Process-based Fundamental Rights Review

Practice, Concept and Theory

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Praktijk, concept en theorie

(met een samenvatting in het Nederlands)

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ACKNOWLEDGMENTS

In 2014, I was busy writing my master's thesis on freedom of religion and belief in the ECHR system, not knowing where life had in store. In mid-August, in an e-mail, my law supervisor Janneke posed an unexpected question: 'would you be interested in writing a PhD under my supervision?' A bit flabbergasted, but very honoured, I said I would think about. The project Janneke had in mind was called 'Improving supranational adjudication in fundamental rights cases: towards a procedural approach for the European Court of Human Rights'. As I had never heard of procedural review – or process-based review as it is called in this book – nor read anything of John Hart Ely, I basically had no idea what I was getting myself into. But with any great journey, perhaps it is best to have no idea where the road will take you. After all, Frodo never let Bilbo's cautionary words, 'It's a dangerous business, Frodo, going out your door. You step onto the road, and if you don't keep your feet, there's no knowing where you might be swept off to', stop him from his grand adventure. So, why should it stop me?

I happily accepted and I took off on my big adventure. The academic journey of writing a PhD was an exciting and inspiring time. Not only because it gave me the chance to be part of academia, which allowed me to mull over a topic and then spit out my ideas in the shape of articles, blogs, presentations, and finally a dissertation, but also because of the wonderful people I met along the way. It is therefore with great pleasure that I take this opportunity to thank all those inspiring, cheerful, and precious people in my life without whom I never would have finished this book, nor started it for that matter.

So first, the one who sent me on my quest. My Gandalf, as it were. Janneke, since the days you supervised my master's thesis you have been a mentor to me and I would not have been able to finish my dissertation without you. You are a source of inspiration, a cradle of kindness, and a beacon of knowledge. You truly deserved the 'Best Supervisor of the Year 2018' award you received, even though I still think it should have been the 'Best Supervisor Ever' award. And Paulien, my second supervisor, you joined at quite an advanced stage of the dissertation writing, yet were able to grasp the topic in no time at all. As a copromotor you provided me with valuable new insights and raised questions that helped me to critically reflect on my writing. As my office buddy you provided me with companionship at work and acted even as my roomie in the winter months in room 3.01 at ASP. Merci pour tes conseils et ton humour!

PROEF 3

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My gratitude also extends to my other wonderful colleagues and former colleagues at Utrecht University. As there are so many of you, and I am sure I will forget names if I list them here ('I am old, Gandalf … like butter that has been scraped over too much bread'), I would like to say thanks to all of my colleagues at the Montaigne Centre, at the Netherlands Institute for Human Rights (SIM), and at the department of Constitutional Law, Administrative Law, and Legal Theory. You have been a true inspiration to me, each in your own way. You shared your ideas and thoughts on philosophical writing, on methodology, on fundamental rights, and on courts' institutional position, but also on all sorts of work-related issues and not-so-work-related-yet-surely-very-urgent-and-existential matters. Thank you for all the amazing insights, laughter, and critical reflections during the many seminars, lectures, and conferences, and for the many coffee (tea!) breaks and hallway bump-ins, drinks and fika's, brown bag and regular lunches, bezinningsdagen and leesclubjes, feel good chats and brainstorm sessions. My thanks also extend to the editors, international members, and executive assistants of the *Netherlands Quarterly of Human Rights*. I am especially grateful to Antoine with whom I worked closely and who showed me the reigns of academia as well as of the editorial business. In addition, I am grateful to Laura for setting up the *Research Brokers* project with me and to the students who participated in the pilot. I am sure, albeit in a different way, this project will continue – in the end, it is wonderful when students' human rights research contributes to the work of human rights organisations.

Although Utrecht is the place where I spent most of my time as a PhD, my PhD journey started in a different city to the East. A small and kind place, surrounded by hills, called Nijmegen. For my first steps outside student life and into the land of 'academic adults' – as I used to call them – I found my first fellowship at Radboud University Nijmegen. My colleagues at the International and European Law department made me feel welcome and provided me with opportunities to develop my teaching and research skills. My colleagues at the Constitutional Law department provided me a place to work as well as some essential constitutional law lessons. I am glad we still see each other now and again at PhD defences and conferences. Special thanks goes out to the Jonge Gaerde for the fun activities, including bowling, pub quizzes, and juggling, and for the friendships that have resulted from it.

PROEF 3

All these people were essential to the part of writing a dissertation. But five wise men and women were ultimately left to decide whether my PhD quest was completed or whether some more battles had to be fought and won. I express my sincere gratitude to Ittai Bar-Siman-Tov, Eva Brems, Patricia Popelier, Robert Spano, and Jerfi Uzman, for reading my dissertation, providing valuable comments, and offering their critical reflections. I also thank you for your academic writing, which formed an important source of inspiration for this book. My gratitude also goes out to Elaine Mak and Antoine Buyse, who were willing to reflect on my work and to take part in the opposition during the defence.

With the approval of the reading committee, my PhD quest has now come to an end. It is therefore time to embark on a new mission. One that allows me to explore a new land. I am therefore happy to have been given the opportunity to set sail to the land of fundamental rights practice. Although I am not saying goodbye to academia forever – unlike the divides of Middle-earth, there is no unbridgeable divide between the lands of practice and theory – the possibility to contribute to the promotion and protection of fundamental rights in the Netherlands is a new adventure that I am excited to begin. Or rather, to continue. Through the years, as part of the Public Interest Litigation Project (PILP), I have worked with fundamental rights in practice. From this work I've seen that, if the time is right and if enough effort is put in by many organisations and people, it is possible to change policies for the better. I am truly grateful to have gotten the opportunity to act as an expert on housing policies for travellers, and have worked closely with the inspiring Jelle. In my new position as policy advisor at the Netherlands Institute for Human Rights (College voor de Rechten van de Mens) I will continue these efforts in different areas. To my new colleagues, I would like to express some words of gratitude. Thank you for allowing me to embark on this ship with you, for your patience with me figuring out how to do this job, and for your support in the final stages of completing this book. I look forward starting this new venture with all of you.

As I leave the shores of academia, I find myself reflecting more broadly on the ones dearest to me and how each and every one of them was essential for the completion of my quest. I greatly appreciate my friends for their willingness – seemingly voluntarily – to be my companions. Through unthinkably funny and awkward moments as well as through inconsolable moments of sadness, we have seen each other through. As true Eärendils, all of you have made my life brighter and less heavy. I believe friendship was the only reason why Frodo's quest succeeded, as did mine.

As I will not be able to mention all of you, I just want to highlight some of my most beloved stars. My oldest friend, Gabin, thank you for sticking around, for the amusing chats, and for keeping it real, Brabant-style. My buddies from Dea Dia, Hong-Ha, Jeske, Kathelijn, Leonie (Do), and Simone, although we see each other on a regular-even-though-not-really-regular-basis these days and have definitely shrunken in size (pun intended!), thank you for the wonderful and unforgettable times. To Bianca, 'my besty', your courage has remained a source of inspiration, and I thank you for your friendship

PROEF 3

and your wisdom. This book is dedicated to you. To my friends from my sorority, Marleen and Moniek, thanks for the serious reflections on life and for goating – I mean joking – around with me. To my many tennis mates – serving as friends and foes – you kept me on my feet and gave me the much-needed physical distraction from writing a PhD. Lastly, Leonie, my paranymph, and the best listener and dancer in the whole wide world, your creativity is amazing, you are true to your word, and you are unbelievably kind. Thank you for it all!

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Now that the journey is getting close to its end and the contours of the new land start to take shape, I think of all the places my PhD quest has brought me. After all, a serious quest requires you to travel beyond your own comfortable realm into the unknown. Amongst other places, my PhD took me to a co-organised expert seminar with Janneke and Kasey McCall-Smith in Edinburgh and a summer school organised by the Venice Academy of Human Rights and Democratisation in Venice, and to smaller and larger conferences in Barcelona, Cambridge, Copenhagen, and Granada. These events made me grow as a scholar and I am grateful for the opportunities I have had to share my research and for the useful feedback I received. I am also thankful for the chance I got to visit the library of the European Court of Human Rights, to consult the case files of several cases, and to meet with several ECtHR judges and Registry members to talk about process-based review. It was great to be back in Strasbourg – the place where I spent a year as an Erasmus student – and it was truly valuable to talk to the people who make such a significant contribution to the protection of fundamental rights in Europe.

My time in Strasbourg was even more enjoyable as I was not on my own – this time I was there with the Sam to my Frodo, my greatest companion of all. Floris was a visiting ECtHR scholar at the time, and he made my stay in Strasbourg triple (Karmeliet) the fun. You are the person who perhaps suffered the most of my journey, as you were often my sounding board even when you were tired and really needed to sleep. Thank you for your support and for the funny, sarcastic, and painfully bad jokes. Thank you for your love,

PROEF 3

your inspiration, and your friendship. I am so happy that we have accompanied each other in our journeys as PhDs. Above all, I am happy that unlike my dissertation, our story will not end in a cover on the shelf, but will continue long after the final sentence of this book has been written.

Thank you all!

Leonie
La Blaisotterie, August 2019

PROEF 3

PROEF 3

CONTENTS

Acknowledgments v
List of Abbreviations xix

INTRODUCTION

Chapter 1
Introduction 3

1.1 The rise and controversy of process-based fundamental rights review 3
1.2 The book's objectives and questions 10
1.3 Scope of the book and terminology 12
1.4 Methodology and methods 13
1.5 Roadmap 15

PART I
THE PRACTICE OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

Introduction to Part I 21

Process-based review in the practice of fundamental rights adjudication 21
Methodology and methods of Part I: case-selection 22
Roadmap to Part I 25

Chapter 2
Process-based fundamental rights review of legislative procedures 27

2.1 Introduction 27
2.2 Examples of review of the legislative process 28
2.2.1 US Supreme Court: *Carolene Products* and *Fullilove* 28
2.2.2 Supreme Court of Hawaii: *Taomae* 29
2.2.3 New Zealand, United Kingdom, and Finland 30
2.2.4 German Federal Constitutional Court: *Hartz IV* 31
2.2.5 South African Constitutional Court: *Doctors for Life International* 33
2.2.6 Colombian Constitutional Court: *'General Foresting Law case'* and *'Consultation of Ethnic Communities case'* 35
2.2.7 European Court of Justice: *Volker und Markus Schecke* 37

PROEF 3

2.2.8 European Court of Human Rights: *Hirst (No. 2)* and *Bayev* 39
2.3 Conclusion 42

Chapter 3
Process-based fundamental rights review of administrative procedures 45

3.1 Introduction 45
3.2 Examples of review of administrative procedures 46
3.2.1 Canadian Supreme Court: *Baker* 46
3.2.2 Australian High Court: *SZSSJ* 48
3.2.3 Danish Supreme Court: *'Tunisian case'* 49
3.2.4 District Court and Court of Appeal of the Netherlands: *Urgenda* 51
3.2.5 Court of Appeal and Supreme Court of the United Kingdom: *Denbigh High School*, *Miss Behavin' Ltd.*, and *Quila* 54
3.2.6 European Court of Human Rights: *Hatton*, *Winterstein*, and *Lambert* .. 57
3.3 Conclusion 62

Chapter 4
Process-based fundamental rights review of judicial procedures 65

4.1 Introduction 65
4.2 Examples of review of judicial procedures 66
4.2.1 Supreme Court of Argentina: *Comunidad Indígena Eben Ezer* 66
4.2.2 Spanish Constitutional Court: '*Melloni case*' 68
4.2.3 German Federal Constitutional Court: *Mr R* 70
4.2.4 Canadian Supreme Court: *Carter* 71
4.2.5 UN Committee on Economic, Social, and Cultural Rights: *I.D.G.* 72
4.2.6 European Court of Justice: *Dynamic Medien* 75
4.2.7 European Court of Human Rights: *Winterstein*, *Lambert*, and *Von Hannover (No. 2)* 77
4.2.8 Inter-American Court of Human Rights: *Gelman* 80
4.3 Conclusion 82

Reflection on Part I 83

PART II
THE CONCEPT OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

Introduction to Part II 89

Process-based fundamental rights review: what's in a name? 89
Methodology and methods of Part II: similarity, difference, and reflective equilibrium 89
Roadmap to Part II 91

PROEF 3

Chapter 5
Conceptualising process-based fundamental rights review 93

5.1 Introduction 93
5.2 Defining process-based fundamental rights review. 94
5.2.1 Definitions of process-based fundamental rights review in the literature 94
5.2.2 Elements of process-based fundamental rights review in practice 97
5.2.3 Common definitions of process-based fundamental rights review 100
5.3 Process-based fundamental rights review as a method of review 104
5.3.1 Levels of case-law analysis: micro-, meso-, and macro-levels 104
5.3.2 Fundamental rights review: from substance-based to process-based . . 110
A. On the substance-procedure distinction 111
B. Spectrum of fundamental rights review 113
5.4 Conclusion 116

Chapter 6
Operationalising of process-based fundamental rights review. 119

6.1 Introduction 119
6.2 Reviewer, subject and object of review 120
6.3 Diverse applications of process-based fundamental rights review 122
6.3.1 Intensity of process-based review 128
6.3.2 Burden of Proof 132
6.3.3 Standards for review 134
A. Authority responsible for procedural standards 134
B. Types of procedural standards 136
I. Certainty standards 136
II. Rationality standards 138
III. Fairness standards 140
C. Other categories of standards 142
6.3.4 Result of procedural considerations 143
6.3.5 Location of review 145
A. Preliminary tests: intensity of justification review 148
I. Process-based review as an indicator for the intensity of review: justification strategy 149
II. Process-based review as a consequence of the intensity of review: avoidance, compensation, and intensification strategies 150
B. Legitimate aim or proper purpose 153
C. Suitability 155
D. Necessity. 157
E. Proportionality in the strict sense 159
6.3.6 Importance of procedural considerations 163

PROEF 3

6.3.7 Conclusion of procedural reasoning 166
6.3.8 Résumé and macro-level impact 169
6.4 Conclusion 171

Reflection on Part II 173

PART III
THE THEORY ON PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

Introduction to Part III 179

The Controversy of Process-Based Fundamental Rights Review:
Set-Up of Part III 179
Methodology and methods of Part III 181
Roadmap to Part III. 183

Chapter 7
Debates concerning process-based review and the rule of law, deliberative democracy, and institutional judicial restraint 185

7.1 Introduction 185
7.2 Process-based review and rule of law 186
7.2.1 Courts as authorities of rule of law compliance 187
A. 'Procedural rule of law' 187
B. Rule of law and process-based review 188
7.2.2 Courts as imperfect protectors of the rule of law 192
7.2.3 Résumé 195
7.3 Process-based review and deliberative democratic theory 195
7.3.1 Courts as guardians and promoters of deliberative processes 196
A. 'Deliberative democracy' and 'deliberative procedures' 196
B. Process-based review to guard the political process 198
C. Process-based review to promote deliberative procedures 200
7.3.2 Courts as part of the deliberative democratic enterprise 204
A. Courts as public reasoners 205
B. Courts as interlocutors 206
C. Courts as deliberators 208
7.3.3 A limited role for courts and process-based review in democratic theory 211
A. Courts as dangers to the deliberative enterprise 211
B. Courts are not part of the deliberative enterprise 213
7.3.4 Résumé 214
7.4 Process-based review and judicial restraint or activism 214
7.4.1 Courts as restrained or self-restraining institutions 215

PROEF 3

7.4.2 Courts as procedural activists 217
7.4.3 Résumé 221
7.5 Reflections and connections 221
7.5.1 Intertwinement of views on process-based review with core constitutional principles 222
7.5.2 Context of process-based review 226
A. Historical context 227
B. Institutional context 228
7.5.3 Intrusiveness of process-based review 230
7.6 Conclusion 232

Chapter 8
Debates concerning process-based review and procedural mandates, judicial standard-setting, and fundamental rights protection 233

8.1 Introduction 233
8.2 Process-based review and the judicial function of protecting procedural standards 234
8.2.1 Courts' procedural mandate 235
8.2.2 Courts and the definition and application of procedural standards 237
A. Originalism, living instruments, and the role of courts 238
B. Temporal aspects of standard-setting: consequences of new procedural standards 241
C. Substantive aspects of standard-setting: level of detail of procedural standards 244
8.2.3 Résumé 247
8.3 Process-based review and the judicial function of protecting fundamental rights 247
8.3.1 Courts offering protection of fundamental rights through process-based review 248
A. Minimum protection of fundamental rights 248
I. Intrinsic approaches to the value of procedures for fundamental rights protection 249
II. Instrumental approaches to the value of procedures for fundamental rights protection 252
B. Enhanced protection of fundamental rights 256
I. Enhanced procedural fundamental rights protection 256
II. Enhanced substantive fundamental rights protection 258
C. Extending courts' jurisdiction through (procedural) positive obligations 261
I. Enforcing fundamental rights in horizontal disputes 262
II. Enforcing socio-economic rights 264
D. Résumé 265

PROEF 3

8.3.2 Courts failing to protect fundamental rights by applying process-based review . . . 266
A. Unsuccessful protection of fundamental rights . . . 266
I. Inadequate protection of fundamental rights . . . 267
II. Reduced protection of fundamental rights . . . 270
B. Weakened judicial protection of fundamental rights . . . 273
C. Résumé . . . 275
8.4 Reflections and connections . . . 275
8.4.1 A standard review loop . . . 276
8.4.2 Primacy of procedural or substantive fundamental rights protection . . 277
8.4.3 Concrete and generic impact of procedural approaches . . . 280
8.4.4 Context-dependent effectiveness of process-based fundamental rights review . . . 283
8.5 Conclusion . . . 285

Chapter 9
Debates concerning process-based review and neutrality, hard cases, judicial expertise, and epistemic uncertainties . . . 287

9.1 Introduction . . . 287
9.2 Process-based review and normative difficulties in adjudication . . . 288
9.2.1 Normativity or neutrality of procedures and procedural reasoning . . . 288
A. John Hart Ely's process-oriented system of review and neutrality. 290
B. Normativity of procedures and process-based review . . . 292
C. Neutral enforcement of (legislative) entrenched substantive values 295
D. Procedural reasoning limiting substantive decision-making . . . 298
E. Neutrality in degrees: more and less value-laden review . . . 301
F. Transparency and risks of corruption, dishonesty, and inconsistency . . . 302
G. Résumé . . . 304
9.2.2 Avoiding morally sensitive or 'hard' cases . . . 305
A. 'Hard cases' . . . 305
B. Normative avoidance strategies . . . 307
C. Process-based review as an avoidance strategy . . . 311
D. Nuancing process-based review's potential . . . 314
E. Résumé . . . 316
9.3 Process-based review, judicial expertise and epistemic uncertainties . . . 317
9.3.1 Judicial expertise on decision-making procedures . . . 317
A. Judicial expertise on matters of process and process-based review 318
B. Limitations on judicial expertise . . . 321
C. Résumé . . . 327
9.3.2 Epistemic uncertainties and decision-making procedures . . . 328
A. Epistemic uncertainties and empirical reasoning . . . 328

PROEF 3

B. Courts and empirical reasoning . . . 330
C. Process-based review as epistemic avoidance strategy . . . 333
D. Evidence-based decision-making and procedural reasoning . . . 339
E. Problems with process-based review of empirical reasoning . . . 343
F. Résumé . . . 347
9.4 Reflections and connections . . . 348
9.4.1 Law, morality, empiricism, and process-based review . . . 349
A. Relationships between law and morality, and law and empiricism 349
B. Moral, empirical, and procedural reasoning . . . 350
9.4.2 Neutrality, normativity, factuality, and process-based review . . . 352
A. Neutrality–normativity tension and procedural reasoning . . . 353
B. Empirical reasoning to resolve the neutrality–normative tension? 355
9.4.3 Normativity in degrees . . . 358
9.5 Conclusion . . . 359

Reflection on Part III . . . 361
Overlap and conflicts between debates on process-based review . . . 361
Conclusion: process-based review is not a one-size-fits-all approach . . . 363

CONCLUSION

Chapter 10
Conclusion . . . 367

10.1 Introduction . . . 367
10.2 Building blocks for process-based fundamental rights review . . . 369
10.2.1 Intensity of process-based review . . . 369
10.2.2 Burden of proof . . . 372
10.2.3 Standards for review . . . 374
A. Authority responsible for setting procedural standards . . . 374
B. Types of procedural standards . . . 376
C. Other categories of standards . . . 377
10.2.4 Result of procedural considerations . . . 380
10.2.5 Location of review . . . 381
A. Preliminary tests: intensity of justification review . . . 383
B. Justification tests: legitimate aim, suitability, necessity, and proportionality . . . 385
10.2.6 Importance of procedural considerations . . . 388
10.2.7 Conclusion of procedural reasoning . . . 391
10.2.8 Résumé . . . 394
10.3 Conclusion . . . 397

PROEF 3

Addendum: Questions for ECtHR Judges 399
Summary 403
Samenvatting 411
Bibliography 421
Official documents 449
Case-law (by Jurisdiction) 451
Case-law (by Name) 455
Curriculum vitae 459
Index 461

PROEF 3

LIST OF ABBREVIATIONS

AHC	Australian High Court
ACHR	American Convention on Human Rights
BCC	Belgian Constitutional Court
Canadian Charter	Canadian Charter of Fundamental Rights and Freedoms
CCC	Colombian Constitutional Court
CCRF	Constitutional Court of the Russian Federation
CESCR	UN Committee on Economic, Social, and Cultural Rights
CJEU	Court of Justice of the European Union (encompassing the ECJ, the General Court and EU specialised courts)
CoATH	Court of Appeal of The Hague of the Netherlands
CRPD	UN Committee on the Rights of Persons with Disabilities
CSC	Canadian Supreme Court
DSC	Danish Supreme Court
DCTH	District Court of The Hague of the Netherlands
EAW	European Arrest Warrant
ECJ	European Court of Justice
ECHR	European Convention for Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights and Freedoms of the European Union
FAC	French Administrative Court
FCFCA	Full Court of the Federal Court of Australia
Framework Decision	EU Framework Decision on the European Arrest Warrant
GFCC	German Federal Constitutional Court
GHRC	German Higher Regional Court
GLoK	German Landgericht of Koblenz
HCA	High Court of Argentina
HRA	Human Rights Act of 1998
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISC	Irish Supreme Court

PROEF 3

NCOP	National Council of Provinces
NZBORA	New Zealand Bill of Rights Act of 1990
OECD	Organisation for Economic Co-operation and Development
OHCHR	UN Office of the High Commissioner for Human Rights
SACC	South African Constitutional Court
SCA	Supreme Court of Argentina
SCBC	Supreme Court of British Colombia of Canada
SCC	Spanish Constitutional Court
SCH	Supreme Court of Hawaii
SCN	Supreme Court of the Netherlands
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKCoA	United Kingdom Court of Appeal
UKSC	United Kingdom Supreme Court
UN	United Nations
US	United States
USSC	United States Supreme Court
VCLT	Vienna Convention on the Law of Treaties

INTRODUCTION

PROEF 3

PROEF 3

PROEF 3

CHAPTER 1
INTRODUCTION

1.1 THE RISE AND CONTROVERSY OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

For some time now, there has been an ongoing debate over the use of process-based fundamental rights review by the European Court of Human Rights. Scholars have noted a so-called 'procedural turn' in the case-law of the ECtHR.[1] This refers to the ECtHR's increasing focus on the decision-making processes of national authorities to determine whether there has been a violation of one of the substantive rights of the European Convention on Human Rights. More and more it relies on the quality, diligence, and fairness of national legislative, administrative, and judicial processes, instead of, or in addition to, the substantive reasonableness of the content of the measures taken. A procedural approach has been taken particularly in cases concerning the right to respect for private and family life (Article 8 ECHR), the right to freedom of religion and belief (Article 9 ECHR), the right to freedom of expression (Article 10 ECHR), the right to freedom of assembly and association (Article 11 ECHR), and the right to respect for one's property (Article 1 Protocol 1 ECHR).[2] For instance, the ECtHR has in some cases praised States for their extensive and serious parliamentary deliberations during the legislative process.[3] It has also examined decision-making

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1 E.g., Cumper and Lewis (2019), pp. 623–625; Kleinlein (2019), pp. 92–99; Popelier (2019), pp. 272–273; Çali (2018), pp. 256–263; Spano (2018), p. 480ff; Arnardóttir (2017), pp. 13–15; Brems (2017), p. 17; Gerards (2017), p. 127; Huijbers (2017a), pp. 178–179; Nussberger (2017), pp. 172–173; Popelier and Van de Heyning (2017), p. 13; Çali (2016), pp. 257–263; Arnardóttir (2015), pp. 4–7; Le Bonniec (2017), pp. 24–26; Saul (2015), pp. 1–3; Brems (2013), p. 138; Gerards (2013b), pp. 52–56; and Christoffersen (2009), p. 455.

2 E.g., De Jong (2017), pp. 388–394; Le Bonniec (2017), pp. 183–186; and Brems (2013), pp. 143–144.

3 E.g., ECtHR (GC) 27 June 2017, app. no. 931/13 (*Satakunnan Markkinap-Rssi Oy and Satamedia Oy v. Finland*), para. 193 ('parliamentary review of Finnish legislation … has been both exacting and pertinent. That scrutiny and debate at domestic level was furthermore reflected … at EU level'); ECtHR (GC) 22 April 2013, app. no. 48876/08 (*Animal Defenders International v. UK*), para. 114 ('The prohibition was therefore the culmination of an exceptional examination by parliamentary bodies of the cultural, political and legal aspects'); ECtHR (GC) 10 April 2007, app. no. 6339/05 (*Evans v. the UK*), para. 86, ('the 1990 Act was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments… and the fruit of much reflection, consultation and debate'); and ECtHR 28 March 2006, app. no. 13716/02 (*Sukhovetskyy v. Ukraine*), para. 65 ('the impugned measure has been the subject of considerable parliamentary scrutiny. There was a serious debate…'). The ECtHR has also reprimanded states for failing to deliberate and reflect

PROEF 3

procedures of national executive authorities to see whether they carried out and relied on impact assessments, and whether they allowed individuals to participate in decisions affecting them.[4] Furthermore, the ECtHR has paid attention to the quality of national judicial proceedings, in particular to make sure that national courts carried out a balancing exercise in light of the Convention rights and the standards developed by the ECtHR.[5]

The use of process-based review is not completely new to the Convention system nor to the ECtHR's reasoning. Indeed, perhaps self-evidently, the ECtHR has routinely applied procedural reasoning in relation to procedural rights, such as the right to a fair trial (Article 6 ECHR) and the right to an effective remedy (Article 13 ECHR). Moreover, as early as the 1990s, the ECtHR attached 'procedural limbs' to the right to life (Article 2 ECHR) and the prohibition of torture, inhuman and degrading treatment (Article 3 ECHR).[6] In particular, it requires national authorities to investigate and prosecute when claims of violations of these rights have been raised. The current 'procedural trend' may thus be seen as a continuation of the ECtHR's procedural approach. At the same time, while the ECtHR's procedural approach concerning Articles 2 and 3 ECHR is often explained by the absence of evidence for finding a substantive violation of these

on the interests involved, e.g., ECtHR 6 October 2005, app. no. 74025/01 (*Hirst v. the UK*), para. 79 ('there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban'). See also the ECtHR examples in Chapter 2. For an overview of legislative procedural obligations, see Gerards (2017), pp. 131–136.

4 E.g., ECtHR 15 January 2013, app. no. 8759/05 (*Csoma v. Romania*), para. 68 ('by not involving the applicant in the choice of medical treatment and by not informing her properly of the risks involved in the medical procedure, the applicant suffered an infringement of her right to private life') and ECtHR 22 November 2011, app. no. 24202/10 (*Zammit Maempel v. Malta*) ('the Court notes that the Government have not adduced evidence in respect of any impact assessment studies made in this respect …, however, that the authorities have enacted legislation in this field and have provided consistent monitoring of the situation through the appointment of a group of experts'). See also the ECtHR examples in Chapter 3. For an overview of administrative procedural obligations, see Gerards (2017), pp. 137–138.

5 E.g., ECtHR app. no. 19 December 2017, app. nos. 60087/10, 12461/11 and 48219/11 (*Öğrü and Others v. Turkey*), par. 68 ('Rien ne montre que les juges saisis des oppositions aient cherché à mettre en balance les différents intérêts en presence … Les arguments des requérants en ce sens n'ont pas fait l'objet d'un examen'); ECtHR 14 September 2017, app. no. 41215/14 (*Ndidi v. the UK*), para. 81 ('the First-tier Tribunal – and, in fact, all the domestic decision-makers – gave thorough and careful consideration to the proportionality test required by Article 8 of the Convention, including the relevant criteria set out in this Court's case-law'); ECtHR (GC) 27 June 2017, app. no. 931/13 (*Satakunnan Markkinap-Rssi Oy and Satamedia Oy v. Finland*), paras. 196 and 198 ('the Supreme Administrative Court, analysed the relevant Convention and CJEU case-law and carefully applied the case-law of the Court' and 'the Supreme Administrative Court gave due consideration to the principles and criteria as laid down by the Court's case-law for balancing'); and ECtHR (GC) 12 September 2011, app. nos. 28955/06 et. al. (*Palomo Sánchez and Others v. Spain*), para. 74 ('The domestic courts … carried out an in-depth examination of the circumstances of the case and a detailed balancing of the competing interests at stake'). See also the ECtHR examples in Chapter 4. For an overview of judicial procedural obligations, see Gerards (2017), pp. 150–154.

6 Brems (2013), pp. 141–143. For an overview of the procedural obligations under Article 2 ECHR, see European Court of Human Rights, Jurisconsult (updated 2018) 'Guide on Article 2 of the European Convention on Human Rights', p. 28ff <https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf>.

PROEF 3

rights, its current approach seems to be of a different nature.[7] In relation to Articles 8 to 11 ECHR the ECtHR frequently emphasises that national authorities are better placed to assess what measures are needed in the national context.[8] In the ECtHR's words, a procedural approach allows it to avoid substituting its own view for that of the national authorities.[9]

Scholars studying ECtHR case-law have tried to make sense of this recent procedural turn. In part, they focus on understanding *what* the ECtHR's procedural approach entails. How does the ECtHR apply process-based review and in what kind of cases? In relation to the latter question, it has been noted that the ECtHR relies on procedural reasoning in particular in cases where it usually leaves a broad margin of appreciation to the States, such as in cases concerning socio-economic policies and morally sensitive matters.[10] In relation to the former question, case-law analyses indicate that the ECtHR's procedural reasoning can take many forms. Sometimes the ECtHR relies exclusively on the quality of national procedures to determine if there has been a violation of a Convention right, but more often, procedural considerations are included alongside substantive ones.[11] Procedural reasoning has also been located in various elements of the ECtHR's assessment.[12] For instance, the quality of national decision-making procedures has been relevant for establishing the scope of the margin of appreciation.[13] This notion concerns the room for manoeuvre left to national authorities to determine how, and in what manner, they wish to secure Convention rights.[14] This discretion is not unlimited, however, since the ECtHR is tasked with providing minimum protection of Convention rights. Procedural reasoning has also been applied in order to establish whether national authorities have tried to strike a proper balance between competing rights and interests. Procedural shortcomings may thus influence the outcome of the ECtHR's proportionality test.[15]

Studies of process-based fundamental rights review also consider the reasons *why* the ECtHR is turning to procedural reasoning. Various scholars have placed the ECtHR's procedural turn in the context of the growing emphasis on the principle of

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7 For a discussion of the rationale for the ECtHR to add a procedural layer to Articles 2 and 3 ECHR, see O'Boyle and Brady (2013), pp. 382–383.

8 E.g., ECtHR (GC) 22 April 2013, app. no. 48876/08 (*Animal Defenders International v. UK*), para. 111. See for this better placed argument, Gerards (2019), pp. 177–188.

9 E.g., ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), para. 107 and also discussed in Chapter 3. For an overview of this approach and several other cases, see Spano (2018), pp. 487–488.

10 Gerards (2017), pp. 146–148, 153. For a topic-centred overview of cases in which procedural reasoning has been applied by the ECtHR, see Christoffersen (2009), p. 463ff.

11 Gerards (2017), p. 159.

12 For an overview see Chapter 6 and Huijbers (2017a), pp. 191–192.

13 E.g., Arnardóttir (2017) and Saul (2015).

14 On the margin of appreciation doctrine by the ECtHR, see e.g. Gerards (2019), p. 160ff; Gerards (2018b), pp. 498–506; Arai-Takahashi (2013); Kratochvíl (2011); Letsas (2006); and Greer (2000).

15 E.g., Saul (2016), p. 1081; Popelier and Van de Heyning (2013), pp. 252–255; and Kavanagh (2014), pp. 472–478.

PROEF 3

subsidiarity.[16] According to this principle, national authorities carry the primary responsibility to protect and ensure the Convention rights. It is only when they fail to do so that the ECtHR should step in.[17] This principle has been established and confirmed in a long line of ECtHR case-law, and after lengthy and critical political discussions on the future of the Convention system and the role of the ECtHR, it was decided that the principle of subsidiarity and the doctrine of the margin of appreciation will be codified in the preamble of the Convention.[18] It has been noted that the ECtHR is now in 'the age of subsidiarity', and that its interest in the quality of national procedures is directly connected to this.[19] By focusing on national procedures, the ECtHR is considered to show substantive deference to national authorities while protecting individuals' rights in line with the principle of subsidiarity.[20] On a related, yet different account, some have put the ECtHR's procedural trend down to its backlog of cases.[21] From this perspective, procedural reasoning is considered to enhance the procedural protection of Convention rights at the national level. This is based on the presumption that better decision-making procedures lead to better decisions.[22] The argument goes that by encouraging the Convention to be embedded in the national legal context, national authorities, especially national courts, will provide stronger protection of the Convention rights.[23] When compliance with Convention rights increases at the national level then there is

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16 E.g., Kleinlein (2019), pp. 99–104; Cram (2018), p. 10; Spano (2018); Huijbers (2017a); and Popelier and Van den Heyning (2017); Le Bonniec (2017), p. 455ff; and Spano (2014), pp. 11–13.

17 On the principle of subsidiarity in the case-law of the ECtHR, see e.g. Gerards (2019), pp. 5–8; Mowbray (2015); and Christoffersen (2009), p. 227ff.

18 See Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 213, <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213>. For an overview of the debates leading up to the adoption of Protocols No. 15 and No. 16 (establishing the possibility of national highest courts requesting the ECtHR to give advisory opinions on the interpretation and application of the Convention rights), see O'Meara (2015) and the compilation of instruments and texts by Council of Europe, Directorate General Human Rights and Rule of Law (2014), 'Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and Beyond' <https://rm.coe.int/reforming-the-european-convention-on-human-rights-interlaken-izmir-bri/1680695a9d>.

19 Spano (2018), p. 481; Huijbers (2017a), pp. 179–187; and Spano (2014), p. 487.

20 E.g., Kleinlein (2019), pp. 99–104; Popelier and Van de Heyning (2017), pp. 8–13; Sathanapally (2017), pp. 54–56; Popelier (2013b), pp. 251–254.

21 E.g., Huijbers (2017a), pp. 180–181, and for an argument in this regard, see Gerards (2012), pp. 176–178. See also Saul (2017), p. 137. In 2011 the backlog of cases was at an all-time high of 151,600 pending cases at the ECtHR. Through using effective working methods – e.g., unmotivated inadmissibility decisions by single judges, friendly settlements, pilot judgment procedures, priority rules – the ECtHR has been able to reduce the total number of pending cases to 56,350 by the end of 2018. Nevertheless, a majority of the currently pending cases will require the ECtHR's full attention. The backlog of cases is thus not expected to be cleared anytime soon. For a discussion of the backlog of cases, see Greer, Gerards, and Slowe (2018), pp. 97–104, and for the figures in 2018, see Council of Europe, European Court of Human Rights (2019), 'Annual Report 2018' <www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf>.

22 Brems (2017), pp. 19–22.

23 On embedding the Convention see Helfer (2008), pp. 133–134. On procedural embeddedness of the Convention, see Spano (2018), p. 481ff.

PROEF 3

less reason for applicants to lodge a complaint with the ECtHR, which would prevent a further influx of cases in Strasbourg.

These two sets of scholarly debates focus on obtaining a better understanding of process-based review by the ECtHR. Simultaneously, there is a third, more normative debate on how to *value* the ECtHR's procedural turn. Is the procedural trend in the Convention system desirable, appropriate, and legitimate? More simply put, is it a positive or a negative development? Answers to these questions are as broad as they are diverse. For example, with a focus on the principle of subsidiarity, it has been argued that the ECtHR should take a procedural approach in order to limit its interference in the substantive decisions of national authorities.[24] By contrast, procedural reasoning has been held to be unsatisfactory for applicants who have suffered violations of their substantive rights.[25]

The debate on the meaning and value of process-based review by the ECtHR is not limited to scholarly debate. In recent political debates on the future of the Convention system, process-based review was a topic for discussion too.[26] In addition to this, it appears that procedural reasoning is also a topic for debate amongst the judges of the ECtHR. Meetings with several ECtHR judges confirmed that they have different views on the desirability of a procedural approach.[27] Some judges indicated that they preferred procedural reasoning by the ECtHR in certain cases, especially considering the subsidiarity principle and the limited capacities of the ECtHR to address all fundamental rights problems on its own. Other judges strongly rejected process-based review in relation to substantive rights, and a third group of judges held no particular view on the procedural trend in the ECtHR's case-law. Articles written extrajudicially by ECtHR judges, moreover, show that some judges regard the procedural trend as a strategy for the ECtHR to deal with the backlog in cases, to respond to legitimacy criticism, and to deal with conflicts of rights.[28] Another judge expressed concerns about

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24 E.g., Brems (2019), pp. 221–223; Baade (2018), pp. 2–4; Harbo (2017), pp. 32–33ff; Popelier and Van de Heyning (2017), pp. 8–13; Gerards (2012), pp. 197–198. Procedural reasoning has also been proposed for reasons of consistency and coherence of the ECtHR case-law, see Leloup (2019), pp. 62–65.

25 E.g., Huijbers (2018a) and Nussberger (2017), pp. 166–167.

26 A far-reaching proposal for enhanced procedural reasoning by the Court was proposed by the Danes, see Council of Europe, Danish Chairmanship to the Committee of Ministers (2018), 'The Draft Copenhagen Declaration' (5 February 2018), paras. 22–30 <https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf>. The final declaration was milder and entails only limited reference to the ECtHR's procedural approach, see Council of Europe, Committee of Ministers (2018), 'The Copenhagen Declaration' (12–13 April 2018), paras. 28 and 31 <https://rm.coe.int/copenhagen-declaration/16807b915c>. For a critical discussion of the procedural approach suggested in the Draft Copenhagen Declaration, see Huijbers (2018b).

