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When ‘reform’ meets ‘judicial restraint’: Protocol 15 amending the European Convention on Human Rights

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Introduction

The European Court of Human Rights (the ECtHR, Court/Strasbourg Court) is presently facing a number of challenges. The perennial problem of its increasing workload has led the Court to implement a number of reforms. Ensuring compliance with its decisions is another strategic goal for the Court, especially with regard to highly non-compliant states. In addition, a number of commentators and governments have recently engaged in a debate concerning the limits of the ECtHR’s jurisdiction: is the Court going too far and – therefore – producing judgments that lack legitimacy?

In this challenging era for the Court, Protocol 15 amending the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention or ECHR) was adopted in June 2013. One of the main features or novelties of this important Protocol is the inclusion of a specific reference to the *subsidiarity principle* and the *margin of appreciation* the contracting parties enjoy when applying the Convention. Indeed, Article 1 of the Protocol provides:

At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:

‘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’.

The two terms should be briefly explained. First, the margin of appreciation is an ‘interpretational tool’ developed by the Strasbourg Court ‘to draw the line between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all countries whatever the variations in traditions and culture’.¹ Put differently, the doctrine implies that ‘the state is allowed a certain measure of

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1 Paul Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’ (1998) 19 Human Rights Law Journal 1.

discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right'.² Second, in international law, the principle of subsidiarity 'regulates how to allocate or use authority within a political or legal order, typically in those orders that disperse authority between a centre and various member units', and suggests that 'the burden of argument lies with attempts to centralize authority'.³ The most well-known application of the principle in the Strasbourg machinery is the exhaustion of domestic remedies rule.⁴

Protocol 15 will enter into force once ratified by all member states (Article 7); the experience with Protocol 14 has shown that this might not be a smooth and straightforward process.⁵ The Protocol contains further provisions in addition to Article 1, most notably, Article 2, which extends the age limit of sitting judges to 74,⁶ and Article 4, which reduces the limitation period to submit an application to the Court from six to four months. The focus of this paper is, however, on Article 1 of the Protocol, due to its controversial or ambiguous nature: critics of the Strasbourg Court expect that the insertion of the Protocol into the Convention's corpus will bring about a restraint in the so-called 'activist' interpretative activity of the Court.⁷

This article is the first contribution aimed at explaining the rationale behind the adoption of Protocol 15, as well as assessing the impact of the Protocol on the Court's jurisdiction. Once ratified, the Protocol will be at the core of legal debate as regards the margin of appreciation conferred upon states and the operation of the subsidiarity principle within the Convention machinery. To that end, this paper advances two claims in relation to Protocol 15. The first point concerns the background to its adoption. It is argued that the Preamble is the product of a *compromise* between two competing tendencies: on the one hand, the Strasbourg institutions, led by the Court, stressed the reform agenda and placed the Protocol in the context of the reduction in the ECtHR's workload; on the other, certain governments, led by the UK, saw in the new Protocol an opportunity for judicial restraint or an answer to their anxieties concerning an increasingly activist Court, in accordance with the ongoing debate on the Court's legitimacy. It will be argued that this is all the more important since the divergent driving forces behind the adoption of the Protocol will play their own distinctive role once the issue of the interpretation of the new Preamble arises

2 David Harris et al, *Law of the European Convention on Human Rights* (OUP 2009) 11. The *Handyside* case (concerning Article 10(2) ECHR) is considered the decisive case for the development of the doctrine: 'The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights . . . Consequently, Article [10(2) ECHR] leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force'; *Handyside v UK*, App no 5493/72, 7 December 1976, para 48.

3 Andreas Follesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law' (2013) 2 *Global Constitutionalism* 37, 37–8.

4 Article 35(1) ECHR.

5 See Christina G Hioureas, 'Behind the Scenes of Protocol No 14: Politics in Reforming the European Court of Human Rights' (2006) 24 *Berkeley Journal of International Law* 718; for more on Protocol 14 see also the 'Subsidiarity' section below. As to the current status of signatures and ratifications of Protocol 15, see <www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=8&DF=&CL=ENG> accessed 24 June 2015.

6 This Article states that 'Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22', and amounts essentially to an amendment of present Article 23(2) ECHR, providing that: 'The terms of office of judges shall expire when they reach the age of 70.' In addition, Article 23(1) ECHR states that the non-renewable term of judges should amount to a period of nine years.

7 See, for example, <www.theguardian.com/law/2013/jun/03/european-human-rights-protocol-15> accessed 30 March 2015.

before the ECtHR. In this respect, the importance the Court has attached to the Preamble of the Convention should also be underlined.⁸

Second, and assessing the text of the new preambulatory paragraph, it is emphasised that the formulation of the text, subordinating the margin of appreciation doctrine to the Court's supervisory jurisdiction, does not support any expressed ambition, on the part of some contracting parties, to actually encourage the ECtHR's so-called judicial restraint. This is pivotal because it marks a departure from the status quo, whereby the ECtHR confines the margin of appreciation doctrine to its overall supervision through its *jurisprudence*; once Protocol 15 is in force, the new Preamble will imply that this confinement stems *directly* from the *Convention*. Thus, it will be argued that the new preambulatory paragraph eventually fails to impose limitations on the ECtHR's existing interpretative practices. In fact – but strictly *legally* – this very text could potentially provide grounds for the Court to employ the paragraph as a vehicle to strengthen its constitutional position. Nonetheless, it is submitted that this is *politically* quite improbable, given that the discussion on the Court's legitimacy occupies a prominent place in academic discourse and beyond. The Court is aware of this discussion and therefore the probability of such a move is – for the foreseeable future – remote.

This contribution is structured as follows. Its first part offers an analysis of the background to the adoption of Protocol 15. Competing interests are identified, including the position of the Strasbourg institutions and the UK government. The second part assesses the main features introduced by Protocol 15 to the Preamble. Three additions can be identified: the reference to the margin of appreciation; the reference to the subsidiarity principle; and the subordination of the margin of appreciation doctrine to the supervisory jurisdiction of the Court. The article concludes by suggesting that the new Preamble, while being the product of a compromise between the two aforementioned competing tendencies, eventually fails to restrain the ECtHR's existing interpretative approach as to the Convention.

1 Background and rationale: divergent ambitions

THE POSITION OF THE STRASBOURG INSTITUTIONS

As a preliminary remark, it is noted that the reform of the Court was the subject of three successive high-level conferences at Interlaken, Izmir and Brighton; these conferences took place between 2010 and 2012.⁹ Moreover, following the Brighton Declaration,¹⁰ the Committee of experts on the reform of the ECtHR published an open call for

8 Speech by Dean Spielmann at the Max Planck Institute for Comparative Public Law and International Law, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2013) <http://echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf> 8 accessed 30 March 2015; see also the relevant discussion below.

9 See Council of Europe, 'Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and Beyond – A Compilation of Instruments and Texts Relating to the Ongoing Reform of the ECHR' (2014) <www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Compilation%20ReformECHR2014_en.pdf> accessed 30 March 2015.

10 High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (2012) <http://echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 30 March 2015 (the Brighton Declaration). The Brighton Conference was organised under the UK's chairmanship of the Committee of Ministers.

contributions on the long-term future of the Convention and the Strasbourg Court.¹¹ The preparation of the draft text of Protocol 15 was assigned by the Committee of Ministers to the Steering Committee for Human Rights (CDDH). The latter had, of course, to take into account the views expressed by the Strasbourg machinery and, most notably, the Court, the states' positions and the submissions by other relevant actors working in the field of human rights; equally important, the CDDH had to consider 'the questions dealt with in [specific] paragraphs' of the Brighton Declaration.¹²

Shortly before the Brighton Conference, the Court submitted a preliminary opinion.¹³ The opinion clearly emphasised the waves of reform that had taken place during the past 15 years and saw the Brighton Conference as an opportunity to build on the success and shortcomings of Protocol 14, the pilot judgment procedure, and so on and so forth.¹⁴ The preliminary opinion identified the member states as crucial allies in the implementation of the Convention; dialogue with national courts was enthusiastically encouraged and steps were proposed in order to deal with inadmissible, repetitive or non-priority cases.¹⁵ The aim of the Brighton Conference, according to the Court, had to be to secure a 'manageable' case load subject to two conditions: the preservation of the right to individual petition; and the promotion of effective remedies/mechanisms at the national and international level for cases the Court is not able to deal with.¹⁶ In brief, the priority for the ECtHR was the reduction of its workload, with a view to safeguarding its efficiency and ultimately its legitimacy vis-à-vis citizens/petitioners.

In a somewhat different vein, the Brighton Declaration departed from the 'reform' discourse, underlining the centrality of the subsidiarity principle and the sovereignty of the parties to the Convention:

The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, *inter alia*, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court.¹⁷

The responsibility of states to comply with the judgments of the Court was still duly stressed. However, it is at point 12 of the Declaration that one finds a clear invitation to the Court to refer to the subsidiarity principle and to the margin of appreciation doctrine, and to amend the Convention's Preamble accordingly:

11 See the call and the contributions at <www.coe.int/t/dghl/standardsetting/cddh/reformechr/Consultation_en.asp> accessed 30 March 2015.

