The Failure to Destroy the Authority of the European Court of Human Rights: 2010-2018

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Abstract

In the 2010-2018 period, certain Member States of the Council of Europe engaged in an unprecedented attempt to undermine the authority of the European Court of Human Rights. The United Kingdom and Denmark, supported by critics in academia, notably sought to institutionalise the principles of "subsidiarity" and "the margin of appreciation" as formal deference doctrines. In a series of High Level Conferences, a large majority of Member States repudiated these efforts, leaving the basics of the Court's powers intact. Despite scholarly efforts to demonstrate the contrary, our analysis does not confirm that the Court has "walked-back" rights, or retreated from its basic jurisprudential orientations. Rather, the Court has sought to address its "dilemma of effectiveness" through inter-judicial dialogue and complex forms of proceduralization.

1. Introduction

The European Court of Human Rights [ECtHR] is the most active and influential human rights court in the world. Since the 1990s, it has received, annually, more individual applications, produced more rulings on the merits, and is cited more often than any other court in the world. High courts as diverse as the Canadian Supreme Court, the Hong Kong Court of Final Appeal, and the Colombian and South African Constitutional Courts routinely consider the jurisprudence of the ECtHR, when they adjudicate domestic charters of rights. The Inter-American Court of Human Rights and the various

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African regional courts virtually never issue an important judgment without consulting the relevant rulings of the European Court. Indeed, the case law of the ECtHR is today a focal point for inter-judicial coordination within a rights-based commons of global scope and significance.[1]

The prominence of the Strasbourg Court rests on its jurisprudence, which features a steadfast commitment to maximizing the effectiveness of the European Convention within national legal orders. Its success ultimately depends on the willingness of national judges to enforce the Convention which is, in turn, contingent upon the tolerance of legislative and executive officials of highly intrusive modes of judicial scrutiny. Neither outcome was pre-ordained. Indeed, prior to the 1990s, the constitutional law and separation of powers doctrines of most European states either strictly limited, or prohibited altogether, the judicial review of statutes by most or all domestic courts.[2]

Although this paper focuses attention on the Court's progressive case law, state officials actively participated in the expansion of the Court's authority. First, states adopted Protocol No. 11 (1998), which conferred upon individuals an unfettered right to sue a member state in Strasbourg for having allegedly violated their Convention rights, upon the exhaustion of domestic remedies. Second, partly in response to the Court's demands, by the mid-2000s officials in every member state of the Council of Europe had "incorporated" the ECHR into *domestic* law,[3] such that it could be pleaded before, and enforced by, ordinary domestic judges.[4] These structural reforms combined with the Court's integrative jurisprudence

[1] Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance. A Comparative and Global Approach* (2019), ch. 6.

[2] Alec Stone Sweet, "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe", 1 *Global Constitutionalism* (2012), 53.

[3] Incorporation has proceeded through one of three pathways: (i) constitutional amendment; ii) legislation; and (iii) judicial decisions interpreting the status of the ECHR in the domestic order. *Ibid*., Appendix 1.

[4] Helen Keller and Alec Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008); Mads Andenas and Eirik Bjorge, "National Implementation of ECHR Rights", in Andreas Føllesdal,

to instantiate a multi-level system of rights protection. As the ECtHR has long emphasized, every national official – including judges – is under a positive duty in law to interpret and apply Convention rights, in line with the European Court's case law. This process "constitutionalized" the regime in all but name. It also generated a nearly catastrophic explosion in individual petitions, prompting the Court (with the support of the Committee of Ministers) to develop new remedies and supervisory powers, including the "pilot ruling." But it also provoked backlash and efforts to curb the Court's powers, among various politicians, lawyers, and academics.

Between 2010 and 2018, the member states of the Council of Europe staged a series of extraordinary "High Level Conferences", the purpose of which was to evaluate the Court's performance and potential reforms. The agenda was dominated by two issues: (i) how to deal with a chronically overloaded docket, which threatened to overwhelm the post-Protocol No. 11 system altogether; and (ii) whether to dismantle the components of judicial supremacy that had been established though the ECtHR's precedents. The latter question had been placed on the agenda by those seeking to force or persuade the Court to soften review and to grant more deference to the policy preferences of governments. This paper provides an account of the law and politics of the High Level Conferences, and of the spectacular failure to curb the Court's authority.

We proceed as follows. The first section briefly discusses the theoretical materials at stake in analyses of the ECtHR. The second provides a synoptic overview of the European Court's most important doctrines, principles, and presumptions that have enabled judicial governance in the regime, while sparking backlash. We then analyse the High Level Conferences as a formal process of regime reform. The Conferences failed to rein-in the Court; indeed, they produced declarations in which the state parties expressed strong collective support of the Court's existing approaches to rights protection. We also engage alternative views. In a recent article published in the *European Journal of International Law*,

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Birgit Peters and Geir Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013), 181–262.

Helfer and Voeten concede that the High Level Conferenced did not induce the ECtHR to roll back protections explicitly; they nonetheless accuse the Court of having done so surreptitiously, betraying its own doctrinal commitments while lying about it.[5] We reject these claims. The last section lays out our own theory of judicial governance in the ECHR, highlighting factors that state-centric models marginalize or ignore. Our focus is on the various strategies the Court deploys to manage the "dilemma of effectiveness" it confronts on a daily basis: how to perform its mission – to raise standards of rights protection in Europe – while retaining the support of those on whom the Court most depends for its success.

2. Theoretical and Empirical Issues

There exists a voluminous and important scholarship that emphasizes the Court's positive contributions to European politics, including in maintaining peace,[6] in improving national systems of rights protection,[7] and in guiding democratic transitions in post-Communist Europe.[8] At the same time,

[5] Laurence R. Helfer and Erik Voeten, "Walking Back Human Rights in Europe?", 31 *European Journal of International Law* (2020), 797.

[6] Angelika Nussberger, "Promoting Peace and Integration among States: Conference 70th Anniversary of the European Convention on Human Rights", European Court of Human Rights, 18th September 2020, available at https://echr.coe.int/Documents/Speech_20200918_Nussberger_Conference_70_years_Convention_ENG.pdf.

[7] Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (2015); Laurence R. Helfer and Erik Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe", 68 *International Organization* (2014), 77.

[8] Antoine Buyse and Michael Hamilton (eds.), *Transitional Jurisprudence and the ECHR* (2011); Leonard Hammer and Frank Emmert (eds.), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (2011); Iulia Motoc and Ineta Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (2016).

the Court has been criticized for allegedly being either too "activist" or for passivity on security and other politically sensitive issues,[9] for procedural reforms that have undermined individual access to justice,[10] and for failing to forge a stable European identity and sense of rights-based citizenship despite aggressive efforts.[11] These literatures underline how salient and pervasive are the law and politics of the ECHR in today's multi-level Europe.

For present purposes, what is crucial is the theory and empirical findings related to the efforts of certain states to induce the Court to reverse its evolutive decision-making and progressive case law. There is no doubt that the Court's stances on evolutive interpretation, the processing of asylum requests, and prisoner's voting rights have led to politicization and "backlash", including in established Western democracies such as Austria and Switzerland,[12] the Nordic Countries,[13] and the UK.[14] Although a strain of the published empirical research is founded on an expectation that domestic politicization of the ECtHR should lead the Court to stage a retreat – by renouncing its precedents and commitments – most

[9] Alexander Breitegger, "Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of Behrami & Saramati and Al Jedda", 11 *International Community Law Review* (2009), 155.

[10] Nikos Vogiatzis, "The Admissibility Criterion under Article 35(3)(b) ECHR: A 'Significant Disadvantage' to Human Rights Protection?", 65 *International and Comparative Law Quarterly* (2016), 185.

[11] Fiorella Dell'Olio, *The Europeanization of Citizenship: Between the Ideology of Nationality, Immigration and European Identity* (2005).

[12] Katja Achermann and Klaus Dingwerth, "Helping v. Hindering Sovereignty: The Differential Politicization of the European Court of Human Rights in the Austrian and Swiss Quality Press", 33 *Temple International and Comparative Law Journal* (2019), 340.

[13] Jaakko Husa, "Nordic Constitutionalism and European Human Rights - Mixing Oil and Water?", 55 *Scandinavian Studies in Law* (2010), 101.

[14] Ed Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg", 14 *Human Rights Law Review* (2014), 503.

scholarship has acknowledged that the Court has held its ground. Indeed, the most detailed research on the impact of the High Level Conferences since 2010 has carefully documented the Court's successful resistance to radical reform,[15] aided by the Council of Europe's other institutions and supportive states.

The explanatory literature on the High Level Conferences contains a handful of exceptions. Madsen has declared efforts by the United Kingdom and Denmark at the High Level Conferences to be a success, in that the Brighton and Copenhagen Conferences "achieved exactly what they set out to do."[16] The second is a claim by Helfer and Voeten to the effect that the politicization, partly manifested through the Conferences, has led the Court to "walk back" rights protection, effecting an important retreat.[17] Similar accusations have been brushed aside by the president of the ECtHR,[18] and by its recent Vice-President.[19] For their part, Helfer and Voeten root their theoretical claims all but exclusively in a paper by Carrubba et al., who claim that EU member states tightly control the decision-making of the CJEU.[20] Carrubba et al., however, contained not a single example of a case in which the CJEU had been

[15] Lize R. Glas, "From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?", 20 *Human Rights Law Review* (2020), 121.

