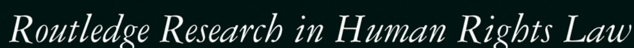

DETENTION AND THE RIGHT TO LIBERTY

ADDRESSING GAPS IN PROTECTION AT THE EUROPEAN COURT OF HUMAN RIGHTS

Sabina Garahan

'The wider understanding of the Court's jurisprudence concerning the right to liberty under Article 5 will be greatly assisted by the excellent work of Dr Garahan.'

Judge Erik Wennerström, *European Court of Human Rights*

'*Detention and the Right to Liberty* is a scholarly and compelling book. Garahan's analysis of the shortcomings of the European case-law on detention and liberty, as well as her prescriptions as to how to rectify them, will be indispensable to all those who work in the field of European human rights law.'

Professor Eirik Bjorge, *Bristol University Law School,*
Adjunct Professor, Columbia Law School

'*Detention and the Right to Liberty* provides a compelling account of the need to develop Article 5 of the Convention. Dr Garahan's finely tuned analysis will contribute to the European Court's distillation of the elements of Article 5 in the coming years during this critical era of global crisis.'

Dr Matthew Gillett, *Chair Rapporteur of the*
UN Working Group on Arbitrary Detention

'The right to liberty is a core human rights value but often misunderstood, undermined, and violated on a mass scale. Garahan's dynamic study of the European Court of Human Rights' adjudication of this right exposes important system-level weaknesses that deserve careful scrutiny and follow up. This book is essential reading not only for scholars of the European Convention system and of the right to liberty, but also for judges, practitioners, and all users of the system.'

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Detention and the Right to Liberty

This book is a ground-breaking study of how the European Court of Human Rights interprets Article 5 of the European Convention on Human Rights – the right to liberty and security.

The right to liberty is a fundamental provision that is enshrined not only in the Convention but in all major human rights treaties. Despite this, Article 5 remains both a largely underdeveloped and unexplored area of European human rights law. The work aims to fill this gap by presenting an original framework for the progressive interpretation of the right to liberty. It is argued that the Court has not made use of opportunities to evolve Article 5 standards, resulting in a weakening of protections against arbitrary detention. This book's original framework for the progressive interpretation of Article 5 identifies and addresses gaps in the protection of vulnerable groups of detainees, including in areas of growing concern across the European human rights space. These include individuals held pre-trial, as children, in immigration detention, following protest, or as a result of their political dissent or human rights activism. The volume outlines the normative justifications for an evolutive approach to Article 5 and elaborates how a dynamic interpretation could be enacted in practice, including by reference to original interview data and insights from European Court of Human Rights judges.

This book will serve as a key point of reference for anyone researching or working on detention and the right to liberty across the Council of Europe and beyond.

Sabina Garahan is a lecturer (assistant professor) in human rights and criminal law at the University of Essex Law School and is director of the Essex Human Rights Centre Clinic.

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Detention and the Right to Liberty

Addressing Gaps in Protection at the European Court of Human Rights

Sabina Garahan

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Foreword

Egidijus Kūris

Professor, Vilnius University Judge of the European
Court of Human Rights (2013–2024)

Judges of the European Court of Human Rights constantly receive requests for interviews from researchers writing on various topics related to the Court's case-law, as well as on its internal workings. Most judges see such communication as part of their broader judicial mission because – despite the oft-repeated adage that courts speak (or at least should speak) through their judgments rather than through informal explanations thereof by individual judges – not everything that determines their collective 'judicial production' is always adequately discernible from the text of the judgments. Moreover, each judge has his or her views both on specific cases which generate the interest of researchers (and the broader readership) and on the general direction in which the Court is headed. Therefore, sharing their perspective – personal and subjective as it may be – with researchers may shed light on why the case-law on specific matters is developing in one or other direction, and whether judges see it as consequent or, as it happens, contradictory. Although the questions posed during these interviews are tailored to the specific needs of respective interviewers, they also provide an additional inducement for a judge giving an interview to once again reflect on what otherwise may be his or her daily judicial routine and to conceptualise the Court's jurisprudence, as well as his or her own stance vis-à-vis the latter. This is a peculiar challenge, because the judge giving an interview becomes not only the information provider to the interviewing researcher, not only his or her advisor or consultant, but at the same time an object of the research thoroughly and, yes, critically examined by the researcher as if through a magnifying lens.

Ms Sabina Garahan, who at that time was working on her doctoral thesis, requested an interview with me (and, I surmise, some of my colleagues at the Court) in early 2020. We scheduled a meeting in Strasbourg well in advance – in April of that year. Then the COVID-19 pandemic entered the stage and dismantled so many plans of so many people. The interview thus could take place only in January 2021; it was conducted not live but online. Although Ms Garahan apprised me that she would focus primarily on matters related to Article 5 of the Convention, our conversation (of which she soon sent me a transcript) went well beyond that. Of course, we talked about such issues as the rather detailed formulas of Article 5 (as compared to those of other Articles), or what suspicion is to be considered 'reasonable' in order to justify,

in the eyes of the Court, a person's pre-trial detention. However, these Article 5–oriented questions inevitably branched out to those related to the good faith, or rather lack thereof, of the authorities; measures increasingly taken in some Member States against political opposition and the Court's almost hopelessly unmovable reluctance to engage in examination of the complaints from the angle of Article 18 (even after having found violations of a number of Convention rights); or how far the Court could go into 'micromanagement' of the domestic authorities' decisions under its examination (so it does not become the court of fourth instance). But Ms Garahan asked even more general questions, inquiring, inter alia, about: how the Court determined how much deference was to be given to the Member States, what the similarities and differences were in the perception of the margin of appreciation by judges, the 'things left unsaid' in various judgments, or how compromises were reached between judges in order that satisfactory majorities were achieved in Chambers and the Grand Chamber of the Court. We spoke about how the Court tended to assess the errors of domestic courts, and what its stance was against possible external influences, in particular in judgments against the 'big players' on the political map. And so on. Already then, I was impressed by Ms Garahan's knowledge of the law of the Convention and her determination to substantiate the ways of enhancing its effectiveness.

Perhaps regrettably, not each and every interviewer later informs the interviewed judge about what he or she has published on the basis of interviews (or, in the alternative, why the responses appeared to be not useful for the purpose of the research). In Ms – now Dr – Garahan's case, however, her deep and pointed questions gave me a feeling that her research will lay a foundation for something really interesting. This book that you hold in your hands is not an easy reading, but it is well-structured, fluent, consequent, absorbing, and thought-provoking. The author skilfully and resourcefully navigates through various descriptive, normative, and theoretical subjects, making Article 5 and the right to liberty (and security) enshrined therein the pretext for raising more substantial questions about the Court's methodology and what she calls gaps in the Court's approaches, as well as about some of its coping strategies in various, so to say, inconvenient cases. She clearly prefers the evolutive interpretation of the Convention in general and of its Article 5 in particular to the subsidiarity-based approach, underlining the negative impact of uncritical reliance on the latter on the effectiveness of the law of the Convention. The giving of prominence to the evolutive interpretation of the provisions of the Convention is in itself nothing new, because this methodology – often intituled by a catchphrase, 'the Convention is a living instrument' – has long become an almost universally acknowledged and approbated approach; therefore, advocating it 'in principle' perhaps would amount to trying to break into an open door. Indeed, the provisions contained in laconic formulas of various Articles of the Convention and its Protocols have grown into a substantive volume of normative standards. That volume is still growing and will grow.

What makes Dr Garahan's book different is that she has shown that, as regards Article 5, this volume of doctrines is not growing fast enough or consequently enough, or perhaps both. An unevenness in the doctrinal evolution, as such, is characteristic of all Articles of the Convention (and, more broadly, all jurisprudential law, both supranational and national). Take, for example, Article 10: it took several decades for the Court to – at last – acknowledge (in *Magyar Helsinki Bizottság v Hungary*, [GC] no. 18030/11, 8 November 2016) that that Article encompassed not only the right to receive and impart information, but also the right to access state-held information (because the access to any information is not literally mentioned in that Article). Or take Article 12, which enshrines the right to marriage but not literally the right to its dissolution, although it should be obvious that without a dissolution of an unhappy marriage (I believe that the Convention is not aimed against the pursuit of happiness) there is no way that a person can enter into a new, happier, marital relationship; this over-conservative – indeed, anachronistic – interpretation coined (in *Johnston and Others v Ireland*, [Plenary] no. 9697/82, 18 December 1986) in times when there was less European consensus regarding the right to divorce was taken on board a few years ago (in *Babiarz v Poland*, no. 1955/10, 10 January 2017), as if nothing has changed. The author speaks out (I would say, appassionato) for the progressive evolution of the law of the Convention in Article 5 cases (but also in its case-law devoted to other Articles). She expresses her concern that the Court, notwithstanding some not insignificant advances in various areas, does not make full use of opportunities to progressively interpret Article 5 by setting certain minimal standards for testing whether deprivation of liberty has been arbitrary and, consequently, whether Article 5 has been violated; this leaves members of certain vulnerable groups (e.g. children, migrants, members of political opposition) without a recourse to an effective remedy under the Convention. This has a bearing on the overall efficiency of the law of the Convention, which, as the author believes, should and could be greater. Parts of this book are a thorough deconstruction of the Court's reasoning (or sometimes the shying of it) in (not only) Article 5 cases, where the author convincingly demonstrates that the Court tends to adopt, at times unduly, a subsidiarity-based approach instead of a more appropriate oversight-based and/or an evolutive one and thus allows for a greater discretion by Member States. Alas, sometimes the non-adoption of an oversight-based approach is dictated by expediency considerations (related to the Court's backlog of cases, etc., which, in order to sound nicer, have their name trimmed to 'judicial policy') which, strictly speaking, are not relevant to the complaints under examination (as, for example, in the cases of *Burmych and Others v Ukraine*, [GC], nos. 46852/13 et al., 12 October 2017, or *Turan and Others v Turkey*, nos. 75805/16, 23 November 2021). More often, however, expediency considerations, when they play a role, remain 'things left unsaid'; in such cases, the readership is left guessing as to, say, the reasons why did the Court refrain from examining certain complaints as 'not requiring separate examination' (as

in, alas, most cases where applicants complain under Article 18) or why it was excessively lenient to domestic authorities and did not seize the opportunity to strengthen the minimal standards for assessing the alleged violations of the right to liberty (or, for that matter, some other Convention right). Or, as is demonstrated, the Court refers to circumstances that have changed, but this prompts it to adopt a subsidiarity-based approach rather than an evolutive one. These criticisms are indeed thoroughly reasoned.

But here is the rub. First, if my impression is correct, the author (as do many others) synonymously equates the evolutive development of the law of the Convention with its 'progressive' advancement, whereby Convention rights are furthered rather than restricted. This equalisation is quite common and usually does not raise any objections. In reality, however, it is not so straightforward. Evolution by definition is not a one-way street. It happens that the evolution of the Court's case-law goes into the opposite direction. For instance, in relation to Article 5, in cases when an applicant was denied access to the case-file, the Court for some time had followed two lines of reasoning: one in Turkish cases, very lenient to domestic authorities, and another one in cases against all other Member States. The Court stepped out of this error in *Yüksekdağ Şenoğlu and Others v Türkiye*, nos. 14332/17 et al., 8 November 2022). Strictly speaking, the Court's temporary departure from the mainstream line of reasoning was some sort of evolution, but hardly a justified one, and was thus not a progressive one. The same goes for the exclusion from the scope of applicability of Article 3 of negligent inhuman and/or degrading treatment of a victim by private individuals (see *Nicolae Virgiliu Tănase v Romania*, [GC] no. 41720/13, 25 June 2019) or for the exclusion from the scope of applicability of Article 6 of civil (pecuniary) disputes which are not justiciable in any other court (see *Károly Nagy v Hungary*, [GC] no. 56665/09, 14 September 2017).

Second, while the Court may be credited for being increasingly compassionate to the plight of victims belonging to such groups as refugees or, more broadly, unlawful migrants, it is not excluded that the circumstances which are currently undergoing significant change may prompt it to toughen its stance in the face of the instrumentalisation (and indeed weaponisation) of migrants by rogue regimes (such as Russia or Belarus). At the time when this Foreword is being written, at least three such cases are pending before the Grand Chamber (against Lithuania, Latvia, and Poland); in some of them, the applicants complain, inter alia, under various provisions of Article 5. Such so far hypothetical toughening, if it materialises, would also be an evolution in the face of 'changing circumstances', but, without prejudice, it may appear to be justified as meeting the today's challenges, especially if it is not too drastic and reflects any 'new consensus'. For European consensus, like any phenomenon which evolves, also may prove not to be a one-way street. The Court has already demonstrated that it can be reasonably responsive to the difficulties which states face owing to new challenges of this kind (see, e.g., *A.A. and Others v North Macedonia*, nos. 55798/16 et al., 5 July 2022).

Third, it is appealing that – and how – the author of this book substantiates her preference to the evolutive approach over a 'conflicting' subsidiarity-based one (including the so-called process-based review). Her preference to the evolutive interpretation is not a whim but a tool for ensuring greater harmonisation of the law of the Convention, both internal (between various Convention provisions) and external (vis-à-vis domestic law and practice), which, in its turn, is aimed at the greater effectiveness of this most important human rights instrument. But this sails the author into waters swarmed with other sailors competing in the race, who raise their flags no less proudly and assuredly than the adherents of the progressive development raise their flag. One of the competitors' flags is sovereignty. Another one is legitimacy. Some could name more. The author skilfully bypasses such potential obstacles by underlining the importance of the European consensus as a condition for the evolutive approach which must be satisfied in order to be seen as legitimate and in line with the Member States' commitments, and this legitimacy is a condition for the effectiveness of the law of the Convention. European consensus, which limits the Member States' margin of appreciation, is interpreted as having not only (or even not so much) a majoritarian but also a non-regression dimension. And yet one must be mindful that the notion of subsidiarity, alongside the mentioning of the margin of appreciation, entered the text of the Convention only in 2021 (with the coming into force of Protocol No. 15). This late inclusion signifies the Member States' willingness to reserve a space for their own decision-making and their expectation that their discretion is given not just a minimal deference. It is not a coincidence that during the last decade, it became fashionable to speak, even if with some degree of exaggeration, of the 'age of subsidiarity'. Therefore, any disfavour of subsidiarity-based approaches must be carefully balanced and adequately reasoned, especially in game-changer cases. Indeed, as argued by the author, evolutive interpretation may be seen not as a choice open to the Court but as an 'interpretive obligation'. At the same time, less or no choice for the Court means the narrowing not only of its discretion, but also that of the Member States. This requires the Court to look into the need and possibilities to progressively interpret the Convention – and this may be not exactly a legal exercise, because it requires value assessment. It is true that the Court has been increasingly – and convincingly – 'progressive' in interpreting, say, the right to life, minority rights (inter alia, the rights of sexual minorities), the protection of privacy (including the freedom from hate speech) and so on, but it remains profoundly 'un-progressive' in certain types of cases, such as the already mentioned ones related to the right to divorce – which, in the Court's interpretation, is not a Convention right, because it is not mentioned as such in the *travaux préparatoires*. The author rightly reminds us that in some cases the Court has taken a position that *travaux préparatoires* are not determinative of the scope of Convention rights. But it appears that, even if they are not, sometimes they are.

Last but not least, Article 5 is the most detailed Article of all Articles of the Convention which enshrine specific rights. Evolutive interpretation is easier when a provision to be interpreted in an increasingly progressive manner when responding to new challenges is worded in abstract (or even vague) terms; it is much more difficult when the clauses are stricter. Therefore, when Article 5 is interpreted, the limits to its jurisprudential evolution may be tighter than to the interpretation of, say, Articles 8 or 10.

These and possible other similar reservations do not in any way subvert the arguments explicated in this book. Dr Garahan undertook an ambitious task to go into an underdeveloped field, and the product of this enterprise is an interesting and very consequential narrative. A book on such a controversial topic as the jurisprudential development of the law contained in a legal instrument more than seven decades old, the child of its time which was and still is looking to the future, inevitably raises more questions than it is possible to answer in one treatise. What one may wish to the author is that she does not abandon this theme but explores it further. Dr Garahan believes in what she writes. Her criticisms of the Court's case-law are aimed at enhancement of human rights protection, which, as I read it, is the driving force behind her research. As a former judge of the Court, I am sure that this book will be of interest not only to other researchers who explore related topics, but also to the judges of the Court, with their different professional, cultural and personal backgrounds, preferences, and inclinations. For, as Professor Aharon Barak has written in one of his opinions (and repeated in a forum at the Strasbourg Court in 2016), '[w]hen we sit at trial, we too stand trial'.

To sum up, Dr Garahan's book is an original and very useful contribution to the scholarly literature on the Strasbourg Court's jurisprudence. Enjoy – and reflect.

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The completion of this book would not have been possible without the wonderful mentorship I have been lucky to receive from dedicated human rights professionals and academics. My endless gratitude goes to Carla Ferstman, who has provided guidance and support for this book from its inception – your kindness is appreciated even more than your wisdom. Warm thanks are owed to Audrey Guinchard for her continued generosity and encouragement. Thank you to Andrea Huber for being a longstanding source of support and inspiration.

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My research focus stems from a deep-seated belief that the Convention system, despite the areas of improvement identified in this book, is an invaluable and extraordinary system of rights protection. This belief originated in academic study of the European Court of Human Rights and was definitively confirmed during my time as a Judicial Assistant to Judge (and former President) Robert Spano. I am grateful to all those at the Court who made this such an illuminating experience, and in particular to Judge Spano for allowing me to become involved in all areas of his work at the Court.

I would like to sincerely thank the judges of the European Court of Human Rights who were interviewed as part of this project. Particular thanks go to Judge Kūris for his insightful Foreword, which so powerfully captures the nature of the challenges of evolving the right to liberty while providing further impetus for doing so.

Finally, my gratitude goes to friends and family for endless support in this and all of life's endeavours.

Introduction

Aims of this book

Article 5 of the European Convention on Human Rights ('the Convention' or ECHR), which enshrines the right to liberty and security of the person, is a fundamental provision not only in the ECHR[1] but in all major human rights treaties.[2] Despite this, the right to liberty remains both a largely underdeveloped and unexplored area of European human rights law. The decision-making of the European Court of Human Rights ('the Court' or ECtHR) has been the subject of extensive academic inquiry. Commentators have examined the methodological tools adopted by the Court[3] in its assessment of the thousands of applications it receives annually.[4] There is a rich literature on the margin of appreciation and broader issues of subsidiarity.[5] Yet the question of discretion and how it applies specifically to Article 5 adjudication remains unexplored.

1 Article 5, together with Articles 2, 3 and 4, is 'in the first rank of the fundamental rights that protect the physical security of the individual . . . and as such its importance is paramount' – *Buzadji v the Republic of Moldova* App no 23755/07 (ECtHR, 5 July 2016), para 84 and, more recently, *Gryshko and Koshlyak v Ukraine* App nos 72970/13 and 12818/16 (ECtHR, 24 February 2022), para 7.

2 Article 9 of the International Covenant on Civil and Political Rights, Article 7 of the American Convention on Human Rights, Article 6 of the African Charter on Human and Peoples' Rights.

3 Key works include John G Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1988), Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) and Eva Brems, *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013).

4 European Court of Human Rights, 'Applications Pending Before a Judicial Formation' (*European Court of Human Rights*, 31 December 2021) <https://www.echr.coe.int/Documents/Stats_pending_2022_BIL.pdf> accessed 17 July 2024.

5 This includes Marisa Iglesias Vila, 'Subsidiarity, Margin of Appreciation and International Adjudication Within a Cooperative Conception of Human Rights' (2017) 15(2) International Journal of Constitutional Law 393, George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) Oxford Journal of Legal Studies 705 and Eyal Benvenisti, 'The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy' (2018) 9(2) Journal of International Dispute Settlement 240.

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In this context, discretion refers to the space left for Contracting States to determine the manner in which they secure their obligations under the ECHR.[6]

This book makes the original argument that Article 5 is a provision in fundamental need of progressive advancement. Since Article 5 lists, at length, an exhaustive set of grounds for detention (beyond which deprivation of liberty cannot be imposed), general understanding of the provision is that it is – by its nature – static. As a result, the progressive potential of the right to liberty has largely been neglected, both within scholarship and at the Court. This book seeks to redress that pattern by outlining the ways in which Article 5 may be read evolutively, thereby helping to address the gaps in protection that have arisen. While the underlying grounds for detention cannot change, the Court's adjudication of whether or not the deprivation of liberty was justified under each ground should attract a dynamic interpretation in order to ensure that the right remains practical and effective in modern-day societies. The aims of this book are therefore two-fold. First, it seeks to prove that, overall, a progressive interpretation of the right to liberty is missing (an argument that has not been previously made). Second, this book makes concrete suggestions for how the gaps in protection against arbitrary detention that have consequently arisen may be addressed by using the Court's existing methods of interpretation. In this way, the exhaustive nature of the right to liberty can be upheld without the need for amendment or derogation by the Council of Europe Contracting States.[7] From increased recourse to and automaticity in immigration detention[8] to the mass detention of protesters,[9] the issues identified in this book regarding the weakening of Article 5 standards continue to be of vital importance in the Convention acquis.

Embracing a progressive interpretation of the Convention has in many areas helped the jurisprudence of the Court – and consequently, relevant human rights standards – to flourish. This has notably been the case under

6 Steven Greer, 'The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights' (*Council of Europe*, July 2000) <https://www.echr.coe.int/librarydocs/dg2/hrfiles/dg2-en-hrfiles-17(2000).pdf> accessed 17 July 2024.

7 Lord Wilson, 'Our Human Rights: A Joint Effort?' (*Northwestern University*, Chicago, 25 September 2018) 8 <https://www.supremecourt.uk/docs/speech-180925.pdf> accessed 17 July 2024 and see, on this, Lewis Graham, 'Liberty and its Exceptions' (2023) 72(2) International and Comparative Law Quarterly 277, 307–8.

8 Sabina Garahan, 'Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers Under the Illegal Migration Act' (2024) Public Law 11; Sabina Garahan and Matthew Gillett, 'Legislative Scrutiny: Illegal Migration Bill', HC 1241, HL Paper 208 (11 June 2023), Written Evidence by Dr Sabina Garahan and Dr Matthew Gillett (IMB0015) <https://committees.parliament.uk/writtenevidence/119881/pdf/> accessed 17 July 2024.

9 Council of Europe, 'Demonstrations in France: Freedoms of Expression and Assembly Must Be Protected Against All Forms of Violence' (*Council of Europe*, 24 March 2023) <https://www.coe.int/fi/web/commissioner/-/manifestations-en-france-les-libert%C3%A9s-d-expression-et-de-r%C3%A9union-doivent-%C3%AAtre-prot%C3%A9g%C3%A9es-contre-toute-forme-de-violence> accessed 17 July 2024.

Article 8 of the Convention, the right to private and family life, and has been achieved through the use of dynamic or evolutive interpretation in order to advance standards in line with developments across the Council of Europe. Where needed to address gaps in protection, the Court has also looked to international principles and commitments signed up to by Contracting States beyond the Convention. Without an evolutive approach that recognises the Convention to be a living instrument that must adapt in order to remain practical and effective, fundamental rights that we now take for granted would not have entered the Convention acquis; this ranges from the decriminalisation of homosexuality[10] to the legal recognition of children of unmarried parents.[11] By contrast, the Court's failure to adopt an evolutive approach to the right to liberty has resulted in significant gaps in rights protection. The Court's refusal to introduce a minimum level of protections against arbitrary detention stems both from its hesitance to adopt evolutive approaches as well as oversight-based approaches. As a result, the Court relies on subsidiarity-based approaches to buttress its hesitation to progressively advance Article 5 standards, whether by duly recognising the shared consensus among Contracting States and setting minimum standards on this basis (through an evolutive reading) or by refusing to question the decision-making of national courts (through the required level of oversight).

Current evolutive interpretation is not always rooted in developments across the Contracting States. I argue that linking an evolutive reading to the principle of effectiveness is further strengthened by a progression that reflects, as far as possible, the trajectory taken by States either in the Council of Europe context or indeed as shown by their other international commitments. This can ensure greater legitimacy and compliance, since the right standards will have been reached through an organic exchange between the steps taken by States and the threshold demanded by the Court. The original framework developed in this book for the progressive interpretation of the right to liberty pursues two key aims: effectiveness and harmonisation. Importantly, the principle of effectiveness seeks to harmonise the Convention both internally and externally.[12] I provide a framing that considers both of these aspects. Internal harmonisation is evaluated with respect to claims under Article 5 being taken together with other ECHR provisions and in analysis of proportionality testing under the provision. External harmonisation is pursued in this book through an emphasis on the capacity of consensus to advance rights standards in line with international (and not merely European) principles where needed to plug gaps in protection.

10 *Dudgeon v the United Kingdom* App no 7525/76 (ECtHR, 22 October 1981).

11 *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979).

12 Georgios A Serghides, 'The Principle of Effectiveness in the European Convention on Human Rights, in Particular Its Relationship to the Other Convention Principles' (2017) 30 Hague Yearbook of International Law 1, 3.

Methods and approaches

Since Article 5 is not set out as a qualified right, classical analyses of discretion relative to limitation clauses cannot be used to effectively test discretion under Article 5. For example, proportionality considerations do not apply in the same way to the provision as they do under qualified rights.[13] The Court itself declares that the exceptions in Article 5 § 1 are to be interpreted narrowly.[14] This presupposes that the exceptions already incorporate a fair balance between individual rights and the public interest.[15] Moreover, the Court does not apply a general theory of discretion. Thus, in order to provide a framework for assessing the appropriateness of discretion, I have identified three approaches that guide the Court's application of its methods of interpretation and which variably impact on discretion.[16] These approaches are subsidiarity-based, evolutive, and oversight-based. While they are based on different sets of justifications, each can be tied to the fundamental requirement of effectiveness, as elaborated throughout this book, which identifies what these justifications are and contextualises them within the ECHR rights space. This book moreover benefits from original interview data and insights from ECtHR judges into the methods and approaches taken in adjudicating the right to liberty, in order to support an evolutive framing capable of addressing gaps in protection against arbitrary detention.

In interpreting the Convention, the Court is guided 'mainly' by the rules of interpretation set out in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT).[17] The Court has additionally developed its own methods of interpretation which guide its review of applications.[18] The methods

13 See Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 215–6.

14 *A. and Others v the United Kingdom* App no 3455/05 (ECtHR, 19 February 2009), para 171:

> If detention does not fit within the confines of the sub-paragraphs [under Article 5 § 1] as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee.

15 See also the Joint Dissenting Opinion of Tulkens, Spielmann and Garlicki in *Austin and Others v the United Kingdom* App nos 39692/09, 40713/09 and 41008/09 (ECtHR, 15 March 2012), para 4: 'the wording of Article 5 in itself strikes the fair balance inherent in the Convention between the public interest and the individual right to liberty by expressly limiting the purposes which a deprivation of liberty may legitimately pursue'.

16 The Court's interpretive devices 'serve to determine whether national authorities have over-stepped the ambit of discretion' – Yutaka Arai-Takahashi (n 3) 2.

17 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008), para 65, but see Letsas who argues that 'the VCLT has played very little role in the ECHR case law' and that 'the Court's interpretive ethic has been very dismissive of originalism and literal interpretation', with the Court instead adopting a moral reading of the ECHR – George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 European Journal of International Law 509, 512. See, more extensively, George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2009).

18 '[T]he Court departed from the Vienna Convention and developed its own methodology in many respects' – Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional*

of interpretation that the Court uses to enact each of these approaches are assessed to test how the level of discretion they allow coincides with (or deviates from) the stated aim of the approaches. The methods of interpretation that this book assesses are: the margin of appreciation (which may pursue all three approaches), the living instrument doctrine (which pursues an evolutive approach), the fourth instance doctrine (which pursues a subsidiarity-based approach), and autonomous concepts (which pursues an oversight-based approach). Categorising the approaches in this way is important since having a clear awareness of their purpose – or intended purpose – can help to more accurately assess the extent to which the discretion that is justified on their basis is appropriate within the context of the case.

The way that this book seeks to test whether evolutive, subsidiarity-based, and oversight-based approaches are appropriately deployed in Article 5 adjudication is by reference to the methods of interpretation that the Court uses to enact each approach. Even where an application of an evolutive approach may, based on personal views, be the preferred outcome, this clearly cannot occur legitimately without a principled application of the relevant method(s). I do not therefore seek to undermine the importance and utility of subsidiarity-based and oversight-based approaches. Rather, I compare the use of all three approaches across Article 5 jurisprudence, noting the gaps in the application of an evolutive approach and suggesting how these gaps can be filled.

Selected Article 5 case-law is used to test the discretion granted through each method, based on the approach it seeks to pursue in a given case. In order to provide an in-depth conceptual analysis, each justification ground for detention where it is argued a dynamic reading is lacking is examined by reference to relevant case-law. This is supplemented by an evaluation of jurisprudence which highlights the challenges of each method of interpretation in the light of its underlying approach(es). In addition, doctrinal inquiry and normative argumentation are supported by original empirical data gathered through semi-structured qualitative interviews with serving judges of the ECtHR.[19] The generated interview data offer important insights into the methods and approaches taken by the Court in adjudicating the right to liberty, as seen from the perspective of practising judges. In particular, the data provide first-hand insight of how traditional discretion-granting tools are applied in the context of a limited right such as Article 5.

An assessment of whether or not evolutive approaches are underused cannot take place in a vacuum. In order to make that determination, I examine how subsidiarity-based and oversight-based approaches are deployed by the Court through the methods of interpretation. This allows for a principled

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Reconstruction (Cambridge University Press 2005) 275. See also Gunn who argues that the Court's operating rules are 'largely exempt from treaty' and that '[t]he relative lack of a governing treaty provides the . . . Court with the opportunity to clarify its own internal procedures' – Jeremy Gunn, 'Limitations Clauses, Evidence, and the Burden of Proof in the European Court of Human Rights' (2020) 15 Religion and Human Rights 192, 205.

19 All views expressed by judges are made in a personal capacity.

conclusion to be reached regarding the position that the Court takes in Article 5 adjudication and the key goals of its findings under the provision. I do not argue that any of the three approaches is, in and of itself, either positive or negative for the realisation of rights at the Convention level. Identifying the rationale – approach – of the methods of interpretation allows for an assessment of whether the discretion accorded on that basis is appropriate. It helps to determine whether the Court is applying its methods as intended, namely in pursuit of the stated aims. Since some methods can pursue more than one approach, this categorisation aids a more nuanced analysis. Rather than determining whether the scope of the margin of appreciation was appropriate in a given case, this book therefore asks – what approach was the Court applying in its use of the method? Did the Court adhere to this aim? If so, the level of discretion accorded on that basis is more likely to be appropriate. If the Court nonetheless looked to other factors – most often, efficiency considerations – in its determination, the discretion is unlikely to be appropriate.

Chapter 1 therefore sets out the three approaches and critically assesses their legitimacy in the context of the Convention, outlining how the methods of interpretation are used to support each approach. This is framed within the key Convention aims of effectiveness and harmonisation. Chapter 2 argues that centring consensus in the evolution of ECHR standards can help to build a more progressive body of jurisprudence that meets the goals of effectiveness and harmonisation. Where needed, the focus can extend to international principles, ensuring external harmonisation in order to address gaps in protection for vulnerable groups. My framing of the principle of non-regression of ECHR standards as mandatory and intrinsically tied to progressive interpretation is crucial in this respect: since the Court's methods of interpretation cannot be used to walk back human rights, any recourse to consensus can only be made if the effect is to expand rather than limit protections. Chapter 3 focuses on problematic areas of Article 5 case-law – namely pre-trial detention, the detention of minors, and immigration detention – as contexts in respect of which it is argued the Court allocates an inappropriate level of discretion and where an evolutive reading is urgently required. Chapter 4 considers the use of proportionality testing under Article 5. Since Article 5 has been drafted to incorporate any possible limitations, allowing for balancing which considers factors beyond the text of the provision undermines the appropriateness of the discretion that is granted. The chapter tests the extent to which this is done by reference both to how the right to liberty is balanced against rights that have benefitted from a more evolutive reading, as well as against the public interest with respect to protest-related detention. Chapter 5 applies the original framework of testing the appropriateness of discretion to the context of claims brought under Article 5 taken together with Article 18, which proscribes the abuse of State power to impose detention (generally, for ulterior political goals), and Article 14, which prohibits discriminatory sentencing practices. Determining the scope of discretion in adjudication

of the right to liberty taken together with other Convention rights provides the opportunity to evaluate how protections against arbitrary detention are upheld when potentially discriminatory or bad faith measures are taken by governments.

Conclusions

This book ultimately finds that the allocation of an undue level of discretion to Contracting States in justifying detention accompanied by the lack of an evolutive reading creates gaps in protection against arbitrary detention. This book comprehensively assesses the development of Article 5 jurisprudence in several key areas, identifying the reasons for a lack of progressive advancement and making suggestions that can spur a more progressive realisation of the right in future. To do so, it outlines, first, the normative justifications for an evolutive approach to Article 5 (in Chapters 1–2), developing a consensus-based framework that pursues the key goals of effectiveness and harmonisation. Importantly, this considers both internal harmonisation among the Convention provisions, and external harmonisation in the light of broader commitments made by the Contracting States of the Council of Europe. Second, this book elaborates how a dynamic interpretation of Article 5 could be enacted doctrinally (in Chapters 3–5). This is considered in the fields of pre-trial detention, immigration detention, and the detention of minors; with a view to proportionality testing; and when the right to liberty is taken together with other Convention provisions that proscribe State abuse of power (Article 18) and discrimination (Article 14). This would allow the Court to discharge its duty to actively develop and promote the human right to liberty, thereby ensuring that it remains practical and effective.

Ultimately, it is concluded that the methods of interpretation used by the Court to assess Article 5 claims apply a strongly subsidiarity-based approach, which tends to stifle both oversight-based and evolutive approaches. Although Article 5 exhaustively lists justifications for detention, beyond which detention cannot be imposed, the progressive potential of the right to liberty has largely been neglected. While the limitations themselves must remain static, the justifications should be subjected to an evolutive reading that takes account of modern-day realities in order to preserve the effectiveness of the right to liberty. The increased focus on subsidiarity has arguably usurped the adoption of evolutive approaches in a number of Article 5 settings. References to the living instrument or an emerging consensus are especially scarce in Article 5 jurisprudence. However, the fact that the provision enshrines a limited right does not give rise to any barriers to evolutive interpretation – to the contrary, despite being a right that provides an exhaustive list of grounds for deprivation of liberty, discretion is applied in numerous ways. By failing to apply evolutive approaches to the right while continuing to use subsidiarity-based approaches, the ECtHR has undermined the progressive quality of a key Convention protection.

Where the competing aims of subsidiarity and evolutive interpretation arise, there is a much greater willingness to adopt the former at the expense of the latter. The consensus-focused framing of evolutive interpretation developed in this book seeks to centre the mandatory nature of both dynamic interpretation and non-regression which I argue flows therefrom. I rely on two primary goals of the Convention: ensuring that rights remain practical and effective (effectiveness), and that they cohere both internally and externally with regard to other commitments made by Contracting States (harmonisation). The requirement of effectiveness offers normative justification for including both existing European consensus and international standards in the adjudication of a claim, where these are more capable of ensuring the effectiveness of a right than European principles. This is linked to my proposed recognition of detainees as a vulnerable group, which would offer normative justification for using progressive European and international standards to ground an increasingly evolutive approach to Article 5, thereby plugging gaps in protection. Since Contracting States have made various (often specialised) international commitments, their consideration as part of a Convention claim helps to ensure a more harmonious application of the rights protections States have pledged to provide. This can be seen in the body of life imprisonment jurisprudence assessed under Articles 14 and 5, which deftly upholds both the right to liberty and equality protections, using dynamic interpretation to advance standards progressively.

Overall, the European right to liberty remains untethered to new and progressive ideals. As a result, its practical use as a shield against arbitrary detention has – in various ways – become weakened. Pursuit of the evolutive framework outlined in this book would allow the Court to discharge its duty to actively develop and promote the human right to liberty, thereby ensuring that it remains practical and effective. I conclude that adopting a more evolutive approach that centres consensus serves to promote both of these aims under Article 5, in particular in the fields of pre-trial detention, immigration detention, and the detention of minors. Since this also leads to a progressive advancement of Article 5 in line with the evolutive interpretation of other Convention provisions, it is argued that three key goals are consequently achieved. First, standards on the right to liberty are strengthened in and of themselves and are able to respond to changing circumstances across the Council of Europe. Second, the right to liberty ceases to be disproportionately ceded to both competing individual rights under the ECHR and the public interest. Third, claims brought in conjunction with other Convention provisions duly consider the role of the right to liberty in protecting against abuses of power and discriminatory sentencing practices. It is therefore ultimately concluded that by adopting the progressive interpretation posited by this book, the Court can meet its interpretive obligation to maintain and further Convention rights,[20] including the right to liberty.

20 As enshrined in the Preamble to the Convention.

1 Framing discretion at the European Court of Human Rights

Introduction

This book offers an original framework for the progressive interpretation of Article 5 in order to address current gaps in the protection of detainees. The central argument that the Court has neglected the progressive advancement of the right to liberty is built on an assessment that the European Court of Human Rights ('the Court' or ECtHR) allocates an inappropriate level of discretion to Contracting States in key areas of Article 5 adjudication. Discretion refers to the scope accorded by the Court to the Contracting States of the Council of Europe in determining the manner in which they uphold the requirements of the European Convention on Human Rights ('the Convention' or ECHR). While discretion at the domestic level refers to the flexibility left to national judges as to how they assess the facts and evidence before them, within the context of the ECtHR, it refers to the level of flexibility allocated to Contracting States in meeting their Convention obligations.[1]

Since the Court does not apply a general theory of discretion, in order to provide a framework for assessing the appropriateness of discretion, I have identified three approaches that guide the Court's application of its methods of interpretation. Identifying the aims that inform the use of the Court's interpretive methods allows for an analysis of discretion based on the normative justifications of each approach. These approaches are subsidiarity-based, evolutive, and oversight-based. I analyse the methods of interpretation – the margin of appreciation, the fourth instance doctrine, the living instrument doctrine, and autonomous concepts – by reference to the approaches that they pursue. Chapter 1 explores the justifications of each approach in the context of European human rights law, providing a basis for assessing whether these approaches are suitable in adjudicating the right to liberty.

1 '[J]udicial deference in international adjudication can be grounded in different reasons than those emerging within a domestic constitutional framework' – Nikos Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' (2019) 3 European Public Law 445, 449.

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The methods of interpretation that this book assesses are: the margin of appreciation (which may pursue all three approaches, depending on the scope that is accorded following margin review), the living instrument doctrine (which pursues an evolutive approach), the fourth instance doctrine (which pursues a subsidiarity-based approach), and autonomous concepts (which pursues an oversight-based approach). Categorising the approaches in this way is important since having a clear awareness of their purpose – or intended purpose – can help to more accurately assess the extent to which the discretion that is justified on their basis is appropriate within the context of the case.

Subsidiarity-based approaches fulfil the goal of subsidiarity which is subject to extensive critique and analysis. Oversight-based approaches extend less discretion to national authorities by preserving a level of oversight, predominantly regarding the interpretation of certain Convention terms. As such, there is a natural tension between the goals of oversight and subsidiarity. This has come to a head with the expansion of subsidiarity on the basis of efficiency concerns and through increasing deference to national legislative processes. This book argues that the bounds of subsidiarity have been overstepped in certain contexts and that an oversight-based approach should be applied when this occurs. Evolutive approaches are founded on developments across the Contracting States and pursue the principle of dynamic interpretation.

It is important to consider whether the use of the methods of interpretation (and, indeed, underlying approaches) is binding. It is not possible to criticise the Court for failing to adopt a certain method or approach in a given case without first determining whether it is obligatory for the Court to do so. This is especially important in the light of the key argument in this book that dynamic or evolutive interpretation has been underutilised in Article 5 review. I frame evolutive interpretation as an interpretive obligation rather than a choice. I use effectiveness, a key Convention principle (termed 'the norm of all norms' by one serving judge[2]) which decrees that rights should be practical and effective, to offer normative justification for an increasingly evolutive approach to Article 5. Taking effectiveness together with another key goal of harmonisation of rights, both internally across the Convention acquis and externally by reference to other commitments undertaken by the Contracting States, allows for an evolutive reading of the right to liberty that encompasses all the protections from which detainees should benefit. The interpretive tools used by the ECtHR to assess Article 5 claims employ a heavily subsidiarity-based approach at the expense of an evolutive interpretation. The notion of how to ensure that rights remain practical and effective must therefore be elaborated with respect to Article 5. Effectiveness is intrinsically linked to the evolutive interpretation of the Convention. Centring effectiveness as the ultimate goal

2 See the seminal work of Georgios A Serghides, *The Principle of Effectiveness and its Overarching Role in the Interpretation and Application of the ECHR: The Norm of all Norms and the Method of All Methods* (Georgios A Serghides 2022).

of the Convention helps to clarify the contextual factors that should be taken into account in the development of a more evolutive approach to Article 5 adjudication. Harmonisation, meanwhile, buttresses a turn to international principles where this is required in order to ensure that rights standards do not regress – something which I argue is proscribed under the Convention (the non-regression principle).

My framing of whether discretion is appropriate focuses on the Court's own working methods (methods of interpretation) and whether they legitimately pursue their stated aims. In addition, I query the legitimacy of the Court's underlying justifications for the use of subsidiarity in certain contexts. Methods of interpretation that pursue subsidiarity on the basis of these justifications are consequently viewed as allocating an inappropriate level of discretion to States. Since the Court's jurisprudence is generally built on a precedential basis,[3] this book identifies any disparities in applying principles from existing case-law, thereby helping to draw out further inconsistencies. Determining whether the Court accords an appropriate level of discretion is important not only for ensuring the overall coherence and consistency of ECHR jurisprudence, which is vital in upholding the rule of law and foreseeability, but for improving the effectiveness of Convention rights. As per the Copenhagen Declaration, the quality – and in particular, the clarity and consistency – of the Court's judgments are important for the authority and effectiveness of the Convention system. This is because the judgments provide a framework for national authorities to effectively apply and enforce Convention standards at domestic level.[4] Indeed, if the content of European human rights law is not clear, it cannot be effectively transposed at the national level and will face sustained challenge by governments both domestically and at the ECtHR level.

This chapter demonstrates how the Convention goal of effectiveness can be used to inform the determination of the appropriateness of discretion. A discussion of the theory of rights in general is beyond the scope of this book. It is moreover not needed for my argument that the Court must engage in greater progressive development of Article 5, since this is rooted in principles found in the Convention itself – namely the requirements of effectiveness and mandatory evolutive interpretation (which I find to be interlinked), and the overall goal of harmonisation. My focus in this book is on those

3 *Scoppola v Italy (No 2)* App no 10249/03 (ECtHR, 17 September 2009), para 104:

> While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases.Note also Article 30 of the ECHR, which provides that:where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber.

4 Council of Europe, 'Copenhagen Declaration' (2018), para 27, <https://rm.coe.int/copenhagen-declaration/16807b915c> accessed 17 July 2024.

principles, their development, and their application within the context of the right to liberty. By maintaining doctrinal focus within the ECHR, with elaboration based on interviews with Court judges, I seek to show that the progressive development of Article 5 is both mandatory in and of itself and by reference to the wider goal of ensuring the effectiveness of rights across the Convention acquis.

The significance of Article 5 as a limited right

There is a rich existing literature on the broader discretion (and in particular, the margin of appreciation) accorded to States in claims brought under qualified rights, and on the more limited discretion granted with respect to absolute rights. The forms and level of discretion applied to the adjudication of Article 5, a limited right, have not previously been comprehensively considered. Because the basis on which the Court recognises and applies discretion is not always clear, in particular in the Article 5 context, it is necessary to assess how the scope of discretion is affected by the Court's application of each method of interpretation. The original framework used in this book helps the identification of whether the Court's use of its methods responds to their underlying aims. Where the pursued aims are not justified under the Convention, the resulting application of discretion on that basis is inappropriate. Testing the appropriateness of discretion is of particular significance in the context of adjudicating the right to liberty, since there is no clear source of discretion under Article 5 as a limited right, in contrast to the qualified rights under Articles 8–11.

Convention rights are generally divided into absolute and qualified rights.[5] Çalı identifies a third category of rights with express limitations, or limited rights, which contain built-in exceptions: 'there is a clearly defined circumstance regarded as belonging to the *internal* logic of the right that limits the right in question'.[6] Article 5 can thus be categorised as a limited right, since it can be restricted pursuant to a specific set of circumstances enshrined in the provision. Letsas identifies absolute rights, such as Articles 3 and 4 § 1, '[o]ther ECHR provisions, like Article 6 . . . or Article 7 which . . . contain more specific details regarding the definition and scope of the right in question', and paragraphs 2 of Articles 8–11 which contain general limitation

5 Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 212; Natasa Mavronicola, 'What Is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12(4) Human Rights Law Review 723, 735; Thiago Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights' (2020) 15 Religion and Human Rights 96, 103.

6 Başak Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29(1) Human Rights Quarterly 251, 258 (emphasis in original).

clauses with an extensive list of legitimate aims that may justify the impugned interference ('qualified rights').[7]

Article 5 § 1 sets out that '[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. What follows in paragraphs (a)–(f) of Article 5 § 1 is an exhaustive list of grounds for detention which may only be subject to a narrow interpretation[8] in order to preserve the ultimate goal of the provision, namely protection against arbitrary detention.[9] The exceptions are as follows:

> (a) the lawful detention of a person after conviction by a competent court;
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;[10]
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

The second paragraphs of Articles 8–11, meanwhile, set out broad justifications for limiting these rights that can be informed by a range of factors which may reflect societal developments – for instance, in line with Article 8 § 2 (the right to private and family life):

> [t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in

7 George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 European Journal of International Law 509, 510.

8 *A. and Others v the United Kingdom* App no 3455/05 (ECtHR, 19 February 2009), para 171.

9 *Labita v Italy* App no 26772/95 (ECtHR, 6 April 2000), para 170.

10 The descriptions by Schabas of references to 'persons of unsound mind' and 'vagrants' as 'embarrassingly archaic' are apt – William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 220.

a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This broader list of justifications encompasses concepts that necessarily shift over time – for instance, societal understandings of morality or how the rights and freedoms of others may be affected. This is less apparent with respect to Article 5, since the prescribed grounds are exhaustive and to be narrowly interpreted. A delineation of which aspects of Article 5 may be subject to a progressive interpretation (those that are evolutive) as opposed to those that are fixed in time (static) is therefore required. In this respect, it is the grounds for detention themselves that cannot be amended; these must remain exhaustive, and thus static. The assessment of whether the detention was justified (after a deprivation of liberty has been established) should meanwhile incorporate evolutive interpretation, since the understanding of whether or not a particular form of detention was justified in a given case will justifiably shift over time, in line with societal changes. While scholars have in recent years considered the Court's assessment of the existence or otherwise of a deprivation of liberty,[11] this book chiefly focuses on the evolutive aspects of Article 5. The exhaustive nature of Article 5 proscribes flexibility with respect to detention grounds, but does not hamper the progressive capacity of substantive review of the provision. This book outlines several areas of Article 5 adjudication that can – and should – be the subject of an evolutive reading.

Even absolute rights combine static and evolutive aspects. Developing standards on what is considered to be torture and inhuman or degrading treatment proscribed by Article 3 are taken into account by the ECtHR through the living instrument approach.[12] Such contextual considerations are, however, limited in the review of absolute rights. As such, in *Tyrer v the United Kingdom*, the Court found that no local requirement could permit a State to carry out punishments in the field of criminal law that would violate Article 3.[13] Moreover, in 2018, the ECtHR dismissed the Irish Government's request for revision of the original *Ireland v the United Kingdom*[14] judgment. The initial judgment had concluded that the UK authorities' use of the five techniques of interrogation in 1971 during the conflict in Northern Ireland amounted to inhuman and degrading treatment rather than torture within

11 Lewis Graham, 'Liberty and its Exceptions' 2023 72(2) International and Comparative Law Quarterly 277; Richard A Edwards, 'Police Powers and Article 5 ECHR: Time for a New Approach to the Interpretation of the Right to Liberty' (2020) 41 Liverpool Law Review 331; Shona Wilson Stark, 'Deprivations of Liberty: Beyond the Paradigm' (2019) Public Law 380.

12 *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999), para 101.

13 *Selmouni v France* (n 12).

14 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978).

the meaning of Article 3.[15] In reviewing the request for revision, the Court accepted that a 1974 document that had recently become available showed a growing tendency in medical circles, at that time, to acknowledge the possibility that the five techniques might produce long-term psychiatric effects. Nonetheless, the majority highlighted that there was no certainty at the time of the initial application as to whether or not this was the case.[16] The possibility of contextual analysis is thus limited in respect of absolute rights. Qualified rights, meanwhile, allow for a consideration of the setting in which they are reviewed (which may include an emerging consensus). The limitations in-built within their provisions are developed by reference to wider societal changes.

The list of limitations under Article 5 § 1 is, by contrast, exhaustive – no other basis for detention is permitted. '[T]he parties to the Convention seem to have been of the opinion that deprivations of liberty are such serious infringements on the rights of individuals that the criteria governing their use must be specified in detail in the text of the Convention'.[17] Graham terms this the 'exhaustive justification principle' and argues that it has gradually been worn away as a result of modern-day developments unforeseen at the time of the Convention's drafting.[18] This is in spite of the fact that the exhaustive list of limitation grounds is a 'core feature of Article 5, and one which distinguishes it from surrounding rights'.[19] I argue that this is just one casualty of the lack of progressive interpretation of Article 5, with issues arising even when the non-exhaustive nature of the provision is not being eroded. Both in those areas and in those where problems stem from an undue expansion of possible grounds for detention, progressive interpretation offers a cohesive and coherent solution. Consequently, the decision to list all possible grounds of detention exhaustively does not need to be considered 'unwise', and the exhaustive nature of those grounds does not need to be amended or derogated from by the Contracting States.[20] An alternative solution is proposed, with progressive advancement helping to plug the gaps in protection that have arisen.

Çalı moreover highlights a key difference between how limited and qualified rights operate. With respect to limited rights, the factual circumstances must fit within pre-defined criteria, while such criteria do not expressly exist for

15 *Ireland v the United Kingdom* (n 14), para 168.

16 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 20 March 2018), para 111.

17 Steinar Fredriksen, 'Police Deprivation of Third Parties' Liberty – A Field of Tension Between National Police Law and the European Convention on Human Rights, as Illustrated by *Austin & Others v the United Kingdom*' (2015) 3(1) Bergen Journal of Criminal Law and Criminal Justice 84, 92.

18 Lewis Graham, 'Liberty and its Exceptions' 2023 72(2) International and Comparative Law Quarterly 277.

19 Graham (n 18) 280.

20 Lord Wilson, 'Our Human Rights: A Joint Effort?' (*Northwestern University*, Chicago, 25 September 2018) 8 <https://www.supremecourt.uk/docs/speech-180925.pdf> accessed 17 July 2024 and see, on this, Lewis Graham, 'Liberty and its Exceptions' 2023 72(2) International and Comparative Law Quarterly 277, 307–8.

qualified rights.[21] However, the Court extends discretion to States in showing how the factual matrix conforms to some of the pre-defined criteria under Article 5. For instance, a flexible approach to the 'educational supervision' underlying the detention of minors under Article 5 § 1 (d) permits States to fit detention into the confines of the limitation. Article 5 is thus uniquely placed in the context of the ECHR since its static qualities are intrinsically woven into its exhaustive and detailed listing of limitation grounds, with space left for a progressive reading after the existence or otherwise of a deprivation of liberty has been established. A general focus on its exhaustive nature has led to an absence of treatment of its evolutive qualities, by judges and scholars alike. In order to bring the evolutive function of Article 5 to the fore, I identify those aspects of the provision that can be subject to an evolutive interpretation.

Although some research exists on the contrasting methods of review of absolute and qualified rights,[22] the adjudication of Article 5 as a limited right and the scope and possibility of its evolutive interpretation have not been considered. This is an important gap to address, since there are key differences in the way in which the rights under Articles 8–11 (typically recognised as the main qualified rights) and Article 5 (as a limited right) are assessed. This can be explained through the variation of static and evolutive elements in the respective provisions. As such, Bielefeldt posits that 'the main function of limitation clauses is not to allow certain limitations, but to set up criteria by which *to limit the scope of permissible limitations*'.[23] This is borne out by the second paragraphs of Articles 8–11, which detail the possible grounds for limiting the right. In addition, such limitations must be found to be lawful, necessary, and legitimately pursuing one of the aims set out in the second paragraphs of the provisions. The goal of limitation clauses is thus 'to preserve the substance of human rights provision in complicated situations, when a human rights-based interest collides, or seems to collide, with important public goods or with the rights and freedoms of others'.[24]

Article 5 in itself is arguably set out as a limitation clause, with the bulk of the provision outlining exhaustive limitations to the right. Yet in contrast to the limitation grounds under Articles 8–11, each possible limitation has an arguable public interest at its core. For this reason, Chapter 4 specifically addresses the use of proportionality and rights balancing under Article 5. As it is not conceptualised as a qualified right in the same way as Articles 8–11, with any limitations being exhaustively cited rather than listed in the broader manner as under the qualified provisions, the manner of reviewing

21 Wilson (n 20) and Graham (n 20).

22 Çalı (n 6); Mavronicola (n 5); Robert Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18(3) Human Rights Law Review 473.

23 Heiner Bielefeldt, 'Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom' (2020) 19 Religion and Human Rights 3, 4 (emphasis in original).

24 Bielefeldt (n 23).

bases for restricting the right differs. Qualified rights reflect a view that the implementation of certain human rights is dependent on considerations that exist freely of the human rights issue in question.[25] In the case of Article 5, the right's implementation – its exhaustive limitations – form an intrinsic part of its structure. Consequently, the progressive development of the provision does not need to be demarcated (as the qualified rights do) by a balancing between competing rights, since the correct balance between the public interest and the individual right to liberty has already been struck. This results from the detailed and exhaustive text of limitation grounds under Article 5, and is perpetuated by the Court's refusal (or stated refusal) to artificially expand the grounds: '[i]f detention does not fit within the confines of the sub-paragraphs [under Article 5 § 1] as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee'.[26]

In addition to the exhaustive nature of the limitations under Article 5 § 1, the Court has identified two other strands of reasoning in its Article 5 jurisprudence – the repeated emphasis on the lawfulness of the detention, both procedural and substantive, in line with the rule of law, and the importance of the promptness of the requisite judicial controls (under Articles 5 § 3 and 5 § 4).[27] Article 5 § 2 sets out the procedural guarantee that '[e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him'. Article 5 § 3 enshrines the right to be 'brought promptly before a judge or other officer authorised by law to exercise judicial power' and to 'trial within a reasonable time or to release pending trial'. Release may be conditioned by guarantees to appear for trial. In accordance with Article 5 § 4, '[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. Article 5 § 5 provides an enforceable right to compensation in the event that any provision of Article 5 has been violated.

This book focuses chiefly on the substantive rather than procedural aspects of Article 5. The rationale for this is two-fold. First, allegations of procedural violations cannot be raised without a justification ground under Article 5 § 1 first being engaged. Second, my doctrinal analysis has shown that while certain procedural guarantees have become increasingly prone to a flexible

25 See Çalı, who makes this argument with respect to qualified human rights claims – Çalı (n 6) 251–2.

26 *A. and Others v the United Kingdom* (n 8), para 171.

27 *Buzadji v the Republic of Moldova* (n 1), para 84 and see references therein to *Ciulla v Italy* App no 11152/84 (ECtHR, 22 February 1989), para 41, *Winterwerp v the Netherlands* App no 6301/73 (ECtHR, 24 October 1979), para 39 and *McKay v the United Kingdom* App no 543/03 (ECtHR, 3 October 2006).

interpretation,[28] the substantive requirements under Article 5 § 1 still attract a broader and more varied scope of discretion. Although prioritising the effectiveness of the right should result in an evolutive approach to the right to liberty, the ECtHR has instead adopted subsidiarity-based approaches in several areas, chiefly, pre-trial detention, immigration detention, and the detention of minors (all explored in Chapter 3).

While Article 5 adjudication thus does not permit flexibility in establishing grounds for detention, once a deprivation of liberty has been established, the way in which the detention itself is reviewed for compliance with the Convention often reflects a subsidiarity-based approach. This is where gaps in progressive interpretation – and, consequently, in rights protection – arise. Graham signals that over time, the fundamental principles of Article 5 (chiefly, those relating to its exhaustive nature) 'have been stretched, if not completely eroded, at least in novel contexts'.[29] As demonstrated in this book, this is sadly not limited to novel contexts alone, but extends also to those existing areas where a stagnation of standards – a failure to adapt to new exigencies in order to ensure the practicality of the right – has led to an erosion of the right's effectiveness. If the Court sets out clear parameters for the contextual boundaries of an Article 5 claim, a more coherent and evolutive body of jurisprudence on the right to liberty can develop. I argue that grounding an evolutive approach in consensus and both common and emerging standards results in the most relevant progressive advancement of the right to liberty, as explored in Chapter 2. Before Chapter 2 presents a more consensus-focused framing of evolutive interpretation, it is vital to analyse these methods of interpretation and the aims that they pursue.

The mandatory nature of evolutive interpretation at the Court

This section establishes that evolutive interpretation is mandatory in the context of the ECHR. The aims of this are two-fold. First, it lays the basis for the overall argument made in this book that the Court must engage in a more progressive development of right to liberty standards in order to further the right's effectiveness. Second, establishing the centrality of evolutive interpretation helps to critically assess the appropriate boundaries of subsidiarity-based approaches. There is an inherent clash between the aims of subsidiarity and evolutive interpretation, the resolution of which requires a clear outline of the parameters of both approaches in the Article 5 context.

The Preamble to the Convention provides that one of the methods of pursuing the aim of the Council of Europe (namely the achievement of greater unity between its members) is not only the maintenance but also the *further*

28 See for example the analysis in Chapter 3 on the judgment in *Mangouras v Spain* App no 12050/04 (ECtHR, 28 September 2010).

29 Lewis Graham, 'Liberty and its Exceptions' (2023) 72(2) International and Comparative Law Quarterly 277, 283.

realisation of human rights and fundamental freedoms. This emphasises the role that the ECtHR must play in the progressive advancement of Convention rights.[30] As per Article 31(2) of the VCLT, the Preamble of a treaty forms part of the context for the purpose of interpretation. From the very outset, Contracting States have committed not only to uphold but also to *progress* Convention standards. The Court has confirmed this on many occasions, by reference both to the living instrument and the narrowing of a margin of appreciation based on a European consensus. The Convention has, from its early case-law, been described as 'a living instrument which . . . must be interpreted in the light of present-day conditions'.[31] Over time, references to present-day or 'current' conditions have been joined by 'the ideas prevailing in democratic States today'.[32] In determining the width of the margin of appreciation, the Court must 'have regard to the changing conditions in Contracting States and respond . . . to any emerging consensus as to the standards to be achieved'.[33] Even the term 'maintenance' in the Preamble arguably requires the Court to continue ensuring the effectiveness of Convention rights and freedoms in evolving societal circumstances by applying an evolutive approach[34] – after all, rights cannot remain effective if they do not respond to changing circumstances.

Rather than signalling a departure from drafters' intentions, an evolutive interpretation is faithful to the text and purpose of the treaty. This offers protection from claims of judicial illegitimacy, so long as an evolutive approach is adopted within a methodologically sound and normatively justifiable framework. The Convention, both textually and on further interpretation by the ECtHR, must therefore be seen in an evolutive light. Judge Serghides has described the principle of effectiveness as '[assisting] in allowing for a broad interpretation of rights and a narrow or restrictive interpretation of their limitations, and, in case of doubt, in showing a preference for that interpretation which is more favourable to the right and its holder'.[35] Interestingly, the Siracusa

30 See also the Dissenting Opinion of Judge Martens at para 3.6.3 in *Cossey v the United Kingdom* App no 10843/84 (ECtHR, 27 September 1990):

> the preamble to the Convention . . . seems to invite the Court to develop common standards. To the extent that the number of member States increases, this side of the Court's mandate gains in weight, for in such a larger, diversified community the development of common standards may well prove the best, if not the only way of achieving the Court's professed aim of ensuring that the Convention remains a living instrument.

31 *Tyrer v the United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para 31.

32 *Kress v France* App no 39594/98 (ECtHR, 7 June 2001), para 70.

33 *Zarb Adami v Malta* App no 17209/02 (ECtHR, 20 June 2006), para 74; *Stafford v the United Kingdom* App no 46295/99 (ECtHR, 28 May 2002), para 68.

34 European Court of Human Rights, 'Dialogue Between Judges' (*Council of Europe*, 2011) 7 <https://www.echr.coe.int/Documents/Dialogue_2011_ENG.pdf> accessed 17 July 2024.

35 Georgios A Serghides, 'The Principle of Effectiveness in the European Convention on Human Rights, in Particular its Relationship to the Other Convention Principles' (2017) 30 Hague Yearbook of International Law 1, 3.

Principles, which deal with the interpretation of the International Covenant on Civil and Political Rights (ICCPR), provide that '[a]ll limitation clauses shall be interpreted strictly and in favour of the rights at issue'.[36] Although this has not been addressed in the same explicit manner in the ECHR context, the requirement to engage in dynamic interpretation has the effect of mandating a progressive development that seeks to promote the furtherance of individual human rights. Since an evolutive reading supports the interpretation that most faithfully pursues this goal, evolutive interpretation must form the basis of any consideration of how to improve the effectiveness of the right to liberty.

In this setting, the Court has been criticised on the grounds that it has 'become a champion for human rights protection first, and a court second'.[37] This is a result of the at times inconsistent application of its methods. Yet while the Court can reasonably be criticised for undermining legal certainty and legitimacy in this way, being a champion for human rights protection is its precise role as mandated by the Convention. Pursuant to Article 31 VCLT, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object and purpose of the Convention is the advancement of human rights across the Council of Europe – to acknowledge this is not to take an activist stance, but to recognise the goals of the ECHR. In order for rights to be protected, they must necessarily remain effective. This is fundamental to understanding and interpreting the approaches underlying the Court's methods, and thereby identifying and addressing gaps in protection that arise. It is also central in this book's framing of the right to liberty, which must necessarily advance in line with societal standards in order to maintain its effectiveness. This is crucial both for the adjudication of Article 5 alone, as well as when taken with, or balanced against, other rights.

Zwart argues that the accession of the former socialist States in Central and Eastern Europe, where levels of human rights protection were generally below the level of existing Contracting States, should have led the Court to adopt less strict Convention standards.[38] Carozza had similarly posited that the accession of more States should lead to rights regression.[39] For Zwart, the fact that such an approach (of weakening the overall Convention acquis to reflect

36 UN Economic and Social Council, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1984/4, Annex), General Principle no. 3.

37 Tom Zwart, 'More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights Is in Need of Repair and How it Can Be Done' in Spyridon Flogaitis, Tom Zwart and Julie Nelson (eds), *The European Court of Human Rights and its Discontents* (Edward Elgar Publishing 2013) 83.

38 Zwart (n 37), 78.

39 Paolo G Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights' (1998) 73(5) Notre Dame Law Review 1217, 1231.

the situation in the newly joined States) was not taken signifies that the living instrument approach has become a euphemism for a progressive interpretation, thereby undermining the credibility of the concept.[40] Yet the living instrument doctrine has been openly developed as a tool specifically for progressive interpretation. This allows the Court to avoid diluting Convention standards where such a pattern appears in one or more States. The non-regression principle and progressive interpretation therefore go hand in hand. The living instrument can necessarily only go in the direction of furthering rights; the corollary of this must be that evolutive interpretation more broadly can only be enacted for the further promotion of ECHR rights. Far from challenging the credibility of the living instrument, looking to emerging standards that promote rather than undermine human rights reflects the very purpose of the Convention, thereby upholding the principle of non-regression. Shying away from the fundamentally progressive nature of the Convention not only stifles the further advancement of the rights it enshrines, but fails to recognise its underlying purpose.

The Contracting States agreed that human rights should be both maintained and further realised. Even if the term 'further realisation' is subjected to a highly literal interpretation that suggests only the continued maintenance of rights in the exact form envisioned at the time of ECHR ratification, the need for an evolutive reading is inevitable. Any interpretation of the rights has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.[41] In the Article 5 sphere, this does not mean that the Court can expand the right to liberty sporadically on a case-by-case basis, without mooring progressive interpretation in a concrete set of principles. Rather, where an exhaustive list of justifications for detention has been elaborated (as in Article 5), those justifications must be assessed by reference to the broader context in which they are now situated. Such an approach has been taken in other spheres, most notably with regard to Article 8 (the right to privacy and family life) and while proving controversial in some quarters,[42] has brought ECHR protections in line with where societies now generally deem they should be.[43] The ways in which that societal agreement can be calculated and consequently considered in line with consensus methodology is developed in Chapter 2. For now, it

40 Carozza (n 39).

41 *Khamtokhu and Aksenchik v Russia* App nos 60367/08 and 961/11 (ECtHR, 24 January 2017), para 73; *Svinarenko and Slyadnev v Russia* App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014), para 118.

42 For an oversight of criticisms levelled by UK figures, see Başak Çalı, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) 35(2) Wisconsin International Law Journal 237, 246–50.