27 In October 2017, the author of this book met nine judges of the ECtHR. In accordance with the agreements made with the judges, the talks were anonymous, were not recorded and were merely used as background information for this research. The questions prepared for these meetings are attached in the Addendum to this book. The author furthermore had access to anonymised transcripts of interviews held by Janneke Gerards with several judges in September 2012. The findings of Gerards have been incorporated in Gerards (2013b), p. 14.

28 Icelandic Judge and Vice-President of the ECtHR Robert Spano in Spano (2018) and Spano (2014), pp. 11–13; former UK Judge and President of the ECtHR Dean Spielmann in Spielmann (2014), p. 12

PROEF 3

the impact of procedural reasoning on applicants and on the protection of the rights of minorities.[29] In separate opinions too, ECtHR judges have articulated their views on procedural reasoning.[30] For example, in *Animal Defenders International*, a case concerning a blanket ban on political advertising in the UK, the ECtHR concluded that there had been no violation of Article 10 ECHR. It reached this conclusion mainly on the basis of the 'culmination of an exceptional examination by parliamentary bodies' prior to the adoption of the legislation.[31] This well-known procedurally reasoned case was decided by a narrow majority of nine votes to eight.[32] Clearly, the ECtHR's judges were divided in the judgment, and five judges expressed their concerns with the procedural approach adopted by the majority.[33] In a Joint Dissenting Opinion, these judges argued that the ECtHR has a duty to assess the content of the legislation in light of the Convention standards. In their view, the legislature's careful deliberations and considerations of the fundamental rights implications of legislation did not 'necessarily mean that the conclusion reached by that legislature is Convention compliant; … nor does such (repeated) debate alter the margin of appreciation accorded to the State'.[34] For these reasons, they found that the majority had attached too much importance to the legislative process.

Thus, the procedural trend in ECtHR case-law is not uncontroversial. The debates surrounding the ECtHR's procedural approach, moreover, do not stand on their own. Similar debates have arisen in other legal contexts. Just like the ECtHR judges, judges from other legal systems have expressed their opinions on the topic of procedural reasoning. For example, the President of the Court of Justice of the European Union,

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and Spielmann (2012), p. 401; and former Belgian Judge and Vice-President of the ECtHR Françoise Tulkens in De Schutter and Tulkens (2009), pp. 169 and 208–213.

29 German Judge and Vice-President of the ECtHR Angelika Nussberger in Nussberger (2017), pp. 165–172.

30 E.g., the Dissenting Opinion of Judge Tuković to ECtHR 14 September 2017, app. no. 41215/14 (*Ndidi v. the UK*), para. 8 (on the procedural obligation for national courts to adequately assess the best interests of the child); the Concurring Opinion of Judge Pinto de Albuquerque to ECtHR 26 November 2013, app. no. 27835/09 (*X. v. Latvia*) (on the need of effective investigations by courts in cases concerning child abduction); the Joint Dissenting Opinion of Judge Mahoney in ECtHR 24 June 2014, app. no. 33011/08 (*A.K. v. Latvia*) (on when national courts' decision-making procedures can be considered arbitrary); and the Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens to ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. UK (No. 2)*), para. 7 (on the ECtHR going too far by prescribing how parliamentary debates should take place). See also the background paper Council of Europe, European Court of Human Rights, Organising Committee (2015), 'Seminar to Mark the Opening of the Judicial Year 2015 – Subsidiarity: A Two Sided Coin?' (30 January 2015) <https://www.echr.coe.int/Documents/Seminar_background_paper_2015_ENG.pdf>, paras. 27–31. This background paper was chaired by Judge Laffranque and composed of Judges Raimondi, Bianku, Nussberger, and Sicilianos.

31 ECtHR (GC) 22 April 2013, app. no. 48876/08 (*Animal Defenders International v. UK*), para. 114ff.

32 See for a discussion of this judgment and the ECtHR's procedural approach, Popelier and Van de Heyning (2017), pp. 17–20; Saul (2016); and Saul (2015), pp. 1–2.

33 Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić, and De Gaetano to ECtHR (GC) 22 April 2013, app. no. 48876/08 (*Animal Defenders International v. UK*), paras. 9–10.

34 Ibid, para. 9. By contrast, see the Concurring Opinion of Judge Bratza to the judgment (paras. 12–17).

PROEF 3

Koen Lenaerts, has asserted positive views on the use of procedural reasoning by the CJEU.[35] By contrast, Lord Bingham, Lord Hoffmann, and Lady Hale of the UK Supreme Court, have strongly opposed a procedural approach in relation to the Human Rights Act.[36] They considered the judicial role of the UKSC to be a substantive one, which requires a substantive inquiry into infringements with fundamental rights. On the other hand, however, a procedural approach has famously been advanced by Justice Stone of the US Supreme Court.[37] In the case of *Carolene Products*, from as early as 1938, in footnote four of his dissenting opinion, he argued that process-based review may help to single out cases in which prejudice against discrete and insular minorities curtailed the political process, which would warrant strict scrutiny of the legislation on the merits.

Justice Stone's view, in turn, inspired scholar John Hart Ely to develop a participation-reinforcing review theory. According to Ely, the USSC should apply procedural reasoning to ensure the political channels are open to participation by all citizens, including minorities.[38] Unlike substantive reasoning, he argued, such an approach would be supportive of the US system of representative democracy and be in line with the expertise and institutional position of the USSC.[39] Ely's theory has sparked many debates on the value of procedural reasoning, especially in light of the assumed neutrality of this approach and the counter-majoritarian difficulty of judicial review.[40] Procedural reasoning has also been a topic for debate in broader discussions on deliberative democratic theories, as illustrated by the theories of the German philosopher Jürgen Habermas and, more recently, the Brazilian scholar Conrado Hübner Mendes.[41] In particular, these scholars have raised questions about whether, and to what extent, courts can play a role in pursuing and upholding deliberative values.[42] Furthermore, a study by Susan Rose-Ackerman, Stefanie Egidy, and James Fowkes has demonstrated the presence of process-based review of legislative processes in the judgments of EU, German, US, and South African courts.[43] An edited volume by Janneke Gerards and Eva Brems has also confirmed that debates on procedural reasoning are not just present at the level of the ECtHR but can also be found in the case-law of the UKSC, the CJEU, and the Appellate Bodies of the World Trade Organization.[44] Lastly, procedural reasoning has been connected to the evidence-based

[35] Lenaerts (2012).

[36] UKSC 22 March 2006, [2006] UKHL 15, (*R (on the application of Begum) v. Denbigh High School*), paras. 28–31 (Opinion Lord Bingham) and para. 68 (Opinion Lord Hoffmann) and UKSC 25 April 2007, [2007] UKHL 19 (*Belfast City Council v. Miss Behavin' Ltd.*), para. 231 (Opinion Lady Hale).

[37] USSC 25 April 1938, 304 U.S. 144 (*Carolene Products*), p. 152.

[38] Ely (1980), Chapter 6.

[39] Ibid, pp. 88ff.

[40] E.g., Tribe (1985), p. 9ff; Tribe (1980). For a good overview of the various arguments expressed in the US debate, see Bar-Siman-Tov (2011). See also Section 9.2.1.

[41] Habermas (1998) and Mendes (2013).

[42] On deliberative democratic theories and the relationship with procedural reasoning, see Section 7.3.

[43] Rose-Ackerman, Egidy, and Fowkes (2015). Concerning the German Federal Constitutional Court, see also Messerschmidt (2016b).

[44] Gerards and Brems (2017).

PROEF 3

trend in the EU and the US, which concerns a development towards more rational, transparent, and informed decision-making by executive and legislative authorities.[45] The appropriateness of procedural reasoning in light of this trend has also been subject to debate.[46]

This introduction has demonstrated two important issues. First, it is clear that the idea of process-based fundamental rights review is not uncontroversial; the use and the value of procedural reasoning are in fact strongly debated. Secondly, it is evident that procedural reasoning is applied not just by the ECtHR, but also by courts in other legal systems.[47] Indeed, mention has been made of a 'cross-national phenomenon' of process-based review.[48] Of course, we may ask whether there is truly a procedural trend around the world. In the absence of (large-scale) empirical research affirming such trends, one cannot know for sure. Nevertheless, even if there were no such trend, the fact remains that procedural reasoning is, at least occasionally, applied in fundamental rights cases by international and national courts.[49] Therefore a study into what process-based review entails exactly and what its role is and reasonably can be in fundamental rights cases, is of considerable significance for the practice of fundamental rights adjudication.

1.2 THE BOOK'S OBJECTIVES AND QUESTIONS

This book pursues two central lines of inquiry. First, it provides a further conceptualisation of process-based fundamental rights review, which is general and context-independent (and thus not limited to the scope of the ECtHR's procedural turn). Much has already been written about procedural reasoning, but the focus is often on one particular court or element of procedural reasoning.[50] Within each of these contexts, various definitions and terminologies are used, from 'participation-oriented, representation-reinforcing approach to judicial review'[51] to 'semi-procedural review'[52], and from 'procedural rationality review'[53] to 'procedural proportionality review'.[54, 55] Providing an overarching definition of procedural reasoning therefore is important,

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45 E.g., Alemanno (2013) and Popelier (2017). For more references, see Section 9.3.2D.

46 Ibid.

47 Although it has been argued that the extent and the width of the ECtHR's procedural approach concerning substantive rights goes well beyond the use of process-based review by the Inter-American Court of Human Rights, the German Federal Constitutional Court, and the UN Human Rights Committee, see Le Bonniec (2017), pp. 186–1190.

48 Alemanno (2013), p. 329.

49 The examples discussed in Part I provide further evidence of this claim.

50 See the references in Section 1.1.

51 Ely (1980), p. 87.

52 Bar-Siman-Tov (2011), p. 1917.

53 Popelier and Van de Heyning (2017), pp. 9–10 and Popelier and Van de Heyning (2013), p. 232.

54 Harbo (2017), p. 32.

55 See more extensively Section 5.2.1.

PROEF 3

especially as it would allow for case-law comparisons and cross-fertilisation of insights and arguments from one legal context to another.

This general conceptualisation also looks at the various ways in which process-based fundamental rights review is used. Returning briefly to the ECtHR, for example, case-law analyses have shown that the ECtHR uses procedural considerations in many different ways.[56] It has relied on procedural reasoning to determine the proportionality of measures as well as the width of the margin of appreciation, and it has relied exclusively on procedural considerations, but it has also relied on them alongside substantive considerations. In addition, since procedural reasoning has been applied by different courts – each court having its own mandate, interpretation techniques and review methods – differences in application of procedural reasoning exist. To ensure the relevance of the conceptualisation of procedural reasoning for the practice of fundamental rights adjudication in different contexts, this book takes account of these different applications of procedural reasoning. This also means that the conceptualisation of procedural reasoning will not regard this type of reasoning as an all-or-nothing approach – that is, as implying that fundamental rights cases are either decided entirely on procedural grounds or decided solely on substantive grounds. Instead, it is submitted that such a conceptualisation should allow for many nuanced and intermediate applications.

A second line of inquiry focuses on the meaning and normative value of process-based review for fundamental rights adjudication. This book aims to provide a broad understanding of the arguments made and the positions taken in the debates on procedural reasoning. From what has already been said, it is clear that the debates on procedural reasoning relate to many different issues. Some debates concern the institutional position of courts to review the legislative process; others relate to the role of procedural reasoning from the function of courts in protecting fundamental rights; and, finally, procedural reasoning has been connected to different types of cases. In the context of the ECtHR, for example, procedural reasoning has been linked to morally sensitive cases. More broadly, the use of procedural reasoning has been regarded as a judicial reflex to the evidence-based trend in administrative decision-making. The wide-ranging issues these debates on procedural reasoning touch upon – that is, institutional, functional, normative and epistemic issues – show that assessing the value of process-based review in fundamental rights cases is riddled with difficulties. Understanding the various aspects of these debates and their interconnectedness will help us to fully comprehend and appreciate the use and desirability of process-based fundamental rights review.

These two lines of inquiry allow the book to bring together literature and cases from different jurisdictions and legal contexts. In particular, they help to identify the relevant arguments on procedural reasoning as well as to counter unwarranted black-and-white and one-size-fits-all approaches towards this type of review. The position taken in this book is that such approaches do little justice to the complex and varied application of

56 See n(10) to (15).

PROEF 3

procedural reasoning in the practice of fundamental rights adjudication. Instead, this book aims to highlight the possible differentiation in the application of process-based review in order to provide general guidelines as to when and how procedural reasoning can best be applied in a given context. In short, the conceptual-theoretical research described in this book uncovers the limitations and potential of procedural reasoning in the practice of fundamental rights adjudication.

Against this background, the book addresses two main questions: **(1) how can process-based review be conceptualised** and **(2) what role can it play in fundamental rights cases?** To answer these central questions, four sub-questions are addressed in the main Parts of the book:

1) How has process-based review been applied in the practice of fundamental rights adjudication? (Part I)
2) How can process-based fundamental rights review be defined? (Part II, Chapter 5)
3) How can process-based review be applied in fundamental rights cases? (Part II, Chapter 6)
4) What are the arguments for and against process-based fundamental rights review? (Part III)

1.3 SCOPE OF THE BOOK AND TERMINOLOGY

To achieve the book's objectives, and to answer the questions formulated in Section 1.2, the conceptual-theoretical research provides an overview of arguments put forward on the value and meaning of procedural reasoning in various contexts. Considering the theoretical nature of this research, the answers provided are inevitably general and rather abstract. Nevertheless, to ensure that the discussion does not become detached from the practice of fundamental rights adjudication, the book regularly turns to the examples of process-based fundamental rights review. The illustrative, procedurally reasoned cases therefore provide not only the necessary concretisation of the theoretical findings of the research, but they also serve as real-world yardsticks against which the theoretical framework on procedural reasoning can be measured.

Quite obviously, this book focuses on *process-based review*. One of the central aims of the book is to provide a better understanding of this notion and of several related terms, such as procedural reasoning, proceduralisation, and procedural considerations. In Chapter 5, process-based review is defined as 'judicial reasoning that assesses public authorities' decision-making processes in light of procedural standards'.[57] While procedural reasoning, as a method of review, can be applied by any person in any given context, this book concentrates on the application of it by courts. *Courts* in this

57 Section 5.2.3.

PROEF 3

context refers to any (quasi-)judicial organisation, tribunal or committee tasked with judicial decision-making.[58] In addition, this book specifically targets the application of procedural reasoning in fundamental rights adjudication. *Fundamental rights adjudication* refers to judicial review in cases in which fundamental rights are at stake, whether directly or indirectly.[59] Sometimes procedural reasoning is applied in cases that directly raise questions about the protection of fundamental rights. For example, at the ECtHR the issue at stake is whether there has been an unjustified infringement with Convention rights. At other times, process-based review is applied in cases that only indirectly address fundamental rights. For example, in cases where the main issue is about the validity of the decision to expel an individual from a State, the fundamental rights of the individual are only indirectly addressed or play only a role in the background of the case. Finally, this book takes the position that fundamental rights, democracy, and the rule of law are intrinsically connected and presuppose each other.[60] In essence this means that independent and impartial fundamental rights adjudication at the national level requires that there is a separation of powers and that all public authorities are bound by the law, including by fundamental rights, and that the authority responsible for making the law is, at least partially, comprised of representatives chosen by the people through open and fair elections. As this book focuses on procedural reasoning in fundamental rights adjudication, it focuses on examples of, and literature on, procedural reasoning from courts in democratic societies (as well as on international courts even though these may not formally meet these criteria). The findings of this study may nevertheless be of relevance to courts in other contexts as well.

1.4 METHODOLOGY AND METHODS

The methodology used to achieve the objectives and to answer the central questions posed by the book can be described as *concept formation and analytical framework building through multiple descriptions*.[61] This mode of comparative constitutional scholarship has been chosen to allow for a detailed understanding of the theory and practice of process-based fundamental rights review as it can be found in different jurisdictions and in different debates. Ran Hirschl described this methodology as follows: 'By studying various manifestations of and solutions to roughly analogous

[58] See also Section 5.2.3.

[59] See also the Introduction to Part I and Section 5.2.2.

[60] For a theoretical discussion on the relationship between fundamental rights, democracy and the rule of law, see the report of the Advisory Council of International Affairs of the Netherlands (2017), 'The Will of the People? The Erosion of Democracy under the Rule of Law in Europe' (June 2017) no. 104 <https://aiv-advies.nl/download/efa5b666–1301–45ef-8702–360939cb4b6a.pdf> and Bisarya and Bulme (2017), pp. 127–136. Chapter 7 relies also on such an understanding, and Section 7.5.1 more explicitly addresses the relationship between debates on procedural reasoning and key notions of democracy, the rule of law, separation of powers, and subsidiarity.

[61] Hirschl (2014), pp. 238–240.

PROEF 3

constitutional challenges, our understanding of key concepts' – in this book, process-based fundamental rights review – 'becomes more sophisticated and analytically sharp'.[62] The universalist approach[63] taken in this book enables the creation of a context-independent theoretical framework for studying as well as for applying procedural reasoning, a result that can be beneficial to both scholars and courts. The methodology chosen is supported by the notion of a reflective equilibrium.[64] This notion entails a continuous shifting forward and backward between theory and practice; that is, between the theoretical arguments on and the practical examples of procedural reasoning. Such a continuous moving forward and backward allows for the development of an understanding of process-based review that is theoretically sound and that meets practical concerns.

The research underlying this book is thus mainly descriptive-analytical in nature. Nevertheless, the conclusions in Chapter 10 and to a certain extent also the reflective parts of the research (see the 'Reflections' to each Part and the sections 'Reflections and connections' to Chapters 7 to 9 (Sections 7.5, 8.4, and 9.4)) are more normatively reasoned. These sections provide not only prescriptive frameworks for courts and scholars to explain different views on procedural reasoning and to determine how procedural reasoning can best be applied, but they also offer justifications for holding a particular view or for choosing a specific procedural approach.[65] In describing and reflecting on the debates on procedural reasoning, on the concept of process-based review, and on the practical examples of the application of this approach, the book relies primarily on English-language literature, although at times reference is made to Dutch, French, and Spanish writings as well.

Each of the three Parts of this book represents one piece of the larger methodological puzzle. The book requires a broad range of examples of process-based review to be included ('multiple descriptions', Part I), a conceptualisation of this review based on these multiple descriptions of procedural reasoning ('concept formation through multiple descriptions', Part II), and a systematic overview and reflection of the pros and cons of process-based review in fundamental rights cases ('analytical framework building', Part III and Conclusion). Because of the different goals of the three Parts, different research methods are used in each of them.[66] To ensure a proper understanding of the content discussed and the perspective taken in each Part, the Introductions to Parts I, II, and III include a more detailed explanation of the methodology applied

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62 Ibid, p. 238.

63 Jackson (2012), pp. 60–62.

64 A term coined by Rawls (1997), para. 4. For a brief discussion of this method in legal research, see Singer (2009), pp. 976–977. This method is discussed in more detail in the Introduction to Part II.

65 On descriptive, prescriptive, and legitimising goals of legal research, see Smits (2017), pp. 213–221.

66 According to Hirschl, reliance on a plurality of methods can strengthen research and it should be ensured that 'a rational, analytically adaptive connection exists between the research questions and the comparative methods used', see Hirschl (2014), p. 18.

PROEF 3

and the methods used. For the sake of clarity, however, a brief description of these approaches is provided here as well.

As regards the application of process-based review in fundamental rights cases, various examples are discussed in Part I. These examples have been gathered from the literature on procedural reasoning, from informal talks with lawyers from different legal systems, and from small-scale case-law analyses. The cases in this 'small-N study' have been selected on various grounds: as they relate to similar or rather to different fundamental rights cases, and as they are prototypical procedural cases or rather are 'most difficult' cases.[67] Part II conceptualises process-based review by moving back and forth between the examples of procedural reasoning and the theory on procedural reasoning and on fundamental rights adjudication. The method of a reflective equilibrium is particularly important here, as this Part relies on the writings of lawyers, legal theorists, philosophers, and political and social scientists as well as on examples of procedural reasoning in the case-law in order to develop a more in-depth yet practice-oriented understanding of process-based fundamental rights review. Part III systematically discusses the various arguments for and against procedural reasoning based on legal theoretical and philosophical literature on process-based review and closely related topics. This Part divides the various arguments into institutional, functional, normative, and epistemic issues. It also includes references to the examples of procedural reasoning to make these theoretical discussions more concrete and lively. This systematic and structured discussion of procedural debates enables a comprehensive overview of the multiple normative arguments, the competing and contested role of procedural reasoning, and the conflicting values underlying these views.[68]

All this provides the basis for the analytical framework, or the 'building blocks', set out in Chapter 10. This concluding chapter addresses the main questions of the book through an impressionistic transposition of the materials in Parts II and III. By assembling the various arguments discussed in Part III to the conceptual framework of process-based fundamental rights review developed in Part II, this final chapter provides new insights into the procedural debates that may be underlying certain applications of process-based fundamental rights review. This framework may be beneficial both for courts in developing well-balanced and informed procedural approaches and for scholars studying process-based fundamental rights review.

1.5 ROADMAP

As noted above, the book is split into three Parts. Each Part starts with a brief introduction explaining the focus and the methodology, and outlining the chapters that

67 Ibid, pp. 244–267.

68 Singer (2009), p. 976.

PROEF 3

follow in that Part. Each Part concludes with a short summary of and a reflection on the main findings.

Part I addresses the application of process-based review in the practice of fundamental rights adjudication. This Part outlines and discusses in detail twenty-eight examples of procedural reasoning in fundamental rights cases. It shows that procedural reasoning is applied by a broad variety of courts, in different ways, and in relation to very different cases and rights. Without intending to provide proof of a world-wide procedural trend, the reference to these examples of procedural reasoning evidences that procedural reasoning is, at least occasionally, used by courts. The examples of process-based fundamental rights review are categorised by the object of the review. Thus, Chapter 2 focuses on the use of procedural reasoning by courts in relation to legislative processes, Chapter 3 discusses procedural reasoning in relation to administrative processes, and Chapter 4 addresses the application of procedural reasoning in relation to judicial procedures.

Part II develops a conceptual-theoretical understanding of process-based fundamental rights review. This conceptualisation is phrased in general and universal terms to ensure its applicability to fundamental rights cases regardless of the specific context in which procedural reasoning is applied. This Part explains what procedural reasoning entails and how it can be applied in fundamental rights adjudication. Chapter 5 defines process-based review as 'judicial reasoning that assesses public authorities' decision-making processes in light of procedural standards'. This definition is based on common elements in the definitions provided in the literature of procedural reasoning and in the examples of procedural reasoning given in Part I. This chapter further clarifies that, from a conceptual perspective, it is impossible to distinguish strictly between procedural reasoning and substantive reasoning. Instead, it is argued that process-based and substance-based review can best be understood as ends of a spectrum of judicial review, ranging from purely procedural reasoning to purely substantive reasoning.

Chapter 6 goes on to address the possible applications of procedural reasoning in fundamental rights adjudication. It explains that courts may vary their use of process-based review in light of seven different elements of fundamental rights adjudication: the intensity of process-based review, the burden of proof, the standards on which the review relies, the result of the procedural considerations, the location of the procedural considerations in the judgment, the importance attached to the procedural considerations, and, finally, the conclusion drawn on the basis of procedural reasoning. For example, courts may closely scrutinise the quality of decision-making procedures or they may scrutinise it in a more lenient manner (intensity of process-based review); and they may apply procedural reasoning to determine the suitability of a measure or they may use it to decide on its proportionality (location of process-based review). This chapter clarifies each of these steps. It explains how procedural reasoning is shaped by and can be applied in each of these steps, and – to make the discussion more concrete – it refers to the practical examples of process-based review given in Part I.

PROEF 3

Part III brings together the wide-ranging debates on procedural reasoning and reflects on the considerations and concepts underlying these debates. It clarifies the broad scope of the debates surrounding process-based review and it explains that black-and-white and one-size-fits-all arguments often lend themselves to inadequate descriptions of the varied and complex practice of process-based fundamental rights review. A more practice-oriented insight into the theoretical debates is provided by explaining how the different arguments relate to the examples of procedural reasoning and how some of these judgments have actually triggered certain debates. Chapter 7 addresses the institutional debates relating to process-based review. It discusses the role of courts and of procedural reasoning in upholding the rule of law and deliberative democratic values. It also addresses the topic of institutional deference, highlighting the opposing views on procedural reasoning as showing judicial restraint on the one hand or as indicating judicial activism on the other. The chapter connects the various arguments on the institutional position of courts with views on key notions in constitutional theory, such as democracy, separation of powers, the rule of law, and subsidiarity. It argues that the views on procedural reasoning are (directly) influenced by views on these underlying and highly intricate constitutional issues. This means that minor differences in institutional design and in perspectives on the institutional position of courts may affect conceptions of the value, appropriateness, and intrusiveness of process-based review.

Chapter 8 addresses the issue of what role there is for procedural reasoning considering courts' function as guardians of fundamental rights. It starts with a discussion on the procedural mandate of courts and their standard-setting task. Different positions have been taken on whether courts should be able to develop standards for decision-making procedures, in particular in relation to legislative processes. The chapter's main focus, however, is on the debates concerning whether procedural reasoning can assist courts in providing protection of fundamental rights. From one perspective, it has been argued that procedural reasoning provides minimum or even enhanced protection of fundamental rights; from another, process-based review is regarded as an unsuccessful way of protecting fundamental rights and as leading to weakened judicial protection. This chapter concludes by finding that the various and competing views can be explained in light of divergent perspectives on the primacy of procedure or substance as well as whether one chooses to focus on the concrete or the generic fundamental rights impact of procedural reasoning. How to value process-based approaches, therefore, depends on whether one emphasises the protection provided to an individual's rights in a case or the protection provided across the board. In any case, from both the concrete and generic perspective the effectiveness of procedural reasoning will depend on various contextual factors.

Chapter 9 discusses two different debates relating to challenges that may arise in fundamental rights adjudication. These concern challenges that arise as a result of normative indeterminacy of fundamental rights and epistemic uncertainties concerning the facts and the effects of measures. First, this chapter addresses the

PROEF 3

views on procedural reasoning in relation to normative difficulties that may arise in fundamental rights adjudication. It addresses the neutrality-normativity debate of process-based review, starting from Ely's perception of procedural reasoning as a neutral and value-free judicial review method. The chapter also discusses arguments regarding procedural reasoning as an avoidance strategy for courts in relation to cases where there is an incommensurable conflict between rights ('hard cases'). Secondly, it considers the role of procedural reasoning in cases with epistemic uncertainties. These are cases in which evidence is indecisive and effects of authorities' measures are not (entirely) known. The chapter outlines various views on the procedural expertise of courts, the use of procedural reasoning to circumvent empirical reasoning, and procedural reasoning advancing or hindering the evidence-based trend in decision-making. It concludes by connecting the debates on procedural reasoning with different views on the relationships between law and morality and between law and empiricism. It also explains that procedural reasoning will not be able to solve the fundamental neutrality-normativity tension in fundamental rights adjudication. Therefore, it argues that the desirability of procedural reasoning is strongly dependent on the specific normative or epistemic context in which it is applied.

Finally, Chapter 10 concludes by bringing the main findings of Parts II and III together. The chapter draws broad, tentative, and general conclusions that indicate how the various arguments in favour and against the use of procedural reasoning may be present in a particular application of process-based review. By setting out these guidelines or building blocks this chapter makes the book's theoretical findings more concrete. This enables scholars and courts to use these findings to study and apply procedural reasoning in the practice of fundamental rights adjudication. The chapter concludes that no one-size-fits-all approach to procedural reasoning should be taken, as the reality of process-based fundamental rights review is highly complex and varied.

PART I

THE PRACTICE OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

PROEF 3

PROEF 3

PROEF 3

INTRODUCTION TO PART I

PROCESS-BASED REVIEW IN THE PRACTICE OF FUNDAMENTAL RIGHTS ADJUDICATION

Chapter 1 discussed the procedural trend that has been noted in the European Court of Human Rights' case-law.[69] The ECtHR is said to have taken a procedural turn by focusing more and more on the quality, diligence and fairness of national decision-making procedures for determining whether a substantive right has been violated. This development has been a topic of scholarly and judicial debate in recent years. At the same time, the ECtHR is not the only judicial institution that has relied on procedural reasoning with the literature showing that process-based review is applied by different courts. In relation to the EU, for example, the use of procedural reasoning by the Court of Justice of the European Union in case-law relating to the EU internal market and fundamental rights has been noted.[70] Various examples have been provided of procedural reasoning employed in the UN Treaty Bodies' complaint mechanisms.[71] At the national level too, process-based review has been discussed in light of specific procedural examples. Cases entailing review of the legislative process can be found in the case-law of the South African Constitutional Court as well as the Colombian Constitutional Court.[72]

So it seems that process-based review is part and parcel of fundamental rights adjudication. Especially in relation to procedural rights, such as the right to a fair trial and the right to an effective remedy, a procedural approach comes naturally to courts. After all, only by examining the decision-making procedures can they determine if these rights are upheld. In the context of judicial review of administrative decisions, which may affect fundamental rights, procedural reasoning is also often used.[73]

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69 See Section 1.1.

70 Beijer (2017a), p. 182ff; Harvey (2017), pp. 101–111; and Lenaerts (2012).

71 McCall-Smith (2015), pp. 9–12.

72 Rose-Ackerman (2015), pp. 114–116 (on the SACC); García Jaramillo (2016), p. 178 (on the CCC); Cepeda Espinosa and Landau (2017), pp. 328–334 (on the CCC's procedural approach to legislative procedures and constitutional amendments). Examples of these courts are discussed in Sections 2.2.5 (SACC) and 2.2.6 (CCC).

73 E.g., Masterman (2017), p. 250 (in the UK 'judicial review of administrative action remains largely procedural guarantee'); Sathanapally (2017), pp. 45–46 (explaining that the default approach in administrative law in common law systems is a procedural one); Mashaw (2016), pp. 15–17 (on proceduralisation of the giving-reason requirement by American and EU courts); Craig (2012), pp. 353–354 (discussing the expansion of procedural rights and therewith process-based review and

PROEF 3

A procedural approach is considered to reflect the separation of powers between the judicial and administrative branches but also to indicate respect for the general expertise of administrative authorities for taking substantive decisions.[74] Finally, even when process-based review is not a standardised approach, and is in fact highly controversial, it is possible to discern fundamental rights cases in which procedural reasoning has been applied by different courts.[75] The famous footnote four of the US Supreme Court's former Justice Stone in *Carolene Products* – discussed in Section 1.1 – already hints in that direction.[76] According to Justice Stone, it was incumbent on the USSC to examine whether insular minorities had been excluded from participating in the political process, and should this be the case, the USSC was required to closely scrutinise the legislation on its merits.

This brief introduction illustrates that procedurally reasoned cases can be found in many fundamental rights cases. In this light and considering the book's aims to better understand process-based fundamental rights review and the debates surrounding this review method, it is necessary to review how procedural reasoning is applied in the practice of fundamental rights adjudication. Examples of procedurally reasoned cases from different courts provide valuable insight into how process-based fundamental rights review works in practice. These examples also show that procedural reasoning is, at least occasionally, applied in different ways and in relation to different types of cases and rights.

METHODOLOGY AND METHODS OF PART I: CASE-SELECTION

Part I aims to provide the first step to solving the riddle of concept formation and analytical framework-building in relation to process-based fundamental rights review through the method of 'multiple descriptions'.[77] This means that it provides multiple descriptive examples of procedural reasoning, which can be found in the practice of fundamental rights adjudication. These examples have been collected from the literature on procedural reasoning, informal discussions with lawyers from different legal systems, and small-scale case-law analyses. For language reasons, most examples

noting that such may also facilitate or encourage substantive review); Correia (2011), p. 314ff ('there is no such thing as non-proceduralised administrative action'); Quinot and Liebenberg (2011), p. 639 (understanding administrative-law conception of review as one that 'is relatively process oriented and pays little regard to developing the substance of the normative content and obligations imposed'); and Harlow (2006), pp. 192ff (noting that administrative law is in most systems primarily concerned with procedure, but he mentions that such may not always warrant process-based review by courts).

[74] See also Section 3.1.

[75] See also the discussion in light of the UK in Section 3.2.5.

[76] USSC 25 April 1938, 304 U.S. 144 (*Carolene Products*), p. 152. See also Section 2.2.1.

[77] Hirschl (2014), pp. 238–240.

PROEF 3

relate to English language case-law, but cases in Danish, Dutch, and Spanish have also been included. It is indicated in the footnotes if the translation is an (official) version provided by the courts themselves, or whether it is provided by the current author or by other scholars. Where an example has been translated by the author, it has been submitted to and discussed with lawyers from the relevant jurisdictions in order to ensure that it conforms as far as possible to the legal understanding of that particular judgment in the national context.

The cases in this Part have been selected on various grounds. Beyond the obvious requirement that a case should comprise explicit procedural reasoning by courts, there were three other prerequisites for a case to be included. First, the case should relate to a judgment or decision taken by an international or national court in a democratic society. As was indicated in Section 1.3, the book starts from the perspective that fundamental rights, democracy and the rule of law are intrinsically connected and presuppose one another.[78] In essence this means that independent and impartial fundamental rights adjudication requires that there is a separation of powers and that all public authorities are bound by the law, including by fundamental rights, and that the authority responsible for making the law is, at least partially, comprised of representatives chosen by citizens through open and fair elections. Therefore, only judicial decisions by national courts in democratic States can be expected to uphold the values for real fundamental rights adjudication. Similarly, for international courts, it can be assumed that they are upholding democracy, fundamental rights and the rule of law.[79] Secondly, the examples must relate to fundamental rights. Thirdly, to ensure the topicality of the examples included, the cases chosen needed to be of relevance today. This required that the decisions were made within the last decade, that the jurisprudential line set out in the judgment is still applicable today, or that the case remains an issue for debate.

In total, this Part discusses twenty-eight examples of procedural reasoning by courts from sixteen different jurisdictions.[80] It thus comprises a 'small-N study'. Inspired by Ran Hirschl's principles for case-selection in such studies, procedural examples were

78 On this relationship see also, Advisory Council of International Affairs of the Netherlands (2017), 'The Will of the People? The Erosion of Democracy under the Rule of Law in Europe' (June 2017) no. 104 <https://aiv-advies.nl/download/efa5b666–1301–45ef-8702–360939cb4b6a.pdf> and Bisarya and Bulme (2017), pp. 127–136.

79 For various views on the legitimacy of international courts in light of democratic principles, see Føllesdal (2016); Rabinovich-Einy (2015); Bellamy (2014); Ulfstein (2014); Føllesdal (2013); Von Bogdandy (2013); Von Staden (2012); and Donoho (2003).

80 The difference in the number of examples and the number of jurisdictions is a result of the discussion of two the same examples in two chapters and the discussion of multiple examples relating to one and the same jurisdiction. More specifically, a total of six examples of the European Court of Human Rights are addressed. This means that a significant number of cases stem from the context of European Convention on Human Rights (in comparison: three cases of the UK courts, two cases of the CSC, of the CCC, of the ECJ, of the GFCC, and of the USSC are discussed). The decision to include more examples from the ECtHR is supported by the procedural trend in the case-law of the ECtHR, which formed the starting point of this book, see Section 1.1. In addition, these examples are particularly illustrative of procedural reasoning and the author of this book is most familiar with the ECtHR's work.

PROEF 3

selected that meet the aforementioned prerequisites on the basis of four different principles.[81] In accordance with the principle of the prototypical cases, the examples on process-based review include landmark and well-known procedural cases, such as *Hatton* (the ECtHR) and *Hartz IV* (the German Federal Constitutional Court).[82] On the basis of the principle of most similar cases, the examples in this Part also concern cases that relate to similar topics or rights in cases from different jurisdictions, for example, the right to political participation.[83] At the same time, cases have also been included on the principle of most different cases. Procedural cases have been selected that relate to different decision-making procedures (legislative, administrative, and judicial procedures), decisions taken at different levels (international, national, and local), different rights (procedural and substantive rights; civil and political rights and cultural and socio-economic rights), and different outcomes (violation and no violation; final decision or referrals). Finally, several cases are included that show some elements of procedural reasoning, but that are generally not regarded as procedural cases. These can be considered cases selected on the basis of the 'most difficult case' principle. For example, the *Urgenda* case at the Dutch District Court of The Hague only refers to procedural reasoning in passing and the procedural aspects have generated little debate. Therefore, this judgment hardly concerns a procedurally reasoned judgment.[84] These principles of prototypical, similar, different and most difficult cases combined, have enabled the inclusion of a broad variety of fundamental rights cases that include procedural reasoning.

Unlike many comparative legal research studies, the aim of this Part is not to draw conclusions on the basis of these cases, but to put forward descriptions of process-based review. Part I is therefore non-systematic and one might say even non-comparative in the strict sense.[85] This means that this Part does not contain an ordered case-law analysis that observes the similarities or dissimilarities of procedural approaches by different courts and compares them to each other.[86] Instead, the aim is to draw a varied picture of process-based review in the practice of fundamental rights adjudication.

[81] Hirschl (2014), pp. 244–267. It should be noted that this research concerns a non-systematic description of procedurally reasoned cases. Hirschl's theory therefore does not completely overlap with this book's aim. His principles for small-N studies have therefore only been an inspirational source for a methodologically convincing selection of cases. As Hirschl noted in relation to the principles for case selection in inference-oriented small-N comparative studies, 'even those who prefer to engage with the first three types of comparative inquiry [including concept formation and analytical framework building through multiple descriptions (as is carried out in this research)] might still find it useful to have a grasp of these principles' (p. 245).

[82] Discussed in Sections 3.2.6 and 2.2.4.

[83] Examples concerning the right to political participation are discussed in Chapter 2.

[84] Discussed in Section 3.2.4. The role that procedural reasoning could play in the *Urgenda* case is briefly addressed in Huijbers and Gerards (2016), pp. 210–211.

[85] The notion 'comparative' can be defined as 'involving the systematic observation of the similarities or dissimilarities between two or more branches of science or subjects of study' (as is put forward in Hirschl (2014), pp. 3–4 with a reference to the Oxford English Dictionary). The notion 'comparison' refers to the act of carrying out such a systematic observation.

[86] Hirschl (2014), pp. 3–5.

