Securing the future of the European Court of Human Rights in the face of UK opposition: political compromise and restricted rights

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Securing the future of the European Court of Human Rights in the face of UK opposition: political compromise and restricted rights.

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Abstract

This article highlights transnational consequences for access to justice of political posturing by national governments in respect of the European Convention on Human Rights (ECHR). It charts the UK context preceding the adoption of Protocol 15, which inserts the concepts of subsidiarity and the margin of appreciation into the ECHR preamble. The article argues that whilst this was an attempt to curb European Court of Human Rights' powers, this proved limited in effect, as the court is too well established as a Supreme Court for Europe in the cosmopolitan legal order of the ECHR. The political-legal interplay which is the genesis of the ECHR system means that political manoeuvring from national governments is inevitable, but not fatal to its existence. However, the legitimacy of the ECtHR is secured only through political concessions, which act to expel surplus subjects from ECHR protection. The article concludes that the legitimacy of the ECtHR is therefore secured at the cost of individuals whose rights are worth less than the future of the court.

KEYWORDS: Protocol 15 European Convention on Human Rights, subsidiarity, margin of appreciation, Supreme Court for Europe, cosmopolitan legal order, access to justice.

1. Introduction

On 7 November 2011 the Conservative-Liberal Democrat coalition UK government took up its six-month chairmanship of the Committee of Ministers (CoM) of the Council of Europe (CoE). The UK government promptly published a document stating its top priority to be 'reforming the European Court of Human Rights and strengthening implementation of the European Convention on Human Rights'.[1] [2] Despite the neutral language of this statement of intent, the aspirations of the UK government were revealed, exposing an intention to limit the powers of the European Court of Human Rights (ECtHR) by means of the principle of subsidiarity: the CoE states would have the final word of interpretation on the European Convention on Human Rights (ECHR), which is supposed to be a check on their own exercise

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[1] Committee of Ministers of the Council of Europe, *Priorities of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe (7 November 2011-14 May 2012)*, (CM/Inf(2011)41 27 October 2011): <https://wcd.coe.int/ViewDoc.jsp?id=1859397>.

[2] All online sources last accessed 30 December 2016.

of power.[3] This article attempts to highlight how the current reforms to the ECHR[4] system enshrined in Protocol 15 are the direct result of the incompatible nature of the human rights protection promised by the ECHR and the UK government's domestic policy agenda. The ECtHR is characterised by the UK government as impinging on national sovereignty and as such the UK government want to ward off any notion of the ECtHR as a Supreme Court for Europe.

The article thus examines the question of whether Protocol 15 does in fact demote the ECtHR to an advisory body as the UK government intended. The article outlines the UK domestic context leading up to the adoption of Protocol 15 and the unhelpful slippage between legal problems and political rhetoric in the discourse surrounding the ECHR in the UK. The genesis of the ECHR system as an interplay between politics and law is examined and the emergence out of this interplay of the ECtHR as a Supreme Court for Europe is demonstrated.

The status of the ECHR as a cosmopolitan legal order (CLO) is explored. However the limits to this characterisation are identified as lying in the very political and legal interplay that lies at the heart of the ECHR system. These limits manifest most clearly in the most recent epoch of the ECtHR's history, the age of subsidiarity,[5] which is considered as a renewed political turn in the history of the ECHR system. The beacon of this age of subsidiarity is Protocol 15. As Judge Robert Spano has stated,[6] recent case law from the ECtHR supports this assertion by demonstrating that a very wide margin of appreciation was applied and justified in a number

[3] Article 1 Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 213, Strasbourg 24 June 2013; Joshua Rozenberg, 'Dominic Grieve takes on the European Court of Human Rights', *The Guardian*, 27 October 2011.
[4] Convention for the Protection of Human Rights and Fundamental Freedoms 1950, CETS 5.
[5] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487, 491.
[6] Ibid; Speech: 'The Role of Parliaments in the Realisation and Protection of the Rule of Law and Human Rights' 7 September 2015 reported here: Brian Chang, 'Strasbourg in the age of subsidiarity: Enough reform to accommodate Conservative concerns?', UK Human Rights Blog, 21 September 2015: < http://ukhumanrightsblog.com/2015/09/21/strasbourg-in-the-age-of-subsidiarity-enough-reform-to-accommodate-conservative-concerns-brian-chang/>.

of cases simply by deferring to a thorough national investigation of the human rights issues at play.[7]

Political and ideological motivations aside, the further revisions that Protocol 15 makes to the ECHR are examined highlighting concerns for access to justice. The restatement of subsidiarity and the margin of appreciation in the preamble to the ECHR is considered to pose no real threat to the status of the ECtHR as a Supreme Court for Europe as such legal-political conflict is inherent in the machinations of the ECHR system. Despite obvious limits to the description of the ECHR as a CLO, the political-legal interplay that lies at the heart of the ECHR system means that such political manoeuvring from national governments form part of the genesis of the ECHR system and is thus inevitable, but not fatal to the ECHR system.

Of more concern is the fact that the legitimacy of the ECtHR is secured only through political concessions, the result of which is to expel surplus subjects from the protection of the rights of the ECHR through limiting access to justice. The article concludes that the legitimacy of the ECHR is therefore secured at the cost of individuals whose rights are worth less than the future of the court, which is too big to fail. This is a moment of exclusion which is written into the text and interpretive methods of the ECHR. Such individuals become the surplus subjects of the ECHR system who are sacrificed in order to secure the ongoing legitimacy of that system.

2. The UK Context

In January 2012 Prime Minister David Cameron delivered a speech before the Parliamentary Assembly of the CoE outlining the concerns held by the UK government about the ECHR system and in particular, the activity of the ECtHR. The UK government's analysis of the 'vital role' played by the ECHR system in the protection of human rights, concluded that this vital

[7] *Animal Defenders International v United Kingdom* App 48876/08, 22 April 2013 (2013) 57 E.H.R.R. 21; *SAS v France* App 4385/11, 1 July 2014 (2015) 60 E.H.R.R. 11; *Lambert v France* App 46043/14, 5 June 2015 (2016) 62 E.H.R.R. 2; *Parrillo v Italy* App 46470/11, 27 August 2015 (ECHR, unreported).

role was endangered. In order to save the ECHR system and enable the ECtHR to function to its full potential, the UK government proposed reform highlighting three specific areas of concern.

Firstly, the ECtHR's backlog of cases was too high and was hindering the ECtHR's ability to resolve the most serious human rights cases. This was said to be caused by simply too many cases getting to Strasbourg.

Secondly, the UK government expressed concern about the role of the ECtHR becoming that of a court of fourth instance where all national decisions on ECHR rights could be appealed. The Prime Minister explicitly linked this "risk" to the right to individual petition, enshrined in Art 34 ECHR. The government stated that this situation should be avoided so that the ECtHR could 'protect itself from spurious cases' which had already been dealt with at the national level. Such an approach assumes that national implementation of the ECHR is beyond reproach and undermines the supra-national[8] status of the ECHR system to which all signatory states agreed.

Madsen explicitly describes the ECtHR as a 'Supreme European Court'[9] charting the evolution from its inception to the institutionally autonomous system that functions today. Indeed the 'normative pull'[10]of ECtHR judgments has been extensive and has exerted a considerable transnational influence on domestic human rights protection in a way that has robustly improved standards of human rights protection.

[8] Laurence Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Journal* 273, 382.
[9] Mikael Rask Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2007) Vol 32, Issue 1, *Law & Social Inquiry* 137.
[10] Dia Anagnostou, 'Politics, courts and society in the national implementation and practice of European Court of Human Rights case law' in Anagnostou (ed), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (EUP 2013) 227.

The ECHR system represents '*par excellence*' the judicialisation of human rights at the European level.[11] As such, the UK government's fear of the ECtHR becoming a court of fourth instance for Europe has already been realised in practice by virtue of the agreement between CoE states culminating in the signing of the ECHR in 1950 and the subsequent state endorsed evolution of the ECtHR as arbiter for human rights issues in Europe.

The "fear" that the ECtHR would become a court of fourth instance thus reflects the current UK government's national policy concerns which seek to reconstruct the debate around the ECHR as an invasion of national sovereignty by European powers. The UK government would seem to be fixated on maintaining a Diceyan notion of sovereignty[12] when it is clear that such a model has been exposed as problematic to say the least,[13] a situation which is magnified with the advent of the EU and the ECHR which represent 'nodes' of sovereignty, whereby sovereignty is pooled and shared as opposed to one hierarchy of power.[14]

Supreme status has been achieved as the result of complex processes and political-diplomatic exchanges between Strasbourg, national governments, NGO activists with the consent of CoE states whose support the ECHR system relies upon for its very legitimacy. The evolution of the ECHR system has been an ongoing exercise in political diplomacy which has translated into the judicial machinations of the ECtHR through the introduction of the margin of appreciation into the interpretive ethic of the Court.[15]

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[11] Ibid, 227.