43 Masuma Shahid, 'The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights' (2017) 10(3) Erasmus Law Review 184.

suffices to say that a dynamic interpretation has allowed the Convention to remain effective in several key areas, ranging from seminal cases enshrining the decriminalisation of homosexuality[44] to the recognition of the rights of children of unmarried parents.[45] Since the effectiveness of the right to liberty has been undermined in several key areas, an evaluation of how dynamic interpretation can be applied in order to reinvigorate Article 5 is both necessary and timely.

The ECtHR accepts the potential of its jurisprudence to actively progress standards across the Council of Europe, noting from its early Article 5 case-law (as well as in other fields) that '[a] failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement'.[46] As expressed by the Court's first President, Luzius Wildhaber, 'it is precisely the genius of the Convention that it is indeed a dynamic and a living instrument'.[47] Yet despite the mandatory nature of the living instrument doctrine and requirement to consider evolving standards as part of the margin of appreciation review, these principles are not enacted by the Court on a routine basis. While a progressive approach is adopted in certain fields, it is neglected under Article 5. Although the view that evolutive interpretation of the Convention should, in general, be pursued is not controversial,[48] its nature and frequency in enshrining protections against arbitrary detention remains to be explored.

It has been argued that evolutive interpretation can be applied to flexible concepts but cannot be used to develop new rights.[49] Others posit that the reference to the 'further realisation' of human rights in the Preamble allows for a degree of innovation and creativity in broadening the scope of Convention guarantees, especially when this is necessary to protect rights.[50] A fundamental principle can be used to draw out the differences in these contrasting positions: namely that the Convention should be 'interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory'.[51] The principle of effectiveness is central to the functioning of the European human rights system. Former Court President Costa has written that

44 *Dudgeon v the United Kingdom* App no 7525/76 (ECtHR, 22 October 1981).

45 *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979).

46 *Stafford v the United Kingdom* App no 46295/99 (ECtHR, 28 May 2002).

47 Luzius Wildhaber, 'The European Court of Human Rights in Action' (2004) 21 Ritsumeikan Law Review 83, 84.

48 The Convention is 'clearly' a dynamic treaty and aims to spread common values among Contracting States – Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Bloomsbury Publishing 2018) 74. For Bjorge, the evolutionary interpretation of international treaties 'represent[s] an intended evolution' – for an in-depth analysis, see Eirik Bjorge, *The Evolutionary Interpretation of the Treaties* (Oxford University Press 2014).

49 See *Feldbrugge v the Netherlands*, Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Vincent Evans, Bernhardt and Gersing, para 24.

50 European Court of Human Rights (n 34).

51 *Scoppola v Italy (no. 2)* (n 3), para 104.

'[e]ffectiveness is the golden thread running through the fabric of the Strasbourg case law' for which '[e]xcessive formalism or legalism is put aside'.[52] In the context of Article 5 specifically, the Court has for example found that:[53]

> [i]n order to ensure that the right guaranteed is practical and effective, not theoretical and illusory, it is not only good practice, but highly desirable in order to minimise delay, that the judicial officer who conducts the first automatic review of lawfulness and the existence of a ground for detention also has the competence to consider release on bail.

The principle of effectiveness provides the necessary basis for any application of progressive interpretation; rights can only remain effective if they provide 'practical and effective' protection in changing societies. This is how the ECHR has managed to adapt even 'in the light of social and technological developments that its drafters, however farsighted, could never have imagined'.[54] The requirement of effectiveness must therefore be viewed as one that inevitably affects, and is in turn affected by, the implementation – or indeed, neglect – of dynamic interpretation.

Several commentators view the living instrument doctrine in the light of the principle of effectiveness.[55] Dzehtsiarou and O'Mahony find that the Court *can* deploy an evolutive reading where rights would otherwise cease to be practical and effective.[56] Rather than acting as a fallback, the routine use of dynamic interpretation as part of Article 5 review can prevent any gaps in effectiveness from arising. Linking evolutive interpretation to the principle of effectiveness helps to support a mandatory progressive reading – the 'further realisation' of human rights urged in the Preamble will have failed to materialise if rights become ineffective. Since Article 5 protects physical liberty, ensuring that the provision's guarantees remain 'practical and effective' is crucial. An interpretation of Article 5 § 1 that

52 Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 European Constitutional Law Review 173, 177.

53 *Magee and Others v the United Kingdom* App nos 26289/12, 29062/12 and 29891/12 (ECtHR, 12 May 2015), para 90.

54 Wildhaber (n 47) 84.

55 Shai Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) 12(1) Chicago Journal of International Law 115, 131. See also former UK Supreme Court judge Baroness Brenda Hale, who identifies the doctrine of practical and effective rights as one of three 'governing ideas' behind evolutive interpretation at the Court (alongside developments in the Contracting States and teleological interpretation of the Convention) – Brenda Hale, 'Beanstalk or Living Instrument? How Tall Can the ECHR Grow?' (*Gresham College*, 16 June 2011) <https://www.gresham.ac.uk/watch-now/beanstalk-or-living-instrument-how-tall-can-european-convention-on-human> accessed 17 July 2024.

56 Kanstantsin Dzehtsiarou and Conor O'Mahony, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court' (2013) 44 Columbia Human Rights Law Review 309, 357–8.

does not serve to safeguard an individual from arbitrary detention will undermine the very purpose of the right,[57] as well as counter the idea of effectiveness. The progressive interpretation that I urge in this book centres on pre-existing ideas contained in Article 5. These are the same terms that currently attract a subsidiarity-based approach. Assessing justifications for detaining a minor under Article 5 § 1 (d) would benefit from an evolutive approach to what can be considered 'educational supervision' in modern-day societies. Technologically enhanced policing techniques equally call for a progressive interpretation of the right to liberty. These and other key areas where Article 5 principles have remained stagnant can be made effective if their adjudication continually considers the societal factors that may change both the need and the conditions of the specific form of deprivation of liberty.

Importantly, the principle of effectiveness aims 'to harmonise the Convention internally, i.e. its provisions with each other, and externally, i.e. its provisions with other rules of international law'.[58] This book provides a framing that considers both of these aspects. Internal harmonisation is evaluated with respect to claims under Article 5 being taken together with, or balanced against, other rights. External harmonisation is pursued through an emphasis on the capacity of consensus to advance rights standards in line with international (and not merely European) principles where needed to fill gaps in protection.

Current evolutive interpretation is not always rooted in developments across the Contracting States.[59] However, linking an evolutive reading to the principle of effectiveness is strengthened by a progression that reflects, as far as possible, the trajectory taken by States either in the Council of Europe context or indeed as shown by their other international commitments (which promotes external harmonisation). This can ensure greater legitimacy and compliance, since, as noted in an interview with Judge Mits, the right standards will have been reached through an organic exchange between the steps already taken by States and the threshold urged by the Court:[60]

> the Convention lays down the minimum standards for domestic authorities. It certainly influences law and practice in the Member States, but it's a two-way street – there is a return influence on the Convention as well. The more uniform the practice becomes in the Member States, the easier it is for the . . . . Court to say that the practice in the Member

57 *Bozano v France* App no 9990/82 (ECtHR, 18 December 1986), para 54; *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004), para 171.

58 Serghides (n 35) 3.

59 Dzehtsiarou and O'Mahony (n 56), 357–8.

60 Interview with Judge Mits, 17 December 2020.

> States confirms a standard. . . . There is no reason why the same would not be applicable to rights and freedoms under Article 5.

Moreover, the Court's task is not merely to decide on the case before it but, more generally, 'to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties'.[61] While the ECtHR is chiefly entrusted with ensuring individual relief, its mission is also to 'determine issues on public-policy grounds in the common interest, thereby *raising the general standards of protection of human rights* and extending human rights jurisprudence' throughout the Council of Europe.[62] An evolutive approach is thus assumed by the Court to be a fundamental part of its task, despite the practical gaps in enacting this. This has not previously been explored within the context of Article 5 adjudication. This book aims to address gap by outlining, first, the normative justifications for an evolutive approach to Article 5, elaborating a consensus-based framework that pursues the key goals of effectiveness and harmonisation (in Chapters 1–2). Second, this book explains how a dynamic interpretation of Article 5 could be enacted doctrinally (in Chapters 3–5). This would allow the Court to discharge its duty to actively develop and promote the human right to liberty, thereby ensuring that it remains practical and effective.

The living instrument doctrine and the margin of appreciation as methods of evolutive interpretation

Having established evolutive interpretation as mandatory under the Convention and as being intrinsically tied to the requirement of effectiveness, I now seek to demonstrate the link between the two evolutive approaches identified in this book and the aim of dynamic interpretation. In doing so, I highlight the role of consensus in driving both the living instrument doctrine and narrowing the margin of appreciation, arguing for the mandatory use of both in helping to establish evolved standards that reflect new and existing challenges to rights. It is argued that this will lead to the interpretation most capable of achieving the primary role of the Convention – namely to advance the march of human rights. This shift in focus is of particular importance in the Article 5 context, where references to consensus have been sparse and an evolutive approach largely neglected. Where there is no consensus within the Contracting States, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin of appreciation given to the respondent State will

61 *Ireland v the United Kingdom* (n 14), para 154.

62 *Jeronovičs v Latvia* App no 44898/10 (ECtHR, 5 July 2016), para 109 (emphasis added).

be wider.[63] A 'decisive element of evolutive interpretation results from the convergence between domestic laws of the States Parties',[64] thereby reflecting (or seeking to reflect) common rights standards across the Council of Europe.

Although the idea of consensus goes beyond a mere tendency among States,[65] full or even majority consensus is not required for a narrowing of the margin.[66] It is important to review the extent to which consensus should determine the margin of appreciation, since key case-law has demonstrated the significant capacity of this tool to advance Convention rights. This is apparent in the *Christine Goodwin v the United Kingdom*[67] line of jurisprudence on legal recognition following gender reassignment explored in Chapter 2. If the Court does not adopt similar approaches in reviewing Article 5 claims, there is a risk that right to liberty standards under the ECHR will fall behind the progressive development shown in other areas, which has implications for the effectiveness of the right when balanced against competing interests as well as in and of itself. This can already be seen, for example, through the Court's adjudication of immigration detention which is highly deferential to States,[68] and the move to include public interest concerns as part of admissibility testing under Article 5, which stymies substantive review of the claim.[69]

In addition to its role in determining the breadth of the margin of appreciation and thereby spurring the margin's evolutive function, consensus has also been used to apply an evolutive approach through the living instrument doctrine:[70]

> [t]he existence of a consensus has long played a role in the development and evolution of Convention protections . . . the Convention being considered a 'living instrument' to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention.

The concept of consensus has thus been used to apply an evolutive approach both through the living instrument and the margin of appreciation. Against

63 See, among many other authorities, *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014), para 67.

64 European Court of Human Rights (n 34), p. 9.

65 *Correia de Matos v Portugal* App no 56402/12 (ECtHR, 4 April 2018), para 137:

> while there may be a tendency amongst the Contracting Parties to the Convention to recognise the right of an accused to defend him or herself without the assistance of a registered lawyer, there is no consensus as such and even national legislations which provide for such a right vary considerably in when and how they do so.

66 See the analysis of *Christine Goodwin v the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002) and related case-law in Chapter 2.

67 *Christine Goodwin v the United Kingdom* (n 66).

68 See Chapter 3 on immigration detention.

69 See the analysis on balancing the right to liberty against the public interest in Chapter 4.

70 *A, B and C v Ireland* (n 54), para 234.

this background, I argue that consensus should be brought to the fore as a starting point for the Court's use of the evolutive methods of interpretation. The focus on consensus is especially useful in the context of an evolutive interpretation by the Court, since it allows for the consideration of, and recourse to, a range of standards. These can include legislative developments, relevant international materials, and any other relevant findings. For instance, under Article 18 taken in conjunction with Article 5,[71] looking to the general repressive atmosphere in a Contracting State can help to inform the Court's response to an allegation that detention was imposed in bad faith. This forms the basis for exploring how the Court should both calculate and incorporate consensus in order to ensure an appropriate level of discretion that meets the key goals of effectiveness and harmonisation.

Centring effectiveness can help to identify the relevant standards and materials that can be taken into account in the application of the Court's subsidiarity-based, oversight-based, and evolutive approaches. By maintaining focus on effectiveness, accusations that the Court 'cherry-picks' the existence or otherwise of a consensus in order to reach a certain outcome can be assuaged. Rather than cherry-picking, the Court can duly – and in fact must – identify whether the existence of a consensus necessitates a narrowing of the margin in order to ensure effectiveness. The appropriateness of discretion can be tested on this basis: if the application of consensus does not help to promote the practical effectiveness of a right, through a narrowing of the margin of appreciation, the use of the method of interpretation will not correspond to its stated aim. The level of discretion accorded will consequently be inappropriate.

My reasons for centring effectiveness are therefore two-fold. First, effectiveness provides normative justifications for looking to international, as well as European, standards in adopting an evolutive approach. Where standards across the Council of Europe are falling behind international instruments that the Contracting States have often signed, looking to international standards helps to ensure the effectiveness of the right, as is the Court's duty. Incorporating standards beyond the Council of Europe consensus where needed offers a way of progressively advancing ECHR standards, an approach that I argue the Court should adopt with respect to key aspects of Article 5 adjudication. I provide an example of how this has been enacted in the field of transgender rights under Article 8. Viewing claims through the lens of effectiveness, which in turn pursues the goal of harmonisation, can also provide a framework for identifying other materials and evidence relevant to an evolutive interpretation of the Convention. Second, looking to effectiveness grounds ECHR interpretation in the requirement that States apply the treaty in good faith. This is especially helpful when assessing the interaction of Article 18 (the Convention's 'bad faith' provision) with Article 5, but equally applicable across the entirety of Article 5 case-law since 'the whole structure

71 Such claims are assessed in detail in Chapter 5.

of the Convention rests on the general assumption that public authorities in the member States act in good faith'.[72] A good faith reading of contracts is sometimes viewed as controversial in the traditional sphere of domestic contracts, on the grounds that it may create uncertainty and deviate from a textual reading.[73] Since good faith application of the ECHR by Contracting States forms the basis of the entire system of Convention protection, a good faith reading can never conflict with either a textual or teleological analysis of the provisions. Article 26 of the VCLT moreover sets out the principle of *pacta sunt servanda*: '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.[74] Good faith performance helps to promote effectiveness since a willingness by States to protect rights necessarily makes them more effective, plugging compliance gaps and ensuring further rights development.

Challenging expansions to subsidiarity – the undermining of oversight-based approaches

A review of the Court's adjudication of any Convention right cannot be conducted without due acknowledgement of the significant role now played by subsidiarity in its case-law, a pattern regenerated by the adoption of Protocol No. 15 (which entered into force on 1 August 2021).[75] The concept of subsidiarity, in accordance with which the Court 'cannot assume the role of the competent national authorities',[76] is a fundamental principle of the ECHR system which has been given renewed weight by its insertion into the Convention's Preamble.[77] In accordance with subsidiarity, national authorities are granted flexibility in choosing the measures that ensure rights compliance, while the Court's role remains limited to checking the conformity of such measures with the Convention.[78] According to the principle of subsidiarity, it is primarily for the Contracting States to decide on the measures necessary to secure human rights within their jurisdictions.[79] Rather than looking at subsidiarity's doctrinal role in stifling progressive development, analyses of subsidiarity tend to focus on broader structural issues related to the division

72 *Khodorkovskiy v Russia* App no 5829/04 (ECtHR, 31 May 2011), para 255.

73 Curtis J Mahoney, 'Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties' (2007) 116(4) The Yale Law Journal 824, 849.

74 Article 26 of the VCLT.

75 Details of Treaty No. 213, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=213> accessed 17 July 2024.

76 *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium* (App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (ECtHR, 23 July 1968) 31 ('Belgian Linguistics Case').

77 Article 1, Protocol No. 15.

78 Article 1, Protocol No. 15.

79 *Christine Goodwin v the United Kingdom* (n 66), para 85.

of powers between Contracting States and an international human rights court.[80] The following sections look at subsidiarity through the perspectives of oversight-based, subsidiarity-based, and evolutive approaches, identifying areas of subsidiarity that have been unduly extended and the consequent impact on the appropriateness of discretion. The aim is to explore and assess justifications for subsidiarity, as with the outlining of justifications for evolutive interpretation above and those for an oversight-based approach below.

This section continues to take effectiveness as key to informing the relevant factors to be taken into account in interpreting the Convention. On this basis, I conclude that both the development of what I term efficiency-based subsidiarity and the expansion of process-based subsidiarity are rooted in factors that cannot form part of the review of a claim. First, since efficiency concerns relate to the general functioning of the ECtHR rather than the resolution of an individual claim, they cannot legitimately ground subsidiarity. This is because subsidiarity is a principle that allocates responsibility between the Court and States with respect to individual claims.[81] Second, the expansion of process-based subsidiarity has led to a retreat from a substantive review of individual rights. The lack of this review is incapable of contributing to the right's effectiveness, since the Court does not address that aspect of the claim. The following sections will deal with each of these expansions to subsidiarity in turn. In expanding subsidiarity in the two identified ways, the ECtHR correspondingly rejects its oversight role. For this reason, the findings in these sections are directly relevant to the operation of oversight-based approaches, as applied through the margin of appreciation and autonomous concepts. The Court itself emphasises that subsidiarity is about sharing rather than shifting responsibility for the protection of human rights;[82] this premise is tested in the following analysis. If neither domestic nor ECtHR supervision is exercised over individual claims, the outcome will be a shifting of responsibility beyond the scope of both levels of jurisdiction with the effect of ousting possible effective adjudication of the claim. The sharing of responsibility mandated by subsidiarity will thus fail to be met.

The subsidiarity-based methods of interpretation reviewed in this book are the margin of appreciation (the evolutive potential of which is explored in Chapter 2) and the fourth instance doctrine. By contrast with evolutive

80 Andreas Føllesdal, 'Subsidiarity to the Rescue for the European Courts? Resolving Tensions Between the Margin of Appreciation and Human Rights Protection' in *Join, or Die – Philosophical Foundations of Federalism* (De Gruyter 2016) 251; Sanele Sibanda, 'Beneath it All Lies the Principle of Subsidiarity: The Principle of Subsidiarity in the African and European Regional Human Rights Systems' (2007) 40(3) The Comparative and International Law Journal of Southern Africa 425.

81 European Court of Human Rights, 'Contribution of the Court to the Brussels Conference' (*Council of Europe*, 26 January 2015), para 3 <https://www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf> accessed 17 July 2024.

82 European Court of Human Rights (n 81).

approaches, the Court defers greatly to the obligatory nature of subsidiarity.[83] Indeed, the margin of appreciation (likely the most debated of the Court's methods)[84] now forms part of the text of the Convention in accordance with Article 1 of Protocol No. 15. As per the Explanatory Report to the Protocol:[85]

> [a] new recital has been added at the end of the Preamble . . . containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law.

In the light of subsidiarity, the Court finds that it 'must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case'.[86] This facet of subsidiarity is upheld by the fourth instance doctrine, in line with which the ECtHR does not act as a final court of appeal in interpreting domestic law, but rather reviews national decisions through a Convention lens. As such, the Court has only limited power to deal with alleged errors of fact or law committed by national courts, which have primary responsibility for interpreting and applying domestic law. Unless their interpretation is arbitrary or manifestly unreasonable, the Court's role is limited to ascertaining whether the effects of that interpretation are ECHR-compliant.[87]

The fourth instance doctrine, like evolutive approaches, is linked to the requirement of effectiveness: the doctrine must be set aside and an oversight-based approach adopted when the needs of effectiveness so require. Glas posits that relying solely on subsidiarity would lead to 'ineffective protection of the Convention rights . . . the Court exceptionally substitutes itself for the domestic authorities'.[88] Ulfstein similarly argues that subsidiarity

83 The Court is now said to be in an 'age of subsidiarity' – Spano, 'Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights Law Review 487.

84 See, among many others, Gary Born, Danielle Morris and Stephanie Forrest, '"A Margin of Appreciation": Appreciating its Irrelevance in International Law' (2020) 61(1) Harvard International Law Journal 65 and Jeffrey A Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2005) 11 Columbia Journal of European Law 113.

85 See Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213), Explanatory Report, para 7 <https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf> accessed 17 July 2024.

86 *Husayn (Abu Zubaydah) v Poland* App no 7511/13 (ECtHR, 24 July 2014), para 393.

87 *Baş v Turkey* App no 66448/17 (ECtHR, 3 March 2020), para 151.

88 Lize R Glas, '*Burmych and Others v. Ukraine*: Deplorable Deviation or Terrific Template for Dealing with Repetitive Applications?' (*Radboud Repository*, 2018) 3, <https://repository.

leaves decision-making to Contracting States 'unless it is more effectively or efficiently performed at the international level'.[89] However, this is not always the case. Increasingly, subsidiarity-based approaches are prioritised over oversight-based approaches, even where use of the latter is necessary to ensure the effectiveness of rights. Rather than 'to some extent' merging with the principle of subsidiarity,[90] I argue that the fourth instance doctrine is a key constituent of Convention subsidiarity. The discretion extended to respondent States in interpreting national law is ever-increasing, as shown by a lack of scrutiny of the proportionality testing conducted by national courts. As such, where a democratic legislative framework is in place, the expansion of process-based subsidiarity is relied on by the Court to avoid a substantive review of national decision-making for compliance with the Convention. In addition, efficiency-based concerns are used to widen the scope of the fourth instance doctrine. Where finding applications admissible would exacerbate the Court's backlog, a Convention review is avoided altogether. As shown by later analysis of the judgment in *Burmych and Others v Ukraine*, the fourth instance doctrine now encompasses not only those instances when the ECtHR would be acting as a final court of appeal, but also where it would be stepping in to redress the lack of a remedy at national level (which is, in fact, the Court's central role).

Vogiatzis finds that the Court is not hostile to subsidiarity 'because it is completely impractical for the Court (or the Committee of Ministers) to ensure compliance without the cooperation of the domestic authorities'.[91] Subsidiarity contributes to the effective functioning of the Convention system, so long it remains grounded on factors that do not impact the effectiveness of rights, a vital component of which is State compliance. Indeed, the support of Contracting States is necessary for the proper functioning of the ECtHR.[92] A key justification for extending discretion on the basis of subsidiarity is that national authorities are said to have a greater awareness of and familiarity with the issues occurring in their jurisdictions, and as such should be chiefly responsible for ensuring rights protection.[93] Arai is, however, critical of the starting point that national authorities are better placed to review cases,

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ubn.ru.nl/bitstream/handle/2066/204457/204457.pdf?sequence=1&isAllowed=y> accessed 17 July 2024.

89 Geir Ulfstein, 'Transnational Constitutional Aspects of the European Court of Human Rights' (2021) 10(1) Global Constitutionalism 151, 159.

90 Spano (n 22) 485.

91 Vogiatzis (n 1).

92 See, for example, Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, 'No Consensus on Consensus?' (2013) 33(7–12) Human Rights Law Journal 248, 254.

93 See Hutchinson, who expresses this by finding that '[t]he margin of appreciation . . . is more a matter of who takes the decisions, rather than what those decisions might be' – Michael R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48(3) The International and Comparative Law Quarterly 638, 640.

finding that this casts undue doubt on the Court's competence in conducting fact-finding. He challenges the idea that national bodies are always better placed to evaluate factual circumstances than international judges, particularly given that the Court and the Committee of Ministers can request the cooperation of the relevant domestic authorities.[94]

The assumption that national authorities are better placed must also be contextualised by reference to 'the other constitutional aspects of the relationship between courts at the two levels, especially the need for protection of human rights and respect for the rule of law'.[95] For one interviewed judge, the very use of the 'better placed' formula under Article 5 signalled the existence of a margin of appreciation with respect to the provision.[96] The Court must thus maintain a supervisory oversight where necessary, especially since, while States may be in a better position to evaluate local circumstances, they are arguably not better placed than the Court to interpret their obligations under the Convention.[97] This is recognised by Articles 19 and 32 of the ECHR, in accordance with which it is the Court's role definitively to interpret and apply Convention provisions. Consensus can be used to inform the decision as to whether or not, as a starting point, national authorities can be assumed to be more qualified to evaluate the facts in a given case. As such, States whose legal regimes are at variance with prevailing European standards will not benefit from the underlying assumption that they are better placed. Rather than separating States along the dividing lines of good and bad faith,[98] or high and low reputation,[99] consensus offers a more equal basis for allocating a greater or lesser level of discretion.

Justifications for subsidiarity cannot be understood as justifications for subsidiarity alone – the notion of subsidiarity must not be stretched so far as to effectively extinguish the competing interests in the Court's oversight. This is because the idea of subsidiarity does not reflect, nor is it intended to reflect, a shifting of responsibilities to States, which would be based on justifications for subsidiarity alone.[100] Rather, it responds to the need to 'share' responsibilities for human rights protection – a goal which requires an assessment of factors tending towards oversight as well as subsidiarity. In any case, '[d]eference to the expertise of the state cannot absolve [international] Tribunals of their responsibility to scrutinise and assess . . . evidence, making

94 Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 23.

95 Ulfstein (n 89) 161.

96 Interview with ECtHR judge, 16 April 2021.

97 Jan Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29(3) Netherlands Human Rights Quarterly 327, 332.

98 For the issues raised by this approach, see Çalı (n 42).

99 See Dothan's framework – Dothan (n 55).

100 European Court of Human Rights (n 81).

their own determination'.[101] On this, former Judge Rozakis has argued that if it is to have 'any meaning whatsoever', the margin of appreciation should only be applied in cases where the Court finds that 'national authorities were really better placed than the Court to assess the "local" and specific conditions which existed within a particular domestic order'.[102] The extent of discretion granted would thus depend on this assessment. However, rather than limit the use of the 'better placed' formula to situations involving 'better information'[103] by domestic authorities, the ECtHR has gradually broadened its application. In my view, it has done so through two main routes of subsidiarity – namely efficiency-based and process-based subsidiarity. As such, Altwicker's argument that the 'better placed' formulation does not allow for any cases where domestic authorities would not be 'better placed' to protect human rights[104] applies within the new strongly subsidiarity-focused Convention system. On the basis of efficiency-based subsidiarity, this is because the Court shifts responsibility for securing rights entirely to the respondent State, even where the State has amply demonstrated that it is unwilling, or unable, to fulfil this task. On the basis of process-based subsidiarity, this is because the level of deference extended to national legislative authorities is such that they are inevitably considered 'better placed' to determine whether the measures that they introduce are necessary and proportionate. The following sections address each of these developments in turn.

The advent of efficiency-based subsidiarity

The use of efficiency-based subsidiarity in several key cases has resulted in the Court shifting responsibility for securing rights entirely to the respondent State, even where it has been shown that the State is fundamentally unable or unwilling to meet its task. These issues were sharply demonstrated by the Grand Chamber's controversial[105] *Burmych*[106] judgment handed down in 2014.

101 Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 147.

102 Concurring opinion of Judge Rozakis in *Egeland and Hanseid v Norway* App no 34438/04 (ECtHR, 16 April 2009).

103 Tilmann Altwicker, 'Non-Universal Arguments Under the European Convention on Human Rights' (2020) 31 European Journal of International Law 101, 124.

104 Altwicker (n 103), 125.

105 Geir Ulfstein and Andreas Zimmermann, '*Certiorari* Through the Back Door? The Judgment by the European Court of Human Rights in *Burmych and Others v. Ukraine* in Perspective' (2018) 17(2) The Law and Practice of International Courts and Tribunals 289; Eline Kindt, 'Giving Up on Individual Justice: The Effect of State Non-Execution of a Pilot Judgment on Victims' (2018) 36(3) Netherlands Quarterly of Human Rights 173; Mikael Rask Madsen, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court' (2021) 2(2) European Convention on Human Rights Law Review 180.

106 *Burmych and Others v Ukraine* App nos 46852/13, 47786/13, 54125/13 et al (ECtHR, 12 October 2017).

Burmych concerned prolonged non-enforcement of final domestic judgments. The applications were part of a group of 12,143 pending claims, originating in the same problem as had been identified in the pilot judgment of *Yuriy Nikolayevich Ivanov v Ukraine*:[107] the systemic non-enforcement, or delayed enforcement, of national court decisions, alongside an absence of effective domestic remedies. The failure at national level to take appropriate general measures, leaving the systemic problem unresolved, had led the Court to deal with the *Ivanov* follow-up cases in an accelerated, simplified summary procedure for grouped judgments and strike-out decisions. These were broadly limited to a statement of a violation and an award of just satisfaction,[108] which allowed the applicants to swiftly obtain a decision granting them financial redress.[109] However, the systemic problems remained. The majority in *Burmych* noted that every year, growing numbers of applicants were applying to the Court in order to obtain financial relief under Article 41 of the Convention, rather than receiving appropriate redress at national level. Some new applications concerned non-enforcement of domestic decisions which had already resulted in findings of ECHR violations.[110]

At the time of *Burmych*, the ECtHR had processed 14,430 similar cases and 12,143 remained pending.[111] The parts of the judgment that outline the Court's concerns and ultimately lead it to strike out the applications under Article 37 § 1 (c) reveal the consideration of practical matters external to the resolution of the claims brought by individual rights-holders:[112]

> if the Court examines the present . . . and all . . . other follow up cases . . . it will face the inevitable prospect that growing numbers of applicants in Ukraine will turn to it for redress . . . the measures for settling . . . already pending cases through friendly settlements or unilateral declarations would not provide a lasting solution to the problem because the Court will still be at risk of receiving new applications as long as the root cause of the problem is not addressed.

The pilot judgment procedure aims to help national authorities to resolve underlying systemic or structural issues identified as giving rise to repetitive

107 *Yuriy Nikolayevich Ivanov v Ukraine* App no 40450/04 (ECtHR, 15 October 2009).

108 See, for example, *Kharuk and Others v Ukraine* App no 703/05 (ECtHR, 26 July 2012) which dealt with 116 applications.

109 As such, in *Kharuk and Others v Ukraine* (n 108), the Court awarded the applicants €1,500 for delays of up to three years and €3,000 for delays exceeding three years.

110 *Burmych and Others v Ukraine* (n 106), paras 151–2; see also decisions CM/Del/Dec(2019)1348/H46-35 (6 June 2019) and CM/Del/Dec(2019)1340/H46-29 (14 March 2019) of the Committee of Ministers.

111 *Burmych and Others v Ukraine* (n 106), para 153.

112 *Burmych and Others v Ukraine* (n 106), paras 154–6.

cases.[113] However, the *Burmych* applications were struck out of the Court's list. While backlog-related concerns[114] are at the heart of pilot judgments, rejecting the admissibility of claims based on efficiency factors outside of the context of a pilot judgment procedure broadens reliance on subsidiarity on unprincipled grounds. Concerns relating to the backlog and efficiency more broadly are beyond the ambit of the specific rights claim. Were the approach of the Court to effect significant changes at national level (thereby addressing the root cause of the problem), the right would become enforceable domestically without creating the need to bring a Convention claim. This would ensure the ultimate guarantee of effectiveness – a rendering of the right to be so practical and effective that recourse to the Court is not needed.

The respondent State's ability to secure the Convention right is relevant to the alleged violation in a way that the Court's backlog is not. Kindt argues that since subsidiarity leaves the primary responsibility for ensuring respect for Convention rights to States, this 'naturally results in a diminished amount of work for the Court' and 'can thus be linked to considerations of efficiency'.[115] However, I would argue that the task of substantive review of claims has hitherto centred on the effectiveness of the individual right rather than broad efficiency concerns. The efficiency that Kindt refers to may naturally arise from situations where the State has, in good faith, applied Convention principles, but it is not the central tenet of the Court's decision-making in these claims. The decision to strike out applications by focusing on the end goal of efficiency thus differs from the general 'sharing' of human rights responsibilities among the Court and Contracting States, which is in fact the aim of subsidiarity.[116]

The majority in *Burmych* highlighted the lack of progress made domestically since *Ivanov*.[117] Had improvements been made at national level, any future case brought before the Court would not have been inadmissible if there were outstanding issues requiring the rights at stake to be protected. While

113 European Court of Human Rights, 'The Pilot-Judgment Procedure Information Note Issued by the Registrar' (*Council of Europe*), para 4 <https://www.echr.coe.int/documents/pilot_judgment_procedure_eng.pdf> accessed 17 July 2024.

114 Lize R Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn' (2014) 14(4) Human Rights Law Review 671; Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19(1) European Journal of International Law 125; Alastair Mowbray, 'Crisis Measures of Institutional Reform for the European Court of Human Rights' (2009) 9(4) Human Rights Law Review 647. See also Ministers' Deputies, Steering Committee for Human Rights (CDDH), 'Report Containing Conclusions and Possible Proposals for Action on Ways to Resolve the Large Numbers of Applications Arising from Systemic Issues Identified by the Court' (*Council of Europe*, 11 July 2013) <https://rm.coe.int/16805c8399> accessed 17 July 2024.

115 Kindt (n 105) 177.

116 European Court of Human Rights (n 81).

117 *Burmych and Others v Ukraine* (n 106), paras 37–44.

the practical implementation of Convention guarantees continued to be undermined domestically in the context of the pending applications, their striking out resulted in an exacerbation of this negative impact. In fact, rights-holders that are the least likely to obtain a remedy because of a systemic problem in the domestic legal system have now also become the least likely to receive redress at ECtHR level.

In reaching its conclusion, the majority relies extensively on the role of subsidiarity[118]:

> [t]he Court observes that it runs the risk of operating as part of the Ukrainian legal enforcement system and substituting itself for the Ukrainian authorities in directing "appropriate and sufficient redress for the non-enforcement or delayed enforcement of domestic decisions" . . . [t]hat task is not compatible with the subsidiary role which the Court is supposed to play.

This expands the fourth instance doctrine beyond not wishing to second-guess the 'better' position of national authorities in securing ECHR rights, to an unwillingness to step in to redress an absence of effective national remedies. Since this is a core part of the Court's role – to provide an effective remedy when domestic authorities have failed to do so – the abdication of this responsibility is concerning. This is because the reliance on efficiency-based factors[119] to support this new expanded approach to subsidiarity results in the undermining of individual rights. In line with subsidiarity, the Court 'cannot assume the role of the competent national authorities',[120] which are granted flexibility in choosing the measures that ensure compliance with the ECHR.[121] In *Burmych*, however, the national authorities had essentially relinquished rather than misused their role; the issue was not the manner in which they had opted to apply the Convention, but their very failure to do so.

The 2018 Copenhagen Declaration placed great emphasis on the concept of subsidiarity, detailing the roles of the fourth instance doctrine and the margin of appreciation in driving the principle.[122] It has been argued that the Declaration can thus be read as 'pushing the Court towards the development and stricter application of . . . subsidiarity' and, thus, towards 'strengthening the local, non-universal dimension of [international human rights law]'.[123] Yet, rather than strengthening the local dimension, *Burmych* fails to ensure a remedy at either the domestic or Convention levels. The Court argues that reviewing the

118 *Burmych and Others v Ukraine* (n 106), paras 155–6.
119 What Ulfstein and Zimmermann describe as an 'obvious attempt to reduce its own caseload' – Ulfstein and Zimmermann (n 105) 294.
120 Belgian Linguistics Case (n 76), para 10.
121 Belgian Linguistics Case (n 76), para 10.
122 See especially para 28 of the Copenhagen Declaration (n 4).
123 Altwicker (n 103) 125.

claims on their merits 'would place a significant burden on its own resources, with a consequent impact on its considerable caseload'.[124] In this light, Ulfstein and Zimmermann point out that striking out the applications:[125]

> means that the Court will have more capacity to deal with urgent cases and cases posing significant judicial issues, possibly with precedential effects, and may make a real difference for the applicants provided there will be a good faith implementation by the respondent State . . . fewer cases might also contribute to improved quality and consistency of the Court's jurisprudence.

Outcomes that promote the overall effectiveness of a system, however, can only be relevant to collective rights.[126] The ECtHR's task in each case is to assess whether the interests held by individual rights-holders have been served. There is no room in this analysis for a consideration of how the collective interests of all rights-holders may be impacted by a decision,[127] since the Convention system pursues individual justice.[128] This leads Madsen to comment that '[u]ndoubtedly, the notion of individual justice and access to the Court took somewhat of a blow with this decision'.[129] Convention rights are moreover not in competition with one another unless and until they require balancing in a concrete instance. Even the Court's flexible interpretation of the notion of the 'rights and freedoms of others'[130] cannot stretch so far as to incorporate the rights of future applicants to usurp existing claims lodged before the Court. The advent of efficiency-based subsidiarity at the expense of oversight is thus significant since it results in the undermining of the effectiveness of existing Convention rights. In adopting the *Burmych* approach, the Court relinquishes not only its duty to interpret the ECHR in an evolutive way, but also to exercise oversight of the rights it has been mandated to protect.

124 *Burmych and Others v Ukraine* (n 106), para 174.

125 Ulfstein and Zimmermann (n 105) 307.

126 On collective rights, see William F Felice, 'The Case for Collective Human Rights: The Reality of Group Suffering' (1996) 10 Ethics and International Affairs 47; Michael Freeman, 'Are There Collective Human Rights?' (1995) 43(1) Political Studies 25; and András B Baka, 'The European Convention on Human Rights and the Protection of Minorities Under International Law' (1993) 8(2) Connecticut Journal of International Law 227.

127 'The deep values and considerations that back up human rights protections are not important because they maximize an overall good, but because they provide a space for individually-centered concerns in a political society' – Çalı (n 6) 260.

128 This refers to the delivery of 'individual justice' in response to individual applications. For alternative constructions of the concept of 'individual justice', see Steven Greer and Luzius Wildhaber, 'Revisiting the Debate About 'Constitutionalising' the European Court of Human Rights' (2013) 12(4) Human Rights Law Review 655, 663–6.

129 Madsen (n 105) 204.

130 See Chapter 2 on the judgments in *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) and *Ebrahimian v France* App no 64846/11 (ECtHR, 26 November 2015).

The approach taken in *Burmych* is troubling and differs from other attempts to improve the effectiveness of the Convention system in two key ways. First, other changes have been enacted through a process of debate and discussion among Contracting States; as such, they have not been the result of a judicial policy. Second, those changes have not stripped the ECtHR of its powers of review and thus its mandate. For instance, the introduction of the single judge procedure through Protocol No. 14 allows a judge to declare the inadmissibility of an application or to strike out a case 'where such a decision can be taken without further examination'.[131] In this way, the Court continues to exercise scrutiny over national decision-making, albeit in a more streamlined manner: an assessment of whether or not a violation has potentially taken place remains. By contrast, in striking out the claims in *Burmych*, the majority denied the applicants the possibility of substantive review. The case resulted from an absence of an effective remedy at national level, thereby clearly raising a Convention issue. While this should have triggered an oversight-based approach, the Court not only employed subsidiarity, but expanded it significantly. Subsidiarity may only be applied where the Court can be assured that the relevant rights will remain practical and effective.[132] Every interpretive method, including the fourth instance doctrine and margin of appreciation, is intrinsically tied to effectiveness. The Court in *Burmych* failed to step in where the exigencies of the case required it to do so; its reliance on subsidiarity consequently undermined the effectiveness of the rights at stake.

Madsen posits that the introduction of the pilot judgment procedure may have had 'similar effects on individual justice' to those caused by *Burmych*.[133] However, the use of pilot judgments[134] does not detract from the centrality of individual justice to the Convention system. This is because the Court's review in a pilot judgment continues to centre on elements relevant to the claim, rather than on any efficiency-based or other external concerns. Pilot judgments can 'dispose of repetitive violations in an efficient manner'[135] and, as shown by the summary procedure stemming from *Ivanov*, such judgments are still capable of offering redress. The ECtHR in *Burmych* asserts that it is not its task to 'provide individualised financial relief in each and every repetitive case'.[136] Yet, as shown by the *Ivanov* follow-up cases, such relief can be delivered without the need for detailed judgments. It is true that the large volume of pending applications, even if addressed through a summary procedure, would have contributed to the Court's backlog. Nevertheless, this bears no

131 Article 27 § 1 of the ECHR.

132 *Scoppola v Italy (No 2)* (n 3), para 104.

133 Madsen (n 105) 204.

134 On which, see Lize R Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice' (2016) 34(1) Netherlands Quarterly of Human Rights 41.

135 Brighton Protocol, para 20(c).

136 *Burmych and Others v Ukraine* (n 106), para 181.

relevance to the individual claim – the responsibility for developing further types of expedited proceedings remains with the Committee of Ministers and the Contracting States. Assessing the differences in approach between the pilot judgment procedure and *Burmych* highlights the unprecedented nature of efficiency-based subsidiarity. This leads to an equally unprecedented undermining of oversight-based approaches, the impacts of which on Article 5 are addressed in later chapters.

The dissenting opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque, and Motoc offers a scathing critique of the majority's reasoning. From the outset, the dissenting judges posit that the judgment 'has nothing to do with the legal interpretation of human rights' but rather relates to 'a matter of judicial policy only, and as such completely changes the well-established paradigm of the Convention system'.[137] While recognising that the Court must concentrate on the most egregious human rights violations and landmark decisions on European values, the judges argue that it 'cannot, on account of a heavy caseload, just cease to perform its judicial tasks'.[138] The dissenting judges note that ECHR claims must end with the proper execution of a judgment.[139] An important practical point consequently remains to be considered. A pilot judgment proving ineffective (like any judgment that remains unenforced) is a matter for the Committee of Ministers. As such, the Committee could have instigated infringement proceedings against the respondent State.[140] However, some practical barriers exist to the launching and ultimate success of infringement proceedings. First, limited funding has been allocated at national level for the purpose of enforcing the relevant judgments.[141] Second, the commencement of infringement proceedings requires the support of two-thirds of the Contracting States.[142] Both of these challenges are likely to have been exacerbated by Russia's invasion of Ukraine in February 2022. Funding to enforce the *Burmych* judgments will hardly be a priority for the Ukrainian Government, and Contracting States are unlikely to support the launching of enforcement proceedings at this time.

137 *Burmych and Others v Ukraine* (n 106), para 181, Joint Dissenting Opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc, para 1.

138 *Burmych and Others v Ukraine* (n 106), para 181, Joint Dissenting Opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc, para 1.

139 *Burmych and Others v Ukraine* (n 106), para 181, Joint Dissenting Opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc, para 1.

140 Fiona de Londras and Kanstantsin Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights' (2017) 66(2) International and Comparative Law Quarterly 467.

141 Ulfstein and Zimmermann (n 125) 306, citing to *Burmych and Others v Ukraine* (n 106), para 131.

142 Laurence R Helfer, 'Populism and International Human Rights Law Institutions' in Gerald L Neuman (ed), *Human Rights in a Time of Populism: Challenges and Responses* (Cambridge University Press 2020) 229.

Turan and Others v Turkey[143] confirms that the Court's reliance on efficiency concerns to pursue a subsidiarity-based approach, as shown in *Burmych*, has been replicated with respect to the right to liberty. *Turan* arose from the arrest and detention of the 427 applicants, all sitting judges or prosecutors, following the attempted coup in Turkey in July 2016.[144] The judgment establishes a violation of Article 5 § 1 on the grounds that the applicants' detention was not prescribed by law.[145] Some individuals had also complained under Article 5 § 1 (c) and 3 that they had been placed in pre-trial detention in the absence of a reasonable suspicion that they had committed the relevant offences, that the decisions for their detention had not been accompanied by relevant and sufficient reasons, and that the length of pre-trial detention had been excessive.[146] Some further argued under Article 5 § 4 that the reviews conducted by national courts into their detention had not complied with certain procedural safeguards and/or that, as required by Article 5 § 5, there was a lack of effective domestic remedies to allow them to obtain compensation for the alleged breaches of their Article 5 rights.[147] In refusing to substantively review these aspects of the claim, *Turan* reflects the efficiency concerns expressed by the majority in (and indeed cites to) *Burmych*:[148]

> [t]he Court has found . . . that the applicants' detention was not prescribed by law . . . Having regard to the significance and implications of this finding . . . and to the accumulation of thousands of similar applications on its docket . . . which puts a considerable strain on its limited resources, the Court considers – as a matter of judicial policy – that it is justified in these compelling circumstances to dispense with the separate examination of . . . each remaining complaint . . . It is precisely within this exceptional context that the Court, guided by the overriding interest to ensure the long-term effectiveness of the Convention system, which is under threat by the constantly growing inflow of applications . . . decides not to examine the applicants' remaining complaints under Article 5.

This reasoning skews the goal of Convention effectiveness, which refers to the need to keep rights – not the Convention system – practical and effective. Since pre-trial detention was commonly imposed in Turkey after the attempted coup,[149] finding that further review could be dispensed with deprived both the

143 *Turan and Others v Turkey* App nos 75805/16 and 426 others (ECtHR, 23 November 2021).

144 On this, see Sabina Garahan and Emre Turkut, 'The "Reasonable Suspicion" Test of Turkey's Post-Coup Emergency Rule Under the European Convention on Human Rights' (2020) 38(4) Netherlands Quarterly of Human Rights 264, 266–72.

145 *Turan and Others v Turkey* (n 143), para 91.

146 *Turan and Others v Turkey* (n 143), para 97.

147 *Turan and Others v Turkey* (n 143), para 97.

148 *Turan and Others v Turkey* (n 143), para 98.

149 See, on pre-trial detention practices during Turkey's post-coup state of emergency, Garahan and Turkut (n 144) 266–72.

applicants of their full rights under Article 5 and Article 5 of its full meaning. The Court has often used the formulation that it is unnecessary to review other aspects of a Convention claim when one or more violations have already been established.[150] Some justifications for the use of this approach were raised in my interview with Judge Kūris[151]:

> in all courts who decide cases collectively the views of the composition have to be adjusted, so certain phrases come out as vague or not concrete enough. This is the cost of finding a common denominator . . . [f]or example, there are not so few cases where the question of applicability of Article 6 § 1 is left open . . . the Court does not provide a conclusion as to whether the first *Vilho Eskelinen* test is satisfied and comes directly to the second test which is in any case not satisfied. What would be the added value of arguing endlessly about the first test if – for the purposes of deciding the case – all the judges agree that the second test is not satisfied, whatever their differences as regards the first test?

This approach, in contrast to that in *Burmych* and *Turan*, remains rooted in discussion of the individual claim rather than in efficiency-based concerns. *Burmych* and *Turan*, meanwhile, have the effect of linking the substantive review of claims to efficiency concerns. States that have systemic problems in ensuring rights protection, such as Ukraine in *Burmych* or Turkey in *Turan*, consequently face less scrutiny than those that do not generate an increase in the Court's backlog. The effectiveness of the rights held by persons bringing claims against States that are repeatedly found to be in breach of the Convention is thereby undermined. While the failure to enforce a remedy forms part of the substantive claim, concerns that finding all or part of a claim admissible may result in backlog challenges fall beyond the scope of the case.

Nevertheless, continuing with the *Vilho Eskelinen and Others v Finland*[152] Article 6 § 1 example, even if an analysis of how the first limb of the test applies is not required for the adjudication of a given case, the fact that the Court leaves a deliberate gap in its reasoning has an impact on subsequent similar claims. This affects the clarity of Convention jurisprudence, since the scope of the test is not explored in full. This is exacerbated by the difficulties highlighted by several interviewed judges in maintaining uniformity across such a large volume of jurisprudence (the challenge of maintaining uniformity is one that the framework for the Court's varying approaches in this book seeks to resolve). Considering the importance of the Court's own case-law in its reasoning,[153] the fact that there are often significant *intended* omissions

150 See, for example, *V.C. v Slovakia* App no 18968/07 (ECtHR, 8 November 2011), para 161.

151 Interview with Judge Kūris, 29 January 2021.

152 *Vilho Eskelinen and Others v Finland* (App no 63235/00, 19 April 2007).

153 '[T]he Court very heavily relies on its own precedents' – interview with Judge Kūris; 'from the perspective of a judge at the Court the level of discretion flows to a considerable degree from the Court's own case law' – written comments from Judge Bårdsen.

in judgments serves only to interfere with – rather than improve – the consistency of its jurisprudence. These concerns are heightened in the context of efficiency-based subsidiarity which broadens the likelihood that all or part of the lodged applications will not be reviewed on their merits.[154]

Çalı argues that in concluding that pursuit of the remaining complaints in *Turan* would hold no 'commensurate benefits', the Court sought to assert a 'significant advantage' doctrine.[155] This is a reference to the new 'significant disadvantage' admissibility criterion introduced to Article 35 § 3 (b) by Protocol No. 14. Article 35 § 3 (b) provides that '[t]he Court shall declare inadmissible any individual application submitted under Article 34 if it considers that . . . the applicant has not suffered a significant disadvantage'. Assessing whether or not reviewing the further claims under Article 5 would bring 'commensurate benefits' cannot affect the individual claim. As such, the identification of a 'significant advantage' cannot be justifiably grounded within the Convention framework. The ECtHR can only consider whether or not individual rights have been upheld in a given case – seeking to detect any 'commensurate benefits' exceeds the scope of its individual-focused remit. Violations of the right to liberty (and, indeed, other Convention rights) must fall to be reviewed where necessary; the alternative strips rights of their effectiveness by misplaced reliance on the effectiveness of the very system in which they are situated.

The expansion of process-based subsidiarity

A move towards a process-based[156] or procedural approach[157] to justice has increased the scope of subsidiarity. In this section, I argue that by justifying an expansion of discretion in reliance on procedural review (what I term 'process-based subsidiarity'), the Court abdicates its supervisory functions and leaves significant gaps in rights protection.

The new Protocol No. 15 highlighted the role of the margin of appreciation and subsidiarity by inserting references to both into the Convention's Preamble.

154 See the strongly worded Partly Dissenting Opinion of Judge Kūris in *Turan and Others v Turkey* (n 143), which supports the view that the Court's unwillingness to review all remaining claims in *Turan* differs from the standard formula whereby analysing further aspects of a case is considered 'unnecessary'.

155 Başak Çalı, 'No Rule of Law? Ne Venez Pas à Strasbourg' (*Verfassungsblog*, 8 December 2021) <https://verfassungsblog.de/no-rule-of-law/> accessed 17 July 2024.

156 Spano (n 22) 485.

157 Eva Brems and Janneke Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017); Oddný Mjöll Arnardóttir, 'The "Procedural Turn" Under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15(1) International Journal of Constitutional Law 9; and Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68(1) International and Comparative Law Quarterly 91.

This is an important development since, as per Article 31(2) of the VCLT, the Preamble informs context for the purpose of treaty interpretation.[158] The new recital added at the end of the Preamble reads as follows:[159]

> [a]ffirming 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 Brighton Declaration, which led to the adoption of Protocol No. 15, was the culmination of years of discontent on the part of UK executive and legislative (and, to an extent, some judicial) authorities, which heavily criticised what they saw as Convention overreach.[160] Following the Brighton Declaration and Protocol No. 15, the Court adapted its substantive and procedural criteria to determine the appropriate level of deference to be granted to Contracting States.[161] The quality of national parliamentary and judicial review gained a new level of importance, 'including to the operation of the relevant margin of appreciation'.[162] Parliamentary process has now emerged as a key factor in triggering a subsidiarity-based broad margin of appreciation.[163] At the same time, the scope of the ECtHR's review of the quality of national parliamentary processes has significantly weakened. As shown by the following analysis of *S.A.S. v France*,[164] the mere existence of a parliamentary procedure in introducing legislation now suffices to elicit a subsidiarity-based approach. The quality of that procedure itself is not open to scrutiny, despite constituting a crucial aspect of the claim since the necessity and proportionality of a measure directly impact a right's effectiveness.

Although *S.A.S.* has been said to be illustrative of the Court's increased focus on the quality of legislative processes,[165] I argue that the Grand Chamber judgment in fact exposes significant gaps in procedural review as it is currently

158 Article 31(2) of the VCLT. On this, see Rachael Ita, 'The Interpretation of the ECHR as a Living Instrument: Demise of the Margin of Appreciation Doctrine?' (*Tampere University*, 12 July 2015) <https://blogs.tuni.fi/ecthrworkshop/yleinen/rachaelita> accessed 17 July 2024.

159 Article 1, Protocol No. 15.

160 For an oversight of these criticisms and ensuing procedures, see Çalı (n 42) 246–50.

161 Spano (n 22) 498.

162 *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR, 22 April 2013), para 108.

163 This development has also been termed the 'direct democratic legitimation' formula – Altwicker (n 103) 125.

164 *S.A.S. v France* (n 130).

165 See Matthew Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) Human Rights Law Review 745, 756–7.

applied. This is problematic, as in addition to the advent of efficiency-based subsidiarity, the ECtHR has furthered process-based subsidiarity in such a way that the mere existence of a legislative process now prompts a subsidiarity-based approach. While efficiency-based subsidiarity results in the Court's refusal to review all or part of a case on the merits, process-based subsidiarity creates its own challenges. Where efficiency-based subsidiarity refuses to engage in the process of reaching findings on all or part of a claim, process-based subsidiarity risks making (and has in fact made) premature conclusions on the Convention compatibility of national legal frameworks. The Court thereby links the review of the margin (which can pursue any approach) to an assessment of the quality of domestic law that is intrinsically based on the democratic features of the respondent State (what Çalı terms the new 'variable geometry' jurisprudence).[166] I argue that the extent to which the Court has limited its own scope of review means that, in practice, the margin is more likely to be widened and deployed as a subsidiarity-based approach, even where other factors exist to narrow the margin (chiefly, a prevailing consensus).

The application in *S.A.S.* was brought by a French national, a practising Muslim, on the basis that she was no longer permitted to wear the full-face veil in public following the entry into force, on 11 April 2011, of a law prohibiting the concealment of one's face in public places in France.[167] The claim was brought under Article 8 (right to respect for private and family life), Article 9 (freedoms of thought, conscience, and religion), and Article 10 (freedom of expression). Under Article 14 (prohibition of discrimination), the applicant complained that the ban led to discrimination on grounds of sex, religion, and ethnic origin against women who wore the full-face veil. The Grand Chamber concluded that the ban did not violate the applicant's rights on any of these grounds. Under Articles 8 and 9, the majority found that, in the light of the wide margin of appreciation extended to France in this area, the ban was proportionate to the pursued aim, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'. The ban could on this basis be considered 'necessary in a democratic society'. Under Article 14 taken together with Articles 8 or 9, the ban was found to have an 'objective and reasonable' justification.

The most common basis for criticisms of the judgment[168] is that it thus ascribed a new category of justification for restricting Articles 8 and 9 – namely 'living together' as an element of the 'protection of the rights and freedoms

166 Çalı (n 42).

167 Law no. 2010-1192 of 11 October 2010.

168 For a detailed analysis of the decision in *S.A.S. v France* (n 130), see Myriam Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*' (2015) 4(1) Oxford Journal of Law and Religion 94. For an empirical analysis, see Eva Brems, '*SAS v France*: A Reality Check' (2016) 25 Nottingham Law Journal 58.

of others' permitted under Articles 8 § 2 and 9 § 2.[169] I have previously criticised the ECtHR for including within the idea of the 'rights and freedoms of others' rights that cannot be found in the Convention – which leads to the inception of a 'right to discriminate'.[170] My analysis in this section focuses on the repercussions of *S.A.S.* on the scope of the Court's procedural review, and the consequent expansion of subsidiarity.

The French Government argued that the ban pursued two legitimate aims: 'public safety' and 'respect for the minimum set of values of an open and democratic society'. The judgment notes that Articles 8–9 do not refer to the second of those aims or to the three values mentioned by the Government in that connection, namely respect for equality between men and women, respect for human dignity, and respect for the minimum requirements of life in society.[171] As for the alleged aim of 'public safety', while the majority acknowledged that 'it may admittedly be wondered whether the Law's drafters attached much weight to [security] concerns',[172] it nevertheless accepted the State's argument that in adopting the ban, the legislature sought to address questions of 'public safety'. This was despite the fact that it had also noted that the explanatory memorandum which accompanied the draft law 'indicated – *albeit secondarily* – that the practice of concealing the face "could also represent a danger for public safety in certain situations"'.[173] Yet although the respondent Government in this way misrepresented both the tone and content of the legislative debate, the majority found that the existence of a

169 See, on this aspect in particular, Shelby L Wade, 'Living Together or Living Apart from Religious Freedoms: The European Court of Human Right's Concept of Living Together and its Impact on Religious Freedom' (2018) 50 Case Western Reserve Journal of International Law 411; Ilias Trispiotis, 'Two Interpretations of "Living Together" in European Human Rights Law' (2016) 75 The Cambridge Law Journal 580; Erica Howard, '*S.A.S. v France*: Living Together or Increased Social Division?' (*EJIL Talk*, 7 July 2014) <https://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/> accessed 17 July 2024; Hakeem Yusuf, '*S.A.S v France*: Supporting "Living Together" or Forced Assimilation?' (2014) International Human Rights Law Review 277; Sune Lægaard, 'Burqa Ban, Freedom of Religion and "Living Together"' (2015) 16 Human Rights Law Review 203; Christos Tsevas, 'Human Rights and Religions: "Living Together" or Dying Apart? A Critical Assessment of the Dissenting Opinion in *S.A.S. v. France* and the Notion of "Living Together"' (2017) 45(3–4) Religion, State and Society 203; Lori G Beaman, 'Living Together v. Living Well Together: A Normative Examination of the *SAS* Case' (2016) 4(2) Religious Diversity and Social Inclusion 3.

170 Sabina Garahan, 'A Right to Discriminate? Widening the Scope for Interference with Religious Rights in *Ebrahimian v France*' (2016) 5(2) Oxford Journal of Law and Religion 352. See also, more broadly, Contreras who argues that States are left with 'almost complete deference' in choosing a legitimate aim – Pablo Contreras, 'National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights' (2012) 11(1) Northwestern Journal of International Human Rights 28, 42.

171 *S.A.S. v France* (n 130), paras 114 and 117.

172 *S.A.S. v France* (n 130), para 115.

173 *S.A.S. v France* (n 130), para 115 (emphasis added).

debate sufficed to justify the use of subsidiarity. Rather than broadening the margin of appreciation on the basis of process-based subsidiarity, the Grand Chamber in *S.A.S.* should have adopted an oversight-based approach, having identified the gap between the Government's alleged aim in introducing the measure and the reality, as evidenced by the legislative process.

In relation to the necessity and proportionality of the ban, the French Government argued that the legislation had been passed both in the National Assembly and the Senate by almost unanimous vote, 'following a wide democratic consultation involving civil society'.[174] This should have triggered the Court's scrutiny since, as the judgment itself sets out, the respondent State repeatedly ignored the recommendations not only of civil society but of other bodies whose views it had itself requested. The judgment should instead have deferred to the documents of these expert bodies, which would have provided a foundation on which to promote the effectiveness of rights by reference to national findings. The parliamentary commission was tasked with drafting a report on 'the wearing of the full-face veil on national territory'.[175] The report found that among both the commission's members and those of the political formations represented in Parliament, there was no unanimous support for the enactment of a law introducing a general and absolute ban on the wearing of the full-face veil in public places.[176] The National Advisory Commission on Human Rights had issued an opinion concluding that it was not in favour of a law introducing a general and absolute ban.[177] The Prime Minister then asked the *Conseil d'État* to carry out a study on the legal grounds for a ban which would be 'as wide and as effective as possible'.[178] The *Conseil d'État* observed that existing legislation already addressed the matter in various ways and found it impossible to recommend a ban on the full veil alone.[179] If 'liaising with national human rights institutions and fostering the creation of a pervasive human rights culture' is indicative of the quality of national parliaments,[180] the French Parliament in this instance clearly fell short. The ECtHR's use of process-based subsidiarity in *S.A.S.* therefore had no justifiable basis. Since national authorities had disregarded prevailing expertise in adopting the impugned legislation, the Court should have limited the discretion extended to the State. Indeed, international '[t]ribunals ought to defer to the state only in so far as their actions limiting human rights standards are based on carefully assessed expertise'.[181] *S.A.S.* presented a clear opportunity for the Court not only to duly take account of the findings of national bodies, but to query why

174 *S.A.S. v France* (n 130), para 83.
175 *S.A.S. v France* (n 130), para 15.
176 *S.A.S. v France* (n 130), para 17.
177 *S.A.S. v France* (n 130), para 18.
178 *S.A.S. v France* (n 130), para 20.
179 *S.A.S. v France* (n 130), para 22.
180 Parliamentary Assembly of the Council of Europe, Resolution 1823 (2011), para 2.
181 Legg (n 101) 174.

the Government, having specifically sought these opinions, proceeded to then plainly disregard them.

Moreover, despite evidence of Islamophobic comments marring the legislative debate, the majority finds that '[i]t is admittedly not for the Court to rule on whether legislation is desirable in such matters'.[182] As well as showing a disregard for the fundamental aim of rights protection that is at the heart of the Convention system, this sets a worryingly broad limit to procedural review. As such, the very fact that a debate takes place in a parliamentary democracy suffices to absolve the State of any discriminatory elements which tarnish that debate. Indeed, referring to the Court's decisions arising from the equivalent ban on full-face veils in Belgium,[183] Fleming concludes that 'the margin of appreciation allows these bans simply upon a showing that the nation followed its normal legislative procedure'.[184] The Court continues to be bound by its oversight function to apply Convention standards in its review, even where a general measure has been enacted by national parliaments. The fact that legislation has been debated by Parliament cannot automatically result in an assumption of its Convention compliance. This view was advanced by the dissenting judges in *Animal Defenders International v the United Kingdom*, who also argued that the existence of parliamentary debates on an issue should not affect the scope of the margin of appreciation.[185] My view differs slightly in this respect. If Convention principles such as necessity and proportionality are indeed rigorously debated at national level, the margin may justifiably be widened. This is because part of the claim's assessment will include a domestic review of the compatibility of impugned measures with the Convention. However, a substantive analysis is still required in order to assess the content of that debate. This should extend to determining whether the passage of the legislative measure was conducted in good faith. As such, discriminatory remarks – such as the Islamophobic language said to precede the ban on the full-face veil in France[186] – should trigger an in-depth assessment by the Court of whether the State acted in a discriminatory manner contrary to Article 14. In addition, where the respondent State arguably acted in bad faith in restricting ECHR rights contrary to Article 18, an independent assessment of compliance with Article 18 should be undertaken.[187]

182 *S.A.S. v France* (n 130), para 149.

183 *Dakir v Belgium* App no 4619/12 (ECtHR, 11 July 2017) and *Belcacemi and Oussar v Belgium* App no 37798/13 (ECtHR, 11 July 2017).

184 Nathaniel Fleming, '*S.A.S. v. France*: A Margin of Appreciation Gone Too Far' (2020) 52(2) Connecticut Law Review 917, 939, citing *Dakir v Belgium* (n 183), paras 57–8.

185 *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR, 22 April 2013), Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydijeva, Vucinic, and de Gaetano, para 9.

186 *S.A.S. v France* (n 130), para 149.

187 On the threshold currently required to engage Article 18 review, see Chapter 5.

As Çalı notes, despite the arguable hidden agenda behind the French legislation, *S.A.S.* fell within the 'good faith' track of ECtHR jurisprudence which extends greater deference to Contracting States that apply the Convention in good faith.[188] A lack of good faith in *S.A.S.* can plainly be established by the absence of Convention-facing necessity or proportionality testing of the proposed ban. It is in this respect useful to contrast the approach taken in the earlier 2005 *Hirst v the United Kingdom (No 2)*[189] judgment with that of *S.A.S.*, decided in 2014. In *Hirst*, which found that the UK's blanket ban on prisoner voting breached Article 3 of Protocol No. 1 (the right to free elections), the Court marked the lack of any evidence that the national Parliament had 'sought to weigh the competing interests or to assess the proportionality' of the impugned ban.[190] Yet in *S.A.S.*, a broad level of discretion was granted to France despite the fact that the national authorities had not conducted a proportionality analysis. The French Constitutional Court had concluded, in respect of proportionality, that:[191]

> to the extent that the . . . measure is directed at individuals who, freely and voluntarily, hide their faces in places that are accessible to the public, it does not have any disproportionate effects in relation to the aims pursued, since the legislature opted for the most lenient criminal sanction.

This clearly falls short of a Convention-compliant proportionality review which could give rise to justifiable process-based subsidiarity. I therefore support Ulfstein's position that the decisions of national democratic organs should be given weight only if they are based on 'genuine democratic processes and respect for the principles embodied in the ECHR'.[192] In line with established jurisprudence, subsidiarity on this basis should only be accorded where balancing exercises have been conducted 'in conformity with the criteria laid down in the Court's case-law'.[193] As highlighted by Sanader,

> the question remains how likely it is for a French citizen to meet one of the 1,900 women wearing a burqa in public and wishing so badly to communicate and socialise with them that their sense of 'living together' is deeply disturbed.[194]

188 Çalı (n 42) 272.

189 *Hirst v the United Kingdom (No 2)* App no 74025/01 (ECtHR, 6 October 2005).

190 *Hirst v the United Kingdom*, para 79.

191 *S.A.S. v France* (n 130), para 42.

192 Ulfstein (n 89) 173.

193 *Von Hannover v Germany (No 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 107.

194 Teresa Sanader, '*S.A.S. v France* – the French Principle of "Living Together" and the Limits of Individual Human Rights' (*LSE Blogs*, 14 July 2014) <https://blogs.lse.ac.uk/humanrights/2014/07/14/s-a-s-v-france/> accessed 17 July 2024.

