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The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law

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ABSTRACT

The current era in the life of the European Convention on Human Rights is a transformative one. The author, a serving judge of the Strasbourg Court, thus finds it opportune to look back in time, consider the present and reflect on the future. In the article, it is argued that the last 40 years or so constituted the Court's 'substantive embedding phase'. This phase has now in general shifted towards a new historical era, the 'procedural embedding phase', which is analysed in detail. During this latter phase, the Court has begun to realign its project attempting to trigger increased engagement with the Convention by national authorities using a mechanism termed 'process-based review'. The overall aim is to secure a higher and more sustainable level of Convention protections within the States subject to European supervision. However, within this process-based review mechanism, national decision-makers have to be structurally capable of fulfilling the task of effectively securing human rights. This means that the foundations of the domestic legal order have to be intact. States that do not respect the rule of law cannot expect to be afforded deference under process-based review in the age of subsidiarity.

KEYWORDS: human rights, rule of law, subsidiarity, process-based review, European Court of Human Rights

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1. A TRANSFORMATIVE ERA IN THE LIFE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS SYSTEM

The current era in the life of the European Convention on Human Rights ('the Convention') is a transformative one. The system has been in the midst of an extended reform process which culminated in the coming into force of Protocol 14 in 2010 and the Interlaken, Izmir, Brighton and Brussels intergovernmental conferences in 2010, 2011, 2012 and 2015 respectively. The Brussels Declaration of 27 March 2015 set out an Action Plan, including elements related to the interpretation and application of the Convention by the European Court of Human Rights ('the Strasbourg Court' or 'the Court'), as well as referring to steps to be taken for the implementation of the Convention at national level. The Committee of Ministers is, before the end of 2019, to evaluate the extent to which the implementation of the Action Plan has improved the effectiveness of the Convention system, while respecting the calendar set out in the Interlaken Declaration of 19 February 2010.[1] It is thus opportune to look back in time, consider the present and reflect on the future. I embark on this precarious venture quite certain in the knowledge, as expressed by my good friend and retired UK Judge of the Strasbourg Court, Paul Mahoney, that 'the most important attitude of mind that a judge should attempt to cultivate is a deep respect for his or her ignorance'.[2]

With this sobering reminder as my starting point, let me begin by asserting that the historical trajectory of the Strasbourg Court, since its inception in 1959, can be characterised by the Court starting from scratch by rendering judgments at the outset into a human rights void where national authorities across the Member States of the Council of Europe,[3] in particular national judges, were not familiar with the legal language of human rights. National systems in the Member States either did not recognise Convention rights as enforceable norms or, if they did, national actors and stakeholders were unaware of their true potential and, at the same time, their natural limits in democratic societies.

On this basis, I will make two interrelated claims in this article. First, I will argue that as a consequence of this historical trajectory, the Strasbourg Court has for the better part of its history to date been engaged in 'embedding' Convention principles into national systems. The last 40 years or so constituted the Court's *substantive embedding phase,* a concept I will discuss in more detail in Section 2. Secondly, and more importantly, this phase has now, in general, shifted towards a new historical phase in which the Court has begun to realign its project away from its decades-long independent embedding work towards the enforcement of already settled principles so as to trigger increased engagement with the Convention by stakeholders[4] at the national level. The overall aim is to secure a higher and more sustainable level of

1 High Level Conference on the Future of the European Court of Human Rights, 19 February 2010, ('Interlaken Declaration'), see point No. 6 on the implementation of the Interlaken Action Plan.

2 Mahoney, 'Judicial Power Plus Judicial Duty Equals Judicial Legitimacy, and Other Concluding Remarks' (2016) 36 *Human Rights Law Journal* 300 at 302.

3 Member States of the Council of Europe are required to ratify the European Convention on Human Rights: Parliamentary Assembly of the Council of Europe, Resolution 1031 (1994), 14 April 1994. Accordingly the terms 'Member States' and 'States Parties' are used interchangeably.

4 I use the term 'stakeholders' in a broad sense, including potential rights-holders, that is, individuals and legal persons, national decision-makers, whether of a judicial, executive or legislative nature, and civil society and non-governmental organisations.

Convention protections within the Member States. The current historical phase of the Strasbourg Court can hence be termed the *procedural embedding phase* as further explained in Section 4. In other words, I will argue that this two-dimensional historical trajectory is both descriptively correct and normatively justified: namely that, first, as a matter of empirical fact my rendition of Convention history did in fact take place and, secondly and more importantly, that this trajectory is to be lauded from a normative point of principle for the future of the Convention system, its sustained legitimacy and continued effectiveness.

2. THE SUBSTANTIVE EMBEDDING PHASE

Commencing with the origins of the Convention system, it is apt to note that the history of the Convention has been subjected to detailed scholarly analysis.[5] As Bates points out, the first few years of the Court's work were performed in relative obscurity, the 'sleeping beauty'[6] waiting to awaken to realise its full potential. The awakening subsequently occurred in the 1970s with a shift in 'mental attitudes'[7] with the Court entering into what I term the 'substantive embedding phase'.

The concept of the domestic embedding of legal norms, that I will use in this article, is inspired by language employed in an article from 2008 by Professor Laurence Helfer,[8] although to be clear, Helfer did not use the term 'embeddedness' in quite the same way as that term is used for the purposes of this piece. Here the concept is deployed to describe a process in which an international court, entrusted by sovereign states with the role of supervising the observation of a collective set of legal norms, by which the states are bound under an international treaty, gives substance to these norms for the primordial purpose of infusing them into the domestic legal systems.

In this sense, I argue that the substantive embedding of Convention principles by the Strasbourg Court has been a functional process aimed at progressively creating the necessary foundations for the realisation of the Convention's overarching institutional structure, so as to trigger the full engagement of the States Parties with their obligations under Article 1 of the Convention as the primary guarantors of human rights and freedoms subject to the supervision of the Strasbourg Court. This concept of 'substantive embeddedness' is therefore not a description of the end result of this process, that is, the actual and full domestication of Convention principles, but rather a term used to describe the *function or purpose of the process itself* as it has developed historically in the last 40 or so years.

It also follows that the Court's embedding process has not impacted every State in the same way. In other words, the extent to which the Court has been successful in its embedding work, by infusing Convention principles into the legal systems of

5 Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (2010). See also, more recently, Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (2017). Also noteworthy is Madsen, *La genèse de l'Europe des droits de l'Homme* (2010).

6 Bates, ibid. at 378.

7 Bates, 'Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career ... Its "Coming of Age"?' (2018) 36 *Human Rights Law Journal* 261 at 263 (forthcoming).

8 Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights' (2008) 19 *European Journal of International Law* 125 at 130.

the Member States, varies, as I will explain in more detail in Section 4. Some States are farther along in the process than others, which creates challenges for the Court in its day-to-day work. However, that fact does not detract from my general claim that towards the middle of the 1970s the Court began 'strategically embedding'[9] the Convention into the national legal systems of the Member States in the functional and purposive sense explained above, by developing its case law, both broadly and deeply. Crucially, it pursued this trajectory within national political environments that were receptive to the idea of an integrationist and internationalist framework of human rights protection.[10]

The historical development of the 'substantive embedding phase' has comprised four important elements. First, in the 1970s and 1980s the old Court and the then Commission started formulating the majority of the Convention's overarching structural, interpretational and institutional principles, namely the living instrument doctrine, the principle of autonomy of Convention rights, the principle of effectiveness, and, crucially, the principle of subsidiarity and its functional tool, the margin of appreciation.

