] Tor-Inge Harbo, 'Introducing Procedural Proportionality Review in European Law' (2017) LJIL 25, 25; Also referred to as 'procedural rationality review': Popelier and Van de Heyning (n 107) 5; Or just 'procedural review': Çalı Başak, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) Wis Int'l LJ 237, 256-257; No specific term used: Robert Spanó, 'Universality or Diversity of Human Rights – Strasbourg in the Age of Subsidiarity' (2014) Hum Rts L Rev, 487, 498.
[109] Some regard the procedural proportionality approach as a separate development to the margin of appreciation (see eg Björnstjern Baade, 'The ECtHR's Role as a Guardian of Discourse: Safeguarding a Decision-Making Process Based on Well-Established Standards, Practical Rationality, and Facts' (2018) LJIL 335, 337); This discrepancy can be explained by the 'confusion and controversy' surrounding the margin of appreciation due to the Court's failure to distinguish between its 'normative' and 'procedural' function (see Letsas, 'Two Concepts' (n 106) 706).

rights at the domestic level can be appropriately implemented in many different ways.[110] However, as a continuation of the systemic aspect of the margin of appreciation, the proportionality assessment is based on factors other than substance.[111] Rather than conducting its own proportionality assessment on the substance itself, the Court instead assesses whether and to which extent the national authorities have done so already.[112] Therefore, sufficient debate on the issue by the domestic decision-making body can act - to an extent - in an exclusionary manner: the Court will not engage normatively with the question at hand and hence removes itself from the equation in regard to the substantive assessment,[113] although the Court will tend to mention a wide range or arguments including substantive, thereby not appearing to give more or less weight to either type of argument.[114] The Court indeed appears susceptible to critical discourse and able to adapt appropriately.[115] It should be noted, however, that any alleged causality between backlash from Contracting States and developments in the Court's case law is founded upon research usually based on cases selected due to their outcome, which generates an obvious bias and inflates the role of critical States such as the UK.[116]

7. Appeasing the UK in the 'Age of Subsidiarity'?

In light of this development, Judge Spanó referred to the current phase as the 'Age of Subsidiarity' in 2014.[117] According to an empirical assessment of the Court's judgments issued between 2009 and 2015, the Court[118] has indeed made increasing reference to the 'margin of appreciation' and 'subsidiarity' in general.[119] However, statistics show that more established Western Contracting States are twice as successful when evoking either element in proceedings against the Court as new Eastern Contracting States.[120] The Court has in fact been accused of having 'double standards' in light of allegedly issuing harder judgments against developing States than against Western European States,[121] although this tendency in the diverging success rate could also be a result of Western Contracting States being more likely to provide stability in legal processes.[122]

In light of potential double standards, there is trepidation that the Court may be using its procedural proportionality review approach in order to appease critical Contracting

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[110] Spanó (n 108) 492.
[111] Oddný Mjöll Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) EuConst 27, 45 f.
[112] ibid.
[113] See eg in *Someşan and Butiuc v Romania* App no 45543/04 (ECtHR 19 November 2013) para 29: 'It is not the Court's intention to speculate on the result of the domestic proceedings in the current case'.
[114] Gerards and Brems (n 15) 149.
[115] Madsen, 'Rebalancing European Human Rights' (n 78) 202-221.
[116] Madsen and others (n 66) 201.
[117] (n 108) 487.
[118] The increased references are primarily attributable to ordinary Chambers with references in the Grand Chamber remaining more stable (Madsen, 'Rebalancing European Human Rights' (n 78) 220).
[119] ibid.
[120] ibid 221.
[121] see Shai Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) Chi J Int'l L 115 f.
[122] Madsen, 'Rebalancing European Human Rights' (n 78) 221.

