

# UNCERTAINTY, IRONY AND SUBSIDIARITY: BLANKET BANS AND THE EUROPEAN COURT OF HUMAN RIGHTS' PROCEDURAL TURN

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**Abstract** In recent years several commentators have identified a ‘procedural turn’ by the European Court of Human Rights whereby it places increased emphasis on the presence or absence and/or quality of legislative and judicial deliberations at domestic level when assessing the proportionality of allegedly rights-infringing measures. One area where the procedural turn has been particularly apparent is in relation to cases involving blanket bans on activities protected by the European Convention. On most accounts this move to ‘process-based review’ is causally linked to the principle of subsidiarity. In this article it is argued that whilst the shift to process-based review may generally have sound justifications in terms of the subsidiary role of the European Court as compared to States parties to the Convention, there are nevertheless several ironic downsides to this approach in the case of blanket bans, in terms of the certainty and predictability of the Court’s case law. Furthermore, and more critically, there may be serious consequences in terms of the rights protection afforded to vulnerable minorities within states who may be at the receiving end of such legislative blanket bans.

**Keywords:** European Court of Human Rights, blanket bans, subsidiarity, process-based review, procedural turn, margin of appreciation

## I. INTRODUCTION

In recent years many commentators have detected a ‘procedural turn’ in the case law of the European Court of Human Rights (the Court or the ECtHR).<sup>1</sup> According to this thesis the Court, when undertaking its analysis of the proportionality of claimed

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<sup>1</sup> See eg J Gerards and E Brems, *Procedural Review in European Fundamental Rights Cases* (CUP 2017), and M Hunt, HJ Hooper and P Yowell, *Parliaments and Human Rights* (Hart Publishing 2017) especially Part VI. See also E Brems and L Lavryson, ‘Procedural Justice in Human Rights Adjudication: the European Court of Human Rights’ (2013) 35 HRQ 176; P Popelier and C Van de Heyning, ‘Procedural Rationality: Giving Teeth to the Proportionality Analysis’ (2013) ECLR 230; P Popelier, ‘The Court as Regulatory Watchdog: the procedural approach in the case law of the European Court of Human Rights’ in P Popelier and W Vandenbruwaene, *The Role of Constitutional Courts in Multilevel Governance* (CUP 2013); R Spano, ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’ (2014) 14 HRLR 487; OM Arnardóttir, ‘Organised Retreat? The Move from ‘Substantive’ to ‘Procedural’ Review in the ECtHR’s Case Law on the Margin of Appreciation’ (European Society of Law International Law Conference Paper Series, Paper No 4/2015, 2015 Annual Conference, Oslo, 10-12 September 2015); M Saul, ‘The European Court of Human Rights’ Margin of Appreciation and the Processes of National Parliaments’ (2015) HRLR 1; P Popelier and C Van de Heyning, ‘Subsidiarity Post Brighton: Procedural Rationality the Answer’ (2017) 30(1) Leiden JIL 5; OM Arnardóttir, ‘The “procedural turn” under the European Convention on Human Rights and the presumptions of Convention compliance’ (2017) 15(1) IJCL 9; LM Huijbers, ‘The European Court of Human Right’ procedural approach in the age of subsidiarity’ (2017) CILJ 177; R Spano, ‘The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law’ (2018) HRLR 1; and T Kleinlein, ‘The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution’ (2019) 68(1) ICLQ 91.

violations of the European Convention on Human Rights (ECHR or Convention), has started to place more emphasis on the quality of legislative deliberations that precipitated alleged breaches of rights at national level, than on the substantive merits of the relevant case. On most accounts this development, which is referred to (*inter alia*) as a ‘procedural turn’, ‘procedural review’ or ‘process-based review’,<sup>2</sup> is causally linked to the doctrine of subsidiarity – the view that national authorities are better placed to strike such balances, and that within the Convention system the primary protectors of human rights are States parties.<sup>3</sup>

Notwithstanding an abundance of scholarship on the procedural turn, there remains one important aspect on which there has been, to date, relatively little focus: the way that it has been applied in cases challenging the proportionality of wide-ranging blanket bans on types of conduct which, on the face of it, should be afforded protection under the ECHR.

At first glance inflexible laws which infringe human rights and take little or no account of individual circumstances might seem to struggle to pass muster on human rights proportionality grounds. Yet, on closer inspection, as explained below, such blanket bans have often been found *not* to violate human rights where the domestic legislative processes by which they were introduced have been held by the Court to be comprehensive and thorough. As such these blanket bans have been one of the main vehicles by which the Court has been able to undertake its ‘procedural turn’.

It is our contention that the application of process-based review in this area has not only produced some ironic consequences, but also creates a number of potentially serious adjudicatory problems for the ECtHR that cut to the quick of its role as the primary human rights court in contemporary Europe. In particular, we suggest, there has been an injection of a large dose of uncertainty and inconsistency into the Court’s adjudication. Even more critically, however, we argue that the procedural turn in blanket ban cases may have serious consequences for the protection of the rights of those from some of Europe’s most vulnerable minorities whose voices may struggle to be heard in the democratic forums of States parties, no matter how rigorous those institutions’ processes are.

The primary focus of this article is the under-explored nexus between process-based review, subsidiarity, and blanket bans, and it adopts the following structure. Part II introduces the concept of blanket bans and some of the key ECtHR cases that illustrate the procedural turn. Part III considers the principle of subsidiarity and the underlying reasons and justifications for the procedural turn. Part IV explores some of the ironic and problematic consequences of this move in relation to blanket bans. Finally Part V concludes that whilst the use of process-based review might be inevitable and even useful in the current geo-legal environment in which the Court operates it should, nonetheless, be approached with a degree of caution.

## II. BLANKET BANS, HUMAN RIGHTS AND THE PROCEDURAL TURN

Philosophers from Aristotle to Hart have recognized that all systems of law have to negotiate a fundamental tension between, on the one hand, legal certainty (so that people know where they stand) and, on the other, flexibility (so that individual

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<sup>2</sup> In this article we use the term ‘procedural turn’ to describe the *shift* in the ECtHR’s approach, and the term ‘process-based review’, following Robert Spano, to refer to the adjudicatory mechanism itself. See Spano (2018) *ibid*.

<sup>3</sup> See Gerards and Brems, Spano, and Kleinlein (n1).

circumstances can be taken into account and fair outcomes reached).<sup>4</sup> Where human rights are concerned this tension is particularly acute. Since human rights are often invoked in order to protect the individual against the application of laws backed by majorities in democratic societies, there is a presumption in human rights adjudication towards a fact-sensitive system that takes the individual's circumstances into account.<sup>5</sup> On the other hand, however, it may be extremely difficult for legislators to craft laws that are sensitive to individual circumstances yet which still achieve the very purposes for which they were enacted in the first place.

It is elementary that the majority of human rights, and certainly those in the ECHR, are not absolute. Most may be subject to limitations in pursuit of legitimate policy objectives, as long as those limitations constitute only a *proportionate* interference with the rights concerned.<sup>6</sup> Whilst its exact contours are hotly contested,<sup>7</sup> it nevertheless seems clear that the principle of proportionality would (on the face of it anyway) suggest that an inflexible law which impacts (without exception) on the human rights of all who fall within its scope – *even where their circumstances mean that the provision's policy aim will not be furthered by impacting upon them in a particular case* – will fall foul of it. This, however, is not always the case.

In 2003 Philip Sales and Ben Hooper reviewed the Strasbourg approach to the proportionality of what they termed 'fact insensitive laws' (where a 'law's fact sensitivity is the degree to which the outcome of applying it depends on the detailed factual context in which it is applied').<sup>8</sup> In this regard they identified both cases where inflexible blanket bans led the Court to favour the individuated approach, and hold that the interference with the right in question was disproportionate,<sup>9</sup> as well as other cases where the Court erred in favour of certainty and found the state's inflexible rules to be proportionate.<sup>10</sup> In light of the relevant case law, Sales and Hooper made a number of suggestions about the factors that ought to influence the Court in

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<sup>4</sup> Aristotle, *Nicomachean Ethics* (Trans WD Ross) (Batoche Books 1999) Book 5, 88-9; HLA Hart, *The Concept of Law* 2<sup>nd</sup> ed (OUP 1994), 130. See also Lord Reid, 'The Judge as Law-Maker' (1972) 12 JSPTL 22, 26.

<sup>5</sup> See eg *ADT v UK*, App No 35765/97, (2001) 31 EHRR 33, in which the ECtHR said: 'It is not the Court's role to determine whether legislation complies with the Convention in abstract. The Court will therefore consider the compatibility of the legislation in the *present case* ... in the *light of the circumstances of the case* ...', para 36 (emphasis added).

<sup>6</sup> In the case of Convention arts 8 (private and family life), 9 (manifestation of religion or belief), 10 (expression), and 11 (peaceful assembly and association), this has been derived from the requirement that interferences must be 'necessary in a democratic society'. It has been implied into other articles such as the 'right to vote' under art 3 prot 1.

<sup>7</sup> See eg G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2015).

<sup>8</sup> P Sales and B Hooper, 'Proportionality and the Form of Law' (2003) 119 LQR 426, 428.

<sup>9</sup> See eg *Campbell v UK*, App no 13590/88, (1993) 15 EHRR 137, concerning the blanket rule that required the opening and reading of all prisoner's correspondence, whether or not legally privileged (art 8); *Tinnelly and McElduff v UK*, App nos 20390/92; 21322/93, (1998) 27 EHRR 246, concerning the 'conclusive' and non-challengeable nature of certifications on security grounds that the applicants had not won contracts (art 6); and *Papachelas v Greece*, App no 31423/96, (2000) 30 EHRR 293, concerning the inflexible and irrebuttable presumption that land value be reduced by a fixed amount in cases of compulsory purchase (art 1 of prot 1).