Secondly, during the last 40 or so years, the Court has been called on to formulate the general principles for the interpretation of almost all Convention rights. A great many commentaries, guides and handbooks on the Convention are now available for perusal by judges and practitioners, as well as the Convention having been analysed in meticulous detail by scholars from all possible angles. It is thus relatively rare that a case that comes before the Court confronts us with truly novel questions of Convention law. I would, in fact, allow myself to make the claim that in approximately 90 to 95 per cent of cases that we as judges deal with on a daily basis the case law is close to well established, at least as regards the general principles applicable to the issue at hand, although a case-specific factual assessment can, of course, remain a matter of debate among the judges.

Thirdly, due to the mass influx of applications to the Court, in particular after the expansion of the Council of Europe to the East following the fall of the Berlin Wall in 1989, at present culminating in roughly 60,000 pending cases,[11] the Court's reform processes have had, as their overarching theme, the increased embeddedness of the Convention at national level. As the Convention lacks 'direct embeddedness',[12] not occupying a formal place in the judicial hierarchies of the Member States, the States were strongly encouraged to incorporate the Convention directly into their national laws, a project which was completed by the early years of the new

9 Ibid. at 130.

10 To be clear, my claim here is not that this trajectory has, necessarily, been a conscious one—in other words, a fully organised methodological project consciously engaged in by the Strasbourg judges. Rather, my claim is that this development is what has in fact occurred, and continues to occur, regardless of the root causes. For an interesting theoretical account, arguing that national and international courts, including the Strasbourg Court, seek to enhance their reputations through the strategic exercise of judicial power, see Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (2015).

11 European Court of Human Rights, 'Pending Applications Allocated to Judicial Formation', 30 November 2017, available at: www.echr.coe.int [last accessed 4 January 2018].

12 Helfer, supra n 8 at 135.

millennium.[13] The pilot judgment procedure[14] is a reform measure intended to increase the embedded nature of Convention principles where systemic flaws in national law and practice are found to exist.

Fourthly, and perhaps most importantly at the jurisprudential level, in the last decade or so an important shift in the Court's case law started to manifest itself. The Court began reformulating its case law to increase further the embeddedness of Convention principles by, first, requiring applicants to exhaust domestic remedies in a more exacting manner. Related to this development is the increased emphasis by the Strasbourg Court on the need for effective domestic remedies as required by Article 13 of the Convention. Secondly, important case law, in particular Grand Chamber judgments, has been formulated in terms of providing, in the general principles part, objective interpretational criteria that can guide national decision-makers in their application of the Convention at ground level. These elements will be further explored in Section 4 below.

In sum, the Convention enterprise began as a novel, and perhaps to an extent politically underestimated, system of international enforcement of human rights. Member States who took part in the project at the outset took it almost for granted that they would not face any problems in upholding their Convention obligations, simply because the political ideal of international human rights as enforceable legal norms, limiting policy choices and room for domestic decision-making, was in itself underdeveloped and even considered unthinkable in some quarters.[15]

Consequently, to give life to the Convention's fundamental values, the Court needed to build an elaborate *edifice of human rights*, both at the substantive as well as the methodological levels, nonetheless always having to bear in mind that under Article 1 of the Convention it is the States Parties who are the primary providers and guarantors of Convention rights. The attempt substantively to embed the Convention into national legal systems was thus, in my view, an inevitable historical trajectory for the Court if the Convention was to fulfil its true potential. It is unquestionable that the Strasbourg Court has been very successful in its substantive embedding process at the level of providing justice on a case-by-case basis in many areas of contemporary political and social life, as well as being at the origins of meaningful structural and institutional reforms,[16] an achievement which should never be underestimated. The trajectory could of course have taken a different route, in particular if

13 Ibid. at 136.

14 See Rule 61 Rules of Court of the European Court of Human Rights and Resolution of the Committee of Ministers DH (2004) 3, 12 May 2004.

15 Bates, supra n 5 at 173–91.

16 In my own country of Iceland, the judicial system was completely overhauled at the beginning of the 1990s following the Strasbourg Court's examination of a complaint brought by an Icelandic citizen claiming that the historical and institutional structure in criminal matters of vesting police and investigatory powers along with judicial powers in one and the same person—the local magistrate in municipalities outside Reykjavik—constituted a violation of the guarantee of impartial and independent tribunals under Article 6 of the Convention. After the Icelandic Government and the applicant entered into a friendly settlement (see *Kristinsson v Iceland* Application No 12170/86, Strike Out, 1 March 1990), the Supreme Court of Iceland held in a landmark judgment in 1990 that this system was in breach of Article 2 of the Icelandic Constitution, which provides for the separation of powers, as interpreted in the light of Article 6 of the Convention: see Supreme Court Judgment, Hrd. 9 January 1990, Case No 120/1989.

the political landscape in the 1970s, 1980s and 1990s had been instinctively averse to international intrusions, akin to the situation we see today. It is to that part that I now turn, reflecting on the current landscape, the problems facing the Convention system, the way the Court is dealing with them at present and how it should deal with them in the future.

3. THE NATURE OF THE CRITICISM LEVIED AT THE CONVENTION SYSTEM

Although the problems that some have argued the Convention system currently faces can be formulated in different ways, attempting to define the components of criticism levied at the Court's work is crucial for a reasoned debate on the status of the system.[17] In what follows, I will thus attempt to characterise the nature and scope of the criticism, including as set out by some important commentators.[18] I do not necessarily subscribe, from a personal standpoint, to those expressions, although I acknowledge that they merit a discussion.[19]

A. Convention Rights as Supra-Political Legal Norms

Against this background, it can be said that criticism levied at the Court comprises in general two components. The first component postulates that the substantive embedding phase, although necessary for the creation of the edifice of human rights forming the basis of the Convention system, has been, as some have argued, an inherently top-down, juridical project. Some scholars have argued that placing an international court at the vanguard of formulating and giving life to legal norms impacting the day-to-day life of democratic societies across Europe may have given rise to a 'crisis of legalism'.[20] Convention rights have thus, this argument proceeds, been developed through language formulated by international jurists and judges over and above national democratic political life, constituting *pre-political or supra-political legal norms*[21] in the sense of being created in isolation from the political community

17 See Donald and Leach, *Parliaments and the European Court of Human Rights* (2016) at 113–34.

18 See, for example, Gearty, *Can Human Rights Survive? Hamlyn Lectures 2005* (2006); Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of Democratic Society' (2016) 5 *Global Constitutionalism* 16; and Oomen, 'A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands' (2016) 20 *International Journal of Human Rights* 407.

19 I agree in principle with the argument advanced by Amos that the 'question of the value of the ECtHR must . . . be distinguished from the question of its legitimacy': see Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28 *European Journal of International Law* 763 at 767. Professor Amos (at 768) separates these values into three broad categories: 'First, there is value identified at the individual level where the ECtHR has an impact on the individual. Second, there is the value at the global level where the ECtHR operates as a setter of minimum standards or strives to achieve solutions to particular global problems. Third, there is a value at the national level where the ECtHR has relevance for national law, policy or practice or the operation of national institutions.'

