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The Burdens and Benefits of Brighton

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More than a month has passed since the conclusion of the high-level conference on the future of the European Court of Human Rights (ECtHR) held at Brighton, England—the third such gathering devoted to overhauling the Strasbourg supervisory system in response to the crushing backlog of pending applications and the structural human rights problems that are their root cause. Unlike the conferences in Interlaken and Izmir, however, the delegates in Brighton gathered under a cloud of vociferous protests against the Court by the public and government officials in the United Kingdom. According to a 2011 poll, a majority of voters believe that the UK government should withdraw from the European Convention on Human Rights—a view likely stoked by incendiary statements such as Prime Minister David Cameron's exclamation that implementing an ECtHR judgment recognizing prisoners' right to vote "makes me feel sick."

A pervasive air of backlash against the Court suffused the lead up to the Brighton Conference. Whereas previous reform proposals stressed the need to strengthen the regional human rights system, ECtHR watchers were shocked that a draft of the Brighton Declaration—leaked to the public in late February 2012—contained a blueprint for clipping the Strasbourg Court's wings and weakening supranational review of member states' human rights practices. The final text is anodyne in comparison, and most observers are breathing a collective sigh of relief that the outcome of the conference was not as bad as they had initially feared.

The Brighton Declaration is, however, a watershed—or, perhaps more accurately, a low water mark—in at least one important respect. It directs the Committee of Ministers to prepare the text of a new Protocol to the Convention. If approved, the Protocol will be the first amendment in the nearly sixty-year history of the Council of Europe's human rights system to include provisions that restrict rather than enhance the authority and discretion of ECtHR judges.

In this brief commentary, I first review the Brighton Declaration provisions that reflect the member states' attempt to rein in the power of Strasbourg judges. I then introduce and defend a proposal to condition access to the new Protocol's "benefits" to those member states that are adequately shouldering the "burdens" of more deeply embedding the Convention and ECtHR case law in their national legal orders. I conclude by identifying alternative ways to implement this proposal and discuss their potential benefits and drawbacks.

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The Brighton Declaration is divided into seven substantive sections. Three sections—implementation of the Convention at national level; processing of applications; and execution of judgments of the Court—correspond to what the Council of Europe has labeled the upstream, midstream, and downstream causes of the ECtHR's docket crisis. The remaining four sections address the interaction between the Court and national authorities; applications to the Court; judges and jurisprudence of the Court; and the longer-term future of the Convention system. The proposals to amend the Convention to restrict the ECtHR's authority appear in these latter provisions. They include:

- adding to the Convention's preamble express references to the principle of subsidiarity and to the doctrine of the margin of appreciation—references that many observers view as a signal to the ECtHR to give greater deference to member states (¶12.b);
- eliminating, from the "significant disadvantage" ground for declaring an application inadmissible, the safeguard clause that permits the ECtHR to review the application if it "has not been duly considered by a domestic tribunal" (¶15.c);
- removing the parties' ability to object to a Chamber's decision to relinquish a case to the Grand Chamber, a venue viewed as more sympathetic to national governments (¶25.d).

Supplementing these "hard law" provisions are several nonbinding statements that, with varying degrees of subtly, suggest that the ECtHR should rein in its scrutiny of national governments:

- an assertion that "the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation" (¶11);
- a recommendation that the ECtHR "take a strict and consistent approach" to declaring inadmissible complaints that have "been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case law of the Court including on the margin of appreciation" (¶15.d);
- an invitation to the Court "to have regard to the importance of consistency where judgments relate to aspects of the same issue, so as to ensure their cumulative effect continues to afford States Parties an appropriate margin of appreciation" (¶25.c); and

- a timetable for the Committee of Ministers to determine whether existing reforms have "proven to be sufficient to assure sustainable functioning" of the ECtHR, or whether "more profound changes are necessary" (¶34).

To be fair, the Brighton Declaration also reaffirms member states' "deep and abiding commitment" to the Convention, its institutions, and the right of individual petition (¶¶1-2). In addition, member states recognize their responsibility to ensure the effective domestic implementation of the Convention and to abide by ECtHR judgments against them (¶¶3-4). The opening paragraph of the section on "implementation of the Convention at national level" makes this point succinctly and forcefully:

> All laws and policies should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the Convention. States Parties must also provide means by which remedies may be sought for alleged violations of the Convention. National courts and tribunals should take into account the Convention and the case law of the Court (¶7).