PROEF 3

Finally, it is important to note that the references to the examples in Chapters 2 to 4 do not suggest that procedural reasoning is the general practice of these courts nor that it is a central feature of these legal systems.[87]

ROADMAP TO PART I

The following three chapters provide examples of procedural reasoning applied by international and national courts in various fundamental rights cases.[88] To ensure a structured discussion, the examples are categorised by the object they focus on, that is, the different types of decision-making procedures they relate to: legislative, administrative, and judicial procedure. This structure fits well with the separation of powers doctrine, as courts are expected to stand in a different institutional relationship with each of the three branches of authorities. Furthermore, as Part III will show, debates on procedural reasoning tend to emphasise the institutional position of courts in relation to the decision-making authority to argue in favour of or against the use of process-based fundamental rights review.

Chapter 2 addresses the review of the *legislative* enactment procedures and refers to examples of procedural reasoning in the context of the United States, Germany, South Africa, Colombia, the EU, and the European Convention on Human Rights. Chapter 3 deals with process-based review in relation to *administrative* decision-making procedures and discusses examples from Canada, Australia, Denmark, the Netherlands, the United Kingdom, and the ECtHR. Chapter 4 discusses examples of procedural reasoning of the *judicial* decision-making procedure. It addresses examples from Argentina, Spain, Germany, and Canada as well as from the UN Committee on Economic, Social, and Cultural Rights, the Court of Justice of the European Union, and the ECtHR. This Part concludes with a Reflection that summarises and reflects on the main findings of these chapters.

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[87] Unless indicated otherwise. In such cases, the comments made are supported with reference to relevant literature.

[88] In the following chapters, the titles of the main examples are highlighted in bold. These are the cases to which Parts II and III will refer. Furthermore, the titles of several cases are placed between double quotation marks in order to indicate that they do not concern the official titles of these cases, rather these titles are used for the purpose of simplifying cross-reference.

PROEF 3

PROEF 3

CHAPTER 2

PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW OF LEGISLATIVE PROCEDURES

2.1 INTRODUCTION

The legislative enactment procedure is generally set out in national constitutions, statutes, and other laws, or, in the international context, in treaties and regulations. Process-based review can be used to assess the compliance of legislative authorities with such procedural requirements.[89] It has been employed by courts to determine whether local, regional, national, and international legislatures have fulfilled the requirements of balancing rights and of ensuring possibilities for participation in the political process.[90] To determine whether fundamental rights have been violated, courts have also examined the deliberativeness[91] and 'evidence-basedness'[92] of legislative enactment procedures, and they have shown willingness to protect the rights of minorities and indigenous peoples in political processes.[93] The following section addresses examples from the US Supreme Court, the Supreme Court of Hawaii, the German Federal Constitutional Court, the South African Constitutional Court, the Colombian Constitutional Court, the European Court of Justice, and the European Court of Human Rights. It also briefly discusses the sensitive nature of judicial review of legislation, which includes the review of the legislative process in New Zealand, the UK, and Finland. This chapter ends with a short conclusion.

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89 For instance, the CCC is keeping 'tight control over legislative process' and 'has intervened when Congress has not followed all of the required procedural steps in the Constitution', see Cepeda Espinosa and Landau (2017), p. 327. In relation to the EU, German, South African and US courts, it has also been noted that 'the protection of rights had led the courts to review some legislative procedures', although some courts more than others, see Rose-Ackerman, Egidy, and Fowkes (2015), p. 267ff.

90 On political participation, see e.g., Sections 2.2.2 (Hawaii), 2.2.5 (South Africa), and 2.2.6 (Colombia), and on careful considerations, see e.g., Sections 2.2.7 (ECJ) and 2.2.8 (ECtHR the *Hirst (No. 2)* judgment).

91 Examples can be found in Sections 2.2.7 (ECJ) and 2.2.8 (ECtHR the *Hirst (No. 2)* judgment). The importance of deliberative political processes is addressed in Section 7.3 (on the value of procedural reasoning in light of deliberative democratic theories).

92 This notion refers to the need of legislative authorities to gather (science-based) evidence during their legislative process and refers to the trend of evidence-based decision-making, which is addresses in Section 9.3.2. Examples of the review of 'evidence-basedness' of legislative enactment procedures can be found in Sections 2.2.4 (Germany) and 2.2.8 (ECtHR the *Bayev* judgment).

93 See e.g., the examples in Sections 2.2.1 (US) and 2.2.6 (Colombia).

PROEF 3

2.2 EXAMPLES OF REVIEW OF THE LEGISLATIVE PROCESS

2.2.1 US SUPREME COURT: *CAROLENE PRODUCTS* AND *FULLILOVE*

Starting with the US Supreme Court (USSC), the classic case of the review of the legislative enactment procedure is the *Ballin* judgment of 1892.[94] The judgment concerned duties levied on the importation of cloth. In that case Justice Brewer considered the meaning of the requirement for the Senate and House of Representatives to take decisions by majority.[95] The applicants challenged the validity of the import legislation and submitted that there was no majority present in the House when the law was passed. The USSC considered that it fell within the powers of the House to determine their internal procedures for verifying whether a quorum was present, and since the House had determined that there was, the legislation was held to be valid.[96] There are other judgments, some concerning different procedural standards, in which the USSC Justices have also considered applying process-based legislative review. In ***Carolene Products*** of 1938, the USSC discussed legislation prohibiting the mixing of skimmed milk with any other oil or fat, than regular milk fat.[97] Although the case itself is regarded as rather unimportant[98], Justice Stone made an influential statement about judicial review of the legislative process in the famous 'footnote four' of his dissenting opinion. He argued that 'prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry'.[99] By looking at the functioning of the democratic process and the role of minorities within that process, courts can determine whether closer scrutiny of the substance of the legislation is warranted. Although Justice Stone did not explicitly mention the need for courts to ascertain the quality of the decision-making process, his words have been interpreted to require process-based review of the legislative process.[100] In ***Fullilove***, a 1980 case relating to equal protection and in which fundamental rights played a more central role, USSC Justice Stevens argued more overtly in favour of judicial review of the legislative process.[101]

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[94] USSC 29 February 1892, 144 U.S. 1 (*US v. Ballin*). See for a discussion of this judgment, Rose-Ackerman, Egidy and Fowkes (2015), p. 32.

[95] USSC 29 February 1982, 144 U.S. 1 (*US v. Ballin*), p. 4. This requirement is laid down in the Article I, Section 5 of the US Constitution.

[96] Ibid, p. 9.

[97] USSC 25 April 1938, 304 U.S. 144 (*US v. Carolene Products*).

[98] Ackerman (1985), p. 713.

[99] USSC 25 April 1938, 304 U.S. 144 (*US v. Carolene Products*), p. 152.

[100] The link between footnote four and process-based review was made clear by John Hart Ely, see for more detail Sections 7.3.1B and 9.2.1A. Furthermore, it is suggested that footnote four had the 'larger ambit to deflect the counter-majoritarian difficulty', see Ackerman (1985), p. 718.

[101] For an overview of Justice Stevens' procedural approaches, see Coenen (2002), pp. 1385–1387.

PROEF 3

> 'For just as *procedural safeguards* are necessary to guarantee impartial decision-making in the judicial process, so can *they play a vital part in preserving the impartial character of the legislative process*… Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of [Congress'] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law. *Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause … it seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process.*'[102]

According to Justice Stevens, it is only where fundamental rights are at stake that review of the legislative process is warranted.[103] The opinions of Justices Stone and Stevens show that USSC Justices have anticipated the application of process-based review of the legislative process, particularly in relation to ensuring equality rights.[104] Two directions can be discerned in the procedural approach suggested. In *Fullilove* it was argued that the rigour with which the USSC could review the legislation would determine whether the USSC could look into the legislative process. In footnote four of *Carolene Products*, it was the other way around. Justice Stone's comment is generally understood as meaning that closer scrutiny was warranted when minorities' rights had not been guaranteed during the political process. These judgments show the close relationship that may exist between the level of scrutiny applied by courts and the use of procedural reasoning.[105] At the same time, these examples are statements in dissenting opinions and do not follow the general line of the USSC. Indeed, as Section 1.1 has already indicated, the legitimacy of judicial review of the legislative process has been subject to much debate in the US, both in scholarly writing and in the opinions of US judges.[106] Furthermore, thorough case-law analysis shows that the USSC only rarely reviews the legislative process.[107]

2.2.2 SUPREME COURT OF HAWAII: *TAOMAE*

Examples of procedural reasoning can also be found in State courts in the US. The Supreme Court of Hawaii (SCH), for instance, considered the compliance of a constitutional amendment with formal requirements of the Hawaii Constitution in ***Taomae*** of 2005.[108] It required that the title of a proposal to amend the Constitution

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102 USSC 2 July 1980, 448 U.S. 448 (*Fullilove v. Klutznick*), pp. 549–551 [emphasis added].

103 See Bar-Siman-Tov (2011), p. 1925. He also mentions other kinds of fundamental rights cases in which procedural reasoning is applied.

104 See Rose-Ackerman, Egidy and Fowkes (2015), pp. 65–66.

105 Addressed more explicitly in Section 6.3.5A.

106 E.g., Bar-Siman-Tov (2011); Coenen (2002); Ackerman (1985); Tribe (1985); Ely (1980); Tribe (1980); and Linde (1975).

107 Bar-Siman-Tov (2011).

108 SCH 1 September 2005, no. 26962 (*Taomae v. Lingle*).

PROEF 3

should indicate that it concerns a constitutional amendment. Furthermore, such a proposal must be read three times in each House before adoption. The amendment at hand, relating to what constitutes a continuing course of conduct in sexual assault cases, violated these requirements.[109] Regardless of these findings, the SCH was satisfied that the legislature had 'contemplated public participation in the legislative procedure', which was relevant for the constitutionality of the law.[110] The judgment touched on civil rights and entailed a review of the legislative process in light of the procedure set out in the Constitution.

2.2.3 NEW ZEALAND, UNITED KINGDOM, AND FINLAND

The desirability of judicial review of legislation, and process-based review in particular, is not just debated in the US context.[111] New Zealand, for example, is famous for its strong commitment to the principle of parliamentary supremacy.[112] The New Zealand Bill of Rights Act of 1990 (NZBORA) explicitly excludes the invalidation, disapplication, or treating as ineffective, legislation that is incompatible with that Act.[113] Instead, a 'rights friendly' interpretation of the legislation adopted by the parliament must be sought by the courts in New Zealand.[114] Nevertheless, the NZBORA is thought to have had little impact on the legislative process generally, which can be explained in large part by 'New Zealand's strong, ongoing constitutional attachment to the theory of pure parliamentary sovereignty' as a result of which 'judicial views on what individual rights require of society' simply do not get much traction.[115] This relates not only to review of the substance of legislation but also to the legislative process.[116]

The sovereignty of parliament is also central to the legal system of the United Kingdom (UK). It has been said that there is 'a long-standing aversion within the British constitutional tradition to the idea of judges consulting *Hansard* [the transcript of the parliamentary debate]' and Article 9 of the Bill of Rights from 1689 was believed to exclude UK courts from questioning parliamentary procedures.[117] Despite this aversion to process-based review of legislation, UK courts are required to review the compatibility of legislation with the rights laid down in the Human Rights Act of 1998 (HRA), which implements the European Convention on Human Rights.[118] Although this is generally

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109 Ibid, Sections I and V.
110 Ibid, Section VII and XII, Part A.
111 See for the debate in the context of Australia, e.g., Goldsworthy (2010) and Stone (2010).
112 Tushnet (2014), p. 41 and Geddis (2011). Of course, a considerable overlap is to be expected between the constitutional features of the UK and New Zealand in light of New Zealand's colonial relationship with the UK.
113 Gardbaum (2013), p. 129.
114 Ibid, pp. 129–130 and Geddis (2011), p. 101–103.
115 Geddis (2011), pp. 104–105. See also Gardbaum (2013), pp. 151–155.
116 Gardbaum (2013), p. 154.
117 Kavanagh (2014), pp. 445–446.
118 For an overview see Williams (2017), pp. 120–121.

PROEF 3

done on the basis of the content of the legislation, it has been argued that the UK Supreme Court is increasingly looking into the legislative enactment procedure.[119]

The Nordic European States are also known for their sceptical view of judicial review.[120] Nevertheless, in Finland for example, judicial review of legislation in light of fundamental rights has gained a place within the country's legal system. With the ratification of the European Convention on Human Rights in 1989 and its accession to the EU in 1995, the Finnish courts became more important in protecting fundamental rights, and a form of weak judicial review has been explicitly recognised in the new Finnish Constitution of 1999.[121] The Finnish Supreme Court has on rare occasions carried out review of Finnish legislation, but this is still regarded as a last resort.[122] It has been suggested, however, that Finnish courts have occasionally also focused on procedural justice in their constitutional review.[123]

2.2.4 GERMAN FEDERAL CONSTITUTIONAL COURT: *HARTZ IV*

In other States, judicial review of legislation, including scrutinising the legislative enactment procedure, is a central feature of the legal system. It has been suggested that Germany takes one of the most far-reaching approaches to legislative review.[124] The German Federal Constitutional Court (GFCC) has the competence to carry out judicial review[125], both concerning the content of the legislation and the procedure for enacting it.[126] Even in relation to legislation touching upon fundamental rights and where the legislature has a wide discretion, the GFCC has established clear procedural standards for legislative decision-making in its case-law. It has required the legislature, for example, to draw 'on existing knowledge by using the available material, consulting experts, and [conduct] hearings in the preparatory as well as the enactment stage' as well as to 'monitor the statute's development, especially the validity of initial prognoses [and to] take corrective steps to ensure continuous compliance with the Constitution'.[127]

A landmark judgment in which process-based review of the legislative procedure was a central feature, is the ***Hartz IV*** judgment of 2010.[128] The case concerned the

119 Kavanagh (2014), pp. 453ff.
120 De Visser (2014), pp. 75–78.
121 See Section 106 of the Finish Constitution entitled 'the Primacy of the Constitution'. For a discussion, see ibid, pp. 76–78 and Lavapuro, Ojanen, and Scheinin (2011), pp. 512–519.
122 Lavapuro, Ojanen, and Scheinin (2011), p. 524.
123 Ibid, p. 521.
124 Messerschmidt (2013), p. 235.
125 See Article 100 of the German Basic Law.
126 GFCC 16 January 1957, 1 BvR 253/56, 6 BVerfGE 32 (*Elfes*), para. 37.
127 Rose-Ackerman, Egidy and Fowkes (2015), p. 176 with references to various relevant GFCC judgments.
128 GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*) [official English translation <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209_1bvl000109en.html>]. See for a discussion Messerschmidt (2013), p. 235 and Egidy (2011).

PROEF 3

applicants' request to increase their entitlement to social security benefits for their children. Since the calculation of those benefits was based on the social support received by the children's parents, the case entailed a challenge to the underlying norm of a subsistence minimum for people in need. In its judgment, the GFCC decided that there is a fundamental right to a subsistence minimum, which it derived from the principle of human dignity in combination with the social welfare State as laid down in the Constitution.[129] The GFCC held that, together, these principles give an individual a subjective right to 'material prerequisites which are indispensable for his or her physical existence and for a minimum of participation in social, cultural, and political life'.[130] The exact scope and ways of providing minimum subsistence – such as, through benefits in kind, monetary benefits, or services – fell within the discretion of the legislature.[131] The GFCC nevertheless considered that it could review the basis for these decisions.[132] In particular, it examined whether the legislature had relied on scientific studies and accurate data:

> 'Within the material bandwidth which is left by this review of evident errors, the fundamental right to the guarantee of a subsistence minimum that is in line with human dignity cannot provide any quantifiable requirements. However, it requires a review of the basis and of the method of the assessment of benefits in terms of whether they do justice to the goal of the fundamental right. *The protection of the fundamental right therefore also covers the procedure to ascertain the subsistence minimum because a review of results can only be carried out to a restricted degree by the standard of this fundamental right*. In order to ensure the traceability of the extent of the statutory assistance as commensurate with the significance of the fundamental right, as well as to ensure the review of the benefits by the courts, *the assessment of the benefits must be clearly justifiable on the basis of reliable figures and plausible methods of calculation*.'[133]

In reviewing the legislation at stake, the GFCC found the legislature had failed to determine the standard of benefits for single adults (fixed at 345 EUR) on factual data. It considered that the legislature had 'made a "random" estimate of a share of expenditure allegedly not serving to secure the subsistence minimum, and deducted it, without an adequate basis in fact, so that there may be no case in this respect of plausible ascertainment of consumption which is relevant to the standard benefit'.[134] It held that even though the legislature could deviate from the statistical model for decision-making, to do so would require special reasoning, which was absent in this case. On the basis of inconsistency of the calculation methods used in the legislative procedure, the GFCC concluded that the factual basis for the legislation was missing

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129 GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*), para. 133.
130 Ibid, the header, para. 1.
131 Ibid, paras. 138.
132 Ibid, paras. 139–140.
133 Ibid, para. 142 [emphasis added].
134 Ibid, para. 175.

PROEF 3

and therefore it held the legislation to be unconstitutional.[135] Subsequently, it went on to consider several aspects that new legislation should take into account. For example, it considered that the legislation should create a possibility for exemptions to the fixed rate of benefits, so as to meet the requirements of persons with special and differentiated needs.[136] Clearly, the GFCC has shown itself willing to invalidate legislation by taking into consideration the procedural shortcomings in the legislative process.[137]

2.2.5 SOUTH AFRICAN CONSTITUTIONAL COURT: *DOCTORS FOR LIFE INTERNATIONAL*

Process-based review of the legislative decision-making process is also visible in the context of South Africa. South Africa is held to be a true democratic State since 1993.[138] Because of its relative young age as a democratic State, the specific content of constitutional rights and the possibility of judicial review is still in its developmental stage.[139] It is clear, however, from the Constitution that there is a quite an extensive potential for judicial review by the South African Constitutional Court (SACC).[140] This relates to the review of legislation on the basis of both substantive and procedural standards.[141] The best-known example of process-based review is the ***Doctors for Life International*** judgment of 2006.[142] In that case, the SACC dealt with the constitutionality of three acts of parliament and a number of bills, including on sensitive issues such as abortion and traditional healers. The judgment was concerned with whether the legislative enactment of these bills and acts complied with the constitutional requirement for the National Council of Provinces (NCOP) to 'facilitate public involvement in the legislative and other processes the Council and its committees'.[143] After a thorough analysis of international and foreign law on the right to political

135 Ibid, para. 173.

136 Ibid, paras 204–209.

137 The procedural consistency-approach adopted in this *Hartz IV* judgment, has been confirmed in a somewhat moderated version in a case concerning benefits for asylum seekers, see GFCC 23 July 2014, 1 BvL 10/12, (*Asylbewerberleistungsgesetz*) [official English translation <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bvl001010en.html;jsessionid=EAEC4D5393E4A7221394B2339105D39B.1_cid370>], paras. 170–173. In this judgment the GFCC also acknowledged there is room left for political negotiations and compromise, para. 162. For a discussion of the procedural approach adopted in this case, see Rose-Ackerman, Egidy, and Fowkes (2015), p. 181.

138 Rose-Ackerman, Egidy, and Fowkes (2015), p. 103.

139 Ibid.

140 Ibid, pp. 104–109.

141 Van der Schyff (2010), p. 267.

142 SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*).

143 See Section 72, paragraph 1, sub A of the South African Constitution. The NCOP, which is part of the legislative authority, is established to ensure the provincial interests are taken into account at the national level as well as to engage provincial legislatures in national policy. It consists of 'ten delegates of each of the nine provinces, including six permanent delegates and four special delegates'. See also ibid, paras. 79–84.

PROEF 3

participation, the SACC considered this right to encompass a positive obligation on the part of the South African government to facilitate participation.[144] This included the obligation to enable citizens' engagement in 'public debate and dialogue with elected representatives at public hearings' and the obligation to ensure that citizens 'have the necessary information and effective opportunity to exercise the[ir] right'.[145]

Against this background the SACC reviewed the legislative decision-making procedure followed for the enactment of these bills and acts of parliament. It noted that the South African parliament and the provincial legislatures have considerable discretion in how they meet their obligation to facilitate political participation.[146] Nevertheless, the SACC held that this obligation required the authorities not only to 'provide meaningful opportunities' for citizens to participate in legislative procedures but also to 'ensure that people have the ability to take advantage of the opportunities provided'.[147] After examining the process of public hearings in the provinces for each health bill separately, the SACC concluded:

> 'Having regard to the nature of the CTOP Amendment Bill [on abortion] and the THP Bill [on traditional healers], the request for public hearings by interested groups, the determination by the NCOP that the appropriate method of facilitating public involvement in relation to these Bills was to hold public hearings, the express promise to hold public hearings and the subsequent failure to hold public hearings, *the failure by the NCOP to hold public hearings was, in the circumstances of this case, unreasonable*. The NCOP therefore failed to comply with its obligation to facilitate public involvement in relation to these Bills as contemplated in section 72(1)(a) of the Constitution. In the event, the challenge relating to the CTOP Amendment Act and the THP Act must accordingly be upheld.'[148]

This judgment concerns a thorough procedural reasoning in relation to the legislative process, resulting in the legislation being declared unconstitutional. Moreover, the SACC compared the procedure followed not with legal procedural standards, but to the procedure that was adopted internally by the legislative authorities.[149] The SACC accepted, as a starting point, the choices of the NCOP and provincial legislatures to hold public hearings in the provinces, as it considered that this fell within their discretion.[150] However, it went further to examine whether the procedure in practice did indeed comply with the process they had laid down for themselves.[151] It was on the basis of

[144] SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*), paras. 91, 99, and 103 (for international and foreign law perspectives); and para. 101 (for the South African perspective).

[145] Ibid, para. 105.

[146] Ibid, paras. 123–124.

[147] Ibid, paras. 129 and 151.

[148] Ibid, para. 195 [emphasis added].

[149] Rose-Ackerman, Egidy and Fowkes (2015), p. 118.

[150] SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*), para. 180 (on the Bill on traditional healers) and para. 187 (on the Bill on abortion).

[151] Ibid, paras. 187–188: 'As with the THP Bill, the NCOP considered public hearings to be the appropriate method of facilitating public involvement in relation to the CTOP Amendment Bill. Once it was

PROEF 3

their failure to comply with these internal processes that the SACC invalidated the bills on abortion and health healers.[152] Particularly relevant for the SACC was the fact that several provincial legislatures had failed to invite written submissions or to hold public hearings, and the NCOP had failed to organise them in their place. Although the full implications of this case are still uncertain and questions about the content of the right to political participation persist (e.g., does it mean that there is an obligation to hold hearings, or should legislatures also engage and listen to what is said?)[153], this judgment shows that in the South African context too, legislative procedure has been reviewed. It is noteworthy that the SACC also refers to similar approaches taken by the SCH and the Portuguese Constitutional Court.[154]

2.2.6 COLOMBIAN CONSTITUTIONAL COURT: *'GENERAL FORESTING LAW CASE'* AND *'CONSULTATION OF ETHNIC COMMUNITIES CASE'*

The Colombian Constitutional Court (CCC) has also reviewed the legislative procedure by applying process-based review, mainly for reasons of deliberative avoidance in light of the Colombian Constitution.[155] In the '***General Foresting Law case***' of 2008, the CCC declared the Foresting Law unconstitutional.[156] It reached this conclusion after finding that the legislature had failed to ensure the right to consultation for indigenous people. This right to participation was protected under the Convention Concerning Indigenous and Tribal Peoples in Independent Countries as part of the International Labour Conventions and Recommendations (ILO Convention 169) and Article 27 of the International Covenant on Civil and Political Rights (ICCPR). These rights entail a right to participation by indigenous and tribal peoples when measures directly affect them; rights that are directly applicable under Colombian law.[157] In the case at stake, the CCC held that the Foresting law, regulating a broad range of activities in the Colombian forests, directly affected indigenous and Afro-Colombian communities. It considered that around seventy per cent of the land area in possession of both communities was forested, that these communities had their natural habitat in the forests, and that they were almost entirely dependent on the resources provided by the

conveyed to the NCOP that, contrary to its decision, a majority of the provinces did not hold public hearings, it was incumbent upon it to hold such hearings. … These considerations, in my judgment, lead to the conclusion that the NCOP and the provinces failed in their duty to facilitate public involvement in their legislative and other processes in relation to the CTOP Amendment Bill.'

[152] Ibid, para. 198.

[153] Rose-Ackerman, Egidy and Fowkes (2015), pp. 117–118.

[154] See SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*), para. 110, footnote 181.

[155] E.g., Jaramillo (2016), pp. 177–196 and Pérez and Fernando (2012). For the importance of process-based review in light of deliberations see also Cepeda Espinosa and Landau (2012), pp. 328–340.

[156] CCC 23 January 2008, C-030 (*'General Foresting Law'*).

[157] Ibid, para. 155.

PROEF 3

forests.[158] The CCC acknowledged that the Foresting law had been debated in Congress and that, in addition to the already deliberative and public process, there was also a broad process of participation by interested sectors.[159] Nonetheless, it considered that the right to consultation of indigenous peoples has specific characteristics that cannot be substituted by such a general participatory process.[160] It concluded:

> 'In order to have complied with the consultation, it would have been necessary for the government to have explained the project of law through sufficiently representative actors to the communities; illustrated its scope and how it might affect those communities; and given them effective opportunities to debate the project. That process was not carried out, and thus the Court concludes, given that the law treats a matter that is profoundly related to the worldview of those communities and their relationship to the land and that it is susceptible … to affecting them directly and specifically, it has no alternative than to declare the law unconstitutional.'[161]

The CCC thus declared an entire law unconstitutional on the grounds of the failure to properly consult the indigenous and Afro-Colombian communities.

A similar approach was taken in 2010 concerning amendments to the Colombian Constitution, which intended to change the Political Constitution in relation to the access of ethnic minorities' political participation in the Congress of Colombia.[162] In this judgment, which shall be called the '***Consultation of Ethnic Communities case***', the CCC held that the right to political participation pertains to a procedural guarantee aimed at the protection of minorities' right to subsistence and the right to cultural integrity.[163] The legislature had failed to consult ethnic minorities during the legislative process, even though the amendment directly affected them. The CCC therefore decided as follows:

> 'having concluded that the failure of the duty to consult the ethnic communities during the adoption of amendments to the Constitution constitutes a procedural defect that has substantive consequences, meaning that legislation can be affected for procedural reasons, and having verified that in the case of [these amendments] said consultation was

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158 Ibid, para. 221.
159 Ibid, para. 238b.
160 Ibid, para. 238e.
161 Ibid, para. 239 [translated in Cepeda Epinosa and Landau (2017), p. 267; emphasis added]. ('Para que se hubiese cumplido con el requisito de la consulta habría sido necesario, poner en conocimiento de las comunidades, por intermedio de instancias suficientemente representativas, el proyecto de ley; ilustrarlas sobre su alcance y sobre la manera como podría afectarlas y darles oportunidades efectivas para que se pronunciaran sobre el mismo. Ese proceso no se cumplió, razón por la cual la Corte concluye que, dado que la ley versa sobre una materia que se relaciona profundamente con la cosmovisión de esas comunidades y su relación con la tierra, y que … es susceptible de afectarlas de manera directa y específica, no hay alternativa distinta a la de declarar la inexequibilidad de la ley.').
162 CCC 6 September 2010, C-702 ('*Consultation of ethnic communities case*'). This case and related cases are briefly discussed in Pérez and Fernando (2012), p. 317.
163 CCC 6 September 2010, C-702 ('*Consultation of ethnic communities case*'), paras. 7.3.1–7.3.3 and 7.5.2.

PROEF 3

> not provided in any way, it declares the [amendments] unconstitutional on the basis of procedural defects.'[164]

The CCC thus concluded that the amendment was unconstitutional on the basis of the procedural failure of the legislature to consult ethnic minorities.[165] These two CCC judgments are clear examples of process-based legislative review concerning the right to consultation and political participation. They show that procedural reasoning may lead courts to declare laws and constitutional amendments unconstitutional. A similar approach has been taken by the CCC in other judgments, relating to parliamentary debates and to referenda on legislation allowing for presidential re-election.[166]

2.2.7 EUROPEAN COURT OF JUSTICE: *VOLKER UND MARKUS SCHECKE*

The Court of Justice of the European Union (CJEU), encompassing the European Court of Justice, the General Court, and EU specialised courts[167], has also reviewed the legislative enactment procedure within the context of fundamental rights. The oldest predecessor of the EU, the European Coal and Steel Community, was established in 1948 with the primary aim of administering coal and steel resources in France and Germany after the Second World War.[168] Over the years the scope of the European Union has increased; not only does it cover a larger territory, with a total of 28 Member States[169], but also its area of competence has expanded.[170] Regardless of the EU's predominant concern with economic issues, fundamental rights have increasingly become part of EU law.[171] Already in 1969 in *Stauder* and in 1974 in *Nold*, the ECJ held that fundamental rights are part of the general principles of EU law, serving to guide the interpretation of EU law and even taking precedence in the event of conflict within EU

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[164] Ibid, para. 7.7.4 [translation by author; emphasis added]. ('De esta manera, habiendo la Corte concluido que la omisión del deber de consultar a las comunidades étnicas concernidas con la adopción de actos reformatorios de la Constitución se erige en un vicio procedimental que se proyecta sustancialmente, por lo cual una disposición superior afectada por tal vicio puede ser demandada por razones de trámite en su aprobación, y habiendo verificado que en el caso del inciso 8° del artículo 108 de la Constitución Política, introducido por el Acto Legislativo No. 01 de 2009, dicha consulta no se surtió en forma alguna, en la parte resolutiva de la presente decisión declarará la inconstitucionalidad por vicios de trámite de dicha norma'.).

[165] This is in line with the obligation to consult minorities under international human rights law in measures affecting them, see for a discussion Fuentes (2016), p. 47.

[166] E.g., CCC 26 February 2010, C-141 and CCC 9 July 2003, C-551 (on the referenda on allowing for presidential re-election) and CCC 8 July 2001, C-760 (on parliamentary debates). These and various other cases have also been discussed in Cepeda Espinosa and Landau (2012), pp. 255–270 and 327ff.

[167] Article 19, paragraph 1 of the Treaty of the European Union. See also for a discussion Craig and De Búrca (2015), pp. 57–60.

[168] Craig and De Búrca (2015), p. 3.

[169] At 10 May 2019, the UK is still part of the EU.

[170] Craig and De Búrca (2015), pp. 1–29.

[171] Ibid, pp. 381–428.

PROEF 3

legislation.[172] With the entry into force of the Treaty of Lisbon in 2009, the EU has now its own binding fundamental rights instrument: the Charter on Fundamental Rights of the European Union (EU Charter).[173] Since then the CJEU has dealt with fundamental rights issues on a more regular basis.[174]

The European Court of Justice (ECJ) has occasionally turned to procedural reasoning in fundamental rights cases, both in relation to legislative acts and regulatory instruments of EU institutions and in relation to decisions of national authorities.[175] The ECJ relied on process-based review to invalidate EU legislation in the case of ***Volker und Markus Schecke***.[176] This case from 2010 concerned two EU Regulations that required EU Member States to publish information on the beneficiaries of European agricultural funds.[177] This included the publication of beneficiaries' names, the municipality in which they resided, and the amount of the funds received by each of them. The question arose whether the Regulations violated the right to privacy (Article 7 EU Charter) and the right to protection of personal data (Article 8 EU Charter). The ECJ considered that publication of this information served a legitimate aim of transparency in the use of EU funds.[178] It held that the principle of transparency in EU decision-making – a procedural principle – was part of EU law, as it 'enables citizens to participate more closely in the decision-making process and guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system'.[179] Although the measure served this legitimate interest, the ECJ concluded that, in relation to the information gathered on natural persons, it did not meet the requirements of necessity:

> 'As far as natural persons benefiting from aid under the EAGF and the EAFRD are concerned, however, *it does not appear that the Council and the Commission sought to strike such a balance* between the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds, on the one hand, and the fundamental rights enshrined in Articles 7 and 8 of the Charter, on the other.
>
> There is nothing to show that … the Council and the Commission took into consideration methods of publishing information on the beneficiaries concerned which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries' right to respect for their private life in general and to protection of their

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172 ECJ 12 November 1969, ECLI:EU:C:1969:57 (*Stauder*) and ECJ 14 May 1974, ECLI:EU:C:1974:51 (*Nold*). See also ibid, pp. 383–385 and 400–401.

173 The EU Charter is part of primary EU law, see Article 6, paragraph 1 of the Treaty of the European Union.

174 Gerards (2018a), p. 302. It has been argued that the ECJ has been more inclined to annul EU legislation for violation of individuals' rights since the binding force of the EU Charter, see Craig and De Búrca (2015), pp. 383–385 and 401.

175 See Beijer (2017a) and Lenaerts (2012). For a non-fundamental rights analysis of the procedural trend in the case-law of the CJEU see Harvey (2017), pp. 93–121.

176 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*).

177 See also discussion Beijer (2017a), pp. 191–192 and Lenaerts (2012), pp. 10–12.

178 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), para. 67.

179 Ibid, para. 68.

PROEF 3

> personal data in particular, such as limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received.'[180]

The ECJ thus attached importance to whether the EU institutions had tried to strike a proper balance between the EU interests and the rights to privacy and protection of personal data. This procedural reasoning, whereby the ECJ focused on the decision-making process of the EU legislature, was combined with substantive reasoning which led the ECJ to suggest possible less infringing measures that would still have served the principle of transparency.[181] On the basis of both the procedural and substantive failures the ECJ concluded that the EU institutions had exceeded the limits of the principle of proportionality.[182] Therefore it invalidated the EU Regulations insofar as they concerned the publication of personal data of natural persons.[183] Nevertheless, it added that 'the findings of the ECJ are not conclusive in this report', and that, in the end, it would be for the EU institutions to adopt new regulations and, in the process of adopting them, consider what the least restrictive means would be to guarantee transparency.[184]

2.2.8 EUROPEAN COURT OF HUMAN RIGHTS: *HIRST (NO. 2)* AND *BAYEV*

Chapter 1 mentioned several examples of procedural reasoning by the European Court of Human Rights (ECtHR).[185] In this respect, the ECtHR has also relied on the quality of the legislative process to determine whether there has been a violation of one of the Convention rights. In particular, it has paid attention to whether legislation infringing on fundamental rights was adopted after an extensive parliamentary process in which fundamental rights were taken into account during serious deliberations.[186] Scholars have paid significant attention to various well-known examples of procedural reasoning, such as the *Animal Defenders International* and *Hirst (No. 2)* judgments.[187] *Animal Defenders International* concerned the blanket ban on political advertisement established by the UK parliament. In that judgment, which was already briefly addressed in Section 1.1, the ECtHR concluded that there been no violation of the Convention because of the exceptional examination of the issue in

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180 Ibid, paras. 80–81 [emphasis added].

181 Indeed it required that the infringement should not go beyond to what is 'strictly necessary', ibid, para. 77. This included a reference to ECJ 16 December 2008, ECLI:EU:C:2008:727 (*Statakunnan Markkinapörssi and Satamedia*), para. 56.

182 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), para. 86.

183 Ibid, para. 89.

184 Lenaerts (2012), p. 12.

185 Section 1.1.

186 See n(3)

187 ECtHR (GC) 22 April 2013, app. no. 48876/08 (*Animal Defenders International v. UK*) and ECtHR 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*).

PROEF 3

the UK parliament.[188] In ***Hirst (No. 2)***, by contrast, it reached a different conclusion. That case concerned the disenfranchisement of the voting rights of prisoners by the UK parliament. This was the first time the ECtHR had to decide on the compatibility of a general and automatic disenfranchisement of convicted prisoners with the right to vote (Article 3 Protocol No. 1 ECHR).[189] The ban affected around 48,000 prisoners and concerned 'a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity'.[190] The question before the ECtHR was whether the legislative ban could be regarded as a justifiable restriction on the right to vote. The ECtHR noted that even though Article 3 Protocol No. 1 ECHR had no explicit limitation clause, there was room for implied limitations to infringements with this right.[191] At the same time, it considered that there was no common practice within the European States and that they had a margin of appreciation in determining which restrictions are necessary in light of their democratic vision.[192] To determine whether the legislative ban on prisoner voting rights could be considered proportionate in light of the UK's margin of appreciation, the ECtHR took a procedural approach.

> 'As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. It is true that the question was considered by the multi-party Speaker's Conference on Electoral Law in 1968 which unanimously recommended that a convicted prisoner should not be entitled to vote. It is also true that the working party which recommended the amendment to the law to allow unconvicted prisoners to vote recorded that successive governments had taken the view that convicted prisoners had lost the moral authority to vote and did not therefore argue for a change in the legislation. It may be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless, it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.'[193]

The ECtHR focused not so much on the substantive proportionality of the blanket ban, but on how the UK parliament had reached this result. The ECtHR furthermore noted that the national courts did not carry out any assessment of the proportionality of the disenfranchisement of an individual prisoner.[194] Against this background, the ECtHR

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188 ECtHR (GC) 22 April 2013, app. no. 48876/08 (*Animal Defenders International v. UK*), para. 114ef.
189 ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*), para. 68.
190 Ibid, para. 77.
191 Ibid, para. 74.
192 Ibid, para. 81 and 61.
193 Ibid, para. 79.
194 Ibid, para. 80. This element is a good example of procedural reasoning concerning judicial procedures, see Chapter 4.

PROEF 3

concluded that '[s]uch a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1'.[195] The lack of an express and extensive debate in parliament seemed to be of importance for the ECtHR in finding a violation of the Convention.