20 As termed by Professor Conor Gearty in his 2005 Hamlyn Lecture entitled *'Can Human Rights Survive?'*: see supra n 18 at 60–98.

21 Ibid. at 72–3.

to which they belong.[22] As Professor Gearty puts it,[23] human rights have come to be seen as 'somehow detached from politics'.[24]

B. Sovereignty and the Separation of Powers

The second component of criticism addressed at the Court is related to the first, but is rather directed at the way some of the Court's overarching methodological principles have been perceived by relevant stakeholders in the Member States. I refer here to examples of some politicians (and even legal professionals) publicly lambasting the Court's use of the living instrument doctrine or lamenting the fact that the Court has second-guessed or substituted its judgment on whether a restriction on a particular right is necessary on the facts for that of the domestic jurisdiction.[25] Particularly topical here are Article 8 family and privacy rights, the rights of foreign nationals and immigrants under Article 3, which prohibits torture and ill-treatment, and fair trial rights under Article 6 of persons faced with a criminal charge.

In short, one can first conclude that this criticism is grounded in a doctrine tied to some extent to the original expectations of the Member States.[26] The argument goes that the Court's interpretations have lost their rational connection to the expected original meaning held by the ratifying States, perceived as a *sovereignty*[27] or a *separation of powers* problem. Secondly, this component manifests itself in the idea that whilst the Strasbourg Court has an important role in giving life to the rights protected by the Convention, it should refrain from applying strict scrutiny to the domestic assessment of the necessity of their restriction. It is claimed that at the stage of balancing individual rights and the public interest and employing the principle of proportionality, the legal aspect of the assessment has in the strict sense ceased, and solely political and policy factors come into play, in the adjudication of which the Strasbourg Court is not in a more knowledgeable position than the domestic decision-maker.[28]

22 For a different view, arguing for the uncoupling of the legitimacy of supranational norm-producing authorities and democracy, see Sadurski, 'Supranational Public Reason: On Legitimacy of Supranational Norm-producing Authorities' (2015) 4 *Global Constitutionalism* 396.

23 Gearty, supra n 18 at 73.

24 This argument has also found expression in political science scholarship, in particular works authored by Professor Richard Bellamy, contrasting the views of legal cosmopolitans, on the one hand, who are enthusiastic about the deep interconnection between constitutional democracy and international human rights law, and, on the other, political constitutionalists, who advocate for a weak form of rights-based judicial review: see Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25 *European Journal of International Law* 1019.

25 See Helgesen, 'What are the Limits of the Evolutive Interpretation of the European Convention on Human Rights?' (2012) 7 *Human Rights Law Journal* 275.

26 See, Spano, 'The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect?' *The Torkel Opsahl Memorial Lecture 2014*, Norwegian Center for Human Rights, 28 November 2014, available at: www.jus.uio.no [last accessed 8 March 2018].

27 See, for example, Amos, supra n 19 at 76, discussing the UK's Conservative Party's plans after the general election in May 2015 to 'alter the relationship between the UK and the ECtHR' by replacing the Human Rights Act with a British Bill of Rights capable of 'reclaiming national sovereignty' while providing human rights protections at an equivalent or higher level than the Strasbourg system.

28 Furthermore, it might be argued that the Court's backlog which, at the end of 2017, rested at around 60,000 pending cases affects (see supra n 11), at least indirectly, issues of its legitimacy if viewed through

4. THE PROCEDURAL EMBEDDING PHASE

A. Conceptual Clarifications

Having now briefly explained the two components forming the basis of criticism levied at the Court, it is apt to proceed by arguing that the Court's historical shift from the 'substantive embedding phase' towards the current period, the *procedural embedding phase,* is both empirically correct and normatively justified, and that, looking to the future, this shift may be beneficial for the Convention system's sustained effectiveness for human rights protections across Europe.

Before proceeding with the empirical argument, it is necessary to explain in more detail what is meant by the 'procedural embedding phase' in this context. As I elaborated in Section 2, the first part of the Court's historical trajectory from its inception in 1959, up until approximately the intergovernmental conferences in Interlaken, Izmir and Brighton in the period from 2010 to 2012, constituted the Strasbourg Court's substantive embedding phase in the functional and purposive sense described earlier. In contrast to the Court strategically attempting to embed Convention principles domestically, and thus invariably having to review strictly domestic decision-making and to substitute its judgment for that of the national authorities, the current era, the procedural embedding phase, manifests itself in the Court taking on a more framework oriented role when reviewing domestic decision-making. This review is *process-based* in the sense that the Court is increasingly examining whether Convention principles have, in fact, been adequately embedded in the domestic legal order and, if so, whether certain material elements allow it to grant deference to national authorities so they can fulfill their duties as the primary guarantors of Convention rights as required by Article 1 of the Convention.

To be clear, process-based review in this sense must be distinguished from a different jurisprudential development, sometimes termed the 'proceduralisation' of Convention rights.[29] Process-based review is not limited to procedural issues in the traditional sense, as distinguished from issues of legal substance. In other words, it does not in any way limit the Strasbourg Court from continuing to fulfil its fundamental role of analysing substantive outcomes at the domestic level. However, the significance of process-based review lies in its shift of the Court's primary methodological focus from its own independent assessment of the 'Conventionality' of the domestic measure towards an examination of whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded

the lens of effectiveness. There are of course many different reasons for the chronic persistence of this backlog, some quite positive for the overall assessment of the system, as encapsulated in the often-stated claim that the Court is a victim of its own success.

29 This development is primarily manifested in the Court emphasising the importance of guaranteeing procedural rights in the assessment of whether an interference with substantive Convention rights has been proportionate: see, in general, Brems, 'Procedural Protection: An Examination of the Procedural Safeguards Read into Substantive Convention Rights' in Brems and Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013) 137. A good example of this approach in the Strasbourg Court's case law is the Grand Chamber judgment in *Karácsony and Others v Hungary* Applications Nos 42461/13 and 44357/13, Merits and Just Satisfaction, 17 May 2016, in particular paras 148–162, where the Court found a violation of Article 10 of the Convention, primarily on the basis that the applicants, Members of Parliament, had fines imposed on them for their conduct in Parliament without having had the opportunity to be heard.

principles and the States' obligations to secure Convention rights to peoples within their jurisdictions. In other words, process-based review is the mechanism by which the Court implements the principle of subsidiarity in practice.

In Section 4(C) below, I elaborate further on the three main institutional elements that operationalise this process-based review mechanism during the procedural embedding phase.

B. The Empirical Claim

In an article published in this journal in 2014, I questioned whether the Strasbourg Court might be entering an 'age of subsidiarity',[30] a statement interestingly provoking extensive scholarly debate.[31] Although it was admittedly a somewhat broad-brush claim, I presented certain arguments in favour of a positive answer. Four years later, I will go a step further and assert, albeit cautiously, that there are signs in the case law that the Court is engaged in the process of more robustly applying the principle of subsidiarity when the national authorities have demonstrated in cases before the Court that they have taken their obligations to secure Convention rights seriously.

It falls beyond the scope of this article to make the empirical argument in full, requiring as it would a thorough examination of an abundance of case law. However, interesting work has been carried out by academics that purports to demonstrate the increased use of subsidiarity and margin of appreciation-type reasoning in recent case law. Professor Mikael Rask Madsen, Director of the iCourts research institute at the University of Copenhagen, has presented, he claims, the first-ever systematic examination of the case law following the Brighton Declaration, using databanks of

30 Spano, 'Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity?' (2014) 14 *Human Rights Law Review* at 487. See also Spano, supra n 26.