States, and in particular the UK.[123] In the case *Ndidi v UK* ('*Ndidi*'),[124] for example, the Court applied said approach which lead to an outcome that could be regarded as a departure from the Court's previous case law on the matter.[125] It concerned a foreign national's deportation order following various criminal offences. By the time the Court became seized of the matter, ten years had elapsed since the order had been issued. The Applicant had not reoffended, had made serious efforts to rehabilitate and had fathered a son. The Court saw no fault in the way the domestic authorities had weighed up the competing interests and thus ruled in favour of the UK. However, as Judge Turković remarked in his dissenting opinion, the Court failed to apply the principles established in *A A v UK*[126] that, in cases regarding the deportation of settled migrants, the Government is required to provide further justification for the necessity of the deportation order due to the elapsed time period between the domestic proceedings and the proceedings before the Court.[127]

Moreover, in *Animal Defenders International v UK* ('*Animal Defenders*'),[128] the Court applied proportionality review to a case concerning an issue that generally falls within a narrow margin (namely the freedom of public speech).[129] It focussed on the quality of the legislative and judicial review of the prohibition on political advertisement and, satisfied of said quality, sustained the measure.[130] This was very suprising considering that the Court had found Switzerland to have violated the Convention in the more or less identical case of *VgT*[131] in 2001 as well as in *TV Vest*[132] against Norway.[133] The Court does not follow a system of binding precedent, however, it has previously stated that 'it is in the interests of legal certainty, forseeabilityand equality before the law that it should not depart, without good reason, from precedents laid down in previous cases'.[134] In *Animal Defenders*, however, the majority refrained from following its own case law, but did not sufficiently explain why, nor elaborate on the status of its earlier judgments *VgT* and *TV Vest*, as it did not explicitly overrule them.[135] The majority merely hinted that these cases may be distinguished. The judgment therefore resulted in legal uncertainty and unforseeability and apparent double standards, as the dissenting judges pointed

[123] See eg Popelier and Van de Heyning (n 107) 23.
[124] App no 41215/14 (ECtHR 14 September 2017).
[125] cf Benoit Dhondt, 'Of course a stranger must conform': reading the *Ndidi* judgment with Euripides' Medea' (*Strasbourg Observers* 27 November 2017) <https://strasbourgobservers.com/2017/11/27/of-course-a-stranger-must-conform-reading-the-ndidi-judgment-with-euripides-medea/> accessed 13 November 2018; See also the narrow majority and nature of the dissenting opinions in *Animal Defenders International* (n 128).
[126] App no 8000/08 (ECtHR 20 September 2011).
[127] *Ndidi* (n 124) 34.
[128] [GC] App no 48876/08 (ECtHR 22 April 2013).
[129] Arnardóttir 'Rethinking the Two Margins' (n 111) 45 f.
[130] (n 127) 109-115.
[131] *(VgT) Verein gegen Tierfabriken Schweiz v Switzerland* App 24699/94 (ECtHR 28 June 2001).
[132] *TV Vest As & Rogaland Pensjonistparti v Norway* App 21132/05 (ECtHR 11 December 2008).
[133] See Dissenting Opinions of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano in *Animal Defenders* (n 128) para 1 and 12.
[134] *Christine Goodwin v UK* App no 28957/95 (ECtHR 11 July 2002) 74; *Stafford v UK* App no 46295/99 (ECtHR 28 May 2002) 68.
[135] Tom Lewis, 'Animal Defenders International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters?' (2014) 77(3) MLR 460, 472.

out.[136]

The Court's Inconsistent Approach

Despite the noticeable 'procedural turn' in the Court's jurisprudence, the Court appears to apply the procedural proportionality approach inconsistently. The Court appears to apply this approach predominantly to cases concerning sensitive socio-economic policy issues or ethical or moral dilemmas.[137] This is unsurprising considering that such cases call for value judgments which the Court in its subsidiary position cannot impose on the Contracting States, thereby replacing domestic decisions.[138] It instead examines in a deferential manner whether the domestic decision-making body has identified all relevant issues and whether the outcomes were reached in a fair and procedurally correct manner, ie that the substantive debates were sufficiently comprehensive and inclusive.[139]

