

# PROTOCOL 15 AND ARTICLES 10 AND 11 ECHR—THE PARTIAL TRIUMPH OF POLITICAL INCUMBENCY POST- BRIGHTON?

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**Abstract** Protocol 15 inserts a new recital into the Preamble of the European Convention on Human Rights (ECHR) which affirms the primacy of national authorities in securing the effective realization of Convention rights. The article discusses the context for Protocol 15, notably the Brighton Declaration, and the democratic principles it engages. A selective retreat from substantive supranational review towards systemic supranational review in political expression cases may be occurring. The article questions the emerging pattern by which newer and transitional democracies remain subject to strict levels of supranational scrutiny, whilst their more established counterparts look set to be the main beneficiaries.

**Keywords:** Human Rights, Brighton Declaration, Copenhagen Declaration, margin of appreciation, political expression, political incumbency, subsidiarity.

## I. INTRODUCTION

Since its inception, a fundamental tension has lain at the heart of the European Convention on Human Rights. The design of the Convention puts domestic national legislatures at the forefront of the effective realization of rights protections. At the same time, the processes and outcomes of democratic decision-making at the municipal level are subject to supranational judicial oversight by the Court in Strasbourg. Protocol 15 of the European Convention on Human Rights signals a renewed emphasis upon the primacy of member states' role in securing the effective realization of rights and freedoms set out in the Convention. Upon the agreement of all 47 Council of Europe members, a new recital will be added to the end of the Preamble:

Affirming that the High Contracting Parties, in accordance with 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

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enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Convention of Human Rights established by this Convention.

As the United Kingdom's parliamentary Joint Committee on Human Rights noted in its 2014 report *Protocol 15 to the European Convention on Human Rights*, the amendments represented the 'culmination of the UK Government's contribution to the ongoing process of reform of the European Court of Human Rights (ECtHR) during its Chairmanship of the Committee of Ministers of the Council of Europe'.<sup>1</sup> The Brighton Declaration in April 2012<sup>2</sup> intended to rebalance national authorities' relationships with the Strasbourg Court by checking what some national governments (including the UK Government) deemed an excessive degree of interference with the considered determinations of rights questions by national authorities (legislatures and courts).<sup>3</sup> One prominent criticism was that the Strasbourg Court was becoming a 'fourth instance' court in which claims heard and disposed of by national court systems were being reheard in Strasbourg. This practice undermined the structure of the Convention itself in which the primary role was given to national authorities in securing the effective realization of the rights, a structure which would have best been respected via the general application of a broad margin of appreciation. It seemed also to evince a lack of respect for the pluralism inherent in the Convention system of rights protection whereby signatory States are permitted in light of the evolution of their particular legal traditions a degree of latitude to fashion jurisdiction-specific mechanisms for the protection of Convention rights. Denmark, during its brief period as Chair of the Council of Europe, proposed a further declaration in February 2018, the draft of which calls for a 'better balance' between national and supranational systems of rights protection.<sup>4</sup> The draft has been interpreted by some as granting further leeway to national majorities to weaken Convention protections for minorities.<sup>5</sup>

The discussion below focuses exclusively on a core democratic freedom, namely freedom of political expression as set out in Article 10 of the

<sup>1</sup> Fourth Report of Session 2014-15 HL Paper 71; HCP 837 at para 2.1.

<sup>2</sup> And see previously *Interlaken Follow-Up – Principle of Subsidiarity* ECHR (Note by the Jurisconsult) <[http://www.echr.coe.int/Documents/2010\\_Interlaken\\_Follow-up\\_ENG.pdf](http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf)>.

<sup>3</sup> See for example Prime Minister Cameron's speech to the Parliamentary Assembly of the Council of Europe on 25 January 2012. For a helpful account locating Brighton as sharing features with a 'state-centric' account of subsidiarity in which member states keep 'maximal authority and immunity' from external review, see A Follesdal, 'Squaring the Circle at the Battle of Brighton: Is the War between Protecting Human Rights or Respecting Sovereignty Over, or Has It Just Begun?' (2015) PluriCourts Research Paper No.15-10 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2642403](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642403)>.

<sup>4</sup> See <[https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft\\_copenhagen\\_declaration\\_05.02.18.pdf](https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf)> para 11.

<sup>5</sup> A Follesdal and G Ulfstein, 'The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?' *EJIL Talk!* (22 February 2018) <<https://www.ejiltalk.org/the-draft-copenhagen-declaration-whose-responsibility-and-dialogue/>>.

Convention.<sup>6</sup> After an initial descriptive section of materials setting out the background to Brighton, the concerns of supranational overreach and the eventual agreed wording of Protocol 15, the analysis which follows coheres around two main areas. The first section of materials considers whether, in advance of the coming into force of Protocol 15, the Court's Article 10 jurisprudence has already begun to anticipate a more relaxed standard of oversight in respect of national authorities' restrictions upon forms of public discourse beyond that which had occurred pre-Brighton. Here a key question will be whether the Court's treatment of margin of appreciation issues suggests an early willingness to defer to national authorities in order to address the issues that prompted the Brighton Declaration and remain at the core of the draft Copenhagen Declaration. A second section then sets out a principled, counter-majoritarian defence of a constitutional role for Strasbourg judges in keeping open the channels of political change, thereby safeguarding in the ultimate analysis the legitimacy of the national political sphere. The novel argument made in this discussion criticizes the steer towards localism in Protocol 15 in as far as it facilitates local majorities' restrictions of unpopular/dissenting political opinion. The case is made for strict supranational review of national decision-making as a *sine qua non* of democratic self-government. An appropriately demanding level of review in respect of limitations on political expression was laid down relatively early in the Court's jurisdiction in *Handyside v UK*:

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.<sup>7</sup>

One relatively neglected aspect of any democracy-protective role for courts, I argue, is a well-founded anxiety that incumbent office holders may be tempted to use legislative majorities to consolidate their grip on the levers of public power by disabling/hindering challenges from their political rivals.<sup>8</sup> This element has not, however, been to the fore in Articles 10 and 11 jurisprudence. My purpose in identifying and isolating it here is to provide a useful frame to explore a discrete aspect of national vs supranational Convention rights protection. I hope to show that where national courts are either unwilling or unable to provide protection under the Convention for the expressive/associative activities of political challengers, the role of the Strasbourg Court should be clear. Without such oversight, disparate levels of protection for public discourse at odds with majority sentiment raise the

<sup>6</sup> As such it makes no claims about the broader picture of Strasbourg intervention/non-interventions in cases involving other Convention rights.

<sup>7</sup> *Handyside v UK* (1979-80) 1 EHRR 737 at para 49.

<sup>8</sup> For a classic statement of this argument, see J Hart Ely, *Democracy and Distrust* (Harvard University Press 1980).

damaging possibility of blocked channels of political change in Council of Europe States. The chances that incumbents will hold onto public office are boosted as the voices of non-incumbent sections of political opinion are marginalized in societal debates. Undoubtedly, as the background to Brighton shows, it must be recognized that strict review carries its own costs, principally in terms of damaged relations between the Court and Contracting States. Nonetheless, it can be plausibly argued that a more intense form of supranational scrutiny over domestic limitations on political expression and/or association helps maintain the democratic credentials of members States. In more general terms, sensitivity in Convention adjudication to local conditions contributes to an unfortunate erosion of principled supranational jurisprudence and undermines effective regional scrutiny of national governments.<sup>9</sup> Frequent deference to local determinations of Convention rights risks marginalizing the Court to the point where, as the Portuguese Judge Pinto du Albuquerque observed in *Hutchinson v UK*, it provides mere recommendations to national authorities on what it might be desirable to do.<sup>10</sup> The present contribution stops well short, however, of making the case for the wholesale abandonment of the margin of appreciation doctrine across all Convention rights contexts.<sup>11</sup>

## II. PROTOCOL 15 AND BRIGHTON/COPENHAGEN (DRAFT) DECLARATIONS

In April 2012, the United Kingdom marked the conclusion of its chairmanship of the Council of Europe's Committee of Ministers with a high-level gathering of Ministers in Brighton. The then UK Prime Minister, David Cameron, had previously remarked on his 'physical revulsion' at the thought of having to implement the Strasbourg Court's decision in *Hirst v UK (No 2)*—that a blanket ban on prisoners' voting rights was a disproportionate restriction on Article 3 of Protocol 1.<sup>12</sup> Somewhat fortified by cross-parliamentary

<sup>9</sup> F Ni Aolain, 'The Emergence of Diversity: Differences in Human Rights Jurisprudence' (1995) 19 *FordhamIntlLJ* 101.

<sup>10</sup> See thus the dissent of Judge Pinto du Albuquerque in *Hutchinson v UK* App No 57592/08, Judgment of 17 January 2017.

<sup>11</sup> See thus Judge De Meyer (dissenting) in *Z v Finland* (Judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, 323, para 3) who stated that it was 'high time for the Court to banish that concept from its reasoning because where human rights are concerned there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not'.