31 See, among others, Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS' (2015) 4 *Oxford Journal of Law and Religion* 94; Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 *Human Rights Law Review* 313; Fokas, 'Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grasstops Mobilizations around Religion' (2016) 5 *Oxford Journal of Law and Religion* 541; Steinbach, 'Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights' (2015) 4 *Cambridge Journal of International and Comparative Law* 29; Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 *Human Rights Law Review* 745; Kanetake, 'Subsidiarity in the Practice of International Courts' in Kanetake and Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (2016); Smet, 'When Human Rights Clash in "the Age of Subsidiarity"' in Agha, *Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts* (2017) 55; Donald and Leach, supra n 17 at 113; Ulfstein, 'The European Court of Human Rights and National Courts: A Constitutional Relationship?' in Arnardóttir and Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations Between the ECHR, EU, and National Legal Orders* (2016); Saul, 'Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights' (2016) 20 *The International Journal of Human Rights* 1077; Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 *Law and Contemporary Problems* 141; Berry, 'Religious Freedom and the European Court of Human Rights' Two Margins of Appreciation' (2017) 12 *Religion and Human Rights* 198; Hervieu, 'Une Cour européenne des droits de l'homme maîtresse de son destin' [May 2014] *La Revue des Droits de l'homme*, available at: journals.openedition.org/revdh/658 [last accessed 22/04/2018]; O'Meara, 'Reforming the ECtHR: The Impacts of Protocols 15 and 16 to the ECHR' in Ziegler, Wicks and Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (2015); and Besson, 'Subsidiarity in International Human Rights Law: What is Subsidiary about Human Rights?' (2016) 61 *The American Journal of Jurisprudence* 69.

cases and focusing in particular on the use of the margin of appreciation and subsidiarity. The research finds that when the statistical analyses are read together, the overall conclusion suggests that the Strasbourg Court is 'indeed providing more subsidiarity following the Brighton Declaration'. He further notes that although this is not a general phenomenon, which cuts across all Convention provisions, nevertheless, in 'all cases the usages of the doctrine are either continued at a high level or further increased following the Brighton Declaration'.[32]

Hence, at a minimum, there seems to be some empirical basis for the conclusion that the descriptive claim has merit, although the complex case law of an international court like the Strasbourg Court can never maintain a fully linear trajectory. While there may of course be exceptions in recent case law which undermine this thesis, the more interesting and difficult question is the normative one, namely, is this development justified and to be lauded? It is to this question that I now turn.

C. The Normative Claim

(i) Subsidiarity and the Universality of Human Rights

To begin with, the normative debate on whether the Strasbourg Court should apply a more robust principle of subsidiarity, namely, a more process-based review of domestic decision-making is, on the one hand, an institutional debate, with views certainly differing on whether the Court should be, to use the simplistic but often used terms, activist or restrained.[33] It is, on the other hand, a debate that goes to the source of the norms forming the subject matter of the debate—the nature and scope of human rights. Before describing the three main institutional elements that give expression to process-based review, I will first reflect on the way in which one's view of the concept of human rights has crucial implications for where, on the activism-restraint spectrum, one situates oneself.

It is often argued by those that feel alarmed at the subsidiarity-based trend in the Court's case law that it undermines the *universality of human rights*, by which a unitary concept of human rights is deployed presenting human rights as one sole norm, whether legal or moral. Not having space to enter too deeply into the rich debate on the philosophical foundations of human rights,[34] I will limit myself to arguing that, at a minimum, this conceptual criticism is not persuasive within the context of the European Convention on Human Rights. The reason for this is simple: the Convention does not protect any unitary, sole or standalone human right. On the contrary, it protects an array of rights that are, first, not necessarily interrelated or cannot easily be justified by the same moral or political conception of human rights.

32 Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' [2017] *Journal of International Dispute Settlement* 1.

33 See, in particular, Raimondi, 'L'activisme et la retenue judiciaire au sein de la CourEDH: Deux faces de la même pièce', colloque en l'honneur de Paul Mahoney à l'occasion de son 70e anniversaire, organisé le 9 septembre 2016 à Strasbourg au Palais des droits de l'homme (2016) 22 *Human Rights Law Journal* 249. See also Bates, supra n 7; and Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism' (1998) 19 *Human Rights Law Journal* 1.

34 See Maliks and Karlsson Schaffer (eds), *Moral and Political Conceptions of Human Rights. Implications for Theory and Practice* (2017).

Secondly, and crucially, some rights under the Convention, like Article 2 on the right to life, are *core rights* and some are also textually couched in absolute terms, such as Article 3 on ill-treatment, Article 4 on slavery and forced labour and Article 7 on the principle of legality in criminal cases. The scope and application of others, often those that, although fundamental, are more contentious, such as Article 8 on the right to privacy, are also often contested since they explicitly or implicitly allow for restrictions.[35]

As explained above, the distinction between core and absolute rights, on the one hand, and qualified rights, on the other, is crucial when identifying ways in which the Court should proceed in the future. Core and absolute Convention rights protect values and interests which usually emanate from the core of the human person and his or her dignity.[36] They are therefore, by definition, not amenable to a balancing exercise or a proportionality-type analysis which open the door to democratic political and policy choices. Such rights, like the right to life and the prohibition against torture or other forms of ill-treatment, are rights that are, after all, rooted in a moral conception of human rights: they are moral imperatives. It is thus the primordial role of the Strasbourg Court, as I see it, to enforce the collective guarantee of the protection of absolute, or core, rights. My thesis on the increased role of subsidiarity and process-based review within the Convention system must, therefore, by definition be limited, in general terms, to qualified rights under the Convention, albeit with some important caveats that I will explore further in the following sections.

A further reason for the importance of the distinction between core and absolute rights, on the one hand, and qualified rights, on the other, is that the permitted limitations of certain Convention rights, namely, Articles 8 to 11, are based on their restrictions being 'necessary in a democratic society'. In this way, the Convention explicitly and textually infuses political and policy-based considerations into the overall assessment of the existence of qualified rights in a particular case. One may thus argue that qualified rights have, primarily, legal and philosophical foundations of a political nature as they are not mere expressions of the rights and responsibilities of individuals as islands unto themselves, but, importantly, of their status and responsibilities within a *democratic and communal (social) entity*.[37] Therefore, these rights are

35 On the question of whether human rights can be both fundamental and contestable, see Ashworth, 'Security, Terrorism and the Value of Human Rights' in Goold and Lazarus (eds), *Security and Human Rights* (2007) at 201, in particular 204–6.

36 Spano, 'Deprivation of Liberty and Human Dignity in the Case-Law of the European Court of Human Rights' (2016) 4 *Bergen Journal of Criminal Law and Justice* 150. See also a recent article by Valentini, 'Dignity and Human Rights: A Reconceptualisation' (2017) 37 *Oxford Journal of Legal Studies* 862, where the author distinguishes between 'inherent dignity' and 'status dignity' and attempts to link human rights to the latter rather than the former. Valentini argues that human rights articulate standards for respecting the status dignity of the subjects of sovereign authority rather than the inherent dignity of human beings *qua* humans.

