

Ancilla Iuris

*Should we be worrying about a Brexit from the
European Convention of Human Rights now, too?*

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Abstract

The Brexit from the EU is now a political fact with all its consequences. Far less media attention has been paid to British criticism of the European Convention of Human Rights, which may face a similar fate unless its Court is changed into an advisory institution. Should we be worrying about a Brexit from the Convention too? This paper analyses the British debate on European human rights in light of developments within the European Court's caselaw. In the author's view, the British government is somewhat overstating the problems.

I. INTRODUCTION

Political debate in Europe and the UK is presently being dominated by the consequences of Brexit from the EU.¹ On 19 June 2017, the British government took the first steps towards leaving the European Union. While those steps are widely covered, far less media attention has been paid to the European Convention of Human Rights, which could face a similar fate. In May 2015, former PM David Cameron announced that his party would “end the ability of the European Court of Human Rights to force the UK to change the law”.² The party is even considering withdrawing from the European Convention of Human Rights, unless the Council of Europe agrees that Britain's parliament has the final say over the Court's rulings.³ Furthermore, the Conservatives made it clear they wanted to scrap “Labour's Human Rights Act” (the 1998 Act which incorporates the European Convention into British law) and replace it with a British “Bill of Rights and Responsibilities”.⁴ Does this mean yet another Brexit – this time from the European Convention?

It goes without saying that an opt-out from the Convention by the United Kingdom would have far-reaching consequences. As a result of British criticism, a first step has already been taken. That is, by Russia. In December 2015, Russian president Putin signed a law allowing Russia's high court to disregard decisions made by the European Court of Human Rights (ECtHR), which receives thousands of cases from Russia annually.⁵ Moreover, in June 2016, a group of senior officials in France urged the French government to retreat from the Convention too.⁶ A dangerous development for the European human rights system – that much is clear for now.⁷

Do the British have a valid point to make? At the national level, to a certain extent they do. That is to say, the Human Rights Act 1998 (which incorporates the European Convention into British law) represents a fundamental departure from the traditional British constitution. Judicial review of matters of parliamentary sovereignty (both at the international and national level) is a break from tradition, and many British still have trouble accepting this system.

Do they have a point regarding the European Court of Human Rights (ECtHR)? As for their proposal to restrict the ECtHR to an advisory role, the Court does not. It is well aware of its role as a constitutional court for the forty-seven Member States of the Council of Europe and strives to enhance its legitimacy in various ways. Certain trends can be discerned in its caselaw which mitigate the intrusion supranational institutions make on national sovereignty, though: a. the use of the margin of appreciation; b. seeking consensus between the States; and c. engaging in judicial dialogue with national courts. Thus, the Court tries to maintain a balance between keeping up Convention standards and accommodating the Member States.

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1 Recently published on this problem: Patrick J. Birkinshaw and Andrea Biondi (eds.), *Britain Alone. The Implications and Consequences of United Kingdom Exit from the EU* (2016).

2 As already announced earlier in the Conservative Manifesto ‘Protecting Human Rights in the United Kingdom’, *The Conservatives' Proposals for Changing Britain's Human Rights Laws*, available at: https://www.conservatives.com/-/media/files/downloadable%20Files/human_rights.pdf, last access: 16 August 2017.

3 *Ibid.*, p. 8.

4 In ‘Protecting Human Rights in the United Kingdom’, the Act is being referred to as ‘Labour's Human Rights Act’ (the law was adopted at the time when New Labour was in power and Tony Blair was Prime Minister).

5 Available at: <http://www.independent.co.uk/news/world/europe/vladimir-putin-signs-law-allowing-russian-court-to-overthrow-international-human-rights-rulings-a6773581.html> (the website links in this article were last accessed in June 2017).

6 In the Netherlands, two proposals are currently pending before the Dutch Parliament that purport to enhance its role vis-à-vis the courts in managing the relationship between domestic law and international agreements. Partly, the initiative is inspired by the debate in the UK, about the perceived undue interference of the European Court of Human Rights. See on this: Maartje de Visser, ‘Recalibrating the roles of the Dutch Parliament and Dutch judges when engaging with international law?’ *IACL Blog*, available at: <https://iacl-aidec-blog.org/2016/04/08/recalibrating-the-roles-of-the-dutch-parliament-and-dutch-judges-when-engaging-with-international-law/>, last access: 16 August 2017. In France, a group of senior officials, calling themselves ‘Le Groupe Plessis’, made a plea similar to that of the British government, i.e. no longer to submit to the European Court of Human Rights, ‘Cour européenne des droits de l'homme: pourquoi en sortir est un impératif démocratique’, *Le Figaro*, 21-6-2016, available at: <http://www.lefigaro.fr/vox/politique/2016/06/21/31001-20160621ARTFIG00149-cour-europeenne-des-droits-de-l-homme-pourquoi-en-sortir-est-un-imperatif-democratique.php>, last access: 16 August 2017.

7 For an overview of recent criticism levelled at the Court (not only by the UK), see, *Tom Zwart*, ‘More human rights than Court: Why the legitimacy of the European Court of Human Rights is in need of repair and how it can be done’, in: Spyridon Flogaitis/Tom Zwart/Julie Fraser (eds.), *The European Court and Its Discontents* (2017), p. 71–95, in particular, p. 72–78.

This paper analyses the British debate on a Bill of Rights and the UK position regarding the case law of the European Court of Human Rights. First, the background of the present debate will be discussed and the rise and fall of the HRA 1998 (II). Following that, the focus will be on the ECtHR's approach in balancing between the national authorities and setting a European standard (III). Next, the options open to the British will be presented (IV), to be concluded with an appraisal of the British plans, both in a national and an international perspective (V).