[16] Mikael Rask Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?", 9 *Journal of International Dispute Settlement* (2018), 199, 199.

[17] Helfer and Voeten, *supra* note 5.

[18] Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", 14 *Human Rights Law Review* (2014), 487.

[19] Angelika Nussberger, "Procedural Review by the ECHR: View from the Court", in Janneke Gerards and Eva Brems (eds.), *Procedural Review in European Fundamental Rights Cases* (2017), 161–176.

[20] Clifford J. Carrubba, Matthew Gabel and Charles Hankla, "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice", 102 *American Political Science Review* (2008), 435.

'constrained' by member state preferences; and the article has been refuted in the *American Political Science Review*.[21]

We examine the claims of Helfer and Voeten in more detail below.

3 The Doctrinal Determinants of the Court's Authority

The state parties to the ECHR organized the High Level Conferences in order to collectively evaluate the European Court's approach to enforcing the Convention, and to consider reforms to manage the Court's docket overload. Here, we summarize the basics of the Court's doctrinal approach to the Convention, focusing on clusters of precedent that interlock with one another to define the Court's authority as the regime's *de facto* "constitutional court."[22]

A first stipulates the regime's overarching purpose: to guide a continuous process of raising standards of protection in Europe. In one of its earliest cases, the Court rejected claims to the effect that a defendant state's "original intent" in signing the Convention, or that an ideology of "rights minimalism", should control interpretation.[23] Instead, it declared the ECHR to be a "living instrument" that would

[21] Alec Stone Sweet and Thomas L. Brunell, "The European Court of Justice, State Noncompliance, and the Politics of Override", 106 *American Political Science Review* (2012), 204.

[22] While the Court's "constitutional status" is contested, the debate is today an integral part of politics in the ECtHR. See Steven Greer and Luzius Wildhaber, "Revisiting the Debate about 'constitutionalising' the European Court of Human Rights", 12 *Human Rights Law Review* (2012), 655; and *infra*, note 35.

[23] *Tyrer v. United Kingdom*, 25th April 1978, Application No. 5856/72, available at https://hudoc.echr.coe.int/eng?i=001-57587.

evolve, in light of changes in society, through the Court's own "evolutive interpretation."[24] In 1995, the Court began characterizing the Convention 'as a constitutional instrument of European public order'.[25]

A second cluster comprises doctrines of precedent-based decision-making, which have been tailored to 'fit' the Court's view of the Convention as a living, constitutional instrument. Although Art. 46(1) ECHR places states under duty only "to abide by the final judgment of the Court in any case to which they are parties", the Court's most important early decisions[26] implied that its major decisions were binding on *all* state members, not simply the parties to the particular dispute. After the entry into force of Protocol No. 11 on November 1, 1998, the Court became increasingly explicit about the *erga omnes* (applying to "all states") effects of its jurisprudence, including the requirement that national judges interpret Convention rights as the ECtHR does. These authority claims pointed to a constitutional understanding of the Court's authority, resting on the presumption that it is the Court's responsibility to make law, progressively. for the regime as a whole.

Although the ECtHR pays lip service to the role of case law in securing "legal certainty and the orderly development of [its] case law", it will abandon precedent that hinders a greater mission to "ensure that the interpretation of the Convention reflects societal change, and remains in line with present day conditions."[27] Hundreds of rulings have raised European standards, as when the Court recognizes a

[24] Kanstantsin Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", 12 *German Law Journal* (2011), 1730; Janneke Gerards, *General Principles of the European Convention on Human Rights* (2019), 51–59.

[25] *Loizidou v. Turkey*, 23rd March 1995, Application No. 15318/89, Preliminary Objection, para. 75, available at https://hudoc.echr.coe.int/eng?i=001-57920.

[26] *Dudgeon v. United Kingdom*, 22nd October 1981, Application No. 7525/76, available at https://hudoc.echr.coe.int/eng?i=001-57473.

[27] *Cossey v. United Kingdom*, 27th September 1990, Application No. 10843/84, available at https://hudoc.echr.coe.int/eng?i=001-57641.

"new" right, or extends and strengthens existing protections. The Court relies heavily on a dense web of (judge-made) "general principles of law", which it has recognized (or discovered) and enshrined as binding precedent. Academic lawyers, for their part, have produced a sophisticated scholarship on the Court's development and the use of such principles.[28]

A third cluster concerns the role of proportionality balancing in the adjudication of the "qualified rights." To understand the importance of proportionality to judicial governance in the ECHR, a brief digression is in order. The founders of the ECHR disagreed with one another on issues of regime design and purpose. A first faction, led by the UK government within the Committee of Ministers, understood rights provisions to express an "undisputed minimalist" core, a floor below which no state member should be allowed to fall. In this view, the regime would function as a fire alarm system – an "insurance policy against dictatorship"[29] – that would alert the Council of Europe to imminent threats to democracy and security. A second group, probably the dominant faction of the Consultative Assembly, worked to enshrine the Convention as a new type of "constitutional" treaty that would guide democratic reconstruction across Europe. Some delegates even hoped that the Convention would comprise "the first step on the road leading to a united Europe."[30] Updated versions of these debates animated the deliberations of the High Level Conferences.

The core issue then as now is how much deference the Court ought to give national officials when reviewing the lawfulness of state measures. The founders modeled the ECHR (which entered into force in 1953) on the Universal Declaration of Human Rights (adopted 1948), albeit with a crucial difference. The ECHR enumerates a small number of "absolute" rights, which states are not allowed to restrict for any public purpose, including the prohibition of torture, cruel and inhumane treatment, and slavery, and certain guarantees of due process and access to justice. But most rights – including to privacy and family,

[28] Gerards, *supra* note 24.

[29] Danny Nicol, "Original Intent and the European Convention on Human Rights", *Public Law* [2005], 152, 154.

[30] *Ibid*., 156.

to freedom of thought, conscience, and religion, and to free expression, assembly and association – are "qualified" by a "limitation clause."[31] The limitation clause attaching to Art. 8 is representative: states may restrict the enjoyment of rights to privacy, but only if "prescribed by law", and only to the extent that the restrictions are:

> necessary in a democratic society in the interests of national security, or public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Limitation clauses raise crucial issues of interpretation and enforcement. Do states themselves determine if the criterion of "necessary in a democratic society" has been met? If so, the limitation clause could be converted into an escape hatch for governments, a result that would comfort the rights minimalists, who have long held that the Convention must not intrude upon a virtually "unlimited choice of policies" available to those engaged in "ordinary party politics."[32] On the other hand, a court committed to raising standards of protection would have reason to scrutinize "necessity" strictly, requiring states to justify infringements with reviewable reasons.

The Court, which began operations only in 1959, seems never to have seriously contemplated adopting a rights-minimalist approach. In its first intensive engagement with a limitation clause,[33] the Court declared that states, when striking a balance between a right and a contending public interest, enjoyed a "margin of appreciation", while insisting that the margin goes "hand in hand" with the Court's supervision:

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[31] The Court has read a limitation clause into the rights contained in Art. 12 (marriage) and in Protocol No. 1 (protection of property, rights to education and democracy), where none existed.

[32] *Ibid*., 164.

[33] *Handyside v. United Kingdom*, 7th December 1976, Application No. 5493/72, available at https://hudoc.echr.coe.int/eng?i=001-57499.

> Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent [domestic] court.[34]

By the end of the 1990s, the Court had enshrined a version of proportionality analysis [PA] as the obligatory approach to qualified rights. Indeed, the failure of *national* judges to use PA in cases involving the qualified rights constitutes, in itself, a violation of Art 13 ECHR (right to an "effective judicial remedy"). The Court thus prohibited states from applying deference doctrines that would shield acts from the proportionality principle, including strong presumptions of legality (e.g., "Wednesbury unreasonableness"), as well as "political questions", and "national security" doctrines that precluded the justiciability of certain disputes.[35]

PA places the burden on the defendant state to demonstrate that the measures under review do not restrict an applicant's rights more than is necessary to achieve a sufficiently important public interest (i.e., one whose contribution to the public good outweighs the harm to the petitioner). As deployed by the Court, PA also grounds a strategy of "majoritarian activism", the purpose of which is to raise standards of protection. Majoritarian activism refers to the disposition of the Court to produce rulings that reflect policies that states would be likely to accept under majoritarian, but not unanimity, decision rules.[36] For the strategy to be successful, the court must be able to gauge the preferences of the member states in support of a given policy.

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[34] *Ibid*., para. 49.

[35] Alec Stone Sweet and Clare Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (2018), 103–108.

[36] Alec Stone Sweet and Thomas L. Brunell, "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO", 1 *Journal of Law and Courts* (2013), 61, 63–64.

To help them do so, the Court engages in a comparative assessment of how, if at all, state parties restrict a right being pleaded in a current case. As institutionalized in the 1990s, "consensus analysis" is a participatory process: "petitioners, the respondent state, and third parties (nongovernmental organizations and states filing as *amici*) collect and report evidence of state practice [while] the Court's staff … undertakes its own investigations."[37] This evidence often weighs heavily in balancing procedures, that is, when determining whether the measure under review is indeed "necessary." As the Court regularly reminds its audience, the margin of appreciation is likely to shrink as consensus within Europe expands, that is, once an increasing number of states have chosen to withdraw public interest justifications for restricting the pleaded right.

