Protocol No.15 to the *European Convention on Human Rights*: subsidiarity and the margin of appreciation

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Section International Affairs and Defence Section

On 28 October 2014 Protocol No.15 to the *European Convention on Human Rights* was laid before Parliament as Command Paper No. 8951. The Protocol:

- adds a reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble to the Convention;
- changes the rules on the age of judges of the Court, to ensure that all judges are able to serve the full nine-year term;
- removes the right of parties to a case before the Court to veto the relinquishment of jurisdiction in a case before a Chamber in favour of the Grand Chamber;
- reduces the time limit for applications to the Court from six months to four months;
- tightens the admissibility criteria to make it easier for the Court to reject trivial applications.

The Protocol must be ratified by all 47 Council of Europe Member States in order to come into force. On 27 November 2014 the Government announced that the scrutiny period would be extended by eight sitting days and would expire when the House of Lords rises for recess on 17 December.

On 2 December 2014 the Joint Committee on Human Rights published a report on Protocol 15, concluding that the Government should ratify it and calling for a debate in both Houses.

This note looks briefly at the Brighton reform conference in 2012 and reforms implemented before and since. It considers two of the reforms in Protocol No.15 that the UK Government particularly wanted, concerning subsidiarity and the margin of appreciation.

Earlier Library work on reform of the European Court of Human Rights include:

- Library blog, Parliamentary Sovereignty and the European Convention on Human Rights, 6 November 2014
- SN 5936 The European Convention on Human Rights and the Court of Human Rights: issues and reforms 14 April 2011
- SN 5949, The European Court of Human Rights: the election of judges, 4 May 2011
- SN 6277, The UK and Reform of the European Court of Human Rights, 27 April 2012

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1 UK Government proposals to reform the European Court of Human Rights

Under the UK chairmanship of the Council of Europe in 2012 the Council of Europe (CoE) adopted the Brighton Declaration. This was a package of reforms to tackle the excessive backlog of cases pending before the European Court of Human rights, and it also emphasised that the main responsibility for guaranteeing human rights rests with national governments, parliaments and courts. The UK's emphasis on the role of national authorities was in part a response to European Court decisions such as *Hirst* and *Abu Qatada* (*Othman*).

Protocol 15 was laid before Parliament on 28 October 2014 as Command Paper 8951. It inserts references to the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention's Preamble. The UK Government wanted more far-reaching proposals, including references to the margin of appreciation in the substantive text of the Convention, but a majority of CoE governments opposed this. However, under the *Vienna Convention on the Law of Treaties*, the preamble to a treaty is in an integral part of the treaty itself and therefore relevant to its interpretation. The *travaux préparatoires* also have a significant role in the interpretation of the Convention provisions.[1] The European Court has accepted this principle of treaty interpretation, pointing out in its Opinion on the draft protocol that "both the explanation given and the context in which the text was drafted are themselves legally significant . . . ." and would be relevant to the Court's interpretation of the protocol.

Protocol 16, not discussed in this note, creates an optional system by which the highest national courts can seek advisory opinions from the European Court on the interpretation of the Convention.

The UK Government supports Protocol 15 but does not currently intend to sign or ratify Protocol 16 provisions; it is "unconvinced of their value, particularly for addressing the fundamental problems facing the Court and the Convention system". Instead, the Government proposes to observe "how the system operates in practice, having regard particularly to the effect on the workload of the Court, and to how the Court approaches the giving of opinions".[2]

On 27 November 2014, using powers under section 21 of the *Constitutional Reform and Governance Act 2010*, the Government announced an extension to the parliamentary scrutiny period by eight sitting days. This will expire when the House of Lords rises for recess on 17 December.

The Joint Committee on Human Rights (JCHR) published a report on Protocol No.15 on 2 December 2014. The Committee concluded that the Protocol should be ratified. Although the report outline "some legitimate concerns … about the changes to the admissibility criteria", the Committee supported "the potentially beneficial effect of the amendment of the Preamble to the Convention and the other amendments".

The JCHR pointed to "the fact that subsidiarity and the margin of appreciation, properly understood in the light of the Court's case-law, are not therefore concerned with the primacy

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1 These are the preparatory documents drawn up during the discussions and negotiations on a treaty. They are a secondary form of interpretation and are used to clarify the intent of the treaty drafters.

