

ACTIVISM AND SELF-RESTRAINT: THE MARGIN OF APPRECIATION'S STRASBOURG CAREER... ITS "COMING OF AGE"?

by Ed Bates, Leicester

I. Introduction	261
II. 1950-1979: The Convention's Initial Transformation Sees the MoA Evolve into "an Important Safeguard" ...	262
1. Pre-1975 "Snapshot": Expansive MoA and Emphasis on Retained Discretion for States	262
2. After 1975: A Shift in "Mental Attitudes"	263
3. The MoA Becomes an "Important Safeguard"?	263
4. Judicial Activism and Self-Restraint	264
III. 1980-1998: The MoA Holding the Convention Back, Or an Inherent Feature of Convention Supervision?	264
1. A Crescendo of Criticism in the 1990s	265
2. The MoA: Focal Point for a Judicial Activism and Self-Restraint Debate?	266
IV. Lessons from the 1990s and Dormant Constitutional Legitimacy (Authority and Consent) Questions	267
1. UK Warnings Against Strasbourg Activism	268
2. Illegitimate State "Pushback"?	268
3. "Constitutional Legitimacy" (Authority and Consent)	269
4. The "New" Court's Legitimate Powerbase?	270
V. Brighton and Protocol No. 15: The MoA and Subsidiarity Come of Age?	270
1. The British-Led Legitimacy Challenge	271
2. Brighton 2012 and Protocol No. 15	272
3. "Age of Subsidiarity"	272
4. Has Subsidiarity and the MoA Come of Age?	274
5. The Significance of Protocol No. 15	274
VI. Conclusion: Future Outlook, and Unresolved Activism/ Self-Restraint Tensions?	275

I. Introduction

Former Vice-President Judge Rozakis contends that the margin of appreciation (MoA) doctrine is "one of the most disputable, [and] most criticised"¹ to do with the Convention. This is an inauspicious context for Protocol No. 15,² which will amend the Convention's Preamble to include an express reference to the MoA and the principle of subsidiarity. Former President Costa suggests that via this amendment "governments (or some of them) wish to compel the Court to exercise increased self-restraint in

its scrutiny, especially when sensitive human rights issues arise or when national Parliaments are involved".³

Against this backdrop, this article examines the MoA's role as a standard-setting doctrine contextualised to the Convention's overall development (the MoA's "Strasbourg career"). This has not been done before.⁴ Via this "career view", we can obtain a panoramic perspective, giving us an insight into why, beyond individual cases, the MoA has been disputed and criticised, enabling us to see the contemporary era, including Protocol No. 15, in a broader context.

This being the overall ambition of this paper, it also seeks to demonstrate the following. That, (i) the role and place of the MoA has been seen differently over time, as "categories of legal thought"⁵ toward the developing Convention (and its standard-setting potential) shifted. That, (ii) with those shifts, and as the Convention matured, there emerged the potential for differing perspectives on the MoA *as a doctrine relevant to standard-setting*, reflecting different potential views (in activism and restraint terms) on what the Court's then role was. That, (iii) a point was reached in the 1990s when the Court's willingness to afford an appropriate MoA to States potentially raised questions going to the source of

* Dr Ed Bates, Associate Professor, University of Leicester, epb3@le.ac.uk. Thank you to former Judge Paul Mahoney for his comments on an earlier draft. Opinions expressed, and any errors, are, of course, the author's sole responsibility. The following text is an expanded version (footnotes added) of the oral presentation made on 9 September 2016.

¹ Christos Rozakis, "Through the Looking Glass: An 'Insiders's' view of the Margin of Appreciation", in: *Mélanges en l'honneur de Jean-Paul Costa*, Paris, Dalloz, 2011, pp. 527-537 at p. 527.

² Protocol No. 15 of 24 June 2013, yet to enter into force. Full text in 33 HRLJ 470 (2013).

³ Jean-Paul Costa, "The relationship between the European Court of Human Rights and the national courts", 3 EHRLR (2013) 264-274 at p. 265.

⁴ This was *not* something addressed in Ed Bates, *The Evolution of the European Convention on Human Rights*, Oxford, OUP, 2010 – hereafter "Bates-Evolution".

⁵ Cf. *infra* text accompanying note 19.

its authority, which in turn, it was said, was relevant to the consent of the States to submit to aspects of its jurisdiction. And that, (iv) to the extent that Protocol No. 15 may be seen as encouraging Strasbourg self-restraint, that is valid, for the longer perspective on the MoA as a standard-setting doctrine supports this, or, at the very least, it does *not* support the case for judicial activism.⁶ Accordingly, one can argue that, (v) the contemporary era of Strasbourg jurisprudence does not necessarily demonstrate a Court in retreat, but reflects an appropriate equilibrium between Strasbourg and (democratic) national authorities.

As its headings indicate, the article is mostly structured in a chronological way, which is necessary to build up the overall picture. The examination initially proceeds by looking at the situation of the Convention and the MoA up to the late 1970s (section II); and then up to the late 1990s (section III). After that, section IV constitutes a more general discussion of the “constitutional legitimacy” of activism and self-restraint at Strasbourg, seen from the perspective of the development of the Convention and the role of the MoA. That forms an essential context to Section V, which mainly focusses on the situation in the period after 2009-2010, Strasbourg’s so-called “age of subsidiarity”, marked by the advent of Protocol No. 15.

II. 1950-1979: The Convention’s Initial Transformation Sees the MoA Evolve into “an Important Safeguard”

A speech delivered, in 1958,⁷ by Sir Humphrey Waldock, the European Commission on Human Rights’ first President (1955-1961) and, subsequently, the Court’s President (1971-1974), is the point of departure for our analysis. Sir Humphrey referred to the Convention’s ambivalent identity as it had been concluded by the States: was it a “constitutional instrument... a European Bill of Rights for the individual”; or was it “a pact for collective action to check the development of any totalitarian methods of government in member countries”? Reference to this second identity is an important reminder of an alternative, very credible vision for the Convention, albeit by the 1970s it was more the Bill of Rights notion which prevailed.⁸

That was because that identity was promoted by the Strasbourg institutions under their tutelage of the Convention up to and beyond the 1970s.⁹ Looking back, via what, *at the time*, may have been viewed an activist jurisprudence, we now see that the foundations were put in place for a human rights instrument that had a far greater capacity to influence the activity of democratic States than if the Convention had remained the type of collective pact Sir Humphrey had also referred to. We may therefore reflect how remarkable it was that the Strasbourg institutions managed to carry the sovereign Contracting States with them in the transformation.

Part of the explanation for that may have been the initial balance the Strasbourg institutions struck between activism and self-restraint in standard setting terms. To this end, let us briefly examine the situation up to the 1970s, before turning to what happened after the mid-1970s.

1. Pre-1975 “Snapshot”: Expansive MoA and Emphasis on Retained Discretion for States

It is well-known that the earliest case-law saw the introduction of the MoA doctrine into the Commission’s Article 15 jurisprudence, as a kind of benefit of doubt doctrine.¹⁰ Less appreciated is that in other cases of the 1950s and 1960s the MoA was often used by the Commission at the admissibility stage as part of the basis to dismiss applications as ill-founded. The overall message conveyed may well have been one of deference, subsidiarity and an expansive MoA for States on most things; that if the State’s reasons for interfering with a Convention right were plausible, Strasbourg would not interfere.¹¹

The Court’s early case-law was limited, but the messages very similar. On the one hand, Strasbourg rejected the proposition that the scope of Convention rights had to be interpreted narrowly based on State-sovereignty grounds.¹² It also asserted its very broad jurisdiction: it had a power of European control over *all* aspects of domestic law, there being *no* areas of reserved domain.¹³

On the other hand, the way Strasbourg exercised that power – its approach to justiciability – was one that entailed that only a few specific and discrete violations of the Convention were found. When it came to standard-setting a very deferential approach was adopted and the Court was very clear that its task was to safeguard minimum European standards only, not to create uniform law.¹⁴ The subsidiary nature of international review was emphasised, consistent with the notion that the State generally knew best how to regulate its own affairs. In the “*Belgian Linguistics cases*” of the late 1960s the Court was explicit that it “cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute”.¹⁵ It could not “assume the rôle of the competent national authorities”, for that would be to “lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention”.¹⁶ The national authorities

“remain[ed] free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concern[ed] only the conformity of these measures with the requirements of the Convention”.¹⁷

Accordingly, a pre-1975 “snapshot” of the Convention revealed a Strasbourg Court which disavowed itself from the role of primary decision-maker, emphasising that it had a supervisory, review function only: to check conformity with the Convention. Here, Strasbourg set the boundaries of European supervision, but its approach to scrutiny entailed that States were left with a large residual area of latitude to work within: they retained a large overall MoA on human rights issues.

Meanwhile the Convention system of control was gradually developing consistent with a type of European Bill of Rights, this by virtue of its stewardship by the Strasbourg institutions, rather than the States’ express endorsement (although their willingness to accept the Convention’s then “optional clauses” was significant). Then

⁶ On definitions of activism and self-restraint utilised in this article, see *infra* text accompanying note 39.

⁷ Sir Humphrey Waldock, “Address by C.M.H. Waldock”, in: Council of Europe, *Fifth Anniversary of the Coming into Force of the ECHR: 3 September 1958*, (1959) at p. 27.

⁸ See Bates-Evolution (*supra* note 4) chaps. 5-9.

⁹ *Ibid.*

¹⁰ See Bates-Evolution (*supra* note 4) at p. 197, and see Dean Spielmann, “Whither the Margin of Appreciation?”, 67 *Current Legal Problems* (2014) 49-65 at pp. 50-51.

¹¹ See, for example, Sir James Fawcett’s comments on the MoA in the late 1960s, J. Fawcett, *The Application of the ECHR*, Oxford, OUP, 1969 at p. 248.

¹² Clovis Morisson, “Restrictive Interpretation of Sovereignty-limiting Treaties: The Practice of the ECHR System”, 19 *International & Comparative Law Quarterly* 360 (1970).

¹⁴ See Bates-Evolution (*supra* note 4) pp. 249-250, as regards early cases concerning Article 5(3).

¹⁵ The “*Belgian Linguistics cases*” (Merits), no.1474/62, 23 July 1968, Series A 6, part B., Interpretation adopted by the Court, § 10 at p. 34 f.

¹⁶ *Ibid.*, §10 at p. 35.

¹⁷ *Ibid.*

again, perhaps Strasbourg's ominous jurisdiction and its last-word authority over sovereign States' laws mattered less if, on the crucial matter of justiciability and standard-setting, it was deferential (although, of course, that was not the same as saying that ECHR law did not apply).

2. After 1975: A Shift in 'Mental Attitudes'

From today's perspective the standards set before 1975 were low, but at the time that was not necessarily the perspective.¹⁸ Nonetheless, attitudes and expectations could change; as Francis Jacobs put it, in 1975, two decades of Convention supervision started to see a modification in the applicable "categories of legal thought".¹⁹ Professor Frowein, a member of the Commission (1973-1993), recalls that the period after 1974-1975 was when the "sleeping beauty" awoke.²⁰ With commentators starting to express concern that the MoA doctrine entailed that Strasbourg was too lax in its scrutiny,²¹ *Handyside v. UK* (1976)²² and *Sunday Times v. UK* (1979)²³ were the two landmark MoA judgments of this awakening period.

The 1976 "Little Red Schoolbook" case set out how the notion of a MoA fitted with a general understanding of the respective roles played by Strasbourg and the national authorities. National human rights protection went "hand in hand" with "European supervision"; exercising its supervisory or "review" role, Strasbourg should not replace the national authorities, but would extend a "margin of appreciation" to them, in particular to recognise their "better" position to assess the competing interests that could be at stake.²⁴ A deferential approach was adopted and no violation was found.

Sunday Times, concerning restrictions on a newspaper publication on grounds of contempt of court, was more of a milestone, illustrating the relevance of the MoA (or a refusal to apply it) to Strasbourg standard-setting. The *Handyside* MoA formula was restated, but the Court took a significant step toward what a contemporary author referred to as a "quasi-constitutional" approach; it "re-assess[ed] the standard by which the border between the competence of the domestic authorities, and the competence of the Convention Organs to strike down their decisions, [was]... drawn".²⁵ It applied an autonomous free-speech standard, despite the fact that the Article 10(2) restriction (protecting the "authority... of the judiciary") had been inserted into the Convention by the UK in order to protect the common law contempt doctrine.²⁶ The conclusion – by 10:9 – was that the UK House of Lords' judgment fell short of Convention standards. Had the *Handyside* notion of the MoA as recognising the better position of the domestic court become a façade? From one angle the doctrine was about deference by recognising the better position of States to make certain assessments. From another angle, in *Sunday Times* the House of Lords' judgment was reviewed, and found to fall outside the UK's MoA, a European standard being applied (one commentator suggested the MoA was reduced "almost to vanishing point").²⁷

Judge Evrigenis, a member of the *Sunday Times* majority, suggested that that case (and that of the late 1970s) marked a "reorientation... in the methods of interpretation and mental attitudes adopted"²⁸ at Strasbourg. It, and other landmark case-law of 1978-1979, did seem to exhibit a shift, as if the Strasbourg institutions had become emancipated. The question started to become *when* Strasbourg could legitimately displace the respondent State's standard, overriding national autonomy on the matter (which would otherwise have come within its MoA). As such, concerns started to arise, in London at least,²⁹ as to the States' consent to the Convention's overall transformation and influence (and, as we note below, they would again in the 1990s).³⁰ Even so, the Strasbourg institutions still managed to carry the States with them; States did not denounce

the Convention, and they kept up their acceptance of its optional clauses.