<sup>10</sup> See eg *James v UK*, App no 8793/79, (1986) 8 EHRR 123, concerning the blanket statutory right to leasehold enfranchisement on the termination of a long lease, taking no account of the individual circumstances of the individual lessee (art 1 of prot 1); *Mellacher v Austria*, App no 10522/83, (1990) 12 EHRR 392, concerning the inflexible reduction of rents without taking account of individual circumstances (art 1 of prot 1); *Stubbings v UK*, App no 22083/93, (1996) 23 EHRR 213, concerning the inflexible operation of the Limitation Act (art 6); and *Pretty v UK*, App No 2346/0-2, (2002) 35 EHRR 1, concerning the statutory blanket prohibition on assisted suicide (art 8).

applications involving fact-insensitive laws. These are: whether a more fact sensitive law would frustrate the pursuit of the state's policy aim or is required to ensure efficient use of limited resources; whether the accurate achievement of the state's policy aim is more important to society than the avoidance of any other consequences that a more fact sensitive law would entail; whether the state may properly wish to reduce the discretion afforded to those whose function it is to apply a particular law; and whether other contracting states have adopted fact insensitive laws to pursue the policy at issue. However, in spite of their detailed analysis, the authors were forced to concede with respect to the tension between flexibility and certainty that: '[u]nfortunately the ECtHR does not in its judgments expressly address this tension, nor has it sought to give clear guidance as to how it should be resolved'.<sup>11</sup> Furthermore, '[t]here [wa]s ... a lack of detailed guidance from Strasbourg regarding how a court should approach a proportionality challenge based on the relative fact insensitivity of a particular law'.<sup>12</sup>

In the years since Sales and Hooper conducted their research, there has been a fresh development. What has since emerged in the case law of the ECtHR, as a significant factor in determining the human rights compliance of fact-insensitive laws, is the *quality and extent of the deliberation and debate* by domestic parliaments.<sup>13</sup> Broadly speaking, the Court has shown itself to be more willing to accept the legitimacy of blanket bans if there has been a rigorous legislative debate at national level, and it is to this issue that we now turn.

#### *A. Blanket Bans, Proportionality And 'Proper Debate'*

The paradigm case illustrating the role of domestic debate in Strasbourg proportionality analysis is *Animal Defenders International v UK*, which concerned the statutory ban on all broadcast political advertisements in the UK.<sup>14</sup> This ban was justified by the state on the grounds both of safeguarding the impartiality of broadcasters, and of preventing the distortion of the democratic process by wealthy actors buying up large swathes of airtime and flooding them with their own political messages. The ban however was very wide in its scope, so as to catch not just moneyed interests but also those who posed no risk to the democratic process, such as the applicant in the case – an animal rights NGO that wished to broadcast an advertisement publicizing the poor treatment of primates by humans.<sup>15</sup> When *Animal Defenders* reached the Grand Chamber of the Court, in seemingly going against its approach in earlier cases where it had emphasized the importance of a fact-sensitive approach in relation to bans on political advertising,<sup>16</sup> it found there to be no violation of article 10.<sup>17</sup> In a striking passage the Court, referring to the blanket ban as a 'general measure', laid out its prescription for process-based review in such cases:

... in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. The quality of

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<sup>11</sup> Sales and Hooper (n 8) 440.

<sup>12</sup> Ibid 454.

<sup>13</sup> Arnardóttir (n 1).

<sup>14</sup> *Animal Defenders International v UK*, App No 48876/08, (2013) 57 EHRR 21.

<sup>15</sup> Earlier Strasbourg case law indicated that such wide bans would breach art 10: see *VgT Verein Gegen Tierfabriken v Switzerland*, App No 24699/94, (2002) 34 EHRR 4 and *TV Vest AS & Rogaland Pensjonistparti v Norway*, App No 21132/05, (2009) 48 EHRR 51.

<sup>16</sup> Ibid.

<sup>17</sup> *Animal Defenders* (n 14), para 102-4.

parliamentary and judicial review of the necessity of the measure [under consideration] is of particular importance in this respect, including to the operation of the relevant margin of appreciation.<sup>18</sup>

The Grand Chamber thus held that the quality of domestic process goes directly to the proportionality of the measure in question, and helps to determine the width of the margin of appreciation. The Court then went on to explain that an inflexible rule might nevertheless be found proportionate where ‘case by case examination would give rise to the risk of significant uncertainty of litigation, expense and delay as well as of discrimination and arbitrariness.’<sup>19</sup> Consequently, the ‘more convincing the general justifications for the general measures were’, the less importance the Court would attach to its impact in a ‘particular case’.<sup>20</sup> Crucially, the Court noted that the UK parliament (and courts) had subjected the ban to ‘exact and pertinent’ reviews.<sup>21</sup> Moreover the statute had been passed ‘with cross party support and without any dissenting voice’ and it was the ‘culmination of an exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition as part of the broader regulatory system governing broadcasted public interest expression ...’.<sup>22</sup>

This process-based approach was echoed in *The National Union of Rail, Maritime and Transport Workers v UK*, which concerned the statutory blanket prohibition on secondary strike action.<sup>23</sup> The Court referred to the parliamentary debates during the initial enactment of the ban in 1980, which made clear the legislative intention to ‘strike a new balance’ in industrial relations in the interests of the broader economy – a balance which was fine tuned in later legislation in 1992. This legislation was ‘sharply contested by the opposition in Parliament’,<sup>24</sup> but because the subject matter here related to ‘social and economic strategy’, the Court allowed a wider margin of appreciation since ‘national authorities, and in particular the democratically elected parliaments’, ‘are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds’.<sup>25</sup> The Court noted that the ban had ‘remained intact for over 20 years, notwithstanding two changes of government during that time’ denoting a ‘democratic consensus in support of it and an acceptance of the reasons for it’.<sup>26</sup>

Whilst cases like *Animal Defenders* and *NURMTW* provide clear and explicit illustrations of the procedural-turn, it can also be discerned, albeit in a less obvious way, in sensitive cases involving blanket legislative bans on forms of religious dress – in particular the Islamic face veil. For example, in *SAS v France*, which concerned a French Law (passed in 2010) that prohibited the covering of one’s face in the public

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<sup>18</sup> Ibid, para 108.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, paras 108-10.

<sup>21</sup> Ibid, para 116. Described in detail at paras 106-11.

<sup>22</sup> Ibid, para 114. See also eg *Shindler v UK*, App No 19840/09, (2014) 58 EHRR 5, concerning the withdrawal of the right to vote from ex-pats after 15 years; *Sukhovetsky v Ukraine*, App No 13716/02, (2007) 44 EHRR 57, concerning the deposit to be paid for standing in elections; and *Murphy v Ireland*, App No 44179/98, (2004) 38 EHRR 13, concerning the ban on religious advertisements on TV and radio in the Republic of Ireland.

<sup>23</sup> *NURMTW v UK*, App No 31045/10, (2015) 60 EHRR 10.

<sup>24</sup> Ibid, para 89.

<sup>25</sup> Ibid, para 90.

<sup>26</sup> Ibid, para 99.

space, the Grand Chamber cited at length the legislative history of the ban.<sup>27</sup> Faced with an extremely controversial and sensitive issue – and, but for the description of it in the first part of the judgment, without making detailed reference to the legislative process – the Grand Chamber commented that it was:

... important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are ... in principle better placed than an individual court to evaluate local needs and conditions. 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.<sup>28</sup>

In referring directly to the explanatory memorandum that accompanied the Bill – but not to the legislative debate itself – the Court held that the ban was a proportionate means to ensure the principle of ‘living together’. Whilst acknowledging the problems that the ban caused for individual Muslim women,<sup>29</sup> the Court nevertheless concluded that the question of whether one should be permitted to wear the full-face veil in public constituted a ‘choice of society’.<sup>30</sup>

Some commentators have suggested that *SAS* does not constitute an example of process-based review, since the Court did not pay close attention to the existence of an elaborate nationwide debate.<sup>31</sup> However Judge Angelika Nussberger, writing extra-judicially, has suggested that this case is indeed illustrative of process-based review. She maintains that whilst, ‘on the surface’, the Court in *SAS* considered all the ‘pros and cons of the prohibition of wearing the burka in public and entered into an in-depth debate of all the arguments advanced by the French government’ at the same time the main message of the judgment is that the blanket ban on wearing the burka in public is justifiable as a “choice of society”.<sup>32</sup> Thus, she says, the legislative procedure so extensively described in the first part of the judgment ‘did not only matter, but was a dominant aspect of the case.’ In this sense, Judge Nussberger argues that there is not only an explicit, but also an implicit, process-based review: ‘[w]herever the Court accepts the “choice of society” based on a democratic decision-making process, it can be assumed that in the Court’s view, the procedure which led to this decision fulfilled all the requirements’.<sup>33</sup>

If there were any doubt about whether the Court in *SAS* was in fact engaging in process-based review such doubts were dispelled in the subsequent Belgian face-covering cases of *Belcacemi and Oussa* and *Dakir*.<sup>34</sup> In these cases the Court referred expressly to ‘the decision-making process leading to the impugned ban’ which, it stated approvingly, ‘took several years and was marked by a wide debate within the House of Representatives and by a detailed and thorough examination by the Constitutional Court of all interests involved.’<sup>35</sup>

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<sup>27</sup> *SAS v France*, App No 43835/11, (2015) 60 EHRR 11, paras 15-27.

<sup>28</sup> *Ibid*, para 129.

<sup>29</sup> *Ibid*, para 145-9.

<sup>30</sup> *Ibid*, para 153. See also *Belcacemi and Oussar v Belgium*, App No 37798/13, ECHR 11 July 2017, para 53 and *Dakir v Belgium*, App No 4619/12, ECHR 11 July 2017, para 56.

<sup>31</sup> J Gerards, ‘Procedural Review by the ECtHR: A Typology’ in Gerards and Brems (n 1) 145.

<sup>32</sup> A Nussberger, ‘Procedural Review by the European Court of Human Rights: the View from the Court’ in Gerards and Brems (n 1) 163.

<sup>33</sup> *Ibid*, para 163-4. See also E Brems, ‘*SAS v France*: A Reality Check’ (2016) 25 Nott LJ 58.