2 Written Ministerial Statement, 28 October 2014.

of national law over Convention law, or with demarcating national spheres of exclusive competence".

The Convention system, it confirmed, is subsidiary to the national system for safeguarding human rights.

> Where that national system is well developed, and has led to detailed and reasoned assessment of a law or policy by the national authorities in light of the Convention and the principles in the Court's case-law, the assessment of the national authorities is likely to be within the State's margin of appreciation (depending on the nature of the right).[3]

The JCHR hoped the Court would ensure that the references to subsidiarity and the margin of appreciation would "accelerate the recent trend in the Court's case-law on subsidiarity and the margin of appreciation". It also expected the UK Government to ensure that this would in turn "lead to continued improvement in the quality of the human rights memoranda provided by Government departments to accompany Bills, and more opportunities for informed parliamentary consideration and debate of Convention compatibility issues".[4]

The JCHR recommended a debate in both Houses in Government time to take note of Protocol 15 and the Committee's Report on it, "in order to raise awareness in both Houses of the significance of the Protocol, and in particular the amendment to the Preamble to refer to subsidiarity and the margin of appreciation".

2 Background to Protocol No. 15

2.1 The Brighton Declaration

The UK Government sought changes to the role and procedures of the European Court of Human Rights during its chairmanship of the Council of Europe (CoE) in 2011-12. Among other things, the Brighton Declaration, adopted in May 2012, aimed to amend the European Convention on Human Rights to give prominence to the principles of subsidiarity and the margin of appreciation:

> 11. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.
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> 12. The Conference therefore:
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> a) Welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments;
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> b) Concludes that, for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as

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3 JCHR 4th Report, para. 3.11.

4 Ibid, para. 3.19.

> developed in the Court's case law should be included in the Preamble to the Convention and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013, while recalling the States Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention;
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> c) Welcomes and encourages open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention, including particularly dialogues between the Court and:
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> i) The highest courts of the States Parties;
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> ii) The Committee of Ministers, including on the principle of subsidiarity and on the clarity and consistency of the Court's case law; and
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> iii) Government Agents and legal experts of the States Parties, particularly on procedural issues and through consultation on proposals to amend the Rules of Court;
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> d) Notes that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties; invites the Committee of Ministers to draft the text of an optional protocol to the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it;

The three bodies concerned with adopting measures to reform the Court of Human Rights and the ways in which Court judgments are implemented in CoE States are:

- The Committee of Ministers (CM) comprising foreign affairs ministers from the CoE Member States;
- The Steering Group for Human Rights (CDDH), comprising "one or more representatives of the highest possible rank in the field of human rights" designated by Member State governments;
- The Committee of Experts, comprising "one or more representatives of the highest possible rank in the field of human rights", designated by the Member State governments (see below).

2.2 Reforms introduced before the Brighton Conference

The CoE had already acted to speed up the processing of cases through new procedures introduced in Protocol 14, by which a single judge, helped by an assistant, can filter out inadmissible cases. Before May 2012, the CM and Court had implemented certain reforms

initiated during the earlier Interlaken and Izmir processes.[5] Reforms adopted before Brighton that did not involve Convention amendment included:

- 21 February 2011 a new Rule 61 was inserted in the Rules of Court regarding the Pilot Judgment procedure.[6]
- 28 March 2012 the CM adopted new Guidelines on the selection of candidates for the post of judge at the Court.

In October 2012 the CDDH published a draft report on measures taken by the Member States to implement relevant parts of the Interlaken and Izmir Declarations.

