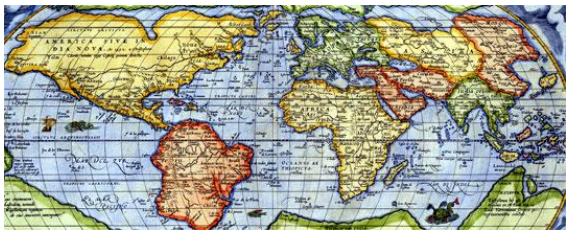

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"The Neutrality of International Law: Myth or Reality?"

Procedural-Type Review: A More Neutral Approach to Human Rights Protection by the European Court of Human Rights?

Leonie Huijbers

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Abstract:

The European Court of Human Rights appears to be increasingly applying procedural-type review. This means that the Court looks into the quality of the decision-making process of the national legislative, executive or judicial authority to determine whether there has been a violation of the European Convention on Human Rights. This paper addresses the questions whether and to what extent this procedural approach of the Court can be regarded as a more neutral approach towards the political choices of the European States, when compared to an approach where the Court looks into the substantive balance struck in the national authorities' decisions. For analysing the potential neutrality of procedural-type review, this paper develops a theoretical framework on the basis of Martti Koskenniemi's theory on the neutrality of international law. On the basis of this framework, it concludes that although procedural-type review as an abstract review method could be considered as a relatively neutral approach of the Strasbourg Court towards the political choices of States, in practice the approach loses much of its initial neutral potential.

Keywords: Procedural review; human rights; European Court of Human Rights; neutrality of international law; neutrality of interpretation techniques and review methods; Martti Koskenniemi

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1. Introduction

The European Court of Human Rights (hereinafter: the Strasbourg Court or the Court) is said to increasingly apply 'procedural-type review'.[1] This procedural approach entails the Court taking into account the quality of the decision-making process at the national level for determining whether the State has violated the European Convention on Human Rights (hereinafter: ECHR or

[1] See E. Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights', in: J. Gerards & E. Brems (eds.), *Procedural Review in European Fundamental Rights Cases* (Cambridge, Cambridge University Press 2017), pp. 17-39; P. Popelier, 'Evidence-Based Lawmaking: Influences, Obstacles and the Role of the European Court of Human Rights', in: Gerards & Brems (2017), pp. 79-94; J. Gerards, 'Procedural Review by the ECtHR – A Typology' in: Gerards & Brems (2017), pp. 127-160, A. Nussberger, 'Procedural Review by the ECtHR: View from the Court', in: Gerards & Brems (2017), pp. 161-176; O.M. Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance', 15 *International Journal of Constitutional Law* 2017 (1), pp. 9-35; P. Popelier & C. van de Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?', *30 Leiden Journal of International Law* 2017, pp. 5-23; M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments', *Human Rights Law Review* 2015, pp. 1-30; E. Brems & L. Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights', 35 *Human Rights Quarterly* 2013 (1), pp. 176-200 and P. Popelier & C. van de Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis', 9 *European Constitutional Law Review* 2013, pp. 230-262; and P. Popelier, 'The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights', in P. Popelier et. al. (eds.), *Role of Courts in a Context of Multilevel Governance* (Antwerp, Intersentia 2012), pp. 249-267.

the Convention)[2] or not.[3] It looks into the way legislation was enacted by the national legislator or the manner in which individual decisions of the national executive or judiciary were reached. In light of the debate on the neutrality of international law, and human rights law in particular, this paper raises the questions whether and to what extent this procedural approach of the Strasbourg Court can be considered as a neutral approach. To be more precise, it looks into the question whether this procedural approach is more neutral in relation to political choices of States than a substantive approach would be, by which the Court would focus on the content of those choices.

To answer these questions the paper starts with briefly outlining the impact of the case law of the Court on the political choices of States and the raised concerns relating to its neutrality (Section 2). The subsequent section develops a theoretical framework on the neutrality of human rights law and the supervision of it by courts in general, and the Strasbourg Court in particular (Section 3). The theory of Martti Koskenniemi serves as a starting point for developing this framework that will be the basis for analysing the neutrality of the Strasbourg Courts' procedural approach. Before conducting such an analysis, this paper first explains what procedural-type review exactly entails and outlines cases of the Strasbourg Court that illustrate the various applications of it (Section 4). The paper then goes on to analyse the neutrality of procedural-type review in relation to three aspects of this approach. Firstly, the abstract idea of procedural-type reviews, secondly, the procedural standards that the Strasbourg Court develops, and, lastly, the way the Court applies procedural-type review (Section 5). The paper concludes that although procedural-type review in theory might be considered as a more neutral approach of the Strasbourg Court towards the political choices of States, in practice the approach loses much of its initial neutral potential (Section 6). It should be noted at the outset, however, that this paper is by no means aims to suggest that procedural-type review should be applied structurally by courts in fundamental rights cases. In fact, whether procedural-type review is desirable in fundamental rights cases depends on a variety of elements, such as whether it provides sufficient individual human rights protection.[4] This paper merely aims to discuss the neutral potential of this procedural approach.

2. The Influence of the European Court of Human Rights and Issues of Neutrality

The European Court of Human Rights has the important task of supervising human rights protection in Europe. Since its establishment in 1959, it has delivered many authoritative judgments on the interpretation of Convention rights and it has been one of the most important institutions for ensuring the compliance with human rights in Europe.[5] Through its judgments the

2 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222.

3 Procedural-type review is more elaborately discussed in Section 4.

4 Many authors deal with some of the drawbacks of a procedural approach by the Court, see references *supra* note 1.

5 With regard to compliance with the Convention see S.C. Greer, *European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge, Cambridge University Press 2006), pp. 316-326 and D.J. Harris et. al., *Law of the European Convention on Human Rights* (3rd edition, Oxford, Oxford University Press 2014), pp. 34-35.

Court has had a significant impact on the development of the legal landscape in Europe.[6] Cases such as *Marckx v. Belgium*,[7] *A.T. v. Austria*,[8] and *Hornsby v. Greece*[9] are illustrative for how the Court has required the States to make legislative and political changes, sometimes even very radical ones.[10] Recently, for instance, in the *Oliari* case from 2015, the Strasbourg Court was asked to decide on the matter of same-sex marriage.[11] It concluded that Italy, the respondent State, had violated Article 8 ECHR (the right to respect the private and family life, home and correspondence), as it did not provide for any form of registered partnership for same-sex couples. Despite the fact that after this judgment Italy still had the possibility to choose whether this registered partnership would include only the option of legal civil union or also the institution of marriage, the judgment clearly challenged the political choice of Italy, which was to not formally recognise same-sex partnerships and required it to make legislative changes.[12]

From such cases it is clear that with its judgments the Court has limited the political choices of national authorities.[13] This relates not only to the political choices of the respondent State to a case, but also to the choices of other States in Europe. Even though the judgments of the Strasbourg Court formally only bind the parties to the case,[14] it can be said that its judgments have broader, case-transcending implications.[15] This follows from the general obligation the

6 See for the of the Court on policy changes of States in relation to LGBTI-rights can be found in L.R. Helfer & E. Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68 *International Organization* 2014 (1), pp. 77-110. See also the overview of some of the general measures adopted by the European States on the basis of Strasbourg Court's judgments in Council of Europe, *Practical Impact of the Council of Europe Monitoring Mechanisms in Improving Respect for Human Rights and the Rule of Law in Member States* (Council of Europe, Strasbourg 2014), at pp. 17-23.

7 ECtHR 13 June 1979, app. no. 6833/74, *Marckx v. Belgium*. Belgium had to change its legislation relating on children born out of wedlock, see ResDH (1988) 3.

8 ECtHR 21 March 2002, app. no. 32636/96, *A.T. v. Austria*. Austria adopted a new Media Act including the rule that during criminal proceedings initiated under that Act, the national court may only decide not to hold a public hearing if the person on trial has explicitly waived his right thereto, see CM/ResDH (2007) 76.

9 ECtHR 19 March 1997, app. no. 18357/91, *Hornsby v. Greece*. Greece made a constitutional reform that allowed for the compulsory execution of judgments against the national authorities (State or local) and legal entities of public law, as well as the obligation of executive bodies to comply with all judicial decisions and allowed for compulsory execution of judgment, see ResDH (2004) 81.

