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INTERNATIONAL LEGAL THEORY

Subsidiarity Post-Brighton: Procedural Rationality as Answer?

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Abstract

During the Interlaeken and Brighton conferences in 2010 and 2012 on the reform of the European Court of Human Rights (ECtHR or the Court) the High Contracting Parties demanded an increased focus of the Court on subsidiarity when considering cases. The ECtHR had been criticized by several states, in particular the United Kingdom (UK), for second-guessing domestic decisions of the democratically elected legislator. A procedural rationality approach could answer this critique. This approach implies that the Court takes the quality of the decision-making procedure as a decisive factor for its assessment of the proportionality of a domestic measure. In several recent high-profile cases the Court has adopted such approach providing the defending state with a wide margin of appreciation due to the high quality of the decision-making procedure. This contribution discusses to what extent the Court has applied this approach pre- and post-Brighton and the potential pitfalls. The contribution concludes that this approach could provide a vital leeway between the Court's supervisory and subsidiary role in the protection of human rights if applied coherently and consistently. However, it is no magic solution to silence the criticism against the Court as the opponents of the Court do not just reject its approach to proportionality review, but judicial review of legislative decisions altogether.

Keywords

European Court of Human Rights; procedural rationality review; proportionality; reform; subsidiarity

1. Restoring confidence in the ECtHR: Calls for a stronger concept of subsidiarity

Criticism of the ECtHR has been on the rise during the last ten years. What started as a case overload crisis slid further into a perceived legitimacy crisis, with critical voices reproaching the Court for judicial activism and intruding into domestic affairs.[1] In particular the introduction of positive obligations on member states and the dynamic interpretation of Convention rights have been denounced as an

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1 Gerards and Terlouw refer to the caseload and legitimacy crisis as a 'double-faced crisis'. J. Gerards and A. Terlouw, 'Solutions for the European Court of Human Rights: The *Amicus Curiae* Project', in F. Spyridon, T. Zwart and J. Fraser (eds.), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (2013), 158 at 165.

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unjustified attempt by the Court to broaden its scope of review. While the UK voiced the most severe aversion for Strasbourg interference,[2] surges of criticism have risen in the Netherlands[3] or are still rising in contracting parties such as Switzerland[4] or Hungary.[5] It is important for the ECtHR to be perceived as a legitimate institution, as eroding legitimacy brings the risk of demise or reform.[6] The Brighton process was initiated exactly with that aim. Ultimately, however, the UK found itself in an isolated position. Instead of dealing with fundamental questions as to the legitimacy of judicial control, the Brighton process resulted for the most part in technical reform.[7]

As the legitimacy question remains unsolved, the Court continues to steer a delicate middle course between human rights protection and respect for national sovereignty. For the most part, the Court does not seem to have control over the factors that are decisive for contracting parties to take a critical stance towards the Convention system.[8] For example, the UK's Strasbourg-hostile position may be explained by the deeply rooted doctrine of Parliamentary sovereignty resulting in a firm distrust of legal control of political authority,[9] as well as historical context,[10] resulting in British confidence in the superiority of its own legal system. Hence, the UK will not easily accept sovereignty costs ensuing from the Court's interference, as it will not readily see added value as to the protection of human rights within its own legal system. This leaves the Court defenceless. Taking democratic tradition into account would only enforce claims that the ECtHR

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[2] According to Spano charges against the Court have been 'unprecedented'. R. Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', (2014) 3 *Human Rights Law Review* 487, at 488.

[3] T. Zwart, 'Een steviger opstelling tegenover het Europese Hof voor de Rechten van de Mens bevordert de rechtsstaat', (2011) 7 *Nederlands Juristenblad* 343 or S. Blok and K. Dijkhoff, 'Leg het Europese Hof aan banden', *Volkskrant*, 7 April 2011.

[4] Criticisms in Switzerland in general target the ECtHR case law on migration and religious freedoms. Politicians of the Swiss People's Party have even proposed leaving the Convention. However, these criticisms were met with a reaction that leaving the Convention was not an option and the Convention was vital for Swiss law. See Cross-party media release, 'Unkündbar, unverzichtbar und untrennbar mits humanitären Tradition der Schweiz verbunden', 9 December 2014, available at www.humanrights.ch/upload/pdf/141209_ueberparteiliche_MM_EMRK.pdf; and Speech President Claude Hêche, '40 ans de la ratification par la Suisse de la Convention européenne des droits de l'homme: allocution conclusive', 9 December 2014, available at www.parlament.ch/fr/reden/Pages/rede-srp-heche-2014-12-09.aspx.

[5] In particular, Russia is one of the most vocal protesters against the ECtHR. See, e.g., on its protests against the introduction of Protocol No. 14 of the Convention B. Bowring, 'The Russian Federation, protocol No. 14 (and 14bis), and the battle for the soul of the ECHR', (2010) 2 *Goettingen Journal of International Law* 589, at 610–13. However, in academic literature or in policy papers the critique by Russia is in general not mentioned due to the general perception of Russia's human rights record as poor. Its criticism is seen as a reaction to the many convictions rather than a principled stance on its democratic legitimacy and homegrown rights protection.

[6] B. Çal, A. Koch and N. Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights', (2013) 35 *Human Rights Quarterly* 955, at 959.

[7] M. Elliott, 'After Brighton: Between a Rock and a Hard Place', (2012) *Public Law* 619, at 627–8.

[8] For the formulation of hypotheses regarding decisive factors, see P. Popelier, S. Lambrecht and K. Lemmens, 'Shifting the Convention System: An Introduction', in P. Popelier, S. Lambrecht and K. Lemmens (eds.), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level* (2016) 3 at 10–20.

[9] Elliott, *supra* note 7, at 627; R. Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act', (2005) 54 *International and Comparative Law Quarterly* 907, at 912–13.

[10] See B. Dickson, 'The Influence of European Law on the Protection of Fundamental Human Rights in United Kingdom Law', in P. Popelier, C. Van De Heyning and P. Van Nuffel (eds.), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (2011), 343 at 344.

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uses double standards, treating 'high-reputation' states more favourably than 'low-reputation' states.[11]

There is, however, one factor that the Court has control over. Empirical evidence shows that support for international courts such as the ECtHR drops precipitously if the Court takes unpopular decisions that trigger public controversy.[12] Even in Strasbourg-friendly countries, interference in sensitive social or cultural issues tends to rouse distrust. For example, in Hungary, ECtHR judgments that were perceived to ignore how strongly the five-pointed red star symbolized the totalitarian regime met with fierce resistance.[13] In the *Lautsi* case, the Grand Chamber reformed the decision taken by the first chamber as soon as a running fire of objections made clear how it had misinterpreted the significance of the crucifix as a symbol of tradition in Italy.[14]

Subsidiarity was presented as a tool to mitigate the tensions on the role of the ECtHR in the Interlaeken Declaration and Plan in February 2010.[15] This Declaration emphasized the 'subsidiary nature' of the ECtHR and the 'fundamental role which national authorities, governments, courts and parliaments play'. As a result of these respective roles the Declaration noted that the concept of subsidiarity ought to be strengthened. This conception was further developed and materialized in the Brighton Declaration in 2012.[16] This Declaration refers to the concepts of subsidiarity and the margin of appreciation as a means to restore confidence in the functioning of the ECtHR. The Declaration emphasizes that the joint responsibility of the Court and member states to realize the effective implementation of the ECtHR is 'underpinned by the fundamental principle of subsidiarity'.[17]

The Brighton Declaration resulted in the adoption of Protocol No. 15 implementing subsidiarity in the Convention texts. According to Article 1 of the Protocol, the following recital is to be added to the preamble to the Convention:

> 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.