Controversially, the ECtHR deploys two starkly incompatible versions of the margin of appreciation doctrine, in Letsas' terminology: "substantive" and "structural."[38] The first, and dominant form, adds little of interest: balancing within PA, which takes place in light of consensus analysis, determines the size of the margin of appreciation. In contrast, the "structural" version resembles a stand-alone deference doctrine, otherwise eschewed, which the Court hides behind for prudential reasons. While deployed rarely, it has been subjected to enormous criticism, given that the Court seemingly invokes it in highly sensitive cases.[39]

In this process of constructing the doctrinal foundations of its own powers, the Court benefits from certain structural advantages. First, it occupies a position of judicial supremacy: rulings may only be overridden by unanimous vote of the member states (which has never occurred), or through subsequent rounds of adjudication before the Court. Second, the Convention recognizes the competence of the Court to determine its own competences, a power used to great effect in crafting new remedies, including the

[37] Stone Sweet and Ryan, *supra* note 35, 170–171.

[38] George Letsas, "Two Concepts of the Margin of Appreciation", 26 *Oxford Journal of Legal Studies* (2006), 705, 706.

[39] Stone Sweet and Ryan, *supra* note 35, 184–196.

development of positive state duties for avoiding violations of the absolute rights. Third, as an international court, the ECtHR has jurisdiction over general principles of law: judge-made legal norms that today permeate every important aspect of the Convention.

Looking forward, it is also true that if the Court could build such an imposing edifice, it could also dismantle it. Through the High Level Conferences, the court's detractors sought to revive rights minimalism, not least, by expanding the domain of the "structural" version of the margin of appreciation. Had they succeeded, the case law just surveyed would have been fatally undermined.

4. The Failure of Reform Efforts: From Brighton (2012) to Copenhagen (2018)

Beginning with the Interlaken Conference in 2010, ECHR member states initiated a series of High Level discussions devoted to the discussion of the regime's operation and possible reform. The United Kingdom and Denmark took the lead in proposing reforms that, they hoped, would reduce the independence of the ECtHR, and induce it to be more deferential to member states. Reining in the ECtHR was the project of conservative (the UK) and right-wing (Denmark) parties. In the UK, ECtHR reform has been tied up in right-wing Euroscepticism[40] and is one facet of conservative attempts in the UK to "take back control" from European institutions.[41] In Denmark, right-wing political parties have

[40] Patrick Smyth, "Tory Europhobia Targets Human Rights", *The Irish Times*, 18th October 2014, 15.

[41] Tom McTague, "Boost for Cameron as top judge says MPs should decide British laws NOT the European Court of Human Rights", *MailOnline*, 25th May 2015, available at https://www.dailymail.co.uk/news/article-3096237/Boost-Cameron-Britain-s-former-judge-slams-power-European-human-rights-court-Parliament.html; Iain Martin, "British justice should not be over-ruled by the European Court of Human Rights", *The Telegraph*, 21st January 2012, available at https://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/9029711/British-justice-should-not-be-over-ruled-by-the-European-Court-of-Human-Rights.html; Daniel Hannan, "Gove vs the Euro-judges", *The Spectator*, 23th May 2015, available at https://www.spectator.co.uk/article/gove-vs-the-euro-judges; N.

pushed the issue, especially surrounding refugee and migrant rights.[42] Other states that the ECtHR had repeatedly found to be in violation of European Convention rights, notably Russia and Hungary (and sometimes Poland), voiced support for reform proposals.

4.1 *The Brighton Declaration*

The British took the lead in proposing reforms that aimed to rein in the ECtHR at the conference that they hosted at Brighton (2012) and the Danes did so at the Copenhagen conference (2018). Each produced a final statement that fell short of their host's aspirations: neither the Brighton nor the Copenhagen Declaration reduced the ECtHR's authority. In fact, both registered high levels of collective state support for the Court's existing approach to adjudicating the European Convention on Human Rights (ECHR). The conferences produced some relatively minor Court reforms, often in line with reforms endorsed by the Court itself in order to reduce its overwhelming backlog of cases. But, in the big picture, the declarations that emerged from the conferences reaffirmed the Court's independence while calling on states to play a more decisive role in producing justice for rights violations in Europe.

O'Brien, "Here's why Britain needs to take back control of human rights law", *The Telegraph (Blog)*, 9th February 2011.

[42] Jacques Hartmann and Samuel White, "The Alleged Backlash Against Human Rights: Evidence from Denmark and the UK", in Kasey McCall-Smith, Andrea Birdsall and Elisenda Casanas Adam (eds.), *Human Rights in Times of Transition: Liberal Democracies and Challenges of National Security* (2020), 139–163; Jacques Hartmann, "A Danish Crusade for the Reform of the European Court of Human Rights", *EJIL: Talk! Blog of the European Journal of International Law*, 14th November 2017, available at https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/; Meghan Davidson Ladly, "Why Denmark is No Cosy Place for Migrants", *Irish Independent*, 26th May 2018.

The UK, pushed by elements of the Conservative Party and by the UK Independence Party, took the lead at the 2012 Brighton Conference. Prime Minister Theresa May made withdrawal from the ECtHR a core part of her campaigning[43] and the idea of reform, or even withdrawal, had featured prominently in the Conservative and UKIP party manifestos in recent elections. Though British proposals leading up to the Brighton Conference aimed to reduce substantially the Court's independence, that project failed.

The Brighton Declaration (2012) declares that the Court has made "an extraordinary contribution to the protection of human rights in Europe for over 50 years."[44] It (i) emphasizes that "the Court authoritatively interprets the Convention";[45] (ii) recognizes the binding nature of the Court's precedents;[46] (iii) approves the strengthening and expansion of new remedies;[47] and (iv) emphasizes that domestic officials "must abide by the final judgment of the Court."[48] These statements are reinforced by reference to states' responsibilities to ensure "effective" compliance with the Court's judgments, under enhanced supervision of the Committee of Ministers.[49] In other words, Brighton expresses approval of how the Court had pursued its mission and reinforces that states bear the responsibility of seeing that ECHR rights are respected in practice.

Most of Brighton 2012 concerns the problem of docket overload, while laying the blame for overload primarily on member states. Though the Declaration does not directly criticize the ECtHR's

[43] S. Walters, "A Great Day for British Justice: Theresa May vows to take UK out of the European Court of Human Rights", *MailOnline*, 4th March 2013.

[44] High Level Conference on the Future of the European Court of Human Rights, "Brighton Declaration" (2012), para. 2, available at https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

[45] *Ibid*., paras. 10, 26.

[46] *Ibid*., paras. 9(c), 35(c).

[47] *Ibid*., paras. 9(c), 7, 20(c) and (d).

[48] *Ibid*., paras. 3, 26.

[49] *Ibid*., para. 20(c).

approach to interpreting the ECHR, it does express some measure of dissatisfaction with the Court and suggests that it develop, "give great prominence to", and "apply consistently" the principles of subsidiarity and margin of appreciation.[50] But the same recital reiterates the basics of the ECtHR's relevant case law:

> The margin of appreciation goes hand in hand with supervision. 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.[51]

These statements, which "invite" the Court "to ensure" that its case law "continues to afford States Parties an appropriate margin of appreciation",[52] are the closest the document comes to criticizing the Court's approach to rights protection. The overwhelming majority of the Brighton 2012 essentially affirms the Court's established role and practices. Ultimately, the Declaration was "anodyne in comparison" to the British pre-conference draft. [53]

The Brighton deliberations ultimately resulted in two amendments to the ECHR. Protocol No. 15, which entered into force in 2021, adds a reference to subsidiarity and margin of appreciation in its Preamble:

> 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

[50] *Ibid*., paras. 11, 12(a).

[51] *Ibid*., para. 11.

[52] *Ibid*., para. 25(c).

[53] Laurence R. Helfer, "The Burdens and Benefits of Brighton", *ESIL Reflections*, 8th June 2012, available at http://esil-sedi.eu/node/138.

> thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights …[54]

The official explanatory report declares that this reform "is intended . . . to be consistent with the doctrine of the margin of appreciation *as developed by the Court in its case law*."[55] In this respect, the document accepts and reinforces the Court's established interpretation of the margin of appreciation. The second, Protocol No. 16,[56] conferred upon the ECtHR powers to issue advisory opinions upon referral from national apex courts. Protocol No. 16 does not diminish the Court's role as the regime's constitutional court; it may well enhance it, while bolstering the Court's view on the importance of inter-judicial dialogue to the subsidiarity principle. Most states still refuse ratification.

Meanwhile, ECtHR reform in Denmark has been motivated primarily by the right-wing opposition to immigration and refugees. The center-right government in place in Denmark (2015 to 2019), depending on the nationalist Danish People's Party (DPP), instituted a near-total halt to refugee admissions.[57] The political success of the DPP, in particular, allowed these parties to shape the center-right governing coalition and to push for ECtHR reform. In the run-up to the 2018 Copenhagen

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[54] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning Criteria of Admissibility, Relinquishment of a Case to the Grand Chamber, and the Appointment of Judges (2013), CETS No. 213.