A more recent and peculiar example of a legislative ban can be seen in the ***Bayev*** case of 2017.[196] In this case, the ECtHR considered Russian legislation prohibiting 'propaganda' about homosexual relationships aimed at minors. The three applicants were gay rights activists who had picketed in front of a secondary school, a children's library, and the St Petersburg City Administration. During these demonstrations, they carried banners with messages such as 'homosexuality is normal', 'Russia has the world's highest rate of teenage suicide. This number includes a large proportion of homosexuals. They take this step because of the lack of information about their nature. Deputies are child-killers. Homosexuality is good!', and 'Children have the right to know. Great people are also sometimes gay; gay people also become great. Homosexuality is natural and normal'.[197] All three applicants were found guilty of the administrative offence of the promotion of homosexuality among minors and had to pay fines ranging from 34 to 130 EUR. The applicants had brought several proceedings before the Constitutional Court of the Russian Federation (CCRF), including one in which they argued that the legislative ban infringed the principle of equal treatment and their freedom of expression.[198] Their cases were declared inadmissible or were dismissed on their merits by the CCRF. Before the ECtHR the applicants complained that the ban on public statements concerning the identity, rights, and social status of sexual minorities was in violation of Article 10 ECHR (the right to freedom of expression).[199] The Russian government argued, however, that the ban was necessary on the grounds of protection of morals, health, and the rights of others.[200] The ECtHR closely examined the aims served by the legislative ban and the suitability of the measure to those aims. As regards the aim of protecting the rights of others, the Russian government more specifically argued that the purpose of the legislation was to shield 'minors from information which could convey a positive image of homosexuality'.[201] In that light, the ECtHR considered the following:

> '… The Court shares the view of the Venice Commission[202], which referred to the vagueness of the terminology used in the legislation at hand, allowing for extensive interpretation of the

[195] Ibid, para. 82 and 85.
[196] ECtHR 20 June 2017, app. nos. 67667/09 et al. (*Bayev and Others v. Russia*). The request for referral to the Grand Chamber is currently pending.
[197] Ibid, paras. 10, 14 and 17.
[198] Ibid, paras. 19–25.
[199] Ibid, para. 42.
[200] Ibid, paras. 65 (morals), 72 (health), and 74 (rights of others).
[201] Ibid, para. 74.
[202] The Venice Commission is called fully the European Commission for Democracy through Law and is the Council of Europe's advisory body on constitutional matters.

PROEF 3

> relevant provisions … It considers that *the broad scope of these laws, expressed in terms not susceptible to foreseeable application, should be taken into account in the assessment of the justification advanced by the Government.*
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> …
>
> The position of the Government has not evolved …, and it remains unsubstantiated. The Government were unable to provide any explanation of the mechanism by which a minor could be enticed into "[a] homosexual lifestyle", let alone science-based evidence that one's sexual orientation or identity is susceptible to change under external influence. *The Court therefore dismisses these allegations as lacking any evidentiary basis.*
>
> …
>
> In the light of the above considerations the Court finds that the legal provisions in question do not serve to advance the legitimate aim of the protection of morals, and that *such measures are likely to be counterproductive in achieving the declared legitimate* aims of the protection of health and the protection of rights of others. *Given the vagueness of the terminology used and the potentially unlimited scope of their application, these provisions are open to abuse in individual cases, as evidenced in the three applications at hand.* Above all, by adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.'[203]

The ECtHR thus found issue not only with the vagueness of the terms used in the legislative ban, which could lead to abuse of powers in individual cases, but also with the fact that there was no scientific evidence that this ban was a suitable means to prevent minors being influenced in their sexual orientation or their lifestyle.[204] In this part of the judgment the ECtHR did not focus on the merits of the ban, but rather on the procedural aspects. First, it tried to determine whether the Russian legislative authorities in their decision-making process had tried to pursue a legitimate aim with the ban. Secondly, even if the law did pursue a legitimate aim, the ECtHR considered that because the ban was 'expressed in terms not susceptible to foreseeable application'[205], the Russian government could not ensure that the executive authorities in the process of implementing the blanket ban would still pursue that aim. On this basis, the ECtHR concluded that the Russian authorities had overstepped their margin of appreciation and violated the right to freedom of expression.

2.3 CONCLUSION

The examples discussed in this chapter demonstrate that courts from various jurisdictions have focused on the quality of legislative procedures to determine whether

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203 Ibid, paras. 76, 78 and 83.

204 The legitimate aim and suitability test are oftentimes closely linked, as a measure is less likely to be suitable if the decision-making authority did not try to specify the aims the measure was aimed to pursue.

205 The Court discussed this element under the heading of the legitimate aim pursued and concluded that it did not serve such legitimate aims.

PROEF 3

fundamental rights have been violated. The examples showed that legislative procedures have been reviewed in cases relating to different types of rights. Several judgments concerned political rights, such as prisoners' right to vote (the ECtHR's judgment in *Hirst (No. 2)*[206]) and the right of various groups to participate in the political process, namely: indigenous peoples (the Colombian '*General Foresting Law case*' and '*Consultation of Ethnic Minorities case*'[207]), discrete and insular minorities (the US *Carolene Products* judgment[208]), and citizens in general (the South African *Doctors for Life International* case[209] and the Hawaii *Taomae* judgment[210]). Other judgments concerned civil rights, such as the right to privacy (the ECJ's judgment in the *Volker und Markus Schecke* case[211]), liberty and property rights combined with equality rights (the US *Fullilove* case[212]), and the right to freedom of expression (the ECtHR's judgment in the *Bayev* case[213]). The German *Hartz IV* judgment[214] concerned the right to a subsistence minimum, which is a socio-economic right. Procedural reasoning therefore appears not to be restricted to rights that are relatively procedural in nature, such as the right to political participation, but can also be applied in the context of various substantive rights.

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206 See Section 2.2.8.
207 See Section 2.2.6.
208 See Section 2.2.1.
209 See Section 2.2.5.
210 See Section 2.2.2.
211 See Section 2.2.7.
212 See Section 2.2.1.
213 See Section 2.2.8.
214 See Section 2.2.4.

PROEF 3

PROEF 3

CHAPTER 3

PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW OF ADMINISTRATIVE PROCEDURES

3.1 INTRODUCTION

Procedural reasoning is a central part of judicial review of administrative actions. In this context, 'most successful judicial review claims success on the basis that the decision-maker has done something in the wrong way, rather than the decision-maker has done something that is, all things considered, unjustifiable'.[215] The courts' role therefore lies primarily (or solely) in checking the administrative decision-making procedure, rather than in supplementing administrative decisions with their own substantive views.[216] This means that courts assess the quality of the administrative process by determining inter alia whether executive bodies gathered the required information, whether they acted within their competences (the principle of *ultra vires*), whether they did not exceed their discretion, and whether they heard the parties involved.[217] Procedural approaches are the starting point not just in national administrative law, but also at the international level.[218] More recent international law projects, such as the Aarhus Convention on environmental policies of the European Union and the EU Member States, primarily establish procedural rights concerning environmental policies, such as the right to information and the right to participate in decision-making affecting the environment.[219] The next section provides examples of fundamental rights review of administrative decision-making procedures from courts in Canada, Australia, Denmark, the Netherlands, as well as the UK and from the ECtHR. A brief conclusion wraps up this chapter.

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215 Hickman (2010), p. 225.

216 Sathanapally (2017), p. 46; Masterman (2017), pp. 251–252; Widdershoven and Remac (2012), pp. 382–386; and Hickman (2010), Chapter 8.

217 Daly (2016b), pp. 333–36; Mashaw (2016), pp. 15–17; Hickman (2010), Chapter 10; and Harlow (2006), p. 192.

218 Although at the international level there may be more room for shaping administrative decision-making processes freely, see Correia (2011), p. 314. Developments at the international level in their turn influence, national administrative law. See Mattarella (2011) and for the impact of the EU and the ECHR on Dutch administrative law Widdershoven and Remac (2012).

219 Lancero (2011), pp. 360–363 and, more generally on environmental procedural rights, Jendrośka (2017), pp. xvii-xix.

PROEF 3

3.2 EXAMPLES OF REVIEW OF ADMINISTRATIVE PROCEDURES

3.2.1 CANADIAN SUPREME COURT: *BAKER*

In immigration cases in Canada, procedural fairness plays an important role in judicial review of administrative actions. The principle of procedural fairness was firmly established by the Canadian Supreme Court (CSC) in the ***Baker*** judgment of 1999.[220] In that case a female Jamaican citizen had illegally lived and worked in Canada for over eleven years. In 1992 she received an order for her deportation as she had overstayed her visitor's visa. She requested an exemption of her expulsion on grounds of humanitarian and compassionate considerations. According to her, her deportation would result in emotional hardship for herself and her four children in Canada, as well as posing a risk to her health. The immigration officer dealing with her case rejected the woman's request without explaining his reasons. Upon request, the woman was provided with the subordinate immigration officer's notes that formed the basis for the expulsion decision. These notes showed prejudicial comments on her mental and personal situation, stating amongst other things that she was 'a paranoid schizophrenic'.[221] For this reason the applicant lodged an appeal against the expulsion decision at the CSC. The CSC considered that decisions affecting the 'rights, privileges or interests of an individual' trigger the duty of procedural fairness[222], which requires fair and open administrative decision-making procedures so as to allow appropriate decisions to be made.[223] After noting a number of factors that are relevant for procedural fairness, including the need for judicial deference to the procedural choices made by the decision-maker[224], the CSC went on to review the administrative decision-making procedure. It held that in immigration cases such as the case at hand, the decision should entail a written reason for the decision, which in this case consisted of the subordinate immigration officer's

220 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). The implications and context of the case is discussed in Dyzenhaus and Fox-Decent (2001).

221 The notes of the subordinate officer mentioned amongst other things that 'the applicant is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C [humanitarian and compassionate] factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity', see CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*), para. 5.

222 Ibid, para. 20.

223 Ibid, para. 22.

224 Relevant factors entailed the nature of the decision, the legal foundation of the decision, the importance of the decision for the individual, legitimate expectations of the individual challenging the decisions, and the procedural choices made by the agency (ibid, paras. 23–27). The last factor is linked to a deferential approach by courts, see for a discussion Daly (2016b), pp. 378–381.

PROEF 3

notes.[225] The CSC also required, as part of the duty of procedural fairness, that the decision should be 'made free from a reasonable apprehension of bias by an impartial decision-maker', a duty which applied 'to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision'.[226] In reviewing the procedure, Justice L'Heureux-Dubé, writing on behalf of the CSC, considered the following[227]:

> '[The subordinate officer's] notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. … Reading his comments, *I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer*'.[228]

The CSC thus focused on the process by which the decision was reached, which showed clear signs of bias on the part of the immigration officer. Noting that this finding in itself would be sufficient to conclude the case[229], the CSC went on to determine whether the applicant should have been exempted in light of the children's best interests. The substantive approach taken in this second part strongly contrasts with the procedural reasoning of the first part. In the second part, the CSC regarded the decision to be unreasonable, because the decision-making authority failed 'to give serious weight to the interests of the children' of the applicant.[230] On the basis of both the violation of the procedural fairness principles and the unreasonable exercise of discretion by the decision-making authority, the CSC allowed an appeal of the exemption decision and required a redetermination by a different immigration officer.[231]

Accordingly, in this landmark case about the right to family life, the CSC established a procedural fairness test for judicial review of administrative decisions.[232] It adopted an almost purely procedural approach as it indicated that the procedural failures would have been sufficient to conclude the case and require an appeal against the immigration

225 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*), paras. 43–44.

226 Ibid, para. 45.

227 The judgment pronounced by Justice L'Heureux-Dubé was joined by Justices Gonthier, McLachlin, Bastarache and Binnie JJ and the separate opinion of Justices Cory and Iacobucci JJ agree with that judgment, except for the interpretation given of the rights of the child (ibid, paras. 78–81).

228 Ibid, para. 48 [emphasis added].

229 Ibid, para. 49.

230 Ibid, para. 65. On this point Justices Cory and Iacobucci J. J. disagree with the majority, see paras. 78–81.

231 Ibid, paras. 76–77.

232 In later judgments the requirements of procedural fairness have been further developed, yet, the procedural fairness elements of *Baker* are still at the core, see the website of the Canadian Immigration, Refugees and Citizenship Service, 'Procedural Fairness' (last modified 22 August 2018) <www.cic.gc.ca/english/resources/tools/service/fairness.asp>. The intensity with which courts have and should review these requirements of procedural fairness is discussed in Daly (2016b).

PROEF 3

decision.[233] This judgment therefore provides a good example of a procedural approach leading to the establishment of procedural obligations for executive authorities, supplemented with (secondary) substantive reasoning.

3.2.2 AUSTRALIAN HIGH COURT: *SZSSJ*

In the Australian context, procedural fairness has also played a role in cases relating to interferences with fundamental rights by administrative bodies. In the ***SZSSJ*** case of 2016, the Australian High Court (AHC) had to determine whether the administrative bodies had violated the principle of non-refoulement of two persons who were to be extradited.[234] The case concerned the accidental publication of the identities of 9,258 applicants for protection visas by the Department of Immigration and Border Protection. As this information could have been accessed by State authorities from which the individuals feared prosecution, the International Treaties Obligation Assessment (ITOA) assessment was established. The ITOA assessment required officers to examine for each individual the effects of the data breach in light of the non-refoulement principle.[235] If the non-refoulement principle was found to be at stake, this could be a ground to allow the issuing of a visa or a renewed asylum application. The applicants in the case were two asylum-seekers whose visa applications had been rejected in final instance, but who had not yet been deported at the time of the data breach. In the ITOA assessment addressing their situation, it was concluded that the data breach did not amount to a violation of the non-refoulement principle. This meant that their deportation would be imminent. The applicants appealed this decision.

The case ended up before the AHC and, just like the Full Court of the Federal Court of Australia (FCFCA) had done[236], it held that the principle of procedural fairness applied to administrative decisions.[237] This principle determines whether a (renewed) substantive decision should be made, more specifically, whether a new decision of the asylum application of the applicants should be sought.[238] Taking into account the requirements of procedural fairness, the FCFCA had concluded that the ITOA process violated the principles of procedural fairness as the process was not adequately explained to the two asylum-seekers and the Immigration Department

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233 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*), para. 49.

234 AHC 27 July 2016, [2016] HCA 29 (*Minister for Immigration and Border Protection v. SZSSJ*). For information about the context within which this case should be placed, see Hammond and Thwaites (2016).

235 Ibid, paras. 9–10.

236 FCFCA 2 September 2015, [2015] FCFCA 125 (*Minister for Immigration and Border Protection v. SZSSJ*), paras. 66–87.

237 AHC 27 July 2016, S75/2016 and S76/2016, [2016] HCA 29 (*Minister for Immigration and Border Protection v. SZSSJ*), para. 74ff.

238 Ibid, paras. 76–78. See also Forsaith (2016).

PROEF 3

had not provided them with an unabridged report of the data breach.[239] The AHC arrived at a different conclusion, however. In assessing whether the process followed met the requirements of procedural fairness, it held that there was no reason to suspect that the ITOA officer was not 'impartial and unprejudiced', nor did the requirement of procedural fairness impose a duty on the immigration department to disclose all information.[240] It continued:

> 'Whatever the inadequacy of the standard letter sent to them and to other applicants in March 2014, *there could be no doubt that SZSSJ and SZTZI were put squarely on notice* of the nature and purpose of the assessment and of the issues to be considered in conducting the assessment from the time of the formal notification of the commencement of the ITOA process with respect to each of them.
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> …
>
> SZSSJ and SZTZI were not deprived of any opportunity to submit evidence or to make submissions relevant to the subject-matter of the ITOA process as a result of not having such further information as might be inferred to have been contained in the unabridged version of the KPMG report.'[241]

In the absence of procedural failures in the ITOA process, the AHC accepted the appeal of the Immigration Department in relation to both applicants.[242] The AHC thus relied on procedural reasoning to determine that the administrative decision-making authorities had met the applicable procedural fairness requirements relating to the principle of non-refoulement.

3.2.3 DANISH SUPREME COURT: *'TUNISIAN CASE'*

In Denmark, there is a long tradition of judicial self-restraint.[243] Under the influence of the European Union and the ECtHR, however, it seems that Danish courts are becoming more active in relation to fundamental rights cases, including in cases concerning administrative decisions.[244] In those cases, Danish courts have also turned to procedural reasoning. A case in point is the ***'Tunisian case'*** of 2008.[245] In that case the Danish Supreme Court (DSC) had to decide on a case relating to the detention of an alien in order to ensure his expulsion. It concerned a Tunisian Muslim who was

239 FCFCA 2 September 2015, [2015] FCFCA 125 (*Minister for Immigration and Border Protection v. SZSSJ*), paras. 105–106 and 125. See also AHC 27 July 2016, S75/2016 and S76/2016, [2016] HCA 29 (*Minister for Immigration and Border Protection v. SZSSJ*), paras. 35–36.

240 Ibid, para. 84.

241 Ibid, paras. 84 and 92 [emphasis added].

242 Ibid, para. 93.

243 Rytter (2014), pp. 57–62.

244 Ibid, p. 56–57.

245 DSC 28 July 2008, no. 157/2008, U2008.2394H ('*Tunisian case*') [official translation <www.supremecourt.dk/about/decided%20cases/HumanRights/Pages/Pressrelease2July2008.aspx>]. For a brief discussion see Rytter (2014), pp. 65–67.

PROEF 3

suspected to have terror-related plans to kill a Danish cartoonist who had published cartoons of the Prophet Mohammad in a Danish newspaper.[246] Before the DSC the National Head of Police argued that the detention of the alien was based on a Danish law that formed an implementation of the UN Security Council Resolution concerning national counter-terrorism measures.[247] He contended that the DSC should not therefore interfere with the decision taken. The DSC dismissed this argument, stating:

> 'Although the decision on deprivation of liberty was made to ensure enforcement of the expulsion decision, which was, in turn, based on the decision that the alien must be deemed a danger to national security, and although the lawfulness of these decisions cannot be reviewed in a case dealing with deprivation of liberty …, the Supreme Court finds that a review of the lawfulness of the deprivation of liberty must include a certain review of the factual basis of the decision to regard the alien as a danger to national security. *The Supreme Court requires that it is proven on a balance of probabilities that such factual basis for the assessment of danger exists* that the detention cannot be regarded as being unauthorised or unfounded, cf. also Article 5(4) of the [ECHR]. *To do this, the authorities must produce the required information in court and the adversarial nature of proceedings must be observed.*'[248]

The DSC thus required the administrative authorities to substantiate a decision for detaining an alien who is to be expelled. It did not look into whether the alien should be detained in those specific circumstances, but it took a procedural approach and found that the National Head of Police had not provided enough evidence for its decision to detain the person.[249] For that reason, the DSC sent the case back to the lower court, where the authorities would have the opportunity to provide more detailed information on their decision.[250] This judgment clearly shows that a procedural approach can be taken in relation to the provision of proof for administrative decisions. The actual review of the reasons for a decision can of course be a substance-based review, in that courts would then look into whether the reasons themselves are sufficiently convincing. In this judgment, however, the DSC limited itself to finding that no information was provided that could show that there was a reason for the detention.

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246 DSC 24 June 2011, 17/2011 ('*Tunisian case*').

247 Ibid.

248 Ibid, [emphasis added]. Another and clearer translation of the Danish judgment can be found is provided in Rytter (2014), p. 66 ('Even if the decision to detain the alien has the purpose of securing the implementation of the decision to expel the alien, which in turn is based on the decision that the alien is a danger to national security, and even if the validity of the latter decisions cannot be reviewed in this case concerning the lawfulness of detention, *the Supreme Court finds that judicial review of the lawfulness of detention must entail some review of the factual basis for the decision that the alien is a danger to national security.* What is required is to show a reasonable probability that there is such a factual basis for the danger assessment that detention cannot be regarded as unlawful or groundless, cf. also Article 5(4) ECHR. *The substantiation of the danger must happen by the authorities' presenting the Court with the necessary information and with appropriate access to adversarial proceedings.*' [emphasis added]).

249 Ibid, p. 10.

250 Ibid, p. 10. For the follow-up, see DSC 19 November 2008, nos. 329/2008 and 330/2008 ('*Tuneser-sagerne*') and the discussion in Rytter (2014), p. 67.

PROEF 3

3.2.4 DISTRICT COURT AND COURT OF APPEAL OF THE NETHERLANDS: *URGENDA*

In the Netherlands, process-based review is an inherent feature of administrative adjudication.[251] This follows from some of the general principles of Dutch administrative law, such as the principles of due care, adequate reason-giving, and balancing of interests in decision-making procedures.[252] An internationally well-known example is the ***Urgenda*** case, in which judgments were delivered in 2015 and 2018. Although this case was brought before the Dutch civil courts, which means that the general principles of administrative law did not directly apply, it did concern governmental executive policies. In 2015, the District Court of The Hague (DCTH) found that the Dutch government should reduce its emission of greenhouse gases by twenty-five per cent by 2020 in comparison to its emissions in 1990.[253] This was in order to minimise the impact of climate change and prevent imminent fundamental rights violations. The case arose as a result of a policy change by the former Dutch government, which had altered its reduction target of thirty per cent to just twenty per cent.[254] In its judgment, the DCTH took the view that the right to privacy and family life (Article 8 ECHR) and the right to life (Article 2 ECHR) were at stake, and that, even though no direct rights could be derived from this by the applicant organisation Urgenda (a non-governmental organisation defending environmental rights), these provisions were relevant for determining whether the Dutch government has met its duty of care under Dutch law.[255] In this particular case, these rights were considered to have an impact on the 'degree of discretionary power the State is entitled to in how it exercises the tasks and authorities given to it [as well as] in determining the minimum degree of care the State is expected to observe'.[256] In light of the government's policy discretion and its duty of care, the DCTH considered the following:

> 'In answering the question whether the State is exercising enough care with its current climate policy, the State's discretionary power should also be considered, as stated above. Based on its statutory duty – Article 21 of the Constitution – the State has an extensive discretionary power to flesh out the climate policy. However, this discretionary power is not unlimited. If, and this is the case here, there is a high risk of dangerous climate change with

251 E.g., Barkhuysen, Den Ouden and Schuurmans (2012), p. 6.

252 Articles 3:2 (on due diligence), 3:4 (on balancing of interests, although it has been disputed that this is one of the formal general principles of administrative law), and 3:46 (on reason-giving) of the General Administrative Law Act. See for a discussion of the formal general principles in Dutch administrative law, Widdershoven and Remac (2012), pp. 393–401.

253 DCTH 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda*) [official English translation]. For an extensive discussion of the case, see Lambooy and Palm (2016), pp. 308–324 and De Graaf and Jans (2015).

254 DCTH 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda*) [official English translation], para. 4.26. The reduction target of 20% was in conformity with the EU agreements. In reality, however, the Dutch policy was expected to only lead to a reduction rate of 14–17%.

255 Ibid, paras. 4.45–4.50 and 4.52.

256 Ibid, para. 4.52.

PROEF 3

> severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures. For this approach, it can also rely on the aforementioned jurisprudence of the ECtHR. Naturally, the question remains what is fitting and effective in the given circumstances. *The starting point must be that in its decision-making process the State carefully considers the various interests.*'[257]

The DCTH thus appeared to regard the due diligence in the decision-making procedure as a precondition to be met by policies affecting society and individual rights on a large scale.[258] This observation was then followed by a thorough and content-related analysis of the justifications the government had advanced for changing its policy to deviate from international agreements. The judgment shows that the procedural requirement for the government to take into account various interests in its policy-making processes can be met by a careful assessment of its substantive decision.

The Dutch government appealed and the Court of Appeal of The Hague (CoATH) delivered its judgment in the *Urgenda* case on 9 October 2018.[259] It confirmed the ruling of the DCTH, but took a different approach. Because of the nature of the appeal, the CoATH restricted itself to determining whether fundamental rights or the principle of duty of care required the Dutch government to aim for a reduction target of twenty-five per cent.[260] In addition, unlike the DCTH, it decided the case on the basis of the right to life (Article 2 ECHR) and the right to private life (Article 8 ECHR).[261] It considered that these rights impose an obligation on the Dutch authorities to protect the lives of citizens within its jurisdiction and to protect their home and private life.[262] More specifically, in relation to environment-related situations and in line with ECtHR case-law, this meant that '[i]f the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible'.[263] In its assessment of the Dutch policy, the CoATH then embarked on a substantive, legal-empirical examination considering inter alia the applicable international agreements, the available scientific information, and the possibilities of adaptive measures. It also took account of more recent scientific data, which included information about what climate science currently considers a safe temperature rise (i.e., 1.5 degrees rather than 2 degrees) and what the present expectations are concerning the Dutch government's

257 Ibid, para. 4.74 [emphasis added].
258 See also Van Gestel and Loth (2015), pp. 2603–2604.
259 CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*) [unofficial English translation provided by the CoATH]. For a detailed discussion of the judgment, see Burgers and Staal (2019) and Bleeker (2018).
260 CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*), para. 33.
261 It is relevant to note that these rights have direct effect in the Dutch context and therefore play an important role in the decisions of Dutch courts. See ibid, para. 36 and Articles 93 and 94 of the Dutch Constitution.
262 CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*), para. 43.
263 Ibid, para. 43.

PROEF 3

reduction of greenhouse gases by 2020 in comparison with 1990.[264] Against this background, the CoATH established that Articles 2 and 8 ECHR were applicable as it 'believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life'.[265] The CoATH then turned to the lawfulness of the Dutch government's policy change and paid considerable attention to how this policy adjustment came about:

> 'Finally, it is relevant noting that up to 2011 the Netherlands had adopted as its own target a reduction of 30% in 2020 … That was, as evidenced by the letter from the Minister of Housing, Spatial Planning and the Environment dated 12 October 2009, because the 25–40% reduction was necessary "to stay on a credible track to keep the 2 degrees objective within reach". No other conclusion can be drawn from this than that the State itself was convinced that a scenario in which less than that would be reduced by 2020 was not feasible. *The Dutch reduction target for 2020 was subsequently adjusted downwards. But a substantiation based on climate science was never given*, while it is an established fact that postponing (higher) interim reductions will cause continued emissions of CO2, which in turn contributes to further global warming. *More specifically, the State failed to give reasons why a reduction of only 20% by 2020 (at the EU level) should currently be regarded as credible,* for instance by presenting a scenario which proves how – in concert with the efforts of other countries – the currently proposed postponed reduction could still lead to achieving the 2°C target. The EU itself also deemed a reduction of 30% for 2030 necessary to prevent dangerous climate change …'[266]

The CoATH thus considered it crucial that the policy change by the Dutch government was not supported by any credible scientific evidence.[267] Although it acknowledged that 'full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking', it found the general international precautionary principle to mean that the Dutch government could not refrain from taking further measures.[268] After having stated that 'a reduction obligation of at least 25% by end-2020, as ordered by the district court, is in line with the State's duty of care'[269] and dismissing various defences by the

[264] Ibid, paras. 44 and 50 (on 1.5 degrees), and 24 and 73 (on the updated expected reduction percentage of 23%). As regards the present expectations of the reduction targets, the CoATH considered that this is more likely to be 23% rather than 14% to 17% reduction at the time of the DCTH judgment. As the CoATH also noted, this expected higher reduction rate of the Netherlands is somewhat misleading. Firstly, there is a margin of uncertainty of the actual reduction falling somewhere between 19–27% reduction. Secondly, the better prognosis is a result of a new calculation that assumes higher emissions of greenhouse gases in 1990. Since the reduction rate entailed a comparison with the emissions in 1990, '[t]his means that the theoretical reduction percentage can be achieved sooner, although in reality the situation is much more serious', see ibid, para. 73.

[265] Ibid, para. 45.

[266] Ibid, para. 52 [unofficial English translation provided by CoATH; emphasis added].

[267] See also Burgers and Staal (2019), para. 3.2.

[268] CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*), para. 63.

[269] Ibid, para. 53.

PROEF 3

Dutch government on substantive grounds[270], the CoATH concluded that the State had failed to comply with its positive obligations under Articles 2 and 8 ECHR.[271] This judgment illustrates that failure to provide reasons in policy adjustments can be a central element in the reasoning in light of positive obligations stemming from fundamental rights.

3.2.5 COURT OF APPEAL AND SUPREME COURT OF THE UNITED KINGDOM: *DENBIGH HIGH SCHOOL*, *MISS BEHAVIN' LTD.*, AND *QUILA*

In the UK, it has been argued that 'process review is at once orthodox and alien to UK constitutional law'.[272] Even though procedural reasoning in relation to administrative decisions is a relatively self-evident approach for the UK administrative courts, fundamental rights cases are different.[273] It has been argued that because the UK courts perceive the focus of the ECtHR is on substance, their review of the compatibility of administrative decisions with the Human Rights Act of 1998 (HRA) should also relate to the content of those decisions. After all, the HRA implements the ECHR.[274]

The idea that procedural reasoning in fundamental rights cases is a 'forbidden method'[275] became clear in the ***Denbigh High School*** judgment by the House of Lords (now the UK Supreme Court, and referred to as such in this book).[276] This 2006 case concerned a school's refusal to allow a female student to deviate from its uniform code in order to comply with her religion's rules on what she could wear. Although the school allowed students some choice in uniform, including an option of loose trousers and a long tunic-like top (worn often by Muslims, Hindus, and Sikhs), this student wanted to wear a Jilbab. As a result of the ongoing dispute, the student did not attend school for almost two years. The UK courts had to decide whether the school's decision had violated the right to freedom of religion of the student. According to Lord Justice Brooke of the UK Court of Appeal (UKCoA), the school had failed to take the following into account in making its decision: 1) was the right to freedom of religion and belief at stake; 2) would the decision lead to an infringement with this right; 3) was the infringement prescribed by law; 4) did the infringement pursue a legitimate aim; 5) was the infringement necessary and suitable to achieving that end; and 6) was it a proportionate infringement?[277] The structure proposed resembled – in fact, matched

270 Ibid, para. 54–70.
271 Ibid, para. 76.
272 Masterman (2017), p. 243.
273 Hickman (2010), Chapter 8.
274 Masterman (2017), pp. 256–262. This approach would moreover be impractical and raise concerns on the expertise of courts to assess decision-making processes.
275 Hickman (2010), Chapter 8.
276 UKSC 22 March 2006, [2006] UKHL 15, (*R (on the application of Begum) v. Denbigh High School*).
277 UKCoA 2 March 2005, [2005] EWCA Civ 199 (*The Queen on the application of SB v. Headteacher and Governors of Denbigh High School*), para. 75. The opinion of Lord Justice Brooke was supported by

PROEF 3

exactly – the structure of the reasoning courts themselves usually adopt in fundamental rights cases.[278] Applying these standards to the case at hand, the UKCoA concluded that the school had not taken the decision in such a manner and therefore it found that the school had not complied with the applicable fundamental rights standards.[279] These procedural defects were conclusive for the finding of a violation of the right to freedom of religion. The UK Supreme Court (UKSC), however, arrived at a different conclusion on the basis that the HRA is meant to protect fundamental rights in substance. Lord Bingham considered that the focus should not be on procedure but on substance, since the unlawfulness of an act should be determined solely on the result of the act.[280] Lord Hoffmann criticised the procedural approach taken by the UKCoA more directly:

> 'Quite apart from the fact that in my opinion the Court of Appeal would have failed the examination for giving the wrong answer to question 2, *the whole approach seems to me a mistaken construction of article 9* [HRA (the right to freedom of religion and belief)]. In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But *article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2?* The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done. Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law.'[281]

Clearly, Lord Hoffmann found that a procedural approach was not acceptable in reviewing administrative decisions in cases in which fundamental rights are at stake.

It should nevertheless be noted that these perceived problems with procedural reasoning appear to relate to its use in the purest form. That is, flaws in the administrative decision-making procedure will be regarded as sufficient grounds for the finding of a violation of a Convention right. Procedural reasoning supporting substantive reasoning has been suggested in other cases.[282] For example, Lord

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Justice Mummery (para. 83ff) and Justice Scott Baker (para. 90ff). The case is discussed in Davies (2005).

278 For the structure of fundamental rights review, e.g., see Section 6.3.5.

279 UKCoA 2 March 2005, [2005] EWCA Civ 199 (*The Queen on the application of SB v. Headteacher and Governors of Denbigh High School*), paras. 76–78.

280 UKSC 22 March 2006, [2006] UKHL 15 (*R (on the application of Begum) v. Denbigh High School*), para. 29.

281 Ibid, para. 68 [emphasis added].

282 Masterman (2017), pp. 265–270. In relation to judicial review of legislation, Kavanagh also shows that courts draw supportive, mainly positive inferences from the parliamentary debate, see Kavanagh (2014), pp. 443–479.

PROEF 3

Neuberger accepted the importance of the administrative decision-making process in the UKSC's landmark case ***Miss Behavin' Ltd.*** judgment of 2007.[283] In that case the executive authority had refused to issue a permit for the establishment of a sex shop in London. Lord Neuberger stated:

> 'Because the issue involves careful scrutiny by the court of the decision, a council faced with an application for a sex establishment licence would be well advised to consider expressly the applicant's right to freedom of expression, and to take it into account when reaching a decision as to whether to grant or refuse the licence. While the fact that a council has expressly taken into account Article 10 when reaching a decision cannot be conclusive on the issue of whether the applicant's Article 10 rights have been infringed, it seems to me … that *where a council has properly considered the issue in relation to a particular application, the court is inherently less likely to conclude that the decision ultimately reached infringes the applicant's rights*.'[284]

At the same time, the procedural reasoning embraced by Lord Neuberger was not accepted by the other Lords. Although Lord Hoffmann recognised that procedural fairness may play a role in relation to substantive rights, he found that the real issue 'is still whether there has actually been a violation of the applicant's Convention rights and not whether the decision-maker properly considered the question of whether his rights would be violated or not'.[285] Lady Hale also considered that a substantive approach was the right one in fundamental rights cases:

> 'The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. *In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account.* If it were otherwise, every policy decision taken before the Human Rights Act 1998 came into force but which engaged a convention right would be open to challenge, no matter how obviously compliant with the right in question it was.'[286]

Although procedural reasoning in administrative law cases on fundamental rights thus seems controversial in the UK, it has been argued that consideration of procedural reasoning has become more acceptable.[287] Indeed, in more recent judgments of the UKSC, the quality of the administrative decision-making process seems to be taken into account in cases where the executive has failed to even try to strike a fair balance

[283] UKSC 25 April 2007, [2007] UKHL 19 (*Belfast City Council v. Miss Behavin' Ltd.*).
[284] Ibid, para. 91 [emphasis added].
[285] Ibid, para. 15.
[286] Ibid, para. 31 [emphasis added].
[287] In the human rights context the decision-making process has been held relevant as a subsidiary argument to the substantive reasoning of the UKSC, see Williams (2017), pp. 113 and 120. See also Masterman (2017), pp. 243–250 and 270–271 and Sathanapally (2017), pp. 64–72.

between the individuals' rights and the general interests at stake.[288] For instance, in the ***Quila*** judgment of 2011, having considered first the substance of the decision by the Secretary of State to refuse marriage visas to two women, the UKSC then focused on the procedure relating to the legislative amendment of the legal age of marriage from 18 to 21 and relating to the administrative processes concerning the two women.[289] Lord Wilson held:

> '*Neither in the material which she published prior to the introduction of the amendment in 2008 nor in her evidence in these proceedings has the Secretary of State addressed this imbalance – still less sought to identify the scale of it.* Even had it been correct to say that the scale of the imbalance was a matter of judgement for the Secretary of State rather than for the courts, it is not a judgement which, on the evidence before the court, she has ever made. She clearly fails to establish, in the words of question (c), that the amendment is no more than is necessary to accomplish her objective and, in the words of question (d), that it strikes a fair balance between the rights of the parties to unforced marriages and the interests of the community in preventing forced marriages. On any view it is a sledge-hammer but she has not attempted to identify the size of the nut. At all events she fails to establish that the interference with the rights of the respondents under article 8 is justified.'[290]

In combination with the clear disproportionality of the amendment, the UKSC concluded that the interference was in violation of the right to respect for private and family life.[291] In this judgment a substantive approach was supplemented with procedural reasoning, in relation to both the legislative and the administrative process.[292]

3.2.6 EUROPEAN COURT OF HUMAN RIGHTS: *HATTON*, *WINTERSTEIN*, AND *LAMBERT*

The arguably more procedural approach in the UK seems to match the case-law of the ECtHR. As discussed in Section 1.1, a procedural trend has been noticed in the ECtHR's judgments. This means that it looks increasingly into the national decision-

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288 See also UKSC 29 July 2015, [2015] UKSC 57 (*R (on the application of Tigere) v. Secretary of State for Business, Innovation and Skills*), para. 32.

289 UKSC 12 October 2011, [2011] UKSC 45 (*R (on the application of Quila and another) (FC) v. Secretary of State for the Home Department*).

290 Ibid, para. 58.

291 Ibid, para. 59.

292 Yet, Lord Brown rejected this procedural approach, see ibid, para. 89 ('Altogether more important than this, however, as it seems to me, is that this court's duty is to decide the appeal, not by a reference to the sufficiency or otherwise of the research carried out by the Home Office before the new rule was introduced, but rather by reference to the proportionality as perceived today between the impact of the rule change on such "innocent" young couples as are adversely affected by it and the overall benefit of the rule in terms of combating forced marriage. As Lord Bingham of Cornhill said [before]: "what matters in any case is the practical outcome, not the quality of the decision-making process that led to it."').

PROEF 3

making procedures for (not) finding a violation of a substantive right.[293] An example of this procedural approach concerning governmental policy-making is the ***Hatton*** judgment of 2003.[294] The case related to night flights into and out of London Heathrow Airport. The applicants complained that the aircraft noise caused environmental nuisance infringing their rights under Article 8 ECHR. In addition, they submitted that they did not have access to an effective remedy as laid down in Article 13 ECHR. The ECtHR had held in a previous case that disturbance caused by aircraft noise fell within the scope of Article 8 ECHR, since 'the quality of [each] applicant's private life and the scope for enjoying the amenities of his home [is] adversely affected by the noise generated by aircrafts using Heathrow Airport'.[295] The 1993 Regulations on limitations on night flights therefore clearly fell within the scope of Article 8 ECHR. In assessing the compatibility of these Regulations with the Convention, the ECtHR emphasised its subsidiary role and the margin of appreciation left to the national authorities in policies affecting environmental issues.[296] Nonetheless, it reasoned that it could assess the fair balance struck within the government's decision, as well as 'scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual'.[297] In relation to the latter, the ECtHR took into account all the procedural aspects, including 'the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available'.[298] After carefully scrutinising the substance of the governmental policy[299], the ECtHR stated:

> '*On 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.* However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided. *In this respect it is relevant that the authorities have consistently monitored the situation, and that the 1993 Scheme was the latest in a series of restrictions on night flights which stretched back to 1962.* The position concerning research into sleep disturbance and night flights is far from static, and it was the government's policy to announce restrictions on night flights for a maximum of five years at a time, each new scheme taking into account the research and other developments of the previous period. The 1993 Scheme had thus been preceded by a series of investigations and studies carried out over a long period of time. The particular new measures introduced by that scheme were announced to the public by way of a Consultation Paper which referred

293 See Section 1.1.
294 ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*). Discussed briefly in Popelier and Van de Heyning (2017), p. 14.
295 Ibid, para. 96 with a reference to ECtHR 21 February 1990, app. no. 9310/81 (*Powell and Rayner v. UK*), para. 40.
296 Ibid, para. 97.
297 Ibid, para. 99.
298 Ibid, para. 104.
299 Ibid, paras. 122–127.

