The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court

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Abstract

In recent years, the European Court of Human Rights (ECtHR) has faced a growing number of challenges, stemming, among other reasons, from problems with the implementation of some of its judgments, an upsurge of sovereigntist sentiments in some member states, and the rise of de facto illiberal democracies within its jurisdiction. This article examines the effects that these changing contexts have had on the operation of the ECtHR. In very general terms, the article finds that the ECtHR has become increasingly more restrained, but that this restraint plays out in multiple different ways which reflect the structural differences among the member states with regard to the protection of human rights. The article argues that the ECtHR has developed a new and differentiated legal rationality that combines elements of its original legal diplomacy with new forms of self-restraint and a new, revised vision for its overarching role in the protection of European human rights. The overall result is a narrowing of the role of the Court.
Keywords

European Court of Human Rights – European Convention of Human Rights – international courts – backlash against international courts – populism and illiberal democracy – the transformation of Europe

1 Introduction

Existing scholarship has argued that European human rights law originally emerged as a form of ‘legal diplomacy’. These studies highlight that the early stages of the development of European human rights were as much a diplomatic-political process as a legal one. This was the result of the ways in which the nascent European human rights system was held on a tight leash by the member states and how this power play came to influence the development of the European Court of Human Rights’ (ECtHR, Court) initial case law. Drawing on Max Weber’s seminal analysis of the rationalisation of law, legal diplomacy implies a particular legal rationality that emphasises elements of ‘formally rational’ law over ‘substantively rational’ law in combination with a diplomatic outlook. Thus, legal diplomacy does not merely signify a proceduralisation of the law of the Court, but rather the development of a particular legal device used to strike a balance between the two competing imperatives of the early Court: i) giving legal life to the European Convention on Human Rights (ECHR, Convention); and ii) ensuring the viability of the project in terms of the member states’ acceptance of the Court and its practices. Hence, through the development of legal diplomacy, the early practices of the ECtHR – and its case law – came to reflect the particular constraints under which the nascent Court operated, resulting in a unique pairing between law and diplomacy.

The ECHR system has since gone through a near-complete transformation to become, at least as of the early 2000s, a mega-regional court of human rights: a permanent international court with compulsory jurisdiction, acting with authority on matters of human rights across Europe. This transformation has implied a thorough judicialisation of European human rights. The European Commission of Human Rights, the intermediate institution of the original system, was closed down and with the entry into force of Protocol No 11, the Court became the only go-to institution once local remedies have

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been exhausted. Simultaneously, via the incorporation of the Convention into the domestic law of the member states, the legal significance of both the Convention and the Court increased dramatically. As a result, the number of cases on the Strasbourg docket grew significantly.

Recent events, however, have challenged the position of the Court and its authority. First, the Court has come under pressure from member states that are not or are only partially implementing the ECtHR’s case law. Importantly, although member states facing structural human rights issues or those turning towards illiberal or authoritarian democracy feature centrally among them, one also finds more established democracies opposing implementation for various (occasionally straight-forward political) reasons. Moreover, with the upsurge of populism in recent years, both in its democratic and authoritarian variants, in some situations implementation has turned into *Realpolitik*, creating a clash between the alleged true expression of the will of the people and supranational governance by courts. Secondly, the Court has also been put under pressure from member states seeking to reassert national institutions’ influence on the development of European human rights or advancing alternative, occasionally illiberal, visions of human rights. These include both states that claim to be structurally better positioned to handle questions of human rights and countries that, inspired by the upsurge of populism and authoritarianism, are politicising the question of human rights or are entirely dismissive of their international commitments to human rights. The combination of non-implementation, national reassertion, and variations thereof have not only resulted in a renewed pressure on the Court, but also in a set of reforms seeking to introduce more efficiency, better implementation, and more subsidiarity into the system. The question persists, however, as to whether this new pressure on the Court has had effects beyond the official reform programme and, more precisely, how the Court has responded to these changes and challenges.

Using the example of the ECtHR, this article explores the possible effects on international courts (ICs) of changes in their operational and political contexts, and whether ICs such as the ECtHR are equipped to deal with such

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changes in context and expectations. Scholarship has historically been torn between observers who view ICs as autonomous and generally insulated from outside pressures,\(^5\) and those who argue that courts adapt to changing pressures on their operation.\(^6\) Recent political changes, notably the rise of various forms of populism, national reassertion, and souverainism, have reintroduced this debate in a new and more demanding context.\(^7\) The question is seemingly no longer whether outside pressures influence the authority of ICs\(^8\) but rather how ICs can respond to such challenges. Are they at all equipped to respond to declining political support and how, or more precisely with what effects, do ICs (or international institutions more generally) strike a balance between maintaining their authority in the eyes of their constituencies and exercising power over those constituencies? This is a new and challenging question for many international institutions, and an increasingly central problématique for scholarship, to which this article seeks to make a contribution. The article specifically studies whether the changes in the ECtHR’s legal and political contexts have led to a revival of the Court’s earlier legal tools, such as legal diplomacy, or, alternatively, caused the emergence of new legal rationalities as a reflection of the changed contexts. Has the ECtHR, as a response to its changing political environment and operational context, returned to the same mix of diplomacy and law that it initially employed to build its authority, or has it developed new strategies and doctrinal tools?

Methodologically, the article employs what is best described as a ‘mixed-methods approach’ in order to provide an analysis of both the historical evolution of the ECtHR and the recent trends in its jurisprudence in the

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8 Building on comparative studies of ICs across the globe, scholars have made a strong claim that the actual authority of ICs is directly linked to how their audiences engage the courts. See, J Alter, L Helfer and MR Madsen (eds), *International Court Authority* (Oxford University Press 2018).
context of the Court’s changing legal-political environments. As regards the analysis of the historical evolution, the article uses a historical sociology of law approach specifically tailored to understanding the institutionalisation of ICs. Drawing on secondary sources in combination with the case law of the Court, this part of the article provides a structural analysis of the evolution of the Court in its changing political contexts by exploring how the Court has been both influenced by and developed methods for gaining authority in these changing historical contexts. The more recent history of the Court, roughly the past two decades, is analysed using a similar approach supplemented with statistics and more pointed legal doctrinal analysis. Since the Court’s level of activity increased dramatically beginning in 2000, the analytical challenge is to somehow capture this complexity while maintaining the bird’s-eye view approach of the article. To address the fundamental question of the possible increase in the usage of the doctrine of subsidiarity, drawing on work published elsewhere, the article introduces statistics on the frequency of reference to the doctrine of margin of appreciation in the case law of the Court over the past two decades. The article also cites other authors’ empirical studies on the possibility of the ECtHR retreating from its former more progressive approach. Details of the relevant methodologies and their limitations are introduced in the respective sections in which they are discussed. This part of the investigation also relies on doctrinal analysis of recent case law in order to corroborate trends observed in the empirical data analysis and the historical structural analysis. In summation, to identify broader trends at the Court and in its practices, which is an inherently difficult task when it comes to law, the section relies on a triangulation approach that links doctrinal analysis with empirical and historical contextual analysis.12