<sup>34</sup> *Belcacemi and Oussar and Dakir* (n 30).

<sup>35</sup> *Ibid* *Belcacemi and Oussar*, para 54 and *Dakir*, para 57.

Cases such as these reveal that where a rights-infringing inflexible blanket ban has been introduced, a crucial ingredient in the Court's assessment of its proportionality is whether a debate has taken place in the domestic legislature, in which competing rights and interests have been weighed against each other. Where there has been such a 'proper' debate, this widens the margin of appreciation, allowing more weight to be given to the domestic legislature's assessment of the optimal balance to be struck, and thereby increasing the state's chances of success.

*B. Absence Of/Inadequate Debate – When Blanket Bans Are More Likely To Be Disproportionate*

There is a necessary obverse of the aforementioned process-review coin. Where the state introduces a blanket ban, and the ban is held *not* to have been debated properly in a domestic context, this inevitably counts against the state in proportionality terms. Thus, for example, in *Hirst v UK (No 2)*, which concerned the statutory prohibition on convicted prisoners from voting in the UK, the applicant prisoner challenged the ban as being contrary to his right to vote under ECHR article 3 of protocol 1.<sup>36</sup> In response the UK Government contended that this was an area (ie the organization of democracy) in which states have traditionally been afforded a wide margin of appreciation, and that there was no evidence of a common European approach on the issue of prisoner voting.<sup>37</sup> In addition, the Government argued, *inter alia*, that this ban – which in its statutory form dated back to 1870 – had been 'adhered to over many years with the explicit approval of Parliament, most recently in the Representation of the People Act 2000, which was accompanied by a statement of compatibility under the Human Rights Act',<sup>38</sup> and that the matter had been fully considered by the domestic courts in applying the Convention.<sup>39</sup> However, in rejecting these arguments, the Grand Chamber found that the ban was 'a blunt instrument' which constituted an 'automatic and indiscriminate restriction on a vitally important Convention right'.<sup>40</sup> Not content to refer merely to the ban's arbitrariness, the Grand Chamber proceeded to make reference to the domestic parliamentary and judicial procedures that had been adverted to by the Government in its submissions. In dismissing the Government's assertion that this was the 'choice of Parliament over many years', the Court stated:

... there is no evidence that Parliament ever 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. ... It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoner. Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in the light of modern day penal policy and of current

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<sup>36</sup> *Mathieu-Mohin and Clerfayt v Belgium*, App No 9267/81, (1988) 10 EHRR 1, para 46-51. The text of art 3 prot 1 states: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

<sup>37</sup> The UK government pointed to at least 13 other Council of Europe states that had a ban on prisoner voting.

<sup>38</sup> *Hirst v UK (No 2)*, App No 74025/01, (2004) 38 EHRR 40, para 47. Compare with the absence of such a section 19(1)(a) Human Rights Act statement in *Animal Defenders* (n 14).

<sup>39</sup> *Ibid*, para 48.

<sup>40</sup> *Ibid*, para 82.

human rights standards for maintaining such a general restriction on the right of prisoners to vote.<sup>41</sup>

Indeed, the Grand Chamber added that the domestic court, in showing deference to Parliament, ‘did not undertake any assessment of the proportionality of the measure itself’.<sup>42</sup> Thus, the failure to debate the issue properly in Parliament significantly reduced the state’s margin of appreciation in this context.

Another case decided in the same vein is *Anchugov and Gladkov v Russia* which concerned the blanket ban on prisoner voting in Russia, as set out in Article 32(3) of the 1993 Constitution, but reflecting a long tradition going back to the nineteenth century.<sup>43</sup> The Russian government argued that this case was distinguishable from *Hirst*, because its ban was enshrined in a Constitutional provision which had been adopted only after a nationwide vote, and after its terms had been subject to ‘extensive public debate at various levels of Russian society’. However, the Court observed that the Russian Government had failed to submit relevant materials that would have enabled it to consider whether, at any stage of this debate, an attempt had been made to ‘weigh the competing interests or to assess the proportionality of a blanket ban on convicted prisoner’s voting rights’.<sup>44</sup>

These cases suggest that where a rights-infringing inflexible blanket ban has been introduced, an important ingredient in the assessment of its proportionality is whether a debate has taken place in the domestic legislature in which competing interests are weighed against each other. Where blanket bans are imposed, the Court looks at the debates that have taken place at national level. Moreover, the Court does not merely accept the Government’s word that there has been *some* debate at face value. Rather it will look at whether or not the debate has been the right *kind* of debate, which takes into consideration the human right and weighs it in the balance against competing considerations of public policy.

Given how the Court’s scrutiny of the adequacy of debate at domestic level has played a significant part in a number of cases involving blanket bans/general measures, it is clearly important to understand the underpinning justifications for this procedural turn. It is on this issue that we now focus.

### III. THE PROCEDURAL TURN AND SUBSIDIARITY: PRINCIPLE, PRAGMATISM AND DIALOGUE

As noted above, there has been a significant amount of academic commentary on the alleged shift towards process-based review in European human rights cases.<sup>45</sup> Moreover, in addition to the blanket ban cases discussed earlier, this trend has also been evident in cases involving the balancing of competing Convention rights – that (in principle) deserve equal respect – in which the Court has said that as long as the domestic organs carry out the balancing exercise ‘in conformity with the criteria laid down in [its] case law [it] would require strong reasons to substitute its view for that of the domestic courts’.<sup>46</sup>

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<sup>41</sup> Ibid, para 79.

<sup>42</sup> Ibid, para 80. See also, eg, *Alajos Kiss v Hungary*, App No 38832/06, (2013) 56 EHRR 38.

<sup>43</sup> *Anchugov and Gladkov v Russia*, App nos 11157/04 and 15162/05, (4 July 2013).

<sup>44</sup> Ibid, para 109.

<sup>45</sup> See n 1 above.

<sup>46</sup> Most commonly this has been in cases involving arts 8 and 10: see eg *Von Hannover v Germany (No 2)*, App no 40660/08, (2012) 55 EHRR 15, para 104-7 and *Axel Springer AG v Germany*, App No

Having regard to the trend outlined above the question arises: what is driving the Court's move to process-based review? A common thread in the answers that have been suggested by commentators to this question lies in the principle of subsidiarity.<sup>47</sup> Indeed ECtHR Judge Robert Spano has recently argued extra-judicially that 'process-based review is the mechanism by which the Court implements the principle of subsidiarity in practice'.<sup>48</sup> It is therefore to this principle that we proceed.

### A. Subsidiarity In The European Convention On Human Rights

Subsidiarity is, in essence, the principle that 'each social and political group should help smaller or more local ones accomplish their respective ends, without arrogating those tasks to itself'.<sup>49</sup> It can be seen to be inherent in the 'institutional design'<sup>50</sup> of the Convention itself in Articles 1,<sup>51</sup> 13,<sup>52</sup> 19,<sup>53</sup> 35(1)<sup>54</sup> which are textual embodiments of the principle that primary responsibility for rights protection lies with States parties.<sup>55</sup> Moreover, the subsidiary role of the ECtHR has long been emphasized by the Court itself.<sup>56</sup> Subsidiarity is especially pertinent in cases where difficult balances have to be struck between rights and competing interests or rights – balances on which reasonable people may well disagree – and on which there may be significant differences across Council of Europe states, driven by cultural and social factors. In this context the principle of subsidiarity can be justified on a two-fold basis: on the grounds of democratic legitimacy (ie that bodies at domestic level are directly democratically accountable to their people); and also epistemically, on the

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39954/08, (2012) 55 EHRR 6, para 85-8. See further M Saul, 'Structuring evaluations of parliamentary processes by the European Court of Human Rights' (2010) 20(8) IJHR 1077; Popelier and Van de Heyning (2017) (n 1); and Gerards (n 31) who argues that the procedural turn is evident in so called 'dilemma cases' (of which blanket ban cases form a significant proportion), and cases involving the balancing of competing Convention rights.

<sup>47</sup> See generally the sources cited at n 1 above.

<sup>48</sup> Spano (2018) (n 1) 481.

<sup>49</sup> PG Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 AmJIL 38. See also J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Brill 2009); A Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15(2) HRLR 313; A Føllesdal, 'Subsidiarity and international human rights courts: respecting self-governance and protecting human rights – or neither?' (2016) 79 Law and Contemporary Problems 147, 148; S Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights' (2016) 61(1) The American Journal of Jurisprudence 69; Kleinlein (n1); and European Court of Human Rights Background Paper, 'Subsidiarity: A Two-Sided Coin?', ECtHR Seminar to mark the official opening of the judicial year 30 January 2015 <[https://www.echr.coe.int/Documents/Seminar\\_background\\_paper\\_2015\\_ENG.pdf](https://www.echr.coe.int/Documents/Seminar_background_paper_2015_ENG.pdf)>

<sup>50</sup> A Von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative and Judicial Standards of Review' (2012) 10 IJCL 1023, 1036.

<sup>51</sup> The High Contracting Parties have the obligation to secure Convention rights to all those within their jurisdictions.

<sup>52</sup> There is a right to an effective remedy before a national tribunal for those whose rights have been violated. See M Kuijer, 'The right to a fair trial and the Council of Europe's efforts to ensure effective remedies on a domestic level for excessively lengthy proceedings' (2013) 13(4) HRLR 779, 785.

<sup>53</sup> The Court is established to ensure the observance of the Convention by the States Parties.

<sup>54</sup> The Court may only deal with a matter after 'all domestic remedies have been exhausted'.

<sup>55</sup> See Background Paper (n 49), para 2; and Mowbray (n 49) 319. See also eg *Austin v UK*, App No 39629/09, (2012) 55 EHRR 14, in which the Court said: 'Subsidiarity is at the very basis of the Convention, stemming as it does from a joint reading of Articles 1 and 19', para 61; and *Kudla v Poland*, App No 30201/96, (2002) 35 EHRR 11, para 155.