II. BACKGROUND OF THE BRITISH HUMAN RIGHTS DEBATE

As a matter of fact, the debate on a Bill of Rights for Britain has been going on for quite some time.⁸ It received a new impetus, however, after the unexpected victory of the British Conservative Party on May 7, 2015, which paved the way for the Party's disturbing plans for the European Court and Convention.

Obviously, an opt-out from the Convention by the UK would have a major negative effect: for the status of the European Convention of Human Rights; for the position of the European Court within the Council of Europe, and for the international reputation of the UK itself. And these are only three of the most obvious issues. The British move may in effect occasion a restoration of national sovereignty and parliamentary decision-making over judicial review. But what lies behind this? What is the reasoning behind the proposals, both regarding the European Convention and the Human Rights Act 1998?

1. The rise and fall of the Human Rights Act 1998

Of course, the Conservative Party proposal did not appear out of thin air.⁹ Fairly soon after the introduction of the Human Rights Act in 1998, and after an initial phase of euphoria, the Act came under serious attack. In order to understand the peculiar position of the HRA, it is necessary to briefly consider the British constitution.

Unlike almost any country in the world, the United Kingdom does not have a written constitution. It does have constitutional law, though, like the Bill of Rights 1689 and the laws devolving powers to Scotland and Wales, but there is no such thing as a special document having a higher status than other laws. A key feature of the British system is the "sovereignty of Parliament" meaning that Acts of Parliament are the highest laws of the land and, for a long time, there was no institution with the power to override or set aside these acts – until the Human Rights Act 1998, which was adopted by New Labour under the leadership of PM Tony Blair. The Human Rights Act 1998 incorporated the rights that have been laid down in the European Convention of Human Rights into the British system. On the basis of this law, the highest courts are authorized to review British laws in light of the HRA, which means in light of the European Convention. But they are not allowed to set aside these laws in case of conflict with the Convention rights; they can only issue a so-called "declaration of incompatibility". Subsequently it is up to Parliament to decide whether or not to change the law.¹⁰ Thus, a major difference with most systems of judicial review is that in the UK, the final word is up to the democratically legitimated institution – the British Parliament. But not, when it comes to the European Convention system. Here, the Court has the last word.

To a certain extent, the British proposals are prompted by the unpopularity of the HRA. After its adoption, and an initial phase of euphoria, the law was soon severely criticized. The HRA was considered a "foreign invasion" (because it facilitated the "invasion" of the European Convention of Human Rights into British law) and the first initiatives for a

8 *Ronald Dworkin*, *A Bill of Rights for Britain? Why British Liberty Needs Protection* (1990). For more recent proposals, available at: http://www.parliament.uk/documents/commons/lib/research/key_issues/Key-Issues-From-the-Human-Rights-Act-to-a-Bill-of-Rights.pdf, last access: 16 August 2017.

9 More in general, there is a tendency to rethink the role of the Court in the United Kingdom. See i.e.: Lady Justice Arden, 'An English Judge in Europe', available at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lj-arden-an-english-judge-in-europe.pdf>, under 'Courts and Tribunals Judiciary, published 25 March 2014, last access: 16 August 2017. Justice Arden argues that the Court should use a 'provisional judgment' as an attempt to link its jurisprudence more effectively with the contracting states, as she puts it: 'For Strasbourg, there is a constant tension between its international obligation to interpret the Convention and national sovereignty. One of the difficulties for Strasbourg is that it is difficult for it to know whether it has gone out of that area of restraint.' See also: Katja S. Ziegler/Elizabeth Wicks/Loveday Hodson, *The UK and European Human Rights: A Strained Relationship?* (2016).

10 On this 'weak system' of judicial review, see; *Mark Tushnet*, *Advanced Introduction to Comparative Constitutional Law* (2014), chapter 3.

'homegrown' Bill of Rights were taken within 10 years after its adoption. Undoubtedly, this was partly inspired by the fact that Britain was confronted with a number of decisions which were difficult – if not impossible to explain to the public at large, or which were simply not accepted by Parliament itself.¹¹ One only has to think of the case of *Hirst v. UK*¹²(2005), in which the Court decided that the British ban on voting rights for prisoners entailed a violation of the Convention; the case of *Abu Qatada*¹³(2012) in which the Court prevented the UK from deporting a convicted terrorist, and *Vinter v. UK*¹⁴ (2013) in which Strasbourg held that full life-terms without a possibility of redress were contrary to article 3 of the Convention. The 'bad' reputation of the HRA in the UK may have a lot to do with the way ECtHR decisions were reported in the press, or rather, in the tabloids. In his highly interesting and informative contribution to the *UK Human Rights Blog*, Adam Wagner refers to this type of journalism as "The Monstering of Human Rights".¹⁵ Wagner demonstrates how the negative qualification of human rights cases has become standard fare in newspapers, so persistently that it would seem almost impossible to imagine a positive image of human rights being reinstated in the United Kingdom.¹⁶

A second reason why the HRA 1998 is so heatedly contested are its provisions that legislation must be read and given effect in a way which is compatible with the Convention rights (so far as it is possible to do so) and that British courts must take the caselaw of the European Court into account in their decisions concerning Convention rights.¹⁷ That means – in the opinion of many – that the caselaw of the Court is in effect determinative for decisions in British courts. At the same time the government has qualified the Court's approach towards the Conven-

tion as "mission creep".¹⁸ By interpreting the Convention as a "living document" the Court broadens its original meaning and at the same time, its own jurisdiction. This second point is all the more important since British courts have gradually become more "activist" and have followed Strasbourg jurisprudence. The extended use of judicial review (and particularly the "subservient" role towards Strasbourg) is not appreciated by everyone, to put it mildly.

