**Strasbourg’s Views on the Modern Mirror Principle: Shattering the Mirror?**

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*Acknowledgements: I would like thank Professor Tom Hickman KC for his immensely helpful comments on an earlier draft. The usual disclaimer applies.*

*Abstract: I argue that the main line of ECtHR jurisprudence counter-intuitively favours less strict adherence by national courts to its own jurisprudence than is favoured by UK courts. I identify four key justifications from the UK case law that have been used to support the contention that domestic jurisprudence should generally ‘mirror’ ECtHR jurisprudence. I argue that the ECtHR’s conception of its own role, especially evident in its ‘procedural turn’, is at odds with these four key justifications from the UK case law. I show how the ECtHR’s use of principles such as subsidiarity, incrementalism, the margin of appreciation, European consensus, and judicial dialogue, militate against any strong ‘mirroring’ between domestic courts and the ECtHR, and point in favour of a more flexible approach unhindered by many of the hard and fast rules which have been developed by the UK courts in this area.*

In *Ullah*, Lord Bingham famously established the “mirror principle”, when he said that “the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”.[[1]](#footnote-1) Over the two decades following *Ullah*, the domestic courts have retained the underlying presumption that some such “mirror principle” flows from section 2 of the Human Rights Act (“HRA”), which requires the courts to “take into account” the jurisprudence of the European Court of Human Rights (“ECtHR”). But there has been a healthy judicial debate about the proper interpretation of this requirement, and the “mirror principle” has thus been through a number of different iterations.

In one respect, the mirror principle has been heavily qualified. Domestic courts have, as Graham observes, gradually “adopted a much more assertive stance in relation to Strasbourg”.[[2]](#footnote-2) There is now a wide range of circumstances in which UK jurisprudence allows the domestic courts to give *less* protection to Convention rights than the ECtHR would.[[3]](#footnote-3) However, in another respect, two very recent Supreme Court judgments—*AB*[[4]](#footnote-4)and *Elan-Cane*[[5]](#footnote-5)—have moved the domestic courts back towards a stricter “mirror principle”. There is now only a small number of circumstances in which domestic courts are permitted to give Convention rights *more* generous protection than they are given by the ECtHR.[[6]](#footnote-6)

Alongside the development of the “mirror principle” in the courts, there has also been a remarkable amount of extra-judicial[[7]](#footnote-7) and academic commentary,[[8]](#footnote-8) as well as political controversy—with the Conservative party repeatedly pledging to break the link between the domestic courts and Strasbourg.[[9]](#footnote-9) This has once again become a “hot topic” of late, because clause 3(3) of the Bill of Rights Bill 2022-23 (which is currently before Parliament) aims to enshrine the main thrust of the current domestic jurisprudence by replacing s.2 HRA with the effect that domestic courts would be expressly permitted to give less protection to Convention rights than Strasbourg gives them, but also expressly prohibited from adopting a more generous interpretation of Convention rights than Strasbourg.[[10]](#footnote-10)

However, in the midst of this excitement about the development of the “mirror principle” (and about clause 3(3) of the Bill of Rights Bill), one important question has gone almost unnoticed[[11]](#footnote-11)—namely, what does the ECtHR itself think about the role of national courts, its own role, and the relationship between the two? Does the current state of domestic jurisprudence fit with the ECtHR’s own view of its relationship to the domestic courts?

At first glance, it may seem that ECtHR judges are happy with the current s.2 HRA and with its interpretation by the UK courts—indeed, senior Strasbourg judges have recently said as much.[[12]](#footnote-12) However, looking deeper, it seems that the superficial appearance of consistency between the ECtHR’s view and the current view of the domestic courts is to a significant extent illusory. In this article, I argue that much of the ECtHR’s jurisprudence, and especially its jurisprudence after the “procedural turn”,[[13]](#footnote-13) in fact conflicts with elements of the modern version of the “mirror principle”.

I identify four justifications that the Supreme Court and academic commentators have given for maintaining a strong “mirror principle”. These four justifications for a strong version of the principle are: (1) that “the correct interpretation of the Convention can be authoritatively expounded only by the ECtHR”; (2) that “domestic Convention rights are not freestanding”; (3) that “the Convention has a uniform meaning throughout all the High Contracting Parties”; and (4) that “domestic courts should not normally diverge from ECtHR jurisprudence if the ECtHR would be likely to confirm its previous jurisprudence”. I show how the UK courts and commentators have relied on these justifications in the past and how they still play a role in the modern mirror principle.

I argue that these justifications are at odds with the ECtHR’s own vision of its relationship with national courts, and that the ECtHR counter-intuitively favours *less* “slavish adherence” to its own jurisprudence than has been favoured by the UK national courts.[[14]](#footnote-14) As one former President of the ECtHR put it in a speech given over a decade ago: “‘Strasbourg has spoken, the case is closed’ is not the way in which I or my fellow judges view the respective roles of the two courts”.[[15]](#footnote-15) Though not all ECtHR judges share this view, the development of the ECtHR’s jurisprudence over the last decade has, in general, made this tension more pronounced.

I show how the ECtHR’s jurisprudence concerning principles such as subsidiarity, incrementalism, the margin of appreciation, European consensus, and judicial dialogue, militate against any strong “mirroring” between domestic courts and the ECtHR. In fact, the ECtHR’s jurisprudence reveals the problems with the metaphor of the “mirror”. The principles articulated by the ECtHR generally point towards a more flexible approach, unhindered by many of the hard and fast rules which have been developed by the domestic courts. They imply that the most recent iteration of the “mirror principle” is to be welcomed insofar it has reduced the rigidity of the link between domestic courts and Strasbourg when it comes to domestic courts interpreting rights less generously than Strasbourg. But they also imply that the UK jurisprudence is wrong to maintain a more rigid version of the “mirror principle” when it comes to preventing domestic courts from interpreting rights more generously than Strasbourg.

Determining the ECtHR’s views about the role of national courts and its own role is not straightforward. As Dzehtsiarou notes, majority judgments of the Court “do not often engage with the existential questions of what the Court is for”.[[16]](#footnote-16) Concurring and dissenting judgments are often more forthcoming, as are speeches and articles written by judges and Presidents of the Court; and anonymous interviews with ECtHR judges provide another important source. However, all of these can be somewhat cryptic and the “relevant narratives need to be carefully extracted from innuendos, references and hints, rather than clear articulations”.[[17]](#footnote-17) Even where the views of ECtHR judges can be gleaned, they often do not speak with one voice. Hence, when I speak of “Strasbourg’s views” on the mirror principle, I do not mean to suggest that ECtHR judges are unified in their opinions. Nonetheless, the ECtHR’s overall direction of travel is, I think, clear enough for the argument presented here to qualify as a faithful *descriptive* account, rather being a chiefly *prescriptive* one. True, it is possible to find some support in the statements of particular ECtHR judges for a contrary view—i.e. that the modern mirror principle *is* congruent with Strasbourg jurisprudence. But any argument that this constitutes the main line of ECtHR thinking would have to be avowedly normative and *prescriptive* to be plausible, and would have little *descriptive* power.

The analysis here maintains strict neutrality about the substantive human rights issues. The arguments made can, I hope, be accepted by people who have different views about whether either the domestic courts or the Strasbourg Court have gone too far in the protection of specific rights, or not far enough. Nor do I claim that the ECtHR’s view of its own relationship with the domestic courts provides a conclusive reason for a particular interpretation of s.2 HRA. I do, however, claim that the view of the ECtHR itself on these matters deserves to be heard and to be taken into account by those participating in the debate about the “mirror principle”, regardless of participants’ particular views about the likely consequences that reducing or strengthening the rigidity of the link between the domestic courts and Strasbourg might have for the substantive protection of Convention rights.

1. **“The Correct Interpretation of the Convention Can Be Authoritatively Expounded Only by the ECtHR”**

One of the most common justifications given by domestic courts for maintaining a strong form of the “mirror principle” is the idea, first articulated by Lord Bingham in *Ullah*, that “the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court”. From this, he said, it followed both that the courts “should not without strong reason dilute or weaken the effect of the Strasbourg case law”, and that while national courts are permitted to provide for more generous protection of rights than the Convention requires, “such provision should not be the product of interpretation of the Convention by national courts”.[[18]](#footnote-18) The same proposition was voiced by Lord Sumption in *Chester,* where he said:

“A decision of the European Court of Human Rights is more than an opinion about the meaning of the Convention. It is an adjudication by the tribunal which the United Kingdom has by Treaty agreed should give definitive rulings on the subject. The courts are therefore bound to treat them as the authoritative expositions of the Convention which the Convention intends them to be … ”[[19]](#footnote-19)

This logic has been echoed by commentators, such as Draghici, who claim that because—under Article 32(1) ECHR—the ECtHR’s jurisdiction extends to “all matters concerning the interpretation and application of the Convention”, it follows that “the only legitimate interpreter of the ECHR provisions is … the Strasbourg Court”.[[20]](#footnote-20)

Draghici’s proposition is true both in the sense that the UK has an obligation under international law to obey the rulings of the ECtHR and in the sense that the Court’s rulings are not just an opinion about the meaning of the Convention. But it does not follow from this that the ECtHR is in a uniquely privileged position to give the “correct” interpretation of the Convention. Any such strong notion of “unique privilege” implies that the ECtHR’s rulings are authoritative in the same sense that the Supreme Court’s judgments might be thought to be authoritative in relation to domestic law[[21]](#footnote-21)—in other words, that there is a hierarchical structure of courts with the ECtHR sitting as final arbiter, that its judgments are designed to “correct” mistakes which have been made by the domestic courts, and that its purpose is to spell out the “true” legal position.

