

THE EUROPEAN COURT OF HUMAN RIGHTS' REVIEW METHODOLOGY

An Evolution

Saadet YÜKSEL



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European Court of Human Rights, Strasbourg, France

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I. INTRODUCTION

Since the turn of the century, the approach of the European Court of Human Rights to reviewing individual cases has taken a procedural turn. As well as analysing the substantive claims of individuals, the Court is increasingly building into its analysis a review of the applicable domestic process for protecting human rights. This shift in approach will be referred to as the Court's current methodology.¹ The greater use of this form of review, and its normative justification, has been discussed elsewhere. Indeed, although the adoption of this methodology may be understood broadly as an implementation of the principle of subsidiarity, it has also been observed to mark a shift away from the orthodox approach to subsidiarity.² This book thus seeks to contribute to the understanding of process-based review by conducting a doctrinal analysis of two key aspects of the Court's process-based methodology. First, the Court's engagement with the adequacy of balancing in light of the Convention of the relevant interests at issue within domestic processes. Second, the development of a process-based approach under the rubric of Article 35 of the Convention, entailing the requirement for the exhaustion of domestic remedies. Specifically, these two methodological aspects of the Court's review will be understood in relation to their evolution within the Convention jurisprudence.

Part II engages with the explicit introduction of the concept of subsidiarity into the Convention system. Part III then turns to consider the development of the Court's engagement with the adequacy of balancing in domestic processes. This doctrinal analysis reveals that this aspect of the Court's jurisprudence has three distinct phases, with the most recent phase

1 This shift in the Court's methodology, has also been referred to as the "procedural turn", and termed as "procedural review" or process-based review". See, Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press, 2017); Oddny Mjoll Arnardottir, 'The 'Procedural Turn' under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15(1) *IJCL* 9, 13-15; Robert Spano, 'The Future of the European Court of Human Rights – Subsidiarity Process-based Review and the Rule of Law' (2018) 18(3) *HRLRev* 473-494. For the purposes of the present publication, the term "process-based review" will be used as it most accurately captures the way the Court reviews the decision-making process. The term "procedural review" may be liable to create confusion with the procedural obligations present in some of the Articles of the Convention.

2 See, for further information, Saadet Yüksel, 'Interplay Between the Principle of Rule of Law and the Process-Based Review' in Jon Fridrik Kjølbro et al (eds), *Liber Amicorum Robert Spano* (Anthemis 2022), 772-3.

entailing an emerging rule of law approach. Part IV will then examine the jurisprudential foundations for the Court's process-based approach towards its assessment under Article 35. This section will also conduct a study of the development of structural guidance for specific domestic processes under Article 35, using the example of domestic individual complaint mechanisms. Finally, the book will explore the recent operation of process-based methodologies across Articles 5, 10, and 8 of the Convention (Part V), revealing the duality between substance and process-based focuses within the Court's review under different areas of the Convention.

II. OVERVIEW OF THE KEY CONCEPTS

1. The Principle of Subsidiarity and Rights Protection

The principle of subsidiarity forms a cornerstone of the Convention system. This was confirmed by the Brighton Declaration, issued as the culmination of the High-Level Conference on the Future of the European Court of Human Rights meeting of the Committee of Ministers in April 2012,³ and more recently the Protocol No. 15 to the European Convention on Human Rights which came into force in August 2021. Whilst the precise meaning and implications of the principle of subsidiarity has long been debated in constitutional theory,⁴ for the purpose of the present discussion it is not necessary to revisit this debate. Nor is it necessary to explain the history of the explicit introduction of subsidiarity the framework of the European Convention of Human Rights. It is instead important to address the two most fundamental, and mutually reinforcing, features of the principle, as understood in relation to the Convention system.⁵ These are: (i) respect for democracy and sovereignty, and (ii) enhanced effectiveness of rights protection. The current discussion seeks to elucidate the way in which the Court's development of its current process-based review methodology responds to both these features, as a means of achieving a fuller understanding of the process-based shift which has been said to shape a 'new historical era' of the Court's jurisprudence.⁶

It has been observed that the principle of subsidiarity 'regulates how to allocate or use authority within a political or legal order', and 'expresses a commitment to leave as much authority to the more local authorities as possible, *consistent with achieving the stated objectives* [emphasis added]'.⁷ Turning to the Convention jurisprudence in particular, the

3 "High-Level Conference on the Future of the European Court of Human Rights: Brighton Declaration" adopted at the High-Level Conference meeting at Brighton on 19 and 20 April 2012 at the initiative of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe.

4 See for example, Nick Barber, 'Subsidiarity' in N. W. Barber, *The Principles of Constitutionalism* (OUP 2018) 187-218; Andreas Follesdal, 'Competing Conceptions of Subsidiarity' in James E. Fleming and Jacob T. Levy (eds), *Federalism and Subsidiarity Nomos* (New York University Press, 2014), vol. 55, 214-230.

5 It is noted that there is a debate as to how the concept of subsidiarity may play out in the supranational context may differ from its application to a national system.

6 Spano (n 1).

7 Andreas Follesdal, 'Appreciating the Margin of Appreciation' in Adam Etinson (eds), *Human Rights: Moral or*

sentiment behind this general conception of the principle of subsidiarity remains present. Accordingly, in the context of the Convention system it has recently been observed that the 'principle of subsidiarity merely encapsulates a norm of power distribution between the Court and the States Parties with the *ultimate aim of securing to every person within the jurisdiction of a State the rights and freedoms provided by the Convention* [emphasis added]'.⁸ These two observations illustrate that a meaningful understanding of the principle of subsidiarity, within the Convention context, is not confined to its role of respecting the democratic legitimation of national authorities. Rather, the subsidiary role of the Convention system should be understood in light of the importance in ensuring effective rights protection, as provided for by the Convention.

At the regional level, this understanding of the principle of subsidiarity has acquired prominence. The 2012 Brighton Declaration stated that State Parties to the Convention and the Court 'share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity'.⁹ Expanding on the interaction between the Court and national authorities, the Brighton Declaration welcomed the 'development by the Court in its case law of principles such as subsidiarity and the margin of appreciation'.¹⁰ Moreover, the High-Level Conference concluded that 'reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention'.¹¹ Consequently, "Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms",¹² was adopted by the Committee of Ministers on 16 May 2013 and entered into force on 1 August 2021. This Protocol provided for a new recital to be added to the end of the Preamble of the Convention, affirming that State Parties 'in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention ... and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction' of the Court. Thus, the Brighton Declaration, the subsequent adoption of Protocol No. 15 by the State Parties to the Convention, have affirmed that a core feature of the principle of subsidiarity is the effective implementation of rights guaranteed by the Convention.

Political? (OUP 2018) 269, 275.

8 Spano (n 1) 492.

9 Brighton Declaration (n 3) para. 3.

10 Ibid, para. 12(a).

11 Ibid, para. 12(b).

12 Hereafter 'Protocol No. 15'.

a. Respect for democracy and sovereignty

The twofold character of the principle of subsidiarity is translated into the methodological aspects of the Court's process-based review. The first methodological aspect explored in this book is the Court's engagement with the adequacy of balancing undertaken within domestic processes. As will be explored in Part III, there are three phases to the Court's jurisprudence in this respect. Under all three stages the Court has consistently recalled the justificatory foundations for this form of review as being constructed in part by the direct democratic legitimization of the national authorities. In this way, the Court's process-based review can be explicitly linked to the underpinnings of the principle of subsidiarity, namely a respect for democracy and sovereignty.

For example, in the early case of *Maurice v. France*, in reiterating the 'fundamentally subsidiary role of the Convention', the Court stated that the 'national authorities have direct democratic legitimization'.¹³ The same apposition between the principle of subsidiarity within the Convention and the direct democratic legitimization of the national authorities may be found in *S.A.S. v. France*,¹⁴ which consolidated the *Animal Defenders* approach towards the methodological aspect of engaging with domestic balancing. As recently as December 2022, the Court repeated during discussion of the principle of subsidiarity that '[t]hrough their democratic legitimization, the national authorities are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions'.¹⁵ Thus, it is clear that throughout the Court's development of its engagement with the adequacy of balancing within both domestic legislative and judicial processes, the Court has consistently threaded its recognition of its subsidiary role with an appreciation of the direct democratic legitimization of the national authorities.

The second methodological aspect of process-based review, centring on the Court's assessment of the exhaustion of domestic remedies under Article 35 of the Convention¹⁶, is

13 *Maurice v. France* [GC] (No. 11810/03, 6 October 2005), para. 117.

14 See, for the relevant part, *S.A.S. v. France* [GC] (No. 43835/11, 1 July 2014), para. 129.

15 *K.K. and Others v. Denmark* (No. 25212/21, 6 December 2022), para. 47.

16 Article 35 of the Convention: "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken. 2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits. 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings."

also evocative of the respect for democracy and sovereignty encapsulated by the principle of subsidiarity. The Court's assessment of the exhaustion of domestic remedies under Article 35 of the Convention has been crucial towards the development of its process-based review, largely because of its clear underlying rationale of the principle of subsidiarity. As will be explored in more depth (see Part IV), the Court's assessment of the exhaustion of domestic remedies under Article 35 of the Convention can be understood as constituting a methodological aspect of process-based review. In a broad sense, the Court's assessment under Article 35 itself serves to strengthen the implementation of the principle of subsidiarity, as it envisions the existence of effective remedies at the national level by which States may be able to fulfil their primary responsibility in securing the rights and freedoms guaranteed by the Convention. Thus, the jurisprudence developed within the area of Article 35 directly relates to the principle of subsidiarity, and the growth of this jurisprudence serves to deepen the embedment of this principle within the Convention system in practical terms.

More specifically, the Court's adoption of a process-based approach towards its assessment under Article 35 has been accompanied by wide-ranging and structural implications within the Convention jurisprudence that have come to be crucial for the implementation of the principle of subsidiarity. This is because it entails a rigorous assessment of the ability of relevant domestic processes, viewed holistically, to provide sufficient and accessible remedies for the alleged rights violation in question. In this way, the Court's approach is not a tick-box exercise concerned with which remedies were on the face of it available at the national level, and whether the applicants could be said to have made any use of them. An emblematic example of the transformative potential for subsidiarity in this area is the jurisprudence developed in respect of domestic individual complaint mechanisms under Article 35. This jurisprudence is demonstrative of the structural implications of the process-based approach of the Court under the rubric of Article 35 due to the copious guidance provided by the Court in relation to a domestic process that is of fundamental importance in embedding Convention norms within national systems.

The Court's assessment under Article 35 of the Convention consistently evinces a respect for democracy and sovereignty, the first fundamental feature of the principle of subsidiarity. In this regard, one may draw on the assessments under Article 35 made in two landmark cases in this area: *Hasan Uzun v. Turkey*¹⁷ and *Vučković and Others v. Serbia*¹⁸ (see Part IV). The Court has highlighted that States do not have to answer for their actions before an international

17 *Hasan Uzun v. Turkey* (dec.) (No. 10755/13, 30 April 2013).

18 *Vučković and Others v. Serbia* [GC] (preliminary objection) (Nos. 17153/11 and others, 25 March 2014).

body until they have had the opportunity to redress the situation in their domestic legal order.¹⁹ Significantly, the Court also stated that it cannot and must not take the place of Contracting States, acknowledging that they were responsible for ensuring that fundamental rights and freedoms enshrined in the Convention are respected and protected at the domestic level.²⁰ The Court in *Vučković and Others* reiterated the principle that States are ‘dispensed from answering before an international body for their acts before they have had the opportunity to put matters right through their own legal system’.²¹ This was again related to the necessity of exhausting domestic remedies, through the notion that ‘those who wish to invoke the supervisory jurisdiction of the Court as concerns complaint against a State are thus obliged to use first the remedies provided by the national legal system’.²² Moreover, the institutional role of the Court has been elucidated consistently with the principle of subsidiarity, namely that it ‘is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts ... which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions’.²³ The consistent reinforcement of the principle that States should have the opportunity to address complaints made against them through their own legal systems before answering before an international court under the rubric of Article 35 of the Convention is emblematic of a respect for sovereignty informing the Court’s methodology in this area.

b. Enhanced effectiveness of rights protection

The second fundamental feature of the principle of subsidiarity is its concern with the enhanced effectiveness of rights protection. This aspect of subsidiarity can also be seen in the methodological aspect of the Court’s process-based review embodied by its analysis under Article 35 of the Convention. Indeed, the methodology of the Court reveals that while the rule of exhaustion of domestic remedies is in large part justified by the notions of respect for democracy and sovereignty, the process-based approach of the Court ensures its assessment under Article 35 is ultimately guided by the goal of securing fundamental rights and freedoms at the national level. This is illustrated by the prominence of the Court’s adoption of a holistic and flexible, rather than formalistic, approach in this area. The case law indicates that this

19 *Hasan Uzun v. Turkey*, para. 39.

20 *Ibid.*

21 *Vučković and Others v. Serbia*, para. 70.

22 *Ibid.*

23 *Ibid.*

has been adopted as a matter of principle, with a view to ensuring the effective protection of rights according in accordance with the circumstances of the individual case.

For example, in the early process-based review case law, the Court stated in *Apostol v. Georgia*,²⁴ that the 'rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically' and that 'it is essential to have regard to the particular circumstances of each individual case'.²⁵ Expanding on what having regard to the particular circumstances of each individual case requires, the Court stated that it 'must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant'.²⁶ The Court has continued to reiterate this.²⁷ Developing on the foundations for this methodology, the Court expressly acknowledged that approach upholds broader qualitative features of its Article 35 assessment, specifically that 'Article 35(1) must be applied with some degree of flexibility and without excessive formalism'.²⁸

2. The Margin of Appreciation and Rights Protection

The way in which the first methodological aspect of process-based review, the Court's engagement with domestic balancing, reflects the fundamental feature of subsidiarity concerned with effective rights protection, is better understood by reference to doctrine of the margin of appreciation. The margin of appreciation doctrine has been understood as a 'principle of interpretation and adjudication that the European Court of Human Rights sometimes uses', which 'grants a state the authority, within some limits, to determine whether they have violated Convention rights in a particular case'.²⁹ This understanding has been termed the 'structural concept' of the margin of appreciation doctrine, whereby the margin of appreciation concerns 'the relationship between the European Court of Human Rights and national authorities, rather than ... the relationship between human rights and public interest'.³⁰ It has been observed that an 'often-cited reason' that supports this understanding of the margin of appreciation doctrine, which is embedded within the practice of the Court,

24 *Apostol v. Georgia* (No. 40765/02, 28 November 2006).

25 *Ibid.*, para. 36.

26 *Ibid.*

27 *Latak v. Poland* (dec.) (No. 52070/08, 12 October 2010), para. 76.

28 *Ibid.*

29 Follesdal (n 7) 270.

30 George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) OJLS 705, 721.

is the subsidiary basis of the Convention system of protection.³¹ In this way the margin of appreciation may be read as a doctrinal expression of the principle of subsidiarity within the jurisprudence of the European Court of Human Rights.

In connection with this subsidiary basis for the doctrine, it has been noted that the margin of appreciation is often considered to be the ‘main tool’ of the Court in finding the balance between ‘the need for uniform and effective rights protection’ and appreciation that there may be some legitimate differences between fundamental rights standards in Europe, stemming from ‘differences in legal traditions, constitutional values and historical developments.’³² This explains how the margin has been understood as providing a ‘room for manoeuvre’ to the national authorities in fulfilling their Convention obligations.³³ Within the jurisprudence of the Court, the doctrine of the margin of appreciation was first explained in *Handyside v. the United Kingdom*,³⁴ during a period far preceding the shift in towards adopting process-based methodologies in the Court’s review. The case concerned whether a conviction for possessing obscene books was compatible with the right to freedom of expression under Article 10 of the Convention. Having noted the subsidiary machinery of protection established by the Convention which ‘leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines’, it was stated that Article 10(2) left the Contracting States a ‘margin of appreciation’, which is ‘given both to the domestic legislator ... and to the bodies, judicial amongst others, that are called to interpret and apply the laws in force’.³⁵

In introducing the concept of the ‘margin of appreciation’ into the Convention jurisprudence, the Court elaborated upon its underlying rationale, namely that ‘[b]y reason of 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 [of morals] as well on the “necessity” of a “restriction” ... intended to meet them’.³⁶ This principle, which may be termed the “direct and continuous contact” principle, has come to occupy a prime position within the principled groundwork that has facilitated the Court’s adoption of process-based methodologies during the turn away from the orthodox approach towards subsidiarity. This is seen especially with respect to the

31 Ibid.

32 Janneke Gerards, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’ (2018) 18(3) HRLRev 495, 495.

33 Steven Greer, *The margin of appreciation: interpretation and discretion under the European Court of Human Rights* (Council of Europe Publishing 2000), 5.

34 *Handyside v. the United Kingdom* (No. 5493/72, 7 December 1976).

35 Ibid, para. 48.

36 Ibid.

methodological aspect of engaging with balancing in domestic processes, since the early stage of the development of the latter (see Part III.2),³⁷ through to the current methodological approach underlying it (see Part III.4).³⁸

The “direct and continuous contact” principle forms a fundamental feature of the relationship between process-based review and the margin of appreciation because it orients the methodological aspects of process-based review around the feature of effective rights protection, entailed by the principle of subsidiarity. This is because it makes clear that the operation of the margin of appreciation is dependent upon State authorities being in a better position to evaluate what may be required under the Convention, rather than the mere fact of the Court and State authorities occupying different institutional positions. This is reinforced by the notion accompanying the introduction of the doctrine that the ‘domestic margin of appreciation ... goes hand in hand with a European supervision’, which concerns ‘both the aim of the measure challenged and its “necessity”’; it covers not only the basic legislation but also the decision applying it, even one given by an independent court’.³⁹

The development of the Court’s engagement with the adequacy of balancing within domestic processes in light of the Convention, as a methodological aspect of process-based review, has witnessed the simultaneous development of a close relationship within the jurisprudence between the quality of domestic processes and the margin of appreciation. This relationship has ensured that the Court’s engagement with the adequacy of balancing within domestic processes responds to both aspects of the principle of subsidiarity, such that this methodological aspect of process-based review is ultimately oriented around the second feature of the principle, namely ensuring effective rights protection at the national level. The foundations for this relationship were laid in the early process-based review case law prior to the adoption of the *Animal Defenders* approach (see Part III.2).⁴⁰

To briefly exemplify the early stages of the relationship drawn between the margin of appreciation doctrine and the quality of domestic processes, and the manner in which this serves to uphold rights protection at the national level, consideration can be given to the case of *Hatton and Others v. the United Kingdom*⁴¹. In this case, the Court conducted an in-depth examination of the ‘procedural aspect’ of the case which revealed among other process-based

37 See, for example, *Murphy v. Ireland* (No. 44179/98, 10 July 2003), para. 67.

38 See, for example, *Ecodefence and Others v. Russia* (Nos. 9988/13, 14 June 2022), para. 125.

39 *Handyside, v. the United Kingdom*, para. 49.

40 *Animal Defenders International v. the United Kingdom* (No. 48876/08, 22 April 2013).

41 *Hatton and Others v. the United Kingdom* [GC] (No. 36022/97, 8 July 2003).

elements that the measure in question had been introduced after a series of investigations and studies carried out over a long time.⁴² Consequently, the Court found that the domestic authorities had not overstepped their margin of appreciation by failing to strike a fair balance between the relevant rights and interests at stake.⁴³

Laying even clearer foundations for the relationship between the process-based methodology of engaging with domestic balancing and the margin of appreciation doctrine the Court in *Hirst v. the United Kingdom (no. 2)*⁴⁴ found that the margin of appreciation was wide but ‘not all-embracing’.⁴⁵ This was in light of the fact that when considering the weight to be attached to the position adopted by the domestic legislature and judiciary, the Court found no evidence that Parliament had ever sought to weigh the competing interests,⁴⁶ and that the domestic courts had not undertaken any assessment of the proportionality of the impugned measure.⁴⁷

Another particularly significant development for the relationship between the quality of balancing within domestic processes, particularly judicial processes, and the margin of appreciation doctrine was the establishment of what has come to be termed the “non-substitution principle” in *Von Hannover v. Germany (no. 2)*.⁴⁸ This refers to the idea that ‘[w] here the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its view for that of the domestic courts’.⁴⁹ The early case law on the quality of the balancing by national authorities established important foundations for encouraging the enhanced effectiveness of rights protection at the national level, in line with the principle of subsidiarity.

Turning to the consolidation of the *Animal Defenders* approach within the process-based review case law (Part III.3), the relationship between the quality of balancing with domestic processes and the operation of the margin of appreciation was drawn in even starker terms. Accordingly, the Court in *Animal Defenders International v. the United Kingdom* espoused the principle that the ‘quality of the parliamentary and judicial review of the necessity of the

42 Ibid, para. 128.

43 Ibid, para. 129.

44 *Hirst v. the United Kingdom (no. 2)* [GC] (No. 74025/01, 6 October 2005).

45 Ibid, para. 82.

46 Ibid, para. 79.

47 Ibid, para. 80.

48 For usage of the term “*Von Hannover* non-substitution principle”, see Spano (n 1) 487.

49 *Von Hannover v. Germany (no. 2)* [GC] (Nos. 40660/08 and 60641/08, 7 February 2012), para. 107.

measure is of particular importance ... including to the operation of the relevant margin of appreciation'.⁵⁰ In its case-law following *Animal Defenders*, the Court has related its process-based review to the operation of the margin of appreciation. This was by acknowledging the 'direct democratic legitimization' of the national authorities, in addition to these authorities being better placed than an international court to evaluate local needs.⁵¹ Moreover, in transitioning towards what can be called an "evolved *Animal Defenders*" approach, the Court stated that even though the legislature enjoys a margin of appreciation, it still 'falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck'.⁵² Thus, the Court during this phase continued to define the nature of its process-based review in relation to the margin of appreciation, and acted that the express basis of the quality of judicial and parliamentary review having relevance to the operation of the margin of appreciation.

Within the Court's current methodology towards its engagement with the adequacy of balancing within domestic processes under the Convention (Part III.4.), the Court has continued to clarify the relationship between the margin of appreciation and the quality of balancing within domestic processes. For example, the Court appeared to elaborate on the *Von Hannover* "non-substitution principle", espoused in its early process-based review case law, by stating that strong reasons would be required for the Court to substitute its view for that of the domestic courts, where the latter had carefully examined the facts, applied the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the individual interests against the public interest.⁵³ In a similar vein, the Court made expressly clear that the quality of judicial review, which had been observed to be thorough, militated in favour of a wide margin of appreciation.⁵⁴ Thus, the Court has established within its current methodology not only the continuity of a relationship between the quality of domestic review processes and the operation of the margin of appreciation, but has made explicit reference to the attributes of these processes which have a bearing on a wide margin of appreciation. Bearing in mind the need for effective rights protection at the national level under the principle of subsidiarity, it is promising that such clarity has been met with accompanying rigour in the Court's exercise of this methodological aspect of its process-based

50 *Animal Defenders International v. the United Kingdom*, para. 108.

51 *S.A.S. v. France*, para. 129.

52 *Correia de Matos v. Portugal* [GC] (No. 56402/12, 4 April 2018), para. 117.

53 *M.A. v. Denmark* [GC] (No. 6697/18, 9 July 2021), para. 149.

54 *Lings v. Denmark* (No. 15136/20, 12 April 2022), para. 58.

review, when examining the adequacy of domestic balancing exercises. Finally, it should be noted that within the rule of law approach, which is an emerging approach within the Court's current methodology, the Court has marked out a relationship between this methodology and the margin of appreciation. This may be seen through the Court's acknowledgment that the exact content of the principle of separation of executive and judicial powers fell within the margin of appreciation of member States even though the principle has taken on particular importance within the Court's case-law.⁵⁵

55 *Willems and Gorjon v. Belgium* (Nos. 74209/16 and 3 others, 21 September 2021), para. 58.

III. THE COURT'S ENGAGEMENT WITH BALANCING IN DOMESTIC PROCESSES UNDER THE CONVENTION

1. General Overview

The first key methodological aspect of the Court's process-based review is constituted by the Court's engagement with the adequacy of balancing of the relevant interests at stake in light of the Convention undertaken within domestic processes. These are primarily the legislative and judicial processes, but also other forms of domestic decision-making processes that affect individual rights. There are three stages within the Court's development of this methodological aspect which are identified in this section: the initial stages of the Court's engagement with domestic balancing (Part III.2); the stage of the Court's development characterised by a consolidation of the approach found in *Animal Defenders International v. the United Kingdom* (Part III.3), and the current methodology of the Court, which evinces an "evolved" *Animal Defenders* approach (Part III.4). Moreover, the emerging rule of law approach will be observed accompanying the current methodology of the Court (Part III.5). By tracing the changes and development within core doctrinal manifestations of this first methodological aspect – such as the "direct and continuous contact" principle, the *Von Hannover* "non-substitution" principle, and overall the relationship between the quality of domestic review and the margin of appreciation doctrine – the analysis of the Court's methodology in Part III seeks to render more precisely the doctrinal mechanisms by which the Court has shifted away from its orthodox approach to subsidiarity.

2. Initial stages of the Court's engagement with domestic balancing

The case of *Animal Defenders International v. the United Kingdom* is commonly heralded⁵⁶ as emblematic of the Court's methodology of engaging with whether national authorities have adequately sought to balance relevant interests within their legislative and judicial processes, among others, in light of applicable Convention standards. However, there is a substantial body of early process-based review case law which serve as forerunners to the case law consolidating the *Animal Defenders* approach. These served as forerunners in two ways:

56 See, for example, Spano (n 1) 488-489.

they both (i) lay principled foundations for engagement by the Court with whether national processes have adequately sought to balance Convention rights; and (ii) offer guidance of what such engagement constitutes.

The first case that may be described as a forerunner to the approach in *Animal Defenders*, and indeed the Court's current methodology of engaging with domestic balancing, is *Hatton and Others v. the United Kingdom*. The case concerned allegations by the applicants that the government policy on night flights at Heathrow airport gave rise to a violation of their rights under Article 8 of the Convention, and that they were also denied effective remedies contrary to Article 13 of the Convention.⁵⁷ In a foundational moment for process-based review, the Court considered that there were two aspects of the inquiry which may be carried out by the Court in cases that involved State decisions affecting environmental issues.⁵⁸ The first aspect entailed an assessment of the substantive merits of the government's decision for compatibility with Article 8,⁵⁹ which accorded with the traditional approach of the Court in its review. The second aspect, however, explicitly marks the Court's endorsement of the first methodological aspect of process-based review concerned with domestic balancing. The Court held 'it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual'.⁶⁰ This second aspect came to be termed later in the *Hatton* judgment as the 'procedural element of the Court's review of cases involving environmental issues', and the Court expanded that this required a consideration of 'all the procedural aspects'.⁶¹ Crucially, the Court verified that these may include the type of policy or decision involved; the extent to which the views of individuals including the applicants were taken into account throughout the decision-making procedure; and the procedural safeguards available.⁶²

In applying this delineated approach between these two identified aspects of review, the Court noted that governmental decision-making processes concerning complex issues of environmental and economic policy must involve appropriate investigations and studies to allow a fair balance to be struck between the conflicting interests at stake. However, the Court added that this did not confine the possibility of decision-making to only those instances where

57 *Hatton and Others v. the United Kingdom* (No. 36022/97, 8 July 2003), para. 3.

