The Role of the European Court of Human Rights: The "Procedural Turn" and the Principle of Subsidiarity

by Jasmin Rauch

LLM Final Thesis
SUPERVISOR: Eszter Polgári
Central European University Private University
Quellenstrasse 51-55, 1100 Vienna
Austria

June, 2022

TABLE OF CONTENTS

ABSTRACT

The European Court of Human Rights is one of the most important international institutions to protect human rights in Europe.[1] As a result of the emphasis on subsidiarity during the reform process and the adoption of Protocol No. 15, the Court is said to be in an "Age of Subsidiarity. At the same time, a "procedural turn" has been indicated in the Court's case-law referring to an increased use of procedural-type review which focuses on quality of the decision-making process at the legislative, administrative, and judicial stages when assessing whether a violation of Convention rights occurred. A link between the emphasis on subsidiarity and the "procedural turn" can be presumed. Consequently, the question arises if the Court is still fulfilling its role in protecting human rights while adopting a procedural approach with regard to the principle of subsidiarity. A focus will be placed on analyzing the implications the procedural approach has on the protection of human rights by discussing a concrete example from the Court's case law and pointing to the potential risks for human rights protection in general.

[1] Leonie M. Huijbers, "The European Court of Human Rights' Procedural Approach in the Age of Subsidiarity" (2017) 6 *Cambridge International Law Journal*, 177.

INTRODUCTION

The European Court of Human Rights (in the following "the Court") is one of the most important international institutions to protect human rights in the Council of Europe.[2]

According to Article 19 of the European Convention of Human Rights (in the following "the Convention") the Court is established "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols". In order to fulfill this role, the Court must give effect to the principle of subsidiarity. The principle of subsidiarity has gained great prominence as the reform processes and especially the Brighton Conference in 2012 show which culminated into the amendment of the Convention with Prot. 15 adding a reference to the principle and the margin of appreciation to the Preamble of the Convention. [3] The Preamble states that:

> "Affirming that the High Contracting Parties, in accordance with the *principle of subsidiarity*, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy *a margin of appreciation*, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

The principle of subsidiarity is crucial to the debates about what should be the primary function of the Court with regard to the relationship to national Courts.[4] The current era of the Court has been described as the "Age of Subsidiarity" in where the Court will empower the member States to "bring rights home".[5] At the same time, many scholars have indicated a "procedural

[2] Leonie M. Huijbers (n 2), 177.
[3] Article 1, Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 Jun. 2013, CETS No. 213, (accessed under: www.echr.coe.int/Documents/Protocol_15_ENG.pdf).
[4] Alastair Mowbray Alastair Mowbray, "Subsidiarity and the European Convention on Human Rights" (2015) 15 Human Rights Law Review, 318.
[5] Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", (2014) 14

turn" of the Court by noticing an increased procedural-type review which focuses, *inter alia*, on the quality of the decision-making process at the legislative, administrative, and judicial stages when determining whether a violation of Convention rights occurred.[6] The procedural approach of the Court seeks to give effect to the principle of subsidiarity, however, it has been seen as controversial and provoked criticism as the case *Animal Defenders v United Kingdom* shows.[7] The question arises if the Court is still fulfilling its role in protecting human rights with regard to the principle of subsidiarity when exercising procedural-type review.

In the following, I intend to examine the role of the Court in protecting human rights with regard to the "procedural turn" and the principle of subsidiarity. The main task will be to assess what implications the procedural approach has on the role of the Court and the protection of human rights. In the first chapter, I will conceptualize the role of the Court by focusing on its creation, the reform processes and the Court's role engaging with judicial review. In chapter 2, I will engage with the principle of subsidiarity and especially with its conceptual origins, the

Human Rights Law Review, 487.

[6] For on overview of the literature: Patricia 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 Courts in a Context of Multilevel Governance* (Intersentia, Antwerp 2013) 249; P Popelier and C van de Heyning, "Procedural Rationality: Giving Teeth to the Proportionality Analysis" (2013) 9 *EU Const* 230; J Gerards, "The European Court of Human Rights and the National Courts: Giving Shape to the Notion of 'Shared Responsibility'" in J Gerards and J Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-law: A ComparativeAnalysis* (Intersentia, Antwerp 2014) 13; M Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) Human Rights Law Review 1; Eva Brems and L Lavrysen, "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights" (2013) *35 HumRtsQ* 176; Eva Brems, "The 'Logics' of Procedural-Type Review by the European Court of Human Rights" in J Gerards and Eva Brems (eds), *ProceduralReview in European FundamentalRights Cases* (CUP, Cambridge 2017) 15; Patricia Popelier, "Evidence-Based Lawmaking: Influences, Obstacles and the Role of the European Court of Human Rights" in Gerards and Brems, *Procedural Review* (ibid); J Gerards, "Procedural Review by the ECtHR: A Typology" in Gerards and Brems, *Procedural Review* (ibid) 125; Angelika Nussberger, Procedural Review by the ECHR: View from the Court, unn J. Gerards & E. Brems (Eds.), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press, 2017), 127; Patricia Popelier and C van de Heyning, "Subsidiarity Post-Brighton: Procedural Rationality as Answer?" (2017) 30 *LJIL* 5; OM Amard6ttir, "The 'Procedural Turn' under the European Convention on Human Rights and Presumptions of Convention Compliance" (2017) 15 *International Journal of Constitutional Law* 9.

[7] *Animal Defender International v UK*, Application no. 48876/08, Judgment 23 April 2013, Judges Ziemele, Sajó et al (dissenting), Angelika Nussberger, Procedural Review by the ECHR: View from the Court, unn J. Gerards & E. Brems (Eds.), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press, 2017).

foundation in the Convention and the Courts usage. This is followed by chapter 3, in which I will examine the "procedural turn" by discussing the Court's case *Animal Defenders v United Kingdom* where the Court is using a procedural approach. In order to assess what implications the procedural approach has on the human rights protection by the Court, I will engage with the relevant criticism. I will draw conclusions on the role of the Court through the lens of subsidiarity and if the Court is still fulfilling its role in protection the Convention rights.

CHAPTER 1

CONCEPTUALIZING THE ROLE OF THE COURT

1.1 Creation of the Court

The European Convention on Human Rights (in the following "the Convention") was established in 1950 and entered into force in 1953. The Convention was drafted by Western European States as a response to the atrocities committed in World War II.[8] As a binding international treaty, the Convention enshrines human rights and establishes safeguards against the abuse of powers in order to prevent that State sovereignty is used to avoid international liability ever again.[9] The European Court of Human Rights was established in 1959 in Strasbourg by the Council of Europe to protect human rights enshrined in the 1950 Convention. The Court was originally intended to be the "conscience of a free Europe" and to function as an "early warning system" to prevent States to fall into totalitarianism.[10] In the first decades of the Court, it worked in conjunction with the Commission which directed cases to the Court.[11] In 1998, the Commission was abolished by Protocol No. 11, the Court was made permanent, and individuals gained direct access to the Court to lodge an alleged human rights violation against one of the member States. For the first 30 years of the Court's work, the Iron Curtain separated Central and Eastern European States from the West, leaving the number of State Parties to the Convention to be very few and to States that were mostly "well-established

[8] Christoph Grabenwarter,"The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights" (2014) *ELTE Law Journal*, p. 101

[9] Anthony Lester, "The European Court of Human Rights After 50 years" in Christoffersen, Jonas and Madsen, Mikael R. (eds.) *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011), p. 99.

[10] Bates, Ed, "The Birth of the European Convention on Human Rights—and the European Court of Human Rights" in Christoffersen, Jonas and Madsen, Mikael R. (eds.) *The European Court of Human Rights between Law and Politics* (Oxford University Pressm 2011), p. 21; Lord Woolf, *Review of the Working Methods of the European Court of Human Rights* (2005), (accessed under: https://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf), p. 7.

[11] Bates, Ed, (n 10), p. 38.

democracies that adhere to the rule of law".[12] In 1990, after the fall of the Iron Curtain, the post-soviet countries joined the Council of Europe leading to its enlargement to the now 46 Member States. These events lead to a shift in the Court's work to "consolidate democracy and the rule of law in new and relatively fragile democracies".[13] As a consequence to the enlargement of the Council of Europe and the individual petition before the Court, the Court was flooded with application leading to a major backlog of the cases.