Indeed, the analysis of the quality of parliamentary process must consider the extent to which the legislation resulted from 'an extended process of consultation and considered debate, where both the individual right and the public interest . . . have been clearly and explicitly analysed in good faith'.[195] Yet the majority in *S.A.S.* does not assess the content of the debate itself, noting only that it was marked by certain Islamophobic remarks.[196] It is clear that the individual right to manifest religion and wear the clothes of one's choosing did not fall to be considered amidst repeated references to the public interest in 'living together' and the values of the Republic. The explanatory memorandum to the Bill strongly centres these values at the expense of individual rights in stating that:

> France is never as much itself, faithful to its history, its destiny, its image, than when it is united around the values of the Republic: liberty, equality, fraternity. Those values form the foundation-stone of our social covenant; they guarantee the cohesion of the Nation.[197]

Since the Court ultimately found that the legislation which interfered with the applicant's rights under Articles 8–9 could be justified to guarantee the conditions of 'living together', proportionality testing at the national level should have substantively weighed these competing interests. The French Constitutional Court's conclusion that the measure was proportionate on account of its foreseeing the 'most lenient criminal sanction' was insufficient to initiate a subsidiarity-based approach. The judgment in *S.A.S.* acknowledges that '[i]t is certainly understandable that the idea of being prosecuted for concealing one's face in a public place is traumatising for women who have chosen to wear the full-face veil'.[198] Despite this, *S.A.S.* echoes the findings of national courts that the sanctions 'are among the lightest that could be envisaged',[199] without engaging in its own balancing exercise.[200] This signals a move away from the stricter scrutiny shown in *Hirst*.

This tendency was already becoming apparent in the *Animal Defenders* judgment, handed down in 2013, a year before *S.A.S.* In finding that a blanket ban on political advertising was proportionate, the majority relied heavily on the fact that adoption of the measure had been preceded by debates in the UK Parliament.[201] It is worth noting that, in contrast to *S.A.S.*, the Committee set up by the UK Government to consider the

195 Spano (n 22) 491–2.
196 *S.A.S. v France* (n 130), para 149.
197 *S.A.S. v France* (n 130), para 25.
198 *S.A.S. v France* (n 130), para 152.
199 *S.A.S. v France* (n 130), para 152.
200 See Hunter-Henin who argues that, in *S.A.S.*, 'proportionality tests and discrimination provisions have been blatantly misinterpreted or simply ignored' – Hunter-Henin (n 168) 100.
201 *Animal Defenders* (n 185), paras 114–6.

issue had at least found the impugned prohibition to be potentially justifiable.[202] The Committee had specifically reviewed and confirmed the ban's necessity,[203] giving rise to a deference on the part of the ECtHR stemming from 'these exacting and pertinent reviews . . . of the complex regulatory regime governing political broadcasting'.[204] By contrast, all that is now seemingly required for process-based subsidiarity to be adopted is for a national legislative procedure to have taken place. The bounds of subsidiarity have thereby been extended to bypass the Court's supervisory role. This removes any possibility that an oversight-based margin may be applied. The case-law analysed in this section therefore bears repercussions for both oversight-based and subsidiarity-based approaches, with the latter acting to extinguish usage of the former.

An expansion of process-based subsidiarity equally stifles evolutive interpretation. In line with its established case-law, even after concluding that the aim of 'living together' was legitimate, alongside the absence of Convention-compliant proportionality testing and the discriminatory statements marring the legislative process, the Court should have taken into account the clear consensus across the Council of Europe against a blanket ban on the full-face veil. This would have supported the finding of a violation based on a narrowed margin of appreciation. The majority's determination to find a non-violation in the face of these findings sets a worrying precedent, leaving the concept of subsidiarity as little more than an excuse for stretching the margin of appreciation beyond all principled limits. Ignoring an existing European consensus that serves to enhance rights leads to the discarding of the evolutive function of margin review. A framework for ensuring that this is avoided, by reference to non-regression and the need to give particular attention to the practical effectiveness of detainees' rights, is elaborated in Chapter 2.

In the wake of a boundless justification for deference (namely the existence of a legislative process), it is vital to refocus on the evolutive and oversight-based responsibilities of the Court. This is of particular importance to Article 5 as a right that inherently subsumes public interest considerations and thus should remain strongly focused on the rights of the individual.[205] The broader patterns seen at the ECtHR have increasingly negative impacts on Article 5. As a provision whose progressive advancement has long been neglected, it stands at even greater risk from considerations external to the merits of the individual claim.

202 *Animal Defenders* (n 185), para 38.

203 *Animal Defenders* (n 185), para 114.

204 *Animal Defenders* (n 185), para 116.

205 The ways in which this exhaustive nature has been undercut by recourse to misplaced proportionality testing is explored in Chapter 4.

Justifications for the use of autonomous concepts

This book identifies two methods of interpretation as pursuing an oversight-based approach: the margin of appreciation and autonomous concepts. The oversight-based approach has as its aim the reverse of the subsidiarity-based approach – namely to preserve an appropriate level of oversight within the Court's scope of review. In deploying oversight-based approaches, the Court seeks to retain sufficient supervision over the interpretation by Contracting States of concepts arising in the ECHR.[206] Oversight-based approaches are therefore, in theory, discretion-limiting. I argue that while autonomous concepts uphold their oversight-based aim, the Court's hesitance to adopt an oversight-based approach to the margin of appreciation – as shown in the previous section – neglects the method's oversight-based function.

While evolutive approaches highlight a degree of convergence in standards among Contracting States, oversight-based approaches retain scrutiny over certain Convention concepts – specifically, through the doctrine of autonomous concepts. In addition, the margin of appreciation, when narrowed following a consensus analysis, is a way for the Court to exercise oversight of rights standards. A narrowed margin will not always lead to the use of an evolutive approach, since other factors may have also limited a State's margin in a given case. For example, a certain margin of appreciation is granted in the assessment of whether a fair balance was achieved by national authorities. The breadth of the margin depends on various factors, including the nature and aims of the restrictions.[207] These will not always entail evolutive considerations. However, a limited margin of appreciation will always result in a greater degree of oversight. Such oversight will attach to the part of the application that is of particular importance to the claim – this may be the necessity of a measure, the legitimacy of the aim, or the proportionality tests conducted at national level. Since the margin will, by contrast, be widened where a subsidiarity-based approach is applied, the findings on the expansion of subsidiarity are relevant to the oversight-based function of the margin.

Evolutive approaches allow the Court to depart from the findings of domestic authorities on the basis of an evolutive reading of the Convention. Because of the lack of a consistently evolutive approach to ECHR interpretation, this aspect of the Court's aims is not always upheld. Oversight-based approaches, by contrast, when enacted through autonomous concepts, are binding. This is key, since oversight-based approaches give the Court greater leeway to challenge the claims of national authorities than subsidiarity-based approaches. As such, pursuant to a subsidiarity-based approach, if balancing tests at

206 An autonomous interpretation of ECHR concepts 'means in reality a uniform interpretation, resulting, in the words of the Preamble . . . in "a common understanding and observance of the human rights" protected' – *Ashingdane v the United Kingdom* App no 8225/78 (ECtHR, 28 May 1985), Concurring Opinion of Judge Lagergren.

207 *Dickson v the United Kingdom* App no 44362/04 (ECtHR, 4 December 2007), para 77.

national level were conducted 'in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts'.[208] Where national courts duly explore Convention reasoning, it is theoretically less likely that their findings will be departed from at ECtHR level. Yet, as argued with regards to the expansion of process-based subsidiarity, this is not always the case in practice. For example, the lack of a Convention-compliant proportionality analysis by the French Constitutional Court did not lead to the use of an oversight-based narrow margin of appreciation in *S.A.S.*

In the context of Article 5, the Court can adopt an oversight-based approach if either an autonomous concept is of relevance to the resolution of the claim, or a consensus analysis leads to a narrowing of the margin of appreciation. Since the concept of consensus is currently underused, especially in Article 5 adjudication, the presence of autonomous concepts is the more likely factor to justify an oversight-based approach. This is because, unlike an oversight-based narrowing of the margin, the doctrine of autonomous concepts is treated as mandatory in theory as well as in practice. This is demonstrated in the following section, offering a helpful point of comparison for the arguments raised in Chapter 2 regarding the Court's hesitance to view the progressive function of consensus in a mandatory light.

The use of autonomous concepts under Article 5

In accordance with the doctrine of autonomous concepts, certain Convention terms are 'to be given an autonomous interpretation, which may differ from the meaning of similar notions in domestic law'.[209] Autonomous concepts are those the national definition of which 'has only relative value and constitutes no more than a starting point'.[210] They 'must be interpreted as having an autonomous meaning in the context of the Convention and not on the basis of their meaning in domestic law'.[211] In other words, the meaning of an autonomous concept is defined by the Court rather than national authorities – where there is conflict between the two, the ECtHR's interpretation prevails. This allows the Convention to '[retain] a uniform meaning and so ensures a uniform minimum standard of human rights protection across all of the states parties'.[212] In this way, autonomous concepts, like every other interpretive method, can be tied to the underlying duty on the Court to maximise the effectiveness of rights. The uniformity created by the use of autonomous concepts results, in the terms of the Preamble, in 'a common understanding and observance

208 *Von Hannover v Germany (No 2)* (n 193), para 107.

209 Costa (n 52) 177.

210 *Chassagnou and Others v France* App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999); *Karakurt v Austria* App no 45718/99 (ECtHR, 20 September 2005).

211 *R.L. v the Netherlands* App no 22942/93 (ECtHR, 18 May 1995).

212 Costa (n 52) 177.

of . . . human rights'.[213] The doctrine therefore plays a key role in enhancing the harmonisation as well as effectiveness of ECHR standards.

For example, in *Engel and Others v the Netherlands*, an early and significant case on the doctrine, the Court raised concerns that domestic legal systems could classify certain offences as disciplinary rather than criminal in order to take them beyond the scope of Article 6 adjudication.[214] This related to the imposition of penalties by national military courts for disciplinary offences. In order to alleviate its concerns, the Court held that the meaning of the terms 'criminal charge' and 'civil rights and obligations' under Article 6 could not merely reflect equivalent concepts in domestic legal systems – rather, the terms were autonomous and subject to independent ECtHR interpretation. In applying autonomous concepts, elements of certain rights are viewed separately from their domestic conception, in theory ensuring the consistent application of such rights at Convention level[215] and limiting the scope of a margin of appreciation. As the Commission stated as early as 1968, if States were able to 'classify an offence as disciplinary instead of criminal . . . the operation of the fundamental clauses . . . would be subordinated to their sovereign will'.[216] The Court therefore does not consider itself bound by the legal conclusions reached at national level as to the meaning of certain terms. Letsas reads into this 'a certain asymmetry or tension' between ECHR concepts and their domestic interpretation.[217] Although this will only be the case where domestic and ECtHR interpretations differ, some discretion is granted to States in the determination of certain autonomous concepts. As per the early *Twenty-One Detained Persons v Germany* case, although the term 'civil rights and obligations' is an autonomous concept subject to independent interpretation, the 'general principles' of national law 'must necessarily be taken into consideration in any such interpretation'.[218]

The term 'offence' under Article 6 similarly bears an autonomous meaning. As such, in *Benham v the United Kingdom*, the Court explained that there are three criteria relevant to deciding whether a person was 'charged with a criminal offence' – the national classification of the proceedings, the nature of the proceedings, and the nature and degree of severity of the penalty.[219] While domestic law forms the basis of Convention review, a level of oversight is nonetheless retained. In its assessment of the second factor (the nature of

213 *Ashingdane v the United Kingdom* (n 206), Concurring Opinion of Judge Lagergren.

214 *Engel and Others v the Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (ECtHR, 23 November 1976), paras 80–81.

215 George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2009) 10.

216 *Twenty-One Detained Persons v Germany* App nos 3134/67, 3172/67, 3188/67 et al (ECtHR, 6 April 1968), para 4.

217 Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (n 7) 525.

218 *Twenty-One Detained Persons v Germany* (n 216), para 4.

219 *Benham v the United Kingdom* App no 19380/92 (ECtHR, 10 June 1996), para 56.

the proceedings), the Court reviews the manner of application of the relevant law; in *Benham*, this applied generally to all citizens and was found to entail some punitive elements. This factor does not leave discretion to national authorities – rather, the ECtHR undertakes an independent assessment of how the proceedings were conducted in practice. Similarly, with relation to the final criterion of the nature and degree of severity of the penalty, an independent Convention assessment is conducted, which in *Benham* resulted in the finding that the applicant 'faced a relatively severe maximum penalty'.[220] On this basis, it was found that the applicant had been charged with a criminal offence. This contradicted the UK Government's argument that Article 6 § 3 (c) did not apply because the proceedings were civil rather than criminal in nature. The independent scrutiny by the ECtHR of the three factors in this sphere demonstrates that any discretion left to States as part of the oversight-based approach is closely circumscribed.

In contrast to the methods of interpretation assessed previously in this chapter, the stated aim of autonomous concepts is enacted in a much more consistent and determinate way. The effectiveness of the right to liberty where Article 5 adjudication involves autonomous concepts should thereby also be strengthened. The term 'persons of unsound mind' in Article 5 § 1 (e) provides a useful means of testing this hypothesis. The term has been interpreted autonomously, requiring that three conditions are met before a person is deprived of liberty under Article 5 § 1 (e):[221]

> firstly, he must reliably be shown to be of unsound mind . . . a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder.

In respect of the first condition, although domestic authorities are granted some discretion in assessing the merits of clinical diagnoses, the permissible grounds for deprivation of liberty under Article 5 § 1 are to be interpreted narrowly.[222] As such, a mental health condition has to attain the threshold of severity to be brought within the scope of Article 5 § 1 (e) – namely that it must be so serious as to require treatment in a specialised institution.[223] As regards the requirements of an 'objective medical expertise', national authorities are also generally considered better placed to evaluate the

220 *Benham v the United Kingdom* (n 219).

221 *Ilnseher v Germany* App nos 10211/12 and 27505/14 (ECtHR, 4 December 2018), para 127.

222 *Ilnseher v Germany* (n 221), para 129.

223 *Ilnseher v Germany* (n 221), para 129.

qualifications of the medical expert in question.[224] This is based on a classical fourth instance (subsidiarity-based) approach. In certain situations, however, additional Convention requirements are imposed relating to the qualifications of the medical expert. For example, when an individual has no previous history of mental health disorders, the assessment must be conducted by a psychiatric expert.[225] The subsidiarity-based approach is therefore modulated in this respect by a level of oversight stemming from the interpretation of the autonomous term.

In deciding whether detention complied with the requirements of Article 5 § 1 (e), a certain level of discretion remains since (in line with subsidiarity) it is in the first place for national authorities to evaluate the evidence in a given case; the Court's task is to review their decisions in the light of the Convention. Thus, it was held in *Ruiz Rivera v Switzerland*[226] that the therapy report in question did not constitute an independent psychiatric assessment because it was not conducted by an external expert.[227] Moreover, no deprivation of liberty of an individual on mental health grounds could be considered compliant with Article 5 if this were to be imposed without a sufficiently recent medical opinion.[228] In *Ruiz Rivera*, the psychiatric assessment on which the therapy report was based, and which grounded the decisions of domestic courts to detain the applicant, was over three years old.

The Court also adopted a strongly oversight-based approach in *Magalhães Pereira v Portugal*,[229] finding excessive a period of two years and six months between an application for release and an expert's assessment examining the reasons for detention. The decisive element was the length of time, which was not in compliance with domestic law. By contrast, in *Ruiz Rivera*, as highlighted by Judge Keller in her dissenting opinion, there was nothing to suggest that the national authorities had breached the law in force at the time.[230] In this respect, the Court's approach varies from its examination of periods of pre-trial detention under Article 5 § 1 (c), which is strongly deferential to domestic laws. This will be explored in Chapter 3, but it is worth noting at this juncture that, in that context, no autonomous concepts are engaged. As for the detention of persons of 'unsound mind', when national

224 *Ilnseher v Germany* (n 221), para 130.

225 *C.B. v Romania* App no 21207/03 (ECtHR, 20 April 2010), para 56; *Ťupa v the Czech Republic* App no 39822/07 (ECtHR, 26 May 2011), para 47; *Ruiz Rivera v Switzerland* App no 8300/06 (ECtHR, 18 February 2014), para 59; and *Vogt v Switzerland* App no 45553/06 (ECtHR, 3 June 2014), para 36.

226 *Ruiz Rivera v Switzerland* (n 225), para 64.

227 *Ruiz Rivera v Switzerland* (n 225), para 63.

228 *Ruiz Rivera v Switzerland* (n 225), para 63.

229 *Magalhães Pereira v Portugal* App no 44872/98 (ECtHR, 26 February 2002).

230 *Ruiz Rivera v Switzerland* (n 225), Dissenting Opinion of Judge Keller, joined by Judge Popović, para 11. Judge Lorenzen also issued a dissenting opinion confirming his agreement with the separate opinion of Judge Keller.

law itself was not breached, as shown by *Ruiz Rivera*, the ECtHR is willing to engage in a more in-depth assessment of the facts. The oversight-based approach of autonomous concepts is therefore ultimately upheld in the face of subsidiarity-based approaches – chiefly, the fourth instance doctrine. As demonstrated in Chapter 3, where autonomous concepts are absent from the assessment of justifications for detention, a strong subsidiarity-based approach prevails.

The judgment in *Ruiz Rivera* concludes that the requirement of an 'objective expert's report' implies an assessment by an external person, highlighting that the last independent report dated back more than three years. Judge Keller argues that this approach cannot be justified, bearing in mind the margin of appreciation granted to States in such matters:[231]

> there is no consensus or uniform practice among . . . States as to the assessment on the basis of which the maintaining or discharge of a confinement measure is decided. On the contrary, in at least 15 of the 26 member States studied, the assessment is carried out by the staff responsible for treating the confined person and not by an external expert.

Thus, the existence of an autonomous concept again circumscribed the discretion that could have been granted to the State, had the Court chosen to widen the margin on the basis of a consensus analysis. My assessment is that, in the light of the underlying aims of oversight-based approaches, the stance taken in *Ruiz Rivera* is justified. In an early dissenting opinion, Judge Matscher had argued that 'autonomous interpretation would call for comparative studies of a far more detailed nature than those carried out so far by the Convention institutions'.[232] However, a comparative review is more relevant to an evolutive consensus analysis, in accordance with which the content of the right is developed in consideration of shared and emerging standards among Contracting States. By contrast, such concerns do not apply to the autonomous concept under review. In fact, the reverse is true – it is not incumbent on the Court to engage in a detailed study of how the relevant concept is interpreted across the Council of Europe; rather, it will continue to rely on its own independent interpretation, which will be informed, where appropriate, by the general principles of the law of the respondent State. Moreover, it is recalled that where a Convention term has an autonomous meaning, its classification in national law has only relative value and serves only as a starting point.[233] When dealing with autonomous concepts, the Court

231 *Ruiz Rivera v Switzerland* (n 225), Dissenting Opinion of Judge Keller, para 19.

232 *Özturk v Germany* App no 8544/79 (ECtHR, 21 February 1984), Dissenting Opinion of Judge Matscher.

233 *Chassagnou and Others v France* (n 210), para 100.

has 'warned against circumventing the Convention guarantees, not against having exceptions to a uniform classification across the . . . States. The aim is clearly to respect what the Convention grants and not to solve some alleged problem of divergence or coordination'.[234] As such, even if the outlining of European standards in *Ruiz Rivera* showed an element of divergence among Contracting States, an oversight-based approach was nonetheless justified. This is because the consensus (or lack thereof) could not affect the content of the autonomous concept of 'persons of unsound mind', since the interpretation of this term remains within the Court's remit. The elements required to resolve the claim were rooted in the Convention meaning of 'unsound mind', since this was the basis of the Article 5 § 1 (e) analysis. The effectiveness of the right was not affected, since the very aim of autonomous concepts was upheld.

Conclusion

Chapter 1 provides an original framework for testing the discretion granted to Contracting States in justifying detention, which identifies three approaches underlying the ECtHR's methods of interpretation – namely subsidiarity-based, evolutive, and oversight-based approaches. The chapter has explored the justifications of each approach, providing a grounding for this book's overall position that the Court has neglected an evolutive interpretation of the right to liberty, which it is argued is mandatory under the Convention.

This chapter has highlighted the main challenges with respect to discretion raised by the Court's methods of interpretation. Identifying the approach or approaches pursued by a specific method allows for a closer analysis of the ECtHR's decision-making. Where disparities between judgments arise, the grounds for these differences are clarified by a review of which aim is being pursued, under which stated approach, and why. It is on this basis concluded that three main aims are applied through the methods of interpretation: the aims of subsidiarity, oversight, and evolutive interpretation. While the use of subsidiarity has been expansively developed through the advent of efficiency-based subsidiarity and further development of process-based subsidiarity, evolutive interpretation remains comparatively neglected. This is despite the fact that this is a mandatory form of Convention interpretation. Moreover, since oversight conflicts with subsidiarity, the broadening of subsidiarity has resulted in a parallel shrinking of the ECtHR's oversight role.

With respect to subsidiarity-based approaches, it is argued that two key strands introduced into subsidiarity reasoning require closer attention. First, efficiency considerations cannot legitimately form part of a Convention claim. This is because rights under the Convention are individual rights that impose corresponding duties on States. Broad considerations of the efficiency of the

234 Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 215) 49–50.

European human rights system can therefore play no part in the adoption of a subsidiarity-based approach. The present approach has resulted in a skewing of the concept of effectiveness from the need to keep rights practical and effective to that of the need to keep the entire system within which those rights are situated effective, as shown by the Article 5 adjudication in *Turan*. Second, the move towards procedural review has led to an increase in the use of subsidiarity. However, the quality of national decision-making must be reviewed before this approach can be used. The current approach leaves gaps in this analysis by making broad assumptions about the ECHR compatibility of national legislative processes, demonstrated in *S.A.S.*

The increased focus on subsidiarity has arguably usurped the adoption of evolutive approaches in a number of Article 5 settings. References to the living instrument or an emerging consensus are especially scarce in Article 5 jurisprudence. However, the fact that the provision enshrines a limited right does not give rise to any barriers to evolutive interpretation – to the contrary, despite being a right that provides an exhaustive list of grounds for deprivation of liberty, discretion is applied in numerous ways. By failing to apply evolutive approaches to the right while continuing to use subsidiarity-based approaches, the ECtHR has undermined the progressive quality of a key Convention protection.

In addition, margin of appreciation review can serve an evolutive, oversight-based, or subsidiarity-based function. Where the margin is narrowed pursuant to a consensus analysis, it may simultaneously pursue the evolutive and oversight-based approaches. However, where the competing aims of subsidiarity and evolutive interpretation arise, there is a much greater willingness to adopt the former at the expense of the latter. For this reason, Chapter 2 develops a consensus-focused framing of evolutive interpretation at the Court to centre the mandatory nature of both dynamic interpretation and the principle of non-regression. The requirement of effectiveness offers normative justification for including both existing European consensus as well as international standards in the adjudication of a claim, where these are more capable of ensuring the effectiveness of a right than European principles. Since Contracting States have made various (often specialised) international commitments, their consideration as part of a Convention claim helps to ensure a more harmonious application of the rights protections they have pledged to provide.

The application of autonomous concepts, meanwhile, involves a careful scrutiny of domestic decision-making to ensure that any deference granted to States is duly balanced against the oversight required by the autonomous term. In contrast to the other methods of interpretation, autonomous concepts serve to promote the effectiveness of Article 5 rights in a more coherent and consistent way. While the lack of a principled stance to consensus and expanded use of subsidiarity serve to usurp dynamic interpretation, autonomous concepts effectively deter the inappropriate use of subsidiarity-based approaches – in particular, the margin of appreciation.

Ultimately, it is concluded that the methods of interpretation used by the Court to assess Article 5 claims apply a strongly subsidiarity-based approach, which tends to stifle oversight-based as well as evolutive approaches. Although Article 5 exhaustively lists justifications for detention (beyond which detention cannot be imposed), the progressive potential of the right to liberty has largely been neglected. While the limitations themselves must remain static, the justifications should be subjected to an evolutive reading that takes account of modern-day realities in order to preserve the effectiveness of the right to liberty. This will also meet the aims of harmonisation of Convention standards, both among themselves and by reference to other international commitments undertaken by the Contracting States. In this way, the European right to liberty can adapt in line with new and progressive ideals, strengthening its effectiveness and resilience in addressing gaps in protection against arbitrary detention.

2 An increased role for consensus in the progressive interpretation of the right to liberty

Introduction

Chapter 1 outlined the justifications for, and problematic expansions to, the aims and approaches underlying the ECtHR's methods of interpretation. Chapter 2 uses the findings in Chapter 1 to set out the arguments in favour of an increased role for consensus in determining discretion. To this end, Chapter 2 explores the ability of the effectiveness and harmonisation requirements to offer normative justification for recognising and considering both European and international consensus in the adjudication of a claim. The majoritarian dimension of consensus has often been used to criticise its presence in Convention jurisprudence. This chapter considers how an increased role for consensus in the Court's adjudication can in fact promote a progressive interpretation of rights, and in particular the right to liberty, which has the effect of strengthening rather than weakening the rights of vulnerable persons. This is rooted, first, in the argument that consensus cannot be used to regress rights, and second, in the need to preserve the effectiveness of the rights of vulnerable groups, whose rights are particularly prone to societal shifts. Elaborating and upholding the mandatory nature of the first principle of non-regression guarantees that rights will not be diminished by reference to majoritarian preferences. The second principle, meanwhile, offers normative justification for turning to international standards where needed to plug gaps in protection and thereby ensure external harmonisation.

Chapter 2 builds on this framework by emphasising the role of consensus in creating a more consistent and evolutive body of Article 5 jurisprudence. It is argued that since consensus affects the scope of the margin of appreciation, a more systematic approach to incorporating consensus within a claim's review can help to resolve the tension that arises between the aims of subsidiarity and oversight. To establish the appropriate weight to be given to consensus, 'it is essential to critically reflect on all forms of reasoning adopted by the Court, with a view to evaluating their significance'.[1] As argued in Chapter 1,

1 Nikos Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' (2019) 3 European Public Law 445, 478.

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by expanding the justifications for subsidiarity, the Court undermines its oversight role. This results from the broadening of the margin of appreciation on the basis of a process-based subsidiarity that fails to substantively assess the quality of national legislative procedures. When the margin is thus expanded, the oversight role of the margin is correspondingly minimised. Where an analysis of the quality of domestic processes could lead to a narrowing of the margin and its consequent oversight-based function, the Court instead adopts process-based subsidiarity.

With respect to efficiency-based subsidiarity, the Court's refusal to review all or parts of a claim on the merits entirely removes its capacity to exercise oversight. Chapter 1 explained the oversight function of autonomous concepts, which are treated as mandatory both in theory and in practice. By contrast, the Court's approach to consensus and its subsequent impact on the margin of appreciation is inconsistent. It has been argued that the increased heterogeneity of the process-based jurisprudence and its delineation of 'good' and 'bad faith' States may stunt the Court's role in developing the Convention as a living instrument for all Contracting States.[2] Indeed, there is a risk that by deferring to national authorities seen to be applying the Convention in good faith, the rights of applicants from 'bad faith' States may be further undermined. This is because, rather than continuing to build a principled jurisprudence, the Court exercises broad discretion as regards one category of States (namely good faith States).[3] In doing so, the Court stifles the progression of ECHR law, since good faith States are more likely to reflect Convention-facing standards that can lead to progressive development. Instead of conducting a consensus analysis that can narrow a margin in pursuit of an evolutive approach, the Court therefore increasingly opts to find a State in procedural compliance with the ECHR. On this basis, substantive review which could allow for a right's progressive development is ruled to be unnecessary, as demonstrated by the efficiency-based jurisprudence analysed in Chapter 1.

Chapter 2 therefore suggests a greater and more consistent evolutive role for consensus as a starting point in the determination of the margin of appreciation and in spurring the application of the living instrument principle. I argue that this would help to address the challenges previously outlined as regards the imbalance and stunting of Convention standards caused by undue expansions to subsidiarity. As a result, consensus can effectively modulate the use of both the living instrument and the margin of appreciation, precluding rights regression. My approach offers normative justifications for deploying consensus in a progressive development of the Convention, which I frame

2 Başak Çalı, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) 35(2) Wisconsin International Law Journal 237, 270.

3 See the discussion by Çali of the Grand Chamber judgment in *Palomo Sanchez* – Çalı (n 2), 258–60.

as a mandatory concept alongside non-regression. I highlight the relevance of this approach to Article 5 by demonstrating the existence of a margin of appreciation in Article 5 adjudication. The concept of consensus has hitherto been neglected in adjudicating the right to liberty. However, consensus is especially useful in driving dynamic interpretation, since it allows for the consideration of – and recourse to – a range of standards. These can include legislative developments, relevant international materials, and findings of expert bodies. I argue that using consensus and expanding its reach to international standards where necessary to fill gaps in protection of vulnerable groups provides a consistent and coherent starting point in an evolution of and subsequent enshrining of standards across the Convention acquis. This promotes both the internal and external harmonisation of rights needed to build an effective body of jurisprudence.

The Preamble to the Convention notes that the Contracting States are resolved 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights' (UDHR). This is easier to achieve where standards across the Council of Europe are more unified, or where the uniformity that exists is at the least reflected in ECHR jurisprudence.[4] Reformulating the Court's approach to the consensus doctrine is crucial in this respect. By positioning consensus as a starting point for uniformity, minimum standards can be developed to promote the effectiveness of rights. Collective enforcement is also more easily achieved when all States are assured that they are held to the same criteria as their counterparts. Before Chapter 3 applies the suggested improvements to particular areas of Article 5 jurisprudence, Chapter 2 outlines the normative justifications for this approach.

Rather than fearing its majoritarian dimension, consensus should be looked to in recognition of the service it has done in progressing standards in vital areas, ranging from corporal punishment in the early judgment of *Tyrer*[5] to the decriminalisation of homosexuality in *Dudgeon v the United Kingdom*[6] and non-refoulement where a risk exists of inhuman or degrading treatment in *Soering v the United Kingdom*.[7] Where consensus is misused, it has indeed resulted in lapses in protection – for example, for women who choose to wear headscarves, as shown by *S.A.S.* The majoritarian aspect can in this respect be successfully assuaged by a refocusing on the manner in which consensus can and should be used in an evolutive reading. Consequently, the capacity of

4 For Føllesdal, the objective of collective enforcement 'does not require harmonization across states, but rather to ensure certain thresholds of human rights protection' – Andreas Føllesdal, 'Subsidiarity to the Rescue for the European Courts? Resolving Tensions Between the Margin of Appreciation and Human Rights Protection' in *Join, or Die – Philosophical Foundations of Federalism* (De Gruyter 2016) 259.

5 *Tyrer v the United Kingdom* App no 5856/72 (ECtHR, 25 April 1978).

6 *Dudgeon v the United Kingdom* App no 7525/76 (ECtHR, 22 October 1981).

7 *Soering v the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989).

consensus to advance rights standards should be wilfully embraced so that the opportunity for progression of the right to liberty is not neglected.

An evolutive role for consensus

This section argues for an increased role for consensus in the determination of the margin of appreciation. I propose that the Court view any consensus through the lens of effectiveness – namely by testing whether consensus can render the rights at stake practical and effective. Since the ECHR is a treaty which aims specifically at the maintenance and further realisation of human rights, a consensus analysis cannot take place in a vacuum; rather, the impact of any measure in respect of which a consensus is found must be duly considered. For example, as in the *S.A.S.* judgment, even if a majority of States had introduced blanket bans on the full-face veil (which was not the case), it would have been incumbent on the Court to determine whether such a ban undermined or progressed individual rights, since that is what determines practical effectiveness. This should be done by reference to the Convention's existing principles, in particular, the requirements of necessity and proportionality. This would ensure that, even where a margin is granted on the basis of a consensus, the application of key principles would remain within the scope of the Court's review. At present, following an increase in process-based subsidiarity, the allocation of a margin leads the Court to readily accept that national authorities adequately tested the impugned measure(s) for necessity and proportionality. This occurs even when case materials convincingly prove that such testing was absent.

When commentators discuss the evolutive or dynamic interpretation of the Convention, the focus is often on the living instrument as the key tool for enacting this form of treaty interpretation. However, the doctrine of the margin of appreciation can also be applied evolutively through its narrowing when a consensus exists across the Contracting States. Yet, the margin is often not deployed as an evolutive approach, and its use in this respect remains inconsistent and often inaccurate. The Court's unwillingness to steadily apply an evolutive approach results in unpredictable and uneven levels of discretion. As shown by some of the case-law in this section, the discretion granted becomes inappropriate since it ceases to respond to the stated aim of dynamic interpretation – namely to progress Convention standards in line with developments across the Council of Europe.

The margin of appreciation has been described as 'the latitude allowed to the member states in their observance of the Convention'.[8] Criticisms often centre on its unpredictability – 'no simple formula can describe how [the margin] works . . . its most striking characteristic remains its casuistic, uneven,

8 Thomas A O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 Human Rights Quarterly 474, 475.

and largely unpredictable nature'.[9] The chapter seeks to tackle these difficulties by separating the use of the method into three strands of its use – as an oversight-based approach, as an evolutive approach, and as a subsidiarity-based approach. The margin of appreciation can pursue an evolutive approach whereby a consensus is considered and applied to narrow the respondent State's margin and to progress Convention standards. The margin can in this way enact both an evolutive and an oversight-based approach. The margin may also be used solely as an oversight-based approach if consensus leads to a narrowing of the margin but the Court does not have recourse to an evolutive interpretation – for instance, one requiring expansion of ECHR standards by reference to an international consensus. An oversight-based approach alone thus tests national decision-making without enacting any progressive advancements of the ECHR. This will be appropriate where an evolution of standards has already taken place in previous jurisprudence and can be applied precedentially.

Although margin of appreciation review can serve any of these approaches, it is primarily used as a tool of subsidiarity. This is done on the basis of consensus, one of the factors used to determine the breadth of the margin of appreciation. If a European (or international) consensus is identified, the margin left to the respondent State should theoretically be narrowed. However, in practice, the Court often disregards a consensus and nonetheless widens the margin of appreciation, in particular, where process-based subsidiarity has been adopted. The underlying aims of subsidiarity are in this way used to strip the margin of its oversight function. Even where a consensus exists and should consequently incur an oversight-based approach in testing an impugned measure's compliance with the Convention, the goals of subsidiarity take precedence in the Court's review.

In 2010, Letsas made the argument that the ECtHR had begun to retreat from extensive use of the margin of appreciation, even in cases raising important issues of moral controversy.[10] My view is that margin review continues to play a significant role as a subsidiarity-based approach, while losing its role as a tool both for the evolutive interpretation of the Convention, as well as its oversight function. This is problematic since the oversight role should always be upheld, in each given case, while evolutive interpretation can be conducted in seminal cases which will then be followed precedentially. It is worth noting that, in supporting his view of the decreased importance of the margin, Letsas referred to the Chamber judgment in *Lautsi and Others v Italy*,[11] which was later overturned by the Grand Chamber.[12] As such, the decision as to whether

9 Steven Greer, 'The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights' (*Council of Europe*, July 2000) 5 <https://www.echr.coe.int/librarydocs/dg2/hrfiles/dg2-en-hrfiles-17(2000).pdf> accessed 17 July 2024.

10 George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 European Journal of International Law 509, 532.

11 *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 3 November 2009).

12 *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011), para 62.

crucifixes should be present in State-school classrooms was ultimately held to fall within the margin of the respondent State.[13]

Protocol No. 15, which entered into force in August 2021, requires the ECtHR to have 'due regard' to the margin of appreciation to which States are entitled.[14] However, this does not mean that an automatically wide margin should be applied – rather, the Protocol formalises recourse to the method while recalling the Court's supervisory function.[15] The Protocol thus does not call for the 'automaticity'[16] of the margin's use. Indeed, the margin of appreciation[17] is commonly said by the Court to go 'hand in hand with European supervision, embracing both the legislation and the decisions applying it'.[18] This highlights the tension between subsidiarity-based and oversight-based approaches emphasised throughout this book. The expansion of subsidiarity results in a corresponding limitation of the ECtHR's oversight role. I argue that some of the underlying reasons for broadening subsidiarity are not justifiable under the Convention. The consequent narrowing of oversight-based approaches is, as a result, equally problematic. The margin of appreciation is resultantly capable of affecting the appropriateness of discretion in numerous ways.

Current challenges to the evolutive role of consensus

Several judges have raised concerns around possible misuse of consensus, emphasising that 'the Court's deference to this approach must have its limits' and that 'the absence of a consensus cannot serve to widen the State's narrowed margin of appreciation in the present case'.[19] Commentators have pointed to an 'an inbuilt contradiction or irony in the relationship between the majoritarian logic of the . . . consensus doctrine and the mission of human rights courts to protect human rights against popular will'.[20] Letsas argues that if one of the roles of human rights law is to shield individuals from 'the

13 *Lautsi and Others v Italy*, para 76.

14 Explanatory Report to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (*Council of Europe*, 24 June 2013), para 9 <https://rm.coe.int/1680a5278a> accessed 17 July 2024.

15 Article 1, Protocol No. 15.

16 *Egeland and Hanseid v Norway* App no 34438/04 (ECtHR, 16 April 2009), Concurring Opinion of Judge Rozakis.

17 Some critiques query whether the concept can be unified into one idea – see Føllesdal (n 4) 254 who writes that the margin 'is so vague and multifarious that even to refer to it in the singular, and to call it a "doctrine" seems unduly charitable'.

18 *Cumpănă and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004), paras 88–91.

19 *Cumpănă and Mazăre v Romania* (n 18), Joint Dissenting Opinion of Judges Sajó, Keller and Lemmens, para 5.

20 Or Bassok, 'The European Consensus Doctrine and the ECtHR Quest for Public Confidence' in Panos Kapotas and Vassilis P Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019).

moralistic views of the majority then we cannot take the majority's moralistic preferences into account in defining what rights people have'.[21] He finds that the margin of appreciation 'is at best redundant and at worst a danger to the liberal-egalitarian values which underlie human rights', since it bases decisions on the moral preferences of the majority.[22] On my approach, this does not accurately reflect the potential of Convention consensus. Where a European consensus pulls back on human rights protections, that consensus can rightfully be ignored for the benefit of the right's effectiveness. This does not constitute cherry-picking or selectiveness but is rather the only way of guaranteeing that the core Convention requirement of effectiveness is duly respected.

However, it remains for the Court to pin that impetus for evolutive interpretation to the principle of effectiveness. This will allay claims of the Court taking an unduly activist approach or of the non-legitimacy of Convention standards on the grounds that they do not really reflect European standards. What the Court aims to do, and what it should do, is to ensure that those shared European standards are brought in line with what Convention effectiveness requires. European consensus sometimes already fulfils the aim of effectiveness; at other times, it should be used creatively – non-formalistically[23] – to raise protections across the Council of Europe. That is indeed the reason why ECHR standards were not lowered when a number of post-Soviet States joined the Council of Europe. My approach therefore aids the disentanglement of the majoritarian dimension of consensus, since I argue that it is a tool that can only be applied in an evolutive manner that progresses rights.

Moreover, in *S.A.S*, a stark example of majoritarian views overriding individual interests, the moral preferences of the majority had been held to outweigh the applicants' rights at national level. Since no adequate proportionality testing had taken place, it remained within the Court's remit to engage in rights balancing and oust majoritarian logic in that way. In so doing, it could have also relied on an international consensus to narrow the margin of appreciation and preserve oversight in that way. The judgment notes that the Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe were strongly opposed to any form of blanket ban on full-face veils.[24] Assessing international standards would have pointed to a strong consensus against banning full-face veils, with several international

21 Letsas (n 10) 540.

22 Letsas (n 10) 531; see also Benvenisti, who similarly argues that in employing the tool, the Court fails to fulfil 'the crucial task of becoming the external guardian against the tyranny by majorities' – see Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31(4) NYU Journal of International Law and Politics 843, 852.

23 As urged by former ECtHR President Costa – see Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 European Constitutional Law Review 173, 177.

24 *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014), para 147.

and national bodies finding a blanket ban to be disproportionate.[25] Crucially, the judgment in *S.A.S.* not only ignored a European consensus against bans on the wearing of the full-face veil in public, but concluded that there was in fact no such consensus. This was in spite of the majority's own admission that 'from a strictly normative standpoint, France is very much in a minority position in Europe: except for Belgium, no other member State . . . has, to date, opted for such a measure'.[26] As expressed by the dissenting judges:[27]

> it is difficult to understand why the majority are not prepared to accept the existence of a European consensus on the question of banning the full-face veil . . . [t]he fact that forty-five out of forty-seven member States of the Council of Europe, and thus an overwhelming majority, have not deemed it necessary to legislate in this area is a very strong indicator for a European consensus.

The judgment in *S.A.S.* is significant because it starkly demonstrates the dangers of an unprincipled approach to consensus. Indeed, a misuse of consensus helped to buttress the alarmingly majoritarian reasoning adopted by *S.A.S.* Reframing consensus in a purely evolutive role can ensure that, in any future contests between the two, rights are not subjugated to moralistic majority preferences.

In *Ebrahimian v France*, a different case concerning religious dress, a Muslim applicant had been employed on a fixed-term contract as a social worker in a public hospital. From the time of her interview and throughout her employment, she had worn a veil that covered her hair, ears, and neck. This led to some patients refusing to meet her and lodging complaints with the hospital. Her decision to continue wearing the veil resulted in the employer failing to renew her contract. The domestic courts found that the decision not to renew her contract had been made in accordance with the principles of laïcité (the separation of State and religion in the French public sphere)[28] and the neutrality of public services in France. The ECtHR, while finding an interference with the applicant's Article 9 rights, held that the interference pursued a legitimate aim, namely the 'protection of the rights and freedoms of others'. The majoritarian framing of 'the right of others' relied on in the judgment can more aptly be described as 'the right to discriminate'.[29] Here, a clear consensus was ignored in its entirety. In reaching its conclusion, the

25 *S.A.S. v France* (n 24).
26 *S.A.S. v France* (n 24), para 156.
27 *S.A.S. v France* (n 24), Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom.
28 Myriam Hunter-Henin, 'Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom' (2012) 61(3) International and Comparative Law Quarterly 613.
29 Sabina Garahan, 'A Right to Discriminate? Widening the Scope for Interference with Religious Rights in *Ebrahimian v France*' (2016) 5(2) Oxford Journal of Law and Religion 352.

majority ignored a patent consensus,[30] despite citing a previous consensus review in the *Eweida and Others v the United Kingdom* judgment which found that in most States, 'the wearing of religious clothing and/or religious symbols in the workplace is unregulated'.[31]

The judgment in *Ebrahimian* notes that 'consideration must be given to the national context of State-Church relations, which evolve over time in line with changes in society'.[32] This is used to support the view that France had appropriately balanced competing private and public interests, thereby justifiably giving rise to a wide margin of appreciation.[33] In this way, the judgment uses dynamic interpretation (referring to changes in society) to regress rights, in breach of the mandatory non-regression principle. In order to do this, the majority broadened the margin of appreciation, arguing that the respondent State had struck the appropriate balance between competing rights, despite the absence of Convention-compliant proportionality testing at national level.[34]

Looking to the use of consensus in prior Article 9 case-law also shows a departure from existing practice in *S.A.S.* and *Ebrahimian*. In *Bayatyan v Armenia*, which concerned conscientious objection to military service, the Court noted an 'obvious trend' across the Council of Europe towards recognising the right to conscientious objection.[35] The judgment identified only four other Contracting States that did not permit claims of conscientious objection. State commitments beyond the Convention also contributed to the establishment of a consensus[36]:

> the domestic law of the overwhelming majority of . . . States, along with the relevant international instruments, has evolved to the effect that at the material time there was already a virtually general consensus on the question in Europe and beyond . . . it cannot be said that a shift in the interpretation of Article 9 . . . was not foreseeable. This is all the more the case considering that Armenia itself was a party to the ICCPR.

The Court paid regard to international developments on the right to conscientious objection, including the Charter of Fundamental Rights of the European Union and decisions of the UN Human Rights Committee.[37] The judgment significantly described these developments as 'equally important'

30 *Ebrahimian v France* App no 64846/11 (ECtHR, 26 November 2015), para 32.

31 *Ebrahimian v France* (n 30), para 32, citing to *Eweida and Others v the United Kingdom* App nos 48420/10, 36516/10, 51671/10 and 59842/10 (ECtHR, 15 January 2013), para 47.

32 *Ebrahimian v France* (n 30), para 65.

33 *Ebrahimian v France* (n 30), para 65.

34 Garahan (n 29) 356–7.

35 *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011), para 103.

36 *Bayatyan v Armenia* (n 35), para 108.

37 *Bayatyan v Armenia* (n 35), paras 105–8.

to those across the Council of Europe, while also highlighting Armenia as a signatory to the ICCPR.[38] The consensus apparent in these various sources served to significantly narrow the respondent State's margin of appreciation.[39] In addition to noting the prevailing consensus at the relevant time, the Court pointed to the foreseeability of future trends. Consensus can in this way constitute a useful tool for determining the appropriate level of discretion through its impact on the margin. Where a respondent State's position on a given issue deviates from a European consensus, a stronger oversight-based approach must follow, since a key factor for broadening the margin of appreciation – a relevant consensus – is absent. As such, Armenia's status as a signatory to the ICCPR was used in *Bayatyan* to emphasise the full scope of its obligations. This enhances rights effectiveness since it contributes to external harmonisation of the Convention's provisions. Using external instruments to support an evolutive interpretation helps keep Convention rights updated and responsive to modern-day needs.[40] Despite this, the Court continues to maintain that the consensus emerging from specialised international instruments *may* constitute a relevant consideration in elaborating Convention concepts.[41] This is at odds with its prior acceptance that, in doing so, it 'can and *must* take into account elements of international law other than the Convention' and their interpretation 'by competent organs'.[42]

Consensus and the evolutive function of margin review

Although consensus can play an important role in determining the scope of the margin of appreciation, there are no clear rules as to either how consensus should be calculated or when it must be used. This is striking, since the existence or otherwise of a consensus and how it helps to situate an impugned measure within European standards affects the scope of discretion. As such, a consensus can ground an evolutive approach where a Contracting State's actions constitute outliers, or it can be used to justify a broader, subsidiarity-based margin where a range of European approaches can be shown. The Court's use of consensus as a means of broadening the margin and finding a non-violation in *S.A.S.* has further obscured the role of consensus. This is problematic, since the effectiveness of rights is consequently undermined – if applicants cannot foresee how a consensus (or a lack thereof) is to be used in the determination of their claim, the nature of ECHR protections remains regrettably abstract.

38 *Bayatyan v Armenia* (n 35), para 105.
39 *Bayatyan v Armenia* (n 35), para 123.
40 Isak Nilsson, 'On the Path to Universalism? The Role of External Instruments in the European Court of Human Rights Jurisprudence' (2023) 92(2) Nordic Journal of International Law 248, 272.
41 *Bayatyan v Armenia* (n 35), para 102.
42 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008), para 85 (emphasis added).

Additional uncertainties are created when the various factors used to calculate the width of the margin pull in opposing directions.[43] The Court should in this respect recall the underlying aim of consensus when using it to determine the margin of appreciation to be accorded to the State. This will help to ensure that an appropriate level of discretion is granted. From its early case-law, the Court remarked that:[44]

> [t]he existence of a consensus has long played a role in the development and evolution of Convention protections . . . the Convention being considered a 'living instrument' to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention.

The underlying aim of consensus is thus to promote and advance Convention rights. Consensus can help to guarantee minimum standards of protection since evolutive interpretation allows only for the progression – rather than regression – of standards.[45] Rather than considering this to be a partisan or one-sided approach[46] on the part of the ECtHR, this should be viewed as its pursuit of the very role with which it has been tasked – the advancement and progression of human rights across the Council of Europe. Consensus should indeed not be used tactically in order to lead to a desired outcome, as appears to have happened in *S.A.S.* to justify a non-violation. To this extent, grounding the consensus analysis in the Convention's evolutive function will allow the Court to fulfil its aim of progressing rights in a manner that responds to the exigencies of the case at hand. Clarifying this specifically evolutive role can thereby help to avoid the suggestion that consensus is used to pursue a pre-determined outcome. This is important since this impression may undermine the legitimacy of the Court's judgments, which a firmer embrace of consensus can by contrast strengthen.[47] It is unthinkable that notions used to interpret and thus progressively advance the Convention – here, consensus – should be used to walk back rights.

To refocus on the effectiveness of individual rights, the Court should moreover maximise references to 'consensus emerging from specialised international

43 Michael R Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48(3) The International and Comparative Law Quarterly 638, 641.

44 *Tyrer v the United Kingdom* (n 5).

45 For analysis on the extent to which this is upheld in practice, see Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) The European Journal of International Law 797.

46 See, in this respect, concerns raised that the Convention 'can only truly be a living instrument if the consensus analysis is not conducted with the specific aim of steering the Court towards a particular outcome' – Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, 'No Consensus on Consensus?' (2013) 33(7–12) Human Rights Law Journal 248, 262.

47 Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 143.

instruments and from the practice of Contracting States'.[48] Indeed, it makes sense that ECtHR judges cannot be experts on every matter that appears on their docket. One judge interviewed as part of the research for this book expressed the view that available expertise should be taken into account for this very reason: a level of humility by the Court must necessarily dictate that it cannot always be apprised of the most relevant contextual information in a case.[49] To this end, the findings of national and international expert bodies and organisations should be given due consideration.[50] Failing to do so has the overall impact of stunting the progressive development of Convention rights, thereby hampering individual justice in specific cases. Use of consensus lends the greatest legitimacy to an evolutive reading of the Convention since it reflects updated State consent.[51]

Vogiatzis argues that 'it cannot be taken for granted that . . . judgments lack legitimacy simply because the Court did not follow or give prominence to the guidance provided by European consensus'.[52] On my approach, deviation from the consensus may be justified but would require explanation. This would promote rather than undermine the legitimacy of the judgment, as the reasoning behind the ECtHR's decision-making would gain transparency. I argue that the most effective way to embed consensus analysis within Article 5 review is by introducing it as a routine part of the 'general principles' section of judgments. This would create an equal basis on which to assess applications. As such, disparities in how the ECtHR approaches applications brought against States with varying levels of protection would be minimised.[53] Once a consensus on the relevant element (or elements) of Article 5 is established, the application of general principles to a given case will become more transparent, since these will reflect a shared set of minimum standards. It will consequently be easier to determine (and thus critique) the extent to which a judgment relies – or fails to rely – on a consensus methodology in pursuit of progressive advancement.

Moreover, the narrowing of the margin of appreciation on the basis of a consensus pursues the harmonisation of Convention standards.[54] As observed by several ECtHR judges in a separate opinion,

> one of the paramount functions of the . . . case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the . . . States and allowing the individuals within

48 *Demir and Baykara v Turkey* (n 42), para 85.

49 Interview with ECtHR judge, 10 March 2021.

50 Dzehtsiarou understands the term 'consensus' as encompassing 'consensus based on international treaties, internal consensus in the respondent Contracting Party, [and] expert consensus' – Dzehtsiarou (n 47) 39.

51 Dzehtsiarou (n 47) 143.

52 Nikos Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' (2019) 3 European Public Law 445, 473–4.

53 See the analysis of time limits for pre-trial detention in Chapter 3.

54 *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010), Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, para 5.

> their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence.[55]

There is therefore no 'race to the bottom' – it is not feasible under the Convention to weaken rights standards by reference to a consensus, as argued by the majoritarian objection to consensus. The overall aim of effectiveness is that Convention rights provide an equally strong, not equally weak, level of protection. Yourow predicted that the ECtHR would 'continue to build its authority incrementally and cautiously, retaining the margin doctrine, pinning it to the security of the consensus principle'.[56] Although the approach to consensus has hitherto been inconsistent (as noted early on by Yourow[57]), a framing that pins the margin of appreciation to consensus in a purely evolutive way strengthens both the level of protection and coherence in the further development (and thus effectiveness) of Convention rights.

Unfortunately, the case-law as it stands shows that consensus is not employed consistently. As seen in *A, B and C v Ireland*, where the relevant rights are strongly contested in the respondent State, the Court appears more hesitant to recognise a consensus. The judgment, which concerned the prohibition of abortion in Ireland for health and/or well-being reasons, found that the applicants could have obtained an abortion in around 30 Contracting States. Some States had expanded the permitted grounds for abortion, and only three States had more restrictive access to abortion services than Ireland.[58] Despite this, the Court did not find that this 'decisively [narrowed] the broad margin of appreciation'.[59] Confusingly, in the next paragraph, the judgment emphasised the 'central importance' of the finding in *Vo v France* that the issue of when the right to life begins falls within the margin of appreciation since there is no 'consensus on the scientific and legal definition of the beginning of life'.[60] The ECtHR therefore, first, identified a consensus amongst a 'substantial majority' of Contracting States towards allowing abortion on more expansive grounds than those accorded under Irish law.[61] It then stated that this consensus did not affect the margin of appreciation, before finally referring to a case that

55 *A, B and C v Ireland* (n 54), para 5.

56 Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Brill 1996) 196.

57 Yourow (n 56) 195:

> Especially vexing in any attempt to uncover the meaning of the consensus factor is the consistently unsubstantiated nature of the Court's pronouncements . . . a student of the Court is not informed as to how the Court measures the existence or non-existence of any one particular consensus.

58 *A, B and C v Ireland* (n 54), para 235.

59 *A, B and C v Ireland* (n 54), para 236.

60 *A, B and C v Ireland* (n 54), para 237; *Vo v France* App no 53924/00 (ECtHR, 8 July 2004), para 82.

61 *A, B and C v Ireland* (n 54), para 235.

undermines rather than supports its stance. Indeed, the absence of a consensus in *Vo* led to a wide margin; the presence of a clear consensus in *A, B and C* should have by contrast narrowed the margin left to the respondent State. The ECtHR in *A, B and C* ultimately concluded that Ireland was acting within its margin of appreciation. In doing so, the judgment allocated an inappropriate level of discretion since the underlying approach thereby enacted – namely the subsidiarity-based approach – could not be pursued through the broad margin of appreciation granted to Ireland. This is because the prevailing consensus among Contracting States should have led to a narrowing rather than a widening of the margin.[62] The underlying aim of a margin that is granted on the grounds that a State's position diverges from the European consensus is that of oversight. Pursuing subsidiarity – the opposing aim – on the basis of an erroneously widened margin in *A, B and C* therefore resulted in an inappropriate level of discretion.

Former Judge Ziemele has noted that, in the case, 'it appears a relevant factor that the restrictive Irish approach stems from several popular referenda and, therefore, the Court is confronted with a rather clear will of the people'.[63] In this way, *A, B and C* constitutes an early example of process-based subsidiarity, spurred by the existence of a 'lengthy, complex and sensitive debate' at national level,[64] which ousts the oversight to be enacted based on the lack of a consensus. The Court in *S.A.S.* similarly moved away from a more oversight-based approach. In *Hirst*, the absence of a clear consensus could not 'in itself be determinative'.[65] While the margin of appreciation continued to be wide, the imposition of a blanket restriction on all prisoners, being '[s]uch a general, automatic and indiscriminate restriction . . . [fell] outside any acceptable margin of appreciation'.[66] In *S.A.S.*, by contrast, both a consensus and a blanket ban had the reverse effect – namely of broadening the margin. The lack of a coherent approach towards consensus renders unpredictable the ECtHR's decision as to whether or not a progressive interpretation will be enacted. Consequently, the application of the evolutive approach serves to extend rights protections in certain areas,[67] while delegitimising the refusal to rely on an existing consensus in others.

At present, there is a similar lack of transparency as to how – and indeed, whether – the Court applies consensus in the context of Article 5. As shown

62 As identified by the partly dissenting judges – see *A, B and C v Ireland* (n 54), Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, para 5.

63 Ineta Ziemele, 'European Consensus and International Law' in Anne van Aaken and Iulia Motoc (eds), *European Consensus and International Law* (Oxford University Press 2018) 38.

64 *A, B and C v Ireland* (n 54), para 239.

65 *Hirst v the United Kingdom (No 2)* App no 74025/01 (ECtHR, 6 October 2005), para 81.

66 *Hirst v the United Kingdom* (n 65), para 82.

67 Most notably, under Article 8 – see Luzius Wildhaber, 'The European Court of Human Rights in Action' (2004) 21 Ritsumeikan Law Review 83, 84, writing that dynamic interpretation 'has received its most frequent expression in relation to Article 8'.

by the original findings gathered through my interviews with ECtHR judges, a survey of approaches across the Council of Europe is sometimes conducted and may be used in Article 5 review. However, this is not always made public or set out in the judgment. As a result, the extent to which a consensus is relied on – and thus, the full rationale for findings of a violation or non-violation – remain unclear. In order to address these challenges, the following section outlines the capacity of consensus to act as a tool of effectiveness and harmonisation, and in doing so offers normative justifications for looking to both European and international standards to achieve these key goals.

Consensus as a tool of effectiveness and harmonisation

The Court has stressed that in the international legal framework 'diverging commitments must . . . be harmonised as far as possible so that they produce effects that are fully in accordance with existing law'.[68] While the Court is of course only empowered to interpret the provisions of the ECHR, considering the full scope of the commitments entered into by States allows for greater effect to be given to State intentions. This is reflected in Article 31(3)(c) of the VCLT, which allows for 'any relevant rules of international law applicable in the relations between the parties' to be taken into account as part of the context for the purpose of treaty interpretation. The Convention must thus be interpreted, so far as possible, in line with the other principles of international law of which it forms a part,[69] and by reference to other international commitments entered into by Contracting States. For example, the judgment in *Mamatkulov and Askarov v Turkey* refers to the practice of the International Court of Justice, the Inter-American Court of Human Rights, the Human Rights Committee, and the UN Committee against Torture.[70] As will be discussed by reference to the *Christine Goodwin* line of case-law on legal recognition following gender reassignment, the ECtHR has also had recourse to an international consensus (in place of a European one) in progressing Convention rights. This section makes the argument that both European and, where needed, broader international consensus can form the building blocks of an evolutive reading and in doing so ensure a consistent dynamic interpretation of rights.

The ECHR is a living instrument which should be viewed as containing dynamic obligations, rather than as an end-game treaty frozen in time at its

68 *Nada v Switzerland* App no 10593/08 (ECtHR, 12 September 2012), para 170. See also Report of the International Law Commission, 58th Session (2006), United Nations General Assembly, Official Records, 61st Session, Supplement No. 10 (A161110) 408.

69 *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005).

70 *Mamatkulov and Askarov v Turkey* (n 69).

inception.[71] The original intentions of Contracting States to comply with and be bound by ECtHR rulings can be evidenced by their ongoing membership of the Council of Europe. As noted by Alves Pinto, in ratifying the Convention, States have given 'explicit permission' to the Court to assess their compliance with the treaty.[72] In addressing the question of State consent, Wessel offers the following analogy: 'it is understood that the general consent to be a member of the football team implies an implicit consent to play whatever position the team, and specifically the coach, commands'.[73] Consequently, Contracting States must respect the Court's rulings, having agreed to respect the content of the ECHR not only as it appeared at the time of ratification, but as it develops.[74] It therefore remains incumbent on States to follow the Court's findings on its application of an evolutive approach. Since States have signed up to observe the Court's interpretation, including one that is evolutive, they must continue to do so in order to fulfil their Convention obligations. Concerns have been raised that treating consensus as binding per se would involve imposing 'a new category of legal obligation' on the Contracting States.[75] Yet, if consensus were to feed into an evolutive interpretation of the ECHR, there is no reason for finding an expanded role for consensus to be illegitimate. This is particularly so since evolutive interpretation of the Convention is mandatory, has been agreed to by States, and is necessary for preserving the effectiveness of rights.

Two views of evolutive Convention interpretation have emerged. The first is demonstrated in *Marckx v Belgium*,[76] whereby the protection of children born to unmarried parents was read into the ECHR in line with the early formulation of the living instrument doctrine:[77]

> the Court cannot but be struck by the fact that the domestic law of the great majority of the member States . . . has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim 'mater semper certa est'.

71 Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12(10) German Law Journal 1730, 1730.

72 Thiago Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights' (2020) 15 Religion and Human Rights 96, 108.

73 Jared Wessel, 'Relational Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Obligations' (2004) 60 NYU Annual Survey of American Law 149, 154–5.

74 Ian R Macneil, 'Bureaucracy and Contracts of Adhesion' (1984) 22(1) Osgoode Hall Law Journal 5, 20–1:

> Liberal society has always recognized numerous legitimate relations into which entry is by consent, but the content of which is largely unknown at the time the consent was given . . .[a]ll that is required – besides our individual consent to join – is that the kind of relation in question be one upon which the collective stamp of approval has been impressed.

75 Wildhaber, Hjartarson and Donnelly (n 46) 256.

76 *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979).

77 *Marckx v Belgium* (n 76), para 41.

This use of consensus was based on both European and international materials, with the mere existence (not ratification) of relevant international treaties regarded as proof of 'a clear measure of common ground in this area amongst modern societies'.[78] It has thus been argued that the scope of evolutive interpretation resulting from the Convention's 'rudimentary character' has allowed the rights therein to be developed without the instrument itself needing to be modified.[79] This is of particular significance to the right to liberty, with some suggestions that gaps in protection against arbitrary detention may require amendment to Article 5.[80] Enacting a progressive advancement of the provision offers a more effective (and realistic) solution.

The second (and more restrictive) view posits that evolutive interpretation can be applied to flexible concepts in the Convention, but cannot justify the development of new rights.[81] This stance can be seen in *Babiarz v Poland*,[82] which confirmed the Court's ongoing refusal to recognise a right to divorce. Although the judgment did not refer to a consensus, one of the methods of interpretation which pursues an evolutive approach, namely the living instrument doctrine, was noted in the following context:

> neither Article 12 nor 8 . . . can be interpreted as conferring on individuals a right to divorce . . . the *travaux préparatoires* . . . indicate clearly that it was an intention of the Contracting Parties to expressly exclude such right from the scope of the Convention.[83]

The reference to the *travaux préparatoires* is unusual because other judgments have expressly stated that they:

> are not delimiting for the question whether a right may be considered to fall within the scope of an Article of the Convention if the existence of such a right was supported by the growing measure of common ground that had emerged in a given area.[84]

An evolutive approach therefore trumps any textual analysis of the *travaux préparatoires*. Despite this, the majority in *Babiarz* appears to use recourse to

78 *Marckx v Belgium* (n 76), para 41.

79 Christos L Rozakis, 'The European Judge as Comparatist' (2005) 80 Tulane Law Review 257, 260.

80 On this, Lewis Graham, 'Liberty and its Exceptions' (2023) 72(2) International and Comparative Law Quarterly 277, 307–8.

81 See, for example, *Feldbrugge v Netherlands* App no 8562/79 (ECtHR, 29 May 1996), Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Vincent Evans, Bernhardt and Gersing, para 24.

82 *Babiarz v Poland* App no 1955/10 (ECtHR, 10 January 2017).

83 *Babiarz v Poland* (n 82), para 49.

84 *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016), para 125.

a textual interpretation as a way of imposing limits on evolutive interpretation. This artificial wrangling of the margin of appreciation in order to leave discretion to the respondent State undercuts the underlying oversight-based (and naturally evolutive) aim of what should be a narrow margin in this setting. Since the European consensus is so vastly in favour of granting the right to divorce, as highlighted in the dissenting opinion of Judge Sajó,[85] a margin in this sphere cannot be wide. The oversight-based and, importantly, evolutive aims of the margin that the Court should have pursued were ignored entirely, with the evolutive goal stemming from an overwhelming consensus in this field. The discretion accorded to the Polish Government was therefore inappropriate.

Under Polish law, a divorce could not be granted if it had been requested by the party to whom fault was imputed for the breakdown of the marriage, if the other party refused to consent, and such refusal was not 'contrary to the reasonable principles of social coexistence'.[86] The judgment observed that this provision aimed to be 'a safeguard to protect one party, usually the weaker, against the machinations and bad faith of the other'.[87] Without elaborating on the Court's capacity to determine which was the weaker or machinating party in a domestic case (a problematic value judgement to be made in light of the subsidiarity concept), it went on to explain its reasoning as follows[88]:

> [t]he Court is well aware that the applicant had a daughter with his new partner . . . the domestic courts had acknowledged a complete and irretrievable breakdown of his marriage. This, however, does not detract from that which is mentioned above. To contemplate otherwise would mean that a request for a divorce would have to be allowed regardless of the . . . rules of domestic divorce law, by a person simply deciding to leave his or her spouse and have a child with a new partner.

Considering the ECtHR's usual reticence to delve into the facts of a case (pursuant to the fourth instance doctrine), it is unusual[89] for members of

85 'In view of the European consensus in this matter, there can be no wide margin of appreciation for the denial of divorce' – *Babiarz v Poland* (n 82), Dissenting Opinion of Judge Sajó, para 7.

86 *Babiarz v Poland* (n 82), para 17.

87 *Babiarz v Poland* (n 82), para 52.

88 *Christine Goodwin v the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 54.

