



# Universality or Diversity of Human Rights?<sup>†</sup>

## Strasbourg in the Age of Subsidiarity

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### ABSTRACT

Over the past few years, the European Court of Human Rights has been criticised in several extrajudicial speeches in the United Kingdom. In this article the author, a judge of the Strasbourg Court, analyses some of this criticism, focussing especially on Lord Hoffmann's views in his 2009 farewell lecture, *The Universality of Human Rights*, as well as discussing some more recent speeches by senior British judges. The author argues that, contrary to some of this criticism, the Strasbourg Court has gradually developed its approach in relation to the principle of subsidiarity and the margin of appreciation by adopting a *qualitative, democracy-enhancing approach* in the assessment of domestic decision-making in the field of human rights. In this way, the Court has demonstrated its willingness to defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations. In this connection, the article then discusses briefly the case law of the Strasbourg Court on the exhaustion of domestic remedies in relation to declarations of incompatibility under the Human Rights Act 1998 (UK).

**KEYWORDS:** European Court of on Human Rights, British judiciary, principle of subsidiarity, margin of appreciation, exhaustion of domestic remedies, declarations of incompatibility

### 1. PRELIMINARY REMARKS

The life of a judicial institution, whether national or international, has its highs and lows, at least if measured by approval ratings. In that sense, the existence of the European Court of Human Rights ('the Strasbourg Court' or 'Court') was, in general,

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a relatively happy one during the so-called 'judicial phase',<sup>1</sup> a period from roughly 1975 up until 1998 when the new, permanent Court was established. The Court had over a period of time issued rulings that were highly influential and even transformative for European human rights protection, but at the same time managed to escape a sustained and hostile political environment.<sup>2</sup> Things have changed, at least in some member states of the Council of Europe, especially in the United Kingdom (UK). It is true, that the Court has over the years been criticised for 'judicial activism',<sup>3</sup> but the charges levelled against the Court in the UK over the past two years have been unprecedented,<sup>4</sup> the Court having been accused of, among other things, being the 'international flag-bearer for judge-made fundamental law',<sup>5</sup> lacking in 'democratic legitimacy', 'encroaching on Parliamentary sovereignty' and even 'human rights imperialism'.<sup>6</sup>

I do not, in particular, intend to discuss the criticism related to the Strasbourg Court's lack of *democratic legitimacy* as it has been addressed adequately elsewhere.<sup>7</sup> Suffice it to say that it is misconceived as a matter of principle, as the whole point of judicial review, whether national or international, is to provide a check on democratic decision-making as it may, disproportionately, restrict individual human rights. Courts are, thus, by definition counter-majoritarian. One can therefore ask whether courts attain legitimacy at all on the basis of democratic credentials. However, it should be noted that the judges of the Strasbourg Court are elected by a cross-section of European parliamentarians, including UK Members of Parliament, in a regular session of the Parliamentary Assembly of the Council of Europe.<sup>8</sup> In sum, as Professor George Letsas has correctly stated: '[there] is no objection to be made against the legitimacy of the Strasbourg Court that cannot equally be made against the UK Supreme Court.'<sup>9</sup>

1 Bates, *The Evolution of the European Convention on Human Rights* (Oxford: Oxford University Press, 2010) at 24.

2 Although a phase of criticism occurred in the 1980s and 1990s, see O'Boyle, 'The Legitimacy of Strasbourg Review: Time for a Reality Check?', in *Mélanges en l'honneur de Jean-Paul Costa, LA CONSCIENCE DES DROITS* (Paris: Dalloz, 2011).

3 Bossuyt, *Judicial Activism in Europe: The Case of the European Court of Human Rights*, Brussels, 16 September 2013.

4 Bratza, 'The relationship between the UK Courts and Strasbourg' [2011] *European Human Rights Law Review* 505; Lady Hale, 'Political speech and political equality', in *Freedom of Expression—Essays in Honour of Nicolas Bratza* (Oisterwijk, The Netherlands: Wolf Legal Publishers, 2012) 177, and O'Boyle, 'The Future of the European Court of Human Rights' (2011) 12 *German Law Journal* 1862: 'The Court has never, in its 50-year history, been subject to such a barrage of hostile criticism as that which occurred in the United Kingdom in February 2011.'

5 Lord Sumption, *The Limits of Law*, 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013, at 7.

6 Lord Dyson, *The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is it a Sound One?* University of Essex, 30 January 2014, at 2: 'There are those who believe that the ECtHR is exercising exorbitant jurisdiction and is guilty of human rights imperialism.'

7 See especially, O'Boyle, supra n 4 at 1866–67; as well as Letsas, 'In Defense of the European Court of Human Rights', available at: [www.ucl.ac.uk/human-rights/news/documents/prisoners-vote.pdf](http://www.ucl.ac.uk/human-rights/news/documents/prisoners-vote.pdf) [last accessed 20 May 2014].

8 Costa, *La Cour européenne des droits de l'homme—Des juges pour la liberté* (Paris: Dalloz, 2013) at 154: 'Si on réfléchit à ce mode de désignation, il y beaucoup à en dire. D'abord, il est au moins en partie démocratique, ce qui rend plus relatives les critiques périodiquement adressées à la Cour, de bonne ou de mauvaise foi, pour la prétendue absence de légitimité de ses juges.'