Observations as to the significance of this addition are contradictory. According to some, it is an incentive for the Court to develop 'a more robust and coherent concept

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11 S. Dothan, 'Judicial tactics in the European Court of Human Rights', (2011) 12 *Chicago Journal of International Law* 115, at 115.

12 E. Voeten, 'Public Opinion and the Legitimacy of the Courts', (2013) 14 *Theoretical Inquiries in Law* 411, at 435.

13 *Vajnai v. Hungary*, Decision of 8 July 2008, no. 33629/06, ECHR 2008. See on this judgment E. Polgari, 'Gains and Loss – Changing the Relationship with the European Court of Human Rights', in Popelier, Lambrecht and Lemmens (eds.), *supra* note 8.

14 *Lautsi and others v. Italy* [GC], Decision of 18 March 2011, no. 30814/06, ECHR 2011. This case was followed by a judgment of the Italian Constitutional Court. This judgment is in general seen as a reaction (and warning) against *Lautsi*. Italian Constitutional Court, Sentencia nr. 311, 16 November 2009.

15 High Level Conference on the Future of the European Court of Human Rights, Interlaeken, 18–19 February 2010.

16 High Level Conference on the Future of the European Court of Human Rights, Brighton, 19–20 April 2012 (hereafter Brighton Declaration).

17 Brighton Declaration, para. 3.

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of subsidiarity' and refine its pre-existing doctrine on the margin of appreciation.[18] By contrast, others claim that Protocol No. 15, in the end, offers a merely modest package with only a low-key reference to the margin of appreciation,[19] and the explanatory memorandum explains that the reference to subsidiarity and the margin of appreciation codifies the Court's already existing jurisprudence.[20]

The question, then, arises as to how the Court responds to these developments. If it regards them as an incentive for a less intensive scrutiny in general, it may frustrate expectations for the Court to set strong common human rights standards. Therefore, it should select those cases that affect particular values or specific arrangements that are typical of a certain country. These characteristics may be considered as constituting a 'national identity' and taken into account by the Court to define the extent of the margin of appreciation and the intensity of its review.[21] Judicial conversations, defined as a successive exchange of legal arguments between courts,[22] are paramount for the Court to identify such national sensitivities and to include them in its balancing exercise.[23] Also, the Court needs a 'reasoning structure' to convince the public of the legitimacy of its decision without risking the reproach of intruding too much on domestic institutions.[24]

In this article, we examine whether for these reasons – the necessity of judicial conversations and an argumentative framework – procedural rationality review offers a balanced response to the recent calls for a stronger concept of subsidiarity. For this purpose, the article first examines the meaning of the subsidiarity principle and explains how procedural rationality review fits in (Section 2). It then gives an overview of the Court's jurisprudence on procedural rationality and examines, in particular, whether this type of review underwent changes after the Brighton Declaration (Section 3). Finally, we caution on the drawbacks of procedural rationality review and examine whether it may disguise an implicit use of 'double standards' (Section 4).

2. Procedural rationality review and the principle of subsidiarity

Calls for a stronger concept of subsidiarity, implying the granting of a broader margin of appreciation, are mainly inspired by the reproach that the Strasbourg Court, being

[18] R. Spano, 'The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect' (Torkel Opsahl Memorial Lecture 2014, Norwegian Center for Human Rights, 28 November 2014), available at www.jus.uio.no/smr/om/aktuelt/aktuelle-saker/2014/docs/judge-spano-torkel-opsahl-memorial-lecture—oslo—2014.pdf, at 4, 6 and Spano, *supra* note 2, at 491.

[19] D. Spielmann, 'Wither the Margin of Appreciation?', (2014) 67 *Current Legal Problems* 49, at 56, 59.

[20] Explanatory Report to Protocol No. 15, para. 7, available at www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf.

[21] L. López Guerra, 'National Identity and the European Convention on Human Rights', in A. Saiz Arnaz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (2013), 305 at 307, 309.

[22] On the finesses of judicial conversations see M. Claes et al. (eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (2012) 3. These interactions are labeled 'constitutional conversations' when they consider the constitutional framework of interaction, e.g., the delineation of competences between both jurisdictions. Ibid., at 4. In a decision of 19 April 2016, the Russian Constitutional Court explicitly refers to such dialogue and calls on the ECtHR to have 'respect for the national constitutional identity', see www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)033-e.

[23] J. Gerards, 'The Pilot Judgment Procedure before the ECHR', in Claes et al. (eds.), ibid., at 376–7.

[24] Çal, Koch and Bruch, *supra* note 6, at 982.

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an international institution, goes too far in second-guessing domestic policy choices or domestic judicial rulings.[25] The margin of appreciation, as the operational tool for the realization of the subsidiarity principle,[26] therefore safeguards space for the national authorities to perform a balance of rights and interests in the adjudication of human rights.

The subsidiarity principle, however, is too often invoked to disguise an antagonism towards legal control of legislative authority.[27] The UK draft proposal clearly intended to reduce the power of the ECtHR and the intensity of its review.[28] The core question, then, as Spielmann has aptly put it, is whether the Court, by allowing a broad margin of appreciation, is 'simply waiving its power of review' or 'attributing responsibility' to the national authorities.[29]

The answer lies in the rationale that underpins the principle of subsidiarity. Spielmann, again, rightly points out that the Convention system does not give priority to national authorities simply on grounds of national sovereignty; instead, it is subsidiary to the national systems of human right protection.[30] The ECtHR explains *why* national authorities have priority: they have 'direct democratic legitimation', they are 'better placed to evaluate local needs and conditions' and the 'domestic policy-maker should be given special weight' in matters 'of general policy, on which opinions within a democratic society may reasonably differ widely'.[31]

This means that the subsidiarity principle, by granting a broad margin of appreciation, by no means has the intention to reduce the protection of human rights. As the ECtHR tends to emphasize: the margin of appreciation goes hand in hand with European supervision.[32] Hence, the presumption that national authorities have the legitimacy, knowledge and expertise to carry out the delicate balance of rights and interests inherent to the proportionality principle and the adjudication of human rights and have indeed carried out a careful balance using their knowledge and expertise, is not irrefutable. On the contrary, in some cases national authorities risk being closely involved where a distant perspective is necessary for an objective and inclusive examination of facts and interests.[33]

Procedural rationality review, then, enters as a type of review that respects the primordial balancing role of national authorities while safeguarding the ECtHR from forsaking its supervisory role. Procedural rationality review implies that the Court takes the quality of the decision-making procedure at the legislative, the

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25 This debate was sparked by an outspoken lecture by Lord Hoffman. Lord Hoffmann, 'The Universality of Human Rights' (Judicial Board Annual Lecture, London 19 March 2009). Speech, available at www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2013/hoffmann.pdf. See on this critique Spano, *supra* note 2, at 489.