Moreover, criticism against the Court has been voiced from judges, academics, press and politicians.[14] Especially Euro-sceptics from the UK aimed at reforms to shield the nation from too much Strasbourg influence.[15]

1.2 The Reform Process of the Court

The reform process of the Convention system started right after the adoption of the Convention with the negotiations of Protocol No.1.[16] After this, other optional protocols followed that amplified the rights protection under the Convention system. Significant change to the Convention system was introduced when Protocol No. 11 entered into force, in 1998, which abolished the Commission and established the full-time Court.[17] In order to improve the Court's efficiency and long-term effectiveness Protocol No. 14, which was adopted in May 2004 and came into force in 2010, introduced the single judge formation, the Committee of

[12] Anthony Lester (n 9), 102.
[13] Lord Woolf, (n 10), 9.
[14] O'Boyle, Michael, The Future of the European Court of Human Rights, (2011) *German Law Journal* 2011, 1862.
[15] Sarah Lambrecht, „Reform to Lesson the Influence of the European Court of Human Rights: A Successful Strategy?, (2015) 21 No. 2 *European Public Law,* 258.
[16] William Schabas, *The European Convention on Human Rights. A Commentary* (Oxford University Press, 2015), 955–6.
[17] Protocol No 11 (accessed under: https://www.echr.coe.int/Documents/Library_Collection_P11_ETS155E_ENG.pdf).

three judges deciding on repetitive cases where well-established case-law exists, and the "significant- disadvantaged" admissibility criterion.[18]

1.2.1 Interlaken and Izmir Conference

In 2010, the Interlaken Conference initiated a series of conferences on the future of the European Court of Human Rights where States identified problems of the Convention system and proposed reform measures through declarations.[19] The Interlaken Declaration aimed to find a solution for the chronic case overload[20] and sought to establish a "roadmap for the reform process towards long-term effectiveness of the Convention system.[21] The Declaration also stresses the "subsidiary nature of the supervisory mechanism" and the "fundamental role which national authorities, i.e governments, courts and parliaments" play in protecting human rights.[22] The Izmir Conference, in 2011, broadly follows the same aims as Interlaken Conference: to manage the Court's caseload.[23] The Declaration also refers to the "subsidiary character of the Convention mechanism" which constitutes a "fundamental transversal principle" and emphasizes the "shared responsibility".[24]

1.2.2 Brighton Conference: Draft and Declaration

The Brighton Conference in 2012 was the third conference that was devoted to reforming the Convention system in order to reduce the backlog of pending cases.[25] The climate at the

[18] Lord Woolf (n 10), 12.
[19] Lize R. Glas, From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights? (2020) 20 *Human Rights Law Review*, 121 f.
[20] Ibid, 126.
[21] Interlaken Declaration, para 10 (accessed under https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf).
[22] Ibid, para 6.
[23] Izmir Declaration, 2011 (accessed under: https://www.echr.coe.int/documents/2011_izmir_finaldeclaration_eng.pdf).
[24] Ibid, para 5 and 6.
[25] Laurence Helfer, "The Burdens and Benefits of Brighton" (2012) 1 *European Society of International Law Reflections* 1, 1.

Brighton Conference dramatically changed since "the delegates in Brighton gathered under a cloud of vociferous protest against the Court by the public and government officials in the United Kingdom.[26] The conference was chaired by the UK that recently critiqued the Court with regard to the *Hirst v UK*[27] judgment that found a ban on prisoner's voting rights to be in violation with the Convention. In his speech to initiate the UK's chairmanship, the former Prime Minister Cameron emphasized that it is necessary to introduce reforms with regard to issues "that threaten to shift the role of the Court away from its key objectives".[28] He specifically mentioned to prevent the Court from becoming a Court of "fourth instance" and voiced concerns about a "slimming of the margin of appreciation".[29] Therefore, it is not surprising that the UK Draft, that was leaked to the public, placed a strong emphasis on the principle of subsidiarity and the margin of appreciation.[30] Unlike other reform proposals that were intended to strengthen the Convention system, the draft contained elements that "weakened supranational review of the member states' human rights practice" and aimed at "clipping the Strasbourg Court's wings".[31] The Brighton Declaration differs from the Draft and is much less invasive on the Court's competences. Focusing on the interaction of the Court with national authorities, the Draft proposed that the "Court provides an authoritative interpretation of the Convention" and not the authoritative interpretation, leading to the final version in the Declaration that "the Court authoritatively interprets the Convention".[32] The Draft proposed to include the principle of subsidiarity and the margin of appreciation to the

[26] Ibid.
[27] *Hirst (2) v. The United Kingdom*, Application No. 74025/01, Judgment 06 October 2005.
[28] David Cameron, "Speech on the European Court of Human Rights", Council of Europe, Strasbourg, 25 Jan. 2012 (accessed under: https://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full).
[29] Ibid.
[30] UK Government, *UK Draft Brighton Declaration* (2013/02/23) (accessed under: www.theguardian.com/law/interactive/2012/feb/28/echr-reform-uk-draft).
[31] Laurence Helfer, (n 25), 2.
[32] UK Government, *UK Draft Brighton Declaration* (2013/02/23) (accessed under: www.theguardian.com/law/interactive/2012/feb/28/echr-reform-uk-draft), para. 16.

Convention for "transparency and accessibility" reasons.[33] Moreover, the Draft wanted to introduce a new admissibility criteria that would declare an application inadmissible if it was already examined by the domestic Court while taking the Convention rights into account.[34] The new admissibility criteria did not make it into the Brighton Declaration partly due to the criticism it provoked. Not every member State was on board with the UK's stance, especially because it would impair the independence of the Court and the effective protection of the Convention rights.[35] The President at the time, Nicolas Bratza, voiced his concern about the Government's intervention by dictating how the Court should "carry out the judicial function conferred on it" and stressed that the principle of subsidiarity should not function as a blanket immunity for the States.[36] The Brighton Declaration is the only Declaration to instruct the Committee of Ministers to amend the Convention. Protocol No. 15 was adopted on 15 May 2013 and introduced an explicit reference to the principle of subsidiarity and the margin of appreciation to the Preamble of the Convention.[37]

1.2.3 Copenhagen Conference: Draft and Declaration

The Copenhagen Conference, in 2018, was chaired by the Danish government that circulated a Draft which urged the States to dramatically expand the "margin of appreciation" and to exercises more control on the Court through political "dialogue".[38] Similar to the Brighton Declaration, the Copenhagen Declaration is far less reaching than its draft.[39] The Draft was met with a "robust rejection" and the final Declaration, instead of being skeptical towards the Court,

[33] Ibid, para 19.a).
[34] Ibid, para 23.c.
[35] For example, Helmut Tichy (head of Austrian delegation) in Council of Europe, Proceedings High Level Conference of the future of the European Court of Human Rights (Brighton, 2012/04/18-20).
[36] Nicolas Bratza, the then President of the ECtHR in Council of Europe, Proceedings High Level Conference of the future of the European Court of Human Rights (Brighton, 2012/04/18-20), 22.
[37] Article 1, Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 Jun. 2013, CETS No. 213, (accessed under: www.echr.coe.int/Documents/Protocol_15_ENG.pdf).
[38] Geir Ulfstein and Andreas Follesdal, "Copenhagen—much ado about little*?", EJIl: Talk*!, Blog, 14 April 2018 (accessed under: https://www.ejiltalk.org/copenhagen-much-ado-about-little/).
[39] Lize R. Glas (n 19), 128.

was supportive and acknowledges its independence from the States.[40] With regard to subsidiarity the Draft mentions the protection of human rights at the national level as a "natural step in the evolution of the convention system" to bring "human rights home".[41] The final Declaration, at the end, takes note of the case-law created by the Court and that the Convention is incorporated at the domestic legal systems which helps the State Parties to secure the rights at the national level.[42] The Draft understands subsidiarity as a right and that human rights should predominantly be protected at the national level "in accordance with their constitutional traditions and in light of national circumstances".[43] The final Declaration reiterates that "strengthening the principle of subsidiarity is not intended to limit or weaken the human rights protection".[44] With regard to the caseload, the Convention mentions that the large backlog gives reason for "serious concern" and a tension between the right to individual application was identified.[45] Regardless, the right for individual application was reaffirmed to remain as a "cornerstone" of the Convention system.[46] Although the Draft tried to constrain the Court, the Declaration is supportive if the Court.

The reform process illustrates that one main concern is the caseload of the Court and to ensure the long-term effectiveness of the Convention system. When the Conference in Interlaken started the Court reached its peak of 160.000 pending cases and while the Conference in Copenhagen took place, the Court was able to reduce the pending cases to less than 56,000 which is significantly less but still a considerable amount.[47] In May 2022, there are 72.100

[40] Geir Ulfstein and Andreas Follesdal, "Copenhagen—much ado about little*?"* (n 38).
[41] Copenhagen Draft, (accessed under: https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf), para. 10.
[42] Copenhagen Declaration, 12 and 13 April 2018 (accessed under: https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf), para 10.
[43] Copenhagen Draft, (n 41) para. 14.
[44] Copenhagen Declaration, para 10.
[45] Ibid.
[46] Copenhagen Declaration (n 42), para 48.
[47] Raimondi, 'Speech', Copenhagen Conference, 11–13 April 2018, at 2, (accessed under https://www.echr.coe.int/Documents/Speech_20180412_Raimondi_Copenhagen_ENG.pdf).

cases pending with a majority coming from Russia, Turkey and Ukraine.[48] Although the Interlaken and Izmir Declaration refer to the principle of subsidiarity, there is a shift to be noted after the Brighton Declaration. The climate changed and the environment for the Court became more hostile.[49]

Both the Brighton and the Copenhagen Draft Declaration not only placed an emphasis on the principle of subsidiarity but sought to constrain the Court which would have undermined its independence significantly. The Declarations did not reflect the far-reaching proposals but nevertheless the emphasis on subsidiarity lead to the amendment of the Convention text. The dilemma that this depicts is that the Court is, on the one hand, independent form the State Parties, but on the other hand, needs to be accountable to the States. The reform process could lead to constraining the competences of the Court which then would impact the level of human rights protection in the Council of Europe. The post-Brighton era the principle of subsidiarity has gained prominence among the State Parties. However, if and how it influenced the Court's behavior needs to be assessed.