<sup>56</sup> In the very early *Belgian Linguistics Case*, 23 July 1968, Series A No 6 35, para 10 the Court referred to the 'subsidiary nature of the international machinery of collective enforcement established by the Convention'.

basis that bodies at state level are in a better position because of their superior knowledge of local conditions (ie they are better placed to strike difficult balances than the ECtHR).<sup>57</sup>

In recent years the role of subsidiarity has been a central message in the Declarations emanating from all the High Level Council of Europe Conferences: Interlaken,<sup>58</sup> Izmir,<sup>59</sup> Brighton,<sup>60</sup> Brussels,<sup>61</sup> and Copenhagen.<sup>62</sup> Indeed, Protocol 15 emerged from the Brighton Conference, which amends the Preamble of the Convention to make specific reference within its text to the principle of subsidiarity and the margin of appreciation.

Subsidiarity is closely related to the margin of appreciation doctrine,<sup>63</sup> which *can* be seen as the juridical manifestation of the subsidiarity principle, and has been described as the ‘operational tool’ for its realisation in that it ‘safeguards space for the national authorities to perform the balance of rights and interests in the adjudication of human rights’.<sup>64</sup> Both doctrines help to ensure that respect for Convention rights lies first and foremost with states’ authorities – rather than with the Court – and that the Court should only intervene when the domestic authorities fail in that task.<sup>65</sup>

Although it is undoubtedly the case that subsidiarity has always been part of the Convention, and recognized as such by the ECtHR, the High Level Conferences since Interlaken have given it a new impetus. In part this renewed emphasis can be ascribed to the long-standing difficulties that the Court has encountered in dealing with its docket, leading to a long backlog of cases. The argument for subsidiarity is directly relevant to an alleviation of the Court’s case load – for the more cases that are dealt with by domestic bodies, in accordance with the subsidiarity principle, the fewer the number of applications that are likely to end up coming before the ECtHR.<sup>66</sup> In

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<sup>57</sup> M Saul (n 1) 28; L Lazarus and N Simmonson, ‘Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference’ in Hunt et al (n 1) 388, 390.

<sup>58</sup> High Level Conference on the Future of the European Court of Human Rights ‘Interlaken Declaration’ (19 Feb 2010) especially at 1 and 3 available at: <[https://www.echr.coe.int/Documents/2010\\_Interlaken\\_FinalDeclaration\\_ENG.pdf](https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf)>

<sup>59</sup> High Level Conference on the Future of the European Court of Human Rights ‘Izmir Declaration’ (27 April 2011) especially at 1 and 3-5 <[https://www.echr.coe.int/Documents/2011\\_Izmir\\_FinalDeclaration\\_ENG.pdf](https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf)>

<sup>60</sup> High Level Conference on the Future of the European Court of Human Rights ‘Brighton Declaration’ (20 April 2012) <[https://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf)>

<sup>61</sup> High Level Conference on the ‘Implementation of the European Convention on Human Rights, our shared responsibility’ ‘Brussels Declaration’ (27 March 2015) <[https://www.echr.coe.int/Documents/Brussels\\_Declaration\\_ENG.pdf](https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf)>

<sup>62</sup> High Level Conference on the European Human Rights System in the Future of Europe ‘Copenhagen Declaration’ (13 April 2018) <<https://rm.coe.int/copenhagen-declaration/16807b915c>>.

<sup>63</sup> In one of the earliest applications of the margin of appreciation, the Court expressly linked subsidiarity and the margin of appreciation. See *Handyside v UK*, App No 5493/72, (1976) 1 EHRR 737, para 48. On the margin of appreciation see eg MR Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’ (1999) 48(3) ICLQ 638 and D McGoldrick, ‘A Deference of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee’ 65(1) ICLQ 21.

<sup>64</sup> Brighton Declaration (n 60), para 11; Copenhagen Declaration (n 62), para 7; Popelier and Van de Heyning (2017) (n 1) 9; R Spano, ‘The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect’ (2015) 33(1) Nordic JHR 1, 4; and Background Paper (n 49), para 16.

<sup>65</sup> E Brems, ‘The “Logics” of Procedural Type Review by the European Court of Human Rights’ in Gerards and Brems (n 1) 22-24; Interlaken Declaration (n 58) 1; Izmir Declaration (n 59) 1; and Brighton Declaration (n 60), paras 3, 11 and 12.

<sup>66</sup> Brighton Declaration (n 60), paras 5-8.

addition, many argue that if the subsidiarity principle is not respected, the Court will inevitably face a crisis of *legitimacy*.<sup>67</sup> Indeed, in some quarters, the Court has been accused of frequently exceeding its mandate and over-reaching itself.<sup>68</sup> As Popelier and Van de Heyning note, ‘what started as a case of overload crisis slid further into a perceived legitimacy crisis, with critical voices reproaching the Court for judicial activism and intruding into domestic affairs’.<sup>69</sup> The former President of the ECtHR, Dean Spielmann, has suggested that:

[t]he future imagined at Brighton [as well as, it might now be added, at Copenhagen] is one where the center of gravity of the Convention system should be lower than it is today, closer temporally and spatially to all Europeans, and to all those under the protection of the Convention.<sup>70</sup>

The connection between subsidiarity and the procedural turn is as follows: where the quality of debate at national level is strong, then the Court should fully embrace its subsidiary role and approach the measure in question with a presumption of deference to be rebutted only by weighty considerations. Conversely, where the quality of the national debate is weak, the Court will be much less willing to adopt a deferential posture.<sup>71</sup>

### *B. Procedural Turn And Subsidiarity – A Principled Move?*

Process-based review, on one view, can be seen as facilitating a *principled* devolution of decision-making power back to contracting states in accordance with subsidiarity. Thus it ensures that subsidiarity is working properly in that ‘better placed’ and ‘democratically accountable’ national decision makers have the primary role of protecting the human rights of those within their jurisdiction – but that there exists a control mechanism to ensure that those domestic decision makers do their jobs with sufficient procedural rigour and diligence, having due regard to their human rights obligations. Clearly this devolution cannot be absolute, for the very *existence* of a European Court of Human Rights *must* presuppose that, at least occasionally, the

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<sup>67</sup> See eg Lazareus and Simonsen (n 57) 320.

<sup>68</sup> See eg David Cameron PM, ‘Speech on the European Court of Human Rights’ 25 January 2012 available at: <<https://www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights>>. See also, eg, Lord Sumption, ‘The Limits of Law’ 27<sup>th</sup> Sultan Azlan Law Lecture 2013 available at: <[http://www.sultanazlanshah.com/pdf/2014%20Book/SAS\\_Lecture\\_27.pdf](http://www.sultanazlanshah.com/pdf/2014%20Book/SAS_Lecture_27.pdf)>; Lord Hoffmann, ‘The Universality of Human Rights’ 19 March 2009 available at: <<https://www.judiciary.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/>>; M Elliott, ‘After Brighton: Between a Rock and a Hard Place’ (2012) PL 619; M O’Boyle ‘The Future of the ECtHR’ (2011) 12 German LJ 1862; A Buyse, ‘The Draft Copenhagen Declaration – What About Civil Society?’ (1 March 2018) available at: <<https://strasbourgobservers.com/2018/03/01/the-draft-copenhagen-declaration-what-about-civil-society/>>; and L Hijbers, ‘The Draft Copenhagen Declaration – Process-based review and subsidiarity’ (27 Feb 2018) available at: <<https://strasbourgobservers.com/2018/02/27/the-draft-copenhagen-declaration-process-based-review-and-subsidiarity/>>.

<sup>69</sup> Popelier and Van de Heyning (n 1); Lazarus and Simonsen, ‘Judicial Review and Parliamentary Debates: enriching the doctrine of due deference’ in Hunt et al (n 1) 390; J Gerards and A Terlouw, ‘Solutions for the European Court of Human Rights: the *Amicus Curiae* Project’ in F Spyridon, T Zwart and J Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 165; and A Føllesdal (n 49) 152.

<sup>70</sup> D Spielmann, ‘Whither the Margin of Appreciation’ (2014) 67(1) CLP 49, 65.

<sup>71</sup> Lazarus and Simonsen (n 69) 392.

domestic authorities will *not* strike an adequate balance and the intervention of a supranational judicial body is required – for otherwise why would it even exist?<sup>72</sup>

In this vein Judge Spano argues that cases like *Animal Defenders* and *Hirst* represent a ‘qualitative, democracy enhancing approach’ wherein the ‘Court’s reformulation or refinement of the principle of subsidiarity, and the margin of appreciation, introduces a clear procedural dimension that can be examined on the basis of objective factors informed by the defendant government in its pleadings.’<sup>73</sup> At the same time, in acknowledging its subsidiary role in striking a substantive balance in hard cases, the use of process-based review nevertheless ensures that the process at national level is robust.<sup>74</sup>

The position above is well summarized in the Court’s 2015 Background Paper, in which it is stated that where a:

...parliament engages in a comprehensive review of the Convention issues at stake and conducts a balancing exercise of the relevant competing interests in the light of Convention case law, they are carrying out *their true mission under the Convention and the Court’s scrutiny will be tailored accordingly*.<sup>75</sup>

### *C. The Procedural Turn And Subsidiarity – A More Pragmatic Explanation?*

If the above analysis casts subsidiarity in a principled light, a slightly more pragmatic take on the subsidiarity argument for process-based review can be identified: not so much that it is driven by an *intrinsic* respect for the appropriate division of labour between institutions based on expertise and democratic accountability, but rather that it is a *strategic* response on the part of the Court to political pressure from states.<sup>76</sup>

The Brighton High Level Conference of 2012 and ensuing Brighton Declaration, as well as the recent Copenhagen Declaration of 2018, can be seen as the result of allegations from within contracting states (most notably the UK, the Netherlands, Hungary and Denmark) that the Strasbourg Court has been guilty of overreaching itself. Protocol 15 explicitly writes subsidiarity and the margin of appreciation into an amended Convention Preamble,<sup>77</sup> and although this textual amendment is ‘intended to ... be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law’, it nevertheless ‘unquestionably’ illustrates that the ‘Contracting States wished to send a strong message to the Court’.<sup>78</sup>

This more pragmatic view of the procedural turn would suggest that it is, in fact, a kind of ‘organized retreat’ from substantive review.<sup>79</sup> As a way of diffusing and/or addressing the disillusionment of state parties in the Strasbourg process, the ECtHR is effectively passing the proverbial baton back to the state – back-tracking in

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<sup>72</sup> Brems (n 65) 26.