10 Practice has shown that States have, albeit at times reluctantly, largely implemented these judgments of the Strasbourg Court see also Council of Europe (2014), *supra* 6, pp. 17-23.

11 ECtHR 21 July 2015, app. nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*.

12 See also G. Zago, 'Oliari and Others v. Italy: A Stepping Stone Towards Fully Legal Recognition of Same-Sex Relationships in Europe' (Strasbourg Observers, 16 September 2015).

13 Although the judgments of the Strasbourg Court do not necessarily have to be regarded as political in itself, within the theory of Koskenniemi the judgments of the Strasbourg Court are clearly political. See section 0.

14 Article 46, para. 1, ECHR holds that '[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

15 The European Court of Human Rights has held that its 'judgments in fact serve not only to decide those cases brought before the Court, but more generally, to elucidate, safeguard and develop rules instituted by the Convention, thereby contributing to the observance by States of the engagements undertaken by them as Contracting Parties', in ECtHR 18 January 1978, app. no. 5310/71, *Ireland v. United Kingdom*, para. 154. In a later case the Court has added that besides individual relief, 'its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence

European States have under Article 1 ECHR, which requires States to 'secure' the rights and freedoms guaranteed in the Convention, and the fact that the Strasbourg Court generally interprets Convention rights in a coherent and consistent manner. The impact of a judgment of the Strasbourg Court extends therefore beyond the case and the Court's interpretations have a catalyst function of Convention-proofing the entire set of European legal systems.[16] Such is, for example clear, from the legislative changes that the Netherlands made as a response to the *Marckx v. Belgium* case, notwithstanding the fact that the Court's findings in that case were directed at the former Belgium legislation on children born out of wedlock and did not formally bind the Dutch authorities.[17]

In ensuring the effectiveness of the Convention system the acceptance of the authority of the Strasbourg Court is of vital importance.[18] This acceptance can be said to be dependent, at least partially, on the perceived neutrality of the Strasbourg Court and its judgments.[19] Neutrality of international law, especially international human rights law, is generally considered to be desirable for the universal acceptance of these legal norms.[20] In that regard also the Strasbourg Court is expected to carry out its task of ensuring effective human rights protection within a socially and morally diverse Europe, in a neutral and impartial manner.[21] To ensure this neutrality, the Strasbourg Court ought to refrain from imposing its own views on 'the best way to live'[22] or 'the common good'[23], instead it should apply the Convention in an objective manner. In

throughout the community of Convention States', ECtHR 24 July 2003, app. no. 40016/98, *Karner v. Austria*, para. 26. See also for a discussion of the *erga omnes* effect of the Strasbourg Court's judgments O.M. Arnardóttir, 'Res Interpretata, Erga Omnes-Effect, and the Role of the Margin of appreciation in Giving Domestic Effect to Judgments of the ECtHR', forthcoming and S. Besson, 'The *Erga Omnes* Effect of Judgments of the European Court of Human Rights – What's in a Name?', in: S. Besson (ed.), *The European Court of Human Rights After Protocol 14 – First Assessment and Perspectives* (Zurich, Schulthess 2011), pp. 125-175.

16 Harris et. al (2014), *supra* 5, at pp. 34-35.

17 B.E. Reinhartz, 'Recent Changes in the Law of Succession in the Netherlands: On the Road Towards a European Law of Succession?', in: J.H.M. van Erp & L.P.W. van Vliet (eds.), *Netherlands Reports to the Seventeenth International Congress of Comparative Law* (Antwerp, Intersentia 2006), pp. 59-81, at p. 73.

18 See on courts in general the theory of M. Weber, *Economy and Society, Volume 1* (ed. G. Roth & C. Wittich, University of California Press, Berkeley 2013 (1978)), pp. 212-215. In relation to the European Court of Human Rights see a discussion in T. Zwart, 'More Human Rights Than Courts: Why the Legitimacy of the European Court of Human Rights Is in Need of Repair and How It Can Be Done', in: S. Flogaitis, T. Zwart & J. Fraser (eds.), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strengths* (Cheltenham, Edward Elgar 2013), pp. 71-95.

19 D.M. Kahan, 'Neutral Principles, Motivated Cognition and Some Problems from Constitutional Law', 125 *Harvard Law Review* 2011, pp. 1-77, at p. 6.

20 P. Weil, 'Towards Relative Normativity in International Law', 77 *American Journal of International Law* 1983, pp. 413-422, at p. 420.

21 It is of 'vital importance' that the recognition and enforcement of human rights is entrusted to courts that can be considered as 'impartial, efficient and reliable', see J. Raz, 'Human Rights in the Emerging World Order', 31 *Transnational Legal Theory* 2010 (1), pp. 31-47, at p. 43. In any case courts need to be perceived as impartial, objective or neutral see e.g. Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford, Oxford University Press 2014), at p. 98. In a similar vein, MacCormick explains that judges need to present themselves as impartial and objectives, as they are expected to be such within the political tradition, see N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Oxford University Press 2003 [1978]), at p. 17.

22 Kahan (2011), *supra* 19, at p. 4.

other words, if human rights are considered to be universal and affirm the worthiness of all human beings, any subjective or biased interpretation by the Court would be at odds with this idea.[24]

Of course, what an objective and unbiased interpretation means is open for debate. Therefore it is unsurprising that the neutrality of the Strasbourg Court is highly contested. In relation to particular judgments of the Court remarks have been made that its interpretations go beyond its attributed task. In relation to the cases concerning prisoner's voting rights in the United Kingdom, for instance, it was argued that the Court has overstepped its role by imposing the obligation on States to allow prisoners to vote.[25] In a similar vein, the Court was held to be disregarding the Christian traditions and identity of European States by the Chamber judgment in the *Lautsi* case.[26] In that case the Chamber found that Italy had violated the Convention by the presence of crucifixes in classrooms of public schools. This judgment was met with fierce criticism as the Chamber was held to impose its subjective view on secularization on States.[27] This criticism might have been an important reason for the Grand Chamber to overturn this judgment.[28]

The Court's neutrality is not only contested with regard to one particular judgment or set of judgments, but there has also been structural criticism on its functioning more in general.[29] The Court has been criticised for interfering too much with the national affairs of States, for instance by imposing positive obligations on them and by its (rigorous) proportionality review of national authorities' decisions.[30] From that perspective the Strasbourg Court is regarded as imposing its own particular perception of human rights and remaining insufficiently neutral towards the internal political choices of States. Arguably, such claims are at the core of the adoption of

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23 P.G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *American Journal of International Law* 2003 (1), pp. 38-79, at pp. 67-68.

24 Weil (1983), *supra* 20, at p. 420. Concerning the notion of human dignity, see the preamble and Article 1 of the Universal Declaration of Human Rights and its discussion in Raz (2010), *supra* 21, at pp. 41-42.

25 D. Davis, 'Britain Must Defy the ECtHR on Prisoner Voting as Strasbourg is Exceeding Its Authority', in: S. Flogaitis et. al. (eds.), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Cheltenham, Edward Elgar 2013), pp. 65-70.

26 ECtHR 3 November 2009, app. no. 30814/06, *Lautsi v. Italy*.

27 For a discussion of the criticism see e.g. D. McGoldrick, 'Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom?', 11 *Human Rights Law Review* 2011, pp. 470-475 and G. Itzcovich, 'One, None and One Hundred Thousand Margin of Appreciations: The *Lautsi* Case', 13 *Human Rights Law Review* 2013, p. 290.

28 ECtHR [GC] 18 March 2011, app. no. 30814/06, *Lautsi v. Italy*, paras. 73-77.

29 Although, according to an evaluation of analyses of a variety of European States, the structural nature of the criticism of the Strasbourg Court, in the media coverage as well as its prominence on the agenda of the Government, appears in 2015 to be unique to the United Kingdom. S. Lambrecht, 'Assessing the Existence of Criticism of the European Court of Hum Rights', in: P. Popelier, S. Lambrecht & K. Lemmens (eds.), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU level* (Intersentia, Cambridge 2016), pp. 505-553, at pp. 510-514.