1.3 Judicial Review and the *Countermajoritarian Difficulty*

The Court's legitimacy has been openly called into question, especially with its lack of democratic legitimacy.[50] This critique is aimed at the Court performing judicial review and ruling against majority decisions. This challenge is known as the *countermajoritarian difficulty*[51] which means that Courts, in order to protect rights, can and sometimes needs to rule against the democratic majority decisions. The Court exercises a *weak judicial* review where

[48] European Court of Human Rights, Pending Applications Allocated to a Judicial Formation 31/05/2022 (accessed under: https://www.echr.coe.int/Documents/Stats_pending_2022_BIL.pdf).
[49] O'Boyle, Michael (n 14), 1862.
[50] Robert Spano, "Universality or Diversity" (n 5), 2.
[51] The term was coined on the national level by Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics.

the Court can declare a national law or its application to be incompatible with the Convention, but it cannot stop its application directly nor does it have any direct effect on the validity of the law.[52] On the contrary, the respective State Party needs to implement the Court's judgment for it to become part of the domestic legal system. According to Article 46 (1) of the Convention, the judgment only binds the State which is party to the case. This means that the judgment has no *erga omnes* effect. However, States have discretion on how to implement the judgment and especially how to stop or prevent the human rights violation found by the Court. Nonetheless, the Courts judgment can indirectly influence national legislation, especially with regard to Article 13 ECHR (a right to an effective remedy) if the compliance of the Charter involves the creation of an effective remedy.

One could argue that an independent court engaging in judicial review, might seem to run counter democratic principles when Courts overturn the democratic will in order to uphold human rights.[53] This challenge face constitutional Courts on the national level and it becomes even more contested with regard to international Courts due to their lack of embeddedness in a national democratic system. What can be highlighted is that the Council of Europe is unique in that regard by being an international organization that has no legislative power or something comparable like the European Union, that could foster a democratic process beyond the national State. Judicial review is held to be illegitimate due to the lack of consensus about rights and uncertainties should not be decided by the judiciary but rather settled in a democratic process.[54] Another objections towards judicial review is that it puts a constraint on the majority rule taken by democratically elected representatives that treat all citizens as political equals.[55]

[52] Rudolf Bernhardt, "Human Rights and Judicial Review: The European Court of Human Rights" in David M. Beatty ed. *Human Rights and Judicial Review: A Comparative Perspective* (Martinus Nijhoff, 1994), 297-313.
[53] Dawson, Mark, *Critiquing and Theorising the Governance of EU Fundamental Rights* (Cambridge University Press, 2017).
[54] Jeremy Waldron, "The Core of the Case against Judicial Review", (2006) 115(6) *The Yale Law Journal*, 1366 f.
[55] Andreas Follesdal, "The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights", (2009) 40 (4) *Journal of Social Philosophy*, p. 595.

The idea is that the majority rule should not be constraint because it is the institutional embodiment of the will of the people.[56] However, this would mean that human rights are subject to the majority will. Human rights are *countermajoritarian* by nature and exist beyond the democratic political process. Judicial review, in this sense, is a crucial part of democracy by allowing individuals to review majority decisions and by giving minorities an avenue to be heard which the democratic decision-making process might not have made possible.[57] Courts are also *countermajoritarian* and exercise judicial review to check the democratic decisions-making process if individual rights have been disproportionately violated.[58]

1.4 The Conceptual Role of the Court

The role of the Court can be categorized into three main objectives: Firstly, to bring individual justice by receiving individual petitions to protect individuals from human rights violation committed by the State authorities. The Court therefore has a *justice function*.[59] The role to bring individual justice can be derived from Article 34 of the Convention where the right to individual application is enshrined. Article 34 of the Convention enables "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation" to lodge a complaint and is described to be the "cornerstone" of the Convention system.

Secondly, the Courts role is to set a minimum standard of human rights protection that is applicable in the member States by defining the scope of the Convention rights and can be described as the *standard-setting function*.[60]

[56] Ibid.
[57] Kavanagh, Aileen, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22 *Law and Philosophy*, 341.
[58] O'Boyle, Michael, (n 14), 1866-67.
[59] Alec Stone Sweet, "The European Convention on Human Rights and National Constitutional Reordering" (2012) 33 *Cardozo Law Review*, 1861.
[60] Ibid.

Thirdly, the Court is supervising State compliance in fulfilling their obligation set out in the Convention by exercising a *monitoring function*.[61] The monitoring function shows predominately the subsidiary role of the Court vis-á-vis the member States because the protection of the Convention takes primarily place at the national level. The Court's task, as Article 19 of the Convention states, is to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention". For all three main objectives identified above, the principle of subsidiarity as used and understood by the Court plays an important role in the protection of individual rights and in determining if the Court is fulfilling its role.

[61] Sarah Lambrecht (n 15), 276.

CHAPTER 2

THE PRNCIPLE OF SUBSIDIARITY- ORIGIN AND USAGE BY THE COURT

2.1 The Principle of Subsidiarity - Introduction

The principle of subsidiarity is at the core of the Convention system, navigating between the supranational and national level.[62] It is a general principle of international law, that can be described as a "structural principle" because it focuses on the structural problem of universality and claims to pluralism.[63] With the Brighton Declaration the member States sought to reform the Convention, putting an emphasis on the principle of subsidiarity. Protocol No. 15 amended the Convention by adding a reference to the principle of subsidiarity and the margin of appreciation to the Preamble of the Convention.[64] The principle of subsidiarity is crucial to the debates about what should be the primary function of the Court with regard to the relationship to national Courts.[65] This chapter intends to outline the conceptual origins of the principle as a general principle of international law and how it emerged in the Convention system. Further, this chapter seeks to show how the principle has been used by the Court and how it has evolved. It is crucial to have a closer look at the principle of subsidiarity when examining the role of the Court in protecting human rights. Depending on what level, either national or regional, the human rights protection takes place and with what degree of scrutiny, it has implications on the protection of human rights in the Council of Europe and especially for individuals.

[62] Laurence Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", (2008) 19 *European Journal of International Law* 125, 128.
[63] Paolo Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97 *The American Journal of International Law*, 49.
[64] Article 1, Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 Jun. 2013, CETS No. 213, (accessed under: www.echr.coe.int/Documents/Protocol_15_ENG.pdf).
[65] Alastair Mowbray (n 4), 318.

2.2 The Conceptual Origins of the Principle of Subsidiarity

The principle of subsidiarity is deeply rooted in the "history of Western political thought" and has rather recently emerged as a prominent legal and political concept.[66] The principle can be traced back to classical Greece and was revived and further developed in history, such as in the seventeenth century by Johannes Althusius in connection with theories of the secular federal state or by political theorists such as Montesquieu, Locke, Tocqueville, Lincoln and Proudhon.[67]

The principle of subsidiarity was introduced into the constitutional order of post-Second World war "West Germany" to allocate legal power away from the centralized government.[68] Later, Ralph Dahrendorf, who was a German member of the European Commission, advocated that the European Economic Community (EEC) should "move away from the dogma of harmonization towards the principle of subsidiarity" in order to reduce bureaucratic powers of the Community.[69] The principle was then included in the 1991 Maastricht Treaty of the European Union and with the adoption of the Charter on Fundamental Rights in 2002, the principle found its way, formally, for the first time into the sphere of international human rights law.[70] The principle of subsidiarity functions as a conceptual mediator between "supranational harmonization" and pluralism on the local level.[71]

There are different theories of subsidiarity that circle around the question "how to allocate or use authority between a centre and various member units".[72] I will shortly outline the concepts

[66] Paolo Carozza (n 63), 38.
[67] Ibid, 41.
[68] Alastair Mowbray (n 4), 315.
[69] Paolo Carozza, (n 63), 50.
[70] Ibid, 39.
[71] Ibid.
[72] Andreas Follesdal, "The Principle of Subsidiarity as a Constitutional Principle in International Law" (2013) 2 *Global Constitutionalism*, 37.

of the principle of subsidiarity to give an overview and more importantly illustrate how different objectives influence the perception of the principle.