The third and perhaps even more fundamental problem concerns a conflict between the Human Rights Act and the European Court. Under the HRA, the last word about how to interpret British law (in light of the Convention rights) is up to Parliament. That is, under the Human Rights Act the sovereignty of Parliament is being upheld. It is the democratically legitimated institution which decides whether or not to change the law. In contrast, under Article 46 of the Convention, once Strasbourg has spoken, Member States must comply with the decision. No sovereignty for the national parliament here – supranational judicial review became part of the Convention fairly soon after its adoption (though at the time, many European governments were reluctant to accept this non-European phenomenon).¹⁹

2. The Conservatives' plans

According to the Conservatives' plans, the HRA 1998 will be repealed and replaced by a British "Bill of Rights and Responsibilities". The idea is to include the rights of the Convention into a new law.²⁰ These rights must be interpreted according to their original meaning and the use of human rights will be limited to the most serious cases, says the Conservative manifesto.²¹ Apart from that, British judges will no longer be required to take decisions of the Court "into account".²²

11 This paragraph draws on my blog 'A British Bill of Rights - Why, How and Now What?', International Journal of Constitutional Law Blog, May 15, 2015, at: <http://www.iconnectblog.com/2015/05/a-british-bill-of-rights-why-how-and-now-what>, last access: 16 August 2017.

12 *Hirst v. UK*, Application No. 74025/01, ECtHR 6 October 2005. For an elaborate and highly informative analysis of the debate on the relationship between the UK and the European Court of Human Rights as a result of the *Hirst* decision, see: *Ed Bates*, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg', *Human Rights Law Review* Vol. 14 (2014), p. 503–540. And for a powerful defence of the British position, see: *David Davis*, 'Britain must defy the European Court of Human Rights on prisoner voting as Strasbourg is exceeding its authority', in: *Spyridon Flogaitis/Tom Zwart/Julie Faser* (eds.), *The European Court and Its Discontents* (2017), p. 65–70.

13 *Othman (Abu Qatada) v. United Kingdom*, ECtHR, 17 January 2012, Appl. No. 8139/09.

14 *Vinter and others v. UK*, ECtHR 9 July 2013, Application nos. 66069/09, 130/10 and 3896/10.

15 Talk at University of Liverpool Conference on Human Rights in the UK Media: Representation and Reality, published on <http://ukhumanrightsblog.com/2014/09/22/the-monstering-of-human-rights/>, last access: 16 August 2017. *Francesca Klug*, *A Magna Charta for all humanity, Homing in on human rights* (2015), p. 185 ff. The Guardian tends to be much more positive about the HRA, though. *Klug*, *idem*.

16 *Bella Sankey*, 'The British government is making a mockery of our record on human rights', *The Guardian*, 6th April 2016, available at: <http://www.theguardian.com/commentisfree/2016/apr/06/human-rights-matter-uk-foreign-office-downgrading>, last access: 16 August 2017.

17 Article 2 and 3 HRA 1998.

18 'Protecting Human Rights in the United Kingdom', p. 3.

19 The Convention dates from 1950 and the Court was established in 1959. Initially, the European governments were very reluctant to accept the optional clauses of Article 25 (right to individual petition) and Article 46 (giving the European Court jurisdiction). *Mark Janis/Richard Kay/Anthony Bradley*, *European Human Rights Law* (1995), p. 26–27. Objections against recognizing the right of individual petition were raised in the Netherlands too. 'It was thought that such recognition was not necessary because there existed in this country effective guarantees in municipal law; abuse was feared; it was feared that the European Commission, which would deal with the complaints, would have a political structure; it was thought that the procedure for individual petition was cumbersome and costly and, finally, it was pointed out that the right of individual petition would have far-reaching repercussions upon our legal system.' Second Chamber of the States-General, Session 1959, as quoted in *European Human Rights Law*, p. 27.

20 'Protecting human rights in the UK', p. 5. For a critical analysis of the report, see: *Klug* (fn. 15), p. 191 ff.

21 Only a few sentences are dedicated to his topic. The 'most serious cases' are 'criminal law and the liberty of an individual, the right to property and similar serious matters.' 'Protecting human rights in the UK', p. 5–6. What is also remarkable is that the Conservative plan considers limiting the extent of the Convention, with a view to 'British armed forces overseas'. *Idem*, p. 7. See also: *Klug* (fn. 15), p. 197–200.

When observed in a European perspective, it can rightly be argued that the UK is authorized to do so.²³ Germany, for instance, has also made a “reservation” regarding human rights protection. The Basic Law’s fundamental reservation of sovereignty implies the following principle: the Convention is a federal law that is subordinate to the Constitution. In the unlikely event that its provisions conflict with the Convention, the Basic Law (that is, the Basic Law as interpreted by the German constitutional court) prevails. Since Germany has made such a reservation, so the thinking goes, why should the UK not do the same?²⁴

However, the proposal concerning the position of the European Court of Human Rights is rather disturbing. The government proposes to end the ability of the ECtHR to “force the UK to change the law”. As stated in the plan: “Every judgment that UK law is incompatible with the Convention will be treated as advisory. [...] It will only be binding in UK law if Parliament agrees that it should be enacted as such.” Even if the UK is free to amend the way the Convention is implemented into British law, transforming the position of the Strasbourg court into an advisory role is quite problematic, if not impossible (from the Convention perspective, that is). Obviously, this move would have far-reaching consequences. Moreover, one may wonder why? What about the Court itself? How does it cope with the often widely diverging viewpoints and laws in the Member States?

III.

