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# THE PROCEDURAL APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS: BETWEEN SUBSIDIARITY AND DYNAMIC EVOLUTION

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**Abstract** This article explores how a procedural approach in the case law of the ECtHR combines subsidiarity and progressive development of international obligations. Rather than constituting a simple retreat from substantive commitments, it renders the obligations of Conventions States more flexible and has the potential to enhance the democratic legitimacy of the Court's rulings. This article first sets out various aspects of proceduralization in international human rights law. This is followed by a discussion of how procedural approaches are linked to subsidiarity. In the case law of the ECtHR, procedural approaches facilitate dynamic evolution, both in the practice of Convention States (analytic or bottom-up approach) or by the Court itself (constructive or top-down approach). This interaction of the procedural approach and arguments based on European Consensus allows the ECtHR and domestic institutions to fulfil their 'shared responsibility' for the effective protection of human rights in Europe.

**Keywords**: consensus, European Court of Human Rights, human rights, margin of appreciation, proceduralization, procedural rationality control, subsidiarity.

## I. INTRODUCTION

Recently, a number of scholars have traced a 'procedural turn' in international human rights law, most notably in the case law of the European Court of Human Rights (ECtHR).[1] Judge Robert Spano of the ECtHR has even

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[1] E Brems and L Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 HumRtsQ 176; P Popelier, 'The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights' in P Popelier, A Mazmanyan and W Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 249; É Dubout, 'La procéduralisation des droits' in F Sudre (ed), *Le principe de subsidiarité au sens du droit de la Convention européenne des droits de l'homme* (Nemesis 2014) 265; OM Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 ICON 9; JH Gerards and E Brems, 'Procedural Review in European Fundamental Rights Cases: Introduction' in JH Gerards and E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 1; LM Huijbers, 'Procedural-Type Review: A More Neutral Approach to Human Rights Protection by the European Court of Human Rights?' (2017) 9

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claimed that the Court is currently undergoing a transformation from a 'substantial embedding phase' to a 'procedural embedding phase'.[2] The ECtHR's 'turn to procedure' may have been motivated in part by the enhanced focus on subsidiarity in the wake of the Brighton Declaration[3] and which is now reflected in the 2018 Copenhagen Declaration.[4] This article explores how the Court's procedural approach combines subsidiarity and the progressive development of international obligations. Section II sets out various aspects of proceduralization: the modes of the procedural approach, its effects on the standard of review and the criteria applied by the ECtHR. This is followed in section III by a discussion of the general background to the Court's move toward procedure. Contrary to the fears expressed by some critics, this move, while closely intertwined with the concept of subsidiarity, does not diminish substantive human rights obligations. Rather, it renders rights protection more effective and flexible and reflects the 'shared responsibility'[5] of the ECtHR and domestic institutions for the effective protection of human rights in Europe. In the case law of the ECtHR, the procedural approach facilitates a dynamic evolution either in the practice of Convention States (analytic or bottom-up approach) or by the Court (constructive or top-down approach) and interacts significantly with arguments based on European consensus. This interaction of procedural and consensus analysis allows the ECtHR and domestic institutions to assume their 'shared responsibility'. The article concludes in section IV that we can observe a proceduralization of the interface between the international and domestic spheres in international human rights law which makes the interaction of these spheres both more flexible and complex.

## II. ASPECTS OF PROCEDURALIZATION IN THE ECTHR'S CASE LAW

### *A. Modes*

Proceduralization in the ECtHR's case law has various dimensions. In a broad sense, it includes the Court's increased focus on the relationships between different decision-making bodies in the European system of human rights

European Society of International Law Conference Paper Series 1; LM Huijbers, 'The European Court of Human Rights' Procedural Approach in the Age of Subsidiarity' (2017) 6 CILJ 177.

[2] R Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 HRLR 1.

[3] High Level Conference on the Future of the European Court of Human Rights 'Brighton Declaration' (20 April 2012) <http://www.echr.coe.int/Documents/2012_Brighton_Final Declaration_ENG.pdf>; cf P Popelier and C van de Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) 30 LJIL 5.

[4] High Level Conference on 'the European Human Rights System in the Future Europe' (13 April 2018) 'Copenhagen Declaration' <https://rm.coe.int/copenhagen-declaration/16807b915c>.

[5] See, in particular, High-Level Conference on the 'Implementation of the European Convention on Human Rights, Our Shared Responsibility' (27 March 2015) 'Brussels Declaration' <https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf>.

protection, especially the pilot judgment procedure[6] and the *Bosphorus*[7] presumption of ECHR compliance.[8] Scholars have mainly focused on two modes of proceduralization.[9] Under the first mode, explicit procedural requirements are increasingly read into different Convention provisions.[10] These self-standing procedural rights involve, *inter alia*, a duty of due diligence in relation to investigation and prosecution, or a duty to hear an interested party before making a decision. Such obligations have become part of the scope of the right in question, which means that consideration or review of the right in question may also include consideration of its procedural dimensions.[11]

In the second mode of proceduralization—integrated procedural review—the Court includes a focus on domestic procedures when determining the merits of a case. Integrated procedural review means that the quality of domestic decision-making processes influences the Court's substantive review. Domestic analysis of the proportionality or reasonableness of a measure can even displace the Court's own review. Especially if the Court is confronted with conflicting fundamental rights and legitimate interests, it will scrutinize the procedural elements of the domestic decision-making process and whether the fundamental rights of individuals have been adequately considered. Several judgments of the ECtHR indicate a procedural approach to the margin of appreciation,[12] which means that granting a margin of appreciation and the breadth of that margin depend on an analysis of domestic procedures. Some

[6] Art 61 of the Rules of the Court (entry into force 16 April 2018).

[7] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland*, App No 45036/98, Judgment of 30 June 2005.

[8] See OM Arnardóttir, 'Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation' (2015) 5 ESIL Conference Paper Series, 7ff; for safeguards against abuse as a procedural factor relevant for the State's margin of appreciation in considering whether a derogation (art 15 ECHR) was strictly required by the exigencies of the situation, see eg *Brannigan and McBride v UK*, App No 14553/89 and 14554/89, Judgment of 25 May 1993, paras 61–66.

[9] Brems and Lavrysen (n 1) 196; Arnardóttir (n 1) 14, 33; JH Gerards, 'Procedural Review by the ECtHR: A Typology' in Gerards and Brems (n 1) 127, 129ff.

[10] E Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights' in E Brems and JH Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013) 137.

