Judicial avoidance at the European Court of Human Rights: Institutional authority, the procedural turn, and docket control

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This article concerns the ongoing conflict over the authority of the European Court of Human Rights (ECtHR). As has been widely discussed, the authority of the Court has come under sustained pressure from states over the last decade. As one response to this pressure, the Court has undertaken what the literature calls a procedural turn—a doctrinal shift that has incorporated its changing political dynamic into its case law. The procedural turn is constituted by renewed deference to national authorities "premised on good faith domestic engagement with [European Convention on Human Rights] principles." This article sets out a functional critique of the procedural turn by drawing attention to certain limitations in its assumptions and application. Is there an alternative—or additional—way for the Court to respond? Drawing on the practice of other courts, I propose that the ECtHR take seriously judicial avoidance as a way to protect its authority—specifically, the Court might avoid making a determination of a particular case at a particular time. This approach—though not without objection—may provide the Court with an ad hoc, flexible capacity to protect its authority, and comes with the additional benefits of neither legitimating the underlying domestic measure nor upsetting important doctrinal structures relevant to other cases. I further suggest that control of its docket through introducing strategic considerations at the admissibility stage would be the most appropriate technique of avoidance for the Court.

1. Introduction

In the last decade, the European Court of Human Rights (ECtHR or "the Court") has come under sustained pressure from states. In formal processes, we have seen the

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backlog issue in the run-up to the Interlaken Declaration of 2010, the heated rhetoric and implicit threats at the time of the Brighton Declaration of 2012, the reiteration of the subsidiary nature of the European Convention on Human Rights (ECHR) system in the Brussels Declaration of 2015, and, most recently, the fraught negotiations that culminated in the Copenhagen Declaration of 2018.[1] Beyond these formal processes, there has been extensive discussion and contestation within states—criticism, non-compliance, and threats of withdrawal. Unambiguously, in this period, a number of states have said they wanted some sort of retrenchment in the Court's role. And, at least in part, a retrenchment is what we have seen. We are now more than five years into the "age of subsidiarity"[2]—more than five years into a renewed emphasis on the Court's subsidiary role in the protection of fundamental rights in Europe.

This is to say that the ECtHR itself has responded to its changing political situation; it has sought to protect its authority by incorporating aspects of the changing political dynamic into its case law. In this respect, academic literature has identified a "procedural turn" in the case law as the Court's key doctrinal tool—the key way in which case law has come to reflect the new political environment.[3] The procedural turn is constituted by a form of deference to national authorities "premised on good faith domestic engagement with Convention principles."[4] Thus, in respect of domestic legislatures, the quality of the parliamentary debate around rights informs the intensity of the Court's evaluation of the impugned measure.[5] In respect of domestic courts, their taking seriously ECHR standards in balancing rights increases the deference the Court gives to their judgments.[6] As one might imagine, responses to the procedural turn have been mixed. For one, a number of these cases have seen strong dissenting opinions.[7] In the scholarship, Cumper and Lewis, for instance, suggest that

1 *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; Interlaken Declaration of the High Level Conference on the Future of the European Court of Human Rights, Feb. 19, 2010, www.coe.int/t/dgi/brighton-conference/Documents/Interlaken-declaration_en.pdf; Brighton Declaration Apr. 20, 2012, www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf; Brussels Declaration Mar. 27, 2015, www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf; Copenhagen Declaration Apr. 13, 2018, www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf.

2 Robert Spano, *Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity*, 14 Hum. Rts. L. Rev. 487 (2014).

3 *See, e.g.*, Oddný Mjöll Arnardóttir, *Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation* (Eur. Soc'y Conference Paper, Dec. 31, 2015), https://ssrn.com/abstract=2709669; Janneke Gerards & Eva Brems, Procedural Review in European Fundamental Rights Cases (2017); Robert Spano, *The Future of the European Court of Human Rights: Subsidiarity, Process-based Review and the Rule of Law*, 18 Hum. Rts. L. Rev. 473 (2018); Thomas Kleinlein, *The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution*, 68 Int'l & Comp. L. Q. 91 (2019); Patricia Popelier, *Procedural Rationality Review after* Animal Defenders International*: A Constructively Critical Approach*, 15 Eur. Const. L. Rev. 272 (2019).

4 Spano, *supra* note 3, 492.

5 Animal Defenders International v. UK, App. No. 48876/08, 57 Eur. H.R. Rep. 21 (2013).

6 Von Hannover v. Germany (No. 2), App. No. 40660/08, 55 Eur. H.R. Rep. 15 (2012).

7 See, e.g., Animal Defenders International v. UK, App. No. 48876/08, 57 Eur. H.R. Rep. 21 (2013) (Ziemele, Sajó, Kalaydjieva, Vučinić, and De Gaetano, JJ., dissenting); MGN v. United Kingdom, App. No. 39401/04, April 18, 2011 (Björgvinsson, J., dissenting), https://hudoc.echr.coe.int/fre?i=001-102965.

this form of process-based review may lead the ECtHR to fail to protect the rights of precisely the people who need it most.[8]

This is an important argument, but it is one I wish to leave aside. Instead, I plan to assess the procedural turn in the ECtHR's case law from a different angle. This piece sets out a functional critique of the procedural turn—that taken on its own terms it entails certain limitations in its assumptions and application. These limitations are threefold. First, the procedural turn is premised on a misunderstanding of political debate and attempts to evaluate the quality of that debate using a legal lens. Second, its prospective application, namely the assumption that what is needed is less intrusive review as *new* questions arise, misses that what may seem at this point a *settled* question of law may, through political contestation, be "reclaimed" by states as unsettled. And, third, in its confined application to qualified rights under the Convention—particularly Articles 8–11 of the ECHR—the procedural turn has no purchase in a set of other cases that equally risk the ECtHR's authority.

In short, although the kind of retrenchment of role denoted by the procedural turn may take some pressure off the Court, and although it may be valuable in incentivizing constitutional actors other than courts to take seriously the demands of rights,[9] it may not be sufficient to protect the Court's authority. Is there an alternative—or additional—way the Court could respond? I propose that the Court consider an approach that other courts have found useful in protecting their authority. This is the practice of judicial avoidance, i.e. the practice of avoiding determination of a particular case at a particular time. The ECtHR is not the first court or tribunal to be faced with a political challenge. Other courts have employed a range of techniques of avoidance—to absorb or parry or evade potential threats by pragmatically avoiding or delaying making a decision on a particular issue.[10] The key idea behind avoidance is that there may be a third option other than (i) doctrinal incorporation of political pressure and (ii) continued, unchanged application of legal principle.[11] That third option is (iii) to do neither, namely to avoid deciding the issue at all—an option that comes with the additional benefit of neither legitimating the underlying measure or conduct nor upsetting existing doctrinal structures. Of the ways in which a court might avoid deciding an issue at a particular time, I argue that docket control—introducing strategic considerations into the admissibility stage of proceedings—is the most appropriate option for the Court.

[8] Peter Cumper & Tom Lewis, *Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights*, 68 Int'l. & Comp. L.Q. 611 (2019).

[9] *See, especially*, Liora Lazarus & Natasha Simonsen, *Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference*, *in* Parliament and Human Rights: Redressing the Democratic Deficit 385 (Murray Hunt, Hayley Hooper, & Paul Yowell eds., 2015). *See, more generally*, Gabrielle Appleby, The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest (2018); Aileen Kavanagh, The Collaborative Constitution (forthcoming 2022).

[10] On delay specifically, see Diego Werneck Arguelhes & Ivar Hartmann, *Timing Control without Docket Control*, 5 J. L. & Cts. 105 (2017).

[11] *See, similarly*, Michael Gilbert & Mauricio Guim, *Active Virtues* 3–4 (Univ. Va. School L. Pub. L. & Legal Theory Paper, April 3, 2019), https://openscholarship.wustl.edu/law_lawreview/vol98/iss3/8/.

To be clear, the overarching argument is a contingent one. It takes as a starting point the Court's own perception post-Brighton that a retrenchment in its role would be and continues to be conducive to protecting its long-term authority.[12] This perception is premised on the importance of *state* support to the Court's ongoing, de facto authority,[13] on the fact that states' delegation of de jure authority can be withdrawn,[14] and on an acceptance that the Court is itself an important actor in responding to backlash against its authority.[15] Left out, then, is a broad set of questions, which would probably entail methodologically diverse forms of inquiry—both empirical and normative.[16] This set might include the ways in which a retrenchment in role has affected or will affect the ECtHR's legitimacy in the eyes of non-state constituencies,[17] how any changes in the Court's legitimacy among particular constituencies affect its position in domestic and international politics, as well as an assessment of the normative legitimacy of particular decisions taken by the Court or states' criticisms thereof.[18]

To make its argument, the article is structured as follows. Section 2 discusses the ECtHR's political crisis in the run-up to Brighton and since, and sets out some features that place the Court, vis-à-vis other courts, in a relatively weak institutional position. This is simply an explanatory account, which gives context to the Court's doctrinal response to its changing political environment. Section 3 then provides an overview of that doctrinal response—capturing the two lines of case law that constitute the procedural turn. Section 4 develops the functional critique—arguing that on its own terms the procedural turn entails certain limitations. Thereafter, Section 5 addresses avoidance. It notes the widespread use of avoidance by other courts, discusses the advantages of avoidance over doctrinal incorporation of political pressure, and suggests that docket control may be an appropriate tool of avoidance for the Court. Section 6 considers five objections, before Section 7 concludes with some general considerations that might inform the Court's use of avoidance.

[12] I use authority here following the framework in Karen Alter, Laurence Helfer, & Mikael Madsen, *International Court Authority in a Complex World*, *in* International Court Authority 1 (Karen Alter, Laurence Helfer, & Mikael Madsen, eds. 2018).

[13] *See* Alter, Helfer, & Madsen, *supra* note 12, at 13; Fiona de Londras & Kanstantsin Dzehtsiarou, *Managing Judicial Innovation in the European Court of Human Rights*, 15 Hum. Rts. L. Rev. 523, 526–7 (2015). A deeper account would need to look within the particular state to capture the actors and processes that drive the pushback against the Court's authority: see Mikael Madsen, Pola Cebulak, & Micha Wiebusch, *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 Int'l J. L. in Context 197, 198–9, 203–6 (2018).

[14] *See* ECHR, *supra* note 1, arts. 46, 58.

[15] See Madsen, Cebulak, & Wiebusch *supra* note 13, at 201–2.