26 Spano, *supra* note 18, at 4.

27 Elliott, *supra* note 7, at 627.

28 Ibid., at 622–3.

29 D. Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?', (2011–12) 14 *Cambridge Yearbook of European Legal Studies* 381, at 381.

30 Spielmann, *supra* note 19, at 53.

31 *S.A.S. v. France* [GC], Decision of 1 July 2014, no. 43835/11, § 129, ECHR 2014. See also Spano, *supra* note 18, at 6.

32 *Mouvement Raëlien Suisse v Switzerland* [GC], Decision of 13 July 2012, no. 16354/06, § 60, ECHR 2012.

33 In this sense see Spano, *supra* note 18, at 4.

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administrative as well as the judicial stage, as a decisive factor for assessing whether government interference in human rights was proportional, thereby avoiding intense substantive review.[34] This type of review is also known as 'semi-procedural review'[35] or, in administrative law, as 'process-review'.[36] It differs from pure procedural review in that it does not merely examine whether a decision was taken in compliance with specific procedural requirements laid down in some statute or regulation.[37] Instead, when conducting substantive review of an act, the court refers to procedural elements.

Where an administrative act is challenged, elements of the decision-making process such as evidence from studies, statistics, impact assessments or consultations are taken into account to assess whether the contested measure is justified. Where a legislative act is concerned, the same elements play a part, as well as the intensity of the parliamentary debate.

Procedural rationality review is thus part of the substantive proportionality test,[38] where scrutiny of the legislative or administrative record and the judicial reasoning process serves to underpin the conclusion of whether or not a measure is the result of an informed balancing exercise.[39] If national authorities assess the proportionality of a measure on the basis of a careful and informed weighing of interests, the ECtHR will more easily be convinced that the measure is, indeed, proportional. In contrast to a strong substantive proportionality review, the Court will thus not weigh the interests or rights itself, but rely on the balancing in so far it is shown that the outcome follows from a duly informed and deliberated procedure.[40] Where national courts may link this scrutiny with more detailed better regulation programs,[41] the Court, overviewing a variety of legal orders, merely looks for evidence in parliamentary debates, consultation papers and scientific reports that the government's interference is based on evidence and informed debate.[42]

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34 For this type of review, see P. Popelier and C. Van De Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Principle', (2013) 9 *Eu.Const.L.Rev.* 230, at 252 and Spano, *supra* note 2, at 487–502.

35 I. Bar-Siman-Tov, 'Semi-procedural Judicial Review', (2012) 6 *Legisprudence* 271, at 272–82.

36 See, e.g., T. Hickmann, *Public Law after the Human Rights Act* (2010) 226–8.

37 Bar-Siman-Tov, *supra* note 35, at 280.

38 A. Alemanno, 'The Emergence of the Evidence-based Judicial Reflex: A Response to Bar-Siman-Tov's Semi-procedural Review', (2013) 1 *The Theory and Practice of Legislation* 331, places great emphasis on this.

39 A substantive proportionality test implies a substantive review of the merits under the proportionality test, i.e., whether the domestic measures serve a legitimate aim, whether suitable and least restrictive means have been applied and striking a fair balance between 'means, ends and affected rights'. See W. Weiss, 'The EU Human Rights Regime post Lisbon: Turning the CJEU into a Human Rights Court', in S. Morano and L. Vickers (eds.), *Fundamental Rights in the EU: A Matter for two Courts* (2015), 71.

40 Spielmann defines a qualitative legislative procedure as one that is sufficiently informed and duly deliberated. See D. Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?', (2011–12) 14 *Cambridge Yearbook of European Legal Studies* 381.

41 For the link between procedural rationality review and better regulation programs, see P. Popelier, 'The Role of Courts in Legislative Policy Diffusion and Divergence', (2015) 3 *The Theory and Practice of Legislation* 315.

42 M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments', (2015) 15 *Human Rights Law Review* 745, at 760–6, points in particular to committee work and plenary sessions. In P. Popelier, 'The Court as Regulatory Watchdog', in P. Popelier, A. Mazmanyan and W. Vandenbruwaene (eds.), *The Role of Constitutional Courts in Multilevel Governance* (2013), 249 at 257–65, a more detailed overview of the case law also highlights the importance of studies and statistics.

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Procedural rationality may also involve the judicial procedure. The ECtHR seems, in particular, preoccupied with the question of whether national courts have sufficiently integrated Strasbourg case law. Moreover, it seems to assign to courts responsibility for evidence-based law-making, to be shared with the legislative authorities. This was most explicit in *Konstantin Markin*, where the Court (initially) reproached the Russian Constitutional Court for going along with the legislature's assumption, 'without attempting to probe its validity by checking it against statistical data or by weighing the conflicting interests'.[43]

This way, the ECtHR seems to take the path advanced by De Schutter as 'the *Bosphorus-like presumption*'. According to the *Bosphorus* doctrine, the ECtHR relies on the EU to offer 'equivalent protection' of human rights. De Schutter proposes a similar stance towards member states under certain conditions, such as the systematic application of ECtHR case law, but leaves it to the Court to develop other requirements.[44] Procedural rationality could constitute such requirement:[45] if the national authorities demonstrate that they have implemented procedural guarantees that ensure an informed balance of interests after careful scrutiny of Strasbourg case-law and under supervision of the national courts, the ECtHR is more ready to presume that a measure is justified.

The advantage of procedural rationality review is that it recognizes the assumptions underlying the priority of national authorities – and national parliaments in particular. First of all, the Court respects national authorities as institutions with 'direct democratic legitimation' and 'general policy-makers', as it will, in principle, accept the balance conducted by national authorities if this is the outcome of a comprehensive, evidence-based process that takes into account the Court's case law.[46] This way, the ECtHR encourages the contracting parties to strengthen the protection of rights at the domestic level.

Secondly, the assumption that the decision taken by the national authorities is the result of a careful weighing of rights and interests, based on knowledge and expertise, is tested. If the decision-making process does not give any evidence thereof and the measure seems to rest upon mere presumptions, the Court may find the measure disproportionate. As such, this approach is, as Spano states, 'qualitative, democracy-enhancing'.[47] Procedural rationality review, moreover, reinforces constitutional review,[48] as it allows the national authorities to explain how specific national values and sensitivities weigh in a concrete balancing exercise, while, at

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43 *Konstantin Markin v Russia*, Decision of 7 October 2010, no. 30078/06, ECHR 2010. The remark, however, was perceived as a hostile attack on the Russian Constitutional Court and disappeared in the Grand Chamber's Decision of 22 March 2012.