[11] See, eg, *AGOSI v United Kingdom*, App No 9118/80, Judgment of 24 October 1986, para 55; *Jokela v Finland*, App No 28856/95, Judgment of 21 May 2002, para 45; *Bäck v Finland*, App No 37598/97, Judgment of 20 July 2004, para 56; *Zehentner v Austria*, App No 20082/02, Judgment of 16 July 2009, para 73; *Denisova and Moiseyeva v Russia*, App No 16903/03, Judgment of 1 April 2010, para 59 (all on art 1 of Protocol No 1 to the ECHR, right to property); *Podkolzina v Latvia*, App No 46726/99, Judgment of 9 April 2002, para 35; *Namat Aliyev v Azerbaijan*, App No 18705/06, Judgment of 8 April 2010, para 59 (on art 3 of Protocol No 1 to the ECHR, right to take part in elections); *Tysiąc v Poland*, App No 5410/03, Judgment of 20 March 2007, paras 115, 117; *A, B and C v Ireland*, App No 25579/05, Judgment of 16 December 2010, para 263 (on art 8 ECHR, abortion cases).

[12] See, eg, *Hatton and others v United Kingdom*, App No 36022/97, Judgment of 8 July 2003, para 128; *Z and Others v United Kingdom*, App No 29392/95, Judgment of 10 May 2001.

recent judgments[13] signal that the Court is just recalibrating the criteria for the level of deference that it accords to Convention States.[14] Acceptable domestic procedures, notably a thorough parliamentary and judicial review of the necessity of a measure, can indicate a significantly more lenient proportionality review by the Court and a wider margin of appreciation for the Convention State.[15] However, the case law also demonstrates that the procedural approach is controversial amongst the judges of the ECtHR both in principle and in its actual application.[16] Some recent cases, while not amounting to a veritable trend against proceduralization,[17] highlight that proceduralization is not a uniform trend. In some cases, the Court has—for specific reasons—rather softened than strengthened procedural requirements.[18]

While the first mode of proceduralization—self-standing procedural rights—creates independent procedural obligations, the second mode—integrated procedural review—affects the normativity of substantive obligations and governs their effect in the domestic legal systems of Convention States. It therefore entails consequences for the interface of international human rights and domestic law. The procedural approach refers to both domestic judicial and law-making procedures. In a set of cases, the Court establishes a clear or at least implicit connection between the quality of parliamentary process and the breadth of the margin of appreciation.[19] In some of these cases,

[13] *Animal Defenders International v United Kingdom*, App No 48876/08, Judgment of 22 April 2013; *Shindler v United Kingdom*, App No 19840/09, Judgment of 7 May 2013; *SAS v France*, App No 43835/11, Judgment of 1 July 2014; *Correia de Matos v Portugal*, App No 56402/12, Judgment of 4 April 2018.

[14] cf R Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 HRLR 487, 498.

[15] CJ Van de Heyning, 'The Natural 'Home' of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights' (2012) 31 YEL 128, 151ff; Popelier (n 1); Brems (n 10) 160; Brems and Lavrysen (n 1) 195ff; Arnardóttir (n 8).

[16] Spano (n 14) 497. See *Hirst v United Kingdom (No 2)*, App No 74025/01, Judgment of 6 October 2005, Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, para 7; *Animal Defenders International v United Kingdom* (n 13), Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para 9; *Correia de Matos v Portugal* (n 13), Dissenting Opinion of Judge Pinto de Albuquerque Joined by Judge Sajó, para 41, Joint Dissenting Opinion of Judges Pejchal and Wojtyczek, para 9.

[17] A Nußberger, 'Procedural Review by the ECHR: View from the Court' in Gerards and Brems (n 1) 161, 172ff.

[18] For softened procedural standards in voting rights cases, see *Frodl v Austria*, App No 20201/04, Judgment of 8 April 2010, paras 34ff; *Scoppola v Italy (No 3)*, App No 126/05, Judgment of 22 May 2012, para 99; for a comparable development in child abduction cases, see *Neulinger and Shuruk v Switzerland*, App No 41615/07, Judgment of 6 July 2010, para 139; *X v Latvia*, App No 27853/09, Judgment of 26 November 2013, paras 103 and 106; cf Nußberger (n 17) 172ff.

[19] *Murphy v Ireland*, App No 44179/98, Merits, Judgment of 10 July 2003, paras 67, 73, 81; *Hirst v United Kingdom (No 2)* (n 16) paras 78–80; *Evans v United Kingdom*, App No 6339/05, Merits, Judgment of 10 April 2007, paras 79, 85ff; *Sukhovetskyy v Ukraine*, App No 13716/02, Judgment of 28 March 2006, para 65; *Friend, The Countryside Alliance and Others v UK*, App Nos 16072/06 and 27809/08, Decision as to the Admissibility of 24 November 2009, para 50; *Lindheim v Norway*, App Nos 13221/08 and 2139/10, Judgment of 12 June 2012, para 128; *Animal Defenders International v United Kingdom* (n 13) para 108; *Shindler v United Kingdom*

parliamentary process was relevant for determining the breadth of the margin of appreciation.[20] In other cases, parliamentary process has been taken into account as an element of the proportionality analysis undertaken when considering the justifiability of the State's limitation to a right,[21] or for both purposes,[22] and sometimes, reference to parliamentary process apparently consumes the rest of the substantive analysis.[23] In particular, the ECtHR has paid close attention to democratic debates in member States when applying the margin of appreciation in the *Hirst*, *Animal Defenders* and *Shindler* cases.[24] Generally, the Court is most inclined to attach value to the quality of legislative process in hard cases with a high degree of sensitivity, namely cases relating to complex choices in socio-economic policy fields and moral dilemma cases.[25] This case law is commonly concerned with so-called general measures, ie measures the impact of which is not tailored to the facts of a particular case. Procedural criteria also are of particular importance in cases in which the Court has to balance rights which are equally protected under the Convention, such as Articles 8 and 10[26] or Articles 9 and 11.[27] Relevant provisions in the case law include Articles 8, 9, 10, 11 of the Convention and Articles 1 and 3 of Protocol No 1.[28] The subject matters of the cases have been diverse. They include voting rights,[29] a statutory broadcasting ban on political advertisements,[30] a prohibition on religious advertising on the radio,[31] a night flight scheme,[32] the legislative proposition on the withdrawal of consent for the storage and use of embryos[33] and the ban on the use of clothing designed to conceal one's face in public places.[34]

(n 13) paras 112, 115, 117; *SAS v France* (n 13) paras 154ff. For an overview, cf M Saul, 'The ECtHR's Margin of Appreciation and the Processes of National Parliaments' (2015) 15 HRLR 745.

[20] *Sukhovetskyy v Ukraine* (n 19) paras 64, 68ff.

[21] *Lindheim v Norway* (n 19) para 128; cf M Saul, 'Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights' (2016) 20 IJHR 1077, 1078.

[22] *Animal Defenders International v United Kingdom* (n 13) para 108.

[23] *Parrillo v Italy*, App No 46470/11, Judgment of 27 August 2015, paras 183ff.

[24] *Hirst v United Kingdom (No 2)* (n 16) paras 21–24, 78ff; *Animal Defenders International v United Kingdom* (n 13) paras 42–55, 108, 110, 114; *Shindler v United Kingdom* (n 13) paras 22–28, 102, 117.