58 *Ibid.*, para. 99.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*, para. 104.

62 *Ibid.*

comprehensive and measurable data was available in respect of all matters to be decided.⁶³ Accordingly, the Court deemed it ‘relevant that the authorities have constantly monitored the situation’, and that each new scheme concerning restrictions on night flights was announced for a period of five years at a time, taking into account ‘the research and other developments of the previous period’.⁶⁴ In this regard, the Court found that the scheme in question had been ‘preceded by a series of investigations and studies carried out over a long period of time’,⁶⁵ and it was open to the applicants and persons in a similar situation to make any representations they felt appropriate in response to the published and accessible Consultation Paper, or challenge subsequent decisions or the scheme itself in the courts.⁶⁶ Ultimately, the Court considered that the authorities had not overstepped their margin of appreciation by failing to strike a fair balance, nor had there been any ‘fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights’. Therefore, no violation of Article 8 was found.⁶⁷

Following *Hatton and Others v. the United Kingdom*, the Court still continues to exhibit a willingness to engage with both process-based and substantive aspects of cases but the process-based review case law has moved away from expressly demarcating a ‘procedural element of the Court’s review’. Indeed, the Court’s process-based review case law has since witnessed the sophistication of its engagement with domestic balancing, resulting in a recognition within the case-law that both process-based and substantive aspects of a case are often related. This position is overall reflective of the notion that an examination of “process” entails more than purely “procedural” issues. Nevertheless, the Court’s detailed analysis in *Hatton and Others* of the decision-making process behind the government’s regulatory scheme, and the indications of the weight given to the interests of affected individuals, embedded within the Convention system a methodology of process-based review with ample rigorous potential.

An early consolidation within the case law of what may be here termed as the “direct and continuous contact” principle in relation to methodology of engaging with balancing by national authorities was evinced in the case of *Murphy v. Ireland*.⁶⁸ Interestingly this case bears a certain amount of factual resemblance to *Animal Defenders* (see Part III.3). The case concerned the prohibition of a radio broadcast of a religious advertisement, against which

63 Ibid, para. 128.

64 Ibid.

65 Ibid.

66 Ibid.

67 Ibid, paras. 129-130.

68 *Murphy v. Ireland* (No. 44179/98, 10 July 2003).

the applicant had unsuccessfully brought domestic judicial review proceedings, including review of the domestic legislation pursuant to which the broadcast had been stopped.⁶⁹ In deciding whether the interference by the national authorities with the applicant's right to freedom of expression under Article 10 of the Convention was "necessary in a democratic society", the Court clearly expressed that the national authorities would be 'in principle in a better position than the international judge' to decide on this question, 'by reason of their direct and continuous contact with the vital forces of their countries'.⁷⁰ While the development of process-based review has witnessed the wider application of this principle, in *Murphy* the principle appeared to have been pertinent particularly due to its connection with the context of regulating freedom of expression within the sphere of morals or religion.⁷¹ A wider margin of appreciation was therefore afforded following the Court's observation that '[w]hat is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations', together with its affirmation that the "direct and continuous contact" principle applied.⁷²

The implications of the principled groundwork laid by the "direct and continuous contact" principle for the methodology of engaging with domestic balancing in light of the Convention was also made clear in *Murphy* itself. When scrutinising the domestic processes, the Court took account of the 'main factor' considered by the Government to justify the prohibition - the 'particular religious sensitivities in Irish society'.⁷³ Thus, the Court specifically noted the identification of the 'potential impact on religious sensitivities' of the relevant legislation during parliamentary debate on its introduction, as well as the 'distinction between advertising time which was purchased and programming'.⁷⁴ The Court also noted that during a 'detailed debate' on the proposed dilution of the measure, similar concerns were 'emphasised at some length'.⁷⁵ Moreover, the Court recounted the analysis of the domestic courts, namely the High Court and the Supreme Court, the latter of whom 'emphasised' the historical divisiveness of the subjects concerned by the prohibition.⁷⁶ The considerations within the domestic process of the distinction made by the prohibition between advertising time and programming, which had

69 Ibid, paras. 7-18.

70 Ibid, para. 67.

71 Ibid.

72 Ibid.

73 Ibid, para. 71.

74 Ibid, para. 73.

75 Ibid.

76 Ibid.

been observed by the Court, may be read as illustrating a rudimentary form of “least restrictive measure” analysis. This reading is supported by later parts of the judgment in *Murphy*, where the Court considered the prohibition reflects a ‘reasonable distinction’ between purchasing broadcasting time to advertise and covering religious matters through programming.⁷⁷ The Court consequently found that aside from advertisements in broadcast media, ‘the applicant’s religious expression was not otherwise restricted’.⁷⁸ Overall, the reasoning in *Murphy* displays an early engagement by the Court with the balancing undertaken by the domestic processes as part of the Court’s process-based review, such as parliamentary debates and judicial decision-making. In this way, it can be seen as a forerunner in the Court’s case-law on process-based review. The case also illuminates the principled foundations underlying this process-based methodology, such as the “direct and continuous contact” principle and its connection with the margin of appreciation.

While the primary contribution of *Murphy* towards the development of this first methodological aspect of process-based review was its provision of a certain principled basis for this methodology, other forerunners to the *Animal Defenders* approach served to flesh out the practical operation of this methodology. In this regard, two notable cases which practically outlined the way in which the Court may engage with balancing in domestic processes are *Hirst v. United Kingdom (no. 2)* (legislative process) and *Von Hannover v. Germany (no. 2)* (judicial process).

a. Balancing within legislative process

The main contribution of *Hirst (no. 2)*⁷⁹ towards the development of process-based methodology was the Court’s exacting analysis of relevant legislative debate, which offered practical guidance towards realising the full rigour of process-based review. *Hirst (no. 2)* concerned whether a blanket ban in domestic legislation on prisoner voting was compatible with the right to free elections under Article 3 of Protocol No. 1 to the Convention. It is worth noting, as the Court itself pointed out, that *Hirst (no. 2)* did not concern a Convention right with express restrictions.⁸⁰ Thus, the domestic balancing did not concern two competing rights under the Convention; rather, it involved the balancing of the competing interests at issue.

⁷⁷ Ibid, para. 74.

⁷⁸ Ibid.

⁷⁹ *Hirst v. the United Kingdom (no. 2)* [GC] (No. 74025/01, 6 October 2005).

⁸⁰ Ibid, para. 74.

Before elaborating upon the Court's analysis, it is apt to consider the way in which the Court's method of engaging with domestic balancing is related to the margin of appreciation. The outset of the Court's assessment of the 'weight to be attached to the position adopted by the legislature and judiciary'⁸¹ was immediately preceded by an acknowledgement of the Government's argument concerning the margin of appreciation in situations where the legislature and domestic courts 'have considered the matter'.⁸² Moreover, after having reviewed the balancing processes undertaken by the legislature and the judiciary,⁸³ together with the state of consensus on the issue among Contracting States,⁸⁴ the Court reiterated that 'while ... the margin of appreciation is *wide*, it is *not all-embracing* [emphasis added]'.⁸⁵ Thus, the substance of the process-based review in *Hirst (no. 2)* may be understood as having fully realised its rigour through its bearing on the operation of the margin of appreciation. This illustrates the manner in which the relationship between the balancing within domestic processes and the operation of the margin of appreciation doctrine continued to render process-based review an effective means of securing rights at the national level.

Turning to the substance of the Court's engagement with the balancing within the domestic legislative process, the Court stated in distinct terms that there was 'no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote'.⁸⁶ Thus, the Court made clear that their inquiry concerning whether the ban was justified under the Convention included an examination of whether the national legislative processes could be said to have carried out adequate balancing in light of the Convention. Additionally, the Court provided guidance as to what such balancing in national processes could have involved; either the weighing of competing interests or an actual proportionality assessment of the measure in question. Elaborating on this guidance, the Court stated: 'it cannot be said that there was any *substantive debate* by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction [emphasis added]'.⁸⁷ This guidance about the possibilities of process-based review was fundamentally important to the Court's development of process-based review, as evidenced by the reliance on *Hirst (no. 2)* in *Animal Defenders*.

81 Ibid, para. 79.

82 Ibid, para. 78.

83 Ibid, paras. 79-80.

84 Ibid, para. 81.

85 Ibid, para. 82.

86 Ibid, para. 79.

87 Ibid.

Accordingly, the following elements of the Court's engagement with balancing in national legislative processes may be identified from the early process-based review case law. First, what may count as adequate balancing in light of the Convention does not necessarily require explicit reference to the Convention. Rather, it may entail considerations such as current human rights standards, or even modern-day policy. Second, the Court indicated it would identify evidence of 'substantive debate by members of the legislature', suggesting that in its inquiry into adequate balancing within national processes the Court will not be satisfied with formalistic acts of balancing in light of the Convention. Finally, aside from making a twofold consideration of the processes of the national Parliament and courts, the Court also considered other kinds of national processes, such as consideration of the question of proportionality by a multi-party conference on electoral law.⁸⁸ This indicates that the Court takes a broad view of what counts as a 'national process' for its process-based review. Overall, it can be considered that the Court in *Hirst (no. 2)* illuminated the open-textured nature of its engagement with balancing in national processes as a key methodological aspect of process-based review.

Although the main contribution of *Hirst (no. 2)* towards developing the Court's engagement with domestic balancing primarily centres on the Court's analysis of the legislative process, it should not be overlooked that the Court also paid close attention to the adequacy of balancing within the domestic judicial processes. In other words, while the Court focused its process-based review on legislative processes, it also made significant insights regarding balancing in judicial processes. Accordingly, the Court noted with regard to the judiciary that during sentencing, 'the criminal courts in England and Wales [made] no reference to disenfranchisement', despite the fact that the right to vote depends on whether a custodial sentence or another form of sanction is imposed on an offender.⁸⁹ Moreover, having regard to the judgment of the Divisional Court, the Court found it evident that the court 'did not ... undertake any assessment of proportionality of the measure itself', and continued further to note that the court found support for its position in a Canadian case which was later overturned.⁹⁰

A perhaps less discussed case, which was decided around the same time of *Hirst v. the United Kingdom (no. 2)*, is *Maurice v. France*. This case also represents an early contribution to the development of the first methodological aspect of process-based review. In *Maurice*, the applicants had complained that legal rules introduced by certain domestic legislation

88 Ibid.

89 Ibid, para. 77.

90 Ibid, para. 80.

had constituted an arbitrary interference with their private and family life contrary to Article 8 of the Convention. This was because it allegedly prevented them from meeting their child's needs,⁹¹ who was born with a disability that was not detected during pregnancy due to negligence in establishing a prenatal diagnosis.⁹² The Court reiterated the fundamentally subsidiary role of the Convention, as well as the fact that the national authorities 'have direct democratic legitimation and are ... in principle better placed than an international court to evaluate local needs and conditions'.⁹³ The Court also stated that in matters of general policy, where there may reasonably be wide difference in the opinions within a democratic society, special weight should be attached to the role of the domestic policy-maker.⁹⁴

Against this principled groundwork, the Court undertook analysis that constitutes an example of a thorough engagement by the Court with domestic balancing. The Court noted that the domestic law altering the existing legal position on the question of medical liability had been the result of intervention by the French parliament, which itself took place in response to a leading Court of Cassation judgment and the 'stormy nation-wide debate which ensued, reflecting the major differences of opinion on the question within French society'.⁹⁵ Moreover, the French parliament had consulted various persons and interest groups involved in establishing a new system of compensation for the prejudice sustained by children born with disabilities and their parents.⁹⁶ While the new rules meant that parents could no longer obtain compensation from the negligent party for the special burdens arising from their child's disabilities, the rules had been 'the result of comprehensive debate in Parliament', which had taken account of 'legal, ethical and social considerations, and concerns relating to the proper organisation of the health service and the need for treatment for all disabled persons'.⁹⁷ It is also worth noting the Court paid attention here both to the range of considerations taken into account within the legislative process, but also specific concerns such as the proper organisation of the health service. These specific concerns appear to replicate closely the 'local needs and conditions' which the Court has repeatedly held that national authorities are better placed to evaluate than an international court. The Court also referred to the fact that the Conseil d'Etat, the highest administrative court in France, had pointed out that Parliament

91 *Maurice v. France* (No. 11810/03, 6 October 2005), para. 109.

92 *Ibid.*, para. 3.

93 *Ibid.*, para. 117.

94 *Ibid.*

95 *Ibid.*, 121.

96 *Ibid.*

97 *Ibid.*

based its decision on general-interest grounds.⁹⁸ This reference may be read as laying the groundwork for the holistic approach towards assessing the quality of parliamentary review witnessed over the development of the Court's methodology, which considers the contribution of judicial review as an accountability mechanism for parliamentary review.

Furthermore, in *Maurice* a relationship between the Court's process-based review and the operation of the margin of appreciation doctrine may be observed, although this was not set out by the Court in explicit terms. This may be seen in the Court's conclusion of its analysis, where it stated that 'there is no serious reason for the Court to declare contrary to Article 8 ... the way in which the French legislature dealt with the problem or the content of the specific measures taken to that end'.⁹⁹ It is interesting that the Court refers in this statement not only to the content of the specific measures dealing with the problem at issue, but also 'the way in which the French legislature *dealt* with the problem [emphasis added]'.¹⁰⁰ The Court's reference to the latter may be read in light of its foregoing analysis, thereby referring to the ascertained adequate quality of legislative review. This indicates a similar methodology of analysis to that found within the later process-based review case law, whereby the Court may be seen to conduct a review of the substantive merits in light of its own examination of the arguments considered by the legislature that led to certain legislative choices. In this regard it is noteworthy that the Court expressly stated in *Maurice v. France* that there was a wide margin of appreciation in this area of social policy and that it was 'certainly not for the Court to take the place of the national authorities in assessing the advisability of such a system [for obtaining compensation for disability] or in determining what might be the best policy in this difficult social sphere', and consequently, there was a wide margin of appreciation in this area.¹⁰¹ Arguably the adoption of a largely process-based review, that considered fully the approach of the legislature in reaching its decision, respected this wide margin in this case.

A number of early cases further consolidated the groundwork relating to the process-based methodology of engaging with the quality of balancing within domestic legislative processes. For example, in *Ždanoka v. Latvia*, the Court had to examine the allegation that the applicant's disqualification from standing for election to the Latvian parliament and to municipal elections constituted an infringement of her rights under Article 3 of Protocol No. 1 to the Convention, as well as Articles 10 and 11 of the Convention.¹⁰² The disqualification

98 Ibid.

99 Ibid, para. 124.

100 Ibid.

101 Ibid, para. 123.

102 *Ždanoka v. Latvia* (No. 58278/00, 16 March 2006), para. 3.

had been pursuant to electoral legislation rendering persons ineligible to stand as candidates to the Latvian Parliament who had “actively participated” in the activities of the Latvian Communist Party after 13 January 1991.¹⁰³ In this case, the Court accepted that both the legislative and judicial authorities in Latvia were ‘better placed to assess the difficulties faced in establishing and safeguarding the democratic order’.¹⁰⁴ The Court continued to state that ‘sufficient latitude’ should be left to the domestic authorities to ‘answer the question whether the impugned measure is still needed for these purposes [of building confidence in the new democratic institutions], provided that the Court has found nothing arbitrary or disproportionate in such an assessment’.¹⁰⁵

It was in respect of these considerations that the Court attached weight to the fact that Latvian parliament had periodically reviewed the legislation in question, and that ‘[e]ven more importantly, the Constitutional Court carefully examined ... the historical and political circumstances’ leading to the enactment of the relevant legislation, and found it to be neither arbitrary nor disproportionate nine years after the event in question.¹⁰⁶ The Court also noted that the Constitutional Court had observed that the Latvian Parliament should establish a time-limit on the restriction.¹⁰⁷ The Constitutional Court’s review of the legislation could be seen as constituting an accountability mechanism which contributes towards the quality of parliamentary review. Indeed, such judicial oversight has been treated as relevant to the quality of the legislative processes within this methodological aspect of process-based review. Overall, it may be said that the Court’s examination of the considerations referred to by the Constitutional Court that led to the legislative choice of enacting such restrictions on conditions for parliamentary candidature, effectively implemented the principle of subsidiarity. This is especially because it had already been accepted that the Latvian parliamentary and judicial authorities were better placed to assess the difficulties facing their democratic order. Such an understanding is further supported by the Court’s sensitivity to the specific historico-political context in Latvia which led to the adoption of the legislation, in light of which the Court viewed the measure may be considered acceptable even though it ‘may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries’.¹⁰⁸

¹⁰³ Ibid, para. 116.

¹⁰⁴ Ibid, para. 134.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, para. 135.

¹⁰⁸ Ibid, para. 133.

Another example consolidating the groundwork laid down in the early process-based review case-law surrounded the dismissal of a complaint made by the applicant to the Ukrainian Supreme Court in the case of *Sukhovetskyy v. Ukraine*.¹⁰⁹ This had related to the refusal by the national electoral commission to register the applicant as a candidate in parliamentary elections on account of his failure to pay the electoral deposit, which was sixty times the tax-free monthly income.¹¹⁰ Under the Convention, the applicant complained that he had been disenfranchised under Article 3 of Protocol No. 1, which guarantees the right to free elections.¹¹¹ In response, the Court considered that the case ‘concerns the way in which the applicant’s right to stand for election was curtailed by the obligation to pay an electoral deposit which was non-refundable to unsuccessful candidates’, and noted that the introduction of the deposit was a ‘general measure’.¹¹² Accordingly, the Court referred to the general principle that the area of establishing constitutional rules on the status of members of parliament was one where member States have a ‘broad latitude’.¹¹³ More specifically, the exact requirements on the eligibility for standing for election to parliament may ‘vary in accordance with the historical and political factors specific to each State’.¹¹⁴

This ‘broad latitude’ led the Court to explicitly contrasting the case to *Hirst (no. 2)* when engaging with the quality of balancing within the relevant domestic legislative processes.¹¹⁵ Thus, the Court deemed the electoral deposit system adopted by the Ukrainian political institutions to be ‘an acceptable compromise between th[e] competing interests’.¹¹⁶ It further acknowledged that once this system had been enacted, it had ‘remained the subject of careful consideration by the domestic legislature and judiciary in the light of modern-day conditions’.¹¹⁷ The Court contrasted the case to the finding in *Hirst (no. 2)*, recalling that in that case it concluded that ‘it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote’.¹¹⁸ Subsequently, the Court indicated the underlying principles that had

109 *Sukhovetskyy v. Ukraine* (No. 13716/02, 28 March 2006).

110 *Ibid*, paras. 7-10.

111 *Ibid*, para. 43.

112 *Ibid*, para. 63.

113 *Ibid*, para. 51.

114 *Ibid*.

115 *Ibid*, para. 67.

116 *Ibid*.

117 *Ibid*.

118 *Hirst (no. 2)*, paras. 79-80.

informed its analysis of the relevant national legislative processes responsible for enacting and monitoring the Ukrainian electoral deposit system were the 'subsidiary role of the Convention' and the 'wide margin of appreciation' enjoyed by States in the field of electoral legislation.¹¹⁹ Again, the Court acknowledged that the 'national authorities are, in principle, better placed than an international court to evaluate local needs and conditions',¹²⁰ which constitutes a key rationale for the margin of appreciation doctrine, which itself gives effect to the principle of subsidiarity in doctrinal terms.

It is worth noting that in *Sukhovetsky v. Ukraine*, the Court's analysis was predicated on the relationship between the better positioning of the national authorities, and the operation of the margin of appreciation. Indeed, the Court had observed that the 'policy behind the impugned measure required the State to strike a *delicate* balance between conflicting interests [emphasis added]', and subsequently recalled that 'in matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight'.¹²¹ In practical terms, the contribution towards the methodological development of the Court's analysis lay in the confirmation of the importance of considering the importance of the domestic balancing to weigh the competing interests affected by an impugned measure in light of modern-day conditions. The case also brought to the fore the subsidiary role of the Convention. This was through highlighting that the national courts are better positioned than an international court to make decisions of domestic policy and consequently special weight should be afforded to the role of the domestic policy-maker as a result.

A third example is *Evans v United Kingdom*.¹²² In this case, the Court was tasked with examining whether provisions of domestic legislation, which allowed the applicant's former partner to withdraw his consent for *in vitro* fertilisation ("IVF") after the fertilisation of the applicant's eggs with his sperm, violated her right to respect for her private and family life under Article 8 of the Convention.¹²³ Here, the Court signalled a shift away from its orthodox approach to subsidiarity by holding that the 'central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it

119 *Sukhovetsky v. Ukraine*, para. 68.

120 *Ibid.*

121 *Ibid.*, paras. 67-68.

122 *Evans v. the United Kingdom* [GC] (No. 6339/05, 10 April 2007).

123 *Ibid.*, para. 57.

under that Article'.¹²⁴ Thus, the relevant issue appeared to be the manner in which Parliament struck the balance between the competing interests at stake. In addressing this question, the Court demonstrated its engagement with the adequacy of balancing within national processes, in particular through the Grand Chamber agreeing with the Chamber about the relevance that the legislation 'was the culmination of an exceptionally detailed examination, and the fruit of much reflection, consultation and debate'.¹²⁵

In this connection, the Court had referred to the fact that the 'potential problems arising from scientific progress in storing human embryos were addressed as early as the Warnock Committee's Report of 1984',¹²⁶ which detailed an inquiry that been commissioned by the Government. It was also acknowledged that this was followed by a Green Paper, an official consultation document issued by the Government, which had specifically asked interested members of the public about what should happen where couples had not agreed as to the use or disposal of an embryo,¹²⁷ and further analysis of the responses in a White Paper,¹²⁸ a document issued by the government containing legislative proposals. The Court also referred to the domestic Court of Appeal's description of the "entirely incommensurable" interests' in its review of the substantive merits, when holding that the absolute nature of the legislation in question 'served to ... avoid the problems of arbitrariness and inconsistency inherent in weighing' the relevant interests.¹²⁹ Therefore, it is clear that the Court paid thorough attention to the manner in which the domestic authorities had considered arguments pertaining to the relevant interests within their domestic processes, both parliamentary and judicial, in arriving at the conclusion that the domestic rules had struck a fair balance between the competing interests under Article 8,¹³⁰ thereby contributing towards the early elaboration on this methodological aspect of process-based review within the Convention jurisprudence.

By contrast, the Court's engagement with the adequacy of the domestic balancing in light of the Convention in *Dickson v. the United Kingdom*¹³¹ informed its finding that Article 8 had been violated,¹³² albeit in relation to an executive rather than legislative decision-

¹²⁴ Ibid, para. 91.

¹²⁵ Ibid, para. 86.

¹²⁶ Ibid, para. 87.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid, para. 89.

¹³⁰ See, for the Court's conclusion regarding the alleged violation of Article 8 of the Convention, *Evans v. the United Kingdom*, para. 92.

¹³¹ *Dickson v. the United Kingdom* (No. 44362/04, 4 December 2007).

¹³² Ibid, para. 85.

making process. The applicants had complained that their right to respect for their private and family life under Article 8 of the Convention had been breached by the refusal of artificial insemination facilities.¹³³ The refusal had been the result of the application of a policy by the Home Secretary whereby requests for artificial insemination by prisoners would only be granted in exceptional circumstances.¹³⁴ In respect of the operation of the margin of appreciation, the Court acknowledged that in principle, a certain margin of appreciation is afforded to the national authorities regarding the assessment 'as to where the fair balance lies in a case before a final evaluation by th[e] Court', given that this assessment is to be made by initially by the national authorities.¹³⁵ The margin of appreciation had been in dispute between the parties,¹³⁶ in response to which the Court noted that the case concerned an area where States 'could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention'.¹³⁷ However, notwithstanding the wide margin of appreciation that could be afforded in this area, the Court indicated a key factor related to the quality of balancing within domestic processes that could affect the width of this margin, namely the exclusion of balancing by the structure of the policy itself. The parties disagreed as to the width of the margin of appreciation on the basis of the alleged lack of parliamentary scrutiny and proportionality examination of the policy.¹³⁸ However, the Court considered that even if there had been judicial consideration at the domestic level of the policy in question under Article 8, the policy 'as structured effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case'.¹³⁹ This suggested that where a domestic governmental policy was structured so as to exclude real weighing of the competing individual and public interests, the accountability function of judicial review may not necessarily be viewed as bearing on the question of whether the process of applying a policy entails adequate balancing. This is a notable step, given that judicial review has been treated as contributing to the quality of parliamentary review within other parts of the process-based review case law. Nevertheless, it is consistent with the notion that the complete lack of balancing within a domestic decision-making process is usually not reflective of the standards required under the Convention.

133 Ibid, para. 37.

134 Ibid, para. 13.

135 Ibid, para. 77.

136 Ibid, para. 80.

137 Ibid, para. 81.

138 Ibid, para. 80.

139 Ibid, para. 82.

In relation to the process leading to the implementation of a governmental policy, the Court stated there was ‘no evidence that when fixing the Policy the Secretary of State sought to weigh the relevant competing individual and public interests or assess the proportionality of the restriction’.¹⁴⁰ The Court also discerned that the fact that Policy was not ‘embodied in primary legislation’ meant that ‘the various competing interests were never weighed, nor issues of proportionality ever assessed, by Parliament’.¹⁴¹ Indeed, the Court at this juncture cited its analysis of the legislative process in *Evans v. the United Kingdom*,¹⁴² suggesting that the Court understood the legislature in *Evans* as having weighed the various competing interests or having assessed the issues of proportionality. Moreover, the Court referred to the domestic court’s observation that the policy had been adopted prior to the incorporation of the Convention into domestic law,¹⁴³ which would be a time in which there was no obligation in domestic law for policies to be fixed in light of the Convention. Following this analysis, the Court found that the policy in question ‘did not permit the required proportionality assessment in an individual case’¹⁴⁴ and that the absence of such an assessment in the circumstances of the case ‘must be seen as falling outside any acceptable margin of appreciation so that a fair balance was not struck’.¹⁴⁵

Overall, in terms of the development of the methodological aspect of process-based review that entails the engagement by the Court with balancing within domestic processes, the contribution of *Dickson v. the United Kingdom* may be characterised as twofold. Firstly, the Court elaborated on the importance of fixing and adopting a governmental policy after having considered the relevant competing interests or proportionality issues by a governmental organ, either legislative or executive. Secondly, the Court indicated that even where competing interests had been considered there were circumstances where the fact a policy precluded an individual assessment meant the measure could go beyond the margin of appreciation. More broadly, the case importantly expanded on the methodology of process-based review in relation to matters concerning governmental policy, as opposed to a general measure adopted by the legislature or a judicial decision.