9 Letsas, supra n 7 at 1.

All judges must accept criticism from time to time. It goes with the job. If no politician ever criticised the rulings of the Strasbourg Court, such a state of affairs would be fundamentally at odds with the nature and role of the Court as an institution entrusted with upholding the rule of law, its rulings often limiting the choices available to domestic legislatures and national judges. Having said that, the interesting but, at the same time, somewhat worrying aspect of this criticism in the UK, is that it is expressed not only by politicians, but also by senior members of the judiciary, that is by professional British judges. I for one, as a judge of the Strasbourg Court, take this criticism very seriously, the arguments expressed by my British colleagues meriting considered reflection. It is therefore my intention to take this opportunity to discuss, critically, in the spirit of reasoned debate, the views espoused by some UK judges that have discussed the Strasbourg Court in extrajudicial speeches, focussing in particular on a widely discussed lecture given by Lord Hoffmann in 2009, entitled *The Universality of Human Rights*.<sup>10</sup> It is impossible, of course, to cover all the issues raised. However, there are in general two common and interrelated claims that have been made, which can be summarised as follows.

Firstly, the Strasbourg Court, as an international court, should not second-guess domestic policy choices and judicial rulings in the national application of human rights. This criticism has also been couched in terms of the Court not going far enough in the granting of a margin of appreciation to the Member States.<sup>11</sup>

Secondly, the Court has, when interpreting the European Convention on Human Rights ('the Convention'), strayed far away from giving the text the meaning as it was understood at the time when the Convention was drafted and adopted by the Member States. Here, reference has especially been made to the alleged tendency of the Court to unify rules of criminal procedure in the Member States, to formulate obligations of a positive nature not worded in the text of Convention provisions and to expand the scope of certain rights, especially Article 8 on the right to respect for private and family life.<sup>12</sup>

This is by no means an original topic of discussion,<sup>13</sup> but it remains a very important one. Let me start by saying that these claims about the workings of the Strasbourg Court are not, in any sense, to be considered as wholly without foundation. The Court is however a very complex institution entrusted with an exceedingly

10 Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009.

11 Ibid. at 14.

12 Lord Sumption, *supra* n 5 at 7: 'The text of Article 8 protects private and family life, the privacy of the home and of personal correspondence. This perfectly straightforward provision was originally devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg Court it has been extended to cover the legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, and a great deal else besides. None of these extensions are warranted by the express language of the Convention, nor in most cases are they necessary implications.'

13 See recent contributions by, for example, Spielmann, 'Whither the Margin of Appreciation?', UCL—Current Legal Problems (CLP) Lecture, 20 March 2014, available at: [echr.coe.int](http://echr.coe.int) [last accessed 20 May 2014]; Mahoney, 'The Relationship Between the Strasbourg Court and National Courts', Inner Temple Lecture, 7 October 2013; and by the same author, 'Reconciling Universality of Human Rights and Local Democracy—The European Experience', in Hohmann-Dennhardt, Masucci and Villiger (eds), *Grundrechte und Solidarität. Durchsetzung und Verfahren, Festschrift für Renate Jaeger* (Kehl-am-Rhein: NP Engel, 2010) 147; O'Boyle, 'The Legitimacy of Strasbourg Review: Time for a Reality Check?', and by the same author, 'The Future of the European Court of Human Rights', *supra* n 4; and Letsas, *supra* n 7.

difficult role of resolving cases of alleged human rights violations by 47 Member States of the Council of Europe, brought by individuals from all over the continent. In my view, one should therefore be cautious when expressing a generalised and abstract viewpoint on the Court. Such an approach, at least, necessitates careful analysis of and reflection on the case law. Also, perspectives on the proper execution of the Court's mandate necessarily vary and it is essential for the Strasbourg Court and its judges to engage in reasoned and informed debate about their work and its wider European implications. It would be wrong to assume that the judges of the Court do not take this aspect of their jobs seriously. They are, in my experience, constantly striving to learn from the past, to better serve the future. After all, the Strasbourg Court, as an international judicial institution, does not operate in a vacuum, a sentiment expressed in very lucid terms by Professors Terris, Romano and Swigart in their book, *The International Judge*, where they state:

[I]nternational judges are keenly aware that while their rulings can be sweeping and influential, they work in *fragile institutions*. Judges cannot afford to ignore the larger circumstances in which their courts are situated, which subject them to pressures from competing loyalties, inadequate funding, public expectations, and the currents of politics. External circumstances have created subtle but significant threats to the cornerstone of an international judge's work, his independence from outside influences. But judges themselves also play a large part in contributing to both the strength and the fragility of international judicial bodies. With the public credibility of their courts at stake, international judges work, as one observer put it, 'under a microscope', so their mistakes are correspondingly magnified.<sup>14</sup>

It is therefore in the spirit of mutual dialogue and reflection that I venture into the hazardous realm of ongoing discourse about the future of the European Court of Human Rights by expressing my humble views on some of the issues that have been raised in the UK in the past few months and years.

On this basis, I will attempt to argue that, as a general matter, the two-dimensional claims about the workings of the Strasbourg Court, that I presented above, are based, as an empirical matter, on rather simplistic assumptions on the work of the Court. Also, I submit that this criticism is also debatable, as a matter of principle, if one correctly appreciates the role and responsibilities of the Court according to the text of the Convention.

Let me however start by saying a few words about the principle of subsidiarity and the interrelated concept of the margin of appreciation, as these principles provide the foundation for what follows.