Much of the ECtHR’s jurisprudence seems to indicate that it does not understand its relationship with domestic courts in this way. First, under the doctrine of “non-substitution”, the ECtHR will require strong reasons to substitute its own judgment for that of a national court about the balancing of a right with public interests or with other Convention rights. As the Court put it in *Ndidi v UK*:

“where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant’s personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities.”[[22]](#footnote-22)

Indeed, *Von Hannover*,[[23]](#footnote-23) *Ibrahim*,[[24]](#footnote-24) *Bărbulescu*,[[25]](#footnote-25) *Hamesevic*,[[26]](#footnote-26) and *Alam*[[27]](#footnote-27) provide good examples of cases where the Court declined to substitute its conclusions for those of the national courts. As Spano observes, this doctrine indicates the Court’s recognition of the fact that, in principle, a “national decision-maker [is] more directly attuned and sensitive to the necessities of domestic and democratic legal order”.[[28]](#footnote-28) In other words, the doctrine shows that the ECtHR displays more deference to national courts than appellate courts generally show to lower courts within hierarchical common law systems. Of course, the doctrine of non-substitution cannot alone dispel the argument that the ECtHR has a monopoly on interpreting Convention rights. It applies only in relation to the final stage of the proportionality analysis, and even this balancing exercise itself must be “undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law” for the doctrine to be applied.[[29]](#footnote-29) So, although the doctrine gives national courts the power to lead the way on the correct interpretation of the Convention, it does so only within tightly defined parameters.

The ECtHR also gives national courts the power to take the lead on the correct interpretation of the Convention where the Court’s jurisprudence is still being developed in new, morally sensitive areas. As Gerards argues, in such circumstances the Court “acts in a very cautious, incremental and circumscribed manner”.[[30]](#footnote-30) It begins by issuing judgments restricted to the facts of the case, “avoiding the moral issues at stake”, and only gradually develops more concrete principles—leaving for itself the “possibility to change position if its approach is met with strong national criticism”.[[31]](#footnote-31) Even once these general principles have crystalised, the Court still leaves itself “room for manoeuvre” so that it can “defer to the national authorities where national constitutional values, legal traditions or sensitive issues are concerned, without having to change the general principles”.[[32]](#footnote-32) For example, the Court has made clear that the Convention does not guarantee a right to an abortion.[[33]](#footnote-33) It has, however, incrementally developed, over a number of cases, a series of concrete rules which apply in relation to the regulation of abortion. Rather than articulating broad principles or directly addressing the moral issues, the Court’s approach has been pragmatic and fact-sensitive, stressing the importance of differing national views on the right to an abortion, and allowing room for manoeuvre.[[34]](#footnote-34) It is clear from this “incrementalism” that, at least when it comes to areas of its jurisprudence which are still developing or which are especially morally sensitive, the ECtHR envisages domestic authorities playing an important role in defining the correct interpretation of the Convention.[[35]](#footnote-35)

Another doctrine— “European consensus” —also shows that the ECtHR sees its role as being to develop Convention jurisprudence iteratively, in cooperation with national courts.[[36]](#footnote-36) The doctrine is, in essence, “a presumption that favours the solution to a human rights issue which is adopted by the majority of the Contracting Parties”.[[37]](#footnote-37) By recognising explicitly that national authorities—both judicial and legislative—have a role in shaping the “correct” interpretation of the Convention, the Court leaves room for domestic judicial conceptions of human rights to develop independently of Strasbourg jurisprudence. The Court explicitly recognises the “shared responsibility” between national courts and itself for the protection of Convention rights.[[38]](#footnote-38) As Bjorge concludes based on a survey of ECtHR judgments including *van* *Kück*,[[39]](#footnote-39) *E.B.*,[[40]](#footnote-40) and *Hirst*,[[41]](#footnote-41) “looking at the judgments of the Strasbourg Court, it becomes clear that the Court in no way conceives of evolutive interpretation as its prerogative”—rather, Strasbourg takes the view that “national courts … have the power to engage in interpretation which develops Convention rights”.[[42]](#footnote-42) Of course, the impact of the doctrine should not be overstated. The doctrine shows that the ECtHR envisages national authorities taking the lead on the correct interpretation of the Convention, but it must be recognised that the presumption set is rebuttable not conclusive, and that the power given to national courts is held collectively rather than by any one national court alone.[[43]](#footnote-43)

We might add that the ECtHR’s “fourth instance” doctrine makes explicit that it is not in the same position as an appellate domestic court. Strictly speaking the doctrine entails only that the Court should “avoid reconsidering questions of fact or national law that have been considered and decided by national authorities”.[[44]](#footnote-44) Nonetheless, when taken together with the other doctrines mentioned, the fourth instance doctrine implies that the ECtHR’s understanding of its own role in interpreting the Convention is permeated by a desire to show due respect to the national courts, rather than by any conception of a hierarchical system with Strasbourg at the apex.

Finally, the ECtHR’s approach to dialogue with the domestic courts confirms that it sees these courts as having an important role to play in determining the correct interpretation of the Convention. As is well known, there are cases in which the ECtHR has been persuaded by the domestic courts to reconsider its position on the correct application of the Convention to domestic states of affairs.[[45]](#footnote-45) Even more important are those cases where the ECtHR has not just applied the Convention in light of the domestic courts’ views, but where, as Bratza puts it, the reasoning of the domestic courts has “formed the basis of the Strasbourg Court’s own judgment”, and shaped the interpretation of the Convention.[[46]](#footnote-46) Similarly, Judges Spano, O’Leary, and Eicke point out in their submission to the Independent Human Rights Act Review (“IHRAR”) that “the sophisticated analysis by the UK domestic courts of the Strasbourg case-law [has been] relied upon in its judgments against other States” —with *S., V. and A. v Denmark* being the most recent example[[47]](#footnote-47)—and that UK judgments are often “circulated by many European Court Judges amongst themselves, not least because of the analytical and persuasive way in which the UK judiciary discussed and dealt with questions of rights”.[[48]](#footnote-48) Indeed, one Strasbourg judge has recently commented that domestic courts are “so well-versed in the case law that when we get the cases I often ask myself, I mean, ‘what is left?’”.[[49]](#footnote-49) None of this is consistent with the proposition that the ECHR conceives of itself as “uniquely privileged” in the way that the Supreme Court correctly conceives of itself in the context of the UK courts.

The central point is that the ECtHR has repeatedly declined to sponsor an hierarchical conception of the relationship between itself and the national courts. Under the hierarchical conception, the ECtHR is seen as the only authoritative expositor of Convention rights. Accordingly, domestic courts “should not without strong reason dilute or weaken the effect of the Strasbourg case law”.[[50]](#footnote-50) Nor can domestic courts adopt more generous interpretations of Convention rights than Strasbourg has done “as a matter of interpretation of the Convention”, but only as a matter of common law rights.[[51]](#footnote-51) From this perspective, the “interpretative role of domestic courts appears residual: only where no clear indication from Strasbourg is available can they proceed to construe the meaning of a Convention right”.[[52]](#footnote-52)

By contrast, under the cooperative conception sponsored by the ECtHR, domestic courts have a much more substantial role to play as interpreters of Convention rights. It of course remains true that domestic courts should not adopt less generous interpretations of Convention rights than the ECtHR in relation to core, settled elements of the Strasbourg Court’s case law. But when it comes to the final “balancing” stage of the proportionality analysis, or to elements of the case law which are still in the process of being incrementally developed, or to morally sensitive areas, or to areas where a European consensus is developing, the ECtHR envisages national courts playing an active role in interpreting the Convention, including by adopting less generous interpretations of Convention rights. Moreover, the ECtHR sees domestic courts as having an important role to play in developing more generous interpretations of the Convention than it has done itself—and over time, through the European consensus and living instrument doctrines, such interpretations may become accepted by the Strasbourg Court as being “correct” and definitive for all the Contracting Parties.