<sup>73</sup> Spano (n 1) 499.

<sup>74</sup> A Sathanapally, ‘The Modest Promise of “Procedural Review” in Fundamental Rights Cases’ in Gerards and Brems (n 1).

<sup>75</sup> Background Paper (n 49), para 27 (emphasis added).

<sup>76</sup> Arnadóttir (2015) (n 1); See also, more generally, S Dothan, ‘Judicial Tactics in the European Court of Human Rights’ (2011) 12 ChJIL 115.

<sup>77</sup> T Kleinlein, ‘Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control’ (2017) (28) 3 EJIL 871.

<sup>78</sup> Background Paper (n 49), para 22.

<sup>79</sup> Arnadóttir (2015) (n 1).

order to stave off criticism, so as not to lose the very support of states upon which its efficacy and effectiveness ultimately depend.<sup>80</sup>

#### *D. Drawing The Sting From The Margin Of Appreciation?*

A slightly different emphasis suggested by several commentators is that the Court's increased emphasis on the review of domestic process might be seen as a kind of *quid pro quo* for its increased willingness to show deference, at least in those cases where the margin of appreciation afforded by the Court is wide.<sup>81</sup> This is to say that process-based review might be utilized to draw the sting from a wide margin of appreciation, and ensures that the level of review is not reduced to one of 'manifest unreasonableness' or 'without legal foundation'.<sup>82</sup> As Patricia Popelier argues, process review gives teeth to otherwise lenient review, enabling the Court to assess the rationality of state's action and avoiding the need to substantively balance interests.<sup>83</sup> And it is a two way street, for while good process *buys* the state some deference, poor process leads to more stringent review – as demonstrated earlier, for example, in the prisoner voting case of *Hirst*.

#### *E. Process-Based Review And Democratic Dialogue*

A related factor explaining and justifying the move to process-based review lies in theories of democratic dialogue and deliberation.<sup>84</sup> There has been a long running debate between legal and political constitutionalists as to who should have the ultimate say on the questions of the content and scope of human rights: judges or legislators.<sup>85</sup> As Sandra Fredman puts it, the:

... basic dilemma of human rights adjudication is easily stated ...  
[u]nconstrained decision making by elected representatives may invade the basic human rights of individuals and minorities – which is precisely why we need human rights; but judges having power to override democratic laws goes against the principle that the people make decisions.<sup>86</sup>

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<sup>80</sup> Popelier and Heyning (2017) (n 1).

<sup>81</sup> P Popelier, 'Evidence Based Lawmaking: Influences, Obstacles and the Role of the European Court of Human Rights' in Gerards and Brems (n 1) 79; Gerards (n 31); and Popelier and Van de Heyning (2017) (n1).

<sup>82</sup> R Masterman, 'Process and Substance in Judicial Review in the United Kingdom and at Strasbourg: Proportionality, Subsidiarity, Complementarity?' in Gerards and Brems (n 1) 247.

<sup>83</sup> Patricia Popelier, 'The Court as Regulatory Watchdog: The Procedural Approach in the Case-law of the European Court of Human Rights', in P Popelier, A Mazmanyan and W Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2012) 265.

<sup>84</sup> T Kleinlein (n 77); Lazarus and Simmonson (n 69).

<sup>85</sup> See eg JAG Griffith, 'The Political Constitution' (1979) 42(1) MLR 1; J Waldron, *Law and Disagreement* (OUP, 1999); J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale LJ 1346; Lazarus and Simmonson (n 69); R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007 CUP); R Bellamy, 'The Democratic Legitimacy of International Conventions: Political Constitutionalism and the European Convention on Human Rights' (2015) 25(4) EJIL 1019; and M Tushnet, 'Taking the Constitution away from the Courts' (Princeton UP 1999).

<sup>86</sup> S Fredman, 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Rights to Vote' in Hunt et al (n 1) 447.

There is a recognition that balances involving human rights will very often provoke disagreement between reasonable people and, in such circumstances, the ultimate arbiters on the content of human rights should not necessarily be judges, but might more appropriately be those institutions with democratic legitimacy and accountability.

Theories of dialogue posit a middle way between these polar extremes whereby human rights are protected by way of democratic dialogue between legislatures and courts.<sup>87</sup> Judges and parliaments should not be seen as adversaries but rather as partners, engaging in conversation, and finding creative ways for the courts to complement the democratic process.<sup>88</sup> On this view, process-based review, whereby the ECtHR examines the legislative process that led to the offending measure or act, can be seen as an example of dialogue in operation.<sup>89</sup>

The Copenhagen Declaration 2018 emphasizes that, for a system of shared responsibility to be effective, there needs to be a:

... a constructive and continuous dialogue between States parties and the Court on their respective roles ... including the Court's development of the rights and obligations set out in the Convention. Civil society should be involved in this dialogue. Such interaction may anchor the development of human rights more solidly in European democracies.<sup>90</sup>

As Lazarus and Simmonson put it:

... rigorous and respectful judicial examination of democratic process enhances constitutional dialogue, and increases opportunities for deference, heightens transparency with which deference is used, and therefore makes it more likely that deference will be accorded, where it has been shown to be justified.<sup>91</sup>

On this theory judgments like *Animal Defenders* can be seen as the ECtHR listening to the considered and reasoned views of democratically accountable actors within the UK, taking on board their serious concerns and arguments, and affording a margin of appreciation to them accordingly.

Such dialogic theories also point to the advantage of the positive feedback loop – improved quality of deliberation leads to better outcomes in human rights terms: process review by courts provides an incentive to improve the caliber of democratic process in states.<sup>92</sup> As Thomas Kleinlein says, dialogue ‘ensures the

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<sup>87</sup> See P Hogg and A Bushell, ‘The Charter Dialogue between Courts and Legislatures (Or perhaps the Charter of Rights Isn’t such a bad thing after all)’ (1997) 35 Osgood Hall LJ 75; S Gardbaum, ‘The new commonwealth model of constitutionalism: theory and practice’ (CUP 2013); and A Young, *Democratic Dialogue and the Constitution* (OUP 2017). Arguably an exemplar of this dialogic approach can be seen in the UK’s HRA – see eg D Nicol, ‘Law and Politics after the Human Rights Act’ [2006] PL 722; and T Hickman, ‘Constitutional Dialogue Theories and the HRA 1998’ [2005] PL 306.

<sup>88</sup> Lazarus and Simmonson (n 69).

<sup>89</sup> The Brighton Declaration (n 60) states that ‘the conference welcomes open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention’, para 12(c).

<sup>90</sup> Copenhagen Declaration (n 62), para 33.

<sup>91</sup> Lazarus and Simmonsen, (n 69).

<sup>92</sup> A Sathanapally (n 74) 40.

avenue for democratic norm contestation is open' and it 'incentivizes states to create structures to embed Convention standards'. Moreover, it may help to pre-empt opportunistic attacks on the ECHR by obliging legislatures to engage with well-reasoned arguments as to the scope of rights and the balances to be struck.<sup>93</sup>

The rationales and reasons for the procedural turn offered by numerous authors, and briefly sketched out above, provide persuasive arguments – both principled and pragmatic – for Strasbourg's procedural turn. However, this article will now explore some of the drawbacks of the process-based review and, with particular reference to cases involving blanket bans, we will argue that a cautious approach is warranted.

#### IV. THE PROCEDURAL TURN AND BLANKET BANS – IRONIES, UNCERTAINTIES AND MINORITIES

##### *A. Consistency and Uncertainty*

There is a fundamental irony at the heart of the process-based review, as it has been applied to blanket bans. Many blanket bans are introduced to promote certainty – the rationale being that they are needed because alternative, more finely-tuned solutions, which would allow for the particularities of right holders, are too prone to the problems of arbitrariness and abuse. This of course is a prey in aid of the virtue of legal certainty – a key characteristic of the rule of law which, in itself, is a vital thread running throughout the whole of the Convention.<sup>94</sup> Moreover, the role of certainty forms a key-note in the 2018 Copenhagen Declaration which states:

*The quality and in particular the clarity and consistency of the Court's judgments are important for the authority and effectiveness of the Convention system. They provide a framework for national authorities to effectively apply and enforce Convention standards at domestic level.*<sup>95</sup>

However, and herein lies the irony, the Court's resort to the use of process-based review is itself open to the charge of major uncertainty at several levels, some of which will now be explored.

##### *1. Predictability of case law – as a guide to states*

There are a number of reasons why the ECtHR's taking a procedural turn is problematic from the perspective of legal certainty. For a start, there is the issue of the predictability of the Court's case law. As the leading human rights court in Europe it is important that the ECtHR's judgments provide clear guidance to States parties as to the substantive human rights standards required in their respective legal systems. Whilst the Court is not formally bound by its previous judgments, 'it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart,

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<sup>93</sup> Kleinlein (n 77) 889.

<sup>94</sup> T Bingham, *The Rule of Law* (Penguin 2011).