44 O. De Schutter, 'The Two Lives of Bosphorus: Redefining the Relationship Between the European Court of Human Rights and the Parties to the Convention', CRIDHO Working paper 2013/6, at 21. Available at cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP-2013-6-ODeSchutterBosphorus-26-8-2013.pdf.

45 De Schutter also hints at this, ibid., at 28.

46 See reference in *S.A.S v. France*, *supra* note 31, § 129; T*he National Union of Rail, Maritime and Transport Workers v. United Kingdom*, Decision of 8 April 2014, no. 31045/10, § 99, ECHR 2014; *Berger-Krall and others v. Slovenia*, Decision of 12 June 2014, no. 14717/04, § 193, ECHR 2014.

47 Spano, *supra* note 2, at 499.

48 See also Spano, *supra* note 18, at 1, 6.

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the same time, encouraging them to make the scrutiny of the ECtHR case law part of the decision-making process when human rights are affected.

Procedural rationality review, however, while on the rise, has not yet fully developed. Courts are often hesitant to interfere in political processes. While procedural rationality review may save the court from second-guessing the appropriateness of a measure, judicial assessment of procedural elements may nevertheless be considered as more, not less, intrusive than substantive review.[49] This may explain the public outcry in the UK after the *Hirst* judgment:[50] as a commentator pointed out, normative evaluations of parliamentary debates are, 'a constitutional anathema in the domestic context'.[51]

A consequence of this hesitancy is that many questions remain unanswered. The ECtHR, for example, is somewhat ambiguous as to the relationship of procedural rationality review with the margin of appreciation.[52] In *Sukhovetskyy* the Court stated that, 'the extent of the State's margin of appreciation depends on the quality of the decision-making process'.[53] If procedural rationality review is part of the proportionality test, however, it should work the other way around: the Court first determines that the margin of appreciation is broad – on the basis of criteria such as European consensus, subject-matter or the vulnerability of the people affected – and then turns to procedural rationality review. In this way, the Court introduces procedural rationality review as a tool for scrutiny, securing respect for fundamental rights when wide deference is granted to the national authorities. However, in *Animal Defenders International*, discussed below, the margin of appreciation was narrow and still the Court turned to procedural rationality review.

It is important to underline that with procedural rationality review, the subsidiarity principle – contrary to what has been stated[54] – is not focused on the judicial process only; while it guides the intensity of the ECtHR's scrutiny, it also looks at the quality of the decision-making process by national judicial, administrative as well as legislative bodies. Moreover, procedural rationality review is not merely a subsidiarity instrument that temporizes tensions between demands for self-rule and autonomy by smaller levels of government and the need for shared rule and equal standards by larger levels of government in a multi-level government environment.[55] It is also used by national courts when reviewing acts of government or parliament within one legal system. Inspired by the US Administrative Procedure Act – which submits administrative rule-making to public notice, hearings from interested persons and reason-giving paired with judicial review – procedural tools to improve legitimacy and efficiency of both administrative rules and parliamentary

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49 Rose-Ackerman, Egidy and Fowkes, *Due Process of Lawmaking* (2015) at 185.

50 *Hirst v. the United Kingdom (no. 2)*, Decision of 30 March 2005, no. 74025/01 and *Hirst v. the United Kingdom (no. 2)* [GC], Decision of 6 October 2005, no. 74025/01, ECHR 2005-IX

51 S. Briant, 'Dialogue, Diplomacy and Defiance: Prisoners' Voting Rights at Home and in Strasbourg', (2011) 3 *European Human Rights Law Review* 243, at 248–50.

52 See Saul, *supra* note 42, at 754–9.

53 *Sukhovetskyy v. Ukraine*, Decision of 28 March 2006, no. 13716/02, ECHR 2006-VI.

54 F. Fabbrini, 'The Margin of Appreciation and the Principle of Subsidiarity: A Comparison', (2015) *Courts Working Paper Series*, No 15, 1, at 6.

55 Ibid.

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laws are being introduced in several European legal systems and increasingly used by national courts to assess the proportionality of these measures.[56]

The next section will illustrate the ECtHR's practice of procedural rationality review, and highlight, in particular, the case law following the Brighton Declaration.

3. Procedural rationality review by the European Court of Human Rights

3.1. An overview

For some time, the ECtHR has accentuated the importance of procedural guarantees in judicial and administrative decisions. In particular if the interest of the child is at stake, the Court, instead of substituting itself for the competent domestic authorities, inquires whether:

> [t]he domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and whether they made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be [for the child].[57]

Also, as regards administrative decisions such as the granting of or refusal to grant licenses, the Court examines whether the procedure leading to the decision was transparent, secured the right to be heard, and offered judicial remedies.[58] In several cases the Court also examines the quality of the decision process that led to the enactment of legislative decisions, including acts of parliament.[59]

Overall, the Court requires evidence that any infringement on fundamental rights rests on a careful balancing of rights and interests. It pursues this requirement to the parliamentary debate. While the principle of sovereignty of parliament, in principle, considers any act by the parliament as legitimate, the ECtHR expects that members of parliament actually have a substantive debate in which they seek to weigh the competing interests or to assess the proportionality of a measure. The lack of such parliamentary debate – combined with the prohibition for the judge to, instead, carry out such a balancing of interests in an individual case – was the reason why the disenfranchisement of certain persons – prisoners or persons under guardianship – was criticized in *Hirst* and *Alajos Kiss*.[60] However, in *Anchugov and Gladkov* the

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[56] For comparative analyses, see Popelier and Van De Heyning, *supra* note 34, at 255–9 and Rose-Ackerman, Egidy and Fowkes, *supra* note 49, at 296.

[57] *Neulinger and Shuruk v. Switzerland* [GC], Decision of 6 July 2010, no. 41615/07, § 139, ECHR 2010; *Vékony v. Hungary*, Decision of 13 January 2015, no. 65681/13, § 55. Established case law, see also *Maumousseau and Washington v. France*, Decision of 6 December 2007, no. 39388/05, § 74.

[58] E.g., *Capital Bank AD v. Bulgaria*, Decision of 24 November 2005, no. 49429/99, § 134, ECHR 2005-XII; *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, Decision of 11 October 2007, no. 14134/02, §§ 51–2; *Vékony v. Hungary*, Decision of 13 January 2015, no. 65681/13, § 36.

[59] Referring explicitly to the quality of the legislative and judicial review: *Animal Defenders International v. the United Kingdom* [GC], Decision of 22 April 2013, no. 48876/08, ECHR 2013. For a more extensive overview, see P. Popelier, 'The Court as Regulatory Watchdog', in Popelier, Mazmanyan and Vandenbruwaene (eds.), *supra* note 42.

[60] *Hirst v. the United Kingdom (no. 2)* [GC], Decision of 6 October 2005, no. 74025/01, ECHR 2005-IX; *Alajos Kiss v. Hungary*, Decision of 20 May 2010, no. 38832/06.