The first conception of subsidiarity can be derived from *Althusius*, the "father of federalism", who places the role of the state at the centre to "co-ordinate and secure symbiosis among associations - on a consensual basis".[73] When looking at *confederal* arguments for subsidiary that are derived from the fear of tyranny, subsidiarity assumes "that individuals should not be subjected to the arbitrary will of others in matters where no others are harmed, and that smaller groups are more likely to share preferences".[74] The concept of subsidiarity, that serves *economic federalism*, holds that "powers and burdens of public goods should be placed with the population that benefit from them.[75] The *Catholic* concept of subsidiarity can be found in Pope Leo XIII's 1891 issued encyclical *Rerum Novarum* "which argued that the state should support lower social units, but not subsume them".[76] On the 40th anniversary of that encyclical in 1931, Pope Pius XI's issued a *Rerum Novarum* placing a stronger emphasis on the principle of subsidiarity to limit state intervention, saying "that it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do".[77] *Liberal contractualists,* such as John Rawls, argue for subsidiarity where "central authorities should seek to support member units' democratic and informed decision-making, and they should also respect member units' immunity against influence – as long as the decisions respect the best interests of its members and avoid local domination.[78]

[73] Johannes Althusius, *Politica Methodice Digesta* 1603 (Liberty Press, 1995) ch. 28.
[74] Andreas Follesdal (n 72), 43.
[75]Ibid, 45.
[76] Leo XIII, Rerum Novarum: Encyclical Letter on Capital and Labor (May 15, 1891), in 2 *The Papal Encyclicas* 1878-1903 (Claudia Carlen ed., 1990), 241.
[77] Pius XI, QuadragesimoAnno: Encyclical Letter on Reconstruction of Social Order (May 15,1931), in 3 The Papal Encyclicas 1903-1939, para. 39.
[78] Andreas Follesdal (n 72), 48.

These concepts of subsidiarity seek to settle the question of how to allocate authority and show that depending on the context and objective how the principle of subsidiarity is defined and used. What becomes evident is that subsidiarity, as a principle, seeks to allocate decision-decision-making processes to the smallest unit of individuals to better accommodate the individual's interest and to limit State intervention as well as to prevent denomination by others.

There remain practical uncertainties on how and when the principle of subsidiarity should be applied in order to achieve this purpose. This does not only become difficult when applying subsidiarity and therefore, allocate power within a State, but it becomes even more controversial when the principle is applied to define the relationship between national and international institution, especially when it comes to human rights law. It helps to consider that

> "The principle of subsidiarity cannot on its own provide legitimacy or contribute to a defensible allocation of authority between national and international institutions, e.g., regarding human rights law. Appeals to subsidiarity are too vague, and require attention to more items – including the standing of *states,* whether centre action is prohibited or required, and who should decide such issues. The more plausible versions of subsidiarity insist that ultimately, these questions are answered in light of which arrangement benefits individual persons' interests better than the alternatives. Unrestricted sovereignty and state consent are not obvious parts of the solution, but explicitly conditional or qualified sovereignty may well be".[79]

This concept of subsidiarity shifts the principle from a *state-centered* to a *personalistic* principle of subsidiarity, which is legitimate when it serves the best interest of the individual. The basis of the principle of subsidiarity is *personalistic* in a sense that it follows the conviction

[79] Andreas Follesdal (n 72), 62.

that every individual has inherent dignity, which comes prior to the state, and therefore, all other forms of society must serve the individual so that it can flourish.[80] Individuals are naturally social beings and can realize their fulfillment only in community with others and therefore, "higher groups" help smaller groups to realize this purpose.[81] This leads to the definition that "subsidiarity is the principle that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself".[82] The principle of subsidiarity, at its core, shares similar conviction as those of international human rights law such as human dignity and freedom, the importance of association with others and the state's obligation to respect the individual.[83]

This can be critiqued as being too individualistic, but as mentioned above, the individual is naturally social and realizes its fulfillment in community with others. Consequently, what benefits the individual also serves the (smallest) group and eventually the "higher" groups that are created to support the smaller groups creating a structural link between the levels.[84] With regard to human rights law, the concept of subsidiarity that should be followed is the one that benefits the individual best.

2.3 Origins of the Principle in the Convention System

The principle of subsidiarity is embedded in the Convention system and used by the Court to mediate between universality of human rights and legitimate claims to diversity in human rights protection in a multinational context.[85] The foundations of the principle of subsidiarity can be

[80] Ibid, 42.
[81] Ibid, 42.
[82] Ibid, 38.
[83] Ibid, 39.
[84] Paolo Carozza (n 63), 43.
[85] Sarah Lambrecht (n 15), 276.

derived from the Convention even before Protocol No. 15 added a textual reference to the principle in the Preamble of the Convention.

As a foundation of the principle of subsidiarity in the Convention Article 35 can be mentioned as it requires individuals to exhaust domestic remedies before lodging a complaint before the Court and can be regarded. This enables the national authorities to firstly deal with the alleged human rights violation and to settle the dispute. Hence, domestic institutions not only have a *duty* to settle human rights violations, but also a *right* to remedy the alleged violation in accordance with the domestic procedures.[86] This, however, can only be realized when a domestic remedy is available. Article 13, the right to an effective remedy, serves as another source of subsidiarity in the Convention, because it creates a State obligation to provide such a domestic remedy. This way, the Court ensures that the human rights violation needs to be firstly "solved" on the national level by the domestic institutions. The principle of subsidiarity, as defined by the Court's Jurisconsult after the Interlaken Declaration, entails:

> "that the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task".[87]

This emphasizes that the member States are primarily responsible for the protection of the Convention rights. However, the difficulty and tension arise when the Court has to define when domestic authorities "fail" to protect human rights and how the Court then "should intervene".

[86] Andreas von Staden, "The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review" (2012) 10 *International Journal of Constitutional Law*, 1036.
[87] ECtHR's Jurisconsult, *Interlaken Follow-up: Principle of Subsidiarity*, Strasbourg 2010, (accessed under: https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf), 2.

The margin of appreciation helps the Court to give effect to the principle of subsidiarity and can be a means to this problem. The margin of appreciation can be considered to be an instrument of "normative subsidiarity", that favors the protection of rights at the lower-level to in order to protect embraced *values*.[88] The margin of appreciation grants the member States an "ambit of discretion" with regard to the assessment of standards of the human rights in the Convention.[89] It is rooted in the principle of subsidiarity and helps the Court to navigate between diversity and universality of human rights protection.[90]

The sources of the principle of subsidiarity in the Convention have been affirmed by the Court's case-law. In the judgment *Kudla v Poland,* the Grand Chamber highlights that Article 1 states that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention" and therefore places the primary responsibility on the national level to ensure the protection of the Convention rights.[91] The Grand Chamber continues by explaining the purpose of the rule to exhaust domestic remedies, manifested in Article 35, is to prevent or remedy the alleged human rights violations on the domestic level before it reaches the Court.[92] Furthermore, the rule in Article 35 is only effective when Article 13 is realized to that extend that the individual has an effective domestic remedy available to challenge the alleged human rights violation.[93] The Grand Chamber, later, confirmed this interpretation of Article 1, 13 and 35 as the textual foundation of the principle of subsidiarity in the Convention in its judgment in *Cocchiarella v Italy*.[94] Following that line of interpretation, the Grand Chamber in *De Souza Ribeiro v. France* more recently confirmed

[88] Andreas von Staden, (n 86), 1035.
[89] Arai-Takahashi, Yutaka, "The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry" in: Foessdal, Peter, Ulfstein eds., *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge), p. 62.
[90] Ibid p. 91.
[91] *Kudla v Poland*, Application No 30210/96, 26 October 2000, 152.
[92] Ibid, 152.
[93] Ibid.
[94] *Cocchiarella v Italy*, Application no. 64886/01, Judgment 29 March 2006.

the three Articles as source of the principle.[95] Article 1, which enshrines the duty of the High Contracting Parties to secure the Convention rights, Article 35, provides the right to exhaust domestic remedies, and Article 13, that ensures that domestic remedies are available effective, all of these are give effect to the principle of subsidiarity. Consequently, all parties to the Convention are bound by that principle and need to ensure that the Convention rights are primarily protected by domestic institutions.[96]

Moreover, the Grand Chamber in *Austin and Others v United Kingdom* has indicated Article 19 to provide a foundation of the principle of subsidiarity.[97] Here, the Court described the principle of subsidiarity to be the "very basis of the Convention" coming from a joint reading of Article 1 and Article 19 which limits the Court's assessment as a fact-finding body, when the facts have been established in the national proceeding.[98] This "self-limitation" with regard to fact-finding by the Court gives effect to the principle of subsidiarity. It acknowledges the responsibility of the domestic authorities to gather the facts in a manner to redress the alleged human rights violation and for the Court to refrain from substituting its own assessment of the already established facts.[99]