1. **“Domestic Convention Rights Are Not Freestanding”**

The second justification often used by the courts for maintaining a strong link between domestic jurisprudence and ECtHR jurisprudence is the idea that the rights in the HRA are “Convention rights, based on the Treaty obligation”, not “free-standing rights of the [domestic] court’s own creation”. This idea was first articulated by Lord Hope in *Ambrose*,[[53]](#footnote-53) and is echoed by commentators, such as Draghici, who claim that there is no substantive distinction between the rights listed in the ECHR, and those same rights as reproduced in Schedule 1 HRA.[[54]](#footnote-54)

There are some cases in which the domestic courts have taken the view that the rights in the HRA have a life independent of the Convention: in *McKerr*, for example, Lord Hoffmann asserted that the rights in the HRA “are domestic rights, not international rights”, whose “meaning and application is a matter for domestic courts, not the court in Strasbourg”.[[55]](#footnote-55) Indeed, as Hickman notes, there is “a tension at the very heart of the [Human Rights] Act between the creation of new domestic rights and the provision of a remedy in domestic law for rights that exist on the international plane”, and this tension is “carried through into the case law”.[[56]](#footnote-56)

But the courts have recently watered down the effect of *McKerr* and cases like itsubstantially, restoring Lord Hope’s doctrine that HRA rights are essentially Convention rights. In *Animal Defenders,* Lady Hale recognised that, according to *McKerr*, the HRA rights “are domestic rights for which domestic remedies are prescribed”, but nonetheless held that “the rights are those defined in the Convention, the correct interpretation of which lies ultimately with Strasbourg”.[[57]](#footnote-57) In *Elan-Cane* Lord Reed said that *McKerr* was concerned simply with the procedural question of “when the domestic Convention rights came into force: a question which evidently fell to be answered by reference to domestic law”, and hence that *McKerr* did not imply that domestic Convention rights were distinct from international Convention rights in any fundamental sense.[[58]](#footnote-58)

The view of the domestic courts that domestic Convention rights are mere copies of the international Convention rights with no independent life of their own is, however, at odds with the growing importance in the ECtHR’s jurisprudence of the principle of subsidiarity[[59]](#footnote-59)—i.e. the notion that the ECHR is “supplementary and subsidiary to the protection of rights and freedoms under national legal systems” whose authorities retain “primary responsibility” for guaranteeing those rights.[[60]](#footnote-60) There are at least two reasons for this.

First, it is inherent in the concept of subsidiarity deployed by the ECtHR that the effective protection of human rights is best achieved through the development of a “homegrown” rights culture and through the domestic “embedding” of human rights.[[61]](#footnote-61) In cases like *Ndidi* the ECtHR was clear that where a national court applies “human rights standards consistently with the Convention and its case-law” then positive inferences will be drawn from this.[[62]](#footnote-62) Conversely, in a great many cases the ECtHR has drawn negative inferences from the failure of national courts to engage fully with Convention principles.[[63]](#footnote-63) The embedding of Convention principles into domestic jurisprudence—which attracts positive inferences from the ECtHR and avoids negative ones—can be most fully achieved only by those principles becoming interwoven into the fabric of the domestic jurisprudence so that they become the basis for a genuinely “domestic” culture of human rights with its own identity, rather than being regarded simply as international “imports”.[[64]](#footnote-64) Of course, it is theoretically possible for Convention principles to become firmly embedded in domestic jurisprudence without domestic Convention rights taking on any life of their own, or for a domestic human rights culture to develop through common law rights, independently from the Convention.[[65]](#footnote-65) But not all Convention rights find domestic analogues in the common law—so a domestic culture of human rights based solely on common law rights, rather than on the development of domestic Convention rights, would be strangely limited.[[66]](#footnote-66) And if we understand “subsidiarity” and “embeddedness” as interconnected aspirational or teleological principles, it is difficult to see how they can be fully realised without the rights concerned developing into a body of domestic law that has a life of its own.[[67]](#footnote-67)

This point should not be overstated. Clearly, the ECtHR would not favour domestic Convention rights becoming completely detached from their international counterparts in all respects. Rather, the point is that key strands of the Court’s jurisprudence seem to imply that there ought to be some room for domestic Convention rights to take on a life of their own in some respects. Exactly how much room, and in exactly what respects, depends on which conception of the doctrine of subsidiarity one thinks fits best with the Court’s jurisprudence.But even a relatively conservative understanding of the Court’s subsidiarity doctrine still entails that there should be some room; and this conclusion is a long way from the domestic courts’ repeated assertions that HRA rights are categorically “not free-standing”.

Second, and more fundamentally, the view that domestic Convention rights are mere copies of international Convention rights is difficult to reconcile with compelling accounts of the underlying normative basis for the principle of subsidiarity employed by the ECtHR.

One plausible account of the underlying normative basis for human rights subsidiarity is Besson’s. She argues that although domestic human rights and international human rights both protect the same moral rights, they serve different purposes and have different roles and functions.[[68]](#footnote-68) Because domestic law is seen as having greater democratic legitimacy than international law, domestic law should be the primary means through which human rights are protected, and domestic institutions should have priority in the “interpretation and specification” of rights.[[69]](#footnote-69) However, international human rights law has a “universal scope that matches that of universal moral rights”, and because human rights “work as constraints on democratic sovereignty and self-determination” they “cannot be guaranteed exclusively from within a given political community”. So international law, on this view, has an essentially *supervisory* role.[[70]](#footnote-70) In Besson’s conception of subsidiarity, then, the role of the ECtHR is not to specify the content of human rights themselves, but rather, to create “second order duties for states … to generate first-order human rights duties for themselves under domestic law”.[[71]](#footnote-71) This leads Besson to the conclusion that the international “human rights law regime has three functions that make it complementary to domestic human rights law”: a substantive one, a personal one, and a procedural one.[[72]](#footnote-72) And, for Besson, each of these complementary functions is reflected in the different forms of subsidiarity adopted by the ECtHR—specifically, in its jurisprudence on the exhaustion of domestic remedies, admissibility rules, the fourth-instance doctrine, the margin of appreciation, the principle of favour, and the declaratory nature of judgments.[[73]](#footnote-73)­­­­

An alternative account of the normative basis for the ECtHR’s doctrine of subsidiarity is provided by Vila, who argues that human rights are not grounded in general moral rights, but are instead “special rights whose existence depends on a previous relationship that justifies the protection of certain goods and interests”.[[74]](#footnote-74) On Vila’s view, human rights are seen as “minimal claims for inclusion in the international system as a whole”, grounded in “three conditions in global interaction that involve relationships of justice: interdependence, institutionalization, and cooperation”. In Vila’s cooperative conception of human rights, domestic and international institutions thus have different roles to play in protecting human rights, which reflect the differences between the associative bonds which exist, respectively, amongst individuals *qua* members of nation states, and individuals *qua* members of the international community. International law is seen as being the primary means through which human rights are protected, and international institutions are seen as having priority in the interpretation and specification of rights. But domestic human rights law still has an important “cooperative” role to play. This cooperative conception involves “an understanding of the subsidiarity principle that favors a balanced division of labor in rights protection”, with different roles being assigned to domestic human rights law and international human rights law. So, for Vila, domestic human rights law is not simply a copy of international human rights law: the protection of rights is “consolidated though inclusion in multiple interrelated structures”, and it is recognised that these “institutional structures pursue their ends in distinctive ways, following their particular histories and circumstances, *which prevent us from subsuming them under any homogenous unity*”.[[75]](#footnote-75) And for Vila, this cooperative conception of human rights is reflected in the different forms of subsidiarity adopted by the ECtHR—specifically in its jurisprudence on incrementalism and the margin of appreciation.[[76]](#footnote-76)

Both of these very different theories of the normative basis for the ECtHR’s doctrine of subsidiarity—each of which fits with important parts of the jurisprudence of the ECtHR—contradict the view that domestic Convention rights are mere copies of international Convention rights. Both are united in the view that the roles, functions, and purposes of domestic and international human rights law are distinct, and that the domestic Convention rights cannot, therefore, be regarded as mere copies of international Convention rights.

We have, in short, two competing conceptions of the nature of domestic human rights— (i) domestic Convention rights as “copies” of international Convention rights, with no substantive life of their own and (ii) domestic Convention rights as, at least in part, “freestanding” from international Convention rights—with the Supreme Court favouring the former view, and the subsidiarity doctrine of the ECtHR being more congruent with the latter.

On the “copies” conception, the fact that domestic Convention rights and international Convention rights are seen as the very same rights provides a strong reason for domestic courts to follow Strasbourg jurisprudence down to the letter—in particular, it provides a strong reason for domestic courts not to “give a more generous scope to [Convention] rights than that which [is] to be found in the jurisprudence of the Strasbourg court”.[[77]](#footnote-77) It follows from this view that where domestic courts give a more generous scope to the protection of Convention rights than Strasbourg, they are not interpreting a domestic Convention right, but rather interpreting only a “corresponding common law right”.[[78]](#footnote-78)

On the “freestanding” conception, by contrast, domestic Convention rights are seen as having “created new rights … not simply given the people within the jurisdiction of the United Kingdom the rights which Strasbourg would give them”.[[79]](#footnote-79) On this view, congruent with the ECtHR’s doctrine of subsidiarity, the nature of domestic Convention rights does not, by itself, appear as a reason for domestic courts always to follow Strasbourg jurisprudence down to the letter. Of course, on this view, the relevant similarities between international and domestic human rights cannot be ignored: (i) that Convention rights and the rights in the HRA are expressed in identical language implies that Strasbourg jurisprudence should carry weight insofar as it provides a compelling interpretation of the language of those rights; and, (ii) that both international and domestic human rights are based on the same underlying moral concerns implies that Strasbourg jurisprudence ought to be given weight insofar as it provides a compelling account of the underlying moral logic of the rights at stake. Nor should one ignore those elements of the ECtHR’s jurisprudence which suggest that certain questions about rights—like those concerning scope—ought to be answered identically at the domestic and international level. But this view also recognises that much of Strasbourg jurisprudence is not based simply on the language of the Convention or on the moral logic of human rights, but rather, is based on the specific roles, functions, and purposes that are served by international human rights law. Insofar as domestic Convention rights have different roles, functions, and purposes, this will provide a reason for domestic courts to diverge from Strasbourg jurisprudence, either by giving more or less generous protection to Convention rights.