[16] For a helpful framework, see Madsen, Cebulak, & Wiebusch, *supra* note 13.

[17] *See* Başak Çali, Anne Koch, & Nicola Bruch, *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 Hum. Rts. Q. 955, 968–72 (2013); Alter, Helfer, & Madsen, *supra* note 12, at 24–56.

[18] *See* Molly Land, *Justice as Legitimacy in the European Court of Human Rights*, *in* Legitimacy and International Courts 83 (Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal, & Geir Ulfstein eds., 2018).

2. The Court and political pressure: Understanding the Brighton Declaration

In the scholarship, the Brighton Declaration of 2012 is generally seen as a critical moment for the Court's authority.[19] Helfer notes that "a pervasive air of backlash against the Court suffused the lead up to the Brighton Conference," which resulted in a "watershed" demand for the "first amendment in the nearly sixty-year history of the Council of Europe's human rights system to include provisions that restrict rather than enhance the authority and discretion of ECtHR judges."[20] Madsen describes the Declaration's criticism of the Court's judges and judgments as "unprecedented" and as setting "the tone for a more profound reshaping of human rights in Europe."[21] Arnardóttir captures the "increased political and legal criticism of the Court's jurisprudence for lack of clarity and consistency, and for encroaching too heavily on the prerogatives of the national authorities. . . ."[22] And Føllesdal explains that "long-simmering conflicts" about the Court's relation to sovereignty "came to a boil prior to the 2012 high level conference at Brighton."[23]

How might we account for the institutional position of the Court at the time of the Brighton Declaration? To begin, to labor an obvious point, this is a *human rights* court—one (almost) entirely set up to limit the activities of individual state parties that do not directly affect the interests of other states.[24] Sovereignty costs are thus not straightforwardly explicable in terms of reciprocal commitments of an interstate nature as in many other areas of international law.[25] Moreover, the fact that it is a human rights court, rather than a court that determines human rights questions *in addition to* other questions of constitutional authority, takes off the table a common way that a court might build institutional power—that is, self-empowerment by, at the same time, empowering political actors.[26] In general, its decisions do not establish the

[19] *See, e.g.*, Laurence Helfer, *The Burdens and Benefits of Brighton*, 1 Eur. Soc'y Int'l L. Reflections 1 (2012); Ed Bates, *Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career . . . It's "Coming of Age"?*, 36 Hum. Rts. L.J. 271 (2016); Mikael Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Diplomacy to the Brighton Declaration and Backlash*, 79 Law & Contemp. Prob. 144 (2016); Andreas Føllesdal, *Squaring the Circle at the Battle at Brighton: Is the War between Protecting Human Rights or Respecting Sovereignty Over, or Has It Just Begun?*, *in* Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders 189 (Oddný Mjöll Arnardóttir & Antoine Buyse eds., 2016); Lewis Graham, *Strategic Admissibility Decisions in the European Court of Human Rights*, 68 Int'l & Comp. L.Q. 1, 3–4 (2019).

[20] Helfer, *supra* note 19, at 1.

[21] Mikael Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?*, 9 J. Int'l Dispute Settlement 199 (2018).

[22] Oddný Mjöll Arnardóttir, *The Brighton Aftermath and the Changing Role of the European Court of Human Rights*, 9 J. Int'l Dispute Settlement 223, 225 (2018).

[23] Føllesdal, *supra* note 19, at 189.

[24] Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Int'l Org. 217 (2000). I leave aside a formal construction of the *erga omnes partes* nature of the obligations in the ECHR.

[25] *See generally* Lea Brillmayer, *From "Contract" to "Pledge": The Structure of International Human Rights Agreements*, 77 British Y.B. Int'l L. 163 (2006).

[26] See, most recently, R (Miller) v. The Prime Minister; Cherry and Others v. Advocate General for Scotland [2019] UKSC 41.

authority of political actors, who may thus be inclined, in turn, to support the Court's judicial authority.[27]

Of course, this is simply a starting point. Tentatively, a number of other developments together may be understood to have driven pressure on the Court. First, through the reform of the institutional provisions of the Convention and abolition of the European Commission of Human Rights in Protocol 11, a great number of people have direct access to the Court.[28] Without a filtering mechanism, the Court may receive applications from the over 800 million people in member states of the Council of Europe *plus* individuals subject to extraterritorial exercises of jurisdiction by those states. Sometimes overlooked, the (diplomatic) role of the Commission was excised at the same time as the dramatic expansion of the Court's role.[29] In other words, compulsory jurisdiction and individual petition—the "jewels" that make the Court so successful—are also, relative to other international courts, a source of institutional difficulty.

Second, sociologically, it may be that there has been a shift in the identity of the judges of the Court. In formal terms, it is simply required that judges "be of a high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence."[30] Madsen has argued that in the early decades of the Court judges were generally legal elites who *also* had experience of, and connections to, the politics of their member states.[31] This experience and those connections enabled the Court to undertake delicate forms of legal diplomacy—legitimating the Court's legal role while not-unduly upsetting state parties.[32] In more recent decades, however, at the time of appointment judges have generally been younger and less connected to political domains.[33] These judges may be less likely to have a situational sense of the limits (and possibilities) of the Court's institutional authority.

Third, and connected to the second, something shifted in how the ECHR was understood by the Court and by some other constituencies. As to the Court itself, in *Loizidou*, handed down in 1995, the Court referred to the Convention as "a constitutional instrument of European public order . . . ."[34] This formulation is found elsewhere—in

[27] In respect of the European Union, see Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 Am. J. Int'l L. 1 (1981); Joseph Weiler, The Constitution of Europe: "Do the New Clothes have an Emperor?" and Other Essays on European Integration (1999); in respect of the United States, see Barry Friedman & Erin Delaney, *Becoming Supreme: The Federal Foundations of Judicial Supremacy*, 100 Colum. L. Rev. 101, 104 (2011).

[28] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, in force Nov. 1, 1998, ETS No. 155 [hereinafter Protocol No. 11].

[29] Mikael Madsen, *The Legitimization Strategies of International Judges: The Case of the European Court of Human Rights*, *in* Selecting Europe's Judges 259, 276 (Michal Bobek ed., 2015).

[30] ECHR, *supra* note 1, art. 21.

[31] Madsen, *supra* note 29, at 270.

[32] *Id.*

[33] *Id.* at 277–78.

[34] Loizidou v. Turkey (Preliminary Objections), App. No. 15318/89, 20 Eur. H.R. Rep. 399, ¶ 75 (1995). *See also* Wemhoff v. FRG, App. No. 2122/64, 1 Eur. H.R. Rep. 55 ¶ 8 (1968).

Bosphorous, in *Behrami*, and in *Al-Skeini*.[35] Beyond a claim about the Convention, implicit, here, is a claim to the Court's role as guardian of that instrument and order.[36] Relatedly, around the same time, an epistemic community of professionals working in human rights law emerged—lawyers, academics, officials, with shared premises, shared commitments, and shared expertise.[37] Doubtless of value, particularly in developing formal virtues of law such as coherence and clarity of case law, an epistemic community of this kind is, as Harmsen argues, vulnerable to isolation from social and political currents outside of the boundaries of its community.[38]

Fourth, on a doctrinal level, the Court's interpretation of the Convention has been dynamic.[39] To give some examples—there has been dynamism in the evolution of states' protective duties arising out of Article 2, in the limitations on removals to face trial in situations where there would be a flagrant breach of Article 6, and in the articulation of privacy rights grounded in autonomy in Article 8.[40] To speak about issues instead of rights, in just the last five years the Court has given judgments on the bulk collection of information by surveillance;[41] on blasphemy;[42] on stop and search without reasonable suspicion at ports, airports, and international rail terminals;[43] on gender recognition;[44] and on pushbacks of people attempting to reach Europe.[45] Moreover, this dynamism takes place in a legal structure with few concessions to shifting political interest, whether by carve-outs or exceptions for particular states or by amendment on substantive matters.

[35] Bosphorus v. Ireland, App. No. 45036/98, 42 Eur. H.R. Rep. 1, ¶ 156 (2005); Behrami and Behrami v. France, Saramati v. France, Germany, and Norway, App. Nos. 71412/01 & 78166/01, 45 EHRR SE10, ¶ 145 (2007); Al-Skeini and Others v. UK, App. No. 55721/07, 58 Eur. H.R. Rep. 18, ¶ 141 (2011).

[36] Marko Milanović, *Norm Conflict in International Law: Whither Human Rights*, 20 Duke J. Comp. & Int'l L. 86 (2009). *See also* Bates, *supra* note 19, at 269; Henry Lovat & Yuval Shany, *The European Court of Human Rights*, *in* Yuval Shany, Assessing the Effectiveness of International Courts 253, 257–8 (2014).

[37] Robert Harmsen, *The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights*, *in* The European Court of Human Rights between Law and Politics 124 (Jonas Christoffersen & Mikael Madsen eds., 2011).

[38] Harmsen, *supra* note 37, at 126. In a different context but similarly, see Martti Koskenniemi, *The Functions of Law in the International Community: 75 Years After*, 79 British Y.B. Int'l L. 353, at 365–6 (2009).

[39] *See* Tyrer v. UK, App. No. 5856/72, 2 Eur. H.R. Rep. 1 (1980). For non-substantive examples, see the reservations cases: Belilos v. Turkey, App. No. 10328/83, Eur. Ct. H.R. (ser. A) at 132, 10 Eur. H.R. Rep. 418 (1988); Loizidou v. Turkey (Preliminary Objections), App. No. 15318/89, 20 Eur. H.R. Rep. 399 (1995).

[40] *See* Osman v. UK, App. No. 23452/94, 29 Eur. H.R. Rep. 101 (1998); Othman (Abu Qatada) v. UK, App. No. 8139/09, 55 Eur. H.R. Rep. 1 (2012); Pretty v. UK, App. No. 2346/02, 35 Eur. H.R. Rep. 1 (2002). See also, more recently, Satakunnan Markkinaporssi Oy and Satamedia Oy v. Finland, App. No. 931/13, June 27, 2017, esp. ¶ 137, https://hudoc.echr.coe.int/eng?i=001-175121 (on the right to "a form of informational self-determination").

[41] Big Brother Watch and Others v. UK, App. Nos. 58170/13, 62322/14, and 24960/15, Sept. 13, 2018, https://hudoc.echr.coe.int/eng?i=001-186048.

[42] E.S. v. Austria, App. No. 38450/12, Oct. 25, 2018, https://hudoc.echr.coe.int/fre?i=001-187188.