<sup>12</sup> App No 74025/01, Judgment of October 5 2005. In a different area of UK policy, Home Secretary Theresa May had similarly voiced her frustration at Convention obstacles that hindered her inability to deport a radical Islamic cleric Abu Qatada to Jordan although she ultimately complied with the Court's insistence that the UK Government obtain binding assurances from the Jordanian authorities that Mr Qatada would not be subject to torture/inhuman or degrading treatment and that none of the evidence used against him in Jordanian proceedings would be secured in violation of art 3 of the Convention. See 'Abu Qatada Deported from UK to Stand Trial in Jordan' <<http://www.bbc.co.uk/news/uk-23213740>>. For a recent statement from the Council of Ministers on the matter, see 4.1 Steering Committee for Human Rights (CDDH) CM

opposition to the *Hirst (No2)* ruling that rejected any change to accommodate the Court,<sup>13</sup> Cameron addressed the Parliamentary Assembly of the Council of Europe in January 2012 and maintained that where the domestic regulation of Convention rights had been ‘subjected to proper, reasoned democratic debate ... and had been met with detailed scrutiny by the national courts in line with the Convention ... the decision made at national level should be treated with respect’.<sup>14</sup>

On this argument, the greater democratic legitimacy that is enjoyed by national elected legislatures’ rule-making (and buttressed by subsequent domestic judicial oversight) is too readily cast aside when Strasbourg intervenes in favour of applicants. Such interventions tend to undermine the pluralism inherent in the Convention whereby meaningful rights protection can be secured across Council of Europe States in varied ways that reflect national cultures and specific pressing interests.<sup>15</sup> The virtues of a pluralistic approach was certainly to the fore in Lord Hoffmann’s 2009 lecture ‘The Universality of Human Rights’ where he questioned the desirability of review by the Strasbourg Court after the government, legislature and judiciary of a particular legal system had arrived at a compromise suited to that legal system.<sup>16</sup> Lord Hoffmann was especially critical of the supranational interventions in disputes engaging Article 6 (right to silence and the hearsay rule),<sup>17</sup> Article 8 (right to respect for private and family life) and Article 13 (right to an effective domestic remedy).<sup>18</sup> His forensic analysis of Strasbourg jurisprudence did not extend, however, to core rights of political expression and association.

Discontent with the interventions of the European Court of Human Courts has not been confined to the UK. Valerii Zorkin, the President of the Russian Constitutional Court, publicly expressed concern about the ‘living instrument’ or ‘evolutive interpretation’ approach taken by the Strasbourg Court to the Convention’s provisions, discerning within it the potential to undermine the

(2018) 18, Analysis of the legal and procedural aspects of effective alternatives to detention in the context of migration (January 2018) <<https://rm.coe.int/0900001680782d83>>.

<sup>13</sup> <<https://publications.parliament.uk/pa/cm/201012/cmhansrd/cm110210/debtext/110210-0002.htm>>.

<sup>14</sup> Speech to the Parliamentary Assembly of the Council of Europe (2012) January 25 available at <<https://www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights>>.

<sup>15</sup> For a leading defence of such pluralism see P Mahoney, ‘Marvellous Richness of Diversity’ (1998) 19 HRIJ 1, 3. Mahoney argues that, just as national judges in political democracies must show deference towards the rights balances struck by freely-elected legislatures, so too must supranational Convention enforcement bodies.

<sup>16</sup> <<https://www.judiciary.gov.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/>>. For an extrajudicial response from a member of the Court, see R Spano, ‘Universality or Diversity of Human Rights?’ [2014] HRLR 6–11.

<sup>17</sup> *O’Halloran & Francis v UK* (2008) 46 EHRR 21 note here that Lord Hoffmann was especially critical of the dissenting judgments in the Grand Chamber ruling, not the majority opinion. Nonetheless, in his view the application should have been deemed ‘manifestly ill-founded’ at the outset and never admitted for substantive consideration; *Al-Khawaja & Tahery v UK* (2012) 54 EHRR 23.

<sup>18</sup> *Hatton v UK* (2002) 34 EHRR 1.

supremacy of the national constitution. President Zorkin's disquiet may derive in part from the *Principle of Subsidiarity Note* following the 2010 *Interlaken Declaration* to the effect that 'evolutive interpretation' of Convention rights might mean that 'a specific matter left entirely to States' discretion may be called into question by the Court'.<sup>19</sup> In *Markin v Russia* discriminatory rules on parental leave were judged by the Grand Chamber to violate fathers' Convention rights to family life.<sup>20</sup> President Zorkin responded by stating that the decision showed a lack of respect for Russia's sovereignty.<sup>21</sup> A successful challenge in *Anchugov and Gladkov v Russia* to a blanket ban on prisoner voting was perceived domestically as subverting the Russian Constitution. The Russian Constitutional Court subsequently affirmed the supreme status of constitutional norms including rules of prisoner disenfranchisement.<sup>22</sup> At present, the ECtHR ruling in *Anchugov* has not been implemented by Russia.<sup>23</sup> Similarly, the German Federal Constitutional Court in *Görgülü* made clear that where a conflict arose between a ruling of the ECtHR and the German Constitution on a matter engaging the fundamental rights of individuals, the latter would prevail.<sup>24</sup> Nonetheless, as a matter of international law, the various stances of the Russian and German Constitutional Courts alongside that of the UK Government and Parliament in *Hirst (No 2)* clearly placed the domestic authorities in breach of Article 46 of the Convention by which the High Contracting Parties agree to abide by the final decisions of the Strasbourg Court in any case in which they have been respondents.<sup>25</sup> It is against this conflictual background that the Brighton Declaration was set.

<sup>19</sup> Reflecting the idea that the evolutive enhancement of rights protection may not have occurred across all Contracting States see *Interlaken Follow-Up – Principle of Subsidiarity* (8 July 2010), <[http://www.echr.coe.int/Documents/2010\\_Interlaken\\_Follow-up\\_ENG.pdf](http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf)> para 15. For reaffirmation see *Izmir Declaration* (2011) <[http://www.echr.coe.int/Documents/2011\\_Izmir\\_FinalDeclaration\\_ENG.pdf](http://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf)>.

<sup>20</sup> App No 59502/00, Judgment of 13 September 2006.  
<sup>21</sup> I Levin, 'At a Crossroads: Russia and the ECHR in the Aftermath of Markin' *Verfassungsblog* (30 January 2015) <<http://verfassungsblog.de/crossroads-russia-echr-aftermath-markin-2/>>.

<sup>22</sup> Art 32(3) of the Russian Constitution.

<sup>23</sup> Tensions between Russia and the Council of Europe have worsened since the annexation of Crimea. The country's delegation has been suspended from the Parliamentary Assembly of the Council of Europe. In return, Russia has suspended payments to the Council of Europe; see further T Batchelor, 'Russia Cancels Payments to Council of Europe after Claiming Its Delegates Are Being Persecuted over Crimea' *The Independent* (30 June 2017) at <<http://www.independent.co.uk/news/world/europe/russia-cancels-council-of-europe-payment-members-persecuted-a7816951.html>>.

<sup>24</sup> <[http://www.bverfg.de/entscheidungen/rs20041014\\_2bvr148104.html](http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html)>; for comment see F Hoffmeister, 'Germany: Status of European Convention on Human Rights in Domestic Law' (2006) 4 *ICON* 722.

<sup>25</sup> In October 2017, the UK Government announced moves to lift the ban on prisoner voting in respect of prisoners serving short sentences who on the relevant election date have been released on licence back into the community. This announcement is reported to have been accepted by the Council of Europe, see O Bowcott, 'Council of Europe Accepts UK Compromise on Prisoner Voting Rights' *The Guardian* (7 December 2017) <<https://www.theguardian.com/politics/2017/dec/07/council-of-europe-accepts-uk-compromise-on-prisoner-voting-rights>>. The reform will affect around 100 prisoners.