30 See amongst others the speech of Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture (19 March 2009) and Davis (2013), *supra* 25. For a discussion of the Dutch criticism concerning the Strasbourg Court see B.M. Oomen, 'A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands', 20 *International Journal of Human Rights* 2016 (3), pp. 407-425.

Protocol 15 to the Convention that *inter alia* codifies the principle of subsidiarity and the margin of appreciation doctrine.[31] Also after the adoption of this Protocol, structural criticism of the Court continues to persist.[32] Such is clear, for instance, from the Russian amendment in 2015 that enables the Russian Constitutional Court to declare judgments of the Strasbourg Court unconstitutional and therefore "impossible to implement".[33]

The Strasbourg Court is well aware of the existence of national criticism and through the years it has developed interpretation techniques and review methods that ostensibly can help to ensure its neutrality. The European consensus doctrine, for example, might be considered as an interpretation technique that helps the Court to ensure its objectivity in interpreting Convention rights.[34] This doctrine is used by the Court to support new interpretations of the Convention or to develop new standards that are in line with an emerging convergence of norms at the level of the European States. Arguably, also the margin of appreciation doctrine is a method of review that could help the Court ensures its neutrality.[35] This doctrine entails the level of discretion that the Strasbourg Court grants to national authorities to make their own assessment and decisions, whilst at the same time maintaining a supervisory function. The Court therefore, instead of imposing its own particular view on States, allows for some differentiation between national authorities. This approach could possibly be considered as a more neutral approach towards the political choices of States.

Certain interpretation techniques and review methods adopted by the Strasbourg Court might, arguably, have a positive effect on its neutrality or appearance of neutrality. This paper, however, does not venture into a discussion of the neutrality of various interpretation techniques and review methods of the Strasbourg Court; instead the focus is on one particular review method of the Court: procedural-type review.[36] Scholars have noted a 'procedural trend' in the case law of the Strasbourg Court,[37] referring to its increasing focus on the quality and diligence of the decision-

31 See R. Spano, 'Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity', *Human Rights Law Review* 2014, pp. 1-16.

32 It has been argued that, because of the fact that the reforms that Protocols 15 and 16 entail are only a weakened forms of the dramatic changes proposed in earlier drafts by *inter alia* the United Kingdom, these reforms are unlikely to tone down the critics of the Strasbourg Court. See P. Popelier, S. Lambrecht & K. Lemmens, 'Introduction: Purpose and Structure, Categorisation of States and Hypotheses', in: Popelier, Lambrecht & Lemmens (2016), *supra* 29, pp. 3-22, at pp. 3-4.

33 Federal Law of the Russian Federation no. 7-KFZ (CDL-REF(2016)006), amending the Federal Constitutional Law no. 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation (CDL-REF(2016)007). The law entered into force on 15 December 2015. The Russian Constitutional Court has already used its power in relation to the change of constitutional provisions on prisoners' voting rights (ECtHR 4 July 2013, app. nos. 1157/04 and 15162/05, *Anchugov and Gladkov v. Russia*). For a discussion in light of the compatibility of these amendments with the European Convention on Human Rights see the Final Opinion of the Council of Europe's Commission for Democracy through Law (Venice Commission), *Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court*, CDL-AD(2016)016 (Strasbourg 13 June 2016).

34 K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights, *Public Law* 2011, pp. 534-553.

35 Carozza (2003), *supra* 23, at pp. 67-68.

36 This is part of the dissertation of the author on procedural review in fundamental rights cases, expected in 2019.

37 See literature mentioned *supra* 1. This trend is not limited to the Strasbourg Court alone, but is also visible in the case law of the Court of Justice of the European Union and constitutional courts in

making *process*.[38] As this trend is very recent, or at least it has only been noted recently, there is limited literature on the added value of this procedural approach,[39] and a discussion on the potential neutrality-enhancing aspects of this approach is lacking. Assumptions of the neutrality of procedural-type review have, however, been made. It is argued that procedural-type review can help the Strasbourg Court to find a proper balance between, on the one hand, effective judicial supervision and, on the other hand, deference to the political choices of States.[40] The link with neutrality is then easily made, as the Court does not impose substantive values on national authorities in a procedural approach, since it does not focus on the weight States have given to certain interests by a particular decision.[41] Whether the assumption of neutrality of procedural-type review can be sustained, is addressed in Section 0.

3. Neutrality and International Human Rights Law

Discussions on the neutrality of international law have been longstanding and continue to persist. The concept of neutrality has been defined in constitutional law 'as lacking the analytical cohesion or power necessary to exclude reliance on contentious values in constitutional decision-making'.[42] A discussion on the neutrality of interpretation techniques or review methods is therefore a controversial one, as there is neither a commonly accepted meaning of 'neutrality' nor a generally endorsed theoretical perspective on how to assess such techniques and methods. For the purposes of this paper, neutrality relates to the impartiality of the Strasbourg Court to the internal political and social choices made by the national authorities of the European States. In other words, it concerns the Court's substantive neutrality, meaning that it respects the diversity of the European States, whilst ensuring a minimum level of human rights protection. In this context the notion of neutrality is furthermore not used to refer to a "binary logic" – the European Court of Human Rights deals with cases in a neutral, objective and impartial manner or not – but rather to a continuum of neutral adjudication, ranging from reasoning reflecting more objectively

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Europe. With regard to the Court of Justice of the European Union, see M. Beijer, 'Procedural Fundamental Rights Review by the Court of Justice of the European Union', in: Gerards & Brems (2017), *supra* 1; D. Harvey, 'Towards Process-Oriented Proportionality Review in the European Union', *European Public Law* (2016), pp. 93-12; and, K. Lenaerts, 'The European Court of Justice and Process-Oriented Review', College of Europe Research Paper in Law 01/2012, pp. 1-19. Concerning the Belgium and German Constitutional Courts see Popelier & Heyning (2013), *supra* 1, and K. Messerschmidt, 'The Race to Rationality Review and the Score of the German Federal Constitutional Court', 6 *Legisprudence* 2012, pp. 347-378.

38 What procedural-type review exactly entails is discussed in Section 4.

39 For some discussions on the possible value of procedural review in the case law of the European Court of Human Rights, see Brems (2017), *supra* 1; A. Sathanapally, 'The Modest Promise of 'Procedural Review', in: Brems & Gerards (2017), *supra* 1, at pp. 40-76.

40 See Sathanapally (2017), *supra* 39; Popelier (2012), *supra* 1, at pp. 251-254 and J.H. Gerards, 'The Prism of Fundamental Rights', 8 *European Constitutional Law Review* 2012, pp. 173-202, at pp. 197-198.

41 See for example the discussion of the procedural approach taken by the ECtHR in relation to abortion cases, D. Fenwick, '"Abortion Jurisprudence" at Strasbourg: Deferential, Avoidant and Normatively Neutral?', 34 *Legal Studies* 2014 (2), at pp. 214-241.

42 Kahan (2011), *supra* 19, at p. 9.

endorsed principles to very subjective reasoning.[43] Therefore, the questions addressed in this paper are relative ones; whether and to what extent procedural approach of the Strasbourg Court can indeed be considered as a *more* neutral approach towards the political choices of States, in comparison with a substantive-type approach.

To assess the neutrality of the Strasbourg Court's procedural approach, a theoretical framework is developed that builds on the theory of Martti Koskenniemi on international law. Koskenniemi regards international law and the application of it by international and national courts as inherently political, and thus absent of neutrality. His neutrality-critical perspective is taken as a starting point as it is still a leading, though not uncontested, theory and as it appears to fit well with the growing criticism the Court is facing – its authority is questioned by politicians, national courts, applicants and the general public as a whole.[44] A critical theory on the neutrality of courts' protection of human rights therefore reflects these existing sentiments in Europe,[45] and allows the subsequent assessment of the neutrality of procedural-type review to match the current European fundamental rights landscape.

This Section addresses the concept of neutrality in relation to the human rights language in international treaties (Section 0), the interpretation of these rights by courts (Section 0), and the application of the Convention by of the European Court of Human Rights (Section 0).