Using these methods, the article finds that the contemporary ECtHR is influenced by its changing contexts and the pressures on its operation coming not only from the incomplete transition to democracy in some member states, but also from new challenges stemming from the rise of neo-nationalist assertion, populism, and authoritarianism (as well as combinations thereof). The article finds a decade-long political process towards increased focus on subsidiarity, starting with the Interlaken Declaration (2010) and further articulated in the Izmir (2011), Brighton (2012), and Copenhagen (2018) Declarations. These changes have had an impact on the Court, both in terms of the frequency with which subsidiarity is referenced in its judgments and in the off-the-bench writings of leading judges. The result of this turn to subsidiarity in both the political discourse on the Court and in the Courts’ own jurisprudence reflects a trend towards proceduralisation and formalisation of both substantive law and procedural provisions. These changes have had variegated effects on member states, notably in their distinct effects on consolidated and non-consolidated democracies. In the context of consolidated democracies, the article finds that these changes affect substantive law, notably in areas related to Articles 8–11 ECHR. The article argues, moreover, that the Court sometimes seems to be exercising what we term ‘situational self-restraint’ vis-à-vis these countries in areas of significant controversy (such as Article 8). In relation to non-consolidated democracies, including countries facing democratic decay and de facto illiberal democracies, proceduralisation via subsidiarity is less visible in substantive law, but plays a role in procedural matters. In some instances, the Court appears to have adhered to a formalist and procedural approach with regard to admissibility, which has limited access to the Court, such as in some cases originating in Hungary and Turkey (as explained below). Moreover, as evidenced in the recent Burmych case, the Court has defined a new, more limited, role for itself with regard to engaging in repetitive systemic violations.


14 The distinction as defined in Stiansen and Voeten (n 11).

15 The terms democratic ‘backsliding’ or ‘decay’ and ‘illiberal democracy’ are defined below.

16 Burmych and Others v Ukraine [GC] 46852/13 and Others (ECtHR, 12 October 2017).
These developments suggest that the ECtHR has changed over the past decade and has developed a new and distinct legal rationality which combines elements of the original legal diplomacy with new forms of restraint and a different general vision for the role of the Court in the protection of European human rights. The overall result is a narrowing of the Court in terms of a more limited, and in some instances a less accessible, Court. The implications of this are not, however, straightforward to explain. On the one hand, these findings might well be interpreted as the concrete realisation of the objectives of the decade-long reform agenda which has obliged the Court to turn towards increased subsidiarity in order to avoid becoming overburdened with too many cases. The reform agenda has also, albeit less uniformly, required a different balance to be struck between the member states and the Court by giving more space to the member states applying the Convention in good faith. On the other hand, the findings could be read more critically and raise concerns that the reform process has not entirely delivered on its promises in terms of freeing up resources at the Court to deal with the most serious human rights situations. Although the reforms have reduced the caseload and seemingly provided a viable pathway for the Court in the near future, the associated procedural turn has made the Court somewhat hesitant when engaging with the new, and in some instances very serious, human rights situations developing in recent years in countries such as Hungary and Turkey. The downturn of democracy in some parts of the European human rights space has basically been at odds with the Court’s general turn to subsidiarity. The article returns to these questions in the conclusion.

Before proceeding with the analysis, a clarification of the terminology employed is warranted. The current situation of human rights, rule of law, and democracy in Europe is marked by a number of complex and still-unfolding processes. With regard to human rights, these processes are resulting in various forms of democratic decay. In the extreme variant, one can observe tendencies towards illiberal democracy and authoritarian democracy which in many, if not most, cases are influenced by an upsurge in political movements.


In this analysis, democracy, human rights, and rule of law are discussed broadly, and there is no attempt to make distinctions between these normative values unless otherwise indicated. All three of these are the foundational values of the Council of Europe and are reflected in the ECHR and the case law of the ECtHR.
linked to populism, souverainism, and nationalism, or combinations of these ideologies. The actual deteriorations, however, vary significantly among the member states, from scattered populist critique targeted toward the Court with limited consequences, to member states effectively rolling back democratic institutions and the rule of law.\textsuperscript{19} Although the current challenges posed to human rights across the European member states do not suggest transitions towards better human rights protection, Europe – and the CoE – is still home to many of the best functioning democracies in the world. According to the World Justice Project’s Rule of Law Index, for instance, eight CoE member states feature in the list’s top ten.\textsuperscript{20} However, other member states, including Turkey and Russia, feature towards the bottom of the list. Basically, the European Convention applies to an increasingly diverse set of member states in terms of human rights and the rule of law.

Some states are moving away from a (relatively) functional democracy. The article uses the terms ‘democratic backsliding’ or ‘democratic decay’ to depict the situation in said countries. Other states experience the deterioration of human rights and rule of law in contexts which were hardly democratic in the first place. In these instances, the article uses the terms ‘authoritarian democracy’ or ‘illiberal democracy’ or refers to a turn in the direction of such state structures. This distinction can sometimes be difficult to make as many member states are at various stages of democratic transition and are situated along a spectrum between democratic and authoritarian rule. This article employs a further distinction between consolidated and non-consolidated democracies for some of the analysis. Although the distinction is far from perfect, it allows us to compare findings with other research and draw broader conclusions in light of current developments. The article follows Stiansen and Voeten’s definition of a consolidated democracy as a member state that has been continuously democratic for twenty years at the time of the establishment of the permanent Court via Protocol No 11 (1998).\textsuperscript{21} The roster of consolidated democracies therefore includes Andorra, Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Monaco,

\begin{footnotes}
\footnotetext[19]{Essentially reflecting the distinction of pushback and backlash developed in Madsen, Cebulak and Wiebusch (n 4).}
\footnotetext[20]{These are Denmark (1st), Norway (2nd), Finland (3rd), Sweden (4th), Netherlands (5th), Germany (6th), Austria (8th), and Estonia (10th). The ECHR member states considered more in detail in this analysis rank as follows: United Kingdom (13th), France (20th), Hungary (60th), Ukraine (72nd), Russia (94th), and Turkey (107th). The index is not exhaustive and includes only 128 countries. Full details are available at: <https://worldjusticeproject.org/rule-of-law-index/global/2020/>.}
\footnotetext[21]{Stiansen and Voeten (n 11).}
\end{footnotes}
the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, and the United Kingdom. Conversely, states typically highlighted as being illiberal democracies, such as Russia and Turkey, or those facing explicit democratic and rule of law backsliding, such as Hungary and Poland, fall into the category of non-consolidated democracies. This category is broader still because it includes certain member states that are arguably not facing democratic decay but are undergoing processes of democratic transition. In other words, it is, therefore, an imperfect category which, in some parts of the analysis, is further broken down using indicators from the World Justice Project’s Rule of Law Index in order to examine specific countries and to test for variation among member states in terms of their human rights and democratic situations.