THE EUROPEAN COURT OF HUMAN RIGHTS AS A CONSTITUTIONAL COURT FOR EUROPE

Despite the subsidiary role the Court is supposed to play (which the Court itself has expressed by developing the doctrine of the “margin of appreciation”²⁵), over the years the position of the Court has

changed into that of a “constitutional court” under the Convention system. This is by no means an uncommon stance, but rather a generally accepted point of view. The Court itself regards the Convention as a constitutional instrument of the European public order.²⁶ Within the perception of its scope as such, it has positioned itself as guardian of the Convention, as a constitutional court. Apart from this, a number of leading experts on ECtHR law tend to denote the Court in these terms. Steven Greer for instance, has been using the “constitutional” framework to discuss the Convention system for quite some time.²⁷ In his view, the Court is “the Constitutional Court for Europe, in the sense that it is the final authoritative judicial tribunal in the only pan-European constitutional system there is”.²⁸

Wojciech Sadurski also labels the Court as a true constitutional court. In his book entitled *Constitutionalism and the Enlargement of Europe*²⁹, he writes about the accession of Central and Eastern European countries to the Council of Europe after the fall of the Berlin Wall. This enlargement inevitably has changed the position of the Court. Where the Court’s role initially was that of “fine-tuning” the national systems regarding human rights protection, it now had to “adopt a role of policing national systems which suffered important systemic deficiencies [...] and in which serious rights violations occurred”.³⁰ The effect was a reinforcement of the constitutional role of the Court, that is to say – the most appropriate way to qualify the Court’s position, is to speak in terms of a trend towards constitutionality.³¹

Finally, Alec Stone Sweet is perhaps most explicit about the Court’s role. He argues that the European Court of Human Rights is a transnational constitutional court whose authority, jurisprudence, law-

22 *Ibid.*, p. 5–6.

23 As the Court stated in *James and Others v. United Kingdom*, 21 February 1986, Ser A, no. 98, par. 84: [...] ‘Although there is thus no obligation to incorporate the Convention into domestic law, by virtue of Article 1 of the Convention the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States.’

24 See: *Dean Spielmann*, ‘Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe’, in: Michel Rosenfeld/András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (2012), p. 1231–1252, here, p. 1236.

25 *Handyside v United Kingdom*, App No 54933/72 (ECtHR 7 December 1976), para. 48, in which the Court had to decide whether the prohibition of a book aimed at school children of twelve years and older because of the allegedly obscene and pornographic character of its sections on sex education, was ‘necessary in a democratic society’ for the ‘protection of morals’. The Court decided that since State authorities are in principle in a better position to judge the requirements of domestic law and the necessity of a restriction than the Court, the Contracting States must be left a margin of appreciation (in this case concerning Art 10, par. 2 of the Convention).

26 See *Loizidou v Turkey* (1997) 23 EHRR 513 para 75; *Loizidou v Turkey* App No 15318/(ECtHR Judgement (Preliminary Objections) 23 March 1995) para 75.

27 *Steven Greer*, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006), p. 165–174.

28 *Ibid.*, p. 173.

In 2002, former President of the ECtHR Luzius Wildhaber put it thus: [...] since the Court’s mission is more to articulate authoritative pan-European standards than it is to provide each deserving applicant with a personal remedy, it should increasingly concentrate on the delivery of “judgments of principle” which “contribute to the Europe-wide human rights jurisprudence, that helps to build up the European “public order” [...] and [...] which place the Court in its true “constitutional” role, deciding what are essentially public policy issues.’ *Luzius Wildhaber*, ‘A Constitutional Future for the European Court of Human Rights’, *Human Rights Law Journal* Vol. 23 (2002), p. 161, 163 quoted by *Steven Greer*, ‘Constitutionalizing Adjudication under the European Convention of Human Rights’, *Oxford Journal of Legal Studies* Vol. 23 (3) (2003), p. 406. Other publications by Wildhaber: *Luzius Wildhaber*, ‘The European Court of Human Rights: The Past, The Present, The Future’, *American University Law Review* Vol. 22 (2007), p. 522, 525. *Luzius Wildhaber/Steven Greer*, ‘Revisiting the Debate about ‘constitutionalising’ the European Court of Human Rights’, *Human Rights Law Review* (2012), p. 655.

29 *Wojciech Sadurski*, *Constitutionalism and the Enlargement of Europe* (2012).

30 *Ibid.*, p. 4–5.

31 *Ibid.*, p. 47.

making capacities and impact on legal and political systems deserves to be compared to “that of even the most powerful national constitutional courts”.³²

As a matter of fact, the Court, being well aware of its role as a constitutional court for the forty-seven Member States of the Council of Europe, strives to enhance its legitimacy in a number of ways. Certain trends can be discerned in its caselaw over the past decennia: 1. the use of the margin of appreciation; 2. seeking consensus amongst the States; and 3. engaging in judicial dialogue with the national courts. In these various ways the Court tries to maintain a balance between keeping up Convention standards and accommodating the Member States.

1. The Court’s use of the margin of appreciation

The first example of the Court seeking this balance is well known: its use of the “margin of appreciation”. The origins of this doctrine lie in the case of *Handyside v. United Kingdom* in which the Court had to decide whether the prohibition of a book aimed at school children of twelve years and older (because of the allegedly obscene and pornographic character of its sections on sex education) was “necessary in a democratic society” for the “protection of morals”. The Court was confronted with the fact that the Member States of the Council of Europe held widely different views when it comes to “morals”. It therefore took a step back. The Court decided that since State authorities are principally in a better position to judge the requirements of domestic law and the necessity of a restriction than the Court, the Contracting States must be left a margin of appreciation (in this case concerning Art 10, par. 2 of the Convention).³³

Initially, the doctrine of the margin of appreciation figured in cases concerning Articles 8–11 ECHR (“family life”, “freedom of religion”, “freedom of expression” and the “freedom of association”). All of these Articles contain a clause which requires that the limitation of the right in question is “necessary in a democratic society”. This means the margin is used in particular where the Convention

enables a weighing of interests by the Member State. Gradually the Court has been applying it in its review of almost all provisions in the European Convention.³⁴