PROEF 3

> to the results of a study carried out for the Department of Transport, and which included a study of aircraft noise and sleep disturbance. It stated that the quota was to be set so as not to allow a worsening of noise at night, and ideally to improve the situation. This paper was published in January 1993 and sent to bodies representing the aviation industry and people living near airports. *The applicants and persons in a similar situation thus had access to the Consultation Paper, and it would have been open to them to make any representations they felt appropriate. Had any representations not been taken into account, they could have challenged subsequent decisions, or the scheme itself, in the courts.* Moreover, the applicants are, or have been, members of HACAN [i.e., the Heathrow Association for the Control of Aircraft Noise, which was a member of the Heathrow Airport Consultative Committee] and were thus particularly well-placed to make representations.'[300]

The ECtHR thus found it relevant that the UK government had taken into account scientific studies in drafting its policy.[301] In addition, it was important that the various interests had been represented in the decision-making process, and that it was possible to challenge the government's decision. In applying these elements to the facts of the case, the ECtHR took a procedural approach and considered that the UK government had considered the most recent research and developments in its night flights restriction scheme. It also acknowledged that the UK government had given individuals, including the applicants, an opportunity to put forward their views on the Consultation Paper. In light of the quality of the decision-making procedure followed and the acceptability of the substance of the regulation, it concluded there had been no violation of Article 8 ECHR.[302]

The ECtHR has also applied process-based review in specific administrative decisions. An example of this is the ***Winterstein*** judgment of 2013.[303] The case concerned a collective eviction order of Roma families who had illegally occupied land for a long time (between five and thirty years), falling within the ambit of Article 8 ECHR. The ECtHR held that the expulsion order interfered with the Roma families' right to respect for the home as well as their private and family life, since 'the occupation of a caravan is an integral part of the identity of travellers [and their] tradition'.[304] Before determining whether the eviction measure could be considered necessary in a democratic society, the ECtHR set out some general principles for evaluating the facts of the case. These principles included the availability of procedural safeguards to the individuals concerned and the need for the administrative authorities to pay special consideration to

300 Ibid, para. 128 [emphasis added].

301 A similar approach requiring consultation and debate was also taken in a case on human fertilisation and embryology, see ECtHR (GC) 10 April 2007, app. no. 6339/05 (*Evans v. UK*), para. 86.

302 ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*), paras. 129–130 ('In these circumstances the Court does not find … that there have been fundamental procedural flaws in the preparation of the 1993 regulations', para. 129).

303 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*). The case is also discussed in Gerards (2019), pp. 259–260.

304 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*), para. 142. See also ECtHR (GC) 18 January 2001, app. no. 27238/95 (*Chapman v. UK*), para. 73. See for a discussion of the case-law of the ECtHR on the housing of Roma and travellers and procedural safeguards, Donders (2016), pp. 15–17.

PROEF 3

the needs and particular lifestyle of Roma and travellers, both in the relevant regulatory planning and in reaching decisions in particular cases.[305] Concerning the eviction order by the local administration, the ECtHR found that no explanation for the eviction was provided other than that the land was occupied unlawfully by the Roma families.[306] In addition, the ECtHR noted that the local authorities were required to consider the timing and manner of evicting the families, as well as the risk that they would become homeless as a result, and, if necessary, provide alternative housing.[307] In that light it considered:

> 'While … *the consequences of the removal and the applicants' vulnerability were not taken into account either by the authorities before the eviction procedure was initiated* or by the courts during the ensuing proceedings, an urban and social study (MOUS) was undertaken after the Court of Appeal's judgment in order to determine the situation of each family and to assess the relocation possibilities that could be envisaged … The Court further observes that those of the families who opted for social housing were relocated in 2008, four years after the eviction order … Therefore in the Court's view, to that extent, the authorities gave sufficient consideration to the needs of the families concerned…
>
> The Court reaches the opposite conclusion as regards those of the applicants who sought relocation on family plots. While the Government listed in their observations the steps taken by the municipality for the development of those plots and stated that the applicants would have the possibility of being relocated there on completion, scheduled for 2010, six years after the [national court's] judgment …, *it can be seen from the most recent information at the Court's disposal that this project has been abandoned by the municipality* …'[308]

The ECtHR's procedural reasoning thus related to the absence of a proportionality assessment in the administrative eviction decision and the lack of follow-up on the relocation policy that would have mitigated the consequences of the eviction. In relation to the need for a proportionality assessment, the ECtHR also emphasised the role of the national courts, requiring them to examine complaints concerning eviction orders in detail and provide adequate reasons (discussed in Section 4.2.7).[309] The cumulative set of procedural shortcomings led the ECtHR to conclude that there had been a violation of Article 8 ECHR, both in relation to the eviction proceedings and the relocation proceedings.[310]

The ECtHR has also turned to procedural reasoning in relation to morally sensitive decisions made by administrative bodies.[311] In 2015 the ECtHR was asked to assess the decision to end a patient's life-sustaining treatment in the case of ***Lambert***.[312] Vincent

305 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*), para. 148.
306 Ibid, paras. 151–152.
307 Ibid, paras. 159–160.
308 Ibid, paras. 161–162 [emphasis added].
309 Ibid, paras. 148(δ), 148(ε) and 153–157.
310 Ibid, para. 167.
311 See further Section 9.2.2. Concerning the legislative and judicial process, see also Gerards (2017), p. 158.
312 ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*). See for a similar case, ECtHR (dec.) 27 June 2017, app. no. 39793/17 (*Gard and Others v. UK*), paras. 91–98. The *Lambert* judgment is discussed briefly in Spano (2018), p. 491.

PROEF 3

Lambert was in a chronic vegetative state after having sustained serious head injuries in a road-traffic accident. In 2012, his carers in the public hospital believed they had witnessed signs of resistance on his part to daily care and they initiated the procedure on end-of-life.[313] This procedure resulted in a decision by the doctor responsible for Lambert's care to withdraw Lambert's nutrition and reduce his hydration, which would lead to his death.[314] After several administrative procedures, a renewed and more extensive medical investigation, and a decision of the *Conseil d'État* supporting the hospital's decisions, the case reached the ECtHR. In Strasbourg, the issue at stake was whether the withdrawal of artificial nutrition and hydration would be in breach of the positive obligations of the French authorities under the right to life (Article 2 ECHR), amount to ill-treatment in violation of the prohibition of torture (Article 3 ECHR), and/or infringe the physical integrity of Lambert in breach of the right to private life (Article 8 ECHR). The ECtHR examined whether the French authorities had complied with their positive obligations under Article 2 ECHR.[315] It noted at the outset that there was no European consensus on the issue of end-of-life and therefore a margin of appreciation should be granted to the French authorities.[316] After finding the French legislative framework for assisted suicide effective in ensuring the protection of patients' lives[317], it addressed the medical decision-making process. In that regard, it considered relevant 'whether account had been taken of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel'.[318] It concluded as follows:

> 'The Court notes the absence of consensus on this subject … and considers that the organisation of the decision-making process, including the designation of the person who takes the final decision to withdraw treatment and the detailed arrangements for the taking of the decision, fall within the State's margin of appreciation. It notes that *the procedure in the present case was lengthy and meticulous, exceeding the requirements laid down by the law*, and considers that, although the applicants disagree with the outcome, *that procedure satisfied the requirements flowing from Article 2 of the Convention*…'[319]

Accordingly, it appeared that it was the careful and extensive decision-making procedure, rather than the outcome of that procedure, that formed the basis for the ECtHR's conclusion that the medical decision met the standards under the right to life. The ECtHR recognised in particular that the medical procedure exceeded the diligence that was expected under the French legislative framework. It noted that '[w]hereas the [legislative] procedure provides for the consultation of one other doctor and, where appropriate, a second one, [the doctor responsible for Lambert's care] consulted six doctors, one of whom was designated by the applicants' and 'he convened a meeting

313 ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*), para. 14.
314 Ibid, para. 15.
315 Ibid, paras. 96–116.
316 Ibid, paras. 144–148.
317 Ibid, para. 160.
318 Ibid, para. 143.
319 Ibid, para. 168.

PROEF 3

of virtually the entire care team and held two meetings with the family which were attended by Vincent Lambert's wife, his parents and his eight siblings'.[320] Furthermore, the thirteen-page report written by the patient's doctor provided very detailed reasons for the end-of-life decision.[321] The ECtHR further considered the judicial remedies available and the judicial process (addressed in Section 4.2.6) and, taking all these factors into account, it concluded by twelve votes to five that there had been no violation of Article 2 ECHR in the event of implementation of the judgment of the *Conseil d'État*. Therefore, the life-sustaining treatment of Lambert could be withdrawn.[322]

3.3 CONCLUSION

This chapter has discussed various examples of procedural reasoning concerning administrative decisions interfering with fundamental rights. It has become clear that process-based review in this context relates to wide-ranging issues. In certain cases the courts focused on procedural fairness, requiring executive authorities to provide sufficient information (*SZSSJ* in the AHC[323]) and take unbiased decisions (*Baker* in the CSC[324]). In other cases the focus was on medical decision-making (*Lambert* in the ECtHR[325]), on visa guidelines (*Quila* in the UKSC[326]), or on the need for executive authorities to provide reasons for their decisions (*'Tunisian case'* in the DSC[327] and

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320 Ibid, para. 166.

321 Ibid.

322 The judgment was followed by a decision of the doctor responsible for Lambert's care to withdraw Vincent Lambert's life-supporting treatment on 9 April 2018. Again various family members of Lambert made a request for an urgent application to the French courts, which was dismissed by both the administrative court and the *Conseil d'État*. They also asked the ECtHR by way of an interim measure to stay the execution of the authorities' end-of-life decision. On 30 April 2019 the ECtHR refused their request and referred to its conclusion in the Grand Chamber judgment of 5 June 2015. The family members then turned to the UN Committee on the Rights of Persons with Disabilities (CRPD), which in an interim measure requested the French government to halt the withdrawal of life-sustaining treatment during the examination of the complaint raised. However, as France did not consider the views of the CRPD to be binding, the family members turned once more to the ECtHR to indicate the immediate application of the interim measures demanded of France by the CRPD. On 20 May 2019 the ECtHR decided to reject this second request for interim measures and held that no new evidence was submitted for the ECtHR to change its position since the Grand Chamber judgment. In the beginning of July 2019 the doctors removed the hydration and nutrition tubes of Vincent Lambert, which led to his passing on 11 July 2019. For the press releases concerning the interim measures requested of the ECtHR, see the Council of Europe, European Court of Human Rights (2019), 'Withdrawal of Vincent Lambert's Treatment: Court Denies Request for Suspension' (30 April 2019) <http://hudoc.echr.coe.int/eng-press?i=003–6394205–8390859> and 'Vincent Lambert: Request for Interim Measures Rejected' (20 May 2019) <http://hudoc.echr.coe.int/eng-press?i=003–6409998–8419084>.

323 See Section 3.2.2.

324 See Section 3.2.1.

325 See Section 3.2.6.

326 See Section 3.2.5.

327 See Section 3.2.3.

Urgenda in the CoATH[328]). In *Winterstein*, the ECtHR also focused on both the *ex ante* obligations of executive authorities to take into account the consequences of an eviction order prior to its execution and on the *ex post* obligations to follow up on promises they had made concerning the relocation.[329] In *Hatton* and *Urgenda*, the ECtHR and the CoATH further emphasised the need for local and national authorities to include scientific studies and evidence in policy-making in complex policy areas.[330] This is a first indication of the close relationship between procedural reasoning and evidence-based decision-making, which requires decision-making authorities to include empirical evidence and engage in open and transparent decision-making (see further Section 9.3.2D).

328 See Section 3.2.4.
329 On *ex ante* and *ex post* obligations, see Section 6.3.3C and also Brems (2013), p. 138.
330 See Sections 3.2.6 and 3.2.4.

PROEF 3

PROEF 3

CHAPTER 4
PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW OF JUDICIAL PROCEDURES

4.1 INTRODUCTION

Both at the national and international level procedural requirements for judicial decision-making are set out in legislation, regulations, and guidelines, or are developed in judicial practice.[331] These procedural requirements concern, for example, the need for courts to give reasons for their judgments and to hear the parties to a case, or to take into account the evidence provided by applicants, experts, or witnesses. Process-based review of judicial decision-making procedures can be explained partly by referring to the courts' task in ensuring compliance with such procedural rights and standards by lower courts. Consequently, review of judicial decision-making processes will be particularly visible in judgments of courts of appeal, of highest national courts, and of international courts. After all, before a case reaches these courts, there has already been a judicial decision by at least one lower court. Indeed, some highest national courts focus solely on the judicial decision-making process of the lower courts, since they lack the competence to establish the facts or decide on the merits of the case themselves.[332] This is also true for the 'courts of cassation' that exist in various legal systems.[333] This chapter provides examples of review of judicial decision-making procedures in fundamental rights cases. It discusses cases from the Supreme Court of Argentina, the Spanish Constitutional Court, the GFCC, the CSC, the UN Committee on Economic, Social, and Cultural Rights, the ECJ, the ECtHR, and, finally, the Inter-American Court of Human Rights. The main findings of the chapter are briefly summarised in a conclusion.

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[331] For a discussion on the standard-setting role of courts, see Section 8.2.2.

[332] There is a distinction between how highest courts in civil law and common law traditions decide cases, see e.g., Geeroms (2002). It has also been opined, however, that the distinction is primarily visible at the level within which these functions can be found, see Bravo-Hurtado (2018). It has been argued that legal systems are moving more and more towards this manner of decision-making by courts at the apex of the court pyramid, see Uzelac and Van Rhee (2018), p. 13. These changes are however not limited to the scope of the review, but entail also other ways for controlling of the case-dockets at national highest courts, such as limiting the access to these courts, see Bratković (2018), pp. 334–335. At the same time, in civil law traditions with long-established systems of courts of cassation (e.g., France, the Netherlands, and Belgium) these courts are turning increasingly towards a more elaborate reasoning style, including by deciding on the merits of the case, see Van Der Haegen (2018), pp. 352–353 (on competence) and 362–366 (on remittal).

[333] E.g., Mak (2013), pp. 46–47 (France and the Netherlands) and Van Der Haegen (2018) (France, the Netherlands, and Belgium).

PROEF 3

4.2 EXAMPLES OF REVIEW OF JUDICIAL PROCEDURES

4.2.1 SUPREME COURT OF ARGENTINA: *COMUNIDAD INDÍGENA EBEN EZER*

A first example of process-based fundamental rights review at the national level can be found in relation to the 'accíon de amparo' or 'recurso de amparo' procedures in Latin American States. These procedures for so-called 'petitions for constitutional protection'[334] originated from the 1857 Constitution of Mexico, but can now be found in all Latin American countries, except Cuba.[335] It has been defined as an 'extraordinary judicial remedy specifically conceived for the protection of constitutional rights against harms or threats inflicted by authorities or individuals' and it concludes with a judicial decision or 'writ of protection'.[336] An example of an amparo procedure in which procedural reasoning is applied can be found in the Argentinian context.

As early as 1954, the Supreme Court of Argentina (SCA) recognised the possibility of 'acción de amparo'.[337] In *Siri*, a director and owner of a newspaper argued that his rights were violated by the shutdown of the paper by the police. The SCA considered that the Constitution and Argentinian practice required the recognition of 'a claim and full exercise of individual guarantees through an effective enforcement of the rule of law and imposes on the judges the duty to ensure them'.[338] The Argentinean courts are thus required to review the validity of governmental action – both legislative and administrative – in light of fundamental and constitutional rights.[339] Since then the SCA has ruled on many amparo procedures and in 1994 the procedure was codified in the Argentinian Constitution.[340]

The amparo procedure thus establishes a duty for courts in Argentina to conduct fundamental rights review. Against this background, in ***Comunidad Indígena Eben Ezer*** of 2008, the SCA revoked a decision of the High Court of Argentina (HCA) that had denied an amparo petition. The case concerned a claim of the Eben Ezer community, an indigenous community in Argentina, to the effect that the Province's executive bodies had violated their rights by a decision taken that two patches of land would no longer be designated as natural reserve.[341] More specifically, the community argued that this decision affected, amongst others, its right to life and its communal

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334 This translation of the Spanish 'recurso de amparo' stems from the ECJ in the *Melloni* judgment, ECJ (GC) 26 February 2013, ECLI:EU:C:2013:107 (*Melloni*), para. 18. This case is further discussed in Section 4.2.2.

335 Brewer-Carías (2009), pp. 81 and 85.

336 Ibid, p. 1.

337 SCA 27 December 1957, 239:459 (*Siri*). For a short discussion of this case, see Galán and Vítolo (2011), pp. 200–201.

338 SCA 27 December 1957, 239:459 (*Siri*).

339 Galán and Vítolo (2011), pp. 200–201.

340 Article 43 of the Constitution of Argentina.

341 SCA 30 September 2008, 331:2119 (*Comunidad Indígena Eben Ezer v. Provincia de Salata*), para. 1.1.

PROEF 3

right to land. Both the Civil Court of First Instance and the HCA had rejected the community's claim for constitutional protection. The Civil Court noted that Article 87 of the Provincial Constitution recognised the action for amparo, but it considered that the claim fell outside the time limits recognised in the Civil Procedural Code.[342] This decision was upheld by the HCA.[343] The SCA, however, was of a different view. It considered that the amparo procedure is aimed at 'the immediate protection of the rights set out in the National Constitution'.[344] When provisions of 'law, decree or ordinance' are clearly in violation of these rights, 'the existence of regulations cannot be an obstacle to the immediate restoration of an individual's enjoyment of the fundamental right breached'.[345] It then referred to the case-law of the Inter-American Court of Human Rights, according to which national authorities must take into account the rights of indigenous peoples and their special relationship with traditional lands.[346] These traditional lands provided these people with means of subsistence, moreover they were part of their cultural identity, religion, and worldview. Against this background the SCA considered:

> 'The relevance and importance of the aforementioned property [for indigenous peoples] should *guide the judiciary not only in clarifying and deciding the points of substantive law, but also and especially in deciding on the so-called amparo remedies*, especially in the field under review, as these should not, in accordance with Article 25 of the American Convention on Human Rights, result in legal protection that is "illusory or ineffective" …'[347]

The ASC thus referred to the American Convention of Human Rights, requiring the protection of land rights through adequate and effective procedures. In rejecting the claim for an amparo, the lower courts had not sufficiently protected the relevant fundamental rights. For that reason, the ASC revoked the appealed judgment and referred it back to the HCA.[348] Without considering the possible outcome of the amparo, the ASC thus focused solely on the decision-making process of the lower courts, which had failed to comply with their duty to ensure protection of fundamental rights.

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342 Ibid, para. 1.2.

343 Ibid, para. 2.

344 Ibid, para. 2.

345 Ibid, para. 3.1.

346 See IACtHR (merits, reparations, and costs) 17 June 2005 (*Yakye Axa Indigenous Community v. Paraguay*), paras. 135 and 154.

347 SCA 30 September 2008, 331:2119 (*Comunidad Indígena Eben Ezer v. Provincia de Salata*), para. 3.2, [translation by author and emphasis added] ('La relevancia y la delicadeza de los aludidos bienes deben guiar a los magistrados no sólo en el esclarecimiento y decisión de los puntos de derecho sustancial, sino también, por cierto, de los vinculados con la "protección judicial" prevista en la Convención Americana sobre Derechos Humanos (art. 25), que exhibe jerarquía constitucional, máxime cuando los denominados recursos de amparo, especialmente en el terreno sub examine, no deben resultar "ilusorios o inefectivos" …'). This case has been considered an example of top-down convergence of indigenous rights case-law from the IACtHR to the national system, see Góngora Mera (2011), p. 224.

348 Ibid, para. 4.

PROEF 3

4.2.2 SPANISH CONSTITUTIONAL COURT: 'MELLONI CASE'

Examples of procedural reasoning concerning judicial procedures can also be found in cases concerning EU Member States implementing EU legislation, for example, in European Arrest Warrant (EAW) cases. EAW cases concern surrender requests of prosecuted and/or convicted persons from one EU Member State to another. Such orders are based on the EU Framework Decision on the European Arrest Warrant (Framework Decision), which aims to ensure the effectiveness of enforcing national judicial decisions.[349] To that end, the Framework Decision requires the surrender of a person between EU Member States with as little formalities as possible, that is, the surrender should be made solely on the basis of a formal judgment without an additional executive granting decision.[350] The EAW system relies on the principle of mutual trust between EU Member States, which is based on the assumption that these States will protect fundamental rights, both in their prosecution process and during the sentence.[351] Over the years, questions have arisen as to whether this assumption actually holds.[352] This has led to various preliminary questions being directed to the ECJ about the fundamental rights guarantees that national courts may provide when dealing with EAW surrender requests.[353]

In 2011, the Spanish Constitutional Court (SCC) raised concerns about fundamental rights.[354] It concerned a case where the Italian authorities requested the surrender of Melloni, who had been convicted in absentia by Italian courts. The SCC asked the ECJ for guidance on the issue. In its famous *Melloni* judgment of 2013, the ECJ had held, in light of the 'primacy, unity and effectiveness of EU law'[355], that EU Member States may '[not] apply the standard of protection of fundamental rights guaranteed by [their] constitution[s] when that standard is higher than that deriving from the [EU] Charter and, where necessary, to give it priority over the application of provisions of EU law'.[356] Taking this interpretation into account, the SCC gave its decision on the ***'Melloni***

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349 The Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States of the European Union, OJ 2002 L 190, 1.

350 Schallmoser (2014), p. 136.

351 E.g., Mitsilegas (2015), p. 465.

352 E.g., Gerards (2018a), pp. 322–325; Ouwerkerk (2018), pp. 103–104; Lenearts (2017), p. 810; Mitsilegas (2015), pp. 467–474; Schallmoser (2014), p. 136.

353 Most importantly, the ECJ recognised that the lack of fundamental rights protection may be a ground for national courts to suspend the surrendering of an individual to another Member State, see e.g., ECJ (GC) 25 July 2018, ECLI:EU:C:2018:586 (*Minister for Justice and Equality v. LM*) and ECJ (GC) 5 April 2016, EU:C:2016:198 (*Aranyosi and Căldăraru*). For case-notes on *Aranyosi and Căldăraru,* see e.g., Van der Mei (2018), pp. 16–20; Anagnostaras (2016); and Gáspár-Szilágyi (2016), and on *LM*, see Ballegooij and Bárd (2018). For an overview and discussion of relatively recent case-law, see Van der Mei (2018).

354 On 28 July the SCC asked for a preliminary ruling, see ECJ (GC) 26 February 2013, ECLI:EU:C:2013:107 (*Melloni*). For the questions raised by the SCC, see para. 26.

355 Ibid, para. 60.

356 Ibid, paras. 56–57.

PROEF 3

case' in 2014.[357] It considered whether or not the Italian authorities had violated the most basic guarantees of the right to a fair trial.[358] In other words, the SCC focused on the Italian judicial decision-making process for determining whether the surrender of Melloni would result in an indirect violation of the right to a fair trial by Spain. In determining the minimum guarantees that needed to be provided, the SCC referred to case-law of the ECJ and the ECtHR.[359] The latter had held that trials in absentia can violate the right to a fair trial 'where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself … or that he intended to escape trial'.[360] Taking this general international framework into account, the SCC then examined Italy's decision-making procedure.[361] It ruled that Melloni's application should be dismissed:

> 'This conclusion is based on the knowledge of a whole series of documents (the supplementary report required to the Office of the Prosecutor General of the Italian Republic, the delivery order and the documentation provided by the respondent) that, on the one hand, did not indicate that the lawyers of the appellant had ceased to represent him from 2001; and, secondly, *that there was no lack of defense, since the defendant was aware of the trial to be held, voluntarily decided not to attend the hearing, and had appointed two lawyers for his representation and defense, who intervened, in that quality, in first instance, in appeal and in cassation, exhausting the domestic remedies.*'[362]

The SCC concluded that the Italian proceedings did not violate the minimum guarantees of a fair trial.[363] Although the result of the SCC's judgment was substantive, as it held that there was no violation of the right to a fair trial and thus Melloni could be surrendered to Italy, in its reasoning it focused on Italy's judicial decision-making proceedings. This case therefore provides a clear example of procedural reasoning concerning the quality of the decision-making procedure by the Italian judiciary.

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357 SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*').

358 Ibid, p. 13.

359 Ibid, pp. 14–15.

360 ECtHR (GC) 1 March 2006, app. no. 56581/00 (*Sejdovic v. Italy*), para. 82.

361 SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*'), pp. 15–16.

362 Ibid, p. 16 [translation by author and emphasis added] ('A dicha conclusión llegó como consecuencia del conocimiento de toda una serie de documentos (el informe complementario requerido a la Fiscalía General de la República Italiana, la orden de entrega y la propia documentación aportada por el reclamado) que le llevaron a apreciar, por un lado, no acreditado que los Abogados que el recurrente había designado hubieran dejado de representarle a partir de 2001; y, por otro, que no se produjo falta de defensa, dado que el reclamado era conocedor de la futura celebración del juicio, situándose voluntariamente en rebeldía, y designó dos Abogados de su confianza para su representación y defensa, los cuales intervinieron, en esa calidad, en la primera instancia, en la apelación y en la casación, agotando así las vías de recurso.').

363 García (2014).

PROEF 3

4.2.3 GERMAN FEDERAL CONSTITUTIONAL COURT: *MR R*

The debate on fundamental rights protection and the European Arrest Warrant did not end with the judgment of the SCC. In 2015, the GFCC dealt with the extradition of a US citizen to Italy in the case of ***Mr R***[364] Under the doctrine of constitutional identity[365], the GFCC considered that the proceedings in Italy violated the right to human dignity and the right to fair trial. In this case, the individual concerned was convicted in absentia, without his being aware of the prosecution and subsequent conviction. The GFCC held that the German courts should provide effective judicial review, which means that they should also be able to assess whether the judicial decision-making process of the requesting Member State met the requirements of the rule of law and fundamental rights.[366] The GFCC therefore examined the decision-making procedure by the German lower courts. As regards the German Higher Regional Court (GHRC) the GFCC stated:

> 'The challenged decision rendered by the Higher Regional Court does not entirely meet these [fair trial] requirements. The Higher Regional Court's assessment that the complainant's extradition is only permissible if he is provided with an effective legal remedy after his surrender is correct. However, the court failed to recognise the extent of its obligation to investigate and to establish the facts and thereby failed to recognise the significance and the scope of [the right to human dignity]. *The complainant asserted in a substantiated manner that the Italian procedural law did not provide him with the opportunity to have a new hearing of evidence at the appeals stage. The Higher Regional Court failed to sufficiently follow up on that issue.* It contented itself with finding that a hearing of evidence in Italy was "in any case not impossible" ("*jedenfalls nicht ausgeschlossen*"). Its decision therefore violates the complainant's rights under [the Constitution].'[367]

The GFCC thus held that the GHRC had failed to follow up on the individual's claim on the procedural failures by the Italian courts. It considered that the GHRC should have carried out a more critical analysis of the arguments put forward.[368] The GFCC discussed various standards that should have been taken into account by the GHRC, and found that the GHRC's reasoning fell short of these standards.[369] It therefore concluded that the GHRC's decision to extradite the individual was in violation of the German Constitution, in particular the right to human dignity. It referred the case back for redetermination by the GHRC.[370]

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364 GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf)* [official English translation <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html;jsessionid=C1647907D1C8C3A89470E2A06005EBE7.2_cid383>]. For a discussion of the case, see Nowag (2016).

365 For a discussion of this doctrine in the case-law of the GFCC, see Polzin (2016), pp. 426–431.

366 GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf)*, para. 105.

367 Ibid, para. 109 [official English translation and emphasis added].

368 Ibid, paras. 110–123.

369 Ibid, para. 123.

370 Ibid, para. 109.

4.2.4 CANADIAN SUPREME COURT: *CARTER*

The CSC has also turned to procedural reasoning in order to determine the quality of the trial judge's decision-making procedure. In ***Carter*** the CSC had to decide on the issue of physician-assisted suicide.[371] The case concerned an individual who was diagnosed with a terminal neurodegenerative disease and challenged the blanket prohibition and criminalisation of assisted suicide, which was laid down in the Canadian Criminal Code. The central issue at stake was whether the absolute prohibition violated the right to life, liberty, and security of the person as laid down in the Canadian Charter of Fundamental Rights and Freedoms (Canadian Charter).[372] In light of the sensitivity and ethical complexity of the case, the trial judge Justice Lynn Smyth had made a great effort in gathering information from medical doctors, scientists, and ethicists, as well as from other legal jurisdictions, in order to determine whether a right to physician-assisted suicide should be recognised.[373] In total, the trial judge's 'evidence included 36 binders of written submissions and over 100 affidavits'.[374] In a judgment 323 pages long, Justice Lynn Smith finally concluded that the prohibition was unconstitutional as it violated the 'rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition'.[375] The blanket ban therefore violated the Canadian Charter. On appeal, the decision of the trial judge was overturned and the blanket prohibition on assisted suicide was upheld.[376] In particular it was found that the trial judge should have followed the CSC's 1993 *Rodriguez* judgment, in which the prohibition on physician-assisted suicide was upheld by the CSC.[377] In 2015 the CSC delivered its own judgment in the case.[378] Unanimously, it overturned its earlier case-law and found that the Canadian Criminal Code unjustifiably infringed the Canadian Charter.[379] In assessing whether the legislative prohibition of assisted suicide was indeed a necessary restriction of the right to life, liberty, and security of the person, the CSC focused on the decision-making process of the trial judge. The CSC considered:

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[371] CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*). Discussed in Chan and Somerville (2016).

[372] CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*), para. 103.

[373] SCBC 15 June 2012, 2012 BCSC 886 (*Lee Carter v. Canada (Attorney General)*), sections V-VIII. See also CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*), para. 104. The decision of the trial judge has been criticised as 'the evidence relied on is scanty, with large gaps, and [the judge's] conclusions were both hesitant and questionable', see Yowell (2018), p. 84.

[374] Yowell (2018), p. 13.

[375] As summarised by the CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*), para. 3. See also the trial judge's judgment, SCBC 15 June 2012, 2012 BCSC 886 (*Lee Carter v. Canada (Attorney General)*), para. 18.

[376] BCCoA 10 October 2013, 2013 BCCA 435 (*Carter v. Canada (Attorney General)*). The BCCoA also noted the careful and lengthy review of the trial judge (para. 247ff), however, on the basis of a substantive assessment of the legal grounds and the precedent set in earlier case-law of the CSC, it reached a different conclusion (para. 324).

[377] CSC 30 September 1993, 3 S.C.R. 519 (*Rodriguez v. British Columbia (Attorney General)*). This case and the judgment of the trial judge in *Carter* are discussed in Beschle (2013).

[378] CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*).

[379] Ibid, para. 127.

PROEF 3

> '… In assessing minimal impairment, the trial judge heard evidence from scientists, medical practitioners, and others who were familiar with end-of-life decisionmaking in Canada and abroad. She also heard extensive evidence from each of the jurisdictions where physician-assisted dying is legal or regulated…
>
> …
>
> In *Bedford*, this Court affirmed that a trial judge's findings on social and legislative facts are entitled to the same degree of deference as any other factual findings … In our view, Canada has not established that the trial judge's conclusion on this point is unsupported, arbitrary, insufficiently precise or otherwise in error. At most, Canada's criticisms amount to "pointing out conflicting evidence", which is not sufficient to establish a palpable and overriding error … *We see no reason to reject the conclusions drawn by the trial judge. They were reasonable and open to her on the record.*
>
> …
>
> Finally, it is argued that without an absolute prohibition on assisted dying, Canada will descend the slippery slope into euthanasia and condoned murder. Anecdotal examples of controversial cases abroad were cited in support of this argument, only to be countered by anecdotal examples of systems that work well. The resolution of the issue before us falls to be resolved not by competing anecdotes, but by the evidence. *The trial judge, after an exhaustive review of the evidence, rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide.* We should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of lives will prove impotent against abuse.'[380]

In short, the CSC focused on the quality of the decision-making process of the trial judge[381], not just as regards the gathering of evidence but also as regards the judge's analysis thereof. The CSC was satisfied with the extensive gathering and exhaustive review of the evidence by the trial judge, and it seemed to leave the substantive analysis of the evidence almost entirely up to the trial judge.[382] This case is thus an example of almost exclusively process-based review of the judicial decision-making process.

4.2.5 UN COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: *I.D.G.*

International courts and tribunals have also been inclined to review the procedure followed by the national judiciary in light of substantive rights. This is also true for UN Treaty Bodies.[383] In recent years, the Human Rights Committee in particular has dealt with many individual complaints under the International Covenant on Civil and Political Rights (ICCPR).[384] Moreover, since 2013, also the UN Committee

[380] Ibid, paras. 104, 109 and 120.
[381] Ibid, para. 103.
[382] Ibid, para. 3. Yowell criticised the CSC for this deferential stance, see e.g., pp. 18–19.
[383] McCall-Smith (2015), pp. 9–12.
[384] Ibid, pp. 2–3.

PROEF 3

on Economic, Social, and Cultural Rights (CESCR) has delivered several decisions on the compliance of States with the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[385] Although the views of these Committees do not have the same legal status as supranational judgments of the ECtHR and the CJEU, they are considered authoritative and influential to the domestic fundamental rights perceptions.[386] It is therefore worthwhile to look into a decision of one of these UN Treaty Bodies to see how procedural reasoning may play a role in their decisions.

The very first case decided by the CESCR provides a clear example of process-based fundamental rights review. It is the ***I.D.G.*** case of 2015 concerning the right to housing (Article 11, paragraph 1 ICESCR) in combination with the right to effective judicial remedies (Article 2, paragraph 1 ICESCR[387]).[388] The central question was whether or not the right to housing was violated by the Spanish authorities in a mortgage enforcement process in a situation where the authorities had allegedly failed to properly notify the individual concerned.[389] The individual was a woman who had missed several mortgage payments, which had resulted in the mortgage enforcement procedure by the lending institution. However, the woman had not received notice of the commencement of mortgage enforcement proceedings that had been ordered by a Spanish court. Attempts to serve the notice in person had taken place during the day, when the woman was working, and she had not seen the public posting of the notice. Consequently, she only became aware of the proceedings after her home had been auctioned.

In its review, the CESCR focused on the Spanish judicial decision-making procedures. It considered that the procedural standard of due process and effective remedies applied when there is an interference with the right to housing.[390] Accordingly, national authorities 'should take all reasonable measures and make every effort to ensure that the serving of notice of the most important acts and orders in an administrative or judicial procedure is conducted properly and effectively so that the persons affected have the

385 The Optional Protocol that enables individuals to complain at the CESCR about violations of the ICESCR rights entered into force in May 2013. For a discussion about the importance of the complaint procedure, see Saul, Kinly and Mowbray (2014), pp. 8–11.

386 E.g., Alebeek and Nollkaemper (2012).

387 Article 2, paragraph 1 ICESCR entails the requirement for states 'to take steps … to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. The CESCR has explained that states ought to provide judicial remedies with respect to the rights that are justiciable, including forced evictions. In particular, '[a]ppropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights' (General Comment 7, para. 15). See CESCR General Comment No. 3, 14 December 1990, E/1991/23, 'The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)', para. 5; CESCR General Comment No. 7, 20 May 1997, E/1998/22, 'The Right to Adequate Housing (Art. 11.1): Forced Evictions', paras. 9, 11 and 15; and CESCR General Comment No. 9, 3 December 1998, E/C.12/1998/24, 'The Domestic Application of the Covenant', para. 2.

388 CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*). For a discussion of the judgment, see Sánchez (2016).

389 CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*), para. 10.6.

390 Ibid, paras. 11.4 and 12.1.

PROEF 3

opportunity to participate in the proceedings in defence of their rights'.[391] The CESCR acknowledged that the national court had ordered notification of the mortgage procedure by public posting, and it considered that this could be an appropriate means, although it noted that this should be a measure of last resort.[392] In its review of the facts of the case, the CESCR then assessed both the court-ordered procedure for notifying the woman and the availability of judicial remedies. Concerning the first procedure, which was administrative in nature, the CESCR considered that in order for the foreclosure proceedings to be adequate, national authorities should, after several attempts at notification in person, try to inform the individual in other ways before resorting to public posting of the event.[393] It therefore concluded that the mortgage procedure was inadequate.[394] In addition, the CESCR noted that it would have been possible for the national courts to remedy this violation themselves, if there were effective judicial remedies available.[395] Concerning the available judicial remedies, the CESCR considered that:

> '… *it would be necessary for the ordinary procedure to permit suspension of the enforcement process and of the auction of the property*, since otherwise, a defence through the regular procedure would not suffice to guarantee the right to housing, because the person would not be able to stop the sale of their home and would only be able to obtain compensation or restitution of the property at a later stage, assuming that were even possible. The Committee notes that the inadequate notice to the author occurred on 30 October 2012, when the Court publicly posted notification. The judgement of the Court of Justice of the European Union referred to by the State party … is dated 14 March 2013, several months after that inadequate notice, and, as stated in that judgement, it is clear that, until that moment, ordinary proceedings would not have been able to suspend the enforcement procedure. *The author was thus deprived of the possibility of defending herself during the enforcement process and of stopping the auction, and when the inadequate notice materialized, even the regular procedure could not be deemed a potentially adequate alternative because it gave no possibility of suspending the enforcement process.*'[396]

According to the CESCR, judicial protection could only be considered an effective remedy if it could stop the imminent foreclosure of the house. The unjustified infringement of the right to housing made by the inadequate notice was, therefore, not remedied by the availability of any effective judicial remedy.[397] On the basis of

[391] Ibid, para. 12.2.
[392] Ibid, para. 12.3.
[393] Ibid, para. 13.3.
[394] Ibid, para. 13.7. From the wording used by the CESCR it seems that the inadequate notice would itself be sufficient to find a violation of the right to housing ('The Committee therefore considers that the inadequate notice constituted at that moment a violation of the right to housing, one that was not subsequently remedied by the State party as the author was denied both reconsideration of the decision to order an auction and *amparo* as sought in the Constitutional Court.').
[395] Ibid, para. 13.6.
[396] Ibid.
[397] Ibid, para. 13.7.