*A. Brighton, Copenhagen and the Impact of the Amended Preamble*

An earlier draft version of the Brighton Declaration proposed by the United Kingdom offered a stronger steer towards nationally-determined rights standards. This draft declared that State parties enjoyed a ‘*considerable* margin of appreciation’ (emphasis added) and that it was the responsibility of ‘democratically-elected national legislatures to decide how to implement the Convention in reasoned judgments’.<sup>26</sup> The Strasbourg Court’s role was to check that the decisions of national authorities were ‘within the margin of appreciation’. As was noted previously, the final agreed version of the text removed the references to ‘considerable’ and ‘democratically elected national legislatures’. How might this somewhat milder assertion of respect for national determinations of Convention rights begin to play out as a matter of supranational judicial practice? The UK Parliament’s Joint Committee on Human Rights suggested that the amended Preamble is ‘likely to have a tangible impact on the approach of the Court’.<sup>27</sup> Taking its cue from the then President of the Court Dean Spielmann, who had cautioned against treating the new wording as ‘a mere rhetorical flourish or form of window-dressing’,<sup>28</sup> the Joint Committee concluded that, as an integral part of the Treaty itself under the Vienna Convention on the Law of Treaties, the Preamble was ‘likely to lead to a renewed focus by the Court on the adequacy of the protection of human rights at the domestic level’.<sup>29</sup> Specifically, the Joint Committee welcomed the emphasis upon the ‘reasoned assessment’ of domestic authorities on the Convention-compatibility of proposed domestic laws. Signatory States would be reassured that the precise margin of appreciation accorded by Strasbourg to domestic determinations would be a function in part of the extent of informed scrutiny at national level of ECHR compatibility issues. This development augured well for the long-term democratic legitimacy of the Convention system.<sup>30</sup> In short, well-functioning democracies could expect, on the Joint Committee’s view, to be afforded more leeway to reach diverse substantive outcomes on rights questions. For their part, newer and less well-established democracies would be encouraged to devise credible internal systems of independent scrutiny.

The brake that is to be applied to national determinations of Convention Rights is signalled primarily in the idea of supranational assessment of the adequacy of national scrutiny of rights-affecting measures both within the legislature (including by specialist committees of the legislature) and the

<sup>26</sup> Quoted in Follesdal (n 2). The UK’s proposals also wanted to tighten the admissibility criteria for the Court by denying jurisdiction to Strasbourg outside those cases where it was obvious that the national court had made an error.

<sup>27</sup> ‘Protocol 15 to the European Convention on Human Rights’ 4th Report of Session 2014-15 (2014) HL Paper 71, HC 837 at para 3.13.

<sup>28</sup> ‘Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ and published under the same title in (2012) 14 CYELS 381.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*, paras 3.18–19.

courts.<sup>31</sup> As such, the anticipated increased deference towards local determinations of rights questions will be contingent upon positive assessments by the Court regarding (i) the type of scrutiny to which legislative proposals/enacted measures are subject and (ii) the willingness of governments to engage constructively with such domestic scrutiny. Where inadequacies exist, Protocol 15 might not result in a markedly enhanced leeway for national authorities.

The emphasis in the Joint Committee's report upon systemic checks at national level is not, however, without its difficulties. It can be criticized in general terms for deflecting attention away from the substantive balance drawn in specific instances between individual rights claims and competing societal interests. This criticism has special force in the case of forms of political expression and association that challenge the prevailing consensus among incumbent public office holders. An emphasis upon the apparently healthy functioning of review systems within the legislature ignores the fact that these systemic checks are operationalized by party politicians who may well be tempted to act in ways that preserve their hold on public office and disadvantage their non-incumbent rivals. The blanket legislative ban on all political broadcasting in the United Kingdom offers a case in point that is the subject of more detailed analysis below.

More recently, the draft terms of the Copenhagen Declaration published in February 2018 speak at paragraph 11 of securing a 'better balance' between national and European mechanisms and affirms that Convention rights should be determined 'predominantly at national level by State authorities in accordance with their constitutional traditions and in light of national circumstances'.<sup>32</sup> Paragraph 23 of the draft declares that, in 'general policy' matters where opinions may differ widely, 'the role of the domestic policy maker should be given special weight'.<sup>33</sup> Plainly then, this latest steer towards the local settlement of Convention rights questions does nothing to discourage incursions into non-incumbents' political freedoms.<sup>34</sup>

### *B. Principled Arguments*

An early and frequently-cited disquisition in favour of the settlement of Convention rights in domestic political institutions is found in Mahoney's 1998 article, 'Marvellous Richness of Diversity or Invidious Cultural

<sup>31</sup> *ibid.*, para 3.14.

<sup>32</sup> <[https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft\\_copenhagen\\_declaration\\_05.02.18.pdf](https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf)> at para 14. For a sceptical view on the willingness and capacity of States and national courts to confer appropriate rights protection, see E Benvenisti, 'The Margin of Appreciation, Subsidiarity, Global Challenges to Democracy' (2016) GlobalTrust Working Paper Series 05/2016, <<http://globaltrust.tau.ac.il/wps-2016-05-the-margin-of-appreciation-subsidiarity-and-global-challenges-to-democracy/>>. I am very grateful to Dr Eirik Borge for alerting me to this paper.

<sup>33</sup> *ibid.*, para 23.

<sup>34</sup> A concern for minority rights in general is expressed by Follesdal and Ulfstein (n 5).



Relativism'. Conceding that the margin of appreciation doctrine had not always been applied by the Strasbourg authorities in a consistent manner,<sup>35</sup> Mahoney set out a principled defence of the primacy of national, majoritarian political institutions in determining Convention Rights questions. His account emphasized the diversity of cultures and traditions across Council of Europe States and concluded that Strasbourg ought not to take on an appellate role in relation to the outcome of national decision-making. Rather it was democratically-elected, representative legislatures that held the 'main responsibility' for law-making especially in 'social, economic and *political* fields where the opinions of citizens differ' (emphasis added).<sup>36</sup> Prefiguring Lord Hoffman's criticism of excessive interference from Strasbourg, Mahoney made the argument that each society must be free to decide its own policies according to its notions and needs. Democratic societies' best assurance of survival 'was 'located in decision-making by freely-elected representatives'.<sup>37</sup> The Court's decision in *Handyside v UK* exemplifies this respectful approach.<sup>38</sup> By thirteen votes to one, the Court refused to find a violation of Article 10 in respect of a criminal conviction for obscenity before an English court of a book first lawfully published in Denmark and subsequently freely available in a number of countries including Germany and France. In declining to interfere with the conviction, the majority stated

The Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories: they have had regard, inter alia, to the different views prevailing there about the protection of morals in a democratic society. The fact that most of them decided to allow the work to be distributed does not mean that the contrary decision of the Inner London Quarter Session was a breach of Article 10.<sup>39</sup>

Recognizing that some Council of Europe States had instituted counter-majoritarian systems of constitutional review, Mahoney cautioned that the judges in these systems had to exercise a degree of self-restraint, lest their adjudication assume an 'over-broad' exercise of discretion and allow the remaking of social policy on a 'whim'.<sup>40</sup>

As noted above, Mahoney's defence of the primacy of law-making by democratically elected legislatures was expressed to extend beyond social and economic matters to include the 'political' realm. In another article published at much the same time, he did, however, endorse a narrow margin of appreciation for States' regulation of 'political speech or debate on

<sup>35</sup> For examples of this type of criticism, see A Lester, *Proceedings of the 8th International Colloquy on the European Convention on Human Rights* (Council of Europe, Strasbourg 1995) 227, 236–7; and E Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 *NYUJIntlL&Pol* 843.

<sup>36</sup> Mahoney (n 15) 2.

<sup>37</sup> *ibid* 3.

<sup>38</sup> *Handyside v UK* (1976) ECHR 5.

<sup>39</sup> *ibid*, para 57.

<sup>40</sup> P Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 *HRLJ* 2.

questions of public interest'.<sup>41</sup> Writing after the Court's ruling in *Wingrove v UK*,<sup>42</sup> Mahoney defended the pattern in Article 10 cases where a greater intensity of supranational review was applied in cases of restrictions on political expression whilst a relatively relaxed scrutiny in cases prevailed in respect of national limitations on artistic expression. Greater latitude had to be afforded to national authorities and majority rule-making within States where expression was in the majority's judgment 'liable to offend intimate personal convictions within the sphere of morals, or, especially, religion'<sup>43</sup> and where no European consensus on the limits of expressive freedom existed.<sup>44</sup>

Unfortunately, Mahoney's defence of closer scrutiny by Strasbourg in cases of restrictions upon political expression lacked a fuller account of both what the 'political' and 'public interest' comprised of and why, in the Strasbourg system, restrictions affecting this type of expression were worthy of particularly close supranational oversight as a matter of principle. To take the definitional question first, Mahoney seems to assume that artistic expression that is offensive to majority tastes might never have a political component. His account thus cannot help identify the appropriate level of supranational review in a case similar to *Müller v Switzerland* where the artistic expression objected to by domestic authorities had depicted national politicians engaged in sexual relations with animals.<sup>45</sup> Or, consider the counterfactual *Otto Preminger* scenario where it is suggested in a film that an established church is a corrupt organization misusing donations from its well-meaning benefactors to silence the victims of child abuse.<sup>46</sup> In each instance, it seems that the elements of public interest expression and offence to persons of faith are both present. Are domestic restrictions on this type of expression deserving of close/relaxed supranational oversight? The answer given on the definitional question above will turn on a deeper-level view about the function of 'political/public interest' expression in liberal democratic systems of government. A broad definition of 'political' might be considered vital for example if, as in systems of popular sovereignty, high value is attached to subjecting public office holders to routine, informed scrutiny via elected representatives (out of election periods) and at regular intervals directly by the people. In the modern era, a conception of the citizen as active participant in democratic decision-making structures will necessarily shape an understanding of what kinds of speech from whom are considered 'political'.