3.1 Neutrality of international human rights language

Koskenniemi's theory starts on the basis of the inevitable incoherence of existing theories on international law. He holds that these theories are either based on ideas of a just international legal order (theories of justice) or on the consent of States (rule-based theories). Whilst the first kind of theories are normative per se, the latter are suggested to be safeguarding the neutrality of international law as it concerns an originalist understanding of the law. As Koskenniemi argues, these theories are, however, inherently inconsistent as they both rely on premises of the other theory. A rule-based approach ensures the connection to what really happens in the international legal order (concreteness), whilst the justice approach puts forward reasons for States to conform to the rules of the international legal order (normativity).[46] At the same time these theories are incommensurable as 'the more normative an idea is, the less concrete it is, and vice versa'.[47] Against this background, Koskenniemi concludes that the reality of international law cannot be captured with these legal theories; instead he puts forward a theory that describes international

43 See H.P. Glenn, 'A Concept of Legal Tradition', 34 *Queen's Law Journal* 2008, pp. 427-455.

44 Council of Europe's Steering Committee for Human Rights (CCDH), *CDDH Report on the Longer-Term Future of the System of the European Convention on Human Rights*, CDDH(2015)R84 Addendum I.

45 Shortly addressed in Section 2.

46 M. Koskenniemi, 'The Politics of International Law', 1 *European Journal of International Law* 1990, pp. 4-32, pp. 7-9.

47 M. Koskenniemi, 'International Law in the World of Ideas', in: J. Crawford et. al. (eds.), *The Cambridge Companion to International Law* (Cambridge, Cambridge University Press 2012), pp. 47-63, at p. 61.

law as purely political.[48] It is political because it concerns rules agreed upon by States for their own normative reasons. Therefore the rules of international law are necessarily minimalist or 'indeterminate',[49] as they reflect the reality of international agreement (concreteness), while at the same time being acceptable to different political perspectives of States (diversity of normativity).

Although criticism can certainly be had on Koskenniemi's theory and his interpretation of the other theories on international law,[50] his conclusion that international agreements are purely political is a valuable insight. From this conclusion it follows that the many international and regional instruments of human rights law are to be considered as political agreements of States. International human rights law represent thus what might be called an international 'reflective equilibrium',[51] meaning that it expresses States' shared commitment to certain principles whilst they have different views on why these principles ought to be protected and what these principles exactly entail. A telling example of this is the notion of 'human dignity', which is generally regarded as the foundational principle of human rights – or at least one of the foundational principles. Michael Ignatieff and Christopher McCrudden have convincingly argued that States agreed on the dignity of human beings as foundation of the human rights enterprise, precisely because their very diverse and often conflicting perspectives could coincide in this highly contingent notion of human dignity.[52]

If international law is political, this is also true for the rights laid down in the various human rights instruments. This means that human rights are not value-neutral, rather their wording can be considered to represent shared commitments. What follows is that human rights, in line with the theory of Koskenniemi, can be considered as a widely shared, or even universal, language between political entities or States.[53] This language relates to the values that these entities commit themselves to, regardless of what reasons they have for holding such values and irrespective of their various interpretations of what they entail. Human rights are therefore 'an effect of politics' as they 'do not exist as such – "fact-like" – outside the structures of political deliberation', instead they are giving meaning through the policies of these political entities.[54] Human rights as abstract notions can thus serve as, what in this paper is called, a *political baseline of neutralit*y, which

48 Koskenniemi (1990), *supra* 46.

49 Koskenniemi (1990), *supra* 46.

50 See for example P.-M. Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi', 16 *European Journal of International Law* 2005 (1), pp. 131-137 and O. Gerstenberg, 'What International Law Should (Not) Become. A Comment on Koskenniemi', 16 *European Journal of International Law* 2005 (1), pp. 125-130.

51 The notion of reflective equilibrium stems from the work of John Rawls see J. Rawls, *A Theory of Justice* (Cambridge, Harvard University Press 1971), at p. 20.

52 According to Ignatieff there was even a 'deliberate silence' as to the substantive justifications for 'why human rights are universal' in M. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, Princeton University Press 2001), at p. 78. See also C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', 19 *European Journal of International Law* 2008 (4), pp. 655-724.

53 Although it is possibly just a European shared language, see M. Koskenniemi, 'Human Rights, Politics and Love', in: M. Koskenniemi, *The Politics of International Law* (Oxford, Hart Publishing 2011), pp. 153-167, at pp. 161-162.

54 Koskenniemi (2011), *supra* 53, at p. 160 and M. Koskenniemi, 'The Effect of Rights on Political Culture', in: M. Koskenniemi (2011), *The Politics of International Law* (Oxford, Hart Publishing 2011), pp. 133-152, at p. 148 (´human rights not only determine and limit policies, but [also] that policies are needed to give meaning, applicability and limits to rights').

refers to the politically endorsed commitments of States.[55] In other words, the neutrality of human rights concerns the abstract notions that are part of a universal political language, despite the diverse ideological, religious, political, philosophical or cultural reasons entities have for supporting these rights.

3.2 Neutral protection of human rights by courts

International human rights law is often considered to be the domain of international law with the most advanced supervision mechanisms. International human rights courts have had an important role in guaranteeing the effective protection of human rights. It is therefore of "vital importance" for such courts that they are considered to be "impartial, efficient and reliable institutions".[56] Institutions like the European Court of Human Rights are dependent on the political will of States to comply with their judgments and are lost without a generally perceived legitimacy.[57] Whilst States can be said to have committed themselves to human rights, this commitment should not be considered as a stable agreement. Instead, "[i]t is liable to be upset by further examination of the conditions which should be imposed […] and by particular cases which may lead us to revise our judgments".[58] Even though human rights might be considered as a "neutral" language, it is so only in abstraction. In order for these rights to have any influence on international relations and State behaviour, however, they necessarily need to be interpreted and applied to concrete cases.[59]

Human rights courts have therefore a complex task as they ought to supervise compliance of States with their human rights agreements and thus need to interpret and apply these indeterminate rights. The shift from neutral indeterminate[60] rules on paper to their application in practice necessarily entails a move away from neutrality towards normativity.[61] In the words of Koskenniemi, "legitimizing or criticizing State behaviour is not a matter of applying formally neutral rules but depends on what one regards as politically right, or just".[62] Using human rights norms in concrete cases, inevitably means that arguments can be raised as to the application of the right (did the State bind itself to the rule? Can the State reject its previous acceptance of the rule?), as well as to the interpretation of it (which value does this right support? Or, in case of

55 Koskenniemi (2011), *supra* 54, at p. 134 ('[t]he usefulness of rights lies in their acting as "intermediate stage" principles around which some communal values and individual interests can be organised').

56 Raz (2010), *supra* 21, at p. 43.

57 For the relation between neutrality and perceived legitimacy, see also Kahan (2011), *supra* 19, at p. 6.

58 As noted by Rawls on what he calls a 'reflective equilibrium', see Rawls (1971), *supra* 51, at pp. 20-21.

59 Koskenniemi (2011), *supra note* 53, at p. 160 ('rights depend on their meaning and force on the presence of institutions, histories and cultures, of people thinking in broadly similar ways about matters social and political').

60 As Koskenniemi holds, the human rights language, 'like any legal vocabulary, is intrinsically open-ended, what gets read into it (or out of it) is a matter of subtle interpretative strategy' in M. Koskenniemi, 'The Politics of International Law – 20 Years Later', 8 *European Journal of International Law* 2009 (1), pp. 7-19, at p. 9.

61 As framed by Raz 'to make practical sense of the right [is] to acknowledge both its universality and its sensitivity to cultural variations', in Raz (2010), *supra* 21, at p. 46.

62 Koskenniemi (1990), *supra* 46, at p. 31.

conflict of values, which value should prevail?). Answering these questions necessitates a decision between different normative perspectives. The interpretation and application of human rights by international and national courts is therefore never neutral, as "political choices" are being made between the opposing arguments of parties.[63] In other words, an international human rights court that decides between different and reasonable views, inherently endorses one perspective over the other – therewith the decision loses its neutrality. On that basis Koskenniemi concludes that human rights courts do not play a neutral or impartial role, but act as institutions that make "political choices".