[25] Gerards (n 9) 146–8.

[26] *Von Hannover v Germany (No 1)*, App No 59320/00, Judgment of 24 June 2004; *Von Hannover v Germany (No 3)*, App No 8772/10, Judgment of 19 September 2013; *Von Hannover v Germany (No 2)*, Apps Nos 40660/08 and 60641/08, Judgment of 7 February 2012.

[27] *Sindicatul 'Păstorul Cel Bun' v Romania*, App No 2330/09, Judgment of 9 July 2013, paras 160, 165; cf Nußberger (n 17) 173ff.

[28] Saul (n 21) 1079.

[29] *Hirst v United Kingdom (No 2)* (n 16); *Alajos Kiss v Hungary*, App No 38832/06, Judgment of 20 May 2010; *Shindler v United Kingdom* (n 13); *Anchugov and Gladkov v Russia*, Apps Nos 11157/04 and 15162/05, Judgment of 4 July 2013.

[30] *Animal Defenders International v United Kingdom* (n 13).

[31] *Murphy v Ireland* (n 19).

[32] *Hatton and others v United Kingdom* (n 12).

[33] *Evans v United Kingdom* (n 19).

[34] *SAS v France* (n 13); *Belcacemi and Oussar v Belgium*, App No 37798/13, Judgment of 11 July 2017; cf Saul (n 21) 1079.

### B. Effect

As a consequence of integrated procedural review, the quality of domestic law-making procedures is a factor that determines the authority of international human rights over domestic law. If the Court is satisfied with domestic parliamentary process, it will defer to the outcome of this process—the domestic law—at least to a certain extent and be more lenient in granting a margin of appreciation. In most cases, this will lead the ECtHR to partial deference to domestic law: While the Court may partly rely on the quality of domestic decision-making processes, it will also perform its own assessment to reach a conclusion on the merits of a case, applying the normative margin in the process.[35] A direct link exists between the degree of proceduralization and the breadth of the margin of appreciation. The Court applies procedural criteria particularly in cases that usually imply a wide or even a very wide margin of appreciation. When Convention States are free to decide a case in different ways without violating the Convention, the inclusiveness and transparency of the decision-making process is the most relevant element for the Court to control.[36] For example, in the context of assessments of whether interferences with rights occurred in pursuit of legitimate aims in the public interest, the application of the margin of appreciation quite frequently results in complete deference. In general, the Court's justification for deference is based upon the rationale that, due to their 'direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge' to decide which aims to pursue.[37] Consequently, procedural control, properly understood, cannot replace substantive control.[38] Complete deference rather rests on a rebuttable presumption: It will not hold and the Court will perform its own assessment if the national authorities' judgment of the public interest is 'manifestly without reasonable foundation'.[39]

*Animal Defenders*, one of the paradigm cases for the effect of domestic parliamentary procedures on the margin of appreciation, also indicates a remarkable extension of the margin of appreciation in the context of general measures. In this case concerning the United Kingdom's statutory broadcasting ban on political advertisements under the Communications Act 2003, the Grand Chamber placed increased emphasis on the national authorities' initial assessments that support general measures and eased up on the Court's own proportionality assessments. The focus of the Court's review seems to have moved from assessing the effects of general measures on

[35] Arnardóttir (n 1) 20. For a discussion of the difference between partial and full deference, see also OM Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 EuConst 27, 45ff.
[36] Nußberger (n 17) 174.
[37] Arnardóttir (n 1) 29. See *SAS v France* (n 13) para 129.
[38] Nußberger (n 17) 174; B Baade, 'The ECtHR's Role as a Guardian of Discourse: Safeguarding a Decision-Making Process Based on Well-Established Standards, Practical Rationality, and Facts' (2018) 7 LJIL, 1, 3.
[39] *Hutten-Czapska v Poland*, App No 35014/97, Judgment of 19 June 2006, para 166; cf Arnardóttir (n 1) 29ff.

individuals *in concreto* to a more lenient review of the general justifications provided by the national authorities *in abstracto*.[40] The Grand Chamber formulated the following guideline: The more convincing the general justifications for a general measure, the less importance the Court will attach to its impact in the particular case.[41] In *Shindler*, a voting rights case lodged against the United Kingdom mainly under Article 3 of Protocol No 1, the Court also reasoned that general measures which do not allow for discretion in their application—like the relevant legislation permitting only British citizens residing overseas for less than 15 years to vote in parliamentary elections—require close scrutiny.[42] This indicates that the Court is more cautious when it defers to parliaments than when it defers to domestic courts and their assessments of the effects of general measures in individual cases.[43]

### C. Criteria

Despite its significant effect on the margin of appreciation and taking into account the complexity of procedures, the ECtHR's analysis and evaluation of domestic process has been rather cursory so far, especially regarding parliamentary process. The case law lacks a general and coherent doctrine.[44] In *Animal Defenders*, the Court highlighted the 'exceptional examination by parliamentary bodies of the cultural, political and legal aspects'.[45] It appreciated the 'serious debate' of the impugned measure in parliament 'before the legislation was adopted' in *Sukhovetskyy*, a voting rights case concerning the requirement for candidates to pay an electoral deposit under the Ukrainian Parliamentary Elections Act.[46] In *Parrillo*, the Court acknowledged that parliamentary discussions had taken account of the different scientific and ethical opinions and questions on the subject of Italy's ban on donating for scientific research embryos obtained from an *in vitro* fertilization and not destined for implantation constitutes.[47] Conversely, in *Lindheim* the Court faulted the lack of 'specific assessment' of whether the

[40] *Animal Defenders International v United Kingdom* (n 13) para 108; Arnardóttir (n 1) 32. The move was controversial amongst the judges of the Grand Chamber (see Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, paras 9ff). Later case law relied on it only very rarely; see, eg, *National Union of Rail, Maritime and Transport Workers v United Kingdom*, App No 31045/10, Judgment of 8 April 2014, paras 101ff.

[41] *Animal Defenders International v United Kingdom* (n 13) para 109.

[42] *Shindler v United Kingdom* (n 13) para 116.

[43] Arnardóttir (n 1) 32.

[44] For an overview of the many different ways in which the ECtHR applies procedural-type review at different stages of its review and for drawing both positive and negative inferences and with different weight attached to procedural arguments, see Huijbers (n 1) 187–93.

[45] *Animal Defenders International v United Kingdom* (n 13) para 114.

[46] *Sukhovetskyy v Ukraine* (n 19), para 65. See also *Murphy v Ireland* (n 19) para 73; *Hirst v United Kingdom (No 2)* (n 16) para 79; *Alajos Kiss v Hungary* (n 29) para 41; *Shindler v United Kingdom* (n 13) para 102; *Anchugov and Gladkov v Russia* (n 29) para 109.