<sup>41</sup> P Mahoney, 'Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments' (1998) EHRLR 377.

<sup>42</sup> *Wingrove v UK* (1997) 24 EHRR 1.

<sup>43</sup> *ibid*, para 58.

<sup>44</sup> For separate criticism of weaker supranational protection for artistic expression, see A Lester, 'Universality versus Subsidiarity: A Reply' (1998) EHRLR 73.

<sup>45</sup> *Müller v Switzerland* (1988) 12 EHRR 212—No violation of artist's or gallery owner's freedom of expression after conviction under Swiss obscenity laws for exhibiting paintings depicting sexual relations between men and animals.

<sup>46</sup> *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34.

Finally, Mahoney's account overlooks the fact that the invocation of a margin of appreciation by the Strasbourg Court has masked at times a *substantive* determination that the Court has made regarding where the balance between individual and State interests lies in a particular case. Here, as Letsas point out, the members of the Court must also be reliant upon some theoretical or moral view about how the competing interests are to be assessed and weighted against each other. Any stated reliance upon national authorities' 'margin of appreciation' does little by itself to help our understanding of the preferred theoretical basis of this balancing exercise.<sup>47</sup>

### *1. The systemic turn in subsidiarity/margin of appreciation debates*

As exemplified by the UK Parliament's Joint Committee on Human Rights's approach noted above, recent discussions of subsidiarity/margin of appreciation questions involving Convention rights have taken a systemic turn. Under this approach when the Strasbourg Court comes to review the compatibility of national restrictions on Convention rights, significant attention is required to be focused upon the systemic functioning of domestic (i) decision-making procedures in the legislature and (ii) judicial oversight (iii) where proportionality is to the fore in the Court's analysis.<sup>48</sup> The clear normative implication here is that a more relaxed supranational level of scrutiny is justified where national systems of independent oversight of executive policy-making are well-established, appear robust and command respect. Here it is said that the national authorities are 'better placed' to strike the balance between the individual right and the competing policy interest. Or, put another way, the balance struck by national authorities in any particular instance ought to be recognized by Strasbourg as possessing an especially compelling legitimacy.<sup>49</sup> This position can be aligned with the so called 'fourth instance Court' criticism levelled at Strasbourg by some Council of Europe States. The basis of the criticism is that there can be no role for the Court when the components of national oversight appear to be in good working order.<sup>50</sup> As suggested earlier, there are a number of ways in which the legitimacy of national mechanisms for rights protections could be established, including the existence of, and regular resort to, mechanisms through which constructive engagement between the executive and parliamentary (and extra-parliamentary) scrutiny bodies can occur. The respondent State might for instance be able to point to a timely set of consultation processes with a range of legislative and civil society groups at the pre-legislative stage that resulted in a modification of legislative

<sup>47</sup> G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 OJLS 712–15.

<sup>48</sup> See thus Follesdal (n 2).

<sup>49</sup> It also follows that no such legitimacy claim can be made in the absence of independent and robust mechanisms of oversight of executive policy/law-making.

<sup>50</sup> OM Arnardottir, 'Rethinking the Two Margins of Appreciation' (2016) EuConst 27.

proposals that has minimized the scope of rights reductions.<sup>51</sup> Consider also post-enactment forms of constructive engagement such as is demonstrated in the UK by the frequency of executive acceptance of non-binding judicial declarations of incompatibility under section 4(2) of the Human Rights Act 1998 and, subsequently, the prompt introduction of amending legislation purporting to remedy the rights violation in question.<sup>52</sup> Elsewhere across Europe where a similarly positive pattern of executive response to parliamentary and judicial inputs is discerned, this should lead *post*-Brighton to a more relaxed approach at supranational level whereby a broad margin of appreciation is accorded to domestic authorities even in those instances where, had it been left to Strasbourg, the balance would have been struck differently.

## 2. *Scrutinizing the systemic approach*

The argument made above for less intrusive supranational review is heavily premised upon the idea of a ‘reasoned assessment’ of Convention compatibility issues by domestic authorities. It is worth seeking clarification of what is understood by this key phrase. In particular, it is important to ascertain whether a ‘reasoned assessment’ can be said to have occurred by virtue of processes alone, that is, independently of the outcomes generated by the process. Could a ‘reasoned assessment’ be established for example by pointing to any/some/all of the following: (i) an inquiry by an independent parliamentary committee that had received expert advice from interested parties; (ii) a report from the committee that reflected a deliberated consensus among its members; and (iii) a response from the government that engaged with issues raised in the parliamentary report?<sup>53</sup> Alternatively, does ‘reasoned assessment’ connote additionally some sense of an alignment between the national authorities and the Strasbourg Court *on the meaning of the right*? If, as seems more likely, it is the latter, then the systemic account is not entirely devoid of supranational assessment of the actual balance struck by national authorities between Convention rights and other societal interests.<sup>54</sup> To assert otherwise would be to abandon any semblance of a pan-European baseline for

<sup>51</sup> See thus Follesdal (n 48). His preferred ‘person-centred’ account of the margin of appreciation stresses the important role played by functioning and effective domestic mechanisms of self-correction. Where domestic authorities fail to engage in proportionality-style review of rights-reducing measures, then a much stricter standard of supranational review should prevail.

<sup>52</sup> Discussed in C Chandrachud, ‘Reconfiguring the Discourse on Political Responses to Declarations of Incompatibility’ (2014)] PL 624.

<sup>53</sup> This interpretation might have been preferred had the UK’s early draft version of the Brighton Declaration prevailed at the Council of Ministers gathering. The draft version had included a reference to the responsibility of ‘democratically-elected national legislatures to decide how to implement the Convention in reasoned judgments’; see earlier discussion in Pt I.

<sup>54</sup> Arnadottir (n 50) observes that the systemic and substantive elements of subsidiarity are seldom distinguished in the Court’s reasoning.

human rights protections. Some element of supranational assessment on *substantive grounds* remains necessary, even in those instances where the systemic mechanisms in the national legal order appear to be functioning well in terms of the criteria referred to earlier. The remaining question centres upon the type or intensity of substantive scrutiny. It is at this juncture that the type of right and its centrality to the Convention system as a whole is germane.

The rationale for stricter forms of supranational oversight is particularly strong when national laws touch upon core Convention rights centrally implicated in the idea of democratic self-government (voting, expression, association and related privacy concerns of citizens and political associations). Consider the scenario where a clear domestic consensus exists across the main political parties, the legislature and perhaps even in wider society that the national policy/rule is Convention-compliant and entirely justified in policy terms, as in fact occurred in the UK in respect of the blanket ban on prisoner voting. On the argument made here the Court retains a role in applying its own judgment to the substantive issue of whether Convention Rights have been infringed. If it concludes that national law does constitute an infringement, this will usually be expressed in the language of proportionality and indicate that the Court believes the balance has been struck at the wrong point. This conclusion stands irrespective of whether national processes have subjected the rights-infringing measure to independent scrutiny and there has been constructive engagement among the domestic political actors.

In the *post-Brighton* world, however, where the ordering of centre-municipal relations has been revised to address concerns of a perceived problem of ‘Strasbourg overreach’, the intensity of substantive review in cases where core democratic freedoms are engaged risks being diluted and subordinated to a focus upon systemic factors. Specifically, where mature democracies are considered to possess adequate mechanisms of executive scrutiny, it follows that they will be the chief beneficiaries of a relatively broad margin of appreciation. A potential and troubling consequence of this systemic focus is the prospect of less strict scrutiny of rights-reducing measures in long-standing democracies, especially where the reductions impact adversely on the openness of channels of political participation.

Without appropriate supranational oversight, incumbent office holders among the legislature and executive may seek to insulate themselves from political challenge by enacting new laws that block off avenues of political change. A range of measures that might be deployed by incumbents to impede the ability of minority political associations and viewpoints to organize and communicate their political programmes to the wider electorate could thus evade rights-based scrutiny. The US constitutional scholar John Hart Ely argued that democracies had to be alive to the threat that the ‘ins’—existing power holders in democratic regimes—would choke off the channels of political change. The ‘ins’ would always be tempted to make it harder for the

'outs' to compete with the 'ins' and appeal successfully to electorates, thereby making it more likely that the 'ins' would hold onto public office.<sup>55</sup> He directed attention to how legislative majorities treat minorities and, especially, to how majoritarian law-making impacts upon political, religious and racial minorities.