This does not mean that human rights language should be abandoned; rather a balance should be sought between the use of this vocabulary and 'its hegemonic tendencies'.[64] As Koskenniemi holds, "[h]owever universal the terms in which international law is invoked, it never appears as an autonomous and stable set of demands over a political reality".[65] What matters is whose view is taken. As this perspective is merely *one* interpretation of human rights, pretending that it would be *the* universal interpretation would therefore risk on being authoritarian or apologetic.[66] Accordingly, in the words of Koskenniemi, we should "move from an uncritical postulation of legal rights into a political culture in which delegated authority would be actively controlled by a condition of civic public-mindedness in the community at large".[67] Awareness of the politics in the interpretation and application of human rights language is thus crucial in order to prevent hegemonic tendencies.

3.3 Neutrality and the European Court of Human Rights

Applying the theory of Koskenniemi to the European Court of Human Rights has a significant impact on the perception of neutrality of the Court's case law. The Convention reflects the shared political commitment of European States to the rights they want to ensure, protect and respect. In deciding these cases on the basis of this Convention, the Strasbourg Court, however, goes beyond merely reflecting these commitments as it sets priorities amongst "conflicting conceptions of political value and scarce resources are distributed between contending social groups".[68] The Strasbourg judges are imposing their view on the States, rather than "doing nothing more contentious than doing their best to apply, in a fair, impartial and neutral manner, standards that originate from an entirely legitimate source, namely, the community's own fundamental moral beliefs and commitments".[69] The Strasbourg Court determines how the Convention rights should

63 Koskenniemi (1990), *supra* 46, at p. 31.

64 See also Carozza (2003), *supra* 23, at p. 58 with a reference to note 118.

65 M. Koskenniemi, 'International Law and Hegemony: A Reconfiguration', *Cambridge Review of International Law* 2004, pp. 1-26, at p. 3.

66 Koskenniemi (2004), *supra* **Error! Bookmark not defined.**, at p. 4 and M. Koskenniemi (2011), *supra* 53, at p. 163-164.

67 Koskenniemi (2011), *supra* 54, at pp. 133-134.

68 Koskenniemi (2011), *supra* 54, at p. 133 and pp. 145-147: "[a]ny balancing will involve broad cultural and political assumptions about whether the good society should prefer the values of public order or those of rehabilitation" at p. 144.

69 W. Waluchow, 'On the Neutrality of Charter Reasoning', in: J.F. Beltrán, J.J. Moreso, D.M. Papayannis, *Neutrality and Theory of Law* (Dordrecht, Springer 2013), pp. 203-224, at p. 208.

be interpreted and therewith limits the different interpretations States may make. By applying these rights to concrete cases, the Court even limits the political choices that national authorities may make, and at times even determines what political choices should be made.

From the perspective of the theory of Koskenniemi, the Strasbourg Court's work is thus inherently political. This is also true for its use of certain interpretation techniques and review methods to decide on cases. Every choice of the Court can be considered as a 'strategic choice' to ensure its decision-making position with regard to the national authorities of the European States.[70] The Court's practice of adjudication represents, in the view of Koskenniemi, the political struggle between different national and international institutions on determining who has the final authority to define, interpret and apply human rights.[71]

Nevertheless, stepping away from a binary logic, this does not mean that the Court's interpretation techniques and review methods cannot be more neutral or less neutral towards the European States.[72] The Court's recourse to certain approaches does not have to be fully normative or decisive towards the political choices the national authorities make. Koskenniemi held that we need "to develop politics in which deviating conceptions of the good – whether or not expressed in rights language – can be debated and realised".[73] He refers in this regard to the margin of appreciation-doctrine, which he holds to be "a healthy admission that there is always interpretative indeterminacy in the construction of particular rights-claims and often it is local courts, and not the Strasbourg organs, that are most competent to police the matter".[74] It appears that the more concrete the Strasbourg Court interprets rights and related principles, the more normative or hegemonic it is towards the European States, whilst when the Court employs approaches that are flexible and responsive to the context and institutional structures of the national level, it could be considered as relatively neutral.[75] To achieve this neutrality the Court should thus take a more context-related understanding of the diverse political choices of States.[76]

4. The procedural turn in the case law of the European Court of Human Rights

In the case law of the European Court of Human Rights, it is possible to discern interpretation techniques and review methods that have helped it to maintain a more open-ended and therewith an allegedly more neutral protection of Convention rights. In addition to the often mentioned

70 Koskenniemi (2009), *supra* 60, at p. 12 and Koskenniemi (2011), *supra* 54, at p. 150.

71 Koskenniemi (2011), *supra* 54, at p. 150.

72 This paper thus focuses on the neutrality of procedural-type review in relation to the political choices of States. This does not mean that in relation to individual perspectives, this approach is still inherently normative. However, since States have committed themselves to certain human rights norms, a method for holding them to their commitments can be to a more or lesser degree be considered as neutral.

73 Koskenniemi (2011), *supra* 54, at p. 152: "the question would be […] to develop politics in which deviating conceptions of the good – whether or not expressed in rights language – can be debated and realised without having to assume that they are taken seriously only if they can lay claim to an a-political absoluteness that is connoted by rights as trumps".

74 Koskenniemi (2011), *supra* 54, at pp. 147-148.

75 Koskenniemi (2011), *supra* 53, at p. 167.

76 Koskenniemi (2011), *supra* 54, at pp. 150-151.

subsidiarity principle and the margin of appreciation doctrine, in the recent years a "procedural turn" is visible in the case law of the Strasbourg Court.[77] With this approach the Court shifts the focus in its judicial reasoning to the decision-making process instead of, or in addition, to the substantive legislative, administrative or judicial outcome of a decision. Arguably, the turn towards procedural-type review by the Strasbourg Court could be considered as a move towards a more neutral approach in human rights adjudication. Before being able to address whether and to what extent this procedural approach can indeed be considered as a more neutral approach to the political choices of States than a substantive approach, this Section briefly explains what procedural-type review entails and illustrates how it is applied by the Strasbourg Court by referring to some of the relevant procedural cases.[78]

4.1 Procedural-type review

The concept of procedural-type review is rather elusive. Scholars have referred to it variously as "process-oriented proportionality review"[79], "responsible domestic courts doctrine"[80], "structural due process"[81], and "semi-procedural review"[82]. Their interpretations have also focussed on different elements, such as the enactment of legislation[83] or the judicial decision-making process.[84] Yet, whatever their diversity in terminology and focus, these interpretations have two things in common. Firstly, they all refer to a form of judicial reasoning that relates to the quality, fairness or carefulness of the decision-making processes of authorities. Secondly, the various interpretations distinguish procedural-type review from substantive-type review, with which they generally contrast it. Substantive-type review is well-known and entails a form of judicial review in which courts normatively engage in the outcome of a decision, most often through a proportionality assessment or balancing test.[85] Procedural-type review, by contrast, concerns

77 See for references *supra* 1.

78 For an case law analysis mapping the use of procedural-type review by the Strasbourg Court Gerards (2017), *supra* 1 and Eva Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read Into Substantive Convention Rights', in: E. Brems & J. Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge, Cambridge University Press 2013), pp. 137-161.

79 Harvey (2016), *supra* 37.

80 B. Çali, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine and the European Court of Human Rights', in: O.M. Arnardóttir & A. Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations Between the ECHR, EU and National Legal Orders* (Routledge, Abingdon 2016), pp. 144-160.

81 L.H. Tribe, 'Structural Due Process', 10 *Harvard Civil Rights and Civil Liberties Law Review* 1975 (2), pp. 269-321, at p. 269.

82 I. Bar-Siman-Tov, 'Semiprocedural Judicial Review', 6 *Legisprudence* 2012 (3), pp. 271-300 and I. Bar-Siman-Tov, 'The Puzzling Resistance to Judicial Review of the Legislative Process', 91 *Boston University Law Review* 2011, pp. 1915-1974, at pp. 1916 and 1921.