3. The MoA Becomes an "Important Safeguard"?

This brings us to a second speech delivered by Sir Humphrey Waldock, this time in 1979.³¹ He commented on recent case-law which demonstrated how the Convention, while an international treaty, was now viewed as "a form of constitution".³² This, he said, needed to be seen from a broader perspective: that of "the whole approach to the distribution of functions and powers between [Strasbourg] and the national authorities".³³ *Sunday Times* was a case which demonstrated the "delicate nature of the [Strasbourg's] supervisory function".³⁴ The "delicacy" was "all the greater" as many of the Convention rights were only set out in "general terms" (they were not "self-executing"), whilst potential evolutive interpretation added "a further element of uncertainty" as to their "scope or implications".

Thus Sir Humphrey suggested that Strasbourg's "supervisory function... inevitably ha[d] in it a creative, legislative element", one which had a potential to "strain the enthusiasm" of the States. As such the MoA doctrine was "one of the more important safeguards [Strasbourg had] developed... to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in democracy".³⁵

So, following the late 1970s' shift, Sir Humphrey highlighted a corresponding change regarding the MoA: it became an "important safeguard" for the "sovereign powers and responsibilities of governments in democracy".

¹⁸ See, for example, comments made as regards the relatively low standards set by the Court in respect of Article 5(3) in: David Harris, "Recent cases of pretrial detention and delay in criminal proceedings in the European Court of Human Rights", 44 BYIL (1970) pp. 87-109 at p. 106-108.

¹⁹ F. Jacobs, *The European Convention on Human Rights*, Oxford, OUP, 1975 at p. 272.

²⁰ J. Frowein, "European Integration through Fundamental Rights", 18 *Michigan Journal of Law Reform* 5-27 at p. 8 (1984).

²¹ See Clovis Morrisson, "The Margin of Appreciation in European Human Rights Law", 6 HRJ (1973) 263-286 (refinement of MoA was "essential" for the Convention's "credibility", at p. 286), and see Jacobs (*supra* note 19) at p. 202.

²² *Handyside v. UK*, no. 5493/72, 7 December 1976, Series A 24. For recent reappraisal, see Sally Dolle, "Handyside, 35 years down the road", in: *Essays in Honour of Sir Nicolas Bratza*, Oisterwijk, Wolf LP, 2012, 541-551.

²³ *The Sunday Times v. UK (No. 1)*, no. 6538/74, 26 April 1979, Series A 30.

²⁴ *Handyside (supra* note 22) at § 48.

²⁵ Peter Muchlinski, "The freedom of speech and the ECHR: the *Sunday Times* case", *Topical Law* (1979) 1-27 at p. 24.

²⁶ The contempt of court doctrine had been "transposed... into an autonomous context. It [was] 'necessity' in terms of the Convention which the Court ha[d] to assess, its role being to review the conformity of national acts with the standards of that instrument", *Sunday Times* judgment (*supra* note 23) at § 60.

²⁷ David Harris, "Decisions on the European Convention on Human Rights during 1979", 50 BYIL (1979) 257-271 at p. 259.

²⁸ Dimitrios Evrigenis, "Recent case-law of the European Court of Human Rights Article 8 and 10 of the ECHR", 3 HRLJ 121-139 at p. 122 (1982).

²⁹ See Ed Bates, "British sovereignty and the European Court of Human Rights", 128 *Law Quarterly Review* (2012) 382-411 at pp. 392-400.

³⁰ See *infra* text accompanying note 94.

³¹ Sir Humphrey Waldock, "The effectiveness of the system set up by the ECHR", 1 HRLJ 1-12 (1980).

³² *Ibid.* p. 2, and see his analysis at pp. 3-5.

³³ *Ibid.* p. 5.

³⁴ *Ibid.* p. 8.

³⁵ *Ibid.* p. 9 (footnotes omitted).

4. Judicial Activism and Self-Restraint

But how much of a “safeguard” was the MoA, and how much respect should be owed to State interests, balanced against what the “effective operation of the Convention” entailed? Here we note that the MoA was a creation of the Strasbourg institutions, and it was within their gift how – indeed *whether* – to apply it and with what effect. In this connection I suggest the 10:9 split in *Sunday Times* demonstrated how, in finely-balanced cases, the “mental attitudes” (Evrigenis³⁶) of individual judges – their conceptualisation of the Convention – was significant to the “creative, legislative” license (Waldock³⁷) the Court did, or did not have (reflected in the willingness, or otherwise, to extend a MoA to the State).

In *Sunday Times* the Court divided on whether there was a European consensus³⁸ on the free-speech issue at stake. Arguing that there was, the majority were more inclined to view the ECHR as a *type of* independent, autonomous, *standard-setting* European Bill of Rights. Their sharpened approach to Strasbourg review, identification of a European standard, and willingness to pare down the general MoA and find the national conduct as exceeding it, reflected this.

The dissent – and a *joint* dissent of *nine* was striking – read like an alternative judgment. It advocated a, by comparison, less ambitious standard-setting role for the Convention, and was more subsidiarity-focussed. Strasbourg’s task was merely to keep the law of the Contracting States within reasonable bounds. That was *not* the same as simply deferring to the State, but did exhibit a greater readiness (compared with the majority) to accept its position in borderline cases; there was a greater inclination to apply and grant a MoA when good-faith restrictions on Convention rights had been employed in a democratic context.

For such reasons, I suggest that *Sunday Times* demonstrated a tension between judicial activism and self-restraint, along the lines identified by former President Wildhaber (“Switzerland” Judge, 1991-2007; President 1998-2007) in 2011.³⁹

Judicial activists, Wildhaber argued, view “the Court’s agenda to be, first, the steady expansion of human rights on a widening front; and secondly, the abandonment of notions such as subsidiarity and margin of appreciation in favour of ambitious standard-setting”.

Advocates of judicial self-restraint, by contrast, reflected traits of “realism”, and “minimalism”, advocating “a sense of proportion in European human rights protection, so that the ECHR would provide above all for inspiration, guidelines, minimal standards, and a programme of realistic idealism and idealistic realism”. They highlight “the ECHR’s ineluctable and inexorable dependence on, and interconnectedness with, the various national courts, parliaments, and governments”.

References hereafter to judicial activism and self-restraint (or the equivalent terminology) will refer to Wildhaber’s categorisations (unless I am citing another author directly). That said, I would respectfully add a further observation: namely that in borderline cases self-restraint advocates would veer towards assumptions opposite to activists as identified by Wildhaber. That is, self-restrainers would highlight the validity of the MoA as an interpretational tool in standard-setting terms. Subsidiarity would be emphasised as an inherent feature of the Convention as an instrument that accepts legitimate diversity (within limits and provided the restriction is in good faith and a democratic context) and opposes the setting of rigid uniform standards, other than minimum standards.⁴⁰

III. 1980-1998: The MoA Holding the Convention Back, Or an Inherent Feature of Convention Supervision?

As I see it, the shift of approach or attitudes, or the modified “categories of legal thought”, that operated from the late 1970s onwards entailed that an activism/restraint tension as just described became more of a relevant consideration at Strasbourg (indeed, perhaps what activism and self-restraint meant may have been seen differently after the late 1970s compared with before). This was the applicable landscape for the remarkable expansion in the case-law occurring in the 1980s and 1990s. For the most part, I would suggest that, even though that case-law was expansive for the new ground it broke, it would be regarded, overall, as adhering to the model of judicial self-restraint. Indeed, as we shall note, in the 1990s – with the “categories of legal thought” potentially shifting again, arguably – there was pressure for Strasbourg to set higher standards, and to realise a judicial activism agenda.

Before that, and with the Convention system slowly maturing, the MoA was left as a very opaque doctrine, a point which some Strasbourg insiders expressed concern about.⁴¹ In 1990 Paul Mahoney argued “[t]he time had probably come to articulate clearer criteria”.⁴² Subsequently Judge Macdonald (the (Canadian) “Liechtensteiner” judge (1980-1998)) complained that it was an “understatement” to say that there were “a variety of jurisprudential principles evolving under [the doctrine]”.⁴³

Of course, certain factors which influenced the MoA’s wide-narrow application were evident, such as the consensus principle. Generally speaking, Strasbourg recognised that it was for national democratic institutions to determine issues of social and economic policy.⁴⁴ It was clear, then, that the MoA was a deference doctrine with a self-restraint (standard-setting) effect. But the overall *conceptual basis* for this, in terms of Wildhaber’s activism/self-restraint categorisations, was hardly, if at all, articulated by the Court, which adopted a functional, *ad*

³⁶ See *supra* text accompanying note 28.

³⁷ See *supra* text accompanying note 35.

³⁸ On European consensus see Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, “No Consensus on Consensus? The Practice of the European Court of Human Rights”, 33 HRLJ 257 (2013); and Paul Mahoney & Rachael Kondak, “Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights”, in: Mads Andenas and Duncan Fairgrieve (eds.), *Courts and Comparative Law*, Oxford, OUP, 2015, pp 119-176.

³⁹ Luzius Wildhaber, “Rethinking the European Court of Human Rights”, in: Jonas Christoffersen and Mikael Rask Madsen (eds.), *The European Court of Human Rights: Between Law and Politics*, Oxford, OUP, 2011, 204-229 at p. 212.

⁴⁰ See the discussion *infra*, text accompanying notes 72 and 198.

⁴¹ See Walter Ganshof van der Meersch, “Le caractère ‘autonome’ des termes et la ‘marge d’appréciation’ des gouvernements dans l’interprétation de la Convention européenne des Droits de l’Homme”, in: *Protecting Human Rights: The European Dimension: Studies in Honour of G.J. Wiarda*, Köln, Carl Heymanns Verlag, 1988, pp. 208-220; and Ronald Macdonald, “The Margin of Appreciation in the Jurisprudence of European Court of Human Rights”, in: *International Law at the Time of Its Codification: Essays in Honour of Judge Roberto Ago*, Milan, Giuffrè, 1987, pp. 187-208.

⁴² Paul Mahoney, “Judicial activism and judicial self-restraint in the European Court of Human Rights: Two sides of the same coin”, 11 HRLJ 57-88 at p. 83 (1990).

⁴³ Ronald Macdonald, “The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights”, in: *Collected Courses of the Academy of European Law Vol. 1 Book 2* (1990), 95-161 at p. 103.

⁴⁴ For example, *James v. UK*, no. 8793/79, 21 February 1986, Series A 98, § 46.

hoc approach to the doctrine. Indeed, contemporary extra-judicial writing indicated that even Strasbourg insiders were cautious and uncertain about the MoA's true nature. For example, Judge Bernhardt (the "German" judge (1981-1998), Vice-President (1992-1998), and latter President of the Court (1998))⁴⁵ wrote in terms that supported the MoA as a valid interpretational tool, appropriate to the institutional competence Strasbourg had as an international court, compared to democratic national institutions. Judge Macdonald⁴⁶ did not disagree, but seemed less inclined to see it that way, implying that, in some respects, when used with a standard-setting effect, the MoA could be a doctrine to appease States (although that may not have been the whole picture). Seen that way, this self-restraint aspect of the MoA's function was potentially temporary, applicable for the time it took for the Convention's future to become secure, after which its restraining effects could be jettisoned. If so, when would that be?

I. A Crescendo of Criticism in the 1990s

By the 1990s the Court was held in very high esteem;⁴⁷ perhaps its forward progress and success seemed irresistible. Protocol 11 was opened for signature (1994), inspiring the title to President Rysdsdal's lecture, "The Coming of Age of the ECHR".⁴⁸ He referred to Strasbourg's progression into a "quasi-constitutional" entity.⁴⁹ Perhaps the higher expectations of this environment were relevant to the stronger criticism⁵⁰ of the MoA that followed.

On one level that criticism was directed at the paucity of the Court's reasoning in certain MoA cases, which the critics were less forgiving of in the 1990s. A concern was that, in effect, a State could succeed not on the strength of the justifications for interference with rights it presented, but because it benefitted from a vague, general MoA. Macdonald (1993) argued that the "principle of accountability" required the Court to "articulate the underlying reasons why a particular amount of deference is considered proper".⁵¹ The MoA doctrine should no longer be vaguely employed by the Court so as to allow it to evade "its responsibility to articulate the reasons why its intervention in particular cases may or may not be appropriate"⁵² (with the risk that "large areas of policy-making are insulated from any effective scrutiny by the Court").⁵³

Apparently the case-law of the late 1990s responded to this, efforts being made to bring greater clarity to the operation of the MoA.⁵⁴ Cases highlighted the importance of there being a national regulatory framework for the rights/community interest-balancing exercise, as a context to the application of the MoA.⁵⁵

Even so, a further criticism was that, for some cases at least, the MoA resulted in what in the 1990s was seen as inappropriate self-restraint in standard-setting terms, the gist being that the doctrine was employed to *devalue* the standard of human rights protection that would otherwise have applied, as the Court protected the traditional powers and responsibilities of States. Discontent was evidenced in certain separate opinions.⁵⁶ However, academic voices were far louder,⁵⁷ and in evidence in the strong reaction

(from eminent commentators)⁵⁸ to several free speech rulings (*Jersild v. Denmark*;⁵⁹ *Otto-Preminger-Institut v. Austria* (1994);⁶⁰ *Wingrove v. UK* (1996);⁶¹ and *Goodwin v. UK* (1996)).⁶² In 1995 Lord Lester objected that the MoA doctrine was "standardless", "as slippery and elusive as an eel... [and] a substitute for coherent legal analysis".⁶³ He also contested Mahoney's defence of the free-speech cases.⁶⁴ After this, over 1997-1998, in two separate cases

⁴⁷ See, for example, Heribert Golsong (Deputy Registrar 1960-1963, Registrar of the Court 1963-1968), "The European Commission of Human Rights", 2 *Connecticut Journal of International Law* 285-297 at p. 285 (1986-1987): the "great authority" that Strasbourg had "in Western Europe", where it was "perceived as the preeminent authority over those matters usually covered by the catalogues of civil rights and freedoms in national constitutions".