## 2. TOWARDS A MORE ROBUST AND COHERENT CONCEPT OF SUBSIDIARITY

The Brighton Declaration on the future of the Strasbourg Court of April 2012, the preceding discussions and declarations at Interlaken in 2010 and at Izmir in 2011,

14 Terris, Romano and Swigart, *The International Judge—An Introduction to the Men and Women Who Decide the World's Cases* (Oxford: Oxford University Press, 2007) at xx.

and the adoption by the Parliamentary Assembly of the Council of Europe of Protocol 15 in June of last year, adding a direct reference to the concepts of subsidiarity and the margin of appreciation in the preamble to the Convention, have, in my view, created an important incentive for the Court in recent years to develop a more robust and coherent concept of subsidiarity. Thus, in some very important recent judgments, which I will discuss in a moment, the Court has demonstrated its willingness to defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations. It is important to stress that this development does not introduce, in essence, any novel feature into Strasbourg jurisprudence, but constitutes rather a further refinement or reformulation of pre-existing doctrines, influenced by recent declarations of the Member States, especially as regards the necessity to reinforce the subsidiary nature of the Strasbourg Court. In this regard, the President of my Court, Judge Dean Spielmann, has recently stated:

One may be tempted to think that the amendment [under Protocol 15] is of limited significance – a mere rhetorical flourish, or form of window-dressing. But that would be incorrect, of course...I need hardly recall, that under the Vienna Convention on the Law of Treaties, the preamble to a treaty is an integral part of the instrument and thus is relevant to its interpretation.

...

Let it not be overlooked that the new paragraph also brings the term subsidiarity into the Convention, a fact that the Court has welcomed. That it does so is consistent with the essential thrust of the reform process – the Interlaken process - which takes as its major premise the need to improve the protection of human rights at the domestic level. This is the only sustainable way to alleviate the huge pressure on the European mechanism, which, I recall, is subsidiary to the national mechanism, by original design and by practical necessity.<sup>15</sup>

I concur wholeheartedly with this viewpoint and would even go so far as to claim that the next phase in the life of the Strasbourg Court might be defined as the *age of subsidiarity*, a phase that will be manifested by the Court's engagement with empowering the Member States to truly 'bring rights home', not only in the UK but all over Europe. But this process has consequences for the overall status of human rights protection in Europe. By its nature, the principle of subsidiarity is an express manifestation of the diversified character of the implementation of human rights guarantees at national level.<sup>16</sup> The unequivocal call for an increased emphasis by the Strasbourg Court on applying a robust and coherent concept of subsidiarity is thus, by definition, a call for an increased diversity in the protection of human rights. In that sense, Lord Justice Laws is correct when he stated in his recent contribution to the Hamlyn Lectures 2013 that, and I quote, '[there] may perfectly properly be different answers to some human rights issues in different States on similar facts'.

15 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, at 8.

16 My colleague on the Court, Judge Paul Mahoney, has made this point in very lucid and powerful terms, see his, 'Reconciling Universality of Human Rights and Local Democracy', *supra* n 13 at 13–14.

He then however goes on to call on the Strasbourg Court to recognise this.<sup>17</sup> With respect, I submit that it is wrong to assume, as Lord Justice Laws seems to, that the Court has, up until now, been unaware of the need to effectively implement the foundational principle of subsidiarity and of the importance of deferring, when suitable, to national decision-making in the sphere of human rights. It suffices to recall here the seminal judgment of the old Court in *Handyside v United Kingdom*<sup>18</sup> from 1976, where the Court already laid the foundation for its approach to subsidiarity and the margin of appreciation which has been the touchstone ever since.<sup>19</sup> However, in my view, the Court has, over recent years, gradually developed its approach in this area. The process of reformulating or refining the concepts of subsidiarity and the margin of appreciation has therefore begun in Strasbourg.

Let me explain further by commenting on the views espoused by Lord Hoffmann in 2009.

### 3. LORD HOFFMANN

In his farewell lecture of 2009, *The Universality of Human Rights*, Lord Hoffmann argued that at the 'level of abstraction, human rights may be universal'. At the 'level of application, however, the messy detail of concrete problems, the human rights which these abstractions have generated are national. Their application requires trade-offs and compromises, exercises of judgment which can be made only in the context of a given society and its legal system.'<sup>20</sup>

I agree, in principle, with the conceptual distinction between the abstract interpretation of the scope of Convention rights on the one hand, and their concrete application to facts at domestic level, on the other. Indeed, they are in my view inherent in those provisions that provide for express, and even implied, limitations of certain rights, namely Articles 8 to 11 and Article 1 of Protocol 1, as well, to some extent, the right to a fair trial under Article 6, the right to education under Article 2 of Protocol 1<sup>21</sup> and the right to free elections in Article 3 of the same Protocol.<sup>22</sup> However, Lord Hoffmann continues by stating the following:

If one accepts, as I have so far argued, that human rights are universal in abstraction but national in application, it is not easy to see how in principle an international court was going to perform this function of deciding individual

17 Lord Justice Laws, 'Lecture III: The Common Law and Europe', Hamlyn Lectures 2013, 27 November 2013, at 13.

18 *Handyside v United Kingdom* A 24 (1976); 1 EHRR 737.

19 Dollé and Ovey, 'Handyside, 35 years down the road', in Casadevall, Myjer, O'Boyle and Austin (eds), *Freedom of Expression—Essays in Honour of Nicolas Bratza, President of the European Court of Human Rights* (Oisterwijk, The Netherlands: Wolf Legal Publishers, 2012) 541 at 545.