That being said, there have also been cases in which the procedural proportionality review was not applied although the circumstances may have called for such an approach.[140] An example is the case of *X and Others v Austria*, which dealt with differential treatment of unmarried different-sex couples and same-sex couples regarding adoption.[141] Surprisingly, the parliamentary process within Austria was not a decisive factor and the judgment was in full contradiction to the according legislation.[142] Furthermore, considering the Court has been accused of 'judicial activism' in regard to migration cases,[143] it is perhaps surprising that the Court did not employ the approach in *Jeunesse v the Netherlands*[144] which dealt with such a matter. Indeed the dissenting judges accused the Court of 'drifting away from the subsidiary role assigned to it'.[145] However, it is feasible that a lacking clarity in the Court's case law in the respective area may be the explanation.[146]

In the case *SAS v France* the Court based its ruling on the burqa on an alleged[147] lack of European consensus on the matter and granted France a wide margin of appreciation.[148] While some argue that the lack of procedural review is surprising considering the highly controversial nature of the case,[149] others propone that the Court in fact impliedly did put heavy weight on procedural aspects of the decision made on the national plane,

[136] Dissenting Opinions of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano in *Animal Defenders* (n 128) para 1.
[137] Gerards and Brems (n 15) 146-147.
[138] ibid 148.
[139] ibid.
[140] Popelier and Van de Heyning (n 107) 22.
[141] App no 19010/07 (ECtHR 19 February 2013).
[142] Gerards and Brems (n 15) 148.
[143] See eg Marc Bossuyt, 'The court of Strasbourg acting as an asylum court' (2012) EuConst 203 ff.
[144] [GC] App no 12738/10 (ECtHR 3 October 2014).
[145] Joint Dissenting Opinion of judges Villinger, Mahoney and Silvis App in *Jeunesse v the Netherlands* (n 144) para 10.
[146] Gerards and Brems (n 15) 165.
[147] Only Belgium had a similar policy to France.
[148] [GC] App no 43835/11 (ECtHR 1 July 2014).
[149] Popelier and Van de Heyning (n 107) 22.

which it expressed by accepting that the blanket ban of wearing a burka in public is justifiable as a 'choice of society'.[150]

Unsurprisingly, the Court does not use the procedural proportionality review in cases in which new substantive issues arise or where the factual situation is very specific which requires a reevaluation or rebalancing of principles.[151] However, there have also been a number of cases in which no new elements were recognisable, and yet the Court nevertheless refrained from procedural scrutiny.[152]

8. Dangers of Procedural Proportionality Review

Although the calibration of authority and associated emphasis of Contracting States as primary arbiters of the Convention's reach is no doubt an attractive development for sovereign Parliaments, it comes at a risk of diluting the individuals' rights protection – as the Court gradually surrenders its prerogative to decide which outcomes are reasonable, it cannot ensure the maintenance of the Convention's minimum standards and is bound to tolerate, to an extent, 'window dressing' on the national level.[153] The general impression is thus that the Court is retracting its rights-oriented practice and substituting strategic adjudicating reminiscent of its legal diplomacy in its early days.[154] However, it must be noted that – in regard to cases in which the Court employs the procedural proportionality review and finds a Convention violation – it does not seem to rest on its laurels, but adds a number of substantive arguments[155] or ensures that there was no 'manifest error of appreciation' in the substantive outcome.[156] Thus, the Court does not appear to be completely substituting substantive assessments of Convention rights for procedural review.[157]

Assuredly, in some cases such as *Von Hannover* the Court will come close to a pure procedural review, but it only does so in areas in which there is sufficient Strasbourg case law on the matter,[158] and the Court can restrict its scrutiny to the extent to which the national court has taken it into account – thereby enhancing dialogue between the Court and national courts, which the Court regards as imperative in order to safeguard human rights protection on the national level.[159] However, such an approach does not necessarily facilitate the relationship between the Court and the Contracting States.[160] In fact, it may have the opposing effect if national judges involved in 'judicial dialogue' with the Court feel personally offended or that their national legal system has been misunderstood or encroached upon beyond an acceptable margin.[161]