[55] Explanatory Report to Protocol No. 15 to the ECHR (2013), available at www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf. The Parliamentary Assembly of the Council of Europe stressed that the 'reference to the principle of subsidiarity and the doctrine of the margin of appreciation' strictly means 'as developed in the Court's case law': Parliamentary Assembly of the Council of Europe, Opinion 283 (2013), available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19723&lang=en.

[56] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning Requests for Advisory Opinions (2013), CETS No. 214.

[57] Hartmann and White, *supra* note 42, 4.

Conference, Denmark focused on "strengthened dialogue" between the ECtHR and member states, by which it meant a greater emphasis on the margin of appreciation and subsidiarity,[58] conceived as principles of deference to national authorities on the part of the Court.[59]

4. 2 *The Copenhagen Declaration*

While Brighton 2012 failed to rein in the Court, Copenhagen 2018 buried that project altogether. The Copenhagen Declaration stresses that the "ultimate goal" of the ECtHR is to enhance "the effective protection of human rights in Europe."[60] It affirms that the Court "authoritatively interprets the Convention … giving appropriate consideration to present-day considerations",[61] a reference to the

[58] Ministry of Foreign Affairs of Denmark, "Priorities of the Danish Chairmanship of the Committee of Ministers of the Council of Europe" (2017), available at https://um.dk/en/foreign-policy/the-danish-chairmanship-of-the-committee-of-ministers-of-the-council-of-europe-2017-2018/.

[59] Hartmann, *supra* note 42; Sarah Lambrecht, "Undue Political Pressure is Not Dialogue: The Draft Copenhagen Declaration and its Potential Repercussions on the Court's Independence", *Strasbourg Observers*, 2nd March 2018, available at https://strasbourgobservers.com/2018/03/02/undue-political-pressure-is-not-dialogue-the-draft-copenhagen-declaration-and-its-potential-repercussions-on-the-courts-independence/; Helga Molbæk-Steensig, "Something Rotten in the State of Denmark?", *Verfassungsblog*, 26th April 2018, available at https://verfassungsblog.de/author/helga-molbaek-steensig/.

[60] Copenhagen High Level Conference on the Reform of the European Convention on Human Rights system, "Copenhagen Declaration" (2018), para. 6, available at https://www.coe.int/en/web/human-rights-rule-of-law/events/-/asset_publisher/E5WWthsy4Jfg/content/copenhagen-declaration-on-the-reform-of-the-european-convention-on-human-rights-system. The Copenhagen Declaration evokes 'effectiveness' 30 times in its 67 paragraphs.

[61] *Ibid*., para. 26.

dynamic, precedent-based construction of the treaty as a "living instrument."[62] It strongly rejects any suggestion that the principles of subsidiarity and margin of appreciation should be reshaped as formal deference doctrines. Indeed, Copenhagen 2018 "reiterates" that "strengthening the principle of subsidiarity is not intended to limit or weaken human rights protection, but to underline the responsibility *of national authorities* to guarantee the rights and freedoms" in the ECtHR.[63] And while "the margin of appreciation goes hand in hand with supervision under the Convention system", the Copenhagen Declaration insists that "the decision as to whether there has been a violation of the Convention ultimately rests with the Court."[64]

Copenhagen 2018 targets the failings of the member states, not the ECtHR's. It is the "ineffective national implementation of the Convention that remains the principal challenge confronting the … system."[65] Thus, state officials must continue to: strengthen "the implementation of the Convention at the national level", create "effective domestic remedies", and ensure that "policies . . . comply fully with the Convention, including by checking, in a systematic manner and at an early stage of the process, the compatibility of draft legislation and administrative practice in the light of the Court's jurisprudence."[66] The Copenhagen Declaration, rather than "reining in" the Court by reinterpreting subsidiarity and margin of appreciation, essentially affirms the Court's use of those principles. The document does note that the principle of subsidiarity "continues to develop … in the Court's jurisprudence", and that "the Convention system is subsidiary to the safeguarding of human rights at national level."[67] But the Declaration restates the Court's approach to the margin of appreciation:

[62] *Ibid*., para. 27.

[63] *Ibid*., para. 10 (emphasis added).

[64] *Ibid*., para. 28(d).

[65] *Ibid*., para. 12.

[66] *Ibid*., para. 16.

[67] *Ibid*., para. 28, 28(d).

> The Court's jurisprudence on the margin of appreciation recognises that in applying certain Convention provisions, such as Articles 8-11, there may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context … Where a balancing exercise has been undertaken at the national level in conformity with the criteria laid down in the Court's jurisprudence, the Court has generally indicated that it will not substitute its own assessment.[68]

We discuss the context of this last sentence further below.

At an event organized in Copenhagen, Goldston bluntly summarized what had occurred as "inappropriate attempts … to use the language of 'reform' as a mask to narrow the Court's role", and to subvert the view that "the scope of the margin of appreciation is to be determined by the Court, not the states."[69] Those attempts failed.

The tenor of the Declarations should be considered alongside formal proposals for reform of the regime. The High Conferences produced a total of at least 29 proposals. Most of these comprised procedural changes meant to reduce the docket, many proposed earlier by the Court itself. As Glas has documented, the ECtHR either rejected or ignored the vast majority of additional proposals.[70] Protocol No. 15, Glas predicts, will be "of mainly symbolic importance", for good reasons: "First, the Court opposed the amendment, and only the Court can ensure that [it] is more than just symbolic. Second, reference to the Court's case law . . . means [that it] can be interpreted as instructing the Court not to change anything at all."[71]

The stakes of the Conferences were high. Certain states – at least, the UK and Denmark, joined by Hungary, Poland, and Russia – sought to curb the Court's authority. The Conferences did not generate

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[68] *Ibid*., para. 28(c).

[69] James A. Goldston, "Remarks on the Copenhagen Declaration on Reform of the ECHR", *Open Society Foundations*, 11th April 2018, available at https://www.justiceinitiative.org/uploads/72b8dbe7-dd22-4df2-a687-fc7bb3ad5b34/james-goldston-remarks-on-copenhagen-declaration-on-reform-of-the-echr-20180411.pdf.

[70] Glas, *supra* note 15.

[71] *Ibid*., 147.

a credible threat to the Court's powers and authority, and thus could not have cowed the Court into a more deferential posture. Assertions to the contrary, the Court did not abandon its commitments in any transparent or honest way.

5. *The Court Did not 'Walk Back Rights'*

The reform agendas advanced at Brighton and Copenhagen failed to constrain the ECtHR in formal *terms*. But it is possible that the ECtHR responded to the criticisms leveled against it by constraining itself, that is, by "walking back" its right-protecting case law, as claimed by Helfer and Voeten.[72] To check that possibility, we examined the Grand Chamber judgments that their paper identifies as containing walking-back dissents during the period 2012 – 2017. That is, Helfer and Voeten classify at least one dissenting judge as accusing the majority in these decisions of being more restrictive of rights than would be allowed by the Court's existing precedents. We sought to confirm the codings for the cases Helfer-Voeten discuss to illustrate their arguments, and their codings of the 23 cases would be most likely to support their thesis: every judgment that invoked evolutive interpretation, margin of appreciation, or explicit consensus analysis. These cases offer the context in which a Court majority could most easily retreat from expansive interpretations of Convention rights. We each independently assessed whether, in these 23 judgments, the Court did in fact reach a judgment that offered a more restrictive interpretation of Convention rights.

Our analysis of these 23 judgments allows us to evaluate the extent to which the Grand Chamber has sought to placate dissatisfied states by retreating from rights protections established in the Court's

[72] Helfer and Voeten, *supra* note 5, 800, 827 where Helfer and Voeten argue that ECtHR separate opinions provide 'suggestive evidence from an especially well-informed group of actors that the [Court] is, in fact, walking back human rights in Europe'. In their conclusion, however, they advance a more far-reaching claim, that the ECtHR 'appears to be … walk[ing] back human rights in Europe' by 'tacitly' overturning its precedents.

case law. It is possible that the Court would not explicitly overturn precedent or "walk back" rights-advancing jurisprudence, but rather would do so without announcing it. The Court could simply ignore or misapply precedent, or could apply the margin of appreciation or consensus analysis so as to stretch state regulatory autonomy and retreat from rights.

We found that in only one case out of 23 – *S.A.S. v. France*[73] – did the ECtHR "walk back" rights from previously announced interpretations of a Grand Chamber judgment. In that case, the Court upheld a French law prohibiting the wearing of full-face coverings (*burqas*) in public spaces. Although the Court rejected every other rationale proffered by France for the ban, it accepted a novel justification: "respect for the minimum requirements of life in society", that is, to render "living together" meaningful.[74] Two of us coded this ruling as retreating from previous interpretations of the ECHR. In this view, the Grand Chamber had added a reason for limiting a qualified right, a reason not included among the Convention's limitation clauses, which are presumptively exhaustive. These two coders discounted the pains the majority took to connect the new justification to limitation clauses authorizing states to take measures necessary to protect "the rights and freedoms" of others. One of us disagreed, emphasizing that the ruling had not rolled-back existing rights protection and that the dissent had not accused the majority of having done so. After all, the Grand Chamber had never recognized a woman's right to wear religious-based face coverings in public spaces, while upholding state authority to prohibit Islamic headscarves in a prior case.[75]

In the other 22 judgments, the Court did not retreat from its precedential positions. In some instances, the Grand Chamber declined to expand rights. In another ruling, the Court determined that

[73] *S.A.S. v. France*, 1st July 2014, Application No. 43835/11, available at https://hudoc.echr.coe.int/eng?i=001-145466.