89 Though not unheard of – see the Dissenting Opinion of Judge Pinto de Albuquerque in *Chiragov and Others v Armenia*, para 16, suggesting that the applicants had fabricated the facts and were 'opportunists' – 'experience shows that mass displacement of people fosters improper property claims by opportunists hoping to profit from the chaos'. Such personal judgements of applicants are rare, however, especially in the context of a case such as *Chiragov* which resulted in the finding of a violation, by an overwhelming majority of the Grand Chamber, of the right to property and the denial of access of the internally displaced applicants to their homes in Azerbaijan after Armenian occupation – see *Chiragov and Others v Armenia* App no 13216/05 (ECtHR, 12 December 2017).

the Court to seemingly cast personal aspersions on an applicant – here, as a person 'simply deciding to leave his or her spouse'. In the same way as relying on a textual interpretation of Article 12 was unpersuasive, these justifications similarly do not legitimately ground a refusal to adopt an evolutive approach. The Court disregards subsidiarity to make a moral judgement, yet engages in subsidiarity-based adjudication all the same by extending an unduly wide margin. The effectiveness of the right itself was clearly not served by the refusal to read the right to divorce into Article 12.[90] A consensus-based delineation of a narrow margin left to Poland, in the context of a Council of Europe that overwhelmingly permits divorce, would have created greater uniformity and harmonisation of Convention standards – goals that the Court itself extolls.

While *Babiarz* shows recourse to strict textual interpretation aimed at avoiding progressive development, *Christine Goodwin*[91] offers an example of the creative evolution of Convention standards in disregard of a European consensus. The case concerned legal recognition following gender reassignment. Both in that judgment and in *I. v the United Kingdom*,[92] the Court found a violation of Article 8 (the right to privacy and family life), notably on the grounds that a European and international consensus had developed in favour of legally recognising a transgender person's gender after reassignment. These cases marked a significant shift from the earlier *Rees v the United Kingdom*[93] and *Sheffield and Horsham v the United Kingdom*.[94] The ECtHR in *Rees* commented that little common ground existed between the Contracting States, some of which did permit a change of gender and some of which did not, and that, generally speaking, the law seemed to be in a state of flux.[95] The later judgment of *Sheffield and Horsham* emphasised the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex could entail in other areas such as marriage, filiation, privacy, or data protection. The lack of an existing consensus was here significant.[96] The Court in *Christine Goodwin* navigated this issue by extending its consensus analysis to international principles beyond the Council of Europe. Generally, evolution has been accepted 'only if a sufficient number of

90 See the strongly worded Dissenting Opinion of Judge Sajó, who notes that 'the refusal to grant a divorce, being a precondition to remarriage, inevitably violates the applicant's right to marry under Article 12' – *Babiarz v Poland* (n 82), Dissenting Opinion of Judge Sajó, para 1.

91 *Christine Goodwin v the United Kingdom* (n 88).

92 *I. v the United Kingdom* App no 25680/94 (ECtHR, 11 July 2002).

93 *Rees v the United Kingdom* App no 9532/81 (ECtHR, 17 October 1986).

94 *Sheffield and Horsham v the United Kingdom* App nos 22985/93 and 23390/94 (ECtHR, 30 July 1998).

95 *Rees v the United Kingdom* (n 93), para 37. See also *Cossey v the United Kingdom* App no 10843/84 (ECtHR, 27 September 1990), which followed the ruling in *Rees*.

96 See Joanna N Erdman, 'The Deficiency of Consensus in Human Rights Protection: A Case Study of *Goodwin v. United Kingdom* and *I. v. United Kingdom*' (2003) 2(2) Journal of Law and Equality 318, 325.

States Parties to the Convention adhered to it'.[97] The Court's departure from its previous stance relied explicitly on a dismissal of the absence of a European consensus while embracing international materials:[98]

> it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

The judgment in *Christine Goodwin* unfortunately fails to explain the grounds on which the international approach was substituted for the European consensus, marking a shift in approach from prior jurisprudence. It is simply noted that 'the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising'.[99] This is used to creatively justify recourse to an international rather than localised trend, resulting in the removal of the issues at stake from the ambit of the State's margin of appreciation. As such, it is concluded in finding a breach of Article 8 that 'the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention'.[100] It is therefore the narrowing of the margin of appreciation following a consensus analysis, and not reference to the living instrument alone, that spurs oversight and evolution in this field. *Christine Goodwin* stresses that a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform.[101] This hinting at the living instrument doctrine (the living instrument is not otherwise referred to in the judgment) serves to strengthen the progressive reading. However, it is the mooring of the consensus to the margin review that provides the framework needed to push transgender rights in the direction sought by the Court.

97 European Court of Human Rights, 'Dialogue Between Judges' (*Council of Europe*, 2011) 9 <https://www.echr.coe.int/Documents/Dialogue_2011_ENG.pdf> accessed 17 July 2024.

98 *Christine Goodwin v the United Kingdom* (n 88), para 85.

99 *Christine Goodwin v the United Kingdom* (n 88), para 85.

100 *Christine Goodwin v the United Kingdom* (n 88), para 93.

101 *Christine Goodwin v the United Kingdom* (n 88), para 74.

Zwart criticises the use made of Australia and New Zealand in *Christine Goodwin* to support the establishment of a consensus since the situation in those countries 'cannot validly be put on par with consensus among the 47 Council of Europe member States'.[102] Indeed, the Preamble's focus on the further realisation of rights is outlined within the context of shared commitments *among* the Contracting States. Dzehtsiarou and O'Mahony argue that since evolutive interpretation seeks to reflect the shared values of a particular community, it would be more appropriate for courts to limit their analysis to materials from within that community.[103] They find that such 'internal consensus' is more likely to promote the acceptance and execution of judgments.[104] In a more positive assessment than that of Zwart, Morawa posits that in the *Christine Goodwin* and *I. v the United Kingdom* judgments, the Court 'has placed at its own disposal a flexible set of tools for interpretation' which it 'uses . . . creatively'.[105] It is important to provide a normative framework in which this can take place since, as demonstrated by the *Christine Goodwin* line of case-law, an evolutive approach that considers both internal and external standards can help to achieve the fundamental aim of the Convention system – the progressive advancement of human rights.

Closer consideration of relevant international standards would certainly be a welcome development in many spheres where this can spur a progressive development of the Convention in line with the Court's obligations. Reference to international principles that adopt a more progressive interpretation than that found among Contracting States is justified, since this helps to achieve the compulsory evolutive interpretation of the ECHR. While an existing European consensus may be found to support dynamic interpretation in certain areas, where gaps arise, it is open to the Court to look to the standards signed up to by Contracting States beyond the European space. To this end, the goals of evolutive interpretation, the narrowing of the margin of appreciation on account of a relevant international consensus, and the consequent resort to the living instrument must be explicitly reasoned in judgments so that the link between these steps and the overall aims of effectiveness and external harmonisation can become apparent.

102 Tom Zwart, 'More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights Is in Need of Repair and How it Can Be Done' in Spyridon Flogaitis, Tom Zwart and Julie Nelson (eds), *The European Court of Human Rights and its Discontents* (Edward Elgar Publishing 2013) 92.

103 Kanstantsin Dzehtsiarou and Conor O'Mahony, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court' (2013) 44 Columbia Human Rights Law Review 309, 365.

104 Dzehtsiarou and O'Mahony (n 103) 335.

105 Alexander Morawa, 'The "Common European Approach", "International Trends", and the Evolution of Human Rights Law: A Comment on *Goodwin* and *I v. the United Kingdom*' (2002) 3(8) German Law Journal, para 28.

The judgment in *Christine Goodwin* outlined both European and international standards as relevant to the resolution of the claim. An explanation of why the lack of a European consensus was less important for ECHR review than the progression in international standards would have helped to legitimise the lessening of discretion on this basis. International principles can indeed be considered as part of a Convention claim, especially in areas where Contracting States have signed relevant treaties.[106] The Court does not require the respondent State to have ratified the treaty in question – in looking for common ground among the norms of international law, sources of law are not distinguished according to whether or not they have been signed or ratified.[107] Yet, as noted by Viljanen, the Court 'has not made a clear turning point towards internationalism . . . international trends and comparative support . . . are still interpretative tools that are used mainly in hard cases'.[108] This is problematic since it undermines the clarity of ECtHR jurisprudence: if applicants cannot foresee how a consensus will be used in the determination of their claim, the consistency of ECHR protections becomes undermined. It is not currently possible to predict the circumstances that may spur an evaluation of international standards – namely which cases will be considered in need of such treatment.

A closer look at *Christine Goodwin* may shed some light in this respect. The judgment demonstrates a recognition at Convention level of the need to take progressive measures to defend the rights of vulnerable groups: 'the Court has, on several occasions . . . signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review'.[109] The vulnerability of this group of rights-holders[110] may have thereby led to the use of a creatively evolutive approach. Applying this to the Article 5 sphere strengthens the arguments made in Chapter 3 in respect of pre-trial detainees and minors and migrants in detention – as particularly vulnerable groups at the mercy of detaining authorities, the Court can rightfully extend its *Christine Goodwin* approach to these fields.[111] Identifying vulnerability as a factor for triggering

106 *Marckx v Belgium* (n 76), para 41.

107 *Demir and Baykara v Turkey* (n 48), para 78.

108 Jukka Viljanen, *The Role of the European Court of Human Rights as a Developer of International Human Rights Law: A Study of the Limitations Clauses of the European Convention on Human Rights* (Tampere 2003) 249, 254.

109 *Christine Goodwin v the United Kingdom* (n 88), para 74.

110 On vulnerability under the Convention, see Corina Heri, *Responsive Human Rights* (Bloomsbury Publishing 2021) and Zuzanna Godzimirska, Aysel Küçüksu and Salome Ravn, 'From the Vantage Point of Vulnerability Theory: Algorithmic Decision-Making and Access to the European Court of Human Rights' (2022) Nordic Journal of Human Rights <https://www.tandfonline.com/doi/full/10.1080/18918131.2022.2078028> accessed 17 July 2024.

111 See, for instance, Sabina Garahan, 'Unsentenced Detainees: Socioeconomic Burdens of Pre-Trial Detention' in Walter Leal Filho, Anabela Marisa Azul, Luciana Brandli, Amanda

evolutive approaches would also allow for the consideration of well-established general facts and knowledge, as well as expert opinions and principles, in applications brought under Article 5, together with other key provisions. This is because Article 18 claims taken together with Article 5 relate to individuals detained for ulterior (often political) motives, while Article 14 claims taken with Article 5 allege discrimination on a ground protected by Article 14. Both categories of case-law involve the rights of particularly vulnerable groups who face serious challenges domestically.

Recognising the vulnerability of applicants, as in *Christine Goodwin*, heightens the need to pursue the living instrument's aims in responding to societal shifts which often have the greatest impact on vulnerable groups. This impact may be positive – for example, a wider recognition of LGBTI rights has spurred a European consensus and subsequently strengthened ECHR principles in this sphere. The impact is also often negative, as for instance shown by increased recourse to immigration detention as a response to populist resentment against refugees.[112] ECtHR Judge Serghides has linked the principles of effectiveness and vulnerability in the field of immigration detention[113]:

> [i]n cases such as the present, where the rights of vulnerable people are at stake, there is a need for the domestic courts and the Court to expressly refer and pay full regard, aside from the pertinent provisions of Article 5 . . . to the principle of effectiveness and also to respect for human dignity, the latter being in my view an integral aspect or component of the principle of effectiveness, both as a norm of international law and a method of interpretation.

While positive changes across the Council of Europe may naturally lead to greater effectiveness of the rights of vulnerable groups as reflected through the consensus doctrine, negative changes require particular attention. Where international principles can help to redress such negative impacts, the Court can make use of them to respond to the undermining of the effectiveness of the vulnerable group's rights. It unfortunately follows that vulnerable groups most often have the effectiveness of their rights undermined domestically,

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Lange Salvia, Pinar Gökçin Özuyar and Tony Wall (eds), *Peace, Justice and Strong Institutions: Encyclopedia of the UN Sustainable Development Goals* (Springer 2020); Deena Haydon, 'Detained Children: Vulnerability, Violence and Violation of Rights' (2020) 9(4) International Journal for Crime, Justice and Social Democracy 16; and Joanna Pétin, 'Exploring the Role of Vulnerability in Immigration Detention' (2016) 35(1) Refugee Survey Quarterly 91.

112 Sabina Garahan, 'Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers Under the Illegal Migration Act' (2024) Public Law 11.

113 *M.B. v the Netherlands* App no 71008/16 (ECtHR, 23 April 2024), Concurring Opinion of Judge Serghides, para 5.

and that they are therefore in greatest need of Convention protection. The Court consequently needs to take stronger steps in redressing the effectiveness gap that arises. A spectrum of responses that includes a turn to international standards where needed to supplement a European consensus provides a way of promoting the aims of dynamic interpretation. International principles have also generally emerged in those areas where the rights of vulnerable groups have been undermined,[114] and are naturally of greater relevance where the rights of the vulnerable are at stake. A detainee's vulnerability should therefore affect the way in which the standards protecting their Article 5 rights are interpreted.

It has been argued that pre-emptively establishing a consensus where only a trend exists undermines respect for subsidiarity, and that the Court should wait until a consensus has been reached.[115] *Christine Goodwin*, however, shows that disregarding this stance offers a way of enacting the progressive advancement of rights that the Court is tasked with. The contrasting approach which stifles the full enjoyment of the right to marry under Article 12 in *Babiarz* shows the incongruence of Convention adjudication that fails to have any regard to consensus. Importantly, consensus can help to test whether the oversight-based and evolutive functions of margin review are being adequately recalled alongside its well-used subsidiarity-based aims. Emerging human rights principles can be used to interpret the ECHR, so long as this is done in a consistent manner.[116] To ensure consistency, the Court must recognise the need for recourse to international principles where gaps have arisen in the protection of vulnerable groups. Consideration of international standards, thus imbued with normative justification, does not therefore seek to usurp European consensus in all cases but rather to step in as an added layer capable of building a progressive body of Convention jurisprudence.

Use of the margin of appreciation in Article 5 adjudication

Since the existence of a margin of appreciation under Article 5 is not always accepted by judges and commentators, the aim of this section is to prove that the Court does indeed employ margin review in its adjudication of the right

114 As with the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Rights of the Child, the Convention relating to the Status of Refugees, and the range of standards on the protection of detainees including the UN Standard Minimum Rules for the Treatment of Prisoners ('Nelson Mandela Rules'), UN Rules for the Treatment of Women Prisoners and Non-custodial measures for Women Offenders ('the Bangkok Rules'), and the UN Rules for the Protection of Juveniles Deprived of their Liberty ('Havana Rules').

115 Wildhaber, Hjartarson and Donnelly (n 46) 257.

116 Laurence R Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26(1) Cornell International Law Journal 133, 135.

to liberty. Acknowledging this permits analysis as to whether the scope of the margin granted is appropriate. As the presence of an Article 5 margin is not universally recognised, limits to that margin have not been debated in the same way as margin methodology under the qualified rights. In this section, use of the margin as both an oversight and a subsidiarity-based approach is demonstrated, since this is fundamental to framing the criticisms of the expansion of subsidiarity at the expense of oversight-based approaches. Proving the existence of a margin of appreciation under Article 5 is also vital for the consensus-focused idea of evolutive interpretation developed in this chapter, including international consensus where needed to plug gaps in protection at European level, and the proposals to increase the use of a consensus analysis under Article 5. These aspects are relevant to centring the evolutive function of margin review in adjudicating the right to liberty.

The margin is considered to mostly apply to the qualified rights under Articles 8–11.[117] Some judges have argued that Article 5 does not accord States any margin of appreciation. For example, Judges Walsh and Carrillo Salcedo argued in *Brogan and Others v the United Kingdom*[118] that '[i]f the concept of a margin of appreciation were to be read into Article 5 . . . it would change the whole nature of this all-important provision which would then become subject to executive policy'.[119] However, since I argue that a margin of appreciation applies within the context of Article 5, it is vital to prove the existence of the margin in Article 5 adjudication. *Brogan* can helpfully be taken as an example here to test the views of the dissenting judges.

In *Brogan*, the Court was tasked with assessing whether detention lasting more than four days without the applicant being brought before a judge complied with the requirements of Article 5 § 3, pursuant to which everyone arrested 'shall be brought promptly before a judge'. In its earlier decision arising from the same application, the Commission had considered that the 'Contracting Parties are given a certain margin of appreciation when interpreting and applying the requirement as to promptitude laid down in Article 5 para. 3'.[120] The judgment in *Brogan*, by contrast, highlights that 'the degree of flexibility attaching to the notion of "promptness" is limited'[121] (though not non-existent). The majority found a violation in respect of all

117 'In terms of scope, the margin of appreciation mostly – but not exclusively – applies to restrictions to human rights' – Samantha Besson, 'Subsidiarity in International Human Rights Law – What Is Subsidiary About Human Rights?' (2016) 61(1) The American Journal of Jurisprudence 69, 81.

118 *Brogan and Others v the United Kingdom* App nos 11209/84, 11234/84, 11266/84 and 11386/85 (ECtHR, 29 November 1988).

119 *Brogan and Others v the United Kingdom* (n 118), Dissenting Opinion of Judges Walsh and Carrillo Salcedo.

120 *Brogan and Others v the United Kingdom* (n 118), Dissenting Opinion of Judge Martens, para 11.

121 *Brogan and Others v the United Kingdom* (n 118), para 59.

the applicants, on the grounds that the scope for flexibility in interpreting and applying the notion of 'promptness' is strictly limited.[122] The fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community from terrorism were insufficient to ensure compliance with the requirements of Article 5 § 3.[123]

The judgment therefore exercised close scrutiny over how the promptness requirement under Article 5 § 3 is to be interpreted. While a margin remained in place, this was strictly limited by reference to its oversight function. Similarly, in the earlier judgment of *de Jong, Baljet and van den Brink v the Netherlands*, the Court took account of particular circumstances – '[t]he issue of promptness must be assessed in each case according to its special features' (in that case, the 'exigencies of military life and justice').[124] The consideration of individual factors suggests the potential to narrow or broaden a margin of appreciation and supports the idea that a margin is implied in the notion of promptness. Even taking due account of the exigencies of military life and justice, *de Jong, Baljet and van den Brink* ultimately held that the delays in question, of seven and 11 days before being brought before a judicial authority, could not be viewed as consistent with the promptness requirement.[125] This similarly indicates an oversight-based use of the implied margin in Article 5 § 3.

Kratochvil disagrees with the existence of a margin in this field, viewing the reasoning in *Brogan* as mere deference to States in how to implement the Convention.[126] While he accepts that the conclusion reached on promptness will depend on the individual factors of each case, this is viewed merely as a reflection of the discretion granted to States in applying the ECHR to different factual circumstances.[127] In my view, it is important to determine the facet of the method of interpretation that is in use, even where it is not expressly referred to by the judgment. This offers a basis for determining whether or not the discretion extended to the State was appropriate in responding to the identified aim. Moreover, deference to States in implementing the Convention reflects the very idea of the margin itself – where space is left for factual considerations, a margin as to how to secure the rights and obligations remains. The scope of the margin of appreciation will then depend on the particular circumstances and the rights and freedoms engaged.[128] Both *Brogan* and *de Jong, Baljet and van den Brink* acknowledge the space left for States in securing their Article 5 § 3 obligations, by reference to the specific exigencies

122 *Brogan and Others v the United Kingdom* (n 118), para 62.

123 *Brogan and Others v the United Kingdom* (n 118), para 62.

124 *de Jong, Baljet and van den Brink v the Netherlands* App nos 8805/79, 8806/79 and 9242/81 (ECtHR, 22 May 1984), para 52.

125 *de Jong, Baljet and van den Brink v the Netherlands* (n 124).

126 Jan Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29(3) Netherlands Human Rights Quarterly 327, 335.

127 Kratochvil (n 126).

128 Council of Europe (n 14), para 9.

of military justice in the latter[129] and the fight against terrorism in the former.[130] This goes beyond mere deference to States, as discussions of these particular settings are formalised by the very notion of a margin of appreciation.

Judge Martens argued in his dissenting opinion to *Brogan* that the term 'promptly' implies a certain margin of appreciation for national legislatures to determine the time period most suitable to their specific country context.[131] This exercise nonetheless remains subject to the ECtHR's final supervision.[132] Greer agrees that States are given discretion when interpreting or applying vague adjectives such as 'reasonable' or 'promptly'.[133] Arai, who criticises the base assumption of the *perceived* higher competence of national authorities to tackle decision-making arising from the right to liberty,[134] also accepts that the 'ambiguity and abstractness of some procedural requirements such as promptness . . . provide some justification for a deferential policy, since it may not be possible to formulate the exact period for lawful detention or arrest'.[135] However, early case-law signalled an oversight-based application of the margin of appreciation, since even in the absence of exact periods for lawful detention or arrest, the procedural safeguards in Article 5 § 3 were nevertheless upheld. The deference identified by Arai was limited by the Court's exercise of its supervisory role in closely scrutinising the justifications raised by the respondent governments in the previously mentioned case-law examples.

The existence of a margin in this sphere was not only confirmed in *Marshall v the United Kingdom*[136] but broadened so as to allow the Court to find that the detention of suspected terrorists for up to seven days 'did not result in the overstepping of the margin . . . which is accorded to the authorities in determining their response to the threat to the community'.[137] The threat of terrorism in this instance widened the margin of appreciation (so far, in fact, that the application was declared inadmissible).[138] The key difference between *Brogan* and *Marshall* was that a derogation was in place in the latter, while the former related to emergency anti-terrorism legislation.[139] Derogations

129 *de Jong, Baljet and van den Brink* (n 124), para 52.
130 *Brogan and Others v the United Kingdom* (n 118), paras 61–2.
131 *Brogan and Others v the United Kingdom* (n 118), Dissenting Opinion of Judge Martens, para 10.
132 *Brogan and Others v the United Kingdom* (n 118), Dissenting Opinion of Judge Martens, para 10.
133 Greer (n 9) 30.
134 Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 24.
135 Arai-Takahashi (n 134), 20.
136 *Marshall v the United Kingdom* App no 41571/98 (ECtHR, 10 July 2001).
137 *Marshall v the United Kingdom* (n 136).
138 *Marshall v the United Kingdom* (n 136).
139 On whether the *Brogan and Others v the United Kingdom* (n 118) judgment acted as an invitation to the UK Government to derogate from the ECHR, see Edward Crysler,

result in a wider margin given to States in implementing the requirements of Article 5,[140] confirming the existence of a margin of appreciation that is, in the first place, subject to extension.[141] For this reason, the Court was able, in contrast to *Marshall*, to find that detention for seven days breached Article 5 § 3 where it was not enacted in a derogation context.[142]

Importantly, this is an area in which the Court has exercised increasing oversight-based scrutiny of the requirement of promptness in Article 5 § 3. As such, in *Nuray Sen v Turkey*, the Court found, even in the context of a derogation, that the applicant's detention for 11 days before being brought before a judge or other judicial officer was not required by the terrorism-related emergency relied on by the government.[143] A similar analysis grounded the finding of an Article 5 § 3 breach resulting from ten days' detention.[144] Where the oversight-based function of a margin of appreciation is expressly recognised, it is therefore more likely that this function will be exercised. In order to ensure the full effectiveness of the right and introduce minimum standards across the board, a consensus-based analysis should be used to also trigger an evolutive interpretation. An overview of emergency detention measures, including the time extensions possible in these contexts before access to a judge is provided, would prove a useful comparator for ascertaining the lengths to which States go in amending detention rules. If a general consensus was found among States for the weakening of Article 5 protections in times of crisis within which the respondent State fell, the Court would be able to conclude that not only was Article 5 breached in the given case, but that a significant number of governments equally risked future findings of a violation. Such a consensus in this area would, in line with the non-regression principle, not be able to result in the dilution of rights standards. If, on the other hand, a general consensus emerged against the undue extension of time permitted before access to a judge is granted, this could be used to strengthen existing ECHR standards by emphasising the evolution by States away from unduly punitive and restrictive

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'*Brannigan and McBride v. U.K.*: A New Direction on Article 15 Derogations Under the European Convention on Human Rights?' (1994) 2 Revue Belge de Droit International 603, 611.

140 There is a 'tendency, on the part of the Court, to give states a relatively wide degree of deference regarding how they choose to respond to emergency situations' – Sean Molloy, 'Covid-19 and Derogations Before the European Court of Human Rights' (*Verfassungsblog*, 10 April 2020) <https://verfassungsblog.de/covid-19-and-derogations-before-the-european-court-of-human-rights/> accessed 17 July 2024.

141 For a detailed analysis of Article 5 review in the context of derogations, see Sabina Garahan and Emre Turkut, 'The "Reasonable Suspicion" Test of Turkey's Post-Coup Emergency Rule Under the European Convention on Human Rights' (2020) 38(4) Netherlands Quarterly of Human Rights 264.

142 *İğdeli v Turkey* App no 29296/95 (ECtHR, 20 June 2002).

143 *Nuray Sen v Turkey* App no 41478/98 (ECtHR, 17 June 2003), para 28.

144 *Tanrikulu and Others v Turkey* App nos 29918/96, 29919/96 and 30169/96 (ECtHR, 6 October 2005), para 41.

detention measures. On this basis, the Court can begin to introduce uniform levels of protection against arbitrary detention in emergency settings in a way that either reflects the reality across the Council of Europe, or which identifies a reality that undermines the right to liberty at present and acts in order to prevent further violations.

Consensus in the adjudication of the right to liberty

The original empirical findings gathered through my interviews with ECtHR judges have shown that judges at the Court not only accept but often support a greater use of the consensus doctrine in Article 5 adjudication. Expanding this approach would not only help the assessment of whether the use of discretion in this context is appropriate, but would build a more transparent body of case-law that would make the allocation of discretion more predictable in the future. This would improve the provision's effectiveness and standardise the factors to be recognised and considered as part of Article 5 review. It would thereby assist in the internal and external harmonisation of ECHR rights, equally ensuring their non-regression. Regression results not only from an active turn to weaker standards, for instance by recourse to majoritarian principles (as seen in *S.A.S.*) – it can also stem from a failure to adapt the right to liberty in line with modern-day realities and the challenges these may bring. Considering the dearth of progressive development applied to Article 5, regression constitutes a particular risk.

It is vital to acknowledge the use of consensus methodology with respect to Article 5; as with recognising a margin of appreciation under the provision, this allows for an assessment of the capacity of consensus review to progress standards on the right to liberty. Consensus already plays a role in developing the content of Article 5: in terms of 'the tools the Court would be inclined to use in order to clarify and develop Convention law, also under criminal procedure and related to Article 5, a clear European tendency or consensus will normally be a weighty argument'.[145] Yet even in cases in which consensus forms part of judicial deliberations, this is not always reflected in the text of the final judgment. The existing use of consensus in the Court's decision-making process under Article 5 was also noted by Judge Kūris[146]:

> [consensus is] less used in Article 5 . . . than in some other cases because Article 5 is so concrete compared to other articles but I wouldn't say that it is not used. Research requests in certain problematic cases are not necessarily made public but . . . at the Court when making our decisions we have research where 30 or 40 countries may be surveyed and we see what the approach of these countries is. That happens also in Article 5 cases.

145 Written response from Judge Bårdsen, 5 December 2020.
146 Interview with Judge Kūris, 29 January 2021.

Cases that attract a research request but which do not focus on consensus are not necessarily marked as such in the text of final judgments. There is consequently a lack of clarity and transparency surrounding the factors that may give rise to an evolutive approach which employs consensus. Indeed, although discussions on the margin of appreciation during deliberations focus on the breadth of the margin and the role that consensus would play in its determination, the types of European standards or principles that should form part of the consensus calculation (such as treaties signed by the Contracting States) remain contested.[147] Judge Paczolay commented that, in the light of the use of European standards as a benchmark for consensus and of a greater uniformity of criminal procedure standards across Europe[148] (as indicated by the European Arrest Warrant in the European Union [EU] context),[149] this should indicate the general direction of travel for 'common European standards': 'under Article 5, I would be in favour of more uniformised or defined standards . . . I think at the European level it should be more standardised and less of a margin given to the States'.[150] Judge Kūris similarly suggested that the use of a consensus under Article 5 would be beneficial – 'I don't assert that a reference to the European consensus or emerging European consensus is a panacea, a magical tool which removes all difficulties, but it is an important tool'.[151] Judge Mits also posited that there is 'absolutely' space for a consensus analysis in this area:[152]

> the Convention lays down the minimum standards for domestic authorities. It certainly influences law and practice in the Member States but it's a two-way street – there is a return influence on the Convention as well. The more uniform the practice becomes in the Member States, the easier it is for the . . . Court to say that the practice in the Member

147 Interview with Judge Paczolay, 21 December 2020.

148 See support for harmonisation of criminal justice standards at the Council of Europe level, Recommendation of the Council of Europe 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe, para 4, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17109&lang=en> accessed 17 July 2024:

> in an ever-more interconnected and mobile Europe, whose citizens are increasingly exposed . . . to other countries' legal systems and cultures, it is important to achieve some degree of harmonisation between the criminal justice systems of member states, so as to maintain their effectiveness in the face of new challenges . . . . Although particular national practices and traditions must be acknowledged . . . these may appropriately be addressed on a European level within the framework of the Council of Europe.

149 On uniformity within the context of European Arrest Warrants, see Szilárd Gáspár-Szilágyi, 'Joined Cases *Aranyosi* and *Căldăraru*: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24(2–3) European Journal of Crime, Criminal Law and Criminal Justice 197.

150 Interview with Judge Paczolay, 21 December 2020.

151 Interview with Judge Kūris, 29 January 2021.

152 Interview with Judge Mits, 17 December 2020.

> States confirms a standard. . . . There is no reason why the same would not be applicable to rights and freedoms under Article 5.

There is thus not only an acceptance among members of the Court that consensus has a role to play under Article 5, but support for its increased use.

In employing the idea of consensus, international bodies have been said to be relinquishing their duty to set universal standards.[153] However, within the framework outlined in this book, which emphasises non-regression as a mandatory tool for ensuring progressive interpretation, only a consensus that advances rights can be applied. The expectations on States can thereby become more uniform. The reciprocity between the development of ECHR and national standards provides grounding for a consensus assessment as part of an evolutive approach in Article 5 adjudication. Since the evolutive living instrument approach requires a review of developing standards across the Council of Europe, any criminal justice developments – such as convergence on pre-trial detention time limits[154] – should form part of the Court's reasoning in allocating discretion. A routine examination of the consensus on any given issue, or reference back to case-law that has already conducted such analysis, would in this way ensure that Convention jurisprudence accurately reflects the position across the Contracting States. In addition, where an existing European consensus fails to adequately safeguard the rights of detainees, the Court must look to international principles in addressing the gaps in rights protection. This is rooted in, first, the argument that consensus cannot result in a regression of rights, and second, in the need to preserve the effectiveness of the rights of vulnerable groups – a category into which detainees fall.

If judges decided that certain shared standards should not be reflected in the jurisprudence, they would be required to explain why, in line with the existing requirement to provide their reasoning as enshrined in Article 45 § 1 of the Convention. This would allow commentators and possible dissenting judges to respond appropriately to the ECtHR's unwillingness to adopt a dynamic interpretation in a given case. It would also help to ensure that the level of discretion granted is appropriate and consistent across similar cases, since judges would be required to outline their decision-making on discretion from an equivalent starting point – namely the recognition of a consensus (whether European or international) as central to progressive development. Where the use of consensus stays hidden within the deliberation process, such opportunity for critique disappears. This, in turn, undermines the effectiveness of the right since it remains impossible to determine the cases in which an evolutive approach will be applied. If consensus were regularly held to form part of a claim's evaluation, the standardised approach would help to create a consistent framework for the Court's adjudication. A firm adherence to the

153 Benvenisti (n 22) 852.
154 On which, see Chapter 3.

non-regression principle would help to preserve rights from a majoritarian dimension intent on walking back protections.

A common critique of the margin of appreciation is that it 'encourages non-uniform, subjective or relativist applications of international law – eroding the idea that like cases will be treated alike'.[155] It is more likely that like cases will be treated alike when a consistent approach to either narrowing the margin (resulting in an oversight-based or evolutive approach, or both) or broadening the margin (resulting in a subsidiarity-based approach) is adopted. While the outcome of the case will depend on the use of subsidiarity, if the same consensus analysis is used to determine the margin's application, outcomes are more likely to be consistent. The challenge of maintaining cohesion and uniformity across the vast body of Convention jurisprudence could thereby be tackled more efficiently. In the same way as the 'general principles' section of judgments currently helps to maintain a uniform approach in many cases (or at least to make it possible to identify where a lack of uniformity arises), a routine 'consensus' section would ensure that decisions are grounded in equivalent shared standards across the Council of Europe – and beyond where necessary. As such, a comparative exercise would not be the 'sole or main criterion' on which a judgment is based (something the Court is unwilling to do),[156] but would constitute an equal starting point for Convention adjudication. This would help to support effectiveness, since the starting point would be like among like cases. States that fell repeatedly short of shared minimum standards would be subject to the more efficient use of summary procedures,[157] which would have the corresponding impact of allowing the Court to tackle its backlog more effectively. However, this impact would not stem from the basis of efficiency-based concerns alone – rather, the individual interests would face greater protection. This is because efficiency considerations would not affect substantive review of the Article 5 claims, as in the *Turan* judgment.[158] The protection of individual justice under the ECHR would thus continue to be served. The increased efficacy would also promote the effectiveness of rights, allowing for a quicker assessment as a result of the more manageable backlog. This again differs from the situation in *Turan*, whereby the interests of persons awaiting a resolution of their claims were ceded to those of later, hypothetical applicants.

I argue that, in adjudicating the right to liberty, the ECtHR can consider not only the prevailing European consensus, but also other international materials including treaties signed by the Contracting States and expert reports. As such, relevant findings of expert bodies on detention, including immigration and

155 Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16(5) European Journal of International Law 907, 912.

156 Vogiatzis (n 52) 464.

157 As in the example of the *Ivanov*-type cases explored in Chapter 1.

158 On which, see Chapter 1.

child detention, should be included within the evaluation of a claim. Standards outlined in specialised international instruments, such as the UN Convention on the Rights of the Child or the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[159] should form a routine part of the development of Article 5 standards. While the Court makes some use of this methodology in other spheres, there is a lack of consistency in its approach.

An area where the Court has openly considered consensus with relation to criminal justice matters, and in fact allowed it to strongly sway its decision-making, is in relation to life sentences. *Vinter and Others v the United Kingdom* considered the issue through the lens of Article 3, which enshrines protections against torture and inhuman or degrading treatment. While the judgment did not openly employ consensus terminology, it used comparative and international law sources to show that, in general, a review was provided no later than 25 years after the imposition of a life sentence. On this basis, it was held that 'where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3'.[160] The comparative and international law materials that showed a consensus as to a 25-year period took precedence over the margin of appreciation that the judgment had previously allocated to the respondent State. As a result, a failure by a State to provide a review within this time frame will automatically result in the finding of an Article 3 violation.

The judgment is striking in that the allocated broad margin of appreciation is almost immediately cast aside by the comparative and international law materials which reveal a consensus on the 25-year period. The ECtHR not only takes this specific time period into account but in fact concludes that the absence of such a review within this time frame will automatically result in the finding of a violation of Article 3. The recognition that a domestic criminal law norm will automatically fall foul of Article 3 is in itself a powerful and rare statement within the context of the ECHR. My proposed approach has therefore already proven effective in enshrining minimum standards in the field of detention. This progressive approach to Convention protections in relation to life sentences bears on the content of Article 5 when it is taken in conjunction with Article 14. As such, the findings on life imprisonment set out under Article 3 are used to feed into an analysis of the right to liberty.[161] An evolutive approach grounded in consensus in various fields of detention

159 For further details on specialised international instruments relating to pre-trial detention, see Sabina Garahan, 'Unsentenced Detainees: Socioeconomic Burdens of Pre-Trial Detention' in Walter Leal Filho, Anabela Marisa Azul, Luciana Brandli, Amanda Lange Salvia, Pinar Gökçin Özuyar and Tony Wall (eds), *Peace, Justice and Strong Institutions: Encyclopedia of the UN Sustainable Development Goals* (Springer 2020).

160 *Vinter and Others v the United Kingdom* App nos 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013), paras 120–1.

161 On this, see Chapter 5.

should be replicated in Article 5 adjudication in order to address gaps in protection. Worked examples as to how this can be achieved with respect to pre-trial detention, immigration detention, and the detention of minors are developed in Chapter 3.

Conclusion

The majoritarian dimension of consensus has often been used to criticise its use in the case-law of the ECtHR. This chapter has demonstrated how an increased role for consensus in the Court's adjudication can in fact promote a progressive interpretation of rights, and in particular of the right to liberty. This is rooted in, first, the argument that consensus cannot be used to regress rights (what I frame as the mandatory non-regression principle), and second, in the need to preserve the effectiveness of the rights of vulnerable groups, whose rights are particularly prone to societal shifts. Upholding the principle of non-regression guarantees that rights will not be weakened by reference to majoritarian preferences, allowing the Court's review to reach beyond the ECHR to address any gaps in protection. The need to safeguard vulnerable groups, meanwhile, offers normative justification for turning to international standards where needed to advance rights and thereby ensure external harmonisation. This can be seen in the *Christine Goodwin* line of case-law, which effectively closed gaps in protections by reference to an international consensus. Recognising the vulnerability of applicants equally heightens the need to pursue the living instrument's aims in responding to societal shifts which tend to impact most greatly on vulnerable groups. Looking to other international commitments undertaken by States with respect to the right to liberty, far from being an illegitimate consideration, more accurately reflects the existing consensus and results in a harmonious application of the key standards to which States have committed.

The underlying aim of consensus is thus to promote and advance Convention rights. Consensus can help to guarantee minimum standards of protection, since evolutive interpretation allows only for the progression – rather than regression – of standards. Once a consensus on the relevant element (or elements) of Article 5 is established, the application of general principles to a given case will become more transparent since these will reflect a shared set of minimum standards. It will consequently be easier to determine (and thus critique) the extent to which a judgment relies – or fails to rely – on a consensus methodology in pursuit of progressive advancement.

The vulnerability of rights-holders has led the Court to adopt a creatively evolutive approach. Applying this to the Article 5 sphere strengthens the arguments made in Chapter 3 in respect of pre-trial detainees and minors and migrants in detention – as particularly vulnerable groups at the mercy of detaining authorities, the Court must consider a consensus capable of upholding their rights, both within and beyond the European space. Identifying vulnerability as a factor for triggering evolutive approaches

would also allow for the consideration of well-established general facts and knowledge, as well as expert opinions and principles, in applications brought under Article 5, together with other key provisions. This is because Article 18 claims taken together with Article 5 relate to individuals detained for ulterior (often political) motives, while Article 14 claims taken with Article 5 allege discrimination on a ground protected by Article 14. Both categories of case-law involve the rights of particularly vulnerable groups who face serious challenges domestically.

Although a margin of appreciation is not always recognised under Article 5, the Chapter has shown its existence and offered clarity for the inclusion of a consensus review in determining the scope of the margin. Interviews with Court judges have confirmed both an acceptance and enthusiasm for the use of consensus in adjudicating the right to liberty. Chapter 3 builds on this enthusiasm by arguing that a more progressive interpretation that looks to a European – as well as international – consensus where needed will allow for the development of a more progressive body of jurisprudence that enshrines minimum standards of protection for persons subjected to the forms of detention assessed therein.

The manner in which consensus is currently deployed is inconsistent from case to case. In some judgments, a developing but as yet incomplete consensus is considered significant,[162] while in others, an overwhelming existing consensus is disregarded.[163] Were a consensus review to form a routine part of Article 5 judgments, the areas of adjudication where the Court considers consensus to be irrelevant or significant would become apparent. This would help to address the disparities presently created in the adjudication of claims brought against States with differing levels of protection of the right to liberty (an issue that is explored in Chapter 3). Chapter 2 therefore ultimately elaborates the potential of consensus to build a more consistent and evolutive body of minimum protections against arbitrary detention. The proposed consensus-based evolutive framework is capable of meeting the goals of effectiveness and harmonisation to the benefit of those who these goals aim to serve – namely those in need of rights protection.

162 See the analysis of *Christine Goodwin v the United Kingdom* (n 88) in Chapter 1.
163 As in *S.A.S. v France* (n 24).

3 An evolutive interpretation of justifications for detention

Introduction

Chapter 3 builds on the arguments set out in Chapter 2 that consensus should form part of the allocation of discretion under Article 5. The normative justifications for including a progressive consensus within evolutive approaches are rooted in two key requirements: first, that consensus methodology does not result in a dilution of existing rights standards, and second, that the rights of vulnerable groups are effectively upheld. An evolutive approach grounded in consensus in various fields of detention should therefore be adopted in Article 5 adjudication in order to address gaps in protection for detainees. Chapter 3 develops worked examples as to how this can be achieved with respect to pre-trial detention, immigration detention, and the detention of minors.

Since evolutive interpretation is an interpretive obligation, the Court's starting point in any case must be whether evolutive approaches can be applied, or whether the evolution of a given facet of a right has already been enacted in prior case-law and must therefore be applied. Where there is an established consensus, this can be deployed effectively to enact both an evolutive and an oversight-based approach, through a narrowing of the margin of appreciation and use of the living instrument. I argue that rooting these approaches in consensus provides a solid and consistent foundation on which to progress ECHR principles. Outlining a broader consensus-based framework in which to ground developing ECHR standards strengthens the effectiveness of rights. This is because this allows for the elaboration of minimum standards that form part of the adjudication of Article 5 claims. The Court's methods of review in each case therefore become more predictable, since the starting point that is taken is shared, regardless of the respondent State.

Chapter 3 identifies problematic areas of Article 5 case-law where the Court allocates an inappropriate level of discretion to Contracting States in justifying the aims of detention. My views are based on the framework of appropriateness elaborated in previous chapters – namely that where the Court applies a method of interpretation in a way that fails to pursue the method's underlying approach, the level of discretion can be considered inappropriate.

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These areas of Article 5 jurisprudence are pre-trial detention (specifically, the length of pre-trial detention and the setting of bail amounts), immigration detention, and the detention of minors. While each form of detention is permitted under Article 5 § 1, the ECtHR must maintain a level of oversight in reviewing the decision-making of national authorities and ensuring a lack of arbitrariness. I identify the lack of an evolutive approach in these spheres which has led to a stagnation of rights standards, highlighting gaps in protection and inconsistencies that have consequently arisen. The misuse of evolutive approaches to weaken rights standards in breach of the non-regression principle is also noted. In other words, the necessary dynamic interpretation of protections against arbitrary detention has been neglected. I also posit that the Court must recognise the specific vulnerability of detainees and, in doing so, embrace international principles in informing consensus, as suggested in Chapter 2, thus allowing for a more progressive interpretation of the ECHR.

Testing whether the Court, first, applies the suitable approach and, second, whether it does so on the basis of methods of interpretation that pursue that approach allows for conclusions to be reached regarding the appropriateness of discretion. The Chapter identifies the factors relevant in each sphere of review (including applicant vulnerability), as well as proposing changes to how these can be considered in the light of the consensus-based notion of discretion developed in Chapter 2.

It is worth explaining why I have not identified the remaining grounds of detention under Article 5 § 1 as problematic areas in terms of discretion. The Court exercises strict oversight over detention following criminal conviction imposed on the basis of Article 5 § 1 (a). Moreover, as argued in Chapter 5 by reference to applications brought under Article 14 taken together with Article 5, the Court adopts an evolutive approach to assessing national sentencing policies. Article 5 § 1 (b), which permits 'the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law', is subjected to strict proportionality testing.[1] As explained with relation to immigration detention under Article 5 § 1 (f) below, the Court explicitly removes certain limbs of Article 5 § 1 from the ambit of necessity and proportionality testing, weakening the level of oversight in these fields. Finally, Article 5 § 1 (e) allows the 'lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants'. This limb incorporates the doctrine of autonomous concepts which, as argued in Chapter 1, entails a strict level of oversight over national decision-making.

Before challenging areas of Article 5 discretion are discussed, it is first important to highlight a key factor that the Court has used to spur a subsidiarity-based approach in certain spheres, namely the existence of further

1 The requirement of proportionality is said to '[assume] particular significance in the overall scheme of things' – *Gatt v Malta* App no 28221/08 (ECtHR, 27 July 2010), para 40.

Protocols that enshrine the progressive interpretation of rights that could otherwise be enacted through evolutive approaches. After addressing this issue, the analysis in the following sections identifies the inappropriate use of discretion under Article 5 that is grounded in considerations other than further Protocols. This offers a fuller evaluation of how subsidiarity-based approaches are applied to the right to liberty.

The consensus shown by further Protocols to the Convention

Protocol No. 13, abolishing the death penalty in its entirety, was the direct result of a growing consensus among Contracting States.[2] As set out in its explanatory report, a key step towards adoption of the Protocol was the prior Protocol No. 6, the first legally binding instrument in Europe (and indeed the world) to provide for the abolition of the death penalty in peacetime, with no possibility of reservations or derogations in emergency situations.[3] The Parliamentary Assembly of the Council of Europe (PACE) required States wishing to join the Council to commit to introducing an immediate moratorium on executions, to remove the death penalty from their statute books, and to sign and ratify Protocol No. 6.[4] PACE also 'put pressure on countries which failed or risked failing to meet the commitments they had undertaken upon accession'.[5]

As such, it was found in *Soering* that:[6]

> Protocol No. 6 . . . as a subsequent written agreement, shows that the intention of the Contracting Parties . . . was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment . . . and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement.

2 Council of Europe, Explanatory Report to Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances Vilnius, 3.V.2002 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d37ad> accessed 17 July 2024.

3 Council of Europe (n 2), para 4.

4 On the role of PACE in the abolition of the death penalty in the Council of Europe and beyond, see 'Death Penalty in the OSCE Area: Background Paper 2021' (OSCE/ODIHR 2021) 31–3 and 50 <https://www.osce.org/death_penalty_2021> accessed 17 July 2024. In adopting Resolution 1560 (2007) on the "Promotion by Council of Europe member States of an international moratorium on the death penalty", PACE signalled its commitment to supporting abolition abroad – Parliamentary Assembly of the Council of Europe, Resolution 1560, "Promotion by Council of Europe Member States of an International Moratorium on the Death Penalty", 26 June 2007 <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17557&lang=en> accessed 17 July 2024.

5 Council of Europe (n 2), para 5.

6 *Soering v the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989), para 103.

Consequently, the Court refused to read into Article 3 a general prohibition of the death penalty in peacetime. Thus where States have demonstrated their intention to progress Convention standards by way of introducing further Protocols, the Court refrains from 'over-creative' interpretations of the ECHR.[7] In this way, this can be seen as a facet of dynamic interpretation, based on the increasing number of ratifications of Protocol No. 13 rather than changes that happened in the national laws of the Contracting States.[8] The 2010 judgment of *Al-Saadoon and Mufdhi v the United Kingdom* reflected on this approach:[9]

> when the Convention was drafted, the death penalty was not considered to violate international standards. An exception was therefore included to the right to life . . . However . . . there has subsequently been an evolution towards the complete de facto and de jure abolition of the death penalty within the member States.

The Court is thus hesitant to advance standards in certain areas until it is assured that the consensus is strong enough to be reflected through the signing of a further Protocol. A casualty of this approach in the Article 5 field can be seen in the context of imprisonment for non-payment of a debt. In *Benham*, the applicant had been imprisoned after failing to pay a community charge of £325. In his partly dissenting opinion, Judge Foighel argued that the deprivation of liberty was unlawful from the start, since detention on account of not having paid the sum was in itself, 'notwithstanding technical arguments', a violation of the rights protected in Article 5.[10] Judge Bernhardt also queried the proportionality of detention, writing: 'if it is undisputed that the . . . person has no means to pay the charge, a prison sentence is . . . hardly compatible with the proper role of criminal sanctions in present-day societies'.[11] The ECtHR could have adopted this form of reasoning through a dynamic interpretation of the provision. Citing to international standards on the appropriateness of detention stemming from debt would have allowed for an evolutive reading rooted in commitments undertaken by Contracting States beyond the Convention acquis. This approach finds legitimacy in its pursuit of external harmonisation. For instance, Article 11 of the ICCPR

7 Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 Human Rights Law Review 57, 69.

8 Kanstantsin Dzehtsiarou and Conor O'Mahony, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court' (2013) 44 Columbia Human Rights Law Review 309, 364.

9 *Al-Saadoon and Mufdhi v the United Kingdom* App no 61498/08 (ECtHR, 2 March 2010), para 116.

10 *Benham v the United Kingdom* App no 19380/92 (ECtHR, 10 June 1996), Partly Dissenting Opinion of Judge Foighel.

11 *Benham v the United Kingdom* (n 10), Partly Dissenting Opinion of Judge Bernhardt.

expressly forbids imprisonment for debt.[12] Since the position of respondent States as signatories to the ICCPR has previously been held to be relevant to the adjudication of a Convention claim,[13] it would have been open to the majority in *Benham* to progress Article 5 standards accordingly. As a party to the ICCPR, an application brought against the UK can justifiably refer to the protection against detention in this sphere which the treaty sets out. Moreover, ratification is not needed to inform the search for 'common ground' among international law norms.[14]

However, the Court's hesitance to apply an evolutive approach may be explained by the existence of Protocol No. 4 to the Convention. Article 1 of the Protocol specifically prohibits imprisonment for debt, reflecting the terms of Article 11 of the ICCPR. It is therefore likely that the ECtHR does not wish to tackle an issue that has already been addressed in a further Protocol. As confirmed by the Explanatory Report to the Protocol, the purpose of Article 1 was to prohibit 'as contrary to the concept of human liberty and dignity' deprivation of liberty for the reason alone that an individual did not dispose of the means to comply with a contractual obligation.[15] Where States have demonstrated their intention to progress rights standards through further Protocols, the Court is careful to 'not transgress' into these areas.[16] These concerns cannot be used to justify the lack of an evolutive approach in the examples of Article 5 jurisprudence identified in what follows. This is because no specific Protocols exist to cover these areas. It is consequently not open to the Court to disregard its evolutive mandate for this reason.

The lack of an evolutive approach to pre-trial protections under Article 5 § 3

Article 5 § 3 provides that persons arrested or detained in line with Article 5 § 1 (c) 'shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial'. Article 5 § 1 (c) permits:

> the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

12 Article 11 of the ICCPR.

13 See the example of *Bayatyan v Armenia* in Chapter 2.

14 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008), para 78.

15 Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, para 5 <https://rm.coe.int/16800c92c0> accessed 17 July 2024.

16 Mowbray (n 7) 69.

The following sections address, first, gaps in protection against arbitrary detention and inconsistencies arising from the Court's application of discretion to a lack of time limits for pre-trial detention, and second, to bail. A more consensus-focused evolutive reading is proposed to tackle the challenges in both areas. The misuse of evolutive approaches to weaken rights standards in breach of the non-regression principle is also identified.

Discretion in the length of pre-trial detention

The lawfulness of detention under the Convention refers chiefly to national law but also, where applicable, to international legal standards.[17] There is no requirement for domestic courts to fix the duration of pre-trial detention in their decisions, regardless of how the matter is regulated by law.[18] The existence or absence of time limits is one of a number of relevant factors in assessing whether domestic law was foreseeable in its application and provided safeguards against arbitrary detention.[19] While the ECtHR accepts that setting time limits protects against arbitrariness,[20] this has not been introduced as a minimum requirement under Article 5. Without stating that it is doing so, the Court thereby allocates a margin of appreciation to States in determining the protections they offer against arbitrary detention. In this section, I identify the problems stemming from this and how they may be addressed by reference to the proposals for a more consensus-focused framing of discretion. An oversight-based and evolutive approach through a margin of appreciation narrowed through consensus would promote the effectiveness of Article 5 rights. The coherence and consistency, and thus legitimacy, of ECHR jurisprudence would also be improved. In particular, I argue that a more consensus-based analysis of time limits for pre-trial detention leads to an evolutive approach that is more capable of guaranteeing the rights enshrined in Article 5 § 3. In adopting this stance, the ECtHR would be fulfilling the requirements of evolutive interpretation of the Convention. The level of discretion accorded on this basis would therefore be more appropriate than the deference that is currently extended.

An equivalent starting point for all States would improve the effectiveness of the right, in particular in protecting vulnerable groups (here, pre-trial detainees). Introducing a shared and predictable set of principles to be included in adjudication would equalise the position across Contracting States. This would address the issue raised in this section of the uneven application of the ECHR resulting from diverging national norms on pre-trial detention

17 *Medvedyev and Others v France* App no 3394/03 (ECtHR, 29 March 2010), para 79.

18 *Merabishvili v Georgia* App no 72508/13 (ECtHR, 28 November 2017), para 199; *Oravec v Croatia* App no 51249/11 (ECtHR, 11 July 2017), para 55.

19 *J.N. v the United Kingdom* App no 37289/12 (ECtHR, 19 May 2016), para 90; *Meloni v Switzerland* App no 61697/00 (ECtHR, 10 April 2008), para 53.

20 *J.N. v the United Kingdom* (n 19), para 77.

time limits. The proposed solution would spur the development of minimum standards against arbitrary detention, helping to strengthen protections in this sphere. Cases from Georgia and Russia are used to illustrate the differences in adjudicating claims brought against a country with existing protections that fails to apply them (namely Russia, in respect of which a violation is found) and one without equivalent protections (Georgia, where no violation is found). The relevant safeguard is a legal requirement to fix the length of pre-trial detention. Since the ECtHR has not imposed any minimum standards in this respect, gaps in protection cannot be remedied by a maintenance of the current approach. The section therefore urges a greater focus on consensus in spurring a more oversight-based and evolutive interpretation of the right to liberty.

At present, a failure to comply with domestic statutory time limits for pre-trial detention does not automatically result in the finding of a violation.[21] The judgment of *Merabishvili v Georgia*[22] highlights that this was not a requirement under Georgian law, and refers to a line of Russian case-law in contrast.[23] Although the Georgian Constitution and Code of Criminal Procedure limited pre-trial detention to nine months, the court imposing detention on remand was not required to specify the duration.[24] The ECtHR's assessment of legality therefore refers back to national provisions. Since the applicant could not be detained for more than nine months under Georgian law, the Court found that it could not be said that there was uncertainty about the rules governing his pre-trial detention.[25] By contrast, in *Logvinenko v Russia*,[26] the domestic courts' failure to set out a time limit for an extended period of pre-trial detention resulted in a breach of Article 5. This is because, although a maximum time limit for pre-trial detention was prescribed in domestic law, the national court did not clarify the time limit to be applied in its judgment. It is important to analyse this case since the Grand Chamber in *Merabishvili* used it to justify its position that the failure of domestic courts to fix the duration of pre-trial detention did not raise an issue under Article 5 § 1 (c).

The applicant in *Logvinenko* complained that part of his pre-trial detention was unlawful since it was not covered by a court order. The Russian Government in response argued that he had at no time been detained pending trial in the absence of a court order, asserting that all orders authorising detention had been issued by a competent judicial body and were subject to challenge on appeal. While the impugned decision had not mentioned a time limit for detention, the Russian Government argued that it should be interpreted, on

21 *S.M. v Italy* App no 18675/09 (ECtHR, 8 October 2013), para 27.

22 The complaint brought under Article 18 taken together with Article 5 in *Merabishvili v Georgia* is analysed in Chapter 5.

23 *Merabishvili v Georgia* (n 18), para 197.

24 *Merabishvili v Georgia* (n 18), para 197.

25 *Merabishvili v Georgia* (n 18), para 200.

26 *Logvinenko v Russia* App no 44511/04 (ECtHR, 17 June 2010), paras 37–8.

account of the applicable rules of domestic criminal procedure, as authorising the extension of the applicant's detention pending trial for a further six months. According to the Russian Code of Criminal Procedure, pre-trial detention could not exceed six months and could be further repeatedly extended for no longer than three months in respect of defendants charged with serious and particularly serious offences.[27] The State thus relied on the existence of an underlying assumption that where periods of pre-trial detention were extended, this would be for the period of time prescribed by the legislation. It argued that since the trial court had carried out a fresh review of the detention issue prior to the expiration of the six-month period, the period of further deprivation of liberty had been lawfully authorised. The Russian Supreme Court, however, held that when deciding on the extension of a defendant's detention pending trial, courts should specify not only the grounds justifying the extension, but also its length.[28]

Logvinenko found that while the domestic court had acted within its powers in authorising an extension of detention on remand, the failure to indicate a time limit violated Article 5 § 1 since the impugned period did not derive from a procedure prescribed by law. The approach in *Merabishvili* differs since the existence of grounds for pre-trial detention is used to justify the lack of an indication of the length of such detention. The inconsistency can be explained by the fact that the terms 'lawful' and 'in accordance with a procedure prescribed by law' in Article 5 § 1 refer back to domestic law.[29] A respondent State is therefore less likely to be found in breach of Article 5 if it has no existing protections for extending periods of pre-trial detention than a State that offers such protections but fails to apply them. The subsidiarity-based approach here seeks to defer to the formulation of Article 5 guarantees at national level. Yet in doing so, it creates a situation whereby a legal framework that offers fewer safeguards faces less scrutiny than one that has enshrined, for example, a maximum length of pre-trial detention. The effectiveness of Article 5 rights thus becomes undermined by the disparity in the adjudication of claims brought against States with varying degrees of protection. An ECtHR judge summarised the problem as follows:[30]

> [w]hen it comes to determining whether there was a legal basis . . . for an interference, it is often an easy case, for if there was no provision justifying the interference, the Court finds a violation, and the case is closed – the proportionality/necessity analysis is not . . . needed. That is justified, for if the State has made certain commitments and has enshrined them in its

27 *Logvinenko v Russia* (n 26), para 29.
28 *Logvinenko v Russia* (n 26), para 30.
29 *Logvinenko v Russia* (n 26), para 35.
30 Interview with Judge Kūris, 29 January 2021.

> domestic law, it must abide by them. If it does not do that, it is acting against the rule of law viewed from the domestic perspective.
>
> The problem arises when we perceive that certain States have vaguer, less determinate legislation than . . . others, and when they adopt the same measures as those other States, they act according to their law because their law does not prohibit them from acting so. In the end, the requirements of the Convention are stricter towards those States who are more precise in putting in place their legislative framework than those who do not care if it is vague and have greater leeway for their actions.

ECHR jurisprudence makes clear that detention for an unlimited and unpredictable amount of time owing to a legislative gap is in breach of the requirement of legal certainty.[31] Despite this, *Merabishvili* avoids a finding of a violation by concluding that Georgian law provided a clear basis for pre-trial detention and in itself limited its duration. This contradicts the judgment in *Logvinenko*,[32] where the domestic courts' failure to expressly set out a time limit for a further period of pre-trial detention resulted in a breach of Article 5, although overall time limits were stipulated in Russian law. The disparity in the scrutiny between the jurisdictions on account of their different legislative schemes thereby results in a greater level of Convention protection for rights-holders in States that have introduced stricter measures. I support the use of an oversight-based approach in claims brought against such respondent States and resulting findings of an Article 5 violation. However, the gap in not extending this methodology to States that offer less concrete protections causes increased difficulties for individuals who are already unable to benefit from the protection of a concrete time limit domestically. The absence of minimum guarantees in this respect is exacerbated on two levels – first, before national courts, and second, before the ECtHR, which shifts its level of scrutiny accordingly. The goal of subsidiarity which aims to share responsibility for protecting rights is thus undermined, since rather than being left chiefly to national authorities and plugged where necessary by the Court, neither jurisdictional level is able to ensure adequate protection.

This approach was confirmed in *Fedorenko v Russia*.[33] In this case, the ECtHR was not persuaded that the maximum legal time limit should be applied implicitly each time that a judicial body authorised detention. The impugned period in itself did not seem unreasonably long and could be justified by the need for authorities to ensure the proper conduct of the investigation. Nonetheless, regardless of how brief a period of detention on remand may be, its length should be clearly specified by a domestic court, this acting as an

31 See for example, *Baranowski v Poland* App no 28358/95 (ECtHR, 28 March 2000), para 56 and *Gal v Ukraine* App no 6759/11 (ECtHR, 16 April 2015), para 36.

32 *Logvinenko v Russia* (n 26), paras 37–8.

33 *Fedorenko v Russia* App no 39602/05 (ECtHR, 20 September 2011).

essential guarantee against arbitrariness. In this respect, *Fedorenko* finds that the absence of a stated time limit in the District Court's decision amounted to a 'gross and obvious irregularity' capable of rendering the applicant's detention arbitrary and thus 'unlawful' within the meaning of Article 5 § 1 (c).[34] The judgment finds that a person's detention on the basis of such a court order becomes 'tainted with arbitrariness'.[35]

The evaluation of the lawfulness of detention during trial is also subject to oversight in jurisdictions that set out pre-trial time limits in their legislation. A line of Armenian case-law offers a useful illustration in this respect, showing how even in the light of an absence of time limits for detention during trial, oversight can be maintained if equivalent pre-trial guarantees exist. *Vardan Martirosyan v Armenia* concerned an absence of reasons or clarification of the time limit given for a period of pre-trial detention.[36] This reflected gaps in the overall approach of national authorities, with the ECtHR finding that

> this appears to have been the general practice at the material time, since the relevant provisions of domestic law explicitly required the courts to provide reasons and to set time-limits for continued detention only during the pre-trial stage of the proceedings.[37]

This had a knock-on impact on the applicant's detention during trial and failed to afford the applicant adequate protection from arbitrariness, resulting in a finding of an Article 5 § 1 breach. While domestic law therefore did not prescribe maximum time limits for detention during trial, the specification of pre-trial periods was sufficient to extend protections once trial had begun. Similar reasoning was later upheld in the judgment in *Pashinyan v Armenia*, where detention during trial had equally been imposed for an uncertain period of time and with limited reasoning.[38] Armenian law, similarly to Russian law, enshrined time limits to pre-trial detention.[39] The Court therefore in effect replicated its review of the absence of time limits as it applies in pre-trial detention when assessing deprivation of liberty during trial, finding breaches in further Armenian applications.[40] Adjudication rooted in domestic provisions clarifying time limits allows an oversight-based approach; those States that fail to enact such domestic provisions are, by contrast, immune from an equivalent level of oversight.

34 *Fedorenko v Russia* (n 33), para 50; see also *Roman Petrov v Russia* App no 37311/08 (ECtHR, 15 December 2015), paras 43–5.

35 *Fedorenko v Russia* (n 33), para 55.

36 *Vardan Martirosyan v Armenia* App no 13610/12 (ECtHR, 15 June 2021), para 48.

37 *Vardan Martirosyan v Armenia* (n 36), para 49.

38 *Pashinyan v Armenia* App nos 22665/10 and 2305/11 (ECtHR, 18 January 2022), para 54.

39 *Vardan Martirosyan v Armenia* (n 36), paras 26–8.

40 *Mkhitaryan and Others v Armenia* App nos 4693/12, 5728/17, 39583/17 and 45189/18 (ECtHR, 23 June 2022).

The claims in *Lutsenko v Ukraine*,[41] *Gal v Ukraine*,[42] and *Kleutin v Ukraine*[43] similarly illustrate the challenges in adjudicating the right to liberty in the absence of minimum standards grounded on an evolutive approach. In all three, the ECtHR concludes that if a national court does not fix the duration of pre-trial detention, that gives rise to uncertainty even if a maximum is stipulated in domestic law. In *Kleutin*, it was held that judicial orders 'which fix no time-limits for further detention, even when the maximum possible duration of detention is known' are in breach of the ECHR.[44] The overall decision-making of national courts in these cases is considered important as they also failed to give even minimally cogent reasons for imposing pre-trial detention – a factor also considered relevant in the Armenian line of case-law.[45] This echoes several judgments which established a breach of Article 5 § 1 based on both a lack of any reasons for ordering detention on remand and a failure to fix its duration.[46] Indeed, *Lutsenko* notes that ordering further detention without determining a time limit has been found to fall short of the requirements of Article 5 § 1 (c).[47] It also observes that further grounds for the applicant's detention, namely the failure to testify and admit his guilt, contravene key fair trial principles such as freedom from self-incrimination and the presumption of innocence.[48] It was concluded that in the light of all these factors, the impugned period of detention breached Article 5 § 1.

The ECtHR therefore ties together various requirements of Article 5, leading it to engage in an overall assessment of arbitrariness rather than of each guarantee in turn. The consideration of time limits becomes an additional factor confirming the existence of a violation; it does not constitute a standalone issue. The Court evaluates the various protections of Article 5 in combination, rather than looking at the separate requirements in turn as under Articles 8–11. This is problematic, since it serves to dilute the content of one Article 5 safeguard by reference to another. However, as Convention rights are individual in nature, each element of the right necessarily reflects a corresponding obligation on the part of the State. The right to know the length of one's pre-trial detention is held by all Article 5 rights-holders. All Article 5 rights-holders are equally entitled to an explanation by courts of

41 *Lutsenko v Ukraine* App no 6492/11 (ECtHR, 3 July 2012).

42 *Gal v Ukraine* (n 31), para 37.

43 *Kleutin v Ukraine* App no 5911/05 (ECtHR, 23 June 2016), para 105.

44 *Kleutin v Ukraine* (n 43).

45 *Vardan Martirosyan v Armenia* (n 36), *Pashinyan v Armenia* (n 38) and *Mkhitaryan and Others v Armenia* (n 40).

46 *Khudoyorov v Russia* App no 6847/02 (ECtHR, 8 November 2005), paras 136–7; *Vladimir Solovyev v Russia* App no 2708/02 (ECtHR, 24 May 2007), paras 95–8; *Gubkin v Russia* App no 36941/02 (ECtHR, 23 April 2009), paras 111–4; *Arutyunyan v Russia* App no 48977/09 (ECtHR, 10 January 2012), paras 92–3; and *Pletmentsev v Russia* App no 4157/04 (ECtHR, 27 June 2013), para 43.