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[150] Gerards and Brems (n 15) 163.
[151] ibid 156.
[152] ibid.
[153] Gerards and Brems (n 15) 6.
[154] Madsen, 'Cold War Legal Diplomacy' (n 71) 171.
[155] Gerards and Brems (n 15) 153.
[156] eg in *Hardy and Maile v UK* App no 31965/07 (ECtHR 14 February 2012).
[157] ibid 154.
[158] An exception is *Julin v Estonia* App nos 16563/08 et al (EctHR 14 February 2014), although it is not clear why the Court did not apply the approach in this case.
[159] Gerards and Brems (n 15) 150-152.
[160] ibid 163.
[161] ibid.

Futhermore, the lack of substantive ruling can be very unsatifsfactory for the Applicant, especially if the violation of the Convention based merely on procedural failures leads to a noticeable descrease in the amount of damages granted.[162] Such an approach can moreover be disadavantageous for a group of individuals if increased focus on procedural aspects leads to minority rights being surpressed by majority votes – such as in *SAS v France* – in which case fair procedure does not help those affected by the outcome.[163]

Last but not least, the difficulty of assessing the procedural processes on the national level is not to be ignored. States have various traditions and methods of reaching democratic decisions that may greatly vary depending on constitutional provisions.[164] Some States hold national referenda on important issues, some do not – while the Court can take the outcome of such referenda into consideration, it cannot infer any assumptions from the lack thereof.[165] It has been argued, therefore, that such scrutiny of procedure lies beyond the Court's competence and should instead be restricted to national constitutional courts.[166] Only very obvious divergences from 'the norm' – in sofar as a 'norm' can be ascertained – should be mentioned in judgments handed down by the Court.[167]

Conclusion

Notwithstanding the contributions of other Contracting States, it would seem that the UK was the main driving force behind the criticism and calls for reform of the Court manifested in the Brighton Declaration. Considering the UK repeatedly affirmed its commitment to the Convention system over the course of the years and acquiesced to the Court's evident development towards precisely what the UK had sought to avoid in the 1950s – a quasi-constitutional European court – the UK Government's *volte-face* and backlash against the Court in light of the perceived threat to the archaic principle of parliamentary sovereignty caused by cases such as *Hirst* and *Abu Qatada* is lamentable, as is the lack of a political equivalent to the principle of estoppel.

However, the Court has, in fact, found a method of reacting to the Contracting States' criticism by implementing means of adjudicating which further endorses the principle of subsidiarity, ie adjusting its focus from substantive rights to Convention diligence. While much criticism has been voiced in regard to this approach, the danger of substantive rights being diluted is relaxed in consideration, firstly, of the Court's inconsistent application of the procedural proportionality review, and, furthermore, by the fact that it tends not to limit its reasoning to procedural aspects if, in fact, it does not find the Convention to have been breached.

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[162] Gerards and Brems (n 15) 166, such as in the case *Schüth v Germany* App no 1620/03 (ECtHR 23 September 2010).
[163] Gerards and Brems (n 15) 168.
[164] ibid 167.
[165] ibid.
[166] ibid.
[167] ibid.

Despite the fact that the Court's inconsistency provides little guidance for Contracting States as to how the Court shall go about reviewing decisions taken by national courts or legislature, this 'pick and choose' approach is well in line with its overall argumentative style lacking highly structured and dogmatic methodology.[168] The fact that the Court seems to employ the procedural approach when it is deemed necessary and does the same in regard to substantive review, it is the author's view that the Court has successfully developed a manner of dealing with highly sensitive cases which, while endorsing the principle of subsidiarity according to the Contracting States' wishes and thereby calming the backlash, also advances judicial dialogue and provides incentive for national decision-makers to take the Court's case law into consideration.

[168] ibid.