PROEF 3

this procedural failure, the CESCR found a violation of the right to housing read in conjunction with the right to an effective remedy.[398]

4.2.6 EUROPEAN COURT OF JUSTICE: *DYNAMIC MEDIEN*

The ECJ has also applied process-based review in fundamental rights cases regarding national courts' decisions. More generally, the ECJ has not only applied procedural reasoning in relation to measures of EU institutions, as the *Volker und Markus Schecke* judgment in Section 2.2.7 demonstrated, but also in relation to EU Member States. Concerning the latter, questions about fundamental rights protection are often brought before the ECJ through the preliminary reference procedure.[399] This procedure allows and sometimes even obliges national courts to ask the ECJ to interpret and provide guidance on the application of EU law. At times, the ECJ has applied procedural reasoning in answering preliminary questions. It should be noted, however, that in preliminary reference judgments the ECJ in principle limits itself to providing guidance to national courts on the interpretation of EU law.[400] Since the ECJ may not apply EU law to the facts of a case, it does not 'review' cases in the strict meaning of the word.[401] Nevertheless, it can and does steer national courts in the direction of adopting a procedural approach in their decision-making. Moreover, theory and practice do not always march hand in hand.[402] In some cases the ECJ has more directly reviewed the reasonableness of national measures in light of EU legislation.[403]

An example of a full review and a more explicit procedural approach in a preliminary reference procedure can be found in the ***Dynamic Medien*** judgment of 2007[404], which was decided before the entry into force of the EU Charter. The case concerned a UK company that sold videos by mail order or on the internet, including DVDs with Anime (i.e., Japanese Cartoons that sometimes contain violent or explicit content). A competitor company based in Germany argued that the German legislation should regulate the import of DVDs ordered online. In order to protect children and young people, German law required DVDs to be licensed by a labelling authority.[405] The German company submitted that the German authorities could not rely on the labelling of the British Board of Film Classification, which had categorised the Anime DVDs as suitable only for 15 years and over.[406] The German District Court and the

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398 Ibid, para. 15.
399 Article 267 TFEU.
400 Article 267, paragraph 1 TFEU.
401 Craig and De Búrca (2015), pp. 466 and 467.
402 Ibid, p. 497.
403 Beijer (2017a), pp. 186–187 and Craig and De Búrca (2015), pp. 496–499. For an explanation of what is meant by 'review' in this book, see Section 5.2.3.
404 ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*). Discussed in Beijer (2017a), pp. 187–188.
405 ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*), para. 9.
406 Ibid, para. 12.

PROEF 3

Higher Regional Court of Koblenz agreed with this line of reasoning and considered that reliance on the labelling of the British Board was contrary to German Law.[407] The German Landgericht of Koblenz (GLoK), however, was unclear as to whether this interpretation was compatible with EU law on the free movement of goods (Article 28 TFEU) and it raised preliminary questions to the ECJ. The ECJ considered that the requirement for companies to obtain additional labelling in Germany was a measure restricting the free movement of goods.[408] It therefore examined whether the measure could be justified for the interest of protecting the rights of the child.[409]

> 'As regards the examination procedure established by the national legislature in order to protect children against information and materials injurious to their well-being …
>
> *…such an examination must be one which is readily accessible, can be completed within a reasonable period, and, if it leads to a refusal, the decision of refusal must be open to challenge before the courts …*
>
> In the present case, it appears from the observations submitted by the German Government before the Court that the procedure for examining, classifying, and labelling image storage media, established by the rules at issue in the main proceedings, fulfils the conditions set out in the preceding paragraph. However, it is for the national court, before which the main action has been brought and which must assume responsibility for the subsequent judicial decision, to ascertain whether that is the case.'[410]

In this case the ECJ directed national courts to adopt a procedural approach by holding that they should asses the compliance of the national procedures with the standard of accessible, timely, and challengeable labelling decisions.[411] In addition, it encouraged the national legislature to put in place relevant examination procedures. It provisionally concluded that the German legislation had devised administrative labelling decision-making procedures in accordance with these procedural standards. Although this review was inconclusive – that is, the ECJ emphasised that ultimately it would be for the national court to decide on the matter – it shows how the ECJ would apply procedural reasoning in the given case and what the result would most likely be.[412]

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407 Ibid, paras. 8–10 and 14.
408 Ibid, para. 35.
409 Concerning the recognition of the legitimate objective of protecting the rights of the child, see ibid, paras. 36–42.
410 Ibid, paras. 49–51 [emphasis added].
411 See also Beijer (2017a), pp. 200–201.
412 The ECJ's instruction can be considered an approach somewhere in between providing guidance and outcome oriented, see Tridimas (2011), pp. 739–745.

PROEF 3

4.2.7 EUROPEAN COURT OF HUMAN RIGHTS: *WINTERSTEIN*, *LAMBERT*, AND *VON HANNOVER (NO. 2)*

The ECtHR took a procedural approach in the ***Winterstein*** judgment of 2013.[413] The case concerned the eviction of a number of Roma families from their caravans. Section 3.2.6 has already discussed the use of procedural reasoning as regards the administrative evictions orders in this case. In the judgment, however, the ECtHR also went on to scrutinise the decision-making processes of the French lower and appeal courts that had approved the eviction orders. In terms of the right to respect of the home, private and family life (Article 8 ECHR), it held:

> 'the loss of a dwelling is a most extreme form of interference with the right to respect for one's home and that any person at risk of being a victim thereof should in principle be able to have the proportionality of the measure determined by a court. In particular, where relevant arguments concerning the proportionality of the interference have been raised, *the domestic courts should examine them in detail and provide adequate reasons* …
>
> In the present case, *the domestic courts ordered the applicants' eviction without having analysed the proportionality of this measure* … Once they had found that the occupation did not comply with the land-use plan, they gave that aspect paramount importance, without weighing it up in any way against the applicants' arguments … As the Court emphasised [in earlier judgments], that approach is in itself problematic, amounting to a failure to comply with the principle of proportionality: the applicants' eviction can be regarded as "necessary in a democratic society" only if it meets a "pressing social need", which is primarily for the domestic courts to assess.'[414]

According to the ECtHR, it was necessary for the national courts to carry out a proportionality assessment of measures infringing fundamental rights, especially when the measures have serious consequences for the individuals involved. Since the French courts had decided on the eviction of the Roma families merely on the basis that the occupation of the land was illegal, the ECtHR concluded that the national courts had failed to properly examine the proportionality of the eviction orders. In combination with the considerations relating to the administrative decision-making process, it found a violation of Article 8 ECHR.[415] The ECtHR thus relied on procedural failures of both the judicial and the administrative procedures to find a violation of this substantive right.

In the ***Lambert*** judgment, also discussed in Section 3.2.6, the ECtHR had to decide on a case relating to assisted suicide.[416] The applicants were family members of Vincent

[413] ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*). For a short discussion of the case and the procedural elements see Gerards (2019), pp. 259–260.

[414] ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*), paras. 155–156 [emphasis added].

[415] Ibid, paras. 158 and 167.

[416] ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*), paras. 161–181. Discussed in Spano (2018), p. 491. For a similar case, see ECtHR (dec.) 27 June 2017, app. no. 39793/17 (*Gard and Others v. UK*), paras. 91–98.

PROEF 3

Lambert, who was in a vegetative state after having sustained serious head injuries in a road-traffic accident. His wife and nephew wanted to stop Lambert's life-sustaining treatment, while his parents, sister, and half-brother wanted to continue the treatment. The doctor started an end-of-life procedure and decided that it would be in the interest of his patient to withdraw nutrition and hydration, which would ultimately lead to Lambert's death. After the doctor's decision to withdraw life support, Lambert's parents, half-brother, and sister lodged urgent applications in the administrative courts. The administrative court of first instance ruled that there had been procedural shortcomings in the medical decision-making procedure, in particular the lack of consultation with Lambert's extended family.[417] It therefore ordered a new procedure. The doctor carried out a new medical decision-making procedure, and after consultation with various family members, he issued a thirteen-page report restating his intention to discontinue Lambert's artificial nutrition and hydration.[418] Against this decision, Lambert's parents, half-brother, and sister instigated proceedings at the French Administrative Court (FAC). The FAC concluded that the medical decision constituted a serious and manifestly unlawful breach of Lambert's right to life and ordered the continuation of life support.[419] The hospital, the wife, and nephew of Lambert then lodged applications at the *Conseil d'État* to override the FAC's judgment. In light of the complexity of the issue, the *Conseil d'État* ordered an expert medical report.[420] After receiving the report, holding several hearings, and taking account of the general observations of the National Medical Council, the *Conseil d'État* set aside the FAC's judgment. This decision meant that the life-sustaining treatment of Lambert could be withdrawn. The case reached the ECtHR, which had to decide whether the French authorities had met their positive obligations to protect the right to life (Article 2 ECHR). The ECtHR considered the quality of the applicable legislative framework and the diligence of the medical decision-making procedure (discussed in Section 3.2.6). It also looked into the judicial remedies available.[421] In that regard it (partly) took a procedural approach and ruled as follows:

> 'The Court is keenly aware of the importance of the issues raised by the present case, which concerns extremely complex medical, legal and ethical matters. In the circumstances of the case, the Court reiterates that it was primarily for the domestic authorities to verify whether the decision to withdraw treatment was compatible with the domestic legislation and the Convention, and to establish the patient's wishes in accordance with national law. The Court's role consisted in ascertaining whether the State had fulfilled its positive obligations under Article 2 of the Convention.
>
> … As to the judicial remedies that were available to the applicants, the Court has reached the conclusion that the present case was the subject of an in-depth examination in the course

417 ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*), paras. 17–18.
418 Ibid, para. 22.
419 Ibid, para. 28.
420 Ibid, paras. 34–43.
421 Ibid, paras. 169–180. In line with the requirement set out in earlier case-law, the ECtHR required that there was 'the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests' (para. 143).

PROEF 3

of which all points of view could be expressed and all aspects were carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies.

Consequently, the Court concludes that the domestic authorities complied with their positive obligations flowing from Article 2 of the Convention, in view of the margin of appreciation left to them in the present case.'[422]

Finding that the procedures by the national courts (in particular the *Conseil d'État*) had been careful and allowed for an in-depth evaluation, the ECtHR went on to rule that Article 2 ECHR had not been violated. This judgment provides a clear example of procedural reasoning in a morally sensitive case.

In another, very different type of case, the ECtHR explicitly noted the importance of the judicial decision-making procedure for the protection of Article 8 ECHR.[423] In this case, ***Von Hannover (No. 2)*** of 2012, Princess Caroline von Hannover from Monaco and her husband Prince Ernst August von Hannover from Germany complained about the German courts' refusal to stop tabloid newspapers from publishing photographs of their private life. Before determining whether there had been a violation of the right to respect for private and family life, the ECtHR reiterated the general principles applicable to the case.[424] Concerning its assessment of the German courts' decisions, the ECtHR stated that it 'would require strong reasons to substitute its view for that of the domestic courts' where they have carried out a balancing exercise of the rights and interests at stake in accordance with the ECHR and its case-law.[425] This meant that the German courts should have sought to strike a balance between the Royal couple's right to privacy and the tabloids' freedom of expression. In its judgment, the ECtHR extensively discussed the judicial decision-making process at the national level.[426]

'*[T]he national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life*. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken.

The Court also observes that the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the *Von Hannover [v. Germany (No. 1)]* judgment [of the ECtHR], the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law.

In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter

422 Ibid, para. 181.
423 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*).
424 Ibid, paras. 95–113.
425 Ibid, para. 107.
426 Ibid, paras. 114–123.

PROEF 3

have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.'[427]

This judgment by the ECtHR provides an example of a procedural approach relating to the fundamental rights assessment made by the national courts.[428] After closely considering whether the national courts had sought to weigh the different interests at stake, and taken the ECHR into account, the ECtHR considered that the right to respect for private and family life had not been violated by the German authorities. This judgment shows that procedural reasoning concerning the judicial decision-making process can lead to the positive finding that national courts' review was compatible with the ECHR, and more specifically, that the State had complied with its positive obligation to protect the right to privacy of the individuals concerned.[429] This approach can also be found in other cases, although the ECtHR hardly ever takes this procedural approach to the 'fullest logical consequence', which would mean that it would not look into the substance of the judicial decision at all.[430]

4.2.8 INTER-AMERICAN COURT OF HUMAN RIGHTS: *GELMAN*

In a similar vein, the Inter-American Court of Human Rights (IACtHR) – the ECtHR's American counterpart – has required national courts to ensure the rights laid down in the American Convention on Human Rights. In *Almonacid Arellano*, a landmark case of 2006, it opined:

> 'The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, *the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights.* To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the *Inter-American Court*, which is the ultimate interpreter of the American Convention.'[431]

427 Ibid, paras. 124–126.

428 For a lengthy discussion of the procedural approach in this and the other *Von Hannover* judgments, see Popelier and Van de Heyning (2017), pp. 16–17.

429 For this approach, see Gerards (2017), pp. 150–154. This approach of the ECtHR is considered to show great deference to the national authorities, see e.g., Arnardóttir (2017), p. 34.

430 Gerards (2017), p. 153.

431 IACtHR (preliminary objections, merits, reparations, and costs) 26 September 2006 (*Almonacid-Arellano et al. v. Chile*), para. 124. Confirmed in later judgment, see e.g., IACtHR (preliminary objections, merits, reparations, and costs) 23 November 2009 (*Radilla-Pacheco v. Mexico*), para. 339; IACtHR (preliminary objections, merits, reparations, and costs) 12 August 2008 (*Heliodoro*

PROEF 3

There is much similarity in the phrasing of the IACtHR's approach, and the ECtHR's requirement for national courts to carry out a balancing exercise in light of the European Convention and its case-law. Despite the similarities of these requirements, where the ECtHR seems to mostly apply procedural reasoning[432] the IACtHR generally takes a substantive approach.[433] The IACtHR has even explicitly clarified that in relation to certain types of cases it will always examine the substance of the issue. Indeed, in the context of amnesty laws it seems to reject a procedural approach altogether. In the ***Gelman*** judgment of 2011, the IACtHR made clear that in dealing with the compatibility of amnesties with the American Convention on Human Rights (ACHR), it would adopt a substantive approach.[434] It stated:

> 'The incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, "self-amnesties", and the Court, more than the adoption process and the authority which issued the Amnesty Law, heads to its *ratio legis*: to leave unpunished serious violations committed in international law. *The incompatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect* in what regards the rights enshrined in Articles 8 and 25, in relation to Article 1(1) and 2 of the Convention.'[435]

In considering whether the authorities of Uruguay had indeed violated the right to a fair trial and the right to judicial protection, the IACtHR looked into the merits of the amnesty legislation and its application. As regards the democratic legitimacy of the law, it held that the procedural qualifications of the laws, in particular the approval of the legislation by a democratic regime and its support by the public by direct democratic means (a referendum and a 'plebiscite'), did not provide legitimacy to this legislation.[436] Instead, amnesties in their substance disclosed a failure to investigate serious human

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Portugal v. Panama), para. 180; and, IACtHR (preliminary objections, merits, reparations, and costs) 24 November 2006 (*Trabajadores Casados del Congreso (Aguado Alfaro y Otros) v. Peru*), para. 128. For a discussion of the doctrine of conventionality control under the IACtHR, see González-Domínguez (2018).

432 See the *Von Hannover (No. 2)* judgment discussed in Section 4.2.7. For a discussion of the ECtHR's approach, see Gerards (2017), pp. 128 and 150–152 and Çali (2016) who calls this the 'responsible courts doctrine'.

433 For a comparison of the ECtHR's procedural approach and the approach of the IACtHR, Le Bonniec (2017), pp. 187–189. Le Bonniec shows that in certain contexts, the IACtHR has turned to procedural reasoning in addition to substantive reasoning. In particular, just like the ECtHR, it has recognised the obligation for states to carry out effective investigations into violations of (absolute) substantive rights, and it has affirmed that in such cases a procedural failure may on itself lead to a violation of the ACHR, see Le Bonniec (2017), pp. 168–170.

434 IACtHR (merits and reparations) 24 February 2011 (*Gelman v. Uruguay*). Discussed in Micus (2015), pp. 138–142.

435 Ibid, para. 229.

436 Ibid, para. 238. See for a very critical discussion of this approach Gargarella (2015).

PROEF 3

rights violations contrary to international law obligations[437], and they could not be overruled by a simple wish of the majority.[438] In the context of amnesties, the IACtHR's conventionality control has gone as far as the IACtHR determining itself that the national law is devoid of legal effects.[439] Evidently, the cases on amnesties related to very serious fundamental rights violations, touching upon the right to life and the right to prohibition of torture, which may explain the rejection of a procedural approach by the IACtHR. At the same time, however, the IACtHR considered these cases under procedural rights of the Convention, which could have supported a more procedural approach.

4.3 CONCLUSION

Process-based review of judicial procedures can be found in a variety of cases. Some cases related to procedural rights, such as the right to an amparo procedure (the SCA's *Comunidad Indígena Eben Ezer* judgment[440]) and the right to a fair trial (the SCC's *Melloni* judgment[441] and the GFCC's *Mr R* judgment[442]). Other cases concerned substantive rights such as the right to life (the ECtHR's *Lambert* judgment[443] and the CSC's *Carter* judgment[444]), the right to housing (the CESCR's *I.D.G.* judgment[445]), and the right to private life (the ECtHR's *Von Hannover (No. 2)* judgment[446]). In their review, some courts turned to an assessment of judgments from courts that are part of the same legal systems, other courts, by contrast, reviewed judicial decision-making procedures of courts from a different legal system altogether, e.g., the IACtHR in the *Gelman* judgment[447] and the SCC in the '*Melloni case*'. Most judgments resulted in a final and conclusive decision on the violation of fundamental rights. The judgments of the ECJ in *Dynamic Medien*[448], the SCA, and the GFCC, however, concerned referrals to lower courts for a (re)determination in light of the standards set out by these courts.

[437] IACtHR (merits and reparations) 24 February 2011 (*Gelman v. Uruguay*), paras. 231 and 232. For the first time mentioned in IACtHR (merits) 14 March 2001 (*Barrios Altos v. Peru*), para. 41.
[438] IACtHR (merits and reparations) 24 February 2011 (*Gelman v. Uruguay*), para. 239.
[439] Binder (2012), pp. 309–311.
[440] See Section 4.2.1.
[441] See Section 4.2.2.
[442] See Section 4.2.3.
[443] See Section 4.2.7.
[444] See Section 4.2.4.
[445] See Section 4.2.5.
[446] See Section 4.2.7.
[447] See Section 4.2.8.
[448] See Section 4.2.6.

REFLECTION ON PART I

Part I of this book has discussed multiple examples of process-based review in fundamental rights cases. The judgments demonstrate that procedural reasoning has been and is being applied by courts to determine whether fundamental rights have been violated. Courts have turned to procedural reasoning concerning a wide variety of rights. Process-based fundamental rights review is not used only in relation to procedural rights, like the right to a fair trial (e.g., the two European Arrest Warrant cases[449]) and the right to effective remedies (e.g., the amparo remedy[450]), but also in relation to substantive rights, like the right to life (e.g., *Carter*[451]). Courts have also applied process-based review to help them assess public authorities' compliance with civil rights (e.g., the right to freedom of expression, *Miss Behavin Ltd.*[452]), political rights (the right to political participation, e.g., *Doctors for Life International*[453]), socio-economic rights (the right to housing, e.g., *I.D.G.*[454]), and cultural rights (the right to respect of the cultural lifestyle of Roma and travellers, *Winterstein*[455]). Procedural reasoning has also been used to examine whether decision-making authorities have met their negative obligations, for example, whether they have refrained from biased decision-making (e.g., *Baker*[456]), as well as their positive obligations, for instance, whether they have tried to strike a balance between the various interests and rights at stake (e.g., *Von Hannover (No. 2)*[457] and *Quila*[458]). In addition, the examples show that courts' review of the quality of decision-making procedures varies in its focus. In certain cases, courts focused on evidence-based decision-making (e.g., *Hartz IV*[459]) and on reason-giving for decisions (e.g., *'Tunisian case'*[460]), whereas in other cases, they emphasised the need for deliberative and participation-oriented procedures (e.g., *Carolene Products* and *Fullilove*[461]).

449 Sections 4.2.2 (*'Melloni case'* by the SCC) and 4.2.3 (*Mr R* by the GFCC).
450 Section 4.2.1 (*Comunidad Indígena Eben Ezer* by the SCA).
451 Section 4.2.4 (by the CSC).
452 Section 3.2.5 (by the UKSC).
453 Section 2.2.5 (by the SACC).
454 Section 4.2.5 (by the CESCR).
455 Section 3.2.6 (by the ECtHR).
456 Section 3.2.1 (by the CSC).
457 Section 4.2.7 (by the ECtHR).
458 Section 3.2.5 (by the UKSC).
459 Section 2.2.4 (by the GFCC).
460 Section 3.2.3 (by the DSC).
461 Section 2.2.1 (by the USSC).

PROEF 3

Additionally, it can be discerned that procedural reasoning is not just applied by international courts, such as the ECtHR[462] and the ECJ[463], but also by national courts. Not only have highest national courts turned to procedural considerations, but this is also being done by lower courts, like the SCH[464], the UKCoA[465], the DCTH and the CoATH.[466] The examples of procedural reasoning also show that courts have probed the quality of the decision-making process of judicial procedures[467] and of administrative procedures.[468] Review of the latter procedures relates both to general and individual decisions (compare *Hatton*[469] and *Baker*[470]), and both to decisions taken by executive authorities exercising State functions and to decisions of public schools and public hospitals (e.g., *Denbigh High School*[471] and *Lambert*[472]). Process-based review has also been used in relation to legislative processes.[473] It has been applied in relation to the adoption of parliamentary acts as well as to the approval of constitutional amendments (compare the *'General Foresting Law case'* and the '*Consultation of Ethnic Communities case'*[474]).

It is also is noteworthy that procedural reasoning has been applied in different ways. For instance, in certain cases it has been used (almost) exclusively (e.g., *Carter*[475]), and in other cases procedural considerations are merely supportive of substantive considerations (e.g., *Urgenda*[476]). Furthermore, sometimes procedural reasoning has led courts to draw positive or negative inferences (e.g., for a negative inference, see *Hirst (No. 2)*[477]), at other times the negative inference drawn required a redetermination by another decision-making authority (compare *Volker und Markus Schecke* and *Dynamic Medien*[478]).

Despite the fact that process-based review is applied in the practice of fundamental rights adjudication, the examples show that the use of procedural reasoning may be

[462] Sections 2.2.8 (*Hirst (No. 2)* and *Bayev*), 3.2.6 (*Hatton*, *Winterstein*, and *Lambert*), and 4.2.7 (*Winterstein*, *Lambert*, and *Von Hannover (No. 2)*).
[463] Sections 2.2.7 (*Volker und Markus Schecke*) and Section 4.2.6 (*Dynamic Medien*).
[464] Section 2.2.2 (*Taomae*).
[465] Section 3.2.5 (*Denbigh High School*).
[466] Section 3.2.4 (*Urgenda*).
[467] Chapter 4.
[468] Chapter 3.
[469] Section 3.2.6 (by the ECtHR).
[470] Section 3.2.1 (by the CSC).
[471] Section 3.2.5 (by the UKCoA and the UKSC).
[472] Section 3.2.6 (by the ECtHR).
[473] Chapter 2.
[474] Section 2.2.6 (both by the CCC).
[475] Section 4.2.4 (by the CSC).
[476] Section 3.2.4 (the relevance of procedural considerations was particularly marginal in the judgment of the DCTH and was more important, yet still combined with substantive reasoning, in the judgment of the CoATH).
[477] Section 2.2.8 (by the ECtHR).
[478] Sections 2.2.7 and 4.2.6 (both by the ECJ).

PROEF 3

controversial. In certain contexts, such as in the US[479], Finland, New Zealand, and the UK[480], review of the legislative procedure is an issue for debate. In addition, the cases demonstrate that procedural reasoning is sometimes considered problematic in light of the courts' task of fundamental rights protection (see the discussion in the UK[481] and the approach of the IACtHR[482]). Even when the use of procedural reasoning is not itself a matter of controversy, the precise application can be (compare the approach of the FCFCA with the approach of the AHC[483]).

In summary then, Part I has illustrated that process-based review is applied in fundamental rights cases by courts from many different jurisdictions and that it is applied in a variety of ways. This brings us to the next question – what, despite all the differences between these examples (or multiple descriptions), is the common denominator? That is, what does process-based fundamental rights review really mean? Part II addresses this conceptual issue. In particular, Chapter 5 provides a definition of process-based review and Chapter 6 discusses the various ways it can be applied. Against this conceptual-theoretical background the debates on procedural reasoning are addressed in Part III.

[479] Section 2.2.1.
[480] Section 2.2.3.
[481] Section 3.2.5 (particularly, *Denbigh High School* and *Miss Behavin' Ltd.*).
[482] Section 4.2.8 (*Gelman*).
[483] Section 3.2.2 (*SZSSJ*).

PROEF 3

PART II

THE CONCEPT OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

PROEF 3

PROEF 3

INTRODUCTION TO PART II

PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW: WHAT'S IN A NAME?

Part I has demonstrated that process-based review in fundamental rights cases is applied by courts from all over the world in a variety of ways. In the literature attention has also been paid to various forms of procedural reasoning. Indeed, one academic even notes the existence of a 'cross-national procedural phenomenon' in judicial review.[484] Various definitions and terminologies have been put forward, including 'participation-oriented, representation-reinforcing approach to judicial review'[485], 'semi-procedural review'[486], 'procedural rationality review'[487], and 'procedural proportionality review'.[488, 489] The variations in these terminologies and the different applications of procedural reasoning inevitably lead to the question: what exactly *is* process-based fundamental rights review? The answer to this conceptual question is essential because our understanding of what constitutes process-based affects our views on its normative value and the desirability of its application. Before discussing the value of procedural reasoning in fundamental rights cases, it is essential therefore to be clear as to what we mean by process-based fundamental rights review.[490] It is the aim of Part II to provide such clarity.

METHODOLOGY AND METHODS OF PART II: SIMILARITY, DIFFERENCE, AND REFLECTIVE EQUILIBRIUM

Looking into the similarities and differences between different understandings of procedural reasoning is a useful way to grasp what is meant by it. In the words of Mitchel de S.-O-l'E Lasser, 'the intellectual constructs of similarity and differences [should be

484 Alemanno (2013), p. 3.
485 Ely (1980), p. 87.
486 Bar-Siman-Tov (2011), p. 1917.
487 Popelier and Van de Heyning (2017), pp. 9–10 and Popelier and Van de Heyning (2013), p. 232.
488 Harbo (2017), p. 32.
489 The various definitions are more extensively addressed in Section 5.2.1.
490 For a similar approach see Messerschmidt (2016b), pp. 373–403.

PROEF 3

deployed] in such a way as to generate or provoke productive insights into the objects of her analysis'.[491] Hence, for a proper understanding of process-based fundamental rights review it is necessary to reflect on the similarities of the examples provided in Part I – what makes them examples of procedural reasoning? Chapter 5 looks for a common core and provides a definition of 'process-based review' and 'process-based fundamental rights review'. At the same time, and just as importantly, a conceptual understanding of procedural reasoning should account for the dissimilarities between the applications of process-based review. As the Reflection to Part I explained, procedural reasoning can be applied by different courts, in different kinds of cases, and in relation to different kinds of rights. Chapter 6 accommodates these varieties by providing an overview of the diverse ways procedural reasoning can be applied.

Part II relies on a 'constant dialectic, [that is a] perpetual shifting back and forth between the conceptual poles of similarity and difference [to] provok[e] the richest comparative analysis' of procedural reasoning.[492] The following chapters search for similarities and differences between procedural reasoning by discussing both the literature on, and practical examples of, procedural reasoning to offer a broad and in-depth understanding of process-based fundamental rights review. The methodology of Part II can thus be described as a striving to achieve a *reflective equilibrium* between the theory and practice of process-based review.[493]

This approach requires further elaboration. Clearly, the gathering of examples of process-based review in Part I required a basic understanding of what procedural reasoning entails. In this book the starting point for that understanding was the literature on process-based review and related concepts. While this theoretical understanding of procedural reasoning enabled a selection of procedurally reasoned judgments, in their turn, these judgments have informed the theoretical conceptualisation of process-based review. This meant that further research on the similarities and dissimilarities of the procedural examples was needed, which subsequently resulted in the identification of other examples of process-based fundamental rights review. This going back and forth between non-specific theory

491 De S-O-l'E. Lasser (2004), p. 163.

492 Ibid, p. 164.

493 A term coined by Rawls (1997), para. 4. Rawls relied on the reflective equilibrium methodology as a method for finding the (ethical) principles of justice. This back-and-forth process, is derived from the non-moral theory of Goodman on induction and deduction, see Goodman (1973), p. 64 ('The point is that rules and particular inferences alike are justified by being brought into agreement with each other. A rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend. The process of justification is the delicate one of *making mutual adjustments between rules and accepted inferences;* and *in the agreement achieved lies the only justification* needed for either.' [emphasis added]). Related more closely to the context of this research, a reflective equilibrium has also been used to describe the matching of legal theory and moral philosophy, see Waldron (2002), p. 360 ('On the legal side, [this matching] might reflect the historic influence of moral ideas on the law, and on the philosophical side, it might also reflect the reverse influence, of legal practice on philosophical theory-building, mediated perhaps under the auspices of reflective equilibrium'). See for a brief discussion of this method in legal research Singer (2009), pp. 976–977.

PROEF 3

and particular fundamental rights judgments ultimately led to the conceptualisation of process-based review that is set out in Part II. However, the reflective equilibrium in this book may be described as a narrow, or perhaps intermediate, reflective equilibrium.[494] The aim of the back-and-forth movement was not to 'undergo a radical shift' in our understanding of process-based review, instead the goal was to refine the understanding previously obtained and to describe process-based review in more detail and in a context-independent manner.[495] Furthermore, in line with the very notion of 'reflective equilibrium', it should be noted that the definitions provided and the variations discussed in the following chapters are not set in stone.[496] While these definitions and applications have a sufficiently strong basis for a general theory on process-based fundamental rights review, the conceptualisation provided in Part II can and necessarily will be flexible to the needs of time, the social and political context, the type of court, the legal systems, and any other relevant factors.[497] In particular, in light of the institutional settings of a court and the default approach to fundamental rights cases, the concept of process-based review may necessitate adjustment to the specific context.

ROADMAP TO PART II

The following chapters provide a theoretical yet practice-oriented understanding of the concept of process-based fundamental rights review. Chapter 5 offers a definition of this type of review, based on the literature on procedural reasoning and through deducing similarities from the examples of process-based review put forward in Part I. It then goes on to explain the various levels of case-law analysis and the relationship between process-based and substance-based review. This helps to provide an in-depth understanding of what is meant by process-based fundamental rights review. Chapter 6 briefly discusses several institutional settings that set the stage for courts to apply

494 Rawls (1997), para. 9.

495 In a sense the reflective equilibrium method is a descriptive method; a method to uncover a syntax, see Norman (2016), para. 3.1.

496 See Chase and Reynolds (2016), pp. 84–85 ('the reflective equilibrium process – whether wide or narrow – … will be, in part, a function of the particular judgments we hold at that time' as 'it is eminently unlikely that the process will involve anything like a radical challenge to our basic convictions').

497 To a certain extent this also addresses the problems universal theories face, as these inherently lead to an oversimplification of reality and an overemphasis on similarities. For the fundamental tension between universalism-particularism and an advice for comparative research, see Hirschl (2014), pp. 197–205 ('Either way, neither contextualists nor universalists have a monopoly over the "right" or "correct" approach to comparative constitutional inquiry. Proponents of universalism tend to overemphasize cross-national similarities, while advocates of contextualism tend to overemphasize differences… The outcome of this new reality [i.e., accessibility of information and travelling possibilities for carrying out comparative research] is what may be poetically described as "difference in similarity", or alternatively "similarity within difference".', pp. 203–204). See also De S.-O.-l'E. Lasser (2004), p. 162 ('details, context, and perspective really do matter').

PROEF 3

procedural reasoning. Its main purpose, however, is to provide an overview of the various elements against which procedural reasoning can be diversified. It discusses the different intensities with which process-based review can be applied, the different procedural standards courts may rely on, the degrees of importance of procedural considerations, and the different tests within which procedural reasoning can be applied. In addition, the way procedural reasoning may vary in light of the burden of proof, the result, and the conclusions drawn are addressed. Part II is concluded by a Reflection that summarises and reflects on the main findings of these chapters.

PROEF 3

CHAPTER 5
CONCEPTUALISING PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

5.1 INTRODUCTION

Various examples of process-based fundamental rights review were addressed in Part I of this book. It has become clear that there is a broad diversity between these cases.[498] This leaves the question open as to what process-based review entails exactly. Despite all the differences, what makes each of these judgments an example of procedural reasoning in fundamental rights cases? This chapter provides an answer to this question and, in so doing, aims to conceptualise process-based fundamental rights review in a general and context-independent manner that accommodates the various ways procedural reasoning is being used in practice. The overarching definition of process-based review can be seen as a first step towards cross-fertilisation of insights and arguments on procedural reasoning from one legal context to another.[499]

To these ends, Section 5.2 develops common definitions of both process-based review and process-based fundamental rights review (Section 5.2.3). It does so on the basis of various definitions provided in the literature on procedural reasoning and related phenomena (Section 5.2.1) and on the basis of an analysis of the similarities and differences of the examples of process-based review from Part I (Section 5.2.2). To fully grasp the concept of process-based fundamental rights review, Section 5.3 discusses two particular elements of this method of review. First, it discusses the different levels of case-law analysis of fundamental rights judgments (Section 5.3.1). In addition, it explains how process-based review and substance-based review are connected. In that regard it discusses the process-substance dichotomy that is central to the topic of process-based review (Section 5.3.2) and it argues that procedural reasoning and substantive reasoning can best be understood as existing on a spectrum of judicial review. A short conclusion in Section 5.4 wraps up this chapter.

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[498] See in particular the Reflection to Part I.

[499] Such may also provide clarity on the different understandings of process-based review and its relation to other developments within which reference is made to procedural reasoning. Bar-Siman-Tov has, for example, already provided a clarification of the distinction between evidence-based judicial review and procedural reasoning, see Bar-Siman-Tov (2016).

PROEF 3

5.2 DEFINING PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

In order to define process-based fundamental rights review in a general and context-independent way, Section 5.2.1 discusses definitions provided in the literature of procedural reasoning in fundamental rights adjudication. Building on Part I, Section 5.2.2 then deduces several similarities and differences between the examples of process-based review discussed there. Against the background of the existing definitions and the elements derived from the procedural examples, Section 5.2.3 draws common definitions of what is called 'process-based review' and 'process-based fundamental rights review'.

5.2.1 DEFINITIONS OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW IN THE LITERATURE

Fundamental rights literature has, in recent years, paid increasing attention to the definition of process-based review. Sometimes these definitions are general in nature. In an edited volume on procedural reasoning by European and international courts, in which the case-law of the CJEU, the ECtHR, UK courts, as well as the Appellate Bodies of the World Trade Organization are discussed, the editors explained their view that process-based review means that courts '[i]nstead of (only) reviewing the substantive reasonableness of interferences with a fundamental rights, might (also) expressly take account of the quality of the legislative, administrative or judicial procedure that has led up to the alleged violation'.[500] In a book on legislative due process concerning the US, South-Africa, Germany and the European Union, the authors argued that 'constitutional courts review the democratic legitimacy of procedures both when they are deployed by the legislature in making laws and by the executive in making rules that have the force of law'.[501]

Other scholarly definitions focus primarily on one particular court. At the level of the European Union, in relation to the CJEU, Koen Lenaerts describes what he calls 'process-oriented review' as a review in which the CJEU examines 'whether, in reaching an outcome, the EU political institutions had followed the procedural steps mandated by the authors of the Treaties'.[502] In relation to the fundamental rights case-law of the CJEU, Malu Beijer has defined 'procedural fundamental rights review' as a type of review where it 'takes the quality of the legislative, administrative and judicial procedures into account to be able to decide about the reasonableness of interferences with fundamental rights in situations falling within the scope of EU law'.[503]

[500] Gerards and Brems (2017), p. 2.
[501] Rose-Ackerman, Egidy and Fowkes (2015), p. 3.
[502] Lenaerts (2012), p. 4. See also Harvey (2017), p. 93.
[503] Beijer (2017a), pp. 177–178.

PROEF 3

Beijer's definition bears resemblance to the fundamental rights review the ECtHR carries out in supervising national authorities' compliance with the European Convention on Human Rights. In relation to both European Courts – the CJEU and the ECtHR –, Tor-Inge Harbo considers that 'procedural proportionality review' implies that these courts review 'whether the reasons for the decision, provided by the appropriate decision-making body, contain proof of proportionality analysis'.[504] Accordingly, irrelevant considerations should not be taken into account. Concerning the ECtHR, Janneke Gerards considers that the ECtHR '[i]nstead of assessing the substantive reasons provided by the states in justification of an interference with a fundamental right, [it] increasingly focuses on the quality and transparency of the national procedures and judicial remedies that have been used in relation to the disputed decision or rule'.[505] In a similar vein, Aruna Sathanapally held this to be 'a type of review that focuses on the procedure followed by national authorities in reaching a particular decision or taking particular action, as distinct from the decision or action itself'.[506] Patricia Popelier and Catherine van de Heyning have narrowed down the approach of the ECtHR to what they call 'procedural rationality review'.[507] From their perspective, the ECtHR 'takes the quality of the decision-making procedure at the legislative, the administrative as well as the judicial stage, as a decisive factor for assessing whether government interference in human rights was proportional, thereby avoiding intense substantive review'.[508] Oddný Mjöll Arnardóttir, by contrast, held that 'procedural review *stricto sensu*' does not need to be decisive; instead, it entails the ECtHR reviewing the quality of the decision-making procedure as 'an element that influences its review of the proportionality or reasonableness of a contested measure'.[509] A 'responsible domestic courts doctrine' has furthermore been noted by Başak Çali, who refers to a procedural approach focused on judicial decision-making procedures. According to her, the ECtHR allows 'domestic courts a larger discretionary interpretative space with regard to making rights violation determinations, provided that domestic courts take ECtHR case-law seriously'.[510] Arguably, the procedural phenomenon of the ECtHR's case-law is part of a bigger development, namely the 'procedural embedding phase' of the European Convention on Human Rights.[511] To ECtHR Judge Robert Spano, this phase manifests itself through 'process-based review' by which 'the Court's primary methodological focus [shifts] 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

504 Harbo (2017), p. 32.
505 Gerards (2013b), p. 52. For a more recent account, see Gerards (2017), p. 129 ('relying on the quality of national decisionmaking in the review of justifications for interferences with Convention rights').
506 Sathanapally (2017), p. 45.
507 Popelier and Van de Heyning (2017) and Popelier and Van de Heyning (2013).
508 Popelier and Van de Heyning (2017), pp. 9–10.
509 Arnardóttir (2015), p. 6.
510 Çali (2016), p. 145. For a discussion of the relationship between the responsible courts doctrine and procedural reasoning see Arnardóttir (2015), pp. 11–14.
511 Spano (2018), p. 480ff.