[74] *Ibid*., paras. 121–122.

[75] *Leyla Şahin v. Turkey*, 10th November 2005, Application No. 44774/98, available at https://hudoc.echr.coe.int/fre?i=001-70956.

domestic courts had properly conducted proportionality analysis, in accordance with the standards that the Court itself had established. When domestic courts have applied the Court's principles in carrying out proportionality analysis, the ECtHR will ordinarily not second-guess outcomes (see below). In short, we did not identify any post-Brighton trend of the Court retreating from rights.

5.1 *Assessing the Grand Chamber's Rulings and Dissenting Opinions*

Here we discuss our disagreements with Helfer and Voeten further, notably their treatment of "walking-back dissents" [WBD] and potentially "walking-back judgments" [WBJ]. Helfer and Voeten's findings and conclusions depend entirely on how they have "coded" – read and classified – the cases in their data set. The classification is binary: either the ruling (i) does contains a WBJ, or (ii) it does not contain a WBJ. We posted our coding notes – which detailed the reasons we coded a ruling as we did – on-line, so that any interested scholar or judge could evaluate the coding decisions on their own.[76] As noted, each of the present authors coded the cases independently, under a common "coding protocol": explicit criteria for identifying "walking back" dissents [WBDs] and rulings [WBRs]. We sought to ensure that these coding rules were clearly stated and matched Helfer and Voeten's own definitions and analytical purposes.[77]

[76] See the Supplementary data in Alec Stone Sweet, Wayne Sandholtz and Mads Andenas, "Dissenting Opinions and Rights Protection in the European Court A Reply to Laurence Helfer and Erik Voeten", 32 *European Journal of International Law* (2021), 907, available at https://academic.oup.com/ejil/article/32/3/897/6433418#supplementary-data.

[77] 'Elements counting in favour of coding a separate opinion as a WBD include: (i) an express accusation or argument to the effect that the majority had 'walked back' rights protection, (ii) claims that the majority had breached specific precedents, and/or (iii) arguments to the effect that the majority had expanded the regulatory autonomy to be afforded states in limiting the scope of a qualified right, compared with the situation in place prior to

Here, we discuss a selection of four coding decisions, the goal being to stimulate further debate, including criticism. We begin with *A, B, and C v. Ireland* (2010)[78], a well-known judgment of the Grand Chamber that was rendered long before the Brighton Conference of 2012.[79] Applications challenged Irish law that prohibited abortion except to save the mother's life, a restriction that reflected the result of a constitutional referendum adopted in 1983. Subsequent efforts to liberalize access to abortion had also been rejected in referenda of 1992 and 2002. In consequence, each of the applicants had traveled to the UK to terminate their pregnancies, incurring severe harm to their own physical and mental health.

The Grand Chamber fully recognized the sensitivity of the case before it. Key provisions of the Irish Constitution were at stake, as were fraught questions concerning the protection of unborn life. Ultimately, the Grand Chamber chose to avoid the most controversial issues raised by the applicants, hiding behind a "structural" version of the margin of appreciation. Consensus analysis had strongly favored liberalization: the vast majority of states in the Council of Europe permitted abortion, while regulating the procedure in the interest of the health or right to life of the foetus. The Grand Chamber concluded that this consensus had left a substantial margin of appreciation, to be afforded Ireland,

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the judgment. *In the absence of at least one of these three elements*, dissenters' objections to the effect that the majority (i) should have raised extant standards or extended the scope of a qualified right (e.g., because a sufficient level of state consensus had been reached), or (ii) erred on methodological grounds (e.g., the Grand Chamber [hereinafter 'GC'] should have given different weights to the factors being balanced, or assessed the facts differently), did not, in themselves, count in favor of coding an opinion as comprising a WBD.': *Ibid*.

'"To be accepted as a WBJ, the Grand Chamber's ruling must have (i) breached an existing precedent, or (ii) restricted the scope of a qualified right, compared to the situation in place prior to the judgment, and/or (iii) expanded the regulatory autonomy of state officials to restrict the scope of a qualified right.': *Ibid*.

[78] *A, B and C v. Ireland*, 16th December 2010, Application No. 25579/05, available at https://hudoc.echr.coe.int/eng?i=001-102332

[79] See Stone Sweet and Ryan, *supra* note 35, 190–195.

intact.[80] The Grand Chamber's nonetheless went on to criticize deficiencies in existing Irish law, condemning its failure to ensure that a woman's right to seek an abortion (when her life would be placed in danger by bringing the foetus to term) be respected. It then ordered Ireland to revise its law, and laid down guidelines for doing so.[81] In a 2012 case on abortion – *P. and S. v. Poland* – the Court used a similar mode of 'reading procedural safeguards' into the Convention, while again declining to recognize the right to terminate a pregnancy under the ECHR.[82]

How did we code *A, B, and C*? Each of us concluded that the ruling neither contained a WBD nor comprised a WBJ. Of particular interest is the dissent of Justices Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, emphasizing that:

> [I]n situations where the Court finds that a consensus exists among European States … it usually concludes that that consensus decisively narrows the margin of appreciation which might otherwise exist if no such consensus were demonstrated … [I]n the case before us a European consensus (and, indeed, a strong one) exists. We believe that this will be one of the rare times in the Court's case-law that Strasbourg considers that such consensus does not narrow the broad margin of appreciation of the State concerned ... [Moreover] it is the first time that the Court has disregarded the existence of a European consensus on the basis of "profound moral views".[83]

The dissenters – correctly, in our view – do not assert that the Court is bound by the results of consensus analysis; rather, they underline the Court's own presumption to the effect that sufficient consensus normally impacts balancing decisions, and decisively so. As important, none of the dissents in *A, B and C* assert that the Grand Chamber had reversed established protections recognized by the Court. Of course, the ruling disappointed those who had hoped that the Court would clearly recognize a woman's right to

[80] *A, B and C v. Ireland*, *supra* note 78, paras. 233-241.

[81] *Ibid.*, paras. 264–266.

[82] *P. and S. v. Poland*, 30th October 2012, Application No. 57375/08, available at https://hudoc.echr.coe.int/eng?i=001-114098.

[83] *A, B and C v. Ireland*, *supra* note 78, paras. 5, 6, and 9.

terminate pregnancy. Yet *A, B, and C* did not "walk back rights"; instead, the Grand Chamber declined to take a significant step forward.

The examination of *A, B and C* reveals a straightforward example of coding error, while other rulings pose more difficult challenges. *Animal Defenders v. the UK* (2013)[84] is a prime example. In this case we agreed with Helfer and Voeten's coding of the case as including a WBD[85]; but we did not view the judgment as comprising a WBJ.

In *Animal Defenders*, the Grand Chamber upheld a British ban on broadcasting political advertising. The applicant – an NGO – argued that an exception to the ban should have been granted, on the grounds of freedom of expression. The offending advertisement protested the keeping and exhibition of primates, in particular, their use in television advertising. The advertisement opened with an image of an animal's cage in which a girl in chains gradually emerged from the shadows. The screen then went blank, and three messages were relayed in sequence: "A chimp has the mental age of a four year old"; "Although we share 98% of our genetic make-up they are still caged and abused to entertain us"; and "To find out more, and how you can help us to stop it, please order your £10 educational information pack". In the final shot, a chimpanzee has taken the position of the girl.[86]

The Grand Chamber (in para. 28) cited Baroness Hale, who began her judgment in the House of Lords (Supreme Court) by pointing out the "elephant in the room", namely, the dominance of advertising in elections in the United States. Absent regulation, the UK risked a profusion of 'non-profit' groups which, backed by wealthy interests, would bring constant litigation.[87]

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[84] *Animal Defenders v. United Kingdom*, 22nd April 2013, Application No. 48876/08, available at https://hudoc.echr.coe.int/eng?i=001-119244.

[85] Coder 3 expressed doubt about whether the dissents in *Animal Defenders* was a "T" – a "toss-up."

[86] *Animal Defenders*, *supra* note 84, para. 9.

[87] See Jacob Rowbottom, "A surprise ruling? Strasbourg upholds the ban on paid political ads on TV and radio", *UK Constitutional Law Blog*, 22nd April 2013, available at http://ukconstitutionallaw.org; and the summing up of the

The High Court and House of Lords had extensively considered the proportionality of the ban, taken account of sustained parliamentary decision-making and scrutiny of the government's bill, and discussed the pertinent case law of the ECtHR. Although a chamber judgment in *VgT v. Switzerland* (2001)[88] had left domestic authorities with a narrow margin of appreciation, Lord Bingham opined that *VgT* had left room for the Parliament to regulate political advertising, at least during electoral periods.

The Grand Chamber split nine to eight. In its judgment, the majority noted the quality of the deliberations of Parliament (paras. 114 and 115), and praised the UK for having properly applied the relevant Convention case-law and principles, taking into consideration the relevance of the judgment in *VgT*. In the end, a slight majority of the Grand Chamber accepted the legislation as "necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process" (para. 116).