1. **“The Convention Has a Uniform Meaning Throughout All the High Contracting Parties”**

The third justification offered by the domestic courts for maintaining a strong link between domestic jurisprudence and ECtHR jurisprudence is that the Convention must have a uniform meaning throughout all the Contracting Parties. The idea first appeared in the judgment of Buxton L.J. in *Anderson*, where he said that “fairness between the citizens of [the] different countries requires that [the Convention’s] terms have a uniform and accessible meaning throughout the member countries”, and that it would be wrong to create “in England and Wales a different set of Convention rules from those that apply in other countries who are signatories to the Convention”.[[80]](#footnote-80) In *Clift,* Lord Hope likewise said: “[a] measure of self-restraint is needed, lest we stretch our own jurisprudence beyond that which is shared by all the states parties to the Convention”.[[81]](#footnote-81) Lord Hope emphasised the same point in *Cadder*, where he said that the approach of the ECtHR was “to provide principled solutions that are universally applicable in all the contracting states”. As he put it:

“[The Convention] aims to achieve a harmonious application of standards of protection throughout the Council of Europe area, not one dictated by national choices and preferences. There is no room in its jurisprudence for, as it were, one rule for the countries in Eastern Europe such as Turkey on the one hand and those on its western fringes such as Scotland on the other.”[[82]](#footnote-82)

In some cases, the courts have recognised that this justification might not apply in all circumstances. Most notably, in *Re G* Lord Hoffmann took the view that “the general desirability of a uniform interpretation of the Convention in all member states” was not a consideration which applied “in a case in which Strasbourg has deliberately declined to lay down an interpretation for all member states, as it does when it says that the question is within the margin of appreciation”.[[83]](#footnote-83)

However, following *Elan-Cane*, the domestic courts now take the view that the Convention should have a uniform meaning across all cases, regardless of Strasbourg’s use of the margin of appreciation doctrine.[[84]](#footnote-84) In *Elan-Cane,* Lord Reed—with whom the rest of the Court agreed—understood the margin of appreciation as a doctrine of “judicial restraint” or deference: where it applies, the ECtHR adopts a “restrained interpretation of the relevant article of the Convention”.[[85]](#footnote-85) For Lord Reed, the doctrine is part of the correct approach to the interpretation of the Convention itself, rather than peculiar to the institutional position of the ECtHR. In Lord Reed’s view, where the ECtHR applies the doctrine it is not declaring that the issue is “within the national margin of appreciation” and thus “declining to interpret the Convention”.[[86]](#footnote-86) Rather, it is authoritatively determining the proper interpretation of the Convention applicable uniformly to all member states. As Lord Reed put it: “The margin of appreciation doctrine is not an abdication of the task of interpretation, but an important aspect of that task.”[[87]](#footnote-87) Thus, according to Lord Reed, even in relation to issues where Strasbourg applies the margin of appreciation, domestic courts should not adopt more generous interpretations of Convention rights than does Strasbourg, unless such results “flow naturally” from Strasbourg’s jurisprudence.[[88]](#footnote-88)

There are two possible views about what the ECtHR is doing when it applies the margin of appreciation. On the first view—held by Lord Reed—the margin of appreciation is seen as consistent with the idea that the Convention has a uniform meaning throughout the member states. On this view, the margin of appreciation operates as a device which allows domestic courts to diverge from Strasbourg’s view, but only as a matter of domestic law, not as a matter of “Convention law”. The Convention is seen as purely international instrument, with only one, uniform meaning: the one it is given at the international level. It follows that when domestic courts take a different view from Strasbourg, they may be doing one of two things: (i) saying what they think the Convention means at the international level, and thus, what it ought to mean uniformly for all member states; or, (ii) saying that the domestic common law should diverge from Convention law. However, what they *cannot* be saying is: (iii) that what the Convention means domestically is different from what it means internationally.

On the second view, in cases where Strasbourg applies the margin of appreciation it is not using the margin of appreciation as a “general” doctrine of restraint which must be mirrored in domestic courts, but rather as doctrine arising from the ECtHR’s specific position as an international tribunal. On this view, although Lord Reed is plainly right that the Court is not “declining to interpret the Convention” when it applies the margin of appreciation, what it seems to be doing is to offer an interpretation of the Convention that is peculiar to its institutional positioning as an international Court, rather than a definitive interpretation of Convention rights uniformly applicable to all member states. As Majewski puts it, the Court here is determining the “extent of a Convention right *on the level of Strasbourg* and yet, at the same time, [declining to determine] its extent on *all* levels”.[[89]](#footnote-89) In other words, the margin of appreciation allows domestic courts to diverge from Strasbourg’s view as a matter of domestic Convention interpretation. Here, the Convention is seen as an instrument of both domestic and international law, and its meaning at the international level may be different from its meaning at the domestic level. From this perspective, when domestic courts take a different view from Strasbourg, they may be saying one of three things: (i) what they think the Convention means at the international level, and thus, what it ought to mean uniformly for all member states; (ii) what domestic common law rights mean, separately from what Convention rights mean; or, (iii) what Convention rights mean domestically, which may differ from what they mean internationally.

The second view fits better than the first with the Strasbourg jurisprudence. As we have seen, realising the aspirations of the ECtHR’s doctrine of subsidiarity entails that domestic Convention rights should, at least to some degree, be “freestanding” from international Convention rights. Given the close connection between the margin of appreciation doctrine and the doctrine of subsidiarity, it seems natural to interpret the margin of appreciation, too, as allowing room for the domestic courts to develop their own domestic Convention rights jurisprudence—not just as allowing domestic courts to develop common law rights. This view has been expressed by ECtHR Presidents: Spano argues that the Court does *not* regard the Convention as being “an instrument of human rights unification”, but rather regards itself as laying down only “minimum standards” and enforcing the “collective guarantee” of the protection of rights;[[90]](#footnote-90) and Spielmann argues that the “paramount concern” of the Court “is effectiveness, not uniformity”.[[91]](#footnote-91) The same sentiment has been expressed in ECtHR judgments: for example, by judges Mahoney and Wojtyczek in *Abdu*, where they said that the “Convention and the Protocols lay down a collective guarantee on some of the universally recognised human rights, establishing a minimum standard of protection … ”[[92]](#footnote-92) And the ECtHR has been explicit that the margin of appreciation is “a tool to define relations between the domestic authorities and the Court” which “cannot have the same application to the relations between the organs of State at the domestic level”.[[93]](#footnote-93)

It is true that some ECtHR judges take the view that the Convention is an instrument of unification which goes beyond merely establishing minimum standards. Rozakis, for example, argues that “no power can stop the Court in the long run from advancing its course towards fulfilling its role as an impactful and weighty instrument of European integration”.[[94]](#footnote-94) And as Dzehtsiarou’s work shows, at least some Strasbourg judges seem to support the notion that the ECtHR should actively aim to create a unified “European public order”.[[95]](#footnote-95) However, even these judges seem to recognise that in a case where the margin of appreciation doctrine applies, the Court’s role is not to treat the Convention as an instrument of unification or integration. Indeed, it is this very feature of the margin of appreciation of doctrine which prompts Rozakis to lament its “re-animation” in recent years, to regard this—and the re-affirmation of subsidiarity by Protocol 15—as “negative developments”, and to hope that the margin of appreciation doctrine will “gradually recede in favour of a real, substantive decision by the ECtHR”.[[96]](#footnote-96) So, even those ECtHR judges who think that the Convention should, in principle, have a uniform meaning, would seem to disagree with Lord Reed’s understanding of the margin of appreciation.

Supporters of Lord Reed’s view may argue that his approach is understandable because the ECtHR sometimes does use the margin of appreciation doctrine as a “substantive concept” —recognising that Convention rights are sometimes limited by reference to collective interests.[[97]](#footnote-97) When it does so, the ECtHR seems to use the margin of appreciation as a general doctrine of deference which it envisages being mirrored by national courts, and uses it to justify ascribing a meaning to the Convention which it does not see as peculiar to its specific role as an international court.

Though this “substantive” use of the margin of appreciation lends some credence to Lord Reed’s approach, the “structural” form of the margin of appreciation is now the primary or focal usage of the doctrine, and the substantive use of the doctrine is a secondary or peripheral form of it. As Rabinder Singh commented over two decades ago, “the [ECtHR’s] case law makes it clear that it primarily regards the concept of margin of appreciation as defining the relationship between a supranational court and national authorities (including national courts). This does not suggest that … the national court should also apply the margin of appreciation when reviewing the decisions of other national authorities.”[[98]](#footnote-98) This comment rings even truer now than it did 20 years ago. Since then, the Court’s use of the substantive concept has been widely criticised as redundant or “purely rhetorical”.[[99]](#footnote-99) Moreover, as I have already argued, the Court has recently placed an increased emphasis on the principle of subsidiarity.[[100]](#footnote-100) Indeed, the margin of appreciation doctrine is now explicitly tied to the principle of subsidiarity by Protocol 15 ECHR, and many commentators argue that subsidiarity is the primary justification for the doctrine.[[101]](#footnote-101) So, even if the “substantive” concept of the margin of appreciation might once have been said to have held some sway, its influence appears to be waning.

All in all, *pace* Lord Reed, there is no reason to doubt that the ECtHR, when following its central practice of applying the structural form of the margin of appreciation, intends to give room for domestic courts to give more generous protection to Convention rights than Strasbourg as a matter of domestic Convention interpretation.