12 See Committee of Ministers, 'Securing the Long-term Effectiveness of the Supervisory Mechanism of the European Convention on Human Rights' (2012) paras 3, 4, and 6 <<https://wcd.coe.int/ViewDoc.jsp?id=1943985&Site=CM>> accessed 30 March 2015.

13 Preliminary Opinion of the Court in preparation for the Brighton Conference (2012) <www.coe.int/t/dgi/brighton-conference/documents/Court-Preliminary-opinion_en.pdf> accessed 30 March 2015 (Preliminary Opinion).

14 Ibid. The pilot judgment procedure was first adopted in *Broniowski v Poland*, App no 31443/96, 22 June 2004, as a means of responding to the 'proliferation of structural and systemic violations capable of generating large numbers of applications from different countries'; see Preliminary Opinion (n 13), point 7.

15 Ibid.

16 Ibid point 25.

17 Brighton Declaration (n 10) point 3.

The Conference therefore:

- a) Welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments;
- b) Concludes that, for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention . . .

The above was confirmed by the Explanatory Report to Protocol 15,¹⁸ which, apart from the abovementioned points 3 and 12 of the Brighton Declaration, explicitly referred (in fact reproduced, at point 9) to point 11 of the Declaration as well:

The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

Thus, the above paragraph underlined that the Court should have 'due regard' to the margin of appreciation; in addition, the reference to the link between subsidiarity and the margin of appreciation is evident.

The Explanatory Report also referred to the 'transparency and accessibility' of the principle of subsidiarity and the margin of appreciation, 'these characteristics of the Convention system';¹⁹ this was also inspired by the Brighton Declaration and the proposals contained therein, suggesting that the visibility of remedies at the national level should be increased.²⁰ Another message stemming from these terms is that the reformulation of the Preamble will incite applicants to exhaust national remedies before turning to Strasbourg,²¹ and thus the overall amount of inadmissible applications solely on the grounds of lack of compliance with the exhaustion rule will be reduced. Importantly, the Explanatory Report pointed out that the new Recital aims at incorporating the margin of appreciation doctrine '*as developed by the Court in its case law*'.²²

As to the views of the Parliamentary Assembly, the Committee on Legal Affairs and Human Rights noted that 'the proposed changes to the text are principally of a technical and uncontroversial nature', and states were therefore urged to proceed with all the

18 Protocol 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report (CETS No 213) (2013) <www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf> accessed 30 March 2015 (Explanatory Report).

19 Ibid point 7.

20 Brighton Declaration (n 10) point 9 (referring, inter alia, to the establishment of independent national human rights institutions, the introduction of new domestic legal remedies and the appropriate translation of the ECtHR's judgments or other documents).

21 As required by Article 35(1) ECHR.

22 Explanatory Report (n 18) point 7 (emphasis added).

appropriate steps so as to speed up the process of ratification.²³ In its Report, the Committee reacted to member states' preoccupation with criticism of the Court by stating that the implementation 'of Convention standards in States Parties' is equally important, in that '[s]tressing the need to reform – and criticising – the [ECtHR] tends to mislead the public by suggesting that reform of the Court alone is needed'.²⁴

Taking into consideration the aforementioned *official* positions of the Strasbourg organs and especially of the ECtHR, one concludes that the Protocol essentially attempts to distinguish responsibilities and reaffirm member states' crucial role in the prevention of human rights violations or their elimination at the national level. In fact, the Court's view, expressed via its preliminary opinion, almost endorses this approach as a means of reducing the perennial problem of its increasing workload. It is therefore evident that, generally, the Strasbourg institutions viewed Protocol 15 as part of a broader reform agenda, whereby the amendments contained in the Preamble would be of a primarily technical nature. It is in the Brighton Declaration that we find the firmest references to states' sovereignty, and it is worth examining this matter in detail.

A RESPONSE TO *HIRST (NO 2)* ?

This section examines whether the first Article of Protocol 15 could also be attributed to British anxieties concerning an increasingly activist Court. One rather influential line of argumentation in the UK has it that, although human rights are universal in their conception, their application and implementation should best be left to the 'hands' of national authorities and courts.²⁵ This is not a recent development. It should be remembered that, in his well-known dissenting opinion in *Golder*, Fitzmaurice concluded in 1975 as follows: '[i]f the right [of access to courts] does not find a place in Article 6.1, it clearly does not find a place anywhere in the Convention. This is no doubt a serious deficiency that ought to be put right. But it is a task for the contracting states to accomplish, and for the Court to refer to them, not seek to carry out itself'.²⁶

A number of interesting deductions stem from the preparatory work of the CDDH and its Committee of Experts, demonstrating that the reality behind the adoption of Protocol 15 is somewhat more complicated when compared to the approach taken by the Court and the Parliamentary Assembly post-Brighton, but before the adoption of the final text. First, during its meeting in June 2012, the CDDH acknowledged that only Article 1 of the forthcoming Protocol would be a 'challenging' amendment; the remaining amendments were viewed as 'relatively straightforward'.²⁷ It was also added that the new text 'should stay within the consensus of the Brighton Declaration, respect the balance of the existing preamble and be comprehensible to the general public'.²⁸ Second, the Report produced by the Committee of Experts in October 2012 clearly referred to 'potentially conflicting

23 Committee on Legal Affairs and Human Rights, 'Draft Protocol No 15 to the European Convention on Human Rights' (2013) <www.assembly.coe.int/Communication/ajdoc11_2013.pdf> accessed 30 March 2015.

24 Ibid point 3.

25 Lord Hoffmann, 'The Universality of Human Rights' (2009) *Law Quarterly Review* 416, critically assessed by Christos Rozakis, 'Is the Case-law of the European Court of Human Rights a Procrustean Bed? Or is it a Contribution to the Creation of a European Public Order? A Modest Reply to Lord Hoffmann's Criticisms' (2009) 2 *UCL Human Rights Review* 51.

26 *Golder v UK*, App no 4451/70, 21 February 1975, Separate Opinion of Judge Sir Gerald Fitzmaurice, para 48. For more on Fitzmaurice's (different) understanding of the Convention, see 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 2013) 359–65.

27 See CDDH's Report of 1 July 2012, CDDH(2012)R75, p 6.

28 Ibid.

positions' concerning the first Article, and concluded that the final text sought to serve a number of interconnected aims: to refrain from defining relevant terms, possibly with a view to leaving this task to the Court; and, by doing so, to avoid presenting the Court as the 'originator of the doctrine of the margin of appreciation' and to avoid 'refer[ring] to the role of the Court in relation to the margin of appreciation'.²⁹ Equally important, the Committee did not accept proposals to include the phrases 'subsidiarity in the interpretation of the Convention' and 'a margin of appreciation in executing Court judgments'.³⁰ In addition, the ECtHR's opinion of 6 February 2013 on Article 1 of the Protocol (that is, after the final text was agreed – reference to this opinion is also made below) not only underlined a preference, on the part of the Court, to refer to the margin of appreciation 'as developed by the Court in its case law', but it also confirmed that the text was the product of a 'compromise' in order to facilitate an agreement.³¹

The submissions by pertinent civil society actors on Protocol 15 ECHR should also be taken into consideration. A significant number of NGOs published a joint statement in June 2013, underlining that this Protocol 'must not be allowed to result in a weakening of the Convention system and human rights protection in Europe'.³² Moreover, the NGOs favoured a more balanced drafting of the Preamble, notably one that would explicitly refer to other interpretative principles developed by the Court, such as the proportionality principle, the interpretation of the Convention as a 'living instrument' or the 'principle that rights must be practical and effective rather than theoretical and illusory'.³³ These views were also endorsed by the European Group of National Human Rights Institutions.³⁴

The UK signed the Protocol on the day it was opened for signature and informed the CDDH that 'it attaches great importance to Protocol 15' and hopes that 'all States Parties will sign and ratify it as soon as possible so that the measures agreed in the Brighton Declaration may be rapidly implemented'.³⁵ Simultaneously, a press release issued by the UK Ministry of Justice emphasised that the Court's reform decided during the Brighton Conference and the subsequent adoption of the Protocol 'was one of the key priorities for the UK's chairmanship of the Council of Europe' and, furthermore, that the new package entails that '[t]he court will not normally intervene where national courts have clearly applied the Convention properly'; lastly, it was mentioned that 'the Court should not routinely overturn the decisions made by national authorities'.³⁶ The press release was, of

29 Committee of Experts on the Reform of the Court (DH-GDR), 2nd meeting of 29–31 October 2012, DH-GDR(2012)R2, 3 (emphasis added).

30 Ibid (emphasis added).

31 CDDH, 'Opinion of the Court and of the Parliamentary Assembly on Draft Protocol No 15 to the European Convention on Human Rights' 7 June 2013, CDDH(2013)015, 2–3. The Parliamentary Assembly in its opinion of 26 April 2013 emphasised as well that the reference to the doctrine of margin of appreciation should be understood 'as developed by the Court's case law'; *ibid* 5.

32 Joint NGO Statement, 'Protocol 15 to the European Convention on Human Rights Must not Result in a Weakening of Human Rights Protection' (2013) <www.amnesty.org/en/library/info/IOR61/007/2013/en> accessed 30 March 2015 (Joint Statement).