Two dissents condemned the quality of the Grand Chamber's own balancing efforts. Five justices (Ziemele, Sajo, Kalaydjiyeva, Vučininć and De Gaetano), suggested (para. 9) that the majority had overruled *VgT*. In a second dissent, Justice Tulkens (joined by Justices Spielmann and Laffranque) also focus on the niceties of balancing, also claiming that the majority's efforts were incompatible with precedent, given that the prohibition in the present case was wider than that which the small chamber had held to be excessive in *VgT* (para. 12). Both dissents criticized the deference shown to UK officials.

The majority's ruling in *Animal Defenders*, however, does not constitute a WBJ. First, as the UK Justice in the Grand Chamber (Justice Bratza) argues in a concurring opinion, *VgT* is readily distinguished

different academic positions in Jeff King, "Deference, Dialogue and Animal Defenders International", *UK Constitutional Law Blog*, 25th April 2013, available at https://ukconstitutionallaw.org/2013/04/25/jeff-king-deference-dialogue-and-animal-defenders-international/.

[88] *VgT, Verein Gegen Tierfabriken v. Switzerland*, 28th June 2001, Application No. 24699/94, available at https://hudoc.echr.coe.int/eng?i=001-59535..

from a later chamber ruling – *Murphy v. Ireland* (2003)[89] – which involved a general (as opposed to specific) measure. It is precisely the Grand Chamber's role to choose among alternatives when existing precedents would lead to inconsistent outcomes. One could also query whether *VgT* (as a judgment of a Chamber, rather than the Grand Chamber), could constitute *jurisprudence constante*, notwithstanding the existence of *Murphy* (which arguably renders the question moot). In any case, it is clear that *Animal Defenders* shows the Grand Chamber willing, even eager, to demonstrate its capacity to engage in active judicial dialogue (discussed below) with national authorities.

In *Biao v. Denmark*,[90] the Grand Chamber held the Danish Aliens Act in breach of the prohibition on discrimination (Article 14 ECHR), but not of the rights to privacy and family life (Article 8 ECHR). In this case, the dissenting judges criticized the majority for failing to enhance standards protections for family unification.

Under the Danish Aliens Act, family reunification required that one spouse be a Danish national for at least 28 years or, for non-nationals, that a spouse live in Denmark for at least 28 years. The applicants complained that the 28-year rule discriminated between those born Danish nationals and those, like the applicant, who had acquired Danish nationality later in life. In fact, the rule had been adopted as an anti-immigration measure, with strong political support, but little consideration of Convention rights.

The Danish Supreme Court split 4 to 3, the majority holding that the 28-year rule complied with Article 14 ECHR, relying on *Abdulaziz v. the UK* (1988),[91] which had held certain restrictive family reunification rules to be proportionate. The majority had extensively referenced the reports of an expert

[89] *Murphy v. Ireland*, 10th July 2003, Application No. 44179/98, available at https://hudoc.echr.coe.int/eng?i=001-61207.

[90] *Biao v. Denmark*, 24th May 2016, Application No. 38590/10, available at https://hudoc.echr.coe.int/eng?i=001-163115.

[91] *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Series A No. 94, 28th May 1985, Applications No. 9214/80; 9473/81; 9474/81, available at https://hudoc.echr.coe.int/eng?i=001-57416.

working group appointed by the Danish Ministry of Integration, whereas the minority, including the President of the Supreme Court, Torben Melchior, took the view that the 28-year rule breached Convention rights, and should have been invalidated as such.

An ECtHR chamber unanimously held that the 28-year ruled did not violate Article 8, and split 4 to 3 in exonerating Danish officials. Moreover, as in the Danish Supreme Court, the opinions of the majority and minority rested on starkly different balancing concerns. For its part, the Grand Chamber split 12 to 5, holding that there was a violation of Article 14, although not of Art. 8 on its own.

It is crucial to stress that no member of the Grand Chamber claimed that the majority explicitly, implicitly, or tacitly overturned a prior judgment of the Court; none accused the majority of construing past case law too narrowly or too broadly, or of ignoring a relevant precedent. Two of the concurring judges were critical, Justice Pinto de Albuquerque stating that: "it seems to me that the time has come to revisit the findings and reasoning set out in *Abdulaziz*."[92] In dissent, Justice Jäderblom (joined by Justices Villiger, Mahoney, and Kjølbro) argued that the majority inadequately explained how it interpreted relevant precedents. Justice Yudkivska would also have acquitted Denmark, fearing that an unintended consequence of the ruling would be to reduce protections, given Danish penchant for minimalist interpretations of Convention rights. In any event, it is difficult to understand how Helfer and Voeten's coders could have classified *Biao* as containing a WBD. We also agreed that *Biao* could not be read as a WBJ.

A fourth example is *Al-Dulimi v. Switzerland* (2016).[93] The case has attracted wide attention, given that the famous *Kadi* judgements of the EU courts had been triggered by the same sanctions regime established by a series of UN Security Council Resolutions.[94] Mr. Al-Dulimi, the owner of a company

[92] *Ibid*., para. 1.

[93] *Al-Dulimi and Montana Management Inc. v. Switzerland*, 21st June 2016, Application No. 5809/08, available at https://hudoc.echr.coe.int/eng?i=001-164515.

[94] See Stone Sweet and Ryan, *supra* note 35, 236–245.

whose bank accounts had been confiscated, alleged that Switzerland's implementation of UN sanctions had denied him due process required under Art. 6 ECHR. In earlier ECtHR cases raising the issue of a supposed hierarchy between the UN Charter and the Convention (e.g., *Bosphorous*[95] and *Al-Jeddah*[96]), the Court had sidestepped the matter through conflict-avoiding, interpretive techniques. In *Al-Dulimi*, the Grand Chamber relied on similar moves, reasoning that since the Security Council had not specified how the implementation of the sanctions regime was to be supervised, its Resolutions could "not be understood as precluding … judicial scrutiny."[97] The Grand Chamber then held that member states could only enforce the Resolutions once their courts had ensured that individuals subject to sanctions (the freezing or confiscation of bank accounts) had not been targeted arbitrarily.[98]

Worthy of note is the concurrence of Justice Pinto de Albuquerque (joined by three of his peers), which developed an alternative model of the rights-based structure of, focusing attention on the incomplete nature of the UN Charter system, which has consequences for the recognition of Security Council's Resolutions:

> The reasons for the constitutional black hole within the UN are twofold. On the one hand, the International Court of Justice [does not subject] the bodies and officials of the UN, and in particular … the Security Council, to an effective constitutional control. On the other hand, the [Charter system lacks] a non-optional, binding, judicial human rights protection system ... Until the day a World Human Rights Court comes into existence, with compulsory jurisdiction over both the bodies and officials of the United Nations and its members, or the ICJ gains compulsory jurisdiction in such matters, the UN will not have a constitutional nature. [Since] the Charter … has not yet acquired the

[95] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketl v. Ireland*, 30th June 2005, Application Nos. 45036/98, available at https://hudoc.echr.coe.int/eng?i=001-69564.

[96] *Al-Jedda v. United* Kingdom, 7th July 2011, Application No. 27021/08, available at https://hudoc.echr.coe.int/eng?i=001-105612.

[97] *Ibid*., para. 148.

[98] *Ibid*., para. 149.

> nature of a Constitution for the international community … there [exists] no hierarchical relationship between Charter obligations and obligations resulting from other international … agreements, most notably human rights treaties.[99]

The Grand Chamber's choice of standard of review – "arbitrariness" – entailed the decision *not* to subject the Security Council's decision-making to a more searching standard: proportionality review. Although the principle of proportionality permeates the ECHR, no prior decision of the Court mandates it's enforcement with respect to implementation of decisions of the UN Security Council on the part of states. The Court balked at taking that step, one that would have extended the reach of existing case law, defensibly in our opinion.

In the text of their article, Helfer and Voeten announce that, in *Al-Dulimi*, the "majority judgment is inconsistent with prior rulings that address potential conflicts between the Convention and obligations to implement Security Council resolutions".[100] It is to be noted that Helfer and Voeten neither specify these "prior rulings", nor describe the nature and scope of the jurisprudential inconsistencies allegedly encountered. In his published coding notes, Andenas rejected the view that *Al-Dulimi* constituted a WBJ, or contained a WBD, stating:

> [Helfer and Voeten] link a previous judgment to [an un-named] principle, but they do not claim that the court has overturned that principle, or [any] judgment in which it [appears]. One judge concurs with both the result and the reasoning, to which 'reflections' are added (Concurring Opinion of Judge Sicilianos, para. 1); another notes that 'the Court has missed an opportunity to clarify' the law (Concurring Opinion of Judge Keller, para. 15). A partially dissenting judge held that the GC's ruling does not 'improve decision-making', or send 'correct messages' … (Concurring Opinion of Judge Ziemele, para. 15). The one judge (Dissenting Opinion of Judge Nussberger) that finds no violation is

[99] *Ibid.*, para. 8.

[100] Helfer and Voeten, *supra* note 5, 819.

> also the least rights expansive of the authors of these separate opinions, accepting that [a] UN Security Council [Resolution] must override Convention-based protections.[101]

While the concurring opinion of Justice Pinto de Albuquerque (et al.) expresses disappointment with the Grand Chamber's dispositions, it does not accuse the Court of overturning existing precedent.