2.3 Action since Brighton

The Committee of Experts on the Reform of the Court (DH-GDR) is an inter-governmental committee working on the reform of the Convention system and Court procedures, under the authority of the Steering Committee for Human Rights (CDDH). It supervises the preparatory work of seven drafting groups. In 2012-2013, the DH-GDR worked on the following matters:

- An analysis of Member States' reports on measures taken to implement relevant parts of the Interlaken and Izmir Declarations (GT-GDR-A)
- An evaluation of the effects of Protocol no. 14 and the implementation of the Interlaken and Izmir Declarations on the Court's situation (GT-GDR-A)
- Draft Protocol no. 15 to the Convention, amending the Preamble, admissibility criteria applicable to individual applications, procedure for relinquishing a case from a Chamber to the Grand Chamber of the Court, and age-limit for judges (GT-GDR-B)
- Draft Protocol no. 16 to the Convention, optionally introducing a procedure allowing certain domestic courts to seek advisory opinions from the Court (GT-GDR-B)
- Interim measures under Rule 39 of the Rules of Court (GT-GDR-C)
- A possible 'representative application procedure' before the Court (GT-GDR-C)
- A Guide to Good Practice in respect of domestic remedies (GT-GDR-D)
- A toolkit to inform public officials about States' Convention obligations (GT-GDR-D)
- How to resolve applications arising from systemic issues (GT-GDR-D)
- Whether to enable the appointment of additional judges to the Court (GT-GDR-E)
- A review of the functioning of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (GT-GDR-E)

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[5] See CM/Inf/DH(2010)37, "Supervision of the execution of judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Modalities for a twin-track supervision system"; CM/Inf/DH(2010)45 final, 7 December 2010, "Outstanding issues concerning the practical modalities of implementation of the new twin track supervision system"; CDDH (2010) 13 Addendum 1, "CDDH Final Report on measures that result from the Interlaken Declaration that do not require amendment of the European Convention on Human Rights, 2-5 November 2010. The CDDH published an interim report in April 2011 and a final report in February 2012.

[6] The pilot judgment procedure aims to identify the structural problems underlying repetitive cases and imposes an obligation on the States concerned to address those problems.

- Whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner (GT-GDR-E).[7]

The CM instructed the CDDH to complete work on various issues arising from Brighton within three deadlines: 15 April 2013, 15 October 2013 and 15 March 2015.

On 14 January 2013 the Court amended Rules 27A and 54 of the Rules of Court, making it possible for the President of Section, acting as a single judge, when communicating a case to the government concerned to simultaneously strike out any manifestly ill-founded or plainly inadmissible complaints from a file. Rule 18A was amended to allow Section Registrars and Deputy Section Registrars to act *ex officio* as non-judicial rapporteurs in single-judge formations. On 6 February 2013 the Court modified Rule 72 of the Rules of Court concerning the relinquishment of jurisdiction in favour of the Grand Chamber.[8]

The Court of Human Rights issued an Opinion on draft protocol 15 on 6 February 2013. Three of the five amendments had been suggested by the Court in its Preliminary Opinion for the preparation of the Brighton Conference, namely the repeal of the compulsory retirement age (Article 23(2)), the removal of the parties' veto over the relinquishment of a case to the Grand Chamber (Article 30), and the reduction of the time-limit for making an application from six months to four months (Article 35(1)). The Court welcomed the insertion into the Preamble of the reference to the subsidiarity principle and was satisfied that the wording of the new recital and the Explanatory Report reflected its pronouncements on the principle. It had some concerns about the reference to the margin of appreciation (see below).

On 26 April 2013 the Parliamentary Assembly of the Council of Europe (PACE) adopted Opinion No. 283 (2013) approving draft Protocol 15.

2.4 Future reform

The Brighton Declaration also called on the CM to consider the future of the Convention system. The Interlaken Conference had asked the CM to evaluate the extent to which the Protocol 14 and of the Interlaken Action Plan had improved the situation of the Court between 2012 and 2015. On the basis of this evaluation, the CM should decide before the end of 2015 whether there is a need for further action.

Before the end of 2019, the CM should decide on whether the measures adopted had been "sufficient to assure sustainable functioning of the control mechanism of the Convention or whether more profound changes are necessary" to reduce the number of cases that have to be addressed by the Court. Drafting Group F is looking specifically at future reform, and is due to report to the CM by the end of December 2015.

3 Protocol No. 15

3.1 Introduction

In the light of the Brighton Declaration the CDDH agreed draft protocol 15 in December 2012. On 17 May 2013 the CM adopted Protocol 15 and opened it for signature and ratification on 24 June 2013. The UK signed it that day. It is published with an Explanatory Report. The amendment of the Preamble was a compromise reached at the Brighton Conference. The Protocol:

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7 See Reform of the European Court of Human Rights website.