PROEF 3

conformity with already embedded principles'.[512] In a similar vein, Nina Le Bonniec has held that by process-based review of substantive rights, the ECtHR is constructing '"a European public procedural order" … one that bridges the detectable limits of both the State and the ECtHR level in order to achieve a better legal quality'.[513]

Definitions of process-based fundamental rights review have been provided at the national level too. In the context of the United Kingdom, Aileen Kavanagh has explained that there is 'an emerging trend in UK adjudication – one where courts take the quality of the legislative decision-making process into account when assessing whether legislation is compatible with Convention rights' and they do so in 'a minimalist and hands-off approach'.[514] According to Klaus Messerschmidt, the GFCC is also concentrating more and more on 'the procedure of law-making', which means that it 'not only checks whether the law-making procedure is correct from the formal and legal point of view, but it verifies its intrinsic value, depending on the assessment of empirical data (which must be correct and more or less comprehensive), impact assessment (prognosis), evaluation and weighing up of interests involved in legislation'.[515] In the context of the United States, Hans Linde has argued that judicial review of 'due process' of law-making allows courts to ensure 'that government is not to take life, liberty, or property under color of laws that were not made according to a legitimate law-making process'.[516] John Hart Ely has famously advocated a 'participation-oriented, representation-enforcing approach to judicial review'.[517] This review would require the US courts to 'ensure that the political process – which is where [substantive] values are properly identified, weighed, and accommodated – was open to those of all viewpoints on something approaching an equal basis'.[518] In a similar context, Ittai Bar-Siman-Tov has proposed a 'semiprocedural judicial review', which means that 'a court reviews the legislative process as part of its substantive constitutional review of legislation'.[519] In this understanding an examination of the legislative process follows only if legislation in its substance infringes upon constitutional rights. Finally, in the Colombian context, process-based review has been discussed in light of the protection of deliberative democratic values. This approach has been described by Leonardo García Jaramillo as a review by which courts assess whether the legislature respected the constitutional and legal procedures in line with the will of the majority, in particular whether it had guaranteed parliamentary deliberation on a particular issue.[520]

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512 Spano (2018), pp. 480–481.

513 Le Bonniec (2017), p. 416 [author's translation] ('"l'ordre public procédural européen" … celle consistant à combler ces limites décelables tant au niveau étatique qu'au niveau de la Cour EDH en vue d'atteindre une meilleure qualité juridictionnelle').

514 Kavanagh (2014), pp. 478–479.

515 Messerschmidt (2013), p. 238.

516 Linde (1975), p. 239.

517 Ely (1980), p. 87.

518 Ibid, p. 74.

519 Bar-Siman-Tov (2011), p. 1924.

520 García Jaramillo (2016), p. 177.

PROEF 3

This brief overview of several definitions provided in the literature, illustrates that there are diverse views on what process-based review entails. Some authors discuss procedural reasoning in relation to the legislative process, while others include processes of all public authorities, or focus on the quality of the judicial process. In some definitions, emphasis is placed on a legality check, that is, on a review of the decision-making process's compliance with procedures set out in the law, while in other definitions it is considered to be the need for rational decision-making. In addition, some authors concentrate on judicial evaluation within which the quality of decision-making procedures was decisive, while others also include procedural reasoning within which procedural quality merely influenced courts' assessments.

The picture that emerges is that scholars discuss different, yet related phenomena, and understand and define these in different, yet related ways. Before drawing lessons from these similarities and differences, and building a definition, the next section provides an analysis of the meaning of process-based review in the practice of fundamental rights adjudication. This helps to elucidate the definitions discussed here, as well as providing practical insights into the topic of process-based fundamental rights review.

5.2.2 ELEMENTS OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW IN PRACTICE

Part I presented twenty-eight examples of process-based fundamental rights review, thereby illustrating that this type of judicial review is applied by courts all around the world in a variety of ways. The different situations in which process-based review is applied also showed the broad scope of this type of review. Just like the definitions provided in the academic literature, the examples can be categorised in relation to which kinds of decision-making procedures, fundamental rights, obligations, and procedural standards process-based review is applied, as well as by which court and in relation to which actor it is applied.[521] The aim of this section is to present such categories in the practice of fundamental rights adjudication.

First, process-based review can be applied in relation to *different types of decision-making procedures*. The '*Consultation of Ethnic Minorities case*' by the CCC on the political participation of minorities indicated that a procedural approach can be used in relation to constitutional amendment procedures.[522] By contrast, the judgment of the SACC in *Doctors for Life International*, on the opportunity for citizens to participate in legislative processes, related to the decision-making processes of both the national and the local legislatures.[523] In addition, courts may review either the decision-making

[521] A broader reflection on these examples is provided in the Reflection to Part I.

[522] CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*'). See Section 2.2.6.

[523] SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*). See Section 2.2.5.

PROEF 3

process in relation to a general measure or in relation to an individual measure, or it may be willing to review the genesis of both types of measures. The ECtHR in *Winterstein*, for example, examined the decision-making process of individual eviction orders, while in its judgment in *Hatton*, it looked into the decision-making process of general policies.[524]

Secondly, it is clear that process-based review can be used in relation to *different kinds of fundamental rights*. The examples of the SCC and GFCC indicated how procedural reasoning is used by these courts to determine whether the execution of a European Arrest Warrant would be contrary to the right to a fair trial.[525] Other judgments show that procedural reasoning is not limited to procedural rights, but can also be used in relation to substantive rights, such as the right to freedom of expression and the right to respect for one's private life. The judgment of the ECJ in *Volker und Markus Schecke*, for instance, entailed a procedural approach in relation to the right of privacy and data retention.[526] In addition, process-based review does not necessarily have to be limited to civil and political rights either. The Committee on Economic, Cultural and Social Rights' decision in *I.D.G.* illustrates that procedural reasoning can also be used in relation to social and economic rights, in that case the right to housing.[527]

Thirdly, related to the issue of civil and political versus social, economic, and cultural rights, is the application of process-based reasoning to *different kinds of obligations* for decision-making authorities. For example, in *Von Hannover (No. 2)*, the ECtHR imposed the obligation on national courts to carry out a balancing exercise of interests and rights at stake in light of its case-law.[528] In *Quila*, the UKSC seemed to impose a similar obligation, as it took issue with the fact that the Secretary of State's decision was 'a sledge-hammer but she [had] not attempted to identify the size of the nut'.[529] The CSC's *Baker* judgment showed that a procedural approach has also been taken concerning negative obligations for decision-making authorities, more specifically, obligations to refrain from making decisions in a partial or arbitrary manner.[530] At the same time, the distinction between positive and negative obligations is rather thin, as the latter negative obligation can also be phrased in terms of a duty to impartial decision-making, and thus as a positive obligation.

Fourthly, the judgments discussed showed that courts can use *different kinds of procedural standards* in process-based review. Sometimes these standards are explicit, for example, when the matter concerns procedural standards set out in legislation, such

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524 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*) and ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*). See Section 3.2.6.

525 SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*') and GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf)*. See Sections 4.2.2 and 4.2.3.

526 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.

527 CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*). See Section 4.2.5.

528 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*). See Section 4.2.7.

529 UKSC 12 October 2011, [2011] UKSC 45 (*R (on the application of Quila and another) (FC) v. Secretary of State for the Home Department*), para. 58. See Section 3.2.5.

530 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.

PROEF 3

as the right to a fair trial or minorities' right to consultation in the Colombian *'General Foresting Law case'*.[531] Other judgments related to standards that had not been explicitly set out in law, but were considered a criterion of due process or fairness against which the decision-making process was to be measured. For example, in both the *Hartz IV* judgment of the GFCC[532] and in the *Urgenda* judgment of the CoATH[533], process-based review was based on the implicit requirement for the decision-making authorities to make their decisions on the basis of available studies and scientific data.

Fifthly, process-based review can be applied by *different kinds of courts*. The examples given in Part I illustrated that process-based review is not only applied by international courts, but also by national courts. These national courts can be the highest in the land, like (federal) supreme courts or (federal) constitutional courts, but they can also concern lower national courts, as the examples of Hawaii, the Netherlands and the UK showed.[534] Courts may also be specialised in fundamental rights review or constitutional cases, or may instead be more general courts that only occasionally hear fundamental rights cases.

Sixthly, and lastly, although procedural approaches are well-known in the context of administrative adjudication, process-based review has also been applied in relation to legislative and judicial decision-making processes. Consequently, the examples show that this type of judicial review can be applied in relation to decisions made by *different public authorities*, that is, authorities from different branches of government – legislative, executive, or judicial – as well as authorities working at different 'levels' – local, national, regional, or international. Furthermore, in *Lambert* the ECtHR focused on the quality of the medical decision-making process concerning an end-of-life decision.[535] In the *Denbigh High School* judgment, the UKCoA sought to review the decision-making process of a public school which had refused to let a student wear a Jilbab.[536] In addition, in various judgments, procedural reasoning was not just applied in relation to one, but several, decision-making authorities. In *Bayev*, a case concerning the Russian ban of gay 'propaganda', the ECtHR established that the Russian legislature had failed to examine whether the legislation was suitable to achieve the aim pursued.[537] Moreover, it found that the law led to an arbitrary administrative enforcement of law, as was evidenced by the conviction of the three applicants in the case at hand.[538]

This brief analysis demonstrates the broad and varied scope of what can be considered process-based review. Procedural reasoning has been applied by different courts in

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531 CCC 23 January 2008, C-030 (*'General Foresting Law'*). See Section 2.2.6.
532 GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.
533 CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.
534 Sections 2.2.2 (Hawaii), 3.2.4 (the Netherlands) and 3.2.6 (UK).
535 ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*). See Section 3.2.6.
536 UKCoA 2 March 2005, [2005] EWCA Civ 199 (*The Queen on the application of SB v. Headteacher and Governors of Denbigh High School*). See Section 3.2.5.
537 ECtHR 20 June 2017, app. nos. 67667/09 et al. (*Bayev and Others v. Russia*). See Section 2.2.8.
538 Ibid, para. 83.

PROEF 3

relation to different decision-making procedures of different authorities. The courts have reviewed these decision-making procedures in light of different fundamental rights, standards, and obligations, including not just procedural rights but also substantive rights, and both positive and negative obligations. The judgments therefore provide a first insight into the wide variety of applications of process-based review. Any definition of that review then ought to accommodate these differences, as well as identifying any similarities between cases.

5.2.3 COMMON DEFINITIONS OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

Based on the academic definitions and the examples of process-based review discussed above, the following common definitions can be identified:

> 'Process-based review concerns judicial reasoning that assesses public authorities' decision-making processes in light of procedural standards.'

And, concerning process-based review applied in relation to fundamental rights cases:

> 'Process-based fundamental rights review concerns judicial reasoning that assesses public authorities' decision-making processes in light of procedural fundamental rights standards.'

These definitions are based on four elements that are common to both the scholarly definitions and the practice of process-based review as provided in Part I: there is a reviewer, a subject of review, an object of review, and a review method. Concerning the first element, in all examples and definitions provided, courts are given the role of *reviewer*.[539] This can be different types of courts: international or national courts, and specialised fundamental rights courts or general courts. The definition reflects the focus on courts by including the notion 'judicial'.

The second element of the definition concerns the *subject* of review (the *reviewee*). This is the public authority whose conduct is reviewed by a court. Academic writing on process-based review often refers to courts as focusing on the legislative enactment procedures. The definitions provided by Bar-Siman-Tov and Messerschmidt, for example, particularly emphasise procedural reasoning in the relationship between the highest national court and the legislature.[540] At the international level, much attention has been focused on the CJEU reviewing the legislative enactment procedures of both the EU legislature and Member States' parliaments.[541] The examples provided

539 Of course, the starting point of this book was to focus on courts. Therefore, the focus necessarily was on judicial reasoning, and not on reasoning of parliaments or by individuals.

540 Bar-Siman-Tov (2011), p. 1924 and Messerschmidt (2013), p. 238. See Section 5.2.1.

541 See Beijer (2017a). Others focused exclusively on the CJEU's review of the enactment of EU legislation and policies, see e.g., Harvey (2017); Kartner and Meuwese (2017); and Lenaerts (2012).

PROEF 3

in Chapter 2 demonstrated that process-based review can be applied in relation to legislative decision-making processes. Chapter 4, in turn, illustrated that a procedural approach by courts can also be taken in relation to decision-making processes of judicial authorities. The latter is also reflected in Çali's definition of the 'responsible courts doctrine', which relates to the European Court of Human Right's review of the decision-making procedures of national courts.[542] Furthermore, judicial review of administrative decisions at the national level generally focuses on the decision-making procedure. Not only do courts in common law systems eschew review of the substance of administrative decisions[543], but in civil law systems too, such decisions are often fully or partially decided on procedural grounds.[544] As we saw in Chapter 3, the CJEU and the ECtHR have also reviewed the administrative decision-making procedures of national and/or EU executive authorities.[545] In addition, the subject of review is not necessarily limited to the highest legislative, executive or judicial authorities. The SACC has, for example, closely scrutinised the processes followed by local governments. In short, there are a variety of possible subjects of process-based review. Nevertheless, the focus of this book is on public authorities and accordingly, the subject of the process-based review addressed here is limited to those decision-making bodies.[546] The definitions provided reflect this in their use of the notion 'public authorities'.

Thirdly, a core element of process-based review is the *object* of courts' reasoning. In essence, by applying process-based review, courts focus in their reasoning on a decision-making procedure or process, rather than on the content or the substance of a decision. 'Substance' in this context refers to a (tangible) result, that is, the material results such as a law, an administrative decision, or a judgment. Substance-based review therefore focuses on the content, that is, 'the things that are held or included in something'.[547] Process-based review, by contrast, concerns review of the way a decision was reached and not the actual decision itself. This book explicitly uses the notion of 'process-based review' instead of 'procedural review', because the notion of 'process' is broader than the notion of 'procedure'. Process can be defined as 'a series of actions that you take in order to achieve a result' and procedure as 'a set of actions that is the official or accepted way of doing something'.[548] Process-based review can thus relate to review both in light of legal *procedural* rules, which entail written and often hard legal rules, and legal *process* rules, which encompass both procedural rules and (unwritten) rules that follow from traditions, customs, and habits, or that are derived from common sense. The scope of process-based review and, in particular, the difference between procedure and

542 Çali (2016), p. 145.
543 See also Section 2.1. However, review of administrative procedures has also been considered controversial in the UK where it concerns a review in light of the Human Rights Act, see Section 3.2.5.
544 E.g., Harlow (2006), pp. 192–193. See also Section 7.5.2B.
545 In relation to the ECtHR see Gerards (2017), pp. 136–140 and in relation to the CJEU see Beijer (2017a), pp. 188–190 and Prechal (2008), pp. 203–210.
546 See also Section 1.3.
547 This definition of 'content' is provided on Lexico.com, the online Dictionary of Oxford University, accessed on 20 July 2019.
548 As mentioned in the Cambridge Dictionary (online), accessed on 20 July 2019.

PROEF 3

process can be illustrated with reference to the *Lambert* judgment of the ECtHR.[549] As regards the medical end-to-life decision of the doctor caring for the patient, the ECtHR noted that the procedure followed complied with that laid down in the law.[550] It focused on a broader notion of process as it noted that the doctor responsible for the patient's care had consulted six other doctors (instead of the legally required two), convened three meetings, including meetings with Lambert's extended family, and provided very detailed reasons for his end-of-life decision in a thirteen-page report.[551] The ECtHR thus focused on the overall process of decision-making and concluded that it had been 'lengthy and meticulous, exceeding the requirements laid down by the law'.[552] In short, therefore, process-based review is not limited to the assessment of a decision-making procedure in light of explicitly spelled-out procedural rules, but also encompasses the quality of the decision-making process in its entirety.[553] The definitions reflect this by referring to 'decision-making *processes*'.[554]

Concerning the object of review of process-based review, it is noteworthy that the definitions provided in the literature reflect the idea that procedure must be linked with a particular result. Lenaerts' definition mentioned 'reaching an outcome' and Sathanapally's definition referred to 'reaching a particular decision or taking a particular action'.[555] The definition provided by Arnardóttir included a 'contested measure', and Çali's mentioned 'making rights violation determinations', thereby explicitly linking the procedure with the decision (allegedly) affecting fundamental rights.[556] In the definition submitted here, the notion of decision is understood in its broadest sense, meaning that there is some conduct, whether it is an act or an omission by a public authority, which has affected a fundamental right and can be reviewed by a court. The examples of process-based review illustrated that decision-making procedures can be considered in light of a duty of authorities to make a decision in a certain manner (positive obligation) or because of a duty imposed on them to refrain from deciding in a certain manner (negative obligation). In all these definitions, the object of review is the decision-making process, rather than the decision in its substance. The definitions provided reflect this in their use of '*decision-making* processes'.

The fourth and last element concerns the fact that process-based review is a *method of review*.[557] This consists of two components: method and review. First, process-based review is a *method* which helps courts to determine whether fundamental rights have

549 ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*).
550 Ibid, para. 168.
551 Ibid, para. 166.
552 Ibid, para. 168.
553 See by contrast Le Bonniec (2017), pp. 78–80, who argued that 'procedure' is encompassing more than the notion of 'process'.
554 It should be noted, however, that in this book the notions 'procedure' and 'processes' are used interchangeably.
555 Lenaerts (2012), p. 4 and Sathanapally (2017), p. 45.
556 Çali (2016), p. 145.
557 In a similar vein, see Le Bonniec (2017), p. 61.

PROEF 3

been violated or not.[558] Arnardóttir's definition showed this where she maintained that the quality of decision-making procedures is 'an element that influences [courts'] review'.[559] It should be noted that the focus is not on the heuristic process of judges to determine whether fundamental rights have been violated[560], but rather, on the judicial argumentation as it is laid down in the judgment.[561] In addition, the fact that the focus is on judicial reasoning means that process-based review should be distinguished from notions such as 'proceduralisation', which generally encompass developments other than courts' use of certain methods of review.[562] For example, in relation to the ECtHR, the notion of proceduralisation has been used to refer to both process-based review as well as to the ECtHR's development of the pilot-judgment procedure.[563] The pilot-judgment procedure, however, relates to a new procedure developed by the ECtHR to deal with structural fundamental rights problems in European States, and is therefore not in itself a method of review. The definitions provided in this section reflect the idea that process-based review is a method of judicial argumentation by incorporating the notion of 'reasoning'.

The second part of the fourth element ('method of review') is that process-based review is a method of *review*. This means that courts review a decision for compatibility with another norm or principle. In other words, the question the courts try to answer by means of process-based review is whether or not decision-making procedure X complied with standard Y. Process-based review is therefore not solely an analytical exercise, but also has a normative aspect: the method is employed by courts to determine whether the decision-making procedure was contrary to, or complied with, normative (fundamental rights) standards. These standards can be diverse. In the definitions in the literature, a distinction is drawn, for example, between 'legality' review, focusing on compliance with legal rules, and 'rationality' review, focusing on the quality of procedures in order to enable reasonable decision-making.[564] This distinction was also found in relation to the examples discussed in Part I. However diverse these standards might be, it is necessary that the standards against which a procedure is compared are *procedural standards*. After all, it is simply impossible to review the procedural fairness of a decision based on standards of substantive proportionality, or, to put it the other way round, to assess the substantive proportionality of a measure against standards of due process. This does not mean that procedural reasoning cannot be used in relation to substantive rights – as is evidenced by the examples in Part I, procedural reasoning is in fact applied in this context as well – it means nevertheless that a procedure is measured

558 See also ibid, p. 111ff.
559 Arnardóttir (2015), p. 6.
560 See e.g., Guthrie, Rachlinksi and Wistrich (2001).
561 See also Endicott (2011), p. 209, who distinguished processes of reasoning from procedures that relate to the steps that are taken in order to make a decision.
562 E.g., McCall-Smith (2015), pp. 9–12 (on the UN Treaty Bodies); Le Bonniec (2017), p. 1 (on the ECtHR); Ray (2011), p. 109 (on the SACC).
563 Kleinlein (2019), pp. 92–95; Arnardóttir (2015), pp. 6–9; and Le Bonniec (2017), pp. 117–120.
564 See for various procedural requirements, Huijbers (2017a), pp. 188–191. See also Section 6.3.3.

PROEF 3

against the procedural standards that are derived from these substantive rights.[565] To reflect the normative element of process-based review the definitions contain the phrase 'assesses … in light of procedural standards' and 'assesses … in light of procedural fundamental rights standards'.

5.3 PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW AS A METHOD OF REVIEW

Even though we now have a common definition of process-based review, the question remains – how can we determine whether process-based review is applied in a judgment? This is a pertinent question to ask, because the examples in Part I illustrated that reasoning in a judgment in which process-based review is applied does not necessarily have to be fully process-based. The CSC in *Baker*, for example, concluded that the procedural shortcomings of the decision-making authority would have been sufficient in itself to conclude the case, yet it also carried out a very strict review of the merits of the executive's expulsion decision.[566] Likewise, in *Volker und Markus Schecke*, the ECJ combined procedural and substantive reasoning.[567] The procedural assessment of whether the EU institutions had tried to strike a fair balance between the individual's privacy rights and the EU principle of transparency was followed by a substantive reasoning concerning the possibility of finding less infringing measures. These judgments, as well as several of the definitions provided in scholarly literature, indicate that one single fundamental rights judgment can entail both procedural and substantive considerations. Accordingly, saying that process-based review is applied in a judgment does not necessarily mean that the entire judgment is reasoned in a procedural manner. This raises the question as to what then makes a judgment (partially) procedural?

This section addresses this question by looking into the different levels on which fundamental rights judgments can be analysed (Section 5.3.1), as well as into the relationship between process-based review and substance-based review (Section 5.3.2).

5.3.1 LEVELS OF CASE-LAW ANALYSIS: MICRO-, MESO-, AND MACRO-LEVELS

The answer to the question what makes a judgment a *procedural* judgment depends on the level of specificity or generality on which a fundamental rights judgment is

565 In relation to the European Convention on Human Rights, various procedural standards under substantive rights have been developed in the case-law of the ECtHR, see e.g., De Jong (2017); Gerards (2017), pp. 130–140; Huijbers (2017a), pp. 188–191; and Brems (2013).

566 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.

567 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.

PROEF 3

analysed.[568] Is the procedural approach in a judgment analysed on the basis of the judgment as a whole, or rather of specific parts of the judgment, or even of smaller elements of judicial considerations? Put differently: is the judgment assessed on a macro-, meso-, or micro-level?[569]

In the context of fundamental rights adjudication, a *macro-level of case-law analysis* concerns a judgment in its entirety and the different phases of judicial review. Generally it is possible to distinguish three phases in a judicial procedure relating to a fundamental rights case: deciding on formal admissibility issues, judging on the merits, and reaching a dictum (which, for example, may include allocation of compensation and/or an order to make reparation).[570] Most importantly, elements of process-based review are applied in relation to the judicial assessment of the merits of the case.[571] It is in this phase that courts are truly involved in judicial review, rather than in determining what their dictum should be or whether they have jurisdiction over a case. This research, therefore, limits itself to the use of process-based review in deciding on the *merits* of a case. This means that formal admissibility issues, such as issues of compensation and reparation, for example, are not considered.

The assessment of the merits can be further distinguished in different stages of fundamental rights adjudication.[572] Generally, two stages are distinguished on this level.[573] The first stage concerns the scope of a right and relates to matters on the determination of the definition of a right, the type of obligation the right imposes (positive or negative), and the issue of establishing an interference with the right. In the second stage, courts review the justification of the interference, that is, they consider if there are legitimate and sufficient reasons to support the limitation or restriction of a

568 Although the discussion of these levels of case-law analysis does not offer a demarcation of what process-based review is, it does ensure a better understanding of the different ways in which fundamental rights judgments can be analysed. This understanding increases the ability to compare different cases and to qualify cases as encompassing process-based review or not.

569 These analytical levels of analysis are often used in literature of social sciences, economics, and international relations. For a discussion on these levels, units or methods of analysis, see e.g., Temby (2015) and Singer (1961).

570 Perhaps even another element could be distinguished, as in some systems judges are allowed to deliver separate opinions, both concurring and dissenting. At the same time these are not considered to form the judgment as such.

571 This is not to say that process-based review cannot have a place in the other phases. The ECtHR seems to use procedural reasoning not just in the merits of the case but also to decide on the admissibility of a case, see Huijbers (2017a), p. 192. For example, in *Aksoy* the ECtHR relied on process-based review to find the case admissible even though the admissibility requirement to exhaust domestic remedies had not been fulfilled, see ECtHR 18 December 1996, app. no. 21987/93 (*Aksoy v. Turkey*), para. 52.

572 The importance of this distinction for the review of fundamental rights case is stressed in e.g., Barak (2012), pp. 19–24 and Gerards and Senden (2009), pp. 622–629. Although it can be argued, especially in relation to the case-law of the ECtHR, that the matter concerning the finding of an interference is in fact a separate stage.

573 Barak (2012), pp. 131–146. In practice the bifurcation between the scope and justification of fundamental rights adjudication is often intertwined and overlapping, see Gerards and Senden (2009), pp. 634–636. For the importance of this distinction for the burden of proof, see Section 6.3.2.

PROEF 3

right. The examples of process-based review have already shown that this type of review is of particular concern in relation to the *justification stage* of fundamental rights judgments. The emphasis in academic writing too is generally placed on this second stage. Popelier and Van den Heyning's definition explicitly refers to the proportionality of the measure and Harbo even uses the term 'procedural proportionality review'. This does not mean that procedural reasoning cannot play a role in the stage of determining the scope of application. Indeed, Sathanapally has indicated that, in theory, process-based review could also be used in that regard.[574] The salient issue for identifying process-based review in this book, however, is the use of such review in one of the tests applied at the justification stage.

Within the justification stage, various tests can be distinguished, which can be considered to be the *meso-level of case-law analysis*. In their assessment of the justification of rights-infringing measures, courts generally refer to requirements or tests that need to be met: 'proper purpose, rational connection, necessary means, and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the [fundamental] right (the last component is also called "proportionality *stricto sensu*" (balancing))'.[575] It is possible to distinguish an additional stage, concerning the intensity of review that is applied.[576] The intensity of review determines how closely courts scrutinise a decision or, in the case of process-based review, the decision-making process. Other elements such as burden and standard of proof, could be included as separate stages of review. Importantly, these elements of intensity of review, and burden standard of proof do not in themselves provide an assessment of the case, but they clarify the manner in which the court is reviewing the case. For this reason, they are not considered a separate stage in this book, but as preliminary tests to the other two stages.[577]

The third and final level that can be distinguished in the discussion of the use of process-based review, is the *micro-level of case-law analysis*. At this level, specific considerations of courts are highlighted which can be regarded as procedural considerations. Procedural considerations entail information about the decision-making procedure followed, as well as about the procedural standard against which it is measured. Such procedural considerations can be found in many fundamental rights judgments and in many parts of these judgments, whether it is the analysis of the proportionality of a measure or the assessment of the legitimate aim. In Part I, a number of these considerations were discussed. The ECtHR's judgment in *Winterstein* can help to illustrate this.[578] The ECtHR required that in cases where individuals

574 Sathanapally (2017), pp. 47–48.
575 Barak (2012), p. 131 ff. Section 6.3.5 provides a more detailed discussion of the various justification tests.
576 E.g., Leijten (2018), pp. 113–117 and Gerards (2005), p. 79ff.
577 See more extensively Section 6.3.5A.
578 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*). See Sections 3.2.6 and 4.2.7.

PROEF 3

are evicted from their homes, domestic courts should examine in detail relevant arguments about the proportionality of the measure and provide adequate reasons for their decisions.[579] This is a statement concerning the general procedural standard that applies in the case, that is, courts should balance interests and provide reasons. In the next paragraph the ECtHR held that 'the domestic courts ordered the applicant's eviction without having analysed the proportionality of the measure'.[580] This second statement concerns the decision-making procedure in the present case in light of the general procedural standard.

So when is it possible to speak of process-based fundamental rights review, considering these three levels? Section 5.2.3 explained that process-based reasoning is a *method of review*, meaning that it informs the review of a decision-making procedure in light of relevant procedural fundamental rights standards. The procedural considerations at the micro-level are therefore clearly elements of procedural reasoning, but they are not complete and they cannot support the final judgment on their own. It is only if they are connected in light of one of the justification tests that it can be considered a fully-fledged judicial review. It is therefore the combination of the procedural considerations at the micro-level and the influence they have on an element in the justification stage at the meso-level, which makes up 'process-based review'. The example of the *Winterstein* judgment may again help to illustrate this. Here, the ECtHR's connection between its consideration of the procedural obligation of domestic courts to balance the relevant interests at stake and its conclusion that the domestic courts did not carry out a balancing exercise, resulted in a negative inference drawn that supported the finding (at the meso-level) that the infringement was disproportionate. Together, these considerations, their part in the proportionality assessment, and the negative inferences drawn by the ECtHR make it into process-based review.

The definition of process-based review thus encompasses procedural considerations concerning a particular justification test. Therefore the finding that process-based review is applied in a judgment concerns a meso-level case-law analysis. In turn, the relative importance of this process-based review for the judgment as a whole might reflect whether, at a macro-level, a judgment is regarded as a procedural judgment. In the *Winterstein* judgment, the ECtHR found, on the basis of procedural considerations, that the infringement was disproportionate, and therefore it concluded (at the macro-level) that the right to respect of the home and private life was violated (Article 8 ECHR). The judgment was thus clearly procedurally reasoned.

As noted earlier, fundamental rights judgments usually also contain elements of substance-based review. Consequently, while at the lowest level of analysis (micro-level), procedural considerations can be distinguished that are of a fully procedural nature, at the higher level of analysis (meso- or macro-level) the density of procedural elements becomes lower. Therefore, it often does not make much sense to draw a black-and-

[579] Ibid, para. 155.
[580] Ibid, para. 156.

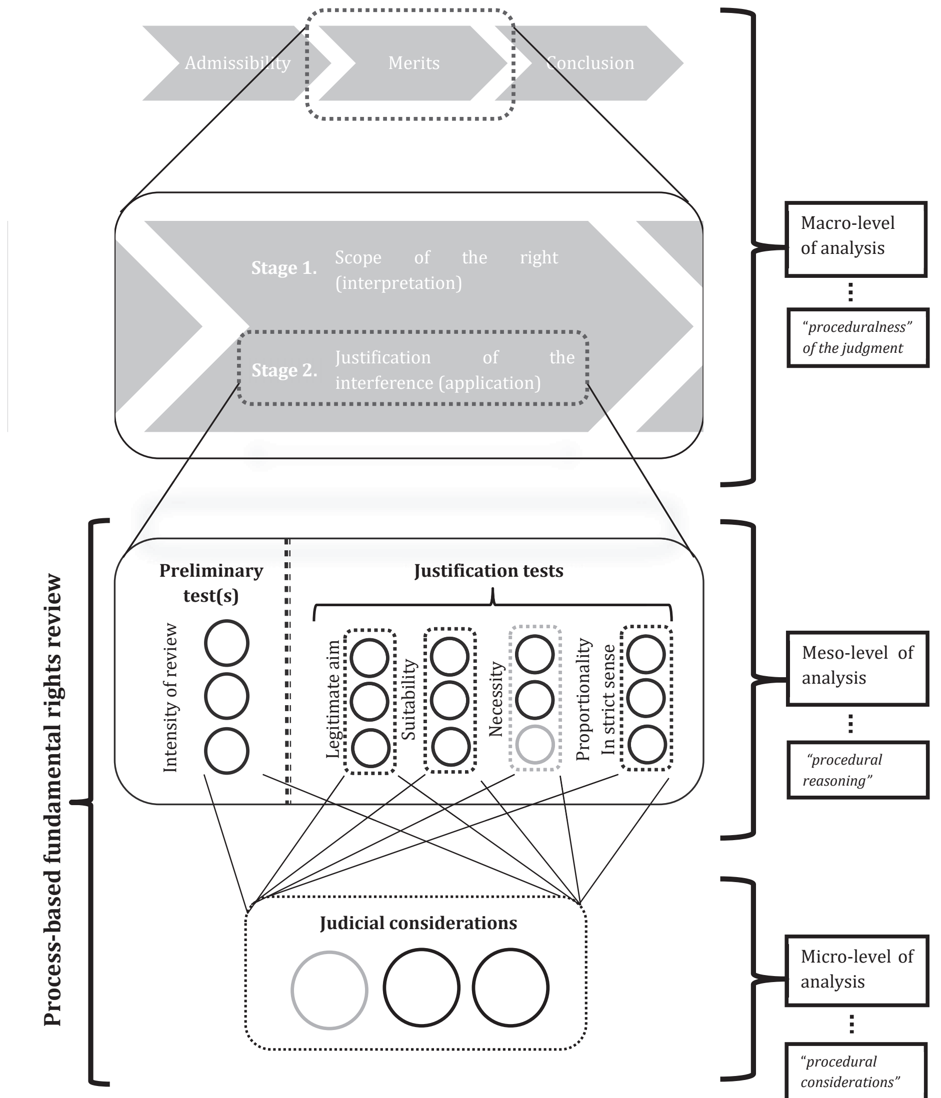
PROEF 3

white distinction on the macro- and even meso-level between 'procedurally' or 'non-procedurally' reasoned judgments. Instead, as the next section clarifies, many different variations and degrees of proceduralness of process-based review can be distinguished.

In Figure 1 the different levels of case-law analysis are set out and the relevant aspects of process-based review are mentioned. On the right, the three levels of case-law analysis are distinguished and connected to the applicable procedural terminology. As was explained above, only at the meso-level it is truly possible to speak of process-based review or procedural reasoning, which are used as synonyms in this book. On the left, we have 'process-based fundamental rights review'. This is to indicate that, even though formally it is only possible to speak of 'procedural reasoning' at the meso-level of case-law analysis, this necessarily includes the procedural considerations that can be distinguished on a micro-level. In the middle part of the figure, we have the various elements – that is, phases, stages, tests, and considerations – of each level. To remain within the scope of the book, at the macro-level the figure zooms in on the merits phase and on the justification stage. At the meso-level both the preliminary and the four justifications tests are set out. The micro-level zooms in on considerations which can be distinguished at each phase of the tests.

PROEF 3

Figure 1. Level of case law analysis in fundamental rights judgments



To further clarify the meaning of 'process-based review' and 'procedural considerations' as well as explaining how Figure 1 can help to analyse judgments, reference can be made to the ECJ's *Volker und Markus Schecke* judgment.[581] This case concerned the online publication of personal data of beneficiaries of EU agricultural funds. The ECJ considered that the publication of these data infringed these beneficiaries' rights to

[581] ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.

PROEF 3

privacy and the protection of personal data. Concerning the necessity of the measure the ECJ concluded that the EU legislature could have chosen for a less infringing measure to achieve the same aim, which was transparency in the use of EU funds. For that reason it found that the online publication of the beneficiaries' names resulted in an unjustifiable infringement of the EU Charter. It reached this conclusion on the basis of both procedural and substantive considerations relating to the necessity of the measure. It considered, amongst other things, that the EU legislature had not tried to strike a balance between the interests and rights at stake.[582] In Figure 1, the grey circle at the micro-level represents this procedural consideration. It is drawn with a solid line, since it is completely procedural. The ECJ's substantive considerations concerning less infringing possibilities are represented by black circles. For argument's sake let's assume there were two substantive considerations. Because of the impact of both the procedural and the substantive considerations on the ECJ's necessity review, the square concerning the necessity test at the meso-level is coloured grey. The dashed line is intended to reflect that it concerns neither purely procedural nor purely substantive review as regards the necessity of the measure. On the basis of the finding that the measure was not the least infringing measure, the ECJ concluded that the infringement could not be justified and therefore invalidated the EU Regulations.[583] The procedural considerations thus had a significant impact on the justification stage and the ECJ's final judgment. Therefore it can be considered a fairly procedural judgment. For that reason, in Figure 1 the square around 'Stage 2' and the square around 'Merits' are coloured grey, and both are drawn in dashed lines to indicate that they were not fully procedural.

5.3.2 FUNDAMENTAL RIGHTS REVIEW: FROM SUBSTANCE-BASED TO PROCESS-BASED

Section 5.2.3 discussed the definition of process-based review. One element of the definition, the *object* of process-based review, is of particular relevance in relation to the 'proceduralness' of judgments. In scholarly literature, process-based review is often opposed to what can be called substance-based review.[584] For example, Sathanapally explicitly contrasts both types of reasoning. In her definition she notes that process-based review is 'a type of review [that] focuses on the procedure followed by national authorities in reaching a particular decision or taking particular action *as distinct from* the decision or action itself'.[585] Likewise, Messerschmidt contends that 'procedural review … *may be distinguished and separated from* traditional substantive review [and they] seem to represent opposite approaches to legislation and judicial scrutiny'.[586] In the examples of process-based review too, a general assumption can be discerned about

[582] Ibid, paras. 80–81.
[583] Ibid, para. 86.
[584] See e.g., Huijbers (2017a), p. 188.
[585] Sathanapally (2017), p. 45 [emphasis added].
[586] Messerschmidt (2012), p. 348 [emphasis added].

PROEF 3

a distinction between procedural and substantive reasoning. For instance, in *Hartz IV*, the GFCC held that it was for the legislature to determine the scope and ways of providing subsistence minimum, but it found that it could review the decision-making procedure, that is, the method used to determine the benefits required.[587] The debate on the acceptability of process-based review in light of the Human Rights Act, discussed in Section 3.2.5, is likewise based on the presumption of a strict distinction between procedural reasoning and substantive reasoning. Lord Bingham, for instance, held in *Denbigh High School* that the right to freedom of religion is 'concerned with substance, not procedure' and '[i]t confers no right to have a decision made in any particular way', instead '[w]hat matters is result'.[588]

There is a clear tendency to draw a distinction between the object of process-based review and substance-based review. In light of what has been discussed so far, the following sections address the conceptual difference between the objects of both types of review. They do so by clarifying the substance-procedure distinction (Section A) and the relationship between both types of review (Section B).