The threats can appear in a number of guises. Proposed reforms to the law on the financing of political campaigns provide obvious opportunities for incumbents to advance their sectional interests at the expense of outsiders. Sunstein has written in the US context about how campaign finance limits can protect incumbents.<sup>56</sup> It is suggested that the Republican Party in the US has altered identification requirements under state voting laws as the incumbent party in ways that make it harder for certain Democrat-leaning groups to cast their ballots.<sup>57</sup> Beyond limits on expressive activity of minorities, partisan gerrymandering of electoral districts offers a clear case in point where the 'ins' can determine the shape of constituency boundaries in ways that favour themselves.<sup>58</sup> The requirement for election candidates in the UK to lodge a deposit with the Returning Officer also plainly impacts adversely on the ability of outsiders to challenge for political office. Candidates in General Elections must deposit £500—a sum that is lost if they fail to secure 5 per cent of the votes cast. To stand for London Mayor a deposit of £10,000 is required whilst candidates for election to the European Parliament must amass a £5,000 deposit. In 2015 the UK Electoral Commission produced a report which reviewed the existing rules. It noted that the larger parties had been mainly in favour of keeping deposits but concluded that this was not an appropriate means of demonstrating the requisite serious intent to hold public office:

It does not seem reasonable to have a barrier to standing for election that depends on someone's financial means. We do not think that the ability to pay a specified fee is a relevant or appropriate criterion for determining access to the ballot paper. We therefore recommend that deposit requirements are abolished.<sup>59</sup>

Addressing the sorts of abuses that had occurred in the political sphere, Hart Ely argued for a judicial role in keeping channels of political representation open. A jurisprudence was needed that buttresses the openness of representative democracy through generous rights of political participation. Although Hart Ely was careful not to attribute especial wisdom to the federal US judiciary, he nonetheless recognized that elected representatives in the legislature were

<sup>55</sup> J Hart Ely, *Democracy and Distrust* (Harvard University Press 1980) Ch 4.

<sup>56</sup> C Sunstein, 'Political Equality and Unintended Consequences' (1994) 94 *ColumLRev* 1390.

<sup>57</sup> C Johnson, 'Proportional Voting through the Elections Clause: Protecting Voting Rights Post-Shelby County' (2015) 62 *UCLALRev* 245–6.

<sup>58</sup> R Pildes, 'The Constitution and Political Competition' (2006) 30 *NovalRev* 253.

<sup>59</sup> Electoral Commission, 'Standing for Election in the UK' (2015) <[https://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0008/180458/Standing-for-Election-in-the-UK-report-Jan-2015.pdf](https://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/180458/Standing-for-Election-in-the-UK-report-Jan-2015.pdf)> 9. The Commission recommended retention of the accompanying requirement to obtain a certain number of signatures endorsing the candidate.

the very last sorts of persons to whom one should turn when attempting to prevent the blocking of channels of political change. As he argued, ‘Courts must police inhibitions on expression and other political activity because we cannot trust our elected officials to do so: ins have a way of wanting to make sure that outs stay out.’<sup>60</sup> The principled arguments he makes in respect of safeguarding the channels of political change in the US Constitution can, without too much difficulty be transposed across to Europe. Some overarching role for Strasbourg can naturally be envisaged when, as in the UK, the courts lack a power of constitutional review over primary legislation. There is also a role for Strasbourg in those jurisdictions where the judicial branch is so empowered, if only to ensure that national judiciaries are applying Strasbourg case law appropriately. My question in the next set of materials is whether the early *post*-Brighton landscape in fact indicates a move away from this position with the result that ‘political channel blocking’ is more likely to escape supranational censure.

### III. POST-BRIGHTON (PRE-ENTRY INTO FORCE OF PROTOCOL 15) A MORE RELAXED APPROACH TO NATIONAL RESTRICTIONS ON POLITICAL EXPRESSION?

One of the clearest instances of the ‘ins’ using their legislative powers to keep the ‘outs’ out concerns blanket bans on political broadcasting. These prohibitions strike directly at the ability of lower-profile and/or recently formed political groups to shape the political agenda by coming to the attention of the electorate at large. As such, bans make it easier for established political parties already enjoying significant media attention through their domination of political news agendas on mainstream channels to maintain their pre-eminent positions. It is true that printed advertisements and online advertising remain open to non-incumbent groups but the rationale behind the selective ban on broadcasting typically rests on the claim that this latter medium—more than its print/online equivalents—has greater immediate influence upon political opinions among the electorate. Given disparities in wealth among persons/groups seeking to influence political opinion, the richest elements in society would end up buying up the lion’s share of broadcast advertising space, drowning out the opinions of other, less well-funded, speakers. Political debate would hence be skewed in favour of the policy agendas of the wealthy. Nonetheless, as the Grand Chamber helpfully pointed out in *VGT v Switzerland* (a pre-Brighton decision), it is not only wealthy groups in society that seek to influence political opinion and challenge mainstream thinking. Convention compatibility issues can arise when a national prohibition aimed at preventing distortion of political debate by the wealthy is used to block communications from a speaker who cannot be said to pose such a threat.

<sup>60</sup> Hart Ely (n 56) 106.

In *VGT v Switzerland* a statutory ban on political advertising was challenged by the applicant animal welfare group which wanted to draw public attention to conditions in which pigs were being reared for human consumption.<sup>61</sup> In June 2001, the ban was held to violate the applicants' Article 10 rights of political communication largely on the basis that the Swiss authorities had failed to provide relevant and sufficient reasons as to why general arguments advanced to support the prohibition might apply in the instant case of VGT's advertisement. The particularistic analysis in *VGT* favoured by the Court represented a strict form of supranational review that assisted the openness of channels of political communication. It had cause to reiterate its interventionist stance in 2009 when, in *VGT v Switzerland (No 2)*, it was brought to the Grand Chamber's attention that the Swiss authorities had maintained the prohibition on the applicant association's advertisement in the intervening eight years.<sup>62</sup> The continued prohibition on the applicant's freedom of political communication was held to be a violation of its Article 10 freedoms.<sup>63</sup>

Viewed against this interventionist pre-Brighton standard, the obvious danger in the post-Brighton/revised Preamble era is that Strasbourg will be disinclined to reach its own substantive particularistic (proportionality-based) conclusions about national bans. As a result, the Court will be seen to intervene less frequently to curtail majority-blocking of political channels of communication and expression, thereby fortifying the grip of political incumbents on office.

As coincidence would have it, one of the earliest Article 10 cases to reach the Grand Chamber of the Court after the Brighton Declaration was the *Animal Defenders International* (ADI) case that centred upon the UK's statutory ban on all political advertising in the broadcast media as set out in section 321(2) of the Communications Act 2003.<sup>64</sup> Significantly, the UK Government clearly had major doubts about the Convention compatibility of the provision and was unable to make a statement under section 19(1)(a) Human Rights Act 1998 before Second Reading of the Bill stage.<sup>65</sup> The sponsoring Minister opted instead to make a section 19(1)(b) statement to Parliament that 'although he is unable to make a statement of compatibility the government nevertheless wishes to proceed with the Bill'. ADI, an animal welfare NGO, wished to pay for a 20-second advertisement 'My Mate's a Primate' on commercially-owned broadcast channels that would have highlighted the plight of primates held captive and abused for the purposes of providing entertainment. The

<sup>61</sup> *VGT v Switzerland* (2002) 34 EHRR 4.

<sup>62</sup> After the June 2001 ruling, the Federal Swiss Court had somewhat bizarrely rejected the applicant association's renewed attempt to be allowed to air its advertisement on the basis that the applicant had not provided a sufficient explanation of the redress it sought nor had it shown that it still had an interest in broadcasting the original commercial.

<sup>63</sup> *VGT v Switzerland (no 2)*, App No 32772/02, Judgment of 30 June 2009.

<sup>64</sup> *Animal Defenders International v UK* (2013) 57 EHRR 607.

<sup>65</sup> This would have reflected the UK Government's understanding of the rulings in *VGT*.



advertisement sought donations from viewers to fund further campaigning by ADI. The proposed advertisement was denied clearance by the regulator on the basis that ADI's objectives were of a 'wholly or mainly political nature' and therefore prohibited under section 321(2) of the 2003 Act. The applicant's challenge to the ban was unsuccessful in the UK courts and an application was taken to Strasbourg.

By the narrowest of majorities 9–8 the Grand Chamber declined to find a violation of the applicant's Article 10 rights. For the majority, although the margin of appreciation enjoyed by the UK in this case was narrow (since it involved political expression and questions of public interest raised by a lawful pressure group), there was a lack of consensus across Europe on the issue of political advertising and, unlike the prisoner voting ban in *Hirst No 2*, prior to the Strasbourg hearing there had been extensive proportionality reviews of the broadcast ban by both the UK Parliament and national courts.<sup>66</sup> The ban addressed the important aim of preventing distortion of democratic debate by financially powerful groups, thereby safeguarding the rights of others (the electorate), and was a proportionate way of achieving that aim. ADI still had access to voters online and through the printed word. In a separate concurrence that almost seemed to signal 'Message understood!' to those Contracting States at the forefront of claims for greater domestic determination of rights questions, Nicolas Bratza, the then President and British judge, stated that it was not Strasbourg's job to do its own balancing or reconciling of competing interests.