20 Lord Hoffmann, *supra* n 10 at 8.

21 See *Ali v United Kingdom* Application No 40385/06, Merits, 11 January 2011, at para 52: 'The Court recognises that in spite of its importance the right to education is not absolute, but may be subject to limitations. Provided that there is no injury to the substance of the right, these limitations are permitted by implication since the right of access 'by its very nature calls for regulation by the State' (*Belgian Linguistics Case*, cited above, p. 28, section 5 and *Campbell and Cosans v. the United Kingdom*, 25 February 1982, section 41, Series A no 48).'

22 *Hirst v United Kingdom* (No 2) 2005-XI; 42 EHRR 849 at para 60.



cases, still less why the Strasbourg Court was thought a suitable body to do so.<sup>23</sup>

With respect, I do not see how Lord Hoffmann's general premise necessarily leads to the conclusion he arrives at, namely that the Court is *not a suitable body* to decide whether the Member States have, in good faith, applied at national level the general principles of human rights that flow from the Convention. The role of the European Court of Human Rights is to interpret an international treaty providing for the *collective guarantee of human rights*,<sup>24</sup> the treaty thus based on the primordial and crucial assumption that all the Contracting Parties agree that, in principle, the protection of human rights is not an issue that is purely a matter of domestic concern. Hence, embodied in the Convention is an express acknowledgment of certain common values that all Member States share as regards minimum guarantees of human dignity and protection. In this respect, it is important to stress that the Convention is not an instrument of human rights unification, as can be derived from Article 53 of the Convention,<sup>25</sup> but only lays down minimum standards.<sup>26</sup> Recently, Lord Reed has expressed this sentiment in the following way:

[The] Strasbourg Court's aim is not to construct a code to be adopted by the 47 contracting states. It knows very well that there are important differences between the various societies and legal systems. But the Court is developing a body of high level principles which can be taken to be applicable across the different legal traditions. Bearing that in mind, in the Strasbourg law, as in our own, we need to identify the principles underlying the development of a line of authorities on a particular topic. We can then develop our law, when necessary, by finding the best way, faithful to our own legal tradition, of giving expression to those principles. If we do so, our domestic legal tradition can continue to develop.<sup>27</sup>

This, in my view, is an excellent and eloquent way of explaining the relationship between the mutually distinct, but interrelated, roles of the Strasbourg Court on the one hand and domestic courts on the other. It is in this sense that one should understand Article 19 of the Convention, which provides that the Court is to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.'

23 Hoffmann, *supra* n 10 at 11.

24 O'Boyle, *supra* n 4 at 1867: '[T]he strongest rebuttal of [the criticism that the Court lacks "constitutional legitimacy"] is that many of the Court's critics have lost sight of the origins of the Convention as a system of collective guarantee of human rights. This concept is the cornerstone of the Convention system. Without it the treaty would have little sense.'

25 Article 53 of the Convention provides: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.'

26 As Lord Reed has convincingly argued recently within the UK context, it is 'important that [UK judges] should not neglect the development of [their] own legal tradition of human rights protection.' See his recent lecture, 'The Common Law and the ECHR', Inner Temple, 11 November 2013, at 13 and 15.

27 *Ibid.* at 15–16.

To elaborate further, the Court's role under Article 19 is not necessarily always the same, it all depends on the nature and substance of the human right implicated, the way in which this right is worded in the Convention and, most importantly, whether the right is considered absolute or open to restrictions.

My general point however is this: it does not follow from the foundational premise that Lord Hoffmann and I share—that human rights, as general principles, are universal in the abstract, although their application in individual cases must take due account of domestic circumstances—that an international court is not suitable in principle for deciding whether a violation of human rights has occurred at national level. The question is rather one of degree, to be analysed along a spectrum of possibilities, at one end the total, *de novo*, reassessment by the international court of domestic decision-making, which can apply in principle in cases on the right to life under Article 2 of the Convention and on the prohibition against torture under Article 3, and, at the other, the granting of full and unlimited deference, which is seldom the case, but is often an issue that needs reflection in cases dealing with difficult issues under Articles 8 to 11, Article 1 of Protocol 1 and to some extent under Article 6. This is the crux of the matter in my view.

Again, to explain, let me revert back to Lord Hoffmann. In the same lecture in 2009, he also argued that in 'practice, the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States.' In support of his claim, Lord Hoffmann referred to three examples in particular, the Strasbourg Court's 'enthusiasm for the right to silence', and for the hearsay rule, and lastly, the Court's judgments, both in Chamber and then in the Grand Chamber, in *Hatton v United Kingdom*,<sup>28</sup> the case on night flights at Heathrow and Articles 8 and 13 of the Convention.

As regards, Lord Hoffmann's reference to the Court's case law on hearsay evidence and Article 6 of the Convention, it suffices to recall that in the Court's Grand Chamber judgment in *Al-Khawaja and Tahery v United Kingdom*, from December 2011,<sup>29</sup> which was handed down after he gave his lecture, a large majority of fifteen votes to two in the Grand Chamber rejected the approach followed by a majority of a Chamber of the Court, at which Lord Hoffmann's criticism was directed, thus going some way in addressing the concerns expressed by the Supreme Court of the United Kingdom in its judgment in *R. v Horncastle and Others* of December 2009.<sup>30</sup>

In my view, looking to *Al-Khawaja* as well as other relevant case law of the Court, especially the recent Grand Chamber judgment in *Taxquet v Belgium*,<sup>31</sup> it is now to be considered settled law at Strasbourg that the fair trial guarantee of Article 6 in

28 2003-VIII; 37 EHRR 611.