¹⁴⁰ Ibid, para. 83.

¹⁴¹ Ibid.

¹⁴² For the analysis in *Evans v. the United Kingdom* cited in *Dickson v. the United Kingdom* at para. 83, see *Evans v. the United Kingdom*, paras. 86-89.

¹⁴³ *Dickson v. the United Kingdom*, para. 83.

¹⁴⁴ Ibid, para. 84.

¹⁴⁵ Ibid, para. 85.

b. Balancing within domestic judicial processes

The second category of cases that served as forerunners to the methodological aspect of process-based review concerned with balancing spans the early process-based review case law primarily concerned with the domestic judicial processes. A keystone case in this regard is *Von Hannover v. Germany (no. 2)*, which famously laid down what has come to be termed the “*Von Hannover* non-substitution principle”. The full statement of the principle is as follows: ‘[w]here the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its view for that of the domestic courts’.¹⁴⁶ The express use of the language of “balancing” in *Von Hannover (no. 2)* may be traced to the earlier case of *Jahn and Others v. Germany*.¹⁴⁷ In this case the Court paid careful regard to the wider margin of appreciation stemming from the ‘unique context of German reunification’.¹⁴⁸ Thus, on the matter of balancing within legislative processes, the Court held that the German legislature ‘cannot be criticised for having failed to realise the full effects of [the Second Property Rights Amendment Act] on the very day on which German reunification took effect’.¹⁴⁹ In relation to balancing within national judicial processes, however, the Court explicitly invoked the language of ‘balancing exercise’, stating that ‘the balancing exercise carried out by the Federal Constitutional Court ... in examining the compatibility of [the impugned law] with the Basic Law, does not appear to have been arbitrary’.¹⁵⁰

Another precursor to the development of process-based review constituted by *Von Hannover v. Germany (no. 2)* was *MGN Limited v. the United Kingdom*.¹⁵¹ This case concerned the determination of whether the finding of a breach of confidence by the domestic courts against the applicant, the publisher of a national daily newspaper, constituted an interference with its freedom of expression contrary to Article 10 of the Convention.¹⁵² The breach of confidence had been found in relation to a publications concerning a well-known model.¹⁵³ The Court considered the operation of the margin of appreciation here in light of its engagement with the adequacy of domestic balancing within judicial processes, stating that ‘against this background ... having regard to the margin of appreciation accorded to decisions

¹⁴⁶ *Von Hannover v. Germany (no. 2)*, para. 107.

¹⁴⁷ *Jahn and Others v. Germany* [GC] (Nos. 46720/99, 72203/01 and 72552/01, 30 June 2005).

¹⁴⁸ *Ibid*, para. 112.

¹⁴⁹ *Ibid*, para. 116.

¹⁵⁰ *Ibid*.

¹⁵¹ *MGN Limited v. the United Kingdom* (No. 39401/04, 18 January 2011).

¹⁵² *Ibid*, para. 136.

¹⁵³ *Ibid*, paras. 6-12.

of national courts in this context, the Court would require strong reasons to substitute its view for that of the final decision of the House of Lords'.¹⁵⁴ Thus, the Court had observed that 'the majority members of the House of Lords recorded the core Convention principles and case-law relevant to the case', and that additionally that 'each member of the majority specifically underlined the protection to be accorded to journalists' regarding their reporting techniques and decisions about the content of published material.¹⁵⁵ It was also observed by the Court that both the minority and majority members of the House of Lords 'were in agreement as to these relevant principles',¹⁵⁶ the latter being the core Convention principles. From these observations, the Court found that 'the difference of opinion between the judges in the national courts on which the present complaint turns, concerned only the application of relevant Convention principles'.¹⁵⁷ Moreover, the Court made reference to the thoroughness of review at all levels by the domestic judiciary, particularly that the Courts had issued detailed and lengthy judgments on the matter.¹⁵⁸

Thus, in light of the foregoing analysis and having regard to the margin of appreciation, the Court determined that it required strong reasons to substitute its view for the final decision of the House of Lords.¹⁵⁹ Consequently, the Court engaged thoroughly with the reasoning of the House of Lords in a manner that discerned the adequacy of the balancing found within the domestic judicial process, and which was demonstrative of the judicial dialogue facilitated by this process-based methodology. For example, the Court made reference to the fact that the majority in the House of Lords underlined, amongst other matters, the 'intimate and private nature of the additional information about Ms Campbell's physical and mental health' and had concluded in light of this that the publication of this material had been harmful to her treatment with Narcotics Anonymous.¹⁶⁰ Furthermore, the Court recounted that the domestic courts had viewed the way in which the photographs were taken 'would have been clearly distressing for a person of ordinary sensitivity in her position and faced with the same publicity', that the publication of this material had not been 'necessary to ensure the credibility of the story', as that the public interest was 'already satisfied by the publication of the core facts of addiction and treatment'.¹⁶¹

154 Ibid, para. 150.

155 Ibid, para. 145.

156 Ibid, para. 146.

157 Ibid, para. 148.

158 Ibid, para. 149.

159 Ibid, para. 150.

160 Ibid, para. 151.

161 Ibid.

Moreover, the Court referred to the findings of the majority of the House of Lords, which responded to arguments that the applicant had made before the Court in Strasbourg. For example, the Court highlighted that whereas the applicant maintained it was impossible to find that Ms Campbell had suffered significant additional stress because of the publication of the additional material, the majority of the House of Lords had considered ‘precisely’ this matter to be established.¹⁶² Similarly, the applicant had referred to the fact that the Court of Appeal had not found the publication of photographs in themselves to have been a grounds of complaint against them; in response, the Court referred to the fact that the House of Lords decision about the photograph had flowed from their decision about the additional material, to which the photographs were inextricably linked, as had been clarified by one member of the House of Lords.¹⁶³ Accordingly, the Court considered the reasons for the decision of the House of Lords majority ‘convincing’,¹⁶⁴ and ultimately considered the ‘relevancy and sufficiency of the reasons ... is such that the Court does not find any reason, let alone a strong reason, to substitute its view for that of the final decision of the House of Lords’.¹⁶⁵ In this way, the Court paved the way for the development of the “*Von Hannover* non-substitution principle” within the Convention jurisprudence, and indicated its relationship with process-based review in two ways.

In *Von Hannover (no. 2)*, while the Court established that the “non-substitution principle” may apply wherever national authorities in general had undertaken Convention conforming balancing exercises, the circumstances of the case meant that the Court’s analysis was centred around the balancing exercises undertaken by the national courts. The circumstances revolved around the long-term efforts of Princess Caroline von Hannover to prevent the publication of photos of her private life in the press, including through the domestic courts, which culminated in the first *Von Hannover* judgment decided by the Court. Relying on that judgment, Princess Caroline and her husband, Prince Ernst von Hannover, subsequently sought injunctions against the publication of further photos before the civil courts. To this end, their claim was unsuccessful in respect of one of the photos before the Federal Court of Justice, who reasoned that the photo concerned a subject of general interest. The Federal Constitutional Court rejected the related constitutional complaint, particularly the argument that the domestic courts had not taken sufficient account of the case law under the Convention.

¹⁶² Ibid para. 152.

¹⁶³ Ibid, para. 153.

¹⁶⁴ Ibid, para. 151.

¹⁶⁵ Ibid, para. 155.

Therefore, as outlined by the Court, the matter at issue was ‘the alleged inadequacy of the protection afforded by the domestic courts to the applicants’ private life’.¹⁶⁶

In arriving at the conclusion in that the national courts had complied with their positive obligations in respect of the right to private life enshrined under Article 8 of the Convention,¹⁶⁷ the Court made a series of observations pertaining to the balancing exercise undertaken by the national courts. The Court thus elucidated the manner in which such obligations may be discharged within national judicial processes. First, the Court observed that the national courts had ‘carefully balanced’ the relevant rights at stake, and during this process they had both ‘attached fundamental importance’ to the question of whether the photos had contributed to a debate of general interest, and examined the circumstances in which the photos had been taken.¹⁶⁸ Second, the Court observed that the national courts ‘explicitly took account of the Court’s relevant case-law’, in particular through the Federal Constitutional Court affirming the changed approach following the first *Von Hannover* judgment and undertaking a ‘detailed analysis of the Court’s case-law’.¹⁶⁹ Both these observations followed directly from the Court’s own detailed analysis, in line with the non-substitution principle, as to whether the national courts had undertaken a balancing exercise in conformity with criteria laid down in the Court’s case law.¹⁷⁰

Within this analysis, one may discern the coalescence of a consistent approach towards engaging with balancing in national judicial processes, through the recurrence of certain features of the early process-based review case law. For example, the Court opined that the interpretation by the Federal Court of Justice - that the information value of the photo in question could be assessed in light of its accompanying article - could not ‘having regard to the reasons advanced by the German courts ... be considered unreasonable’ under the Convention.¹⁷¹ This is redolent of the standard calibrating the Court’s broader assessment of the balancing exercise of Federal Constitutional Court in *Jahn and Others*, where the Court stated that this ‘does not appear to have been arbitrary’.¹⁷² In *Jahn*, a standard of non-arbitrariness appears to have informed the Court’s assessment of the relevant balancing exercise undertaken by the domestic courts in general. Whilst in *Von Hannover (no. 2)* a

166 *Von Hannover v. Germany (no. 2)*, para. 98.

167 *Ibid*, para. 126.

168 *Ibid*, para. 124.

169 *Ibid*, para. 125.

170 For the full analysis, see *Von Hannover v. Germany (no. 2)*, paras. 114-123.

171 *Ibid*, para. 118.

172 *Jahn and Others v. Germany*, para. 116.

similar standard of reasonableness was applied to a specific aspect of the balancing exercise. In this way, *Von Hannover (no. 2)* may be understood as solidifying the standard of review in relation to the balancing exercises undertaken by domestic courts of the relevant competing interests at stake.

Another instance of such coalescence is the recurrence of the emphasis on the conduct of a substantive balancing exercise, rather than a formalistic version of balancing. Thus, the Court demonstrated a particularly nuanced approach by admitting that, on the question of whether the applicants should be regarded as public figures, the Federal Court of Justice ‘based its reasoning on the premise that the applicants were well-known public figures who particularly attracted public attention, without going into their reasons for reaching that conclusion’.¹⁷³ Although the domestic courts did not go into their reasoning, the Court considered that this assumption was not unfounded and that the applicants were not ‘ordinary private individuals’.¹⁷⁴ Assessing the detail of the national court’s decisions can be paralleled to the equally detailed assessment undertaken by the Court in its assessment of the balancing within national legislative processes. For example, in *Hirst (no. 2)*, the Court noted that there was no ‘substantive debate by members of the legislature’ regarding the continued justification for a blanket ban on prisoner voting, in light of the fact that the legislature could only be said to have ‘implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners’.¹⁷⁵ Indeed, it may be understood this implicit affirmation of a continued justification for the impugned measure would not have measured up to, for example, the advancement of reasons in light of the Convention during parliamentary debate, which likely would have demonstrated a higher quality of balancing exercise. This shows that both when reviewing judicial decisions, and legislative balancing, the Court is careful to ensure a thorough analysis.

Finally, in relation to the balancing of competing interests within the domestic judicial process, the Court continued to frame its analysis in *Von Hannover (no. 2)* through the lens of the margin of appreciation, which it had regard to both when outlining the scope of its supervisory function in relation to the national courts,¹⁷⁶ and when concluding that the national courts had complied with their positive obligations under Article 8.¹⁷⁷

The *Von Hannover* “non-substitution principle” was soon reiterated within the early process-based review case law, in a way which tightened the connection between the

¹⁷³ *Von Hannover v. Germany (no. 2)*, para. 120.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Hirst v. the United Kingdom (no. 2)*, para. 79.

¹⁷⁶ *Von Hannover v. Germany (no. 2)*, para. 105.

¹⁷⁷ *Ibid.*, para. 126.

adequacy of balancing within domestic judicial processes and the operation of the margin of appreciation. Thus, the Court stated in *Aksu v. Turkey*: ‘If the balance struck by the national judicial authorities is unsatisfactory, in particular because the importance or the scope of one of the fundamental rights at stake was not duly considered, the margin of appreciation accorded to the decisions of the national courts will be a narrow one.’¹⁷⁸ This made clear that the determination of whether the balance struck was satisfactory will be made by reference to the adequacy of the balancing within the domestic judicial process. Prior to this elaboration on the “non-substitution principle”, the Court noted examples within its case law where significant weight had been attached to ‘the fact that the domestic authorities had identified the existence of conflicting rights and the need to ensure a fair balance between them’.¹⁷⁹ This made it clear that part of the Court’s methodology for assessing compliance with the Convention would include consideration of whether the domestic authorities had already balanced the competing interests. The Court’s approach also suggests that it sometimes uses domestic balancing as the starting point for its own identification of a conflict between rights.

In the aforementioned case, the domestic courts had been tasked with striking a fair balance ‘between the applicant’s rights under Article 8 of the Convention as a member of the Roma community and the freedom of the author of the book in issue to carry out academic/scientific research on a specific ethnic group and publish his findings’.¹⁸⁰ Significantly, the Court made clear it had engaged with the balancing of the domestic courts by stating it was satisfied that ‘in balancing the conflicting fundamental rights under Articles 8 and 10 of the Convention, the Turkish courts made an assessment based on the principles resulting from the Court’s well-established case-law’.¹⁸¹ Thus, the Court noted that consistent with its own case law, the courts had ‘submit[ted] to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings’ by attaching importance to the fact that the book had been written by an academic and therefore was considered to be a piece of academic work.¹⁸² Moreover, the Court viewed it was ‘also in line with [its] approach to consider the impugned passages not in isolation but in context of the book as a whole’.¹⁸³ Therefore, a number of practical considerations relevant to the adequacy of domestic balancing within judicial processes under the Court’s methodology came to light,

178 *Aksu v. Turkey* [GC] (Nos. 4149/04 and 41029/04, 15 March 2012), para. 67.

179 *Ibid*, para. 66.

180 *Ibid*, para. 69.

181 *Ibid*, para. 74.

182 *Ibid*, para. 71.

183 *Ibid*, para. 72.

such as the intensity of scrutiny employed in relation to certain issues; the weight to be attached to certain interests or facts; and the holistic approach towards considering the facts. Finally, it should be noted that the Court displayed particular nuance when engaging with the domestic balancing in the judicial process. The Court observed that the reasons put forward in support of the domestic courts' conclusions were expressed in a 'somewhat laconic manner', although it was ultimately found that these conclusions were 'in keeping with the principles set forth in the Court's case-law'.¹⁸⁴

3. Consolidating the *Animal Defenders* approach to balancing

The next stage in the development in the Court's approach to process-based review of domestic balancing came in the case of *Animal Defenders International v. United Kingdom*. The approach in *Animal Defenders* marks the Court's recognition that, as a matter of doctrine, the engagement with balancing by national authorities is integral to the Court's analysis as well as the margin of appreciation to be afforded in any given case. This was epitomised in the following statement from *Animal Defenders*: 'It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it'.¹⁸⁵ The Court expanded: 'The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation'.¹⁸⁶ In the years following the judgment in *Animal Defenders*, the latter statement of the Court has been described as 'one of the clearest statements to date on the link between parliamentary process and the breadth of the margin of appreciation'.¹⁸⁷ This may explain the robust contribution of the case to the development of process-based review on the whole, given that it clearly explains the connection between process-based review, the principle of subsidiarity and the margin of appreciation. In this regard, the willingness of the Court to engage with the quality of parliamentary processes and debate in this case has also been described as 'associated with a deepening of the Court's concept of subsidiarity'.¹⁸⁸ This is because it creates an incentive for domestic authorities to balance the relevant interests at stake in a manner consistent with the Court's case-law. Where such balancing takes place, the Court is likely to afford a greater degree of deference to the domestic authority's decision in recognition of the subsidiary role

¹⁸⁴ Ibid, para. 71.

¹⁸⁵ *Animal Defenders International v. United Kingdom*, para. 108.

¹⁸⁶ Ibid.

¹⁸⁷ Matthew Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' [2015] HRLRev 745, 754.

¹⁸⁸ Ibid, 752.

of the Court in protecting human rights. In other words, the Court is encouraging a ‘culture of human rights’ in national governments.¹⁸⁹

At the heart of the complaint in *Animal Defenders* was a legislative prohibition on paid political advertising in television or radio services, which applied not only to advertisements with political content, but also bodies which were wholly or mainly of a political nature, regardless of the content of their advertisements.¹⁹⁰ The aim of the prohibition was to maintain impartiality in the broadcast media, and to prevent powerful groups from buying influence through airtime.¹⁹¹ In relation to this, the Court held the central question to be whether the legislature acted within the margin of appreciation afforded to it in adopting that general measure.¹⁹² As discussed, the margin of appreciation may be understood as the principal doctrinal tool for the implementation of subsidiarity in practice. The Court reflected such an understanding through its reiteration at the preliminary stage of its analysis of the “direct and continuous contact” principle,¹⁹³ which constitutes a justificatory link between the quality of parliamentary review and its impact on the operation of the margin of appreciation. In this case the principle gave effect to the idea that, in the area of measures necessary for protecting democratic order, domestic legislative and judicial authorities are ‘best placed to assess the particular difficulties in safeguarding the democratic order in their State’.¹⁹⁴

The earlier process-based review case-law, which formed the initial stages of the Court’s engagement with domestic balancing, provided clear reference points for the underlying rationale of the *Animal Defenders* approach. Drawing on the “direct and continuous contact” principle, the Court cited its previous affirmation that the both the legislative and judicial national authorities were ‘better placed to assess the difficulties in establishing and safeguarding the democratic order’.¹⁹⁵ It was also deemed ‘relevant to recall that there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision’.¹⁹⁶

189 Spano, (n 1) 489.

190 *Animal Defenders International v. United Kingdom*, para. 58.

191 Ibid, para. 52.

192 Ibid, para. 110.

193 Ibid, para. 111.

194 Ibid.

195 *Ždanoka v. Latvia* [GC], para. 134; cited in *Animal Defenders International v. the United Kingdom*, at para. 111.

196 *Animal Defenders International v. United Kingdom*, para. 111; citing *Hirst v. the United Kingdom* (no. 2), para. 61.

Arguably, the Court's establishment of a direct relationship between the quality of parliamentary processes and the operation of the margin of appreciation is to some extent comparable with the approach in *Von Hannover (no. 2)* towards national judicial processes, where the Court required 'strong reasons to substitute its own view for that of the domestic courts' where the national authorities had undertaken a balancing exercise in conformity with criteria within the Court's case law.¹⁹⁷ However, it should not be overlooked that although the Court in *Animal Defenders* attached 'considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies',¹⁹⁸ it nevertheless engaged substantially in its own proportionality assessment in dealing with the applicant's submission concerning the rationale underlying the legislative choices regarding the scope of the prohibition.¹⁹⁹ This also served to maintain the spirit of *Von Hannover (no. 2)*, where the Court reaffirmed the notion that the margin of appreciation 'goes hand in hand with European supervision, embracing both the legislation and the decisions applying it'.²⁰⁰

In determining the proportionality of the general measure, the Court examined the national parliamentary and judicial review of the necessity of the measure, acknowledging that these were of 'central importance to the present case'.²⁰¹ This rendered engagement with domestic balancing of the relevant interests at stake as the methodological focus of the Court's review. Accordingly, the Court assessed that the prohibition was 'the culmination of an exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition ... and all bodies found the prohibition to have been a necessary interference with Article 10 rights'.²⁰² The assessment of the domestic parliamentary review as entailing an 'exceptional examination' of various aspects of the prohibition was made on the basis of reasoning that clearly revolved around the adequacy of domestic balancing in light of the Convention. For example, together with reference to the review of the prohibition's necessity by the Neill Committee in 1998, the Court carefully surveyed the response of all the various parliamentary bodies in light of *VgT Verein gegen Tierfabriken v. Switzerland*.²⁰³ This was an earlier case which had concerned a refusal to broadcast the applicant association's commercial in pursuit of its aim of animal protection.²⁰⁴ Accordingly, the Court identified the following

197 *Von Hannover v. Germany (no. 2)*, para. 107.

198 *Animal Defenders International v. United Kingdom*, para. 116.

199 *Ibid.*, paras. 118-124.

200 *Von Hannover v. Germany (no. 2)*, para. 105.

201 *Animal Defenders International v. United Kingdom*, para. 113.

202 *Ibid.*, para. 114.

203 *Ibid.*

204 For further information, see *VgT Verein gegen Tierfabriken v. Switzerland* (No. 24699/94, 28 June 2001).

features of balancing within the domestic legislative processes: first, the fact that ‘all later stages of the pre-legislative review [following the publication of the White Paper] examined in detail the impact of this judgment on the Convention compatibility’; second, that the draft Bill pertaining to the prohibition was ‘published with a detailed Explanatory Note’ dealing with the implications of *VgT*; and thirdly, that ‘all later specialist bodies consulted’ had favoured maintaining the prohibition by considering it was proportionate even after *VgT*.²⁰⁵ This close analysis of the way in which the domestic legislative process had considered and upheld the prohibition in light of specific and relevant Convention jurisprudence highlights the impact of the clear statement of methodology in *Animal Defenders* relating to the examination of the quality of parliamentary review.

Moreover, the Court took a holistic approach towards its assessment of the quality of parliamentary review by examining the contribution of other branches of government to the quality of parliamentary review, such as the executive. For example, the Court referred to the ‘important part’ played in the legislative debate about the proportionality of the measure by the Government, specifically the Department of Culture, Media and Sport.²⁰⁶ This was through ‘explaining frequently and in detail their reasons ... for considering [the prohibition] to be proportionate’, as well as disclosing relevant legal advice.²⁰⁷ Furthermore, the Court supported its analysis of the quality of parliamentary review by reference to the degree of judicial deference shown towards Parliament on the basis of its ‘particular competence ... and the extensive pre-legislative consultation’.²⁰⁸ While the Court did not frame this element of its analysis as acknowledging the contribution of judicial review towards the quality of parliamentary review, as it has in other cases it is nonetheless interesting to note this example of judicial dialogue, constituted by the Court’s reference to the domestic judicial review of parliamentary process within its own assessment of the quality of parliamentary review.

An interesting comparison here is *Anchugov and Gladkov v. Russia*.²⁰⁹ In this case the Court’s engagement with the adequacy of balancing within national legislative processes resulted in the narrowing, or ‘negative interferences’, of the margin of appreciation.²¹⁰ In factual circumstances that were very similar to those examined in *Hirst v. the United Kingdom*

205 *Animal Defenders International v. United Kingdom*, para. 114.

206 *Ibid.*

207 *Ibid.*

208 *Ibid.*, para. 115.

209 *Anchugov and Gladkov v. Russia* (Nos. 11157/04 and 15162/05, 4 July 2013).

210 Saul (n 187), 755.

(no. 2),²¹¹ the applicants complained that their disenfranchisement on the ground that they were convicted prisoners violated their right to vote. In this regard, the applicants relied on Article 3 of Protocol No. 1 to the Convention, which enshrines the right to free elections.²¹² The Government had argued in favour of a wide margin of appreciation, referring to the 'historical tradition in Russia of imposing a ban on electoral rights of convicted prisoners in detention', and also contending that the provisions of the Constitution laying down the ban on prisoner voting 'corresponded to Russia's current democratic vision'.²¹³ In response to this argument, the Court reiterated that the margin of appreciation was wide, but not all-embracing.²¹⁴ In light of this, the Court also considered that 'valid and convincing reasons should be put forward for the continued justification' of the general restriction on prisoner voting, '[i]n the light of modern-day penal policy and of current human rights standards'.²¹⁵ This suggests that whilst legislative process review can result in a wider margin of appreciation, to an extent it also has to be "earned",²¹⁶ in the sense that only if the balancing is found to have taken place, and is compliant with the Convention, the margin will be widened. The idea that the domestic balancing has to have some "quality" in order for the Court to give it weight in its assessment is something the develops further, as discussed in Part III.4.²¹⁷

Anchugov and Gladkov v. Russia is also an interesting case as it highlights that as well as engaging in the balancing exercise themselves, the legislative process should take account of modern-day policy and current human rights standards in order for the margin to be widened. This shows how rigorous the Court's process-based review can be.

Consistently with the subsidiary role of the Convention mechanism, the Court also stated that where member States have decided to 'incorporate provisions into their laws defining the circumstances in which [a measure restricting convicted prisoners' voting rights] should be applied ... it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction'.²¹⁸ In this connection, the Government had argued that the 'adoption of the Russian Constitution [laying down the voting

211 This was observed by the Court itself. See, *Anchugov and Gladkov v. Russia*, para. 101.

212 Ibid, para. 47.

213 Ibid, para. 103.

214 Ibid.

215 Ibid.

216 Murray Hunt, 'Enhancing Parliaments' Role in the Protection and Realisation of Human Rights' in Murray Hunt, Hayley Hooper and Paul Yowell's *Parliaments and Human Rights: Redressing the Democratic Deficit* (eds) (Hart Publishing 2015) 469, 472.

217 For discussion of the normative consequences of this see, Spano, (n 1) 491.

218 *Anchugov and Gladkov v. Russia*, para. 107.

restriction] was preceded by extensive public debate at various levels of Russian society’.²¹⁹ Under its process-based review methodology, the Court made clear that for arguments about ‘extensive public debate’ to hold weight, it would need to be able to identify relevant materials enabling it to consider ‘whether at any stage of the debate referred to by the Government any attempt was made to weigh the competing interests or to assess the proportionality of a blanket ban’.²²⁰ Overall, the Court held in these circumstances that it was bound ‘to conclude that the respondent Government [had] overstepped the margin of appreciation afforded to them in this field’.²²¹ Again this indicates that there is a qualitative aspect to the Court’s process based review whereby it looks at the quality of the substantive debate at the national level before widening the margin.

a. The aftermath of *Animal Defenders*

The *Animal Defenders* approach outlined thus far continued to be consolidated on both the principled and methodological levels by subsequent cases. For example, in *RMT v. the United Kingdom*,²²² the Court made reference to the fact that the position of the Government was ‘sharply contested ... by the opposition in Parliament’ at the time the relevant legislation had been enacted.²²³ The regard had by the Court to the consensus around the balance struck by the interfering measure within national processes can be traced to a similar observation in *Animal Defenders*, wherein the Court referred to the fact that the legislative prohibition was ‘enacted with cross-party support and without any dissenting vote’.²²⁴ While in neither case was the element of cross-party consensus within national legislative processes a determinative factor in the Court’s review, this observation in both cases indicates the ability of process-based review to capture a wide range of features encompassed by the factual scenarios at issue before the Court.