33 *Ibid* 2. The 'living instrument' method has enabled the Court to adopt a dynamic interpretation, taking into consideration the 'present-day conditions', embedding a 'higher standard of protection' and accommodating 'new technologies or . . . social change'. See Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 *European Constitutional Law Review* 173, 177–8.

34 CDDH/DH-GDR, 'Compilation of Written Comments on Draft Protocol No 15' 26 October 2012, DH-GDR(2012)012, 2.

35 CDDH, 'Review of the Council of Europe Conventions' 2 April 2014, CDDH(2014)005, 14. It should also be noted that the UK ratified Protocol 15 on 10 April 2015.

36 See Press Release, 'UK Delivers European Court Reform' <www.gov.uk/government/news/uk-delivers-european-court-reform> accessed 30 March 2015.

course, a political document directed mainly at the national audience or part thereof. Still, the statement by the UK Ministry of Justice aligns with a significant number of warning signs delivered by the current UK government and even by members of the judiciary, questioning the ambit of the ECtHR's authority.³⁷ These signs have recently been characterised by the incumbent President of the Court, Dean Spielmann, as disappointing, given that the UK was one of the founding states of the Council of Europe.³⁸

The current state of human rights affairs in the UK is primarily characterised by the balance the Human Rights Act 1998 strikes between the doctrine of parliamentary sovereignty³⁹ and the Convention. This is reflected in ss 2–4 of the Act. The Act essentially injected 'fundamental values . . . intrinsic to representative democracy' in a deeply 'procedural' UK constitution, 'based on a commitment to a particular form of representative majoritarian democracy and responsible government'.⁴⁰ Section 2(1) imposes an obligation upon UK courts and tribunals to 'take into account' any judgment or opinion of the ECtHR. Section 3(1) states that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. If this is not possible and regarding primary legislation only, s 4(2), read in conjunction with s 4(1), empowers certain high-ranking courts to issue a declaration of incompatibility. The exact ambit of these sections or the Act itself is a question open to debate. With respect to the fairly contentious s 2(1), for example, Clayton reads that section as leaving it to the courts to decide 'the weight to be given to the Strasbourg jurisprudence', not least since 'it was not the government's intention to require the domestic courts to be bound by Strasbourg decisions'.⁴¹ For Sales, the so-called 'mirror principle' implies that UK courts should generally – but not always – follow judgments of the Strasbourg Court, unless there are convincing reasons for them to do otherwise; this means that, although the discretion as to the weight ultimately remains with the courts, Parliament's intention was that 'the weight to be given to [Strasbourg jurisprudence] should be great'.⁴²

The law is, of course, evolving through the UK courts' jurisprudence, which cannot be discussed here extensively.⁴³ Suffice it to briefly refer to the well-known views of Lord Bingham in *Ullah*: '[t]he duty of national courts is to keep pace with the Strasbourg

37 See 'European Court is not Superior to UK Supreme Court, says Lord Judge' *The Guardian* (London 2013) <www.theguardian.com/law/2013/dec/04/european-court-uk-supreme-court-judge> accessed 30 March 2015.

38 BBC, *Hardtalk – Dean Spielmann* <www.bbc.co.uk/programmes/n3cstjlm> accessed 24 June 2015. Along similar lines, former President Bratza found 'deeply regrettable' the proposals within the UK to withdraw from the ECHR; Nicolas Bratza, 'The Relationship between the UK Courts and Strasbourg' [2011] *European Human Rights Law Review* 505, 506.

39 It is needless to point out that the Diceyan 'orthodoxy' is facing increasing challenges, including from the Human Rights Act 1998; see, for example, John McGarry, 'The Principle of Parliamentary Sovereignty' (2012) 32 *Legal Studies* 577; Anthony Bradley, 'The Sovereignty of Parliament – Form or Substance?' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (OUP 2011) 35; R (*Jackson*) v *Attorney General* [2005] UKHL 56; or the very recent case R (*Evans*) v *Attorney General* [2015] UKSC 21 (the 'black spider memos'), which will no doubt prompt further reflections on the relevancy of the traditional understanding of parliamentary sovereignty. For a more reconciliatory approach compare, however, Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015).

40 David Feldman, 'The Human Rights Act and Constitutional Principles' (1999) 19 *Legal Studies* 165, 166.

41 Richard Clayton, 'Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law' [2012] *Public Law* 639, 640–1.

42 Philip Sales, 'Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine' [2012] *Public Law* 253, 255–8.

43 See, in this respect, Sales (n 42); Clayton (n 41); Bratza (n 38); Colm O'Cinneide, 'Human Rights Law in the UK – Is There a Need for Fundamental Reform?' [2012] *European Human Rights Law Review* 595; Francesca Klug, 'The Long Road to Human Rights Compliance' (2006) 57 *Northern Ireland Legal Quarterly* 186.

jurisprudence as it evolves over time: no more, but certainly no less';⁴⁴ or to the statement (with 'considerable regret') by Lord Hoffmann that 'the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation';⁴⁵ or to the more balanced position in *Manchester City Council v Pinnock* that the UK Supreme Court is not 'bound to follow every decision of the [ECtHR]', but

[w]here, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of [UK] law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for [the UK Supreme Court] not to follow that line.⁴⁶

This meticulously drafted balance is presently experiencing an unmatched degree of scrutiny⁴⁷ due to – among other cases – one (controversial, for some) decision of the ECtHR. In the well-known *Hirst (No 2)* case, the Strasbourg Court held that the blanket ban on voting rights imposed upon all prisoners was disproportionate and inconsistent with the right to vote, as guaranteed by Article 3 of Protocol 1 ECHR.⁴⁸ Putting aside the discussion of the case in the media, *Hirst (No 2)* was met with varying reactions from the UK courts and the UK Parliament, the latter being split into three groups: the first group stressed the importance of complying with international law and effectively respecting the rule of law; the second group favoured the sovereignty of Parliament and eyed Strasbourg as a threat; and yet another favoured extensive deliberation on this issue as a means of influencing the European Court.⁴⁹ But it was only after *Hirst (No 2)* that a major debate on the relationship between the Convention and the domestic legal order took place in Westminster, which, according to Bates, cannot but suggest that the progressively expanding jurisdiction of the Court before that case was duly accepted on the basis of a 'political calculation' by successive UK governments, although the consequences of this 'commitment' were occasionally viewed as 'unwelcome'.⁵⁰

One line of argument on why the ECtHR overstepped its authority was that Article 3 of Protocol 1 ECHR does not grant universal suffrage, but is destined at guaranteeing a specific democratic procedure.⁵¹ This is flawed, not least since it is in clear contrast to the Court's expressly adopted view since 1987.⁵² However, criticism has been levelled against

44 *R (on the Application of Ullah) v Special Adjudicator* [2004] UKHL 26, para 20.

45 *Secretary of State for the Home Department v AF* [2009] UKHL 28, para 70; regret was expressed because the relevant decision of the ECtHR was, in Lord Hoffmann's view, 'wrong'.

46 *Manchester City Council v Pinnock* [2010] UKSC 45, para 48. Compare also the brief discussion of *R v Horncastle* in the concluding section below.

47 As Judge Bratza put it (referring to *Hirst No 2* (n 48)): '[t]he vitriolic – and I am afraid to say, xenophobic – fury directed against the judges of my Court is unprecedented in my experience'. See Bratza (n 38) 505.

48 *Hirst v UK (No 2)*, App no 74025/01, 6 October 2005, paras 76–85. See also s 3 of the Representation of the People Act 1983. Importantly, however, the Court left it to the UK to decide how, under its wide margin of appreciation, it will implement this judgment and comply with Article P1–3; see paras 83–4.

49 Sophie Briant, 'Dialogue, Diplomacy and Defiance: Prisoners' Voting Rights at Home and in Strasbourg' [2011] *European Human Rights Law Review* 243, 250.

50 Ed Bates, 'British Sovereignty and the European Court of Human Rights' (2012) *Law Quarterly Review* 382, 406–7.

51 David Davis, 'Britain Must Defy the European Court of Human Rights on Prisoner Voting as Strasbourg is Exceeding its Authority' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 67–8.