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Court made it clear that even a constitutional ground, preceded by extensive public debate, is insufficient if there is no evidence that any attempt was made to weigh competing interests.[61]

The Court might overlook the lack of actual thorough debate if it is clear from parliamentary documents or overview, that the policy or legislation is result of a widespread political consensus on the issue. For example, in relation to the restrictive British legislation on the permissibility of secondary action, the ECtHR provided a wide margin noting that although other countries had opted for other, less restrictive choices, parliamentary debate (or lack of over several years) gave evidence of a 'democratic consensus' that spans 'a broad spectrum of political opinion'.[62] This was supported by evidence that the rule went nearly unquestioned by the main political actors over several decades.

In other cases, the Court requires that the decision-making process is, moreover, based on more substantial evidence. Most explicitly, the Grand Chamber, in the *Hatton* judgment regarding aircraft noise pollution, stressed its subsidiary role but noted that governmental decision-making processes in complex issues of environmental and economic policy, 'must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake'.[63] The First Chamber reproached the UK government for not having made 'specific and complete' studies that allowed for making the 'right' balance, and for not having made any 'serious attempt' to evaluate the interferences with sleep patterns or to find the least onerous solution as regards human rights.[64] The Grand Chamber, however, lowered its standards, requiring 'appropriate' instead of 'specific and complete' studies, and was satisfied that a series of studies and investigations were carried out over a long time regarding the economic value of night flights and the average perception of noise disturbance and that the authorities consistently monitored the situation. In *Zammit Maempel* as well, the court stressed that it requires evidence through 'appropriate' investigations, not comprehensive and measurable data in relation to each and every aspect of the matter, and was satisfied with the additional monitoring of the concrete situation.[65]

In several decisions, the ECtHR examined the decision-making procedure to dismiss the justification for a legislative intervention for not being based on facts and figures. For example, in the *Lecarpentier* case, the Court found that the French government's claim, that the retroactive legislative intervention to counter the effects of a judicial decision concerning a mortgage loan was justified by motives of general economic interest, was not substantiated as no evidence had been presented to underpin the fear that the banking sector and the economic activity in general were put at risk.[66] In *Konstantin Markin*, the Russian government's assertion that

[61] *Anchugov and Gladkov v. Russia*, Decision of 4 July 2013 nos. 11157/04 and 15162/05, § 108.
[62] T*he National Union of Rail, Maritime and Transport Workers v. United Kingdom*, Decision of 8 April 2014, no. 31045/10, § 99, ECHR 2014.
[63] *Hatton v. the United Kingdom* [GC], Decision of 8 July 2003, no. 36022/97, § 128, ECHR 2003-VIII.
[64] *Hatton v. the United Kingdom*, Decision of 2 October 2001, no. 36022/97, §§ 98 and 105.
[65] *Zammit Maempel v. Malta*, Decision of 22 November 2011, no. 24202/10, §§ 70–71.
[66] *Lecarpentier and Other v. France*, Decision of 14 February 2006, no. 67847/01, § 47.

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denying military servicemen the right to parental leave was criticized for not being backed by any expert study or statistical research.[67] In *X and Others* the Court found the absolute prohibition on second-parent adoption for same-sex couples in Austria disproportional, because no evidence was produced by the Government to support the presumption that such adoption would be detrimental to the child.[68] Especially if the government gainsays what is the general opinion of experts, it has to provide expert opinions or scientific evidence. Therefore, in *Kyutin*, the Court found that arguments of public health could not justify the travel restrictions on people living with HIV as there were no 'compelling and objective arguments' supporting this rationale for the restriction.[69]

The ECtHR does not only take into account whether or not the domestic decision was based on an assessment of the scientific evidence available; it also appreciates the input of interested parties or the public at large. It refers to Green and White Papers and other consultation processes to establish that the measure is based on a careful balance of interests and is therefore proportional.[70] In ethical issues, consultation processes and referendums may also demonstrate that the priority given to the protection of specific rights and values is legitimate in the societal context of that state. This is why in *A., B. and C.* the Court found the Irish restrictive abortion laws proportional.[71]

3.2. Procedural rationality review post-Brighton Declaration

The overview in the previous section includes both pre- and post-Interlaeken/Brighton Declaration judgments. Apparently, the Court did not need the declarations to remain conscious of the delicate trade-off between sovereignty arguments and human rights protection. However, Mowbray noted that the first data show that – at least from a formal perspective – the Court has been perceptive of the call to strengthen the role of subsidiarity in its case law.[72] References to 'subsidiarity' in ECtHR judgments have been notably higher since the Interlaeken Declaration. While such references might be an indication of a new approach, it does not necessarily mean that the case law, as such, has fundamentally changed. Such references might be mere lip service to soothe the member states.

In that perspective, it is far too early to decide whether the Court uses procedural rationality review in a more deferential way than before, namely in order to 'refine' its margin of appreciation doctrine and its proportionality analysis. For now, we want to make two observations starting from judgments where the ECtHR seems to take a position diametrically opposed to a former judgment in a similar case. The first revolves around the *von Hannover* saga and stresses the intensified judicial dialogue. The other discusses the *Animal Defenders International* case as a possible

67 *Konstantin Markin v. Russia*, Decision of 7 October 2010, no. 30078/06, § 144.
68 *X and Others v. Austria* [GC], Decision of 19 February 2013, no. 19010/07, §§ 142, 146, ECHR 2013.
69 *Kiyutin v. Russia*, Decision of 10 March 2011, no. 2700/10, § 72, ECHR 2011.
70 *Evans v. the United Kingdom* [GC], Decision of 10 April 2007, no. 6339/05, §§ 87-91, ECHR 2007-I.
71 *A., B. and C. v. Ireland* [GC], Decision of 16 December 2010, no. 25579/05, § 241, ECHR 2010.
72 A. Mowbray, 'Subsidiarity and the European Convention on Human Rights', (2015) 15 *Human Rights Law Review* 313, at 338. As such, it is obvious that the Court has been perceptive to the criticisms.

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turn in the Court's practice on procedural rationality review when general Acts of Parliament are involved.