83 I. Bar-Siman-Tov (2011), *supra* 82.

84 B. Çali (2016), *supra* 80.

85 O.M. Arnardóttir, 'Organised Retreat From Substantive to Procedural Review', 5 *ESIL Conference Paper Series* 2015 (No. 4), p. 4; D.T. Coenen, 'A Constitution of Collaboration: Protecting Fundamental Values With Second-Look Rules of Interbranch Dialogue', 42 *William & Mary Law Review* 2001, pp. 1575-1870, pp. 1596-1597 and Sathanapally, supra 39.

judicial review of the enactment of legislation and the manner in which administrative authorities or judiciaries reach their decisions.

This procedural-type review can be applied in judgments in a variety of ways, or "modalities". A first category of modalities of procedural-type review concerns the way procedural reasoning is used. If the court determines the finding of a violation (or not violation) of a right on the basis of the quality of the process, it concerns procedural-type review that is outcome-oriented.[86] Another use of procedural-type review is one that is deference-oriented, in which the intensity of review or the discretion left to the decision-making authority is determined on the basis of procedural reasoning.[87] Lastly, procedural-type review can also take the form of a procedural argument.[88] Procedural reasoning is then just one argument amidst other non-procedural arguments. In this modality, the value attached to the procedural argument varies from case to case; sometimes the procedural argument is decisive, for example, to find a decision proportionate, at other times, it is merely a supporting argument next to other non-procedural arguments to reach that same conclusion. [89]

As well as a variety of uses, procedural-type review can have various consequences. This second category of modalities of procedural-type review relates to the various specific and general consequences a court can draw on the basis of procedural reasoning. Procedural-type review has specific consequences for the particular case at hand. In concrete cases, courts may positively or negatively validate the fairness, carefulness, adequateness, or quality of decision-making procedures. If a court holds that the decision-making process was of a poor quality, it can find a violation of a right (negative outcome-oriented procedural-type review); or, if it holds that the decision-making process was particularly meticulous, the quality of the process can be a decisive argument for it to find that the decision was proportionate (positive argumentation-oriented procedural-type review).[90] At the same time, the application of procedural-type review can have more general consequences that transcend the particular case.[91] These general consequences relate to the procedural standards set by a court and entail requirements for decision-making authorities such as proportionality assessments by national courts, human rights considerations in the process of decision-making, and deliberations on the implications of policies. For example, the latter standard – deliberations on the implications of policies – might require the legislator to make an economic and cultural impact assessment before adopting a certain law or policy. This standard relates not only to this specific policy by this specific legislator, but also to future policies, and possibly even to other legislators.

4.2 The European Court of Human Rights' practice of procedural-type review

These various modalities of procedural-type review can be distinguished in the case law of the European Court of Human Rights. As Eva Brems shows, the outcome-oriented approach is used not only by the Court for finding violations of procedural rights, such as the right to a fair trial

86 See also Brems (2017), *supra* 1.
87 Popelier (2012), *supra* 1, at pp. 249-267.
88 Gerards (forthcoming 2017), *supra* 1, at pp. 144-148.
89 Gerards (forthcoming 2017), *supra* 1, at p. 149.
90 See also Gerards (2017), *supra* 1.
91 Brems (2013), supra 78.

(Article 6 ECHR), but also for substantive rights when 'fundamental procedural flaws'[92] in the decision-making procedure have prevented the Court from making a careful and systematic assessment on the substance of the case.[93] In *A.K.*, for example, the Strasbourg Court considered that in order for it to establish a violation of the right to respect for private and family life (Article 8 ECHR), it was sufficient "to limit itself to examining the procedural aspect of [the] Article".[94] The Court concluded, on the basis of a cumulative set of procedural shortcomings, that the domestic court had not properly examined the applicant's claim, and that this had resulted in the "appearance of arbitrariness".[95] This resulted in the Court finding a violation of Article 8 ECHR.

Whilst the Strasbourg Court might have applied procedural reasoning in outcome-oriented manner, Janneke Gerards puts forward that procedural-type review more often has a supportive role in the case law of the Strasbourg Court (argumentation-oriented procedural-type review).[96] According to her the Court hardly ever takes procedural-type review to its "fullest logical consequence, which would be that it would not at all look into the substance of the decision complained about".[97] In his turn, Matthew Saul, has identified cases in which the Strasbourg Court has paid attention to the parliamentary debates preceding the adoption of legislation for determining the width of the margin appreciation left to the national parliaments (deference-oriented procedural-type review).[98] In the case of *Animal Defenders International*, for example, the Court considered that in relation to the right to freedom of expression, "[t]he quality of parliamentary and judicial review of the necessity of the measure is of particular importance [for determining the proportionality of a general measure], including to the operation of the relevant margin of appreciation".[99]

The specific consequences of the employment of procedural-type review are readily apparent from these cases. In *A.K.* it led the Strasbourg Court to the negative finding that the right to respect for private and family life was violated (negative outcome-oriented procedural-type review). By contrast, in *Von Hannover (No. 2)* the Court considered that it "would require strong reasons to substitute its view for that of the domestic courts" when the national authorities have assessed the proportionality of the measure in accordance with the Convention standards.[100] In other words, the Court in such cases will make positive inferences by awarding a broad margin of appreciation to the national authorities – it will thus be more deferential towards the substantive

92 ECtHR [GC] 8 July 2003, appl. no. 36022/97, *Hatton v. United Kingdom*, para. 129.

93 Brems (2017), *supra* 1.

94 ECtHR 24 June 2014, appl. no. 33011/08, *A.K. v. Latvia*, par. 93. The case concerned the matter whether the national court had failed to uphold a civil claim by the applicant, a mother of a daughter with the Down syndrome, who had not received medical information on antenatal screening test by her gynaecologist. See for a discussion of the case E. Brems, 'Making Subsidiarity Work: Struggling with Procedural Review – A.K. v. Latvia', *Strasbourg Observers* (14 July 2014).

95 ECtHR 24 June 2014, appl. no. 33011/08, *A.K. v. Latvia*, par. 93.

96 Gerards (2017), *supra* 1.

97 Gerards (2017), *supra* 1, at p. 253 and also at p. 149.

98 Saul (2015), *supra* 1, pp. 9-15. See also Arnardóttir, *supra* 85, at pp. 11-14 and Popelier (2012), *supra* 1, at pp. 251-252.

99 ECtHR [GC] 22 April 2013, appl. no. 48876/08, *Animal Defenders International v. United Kingdom*, para. 108.

100 ECtHR [GC] 7 February 2012, appl. nos. 40660/08 and 60641/08, *Von Hannover v. Germany (No. 2)*, para. 107.

balance struck by the national authorities in the concrete case if they have applied Convention standards (positive deference-oriented procedural-type review).

General consequences in the Strasbourg Court's case law often involve a variety of standards. The Court has set out a very general requirement for domestic courts to take into account the fundamental rights standards set out in its case law.[101] In relation to the expulsion of Roma from their homes, it held in *Winterstein* that individual expulsion orders should be open to a detailed and adequately substantiated proportionality assessment by the domestic courts.[102] Other examples of general consequences can be found in cases such as *Evans*[103], in which the Court paid attention to the informed parliamentary debate in the process of enacting the Embryology Act in the United Kingdom, and *Hatton*[104] where it mentioned the crucial importance of involving scientific evidence in administrative and legislative processes concerning complex issues such as environmental and economic policy.

5. Procedural-type review: a neutral approach of the European Court of Human Rights?

As Koskenniemi recognises, the interpretation and application of human rights inevitably means making political choices. Procedural-type review, therefore, cannot be neutral, in the sense that it is void of normativity. It can, however, be argued that it is rather more neutral towards the political choices of States in the sense that, in comparison with substantive review, it is further away from imposing particular perceptions of the common good on States and closer to what has been called the "political baseline of neutrality".[105] This baseline refers to the politically endorsed commitment of national authorities to human rights as expressed in, amongst others, the European Convention on Human Rights and its additional Protocols.