<sup>95</sup> Copenhagen Declaration (n 62), para 27 (emphasis added). See also Brighton Declaration (n 60), para 23.

without good reason, from precedents laid down in previous cases'.<sup>96</sup> However, a focus on procedure rather than substantive balance tends to muddy these waters considerably. Rather than providing guidance on substantive human rights standards and whether, in particular circumstances, there has been a violation of the Convention, much will instead depend on whether there has been an appropriate legislative debate at municipal level. This will inevitably have unsettling consequences in terms of the Court's case law, perhaps most effectively illustrated by way of the following example. Imagine the scenario of two States parties to the Convention, Xland and Yland, both of which introduce identical blanket prohibitions on activities that fall within the scope of a Convention right. Where one state, Xland conducts a full and far reaching debate in its pre-legislative and legislative procedures, this will clearly stand it in good stead in terms of any subsequent Strasbourg challenge. It will be readily accepted by the Court that this is a 'choice of society', that the Court has a role which is subsidiary to that of states in protecting human rights, and that the margin of appreciation should be wide. Yland has an *identical* measure on its statute books. However, in contrast to Xland, the Ylandian ban has been in force since the early 20<sup>th</sup> century, and there has never been a legislative debate as to its compatibility with contemporary human rights norms.<sup>97</sup> Clearly, on the process-based review model, it is far more likely that Yland's provision will be found to violate the ECHR, since the domestic authorities will not have conducted their own balancing act in the light of Convention standards and case law. This will result in the problematic situation where identical legal provisions in different states will be found to be, respectively, compliant and in violation of Convention standards, purely on account of the quantity and quality of their domestic debates.

Such a scenario might be considered fanciful, but the context of the *Animal Defenders* litigation may be recalled. The UK's Communications Act 2003, which re-enacted and widened an existing statutory ban on broadcast political advertisements, was passed in the knowledge that an almost identical prohibition in Switzerland enacted for the same reasons – to prevent distortion of the democratic process by wealthy interests, and to protect broadcaster impartiality – had been found to be a breach of article 10 ECHR in *VgT v Switzerland*. This was because the broadcast ban did not sufficiently take into account the fact that the applicant, an impecunious animal rights organization, presented no such threat to democracy.<sup>98</sup> Indeed, it was almost certainly only because of this earlier Strasbourg ruling that the UK parliamentary organs reviewed the legislation in so 'exact and pertinent' a manner.<sup>99</sup> Had *VgT* not been so decided, it is highly unlikely that such reviews would have occurred (at least to the extent that they were), for a large part of the debate was

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<sup>96</sup> *Christine Goodwin v UK*, App No 28957/95, (2002) 35 EHRR 18, para 74; *Bayatyan v Armenia*, App No 23459/03, (2012) 54 EHRR 15, para 98; and E Brems and L Lavrysen 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35(1) HRQ 176, 186.

<sup>97</sup> The same could be said if Yland passed its measure without debate more recently, or indeed, after the judgment in Xland's case is handed down.

<sup>98</sup> *VgT* (n 15), para 75. In the domestic incarnation of *Animal Defenders, R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312, Lord Bingham commented that the 'facts in *VgT* were very similar to those in the present case', para 9. See T Lewis, 'Animal Defenders International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters?' (2014) 77(3) 460.

<sup>99</sup> *Animal Defenders* (n 14), paras 42-55 the Court summarized the domestic debate and the impact that *VgT* had on the legislative deliberations.

centered on why *VgT* should not be followed.<sup>100</sup> And had *VgT* never happened it would no doubt have been assumed by the UK legislative bodies that the regulation of broadcast advertising would fall within the state's margin of appreciation, which is traditionally wide in such matters. In short, the UK debates and reviews were only so 'exacting and pertinent' as a result of legal happenstance.

In December 2008 after *VgT*, but before *ADI*, the ECtHR reaffirmed its position in *TV Vest and Rogaland Pensioners Party v Norway*, despite an intervention by the UK government in which it was argued that *VgT* should be either overturned or confined to its precise facts.<sup>101</sup> In neither *VgT* nor *TV Vest* was any emphasis placed by the Court on the quality of parliamentary debates that led to the bans. In both Switzerland and Norway – and in Denmark which changed its law to comply with what it considered to be its Convention obligations – the judgments led to the respective parliaments changing the law in order to comply with what was no doubt presumed to be a statement of substantive legal principle by the ECtHR.<sup>102</sup> But then the Grand Chamber, in *ADI*, held that such bans may be permissible where parliament has properly debated them. One might wonder what would have happened if, instead of changing the law, the legislatures in Switzerland, Norway and Denmark had, rather, conducted full debates along the lines of that in the UK parliament. Would these have insulated them from further challenge at Strasbourg? And what, *now*, if those state parties decided to re-establish their blanket bans, only this time ensuring that the legislatures fully debate them in 'exacting and pertinent' fashion?

As the dissenting Judges Ziemele, Sajó, Kalaydjieva, Vučinič and De Gaetano argued, this approach runs the risk of establishing a 'double standard within the context of a Convention whose minimum standards should be equally applicable to all the States parties to it'. How could 'essentially identical' general prohibitions on political advertising be, respectively, 'not necessary in Swiss [and Norwegian and Danish] democratic society, but ... proportionate and *a fortiori* necessary' in the UK's democratic society?<sup>103</sup> In the absence of a clear explanation, the position is now undoubtedly one of uncertainty across Europe.

## 2. Blanket bans as a remedy to uncertainty

There is a further irony at the heart of utilizing process-based review in blanket ban cases. As described in Part 1, above, a broadly framed law which is designed to pursue a particular legitimate goal, but casts its net so wide as to interfere with human rights and takes no account of the circumstances of the individual appears (*prima facie*) to be disproportionate: the less fact-sensitive a measure is, the less likely it is to be found substantively proportionate. Accordingly, the Court's procedural turn case law sends an ironic signal: the more suffocating the blanket, the more the Court will eschew an *in concreto* review of the substance of the circumstances of the claimant and the more it will rely on the quality of legislative debate that resulted in the enactment of the measure. So the *less* fact sensitive the measure is – the *more* it will be insulated from substantive proportionality review, and the more attention will be

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<sup>100</sup> Ibid, in particular at paras 53-5.

<sup>101</sup> *TV Vest* (n 15), para 55.

<sup>102</sup> *Animal Defenders* (n 14), para 67, citing the 2006 report of the European Platform of Regulatory Authorities.

<sup>103</sup> Joint dissent of Judges Ziemele, Sajó, Kalaydjieva, Vučinič and De Gaetano. Judge Spano (2018) (n 1) 20 denies that this will be the case. See Lewis (n 98) 472.

paid to domestic process. To repeat the words of the majority of the Grand Chamber in *Animal Defenders*:

... in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it ... [t]he quality of 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.<sup>104</sup>

As will be recalled, one of the main reasons proffered for the enactment of blanket bans is the intrinsic difficulty and sensitivity of the subject matter in such cases and, in particular, the uncertainty induced by the need for the drawing of fine distinctions between those to whom the rule should apply and those to whom it should not. In other words, the need to avoid acrimonious disputes by way of a ‘bright line rule’ and the need to protect the vulnerable.<sup>105</sup> If the legislative debate illustrates that such reasons lie behind the blanket ban, this will then seem to have the effect of letting the state “off the hook” in substantive proportionality terms. Thus the Court – because of claimed sensitivity and the difficulty of drawing fine lines at national level – buys into the argument and itself avoids conducting that full substantive review which would give the applicant the opportunity to demonstrate that the interference with his/her rights is disproportionate. As Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano phrased it in their joint dissent in *Animal Defenders*:

The fact that a general measure was enacted in a fair and careful manner by Parliament should not alter the duty incumbent upon the Court to apply the established standards that serve for the protection of fundamental human rights. Nor does the fact that a particular topic is debated (possibly repeatedly) by the legislature *necessarily* mean that the conclusion reached by the legislature is Convention compliant; and nor does such (repeated) debate alter the margin of appreciation accorded to the state. Of course a thorough parliamentary debate may help the Court to understand the pressing social need for the interference in a given society. In the spirit of subsidiarity, such explanation is a matter for honest consideration. In the present judgment, however, excessive importance has been attributed to the process of generating the general measure ...’.<sup>106</sup>

In a speech in 2015, the Vice President of the French Conseil d’État, Jean Marc Sauvé – whilst supportive of the procedural turn and the role of subsidiarity – made the point that ‘national authorities expect the Court to take positions which are stable and coherent and to provide case-law positions, so that they can rule with certainty on the situations submitted to them without running the risk of subsequent disavowal.’<sup>107</sup> Clearly this expectation may be difficult to meet following the procedural turn.

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<sup>104</sup> *Animal Defenders* (n 14), para 108. See also *Shindler* (n 22), para 117; and *NURMTW* (n 23), para 101.

<sup>105</sup> *Animal Defenders* (n 14), para 122. See also *Shindler* (n 22), para 116; and *NURMTW* (n 23), para 102-3.

<sup>106</sup> *Animal Defenders* (n 14) dissent of Judge Ziemele et al, para 9-10, emphasis in original. See also *NURMTW* (n 23) concurring opinion of Judges Ziemele, Hirvelä and Bianku, para 2.