To its supporters, the ruling represents a sensible resolution of a complex issue on which reasonable persons disagree. The leeway that had been afforded to the national authorities reflected the fact that very careful consideration had been given to the issue in the legislature and that, when examined in the highest domestic court, their Lordships had endorsed the legislative policy. Democratically elected politicians in national legislatures could be trusted to adopt appropriate measures to safeguard the integrity of democracy.

The *ADI* ruling is thus noteworthy on a number of fronts, not least for the fact that a supposedly narrow margin of appreciation did not in the final analysis lead to the finding of a violation. To the fore in the majority ruling is a twin reliance upon (i) the lack of a consensus across Council of Europe States and (ii) a stress upon the functional or systemic health of UK democracy as revealed by the factual background to *ADI*.

At the outset, the assertion that a lack of consensus across Council of Europe States ought to incline the Court towards a deferent stance is hardly conclusive,

<sup>66</sup> The Joint Committee on Human Rights had asked Parliament to look at compromise solutions but 'the Government had concluded that no fair and workable compromise solution could be found'. Lord Bingham in *Animal Defenders Ltd v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, para 31.

even if it was empirically true (which in any event the minority denied). The right to participate in political debate lies at the core of the founding features of Convention. *ADI* engages head-on the issue of who may speak via broadcast media to the electorate about matters of political controversy. The lack of a consensus across Europe on prisoners' voting rights did not for example prevent the Court in *Hirst (No 2)* from substituting its own substantive analysis of the competing interests at stake to find the UK in breach of its obligations under Protocol 1 of the Convention. Aside from issues of case law consistency, the very lack of consensus on political advertising could have been deployed as the basis of a proportionality argument *against* the UK's position by evidencing that other 'well-functioning' democracies in Europe had managed to uphold the integrity of their political systems without resort to such draconian bans on political expression. At the very least, the existence of alternative methods of protecting democratic processes might have placed a burden on the respondent State to show why less restrictive means were not considered suitable.<sup>67</sup> From a 'political channel blocking' perspective, the majority's systemic emphasis upon the processes of UK law-making and review is disconcerting. A *permanent* ban on spending *any* sum of money on advertising in the broadcast sector suits the main political parties (those who got to decide the matter) as it makes it harder for rival viewpoints to gain public attention and shape the agenda of political debate. Much coverage of political debate in the broadcast media is dominated by the established political parties who would naturally be reluctant to allow others to gain a platform in this forum of political debate.<sup>68</sup> Curiously, when Lord Bingham in the House of Lords stated that 'each State is best fitted to judge the checks and balances necessary to safeguard consistently with article 10 the integrity of its own democracy',<sup>69</sup> he failed to acknowledge the possibility that the main political parties might have self-interested reasons for maintaining the draconian ban. This surprising omission by itself might have prompted the Strasbourg Court to take a closer look at matters.

As the minority pointed out, the idea that Member States' obligations to uphold freedom of political expression might not be made subject to the Court's own proportionality analysis when, as here, a generalized ban had been implemented after the most careful consideration during the legislative process, was to attach excessive importance to process concerns. A reading of the dissenting judgments makes clear that the minority would have applied an exacting proportionality analysis to the ban on ADI's advertisement and

<sup>67</sup> See on this point the dissenting opinion of Judge Tulkens (joined by Judges Spielmann and Laffranque) para 16. A separate set of dissenting judgments was jointly authored by Judges Ziemele, Sajo, Kalaydjieva, Vucinic and De Gaetano.

<sup>68</sup> See J Rowbottom, 'Political Advertising and the Broadcast Media' (2008) 67 CLJ 452.

<sup>69</sup> *Animal Defenders Ltd v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, para 35.

found it to have violated the applicant's Article 10 rights. Whilst section 321 had been prompted by 'well-intentioned paternalism', it 'entirely and permanently clos(es) off the most important medium of communication to any and all advertised messages about the conduct of public affairs'.<sup>70</sup> As a legislative policy to prevent the wealthy distorting public debate, it was not credible in view of the fact that less draconian mechanisms were in use in Europe. Moreover, nothing about the state of democratic debate in the UK had been shown to indicate a 'pressing need' for a generalized and total ban on political advertisements. The specific facts surrounding the particular advertisement from ADI had not been shown to be likely to distort democratic debate. The rationality of the ban was also challenged. The emergence and importance of newer online forms of information meant that the basis for treating the broadcast sector as enjoying special influence over viewers/listeners had now to be doubted.

The majority opinion of the Grand Chamber in *ADI* may reflect a kind of political wisdom in the face of pressures detailed in Part II of this discussion. To its defenders it may also signal the Court's commitment to pluralism through which a set of widely differing constitutional arrangements across Council of Europe States can nonetheless satisfy baseline Convention standards. The natural implication of the majority's stance is that where the Court adjudges systemic protections for domestic checks on executive power to operate adequately, it is much less likely to interfere with instances of individual liberty/societal policy line-drawing. Long-standing democracies such as the UK will enjoy a degree of latitude in regulating Convention rights. Where checking mechanisms are less firmly established in the Court's eyes (more typically in newer, less well-established or transitioning democracies), a pattern of diminished margins of appreciation and correspondingly more frequent resort to substantive review is likely as the Court seeks to keep open the channels of political participation and peaceful democratic change. Recent case law from the Court concerning limitations on political expression/association appears to support the foregoing analysis. In Turkey, Hungary and Russia such restrictions continue to come under stricter forms of supranational scrutiny.<sup>71</sup> In this regard Protocol 15 is unlikely to usher in a period of generalized respite across all Council of Europe States.<sup>72</sup> A brief

<sup>70</sup> Joint Dissenting Opinion of Judges Ziemele, Sajo, Kalaydjieva, Vucinic and De Gaetano, para 13.

<sup>71</sup> But of the Grand Chamber ruling in *Kudrevičius and others v Lithuania* App No 37553/05, Judgment of 15 October 2015 discussed below which departs from this pattern.

<sup>72</sup> Indeed, outside of political expression/association cases such as commercial advertising where States might more confidently expect to enjoy a broader margin of appreciation, the Court continues to police national restrictions relatively strictly. See thus *Sekmadienis Ltd. v Lithuania* App No 69317/14, Judgment 30 January 2018. A violation of art 10 was found in relation to billboard advertisements for clothing with captions that stated 'Jesus, what trousers!' and 'Dear Mary, what a dress!' The basis of the ban in domestic law was the 'inappropriate' and 'distorted' use of religious symbols. Notwithstanding the broad margin of appreciation enjoyed by domestic authorities in the regulation

account below of some recent rulings involving Turkey, Hungary and Russia shows that restrictions on these States continue to come under close examination.

The lack of a clearly stated legal basis for restrictions on certain forms of political activity in Turkey has led to successful challenges before the Court in *Semir Güzel*<sup>73</sup> and *Cumhuriyet Halk Partisi*.<sup>74</sup> In the former case, a conviction of the applicant chairman for allowing speakers to use Kurdish at a lawful political meeting was held not to be 'prescribed by law' for the purposes of Article 10. The basis of the applicant's conviction was a provision in the criminal law which stated that political parties 'could not remain indifferent to the use of Kurdish in a political context'. This was not sufficiently precise to permit affected parties to predict with any degree of certainty how the restriction would operate in practice. *Cumhuriyet Halk Partisi* originated in the seizure of assets and the imposition of fines upon the main opposition party for non-compliance with rules of party expenditure. The effects of the sanctions were to force the party to cease a number of its political campaign activities. At Strasbourg, the relevant provision of Turkish law was deemed to be too vague to conform to the 'prescribed by law' element of Article 11(2). The Court was concerned that the lack of clarity and foreseeability in domestic law could open the door to 'the abuse of the financial inspection mechanism for political purposes'.<sup>75</sup> The Court's alertness to the possible abuse by public officials marks an important check on improper attempts by political incumbents to consolidate their hold on power.

The respective failures of Turkish law in *Semir Güzel* and *Cumhuriyet Halk Partisi* to satisfy Convention requirements regarding the clarity and foreseeability of restrictions on Article 10/11 meant, of course, that the Court did not have to reach a conclusion in either case about the legitimacy of any objectives behind restriction, nor was it required to conduct a proportionality analysis. Where newer, less well-established and transitioning democracies have been able to demonstrate that a restriction on political activity satisfies the 'prescribed by law' element of Articles 10(2) and 11(2), attention then falls on the questions of legitimate purpose and proportionality. Here too Brighton appears not to have diluted the intensity of supranational review and the Court has intervened to safeguard channels of political opposition. In *Karácsony and Others v Hungary* and *Szél v Hungary* disciplinary sanctions (including fines) that had been imposed upon opposition MPs in the

of commercial expression, the Lithuanian courts had exceeded this limit by conferring 'absolute primacy' upon the protection of religious (Christian) feelings and failing to give weight to the intentionally comic use of emotional interjections common in daily speech.