2.4 How the Court uses the Principle of Subsidiarity

The Court referred to the principle of subsidiarity for the first time in the *Belgian Linguistic Case* of 1968 and stated that it "cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention".[100] Here, it becomes evident that the

[95] *De Souza Ribeiro v. France,* Application no. 22689/07, Judgment 13 December 2012.
[96] Alastair Mowbray (n 4), 320.
[97] *Austin and Others v United Kingdom*, Applications Nos 39692/09, 40713/09 and 41008/09,15 Judgment March 2012.
[98] Ibid, 61.
[99] Alastair Mowbray (n 4), 320.
[100] "*Relating To Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium*

Court highlights the collective effort in the protection of human rights as foreseen in the Convention and is mindful of the responsibility carried out by national authorities. A study undertaken by Petzold sheds light on the *procedural* and *substantive* aspect of the principle as used by the Court.[101] The procedural aspect of the principle of subsidiarity amounts to the requirement to exhaust domestic remedies.[102] The substantive aspect of subsidiarity includes that the Court refrains from interpreting domestic law referring to the primary role of national courts[103]. In addition, the substantive aspect is further realized by the margin of appreciation, which helps the Court to allocate decision-making to the proper authority, as foreseen in the Convention, and gives the Court flexibility to decide on a case-by-case basis, between *primary* national discretion and its *subsidiary* supervision role.[104] The Court's judgment in *Handyside v United Kingdom* underlines this conception of the margin of appreciation giving effect to the principle of subsidiarity. Here, the Court refers to the subsidiary role to the domestic level in protecting the Convention rights and acknowledges that there is no "uniform European conception of morals". The Court stresses that due to "their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements".[105] However, the margin of appreciation is not unlimited and goes "hand in hand with European supervision". [106] The Court refers to its responsibility established in Article 19 of the Convention to ensure the observance of the State's engagements the Court mentions and stresses that it gives the "final ruling" on whether the domestic measure violate the Convention right.[107] After Protocol No. 11 entered into force the now full-time Court reaffirmed in the case

('Belgian Linguistic case') Applications Nos 1474/62 Judgment 23 July 1968, at 31 para 10.
[101] Herbert Petzold, "The Convention and the Principle of Subsidiarity" in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publisher, 1993), 42.
[102] Ibid.
[103] *X and Y v Netherlands*, Application No 8978/80, Judgment 26 March 1985, 29.
[104] Herbert Petzold (n 101) 59.
[105] *Handyside v. United Kingdom*, Application No. 5493/72, Judgment of 7 December 1976, para 48.
[106] Ibid, 49.
[107] Ibid.

Christine Goodwin v United Kingdom that in "accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction".[108] In the judgment *Kudla v Poland*, the Court relied heavily on the principle of subsidiarity to change its approach with regard to Article 13 in applying it to cases where there is no effective remedy to challenge excessive delays in the national judicial system.[109] This change in interpretation and application of Article 13 of the Convention was motivated by the growing caseload and illustrates how the Court uses subsidiarity in order to allocate its resources by establishing an obligation for member States to provide domestic effective remedies.[110] Here, the Court placed an obligation on the member State to fulfill its obligation under the Convention which is in line with the principle of subsidiarity referring to the primary responsibility of States.

Another innovation by the Court in order to give effect to the principle of subsidiarity and to tackle to caseload was the development of the pilot judgment procedure. In 2004, upon a proposal from the Court, the Committee of Ministers issued a Resolution introducing the pilot judgment procedure in order to indicate a "underlying systemic problem" in the member States that gives rise to numerous applications.[111] The pilot judgment procedure is now enshrined in Rule 61 of the Rules of the Court.[112]

It becomes evident that the principle of subsidiarity, on the one hand, concerns the role of the Court to protect Convention rights when States fail and, on the other hand, concerns the State roles in being primarily responsible to protect the Convention rights.[113] The principle of subsidiarity entails a negative and a positive aspect. Negative subsidiarity requires the Court to

[108] *Christine Goodwin v United Kingdom,* Application No. 46221/99, Judgment 11 July 2022, 85.
[109] *Kudla v Poland*, Application No 30210/96, Judgment 26 October 2000.
[110] Alastair Mowbray (n 4), 325.
[111] Resolution (2004)3 on judgments revealing an underlying systemic problem, 12 May 2004.
[112] Rules of the Court (accessed under: https://www.echr.coe.int/documents/rules_court_eng.pdf).
[113] Leonie M. Huijbers, (n 1), 183.

follow a deferential approach by granting the member States discretion therefore exercising judicial restraint. This is seen in the abovementioned *Handyside v UK* judgment where the Court refrained from imposing a "uniform European conceptions of morals".[114] Here, the margin of appreciation is used as a tool by the Court to accommodate diversity in the member States where a European consensus is absent. Positive subsidiarity reflects the Court's supervisory role and the primary responsibility of member States to protect Convention rights. This entails that the Court provides incentives for domestic authorities to implement the Convention in order to protect the rights.[115] The Court does this by giving an authoritative interpretation of the Convention Rights and by spelling out obligations for the national level.[116] Moreover, the positive subsidiarity also entails the Courts responsibility to protect the Convention rights when member States fail to ensure that individual justice provided.

[114] *Handyside v UK* (n 105).
[115] Eva Brems, "The 'Logics' of Procedural-Type Review by the European Court of Human Rights" in J Gerards and E Brems (eds), *Procedural Review in European Fundamental Rights Case*s (Cambridge Univeristy Press, 2017), 23.
[116] Alastair Mowbray (n 4), 340.

CHAPTER 3

THE "AGE OF SUBSIDIARITY" AND THE "PROCEDURAL TURN"

3.1 The Post-Brighton Development

As the reform processes and especially the Brighton Conference show is that the principle of subsidiarity has gained great prominence. The emphasis on subsidiarity culminated into the amendment of the Convention with Prot. 15, adding a reference to the principle and the margin of appreciation to the Preamble of the Convention. The Court as an "agent of transformation" can itself become an "object of transformation".[117] When looking at the high-level conference that led to an emphasis on subsidiarity it is important to see that it was initiated by the member States. It is not clear how it influenced the Court's behavior and case law which is then relevant to assess the Court's role and its impact on human rights protection in the Council of Europe.

The former President of the Court, Jean-Paul Costa, mentioned that a reference to the principle of subsidiarity in the Preamble of the Convention only has "symbolic or political reason" since the principle of subsidiarity is enshrined in the text of the Convention as in Article 35 (the exhaustion of domestic remedies).[118] As outlined above, the Court has affirmed the textual foundation of the principle in the Convention in its case law which could lead to the conclusion that it makes a textual reference to the principle on the Convention obsolete or if added of mere symbolic nature.

[117] The terminology was used by Kenneth Armstrong during his introductory speech at the Cambridge International and European Law Conference of 23 and 24 March 2017.
[118] Jean-Paul, Costa, "The Relationship between the European Court of Human Rights and the National Courts", *European Human Rights Law Review*, 267.

The current era of the Court, however, has been described as the "Age of Subsidiarity".[119] At the same time many scholars have indicated a "procedural turn" of the Court by noticing an increased procedural-type review by the Court.[120] A link between the "procedural turn" of the Court and the increased emphasis on subsidiarity since the Brighton Declaration in 2012 can only presumed, but empirical studies are still needed to provide conclusive answers.[121] What the focus of this analysis will be, is how the Court understands its role with regard to subsidiarity in this "procedural turn" and what implications this has on human rights protection in the Council of Europe.

I will firstly outline what is meant by the "Age of Subsidiarity" and explain the procedural turn of the Court. I will complement this, by discussing an example from the Court's case-law where the Court used a procedural-type review. In order to identify the implications such a review has on human rights protection; I will engage with the criticism of the case and draw conclusions for the risks this type of review has on the protection of human rights. I will conclude by analyzing if the Court is still fulfilling theits role with regard to its *justice, standard-setting and justice function.*

3.2 The "Procedural Turn"- *Process-Based Review*

The current era of the Court has been described by Judge Spano as the "Age of Subsidiarity" which is a transformative one.[122] In this phase, the Court's engagement lies in empowering

[119] Robert Spano, "Universality or Diversity" (n 5), 487; Robert Spano, The Future of the European Court of Human Rights- Subsidiarity, Process-Based Review and the Rule of Law (2018), 18 *Human Rights Law Review*, 474.
[120] For an overview of literature (n 6).
[121] In favor: Patricia Popelier, Catherine van de Heyning, "Subsidiarity Post-Brighton: Procedural Rationality as Answer?" (2017) 30 Leiden Journal of International Law, pp. 5–23; A need for empirical research: Leonie M. Huijbers (n 2), 194.
[122] Robert Spano, "Universality or Diversity" (n 5), 487; Robert Spano, The Future of the European Court of Human Rights- Subsidiarity, Process-Based Review and the Rule of Law (2018), 18 *Human Rights Law Review*, 474.