The article is structured as follows. It begins by briefly revisiting the notion of legal diplomacy and the particular empirical context that led to its development. The article then outlines the current and changing operational context of the Court and the rise of protracted institutional politics. In the two following sections, the effects of these changes and politics on the practices of the Court are analysed using empirical and doctrinal insights. The article concludes by drawing a general picture of the Court’s transformation over the past decade through comparison with its original rationality.

2 Legal Diplomacy Revisited: Law, Diplomacy, and the Genesis of the ECtHR

The idea of including binding law and effective institutions in the European human rights system was certainly innovative. In fact, it was so novel that most of the negotiating parties were not yet ready to accept such international powers. Nevertheless, the ECHR project was deemed both important and legitimate by the participating states and was proposed as a direct continuation of the 1948 Universal Declaration of Human Rights and to reflect the general idea of building better and stronger international institutions which marked the post-war period. The ECHR project was, however, not just perceived as legitimate but also as (geo)politically salient. The growing power of Communism both within Western European states and throughout the Soviet Bloc caused alarm in many centrist and conservative circles.22 In fact, as detailed elsewhere, for

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many of its proponents the ECHR was seen predominantly as a Cold War instrument put in place to defend the free world both from within and outside.23

The European venture into a binding international bill of rights remained somewhat ambiguous. From the travaux préparatoires it is clear that although many of the drafters were quite willing to speak in the lofty language of ‘genuine democracy’ and ‘liberty’, there was less agreement as to how far they would go in legally securing those ideals. Overall, the original Convention was missing precisely that which later made it famous: the quality of being legally binding through a court. The most central clauses for the institutional effectiveness of the system, the jurisdiction of the court and the right of individuals to petition the system, were optional in the original Convention. Signing and ratifying the Convention was, therefore, not particularly intrusive with regard to member state sovereignty, and it was generally assumed to be rather unlikely to be brought before the international bar by the other member states via interstate lawsuits, considering that practically all signatories were also members of NATO. The signing of the Convention thus primarily implied signing up for a political agenda of new and growing importance, namely containing the expansion of the Soviet Union’s power and identifying and delineating ‘free Europe’. In more legal terms, this also meant that few signatories, if any, saw developing a detailed case law on European human rights as we know it today as a goal.

For precisely these reasons, the logic of the institutionalisation of the European system was turned on its head. Rather than being focused on monitoring the member states and developing jurisprudence, the immediate task faced by the institutions was to bring the member states aboard the European human rights ship by signing up for the optional clauses. This translated into an institutional practice of ‘legal diplomacy’, which is to say that for the first decade or so of the Court’s operation the development of law had to be carefully balanced with the diplomatic interest of attracting more member states to sign up for the optional clauses.24 Only requiring six ratifications, the clause on individual petition became effective with regard to the Federal Republic of Germany and a series of smaller countries as of 1955. The establishment of the Court required eight ratifications, the last of which was obtained in 1958, and the Court opened in 1959 with jurisdiction over the Federal Republic of

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24 Madsen (n 1).
Germany and seven smaller European states. Since practically all the larger European countries (specifically France, the United Kingdom, and Italy) remained out, and those that did sign up did so for limited time-periods subject to renewal, the practice of legal diplomacy continued throughout the 1960s and early 1970s.

This can be illustrated with an example from the very first case law of the Court; the case Lawless v Ireland, in which judgment was delivered in 1960. At this point in time, the Commission had already been involved in a high politics case, the inter-state case of Greece v the United Kingdom, which had been settled through diplomatic negotiation. The Lawless case had similarly high political connotations and concerned the alleged violations of the rights of an inmate in the context of detention without trial in Ireland during an IRA insurgency, a question also of interest to other member states such as the United Kingdom and France. Interestingly, first the European Commission and subsequently the European Court found that Ireland had violated Article 5 ECHR. The Court ultimately concluded, however, that the Irish Government was not in violation of the Convention because the 'life of the nation' was at risk and the government had legitimately derogated from the Convention. Thus, at the substantive level there was not much to be gained for Mr. Lawless, while at the procedural level the Court had discretely asserted its power to decide precisely when such situations of emergency exist. This outcome was reassuring for the more reluctant member states. For example, when the United Kingdom eventually decided to accept the optional clauses in 1966, the assumption was that there was very little to fear from Strasbourg. A similar appreciation of the Court also resonated in other member states, such as in France and Italy.

What can generally be observed during the first decade of the ECtHR’s operation is a form of judicial behaviour that demonstrated the Court’s reluctance to find the member states in violation of the Convention. The Court was, however, somewhat more eager at the procedural and abstract level. It crafted principles without finding violations, thereby building up towards the future. The difficult context in which the Court operated due to the non-adoption of the optional clauses played a major role in this regard. At the Court, however, the calculation was fairly straight-forward: if the ECtHR were to be successful in the long run, it had to gain acceptance from member states and convince

25 Lawless v Ireland No 1 332/57 (ECtHR, 14 January 1960).
26 Greece v United Kingdom 176/56 (Committee of Ministers, 20 April 1959).
them to opt-in. Legal diplomacy thus emerged as an institutional solution to the real challenges that the Court faced. The result was a kind of reflexive or consequentialist judging in which judges implicitly or explicitly considered the institutional ramifications of their judgments for the Court before reaching final decisions. Legal diplomacy was as much about the diplomacy of institution-building as about careful legal development and mediation of potential political crisis. It was, above all, context dependent, in the sense that the politics surrounding the Court affected its institutionalisation and practices.

3 The Return of Institutional Politics: the Pushback Against the ECtHR

The question which must still be asked is whether legal diplomacy is only a feature of nascent international courts or one which is recurrently observable in their established, day-to-day practices? In the case of the ECtHR, institutional and legal practices have undoubtedly changed considerably since the early period of institution-building and legal diplomacy. From the mid-1970s until the end of the Cold War, the Court settled on a more progressive path that approached the development of European human rights as a fundamental and dynamic endeavour reflective of rapidly changing European societies.

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29 A similar approach was arguably evident during the same period at the European Court of Justice (ECJ), where the ECJ managed to craft bold principles without imposing high costs on the member states. See, for example, K Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe (Oxford University Press 2001). Studies of more recent international courts, for example the Caribbean Court of Justice, have also found that they have employed a similar logic to legal diplomacy. See, S Caserta and MR Madsen, ‘Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies’ (2016) 79 Law and Contemporary Problems 89.