[12] 'No person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament', A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915; reprinted Indianapolis, IN: Liberty Fund, 1982), 3-4.

[13] Pavlos Eleftheriadis, 'Parliamentary Sovereignty and the Constitution' (2009) 22 *Canadian Journal of Law and Jurisprudence* 267; *Jackson and Others v. Attorney General* [2005] UKHL 56, [2006] 1 A.C. 262.

[14] Alec Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe, Global Constitutionalism', (2012) 1:1 *Journal of Global Constitutionalism* 53, 62.

[15] George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', (2010) Vol. 21 no. 3 *The European Journal of International Law* 509.

The margin of appreciation was first applied by the ECtHR in the case of *Handyside v UK*[16] in recognition of the fact that there is 'no uniform concept of morals in Europe',[17] although it had been developed by the European Commission of Human Rights some 20 years previously.[18] In absence of European consensus, the ECtHR defers to the decision of national governments via the margin of appreciation.[19] The margin of appreciation is the room for manoeuvre[20] or latitude[21] that the ECtHR affords to states when fulfilling their obligations under the ECHR. The ECtHR has stated that the scope of the margin will vary according to context[22] and some have thus warned that the doctrine must be handled with care.[23]

The margin of appreciation can be considered as the tool developed by the ECtHR to negotiate the delicate political balancing of power between signatory states and the ECtHR. Thus the interplay of politics and law surfaces in the interpretive methods of the ECtHR. Some have, however, described the margin of appreciation as embodying the embarrassing doctrine of cultural relativism.[24] Often the invoking of the margin of appreciation sees the ECtHR deferring to the political interests of national governments and thus avoids politically 'damaging confrontations'[25] between the ECtHR and signatory states that would undermine the legitimacy of the ECtHR as an institution.

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[16] *Handyside v United Kingdom* App 5493/72, 7 December 1976 (1979-80) 1. E.H.R.R. 737.
[17] Ibid, para 48.
[18] *Greece v United Kingdom* App 175/56, 26 September 1958, European Commission of Human Rights (the Cyprus Case).
[19] Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff 2001), 397.
[20] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' February 2012 (Centre for European Legal Studies Working Paper Series University of Cambridge), 2: <http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf>.
[21] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the principle of proportionality in the jurisprudence of the ECtHR* (Intersentia 2002), 2; the author considers the principle of proportionality to constitute the "other side" of the margin of appreciation, 14.
[22] *Buckley v United Kingdom* App 20348/92, 25 September 1996 (1997) 23 E.H.R.R. 101, para 74.
[23] *Lautsi v Italy* App 30814/06, 18 March 2011 (2012) 54 E.H.R.R. 3, Judge Malinverni dissenting, para 1.
[24] Marie-Bénédicte Dembour, *Who Believes in Human Rights: Reflections on the European Convention* (CUP 2006) 162.
[25] Ronald St. J MacDonald, 'The Margin of Appreciation', in *The European System for the Protection of Human Rights* in R St. J MacDonald et al. (eds) (Dordrecht: Martinus Nijhoff 1993) 83, 123.

In accordance with such an analysis and perhaps most tellingly, the third point causing consternation and concern for the UK government was the so-called shrinking of the margin of appreciation: 'At times, it has felt to us in national governments that the 'margin of appreciation' – which allows for different interpretations of the Convention – has shrunk'.[26]

That the margin of appreciation allows for 'different interpretations' of the ECHR is a point to be contended, as the margin is simply supposed to give national governments room to manoeuvre within the meaning of ECHR rights. However, Cameron's statement belies little and is a realistic assessment of the way the margin has been applied by the ECtHR in controversial cases of political sensitivity which cut to the core of the democratic state and issues of national security. European supervision by the ECtHR in those cases has been completely absent.[27]

As Benvenisti notes, the result of deferring to the majority-dominated national institutions via the margin of appreciation, is to stultify the goals of the human rights system of the ECHR and 'abandon the duty to protect the democratically challenged minorities'.[28] In such instances the ECtHR is not merely giving national governments latitude but rather deferring to their interests or interpretation of the ECHR altogether. The assertion by the UK government which considers the margin of appreciation to have 'shrunk', is a tautology at best considering that the *raison d'etre* of the margin of appreciation is the flexibility that it provides in balancing national political interests and the issue of national sovereignty with the transnational system of

[26]David Cameron, Speech on the European Convention on Human Rights, delivered at the Parliamentary Assembly of the Council of Europe, 25 January 2012: < https://www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights>.
[27] See for example: *Sahin v Turkey* App 44774/98, 10 November 2005 (2007) 44 E.H.R.R. 5, Judge Tulkens, para 3.
[28] Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards', (1999) 31 *NYU Journal of International Law & Politics*, 843, 850.

European human rights protection; thus malleability is inherent in the very form of the margin of appreciation.

The context that gave rise to the UK government's concerns about the margin of appreciation and the ECHR system more generally was the ongoing controversy surrounding the issue of prisoners' voting rights and the deportation of Abu Qatada.

3. Prisoners' Voting

In the judgment of *Hirst v UK* (No 2)[29] the Grand Chamber of the ECtHR upheld the ruling of the Chamber of the ECtHR in *Hirst v UK*[30] that the blanket ban on prisoners' voting outlined in Section 3 of the Representation of the People Act 1983 was a breach of the electoral right protected under article 3 of Protocol No 1 of the ECHR. The ECtHR stated that under the ECHR system which considered the markers of a democratic society to be tolerance and broadmindedness, there was no place 'for automatic disenfranchisement based purely on what might offend public opinion'.[31] Such a severe measure of disenfranchisement coupled with the principle of proportionality required an explicit link between the sanction and the conduct of the individual in question.[32]

The ECtHR described the ban as a 'blunt instrument'[33] which applied a blanket restriction automatically and indiscriminately to all prisoners regardless of their conduct. Such restriction of a vitally important convention right was considered to fall 'outside any acceptable margin of appreciation, however wide that margin might be'.[34] The ECtHR left the issue in the hands of the UK government to amend their legislation accordingly.

[29] *Hirst v United Kingdom* (No. 2) App 74025/01, 6 October 2005 (2006) 42 E.H.R.R. 41.
[30] *Hirst v United Kingdom* App 74025/01, 30 March 2004 (2004) 38 E.H.R.R. 40.
[31] *Hirst*, *supra* n29 at para 70.
[32] Ibid, para 71.
[33] Ibid, para 82.
[34] Ibid, para 82.

Over the five years following the judgment, the then Labour UK government published two consultation papers on prisoners' voting rights[35] but failed to develop policy and implement the ruling in *Hirst*, a position that continued under the Conservative Liberal Democrat coalition government. In 2006-2007 the Joint Committee on Human Rights (JCHR), the body tasked with overseeing the government's implementation of adverse ECtHR judgments against the UK, published a report stating that whilst the topic of the *Hirst* judgment may be politically unpopular, the legal issues involved in implementing the decision at domestic level were not complex. The JCHR stated that 'The continued failure to remove the blanket ban...is clearly unlawful'[36] and stressed the urgency of the government making legislative change by way of an urgent Remedial Order.[37] The following year, the JCHR reiterated its recommendation to the government emphasising the politically difficult but legally unproblematic nature of the implementation of the *Hirst* judgment:

> This case appears destined to join a list of long standing breaches of individual rights that the current Government, and its predecessors, have been unable or unwilling to address effectively within a reasonable time frame. The Government should rethink its approach.[38]

Still the UK government did not alter its position and failed to implement the *Hirst* judgment.

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[35] Department of Constitutional Affairs, *Voting rights of convicted prisoners detained within the United Kingdom – the UK Government's response to the Grand Chamber of the European Court of Human Rights judgment in the case of Hirst v the United Kingdom: consultation paper* (14 December 2006): <http://www.dca.gov.uk/consult/voting-rights/cp2906.pdf>; Ministry of Justice, *Voting rights of convicted prisoners detained within the United Kingdom: second stage consultation.* (Consultation Paper CP6/09, 8 April 2009).

[36] House of Commons and House of Lords Joint Committee on Human Rights *Monitoring the Government's response to court judgments finding breaches of human rights*. Sixteenth report (HC 728, 2006-07) para 78.

[37] Ibid, para 79.

[38] House of Commons and House of Lords Joint Committee on Human Rights, *Monitoring of the Government's response to human rights judgments: annual report 2008*. Thirty-first report (HC 1078, 2007-08) para 62. Other judgments yet to be implemented are Northern Ireland security forces cases**:** *McCann & Others v UK* App 18984/91, 27 September 1995 (1996) 21 E.H.R.R. 97; *McKerr v UK* App 28883/95, 4 May 2001 (2002) 34 E.H.R.R. 20; *Jordan v UK* App 24746/94, 4 May 2001 (2003) 37 E.H.R.R. 2; *Kelly & Others v UK* App 30054/96, 4 May 2001 (ECHR); *Shanaghan v UK* App 37715/97, 4 May 2001 (ECHR); *Finucane v UK* App 29178/95, 1 July 2003 (2003) 37 E.H.R.R. 29.