<sup>73</sup> *Semir Güzel v Turkey*, App No 29483/09, Judgment of 13 September 2016.

<sup>74</sup> *Cumhuriyet Halk Partisi v Turkey*, App No 19920/13, Judgment of 26 April 2016.

<sup>75</sup> *ibid* para 88. It is, of course, interesting to speculate whether, in the event that domestic law had been stated with greater precision, the respective interferences in *Semir Güzel* and *Cumhuriyet Halk Partisi* would have survived substantive scrutiny.

Hungarian Parliament for holding up banners and, in one case, using a megaphone during proceedings were found by the Grand Chamber to have violated the MPs' Article 10 rights.<sup>76</sup> Whilst it was true that legislative assemblies did enjoy a degree of autonomy in how they regulated their proceedings, this autonomy was somewhat narrowed when the governing party's MPs appeared to have used their dominant position in the legislature to disadvantage opposition MPs. On a proportionality analysis of the sanctions, the Court attached particular importance to the extent of available procedural safeguards such as whether the MPs had been given an opportunity to make representations prior to any determination by disciplinary body and informed of the reasons for the sanctions imposed on them. These procedural entitlements were needed to prevent abuse of the disciplinary process by the dominant party in the legislature. Their absence meant that the applicants' freedom of political expression had been disproportionately interfered with by the Hungarian authorities.

Finally in *Novikova and Others v Russia* the Court reasserted its willingness to review domestic penalties for demonstrators who fail to secure prior consent before assembling for protest activities.<sup>77</sup> Under Russian law, it is only sole demonstrators that need not give advance notice to the authorities. Somewhat surprisingly in *Kudrevičius and Others v Lithuania* the Grand Chamber had declined to find that a prior authorization requirement for a static gathering was by itself a breach of Article 11.<sup>78</sup> In *Novikova* the Court heard from a number of unconnected individuals who had been engaged in solo protests on matters of public interest (corruption in public office, education, state medical provision) and had been fined for breaching the administrative requirement to give prior notice. Each of the applicants had been protesting peacefully and non-obstructively but their protests had been curtailed prematurely by arresting officers. They had then been detained at the police station before being given administrative fines. They were not subsequently charged with any offence. Whilst the Court was prepared to accept that the fines might have been rationally connected to the objective of preventing crime (ie the administrative offence) and disorder, the arrests of the protesters had been a disproportionate means of curtailing a peaceful, non-obstructive protest. The aim of preventing crime and disorder might have been secured by allowing the protesters to complete their actions before issuing a fine. Disappointingly, the Court did not expressly consider whether the

<sup>76</sup> *Karácsony and Others v Hungary*, App No 42461/13, Judgment of 17 May 2016.

<sup>77</sup> *Novikova and Others v Russia*, App Nos 25501/07; 57569/11; 80153/12; 5790/13; 35015/13, Judgment of 26 April 2016. For commentary see blog by D Simons and D Voorhoof, 'One Man Banned: Russia's Treatment of Solo Protests Scrutinised in *Novikova v Russia*' *Strasbourg Observers* (9 May 2016) <<https://strasbourgobservers.com/2016/05/09/one-man-banned-russias-treatment-of-solo-protests-scrutinised-in-novikova-v-russia/>>.

<sup>78</sup> *Kudrevičius and others v Lithuania*, App No 37553/05, Judgment of 15 October 2015.

notification requirement for extremely sparsely attended assemblies pursued a legitimate aim.<sup>79</sup>

Gay Rights campaigners in Russia have encountered a number of obstacles in their efforts to alter what they experience as prejudicial and discriminatory attitudes in official circles and wider Russian society. Although homosexuality was decriminalized in 1993 and declassified as a mental illness in 1999, LGBT supporters have for a number of years been denied permission to hold marches in major Russian cities. Campaigners have also been convicted of the criminal offence of promoting homosexuality among minors. In both instances, Strasbourg has found that the domestic authorities have acted in violation of the applicants' Article 10/11 rights, thereby manifesting a clear determination to keep open channels of political communication by minority groups, notwithstanding claims by State authorities to be entitled to a wide margin of appreciation on account of the need *inter alia* to protect public morals (or, more specifically, the religious views of the majority) or the rights of others. The Court has taken an especially close look at whether national law satisfies each of the three conditions of a lawful restriction upon Article 10/11.

A total ban on marches by Gay Rights supporters in Moscow between 2007 and 2009 was found in *Alekseyev v Russia* to be a disproportionate interference with Article 11 freedoms.<sup>80</sup> Aside from the absence of evidence put forward to support the need for a total ban, the bans also lacked a legitimate purpose in the Court's eyes since it was apparent that they had not been exclusively based on fears of public disorder but prompted in part by the publicly-stated hostility of the Mayor (and other Government officials) towards the views of the campaigners.<sup>81</sup> Referring to the hostility of the religious majority in Moscow and elsewhere towards homosexuality, the Russian Government argued that the ban was needed to prevent insult to the religious beliefs of many Russians. The Court dismissed this argument. The exercise of Convention freedoms by a minority group 'could not be made conditional on it being accepted by the majority'.<sup>82</sup>

In later litigation involving domestic laws criminalizing the 'promotion' of, and 'propaganda' about, homosexuality among minors, a diminished margin of appreciation was also applied by the Court to review the treatment of gay rights

<sup>79</sup> *Simons and Voorhoof* (n 78).

<sup>80</sup> *Alekseyev v Russia*, App Nos 4916/07; 25924/08 and 14599/09, Judgment of 21 October 2010.

<sup>81</sup> See also *Lashmankin & others v Russia* App No 57818/09, Judgment of 7 February 2017, where the arbitrary and discriminatory use of local authorities' powers to consent to peaceful demonstration was held to have violated art 11. A number of human rights groups and LGBT activists had been permitted to assemble at remote, out of town locations presenting issues of personal safety for participants whilst pro-Government groups were favoured with city centre permits. A clear theme in the Court's reasoning in this and other public protest cases is the evident lack of official tolerance towards peaceful, anti-Government demonstrators.

<sup>82</sup> *Alekseyev v Russia*, App Nos 4916/07; 25924/08 and 14599/09, Judgment of 21 October 2010, para 81.

activists in *Bayev and others v Russia* who had held banners outside a secondary school and a children's library declaring variously that 'homosexuality is good', 'homosexuality is normal', 'great people are sometimes gay' and 'gay people also become great'.<sup>83</sup> Russia had argued that the 'open manifestation' of homosexuality was contrary to public morals, being both offensive to the majority of Russians and injurious to maintaining family values. A related limb of the Russian Government's arguments justified the curtailment of the applicants' expressive freedom on the need to protect minors from conversion to a lifestyle that would be detrimental to their development and make them vulnerable to abuse (that is the 'rights of others'). Russia's arguments were unsuccessful for a number of reasons including the fact that the criminal offence of 'promotion' did not satisfy the demands of clarity and foreseeability required under Article 10(2). Moreover the objectives of the law did not conform to the Convention.

Affirming its earlier remarks in *Alekseyev*, the Court observed that the feelings of the majority (religious or otherwise) could not afford an acceptable basis for narrowing the substantive Convention protections for minority groups under the 'contrary to public morals' purpose in Article 10 (2). As for the protection of minors from abuse and harm, Russia had failed to show why minors were more vulnerable to abuse in homosexual as opposed to heterosexual relationships. Nor had it been shown how existing laws protecting young persons from sexual approaches by adults, irrespective of sexual orientation, might be inadequate. There was therefore no rational basis for a law that targeted exclusively communications from the applicants. The adoption of these prohibitions amounted to an official endorsement of prejudicial attitudes on sexual orientation grounds, which was contrary to Convention values of equality, pluralism and tolerance.<sup>84</sup> This endorsement placed Russia outside the margin of appreciation granted to States to regulate freedom of expression.<sup>85</sup>

#### *A. Does ADI Really Portend Diminished Supranational Oversight in Mature Council of Europe Democracies?*

As described previously, the early indications from the slender majority in the Grand Chamber ruling in *ADI* are that a preference for systemic over substantive analysis in more mature democracies has emerged *post*-Brighton. The argument

<sup>83</sup> *Bayev and others v Russia*, App No 67667/09, Judgment of 13 November 2017.

<sup>84</sup> *ibid*, para 83.