The Court has also elaborated on the principled foundations for attaching ‘special weight’ to the role of the domestic policy-maker. For example, in *S.A.S. v. France*, the so-called ‘Burqa-ban’ case, the Court stated that in matters of general policy on which opinions may differ widely within a democratic society ‘the role of the domestic policy-maker should be

²¹⁹ Ibid, para. 109.

²²⁰ Ibid.

²²¹ Ibid, para. 110.

²²² *The National Union of Rail, Maritime and Transport Workers (RMT) v. the United Kingdom* (No. 31045/10, 8 April 2014).

²²³ Ibid, para. 89.

²²⁴ *Animal Defenders International v. United Kingdom*, para. 114.

given special weight'.²²⁵ Given the implications of the legislative prohibition for anyone to conceal their face in public places for those wearing a burqa and niqab in accordance with their religious faith, such as the applicant, *S.A.S. v. France* can be seen to concern the relationship between the State and religion.²²⁶ In emphasising the 'fundamentally subsidiary role of the Convention mechanism', the Court went beyond reiterating that national authorities are '*in principle* better placed than an international court to evaluate local needs and conditions', to acknowledging in addition the 'direct democratic legitimation' of national authorities (emphasis added).²²⁷ The Court continued in this vein by stating that it had 'a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question'.²²⁸

Taking this consideration of direct democratic legitimation together with the fact that the case concerned a matter of general policy on which opinions may reasonably differ widely, the Court consequently held that France had a wide margin of appreciation.²²⁹ Thus, the Court developed the principled groundwork of the methodological aspect of process-based review concerned with balancing, by adding another layer besides the "direct and continuous contact" principle for the relationship between the quality of domestic review and the operation of the margin of appreciation within the Convention jurisprudence. In *Animal Defenders*, the accordance of 'some discretion as regards this country-specific and complex assessment' was warranted by the 'direct and continuous contact' of the national authorities with their country's vital forces, which placed the domestic legislative and judicial authorities in a better position for assessing the difficulties in safeguarding democratic order.²³⁰ In *S.A.S. v. France*, by adding within the jurisprudence that national authorities have 'direct democratic legitimation', the Court rendered the *Animal Defenders* approach more widely applicable. This is at least in relation to matters of general policy, which concern by their nature a balance struck by the domestic democratic process. Overall, this refinement of the principled foundations of the operation of the margin of appreciation in relation to matters of general policy marks a fundamental juncture in the development of process-based review. This is because, in strengthening the doctrinal tool of the margin of appreciation by nuancing its justificatory

225 *S.A.S. v. France*, para. 129.

226 *Ibid*, paras. 10-14.

227 *Ibid*, para. 129.

228 *Ibid*, para. 154.

229 *Ibid*, paras. 154-155.

230 *Animal Defenders International v. United Kingdom*, para. 111.

layers, the Court deepened its concept of subsidiarity. Given that the overall development of process-based review is ultimately tied to the implementation of the principle of subsidiarity, this deepening of the concept and its doctrinal expression have arguably catalysed the development of methodological aspects of process-based review.

It is also worth observing the commentary given by the Court regarding the concerns raised ‘by the indications ... to the effect that certain Islamophobic remarks marked the debate which preceded the adoption of the Law of 11 October 2010’, which entailed the legislative prohibition on concealing one’s face in public places.²³¹ The Court noted that it was not its role to ‘rule on whether legislation is desirable in such matters’.²³² However, this did not preclude the Court from emphasising that entering a ‘legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance’, contrary to a State’s duty of promoting tolerance under the Convention.²³³ This observation illustrates how the shift towards process-based review within the Convention jurisprudence, and the corresponding development of a methodological aspect focusing on balancing within domestic processes, facilitated identification of certain structural issues within legislative processes that constitute risk factors for compliance with the Convention, such as the discriminatory remarks within legislative debate.

A similar range of factors were also at issue in the subsequent case of *Dakir v. Belgium*.²³⁴ In this case the Court also undertook a process-based review. The applicants had specifically requested the Court to change their earlier approach in assessing the proportionality of such a ban, and the intervening organizations submitted that the latter assessment must take account of the specific ‘legislative process preceding the ban in Belgium’.²³⁵ In particular, the intervening organisations had alleged that the democratic process leading to the ban on wearing the full-face veil ‘had not taken full account of what was at stake’ and therefore should not hold weight in the Court’s assessment.²³⁶ In response to these arguments, the Court built upon the structural rationale for its engagement with the balancing in domestic legislative processes already adduced in its case law, namely the ‘direct democratic legitimation’ of

231 *S.A.S. v. France*, para. 149.

232 *Ibid.*

233 *Ibid.*

234 *Dakir v. Belgium* (No. 4619/12, 11 July 2017), para. 47.

235 *Ibid.*, para. 53.

236 *Ibid.*, para. 57.

the national authorities.²³⁷ Thus, the Court stressed the ‘fundamentally subsidiary role of the Convention system’, and reiterated in stark terms that ‘the national authorities have direct democratic legitimation in so far as the protection of human rights is concerned’.²³⁸ In this respect, it was pointed out that because the Court was in the present case ‘assessing a decision taken democratically within Belgian society’, it had to ‘show restraint in its scrutiny of Convention compliance’.²³⁹ The refined analysis of the impact of the direct democratic legitimation of an impugned measure on the nature of the Court’s review aided in developing the principled groundwork of process-based review within the *Animal Defenders* approach. This was because it highlighted the function of the *Animal Defenders* approach in such circumstances; namely, that it maintains the rigour of review while recognising and adhering to the fundamentally subsidiary role of the Convention. Thus, the Court indicated it would be searching in its inquiry as to balancing of the relevant interests within the domestic processes, noting that: ‘the decision-making process leading up to the impugned ban took several years and was accompanied by a wide-ranging debate within the House of Representatives and by a detailed and thorough examination by the Constitutional Court of all the interests involved’.²⁴⁰

The Court also provided further guidance as to the way domestic legislative processes relate more broadly to the protection of rights under the Convention, by again highlighting the risk of entering such a legislative process in terms of consolidating certain stereotypes, but also highlighted that this was specifically because this kind of legislation ‘mainly affects Muslim women who wish to wear the full-face veil’, even if not based on the religious connotation of the veil.²⁴¹

Following *Animal Defenders*, the methodology of engaging with the balancing conducted within domestic processes continued to hold an important function in review where complex assessments were required at the domestic level, especially due to the relationship of the latter with the margin of appreciation. This is illustrated in *Lambert and Others v. France*,²⁴² where it was submitted that the withdrawal of artificial nutrition and hydration of an individual in chronic neuro-vegetative state would breach the right to life guaranteed by Article 2 of the Convention. In that case, the Court reiterated that member States have a certain margin of appreciation in the context of their positive obligations ‘when addressing complex scientific,

237 *S.A.S. v. France*, para. 129.

238 *Dakir v. Belgium*, para. 54.

239 *Ibid.*, para. 57.

240 *Ibid.*

241 *Ibid.*, para. 55.

242 *Lambert and Others v. France* (No. 46043/14, 5 June 2015).

legal and ethical issues concerning in particular the beginning or the end of life, and in the absence of consensus among member States'.²⁴³ In light of the Court's keen awareness of the fact that *Lambert and others v. France* did, indeed, concern 'extremely complex medical, legal and ethical matters', the Court acknowledged that the domestic authorities had the primary role of verifying whether the decision to withdraw treatment was compatible with the Convention; the Court's role on the other hand consisted of ascertaining whether the State had fulfilled its positive obligations.²⁴⁴

The assessment undertaken by the Court in accordance with this approach turned, in part, on the quality of the balancing in light of the Convention taking place within the domestic decision-making process, which the Court found was 'conducted in meticulous fashion' such that it was compatible with the requirements of Article 2.²⁴⁵ In terms of the domestic judicial process, the Court deemed that the case had been 'the subject of an in-depth examination in the course of which all points of view could be expressed and all aspects were carefully considered'.²⁴⁶ These considerations pertaining to the domestic processes formed the basis of the Court's conclusion that the domestic authorities had complied with their positive obligations under Article 2 of the Convention in view of the margin of appreciation available in that case.²⁴⁷ This again indicates the relationship between the quality of national processes under the Convention and the margin of appreciation. Ultimately, this constituted an important development because the Court provided fresh guidance for review of domestic decision-making processes beyond legislative processes, in situations where the issue is complex by reason of the combination of its medical, legal and ethical aspects.

The *Animal Defenders* approach was further consolidated in another case concerning complex scientific and ethical questions: *Parrillo v. Italy*.²⁴⁸ This case concerned a legislative ban on donating to scientific research embryos conceived through medically assisted reproduction, which entailed the 'restriction of the right asserted by the applicant to decide the fate of her embryos'.²⁴⁹ While the Court in *Lambert and Others v. France* had outlined the nature of the approach to be taken for this kind of complex issue, it largely dealt with domestic decision-making processes aside from legislative processes; namely, it concerned the

²⁴³ Ibid, para. 144.

²⁴⁴ Ibid, para. 181.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ *Parrillo v. Italy* (No. 46470/11, 27 August 2015), para. 3.

²⁴⁹ Ibid, para. 152.

specific decision to withdraw end-of-life treatment. In contrast, the present case is noteworthy for its engagement with balancing within domestic legislative processes under the *Animal Defenders approach*, in light of the refined understanding of the nature of review in complex areas following *Lambert*. Thus, having found that 'the State's margin of appreciation is not unlimited',²⁵⁰ the Court indicated that its role in the circumstances was to 'examine the arguments to which the legislature has had regard in reaching the solutions it has retained and to determine whether a fair balance has been struck'.²⁵¹ Consequently, the Court observed that within the drafting process of the relevant legislation, the legislature 'had already taken account of the different interests at stake'.²⁵² In this regard, the Court indicated that the drafting process had taken particular account of the most relevant interests, such as the 'State's interest in protecting the embryo' and the right of persons concerned to 'individual self-determination in the form of donating their embryos'.²⁵³

The Court's analysis in *Parrillo v. Italy* exemplifies the utility of referring to documents relating to preparatory works to legislation at issue before the Court for the purposes of analysing the balancing undertaken by the legislature and identifying the interests considered.²⁵⁴ Indeed, the Court discerned in one report of a parliamentary committee that 'doctors, specialists and associations working in the field of assisted reproduction had contributed to discussions' relating to the legislation,²⁵⁵ which would have been indicative of the level of expertise informing parliamentary review of the balance struck by the measure. Additionally, the Court was able to identify from the report that the 'liveliest part of [the discussions relating to the drafting of the legislation] had in general concerned the sphere of individual freedoms',²⁵⁶ which would have been illustrative of the fact that a balancing exercise in light of the Convention had indeed taken place during the drafting process. Furthermore, the Court had also been able to discern from other discussions preceding the relevant legislation that the measure had already been criticised because it 'gave rise ... to a series of prohibitions, such as the use of heterologous fertilisation and the use of cryopreserved embryos not destined for implantation for scientific research'.²⁵⁷ This highlighted to the Court that within legislative debate, the scope of the implications of the prohibition had already been considered. Overall,

250 Ibid, para. 183.

251 Ibid.

252 Ibid, para 188.

253 Ibid.

254 For this aspect of the judgment see para. 184.

255 Ibid, para. 185.

256 Ibid.

257 Ibid, para. 186.

this reinforced the rigour with which balancing undertaken in domestic legislative processes may be scrutinised, and the practical means of proceeding with such analysis in an area concerning complex scientific and ethical questions.

b. Transitioning towards the “evolved Animal Defenders” approach

The current methodology of the Court in engaging with the adequacy of balancing undertaken within domestic processes has evolved from the *Animal Defenders* approach, primarily in terms of the Court being more explicit in signalling and signposting its methodology (see Part III.4). Within the case law, a phase may be identified as marking a “transition period” between the *Animal Defenders* approach and its “evolved” stage that is found within the Court’s current methodology. The jurisprudence related to this transitional phase tends to be cited in support of the current methodology. A noteworthy example is *Correia de Matos v. Portugal*,²⁵⁸ which concerned a complaint about the domestic courts’ decision to refuse the applicant leave to conduct his own defence in criminal proceedings against him. The decision of the national courts was based on legislation requiring mandatory legal representation, which required him to be represented by defence counsel despite him being a trained lawyer himself, raising an issue under Article 6 of the Convention.²⁵⁹ In line with the *Animal Defenders* approach and its consolidation in the subsequent case law, the Court drew attention to the fundamentally subsidiary role of the Convention system and the direct democratic legitimation of the national authorities rendering them in principle better placed than an international court to evaluate local needs and conditions.²⁶⁰ The methodological development, however, was indicated through the Court continuing to state that where a legislature enjoys a margin of appreciation, it still falls to the Court to ‘examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State or the public generally and those directly affected by those legislative choices’.²⁶¹

This echoed the approach in the earlier case of *Garib v. the Netherlands*.²⁶² This case concerned a complaint that certain domestic legislation had violated an applicant’s freedom

258 *Correia de Matos v. Portugal* [GC] (No. 56402/12, 4 April 2018).

259 *Ibid*, para 109.

260 *Ibid*, para. 116.

261 *Ibid*, para. 117.

262 *Garib v. the Netherlands* (No. 43494/09, 6 November 2017), paras. 137-138.

to choose her residence under Article 2 of Protocol No. 4 to the Convention.²⁶³ In this case, the Court referred to the legislative history of the relevant legislation and found this showed that ‘the legislative proposals were scrutinised by the Council of State, whose concerns were addressed by the Government ... and that Parliament itself was concerned to limit any detrimental effects’.²⁶⁴ In relation to the latter, the safeguard clauses identifiable within the legislation were found to ‘owe much to direct Parliamentary intervention.’²⁶⁵ This illustrated that the Court had investigated the role played by bodies such as the Government and the Council of State as mechanisms for ensuring the proportionality of the eventual legislative measure, together with Parliament’s own consideration of the potentially detrimental effects of the measure. Such an inquiry is reminiscent of the approach in *Animal Defenders* itself, where the Court examined the contribution of other branches of government to the quality of parliamentary review, such as the Department of Culture, Media, and Sport,²⁶⁶ demonstrating the continuity of a holistic approach towards this assessment. In contrast to *Animal Defenders*, however, the Court during this transitional phase made clear its methodology before embarking upon it. This marks a shift in the *Animal Defenders* approach where the methodology of the Court was discernible from the substance of the analysis itself, rather than the signposting on the part of the Court. Such a shift is important as it demonstrates a more conscious effort on the part of the Court to adopt a process-based methodology. This makes it clearer to domestic authorities the steps they ought to take to be afforded a greater margin of appreciation. In turn this encourages the embedding of a human rights culture within domestic systems. At the same time, the Court also indicated within this transition stage that its process-based review does not exclude attention to the substantive merits of the case. This serves to meaningfully uphold its previous statement that ‘choices made by the legislature are not beyond [the Court’s] scrutiny’.²⁶⁷

The transition towards the “evolving *Animal Defenders*” approach may be better understood by reference to *Lekić v. Slovenia*²⁶⁸, where the Court was tasked with determining the lawfulness of an interference with the applicant’s peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 to the Convention.²⁶⁹ The interference had consisted of a

263 Ibid, para. 103.

264 Ibid, para. 150.

265 Ibid.

266 *Animal Defenders International v. the United Kingdom*, para. 114.

267 *Correia de Matos v. Portugal*, para. 129.

268 *Lekić v. Slovenia* (No. 36480/07, 11 December 2018).

269 Ibid, para. 93.

decision to hold the applicant personally liable for the debt of a company which had been struck off the register, pursuant to relevant domestic legislation.²⁷⁰ The Court engaged in significant depth with the preparatory work of the legislation in question when assessing the quality of parliamentary review. This corresponded fittingly with the reiteration that legislative choices are not beyond its scrutiny and that it will carefully examine the arguments considered that led to these. However, this engagement also corresponded in concrete terms with the understanding that the national authorities are in principle better placed than an international court to evaluate local needs and conditions,²⁷¹ demonstrating the continued implementation of the principle of subsidiarity in this methodology of process-based review.

Accordingly, the Court highlighted that it was evident from the preparatory work of the legislation that the domestic legislative process had considered the previous legislation to be incapable of dealing with the thousands of companies created in the former Socialist Federal Republic of Yugoslavia that existed only on paper, had large debts, and no assets.²⁷² Moreover, the Court found it ‘further apparent’ from the preparatory work that the legislation was ‘introduced in response to a serious and widespread problem in post-socialist Slovenia’.²⁷³ Through examining the considerations within the legislative process leading towards the relevant legislative choices, the Court unearthed the national authorities’ evaluation of local needs and conditions, resulting in the latter acquiring relevance in the Court’s review - consistent with the notion that in principle national authorities are better positioned to make such evaluations than an international court. Furthermore, the Court acknowledged it was ‘true that [the legislation had] become the subject of at least two rounds of legislative changes and judicial appeals to the Constitutional Court’.²⁷⁴ From the Court’s ‘perusal of the relevant considerations in the preparatory work and the reasoning of the Constitutional Court’, the Court found that ‘genuine efforts were made to achieve a fair balance’.²⁷⁵ The combination of extensive legislative debate, and judicial review of the legislation at issue, can thus be seen to have contributed to a wide margin of appreciation.

The foregoing analysis gives rise to a number of key points regarding the Court’s transition towards the evolved *Animal Defenders* approach. First, there is an increased clarity as regards the signalling of the Court’s methodology within this approach, namely through stating its

²⁷⁰ Ibid, para. 96.

²⁷¹ Ibid, para. 108.

²⁷² Ibid, para. 114.

²⁷³ Ibid, para. 116.

²⁷⁴ Ibid, para. 117.

²⁷⁵ Ibid, para. 118.

role of carefully examining the arguments taken into consideration during the legislative process and leading to legislative choices. This is facilitative of an incisive engagement with the preparatory works of legislation and reasoning by judicial bodies such as a domestic Constitutional Court. Secondly, this approach makes clear that ‘genuine efforts ... to achieve a fair balance’ are significant in the Court’s assessment of the quality of parliamentary and judicial review, given that in *Lekić* it was the finding of these genuine efforts regarding balancing that led the Court to hold that the quality of domestic review was ‘such as to warrant a wide margin of appreciation’.²⁷⁶ This constitutes a clear pronouncement of the standard of balancing which could specifically warrant a wide margin of appreciation being afforded to the respondent State. It can be contrasted to less clear statements found within the early process-based review case law that the margin of appreciation is not all-embracing where there has been no substantive debate in light of modern day human rights standards by the legislature.²⁷⁷ Thirdly, this transitional approach towards the methodology of engaging with domestic balancing also meaningfully implements the principle of subsidiarity by signalling the direct relationship between a quality of domestic review characterised by ‘genuine efforts’ in relation to balancing, and the operation of the margin of appreciation doctrine.

4. Current methodology: an “evolved *Animal Defenders*” approach

The current approach of the Court towards the methodological aspect of process-based review builds on the notion that it falls to the Court to ‘examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State or the public generally and those directly affected by those legislative choices’.²⁷⁸ The core feature of the *Animal Defenders* approach has been maintained, namely a clear relationship between the quality of parliamentary and judicial review of the necessity of a measure, and the operation of the margin of appreciation.²⁷⁹ Nevertheless, and in light of the transition already taking place within the case law, the approach may be said to have evolved, in terms of the Court’s clarity in outlining the methodology and nature of review it is undertaking.

In line with the clear signalling in this “evolved *Animal Defenders*” approach towards the Court’s engagement with the adequacy of balancing within domestic processes, the Court has

²⁷⁶ Ibid.

²⁷⁷ See for example, *Hirst v. the United Kingdom (no. 2)*, para 79, 82.

²⁷⁸ *Correia de Matos v. Portugal*, para. 117.

²⁷⁹ *Animal Defenders International v. the United Kingdom*, para. 108.

specifically outlined principles concerning the quality of parliamentary and judicial review as part of the general principles relating to the scope of the margin of appreciation.²⁸⁰ This is seen in *M.A. v. Denmark*, where under the rubric of the State's positive obligations under Article 8 of the Convention, the Court examined whether the Danish authorities struck a fair balance between the competing interests of the individual and the community as a whole when refusing the applicant's request for family reunion, thereby deferring his right to be granted family reunification with his wife in Syria for three years.²⁸¹ In line with the "evolved *Animal Defenders*" approach, the Court made clear that domestic legislative are not beyond the scrutiny of the Court in this manner.²⁸² This was prefaced through an acknowledgment that the Court's subsidiary role in the Convention protection system has an impact on the scope of the margin of appreciation, especially given that national authorities through their democratic legitimation are in principle better placed than an international court to evaluate local needs and conditions.²⁸³ Through this structure of analysis, the Court continued within this approach to build the scaffolding for its assessment of the quality of parliamentary and judicial review around the principle of subsidiarity.

Notably, the Court in *M.A. v. Denmark* recalled, in respect of its role in examining carefully the arguments taken into consideration in the legislative process and leading to the choices that had been made by the legislature,²⁸⁴ 'that the domestic courts must put forward *specific reasons* in light of the circumstances of the case' [emphasis added].²⁸⁵ Expanding upon the implications of this, it was stated that '[w]here the reasoning of domestic decisions is insufficient, and the interests in issue have not been weighed in the balance, there will be a breach of the requirements of Article 8 of the Convention'.²⁸⁶ Contrastingly, and reminiscent of the "*Von Hannover* non-substitution principle", it was stated that strong reasons would be required for the Court to substitute its own views for that of the domestic courts where the domestic courts had: (i) carefully examined the facts; (ii) applied the relevant human rights standards consistently with the Convention and the Court's case-law; and (iii) adequately weighed up the individual interests against the public interest.²⁸⁷ The Court came full circle in its review of the general principles relating to the quality of parliamentary and judicial review

280 *M.A. v. Denmark* (No. 6697/18, 9 July 2021), paras. 147-150.

281 *Ibid.*, paras. 164-165.

282 *Ibid.*, para. 148.

283 *Ibid.*, para. 147.

284 *Ibid.*

285 *Ibid.*, para. 149.

286 *Ibid.*

287 *Ibid.*

by noting the entry into force of Protocol No. 15 to the Convention, which would amend the Convention by emphasising the principle of subsidiarity and the margin of appreciation doctrine.²⁸⁸

Drawing on the methodology within the transition towards the “evolved *Animal Defenders*” approach, the Court examined the preparatory notes for the legislation in question in striking detail. In particular, the Court discerned that considerations related to the necessity of the legislative amendments had been considered in relation to the 2015 Act,²⁸⁹ as well as the 2016 Act.²⁹⁰ Moreover, the Court referred to the fact that long sections of the preparatory notes for both the 2015 and 2016 amendments were ‘devoted to an examination of whether the introduction of the waiting period would comply with Denmark’s international obligations, *in particular Article 8 of the Convention* [emphasis added]’.²⁹¹ The Court also acknowledged that the general justification for the relevant legislative amendments, namely the need to control immigration, served the general interests of the economic well-being of the country and preserving social cohesion.²⁹² This suggested an inquiry on the part of the Court as to whether the legitimate aims adduced in the legislative process were such that the domestic balancing exercise could be viewed as corresponding with Convention principles.

The Court may also be understood within this approach as having considered the conditions under which the domestic balancing within the legislative processes took place. Thus, the Court noted that when introducing the three-year waiting period the legislature ‘did not have the benefit of any clear guidance being given in the existing case-law as to whether, or to what extent, the imposition of such a statutory waiting period would be compatible with Article 8 of the Convention’.²⁹³ As well as examining which arguments were considered within the legislative process that led to the relevant legislative choices, the Court also considered which arguments had not been considered within the legislative processes. In this regard, the Court stated that although the relevant legislation included a review clause so that the waiting period could have been reviewed during the 2017/18 parliamentary year at latest, ‘it does not appear that the sharp fall in the number of asylum-seekers in 2016 and 2017 prompted any reconsideration of the three-year rule’.²⁹⁴ This suggests that the Court

288 Ibid, para. 150.

289 Ibid, para. 168.

290 Ibid, paras 169-170.

291 Ibid, para. 174.

292 Ibid, para. 178.

293 Ibid.

294 Ibid, para. 180.

undertook a comprehensive review of the domestic debate relating to the relevant legislation.

It is important to note that the Court also undertook its own analysis of whether a fair balance had been struck in light of the considerations within the legislative process, as called for by the second step of the evolved *Animal Defenders* approach.²⁹⁵ For example, the Court considered that the waiting period of three years is ‘by any standard a long time to be separated from one’s family’, which prompted other proportionality considerations noted by the Court such as the disruption of the mutual enjoyment of matrimonial cohabitation.²⁹⁶ The Court’s assessment of the quality of the domestic judicial review also exhibited a notable degree of rigour. For example, the Court referred to the fact that the Supreme Court judgment in respect of the proceedings brought by the applicant ‘had regard to the applicable principles under Article 8 of the Convention and the relevant case-law on family reunification’, as well as the fact that the Supreme Court had noted the similar rules of other member States, and that the Court had not yet considered the compatibility of statutory waiting periods with Article 8.²⁹⁷ Moreover, the Court identified that the Supreme Court had regarded the preparatory notes for the legislative amendments leading to the three-year waiting period, and had also noted the background to the amendment.²⁹⁸ Indeed, this review by the Supreme Court corresponded with the Court’s own review of the quality of parliamentary review in *M.A. v. Denmark*.

The Court has clarified two aspects of the conditions allowing it to ‘focus primarily on the national parliamentary and judicial reviews of the Convention issues’²⁹⁹ during its proportionality assessment analysis.³⁰⁰ This clarification came in the case of *The Karibu Foundation v. Norway* which concerned the imposition by national authorities’ of ceilings on ground rents on property owned in Oslo, pursuant to national legislation giving lessors the right to require an adjustment of annual rent, with a maximum overall ground rent. The domestic legislation had been implemented after the Court had found a violation of Article 1 of Protocol No. 1 to the Convention, on the grounds that a previous version of the legislation had placed a disproportionate burden on lessors by allowing lessees to extend leases without an increase in rent and without a time-limit.

²⁹⁵ Ibid, para. 148.

²⁹⁶ Ibid, para. 179.

²⁹⁷ Ibid, para. 186.

²⁹⁸ Ibid, para. 187.

²⁹⁹ *The Karibu Foundation v. Norway* (No. 2317/20, 10 November 2022), para. 79.

³⁰⁰ Ibid, para. 76.