29 ECHR Reports 2011.

30 Lady Hale, 'What's the Point of Human Rights?', Warwick Law Lecture 2013, 28 November 2013, at 9. See also Mahoney, 'The Relationship Between the Strasbourg Court and National Courts'; and Borge, 'Bottom-up Shaping of Rights: How the Scope of Human Rights at the National Level Impacts upon the Convention Rights', in Gerards and Brems (eds), *Shaping Rights: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press, 2013) at 9 and 217 respectively.

31 ECHR Reports 2010.



criminal cases does not, in principle, provide for blanket rules on the use of criminal evidence,<sup>32</sup> but rather accommodates in a practical manner the diversity of systems in the Member States of the Council of Europe. I know of no recent case that could meaningfully support the claim, espoused by Lord Hoffmann, that the Strasbourg Court is engaged in the process of *unifying rules of criminal procedure*. On the contrary, in light of the open-ended character of the fair trial guarantee under Article 6, and the subsidiary nature of the Convention, the Member States are, in principle, free to fashion their criminal justice systems in accordance with their traditions and policy choices, so long as the execution of domestic rules in individual cases are, in general, applied in a manner that respects, as a whole, the right of the accused to a fair trial,<sup>33</sup> a fundamental requirement of any democratic state subject to the rule of law. Furthermore, the Court has consistently held that in accordance with the *fourth instance doctrine*, it is for national courts to assess the probative value of evidence in criminal proceedings. Hence, it is a rare application indeed that survives scrutiny at the admissibility stage and advances to communication for a response by the defendant government, let alone to a finding of a violation on purely procedural, evidentiary grounds under Article 6.<sup>34</sup>

Turning then to Lord Hoffmann's discussion of the Grand Chamber judgment in *Hatton v United Kingdom* of July 2003, I have to admit, and I say this with great respect, that I have never understood how this judgment proves his point. It is true that a Chamber of the Court had concluded, by five votes to two, that the UK had violated Article 8 as regards the lack of respecting the rights of local residents to privacy and family life due to noise from night flights at Heathrow. But, and this is the crucial point in this debate, the Grand Chamber of the Court, by a large majority of twelve votes to five, rejected that interpretation of Article 8 and its application to the facts of the case. In light of Lord Hoffmann's reference to a dissenting opinion by one of the judges in

32 With the exception of evidence, such as statements, relied upon in criminal proceedings under Article 6, but obtained by torture in violation of Article 3 of the Convention, see *Gäfgen v Germany* ECHR Reports 2010.

33 *Taxquet v Belgium*, supra n 31 at para 84: 'Accordingly, the institution of the lay jury cannot be called into question in this context. The Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6. The Court's task is to consider whether the method adopted to that end has led in a given case to results which are compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case. In short, it must ascertain whether the proceedings as a whole were fair (see *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B, and *Stanford v. the United Kingdom*, 23 February 1994, § 24, Series A no. 282-A).'

34 Since Lord Hoffmann's 19 March 2009 farewell lecture, the Court has adopted only five judgments against the United Kingdom finding a violation of Article 6 in criminal cases: *Beggs v United Kingdom* Application No 25133/06, Admissibility, 6 November 2012 (length of proceedings); *Minshall v United Kingdom* Application No 7350/06, Merits, 20 December 2011 (length of proceedings); *Othman (Abu Qatada) v United Kingdom* ECHR Reports 2012 (real risk of a flagrant denial of a fair trial if the applicant were deported to Jordan); *Hanif and Khan v United Kingdom* Application Nos 52999/08 and 61779/08, Merits and Just Satisfaction, 20 December 2011 (lack of impartiality as a result of the presence of a serving police officer on the jury); and *Al-Khawaja and Tahery v United Kingdom*, supra n 29 (admissibility of hearsay evidence – violation in Mr Tahery's case only). The Chamber and the Grand Chamber have adopted a far greater number of inadmissibility decisions and judgments finding no violation. A significant number of inadmissibility decisions in criminal cases where Article 6 has been invoked have also been adopted in single judge formation.

the Grand Chamber, it suffices to say that it is axiomatic that dissenting views of judges do not constitute a relevant and sufficient ground for expressing a general viewpoint about the workings of the court in question. The essential holding of the Grand Chamber in *Hatton* has furthermore not been revisited in any subsequent case.

Bearing all of this in mind, how can *Hatton* legitimately be considered a case in point when making the claim that the Court cannot resist the 'temptation to aggrandise' its jurisdiction, using the words of Lord Hoffmann? It is true that the Court considered that the 'implementation of the 1993 Scheme was susceptible of adversely affecting the quality of the applicants' private life and the scope for their enjoying the amenities of their respective homes, and thus their rights protected by Article 8 of the Convention'.<sup>35</sup> The measure therefore constituted an interference under Article 8, in light of the broad language of that provision and the consistent case law of the Court,<sup>36</sup> which thus had to be justified under the limitation clause of the second paragraph. But the bottom line is what counts, that is the way in which the Court correctly deferred to the economic and social policy choices of the domestic authorities. In reality, *Hatton* is thus, on the contrary, a part of a line of relatively recent cases of the Strasbourg Court that, in my view, stands for the opposite proposition expressed by Lord Hoffmann, as I will now explain.

In paragraph 128 of the Grand Chamber judgment in *Hatton*, the Court states, and I quote, 'that a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake'. The Court then noted that the 1993 Scheme in question had 'been preceded by a series of investigations and studies carried out over a long period of time. The particular new measures introduced by that scheme [had been] announced to the public by way of a Consultation Paper which referred to the results of a study carried out for the Department of Transport, and which included a study of aircraft noise and sleep disturbance.' On this basis, the Court found that '[in] these circumstances..., in substance, the authorities [had not] overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole, nor [did the Court] find that there [had] been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.'<sup>37</sup>

When *Hatton* is thus explored in depth, one cannot but conclude that the Grand Chamber judgment is, in reality, a classic example of the appropriate way of constructing and applying a meaningful level of deference afforded by the Court in

35 *Hatton v United Kingdom*, supra n 28 at para 119.