47 *Lutsenko v Ukraine* (n 41), para 73.

48 *Lutsenko v Ukraine* (n 41), para 72.

relevant and sufficient reasons for their pre-trial detention. By mixing various elements of the provision and reaching a conclusion as to their overall impact on arbitrariness, the ECtHR weakens the effectiveness of the right. This is because the content of each corresponding State obligation becomes diluted where another obligation is upheld, although each aspect of the liberty protection must be addressed independently. This challenge similarly arises in the context of detention under Article 5 § 1 (f) (immigration detention), addressed further in what follows.

To ensure that an appropriate level of discretion is extended, it is necessary for the Court to address each element in turn. This will allow for oversight of whether governments have secured each of the obligations that they hold under the Convention. A legislative anomaly on pre-trial detention time limits when compared to other Contracting States would make it more difficult for the State concerned to justify the absence of this safeguard against arbitrary detention. The ECtHR in *Vinter* reiterated that it 'must have regard to the changing conditions within the respondent State and within Contracting States generally and respond . . . to any emerging consensus as to the standards to be achieved'.[49] This approach would work preventively in prompting States to bring their criminal justice systems in line with shared European standards. Helfer and Slaughter have hence argued that in looking to consensus, the Court can:[50]

> identify potentially problematic practices for . . . States before they . . . become violations, thereby permitting the States to anticipate that their laws may one day be called into question. In the meantime, a . . . government lagging behind in the protection of a certain right is allowed to maintain its national policy but is forced to bear a heavier burden of proof before the ECHR – whose future opinions will turn in part on its own conception of how far the 'trends' in European domestic law have evolved.

Where an applicant's pre-trial detention exceeds the general consensus for the maximum length of such detention among Council of Europe States, the Court could subsequently employ one of two approaches. If national legislation stipulates a maximum length of pre-trial detention, a failure to uphold this standard can be considered arbitrary. If, however, the State has failed to bring its legislation in line with general European standards, the level of discretion – whether expressed as a margin of appreciation or otherwise – can be lowered. In the latter case, only exceptional justifications would allow for

49 *Vinter and Others v the United Kingdom* App nos 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013), para 79.

50 Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale Law Journal 273, 317.

the finding of a non-violation. Otherwise, the Court must apply an evolutive approach through a consensus-based narrowing of the margin. Since national legislation in this way leads to findings of Article 5 violations, it will swiftly become expedient for the State to advance its justice system in line with an emerging consensus. The legitimacy of this proposal is supported by the Interlaken Declaration, which calls on States to take stock of the Court's 'developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system'.[51] The commitments made by Contracting States to limit periods of pre-trial detention must also be incorporated in an evolutive reading and external harmonisation of the right to liberty.[52]

Discretion in the context of bail

Having analysed gaps in protection against arbitrary detention with respect to pre-trial guarantees, this section identifies the Court's use of the living instrument to undermine the progressive interpretation of the ECHR. Since this contradicts the very purpose of evolutive approaches, I argue that the discretion granted to respondent States on this basis is inappropriate. This problem came to the fore in the Grand Chamber judgment in *Mangouras v Spain*.[53] *Mangouras* arose from a 2002 oil spill from the ship MV *Prestige*, of which the applicant was Master. He had been remanded in custody with the bail amount set at €3 million. National courts justified the high bail sum by reference to the seriousness of the alleged offences and the applicant's lack of ties to Spain, where he was detained.[54] The question before the Grand Chamber was whether the applicant's detention for 83 days constituted a violation of Article 5 § 3. The guarantee enshrined in that provision aims to ensure not the reparation of loss but the appearance of the accused at trial.[55] The bail amount must be assessed principally by reference to the individual's

51 'High Level Conference on the Future of the European Court of Human Rights: Interlaken Declaration' (19 February 2010) <https://prd-echr.coe.int/documents/d/echr/2010_Interlaken_FinalDeclaration_ENG> accessed 17 July 2024.

52 See, for example, rule 6.2 of the UN Standard Minimum Rules for the Treatment of Prisoners ('Nelson Mandela Rules'), in line with which '[p]re-trial detention shall last no longer than necessary . . . and shall be administered humanely and with respect for the inherent dignity of human beings'. For further references, see Sabina Garahan, 'Unsentenced Detainees: Socioeconomic Burdens of Pre-Trial Detention' in Walter Leal Filho, Anabela Marisa Azul, Luciana Brandli, Amanda Lange Salvia, Pinar Gökçin Özuyar and Tony Wall (eds), *Peace, Justice and Strong Institutions: Encyclopedia of the UN Sustainable Development Goals* (Springer 2020).

53 *Mangouras v Spain* App no 12050/04 (ECtHR, 28 September 2010).

54 *Mangouras v Spain* (n 53), para 17.

55 *Mangouras v Spain* (n 53), para 78.

means, but may also refer to the cost of damage and the seriousness of the offence.[56]

The majority in *Mangouras* concluded that setting the bail amount at €3 million, beyond the applicant's means, did not breach Article 5 § 3, since account had been taken of his personal situation and lack of ties to Spain.[57] Importantly, the majority also found that national courts were justified in considering the seriousness of the offences in question '[i]n view of the particular context of the case and the disastrous environmental and economic consequences of the oil spill'.[58] In reaching this finding, the Grand Chamber relied on a dynamic reading, looking to the 'growing and legitimate concern both in Europe and internationally' regarding environmental offences.[59] In support of this, the judgment relied on States' powers and obligations as to the prevention of maritime pollution, as well as 'the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and, if appropriate, impose sanctions on them'.[60] The Court likewise identified a 'tendency . . . to use criminal law as a means of enforcing the environmental obligations imposed by European and international law'.[61] These 'new realities' were therefore taken into account in the adjudication of the Article 5 § 3 claim.[62] Yet the amount set for bail clearly failed to consider the accused's means[63] or to even refer *principally* to the individual and his assets.[64]

Some support has been voiced for the Grand Chamber's reasoning:[65]

> [o]il (transport) companies . . . do not always play by the rules of the game and sometimes take unnecessary risks with immense consequences for the environment, causing enormous amounts of damage to both humans and animals . . . the people responsible for such disasters should not be allowed to escape justice and one can certainly sympathise with the position of the Spanish government and the majority of the Grand Chamber that in such special circumstances, new realities justify exceptional measures.

56 *Mangouras v Spain* (n 53), para 81.
57 *Mangouras v Spain* (n 53), para 92.
58 *Mangouras v Spain* (n 53), para 92.
59 *Mangouras v Spain* (n 53), para 86.
60 *Mangouras v Spain* (n 53), para 86.
61 *Mangouras v Spain* (n 53), paras 33 and 86.
62 *Mangouras v Spain* (n 53), paras 86–7.
63 *Mangouras v Spain* (n 53), para 80.
64 *Mangouras v Spain* (n 53), para 81.
65 Strasbourg Observers, 'European Court of Human Rights Goes with the Times: *Mangouras v. Spain*' (*Strasbourg Observers*, 1 October 2010) <https://strasbourgobservers.com/2010/10/01/european-court-of-human-rights-goes-with-the-times-mangouras-v-spain/> accessed 17 July 2024.

New realities – viewed through the lens of the living instrument doctrine – cannot, however, be used to restrict ECHR rights. This constitutes a fundamental breach of the non-regression principle, the very aim of which is to aid progressive development of the Convention. The majority argues that the 'increasingly high standard' required in human rights protection 'correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.[66] The Grand Chamber justifies the domestic courts' consideration of the applicant's 'professional environment' when setting the bail amount as upholding the effectiveness of the bail system.[67] This is problematic, since the rights protection that the ECtHR is tasked with upholding is that enshrined in the Convention. Despite this, the mention of 'fundamental values' in the judgment appears to be a reference to growing concerns regarding environmental offences.[68] While environmental protection is, of course, a valid matter for States to have regard to, it cannot be used to dilute the effectiveness of existing rights. As such, the Court cannot lean on an increasing tendency to use criminal law to enforce environmental obligations without addressing the impact that this has on the applicant's right to liberty. The discretion extended to the respondent State in *Mangouras* is thus inappropriate because it results from a subsidiarity-based use of the living instrument, going against its very nature as an evolutive approach the aim of which must be to further rather than restrict rights.

Bjorge also finds that *Mangouras* lowers the protection offered by Article 5 to individual claimants.[69] Rather than adopting an evolutionary interpretation that would have coincided with the object and purpose of the treaty, the majority instead sought guidance in the subsequent agreements and practice of the States which seemed to reflect an opposing view.[70] The discretion accorded on this basis is inappropriate, since evolutive approaches must stem from a dynamic *progressive* interpretation, as required under the Convention. Moreover, in justifying the applicant's detention on remand, domestic courts referred to the 'public outcry' generated by the oil spill.[71] In this respect, the Grand Chamber began by highlighting the fundamental tenet of the fourth instance doctrine – namely that national authorities are 'better placed' than international judges to assess 'local reality'.[72] The reliance on 'public outcry' is upheld on this basis.[73] In addition, *Mangouras* states that national courts had

66 *Mangouras v Spain* (n 53), para 87.
67 *Mangouras v Spain* (n 53), para 87.
68 *Mangouras v Spain* (n 53), para 86.
69 Eirik Bjorge, 'The Convention as a Living Instrument: Rooted in the Past, Looking to the Future' (2016) 36(7–12) Human Rights Law Journal 243, 251.
70 Bjorge (n 69).
71 *Mangouras v Spain* (n 53), paras 17 and 20.
72 *Mangouras v Spain* (n 53), para 85.
73 *Mangouras v Spain* (n 53), para 85.

taken note of the applicant's age[74] (he was 67 years old at the time that he was remanded in custody),[75] although this does not appear to have been the case.[76] The ECtHR deferred greatly to the findings of domestic courts on the grounds that there was an increasing concern regarding the types of offences of which the applicant stood accused. However, since the living instrument doctrine is an evolutive approach, employing it as a tool of subsidiarity undermines the appropriateness of discretion accorded on this basis. The level of discretion extended to national authorities in taking 'public outcry' into account when determining bail amounts is, consequently, inappropriate.

Legg argues that, for the majority, domestic courts were 'better placed' to assess matters related to the bail decision, such as the accused's 'professional environment'.[77] Yet, the allocation of discretion on this basis could only have been justified by a subsidiarity-based approach. As such, the ECtHR should have either adhered to the fourth instance doctrine without introducing aspects of evolutive approaches, or explained how the trends it identified served to broaden the margin of appreciation. The impact of this would be that States which do not set bail amounts into the millions by reference mainly to the seriousness of the offence and public outcry would be in a minority. It would then be incumbent on them to demonstrate the necessity of their approach. Nonetheless, in *Mangouras*, the Court uses the living instrument, looking to developments across the Contracting States, in a way that limits rather than progresses Article 5. Pursuant to the non-regression principle, if the majority had conducted a consensus analysis and found that States tended to apply a similar approach, it would have been incumbent on the Court to redress the gaps in protection by expanding its consensus analysis to international principles on bail. As such, the UN Human Rights Committee has made clear that bail should be granted 'except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party'.[78] In addition, and of particular importance in *Mangouras*, '[t]he mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial'.[79] Neither public outcry nor the gravity of the offence may be considered.

The extension of discretion 'on the basis of expertise is an outworking of the principle of subsidiarity inherent in the treaty protection of human rights'.[80] While deference can be legitimate if the particular expertise of

74 *Mangouras v Spain* (n 53), para 92.
75 *Mangouras v Spain* (n 53), para 58.
76 *Mangouras v Spain* (n 53), para 17.
77 Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 169.
78 UN Human Rights Committee, Views of 2 April 1997, Communication No. 526/1993, *Michael and Brian Hill v Spain*, para. 12.3. See further references in Garahan (n 52) 2–3.
79 UN Human Rights Committee (n 78).
80 Legg (n 77), 174.

national authorities is duly clarified, it cannot be afforded automatically based on general proximity to the case facts alone. As such, in *Mangouras*, rather than identifying relevant aspects of the State's expertise, the Grand Chamber accepted 'public outcry' as a factor for broadening discretion. Worryingly, this was moored to a dynamic interpretation in accordance with which societies were found to increasingly favour crackdowns on the type of offence at issue. This is a dangerous misstep – populist attempts to weaponise tragic events and subsequently call for a 'tough on crime' approach abound.[81] In allowing an individual's right to liberty to be ceded to 'public outcry', the ECtHR opens the floodgates for governments to insist that they are 'better placed' and thus authorised to expand the imposition of bail, violating the fundamental aims both of evolutive interpretation and non-regression.

Discretion in the aims of immigration detention under Article 5 § 1 (f)

Article 5 § 1 (f) permits 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. This gives States the power to detain foreign citizens in an immigration setting.[82] As with the other limbs of Article 5 § 1, detention in this field must be free from arbitrariness.[83] The principle that detention should not be arbitrary applies to detention under the first limb of Article 5 § 1 (f) in the same manner as to detention under the second limb.[84] Protection against arbitrariness in this sphere requires that the deprivation of liberty is imposed in good faith and is closely connected to the ground of detention relied on by the government. The place and conditions of detention must be appropriate, bearing in mind that it is applied to persons who 'often fearing for their lives, have fled from their own country', rather than to those convicted of criminal offences.[85] Finally, the length of detention should not exceed that reasonably required for the purpose pursued.[86] These elements can hence be considered essential in adjudicating a claim alleging a violation of Article 5 § 1 (f). This section considers, first, the inappropriate use of subsidiarity in evaluating safeguards from arbitrariness in immigration detention, and second, the lack of an evolutive approach in developing protections in this area.

81 See, for example, Marc Mauer, 'Why Are Tough on Crime Policies So Popular?' (1999) 11(1) Stanford Law and Policy Review 9.

82 *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 15 December 2016), para 89.

83 *Saadi v the United Kingdom* App no 13229/03 (ECtHR, 29 January 2008), paras 64–6.

84 *Saadi v the United Kingdom* (n 83), para 73.

85 *Suso Musa v Malta* App no 42337/12 (ECtHR, 23 July 2013), para 93.

86 *Suso Musa v Malta* (n 85), para 93.

Subsidiarity in evaluating safeguards from arbitrary immigration detention

The 'quality of the law' assessment under Article 5 § 1 attracts an increasingly subsidiarity-based approach. The 'quality of the law' implies that where legislation authorises deprivation of liberty, it must be sufficiently accessible, precise, and foreseeable in its application. Factors relevant to this assessment – referred to in some cases as 'safeguards against arbitrariness' – include the existence of clear legal provisions for ordering, extending and setting time limits for detention, and an effective remedy for challenging the lawfulness and length of detention.[87] Standardising these safeguards, which already form an integral part of Article 5 review, can offer a more streamlined and effective approach to adjudicating the right to liberty. Deferring to relevant European and international principles to do so can plug the gaps in minimum standards of protection. This will limit the space left to States to argue that the solutions they offer, some of which are explored in what follows, are compatible with the right to liberty. A uniform body of standards can thereby help to ensure that the exclusion of necessity and proportionality testing from the scope of Article 5 § 1 (f) does not undermine the fundamental condition of Article 5, applicable to all grounds of detention, that the individual is shielded from arbitrariness.

The strongly subsidiarity-based approach can be seen in jurisprudence pertaining to the second limb of Article 5 § 1 (f). The judgment in *Chahal v the United Kingdom*[88] confirms that all that is required under the provision is that 'action is being taken with a view to deportation' – it is immaterial whether the underlying decision to expel can be justified under either national or Convention law.[89] This is why the UK's controversial Illegal Migration Act falls foul of even this standard, as it permits detention regardless of whether or not deportation is being pursued.[90] Any deprivation of liberty under Article 5 § 1 (f) can be imposed only for as long as deportation proceedings are in progress. If such proceedings are not conducted with due diligence, detention will cease to be permissible.[91] Thus, while accepting that the applicant's detention for six years pending deportation was 'bound to give rise to serious concern', the ECtHR nonetheless concluded that national authorities had acted with due diligence throughout the proceedings and that there were sufficient guarantees against the arbitrary deprivation of his liberty.[92]

87 *J.N. v the United Kingdom* (n 19), para 77.
88 *Chahal v the United Kingdom* App no 22414/93 (ECtHR, 15 November 1996).
89 *Chahal v the United Kingdom* (n 88), para 112.
90 Sabina Garahan, 'Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers Under the Illegal Migration Act' (2024) Public Law 11, 13.
91 *Chahal v the United Kingdom* (n 88), para 113.
92 *Chahal v the United Kingdom* (n 88), para 123.

Crucially, the applicant had no right of appeal against the deportation order owing to national security concerns. Recourse was instead had to a non-statutory advisory procedure. The panel, which included experienced judges, assessed the evidence relating to the national security threat posed by the applicant. Although its report had never been disclosed, the panel had agreed with the UK Home Secretary that the applicant should be deported for reasons of national security. The ECtHR considered that as this procedure provided an adequate guarantee that there were at least prima facie grounds justifying the applicant's detention, the executive had not acted arbitrarily.[93] As admitted by the majority, 'the domestic courts were not in a position effectively to control whether the decisions to keep Mr Chahal in detention were justified, because the full material on which these decisions were based was not made available to them'.[94] The majority nevertheless concluded that the advisory panel procedure provided an important safeguard against arbitrariness.[95]

The very presence of the advisory panel was therefore sufficient for the Court to conclude that the applicant would be protected from arbitrariness. However, the judgment failed to fully explain why this procedure was capable of providing a sufficient safeguard, as made clear by the reference to at least 'prima facie' grounds. As noted by partly dissenting Judges Martens and Palm[96]:

> [t]aking into account the importance of guarantees against arbitrariness especially in respect of detention under Article 5 para. 1 (f) . . . as well as the necessity of uniform standards being applied in this respect to all member States, we cannot but conclude that . . . the panel does not constitute an adequate guarantee against arbitrariness. The fact that it includes 'experienced judicial figures' . . . cannot change this conclusion.

The partly dissenting judges draw attention to the importance of maintaining consistent Article 5 standards in this field – as shown by the judgment, neglecting uniformity leads the Court to accepting a solution developed by a respondent government that falls short of necessary protections. Moreover, in the secretive context in which this arbitrariness review was alleged to have taken place, an identification of bad faith or deception would have been virtually impossible. This echoes the unwillingness to delve into the good faith shown by the Maltese Government, around which the Court had 'reservations'.[97] Gaps in protection consequently arise due to a hesitance to assess the presence

93 *Chahal v the United Kingdom* (n 88), para 123.
94 *Chahal v the United Kingdom* (n 88), para 121.
95 *Chahal v the United Kingdom* (n 88), para 122.
96 *Chahal v the United Kingdom* (n 88), Joint Partly Dissenting Opinion of Judges Martens and Palm, para 6.
97 *Suso Musa v Malta* (n 85), para 100.

of bad faith, which would necessarily render detention arbitrary: 'detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities'.[98] As explored in Chapter 5, this pattern continues to persist in the context of adjudicating Article 18, the very provision tasked with addressing a lack of good faith by State authorities. Since immigration detention may be imposed as an act of political expediency,[99] the evaluation of whether or not bad faith marred the decision to detain is especially vital.

When assessing the arguments under Article 5 § 4, the majority in *Chahal* by contrast held that the panel procedure did not comply with Convention requirements. This limb entitles an individual to take proceedings by which the 'lawfulness of . . . detention shall be decided speedily by a court and . . . release ordered if the detention is not lawful'. The reference to the 'lawfulness' of detention directly echoes Article 5 § 1 (f), which permits only the 'lawful arrest or detention of a person . . . against whom action is being taken with a view to deportation or extradition'. In the light of this, it is somewhat paradoxical for the majority in *Chahal* to conclude under Article 5 § 1 (f) that the applicant's detention was lawful, while at the same finding a violation of Article 5 § 4, since the advisory panel procedure forms the crux of each argument. This discrepancy may be explained by the fact that, with relation to Article 5 § 1 (f), the Court maintains that it is immaterial whether the underlying decision to expel could be justified under national or Convention law,[100] while Article 5 § 4 independently grants the right to a speedy review of the lawfulness of detention. At the same time, such review should encompass those conditions which are essential for the 'lawful' detention of a person according to Article 5 § 1 (f).[101] The facts surrounding the lawful arrest or detention of an individual against whom action is being taken with a view to deportation or extradition must fall to be considered. The Court's hesitance to adopt an oversight-based approach undermines the effectiveness of the right in this setting, since the link between the lawful ground justifying detention under Article 5 § 1 and the right to review that detention under Article 5 § 4 becomes undermined.

The ECtHR's hesitance to delve deeper into a factual analysis of Article 5 § 1 (f) claims thus leaves a gap in the protections it offers. It is open to applicants to assert that the underlying decision to expel them is unjustified either by challenging the decision-making process under Article 6, or by arguing that expulsion would be contrary to other Convention provisions. These can include Article 3, where they may be exposed to torture or inhuman or

98 *James, Wells and Lee v the United Kingdom* App nos 25119/09, 57715/09 and 57877/09 (ECtHR, 18 September 2012), para 192.

99 Sabina Garahan, 'Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers Under the Illegal Migration Act' (2024) Public Law 11, 15–7.

100 Garahan (n 99), para 112.

101 Garahan (n 99), para 127.

degrading treatment in the requesting State (an argument which the applicant in *Chahal* was able to successfully make), or Article 8, if expulsion would result in the separation of the individual from their family. However, since the basis on which they are detained stems from the initial decision to deport or extradite under the second limb of Article 5 § 1 (f), the exclusion of an assessment of the grounds on which detention is based strips a key Article 5 safeguard of its effectiveness.

The lack of an evolutive approach to immigration detention

As under pre-trial detention, fixed time limits are not a requirement of Article 5 § 1 (f).[102] The third-party intervener in *J.N. v the United Kingdom*, Bail for Immigration Detainees, pointed to the general consensus among Contracting States in which the UK was an anomaly – it is 'common ground amongst the majority of Contracting States . . . that administrative detention of foreign nationals for the purposes of expulsion should be subject to maximum time-limits'. With the judgment pre-dating Brexit, the UK was also 'alone among the Member States of the European Union in placing no time limit on the detention of foreign nationals'.[103] The judgment finds that while the EU Returns Directive system, which enshrines a maximum initial time limit on immigration detention of six months, might be viewed by:

> critics as reflecting a preferable approach . . . that does not mean that the system set up under the Returns Directive, including in particular its provision of time-limits, is to be taken as being imposed by [Article 5 § 1 (f)] . . . or as representing the only system conceivable in Europe as being compatible with [Article 5 § 1 (f)].[104]

There is, however, no indication of other systems that may help to protect the rights at stake. The judgment also defers to the fact that Council of Europe standards do not urge maximum time limits for immigration detention.[105] A review of relevant principles is therefore used to undermine rather than promote the effectiveness of the right. The Court should instead consider the movement towards incorporating maximum time limits in this area, especially in the light of this being enshrined in EU standards to which many Contracting States have subscribed. This can form part of the consensus-focused framework for progressive interpretation since it can be used to support an evolutive

102 *Lazăr v Romania* App no 20183/21 (ECtHR, 9 April 2024), para 97; *J.N. v the United Kingdom* (n 19).
103 *J.N. v the United Kingdom* (n 19), para 70.
104 *J.N. v the United Kingdom* (n 19), para 91.
105 *J.N. v the United Kingdom* (n 19), para 91.

reading of Article 5 § 1 (f) – one which fulfils the goal of the right to liberty by seeking to preclude any arbitrary periods of detention.

The judgment in *J.N.* goes on to explain that the presence of fixed time limits cannot be assessed 'in the abstract but should instead be viewed in the context of the immigration detention system taken as a whole', using the example of States which have fixed time limits for detention pending expulsion but which might not offer detainees an effective judicial remedy.[106] For this reason, it is stated that the ECtHR has 'resisted interpreting Article 5 so as to impose a uniform standard on Contracting States . . . rather, it has preferred to examine the system of immigration detention as a whole, having regard to the particular facts of each individual case'.[107] The existence of other possible guarantees is used to chip away at an evolving convergence towards protections in key areas, such as imposing a maximum time limit on detention or at the least seeking to legally limit it as far as possible. The risk of arbitrariness within the UK system is consequently found by the Court to be allayed 'in principle' by the possibility of challenging ongoing detention at any time. This undermines the very nature of Article 5, which seeks to safeguard an individual from arbitrary detention.[108] The Court appears to recognise that the UK immigration context raises the risk of arbitrary detention, and consequently points to judicial review as capable of assuaging that risk. Having recognised the possibility of arbitrariness stemming from an absence of time limits, however, the solution must also appear in that area.

The Court dilutes the right to liberty by engaging only in overall arbitrariness review and by permitting protections to be watered down in one area where they are found to be stronger in another. This gap in protection reappeared in the *Ahmed v the United Kingdom* judgment where it was noted with 'some concern that the period of detention under challenge lasted for nearly two and a half years, during which time the applicant was exercising his right to bring proceedings challenging the decision to deport him'.[109] Despite this, the Court was 'satisfied that, in the particular circumstances, the requirements of Article 5 § 1 (f) have been met'.[110] The mere existence of judicial review thus appears to give carte blanche to a State with no limit on immigration detention in place. Nevertheless, with the UK Illegal Migration Act ousting the possibility of judicial oversight for the first 28 days of detention[111] and thereby stripping the absence of time limits of any supporting anti-arbitrariness framework, a finding that the UK system breaches Article 5 requirements must now be inevitable.

106 *J.N. v the United Kingdom*, para 92.
107 *J.N. v the United Kingdom*, para 92.
108 *Bozano v France* App no 9990/82 (ECtHR, 18 December 1986), para 54; *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004), para 171.
109 *Ahmed v the United Kingdom* App no 59727/13 (ECtHR, 2 March 2017).
110 *Ahmed v the United Kingdom* App no 59727/13 (ECtHR, 2 March 2017).
111 Sabina Garahan, 'Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers Under the Illegal Migration Act' (2024) Public Law 11, 13.

The Court has, by contrast, looked to external standards in reviewing the immigration detention of minors. In this respect, the Court emphasises calls to end child immigration detention by the Council of Europe, as well as the Inter-American Court of Human Rights and UN bodies including the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.[112] Relevant judgments cite the UN Convention on the Rights of the Child (UNCRC), Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, and a Council of Europe position paper on the rights of migrant children in an irregular situation.[113] A child's 'extreme vulnerability should be a decisive factor' in adjudicating Article 5 § 1 (f) claims,[114] which provides solid grounding for the conclusion that acting without due regard to children's best interests entails a breach of the provision.[115] This helps to support the previously posited connection between the notion of vulnerability and that of effectiveness – a link which decrees both non-regression and evolutive interpretation, including by reference to external standards where need be. Turning to expert opinions and specialised standards has provided leverage for limiting discretion left to the State in imposing immigration detention on children. This approach can be helpfully replicated in other contexts under Article 5 § 1 (f).

A strongly subsidiarity-based approach is taken in the field of immigration detention. This undercuts the exhaustive nature of the Convention right to liberty – although a clear enumeration of only two justifications for detaining migrants should limit the bases for detention, an 'expansive approach' has made it 'easier for states to demonstrate that the detention of refugees and other migrants falls within either limb'.[116] For instance, the determination of when the first limb of the provision ceases to apply (because the individual has been granted formal authorisation to enter or stay) is largely dependent on national law.[117] Where a person has been detained under Article 5 § 1 (f), the Grand Chamber, in interpreting the second limb, has held that as long as a person was being detained 'with a view to deportation', there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing.[118] The Court has expressed reservations about the practice of automatically placing asylum seekers in detention without an individual assessment of their

112 *G.B. and Others v Turkey* App no 4633/15 (ECtHR, 17 October 2019), paras 67–79.

113 *G.B. and Others v Turkey* (n 112), paras 67–79.

114 *M.H. and S.B. v Hungary* App nos 10940/17 and 15977/17 (ECtHR, 22 February 2024), para 72.

115 *M.H. and S.B. v Hungary* (n 114), para 80.

116 Carla Ferstman, 'Enforcing Hostility and Social Control' in *Conceptualising Arbitrary Detention: Power, Punishment and Control* (Bristol University Press, 2024) 95.

117 Ferstman (n 116), para 97.

118 *Saadi v the United Kingdom* (n 83), para 72.

particular needs.[119] In spite of this, it has not exercised oversight in this area or sought to engage in evolutive interpretation, relying instead on a strongly subsidiarity-based approach. As such, the practice of automatic detention has not been found to be in breach of the ECHR.

The judgment in *Mahamed Jama v Malta* noted only the existence of 'odd practices on the part of the domestic authorities when dealing with immigrant arrivals',[120] without seeking to test the compatibility of such 'odd practices' with the Convention. *Suso Musa v Malta*, also brought against the Government of Malta, had identified the 'odd practices' to be the bypassing of the voluntary departure procedure and across-the-board decisions to detain.[121] The applicant in *Suso Musa* had entered Malta 'in an irregular manner' by boat.[122] On arrival, he was arrested and presented with a document containing a Return Decision and a Removal Order. He was categorised as a 'prohibited immigrant' based on his 'entry into Malta in an irregular manner' and a lack of sufficient means to support himself.[123] The Return Decision outlined the possibility of applying for a period of voluntary departure. The same document included a Removal Order grounded in the rejection of the applicant's request for a period of voluntary departure, yet the applicant had never filed a request – the rejection had been automatically delivered alongside information as to how to make the request. The applicant was never informed of the factors grounding this decision or given the chance to provide information in support of a request.[124]

The lack of necessity and proportionality testing under Article 5 § 1 (f) creates gaps in protection that, as has been shown with respect to child detention, can be addressed by reference to a consensus arising from international principles. The judgment in *Suso Musa* referred to Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers, which outlines that such measures 'should be applied only after a careful examination of their necessity in each individual case'.[125] In this light, the Court had 'reservations as to the Government's good faith in applying an across-the-board detention policy'.[126] This aspect of the claim, however, does not receive further treatment and a violation is ultimately found on the grounds that the place and conditions of detention breached the requirements of Article 5 § 1 (f).[127] Moreover, the question of whether detention pending an asylum determination was unreasonably lengthy is coupled with a review of

119 *Thimothawes v Belgium* App no 39061/11 (ECtHR, 4 April 2017), para 73; *Mahamed Jama v Malta* App no 10290/13 (ECtHR, 26 November 2015), para 146.
120 *Mahamed Jama v Malta* (n 119), para 146.
121 *Suso Musa v Malta* (n 85), para 100.
122 *Suso Musa v Malta* (n 85), para 7.
123 *Suso Musa v Malta* (n 85), para 7.
124 *Suso Musa v Malta* (n 85), para 8.
125 *Suso Musa v Malta* (n 85), para 100.
126 *Suso Musa v Malta* (n 85), para 100.
127 *Suso Musa v Malta* (n 85), para 101.

whether the applicant was held in inappropriate conditions.[128] This, again, has the effect of diluting one protection against arbitrary detention by reference to another. As such, where inappropriate conditions are not found, a violation of Article 5 § 1 (f) is less likely to be established.

The lack of an evolutive approach to the assessment of the State's 'odd practices' left gaps in Convention protections for migrants. A consensus analysis to determine the scale of uptake of this approach across the Council of Europe, an indication that this breached protections against arbitrary detention were such a consensus to be found, and references to international standards as also recommended with respect to the detention of minors, would have contributed to the practical effectiveness of the right beyond a mere indication of concern. If Malta had been found to be an anomaly, a consensus assessment would have spurred an oversight-based and evolutive review, equally by reference to relevant international instruments. Instead, they are noted without any engagement – an issue that occurs with respect to judgments on the detention of minors. The Court therefore fails to rely on key principles and expertise which would help in the determination of 'odd practices' as undermining the effectiveness of the rights of vulnerable detainees.

The judgment in *Chahal* also makes references to – but ultimately disregards – relevant international materials such as the UDHR and submissions from the UN Human Rights Committee. In doing so, it fails to enact an evolutive reading of the right to liberty which looks to an international consensus where needed to fill gaps in rights protection for vulnerable groups facing immigration detention. Ferstman in particular has powerfully framed the experience of asylum seekers as one of punishment and othering, ultimately driving the increased use of detention in this sphere.[129] Rather than deferring to principles that may help to close the protection gaps that have arisen through a lack of uniformity and assessment of bad faith reasons in imposing detention, a 'restrictive view' of Article 5 is adopted. Such principles may include the Office of the United Nations High Commissioner for Refugees (UNHCR) Detention Guidelines which, in contrast to ECHR standards, require immigration detention to be necessary and proportionate.[130] Instead of seeking to advance in line with a wider international rights consensus on the need to protect migrant rights, the Court's interpretation remains 'centred on a reading of the right to liberty within the limited and confining context of the ECHR as a regional human rights instrument'.[131]

128 *Suso Musa v Malta* (n 85), para 102.

129 Carla Ferstman, 'Enforcing Hostility and Social Control' in *Conceptualising Arbitrary Detention: Power, Punishment and Control* (Bristol University Press, 2024).

130 UNHCR Detention Guideline, Guideline 4.2, para 34.

131 Ian Bryan and Peter Langford, 'The Lawful Detention of Unauthorised Aliens Under the European System for the Protection of Human Rights' (2011) 80 Nordic Journal of International Law 193, 201.

By contrast, in *Z.A. and Others v Russia*, the Court confidently pointed to 'the argument of the applicants and the UNHCR pointing to the lack of any legal basis for the applicants' confinement in the transit zone of Sheremetyevo Airport'.[132] Since the Russian Government 'essentially did not dispute that allegation' and as there was 'no trace of any provision of Russian law capable of serving as grounds for justifying the applicants' deprivation of liberty',[133] a breach of Article 5 § 1 could be found and supported by references to findings of an expert body – here, UNHCR. However, it is the ease of establishing a complete absence of lawful justification for detention that emboldens the Court to acknowledge the relevance of expert knowledge. Preserving engagement with international materials in these extreme cases does no more than strengthen an existing finding of a breach, rather than helping to address gaps where needed in those cases where State disregard for Convention principles may be less openly wilful.

The challenges raised by the Court's reliance on subsidiarity and unwillingness to adopt an evolutive approach to Article 5 § 1 (f) are further demonstrated in the judgment of *Saadi v the United Kingdom*. In *Saadi*, the applicant had been detained for seven days and released the day after his asylum claim had been refused at first instance. The Grand Chamber concluded that his detention could not be said to have exceeded that reasonably required for the purpose pursued.[134] No further analysis was undertaken to justify this conclusion. It was ultimately held that there had been no violation of Article 5 § 1 (f). In the light of the 'difficult administrative problems with which the United Kingdom was confronted during the period in question, with increasingly high numbers of asylum-seekers', detaining the applicant for seven days in 'suitable conditions to enable his claim to asylum to be processed speedily' was not in breach of the ECHR.[135] The reference to 'suitable conditions' reflects the finding in *Saadi* that the detention centre where the applicant had been held was 'specifically adapted' to house asylum seekers and that 'various facilities, for recreation, religious observance, medical care and, importantly, legal assistance, were provided'.[136] Thus, while the majority admitted that there had been an 'interference with the applicant's liberty and comfort', his detention was held to be free from arbitrariness.[137] The ECtHR's ability to identify arbitrariness is thereby weakened by the global nature of its analysis, a problem previously shown to arise in the field of pre-trial detention. Each distinct guarantee under Article 5 § 1 (f) contributes to the provision's overall effectiveness – so it follows that each aspect of protection

132 *Z.A. and Others v Russia* App nos 61411/15, 61420/15, 61427/15 and 3028/16 (ECtHR, 21 November 2019), para 164.

133 *Z.A. and Others v Russia* (n 132).

134 *Saadi v the United Kingdom* (n 118), para 79.

135 *Saadi v the United Kingdom* (n 118), para 80.

136 *Saadi v the United Kingdom* (n 118), para 78.

137 *Saadi v the United Kingdom* (n 118), para 78.

from arbitrariness should be evaluated in turn. Rights-holders have an interest in their detention being carried out in good faith and having a genuine link to the permitted aim of detention, and in the appropriateness of the place and conditions where they are held. Each of these protections imposes a discrete and corresponding obligation on national authorities. The State's compliance with one element of Article 5 § 1 (f) cannot absolve it of its duty to secure the remaining guarantees.

Saadi, moreover, results in a 'lesser of two evils' approach, with the judgment finding that 'a more efficient system of determining large numbers of asylum claims rendered unnecessary recourse to a broader and more extensive use of detention powers'.[138] This has the effect of extending discretion to States in organising their immigration systems[139] and detaining individuals on the grounds that an alternative system may have caused more egregious violations. Yet, as explained in Chapter 1, efficiency considerations cannot ground a subsidiarity-based approach.[140] In *Saadi*, the Court includes reasons of efficiency, which do not form part of its formulation of subsidiarity, in the determination of the breadth of discretion, this time referring to the efficiency concerns of national judiciaries. This creates problems, since questions of efficiency do not respond to the Court's wish not to substitute its decision-making for that of the domestic courts. The use of a subsidiarity-based approach to justify detention under Article 5 § 1 (f) thus has no legitimate basis. Consequently, although the grounds for detention under Article 5 § 1 should be interpreted narrowly,[141] the Court's use of its methods of interpretation in this sphere leaves a large scope of discretion to respondent States. Most worryingly, this is not acknowledged by the Court; neither the margin of appreciation nor any other subsidiarity-based approach is mentioned or analysed in the *Saadi* judgment. It is worth noting that, since *Saadi* was handed down, the UK's Illegal Migration Act has introduced 'the very detention powers that the majority in *Saadi* was seeking to avert'.[142] Detention imposed under the Act will therefore clearly not be found to create the necessary link between the aim and place of detention.[143] It can reasonably be queried whether the green light given to the UK in its approach allowed the eventual and total disregard of basic ECHR principles.[144]

138 *Saadi v the United Kingdom* (n 83), para 80.

139 Cornelisse refers to this as 'the discourse of "efficiency, management and control"' – Galina Cornelisse, 'Immigration Detention in Contemporary Europe' in *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Brill 2010) 24.

140 See the analysis of the *Burmych* and *Turan* case-law in Chapter 1.

141 *Ladent v Poland* App no 11036/03 (ECtHR, 18 March 2008), para 72.

142 Sabina Garahan, 'Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers Under the Illegal Migration Act' (2024) Public Law 11, 13.

143 Garahan (n 142).

144 Sabina Garahan and Matthew Gillett, 'Legislative Scrutiny: Illegal Migration Bill', HC 1241, HL Paper 208 (11 June 2023), Written Evidence by Dr Sabina Garahan and Dr Matthew

Moreover, as per the dissenting judges in *Saadi*, positioning detention as being in the interests of the individual is 'an exceedingly dangerous stance to adopt'.[145] Immigration detention in a person's own interests is not permitted by any of the exhaustive grounds listed in Article 5 § 1. In the context of Article 5 § 1 (e), those who are not medically diagnosed with alcohol addiction but whose conduct under the influence of alcohol poses a threat to public order or to themselves can be taken into custody for their own interests, including their health or personal safety.[146] No such justification can be read into the text of Article 5 § 1 (f). The Court explains that the reason why those mentioned in Article 5 § 1 (e) can be deprived of their liberty is that they are 'socially maladjusted', and may thus pose a threat not only to public safety but to themselves.[147] As previously explained, Article 5 § 1 (e) falls beyond the remit of this chapter, but this comparison does help to clarify that as no equivalent concerns can be found in Article 5 § 1 (f) jurisprudence, the creation of a justification for detention on their basis renders inappropriate any discretion granted specifically as a result.

Regarding the absence of an evolutive approach in this area, O'Nions recognises that the 'reluctance [in *Saadi*] to require specific necessity in the decision to detain does not sit comfortably with international human rights or refugee law',[148] or indeed with the Council of Europe's own recommendations.[149] In approving the *Chahal* approach to the second limb of Article 5 § 1 (f), the *Saadi* majority 'paid little regard to international treaty provisions applicable to the ECtHR's interpretative responsibilities'.[150] This supports the position that the 'restrictive view' of Article 5 § 1 (f)[151] stems from the fact that 'the Court has read its substantive rights protections for migrants through a sovereignty bias'.[152] By adopting a stance to the provision

Gillett (IMB0015) <https://committees.parliament.uk/writtenevidence/119881/pdf/> accessed 17 July 2024, and University of Essex, 'Essex Experts Warn Illegal Migration Bill Could See UK Breach European Law' (*University of Essex*, 25 May 2023) <https://www.essex.ac.uk/news/2023/05/25/illegal-migration-bill-could-breach-european-law> accessed 17 July 2024.

145 *Saadi v the United Kingdom* (n 83), Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä.

146 *Hilda Hafsteinsdóttir v Iceland* App no 40905/98 (ECtHR, 8 June 2004), para 42.

147 *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980), para 98.

148 Helen O'Nions, 'Exposing Flaws in the Detention of Asylum Seekers: A Critique of *Saadi*' (2008) 17 Nottingham Law Journal 34, 40.

149 Recommendation Rec (2003) 5 of the Committee of Ministers to member states on measures of detention of asylum seekers <https://rm.coe.int/16805e0313> accessed 17 July 2024.

150 Bryan and Langford (n 131) 212.

151 Bryan and Langford (n 131) 201.

152 Başak Çalı, Ledi Bianku and Iulia Motoc, 'Migration and the European Convention on Human Rights' in Başak Çalı, Ledi Bianku and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (Oxford University Press 2021) 13.

that is strongly deferential to State sovereignty,[153] the Court appears to reflect the process-based subsidiarity outlined in Chapter 1.

Discretion in the 'educational supervision' of minors under Article 5 § 1 (d)

The notion of a minor in the Convention context refers to a person under the age of 18.[154] Article 5 § 1 (d) contains specific but non-exhaustive examples of circumstances in which minors can be detained, namely for the purpose of (a) their educational supervision or (b) bringing them before the competent legal authority.[155] The first limb of Article 5 § 1 (d) authorises the deprivation of a minor's liberty in their own interests, regardless of whether they are suspected of having committed a criminal offence or are considered an at-risk child.[156] These aspects of Article 5 § 1 (d) give rise to a subsidiarity-based approach on the part of the ECtHR, without a turn to the more progressive advancement of Article 5 urged by this book. This section identifies the resultant gaps in protection and suggests how they may be addressed by a move away from an inappropriate level of subsidiarity towards an evolutive approach.

In the Convention sphere, the words 'educational supervision' should not be equated rigidly with notions of classroom teaching.[157] In the context of a young person in local authority care, educational supervision should embrace the various aspects of the exercise by the local authority of parental rights for the benefit and protection of the child.[158] This section argues that the Court should look to international standards in determining whether the purpose of restrictions under Article 5 § 1 (d) has been met, as this helps to ensure a more progressive interpretation of the provision (as required under the Convention). In determining whether detention under Article 5 § 1 (d) was lawful and ordered 'for the purpose' of educational supervision, the ECtHR chiefly defers to national law.[159] In addition, any deprivation of liberty must comply with the overall purpose of Article 5 to protect the individual from arbitrariness.[160] As with immigration detention under Article 5 § 1 (f), there must also be a relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.[161]

153 O'Nions (n 148) 37.

154 *Koniarska v the United Kingdom* App no 33670/96 (ECtHR, 12 October 2000).

155 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006), para 100.

156 *D.L. v Bulgaria* App no 7472/14 (ECtHR, 19 May 2016), para 71.

157 *Ichin and Others v Ukraine* App nos 28189/04 and 28192/04 (ECtHR, 21 December 2010), para 39; *D.G. v Ireland* App no 39474/98 (ECtHR, 16 May 2002), para 80.

158 *Koniarska v the United Kingdom* (n 154).

159 *D.L. v Bulgaria* (n 156), para 71; *Bouamar v Belgium* App no 9106/80 (ECtHR, 29 February 1988), para 47.

160 *D.L. v Bulgaria* (n 156), para 71; *Bouamar* (n 159), para 47.

161 *D.L. v Bulgaria* (n 156), para 71; *D.G.* (n 157), para 75.

As under Articles 5 § 1 (b) and (e), the concept of 'lawfulness' under Article 5 § 1 (d) requires the measure to be proportionate to the aims that are relied on – specifically, those relating to education.[162] Indeed, the placement of a minor in a closed institution must be proportionate to the aim of 'educational supervision' and a measure of last resort, taken in the child's best interests and intended to prevent serious risks for their development.[163] In determining these as salient factors, the Court has recourse to 'relevant international standards'.[164] However, it has arguably failed to evolve its approach to child rights in line with key international materials – in particular, the UNCRC. While specialised international instruments are said to be relevant, they are not structurally incorporated within a claim's adjudication in a manner capable of building a more progressive body of jurisprudence. It is argued that the development of minimum guarantees reflective of the international commitments to which all States have signed up (including the UNCRC) should be rooted in a consensus that expands towards international principles where needed to address gaps in protection.

The proposals in Chapter 2 for the ECtHR to make greater recourse to international standards through a consensus approach are of especial relevance to the development of Article 5 § 1 (d). This is because children in detention are an especially vulnerable group whose rights must be expanded in line with the modern-day understanding of child rights. In particular, in highlighting Contracting States as signatories to the UNCRC and other key instruments, the Court can use the consensus methodology to promote an evolutive approach in this sphere. This would be based on the normative justifications for including specialised international instruments within the adjudication of a claim – namely the non-regression of Convention rights, which must be kept effective, especially for vulnerable groups. As a consequence, and importantly, protections under Article 5 would evolve progressively, as required by the mandatory evolutive interpretation of the Convention. This would keep standards on child rights in line with an international consensus. It would also result in proportionality testing that does not cede children's rights to the more progressively developed interests of adults under Article 8 of the ECHR (the right to private and family life). The issue of a minor's underdeveloped right to liberty being outweighed by competing Convention rights is explored in Chapter 4.

A willingness to engage in a more evolutive adjudication of Article 5 § 1 (d) was shown in the Grand Chamber judgment of *Blokhin v Russia*, which made extensive reference to a variety of international standards on the rights of the child.[165] These include findings of other international human rights bodies

162 *D.L. v Bulgaria* (n 156), para 74.
163 *D.L. v Bulgaria* (n 156), para 74.
164 *D.L. v Bulgaria* (n 156), para 74.
165 *Blokhin v Russia* App no 47152/06 (ECtHR, 23 March 2016), paras 77–89.

with respect specifically to the respondent State, for instance, concluding observations from the Committee on the Rights of the Child which 'urged the State party to establish a juvenile justice system in full compliance with the [UNCRC] . . . and with other relevant standards' and recommended that the Russian Federation 'prevent the unlawful detention of children and ensure that legal safeguards are guaranteed for children detained'.[166] The judgment noted that as per 'established international law, the health of juveniles deprived of their liberty shall be safeguarded according to recognised medical standards applicable to juveniles in the wider community'.[167] In this respect, it cited to the 2008 European Rules for juvenile offenders subject to sanctions or measures, Article 3 § 3 of the UNCRC, and Rules 49 to 53 of the UN Rules for the Protection of Juveniles Deprived of their Liberty ('Havana Rules'),[168] showing a movement towards an evolutive approach in this sphere. In doing so, *Blokhin* highlighted the capacity of the Court's methodological tools to improve the effectiveness of right to liberty protections enshrined in the Convention. An evolutive approach can help to limit the discretion extended to States in Article 5 cases in a way that is consistent with rights standards across the Council of Europe. In *Blokhin*, it was considered that detention had been imposed for the purposes of 'behaviour correction' and the need to prevent the applicant from committing further criminal acts, which were not aims found to be justified by Article 5 § 1 (d).[169] The finding of a violation was supported by extensive references to Council of Europe and UN standards on the detention of minors,[170] which had been detailed at length.[171]

Significantly, the Grand Chamber in *Blokhin* showed a willingness to scrutinise the characterisation of the child by national authorities: 'particular care must be taken to ensure that the legal classification of a child as a juvenile delinquent does not lead to the focus being shifted to his status as such, while neglecting to examine the specific criminal act of which he has been accused and the need to adduce proof of his guilt in conditions of fairness'.[172] Unfortunately, the combination of oversight-based and evolutive approaches shown in *Blokhin* is not adopted in other areas of child detention. As such, in *Blokhin*, the applicant's status as a juvenile offender and the subsequent impact on his liberty rights was interrogated, while child victims of crime who are mischaracterised as offenders at the domestic level do not benefit from equivalent levels of protection. The recent judgment in *D.L. v Bulgaria*[173] demonstrated the ECtHR's refusal to conduct oversight of both this misrepresentation,

166 *Blokhin v Russia* (n 165), para 89.
167 *Blokhin v Russia* (n 165), para 138.
168 *Blokhin v Russia* (n 165), para 138.
169 *Blokhin v Russia* (n 165), paras 168 and 171.
170 *Blokhin v Russia* (n 165), para 170.
171 *Blokhin v Russia* (n 165), paras 77–89.
172 *Blokhin v Russia* (n 165), para 196.
173 *D.L. v Bulgaria* (n 156).

which portrays children as contributors to their own ill treatment, and the acts imposed on that basis. Fenton-Glynn concludes that the ECtHR leaves a 'very wide mandate for authorities . . . as long as the detention provides protection for the child, the "educational" aspect . . . is interpreted broadly to include any kind of benefit for personal development'.[174] She argues that while the scope of discretion may seem 'problematic', it is a reflection of 'the wider function of a specialised juvenile justice system, which recognises that children who have committed offences are also children in additional need of care'.[175] It is therefore necessary for the Court to exercise oversight over the determination of national authorities as to whether the applicants in these cases had in fact committed criminal offences. Failing to acknowledge the vulnerability of child victims of crime as a crucial aspect of such claims results in the absence of appropriate oversight of national decision-making. The gap also results in a failure to adopt an evolutive interpretation of the ECHR which would reflect relevant international standards on the treatment of children. This includes standards set out in treaties that all Contracting States of the Council of Europe have ratified, including the UNCRC. Consequently, States are granted an inappropriate level of discretion in establishing the presence of an educational purpose under Article 5 § 1 (d). While this may not prevent the finding of a breach in the most extreme cases, the lack of attention paid to developing a minimum set of standards against arbitrary detention results in a failure to ensure the practical effectiveness of the right to liberty in others.

P. and S. v Poland provides a searing example of an extreme case, which, while establishing a violation following an oversight-based adjudication, failed to enact an evolutive interpretation capable of establishing minimum protections for the benefit of later applicants. In *P. and S.*, the Polish Family Court had ordered the detention of the 14-year old first applicant based on doubts as to whether she was facing pressure to have an abortion after being the victim of rape. The ECtHR held that the essential purpose of the detention was to separate her from her parents, in particular from the second applicant (her mother), and to prevent the abortion. It was thus concluded that 'by no stretch of the imagination can the detention be considered to have been ordered for educational supervision . . . if its essential purpose was to prevent a minor from having recourse to abortion'.[176] The Court's willingness to exercise greater oversight over the purpose of detention in this case may have stemmed from the overall context. A violation of Article 8 was also established since the hospital which had refused to perform an abortion issued a press release about the first applicant's situation, her pregnancy, and the hospital's refusal

174 Claire Fenton-Glynn, *Children and the European Court of Human Rights* (Oxford University Press 2021) 76.

175 Fenton-Glynn (n 174).

176 *P. and S. v Poland* App no 57375/08 (ECtHR, 30 October 2013), para 148.

to carry out an abortion.[177] Journalists who contacted the hospital were given information about the minor's circumstances, following which she became the subject of several articles in the national press.[178] The judgment also found a violation of Article 3 resulting from the fact that the authorities had not only failed to protect the applicant, who was particularly young and vulnerable, but in fact aggravated her situation. She had requested police protection after being harassed by anti-abortion activists after leaving hospital. Instead, she was arrested in the execution of the Family Court's decision to place her in a juvenile centre.[179] Polish authorities had moreover launched a criminal investigation against her on charges of 'unlawful intercourse' despite the fact that she had been raped.[180] The evidence that the applicant's detention did not pursue the purpose of educational supervision was overwhelming.

Although the ECtHR in *P. and S. v Poland* adopted a strongly oversight-based approach that scrutinised the acts of national authorities,[181] this was not accompanied by an evolutive reading. While third-party interveners referred to the UNCRC,[182] the Court itself did not rely on or mention international standards in support of its findings. Arguably, since the behaviour of domestic authorities had been both egregious and uncontested by the Polish Government (which sought only to justify rather than deny the acts that had taken place), an evolutive approach was not needed to reach findings that upheld the applicant's Article 5 rights. However, a consideration of the relevance of international standards on child rights would have created a more coherent and progressive body of jurisprudence on Article 5 § 1 (d). The judgment did not specify the permitted parameters of an 'educational purpose' where a minor has been the victim of a crime. Elaborating this would have created a more coherent and predictable precedent for a similar complaint brought under the provision. Importantly, this would have allowed for the applicant's specific vulnerability to constitute a starting point for querying the existence of an 'educational purpose' in her situation. These remaining gaps in the protection of minors came to the fore in *D.L.*,[183] which concerned the placement in a juvenile detention centre of a minor who had been a victim of sex trafficking. The Court allocated an inappropriate level of discretion to the respondent State in justifying detention on the basis that it aimed at 'educational supervision' pursuant to Article 5 § 1 (d). Rather than querying the assignment of the applicant as a perpetrator rather than victim of crime,

177 *P. and S. v Poland* (n 176), para 129.
178 *P. and S. v Poland* (n 176), para 129.
179 *P. and S. v Poland* (n 176), para 164.
180 *P. and S. v Poland* (n 176), para 165.
181 See also *Bouamar v Belgium*, where the detention of a minor in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training could not be justified under Article 5 § 1 (d) – *Bouamar v Belgium* (n 159), para 52.
182 *P. and S. v Poland* (n 176), paras 62–5.
183 *D.L. v Bulgaria* (n 156).

which informed the manner in which she was treated by national authorities, the judgment accorded an inappropriate level of subsidiarity to the State in establishing grounds for her detention. In doing so, the Court failed to consider a minor's particular vulnerabilities despite these being directly relevant to assessing the legitimacy of detention. The oversight needed and previously shown in *Blokhin* and *P. and S.* was thus lacking.

The applicant in *D.L.*, aged 13, was admitted on 2 August 2012 to a children's crisis centre as a protective measure under the Child Protection Act, at the request of her mother who reported being unable to look after her.[184] On 1 August 2012, a criminal bench of the District Court had confirmed and extended the applicant's placement. It was held that the conditions for the placement of a minor in a specialist institution were complied with – namely her parents were unable to provide her with adequate care and she was living in a 'dangerous social environment, as she associated with "men identified as delinquents"'.[185] On 3 April 2013, the local committee for combating juvenile antisocial behaviour ('the local committee') asked the District Court to order her placement in a correctional boarding school. On 19 April 2013, a criminal bench of the District Court imposed a less severe educational measure – 'a ban on meeting and making contact with certain individuals'. The District Court explained that placement in a correctional boarding school was likely to have a negative impact on the child's psychological and social development on account of the 'unfavourable environment offered by that type of institution'. It was considered that, after the end of the placement in the children's crisis centre, it would be suitable to admit her to another institution regulated by the Child Protection Act in order to keep her away from the individuals who had forced her into prostitution.[186] It is worth noting that, until this part of the chronology is addressed in the judgment, no mention is made of the fact that the applicant was a victim of sex trafficking. Ultimately, the majority judgment shows that this fact was not considered relevant to the claim.

On 17 May 2013, the local committee issued a new proposal to the District Court for the applicant's admission to a correctional boarding school under the Juvenile Antisocial Behaviour Prevention Act. It was argued that the lack of a stable family environment had caused the applicant to run away from home and 'develop a circle of friends including both adults and juveniles who were identified as "delinquents" and had allegedly incited her to engage in immoral conduct, such as the provision of "sexual services"'.[187] The local committee stated that she had twice run away from the children's crisis centre and acted aggressively towards staff at the centre.[188] On 10 June 2013, a criminal bench

184 *D.L. v Bulgaria* (n 156), para 6.
185 *D.L. v Bulgaria* (n 156), para 7.
186 *D.L. v Bulgaria* (n 156), para 9.
187 *D.L. v Bulgaria* (n 156), para 10.
188 *D.L. v Bulgaria* (n 156), para 10.

of the District Court held a hearing at which an inspector from the child protection team stated that the minor 'engaged in prostitution and had been found offering prostitution services'.[189] Two social workers from the children's crisis centre opined that this factor had justified her placement at the centre as a protective measure for a child at risk. They also reported that 'the child had remained in contact with the people who had incited her to engage in prostitution despite the steps that had been taken to protect her'.[190]

The judgment notes that the applicant had 'attended a series of talks on prevention of "lover boy"-type human trafficking but had not been receptive to the protective measures recommended'.[191] This shows a continued pattern of the child being viewed as somehow responsible for her own mistreatment, impacting on the Court's perception of the legitimacy of her detention and ultimately on the effectiveness of the rights she held in Article 5. This is because the characterisation given to the criminal acts of which the applicant had been a victim affected the justifications given for her detention, which were ultimately upheld by the Court as compliant with the right to liberty. The social workers also expressed the opinion that the minor was at risk of being forced into prostitution and that the arrangements in place at the crisis centre did not afford her the necessary protection against this. They recommended detention at a secure centre with a restrictive regime. During legal proceedings, they drew attention to what they described as the applicant's 'lifestyle and the risks to which she was exposed', noting that she 'still had dealings with the individuals who had initially incited her to engage in prostitution' and that she was 'the victim of a "lover boy"-type trafficking scheme but refused to admit it and protect herself'.[192] This is a particularly disturbing statement since it clearly does not fall to child victims of sex trafficking to 'protect themselves' from their abusers. If the social services and child protection structures intended to safeguard minors fail to do so, this demonstrates only a failing on the part of the government, not on that of the victim.

Regardless, the ECtHR finds that it 'cannot accept the applicant's argument that her placement in the school was an arbitrary measure and that the courts did not take her interests into account'.[193] Contrary to the majority's findings,

189 *D.L. v Bulgaria* (n 156), para 11.

190 *D.L. v Bulgaria* (n 156), para 11.

191 *D.L. v Bulgaria* (n 156), para 11. 'Independent traffickers, family-based organisations and loose networks often employ the so called "lover-boy" method or similar strategies involving deceit and manipulation. This method includes courting, befriending and manipulating the potential victim by the recruiter into a relationship of trust' – Center for the Study of Democracy, Trafficking for Sexual Exploitation in Bulgaria: Criminal Finances and Capacity for Financial Investigations, Policy Brief No. 78, June 2018, p. 6 <https://csd.eu/fileadmin/user_upload/publications_library/files/2018_06/CSD_POLICY_BRIEF_78_ENG.pdf> accessed 17 July 2024.

192 *D.L. v Bulgaria* (n 156), para 79.

193 *D.L. v Bulgaria* (n 156), para 80.

the deprivation of liberty clearly did have a punitive purpose,[194] as evidenced by the minor being brought repeatedly before the criminal bench of the District Court, despite being a victim of crime.[195] Her status as a victim of child sex trafficking should have been at the forefront of the adjudication of her claim, since this has a direct impact on the legitimacy of her detention on the grounds of 'education supervision'. This would reflect the approach taken in both *Blokhin* and *P. and S. v Poland*, which exercised oversight over the factual determinations reached by domestic authorities. As such, in *Blokhin*, the Court scrutinised the effects of the legal classification of the applicant as a juvenile delinquent. In *P. and S.*, the applicant's status as a young and vulnerable victim of rape was central in the Court's review. In that case, it was firmly held that 'by no stretch of the imagination can the detention be considered to have been ordered for educational supervision . . . if its essential purpose was to prevent a minor from having recourse to abortion'.[196] Moreover, the judgment asserted that:

> if the authorities were concerned that an abortion would be carried out against the first applicant's will, less drastic measures than locking up a 14-year old girl in a situation of considerable vulnerability should have at least been considered by the courts.[197]

In stark contrast to this oversight-based review which duly noted the child's vulnerability, the judgment in *D.L.* fails to uphold the minor's rights, since it endorses the status assigned to the applicant at national level as an offender rather than as a victim of crime.

The progressive approach that stems from a recognition of vulnerability is therefore conspicuously absent from *D.L.* This is aggravated by the way in which the Court treats materials from non-governmental organisations (NGOs) and other international organisations. It refers to criticisms of various aspects of the Bulgarian system for accommodating at-risk children. The Juvenile Antisocial Behaviour Act is described as 'undeniably obsolete' and 'based more on a philosophy of "punishing" than "protecting" children, a fact that has attracted criticism from international and national organisations'.[198] The national State Agency for Child Protection and Ombudsman had indicated concerns regarding the appropriateness of judicial proceedings concerning juveniles, the implementation of educational and support programmes, and the physical living conditions in secure institutions for minors.[199] The Court

194 *D.L. v Bulgaria* (n 156), para 81.
195 On this, see *D.L. v Bulgaria* (n 156), Dissenting Opinion of Judge O'Leary, paras 8–10.
196 *P. and S. v Poland* (n 176), para 148.
197 *P. and S. v Poland* (n 176), para 148.
198 *D.L. v Bulgaria* (n 156), para 76.
199 *D.L. v Bulgaria* (n 156), para 76.

felt 'compelled to note' that a national reform encompassing wide-ranging legislative and administrative measures and encouraged by the UN Committee on the Rights of the Child was being planned. Nonetheless, it highlighted that its task was not to undertake 'an abstract examination . . . of the Bulgarian system of educational measures . . . but to review the manner in which the existing system was applied in this specific case'.[200] While this is a justified approach under the Convention, which enshrines a system of individual rights protection, there was sufficient evidence to show that the implementation of the Bulgarian system in the applicant's case failed to protect her individual rights. Despite this, the Court concluded that the State should be afforded a certain margin of appreciation in organising the educational and support system in such a way as to make it effective.[201]

In spite of criticisms from both national and international bodies, the majority in *D.L.* considered that the child was able to follow a school curriculum, that individual efforts were made to alleviate her learning difficulties, that she achieved a mark allowing her to proceed to the next class, and that she was eventually awarded a professional qualification offering her prospects of reintegration into the community (language that again reflects a view of the applicant as a perpetrator rather than victim of crime). On this basis, it was concluded that the State had met its obligation under Article 5 § 1 (d) to ensure that the placement pursued an educational objective.[202] The majority was particularly careful to outline the boundaries of its review, noting that it 'does not consider itself to have jurisdiction to examine the possible failings of the national system any further' as it 'has been able to establish from the evidence before it that the measure . . . pursued an educational purpose on a sufficient scale to fall within Article 5 § 1 (d)'.[203] For Gerards, this approach shows that the ECtHR sees the scope of its review as justifiably encompassing only the individual circumstances of a case – namely a 'concrete type of review'.[204] While each application must, of course, be based on individual rather than general claims, national and international findings on the Bulgarian system are seemingly dismissed on the grounds that they are general rather than specific to the applicant's situation. A wholesale adoption of this position would mean that any contextual information provided by applicants or third-party interveners would need to be dismissed without further review. Rather than placing the individual's claims within the general context of the issues identified in the national system, the ECtHR appears to dismiss the broader findings on the ground that they do not relate specifically to the case.

200 *D.L. v Bulgaria* (n 156), para 76.
201 *D.L. v Bulgaria* (n 156), para 77.
202 *D.L. v Bulgaria* (n 156), para 77.
203 *D.L. v Bulgaria* (n 156), para 77.
204 Janneke Gerards, 'Abstract and Concrete Reasonableness Review by the European Court of Human Rights' (2020) 1 European Convention on Human Rights Law Review 218, 228–9.

This is done without any attempt by the majority to assess how the minor's allegations may be borne out by the reports, or how an oversight-based approach should result on this basis.

Moreover, national bodies themselves had expressed concerns over detention at the juvenile centre, creating an opportunity for the Court to enact a progressive interpretation on the basis of domestic findings without needing to rely exclusively on international standards. Although the local committee had applied for an order for placement in a correctional boarding school, the District Court imposed a less severe educational measure, namely 'a ban on meeting and making contact with certain individuals'. The justification for this was that placement in a correctional boarding school would likely have a negative impact on the child's psychological and social development, given the 'unfavourable environment offered by that type of institution'.[205] Reports of the State Agency for Child Protection questioned not only the effectiveness of educational and rehabilitative measures in that setting, but even whether 'such measures exist in practice'.[206] It is therefore unclear why the judgment refers to international and national criticisms of the child protection system if these are curtly disregarded on the grounds that the requirements of Article 5 § 1 (d) have been met. The references to international materials that centre the best interests of the child equally appear to serve no purpose. As per dissenting Judge O'Leary, 'if the Court fails, when required, to condemn systems which ostensibly seek to protect children but which, in their organisation and functioning, fail to do so then these references . . . are neither necessary nor useful'.[207] Although the judgment notes that 'an essential criterion for the assessment of proportionality is whether the detention was ordered as a last resort, in the child's best interests',[208] this principle is not applied to the circumstances of the case. Consequently, I do not share Sormunen's view that the ECtHR adopts a 'best interests' approach in the judgment.[209] While the best interests principle is understood as central to this type of application, it is not used in the adjudication of the claim in any way that is capable of ensuring the practical effectiveness of the right.