The Declaration then lists the "specific measures" to achieve the objectives in this paragraph. These measures include establishing independent national human rights institutions; authorizing parliaments to review the Convention-compatibility of draft legislation; introducing new legal remedies; encouraging courts to take the Convention and ECtHR case law into account; facilitating litigants' ability to raise Convention violations; and training and informing officials at all levels of government about the Convention's requirements (¶9.c).

It bears emphasizing, however, that these commitment to domestic implementation are couched in hortatory, aspirational language. States "should" take these steps. They will "consider" these measures "so far as relevant" and will "encourage" their adoption (¶¶7, 9.c). None of these pledges will be part of the new Protocol that the Declaration contemplates. This creates a structural imbalance in the proposal to amend the Convention. A binding international instrument will give member states the "benefits" of the Brighton Declaration—dismissal of more applications and more deferential review of those considered on the merits—without a corresponding obligation to shoulder the "burdens" of fully implementing the Convention and ECtHR jurisprudence in national legal systems.

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To forestall this imbalance, I propose that the envisaged new Protocol require member states to embed the Convention and ECtHR case law more firmly in their respective domestic legal orders. Such a proposal is—with the notable exception of the recent backlash against the Strasbourg Court in the UK—the next logical step in a decades-long evolution of the European human rights system.

Over the last quarter century, a growing number of countries have incorporated the Convention into domestic law. As the Strasbourg system matured, the percentage of incorporating countries increased such that by 2004 the treaty had "become an integral part of the domestic legal orders of all states parties." A more rapid shift has occurred with respect to the ability of national courts to reopen judicial proceedings following adverse ECtHR judgments. In 2000, the Committee of Ministers launched a campaign urging governments to authorize this remedy. By 2006, reopened proceedings were available in criminal cases in 80% of member states, and in civil and administrative cases in approximately half of those states. Procedures to verify the Convention-compatibility of draft legislation and administrative regulations are another area of rapid progress encouraged by the Committee of Ministers. Such procedures now exist in various forms in all member countries.

The domestic implementation clauses of the Brighton Declaration, summarized above, reinforce these efforts. Taken together, these recommendations—and governments' generally favorable responses to them—create an *acquis* of best practices for how to more firmly embed the Convention and ECtHR judgments in national legal orders. The ultimate goal of this process, as I have previously argued, is for national decision-makers to acquire the authority and capacity to serve as first-line defenders and remediators of human rights violations in Europe, with the ECtHR serving as a backstop where national actors fail to carry out these functions.

Although member states have made significant strides toward this goal over the last decade, the progress has been uneven. This is especially true for the endemic structural human rights problems in a handful of countries that generate numerous applications to Strasbourg. Well-known examples include excessively lengthy judicial proceedings in Italy; executive meddling in final court judgments in the Ukraine; disappearances in the Kurdish regions of Turkey; and discrimination against Roma communities in several Eastern European countries. The result is marked and growing geographic imbalance in the ECtHR's case load. At the end of 2011, just five of 47 member states—Italy, Romania, Russia, Turkey, and the Ukraine—accounted for more than 61% of all applications to the Court, with Russia alone the source of more than 26% of all complaints. Adding the next five states increased the proportion to 78%. The reason for these disparities, as Helen Keller and her coauthors explain in an insightful 2011 journal article, is that "the systems of judicial relief in these countries are particularly problematic . . . owing to structural problems affecting the efficiency of the judicial work or to deficiencies concerning respect for the principle of the rule of law."

The disproportionate percentage of applications from this small group of countries highlights the need to disaggregate proposals for greater subsidiarity and a wider margin of appreciation from "the principle of equal treatment of all States Parties," which the Brighton Declaration reaffirms (¶20.c). Nonbinding pledges to improve domestic implementation of the Convention and to speed compliance with ECtHR judgments—and the financial and technical assistance from the Council of Europe that facilitate them—are well and good. But they are no longer sufficient. If a new treaty is required to meet the crisis that the Strasbourg system now faces, that instrument should include

specific and binding commitments to more securely anchor the Convention and ECtHR judgments in national legal orders. In addition, and more crucially, the Protocol should make compliance with those commitments a condition of applying the narrower admissibility rules and more deferential judicial review standards that the Brighton Declaration contemplates.