The CoM of the CoE adopted a resolution on 3 December 2009 which expressed serious concern that the failure of the UK government to implement the *Hirst* judgment would risk the next UK general election taking place under conditions that were in violation of the ECHR.[39] The CoM urged the UK government to rapidly adopt necessary measures before the next general election which would have to be held by June 2010. The following March the CoM reiterated their serious concerns that failure to implement by the UK government before the general election would create repetitive applications to the ECtHR and again urged the government to rapidly adopt measures.[40] In June 2010 the CoM expressed 'profound regret' that the blanket ban on prisoners' voting had not been lifted before the general election.

In December of the same year the CoM asked the UK government to present an action plan for implementation with a clear timetable for adoption of necessary measures. In the meantime, the UK government's failure to implement the judgment had given rise to the pilot judgment of *Greens and MT v UK*[41], contesting the UK failure to implement. At that point in time the ECtHR had received over 2,500 clone applications regarding the ongoing blanket ban, some of which have subsequently been dealt with by the ECtHR.[42] This is somewhat paradoxical given that one of the UK's major concerns prompting proposals for reform of the ECtHR was its huge backlog to which the UK government, through actions incongruous with its own concerns, is adding.

[39] Interim Resolution (CM/ResDH) (2009)1601, Execution of the judgment of the European Court of Human Rights Hirst against the United Kingdom No. 2.
[40] Meeting of the CoM, 1078th meeting (DH) Cm/Del/Dec(2010)1078, 4 March 2010 Section 4.3.
[41] App 60041/08 and 60054/08, 23 November 2010 (2011) E.H.R.R 21.
[42] *McLean and Cole v United Kingdom* App (12626/13) 11 June 2013 (2013) 57 E.H.R.R. SE8; *Dunn and Others v United Kingdom* App 7408/09 and 130 other applications, 13 May 2014 [2014] ECHR 507; *Firth and Others v United Kingdom* App 47784/09, and nine other applicants, 12 August 2014 [2014] ECHR 874; *McHugh and Others v United Kingdom* App no 51987/08 and 1,014 others, 10 February 2015 [2015] ECHR 155; *Millbank and Others v United Kingdom* App nos 44473/14 and 21 other applicants, 30 June 2016 [2016] ECHR 595.

Cameron lent his voice to the debate more publicly in an article in *The Telegraph* stating that prisoners 'damn well shouldn't' be given the vote as he vowed to 'clip the wings' of the ECtHR.[43] In Cameron's remarks one witnesses a linguistic slippage which results in the unhelpful conflation of whether Strasbourg has exceeded its powers and the actual question of whether prisoners should have a right to vote. In such a presentation of the issues to the voting public, the dry legal machinations of the ECHR system with its strong roots in the UK stretching back to Winston Churchill and a conservative government who were amongst the most significant drafters of the ECHR, are obscured in favour of a populist, sensationalist and fetishised account of the ECHR punctuated by a few controversial ECtHR decisions. The lines between law and current national political agendas are blurred, painting the ECtHR in a distorted manner. The ECtHR becomes the object of a distorted discourse, particularly in the media, which functions on the basis of an instrumental rationality having certain political goals as its end.[44]

As Sir Nicholas Bratza, former UK judge at the ECtHR has stated:

> It is disappointing to hear senior British politicians lending their voices to criticisms more frequently heard in the popular press, often based on a misunderstanding of the court's role and history, and of the legal issues at stake.[45]

Bratza lamented further the use of the *Hirst* judgment on prisoners' voting as a 'springboard for a sustained attack' on the ECtHR including calls to grant Parliament powers to override

[43]Steven Swinford, 'David Cameron: I will clip European Court's wings over prisoner voting', *The Telegraph*, 13 December 2013.
[44] On instrumental rationality see: Jürgen Habermas, *The Theory of Communicative Action, Volume I, Reason and the Rationalisation of Society*, English translation Thomas McCarthy (Boston: Beacon Press 1984), 11-12.
[45] Nicholas Bratza, 'Britain should be defending European justice, not attacking it', *The Independent,* 24 January 2012; Nicholas Bratza, 'The relationship between the UK Courts and Strasbourg' (2011) *European Human Rights Law Review*, 505.

adverse Strasbourg judgments against the UK and more significantly, withdrawal from the ECHR altogether.

The exchange between Strasbourg and the UK over the issue of prisoners' voting was drawn upon by ECtHR critics stating that the ECtHR had gone too far in interfering with policy making. Cameron stated that it was time to 'stand up to the ECtHR' and assert the sovereignty of the UK Parliament over Strasbourg,[46] even if this meant that the UK would be in clear violation of its international obligations. Once again there is an unhelpful leap made by the UK government's argument here which jumps from the specific instance of prisoners' voting to the more general debate on the powers of Strasbourg and Parliamentary sovereignty; the jump is one from a specific legal case to a general political debate. It is pertinent to remember that the ECtHR in requiring the UK government to implement the judgment in *Hirst* was not asking the UK government to adopt a new policy in relation to prisoners' voting *tout court.* The issue with the ban on prisoners' voting was its automatic and indefinite nature with no possibility for review. As Thomas Hammerberg, European Commissioner for Human Rights pointed out:

> Universal suffrage is a fundamental principle in democracy. My position is that a blanket, automatic ban does indeed violate basic principles. If deprivation of the right to vote is to be a punishment, then this should be expressly spelled out in each individual case by a judicial authority.[47]

Thus the problem is a legal one, centred upon the notion of proportionality which requires that the UK government insert into its laws on prisoners' voting an element of flexibility which allows each case to be assessed on the individual merits as opposed to an outright ban for all prisoners. The point is an easily remedied legal one, one which the ECtHR reiterated in the

[46] Tom Whitehaed, 'Cameron vows to defy Europe on prisoner voting', The Telegraph, 24 May 2012.
[47] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, at the Equality and Diversity Forum, *British contributions are needed in the global struggle for equality and diversity*, (CommDH/Speech) (2011) (London, 13 December 2011) 17.

case of *Vinter & Others v UK*.[48] The ECtHR is not dictating what UK policy should be. This nuanced point has however been submerged by the dominant political and media discourse which constructs this issue as one of protecting and saving the sovereignty of the UK.

In 2013 the UK Court of Appeal stated categorically that Strasbourg got it wrong[49]. Cameron reiterated that 'life should mean life'[50] thus perpetuating the conceptual burring of the problematic in question.

4. Abu Qatada

Another hot topic that has fuelled controversy around the ECtHR and its place in UK law and politics has been the deportation of Abu Qatada. In 2005 the UK Secretary for State ordered the deportation of Abu Qatada back to Jordan on the basis of national security concerns. Qatada appealed to the Special Immigration Appeals Commission (SIAC) on the basis of ECHR articles 2 the right to life, 3 the right to be free from torture, 5 the right to liberty and security of the person and 6 the right to a fair trial, stating that there was a real risk of torture upon his return to Jordan. Further, he claimed that he may be deported to the U.S and subject to the death penalty and that the retrial he would face in Jordan for crimes he was tried in absentia for, would be 'flagrantly unfair'. It was also stated that evidence gained through torture of his co-accused would be used against him.

His appeal was rejected by the SIAC on all four grounds reiterating the threat that Qatada posed to national security given that he was regarded by many terrorists as a spiritual adviser who legitimated their acts of violence.[51] Qatada successfully appealed to the Court of Appeal (CoA)[52] who unanimously found in his favour in regard to the claim to a right to fair trial under

[48] App 66069/09, 130/10 and 3896/10, 9 July 2013 (2016) 63 E.H.R.R. 1.
[49] *McLoughlin, R v* [2014] EWCA Crim 188.
[50] Andy McSmith, ''Life should mean life' for prison sentences despite what Europe decides, says David Cameron', *The Independent*, 2 January 2014.
[51] *Othman (Abu Qatada) v United Kingdom* App 8139/09 17 January 2012 (2012) 55 E.H.R.R. 1, para 27.
[52] *Othman (Jordan) v SSHD* [2008] EWCA Civ 290.

article 6 and the risk of use of evidence gained under torture under article 3. The CoA dismissed all other claims. The Secretary of State then appealed to the House of Lords in relation to the article 6 claim and Qatada cross-appealed in relation to the rejection of his other claims, the use of closed evidence by the SIAC and assurances given in a Memorandum of Understanding (MOU) signed between Jordan and the UK the day before Qatada's notice of deportation was served on Qatada's conditions of return to Jordan. This MOU had played a significant role in justifying the SIAC's decision. The House of Lords unanimously allowed the government's appeal and rejected Qatada's cross-appeal.[53]

The issue then went to the ECtHR, who found in favour of Qatada's article 6 claim on the basis that there would be a real risk that evidence obtained by torture of third persons would be used against Qatada at retrial.[54]

Qatada was finally deported the following year on 6 July 2013 after an agreement was signed between the Jordanian authorities and the UK stating that evidence gained through torture would not be used in retrial against Qatada. Despite the deportation of Qatada, the UK Home Secretary, Theresa May, took this opportunity to further lambast the ECHR. Referring to the 'crazy interpretation of our human rights laws' by the ECtHR she cited the Qatada affair as proof that the UK should very carefully consider its relationship with Strasbourg. 'All options' May stressed, 'including withdrawing from the convention altogether - should remain on the table'.[55] As with prisoners' voting, the Home Secretary employed a slippage in logic whereby one specific legal incident about the interpretation of the ECHR is being used to draw and support wider political conclusions about the UK's relationship with Strasbourg, conclusions which conveniently supported the government's wider political aspirations and agendas.

