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Judicial Seminar

"Revisiting subsidiarity in the age of shared responsibility"

Process-based review in the 'age of subsidiarity'

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Esteemed members of the judiciary, colleagues.

I would like to start by thanking President O'Leary and the members of the organising committee, particularly Judges Elósegui and Sabato, for the honour of inviting me to join you here today.

In the short time that is available to me, I will speak to the Court's development of 'process-based review', rooting it in concerns relating to subsidiarity, and exploring its implications for national legislative and judicial decision making. Having briefly outlined process-based review, I will proceed to make three suggestions for your consideration.

First, I will suggest that process-based review has the potential to enhance subsidiarity in a way that meaningfully supports the "shared responsibility" of Convention and national institutions for the implementation of the European Convention and protection of individual rights.

Second, I will suggest that whether this is successful will depend largely on the quality of national deliberation, including judicial engagement with the Convention.

Third, I will suggest that some tensions framed through the lens of subsidiarity cannot be resolved through process-based review, and that awareness of this is key to ensuring that the European Court of Human Rights does not unduly erode its proper role as the primary interpreter and ultimate adjudicator of the Convention.

Process-Based Review

In straightforward terms, 'process-based review' refers to the Court's practice of "relying on the quality of national decision-making in the review of justifications for interferences with Convention

rights".[1] As much of the foundational case law is outlined in the background note to our seminar today, I will not rehearse it here. Suffice to say that if Convention principles have adequately been taken into account in domestic decision-making processes, it is generally considered that the Convention is effectively embedded and was given appropriate weight so that the Court in Strasbourg will afford significant deference to the domestic authorities' views on Convention compatibility. In other words, the decision as to whether there has been a substantive violation of Convention rights will be informed—sometimes to a considerable degree—by whether the Convention played a part in domestic decision-making processes, including whether domestic courts considered the Convention and this Court's jurisprudence when assessing the matter in respect of which an application has been made.

Clearly, process-based review is most applicable in cases where there is a clear question as to whether the interference complained of is permissible under the limitations articulated in Convention provisions and interpreted and applied over decades of the Court's jurisprudence. It is thus to be expected that the procedural approach has been particularly noticeable in questions relating to Articles 8, 9, 10, 11, and Article 1 of Protocol 1. In large part, as you will know, these are among the articles where there is the greatest controversy about what some call 'judicial activism' and others, including me, characterise as the evolution of the Convention through dynamic interpretation taking social, legal, and scientific developments into account.

While scholars such as Leonie Huijbers have noted that process-based review is, in some ways, a continuation of the Court's established concern with procedure evident in cases relating to positive obligations under Articles 2 and 3, due procedure as it applies to Article 6, and the right to an effective remedy under Article 13,[2] I think it is right to say that process-based review engages with process in a different way. Rather than ask the substantive question of whether a complainant has been afforded the process to which she is entitled as a bearer of Convention rights, the Court taking a process-based approach to review asks whether national authorities have made a decision *in the right way* and uses the response to inform its answer to the substantive question of compliance with the Convention.

According to former President of the Court, Robert Spano, this represents a "shift of the Court's primary methodological focus from its own independent assessment of the 'Conventionality' of the domestic measure towards an examination of whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded principles and the States' obligations to secure Convention rights". In this, I think that Spano must be right when he writes "process-based review is the mechanism by which the Court implements the principle of subsidiarity in practice".[3]

Process-Based Review and Enhancing Subsidiarity

On this reading, the turn to process-based review can be understood as a kind of completion of the process of embedding the Convention in national law. In doing so it most obviously enacts subsidiarity in a 'negative' way, i.e. by restraining the Strasbourg court through dispersing of decision-making 'downwards' towards national authorities. I will shortly argue that it also distributes decision-making positively, i.e. towards Strasbourg, although that distribution is perhaps less 'obvious'.

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[1] Janneke Gerards, "Procedural Review by the ECHR: A Typology" in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017; Cambridge University Press).

[2] Leonie Huijbers, *Process-Based Fundamental Rights Review* (2019; Cambridge University Press)

[3] Robert Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18 *Human Rights Law Review* 473.