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Although my proposal to reform the ECtHR will likely be controversial, there are several reasons to think that it may be politically feasible. First, the *acquis* of best practices on embeddedness that has built up over the last decade has strong support from the member states, acting on their own and through recommendations of the Council of Europe adopted by consensus. Second, the three recent high-level conferences on the ECtHR's future have reaffirmed the basic elements of the *acquis* that would comprise the Protocol's "burdens." Third, the amendment could be structured to give states a modicum of flexibility regarding embeddedness. For example, it could include a phase-in clause to give governments additional time to adjust their laws and practices, or. Or it could allow states to accept different packages of commitments, an approach used by the European Social Charter. Such a procedure would be especially useful for states that oppose specific implementation measures, such as reopening judgments in civil cases. Finally, the Protocol would not single out countries based on how many applications are pending against them, either in absolute or relative terms. Rather, it would provide a template to assess whether any ratifying state had adopted the implementation measures that the amendment requires.

Assuming that the political will exists for such a proposal, how might it be implemented? An important initial issue relates to the new Protocol's entry-into-force rules. Previous systemic overhauls of the European human rights system—such as Protocol No. 11, which established a permanent Court, and Protocol No. 14, which authorized single judges and three-judge committees to dismiss inadmissible applications—have required ratification by all member states. More modest reforms, such as Protocol No. 9, which gave private litigants a right to appeal to the ECtHR the reports of the erstwhile European Commission, could be adopted on a country by country basis. The new amendment falls somewhere in between these two extremes.

If the drafters choose an opt-in approach, each member of the Council of Europe would confront a "package deal" treaty that includes both the burdens and the benefits of the Brighton Declaration. A state could eschew this deal altogether. Such a country would continue to be governed by existing admissibility rules and supranational review standards. But it would avoid the Protocol's hard law obligation to implement the Convention domestically. (The nonbinding recommendations of the high-level conferences would retain their persuasive authority.) Conversely, a state that ratified the Protocol would be subject to its narrower admissibility requirements and more deferential review standards. It would, however, also undertake a binding commitment to embed the Convention and ECtHR judgments in national law.

An opt-in Protocol must also include a mechanism to ensure that ratifying states adhere to this bargain. If the Protocol's embeddedness obligations will be effective immediately, the drafters could create a preclearance procedure by which a new or existing Council of Europe body would determine whether a state has implemented the necessary measures. A green light from that body would be a prerequisite to ratification. As an alternative or in addition, the drafters could establish a mechanism to review compliance after ratification. Such a mechanism might be designed in a variety of ways. States could submit periodic reports to a Council of Europe body to demonstrate their compliance. Or the ECtHR could make such an assessment, either on its own authority or in response to a complaint by a private litigant or another state. Finally, the Protocol would also need a suspension clause to identify the conditions under which a country that falls out of compliance with its embeddedness obligations would lose some or all of the benefits of the amendment's more sovereignty-friendly admissibility rules and review standards.

One possible downside of an opt-in approach is that it would not do enough to reduce the ECtHR's backlog of cases. This might occur if several of the ten member states that generate most applications to the Court decided not to ratify the amendment. In that event, the Protocol might curb the number of politically controversial judgments that the ECtHR issues against states with comparatively good records of protecting civil and political liberties, but have limited impact in reducing complaints from countries with enduring, structural human rights problems.

How might the process differ if all 47 member states were required to ratify the Protocol to bring it into force? In that event, countries in which the Convention or ECtHR judgments are less deeply embedded may seek to water down the Protocol's implementation rules or the mechanisms for reviewing compliance with them. The result is likely to be a weaker legal instrument than would be agreed to under an opt-in scenario. In addition, the prospect of region-wide ratification would likely require more extensive negotiations, postponing the adoption of the final text. A further delay of several years would follow as each country proceeded through its domestic ratification process. Once the amendment was in force, however, it would avoid the potential legitimacy concerns raised by applying different admissibility rules and judicial review standards to different member states. There would also be modest efficiency gains for ECtHR judges and Registry lawyers from applying a uniform set of procedures.

Whichever design strategy is adopted, what is essential is to link the burdens and benefits of Brighton in a single legal instrument. Doing so would create a positive incentive for member states to bolster national systems of human rights protection and, ultimately, to take primary responsibility for preventing and remedying the vast majority of violations of civil and political liberties. The judges in Strasbourg could then concentrate their considerable legal talents on monitoring the proper functioning of those national systems, stepping into the breach where those systems falter, and ensuring that the Convention remains a living instrument that responds to evolving regional and global understandings of human rights.