States "to truly bring rights home" and to create a more "robust and coherent concept of subsidiarity".[123] The Brighton Conference which at the end culminated into Protocol No. 15 was build up not only by the Courts caseload but also the criticism that arose. The criticism targeted at the Court can be narrowed down to the claims that the Court should not second-guess domestic choices or judicial rulings and not go beyond the textual meaning of the Convention when interpreting.[124] The latter one alluding to judicial activism and evolutive interpretation of the Court such as with the living-instrument doctrine. Spano explains that the current era of the Court is a transformative one and that the old Court and the then Commission moved from the "substantive embedding phase" in the 1970s and 1980s to a now new historical phase of the Court: the "procedural embedding phase".[125] In the former, the Court established most of the structural, institutional and interpretational tools that form the basic principles of the Convention such as the living-instrument doctrine, the autonomous concept of Convention rights, the principle of subsidiarity and the margin of appreciation.[126] In the "substantive embedding phase" the Court was able to establish the general principles of interpretation that should guide the member States with regard to the Convention rights.[127] The argument is that the Court, in the "substantive embedding phase" progressively set the foundation for the Convention to be primarily ensured, as Article 1 fleshes out, by the member States while enhancing their engagement with the Convention and leaving the Court with its supervisory role.[128] While creating an *edifce of human rights* the Court was increasingly criticized to engage with judicial activism[129], for lacking democratic legitimacy and for its top-down judicial approach.[130] This lead to the historic shift to the "procedural embedding phase" where the

[123] Robert Spano, "Universality or Diversity" (n 5).
[124] Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009.
[125] Robert Spano, "Subsidiarity, Process-Based Review and the Rule of Law" (n 122), 474 f.
[126] Ibid, 476.
[127] Ibid.
[128] Ibid, 475.
[129] Bossuyt, *Judicial Activism in Europe: The Case of the European Court of Human Rights*, Brussels, 16 September 2013.
[130] Robert Spano, "Subsidiarity, Process-Based Review and the Rule of Law" (n 122), 478.

Court is taking "a more framework oriented role" by giving a greater emphasis on the domestic decision-making process in the member States.[131] As above mentioned, to indicate that the emphasis has led to and the procedural turn of the Court would require more research. The focus of the examination will be placed on the "procedural turn" of the Court, especially the *process-based review* in connection to the principle of subsidiarity.

The procedural approach or the proceduralization in the Court's case law has various dimensions and broadly includes the Court's increased focus on different decision-making bodies in the Convention system.[132] One dimension of proceduralization includes the reading of procedural requirements into the Convention rights.[133]

Another dimension is the procedural review or process-based review where the Court focuses on domestic procedures when determining if a violation occurred.[134] This *process-based review*, is not limited to guarantee procedural safeguards of the Convention rights, but more specifically entails a shift from the Court's own independent assessment of the Convention conformity of national measures towards an examination of the domestic decision-making process of the "embedded" principles of the Convention rights.[135] Here, the quality of the decision-making process at the legislative, administrative, and judicial stages are relevant to the assessment of the Court whether a human rights violation by the member State was committed and therefore influence the Court's substantive review.[136] The analysis of the

[131] Ibid.
[132] Thomas Kleinlein, The procedural approach of the European Court of Human Rights: between subsidiarity and dynamic evolution, (2019) 68 (1) *International and Comparative Law Quarterly*, 93.
[133] Eva 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.
[134] Thomas Kleinlein (n 132), 93;
[135] Robert Spano, "Subsidiarity, Process-Based Review and the Rule of Law (n 122), 480.
[136] J. Gerards and Eva Brems, *Procedural Review in Fundamental Rights Cases* (Cambridge University Press 2017).

domestic procedures can influence the width of the margin of appreciation.[137] The *process-based review* will be the main focus of the following analysis because it effects the substantive obligations of both the Court and the member States and therefore has implications for the human rights protection. The main question will be if the *process-based review* is giving effect to the principle of subsidiarity and therefore is line with the Court's role.

The Court has focused on domestic decision-making process especially in the cases *Hirst(2) v United Kingdom, Parillo v Italy*[138]*, Lambert and Others v France*[139]*, S.A.S v France* and *Animal Defenders v United Kingdom*.[140] *Animal Defenders v United Kingdom* (ADI) is one of the paradigm cases for the effect of domestic decision-making procedure on the margin of appreciation and provoked criticism also among judges.[141] I will therefore discuss it as an example for the process-based review and engage with the criticism to draw conclusions on the implications it has on the Court's role and human rights protection in general.

3.2.1 Case-Law Example: *Animal Defender International v United Kingdom*

A case where the Court is using process-based review is *Animal Defender International v UK* (ADI). The majority of the Grand Chamber, by nine to eight votes, decided that the UK's statutory broadcasting ban on political advertisement under the Communication Act 2003 did not violate the applicant's freedom of expression under Article 10 of the Convention.[142] The Communication Act 2003 was introduced to protect equal opportunity in the democratic process by prohibiting the broadcasting of political advertisement on television and radio.[143]

[137] *Hatton and others v United Kingdom*, Application No, 36022/97, Judgment of 8 July 2003, para 128; *Z and Others v United Kingdom*, Application No. 29392/95, Judgment of 10 May 2001.
[138] *Parillo v Italy*, Application No. 46470/11, Judgment 27 August 2015.
[139] *Lambert and Others v France*, Application No. 46043/14, Judgment 5 June 2015.
[140] *Hirst v United Kingdom* (No 2), Application No. 74025/01, Judgment of 6 October 2005; *Animal Defender International v UK*, Application no. 48876/08, Judgment 23 April 2013.
[141] Joint Dissenting Opinion of Judges Ziemele, Sajó et al.
[142] *Animal Defender International v UK*, Application no. 48876/08, Judgment 23 April 2013.
[143] Communications Act 2003, s 319(2)(g).

ADI, a non-profit, non-charitable NGO, campaigns against animal cruelty and wanted to broadcast a shortfilm to shed light on the abuse of primats by humans.[144] The Broadcast Advertising Clearance Centre declined the broadcasting of the shortfilm due to a breach of the Communication Act 2003 by the "mainly political nature" of ADI. After exhausting domestic remedies, ADI lodged a complaint at the Court. In light of the strong protection afforded to political speech by the Court and the "little scope" for restrictions under Article 10(2) of the Convention on political speech or matters of public concern, as well as the narrow margin of appreciation[145], the prospect of succeeding seemed quite promising. Moreover, the Court mentioned freedom of political debate to be "the very core of the concept of democratic society which prevails throughout the Convention".[146] ADI's case was especially supported by the precedent in *Verein gegen Tierfabriken Schweiz v Switzerland (VgT).*[147] Here, a non-governmental organization had been prohibited from broadcasting an advertisement on television to highlight animal cruelty in the meat industry. The Swiss broadcasting ban on political advertisement was, similar to the UK's, designed to "prevent financially powerful groups from obtaining a competitive political advantage" and intended to protect the democratic process by ensuring the independence of broadcasters.[148] The Court held that VgT was not a wealthy group that could distort the political process in a manner the ban intended to prevent and was not convinced by the justification of the Swiss government with regard to the application to VgT.[149] Due to the political nature of the advertisement, the ban was qualified as a restriction on political expression which narrowed the margin of appreciation granted to the domestic authorities.[150] Another judgment that supported ADI's case was *TV Vest AS and*

[144] *Animal Defender International v UK*, Application no. 48876/08, Judgment 23 April 2013.
[145] *Verein gegen Tierfabriken Schweiz v Switzerland,* Application No. 32772/02, Judgment 30 June 2009 (VgT).
[146] *Lingens v Austria,* Application no. 9815/82, Judgment, 42.
[147] *Verein gegen Tierfabriken Schweiz v Switzerland,* Application No. 32772/02, Judgment 30 June 2009.
[148] Ibid,63.
[149] Ibid,75.
[150] Ibid, *71.*

Rogaland Pensjonistparti v Norway.[151] The Court confirmed the line of reasoning established in VgT by finding that the broadcasting ban on political advertisement violated the right of a minor political party which only means of reaching the wider public was through paid advertisement.[152] The Court acknowledged that the *rationale* of the broadcasting ban was to protect minor political parties in the democratic process.[153]

In ADI, the Court had to decide whether a broadcasting ban that targets not exclusively wealthy political actors, but also social advocacy groups that do not impose a threat to the equality of the democratic process, was a proportionate interference of Article 10 of the Convention.[154] The Court reaffirmed that restrictions on the debate on matters of public interest lead to a narrow margin of appreciation.[155] The core issue, so the Court, was to assess whether the legislature, when adopting the general measure, acted within the margin of appreciation when "striking the balance it did".[156]