<sup>85</sup> The sole dissent from the Russian judge treats the dispute in essence as requiring the Strasbourg Court to accord the respondent State a wide margin of appreciation (which was not in the event exceeded) for two main reasons. First, the applicants' expressive activity was considered to fall outside the category of political expression altogether, being concerned with matters of morals, decency and religion. Second, domestic law sought to balance two conflicting rights (art 10 interests of campaigners and the art 8 interests of families and parents).

here has been that that this could prove problematic in confronting the problem of political incumbency where public office holders fashion rules (or simply fail to reform existing, self-serving ones) that make it harder for rival candidates and parties to compete for office. Broadcast bans, deposit rules, voter identification requirements and boundary changes all offer fairly specific means of consolidating existing power holders grip on office. More generally, however, political incumbency is protected by domestic laws that limit minority dissenting forms of expression, association and assembly. There are, however, contraindications that Brighton has not heralded an unequivocal retreat from the Grand Chamber's universalist endeavours in its political expression case law concerning more mature democracies. A notable example is provided in *Perincek v Switzerland*.<sup>86</sup> The ruling concerned a Turkish speaker who denied that events in 1915 and subsequently indicated that a genocide of the Armenian people was committed by the Ottoman Empire. In the absence of an evidential finding in the lower courts that the speaker had expressed hatred, abuse or contempt for the victims of the events in question,<sup>87</sup> a majority of 10–7 of the Grand Chamber held that the criminal sanction applied to Perincek in respect of speeches in which he had called the Armenian genocide an 'international lie' was a violation of his Article 10 rights. The Swiss were not acting within the limits of the margin of appreciation when they imposed a criminal penalty on the applicant.

The majority ruling might seem surprising for several reasons. First it is in the clear line of case law involving holocaust denial where States' restrictions on denial or minimalization of Nazi atrocities in a number of European countries (Austria, Belgium, France & Germany) have been held to be Article 10-compliant. The Court has in the past recognized a spectrum of national positions on this point and generally speaking a lack of consensus across Europe tends to conduce towards a wide margin of appreciation.<sup>88</sup> Second is the fact the Swiss authorities in reaching their conclusion had sought to balance the applicant's Article 10 rights against Armenian citizens' Article 8 rights to dignity (which seems curiously to have included as a right to have one's memory of an historical event not contradicted/insulted by an assertion that one's ancestors were instruments of imperialist powers). There is a view that when a national court has struck a balance between two conflicting Convention rights, absent any *prima facie* unreasonableness or arbitrariness,

<sup>86</sup> *Perincek v Switzerland*, App No 27510/08, Judgment of 15 October 2015.

<sup>87</sup> Meaning that there was no separate basis under art 17 for rejecting the applicant's case.

<sup>88</sup> See thus the discussion at para 256 of the various national legal systems' positions ranging from the absence of dedicated laws criminalizing the denial of historical events (UK, Sweden, Spain, Denmark, Finland) to States penalizing the denial of the Holocaust and Nazi crimes (Austria, Belgium, France, Germany, Netherlands, Romania) and Holocaust, Nazi and communist crimes (Czech Republic and Poland) and at the other end States that apply the criminal law to the denial of any genocide (Andorra, Cyprus, Hungary, Latvia, Macedonia Slovakia and Switzerland).



the Strasbourg Court should be slow to intervene.<sup>89</sup> Specifically in the context of Article 10 versus Article 8 conflicts, the Court in both *Springer*<sup>90</sup> and *Von Hannover (no 2)*<sup>91</sup> has said that where the balancing exercise has

been undertaken by 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.

The starting point was that the Swiss laws sought to regulate a form of political expression—the type of expression enjoying the greatest protection under the Convention, factual speech concerning what did or did not happen in Armenia in 1915 and value-laden assertions about whether the Armenians were the ‘instruments’ of the imperial powers of England, France and Tsarist Russia. Secondly, the speech fell short of inciting hatred or intolerance. Even the dissent appears to agree that the speech was properly characterized as insulting the memory of people who had lived and died in the events of 1915. Historical and temporal factors pointed towards a stricter proportionality analysis of Swiss laws than was appropriate for other States' restrictions on speech regarding the Holocaust. There was no direct link between Switzerland and events in Armenia in the way that French, Belgian, German and Austrian citizens experienced first-hand the horrors of deportation to the death camps.<sup>92</sup> Put simply, Swiss citizens and residents had not had an equivalent direct experience of the Armenian events. The applicant's speeches referred to events 100 years ago and could not be considered within living memory or relatively recent in the way that Nazi atrocities still were. The fact that the Swiss had chosen to impose criminal sanctions for speech falling short of incitement to feelings of hatred or intolerance towards Armenians was therefore deserving of close scrutiny.<sup>93</sup>

In support here, it can be noted that, aside from any punitive element felt by the transgressor, criminal sanctions send out separately a signal to the wider community that may self-censor future expressive acts of politically controversial expression. Critically, the failure of the Swiss courts to accord political expression its proper weight in the balancing act required of them meant that they could not satisfy the prerequisite in clashing Convention rights cases of having carried out the balancing exercise in conformity with the Court's case law.

In 2018, the Swiss national courts were again adjudged to have applied Convention jurisprudence incorrectly in another Article 8 vs Article 10 conflicting rights dispute *Gra Stiftung gegen Rassismus und AntiSemitismus v Switzerland* where the Third Section of the Court found a violation of the

<sup>89</sup> See B Hale, ‘*Argentoratium Locutum*: Is Strasbourg or the Supreme Court Supreme?’ (2012) HRLR 77.

<sup>90</sup> *Axel Springer AG v Germany* [2012] ECHR 227, para 88.

<sup>91</sup> *Von Hannover v Germany (no 2)* (2012) 55 EHRR 15, para 107.

<sup>92</sup> The main link was provided by the presence of Armenian and Turkish citizens on Swiss soil.

<sup>93</sup> The majority noted that there were few, if any, survivors from the events of 1915.

applicant's freedom of expression. The latter's website had provided a report of a meeting held by the *Young Swiss Party* (the youth wing of the *Swiss People's Party* an anti-Islamic party) during a federal referendum in 2009 on whether to impose a ban the construction of minarets. The report accurately stated the words spoken by the President of the Local Branch and then inserted in parenthesis the words 'verbal racism'. The President sued for infringement of his Article 8 rights and the Swiss Courts ordered the removal of the report from the website. In finding a violation of the applicant's Article 10 rights, the Court attached decisive weight to the national authorities' failure to give proper consideration to, and then apply, established features of relevant Convention jurisprudence including i) the contribution of the applicant's website to a debate of public interest; ii) the President's willing exposure to public scrutiny by virtue of his party role; and iii) the fact that the accusation of 'verbal racism' could not be said to be devoid of a factual basis.<sup>94</sup>

#### IV. CONCLUSION

An important if relatively neglected aspect of the rationale for broadly conceived rights to freedom of expression, association and assembly is located in the democratic ideal of open channels of political change. Office holders in the Executive and Legislature will always face temptations to use their political powers in ways that consolidate their incumbency at the expense of rival, non-incumbents. Following the Brighton and Copenhagen (Draft) Declarations, the renewed emphasis upon national authorities' responsibilities for securing Convention rights (and soon to take the form of a new Recital to the Preamble of the Convention) naturally prompts discussion about the precise nature of any shift towards local determinations of rights questions.

The emerging stress upon systemic elements of domestic oversight and review of rights-impacting laws has significant implications for the openness of political channels. Unsurprisingly, newer and transitioning democracies may well find it harder to satisfy the Court on this point, finding themselves subject to close supranational scrutiny of the intensity experienced prior to Brighton. Recent case law from Turkey, Hungary and Russia appears to lend credence to this view. Here, at least, political incumbents' efforts at channel blocking continue to receive appropriately rigorous review.

The other claim made here concerns more established democracies where I have argued that the emphasis on internal mechanisms of, *inter alia*, legislative oversight runs a clear risk that transient political majorities in the legislature can close off avenues of political participation without undue fear of supranational disapproval. The picture *post*-Brighton remains mixed. On the one hand, the

<sup>94</sup> *Gra Stiftung gegen Rassismus und AntiSemitismus v Switzerland*, App No 18597/13 (2018) Judgment of 9 January.

retreat in *ADI* from supranational review of a complete ban on political advertising points up a lack of appetite in Strasbourg for tackling this aspect of the privileging of political incumbency with worrying implications for the Court's oversight of other rules that favour office holders. At the same time, a more robust look at national restrictions on political expression in Switzerland was preferred in both *Perincek* and *Gra Stiftung gegen Rassismus und AntiSemitismus*. A concern to follow from the Copenhagen Declaration is that the weighting of competing claims by national authorities will enjoy greater immunity from the Court supervision. As Follesdal and Ulfstein note, the effect of the Declaration may well be to 'empower the executives of states and weaken the Court'.<sup>95</sup>

It is worth recalling, however, the Recital to be added by Protocol 15 to the Preamble sits alongside the statement that the Convention rights and freedoms 'which are the foundation of justice and peace ... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend'. It is important the Court remembers its obligations in preserving the conditions of effective political democracy not just in the newer democracies. The Court can fulfil this duty by continuing to advance a common understanding and observance of core political freedoms.

<sup>95</sup> Follesdal and Ulfstein (n 5).