36 The application of Article 8 to noise contamination from Heathrow Airport that was considered to have an effect on the quality of private life was not a novelty in the Court's case law, see *Powell and Rayner v United Kingdom* A 172 (1990); 12 EHRR 335 at para 40: 'In each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport (see paras 8 to 10 above). Article 8 (art. 8) is therefore a material provision in relation to both Mr Powell and Mr Rayner.'

37 *Hatton v United Kingdom*, supra n 28 at paras 128–29.

accordance with the principle of subsidiarity. At a minimum, *Hatton* does not prove Lord Hoffmann's point, but in actuality weakens his central argument.

#### 4. A QUALITATIVE AND DEMOCRACY-ENHANCING APPROACH IN THE IMPLEMENTATION OF THE PRINCIPLE OF SUBSIDIARITY AND THE MARGIN OF APPRECIATION

As I intimated above, *Hatton* is part of a line of cases that, in my view, support the claim that the Court is in the process of developing a more robust and coherent concept of subsidiarity as well as attempting to reformulate the conditions for allocating deference to the Member States. Among other cases that can be mentioned here are *Murphy v Ireland*<sup>38</sup> of 2003,<sup>39</sup> and the Grand Chamber judgments in the UK context in *Hirst v United Kingdom (No 2)*<sup>40</sup> from 2005, *Evans v United Kingdom*<sup>41</sup> from 2007, *Dickson v United Kingdom*<sup>42</sup> from the same year, and most recently, *Animal Defenders International v United Kingdom*<sup>43</sup> and the Chamber judgment in *Shindler v United Kingdom*<sup>44</sup> from April and May of last year, respectively.

I must say that I have been struck by the fact that almost none of my esteemed British colleagues, who have given speeches recently, have directly discussed *Animal Defenders*, with the notable exception of Lady Hale in her 2013 Warwick Law Lecture,<sup>45</sup> where she cited the case, correctly in my view, as an example of a 'successful dialogue with Strasbourg'.<sup>46</sup> It is true, as the closely divided vote in *Animal Defenders* manifests, that not all of the judges of my Court have the same views on these issues, but that is inevitable, we are after all dealing with the core nature of the institutional status of the Court and its future development.

In *Animal Defenders*, the applicant, a non-governmental organisation based in London, complained about the prohibition on paid political advertising by Section 321(2) of the Communications Act 2003. The parties agreed that the prohibition amounted to an interference with the applicant's rights under that provision, that the measure was prescribed by law and pursued the legitimate aim of preserving the

38 2003-XI; 38 EHRR 212 at para 73.

39 On the Court's judgment in *Murphy v Ireland*, see the excellent discussion by Fribergh and Darcy, 'The Advertisement of Religious Belief: What think ye of Murphy?', in Casadevall et al., supra n 19 at 189.

40 Supra n 22 at paras 78–80.

41 46 EHRR 728 at para 86: 'In this connection the Grand Chamber agrees with the Chamber that it is relevant that the 1990 Act was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate (see, mutatis mutandis, *Hatton* and *Others v. the United Kingdom* [GC], no. 36022/97, § 128, ECHR 2003-VIII).'

42 46 EHRR 927 at para 83: 'In addition, there is no evidence that when fixing the Policy the Secretary of State sought to weigh the relevant competing individual and public interests or assess the proportionality of the restriction. Further, since the Policy was not embodied in primary legislation, the various competing interests were never weighed, nor issues of proportionality ever assessed, by Parliament (see *Hirst*, § 79, and *Evans*, §§ 86–89, both cited above). Indeed, the Policy was adopted, as noted in the judgment of the Court of Appeal in the *Mellor* case (see paragraph 23 above), prior to the incorporation of the Convention into domestic law.'

43 ECHR Reports 2013.

44 Application No 19840/09, *Merits* and *Just Satisfaction*, 7 May 2013, at para 102.

45 See also Lady Hale's previous article, 'Political speech and political equality', supra n 4 at 177–87.

46 Lady Hale, supra n 30 at 16.

impartiality of broadcasting on public interest matters and, thereby, of protecting the democratic process. The Court accepted that this corresponded to the legitimate aim of protecting the 'rights of others' under paragraph 2 of Article 10. The dispute only concerned whether the interference was 'necessary in a democratic society'.

In this case, the Court was confronted with a very difficult question under the Convention, that is the adoption and application by a Member State of a blanket ban on a particular type of expressive activity protected by Article 10, as such general measures are, *prima facie*, difficult to square with the fundamental criterion of proportionality underlying the limitation clause of paragraph 2 of Article 10. However, the Court noted that the necessity of a general measure had been examined by the Court in a variety of contexts. From this case law, it emerged that in order to determine the proportionality of a general measure, the Court had primarily to assess the legislative choices underlying it. Then, the Court said the following:

The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including the operation of the relevant margin of appreciation.<sup>47</sup>

Immediately after this very important statement of principle, the Court cites the above-mentioned cases in *Hatton*, *Murphy*, *Hirst*, *Evans* and *Dickson*. It is clear from the rest of the majority judgment in *Animal Defenders* that the extensive examination by Parliament, taking into account the case law of the Strasbourg Court before the adoption of the Communications Act of 2003, the cross-party support for the Act as well as the in-depth analysis of the compatibility of the Act with the Convention, conducted by the domestic courts, were all crucial factors in the eventual findings by the majority of non-violation.<sup>48</sup>

My aim here is not to express a personal viewpoint on the result in *Animal Defenders*. Whatever one thinks of the ultimate outcome, what is important is to appreciate that *Animal Defenders*, and the line of cases of a similar nature, demonstrate in my view that the Strasbourg Court is currently in the process of reformulating the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to the Member States so as to implement a more robust and coherent concept of subsidiarity in conformity with Brighton and Protocol 15. There are other more recent judgments that could be cited in this regard, but as they have not become final it is inappropriate for me to discuss them at this stage.