37 Here I am inspired by the emerging field of the sociology of human rights which has 'argued from its beginnings how the common association of human rights with universal and foundational claims about humanity easily leads to interpretations presuming that human rights can exist without social preconditions, or even beyond the realm of society': in this sociological sense, 'fundamental rights can be considered institutional devices to uphold protection not only for the individual, but also for the social order of modern societies': see Madsen and Verschraegen (eds), *Making Human Rights Intelligible: Towards a Sociology of Human Rights* (2013) at 7.

not rooted to the same extent in a moral theory on the dignity of the human person as are absolute rights, but find their mooring perhaps to a larger extent in political conceptions of human rights.[38]

As to the limited application of the principle of subsidiarity in the interpretation and application of core and absolute rights, some qualifications are nonetheless necessary, as previously mentioned. When confronted with complaints that the State has, itself, acted in breach of its negative obligations by violating core or absolute rights, for example, through State agents killing a person in violation of Article 2 or torturing or otherwise ill-treating accused or detained persons in violation of Article 3, there is no room, in principle, for the Court to defer to the domestic authorities on whether the act in question comes within the scope of the Convention. The final legal qualification of the act for Convention purposes resultantly falls outside the institutional realm of subsidiarity as it finds its expression in process-based review; it is the Court that decides that question without granting deference to the views of the domestic decision-maker.[39]

However, when a complaint alleges that a State Party to the Convention has failed to fulfil a procedural obligation[40] under a core or absolute provision by not adequately elucidating the facts surrounding the death of a person, irrespective of whether this can be attributed to the State itself[41] or resulted from private-to-private relations or medical negligence,[42] the Court has accepted that the ways in which the State has chosen to fulfil its procedural obligation may vary. Hence, the State may be entitled to choose between various substantive and procedural mechanisms, whether criminal, civil or disciplinary, to elucidate the facts, depending on the particular circumstances of the case. States are thus afforded a certain discretion by the Court in deciding how they organise their domestic procedures and practices so as to fulfil their procedural obligations under the core and absolute provisions of the Convention. In this sense, the principle of subsidiarity, as an institutional norm of power distribution between the States and the Strasbourg Court, comes into play

38 See Tasioulas, 'Human Dignity and the Foundations of Human Rights' in McCrudden (ed.), *Understanding Human Dignity* (2013) at 291, in particular 292–3. That is not to say that some rights derived from Articles 8–11 of the Convention do not find their expression to some extent in a dignitarian rationale of human rights, as, for example, sexual orientation and sexual identity rights under Article 8: see Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in McCrudden (ed.), *Understanding Human Dignity* (2013) 393. The point argued here is that these rights do not constitute moral imperatives under the Convention in the same manner as core or absolute rights under Articles 2, 3 and 4 of the Convention, the latter not justifying the limitation of these rights on the basis of a necessity analysis as permitted under the limitation clauses of Articles 8–11.

39 See Callewaert, 'Is There a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention? (1998) 19 *Human Rights Law Journal* 6 at 7, where the same idea is formulated a bit differently.

40 See, in general, Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (2012); and Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

41 On the procedural obligation in cases of deaths in the military under Article 2 of the Convention, see the Grand Chamber judgment in *Mustafa Tunç and Fecire Tunç v Turkey* Application No 24014/05, Merits, 14 April 2015.

42 On the procedural obligation in medical negligence cases under Article 2 of the Convention, see the recent landmark Grand Chamber judgment in *Lopes de Sousa Fernandes v Portugal* Application No 56080/13, Merits and Just Satisfaction, 19 December 2017.

under the procedural limbs of these provisions. Furthermore, in these kinds of cases, the *fourth instance doctrine* may, to some extent, *merge* with the principle of subsidiarity.[43] This happens when domestic authorities have adequately established the facts in question which implicate rights protected by Articles 2 or 3 of the Convention for the purposes of implementing their procedural obligation to investigate the events in question.[44] If that is the case, the Court may consider it appropriate to defer to the factual findings of the domestic decision-maker.[45]

(ii) The Age of Subsidiarity and Domestic Engagement with Convention Rights

As I argued above, the Strasbourg system's substantive embedding phase, during which the Court independently attempted to embed the Convention into national legal systems, has shifted in recent years towards an 'age of subsidiarity' which is focused on the procedural embedding of Convention law. To explain in more detail what this entails within the context of process-based review and how it should affect the future trajectory of the Court, it is at the outset important to recall the two components, identified above, that some form the basis of the criticism levied at the Convention system.

If one views the core of these components of criticism, one may perhaps see it finding its expression to some extent in the lack of domestic engagement with, or empowerment[46] of, the Convention system. Rights-holders, namely individuals and legal persons, ultimately look to Strasbourg for justice, hence the approximately 60,000 applications pending before the Court.[47] Many national judges and practitioners view the Convention as an international ensemble of norms, not home-grown or a part of their own constitutional, political or social fabric. They are therefore hesitant when called upon independently to develop Convention rights. Some politicians feel as if their democratic mandates are being threatened by what they deem to be international judges imposing their will on the peoples of Europe. As such, some members of the political establishment consider that important elements of social and economic policy are being determined outside of national democratic or judicial processes.

One can of course take the view that it is natural for an international system for the collective enforcement of human rights to attract criticism, and that the Court and the Convention system should thus neither be concerned by, nor react to, it. In

43 On the procedural obligation in the assessment of asylum applications under Article 3 of the Convention, see the Grand Chamber judgment in *F.G. v Sweden* Application No 43611/11, Merits and Just Satisfaction, 23 March 2016, and the application of the general principles deriving from *F.G.* in *A. v Switzerland* Application No 60342/16, Merits, 19 December 2017.

44 Callewaert, supra n 39 at 6.

45 See, *F.G. v Sweden*, supra n 43 at para 118 ('Moreover, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them . . . . As a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned').

46 Karlsson Schaffer, 'The Point of the Practice of Human Rights: International Concern or Domestic Empowerment' in Maliks and Karlsson (eds), supra n 34, 33.

47 European Court of Human Rights, supra n 11.

my view, that is not the right approach to take. Every international system of law, as a system that by definition is not embedded politically and historically in a national constitutional framework, is from time to time confronted with the threat of losing its effectiveness at national level if a critical mass of distrust and a perceived lack of legitimacy pervades its work. The historical trajectory of the Convention system has, by its very nature and current status, called for a shift of focus to secure the increased effectiveness of human rights protections at national level by moving towards a bottom-up strategy empowering national rights-holders and decision-makers to take the lead in securing human rights, albeit ultimately subject to the supervision of the Strasbourg Court as provided for by Articles 19 and 32 of the Convention.