[53] *RB (Algeria) v SSHD, OO (Jordan) v SSHD* [2009] UKHL 10.
[54] *Othman*, *supra* at n51.
[55] Theresa May, HC Deb, Vol 566, col 24 (8 July 2013).

The legal point is not controversial. The point pressed by the ECtHR was that in a democratic society, Qatada should not be deported to face trial on evidence gathered under torture. Such a stance is in line with previous case law of the ECtHR on the unreliability of torture evidence[56] and as such ensures the principled application of human rights law. The Qatada case was not an exception where the ECtHR attempted to usurp the UK government. Although the Home Secretary paints the public-political discourse otherwise:

> Qatada would have been deported long ago had the European Court not moved the goalposts by establishing new, unprecedented legal grounds on which it blocked his deportation.[57]

The fact was simply that the desires of the UK government, to deport Qatada regardless of the consequences, were out of line with the democratic principles of the rule of law whereby trial and due processes should not be compromised by the admission of torture evidence. Such a conclusion is supported by the established case law of the ECtHR and the United Nations Convention Against Torture to which the UK is signatory.

5. Brighton Reform

Work to reform the ECHR system began at conferences in Interlaken and Izmir and continued at the Brighton Conference which was organised by the UK government in its capacity as chair of the CoM of the CoE. The conference, held in Brighton in April 2012, produced the 'Brighton Declaration' on the future of the ECtHR.[58] The media, already galavanised by prisoners' voting and Abu Qatada, maintained an increasingly hostile approach to human rights discourse and set the scene in Brighton as a head to head between Strasbourg and London where the UK

[56] The Belmarsh case: *A v SSHD* [2004] UKHL 56.
[57] May, *supra* at n55.
[58] European Court of Human Rights Council of Europe, *High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration* <http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf>.

government would fight to save UK sovereignty from an illegitimate and activist ECtHR. Debate on the mundane fundamentals, such as the rule of law and the UK's obligations under international law, was displaced by the domestic political debate of the moment steered by the Conservative-Liberal Democrat coalition which sought to question the role of the HRA 1998 and potentially replace it with a British Bill of Rights.[59]

Such debate went hand in hand with a sustained focus by the UK government on a few controversial cases, outlined above, which the government found politically objectionable. The rights of the ECHR were proving problematic for policy that the UK government wanted to pursue. As such the UK government sought to increase the power of national governments in implementation and definition of the ECHR system.

The UK government took this opportunity to push through what is now Protocol 15 to the ECHR. Protocol 15 makes four amendments to the ECHR; three of which can be considered to limit the scope of the ECHR system. The first and at first glance most significant amendment to the ECHR is the remoulding of the preamble to the Convention. The rewording of the preamble was a compromise reached after Joint NGO organisations strongly opposed the incorporation of jurisprudentially developed principles of interpretation of the ECtHR, most notably the margin of appreciation, into the text of the substantive provisions of the ECHR[60], concluding that the preamble would have benefited from 'more accurate drafting'.[61] The text of the revised preamble reads:

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[59] The Conservative Liberal Democrat Coalition government established a Commission on a Bill of Rights on 18 March 2011. The Commission reported its findings on 18 December 2012: <https://www.justice.gov.uk/about/cbr>.

[60] Joint NGO Statement, *Protocol 15 to the European Convention on Human Rights must not result in a weakening of human rights protection*, 24 June 2013: <https://www.opensocietyfoundations.org/sites/default/files/echr-protocol15-joint-statement-06272013.pdf>.

[61] Ibid, 2; See Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre, the Helsinki Foundation for Human Rights, Human Rights Watch, Interights, the International Commission of Jurists, JUSTICE, Open Society Justice Initiative and REDRESS, *Draft Protocol 15 to the European Convention on Human Rights: a reference to the doctrine of the margin of appreciation in the Preamble to the Convention. Open letter to all member states of the Council of Europe*, 15 April 2013:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.[62]

The reworded preamble clearly aims to bestow a primary role on national governments thus reinforcing national sovereignty, and a secondary role on the ECtHR. This is not an insignificant move as the Vienna Convention on the Law of Treaties describes the preamble to a convention as an integral part of the instrument.

However the reaction at this attempt to embed subsidiarity and impose meaning on the established ECHR doctrines demonstrates how well established the ECHR institutions are. Joint NGO organisations welcomed the reiteration of the supervisory role of the ECtHR stating that the preamble thus 'recognizes that the court remains the sole institution empowered to define, develop and apply tools of judicial interpretation'.[63] Further this new mention of the margin of appreciation is to be 'consistent with the doctrine…as developed by the Court in its case law'[64] and is therefore not intended to change the margin of appreciation in any way. The ECtHR and the Parliamentary Assembly of the CoE have both expressed the understanding that the doctrine of the margin of appreciation should not be altered[65] in light of Protocol 15.

<http://www.amnesty.org/en/library/info/IOR61/006/2013/en>.

[62] Article 1 Protocol No. 15.

[63] Joint NGO Statement *supra* n60 at 2; This follows what was agreed at Brighton see ECtHR COE *supra* n58 at para 12(b), confirming that the principle of subsidiarity and the doctrine of the margin of appreciation must be understood as defined by ECtHR case law.

[64] 123rd session of the Committee of Ministers (Strasbourg 16 May 2013) Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms CM(2012) 166-add, para 7.

[65] European Court of Human Rights, *Opinion of the Court on Draft Protocol No.15 to the European Convention on Human Rights*, adopted on 6 February 2013, para 4: <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Reports/>; Parliamentary Assembly of the Council of Europe (PACE), *Draft Protocol 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion No. 283(2013), adopted on 26 April 2013, para 2.1: <http://assembly.coe.int/ASP/Doc/XrefATListing_E.asp.>.

However, it is clear from the wording of the new preamble, especially in light of UK government political preferences, that the intention was to shift power in favour of national governments in terms of deciding when they should be subject to human rights review and to limit the scope of the ECHR in reducing the time limit for applications and amending the admissibility criteria to the ECtHR.[66] The UK government consider that Protocol 15 shifts the role of the ECtHR to that of advisory body and have declared to have brought change to the way in which the ECtHR operates through the Brighton declaration.[67]

Diverging interpretations of the effect of Protocol 15 thus attest to the dialectic that the ECHR system exists in as between national politics and European human rights law. Those who favour a strong supranational system of European human rights review consider Protocol 15 to be nothing more than a restatement of the position as it already existed whereas the UK government are of the opinion that they have reformed the ECHR system. As the joint NGO statement highlighted, Protocol 15 'must not result in a weakening of human rights protection',[68] a human rights protection that has not been imposed by a remote European judiciary as the current UK government mandate would have public-political discourse believe but rather has evolved with careful consideration for the delicate balance between the ideology of human rights for Europe and the reality of national political agendas.

The ECHR system already makes huge concessions for government preferences. It gives individuals the right to petition *as* individuals but then counters these claims with justifications couched in the language of the public good, or national security. As such the ECHR system is one that heavily considers the national political interest in every decision it makes. It is well aware that its existence relies on the legitimation of the state members of the CoE. It does not

[66] Articles 1, 4 and 5, Protocol 15.
[67] May, *supra* n55 at col 27.
[68] Joint NGO Statement, *supra* n60 at 1.

want to upset the balance and risk losing legitimacy. Thus the reality is that national political interests play a much larger role than the ideology of a human rights system for Europe would want. Such a reality is a necessary evil of the system itself and is demonstrated in considering the historical emergence of the convention.