8 For other amendments to the Rules of Court, see RC (2013) 3, 14 March 2013.

- Adds a reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble of the Convention;

- Shortens from six to four months the time limit within which an application must be made to the Court;

- Amends the 'significant disadvantage' admissibility criterion to remove the second safeguard preventing rejection of an application that has not been duly considered by a domestic tribunal;

- Removes the right of the parties to a case to object to relinquishment of jurisdiction over it by a Chamber in favour of the Grand Chamber;

- Replacing the upper age limit for judges by a requirement that candidates for the post of judge be less than 65 years of age at the date by which the list of candidates has been requested by the Parliamentary Assembly.

3.2 Subsidiarity and the margin of appreciation

The two matters at the centre of the Government's policy on European Court reform and incorporated into the new Protocol are the principle of subsidiarity and the doctrine of the margin of appreciation.

Under Article 1 the Protocol inserts at the end of the preamble to the Convention the following new recital:

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

The Explanatory Report on the Protocol states:

> 9. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

Subsidiarity

Subsidiarity has been a principle of EU law-making since the *Treaty on European Union cam*e into force in 1993. It means that where possible decisions should be made nationally rather than at European level. It has been a tricky concept to implement in the EU context. The burden of proof regarding compliance with the subsidiarity principle has increasingly fallen on the European Commission as the 'guardian' of the EU Treaties. If the Court is to supervise the application of subsidiarity and review national decisions for compliance with Convention law "having due regard to the State's margin of appreciation", this could counter

the aim of applying the principle in order to reduce the workload of the Court. The effects of this responsibility remain to be seen.

Sir Nicolas Bratza, former President of the European Court of Human Rights, considered the UK proposals in an address to CoE Ministers' Deputies on 23 February 2012:

> Looking at what the United Kingdom is proposing - that is, a test based on the fact that the national courts have examined the Convention issues without manifestly erring in their application and interpretation of the Convention - it has to be said that we doubt whether it would be easy to apply. Moreover, as we point out in the preliminary opinion, this test reflects the Court's practice and how it sees the proper operation of the principle of subsidiarity as expressed in, for example, both the margin of appreciation and the fourth instance rule. That principle and these two distinct doctrines have often been confused in discussions about the Court's future.
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> The Court has consistently stressed the value of these notions in its case-law. It understands the importance which Contracting Parties attach to them. It is not however convinced that enshrining them in the Convention would serve any useful purpose. This is particularly true of the margin of appreciation which by definition requires flexibility of application. Coming back to the obligation of States under the Convention, both Interlaken and Izmir refer to the idea of shared responsibility. It is clear that this entails ensuring that national courts are able to apply the Convention and in fact do so. Where an application has been duly examined under the Convention at national level, the Court will normally have no difficulty in finding that it is manifestly ill-founded using the existing criterion.[9]

When subsequently questioned about this issue by the Joint Committee on Human Rights on 13 March 2012, Sir Nicholas appeared to take a more nuanced approach to the question of subsidiarity, but expressed concern about the issue of the margin of appreciation:

> I do not think we have a strong objection to writing it [the principle of subsidiarity] in. We feel it is not necessary, and I think we would need to see how it was actually expressed, because I think the word "subsidiarity" has been given a number of different meanings. For us, it is based on the premise that member states have fulfilled their primary obligation under Article 1 to secure the rights and freedoms of those within the jurisdiction, and their obligation, effectively, under Article 35 to provide an effective remedy where those rights have been violated.
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> We would have more concern still about the suggestion that somehow the margin of appreciation should be legislated for as well. There I think there would be real doubts in attempting to legislate for something that, as is clear from our jurisprudence, varies very much depending on the nature of the particular article of the Convention invoked, the breach of that article, and whether it is for reasons of national security or for morals, in which case you give a wider margin, or in circumstances such as interference with political speech, where you would give a narrower margin. It would be extremely difficult to legislate for a margin of appreciation that would inevitably vary.