3.2.1. von Hannover: Reaching out to domestic courts

In the first *von Hannover* case, the ECtHR, unanimously, sided with the applicant, Princess Caroline of Monaco, who complained that the unremitting publication in the German press of photos and articles related exclusively to details of her private life, had intruded upon her right to privacy whereas she did not hold a public office. The ECtHR concluded that the criteria established by the German courts to weigh the right to privacy with the freedom of expression, had not been sufficient to ensure the effective protection of her private life.[73] In particular, they had not drawn a clear distinction between figures of contemporary society 'par excellence' and 'relatively' public figures, nor given precise indications as to when and where these figures were in a protected sphere.[74]

In the second *von Hannover* case, Princess Caroline and her husband contested the continued publication of photos of her private life. This time, however, the ECtHR, also unanimously, rejected her petition.[75] To that end, the Court emphasized that the Federal Court of Justice had made changes to its previous case law and that the Constitutional Court had confirmed that new approach.[76] Although the distinction between public figures 'par excellence' and 'relatively' public figures had still not been developed, the national courts had carefully examined whether the photos had contributed to a debate of general interest and examined the circumstances in which they had taken.[77] The ECtHR was in particular satisfied that the Constitutional Court had undertaken a detailed analysis of the Strasbourg case law to come to its conclusion.[78]

Finally, in the third *von Hannover* case and in a recent judgment petitioned by Princess Caroline's husband, Ernst August von Hannover, the Court recalled that if the national authorities, within their margin of appreciation, have balanced interests in the light of the criteria set out by ECtHR jurisprudence, only serious reasons will bring the Court to substituting the national judgments for its own assessment.[79] In both cases, the ECtHR subsequently analyzed the German Federal Court of Justice's reasoning to identify the relevant criteria and concluded that Article 8 of the Convention was not violated as the national court had exercised a substantiated balance of rights and interests.

While the later *von Hannover* cases emphasize the procedural rationality review and by doing so seem to come to a different conclusion than the first judgment, they do not really depart from the substantial conclusions in the first judgment. While, in the first judgment, the Court was not satisfied that the judgment was

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73 *Von Hannover v. Germany*, Decision of 24 June 2004, no. 59320/00, §§ 74 and 78, ECHR 2004-VI.
74 Ibid., § 73.
75 *von Hannover v. Germany (no. 2)* [GC], Decision of 7 February 2012, nos. 40660/08 and 60641/08, ECHR 2012.
76 Ibid., §§ 114 and 125.
77 Ibid., § 124.
78 Ibid., § 125.
79 *von Hannover v. Germany (no. 3)*, Decision of 19 September 2013, no. 8772/10, § 45; *Ernst August von Hannover v. Germany*, Decision of 19 February 2015, no. 53649/09, § 47.

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shaped in the light of its jurisprudence, the explicit mentioning of the Strasbourg criteria in the subsequent judgments convinced the Court that a fair balance was struck. Conversely, this means that the ECtHR will more easily find government interference to violate the Convention if such violation was already established by the national courts.[80] Hence, the ECtHR encourages the national courts to explicitly take into account the Strasbourg case law, and in return – unless the reasoning is manifestly deficient – respects the outcome of the national courts. This way, procedural rationality review reinforces constitutional conversations between courts.[81]

3.2.2. Animal Defenders International: Reaching out to national parliaments

In *Animal Defenders International*[82] the Grand Chamber applied procedural rationality review in a case that revolved around the restriction of freedom of public speech, which, as a rule, falls within a narrow margin of appreciation.[83] Previously, procedural rationality review was applied in cases where the margin was either broad or uncertain. It played no role in the *VgT* case, where the Court, after a substantial review, found the prohibition on political advertising on radio and television in Switzerland to violate Article 10 of the Convention.[84] By contrast, in *Animal Defenders International*, the Grand Chamber confined itself to a procedural rationality review to sustain an even broader[85] prohibition on political advertising on television and radio. The Grand Chamber argued that there were convincing general justifications for the general measure, such as protection of the electoral process and the maintenance of the free and pluralist debate on matters of public interest, which reduced the importance of the impact of that measure in a particular case[86] and justified the central importance given by the Grand Chamber to the quality of the national legislative and judicial review of the necessity of the measure.[87] After reciting the White Paper consultations, Explanatory Note and specialist bodies' opinions, the Court concluded that the prohibition was 'the culmination of an exceptional examination by parliamentary bodies' of its 'cultural, political and legal aspects' and underlined that the measure was enacted with cross-party support and its necessity endorsed by all specialist bodies.[88] Added to that was the careful judicial scrutiny, with the High Court and the House of Lords analyzing the relevant Convention case law and principles and applying it to the prohibition.[89]

Hence, apart from the emphasis put on the limitations of the prohibition, confined only to radio and television which are considered the most influential and expensive media, the judgment rested mainly on the intensity of the parliamentary

80 *A. and Others v. the United Kingdom* [GC], Decision of 19 February 2009, no. 3455/05, § 182, ECHR 2009.
81 For a definition of (constitutional) conversations in the respect of this contribution see *supra* note 22.
82 *Animal Defenders International v. the United Kingdom*, [GC] Decision of 22 April 2013, no. 48876/08, ECHR 2013.
83 Ibid., §§ 102–4.
84 *VgT Verein gegen Tierfabriken v. Switzerland*, Decision of 28 June 2001, no. 24699/94, ECHR, 2001-VI. In his concurring opinion, Judge Bratza, § 12, underlined that in *VgT* the precise extent of the parliamentary scrutiny was 'unclear'.
85 As stressed in the dissenting opinion of Judge Tulkens, joined by Judges Spielmann and Laffranque, § 12.
86 See also, in this respect, the concurring opinion of Judge Bratza, § 4.
87 Ibid., §§ 109–13.
88 Ibid., §114.
89 Ibid., § 115.

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and judicial scrutiny. The applicant, however, questioned in particular the presumptions underlying the measure and criticized the lack of evidence for these presumptions. She maintained that the different approach to broadcast and other media was 'unproven' and that the government had presumed that the broadcast media was uniquely powerful and expensive, 'without any proof, analysis or comparative studies', notwithstanding the growing impact of other forms of pervasive media.[90] She also claimed that the risk of compromising the impartiality of broadcasting as well as the fear of distortion of the public debate by rich and powerful interest groups were unproven, and seemed exaggerated when looking at other European states.[91]

The Court shifted the burden of proof, arguing that, 'there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the respondent State to undermine the need for special measures for the latter',[92] considered sufficient the observation by a judge in the High Court that broadcasted advertisements have a certain advantage for which advertisers would pay large sums of money, far beyond the reach of most NGOs,[93] and resorted to the lack of European consensus between contracting states on how to regulate paid political advertising in broadcasting.[94] An important factor was that the Court itself kept the same presumption, considering that the government could reasonably presume that the broadcasting media are particularly powerful, and that the applicant should prove otherwise, as this presumption was commonly shared and relied upon in previous ECtHR case law.[95]

The judgment was pronounced by a narrow 9–8 majority decision. Judges in their dissenting opinion, comparing the case with *VgT* criticized the use of double standards, and held that given the narrow scope of the margin of appreciation in matters of public debate, 'an assumption of existing public interest' should not be equated with, nor be necessarily seen as sufficient to establish, the pressing social need justifying restrictions to freedom of expression.[96] In their opinion, 'excessive importance has been attributed to the process generating the general measure', resulting in the overruling of *VgT*.[97] In another dissenting opinion, the quality of the legislative and judicial scrutiny was criticized, in so far as no convincing arguments or references to expert reports were put forward for rejecting less restrictive solutions.[98]

The reproach of using a double standard is not new. It has been claimed before that the ECtHR is more restrained towards 'high-reputation' states – generally West-European states – than 'low-reputation' or developing states.[99] In this case, however, the double treatment concerned two 'high-reputation' states, Switzerland and the UK. Nevertheless, it may have played a part that in this particular case the UK was the

90 Ibid., § 82.
91 Ibid., §§ 84–5.
92 Ibid., § 119.
93 Ibid., § 120.
94 Ibid., § 123.
95 Ibid., § 119 and concurring opinion of Judge Bratza, § 6.
96 Ibid., Dissenting opinions of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, §§ 1 and 3.
97 Ibid., § 9.
98 Ibid., Dissenting opinion of Judge Tulkens, joined by judges Spielmann and Laffranque, §§ 16 and 17.
99 Dothan, *supra* note 11, at 115.