⁴⁸ Rolv Ryssdal, "The Coming of Age of the ECHR", 1 EHRLR (1996) 18-29.

⁴⁹ *Ibid.* at p. 22. Such talk may be frowned upon today, see *CDDH Report on the Longer-Term Future of the System of the European Convention on Human Rights* (adopted on 11 December 2015), at p. 37 note 116.

⁵⁰ Which is not to suggest that criticism did not exist in the lead up (i.e. the 1980s), see Mahoney's coverage (HRLJ 1990, *supra* note 42) at pp. 80-81.

⁵¹ Ronald Macdonald, "The Margin of Appreciation" in: Ronald Macdonald et al. (eds.), *The European System for the Protection of Human Rights*, Dordrecht et al., Nijhoff, 1993, 83-124 at p. 124.

⁵² *Ibid.*

⁵³ *Supra* note 43 (Macdonald 1990) at p. 160.

⁵⁴ See Jeroen Schokkenbroek, "The doctrine of the margin of appreciation under the European Convention on Human Rights: Its legitimacy in theory and application in practice" 19 HRLJ 30-36 at p. 36 (1998).

⁵⁵ See, for example, *Buckley v. UK*, no. 20348/92, 25 September 1996, Reports 1996-IV, § 76, and see § 84; *Stubbings v. UK*, no. 22083/93, 22 October 1996, Reports 1996-IV, §§ 62-67; *Wingrove v. UK*, no. 17419/90, 25 November 1996, Reports 1996-V, § 61 (and see also § 58). See also *Vogt v. Germany*, no. 17851/91, 26 September 1995, Series A 323, § 52(iii); and *Jersild v. Denmark*, no. 15890/89, 23 September 1994, Series A 298, § 31.

⁵⁶ See, for example, the various separate opinions in *Cossey v. UK*, no. 10843/84, 27 September 1990, Series A 184, including that of Judge Macdonald and Judge Martens.

⁵⁷ See especially Pieter van Dijk, *Theory and Practice of the ECHR*, 2nd ed., Deventer-Boston, Kluwer, 1990 at pp. 602-606. Contemporary contributions included Eva Brems, "The Margin of Appreciation in the Case Law of the European Court of Human Rights", 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996) 240-314; Eyal Benvenisti, "Margin of appreciation, consensus, and universal standards", 31 *NYU Journal of International Law & Politics* 843-854 (1998); Timothy Jones, "The Devaluation of Human Rights Under the European Convention", *Public Law* (1995) 430-449; Nick Lavender, "The Problem of the Margin of Appreciation", 4 EHRLR (1997) 380-390; Michael Hutchinson, "The margin of appreciation doctrine in the European Court of Human Rights", 48 *ICLQ* (1999) 638-650.

⁵⁸ See Mahoney's summary in Paul Mahoney, "Universality versus subsidiarity in the Strasbourg case-law on free speech. Explaining some recent judgments", 4 EHRLR (1997) 364-379 at pp. 364-367 – hereafter "Mahoney in EHRLR 1997".

⁵⁹ *Supra* note 55.

⁶⁰ *Otto-Preminger-Institut v. Austria*, no. 13470/87, 20 September 1994, Series A 295-A.

⁶¹ *Supra* note 55.

⁶² *Goodwin v. UK*, no. 17488/90, 27 March 1996, Reports 1996-II.

⁶³ Anthony Lester, "The ECHR in the new architecture of Europe", in: *Eighth ECHR Colloquy*, Council of Europe, 1995, 226-240 at p. 236 (later arguing his "criticisms reflected the views of many other users of the system, advocates who have appeared for and against governments, as well as senior officials within the Court and the Commission": Anthony Lester "Universality versus subsidiarity: A reply", 1 EHRLR 73-81 (1998) at p. 73.

⁶⁴ *Ibid.*, in response to Mahoney (in EHRLR 1997, *supra* n. 58).

⁴⁵ Rudolf Bernhardt, "Thoughts on the Interpretation of Human Rights Treaties", in: *Wiarda Essays* (*supra* note 41) 65-71 at p. 68; and see also (by the same author) "Human Rights and Judicial Review: The European Court of Human Rights", in: David M. Beatty, ed., *Human Rights and Judicial Review, A Comparative Perspective*, Dordrecht et al., Martinus Nijhoff Publishers, 1994, 297-319.

⁴⁶ Macdonald, 1990 (*supra* note 43) at p. 161 (Court needed the "flexibility" the MoA offered "at the present stage of developments", given the voluntary nature of States' submission to European human rights control (the "consent" they gave "to be guided by" international organs)).

Judge De Meyer (“Belgian” Judge, 1986-1998) openly questioned whether it was still appropriate to use the MoA concept in the Court’s reasoning, arguing for its abandonment.⁶⁵

2. *The MoA: Focal Point for a Judicial Activism and Self-Restraint Debate?*

Was what was really occurring a debate about whether a judicial-activism and self-restraint understanding of the Convention was appropriate?

As to the former, consider, for example, Judge Macdonald’s (1993) criticism of the MoA (and the consensus principle) from the perspective of the Convention as a “pragmatic gradualist project” for “the eventual realization of a European-wide system of human rights protection, in which a universal standard of protection is secured”.⁶⁶ Seen that way the MoA (in standard-setting terms) could be “more [of] a principle of justification than interpretation”,⁶⁷ used to sustain Strasbourg’s continued power on the pragmatic basis that the Court’s existence rested upon the States’ consent (and to avoid alienating them). The argument⁶⁸ was that Strasbourg should be less concerned with this by the 1990s, as the Convention system was more mature and robust: the MoA should no longer prevent “the emergence of a theoretical vision of [Strasbourg’s] role in the European legal order”.⁶⁹ It, like the related principle of consensus,⁷⁰ should no longer block the Court from “forfeit[ing] its aspirational role”, preventing it from “decid[ing] questions of appropriateness by open reference to the standards of an ideal European democratic society”.⁷¹

Yet, of course, this made (judicial activist) assumptions about the Convention’s, and so Strasbourg’s, true vocation. Were those assumptions correct?

Not (it would seem) according to the views of certain senior Strasbourg figures in the 1990s, who set out what may be seen as a judicial self-restraint perspective. The argument was that the MoA reflected the level of protection that was appropriate under the ECHR *in the first place*. Accordingly, it was incorrect to see the MoA as downgrading standards of human rights protection from what they should be; it did not hold back the Court, and its application did not deny applicants their rights. Subsidiarity was the focal point of this vision for the ECHR, and the notion that – contrary to the view just set out – it was *not* for Strasbourg to enthusiastically forge European standards. This flowed from a conceptualisation of the Convention and its interaction with the powers of (still) sovereign States. It was a recognition that, although Contracting States had conceded sovereignty to Strasbourg, and so were accountable to it, in return the latter still had to respect the legitimacy of aspects of their sovereign power. This was to reflect “the freedom of different societies to disagree, to choose different solutions according to their own notions and needs... in relation to the vast range of human activity covered by the Convention”.⁷² Under this view the MoA’s (standard-setting) self-restraint effects were *not* State appeasement but a legitimate product of a valid interpretational tool that was an inherent feature of the Convention.

So, for example, Judge Matscher (“Austrian”, Strasbourg Judge, 1977-1998) referred to the “ideological background” to the MoA doctrine for a Convention *not* intended to establish a “streamlined Europe”, but which should permit “the preservation of the marvellous and inexhaustible variety of our continent”. The doctrine therefore amounted to the expression of realistic “judicial self-restraint”, and complied “with the spirit of the Convention”, being “a legitimate method of interpreting an international instrument”.⁷³

As for President Ryssdal (“Norwegian” Judge, 1973-1998, President 1985-1998), he saw the MoA *stemming* from subsidiarity, which was “probably the most important of the principles underlying the Convention”.⁷⁴ The doctrine was “a legitimate and key component in the inevitably complex relationship between national authorities and the supervisory institutions, a delicate balance between national sovereignty and traditionally – and inherently – fragile international jurisdiction”.⁷⁵

This linked to the emphasis placed upon national authorities being better placed than Strasbourg to strike the right balance regarding conflicts between rights and the general interest of the community. Thus, the MoA doctrine did not open the door to “an insidious variable geometry in human rights protection”, for the Convention was “not intended to destroy the richness of the cultural and other variety found in Europe by imposing rigid, uniform solutions in the vast field it covers”.⁷⁶ It “recognis[e] the right of free societies, within limits, to choose for themselves the human rights policies that best suit them”.⁷⁷

In a similar vein, Paul Mahoney, Deputy Registrar of the Court at the time, defended the much-criticised free-speech cases.⁷⁸ They revealed a context-specific approach (as *Wingrove* indicated)⁷⁹ and Strasbourg’s basic, and subsidiary, safeguard role.

Mahoney elaborated on this in his other writing. In 1998⁸⁰ he referred to the MoA as a “much maligned notion”.⁸¹ He acknowledged the need for “some attempt at a conceptual analysis”, given “the Court’s frequent reticence to expound in its judgments the conceptual framework within which it ha[d] recourse”⁸² to the MoA. Here Mahoney argued that Strasbourg needed to afford appropriate respect to

⁶⁵ Partly dissenting opinion of Judge De Meyer in *Z v. Finland*, no. 22009/93, 25 February 1997, Reports 1997-I, and see also his concurring opinion in *XYZ v. UK*, no. 21830/93, 22 April 1997, Reports 1997-II.

⁶⁶ Macdonald (1993), *supra* note 51 at p. 123. Macdonald was hypothesising, rather than necessarily adopting this view.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at p. 124.

⁶⁹ *Ibid.*

⁷⁰ See Helfer’s critique: Laurence Helfer, ‘Consensus, Coherence and the European Convention on Human Rights’, 26 *Cornell International Law Journal* 133-165 at p. 165 (1993).

⁷¹ Macdonald (1993), *supra* note 51 at p. 124, and see Benvenisti (*supra* note 57) at pp. 850-854.

⁷² Paul Mahoney, “Marvellous Richness of Diversity or Invidious Cultural Relativism?”, 19 *HRLJ* 1-6 at p. 3 (1998) – [special edition of the HRLJ on “The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice”] – hereafter “Mahoney in HRLJ 1998”.

⁷³ Franz Matscher, “Methods of Interpretation of the Convention”, in: *European System* (*supra* note 51) 63-81 at p. 76 (doctrine was “not free of doubts and incongruities”, but it “did not deserve the criticism directed against it by some writers”, and had nothing to do with a reserved domain for States, *ibid.* at pp. 77-78).

⁷⁴ Ryssdal (*supra* note 48) at p. 24.

⁷⁵ *Ibid.* at p. 25.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at p. 26.

⁷⁸ See Mahoney in EHRLR 1997 (*supra* note 58).

⁷⁹ *Wingrove* (*supra* note 55) at § 58. And see concurring opinion of Judge Bernhardt.

⁸⁰ Mahoney in HRLJ 1998 (*supra* note 72).

⁸¹ *Ibid.* at p. 1.

⁸² There was “undeniably some substance” to criticisms that the Court had used the MoA to evade responsibility to articulate the reasons for non-intervention in particular cases, *ibid.* at p. 2; there was sometimes a “lack of both accompanying explanatory analysis and consistency of approach”. See also Schokkenbroek (*supra* note 54) at pp. 30-31.

democratically endorsed choices,⁸³ in keeping with the Convention's status as an international instrument. Its role inevitably involved "a tension between subsidiarity... and universality". The former could be broadly defined as "letting each community decide democratically at local level what is appropriate for its members"; the latter as "insisting on the same standard of European protection for everyone, whatever the national community in question".⁸⁴ In defence of subsidiarity, Mahoney maintained that a level of diversity (amongst democracies) was something that the Convention should naturally accommodate and respect as a feature of "cultural variety" (not "cultural relativism").⁸⁵ The Convention "establish[ed] a legal community with a common ethos in human-rights matters", but underlying it was "an inexhaustible cultural and ideological variety among the Member States". Strasbourg should act "as a force contributing to the preservation of that 'marvellous richness' of diversity, or, at least, should not undermine it by seeking to impose rigidly uniform solutions valid for all the different democratic societies making up the Convention community".⁸⁶ Seen this way the MoA did not undermine human rights, and was not the "sinister brake" on individual liberty that some critics claimed it to be; it was "inherent in the Convention".⁸⁷

IV. Lessons from the 1990s and Dormant Constitutional Legitimacy (Authority and Consent) Questions

Let us pause for a moment to take stock. I have argued that "categories of legal thought" related to the Convention slowly changed over the first half decade of the Convention's life (1950-1998), and so did the place of the MoA in the context of Strasbourg's standard-setting role. Contrast, on the one hand, the ambiguity of the Convention's very identity in the late 1950s (Waldock's 1958 speech), and the "pre-1975 snapshot", characterised by the subsidiarity messages of the "*Belgian Linguistics cases*", with, on the other, the "shift" that was underway in the late 1970s (*Sunday Times*), and how matters developed thereafter. That shift opened up the possibility for the expression of differing activism/self-restraint visions of what was the aim of the Convention, and, therefore, the Court's role. It started to see Strasbourg potentially operate greater scrutiny, but did not entail a lurch to either activism or self-restraint in every case. Indeed, through the 1980s, while the case-law grew, setting new benchmarks, and the Strasbourg system of control was maturing, judgments were unsatisfying in that the MoA was left as an opaque doctrine: not much, if any, overall "conceptual framework"⁸⁸ was supplied, perhaps masking or subduing an activism and self-restraint debate. That debate surfaced with the "coming of age" of the system of control (Protocol 11). At the dawn of the "new" Court, its use of the MoA became the subject of a wave of criticism, the essence of which was that it was a doctrine by which Strasbourg voluntarily emptied rights protection of its strength to appease national interests. Rebutting that, however, were the views of several Strasbourg figures who had been central to the Convention's development since the 1970s. They defended a subsidiarity-orientated, judicial self-restraint understanding of the Convention as a standard-setting instrument of which the MoA was an integral part.