30 See, for example, E Bates, The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights (Oxford University Press 2010).
During this period, the ECtHR delivered a series of judgments that laid the foundation for the modern-day protection of European human rights and allowed the Court to become a central institution in the global field of human rights with growing authority among its member states.31

After the end of the Cold War, the Court continued down its established path of substantive and principled legal development, but the operational context changed dramatically due to the decision to extend membership to states in Central and Eastern Europe, and thereby expand the territorial jurisdiction of the Court. Becoming the de facto frontier of European integration, this had profound effects not only on the ECtHR, but also on the CoE more widely. Two other processes were similarly and simultaneously having an important impact on the Court’s functioning. The first was the incorporation of the ECHR into domestic legal orders, which significantly changed the interface of the Court with national law and institutions. The second was the structural decision to establish a new and permanent court (Protocol No 11), replacing the original system consisting of a commission and an ad hoc court. All of this was incited and legitimised by a general belief in human rights as a tool for reinforcing democracy in both the East and the West, and for integrating the wider Europe. This not only resulted in a very different Court, but also in a transformation of Europe itself. Starting some fifteen years ago, this ambitious pan-European human rights project began losing some of its momentum and even began to show its first cracks in, for example, Russia and the United Kingdom.32 In addition to a looming political critique, the Court faced the two recurrent (and often linked) problems of non-compliance and case-overload, which prompted new reforms, notably Protocol No 14 which introduced new admissibility criteria and procedures for treating repetitive or clearly inadmissible cases. Moreover, the Committee of Ministers was empowered. Since, due to Russian hesitation, Protocol No 14 did not become effective until 2010, these same issues also had an inevitable influence on the Interlaken process, which was ultimately dragged out into a ten-year long process of reform to establish new and semi-permanent politics of institutional change.33 Another reform from the same period with more immediate consequence was the introduction of the pilot judgment procedure, which also aimed at reducing the number of

31 Madsen (n 3).
32 Ibid.
repetitive cases stemming from structural human rights problems. This reform put the long-standing and unresolved debate on whether the role of the Court was to deliver justice in individual cases or perform a more constitutional role into sharp focus.34

ECtHR reforms have historically and predominantly been a matter of technical reform, dominated by more legal-technical actors. The Interlaken process, however, became increasingly politicised when a growing number of member states, most famously the United Kingdom, started pushing back against the ECtHR’s power and influence on domestic law and politics. Although subsidiarity was already on the table at the 2010 Interlaken conference, and the resulting declaration was used as a means of finding a way out of the case-overload, it was the United Kingdom’s pairing of subsidiarity with alleged over-centralisation and over-intervention on the part of the Court that raised the role of the ECtHR as a political question.35 The simultaneous emergence of powerful populist parties and new forms of national reassertion in the context of terrorism and mass migration only made the position of the ECtHR as a guardian of minorities more precarious.

The push towards granting subsidiarity a more prominent role in the Convention system was undoubtedly triggered by a sense of crisis in the form of both the docket crisis of the Court and in the pushback from member states. The Interlaken Declaration of 2010, which launched the process of making subsidiarity more central to the system, saw the docket crisis as the main threat, noting ‘[...]that this situation [the number of pending cases] causes damage to the effectiveness and credibility of the Convention and its supervisory mechanism and represents a threat to the quality and the consistency of the case law and the authority of the Court’.36 The plan prescribed by the Interlaken Declaration was for proximate national institutions to play a greater role in monitoring and implementing the ECHR, and thereby ultimately reduce the caseload of the Court. The 2011 Izmir High Level Conference followed in the footsteps of the Interlaken Declaration and also focused on solving the docket crisis. Some of the language included in the former suggests, however, a simmering critique of the Court, notably point A1 of the Action Plans which states

35 Debates on judicial-activism and judicial self-restraint existed before the British political critique and the political stances in many ways reflect those positions. See, Bates (n 17).
that ‘the Court is not an immigration Appeals Tribunal or a Court of fourth instance’.  

The political critique of the Court became far more apparent in the 2012 Brighton Declaration, which, particularly in its first draft, made the argument for more subsidiarity in close connection with a critique of the ECtHR. The wording in the final Declaration was more moderate, but at the heart of the Brighton Declaration was a call to strike a different balance between national autonomy and European supervision. The subsequent 2015 Brussels Declaration also encouraged subsidiarity, but its primary focus was on the problem of non-compliance. The critical tone of Brighton made a comeback in the initial draft of the 2018 Copenhagen Declaration, wherein the insistence on the importance of domestic institutions led to both a restatement of the Izmir wording that the Court not be an ‘immigration Appeals Tribunal or a Court of fourth instance’ and the articulation of subsidiarity as negative subsidiarity or, more crudely, deference. The final and official Copenhagen Declaration was more subdued, but the underlying political ambition of the Danish government to signal its negative subsidiarity agenda could not be entirely ignored.

Much of the reform process can thus be summarised as a repeated call for subsidiarity and shared responsibility, particularly in the declarations stemming from Interlaken, Izmir, Brighton, and Copenhagen. Importantly, this call for subsidiarity had different motivations and the message sent to the Court was, at best, mixed. For many member states, the goal of reform was simply to solve the problem of too many cases reaching Strasbourg. For others, however, the goal was to strike a different balance which empowered national institutions in the European protection of human rights. To further complicate matters, striking such a different balance was seen by some as a real political issue of national reassertion, while others saw it as a legal tool for transforming the ECtHR into more of a constitutional court. The question is, what impact has all of this reform and political jockeying had on the operation of the Court, particularly in the context of a deterioration of the rule of law and human rights in many of the member states? To detect general trends in the practices

38 For details, see, Madsen (n 7).
40 Even the Brighton Declaration is not entirely clear. See, for example, I Helfer, ‘The Burdens and Benefits of Brighton’ (2012) 1 ESIL Reflections 1.
41 Wildhaber (n 34).

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and responses of the ECtHR to these changes, the following sections triangulate analysis derived from empirical and doctrinal studies, as well as general contextual institutional analysis. Whilst the approach is somewhat different to the preceding sections, it seeks to discern the implications of the changes detailed above while maintaining the bird’s-eye perspective of the article.

4 The Rise of Procedural Subsidiarity

Analysing the period 2000–2019, a forthcoming study by the author suggests that references to subsidiarity have generally increased, with a particular change in the aftermath of the Interlaken Declaration. The study measures increases in subsidiarity in terms of the relative frequency of margin of appreciation in the total number of judgments delivered by the Court per year during the relevant period. The doctrine of margin of appreciation is used as the unit of analysis because it is the Court’s long-standing legal tool with regard to subsidiarity. This empirical analysis suggests that the relative frequency of references to margin of appreciation increases significantly following Interlaken and has remained at this higher level ever since (2010–19), with a median of over fourteen percent (as compared to below nine percent in the earlier period (2000–9)). The relative frequency is, therefore, more than fifty percent higher following Interlaken. Measuring subsidiarity in terms of the evocation of margin of appreciation in the case law is obviously not a perfect measure for a number of reasons, the primary one being that referencing a doctrine does not per se mean applying it with bearing on the outcome of the case. What can be detected using this approach is the overall occurrence of the term and general trends, and, by extension, indications of changes in the underlying doctrine of law.