1. **“Domestic Courts Should Not Normally Diverge From ECtHR Jurisprudence if the ECtHR Would Be Likely to Confirm Its Previous Jurisprudence”**

The fourth justification offered by the domestic courts for maintaining a strong link between domestic jurisprudence and ECtHR jurisprudence was articulated by Lord Slynn in *Alconbury*, where he said:

“it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence.”[[102]](#footnote-102)

Similarly, in *Amin* Lord Bingham said that domestic courts should follow Strasbourg because otherwise “the dissatisfied litigant has a right to go to Strasbourg where existing jurisprudence is likely to be followed.”[[103]](#footnote-103)

These statements illustrate an unwillingness by the domestic courts ever to give Convention rights less protection than Strasbourg. They represent a relatively “risk-averse” approach to disagreement with Strasbourg, the effect of which is that domestic judges have sometimes felt bound to follow Strasbourg jurisprudence even where there remains reasonable doubt about whether Strasbourg would maintain its original position “on appeal” were the domestic court to diverge from it. This risk-aversion is evident, for example, in Lord Reed’s judgment in *Hallam.* There, the majority declined to follow ECtHR’s position, taking the view that it was “not just wrong but incoherent”,[[104]](#footnote-104) or was unclear and created “considerable difficulties”,[[105]](#footnote-105) or was “full of unsatisfactory and unsatisfying distinctions and uncertainties”.[[106]](#footnote-106) Although the majority recognised that it might be overly-optimistic to think there was “room for further constructive dialogue” with Strasbourg, and regarded it as likely that Strasbourg would maintain its original position, they were nonetheless willing to take the risk of diverging from Strasbourg.[[107]](#footnote-107) Lord Reed, on the other hand, was unwilling. He thought that there was “unlikely to be scope for dialogue”.[[108]](#footnote-108) As he said:

“I find it difficult to accept that this court should deliberately adopt a construction of the Convention which it knows to be out of step with the approach of the European Court of Human Rights, established by numerous Chamber judgments over the course of decades, and confirmed at the level of the Grand Chamber, in the absence of some compelling justification for taking such an exceptional step.”[[109]](#footnote-109)

Similarly, this risk-aversion is evident in the majority of the Supreme Court’s decision in *DSD* to follow Strasbourg jurisprudence despite the recognition by Lord Mance (who was in the majority) that “its foundations or rationale may be shaky”,[[110]](#footnote-110) and despite Lord Hughes’s dissenting judgment in which he was highly critical of the Strasbourg jurisprudence and opined that large elements of it were unclear and unexplained.[[111]](#footnote-111) And even in *Horncastle* (where the Supreme Court was united in the view that the Strasbourg jurisprudence should not be followed) the Court was at pains to show how likely it was that Strasbourg would yield to their view.[[112]](#footnote-112)

However, in other cases the domestic courts have taken a less risk-averse approach—maintaining that the need to give Convention rights as much protection as Strasbourg, even where the domestic court regards Strasbourg’s interpretation of the Convention as incorrect, arises only where there is no serious chance of the ECtHR changing its view. In these cases, the courts have emphasised that Strasbourg should be followed only because it is near-certain that Strasbourg would “stick to its guns” were the domestic courts to diverge. In *AF (No 3)*, there was evidently judicial disquiet about the position taken by Strasbourg—but their Lordships recognised that if they diverged from Strasbourg it would “almost certainly” confirm its original view, and that they had “in reality … no choice” but to abide by Strasbourg’s clear jurisprudence.[[113]](#footnote-113) A similar theme appears in *Chester.*[[114]](#footnote-114)There, Lord Mance recognised that the process of “dialogue” could be useful where a national court could have “confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg”, but that there were “limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice.”[[115]](#footnote-115) Lord Sumption was explicit that he reached the conclusion he did only because there was “*no realistic prospect* that further dialogue with Strasbourg [would] produce a change of heart”.[[116]](#footnote-116)

This case law reveals competing views within the domestic case law about how “clear and constant” Strasbourg jurisprudence must be for domestic courts to regard themselves as effectively bound to give Convention rights as much protection as does Strasbourg (absent special circumstances[[117]](#footnote-117)). On one view, domestic courts are effectively bound whenever Strasbourg is “likely” to follow its own jurisprudence—even if there is a significant chance that Strasbourg might change its view. Whereas, on the other view, domestic courts are effectively bound only where there is “no realistic prospect” that Strasbourg will change its view.

But what is the view of the Strasbourg judges themselves? There are at least two reasons for believing that the ECtHR’s own approach is once again, counter-intuitively, more consistent with the view that the domestic courts should feel entitled sometimes to give Convention rights less protection than does Strasbourg unless there is genuinely no realistic prospect of the ECtHR changing its mind.

The first reason for thinking that this less risk-averse view accords with the ECtHR’s approach is that even when Strasbourg’s jurisprudence appears settled dialogue with the domestic courts might nonetheless be productive. The ECtHR has repeated many times its willingness to depart from previous case law where there is “good reason” to do so.[[118]](#footnote-118) Clearly, one “good reason” could be that a domestic court has taken a different view. Although “applicants have been the prime beneficiaries of the Court overruling its previous case law”, there have been several instances of the Court overruling its previous case law which have benefitted states rather than applicants.[[119]](#footnote-119) And the ECtHR has shown itself willing sometimes to turn back on its relatively settled case law under pressure from the domestic courts.[[120]](#footnote-120) Indeed, if the Court seemed willing to overrule its own precedents in response to dialogue with national courts even during its earlier “substantive embedding phase”, now that the Court has moved into its “procedural embedding phase” that willingness can only have increased.[[121]](#footnote-121) Moreover, even in a case where the ECtHR does stick to its guns in the face of a reasoned dissent from a domestic court, such dissent might nonetheless be productive in that it may provide the ECtHR with opportunities to improve the quality and persuasiveness of its reasoning by responding directly to arguments made by the domestic courts.[[122]](#footnote-122)

The second reason for thinking that the ECtHR is itself inclined to favour the *Chester/AF (No 3)* approach, is that nothing about Strasbourg’s jurisprudence implies that such an approach would diminish the good reputation of the domestic courts with the ECtHR or damage the mutual respect which exists between these courts. It would be one thing for a domestic court to fail to engage seriously with the ECtHR’s jurisprudence, or to deal with that jurisprudence in bad faith: clearly, such an approach would risk alienating the ECtHR and damaging the strong working relationship that has formed between these courts. But it is quite another thing for a domestic court to engage seriously with the ECtHR’s jurisprudence and apply the Convention principles in good faith, whilst ultimately coming to a different view from the ECtHR.

If we examine the reasons why the domestic courts have such a good relationship with the ECtHR, it is evident that this has little to do with any kind of “slavish adherence” to the Strasbourg jurisprudence, and much more to do with the quality of the domestic courts’ reasoning about human rights. Bratza, for example, argues the Strasbourg Court has been “particularly respectful of decisions emanating from courts in the United Kingdom … because of the universally accepted high quality of the analysis of the Convention issues in those judgments”.[[123]](#footnote-123) Comments made by a number of different Strasbourg judges reveal the same attitude.[[124]](#footnote-124) As one judge put it, there are have been relatively few adverse judgments against the UK in recent years because “the UK domestic judgments are so extremely well-reasoned, the quality is so high compared to other countries, that it is hard for Strasbourg to overrule”; and another judge commented that British judges engage “much more extensively” with Convention principles than judges in other countries and were “better versed in the application of the case law”.[[125]](#footnote-125) Similarly, Judges Spano and Eicke comment that though domestic courts have sometimes adopted different views from Strasbourg, they would “not necessarily categorise these as “problematic” cases”.[[126]](#footnote-126)

Two distinctions are important here. On the one hand, we must distinguish between approaches that permit domestic courts routinely to diverge from core, settled elements of the ECtHR’s jurisprudence, and approaches which permit divergence only where there remains a realistic possibility for dialogue with the ECtHR. Though the former would clearly be likely to weaken the UK’s standing, the latter would not. On the other hand, we must distinguish between divergence which results from executive or legislative acts, and divergence which is the result of interpretation by the domestic courts. In the former situation, if the ECtHR ultimately confirms its previous case law then the applicant may still have some difficulty in obtaining their desired result: they may have to wait for the executive or legislature to come up with a new Convention-compliant approach and their position depends on uncertain political factors. Whereas in the latter situation, if the ECtHR ultimately confirms its previous case law, then the applicant can be certain that the domestic courts will now immediately abide by Strasbourg’s ruling, given that no realistic possibility of dialogue remains.

Provided that these caveats are observed, there is no reason to suppose that *bona fide* jurisprudential divergence in the cause of promoting judicial dialogue will “weaken the UK’s position with regard to international politics” or “land the UK in hot water with the Council of Europe” as some commentators have suggested it might.[[127]](#footnote-127) On the contrary, so long as any domestic divergence is based on thorough and good faith engagement with the Strasbourg jurisprudence, it seems highly unlikely that any bad blood will arise between Strasbourg and the domestic courts. It does not seem, then, that domestic divergence will “undermine the effectiveness of the ECHR system and make a mockery of [the] State’s obligations”, as some commentators have suggested.[[128]](#footnote-128) Rather, the ECtHR seems likely to be receptive to such disagreement and to take it seriously, even where it ultimately confirms its previous case law.