Is all this old ground, of little relevance today? No.

Firstly, the activism/restraint debate – which is really a debate about the appropriate role of the Convention (and so the MoA) as a standard-setting instrument – was not settled in the 1990s, and so was inherited by the "new" Court.⁸⁹ Controversy over the effects of MoA, in standard-setting terms, has been a feature of contemporary case-law. Space does not permit a detailed analysis this, but consider the critique offered by Vice-President Rozakis ("Greek" Judge and Vice-President: 1998-2011) in 2011,

an adherent, I assume, to judicial activism. Rozakis argued that the invocation of the MoA was "not always consonant with one of [Strasbourg's] main roles, bestowed on it by the Convention, namely that of a tool or mechanism for progressive harmonisation of human rights protection among the States Parties".⁹⁰ Whilst recognising that there could be differences of human rights protection in Europe, Rozakis was wary that the point should not be used for too liberal invocation of the MoA, for diversity "must be the exception and by no means the rule".⁹¹ Evidently, Rozakis' conceptual framework was different to Ryssdal, Mahoney, and Matscher, noting their arguments that Strasbourg should preserve "rich" or "marvellous" diversity.⁹²

As such, the issues addressed in the previous section, going to what the appropriate conceptual framework for the Convention should be, remain potentially relevant today. They may help us to appreciate aspects of the differences of agreement played out in some contemporary Strasbourg judgments.

Secondly, let us recall Protocol No. 15, and the proposal to amend the Convention's Preamble to refer explicitly to two doctrines clearly associated with self-restraint, i.e. the MoA and subsidiarity. Could it be that for some States the aim was to remind Strasbourg that its *legitimate* remit essentially coincided with a judicial self-restraint approach articulated by certain senior Strasbourg insiders in the 1990s?

I submit that there is good reason to suggest that this was the UK's motivation. As is well known, at Brighton in 2012 the UK was at the forefront of initiatives to send such a message to the Court. Less well known is that there was an element of *déjà vu* about that, for the mid-1990s saw a similar UK-inspired attempt to, in effect, require Strasbourg to adopt a self-restraint perspective. In 1996 the UK authored a Memorandum which was put to the

⁸³ Mahoney in HRLJ 1998 (*supra* note 72) at pp. 3-4.

⁸⁴ Mahoney in EHRLR 1997 (*supra* note 58) at p. 364.

⁸⁵ Mahoney in HRLJ 1998 (*supra* note 72) at p. 3.

⁸⁶ *Ibid.* at pp. 3-4.

⁸⁷ Mahoney in EHRLR 1997 (*supra* note 58) at p. 370. See also his understanding of the Court's review function, Mahoney in HRLJ 1998 (*supra* note 72) at p. 5.

⁸⁸ Cf. Mahoney in HRLJ 1998 (*supra* note 72).

⁸⁹ In recent case-law, see, for example, the discussion of the breadth of the MoA in the separate opinions attached to *A, B and C v. Ireland* [GC], no. 25579/05, 16 December 2010, ECHR 2010 = 31 HRLJ 344 (2011) and in cases such as *S.A.S. v. France* [GC], no. 43835/11, 1 July 2014, ECHR 2014 (extracts), full text in 34 HRLJ 99 (2014). On the unsatisfactory opaque nature of MoA: see, for example, the dissenting opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele in *Evans v. UK* [GC], no. 6339/05, 10 April 2007, ECHR 2007-I (although see § 80 of the judgment); and, to similar effect, the joint dissenting opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria in *S.H. v. Austria* [GC], no. 57813/00, 3 November 2011, ECHR 2011, § 11; dissenting opinion of Judge Tulkens in *Leyla Şahin v. Turkey* [GC], no. 44774/98, 10 November 2005, ECHR 2005-XI, § 3 = 26 HRLJ 166 at p. 182 (2005). See also the concurring opinions of Judge Rozakis and Judge Malinverni in *Egeland and Hanseid v. Norway*, no. 34438/04, 16 April 2009.

⁹⁰ Rozakis (*supra* note 1) at pp. 528-529 (also arguing that Strasbourg relied on the MoA in cases when it was unnecessary to do so).

⁹¹ *Ibid.* at p. 537. Cf. the joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi in *A, B and C v. Ireland*, *supra* note 89 (role of "consensus", and "one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection", § 5).

⁹² See also, from a judicial self-restraint perspective, the extra-judicial comments of President Wildhaber, Luzius Wildhaber, "A Constitutional Future for the European Court of Human Rights?", 23 HRLJ 161-165 at p. 162 (2002).

Committee of Ministers, and called upon Strasbourg to apply the MoA doctrine in order “to allow for diversity, particularly on those moral and social issues where the view of what is right may legitimately vary”.⁹³

The thrust of the UK’s argument was that, to avoid accusations of acting illegitimately, the Court had to adopt a self-restraint understanding of the Convention. An examination of the UK’s position of 1996 therefore raises issues prescient for the Protocol No. 15 era, and the place of the MoA in the Convention scheme – a further reason why the 1990s period should not be viewed as mere history today.

The discussion immediately below therefore addresses the UK’s 1996 position, i.e., the arguments it presented why Strasbourg had to operate self-restraint. It bridges our analysis of the MoA under the “old”, and then under the “new” Court, and the post-2010 (Protocol No. 15) era.

1. UK Warnings Against Strasbourg Activism

The UK’s (1996) arguments were set out in an essay published by the British Lord Chancellor, Lord Mackay, which focussed on the MoA and Strasbourg scrutiny.⁹⁴ It expressed doubts over the Court’s legitimacy to adopt more than a basic irrationality approach when reviewing national decisions: Strasbourg should “only interfere where the situation under national law cannot reasonably be reconciled with the terms of the Convention”.⁹⁵ Provided the national decision was “a reasonable one, and within a reasonable interpretation of the Convention”, Mackay argued, “it should not be interfered with”: the “democratic legitimacy of the national authority should be respected”, and the MoA should be applied to reflect that.⁹⁶

Evidently this approach envisaged Strasbourg leaving very considerable scope for national discretion, operating in a deferential way and conceding that the type of decisions Mackay identified should be left, by default, to the State’s sphere of responsibility (part of its considerable MoA). Why? He implied that Strasbourg’s failure to adopt the irrationality approach he advocated would be potentially (i) constitutionally suspect, and even (ii) dangerous.

On (i), Mackay highlighted the significant expansion of power reflected in the Court’s operation in the 1990s, compared with when the Convention was drafted, and how this raised valid concerns for States. Here he stressed the “entrenched” nature of the law of the ECHR as “a body of law that [had] been formally removed from the democratic process”.⁹⁷ In essence, the point was that the more constitutional-like the Convention became – and so the less MoA States had –, the more the Court should be conscious of the fact that there could be no response to its judgments by an individual State’s democratic and constitutionally valid, law-making authorities. As such Strasbourg should acknowledge its potentially constitutionally suspect position via deference, i.e. an appropriate MoA.⁹⁸

Related to this were the dangers of not adopting a self-restraint approach [(ii)]. Here Mackay warned that if the Court progressed too far beyond “the uncontroversial territory of condemning obvious breaches of the Convention”⁹⁹ it would be exceeding the remit agreed upon by the States when establishing it. As such, with the exercise of this expansive jurisdiction

“questions may arise about the source of the authority of the Court to make these judgments, and the consent of the member States on which the system rests may be threatened”.¹⁰⁰

Thus the argument was that aspects of the law of the ECHR, as interpreted by a Court which had developed its jurisdiction to a stage that was perceived as having become constitutionally suspect, may jeopardise the States’ unquestioned consent to that jurisdiction. In short, judgments might be resisted (“a damaging reaction”¹⁰¹ needed to be avoided).

Mackay therefore highlighted the principle of subsidiarity (and the MoA), as expounded in the “*Belgian Linguistics cases*”,¹⁰² emphasising the need to place the onus on the primary role of national – Mackay would say, constitutionally and democratically legitimate – decision-makers. Strasbourg, Mackay argued, was supplemental to such institutions, under a Convention scheme that was “not designed to eliminate local variations”.¹⁰³ The Court, he argued, should employ the MoA to respect these considerations.

2. Illegitimate State “Pushback”?

Today the UK’s 1996 initiative might be labelled an interference with the Court’s independence, or “pushback”. Indeed, any attempt to influence the extent of a court’s judicial discretion by a respondent before it (as the UK regularly was in the 1990s) raises concerns.

Then again, the arguments – which have obvious parallels to contemporary times – raised some valid issues, ones that remain relevant today. Undoubtedly, Strasbourg’s impact and influence *had* expanded way beyond what could have been expected at the outset of the Convention’s life, or the early 1970s, almost in defiance of its international status.¹⁰⁴ President Ryssdal himself recognised this, commenting, in 1995, that if the Convention was a “scalpel” it had “gone from scraping the surface [the 1960s] to making deep incisions [the 1990s]”, as Strasbourg came “to dig progressively deeper into the legal orders of the Contracting States”.¹⁰⁵ Indeed, looking back, it may be suggested that the late 1970s, and the shift of approach associated with that time, marked the start of the process Ryssdal referred to. It was after this and into the 1980s and 1990s that, slowly but surely, States started to be found in violation of the Convention regularly. Certain characteristics of the “pre-1975 snapshot”¹⁰⁶ of the Convention faded considerably

⁹³ (editorial), “Reform of the Court: the Foreign Office position paper”, 3 EHRLR (1996) 229-232 at 230 (citing the Memorandum at § 7). The intention was that the Committee of Ministers pass a resolution for the Court’s attention, highlighting the following principles: “(a) account should be taken of the fact that democratic institutions and tribunals in Member States are the best placed to determine moral and social issues in accordance with regional and national perceptions; (b) full regard should be paid to decisions by democratic legislatures and to differing legal traditions; (c) long-standing laws and practices should be respected, except where these are manifestly contrary to the Convention”, *ibid.* at p. 231 (citing the Memorandum at § 8). No Committee of Ministers resolution followed.

⁹⁴ Lord of Clashfern Mackay, “The margin of appreciation and the need for balance”, in: *Studies in Memory of Rolv Ryssdal*, Köln, Carl Heymanns Verlag, 2000, pp. 837-843.

⁹⁵ *Ibid.* at p. 842.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* at p. 838.

⁹⁸ Protocol 11 removed the Convention’s so-called “optional clauses”; from a State perspective this took away a “check” against the Court (in the form of withdrawal, or threatened withdrawal of consent to renewal of the clauses).

⁹⁹ Mackay (*supra* note 94) at p. 838.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* at p. 842.

¹⁰² The “*Belgian Linguistics cases*” (Merits), *supra* note 15.

¹⁰³ Mackay (*supra* note 94) at p. 840.

¹⁰⁴ See, for example, comments made by Thomas Buergenthal, Judge of the Inter-American Court, in: Thomas Buergenthal, Book Review, Frowein & Peukert, EMRK Kommentar, 81 AJIL 280-282 (1987) at p. 280: “The treaty, once perceived as a daring experiment of limited significance, has become a veritable Magna Carta of Western Europe.”

¹⁰⁵ Ryssdal (*supra* note 48) at p. 22.

¹⁰⁶ See *supra* text accompanying note 10.

as, almost imperceptibly, matters which back in the 1970s had been assumed to be (in practical terms) the preserve of national sovereignty and politics (by virtue of the generous MoA Strasbourg conceded to the States) started to come more and more within the Court's remit, and so were more noticeably under the control of Strasbourg law.

Against that backdrop – which some, today, may label “aggrandisement” – Mackay was, in effect, insisting that Strasbourg had to operate in a hard self-restraint way. He did so based on certain questions he raised relevant to the legitimacy of Strasbourg's role as it had developed by the 1990s. How could it justify the power absorbed by it, and the corresponding shift from national sovereignty to Convention law associated with the scalpel-effect surgery Ryssdal referred to? States had not actively consented to this, or, for that matter, the earlier transformation of the Convention into the type of European Bill of Rights it had become by the 1970s. This also accounted for Mackay's warning that State consent could be lost if Strasbourg did not operate the MoA and apply subsidiarity to correspond with self-restraint. In turn this underlines why Strasbourg's defenders needed (and still need) valid responses to the arguments brought up, rather than dismissing them as an unpatriotic swipe at the Court.

So what might the responses be?

3. “Constitutional Legitimacy” (Authority and Consent)

The Convention's “living-instrument” quality and its status (self-proclaimed, but unexplained, by the Court) as a “constitutional instrument of European public order”¹⁰⁷ are often identified as catch-all responses to the types of issues Mackay identified. However, the “living-instrument” doctrine offers an explanation for certain modern-day *interpretations* of Convention rights. I do not think it accounts for the veritable transformation in the *overall role* performed by the Convention – the shift in “categories of legal thought”, and the scalpel going from “scraping the surface” to “deep incisions” – that took place from the 1950s to the 1990s, and the legitimacy of the corresponding reduction of the overall MoA States benefitted from.