The Government's Explanatory Memorandum on the Protocol notes that the amendment "recalls explicitly that it is the High Contracting Parties that hold the primary responsibility to

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[9] Sir Nicolas Bratza on the Court's Preliminary Opinion on issues for discussion at Brighton, 23 February 2012.

implement the Convention", referring to the "proper role of the Court and the operation of the doctrine of the margin of appreciation". Later the EM underlines the importance of the Article 1 amendment, which

> … goes to the heart of current domestic and international debates about the role of the Court and its relationship with the High Contracting Parties. It will be important that the Court follows the clear direction given by the High Contracting Parties in the Brighton Declaration as to the limits of its role, and reflects this in the cases that it admits and the judgments that it gives.

The JCHR Report of December 2014 pointed to the different pressures the amendment will put on the Court, national governments and parliaments:

> … the increased onus the amendment to the Preamble places on the Court to pay respectful attention to the reasoned assessment of the national authorities, and, in turn, the correspondingly greater onus on, first, Government departments to conduct such detailed assessments of the Convention compatibility of their laws and policies and, second, Parliament to subject the Government's assessment to careful scrutiny and debate.

> The "margin of appreciation" referred to in the amended Preamble is the doctrine that, subject to the supervisory jurisdiction of the Strasbourg Court, States enjoy a degree of latitude in deciding from a range of possible ways in which the rights in the Convention may be implemented. The margin of appreciation is variable, and dependent on the circumstances of the particular case, and has no application at all in relation to certain rights, such as the right to life, the prohibition of torture or the ban on slavery or forced labour.
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> Joint Committee on Human Rights, 4th Report 2014-15

The margin of appreciation

The European Court of Human Rights has used the term "margin of appreciation" in hundreds of rulings and decisions to take account of the room of manoeuvre that national authorities may be allowed in fulfilling some of their main obligations under the European Convention.[10] However, the principle has not been written into the Convention itself.

The term was defined in 1976 in the case of *Handyside v United Kingdom* (which concerned freedom of expression under Convention Article 10) where the Court explained that "the machinery of protection established by the Convention is subsidiary to the national system safeguarding human rights". The Court observed that although national authorities enjoyed a "margin of appreciation", this went "hand in hand with [...] European supervision". The Court had to decide, the ruling went "on the different data available to it, whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient …"

A practitioner text, *Human Rights Law and Practice*[11], noted that after several further cases, the Court had indicated that the attitude which it adopts towards the margin of appreciation will vary according to the context, and that "relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned".[12]

Derogations from Convention obligations have been granted under Article 15 of the Convention "in time of war or other public emergency". But some Convention Articles cannot

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10 See CoE Lisbon Network page on the margin of appreciation.

11 Lester, Pannick and Herberg (Eds) *Human Rights Law and Practice* (3rd Edition, LexisNexis, 2009)

12 *Ibid*, para 3.18

be subject to the margin of appreciation. A derogation, as distinct from the 'room for manoeuvre' of the margin of appreciation, is when deviation from the Convention rights may be permitted, but not with regard to Article 3 (or from Article 2, right to life – "except in respect of deaths resulting from lawful acts of war", Article 4(1), prohibition of slavery and forced labour, or Article 7, no punishment without law). In *Lawless v Ireland* in 1961 the then Commission of Human Rights alluded to the margin of appreciation in dealing with the lawfulness of a derogation made in the context of terrorism in Northern Ireland, although the Court in its judgment did not refer to the principle, stating that an emergency was "reasonably deduced by the Irish Government from a combination of factors" (para. 28), which it enumerated.[13]

In *Ireland v The United Kingdom* (1978) and *Brannigan and McBride* (1993), the Court held that:

> It falls in the first place to each contracting state, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation.