[43] Beghal v. UK, App. No. 4755/16, Feb. 28, 2019, https://hudoc.echr.coe.int/fre?i=001-191276.

[44] X v. former Yugoslav Republic of Macedonia, App. No. 29683/16, Jan. 17, 2019, https://hudoc.echr.coe.int/fre?i=001-189096.

[45] N.D. and N.T. v. Spain, App. Nos. 8675/15 and 8697/15, Feb. 13, 2020, https://hudoc.echr.coe.int/eng?i=001-201353.

Fifth, finally, and slightly speculatively, although civil society engagement has been central to the Court's legitimation and success,[46] these groups are diverse and have plural interests. The plural nature of civil society across Europe makes more difficult either implicit or explicit coordination aimed at protecting the Court's institutional authority. In contrast, literature on strategic litigation emphasizes not only choices about which cases to bring, but also which cases not to bring at a particular moment. A good example is the decision in South Africa not to bring a same-sex marriage challenge too soon—a challenge that would have risked the incremental development of case law and also placed the Constitutional Court in a difficult institutional position.[47] By the time that case was heard, both doctrine and political context had shifted, and the resulting decision holding unconstitutional the denial of same-sex marriage was unanimous.[48]

For the most part, these are institutional features, and by highlighting them there is a risk of overlooking that international courts are inevitably affected by wider social and political cleavages in domestic and international politics.[49] Nonetheless, these features provide background to the Court's institutional difficulties around the time of the Brighton Declaration and give context to the Court's procedural turn—its key doctrinal tool in responding to its new political situation.

3. Trying to take the pressure off: The procedural turn after Brighton

The previous section provided an account of the ECtHR's institutional position in the run-up to the Brighton Declaration in 2012. As noted above, it is now widely accepted that the Court's key doctrinal tool in responding to that crisis has been the so-called procedural turn in its case law. In general, the procedural turn refers to the "Strasbourg Court's consideration of the quality of the decision-making process at the legislative, administrative, and judicial stages to assess whether government interference in human rights was proportional."[50] As Popelier explains, an approach along these lines has been, in specific cases, a long-standing feature of the Court's case law.[51] Nonetheless, it is generally agreed in the literature that in the period since Brighton, the case law demonstrates an invigoration of a procedural approach defined in these terms—a renewed emphasis by the Court on the quality—or lack of quality—of

[46] Rachel Cichowski, *Civil Society and the European Court of Human Rights*, *in* The European Court of Human Rights between Law and Politics, *supra* note 37, 77.

[47] Steven Budlender, Gilbert Marcus, & Nick Ferreira, Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons 1, 27–34 (2014).

[48] *See* Minister of Home Affairs v. Fourie [2005] ZACC 19 (CC) (S. Afr.).

[49] *See generally* Madsen, Cebulak, &Wiebusch, *supra* note 13, at 200–1; in relation to the ECtHR, specifically, see Madsen, *supra* note 29, at 272–6.

[50] Popelier, *supra* note 3, at 272. *See generally* Hayley Hooper, *The Use of Parliamentary Materials by Courts in Proportionality Judgments*, *in* Parliament and Human Rights: Redressing the Democratic Deficit, *supra* note 9, 363.

[51] Popelier, *supra* note 3.

domestic decision-making processes. The present section provides an overview of that case law.

3.1. Two lines of case law

Two lines of case law are central to the procedural turn. The first concerns general state measures that, by design, do not take account of individual circumstance.[52] Cumper and Lewis describe these cases as concerning "blanket bans" on particular conduct that, prima facie, is entitled to Convention protection.[53] Here, *Animal Defenders v. United Kingdom* is key.[54] In *Animal Defenders*, the applicant, an animal rights non-governmental organization (NGO), sought to broadcast an advert in support of a campaign to protect primates from threats caused by humans. Permission to show the advert was refused by the Broadcast Advertising Clearance Centre, on the basis that it breached section 321(2) of the Communications Act 2003—the prohibition on political advertising.

After losing in the House of Lords,[55] the applicant took its challenge to the prohibition on paid political advertising to the ECtHR. The Grand Chamber, by nine votes to eight, found that there had been no violation of freedom of expression under Article 10 of the ECHR. Key to its reasoning was its assessment that domestic authorities, and in particular the legislature, paid careful attention to "cultural, political and legal aspects of the prohibition" in enacting it. By way of preliminary remarks, the Court reiterated that:

> [I]n order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation.[56]

Then, in its assessment of the proportionality of the prohibition, the Court placed great weight on the quality of the process that led to enactment—a White Paper, consultation with specialist bodies, and engagement with the implications of the Court's previous judgment in the *VgT* case.[57] Searching examination was also said to have followed in the domestic courts.[58]

This, then, is the first line of cases constituting the procedural turn—cases concerning general measures where the Court's emphasis on the quality of this domestic process drives it to widen the state's margin of appreciation.[59] Spano, pointing to *Animal*

[52] For a critical assessment, see Cumper & Lewis, *supra* note 8.

[53] *Id.* at 612.

[54] *See, e.g.*, Arnardóttir, *supra* note 3; Popelier, *supra* note 3; Cumper & Lewis, *supra* note 8; Kleinlein, *supra* note 3.

[55] R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport [2008] UKHL 15.

[56] Animal Defenders International v. UK, App. No. 48876/08, 57 Eur. H.R. Rep. 21, ¶ 108 (2013) (citations omitted). For a rich overview, see Arnardóttir, supra note 3.

[57] *Animal Defenders*, App. No. 48876/08, 57 Eur. H.R. Rep. 21, ¶ 114. *See* VgT Verein gegen Tierfabriken v. Switzerland, App. No. 32772/02 (2001) 34 EHRR 159.

[58] *Animal Defenders*, App. No. 48876/08, 57 Eur. H.R. Rep. 21, ¶¶ 115–16.

[59] *See also* Kleinlein, *supra* note 3 (on the relevance of the (lack of) European consensus in the cases).

Defenders, as well as *Parillo v. Italy*, *Lambert and others v. France*, and *S.A.S. v. France*, terms these cases a qualitative democracy-enhancing approach to legislative deference.[60] To take *Parillo*, for instance, in which, though in less effusive terms than in *Animal Defenders*, the Court likewise emphasized the domestic process that led to the domestic ban on donating embryos obtained through in-vitro fertilization (IVF) to scientific research.[61] In particular, it found that:

> [D]octors, specialists and associations working in the field of assisted reproduction had contributed to the discussions and that the liveliest part of these had in general concerned the sphere of individual freedoms, pitting the advocates of a secular conception of the State against those in favour of a denominational approach.[62]

As in the other cases, the quality of the domestic legislative debate widens the state's margin of appreciation, here leading to the finding that the ban did not violate the applicant's right to private life under Article 8 ECHR.

The second line of cases concerns the balancing of interests by domestic courts.[63] Çali has argued that the case law shows signs of a shift towards a "responsible courts doctrine"—a willingness to defer to judgments of domestic courts that engage seriously with Convention standards in the context of balancing rights against each other.[64] Here, the central case is *Von Hannover (No. 2) v. Germany*—a case that concerned the refusal of German courts to grant an injunction against the publication of certain photographs of the daughter and son-in-law of the late Prince Rainier II of Monaco.[65] Relying on Article 8 ECHR, the applicants argued that the refusal violated their right to respect for their private and family life. On the other side of the equation was, of course, the right of the publisher to freedom of expression under Article 10 ECHR.

The Grand Chamber rejected the applicant's argument. Key to this rejection was the explanation that "[w]here the balancing exercise has been undertaken by the national authorities 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."[66] Spano, pointing to *Von Hannover*, as well as *Ibrahim v. United Kingdom*, *Bărbulescu v. Romania*, and *Ndidi v. United Kingdom*, explains these cases as the manifestation of a non-substitution principle—an attempt to incentivize national judges to

[60] Spano, *supra* note 3, at 488–9. *See* Parillo v. Italy, App. No. 46470/11, 62 Eur. H.R. Rep. 8 (2016); Lambert and Others v. France, App. No. 46043/14, June 5, 2015, https://hudoc.echr.coe.int/eng?i=001-155352; *S.A.S. v France*, App. No. 43835/11 (2015) 60 Eur. H.R. Rep. 11.

[61] *Parillo*, App. No. 46470/11, 62 Eur. H.R. Rep. 8 (2016). *See* Matthew Saul, *Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights*, 20 Int'l J. Hum. Rts. 1077 (2016).

[62] *Parillo*, App. No. 46470/11, 62 Eur. H.R. Rep. 8, ¶ 185. *But see* Popelier, *supra* note 3, at 291–2.

[63] To be clear, although the emphasis in the first line is on domestic legislative processes, that case law also mentions the assessments undertaken by domestic courts.

[64] Başak Çali, *Towards a Responsible Domestic Courts Doctrine? The European Court of Human Rights and the Variable Standard of Judicial Review of Domestic Courts*, *in* Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders, *supra* note 19, at 144. *See also* Arnardóttir, *supra* note 3, at 11–14.

[65] Von Hannover v. Germany (No. 2), App. No. 40660/08, 55 Eur. H.R. Rep. 15 (2012).

[66] *Id.* ¶ 107.

engage with Convention standards and thus embed the Convention in domestic legal orders.[67] Depending on how the case law develops it may become important to distinguish,[68] within this category, cases that entail a balancing of rights against each other—like *Von Hannover*—from cases that involve a balancing of an individual right against the general state interest—as in *Ndidi*.[69] Structurally, the similarity with the first line of cases is clear—the genuine attempt by the domestic actor to engage with the Convention widens the margin of appreciation granted by the Strasbourg Court to the state.