6. ECHR As Politics

In its initial 1950 incarnation the ECHR system was a Cold War endeavour with clear geo-political connotations. Only much later did this arrangement develop into the sophisticated legal system of today.[69] Madsen demonstrates how the genesis of the ECHR system developed through the interaction of legal actors with the realm of politics which resulted in 'blurred boundaries between law and politics'.[70] These blurred boundaries reflected a lack of institutional autonomy on the part of the ECtHR and the European Commission of Human Rights, which was allied with a lack of legal science and knowledge of European human rights. Such deficiencies in the ECHR system allowed national political interests to influence the development of the ECHR system. This legal political interplay was personified by advocates of the ECHR who were both politically and legally active[71], strategically 'zigzagging' between the national and international levels of action incorporated in the ECHR system.[72]

The drafters of the ECHR knew that the success of the ECHR system depended on striking a balance between the new human rights law of Europe with the national political interests of states. The group of legal experts that drafted the ECHR was thus careful to avoid endangering national political interests by presenting the 'legal idealism' of the ECHR as politically acceptable and pragmatic.[73] The drafting of the ECHR was seen as a way of protecting the

[69] Madsen, *supra* n9 at 138.
[70] Ibid, 138.
[71] Ibid, 141.
[72] Ibid, 138.
[73] Ibid, 139-142.

democracies of Europe from communism[74] and ensuring that fundamental rights were upheld in all countries proclaiming to be liberal democracies. A concentrated group of Western European countries ensured that the ECHR could be established and develop without the Cold War difficulties encountered by the Universal Declaration of Human Rights (UDHR).[75] The ECHR, unlike the UDHR which is implemented through soft law measures, was always intended to be a legally binding instrument with powerful mechanisms of implementation.[76]

The ECHR project was thus in its formative years very much a political, diplomatic project seeking to reassure sceptical nation states that the ECHR was not a federalist plan for Europe but rather an intergovernmental body respecting the sovereignty of nation states.[77]. In this sense the ECHR as a legal guardian of fundamental freedoms for individuals was largely ineffective in the years from its inception in 1950 up to the mid-1970s. From the mid-1970s onwards the ECHR began to evolve into a substantive human rights instrument making its mark as a legal protector of freedoms culminating in the permanently established ECtHR that sits in Strasbourg today.

In 1950, accepting the jurisdiction of the ECtHR was optional. The right to individual petition was not mandatory and had not been granted by all signatory states. The state as an actor was very much in control and the rights protection of individuals was at their discretion. The absence of a mandatory right to individual petition weakened the force of the ECHR and reflected the reticence of signatory states to hand over sovereign authority to a supra-national European power.

[74] Ed Bates, *The Evolution of The European Convention on Human Rights, From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 6-7.
[75] Madsen, *supra* n9 at 140.
[76] Ibid, 140-141.
[77] Ibid, 143.

The result was a court, established in 1959, which did not sit permanently, did not have mandatory jurisdiction and to which applicants did not have the right to individual petition. The institutional set up of the ECtHR in these early years was a two-tier system of decision making divided between the ECtHR and the European Commission of Human Rights. The European Commission of Human Rights played a filtering role for the ECtHR but the powers of the Commission were somewhat limited by the fact that it was beholden to the CoM of the CoE. Madsen highlights how this interplay between the part-time ECtHR, the Commission and the CoM demonstrates a clear interaction between law and politics in the ECHR system.[78]

The early manifestation of the ECHR system as 'reliable, respectable and legally conservative' and respectful of national sovereignty in the area of human rights, won the support of national governments and paved the way for the ECtHR to become a supreme court for European human rights adjudication.[79] Geopolitical shifts away from Cold War politics and decolonisation in the 1970s provided a context whereby human rights were thought of in legal terms rather than political terms.[80] Over time, the ECtHR has delivered a number of seminal judgments which have cemented its position as a Supreme Court for Europe. These decisions have instantiated a number of interpretive principles, 'interpretive ethic'[81] or 'methods of interpretation'[82] to guide decision making.

The ECtHR made it clear in *Wemhoff v Germany*,[83] decided in 1968, that the ECtHR should not be interpreted in a restrictive manner:

[78] Madsen, *supra* n9 at 144.
[79] Ibid, 151.
[80] Ibid, 151.
[81] See: Letsas, *supra* n15.
[82] European Court of Human Rights, 'Dialogue between judges 2011: What are the limits to the evolutive interpretation of the Convention?', Judge Tulkens at 6: <http://www.echr.coe.int/Documents/Dialogue_2011_ENG.pdf>.
[83] *Wemhoff v Germany* App 2122/64, 27 June 1968 (1979-80) 1 E.H.R.R. 55.

> Given that [the Convention] is a law-making treaty, it is … necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties[84]

This decision paved the way for a more expansive reading of the ECHR provisions clearly trying to avoid the situation where signatory states could enjoy a privileged position and minimise their obligations under the ECHR. Over the next 30 years the ECtHR established the method of evolutive interpretation,[85] also to be found in the preamble to the ECHR, the notion of the margin of appreciation[86] and the principle of effectiveness whereby 'Convention rights should be practical and effective not merely theoretical and illusory'.[87] These declarations of interpretive methodology at the ECtHR culminated in *Golder v United Kingdom*[88] which was the first case to elaborate a general theory of interpretation at Strasbourg[89] in relation to 'un-enumerated' rights, rights which are not explicitly articulated in the text of the ECHR, thus demonstrating 'a bold and revolutionary approach to interpretation'.[90] In 1985, the ECtHR established that there may be positive obligations incumbent on states in the protection of ECHR rights.[91] More recently, the ECtHR established a real right to personal autonomy as inherent in Article 8 ECHR, the right to private and family life.[92] The ECtHR equated such a right with a right to self-determination and Judge Françoise Tulkens has described extra

[84] Ibid, para 8.
[85] *Tyrer v United Kingdom* App 5856/72, 25 April 1978 (1979-80) 2 E.H.R.R. 1.
[86] *Handyside*, *supra* n16.
[87] *Airey v Ireland* App 6289/73, 9 October 1979 (1979-80) 2 E.H.R.R. 305.
[88] *Golder v United Kingdom* App 4451/70, 21 February 1975 (1979-80) 1 E.H.R.R. 524.
[89] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2008) 6.
[90] Letsas, *supra* n15 at 516.
[91] *X and Y v Netherlands* App 8978/80, 26 March 1985 (1986) 8 E.H.R.R. 235.
[92] *Pretty v United Kingdom* App 2346/02, 29 April 2002 (2002) 35 E.H.R.R. 1.

judicially how autonomy should in fact be considered a guiding principle in the ECtHR's jurisprudence.[93]

By 1990, reform of the ECHR system was needed to overcome backlogs resulting from the democratisation of Eastern Europe. In 1998 Protocol No 11 came into force, which established the ECtHR as a permanent institution with a permanent judiciary. From this date, applicants now had a mandatory right of individual petition to the ECtHR enshrined in Article 34 ECHR. The European Commission on Human Rights was dissolved and the CoM ceased to have any decision making power.[94] This removed the political influence that the CoM and the Commission had held over the part-time ECtHR and allowed the now permanent ECtHR independence to develop substantive legal human rights for individuals, thus transforming the human subject into the pertinent actor in ECHR discourse. The main facilitator of the evolution of this discourse has been the ECtHR therewith securing it the title of Supreme Court for Europe.

7. The ECHR: A Cosmopolitan Legal Order?

If the ECtHR is a Supreme Court, one might ask: what legal order does it belong to? Stone-Sweet has recently described the ECHR system as a CLO[95] . His claim is not that the ECtHR alone has the capacity to eliminate the discrimination of marginalised individuals and groups but rather that the jurisgenerative effects of the CLO of the ECHR on human rights politics in signatory states cannot be easily dismissed.[96] Stone Sweet defines a CLO as:

[93] De Schutter, O. and Tulkens, F., 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in Brems, E (ed), *Conflicts between Fundamental Rights*, (Antwerp: Intersentia 2008) 169, 199.
[94] Bates, *supra* n74 at 21.
[95] Stone Sweet, *supra* n14.
[96] Ibid, 79.

> a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship.[97]

Stone Sweet draws explicitly on Seyla Benhabib's insights into Kantian Cosmopolitanism,[98] the right to hospitality and the notion of jurisgenerative politics.

Cosmopolitanism promotes a universal standpoint that can potentially include all of humanity. Cosmopolitanism thus constitutes a way of understanding universalism beyond the boundaries set by the nation state. As David Held explains, cosmopolitan justice considers international law to be a system of public law whereby cosmopolitan sovereignty is the law of peoples because the individual as a political agent is at the core of cosmopolitanism, as well as the accountability of power.[99] Held considers this to be one characteristic of a Cosmopolitan Political Order, three remain. These are status of equal worth, consent, and inclusiveness and subsidiarity which refers to multi-level democratic governance.[100]

Benhabib's claim is that since the promulgation of the UDHR in 1948 global society has been characterised by a shift from international to cosmopolitan norms of justice[101] whereby a model of international law based on treaties among states is displaced by cosmopolitan law as international law that 'binds and bends the will of sovereign nations'.[102] Benhabib claims that

[97] Ibid, 53.
[98] Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch' (1795) in Immanuel Kant *Perpetual Peace and Other Essays,* trans Ted Humphrey (Hackett 1983).
[99] David Held, 'Law of States, Law of Peoples' (2002) *Legal Theory* 1 at 1.
[100] David Held, 'Cosmopolitanism: globalisation tamed?' (2003) Review of International Studies 465, 470-471.
[101] Seyla Benhabib et al., *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations*, ed Robert Post, (OUP, 2006) 15.
[102] Ibid, 46.

the ECHR, amongst others, is representative of the spread of cosmopolitan norms.[103] Stone-Sweet follows her in this assertion.