In *Ireland v United Kingdom,* the Court emphasised the margin of appreciation to be granted to each Party and found that the extrajudicial deprivation of liberty was justified by the circumstances between August 1971 and March 1975, as they were perceived by the UK Government.[14] The Court stipulated, however:

> There must be a link between the facts of the emergency on the one hand and the measures chosen to deal with it on the other. Moreover, the obligations under the Convention do not entirely disappear. They can only be suspended or modified 'to the extent that is strictly required' as provided in Article 15.[15]

In *Brannigan and McBride v UK,* recalling *Lawless*, the Court added:

> Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstance leading to, and the duration of the emergency situation.[16]

As with the subsidiarity principle, opponents of the status quo argued that the activities of the Strasbourg Court could be constrained by the operation of this doctrine. Most notably, Lord Hoffman argued that:

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[13] *Lawless* judgment, 1 July 1961, Para. 28.
[14] *Ireland v UK*, judgment, 18 January 1978, Series A, No.25; (1979-80) 2 EHRR 25.
[15] *Ireland v UK* (1978) 2 EHRR 25:
[16] *Brannigan and McBride v UK*, judgment 26 May 1993, Series A, No. 258-B; (1994) 17 EHRR 539, Para. 43.

> The Strasbourg court has to a limited extent recognised the fact that while human rights are universal at the level of abstraction, they are national at the level of application. It has done so by the doctrine of the 'margin of appreciation', an unfortunate Gallicism by which Member States are allowed a certain latitude to differ in their application of the same abstract right. Clearly, that is a step in the right direction. But there is no consistency in the application of this doctrine and for reasons to which I shall return in a moment, I do not think that there is a proper understanding of the principle upon which it should be based. 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. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe. [...]
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> The court treats the margin as a matter of concession to Member States on the ground that they are likely to know more about local conditions than the judges in Strasbourg. In other words, they assume that in principle they are competent to decide any question about the law of a Member State which is arguably touched by human rights but sometimes abstain from exercising this vast jurisdiction on the ground that it is something which the local judges are better equipped to do. What I think they should recognise is that we are concerned with a matter of constitutional competence, that is, whether they have the right to intervene in matters on which Member States of the Council of Europe have not surrendered their sovereign powers.[17]

In its Opinion on the draft protocol, the Court of Human Rights had been concerned about the wording of what became Article 1 of the Protocol, fearing that the reference to the margin of appreciation in Article 1 could give rise to uncertainty about its meaning. Unlike the Brighton Declaration, it did not include the words "as developed in the Court's case law". The Court was concerned that the amended Preamble might be thought to infer that the States Parties intended to alter the substance of the Convention or its system of international, collective enforcement, which was not the intention. The Court wanted a reference to the doctrine of the margin of appreciation "as developed in the Court's case law" to be included in the Article, but the final text of Protocol Article 1 was not amended to take account of this concern. The accompanying Explanatory Report clarifies the drafters' intention that the reference to the margin of appreciation is to be consistent with the doctrine "as developed by the Court in its case-law" and does not apply to the Convention's non-derogable rights in matters of life and death, torture or slavery (Convention Articles 2, 3 and 4).

The JCHR welcomed the clarification in the Explanatory Report that the term "as developed in the Court's case-law", "was not intended to dilute in any way the States' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention.[18]

Vincent Berger (former jurisconsult of the European Court of Human Rights) thought the amendment's "symbolic value evidently prevails over its practical scope".[19]

3.3 Time frame for implementing reforms

The protocol must be ratified all 47 CoE Member States. As of 4 December 2014 it had been signed by 29 CoE States and ratified by 10.[20] The Protocol will come into force on the first

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

18 JCHR 4th Report 2014-15, para. 3.9.

19 Human Rights Education for Legal Professionals, Protocol n. 15 and legal practitioners

day of the next month after three months from the date of the final ratification. Articles 1 and 5 will enter into force on that date while Articles 2, 3 and 4 are subject to transitional provisions set out in Protocol Article 8. The reduction in time limit in Article 4 will take effect six months after the Protocol comes into force.

To give an idea of the time it can take to implement reforms requiring amendments to the Convention in the form of new protocols, Protocol 14 was opened for signature on 13 May 2004, received its final ratification on 18 February 2010 and entered into force on 1 June 2010. To tackle the problems arising in the interim, in May 2009 States Parties adopted Protocol 14 *bis* and the Madrid Agreement on the provisional application of certain provisions of Protocol 14 pending its entry into force.

According to the Government EM on Protocol 15, it does not require any changes to UK law and the Government "does not expect to take any action to implement Protocol 15. The One-in, One-out Rule[21] is not applicable to the process of concluding this Treaty".