52 See *Mathieu-Mohin and Clerfayt v Belgium*, App no 9267/81, 2 March 1987. For some discussion on the *travaux préparatoires* behind Article P1–3, see Nikos Vogiatzis, 'Mapping the Jurisdiction of the European Court of Human Rights further to the "Reasonable Intervals" Clause of the Right to Free Elections' [2013] *European Human Rights Law Review* 401.

the Court from outside the UK as well. Zwart considers, for instance, that the case was an instance where the ECtHR pursued a strategy to target a highly compliant state so as to increase the overall boundaries of protection, especially because prisoners lack the right to vote in other contracting states as well.⁵³ In any case, the fact remains that, in light of strong domestic opposition, the UK government has yet to implement the ECtHR's decision.⁵⁴

Another – interconnected with Brighton – manifestation of the British anxieties vis-à-vis the Strasbourg Court is the UK government's persistence in drafting its own Bill of Rights, an idea that would, in all probability, amount to the repeal of the Human Rights Act 1998.⁵⁵ The independent Commission on a Bill of Rights, appointed to examine this possibility, submitted its final report in December 2012; the majority of members found that 'there is a strong argument in favour of a UK Bill of Rights', but two members opined otherwise as they were not convinced that there are flaws in the way the Human Rights Act 1998 currently operates and is applied by the domestic courts.⁵⁶ Individual members openly denounced the ECtHR on the grounds of *Hirst (No 2)* and the 'judicially activist approach' taken by Strasbourg 'in the last 30 years', which undermines – according to the authors – 'the democratically expressed will of Parliament'.⁵⁷ Many have criticised the necessity or the motives behind such a move: Elliott argues, for example, that, regardless of the content of the list of rights contained in a possible new Act, the adoption of a mechanism which would '[make] more difficult the vindication of extant legal rights by requiring litigants more frequently to traverse the road to Strasbourg' is perfectly imaginable.⁵⁸ For Harvey, the process is primarily informed by an 'inward looking' agenda, which does not pay sufficient attention to the complexities of the UK's constitutional design.⁵⁹

A COMPROMISE, LEAVING OPEN QUESTIONS OF INTERPRETATION

The above analysis reveals that the Brighton Declaration and the subsequent Protocol 15 should be viewed as a story of competing interests leading to a compromise. The 'reform' discourse advanced by the Court and the Parliamentary Assembly had to be reconciled with British concerns about an increasingly 'activist' Court.⁶⁰ This is not unfamiliar territory for

53 Tom Zwart, 'More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights Is in Need of Repair and How It Can Be Done' in Flogaitis et al (n 51) 71, 80.

54 For the legal developments after *Hirst (No 2)* (n 48), see Colin Murray, 'We Need to Talk: "Democratic Dialogue" and the Ongoing Saga of Prisoner Disenfranchisement' (2012) 62 Northern Ireland Legal Quarterly 57.

55 Mark Elliott, 'After Brighton: Between a Rock and a Hard Place' [2012] Public Law 619; O'Connell (n 43). The debate did not commence in light of Brighton, but constitutes part of a broader discussion on the functionality of the Human Rights Act – see, in this respect, Colin Murray, 'Taking the Next Step? Achieving Another Bill of Rights' [2011] European Human Rights Law Review 24; Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 Modern Law Review 883.

56 Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice Before Us' (2012) vol 1, 175–7.

57 Lord Faulks QC and Jonathan Fisher QC, 'Unfinished Business', in Commission on A Bill of Rights (n 56) 182.

58 Elliott (n 55) 627.

59 Harvey (n 55) 41.

60 This is confirmed by Judge Costa, who observed that, during the Izmir and Brighton conferences, 'the attitude has been less favourable to the Court', sending the following message: 'governments (or some of them) wish to compel the Court to exercise increased self-restraint in its scrutiny', particularly in relation to sensitive issues, the prisoners' right to vote being the evident example. See Jean-Paul Costa, 'The Relationship between the European Court of Human Rights and the National Courts' [2013] European Human Rights Law Review 264, 265.

the Convention.⁶¹ What remains to be assessed, though, is whether and to what extent the final text reflects such a compromise, or whether the actual solution might be more promising for the Court than its critics imagined.

2 Three elements of Article 1 of Protocol 15 in context

THE MARGIN OF APPRECIATION

The new Preamble will state that the contracting parties 'enjoy a margin of appreciation'. It is therefore appropriate to provide some clarification as to the meaning and scope of this term. The margin of appreciation doctrine generally places the Court in a position to ask a number of questions, including the following: when exactly are restrictions to a right necessary in a democratic society? When does the legislation under examination go below the common standards in most European countries? When may these restrictions not be justified with reference to the constitutional and historical background of the respondent state?⁶² The doctrine takes other 'manifestations' as well, including 'the Court's respect for the facts as established by the domestic courts or their interpretation of domestic law'.⁶³ The doctrine is irrelevant for specific Convention rights, a point which is returned to below. For *Arai-Takahashi*, the proportionality principle and the doctrine possibly interact: '[t]he more intense the standard of proportionality becomes, the narrower the margin allowed to national authorities'.⁶⁴

Some commentators consider that the Strasbourg Court could provide further guidance as to the use and application of this doctrine. Letsas invited the Court to distinguish between the 'substantive' and 'procedural' use of the margin of appreciation, namely between cases where 'the applicant did not, as a matter of human rights, have the right he or she claimed', and cases where the ECtHR 'will not substantively review the decision of national authorities as to whether there has been a violation'.⁶⁵ For the ECtHR's President, the application of the doctrine is indeed 'predictable only to a certain degree', but this is inevitable as the facts and the legal framework of the case are of utmost importance: the margin 'is not a fixed unit of legal measurement[,] [n]or is it applied at the Court's own pleasure'.⁶⁶

In an effort to apply the proportionality principle consistently, the ECtHR will often seek for – what is termed as – the European consensus, the identification of pan-European legal agreement on a – frequently – sensitive or controversial matter. The interpretative instrument of European consensus could also benefit from a precise definition, on the part of the Court, in order to unravel its true legitimising factor and to bring about 'clarity and foreseeability to case law in relation to almost all Convention rights'.⁶⁷

61 See Danny Nicol, 'Original Intent and the European Convention on Human Rights' [2005] Public Law 152; Bates (n 50) 382.

62 Anthony Bradley, 'Introduction: The Need for Both International and National Protection of Human Rights – The European challenge' in Flogaitis et al (n 51) 5–6.

63 Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 Current Legal Problems 49, in particular 55 (and case law cited therein).

64 Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 14.

65 George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 81.

66 Spielmann (n 63) 56.

67 Kanstantsin Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] Public Law 534.

To the possible surprise of many contemporary critics of the Court, the ECtHR had to deal with certain rather severe allegations during the 1990s, including from UK politicians, all centring on the tenet that it was relying too much on the margin of appreciation the contracting parties enjoy.⁶⁸ Thus, the Court was accused *inter alia* of ‘denial of justice’, ‘resignation’, ‘opportunism’ and avoiding adjudication in sensitive cases.⁶⁹

If one now considers the amended text of the Preamble, the first thing to be noted is that the new formulation departs from the initial intention to refer to the term ‘*considerable margin of appreciation*’.⁷⁰ In addition, as discussed above, the Explanatory Report highlighted that the margin of appreciation is dependent on the facts of the case and the rights in question.⁷¹ Equally important, according to the explanatory text, the notion of margin of appreciation should be understood *in line with the Strasbourg case law*.⁷² This qualification does not feature in the text of the new preambulatory paragraph. The ECtHR was quick to note that, although the text is incomplete, and ‘could give rise to uncertainty as to its intended meaning’, the fact that ‘the drafters’ intentions have been clarified’ was not without legal consequences.⁷³ The Court added, in particular, that the Explanatory Report, as well as the documents prepared under the CDDH, [form] part of the *travaux préparatoires* of the Protocol and thus [are] relevant to its interpretation.⁷⁴ The Joint NGO Statement also observed that the subordination of the doctrine to the ECtHR’s interpretative practices entails a confirmation of specific principles: ‘the Court has always accepted that the doctrine of the margin of appreciation does not apply at all in respect of some rights, such as freedom from torture and other ill-treatment’.⁷⁵ The Strasbourg Court arguably believed that the inclusion of the phrase ‘as developed by the Court’s case law’ would recognise the ‘*provenance* of the margin of appreciation’,⁷⁶ but the CDDH refrained from developing the text further.

The removal of the term ‘considerable’ is noteworthy because the Court itself on a number of occasions has recognised that the extent of the states’ discretion is significant. To take the example of the abovementioned prisoners’ right to vote, in *Mathieu-Mobin* the ECtHR accepted that the contracting parties ‘have a *wide* margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 (P1) have been complied with’.⁷⁷ Still, the omission of the term ‘considerable’ may not be overstressed; the doctrine interacts⁷⁸ with the subsidiarity

68 See Mahoney (n 1) 1; the author also refers to an opinion expressed at the time by Lord Lester of Herne Hill, who argued that the margin of appreciation [had] become as slippery and elusive as an eel’ and could ‘become the source of a pernicious “variable geometry” of human rights’. See also Timothy Jones, ‘The Devaluation of Human Rights under the European Convention’ [1995] Public Law 430.

69 Mahoney (n 1) 1.

70 See Elliott (n 55) 623, commenting on the Brighton Declaration (n 10) and comparing the final text of the Declaration with a leaked, preparatory version of February 2012, drafted in the context of the UK’s chairmanship of the Council of Europe’s Committee of Ministers, which indeed referred (at point 17) to the ‘considerable margin of appreciation’ the states need – according to the drafters of this document – to enjoy.

71 Explanatory Report (n 18).

72 *Ibid* point 7.

73 Opinion of the Court (n 31) point 4.

74 *Ibid*.

75 Joint Statement (n 32) 3.

76 Spielmann (n 63) 58 (emphasis added).

77 *Mathieu-Mobin and Clerfayt v Belgium* (n 52) para 52 (emphasis added). The Court has consistently followed this approach on P1–3. See, recently, *Söyler v Turkey*, App no 29411/07, 17 September 2013, para 33.