According to Stone-Sweet, a CLO has three defining features. Firstly, a CLO endows individuals with certain rights rather than states. This characteristic has been entrenched in the ECHR system through the mandatory imposition of Article 34, the right to individual petition, on all signatory states in 1998 by Protocol No 11.

A further defining characteristic of a CLO is that the growth of cosmopolitan norms transcends nation state boundaries.[104] This pattern has recently been witnessed in the case law of the ECtHR in *Al-Skeni and Others v UK*[105] and *Al-Jedda v UK*[106] where the ECtHR stated that the rights enshrined in the ECHR could be applicable outside the *espace juridique* of ECHR signatory states. This defiance of the boundaries of the nation state has been further underlined by the promise of accession of the European Union to the ECHR as per Article 6(2) TEU as amended by the Lisbon Treaty in 2009.[107] However, political interplay has recently interrupted this legal process. In December 2014 the Court of Justice of the European Union (CJEU) released an opinion[108] stating that the EU cannot accede to the ECHR under the current proposed terms.

The final defining characteristic of a CLO is that it constitutes an autonomous source of rights. As demonstrated above the ECHR has evolved into an autonomous institution with distinctive interpretive methods and jurisprudence developed by the ECtHR. This autonomy has been

[103] Seyla Benhabib, 'Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times' (2007) 11:1 Citizenship Studies 19, 19.
[104] Stone-Sweet, *supra* n14 at 79.
[105] App 55721/07, 7 July 2011 (ECHR).
[106] App 27021/08, 7 July 2011 (ECHR).
[107] "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.".
[108] Opinion of the Court (Full Court) of 18 December 2014. Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties (Opinion 2/13).

achieved by a subtle interplay between national and international, political, legal and diplomatic interests[109] through multifarious, multilayered processes of debate. This process corresponds with the characteristics of a CLO whereby rights are enforced by a 'decentralized sovereign'[110] where there is 'no single hierarchy that encompasses the entire political order, but instead a series of related hierarchies'.[111]

In Europe, Stone-Sweet concludes that ECHR signatory states have 'pooled and then distributed sovereignty in such a way as to create a layered set of 'nodes' of judicial authority to protect rights'.[112] This process can be witnessed in the inter-institutional and international exchanges characteristic of the early years spent establishing the ECHR which was more of a political diplomatic endeavour.[113] This interplay transposes to the present day existence of the ECHR as a dynamic legal system of human rights protection through the way in which the ECtHR and domestic courts interact and apply the ECHR rights.

8. Limits to the Cosmopolitan Approach: Politics and the Age of Subsidiarity

However, the limits to the ECHR system as a CLO lie in the very political-legal interplay at the heart of the ECHR system, upon which the ECHR relies for its existence. These limits come to the fore most prominently in the most recent period in the ECtHR's history: the age of subsidiarity.

Following what could be considered a fruitful legal period for the ECHR system in a context of economic prosperity, the suggestion here is that the advent of Protocol 15 represents a renewed political turn in the history of the ECHR. Such a political turn goes hand in hand with economic depression and the austerity measures that have been in place in Europe since 2008.

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[109] Madsen, *supra* n9 at 138.
[110] Stone-Sweet, *supra* n14 at 83.
[111] M Smith, 'Rethinking Sovereignty, Rethinking Revolution' Philosophy and Public Affairs 36(4): 143, quoted in Stone Sweet, *supra* n14, 62.
[112] Stone-Sweet, *supra* n14 at 62.
[113] Madsen, *supra* n9 at 138-139.

In times of economic crisis national political discourse shifts to internal affairs and how domestic economies can be resuscitated. An integral part of such discourse is nationalistic political discourses which seek to bolster state walls and eject those who are perceived to be an economic burden on the state.[114] National identity crises ensue and defensive strategies come to the fore as 'native' Europeans see their economic stability and the prominence of the nation state built on shared culture and language dwindling in the face of economic globalisation. This results in what Brown has termed 'psychic insulation',[115] a phenomenon based on the desire for walls between themselves and the other in an attempt to regain the comfort of a nation state built on homogenous hegemony.

Far from representing the CLO suggested by Stone-Sweet which transcends the nation state, the effect of the ECHR on the current map of Europe is to tame the nation state.[116] This process of taming reinforces the nation states of Europe and further serves to make Europe over in the image of the nation state. In such a political climate, the desired role for the ECHR system by some governments is that of advisory body which leaves domestic matters well alone. As such the changes made by Protocol 15 become necessary to assuage political anxieties and buffer political egos to ensure the ongoing legitimacy of the ECHR system. As the history of the ECHR system demonstrates, this is a delicate political balancing act that at times in the past had to present the ECHR as legally conservative in order to maintain the legitimate support of national governments. Protocol 15 is a resurgence of this idea. Such conflict and diplomacy is an integral part of the ECHR system itself.

The recent introduction of the Protocol 15 amendments demonstrates in real terms the limits to the autonomous legal system envisaged by a CLO. Protocol 15 represents a push back by

[114] Wendy Brown, *Walled States Waning Sovereignty* (Zone Books 2010) 121.
[115] Ibid, 121.
[116] Will Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice', in Benhabib *et al supra* n101 at 131.

national governments, led by the UK, to the supreme status of the ECtHR and what the current UK government interprets as the creeping powers of Strasbourg. Such a narrative prevails in the UK despite the fact that the UK government agenda is largely driven by specific policy concerns in relation to migration and national security in conjunction with the question of sovereignty, rather than any real concern for the protection of fundamental rights or the realities of the relationship between Strasbourg and London. This political demand from the UK government has been sparked by an increasingly authoritative and autonomous ECtHR which has undoubtedly evolved into a Supreme Court for Europe, although important to note, not a direct court of appeal.

The spirit in which Protocol 15 was conceived is antithetical to the notion of the ECtHR as supranational, constitutional court for Europe and the ECHR system as a CLO. However, this form of vying between political and legal and national and international interests lies at the heart of the genesis of the ECHR system. As such, the coming into force of Protocol 15 should be considered as a renewed and inevitable political turn in the evolution of the ECHR system, indeed constitutive of that system, as opposed to fatal to the ECtHR's status as Supreme Court for Europe.

The political will and impetus behind Protocol 15 to limit the powers of the ECtHR is a political will which endures in the UK Conservative party which published a plan to withdraw from the ECHR should it win the next general election[117]. Having won the election, they are pursuing this plan as government policy and building a manifesto for the 2020 general election on the platform of withdrawing from the ECHR.[118] Through imposing formal legal measures and restrictions on the decision making processes of the ECtHR, Protocol 15 attempts to block

[117] Nicolas Watt and Owen Bowcott, 'Tories plan to withdraw UK from European convention on human rights', *The Guardian*, 3 October 2014 .
[118] Will Worley, 'Theresa May 'will campaign to leave the European Convention on Human Rights in 2020 election', *The Independent*, 30 December 2016.

iterative evolutive processes and negate the status of the ECHR system as a CLO. Ultimately the impact of Protocol 15 will be measured by the effect that it has on the decision making of the ECtHR and the level of ECHR rights protection it provides. Quantitative data has demonstrated that respondent states have relied surprisingly little on the principle of subsidiarity in their submissions since the Interlaken and Brighton conferences.[119]

The UK government considered in its explanatory memorandum to Protocol 15 that the High Contracting Parties in agreeing on the terms of Protocol 15 had sent the ECtHR clear direction on the limits of its role[120] and hoped that the ECtHR would reflect these limits in its judgments. The changes to the ECHR implemented through Protocol 15 were in fact the result of compromise in light of opposition from other state parties at more radical changes proposed by the UK government which would essentially turn the ECtHR into a court of judicial review as opposed to a substantive human rights arbiter. The political compromise that resulted was Protocol 15.

The inclusion of a reference to subsidiarity and the margin of appreciation in the preamble to the ECHR is intended to signal the limits of the ECtHR's role. This political message, although loud and clear, will need to be implemented by the ECtHR in its legal decision making for it to have any practical effect in reducing the role of the ECtHR. As the JCHR has pointed out in its report to the UK Parliament on ratification of Protocol 15[121], The Equality and Human Rights Commission and other NGOs expressed concern that Protocol 15 would limit and

[119] Alastair Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) *Human Rights Law Review*, 1, 25-29.
[120] UK Government Explanatory Memorandum on Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Command Paper number: 8951, Lord Faulks QC, Minister of state for civil Justice and Legal Policy 13 October 2014, 2.
[121] House of Lords and House of Commons, Joint Committee on Human Rights, Protocol 15 to the European Convention on Human Rights, Fourth Report of Session 2014-2015 (HL Paper 71, HC 837, 2 December 2014) 7.

reduce fundamental rights protection in the CoE. Given the UK political will and policy objectives behind Protocol 15, these fears are certainly well founded.