6. The Dilemma of Effectiveness: Overload, Dialogue, and Proceduralization

The Court confronts an existential dilemma: how to reduce a catastrophically overloaded docket, while remaining faithful to its commitments to bolstering rights protection in Europe. Embedded in this dilemma is a brute fact: the Court cannot achieve either goal without the active, ongoing support of national officials, in particular, of domestic high court judges. At the same time, the Court's own progressive jurisprudence has stimulated demand for rights protection, which has not only generated more litigation of Convention rights, but led some officials and elites to challenge the legitimacy of its approach to enforcing the ECHR. Simplifying a complex topic, the Court has sought to address the dilemma through procedural innovation.

Very early in the life of the new Protocol No. 11 system, leading members of the Court realized that the regime could not survive on the basis of a narrow view of its function to render "individual justice", one that emphasizes full merit review of each admissible claim on a case-by-case basis. Saving the regime from collapse[102] would require a more systemically integrated, managerial, indeed "constitutional" conception of justice.[103] Regaining control of the docket would require internal procedural reform,[104] and a more formal engagement with domestic law and courts. In the early 2000s,

[101] Appendix D and Supplementary Appendixes to Stone Sweet, Sandholtz and Andenas, *supra* note 76.

[102] Murray Hunt, "The European Convention on Human Rights", 22 *Yearbook of European Law* (2003), 483.

[103] Stone Sweet and Ryan, *supra* note 5, 138–146.

[104] *Ibid.*

Strasbourg began issuing "pilot rulings", judgments that require the target state to adopt specified general measures within a fixed time frame, in order to stem the flow of clone petitions. The Court codified the procedure in 2009, with the strong support of the Committee of Ministers. During this same period, the Court developed new rules governing requests for interim measures (injunctions), and streamlined its admissibility procedures, enabling it to more efficiently reject petitions (far more than 90% in the past decade).

The Court has also worked to enhance its own managerial capacity as the constitutional court of a transnational, multi-level legal system. From its perspective, the principle of subsidiarity stands for the proposition that the primary duty to protect Convention rights lies with domestic officials, following guidelines laid down by the Court. In practice, these guidelines are developed in interactions – both cooperative and conflictual – between the organs of the ECtHR and the domestic branches of governments. Put differently, the principle is institutionalized through the domestic incorporation process, which the Court supervises. It is crucial to stress two points. First, the Court had virtually no hope of mitigating its effectiveness dilemma, without investing in mechanisms of dialogue and coordination. It began doing so before the High Level Conferences had been conceived. Second, the practices to which we now turn have not meant an unraveling of the Court's jurisprudence. These reflect the fierce difficulties the Court has, at times, in moderating its own internal disagreements, and in forging partnerships with domestic judges when logics of inter-jurisdiction collaboration are strained.

6.1 *Proceduralization as an (Imperfect) Substitute for Findings of Violation*

We found, contrary to Helfer and Voeten, that the Court has not "walked back" rights protection in any systemically meaningful sense, or abandoned the basic principles of its case law. At the same time, we recognize that the ECtHR's decision-making is constrained by intramural divisions, and the preferences of the Court's most important interlocutors: judges on national supreme courts. These constraints are revealed in diverse ways, as when the Court balks at expanding the substantive scope of a

qualified right, even when there would appear to be a strong regime consensus for doing so. In such instances, the Court may nonetheless strengthen protections, as when it commands a defendant state to revise its law to better secure the availability and effectiveness of *existing* rights, under *existing* case law. See the discussion of *A, B and C v. Ireland* above.

The ECtHR deploys this type of "Proceduralization" – in which it "read[s] procedural safeguards" into rights provisions[105] – to manage what Gerards calls "dilemma cases."[106] The outcomes produced will always disappoint those who have failed to convince the Grand Chamber to expand rights protection through declaring a violation and recognizing a "new" right. Its strategic function, however, is to enable the Court to avoid taking decisions that a majority on a Grand Chamber believes would harm the institution, while reaffirming an abiding commitment to enhancing effectiveness.

6.2 *Dialogic Proceduralisation*

A second type of proceduralisation – which we label "dialogic" – involves judicial review of the quality of the reasons given to justify the limitation of a right in domestic law. In *Hirst v. UK (No. 2)*[107], the Court famously censured the UK on the grounds that Parliament had failed to give a proportionality-congruent rationale for a blanket ban on the voting of incarcerated persons, without regard to the niceties of individual situations. In rulings rendered both before and after *Hirst*, Grand Chambers have granted substantial deference to parliaments that positively consider the Court's jurisprudence when they legislate.

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[105] *Ibid.*, 196.

[106] Janneke Gerards, "Procedural Review by the ECtHR: A Typology", in Gerards and Brems (eds.), *supra* note 19, 127, 146.

[107] *Hirst v. United Kingdom (No. 2)*, 6th October 2005, Application No. 74025/01, available at https://hudoc.echr.coe.int/eng?i=001-70442.

In *Animal Defenders v. UK*,[108] discussed above, the Court commended the serious and comprehensive nature of the deliberations of national officials.[109] When reviewing general measures such as legislation, the Grand Chamber noted that it would "primarily assess the legislative choices underlying" the statute, focusing on the "the quality of the parliamentary and judicial review." The upshot: "the more convincing the general justifications for the general measure … the less importance the Court will attach to its impact in the particular case."[110] As Kleinlein suggests, "a direct link [now] exists between the degree of proceduralisation and the breadth of the margin of appreciation" to be granted, in that the Court can be expected to be less strict with domestic officials who balance in good faith, in light of the relevant jurisprudential principles.[111]

The Court has also formalized the presumption with respect to its control of the proportionality analysis undertaken by national apex courts, which it initiated in the context of a conflict with the German Federal Constitutional Court.[112] This conflict ultimately resulted in a negotiated settlement,[113] the core of which is expressed by the following statement:

> Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.[114]

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[108] *Animal Defenders v. United Kingdom*, *supra* note 84.

[109] Thomas Kleinlein, "The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution", 68 *International and Comparative Law Quarterly* (2019), 91, 96–98.

[110] *Animal* Defenders, *supra* 84, 108–109.

[111] Kleinlein, *supra* note 109, 95.

[112] *Van Hannover v. Germany (No. 2)*, 7th February 2012, Application Nos. 40660/08 and 60641/08, available at https://hudoc.echr.coe.int/eng?i=001-109029.

[113] Stone Sweet and Ryan, *supra* note 35, 196–201.

[114] *Van Hannover v. Germany (No. 2)*, *supra* note 112, para. 107.

In effect, the Grand Chamber has told domestic judges that even though, in balancing, we might have arrived at a different conclusion, we accept your ruling as a defensible rendering of the jurisprudential principles relevant to such cases.[115]

Contrary to the presumptions of Helfer and Voeten, dialogic proceduralisation does not directly trim the Court's authority. Instead, it repurposes procedures for what has become a multi-level, quasi-federal, legal system. While the High Level Conferences' "focus on subsidiarity" may well have accelerated the "turn to procedure", Kleinlein concludes that:

> [T]his move … does not diminish substantive human rights obligations. Rather, it renders rights protection more effective and flexible and reflects the 'shared responsibility' of the ECtHR and domestic institutions for the effective protection of human rights in Europe.[116]

Robert Spano, the current President of the ECtHR, notes:

> [T] he Court has demonstrated its willingness to defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations. [T]his development does not introduce … any novel feature into Strasbourg jurisprudence, but constitutes … a further refinement or reformulation of pre-existing doctrines, influenced by recent declarations of the Member States, especially as regards the necessity to reinforce the subsidiary nature of the Strasbourg Court.[117]

It is virtually costless for the Court to pay respect to the principle of subsidiarity, under such circumstances. Angelika Nussberger, a Vice-President of the Court (2017-2019), has pointedly stated that proceduralisation does not necessarily constitute a "softer" mode of review, and may at times exacerbate conflicts with domestic officials.[118]

It is worth stressing that the world's most effective domestic constitutional courts rely heavily on analogous modes of proceduralisation; they routinely and self-consciously avoid contentious rulings of

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[115] Janneke Gerards, "The Prism of Fundamental Rights", 8 *European Constitutional Law Review* (2012), 173, 198.

[116] Kleinlein, *supra* note 109, 92.

[117] Spano, *supra* note 18, 491.

[118] Nussberger, *supra* note 19, 161–163.

unconstitutionality (through, say, conflict avoiding interpretations), read into charters of rights stringent procedural duties, and establish substantive guidelines for making and enforcing law going forward.[119] In relationships between a domestic constitutional court and the supreme courts of ordinary jurisdiction, proceduralisation is an important "means of avoiding conflicts of competence",[120] and for building dialogic comity. As in national constitutional settings, procedural review does not preclude substantive review of an impugned measure; thus, the ECtHR can sequence procedural and substantive scrutiny as interdependent judgments, or stages of inquiry. It arguably ought to do so when domestic procedural review has been found to be deficient.[121]

Proceduralisation helps powerful constitutional courts manage their own version of the "dilemma of effectiveness." But it is no panacea. In our view, a rights-protecting court can mitigate – but never resolve – the dilemma of effectiveness. In the ECtHR, an increasingly sophisticated literature has shown,[122] that proceduralisation is today part and parcel of regime governance.