Obviously what has just been said is not an argument against evolutive interpretation, rather it underlines why that interpretive technique must be employed cautiously, as it was by Strasbourg up to the 1990s. Its approach tended to reflect incremental advancements of Convention law, with a reliance on the need for European consensus, failing which the matter was left for the States' MoA (such that it could be said that the judge developed the law by an objective reference point, and not according to what s/he personally preferred).¹⁰⁸ One may speculate that that was significant precisely as difficult questions could be asked of aspects of Strasbourg's functioning, as Mackay had. In particular, how could the exercise of Strasbourg's power under a type of quasi-constitutional instrument be justified when that power was derived from the Court's own interpretation of the Convention, under a regime which lacked express State consent to the same, and which permitted no democratic override?

To be clear, however, these points highlighted the need for caution on Strasbourg's part. They did not endorse the full extent of Mackay's arguments. Why?

Firstly, let us consider the point about lack of State consent to Strasbourg's greater role (an important strand to Mackay's argument, arguing that the Court should stick to ‘obvious’ breaches, as that was within its agreed remit). Protocol No. 11 – agreed upon and opened for signature in 1994, and entering into force in 1998 – had considerable relevance here. It did not concern the substance of Convention rights, being mainly directed to improving the Strasbourg control machinery. Even so, this fundamental reform of the system of control, making it fully judicial, occurred at the instance

of States enlightened by an understanding of what it could achieve. This was undoubtedly so for the UK, which proceeded to ratify Protocol No. 11. Importantly, however, it insisted that a record be made of its concerns about the Court's lack of accountability to elected governments in Parliamentary democracies.¹⁰⁹

Arguably, then, Protocol No. 11 amounted to State recognition of – one might say “acquiescence” (or *consent* to) – how Strasbourg was operating by the 1990s (its “quasi-constitutional” identity, compared with its original ambivalence), and a collective desire to preserve the system's effectiveness to operate in that way.

This “Protocol No. 11 consent” point forms part of a response to sweeping accusations of Strasbourg aggrandisement. It is important given that, in effect, Mackay argued not so much why decisions of national authorities deserved Strasbourg's respect (other than their purported democratic legitimacy), but that the latter was not really entitled to upset them. Based on this point we may say that, from a legitimacy perspective, it was not the case that Strasbourg *had* to adopt a crude irrationality review approach out of deference to the democratic legitimacy of the national authorities of States which had not agreed to this rise in its influence.

Then again, of course, that did not mean that Strasbourg could ignore considerations relevant to democratic legitimacy. The issue became, *when* it should show deference, based on claims such as democratic legitimacy and constitutional competence.

When seen that way a further fault with Mackay's argument became evident. The UK was arguing for more emphasis on subsidiarity, but had not incorporated the Convention. As such it was, in effect, arguing for judicial self-restraint – deference to national authorities – without accepting that the latter had a duty to take principled decisions based on Convention rights. That this was not a very credible position was implied by President Ryssdal in a lecture delivered in London in 1995, arguing that the Convention system's operation would be more effective if national judicial authorities were equipped “to determine issues directly on the basis of the criteria stated in the Convention”. Strasbourg case-law, he noted, recognised that those authorities were “in a better position to make certain assessments”; if they did so “having direct regard to the Convention”, Ryssdal argued, it would be “that much easier for the Court to exercise the self-restraint implicit in the system”.¹¹⁰ Precisely the same (“self-restraint”) message had been made in an essay on subsidiarity authored by Herbert Petzold (Deputy Registrar (1975-1995) and Registrar (1995-1998)).¹¹¹ He referred to a time when, post-incorporation, national authorities assumed the responsibility to apply the Convention themselves, such that they could “intensify the dialogue”¹¹² with Strasbourg on the protection of human rights.

¹⁰⁷ *Loizidou v. Turkey* (Preliminary Objections) [GC], no. 15318/89, 23 March 1995, Series A 310, § 75 = 16 HRLJ 15 at p. 24 (1995).

¹⁰⁸ See Mahoney in HRLJ 1990 (*supra* note 42) at pp. 60-66 and p. 87. Cf. the joint dissent in *Hirst v. UK* (No. 2), no. 74025/016, October 2005, ECHR 2005-IX = 30 HRLJ 204 at pp. 217-219 (2009-2010).

¹⁰⁹ See the coverage in: Bates-Evolution (*supra* note 4) at pp. 458-460.

¹¹⁰ Ryssdal (*supra* note 48) at p. 26.

¹¹¹ Herbert Petzold, “The Convention and the principle of subsidiarity” (in: Macdonald, *supra* note 51) at pp. 41-62. See *infra* text accompanying note 132 (dialogue).

¹¹² *Ibid.* at p. 62.

4. The “New” Court’s Legitimate Powerbase?

Taking stock, we may make the following observations about the UK’s arguments, as presented in the mid-1990s.

In rebuttal of the UK arguments, Protocol No. 11 was significant for it affirmed the ‘constitutional legitimacy’ of Strasbourg’s jurisdiction to disagree with national perspectives, beyond obvious cases. It provided an element of collective State consent regarding how the Court’s influence had evolved to the 1990s, compared with the more deferential era of, say, the “*Belgian Linguistics cases*”. Moreover, other aspects of the UK’s arguments, directed as they were to emphasising subsidiarity, were undercut by the UK’s failure to incorporate the Convention.

Even so, three important qualifications need to be added.

Firstly, Protocol No. 11 was not a license for Strasbourg to practice a judicial-activism vision for the ECHR. It did not endorse it as a “pragmatic gradualist project”.¹¹³ On the contrary, the jurisprudence contemporary to Protocol No. 11, in the 1990s, predominantly reflected judicial self-restraint, hence the defence of the *status quo* as articulated by figures such as Mahoney, Ryssdal and Matscher. In terms of Mackay’s arguments, this would be the benchmark (one might say the future “source of [Strasbourg’s] authority”) that the States were consenting to via Protocol No. 11.

Secondly, the shift to incorporation of the Convention in the 1990s (including the UK via the Human Rights Act 1998) did not give a green light to judicial activism either. On the contrary, it equipped Strasbourg to more effectively exercise the self-restraint it was practising in the 1990s, based on subsidiarity (in accordance with the perspective advanced by Ryssdal and Petzold).

Accordingly, and thirdly, one could say that, into the 2000s, the onus was on the Court to maintain a self-restraint approach, and to elaborate a new MoA jurisprudence to reflect responsible incorporation, where it existed.

Indeed, post-incorporation aspects of Mackay’s arguments about consent and the source of the Court’s (post Protocol No. 11) authority *potentially* acquired a new relevance. That is, if the national legal system applied Convention rights in a reasonable way, its claim for due respect from Strasbourg expressed via a MoA and subsidiarity, was enhanced. In such circumstances, and if, indeed, the matter was one that could be reasonably argued both ways, questions might arise about Strasbourg’s legitimate entitlement to disagree with the national view. Mackay’s warnings about placing in jeopardy the States’ unquestioned consent to Strasbourg’s jurisdiction could then become very real.

With that in mind let us turn our attention to contemporary times. Did Lord Hoffmann’s now infamous attack on Strasbourg in his 2009 lecture,¹¹⁴ and certain (not all) events that have followed since, evidence Mackay’s warning starting to come to fruition?

To be clear, Hoffmann’s analysis was sweeping and exaggerated, notably since he insisted that the Court had aggrandized its jurisdiction, in ignorance of the “Protocol 11 consent” point.¹¹⁵ That aside, it was argued that Convention law had grown too big (there was “virtually no aspect of our legal system”¹¹⁶ not touched by Strasbourg, Hoffmann argued) and that, in a post-incorporation context, Strasbourg was acting too much like a Supreme Court for Europe, arrogantly dictating to national authorities. He attacked its activist desire (he claimed) to set uniform laws for European democracies who had greater constitutional legitimacy to resolve the issues at stake.¹¹⁷ As such he criticised its failure to apply the MoA on a principled basis, with Strasbourg judges arrogantly assuming that they had competence to decide any issue of national law, failing to address the MoA doctrine from the perspective of Strasbourg’s “constitutional competence”.¹¹⁸

The years that followed saw sustained criticism of the Court. It reacted by offering a clearer conceptual analysis

of the MoA, articulating what was, by and large, a judicial self-restraint approach. Judge Spano spoke of an “age of subsidiarity” and of a Court “in the process of developing a more robust and coherent concept of subsidiarity” and “attempting to reformulate the conditions for allocating deference to the Member States”.¹¹⁹

V. Brighton and Protocol No. 15: The MoA and Subsidiarity Come of Age?

As for academic analyses of the MoA after 1998, given space constraints it must suffice to say that the doctrine has been in ever greater focus, evidenced in many detailed, penetrating and thought-provoking accounts.¹²⁰ It must be stated, however, that careful reviews of the MoA case-law up to and around 2011-12 were trenchant in their criticism of Strasbourg’s varying use of the doctrine.¹²¹ One former judge¹²² suggested that it was incapable of being distilled into a coherent theory, referring to Strasbourg’s highly inconsistent application of it. A damning critique published in 2011 referred to a jurisprudence that had built “a judicial environment akin to a legal realist paradise where judges can decide cases on whatever preferences they have”.¹²³

It should not be surprising then that the Court’s employment of the MoA has come into question in recent years.¹²⁴ Does the legal paradise enable critics to identify cases of (what they see as) inappropriate application of the MoA, and Strasbourg’s defenders to respond with their own examples in rebuttal? In what follows I address the criticism, and Strasbourg’s reaction to it, during the next significant phase in the MoA’s Strasbourg career: that associated with the post-Interlaken reform process (i.e. after 2009-2010).

Initiated by President Costa, part of the long-term strategy of this reform phase was to save the Court from its crippling caseload by placing emphasis on “shared responsibility” for human rights protection, and, so, the fulfilment by the then 47 Convention States of their part of the subsidiarity equation, i.e. effective domestic application of the Convention, to prevent so many basic cases going to Strasbourg. This opened up the opportunity for certain States, led by the UK, to argue that Strasbourg met what they saw as its part of the “shared responsibility” agenda, i.e. it should act as a safeguard, operating only when national authorities had not already applied the Convention, or when further guidance was needed on what was required.

¹¹³ Cf. Macdonald (1993), *supra* note 51 at p. 123.

¹¹⁴ Leonard Hoffmann, “The Universality of Human Rights”, *125 Law Quarterly Review* (2009) 416.

¹¹⁵ See *supra* text accompanying note 109 and following.

¹¹⁶ Leonard Hoffmann (*supra* note 114) at p. 430.

¹¹⁷ *Ibid.* p. 424.

¹¹⁸ *Ibid.* p. 431.

¹¹⁹ Robert Spano, “Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity”, 14 HRLR (2014) 487-502 at p. 497.

¹²⁰ Mention should be made of George Letsas, *A Theory of Interpretation of the ECHR*, Oxford, OUP, 2007; and Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford, OUP, 2012.

¹²¹ See Jan Kratochvíl, “The inflation of the margin of appreciation by the European Court of Human Rights”, 29(3) NQHR (2011) 324-357.

¹²² David Thór Björgvinsson, “The Role of Judges of the ECtHR as Guardians of Fundamental Rights of the Individual”, iCourts Working Paper Series, No. 23, 2015 at p. 19. Thór Björgvinsson was “Icelandic” Judge, 2004-2013.

¹²³ Kratochvíl (*supra* note 121) at p. 352.

¹²⁴ The Brighton Declaration of 2012 [High Level Conference on the Future of the European Court of Human Rights, 19/20 April 2012] called for consistent application of the MoA, see § 12(a); see also §§ 12(c)(ii), 23, 24 and 25(c); full text in 32 HRLJ 226 (2012).

1. The British-Led Legitimacy Challenge

One can speculate what gave that argument sufficient force to culminate in relevant aspects of the Brighton Declaration of 2012, and Protocol No. 15. One aspect is clear: the period from 2009-2010 onwards has seen an unparalleled level of criticism directed at Strasbourg. Certainly the UK has been the most vocal State critic,¹²⁵ but it has not been the only original Convention signatory to question aspects of the Court's functioning.¹²⁶ In that respect the context was different to the UK's lone attempts to curtail Strasbourg in 1996.

It was different too in that, to an unprecedented extent, *some* academics and *certain* senior national judges¹²⁷ became critical of aspects of the Court's activity after the late 2000s. Strikingly, the argument from these natural allies of Strasbourg was that it was not always exercising a self-restraint vision of the ECHR.

Criticism from UK judges stood out, but was not unique. On the whole it was more balanced and diplomatic than Lord Hoffmann's 2009 attack,¹²⁸ as it was usually tempered by clear overall support for the Convention and its achievements. Even so there was a consistent (mild) reproaching of Strasbourg for, in *certain* cases, being too ready to ignore subsidiarity, and override a reasonable national view by narrowing the MoA.¹²⁹

To be clear, then, the vast majority of this criticism was nuanced. The appropriateness of that was demonstrated by interventions from certain Strasbourg insiders, such as that from Judge Bratza ("British" Judge 1998-2012; President of the Court 2011-2012.) who provided a compelling account of how the decisions reached by UK courts had been treated with great respect at Strasbourg, in accordance with the subsidiarity principle.¹³⁰ Moreover, Strasbourg took on board the criticisms made of it, as is discussed further below.¹³¹ For example, after 2009-2010 there has been a very notable emphasis on dialogue between European and domestic judges,¹³² something the Brighton Declaration of 2012 encouraged.¹³³ Strasbourg case-law emphasised its receptivity to the notion that national courts could enter into a dialogue with it in order to credibly demonstrate the latter were better placed to understand the impact of Convention rights.