78 Explanatory Report (n 18).

principle, enabling the Court to essentially entrust the protection of a specific right (or the justification of its restriction) to the domestic order and, in particular, the domestic courts.

SUBSIDIARITY

It would not be hyperbole to suggest that the ECtHR more often than not 'treasures' the notion of subsidiarity. Subsidiarity has various meanings.⁷⁹ The principle indeed penetrates in a number of ways the Convention, the Court's function and the implementation of its decisions. The classic understanding of subsidiarity in the Convention machinery is the exhaustion of domestic remedies rule; otherwise, the application is considered inadmissible.⁸⁰ Moreover, although the extent of the margin of appreciation is primarily defined by the matter/case at hand and the right in question,⁸¹ subsidiarity may also be viewed as granting contracting parties greater discretion: this was duly acknowledged by the Explanatory Report to Protocol 15 and the Brighton Declaration.⁸² Further, subsidiarity is pivotal for the enforcement of the ECtHR's judgments;⁸³ this entails not only that states parties have a number of options as to 'how to fulfil their obligations under the Convention',⁸⁴ but also that they are encouraged to 'develop domestic capacities and mechanisms to ensure the rapid execution of the Court's judgments'.⁸⁵ In addition, subsidiarity presupposes *prevention* at the domestic level, including the establishment of appropriate legal remedies.⁸⁶ The new Preamble aptly reflects this tenet, since the '*primary* responsibility to secure the rights and freedoms' rests with states.⁸⁷ In a formulation echoing s 2 of the Human Rights Act 1998, the Brighton Declaration invited national courts and tribunals to 'take into account the Convention and the case law of the Court'.⁸⁸

Pragmatically, the subsidiarity principle has been employed to justify a number of reforms seeking to reduce the enormous workload of the Strasbourg Court. The Court may have managed to significantly reduce pending cases below the threshold of 100,000,⁸⁹ but the problem remains unresolved.

In 2005, Lord Woolf sent a clear warning sign with his report on the working methods of the Court, in which he identified possible reforms that would not require amendments to the Convention.⁹⁰ Among others, it was proposed that national extra-judicial institutions could play a catalytic role in the reduction of the Court's workload,⁹¹ while the possibility of

79 For a convincing definition of the principle in international law see Follesdal (n 3) 37–8.

80 Article 35(1) ECHR.

81 Mahoney (n 1) 1.

82 Explanatory Report (n 18).

83 Article 46(1) ECHR states that: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.'

84 Brighton Declaration (n 10) point 29(b).

85 Ibid point 29(a).

86 Ibid points 7 and 9(c)iii.

87 Article 1 Protocol 15 (emphasis added).

88 Brighton Declaration (n 10) point 7.

89 Press Release, 'President Spielmann Highlights the Court's Very Good Results in 2013' (2014) <<http://hudoc.echr.coe.int/webservices/content/pdf/003-4653899-5638176>> accessed 31 March 2015. It should also be noted that, according to the Provisional Annual Report 2014, the number of pending cases was further reduced by the end of 2014 to 70,000.

90 Lord Woolf, 'Review of the Working Methods of the European Court of Human Rights' (2005) <www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf> accessed 30 March 2015.

91 In this respect, the Brighton Declaration (n 10) refers to the establishment of 'an independent National Human Rights Institution' (point 9(c)).

establishing Satellite Offices of the Registry, especially in countries producing a high number of inadmissible complaints, was duly underlined.⁹² In 2006, another report was produced by a group of experts, containing additional recommendations.⁹³ Amendments to the Convention were not subsequently avoided, and Protocol 14 entered into force despite the initial Russian opposition.⁹⁴ According to the President of the Court, this Protocol is mainly responsible for the massive reduction in the number of pending cases.⁹⁵

It is the severe problem of the increasing workload⁹⁶ that has prompted commentary on the overall constitutional position of the ECtHR. Has the time come for the Court to focus on its ‘constitutionalist’ function, that is, ‘clarifying standards, holding states to account’ or developing rights and standards ‘beyond their literal . . . conceptions’, instead of its ‘adjudicatory’ one, possibly with the implication of restraining the right of individual petition?⁹⁷ In their review of ‘the “official” and the “academic/judicial” debates’ on the ECtHR’s constitutionalisation, Greer and Wildhaber ‘advocate “constitutional pluralism” as the best analytical paradigm for the Convention system and also the best framework for the identification and pursuit of procedural and other reforms’.⁹⁸ Other more cautious approaches favour a more efficient division of labour between the Grand Chamber and the Chambers, in order for the right of individual petition to be maintained, a right that admittedly preserves the Court’s own legitimacy.⁹⁹

The Court is well aware of this debate. In accordance with the ‘reform’ discourse discussed above, in its opinion before Brighton it realistically acknowledged that there is ‘a mismatch between the Court’s workload and its capacity’, and that the Convention system may only be efficient by adopting the principle of shared responsibility, since ‘[t]he Court should not in principle, and cannot in practice, bear the full burden of work generated by implementation of the Convention’.¹⁰⁰ These considerations demonstrate that the reference to the subsidiarity principle under Protocol 15 is arguably viewed by the Court as a positive development.¹⁰¹

92 Lord Woolf (n 90) 5.

93 Report of the Group of Wise Persons to the Committee of Ministers (2006) CM(2006)203 <<https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM>> accessed 30 March 2015.

94 The Protocol brought about (among others) a number of procedural amendments to the Convention, notably: the single-judge formation (Articles 26 and 27 ECHR); the competence of committees to decide cases further to well-established case law (Article 28(1)b ECHR); the ‘significant disadvantage’ criterion for admissibility (Article 35(3)b ECHR). For a discussion see, for example, Lucius Caflisch, ‘The Reform of the European Court of Human Rights: Protocol No 14 and Beyond’ (2006) 6 Human Rights Law Review 403; Michael O’Boyle, ‘On Reforming the Operation of the European Court of Human Rights’ [2008] European Human Rights Law Review 1.

95 Press Release (n 89).

96 As noted above (n 89), the results in 2014 were encouraging: the number of pending cases fell below 70,000.

97 Fiona de Londras, ‘Dual Functionality and the Persistent Frailty of the European Court of Human Rights’ [2013] European Human Rights Law Review 38. For an overview of the academic debate, see, for example, Steven Greer and Luzius Wildhaber, ‘Revisiting the Debate about “constitutionalising” the European Court of Human Rights’ (2012) 12 Human Rights Law Review 655; Robert Harmsen, ‘The European Court of Human Rights as a “Constitutional Court”: Definitional Debates and the Dynamics of Reform’, in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (OUP 2007) 33.

98 Greer and Wildhaber (n 97) 659, 684. They explain that the ‘official debate is dominated mostly by Strasbourg officials, diplomats and NGOs’.

99 Kanstantsin Dzehtsiarou and Alan Greene, ‘Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism’ [2013] Public Law 710.

100 Preliminary Opinion (n 13) points 4, 5.

101 CDDH (n 31) point 5.

However, this does not mean that the precise *ambit* of the term enjoys universal acceptance. For the Court's President (citing *Handyside*),¹⁰² the question 'Subsidiarity to what?' necessitates the following answer: '[t]o "the national systems safeguarding human rights", and not, as some seem to think, to the political will or policy of the national authorities'.¹⁰³ For de Londras, the effectiveness of the Convention requires 'a level of political subsidiarity between the Council of Europe's political processes and the Court', in the sense that a more robust political supervision of systemic violations would provide the Court with sufficient breathing space to deal with its constitutional function.¹⁰⁴

ON THE INCLUSION OF BOTH TERMS IN THE PREAMBLE

Elliott observed that the references to the subsidiarity principle and the margin of appreciation feature in the Preamble and not in the main corpus of the Convention.¹⁰⁵ Indeed, the draft version of the Declaration, presented in February 2012, stated that the 'transparency and accessibility of the principles . . . should be enhanced by their express inclusion in the Convention'.¹⁰⁶

If the above version of the Declaration was adopted, the two terms could have been included in specific Articles of the Convention or possibly Article 1 ECHR,¹⁰⁷ which can be seen as an expression of the subsidiarity principle.¹⁰⁸ Two questions stem from this point. First, would it have been preferable if the references had featured in specific Articles, for instance, Articles 8–11 of the Convention, where the Court has employed the margin of appreciation doctrine to identify whether interference with these rights may be justified under public interest grounds?¹⁰⁹ Second, would it have been possible to envisage the insertion of the clause into the existing Article 1 ECHR?

It is initially essential to remind ourselves of the importance the Court has attached to the Preamble of the Convention. As is well known, the Court follows a contextual interpretation, suggesting that the Convention should be interpreted as a whole; this is linked to its approach that the 'object and purpose' of the Convention need to be duly considered.¹¹⁰ According to the Vienna Convention, which informs the work of the Court, '[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 purposes' – the Preamble forms part of the context of a Treaty.¹¹¹ Thus, the Preamble 'articulates

102 *Handyside* (n 2) paras 48–50.

103 Spielmann (n 8) 2. However, as previously mentioned (above n 2), the margin of appreciation is 'given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force'; see *Handyside* (n 2) para 48.