6.3 *Institutionalizing Inter-Court Dialogue*

Protocol No. 11 (1998) and the gradual incorporation of the ECHR as directly enforceable national law all but required courts and legal scholars to reconsider rights protection in Europe. After 1998, it became untenable to study the ECHR restrictively, as a species of international law and practice.

[119] Stone Sweet and Mathews, *supra* note 1, ch. 5.

[120] Nussberger, *supra* note 19, 165.

[121] Gerrards, *supra* note 106.

[122] Oddný Mjöll Arnardóttir, "The 'Procedural Turn' under the European Convention on Human Rights and Presumptions of Convention compliance", 15 *International Journal of Constitutional Law* (2017), 9; Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2014); Kleinlein, *supra* note 109.

Clearly, the ECtHR's decision-making could not be separated from the activities of domestic courts, each being constituent parts of a larger legal "system." Incorporation also fully revealed the state of "constitutional pluralism" that existed in many domestic legal orders, giving lie to the notion that every legal system had to feature an authoritative "final word" for setting conflicts of law or between jurisdictions.[123] In the Europe, pluralism – as an embedded property of the multi-level regime as a whole – was recognized by scholars, usually in order to be celebrated or decried, depending on the analysts' respective normative commitments. Constitutional pluralism refers to the situation in which (i) multiple apex courts make overlapping authority claims concerning (ii) the interpretation and enforcement of multiple charters of rights.[124]

At the same time, the courts struggled to give the regime's pluralist characteristics a semblance of systemic stability, having shown themselves to be incapable or unwilling to resolve conflicts of law and authority that, they could assume, would chronically arise. In a legal situation wherein a high court (*x*) is unable to impose its preferred jurisprudential positions on another high court (*y*), the legal system will only prosper to the extent that judges on courts *x* and *y* each demonstrate that it is open to being persuaded to change their jurisprudence. In the ECHR, too, regime viability has depended on the development of norms of mutual respect and recognition. Over the past two decades, scholars have identified and analyzed the dynamics of constitutional pluralism in great detail. For their part, the ECtHR and national high courts self-consciously engage in intensive interactions, both cooperative and conflictual, and such "dialogues" are now essential to how this "community of courts"[125] evolves.

After the explosion of its docket following the entry into force of Protocol No. 11, the ECtHR became acutely aware of the fact that it could (hope to) manage the crisis only by greater reliance on

[123] Stone Sweet, s*upra* note 2; Andenas and Bjorge, *supra* note 4.

[124] Stone Sweet and Ryan, *supra* note 35, 82–101.

[125] European Court of Human Rights Superior Courts Network, "Message From President Spano", 25th August 2020, available at https://www.echr.coe.int/Pages/Home.Aspx?P=Court/Dialoguecourts/Network&C.

partnership with the national courts. Optimally, national courts would adopt the posture of strong and "faithful trustees" of the Convention, in Bjorge's telling phrase; Bjorge demonstrates that judges in France, Germany, and the UK not only engage the ECtHR's case law, but apply their own interpretations of Convention rights, with expansive, jurisgenerative effects.[126] The logics of embracing an incorporated ECHR coupled with dynamics of judicial empowerment presumably apply across much of the Council of Europe.

In 2014, the Court's dedicated its annual opening ceremonies to the topic of "inter-judicial" dialogue. The proceedings featured a cautionary speech by the President of the German Federal Constitutional Court, who emphasized the ECHR's pluralistic features, while downplaying its constitutional achievements.[127] In 2015, the European Court founded the Superior Courts Network [SCN], a formal organization designed to "enrich dialogue and implementation of the Convention."[128] In 2020, the President of the Court surprised no one in declaring that "dialogue among European judges" is the "bedrock of the Convention system".[129] The express purpose of dialogue, of course, is to strengthen regime "subsidiarity", as the Court understands that principle, and to enhance the effectiveness of Convention rights in national legal orders.[130]

The SCN, which is managed by officials of the Court, now includes ninety-eight high courts from forty-three states. Its purpose is to provide a platform for judges to exchange case law and views on

[126] Bjorge, *supra* note 7.

[127] Speech by Prof. Dr. Andreas Voßkuhle, On-line at:

https://www.echr.coe.int/Pages/home.aspx?p=events/ev_sem&c=.

[128] European Court of Human Rights, "Superior Courts Network", available at

https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c.

[129] European Court of Human Rights, *Annual Report 2020* (2021), 133, available at

https://www.echr.coe.int/Documents/Annual_report_2020_ENG.pdf.

[130] Janneke Gerrards, *General Principles of the European Convention on Human Rights* (2019),160-165.

matters of common concern. The forum reduces the costs of inter-judicial communication and – more importantly – makes a "community of judges" an organizational reality.[131] The remaining holdouts represent a small minority: the courts of Denmark, Estonia, Finland, and Switzerland. In joining the SCN, apex courts hope to strengthen their influence over the ECtHR decision-making. In the ECR, dialogue may never result in eliminating inter-judicial conflict, but it can reduce the likelihood that judicial decision-making will be based on errors of appreciation and mutual misunderstanding.

Protocol No. 16 further institutionalizes dialogue.[132] As noted, Protocol No. 16[133] permits domestic apex courts to request an advisory opinion from the European Court, including with reference to ongoing litigation in the domestic courts, in which the interpretation of Convention rights is material to the outcome. If the Court accepts the request, a Grand Chamber (17 members) will proceed to produce a reasoned opinion. The advisory opinion is not binding, although one expects that the reasoning that comprises such opinions will be anchored in the Court's precedents, which are binding. The revision of the ECHR entered into force in August 2018, upon its ratification by ten member states. Some, perhaps most, states fear that Protocol No. 16 will further strengthen the Court's "constitutional" authority.

It is important to stress that these projects extend rather than originate dialogic procedures. Dialogue, after all, is built into the Court's ordinary deliberations. Typically, the Court takes pains to trace carefully how national institutions considered the applicant's case – that is, the process of exhausting national remedies. Further, the Court's enforcement of the proportionality principle, including the

[131] Spano, *supra*, note 125.

[132] See Lize R. Glas, "The Boundaries to Dialogue with the European Court of Human Rights", in Wolfgang Benedek, Philip Czech, Lisa Heschl, Karin Lukas and Manfred Nowak (eds.), *European Yearbook on Human Rights* (2018), 287–318.

[133] Janneke Gerards, "Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal", 21 *Maastricht Journal of European and Comparative Law* (2014), 630.

deployment of consensus analysis is participatory, involving the submissions of the parties to the case, as well as interested third parties (NGOs and states not party to the suit). These discussions focus attention on cross-national law and practice, the ECHR's extant case law, and the future trajectory of the relevant jurisprudence. The sensitivity to dialogic procedures does not end with the ruling. Monitoring compliance with pilot rulings, and with rulings that expose serious systemic failures in domestic systems of rights protection more generally, regularly leads the Court into delicate and multi-faceted negotiations with state officials on the nature and scope of necessary reforms. The Court's own Department for the Execution of Judgments, working with the Committee of Ministers of the Council of Europe, consults with state officials and other stakeholders with the goal of removing obstacles to implementation; these negotiations typically lead to the development of formalized "action plans" to achieve compliance.[134]

Such factors continuously underline the fact that no national court is alone when it adjudicates rights in the Convention system. Research that focuses excessively on the policy positions of transient governments and political parties, while ignoring the importance of litigants and domestic judges, miss crucial determinants of the ECHR's evolution as a legal system.

7. Conclusion

There are several clear reasons for the failure of states and reformers to curb the powers of the Court. First, the decision-rules governing treaty revision (consensus-based unanimity) are protective of the Court and its authority. Second, only a minority of states were committed to rolling back the ECtHR's progressive jurisprudence. A majority of states recognized and supported the Court's achievements, which include helping to maintain peace in Europe, bolstering transitions to rights-based democracy, operating a system of monitoring and enforcement of human rights, and raising standards of

[134] For an overview, see Department of Execution of Judgments of the European Court of Human Rights, *Annual Report 2020* (2021), available at https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8.

protection. Third, states proved willing to the pay the tax for these collective goods, which entails tolerating enhanced supervision of their own rights-regarding activities. Of course, they may well protest judgments finding violations in sensitive policy areas, and high court judges will be unhappy with rulings they would not have produced on their own. For its part, the ECtHR has noted and responded to these reactions, while maintaining its core commitments.

By the early years of the 21st century, the ECtHR was being buried in a backlog of cases. The Court itself initiated changes – before the series of High Level Conferences – that would reduce the backlog and preserve its credibility: pilot rulings, dialogue with national courts, and proceduralization. The ECtHR made clear that it would assess the extent to which national institutions had considered the Court's jurisprudence and properly balanced; where domestic courts had balanced in accordance with its announced principles, their choices would merit respect. The ECtHR was becoming a constitutional court for Europe.

Although the Court has been beset by regular political "crises" well before the High Level Conferences, the latter provided fora in which some member states could express their dissatisfactions with the regime. British governments at times even threatened to abolish the 1999 Human Rights Act and to withdraw from the Court. Still, the efforts of the United Kingdom at Brighton, and of Denmark at Copenhagen, failed. In the end, the interpretation and application of subsidiarity and margin of appreciation remain in the hands of the Court.