On this basis, I will now, before concluding with some final reflections, describe the three main elements of process-based review within the procedural embedding phase going forward and elaborate on the means I argue the Strasbourg Court is currently deploying to effectuate an approach triggering increased domestic engagement with Convention rights in accordance with Article 1 of the Convention.[48]

(iii) Main Elements of the Procedural Embedding Phase

Exhaustion of domestic remedies. First, as previously mentioned, the Court has in recent years developed its exhaustion of domestic remedies jurisprudence under Article 35 of the Convention, in particular with its Grand Chamber judgment in *Vučković and Others v Serbia*[49] which, while confirming already settled principles, may 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. Applicants have to demonstrate that they have not only pleaded the Convention issue domestically, at least in substance, but done so in a manner that has realistically given the national judge the opportunity to consider the issue through a Convention lens.[50]

The purpose of this more exacting standard for the exhaustion of domestic remedies is clear—it is the national forum which is the primary arena for resolving Convention disputes, not Strasbourg. It is for the potential rights-holder to take control of his or her Convention-based destiny and for the national judge to apply the embedded principles which he or she will readily find in, as I argued above, approximately 90 to 95 per cent of cases by consulting the relevant materials. However, it is

48 There are different ways in which one can analyse the main conceptual elements of a subsidiarity-based approach. Recently, Paul Harvey, a former lawyer in the Registry of the European Court of Human Rights, published an interesting article arguing for a more 'positive approach' to the issue. He suggests that in the Convention legal order, putting the principle of subsidiarity fully into practice requires the Strasbourg judge to know 'not just when not to intervene, but when to intervene and just as importantly, to be able to justify that intervention': see Harvey, 'The Principle of Subsidiarity: A More Positive Approach' (2016) 36 *Human Rights Law Journal* 335 at 335–6.

49 Applications Nos 17153/11 et al., Judgment (Preliminary Objection), 25 March 2013.

50 See, for example, in the UK context, *Peacock v United Kingdom* Application No 52335/12, Admissibility, 5 January 2016; and *Roberts v United Kingdom* Application No 59703/13, Admissibility, 5 January 2016. See also, for example, *Unseen ehf. v Iceland* Application No 553630/15, Admissibility, 20 March 2018.

necessary to make clear that the Court will not apply here a rigid and inflexible standard, but will necessarily take account of the nature of the alleged violation made, the status of the applicant and the factual background at national level.

Criteria-based guidance for Convention-based assessment at domestic level—the Von Hannover non-substitution principle. The second element of the procedural embedding phase manifests itself, as also previously mentioned, in important case law, in particular Grand Chamber judgments, being formulated in terms of providing, in the general principles part, objective interpretational criteria that can guide national decision-makers in their application of the Convention at ground level. Many examples can be given here, for example *Ibrahim and Others v United Kingdom,*[51] providing criteria for the assessment of fairness in criminal cases under Article 6, *Roman Zakharov v Russia,*[52] providing criteria for the assessment of domestic systems of targeted surveillance under Article 8, *Von Hannover v Germany (No 2)*[53] on the balancing between Articles 8 and 10 in defamation cases and *Üner v The Netherlands*[54] and *Maslov v Austria*[55] as regards the expulsion of convicted foreign nationals.[56] The case of *Ndidi*[57] is interesting in this field. In this judgment, the Court, for the first time to my knowledge in a case under Article 8 alone, and dealing with the family life rights of foreign-born convicted nationals, imported the *Von Hannover non-substitution principle* from the Article 10 context, thus transposing the Court's finding that strong reasons are needed for the Court to substitute its judgment for that of the national courts where the balancing of interests has taken place at the national level. Also of note is the judgment in *Bărbulescu v Romania*[58] dealing with the issue of an employer's monitoring of employees' email usage in the workplace, in which the Grand Chamber, in meticulous detail, provided no less than six criteria that national decision-makers should look to under Article 8 when assessing the proportionality of such measures.[59]

The purpose of this second, and crucial, element in the Court's process-based review mechanism is domestically to incentivise national judges to engage forcefully with embedded principles when having to undertake the often complicated assessment of legality, legitimate aims and necessity[60] under the limitation clauses of qualified Convention provisions. If done faithfully at the national level, the Strasbourg

51 Applications Nos 50541/08 et al., Merits and Just Satisfaction, 13 September 2016. See also *Simeonovi v Bulgaria* Application No 21980/04, Merits and Just Satisfaction, 12 May 2017.

52 Application No 47143/06, Merits and Just Satisfaction, 4 December 2015.

53 Applications Nos 40660/08 and 60641/08, Merits and Just Satisfaction, 7 February 2012.

54 Application No 46410/99, Merits, 18 October 2006.

55 Application No 1638/03, Merits and Just Satisfaction, 23 June 2008.

56 Recent examples of the process-based application of the *Üner* and *Maslov* criteria in cases dealing with the expulsion of foreign nationals convicted of crimes are the Second Section's inadmissibility decisions in *Hamesevic v Denmark* Application No 25748/15, Admissibility, 16 May 2017 and *Alam v Denmark* Application No 33809/15, Admissibility, 6 June 2017.

57 Application No 41215/14, Merits and Just Satisfaction, 17 September 2017, in particular para 76.

58 Application No 61496/08, Merits and Just Satisfaction, 5 September 2017.

59 Ibid. at 121.

60 On proportionality and balancing as components of the necessity test under the Convention's limitation clauses, see, in particular, Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009).

judges may feel justified, as a departing point of principle, in the result as being within the realm of reasonable outcomes, adopted by the national decision-maker more directly attuned and sensitive to the necessities of the domestic and democratic legal order.[61]

It is very important to emphasise that this process-based *incentivisation* of national courts by the Strasbourg Court goes both ways. In recent case law, the Court has developed this methodology in more depth by finding violations of the Convention, for example, in cases brought under Articles 8, 10 and 11, primarily on the basis that the domestic courts in these cases failed to assess the Convention issue in question in the light of the principles established in the Court's case law. The Court therefore did not consider it necessary, for the first time in the cases in question, to engage itself with the necessity analysis under the limitation clauses, as has been historically the norm. The fact that an interference with Convention rights was not assessed properly at domestic level, or not in accordance with the principles set out in the Court's case law, thus sufficed for a finding of a violation on the ground that the Government had not demonstrated before the Court the necessity of the interference.[62]

This is in my view an important shift in the Court's case law towards a process-based approach which, whilst rewarding the true embedding of Convention principles within the States Parties, enforces at the same time Convention rights in a more principled, pragmatic and efficient manner where embeddedness is lacking. It should lastly be reiterated that although the reasoning of domestic courts in a particular case may, at first glance, seem to manifest an attempt to engage with embedded principles, the Strasbourg Court's review will always, at a minimum, include a substantive assessment of whether the outcome is within the parameters of reasonableness.[63] The Court consequently retains in every case the final say on whether the result arrived at domestically is fraught with unreasonableness, regardless of the reasoning deployed by the national decision-maker.

A qualitative democracy-enhancing approach to legislative deference. The third element of the Court's process-based review approach is its refusal to draw any distinction of principle between the subsidiarity grounded deference that may be afforded to national authorities of a judicial or executive nature, on the one hand, and, on the other, to domestic parliaments producing legislative norms that are facially challenged before the Strasbourg Court. Examples of the latter include *Animal*

61 Looking to the future, it is interesting to ponder whether the Court's traditional approach of applying a very formal and rational relations-type analysis to a Government's invoked legitimate aim, thereby leaving all the legwork of the necessity assessment to the test of proportionality, needs some reformulation: in other words, whether the Court should engage in a methodological shift towards a more strict, evidentiary based assessment of invoked legitimate aims, as some scholars have in fact called for, see, in particular, Sadurski, 'Is There Public Reason in Strasbourg?' (2015) *Legal Studies Research Paper No. 15/46*: available at: papers.ssrn.com [last accessed 4 January 2018].