While signature, ratification, and domestic incorporation of the Convention achieved a kind of doctrinal embedding, it is argued that process-based review enables substantive embeddedness. This in turn, it is argued, increases domestic engagement with the Convention leading to enhanced rights protection for individuals, effectiveness for the Convention, and legitimacy for the Convention institutions.

Process-based review can thus be seen alongside the developments discussed in our earlier session by Professor Ducoulombier as part of a broader move to greater effect to the principle of subsidiarity and its key underpinning assumption: that national authorities are the primary guarantors of Convention rights, and that the Strasbourg Court is to be selective about when it will step in.

Importantly, process-based review brings into sharper focus parliamentary engagement with the Convention, underlining in supranational adjudication what we all know in national constitutional arrangements: that serious engagement with human rights by legislatures is both critical to effective rights protection, and reflective of the roles and responsibilities of legislatures within national constitutional structures.

Rights are not only for courts.

This does not mean that there is a 'right' and a 'wrong' way to make law, or that the Convention requires or prefers one approach to parliamentary process over another. There is plenty of space for variation in practice across the Council of Europe without deviation from the central principle that legislatures are bound by the European Convention on Human Rights.

The Need for Robust National Processes

This brings me to the second suggestion I wish to make today: that the success of process-based review, and indeed of all the long-standing and more recently developed manifestations of subsidiarity, largely depends on the robustness of national processes. Like all meaningful expressions of respect and trust, subsidiarity rests on relationships and behaviours.

If, as I have already said, the new age of subsidiarity is an attempt to disperse the capacity to decide about rights more effectively across national and Council of Europe institutions, domestic institutions must be willing to be robust in carrying out their functions. By this I mean courts must engage thoroughly with the Convention and its jurisprudence, and that they must recognise and treat that as a binding limit to what the state may do; as the delineation between proportionate and disproportionate interferences with Convention rights.

In other words, the age of subsidiarity and the turn to process-based review recognises and reinforces the shared responsibility of national and international institutions for the Convention but it does not constitute a move away from the basic proposition that regardless of *who* decides, the Convention remains a hard limit on *what* can be decided. As a matter of international law, and (in almost all cases) of domestic law, legality requires compliance with the Convention.

It cannot, thus, be the case that the *mere* discussion of Convention law during parliamentary processes (even if lengthy and detailed), or performative engagement with Strasbourg case law in domestic courts, is sufficient to satisfy the aspiration towards subsidiarity that in principle underpins process-based review. Process-based review properly involves qualitative questions. To borrow from Eva

Brems, "a review of the quality of domestic process is best conceived as a review of domestic human rights scrutiny".[4] Was the European Convention engaged with accurately and in good faith? Did the outcome emerge from a process in which effective deliberation and consideration of proportionality was evident? Did the domestic court take due account of ECHR jurisprudence, explain its handling of that jurisprudence, and reason in accordance with the principles of adjudication laid down in Strasbourg case law? *And even then*, was the outcome broadly within the Margin of Appreciation to which states are entitled? Even if it was, does the application before this Court suggest that the time is ripe for it to revisit current understandings and principles?

As this suggests, the role of national courts is of real importance in ensuring shared development and application of the Convention and effective rights protection. That said, it cannot be the case that the Strasbourg Court would *never* closely scrutinise a matter that has already received robust national consideration, or even that it would never disagree with the national court's outcome following robust processes at the national level. Comity, shared responsibility, and subsidiarity do not demand absolute deference of this kind.

National authorities may sometimes misapply or misunderstand the law, they may reach an unreasonable conclusion as to proportionality, or their deliberations may reveal uncertainty about, inconsistency within, or unsuitability of existing Convention law. In some cases, of course, national authorities may even knowingly and expressly make decisions that are inconsistent with the Convention either because of disagreement with the Convention or because a source of law with supremacy within the domestic legal system could not be interpreted in a manner consistent with it. In such circumstances, the Court might apply strict scrutiny notwithstanding a Convention-engaged national process. To do so is not to reject process-based review, undermine subsidiarity, or show a lack of comity to national institutions and processes. Subsidiarity is not an injunction to the Court in Strasbourg to take its hands off the Convention, but rather to be hands on *where appropriate*. In other words, it distributes decision-making both negatively (away from Strasbourg) *and* positively (towards Strasbourg).