<sup>107</sup> Jean-Marc Sauvé, ‘The role of the national authorities’, speech at seminar organised by the ECtHR ‘Subsidiarity: a two sided coin’ 30 January 2015, 9  
<[https://www.echr.coe.int/Documents/Speech\\_20150130\\_Seminar\\_JMSauv%C3%A9\\_ENG.pdf](https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf)>

### 3. Uncertainty of usage – when is process-based review used?

A related kind of uncertainty lies in the ‘lack of clarity and consistency’ with which the ECtHR in fact utilizes process-based review. States are offered ‘little guidance’ by the Court in its case law ‘as they can hardly know in advance how the Court will go about reviewing decisions taken by the legislature or by national courts’.<sup>108</sup> For example, it will be recalled that one of the factors leading to the finding of a violation of the right to vote under article 3 protocol 1 in *Hirst* was that there had been no meaningful parliamentary debate on the issue. The issue of prisoner voting was subsequently considered in *Scoppola v Italy (no 3)*.<sup>109</sup> Under Italian law prisoners sentenced to between five years and life permanently lost the right to vote, even after release; those imprisoned for between three and five years were disenfranchised for five years; and those sentenced to three years or less received no ban. The Grand Chamber held that this scheme demonstrated the ‘legislature’s concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender’.<sup>110</sup> However, it is notable that, beyond this assertion, there was no reference in the judgment to the presence, or absence, of parliamentary debate on the issue of prisoner disenfranchisement. As Judge Björgvinsson said in his lone dissenting judgment, the Italian legislation – ‘just like’ the United Kingdom’s ban – was a ‘blunt instrument stripping of their Convention right to vote a significant number of persons and doing so in an indiscriminate manner and to a large extent regardless of the nature of their crimes and the length of their sentences and their individual circumstances’.<sup>111</sup> Indeed it can be argued that the Italian ban was more severe than that in the UK, for many Italian prisoners continue to be disenfranchised even after release, whereas British prisoners regain the vote immediately they leave prison. Despite this however, as Judge Björgvinsson noted in *Scoppola*, there was no evidence adduced to the Court that the Italian legislature had made a ‘sufficient assessment of proportionality ... as regards the justification for depriving all these prisoners in Italy of their voting rights beyond the end of their prison sentence, and in many of them for life.’<sup>112</sup>

There is apparently, therefore, a lack of consistency in usage, which has even led some commentators to suggest that it is only utilized in cases from certain countries. For example, Popelier and Van de Heyning have argued that the use of process-based review by the court ‘risks being criticized as selective in that the Court appears to undertake such review only in respect of cases from certain (openly critical) countries’ such as the UK. As such, they maintain that ‘procedural review might not be conceived as a necessary tool to strike the balance between the Court’s supervisory role and the subsidiarity of the Convention, but rather as a method to canalize and mitigate the protests from the UK’.<sup>113</sup>

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<sup>108</sup> Gerards in Gerards and Brems (n 1) 159; Saul (n 1) (2015) 15 and Saul (n 46) 1082.

<sup>109</sup> *Scoppola v Italy (no 3)*, App No 126/05, (2013) 56 EHRR 19.

<sup>110</sup> *Ibid*, para 106.

<sup>111</sup> *Ibid* Judge Björgvinsson dissent.

<sup>112</sup> *Ibid*. See Fredman (n 86) 462.

<sup>113</sup> P Popelier and C Van de Heyning (2017) (n 1). See also Gerards (n 31) who makes the same point in relation to *Lindheim v Norway*, 143, and *X and Others v Austria*, 148, in which procedural review was not used.

#### 4. Uncertainty as what constitutes a good debate

A further area of uncertainty, in addition to those adumbrated above, is what kind of legislative debate ought to be considered optimal, and therefore ‘earn the right’ to process-based review? After all, there exist no clear criteria by which the Court can accurately and consistently measure or assess the quality of parliamentary debate.<sup>114</sup> In *Animal Defenders* the ECtHR spoke in approving terms of the scrutiny by the domestic legislature, accepting their word that a wide blanket ban was necessary because of the problems associated with more finely tuned regimes. However, as the dissenting Judges Tulkens et al pointed out, the UK failed to carry out an investigation into the actual feasibility or workability of any proposed alternative regime.<sup>115</sup> Thus the Court, in effect, simply accepted the UK legislature’s view that the blanket prohibition was the only viable option, without providing strong evidence of having explored other possible alternatives.

By the same token, in *Hirst*, the ECtHR emphasized the *lack* of parliamentary debate on the issue of prisoner disenfranchisement. Yet in the UK parliament a debate was subsequently conducted, initiated by a private members motion, in which the overwhelming majority of the House of Commons voted to retain the blanket ban.<sup>116</sup> Indeed the UK, as a third party intervener in *Scoppola (3)*, made specific reference to this debate,<sup>117</sup> as part of its argument that the issue fell within the state’s margin of appreciation and that the Court’s findings in *Hirst* were ‘wrong’ and should be revisited.<sup>118</sup> These arguments, however, clearly failed to convince the Court and were to no avail. Thus, the extent to which the presence or absence of a parliamentary debate is relevant remains highly questionable.

Issues such as what constitutes the *right kind* of process, and what is the relevance of an overwhelming democratic mandate in favour of a rights infringing measure, continue to be far from clear. A brief recap of the cases introduced in Part 1 above will help illustrate the point. Recall that in *Animal Defenders*, the relevant legislation was passed without a single dissenting voice, and this was considered by the Court to be indicative of an overwhelming democratic mandate. Similarly, in the face-cover cases – *SAS*, *Belcacemi and Oussar* and *Dakir* – overwhelming parliamentary majorities in favour of the blanket bans on face-coverings in public space were held to indicate ‘a balance that has been struck by means of a democratic process within the society in question’ and a ‘choice of society’.<sup>119</sup> Furthermore, in *NURMTW* the ban on secondary strike action introduced by legislation in 1980 and 1992 whilst it had been ‘sharply contested at the time’,<sup>120</sup> had nevertheless ‘remained intact for over twenty years, notwithstanding two changes in government during that

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<sup>114</sup> *Saul* (n 1) 1082.

<sup>115</sup> *Animal Defenders* (n 14), dissent of Judges Tulkens et al, para 17.

<sup>116</sup> Hansard HC Deb 10 February 2011, Vol 523, col 493-586. The House voted by 234 to 22 against loosening the restrictions on prisoner voting. See Fredman (n 86) 463ff. For differing views on the question of whether the debate was a genuine substantive consideration of the human rights issues, or whether the ECtHR had exceeded its authority see (respectively) D Nicol, ‘Legitimacy of the Commons vote on prisoner voting’ [2011] PL 681 and J King, ‘Should Prisoners have the Right to Vote’ UK Constitutional Law Group Blog (8 May 2011), available at: <https://ukconstitutionallaw.org/2011/05/18/jeff-king-should-prisoners-have-the-right-to-vote/>.

<sup>117</sup> *Scoppola* (109), para 79.

<sup>118</sup> *Ibid*, para 75-80.

<sup>119</sup> *SAS* (n 27) 153-4; *Belcacemi and Oussar* (n 30), para 53; *Dakir* (n 30), para 56.

<sup>120</sup> *NURMTW* (n 23), para 89.

time'.<sup>121</sup> This, the ECtHR suggested, denoted 'a democratic consensus in support of [the ban]', and an 'acceptance of the reasons for it', which 'span a broad spectrum of political opinion'.<sup>122</sup> However it might be considered difficult to see how this 'democratic consensus' differs meaningfully from that in *Hirst*, where the ban in question had been in place since 1870 but where, in stark contrast, this was said to be problematic, because it had never been debated in light of modern human rights standards.<sup>123</sup> Similarly, in the Russian prisoner voting ban case *Anchugov and Gladkov*,<sup>124</sup> it will be recalled that this ban had been introduced by the Constitution in 1993, which itself had been affirmed by a nationwide vote and preceded by nationwide public discussion and debate at all levels of society.<sup>125</sup> Such a plebiscitary mandate would certainly seem to be a good indication that the provisions of the Constitution amounted to a 'choice of society', at least to the same extent as, say, the veil bans in France and Belgium. However, in *Anchugov and Gladkov*, the Court observed that the government had submitted no relevant materials that would enable it to consider whether any attempt had been made to 'weigh the competing interests or to assess the proportionality of the blanket ban' – so Russia was found to be in breach of article 1 protocol 3 of the Convention.<sup>126</sup>

A fundamental uncertainty is evident in the aforementioned cases: an absence of debate over a long period might be interpreted as indicating a wholesale democratic acceptance of a state of affairs. Or, in contrast, it might be seen as indicative of a failure to engage properly with the human rights arguments in the light of present day conditions.<sup>127</sup> As Nussberger notes, 'a unanimous vote in parliament can be interpreted in different ways – either as a consequence of the lack of inclusiveness in the democratic process and a suppression of the views of the opposition, or as a realistic mirror of the wishes and attitudes held in a certain society'.<sup>128</sup>

It is evidently the case that across Europe there exists a wide diversity of democratic systems, and a commonly repeated trope of the ECtHR's case law is that it is for each state to 'mould its own democratic vision'.<sup>129</sup> Given this diversity the Court's assessments will 'necessarily be impressionistic'.<sup>130</sup> For the Court to attempt to develop a set of common standards that could be applied uniformly would be an extremely challenging task, and one that is arguably 'beyond what is feasible for a court to develop via case law alone'.<sup>131</sup> After all, what might count as an excellent debate in one forum might not be considered as such in another, and what might be seen as 'exceptional balancing' by judges might 'struggle to resonate in a

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<sup>121</sup> *Ibid.*, para 99.

<sup>122</sup> *Ibid.*

<sup>123</sup> See the dissent of Judge Wildhaber et al in *Hirst*, para 7: 'It must be assumed that section 3 of the Representation of the People Act 2000 reflects political, social and cultural values in the United Kingdom'.

<sup>124</sup> *Anchugov and Gladkov* (n 43).

<sup>125</sup> *Ibid.*, para 109.

<sup>126</sup> *Ibid.*

<sup>127</sup> See the questions posed in the Third Party Intervention, 'European Court Of Human Rights *Fouzia Dakir v Belgium*, Application No. 4619/12. Written submission by the Human Rights Centre of Ghent University', 6 <[http://www.hrc.ugent.be/wp-content/uploads/2015/11/Dakir\\_hrc.pdf](http://www.hrc.ugent.be/wp-content/uploads/2015/11/Dakir_hrc.pdf)>

<sup>128</sup> Nussberger (n 32) 168.

<sup>129</sup> *Yabloko Russian United Democratic Party And Others v Russia*, App No 18860/07, 8 Nov 2016, para 87; *Zdanoka v Latvia*, App No 34932/00, (2007) 45 EHRR 17, para 103; *Anchugov and Gladkov* (n 43), para 95; and A Donald and P Leach, 'The Role of Parliaments Following Judgments of the European Court of Human Rights' in Hunt et al (n 1) 59.

<sup>130</sup> Sathanapally (n 74) 75.