In a general sense, these developments certainly signal a shift in the allocation of power from the Court to states.[70] They have been the Court's main doctrinal response to its changing political situation, a decrease in the intensity of the Court's scrutiny of domestic measures and decisions. These developments may also be linked to other institutional developments—the pilot judgment procedure codified in Rule 61[71] and new possibility in Protocol 16 that the highest courts of state parties can request an advisory opinion from the Court on questions of principle relating to the interpretation and application of the ECHR.[72] The former attempts to locate responsibility for dealing with structural problems on the state and, if *Burmych v. Ukraine* is emblematic, may also entail a shifting of responsibility from the Court to the Committee of Ministers.[73] The latter—drafted in the aftermath of Brighton—is, as set out in the Explanatory Report to Protocol 16, an explicit attempt to foster dialogue between national courts and tribunals and Strasbourg.[74]

4. The procedural turn: Assumptions and application

The argument so far runs as follows. The ECtHR has, over the last decade, come under sustained pressure from states. It has identified that some retrenchment in its role is

[67] Spano, *supra* note 3, at 487–8. *See* Ibrahim v. UK, App. Nos. 50541/08, 50571/08, 50573/08, and 40351/09, Sept. 13, 2016, https://hudoc.echr.coe.int/eng?i=001-166680; Bărbulescu v. Romania, App. No. 61496/08, Sept. 5, 2017, https://hudoc.echr.coe.int/eng?i=001-177082; Ndidi v. UK, App. No. 41215/14, Sept. 14, 2017, https://hudoc.echr.coe.int/eng?i=001-176931.

[68] *See, e.g.*, Spano, *supra* note 3, at 487.

[69] *See Ndidi*, App. No. 41215/14, Sept. 14, 2017.

[70] *See also* Başak Çali, *Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights*, 35 Wis. J. Int'l L. 238 (2018).

[71] European Court of Human Rights, Rules of Court, rule 61 (Feb. 1, 2022). *See* Burmych and Others v. Ukraine, App. Nos. 46852/13 and others, Oct. 12, 2017, https://hudoc.echr.coe.int/eng?i=001-178082; Ivanov v. Ukraine, App. No. 40450/04, Oct. 15, 2009, https://hudoc.echr.coe.int/eng?i=001-95032.

[72] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Oct. 2, 2013, in force Aug. 1, 2018, ETS No. 214.

[73] For a helpful analysis of how the Court in *Burmych*, App. Nos. 46852/13 and others, Oct. 12, 2017, dealt with Ukraine's non-execution of the pilot judgment in *Ivanov*, App. No. 40450/04, Oct. 15, 2009, see Eline Kindt, *Giving Up on Individual Justice: The Effect of State Non-Execution of a Pilot Judgment on Victims*, 36 Neth. Q. Hum. Rts. 173 (2018).

[74] For a critical approach, see Kanstantsin Dzehtsiarou & Noreen O'Meara, *Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-Control?*, 34 Legal Stud. 444 (2014).

necessary, and has undertaken a procedural turn as its key doctrinal response. The procedural turn, understood in ideal terms as a reinvigoration of the systemic margin of appreciation, certainly connotes a shift in power back to states. As such, insofar as state support is central to the Court's authority, it is likely to take some pressure off. In addition, it may be valuable, insofar as it prompts actors other than courts to take seriously the demands of rights.[75] However, the argument in this section is that, taken on its own terms, the procedural turn entails certain limitations in its assumptions and application. There are three. They concern the procedural turn's use of a legal lens to evaluate the quality of politics and political debate, its failure to appreciate that what seems from the perspective of the law as *settled* may be unsettled by political reclamation, and its non-application to certain kinds of cases which, as much as any other, might put the authority of the Court at risk.

4.1. Legal principle and political debate

The first problem in the procedural turn lies in its attempt to assess *political* debate about rights limitation with a legal lens. To use Post's phrase, the Court is using "the expert grammar of law" to evaluate the quality of political debate.[76] Thus, to reiterate, in *Animal Defenders* the Grand Chamber held that "[t]he quality of the parliamentary . . . review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation."[77] It is certainly true that, in some cases, aspects of the parliamentary debate may assist a Court in undertaking a proportionality assessment. This is particularly so in cases entailing technical assessment where the very feasibility of a system of exceptions is complex, such that deference based on institutional expertise is appropriate.[78] But, in other cases, the Court, in attempting to use legal standards to moderate its role, sets itself up to fail.

This is so because the grammar of politics is different from the grammar of law. To make this claim is not to deny a dynamic and complicated relationship between the two,[79] but simply to recognize a difference between them. This point holds across a range of accounts of the political process. On a pejorative view of that process—on a view that emphasizes what Waldron calls the "deal-making, log-rolling, interest-pandering, pork-barrelling, [and] horse-trading"[80] view—for the Court to cast its evaluative frame in legal terms is to speak a different language. On a less pejorative view of that process, one defended by Waldron himself, it remains the case that political debate about fundamental questions, including questions of rights, is quite different from legal reasoning. In varying combinations, political debate is partial, personal,

[75] *See* Lazarus & Simonsen, *supra* note 9.

[76] Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 Cal. L. Rev. 1345 (2010).

[77] Animal Defenders International v. UK, App. No. 48876/08, 57 Eur. H.R. Rep. 21, ¶ 108 (2013).

[78] *See generally* Reasoning Rights: Comparative Judicial Engagement (Liora Lazarus, Christopher McCrudden, & Nigel Bowles, eds., 2014); Paul Yowell, Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review (2018).

[79] Post, *supra* note 76, at 1343–4.

[80] Jeremy Waldron, Law and Disagreement 30 (2009).

sometimes principled, sometimes symbolic, and, crucially, underpinned by radically different conceptions of the common good and demands of rights.[81] Beneath it is the essential fact of disagreement.[82]

What, then, are the implications of this point for potential effectiveness of the procedural turn by the Court? Remember, again, that the *quality* of the political debate on the necessity of a measure is the key driver in widening the state's margin of appreciation. Underpinning the Court's use of this test is the assumption that if the political actor would just reason a little bit better, they would come to a lawful answer. Moreover, what "better" entails is judged from the perspective of the legal principles laid down from the Court. But, as set out in the previous paragraphs, such an assumption does not fit with the very nature of political debate—debate that is premised on the fact of fundamental disagreement among the relevant actors, as well as the different register in which that disagreement is expressed.[83]

Furthermore, the problem with the Court's approach may even be starker. It may be starker because the very cases that are prime candidates to provoke political pushback are also cases where the quality of the debate—again, assessed in *legal* terms—may well be low. To make that concrete, an example might assist. In June of 2011, Belgium passed a law that prohibited the wearing in public of clothing that partially or fully covers the face. The law was but another iteration of laws in Europe aimed at the dress of Muslim women.[84] From the perspective of the Convention, which protects both religious freedom and the freedom to manifest one's religion,[85] it is extremely difficult to see how such a ban could be justified. At the same time, it has been evident for some time that the Court is loath to intervene in religious dress cases of this kind.

I leave aside whether the Court ought to have found that the ban in *Belcacemi* violated the Convention. The question, rather, is what the procedural turn can offer in this case, and cases of its kind. The answer is very little.[86] The procedural turn as a moderating device rests on the assumption that it is coherent to assess the quality of political debate from a framework of legal principle. But what legal principle—here understood from the (internal) perspective of a convention of human rights—justifies the imposition of a penalty ranging from a fine to prison on women who appear in public in the dress of their choice? To believe that the procedural turn could work in these cases, we'd need to think that the reason that European parliaments are ending up with these bans is because they are just not reasoning well enough about the demands of rights.

[81] *See generally* Waldron, *supra* note 80, at esp. 21–48. *See also* Alexander Bickel, *The Passive Virtues*, 75 Harv. L. Rev. 49 (1961).

[82] Waldron, *supra* note 80, at 105–6.

[83] Post, *supra* note 76, at 1341–7.

[84] *See, e.g.*, Eva Brems, Saïla Ouald Chaib, & Katrijn Vanhees, *"Burkini" Bans in Belgian Municipal Swimming Pools: Banning as a Default Option*, 36 Neth .Q. Hum. Rts. 270 (2018).

[85] Not to mention other rights—namely Articles 8 and 14 ECHR.

[86] The issue of prisoner voting in the United Kingdom provides a similar example. *See* Hirst v. UK (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006); Greens and MT v. UK, App. Nos. 60041/08 and 60054/08, 53 Eur. H.R. Rep. 21 (2011).

The irony, here, is that it is probably the case that the Court knows this. In *Belcacemi* itself, drawing on its approach in *S.A.S. v. France* the Court emphasized its more limited role of reviewing the quality of the domestic processes: "In this regard, the Court notes that the decision-making process resulting in the ban under review *lasted several years and was marked by a wide debate* in the Chamber of Representatives as well as by a detailed examination of the interests at stake in the Constitutional Court."[87] This sounds positive. However, as Brems has noted, the domestic political debate was marked by a *failure* to consider human rights standards, and the long timeframe was due to an election.[88] More generally, the misleading nature of the exercise in *Belcacemi* illustrates the wider point: in many cases, a properly applied evaluation of the *quality* of domestic procedures sets a test for political debate that it is unlikely to pass.

4.2. Settled questions

The first problem, then, with the procedural turn is its use of legal principle to evaluate political disagreement and debate. The second problem relates to the issue of "settled" law. The procedural turn has mostly been understood by the Court and in the literature as a device to moderate the intensity of review prospectively. That is to say, as *new* questions of interpretation and application arise, so the quality of the domestic actor's engagement with the Convention lessens scrutiny by the Court. Subject to the point in Section 4.1, in some cases this might work in effectively moderating the Court's role so as to stave off political pressure. It might work in situations where the context and scope of the domestic measure infringing a right allows the Court to conduct a proportionality analysis plausibly different from that established in existing case law. That is to say, it might work in situations where existing doctrine allows a set of plausible interpretations. Relatedly, under the responsible courts line of cases it might work because of ambiguities provided by the very idea of Convention *standards*. In both of these instances, procedural review will allow the Court to moderate its role—thus incorporating within its doctrinal structures the underlying political pressure.

But there will be other cases where the existing case law on any plausible reading renders an issue *settled*. This is likely to be so where the existing case law establishes a rule of such specificity that no rebalancing of interests or renewed proportionality assessment is possible. Take, for instance, case law that establishes that at least some prisoners be allowed to vote or that whole life sentences are impermissible under the Convention.[89] Once a rule is articulated in these terms, the kind of (re-)assessment envisaged by the procedural turn doesn't really work.[90] No amount of attention to the

[87] Belcacemi v. Belgium, App. No. 37798/13, July 11, 2017, ¶ 54 https://hudoc.echr.coe.int/eng?i=001-175636 (emphasis added; translation by author).

[88] Eva Brems, *Positive Subsidiarity and its Implications for the Margin of Appreciation*, 37 Neth. Q. Hum. Rts. 1, 13–14 (2019).