In order to give a comprehensive assessment of the neutrality of procedural-type review in light of the framework developed in Section 0, this paper focuses on the neutrality of three different aspects of this review method. The first aspect concerns the neutrality of the approach as an abstract concept (Section 0).[106] This relates to the question whether the idea of procedural-type

101 What is called by Çali the 'responsible court doctrine', see Çali (2016), *supra note* 80.

102 ECtHR 17 October 2013, appl. no. 27013/07, *Winterstein and Others v. France*, para. 148(d).

103 ECtHR [GC] 10 April 2007, appl. no. 6339/05, *Evans v. United Kingdom*, para. 86: "it is relevant that the 1990 Act was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate".

104 ECtHR [GC] 8 July 2003, appl. no. 36022/97, *Hatton v. United Kingdom*, par. 128: "[o]n the procedural aspect of the case, the Court notes that a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake".

105 See Section 0.

106 See in that regard also R.H. Bork, 'Neutral Principles and Some First Amendment Problems', 47 *Indiana Law Journal* 1971 (1), pp. 1-35, at p. 7 ('We have not carried the idea of neutrality far enough. We have been talking about neutrality in the *application* of principles. If judges are to avoid

review as such can be considered as neutral. The second aspect entails the neutrality of the standards put forward by the Strasbourg Court by using this procedural approach, such as those standards mentioned in the cases of *Winterstein*, *Evans* and *Hatton* (Section 0).[107] Since procedural-type review entails the evaluation of the quality, carefulness and deliberateness of decisions-making processes, this Section addresses the question whether these procedural standards can be considered as relative neutral standards. The last and third aspect concerns the neutrality of the application of the procedural approach (Section 0). In this regard, the neutrality of the procedural approach relates to the question whether it is applied in a neutral manner by the Court.[108]

5.1 Neutrality of the procedural approach

As Koskenniemi has maintained, human rights discourse is politics. This means that the European Court of Human Rights unavoidably makes political choices when defining, interpreting, and applying the rights laid down in the Convention. Nevertheless, procedural-type review in human rights cases might be regarded as a rather neutral model, at least one that is more neutral than substantive-type review. As John Hart Ely has put forward in relation to constitutional cases, a "representation-reinforcing"[109] model of judicial review, or "process-oriented system of review"[110], is

> "fuelled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process – which is where such values are properly identified, weighed and accommodated – was open to those of all viewpoints on something approaching an equal basis".[111]

In other words, procedural reasoning by courts does not restrict "the value choices that the political branches of government can make, [nor does it] permit judges to rely on substantive values […] to override democratic political choices".[112]

In a similar vein, if the Strasbourg applies procedural-type review it is not substituting its own view for the substantive balance struck by the national authorities in a particular case, instead it overcomes (at least to a certain extent) the hegemonic tendencies of human rights interpretation by leaving the political choices and balancing of different interests to the national authorities. In

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imposing their own values upon the rest of us, however, they must be neutral as well in the *definition* and the *derivation* of principles').

107 H. Wechsler, 'Toward Neutral Principles of Constitutional Law', 73 *Harvard Law Review* 1959 (1), pp. 1-35, p. 10.

108 See also Bork (1971), *supra* 106, at p. 7.

109 J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Harvard University Press 1980), p. 88.

110 Ely (1980), *supra* 109, p. 136.

111 Ely (1980), *supra* 109, p. 74.

112 C.E. Baker, 'Neutrality, Process and Rationality: Flawed Interpretations of Equal Protection', 58 Texas Law Review 1980, pp. 1029-1096, at p. 1030. He criticizes the 'neutrality model' for making meaningful judicial review impossible (pp. 1031-1041).

other words, the Court is not the final authority as to the substance of a right or the justification of a restriction of that right, but instead is responsive to diverse interpretations.[113] Next to the margin of appreciation-doctrine, procedural-type review might thus be considered, in the words of Koskenniemi, as "a healthy admission that there is always interpretative indeterminacy [of rights and that national authorities are] the most competent to police the matter".[114] A procedural approach can therefore be considered as a relatively neutral method towards the political choices of States.

5.2 Neutrality of the procedural standards

A procedural approach can, from the perspective of Ely, be considered as a heuristic method for deriving and applying neutral rules.[115] Such would suggest that procedural standards might be of a more neutral nature than substantive standards, such as those of reasonableness or proportionality. Nevertheless, in line with the theory of Koskenniemi, since fundamental rights are indeterminate and the procedural standards the Strasbourg Court identifies necessarily require some interpretation, the Court will have to make political choices as to the content of these standards (i.e., it needs an "interpretative strategy").[116] As also argued by Tribe, procedural standards are, just as substantive standards, not value-free – they are often connected to value-laden notions such as fairness, carefulness and adequacy.[117] For these notions to have a role in analysing the compliance of decision-making processes with human rights, these notions need some substantive content. In other words, we need to know what we mean by "fair", "careful" or "adequate", before we can make an assessment of a decision-making process with reference to these procedural standards. This means that human rights standards, whether they are procedural or substantive, are never neutral standards. Arguing that neutral standards do exist would mean that one particular perspective is elevated to a universal standard, and such would be pure hegemony.[118]

In this paper, however, the focus is on the neutrality of procedural standards as they are used to deal with the political choices of States. Whilst the Strasbourg Court can be said to take up the position as the final authority concerning the interpretation of the Convention rights, this constitutional function has, at least to a certain extent, been assigned to it by the States.[119] States have therefore willingly submitted themselves to the interpretation of the Court. If only for that reason, it can be argued that the Strasbourg Court has some room for the identification of standards that might be close to the rights endorsed by States (the political baseline of neutrality). In this way, whether procedural standards can be regarded as relatively "neutral" standards, i.e.,

113 Koskenniemi (2011), *supra* 54, at pp. 147-148.
114 Koskenniemi (2011), *supra* 54, at pp. 147-148.
115 Ely (1980), *supra* 109, at p. 74. According to Kahan such can be considered as a heuristic technique, see Kahan (2011), *supra* 19, at p. 13.
116 Koskenniemi (2009), *supra* 60, p. 9.
117 Koskenniemi (2011), *supra* 60, p. 164.
118 L.H. Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories', 89 *The Yale Law Journal* 1980, pp. 1063-1080, at p. 1064.
119 Article 32, para. 1 ECHR.

more neutral than their substantive counterparts, depends on the kind of procedural standards the Court develops in its case law.

Examples of standards that can be considered as more neutral towards the political choices of States concern very general procedural standards that are closely connected to the procedural obligations to which the States have bound themselves by signing and ratifying the Convention. These concern standards that are explicitly mentioned in procedural rights provisions, such as the right to fair trial (Article 6 ECHR) and the right to an effective remedy (Article 13 ECHR). Another way in which procedural standards can express politically endorsed principles is through focusing on procedural-aspects that feature a European consensus. When States hold themselves to certain procedural standards, such can be considered to be implicitly endorsed, and thus reflecting a political baseline of neutrality. An example of this can be found in the standard of evidence-based decision-making, by which the Strasbourg Court requires national authorities to base their legislation, policies or decisions on the available empirical or scientific evidence.[120] As Alberto Alemanno argues, procedural-type review should be considered as a response to this trend of evidence-based decision-making at the national level.[121] Procedural standards concerning the need to include scientific evidence might therefore be considered as nothing more than reflecting the standards to which national authorities have already decided to hold themselves.

As it concerns other procedural standards that have no direct connection with the commitments of States, the Strasbourg Court might have a significant influence on the political choices that States can make. As Angelika Nussberger, the German judge at the European Court of Human Rights, and Aruna Sathanapally show, procedural standards can be very intrusive when they require States to make dramatic changes to their legislative, administrative or judicial systems.[122] By requiring States to make such fundamental alterations the Court has an impact on an indeterminate set of decisions; the judgments of the Strasbourg Court have far-reaching general consequences. Applying procedural-type review therefore necessarily limits, not only the procedural political choices of States, but also their substantive choices.[123] For instance, it is not hard to imagine that the procedural requirement for national authorities to carry out an impact assessment before adopting environmental policies, limits the choices they can make After a legislator discusses an impact assessment it will be difficult for it to deviate from the assessments' general conclusions in its legislation, although not necessarily completely impossible.