Keeping these limitations in mind, the cited study further observes that the increase in margin of appreciation following the Interlaken Declaration is particularly noticeable with regard to Article 8. Article 8 (sometimes in combination with Article 3) has become a controversial Convention right in some member states, notably when applied in the context of the deportation of migrants with irregular migration status or those having been convicted of committing serious domestic crimes. In the United Kingdom’s early criticism of the ECtHR, Article 8 was very central. In the more recent criticism coming from Denmark, deportation of ‘foreign criminals’ similarly took centre-stage.44

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42 Madsen ‘Unity in Diversity’ (n 10).
43 Ibid.
44 Ibid.
Drawing on the cited empirical study, there are indications that the rise in subsidiarity (via margin of appreciation) is, to an extent, occurring in issue-areas that have caused political uproar in some member states. This is further explored by differentiating between the old and new member states, and the observation that old and mostly democratically well-consolidated member states are driving said change.\textsuperscript{45} A further specification of the result is then attained by grouping member states according to their rule of law scores, using the index developed by the World Justice Project.\textsuperscript{46} This assessment shows that countries with a high rule of law score are also those with the highest ratio of margin of appreciation in Article 8 cases. The study finally looks at the win-rates in margin cases (defined as the state not being found in violation) and finds that high rule of law scoring countries and high-income countries (most often one and the same) are now less likely to be found in violation of the Convention in margin of appreciation cases.\textsuperscript{47}

These findings are supported and expanded in a new study by Øyvind Stiansen and Erik Voeten, which suggests that the ECtHR has been finding fewer violations of the Convention since the mid-\textsuperscript{2000s}, when the first critique was voiced.\textsuperscript{48} Studying case outcomes in the period since \textsuperscript{2010}, Øyvind Stiansen and Erik Voeten find that ‘consolidated democracies other than the United Kingdom have experienced a significant reduction in the violation rate of about eleven percentage points’.\textsuperscript{49} In the specific case of the United Kingdom, they note that the member state has ‘experienced a more than twenty-six percentage point drop in the violation rate’.\textsuperscript{50} In their study, they distinguish between consolidated democracies and non-consolidated democracies (using the definition borrowed by this article), determining that the Court is finding fewer violations in cases against consolidated democracies. For non-consolidated democracies, they do not observe marked change.\textsuperscript{51} They explain this pattern being in part due to changes on the bench, noting that since \textsuperscript{2005} more conservative judges have been appointed, reflecting the dominance of right-wing governments in Europe during the same period. Overall, Stiansen and Voeten attribute their findings to the effect of changing political contexts, including the backlashes against the Court from its normal allies, such as in the context of the draft Brighton and Copenhagen Declarations. In fact, they find that member

\textsuperscript{45} Old member states are defined as those who joined the system before \textsuperscript{1989}.
\textsuperscript{46} See, World Justice Project: \textless\text{https://worldjusticeproject.org}\textgreater. 
\textsuperscript{47} All of these findings are derived from Madsen ‘Unity in Diversity’ (n 10).
\textsuperscript{48} Stiansen and Voeten (n 11).
\textsuperscript{49} Ibid 782.
\textsuperscript{50} Ibid 781.
\textsuperscript{51} Ibid.
states that have urged the Court to be more restrained at multilateral reform conferences have received less rulings against them.\(^52\) In other words, pushback against the Court – when enacted by well-established democracies – seems to have an effect.\(^53\) The implications of these findings, they argue, is that the Court will be less likely to pursue its traditional rights-expanding course in the near future.

A third new empirical study goes one step further and seeks to determine not only whether the Court is less likely to find violations with regard to consolidated democracies, but whether it is also retreating from its previously held positions, at least in certain areas of law. Studying all of the separate opinions of the Grand Chamber between 1999 and 2018, Larry Helfer and Erik Voeten seek out language and arguments which suggest that the majority is retreating from a previously held position, which they term ‘walking back dissents’.\(^54\) In their analysis, walking back dissents are minority opinions that suggest that the Grand Chamber is retreating or overturning earlier rulings or doctrine, and thereby favouring the respondent state. They conclude that ‘walking back dissents have increased in both absolute and percentage terms over the last two decades, with the sharpest uptick following the 2012 Brighton Declaration. They also find that such dissents are especially common in cases against established democracies, and in cases – often brought by prisoners, immigrants and terrorism suspects – whose Convention protections have provoked significant backlash against the Court’.\(^55\) More specifically, they observe that Article 8 is the provision most often involved when walking back dissents are attached to judgments, and that the UK is the most frequent respondent state in such cases. Finally, Helfer and Voeten suggest that their empirical results indicate that the ECtHR will be less likely to use rights-expanding tools, such as ‘living instrument’ and ‘European consensus’, in the near future.

Seen together, these new empirical studies make the case that the Court has, in recent years, exercised what might best be termed ‘situational self-restraint’. At least in certain issue areas (notably Article 8), the Court has been increasingly deferential when the respondent state was a consolidated democracy. The observed patterns might also be read as a resurgence of legal diplomacy in the sense that the Court has become increasingly concerned with maintaining

\(^{52}\) Ibid.
\(^{53}\) Using a more limited sample of all margin of appreciation cases in the period 2009–15, Madsen ‘Rebalancing European Human Rights’ (n 10) explored similar questions but did not find that consolidated democracies critical of the ECtHR came out ahead of other consolidated democracies in this regard.
\(^{54}\) Helfer and Voeten (n 11).
\(^{55}\) Ibid 823.
its authority following the Brighton Declaration and associated backlash, and therefore seeks to mediate potential political conflict by exercising restraint in certain situations. Above all, these studies argue that the politics towards the Court has affected its recent practices and institutionalisation, and has even possibly put somewhat of a break on the Court’s traditional rights-expanding approach.56

Overall, the macro trends observed in the empirical studies find support in a string of doctrinal studies. Başak Çalı, for example, has argued that the current practices of the ECtHR are producing a variable geometry in which there is a growing divide between countries which are, or are perceived to be, faithfully applying Convention standards and those that are known to ignore these standards and are reluctant to implement lost cases.57 This variable geometry seems to overlap with the differentiations observed in the cited empirical studies. Doctrinal scholars have further sought to qualify the underlying processes leading to these changes. Oddný Arnardóttir has argued that the Court is increasingly deferential towards member states that can document having engaged procedurally and substantively with the relevant case law of the ECtHR.58 In fact, a string of studies suggest that member states which are perceived to be consolidated democracies may now be granted deference via subsidiarity if they can document that they have engaged the Convention and the relevant case law sufficiently in presumed ‘good faith’. In other words, the ECtHR will reluctantly act as a fourth instance court in situations where consolidated rule of law states have applied its case law and principles in good faith.59 A number of scholars have pointed to the risks inherent in these developments. Jon Petter Rui, for example, argues that the developments lead to a more superficial judicial oversight in terms of an ‘outer procedural control’ as opposed to ‘inner material’ oversight.60 Equally critical, Eva Brems argues that subsidiarity has both a positive and negative dimension; the negative dimension implies restraint on the part of the ECtHR, and the positive dimension

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56 This does not imply that there are not areas of rights-expanding jurisprudence, such as those relating to Articles 10 and 14. Article 3 has also seen a number of developments in recent years, although not all leading to expansion. See, E Yıldız, ‘A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights’ (2020) 31(1) European Journal of International Law 73.