The idea of the margin of appreciation – or some form of judicial restraint – is understandable, given that an international body is supposed to make decisions based upon common international standards while at the same time dealing with sovereign states. Or, as McGoldrick puts it, it is arguable that the margin of appreciation is necessary to make the interference by an international court with the sovereignty of democratic States tolerable and politically acceptable.³⁵

The effect of the doctrine is thus (in most cases) one of self-restraint by the Court. That is to say, it is the Member States’ authorities, rather than the ECtHR, who often decide the final outcome of a case. But not by definition. There are many cases in which the ECtHR affords States a wide “margin of appreciation” but then decides that States have not remained within it, usually due to disproportionality or the lack of a fair balance. The conclusion then is “that there is a violation”.³⁶

The ECtHR’s approach to the “margin of appreciation” has been the focus of increasing criticism, in particular by the UK.³⁷ However, the proposed Fifteenth Protocol to the Convention may meet this criticism. At the end of the Preamble to the Convention, a new clause shall be added, which reads as follows:

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

This provision, resulting from the Brighton declaration,³⁸ was initiated by the British, when the United Kingdom chaired the Council of Ministers. It is supposed to enter into force as soon as all the

32 See: *Alec Stone Sweet*, ‘On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court’, Yale Law School, Faculty Scholarship Series, Paper 71 (2009), p. 14, http://digitalcommons.law.yale.edu/fss_papers/71/, last access: 16 August 2017.

33 App. No. 54933/72 (Dec. 7, 1976), para 48. Recent publications on the margin of appreciation are: *Dominic McGoldrick*, ‘A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee’, *International and Comparative Law Quarterly* Vol. 65 Issue 01 (2016), p. 21–60; *Dean Spielmann*, ‘Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’, *Cambridge Yearbook of European Legal Studies*, Vol. 14 (2012), p. 381–418; *Andrew Legg*, *The Margin of Appreciation in International Human Rights Law, Deference and Proportionality* (2012).

34 *Jan Kratochvil*, ‘The Inflation of the Margin of Appreciation by the European Court of Human Rights’, *Netherlands Quarterly of Human Rights* Vol. 29 Issue 3 (2011), p. 324, 325. On the way the ‘nature of the right’ or ‘type of case’ may affect the margin of appreciation: *Legg* (fn. 33), p. 200 ff.

35 *McGoldrick* (fn. 33), p. 33.

36 *McGoldrick* (fn. 33), p. 26.

37 The argument is, that it is either being applied too narrowly or inconsistently. See *McGoldrick*, (fn. 33), p. 36 (and footnotes 135–137).

38 Which is a largely reflection of the British critique: http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf, last access: 16 August 2017.

States Parties to the Convention have signed and ratified it. Even before Protocol 15 comes into force the ECtHR had stressed the ‘crucial importance’ of its subsidiary role.³⁹

2. Seeking consensus to enhance the Court’s legitimacy

Being an international tribunal, the ECtHR depends to a greater degree than domestic courts on the legitimacy of its judgments as a stimulus for compliance. The use of the margin of appreciation is one way to attempt to enhance the Court’s legitimacy. Another tool of interpretation the Court uses is to seek out where European consensus already exists. As Dzehtsiarou puts it, the reason for the application of European consensus is that “the meaning of some Convention terms can be linked to their common usage by the Contracting Parties”.⁴⁰ Comparative analysis of the laws and practices of the Member States may lead to a particular solution when a human rights issue arises. Unless the Member State in question provides sufficient and weighty reasons for divergence from the solution for which consensus exists, the consensus approach will prevail. Consensus does not mean unanimity; the Court usually means “a trend” when it uses the term.⁴¹ Thus, in *X, Y and Z. v. the United Kingdom*, the Court identified “a clear trend within the Contracting states towards the legal recognition of gender reassignment”.⁴²

Despite the fact that it is widely used, there is by no means consensus on the approach itself. Dzehtsiarou distinguishes between two types of criticism: procedural (how is consensus identified and applied?) and substantive. The latter focuses on the idea that human rights are basically anti-majoritarian – they are meant to protect the individual from majoritarian group-think. Seeking European consensus means that whatever the majority thinks is right, must prevail.⁴³ In Jeffrey Brauch’s view the consensus standard to protect human rights actually endangers human rights:

A consensus may change with the prevailing political or cultural winds. A trend (“an emerging consensus”) is by definition a reflection of change. These provide a shaky foundation on which to build the protection of fundamental and universal rights. Such rights are to be protected no matter what political and cultural winds blow, no matter what current opinion polls or national laws reflect.⁴⁴

It remains to be seen whether European consensus, if deployed consistently, is justifiable or not. But the fact is that the Court, by means of this method of interpretation, is indeed seeking to enhance its legitimacy. Thus, finding a European consensus is yet another way to counter objections from the Member States against the Court’s position.

3. Judicial dialogue with national courts

A third method to deal with its role as a supranational institution amidst sovereign states is for the Court to enter into a “judicial dialogue” with the national judges on the interpretation of the Convention (a).⁴⁵ The term “judicial dialogue” is also being used for the phenomenon that courts worldwide increasingly refer to one another’s decisions (b) and to describe informal networks of domestic courts existing worldwide (c).⁴⁶

44 Jeffrey Brauch, ‘The dangerous search for an elusive consensus’, p. 289.

45 See on this: *Maya Hertig Randall*, *Der grundrechtliche Dialog der Gerichte in Europa* (The Dialogue on Human Rights by Courts in Europe, CMZ), *Europäische Grundrechte Zeitschrift* 5 (2014). Hertig Randall distinguishes between the following functions of dialogue; a. strengthening of persuasive authority; b. striving for external coherence; c. countering the fragmenting of human rights systems; d. mutually limiting authority (in the case of ‘vertical dialogue’); *Merris Amos*, ‘The Dialogue between United Kingdom Courts and the European Court of Human Rights’, *International and Comparative Law Quarterly* (2012), p. 557; or *Lord Kerr*, ‘The Conversation between Strasbourg and National Courts – Dictation or Dialogue’, *Irish Law Journal* (2009), 44, 1; *Nico Krisch*, ‘The Open Architecture of European Human Rights Law’, *The Modern LR* (2008), 183.