[89] In respect of prisoner voting, see *Hirst*, App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006); *Greens and M.T.*, App. Nos. 60041/08 and 60054/08, 53 Eur. H.R. Rep. 21 (2011). In respect of life sentences, see Vinter and Others v. UK, App. Nos. 66069/09, 3896/10, and 130/10 63 Eur. H.R. Rep. 1 (2016); Hutchinson v. UK, App. No. 57592/08, Jan. 17, 2017, https://hudoc.echr.coe.int/eng?i=001-170347; Petukhov v. Ukraine, App. No. 41216/13, Mar. 12 2019, https://hudoc.echr.coe.int/eng?i=001-191703.

[90] *See* Lewis Graham, *From Vinter to Hutchinson and Back Again? The Story of Life Imprisonment Cases at the European Court of Human Rights*, Eur. Hum. Rts. L. Rev. 258 (2018).

quality of the domestic process can obscure the actual question of compliance with an established rule.

In these situations of an established rule, the obvious temptation for the Court is to simply regard their settled case law as, well, settled. But to make this assumption is to misunderstand the dynamic relationship between law and politics. On a macro level, this is true of constitutions themselves—in Crick's terms:

> Constitutions are themselves political devices. They may be viewed as self-sufficient truths in the short run; but in the long run it is political activity itself which gives—and changes—the meaning of any constitution. When we praise a constitution we are doing no more than praise a particular abridgement of a particular politics at a particular time.[91]

But it is also true on a more general level—of all law. As Post explains:

> If the relationship between law and politics is conceptualized in [a] dynamic and dialectical way, the exact location of the boundary between law and politics is necessarily contestable. From the perspective of politics, it is always disputable whether present disagreements should be ceded to the expert grammar of the law, or whether extant legal decisions ought to be reclaimed as subjects of political dispute… It is intrinsically uncertain whether ongoing conflicts over particular values will be addressed within legal practice, within political practice, or within both simultaneously.[92]

If this is too theoretical, historical practice is replete with examples of how questions seemingly settled in law can be reclaimed by political contestation.[93] How this happens will depend on system-specific factors. In respect of international courts, scholarly work has started to capture different forms of reaction by states to jurisprudential developments.[94] In respect of domestic courts, political actors have sought to regain control—to unsettle settled questions—by myriad means—from the increased role of legislative scrutiny in the judicial appointments process in the United States[95] to the attempts in Poland to change the retirement ages of sitting judges;[96] from the reversal by amendment of decisions of the courts in Hungary[97] to the ordinary, principled contestation of the meaning of legal terms by legal and political elites.[98] These examples are simply manifestations of the theoretical point that courts are part of, rather than separate from, the political arrangements of any community.

For the purposes of this section, the point is twofold. First, it is a mistake to think that a particular set of legal rules can be settled. Those rules can always be unsettled—politics can reclaim them as issues to be contested. How this reclamation happens will vary, as shown by the examples above. That reclamation may range from contestation

[91] Bernard Crick, In Defense of Politics 147 (Bloomsbury 2013) (1962). *See also* Martin Loughlin, Sword and Scales: An Examination of the Relationship between Law and Politics (2000).

[92] Crick, *supra* note 91, at 143. *See also* Post, *supra* note 76, at 1347.

[93] To be sure, ongoing contestation of the meaning of legal terms—that is, contestation within law—is inherent in any system—see Madsen, Cebulak, & Wiebusch, *supra* note 13, at 202.

[94] For a helpful taxonomy, *see especially id.*

[95] *See, e.g.*, Benjamin Wittes, Confirmation Wars: Preserving Independent Courts in Angry Times (2006).

[96] *See, e.g.*, Wojciech Sadurski, Poland's Constitutional Breakdown (2019).

[97] *See, e.g.*, Pál Sonnevend, *Preserving the Acquis of Transformative Constitutionalism in Times of Constitutional Crisis: Lessons from the Hungarian Case*, *in* Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune 123, 137–8 (Armin von Bogdandy et al. eds. 2017).

[98] Madsen, Cebulak, & Wiebusch, *supra* note 13, at 203.

by way of legal argument to simply destroying the system by withdrawal. Second, as to the Convention specifically, the procedural turn as a device doesn't allow for the fact that future matters of deep dissatisfaction on the part of state parties may relate to those issues that on any plausible reading of the case law are settled from the perspective of the Court. In this sense, if the first problem with the procedural turn is its misunderstanding of the nature of politics, the second problem is that it doesn't grasp the dynamic relationship between politics and law.

4.3. The procedural turn's limited application

There is a third problem with the procedural turn—one relating to its scope. As set out above, the procedural turn applies to limitations on Articles 8–11. In addition, in cases concerning, say, the procedural duties that flow from other rights in the ECHR, the flexibility built into the specification of the duty itself would in some cases allow the ECtHR to moderate the intensity of its review in a functionally similar way to the procedural turn.[99] But it is generally assumed that this moderation of review is inapplicable to claims that the state has violated the duties of restraint generated by other Convention rights.[100]

At first glance, this is compelling. But, from another perspective, it is too categorical, for it is not only cases under Articles 8–11 that place the Court in a difficult institutional position. Two examples from the Court's case law illustrate this point: *Banković* and *Hassan*. In *Banković*—a case concerning the North-Atlantic Treaty Organization's (NATO) bombing in April 1999 of the buildings of Radio Television of Serbia, which killed sixteen people—the Court declared an application brought by family members of the victims inadmissible. The reason given was the absence of a jurisdictional link between the victims and the respondent states.[101] In *Hassan*, addressing the compatibility of Tareq Hassan's detention in Iraq with Article 5 of the Convention, the Court found that the United Kingdom's compliance with detention provisions in the Geneva Conventions rendered its actions in the case lawful.[102]

Two things unite the cases. First, they are marked by a desire on the part of the Court to not find the respondent states responsible for a violation of the Convention.[103] That is, although legal principle pushed in one direction, a kind of pragmatism won out. Second, in avoiding the finding of breach, the Court put at risk doctrinal structures that apply beyond the cases themselves.[104] Thus, in respect of *Banković*, the unfortunate story of its interpretation of jurisdiction in Article 1—its territorial starting point, its *espace juridique*, its proscription of divided and tailored rights—has been well-ventilated.[105] Even after *Issa*, *Ocalan*, *Pad*, *Medvedyev*, *Al-Skeini*, and *Jaloud*,

[99] Spano, *supra* note 3, at 484–5. See Miles Jackson, *Amnesties in Strasbourg*, 38 Oxford J. Legal Stud. 451, 464–7 (2018).

[100] *See especially* Spano, *supra* note 3, at 483–4.

[101] Banković and Others v. Belgium and Others, App. No. 52207/99, 44 EHRR SE5, ¶ 82 (2007).

[102] Hassan v. UK, App. No. 29750/09, ECHR 1162 (2014).

[103] See also Behrami and Behrami v. France, Saramati v. France, Germany, and Norway, App. Nos. 71412/01 & 78166/01, 45 EHRR SE10 (2007).

[104] The same point applies to the issue of attribution in *id.*

[105] *See* Marko Milanović, Al-Skeini *and* Al-Jedda *in Strasbourg*, 23 Eur. J. Int'l L. 121 (2012); Miles Jackson, *Freeing Soering: The ECHR, State Complicity in Torture, and Jurisdiction*, 27 Eur. J. Int'l L. 817 (2016).

the effects of *Banković* linger.[106] In respect of *Hassan*, the Court's decision to effectively read into the closed list of exceptions in Article 5 an extraneous ground was quickly taken forward by the UK Supreme Court in *Serdar Mohammed*.[107] The risk of additional grounds materializing over time is clear—undermining the narrowness of Article 5's exceptions.

For the avoidance of doubt, I make no claim about whether it was wise for the Court to take the routes it did in these cases, though *Banković* in particular provides a salutary lesson in how *not* to pragmatically protect court authority. For present purposes, the key point is that it is hard to see how the procedural turn might provide a solution. This is in true relation to the kinds of claims in *Banković* and *Hassan*, claims which, given the expansion of extraterritorial jurisdiction since *Banković*, the fixing of the rules of attribution in *Al-Jedda*, and the continued undertaking of extraterritorial military operations by states, are likely to return to the Court.[108] But it is also true more generally: many cases that involve fraught political questions will not entail the kinds of domestic deliberation that attract the form of deference envisaged by the procedural turn. Here, the Court's prevailing doctrinal response to its political environment will provide no protection.

5. Avoidance

To reiterate, the procedural turn ought to be understood as an attempt by the Court to incorporate within its legal doctrine political contestation by states. Although it may take some pressure off and also prompt valuable deliberation about rights in some cases, it entails certain limitations. In this section, I will suggest that there is an alternative—or additional—option open to the court. That option is the practice of avoidance—of not deciding a case one way or the other.[109]

5.1. Avoidance in practice

Academic engagement with the idea of judicial avoidance often builds on Bickel's assessment in 1960 of the US Supreme Court's practice. There, Bickel traced various techniques relating to the "timing and limits of the judicial function."[110] In that jurisdiction—the case law of the US Supreme Court—these were doctrines of standing, case and controversy, ripeness, and a political question.[111] In the first place, Bickel's

[106] *See* Al-Saadoon and Others v. Secretary of State for Defence [2016] EWCA Civ 811; see also, more recently, Georgia v. Russia, App. No. 38263/08, Jan. 21, 2021.

[107] Abd Ali Hameed Al-Waheed (Appellant) v. Ministry of Defence (Respondent); Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant) [2017] UKSC 2.

[108] On attribution, see Al Jedda v. UK, App. No. 27021/08, 53 Eur. H.R. Rep.23 (2011); on cases relating to armed conflict, see *Georgia v. Russia (II)*, App. No. 38263/08, Jan. 21, 2021, https://hudoc.echr.coe.int/eng?i=001-207757; Hanan v. Germany, App. No. 4871/16, Feb. 16, 2021, https://hudoc.echr.coe.int/eng?i=001-208279.

[109] Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 69 (2d ed. 1986).

[110] Bickel, *supra* note 81, at 42.