[47] *Parrillo v Italy* (n 23) paras 184ff.

amendment at issue achieved a 'fair balance' between the interests affected by the legislative extension of ground lease contracts under scrutiny.[48] It was dissatisfied with the lack of expert studies in *Markin*, a complaint lodged against Russia, whose domestic authorities refused to grant parental leave to men.[49] In *Hirst*, the Court could not find any 'evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote'.[50] In some cases, the Court did not distinguish adequately between an examination of the (substantive) 'arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature' and an examination of domestic procedures *stricto sensu*.[51]

Scholars have therefore criticized the Court's invocation of the quality of legislative debate for its *ad hoc* character and lack of transparent criteria.[52] These scholars recommend that the quality of deliberative debate should be considered in accordance with standardized key criteria, determined and communicated in a transparent manner. Suggested criteria for assessing parliamentary process include the degree of participation, as well as the quality of representation and of the consideration given to the views of rights-bearers and intensive engagement with minority voices. Furthermore, the Court should assess systematically whether there was evidence presented to the legislature of the necessity of the measure that restricts or violates rights.[53] Beyond the criteria directly relevant for assessing parliamentary process, the nature of the right, its importance and the gravity of the limitations will also be relevant for the consequences that the ECtHR can draw from this procedural assessment.[54]

While there is certainly room for improvement in this regard, the criteria for participation and representation are still relatively vague and abstract. Given the fact that the Court needs to cope with the diversity in the nature of the parliamentary processes within 47 States Parties, one should not have too high expectations with regard to clear and consistent criteria.[55] Inclusiveness, participation and transparency can be guaranteed in many ways.[56] The example of domestic courts that have developed analytical tools to govern

[48] *Lindheim v Norway* (n 19) para 128.

[49] *Konstantin Markin v Russia*, App No 30078/06, Judgment of 7 October 2010, para 57; *Konstantin Markin v Russia*, App No 30078/06, Judgment of 22 March 2012, para 144.

[50] *Hirst v United Kingdom (No 2)* (n 16) para 79.

[51] See, on the one hand, *S.H. and others v Austria*, App No 57813/00, Judgment of 3 November 2011, para 97; *Parrillo v Italy* (n 23) para 170; *Garib v the Netherlands*, App No 43494/09, Judgment of 6 November 2017, para 138; *Correia de Matos v Portugal* (n 13) para 117; on the other hand, *Animal Defenders International v United Kingdom* (n 13) para 108 (cited in *Garib* and *Correia de Matos* without making this distinction).

[52] L Lazarus and N Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference' in M Hunt, HJ Hooper and P Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Hart Studies in Comparative Public Law (Hart 2015) 385, 393ff. [53] ibid 393ff. [54] ibid 400ff. [55] Saul (n 19) 752.

[56] Nußberger (n 17) 168.

their analysis of legislative materials in other judicial proceedings[57] is of limited value for the ECtHR,[58] for the simple reason that domestic courts have to cope with law-making procedures of only one jurisdiction. The ECtHR is in a dilemma: On the one hand, the very diversity of domestic procedures creates the need for the Court to make explicit the presumptions on which subsidiarity rests. On the other hand, this diversity of domestic procedures is a challenge if the Court wants to assess their credentials based on transparent, generalizable and nonetheless ambitious procedural criteria.

The analysis of the ECtHR's procedural approach—its modes and effect and the criteria applied by the ECtHR—allows us to assess how it affects substantial human rights commitments. While the procedural approach implies a shift from substantive to procedural values, the content of the procedural values has remained rather vague so far. Still, scholars have offered a number of values that could guide the Court's engagement with the processes of national parliaments, including procedural justice, comity with member States, political democracy, but also the legitimacy and effectiveness of the Court as a source of rights protection.[59] The Court itself has struggled to enhance the foreseeability of its jurisprudence and to guide the balancing process of domestic institutions by elaborating, for some recurring problems, lists of substantive factors to be weighed in order to arrive at a balanced decision.[60] This is true for conflicts between the individual's right to respect for his or her private life and publishing companies' right to freedom of expression,[61] as well as for the protection of foreigners in cases of deportation following a series of criminal convictions.[62]

## III. THE MOVE TOWARD PROCEDURE: BETWEEN SUBSIDIARITY AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS

### *A. Procedural Rationality and Subsidiarity*

#### *1. The turn to procedure and substantial human rights obligations*

So far, we have seen that the ECtHR's procedural approach implies a certain shift of attention from substance to procedure and, at least in some circumstances, a less strict substantive review if certain procedural demands are fulfilled. This raises the broader issue of whether this move

[57] Lazarus and Simonsen (n 52) 393; Saul (n 19) 752.

[58] For the limited usefulness of the guidance offered by the way in which domestic courts have dealt with parliamentary process in their doctrines of deference, see A Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34 OJLS 443, 472ff. For an assessment of the UK experience, see A Sathanapally, 'The Modest Promise of "Procedural Review" in Fundamental Rights Cases' in Gerards and Brems (n 1) 40.

[59] Saul (n 19) 752, with further references.

[60] Nußberger (n 17) 174.

[61] *Von Hannover v Germany (No 2)* (n 26) paras 108ff.

[62] *Maslov v Austria*, App No 1638/03, Judgment of 23 June 2008, paras 71–76.

toward procedure also entails a retreat from substantive human rights obligations.[63] A more human-rights-oriented order and thicker human rights standards commonly represent a 'rise' of the international rule of law.[64] Conversely, the ECtHR's move to procedure could be regarded as a departure from common values that fits a possible general 'decline' of the international rule of law. The ECtHR would simply respond to the criticism voiced by several States for second-guessing domestic decisions of the democratically elected legislator,[65] and specifically yield to those States most averse to the Court's 'intervention in their domestic affairs', like the United Kingdom, Switzerland or Russia. Additionally, by enhancing the role of parliaments, the ECtHR assuages democratic concerns.[66] If proceduralization actually is a reaction to Convention State critique, this is a remarkably targeted reaction in the UK voting rights cases.[67] In these cases, the Court directly countered the critique of its own democratic legitimacy with a critique of the United Kingdom's democratic procedures.

Notably, a considerable asymmetry exists in the Strasbourg case law between positive and negative inferences on substantive controls standards from procedural rationality control.[68] Whilst there are few cases in which the ECtHR has drawn a negative inference from an absence of parliamentary deliberation on the rights issue,[69] the Court has drawn a positive conclusion from substantial parliamentary debate in numerous cases.[70] However, one cannot simply

[63] Arnardóttir (n 8); see also JP Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (2013) 31 NordicJHumRts 28, 48ff; Popelier and van de Heyning (n 3).

[64] H Krieger and G Nolte, 'The International Rule of Law – Rise or Decline? Points of Departure' (2016) 1 KFG Working Paper Series, 8.

[65] For summaries of the critique voiced regarding the ECtHR's understanding of its role, see R Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25 EJIL 1019, 1020–2; BM Oomen, 'A serious case of Strasbourg-bashing? An evaluation of the debates on the legitimacy of the European Court of Human Rights in the Netherlands' (2016) 20 IJHR 407; Baade (n 38) 1ff.