<sup>131</sup> *Ibid.*

parliamentary setting'.<sup>132</sup> As Aileen Kavanagh observes: 'political persuasion is not the same as legal interpretation' so parliamentary debates have a very different function to that of the courts.<sup>133</sup>

In light of the above, there exists the risk that, in reviewing and assessing parliamentary debates, the ECtHR will be seen to be lecturing parliaments on "how to do their job". As dissenting Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens said in *Hirst*, 'it is not for the Court to prescribe the way in which national legislatures carry out their legislative functions'.<sup>134</sup> Moreover in their concurring opinion in the same case, Judges Tulkens and Zagrebelsky issued the stark warning that the Court, in seeking to evaluate 'not only the law and its consequences, but also the parliamentary debate', was embarking on 'difficult and slippery terrain' given that this was 'an area in which two sources of legitimacy meet, the Court on the one hand and the national parliament on the other'.<sup>135</sup>

Aruna Sathanapally suggests that the advance of process-based review may have the ironic consequence of denuding parliaments of those very deliberative qualities that contribute to their legitimacy in the first place: '... the more human rights scrutiny resembles legal analysis in anticipation of what a court would decide the less likely it is that the institution ... will be drawing on any unique deliberative capabilities'. Furthermore, argues Sathanapally, where legislatures focus on judicial decision-making there exists the risk that human rights concerns will be reduced to predictions of 'how a court may treat a particular matter, rather than the type of deliberation that human rights – as fundamental ethical commitments – ought to invite'.<sup>136</sup> Again, a significant irony suggests itself. If process-based reviewed is viewed through the prism of dialogue or deliberative democracy, in which no actor has a monopoly of wisdom on how human rights balances should be struck, and the democratic fora in states constitute a valuable and unique component of the "conversation", then a judicial procedural turn that leads to those legislatures attempting to ape future judicial decision makers may actually lead to the muting of that democratic voice.

### 5. Symbolic Debates

It is axiomatic that the greater the emphasis placed on domestic procedure, the greater the incentive will be for states to show that they are conducting the *right* kind of debate: one in which the human rights issues are properly considered and balanced against competing factors. It will thus clearly benefit the state – with one eye on future human rights challenges in Strasbourg – to ensure that a visible and apparently genuine debate is undertaken. Accordingly, there is a real risk that states will just conduct 'symbolic debates', or merely engage in 'window dressing' to disguise abusive measures, so as to protect such measures from challenge at any subsequent Strasbourg hearing.<sup>137</sup>

### C. Minority Rights

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<sup>132</sup> Saul (n 46) 1082.

<sup>133</sup> A Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 15.

<sup>134</sup> *Hirst* (n 38) dissent of Wildhaber et al, para 7.

<sup>135</sup> *Hirst* (n 38) Concurring opinion of Tulkens et al.

<sup>136</sup> Sathanapally (n 74) 60. See also A Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2012) 49.

<sup>137</sup> Donald and Leach (n 129) 84; Sathanapally (n 74) 76; and Saul (n 1) 28.

The ironies and uncertainties alluded to above are undoubtedly problematic. Addressing them will take considerable time and care. However, in our opinion, a far more significant risk associated with process-based review in the context of blanket bans lies in the implications for the rights of vulnerable and unpopular minorities. Human rights protections in liberal democracies are, at their core, designed to afford protection to those who may be at risk from the dominant interests of majorities. Frequently these are people with no real voice or sway in legislatures elected by those very same majorities.<sup>138</sup>

As we have seen in the cases discussed above, blanket bans on kinds of conduct covered by Convention rights by definition catch all those whose conduct falls within their net, with no little or account taken of individual circumstances. Where process-based review supplants, in whole or in part, substantive review by the Court, and where in essence the Court says that it will place emphasis on the quality of the debates that took place during the enactment of the ban – rather than its actual impact in a *particular* case – then this absence of individuation is necessarily accentuated. As the Court has said: ‘... the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in a particular case’.<sup>139</sup>

In contrast, as far as vulnerable minority applicants are concerned, it matters not how *good* the parliamentary debate was that led to the measure that infringed their rights. As Judge Nussberger has said: ‘[w]hat matters for the “Humiliated and Insulted” ... are the results. It is not sufficient that justice is seen to be done but that it is done. Therefore the finding of a procedural violation of a Convention right is often unsatisfactory for the applicant.’<sup>140</sup>

The European Court has the role of ‘ensuring the observance’ by states of the substantive rights of the ECHR.<sup>141</sup> After all, article 1 requires that states ‘secure’ the rights of all those within their jurisdiction, and not simply to take them into consideration in a particular manner. As Sathanapally points out, ‘[h]uman rights law is not agnostic as to outcomes: the ultimate issue before [the Court] is whether the particular State action or decision that is under challenge complies with the substantive right claimed’.<sup>142</sup> Indeed, it is significant that one of the Court’s most vocal advocates of process-based review, Judge Spano, voiced a note of caution in his concurring opinion in the cases concerning the blanket ban on face-covering in Belgium, *Dakir* and *Belcacemi*:

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<sup>138</sup> Nussberger (n 32) 167; and Fredman (n 86) 447.

<sup>139</sup> *Animal Defenders* (n 14), para 109; and *NURMTW* (n 23), para 101.

<sup>140</sup> Nussberger (n 32) 166. Admittedly there is an argument, following Tom Tyler, that from the viewpoint of social psychology, procedural fairness is important because in people’s contact with the law they care not only about the outcome of their case, but also about the way in which it has been handled. See T Tyler, ‘Procedural Justice and the Courts’ (2007-8) 44 (1/2) *Court Review* 26-32; E Brems and L Lavrysen, ‘Procedural Justice in the Human Rights Adjudication of the European Court of Human Rights’ (2013) *HRQ* 176 200; SO Chaib, ‘Procedural Fairness as a Vehicle for Inclusion in the Freedom of Religion Jurisprudence of the Strasbourg Court (2016) 16(3) *HRLR* 48; and Brems (n 65) 31. However where we are concerned with legislative blanket bans introduced by majorities to the detriment of minority groups, and where domestic courts have no ability to find in favour of applicants because of the blanket nature of domestic law (unless they find a breach of their human rights), the efficacy of such arguments is rather devalued.

<sup>141</sup> Art 19 ECHR.

<sup>142</sup> Sathanapally (n 74) at 46.

... the Court's increased emphasis on the principle of subsidiarity does not give a *carte blanche* to member States in their choice of measures and means that restrict Convention rights even though a balancing of interests has taken place at the legislative level. History has amply demonstrated that there is an inherent risk in democratic societies that majoritarian sentiments, subsequently translated into legislative enactments, are formed on the basis of ideas and values which threaten fundamental human rights. Insular and vulnerable groups are therefore left with recourse to courts and these courts, whether national or international, like this Court, have the duty to review and detect, if possible, whether the imposition of measures, although widely accepted in the legislative forum, are triggered by animus or intolerance towards a particular idea, view or religious faith.<sup>143</sup>

So what of the rights of applicants who might be regarded as being 'insular and vulnerable'? In *SAS* and the Belgian veil cases, the legislative debates that led to the bans on face coverings in public space were held by the Court to indicate that the bans were a 'choice of society'. But, critically, those debates failed to take into account the views of the very people with the most obvious interest in the subjects under discussion – women who wear the veil.

#### IV. CONCLUSION

Judge Spano recently argued that the first four decades of the Court's existence constituted a 'substantive embedding phase' for the ECHR, and that the recent shift towards process-based review represents a new historical era for the Court – the start of a 'procedural embedding phase'.<sup>144</sup> In this new phase, he argues, the Court's purpose is 'to incentivize national authorities to fulfill their obligations to secure Convention rights, thereby raising the overall level of human rights protections in European legal space' and that the 'Court has begun to realign its project attempting to trigger increased engagement with the Convention by national authorities'.<sup>145</sup>

If Judge Spano is correct then it may well be that the procedural turn described in this article is not only inevitable, but is also to be welcomed as a part of this 'new historical era'. Indeed, if the Promised Land envisaged by the likes of Judges Spano and Spielmann<sup>146</sup> is achieved, whereby contracting states properly adopt human rights standards and procedures into their domestic processes, the European Court's subsidiary role will become one of checking domestic procedures and correcting flagrant and egregious abuses.<sup>147</sup>

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<sup>143</sup> *Dakir* (n 30) Judge Spano joined by Judge Karakaş, concurring opinion, para 9. They made the point that *SAS* should not be followed blindly, and that any loss of liberty on account of wearing a face-veil would carry a 'strong presumption of disproportionality', para 10.

<sup>144</sup> Spano (2018) (n 1) 473.

<sup>145</sup> *Ibid* 492. This approach aligns with a 'constitutionalizing' view of the ECtHR. See AS Sweet, 'On the Constitutionalisation of the Convention: the ECtHR as a Constitutional Court' (2009) Yale Law Faculty Scholarship Series. Paper 71: <[http://digitalcommons.law.yale.edu/fss\\_papers/71](http://digitalcommons.law.yale.edu/fss_papers/71)>; W Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the ECtHR, the Accession of Central and East European States to the Council of Europe and the Idea of Pilot Judgments' (2009) 9 HRLR 379; S Greer and L Wildhaber, 'Revisiting the debate about the constitutionalisation of the ECtHR' (2012) HRLR 655; and F De Londras, 'Dual functionality and the persistent frailty of the ECtHR' (2013) EHRLR 38.

<sup>146</sup> Spielmann (n 70).

<sup>147</sup> Spano (2018) (n 1) 484; and I Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271, 297.

However, as we have argued, some serious questions remain about an untrammelled move to process-based review, especially in relation to the imposition of inflexible blanket bans. Given that this is a field in which there is an abundance of uncertainty, it would seem incumbent for members of the Court to tread warily. This is self-evidently the case when it comes to the very kinds of people who are *most* in need of the ECtHR's protection – vulnerable or unpopular minorities, who are subjected to restrictions on their rights by sweeping legislative enactments of the majority will. Thus, the Court needs to be careful to avoid laying itself open to the accusation that it is failing in its crucial mission of protecting the human rights of the weak and vulnerable – and thereby ensure that the 'procedural turn' does not in effect constitute a turn for the worse rather than the better.