Nevertheless, whilst procedural standards can limit the scope of the substantive political choices that national authorities can make, this might still be considered as more "neutral" towards the

120 P. Popelier (2012), *supra* 1.

121 A. Alemanno, 'The Emergence of the Evidence-based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review', 1 *The Theory and Practice of Legislation* 2013 (2), pp. 327-340.

122 Nussberger (2017), *supra* note 91 and Sathanapally, *supra* 39.

123 A similar case is made from a psychological perspective by Kahan in relation to the Supreme Court of the United State. She refers to psychological studies concerning the way in people motivate their reasoning. People have the tendency when motivating their reasoning "to unconsciously process information – including empirical data, oral and written arguments, and even their own brute sensory perceptions – to promote goals or interests extrinsic to the decision making task at hand". In Kahan (2011), *supra* 19, p. 7.

substance of decisions than substantive standards. Procedural-type review requires changes in the decision-making process, yet it does not determine directly the substantive choices that can be made. It is true, of course, that a substantive approach of the Strasbourg Court leaves a certain level of discretion to the States to make substantive assessments on their own behalf. For instance in *Oliari*, the Strasbourg Court left it to the Italian authorities to determine what the specific legal construction would be for recognising the bond between same-sex couples – they could choose between opening the option of marriage to same-sex couples or solely a form of legal partnership.[124] By requiring some form of legal recognition of same-sex couples the Strasbourg Court has clearly limited the substantive political choices of States. However if a procedural approach was taken by the Court in this case, it would, for example, only require the State to deliberate the issue more extensively in Parliament and take into account the rights of LGBTIs. Although such debates would possibly lead to the same conclusion – some form of legal recognition of same-sex couples – this substantive outcome would be the decision of the national authorities themselves. In other words, whilst substantive standards *directly* limit the political choices of States, procedural standards only do so *indirectly* and generally in a less restrictive manner. Whether procedural standards are indeed less restricting than substantive standards, would, however, depend on the concreteness of the procedural standards. After all, the smaller the scope, or the more concrete and detailed the standards the Strasbourg Court sets out, whether these are procedural or substantive of nature, the less room States have to make diverse political choices.

It can thus be concluded, in line with the framework set out in Section 3, that the more abstract and general the procedural standards are that the Strasbourg Court develops; the more neutral they are towards the diversity of States' political choices. By contrast, the more detailed and concrete these procedural standards are, the more the Court limits the choices of States and indirectly imposes its own particular normative perspective on them.

5.3 Neutrality of the application of procedural-type review

As explained in Section 0, procedural-type review has been applied by the European Court of Human Rights in a variety of ways. In relation to the neutrality of the application of the procedural approach two comments can be made. Firstly, the different modalities of procedural-type review are not of an equal neutral nature. The most neutral approach would be one in which procedural-type review is employed by the Court in an outcome-oriented way with a positive consequence. In such a case, the Strasbourg Court basis its conclusion, that there has not been a violation of a right, exclusively on procedural reasoning. Because it positively validates the process followed by the national decision-making authority for being in compliance with the Convention, it does not give an evaluation of the substantive political choice of the national authority. By contrast, when the Strasbourg Court draws negative consequences based on procedural-type review such can limits the political choices of States to a certain extent. The extent to which it limits those choices depends, however, on the use of this procedural approach. If it draws such negative inferences in relation to the proportionality of a measure (negative

[124] ECtHR 21 July 2015, app. nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*.

outcome-oriented procedural-type review), it would still allow the same substantive political choices to be taken by the State – as long as they are reached in accordance with procedural standards. If it draws negative consequences in relation to the margin of appreciation that should be left to States (negative deference-oriented procedural-type review), it would limit a State's discretion concerning the substantive political choices it makes. In the last situation, the Court will leave only a narrow margin of appreciation to the State and thus will more closely look into the proportionality of the content of the national authority's decision. This last modality thus necessarily limits the scope of political choices that States can make. As Gerards has shown, the positive outcome-oriented approach, which can be considered as the most neutral application of procedural-type review, is rarely ever applied by the Strasbourg Court, whereas the negative approach occurs more often.[125] Therefore, looking at the practice of its application, the procedural approach may not be regarded as neutral as it arguably could have been.

Secondly, the application of procedural-type review is not neutral in the sense that there is a strategic choice behind the use of a particular method in any given case.[126] Why would the Strasbourg Court apply procedural-type review in one case and not in the other? What are the grounds for its application of procedural-type review and in what modality? In more general terms it can be argued that interpretation techniques and review methods need to be applied in a transparent, structural or comprehensive manner in order for the application to be neutral. As Koskenniemi puts forward, since human rights interpretation is "never about realising rights that are 'out there', but always about whom we are to privilege [and] how scarce resources are to be allocated, then it becomes imperative to articulate the criteria of distribution that underlie such choices".[127] It can, thus, be argued that if the Strasbourg Court would explain more clearly and in a more detail when and how it would apply a procedural approach, such would enable the reveal of the "systematic bias" that are at the core of its decisions.[128] This would result in more clarity for the States, and therefore, they might more easily use of the little room they have to make procedural and substantive choices, and, more fundamentally, it may allow them to contest the strategic application of this procedural approach by the Strasbourg Court.[129] From scholarly research it follows,[130] however, that this potential more neutral application of procedural-type review has not been reached, as in practice no structural application of it can be discerned from the case law of the Strasbourg Court.[131]

125 Gerards (2017), *supra* 1, at pp. 149 and 153.
126 Koskenniemi (2009), *supra* 60, at p. 12 and Koskenniemi (2011), *supra* 54, at p. 150.
127 Koskenniemi (2011), *supra* 53, at p. 164.
128 Koskenniemi (2011), *supra* 53, at p. 164.
129 Koskenniemi (2004), *supra* 66, p. 3.
130 See literature mentioned before, *supra* 1.
131 This is, however, not different to any other interpretation technique or review method employed by the ECtHR and therefore cannot be considered to be more problematic than the margin of appreciation doctrine or substantive-type review for that matter.

6. CONCLUSION

In the theory of Koskenniemi, the application and interpretation of human rights is inherently and unavoidably political. This also means that the judgments of the European Court of Human Rights cannot reflect a neutral and universal conception of the rights laid down in the European Convention on Human Rights. Instead, they represent the Strasbourg Court's strategic and political choices of what these rights mean and how they apply in concrete cases. As argued in this paper, however, this does not mean that the interpretation techniques and review methods used by the Strasbourg Court might be considered as more or less neutral towards the political choices of the States. As Koskenniemi has acknowledged in relation to the margin of appreciation doctrine, the more open the Court is to the indeterminacy of human rights – and thus the more open to a diversity of political choices of national authorities – the more sensible and more neutral its reasoning is. It is a "healthier" approach for the Strasbourg Court, because it thereby refrains from imposing certain fundamental rights conceptions on States, instead it allows for a variety of interpretations. To the extent that the Strasbourg Court adopts approaches that stay closer to the politically endorsed commitments of States (political baseline of neutrality), the more neutral these approach are.

In light of the theory of Koskenniemi, it can be concluded that the range from a theoretical concept of procedural-type review to its practical application reflects a range from politically endorsed neutrality to rather more political choices of the Strasbourg Court. Whilst procedural-type review as a concept might be considered as a relatively neutral approach, which leaves the political choices to the national authorities, procedural standards may be more value-laden, and the application of procedural-type review can be considered as even less neutral. This, however, does not necessarily mean that procedural-type review is a less neutral approach than substantive-type review, or than the margin of appreciation doctrine for that matter. The Strasbourg Court has also been criticised for its use of those non-procedural approaches too, as they are generally applied incoherently and inconsistently. Procedural-type review can therefore still be regarded as a valuable asset for the Strasbourg Court in recognising and providing room for substantive diversity between States. By applying a procedural approach the Court at least leaves some room for the national authorities to make different political choices as to the substance of legislation, administrative and judicial decisions. Nevertheless, we should take Koskenniemi's point seriously, as the Strasbourg Court should adopt a more coherent and systematic application of this approach. Such would allow for a better insight into the inherent political and strategic choices that are behind the Court's choices and appears to be the only way by which procedural-type review, as a method to review human rights compliance, will not fall foul of the hegemonic tendencies of human rights interpretations.