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responding state. Much criticism had been voiced in the UK after the pronouncement of the *VgT* judgment,[100] and in *Pensioners Party*, also revolving around the freedom of political speech, the UK intervened as a third party, asking – at that point, in 2008, to no avail – 'to confine VgT to its factual circumstances or alternatively to depart from its reasoning'.[101] The narrow majority in *Animal Defenders International* and the nature of the dissenting opinions show that the resort to procedural rationality review was controversial. In doctrinal literature, expectations were that the ECtHR, in line with *VgT* and *Pensioners Party*, would decide in the applicant's favour.[102] The UK courts as well envisaged this possibility, but upheld the act considering the wide latitude falling to Parliament in a context where the sovereignty of Parliament doctrine prevails.[103]

Irrespective of these considerations, the question rises whether the Grand Chamber has now taken a new turn, by weakening its scrutiny upon evidence of an extensive examination by the national authorities in the case of a general measure enacted by parliament, even if the margin of appreciation is narrow. In that case, extensive legislative and judicial examinations replace, for a large part, substantive review, and in the procedural rationality review legislative debates prevail over evidence-seeking. This was echoed in *Shindler*, pronounced soon after *Animal Defenders International*, where the Court referred to repeated parliamentary debates that were held on non-residents' voting rights. While it underlined that this is only one consideration in the proportionality analysis, it was a decisive factor to conclude that a fair balance had been struck, given the large margin of appreciation.[104] This new approach may very well imply a reaction to the Brighton process, given the crucial importance attached to national legitimacy arguments: if the measure relies on a broad and cross-party consensus in parliament, after public consultations and intensive debate, and is upheld by the national courts after careful legal scrutiny, the Court is ready to accept measures which it would consider questionable otherwise.

A counter-indication is *X and Others* v. *Austria*, where the Court laid the burden of proof on the Austrian Government by requiring scientific studies or other items of evidence to underpin the statute's assumption that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs.[105] This case, however, concerned the question of whether there was a discriminating difference in treatment on the ground of sexual orientation, in which case the Court requires particular convincing and weighty reasons by way of justification.[106] Moreover, a condition remains that the different interests at stake were at least considered in the light of the ECtHR jurisprudence. If there is no evidence thereof,

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100 T. Lewis, 'Reasserting the Primacy of Broadcast Political Speech after Animal Defenders International? – Rogaland Pensioners Party *v.* Norway', (2009) 1 *Journal of Media Law* 37, at 41.
101 *TV Vest AS and Rogaland Pensjonistparti v Norway*, Decision of 11 December 2008, no. 21132/05, ECHR 2008.
102 Lewis, *supra* note 100, at 48.
103 Ibid., at 47.
104 *Shindler v. the United Kingdom*, Decision of 7 May 2013, no. 19840/09, § 117.
105 *Others v. Austria*, *supra* note 68, §§ 142, 146.
106 Ibid., § 99.

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even a constitutional provision accepted by the society at large may not convince the Court.[107]

Several of the cases mentioned above indicate that the ECtHR will take a deferential approach if the government can establish that sufficient research and parliamentary debate has been undertaken. Interestingly, such studies might also support the ECtHR in finding a violation. In those cases which might be culturally or political sensitive, domestic studies or societal changes perceivable in parliamentary debate might convince the ECtHR to narrow the margin if these findings have not been dealt with by the authorities. For example, in the case *MGN Limited* v. *United Kingdom* the ECtHR referred to the Consultation Paper of the Ministry of Justice and other policy papers to support the finding that the costs in defamation and privacy proceedings were disproportionate and therefore constituted a violation of Article 10 of the Convention.[108] In this case the Court again took account of the actions of the public authorities but noted that the government had failed to adopt appropriate legislation or address the public consultations scheme even though they were well aware of the issue in view of the above-mentioned consultation paper.[109]

4. Drawbacks

While we have outlined, in Section 2, the benefits of procedural rationality review in the light of recent calls for a more refined application of the subsidiarity principle, we also have to take notice of certain drawbacks. Some incoherencies in the practice of procedural rationality review were already mentioned above and may fortify possible suspicions of the use of double standards between contracting parties. Apart from that, two other considerations come to mind.

First of all, if procedural rationality review serves as a reply to the Interlaeken/Brighton process, it will not be able to tone down recent waves of criticism if the Court concludes that the decision making procedure did not fulfil the requirements. The general indignation in the UK following *Hirst* shows that the doctrine of sovereignty of parliament also denies the court the right to interfere with the national decision-making process. This is obvious in the speech of Lord Hoffmann which triggered the academic debate on the limits of the ECtHR. He claims that the ECtHR's approach of the margin of appreciation is a concession to the member states is mistaken. Instead he claims that the ECtHR should consider in cases whether they are competent to intervene:

> Even if the Strasbourg judges were omniscient, knowing the true interests of the people of the United Kingdom better than we do ourselves, it would still be constitutionally inappropriate for decisions of the kind which I have been discussing to be made by a foreign court.[110]

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107 *Anchugov and Gladkov v. Russia*, *supra* note 61, § 108.
108 *MGN Limited v. United Kingdom*, Decision of 18 January 2011, no. 39401/04.
109 Ibid., §§ 215–17.
110 Lord Hoffmann, *supra* note 25, at 25–6.

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Although procedural rationality review, in theory, strikes a fair balance, answering to the objections raised by opponents while holding on to its supervisory role, in practice it will only satisfy criticasters if it is used as a leeway to stop the ECtHR from interfering in domestic issues. This, again, will bring human rights watchers to reproach the Court from forsaking its duty to protect Convention rights. Hence, the *Animal Defenders International* case may raise the question of whether the Court, by prioritizing parliamentary debate over evidence-seeking, still seeks a fair balance as offered by procedural rationality review.