Despite concerns raised by national bodies on the implementation of educational programmes at the boarding school, the Court deferred to a report by the head of the school which, unsurprisingly, painted a more positive picture of the educational provisions on offer.[210] Reliance on the account of the head of the school at the heart of the proceedings seems unusual from

205 *D.L. v Bulgaria* (n 156), para 9.

206 *D.L. v Bulgaria* (n 156), para 32.

207 *D.L. v Bulgaria* (n 156), Dissenting Opinion of Judge O'Leary, para 17.

208 *D.L. v Bulgaria* (n 156), Dissenting Opinion of Judge O'Leary, para 74.

209 Milka Sormunen, 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights' (2020) 20(4) Human Rights Law Review 745, 762.

210 *D.L. v Bulgaria* (n 156), para 24.

a Convention standpoint, where a plethora of contrasting conclusions from a range of experts were available. Previous chapters have offered normative justifications for advancing rights standards beyond a European consensus where necessary to achieve dynamic interpretation. The majority in *D.L.* could have deferred to the concerns raised by national organs in respect of the detaining institution; references to the observations of international bodies could have buttressed these findings. It was vital to incorporate these aspects within ECHR review, since they clearly affected the applicant's ability to access the rights held in Article 5 § 1 (d) in practice.

The judgment in *Blokhin*, which enacted an evolutive approach, concluded that schooling in line with the regular curriculum should be standard practice for all minors deprived of liberty.[211] To reach this conclusion, the Court relied on international instruments relating to the detention of minors, including the 2008 European Rules for juvenile offenders subject to sanctions and measures, the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, the UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules'), and the Havana Rules. While the Court in *Blokhin* accepted that some schooling was provided in the centre where the applicant was held, this was not sufficient to substantiate the Russian Government's claim that his detention aimed at educational supervision. The regime at the juvenile detention centre was ultimately found to be disciplinary rather than educational in nature.[212] Applying this approach to *D.L.* would have led to closer scrutiny of whether the detention in fact served an educational purpose. It is likely that the unwillingness to establish the minor's status as a victim of crime, yet at the same time to acknowledge the treatment of her as an offender, contributed to the disparities between the judgments in *D.L.* and *Blokhin*. In the latter, the Court conducted oversight over the minor's situation and identified that his detention aimed to prevent his commission of further offences. In essence, the applicant's detention in *D.L.* in several respects appeared to serve the same purpose. Yet since the Court did not denote her as a juvenile offender, it did not extend her the same protections that it could offer in line with *Blokhin*. In fact, mirroring the thinly veiled blaming of the victim by the national authorities, the Court finds that teaching her to 'protect herself' was justified while failing to recognise the more punitive aspects of her detention.[213]

Blokhin further flags as important the fact that none of the domestic courts examining the detention order stated that the placement was for educational purposes. Instead, they referred to 'behaviour correction' and the need to prevent

211 *Blokhin v Russia* (n 165), para 170.

212 *Blokhin v Russia* (n 165), para 170.

213 In the words of dissenting Judge O'Leary, 'it is very hard to dispel the impression that the applicant, a victim, from the age of twelve, of grooming, was being punished for the crimes of others' – *D.L. v Bulgaria* (n 156), Dissenting Opinion of Judge O'Leary, para 9.

the minor from committing further delinquent acts, neither of which constitute valid grounds covered by Article 5 § 1 (d).[214] Again, such an approach was not followed in *D.L.,* though national courts had similarly continually referred to the minor's acts of 'prostitution' and 'absconding' (reflecting their positioning of her as an offender) rather than to the allegedly educational purposes offered by her deprivation of liberty. National decisions made clear that the victim was viewed as a perpetrator rather than as a victim of the grooming that she had suffered since the age of 12. Rather than recognising her vulnerability and using this to appropriately progress standards, her vulnerability is, in fact, used against her to justify detention. The existing gaps in protecting child detainees are thereby exacerbated by not only a disregard for vulnerabilities but by a misuse of those vulnerabilities to deliver a subsidiarity-based approach and inappropriate discretion to State authorities. The Court in *P. and S.* could have built on its oversight by clarifying the form and level of oversight needed in testing the characterisation given by national authorities to vulnerable minors. Supplementing this with an evolutive reading of justifications for detaining this group would have given the majority in *D.L.* the impetus and grounding needed to properly scrutinise the applicant's detention. Regrettably, the Court repeated the omission, exacerbating the lack of a progressive advancement and its dire consequences for vulnerable children, both in claims assessing Article 5 alone and in those weighing competing Article 8 interests in the balance (as explored in Chapter 4).

Conclusion

In this chapter, the subsidiarity-based approach to the exhaustive list of justifications for detention under Article 5 § 1 has been tested to assess whether an appropriate level of discretion is accorded under Article 5. The Court's hesitance to adopt an evolutive approach in the areas identified in this chapter cannot be imputed to any relevant further Protocols, the existence of which stifles a dynamic reading. It is therefore concluded that the inappropriate level of discretion granted to Contracting States results from an undue reliance on subsidiarity and parallel neglect of evolutive approaches in determining whether pre-trial detention, immigration detention, or the detention of a minor was justified.

In the field of pre-trial detention under Article 5 § 3, it is concluded that an inappropriate level of discretion arises in two key ways. First, a gap in introducing time limits as a fundamental protection against arbitrariness results in an uneven application of arbitrariness review. Consequently, weaker oversight is exercised over States that fail to enshrine these minimum protections in national law. Ensuring a shared starting point rooted in consensus across all Contracting States can improve the predictability and thus

214 *Blokhin v Russia* (n 165), para 171.

effectiveness of Article 5 rights. Second, in the context of bail, the Court has used the living instrument method of interpretation in stark disregard of its underlying evolutive aim. As a result, the level of discretion accorded to States on this basis is inappropriate and breaches the non-regression principle since an evolutive approach is used to walk back rights and allow for the imposition of excessive bail amounts.

With respect to immigration detention, the ECtHR largely displays a similar unwillingness to look to shared European or international standards in order to set minimum levels of protection. Immigration detention suffers, first, from an inappropriate use of subsidiarity in evaluating safeguards against arbitrariness, and second, from the lack of an evolutive approach in developing protections. The 'quality of the law' implies that legislation authorising deprivation of liberty must be sufficiently accessible, precise, and foreseeable in its application. Factors relevant to this assessment – referred to in some cases as 'safeguards against arbitrariness' – include the existence of clear legal provisions for ordering, extending, and setting time limits for detention, and an effective remedy for challenging the lawfulness and length of detention.[215] The problem of an absence of maximum time limits for detention, seen with detention on remand, equally mars decision-making in the field of immigration detention. Deferring to relevant European and international principles can plug the gaps in minimum standards of protection against arbitrary detention. This will limit the space left to States to argue that the solutions they offer are compatible with the right to liberty. A uniform body of standards can thereby help to ensure that the exclusion of necessity and proportionality testing from the scope of Article 5 § 1 (f) does not undermine the fundamental condition of Article 5, applicable to all grounds of detention, that the individual is shielded from arbitrariness.

Moreover, in assessing arbitrariness globally rather than by testing compliance with individual protections, the Court creates a situation whereby one element of protection against arbitrariness can be met by reference to the fulfilment of another. This weakens Article 5 protections by failing to uphold each individual relevant facet of the right – an especially important undertaking since Article 5 § 1 (f) does not evaluate the necessity or proportionality of detention measures. The stance taken to adjudicating claims of child immigration detention is, by contrast, evolutive in nature, taking account of international principles on the rights of the child and their vulnerable status to limit the discretion left to States. A more structured analysis that roots key principles in a consensus review will help to build a more progressive body of jurisprudence and incorporate minimum standards of protection for both child and adult migrants.

Under Article 5 § 1 (d), meanwhile, the Court allocates an undue level of discretion by failing to duly consider the particular vulnerability of children

215 *J.N. v the United Kingdom* (n 19), para 77.

with respect to detention allegedly imposed 'for the purpose of educational supervision'. Since the child in *D.L.* was a victim of sex trafficking who had nonetheless been treated as an offender by national authorities, her specific vulnerabilities should have formed part of the claim. International principles on child rights and protection would have helped to reinforce a finding of a violation, similarly to the harmonisation of child migrant rights in the light of relevant international standards. Instead, adopting the characterisation of the applicant as 'unable to protect herself' from those who had forced her into prostitution, *D.L.* reflects a determination made of her as an offender. This is significant, as it affects the Convention review of whether or not detention can be justified by reference to Article 5 § 1 (d). Since the ECtHR challenged the State's designation of the applicant in *P. and S.* as an offender rather than a victim, it was able to conclude that detention under Article 5 § 1 (d) had been inappropriate. No remedial or 'improvement' function needed to be served, since she had not committed any offences. Had the Court scrutinised the facts in *D.L.* in the same way, the mischaracterisation of the child as an offender would have led to a finding that the detention served no educational purpose, especially since no such purpose could conceivably be applied to a child victim of sex trafficking. As a result, the more evolutive approach taken to the detention of young offenders demonstrated in the *Blokhin* judgment is not extended to cases where greater oversight of the characterisation of minors in law is needed. Existing gaps in protecting child detainees are thereby exacerbated by not only a disregard for vulnerabilities but by a misuse of those vulnerabilities to deliver a subsidiarity-based approach and inappropriate discretion to State authorities.

In highlighting Contracting States as signatories to the UNCRC and other key instruments, the Court can use the consensus methodology to promote an evolutive approach in this sphere. This would be based on the normative justifications for including specialised international instruments within the adjudication of a claim – namely the non-regression of Convention rights, which must be kept effective, especially for vulnerable groups. As a consequence, importantly, protections under Article 5 would evolve progressively, as required by the mandatory evolutive interpretation of the Convention. This would keep standards on child rights in line with an international consensus. It would also result in proportionality testing that does not cede children's rights to the more progressively developed interests of adults under Article 8 of the ECHR (the right to private and family life). The issue of a minor's underdeveloped right to liberty being outweighed by competing Convention rights is explored in Chapter 4.

This chapter has therefore shown that several key areas of the Convention right to liberty are in urgent need of progressive interpretation in order for the right to remain effective. The Court should use consensus as a basis for advancing protections in line with commitments made by Contracting States – both within the European space and beyond where needed – to ensure the non-regression of rights and protection of vulnerable detainees. This will

build a body of jurisprudence more capable of responding to challenges to rights arising with respect to pre-trial detention, immigration detention, and the detention of minors. Application of the proposed evolutive framework is long overdue, especially in the light of an increasingly subsidiarity-based approach to assessing the legality of detention. An evolutive reading rooted in both European and international consensus where needed to address gaps in the rights of vulnerable groups will allow Article 5 to progress in a way that finds legitimacy in the pledges made by States, thereby meeting the goal of external harmonisation and ultimately ensuring the effectiveness of the right to liberty.

4 An evolutive approach to Article 5 proportionality

Introduction

The aim of this chapter is to explore the Court's recognition and application of discretion in the context of proportionality testing under Article 5, and the role of discretion in informing an evolutive, subsidiarity-based, or oversight-based interpretation of Article 5. The idea of a balancing of competing rights and interests throughout ECtHR jurisprudence is rooted both in the nature of the Convention as a whole and in the requirements of specific provisions.[1] Continuing to use effectiveness as a core driver of the Convention, Chapter 4 assesses protection gaps in proportionality testing under Article 5. This is important since, at present, the basis for assessing proportionality with respect to the right to liberty remains unclear – classic balancing tests do not apply to the provision, which theoretically subsumes both public and private interest considerations within its exhaustive limitations. Because Article 5 has been drafted to incorporate any possible limitations, allowing for balancing which considers factors beyond the text of the provision undermines the appropriateness of the discretion that is granted. Chapter 4 therefore considers two main aspects of Article 5 proportionality.

First, I assess how competing individual rights under the Convention are balanced in the context of Article 5 adjudication. This issue arises in particular in the area of child rights, where the lack of an evolutive approach continues to undermine the effectiveness of the rights held by child applicants in the Convention. The lack of an evolutive approach to children's right to liberty was considered in Chapter 3. Second, I consider the implications of the Grand Chamber's judgment in *Austin and Others v the United Kingdom*,[2] which is significant in its introduction of public interest concerns into the question of whether or not a deprivation of liberty has taken place. As previously noted, Article 5 is seen as incorporating public interest considerations in the

1 Alastair Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 Human Rights Law Review 289, 294.

2 *Austin and Others v the United Kingdom* App nos 39692/09, 40713/09 and 41008/09 (ECtHR, 15 March 2012.

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exhaustive limitations set out at Article 5 § 1. The changes to Article 5 enacted by *Austin* are therefore marked. The judgment has significant implications for the effectiveness of the right, since proportionality testing that is not conducted coherently or transparently can preclude a review on the merits, in the context of balancing conducted against competing individual rights, as well as the public interest. Although the Court's proportionality discourse is said to have arisen from the need for balancing in rights with explicit limitation clauses,[3] the use of balancing tests under Article 5 has risen over time.

The aim of previous chapters has been to position consensus as taking a more central role in pursuing the fundamental Convention goals of effectiveness and harmonisation with respect to the right to liberty. On this basis, Chapter 4 highlights how an increased focus on consensus to drive effectiveness and harmonisation – both across the Convention acquis to ensure internal harmonisation and with a look to international standards to ensure external harmonisation – can inform proportionality testing under Article 5. The level of discretion granted to States in determining the proportionality of a detention measure should be limited in line with the approaches underlining the Court's methods of interpretation. The normative justifications for a turn to both international and European consensus, namely non-regression and the need to protect the rights of vulnerable groups, can be used to enact a consensus-focused evolutive approach. Both children and persons under the control of police authorities are particularly vulnerable to breaches of the right to liberty. As explored in the chapter, gaps in protection arise where these vulnerabilities are not situated within evolving societies. Leaving the Article 5 rights of these groups stagnant results in imbalanced proportionality review.

In this book, I argue that to ensure the effectiveness of rights, discretion should be applied strictly in line with the purposes assigned to each approach (evolutive, subsidiarity-based, or oversight-based). This extends equally to the assessment of proportionality undertaken with respect to the various limbs of Article 5. As outlined in previous chapters, the different aims sought by the Court in each approach affect the way in which discretion is allocated. The aims of proportionality testing must therefore also be considered, as when deployed, this plays a key role in the overall outcome of the case. Proportionality assessments raise particular issues regarding the suitability of weighing certain interests against others, as explored through the lens of *S.A.S.* in Chapter 1. In that judgment, the element of 'living together' was weighed against the rights of the applicant, although 'living together' is not a right protected by the Convention. The result of this was an application of subsidiarity allowing the French Government to exercise broad discretion in seeking to rely on

3 Jeremy McBride, 'Proportionality and the European Convention on Human Rights' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 24.

'living together' as a legitimate aim. In practice, this has led to individual rights protected by the ECHR being ceded to the 'right to discriminate'.[4]

As with discretion in general under Article 5, recognising the use of proportionality testing and the use of discretion it entails is vital for an evaluation of the appropriateness of the discretion that is deployed. This chapter plugs existing gaps by first identifying and assessing the balancing that takes place under Article 5, and, second, by providing solutions that can ensure a progressive advancement of the right to liberty capable of stifling unjustified expansions to balancing under the provision. Delineating the scope of factors in proportionality testing raises particular challenges with respect to the right to liberty. There is a risk that balancing exercises may undermine the effectiveness of Article 5 by subjecting it to a stricter proportionality assessment than that which is already built into the provision's very rationale. This chapter therefore seeks to determine whether factors weighed against the right to liberty can legitimately form part of a claim's review. This is assessed, first, by reference to whether the conflicting factors are protected in the Convention, and second, if so, whether the proportionality testing reflects the mandatory evolutive nature of Convention interpretation. Determining the key elements of a proportionality analysis is especially important for the effectiveness of the right, since balancing tests are known for their abstract nature.[5] Indeed, it has been argued that balancing as a principle of international human rights adjudication leads to judicial restraint and deference on the part of international human rights institutions, including the ECtHR.[6] This chapter tests the extent to which this is the case with respect to the right to liberty.

Proportionality testing under the Convention

The Court has long stated that the ECHR 'implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter'.[7] Arai-Takahashi identifies two forms of proportionality evaluation. First[8]:

> a 'fair balance' must be struck between the right of individual applicants and the general interests of the public. . . . The second meaning of

4 Sabina Garahan, 'A Right to Discriminate? Widening the Scope for Interference with Religious Rights in *Ebrahimian v France*' (2016) 5(2) Oxford Journal of Law and Religion 352.

5 Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62(5) Modern Law Review 671.

6 Başak Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29(1) Human Rights Quarterly 251, 254.

7 *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium* App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (ECtHR, 23 July 1968) 31 ('Belgian Linguistics Case'), para B.5.

8 Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 193.

> proportionality is a modified and more specific version of the first and defined as a reasonable relationship between the means employed, including their severity and duration, and the public objective to be sought.

However, it is difficult to conduct principled and consistent proportionality testing on the basis of an aim that is as broad as the 'general interest'.[9] An abstract judgement on the importance of each right relative to conflicting values motivates its entrenchment as a constitutional or human right. A decision-maker in a claim in which these rights collide is required to disentangle this abstract order of importance.[10] I have made the argument in previous chapters that taking an evolutive approach to the content of Article 5 itself is an effective way of promoting the effective realisation of the rights in the provision. Adopting an evolutive approach to determining where the just balance lies in modern-day societies can equally help to promote the clarity and consistency of the ECtHR's decision-making.

The degree of discretion granted to Contracting States will in itself vary the intensity of the proportionality review – a greater level of discretion will result in a less intense proportionality examination, while less discretion will result in a stricter application of proportionality principles.[11] A domestic proportionality exercise that reflects the nature of the ECtHR exercise will lead to higher levels of subsidiarity:

> [w]here a balancing exercise has been undertaken at the national level in conformity with the criteria laid down in the Court's jurisprudence, the Court has generally indicated that it will not substitute its own assessment for that of the domestic courts, unless there are strong reasons for doing so.[12]

Proportionality testing consequently leaves much of the final decision-making as to where the appropriate balance lies to Contracting States. In terms of the discretion analysed throughout this book, a wide scope is accorded to national authorities.

In addition, many of the common criticisms that the margin of appreciation doctrine attracts apply equally to the idea of a fair balance – namely that the

9 Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466, 480.

10 Aleardo Zanghellini, 'Raz on Rights: Human Rights, Fundamental Rights, and Balancing' (2017) 30 Ratio Juris 25, 34.

11 Mark Janis, Richard Kay and Anthony Bradley, *European Human Rights Law: Text and Materials* (Oxford University Press 2000) 156.

12 Council of Europe, 'Copenhagen Declaration' (2018), para 28(c) <https://rm.coe.int/copenhagen-declaration/16807b915c> accessed 17 July 2024.

concept is vague and in itself subject to a varying margin of appreciation.[13] My conception of the relationship between proportionality and the sources of discretion under the ECHR is broader. I find that it is not only the margin of appreciation as a subsidiarity-based approach that affects proportionality testing. Rather, an imbalance in the application of an evolutive approach to the right to liberty as compared with other Convention provisions also affects where the appropriate balance between competing interests is found to lie. Previous chapters have highlighted my concerns regarding the Court's unwillingness to apply an evolutive approach to Article 5 standards. Chapter 4 demonstrates how these concerns are exacerbated when the underdeveloped interests under Article 5 are weighed in the balance against rights that have benefitted from a more progressive reading by the Court. The relationship between the margin of appreciation and proportionality is nonetheless significant, with the principles being generally associated.[14] As observed by Arai-Takahashi, '[t]he more intense the standard of proportionality becomes, the narrower the margin allowed to national authorities'; proportionality can thus be viewed as 'the other side' of the margin of appreciation.[15] As argued in this book, the margin plays a role as a subsidiarity-based approach in Article 5 adjudication, while its potential as a tool for evolutive interpretation is generally underexplored. The ECtHR is said to use the flexible margin doctrine as a way of modifying the intensity of its assessment of the fair balance between community goals and individual rights.[16] This is particularly relevant to Article 5 adjudication, where every limitation of the right responds to a community interest such as keeping societies safe or preventing the spread of infectious diseases.[17] These considerations are built in to the text of the provision (arguably framed as a limitation clause in and of itself).

Because balancing requires the identification of competing interests, assigning values to those interests, and ultimately deciding which interest yields the net benefit, qualified human rights by their very nature conflict with communal aims and interests.[18] It is worth emphasising in this respect

13 Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 349.

14 Nikos Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' (2019) 3 European Public Law 445, 461.

15 Arai-Takahashi (n 8) 14.

16 Alastair Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 Human Rights Law Review 289, 316.

17 On this, see Carla Ferstman, 'Detention and Pandemic Exceptionality' in Carla Ferstman and Andrew Fagan (eds), *Covid-19, Law and Human Rights: Essex Dialogues. A Project of the School of Law and Human Rights Centre* (University of Essex 2020); Lewis Graham, 'Liberty and its Exceptions' 2023 72(2) International and Comparative Law Quarterly 277; Sanja Jovičić, 'COVID-19 Restrictions on Human Rights in the Light of the Case-Law of the European Court of Human Rights' (2021) 21 ERA Forum 545; Alessandra Spadaro, 'COVID-19: Testing the Limits of Human Rights' (2020) 11(2) European Journal of Risk Regulation 317.

18 Çalı (n 6) 259.

that '[e]very time a human rights protection is upheld, this does not mean that a common interest is simultaneously sacrificed'; 'more of human rights protections [does not] mean less protection of common interests'.[19]

In deducing the scope of a State's margin of appreciation, the Court applies varying factors, which can often pull in opposing directions.[20] The same issue arises in balancing tests, which by their nature require the adjudicating body to weigh competing interests in the balance and make a determination as to which are most significant.[21] Consensus is sometimes used by the ECtHR in its proportionality review when deciding on the scope of the margin in a given case.[22] Consensus constitutes a useful and so far untapped source of clarity in establishing the importance of competing values in a claim relating to the right to liberty, as elaborated in the following sections.

Proportionality testing under a limited right

In framing proportionality, it is important to recall that the idea of a fair balance is inherent in the Convention.[23] Under some provisions, the assessment of proportionality starts with a review of the impugned measure's necessity.[24] For instance, pursuant to Article 8 § 2, an interference with the right must be 'necessary in a democratic society'. In order to determine what is 'necessary', the interests of the individual must be weighed against those of society – it seems 'quite obvious' that these clauses establish a guarantee-specific proportionality test.[25] In others, elements of proportionality feed into the determination of other issues. For instance, the 'no more than absolutely necessary' test under Article 2 can be viewed as one of strict proportionality. This is because the term 'absolutely necessary' requires a 'more compelling' necessity review than under the 'necessary in a democratic society' requirement set out in paragraphs

19 Çalı (n 6) 259.

20 See the concerns raised in this respect by Hutchinson – Michael R Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48(3) The International and Comparative Law Quarterly 638, 641.

21 Vogiatzis (n 14) 477.

22 Vogiatzis (n 14) 448.

23 *Soering v the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989), para 89. Interestingly, the fair balance principle is set out explicitly in Article 4 of the ICCPR and in Article 27 of the American Convention on Human Rights.

24 Jeffrey Jowell and Jonathan Cooper, *Understanding Human Rights Principles* (Bloomsbury Publishing 2001) 52.

25 Helmut Satzger, Frank Zimmermann and Martin Eibach, 'Does Art. 18 ECHR Grant Protection Against Politically Motivated Criminal Proceedings? – Rethinking the Interpretation of Art. 18 ECHR Against the Background of New Jurisprudence of the European Court of Human Rights' (2014) 4(2) European Criminal Law Review 91, 107. See also, on proportionality and balancing as components of the necessity test under the limitation clauses, Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Brill 2009).

2 of the qualified rights of Articles 8–11.[26] There is thus no singular approach to proportionality across the spectrum of ECHR rights – such testing depends on the construction of justifications for limiting rights. This makes Article 5 particularly fertile ground for exploration of rights balancing, since, as previously posited, the provision is in itself arguably set out as a limitation clause, with the bulk of the provision outlining exhaustive limitations to the right. In contrast to the limitation grounds under Articles 8–11, however, each possible limitation has an arguable public interest at its core.

The impact of the lack of an evolutive approach to Article 5 ultimately has repercussions in the sphere of proportionality testing. This is because competing rights under the ECHR have been more progressively developed than those held under Article 5. As such, the competing interests under other provisions override the counter-considerations in Article 5. In these instances, the effectiveness of the right to liberty is entirely undermined since the preference given to countervailing interests results in non-admissibility findings in Article 5 claims, precluding a substantive review on their merits. This pattern is replicated in the weighing of the public interest – which is already subsumed within the exhaustive right to liberty – against Article 5.

A further difference between the adjudication of Article 5 as a limited right and the qualified rights is that, as seen under Article 5 § 1 (f) which permits immigration detention, the Court does not always test the necessity or proportionality of detention. Since Article 5 does not more generally refer to the necessity of an interference in a democratic society, the idea of proportionality is not relevant here in the same way as it is to the qualified rights that feature the necessity clause.[27] For Ashworth, neither the ECHR nor the jurisprudence imply that the rights in Article 5 may 'simply be pushed aside for public policy . . . reasons, on the ground that such curtailments are proportionate'.[28] Unfortunately, restrictions of the right to liberty have been permitted by reference to a need to balance the right against the public interest. On this basis, I argue that without recognising that it is doing so, the Court engages in proportionality testing at the admissibility stage of Article 5 claims. Consequently, it is important to determine the aims which the Court pursues in its use of balancing at this stage. Where the degree of discretion granted to States to determine the proportionality of a detention measure is not clearly delineated, the effectiveness of the right becomes undermined since the scope of Article 5 protections remains unclear. This raises the need to consider how the factors weighed in the balance against the right to liberty can and should be conceptualised. In identifying the appropriateness of discretion in Article 5 claims, this chapter investigates whether there is a clear source of

26 *McCann v the United Kingdom* App no 18984/91 (ECtHR, 27 September 1995), para 149.

27 Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 214–5.

28 Ashworth (n 27) 215.

discretion in the assessment of proportionality, and whether this meets the goal of effectiveness.

As the grounds for detention under Article 5 § 1 are strictly limited, they subsume any possible balancing. The meaning of 'deprivation of liberty' thus in itself forms part of proportionality testing. As such, the duration of the detention is one factor to be taken into account.[29] This is a determination that must be conducted by reference to the specific facts.[30] The purpose for which a measure was imposed is also a relevant factor. While the duration of detention responds to the right to be free from arbitrary detention, the question of purpose raises its own counter-considerations on the basis of the exhaustive list of justifications in Article 5 § 1. The purposes of a measure are strictly set out in that provision (for instance, the lawful detention of a person after conviction by a competent court in Article 5 § 1 [a]). In addition to these prescribed and limited purposes, the ECtHR also takes into account – and weighs in the balance – the general context of a given case. For instance, in *Brogan*[31] and *Marshall*,[32] the Court found that the context of the fight against terrorism had to be taken into account in determining the scope of the margin of appreciation to be allocated in the Article 5 § 3 assessment of promptness.

Determining where the fair balance lies under Article 5, which already considers the public interest in its limitations, is key since the provision arguably already contains the full scope of the 'sacrifices' that may be made to common interests. Consequently, if a deprivation of liberty cannot be justified under Article 5 § 1, a proportionality assessment cannot be used to assert that Article 5 protections were nevertheless upheld. The implication is that if detention fell within a ground under Article 5 § 1, a proportionality exercise weighing the individual rights against the public interest would be permitted. This is confirmed by the example of detention under Article 5 § 1 (b), which allows detention in order to ensure compliance with a court order. The provision requires national authorities to strike a fair balance between the importance in a democratic society of securing compliance with a lawful court order and the right to liberty. Factors to be taken into account here include the purpose of the order, the feasibility of compliance, and the length of detention, with the issue of proportionality in fact assuming 'particular significance in the overall scheme of things'.[33]

29 *Engel and Others v the Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (ECtHR, 23 November 1976), paras 58–59; *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980), paras 92–3.

30 *Engel and Others v the Netherlands* (n 29); *Guzzardi v Italy* (n 29).

31 *Brogan and Others v the United Kingdom* App nos 11209/84, 11234/84, 11266/84 and 11386/85 (ECtHR, 29 November 1988).

32 *Marshall v the United Kingdom* App no 41571/98 (ECtHR, 10 July 2001).

33 *Gatt v Malta* App no 28221/08 (ECtHR, 27 July 2010), para 40.

It is at present unclear how proportionality is evaluated under Article 5. If national courts determine that countervailing interests outweigh those of an individual (or multiple individuals) under Article 5, then the relevant duty would no longer be grounded in the right. The ECtHR therefore reaches a conclusion, either agreeing with that finding or determining that the Article 5 rights in question continue to be of sufficient importance to override any conflicting factors. Interests, however, do not ground rights unless they are of sufficient importance to override counter-considerations and ground duties.[34] As an international human rights court, the ECtHR can only do this from the standpoint of the Convention. As such, the test of whether interests can be overridden must respond to counter-considerations which are similarly protected by the Convention. This is where gaps in protecting the right to liberty arise. While the qualifying second paragraphs of Articles 8–11 specify the possible counter-considerations, any possible limitations are written into the exhaustive list of justifications for detention under Article 5 § 1. Article 5 thus does not encompass broad justifications such as the protection of health or morals, or the protection of the rights and freedoms of others.[35]

Certain reasons for infringing a right are ruled out as unjustifiable by the very raison d'être of that right – the exclusion of these reasons is in-built into the recognition of the right.[36] In this respect, the Court has been careful to avoid proportionality testing in some Article 5 contexts, seemingly in order to avoid a 'net benefit' analysis between the interests of rights-holders under Article 5 and those of society at large. This has arisen in areas which place the right to liberty in direct conflict with community interests. As such, the Grand Chamber in *A. and Others v the United Kingdom* rejected the UK Government's argument that Article 5 § 1 allowed a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from terrorist threats.[37] The judgment concludes that this argument is inconsistent not only with Article 5 § 1 (f) jurisprudence but also with the principle that the limitations set out in Article 5 § 1 are exhaustive.[38] Since only a narrow interpretation of these exceptions is compatible with the aims of the provision, a State interest in protecting society from terrorism cannot be weighed in the balance. *Brogan* outlined in its Article 5 review that:

> [t]he Court, having taken notice of the growth of terrorism in modern society, has already recognised the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights.[39]

34 Zanghellini (n 10) 27.
35 See, for example, Article 8 § 2.
36 Zanghellini (n 10) 36.
37 *A. and Others v the United Kingdom* App no 3455/05 (ECtHR, 19 February 2009), para 171.
38 *A. and Others v the United Kingdom* (n 37), para 171.
39 *Brogan and Others v the United Kingdom* (n 31), para 48.

A. and Others, however, later rejected the idea of such a balance. Mowbray notes the challenges of '[reconciling] the blanket rejection of the application of the elements of the fair balance principle to Article 5 § 1, including its use to interpret the scope of the enumerated exceptions, in *A. and Others* with its express invocation by the Grand Chamber in *Öcalan*'.[40] Indeed, *Öcalan v Turkey*[41] reiterates the concept of a fair balance between the demands of the general community interest and the need to protect the individual's fundamental rights. The judgment highlights that '[a]s movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad . . . be brought to justice'.[42] The following section therefore considers whether the idea of a fair balance has been reintroduced into Article 5 § 1 adjudication, by analysing the impact of the *Austin* judgment, the most recent and authoritative edict by the Grand Chamber of the role of the public interest under Article 5.

Balancing the exhaustive right to liberty against the public interest

The principle of proportionality has been said to have as its aim the restraint of the power of national authorities to interfere with the rights of individuals; it has been conceptualised as a tool for the protection of individual autonomy.[43] The extent to which this aim has been met can be queried with respect to proportionality testing at the admissibility stage which precludes a review on the merits. In line with the fourth instance doctrine, the ECtHR requires 'cogent elements to lead it to depart from the findings of facts reached by the domestic courts'.[44] This includes the conclusions of national authorities as to whether or not there was a deprivation of liberty.[45] Since the Court needs to undertake a review of whether or not a deprivation of liberty has taken place in all cases, the challenges to the effectiveness of the right to liberty identified in this section apply to all Article 5 claims.

Austin adopted the domestic view that no deprivation of liberty had taken place. It is argued that, in doing so, the judgment departed from the stricter overview of the issue of whether a deprivation of liberty existed, as seen in

40 Alastair Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 Human Rights Law Review 289, 301.

41 *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005).

42 *Öcalan v Turkey* (n 41), para 88.

43 Arai-Takahashi (n 15) 2.

44 Arai-Takahashi (n 15) 2.

45 *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 15 December 2016), para 71; *H.L. v the United Kingdom* App no 45508/99 (ECtHR, 5 October 2004), para 90; and *H.M. v Switzerland* App no 39187/98 (ECtHR, 26 February 2002), paras 30 and 48. See also *Creangă v Romania* App no 29226/03 (ECtHR, 23 February 2012), para 92 – 'the characterisation or lack of characterisation given by a State to a factual situation cannot decisively affect the Court's conclusion as to the existence of a deprivation of liberty'.

earlier case-law. The first substantive question that it is necessary to answer before Article 5 protections can be engaged is whether there was a deprivation of liberty. The Court does not consider itself bound by the findings of national authorities and undertakes an autonomous assessment of the factual and legal circumstances.[46] Article 5 does not apply to restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4.[47] The starting point in determining whether someone has been deprived of their liberty is the concrete situation. The Court must consider a range of criteria such as the type, duration, effects, and manner of implementation of the measure in question.[48] Although a rigorous level of oversight generally existed in determining this issue, a strongly subsidiarity-based approach has emerged from the judgment in *Austin*. It is first therefore useful to consider the scope of review prior to *Austin*. *Medvedyev and Others v France* offers a useful example in this respect.

Medvedyev concerned the confinement on the high seas of crew members of a foreign ship called the *Winner*. French authorities suspected that the ship was carrying large quantities of drugs. Cambodia, where the ship was registered, gave its agreement in a diplomatic note that the relevant French authorities could take action. French naval authorities then intercepted the *Winner* on the high seas and escorted it to the port of Brest in France. The Chamber judgment unanimously found a violation of Article 5 § 1 as the applicants had not been deprived of their liberty 'in accordance with a procedure prescribed by law'. It also concluded, by four votes to three, that there had been no violation of Article 5 § 3. It found that the applicants had not been brought before 'a judge or other officer authorised by law to exercise judicial power' within the meaning of Article 5 § 3 until they were brought before a judge to be placed in detention pending trial, after 15 or 16 days of deprivation of liberty. However, the Chamber considered that this duration had been justified by wholly exceptional circumstances.

The Grand Chamber rejected the argument of the French Government that measures taken after the ship was boarded by naval authorities constituted a restriction on the crew's freedom of movement, finding that these amounted to a deprivation of liberty.[49] The crew members were placed under the control of French special forces and confined to their cabins during the voyage. In contrast to the position taken by the dissenting judges, the Court was unwilling to apply a subsidiarity-based approach, even in the light of the challenging

46 *Khlaifia and Others v Italy* (n 45); *H.L. v the United Kingdom* (n 45); *H.M. v Switzerland* (n 45); *Creangă v Romania* (n 45).

47 *De Tommaso v Italy* App no 43395/09 (ECtHR, 23 February 2017), para 80.

48 *De Tommaso v Italy* (n 47), para 80; *Guzzardi v Italy* (n 29), para 92; *Medvedyev and Others v France* App no 3394/03 (ECtHR, 29 March 2010), para 73; *Creangă v Romania* (n 45), para 91.

49 *Medvedyev and Others v France* (n 48), paras 74–5.

circumstances of an international drug trafficking investigation. The dissenting judges argued that:

> [w]hen there is sufficient concurring evidence to suspect that a ship on the high seas . . . is engaged in international trafficking to which all countries want to put a stop, it is without a doubt legitimate not to place as narrow an interpretation on the legal basis as one would inside the territory of the State concerned.[50]

The majority, however, did not recognise the specific context of the fight against drug trafficking in international waters as an exceptional category permitting deviation from the standards prescribed by Article 5. The *Austin* judgment marked a departure from this strongly oversight-based approach. It is now possible for the Court to take into account the purpose for which an individual was detained in determining whether or not there has been a deprivation of liberty. If the *Medvedyev* application had been brought following *Austin*, it is possible that the Court may have found that no deprivation of liberty took place on the grounds that the fight against drug trafficking served the public interest. This stance is supported by the Court's consideration of the purpose of COVID-19 lockdowns in finding that these did not entail a deprivation of liberty.[51] In that setting, it was noted that 'the applicant was free to leave his home for various reasons, and to go to various destinations, at whatever time of day it was necessary to do so',[52] which proved ultimately decisive. This factual difference with the applicants in *Austin* (who were unable to leave the area in which they were contained) justified the finding of non-admissibility. A discussion of the aims of the deprivation of liberty are, by contrast, out of place in a consideration of whether or not the claim should be admissible.

Austin concerned, for the first time before the ECtHR, the 'kettling' or containment of a group of individuals by the police on public order grounds.[53] This had taken place in the context of protests at London's Oxford Circus on May Day 2001. When over 1,500 people had gathered, a police cordon was imposed, following which time no-one in the crowd could leave the area without permission. There was space within the cordon to walk around and there was no crushing, but conditions were uncomfortable, with no shelter, food, water, or toilet facilities. Throughout the afternoon and evening, attempts were allegedly made by the police to start collective release but due to the reportedly violent and uncooperative behaviour of persons both within the cordon and in the surrounding area, full dispersal was not completed until

50 *Medvedyev and Others v France* (n 48), Joint Partly Dissenting Opinion of Judges Costa, Casadevall, Bîrsan, Garlicki, Hajiyev, Šikuta, and Nicolaou, para 10.

51 See *Terheş v Romania* App no 49933/20 (ECtHR, 13 April 2021) and analysis in Graham (n 17) 295–7.

52 *Terheş v Romania* App No 49933/20 (ECtHR, 13 April 2021), para 53.

53 *Austin and Others v the United Kingdom* (n 2), para 52.

9.30 p.m. The police allowed around 400 individuals, who could clearly be identified as not being involved in the demonstration or who were particularly affected by the confinement, to leave. The first, second, and third applicants were held within the police cordon for approximately seven hours and the fourth applicant for five and a half hours.[54]

The UK Government argued that, in the circumstances, it had been necessary for the police to take proportionate action to confine persons for a limited time, in order to prevent serious public disorder involving a substantial risk of death or serious injury. It was asserted that there were no other steps which the police could have taken to prevent serious public disorder.[55] In the alternative, if there had been a deprivation of liberty, it was justified under Article 5 § 1 (b) to secure the fulfilment of the 'obligation prescribed by law' to assist a constable in dealing with a breach of the peace. In the further alternative, any deprivation of liberty fell within the exception of Article 5 § 1 (c), in that the confinement of each applicant was necessary in order to allow the police to prevent the expected breach of the peace.[56] For the applicants, this was akin to arguing that if containment was required for a public interest purpose, it would not amount to a deprivation of liberty.[57] Ultimately, this was the approach taken by the Court. As outlined by the dissenting judges, this could be 'interpreted as implying that, if it is necessary to impose a coercive and restrictive measure for a legitimate public-interest purpose, the measure does not amount to a deprivation of liberty'.[58] They described this as 'a new proposition which is eminently questionable and objectionable'.[59]

The applicants further argued that the UK Government's reference to the need for a fair balance between the demands of the public interest and the need to protect individual rights was 'misconceived', since the fair balance had already been struck by the very formulation of ECHR rights.[60] This position was echoed by the dissenting judges who posited that 'the wording of Article 5 in itself strikes the fair balance inherent in the Convention between the public interest and the individual right to liberty by expressly limiting the purposes which a deprivation of liberty may legitimately pursue'.[61] For the applicants, it was thus not possible to weigh public interest considerations in the balance in order to narrow the scope of Article 5 protections; if the

54 *Austin and Others v the United Kingdom* (n 2), para 62.

55 *Austin and Others v the United Kingdom* (n 2), para 43.

56 *Austin and Others v the United Kingdom* (n 2), para 44.

57 *Austin and Others v the United Kingdom* (n 2), para 46.

58 *Austin and Others v the United Kingdom* (n 2), Joint Dissenting Opinion of Judges Tulkens, Spielmann and Garlicki, para 3.

59 *Austin and Others v the United Kingdom* (n 2), Joint Dissenting Opinion of Judges Tulkens, Spielmann and Garlicki, para 3.

60 *Austin and Others v the United Kingdom* (n 2), para 47.

61 *Austin and Others v the United Kingdom* (n 2), Joint Dissenting Opinion of Judges Tulkens, Spielmann and Garlicki, para 4.

UK Government's arguments were to be accepted, Contracting States could circumvent the right to liberty by detaining people for a wide range of reasons exceeding the exhaustive limitations.[62] I agree with this stance since the approach posited by the Government undermines the effectiveness of Article 5 by subjecting it to a stricter proportionality assessment than that which is already built into the provision's very rationale. Yet, *Austin* has the effect of introducing public interest considerations into Article 5 admissibility review by according significance to context[63]:

> situations commonly occur in modern society where the public may be called upon to endure restrictions on freedom of movement or liberty in the interests of the common good . . . members of the public generally accept that temporary restrictions may be placed on their freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match . . . [t]he Court does not consider that such commonly occurring restrictions . . . so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose, can properly be described as 'deprivations of liberty' .

Proportionality requires the objective of the communal aim or interest to be 'sufficiently important to limit the right; the measure of the limitation has to be suitable and no more than necessary to defend the communal interest in question'.[64] The determination of whether the measure was 'no more than necessary'[65] in the facts arising in *Austin* should therefore have tested how the limitation of the applicants' Article 5 rights had been affected over the course of the day. Despite this, the Court could not 'identify a moment when the measure changed from what was, at most, a restriction on freedom of movement to a deprivation of liberty', as the police conducted periodic reviews of whether a controlled crowd release was possible.[66] On this basis, it was held that:[67]

> [i]n these circumstances, where the police kept the situation constantly under close review, but where substantially the same dangerous conditions which necessitated the imposition of the cordon at 2 p.m. continued to exist throughout the afternoon and early evening, the Court does not

62 *Austin and Others v the United Kingdom* (n 2), para 47.
63 *Austin and Others v the United Kingdom* (n 2), para 59.
64 Çalı (n 6) 253.
65 Çalı (n 6) 253.
66 *Austin and Others v the United Kingdom* (n 2), para 67.
67 *Austin and Others v the United Kingdom* (n 2), para 67.

> consider that those within the cordon can be said to have been deprived of their liberty.

Yet, as the day went on, the negative impacts of containment would have been exacerbated. Consequently, the obligations on the State would have changed as the situation unfolded. The majority therefore needed to engage in a nuanced proportionality analysis of how the factors to be weighed in the balance shifted over time. Instead, the proportionality testing is deployed in a way that takes the situation of the applicants to have remained static over a seven-hour period. Considering the developing impact on Article 5 rights would have responded to the increasing gaps in protection during that time. In particular, the conclusion that kettling was the 'least intrusive and most effective' measure[68] may thereby have been affected.

The threshold for imposing measures of deprivation of liberty is moreover lowered by *Austin*. This is because it is now easier to show that such deprivation was justified on public interest grounds and that Article 5 protections should subsequently not be engaged on account of inadmissibility. The judgment granted a wide scope of discretion by adopting the findings of the national courts that members of the public generally accept temporary restrictions on their freedom of movement in some contexts. The factual situations drawn as comparators here were the containment of a crowd at a football stadium for the protection of individuals or the blocking of exits from motorways because of police action following an accident.[69] It is worth noting that these examples, first set out by the UK Court of Appeal, were adopted by the majority in its reasoning. The comparisons, however, do not support the conclusions on proportionality reached in *Austin*. Being detained on a motorway after an accident or in a football stadium because of rioting both reflect situations where the right to liberty is balanced against harms that have already materialised. Moreover, the risk of a car accident causing delays is far higher and more expected than prolonged containment by the police on a pedestrian street. The type, duration, effects, and manner of implementation of the measure of kettling starkly differ from the examples of being held up on a motorway or at a football match.[70] In addition, as argued by Oreb, these situations do not persuasively prop up the majority's approach, since 'it has

68 *Austin and Others v the United Kingdom* (n 2), para 66.

69 *Austin and Others v the United Kingdom* (n 2), para 43, referring to the comparisons set out by the UK Court of Appeal, for which, see para 35.

70 *H.M. v Switzerland* (n 45) App no 39187/98 (ECtHR, 26 February 2002), Dissenting Opinion of Judge Loucaides:

> Detainees in prisons and other places of detention, which amount to typical cases of deprivation of liberty for the purposes of Article 5 . . . may be allowed to move freely within defined areas and have social contact with the outside world through telephone calls, correspondence and visits, for example; some may also be allowed day release. Yet, so long as they . . . are not permitted to leave the place where they are detained and go anywhere they like and at any time they want they are certainly 'deprived of their liberty'.

never been fully argued nor decided whether or not these examples fall foul of Article 5'.[71] They consequently cannot be deployed on a precedential basis, since the necessary oversight of these situations has not previously taken place.

Austin linked the question of whether the applicants were deprived of their liberty, and thus whether Article 5 § 1 applied, to the substantive assessment of the complaints, joining what should be a preliminary issue to the merits.[72] This is problematic, since it invites a proportionality assessment at the admissibility stage, incorporating factors that should – pursuant to Article 5 methodology – only be considered during a review on the merits. This creates a precedent whereby the outcome of applications can be prejudged at the admissibility stage. The structure of Article 5 is such that exceptions to the right are prima facie acceptable until it can be shown that they have been imposed in an unlawful, unnecessary, disproportionate, or otherwise arbitrary way. By imbuing admissibility review with substantive elements, the Court undermines the limited nature of the right since this invites reasoning to suggest that the protections of Article 5 should not be engaged. *Austin* therefore marked a departure from the stricter oversight-based stance of *Medvedyev*. *Austin* also overturned the established principle that the purpose of detention measures does not determine whether there was a deprivation of liberty.

Applying the *Engel*[73] criteria that determine whether or not a deprivation of liberty has taken place, the majority in *Austin* initially noted that the coercive nature of containment within the cordon, its duration, and its effect on the individuals, in terms of physical discomfort and inability to leave the area, intimated a deprivation of liberty. Despite this, the 'type' and 'manner of implementation' of the measure ultimately led it to conclude that no deprivation of liberty had occurred. The context was here found to be significant.[74] The judgment upheld the national court findings that the imposition of an absolute cordon was the least intrusive and most effective measure that could have been applied.[75] The fact that the cordon was absolute necessitated a proportionality test. A key aspect of this assessment was the fact that the kettling had been imposed to isolate and contain a large crowd in volatile and dangerous conditions.[76] The decision was based on the available intelligence, which had estimated that 500–1,000 individuals 'intent on violence' would participate in the protest – yet an absolute cordon had been imposed on the basis of past events at similar demonstrations, rather than of the behaviour of the crowd up until that point.[77] The right to liberty was weighed against the stated need

71 Naomi Oreb, 'Case Comment: The Legality of "Kettling" After *Austin*' 76(4) The Modern Law Review Limited 735, 741.
72 *Austin and Others v the United Kingdom* (n 2), para 50.
73 *Engel and Others v the Netherlands* (n 29).
74 *Austin and Others v the United Kingdom* (n 2), paras 64–5.
75 *Austin and Others v the United Kingdom* (n 2), para 65.
76 *Austin and Others v the United Kingdom* (n 2), para 66.
77 *Austin and Others v the United Kingdom* (n 2), para 21.

to prevent future unrest. Since it was the threat of possible violence which led the police to impose a cordon, the Grand Chamber should have weighed the need to prevent such future violence as a factor in the balance. Identifying that the anticipated dangers had not yet materialised, and that the kettling was hence imposed on a preventive basis, would have arguably shifted the assessment. This is because the weight of the factors held against the right to liberty would have been lowered, as compared to a situation where violence had both materialised and was ongoing.

The applicants in *Austin* did not rely on Protocol No. 4, since it had not (and still has not) been ratified by the UK. In the Court's view, in the light of the importance and purpose of the distinct provisions of Article 5 and of Article 2 of Protocol No. 4, the former should not, in principle, be interpreted in such a way as to incorporate the requirements of the latter in respect of States which have not ratified the Protocol. This reflects the Court's hesitance to tread progressively where further Protocols are in place.[78] However, *Austin* subsequently shifts from this stance, noting that Article 2 § 3 of Protocol No. 4 allows for restrictions to be placed on the right to freedom of movement where necessary, inter alia, for the maintenance of public order, the prevention of crime, or the protection of the rights and freedoms of others.[79] After referring to the content of Protocol No. 4 in this way, *Austin* goes on to introduce these factors into proportionality testing under Article 5, although they do not form part of the scope of the provision itself (as signalled by the existence of a further Protocol).[80] The judgment's reliance on public interest reasons in the context of the right to liberty is thus linked to Protocol No. 4 proportionality testing which deals with restrictions on freedom of movement. This manner of reasoning leads to inappropriate levels of discretion, since considerations arising from Protocol No. 4 bear no relevance to an Article 5 claim and in fact serve to stifle the effectiveness of the latter provision.

The Grand Chamber rejects the Government's arguments on incorporating the idea of a fair balance between the public interest and individual rights into the justification for detention itself. This corresponds to the manner in which Article 5 has been constructed. Yet by including elements of other provisions in its reasoning, the Court ultimately reaches the same outcome: the introduction of factors into proportionality testing that cannot be found in Article 5 itself. Similarly to the inclusion of efficiency-based concerns to support subsidiarity, using factors that have no foundation in an Article 5 proportionality analysis results in a skewing of the balance inherent in the provision. This ultimately weakens the right's effectiveness, since the limitations permitted in Protocol No. 4 on freedom of movement were not conceptualised, and the balance not struck, with the right to liberty as a competing interest in mind. The

78 See Chapter 3.

79 *Austin and Others v the United Kingdom* (n 2), para 55.

80 *Austin and Others v the United Kingdom* (n 2), para 55.

restrictions granted against the right to liberty are listed exhaustively in Article 5 for a specific reason – namely that the proportionality of detention measures on those grounds is assumed in those areas and further guaranteed by the procedural protections of the provision. Where all those protections are met, detention will not be found to be arbitrary. Where, as in *Austin*, deprivation of liberty was justified by reference to a public interest ground which does not appear standalone in the text of Article 5, a breach of the right should have been found.

The Court also notes that, in certain well-defined circumstances, Articles 2 and 3 (which enshrine the right to life and to freedom from torture and ill treatment, respectively) may impose positive obligations on national authorities to take preventive operational measures to protect persons at risk of serious harm from the criminal acts of others.[81] In considering whether the authorities have complied with these positive obligations, it is stated that account must be taken of the difficulties involved in policing modern societies, the unpredictability of human conduct, and the operational choices which must be made regarding resources and priorities.[82] Here the majority in *Austin* again presents as countervailing considerations factors that are weighed in proportionality testing under other provisions. Considering the specific way in which Article 5 has been drafted to incorporate any possible limitations, allowing for balancing which considers factors beyond the text of the provision undermines the appropriateness of the discretion that is granted. The effectiveness of the right inevitably becomes undermined where the scope of possible limitations to the right reaches across a range of ECHR provisions, leading to a dilution of protections under Article 5, which enshrines all possible limits within itself.

For the Court, Article 5 cannot be interpreted in a way that makes it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of the provision, which is to protect the individual from arbitrariness.[83] However, as Oreb highlights, *Austin* 'did not engage meaningfully with whether or not kettling itself might be perceived as an example of arbitrary policing'.[84] Such analysis could have referred to the fact that the police had not distinguished between persons who were not in any way involved in the protests (like the applicants) and those who posed a risk.[85] Moreover, the framing of the issue in *Austin* does not accurately respond to the nature of individual rights under the Convention. Rather than focusing on the need to make it practicable for the police to fulfil their duties, the ECtHR must

81 *Austin and Others v the United Kingdom* (n 2), para 55.
82 *Austin and Others v the United Kingdom* (n 2), para 55.
83 *Austin and Others v the United Kingdom* (n 2), para 56.
84 Oreb (n 71) 740.
85 Oreb (n 71) 740.

instead assess whether the manner in which the detention measure was applied ensured the practical effectiveness of the right to liberty. This would require analysing how the status of the applicants as uninvolved bystanders impacted their rights under the Convention.[86] As such, their interests as rights-holders who did not present any danger should have been identified as corresponding to a set of State obligations that necessarily differed from those owed to violent protesters. Despite this, the Court defers strongly to subsidiarity-based methods in its review: '[t]he question whether there has been a deprivation of liberty is . . . based on the particular facts of the case . . . within the scheme of the Convention [the Court] is intended to be subsidiary to the national systems safeguarding human rights'.[87]

A strongly subsidiarity-based approach is thus adopted in the assessment of whether a deprivation of liberty has taken place. This question is fundamental to the effectiveness of the right, since if a deprivation is not found, adjudication on the merits cannot take place. From the standpoint of the appropriateness of discretion, proportionality testing is not in itself a subsidiarity-based approach – it does not have subsidiarity as its stated aim. By turning proportionality review under Article 5 into a tool of subsidiarity, the discretion extended on this basis becomes inappropriate. This is because the use of balancing ceases to respond to its underlying aim – namely to maintain oversight of whether the weighing conducted at national level complied with Convention principles.

The judgment in *Austin* makes much of the need to afford to the police a degree of discretion in making operational decisions. Since such decisions are generally complicated and police forces have access to information and intelligence not available to the public, they are considered best placed to make them.[88] The Grand Chamber notes that, even by 2012, technological advances had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale.[89] This is raised in justification of the sweeping measures taken in the case to deprive individuals of liberty in order to prevent possible future unrest. Yet in the wake of the technological enhancements now available to the police (and even in 2012, when *Austin* was handed down), it is arguably difficult to prove the need for an instrument as blunt as kettling. Consequently, it would appear that the easier it becomes to organise mass protests,[90] the broader the discretion that will be granted to national authorities in preventing possible disturbances arising in such contexts. The

86 Oreb (n 71) 740.

87 *Austin and Others v the United Kingdom* (n 2), para 61.

88 See also *P.F. and E.F. v the United Kingdom* App no 28326/09 (ECtHR, 23 November 2010), para 41.

89 *Austin and Others v the United Kingdom* (n 2), para 56.

90 See Lucas Melgaço and Jeffrey Monaghan (eds), *Protests in the Information Age: Social Movements, Digital Practices and Surveillance* (Routledge 2018); Hao Cao, 'Organizing an "Organizationless" Protest Campaign in the WeChatsphere' (2022) Big Data and Society

increased surveillance of protest movements[91] and the greater accuracy of police responses that this should entail, meanwhile, are not weighed in the balance. The ECtHR should have applied an evolutive approach, assessing relevant developments and how these can in fact be used to progress the right to liberty accordingly. For example, recognising the greater surveillance of protest movements and hence greater volume of data and possibility of risk assessment available to police forces should drive a necessary acknowledgement of how the need for deprivation of liberty is correspondingly minimised, since such measures can become more targeted. Instead, *Austin* maintained a one-sided focus on police access to intelligence and how this can be used to justify greater limitations on the right.

More recent protest cases entailed findings of a violation based on an absence of a lawful basis for detention for kettling, and moreover focused on Article 2 of Protocol No. 4, which the respondent State had ratified.[92] Others (not involving kettling) have been beset by a plethora of procedural irregularities, with breaches of Article 5 being established on this basis.[93] As such, *Austin* would have constituted a suitable opportunity for evaluating shifts in modern policing across the Council of Europe that may call for changes in the adjudication of relevant Article 5 claims.[94] Feldman identifies the dangers of the Grand Chamber's approach, noting that the national court's findings, largely followed in *Austin,* 'probably encouraged' the use by UK police of kettling during the G20 protests in 2009,[95] which led to the death of a bystander.[96] It is vital that the ECtHR does not neglect its

1; Zeynep Tufekci, 'Social Movements and Governments in the Digital Age: Evaluating a Complex Landscape' (2014) 68(1) Journal of International Affairs 1.

91 On this, see Sarah Zarmsky, 'Digital Evidence and The Black Lives Matter Movement' (*Opinio Juris*, 12 June 2020) <https://opiniojuris.org/2020/06/12/digital-evidence-the-black-lives-matter-movement/> accessed 17 July 2024; Jennifer Earl, Thomas V Maher and Jennifer Pan, 'The Digital Repression of Social Movements, Protest, and Activism: A Synthetic Review' (2022) 8(1) Science Advances 1; Kandrea Wade, Jed R Brubaker and Casey Fiesler, 'Protest Privacy Recommendations: An Analysis of Digital Surveillance Circumvention Advice During Black Lives Matter Protests' (2021) 246 Extended Abstracts of the 2021 CHI Conference on Human Factors in Computing Systems 1.

92 *Auray and Others v France* App no 1162/22 (ECtHR, 8 February 2024).

93 *Bryan and Others v Russia* App no 22515/14 (ECtHR, 27 June 2023).

94 See Edwards, who argues that the ECtHR as well as UK courts have failed to take account of present-day conditions in policing – Richard A Edwards, 'Police Powers and Article 5 ECHR: Time for a New Approach to the Interpretation of the Right to Liberty' (2020) 41 Liverpool Law Review 331.

95 David Feldman, 'Containment, Deprivation of Liberty and Breach of the Peace' (2009) 68(2) The Cambridge Law Journal 243, 245.

96 Michael Rosie and Hugo Gorringe, 'What a Difference a Death Makes: Protest, Policing and the Press at the G20' (2017) 14(5) Sociological Research Online 68. See also UK Home Affairs Committee, 'Policing of the G20 Protests Eighth Report of Session 2008–09' (*House of Commons*, 2009) <https://publications.parliament.uk/pa/cm200809/cmselect/cmhaff/418/418.pdf> accessed 17 July 2024.

oversight role by adopting the findings of national authorities without closer scrutiny of their Convention compatibility. It must also adopt a progressive interpretation of the right to liberty in this setting, with due consideration of the evolving context in which police measures are imposed. This will help to preserve the effectiveness of the right to liberty; at present, a disconnect has formed between the scope of action permitted to authorities and the steps expected of States to protect individuals from arbitrary detention.

Balancing the underdeveloped right to liberty with competing Convention rights

The analysis of *Austin* considered the inappropriate introduction of public interest concerns through proportionality testing at the admissibility stage and the protection gaps this creates when coupled with a static rather than dynamic interpretation of police action. This section outlines how gaps stemming from a lack of progressive development of Article 5 arise when the right is weighed in the balance against competing ECHR rights. This again raises challenges for admissibility review and an increasing number of Article 5 applicants, the assessment of whose claims may consequently be precluded. *Nielsen v Denmark*[97] offers a stark illustration, whereby the underdevelopment of an evolutive approach to the right to liberty of children results in the skewing of proportionality testing towards the far more developed rights of parents under Article 8 (the right to privacy and family life). The ECtHR's approach as evaluated in this section reveals two key problems. First, considering the individual interests in Article 5 to be secondary to the more progressively developed Article 8 rights of parents confirms the risks raised by a non-evolutive approach to Article 5. Second, making this proportionality assessment at the admissibility stage renders the rights held in Article 5 entirely ineffective, since the application is declared inadmissible. A detention measure cannot be made to fit within the strict confines of Article 5 § 1 by reference to a balance against competing rights. In breach of this, the majority in *Nielsen* not only removes the claim from the ambit of Article 5 by introducing proportionality testing into the admissibility stage, but uses a balance against competing Article 8 rights to do so.

The facts of *Nielsen* are complex and require setting out in some detail. At the time of the judgment, the applicant was 16 or 17 years old.[98] Since his parents had been unmarried, as per the Danish law prevailing at the time, only his mother had parental rights. After his parents' separation, his father could see him on the basis of what the Court describes as a 'gentlemen's

97 *Nielsen v Denmark* App no 10929/84 (ECtHR, 28 November 1988).

98 Since the judgment was handed down in 1988 and only the applicant's birth year is indicated, it is not possible to determine this exactly.

agreement'.[99] Since this fell through shortly thereafter, the father obtained access rights through the competent authorities.[100] He continued to have regular parental access until the applicant apparently refused to return to his mother after a holiday with his father. After social authorities were contacted, the applicant was placed in a children's home 'with the consent of all parties'.[101] He disappeared from the home and returned to live with his father. The latter instituted legal proceedings to have custody rights transferred to him (by this point, Danish law permitted paternal custody).[102] The applicant and his father also went 'underground' for a period of time, which resulted in the father's arrest.[103] Following the arrest, social authorities placed the applicant in the Department of Child Psychiatry in the county hospital with the mother's consent. The father's parental access was suspended. The child disappeared from the hospital and began living in hiding with his father again,[104] staying with various families.[105] This lasted for more than three years[106] while the father unsuccessfully sought custody rights.[107] The father was ultimately arrested again and charged with depriving the mother of the exercise of her parental rights, while the applicant was again placed in a children's home.[108]

The mother, advised by the Social Welfare Committee of Herlev County and Professor Tolstrup (chief physician at the state hospital's Child Psychiatric Ward) and on the recommendation of her family doctor, requested that her son, by then 12 years old, be admitted to the Child Psychiatric Ward 'since it was clear that he did not want to stay with her'.[109] The applicant was admitted to the Ward by Professor Tolstrup, and the Social Welfare Committee confirmed that he was to be placed away from home in line with his mother's request.[110] According to Professor Tolstrup, the usual procedure was followed – the holder of parental rights lodged the request, the family doctor recommended admission, and the responsible chief physician of the ward accepted the admission.[111] The child's father challenged the lawfulness of the detention on his behalf on the grounds that legislation on compulsory hospital admission had not been complied with. The Ministry of Justice passed the matter to the chief physician at the Child Psychiatric Ward. On the basis of information submitted by Professor Tolstrup, the Ministry informed the father that the

99 *Nielsen v Denmark* (n 97), para 10.
100 *Nielsen v Denmark* (n 97), para 10.
101 *Nielsen v Denmark* (n 97), para 12.
102 *Nielsen v Denmark* (n 97), para 12.
103 *Nielsen v Denmark* (n 97), para 12.
104 *Nielsen v Denmark* (n 97), para 13.
105 *Nielsen v Denmark* (n 97), para 15.
106 *Nielsen v Denmark* (n 97), para 16.
107 *Nielsen v Denmark* (n 97), paras 14–7.
108 *Nielsen v Denmark* (n 97), para 18.
109 *Nielsen v Denmark* (n 97), para 19.
110 *Nielsen v Denmark* (n 97), para 19.
111 *Nielsen v Denmark* (n 97), para 20.

child had not been admitted pursuant to the laws on hospital admission but to a decision made by his mother as bearer of custodial rights. Consequently, the Ministry could not rule on the matter.[112] The Copenhagen City Court later confirmed that since the detention was not covered by the legislation on compulsory hospital admission, it could not be subject to judicial review.[113]

The applicant's father lodged an appeal on his behalf, arguing in particular that if the applicant had not been a minor, he could have challenged the lawfulness of his detention before the courts. The father argued that while the custody holder had an extensive right to make decisions about and for the child, such a right must have limitations and should not extend to the imposition of involuntary detention.[114] The Court of Appeal found that the applicant '[did] not suffer from any mental illness' and there was 'no question of admittance for treatment of a mental illness'. The decision to admit him to the Child Psychiatric Ward 'after the disturbances he [had] been through and the decision on his temporary stay there were taken by his mother, who [had] the parental rights over him'. The judicial review claim was again rejected, and the child was detained at the hospital for six months.[115] On the day that he should have been discharged to his mother's home, he disappeared from the hospital. After the police located him, he was readmitted to the Child Psychiatric Ward at his mother's request.[116] He was ultimately discharged to the care of a family not officially known to the father.[117] Around five months after his release from hospital, the Supreme Court awarded custody of the applicant to his father.[118] This constituted the first mention of the child's own wishes in the domestic proceedings as outlined by the ECtHR – 'out of consideration for his welfare it is desirable that custody of him be granted to the appellant in accordance with Jon's own wish'.[119]

At the Convention level, the applicant alleged that his placement at the Child Psychiatric Ward amounted to breaches of Article 5 § 1 and Article 5 § 4 on account of his lack of access to judicial proceedings by which the lawfulness of his detention could be reviewed. The Commission established violations of both provisions. In finding that there had been a deprivation of liberty, the Commission attached particular weight to the fact that the case concerned 'detention in a psychiatric ward of a 12-year-old boy who was not mentally ill' and that 'the applicant, when he disappeared from the hospital, was found

112 *Nielsen v Denmark* (n 97), para 21.
113 *Nielsen v Denmark* (n 97), para 23.
114 *Nielsen v Denmark* (n 97), para 24.
115 From the time of his admission on 26 September 1983 until 30 March 1984. The majority sets this time as five and a half months – *Nielsen v Denmark* (n 97), para 70.
116 *Nielsen v Denmark* (n 97), para 34.
117 *Nielsen v Denmark* (n 97), para 36.
118 *Nielsen v Denmark* (n 97), para 37.
119 *Nielsen v Denmark* (n 97), para 37.

and brought back to the hospital by the police'.[120] The ECtHR, by contrast, did not proceed to a substantive review of the compatibility of the detention with Article 5 since it held that there had been no deprivation of liberty. Instead, the majority concluded that this was 'a responsible exercise by his mother of her custodial rights in the interest of the child'.[121] The mother, when taking the decision to have her son hospitalised on the basis of *medical advice* from her family doctor, was said by the Court to have had as her objective the protection of the applicant's health.[122] The majority held that this was 'certainly a proper purpose for the exercise of parental rights'.[123] However, this basis for detention does not fall within any of the exhaustive categories under Article 5 § 1. Indeed, as admitted in the judgment, the child was not detained as a 'person of unsound mind' in a way that could bring the case within the remit of Article 5 § 1 (e);[124] the existence of 'medical advice' could bear no impact on his detention. Article 5 § 1 (d), which concerns the detention of minors, does not allow for detention on health protection grounds.