As such, the relevant question was what, if anything, was required to accommodate the measured criticism directed at Strasbourg. A careful, balanced and unemotional perspective, and response, was required.

It was certainly not provided by the Court's opponents, including some UK politicians and a vitriolic tabloid press. Anti-Strasbourg sentiment in the UK was exploited based on unpopular decisions (often immigration-related) to suggest that the whole Convention system was in disrepute, no credit being given for Strasbourg's remarkable achievements over the decades. Doubtless these opponents were emboldened by the domestic judges' critique; a veneer of legal credibility was provided to the anti-Strasbourg cause. A caricature of Strasbourg was drawn up, one of a micro manager constantly overturning decisions reasonably made at the domestic level, and which needed to be reined in, if not dismantled.

Given the (respectable) national judicial critique, the UK Prime Minister was in a credible position to complain (in 2012) that: "at times it has felt to us in national governments that the 'margin of appreciation'... has shrunk and that not enough account is being taken of democratic decisions by national parliaments".¹³⁴ This followed an earlier announcement from the UK Attorney General, Dominic Grieve, that, under the UK's Chairmanship of the Committee of Ministers over 2011-2012, Convention reform would in part be directed toward ensuring that subsidiarity would be "the guiding principle".¹³⁵ Strasbourg should

"afford Member States a wide margin of appreciation where national parliaments have implemented Convention rights and where national courts have properly assessed the compatibility of that implementation with the Convention".

Grieve recognised that this was often what the Court did, citing an extract from *Greens and M.T. v. UK*¹³⁶ as emblematic of what the Court should be doing.

¹²⁵ For an account of strained relationship between the UK and Strasbourg since 2009-2010, see Ed Bates, "The United Kingdom and Strasbourg: A strained relationship – the long view", in: Katja Ziegler et al. (eds.), *The UK and European Human Rights. A Strained Relationship?*, Oxford, Hart, 2015.

¹²⁶ On the criticisms, see Tom Zwart, "More human rights than Court", in: *The European Court of Human Rights and its Discontents*, Cheltenham, Edward Elgar, 2013, 71-95 at pp. 72-78; and Patricia Popelier, Sarah Lambrecht, Koen Lemmens (eds.), *Criticism of the European Court of Human Rights: Shifting the Convention System*, Antwerp, Intersentia, 2016, especially chap. 19, with reference to the UK, France, The Netherlands and Switzerland, in particular.

The Vice-President of the Venice Commission (Jan Erik Helgesen) compared the situation in 2011 with earlier decades, fearing that "we have left the governments behind", and that the expansive dynamism of international human rights law had "created some kind of a backfire effect", resulting in "a lack of trust between many governments and the international supervisory bodies". He was referring to international human rights law generally, but also to the Convention: Jan Helgesen, "What are the limits to the evolutive interpretation of the Convention?", 31 HRLJ 275-281 at p. 279 (2011).

¹²⁷ See analysis by former President Wildhaber, in Luzius Wildhaber, "Recent criticism of the European Court of Human Rights", in: Gerhard Hafner et al. (eds.), *Völkerrecht und die Dynamik der Menschenrechte: liber amicorum Wolfram Karl*, Wien, Facultas, 2012, 160-172 at p. 163, citing examples from Germany, Austria, Belgium and the UK.

¹²⁸ Lord Hoffmann (*supra* note 114), and see Bates (*supra* note 125) at p. 61 note 142 for details of other critical voices (Lord Sumption, Lord Justice and Laws LJ).

¹²⁹ Regarding the MoA see: Mary Arden, in: *Dialogue between Judges*, Council of Europe, 2010, 22-29 at p. 27; Brenda Hale, in: *Dialogue between Judges*, Council of Europe, 2011, 11-18 at pp. 17-18 (could not 'pretend that we have not sometimes been deeply troubled by an apparent narrowing of the margin'); and Lord Phillips, "European Human Rights – A Force for Good or a Threat to Democracy?", King's College London (17 June 2014) at p. 7 ('insufficient margin of appreciation'; hoping Court will 'pay regard' to Protocol No. 15), also p. 13.

¹³⁰ Nicolas Bratza, "The Relationship between the UK Courts and Strasbourg", 5 EHRLR (2011) 505-512. See also Jean-Paul Costa, "On the Legitimacy of the European Court of Human Rights' judgments", 7 *European Constitutional Law Review* (2011) 173-182.

¹³¹ *Infra* text accompanying notes 151-172.

¹³² Cf. Judge Bratza's opinion in *Al-Khawaja v. UK*, no. 26766/05, 15 December 2011, ECHR 2011. Jean-Paul Costa (relationship) *supra* note 3; Paul Mahoney, "The relationship between the Strasbourg Court and the national courts: As seen from Strasbourg", in: Ziegler (*supra* note 125) at p. 21; and D. Spielmann, "Whither Judicial Dialogue" (12 October 2015), (http://www.echr.coe.int/Documents/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf).

¹³³ Brighton Declaration (*supra* note 124) § 12 (c) and (d).

¹³⁴ See also David Cameron, "Speech on the European Court of Human Rights" (25 January 2012).

¹³⁵ Dominic Grieve, "European Convention on Human Rights: current challenges" (24 October 2011). Since leaving government, Mr Grieve's writing has been supportive of the Court, see, for example, Dominic Grieve QC MP, "Why Human Rights Should Matter to Conservatives", 3 December 2014 (University College London, available at: https://www.ucl.ac.uk/laws/judicial-institute/files/Dominic_Grieve_s_Speech.pdf).

¹³⁶ *Greens and M.T. v. UK*, no. 60041/08, 23 November 2010, ECHR 2010-VI, § 113 = 32 HRLJ 238 at p. 249 (2009-2010).

However, he maintained that “the Court does not always follow its own advice”, as with, he maintained, its stance on the earlier prisoner voting case (namely in *Hirst v. UK*).¹³⁷

It was against this overall, highly complex (and politically-charged) backdrop that a leaked British draft of the Brighton Declaration¹³⁸ made proposals regarding Strasbourg’s judicial function. It suggested an adjustment to the admissibility threshold (on condition that the Convention had received reasonable application domestically).¹³⁹ With some echoes of the 1996 UK Memorandum, the leaked draft also spoke of States benefitting from a “considerable margin of appreciation”, to reflect that “national authorities are in principle best placed to apply the Convention rights in the national context”.¹⁴⁰ It stated that the MoA implied that it was “the responsibility of democratically-elected national parliaments to decide how to implement the Convention in reasoned judgments”. Strasbourg’s role was to “review decisions taken by national authorities to ensure that they are within the margin of appreciation”.¹⁴¹

2. Brighton 2012 and Protocol No. 15

Commenting on the final version of the Brighton Declaration, Derek Walton, (UK) Chair of the Steering Committee on Human Rights, stated that its focus on subsidiarity was inspired by the caseload challenge (which readers will be familiar with), and that of problems associated with the “perceived legitimacy” of the Court’s operation.¹⁴² He observed that, “whether or not one accept[ed] the validity of the criticisms” (listed as “democratic legitimacy”; “national sovereignty”; “judicial activism”; and the selection of the judiciary), it was appropriate for a declaration on safeguarding Strasbourg’s longer-term future to help “restore confidence in the Convention system more generally”.¹⁴³ The principle of subsidiarity, which ran through the Brighton Declaration, entailed that, “as States do more to implement the Convention effectively at the national level, the Court should intervene less frequently”.¹⁴⁴ Thus, the Brighton Declaration called for a reinforcement of subsidiarity at the national level. It exhorted States to pay full regard to the importance of the Convention generally, especially in parliamentary and judicial contexts, and with respect to execution of judgments.

As for Strasbourg’s role,¹⁴⁵ the final version of the Brighton Declaration asked the Court to “give great prominence to”, and “apply consistently” the MoA doctrine and the principle of subsidiarity.¹⁴⁶ It was agreed that, for “reasons of transparency and accessibility”, “a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court’s case-law should be included in the Preamble to the Convention”.¹⁴⁷

The amendment Protocol No. 15 proposes is that States, “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”.¹⁴⁸ As such, the Protocol does not purport to interfere with the Court’s autonomy as regards the operation of the MoA.¹⁴⁹ As a Court “Background Paper” puts it, the MoA’s “character as a jurisprudential construct” will not be “fundamentally alter[ed]”. That said, it added, “unquestionably the Contracting States wished to send a strong message to the Court”.¹⁵⁰

3. “Age of Subsidiarity”

As to that message, I suggest that it may be seen from the perspective of how, prior to Brighton, and since, Strasbourg had been signalling its recognition of the measured national, judicial criticism that was being levelled against

it. Alongside the formal reform process, culminating in Protocol No. 15, there seemed to be an unofficial dialogue between Strasbourg and its critics. Arguably this forms an essential context to Protocol No. 15 and the “message” behind the otherwise neutral tone of the envisaged new Preamble.

As to this unofficial dialogue, take, for example, some of the extra-judicial responses to Lord Hoffmann’s lecture. Writing in 2011, i.e. before Brighton, Michael O’Boyle,¹⁵¹ the Court’s Deputy Registrar, responded, contesting the sweeping nature of the criticisms. However, he recognised (a) that they amounted to a “reality check”¹⁵² requiring Strasbourg to focus on its central objectives,

¹³⁷ *Hirst v. UK* (*supra* note 108).

¹³⁸ See United Kingdom, “Draft Brighton declaration on the future of the European Court of Human Rights” (23 February 2012) available at <https://adam1cor.files.wordpress.com/2012/02/2012dd220e.pdf>

¹³⁹ *Ibid.* (leaked draft) § 23(c), which was not adopted in the final version. As regards admissibility, see the important clarification at point 15.d of the (final version) Brighton Declaration (*supra* note 124).

¹⁴⁰ *Ibid.* at § 17.

¹⁴¹ *Ibid.* President Bratza expressed unease that governments could “in some way dictate to the Court how its case-law should evolve or how it should carry out the judicial functions conferred on it”, Nicolas Bratza, “High Level Conference, Brighton 18-20 April 2012: Speech” at p. 2, and see at pp. 5-6.

¹⁴² See Derek Walton, “Subsidiarity and the Brighton Declaration”, in: A. Seibert-Fohr and M. E. Villiger (eds.), *Judgments of the European Court of Human Rights: Effects and Implementation*, Baden-Baden, Nomos, 2014, 193-206 at p. 195.

¹⁴³ *Ibid.* at p. 195.

¹⁴⁴ *Ibid.* at p. 196. For an illuminating study of subsidiarity in contemporary case-law, see Alastair Mowbray, “Subsidiarity and the European Convention on Human Rights”, 15 HRLR (2015) 313-341.

¹⁴⁵ See also Andreas Follesdal, “Squaring the Circle at the Battle of Brighton”, in: Oddný Mjöll Arnardóttir and Antoine Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection*, London, Routledge, 2016.

¹⁴⁶ Brighton Declaration (*supra* note 124), § 12(a). See also §§ B 11, B 12 (b), and (d) and 25(c). See also High Level Conference on the Implementation of the European Convention on Human Rights, “Brussels Declaration” (27 March 2015), (inviting the Court to “remain vigilant in upholding the States Parties’ margin of appreciation”, para. 7 = 35 HRLJ 277 (2015)).

¹⁴⁷ § 12(b), emphasis added.

¹⁴⁸ *Supra* note 2.

¹⁴⁹ The Court’s official “Opinion” on Protocol No. 15 spoke of it “affirm[ing] the pre-eminent role of the Court in protecting human rights in Europe”, (*Opinion of the Court on Draft Protocol No. 15 to the ECHR* (6 February 2013) § 3). See also Spielmann, *supra* note 10 (Whither) at pp. 56-59 (‘clearly not the intention of the High Contracting Parties to “legislate” (and in doing so control) the margin of appreciation’ at p. 59). On Protocol No. 15, see Noreen O’Meara, “Reforming the European Court of Human Rights: The impacts of Protocols 15 and 16 to the ECHR”, in: Ziegler, *supra* note 125 at p. 71; Nikos Vogiatzis, “When ‘reform’ meets ‘judicial restraint’: Protocol 15 amending the ECHR”, 66 *Northern Ireland Legal Quarterly* (2015) 127-149. On Protocol No. 15, subsidiarity and the MoA, see the various contributions in *Dialogue between Judges 2015*: (Council of Europe, 2015).

¹⁵⁰ European Court of Human Rights, “Subsidiarity: a two-sided coin? Background Paper” (30 January 2015) at p. 6. See also Costa (*supra* note 3), and 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?”, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 13 December 2013 (new Preamble no “mere rhetorical flourish, or form of window-dressing”, at p. 8).

¹⁵¹ Michael O’Boyle, “The legitimacy of Strasbourg review: Time for a reality check?”, in: *Mélanges Costa* (*supra* note 1) at pp. 489-498.