[66] M Hunt, 'Introduction' in Hunt, Hooper and Yowell, *Parliaments and Human Rights* (n 52) 1, 2.

[67] *Hirst v United Kingdom (No 2)* (n 16) para 79; *Greens and MT v United Kingdom*, App Nos 60041/08 and 60054/08, Judgment of 23 November 2010, paras 73–79; *Shindler v United Kingdom* (n 13) para 117.

[68] Kavanagh (n 58) 473ff.

[69] *Goodwin v United Kingdom*, App No 28957/95, Judgment of 11 July 2002, paras 92f; *Hirst v United Kingdom (No 2)* (n 16) para 79; *Dickson v United Kingdom*, App No 44362/04, Judgment of 4 December 2007, para 83; *Konstantin Markin v Russia* (n 49) para 114; *Lindheim v Norway* (n 19) paras 85, 128.

[70] eg, *Dudgeon v United Kingdom*, App No 7525/76, Judgment of 22 October 1981, para 59; *James v United Kingdom*, App No 8793/79, Judgment of 21 February 1986, para 48; *Mathieu-Mohin and Clerfayt v Belgium*, App No 9267/81, Merits, Judgment of 2 March 1987, para 57; *Goodwin v United Kingdom* (n 69) para 79; *Hatton and others v United Kingdom* (n 12) paras 128f; *Murphy v Ireland* (n 19) para 73; *Maurice v France*, App No 11810/03, Judgment of 6 October 2005, paras 121, 124; *Ždanoka v Latvia*, App No 58278/00, Judgment of 16 March 2006, para 134; *Sukhovetskyy v Ukraine* (n 19) para 65; *Evans v United Kingdom* (n 19) para 86; *Friend, The Countryside Alliance and Others v UK* (n 19) para 50; *A, B and C v Ireland* (n 11) paras 233, 239; *Animal Defenders International v United Kingdom* (n 13) paras 108, 116; *Shindler v United Kingdom* (n 13) para 117.

conclude from this that the new attention to parliamentary procedure entails a relaxation of substantive control standards. Procedural rationality is only one of the factors the Court takes into account when determining the intensity of review, and its actual influence is difficult to reconstruct. The overarching objective of the ECtHR's efforts to reformulate the criteria defining the appropriate level of deference to be afforded to States Parties is to implement a more robust and coherent concept of subsidiarity in conformity with the Brighton Declaration and Protocol 15.[71] The *SAS* judgment, next to *Animal Defenders*, is one of the more prominent judgments—and indeed a controversial one[72]—in which the Court addressed the processes of a national parliament. In its reasoning, the Grand Chamber highlighted that

> [i]t is […] important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are […] in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.[73]

This striking prominence of subsidiarity results not only from deteriorated relations between the Court and certain member States, but also from the Court's high caseload.[74] From this vantage point, the emphasis on subsidiarity suggests that States Parties should do more to fulfil their obligations so that cases do not arise. Moreover, the procedural approach to the margin of appreciation makes explicit a premise of the Court's deference: Deference is based on the assumption that domestic institutions and procedures are working as they should, in a transparent manner, allowing for participation of affected rights-holders and, generally, under conditions that are capable of generating reasonable outcomes.[75] The procedural approach lays the foundation for an 'embedded' international regime of human

[71] High Level Conference on the Future of the European Court of Human Rights 'Brighton Declaration' (20 April 2012) <http://www.echr.coe.int/Documents/2012_Brighton_Final Declaration_ENG.pdf>; Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 24 June 2013, CETS No 213. See Spano (n 14) 498; Saul (n 19) 747; Nußberger (n 17) 172; I Cram, 'Protocol 15 and Articles 10 And 11 ECHR—The Partial Triumph of Political Incumbency Post-Brighton?' (2018) 67 ICLQ 477. For an analysis of procedural review as a variant of judicial restraint see Sathanapally (n 58) 54–6. For a meticulous analysis of the complex relationship between the procedural approach and subsidiarity, see Huijbers (n 1) 193ff.

[72] See joint partly dissenting opinion of Judges Nußberger and Jäderblom; H Yusuf, 'S.A.S. v France: Supporting "Living Together" or Forced Assimilation?' (2014) 3 IntlHumLRev 277; J Adenitire, 'SAS v France: Fidelity to Law and Conscience' (2015) EHRLR 78; A Steinbach, 'Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights' (2015) 4 CJICL 29.

[73] *SAS v France* (n 13) para 129.

[74] Saul (n 19) 749ff.

[75] JH Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 ELJ 80, 87; Saul (n 19) 751ff.

rights,[76] or for subsidiarity as 'shared responsibility'.[77] In line with this, the Brussels Declaration of 2015 and the Copenhagen Declaration of 2018 pay closer attention than the Brighton Declaration of 2012 to the role of a range of actors for effective national implementation, including effective domestic remedies and appropriate involvement of national parliaments.[78] The Copenhagen Declaration calls upon States Parties to ensure that policies and legislation comply fully with the Convention, including by checking, in a systematic manner and at an early stage of the process, the compatibility of draft legislation and administrative practice in the light of the Court's jurisprudence.[79] Accordingly, the turn to procedure is not a simple retreat from substantial obligations.

### 2. *Subsidiarity and human rights effectiveness*

Apart from specifying the terms of 'shared responsibility', the turn to procedure can make the international protection of human rights more effective,[80] as a broader picture of international human rights protection demonstrates.[81] The importance of enhancing the role of parliaments in human rights issues has been the focus of ongoing initiatives of political bodies at the international level, such as the Parliamentary Assembly of the Council of Europe (PACE) and the Inter-Parliamentary Union (IPU).[82] Beyond the Council of Europe, a number of bodies that assess the human rights compliance record of States—like the ICCPR Human Rights Committee (HRC), the Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee

[76] LR Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 EJIL 125, 159.

[77] JH Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of 'Shared Responsibility'' in JH Gerards (ed), *Implementation of the ECHR and of the Judgments of the ECtHR in National Case Law: A Comparative Analysis* (Intersentia 2014) 13 (on the ECtHR's relationship with the domestic courts).

[78] High-Level Conference on the 'Implementation of the European Convention on Human Rights, Our Shared Responsibility' 'Brussels Declaration' (27 March 2015) <https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf>; High Level Conference 'The European Human Rights System in the Future Europe' (13 April 2018) <https://rm.coe.int/copenhagen-declaration/16807b915c>.

[79] Copenhagen Declaration 2018, para 16(b).

[80] D Anagnostou and A Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter' (2014) 25 EJIL 205.

[81] KL McCall-Smith, 'Human Rights Treaty Bodies, Proceduralization and the Development of Human Rights *Jus Commune*' (2015) 5 ESIL Conference Paper Series 1; M Saul, 'How and When Can the International Human Rights Judiciary Promote the Human Rights Role of National Parliaments?' in M Saul, A Føllesdal and G Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond*, Studies on Human Rights Conventions (Cambridge University Press 2017) 135.