46 In this conception, (transnational) judicial dialogue is supposed to lead not only to court decisions that enforce international law, but also to contribute to the creation of international norms. *Melissa Waters*, ‘Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law’, 93 *The Georgetown Law Journal* 487 (2005).

Yet another form of judicial dialogue occurs when supranational courts, such as the ECtHR, refer to decisions taken by other courts, be they supranational, courts from the Member States of the ECHR or from outside this jurisdiction. *Carla M. Zoethout*, ‘The European Court of Human Rights and Transnational Judicial Dialogue. References to Foreign Law and the Quest for Justification’, *Vienna Journal on International Constitutional Law* Vol. 9 No. 3 (2015), 398–416; *Kanstantsin Dzehtsiarou/Conor O’Mahony*, ‘Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court’, 44:1, *Columbia Human Rights Law Review*, 309, 45 (2013). For the American debate on this topic, see: *Vicki Jackson*, *Constitutional Engagement in a Transnational Era* (2010); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, (2008); ‘Judicial cosmopolitanism’, *Roger P. Alford*, ‘In Search of a Theory for Constitutional Comparativism’, 52 *UCLA Law Review*, 639 (2005); *Jeremy Waldron*, ‘Foreign Law and the Modern *Ius Gentium*’, 119:1 *Harvard Law Review*, 129 (2005); *Norman Dorsen*, ‘A conversation between U.S. Supreme Court justices. The relevance of foreign legal materials in U.S. constitutional cases: A conversation between *Justice Antonin Scalia/Justice Stephen Breyer*’, 3:4 *International Journal of Constitutional Law*, 519 (2005).

39 *McGoldrick* (fn. 33), p. 22.

40 *Kanstantin Dzehtsiarou*, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015), p. 1.

41 *Anatoly Kovler et al.*, ‘The Role of Consensus in the System of the European Court of Human Rights’, in: *Dialogues between Judges*, Council of Europe (2008), p. 27.

42 *X, Y and Z. v. the United Kingdom*, Application no. 21830/93, Judgment of 22 April 1997, para. 44. In the case of *Christine Goodwin v. UK*, Application No. 28957/95, Judgment of 11 July 2002, para 84–85, the Court even recognized an ‘international trend’ on the basis of laws of such non-European nations as Australia and New Zealand.

43 An outspoken ‘substantive’ critic is *Jeffrey A. Brauch*, ‘The dangerous search for an elusive consensus: what the Supreme Court should learn from the European Court of Human Rights’, *Howard Law Journal* Vol.52 (2) (2009), p. 277–318.

To a certain extent, the ECtHR's openness to dialogue has become part of its jurisprudence. Thus, it has stated that:

The Court is intended to be subsidiary to the national systems safeguarding human rights. It is, therefore, appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries.⁴⁷

As Merris Amos demonstrates, the dialogue which actually takes place between the ECtHR and UK courts is not as extensive as is commonly assumed. It is by no means in every Human Rights Act judgment that a UK court seeks to enter into a dialogue with the ECtHR. In the strict sense of the term, dialogue has “really only been sought by the highest UK courts in a handful of cases”.⁴⁸ Furthermore, courts cannot disregard the fact that the Human Rights Act itself (and the European Court) are often contested within the UK. That means that when courts do not engage in dialogue and simply accept and apply the jurisprudence of the ECtHR, the result may be that the HRA (and the courts themselves, for that matter) loses legitimacy.⁴⁹

Interestingly, similar problems arise in other Member States when it comes to the Court's claim to legitimacy and how to deal with its caselaw. As Krisch has observed, there is no doubt that the ECtHR has gradually gained remarkable authority and that its judgments enjoy high rates of compliance. At the same time, this ever-closer linkage between the national and European levels of human rights protection has been accompanied by reservations in many national legal systems.⁵⁰ In his article, Krisch substantiates his claim that in Germany, Spain and France, preserving autonomy by the domestic courts seems to have taken precedence over fostering close ties with Strasbourg.⁵¹ The Italian Constitutional Court went even further in the case of *Sentenza* where it was held that Strasbourg rulings which conflict with provisions of the Italian Constitution “lack legitimacy”.⁵² Remarkably, the

first verdict in *Lautsi v. Italy*⁵³ was given a few weeks earlier, in which the Chamber of the ECtHR ruled that the presence of crucifixes in Italian classrooms violated Art. 2 of the 1st Protocol and Article 9 of the Convention. That judgment was subsequently overturned however, by the Grand Chamber.⁵⁴

Despite the flexible approach of the European Court itself, the reverse is not always true, so it seems. Questions regarding the Court's legitimacy arise as soon as the contracting States express difficulties in accepting the outcome of its decisions, not only in the United Kingdom but in other many Member States too. All the same, the three interpretive methods that are being used demonstrate the Court's rather open-minded approach. Since it cannot impose its judgments upon national governments, it seeks to make its decisions acceptable and accepted in other ways.

IV.