57 Çalı (n 13).

58 For example, Arnardóttir (n 13).

59 For an overview of scholarship, see, Glas (n 39).

implies domestic authorities' duty to protect the Convention, yet too much focus has been put on the negative dimension in case law.\textsuperscript{61}

It is important to note that these developments in the Court's practices have not been covert – they have, in fact, been openly discussed. The best outline and defence of these new practices comes from the Court itself through the off-the-bench writings of its current President, Judge Robert Spano, who captures these new practices succinctly as a triad of subsidiarity, process-based review, and the rule of law.\textsuperscript{62} His argument is that the ECtHR, in its current phase of development, needs to elicit greater engagement with the Convention and ECtHR case law at national level if a sustainable and even higher level of protection is to be achieved. He adds, however, that said national institutions need to be 'structurally capable of fulfilling the task of effectively securing human rights'.\textsuperscript{63} If they have this capability, then the entire legal system is marked by the rule of law and judicial independence, and thus deference may be granted. He specifies that this applies mainly to what he terms 'qualified rights,' which are Articles 8 to 11, and the number of permitted limitations they contain. He writes:

There are signs in the case law that the Court is engaged in the process of more robustly applying the principle of subsidiarity when the national authorities have demonstrated in cases before the Court that they have taken their obligations to secure Convention rights seriously.\textsuperscript{64}

There are now more concerted signs that the Court is taking this approach, a fact reinforced by the 2018 Copenhagen Declaration which largely codifies this particular understanding of subsidiarity (see in particular Article 28(c)) and the many academic writings on the subject.\textsuperscript{65} For the most part, however, the


\textsuperscript{63} Ibid.

\textsuperscript{64} Ibid 481.

\textsuperscript{65} Article 28(c) reads: 'The Court's jurisprudence on the margin of appreciation recognises that in applying certain Convention provisions, such as Articles 8–11, there may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context. This may be relevant when assessing the proportionality of measures restricting the exercise of rights or freedoms under the Convention. Where a balancing exercise has been undertaken at the national level in conformity with the criteria laid down in the Court's jurisprudence, the Court has generally indicated that it will not substitute its own assessment for that of the domestic courts, unless there are strong reasons for doing so.'
observed patterns relate to developments with regard to what Robert Spano terms ‘structurally capable’ rule of law states. Yet, only half of the member states are such ‘structurally capable’ rule of law states and, in principle, the possible deference is limited to those states. The question is, therefore, whether this form of judicial restraint via proceduralisation and margin of appreciation is also having effects beyond the doctrine of margin of appreciation and its application in consolidated democracies. The next section explores the possible effects of the proceduralisation of subsidiarity in the context of non-consolidated democracies, including illiberal democracies.

5 Subsidiarity Meets Illiberal Democracy and Democratic Decay

Scholars generally agree that subsidiarity is a broader notion than simply that of margin of appreciation. Reflecting the institutional interfaces of the Convention system, the primary responsibility to protect the substantive rights of the Convention rests with the national institutions (Article 1), while the ECtHR has more of a controlling and monitoring role (Article 19) after claimants have exhausted local remedies (Article 35(1)). In the recent practices of the Court, one can observe that subsidiarity appears increasingly more frequently with regard to Article 35. Recent case law of the Court has, for example, highlighted that applicants must ensure that they argue their cases in a manner that gives domestic judges a real chance to consider Convention issues sufficiently. If they fail to do so, they have, in principle, not exhausted local remedies and thus their case will not be admissible to the Court. This seems to suggest a pairing of increased proceduralisation with a new formalism in the understanding of the exhaustion of local remedies. The issue is returned to below.

The operationalisation of the rule of exhaustion of domestic remedies is more generally based on the existence and availability of an effective remedy at domestic level. Robert Spano provides a good outline of the conventional position of the Court in this regard: ‘To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success. However, the existence of mere doubts as to the prospects of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress. The Court has, however, also

66 For example, Arnardóttir (n 13).
67 A Mowbray (n 13).
68 Madsen ‘Unity in Diversity’ (n 13).
69 Spano (n 62).
frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism. It is the last sentence of this statement that is of interest for this analysis, namely the degree of flexibility and the formalism included in the assessment, in particular how it applies in the current context of countries with deteriorating protection of human rights which puts a question mark on the effectiveness of their domestic remedies.

In recent case law, there are indications of an emphasis on proceduralisation with regard to the non-exhaustion of domestic remedies, including in democratically decaying or illiberal states such as Hungary and Turkey respectively. A string of cases from Hungary, for example, suggests that the ECtHR is focused on the mere existence of a potential remedy – in this case, the Hungarian Constitutional Court – and not the reasonable prospects of success with regard to alleged violations and possible redress. The ECtHR has insisted that, due to the subsidiary role of the Court, even a remedy that appears statistically futile has to be pursued before a case can be accepted in Strasbourg. The fact that pursuing the remedy in question – in this instance, putting the case before the Hungarian Constitutional Court – might significantly delay justice does not feature in the Court’s reasoning. Neither does the question of the actual independence of the Hungarian justice system. The reasoning is instead based on what may be termed an ‘as if’ logic and the use of conditionals, allowing the Court to assume that the remedy is formally effective, yet signalling willingness to revisit the assessment of the local remedy in the future. This precise example suggests that the Court insists on subsidiarity, procedurally as well as formally, even in cases where it is well-known that democracy and the rule of law is decaying.

A similar stance on admissibility is found in the potentially huge number of cases arising in the aftermath of the 2016 failed coup in Turkey, which concern widespread detentions and dismissals of civil servants. It is estimated that some 50,000 public servants were arrested, including 2,000 judges and prosecutors (with another 2,000 legal professionals dismissed). Specifically, two members of the Turkish Constitutional Court (TCC) were dismissed alongside 108 members of the High Court of Appeal and 48 members of the Council of State. Despite this onslaught on the judiciary, Turkish cases pertaining

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70 Spano (n 17).
71 See, for example, Szalontay v Hungary 71327/13 (ECtHR, dec, 12 March 2019).
74 Ibid.
to dismissals of civil servants lodged in Strasbourg have been dismissed on admissibility grounds for lack of exhaustion of local remedies. A large number of applications have been dismissed because the applicants did not use a new remedy, the ‘State of Emergency Inquiry Commission’, set up by decree to assess the post-coup measures.\textsuperscript{75} Although serious doubts were raised as to the possibility of an effective domestic judicial review of the dismissals by decree laws, including from the CoE’s own Venice Commission,\textsuperscript{76} the ECtHR has relied on a procedural argument in combination with a formalistic approach and, therefore, not directly addressed the actual prospects of an effective judicial review. As in the Hungarian cases, the Court has opted for a non-contextual understanding,\textsuperscript{77} relying instead on the aforementioned ‘as if’ logic, rather than questioning the actual rule of law situation.