The first aspect of the conditions identified by the Court that allowed their primary focus to be on balancing was that it was 'evident to the Court that the legislature sought to implement fully the Court's findings ... and thoroughly reviewed the Convention requirements in connection with the finalisation of the legislation'.³⁰¹ Whilst the circumstances of *The Karibu Foundation v. Norway* were quite particular, in the sense the domestic legislation was adopted to remedy a previous violation, the case nevertheless suggests that the Court will take into account the following in its decision to focus its methodology on assessing the adequacy of balancing within domestic review: (i) whether a legislature has enacted legislation with the intention of implementing the findings of the Court; and (ii) whether in the final stages of enactment the legislation has been reviewed directly in light of Convention requirements. In this regard, it is worth noting that the Court also considered the fact that 'the Convention requirements ... underwent an extensive judicial review, not only in general but in light of the applicant organisation's specific circumstances, by three levels of domestic court'.³⁰²

The second set of conditions identified which allowed the Court to focus on domestic balancing was the complexity of the case at hand. The Court commented that there was 'common complexity of ground lease arrangements' which meant that the legislature had to focus on other policy choices besides "normal market mechanisms", and also needed to bear in mind 'long-term perspectives'.³⁰³ In this section of the Court's analysis, the Court also recognised the 'need emphasised in the national legislative process for clear and foreseeable solutions'.³⁰⁴ To some extent, this second aspect may be understood as reflective of the understanding that has pervaded the development of the Court's methodology of engaging with balancing within domestic processes: namely, that national authorities are 'in principle better placed than an international court to evaluate local needs and conditions'.³⁰⁵

Another case elucidating the evolved *Animal Defenders* approach is *Lings v. Denmark*. In this case, the measure at issue raised moral questions, as it concerned the criminalisation of assisted suicide, which had regularly been the subject of public and political debate in Denmark.³⁰⁶ In particular, the Court was tasked with determining whether the application of the legislative criminalisation of assisted suicide to the applicant gave rise to a violation under

301 Ibid, para. 77.

302 Ibid.

303 Ibid, para. 78.

304 Ibid.

305 See, for example, *S.A.S. v. France*, para. 129.

306 *Lings v. Denmark*, para. 21.

Article 10 of the Convention.³⁰⁷ Clearly adopting the methodological aspect of process-based review concerned with the adequacy of balancing within domestic processes, the Court held that the ‘quality of the parliamentary and judicial review of the necessity of a general measure, such as in the present case the criminalisation of assisted suicide, is of particular importance, including to the operation of the relevant margin of appreciation.’³⁰⁸ The adoption of the evolved *Animal Defenders* approach can be seen in concrete terms in the clarity of the Court’s analysis, as illustrated through the clear mapping of its determination of the quality of judicial review onto the operation of the margin of appreciation, specifically in that it ‘militate[d] in favour of a wide margin of appreciation’.³⁰⁹ Thus, the Court had noted that the Supreme Court ‘made a thorough judicial review of the applicable law in the light of the Convention, including the Court’s judgment in *Open Door and Dublin Well Woman v. Ireland*’, which the Court itself had made reference to.³¹⁰ Again, the importance of taking into account specific and relevant case law under the Convention was emphasised. Thus, in concluding its analysis the Court found that the national authorities had acted within their margin of appreciation, making pointed reference to the fact that the national authorities had ‘taken into account the criteria set out in the Court’s case-law’.³¹¹

Within the evolved *Animal Defenders* approach, the “direct and continuous” contact principle established since the early process-based review jurisprudence has been reiterated.³¹² This can be seen recently in the case of *Ecodefence v Russia*. In this case, the applicants complained that the Russian authorities had interfered with their rights to freedom of expression and association, under Article 11 of the Convention read in light of Article 10, by applying a range of measures against the applicants which included making them register under the stigmatising label of “foreign agents”.³¹³ Considering the creation of a new category of “foreign-agent”, the Court reiterated that to determine the proportionality of a general measure, the Court ‘must primarily assess the legislative choices underlying it and the quality of the parliamentary and judicial review of the necessity of the measure, attaching particular importance to the operation of the margin of appreciation’.³¹⁴ Thus, the Court found that the Foreign Agents Act ‘appear[ed] to be based on a notion that matters such as respect for human

307 Ibid, para. 47.

308 Ibid, para. 42.

309 Ibid, para. 58.

310 Ibid.

311 Ibid, para. 61.

312 *Ecodefence and Others v. Russia*, para 125.

313 Ibid, para. 78.

314 Ibid, para. 138.

rights and the rule of law are “internal affairs” of the State and that any external scrutiny of such matters is suspect and a potential threat to national interests’, which ran counter to the drafting history and underlying values of the Convention.³¹⁵ It may be observed that the Court in this case did not adopt as clearly the manner of signalling their methodology of engaging with balancing in domestic processes in the way found elsewhere within the evolved *Animal Defenders* approach, namely where the Court has stated that it fell to the Court to ‘examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck’.³¹⁶ However, a closer view of the substance of the Court’s analysis demonstrates that the Court still engaged with considerations that may have led to the choices made by the legislature, which is a constituent element of the evolved *Animal Defenders* approach, by examining the basis upon which the relevant regulations appeared to have been created.

The Court maintained a similar clarity in terms of stating the methodology of engaging with the balancing within domestic processes in *K.K. and Others v. Denmark*. The case concerned the refusal of the national authorities to grant the first applicant adoption of the second and third applicants, who were born from a commercial surrogacy arrangement. Similarly to where the Court had signposted its engagement with balancing in domestic processes by stating that it was proceeding ‘to consider the review carried out in the applicant organisation’s case’,³¹⁷ the Court here explicitly stated that it would ‘focus on the reasoning by the Supreme Court’.³¹⁸ This was after the Court expressed that it considered: first, that its task was not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating such a complex and sensitive matter;³¹⁹ second, that in principle States must be afforded a wide margin of appreciation regarding delicate moral and ethical questions upon which there is no European consensus;³²⁰ and third, the fact that the quality of parliamentary and judicial review of a general measure is of particular importance including to the operation of the relevant margin of appreciation.³²¹ Significantly, the Court developed its margin of appreciation and subsidiarity groundwork by stating that

315 Ibid, para. 139.

316 See, for the statement of this methodological principle within the transitional period towards the evolved *Animal Defenders* approach, *Lekić v. Slovenia*, para. 109; see, for this principle being established within the Court’s current methodology that adopts an evolved *Animal Defenders* approach, *M.A. v. Denmark*, para. 148.

317 *The Karibu Foundation v. Norway*, para. 80.

318 *K.K. and Others v. Denmark*, para. 56.

319 Ibid, para. 44.

320 Ibid, para. 45.

321 Ibid, para. 46.

‘*through* their democratic legitimization [emphasis added]’, the national authorities were better placed than an international court to evaluate local needs and conditions.³²² This indicates an evolution of the *Animal Defenders* approach, which as in *S.A.S. v. France* entailed only that ‘national authorities have direct democratic legitimization *and* are ... in principle better placed than an international court to evaluate local needs and conditions [emphasis added]’.³²³

In *K.K. and Others v. Denmark*, it was not unanimously viewed that the methodology outlined by the Court was fully applied by the majority in a manner consistent with the relationship in the case law between the first methodological aspect of process-based review and the operation of the margin of appreciation doctrine discussed thus far.³²⁴ Nevertheless, some attempts by the Court in that case to apply this methodology may be instructive in understanding the most recent iteration of the Court’s engagement with the adequacy of balancing in domestic processes. Thus, the Court made reference to the manner in which the Supreme Court had ‘explicitly assessed whether the decision to refuse [the adoption] ... was in compliance with Article 8 of the Convention’, and had referred in particular to the most relevant case law of the Court on the issue, namely *Mennesson v. France* and the *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*.³²⁵ Another feature of the balancing in the domestic judicial process observed by the Court was that the Supreme Court ‘did not limit its examination’ to the absolute ban on granting adoption if the person required to consent had been paid or received remuneration, but also assessed the individual circumstances of the persons involved in light of their finding that the relevant legislation containing the absolute ban needed to be amended.³²⁶ It was viewed that the Supreme Court had also balanced the relevant interests, specifically the interests of the second and third applicants in being adopted and general interests such as protecting children from being turned into a commodity.³²⁷ In arriving at a different conclusion of the outcome of the balancing exercise under the Convention, the Court made reference to features within the domestic balancing, such as the Supreme Court’s conclusion that an individual assessment had to be carried out as to whether refusing an adoption would be

322 Ibid, para. 47.

323 *S.A.S. v. France*, para. 129.

324 See, further, *K.K. and Others v. Denmark*, ‘Joint Dissenting Opinion of Judges Kjølbrot, Koskelo and Yüksel’.

325 Ibid, para. 56.

326 Ibid.

327 Ibid, para. 57.

contrary to Article 8 of the Convention,³²⁸ and the Supreme Court's unanimous finding that it would be in the children's best interest to be adopted.³²⁹ Consequently, the case affirmed the methodology of the recent case law that the conduct of the balancing exercise and the balance that is struck within domestic processes are not collapsible, and the Court may carry out its supervisory jurisdiction in relation to both.

5. An emerging approach: engaging with domestic balancing and the rule of law

As has so far been explored in Part III, an important methodological aspect of the Court's process-based review has been its engagement with the adequacy of balancing in light of the Convention standards undertaken within domestic processes, whether they be legislative or judicial. It has so far been observed that this methodology is reflective of both the key features of the principle of subsidiarity: (i) respect for democracy, and (ii) ensuring effective rights protection. While it has been observed that the current methodology of the Court concerning its engagement with domestic balancing has demonstrated an evolved *Animal Defenders* approach, whereby the Court more clearly signals its methodology and explicitly considers arguments underlying legislative choices together with whether those choices struck a fair balance, an emerging aspect of this current methodology remains to be discussed. This is the "rule of law approach", whereby the Court may be seen to accompany its process-based approach with extensive substantive considerations of the case.³³⁰ This approach has been particularly visible within the recent jurisprudence under the Convention concerning access to justice through courts, one of the essential pillars of the concept of the rule of law. Besides this, there are numerous areas where this approach is also notable, such as the independence of the judiciary and the guarantee of no punishment without law or more broadly legal certainty under Article 7 of the Convention. Indeed, it should be remembered, as the Court itself has reiterated, that the rule of law is treated under the Convention as one of the fundamental principles of a democratic society and 'inherent in all the Articles of the Convention'.³³¹

The rule of law has formed the spirit of the Convention since its inception, as illustrated within the jurisprudence of the Court itself in the foundational case of *Golder v. the United Kingdom*. In that case, the Court elaborated that although the Preamble to the Convention did not include the rule of law in the object and purpose of the Convention, the rule of law forms

328 Ibid, para. 61.

329 Ibid, para. 62.

330 See, Yüksel (n 2) 777.

331 *Grzęda v. Poland* (No. 43572/18, 15 March 2022), para. 339.

‘one of the features of the common spiritual heritage of the member States of the Council of Europe,’ thereby giving it relevance for those interpreting the Convention.³³² In terms of access to justice in particular, the Court in *Golder* stated that ‘one can scarcely conceive of the rule of law without there being a possibility of having access to the courts’.³³³ Consistent with this acknowledgment that the possibility of access to courts is a core element of the rule of law, the Court in the recent case of *Grzęda v. Poland* stated that ‘in order for national legislation excluding access to a court to have any effect under Article 6(1) in a particular case, it should be compatible with the rule of law’.³³⁴

In *Grzęda v. Poland*, the applicant, who was a judge of the Supreme Administrative and elected to the National Council of the Judiciary (NCJ) for a four-year term,³³⁵ complained that he had been denied access to a court to contest the premature and allegedly arbitrary termination of his term of office as a judicial member of the NCJ, which he claimed breached the rule of law and Article 6(1) of the Convention (the civil limb of the right to a fair trial).³³⁶ The issue of access to courts in this case was intimately linked with the independence of the judiciary, and the Court considered that due to ‘the link between the integrity of the judicial appointment process and the requirement of judicial independence’, similar procedural safeguards to those available in cases of dismissal or removal of judges should be available where a judicial member of the NCJ has been removed from their position.³³⁷ Moreover, the Court deemed it ‘necessary to take into account the strong public interest in upholding the independence of the judiciary and the rule of law’ when assessing any justification for excluding access to a court regarding membership of judicial governance bodies, having emphasised the need to protect a judicial council’s autonomy from encroachment by legislative and executive powers.³³⁸ Ultimately, the Court found that the ‘very essence of the applicant’s right of access to a court’ had been impaired,³³⁹ flowing from the fact that their case was ‘one exemplification of [a] general trend’ towards weakening judicial independence through interference by executive and judicial powers.³⁴⁰

332 *Golder v. the United Kingdom* (No. 4451/70, 21 February 1975), para. 34.

333 *Ibid.*

334 *Grzęda v. Poland*, para. 299.

335 *Ibid.*, paras. 30-32.

336 *Ibid.*, para. 172.

337 *Ibid.*, para. 345.

338 *Ibid.*, para. 346.

339 *Ibid.*, para. 349.

340 *Ibid.*, para. 348.

While the Court's review in *Grzęda v. Poland* revolved around the central concern of upholding the rule of law under the Convention, as is clear from its conclusive finding under Article 6(1), the overall reasoning demonstrates how process-based methodology and the rule of law approach are complementary. The Court had earlier in the judgment addressed the 'general issue of judicial reform',³⁴¹ which was later referred to as responsible for weakening independence of the judiciary in Poland, in relation to which the applicant's case was taken to be one exemplification.³⁴² In addressing this general issue, the Court made clear that the Convention did not prevent States from 'taking legitimate and necessary decisions to reform the judiciary'. However, such reforms 'should not result in undermining the independence of the judiciary and its governing bodies'.³⁴³ In this way, the Court may be understood to have indicated an area, in the context of judicial reforms, where a predominantly process-based review may be appropriate. At the same time, it can be inferred that this process-based approach would be less applicable where judicial reforms were aimed at undermining the independence of the judiciary, such as in *Grzęda* itself, where it was noted that 'the whole sequence of events in Poland ... vividly demonstrate[d] that successive judicial reforms were aimed at weakening judicial independence'.³⁴⁴

As has been discussed, the fundamentally subsidiary role of the Court in the supervisory mechanism under the Convention forms the main rationale for its marked adoption of a process-based review methodology. The Court in *Grzęda* emphasised the same fundamentally subsidiary role of the Court in the supervisory mechanism under the Convention,³⁴⁵ and more importantly that 'the Convention system cannot function properly without independent judges'.³⁴⁶ Thus, the adoption of a rule of law approach within the domain of access to justice through the courts in *Grzęda* illustrates the consistency of the rule of law approach with the rationale underlying the process-based review methodology. Moreover, it demonstrates the twofold nature of the principle of subsidiarity. As well as respecting democracy and sovereignty, subsidiarity 'imposes a shared responsibility' requiring that 'national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the Convention'.³⁴⁷ Under the rule of law approach that is emerging alongside the Court's current

341 Ibid, para. 323.

342 Ibid, para. 349.

343 Ibid, para. 323.

344 Ibid, para. 348.

345 Ibid, para. 324.

346 Ibid.

347 Ibid.

methodology towards engaging with domestic balancing, the Court has continued to make clear that in the domain of access to justice it will undertake extensive review of the substantive aspects of a case. In *Willems and Gorjon v. Belgium*, the Court addressed the excessive formalism of domestic courts where this precluded access to the courts. The case concerned the alleged deprivation of the right to appeal to the Court of Cassation because of apparent the excessive formalism of that court.³⁴⁸ The decision of the Court of Cassation had taken note of a unilateral declaration made by the Government,³⁴⁹ which acknowledged the inadmissibility of the applicants' appeals on the basis that the signatory lawyer had not mentioned that they had the required training certificate. The Court held that this did not comply with the right of access to a court guaranteed by Article 6 of the Convention.³⁵⁰ Significantly, in determining the case, the Court considered that the delineation of the exact content of the principle of separation of executive and judicial powers, which had also been referred to by the Court of Cassation, fell within the margin of appreciation of member States.³⁵¹ This was despite the fact that the principle has taken on particular importance within the Court's case law. In turn this illustrates another dimension of the complementary relationship between process-based review and the emerging rule of law approach.

Reflecting the integral nature of access to justice as principle of the rule of law, the Court also reiterated that the right of access to a court must be concrete and effective rather than theoretical and illusory.³⁵² Thus, in *Willems and Gorjon v. Belgium* the Court's approach towards the interference with the right of access to courts continued to be underlined by substantive rule of law considerations. For example, the Court attached importance to whether the rules restricting access were foreseeable in the eyes of the individual,³⁵³ which is evocative of the principle of legal certainty. The principle of legal certainty may also be understood as informing the observation that the wording of relevant domestic law provisions did not require it to appear from the documents adduced in the proceedings that the signatory lawyer holds the certificate of training required; as well as that neither the website of the Court of Cassation nor the training regulations contain any information concerning this requirement.³⁵⁴ Ultimately, these substantive rule of law considerations led the Court to hold that the Court of

348 *Willems and Gorjon v. Belgium* (Nos. 74209/16 and 3 others, 21 September 2021), para. 67.

349 *Ibid*, para. 55.

350 *Ibid*, para. 54.

351 *Ibid*, para. 58.

352 *Ibid*, para. 77.

353 *Ibid*, para. 78.

354 *Ibid*, para. 86.

Cassation had upset the fair balance between the legitimate concern of ensuring compliance with procedural requirements for lodging an appeal, and the right of access to the court. In this way, the Court of Cassation had demonstrated excessive formalism regarding the admissibility requirements for appeals.³⁵⁵

The complementary relationship between process-based methodology and the emerging rule of law approach again came to light recently in the domain of access to justice. In *Mnatsakanyan v. Armenia* the applicant had complained of denied access to a court to contest his premature dismissal from the post of a judge, relying on the civil limb of Article 6(1) of the Convention.³⁵⁶ The Court considered that the 'very essence' of the applicant's right of access to a court had been impaired,³⁵⁷ in light of the fact that no weighty reasons exceptionally justifying the absence of a judicial review had been provided, as required under Article 6(1) of the Convention in cases involving the removal or dismissal of judges.³⁵⁸ This finding by the Court exemplifies the manner in which the process-based consideration of the quality of judicial review and the rule of law approach may operate in conjunction to reinforce each other. Indeed, the Court had considered there was no basis to view that the administrative law action accessible to the applicant would provide 'sufficient review'.³⁵⁹ This was because the administrative law action was limited to an examination of the validity of the presidential decree prematurely terminating the applicant's judicial office, in terms of its compliance with domestic law provisions, rather than providing a review of the factual and legal basis for the decision to recommend his dismissal which formed the basis of the decree.³⁶⁰

355 Ibid, para. 88.

356 *Mnatsakanyan v. Armenia* (No. 2463/12, 6 December 2022), para. 44.

357 Ibid, para. 66.

358 Ibid, para. 65.

359 Ibid, para. 64.

360 Ibid.

IV. PROCESS-BASED METHODOLOGY AND THE EXHAUSTION OF DOMESTIC REMEDIES

1. General Overview

Article 35 of the Convention sets out the general admissibility requirement of the exhaustion of domestic remedies. The development of the jurisprudence related to this requirement under the Convention has been crucial to the broader evolution of process-based review. The Court's jurisprudence under Article 35 of the Convention both complements and forms a methodological aspect of its process-based review. It complements the Court's process-based review by implementing the principle of subsidiarity, which forms a constituent element of the underlying rationale for process-based review. However, it also forms a methodological aspect of the Court's process-based review due to the Court's examination of compatibility with Article 35 entailing an examination of the capacity of domestic processes to provide sufficient and accessible remedies. The structural guidance issued by the Court as a result of this process-based analysis, exemplified in the area of domestic individual complaint mechanisms, serves to facilitate domestic processes that may act as the primary forum for securing fundamental rights and freedoms under the Convention.

2. The requirement to exhaust domestic remedies under Article 35

a. *Vučković and Others v. Serbia*

Although Article 35 sets out the basic requirement to exhaust domestic remedies, the Court has elaborated on what this means in practice in its case law. A landmark case in the Court's exhaustion of domestic remedies jurisprudence is the recently decided case of *Vučković and Others v. Serbia*.³⁶¹ This case both 'confirm[ed] already settled principles' but may also 'be interpreted as requiring applicants to be more diligent in raising their Convention complaints for domestic remedies to be properly exhausted than transpired from previous case law'.³⁶² The case originated from thirty separate applications against Serbia,³⁶³ brought by applicants who had all been reservists drafted by the Yugoslav Army in respect of the North Atlantic

361 *Vučković and Others v. Serbia* [GC] (preliminary objection) (Nos. 17153/11 and others, 25 March 2014).

362 Spano (n 1) 486.

363 *Vučković and Others v. Serbia*, para. 1.

Treaty Organisation's intervention in Serbia.³⁶⁴ The applicants had been unable to benefit from an agreement established between the government and some of the reservists following a series of public protests, whereby they were guaranteed *per diem* payment to which they were entitled in six monthly instalments, because they did not have registered residence in one of the seven municipalities to which the agreement applied.³⁶⁵ Accordingly, the applicants had complained of discrimination stemming from the agreement in question, relying on Article 14 of the Convention (prohibition of discrimination) read together with Article 1 of Protocol No. 1 to the Convention (right to property) and Article 1 of Protocol No. 12 to the Convention (general prohibition of discrimination).³⁶⁶

The Court in *Vučković and Others* conducted a thorough overview of the general principles within the case law relating to the requirement of the exhaustion of domestic remedies, which outlined in depth the relationship between that requirement and the principle of subsidiarity. The Court also elaborated on the manner in which the requirement under Article 35 of the Convention may be complied with. This has come to constitute an important aspect of the Court's process-based review, in which the Court conducts a twofold examination entailing: (i) whether the remedies available could constitute a remedy to be exhausted under Article 35 of the Convention; and (ii) whether the applicant could be said to have exhausted these remedies in accordance with the requirement under Article 35. The underlying rationale behind these twofold aspects of the Court's examination under Article 35 is encapsulated by the following statement: '[t]he rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation.'³⁶⁷ This is because this assumption, that the domestic processes will provide for an effective remedy in respect of violations of Convention rights and freedoms, gives effect to the 'fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights.'³⁶⁸ As a consequence of the rule under Article 35 of the Convention envisaging the functioning of domestic processes so as to ensure that fundamental rights and freedoms are 'respected and protected on a domestic level', the exhaustion of domestic remedies requirement may be understood as an 'indispensable part of the functioning of this system of protection'.³⁶⁹

³⁶⁴ Ibid, para. 13.

³⁶⁵ Ibid, paras. 13-16.

³⁶⁶ Ibid, para. 55.

³⁶⁷ Ibid, para. 69.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

In light of this principled groundwork relating the rule under Article 35 inextricably to the principle of subsidiarity, the Court explained in detail the twofold aspects of its examination regarding the requirement to exhaust domestic remedies. First, this was by expressing that the ‘obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances’.³⁷⁰ This elaborated upon the steps required to be taken by the applicant in order for the Court to satisfy itself in its assessment of compliance with Article 35. However, it also indicated the nature of the remedies that the applicant would have been required to make normal use of, being those that are ‘available and sufficient’ in respect of their Convention grievances, thereby excluding those remedies that do not meet this standard. Continuing to elaborate on the steps required by the applicant, the Court indicated that to assess whether Article 35 of the Convention has been complied with, the Court will investigate whether the relevant complaint ‘intended to be made subsequently in Strasbourg’ had been in the first place ‘made to the appropriate domestic body’.³⁷¹

The Court’s guidance on compliance with domestic procedure here amounted to implementation of the principle of subsidiarity through the application of Article 35, as demonstrated by the emphasis on the need for the applicant to comply with the ‘formal requirements and time-limits laid down in domestic law’, as well as the need for ‘any procedural means that might prevent a breach of the Convention’ to have been used.³⁷² Indeed, the Court stated that in principle an application should be declared inadmissible for non-compliance with the rule under Article 35 if they do not fulfil these requirements.³⁷³ In a similar vein, the Court stated that where a remedy exists at the national level allowing the domestic courts to address at least in substance the argument of a violation of a Convention right, the applicant should exhaust this remedy. Consequently, Article 35 will not be deemed to have been complied with where the applicant has ‘unsuccessfully exercised another remedy which could have overturned the impugned measure on other grounds not connected with the complaint of a violation of a Convention right’.³⁷⁴ This element of the Court’s guidance also constituted a clear doctrinal manifestation of the principle of subsidiarity, given the Court’s own observation that this would be contravened where an applicant was able to lodge an application before the Court based on a Convention argument, when they had

³⁷⁰ Ibid, para. 71.

³⁷¹ Ibid, para. 72.

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ Ibid, para. 75.

ignored a possible Convention argument and relied on some other ground for challenging an impugned measure before the national authorities.³⁷⁵ Second, the Court expanded upon the nature of remedies that may be considered exhaustible under Article 35 by stating that ‘the existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness’.³⁷⁶ This element of the Court’s guidance and subsequently its examination may be understood more intuitively as a manifestation of process-based review, given that it concerns the capacity of domestic processes to provide remedies that would in essence allow the subsidiary character of the protective machinery under the Convention to be realised; that is, through offering the requisite protection of Convention rights and freedoms at the national level. This was further made clear by the Court’s unequivocal pronouncement that under Article 35 of the Convention there is ‘no obligation to have recourse to remedies which are inadequate or ineffective’, and also that the rule under Article 35 is inapplicable where there exists ‘an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective’.³⁷⁷ Rather, for a remedy to be effective and therefore exhaustible under Article 35 of the Convention, it ‘must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success’.³⁷⁸

Another key facet of the Court’s guidance relevant to both aspects of its examination under Article 35, which reinforces the notion that the guidance related to the exhaustion of domestic remedies is oriented around the subsidiary character of the Convention’s protective mechanism, is the Court’s emphasis on the flexible manner in which the rule under Article 35 should be applied where warranted by the circumstances. Accordingly, the Court stated, with reference to the “generally recognised rules of international law”, that ‘there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies’ at their disposal.³⁷⁹ Similarly, the Court observed that it had ‘frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive

375 Ibid. Though, it is also worth noting in this respect, that the Court has also stated that an individual cannot be expected to have exhausted every possible remedy. Therefore, ‘when a remedy has been pursued, use of another remedy which has essentially the same objective is not required’ (*Micallef v. Malta*, [G.C.], no. 17056/06, 15 October 2009, para 58).

376 Ibid, para. 71.

377 Ibid, para. 73.

378 Ibid, para. 74.

379 Ibid, para. 73.

formalism’.³⁸⁰ Overall, this emphasis on the possibility of flexible application, and more significantly the reticence shown towards a formalistic approach, demonstrates that the Court has developed its process-based guidance under Article 35 of the Convention with a view to encouraging the development of effective means of securing the Convention rights and freedoms at the national level, in line with the principle of subsidiarity.