THE BRITISH PLANS CONSIDERED

Turning once again to the British opposition to the European Court, we must consider the decision which undoubtedly affected British feelings the most, i.e. *Hirst v. UK*. In that case, the Court found that the blanket ban on prisoners voting in elections was incompatible with Article 3 of Protocol No. 1 to the Convention. In February 2015, the case received a follow-up of sorts in *McHugh and others v. the United Kingdom*⁵⁵ in which the applicant and 1,014 others complained that they were prevented from voting in elections. Given that the impugned legislation so far remains unamended (essentially, a stalemate on the issue has been reached between the Court and the UK), the Court could not ‘but conclude that there has been a violation in the applicants' case’.

47 A v. United Kingdom, Application No. 3455/05, 19 February 2009, at 154.

48 Amos, ‘The Dialogue between United Kingdom Courts and the European Court of Human Rights’, p. 583.

49 *Ibid.*, p. 577.

50 Nico Krisch, ‘The Open Architecture of European Human Rights Law’, 71 *Modern Law Review*, 183 ff.

51 According to Krisch, rather than in terms of ‘a constitutionalist narrative’ of European human rights protection between the ECtHR and national courts, one should speak of ‘mutual accommodation in a pluralist order’, Krisch, ‘The Open Architecture of European Human Rights Law’, p. 196.

52 Case of *Sentenza*, N. 311/2009, quoted in *M Soriano*, ‘Italy and Spain’, in: Helen Keller/Alec Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Systems* (2008), p. 393, 429. See also: https://cfam.org/friday_fax/italian-supreme-court-decision-signals-sovereign-resistance-to-european-overreach/, last access: 16 August 2017.

53 *Lautsi and Others v. Italy*, Application no. 30814/06, Chamber 3 November 2009. Grand Chamber judgement 18 March 2011, Application no. 30814/06.

54 See on this: *Carla M. Zoethout*, ‘Secularism stated, rejected and reaffirmed. France, Italy and Canada and the dilemmas of multi-religious societies’, *Journal of Religion and Society*, Vol. 17 (2015), p. 1–19; *Carla M. Zoethout*, ‘Rethinking Adjudication under the European Convention’, in: Jeroen Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (2012), p. 413–427.

55 Previous cases on the same provision were: *Greens and M.T. v. the United Kingdom* (2010); *McLean and Cole v. the United Kingdom* (2013) and *Firth and Others v. the United Kingdom* (2014, see para 6, *McHugh and others v. the United Kingdom*).

The British failure to act on prisoner voting, alongside its threats to leave the Convention, have already produced wider consequences, and not only in Convention states. The President of Kenya invoked the British situation in trying to defy the jurisdiction of the ICC.⁵⁶ Within the Convention, those countries with the worst records on implementation have invoked the UK's ambivalence on the Convention as justification for their position, Russia being the prominent example.

As a consequence of new legislation, Russia's Constitutional Court ruled on 19 April, 2016 that enforcement of the 2013 *Anchugov & Gladkov v. Russia* judgment by the European Court of Human Rights is "impossible", because it is contrary to the Russian Constitution. Acting upon a request by Russia's Ministry of Justice, the Constitutional Court considered whether it was possible to execute the *Anchugov* judgment in accordance with the Russian Constitution. The ECtHR had concluded to a violation of the Russian prisoners' right to vote as protected by Protocol 1(3) of the Convention. Article 32(3) of the Russian Constitution prohibits "citizens detained in a detention facility pursuant to a sentence imposed by a court, to vote or to stand for election". The April 19 decision was the Constitutional Court's first on the enforceability of the ECtHR's judgments since the Court's mandate was broadened.⁵⁷

It is difficult to escape the feeling that the British, despite appearances, are perhaps overreacting, now that the government seems to be seriously considering withdrawing from the Convention. Or was this merely a political strategy which has lost *momentum* now that the British people have decided to leave the other European organization, the EU? After all, the number of judgments concerning the UK in which the Court concludes to a violation of the European Convention of Human Rights could hardly be considered alarming.⁵⁸ Aside from that, leaving the Convention would mean the British people would, in effect, be denied access to a court of last resort that is available to all European citizens. "Surely it would be simpler just to allow a few more prisoners the vote?"⁵⁹

56 *Dominic Grieve QC MP*, 'Can a Bill of Rights do better than the Human Rights Act?', Public Law (2016), p. 229.

57 *Ilya Nuzov*, Russia's Constitutional Court Declares Judgment of the European Court "Impossible" to Enforce, Int'l J. Const. L. Blog, May 13, 2016, at: <http://www.icconnectblog.com/?s=nuzov>, last access: 16 August 2017.

58 Perhaps some statistics may be illuminating here. According to the Convention website, in 2015, the total number of judgments against the UK was 13. There were 4 judgments finding at least one violation and 9 judgments in which no violation was found. Between 2012 and 2014, fewer than 1% of cases lodged against the UK resulted in a finding against the government. <https://fullfact.org/law/uks-record-human-rights-cases/>, last access: 16 August 2017.

59 'Tory plans for European human rights convention will take UK back 50 years', *Joshua Rozenberg*, The Guardian (2014).

1. What could be done? Some options for the British

Given the negative image the Human Rights Act 1998 has, it may very well be that a point of no return has been reached.⁶⁰ A powerful argument for replacing the HRA with a new constitutional instrument is its "lack of ownership" by the public. Inaccurate stories in the tabloids as to how it operates have contributed to the fact that it is often seen as "a foreign imposition to benefit the undeserving".⁶¹ Something has to be done in order to change the public's view on human rights protection in Britain and in Europe.