The very recent judgment in *Animal Defenders*, as well as others, thus stand for the important proposition that when examining whether and to what extent the Court should grant a Member State a margin of appreciation, as to the latter's assessment of the necessity and proportionality of a restriction on human rights, the quality of decision-making, both at the legislative stage and before the courts, is crucial and may ultimately be decisive in borderline cases.<sup>49</sup> It is important here to contrast the

47 Supra n 43 at para 108.

48 Ibid. especially at paras 114–116.

49 Spielmann, supra n 15 at 5: 'It is clear from the case law that the legislative process can be very relevant to the margin of appreciation.'

Grand Chamber judgment in *Hirst (No 2)*, in the famous prisoner's voting rights case, with the situation in *Animal Defenders*, where the Court stated explicitly in *Hirst* that as to the 'weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament... ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote.'<sup>50</sup> I should however note that Lady Justice Arden, in her recent Neill Lecture at All Souls College, Oxford, in February of this year, argued that the majority in *Hirst* was not altogether accurate in its account on this issue.<sup>51</sup> As regards judicial review, the Grand Chamber furthermore considered that it was 'evident from the judgment of the Divisional Court that the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was generally seen as a matter for Parliament and not for the national courts. The court did not, therefore, undertake any assessment of proportionality of the measure itself.'<sup>52</sup>

With this *qualitative, democracy-enhancing approach*, the Court's reformulation or refinement of the principle of subsidiarity, and the margin of appreciation, introduces a clear procedural dimension that can be examined on the basis of objective factors informed by the defendant government in its pleadings. It also addresses to some extent Lord Sumption's claim that the Strasbourg case law gives rise to what he terms 'a significant democratic deficit' in some important areas of social policy.<sup>53</sup>

However, it is important to stress that this methodology has inherent limits as its application is not necessarily appropriate unless the Convention right in question expressly, or at least by strong implication, allows for restrictions by the Member States. In that sense, the underlying Convention issues in *Hirst (No 2)* on the one hand, and *Animal Defenders* on the other, are not necessarily entirely the same, the former dealing with Article 3 of Protocol 1, which only provides for limitations by implication, the latter with Article 10, where restrictions on the free speech right are expressly provided in the text of paragraph 2.

## 5. SUBSIDIARITY, THE MARGIN OF APPRECIATION AND EXHAUSTION OF DOMESTIC REMEDIES

In my final part, I want to discuss a related issue of a more technical nature that has, however, important implications for the future development of the ongoing dialogue between the Strasbourg Court and the UK judiciary. If, as I have argued, a qualitative, democracy-enhancing approach should be considered an important procedural criterion in the construction and application of the margin of appreciation in individual cases, it seems self-evident that the existence and quality of domestic review of Convention compatibility, either with legislative measures or administrative decisions

50 O'Boyle, 'The Future of the European Court of Human Rights', supra n 4 at 1862–63: 'An important feature of the case was that there had been no substantive parliamentary debate on the issue of prisoners voting since the 19th century.' See, however, Lady Justice Arden, 'An English Judge in Europe', Neill Lecture, All Souls College, Oxford, 28 February 2014, at 30–1, available at: [www.judiciary.gov.uk/Announcements/speech-by-arden-lj-english-judge-in-europe/](http://www.judiciary.gov.uk/Announcements/speech-by-arden-lj-english-judge-in-europe/) [last accessed 16 June 2014].

51 Lady Justice Arden, *ibid.*

52 Supra n 22 at paras 79–80.

53 Lord Sumption, supra n 5 at 9–10.



in individual cases, is crucial. In this respect, the admissibility criterion on exhaustion of domestic remedies under Article 35(1) of the Convention is of vital importance.

The Grand Chamber of the Strasbourg Court recently summarised its case law on the exhaustion of domestic remedies in its important judgment in *Vučković and Others v Serbia* from 25 March of this year. The Court reiterated that it is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. The rule of exhaustion of domestic remedies is based on the assumption that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court, as concerns complaints against a State, are thus obliged to use first the remedies provided by the national legal system. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are *available and sufficient* in respect of his or her Convention grievances. The existence of the remedies in question must be *sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness*. However, there is no obligation to have recourse to remedies which are *inadequate or ineffective*. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success. However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress. The Court has, however, also frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism.<sup>54</sup>

The Human Rights Act provides for a special kind of review mechanism in Section 4 which grants the courts the authority to issue declarations of incompatibility where primary legislation is considered incompatible with the Convention. In light of the constitutional principle of parliamentary sovereignty, this is the only avenue possible under UK domestic law to test the Convention compliance of primary legislation.