[82] See, eg, Res 1823, PACE; H Yamamo, *Tools for Parliamentary Oversight: A Comparative Study of 88 National Parliaments* (Inter-Parliamentary Union 2007, published by Inter-Parliamentary Union); A Drzemczewski and J Lowis, 'The Work of the Parliamentary Assembly of the Council of Europe' in Hunt, Hooper and Yowell, *Parliaments and Human Rights* (n 52) 309; I Schwarz, 'The Work of the Inter-Parliamentary Union' in Hunt, Hooper and Yowell ibid 329.

on the Rights of the Child (CRC)—promote implementation by domestic parliaments.[83] They are increasingly interested in parliamentary oversight as a complementary instrument for human rights realization. Their concluding observations in reporting processes offer several routes to promote the quality of parliamentary process. One is to make recommendations for the executive to involve parliament in the reporting process. Greater direct involvement in reporting can generate higher information levels, which can then be a basis for parliamentary activities that are more aware of international human rights. While calls for more direct engagement with parliaments have emanated from members of the HRC,[84] CEDAW has been most active in seeking to generate parliamentary involvement and has gone one step further. As a matter of principle, CEDAW includes a prominent paragraph in its concluding observations on State reports calling for a role for parliaments in the implementation of its recommendations. Another means that concluding observations harness is direct recommendations to the executive to take measures to empower parliaments in the development of legislation. CEDAW makes recommendations that can serve either to enhance the working conditions of parliaments or directly to address the types and nature of activities that are desirable in relation to particular legislation. Other bodies such as CRC have also voiced calls for legislative action.[85] Under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Subcommittee on Prevention of Torture routinely stresses that the National Preventive Mechanism—the 'domestic oversight' arm of the convention framework—should have its reports laid before Parliament and be subject to parliamentary discussion.[86] This once again highlights the role of Parliamentary processes in domestic level human rights implementation within the framework of UN human rights conventions.

Proceduralization can 'give teeth' to international human rights review, especially in complex or highly contested situations where international institutions of human rights protection would otherwise hesitate to engage too actively.[87] To be realistic, good process can increase the prospects of—but certainly does not guarantee—good outcomes from a rights perspective.[88]

[83] On role of parliaments in the protection and realization of human rights, see B Chang and G Ramshaw, *Strengthening Parliamentary Capacity for the Protection and Realisation of Human Rights: Synthesis Report* (2016); Hunt, Hooper and Yowell, *Parliaments and Human Rights* (n 52).

[84] See, eg, UN Doc CCPR/C/SR.2412 (2006) para 52, Ruth Wedgwood calling on the HRC to find ways to 'speak to states and to parliaments directly' and to seek 'to increase the influence and didactic effectiveness of its jurisprudence'.

[85] eg, UK, CRC/C/OPSC/GBR/CO/1 (8 July 2014) para 44.

[86] See Guidelines on national preventive mechanisms, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/12/5 (2010) para 29.

[87] Arnardóttir (n 1) 14.

[88] Brems (n 10) 159; A Donald and P Leach, 'The Role of Parliaments Following Judgments of the European Court of Human Rights' in Hunt, Hooper and Yowell, *Parliaments and Human Rights* (n 52) 59, 84; Saul (n 21) 1082.

In the light of this ambiguity, it comes as no surprise that, on the one hand, the ECtHR has been criticized for overstepping its mandate by including parliamentary process in the Court's reasoning,[89] while on the other hand its approach has also raised concerns about a reduction in the level of protection of rights.[90] Empirical research and case studies demonstrate that the ECtHR's attention to procedure, as well as the formulation of procedural requirements, may lead national authorities to step up their efforts to provide for better regulation and evidence-based decision-making.[91] Quite in contrast to a 'retreat', however, the procedural approach is a 'bold' strategy[92] that can be fairly intrusive: The ECtHR tries to create incentives for parliamentary bodies, domestic courts and authorities to actively take into account the Convention and its own case law, to influence the institutional prerequisites of and to shape its domestic partners in a dialogue about the meaning of the Convention. This move is daring because structural arrangements are even more difficult to change than substantive commitments.[93] Therefore, it is unlikely that States Parties that resist the ECtHR will ease into structural changes of their law-making procedures. The ECtHR's assessment of domestic procedures actually prompted fierce reaction in both Russia and the United Kingdom. These examples demonstrate that a procedural turn does not necessarily smoothen the relationship between the Court and the national authorities.[94]

### *B. Procedural Rationality and European Consensus*

#### *1. Interaction of procedural rationality and consensus*

If we insist on the moral value of human rights and require interpretation to be based on 'moral principles that underpin human rights',[95] a procedural approach to the margin of appreciation—like any form of deference to States Parties—signifies a retreat from these moral principles, however defined. By contrast, human rights as fundamental values enshrined in legal practice and

[89] ibid, Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, para 7: 'it is not for the Court to prescribe the way in which national legislatures carry out their legislative functions'. For the reaction to the *Hirst (No 2)* judgment in the United Kingdom, see E Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 HRLR 504.

[90] J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 455, 460; Brems (n 10) 159; Donald and Leach (n 88) 84. For a careful assessment of the risks of the proceduralization of human rights protection, see Nußberger (n 17) 165ff.

[91] Gerards and Brems (n 1) 12–13.

[92] Lazarus and Simonsen (n 52) 401.

[93] DJ Levinson, 'Parchment and Politics: The Positive Puzzle of Constitutional Commitment' (2011) 124 HarvLRev 657 (offering a comparative outlook).

[94] Nußberger (n 17) 162ff; referring to *Konstantin Markin v Russia* (n 49); *Hirst v United Kingdom (No 2)* (n 16).

[95] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 59.

entrenched in European societies can be progressively developed with an approach that avails itself of the interplay of procedural rationality control and European consensus. Consensus-based arguments rely on comparative analysis. Indeed, in the case law of the ECtHR, arguments referring to procedural rationality control interact significantly with arguments based on European consensus. Both the procedural approach and European consensus belong to the second-order reasons that influence the Court's authority to weigh first-order reasons for itself[96] and provide criteria for the breadth of the margin of appreciation in a structural sense. They both define the relationship between the ECtHR and national authorities with regard to how much discretion the Court will afford to the defendant State.[97] The margin of appreciation is broad in cases where there is no European consensus and hence no common or converging approach among Convention States and in cases that pertain to morally or politically sensitive rights.[98] Furthermore, as we have seen, procedural rationality control can have the effect of broadening the defendant State's margin of appreciation. Accordingly, arguments from procedural rationality control and European consensus can be complementary. Since both factors have a combined effect on the breadth of the margin of appreciation, the ECtHR may also see a lack of a European consensus in a given area as a reason for giving additional consideration to procedural criteria in order to determine the margin of appreciation. This fits the direct link observed above between the role of procedural criteria and the breadth of the margin of appreciation, as defined by other second-order reasons. By contrast, when there is a strong consensus, the Court is likely to view even a strong, and procedurally proven, domestic consensus in a contrary direction as insufficient to give a broad, or any, margin of appreciation in a given area.[99]

The interaction of procedural rationality and consensus is twofold. First, the procedural approach lays the foundation for an active engagement of States Parties' domestic institutions that can contribute to a consolidation of European consensus later analysed by the Court. Secondly, the procedural approach can specify the conditions for contesting a progressive consensus established by the Court in a constructive mode. In both modes, this interaction facilitates a dynamic evolution of European human rights either achieved in the practice of Convention States (analytic or bottom-up

[96] Baade (n 38) 12.