However, as the JCHR noted, subsidiarity and the margin of appreciation are not to be read in a new light. The meaning of those principles is not to be changed to reflect the will of the UK government. In this respect the JCHR, taking the wording of the explanatory material to the Brighton Declaration which states that those principles should be read 'as developed in the Court's case-law' has reiterated the meaning of those principles as espoused by the ECtHR. The inclusion of these principles in the preamble to the ECHR was not intended to dilute state obligations to the fundamental rights of the ECtHR. Quite the contrary, it can have a 'potentially beneficial effect'.[122]

Subsidiarity has not been a principle explicit in the evolution of the ECHR system in a way comparable to other interpretive ethics such as the principle of evolutive interpretation. It was not mentioned in talks leading up to the adoption of the ECHR.[123] However, as Mowbray has shown, subsidiarity has been present from the ECtHR's early decision making and has become more pronounced in the 'contemporary period of heightened state emphasis on subsidiarity'.[124] He describes how the early part-time ECtHR demonstrated an evolving notion of subsidiarity in the form of the margin of appreciation. The post-1998 full-time court used subsidiarity to reiterate that the primary responsibility for protecting ECHR rights lay with states[125] whilst also using subsidiarity as a way of promoting state support and compliance for the ECHR through mutual cooperation. The ECtHR has highlighted that subsidiarity means support for

[122] Ibid, 27.
[123] Petzold, 'The Convention and the Principle of Subsidiarity' in Macdonald, Matscher and Petzold (eds) *The European System for the Protection of Human Rights* (1993) 42.
[124] Mowbray, *supra* n119 at 8.
[125] *Goodwin v United Kingdom* App 28957/95, 11 July 2002 (2002) 35 E.H.R.R. 18, para 85.

national courts in their interpretations of the ECHR, not bending to the political will of particular governments.[126]

Mowbray marks out the post-Interlaken age as a 'new era' for the ECtHR[127] where the Interlaken Conference proceedings called for 'a strengthening of the principle of subsidiarity'.[128] He highlights a number of cases decided post-Interlaken that support and comply with the Brighton notion of subsidiarity.[129] However most of the cases cited by Mowbray involve controversial cases of freedom of religion and public order which I would suggest would always invite a wide margin of appreciation or reliance on subsidiarity, whatever the language. Referring to data gathered from HUDOC, the ECHR online database, Mowbray demonstrates that statistically, there has been an increase in average yearly references to subsidiarity in the judgments of the Grand Chamber and Chambers in the post-Interlaken period.[130] It may well be that this increase is due to a shift in language to appease political dissatisfaction and such decisions would have been made anyway under the guise of the margin of appreciation as part of the ongoing legal-political interplay at the heart of the ECHR system.

Discussions emerging around subsidiarity and the ECHR mirror those that have taken place regarding the EU and subsidiarity since the introduction of the principle by the Maastricht Treaty (1992), which question subsidiarity as the correct way to divide competences between EU member states and EU institutions. Controversy has surrounded the question of whether subsidiarity is a legal or political principle. De Burca has described subsidiarity as both a legal and political principle although largely politically driven.[131] Similarly, the Working Group

[126] *A and Others v United Kingdom* App 3455/05, 19 February 2009 (2009) 49 E.H.R.R. 29.
[127] Alastair Mowbray, 'The Interlaken Declaration: The beginning of a New Era for the European Court of Human Rights?' (2010) *Human Rights Law Review*, 519.
[128] Mowbray *supra* n119 at 17 citing 'High Level Conference on the Future of the European Court of Human Rights' convened by the Swiss government on 18 and 19 February 2010.
[129] Ibid, 17-22.
[130] Ibid, 25-26.
[131] See: G de Burca, 'Re-appraising Subsidiarity's Significance after Amsterdam' (1999) Harvard Jean Monnet Working Paper. No 7/1999 <http://jeanmonnetprogram.org/archive/papers/99/990704.html>; G de Burca,

tasked with framing the principle of subsidiarity in the context of drafting the Constitutional Treaty for the EU emphasised the 'essentially political nature'[132] of subsidiarity. Such a view has been endorsed by Petersen who considers that subsidiarity is a concept that can be 'moulded to suit virtually any political agenda'.[133] As such subsidiarity in the EU context allows states to apply EU laws depending on their political aims.

Such an analysis of subsidiarity at the EU level accords well with the analysis being presented here of the introduction of subsidiarity into the text of the ECHR which has largely been fuelled by the political agenda of the UK government. In light of such analysis at the EU level some commentators have suggested that proportionality is a more appropriate guiding principle for the EU in place of subsidiarity. Proportionality has traditionally played a key role in the jurisprudence of the ECtHR and is enshrined into the text of the qualified rights of the ECHR. As such, the move to subsidiarity in Protocol 15 can be considered a retrograde step.

Considered in a different light, subsidiarity in the context of the ECHR means that national governments, parliaments and courts have the primary responsibility for protecting ECHR rights of individuals within their national jurisdiction and providing an effective remedy for violations.[134] As such the principle of subsidiarity does not solely enable restrictions to be put on the powers of the ECtHR, but rather the principle of subsidiarity places governments under legal obligations to take the ECHR seriously and effect a proper interpretation and implementation of the ECHR rights in the domestic system. Subsidiarity is not then the Democles sword that governments may have hoped for in relegating the ECtHR to mere

'Proportionality and Subsidiarity as General Principles of Law' in U Bernitz and J Nerglius (eds), *The General Principles of EC Law* (Kluwer Law International, The Hague 2000) .

[132] Conclusions of Working Group I on the Principle of Subsidiarity, Brussels, 23 September 2002 (CONV 286/02 WGI 1) < http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00286.en02.pdf>.

[133] J Petersen, 'Subsidiarity: A Definition to Suit Any Vision?' (1994) 47 *Parliamentary Affairs* 116, 132.

[134] Joint Committee on Human Rights, *supra* n121 at 17.

advisory body. It is a principle which enhances the political and legal interplay that characterises the evolution of the ECHR system.

The margin of appreciation is explained by the JCHR as the doctrine that 'subject to the supervisory jurisdiction of the Strasbourg Court' states enjoy a certain degree of latitude when deciding from a range of possible alternatives in which ECHR rights may be implemented. Petzold considers that the doctrine of the margin of appreciation stems directly from the principle of subsidiarity.[135] Von Staden states that the margin of appreciation represents a form of 'normative subsidiarity'[136] at the ECtHR. However, this does not amount to each state giving different interpretations of the ECHR as former UK Prime Minister David Cameron suggested when lamenting the shrinking of the margin of appreciation.

Subsidiarity and the margin of appreciation, 'are not therefore concerned with the primacy of national law over Convention law, or with demarcating national spheres of exclusive competence'.[137] The JCHR further clarified in no uncertain terms:

> The Convention system is subsidiary, not to the political will of national authorities, but to the national system for safeguarding human rights[138]

As such, the insertion of these two doctrines into the preamble to the ECHR does not allow for unfettered national interpretations of the ECHR, deciding on an ad hoc basis when governments and domestic human rights protection should be subject to ECHR scrutiny. Rather the inclusion of these doctrines means that states are now under a greater obligation to ensure protection of all ECHR rights in the national system, not just ones that cohere with current

[135] Petzold, *supra* n123 at 11.
[136] Von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 *International Journal of Constitutional Law* 1023, 1035.
[137] Mowbray, *supra* n119 at 17.
[138] Ibid, 17.

government policy. Correspondingly, national implementation of the ECHR rights will be carefully scrutinised by the ECtHR.

The JCHR interprets the inclusion of these principles in the preamble as a way to strengthen fundamental rights protection in the CoE as an interaction between the political powers of the UK Parliament having a more involved role of ensuring the protection of the rights of the ECHR and the legal powers at Strasbourg and in national domestic courts. This is a new 'age of subsidiarity' as Robert Spano, judge at the ECtHR has recently described the post Interlaken, Brighton and Protocol 15 era.[139] As Spano explains the ECtHR has taken a 'qualitative democracy-enhancing approach' towards assessing domestic decision making in the context of the principle of subsidiarity and the margin of appreciation.[140] In such an age, national governments and courts take on the greater onus of ensuring the democratic legitimacy and effectiveness of the ECHR system. The ECtHR will, however, be taking great care to ensure that national courts and Parliaments carry out a reasoned assessment of Convention compatibility.[141] The political move manifested in Protocol 15 to limit the legal powers of Strasbourg, has then been apprehended as a continuation of political and legal interplays and as a way to engage more substantively on human rights issues in Europe to ensure better ECHR rights protection. As such, the inclusion of subsidiarity and the margin of appreciation into the preamble of the ECHR can be seen as a way of ensuring that human rights protection in Europe has some possibility of holding up over time. In such a light, the ECHR system presents the level of autonomy required of a CLO which allows it to exist as a participant in ongoing negotiations rather than being beholden to the political will of certain dissatisfied states.