Nielsen attracted several dissenting opinions which focused on the fact that the committal lasted for several months and involved the placing in a psychiatric ward of a 12-year-old boy who was not mentally ill. The dissenting judges considered, contrary to the majority view, that this constituted a deprivation of liberty.[125] In finding Article 5 inapplicable to the claim in *Nielsen*, the Court weighed factors not mentioned in the text of the provision in the balance – the rights of others, namely his mother.[126] This entails serious implications for the clarity and predictability of ECtHR case-law, since, despite Article 5 § 1 being exhaustive, other justifications for restricting the right are introduced through balancing conducted at the admissibility stage. Significant concerns about threats to the exhaustive nature of the right to liberty have been expressed by ECtHR judges:[127]

> [P]hysical freedom is of unique importance and . . . the exceptions to the prohibition of deprivation of liberty are exhaustively limited . . . If an individual's deprivation of liberty does not fall within any of these categories then it must be prohibited by Article 5. . . . if it were true that those responsible for the application or interpretation of the Convention

120 *Nielsen v Denmark* (n 97), para 71.
121 *Nielsen v Denmark* (n 97), para 73.
122 *Nielsen v Denmark* (n 97), para 69.
123 *Nielsen v Denmark* (n 97), para 69.
124 *Nielsen v Denmark* (n 97), para 72.
125 *Nielsen v Denmark* (n 97), para 72, Joint Dissenting Opinion of Mr Thór Vilhjálmsson, Mr Pettiti, Mr Russo, Mr Spielmann, Mr De Meyer, Mr Carrillo Salcedo and Mr Valticos.
126 See the Dissenting Opinion of Judges Pettiti and De Meyer, who similarly argued that the applicant's detention could not be based on any of the grounds permitted under Article 5 § 1.
127 *H.M. v Switzerland* (n 45), Dissenting Opinion of Judge Loucaides.

> were free to establish other categories of 'deprivation of liberty' in respect of which the prohibition of Article 5 would be inapplicable, either because the compulsory restriction of a person's physical freedom is a 'responsible measure' for his own good . . . or for any other 'useful' purpose, this would render the prohibition in question meaningless and make a mockery of its objectives. Even worse, it would open the door to uncontrolled arbitrariness and real and unwarranted dangers to the freedom of the individual which the Convention aims to avert.

Rather than acting as factors weighed against the right to liberty, considerations that are not part of the Convention are used to determine the very applicability of the provision. This unjustifiably undermines the effectiveness of Article 5 while giving precedence to the counter-considerations of the right. The counter-considerations were held to be the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities.[128] The Court situates this right within Article 8.[129] The protections inherent in Article 5 are therefore diluted by reference to Article 8, a progressively developed right under the Convention.[130] The Court undertakes a weighing of the competing interests in Articles 5 and 8 without expressly recognising that it is doing so. Undertaking a proportionality analysis at the admissibility stage has significant implications for the effectiveness of a right, since the interests in the right cannot be protected where a finding of non-admissibility is reached. This is the case with respect both to competing Convention rights and to the public interest (as demonstrated by the preceding analysis of *Austin*).

The *Nielsen* approach is troubling in that the balancing of competing interests consisted of broad deference to the more developed parental rights. In this respect, the Court emphasised its position that '[f]amily life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognized and protected by the Convention, in particular by Article 8'.[131] Indeed, the Court is 'not always enthusiastic' about the idea of children as rights-holders, especially in situations where the rights of parent and child must be weighed against each other, with *Nielsen* '[reinforcing] the view that the Convention is ill-equipped to help courts find an appropriate balance between parents' powers and children's rights'.[132] The applicant's rights should have equally been weighed in the balance against the competing rights of his

128 *Nielsen v Denmark* (n 97), para 61.

129 *Nielsen v Denmark* (n 97), para 61.

130 Evolutive interpretation 'has received its most frequent expression in relation to Article 8' – Luzius Wildhaber, 'The European Court of Human Rights in Action' (2004) 21 Ritsumeikan Law Review 83, 84.

131 *Nielsen v Denmark* (n 97), para 61.

132 Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press 2009) 68.

mother. The ECtHR's failure to do so reveals a broader problem with the lack of progressive advancement of Article 5 in the context of proportionality testing. This flows from the absence of a progressive interpretation of the right to liberty for minors. As such, while it has been argued that the balance between the conflicting ECHR rights of a parent and child will 'tip in the child's favour as he or she grows in understanding and intelligence',[133] rather than engaging in a substantive balancing exercise to this effect, *Nielsen* simply deferred to the fact that, under national law, a parent could request their child's detention in a psychiatric ward. The applicant's age and its effect on the balance between his Article 5 rights and his mother's competing Article 8 rights was not considered. The majority remarks that although the length of his detention 'may appear to be a rather long time for a boy of 12 years of age . . . it did not exceed the average period of therapy at the Ward'.[134] Given that a 12-year-old is 'normally quite old enough to have strong views', the judgment reflects a 'peculiarly authoritarian view of the parental role'.[135]

The majority could have avoided weighing the mother's custodial interests against those of the applicant under Article 5 if it had instead assessed the compatibility of detention with domestic law. Proceeding to a review on the merits would have forced the Court to conclude that a violation of Article 5 had taken place, on account of the legislative gaps on judicial review of detention in a psychiatric hospital.[136] The Danish Government had simply argued that as the detention had resulted from a decision made by a parent, the State bore no responsibility under the Convention – an argument that deflects State obligations entirely and yet which was accepted by the Court. The extension of subsidiarity on this basis is inappropriate as it serves to absolve both jurisdictional levels of the obligation to uphold human rights, rather than to share rights protection, as mandated by the principle of subsidiarity.

The use of consensus in proportionality testing under Article 5

While proportionality testing does not at present incorporate consensus, doing so would provide a way for the Court to specify the content of a more determinate set of factors to be weighed in the balance. This would help to improve the consistency and, consequently, effectiveness of Article 5 rights. This would also remove the need for alternative and (as admitted by those who have noted them) clunky solutions that have been suggested as responses

133 Fortin (n 132), 96.
134 *Nielsen v Denmark* (n 97), para 72.
135 Fortin (n 132) 101.
136 Dissenting Opinion of Judge Carrillo Salcedo, *Nielsen v Denmark* (n 97):

> The case did not concern a child's right to oppose a decision of a parent with custody, but, rather, the absence in Danish law of adequate judicial review of a child's committal to a psychiatric hospital by a parent with custodial rights, where the child was not mentally ill and there were disagreements relating to his custody.

to the expansion of grounds for justification, such as reform of Article 5 or increased State derogations.[137] As such, State practice that differed significantly from the European consensus would require stronger justifications in order to outweigh the rights held in Article 5. States that deviate from the list of factors commonly weighed in testing the proportionality of a detention measure – by considering a factor disregarded by most States – would be more likely to be held in breach of the ECHR. This is because the relevance of the factor or the Convention interests it protects would need to be convincingly established where other States have not made similar recourse to those justifications.

While not at present binding in ECHR jurisprudence, as outlined in previous chapters, consensus can in various ways inform the content of State obligations. Vogiatzis argues that 'using consensus as one of the available forms of reasoning within proportionality is preferable to either disregarding consensus altogether or relying primarily (or perhaps exclusively) on it'.[138] On my approach, a turn to consensus can help to concretise the factors to be taken into account in proportionality testing. An evolutive approach to balancing can improve the unpredictability of such testing. Since the Court has failed to enact an evolutive interpretation of Article 5 in several contexts, applying the proposed proportionality methodology to the provision would ensure that interests in the right to liberty are not subjugated to competing, more progressively developed rights. While States would be able to cite reasons for departing from a general consensus, stronger justifications for factors weighing against Article 5 interests would be needed. As such, the starting point will at the very least be more predictable, thereby improving the effectiveness of the right and granting ECtHR judgments greater legitimacy: '[t]he quality of the Court's reasoning augments the legitimacy of its judgments . . . a thoroughly explained decision adds to the coherence and predictability of the Convention machinery, thereby contributing to legal certainty'.[139]

Acknowledging consensus as a factor in proportionality assessments can help to tackle the current challenges of determining whether consensus was decisive and thus possibly binding in a given case – a task which has been described as 'sheer guesswork'.[140] In this way, the manner in which proportionality was reviewed in *Austin* would have been improved by reference to an evolutive approach. Since *Austin* was the first Convention case to concern the detention of a large number of protesters as well as uninvolved bystanders, the judgment presented an opportunity for the Court to clarify how the provisions of Article 5 would apply in this setting. In particular, it would have been significant for the development of proportionality testing under the provision. By finding

137 Graham (n 17) 302–4.
138 Vogiatzis (n 14) 475.
139 Vogiatzis (n 14) 471.
140 Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, 'No Consensus on Consensus?' (2013) 33(7–12) Human Rights Law Journal 248, 262.

that no deprivation of liberty had taken place, however, any such analysis was forfeited.

While *Austin* readily adopts a subsidiarity-based position, identifying possible consensus across the Council of Europe on the measures used to prevent possible disorder would have improved the Court's reasoning. This would have involved contextualising the actions of UK police within the procedures permitted across the Contracting States for dealing with possible future unrest. Instead, in the absence of an evolutive approach, the judgment defers entirely to the need to allow for effective policing, without situating the methods employed in the context of prevailing European standards. In this way, the content of Article 5 rights remains underdeveloped and unresponsive to changing circumstances in the Contracting States. This echoes the pattern in jurisprudence that balances Article 5 rights, which have not been progressively advanced, against competing Convention interests. An evolutive approach to proportionality testing can thus plug gaps in protection – in particular, where such testing takes place at the admissibility stage. This is a problem that is both longstanding in the field of children's rights, as shown by the 1988 judgment in *Nielsen*, and more recent to the field of protest, as demonstrated by the 2012 judgment in *Austin*.

An evolutive interpretation of Article 5 would allow the ECtHR to progress the rights of children in line with an international consensus and thereby address the imbalance between parents' powers and children's rights. Yet in the absence of this approach, long after *Nielsen*, the Court continues to neglect progressive advancement in this sphere. As a result, children's right to liberty is left unmoored in an overwhelming consensus on children's rights, the dire consequences of which were demonstrated in Chapter 3 by reference to the more recent judgment in *D.L.* It has been argued that the gaps in protection in *Nielsen* arose from the fact that the judgment pre-dated the UNCRC[141] and that, resultantly, *Nielsen* 'would not be followed now that the Court uses the UN Convention on the Rights of the Child . . . to guide its application of the ECHR in cases involving children'.[142] Unfortunately, my analysis of the detention of minors and the increased justifications for deprivation of liberty introduced by *Austin* make it difficult to confidently subscribe to this view. While *Nielsen* constitutes the last judgment to consider the detention of a child at the behest of a parent, the case of *D.L.* analysed in Chapter 3 shows continuing gaps in protection where deprivation of liberty is sought by public authorities. The UNCRC and the weight given to the best interests of the child would prove particularly useful in ensuring that the child's right to liberty is not relinquished either to parental rights held under Article 8 or to the actions of State authorities who declare that detention meets the aim of 'educational

141 Camilla H Parker, '*Trust A v X and Others*: The Ghost of *Nielsen* Returns' (2016) 24(2) Medical Law Review 268, 273.

142 Feldman (n 95) 244.

supervision'. Until the ECtHR adopts a progressive interpretation of the right to liberty – one that is harmonious with the external commitments signed up to by Contracting States – the threat to children's freedom from arbitrary detention remains.

Conclusion

Chapter 4 has explored the use of discretion in proportionality testing under Article 5, evaluating the impact of the Court's decision-making on the effectiveness of the provision. The chapter finds that the Court inappropriately deploys subsidiarity to allow for an expansion of justifications for detention. From the standpoint of the appropriateness of discretion, proportionality testing is not in itself a subsidiarity-based approach – it does not have subsidiarity as its stated aim. By turning proportionality review under Article 5 into a tool of subsidiarity, the discretion extended on this basis becomes inappropriate. The adoption of the consensus-based evolutive framework outlined in this book can help to address consequent gaps in protection, namely through an increased use of an evolutive approach to proportionality testing. The normative justifications for a turn to both international and European consensus, namely non-regression and the need to protect the rights of vulnerable groups, can be used to spur the adoption of a consensus-based evolutive approach to proportionality.

Since Article 5 can be said on account of its exhaustive nature to be framed as a limitation clause, the sources of discretion and proportionality testing under the provision remain unclear. This chapter offers clarity of the factors engaged in Article 5 proportionality testing and argues that by using justifications to limit Article 5 that cannot be found in the provision, the Court's proportionality analysis results in a skewing of the balance inherent in the provision. Chapter 4 has demonstrated how the problem caused by this approach can be redressed by recourse to an evolutive approach grounded in consensus. This has been done by reference to the balancing of Article 5 rights against the public interest (which is inherent in the provision) and against competing individual interests that have benefitted from a more dynamic reading under the Convention.

Closer use of consensus in Article 5 claims can help to improve the legitimacy of the Court's findings. As such, consensus on the detention practices applied by national authorities in preventing public disorder would provide legitimate grounds for questioning whether an appropriate balance between competing interests has been struck. This would allow the Court to adopt a dynamic interpretation, thereby keeping Article 5 protections effective in modern-day societies while staying faithful to the principle of non-regression. In the field of child rights, and in similar pursuit of non-regression, looking more broadly to the commitments undertaken by Contracting States would allow for a harmonious and progressive interpretation capable of meeting the Convention's mandatory evolutive function. The UNCRC and the weight given to the

best interests of the child would prove particularly useful in this respect in ensuring that the child's right to liberty is not relinquished to parental rights held under Article 8. It would also prevent the undue discretion extended to States in justifying deprivation of liberty on the grounds of the 'educational supervision' of minors (a problem highlighted in Chapter 3).

The ECtHR in *Nielsen* found that 'the rights of the holder of parental authority cannot be unlimited and that it is incumbent on the State to provide safeguards against abuse'.[143] However, the judgment does not define how the parental rights-holder's interests are to be limited, or which factors are to be considered decisive in the balance. Parental rights therefore take precedence over the child's right to liberty, since the majority holds that Article 5 is not engaged. The balancing exercise in fact results in the effectiveness of the child's right to liberty being undermined in its entirety, since the finding of inadmissibility forestalls a substantive review on the merits. The lack of progressive development of Article 5 thus affects the content of proportionality testing to the detriment of detainees, since competing Convention rights have evolved more than the right to liberty.

As regards the balancing of Article 5 rights with the public interest, the Court has stated that situations often occur in modern-day societies that require the public to endure restrictions on their liberty 'for the common good'.[144] This is a key area of discretion in right to liberty adjudication. Where such situations are found to exist, the Court adopts a strongly subsidiarity-based approach, leaving wide scope to national authorities to find not only that a deprivation of liberty was justified, but indeed to query whether one took place at all, thereby affecting the admissibility of the claim. While the Court did not find the context of international drug trafficking in *Medvedyev* to be exceptional for the purposes of determining whether or not a deprivation of liberty had taken place, *Austin* signalled a departure from this approach. By finding that kettling did not amount to a deprivation of liberty, the ECtHR introduced balancing considerations into the admissibility stage of an Article 5 claim. In doing so, it undermined the effectiveness of the right since, as is the case in balancing against competing private interests, this precludes a substantive evaluation on the merits.

While it is true that the Court is largely restrained by subsidiarity-based approaches (including the fourth instance doctrine) from querying domestic courts' findings of fact, it is its task to review Convention compliance. Centring any European consensus regarding police practices aimed at preventing public disorder would provide legitimate grounds for questioning whether an appropriate balance between the competing interests has been struck. Where necessary, as with adjudicating justifications for detention, a

143 *Nielsen v Denmark* (n 97), para 72.

144 *De Tommaso v Italy* (n 47), para 81; *Nada v Switzerland* App no 10593/08 (ECtHR, 12 September 2012), para 226; *Austin and Others v the United Kingdom* (n 2), para 59.

turn to international standards would furnish the Court with the consensus analysis needed to further rights. This would be done on the basis of the normative justifications for including a progressive consensus within evolutive approaches – namely ensuring that consensus methodology does not result in a dilution of existing rights standards and that the rights of vulnerable groups are effectively upheld. Both children and persons under police control are particularly vulnerable to breaches of the right to liberty, with gaps in protection arising where these vulnerabilities are not situated within evolving societies. Leaving the Article 5 rights of these groups stagnant results in imbalanced proportionality review that is skewed against the right to liberty.

The progressive interpretation urged in this chapter offers a way to ensure that the right is not only rendered effective in current contexts, but continues to remain effective in the light of future challenges and, importantly, immune to further attempts at unjustified constriction.

5 Discretion in adjudicating a right to liberty free from abuse of power or discrimination

Introduction

Chapter 5 explores the Court's use of discretion within the context of the key relationships between Article 5 and other Convention provisions, specifically Articles 14 and 18. Article 14 protects against discrimination, while Article 18 enshrines the ban on abuse of power by Contracting States. Although protections against discrimination and bad faith restrictions of rights apply across the entire Convention, their capacity to strengthen the effectiveness of the right to liberty requires particular consideration. Arbitrary detention is often used as a tool to stifle dissent from civil society or opposition figures,[1] and discriminatory sentencing policies are common. Against this background, the European right to liberty sits untethered to new and progressive ideals with its practical use as a shield against arbitrary detention in many ways neglected. The chapter therefore assesses how Article 5 review is affected when adjudication revolves around not merely a justified limitation, but one that must provide further guarantees pursuant to either Articles 14 or 18. In doing so, it evaluates whether this contributes to a strengthening of the effectiveness of the right to liberty.

Assessing the manner in which discretion is applied when Article 5 is taken together with other provisions offers a clear opportunity for testing the appropriateness of discretion, as this highlights the challenges arising with some elements of Article 5. As in previous chapters, the appropriateness of discretion is determined by reference to the approaches underlying the Court's methods of interpretation, with effectiveness taken as the core driver of the Convention. The chapter thus explores the impact that other ECHR provisions have on an

1 Sabina Garahan, 'Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers Under the Illegal Migration Act' (2024) Public Law 11, 15. See also Office of the Council of Europe Commissioner for Human Rights, Human rights defenders in the Council of Europe area in times of crises: Round-table with human rights defenders organised by the Office of the Council of Europe Commissioner for Human Rights, Dublin, 24–25 October 2022 (*Strasbourg*, 23 March 2023) CommHR(2023)2 <https://rm.coe.int/report-on-the-round-table-human-rights-defenders-in-the-council-of-eur/1680aaa813> accessed 17 July 2024.

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evolutive, subsidiarity-based, or oversight-based interpretation of the right to liberty.

The chapter ultimately finds that the subsidiarity-based approach to Article 5 adjudication is replicated in Article 18 jurisprudence. By contrast, in adjudicating claims brought under Articles 14 and 5, the Court makes use of evolutive approaches to advance the relevant rights standards. The more evolutive approach taken to Articles 14 and 5 adjudication, as well as the more nuanced handling of evidentiary challenges, offers ways of addressing the gaps in protection that have arisen under Article 18. First, recalling the need for internal harmonisation would mean that the existence of bad faith shown under Article 5 would trigger the State's responsibility under Article 18. Second, unjustified differences in treatment are considered concurrently rather than alternatively under Article 14. Adopting this approach under Article 18 would mean that the existence of any ulterior purpose would be sufficient to establish a violation, without applicants needing to prove that the illegitimate aim was predominant in ordering detention.

The relationship between Article 18 and Article 5 is significant since it reveals how claims where no lawful justification for detention has been found under Article 5 § 1 are reviewed. Meanwhile, the interaction between Article 14, which prohibits discrimination, and Article 5 helps to highlight important equality considerations in the use of detention measures. Issues of discrimination have the capacity to alter the appropriateness of discretion since the aims underlying the different approaches will shift accordingly. As such, the ECtHR may be more likely to adopt an oversight-based or evolutive approach to Article 5, thereby maintaining the effectiveness of the right. The way in which the Court navigates relevant Articles 14 and 5 case-law offers vital insights for a more progressive reading of Article 18. The Court's adjudication in this sphere deftly meets the goal of reading the Convention as a whole and ensuring the internal consistency and harmony of various provisions.[2] Standards on life imprisonment under Article 3 are carefully taken into account in the delineation of discretion accorded under Articles 14 and 5. In addition, close scrutiny and consideration of international principles signed up to by Contracting States achieve external harmonisation which situates the right to liberty and the sentencing practices it is affected by in a modern-day conception of protections in this field.

The impact of the Court's review of Article 18 on Article 5 discretion

Article 18 breaches are rare and usually imputed to authoritarian governments that misuse detention for political ends.[3] The Court has described Article 18 as both an autonomous and non-autonomous right. It is non-autonomous

2 *Maaouia v France* App no 39652/98 (ECtHR, 5 October 2000), para 36.

3 Sabina Garahan, 'Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers Under the Illegal Migration Act' (2024) Public Law 11.

because, like Article 14, it can only operate in conjunction with other provisions.[4] Article 18, however, does not serve merely to clarify the scope of restriction clauses, but also expressly prohibits Contracting States from restricting rights and freedoms for purposes not prescribed by the ECHR (namely for ulterior purposes). To this extent, Article 18 may be regarded as autonomous.[5] Because of this, it is possible for a violation of Article 18 to be established even if there is no breach of the underlying provision taken alone.[6] A finding that the restriction pursues a purpose prescribed by the Convention does not necessarily rule out a breach of Article 18, either.[7] Since the rule of law is inherent in all provisions,[8] the very existence of Article 18 in addition to the limitation clauses demonstrates its intended use as a further guarantee against the illegitimate restriction of rights. Moreover, the ECHR must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions.[9] This section therefore assesses the level of discretion accorded to national authorities in the review of Article 18 claims taken together with Article 5, and whether or not this is appropriate in the scheme of the Convention. Effectiveness here importantly translates to greater protection of rights for persons whose detention is often imposed in bad faith in order to silence them – to 'suppress that political pluralism which forms part of "effective political democracy" governed by "the rule of law"'.[10] These groups of people – human rights activists, opposition politicians, and journalists – are at particular threat of arbitrary detention. Their vulnerability in this respect needs to be recognised and addressed urgently by the Court.

Moreover, an effective body of protections under Articles 18 and 5 is also vital to ensuring that legislation passed in bad faith can be adequately addressed by the Convention framework. While most Article 18 applications stem from government attempts to silence critics, States are increasingly resorting to sweeping detention measures for migrants and asylum seekers for political goals. As noted in Chapter 3 with respect to immigration detention,

4 *Gusinskiy v Russia* App no 70276/01 (ECtHR, 19 May 2004), para 73.

5 *Ahmet Hüsrev Altan v Turkey* App no 13252/17 (ECtHR, 13 April 2021), para 234; *Merabishvili v Georgia* App no 72508/13 (ECtHR, 28 November 2017), paras 287–8; *Selahattin Demirtaş v Turkey (No. 2)* App no 14305/17 (ECtHR, 20 November 2018), paras 421–2.

6 *Gusinskiy v Russia* (n 4), para 73.

7 *Merabishvili v Georgia* (n 5), para 304.

8 'One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law' – *Golder v the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975), para 34. See also *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016), para 117 and *Mozer v the Republic of Moldova and Russia* App no 11138/10 (ECtHR, 23 February 2016), para 134.

9 *Stec and Others v the United Kingdom* App nos 65731/01 and 65900/01 (ECtHR, 12 April 2006), para 48; *Austin and Others v the United Kingdom* App nos 39692/09, 40713/09 and 41008/09 (ECtHR, 15 March 2012), para 54.

10 *Navalnyy v Russia* App nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECtHR, 15 November 2018).

the UK's Illegal Migration Act 2023 was introduced in order to dissuade, for electoral ends, individuals making boat crossings from claiming asylum in the UK.[11] The Act falls short of several fundamental Article 5 protections, with the previous Conservative government acknowledging that the Act failed to comply with the UK's human rights obligations.[12] Similarly punitive legislation which permits the automatic detention of persons rescued at sea has also been introduced by the Italian Government, which again declares the purpose of this system to be to deter migrants from making boat crossings to Italy.[13] It is therefore crucial that the Court's Articles 18 and 5 jurisprudence is capable of responding to bad faith restrictions to the right to liberty as these begin to multiply across the Council of Europe. Two key factors, both of which are explored in this chapter, are required to meet this aim. First, vulnerable groups will only be shielded from politicised detentions if the Court recognises the need to evaluate the presence of ulterior motives for detention rather than finding Article 18 review to be unnecessary. Second, contextual information proving hostility towards migrants on the part of governments should be duly considered as evidence of an illegitimate purpose.

Existing jurisprudence under Article 18, taken together with Article 5, has largely arisen with respect to the detention of political dissenters, including members of opposition parties and NGOs, with the ulterior purpose in these cases found to be the suppression of political pluralism, with a likely chilling effect on human rights work.[14] The 1974 Commission decision of *Kamma v the Netherlands*[15] marked the first reference to Article 18.[16] This set out the role of Article 18 as operating in conjunction with other Convention provisions rather than as a standalone, autonomous right.[17] Article 18 is said to have been aimed at preventing abuses of power by States to the detriment of individuals, the Convention drafters striving to avert a repeat of Europe's dark

11 Garahan (n 3) 15. Sabina Garahan and Matthew Gillett, 'Legislative Scrutiny: Illegal Migration Bill', HC 1241, HL Paper 208 (11 June 2023), Written Evidence by Dr Sabina Garahan and Dr Matthew Gillett (IMB0015) <https://committees.parliament.uk/writtenevidence/119881/pdf/> accessed 17 July 2024, and University of Essex, 'Essex Experts Warn Illegal Migration Bill Could See UK Breach European Law' (*University of Essex*, 25 May 2023) <https://www.essex.ac.uk/news/2023/05/25/illegal-migration-bill-could-breach-european-law> accessed 17 July 2024.

12 Garahan (n 3) 16.

13 Amnesty International, 'Italy: Parliament's Ratification of Dangerous Automatic Detention Deal with Albania "Shameful"' (*Amnesty International*, 15 February 2024) <https://www.amnesty.org/en/latest/news/2024/02/italy-parliaments-ratification-of-dangerous-automatic-detention-deal-with-albania-shameful/> accessed 17 July 2024.

14 Garahan (n 3) 15.

15 *Kamma v the Netherlands* App no 4771/71 (Commission, 14 July 1974).

16 *Kamma v the Netherlands* (n 15) 9.

17 *Kamma v the Netherlands* (n 15) 9.

history in the first half of the 20th century.[18] This reinforces the suggestion that the increase in Article 18 jurisprudence has resulted from a surge of new Contracting States into the ECHR system, including many 'young' and developing democracies.[19] The primary aim of Article 18 thus appears to be a prevention of a regression by Contracting States to the autocratic patterns previously seen in Europe.[20] While Article 17 of the Convention prohibits the destruction or excessive limitation of rights, no State has ever been found in breach of the provision.[21] It has fallen to Article 18 to step in where rights violations go beyond the good faith[22] expected of Contracting States. For this reason, it is vital to consider the practical effectiveness of Article 18 in responding to bad faith restrictions of the right to liberty.

The Court's first finding of an Article 18 violation was in 2004, in *Gusinskiy v Russia*.[23] As the first judgment to find a breach of Article 18 taken together with Article 5, *Gusinskiy* is an appropriate starting point for assessing the use of discretion in this field. The judgment also brings into sharp focus the high evidentiary burden required for a finding of an Article 18 violation. During the applicant's detention on suspicion of fraud, the Acting Minister for Press and Mass Communications offered to drop criminal charges if the applicant agreed to the sale of Media Most to Gazprom, with the price to be set by Gazprom. Media Most was a private Russian media holding company of which the applicant was a majority shareholder, while Gazprom is a natural gas monopoly controlled by Russia. Criminal charges were dropped after an agreement was signed between the detainee and Gazprom.[24] The ECtHR found that

18 Helmut Satzger, Frank Zimmermann and Martin Eibach, 'Does Art. 18 ECHR Grant Protection Against Politically Motivated Criminal Proceedings? – Rethinking the Interpretation of Art. 18 ECHR Against the Background of New Jurisprudence of the European Court of Human Rights' (2014) 4(2) European Criminal Law Review 91, 106.

19 Satzger, Zimmermann and Eibach (n 18) 93.

20 Tsampi supports the view that Article 18 was included in the Convention 'just in case' a state tipped into authoritarianism – see, with further references, Aikaterini Tsampi, 'The New Doctrine on Misuse of Power Under Article 18 ECHR: Is it About the System of *Contre-Pouvoirs* Within the State After All?' (2020) 38(2) Netherlands Quarterly of Human Rights 134, 137.

21 Sabina Garahan, 'Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers Under the Illegal Migration Act' (2024) Public Law 11, 17. See also the Joint Partly Dissenting Opinion of Judges Pejchal, Dedov, Ravarani, Eicke and Paczolay in *Navalnyy v Russia* (n 10), paras 17–18, where the judges discuss the relationship between Article 18 and Article 17 of the Convention, arguing that Article 17 is more suitable to address an abusive system which aims at the destruction of the rights and freedoms provided by the Convention. On this, see Paulien de Morree, *Rights and Wrongs Under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights* (Intersentia 2017).

22 '[T]he whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith' – *Khodorkovskiy v Russia* App no 5829/04 (ECtHR, 31 May 2011), para 255.

23 *Gusinskiy v Russia* (n 4).

24 *Gusinskiy v Russia* (n 4), paras 27–30.

the restriction of the applicant's liberty had been imposed not only for the purpose of bringing him before the competent legal authorities on reasonable suspicion of having committed an offence, but also for other reasons.[25] An absence of a reasonable suspicion under Article 5 does not always denote bad faith – 'theoretically, it could be incompetence'.[26] However, in *Gusinskiy*, the facts of the case – that Gazprom had asked the applicant to sign the agreement when he was in prison, that a State minister signed the agreement, and that a State investigating officer then dropped the charges – indicated that the prosecution had been used as a tool of intimidation.[27] The existence of ulterior motives was sufficient to find a breach of Article 18 taken in conjunction with Article 5.

Since the 2004 judgment in *Gusinskiy*, Article 18 review has shifted from recognising that the existence of *any* ulterior purpose violates Article 18 towards determining the concrete role that the ulterior purpose played in justifying detention as part of a 'plurality of purposes' approach. This approach was developed in the *Merabishvili*[28] judgment. An applicant bringing a claim under Article 5 together with Article 18 now needs to demonstrate that where both legitimate and illegitimate reasons motivated the detention, the ulterior purpose played the predominant role. Before the changes introduced by *Merabishvili* and later cases are considered, it is worth reflecting on the Court's failure to engage in Article 18 review even where bad faith is found to mar the decision to detain.

Hakobyan and Others v Armenia[29] concerned the bad faith detention of members of the main opposition parties in Armenia in the wake of electoral irregularities and subsequent protests. In February and March 2003, a presidential election was held in Armenia which was won by the incumbent President Robert Kocharian. The international election observation mission found that the election process fell foul of international standards. Mass protests demanding a referendum of confidence in the president followed. According to the applicants, they had been planning to attend several demonstrations prior to their detention.[30] The ECtHR could:

> [infer] from the existence of such numerous and consistent allegations coming from various sources that at the material time there was an administrative practice of deterring or preventing opposition activists from participating in demonstrations, or punishing them for having done so, by resorting to the procedure of administrative detention.[31]

25 *Gusinskiy v Russia* (n 4), para 77.
26 Interview with ECtHR judge, 16 April 2021.
27 *Gusinskiy v Russia* (n 4), para 76.
28 *Merabishvili v Georgia* (n 5).
29 *Hakobyan and Others v Armenia* App no 34320/04 (ECtHR, 10 April 2012).
30 *Hakobyan and Others v Armenia*, paras 6–8.
31 *Hakobyan and Others v Armenia*, para 92.

All the applicants had been taken to the same police department around the time when protest rallies were being held in Armenia, and faced two practically consecutive terms of administrative detention, imposed by the same court in 'strikingly similar circumstances'.[32] The applicants had moreover been visited by the police in the first instance on suspicions that were unconnected to the public order charges later brought against them.[33]

Despite finding bad faith in the acts of police officers in *Hakobyan*, bad faith was only reviewed under and held to breach Article 5 § 1.[34] This was despite the fact that the applicants had argued that their detention aimed to prevent them from attending opposition demonstrations in Armenia, referring to 'waves of detention' which pointed to a 'policy of blanket arrests of opposition supporters'.[35] The judgment found that the applicants' deprivation of liberty 'as a whole was arbitrary' – significantly, the pursued aims of detention were unrelated to the formal grounds on which it was based.[36] The applicants' claims were supported by a PACE Resolution[37] which confirmed that a series of protests had been organised by the opposition forces in Armenia, calling for a 'referendum of confidence' in President Kocharian. PACE clarified that:

> [t]he demonstrations, although announced, were not authorised by the authorities, who have threatened the organisers with criminal prosecution. Following the demonstrations . . . the General Prosecutor opened criminal investigations against several members of the opposition and arrested many more, in connection with the opposition parties' rally. On the same occasion, several journalists and politicians were beaten up by unknown persons while the police stood by and took no action.

PACE also specifically urged the Armenian Government to immediately release protesters and immediately cease the practice of administrative detention, amending national law accordingly. While evidence verifying the applicants' claims was therefore ample, the Court did not engage in a further Article 18 analysis, despite the patently political motives underlying the deprivations of liberty. The failure to engage in an Article 18 analysis in these circumstances represents a continued omission on the part of the Court. Since Article 18 aims to proscribe the very use of bad faith to impose restrictions, a finding of the existence of bad faith must necessarily engage the State's responsibility under the provision.

32 *Hakobyan and Others v Armenia*, para 93.
33 *Hakobyan and Others v Armenia*, para 94.
34 *Hakobyan and Others v Armenia*, para 123.
35 *Hakobyan and Others v Armenia*, para 113.
36 *Hakobyan and Others v Armenia*, para 123.
37 Resolution 1374 (2004) of the Parliamentary Assembly of the Council of Europe (PACE): Honouring of obligations and commitments by Armenia, 28 April 2004, with relevant extracts outlined at *Hakobyan and Others v Armenia*, para 64.

The applications in *Hakobyan* differ from the principle that 'the mere fact that politicians have been prosecuted or placed in pre-trial detention, even during an election campaign or a referendum, does not automatically indicate that the aim pursued was to restrict political debate'.[38] In *Hakobyan*, bad faith had already been established – assessment of the ulterior motives should have followed. Even if the applicants did not raise an Article 18 complaint, as 'the master of the characterisation to be given in law to the facts of the case',[39] the Court both can and should trigger this analysis. Indeed, the Court has previously, of its own motion, examined complaints under Articles or paragraphs not relied on by the parties.[40] This omission continues not only in respect of claims where applicants have not alleged a breach of Article 18, but also where ulterior motives are not only shown to exist but used to ground a breach of other provisions. The internal harmonisation of the Convention is strongly undermined, with findings in judgments failing to cohere both across the spectrum of rights and amongst themselves. The capacity of the Court's abuse of power provision to protect vulnerable detainees remains unused where a substantive assessment of ulterior motives is precluded. Gaps in the ability of Article 18 to bolster the right to liberty have additionally been exacerbated by the introduction of the 'plurality of purposes' approach. As such, proof of bad faith may not only not engage Article 18 adjudication, but contribute to a finding that it is – in and of itself – insufficient where other legitimate purposes can be found. The problems emanating from this development are explored in the following section.

The advent of the 'plurality of purposes' approach

Merabishvili, which introduced the 'plurality of purposes' approach, concerned the detention of the former Prime Minister of Georgia who was the leader of the main opposition party. The Grand Chamber found that the extension of his pre-trial detention was primarily aimed at obtaining information on matters unrelated to the offence of which he was suspected, and thereby constituted a violation of Article 18. It was unanimously held that there was no breach of Article 5 § 1 relating to the arrest and pre-trial detention, or of Article 5 § 3 with regard to the first judicial decisions ordering his placement in pre-trial detention. However, Article 5 § 3 had been violated since there had subsequently been insufficient grounds to justify the ongoing detention. Although the ECtHR recalled its subsidiary position and recognised that it must be cautious in taking on the role of a primary fact-finder, it could nonetheless consider the quality of domestic investigations and any possible

38 *Selahattin Demirtaş v Turkey (No 2)* (n 5), para 260.

39 *Grosam v the Czech Republic* App no 19750/13 (ECtHR, 23 June 2022), para 70.

40 *Scoppola v Italy (no. 2)* App no 10249/03 (ECtHR, 17 September 2009), para 54.

flaws in the decision-making process.[41] This showed a rare instance, in the context of Article 18 adjudication, of the Court's willingness to balance its subsidiarity-based approaches against the need to uphold the content of the relevant rights. As per Judge Serghides:[42]

> if the Court, by way of an exception to its subsidiary role, finds it justifiable to intervene where a national court has interpreted the national legislation in an arbitrary or manifestly unreasonable way, then it will have an even greater duty to do so where the national authorities wrongfully restrict human rights contrary to Article 18 and other provisions of the Convention, which it is within the primary duty of the Court to interpret and apply.

The natural corollary to the Court's unduly broad[43] 'democratically incentive review mechanism'[44] must be the increase of oversight where a democratic deficit is found. Where the aims of subsidiarity do not apply in a case, oversight-based approaches must instead be adopted. Since Article 18 claims arise in circumstances where democratic principles face serious threat, the Court's starting point must be one of strict oversight. This is vital to redress an imbalance in the use of oversight-based as opposed to subsidiarity-based approaches where identifying the very presence of a democratic process leads to excessive subsidiarity.

In elaborating the plurality of purposes approach in *Merabishvili*, the Grand Chamber looked to the national laws of Council of Europe States:[45]

> the courts of several . . . Contracting States accept as proof of misuse of power the terms of the impugned decision, documents in the file relating to the adoption of that decision, documents created in the course of the judicial-review proceedings, presumptions of fact, and, more generally, contextual evidence. When faced with a situation in which an authority has pursued both an authorised and an ulterior purpose, they assess which of those purposes was predominant.

The judgment also found that this interpretation was consistent with the case-law of the Court of Justice of the European Union. This approach was considered 'especially appropriate' in the context of Article 18, with the

41 *Merabishvili v Georgia* (n 5), para 333.

42 *Merabishvili v Georgia* (n 5), Concurring Opinion of Judge Serghides, para 42.

43 See Chapter 1 on the expansion of process-based subsidiarity.

44 Robert Spano, 'The Democratic Virtues of Human Rights Law – a Response to Lord Sumption's Reith Lectures' (*European Court of Human Rights*, 20 February 2020) 11 <https://echr.coe.int/Documents/Speech_20200220_Spano_Lecture_London_ENG.pdf> accessed 17 July 2024.

45 *Merabishvili v Georgia* (n 5), para 168.

preparatory works to the Convention showing that the provision was intended as the ECHR's version of the administrative law notion of misuse of power.[46] Yet, the previously outlined stance which accepts as proof of misuse of power documents, presumptions of fact, and contextual evidence was disregarded in a series of claims brought against Turkey in the aftermath of the attempted coup of July 2016. This reiterates concerns raised by Çalı about evidence of 'systemic decay in human rights protections' not sufficing to show proof of bad faith 'if they cannot provide immediate inferences about restrictions of rights at a certain time and place'.[47]

Commentators have argued that the plurality of purposes approach results in 'countries where rule of law protections are seriously at risk [enjoying] the benefit of the doubt from the Court if they can show plurality of purposes, legitimate and illegitimate at the same time',[48] which has the effect of '[normalising] anti-democratic practices'.[49] I analyse the evidentiary problems raised by the plurality approach through the judgments in *Sabuncu and Others v Turkey*,[50] *Şık v Turkey (No. 2)*,[51] and *Ahmet Hüsrev Altan v Turkey*.[52] In these cases, despite an absence of lawful justification for detention under Article 5 § 1 (c) and in the face of both case-specific and contextual evidence of ulterior motives, the Court concluded that violations of Article 18 could not be found. I have also chosen to focus on these judgments because they mark as yet the only instances of the Court referring to a requirement that elements suggesting an ulterior purpose should amount to a 'sufficiently homogeneous whole'. They are therefore particularly illustrative of the inadequate approach

46 *Merabishvili v Georgia* (n 5), para 306, although the Court has in other judgments confirmed that the *travaux préparatoires* are not determinative of the scope of Convention rights – *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016), para 125. On this, see Çalı and Hatas who argue that '*Merabishvili* . . . showed a clear tension on the bench of the Court about what the drafting history of Article 18 meant' – Başak Çalı and Kristina Hatas, 'History as an Afterthought: The (Re)discovery of Article 18 in the Case Law of the European Court of Human Rights' in Helmut Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical Perspective* (Edward Elgar Publishing 2021) 173. See also Pablo Santolaya, 'Limiting Restrictions on Rights. Art. 18 ECHR (A Generic Limit on Limits According to Purpose)' in Javier García Roca and Pablo Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights* (Brill 2012) 527, who argues that the *travaux préparatoires* do not clarify Article 18's intended effect, and Tsampi – 'the historic interpretation based on the preparatory works is of limited importance to the Court, which indeed uses it but will more often rely on other methods of interpretation' – Tsampi (n 20) 139.

47 Başak Çalı, '*Merabishvili v. Georgia*: Has the Mountain Given Birth to a Mouse?' (*Verfassungsblog*, 3 December 2017) <https://verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a-mouse/> accessed 17 July 2024.

48 Çalı and Hatas (n 46) 176.

49 Çalı and Hatas (n 46) 176.

50 *Sabuncu and Others v Turkey* App no 23199/17 (ECtHR, 10 November 2020).

51 *Şık v Turkey (No. 2)* App no 36493/17 (24 November 2020).

52 *Ahmet Hüsrev Altan v Turkey* App no 13252/17 (ECtHR, 13 April 2021).

to the adjudication of claims brought under Article 18 together with Article 5. I argue that this stems from an unwillingness to recognise significant findings of international expert bodies as relevant to the consideration of a claim. The normative justifications for deferring to international materials have been provided in previous chapters of this book; the need to uphold the effectiveness of rights of vulnerable groups is pivotal here. In the anti-democratic contexts in which Article 18 claims tend to be situated, it is human rights defenders, journalists, and all those expressing dissenting views who are susceptible to arbitrary detention.

Evidentiary challenges in establishing bad faith

In *Ahmet Hüsrev Altan*, the most recent of the three Turkish cases, a violation of Article 5 § 1 (c) was found on account of the applicant's unlawful pre-trial detention which had been imposed without reasonable suspicion of involvement in an illegal organisation (referred to by the Turkish authorities as FETÖ/PDY and by its supporters as the Gülen or Hizmet movement) and the attempted coup of July 2016.[53] The applicant was arrested during the course of investigations into the attempted coup and the illegal organisation. He was placed in pre-trial detention and indicted, inter alia, for having acted on the instruction of FETÖ/PDY in his capacity as a journalist and previous editor-in-chief at the daily newspaper *Taraf* by trying to manipulate public opinion in favour of the coup. The Court found a violation of Article 10 (the right to freedom of expression) on the grounds that he had been detained on an unjustified and unlawful basis as a result of statements made and articles published in the course of his journalistic activities.[54]

The applicant had been detained more than four years after the events of which he stood accused; his detention could not therefore have been a necessary measure.[55] He also could not have been reasonably suspected, at the time of his detention, of having committed the relevant offences.[56] Yet, in assessing the claim brought under Article 18 in conjunction with Article 5, it could not automatically be concluded that the applicant's detention on remand was imposed in order to silence him.[57] The Court held that the predominant purpose of his detention had been the 'smooth conduct' of the criminal investigation.[58] As previously outlined, the goal of harmonisation requires the

53 For an analysis of the Court's adjudication of Article 5 claims arising from the post-coup emergency rule, see Sabina Garahan and Emre Turkut, 'The "Reasonable Suspicion" Test of Turkey's Post-Coup Emergency Rule Under the European Convention on Human Rights' (2020) 38(4) Netherlands Quarterly of Human Rights 264.

54 *Ahmet Hüsrev Altan v Turkey* (n 52), paras 220 and 226.

55 *Ahmet Hüsrev Altan v Turkey* (n 52), para 141.

56 *Ahmet Hüsrev Altan v Turkey* (n 52), para 148.

57 *Ahmet Hüsrev Altan v Turkey* (n 52), para 243.

58 *Ahmet Hüsrev Altan v Turkey* (n 52), para 243.

ECHR to be interpreted in such a way as to promote internal consistency and harmony between its various provisions.[59] Yet nothing in the Court's Article 5 review indicated an aim on the part of national authorities to ensure the 'smooth conduct' of criminal proceedings. The introduction of this hitherto unstated purpose into the Article 18 analysis had the result of granting discretion to the Turkish Government in justifying periods of detention not lawfully grounded within Article 5 § 1. An undue level of discretion was therefore accorded in reliance on the plurality of purposes approach. However, 'smooth conduct' cannot form part of the adjudication of an Article 5 claim, as it cannot justify interferences with the right to liberty. It therefore certainly cannot form part of the claim brought under Article 18 together with Article 5 or be denoted as a predominant purpose rendering the imposition of detention good faith. This is because Article 18 is not autonomous and is necessarily connected to the substantive Article 5 complaint.

Moreover, in identifying the 'smooth conduct' of the investigation as the predominant purpose of detention, the Court failed to exercise oversight over the other justifications. As such, while the majority accepts the chilling effect of the applicant's detention on his willingness to express his views in public,[60] this aspect is not subjected to any substantive analysis. The judgment merely finds that the chilling effect is 'insufficient by itself' to result in the finding of an Article 18 violation.[61] Without the predominant purpose approach, this factor alone could (following proper analysis) suffice to substantiate a violation, since its impact on the effectiveness of Article 5 would be assessed separately, rather than by reference to the existence of other – possibly legitimate – reasons. In other words, the Court would need to assess whether the chilling effect was demonstrative of an ulterior purpose sought by national authorities in imposing detention. At present, the scope of this assessment is weakened by the acceptance of the 'smooth conduct' of the investigation as a legitimate purpose.

It has been suggested that even an isolated incident can be indicative of an abuse of power, since it can lead to a 'chilling effect' on civil society at large,[62] as acknowledged by the ECtHR itself.[63] In my view, even in the absence of a chilling effect, one instance of a politically motivated deprivation of liberty should suffice to corroborate an Article 18 violation. This is because although an Article 18 claim, for evidentiary reasons, often refers to the general context in which detention took place, it is the individual right under Article 18 taken together with Article 5 that is being assessed. When an applicant uses

59 *Stec and Others* (n 9), para 48; *Austin and Others v the United Kingdom* (n 9), para 54.

60 *Ahmet Hüsrev Altan v Turkey* (n 52), para 244.

61 *Ahmet Hüsrev Altan v Turkey* (n 52), para 244.

62 Tsampi (n 20) 152.

63 *Aliyev v Azerbaijan* App nos 68762/14 and 71200/14 (ECtHR, 20 September 2018), para 213.

contextual factors to support their claim, these should form part of the individual case review. The Court should not maintain a de facto requirement that the applicant prove the negative impact on others of their own individual rights violation. In this way, evidence of a 'systemic decay in human rights protections'[64] at the national level may legitimately form part of a claim – but cannot, by extension, be removed from the adjudication of the case where it cannot be shown that it affects wider civil society. This approach serves two purposes. First, the ECtHR's own insistence that Article 18 violations do not automatically result from the finding of an Article 5 breach will be upheld.[65] Second, Convention review of the Article 18 application taken together with Article 5 will rely on those factors that are relevant to the determination of the individual claim. As such, the risks previously identified of the inclusion by the Court of collective efficiency-based concerns in its adjudication will be avoided.[66]

Although *Merabishvili* confirmed the relevance of circumstantial evidence under Article 18,[67] this has the effect of heightening the evidentiary threshold for showing an abuse of power rather than incorporating such evidence within the claim's assessment. Rather than including context in the adjudication of an individual application, the Court again shifts individual rights towards a collective rights space where matters of efficiency (as in efficiency-based subsidiarity) and those of democratic deficit (as under Article 18) affect rights-holders as a group rather than as individuals. This is problematic, since framing Convention rights in this way weakens the Court's focus on their promotion and advancement (and, thereby, their effectiveness). Thus while complaints raised under Article 18 may indeed be 'just the proverbial tip of the iceberg',[68] it should not fall to the individual to not only convincingly establish that the tip of the iceberg violates Article 18, but that the rest of the iceberg does, too. Only their tip of the iceberg concerns their particular, individual rights. The rest of the iceberg is relevant only insofar as it affects their rights specifically. Indeed, even if 'it is not only the applicant's rights and freedoms as an individual that could be said to be under threat but the whole democratic system itself',[69] it is still the applicant's rights that are under review.

Findings relating to the democratic system should feed into the adjudication of the applicant's claim, not the other way around. In other words, the individual case should not be tested for what it reveals about the entire system of democracy in the respondent State. The high threshold imposed by the current approach results in established findings on the rule of law situation

64 Çalı (n 47).
65 *Selahattin Demirtaş v Turkey (No 2)* (n 5), para 260.
66 See Chapter 1 on efficiency-based subsidiarity.
67 *Merabishvili v Georgia* (n 5), para 317.
68 Tsampi (n 20) 153.
69 *Selahattin Demirtaş v Turkey (No 2)* (n 5), para 272.

in a country to be disregarded. This is because rather than being used to test respect for an applicant's rights, such findings are used to tie their individual interests to the broader societal impacts of the breach. In the same way, in *Burmych*, the non-enforcement of ECtHR judgments formed a central part of the applicants' claims, but rather than considering how this affected the effectiveness of their rights, the majority viewed the non-enforcement through the lens of efficiency-based subsidiarity.[70] In *Turan*, the complaints of the applicants under Article 5 were similarly not reviewed in full in order to expedite the claims of other Convention applicants.[71]

Moreover, it has been suggested that, where no direct proof of an Article 18 violation exists, a 'multi-factor approach' should lead the Court to consider the general context.[72] This should be enacted 'when either the offence is of political nature . . . or the proceeding suffered from an accumulation of procedural mistakes'.[73] I suggest a broader approach. The judgment in *Ahmet Hüsrev Altan* set out that:[74]

> [c]ircumstantial evidence . . . means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts. Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts, are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court.

The failure in *Ahmet Hüsrev Altan* to consider what Judge Kūris describes as 'a system, a synergy and a policy behind the measures taken by the State against representatives of the media'[75] is a serious oversight. It is incumbent on the ECtHR to view the evidence it identifies in the preceding extract as central to the claim. This will ensure the full effectiveness of Article 18 and, by extension, Article 5 when the two provisions are taken together. In order to support this position, it is also helpful to recall that:[76]

> proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact . . . the level of persuasion required to reach a conclusion is intrinsically linked

70 See relevant analysis at Chapter 1.

71 See relevant analysis at Chapter 1.

72 Helmut Satzger, Frank Zimmermann and Martin Eibach, 'Does Art. 18 ECHR Grant Protection Against Politically Motivated Criminal Proceedings: (Part 2) – Prerequisites, Questions of Evidence and Scope of Application' (2014) 4(3) European Criminal Law Review 248, 258.

73 Satzger, Zimmermann and Eibach (n 72).

74 *Ahmet Hüsrev Altan v Turkey* (n 52), para 237.

75 *Ahmet Hüsrev Altan v Turkey* (n 52), Partly Dissenting Opinion of Judge Kūris, para 3.

76 *Merabishvili v Georgia* (n 5), para 314.

> to the specificity of the facts, the nature of the allegation made, and the Convention right at stake.

On this basis, on account of the nature of Article 18, the scope of the claim's adjudication must be amended to allow for the consideration of contextual information, in a setting where evidence gathering may be particularly difficult for applicants. This can also be justified by reference to the Court's own acceptance that circumstantial evidence can be used to 'shed light on the facts, or to corroborate findings made by the Court'.[77] The very purpose of Article 18 is to address any ulterior motives or policies at the root of national decision-making. The 'nature of the allegation made'[78] means that an individual bringing an Article 18 claim together with Article 5 is more likely to be in a situation where they face particular difficulties in obtaining evidence, having been detained, possibly on the basis of ulterior motives. Applicants in these settings are thus justified in relying on the findings of international bodies to support their claims since national authorities largely control evidence at national level. As noted by Judge Kūris in his interview, '[t]he Court has a lot more to do in Article 18 cases when bad faith is alleged and the government is not persuasive enough in dismissing the allegations which the rest of the world takes for commonplace knowledge'.[79] Deferring to the findings of expert bodies can help to address this gap in protection – ensuring that any ulterior purposes can be brought to the fore will maximise the right's effectiveness.

It has been held that the Court's ability to draw inferences from the State's conduct in the relevant proceedings is:[80]

> especially pertinent in situations – for instance those concerning people in the custody of the authorities – in which the respondent State alone has access to information capable of corroborating or refuting the applicant's allegations . . . [t]hat possibility is likely to be of particular relevance in relation to allegations of ulterior purpose.

Importantly, in the Articles 5 and 18 setting, the Court has confirmed that:

> a strict application of the principle *affirmanti incumbit probatio*, that is that the burden of proof in relation to an allegation lies on the party which makes it, is not possible, notably in instances when this has been justified by the specific evidentiary difficulties faced by the applicants.[81]

77 *Ahmet Hüsrev Altan v Turkey* (n 52), para 237.
78 *Merabishvili v Georgia* (n 5), para 314.
79 Interview with Judge Kūris.
80 *Merabishvili v Georgia* (n 5), para 313.
81 *Merabishvili v Georgia* (n 5), para 311.

Recognising the vulnerabilities of rights-holders in this sphere allows for a more progressive and effective interpretation of the Convention, since it responds to realities on the ground. Where detention may have been imposed in bad faith for ulterior motives, the respondent State will often alone have 'access to information capable of corroborating or refuting the applicant's allegations'.[82] It is therefore incumbent on the Court to consider the context and give the findings of international bodies, which are often solely capable of adducing the information needed by applicants, their due deference in this field. Failing to do this leads to a weakening of the effectiveness of the rights held by applicants since the imbalance of power in the context of Article 18 claims taken with Article 5 creates specific difficulties in access to evidence. This creates further vulnerabilities that must be addressed and which moreover grant normative justification for a turn to wider international standards. An approach that embraces expert findings can help to address gaps in protection created by Convention standards falling behind realities accepted beyond the Court.

With reference to available evidence, one judge considered that the reason that violations were more frequently found in respect of certain States was that a clear 'sequence of events' could be established.[83] In this sequence of events, a human rights activist or member of the opposition is targeted shortly after criticising the government. Although 'after' does not necessarily mean 'because of' – the two events may be independent of each other – in these cases, the Court has found that applicants are targeted both 'after' and 'because of' their anti-government views.[84] The context therefore plays a 'very important, if not decisive, role' in these judgments.[85] The timeline can also be especially pertinent where a statement made by a public official precedes detention. As such, in *Kavala*, the ECtHR considered discriminatory and accusatory comments made about the applicant by Turkey's President to be 'significant'.[86] Since the statements preceded the bringing of charges, Article 18 was effectively used as a means of upholding the requirement of a reasonable suspicion under Article 5 § 1 (c).[87]

Indeed, statements made by public officials can undermine the reasonableness of a suspicion by suggesting that ulterior reasons motivated detention. However, since an ulterior motive may not always be preceded by a public statement that reveals the true intentions of the authorities, Articles 18 and 5 review must be broadened so as to adequately acknowledge the reality of misuse of power to impose detention, which the provisions taken together aim to proscribe. Moreover, contextual information on political motivations

82 *Merabishvili v Georgia* (n 5), para 313.
83 Interview with ECtHR judge, 16 April 2021.
84 Interview with ECtHR judge, 16 April 2021.
85 Interview with ECtHR judge, 16 April 2021.
86 *Kavala v Turkey* App no 28749/18 (ECtHR, 10 December 2019), para 229.
87 Garahan and Turkut (n 53) 280–1.

for detention was widely available in *Ahmet Hüsrev Altan*. Yet, contrary to its own delineation of the misuse of power doctrine in *Merabishvili*,[88] such contextual evidence was not taken into account. Evidence provided by third-party interveners, including the Commissioner for Human Rights, demonstrated widespread use of pre-trial detention against journalists in Turkey. In the aftermath of the attempted coup, many journalists faced unsubstantiated terrorism-related charges in connection with the legitimate exercise of their right to freedom of expression. In the Commissioner's view, the targeting of not only journalists but also human rights defenders, academics, and Members of Parliament availing themselves of their right to freedom of expression indicated that criminal laws and procedures were being used by the judiciary to silence dissenting voices.[89]

In this respect, the Court's approach in *Ahmet Hüsrev Altan* can be contrasted with the judgment in *Rasul Jafarov v Azerbaijan*,[90] which found a violation of Article 18 taken together with Article 5. The applicant, a prominent human rights activist, had been arrested in connection with criminal proceedings for alleged irregularities in the financial activities of several NGOs. The ECtHR considered that the charges against him had not been based on a reasonable suspicion, contrary to Article 5. Although that conclusion in itself was not enough to lead to a finding of an Article 18 violation, certain circumstances viewed together convincingly showed that the restriction of his rights had been based on improper reasons.

The idea of a 'sufficiently homogeneous whole' raised in *Ahmet Hüsrev Altan* appears at odds with the reasoning in *Rasul Jafarov* in accordance with which 'it [could] be established to a sufficient degree that proof of improper reasons follows the combination of relevant case-specific facts'.[91] The case-specific facts fell into three main strands, all of which related to the situation prevailing in the respondent State and how this affected the applicant's rights.

First, the judgment noted the 'general circumstances' that the Court looks to when assessing claims brought under Article 5 § 1, which are 'equally relevant' in the context of Article 18 complaints.[92] These general circumstances revealed increasingly harsh and restrictive legislative regulation of NGO activity and funding, which '[could not] be simply ignored' where the applicant, an NGO activist, had been prosecuted for an alleged failure to comply with legal formalities pertaining to his work. By contrast, in the Turkish setting, the majority in *Ahmet Hüsrev Altan* did not find that the general context of repression against dissenting voices indicated a violation of Article 18.

88 *Merabishvili v Georgia* (n 5), para 168.
89 *Ahmet Hüsrev Altan v Turkey* (n 52), para 232.
90 *Rasul Jafarov v Azerbaijan* App no. 69981/14 (ECtHR, 17 March 2016).
91 *Rasul Jafarov v Azerbaijan*, para 158.
92 *Rasul Jafarov v Azerbaijan*, para 159.

Second, the Court noted various statements by high-ranking officials and articles published in pro-government media where local NGOs and their leaders, including the applicant, were consistently accused of being national traitors and a 'fifth column' for foreign interests. They were criticised for portraying a negative image of the country abroad. For the Court, what was held against these individuals was not simply an alleged breach of NGO laws, but their activity itself.[93] However, in *Ahmet Hüsrev Altan*, the applicant's detention – which had stifled his freedom of expression in breach of Article 10 – was not held to have interfered with his journalistic activity sufficiently to constitute an Article 18 violation. This marked a regression from the more harmonious and effective reading of the provision in *Selahattin Demirtaş v Turkey (No 2)*.[94]

Third, the Court again emphasised the situation generally prevailing in Azerbaijan, noting that the applicant's situation could not be viewed in isolation. Several human rights activists who cooperated with international organisations, including most notably the Council of Europe, were similarly arrested and charged with serious criminal offences entailing lengthy prison terms. These facts, taken together with the statements by the country's officials, supported the view that restrictions on the applicant's liberty were part of a broader campaign to 'crack down on human rights defenders'.[95] Such information was undoubtedly available and presented to the Court in the Turkish cases of *Ahmet Hüsrev Altan*, *Sabuncu*, and *Şık*, all brought by journalists who had been detained during the post-coup emergency rule in Turkey. The reasons for the ECtHR's refusal to consider evidence of a repressive atmosphere prevailing in Turkey at that time – which included the mass detention of journalists, human rights defenders, and opposition politicians[96] – remain unclear.

In *Rasul Jafarov*, the Council of Europe Commissioner for Human Rights had intervened and submitted that the case was an illustration of a serious and systemic human rights problem in Azerbaijan.[97] In *Ahmet Hüsrev Altan*, the Commissioner highlighted that excessive recourse to detention was a longstanding problem in Turkey, with 210 journalists having been placed in pre-trial detention during the state of emergency, not including those who had been arrested and released after being questioned. In most instances, journalists had been charged with terrorism-related offences without any evidence corroborating their involvement in such activities. The Commissioner for

93 *Rasul Jafarov v Azerbaijan*, para 160.

94 On this, see Başak Çalı, 'The Whole Is More than the Sum of its Parts: *The Demirtaş v Turkey (No 2)* Grand Chamber Judgment of the ECtHR' (*Verfassungsblog*, 24 December 2020) <https://verfassungsblog.de/the-whole-is-more-than-the-sum-of-its-parts/> accessed 17 July 2024.

95 *Rasul Jafarov* (n 90), para 161.

96 For an analysis of the violations of domestic law in this context, see Garahan and Turkut (n 53) 266–72.

97 *Rasul Jafarov* (n 90), para 99.

Human Rights was 'struck by the weakness of the accusations and the political nature of the decisions ordering and extending pre-trial detention in such cases'.[98] The Commissioner made equivalent interventions in *Sabuncu*[99] and *Şık*.[100] The views expressed by the same body on the same issue – repression of views that do not fall in line with the government position – are thus inexplicably given significant weight in one case while swiftly disregarded in several others. As a result, realities that are commonplace knowledge are not accepted by the Court although, as per Judge Kūris[101]:

> it is the Court's not only task but its mission to state openly, irrespective of any political, expediency or other considerations, that certain States are acting in bad faith against the political opponents of the regime. There has been an increasing number of violations of Article 18 found against Azerbaijan, but when it comes to Turkey or Russia, the picture is different. That prompts some commentators to consider whether the Court is not pandering to the big players on the international scene.

A further disparity that arises in the review of Article 18 between different Contracting States is the reference to a 'sufficiently homogeneous whole'. In *Merabishvili*, the Chamber held that the burden of proof of showing the pursuit of illegitimate purposes by State authorities does not necessarily have to rest on the applicant. Some of the burden of disproving a hidden agenda may also fall on government authorities if the facts of the case so require. *Merabishvili* also established, for the first time, that even if no violation of another standalone article is found, that does not preclude the finding of a violation of that provision in conjunction with Article 18.[102] Although this marked a 'decisive lowering' of the standard of proof for bad faith violations,[103] this has now been undermined by *Sabuncu* and confirmed in *Ahmet Hüsrev Altan* and *Şık*. This is problematic, as it signals a move away from recognising contextual evidence as relevant to an Article 18 application taken together with Article 5. The practical effectiveness of the right to liberty is consequently weakened, since the challenges for individuals in adducing compelling evidence of a clandestine motive for detention are not duly recognised. Although previous judgments have made reference to these problems, the Court fails to give practical effect to their resolution.

98 *Ahmet Hüsrev Altan v Turkey* (n 52), para 119.
99 *Sabuncu and Others v Turkey* (n 50), para 138.
100 *Şık v Turkey (No. 2)* (n 51), para 108.
101 Interview with Judge Kūris, 29 January 2021.
102 *Merabishvili v Georgia* (n 5), para 271.
103 Başak Çalı, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (2018) 35(2) Wisconsin International Law Journal 237, 268.

In explaining the absence of an Article 18 violation in *Ahmet Hüsrev Altan*, the judgment notes that the case-file does not contain any speech or interference of any high-ranking public official which would suggest an ulterior purpose for detention.[104] A public statement is by no means the sole determinant of an ulterior motive, as accepted by the Court's own explanation of what is meant by 'contextual evidence'. This approach marks a departure from the evidentiary threshold that had been lowered by *Merabishvili* in 2017.[105] Prior to *Merabishvili*, applicants had to provide 'incontrovertible and direct proof' of an Article 18 breach and to show that 'the whole legal machinery' of the State had been 'misused' – 'that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention'.[106] This earlier 'beginning to the end' standard appears to have been surreptitiously reintroduced through the requirement that the elements suggesting an ulterior purpose form a 'sufficiently homogeneous whole'. Thus, in *Ahmet Hüsrev Altan*, the majority found that elements relied on by the applicant in support of a violation of Article 18, taken separately or in combination with each other, did not form a 'sufficiently homogeneous whole' for finding that detention pursued a purpose not prescribed by the Convention.[107]

The term 'sufficiently homogeneous whole' appears only in two other judgments (both also post-coup claims brought against Turkey): *Sabuncu* and *Şık*. The applicant in *Şık* was an investigative journalist and writer working for the daily newspaper *Cumhuriyet*, which is known for its critical stance towards the government.[108] The applicants in *Sabuncu* were also journalists at *Cumhuriyet*. All the applicants had been held contrary to Article 5 § 1 and all had had their Article 10 rights violated by the unjustified measures of detention. In both *Şık* and *Sabuncu*, the Court also found by a majority that there was no violation of Article 18 taken together with Article 5.[109] None of the cases where a violation of Article 18[110] has been established since the

104 *Ahmet Hüsrev Altan v Turkey* (n 52), para 242.