On the other hand – and this is the second drawback – it is debated whether judges actually have the expertise to assess the quality of administrative and legislative decision-making processes.[111] This may explain why the ECtHR is reluctant to engage in methodological disputes and relies on the domestic standards of quality of reviews or consultations. In *Hatton*, it did not consider the fact, highlighted in a dissenting opinion, that 'the government's claims in respect of the country's economic well-being are based on reports prepared by the aviation industry'.[112] In *Hardy and Maile* as well, the Court, satisfied that 'extensive reports and studies were carried out', refused to discuss the quality of the risk assessment carried out by the national authorities.[113] In *S. and Marper* the Court doubted whether the statistics provided by the government established sufficient proof, but did not want to discuss this further. In the latter case, it nevertheless concluded that the blanket law on the retention of fingerprints and samples in a database violated the Convention.[114] Only in the case of manifest errors does the Court criticize the quality of studies produced as evidence for the proportionality of governance interference. Hence, in *Smith and Grady*, the Court explicitly expressed its doubt as to the quality and impartiality of the surveys invoked by the British Government to support the policy of discharging homosexual members of the armed forces.[115]

Third, the application of rationality review by the ECtHR risks being criticized as selective in that the Court appears to undertake such review only in respect to cases from certain (openly critical) countries. When considering the cases mentioned above, in which the Court applied procedural rationality review, it is striking that the vast number of those cases originate from the UK. As such, procedural review might not be conceived as a necessary tool to strike the balance between the Court's supervisory role and the subsidiarity of the Convention, but rather as a method to canalize and mitigate the protests from the UK.[116]

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111 See also P. Popelier, 'Preliminary Comments on the Role of Courts as Regulatory Watchdogs', (2012) 6 *Legisprudence* 257, at 267–9 for strategies to deal with limited methodological capacity.

112 Dissenting Opinion, Judges Costa, Ress, Türmen, Zupančič and Steiner, *Hatton and Others v. United Kingdom* [GC], Decision of 8 July 2003, no. 36022/97, § 15, ECHR 2003-VIII.

113 *Hardy and Maile v. the United Kingdom*, Decision of 14 February 2012, no. 31965/07, § 231.

114 *S. and Marper v. the United Kingdom* [GC], Decision of 4 December 2008, nos. 30562/04 and 30566/04, ECHR 2008.

115 *Smith and Grady v. the United Kingdom*, Decision of 27 September, nos. 33985/96 and 33986/96, ECHR 1999-VI.

116 If this was the underlying purpose, however, it is clear from current political views in the UK that this has failed. An exit from the Convention has remained high on the agenda and is ever more probable after the Brexit vote on 23 June 2016. See C. Smith, 'Lawyers fear for UK's role in ECHR after Brexit vote', *The Law Society Gazette*, 24 June 2015, available at www.lawgazette.co.uk/law/lawyers-fear-for-uks-future-in-echr-after-brexit-vote/5056112.article.

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For example, the case *Jeunesse* v. *the Netherlands* was a perfect opportunity for the Court to apply a procedural proportionality review.[117] The dissenting judges reproached the Court for not respecting the subsidiarity principle as established in the *von Hannover n° 2* judgment. It is interesting to note that the Court did not extend its practice precisely in this case, which might be considered a sensitive one, given the fact that the ECtHR is in particular criticized for 'judicial activism' in cases regarding migration law and social security, and given the recent upsurge of harsh criticism in the Netherlands.[118] The Court found that the Netherlands had violated Article 8 of the Convention by refusing the applicant residence in the Netherlands, disrespecting, according to the Court, 'exceptional circumstances' and, in particular, the children's best interests.[119]

According to the three dissenting judges, the case required the performance of a difficult and detailed balancing exercise, which belongs in principle to the national authorities and should, save serious reasons, not be substituted by the Court's view if the national decision was undertaken in the light of the criteria laid down in the Strasbourg case law.[120] And the judges to conclude that the balancing exercise was indeed performed by the national authorities, including the domestic courts, 'in a full and careful manner, in conformity with the well-established principles of the Court's case-law' and reproaching the Court for, 'drifting away from the subsidiary role assigned to it by the Convention'.[121]

The same is true for the case *S.A.S.* v. *France* concerning the *burqa* ban in France.[122] Due to the highly political and societal sensitivity of this rule, finding a violation of the freedom of religion would have sparked outrage in France. However, several international reports condemned the French ban. Moreover, sanctioning an outright ban would be difficult to reconcile with the Court's previous case law. The Court could have relied on procedural rationality to resolve the issue. It was clear that an extensive report and studies had been drawn on the measure. Parliamentary committees issued reports in favour of the draft law. There was an overwhelming support in favour of the Bill in Parliament. As such, while contested among minorities, the decision was the product of intense debate and deliberation. Instead of referring to these reports, studies and parliamentary approach, the ECtHR held that a wide margin was to be accorded to France given that a face veil was discussed in several European countries and as such no common European consensus existed.[123] This reasoning was open to critique given that it was clear that France was rather isolated (with the exception of Belgium) in establishing an outright ban on wearing face veils in public. As such, one might as easily have concluded that there was a European

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117 *Jeunesse v. the Netherlands* [GC], Decision of 3 October 2014, no. 12738/10.
118 See, e.g., M. Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court', (2012) 8 *European Constitutional Law Review* 203; M. Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers', (2010) 3 *Inter-American and European Human Rights Journal* 3–48.
119 *Jeunesse v. the Netherlands*, *supra* note 117, § 122.
120 Ibid., Dissenting opinion of Judges Villiger, Mahoney and Silvis, § 1.
121 Ibid., § 10.
122 *S.A.S. v. France*, *supra* note 31.
123 Ibid., § 156.

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consensus, namely that wearing full face veils is considered acceptable to the vast majority of European states.[124]

In order for procedural rationality to become an accepted approach providing a leeway between the post-Brighton focus on subsidiarity and the Court's supervisory role, the Court will have to develop a coherent approach. Only in such a case can it also encourage domestic legislators to take the democratic process seriously and provide for a procedurally sound approach. If not, procedural rationality might all too easily be categorized as the 'British approach'.

5. Conclusion

During the Interlaeken and Brighton conferences on the future of the ECtHR much focus was placed on strengthening the role of subsidiarity in the reasoning of the ECtHR. Criticisms of the Court for second-guessing domestic legislators' democratic choices resulted in adoption of the principle of subsidiarity in Protocol No. 15 to the Convention. The Court has been receptive to the criticism and refers to the principle of subsidiarity. With the margin of appreciation it had already developed a tool to mitigate the criticisms. A lack of coherent approach of the margin by the Court meant that this tool could not soothe the member states. Procedural rationality might come to the Court's aid. Not only would this approach reconcile the Court's supervisory function with the principle of subsidiarity, it would moreover encourage member states to improve the democratic processes in run up to the adoption of legislative norms. Nonetheless, it is illusory to believe that even if the Court would develop a coherent and consistent approach in this sense all protests against the Court's case law would vanish. The criticisms of, for example, the UK do not only target the ECtHR, but judicial, in particular supranational, review of legislation altogether. As such, developing a procedural rationality approach and more in general providing for a structured, coherent and consistent application of subsidiarity in the case law should be addressed in order to find the correct balance between the Court's supervisory function and the role of domestic institutions and not merely to answer the criticisms voiced in result of particular domestically sensitive cases.

[124] Ibid., Dissenting opinions of Judges Nussberger and Jäderblom, § 19.

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