¹⁵² Hence the title of his paper, *ibid.*

and (b) the importance of retaining the States' confidence in the system, which required the Court to "strive for a better balance between judicial self-restraint and judicial activism in its decision-making".¹⁵³ Strasbourg had received a reminder that interpretation of the Convention had to follow "an orderly approach", in case there be a "friction between the national and the international spheres", and thus "a crisis of confidence that would undermine the entire system".¹⁵⁴ Judges had to be conscious that they were

"not acting as members of a constitutional court with the latitude of vision that that entails but as judges of an international court subject to a particular philosophy of legal interpretation that has been well articulated in many of the leading judgments of the Court and accepted by many generations of judges".¹⁵⁵

As O'Boyle put it, "judicial self-restraint and knowledge of the proper boundaries to be respected by an international court [were] both inherent elements in the rationale of the margin of appreciation".¹⁵⁶

After Brighton Judge Spano¹⁵⁷ provided his response to Lord Hoffmann (and other, subsequent, criticism from certain UK judges). Coining the "age of subsidiarity" phrase, his argument was that Strasbourg was adopting a jurisprudential response to the legitimacy critique by developing its approach to the MoA and subsidiarity. This was not a radical departure in approach but a "further refinement or reformulation of pre-existing doctrines, influenced by recent declarations of the Member States".¹⁵⁸ As the "Icelandic" Judge demonstrated, the post-2011 jurisprudence reflects this. Here reference may be made, by way of example, to *S.A.S. v. France*,¹⁵⁹ which recognised that national authorities had "direct democratic legitimisation" and are "in principle better placed than an international court to evaluate local needs and conditions".¹⁶⁰ The Grand Chamber was explicit that "[i]n matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight".¹⁶¹

Meanwhile, successive speeches delivered by the Court's President highlighted the significance of such cases in terms of their meeting the criticisms made of Strasbourg. For example, former President Spielmann¹⁶² referred to the *Animal Defenders International* case¹⁶³ as evidence that

"where [national] legislators carefully weigh up the relevant human rights aspects of a piece of legislation, and seek to achieve a reasonable accommodation between individual rights and other aspects of public interest, the Court has shown itself inclined to accept the balance that has been struck".¹⁶⁴

Spielmann also highlighted "recent case-law" involving the MoA as revealing "a trend towards judicial self-restraint when it is clear that the superior national courts have, at the domestic level, examined the case in light of the relevant Convention provision and case-law principles".¹⁶⁵ This has been continuously confirmed in cases,¹⁶⁶ the approach being that, provided the domestic court has correctly, and carefully, applied the relevant principles of Convention law, and responsibly undertaken proportionality analysis, Strasbourg should require "strong reasons" to substitute its view for that of the national court.¹⁶⁷

Spielmann¹⁶⁸ commented that this demonstrated "the systemic objective" of the MoA, i.e. "devolv[ing] to the domestic level a measure of responsibility for ensuring observance of human rights".¹⁶⁹ This characterised the MoA not as a "concession" to national authorities, but as an "incentive" to them to responsibly apply the Convention and its values, leaving Strasbourg to "supervise the review conducted by the domestic courts".¹⁷⁰ This was in keeping with the future imagined at Brighton, with "the centre of gravity of the Convention system... lower than it is today, closer in time and in space to all Europeans, and to all those under the protection of the Convention", provided,

of course, the Convention was faithfully applied at national level.¹⁷¹ Spielmann argued that the possibilities for this approach were opened up by national legal systems now

¹⁵³ *Ibid.* at p. 494.

¹⁵⁴ *Ibid.* at p. 495.

¹⁵⁵ *Ibid.* at p. 496.

¹⁵⁶ *Ibid.* at p. 495.

¹⁵⁷ Spano, *supra* note 119. See also Robert Spano, "The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect?", 33 NJHR (2015) 1-10.

¹⁵⁸ Spano, *supra* note 119, at p. 491. For comments by President Guido Raimondi see "Speech to the Supreme Court of The Netherlands, 18 November 2016" at p. 2, available at: http://www.echr.coe.int/Documents/Speech_20161118_Raimondi_Supreme_Court_Netherlands_ENG.pdf

¹⁵⁹ *S.A.S. v. France* (*supra* note 89).

¹⁶⁰ See also, more recently, *Dubská and Krejzová v. Czech Republic* [GC], 28859/11, 15 November 2016, (the Grand Chamber "reiterates the fundamentally subsidiary role of the Convention system and recognises that the national authorities have direct democratic legitimisation in so far as the protection of human rights is concerned", § 175 [emphasis added]; see also § 184, but also the joint dissent on approach to MoA).

¹⁶¹ To be clear, this was not the first time the Court had used this language: see *Hatton and Others v. UK* [GC], no. 36022/97, 8 July 2003 § 97.

¹⁶² See also, Dean Spielmann, *supra* note 10 (Whither) and *idem*, *supra* note 150 (Allowing the Right Margin). See also Paul Mahoney, "The Changing Face of the European Court of Human Rights: Its Face in 2015?", 1 *Queen Mary HRLR* (2014) 4-17 at pp. 9-10.

¹⁶³ *Animal Defenders International v. UK* [GC], no. 48876/08, 22 April 2013, ECHR 2013-II; see especially §§ 108 and 115 (the no violation finding was by 9 votes to 8).

¹⁶⁴ Dean Spielmann, "Speech at Yerevan Pan-European Conference" (3 July 2013) p. 3. See also, for example, *Shindler v. UK*, no. 19840/09, 7 May 2013, §§ 117-118. On Strasbourg's interaction with Parliaments, see Murray Hunt (ed.), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, OUP, 2015; Matthew Saul, "The European Court of Human Rights' margin of appreciation and the processes of national parliaments", 15 *HRLR* (2015) 745-774; and Alice Donald and Philip Leach, *Parliaments and the European Court of Human Rights*, Oxford, OUP, 2016.

¹⁶⁵ D. Spielmann, *ibid.* (Yerevan) p. 3, citing *von Hannover No. 2 v. Germany* [GC], no. 40660/08, 7 December 2015, ECHR 2012-I. See Raimondi, *supra* note 158.

¹⁶⁶ Examples include, *MGN Limited v. UK*, no. 39401/04, 18 January 2011, §§ 150 and 155; *von Hannover v. Germany* (No. 2), *supra* note 165, § 107; *Fernández Martínez v. Spain* [GC], no. 56030/07, 12 June 2014, ECHR 2014-II § 151; *McDonald v. UK*, no. 4241/12, 20 May 2014, §§ 54-58; *Lillo-Stenberg and Sæther v. Norway*, no. 13258/09, 16 January 2014, § 44. See, further, Geir Ulfstein, "The European Court of Human Rights and national courts"; and Basak Cali, "From flexible to variable standards of judicial review: The responsible domestic courts doctrine", both *supra* in note 145 (*Shifting Centres*).

¹⁶⁷ See Raimondi (*supra* note 158) at pp. 2-3, citing this case-law trend. However, he noted that Strasbourg's final assessment "will not be totally free of controversy", it being "not uncommon for judges at Strasbourg to reach different conclusions on exactly this issue"; and citing *Jeunesse v. Netherlands* [GC], no. 12738/10, 3 October 2014, see joint dissenting opinion of Judges Villiger, Mahoney and Silvis at § 10.

¹⁶⁸ See Spielmann (Whither), *supra* note 10 at p. 63, with an overview of case-law at pp. 59-63.

¹⁶⁹ Although the question arises, what if the respondent State does not offer cogent reasons, or evidence of its responsible approach? In that connection, can there be a MoA? See joint dissenting opinion of Judges Rozakis, Spielmann and Jebens in *Schalk and Kopf v. Austria* [GC], no. 30141/04, 24 June 2010, ECHR 2010-IV, at § 8. But this does not justify activist standard-setting.

¹⁷⁰ Spielmann (*supra* note 10) at p. 63.

¹⁷¹ Spielmann (*supra* note 10) at p. 65. See also Mahoney (*supra* note 162) at p. 10 (in the circumstances identified deference was "normal and not... backtracking or as an abdication of its responsibility... [but was]... the optimal functioning of shared responsibility").

allowing for the Convention to be directly enforceable in the domestic courts.¹⁷²

4. Has Subsidiarity and the MoA Come of Age?

Standing back, what should we make of this? If Protocol No. 11 saw the “coming of age” of the Convention’s supervision machinery,¹⁷³ do the developments just referred to, and Protocol No. 15, mark the “coming of age” of subsidiarity and the MoA in Convention law?

If the view is that recent case-law merely provides a clearer and more transparent articulation of principles which were always inherent in Convention supervision, the answer may be “no”. Yet that does beg the question, why has it taken so long for Strasbourg to be as explicit as it now is regarding the institutional and constitutional competence that it has in its relationship with national authorities?

Obviously the answer lies with the legitimacy challenge of recent years. Here one could say that Strasbourg has been through a type of rite of passage. Following narratives concerning its (perceived) faltering legitimacy in relation to national democratic bodies, which, it is said, should have more MoA, arguably the type of (loss of) authority and (dwindling) consent issues identified by Mackay’s essay of 20 years ago loomed large.¹⁷⁴ As a result, Strasbourg was required to articulate a more constitutionally legitimate basis for the exercise of its jurisdiction.

What has emerged is a model of Convention supervision that is more explicit as regards the type of subsidiary review approach adopted in the “*Belgian Linguistics cases*” of the late 1960s, but applies it to a contemporary context, to reflect the importance that the law of the ECHR now has, fifty years on. Due deference is not an automatic entitlement based on national sovereignty and democratic legitimacy, as might have been assumed five decades ago, and Mackay sought to argue in 1996. Rather it can be “earned by States demonstrating that the national law is the product of a deliberative process which has conscientiously engaged with all the relevant human rights issues and reached a decision which in substance is defensible in a democracy”,¹⁷⁵ including via proper parliamentary and judicial consideration, as appropriate. The approach strives for “appropriate deference to proper democratic process, thereby encouraging recourse to such process and, at the same time, enhancing the acceptability of the Court’s decisions”.¹⁷⁶ States are incentivised to properly apply Convention standards almost as a condition to their invoking and obtaining the benefits of a MoA.

So, one may say that the “age of subsidiarity” witnesses a maturity in Convention law generally. Strasbourg has had to work hard to defend its authority, but part of its response has been to require national authorities to justify why their positions deserve its respect. This fashions a “shared responsibility”¹⁷⁷ for the protection of human rights, as envisaged (I believe) by figures such as Ryssdal and Petzold in the 1990s.¹⁷⁸

5. The Significance of Protocol No. 15

I argue that the Preamble amendment that Protocol No. 15 envisages (the first ever such amendment) should be seen in the above light and context, even if its references to the MoA and subsidiarity are, on the face of it, “silent” as to their intended meaning. These two concepts are clearly associated with self-restraint and their insertion into the Convention is clearly attributable to the legitimacy challenge and the political (reform) Declarations of recent years. Strasbourg’s response, in terms of its ‘age of subsidiarity’ jurisprudence (accompanied by clear extra-judicial statements as noted above), is, therefore, part of the context to the new Preamble. Governments are entitled to argue that point before the Court, and that Protocol

No. 15 should seal an “age of subsidiary” future trajectory for this aspect of Convention supervision.¹⁷⁹

I respectfully submit that Strasbourg judges need to be aware of this, and of the dangers of veering away from this course. This is said, for it remains to be seen whether the approach outlined in the preceding two sub-sections will indeed form the constant jurisprudence of the Court and firmly reflect future “categories of legal thought”. Alternatively will differences and exceptions emerge, such that the case-law becomes so variable that one cannot say that it remains in keeping with the “age-of-subsidiarity” vision articulated above?¹⁸⁰

The temptation to veer will surely be there, but what are the dangers? Here I submit that what has been demonstrated in recent years is how *reasonable* criticism of Strasbourg cannot just be dismissed as unpatriotic “pushback”, and how vulnerable the Court can quickly become if the seed of that criticism falls into a soil keenly fertilised by those looking to yield a crop of national self-interest and anti-European sentiment.

In this difficult environment the Court’s supporters need to be able to come to the Court’s defence. Currently they can say that the States’ collective response to the legitimacy critique (via Protocol No. 15) was not that Strasbourg needed to have hard limitations imposed upon it, but that, rather, a “nudge” toward self-restraint (amendment to the Preamble) was deemed suitable. They can also argue that Strasbourg has demonstrated its ability to take on board reasonable criticism and responsibly adapt, a new “age of subsidiarity” being underway. Here they can cite the case-law noted above, arguing that it reflects a “democracy-enhancing approach”,¹⁸¹ “manifested by the Court’s engagement with empowering Member States to truly ‘bring rights home’”.¹⁸²

In short, the Court’s defenders can say to those governments who have been critical of it – the UK, in particular – that they should take note of this bigger picture, and start doing their bit at a time when the Court needs their full support. By contrast, the case for the Court’s defence will be much harder to make if the perception is that Strasbourg is not adhering to the new arrangements that (it may be strongly argued) Protocol No. 15 envisages.¹⁸³ If so, will Mackay’s 1996 warning haunt the Court? Will “questions... [not] arise about the source

¹⁷² Spielmann, *supra* note 132 (“Whither Judicial Dialogue”) at p. 11.

¹⁷³ See Ryssdal, *supra* note 48.

¹⁷⁴ See *supra* text accompanying note 100.

¹⁷⁵ *Supra* note 164 (Hunt) at p. 472.

¹⁷⁶ *Supra* note 150 (Background Paper) at § 43.

¹⁷⁷ The Court has been keen to emphasise it is “shared responsibility”, not a “shift” in responsibility: “Contribution of the Court to the Brussels Conference” (26 January 2015), at § 3.

¹⁷⁸ See *supra* text accompanying notes 110-113.

¹⁷⁹ Cf. comments made by Raimondi, *supra* note 158, at p. 3.

¹⁸⁰ For doubts about the quality and consistency of the case-law, see insightful analysis by Oddný Mjöll Arnardóttir, “Organised Retreat? The Move from ‘Substantive’ to ‘Procedural’ Review in the ECtHR’s Case Law on the Margin of Appreciation”, ESIL Conference Paper. 4/2015, Annual Conference, Oslo, 10-12 September 2015 at pp. 11-23.