9. Access to Justice and Surplus Subjects

[139] Spano, *supra* n5.
[140] Ibid, 487.
[141] Joint Committee on Human Rights, *supra* n119 at 17.

Of greater concern are the changes to admissibility procedures introduced to the ECHR system by Protocol 15 which have implications for access to justice. These changes introduce a reduction of the time limit to apply to the ECtHR from six to four months and the tightening of the 'significant disadvantage' admissibility criterion. The reduction in time limit clearly reduces an individual's opportunity to apply to the ECtHR. This will have an adverse effect on successful access to a remedy and the effect will be greater on those individuals in vulnerable or precarious circumstances. In particular NGOs have highlighted that circumstances such as slow domestic procedure, geographical remoteness, lack of access to communications technology, limited access to qualified lawyers, lawyers who are not adept at dealing with the ECHR system and those with complex cases would all suffer detrimentally from this change. The NGOs further felt that this change had been adopted without adequate reflection on the consequences.[142]

The JCHR report highlights how although this amendment to application time limits was proposed by the ECtHR itself, the ECtHR proposed this change under significant political pressure from national governments to reduce the backlog at the ECtHR. Here, the political pressure from governments and the ECHR system's reliance for legitimacy on national governments manifests in a way which threatens rights protection in Europe. The political pressure exerted on the ECtHR threatens to undermine the individual right to petition which lies at the heart of the ECtHR system. Such political pressure also demonstrates the limits of the ECHR as a CLO as the individual at the heart of the CLO is being erased as a result of national political will.

[142] Ibid, 19.

The 'significant disadvantage' criterion in the admissibility procedure means that where an applicant has not suffered significant disadvantage an application will be considered to be inadmissible. There are two exceptions to this where a claim should be admitted if i) respect for human rights requires an examination of the application on its merits and ii) no case may be rejected on this ground (of significant disadvantage) which has not been duly considered by a domestic tribunal. Protocol 15 removes the second exception from the admissibility criteria, thus leaving less scope for applications to be saved. The justification for this is to avoid the ECtHR dealing with trivial issues.[143] Many submissions to the JCHR expressed concern that this erasure of the second exception would limit access to justice and result in some cases in a denial of justice altogether; a case should be heard by a least one court no matter how trivial the matter.[144]

It is clear that the amendments to the admissibility criteria pose a real threat to access to justice and access to the ECtHR. The amendments undermine the right to individual petition which places the individual instead of the state at the core of fundamental rights protection in Europe. These political moves to limit application to the ECtHR threaten to undermine not only the identification of the ECHR system as a CLO but more importantly, the priority of individual rights protection over national political concerns. Here, the complex interplay of law and politics at the heart of the ECHR system is at its most violent, not in deferring to state interpretations of the fundamental rights of the ECHR, but in potentially blocking access to these rights for some applicants altogether.

This does not however mean that the idea of the ECHR system as a CLO and the ECtHR as a Supreme Court for Europe becomes untenable. Rather the point is to acknowledge that the

[143] *Supra*, n64 at para 23. The principle is *de minimis non curat praetor* (a court is not concerned with trivial matters).
[144] Joint Committee on Human Rights, *supra* n119 at 22.

exclusion of certain subjects from the remit of the ECHR protection, which is the political concession made in Protocol 15, in fact strengthens the characterisation of the ECHR as a CLO and the ECtHR as a Supreme Court for Europe in political terms. Such a moment of exclusion of certain individuals is then written into and constitutive of the ECHR system itself. This is the exclusion that secures the ongoing legitimacy of the ECHR system.

Subsidiarity and the margin of appreciation are the headlines of Protocol 15. These political terms embody the legal-political contestation and conflict which lies at the heart of the ECHR system, given its aspirations for a human rights law for Europe and its foundations in national governments. However, the blunt and blanket changes to access to justice which are by comparison hidden in the text of Protocol 15, are more problematic than the changes to the preamble as they exclude certain individuals and groups from the remit of the ECHR altogether. Indeed as the ECtHR itself has in the past pointed out 'One can scarcely conceive of the rule of law without there being a possibility of having access to the courts.'[145]

Integral to the functioning of the ECHR system is a backwards and forwards between political, legal and fundamental rights agendas. Inevitably, subsidiarity has a role to play be it implicit in the ECtHR's legal decision making or explicitly in political statements from signatory states. Subsidiarity has always been present in the case law of the court most notably in high profile cases such as *Sahin v Turkey*[146] and *Lautsi v Italy.*[147] Much like those who will now experience access to justice problems post Protocol 15, the applicants in these two cases also became surplus to the ECHR system and ultimately, national political agendas prevailed. The illusion of justice was served through access to the ECtHR but the same moment of exclusion was present in deferring to national agendas in order to secure the ongoing legitimacy of the ECHR

[145] *Golder, supra* n89 at para 34.
[146] *Supra* n27.
[147] *Supra*, n23.

system. This was particularly evident in the case of *Lautsi* whereby the Italian government demanded that the ECtHR revisited their original findings. More recently the case of *SAS v France*[148] demonstrates subsidiarity at its most violent whereby the ECtHR import the language of 'living together', previously unknown to the jurisprudence of the ECHR, into the discourse of the ECtHR to justify their decision. This term is clearly reminiscent of the rhetoric of the French republic and affords an overwhelming and unwarranted space to French national political ideology in the transnational discourse of the ECtHR.

10. Conclusion

Former President of the ECtHR, Jean-Paul Costa, has stated that the principle of subsidiarity is already enshrined in the machinations of the ECtHR in the requirement that applicants exhaust domestic remedies before resorting to Strasbourg. As such, any reiteration or codification of the principle in the preamble to the ECHR would be purely for 'symbolic or political reasons'.[149] As the ILPA submission to the JCHR report noted the changes in relation to admissibility criteria 'strengthens the relative position of national executives against all forms of judicial control and supervision of rights'.[150] This observation sums up what the UK government was aiming to instigate with the Protocol 15 amendments, to strengthen the national executive in relation to judicial control of rights. Again, the interplay between politics and law and the domestic and international presents itself.

The extent to which Protocol 15 will strengthen national powers over the ECHR system is questionable and remains to be seen. But this political move to extend the powers of national governments and limit the powers of Strasbourg *vis à vis* implementation and interpretation of the ECHR should not be seen as fatal to the ECHR system. Indeed, such political and legal

[148] *Supra*, n7.
[149] Jean-Paul Costa, 'The Relationship between the European Court of Human Rights and the national courts' , (2013) *European Human Rights Law Review* 264, 267.
[150] Joint Committee on Human Rights, *supra*, n122, 22.

interplay lies at the very heart of the genesis of the ECHR system and as such does not pose a threat to the ECHR system. Rather such political manoeuvres as that of the UK seeking to limit the powers of the ECtHR are often contested not only by civil society, NGOs and Law Societies but also by other national governments. As such these demonstrations of political will and authority, although given credence in the sense of amending the wording of the ECHR are interpreted not as a mandate for the court to curb its activity but instead can be appropriated as a way of bolstering the ECHR system by further developing the dialogue and relationship between Strasbourg and national governments.

The main concern is not for the future of the ECHR system. Politically, such contestation lies at the heart of the ECHR system as a CLO. The evolved and independent ECtHR demonstrates the requisite autonomy characteristic of a CLO to resist political manoeuvres which seek to limit its powers. However, it does so through concessions which see certain groups and individuals expelled as the surplus subjects of the ECHR system and excluded from the protection of ECHR rights. This manifests in Protocol 15 as the reduction of time limit for application and the changes to the significant disadvantage criterion. This moment of exclusion is then integral to the very existence of the ECHR system and moreover, is constitutive of it. This is a moment of exclusion which is written into the text and interpretive methods of the ECHR. In so doing, the national policy agendas of governments are given an unwarranted space in the transnational jurisprudence of the ECtHR.

The real concern should not then be for the ECtHR, as it is already too well established to revert to a mere human rights advisory body and its place as a Supreme Court for Europe is secure, even in the face of self-serving opposition such as that of the UK government. This is nothing new and such opposition has constituted the existence conditions of the ECHR system from its inception in 1950. Rather, the real concern should be for those individuals and groups who

through political concessions either inscribed in text or performed in court, are erased from the ECHR system altogether thereby ensuring the ongoing legitimacy of the ECHR system itself.