The Risks to the Court

This brings me to my third suggestion; that the turn towards process-based review brings some risks for the Court of which it ought to be aware.

Supporting the more meaningful embedding of the Convention in domestic systems in a spirit of shared responsibility is not the only purpose of, or reason for, the turn to process-based review and broader intensification of subsidiarity-enhancing practices.

While the Court no doubt has normative and organisational interests in national institutions taking more ownership over the Convention, it is also conscious of a radical challenge numerous states have posed for some years now. While I would characterise that as a challenge of sovereignty, others might deem it a challenge of accountability. In either reading, the question posed is the same: "who gets to decide whether 'we' can do what 'we' determine 'we' ought to do?". Or, put in a way that is, perhaps, more common in my adopted country, the United Kingdom, "why should a foreign court get to tell us what we can and cannot do?".

[4] Eva Brems, "The Logics of Procedural-Type Review by the European Court of Human Rights" in Gerards and Brems (ed), *Procedural Review in European Fundamental Rights Cases* (CUP).

The turn to enhanced subsidiarity, including process-based review, aligns in time with the intensification of states' expressions of concern about the Court and its 'expansion' of the Convention. Indeed, Andreas Follesdal and Geir Ulstein capture the moment very well when they write "One explanation [for the turn to subsidiarity] may be prominent political parties' general calls to renationalize authority from international institutions, further fueled (sic!) by perceptions that the ECHR protects bad people, criminals in particular, and hinders the defense of democracies under threat".[5]

Even when we are considering the potentially fruitful effects of the turn to process-based review, we must be cognisant of this context and the risks that it produces of intensified criticism from states. I say this not because the broader context ought to lead the Court to be more and more deferential to national authorities, but because it ought to harden the Court's resolve to step in *even where* national authorities have engaged with the Convention if it considers it necessary to do so.

I have already suggested situations in which I think such necessity can be established: where the national authorities have manifestly erred in their interpretation or application of the Convention, where they have expressly decided to act in contravention of the Convention, and where the case reveals a need for further development of Convention standards. This course has echoes of what was earlier proposed by the CDDH.

There is a real risk that, in a context of hostility towards the Court, process-based review could morph into a 'hands off' approach for states that do not consider themselves—and perhaps are not generally regarded as—countries 'in need of' close international supervision.[6] It strikes me as critical that this does not happen. As well as the obvious legitimacy-related challenge of treating different states differently based on generalised assumptions about the quality of their decision-making processes, thus exacerbating what Başak Çalı has called "variable geometry" in human rights protection,[7] I offer three arguments against excessive commitment to process-based review to close my remarks.

First, the age of subsidiarity cannot be an age of statis or sovereignty. For it to remain relevant, the Convention must continue to evolve progressively with the social, political, cultural, and legal evolution of our continent. If the age of subsidiarity and its embrace of process-based review results in a Court that takes too great a step back, the Convention's essential character as a dynamic instrument of international human rights law may be lost. No longer a living instrument, it would be an artefact. For it to fulfil its function, the Court must continue to be a Court. Moreover, it must continue to be *the superior authority* on the meaning of the Convention and the engine for its continued development. This is not inconsistent with subsidiarity. It is integral to it. It would mean the Court embracing its role vis-à-vis the Convention and stepping away from any (wrongly) perceived function as a court of fourth instance.

Second, the people of Europe need this Court to continue to undertake substantive review. We know that we cannot rely on domestic processes alone to secure effective protection of individuals'

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[5] Andreas Follesdal and Geir Ulstein, "The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?" *EHIL: Talk!* 22 February 2018. https://www.ejiltalk.org/the-draft-copenhagen-declaration-whose-responsibility-and-dialogue/

[6] Robert Spano has suggested closer supervision may still be required for states "that do not respect the rule of law…do not ensure the impartiality and independence of their judicial systems, oppress political opponents or mask prejudice and hostilities to-wards vulnerable groups or minorities". Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18 *Human Rights Law Review* 473, p. 493.

[7] Başak Çalı, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights in Oddný M Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in European Human Rights Protection: Rethinking Relations between the ECHR, EU and National Legal Orders* (Routledge 2016).