In applying the general principles relating to the exhaustion of domestic remedies rule under Article 35 of the Convention in *Vučković and Others v. Serbia*, the Court engaged in a rigorous analysis of the functioning of the domestic processes. This served to illustrate how the Court’s development of jurisprudence under Article 35 constitutes an important aspect of its process-based review. For example, the Court was satisfied that at the material time an appeal to the civil courts constituted an effective remedy under Article 35(1) of the Convention. This was because those courts had full jurisdiction to examine claims such as those at issue; proceedings could be instituted before the civil courts against the domestic authorities through which the applicants could on certain conditions claim compensation for non-payment of *per diems* due to them, and it was also possible to challenge any discriminatory practices relating to these payments under the rubric of the Serbian Constitution itself.³⁸¹ Moreover, in regarding the question of whether the applicants could be said to have exhausted the available remedies, the Court engaged with the actions facilitated by the domestic processes. Thus, the Court highlighted that the applicants sought the payment of specific sums on account of the allegedly unpaid *per diems*, rather than relying on the prohibition of discrimination under their Constitution and under the Convention, which the Constitution had rendered directly applicable.³⁸² The national prescription rules were also regarded by the Court in accordance with the interpretation given by the civil courts, with the Court reiterating that it is primarily for the national authorities to resolve problems of interpretation of domestic legislation.³⁸³

Furthermore, the Court emphasised the importance of having raised complaints under the Convention, specifically the discrimination complaint, either expressly or in substance before the Constitutional Court during constitutional appeal.³⁸⁴ This served to support the protective mechanism provided by the domestic process of constitutional appeal, especially in light of the subsidiary character of the Convention. Indeed, the Grand Chamber showed particular engagement with the effectiveness of that process, by taking note of three decisions by the

380 Ibid, para. 76.

381 Ibid, para. 78.

382 Ibid, para. 79.

383 Ibid, para. 80.

384 Ibid, para. 82.

Constitutional Court in comparable cases.³⁸⁵ The Court observed that the Constitutional Court had not declined jurisdiction in any of these cases, and although in two out of three of cases the Constitutional Court had omitted to deal with the issue at hand, it had upheld the constitutional appeals on other grounds.³⁸⁶ According to the Grand Chamber, these observations did not lead to the conclusion that the constitutional remedy would have offered no reasonable prospect of success regarding the applicants' discrimination complaint. In this connection the Court reiterated that the existence of mere doubts as to the prospects of success of a particular remedy is not a valid reason for failing to exhaust it unless it was obviously futile.³⁸⁷

Having found that the applicants failed to exhaust the civil and constitutional remedies sufficient and available to them,³⁸⁸ the Court considered whether there were special circumstances justifying the non-application of the requirement to exhaust domestic remedies.³⁸⁹ Again, the Court demonstrated sensitivity to the domestic processes as the fora in which complaints under the Convention are to be raised. This was through, firstly, noting that while the Constitutional Court reviewed and upheld the applicants' complaint that the civil courts' case-law on the statutory prescription rules had been inconsistent, this finding indicated that the national civil courts' differing practices in this area as a whole was unconstitutional, rather than the application of the rules in the instant case.³⁹⁰ Moreover, the Court observed that it appeared that the applicants could have relied on this ruling to reopen their case.³⁹¹ Ultimately, the Court's holistic examination of the domestic processes through which the applicants could have availed themselves of sufficient and accessible remedies, regarding the circumstances as a whole, resulted in the conclusion that there were no special reasons for dispensing with the requirement to exhaust domestic remedies under Article 35.³⁹² Rather, the Court's examination of the domestic processes indicated both that had the applicants complied with the requirement, this would have given the domestic courts the opportunity to determine the issue of compatibility of impugned national measures or omissions to act with the Convention; and had the applicants afterwards pursued their complaints before the Court, the latter would have had the benefit of the views of the national courts.³⁹³ Thus, for

385 Ibid, para. 83.

386 Ibid.

387 Ibid, para. 84.

388 Ibid, para. 85.

389 Ibid, para. 86.

390 Ibid, para. 88.

391 Ibid.

392 Ibid, para. 90.

393 Ibid.

reasons of the applicants' actions rather than the provision of remedies within the domestic judicial process, the domestic courts were not enabled to fulfil their fundamental role in the Convention protection system, to which the role of the Court is subsidiary.³⁹⁴

b. Gherghina v. Romania

Another oft-cited case providing a pipeline for the Court's adoption of a process-based approach towards its assessment under Article 35 of the Convention within its case law is *Gherghina v. Romania*.³⁹⁵ The complaints of the applicant here related mainly to his inability to pursue his academic studies under the same conditions as other students, due to the lack of suitable facilities for accommodating his locomotor impairments in the buildings where the lecture rooms were located.³⁹⁶ The case is notable for the context-specific manner in which the Court clearly applied the general principles in this area. The Court first identified the nature of the available remedies required by the general principles in the case. In this way, the Court can be seen to have developed clear "sub-principles" regarding the required available remedies. Second, the Court systematically reviewed the three remedies referred to by the Government in light of these "sub-principles", specifically that of a court order, an action in tort, and remedies in respect of the successive decisions to exclude the applicant from university.

Thus, the Court considered the remedies in would only be "effective" under Article 35(1) of the Convention if they were 'capable, primarily, of preventing or putting a swift end to the alleged violations and, secondarily, of affording adequate redress for any violation that had already occurred'.³⁹⁷ When elaborating on the implications of these "sub-principles" for the criteria to be employed in determining the effectiveness of the remedies available in the instant case, the structural considerations adduced by the Court concerning the certain kinds of remedies that must have been available may be read as, by extension, requiring domestic processes to be able to facilitate these. Therefore, it was held that the applicant must be able to avail himself first and foremost 'of a remedy capable of leading to the swift adoption of decisions requiring the universities concerned to install suitable facilities for people with locomotor impairments or to make reasonable accommodation to enable him to continue his studies'.³⁹⁸ Turning to the 'secondary consideration', the applicant 'needed to have reasonable prospects of obtaining redress for any non-pecuniary or pecuniary damage he might have

394 Ibid.

395 *Gherghina v. Romania* (dec.) [GC] (No. 42219/07, 9 July 2015).

396 Ibid, para. 90.

397 Ibid, para. 91.

398 Ibid, para. 92.

sustained through being unable to pursue his university studies under the same conditions as other students'.³⁹⁹ Demonstrating the process-based approach in this case, these “sub-principles” were outlined in light of the fact that the rights flowing from the requirement under Article 2 of Protocol No. 1 - that any State which has set up higher-education institutions must ensure effective access to them - risked becoming illusory where there was a remedial process which could only lead to a retrospective award of pecuniary compensation.⁴⁰⁰

The Court’s application of these principles and “sub-principles” in *Gherghina* illustrates the engagement under Article 35(1) of the Convention with the domestic processes facilitating the provision of remedies and the subsidiary role of the Convention protective mechanism. This is most clearly demonstrated by the Court’s review of the court orders referred to by the Government as a remedy the applicant could have secured.⁴⁰¹ Adopting a holistic approach, the Court observed that there were both special and general provisions of domestic law that responded to the need for premises accessible to people with disabilities,⁴⁰² which the Court read in conjunction to conclude that there was a sufficiently certain and foreseeable legal basis for a claim seeking to remedy shortcomings in accessibility.⁴⁰³ Closely examining the special legislative framework, the Court observed that this had been put in place since 1999, requiring various public institutions to make their premises accessible to people with disabilities, and that the range of entities covered by this requirement had gradually expanded, such that in 2004 all public service providers were under an obligation to make their premises accessible, whether in the public or private sector.⁴⁰⁴ Moreover, the Court examined the general provisions of domestic law entitling an obligee to demand the performance of an obligation to take particular action or be awarded damages if that were unsuccessful, and those providing that an obligee may be entitled to ensure performance of an obligation that had not been honoured themselves at the obligor’s expense.⁴⁰⁵ The Court also examined domestic law provisions ‘of a procedural nature’ which empowered courts to order interim measures in urgent proceedings, specifically geared towards ‘preserving a right that is liable to be impaired’, which meant that ‘an application made on this basis could have afforded the applicant prompt redress for his complaints’.⁴⁰⁶ In light of the Court’s engagement with the special legislative framework

399 Ibid.

400 Ibid, para. 91.

401 Ibid, paras. 94-103.

402 Ibid, para. 95.

403 Ibid, para. 96.

404 Ibid, para. 95.

405 Ibid.

406 Ibid, para. 97.

and the general provisions in domestic law, including those of a procedural nature, the review may be said to have engaged closely with the capacity of the domestic processes to provide appropriate redress for the applicant. This was both in terms of the available actions for the applicant, and the scope of powers of the institutions involved.

c. Recent approach: Ulemek v. Croatia

The more recent case of *Ulemek v. Croatia*⁴⁰⁷ offers an apt illustration of the Court's process-based approach under Article 35(1) of the Convention. Here, the Court dealt with the rule of exhaustion of domestic remedies in the context of complaints about inadequate conditions of detention in prisons, and the lack of remedy for this, which raised issues under Articles 3 and 13 of the Convention. The significance of the context should be noted, given that the Court in its recent case law had examined the structural reforms relating to the systems of remedies in different countries introduced in response to its pilot and leading judgments on inadequate detention conditions. In these judgments preventive and compensatory remedies have been considered complementary.⁴⁰⁸ The Court made clear that the principle of subsidiarity continues to inform its approach under Article 35, by stating that the rule of exhaustion of domestic remedies is an 'important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights'.⁴⁰⁹

This reiteration of principled groundwork under Article 35(1) within the recent case law importantly also draws upon the second feature of the principle of subsidiarity, namely enhancing effective rights protection at the national level. Accordingly, as part of its explanation of the importance of the Article 35 rule in light of the principle of subsidiarity, the Court restated; '[t]he rule is based on the assumption, reflected in Article 13 of the Convention, with which it has close affinity, that the domestic legal system provides an effective remedy which can deal with the substance of an arguable complaint under the Convention and grant appropriate relief'.⁴¹⁰ With regards to the second feature of the principle of subsidiarity, it is also apt to observe the Court's express acceptance that there may be instances where the use of an otherwise effective preventive remedy would be futile in light of the brevity of an applicant's stay in inadequate detention conditions.⁴¹¹ This exemplifies the sensitivity

⁴⁰⁷ *Ulemek v. Croatia* (No. 21613/16, 31 October 2019).

⁴⁰⁸ *Ibid*, para. 72.

⁴⁰⁹ *Ibid*, para. 75.

⁴¹⁰ *Ibid*.

⁴¹¹ *Ibid*, para. 88.

to different contexts, such as the detention context in the instant case, that permeates the Court's assessment under Article 35(1) and ensures that it is ultimately aimed at securing fundamental rights and freedoms under the Convention. The Court in *Ulemek* also 'stress[ed] that principally it is the domestic procedural arrangement which determines the exhaustion of domestic remedies'.⁴¹² This was illustrated in the Court's broad engagement with and sensitivity towards the domestic processes underlying the provision of remedies, as well as the fact that its assessment under Article 35(1) takes these features of the relevant domestic processes into account, thereby avoiding formalism in determining whether the applicant has exhausted their domestic remedies.

Against this background regarding methodology, the Court considered the issue of the exhaustion of domestic remedies in a manner that bolstered its process-based approach. Thus, the Court identified a distinction in its case law between countries where individuals could only seek compensatory remedies for treatment during detention, and countries that could allow for preventive measures to be taken whilst an individual was in detention. In the former situation, the case-law showed that so long as the person lodged their application after their detention had ended, the compensatory remedy would be considered, in principle, effective. However, in countries where there was also a preventive remedy, both would be considered by the Court.⁴¹³ Since Croatia provided for both compensatory and preventive remedies, the Court determined to assess both in combination.⁴¹⁴ This indicates the embedding of a holistic approach towards the exhaustion of domestic remedies, that considers the different processes of availing remedies in combination. It therefore served to refine the process-based approach, the rigour of which is reliant on a multi-faceted analysis. At the outset of this analysis, the Court addressed the differing natures of the processes of exercising preventive and compensatory remedies, specifically noting the possibility of, in any event, bringing complaints before the Constitutional Court.⁴¹⁵ The roots of this methodological aspect of process-based review were again deepened through reference to the Court's previous case law regarding the preventive remedy concerning prison conditions in Croatia,⁴¹⁶ as well as the compensatory remedy for detention in inadequate conditions.⁴¹⁷ Furthermore, the Court examined further the process of availing oneself of the preventive and compensatory remedies

⁴¹² Ibid, para. 77.

⁴¹³ Ibid, para. 83.

⁴¹⁴ Ibid, para. 93.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid, para. 94.

⁴¹⁷ Ibid, para. 95.

in the relevant context by reference to the practice of the domestic authorities, including the Constitutional Court.⁴¹⁸ Ultimately, the Court complemented its holistic and process-based approach with its reasoning behind the finding that the complaints could not be dismissed for failure to comply with the rule under Article 35(1).⁴¹⁹ The Court reasoned that although an issue may be raised regarding the proper exhaustion of the relevant domestic remedies for some periods of the applicant's imprisonment, it should be noted that the Constitutional Court examined on the merits the overall period of his confinement, and that his application was duly lodged with the Court after obtaining the Constitutional Court decision.⁴²⁰

3. Structural guidance under Article 35(1) of the Convention: domestic individual complaint mechanisms

The Court's development of a process-based approach towards its assessment under Article 35(1) of the Convention in relation to the exhaustion of domestic remedies has come to constitute a core methodological aspect of its process-based review. One reason for this is that the process-based approach under Article 35(1) has allowed the Court to develop rigorous guidance concerning the requisite features of specific domestic processes under the Convention, with a view to effectively protecting rights at the national level in line with the principle of subsidiarity. A key example of this structural guidance may be seen in relation to the Court's engagement with domestic individual complaint mechanisms under Article 35(1). This has facilitated the role of such mechanisms playing a transformative role in the securing of the Convention rights and freedoms at the domestic level.

a. Hasan Uzun v. Turkey

The case of *Hasan Uzun v. Turkey* constitutes a landmark judgment for the Court's engagement with the process of domestic individual complaint mechanisms, in terms of the issuing of comprehensive guidance as to the features required for this important domestic process to constitute an exhaustible remedy under Article 35 of the Convention. The case of *Hasan Uzun v. Turkey* concerned a decision, challenged by the applicant under Articles 6 and 14 of the Convention,⁴²¹ by the civil courts to register a plot of land previously used by him in the name of a third party.⁴²² The applicant had not brought an individual complaint

418 Ibid, paras. 97-98.

419 Ibid, para. 118.

420 Ibid.

421 *Hasan Uzun v. Turkey*, paras. 33-34.

422 Ibid, paras. 2-6.

with the Constitutional Court,⁴²³ a process which had recently acquired status as law in Türkiye by constitutional amendment adopted by public referendum in September 2010,⁴²⁴ and was enshrined by Article 148(3) of the Turkish Constitution.⁴²⁵ Thus, the admissibility of the application in *Hasan Uzun v. Turkey* may be read as having turned on the Court's determination of whether the individual complaint before the Constitutional Court constituted a remedy that must be exhausted under Article 35 of the Convention.

The Court's determination of whether the remedy of individual application before the Constitutional Court constituted a remedy to be exhausted under the rule of exhaustion of domestic remedies under Article 35 entailed a process-based analysis on two fronts: the Court had considered it necessary to examine both the practical aspects of the route of individual application, as well as the legislature's intention in relation to this remedy.⁴²⁶ Accordingly, in terms of the practical aspects of the remedy of individual application before the Constitutional Court, the Court examined features such as its accessibility and the provisions for lodging an individual application.⁴²⁷ On the matter of accessibility, the Court gave consideration to the ordinary remedies to be exhausted before the remedy of individual application, and the ease, time, and means of referral to the Constitutional Court.⁴²⁸ The Court observed that there was no apparent problem of accessibility to the remedy of individual application before the Turkish Constitutional Court,⁴²⁹ having noted the following: that an individual application to the Constitutional Court is only subject to the exercise of ordinary remedies rather than other remedies or prior requests;⁴³⁰ that the period of thirty days for lodging an appeal is *a priori* reasonable, and that an additional period of fifteen days is available in certain circumstances;⁴³¹ and that the requirement to pay court fees, which themselves did not appear to be excessive, did not affect the accessibility of the remedy because individuals may be eligible for legal aid.⁴³²

As already outlined, another feature of the process deemed relevant by the Court to the matter of accessibility was the procedure for the Constitutional Court to respond to

423 Ibid, para. 70.

424 Ibid, para. 7.

425 Ibid, para. 52.

426 Ibid, para. 53.

427 Ibid.

428 Ibid, para. 54.

429 Ibid, para. 58.

430 Ibid, para. 57.

431 Ibid.

432 Ibid, para. 58.

complaints submitted to it,⁴³³ which the Court considered offered an *a priori* adequate means for safeguarding human rights and fundamental freedoms.⁴³⁴ In this regard, the Court noted that the scope *ratione materiae* of the Constitutional Court extended to the Convention and its Protocols that Türkiye had ratified, that the Constitutional Court had the power to request from any authority any information relevant to the examination of the appeal, and that the Constitutional Court could inform the authorities of interim measures both of its own motion or at the request of the appellant where this was considered necessary for rights protection.⁴³⁵ Consequently, the Court's examination of the practical aspects of the remedy of individual application before the Constitutional Court under Article 35(1) of the Convention may be viewed as entailing a different kind of assessment of the quality of the domestic individual application process. This is because the Court addressed the structural capacity of the process to offer the rights protection envisioned at the national level by the subsidiary nature of the Convention system.

Turning to the Court's examination of the legislative intention as part of its assessment under Article 35(1) of the Convention, the Court considered this question by reference to three aspects of the process of individual application: the jurisdiction of the Constitutional Court; the resources granted to the Constitutional Court; and the scope and effects of its decisions.⁴³⁶ With respect to the jurisdiction of the Constitutional Court, the Court saw no reason to doubt the intention of the legislature, especially given that the relevant legislation expressly indicated that the scope *ratione materiae* of the Constitutional Court extended to the fundamental rights and freedoms guaranteed by the Convention, and which are also contained in the Turkish Constitution itself.⁴³⁷ Moreover, the Court adopted a markedly process-based approach in its examination of whether the procedure before the Constitutional Court offered an adequate remedy in relation to the rights guaranteed by the Convention, whereby it made reference to the domestic law providing that the examination of the merits of an individual complaint must make it possible to establish whether or not there has been a violation of fundamental rights, and to indicate the remedy likely to put an end to the violation.⁴³⁸ These provisions, among others, in the Court's view provided the Constitutional Court with adequate means for the implementation of individual provisions, and indicated that the Turkish Parliament had

433 Ibid, para. 59.

434 Ibid, para. 61.

435 Ibid, para. 60.

436 Ibid, paras. 62-67.

437 Ibid, para. 62.

438 Ibid, para. 63.

expressed its willingness to make the Constitutional Court specifically competent to establish violations of provisions of the Convention and to entrust it with appropriate powers to remedy violations.⁴³⁹

In terms of the resources granted to the Constitutional Court, the Court noted that the number of judges had been increased to seventeen, that all the judges took up their duties well before the entry into force of the individual complaint mechanism, and that there was provision in law for sufficiently large resources for the functioning of the Registry.⁴⁴⁰ Finally, the Court took note of the fact that as a matter of constitutional law the decisions of the Constitutional Court were binding, and in practice that questions of compliance with these decisions should not arise *a priori* in Türkiye. In this regard, the Court noted that even the decision to dissolve a political party in power in a coalition government had been implemented.⁴⁴¹ Overall, the Court transformed what could have remained a formalistic investigation of the legislature's intentions in providing for a domestic individual application mechanism, into one enlivened to the capaciousness of the individual application process to provide rights protection. This was through placing under scrutiny the three aspects of the Constitutional Court's jurisdiction, resources, and the scope and effects of its decisions.

b. Wider examination of constitutional appeal processes

The case of *Hasan Uzun v. Turkey* constitutes a high watermark in terms of the process-based methodology employed, which entailed rigorous engagement with the structural capacity of domestic individual application processes to protect rights guaranteed by the Convention under the rubric of Article 35(1). It may also be deemed a high watermark with regards to the manner in which this methodological aspect is able to provide guidance on the features of these processes that rendered them exhaustible remedies in line with the assumption behind the exhaustion of domestic remedies rule – that there is an effective remedy available in respect of alleged violations of the Convention.⁴⁴² However, it should be acknowledged that *Hasan Uzun* also follows a trajectory of case law that has engaged with the capaciousness of domestic processes under the rule of the exhaustion of domestic remedies, and has strengthened the subsidiary protective mechanism of the Convention by doing so. Some early examples of this jurisprudence are constituted by cases in which the Court

439 Ibid, para. 64.

440 Ibid, para. 65.

441 Ibid, para. 66.

442 See, for an outline of the principled groundwork of the requirement under Article 35 of the Convention, *Vučković and Others v. Serbia*, para. 69.

engaged with well-established forms of individual constitutional complaint mechanisms, such as the institutions of *Verfassungsbeschwerde* in Germany⁴⁴³ and *recurso de amparo* in Spain, which have been observed by the Venice Commission as the ‘most well-known examples of constitutional complaint’.⁴⁴⁴

For example, in *Fernandez-Molina Gonzalez and Others v. Spain*, the Court was tasked with determining the issue of admissibility of a complaint under Article 6(1) of the Convention regarding the length of proceedings before the domestic courts, which concerned the State’s failure to pay interest on financial compensation awards in relation to the applicants’ “toxic syndrome” caused by severe food poisoning.⁴⁴⁵ The Spanish Constitution provided for expedited application to ordinary courts in order for citizens to assert their rights and freedoms under domestic law including the Constitution, and the possibility of lodging an *amparo* appeal with the Constitutional Court if appropriate. In examining whether the *amparo* appeal to the Constitutional Court could be considered a remedy that should have been exhausted under Article 35, the analysis of the Court was markedly orientated around the features of the domestic judicial process. Thus, the Court observed that in the Spanish legal system, anyone who considers that excessive delays are being incurred in proceedings to which they are a party can lodge an *amparo* appeal with the Constitutional Court under Article 24(2) of the Constitution, if they have unsuccessfully complained to the court dealing with their case.⁴⁴⁶

In light of these features of the domestic judicial process, the Court’s analysis as to whether the applicants could be said to have exhausted domestic remedies in relation to their complaint under Article 6(1) of the Convention evinced a keen awareness of the subsidiary role of the Convention mechanism. It also aided the implementation of the principle of subsidiarity in that case, by accounting for the structural capacity of the domestic processes to protect Convention rights and freedoms at the national level. Accordingly, the Court noted that the applicants did not raise the complaint concerning the length of proceedings either expressly or in substance before the domestic courts responsible for the alleged delays, or before the Constitutional Court in their *amparo* appeal.⁴⁴⁷ Rather, the Court noted that the question

443 See generally, for affirmation of the Court that the remedy of the complaint before the Federal Constitutional Court is one to be exhausted under Article 35 of the Convention, *Schädlich v. Germany* (No. 21423/07, 3 February 2009).

444 “Opinion on the Draft Constitutional Amendments with Regard to the Constitutional Court of Turkey” (CDL-AD(2004)024) adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), para. 28.

445 *Fernandez-Molina Gonzalez and Others v. Spain* (No. 64359/01, 8 October 2002).

446 *Ibid.*

447 *Ibid.*

of the length of proceedings had only been raised before at the Strasbourg level.⁴⁴⁸ At the national level, the applicants had only relied in a general way on Article 24(2) of the Spanish Constitution before the Constitutional Court, without adducing evidence in support of the complaint concerning the length of proceedings.⁴⁴⁹ In respect of this observation, the Court stated in clear terms that the way in which the applicants had raised their complaints did not suffice under the case law of the Convention to show that they had referred their complaint at least 'in substance' to the domestic courts.⁴⁵⁰ Overall, the Court may be read in *Fernandez-Molina Gonzalez and Others v. Spain* as laying the foundations for its emphasis on avoiding a formalistic approach towards applying the requirement under Article 35(1) of the Convention, through undertaking instead a holistic and multi-faceted towards assessing the provision of remedies within the relevant domestic processes, and whether these had been exhausted.

By contrast to the landmark case of *Hasan Uzun v. Turkey*, an early adoption of process-based analysis in *Apostol v. Georgia* led to the conclusion that the remedy of individual constitutional complaint did not need to be exhausted in that case.⁴⁵¹ The Court found that the system of individual constitutional complaints in place in Georgia at the material time 'lack[ed] effective mechanisms for offering direct and specific redress for particular instances of human rights violations'. Therefore it could not be regarded as an appropriate remedy for the complaint at issue about the non-enforcement of binding decisions with a sufficient degree of certainty.⁴⁵² In arriving at this conclusion, the Court laid down in similar fashion to that found later in its case law the notion that 'the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically', meaning that the Court must take 'realistic account ... of the general legal and political context in which [the formal remedies in the legal system] operate'.⁴⁵³ Adopting this contextual approach, the Court observed the structural features of the individual constitutional complaint process in Georgia, and noted that '[w]hile a literal reading of the relevant constitutional provision suggests that it actually provides for the right of access to a court', no decisions or judgments of the Constitutional Court had been referred to that inferred a guarantee against non-enforcement of binding decisions, which prevented similarities being drawn to the guarantees within the Court's case

448 Ibid.

449 Ibid.

450 Ibid.

451 *Apostol v. Georgia*, paras. 36-46.