1. **Conclusion**

The conclusion that emerges from this review of the ECtHR’s approach to principles such as subsidiarity, the margin of appreciation, European consensus, and judicial dialogue, is that any UK demand for “slavish adherence” by the domestic courts to the judgments of the ECtHR is by no means replicated in Strasbourg itself. All four of the justifications for a strong version of the mirror principle most commonly advanced in the UK are in fact at odds with the prevailing views of the ECtHR about the proper relationship between itself and the national courts.

It must be conceded, of course, that not every ECtHR judge has been enthusiastic about the Court’s procedural turn. In his dissenting judgment in *Hutchinson*, for example, Judge Pinto de Albuquerque was highly critical of the majority’s decision to backtrack on the Court’s previous decision in *Vinter* in response to dialogue with the Court of Appeal.[[129]](#footnote-129) In a swingeing critique of the Court’s procedural turn, he said that Court was facing “an existential crisis” and that the Court changing its views in response to dialogue with domestic courts allowed domestic authorities to engage in “self-interested manipulation”.[[130]](#footnote-130) He said that the majority’s decision represented “a peak in a growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards”, and he wholeheartedly endorsed Lord Rodger’s statement: “Strasbourg has spoken, the case is closed”.[[131]](#footnote-131) Many of the same themes are also developed in his recent dissenting judgment in *G.I.E.M.*, which he called “a pledge for the principle of universality of human rights” and in which he again approved Lord Rodger’s maxim.[[132]](#footnote-132)

Despite these dissenting judicial voices, Strasbourg’s overall direction of travel is, I think, relatively clear. Through the development of the doctrines of subsidiarity and of the margin of appreciation (accentuated in recent years), the ECtHR has sought to encourage national courts to contribute to the ongoing dialogue about the correct meaning of the Convention at the international level, and to develop their own parallel human rights jurisprudence at the national level. The ECtHR has not insisted that the Convention must have a uniform meaning across all member states, and has instead adopted a more flexible approach whereby national courts are encouraged to develop distinct and nationally appropriate applications of the Convention rights. Finally, ECtHR judges have shown themselves willing to countenance continuing dialogue with the domestic courts even where they ultimately disagree about the substance.

In short, whereas Lord Bingham’s original version of the “mirror principle” proposed a rigid linkage in both directions and the modern version of the mirror principle maintains the rigidity of the link at least when it comes to domestic courts going any further than Strasbourg, the doctrines and views expounded by the judges of the ECtHR—by contrast—imply that the linkage ought to be relatively flexible in both directions.