The Court characterized the broadcasting ban as a "general measure" and held that "in order to determine the proportionality of a general measure, the Court must *primarily assess the legislative choices underlying it*".[157] In order to do so, the Court had to take the "quality of the parliamentary and judicial review of the necessity of the measure" and the "risk of abuse if a general measure were to be relaxed" into account.[158] The Court considered the quality of the parliamentary and judicial reviews of "central importance".[159] The Court stated that "the more convincing the general justifications for the general measures are the less importance the Court

[151] *TV Vest AS and Rogaland Pensjonistparti v Norway,* Application No. 21132/05, Judgment 11 December 2008.
[152] Ibid, 55, 57.
[153] Ibid, 57.
[154] Tom Lewis, Animal Defenders International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters? 2014 77 (3) *The Modern Law Review*, 465.
[155] *Animal Defenders International v the United Kingdom*, supra n. 5, para. 104.
[156] Ibid, 109.
[157] Ibid, 108.
[158] Ibid.
[159] Ibid, 108 and 113.

will attach to its impact in a particular case".[160] The Court stressed the "exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition" and noted the "particular competence of the Parliament and the extensive pre-legislative consultation on the Convention compatibility".[161] Further, the Court attached "considerable weight" to the "exacting and pertinent review" conducted by the Parliament and the domestic courts which lead them to the conclusion that the general measure was a proportionate interference.[162] The Court agreed with the UK Government to dismiss the proposal of ADI to differentiate between political and social advocacy groups due to the uncertainty and litigation it would provoke.[163] The Court considered that the UK Governments justifications for the prohibition were "relevant and sufficient" and therefore did not find that the broadcasting ban violated the applicant's right of freedom of expression.[164]

3.2.2 Criticism Against the Judgment

This judgment does not only create reason for concern about the protection of freedom of expression under Article 10, but for the protection of human rights in the Convention system in general.[165] I will firstly give an overview of the criticism voiced against the Court's judgment in ADI. Focus will be placed on the central importance and weighed the Court has given to the quality of the parliamentary debate. The criticism of the judgment of ADI will then serve as a starting point to indicate the risks that *process-based review* on the human rights protection. The analysis conducted will then be if the Court is fulfilling its role with regard to the principle of subsidiarity.

[160] Ibid, 109.
[161] Ibid, 115.
[162] Ibid, 116.
[163] Ibid, 122.
[164] Ibid, 125.
[165] Tom Lewis, (no 154), 465.

In ADI, the majority of the Grand Chamber held that a "general measure", that follows a legitimate aim but interferes with human rights because its broad rule applies also to those who fall outside the aim of the provision, was proportionate due to the quality of the domestic decision-making process. The Grand Chamber seems to send the problematic message that in such circumstances a human rights interference by the State is likely to be found proportional, as long as the measure is accompanied by a thorough parliamentary debate.[166]

Moreover, in the joint dissenting opinion, the judgment was criticized to create a *"double-standard"* within the context of the protection of Convention rights.[167] This becomes apparent when comparing the outcome of the Swiss TgV case and the findings in ADI, both concerning an almost identical "general measure" on banning political advertisement.[168] In the former the ban was found to be not necessary in the democratic Swiss society, whereas in the UK it is "proportionate and *a fortiori* necessary" in democratic society.[169] This results in an incoherence in the protection of human rights when an identical measure is assessed differently due to the intensity of parliamentary debate.[170] The "double-standard" created is not compatible with the establishment of a minimum standard of human rights protection by the Court that is applicable to all State parties equally.[171] Human rights protection, as exercised by the Court, should not be influenced by the "origin" of the interference whether it be a legislative, judicial or administrative act or omission.[172] The dissenters allude to the fact that such an approach might limit the obligation of the State authorities under Article 1 of the Convention in conjunction with Article 19, to secure everyone within their jurisdiction the rights and freedoms guaranteed

[166] Ibid, 465.
[167] Ibid.
[168] Animal Defenders v United Kingdom, Judges Ziemele, Sajó et al (dissenting), 1.
[169] Ibid.
[170] Patricia Popelier, Procedural Rationality Review after Animal Defenders International: A Constructively Critical Approach, (2019) 15 *European Constitutional Review*, p. 277.
[171] Animal Defenders v United Kingdom, Judges Ziemele, Sajó et al (dissenting), 1.
[172] Ibid, 10.

by the Convention and the Court's obligation under Article 19.[173] By letting the legislator solely and exclusively decide what constitutes a public interest and how it is best achieved will have an effect on such obligation by the State parties.

Consequently, the scrutiny of how the measure impacted the individual will be less rigorous by the Court.[174] It becomes a review of the quality of the debate by the domestic authorities which raises concerns form the *rights-holder's perspective* "why the quality and the quantity of debate should have a determinative impact on whether there has been a violation of his or her rights".[175] In addition, the mere fact that a measure was debated by the legislature does not necessarily lead to the conclusion that an incompatibility with the Convention is avoided or that the margin of appreciation should be adjusted to the quality of that debate.[176]

To give effect to the principle of subsidiarity the Court should take the rationale of the domestic legislator into consideration.[177] However, to attribute considerable weight to the domestic process that generated the general measure and conclude that no violation was found gives rise to concern. The criticism and concerns that have been voiced against the Court's judgment in ADI illustrate the risk of a *process-based review* on human rights protection which I will elaborate on in the next section.

3.3 Risks of *Process-Based Review* for Human Rights Protection and Subsidiarity

A shift from a substantive review towards a process-based review might be seen as a positive development by the Court towards a "more robust concept of subsidiarity" by placing the primary responsibility on the member States which enhances human rights protection.[178] It

[173] Ibid.
[174] Tom Lewis (no 154), 468.
[175] Ibid, 465.
[176] *Animal Defenders v United Kingdom*, Judges Ziemele, Sajó et al (dissenting), 9.
[177] Ibid.
[178] Robert Spano, "Subsidiarity, Process-Based Review and the Rule of Law" (n 122), 492.

simultaneously gives rise to concerns for the human rights protection. The following section shall highlight the risks especially with regard to *individual justice*, *minority rights protection* and the *application by the Court*.

3.3.1 Individual Justice from a Right's Holder Perspective

Process-based review, as shown in the case ADI, can come at the detriment of individual justice which would run counter the Court's *justice function*. If the impact of a measure on an individual is not assessed by the Court, because the national parliament thoroughly debated the measure before implementing it, and this measure does in fact violate the right of the individual, then individual justice is not served. By not only considering but putting considerable weight on the domestic decision-making process for the Court's assessment, the Court gives effect to the principle of subsidiarity. However, the principle of subsidiarity with regard to human rights law foresees that the decision-making is allocated to the proper institution that would, at the end, serve the individual best. In order to ensure this, the Court cannot simply substitute its own assessment by referring to the quality of the domestic decision-making. The procedure-based review should not be used to avoid the detection of human rights violations.

3.3.2 Protection of Minority Rights

By giving considerable weight to the quality of the decision-making process at the national level, the Court seems to follow the presumption that a through debate in parliament will result legislation that does not provoke human rights violation. The Court disregards, that majority decisions, despite a transparent debate, could suppress minority rights or even error in their decision.[179] This is illustrated in the case *S.A.S v France* where the Court acknowledged that the French ban on religious symbols in the public sphere, a seemingly neutral provision that, however, exclusively targeted Muslim woman wearing a full face veil, as justifiable since it is

[179] Angelika Nussberger (n 7), 166.

the "choice of society" referring to the in-depth parliamentary debate.[180] Although, in *S.A.S v France* the Court did not entirely rely on the democratic decision-making process when assessing the proportionality, but it was an important aspect for consideration.[181] The function of human rights protection is to counterbalance majority decision that impact the rights of minorities and a thorough debate by the legislator is no guarantor that the result is just.[182]

A majority rule decision-making by a legislature is founded in the *principle of equality* and is therefore in line with democracy and the Convention.[183] However, as seen in Chapter 1, human rights are by nature *countermajoritarian* and the Court engaging with judicial review has a clear role in protecting the Convention rights from majority rule. A process-based review that substitutes a substantive review could limit the judicial review of parliamentary acts.[184] The principle of subsidiarity and especially its positive side imply that the Court monitors the protection of the Convention rights by the member States. This *monitoring role* is only fulfilled when the Court checks if a human rights violation occurred. The Court should not simply assume that the majority decision did not violate the individual's right. The Court should therefore refrain from only reviewing the procedure that led up to the State measure and still engage in substantive review on how the measure impacted the individual.

3.3.3Evaluating the Domestic Decision-Making-Process

It is difficult for the Court to evaluate the quality of the national decision-making process.[185] This can range from the indicating the mere absence of a substantive debate, such as in *Hirst (2) v United Kingdom*, or by rereferring to abstract concepts such as transparency, participation or inclusiveness.[186] The Court mentioned that democracy is the only model where the

[180] *S.A.S v France*, Application No. 43835/11, Judgment 1 July 20014, para 157.
[181] Angelika Nussberger (n 7), 163 f.
[182] Ibid, 167.
[183] Robert Spano, "Subsidiarity, Process-Based Review and the Rule of Law" (n 122), 489.
[184] Patricia Popelier (n 170), 279.
[185] Angelika Nussberger (n7), 167.
[186] Ibid.