[111] *Id.*

ambition was to show that together these doctrines constituted a "well-established if imperfectly understood practice of declining on occasion to exercise the power of judicial review. . . ."[112] But, more widely, Bickel aimed to justify the use of these passive virtues—to justify the Court's use of prudential considerations in declining to decide matters one way or another.[113]

Leaving aside a normative assessment, avoidance is a key part of judicial practice across a range of different courts.[114] In Delaney's terms, "[a]voidance is everywhere."[115] A few examples are illustrative. As to the South African Constitutional Court, Roux has shown how the first post-apartheid bench built its legal and political legitimacy through a subtle mix of principled and pragmatic adjudication.[116] This mix included the development of a strict jurisprudence on direct access to the Court,[117] a standard that allowed political issues to either crystallize—such that the Court had a better sense of the stakes—or be settled without engaging the Court's constitutional function.[118] As to the Brazilian Supreme Court, Arguelhes and Hartmann argue that judges have developed an informal mechanism of *timing* control—using the power to simply sit on political cases—to prevent their having to decide dangerous or inconvenient cases at a particular time.[119] Discussing the US Supreme Court, Frickey has illustrated how the early Warren Court parried institutional and doctrinal threats caused by McCarthyism by deciding a set of cases using the doctrine of constitutional avoidance.[120] On his telling, constitutional avoidance, as a specific canon of statutory interpretation, allowed the Court to avoid direct confrontation while also protecting, to some extent, political liberty.[121] And in respect of the International Court of Justice, it is clear that the court uses a range of techniques to prevent having to make a decision on the merits in certain cases[122]—something that holds more generally for

[112] *Id.* at 47.

[113] *Id.* at 79. For early criticism, see Gerald Gunther, *The Subtle Vices of the Passive Virtues: A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

[114] For an overview, see Jed Odermatt, *Patterns of Avoidance: Political Questions before International Courts*, 14 Int'l J. L. in Context 221 (2018).

[115] Erin Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 Duke L.J. 3 (2016).

[116] Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 Int'l J. Const. L. 106 (2009); Theunis Roux, The Politics of Principle: The First South African Constitutional Court, 1995–2005 (2013).

[117] Roux, *supra* note 116, at 377. *See* Transvaal Agricultural Union v. Minister of Land Affairs and Another [1996] ZACC 22 (S. Afr.).

[118] Roux, *supra* note 116, at 379. To be sure, Roux locates the Constitutional Court's pragmatism primarily in its moderation of the standard of review.

[119] Arguelhes & Hartmann, *supra* note 10, at 110. *See also* Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Referral in Defence of Democracy*, Wis. L. Rev. 683 (2016).

[120] Philip Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Warren Court*, 93 Cal. L. Rev. 397 (2005). For a warm assessment, see Post, *supra* note 76.

[121] Frickey, *supra* note 120, at 401. For clarity, *constitutional* avoidance is one technique falling within the wider category under discussion.

[122] For a recent example, see the slightly revised test for the jurisdictional requirement of the "existence of a dispute" in the *Marshall Islands* cases: Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India) (Jurisdiction and

international courts. As Shany puts it, "rules of admissibility typically allow [international] courts to engage in some degree of case selection according to their internal policy preferences and in response to external expectations."[123]

From this range of practice, three points emerge. First, this practice confirms the general point that courts usually have a third option that lies in between resolution of a matter on the merits one way or another. Second, that these courts—indeed, many courts—have found it useful to employ techniques of avoidance provides an inference, albeit a weak one, about the general limits of judicial authority. And third, the disparate nature of the techniques suggests the (perhaps obvious) point that how a court might go about avoiding an issue will be jurisdiction-specific. It will be informed by institutional and political context.

5.2. The benefits of avoidance

To start with the obvious point, the key benefit of avoidance is putting off a potentially damaging confrontation with states over a particular issue. As Delaney explains, avoidance creates delay:

> Strategic avoidance—postponing decision of contentious issues that might threaten a court's institutional viability—is a way of engaging various external actors to create and secure institutional support. Delaying a decision on substance might allow the time and space necessary for productive dialogue with (and within) the political branches to resolve the question outside of the courts. Delay may even allow for the evolution of popular consensus on the issue.[124]

In one sense, this is another way of saying that timing really matters. In respect of the Court specifically, domestic political dynamics are constantly shifting, as are positions on the underlying rights issue in any particular case. Certain issues become fraught prior to elections; certain political parties might seek to mobilize around a particular adverse judgment. Moreover, salience is variable across different states,[125] and avoiding a decision on the merits at a particular point in time also makes it easier for the Court to return to the issue at a more propitious time. Crucially, in contrast to a general moderation of legal principle, avoidance offers case-specific, *ad hoc* flexibility to the Court. This flexibility is key to its functional strength.

Thus, on one side of the coin, avoidance would allow the Court to evade certain particularly fraught confrontations with states. The other side of the coin is that certain kinds of avoidance would allow it to do so without either damaging its doctrinal structures or legitimating the state measure. In relation to the former—the issue of

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Admissibility), ICJ Rep. 255 (2016); as well as the treatment of this requirement in the cases Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), ICJ Rep 422, ¶¶ 54–5 (2012); Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia) (Preliminary Objections), ICJ Rep. 3, ¶¶ 76–7 (2016).

[123] Yuval Shany, *Jurisdictional Powers and Issues of Admissibility*, in Shany, *supra* note 36, at 67, 67–8.

[124] Delaney, *supra* note 115, at 4. *See further* David Fontana, *Docket Control and the Success of Constitutional Courts*, *in* Comparative Constitutional Law 624 (Tom Ginsburg & Rosalind Dixon eds., 2011) (on "issue" and "legitimacy" timing).

[125] For a general framework, see Lee Epstein & Jeffrey Segal, *Measuring Issue Salience*, 44 Am. J. Pol. Sci. 66 (2000). More specifically, see Çali, Koch, & Bruch, *supra* note 17, at 968–72.

doctrinal structures—in a number of circumstances where the Court has felt unable to apply legal principle it has found for the respondent state in a way that has put at risk important legal rules. This is true as to jurisdiction in *Banković*, attribution in *Behrami*, and the exhaustive nature of the grounds for depriving a person of her liberty in *Hassan*.[126] Each of these legal principles is critical in a wider set of cases.

As to the latter—the idea of legitimation—by using avoidance no judgment comes out of the Court finding that the relevant measure complies with the European Convention on Human Rights. To take *Belcacemi* again, the Belgian niqab ban, the Court concluded: "The impugned restriction can therefore be considered necessary in a democratic society. This conclusion holds in respect of Article 8 of the Convention and Article 9." Thus, there was not a violation of either Article 8 or Article 9 ECHR.[127]

Here, in stark terms, we see the legitimation of the underlying measure. It is a statement by the Court that the infringement of private life and religious rights of the claimant is justified in a democratic society.[128] There is an authoritative interpretation that the ECHR does not protect the rights of women to wear a niqab. In contrast, with avoidance there is no legitimation of the measure from the perspective of the Convention, either in the state concerned or, indeed, in other states.[129] This critique of the procedural turn—the issue of legitimation—complements the functional one set out above.

Avoidance thus lies between doctrinal incorporation of shifting political dynamics and the Court pushing straight on into confrontation. It creates space for political dialogue and contestation in the domestic order, not only within the respondent state, but also in others, where domestic courts might take forward the rights claim in the absence of a judgment from Strasbourg. It can be case-specific, and thus provides the Court as an institution with flexibility in evading potential confrontations harmful to its long-term authority. Of course, by *not* deciding the Court does not vindicate the underlying claim, and the domestic decision in respect of the lawfulness of the measure stands. But the Court nonetheless does not legitimate the underlying measure by finding it permissible under the Convention.

5.3. Docket control and admissibility

If those are the benefits of avoidance, the next question is how the Court might undertake it. As noted above, practice demonstrates a range of possible techniques of avoidance, and the issue of which is most appropriate in a particular system depends on legal, institutional, and social specificities of the system.[130] One option is to control the

[126] Banković and Others v. Belgium and Others, App. No. 52207/99, 44 EHRR SE5, ¶ 82 (2007); Behrami and Behrami v. France, Saramati v. France, Germany, and Norway, App. Nos. 71412/01 & 78166/01, 45 EHRR SE10 (2007); Hassan v. UK, App. No. 29750/09, Eur. Ct. H.R. 1162 (2014).

[127] Belcacemi v. Belgium, App. No. 37798/13, July 11, 2017, ¶¶ 62–3, https://hudoc.echr.coe.int/eng?i=001-175636 (translation by author).

[128] For the media coverage of the decision, see, e.g., *Belgian Face Veil Ban Backed in European Court Ruling*, BBC News (July 11, 2017), www.bbc.co.uk/news/world-europe-40567422.

[129] Bickel, *supra* note 81, at 50; Bickel, *supra* note 109, at 69–70.

[130] Delaney, *supra* note 115, at 5.

timing of handing down judgment on a particular application, which might provide the Court with a degree of protection.[131] More widely, of all techniques of avoidance, it is control of the docket that allows the greatest flexibility to a court.[132] In some systems, there is no appeal as of right—its grant is discretionary. In the United States, for instance, the Supreme Court has discretion to grant certiorari—since 1988 its mandatory jurisdiction has been minimal.[133] This process of decision has, understandably, provoked academic inquiry, often linked to the idea of agenda setting as an analytical concept in political science.[134] In addition, though, control of their docket is also a way that courts may take into account pragmatic considerations pushing against the exercise of jurisdiction.[135]

What distinguishes docket control from other techniques of avoidance is the lack of need to give reasoned, public justification for the decision. This is key to docket control's functional potential in that it allows for exactly the kind of *ad hoc*, strategic decision-making that is rendered difficult by the generality of legal reasoning. To reiterate, the suggestion is that the Court ought to use considerations that are not explicable in terms of existing legal principle to avoid having to decide certain substantive questions on the merits. In situations where a court has to provide reasoned, public justification for its decisions, avoidance is trickier. Thus, to give an example mentioned above, in the recent *Marshall Islands* cases concerning nuclear disarmament, the International Court of Justice (ICJ) appeared to want at great cost to avoid having to adjudicate the matter on the merits. To put it gently, it thus *developed* the existing requirement of the "existence of a dispute" between the parties.[136] That this was a development of the existing requirement was evident both in the opinions of dissenting judges and in scholarly reaction.[137] Here, the evident difficulties with candour—"we don't really want cases to do with nuclear weapons"—combined with the need to give a reasoned decision meant that the ICJ had to incorporate its concern about its authority within its doctrinal structures.[138]

Fewer difficulties would arise for the ECtHR if it undertook avoidance at the admissibility stage through docket control. As a matter of judicial technique, the

[131] *See* Arguelhes & Hartmann, *supra* note 10.

[132] Fontana, *supra* note 124, at 625. *But see* Delaney, *supra* note 115, at 58 (on the tradeoff with dialogue).

[133] 42 U.S.C. §§ 1252, 1254(2) (repealed 1988). *See* Fontana, *supra* note 124, at 626.