4 Documentation and comment

4.1 Documentation

- Interlaken Declaration, 19. February 2010
- Izmir Declaration, 26 – 27 April 2011
- Brighton Declaration, 19-20 April 2012
- Council of Europe, Reforming the European Convention on Human Rights : Interlaken, İzmir, Brighton and beyond: a compilation of instruments and texts relating to the ongoing reform of the European Convention, March 2014
- Protocol No.15 (CETS No. 213)
- Explanatory Report on Protocol No.15
- UK Government Explanatory Memorandum on Protocol No. 15

4.2 Reading list

- Joint Committee on Human rights 4th Report of 2014-15, Protocol 15 to the European Convention on Human Rights, 2 December 2014
- UCL, The margin of appreciation doctrine in European human rights law, October 2014
- Sarah Lambrecht, Reforms to lessen the influence of the European Court of Human Rights: A new strategy, Working paper, World Congress of Constitutional Law 2014 'Constitutional Challenges: Global and Local' Workshop 9: Constitutional identity and constitutionalism beyond the nation state, Oslo, 16-20 June 2014

- Ingrid Leijten, The Strasbourg Margin of Appreciation: What's in a Name? 8 April 2014
- Dean Spielmann, UCL – Current Legal Problems lecture: Whither the Margin of Appreciation? 20 March 2014

- Dr. sc. Maša Marochini, The Interpretation of the European Convention on Human Rights, 27 October 2013

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[20] CoE chart of signatures and ratifications, CETS No.213.

[21] 2010 Government plan that no new regulation would be brought in without other regulation being cut by a greater amount. See http://www.oecd.org/gov/regulatory-policy/49076201.pdf.

- Noreen O'Meara, Reforming the European Court of Human Rights through Dialogue? Progress on Protocols 15 and 16 ECHR, *UK Constitutional Law Group*, 31 May 2013

- Elliot Gold Reform human rights to save human rights, *The Spectator*, 3 April 2013

- Laurens Lavrysen Procedural Justice in Human Rights Adjudication: The European Court of Human Rights, *Strasbourg Observers*, 12 February 2013

- Open Society comment on the Margin of Appreciation, April 2012

- Dean Spielmann, Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver of Subsidiarity of European Review? *Cambridge Yearbook of European Legal Studies* 381, 383 (2011-2012). Lecture at Centre for European Legal Studies (CELS), March 2012, available at http://www.law.cam.ac.uk/press/news/2012/03/judge-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/1821.

- Lord (Michael) Howard QC, Kingsland Memorial Lecture, Policy Exchange 2012

- Teresa Sanader, The development of the margin of appreciation doctrine: "as the margin of appreciation has shrunk, so controversy has grown" (David Cameron, speech, Strasbourg, *Public Law,* 25 January 2012)

- Dominic Grieve, European Convention on Human Rights - current challenges, speech, October 2011

- Dr Michael Pinto Duschinsky, 'Bringing Rights Back Home', Policy Exchange 2011

- Paul Gallagher, "The European Convention on Human Rights and the Margin of Appreciation", University College Dublin Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 52/2011

- Sir Nicholas Bratza *QC,* "The relationship between the UK courts and Strasbourg", *European Human Rights Law Review* 2011, No. 5, pp. 505-512,

- Janneke Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine", *European Law Journal* Vol. 17 Issue 1, January 2011

- Giuseppe Franco Ferrari and Oreste Pollicino, "The impact of supranational laws on the national sovereignty of member states with particular regard to the judicial reaction of UK and Italy to the new aggressive approach of the European Court of Human Rights", *Comparative Law Review* Vol. 2, No. 2, 2011

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

- Ignacio de la Rasilla del Moral, "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine", *German Law Journal* No. 6 1 June 2006

- *Cenap Cakmak*, "The Problem Relating to the Margin of Appreciation Doctrine under the European Convention on Human Rights", *Review of International Law and Politics* 18, 2006

- George Letsas, "Two Concepts of the Margin of Appreciation", *Oxford Journal of Legal Studies* 2006 26(4) pp 705-732