[97] G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 OJLS 705, 721: margin of appreciation in a substantive and a structural sense. The use of the term in a substantive sense is a reference to the discretion that a State has as a general matter to determine the relationship between human rights and public interest.

[98] S Besson, 'Subsidiarity in International Human Rights Law—What Is Subsidiary about Human Rights?' (2016) 61 AmJJuris 69, 81.

[99] For an analysis of the encounter of European consensus and a procedural approach to the margin of appreciation in the ECtHR's case law, see T Kleinlein, 'Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' (2017) 28 EJIL 871, 873ff.

approach) or accomplished by the Court (constructive or top-down approach). At this point, it should be clarified that the Court's practice is diverse. The ECtHR utilizes various sources to establish a consensus in its case law. Apart from a consensus based on comparative analysis of the law and practice of the contracting parties, the Court also relies on international treaties,[100] on an internal consensus in the respective respondent State and, in some cases, on a consensus among experts.[101]

### 2. *Procedural criteria for the recognition of consensus developed bottom-up*

In the first mode, the procedural approach to the margin of appreciation lays the foundation for the progressive development of a meaningful consensus in European societies. The ECtHR continuously crystallizes and consolidates the (evolving) minimal human rights protection standards identified in the practice of different organs of the democratic States Parties to the convention in its case law. This element of a dynamic interpretation is especially relevant in areas that are affected by technological, scientific and medical developments, by societal changes or by shifting moral or ethical convictions. The ECtHR relies on consensus-based reasoning especially in case of newly litigated issues and in the absence of established case law, or in order to change own precedents.[102] If a core right is at stake, the Court will not base itself on consensus.[103] By referring to European consensus, the ECtHR validates the custom stemming from States' subsequent practice under the Convention. The Court entrenches minimal human rights protection standards and reimposes them on domestic authorities.[104]

In order to enable the Court to base European consensus on a profound comparative analysis, there must be a significant engagement with Convention rights within the member States. The ECtHR can then more easily recognize, validate and consolidate any consensus that is developing bottom-up. For this reason, the Court encourages the engagement of the domestic authorities with the substantive rights of the ECHR, communicates procedural obligations and valuates compliance via the degree of substantial scrutiny it applies.[105] Through its turn to procedure, the Court communicates

[100] In the exceptional case of *Goodwin v United Kingdom* (n 69) paras 84ff, the Court placed more emphasis on the 'continuing international trend' towards legal recognition of transsexuals. In the Court's reasoning, this continuing international actually substitutes European Consensus. For a discussion, see K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 65ff.

[101] For a typology, see ibid 38ff.

[102] K Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) 56 PL 534, 545.

[103] *Parrillo v Italy* (n 23) paras 174, 176.

[104] Besson (n 98) 101: '*erga omnes* effect'; A Müller, 'Domestic Authorities' Obligations to Co-develop the Rights of the European Convention on Human Rights' (2016) 20 IJHR 1058, 1059.

[105] ibid 1068.

the different aspects of the general procedural obligations of the executive, the legislature and the judiciary to secure convention rights in an evolutionary fashion, and actively takes on its role as a 'facilitator of the self-interpretation'[106] of human rights law by democratic States.[107] This facilitation by the ECtHR increases the possibility for the progressive development of the substantive provisions of the Convention in present-day conditions,[108] through 'mutual positivization' of international and domestic human rights law.[109]

In line with this theoretical framework, the relevance of procedural criteria for the identification of European consensus is acknowledged in the Joint Dissenting Opinion of Judges Pejchal and Wojtyczek in the Grand Chamber judgment in *Correia de Matos v Portugal*.[110] The Grand Chamber held by a majority of nine votes to eight that the right to a fair trial was not violated with regard to the applicant, who was not allowed to conduct his own defence in the criminal proceedings against him. Five dissenting opinions are annexed to this judgment and demonstrate, *inter alia*, the potential for conflict of both procedural rationality control and consensus analysis in the Court's practice.[111] The dissenting judges Pejchal and Wojtyczek were not persuaded that the quality of the legislative process can justify disproportionate measures. However, they recognized that the question of the democratic or authoritarian pedigree of a legislative measure may be relevant for the purpose of addressing questions concerning the existence of a European consensus.[112] Relying on European consensus in this way, the Court can refer to the democratic law-making of other institutions in the Convention States, or at least of institutions that seem to be better placed in terms of democratic legitimation. The consensus method serves the Court to bring its judgments—which are based on vaguely defined human rights norms, and yet question the decisions of democratically elected governments[113]—more in line with democratic law-making.

### *3. Procedural criteria for contesting a progressive consensus established by the Court top-down*

To be sure, the ECtHR does not shrink from the progressive development of Convention guarantees. The second, top-down mode of interaction between procedural rationality control and European consensus becomes apparent when the Court progressively builds on an 'emerging' consensus. In fact, and

[106] Besson (n 98) 100. [107] Müller (n 104) 1059ff. [108] ibid 1060.
[109] S Besson, 'Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimations' in R Cruft (ed), *Philosophical Foundations of Human Rights*, Philosophical Foundations of Law (OUP 2015) 279, 280. [110] *Correia de Matos v Portugal* (n 13).
[111] ibid, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Sajó, paras 18 and 72. [112] ibid, Joint Dissenting Opinion of Judges Pejchal and Wojtyczek, para 9.
[113] Dzehtsiarou (n 100) 144.

contrary to what the notion of 'consensus' might connote, European consensus as identified by the Court is rarely based on uniform laws or even actual practice in all States Parties: Consensus does not mean unanimity.[114] The notion of consensus does not require the Court to wait for all contracting States to adopt a certain legislative provision or practice. Even in the majority of cases, European consensus is used in the sense of a trend, a general direction in which a certain area of the law is developing or changing in a certain number of Convention States. The Court does not look for identical legal rules, but rather strives to trace a convergence between States[115] and utilizes European consensus as an instrument to develop the guarantees of the Convention progressively.[116] The case law reveals a flexible use of the consensus argument.[117] This approach allows the Court to show less deference to member States than the invocation to consensus might suggest to the ingenuous observer, and to adopt a more progressive, rights-friendly approach.[118] For example, in *Hirst v United Kingdom*, the threshold constituted just over 50 per cent of the then members of the Council of Europe. In *EB v France*, the applicant referred to the practices of barely ten of the 47 present Council of Europe States. In *A, B and C v Ireland*, the ECtHR went against a clear majority of States Parties.[119] Moreover, consensus can move beyond the actual consent of States parties if the ECtHR refers to a consensus that exists only on the level of principles, not of specific rules, and derives specific consequences for the case at hand from this abstract principle.[120]

These judgments—which, to a certain extent, establish consensus top-down, through an international court—do not necessarily represent 'the last word'. Rather, they set a sort of 'soft' precedent.[121] If a finding that the Convention has been violated also depends on procedural conditions that vary among the State Parties, it will potentially become more difficult to deduce general statements from specific judgments.[122] In reaction to the *Animal Defenders*

[114] ibid, at 12ff.