¹⁸¹ *Supra* note 119 (Spano) at pp. 497 and 499.

¹⁸² *Ibid.* at p. 491. See also Raimondi (*supra* note 158), at pp. 2-3.

¹⁸³ The UK Parliament’s Joint Committee on Human Rights views Protocol No. 15 as “signifi[ng] a new era in the life of the Convention”, highlighting the Court’s willingness to extend a MoA in cases when the national authorities have already diligently applied the Convention (evidenced in “a significant and growing number of recent cases against the UK”): Joint Committee of Human Rights, “Protocol 15 to the ECHR”, HL Paper 71/ HC 837, 2014, §§ 3.17 and 3.15.

of the authority of the Court to make [what will be seen as activist] judgments", and if so, is there not a risk that "the consent of the member States on which the system rests may be threatened"?¹⁸⁴ Have we been reaching that point for some States?

VI. Conclusion: Future Outlook, and Unresolved Activism/Self-Restraint Tensions?

I have reviewed the MoA's career to the present day. By way of conclusion let us stand back and reflect on matters as they may be seen today, as the Convention progresses into the twenty-first century. Two perspectives may be offered, before a broader point is made, and we look to the future.

Firstly, the Court has now offered much more of a "conceptual framework" for the MoA than before,¹⁸⁵ suitable for an era of "shared responsibility" when States (not all) are applying Convention rights. There is a clearer recognition of Strasbourg self-restraint for explicit constitutional reasons: as the Grand Chamber recently put it, "national authorities have direct democratic legitimation in so far as the protection of human rights is concerned".¹⁸⁶ This is a basis for due (not automatic) deference, when the Convention has been responsibly taken into account, as opposed to a wholesale shift of responsibility. Accordingly, the "age of subsidiarity" jurisprudence is a solid response to Lord Hoffmann's 2009 claim (*supra* note 114) that an omnipotent Strasbourg only offered a MoA to States begrudgingly, based on the former's remoteness from the national context, rather than on a principled understanding of when it would be "constitutionally inappropriate" for Strasbourg to intervene.

If Strasbourg continues in this vein of due deference and the States respond in good faith, recent developments *should* provide foundations for a more durable Convention, at a time, of course, when it is facing other severe challenges.¹⁸⁷ I suggest Strasbourg's approach to the MoA today delivers a response to the type of constitutional legitimacy issues Mackay brought up in 1996 (see *supra* note 94), and much of the legitimacy critique of recent years. It speaks to why the UK should continue to faithfully apply the Convention in domestic law, and be reassured about the Court's operation. Tragically, however, the current (2016) UK government's approach seems to be more antagonistic than constructive.

Secondly, and by contrast, an alternative perspective is that there are reasons to be worried about aspects of the Court's approach as noted above, or that there are dangers with it. It is said that, in reaction to various pressures, the Court is employing the MoA and subsidiarity as part of a pacification strategy, retreating from its true vocation. Former Judge Thór Björgvinsson has contended that

"By increasing its reliance on the margin of appreciation and referring more to the democratic process in the Member States, in other words by beginning to try to appease the Court's most prolific critics, be they political or judicial on a national level, the Court runs the risk of losing its moral capital".¹⁸⁸

When saying this, Thór Björgvinsson had in mind the Convention's status amongst constituencies such as civil society, a sector that had customarily looked to the Court to adopt "an activist approach", a "moral" reading of Convention rights and a "living instrument" stance which traditionally saw Strasbourg have "an active role in the advancement and evolution of human rights in Europe".¹⁸⁹ It was on that basis, Thór Björgvinsson argued, that Strasbourg had built up a "'moral capital' which [was] a major factor in founding its claim to legitimacy", but which was now threatened. His comments were directed to the purported conservatism of cases such as *Scoppola v. Italy* (No. 3),¹⁹⁰ *A, B and C v. Ireland*,¹⁹¹ *S.A.S. v. France*,¹⁹² *RMT*

v. UK,¹⁹³ and *Schalk and Kopf v. Austria*.¹⁹⁴ No doubt others could be added to the list.¹⁹⁵

Thus, it seems that this critique mainly applies to certain cases with a social-policy aspect to them, when the Court is looked to as 'the conscience of Europe' in order to facilitate change. Against that backdrop former Vice-President Tulkens has argued that the envisaged (Protocol No. 15) amendment to the Convention's Preamble is a potentially dangerous interference with the Court's independence.¹⁹⁶

This leads us to the third, broader point, concerning activism and restraint. On the one hand, due deference to national authorities who have responsibly taken the Convention into account corresponds to the subsidiary nature of Strasbourg review. As Mahoney has put it,¹⁹⁷ it allows for a shift in emphasis away from what potentially could be viewed as micro-management to a more general "review of democratic legality and due process", as it has operated at the national level. This fits with the idea that, if the matter is one on which reasonable people can disagree, Strasbourg should defer to the national view, for it is not for it to impose its preferred solution. It is consistent with the "*Belgian Linguistics cases*" notion of the Court not taking the place of national authorities, but acting as a review jurisdiction to check "conformity of [the] measures with the requirements of the Convention" (*supra* note 17).

On the other hand, it is Strasbourg's task to decide what the Convention's "requirements" are; it sets the European human rights boundaries within which States operate, and can have a standard-setting role when doing so. Here there may be times when it falls to Strasbourg to consider whether, on a specific matter, the European boundaries it sets need adjusting, such that the respondent State's national law then falls outside them even if its national authorities have had faithfully applied pre-existing Convention law.

So the third point really brings into play the MoA's place in standard-setting cases and how Strasbourg, as

¹⁸⁴ See *supra* text accompanying note 100.

¹⁸⁵ See *supra* text accompanying note 82.

¹⁸⁶ *Supra* note 160.

¹⁸⁷ Cf. comments made by the Court in: European Court of Human Rights, "Contribution of the Court to the Brussels Conference" (26 January 2015), § 3.

¹⁸⁸ Interview with former Judge Thór Björgvinsson published in: G. Butler, "A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the ECHR", 31 *Utrecht Journal of International and European Law* (2015) 104-111 at p. 110. See also David Thór Björgvinsson, "The Role of Judges of the ECtHR as Guardians of Fundamental Rights of the Individual", iCourts Working Paper Series, No. 23, 2015, and Rui Jon Petter Rui, "The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the ECHR", 31 *Nordic Journal of Human Rights* (2013) 28-54.

¹⁸⁹ *Supra* note 188 (iCourts paper) at p. 12.

¹⁹⁰ No. 126/05, 22 May 2012.

¹⁹¹ *Supra* note 89.

¹⁹² *Ibid.*

¹⁹³ *National Union of Rail, Maritime and Transport Workers v. UK*, no. 31045/10, 8 April 2014, ECHR 2014-II.

¹⁹⁴ *Supra* note 169.

¹⁹⁵ For example, *Lambert and Others v. France* [GC], no. 46043/14, 5 June 2015.

¹⁹⁶ Françoise Tulkens, "La Cour européenne des droits de l'homme et la Déclaration de Brighton. Oublier la réforme et penser l'avenir", 2 (2012) *Cahiers de droit européen* 305-343 at p. 341. As regards objections to the Court deferring to national authorities, rather than independently and autonomously reviewing the case, see, for example, Judge Thór Björgvinsson's partial dissent in *MGN*, *supra* note 166, § 5, and the separate opinion of Judges Tulkens, Thór Björgvinsson, Jočienė, Popović and Vučinić in *Palomo Sanchez v. Spain*, no. 28955/06, 12 September 2011, ECHR 2011-V.

¹⁹⁷ See Mahoney, *supra* note 162 (QMHLR) at p. 10.

authoritative interpreter of the Convention, approaches the matter. Regarding the MoA, it brings into focus its function as “an interpretational tool” that draws the line “between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all countries whatever the variation in traditions and cultures”.¹⁹⁸

Protocol No. 15 does not settle this (*how* the MoA should be used in this “interpretational tool” sense), even if its overall context is that certain States wish to compel Strasbourg to exercise more self-restraint. Thus, how the line-drawing process just referred to should be approached remains for the Court, and my impression is that here much still depends on how the individual judge perceives his or her role.

Inevitably, then, we come back to whether the Convention itself should be viewed through the lens of activism or self-restraint, as noted above.¹⁹⁹ At the risk of over simplification (for the matter may be very finely-balanced in individual cases), it seems there are two different ends of the spectrum that the judge may gravitate to.

At one end is an activist approach that sees “progressive harmonisation of human rights protection”²⁰⁰ as the Convention’s mission, there being less room for the MoA “in the rather limited instances where diversity should prevail over uniformity”.²⁰¹ Accordingly, Strasbourg should be less inclined to follow in the footsteps of national legislatures and courts, *even if* they have had regard to the Convention, for Strasbourg should be able to realise “its aspirational role”,²⁰² and resolve human rights issues “by open reference to the standards of an ideal European democratic society”.²⁰³ Failure to adhere to this may give rise to potential accusations of loss of “moral capital” and abdication of Strasbourg’s role as the “conscience of Europe”.

The alternative view would be that that misconstrues Strasbourg’s role in the first place, which has much more to do with its collective mission. The argument would be that it is within the design of the Convention, and its subsidiary nature, that Strasbourg should necessarily respect healthy diversity, and recognise the ability of democratic societies to adopt varying human rights policies provided they respect core Convention values. Here the key issues were set out by Mahoney in 1998.²⁰⁴ The argument would be that, for cases of due or earned deference, Strasbourg is not abdicating its responsibility,²⁰⁵ but adhering to its appropriate, subsidiary role and function, with the MoA acting as “an important safeguard” (Waldock²⁰⁶) against inappropriate activism. This does not mean that ECHR law will remain static; rather the onus to push forward the boundaries of human rights law for matters touching on social policy lies with the States taking into account the Convention (with Strasbourg coming in at a later stage, presumably via the consensus principle). As to loss of “moral capital”, it could be argued as follows. That that understanding of the Convention was mainly developed from the late 1970s and in the pre-Protocol No. 11 era, when different “categories of legal thought” applied. Today, by contrast, many States apply Convention values directly, and expectations of Strasbourg need to be adjusted accordingly.

Which approach *should* Strasbourg adopt? As I see it, Mahoney’s 1998 article²⁰⁷ still remains a detailed and compelling case for realistic self-restraint. I respectfully submit that it fits with the constitutional legitimacy (authority and consent) reasons for self-restraint, set out in section IV above.

I am not aware of any equivalent writing that has properly explained how the Court has legitimately gained the authority to act in accordance with a judicial activism

model for the Convention. As stated above,²⁰⁸ Protocol No. 11 did not endorse that. It may be argued that it amounted to State consent for a quasi-constitutional court; if so, however, that consent now needs to be seen alongside Protocol No. 15’s messages.

Talk of Strasbourg’s role as the “conscience of Europe” is certainly appealing, but it is ill-defined and potentially very weak if questions are asked as to the source of the authority upon which Strasbourg claims to act, which, if doubted, may result in “the consent of the member States on which the system rests... being threatened” (as Mackay once put it).²⁰⁹ That potential will be great if a Strasbourg judge’s claim to be the “conscience of Europe” is regarded as an entitlement to impose his or her *view* of what democratic Convention values are (as opposed to say an unambiguous European consensus view), in preference to a democratic decision made at the national level. The Convention is not a European constitution and its Court is not a constitutional court.²¹⁰

To be clear, this is not an argument for the Court to kowtow to States; nor is it an argument against human rights. It does not justify current UK hostility to the Court, based on isolated examples of purported judicial activism. It is an (additional) argument for prudent self-restraint, especially when the Convention has been taken into account appropriately in the national setting (although the failure to do so does not warrant activism either). I submit that a self-restraint model helps to maintain the Convention system on secure foundations going forward, for it helps guard against legitimacy challenges that Strasbourg may be very vulnerable to losing, at considerable cost to its authority.

As to the current foundations, these were built up over many years, even before, but especially since Paul Mahoney’s association with the Court began from the 1970s onwards. Forty years on, during his time as a judge, I submit those foundations have been made more secure in an ‘age of subsidiarity’, although, of course, the Convention’s overall situation remains imperilled. Indeed, one wonders what shape the Court will be in forty years from now, as it looks to its centenary.

In order to get to that milestone, I respectfully submit that today’s Strasbourg judges need to be aware of the bigger picture that this account of the MoA’s application and the development of the Convention has sought to convey. It has been inspired by Paul Mahoney’s writing, which, with the unique perspectives he has provided as a Strasbourg insider for over four decades, will repay very careful study by future generations of Strasbourg judges.

¹⁹⁸ *Supra* note 72 (Mahoney in HRLJ 1998) at p. 1.

¹⁹⁹ See *supra* text accompanying note 39 (Wildhaber).

²⁰⁰ Rozakis (*supra* note 1) at p. 537.

²⁰¹ *Ibid.*

²⁰² See *supra* text accompanying note 71 (Macdonald 1993).

²⁰³ *Ibid.*

²⁰⁴ *Supra* note 72 (Mahoney in HRLJ 1998).

²⁰⁵ See *supra* note 162 (Mahoney in QMHLR) at p. 10.

²⁰⁶ *Supra* text accompanying note 35 (Sir Humphrey Waldock).

²⁰⁷ *Supra* note 72 (Mahoney in HRLJ 1998).

²⁰⁸ See *supra* text accompanying note 113 (Macdonald 1993).

²⁰⁹ Lord Mackay (*supra* note 94) at p. 838.

²¹⁰ See *supra* note 151 (O’Boyle). As to a general claim regarding the ‘constitutional nature of the Convention’, see concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016, ECHR 2016, §§ 59-60.