[134] *See especially* H.W. Perry, Deciding to Decide: Agenda Setting in the United States Supreme Court (1991).

[135] Delaney, *supra* note 115, at 17–19; Fontana, *supra* note 124, at 629–30.

[136] *See* Odermatt, *supra* note 114, at 231–2; Manuel Casas, *Functional Justiciability and the Existence of a Dispute: A Means of Jurisdictional Avoidance*, 10 J. Int'l Dispute Settlement 599 (2019). I leave aside whether the requirement of the existence of a dispute is a precondition to the exercise of jurisdiction or a requirement of admissibility.

[137] *See, e.g.*, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India) (Jurisdiction and Admissibility), ICJ Rep. 255 (2016) (Tomka, Crawford, Bennouna, Cançado Trindade, Robinson, Sebutinde, and Bedjaoui, JJ., dissenting); Juliette McIntyre, *Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility before the International Court*, 19 Melb. J. Int'l L. 546, 551–2 (2018). For a defense, see Casas, *supra* note 136.

[138] *See, e.g.*, Surabhi Ranganathan, *Nuclear Weapons and the Court*, 111 Am. J. Int'l L. 88 (2017); Federica Paddeu, *Multilateral Disputes in Bilateral Settings: International Practice Lags Behind Theory*, 76 Cambridge L.J. 2 (2017).

incorporation of pragmatic considerations into admissibility decisions would be relatively straightforward. In part, this is because the Court may dispose of a matter with only summary reasoning.[139] As to process, a single judge may deal with the matter. It need not be like that—admissibility may also be considered by a committee of judges or by a chamber.[140] Given the subtlety of political judgment required here, an issue returned to below, it may be that involving more than one judge in the internal decision-making process will be helpful. The key point, though, is that the absence of a requirement to provide detailed, reasoned justification for its decisions on admissibility provides flexibility for the Court. As has been pointed out in the US literature,[141] where a Court undertakes avoidance through other doctrines such as mootness or standing, those doctrines themselves take on content over time that can be evaluated in terms of principle, thus limiting to some degree future avoidance as new issues arise. Control of the docket without detailed reasoning comes without such costs.[142]

The Court faces other problems—in particular, the ongoing issue of caseload and the lack of domestic implementation.[143] In relation to caseload, avoidance is no part of the solution. The kind of case-specific, strategic reasoning at the admissibility stage proposed here is qualitatively different from structural issues relating to caseload. In relation to problems of domestic implementation, in some cases avoidance may head off at the outset an issue that might otherwise become one of discrete noncompliance.[144] More importantly, however, the technique proposed here would only be one part of a solution to the multifaceted issue of the Court's authority.

6. Objections

To spell out again what is being proposed is to immediately bring to mind a range of objections. To reiterate, the suggestion is that the Court should, in a set of applications that would otherwise be admissible, make an unreasoned finding of inadmissibility in order to protect its institutional authority. These objections may be classified as follows: principled, institutional, instrumental, dialogic, and epistemic. Although collectively they give reason for pause, they do not quite rebut the potential value of avoidance for the Court.

[139] European Court of Human Rights, Rules of Court, rules 52A(1), 53(4), 54(3) (Feb. 1, 2022). On potential strategic reasoning in three recent reasoned inadmissibility decisions, see Graham, *supra* note 19. *See* further Janneke Gerards & Lize Glas, *Access to Justice in the European Convention on Human Rights System*, 35 Neth. Q. Hum. Rts. 11 (2017).

[140] *See* ECHR, *supra* note 1, arts. 27–31. *See* de Londras & Dzehtsiarou, *supra* note 13, at 532–3.

[141] Gunther, *supra* note 113, at 10.

[142] *See further* de Londras & Dzehtsiarou, *supra* note 13, at 529–35.

[143] *See* Janneke Gerards & Joseph Fleuren, Implementation of the ECHR and of Judgments of the ECtHR in National Case-Law: A Comparative Study (2014).

[144] On discrete non-compliance, see Madsen, Cebulak, & Wiebusch, *supra* note 13, at 208–9.

6.1. Principled objections

Thus to start with principled objections, there are two—each of which concerns how avoidance affects individual rights-bearers. The first is that it would be unjustifiable for a court, particularly in a case concerning rights, to sacrifice the claim of an individual applicant, compelling on the face of the legal materials, in order to protect its long-term authority.[145] By definition, these will be people attempting to vindicate their rights to religious freedom or privacy or liberty, and so on. The second, more narrow, objection is that it would be illegitimate for the Court to use an admissibility criteria not found in the Convention, particularly given that the whole point of the system—its great achievement—is to establish the *right* of individual petition.[146] Indeed, recent work stresses the importance of the progressive development of the right to access justice on the international level.[147] In formal terms, the Convention is understood to set up a system by which, subject to the admissibility requirements in Article 35, the Court shall determine the merits of the individual complaint.

In a sense, these principled objections are related—one focused on the substantive right (and its bearer) and the other focused on the formal establishment of the right of petition. Purely on the level of principle, these objections seem strong. However, there are two potential responses. The first lies in a basic point about the Court's workload. In 2018, the Court received 7644 new applications. It decided 42,761 applications—2738 by judgment and 40,023 by decision on admissibility.[148] Such is the scope of the Court's potential jurisdiction that it is almost certainly the case that not every matter that is formally admissible in terms of Article 35 ECHR actually makes it through to a judgment in the merits. In a qualitative sense, this is likely evident in the *Achabal* case, where the Court dismissed as inadmissible a complaint that was subsequently upheld by the Human Rights Committee under the Optional Protocol to the ICCPR.[149] More generally, the key point is that the choice is not one that arises as between (a) principled adjudication of all matters within jurisdiction and (b) pragmatic avoidance of a set of those matters. Rather, the point is whether it is appropriate to avoid certain cases within a system where for structural reasons a substantial set of claims within jurisdiction will never be heard in any case. In this light, the use of pragmatic considerations seems less egregious.

However, this point about workload only takes us so far. The better response to the principled objection lies in properly seeing the alternative course of action to

[145] *See* Graham, *supra* note 19, at 21.

[146] For an interesting assessment, see Gerards & Glas, *supra* note 139.

[147] *See* Antônio Augusto Cançado Trindade, The Access of Individuals to International Justice (2011); Gerards & Glas, *supra* note 139.

[148] Annual Report of the European Court of Human Rights, Council of Europe 167 (2018), https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf. *See further* European Court of Human Rights, *The Court's Priority Policy* (May 2017), https://www.echr.coe.int/documents/priority_policy_eng.pdf.

[149] U.N. Hum. Rts. Council, *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol concerning communication No.1945/2010 (María Cruz Achabal Puertas v Spain)*, U.N. Doc. CCPR/C/107/D/1945/2010 (Mar. 27, 2013).

avoidance. As noted above, this piece is anchored by the Court's own perception after Brighton that a retrenchment in its role was conducive to the protection of its long-term authority—authority that states are able to undermine through a range of measures: reduced funding, the appointment of complaisant judges, non-compliance, and/or withdrawal, each of which is itself potentially devastating to the protection of the rights of individuals in the long term. Given this assumption, the appropriate comparator here is the course of conduct undertaken by the Court since Brighton—that is, the doctrinal incorporation of political pressure through the procedural turn, as well as other doctrinal responses to specific politically difficult cases, as in *Banković*, *Behrami*, and *Hassan*. Seen in this frame, avoidance looks less objectionable in principle, and its flexibility, its preservation of the Court's doctrinal structures, and refusal to legitimate the impugned measure make it preferable, in some cases, to doctrinal incorporation.[150] Moreover, by avoiding determination of an issue, similar claims by individuals in other ECHR states are not prejudiced. Domestic courts across the Council of Europe can continue to develop rights protection in the absence of a contrary, authoritative ruling from the Court.

6.2. An institutional objection: Deceit

A second objection is institutional and concerns the problem of judicial deceit. That a court would be undertaking the *covert* use of avoidance techniques has exercised a number of scholars.[151] It is easy to see the force of their doubts—public, reasoned explanation of decisions is a compelling ideal.[152] Moreover, candid forms of avoidance are imaginable: one way, among others, to think about certain justiciability doctrines in domestic systems is as explicit, doctrinal articulation of the potential limits of judicial power in politically difficult cases. Relatedly, even if the procedural turn is a pragmatic retreat in the face of political pressure, at least it is a non-deceitful retreat. The Court is explaining the moderation of its role in a public, legally intelligible way.[153] No one is asking the Court to deceive, even if the decisions are themselves a response to political pressure.

This problem of judicial deceit is a difficult one. Some solace may come from the widespread practice of avoidance by other courts, though, of course, from another perspective that may simply confirm the pervasiveness of the problem rather than provide any kind of mitigation. More widely, if we accept that courts' authority is a matter of ongoing contestation, and we accept that courts can and ought to play a role in protecting that authority, it seems strange to categorically exclude non-candid avoidance from the set of tools by which they may do so.[154] Such an exclusion may seek an

[150] *See further* Land, *supra* note 18, at 84.

[151] *See* Delaney, *supra* note 115, at 62. *See also* Deborah Hellman, *The Importance of Appearing Principled*, 37 Ariz. L. Rev. 1107 (1995).

[152] Delaney, *supra* note 115, at 13; Jeremy Waldron, *The Rule of Law*, *in* Stanford Encyclopedia of Philosophy (updated June 22, 2016), https://plato.stanford.edu/entries/rule-of-law/.

[153] As *Belcacemi* shows, though, in at least some cases the Court likely has to apply its procedural evaluation in a misleading way. Belcacemi v. Belgium, App. No. 37798/13, July 11, 2017, https://hudoc.echr.coe.int/eng?i=001-175636.

[154] On potential tradeoffs here, *see* Delaney, *supra* note 115.

unrealistic purity from an institution, even if legal, deeply enmeshed in the political world. Again, this is a purely instrumental response to a principled objection and, as such, much will turn on its success. If avoidance through docket control contributes to the preservation of the Court's long-term authority, the lack of candor might look wise and strategic; if it doesn't, it might look like a debasement of judicial ethics.