Perhaps the easiest way out would indeed be to adopt a new bill of rights containing largely the same rights as the European Convention, as has been suggested in the Conservative's policy document. The idea is to implement the Convention rights into the new law. These rights should be interpreted according to their original meaning and the use of human rights will be limited to the most serious cases, the Conservative document says enigmatically.⁶²

Moreover, the new bill of rights will undoubtedly not include the provision which requires British courts to "take into account" the Court's jurisprudence. The point is that the ECHR does not require any specific mode of incorporation⁶³ and it is exactly this provision which has been so fiercely disputed over the past few years in the UK. Section 2(1)a of the Human Rights Act 1998 provides that a court or tribunal determining a question arising in connection with a Convention right *must* take into account any judgment, decision, declaration or advisory opinion of the ECtHR, insofar as (in the opinion of the court) it is relevant to the proceed-

60 Even though it must be admitted that there is also much support (also by judges) for the Human Rights Act 1998.

61 Or worse. It is also described as a 'Charter for criminals' or as Anthony Lester recently put it: 'The commercial self-interest of newspaper owners in printing scandals is one reason why the public is fed a diet of half-truths and downright lies about the so-called "threats" to our way of life. Story after story attacks what the papers call "this Human Rights Act farce", calling the Human Rights Act a "gift to our enemies", and demanding that the government ignore the binding rulings of "this foreign court"'. *Anthony Lester*, 'Five ideas to fight for', *European Human Rights Law Review* 3 (2016), p. 232. See also *Dominic Grieve QC MP* (fn. 59), p. 231.

62 Only a few sentences are dedicated to this problem. The cases concern 'criminal law and the liberty of an individual, the right to property and similar serious matters'. 'Protecting human rights in the UK', p. 5-6. Remarkably, the intention is also to limit the reach of human rights cases to the UK, 'so that British Armed Forces overseas are not subject to persistent human rights claims that undermine their ability to do their job and keep us safe'. *Idem*, p. 7. See on this *Klug* (fn. 15), p. 197-200.

63 *Helen Keller/Alec Stone Sweet*, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008), p. 682. As Helen Fenwick says: 'there is no Convention-based reason why the domestic courts should – in effect – be 'bound' by Strasbourg jurisprudence [...]; nor is there any express necessity under the Convention, for the courts even to take it into account'. *Helen Fenwick*, 'The Conservative stance in the 2015 election on the UK's relationship with the Strasbourg Court and its jurisprudence – bluff, exit strategy or compromise on both sides? (Part I)', UK Const. L. Blog (10th March 2015), available at: <http://ukconstitutional-law.org>, last access: 16 August 2017.

ings. Among the Member States of the Council of Europe, it would seem that only Ireland and the UK have imposed a legislative stipulation requiring their domestic courts to take account of Strasbourg jurisprudence.⁶⁴

However, the Conservatives also suggest ending the ability of the European Court “to force the UK to change the law”. How to do that? Every judgment by the Court declaring British law incompatible with the Convention, will be considered advisory. It will only be binding in UK law if Parliament agrees that it should be enacted as such.⁶⁵

From an international point of view, changing the supranational European Court into an advisory body is simply not possible. Article 46 of the European Convention says that the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Apart from that, such a step might have an erosive effect on the system of human rights protection in Europe as a whole.

V. TOWARDS A BREXIT FROM THE CONVENTION?

Will a “dikastocracy”⁶⁶ be imposed sooner or later by the European Court of Human Rights? That seems rather unlikely. Rather than the activism which the British government alleges, the ECtHR seems to be gradually adopting an attitude of judicial restraint. As much would seem to follow from the preceding paragraphs. The Court is very much aware of its supranational status, dependent as it is on the willingness of the national authorities to abide by its judgements.

In that light, the proposal to withdraw from the Convention seems a drastic measure in reaction to a few negative decisions from the Court. In the end, the number of decisions against the UK in which the Court concludes to a violation seems hardly alarming. The accusation of “mission creep” by the Court is also somewhat overblown; whereas, the depiction of the UK as having been the victim of a gradual loss of legal sovereignty and, as a consequence, European courts assuming an influence they were never meant to have is not justified.⁶⁷

Perhaps the debate in the UK is a logical consequence of the system of judicial review as it has been established under the Convention system. Just as in the United States, where the “counter-majoritarian” role of the Supreme Court is more or less permanently up for discussion, the same is happening regarding the European Court of Human Rights. And for that matter, not only in the UK – many state parties have, at one point or another, endured severe friction with the ECtHR.⁶⁸

As far as the British plans at the national level are concerned, the question is of course whether a British bill of rights without the much disputed provisions of the HRA 1998, will provide British judges more leeway regarding the Court. No matter what, the old Diceyan principles would (to a certain extent) be restored by a British rights catalogue and that could prove to be very important in light of the EU-Brexit. The point is that for many British, the idea of regaining their country was an important factor during the referendum on the European Union. Aside from that, the EU adventure may have been a warning for the British not to take matters too lightly.

Hopefully, the near future presents a “Bremain” in the Convention. But if the Tories stick to their original ideas, a “Brexit” may be near. That is a rather disturbing thought (to say the least) at a time when the need for European human rights standards is perhaps even more urgent than in 1950.⁶⁹

64 *Lord Kerr* (fn. 45), p. 1.

65 ‘Protecting human rights in the UK’, p. 6.

66 Governance by judges.

67 *Paul Harvey*, ‘The UK and the European courts: has the incoming tide become all washed up?’, *European Human Rights Law Review* 3 (2016), p. 285, who also refers to the Court of Justice of the EU in Luxembourg. As Paul Harvey puts it: ‘[...] whatever was said or believed at the time of entry, we have repeatedly affirmed our participation in those institutions. We have done so even when the full impact of the European courts on our sovereignty and our law has become apparent.’

68 *Ziegler/Wicks/Hodson* (fn. 9), p. 7–8.

69 Or, as *Francesca Klug* (fn. 15) puts it: ‘It is not Cassandra-like to predict that if the UK walks away from the ECtHR the credibility of the entire post-war human rights edifice will be severely shaken, possibly terminally so. It has not had 800 years to bed down. It is less than seventy years old.’, p. 208.