452 Ibid, para. 46.

453 Ibid, para. 36.

law.⁴⁵⁴ Taking this lack of reference to judicial practice displaying a guarantee against non-enforcement, together with the fact that under national law the absence of a constitutional right renders a complaint incompatible *ratione materiae* with the provisions of the Constitution and inadmissible for examination, the Court was unable to conclude that the applicant could have claimed a constitutional right to have binding judgments enforced successfully before the Constitutional Court.⁴⁵⁵

Continuing its structural analysis, the Court observed the fact that within the process of individual constitutional complaint in Georgia, there was only provision for individual access to the Constitutional Court in the form of an “abstract” constitutional complaint, meaning that individuals could not challenge decisions made by the courts or public authorities that directly affected their particular circumstances.⁴⁵⁶ Another feature of the process noted by the Court was that the Georgian Constitutional Court was not empowered to set aside individual decisions of public authorities which directly affect the complainant’s rights, nor did the declaration that a normative act was unconstitutional result in the quashing of judicial decisions taken on its basis, or even the termination of enforcement proceedings.⁴⁵⁷ Notably, the methodology of the Court in making these observations entailed some comparative analysis, indicating the rigorous potential of a process-based analysis under Article 35 of the Convention. For example, the Court compared the Georgian constitutional proceedings to those of Germany, Spain or the Czech Republic. In these countries the “specific” constitutional complaint made it possible to remedy violations of rights and freedoms committed by authorities or officials; prohibit concerned authorities from continuing to infringe a right and order it to re-establish the status quo where possible; and to remedy violations resulting immediately and directly from an act or omission of a judicial body, regardless of the facts that had given rise to the proceedings.⁴⁵⁸ The Court also referred to the fact that the “abstract” model of constitutional complaint ‘resembles that of the Hungarian Constitutional Court’, which had previously been found by the Court to be an ineffective remedy for the purposes of Article 35 because the Constitutional Court was ‘only entitled to review the constitutionality of laws in general terms and could not quash or modify specific measures taken against an individual by the State.’⁴⁵⁹ Having reiterated that ‘for a remedy to be effective, it should answer the complaint

454 Ibid, para. 38.

455 Ibid, para. 39.

456 Ibid, para. 40.

457 Ibid, para. 43.

458 Ibid, para. 42.

459 Ibid, para. 41.

by providing specific and speedy redress for specific harm, and not merely indirect protection of the rights guaranteed in Article 6 of the Convention',⁴⁶⁰ the Court concluded that the system of individual constitutional complaint in Georgia 'lack[ed] effective mechanisms for offering direct and specific redress for particular instances of human rights violations'.⁴⁶¹

Another early example of process-based methodology under Article 35(1) of the Convention is *Ismayilov v. Azerbaijan*,⁴⁶² where the Court found that the individual constitutional complaint 'constituted a remedy which lacked adequate accessibility', particularly because it 'obliged the applicant to attempt to exhaust another remedy ... found to be ineffective within the meaning of Article 35(1)' as a precondition of accessibility.⁴⁶³ Here, the applicant had alleged a violation of his right to freedom of association in connection with the failure by the Ministry of Justice to register his public association in a timely manner.⁴⁶⁴ The Court reiterated that 'the purpose of the domestic remedies rule in Article 35(1) is to afford Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court'.⁴⁶⁵ This served to affirm the centrality of the principle of subsidiarity within the Court's process-based methodology under the rule of exhaustion of domestic remedies. Thus, the Court determined that at the time the present application was lodged there was no reasonable prospect of success for the applicant offered by the right of individual application to the Constitutional Court. Even though the latter had already been granted by constitutional amendments, the procedural rules for examination of individual constitutional complaints had not yet been established in law, and pending the entry into force of these the Constitutional Court had refused to examine any complaints lodged by individuals.⁴⁶⁶ Furthermore, the Court also observed that in accordance with domestic practice, based on the conditions for admissibility of an individual application before the Constitutional Court, individuals were first required to lodge an additional cassation appeal with the Supreme Court's President. The Court had previously been found this to constitute 'an extraordinary remedy' which was not required to be exhausted.⁴⁶⁷ Overall, the process-based approach of the Court, underlined by the principle of subsidiarity, enabled it to determine structural features in the individual constitutional complaint process, such as the refusal to examine complaints

460 Ibid, para. 44.

461 Ibid, para. 46.

462 *Ismayilov v. Azerbaijan* (No. 4439/04, 17 January 2008).

463 Ibid, para. 40.

464 Ibid, para. 21.

465 Ibid, para. 35.

466 Ibid, paras. 37-38.

467 Ibid, para. 39.

pending the establishment of legal procedural rules and the requirement to lodge an additional appeal, which impeded the effective protection of rights at the national level.

The case of *Vinčić and Others v. Serbia* constitutes a forerunner of *Hasan Uzun v. Turkey* in terms of the principled framework for the relationship between the exhaustion of domestic remedies rule, subsidiarity, and process-based review set out in that case. The applicants in that case were all members of a Serbian trade union,⁴⁶⁸ and had complained about the ‘flagrantly inconsistent case-law of the District Court ... in Belgrade concerning the payment of the same employment-related benefit’.⁴⁶⁹ This inconsistency was based on the allegedly “erroneous application of the relevant domestic legislation” and the same court’s simultaneous acceptance of identical claims filed by their colleagues’.⁴⁷⁰ The Court clearly affirmed the established rationale and principles relating to the rule of exhaustion of domestic remedies under Article 35(1) of the Convention. This included that the exhaustion of domestic remedies rule serves to ‘dispens[e] States from answering before the Court for their acts before they have had an opportunity to put matters right through their own legal system’.⁴⁷¹ While the Court stopped short of expressly reiterating the relationship between Article 35 and the principle of subsidiarity under the Convention, as it did later in *Hasan Uzun v. Turkey*,⁴⁷² this identification of the purpose of the exhaustion of domestic remedies rule clearly indicates an acknowledgment of its integral role in the subsidiary nature of the Convention system of protection.

In addition, the Court referred to its recognition that Article 35(1) of the Convention ‘must be applied with some degree of flexibility and without excessive formalism’ and continued to state that ‘an effective remedy must form a part of the normal process of redress and cannot be of a discretionary character’.⁴⁷³ The latter principle may be characterised as facilitating a distinctly process-based form of review, given that it encourages a holistic consideration of the national processes of redress in order to ascertain whether a certain remedy forms part of this. Accordingly, the Court drew a subtle distinction meaning that in respect of applications introduced as of 7 August 2008 - the date when the Constitutional Court’s decisions on the merits of constitutional appeals had first been published in the State’s Official Gazette - constitutional appeal in Serbia was considered an effective domestic remedy, evidenced

468 *Vinčić and Others v. Serbia* (Nos. 44698/06 and 30 others, 1 December 2009), para. 7.

469 *Ibid.*, para. 3.

470 *Ibid.*, para. 44.

471 *Ibid.*, para. 48.

472 See, for this part of the judgment, *Hasan Uzun v. Turkey*, paras. 36-37.

473 *Vinčić and Others v. Serbia*, para. 49.

through its case law and the competence of Commission for Compensation.⁴⁷⁴ Given that the applicants had filed their applications with the Court before that date, their complaints could not be declared inadmissible for non-exhaustion of domestic remedies under Article 35(1) of the Convention.⁴⁷⁵

c. Other types of domestic individual application mechanisms

Aside from domestic individual application mechanisms involving specifically the process of individual constitutional appeal, the Court has exercised a process-based methodology in respect of determining whether other forms of individual application constitute remedies that should be exhausted under Article 35(1) of the Convention. For example, the Court has examined the judicial review mechanism under the Human Rights Act in the United Kingdom. Notably the Court declared the applicant's case in *Donnan v. the United Kingdom* inadmissible on the basis of the applicant's failure to demonstrate he had exhausted all effective domestic remedies available to him as required by Article 35(1).⁴⁷⁶ Before the Court, the applicant had relied on Article 10 of the Convention regarding his complaint that he had been arrested while taking part in a peaceful protest, as well as Article 7 in relation to his complaint that he had been given a "criminal record" without having been taken to a court. In deciding that the application was inadmissible, the Court observed that the applicant could have relied on section 6 of the domestic Human Rights Act 1998, which made provision for bringing an application for judicial review, both against the public authority responsible for the arrest of the applicant and his consequent "criminal record".⁴⁷⁷ The Court observed that the process of making an application for judicial review under the Human Rights Act would have allowed the applicant, if he had been successful, to obtain a declaration that his arrest was unlawful, an order to quash any relevant criminal record, and even damages if this was necessary to award him just satisfaction.

Another notable example of the Court's engagement with a process of individual application aside from constitutional appeal was a civil action in relation to an alleged breach of Article 3 of the Convention, due to detention in overcrowded cells and the alleged failure by the State to secure adequate living conditions to the applicant throughout his detention.⁴⁷⁸ Specifically, the Court had to determine whether the civil action under the Polish Civil Code

⁴⁷⁴ Ibid, para. 51.

⁴⁷⁵ Ibid, paras. 51-52.

⁴⁷⁶ *Donnan v. the United Kingdom* (No. 3811/04, 8 November 2005).

⁴⁷⁷ Ibid.

⁴⁷⁸ *Latak v. Poland*, para. 59.

for compensation for the infringement of the applicant's personal rights due to overcrowding and insanitary conditions of his detention could 'be considered an effective remedy to be exhausted'.⁴⁷⁹ In this regard, the Government had argued that the latter civil action provided the applicant with the opportunity to seek compensation for the past violation of Article 3 of the Convention, on account of having previously been placed in cells that did not comply with standards of Polish law.⁴⁸⁰ At the outset, the Court had considered it 'appropriate' that its examination of this issue 'should take into account ... developments at the domestic level'.⁴⁸¹ These developments included the introduction of a Code of Execution of Criminal Sentences with detailed provisions on temporary placement of detainees in cells below the statutory minimum space per person, as well as legal means for contesting the measure.⁴⁸² It is noteworthy that the Court considered that these developments at the domestic level required consideration within its examination because they had been introduced following previous judgments where the Court had encouraged the respondent Government to develop an efficient complaints mechanism to enable domestic authorities to react speedily to allegations similar to those raised in the present case.⁴⁸³ The above analysis is illustrative of the harmonisation-enhancing discourse permeating the jurisprudence under Article 35, sustained by a holistic consideration of the processes within the domestic framework oriented towards protecting against the alleged rights violation at issue. This approach may therefore be said to be underlined by the principle that the Convention protective mechanism is 'subsidiary to the national systems safeguarding human rights', which the Court had viewed as 'primordial'.⁴⁸⁴

Having cemented the underlying principle of subsidiarity within its approach towards assessing the exhaustibility of the Polish civil action under Article 35 in this case, the Court continued to facilitate the subsidiary role of the Convention. This was by means of utilising a process-based methodological approach, and expanding on its reticence towards adopting a formalistic approach. Thus, the Court reiterated that the rule of exhaustion of domestic remedies 'must be applied with some degree of flexibility and without excessive formalism'. The Court elaborated upon this as meaning that amongst other things 'it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting

479 Ibid, para. 79.

480 Ibid, para. 64.

481 Ibid, paras. 73-74.

482 Ibid, para. 73.

483 Ibid.

484 Ibid, para. 75.

Party concerned but also of the general legal and political context in which they operate'.⁴⁸⁵ This approach facilitated a particularly nuanced analysis of the domestic judicial processes, especially discernible in the Court's contestation of the argument that the 'availability and effectiveness [of the civil action at issue] had unambiguously been confirmed by the Supreme Court' in a landmark judgment of 27 February 2007'.⁴⁸⁶ Rather, the Court viewed that until the second judgment of the Supreme Court on 17 March 2010, there had not been in place a 'fully consolidated, consistent and established practice of civil courts in respect of the interpretation and application of ... the Civil Code in cases concerning overcrowding in prisons, a practice that would unambiguously confirm the effectiveness of that remedy for the purposes of Article 35(1) of the Convention'.⁴⁸⁷ Ultimately, the Court held in light of its analysis of the availability and effectiveness of the civil action, as well as the fact that the three-year limitation under Polish law had not yet expired for the applicant, he should have sought redress at the domestic level before having their Convention claim examined by the Court, through bringing the civil action for the infringement of his personal rights.⁴⁸⁸

485 Ibid, para. 76.

486 Ibid, para. 80.

487 Ibid.

488 Ibid, para. 81.

V. OBSERVING PROCESS-BASED METHODOLOGIES ACROSS CONVENTION RIGHTS

1. General Overview

The broad shift undertaken by the Court since the early part of the twenty-first century towards the adoption of a process-based methodology within its review has entailed significant development and clarification of its methodological aspects (see Parts III and IV). However, this is not to say that within individual cases, the Court has exclusively utilised process-based methodologies and excluded substantive considerations of the relevant issue. As has been observed, process-based review ‘does not in any way limit the Strasbourg Court from continuing to fulfil its fundamental role of analysing substantive outcomes at the domestic level’, but rather entails a ‘shift of the Court’s primary methodological focus’.⁴⁸⁹ The duality of substantive and process-based focuses of the Court’s review is especially visible within the emerging rule of law approach (Part III.5) found in the Court’s current methodology, alongside the evolved *Animal Defenders* approach towards engaging with balancing in domestic processes (Part III.4). The following section seeks to draw out this duality, and the way in which process-based and substantive focuses vary across the Convention. In doing so, this section will focus on the jurisprudence under three Convention articles: Article 5, covering the right to liberty and security; Article 10, enshrining the right to freedom of expression; and Article 8, guaranteeing the right to respect for private and family life.

2. Article 5: Right to liberty and security

The jurisprudence under Article 5 of the Convention clearly illustrates that the Court has continued to undertake extensive substantive considerations within its review during the overall broader shift towards the adoption of process-based methodologies within its case law. Moreover, the jurisprudence illustrates the consistency of this approach with the principle of subsidiarity, which as has been discussed in Part II.2 entails the key feature of effective rights protection at the national level. Within the recent jurisprudence under Article 5, this is especially demonstrated in respect of the first limb, which requires the existence of

489 Spano (n 1) 480.

‘reasonable suspicion’ that a person has committed an offence where they are detained for the purpose of bringing them before a competent legal authority.

The requirement of ‘reasonable suspicion’ upon which an arrest must be based has been held within the jurisprudence under the Convention as forming an essential part of the safeguard laid down in Article 5(1)(c). In practice, the fulfilment of this essential safeguard has been understood as presupposing the existence of facts or information which would satisfy an objective observer that the individual concerned may have committed the relevant offence.⁴⁹⁰ This explains the undertaking of extensive substantive considerations within the Court’s review in this area; such review corresponds with the ‘general rule’ that ‘problems concerning the existence of a “reasonable suspicion” arise at the level of the facts’.⁴⁹¹ On the level of principle, the substantive considerations related to the existence of ‘reasonable suspicion’ may be explained by the latter’s intrinsic relationship with safeguarding against arbitrary arrest and detention.⁴⁹² This is because the exercise of arbitrary power is the antithesis of the rule of law.⁴⁹³ The fact that a core component of the rule of law is threatened where a lack of ‘reasonable suspicion’ under Article 5 is concerned, brings to the forefront of the analysis the substantive aspects of the case. Against this principled background concerning the rule of law, it may be observed that the extent of substantive considerations undertaken in this area has not receded. Rather, a duality may be witnessed between these extensive substantive considerations and process-based focuses within the recent case-law under Article 5 of the Convention in relation to ‘reasonable suspicion’.

Accordingly, in *Taner Kılıç v. Turkey (no. 2)* the Court conducted its own assessment and concluded that there were not any facts or information capable of convincing an objective observer that the person concerned had committed the offence charged at the second stage of proceedings. At the same time, the Court also noted that no such facts or information had been presented during this stage of proceedings.⁴⁹⁴ The Court further noted that the facts relied upon by the domestic authorities pertained to *prima facie* ordinary and legal acts of human rights defenders and that there was an absence of other evidence establishing their criminal

490 See, for example, *Ibrahimov and Mammadov v. Azerbaijan* (Nos. 63571/16 and 5 others, 13 February 2020), para. 113; see, for an older example, *Fox, Campbell and Hartley v the United Kingdom* (Nos. 12244/86 and 2 Others, 30 August 1990), para. 32.

491 *Ibrahimov and Mammadov v. Azerbaijan*, para. 113.

492 *Fox, Campbell and Hartley v. the United Kingdom*, para. 32; *Ibrahimov and Mammadov v. Azerbaijan*, para. 113.

493 See, Timothy Endicott, ‘The Coxford Lecture: Arbitrariness’ (2014) 27 Canadian Journal of Law & Jurisprudence 49.

494 *Taner Kılıç v. Turkey (no. 2)* (No. 208/18, 31 May 2022), para. 113.

nature.⁴⁹⁵ It therefore seems, that in its substantive considerations, the Court had on the whole engaged rigorously with the facts alleged against the applicant in the context of the second set of proceedings. From the process-based perspective, it is notable that the Court ultimately framed the substantive analysis through the lens of assessing the relevant facts considered by the national authorities. This illustrates the way the Court has combined its substantive review with elements of its process-based methodology.

It is noteworthy that the Court took into account the fact that several expert reports indicated that the applicant had not downloaded and used a messaging system facilitating encrypted means of communication,⁴⁹⁶ which the case file made apparent was a decisive factor upon which the suspicion of the criminal activity of the applicant had been based.⁴⁹⁷ Again, this suggests that the Court, in the pre-trial detention cases, has a tendency to merge its process-based and substantive analysis. Overall, *Taner Kılıç v. Turkey (no. 2)* constitutes a recent example of how the Court approaches process-based considerations in an area under the Convention which is by its nature governed by substantive considerations. This also highlights the room for duality between these two types of analysis within the Court's current methodology of review.

Even where the Court has not made determinative process-based considerations in connection with 'reasonable suspicion' within its broader substantive focus, it may be seen in the recent case law that it has engaged with the judicial process through acknowledging the views of the domestic courts where relevant. For example, where an applicant had been detained partly on the basis of a risk of disturbing public order,⁴⁹⁸ the Court shared the view of the domestic Court of Appeal that this risk was linked to possible recidivism by the applicant, rather than their past conduct or the reaction of the community to prior offences.⁴⁹⁹ The Court also noted that the investigative judge disregarded some factors when they considered a certain telephone conversation as having probative value, and the Court considered that extracts from the conversation should have been compared with other evidence in the file, and treated with caution because they took place between third parties to the case.⁵⁰⁰ It should still be observed that this concurrence with the opinion of the Court of Appeal, and consideration of factors taken into account within the domestic process, took place within the context of

495 Ibid, para. 113.

496 *Taner Kılıç v. Turkey (no. 2)*, 'Partly Concurring Opinion of Judge Yüksel'.

497 *Taner Kılıç v. Turkey (no. 2)*, para. 108.

498 *Fernandes Pedrosa v. Portugal* (No. 59133/11, 12 June 2018), para. 18.

499 Ibid, para. 103.

500 Ibid, para. 105.

the Court making its own substantive assessment of the risks invoked on the part of the respondent State to justify the deprivation of liberty under Article 5.⁵⁰¹ Nevertheless, and similarly to the aforementioned case, it is worth observing that the framing of the Court's substantive analysis culminated in terms of there being no reasonable suspicion of sexual abuse of minors because the domestic authorities had failed to adduce relevant and sufficient grounds to justify the deprivation of liberty.⁵⁰² The latter standard of the absence of relevant and sufficient grounds crucially ensures the Court does not undertake a fourth-instance assessment where it undertakes extensive substantive considerations, consistently with the principle of subsidiarity.

Within the recent review under Article 5(1)(c) of the Convention, the specific connection between the lack of 'reasonable suspicion' and arbitrariness has been highlighted, not only as a matter of principle but also as a finding of the Court. Indeed, in *Shmorgunov and Others v. Ukraine* the Court found that 'on the basis of all material at its disposal ... the minimum standard set by Article 5(1)(c) of the Convention for the reasonableness of a suspicion was not met and that there was an element of arbitrariness [emphasis added]'.⁵⁰³ As has been discussed, the prevention of arbitrary decision-making is a cornerstone of the rule of law.⁵⁰⁴ Therefore, the above finding supports the notion that the continuity of substantive considerations in the recent case law related to 'reasonable suspicion' under Article 5 of the Convention reinforces the emerging rule of law approach, whereby substantive considerations are undertaken where central rule of law issues are concerned. Indeed, the substantive focus of the Court was clear in the context of the finding of an 'element of arbitrariness', made in connection with the finding that the minimum safeguard under Article 5(1)(c) of the Convention was not met. For example, the Court noted that upon a police search of the four applicants in the course of their arrest, no dangerous objects were found, which according to the authorities had been used in protests.⁵⁰⁵ From a broader substantive perspective, it was viewed that 'the facts concerning concretely the four applicants ... point to a significant probability that the applicants' arrest and detention were at least partly the result of acts and decisions which formed part of a larger strategy in relation to protests which ... involved a vast majority of peaceful protesters.'⁵⁰⁶

The rigorous nature of substantive considerations under Article 5 of the Convention has

501 See, for example, *ibid.*, para. 100.

502 *Ibid.*, para. 108.

503 *Shmorgunov and Others v. Ukraine* (Nos. 15367/14 and 13 others, 21 January 2021), para. 477.

504 See Endicott (n 493).

505 *Shmorgunov and Others v. Ukraine*, para. 466.

506 *Ibid.*, para. 476.

also been matched in process-based aspects of the Court's analysis concerning 'reasonable suspicion', witnesses in the examination of investigative measures and, as has been seen already, judicial treatment of the issue at the domestic level. While such examinations by the Court do not constitute core methodological aspects of process-based review, which would consider more prominently whether Convention principles had been taken into account and applied within domestic processes, they again illustrate the compatibility of process-based considerations within an overall substantive examination, and the utility of the former for providing guidance for higher quality of domestic process under the Convention. Thus, to illustrate the rigour of the examination of investigative measures within the assessment of the existence of 'reasonable suspicion', the Court has recently taken a critical approach where: the applicants had not been searched at the place of arrest, rather only when in police custody and in the complete control of the police;⁵⁰⁷ the police had limited their search exclusively to the seizure of drugs where the applicants had been accused of involvement in drug trafficking rather than just possession of drugs;⁵⁰⁸ and where 'despite the seriousness of the allegations made, at no stage during the proceedings did the domestic authorities endeavour to verify and investigate those complaints'.⁵⁰⁹

Similarly, in terms of the domestic judicial treatment of the issue of 'reasonable suspicion' under Article 5(1)(c) of the Convention, the Court has critically engaged with certain aspects of domestic judicial processes within its overall substantive assessment. For example, in the joined cases of *Ibrahimov and Mammadov v. Azerbaijan* the Court deemed it to be a 'general observation pertinent to both cases' that although the criminal proceedings against the applicants 'were not formally interrelated in any way and were based on separate sets of facts', it was apparent from the case file that 'those proceedings followed the same pattern'.⁵¹⁰ Scrutinising this formulaic approach in the area of judicial reasoning, rather than the proceedings as a whole, the Court has also observed the use of 'formulaic reasoning' by domestic courts which failed to address specific facts, give further details, or address specific arguments; and overall found that the examination of important aspects by the domestic courts in such a context had been 'perfunctory'.⁵¹¹ Moreover, excessive deference to investigators' submissions without reasons as to why their suspicion had been considered reasonable by the domestic courts has been observed, for example where the domestic courts had 'simply

507 *Ibrahimov and Mammadov v. Azerbaijan*, paras 123-124.

508 *Ibid*, para. 125.

509 *Ibid*, para. 130.

510 *Ibid*, para. 116.

511 *Shmorgunov and Others v. Ukraine*, para. 469.

reproduced or referred to the investigators' submissions' in their reasons for justifying detention.⁵¹² In this connection, the Court expressly stated it could not disregard concerns that judges of the domestic courts had 'essentially deferred to the investigators' assessment'.⁵¹³

In sum, under Article 5 of the Convention the Court has continued to engage in a primarily substantive rather than process-based review, which is highlighted specifically in respect of the requirement of 'reasonable suspicion' where there has been a deprivation of liberty. Additionally, the Court's continuation to undertake extensive substantive considerations of individual cases in this area is consistent with the emerging rule of law approach within the Court's current methodology of review. Nevertheless, it can be seen from the recent jurisprudence that there is room for a duality between substantive and process-based focuses within the Court's assessment, namely through the inclusion of process-based considerations within the more distinctively substantive methodology of review of the existence of 'reasonable suspicion' under Article 5 of the Convention. This duality can be welcomed as it enables the Court to undertake a rigorous analysis of the case whilst still respecting that it is not a fourth instance court and that it has limited fact-finding ability. In this way, the process-based review neatly complements the substantive review under Article 5.

3. Article 10: Freedom of Expression

The Court has recently stated that '[d]emocracy thrives on freedom of expression'.⁵¹⁴ Given that democracy has long been viewed as 'the only political model contemplated by the Convention and, accordingly, the only one compatible with it',⁵¹⁵ it is perhaps unsurprising that the jurisprudence under Article 10 of the Convention provides ample points of reference for exploring the duality of process-based and substantive focuses in the methodology of the Court's review.⁵¹⁶ On one hand, some of the early landmark cases in the Court's development of the methodological aspects of its process-based review arose from the Court being tasked with balancing the rights of publishing companies to freedom of expression, as guaranteed under Article 10, with the rights of individual applicants to their private life under Article 8

⁵¹² Ibid, para. 468.

⁵¹³ Ibid.

⁵¹⁴ *NIT S.R.L. v. the Republic of Moldova* [GC] (No. 28470/12, 5 April 2022), para. 185.

⁵¹⁵ *United Communist Party of Turkey and Others v. Turkey* [GC] (No. 19392/92, 30 January 1998), para. 45; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC] (Nos. 41340/98 and 3 others, 13 February 2003), para. 86.

⁵¹⁶ For a recent recapitulation of the relevant principles with regards to the subsidiary review carried out by the Court within the context of Article 10 of the Convention, see, *Halet v. Luxembourg* [GC], no. 21884/18, §§ 159-162, 14 February 2023, and the case-law references therein.

of the Convention.⁵¹⁷ On the other hand, there have been key recent findings concerning the ‘hallmarks of democratic society’⁵¹⁸ under the Convention, which have been borne from a largely substantive focus within the Court’s review.

One area warranting attention for the purposes of exploring the duality of substantive and process-based methodologies under Article 10 of the Convention concerns where domestic authorities have perceived certain acts of expression as calls to violence, and in response have imposed sanctions. The cases arising in this domain often raise issues cutting to the core of rule of law concerns, as well as democratic values underlying the Convention. For example, in *Ete v. Türkiye* it was held that the applicant’s criminal conviction for propagandising for a terrorist organisation violated the right to freedom of expression under Article 10.⁵¹⁹ The main acts relied on by the domestic courts had been the cutting of a cake to celebrate the birthday of the leader of the terrorist organisation and the distribution of the cake in plates during the demonstration. The Court held that these acts taken as a whole could not be perceived as containing a call to violence, armed resistance or uprising, or as constituting hate speech.⁵²⁰ The case may be seen as raising the central rule of law concern of legal certainty, given that the interference in question resulted from an application of a domestic law provision by the domestic courts, which had already raised serious doubts from the perspective of the Court about the foreseeability of its application.⁵²¹ In terms of exploring the duality of the substantive and process-based approaches of the Court under Article 10, it can be seen that while the Court engaged with the domestic judicial process, this was not for the purposes of determining the adequacy of the balancing undertaken in light of the Convention, but rather in order to take a position on the essential element⁵²² of the case to be taken into account: whether cutting a cake and distributing it in the given context could be perceived as containing a call for the use of violence. This undertaking of substantive considerations may also be seen as illustrative of the emerging rule of law approach within the Court’s current methodology of review, given that the case centrally concerned the issue of legal certainty.

By way of comparison, the Court deployed a more combined approach spanning both substantive and process-based focuses in *Dicle v. Turkey*, which similarly concerned a criminal conviction for assisting and propagandising the terrorist organisation, this time in

⁵¹⁷ See, *Von Hannover v. Germany* (no. 2); see also, *MGN Limited v. the United Kingdom*.