[115] Dzehtsiarou (n 102) 542.

[116] B Petkova, 'The Notion of Consensus as a Route to Democratic Adjudication?' (2013) 14 CYELS 663. See, eg, *EB v France*, App No 43546/02, Judgment of 22 January 2008 (pronouncing as discriminatory national policies preventing homosexuals from adopting children).

[117] For a case analysis exploring the roles of legal and political factors, see N Bamforth, 'Social Sensitivity, Consensus and the Margin of Appreciation' in P Agha (ed), *Human Rights between Law and Politics: The Margin of Appreciation in Post-National Contexts*, Modern Studies in European Law (Hart 2017) 129; for a detailed analysis of inconsistencies in the use of the consensus argument, see J Asche, *Die Margin of Appreciation: Entwurf einer Dogmatik monokausaler richterlicher Zurückhaltung für den europäischen Menschenrechtsschutz* (Springer 2018) 99–149.

[118] For instance, in *Goodwin v United Kingdom*, the Court stated: 'In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments …' (*Goodwin v United Kingdom* (n 69) para 92).

[119] *Hirst v United Kingdom (No 2)* (n 16) para 81; *EB v France* (n 116); *A, B and C v Ireland* (n 11). See F de Londras and K Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, *A, B & C v Ireland*, decision of 17 December 2010' (2013) 62 ICLQ 250, 256.

[120] Dzehtsiarou (n 100) 14ff.

[121] Baade (n 38) 18.

[122] Kleinlein (n 99) 892.

judgment, a commentator claimed that it is an obvious irony if debates provoked by a certain precedent of the ECtHR can contribute to the 'quasi-overruling' of this very precedent.[123] However, if domestic institutions seriously engage with the Court's judgments in a procedurally sound manner, this gives them some flexibility. In that sense, the Court's more progressive judgments building on an emerging consensus can provide a trigger for democratic contestation and deliberation. It is plausible to assume that they even have a special potential of sparking debate, both within the nation States and at the level of the Council of Europe.[124] If progressive judgments that rely on an emerging consensus initiate a debate that finally also has an impact on the Court and allows the Court to establish a dialogue with the various constituencies in the State Parties, even backlash can be beneficial for the legitimacy of the Court's ruling.[125]

However, as the *Hirst* case demonstrates, the debate provoked by judgments of the ECtHR can simply be dominated by general concerns about the legitimacy of the ECtHR rather than any extensive engagement with the nature of the right at stake.[126] UK critics of the *Hirst* judgment did not contest primarily the meaning that the ECtHR gave to Article 3 of Protocol 1. Criticism did not centre on the 'correct' meaning of Article 3 Protocol 1, but on the Court's purported activism and undue interference with affairs of domestic democracy. Therefore, in the later *Greens and MT* case, the Court declined the United Kingdom's invitation to overturn the *Hirst* judgment in the light of this debate.[127] The Court made it clear that the mere fact of such a debate is not enough: it is the quality of the deliberation taking place that matters.[128] In this second mode, procedural rationality control ensures that an avenue of democratic norm contestation is open and specifies the procedural criteria for contestation.

In both modes, the interaction of procedural rationality and consensus in the Court's reasoning incentivizes States Parties to create structures with embedded parliamentary consideration of Convention standards and the ECtHR's judgments. Therefore, its current reformulation or refinement of the principle of subsidiarity has the potential both to enhance the democratic legitimacy of

[123] T Lewis, '*Animal Defenders International v United Kingdom*. Sensible Dialogue or a Bad Case of Strasbourg Jitters?' (2014) 77 The Modern Law Review (2014) 460, 469.

[124] Petkova (n 116) 665.

[125] cf, for related arguments with regard to the United States, RM Cover, 'The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation' (1981) 22 Wm&MaryLRev 639–82; PW Kahn, 'Interpretation and Authority in State Constitutionalism' (1993) 106 HarvLRev 1147; RC Post and RB Siegel, '*Roe* Rage: Democratic Constitutionalism and Backlash' (2007) 42 HarvCR-CLLRev 373. For a more in-depth discussion of the argument for the ECHR, see Kleinlein (n 98) 887ff.

[126] D Nicol, 'Legitimacy of the Commons Debate on Prisoner Voting' (2011) PL 681; Bates (n 89); S Fredman, 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Rights to Vote' in Hunt, Hooper and Yowell, *Parliaments and Human Rights* (n 52) 447.

[127] *Greens and MT v United Kingdom* (n 67).

[128] Hunt (n 66) 18.

the Court's rulings[129] and to stimulate domestic democracy. By incentivizing deliberation,[130] it could amount to a genuinely 'democracy enhancing approach'.[131] The Court does not misinterpret subsidiarity as a retreat, but uses it as an instrument to reconcile the need for a democratic legitimation of the Court's judgments and the progressive development of human rights in both an analytic and a constructive mode, bottom-up and top-down.

## IV. CONCLUSION AND OUTLOOK

To conclude, proceduralization does not imply a retreat or a deterioration of international human rights as fundamental values or a decline of the rule of law. As we have seen, proceduralization can make human rights protection more effective and reinforces procedural values as an element of the rule of law. However, the prospects and success of a procedural approach will depend on the ability of international judges to cope with the difficult task of spelling out and operationalizing procedural criteria that are clear, transparent and demanding and allow for a procedural rationality control that is flexible and takes into account the diversity of domestic procedures.

Arguably, the turn to procedure we traced in international human rights law has broader implications for the interface of international and domestic law, at least in those areas of international law that are strongly 'judicialized'. If international and domestic institutions assume a 'shared responsibility', international and domestic law are more subtly interweaved. International judicial institutions share their authority with domestic institutions on the basis of an allocation of power that is defined, *inter alia*, by the procedural criteria applied in international judicial review as part of the standard of review. This gives rise to a new flexibility and complexity in the interaction of international and domestic institutions in the realization of human rights.

[129] A von Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 ICON 1023.

[130] Sathanapally (n 58) 56–60.

[131] Spano (n 14) 499.