105 *Merabishvili v Georgia* (n 5).

106 *Khodorkovskiy v Russia* App no 5829/04 (ECtHR, 31 May 2011), paras 66 and 260.

107 *Ahmet Hüsrev Altan v Turkey* (n 52), para 246.

108 *Şık v Turkey (No. 2)* (n 51), paras 4–5.

109 See the Partly Dissenting Opinions of Judge Kūris (the only judge to vote for a finding of an Article 18 violation) in both cases.

110 *Ukraine v Russia (Re Crimea)* App nos 20958/14 and 38334/18 (ECtHR, 25 June 2024); *Zarema Musayeva and Others v Russia* App no 4573/22 (ECtHR, 28 May 2024); *Kutayev v Russia* App no 17912/15 (ECtHR, 24 January 2023); *Yüksekdağ Şenoğlu v Turkey* App nos 14332/17, 24585/17, 25445/17 et al (ECtHR, 8 November 2022); *Juszczyszyn v Poland* App no 35599/20 (ECtHR, 6 October 2022); *Kogan and Others v Russia* App no 54003/20 (ECtHR, 7 March 2023); *Selahattin Demirtaş v Turkey (No 2)* (n 5); *Azizov and Novruzlu v Azerbaijan* App nos 65583/13 and 70106/13 (ECtHR, 18 February 2021); *Democracy and Human Rights Resource Centre and Mustafayev v Azerbaijan* App nos 74288/14 64568/16 (ECtHR, 14 October 2021) and *Miroslava Todorova v Bulgaria*.

requirement of a 'sufficiently homogeneous whole' first appeared in *Sabuncu* in November 2020 refer to the standard.[111]

In this respect, Judge Kūris commented that it is 'not surprising' that some people have begun to question whether the Court is indeed pandering to the bigger players in the Council of Europe (while acknowledging that this cannot be proven).[112] Several explanations may be given for the disparities and the repeated findings of non-violations of Article 18 in the Turkish line of case-law. Dothan argues that stricter demands are imposed on low-reputation States, since the reputational impact on the ECtHR of such States failing to comply with its judgments is lower than that of high-reputation States.[113] A high-reputation State suffers a greater reputational loss from non-compliance than a low-reputation State.[114] Because high-reputation States have higher reputational payoffs, they have a stronger incentive to comply, making the expectation that they will do so in more cases a reasonable one.[115] Thus, the non-compliance of a State that is expected to comply can cause reputational damage.[116] Such considerations – like those tied to efficiency – cannot form part of a claim's review. Moreover, the unwillingness to establish Article 18 violations against Turkey in several cases does not concord with this categorisation. This is because Turkey cannot be classified as a high-reputation State, including under Dothan's own delineation.[117] Thus while this may account for the strongly worded Article 18 judgments against Azerbaijan, the gaps in Article 18 adjudication concerning Turkey are left unexplained.

Since Turkey cannot be categorised as a good faith State, the ECtHR's hesitance to adopt a strongly oversight-based approach towards the country in this sphere may be explained by the new efficiency-based concerns that now fall within subsidiarity-based review. This is highlighted with respect to Article 5 by *Turan*, where the Court did not wish to assess the applicants' claims in full out of expediency concerns. Perhaps the Court does not wish to open the floodgates with consistent findings of Article 18 breaches that may further exacerbate its backlog.

It is possible that the focus on efficiency stems from a risk-averse fear that a State will simply cease engaging with Convention procedures. Judge Nussberger has raised the point that 'there is a danger that Article 18 violations might soon be understood as everyday criticism, and lose their special effect of

111 *Sabuncu and Others v Turkey* (n 50), para 256.

112 Interview with Judge Kūris, 29 January 2021.

113 Shai Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) 12(1) Chicago Journal of International Law 115.

114 Dothan (n 113) 122.

115 Dothan (n 113) 122.

116 Dothan (n 113) 117.

117 Dothan identifies Russia, Turkey, and Eastern European States as examples of low-reputation States, and Western European States as more likely to be considered high-reputation States – Dothan (n 113) 120.

"blame and shame"'.[118] It has also been argued that the stigma[119] attached to a finding of an Article 18 breach 'may in all but the clearest of cases incite the State to resist its conviction, and thus, in the long run, damage the legitimacy of the Court itself'.[120] Yet the danger that 'the very act of "naming and shaming" populist governments may add fuel to the fire of public opposition to external institutions that scrutinize and condemn populist leaders and their policies'[121] cannot legitimately form part of the Court's rationale. This is because, like efficiency-based subsidiarity, fear-based subsidiarity does not reflect factors relevant to the adjudication of individual rights claims. The reaction of a respondent government to a judgment has no role to play in the substantive review of a claim on its merits. It therefore cannot be considered by the Court, falling as it does beyond the scope of a case.

Alternatively, the ECtHR's reticence in establishing Article 18 breaches may result from its classic formulation that it is not necessary to consider complaints brought under other provisions where a violation has already been found. Yet, the Court does engage in discussion of whether there is a 'sufficiently homogeneous whole' in the Turkish cases,[122] rather than merely dismissing the Article 18 complaint or concluding that engagement with the issue is not necessary. It has also been posited that the Court fears an 'inflationary effect' that could undermine the 'special weight' of an Article 18 violation.[123] However, such factors cannot justify the hesitance shown in this area. This is because the wish to maintain Article 18 as a 'special provision' does not, as a matter of judicial policy, pertain to the individual rights in a case. While a high threshold may be preserved on the basis of coherent standards, since the Court has decided to resurrect the provision, it cannot now decide to 'put the genie back in the bottle'.[124] Having established Article 18 as a powerful tool for protecting democracy and the rule of law, the ECtHR cannot intentionally halt the progressive development of its own jurisprudence. This would not only serve to undermine the practical effectiveness of rights held under the Convention, but would also compromise the evolutive interpretation that it is obliged to pursue. A progressive interpretation, once begun, cannot be retrogressively ceased. Allowing Article 18 review to take place is crucial for

118 Angelika Nussberger, 'The European Court of Human Rights at Sixty – Challenges and Perspectives' (2020) 1(1) European Convention on Human Rights Law Review 11, 13.

119 On this, with further references, see Tsampi (n 20) 150.

120 Satzger, Zimmermann and Eibach (n 72) 253.

121 Laurence R Helfer, 'Populism and International Human Rights Law Institutions' in Gerald L Neuman (ed), *Human Rights in a Time of Populism: Challenges and Responses* (Cambridge University Press 2020) 229.

122 *Ahmet Hüsrev Altan v Turkey* (n 52), *Sabuncu and Others v Turkey* (n 50) and *Şık v Turkey (No. 2)* (n 51).

123 Satzger, Zimmermann and Eibach (n 72) 253.

124 On the resurfacing of Article 18 at the ECtHR, see Çalı and Hatas (n 46).

maintaining the effectiveness of protections against arbitrary detention in the light of politicised attempts to limit the right to liberty.

Discretion in the adjudication of Article 14 in conjunction with Article 5

As in the case of Article 18, the Court has imbued Article 14 with both autonomous and non-autonomous content.[125] For Article 14 to become applicable, it suffices that the facts of a case fall within the ambit of another Convention provision.[126] At the same time, the Court has also attempted to give an autonomous, substantive meaning to the prohibition of discrimination contained in Article 14.[127] Although Article 14 must link to a Convention right, it is autonomous to the extent that it does not presuppose a breach of that right.[128]

This section addresses the discretion granted to Contracting States in applications brought under Article 14 taken together with Article 5. These claims have centred on national sentencing practices and the variations in their application to different groups – though the potential of Article 14 to uphold protections against arbitrary detention is much broader.[129] A more evolutive approach arises in the discretion granted to States in sentencing than in the review of other areas of Article 5. This is the result of the provisions of Article 14 combining with Article 5 in a way that requires the Court to adopt more progressive standards. Since it falls beyond the Court's scope to assess the appropriateness of a sentence, it is the mere engagement of the Article 14 protections that allows for such an interpretation to be enacted. Article 14 provides that:

> [t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race,

125 For an in-depth review of Article 14 jurisprudence, see Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts* (Routledge 2015).

126 *Thlimmenos v Greece* App no 34369/97 (ECtHR, 6 April 2000), para 40; *Sommerfeld v Germany* App no 31871/96 (8 July 2003), para 84; and *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008), para 159.

127 Nikolaidis (n 125) 50. See also *Rasmussen v Denmark* App no 8777/79 (Commission (Plenary), 5 July 1983), para 68: '[i]t is as if Art.14 formed an integral part of each of the provisions laying down specific rights and freedoms', confirming the Court's approach in the Belgian Linguistics Case, para 9 – *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium* (App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (ECtHR, 23 July 1968) 31 ('Belgian Linguistics Case').

128 Belgian Linguistics Case (n 127).

129 For analysis of possible discrimination claims in the field of immigration detention, see Sabina Garahan, 'Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers Under the Illegal Migration Act' (2024) Public Law 11, 18.

colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The term 'other status' suggests that there is no limitation on the types of identifying factors that may fall within the ambit of the provision. This is especially significant in the context of claims brought under Article 14 in conjunction with Article 5, since sentencing policies may be based on a range of factors across the Contracting States. Article 5 § 1 (a) permits the lawful detention of a person after conviction by a competent court. Matters of appropriate sentencing or individual guilt fall beyond the ECtHR's remit.[130] These are considered to be matters that are within the exclusive competence of national criminal courts.[131] However, where sentencing policies or decisions are applied in a discriminatory manner – for example, where legislation differentiates between offenders on the grounds of age or gender – an arguable claim of a violation of Article 14 taken with Article 5 § 1 (a) may arise.[132] As such, in a case concerning the eligibility of a life prisoner for parole, while the Court recognised that Article 5 § 1 (a) does not enshrine a right to automatic parole, 'an issue may arise under that provision taken together with Article 14 . . . if a settled sentencing policy affects individuals in a discriminatory manner'.[133]

Article 14 prohibits only the kind of discrimination that interferes with the equal enjoyment of Convention rights.[134] The burden of proof with respect to Article 14 dictates that once an applicant has shown a difference in treatment, it falls to the government to explain why it was justified.[135] In principle, a wide margin of appreciation is left to States in matters of penal policy. Nevertheless, as argued in this section, the Court retains a close scrutiny over claims under Article 14 taken together with Article 5 which allege that domestic measures resulted in detention which was arbitrary or unlawful.[136] The threshold

130 But see the Article 3 context where the Court has commented specifically on the inadequate nature of sentences for torture. For example, in *Derman*, the sentences of police officers who were found guilty of ill-treating the applicant to extract a confession were suspended, leading the Court to conclude that the application of domestic law was unacceptable since its effect was to render convictions ineffective – *Derman v Turkey* App no 21789/02 (ECtHR, 31 May 2011), para 28.

131 *Nikolova and Velichkova v Bulgaria* App no 7888/03 (ECtHR, 20 December 2007), para 61.

132 *Aleksandr Aleksandrov v Russia* App no 14431/06 (ECtHR, 27 March 2018), para 22.

133 *Gerger v Turkey* App no 24919/94 (ECtHR, 8 July 1999), para 69; *Clift v the United Kingdom* App no 7205/07 (ECtHR, 13 July 2010), para 42.

134 Nikolaidis (n 125) 54.

135 *D.H. and Others v the Czech Republic* App no 57325/00 (ECtHR, 13 November 2007), para 177 and *Andrejeva v Latvia* App no 55707/00 (ECtHR, 18 February 2009), para 84.

136 *Qing v Portugal* App no 69861/11 (ECtHR, 5 November 2015), para 82; *Clift v the United Kingdom* (n 133).

imposed on respondent States for proving that a difference in treatment, such as one based exclusively on grounds of nationality,[137] was compatible with the ECHR is high.

Lessons for the Court's review of Articles 18 and 5 claims

The more evolutive approach taken to Articles 14 and 5 adjudication, as well as the more nuanced handling of evidentiary challenges, offers ways of addressing the gaps in protection that have arisen under Article 18. First, linking the review of the two provisions taken together would mean that the existence of bad faith shown under Article 5 would necessarily entail the State's responsibility under Article 18. The goal of internal harmonisation would thus be met in a way that ensures that protections against arbitrary detention motivated by bad faith become practical and effective. Second, unjustified differences in treatment are considered concurrently rather than alternatively under Article 14. Adopting this approach under Article 18 would mean that the existence of any ulterior purpose would be sufficient to establish a violation, without applicants needing to prove that the illegitimate aim was predominant in ordering detention.

In *Clift v the United Kingdom*,[138] the ECtHR considered that the early release scheme to which the applicant was subjected lacked objective justification, resulting in the finding of a violation of Article 14 with Article 5. The scheme allowed those serving long-term determinate sentences of less than 15 years or indeterminate sentences to be released on a positive recommendation of the Parole Board. Those serving long-term determinate sentences of 15 years or more were additionally required to secure the approval of the Secretary of State. The ECtHR found that only risk-based considerations could justify the imposition of different early release conditions. In the light of the apparently greater risk posed by life prisoners, a system which imposed less stringent conditions for early release on them while prisoners serving fixed-term sentences of 15 years or more were subject to more stringent demands lacked objective justification. In this regard, the requirements of Article 5 § 4 concerning the right of life prisoners to have their initial release determined by a judicial body could not justify treating long-term prisoners less favourably.[139] The Court expressly links the protections set out in Article 5 to the evaluation of discrimination under Article 14, in finding that:[140]

> [w]here an early release scheme applies differently to prisoners depending on the length of their sentences, there is a risk that, unless the difference

137 On this, see *Qing* (n 136), para 82.
138 *Clift v the United Kingdom* (n 133).
139 *Clift v the United Kingdom* (n 133), para 75.
140 *Clift v the United Kingdom* (n 133), para 62.

> in treatment is objectively justified, it will run counter to the very purpose of Article 5, namely to protect the individual from arbitrary detention.

The invocation of a claim under Article 14 thus serves to bolster the effectiveness of Article 5.[141] The discretion accorded to States is here controlled by reference to the express interest protected by Article 14 – the right to non-discrimination. This is used to strengthen the protection against arbitrary detention. By contrast, in assessing Article 18 claims, the Court separates any findings established under Article 5 from the overall review of whether the respondent State was acting in bad faith – the very question which Article 18 is designed to ask.

In *Aleksandr Aleksandrov v Russia*,[142] moreover, the ECtHR had cause to assess whether an individual sentencing decision introduced a difference in treatment based on place of residence. The judgment assessed whether the respondent State presented an objective and reasonable justification for the alleged difference in treatment. Since the applicant was deprived of his liberty after being convicted by a competent court, the claim fell within the ambit of Article 5 § 1 (a).[143] In its review of Article 14 taken together with Article 5, the judgment noted that national courts had refused to consider a non-custodial sentence by reference to the 'particular circumstances' of the offence. Although the trial court did not expand further on this, reference to this ground was not, on the face of it, discriminatory under the ECHR.[144] However, since the individual's place of residence was also explicitly considered in sentencing, a difference of treatment arose between the applicant and other offenders convicted of similar offences and eligible for a sentence of probation or a fine.[145] Since place of residence was held to constitute an aspect of personal status under Article 14,[146] the protection of that provision was triggered.

The trial court had noted that the applicant had no permanent residence within the Moscow Region where the offence had been committed and he had been sentenced. The domestic court did not explain the relevance of this fact to the decision to impose a custodial sentence. While the existence of strong social links in the individual's hometown was acknowledged, it was not

141 On this, see Nikolaidis, who argues (n 125) 55:

> the ambit of a human right, understood as a wide area in which an individual can be said to enjoy it, may operate to expand the reach of Article 14 far beyond the protective core of the fundamental rights enshrined in the Convention.

142 *Aleksandr Aleksandrov v Russia* (n 132).

143 *Aleksandr Aleksandrov v Russia* (n 132), para 23.

144 *Aleksandr Aleksandrov v Russia* (n 132), para 24.

145 *Aleksandr Aleksandrov v Russia* (n 132), para 25; *Paraskeva Todorova v Bulgaria* App no 37193/07 (ECtHR, 25 March 2010), paras 37–44; and *Moldovan and Others v Romania (No. 2)* App nos 41138/98 and 64320/01 (ECtHR, 12 July 2005), para 139.

146 *Carson and Others v the United Kingdom* App no 42184/05 (ECtHR, 16 March 2010), paras 70–1.

explained why a non-custodial sentence should have been contingent on his ability to have a permanent residence outside of his home region. The appellate court did not deal with the applicant's claim of discrimination and offered no justification for the difference in treatment.[147] Since the difference did not pursue a legitimate aim or have an objective and reasonable justification, the ECtHR established a violation of Article 14 in conjunction with Article 5,[148] noting that it could not speculate on the underlying reasons for the decisions of domestic courts where those reasons were not apparent.[149] The judgment was nonetheless able to find that national authorities had acted in breach of the Convention. This approach respects the fourth instance doctrine while not extending discretion to respondent States where the reasoning of their decisions remains unclear. Such an approach would greatly benefit Article 18 jurisprudence. It amply demonstrates that, in the absence of a lawful justification for detention under Article 5 § 1, it is possible for the ECtHR to engage in Article 18 review without needing to speculate on specific ulterior motives. If a lawful ground for detention is lacking and bad faith is established, the Court could on this basis find a violation of Article 18. As such, applicants such as those in *Hakobyan* where bad faith is found would be able to establish that detention breached both Articles 18 and 5, as well as Article 5 taken alone.

Aleksandr Aleksandrov is indicative of the approach of Article 5 sentencing case-law, where the scope of discretion accorded under the provision becomes necessarily narrowed by Article 14 considerations. This constitutes a strong divergence from the manner of the Court's review of Article 18 claims taken together with Article 5. In that category of cases, even the absence of a legitimate basis for detention under Article 5 does not necessarily influence the conclusions reached under Article 18. In discrimination cases where more than one ground is used to justify a difference in treatment, meanwhile, these grounds will be considered concurrently rather than alternatively.[150] This presents a stark contrast with the Court's 'plurality of purpose' approach to Article 18. The illegitimacy of any ground for decision-making under Article 14 has the effect of tainting the entire decision.[151] Under Article 18, meanwhile, an illegitimate purpose will not prove bad faith on the part of national authorities

147 *Aleksandr Aleksandrov v Russia* (n 132), para 28.

148 A differential treatment will only be discriminatory if it does not pursue a 'legitimate aim' or if there is no 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' – *Aleksandr Aleksandrov v Russia* (n 132), para 19; *Vallianatos and Others v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013). For more on proportionality testing under Article 5, see Chapter 4.

149 *Aleksandr Aleksandrov v Russia* (n 132), para 29. See also *Pichugin v Russia* App no 38623/03 (ECtHR, 23 October 2012), para 138 and *Mamedova v Russia* App no 7064/05 (ECtHR, 1 June 2006), para 79.

150 *Aleksandr Aleksandrov v Russia* (n 132), para 26.

151 *E.B. v France* App no 43546/02 (ECtHR, 22 January 2008), para 80.

if this aim is not found to be the predominant justification for detention in a given case. Moreover, as demonstrated by the analysis in the following section, when assessing national sentencing policies through the lens of Article 14 with Article 5, the Court looks to a lack of common ground on the issue among the Contracting States. Adopting an evolutive approach allows the ECtHR to contextualise penal policies within the broader European consensus. This is important since the acknowledgement of any characteristics protected by Article 14 during sentencing (including 'other status') triggers a further layer of protection and thus effectiveness of protections against arbitrary detention.

Allegations of discriminatory sentencing policies

Having drawn parallels between Article 14 and Article 18 case-law taken with Article 5 in order to make suggestions for a more effective adjudication of Article 18, this section hones in on Article 14, focusing on allegations of the discriminatory imposition of life imprisonment. This is a particularly useful area for testing the Court's capacity to enact a progressive development of Article 5, and it is suggested that the evolutive approach taken should be reflected in complaints brought under Article 5 alone. The analysed jurisprudence deftly upholds the protections of both the right to liberty and the right to equality, using dynamic interpretation to advance Article 5 standards progressively. Consideration of relevant specialised instruments to which States have signed up ensures a consensus-based evolutive body of case-law that strongly adheres to the non-regression principle and contributes to both internal and external harmonisation of rights.

Contracting States are in principle free to decide whether a life sentence constitutes appropriate punishment for particularly serious crimes. However, their discretion in this respect is not unfettered and is subject to certain minimum requirements.[152] The Court's adjudication in this sphere deftly meets the goal of reading the Convention as a whole and ensuring the internal consistency and harmony of various provisions.[153] Standards on life imprisonment under Article 3 are carefully taken into account in the delineation of discretion accorded under Articles 14 and 5. In addition, close scrutiny and consideration of international principles signed up to by Contracting States achieve external harmonisation which situates the right to liberty and the sentencing practices it is affected by in a modern-day conception of protections in this field.

The applicants in *Khamtokhu and Aksenchik v Russia* argued that their sentences had deprived them of their liberty for life and that, under domestic law, they had been treated less favourably than women or than men aged younger than 18 or older than 65 convicted of similar crimes, in violation

152 *Khamtokhu and Aksenchik v Russia* App nos 60367/08 and 961/11 (ECtHR, 24 January 2017), para 75.

153 *Maaouia v France* App no 39652/98 (ECtHR, 5 October 2000), para 36.

of Article 14 in conjunction with Article 5.[154] National law stipulated that a life sentence could not be imposed on women or those who were minors when the offence was committed or older than 65 at the time of conviction.[155] The ECtHR found that the applicants' life sentences were not arbitrary or unreasonable for several reasons.[156] First, the applicants were sentenced after an adversarial trial during which they were able to submit arguments in their defence and to state their views on the appropriate punishment. Second, the trial court had imposed the sentences on the basis of specific case facts and an individualised application of criminal law. The trial court's discretion in choosing an appropriate sentence was not limited by the existence of a provision which allowed for the imposition of a life sentence on the applicants but not on certain other groups. Third, the judgment emphasised the penological objectives of the protection of society and general and individual deterrence underlying the life sentences. Fourth, the applicants were eligible for early release after the first 25 years provided that they fully abided by prison regulations in the previous three years. As such, the national legal system did not raise issues of compliance with *Vinter* or *Murray*[157] – judgments which, pursuant to Article 3 of the Convention, require that life sentences are not irreducible.[158]

It was found that Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. The scope of this margin varies according to the circumstances, as well as the subject matter and its background.[159] Differences based on sex require particularly compelling justification. In this respect, references to traditions, general assumptions, or prevailing social attitudes are not, by themselves, sufficient to justify a difference in treatment, any more than stereotypes based on race, origin, colour, or sexual orientation.[160] *Khamtokhu and Aksenchik* confirms that the existence of a European consensus is a relevant factor in determining the scope of the margin and the need for the Court to respond to any emerging consensus as to the standards to be achieved in this sphere.[161] The judgment's approach to assessing the justification for

154 *Khamtokhu and Aksenchik v Russia* (n 152), para 54.

155 *Khamtokhu and Aksenchik v Russia* (n 152), para 15.

156 *Khamtokhu and Aksenchik v Russia* (n 152), para 76.

157 *Khamtokhu and Aksenchik v Russia* (n 152), para 76; *Murray v the Netherlands* App no 10511/10 (ECtHR, 26 April 2016); *Vinter and Others v the United Kingdom* App nos 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013).

158 On this, see Robert Spano, 'Deprivation of Liberty and Human Dignity in the Case-Law of the European Court of Human Rights' (2016) 4(2) Bergen Journal of Criminal Law and Criminal Justice 150.

159 *Khamtokhu and Aksenchik v Russia* (n 152), para 77.

160 *Konstantin Markin v Russia* App no 30078/06 (ECtHR, 22 March 2012), para 127; *X and Others v Austria* App no 19010/07 (ECtHR, 19 February 2013), para 99; *Vallianatos and Others v Greece* (n 148), para 77.

161 *Khamtokhu and Aksenchik v Russia* (n 152), para 79.

the difference in treatment between the applicants and women, minors, and those older than 65 shows its use of consensus to progress standards where needed. It also demonstrates how interaction with other advancing standards elsewhere in the Convention acquis can ensure that a consensus-based analysis does not result in a regression of rights protection.

It was held that the difference in treatment of the group of adult offenders to which the applicants belonged as compared to that of juvenile offenders was justified. In reaching this conclusion, the judgment cited to the common approach of the Contracting States. This was based on a comparative survey of sentencing guidelines in 37 States which allow life imprisonment. All of these had in place a special sentencing regime for juveniles or young adults.[162] Life imprisonment of offenders below the age of 18 years was prohibited in 32 States.[163] This was sufficient for the Court to establish a common approach among the legal systems of the Council of Europe. This approach was also consistent with the recommendation of the UN Committee on the Rights of the Child ('CRC')[164] to abolish all forms of life imprisonment for offences committed by persons below the age of 18 and with the UN General Assembly's Resolution[165] inviting States to consider repealing all forms of life imprisonment for minors. The ECtHR identified relevant international instruments and findings, duly recognising the underlying purpose of the materials as enabling the rehabilitation of young offenders. In this respect, the judgment adds that:[166]

> when young offenders are held accountable for their deeds, however serious, this must be done with due regard for their presumed immaturity, both mental and emotional, as well as the greater malleability of their personality and their capacity for rehabilitation and reformation.

The Court ultimately saw 'no reason' to query the difference in treatment between adult offenders who could face life imprisonment and juvenile offenders, who could not – this was 'consonant with the approach that

162 *Khamtokhu and Aksenchik v Russia* (n 152), para 20.

163 *Khamtokhu and Aksenchik v Russia* (n 152), para 20.

164 As set out in General Comment No. 10 (2007):

> [g]iven the likelihood that a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18.

165 Resolution A/RES/67/166 on Human Rights in the Administration of Justice on 20 December 2012, which urges States:

> to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release . . . is imposed for offences committed by persons under 18 years of age, and . . . to consider repealing all other forms of life imprisonment for offences committed by persons under 18 years of age.

166 *Khamtokhu and Aksenchik v Russia* (n 152), para 80.

is common to the legal systems of all the Contracting States'.[167] Thus, in evaluating claims brought under Article 14 with Article 5, the Court accords a more central role to consensus, citing to both European and international sources. This ensures that the rights of minors as a vulnerable group are both upheld and not subject to regression. Since Russian law already shielded minors from life imprisonment, a finding that the difference in treatment was not justified would have required a weakening of rights protection through a demand that juveniles no longer benefit from the exemption. The commitment to non-regression shown with respect to life imprisonment is further and keenly shown in the evaluation of whether exempting women from the punishment could be justified. The approach urged throughout this book is thus successfully enacted in this sphere. Both European and international standards are read progressively by the Court and applied to the adjudication of the claim in a way that ensures continued rights protection. This allows the Court to properly deduce the scope of the margin to be accorded. The effectiveness of the rights held by minors elsewhere in the Convention is upheld through the Article 14 claim, contributing to the overall harmonious reading of ECHR rights urged by the Court.

The aim of internal harmonisation is met by reliance on Article 3 and its progressive jurisprudence on life imprisonment (explored further in what follows); external harmonisation is met by elaboration of international principles on children's rights, to which Contracting States have committed. By referring to the fact that the exemption of juvenile offenders from life imprisonment exists in all of the Contracting States, 'without exception',[168] the bar is set high in establishing a consensus with respect to Article 5. Here, unlike in other areas where consensus is of relevance, consensus is indeed taken to mean an absolute consensus across the Council of Europe, rather than a trend or a tendency. However, this is somewhat tempered by the reference to other international materials to support the Court's conclusion that the established consensus reflects the correct approach to take under the Convention. This is underlined by the judgment's own reflections on the need to offer rehabilitation to juvenile offenders.[169] In emphasising the rehabilitation of young offenders, the Court in *Khamtokhu and Aksenchik* shows its understanding of the consensus in the States bound by its rulings, which both flows from and informs other international standards. It also recognises that all Contracting States must consider the findings of the CRC and the General Assembly. This aspect would be further strengthened if the Court were to explicitly address the relevance of the CRC's and General Assembly's findings on the States within its jurisdiction – namely by noting that all Council of Europe States have ratified the UNCRC and are members of the UN.

167 *Khamtokhu and Aksenchik v Russia* (n 152) para 80.
168 *Khamtokhu and Aksenchik v Russia* (n 152), para 80.
169 *Khamtokhu and Aksenchik v Russia* (n 152), para 80.

As regards offenders aged 65 or older, the other age group exempted from life imprisonment, *Khamtokhu and Aksenchik* recalled *Vinter*, in accordance with which a life sentence is Article 3 compliant only if there is a possibility of release and review (both of which must exist from the time that the sentence is imposed).[170] The judgment in *Khamtokhu and Aksenchik* found that excluding offenders aged 65 or older from life imprisonment had an objective and reasonable justification in the light of this Convention requirement. This was based on the Russian Government's argument that life imprisonment of persons aged 65 or older would make them eligible for release on parole only at the age of 90, which was an illusory possibility having regard to life expectancy.[171] The ECtHR was here creative in establishing a common approach. Only four other Contracting States, other than Russia, provided a specific sentencing regime for older offenders.[172] It was nevertheless found that the purpose of these rules coincided with the interests underlying eligibility for early release after the first 25 years for adult male offenders aged younger than 65. This was determined in *Vinter* to be a common approach in jurisdictions where life imprisonment can be imposed. In *Vinter*, the Court had found support for the institution of a dedicated mechanism guaranteeing a review within 25 years, with further periodic reviews, on the basis of comparative and international law authorities.[173] It was found in *Khamtokhu and Aksenchik* that the reducibility of a life sentence must carry greater weight for elderly offenders in order to avoid becoming a right that is merely illusory.[174] In limiting the imposition of life sentences by stipulating a maximum age limit, the Russian legislature used one of several methods at its disposal for securing a prospect of release for a reasonable number of prisoners.[175] On this basis, the respondent Government was found to have acted within its margin of appreciation.[176] The principle of non-regression was again significant in driving effectiveness in this field. The harmonisation with other Convention jurisprudence provided further framing of the ways in which consensus and standards of protection for older offenders could be upheld.

The factors to be considered thus included other areas of rights protection (here, the reducibility of life sentences) as per the requirement that the ECHR be read harmoniously.[177] This approach to the ban on life imprisonment on persons aged 65 or older was directly rooted in the ECtHR's own standards as enshrined in *Vinter*, constituting a strong basis for discretion and a consequent

170 *Khamtokhu and Aksenchik v Russia* (n 152), para 81.
171 *Khamtokhu and Aksenchik v Russia* (n 152), para 44.
172 An offender who has reached retirement age (Azerbaijan), the age of 60 (Georgia) or 65 (Romania and Ukraine) cannot be sentenced to life imprisonment – *Khamtokhu and Aksenchik v Russia* (n 73), para 21.
173 *Vinter and Others v the United Kingdom* (n 157), para 120.
174 *Khamtokhu and Aksenchik v Russia* (n 152), para 81.
175 *Khamtokhu and Aksenchik v Russia* (n 152), para 81.
176 *Khamtokhu and Aksenchik v Russia* (n 152), para 81.
177 *Khamtokhu and Aksenchik v Russia* (n 152), para 87.

evolutive reading. By drawing links between the identified consensus and Convention law, the Court is able to interpret rights progressively and by reference to shared standards. As argued in previous chapters, outlining a broader consensus-based framework in which to ground developing ECHR standards strengthens the effectiveness of rights. This is because this allows for the elaboration of minimum standards against arbitrary detention that form part of the adjudication of Article 5 claims. The Court's methods of review in each case therefore become more predictable, since the starting point that is taken is shared, regardless of the respondent State. Moreover, applicants are able to expect that adjudication of their claim will consider not only relevant external standards, but will cohere with guarantees offered in other areas of the Convention.

The third and final difference in treatment that was assessed, namely that between the applicants and adult female offenders who could not face life imprisonment, most amply demonstrates the Court's commitment to harmonisation and non-regression in this sphere. The way in which the ECtHR reasoned the justification for a difference in treatment necessitated a deft handling of competing Convention ideals. Its manner of doing so gave rise to a number of separate opinions. It also ultimately succeeded in meeting the aims of harmonisation and non-regression. The judgment itself considered various European and international sources that enshrine protections for women against gender-based violence, abuse, and sexual harassment in custodial settings, and in the contexts of pregnancy and motherhood.[178] These included detailed references to the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules').[179] This recognition of specialised instruments offers a useful example of the need to refer to particular expertise in interpreting the Convention. However, it is regrettable that the references to the Bangkok Rules do not respond specifically to the matter of life imprisonment of women, referring instead to the general needs of women in prison. As such, in their partly dissenting opinion, Judges Sicilianos, Møse, Lubarda, Mourou-Vikström and Kucsko-Stadlmayer argue that the cited materials do not disclose a 'very weighty reason', still less a 'particularly serious reason', for justifying the difference in treatment on grounds of sex. The judges argue that the instruments cited by the majority do not touch on the justifications referred to by the Russian Government in support of the legislation, namely the 'natural vulnerability' of women, their 'special role in society' or their 'reproductive function'.[180]

In this respect, the Court could have expanded on the Preamble to the Bangkok Rules which outlines that 'women prisoners belong to one of the vulnerable groups that have specific needs and requirements' and that 'a

178 *Khamtokhu and Aksenchik v Russia* (n 152), paras 27–31.

179 *Khamtokhu and Aksenchik v Russia* (n 152), para 29.

180 *Khamtokhu and Aksenchik v Russia* (n 152), Joint Partly Dissenting Opinion of Judges Sicilianos, Møse, Lubarda, Mourou-Vikström and Kucsko-Stadlmayer, para 7.

number of female offenders do not pose a risk to society'.[181] Since Article 14 does not prohibit a State from treating groups differently in order to correct 'factual inequalities' between them,[182] this could have formed the basis of a more nuanced approach which moved beyond the stereotyped arguments of the respondent State towards a more progressive analysis of ECHR standards. This would also have allowed the Court to ground its findings in the need to ensure practical respect for the rights of vulnerable groups. The judgment could equally have highlighted the focus of the Bangkok Rules in prioritising non-custodial measures for women offenders.[183] It could have, on this basis, considered whether the Russian legal system had responded in a proportionate manner to the 'specific needs and requirements' recognised in the Bangkok Rules by exempting women from life imprisonment.

It is possible that the Court wished to avoid assessing the justifications raised by the Russian Government for the difference in treatment. These were linked chiefly to the 'special role' held by women in society 'which related, above all, to their reproductive function'.[184] Engaging substantively with such arguments may have entailed the inevitable finding that the difference in treatment was not compliant with Article 14. The Russian Government would consequently have been required to revoke the exemption of women prisoners from life imprisonment. Mentioning international standards that broadly relate to the protection of women prisoners constituted a way of avoiding this and of denoting the particular vulnerabilities of women in this field without mirroring the arguments of the respondent State.

Reading the concurring opinions in the case shows that the interest in avoiding the finding of an Article 14 violation was linked to the application of an evolutive approach, as well as the maintenance of an evolutive approach to life sentences under Article 3. The question of how the non-finding of a breach interacted with an evolutive interpretation is an interesting one. Claims brought under Article 14 in conjunction with Article 5 are capable of promoting an evolutive approach by encouraging (or at the least not stifling) more progressive policies to criminal justice, even if such policies are not applied equally to all groups. Judge Nussberger finds it 'difficult to criticise the . . . State for having introduced, in a gradual manner and thus not for all at once, a measure advancing human rights protection'.[185] For Judge Turković, '[g]radual abolition, targeting groups that are more vulnerable to the harmful

181 Preamble to the Bangkok Rules.

182 *Andrle v the Czech Republic* App no 6268/08 (ECtHR, 17 February 2011), para 48.

183 See Section III of the Bangkok Rules. See also the Preamble which mentions 'the gender specificities of, and the consequent need to give priority to applying non-custodial measures to, women who have come into contact with the criminal justice system'.

184 *Khamtokhu and Aksenchik v Russia* (n 152), para 47.

185 *Khamtokhu and Aksenchik v Russia* (n 152), Concurring Opinion of Judge Nussberger, para 5.

impact of life sentences, should be tolerated as a step towards its complete abolition'.[186]

By making a broad reference to the lack of a consensus regarding the use of life sentences, the ECtHR sought to justify its non-finding of a violation of Article 14 in order to avoid a situation whereby the respondent government would be required to remove the exemption of women from life imprisonment. A closer inspection of justifications would have required the Court to navigate and respond to the underlying discriminatory rationale, which falls short of Article 14 standards, for a measure that has the overall effect of advancing rights protection, thus rendering Convention rights generally more effective. While this cannot be proven, it is clear from the concurring opinions of Judge Nussberger and Judge Mits that, at least for them, this formed the rationale for voting against the finding of a violation on this ground.[187] Judge Nussberger powerfully expresses this fear when she writes that:[188]

> [t]he question is not about sentencing in individual cases, but a much more general one regarding the extent to which life sentences may be kept on the statute books as an *ultima ratio* threat in cases of outrageous crimes. In Russia this is considered necessary only for men. I have voted for a non-violation as I cannot accept that such an *ultima ratio* threat will also be introduced for women. It would be appalling if such a backward step were justified by the necessity to execute a judgment of the Court and were even done under the supervision of the Committee of Ministers.

This reasoning can be moored in consensus, since this can only ever be used in support of a progressive interpretation; regression cannot stem from a consensus or, by extension, a margin of appreciation methodology. In *Khamtokhu and Aksenchik*, it is recognised that 'the area in question [imposition of life imprisonment] should still be regarded as one of evolving rights, with no established consensus, in which States must also enjoy a margin of appreciation'.[189] This allowed for the finding that there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued, since this fell within the respondent State's margin of appreciation. The ECtHR could have relied on the stereotyped language surrounding the role of women in society which was used to justify the difference in treatment and ultimately considered that there was no reasonable

186 *Khamtokhu and Aksenchik v Russia* (n 152), Concurring Opinion of Judge Turković, para 11.

187 *Khamtokhu and Aksenchik v Russia* (n 152), Concurring Opinion of Judge Nussberger, para 6: 'a State should not be punished for taking one step in a good direction merely because the second step does not follow'.

188 *Khamtokhu and Aksenchik v Russia* (n 152), Concurring Opinion of Judge Nussberger, para 7.

189 *Khamtokhu and Aksenchik v Russia* (n 152), para 85.

justification for protecting women from life sentences. Instead, the judgment appropriately concludes by noting that 'the Court has taken full account of the need to interpret the Convention in a harmonious manner and in conformity with its general spirit'.[190] Such general spirit does not permit regression, even where the margin – as in this case – remains broad. The interconnectedness of effectiveness and harmonisation ensure that it is the most practically effective solution that is reached.

Similarly to Judge Nussberger, Judge Mits concluded that requiring the respondent State to treat the groups exempted from life imprisonment in the same way as the applicants 'in the name of equality . . . would lead to extending the application of life imprisonment to all groups'.[191] Women, minors and those aged 65 or older would resultantly face harsher punishment, which would be 'an absurd result and at odds with the idea of the protection of human rights'.[192] There was therefore a tension between the interest in pursuing an evolutive approach to the ECHR, stemming from a wide margin, and determining that the margin of appreciation was in fact narrowed as a result of the State's illegitimate justifications for shielding women from life sentences. The progressive capacity of margin review was thus magnified. For example, evolutive interpretation could have been used to support the position that consensus across the Council of Europe has moved beyond viewing women chiefly as bearers of reproductive functions. This would have grounded a narrowing of the margin for the State, leading to an inevitable finding that no reasonable relationship of proportionality existed between the legislation and its declared aim of protecting women's 'natural vulnerability' and 'special role in society'. As several judges recognised, this type of consensus and resulting method analysis would have led to the narrowing of a margin and finding of an Article 14 breach, imposing a demand on the State to extend its use of life sentences to women.

Heri argues that the findings in *Khamtokhu and Aksenchik* were reached on the basis of arguments that 'place politics over principle'.[193] On my reading of the case, however, the judgment engaged in a harmonious and holistic application of Convention principles. Concerns about a levelling down of protection – of life imprisonment being applied to women as well as men – are not 'by and large extrinsic',[194] but rather fundamental to how the Court interprets claims in this field. This differs from the need to avoid considering external factors (such as delays for other applicants, as in *Turan*)

190 *Khamtokhu and Aksenchik v Russia* (n 152), para 87.

191 *Khamtokhu and Aksenchik v Russia* (n 152), para 87, Concurring Opinion of Judge Mits.

192 *Khamtokhu and Aksenchik v Russia* (n 152), para 87, Concurring Opinion of Judge Mits.

193 Corina Heri, 'Between a Rock and a Hard Place: The Court's Difficult Choice in *Khamtokhu and Aksenchik v. Russia*' (*Strasbourg Observers*, 17 March 2017) <https://strasbourgobservers.com/2017/03/17/between-a-rock-and-a-hard-place-the-courts-difficult-choice-in-khamtokhu-and-aksenchik-v-russia/> accessed 17 July 2024.

194 Heri (n 193).

since the broader context here has an impact on what is being directly tested by the applicants themselves, namely national penal policy's compatibility with Article 14. Heri also suggests that the hostile domestic reaction to previous ECtHR judgments on gender discrimination in Russia had a role to play in the non-finding of a violation.[195] Considering the large proportion of violation findings against Russia,[196] and in the light of other considerations that may have plagued the Court (and demonstrably plagued at least three of the judges who issued separate opinions), this is not proven by the judgment. It appears rather that evaluation of the claim centred on questions of the effectiveness of ECHR rights rather than political expediency. As I have previously posited, the former is a central and legitimate factor that affects the application under review, while the latter is extrinsic to the Convention complaint and thus cannot be considered.

Khamtokhu and Aksenchik therefore sits 'at the crossroads' between two battles fought by the ECtHR – the fight against the spread of life imprisonment and the fight against gender stereotyping.[197] Of these, the former – which finds its roots in Article 3 and grows through Article 5 – took precedence over the latter, enshrined in Article 14. The penal justifications for not allowing the greater use of life imprisonment by Russia justified the finding of a non-violation. Had equivalent discrimination been challenged in the context of legislation pertaining to other fields, the judgment may have found the stereotyped views of women to breach the non-discrimination clause. The impact of such a conclusion may have been less egregious in circumstances where it would not necessitate a demand that a Contracting State walk back on human rights protections. As it stood, however, the Court did not seem prepared to sacrifice the progress made in the penal practices of States, even if doing so would have signalled a furtherance of its non-discrimination jurisprudence.[198] By linking its assessment of the measure's proportionality to progressing standards on life imprisonment, the Court also ensures the non-regression of equality principles. No carte blanche is given to the introduction of legislative differences based on sex – it is the progressive development of criminal justice standards that grants specific justification. Since finding the differential treatment based on sex to be proportionate ensured the non-regression of Articles 3 and 5 rights, uneven standards between genders will not automatically be found to comply

195 Heri (n 193).

196 'The ECHR in Facts and Figures 2021' (*Council of Europe*, 2022) <https://www.echr.coe.int/Documents/Facts_Figures_2021_ENG.pdf> accessed 17 July 2024.

197 Marion Vannier, 'Caught Between a Rock and a Hard Place – Human Rights, Life Imprisonment and Gender Stereotyping: A Critical Analysis of *Khamtokhu and Aksenchik v. Russia*' in Sandra Walklate, Kate Fitz-Gibbon, JaneMaree Maher and Jude McCulloch (eds), *The Emerald Handbook of Feminism, Criminology and Social Change* (Emerald Publishing Limited 2017) 280.

198 See, for example, the judgment in *Konstantin Markin v Russia* (n 160).

with Article 14 where such exigencies are absent. The non-regression of all relevant provisions is in this way assured.

Even if the Court's approach in *Khamtokhu and Aksenchik* may be criticised on policy grounds,[199] it must be seen in the context of the evolutive interpretation of criminal justice standards in the Convention acquis. As a result of this evolutive approach, rights under Article 5 could be upheld in conjunction with Article 14 on the basis of ECHR standards developed under other provisions – namely the requirement for the reducibility of life sentences pursuant to Article 3. Chapter 4 showed that in proportionality exercises, the right to liberty is ceded to competing rights where those have attracted a more evolutive reading. As the jurisprudence on life sentences has been developed more progressively, its inclusion within the assessment of the claim in *Khamtokhu and Aksenchik* – and indeed, its impact on determining the existence of a broad margin of appreciation – meant that the advancement of existing Article 5 rights in fact took priority over the autonomous Article 14 matter of gender inequality. This perhaps undermines the positioning of Article 14 as an autonomous provision, since where other provisions are at play, its own development will be sacrificed (though, as noted previously, its non-regression is guaranteed). Another interpretation and one that concords with my framing of the Convention as a harmonious and non-regressive rights space is that where another right risks dilution, the margin under Article 14 will be sufficiently broadened to prevent that from happening. This interplay between provisions ultimately confirms the precedence given to the right's non-autonomous facet where necessary to ensure the practicality of the underlying rights. Importantly, it also signifies the power of Article 14 in strengthening the effectiveness of protections against arbitrary detention.

Indeed, the Court takes a generally progressive approach to changing standards in the field of penal policy, demonstrating the importance of the overall conception of rehabilitation as the objective of imprisonment in the jurisprudence of the ECtHR.[200] This can be seen in references to the

199 See Vannier (n 197) 282–3:

> When policy-makers carve out categories of individuals who should not be exposed to a particular type of punishment, they concomitantly determine who deserves to be sentenced to that sanction . . .[c]leaving out classes from life imprisonment indeed reflect an inherently moral but also political judgement about who deserves to die in prison and who does not.

See also the powerful and poignant letter of abolitionist families of murder victims which brings these issues to the fore – Floridians for Alternatives to the Death Penalty, 'Murder Victims' Family Members Sign-On Letter in Support of Protecting People with Serious Mental Illness from the Death Penalty' (*Floridians for Alternatives to the Death Penalty*, 14 April 2022) <https://www.fadp.org/murder-victims-family-members-sign-on-letter/> accessed 17 July 2024:

> [t]he death penalty is said to be reserved for "particularly heinous murders". We have difficulty understanding this position. The implication is that other murders are "ordinary". From experience, we know that every murder is heinous to the family of the victim.

200 Dirk van Zyl Smit, Pete Weatherby and Simon Creighton, 'Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?' (2014) 14 Human Rights Law Review 59, 70.

rehabilitation of youth offenders in *Khamtokhu and Aksenchik*,[201] and the need to provide a realistic prospect of release for older offenders. In other judgments, it has been emphasised that where a respondent government uses risk to the public to justify continued detention of offenders, attention must be paid to the need for rehabilitation opportunities.[202] The harmonious reading of Articles 14 and 5 has continued in more recent case-law, resulting in findings of a breach with particular regard given to the fact that:[203]

> a detainee, regardless of age, has the right to seek judicial review of his or her detention . . . this interpretation of the relevant Convention provisions, emphasising the protective nature of juvenile justice in detention proceedings, is supported by Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, according to which juveniles may not have fewer legal rights and safeguards than adult offenders under the general rules of criminal procedure . . . the particular vulnerability of minors requires additional protection of their rights.

References to specialised instruments on the rights of the vulnerable group concerned therefore bear particular weight in Article 5 claims brought together with Article 14. Reflecting this harmonious reading would help to uphold the right to liberty in other spheres of Article 5 adjudication, even where a discrimination claim is not made. Adjudication of Articles 14 and 5 cases shows how a dynamic reading helps to delineate a margin of appreciation most capable of ensuring both non-regression and effectiveness of rights. In order to help the right to liberty stand independently, the Court should imbue Article 5 review with a similarly evolutive reading – one that is cognisant of shifting societal approaches to the detention of vulnerable groups.

Conclusion

Chapter 5 has evaluated whether the Court accords an appropriate level of discretion in adjudicating claims brought under Article 5 in conjunction with other Convention provisions, namely Articles 14 and 18. In doing so, it has shown that while an undue level of discretion is accorded to States in showing that detention was not imposed in bad faith contrary to Article 18, a more harmonious interpretation has emerged in Articles 14 and 5 jurisprudence. Moreover, in *Sabuncu*, *Ahmet Hüsrev Altan*, and *Şık*, the Court reverts to a standard that requires every element relied on in support of an Article 18 violation to disclose a 'sufficiently homogeneous whole'. The effectiveness of

201 See the reference to minors' 'capacity for rehabilitation and reformation' – *Khamtokhu and Aksenchik v Russia* (n 152), para 80.

202 *Rangelov v Germany* App no 5123/07 (ECtHR, 22 March 2012), para 218.

203 *Spišák v the Czech Republic* App no 13968/22 (ECtHR, 20 June 2024), paras 81–2.

Article 18 (and, by extension, Article 5) in this way continues to be undermined, even in cases where violations of another provision (such as Article 10) show that States were restricting rights for an ulterior motive. Evidentiary hurdles imposed on applicants stem from a lack of oversight which fails to redress an imbalance in power where allegations of politicised detentions of human rights activists, journalists, and opposition figures are concerned. This is aggravated by the Court's refusal to defer to expert findings regarding certain country contexts, which would plug the gaps in evidence faced by persons detained for ulterior motives.

In this respect, the review of Article 14 claims taken together with Article 5 reflects a more harmonious approach towards the Convention, since the ECtHR takes account of sentencing standards protected under Article 3. A more oversight-based and evolutive approach, in particular as regards common equality standards across the Council of Europe, demonstrates how assessing Article 14 cases jointly with Article 5 provides an effective way of addressing issues of inequality under the Convention. Although – as a general rule – Contracting States are granted a margin in concluding whether and to what extent differences in otherwise similar situations justify differential treatment, the Court deploys both oversight-based and evolutive approaches to determining complaints under Articles 14 and 5. The Court both can and should adopt the same deft balancing of competing approaches to adjudicating allegations of Article 18 violations taken with Article 5. This will result in an appropriate level of discretion preserved in the review of Article 5 claims that are brought not only with Article 14 but also with Article 18. The effectiveness of the right to liberty can thereby be effectively promoted not solely for the provision in its own right, but in reliance on, and in furtherance of, other protections offered by the ECHR. In this way, the goal of harmonisation and its contribution to the effectiveness of rights can be achieved.

The more evolutive approach taken to Articles 14 and 5 adjudication, as well as the more nuanced handling of evidentiary challenges, offers ways of addressing the gaps in protection that have arisen under Article 18. First, linking the review of the two provisions taken together would mean that the existence of bad faith shown under Article 5 would necessarily entail the State's responsibility under Article 18. The goal of internal harmonisation would thus be met in a way that ensures that protections against arbitrary detention motivated by bad faith become practical and effective. Second, unjustified differences in treatment are considered concurrently rather than alternatively under Article 14. Adopting this approach under Article 18 would mean that the existence of any ulterior purpose would be sufficient to establish a violation, without applicants needing to prove that the illegitimate aim was predominant in ordering detention.

The analysed Articles 14 and 5 jurisprudence deftly upholds both the right to liberty and equality protections, using dynamic interpretation to advance standards progressively. Consideration of relevant specialised instruments to

which States have signed up ensures a consensus-based evolutive body of case-law that strongly respects the non-regression principle and contributes to both internal and external harmonisation of rights. The primary role of the Convention in advancing the march of human rights is thereby achieved in the field of life imprisonment through the evolutive reading of the right to liberty urged throughout this book. Applying the proposed evolutive framework to Articles 18 and 5 claims would help to resolve gaps in protection against arbitrary detention that have arisen through neglect of the need to harmonise and evolve rights.

Conclusion

Key challenges

At the root of this book is my concern that the Court has not made use of opportunities to progressively evolve Article 5 standards. As a living instrument, it has long been accepted, both through the Court's own methods of interpretation and on application of the Vienna Convention on the Law of Treaties, that the Convention should evolve in line with progressive developments across the Council of Europe. As shown in this book, this has been the case in other areas of Convention jurisprudence. When it comes to Article 5, however, gaps in progressively advancing protections against arbitrary deprivation of liberty become apparent. Consequently, vulnerable groups of detainees – including those held pre-trial, as children, or for political reasons – are left without recourse to an effective remedy at Convention level. This is because the lack of an evolutive interpretation fails to reflect minimum standards that have developed across the Council of Europe, or to acknowledge the broader international consensus, signalled in many cases by the ratification by Contracting States of other key international instruments. This book therefore centres the goals of both internal and external harmonisation as key to ensuring the effectiveness of Article 5. This ensures that rights cohere internally across the Convention acquis, as well as reflecting the external commitments signed up to by Contracting States. This book benefits from original interview data and insights from European Court of Human Rights (ECtHR) judges into the methods and approaches taken in adjudicating the right to liberty, in order to provide analysis and solutions to address the gaps in protection against arbitrary detention.

Arguing that evolutive interpretation is an interpretive obligation under the Convention, this book shows that a lack of progressive advancement of the right to liberty is significant for two key reasons. Normatively, where the Court is not subjecting Article 5 to an evolutive reading, it is failing to interpret the right in a practical and effective way. The right to liberty has – in ways explored in this book – become incapable of responding to modern-day challenges, with the Court neglecting opportunities for progression, which can be found in a European consensus or in specialised international instruments. Since the

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Court adopts dynamic interpretation in other areas, this also has the effect of leaving Article 5 as an underdeveloped provision in the context of the ECHR. This results in the dilution of protections against arbitrary detention taken alone (as shown in Chapter 3), as well as when balanced against competing rights in proportionality testing (explored in Chapter 4). Practically, keeping Article 5 in line with prevailing standards across the Council of Europe can help to address the Court's backlog by creating a body of minimum standards capable of responding more effectively to the issue of whether or not an Article 5 violation has taken place. Evolutively interpreted rights standards attract greater legitimacy and therefore compliance, reflecting developing State consent and views on the necessity of detention in various spheres. Importantly, elaborating the mandatory nature of the non-regression principle ensures that consensus analysis does not accept majoritarian input, with non-regression and the interpretive obligation of progressive interpretation going hand in hand. The development of minimum standards to protect against arbitrary deprivation of liberty based on State consensus would thus fulfil the Court's normative goals while improving the effectiveness of the Convention system.

In order to elaborate the evolutive reframing proposed to Article 5, this book provides an in-depth conceptual analysis of the Court's use and justification of discretion in adjudicating the right to liberty. A new framework is developed for determining the appropriateness of discretion which links the Court's use of its methods of interpretation to their underlying approaches – subsidiarity-based, evolutive, and oversight-based. Evaluating the approach or approaches pursued by a specific method allows for a closer analysis of the ECtHR's decision-making. Where disparities between judgments arise, the grounds for these differences are clarified by a review of which aim is being pursued, under which stated approach, and why. This allows for an identification of the strongly subsidiarity-based stance adopted in several spheres and the parallel aversion to oversight-based and evolutive methods.

The development and application of the framework in the Article 5 context is rooted in both doctrinal analysis and empirical findings on Court practice, as gathered through interviews with serving judges of the ECtHR. On this basis, this book has identified the key challenges with respect to discretion raised by the Court's use of its methods of interpretation in Article 5 adjudication. While the use of subsidiarity has been expanded through the advent of efficiency-based subsidiarity and rapid growth of process-based subsidiarity, evolutive interpretation remains comparatively neglected. This is despite the fact that this is a mandatory form of Convention interpretation. Moreover, since oversight conflicts with subsidiarity, the broadening of subsidiarity has resulted in a parallel shrinking of Convention-level oversight. The increased focus on subsidiarity has usurped the adoption of evolutive approaches in a number of Article 5 settings. References to the living instrument or an emerging consensus are especially scarce in Article 5 jurisprudence. However, the fact that the provision enshrines a limited right does not give rise to any barriers to evolutive interpretation – to the contrary, despite being a right that

provides an exhaustive list of grounds for deprivation of liberty, discretion is applied in numerous ways. By failing to apply evolutive approaches to the right while continuing to use subsidiarity-based approaches, the ECtHR has undermined the progressive quality of a key Convention protection.

With respect to subsidiarity-based approaches, it is argued that two key strands introduced into subsidiarity reasoning require closer attention. First, efficiency considerations cannot legitimately form part of a Convention claim. This is because rights under the Convention are individual rights that impose corresponding duties on States. Broader concerns surrounding the efficiency of the European human rights system can therefore play no part in the adoption of a subsidiarity-based approach. Disregarding this has caused a skewing of the concept of effectiveness from the need to keep rights practical and effective to the need to keep the entire system within which those rights are situated effective. This is evidenced by *Turan*, where the Court declined to assess the applicants' Article 5 claims in order to ease the backlog – namely to ensure that later, hypothetical applicants would benefit from Convention review. Second, the move towards procedural review has led to an increase in the use of subsidiarity. However, although the quality of national decision-making must be evaluated before this approach can be used, present gaps stem from broad assumptions made about the ECHR compatibility of national legislative processes.

Indeed, a continuing theme throughout this book is the tension between the conflicting aims of subsidiarity and oversight. I find that the Court is not resolving this tension in a principled manner but rather extending excessive discretion to States. This is done on the basis of undue expansions to subsidiarity that are not grounded in factors relevant to a Convention claim. The Court thereby undermines the effectiveness of ECHR rights by moving away from adjudicating them as individual rights. The fundamental issue with relying on efficiency concerns to extend subsidiarity is that the Court's worries about its backlog are irrelevant to an individual claim. Subsidiarity responds to a need identified by the Court not to substitute its decision-making for that of national authorities where Convention principles have been faithfully applied – that is the fundamental aim of subsidiarity. On the other hand, it could be argued that in making its caseload more manageable, the Court in fact makes ECHR rights more practical and effective by improving the speed and efficiency with which claims may be processed. This, however, would only cohere in a framework of collective rights that are held in community rather than individually. The obligation to secure individual rights endures regardless of the practical challenges faced by the adjudicatory body; the discretion extended on the basis of efficiency-based subsidiarity and increased process-based subsidiarity is, consequently, inappropriate.

Moreover, Article 5 judgments such as *Mangouras* and *Austin* constitute examples of how the living instrument – a purely evolutive approach – has been inappropriately used to spur the use of subsidiarity. They demonstrate the importance of linking the use of a method to its underlying approach

in a given case. The level of discretion accorded is inappropriate, since the Court does not allocate discretion on the basis of the stated aim. My analysis of the misuse of the living instrument in these cases highlights the challenges to effective dynamic interpretation in the Article 5 context. Accordingly, this book proposes ways in which these challenges can be addressed so that the Court's use of evolutive approaches can become more effective, in pursuit of their underlying aims.

Towards an evolutive reading of the right to liberty

Analysing those areas of detention that attract an especially subsidiarity-based approach and, consequently, neglect evolution allows for solutions to be offered for filling in the gaps in progressive interpretation. Although a margin of appreciation is not always recognised under Article 5, this book has demonstrated its existence and offered clarity for the inclusion of a consensus review in determining the scope of the margin. As such, while the majoritarian dimension of consensus has often been used to criticise its use in Convention case-law, this book disentangles consensus from such dimension by elaborating the mandatory nature of the non-regression principle in line with which it is not open to the Court to walk back human rights. An increased role for consensus in the Court's adjudication can in fact promote a progressive interpretation of rights, and in particular of the right to liberty. This is rooted in, first, the argument that consensus cannot be used to regress rights (what I frame as the mandatory non-regression principle), and second, in the need to preserve the effectiveness of the rights of vulnerable groups whose rights are particularly prone to societal shifts.

Within the framework developed in this book, which emphasises non-regression as a mandatory tool for ensuring progressive interpretation, only a consensus that advances rights can be used in Convention adjudication. Upholding the principle of non-regression guarantees that rights will not be weakened by reference to majoritarian preferences, allowing the Court's review to reach beyond the ECHR to address any gaps in protection. The need to shield detainees from arbitrary deprivation of liberty offers normative justification for turning to international standards where needed to safeguard rights and thereby ensure external harmonisation. These international instruments are often specialised and thus particularly well-placed to address gaps in protection that have arisen.

I conclude that centring the goals of effectiveness and harmonisation of Convention rights helps to clarify the scope of consensus in a given claim, which sources can inform consensus, and the role these can play in the allocation of discretion. It is argued that the goal of effectiveness taken in the light of mandatory evolutive interpretation must include not only any existing consensus across the Council of Europe, but, where this does not serve to progress rights, also any emerging consensus, as well as other international treaties that the Contracting States have signed or ratified. This is because

the Court's methods and the requirement of effectiveness do not permit the regression of rights standards. Since States are bound by their other treaty obligations beyond the Convention, failing to consider the full scope of their corresponding duties when needed to ensure the practical and effective nature of rights neglects both an evolutive reading and external harmonisation. This can be seen through the inappropriate discretion accorded to States in showing the legitimacy of the aims of detention in the fields of pre-trial detention, immigration detention, and the detention of minors. It is also apparent in the problematic use of proportionality testing at the admissibility stage in Article 5 adjudication, and in the weight given to competing rights when balanced against the provision, which reflects the underdeveloped nature of the right to liberty in the Convention system.

The goal of effectiveness requires Article 5 adjudication to consider the particular vulnerability of persons in detention, since vulnerabilities create gaps in rights protection that it is incumbent on the Court to address. Identifying vulnerability in this way impacts on the subsequent analysis of the legitimacy of imposing detention. As such, acknowledging the vulnerable status of child victims of crime affects the discretion that can be accorded to States in imposing detention on minors in reliance on the purpose of 'educational supervision' under Article 5 § 1 (d). Recognising the particular power imbalance that arises where detention has been imposed on political grounds to silence dissent contrary to both Articles 18 and 5 heightens the need to consider evidence of systemic human rights abuses. Adjudication of immigration detention under Article 5 § 1 (f) requires a move beyond the strongly subsidiarity-based approach currently taken towards a more progressive approach that takes account of the specific vulnerabilities of this group of detainees and international instruments offering protection. The vulnerability of pre-trial detainees equally requires a consideration of consensus under Article 5 § 3 in order to build a minimum body of Convention standards that shield against excessive – and thus arbitrary – deprivation of liberty.

A more effective and harmonious adjudication of the right to liberty is by contrast identified with respect to Articles 5 and 14 claims taken together, with the latter provision enshrining protections against discrimination. I find that the Court's adjudication in this sphere demonstrates a harmonious and progressive approach to rights protection. Sentencing standards enshrined as part of other Convention provisions are used to determine the scope of State obligations, ensuring internal harmonisation. Reliance on specialised instruments on the vulnerability of youth, older, and women offenders meets the aim of external harmonisation, consequently imbuing rights in this area with more effective protection. Where equality standards under Article 14 may point to a violation, the Court interprets the right to liberty in the light of the overall Convention acquis. As a result, applications brought under Articles 14 and 5 are subject to a progressive interpretation that is careful to avoid any regression in rights standards and which capably upholds the rights of vulnerable groups.

The more evolutive approach taken to Articles 14 and 5 adjudication, as well as the more nuanced handling of evidentiary challenges, offers ways of addressing gaps in protection that have arisen under Article 18. First, recalling the need for internal harmonisation would mean that the existence of bad faith shown under Article 5 would trigger the State's responsibility under Article 18. Second, unjustified differences in treatment are considered concurrently rather than alternatively under Article 14. Adopting this approach under Article 18 would mean that the existence of any ulterior purpose would be sufficient to establish a violation, without applicants needing to prove that the illegitimate aim was predominant in ordering detention. The ability of Articles 14 and 5 jurisprudence to uphold equality protections while advancing the right to liberty emphasises the benefits of the consensus-based and non-regressive evolutive framework outlined in this book. In line with this framing, the fundamental goals of effectiveness and harmonisation ensure that the Court's adjudication looks to the Convention acquis to guarantee rights, and further afield where needed.

This book has shown how consensus can be used to build a more consistent and evolutive body of minimum protections against arbitrary detention. Interviews conducted with serving Court judges confirm both the existence and enthusiasm for greater use of consensus in driving evolutive adjudication of the right to liberty. Introducing a consensus analysis into Article 5 adjudication would confirm that each decision was being made on the basis of equivalent expected standards, regardless of the respondent State. Thus, first, existing concerns as to the Court's hesitance in finding violations against more powerful Contracting States[1] could be allayed. Since a review of applications against any State would be based on the same general consensus across the Council of Europe, there would be no grounds for accusations by governments that decisions resulted from bias against them or a specific group of States. At present, since judgments are (sometimes deliberately) not fully reasoned, room is left for governments to impute their lack of execution of judgments to alleged bias on the part of the Court. The proposed approach to consensus would therefore not only resolve the widespread lack of standard-setting under Article 5, but would also have the practical impact of helping to improve the enforcement and overall legitimacy of judgments.

Ultimately, this book establishes that, as a result of the Court's hesitance to progress the right to liberty, groups of detainees held pre-trial, as children, in immigration detention, following protest, and as a result of their political dissent or human rights activism are left without recourse to an effective remedy at Convention level. This is because the lack of an evolutive interpretation fails to reflect the minimum standards that have developed across the Council of

1 See particularly the discussion of Article 18 applications brought in conjunction with Article 5 in Chapter 5.

Europe States in these areas. With the European right to liberty remaining untethered to new and progressive ideals, its practical use as a shield against arbitrary detention has become weakened. This book thus concludes that the Court's failure to adopt an evolutive approach to the right to liberty has led to significant gaps in rights protection. Continued neglect of a progressive interpretation of Article 5 risks not only the further realisation[2] of the right, but indeed its continued maintenance as a vital tool of human rights protection.

2 A requirement enshrined within the Preamble to the Convention.

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