62 See, for example, *Annen v Germany* Application No 3690/10, Merits and Just Satisfaction, 26 November 2015; *Terentyev v Russia* Application No 25147/09, Merits and Just Satisfaction, 26 January 2017; *Moskalev v Russia* Application No 44045/05, Merits and Just Satisfaction, 7 November 2017; and *Öğrü and Others v Turkey* Application No 60087/10, Merits and Just Satisfaction, 19 December 2017.

63 See here, for example, *Egill Einarsson v Iceland* Application No 24703/15, Merits and Just Satisfaction, 7 November 2017.

Defenders International v United Kingdom,[64] *Parrillo v Italy*,[65] *Lambert and Others v France*[66] and *S.A.S. v France*,[67] the case concerning the ban on full-face veils, as recently confirmed in the corresponding Belgian cases, *Dakir v Belgium* and *Belcacemi and Oussar v Belgium*.[68] In other words, the Court will look closely at whether the national parliament, in enacting primary legislation which adversely affects Convention rights, has openly and in good faith engaged in the balancing of conflicting interests.[69] I have previously termed this the *qualitative democracy-enhancing approach*.[70]

It is necessary at this point to develop this element further by exploring the normative arguments for this approach as it finds its expression in the relationship between human rights, democratic governance and legitimate authority.[71] I will make two points, the first doctrinal, the second practical.

First, the effective implementation of human rights requires a *culture of human rights* at all levels of government as well as in society in general. Here, drawing on literature in the field of sociology of human rights, I am referring to the claim that for human rights to have social meaning, they must become institutionalised socially and become embedded in peoples' mindsets as well as in the day-to-day workings of societal institutions such as the judiciary, the legislature, the schooling and healthcare systems, and the family.[72] In short, it is potentially a transformative development in Convention law that the role of national parliaments in the realisation of human rights protection within the Convention system has increasingly become a focal point in recent years, both at the level of policy within the Council of Europe, and, importantly, at the level of adjudication of human rights cases in the Strasbourg Court.

In this regard it is important to appreciate that the Court, interpreting the Convention, has several underlying doctrinal strands or principles permeating its jurisprudence. One is the principle of the *rule of law*;[73] another is the principle of *constitutional democracy* as the preferred political system for regulating human affairs in a way which is conducive to the effective realisation of individual human rights. Majority rule decision-making based on a legislative structure of elected representation, a system founded on the *principle of political equality*, is thus infused into the fabric of the Convention.[74] It is therefore no coincidence that the Convention requires that where States Parties restrict Convention rights that allow for

64 Application No 48876/08, Merits and Just Satisfaction, 22 April 2013.
65 Application No 46470/11, Merits and Just Satisfaction, 27 August 2015.
66 Application No 46043/14, Merits and Just Satisfaction, 5 June 2015.
67 Application No 43835/11, 1 July 2014.
68 *Dakir v Belgium* Application No 4619/12, 11 July 2017; *Belcacemi and Oussar v Belgium* Application No 37798/13, Merits and Just Satisfaction, 11 July 2017.
69 A seminal book on this topic is Donald and Leach, supra n 17.
70 Spano, supra n 30 at 497–9.
71 Donald and Leach, supra n 17 at 113–54.
72 See Madsen and Verschraegen, supra n 37 at 8.
73 See, for an excellent overview, Lautenbach, *The Concept of the Rule of Law and The European Court of Human Rights* (2013).
74 See here the Scottish Referendum case brought under Article 3 of Protocol No 1, *Moohan and Gillon v United Kingdom* Applications Nos 22962/15 and 23345/15, Admissibility, 13 June 2017; and the Turkish Constitutional Referendum case brought under the same provision, *Cumhuriyet Halk Partisi v Turkey* Application No 48818/17, Admissibility, 21 November 2017.

limitations, this must be shown to be 'necessary in a democratic society'.[75] In this sense, the Convention directly calls for a system of shared responsibilities and defined roles between the primary system of protection, the States Parties themselves, and the international system of adjudication at Strasbourg which is subsidiary to primary protection, a safety valve. It is at the outset for the State Party to decide whether a limitation of a Convention right is necessary in a democratic society, and not just in any democratic society, but specifically its own.

When democratic societies confront difficult issues of economic and social policy and public order, where tensions often arise between individual rights and the public interest, clear-cut answers are seldom forthcoming. Human rights protections and restrictions at national level implicate a mix of legal, moral and political elements that require balancing into a coherent whole. Inevitably, then, questions of institutional legitimacy in the decision-making process arise. It is hence axiomatic that since the Convention explicitly and implicitly recognises democracy as the preferred political system of decision-making, the case law of the Court should highlight the crucial importance of the effective and human rights-oriented role of national parliaments in defining the domestic scale of rights protections subject to European supervision. This is the doctrinal basis for the recent developments in the case law of the Court, identified by Donald and Leach, referring to the scope, form and quality of legislative deliberations in the assessment of whether it has been demonstrated by the respondent Government that a limitation of a Convention right was, indeed, necessary in a democratic society.[76]

My second point relates to the practical difficulties and challenges of this parliamentary and subsidiarity-based approach in the future development of the Court's case law. It is still early days in the jurisprudential life of this development although it is, as such and at its core, not a novel phenomenon in the Court's history. As some judges of the Court have identified in separate opinions, echoing the views of academic commentators, the Court must be alive to certain risks when applying this approach.[77]

It is useful here to recall that like other international courts, the Strasbourg Court may consider it useful to take into account the common doctrinal threads to be found in the legal traditions of the Member States of the Council of Europe.[78] For example, although the margin of appreciation is usually considered to be a functional methodology of deference applicable to the relationship between the domestic and international jurisdictions it is, at its core, a hybrid or variation of classical institutional norms of constitutional deference afforded by national courts towards other branches of government, in particular the legislature. There is no principled reason to exclude the possibility that in the future the Court will better educate itself on the ways in which domestic supreme and constitutional courts exercise their review powers when asked to examine the way in which national parliaments have assessed

75 As per the limitation clauses of Articles 8–11 of the Convention.

76 Donald and Leach, supra n 17 at 134–40.

77 Ibid. at 140–4.

78 O'Boyle and Lafferty, 'General Principles and Constitutions as Sources of Human Rights Law' in Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013).

the human rights implications of their enactments. Nonetheless, it is certainly right[79] that deepening its framework beyond what is already in place will run the risk of the Court assuming a primary rather than a secondary role in the determination of what parliamentary processes should look like. The Court must consequently tread very carefully in this area and be wary of making generalised pronouncements.

Having said that, it is possible in my view to attempt now to articulate, at least in general terms, some of the main *objective indicators* that form part of a qualitative democracy-enhancing approach by the Court when it is invited to assess, in a particular case, parliamentary enactments that interfere with Convention rights.