104 De Londras (n 97) 44.

105 Elliott (n 55) 623, referring to the Brighton Declaration, but with consequent implications for Protocol 15 as well.

106 *Ibid.* See also point 19(b) of the draft version <www.theguardian.com/law/interactive/2012/feb/28/echr-reform-uk-draft> accessed 30 March 2015.

107 Article 1 ECHR provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

108 See Mahoney (n 1) 2; compare also the discussion below.

109 See, for example, Harris et al. (n 2) 12.

110 See, for example, Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (OUP 2014) 73ff.

111 Vienna Convention on the Law of Treaties, Articles 31(1) and 31(2). Aust argues that there is no hierarchy of norms in Article 31, but a 'logical progression': '[o]ne naturally begins with the text, followed by the context, and then other matters, in particular, subsequent material'. Anthony Aust, *Modern Treaty Law and Practice* (CUP 2013) 208.

certain fundamental precepts that the Court has drawn upon when interpreting the substantive provisions of the Convention'.¹¹² Judge Rozakis expressed the view that the current Preamble not only reflects the fact that 'all the contracting states express their expectations [therein] and describe their goals to be achieved through the implementation of the [Convention's] provisions', but also that some terms featuring therein, and notably 'the achievement of greater *unity*' and 'the maintenance and *further realisation* of Human Rights', clearly, 'and without stretching the meaning of the words to eccentric results', suggest that the drafters had in mind a 'more ambitious future' for the Convention.¹¹³ Now, if one is willing to interpret the Preamble in this vein, one is simultaneously willing to accept that the 'post-Protocol 15' Preamble, featuring the principles of the margin of appreciation and subsidiarity, could perhaps imply a *less* ambitious future.

Regardless of the fact that since in its jurisprudence to date the Court has not subjected Article 1 ECHR to the margin of appreciation, it is certainly preferable that the doctrine features in the Preamble, instead of as part of Article 1. Indeed, the laconic Article 1 declares the states' obligation to embed the rights granted by the Convention and it has been employed by the Court to underline the significance or to delineate the ambit of other rights and, more specifically, in order to stress the contracting parties' *positive obligations*.¹¹⁴ An insertion of the doctrine in Article 1 would be in contradiction to the unquestionable fact that the margin of appreciation is inapplicable vis-à-vis certain rights or aspects of rights. Such an insertion could incite respondent states to press for its recognition throughout the corpus of – and the rights guaranteed by – the Convention; this would be a highly unfortunate consequence. Even in that case, the final word on the interpretation of an amended Article 1 ECHR would, of course, remain with the Court.

In this regard, it has been noted that Article 1 ECHR is a 'clear' expression of the subsidiarity principle, granting 'the primary responsibility' to member states.¹¹⁵ Indeed, the Court has confirmed that Article 1, combined with Article 13 ECHR, verifies that '[t]he machinery of complaint to the Court is . . . subsidiary to national systems safeguarding human rights'.¹¹⁶ Further, Article 1 has been used to stress the states' primary responsibility in the *implementation of judgments* and the practical impossibility of the ECtHR undertaking this task.¹¹⁷ While the meaning of the subsidiarity principle is precisely this, one may consider whether the broad formulation of Article 1 is a reflection of the subsidiarity principle *only*,¹¹⁸ especially since subsidiarity and the margin of appreciation doctrine go hand in hand, and the latter is inapplicable vis-à-vis certain Convention rights. Besides, Article 1 has been frequently used by the Court to define the *territorial scope* of its *own*

112 Spielmann (n 8) 8. He refers to *Goldler v UK*, App no 4451/70, 21 February 1975 (the rule of law and access to courts); *United Communist Party v Turkey*, App no 19392/92, 30 January 1998 (effective political democracy); *Matthews v UK*, App no 24833/94, 18 February 1999 (effective political democracy); *Ireland v UK*, App no 5310/71, 18 January 1978 (collective enforcement); *Mamatkulov and Askarov v Turkey*, App nos 46827/99 and 46951/99, 4 February 2005 (collective enforcement).

113 Rozakis (n 25) 57 (emphasis in original).

114 See, for example, *McCann and Others v UK*, App no 18984/91, 27 September 1995, para 161; *Kontrová v Slovakia*, App no 7510/04, 31 May 2007, para 51.

115 Mahoney (n 1) 2.

116 *Kudła v Poland*, App no 30210/96, 26 October 2000, para 152.

117 *Papamichalopoulos and Others v Greece*, App no 14556/89, 31 October 1995, para 34, discussed by Lucia Miara and Victoria Prais, 'The Role of Civil Society in the Execution of Judgments of the European Court of Human Rights' [2012] *European Human Rights Law Review* 528, 529.

118 By this it is not implied that Mahoney (n 1) viewed Article 1 as an expression of the subsidiarity principle *only* or that a reference to subsidiarity cannot be inferred from the aforementioned Article. Instead, the purpose of this paragraph is to explore to what extent this reference is so *clear* or whether this article serves other (and perhaps equally, if not more, important) purposes as well.

jurisdiction, including possible extra-territorial obligations of contracting parties.¹¹⁹ Moreover, one could equally place Article 1 alongside Article 19 ECHR, which establishes the ECtHR with a mission to 'ensure the observance of the engagements undertaken by the High Contracting Parties', in other words with a mission to essentially ensure compliance with the content of Article 1. Thus, although the primary responsibility remains with the states, the ECtHR's pivotal supervisory role is duly stressed under Article 19 of the Convention. Lastly, as previously stated, Article 1 has been used by the Court to further develop or interpret positive obligations. It may therefore be argued that Article 1 serves multiple purposes, the subsidiarity principle being just one of them. For these reasons, an insertion in Article 1 of the above two terms would be unfortunate.

What remains to be assessed is whether the new Preamble is, from the perspective of the protection of human rights, a preferable option when compared to the insertion of the terms in specific Articles where the Court has conferred upon contracting parties a margin of appreciation. A tentative answer may be endeavoured. If a possible insertion in specific Articles (for example, Articles 8–11 or 2 ECHR) would be viewed¹²⁰ as imposing an *obligation* upon the Court to essentially reconsider its current interpretative approach vis-à-vis the aforementioned Articles possibly with a view to conferring upon states a *wider* discretion, then the post-Protocol 15 preambulatory paragraph may be seen as expanding the discretion of the Court to refer to the principle of subsidiarity and the margin of appreciation. Still, since certain Strasbourg judges have attached great importance to the existing Preamble, notably in order to justify a more dynamic interpretation of Convention rights,¹²¹ is a more cautious reliance on the Preamble's updated text to be expected by the Court, once the ratification of Protocol 15 takes place? This remains to be seen.

Two further points stemming from the preparatory work to Protocol 15 should also be discussed. First, it is understood that at least the majority of judges at the ECtHR would prefer a Convention (including its Preamble) which did not contain *any* reference to the margin of appreciation.¹²² Clearly, this was politically not feasible, a point the Court was fully aware of. It is sufficient to consider, in this respect, the Brighton opening address of the UK Lord Chancellor and Secretary of State for Justice: 'we hope to get an agreement that makes clear that the protection of human rights goes hand-in-hand with democracy and the role of democratically-elected national parliaments'.¹²³ The inclusion in the Preamble should therefore be viewed as (yet another) compromise between two positions: the inclusion in the main body of the Convention and the overall omission of such a reference.

Second, concerning subsidiarity, the work of the CDDH demonstrates that the Strasbourg Court secured a number of (legally) important things: the avoidance of phrasing such as 'subsidiarity in the interpretation of the Convention', and the lack of a definition (in the Convention) of the term subsidiarity.¹²⁴ The discretion granted to the Court, in this respect, is considerable. As the President of the Parliamentary Assembly put it during the

119 See *Soering v UK*, App no 14038/88, 7 July 1989; *Banković and Others v Belgium*, App no 52207/99, 12 December 2001; *Al-Skeini and Others v UK*, App no 55721/07, 7 July 2011.

120 By commentators, or respondent states. Again, it should be emphasised that even if it was decided that the term would feature in specific Articles of the Convention, the authoritative interpretation of these Articles could be provided by the ECtHR only.

121 Rozakis (n 113).

122 See Council of Europe (n 9) 80–3 (Speech by Judge Bratza before the Brighton Conference); 77–80 (Speech by Jean-Claude Mignon before Brighton); Faulks and Fisher (n 57) 188; Spielmann (n 63) 57–9.

123 Council of Europe (n 9) 74.

124 See the relevant discussion at n 30 above.

Brighton Conference, the limit to subsidiarity is the effectiveness of the available machinery at the national level and, in any event, the last word remains with the Court.¹²⁵ Accordingly, for Judge Bratza, subsidiarity ‘can never totally exclude review by the Court. It cannot in any circumstances confer what one might call blanket immunity.’¹²⁶

In order to assess the overall position of the Strasbourg Court post-Protocol 15, it is now appropriate to examine the last phrase of the new preambulatory paragraph.

THE SUPERVISORY JURISDICTION OF THE ECtHR

The provision in the Convention’s new Preamble that the margin of appreciation is ‘subject to the supervisory jurisdiction of the European Court of Human Rights’ deserves to be stressed. That is so because it will be the first time that the *Convention itself* will explicitly reflect the Strasbourg jurisprudential principle that the margin of appreciation doctrine is *subject to the Court’s scrutiny*.