1. *R. (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323, at [20]; for the term’s origin see Jonathan Lewis, “The European Ceiling on Rights” [2007] P.L. 720. [↑](#footnote-ref-1)
2. Lewis Graham, “The Modern Mirror Principle” [2021] P.L. 523-541, 524. [↑](#footnote-ref-2)
3. See especially *R. (Hallam) v Secretary of State for Justice* [2019] UKSC 2; [2020] A.C. 279; *R. (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66; [2015] A.C. 1344; and *R. (Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9; [2017] A.C. 256. [↑](#footnote-ref-3)
4. *R. (AB) v Secretary of State for Justice* [2021] UKSC 28; [2021] 3 W.L.R. 494. [↑](#footnote-ref-4)
5. *Elan-Cane v Secretary of State for the Home Department* [2021] UKSC 56; [2022] 2 W.L.R. 133. [↑](#footnote-ref-5)
6. For analysis of how these cases represent a move towards a stricter mirror principle, see Jeremy Letwin, “The Bill of Rights Bill and the Modern Mirror Principle” (U.K. Const. L. Blog, March 2023) *https://ukconstitutionallaw.org/2023/03/14/jeremy-letwin-the-bill-of-rights-bill-and-the-modern-mirror-principle/* [↑](#footnote-ref-6)
7. E.g. Brenda Hale, “Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?” (2012) 12(1) H.R.L.R. 65; Brian Kerr, “The UK Supreme Court—the modest underworker of Strasbourg?”, Clifford Chance Lecture, 25 January 2012; David Neuberger, “The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience”, Conference at the Supreme Court of Victoria, 8 August 2014; and, Robert Carnwath, “UK Courts and Strasbourg”, Rome, 20 September 2013. [↑](#footnote-ref-7)
8. Very recent contributions include, for example: Graham, “The Modern Mirror Principle”; Kacper Majewski, “Mirroring the Margin” [2022] P.L. 553; and Adam Ramshaw, “A Crack in the Mirror: Reclaiming the Human Rights Narrative from Strasbourg in Agenda Setting Theory and Legal Narrative” [2022] E.H.R.L.R. 144. [↑](#footnote-ref-8)
9. Helen Fenwick and Roger Masterman, “The Conservative Project to ‘Break the Link between British Courts and Strasbourg’: Rhetoric or Reality?” (2017) 80(6) M.L.R. 1111. [↑](#footnote-ref-9)
10. Clause 3(3)(a) provides that domestic courts “may not adopt an interpretation of the right that expands the protection conferred by the right unless the court has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were before it”. Clause 3(3)(b) provides that domestic courts “may adopt an interpretation of the right that diverges from Strasbourg jurisprudence”. For commentary, see, for example, Letwin, “The Bill of Rights Bill and the Modern Mirror Principle”; Roger Masterman, “The Convention Rights in the Human Rights Act and under a Bill of Rights: Domestic, European or Both?” (U.K. Const. L. Blog, November 2022) *https://ukconstitutionallaw.org/2022/11/23/roger-masterman-the-convention-rights-in-the-human-rights-act-and-under-a-bill-of-rights-domestic-european-or-both/* [↑](#footnote-ref-10)
11. With the notable exceptions of: Roger Masterman, “Federal dynamics of the UK/Strasbourg relationship” in Schütze and Tierney (eds) *The United Kingdom and the Federal Idea* (Bloomsbury, 2018); and Alice Donald, “Earning Deference from Strasbourg: Has the UK Got the Message?” (U.K. Const. L. Blog, December 2022) *https://ukconstitutionallaw.org/2022/12/06/alice-donald-earning-deference-from-strasbourg-has-the-uk-got-the-message/* [↑](#footnote-ref-11)
12. See Summary of the meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights, 20 May 2021, available at *https://lawandreligionuk.com/wp-content/uploads/2021/08/ECtHR-Meeting-Minutes.pdf* [↑](#footnote-ref-12)
13. On the “procedural turn” see Robert Spano, “The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law” (2018) 18 H.R.L.R. 473. [↑](#footnote-ref-13)
14. As Sedley L.J. put it: see Stephen Sedley, “How to Comply with Strasbourg” (2013) 35(2) L.R.B. [↑](#footnote-ref-14)
15. Nicholas Bratza, “The relationship between the UK courts and Strasbourg” [2011] E.H.R.L.R. 505, 512; referring to Lord Rodger’s comment in *AF (No 3) v Secretary of State for the Home Department* [2009] UKHL 28; [2010] 2 A.C. 269, at [98]. [↑](#footnote-ref-15)
16. Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (Cambridge University Press, 2021), p.112, also see p.177. [↑](#footnote-ref-16)
17. Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?*, p.124. [↑](#footnote-ref-17)
18. *Ullah* [2004] UKHL 26, at [20]. [↑](#footnote-ref-18)
19. *R. (Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] A.C. 271, at [121]; a similar notion appears in Lord Hope’s judgment in *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 A.C. 296, at [25]. [↑](#footnote-ref-19)
20. Carmen Draghici, “The Human Rights Act in the shadow of the European Convention: are copyist’s errors allowed?” [2014] E.H.R.L.R. 154, 159; see also Merris Amos, “The Principle of Comity and the Relationship between British Courts and the European Court of Human Rights” (2009) 28(1) *Yearbook of European Law* 503, 513-515. [↑](#footnote-ref-20)
21. On this point see Aileen Kavanagh, *Constitutional Review Under the Human Rights Act* (Cambridge University Press, 2009), p.148. [↑](#footnote-ref-21)
22. *Ndidi v the United Kingdom* (41215/14), 14 September 2017, at [76]. [↑](#footnote-ref-22)
23. *Von Hannover v Germany* *(No. 2)* [GC](40660/08), 7 February 2012. [↑](#footnote-ref-23)
24. *Ibrahim v the United Kingdom* (50541/08, 50571/08, 50573/08, and 40351/09), 13 September 2016. [↑](#footnote-ref-24)
25. *Bărbulescu v Romania* (61496/08), 5 September 2017. [↑](#footnote-ref-25)
26. *Hamesevic v Denmark* (25748/15), 16 May 2017, at [43]. [↑](#footnote-ref-26)
27. *Alam v Denmark* (33809/15), 6 June 2017, at [35]. [↑](#footnote-ref-27)
28. Spano, “The Future of the ECtHR”, p.488. [↑](#footnote-ref-28)
29. *Von Hannover (No. 2)* (40660/08), at [107]. [↑](#footnote-ref-29)
30. Janneke Gerards, “Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights” (2018) 18 H.R.L.R. 495, 507. [↑](#footnote-ref-30)
31. Gerards, “Margin of Appreciation and Incrementalism”, 509 [↑](#footnote-ref-31)
32. Gerards, “Margin of Appreciation and Incrementalism”, 510-511. [↑](#footnote-ref-32)
33. *A, B and C v Ireland* [GC] (25579/05), 16 December 2010. [↑](#footnote-ref-33)
34. See, for example, *Tysiąc v Poland* (5410/03), 20 March 2007; see also, for more examples, Bríd Ní Ghráinne and Aisling McMahon, “Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?” (2019) 19(3) H.R.L.R. 561. [↑](#footnote-ref-34)
35. Although the Supreme Court has sometimes adopted an incremental approach to the development of the common law, this is very different form of “incrementalism”—see, for example, *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] A.C. 736. [↑](#footnote-ref-35)
36. The same point is made by Roger Masterman, “Deconstructing the Mirror Principle” in Masterman and Leigh (eds) *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press, 2013), p.123. [↑](#footnote-ref-36)
37. Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015), p.9. [↑](#footnote-ref-37)
38. See Meeting of IHRAR and ECtHR judges; and Janneke Gerards, “The ECtHR and the National Courts: Giving Shape to the Notion of ‘Shared Responsibility’” in Gerards and Fleuren (eds) *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law* (Intersentia, 2014). [↑](#footnote-ref-38)
39. *Van Kück v Germany* (35968/97), 12 June 2003. [↑](#footnote-ref-39)
40. *E.B. v France* [GC] (43546/02), 22 January 2008. [↑](#footnote-ref-40)
41. *Hirst v the United Kingdom* [GC] (74025/01), 6 October 2005. [↑](#footnote-ref-41)
42. Eirik Bjorge, “National supreme courts and the development of ECHR rights” (2011) 9(1) I•CON 5, 30; see also Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford University Press, 2015), which ends with the following conclusion: “The safeguarding of the Convention rights was always intended to lie in the first place with the domestic authorities … The domestic authorities are supposed to be the prime movers, willing to take a lead both in the development and the further realization of the Convention rights; only then can the role of the European Court properly be called subsidiary.” [↑](#footnote-ref-42)
43. For the circumstances in which it can be rebutted, see Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, pp.30-36. On the doctrine’s collective nature, see Jens Theilen, *European Consensus between Strategy and Principle* (Nomos, 2021), pp.139-145. [↑](#footnote-ref-43)
44. Interlaken Declaration, Action Plan at para 9(a). [↑](#footnote-ref-44)
45. The most well-known examples are the following pairs of cases: *R v Spear* [2002] UKHL 31; [2003] 1 A.C. 734 and *Cooper v the United Kingdom* [GC] (48843/99), 16 December 2003; *R v Horncastle* [2009] UKSC 14; [2010] 2 A.C. 373 and *Al-Khawaja and Tahery v the United Kingdom* [GC] (26766/05 and 22228/06), 15 December 2011; *R. (Animal Defenders International) v Culture Secretary* [2008] UKHL 15; [2008] 1 A.C. 1312 and *Animal Defenders International v the United Kingdom* [GC] (48876/08), 22 April 2013; and *R v McLoughlin* [2014] EWCA Crim 188; [2014] 1 W.L.R. 3964 and *Hutchinson v the United Kingdom* (57592/08), 3 February 2015. [↑](#footnote-ref-45)
46. Nicholas Bratza, “Response to call for evidence by the IHRAR”, at [27] —he gives the examples of *Pretty v the United Kingdom* (2346/02), 29 April 2002; *Stafford v the United Kingdom* (46295/99)*,* 28 May 2002; and *Christine Goodwin v the United Kingdom* [GC](28957/95), 11 July 2002. Other examples of this include: *Jones v the United Kingdom* (34356/06 and 40528/06), 14 January 2014, especially at [214]; and *Austin v the United Kingdom* (39692/09, 40713/09 and 41008/09), 15 March 2012. [↑](#footnote-ref-46)
47. *S., V. and A. v. Denmark* [GC] (35553/12 and 2 others), 22 October 2018. [↑](#footnote-ref-47)
48. Meeting of IHRAR and ECtHR judges, p.3. [↑](#footnote-ref-48)
49. Jeff King, “Submission to the IHRAR”, p.4—comments of ‘judge A’. [↑](#footnote-ref-49)
50. *Ullah* [2004] UKHL 26, at [20]. [↑](#footnote-ref-50)
51. Draghici, “The HRA in the shadow of the European Convention”, 161; see also Lord Bingham’s comment in *Ullah*, that “it is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts”, at [20]. [↑](#footnote-ref-51)
52. Draghici, “The HRA in the shadow of the European Convention”, 159. [↑](#footnote-ref-52)
53. *Ambrose v Harris* [2011] UKSC 43; [2011] 1 W.L.R. 2435, at [19] (per Lord Hope); repeated in *Smith v Ministry of Defence)* [2013] UKSC 41; [2014] A.C. 52, at [43] (per Lord Hope); cited with approval in *AB* [2021] UKSC 28, at [58], and in *Elan-Cane* [2021] UKSC 56, at [100]. [↑](#footnote-ref-53)
54. Draghici, “The HRA in the shadow of the European Convention”, 159. [↑](#footnote-ref-54)
55. *In re McKerr* [2004] UKHL 12; [2004] 1 W.L.R. 807, at [63] (per Lord Hoffmann), and see Lord Nicholls at [25]; see also *R v Lyons* [2002] UKHL 44; [2003] 1 A.C. 976, at [27] (per Lord Hoffmann); and *R. (Al-Skeini ) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153, at [10] (per Lord Bingham). [↑](#footnote-ref-55)
56. Tom Hickman, *Public Law After the Human Rights Act* (Hart, 2010), p.27 and p.30; see also Alison Young & Gavin Phillipson, “Would use of the prerogative to denounce the ECHR ‘frustrate’ the Human Rights Act? Lessons from *Miller*” [2017] (Brexit) P.L. 150. [↑](#footnote-ref-56)