In *Burden v United Kingdom*,<sup>55</sup> a Grand Chamber judgment of 29 April 2008, the two applicants, sisters, complained in substance of a violation of Article 14 of the Convention, taken in conjunction with Article 1 of Protocol 1, in that when the first of them died, the survivor would be required to pay inheritance tax on the dead sister's share of the family home, whereas a married couple or the parties to a homosexual relationship registered under the Civil Partnership Act 2004 would be exempt from paying inheritance tax in these circumstances. When the case came to Strasbourg, the applicants had not brought any judicial proceedings to vindicate their claim domestically. Therefore, the government made a preliminary objection to the admissibility of the complaint on the basis of non-exhaustion of domestic remedies claiming that the applicants should have sought a declaration of incompatibility

54 *Vučković and Others v Serbia* Application Nos 17153/11 et al., Preliminary Objections, 25 March 2014, at paras 69–77.

55 ECHR Reports 2008; 44 EHRR 49.



under Section 4 in the High Court, as this remedy was 'effective and capable of providing redress for the complaint'. The government emphasised that there was not a single case where it had refused to remedy a declaration of incompatibility. While as a matter of pure law it was true, as the Strasbourg Court had found in a previous case from 2002, *Hobbs v United Kingdom*,<sup>56</sup> that such a declaration was not binding on the parties and gave rise to a power for the minister, rather than a duty, to amend the offending legislation, this was to ignore the practical reality that a declaration of incompatibility was highly likely to lead to legislative amendment.

The Grand Chamber rejected the Governments's preliminary objection, although it was prepared to accept the Government's argument that the case could be distinguished from *Hobbs*, given that neither applicant complained of having already suffered pecuniary loss as a result of the alleged violation of the Convention. The Court then went on to note that it had carefully examined the material provided to it by the Government concerning legislative reform in response to the making of a declaration of incompatibility, and observed with satisfaction that in all the cases where declarations of incompatibility had to date become final, steps had been taken to amend the offending legislative provision. However, given that there had to date been a relatively small number of such declarations that had become final, it agreed with the Chamber that it would be 'premature to hold that the procedure under section 4 of the Human Rights Act provides an effective remedy to individuals complaining about domestic legislation'. Nonetheless, the Grand Chamber was mindful that it was appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application was nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries. The Court thus concluded with the following statement:

43. The Grand Chamber agrees with the Chamber that it cannot be excluded that at some time in the future the practice of giving effect to the national courts' declarations of incompatibility by amendment of the legislation is so certain as to indicate that section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation. In those circumstances, except where an effective remedy necessitated the award of damages in respect of past loss or damage caused by the alleged violation of the Convention, applicants would be required first to exhaust this remedy before making an application to the Court.

44. This is not yet the case, however, and the Grand Chamber therefore rejects the Government's objection on grounds of non-exhaustion of domestic remedies.<sup>57</sup>

*Burden v United Kingdom* remains the controlling precedent in Strasbourg as regards declarations of incompatibility and the exhaustion of domestic remedies and has been applied in subsequent cases. Thus, as things stand, complaints directly

56 Application No 63684/00, Admissibility, 18 June 2002.

57 *Burden v United Kingdom*, supra n 54.

challenging primary legislation can be brought directly to Strasbourg without prior judicial review in the UK.

According to statistics from the latest annual report of the UK Parliament's Joint Committee on Human Rights,<sup>58</sup> the situation on the implementation at domestic level of declarations of incompatibility was the following. As of 31 July 2013, in total, 28 declarations of incompatibility have been made. Of these, 19 have become final (in whole or in part) and are not subject to further appeal, one subject to further appeal, and eight have been overturned on appeal. Of the 19 declarations that have become final, 11 have been remedied by later primary legislation, three have been remedied by a remedial order under Section 10 of the Human Rights Act, four are related to provisions that had already been remedied by primary legislation at the time of the declaration, and one is under consideration as to how to remedy the incompatibility.

In her recent Warwick Law Lecture, Lady Hale made an interesting observation on the reactions by the Prime Minister in Parliament when he introduced an order under the 'fast track' remedial procedure under Section 10 of the Human Rights Act which concerned the lack of any provision in UK law for removing a person's name from the sex offender's register. She noted that the Prime Minister had been 'highly critical of our decision, but made no mention of the fact that the Government could have chosen to do nothing about it'.<sup>59</sup>

This spring, the Grand Chamber judgment in *Burden v United Kingdom* celebrated its sixth anniversary. In light of the experience of the last six years, and the available statistics on the overwhelming positive reaction by the UK Government and Parliament towards declarations of incompatibility, the Court asked the UK Government on 7 January 2014, in the communicated case, now pending, in *Big Brother Watch*,<sup>60</sup> whether 'the practice of giving effect to the national court's declarations of incompatibility by amendment of legislation has become sufficiently certain that the remedy under Section 4 of the Human Rights Act 1998 should be regarded by the Court as an effective remedy which should be exhausted before bringing a complaint of this type before the Court'. I do not want in any way to be seen to pre-judge the issue, as it is a very difficult one. Let me thus conclude by merely stating that it will be very interesting to see how the Court will grapple with the very important and complex issues that arise when confronted with the question whether the time has come to revisit the holding in *Burden*.

58 UK Ministry of Justice, 'Responding to human rights judgments: Report by the Ministry of Justice to the Joint Committee on Human Rights on the Government response to human rights judgments 2012–13', Annex A, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/252680/human-rights-judgments-2012-13.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252680/human-rights-judgments-2012-13.pdf) [last accessed 20 May 2014].

59 Lady Hale, *supra* n 30 at 17.

60 *Big Brother Watch and Others v United Kingdom* Application No 58170/13, Communication, 4 September 2013.