It should be remembered that the Explanatory Report states that the doctrine ‘goes hand in hand with supervision’ and ‘[i]n this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation’.¹²⁷ The Brighton Declaration pushed for a somewhat different formulation as it ‘welcome[d] the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourage[d] the Court to give *great prominence* and *apply consistently* these principles in its judgments’.¹²⁸ This is not surprising, in light of the aforementioned dual rationale behind the initiatives leading to the adoption of the Protocol. However, the terms ‘great prominence’ and ‘apply consistently’ are not found in the Explanatory Report or, of course, in the new Preamble.

It is not difficult to imagine that respondent states will attempt to rely on the new Preamble as a means of solidifying their argumentation and justifying proportionate, in their view, restrictions to rights guaranteed by the Convention. In that case, the ECtHR might be convinced to respond to a consistent academic call and provide a more elaborate definition of the margin of appreciation doctrine. This is an additional angle to the reference to ‘transparency’ advanced by the Brighton Declaration.¹²⁹

Regardless of this, the last phrase of the new Preamble serves essentially as a safeguard for the Court: no matter how elaborate a definition it provides, the Court is expected to hold firmly the status quo, namely its maintenance of the final word on states’ discretion.

The precise formulation of the phrase prompts further consideration. It can be argued that, had the sovereign states not wished to allow the Court a ‘supervisory jurisdiction’ on the margin of appreciation, this particular phrase could have been omitted from the new paragraph. Put differently, while proponents of the Court might have wished for an inclusion, next to the margin of appreciation doctrine, of the phrase ‘as developed by the Court’s case law’, and for good reasons,¹³⁰ one wonders whether the new text actually provides the Court with a lot more than this, given that it now has explicitly *under the Convention* the final say on this very matter. And, as highlighted above, it is arguably one thing if the Court itself confines the margin of appreciation doctrine to its overall supervision *through its jurisprudence*, and quite another if this confinement stems *directly* from

125 Mignon (n 122) 78.

126 Bratza (n 122) 82.

127 Explanatory Report (n 18).

128 Brighton Declaration (n 10) point 12(a) (emphasis added).

129 Ibid point 12(b).

130 Joint Statement (n 32) 2.

the *Convention*. The time that will elapse until the ratification of Protocol 15 will enable the Strasbourg Court to realise that a more 'developed text'¹³¹ concerning the margin of appreciation would not necessarily be preferable to the existing explicit reference in the Preamble that the doctrine is *subject to its supervision*. The above analysis demonstrates that the Court is possibly concerned with a number of issues, including the following: that the provenance of the doctrine is unclear under Protocol 15; and that the States might heavily invoke the margin of appreciation, questioning its context-dependent nature and its inapplicability vis-à-vis specific Convention rights. The first point to be considered, in this respect, is that it is the ECtHR that will interpret the new Preamble, including the terms mentioned therein. The lack of a definition in the Convention of the doctrine and the presence of the phrase 'as developed by the Court in its case-law' in the Explanatory Report could easily enable the Court to deal with these concerns. Second, and equally important, a more 'developed text' in the Preamble under the aforementioned terms¹³² could be viewed as limiting the Court's discretion: in that case, the ECtHR would need to follow its established case law on the margin of appreciation, however fragmented or uncertain it has been characterised as. Under the existing formulation, the Court has an additional strategic option at its disposal: to further limit the states' discretion (that is, to review its case law on the margin of appreciation) because the doctrine operates in the Convention *subject to its jurisdiction*. As is well known, while the Court takes into due consideration previous case law, it is not formally bound by precedent.

The ECtHR is fully aware, of course, of the discussions on its legitimacy¹³³ and may not be expected to embark on such a risky and expansive approach any time soon. Thus, it could be claimed that the above reflections are mainly legalistic in their nature, adhere too much to the final text, and do not pay sufficient attention to its background. However, it is important to underline that the new Preamble may be employed by the Court to defend its own legitimacy, while maintaining the same balanced¹³⁴ approach to its interpretation. Put simply, the Court could merely reiterate *pacta sunt servanda*, in other words, that it was 'the will of democratic states' to sign the treaty¹³⁵ and grant the Court the supervisory role and, therefore, the development and application of the margin of appreciation.

In any event, it is not possible to predict with absolute certainty the actual stance of the Court when it will be called upon to interpret the Preamble. The President of the Court, discussing possible developments on the margin of appreciation doctrine after Protocol 15, has given some early signs, observing that:

[w]ithout prejudging – or even predicting – how exactly the Court will interpret the new provision when the time finally comes, the signs so far are that it will not be regarded as modifying the basis of the Court's review, laid down in the case-law of many years.¹³⁶

This issue is returned to in the following section.

131 See above n 31. A more 'developed text', according to the Court, would refer to the margin of appreciation 'as developed by the Court in its case law'.

132 See above nn 31, 131.

133 It is not coincidental that former Presidents of the Court have written on the latter's legitimacy; see Costa (n 33); Bratza (n 38) – it is noteworthy that Judge Bratza highlights (at 506) that Strasbourg judges *are* actually elected (by the Parliamentary Assembly).

134 Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 Human Rights Law Review 57; he concludes (at 79): 'the Court has generally struck a fair balance between judicial innovation and respect for the ultimate policy-making role of member States in determining the spectrum of rights guaranteed by the Convention'.

135 Costa (n 33) 174.

136 Spielmann (n 8) 8.

In addition, the last phrase of the new Preamble places the Court in the strategic position to make use of the subsidiarity principle and the margin of appreciation doctrine to overcome perennial shortcomings of the machinery. For instance, the Court may refer to the subsidiarity principle so as to press for the enforcement of its judgments at the national level. Such an attitude would complement approaches favouring an increased diplomatic involvement from the Committee of Ministers.¹³⁷ The institutional reality remains that the Strasbourg Court, no matter how creatively it may use the Preamble, can only achieve so much in the field of implementation without the support of the Committee and, perhaps more importantly, of the national authorities. It is well-known that the enforcement regime is not always effective, especially with regard to persistently non-compliant states and the prevention of consistent breaches.¹³⁸ Recent research, however, presents a more optimistic picture as the influential Secretariat of the Council of Europe uses ‘interpretive and monitoring tasks . . . to ensure the even-handed and impartial implementation of Court judgments’.¹³⁹

3 Three (not necessarily divergent) directions for Protocol 15

Although one has to be fully aware of the limitations involved in assessing the direction of a Protocol not yet ratified by all the contracting parties, the above analysis enables us to formulate a number of possible (but not necessarily divergent) directions that may be taken. These are based on three initial remarks: (i) a Protocol containing such sensitive and controversial terms, adopted further to laborious negotiations by states and institutions with different priorities, cannot evade legal developments; (ii) the final word on the interpretation of the Protocol, including the new preambulatory paragraph, cannot but remain with the ECtHR; but the latter (iii) is well aware of the discussions concerning its legitimacy, including the fact that the Protocol was essentially the product of the Brighton Declaration.

To begin with the most unlikely scenario, the new Protocol might be used by the Court to expand its supervisory jurisdiction with a view to reducing the states’ margin of appreciation as applied so far. Although the text could legally support such an approach, this should be considered as improbable, for reasons explained in more detail below and relating to its legitimacy. Second, the new Preamble may be used by states to expand their margin of appreciation. The final text does not guarantee any success in such efforts, since it clearly refers to the supervisory jurisdiction of the Court and since the margin of appreciation doctrine does not feature, for example, in Article 1 ECHR. However, the positive consequence of a possible eagerness of certain respondent states to cite the new Preamble might be the much awaited clarification by the Court of the precise ambit of the margin of appreciation doctrine. Third, the new Preamble may be cited by the Court to point out the states’ primary responsibility in the implementation of its judgments or their responsibility to establish or improve domestic remedies for the protection of Convention rights. The Court was not hostile to the inclusion of the term ‘subsidiarity’ in the Preamble, while also viewing Brighton as part of the reform agenda. This scenario is therefore probable.

137 De Londras (n 97) 44.

138 Philip Leach, ‘The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights’ [2006] Public Law 443. Enforcement occupied a considerable part of the discussions in Brighton – see Council of Europe (n 9).

139 Başak Çali and Anne Koch, ‘Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe’ (2014) 14 Human Rights Law Review 301, 314. With the term ‘Secretariat’, the authors (at 304) refer to the ‘Department for the Execution of Judgments of the European Court of Human Rights’.

Lastly, given that the amended Preamble is the outcome of two competing tendencies (on the one hand, the position of the Strasbourg institutions, and especially the ECtHR, and, on the other, the aspirations of certain states, and notably the UK), one thing is certain: the two tendencies will play their own roles once the issue of its interpretation surfaces.

Concluding remarks

This article explored the background to the adoption of Protocol 15 ECHR and assessed its main features. The focus was on Article 1 of the Protocol, which includes an explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It was shown that the Preamble is the product of a compromise between two competing tendencies: on the one hand, the Strasbourg institutions, led by the ECtHR, stressed the reform agenda and placed the Protocol in the context of the reduction in the ECtHR's workload; on the other, certain governments, led by the UK, saw in the new Protocol an opportunity for judicial restraint or an answer to their anxieties concerning an increasingly activist Court, in accordance with the ongoing debate on the Court's legitimacy.