Convention can be implemented but refrained from establishing a definition with regard the constitutional concepts that States should adhere to.[187] In addition, parliamentary debate can differ based on tradition and national experiences which influence the cultural setting the debate takes place.[188] The question arises under which circumstances the democratic debate meets the quality the Court finds as sufficient to produce a fair result. As mentioned above, this could lead to double-standards which runs counter the Court's *standard-setting role* in which the Court creates a minimum standard of human rights protection in the Council of Europe that is equally applicable. The principle of subsidiarity does not entail that the Court should lower its standards of review in order to defer the decision-making to the national authorities. This would not be in line with the principle of subsidiarity and the Court's role.

[187] Ibid.
[188] Ibid.

CONCLUSION

The Court's role has been evolving over the years. From its establishment in 1959, to becoming a permanent Court after Protocol 11 in 1989 and to its current stage. The Court's role has evolved and alongside has the Court's use of the principle of subsidiarity. Throughout the years the Court did not only have, and still does, to deal with a large backlog, but also has been target of criticism. Its subsidiary role has been predominantly emphasized as illustrated by the Conference in Brighton in 2012 and Copenhagen in 2018. By placing an emphasis on the principle of subsidiarity, the Member States wanted to shield themselves from too much Strasbourg influence. At the same time, a procedural turn in the Courts case law could be identified. The *process-based review* gives effect to the principle of subsidiarity. However, what the judgment in *Animal Defender v UK* makes evident, is that the *process-based review* can undermine the Courts *justice-*, *standard-setting-* and *monitoring function* which is not in line with the principle of subsidiarity. The risks show the negative implications it can have on human rights protection such as the creation of "double-standards", deficient protection of minority rights and the unsatisfactory result from a right's holder perspective with regard to individual justice. By pointing out the risks of *process-based review*, the argument is not that the Court should refrain from *process-based review*. A positive example of process-based review can be seen in the *von Hannover v Germany*[189] case, where the German Courts exactly applied the instructions as outlined by the Court and therefore no violation was found. I argue that a rather more nuanced account is needed where the Court decides on a case-by-case basis and takes the domestic-decisions making into consideration, but should not put considerable weight on it by solely relying on it for its assessment. As seen above, the principle of subsidiarity does not only have a negative aspect which calls for the Court to exercise deference

[189] *Von Hannover v. Germany (no. 2)* (Appl. No.40660/08 and 60641/08), Judgment 7 February, 2012.

towards the domestic institution. The Court's role is to protect the Convention rights in the Council of Europe. The positive side of the principle of subsidiarity entails the obligation for the Court to step in when the member States fail to protect the Convention rights. Although the Convention rights might be already embedded in the domestic legal system, there is no guarantee that a human rights violation is avoided. A *process-based review* should be exercised by the Court in light of the Court's role and the principle of subsidiarity – to allocate the decision-making to the authority that serves the individual best. The Court should therefore refrain from substituting its substantive review when a violation of Convention rights would be indicated. The principle of subsidiarity should not be used as a blanket immunity for the States.

The principle of subsidiarity, although used by the Court from 1968 on, is relatively new in the arena of human rights law. The current era of the Court is a transformative one and it is still left to be seen how the procedural approach of the Court will develop and what this means for the role the Court in protecting human rights in the Council of Europe.

BIBLIOGRAPHY

Arai-Takahashi, Yutaka, "The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry" in: Foessdal, Peter, Ulfstein eds., *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge)

Bates, Ed, "The Birth of the European Convention on Human Rights—and the European Court of Human Rights" in Christoffersen, Jonas and Madsen, Mikael R. (eds.) *The European Court of Human Rights between Law and Politics* (Oxford University Pressm 2011)

Bernhardt, Rudolf "Human Rights and Judicial Review: The European Court of Human Rights" in David M. Beatty ed. *Human Rights and Judicial Review: A Comparative Perspective* (Martinus Nijhoff, 1994)

Bossuyt, *Judicial Activism in Europe: The Case of the European Court of Human Rights*, Brussels, 16 September 2013

Brems, Eva "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)

Brems, Eva "The 'Logics' of Procedural-Type Review by the European Court of Human Rights" in J Gerards and E Brems (eds), *Procedural Review in European Fundamental Rights Case*s (Cambridge Univeristy Press, 2017)

Cameron, David, "Speech on the European Court of Human Rights", Council of Europe, Strasbourg, 25 Jan. 2012 (accessed under: https://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full)

Carozza, Paolo, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97 *The American Journal of International Law*

Costa, Jean-Paul, "The Relationship between the European Court of Human Rights and the National Courts", *European Human Rights Law Review*

Dawson, Mark, *Critiquing and Theorising the Governance of EU Fundamental Rights* (Cambridge University Press, 2017)

Follesdal, Andreas "The Principle of Subsidiarity as a Constitutional Principle in International Law" (2013) 2 *Global Constitutionalism*

Follesdal, Andreas The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights, (2009) 40 (4) *Journal of Social Philosophy*, p. 595

Gerards, J. and Brems, Eva *Procedural Review in Fundamental Rights Cases* (Cambridge University Press 2017

Glas, Lize R. From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights? (2020) 20 *Human Rights Law Review*

Grabenwarter, Christoph, "The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights" (2014) *ELTE Law Journal*

Helfer, Laurence, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", (2008) 19 *European Journal of International Law*

Helfer, Laurence, "The Burdens and Benefits of Brighton" (2012) 1 *European Society of International Law Reflections*

Huijbers, Leonie M. "The European Court of Human Rights' Procedural Approach in the Age of Subsidiarity" (2017) 6 *Cambridge International Law Journal*, 177.

Kavanagh, Aileen, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22 *Law and Philosophy,* 341.

Kleinlein, Thomas, The procedural approach of the European Court of Human Rights: between subsidiarity and dynamic evolution, (2019) 68 (1) *International and Comparative Law Quarterly*

Lambrecht, Sarah, „Reform to Lesson the Influence of the European Court of Human Rights: A Successful Strategy?, (2015) 21 No. 2 *European Public Law,*

Leo XIII, Rerum Novarum: Encyclical Letter on Capital and Labor (May 15, 1891), in 2 *The Papal Encyclicas* 1878-1903 (Claudia Carlen ed., 1990), 241.

Lester, Anthony, "The European Court of Human Rights After 50 years" in Christoffersen, Jonas and Madsen, Mikael R. (eds.) *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011),

Lewis, Tom Animal Defenders International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters? 2014 77 (3) *The Modern Law Review*

Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009

Lord Woolf, Review of the Working Methods of the European Court of Human Rights (2005), (accessed under: https://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf)

Mowbray, Alastair "Subsidiarity and the European Convention on Human Rights" (2015) 15 *Human Rights Law Review*,

Nussberger, Angelika, Procedural Review by the ECHR: View from the Court, unn J. Gerards & E. Brems (Eds.), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press, 2017)

O'Boyle, Michael, The Future of the European Court of Human Rights, (2011) *German Law Journal* 2011, 1862.

Petzold, Herbert "The Convention and the Principle of Subsidiarity" in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publisher, 1993)

Pius XI, QuadragesimoAnno: Encyclical Letter on Reconstruction of Social Order (May 15,1931), in 3 The Papal Encyclicas 1903-1939, para. 39.

Patricia Popelier, Procedural Rationality Review after Animal Defenders International: A Constructively Critical Approach, (2019) 15 *European Constitutional Review*

Popelier, Patricia, van de Heyning, Catherine "Subsidiarity Post-Brighton: Procedural Rationality as Answer?" (2017) 30 *Leiden Journal of International Law*

Raimondi,"Speech", Copenhagen Conference, 11–13 April 2018, 2, (accessed under https://www.echr.coe.int/Documents/Speech_20180412_Raimondi_Copenhagen_ENG.pdf

Schabas, William, *The European Convention on Human Rights. A Commentary* (Oxford University Press, 2015)

Spano, Robert "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", (2014) 14 *Human Rights Law Review*

Spano, Robert The Future of the European Court of Human Rights- Subsidiarity, Process-Based Review and the Rule of Law (2018), 18 Human Rights Law Review

Stone Sweet, Alec "The European Convention on Human Rights and National Constitutional Reordering" (2012) 33 *Cardozo Law Review*, 1861.

Ulfstein, Geir and Follesdal, Andreas, "Copenhagen—much ado about little*?", EJIl: Talk*!, Blog, 14 April 2018 (accessed under: https://www.ejiltalk.org/copenhagen-much-ado-about-little/)

von Staden, Andreas, "The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review" (2012) 10 *International Journal of Constitutional Law*

Waldron, Jeremy "The Core of the Case against Judicial Review", (2006) 115(6) *The Yale Law Journal*