6.3. An instrumental objection

A third, and connected, objection rests on that instrumental level. As has been widely argued, international court authority does not rest only in the responses of states and national governments—it is constituted in the reactions and engagement of domestic opposition parties, journalists, civil society and activist groups, as well as the legal community, amongst others.[155] These are constituencies whose support for the Court has been crucial to its authority in the past, and are constituencies who will be attuned to changes in how the Court deals with cases on contested issues, including at the admissibility stage.[156] Further, public, reasoned explanation of decisions is a central way that courts build legal legitimacy in the eyes of some of those constituencies.[157] The question, then, is whether avoidance through docket control would be self-defeating on the instrumental level. That is, even if we grant that certain principled objections may be outweighed by the goal of protecting the court's long-term authority—an end itself important for rights protection—there will be no such gains in court authority.

To reiterate, this article took as a starting point the Court's own perception post-Brighton that a retrenchment in its role would be conducive to protecting its long-term authority, and left aside any inquiry into the effects of such a change on the support and engagement of non-state constituencies. But the question here is a slightly different one—it is whether, even with that starting point, avoidance might cause greater damage to the court's authority in the eyes of non-state audiences than incorporating political pressure into doctrine. This is a tricky question, and would require empirical work. As a bare hypothesis, it seems unlikely that avoidance through docket control would have greater costs to the Court's authority among those constituencies than doctrinal incorporation. It is hard to see what additional costs would be generated by avoiding a decision in a case like *Belcacemi*, rather than by undertaking doctrinal incorporation through the procedural turn, or what additional costs would be generated by avoiding a decision in a case like *Banković*, rather than by incorporating political pressure in the interpretation of the specific provision at issue, in that case Article 1 ECHR. Under neither approach is the putative right of the claimant vindicated—a matter central to those constituencies' ongoing support for the Court.

[155] *See* Çali, Koch, & Bruch, *supra* note 125; Alter, Helfer, & Madsen, *supra* note 12, at 24–56.

[156] *See further* Gunther, *supra* note 113, at 10 (on how repeated patterns of avoidance may, over time, come to have their own doctrinal content).

[157] *See generally* Roux, *supra* note 116.

6.4. A dialogic objection

A further objection is dialogic. Delaney's work, in particular, has emphasized that *how* a court avoids deciding certain issues implicates a set of trade-offs in whether an overarching aim of promoting dialogue is secured.[158] In her framing, timing and candor are two key factors in informing the success of a judicial strategy of avoidance. To make that concrete, docket control in the manner proposed in this article may be understood in Delaney's terms as non-candid, pre-merits avoidance. Together, these elements—that avoidance is not candid and happens pre-merits—might be thought to negatively affect the possibility of dialogue with and among states and other constituencies therein.[159] By a simple statement of inadmissibility, the ECtHR may, in fact, not even prompt detailed consideration by the respondent state and loses any chance of making even a small, principled contribution to the substantive resolution of the issue at that stage.[160] By contrast, through the procedural turn the Court might, in the process of finding in favor of the state, nonetheless prompt and contribute to the terms of a dialogue among the relevant political actors.[161]

There is something to this argument—even if our empirical understanding remains uncertain, there are likely significant tradeoffs in respect of dialogue that turn on how the ECtHR avoids certain issues, at least in the short term. Moreover, it may be that the procedural turn remains a valuable tool for the Court in certain situations. But, in other cases, where the functional critique set out above really bites, avoidance through docket control may be a better option. Connected to the argument above about the legitimation of a particular measure through a decision on the merits, avoidance of this kind has another benefit: it allows domestic courts to continue developing, in different ways, the rights set out in the ECHR. Domestic courts, a key actor in the whole Convention system, receive no authoritative decision from the Court that a particular measure does *not* violate the Convention.[162] Subject to domestic rules of incorporation, domestic courts then remain free to articulate new understandings of the rights in the Convention.[163] In other words, given the institutional make-up of the Convention system, it is plausible to think that on an instrumental level, avoidance through docket control is well suited to facilitate the incremental development of human rights protections in domestic courts.

6.5. An epistemic objection

There is one final, quite different, objection to the idea that docket control as a means of avoidance may help the court to protect its authority. Beneath a suggestion that a court

[158] Delaney, *supra* note 115.

[159] *Id.* at 58.

[160] *Id.* at 58–9. *See also* Graham, *supra* note 19, at 22.

[161] *See* Kleinlein, *supra* note 3, at 873, 887–90; Lazarus & Simonsen, *supra* note 9.

[162] For a related point about the inevitable pluralism of the Convention, see Stéphanie Hennette-Vauchez, *Constitutional v. International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law*, *in* The European Court of Human Rights between Law and Politics, *supra* note 37, at 144.

[163] *See also* Delaney, *supra* note 115, at 65.

ought to use wise and pragmatic, *ad hoc* judgment to evade certain confrontations is an assumption about the capacity of judges to make those judgments. Connected to the previous points about the identity of judges and the relative insulation of the wider community of international human rights lawyers, we might wonder about this capacity. Indeed, in his discussion of potential legitimation strategies of judges at the Court, Madsen suggests:

> While the immediate functionalist answer to the problem would inevitably be a call for renewed "legal diplomacy," this seems in practice not to be such an obvious turn if we look more closely at the current Strasbourg bench. More precisely, even if legal diplomacy could perhaps solve some of the immediate problems faced by the Court, it is questionable whether the necessary staff are available to engage in such a practice and legitimization strategy.[164]

There is an important point here: what makes a good judge in legal terms—assuming that is what leads to promotion—is not necessarily the same as that needed to make contextual, *political* calculation. It makes little sense to propose a technique that turns on wise and strategic consideration if that is implausible given the present sociological and institutional features of a system.[165]

There is no easy answer to this objection—it may prove to be the case that the current bench does not quite have the situational sense necessary to protect its authority through avoidance. But a more optimistic view is also plausible. For one, the crucial starting point is self-understanding—does the ECtHR (and its judges) see itself as an authoritative rights giver in Europe—the guardian of the order—or as part of a system aimed at the co-operative realization of those rights? The procedural turn itself—together with certain extra-judicial statements—indicates that the latter view is prevailing. Whether or not it ever held, a sort of 'insulated and disconnected judges in Strasbourg' critique seems out of step with the current practice of the Court.

If this is the Court's self-understanding, it may then be possible for it to inform itself in particular cases as to the potential appropriateness of avoidance—there may be signals that it can read. Two may be put forward, each of which exists in some form in existing practice of the Court,[166] though there may be other, less formal, signals on which other international courts sometimes rely. First, unanimity or near unanimity in the domestic order against a particular position on the Convention points towards caution. Unanimity here means unanimity across branches of government, as well as within and across different courts in the domestic system.[167] In such cases, particularly without domestic courts as a supportive agent, compliance is likely to be more difficult.[168] Second, proposed third-party intervention by a number of states—where their views are unanimous—provides a signal to the Court about wider views

[164] Madsen, *supra* note 29, at 276.

[165] *See also* Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law* (Univ. Chi. Pub. L. & Legal Theory Working Paper No. 73, 2004), https://chicagounbound.uchicago.edu/public_law_and_legal_theory/73/.

[166] *See* Fiona de Londras & Kanstantsin Dzehtsiarou, *The Grand Chamber of the European Court of Human Rights, A, B & C v. Ireland, Decision of 17 December 2010*, 62 Int'l. & Comp. L.Q. 250 (2013); de Londras & Dzehtsiarou, *Managing Judicial Innovation*, *supra* note 13, at 536.

[167] De Londras & Dzehtsiarou, *supra* note 166.

[168] *See, e.g.*, Hirst v. UK (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006).

of states on a particular issue.[169] Given capacity constraints, it is likely that states will only pursue such an avenue in matters of particular salience. In terms of process, such a signal may translate into a judgment on the merits[170] or, importantly for present purposes, on admissibility.[171]

7. Conclusion

The argument in this piece is narrow on a number of levels. The European Court of Human Rights is just one actor in an ongoing conversation and conflict about its authority, and, moreover, can only play a small role in protecting itself in that conflict. The authority of even astute courts can be washed away by wider politics. Moreover, in the general sweep of cases the appropriate approach for the Court is the ordinary application of legal principle. In that general sweep, strategic considerations ought not to play any role in judicial reasoning. And finally, it may be that in some kinds of case there are advantages in persisting with the approach to review denoted by the procedural turn.

Nonetheless, there may be situations where avoidance through docket control offers an alternative route to protecting authority. The dynamic politics of the Court's authority and the shifting issues that provoke conflict with states make it difficult to set out a model for when avoidance might be appropriate. Indeed, a great deal of its value lies in its *ad hoc* flexibility. However, drawing on the discussion above, two considerations may be put forward. The first is practical. As set out in the previous section, signals from the domestic order—including national courts in how they reasoned in the domestic proceedings—may assist the Court in making a contextual judgment. Second, on a substantive level, the Court ought to be on the look out for cases in which the political salience of the issue in a particular state is out of all proportion to the gravity of the putative rights infringement. This set provides prime candidates for avoidance. Better to pass on *Lautsi* at an early stage, and to proceed with cases concerning, for instance, the many ways that European states are violating the rights of migrants and refugees.[172]

Avoidance of this kind is not without objections—principled, institutional, instrumental, dialogic, and epistemic. But, in addition to preserving important doctrinal structures and not legitimating certain state measures, its potential upside is significant. First, on an existential level, avoidance may allow the Court to play a small role in protecting its long-term authority—to consolidate its role as an important actor in the incremental development of ECHR standards. Second, dependent on that continued

[169] *See generally* Nicole Bürli, Third-Party Interventions before the European Court of Human Rights esp. 131–56 (2018). In particular, there is the possibility of the submission of written comments by states at an early stage in proceedings.

[170] *See* de Londras & Dzehtsiarou, *supra* note 13, at 536 (discussing Lautsi and Others v. Italy, App. no. 30814/06, Mar. 18, 2011, https://hudoc.echr.coe.int/eng?i=001-104040).

[171] *See* ECHR, *supra* note 1, art. 35(4); Rules of Court, *supra* note 71, rule 44.

[172] *See* Lautsi and Others v. Italy, App. no. 30814/06, Mar. 18, 2011, https://hudoc.echr.coe.int/eng?i=001-104040.

existence, the Convention's plural identity, standards, and means of diffusion across member states can continue to evolve.[173] And third, by protecting itself in one set of cases, the Court may free up institutional authority to push on matters of grave importance in other cases. In short, the value of court authority rests in its use.[174] By avoiding confrontation in certain cases, there will be space in others where the ECtHR can effectively contribute to the increased protection of rights in Europe.

[173] Hennette-Vauchez, *supra* note 162, at 145–6.

[174] *See also* Shany, *supra* note 36, at 148–9.