57. *Animal Defenders* [2008] UKHL 15, at [53] (per Lady Hale), and see Lord Bingham at [37] and [44]. [↑](#footnote-ref-57)
58. *Elan-Cane* [2021] UKSC 56, at [76]. [↑](#footnote-ref-58)
59. See Spano, “The Future of the ECtHR”; and Robert Spano, “Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity” (2014) 14 H.R.L.R. 487; see also Liz R. Glas, “From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?” (2020) 20 H.R.L.R. 121, 134-137, and the research cited there. In August 2021, Article 1 Protocol 15 ECHR also entered into force, which makes subsidiarity part of the preamble to the Convention. [↑](#footnote-ref-59)
60. Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of ECHR* (Intersentia, 2002), p.236. [↑](#footnote-ref-60)
61. As one President of the ECtHR put it, “subsidiarity represents a deepening … of human rights protection. It lays a just emphasis on the role of the national authorities—above all the national courts—in safeguarding fundamental rights” (Guido Raimondi, “Speech to the Supreme Court of the Netherlands” (18 November 2016) *https://www.echr.coe.int/Documents/Speech\_20161118\_Raimondi\_Supreme\_Court\_Netherlands\_ENG.pdf.*). [↑](#footnote-ref-61)
62. *Ndidi* (41215/14), at [76]; see also the cases cited in Janneke Gerards, “Procedural Review by the ECtHR: A Typology” in Brems and Gerards (eds) *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press, 2017), section 6.4.2. [↑](#footnote-ref-62)
63. See the wealth of cases cited in Gerards, “Procedural Review by the ECtHR: A Typology”, section 6.4.3. [↑](#footnote-ref-63)
64. This perspective is reflected by the comments of ‘judge 14’ in Dzehtsiarou, *Can the ECtHR Shape European Public Order?*, p.189. [↑](#footnote-ref-64)
65. See, on this point, *R. (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] A.C. 657; and *Kennedy v Charity Commission* [2014] UKSC 20; [2015] A.C. 455. [↑](#footnote-ref-65)
66. For example, there is no common law analogue of many of the positive obligations arising under Articles 2 and 3 ECHR. [↑](#footnote-ref-66)
67. On the relationship between “subsidiarity” and “embeddedness”, see Laurence Helfer, “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime” (2008) 19 E.J.I.L. 125. For Helfer, “embeddedness serves as subsidiarity’s necessary compliment” and its “ultimate aim” is “to revive the subsidiarity doctrine when domestic decision-makers have resumed their rightful position as the Convention’s first-line defenders” (p.149). [↑](#footnote-ref-67)
68. Samantha Besson, “Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation” in Cruft, Liao and Renzo (eds) *Philosophical Foundations of Human Rights* (Oxford University Press, 2015). [↑](#footnote-ref-68)
69. Besson, “Human Rights and Constitutional Law”, p.290. [↑](#footnote-ref-69)
70. Besson, “Human Rights and Constitutional Law”, p.286. [↑](#footnote-ref-70)
71. Besson, “Human Rights and Constitutional Law”, p.287. [↑](#footnote-ref-71)
72. Besson, “Human Rights and Constitutional Law”, p.288. [↑](#footnote-ref-72)
73. Besson, “Human Rights and Constitutional Law”, pp.292-295. [↑](#footnote-ref-73)
74. Marisa Iglesias Vila, “Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights” (2017) 15(2) I•CON 393, 397. [↑](#footnote-ref-74)
75. Vila, “Subsidiarity, margin of appreciation and international adjudication”, 402 [emphasis added]. [↑](#footnote-ref-75)
76. Vila, “Subsidiarity, margin of appreciation and international adjudication”, 403-412. [↑](#footnote-ref-76)
77. *Ambrose v Harris* [2011] UKSC 43, at [19]. [↑](#footnote-ref-77)
78. Draghici, “The HRA in the shadow of the European Convention”, 161. [↑](#footnote-ref-78)
79. Hale, “Argentoratum Locutum”, 69. [↑](#footnote-ref-79)
80. *Anderson* [2001] EWCA Civ 1698, at [89]. [↑](#footnote-ref-80)
81. *R. (Clift) v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 A.C. 484, at [49]. [↑](#footnote-ref-81)
82. *Cadder v HM Advocate* [2010] UKSC 43; [2010] 1 W.L.R. 2601, at [40]. [↑](#footnote-ref-82)
83. *In re G* [2008] UKHL 38; [2009] 1 A.C. 173, at [36]. [↑](#footnote-ref-83)
84. *Elan-Cane* [2021] UKSC 56. [↑](#footnote-ref-84)
85. *Elan-Cane* [2021] UKSC 56, at [77] and [78]. [↑](#footnote-ref-85)
86. *Elan-Cane* [2021] UKSC 56, at [80]. [↑](#footnote-ref-86)
87. *Elan-Cane* [2021] UKSC 56, at [83]. [↑](#footnote-ref-87)
88. *Elan-Cane* [2021] UKSC 56, at [104]. [↑](#footnote-ref-88)
89. Majewski, “Mirroring the Margin”, 555 [emphasis in original]. [↑](#footnote-ref-89)
90. Spano, “Universality or Diversity of Human Rights?”, 493. [↑](#footnote-ref-90)
91. Dean Spielmann, “Judgments of the ECHR Effects and Implementation” (20 September 2013) *www.echr.coe.int /Documents/Speech\_20140519\_Spielmann\_ENG.pdf.* [↑](#footnote-ref-91)
92. *Abdu v Bulgaria* (26827/08), 11 March 2014, partially dissenting opinion, at [1]; see also the opinion of judge Villiger *M.S.S. v Belgium* [GC] (30696/09), 21 January 2011, at [4]; *Vo v France* [GC] (53924/00), 8 July 2004, at [47] at [82]; and *Leyla Şahin v Turkey* [GC] (44774/98), 10 November 2005, at [109]. [↑](#footnote-ref-92)
93. *A v the United Kingdom* [GC] (3455/05), 19 February 2009, at [184]. [↑](#footnote-ref-93)
94. Christos Rozakis, “The European Convention on Human Rights as a Tool of European Integration” (2020) 1 E.C.L.R. 22, 24. [↑](#footnote-ref-94)
95. See Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* [↑](#footnote-ref-95)
96. Rozakis, “The European Convention on Human Rights as a Tool of European Integration”, 23-24. [↑](#footnote-ref-96)
97. Letsas, “Two Concepts”, 709. [↑](#footnote-ref-97)
98. Rabinder Singh, “Is there a role for the ‘margin of appreciation’ in national law after the Human Rights Act?” [1999] E.H.R.L.R. 15, 17. [↑](#footnote-ref-98)
99. See Letsas, “Two Concepts”, 713; and Gerards, “Margin of Appreciation and Incrementalism”, 500-506. [↑](#footnote-ref-99)
100. See Glas, “From Interlaken to Copenhagen.” [↑](#footnote-ref-100)
101. See Dean Spielman, “Allowing the Right Margin” (2012) Working Paper Series of the Centre for European Legal Studies, University of Cambridge; Jan Kratochvil, “The Inflation of the Margin of Appreciation by the European Court of Human Rights” (2011) 29(3) *Netherlands Quarterly of Human Rights* 324; J.A. Sweeney, “Margins of appreciation: cultural relativity and the European Court of Human Rights in the post-Cold War era” (2005) 54(2) *International and Comparative Law Quarterly* 459. [↑](#footnote-ref-101)
102. *R. (Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295, at [27], [↑](#footnote-ref-102)
103. *R. (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 A.C. 653, at [44]. [↑](#footnote-ref-103)
104. *Hallam* [2019] UKSC 2, at [90] (per Lord Wilson). [↑](#footnote-ref-104)
105. *Hallam* [2019] UKSC 2, at [126] (per Lord Hughes). [↑](#footnote-ref-105)
106. *Hallam* [2019] UKSC 2, at [71] (per Lord Mance). [↑](#footnote-ref-106)
107. *Hallam* [2019] UKSC 2, at [94] (per Lord Wilson). [↑](#footnote-ref-107)
108. *Hallam* [2019] UKSC 2, at [173]. [↑](#footnote-ref-108)
109. *Hallam* [2019] UKSC, at [175]. [↑](#footnote-ref-109)
110. *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11; [2019] A.C. 196, at [150]. [↑](#footnote-ref-110)
111. *DSD* [2018] UKSC 11, at [114] and [117]. [↑](#footnote-ref-111)
112. *Horncastle* [2009] UKSC 14, at [11] (per Lord Phillips) and at [116] (per Lord Brown). [↑](#footnote-ref-112)
113. *AF (No 3)* [2009] UKHL 28, at [70] (per Lord Hoffmann) and at [98] (per Lord Rodger). [↑](#footnote-ref-113)
114. *Chester* [2013] UKSC 63. [↑](#footnote-ref-114)
115. *Chester* [2013] UKSC 63, at [27]. [↑](#footnote-ref-115)
116. *Chester* [2013] UKSC 63, at [137] [emphasis added]. [↑](#footnote-ref-116)
117. E.g. that it conflicts with some “fundamental feature of the law of the United Kingdom” or involves “some most egregious oversight or misunderstanding”—see *Chester* [2013] UKSC 63, at [27] (per Lord Mance) and at [137] (per Lord Sumption). [↑](#footnote-ref-117)
118. See *Christine Goodwin* (28957/95), at [74]; see also *Mamatkulov and Askarov v Turkey* [GC] (46827/99 and 46951/99), 4 February 2005, and *Vilho Eskelinen and Others v. Finland* [GC] (63235/00), 19 April 2007. [↑](#footnote-ref-118)
119. See Alastair Mowbray, “An Examination of the European Court of Human Rights’ Approach to Overruling its Previous Case Law” (2009) 9(2) H.R.L.R. 179, 201; he cites cases such as *Pellegrin v France* [GC] (28541/95), 8 December 1999and *Z. and others v the United Kingdom* (29392/95), 10 May 2001as instances where the Court has overruled its own case law in favour of the state. [↑](#footnote-ref-119)
120. See *Cooper* (48843/99); *Al-Khawaja* (26766/05); *Animal Defenders* (48876/08); and *Hutchinson* (57592/08). [↑](#footnote-ref-120)
121. Both the *Cooper* (48843/99) and *Al-Khawaja* (26766/05) judgments were delivered during the Court’s substantive embedding phase, and *Animal Defenders* (48876/08) was arguably the start of the Court’s procedural embedding phase in earnest; see also, the comments of ‘Judge A’, in King, “Submission to the IHRAR”, p.4, who said that the ECtHR has been “more receptive to these kinds of arguments, to these kind of institutional, deferential, subsidiary-type arguments than perhaps judges in the past were receptive to”. Indeed a number of commentators have argued that the Court’s procedural turn risks undermining the effective protection of the Convention rights: see Angelika Nussberger “Procedural Review by the ECHR: View from the Court” in Brems and Gerards (eds) *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press, 2017); and Peter Cumper and Tom Lewis, “Blanket Bans, Subsidiarity, and the Procedural Turn of The European Court of Human Rights” (2019) 68 I.C.L.Q. 611. [↑](#footnote-ref-121)
122. On the importance of this, see Jeremy Letwin, “Why Completeness and Coherence Matter for the European Court of Human Rights” (2021) 2(1) *ECHR Law Review* 119, and the other authors cited there; see also Copenhagen Declaration, 12 and 13 April 2018, at [27] and Glas, “From Interlaken to Copenhagen”, 143. [↑](#footnote-ref-122)
123. Bratza, “Response to call for evidence by the IHRAR”, at [25]. [↑](#footnote-ref-123)
124. King, “Submission to the IHRAR”. [↑](#footnote-ref-124)
125. King, “Submission to the IHRAR”, pp.4-5. [↑](#footnote-ref-125)
126. Written evidence from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke to the JCHR (HRA0011), p.3. [↑](#footnote-ref-126)
127. See Graham, “The Modern Mirror Principle”, p.539. [↑](#footnote-ref-127)
128. Amos, “The Principle of Comity”, p.514. [↑](#footnote-ref-128)
129. *Hutchinson* (57592/08); *Vinter and Others v the United Kingdom* [GC] (66069/09, 130/10 and 3896/10), 9 July 2013; and *McLoughlin* [2014] EWCA Crim 188. [↑](#footnote-ref-129)
130. *Hutchinson* (57592/08), dissenting judgment of judge Pinto de Albuquerque, at [35] and [37]. [↑](#footnote-ref-130)
131. *Hutchinson* (57592/08), dissenting judgment of judge Pinto de Albuquerque, at [38] and [43]. [↑](#footnote-ref-131)
132. *G.I.E.M. S.R.L. and Others v Italy* [GC] (1828/06 and 2 others), 28 June 2018, dissenting judgment of judge Pinto de Albuquerque, at [86] and [94]. [↑](#footnote-ref-132)