The remainder of this article considered the text of the new preambulatory paragraph. It was observed that the new Preamble will by no means impose any duty upon the ECtHR to modify its interpretative methods, notably by lowering the standards of human rights protection it has developed over time (which only serve as the minimum standard of protection). It ultimately rests upon the Court to decide when and how it may resort to the new Preamble to essentially confirm that the margin of appreciation doctrine and the subsidiarity principle operate subject to the Court's supervisory jurisdiction. Put differently, the new preambulatory paragraph fails to impose limitations on the ECtHR's existing interpretative practices. More specifically, whereas currently the ECtHR confines the margin of appreciation doctrine to its overall supervision *through its jurisprudence*, once Protocol 15 is in force, the new Preamble will imply that this confinement stems *directly from the Convention*. This means that a more adventurous avenue to be taken by the Court would be to further substantiate its supervisory realm via Protocol 15, in a sufficiently opportune political setting. If the leading role of the UK government in the drafting of preparatory documents behind the adoption of the Protocol is taken into consideration, one can expect the existing momentum to clearly point in a different direction.

Inversely, it cannot be excluded that the contracting parties or at least some of them will see in the new Preamble an opportunity to question any further or even existing limitations to their margin of appreciation, in which case the Court might be forced to clarify more precisely the ambit of the doctrine. This would be a positive development serving legal certainty. Lastly, the Court could also see in the Preamble an opportunity to stress subsidiarity in the execution of judgments, much in line with its own discourse before and after the Brighton Declaration which, as explained in this article, focused on the reform of the Convention machinery.

Protocol 15 may not be instantly viewed as a substantial revision of the Convention, but it is far from certain that its nature is simply 'technical and uncontroversial', as no doubt strategically the Parliamentary Assembly suggested. Once in force, it may prompt analogous discussions to the ones currently taking place concerning, for example, s 2 of the Human Rights Act 1998, namely debates concerning the ambit of human rights protection and the role of courts – national, supranational or international – in such a protection. In this perennial constitutional question, arguments regarding the ECtHR's legitimacy – a fairly recent academic debate – will come into play yet again.

The judges of the ECtHR have certainly engaged in the aforementioned legitimacy debate, and rightly so, but one thing should be stressed: the ECtHR needs to underline with

sufficient clarity that the question of its legitimacy may not be employed à la carte, in other words, whenever Strasbourg is not producing a desirable outcome for the respondent.¹⁴⁰ To return to an aforementioned example, could it really be ignored that the interpretation of Article 3 of Protocol 1 as a provision granting an *individual right to vote* took place in 1987,¹⁴¹ and not in 2005, when *Hirst (No 2)* was decided? If so, why was the legitimacy question raised after that specific case?¹⁴² One has to be clear: the ECtHR promotes an understanding of democracy (or democratic values) whereby the rule of law is an essential, if not inherent, feature, and ‘pluralism, tolerance and broadmindedness’ are prerequisites, to the extent that the majority may not always prevail.¹⁴³ And the debate is, in fact, similar to the debates taking place within the confines of a national legal order: the Convention in ‘certain domains’ ‘disables democratic discretion’ (understood as majority rule) to ensure the respect for fundamental rights and freedoms, and in some other areas it leaves a ‘permissible spectrum’ to national authorities.¹⁴⁴ The idea that democracy as majority rule could go as far as undermining fundamental or minority rights is not only outdated, but also contrary to equality,¹⁴⁵ an essential precondition for contemporary democratic states which are not or should not be concerned solely with the proper functioning of majority rule within the political system.¹⁴⁶ It is in the late twentieth century that we find approaches stressing the non-antagonistic, but ‘*mutually reinforcing* nature of rights and democracy’.¹⁴⁷ That said, it is unavoidable that the European or national judge might sometimes fail to strike the right balance, as it is unavoidable that the legislature might at some point produce bad laws; but it is only through this constructive interaction, whereby democracy and the rule of law are mutually dependent, that citizens can benefit the most.

To be sure, the Court is not expected to disregard the surrounding ‘legitimacy’ discourse and attempt a ‘dynamic’ interpretation of the new Preamble in the foreseeable future, although strictly *legally* it may be possible for it to do so. The ECtHR is certainly aware that the main issue to be resolved is its workload. It is to this area that efforts should be geared, and this perhaps explains why the Strasbourg actors and notably the Court, pre and post-

140 It has been argued that the UK’s reactions against supranational judgments take place on an ad hoc basis, and that a long-term strategy based on dialogue and mutual understanding should be advanced; see Rt Hon Lady Justice Arden, ‘Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe’ (2010) 29 Yearbook of European Law 3.

141 *Mathien-Mobin and Clerfajt v Belgium* (n 52).

142 Judge Caflisch clearly explained in his concurrent Opinion in *Hirst (No 2)* (n 48) the role of the Court within the Convention machinery. The Latvian Government as third-party intervener argued that the ‘Court was not entitled to replace the views of a democratic country by its own view as to what was in the best interests of democracy’. Judge Caflisch responded: ‘This assertion calls for two comments. Firstly, the question to be answered here is one of law, not of “best interests”. Secondly, and more importantly, the Latvian thesis, if accepted, would suggest that all this Court may do is to follow in the footsteps of the national authorities. This is a suggestion I cannot and do not accept. Contracting States’ margin of appreciation in matters relating to Article 3 [P 1] may indeed, as has been contended, be relatively wide; but the determination of its limits cannot be virtually abandoned to the State concerned and must be subject to “European control?” (para 3 of his Opinion)

143 Rainey et al (n 110) 79, discussing *Gorzeliak and Others v Poland*, App no 44158/98, 17 February 2004.

144 Mahoney (n 1) 3.

145 For some arguments on why and how the ECtHR could realise political equality with an occasional reduction in the margin of appreciation see, notably, Rory O’Connell, ‘Realising Political Equality: The European Court of Human Rights and Positive Obligations in a Democracy’ (2010) 61 Northern Ireland Legal Quarterly 263, and, in particular, 266–7.

146 This is not the place to discuss the interplay between democracy and constitutionalism but see, in this respect, Richard Bellamy (ed), *Constitutionalism and Democracy* (Ashgate 2006).

147 Rory O’Connell, ‘Towards a Stronger Concept of Democracy in the Strasbourg Convention’ [2006] European Human Rights Law Review 281, 282.

Brighton, have used the 'reform' line of argumentation to justify the insertion of the subsidiarity principle.

In this vein, Protocol 15 may also be expected to feature in forthcoming discussions on a mutually constructive dialogue between the Strasbourg judges and the highest domestic judges and courts,¹⁴⁸ including in the UK, where common law still maintains its distinctive characteristics.¹⁴⁹ This dialogue necessarily presupposes that the ECtHR will duly consider the domestic input as well; the *R v Horncastle*¹⁵⁰ and *Al-Khawaja*¹⁵¹ cases constitute an indicative example of such a stance.¹⁵²

To conclude, one could accept that the Brighton Conference – at least insofar as the approach taken by the UK government is concerned – was another 'manifestation of a specific, and influential, strand within politico-legal discourse in the United Kingdom . . . characterised by a deep antipathy towards legal control of political . . . authority in general, and external – "European" – legal control in particular', in other words, a manifestation of 'a deep-seated commitment to the notion of the political constitution'.¹⁵³ This contribution argues that the final, adopted text of Protocol 15 does not reduce the intensity of this 'external' control. The position of the Strasbourg Court within the Convention is to secure minimum standards of protection of human rights, while granting states an – oftentimes wide – margin of discretion. Even if Protocol 15 might have been presented to the UK audience as a supposed reduction in the ECtHR's jurisdictional realm, a closer look at the new preambulatory paragraph does not support such an approach. As the title of this contribution suggests, Protocol 15 might have been a constructive 'meeting' between Strasbourg voices pressing for reform and efficiency and certain states' voices dissatisfied with the ECtHR's allegedly activist approach. Nonetheless, there is no reason preventing the Strasbourg Court from being satisfied with the 'outcome' of this 'meeting'.

148 Compare in this respect an analysis of Protocol 16 ECHR, providing for an extension of the advisory jurisdiction of the ECtHR; Kanstantsin Dzehtsiarou and Noreen O'Meara, 'Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-control?' (2014) 34 *Legal Studies* 444.

149 For a case study on Article 6 ECHR, see Gordon Anthony, 'Article 6 ECHR, Civil Rights, and the Enduring Role of the Common Law' (2013) 19 *European Public Law* 75.

150 *R v Horncastle and Others* [2009] UKSC 14.

151 *Al-Khawaja and Tabery v UK*, App nos 26766/05 and 22228/06, 15 December 2011.

152 Duly stressed by the UK Supreme Court, see <supremecourt.uk/about/the-supreme-court-and-europe.html> accessed 30 March 2015.

153 Elliott (n 55) 626–7. For a discussion of the political constitution, see Special Issue: Political Constitutions (2013) 14 *German Law Journal* 2103.