In all fairness to the Court, it should be reiterated that the ECtHR has stood up against flagrant violations in post-coup Turkey on a number of occasions, notably in a handful of detention cases such as those of Mehmet Altan \textit{v} Turkey,\textsuperscript{78} Alparslan Altan \textit{v} Turkey,\textsuperscript{79} and Kavala \textit{v} Turkey.\textsuperscript{80} These are very important cases, but the general picture is nevertheless that strict admissibility decisions have impacted tens of thousands of other applicants who have instead proceeded through a commission set up by decree to assess the consequences of other decrees. Moreover, these cases were only decided after the TCC had ruled on the matters. This necessary recourse to the TCC caused concern given that the TCC’s own independence and impartiality was being questioned in the post-coup period. The TCC had dismissed two of its members based on allegations that they were linked to the coup.\textsuperscript{81} Other developments at the TCC with regard to the post-coup situation, including limited review of

\textsuperscript{75} For example, Köksal \textit{v} Turkey 70478/16 (ECtHR, dec, 6 June 2017), where the future availability of this remedy was used as grounds for dismissal.


\textsuperscript{78} Mehmet Hasan Altan \textit{v} Turkey 13237/17 (ECtHR, 20 March 2018).

\textsuperscript{79} Alparslan Altan \textit{v} Turkey 12778/17 (ECtHR, 16 April 2019).

\textsuperscript{80} Kavala \textit{v} Turkey 28749/18 (ECtHR, 10 December 2019).

\textsuperscript{81} See, E Demir-Gürsel in this Special Issue.
the state of emergency measures, also put a question mark on the position of the TCC with regard to the post-coup cases.82

In purely legal terms, the position of the Court can, however, be justified through simple reference to subsidiarity, as laid out in Article 35.83 Moreover, as can be inferred from the outline of what constitutes an effective remedy stated above, ‘mere doubts as to the prospects of success of a particular remedy’ is insufficient. Basically, the doubts about a remedy must be established via usage and testing before bringing the case to Strasbourg for the situation to be determined. Although the position is justifiable in the particular subsidiary role of the Court in the Convention system, it only highlights the broader problem that the Court is facing in the context of democratic decay and illiberality in some member states. The operational logic of subsidiarity with regard to admissibility, and the proceduralism and formalism associated with it, is increasingly at odds with the actual functioning of human rights and rule of law in a number of member states and the traditional ‘as if’ logic appears to be becoming problematically restrictive.

The ECtHR system provides the inter-state procedure for suits challenging the general state of the rule of law and human rights in a member state. Recent years have in fact seen a general upsurge in inter-state cases. Inter-state cases seeking to challenge the general human rights situation in a member state are, however, very rare and close to non-existent in the current caseload before the ECtHR.84 Another means for highlighting the deterioration of human rights in a member state is Article 18 (the original ‘alarm bell’ provision), which has gained increased attention in recent years. The rediscovery of Article 18 and the gradual development of a jurisprudence on ‘bad faith’ applications of Convention might well be a better way for the Court to remedy the situation described here and address democratic deterioration head-on.85 While scholars demonstrate that Article 18 has gathered more sway in recent years, it is only applied in relatively few judgments. A very recent Grand Chamber

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82 Ibid.
judgment, *Selahattin Demirtaş v Turkey (No 2)*, however, seems to signal a new and more resolute approach to member states’ abuses of the Convention. These developments must be seen in light of the new infringement procedure under Article 46, which was used for the first time in 2017, resulting in a first ruling delivered against Azerbaijan in 2019. Overall, these developments seem to counter the tendencies described with regard to subsidiarity, but they are yet to have a broader impact to reverse the general picture.

A related question is whether subsidiarity is, more generally, impacting the institutional order of the ECtHR and having a structural effect on the entire system. A case in point is the judgment in *Burmych and Others v Ukraine*, which concerned the prolonged non-enforcement of final judicial decisions in Ukraine. The underlying legal issues had already been addressed in the pilot judgment of *Yuriy Nikolayevich Ivanov v Ukraine*. Deciding to add some 12,143 other *Ivanov* follow-up applications to the *Burmych* case, the Court struck the entire set of cases off its list in a narrow 10–7 decision of the Grand Chamber. In practice, this body of cases was thereby transferred to the Committee of Ministers to be decided within the framework of the *Ivanov* pilot judgment. This whirlwind decision quite clearly confirmed that the Court's majority was set on delineating the institution’s role in the context of a pronounced worry about the number of pending cases in Strasbourg. As evidenced in the seven-judge dissenting opinion and commentary related to the case, however, the decision inevitably signalled a more restrained or limited role for the Court in terms of availability and accessibility. Undoubtedly, the notion of individual justice and access to the Court took somewhat of a blow with this decision, and the Court seemingly moved towards a more limited constitutional role. Arguably, the introduction of the pilot judgment procedure in itself had some similar effects on individual justice.

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86 *Selahattin Demirtaş v Turkey (No 2)* [GC] 14305/17 (ECtHR, 22 December 2020).  
87 See, B Çali in this Special Issue.  
88 *Burmych and Others v Ukraine* [GC] 46852/13 and Others (ECtHR, 12 October 2017).  
89 *Yuriy Nikolayevich Ivanov v Ukraine* 43450/04 (ECtHR, 15 October 2009).  
Both of these recent developments – Article 35 proceduralism and formalism, and the *Burmych* case – reflect different angles of subsidiarity. *Burmych* puts the shared responsibility of the different institutions in the system, and particularly the responsibility of the Committee of Ministers to enforce judgments, into sharp focus. In so doing, however, it also inevitably signals a limitation of the role of the Court. The Article 35 developments, as exemplified in the Turkish post-coup cases, also highlight dimensions of shared responsibility, in these cases between the Court and the member states. These developments emphasise the reliance and insistence on the formal procedures of the system, even when this potentially risks leaving tens of thousands of people unprotected in contexts of significant rule of law deterioration and *de facto* turn toward illiberalism. This form of proceduralism paired with legal formalism can be justified in legal terms, including shared responsibility as discussed above, but it also inevitably signals the limited availability of the Court. There is, of course, a real question as to what can realistically be expected of the Court in this respect, both in terms of how the Court deals with countries that are *de facto* unqualified for membership of the CoE due to their human rights record and in the number of cases that it can take on.