⁵¹⁸ *Macatê v. Lithuania* [GC] (No. 61435/19, 23 January 2023), para. 214.

⁵¹⁹ *Ete v. Türkiye* (No. 28154/20, 6 September 2022), para. 31.

⁵²⁰ *Ibid*, para. 29.

⁵²¹ *Ibid*, para. 27.

⁵²² *Ibid*, para. 29.

relation to a statement made by a politician during an interview with a news agency.⁵²³ It was found that there had been no violation of the applicant politician's right to freedom of expression under Article 10 of the Convention, on the basis that the reasons set out by the domestic courts were "sufficient and relevant" to justify the necessity of the interference with the exercise of freedom of expression.⁵²⁴ The test of whether the domestic authorities relied upon "sufficient and relevant" reasons is process-based, as the review by the Court focuses on the reasons of the domestic court, rather than conducting the balancing analysis afresh itself. However, in *Dicle* the Court's engagement with the domestic court's reasoning went beyond assessing the adequacy of the balancing exercise, in light of the Convention, which would have been consistent with an exclusively process-based approach. Rather, the Court dealt directly with the reasoning of the domestic courts and even endorsed specific aspects. Reflecting this combined process and substantive approach in its methodology, the Court stated it would pay attention to the terms used in the press statement taken as a whole, as well as other factors such as the personality of the author of the statement, and the place and context of its publication.⁵²⁵ The combination of substantive and process-based focuses in this case can also be discerned through, for example, reference to the specific reasoning of the domestic courts to support the observation that the applicant's allegedly peaceful intentions did not stand up to scrutiny,⁵²⁶ and specific endorsement of the findings taking into account both the applicant's past history as a politician and the nature and gravity of the actions of the terrorist organisation in question.⁵²⁷ Overall, it was concluded that the reasoning of the domestic courts made apparent the essential factor to be taken into consideration in the case, namely that the statement of the applicant read as a whole may be perceived as containing incitement to use violence.⁵²⁸ This exemplifies the combined focus on substantive and process-based aspects of the case which appears to entail the Court determining the essential factor to be taken into account, and then having regard to the inclusion of this factor in reasoning of the domestic courts.

Other areas of the Court's jurisprudence under Article 10 of the Convention have also evinced more substantive considerations being undertaken where rigorous supervision has

523 *Dicle v. Turkey* (no. 3) (No. 53915/11, 8 February 2022), para. 88.

524 *Ibid*, paras. 100-101.

525 *Ibid*, para. 90.

526 *Ibid*, para. 94.

527 *Ibid*, para. 96.

528 *Ibid*, para. 98.

been necessitated by the protection of ‘democracy itself’.⁵²⁹ This has especially been the case in contexts which raise both democratic and rule of law concerns; this again attests to the emerging rule of law approach (see Part III.5). Pertinent among these contexts are interference with the freedom of expression of political parties, which have been deemed under the Convention to play an essential role in ensuring pluralism and the proper functioning of democracy.⁵³⁰ In particular, any restriction on their freedom of expression, especially in the period preceding an election, without sufficiently foreseeable regulations has been viewed to harm, ‘ultimately, the confidence of citizens in the integrity of democratic institutions *and their commitment to the rule of law* [emphasis added]’.⁵³¹ In light of this, where decisions had been taken prohibiting and penalising the operation of a mobile application allowing voters to anonymously publish photographs of their ballot papers,⁵³² the Court viewed the ‘salient issue’ to be whether the applicant political party knew or ought to have known that their conduct in creating the forum provided by the mobile application would breach existing electoral procedure law in the absence of a binding provision of domestic legislation.⁵³³ This necessitated the undertaking of substantive considerations within the Court’s assessment under Article 10 from the outset, rather than addressing firstly the adequacy of the balancing exercises undertaken in domestic processes.

This coalescence of rule of law and democratic concerns appears to have been acknowledged in *Magyar Kétfarkú Kutya Párt v. Hungary*, through the regard to the particular importance of the foreseeability of restrictions on the freedom of expression of a political party in the context of an election or referendum.⁵³⁴ In this context, the Court may be seen to have engaged with domestic processes as a subset of its primarily substantive focus of review. Thus, the Court observed that the National Election Commission (NEC) and the *Kúria* (the Hungarian Supreme Court) had relied on various ways on the principle of the exercise of rights in accordance with their purpose.⁵³⁵ In respect of the main issue of foreseeability, the vagueness of the latter principle in relation to the impugned restriction was in question. On this issue, the Court referred to the Constitutional Court having pointed out this concern,⁵³⁶ as well as the NEC and the *Kúria* disagreeing as to the applicability of the basic principles of

529 *Magyar Kétfarkú Kutya Párt v. Hungary* (No. 201/17, 20 January 2020), para. 101.

530 *Ibid.*, para. 100.

531 *Ibid.*, para. 101.

532 *Ibid.*, para. 63.

533 *Ibid.*, para. 109.

534 *Ibid.*, para. 116.

535 *Ibid.*, paras. 105-6.

536 *Ibid.*, para. 110.

electoral procedure.⁵³⁷ From these references, it can be seen that the Court engaged with the domestic processes, but in contrast to other cases the duality between the process-based and substantive considerations in this case manifested through the process-based considerations being part of the central substantive assessment of the Court regarding the foreseeability of the legal principle in question. This appears consistent with the fact that the case raised concerned the central rule of law issue of legal certainty in the context of freedom of expression.

Another set of democratic concerns surfacing recently under the rubric of Article 10 of the Convention relates to measures incompatible with the 'notions of equality, pluralism and tolerance inherent in a democratic society'.⁵³⁸ As regards these concepts, the Court has engaged in extensive substantive analysis in case law arising under Article 10 subsequent to the broader shift towards employing process-based methodologies in the Court's review.⁵³⁹ In terms of the current methodology employed by the Court in this area, it may be observed that while the Court has engaged with the reasoning of the domestic courts and legislatures, this has been in a largely substantive manner, rather than from the process-based perspective of assessing the adequacy of balancing or the quality of review.

For example, in *Macatė v. Lithuania* it was held that the temporary suspension by a public-law entity of the distribution of a children's fairy tale book depicting same-sex relationships, and subsequent marking of these with warning labels,⁵⁴⁰ did not pursue a legitimate aim under Article 10(2) and therefore violated Article 10 of the Convention.⁵⁴¹ In examining whether the impugned measures had a legitimate aim, the Court expressly adopted differing positions to the domestic courts, demonstrating a substantive focus in its analysis. Indeed, the Court was unable to see how a particular passage of the book could be regarded as sexually explicit, unlike the finding referred to of the domestic court.⁵⁴² It also found that the domestic court in question had 'not provide[d] adequate reasons to justify why it saw the fairytales as "encouraging" ... some types of relationships at the expense of others, rather than as seeking to foster acceptance of different types of families'.⁵⁴³ In terms of process-based elements within this analysis, the Court stated there were no grounds for finding that the domestic regional court had taken into consideration that treating information about same-sex

⁵³⁷ Ibid, para. 113.

⁵³⁸ *Macatė v. Lithuania*, para. 202.

⁵³⁹ *Bayev and Others v. Russia* (Nos 67667/09 and 2 others, 20 June 2017), para. 83.

⁵⁴⁰ *Macatė v. Lithuania*, para. 174.

⁵⁴¹ Ibid, para. 218.

⁵⁴² Ibid, para. 190.

⁵⁴³ Ibid, para. 194.

relationships as harmful to children was no longer permissible under Lithuanian constitutional law. Ultimately, the finding of a violation under Article 10 was underlined by the view that ‘measures which restrict children’s access to information about same-sex relationships solely on the basis of sexual orientation have wider social implications.’⁵⁴⁴

4. Article 8: Right to respect for family and private life

Another area under the Convention which warrants closer attention in terms of the duality of the substantive and process-based focuses in the Court’s review is found within the recent jurisprudence under Article 8 of the Convention, which protects the right to family and private life. The jurisprudence under Article 8 of the Convention, as is the case with Article 10, is pertinent in this regard due to the character of Article 8 as a qualified right. Thus, when engaged by an individual case at the national level, the national judges have the opportunity, ‘to engage forcefully with embedded principles when having to undertake the often complicated assessments of legality, legitimate aims and necessity under the limitation clauses of qualified Convention provisions’.⁵⁴⁵

a. Consensus among member States and Article 8

Under the rubric of Article 8 of the Convention, the Court has consistently been tasked with reviewing issues of high sensitivity, including within its recent case law. Such review has often involved issues attracting varying consensus, especially from a moral perspective, across member States of the Council of Europe.⁵⁴⁶ In recent times, this has entailed the Court assessing the compatibility under Article 8 of, *inter alia*: the dismissal of a widow’s request to continue an assisted reproduction procedure using her late husband’s frozen sperm;⁵⁴⁷ and the application of a disciplinary sanction in respect of a prisoner pursuant to a ban on the possession of pornographic material for prison inmates.⁵⁴⁸ The former case, *Pejřilová v. the Czech Republic*, was understood as concerning an interference with the right of the applicant under Article 8 to avail herself of techniques of assisted reproduction resulting from the operation of certain domestic legislation provisions, which had prevented her from successful challenge before the Czech courts.⁵⁴⁹ In one sense, the approach here to the margin

⁵⁴⁴ Ibid, para. 215.

⁵⁴⁵ Spano (n 1) 487.

⁵⁴⁶ See, for example, *Dudgeon v. the United Kingdom* (No. 7525/76, 22 October 1981), para. 60; *Stübing v. Germany* (No. 43547/08, 12 April 2012), paras. 60-61.

⁵⁴⁷ *Pejřilová v. the Czech Republic* (No. 14889/19, 8 December 2022), para. 22.

⁵⁴⁸ *Chocholáč v. Slovakia* (No. 81292/17, 7 July 2022), para. 1.

⁵⁴⁹ *Pejřilová v. the Czech Republic*, para. 47.

of appreciation demonstrates a focus on the substantive aspects of the case, given that a wide margin of appreciation was afforded due to the absence of clear European consensus on the issue of the regulation of IVF treatment, the consent to be given to the use of genetic material provided for that purpose and the use of a deceased man's sperm - all of which were issues of a morally and ethically delicate nature.⁵⁵⁰ This was instead of having considered that the quality of parliamentary and judicial review was particularly important, including to the operation of the relevant margin of appreciation, as has been the case within the evolving process-based approach of the Court.⁵⁵¹

Some elements of the Court's analysis in *Pejřilová* may be construed in part as considering aspects of balancing in domestic processes, such as the fact that the legislature's decision to enact such provisions and the interpretation of the domestic courts revealed 'an intention to respect human dignity and free will, as well as a desire to ensure a fair balance between the parties involved in assisted reproduction'.⁵⁵² Moreover, reference was made to the fact that the domestic courts had fully examined the arguments of the applicant, and had specifically emphasised *inter alia* the features of the situation at hand rendering those courts unable to replace the further consent from the husband, which was required by law after the informed consent form had been signed.⁵⁵³ The crux of the analysis, however, entailed substantive considerations regarding the necessity of the impugned measure, such as: the allowance under Czech law for artificial fertilisation using cryopreserved sperm, provided by either a woman's partner or an anonymous donor, for couples and *inter vivos*;⁵⁵⁴ the lack of prohibition under Czech law on a person going abroad to seek post-mortem fertilisation in a country which allows it;⁵⁵⁵ and the provision of certain guarantees where assisted reproduction after a husband's death is allowed to continue, related to the deceased man's prior informed consent.⁵⁵⁶ Overall, while there was room for some process-based considerations, the relationship between the substantive issues raised and the operation of the margin of appreciation, as well as the extensive substantive considerations within the proportionality analysis, illustrate the willingness of the Court in its current methodology of review to employ a primarily substantive approach towards certain issues under Article 8 of the Convention.

⁵⁵⁰ Ibid, para. 46.

⁵⁵¹ *Animal Defenders International v. the United Kingdom*, para. 108.

⁵⁵² *Pejřilová v. the Czech Republic*, para. 52.

⁵⁵³ Ibid, para. 61.

⁵⁵⁴ Ibid, para. 59.

⁵⁵⁵ Ibid, para. 60.

⁵⁵⁶ Ibid.

A second area lacking moral consensus across the member States of the Council of Europe that Court was recently tasked with making an assessment under Article 8, is the possession of pornographic material by those serving prison sentences. In *Chocholáč v. Slovakia* it appeared that the operation of the margin of appreciation was linked more directly to the substantive aspects of the case than process-based considerations. This may be understood from the Court having noted that there were no uniform European conception of morals within the legal and social orders of the Contracting Parties, meaning that there was accordingly a wide margin of appreciation afforded in relation to the means for the protection of morals.⁵⁵⁷ It should be noted the approach in this area continued to reflect the principle of subsidiarity, through an acknowledgment that the national authorities would be in principle better placed than an international judge to give an opinion on the exact content of the requirements of morals in the present case, as well as the fact the necessity of a measure to meet these requirements.⁵⁵⁸ Interestingly, the Court exhibited a greater depth of process-based analysis, resulting in the finding that ‘not even the Constitutional Court’s assessment can be accepted as involving any real weighing of the competing individual and public interests’.⁵⁵⁹ This flowed from the lack of legislative scope confirmed by the Constitutional Court for their taking into account any individual interests,⁵⁶⁰ the lack of power of the Constitutional Court to deal with the problem at issue in response to an individual complaint, and the presumption within the domestic judicial review that the lawmakers would have based their legislation on requisite expert assessment without any reference having been made to this.⁵⁶¹ On the basis of these process-based considerations, it was held that the ‘contested ban thus amounted to a general and indiscriminate restriction not permitting the required proportionality assessment in an individual case’.⁵⁶² Consequently, and reflecting an engagement with the adequacy of domestic balancing found in the first methodological aspect of process-based review, the Court found that there was an ‘absence’ of an individualised proportionality assessment ‘both at the legislative level and on the facts of the applicant’s individual case ... such that a fair balance was not struck’.⁵⁶³ Thus, while the operation of the margin of appreciation was more pronouncedly linked to substantive aspects of the case rather than the quality of parliamentary and judicial review, as would have been the case during an instance of full process-based review, the conclusion drawn by the Court was reliant on process-based methodology.

⁵⁵⁷ *Chocholáč v. Slovakia*, paras. 70-71.

⁵⁵⁸ *Ibid*, para. 70.

⁵⁵⁹ *Ibid*, para. 75.

⁵⁶⁰ *Ibid*, para. 73.

⁵⁶¹ *Ibid*, para. 74.

⁵⁶² *Ibid*, para. 76.

⁵⁶³ *Ibid*, para. 77.

The case of *Thörn v. Sweden*⁵⁶⁴ is an instructive example on how the Court will examine cases under Article 8 where the level of consensus is not known but is nevertheless understood to be an issue. The case concerned the balance struck by the Swedish authorities between the applicant's interest in having access to pain relief and the general interest in enforcing the system of control of narcotics and medicines.⁵⁶⁵ The applicant had been fined for having produced and used cannabis for the purpose of pain relief without a prescription to do so.⁵⁶⁶ Having expressed as a matter of principle that the margin of appreciation will be wider 'where there is no consensus within the member States of the Council of Europe ... particularly where the case raises sensitive moral or ethical issues',⁵⁶⁷ the Court emphasised that the issue to be determined was whether the Swedish authorities had 'remained within their wide margin of appreciation'.⁵⁶⁸ Interestingly, the Court indicated that it had sought to determine whether the domestic courts 'may at all be said to have carried out a balancing exercise with regard to the applicant's conviction as such', and made reference to the fact that balancing had been effectively limited at the stage of conviction, whereas when deciding on punishment the individual circumstances of the applicant's case were taken into account.⁵⁶⁹ More broadly, in seeking to address the main question of whether the authorities struck a sufficiently fair balance when viewing the domestic proceedings as a whole, the Court studied the 'concrete balancing exercise' undertaken in domestic proceedings.⁵⁷⁰ Thus, the Court observed that the Supreme Court 'took the applicant's interest in finding effective pain relief into account and reflected it principally in setting the fine at the level that it did'.⁵⁷¹ Thus, it may be seen that in the area of measures relating to narcotic use for pain relief without prescription, the Court has acknowledged a wide margin of appreciation, without drawing a specific link with a lack of consensus among member States, which in turn has undergirded a largely process-based methodology.

b. Discrimination and Article 8

The duality of the process-based and substantive focuses within the Court's current methodology of review under Article 8 of the Convention may also be usefully explored in

564 *Thörn v. Sweden* (No. 24547/18, 1 September 2022).

565 *Ibid*, para. 59.

566 *Ibid*, para. 1.

567 *Ibid*, para. 46.

568 *Ibid*, para. 59.

569 *Ibid*, para. 54.

570 *Ibid*, para. 55.

571 *Ibid*, para. 58.

relation to cases where the Court has examined complaints taking Article 14, the principle of non-discrimination, in conjunction with Article 8. The Court has recently been tasked with tackling the intersection between the interference with the right to respect for private and family life and discrimination on the grounds of sex⁵⁷² and race⁵⁷³ respectively. Of course, it is difficult to draw strong conclusions as to the Court's methodology from just a few examples in this area of law, but the case law in this area nevertheless is worthwhile analysing.

In relation to discrimination on the grounds of sex, it was recently complained under the Convention that the cessation of a male applicant's entitlement to survivor's pension since his younger daughter had reached the age of majority constituted discrimination on the grounds of sex, contrary to Article 14 of the Convention read in conjunction with Article 8.⁵⁷⁴ In the case, the operation of the margin of appreciation appeared to be linked to the substantive issues at play. It was accepted that although the field of social welfare is among those where States must be afforded a margin of appreciation in deciding on when new legislation should be introduced,⁵⁷⁵ that the margin of appreciation afforded to States in justifying a difference in treatment based on the ground of sex is narrow.⁵⁷⁶ Notably this was accompanied by a process-based analysis, whereby the Court 'attache[d] fundamental importance to the considerations set out in the present case by the Federal Supreme Court' in this connection.⁵⁷⁷ Thus, an engagement with the judicial process entailed by the 'assessment of the impugned legislation by the country's highest court' contributed to the Court's finding that the old "factual inequalities" underlying the rules on survivor's pension had become less pronounced in Swiss society.⁵⁷⁸ In particular, reference was made to the fact that the domestic court had noted the legislature made a distinction which was not necessary for either biological or functional reasons, and that the domestic court had drawn attention in its review to the fact that the legislature had been made aware that the relevant measure was contrary to the principle of gender equality within the Swiss Constitution.⁵⁷⁹ Accompanying this process-based focus, the Court itself also focused on the substantive issue of whether the applicant would have had less difficulty in returning to employment than a woman in a similar situation,

⁵⁷² *Beeler v. Switzerland* [GC] (No. 78630/12, 11 October 2022).

⁵⁷³ *Paketova and Others v. Bulgaria* (Nos. 17808/19 and 36972/19, 4 October 2022).

⁵⁷⁴ *Beeler v. Switzerland*, para. 84.

⁵⁷⁵ *Ibid*, para. 111.

⁵⁷⁶ *Ibid*, para. 105.

⁵⁷⁷ *Ibid*, para. 112.

⁵⁷⁸ *Ibid*, para. 113.

⁵⁷⁹ *Ibid*, paras. 112-113.

or that the termination of the pension would have had less impact on him.⁵⁸⁰ This entailed clearly substantive considerations, such as the observation by the Court that ‘after his wife’s death, the applicant devoted himself entirely to looking after, bringing up and caring for his daughters and gave up his job’.⁵⁸¹ Therefore, the approach of the Court towards the issue of the cessation of the survivor’s pension of a male widower under different conditions than a female widower, engaging Article 14 taken in conjunction with Article 8, demonstrates clearly the possibility of both substantive and process-based elements within the Court’s review. Turning to the approach towards racial discrimination taking Article 14 in conjunction with Article 8, a case raising this issue arose recently in relation to complaints by applicants of Roma origin.⁵⁸² The applicants complained that they had been forced to leave their homes and prevented from returning, and that they had been refused protection by the authorities ‘in an environment of racially based hostility’.⁵⁸³ Crucially, the Court had observed that the findings of the different domestic authorities involved in the case were incomplete, particularly that they had avoided directly addressing the issue, and had not dealt with all the relevant available evidence.⁵⁸⁴ The Court was also ‘especially struck by what would appear to be a clear contradiction’ in the positions of the prosecution authorities, the administrative courts’ findings, and the Government.⁵⁸⁵ As a result, the Court found it ‘necessary to conduct its own assessment of the relevant facts’.⁵⁸⁶ Thus, it can be seen that in the area of racial discrimination and Article 8, the Court demonstrates a clear willingness to adopt a substantive focus in making its own assessment of the facts, where a review of the domestic processes reveals a patent inadequacy in conducting a factual evaluation of the circumstances. The rigour of such an approach accords with the position under the Convention that ‘[r]acial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction’.⁵⁸⁷

580 Ibid, para. 114.

581 Ibid.

582 *Paketova and Others v. Bulgaria*, para. 2.

583 Ibid, para. 1.

584 Ibid, para. 156.

585 Ibid, para. 157.

586 Ibid, para. 158.

587 Ibid, para. 152.

VI. CONCLUSION

In this book, the close doctrinal analysis of the two key methodological aspects of the Court's process-based review has sought to unpack the shift away from the orthodox approach towards subsidiarity. The Court's process-based methodology has continually evolved since early discussions on the subject of its review as a whole. In these early discussions, the changes in the Court's approach were taken to demonstrate a growing awareness of the importance of subsidiarity. By tracing the continued doctrinal evolution of the methodological aspects of the Court's process-based review, this book has sought to uncover the way in which the process-based review methodology has continued to respond to, and encourage, national authorities to secure fundamental rights and freedoms effectively at the national level. The enhanced effectiveness of securing fundamental rights and freedoms guaranteed under the Convention at the national level has been acknowledged as a core feature of the principle of subsidiarity, alongside respect for democracy and sovereignty. The process-based methodology adopted by the Court in its review serves to uphold both these features of the principle of subsidiarity. The first methodological aspect explored is constituted by the Court's engagement with domestic balancing: more specifically, the engagement with the adequacy of the balancing of relevant interests within domestic processes, mainly legislative and judicial, in light of the Convention. The second methodological aspect of process-based review is the process-based approach towards the Court's assessment regarding the exhaustion of domestic remedies rule under Article 35 of the Convention. The rigour of this process-based approach has given rise to the corresponding development of structural guidance for enhancing the capacity of domestic processes to effectively protect rights at the national level, which has been exemplified in the context of domestic individual complaint mechanisms (see Part IV.3). Through unravelling the doctrinal development of these two methodological aspects of process-based review, the way they respond to the core features of the principle of subsidiarity may be understood. Key doctrinal developments in this regard have included: the "direct and continuous contact" principle; the *Von Hannover* "non-substitution" principle; the recognition of the need to apply the exhaustion of domestic remedies rule with some degree of flexibility and without excessive formalism; and the acknowledgment that the quality of parliamentary and judicial review is of relevance to the operation of the margin of appreciation doctrine.

While the first methodological aspect of the Court's process-based review, namely its engagement with domestic balancing, is broadly associated with the approach in *Animal Defenders International v. the United Kingdom*, upon further examination this methodology has undergone a rich and intricate doctrinal evolution within the jurisprudence of the Convention. Relatedly, the approach in *Animal Defenders* may be more accurately described as occupying the middle of three stages in the development of the Court's engagement with balancing in domestic processes. Firstly, the initial stage of the Court's engagement with domestic balancing in its early process-based review case law established both principled foundations for this methodological aspect of review, and offered practical guidance as to how the Court may engage with the balancing undertaken in domestic processes in light of the Convention. The second stage may be characterised by the approach in *Animal Defenders* and its consolidation within subsequent case law, which drew on the established principled groundwork and aligned this methodology even more closely with the principle of subsidiarity, by acknowledging the relationship between balancing within domestic processes and the margin of appreciation as a matter of doctrine. At the end of this stage of development, this methodology witnessed a transition towards an "evolved *Animal Defenders*" approach, which exuded a new depth of methodological clarity. This "evolved *Animal Defenders*" approach has characterised the third stage of the development of engagement with domestic balancing, constituted by the current methodology within the Court's review. Within this third stage, the jurisprudence has also witnessed an emerging rule of law approach, which evinces a complementarity with the process-based approach of the Court towards domestic balancing in that it shares the same rationale of enhancing the effective protection of rights at the national level. Overall, all three stages in the development of this methodological aspect of process-based review have witnessed the deepening of the principle of subsidiarity.

The second methodological aspect of the Court's process-based review is underscored by the process-based approach towards the rule of exhaustion of domestic remedies under Article 35 of the Convention and has evolved to facilitate rigorous and structural analysis with transformative potential for domestic processes. Through tracing the doctrinal evolution of the approach under Article 35(1) of the Convention, one may discern the development of a holistic approach towards determining the exhaustibility of remedies, considering their availability with regard to where certain remedial processes sit within the domestic framework, and their real capacity to provide effective and speedy redress. Moreover, the applicant's own engagement with these domestic processes is considered in a contextualised manner against the background in which these remedies operate. The importance of this methodological aspect of the Court's process-based review is exemplified by the way in which the Court has

been able to provide structural guidance such that domestic processes are able to effectively protect rights at the national level. This is demonstrated through a closer examination of the jurisprudence under Article 35 concerning domestic individual complaint mechanisms.

Finally, this book has sought to explore how the Court's process-based review takes shape across different areas of the Convention. While the focus of the Court has overall shifted towards domestic processes, rather than undertaking in the first place a substantive assessment of the case, this has not resulted in the withdrawal of extensive substantive considerations as a methodology of review across the Convention. Indeed, the Court's review within individual cases has entailed both substantive and process-based considerations. Thus, it may be observed in both general and individual terms that the Court's review exhibits a duality between the substantive and process-based approaches made available under the jurisprudential arsenal of the Convention. The existence of this duality, together with its various iterations, has been highlighted within the recent jurisprudence under Article 5 (right to liberty and security), Article 10 (freedom of expression), and Article 8 (right to respect for family and private life) of the Convention.

Ultimately, the intricacy and sophistication of the developments witnessed in the evolution of these two key methodological aspects of process-based review are testament to the deep doctrinal roots of this form of review, grounded upon robust foundations constructed around the principle of subsidiarity which defines the role of the Convention protective mechanism. Within the recent jurisprudence, the duality between substantive and process-based focuses across different areas of the Convention, especially together with the emerging rule of law approach, highlights the importance of these deep doctrinal roots in having built the capacity for the Court to adopt nuanced analysis. Overall, the meticulous layering of doctrinal developments is constitutive of the process-based methodologies under the Convention, ensuring that continuing methodological evolution will be oriented towards the effective protection of rights at the national level.

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