Convention rights. Parliamentary processes are not effectively representative and never have been, so even the most robust legislative process marginalises, excludes, ignores, or impugns. Populism is spreading across the Continent, putting law and law-making into the hands of actors often content to embrace and enact anti-constitutionalist commitments. Human rights are routinely demonised as for the criminal, the dangerous, and the woke. Prison populations are rising, police violence is widespread, discrimination and exclusion remain endemic, poverty and social exclusion continue to divide and limit us. War has come to Europe once more. If the Convention was to be "a beacon to those at the moment in totalitarian darkness" upon its foundation, the Court is a beacon of hope for millions of people still. For the work the European Court of Human Rights does is not only about the distribution of power between states and institutions. It is about the limitation of power for the benefit of individuals and the ability to hold states to account through application to this Court. Even recognising the need for pragmatism and to maintain and build legitimacy among states parties, we ought not to allow process to replace substance; comity to trump rights protection.

Third, taking too great a step back in the name of subsidiarity and process-based review would not satisfy the Court's sharpest critics in any case. Rather, it would be a false economy, with the Court retreating from substantive adjudication but remaining the subject of intense critique and attempted delegitimisation.

As I said earlier, for many the 'problem' with the Court is not really what it decides, how it decides, or how it develops the Convention. It is that it decides at all. It is that there is an external body that can tell states what they may and may not do. The most vociferous critics of the Court reject the proposition that a so-called 'foreign court' should have any role in informing or determining 'domestic' decisions, not only because of its alleged foreignness but also because of the counter-majoritarian nature of judicial decision-making. They devalue that counter-majoritarianism as central to human rights law and adjudication because it frustrates, slows down, or exposes the human rights harms produced by their preferred policies and laws. They criticise the Court because they cannot control it. And they continue to criticise it even when the Court exhibits changed behaviours, shows greater deference, and makes only very rare findings of violation against critics' home state. Unlike their domestic legislation (or in some cases their constitutions), states cannot simply change the Convention to make lawful the actions they wish to take. That is, understandably, frustrating. It is also of the essence of human rights law, which does and must limit states' actions and restrain them in their choices.

Alice Donald has described persistent political hostility to the Court in the UK despite increased subsidiarity and reduced findings of violation as a 'paradox'.[8] One might go a step further, and ask whether it reveals the potential trap of making increasing concessions to a state party whose appetite for sovereignty cannot be sated and has more to do with domestic political currents than with the arrangement of authority within the Council of Europe. Once we are forthright about that, we can see clearly that no amount of subsidiarity will satisfy such critics' concerns, for those concerns go to the very heart of the international system of supervision. We can thus temper the turn to process-based review and support the Court in continuing its work of substantive adjudication *even if* that adjudication results in adverse findings or requires us to revisit domestic political or legal decisions.

[8] Alice Donald, "Earning Deference from Strasbourg: Has the UK Got the Message?", U.K. Const. L. Blog (6th December 2022) https://ukconstitutionallaw.org/2022/12/06/alice-donald-earning-deference-from-strasbourg-has-the-uk-got-the-message/

Conclusion

The turn to process-based review in this new age of subsidiarity is, then, broadly to be welcomed, but we must be realistic about what it means and embrace it only to the extent that it does not undermine the Court and the Convention. If it is meaningfully to bolster subsidiarity it will operate as an instrument of dialogue, respect, and comity, empowering and enabling domestic courts, legislatures, and executives to engage more effectively and more deeply with the Convention, and the European Court of Human Rights to scrutinise and engage and still to interpret, evolve, and develop the Convention text.

This approach to process-based review will not silence all critics of the Court. Indeed, in some cases it may amplify them, especially if—as must be the case for the procedural turn to be taken seriously—the Court were to find that a national decision-making process was *not* adequately robust and did *not* attract significant deference, thus opening the Court up to accusations of disrespecting the national process.

To sound a cautionary note, then, there is an obvious risk that in trying to avoid any such outcome the Court would take the procedural turn too far, effectively turning itself into an administrative court, engaged simply with procedural matters and retreating from its constitutionalist capacity and proper function within the transnational ecosystem within which the Convention sits.[9] Were that to happen we would find ourselves in an age of nationalisation and abdication, rather than an age of subsidiarity.

[9] See further Eva Brems, "Procedural protection: an examination of procedural safeguards" in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013; CUP).