Although it cannot be directly empirically verified, the caseload challenge of the Court seems to loom large as a background to many of these developments. Motivated by the Interlaken reform agenda as well as internal processes, the Court has generally managed to reduce the number of pending cases since the all-time high that was reached in 2011. It did so primarily by dismissing a very significant number of cases in the immediate period following the 2012 Brighton Declaration. However, scrutiny of the data reveals that this approach was insufficient, and the Court began to accumulate a new backlog of cases as of 2016.92 Had the Court not employed the *Burmych* approach and the strict admissibility criteria applied in the Turkish post-coup cases, the number of pending cases in Strasbourg would be significantly higher today. The timing of these measures is, however, delicate, as the focus on reducing the caseload occurred at the same time that attacks on human rights were on the rise in Europe and were employed in relation to cases originating in some of the countries exemplifying this tendency, such as Hungary and Turkey.

We can briefly contrast the current situation with that of the early Court and the challenges that it faced. The original idea of legal diplomacy discussed

92 Demonstrating these trends, an analysis of the throughput of the Court, that is the output (defined as the number of applications judged + dismissed cases + cases struck off the list) divided by the input (defined as the number of new cases allocated a judicial formation), was conducted in Madsen ‘Rebalancing European Human Rights’ (n 10).
above involved an element of institutional self-preservation, and it would be entirely reasonable to view the responses to the caseload problem as also containing elements of institutional self-preservation. Legal diplomacy also espouses an element of situational tolerance and restraint for the sake of the long-term success of the system. Of course, the human rights problems we observe with regard to Turkey, for instance, are very different from the context of the original Court. Today, the consequence of too much legal diplomacy is that deteriorating legal systems in member states, and what in some instances might be termed captured courts, are allowed to operate as if they represent the rule of law. This is where law and politics meet. The question of whether to oust member states from the Convention system is not one for the Court to answer, even if some states’ practices objectively seem to disqualify their CoE membership. This discussion is a political one and it rests upon the political level to perform in this regard. Yet, the political performance, driven by a very different form of realism than law and legal diplomacy, still provides a context for the Court’s operation, a context that colours how audiences view the Court’s own performance.

6 Conclusion: Legal Diplomacy, Situational Self-Constraint, and the Narrowing of the Court

This article has explored both the original balancing tools of the ECtHR and its current attempts to find a viable path through a decade of reforms and increasingly complex operational contexts, ranging from democratic deterioration to pushback from consolidated democracies. But do all of these changes amount to a return to an environment of legal diplomacy in which legal development is balanced with a consequentialist diplomatic outlook to preserve the institution and mediate political conflict? Or do they more accurately represent a new and different legal rationality at the ECtHR? In attempting to reconcile these two suggestions, it must first be recalled that history is not linear. There are setbacks and advances for all social institutions, including courts such as the ECtHR, and democracies similarly experience political ups and downs. Thus, prima facie, it would be unsurprising for the ECtHR to return to some of its earlier tools when again finding itself in a situation of institutional uncertainty due to contextual changes that put additional pressure on its operation.

There are, however, numerous and significant social and political differences between the period between 1960–1975 and the past ten to fifteen years. In terms of law, the early ECtHR operated in an emerging field of international human rights marked by geopolitical tensions. It had little to refer to in terms
of existing doctrines and was, therefore, naturally inclined to adopt a case-
by-case approach for careful development. The current Court has delivered
more than 23,000 judgments and relies on a set of established doctrines across
the Convention as well as international case law, and, while the early Court
was faced with very few cases, one of the current Court’s biggest challenges is
the high number of cases lodged in Strasbourg. There are, however, some per-
sisting similarities between the Court in its two incarnations. Legal diplomacy
has largely been the result of the interplay with the member states in terms of
securing their commitment to and acceptance of the ongoing endeavour. This
has been a long-term strategy, in a sense, for securing the institutionalisation
of the Convention, even if it initially meant low standards. If the original strat-

ey was to convince states to opt-in, today it appears to function to prevent
them from opting-out. This is a consequential difference.

The current Court has faced challenges to its authority from both consoli-
dated and non-consolidated democracies, including authoritarian and illiberal
states, which have triggered the development of new responses and practices,
as detailed in this article. With regard to consolidated democracies and particu-
larly those with good rule of law scores, the new subsidiarity approach implies
that the Court will seemingly grant greater deference (in certain areas of law)
to a member state that is engaging the case law and Convention standards in
good faith, even if it implies greater diversity in standards among the faithful
appliers of the Convention. With regard to non-consolidated, decaying, or
illiberal democracies, the proceduralisation and formalisation of admissibility
has produced a different form of restraint which is somewhat at odds with
the empirical developments in the member states in terms of a deteriorating
protection of human rights, the rule of law, and democracy. Taken together,
these developments suggest that the ECtHR has changed over the past dec-
ade and has developed a new and differentiated legal rationality, a legal diplo-
macy 2.0, which combines elements of the original legal diplomacy with new
forms of situational self-restraint and a different vision for its overall role in the

93 A similar argument has been made in a partly dissenting opinion, referring to legal
diplomacy. See, S, V and A v Denmark 35553/12, 36678/12 and 36711/12 (ECtHR, 22 October

94 In principle, non-consolidated democracies can engage in good faith with the Convention
standards. The effect of procedural subsidiarity, however, seems to be primarily observable
with regard to high performing rule of law states. Such states might benefit from a ‘high
reputation’ when being brought before the ECtHR. See, on reputation, S Dothan, Reputation
and Judicial Tactics: A Theory of National and International Courts (Cambridge University
Press 2014).
protection of European human rights. The result is a more limited and in some instances a less accessible Court.

The remaining question is whether all of this has produced a more focused Court that is prepared to deal with the most pressing human rights issues in today’s Europe? According to this analysis, the narrowing of the ECtHR does not seem to have freed-up sufficient resources to tackle the most dramatic downturn of rule of law and human rights experienced in Europe since the aftermath of the Second World War. This is the result of the continuous pressure put on the Court and its authority over the past decade, a pressure coming not just from decaying and illiberal democracies but from consolidated democracies alike, which has been both formalised in the reform process and exercised through informal means of politics and negative public discourse. This has put the Court in the difficult situation of having to strike a balance between accommodating changing ideas of its place as a European institution and maintaining its role as guardian of European human rights across its increasingly varied contexts and member states. Effectively, the Court has had to balance the institutional questions relating to its heavy caseload and the associated debate on individual vs. constitutional justice and find adequate responses to backlash and pushback from both consolidated and non-consolidated democracies. Its new practices, involving forms of legal diplomacy, situational restraint, and proceduralism, represent the Court’s attempt thus far at reconciling these many challenges and developing a viable path forward.