First, the starting point for any assessment of the quality of parliamentary processes and enactments is the identification of the nature and substance of the Convention right implicated in a case brought before the Court. The right must, as such, be amenable to considered democratic debate where reasonable minds may differ on the scope and content of the proposed policy. The right in question must also be contestable in nature,[80] and thus subject to the limitation clauses under the Convention, in particular under Articles 8 to 11 and Article 1 of Protocol No. 1, or at least open to implicit restrictions as permitted by Article 6 and Articles 2 and 3 of Protocol No 1. A negative interference with core and absolute rights, protected by Articles 2, 3, 4 and 7, will not therefore be justified under the Convention even where it has a solid basis in parliamentary legislation.[81]

Secondly, parliamentary processes will be particularly important in cases where the Convention right in question involves the assessment of complex and novel issues falling within societal and moral democratic discourse, for example in the field of bioethics, as in the Grand Chamber judgment in *Parrillo v Italy*,[82] or in areas where individual rights are clearly in tension with strong public interests, for example on right to life issues, assisted suicide and euthanasia, as in the Court's Grand Chamber judgment in *Lambert and Others v France*.[83]

Thirdly, the Court may have regard to whether the legislative policy choices that form the basis of enactments interfering with Convention rights have their origins in the State's historical and legal traditions. In this light, it will be of significance whether the policy adopted in parliament can be shown to be a part of a long tradition of enforcing a certain conception of social and moral life in the State in question, which as such is in conformity with the Convention's fundamental values, or is simply the consequence of a transient majoritarian sentiment finding among its expressions hostility towards a particular group of persons or certain Convention rights.

Fourthly, at the practical level, the Court's Grand Chamber judgments in the cases of *Animal Defenders International v United Kingdom*[84] and *S.A.S. v France*[85] demonstrate that the extent to which the legislative enactment in question is based on an

79 Donald and Leach, supra n 17 at 141.

80 See Section 4(C) above.

81 See, however, the nexus between the principle of subsidiarity and the procedural limbs of Articles 2, 3 and 4, as explained in Section 4(C) above.

82 See supra n 65.

83 See supra n 66.

84 See supra n 64.

85 See supra n 67.

extended process of consultation and considered debate, where both the individual right and the public interest in question have been clearly and explicitly analysed in good faith, will inform the Court in its analysis of the quality of the parliamentary process. Traditional parliamentary materials, such as *travaux préparatoires*, committee reports, debates in parliamentary sessions and expert reports prepared prior to or during the parliamentary process, may hence provide the Court with information relevant to its assessment.[86]

Process-based review, the rule of law and double standards. Before concluding, it is necessary to make clear that process-based review in no way envisages the lowering of standards for human rights protections across Europe, quite the contrary—the overarching aim of an effective procedural embedding phase is to *increase* the general level of Convention protections at domestic level, subsidiarity-based deference being premised on good faith domestic engagement with Convention principles. 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. Importantly, it is not the Strasbourg Court that is entrusted with the day-to-day responsibility of securing Convention rights, it is the States Parties. As outlined earlier, in accordance with Article 1 of the Convention, it is the national authorities who are the primary guarantors of human rights subject to the supervision of the Court.[87] When the Member States of the Council of Europe fulfil their Convention role by applying the general principles in the Court's case law, the principle of subsidiarity provides that the Court may defer to their findings in a particular case. As I explained in this article, the purpose is thus to incentivise national authorities to fulfil their obligations to secure Convention rights, thereby raising the overall level of human rights protections in the European legal space.

I would also recall that the Court's powers and jurisdictional competences are entrenched in Articles 19 and 32 of the Convention. It is the Court that is the final arbiter of the scope and content of the Convention. States Parties demonstrate through their actions, in particular the reasoning provided by national courts, whether deference is due under the principle of subsidiarity. It follows that the operationalisation of the principle towards a more process-based review of domestic decision-making, within the conceptual framework of the margin of appreciation doctrine, does not in any way limit the Court's competence ultimately to review substantive findings at national level at the stage of application of Convention principles. In short and to be clear, the robust and coherent application of the principle of subsidiarity by the European Court of Human Rights has nothing to do with taking power away from the Court.

86 See Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 *Human Rights Law Review* 745.

87 See, in particular, the Grand Chamber judgment in *F.G. v Sweden*, supra n 43 at para 117 ('By virtue of Article 1 of the Convention the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention').

Moreover, within this process-based mechanism, the Court may grant deference if national decision-makers are structurally capable of fulfilling that task. This means that the foundations of the domestic legal order have to be intact. States that do not respect the rule of law, a fundamental principle that permeates the whole of the Convention system,[88] and do not ensure the impartiality and independence of their judicial systems, oppress political opponents or mask prejudice and hostilities towards vulnerable groups or minorities, cannot expect to be afforded deference under process-based review.[89] I also note that it flows directly from the language of Article 15 of the Convention that these principles apply equally where a State is confronted with a public emergency threatening the life of the nation. A state of emergency is not an open invitation to States Parties to erode the foundations of a democratic society based on the rule of law and the protection of human rights. Only measures which are strictly required by the exigencies of the situation can be justified under the Convention and it is ultimately for the Court to pass judgment at the European level on whether that justification has been adequately demonstrated on the facts.

The Court's application of the principle of subsidiarity and process-based review thus in no way gives *carte blanche* to States Parties in their choice of measures and means that restrict Convention rights, even where a balancing of interests has taken place at the domestic level. History has amply attested to the inherent risk in democratic societies of majoritarian sentiments,[90] subsequently translated into legislative enactments and practice, being formed on the basis of ideas and values that threaten fundamental human rights. Isolated and vulnerable groups ultimately seek recourse to courts and these courts, whether national or international, have a duty to review and detect, if possible, whether the imposition of measures, although widely accepted, has been triggered by animus or intolerance towards a particular idea, view or religion.[91]

It may finally be questioned whether process-based review will inevitably lead to double standards of human rights protections in Europe. That of course depends on what is meant by 'double standards'. My understanding of the term leads me to answer in the negative. The Convention's general principles apply equally in all Member States and the Court's process-based supervision of their domestic enforcement is, at the level of principle, the same for each state. Nevertheless, it is a fact of life that states have not progressed or are not progressing in the same manner when

88 See, in particular, Lautenbach, supra n 73.

89 A particularly good example is the judgment in the case of *Bayev and Others v Russia* Applications Nos 67667/09 et al., Merits and Just Satisfaction, 20 June 2017, in which the Court found that the Russian legislative ban on 'propaganda of non-traditional sexual relations aimed at minors' violated the applicants' right to freedom of expression under Article 10 of the Convention and was also discriminatory in violation of Article 14 taken in conjunction with Article 10.

90 See *Hamidović v Bosnia and Herzegovina* Application No 57792/15, Merits and Just Satisfaction, 5 December 2017 at para 41 ('Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail. The role of the authorities is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other').

91 This paragraph is based on para 9 of my concurring opinions, joined by Judge Karakaş, in the Belgian full-face veil cases, supra n 68.

it comes to the embedded status of Convention law. That is the unfortunate and inevitable consequence of certain domestic political, historical and social developments, and clearly one that cannot be ascribed to the Strasbourg system.

5. CONCLUSION

In this article, I have argued that the two-dimensional historical trajectory of the European Court of Human Rights manifested, on the one hand, by the *substantive embedding phase* and, on the other, by the current *procedural embedding phase,* is both descriptively correct and normatively justified. There are clear signs that this historical trajectory is an empirical reality, but more importantly a development that is normatively justified on both institutional and substantive grounds. It will in my view sustain and support in the long run the system's overall legitimacy and effectiveness for the peoples of Europe and, hopefully, at the same time result in the progressive decrease in the number of applications to the Strasbourg Court. This should be the inevitable outcome of the enhancement of Convention protections at national level, at least in those Member States of the Council of Europe that take their obligations seriously and apply the general principles set out by the European Court of Human Rights in good faith.