A. *On the substance-procedure distinction*

The distinction between process-based review and substance-based review ostensibly lies with the focus of both types of review: procedure versus substance. It has often been said, however, that the distinction between substance and procedure is hard to draw[589], or even that '[d]octrines founded upon this false [substance-process] dichotomy are flawed and vulnerable.'[590] If it really were impossible to draw a distinction between process and substance, it would be very difficult to distinguish process-based review from substance-based review. At the same time, the conclusion that the substance-process dichotomy is non-existent, feels somewhat counterintuitive. We are all familiar with the distinction between 'what is done' and 'how it is done'; in philosophy, schools of ethics are distinguished on the basis that they focus on the process of making good decisions (deontic and virtue ethics) or rather on achieving the best result (utilitarian and consequentialist ethics); sociologist carry out extensive research into the different impacts that procedural justice and substantive justice have on individuals; and lawyers are trained to differentiate between legislation which regulates the content of decisions and that which regulates procedures to be followed.[591] Hence, either this 'false' process-

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[587] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*), paras. 138–140 and 142. See Section 2.2.4.

[588] UKSC 22 March 2006, [2006] UKHL 15 (*R (on the application of Begum) v. Denbigh High School*), para. 68. See Section 3.2.5.

[589] See e.g., the different theories discussed in Kocourek (1941). See also Tribe (1985), pp. 9–20 and, in relation to the procedural and substantive rights dichotomy, see Alexander (1998).

[590] Main (2010), p. 841.

[591] See also Prezas (2019), Avant Propos ('Ayant une conscience pour ainsi dire instinctive de l'existence de deux concepts a priori distincts, la "substance" et la "procédure", presque tout juriste est amené, à un moment ou à un autre, à s'intéresser à tel aspect "procédural" ou à telle autre dimension "substantielle" (voire matérielle) de l'objet de son étude.').

PROEF 3

substance dichotomy is just a persistent misconception, or there is some truth, or at least some value, in the distinction.[592]

The answer lies in the problematic use of the term 'dichotomy', which appears to be based on the idea of a strict and mutually exclusive distinction between procedure and substance. Nevertheless, as Walter Wheeler Cook explained in 1933, 'the concepts which we use in our attempts to classify objects, events, or situations turn out to be surrounded by a "twilight zone" or penumbra, so that continually as our experience widens we are left in doubt, and in consequence are unable to make a purely mechanical or "logical" application of the concept to the ever-varying phenomena of life'.[593] Accordingly, it is not as strange as it might first appear that classification of the object of a judicial consideration as 'procedural' or 'substantive' is not always clear-cut and logical.

Indeed, the examples of process-based review demonstrate – in the words of Wheel Cook – the twilight zone surrounding the notions of procedural and substantive reasoning.[594] For example, in the *Hatton* judgment, the ECtHR considered that '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'.[595] Is the rule to 'involve appropriate investigations and studies' a procedural or a substantive one? On the one hand, as this book argues, this is a procedural standard, requiring governmental authorities to *include* such studies in their decision-making process. The ECtHR is therefore concerned with the quality of the decision-making process. On the other hand, the rule of including investigations and studies in economic and environmental policies could be regarded as a substantive rule. What the ECtHR would require then is that governmental authorities carry out *appropriate* investigations and studies to strike a fair balance. On this understanding, the ECtHR is interested in the substantive quality of these investigations.

The classification of the ECtHR's reasoning in this judgment as process-based or substance-based review is therefore not self-evident. At the same time, this does not render the distinction between procedure and substance useless or illogical.[596] Instead it underlines the limitation of classifications by demonstrating the invalidity of 'the tacit assumption that the supposed "line" between the two categories has some kind of objective existence … which can be "discovered" by analysis alone'.[597] There is thus no

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592 In a similar vein, see Dyzenhaus and Fox-Decent (2001), p. 196. On the importance of the distinction between procedure and substance, see Jacobs (2007).

593 Wheeler Cook (1933), p. 334.

594 Another example can be found in the reason-giving requirement in administrative law. It has been argued that although it initially started as a procedural requirement in the US context, the US courts have more and more turned it into a substantive requirement, which allows for substance-based review. See Shapiro (1992), pp. 184–189.

595 ECtHR (GC) 8 July 2003, app no. 36022/97 (*Hatton and Others v. UK*), para. 128. See Section 3.2.6.

596 Wheeler Cook (1933), p. 356.

597 Ibid, p. 335.

PROEF 3

procedure-substance dichotomy out there waiting to be found, there is only a (socially) constructed distinction between procedure and substance; a distinction that can be applied in a variety of ways. In the absence of a pre-existing dichotomy, drawing the line between procedure and substance is inevitably arbitrary, at least to a certain degree: the point of division chosen in a given context can make more or less sense, be more or less useful, or more or less convincing.[598] The notion of a dichotomy therefore provides for an inadequate description of the procedure-substance classification, as it renders the context and the perspective of the classifier irrelevant. For that reason it is not used in this book.

For the purposes of this book it is not necessary to draw a sharp or absolute distinction between procedure and substance since judicial considerations or reasoning do not focus either on procedural, or substance issues. Rather what is relevant for the classifications as procedure, process, procedural, or process-based is that there is a justifiable and intelligible claim to be made that the judicial consideration or reasoning concerns a decision-making *procedure*, even though, as is the case with *Hatton*[599], it would also be possible to argue that it concerns *substance*. This approach aligns with Laurence Tribe's comment that public policies are not just formed by procedure and substance, but are also 'formed in the very process of being applied'.[600] If indeed there is a dynamic interaction between procedure and substance in the practice of public decision-making, then it is just a matter of *perspective* whether the issue is classified as procedure or substance.[601]

The notions of procedure and substance as used in this book have already been defined in Section 5.2.3. It was explained that substance concerns the content or merits of a decision of a decision-making authority and that procedure concerns the way a decision of a decision-making authority is reached. The object of substance-based review, therefore, refers to courts' focus on the outcome, the content of a decision, or the balance struck between the involved interests and fundamental rights.[602] By contrast, the object of process-based review relates to the review of the steps taken that led to a particular decision.[603] This encompasses not just formal rules ('procedures') but also other elements of the process.

B. Spectrum of fundamental rights review

As explained above, distinguishing procedure and substance is not as simple as often thought. In the context of fundamental rights review, this debate plays a role

598 Ibid, p. 356.
599 ECtHR (GC) 8 July 2003, app no. 36022/97 (*Hatton and Others v. UK*). See Section 3.2.6.
600 Tribe (1975), p. 269 [emphasis added].
601 Ibid, p. 290.
602 Arnardóttir (2015), p. 4 and Coenen (2001), pp. 1596–1597.
603 This can be traced back to the distinction between procedure and substance, see Gutmann and Thompson (2004), pp. 23–24.

PROEF 3

particularly at the micro-level of analysis, where a distinction has to be made between procedural and substantive considerations. As regards the considerations that can be found in the grey area or twilight-zone, which are those that might be classified from one perspective as procedural and from another perspective as substantive, this book takes the view that those considerations are regarded as procedural considerations insofar as a reasonable argument can be made to that effect.

At the meso-level, it could be said that procedural and substantive reasoning can be distinguished from one another (as is stated in the section above). At the same time, there are grey areas. In fact, they are even more prominent, as judicial reasoning at the meso-level consists of multiple considerations, each of which can be substantive or procedural in nature. Therefore, instead of drawing a sharp line of division between procedural reasoning and substantive reasoning, at the meso-level it is necessary to speak of a *spectrum of judicial review* or a 'continuum of judicial intervention'.[604] This spectrum ranges from purely substantive review, which is solely based on undeniably substantive considerations, and purely procedural review, which is solely based on undeniably procedural considerations.[605] In between these two extremes, mixed forms of review can be found that encompass substantive and procedural considerations, and twilight-zone considerations (see Figure 2 below).[606]

The recognition of a continuum between purely procedural and purely substantive review allows for interfaces between courts' procedural and substantive considerations, since they can be considered to form the in-between or mixed forms of judicial review.[607] The more important a procedural consideration is, or procedural considerations are, in a court's assessment, the more it inclines to purely procedural review, and vice versa. In essence then, we can speak of a 'degree of proceduralness' of courts' reasoning (and at the macro-level 'proceduralness' of the judgment). To do justice to this finding, this book proposes the use of the term 'process-based review', that is, judicial review that is, at least to a certain extent, *based* on considerations of decision-making procedures or processes.

This spectrum of judicial review seems to fit well with the literature on process-based review. In the context of European fundamental rights review, Gerards and Brems explain that '[i]nstead of (*only*) reviewing the substantive reasonableness *of* interferences with a fundamental rights, [courts] might (*also*) expressly take account

[604] Goodwin (2008), p. 258. See also, Messerschmidt (2016b), p. 381.

[605] See in a similar vein Malcai and Levine-Schnur (2017), pp. 190–193, who discuss the 'pure justification priority of procedure'. This entails the understanding that the evaluation of the decision-making procedure is sufficient for courts to decide on the matter, in other words, its judgments of the case or part of the case is justified solely on the basis of procedural reasoning.

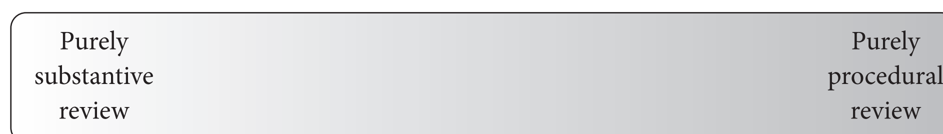
[606] Where substantive considerations are incorporated in process-based review, or procedural reasoning is included in substance-based review, the 'lexical dichotomy' between both forms of review becomes relaxed. See Malcai and Levine-Schnur (2017), p. 194.

[607] The area in between substance and procedure has been called the 'twilight zone' and 'no-man's land', see Wheeler Cook (1933), pp. 351 and 352. It has also been suggested, however, that the difficulty of the distinction between procedure and substance only arises in practice and not on a theoretical level, see Kocourek (1941), pp. 157–186.

PROEF 3

of the quality of the legislative, administrative or judicial procedure that has led up to the alleged violation'.[608] Clearly, process-based review is not just an either/or approach, but both procedural and substantive considerations can be part of a court's reasoning in a judgment. In the US context, Bar-Siman-Tov has likewise recognised a gradual scale ranging from purely procedural review via semi-procedural review to purely substantive review.[609] With semi-procedural review he refers to judicial review that includes the decision-making procedure as part of a court's substantive consideration of the decision; only when the content of the decision infringes upon the individual's rights, should the court examine the decision-making process.[610] Somewhat similarly, Dan T. Coenen describes the interaction between substantive values and the focus on the decision-making process as 'semi-substantive review'.[611]

Figure 2. Spectrum of judicial review



This continuum of fundamental rights review, however, forces us to revisit the question already briefly addressed in Section 5.2.3: if process-based review may contain both elements of procedural considerations and elements of substantive considerations, then what is the defining characteristic of process-based review? The definitions provided in Section 5.2.1 indicate that this question can be answered in different ways. In the context of the ECtHR, Arnardóttir submits that process-based reasoning is '*an element that influences* its review of the proportionality or reasonableness of a contested measure'.[612] Popelier and Van de Heyning, by contrast, consider that 'procedural rationality review' relates to review in which the quality of a public authorities' decision-making procedure is '*a decisive factor* for assessing whether government interference in human rights was proportional'.[613]

The argument made here is that the relative importance of the procedural considerations for a justification test is most important for determining whether that judgment contains process-based review on the meso-level. In this respect, it can be interesting to categorise fundamental rights review mainly in reasoning that contains *more or less procedural* considerations. The question then remains what is the minimum

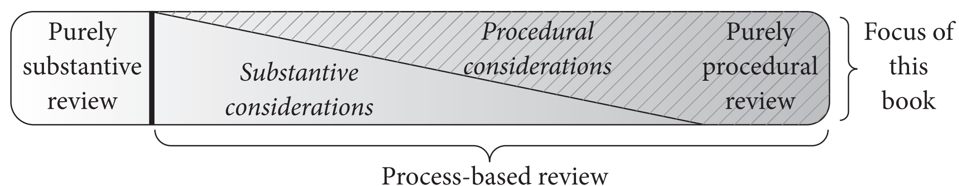
608 Gerards and Brems (2017), p. 2 [emphasis added].
609 Bar-Siman-Tov (2012).
610 Bar-Siman-Tov (2011), p. 1924.
611 Coenen (2002), pp. 1282–1283 ('It is the interaction of these substantive values with demands for heightened procedural regularity that justifies describing this judicial approach as involving semisubstantive review', p. 1283).
612 Arnardóttir (2015), p. 6 [emphasis added].
613 Popelier and Van de Heyning (2017), pp. 9–10 [emphasis added].

PROEF 3

importance of procedural considerations that is needed to consider judicial reasoning at the meso-level as process-based review. In other words, what can still be regarded as process-based review, and what not?

The theoretical and overarching perspective taken in this book makes it difficult to provide a very clear answer to this question on the meso-level. It can only be justifiably and logically said that purely substantive review is not included, and as such it falls outside the 'twilight zone' (see the bold line on the left in Figure 3). Likewise, purely procedural review – as is also suggested by Popelier and van de Heyning – can obviously be considered part of process-based review. Given the notion of the twilight zone and the continuum, however, the mixed-forms of fundamental rights review – which can be analysed both from a procedural and from substantive perspective – can also be said to be part of process-based review, as long as there is a reasonable claim to be made that those considerations are of a procedural nature. As regards the mixed-forms of judicial review, this book will obviously focus on the procedural considerations of courts' reasoning instead of the substantive ones (see the striped area, Figure 3). The dashed, diagonal line between procedural and substantive considerations indicates that there is a grey zone between what can be found to be procedural and substantive considerations.

Figure 3. Scope of process-based review in this research



This (very) broad understanding of process-based review is the most fitting and convincing one for the theoretical perspective chosen in this book. In other contexts a more focused and narrow definition may nevertheless be more appropriate. The focus of various researchers on procedural rationality review, semi-procedural review, due process of law-making, and so on may indeed prove more accurate and more useful for understanding certain developments in the case-law of specific courts.[614] The holistic conceptualisation provided here, however, provides a useful insight into how those different but related definitions are connected and what each entails exactly.

5.4 CONCLUSION

On the basis of the literature on process-based review and the examples provided in Part I, process-based fundamental rights review has been defined as 'judicial reasoning

[614] Terminologies discussed in Section 5.2.1.

PROEF 3

that assesses public authorities' decision-making processes in light of procedural fundamental rights standards'. This chapter has clarified that process-based review is a normative review method, which means courts assess decision-making processes in light of procedural standards. The notion of the decision-making process means that it is not only review that relates to explicit formal procedures, but a more holistic perspective is taken to decision-making, including also the process aspect. Against this background, it has become clear that no strict distinction can be made between process-based fundamental rights review and substance-based fundamental rights review. Instead fundamental rights review concerns a spectrum of judicial review between these two extremes. Because of this broader understanding of process-based fundamental rights review, and as evidenced by the variety of ways procedural reasoning has been applied in Part I, it is clear that procedural reasoning can take many shapes and forms.

PROEF 3

CHAPTER 6

OPERATIONALISING OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

6.1 INTRODUCTION

Process-based fundamental rights review has been defined in Chapter 5 as 'judicial reasoning by which courts assess public authorities' decision-making processes in light of procedural fundamental rights standards'. This review method therefore can be distinguished from substance-based review, which focuses on the content of an administrative or judicial decision or of a law. While the discussion in that chapter mainly focused on finding similarities between the examples of process-based review as well as the various conceptions of it put forward in the literature, this chapter focuses primarily on highlighting their differences or dissimilarities with the aim of uncovering the different ways in which this type of review can, at least theoretically, be applied.

Section 6.2 reiterates the constitutive elements of reviewer, subject of review, and object of review that have been set out in Section 5.2.3 and explains how they provide an important context for the application of process-based review. Section 6.3 aims to clarify the different ways process-based fundamental rights review, as a review method, can be applied. Using the examples provided in Part I as illustration, this section discusses seven aspects that allow for variations in the application of process-based review: the intensity of process-based review, the burden of proof, the standards for review, the result of procedural considerations, the location of review, the importance of procedural reasoning, and, finally, the conclusion of procedural reasoning. By distinguishing these elements, different variations of application of process-based review are identified in line with the general structure of fundamental rights adjudication.[615] It therefore not only clarifies that process-based review is not a one-size-fits-all approach, but it also ensures the utility of this chapter for judicial practice. Section 6.4 briefly concludes the chapter.

[615] Although it must be noted that different variations are possible in different contexts. Especially the location of process-based review can take different forms of applications of process-based review than those discussed here.

PROEF 3

6.2 REVIEWER, SUBJECT AND OBJECT OF REVIEW

The definition provided in Chapter 5 showed that process-based fundamental rights review entails a court ('reviewer') that looks into the decision-making procedure ('object') of a decision-making authority ('subject'). These are three of the four constitutive elements of process-based review. The fourth concerns the qualification of process-based review as a 'review method', which helps courts to determine whether a decision-making procedure met procedural requirements as set out in fundamental rights standards. This section focuses on the first three elements – reviewer, subject and object of review – because these elements provide relevant information about the *context* in which process-based review is applied and *not* about *how* courts can apply process-based review. They provide information as to *who* reviews, *whose* procedure is reviewed, and *what* is reviewed. These three questions may provide an indication for courts to determine the legitimate and appropriate use of process-based review in a particular judgment.

The answer as to the 'who', 'whose', and 'what' questions is provided by the context of a fundamental rights judgment. In fundamental rights adjudication, cases are brought before courts and the issues addressed in those judgments are largely determined by the claims parties make. Who the reviewer will be is thus generally not determined by the court, but by the parties to a case. Furthermore, a court usually cannot determine whose acts or omissions it reviews, as this is also dependent on the issues raised by the parties. What procedure the court reviews is, moreover, usually a given – as the decision under review has already been taken, as well as the decision-making path.

The elements of reviewer, subject, and object of process-based review are thus contextual factors, which courts can influence only to a limited degree, if at all. To hold that these three elements can be considered contextual factors of process-based review, however, does not mean that courts have no say in these issues at all. Even though a court generally cannot determine whether a case is brought before it, it may declare a case inadmissible if it finds – on legal grounds – that it is not the appropriate reviewer in that case. In addition, courts often have some leeway in determining whether they focus in their judgment on either one or the other decision-making authority (legislative, administrative, or judicial), or on the content of a decision, or the decision-making procedure. The idea of review *ex officio* is also relevant in this regard since, even if an issue is not raised by parties, in certain situations courts can make an assessment of their own motion. Thus, even when parties only make substantive claims, courts may still decide to look into the decision-making procedure.

The elements of 'reviewer' and 'subject of review' relate to the institutional settings of fundamental rights adjudication. In particular, the *functions* of a particular court ('reviewer') might be relevant for determining whether and how process-based review can be employed by that court.[616] These functions are nevertheless not fixed and can

[616] The Introduction to Part III also addresses the issue of the functions of courts.

PROEF 3

change over time or depend on the issue at stake in a case. An illustrative example of the relevance of the function of a court can be found in the context of the ECtHR. It has been contended that the ECtHR performed an important substantive standard-setting function in the first decades of its existence, but now that these standards have been clearly set out in its judgments, it has been argued that it has entered a new phase.[617] Arguably, this new phase concerns the systematic embedding of the European Convention on Human Rights in national law, judgments and decisions, where the ECtHR's function lies with the improvement of the decision-making procedures of national authorities.[618] This function of procedural embedding might warrant an increased focus on process-based review which, when the ECtHR's main function was to develop substantive standards, seemed less appropriate.

In addition, the relationship between the court ('reviewer') and the decision-making authority ('subject') may be crucial to fundamental rights adjudication. That is, the *position* of the reviewer in relation to the subject may also influence the way process-based review can legitimately be applied by a court.[619] Section 3.1 already indicated that this type of review is often a central feature of judicial review of administrative decisions. Indeed process-based review of such decisions is considered an essential element of the judicial task of upholding the system of the separation of powers and in providing check and balances.[620] At the same time, the short discussion of administrative review in the UK demonstrates that when it comes to protecting fundamental rights, process-based review is not always considered a proper method by courts.[621] As we saw in Chapter 2, matters are often more complex where the case concerns the relationship between a court and a legislature. Yet even though review of the legislative process might be problematic in States such as the US[622], UK[623], and New Zealand[624] – which are States with a strong concept of 'parliamentary supremacy' – in other States, judicial review of legislation and the legislative process is accepted or even an essential aspect of courts' review. For example, the judgments of the GFCC[625], the SACC[626], and the CCC[627], indicate that the position of these courts as regards the legislature does not stand in the way of a review of the legislative process.

Finally, also the *object* of review is related to the institutional setting of a fundamental rights judgment. As explained in detail in Sections 5.2.3 and 5.3.2A, this

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617 Spano (2018), pp. 474–475. The developments in the approach of the ECtHR is also elaborately described in Bates (2011).

618 Spano (2018), pp. 480–481 and Le Bonniec (2017), p. 416. On the idea of embedding the European Convention on Human Rights, see Helfer (2008).

619 The Introduction to Part III also addresses the issue of the position of courts.

620 E.g., Sathanapally (2017), p. 46; Masterman (2017), pp. 251–252; Widdershoven and Remac (2012), pp. 382–386; Hickman (2010), Chapter 8; and tBarak (2008), p. 241.

621 See Section 3.2.5.

622 See Section 2.2.1.

623 See Section 2.2.3.

624 See Section 2.2.3.

625 See Section 2.2.4 (*Hartz IV*).

626 See Section 2.2.5 (*Doctors for Life International*).

627 See Section 2.2.6 ('*General Foresting Law case*' and '*Consultation of Ethnic Communities case*').

PROEF 3

book is premised on a broad understanding of 'process'. This means that procedural reasoning encompasses not just formal procedures, but also processes like customs and traditions. Furthermore, it was explained that there are grey areas where the object of review may be regarded as both procedural and substantive. Insofar as there is a reasonable argument to be made that the object of review concerns a procedure or process, this book regards it as an example of process-based review. It is noteworthy that the object of review also may provide for a contextual setting for courts in their adjudication. Courts' institutional position and their functions, often expressed in their mandates, determine what kind of procedures they may review. Many courts may review compliance of decision-making authorities with formal procedures, but some courts may also review other types of processes. For instance, the SACC in *Doctors for Life International* assessed whether the national and provincial legislatures complied with the *internal* procedure for ensuring political participation in the adoption of a variety of bills and acts.[628] The more recent case-law of the ECJ concerning the European Arrest Warrant cases, furthermore, broadened the review by EU Member States' courts who are dealing with a request for surrender of a person to another Member State. These Member States may now check whether there have been systematic failures to protect fundamental rights in the requesting Member States and whether the individual concerned can be surrendered nonetheless.[629]

This brief discussion of the three factors identified in Chapter 5 clearly shows that context matters to the definition and application of process-based review. In particular, whether and how process-based review can play a role in the assessment of a case depends on the specific institutional setting of a court, its function and its relation with the reviewee. These contextual factors are also essential for the (perceived) legitimacy and appropriateness of procedural reasoning as is clarified in the various discussions in Part III, see in particular Sections 7.5.2, 8.4.4, and 9.4.3.

6.3 DIVERSE APPLICATIONS OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

Part I concluded that, in practice, procedural reasoning is applied in a variety of ways. Process-based fundamental rights review has been used in relation to a wide variety of rights, both positive and negative fundamental rights obligations, and different types of procedural standards. This section provides an analytical-theoretical framework

[628] SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*), para. 195. See Section 2.2.5.

[629] E.g., ECJ (GC) 25 July 2018, ECLI:EU:C:2018:586 (*Minister for Justice and Equality v. LM*) and ECJ (GC) 5 April 2016, EU:C:2016:198 (*Aranyosi and Căldăraru*). For case notes on *Aranyosi and Căldăraru,* see e.g., Van der Mei (2018), pp. 16–20; Anagnostaras (2016); and Gáspár-Szilágyi (2016); and on *LM*, see Ballegooij and Bárd (2018). For an overview and discussion of relatively recent case-law, see Van der Mei (2018).

PROEF 3

for distinguishing various applications of process-based fundamental rights review. It thus takes a closer look at the 'review method' element in the definition of process-based review. To that end, it distinguishes seven elements which may affect the way in which process-based fundamental rights review may be varied: the intensity of process-based review, the burden of proof, the standards for review, the result of procedural considerations, the location of review, the importance of review, and, finally, the conclusion of procedural reasoning.

Before we discuss the differences in procedural approaches in relation to each of these elements, an overview is provided by Figure 4. This figure is further explained with reference to the *Volker und Markus Schecke* judgment of the ECJ[630], and is intended to offer some useful guidance for the discussions in the following sections.

Figure 4. Diverse applications of process-based fundamental rights review

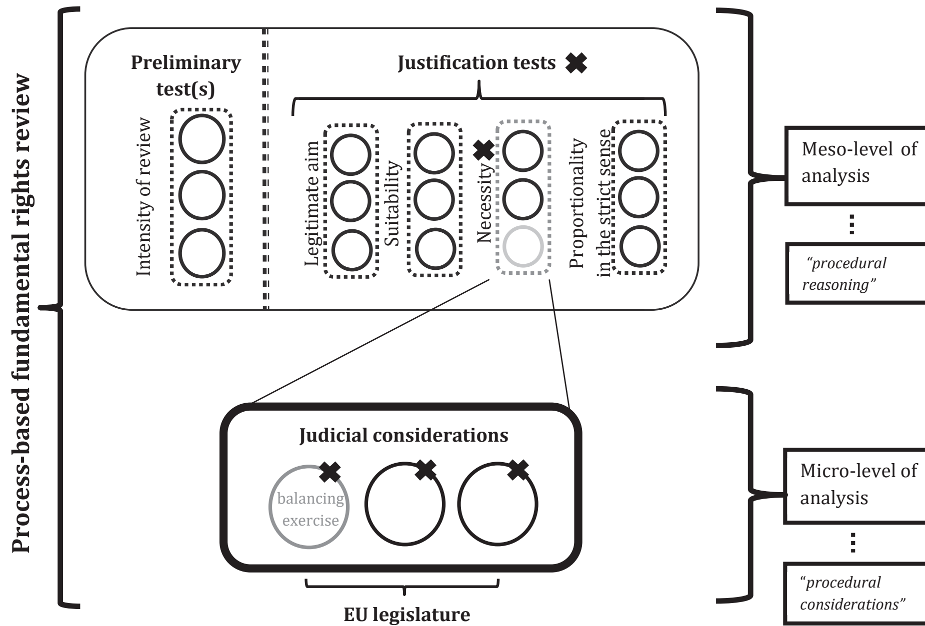

Figure 4 is similar to Figure 1 (see Section 5.3.1), apart from the fact that it zooms in on the micro- and meso-levels of case-law analysis. Some additional information is provided to reflect the ECJ's procedural approach in the *Volker und Markus Schecke* judgment.[631] The judgment concerned EU Regulations that required the online publication of personal data of beneficiaries of EU agricultural funds.[632] The ECJ concluded that these Regulations unjustifiably infringed the beneficiaries' rights to

[630] ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.

[631] Ibid.

[632] Ibid.

PROEF 3

privacy and the protection of personal data, as laid down in Articles 7 and 8 of the EU Charter. It based its conclusion on both procedural and substantive considerations relating to the necessity of the measure. The seven aspects that are discussed in the following sections can be distinguished in the ECJ's judgment. Below, these elements are further explained with a reference to parts of the judgment and to Figure 4 (on the right, between brackets).

1. **Intensity of process-based review**: the ECJ clarified in *Volker und Markus Schecke* that it would closely scrutinise the case, as it held that derogations and limitations of rights under the EU Charter needed to be *strictly* necessary. The ECJ held:

   'The Court has held in this respect that derogations and limitations in relation to the protection of personal data must apply only in so far as is *strictly* necessary…'[633]

   [In Figure 4, the square around the 'judicial considerations' is in bold to indicate that it concerns strict scrutiny by the ECJ.]

2. **Burden of proof**: since the ECJ already accepted that there had been an infringement of the right to privacy and the right to the protection of personal data (Articles 7 and 8 EU Charter)[634], the burden of providing evidence that the measure was justified lay with the EU legislature. The ECJ considered the following submissions from the EU legislature:

   '… the Council and the Commission argue that the objective pursued by the publication required … could not be achieved by measures which interfere less with the right of the beneficiaries concerned to respect for their private life in general and the protection of their personal data in particular. Information limited to those of the beneficiaries concerned who receive aid exceeding a certain threshold would, it is submitted, not give taxpayers an accurate image of the CAP. Taxpayers would have the impression that there were only 'big' beneficiaries of aid from the agricultural Funds, whereas there are numerous 'little' ones. Limiting publication to legal persons only would not be satisfactory either. The Commission submits in this connection that the largest beneficiaries of agricultural aid include natural persons.'[635]

   [In Figure 4, the words 'EU legislature' are added underneath the bold square to indicate that the EU legislature carries the burden of proof.]

3. **Standard for review**: to determine whether the infringing measure was justified, the ECJ clarified what the standard for review concerning the decision-making procedure entailed. It found that the EU legislature had to carry out a balancing

[633] Ibid, para. 77 [emphasis added].
[634] Ibid, para. 64.
[635] Ibid, para. 78.

PROEF 3

exercise, in an attempt to find a fair balance between the interests involved and the rights at stake. The ECJ held:

> 'It is thus necessary to determine whether the Council of the European Union and the Commission *balanced* the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds against the interference with the right of the beneficiaries concerned to respect for their private life in general and to the protection of their personal data in particular.'[636]

[In Figure 4, the words 'balancing exercise' are added in the grey circle to indicate that this is the standard for review for the decision-making procedure.]

4. **Result of consideration**: in its assessment, the ECJ examined both the decision-making procedure and the content of the EU Regulations. As regards the decision-making procedure, the ECJ drew the negative inference that the legislative procedure did not meet the applicable procedural standard (micro-level result[637]). It held:

> 'As far as natural persons benefiting from aid under the EAGF and the EAFRD are concerned, however, *it does not appear that the Council and the Commission sought to strike such a balance* between the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds, on the one hand, and the fundamental rights enshrined in Articles 7 and 8 of the Charter, on the other.'[638]

[In Figure 4, a 'X' is added to the grey circle to indicate that the procedure did not meet the applicable procedural standard.]

5. **Location of review**: the ECJ's procedural consideration lay in the necessity test. It considered:

> 'As to whether the measure is *necessary*, it must be recalled that the objective of the publication at issue may not be pursued without having regard to the fact that that objective must be reconciled with the fundamental rights set forth in Articles 7 and 8 of the Charter …'[639]

[For this reason, Figure 4 zooms in on the necessity test.]

6. **Importance of procedural reasoning**: the negative inference drawn by the ECJ in relation to the decision-making procedure seems to be of relevance in the ECJ's

636 Ibid, para. 77 [emphasis added] and see also para. 79.
637 This is a micro-level result as it only concerns the individual consideration. For the micro-, meso-, and macro-levels of case-law analysis, see Section 5.3.1.
638 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), para. 80 [emphasis added].
639 Ibid, para. 76.

PROEF 3

overall assessment of the necessity of the measure. The ECJ appears to have been predominantly concerned with the fact that the EU legislature had not sought to strike a balance between the interests at stake. After that finding it went on to substantively discuss several options that it considered less infringing.[640] The importance of the negative inference drawn on procedural grounds (i.e., the absence of a balancing exercise), as well as those drawn on the basis of substantive considerations (i.e., the possibility of less infringing measures) is clear from the following statement from the ECJ:

> '*There is nothing to show that* … the Council and the Commission took into consideration methods of publishing information on the beneficiaries concerned which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries' right to respect for their private life in general and to protection of their personal data in particular [i.e., procedural consideration], such as limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received [i.e., substantive considerations].'[641]

[In Figure 4, the importance of the procedural consideration is emphasised by colouring the square around the necessity considerations grey. The square is dashed to signify that both procedural and substantive considerations were relevant.]

7. **Conclusion of procedural reasoning**: in light of the negative inferences drawn on the basis of both procedural and substantive considerations the ECJ considered that the measure went beyond what was strictly necessary (meso-level conclusion[642]). It concluded:

> 'It follows from the foregoing that it does not appear that the institutions properly balanced, on the one hand, [the need for transparency of EU decision-making] against, on the other, the rights which natural persons are recognised as having under Articles 7 and 8 of the [EU] Charter. Regard being had to the fact that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary … and that it is possible to envisage measures which affect less adversely that fundamental right of natural persons and which still contribute effectively to the objectives of the European Union rules in question…'[643]

[In Figure 4, to indicate the ECJ's conclusion that the measure did not meet the necessity requirement a 'X' is added next to the word 'necessity'.]

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640 Ibid, paras. 83–85.

641 Ibid, para. 81 [emphasis added].

642 This is a meso-level conclusion as it only concerns the individual justification test. For the micro-, meso-, and macro-levels of case-law analysis, see Section 5.3.1.

643 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), para. 86.

PROEF 3

The conclusion that the measure was not necessary, resulted in the ECJ's finding that the measure was not justifiable and that it violated Articles 7 and 8 of the EU Charter (macro-level conclusion[644]). The ECJ therefore continued its conclusion, quoted above, as follows:

'… it must be held that, by requiring the publication of the names of all natural persons who were beneficiaries of EAGF and EAFRD aid and of the exact amounts received by those persons, the Council and the Commission exceeded the limits which compliance with the principle of proportionality imposes [i.e., proportionality in the broad sense, which in this book is referred to as the justification stage].'[645]

[In Figure 4, a 'X' is added next to the word 'justification' to indicate the ECJ's conclusion that the infringement caused by the measure was not justifiable.]

For these reasons the ECJ went on to declare the EU Regulations invalid (macro-level conclusion[646]). It held that:

'On the basis of all of the foregoing, [the EU Regulations] *must be declared invalid* to the extent to which, with regard to natural persons who are beneficiaries of EAGF and EAFRD aid, those provisions impose an obligation to publish personal data relating to each beneficiary without drawing a distinction based on relevant criteria such as the periods during which those persons have received such aid, the frequency of such aid or the nature and amount thereof.'[647]

[Since Figure 4 only indicates the micro- and meso-level of case-law analysis, this element is not shown.]

In short, the procedural approach adopted by the ECJ in the *Volker und Markus* Schecke judgment can be said to entail an intensive (1) process-based review of compliance with the balancing exercise requirement (3) in light of the necessity test (5), which resulted in the finding that the EU legislature had not shown (2) that it had complied with this standard (4), and, together with other substantive considerations (6), this led the ECJ to conclude that the measure was not necessary (7).

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644 This is a macro-level conclusion as it concerns the conclusion as regards the second stage of fundamental rights review, the justification of an interference. For the micro-, meso-, and macro-levels of case-law analysis, see Section 5.3.1.

645 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), para. 86 [emphasis added].

646 This is a macro-level result as it concerns the conclusion concerning the merits of the case. For the micro-, meso-, and macro-levels of case-law analysis, see Section 5.3.1.

647 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), para. 89 [emphasis added].

PROEF 3

Figure 4, and reference to the *Volker und Markus Schecke* judgment, have provided an overview and an initial explanation of the seven categories within which procedural reasoning may be varied. The following sections clarify these variations further. Section 6.3.1 addresses the intensity of process-based review, Section 6.3.2 the burden of proof, Section 6.3.3 the standards for review, and Section 6.3.4 the result of procedural considerations. Section 6.3.5 discusses the location of review, Section 6.3.6 the importance of procedural reasoning, and, finally, Section 6.3.7 the conclusion of procedural reasoning. A figure is included at the start of each section which provides an overview of how the element being discussed relates to the other six elements. Section 6.3.8 summarises the main findings of these sections and briefly addresses the proceduralness of judgments from a macro-level perspective.[648]

Although procedural reasoning may be applied differently in light of each of these elements, it should already be clear that the categories of 'result' and 'conclusion' are not genuine categories since they are supposed to flow logically from the other categories. The result relates to determining whether a procedure – in the end – can be said to have met the procedural standards. The conclusion concerns the impact of this result on a particular test in the judgment (meso-level conclusion), but it also relates to the final conclusion of a court for finding a violation of a right or not (macro-level conclusion). Insight into how such elements are analytically constructed can provide valuable information on how to dissect a fundamental rights judgment. In addition, these two categories help to further distinguish micro-level considerations and meso-level reasoning, as well as clarifying the role process-based review has played in a judgment from a macro-level perspective.[649] A conceptual discussion of these elements might thus be helpful for future case-law analysis of process-based fundamental rights review by specific courts as well as for courts' application of such review. Hence they are included in this section.

6.3.1 INTENSITY OF PROCESS-BASED REVIEW

It is widely accepted that courts review fundamental rights cases with different levels of intensity.[650] The topic of intensity of review is often connected with notions of judicial

[648] See also Section 5.3.2B.

[649] For a discussion of these three levels of case-law analysis, see Section 5.3.1. A further discussion in light of the category of results and conclusions, see Sections 6.3.4 and 6.3.7.

[650] For reasons of clarity of the conceptualisation of process-based review provided in this chapter, this section combines intensity of review with standards of proof. This is an oversimplification, yet for the purposes of this book this raises no strong concerns. Generally, the rule applies that the stricter the scrutiny is, the higher the level of proof is, and vice versa. For this rule to work, however, it is necessary that both the scrutiny applied and the level of proof needed is viewed from the perspective of the

PROEF 3

deference, restraint, discretion, intervention and activism.[651] The general idea is that a distinction can be made between an approach where courts closely scrutinise a decision or process, and an approach where they only check for obvious shortcomings. The exact categorisation of the intensity of review differs from court to court and can change over time.[652] Generally speaking, two models can be distinguished as regards the intensity of review. The first model is where strict scrutiny and deferential scrutiny are connected on a continuum, with a large grey area in between.[653] This model works as a 'sliding scale'[654] or with 'fluid degrees of deference'[655] and it can be found, for example, in the case-law of the ECtHR and the CJEU.[656] The second model is a categorical one, which distinguishes between five or three intensities of review, ranging from (very) intensive review to (very) deferential review, with a neutral or intermediate review test in between.[657] The categorical model sets out precisely defined tests or standards for each category of review. An example of this model can be found in the judicial practice of the US, where deferential legislative review entails a rational basis test, intermediate review requires legislation to be 'substantially related to an important government purpose', and strict review concerns a test of necessity of the legislation in the sense that it serves compelling state interests.[658]

For the purposes of this research, a categorical approach, with three intensities of review, each having its own test, is the most helpful.[659] This is not to say that an approach similar to that taken by the US courts needs to be adopted in all cases and jurisdictions, nor that this system is undisputed.[660] Furthermore, in practice it may not always be easy to determine *in abstracto* whether a judgment contains lenient, intermediate, or strict scrutiny. Whether a particular approach is considered a strict or lenient review seems to be dependent on the context of the case. This means that what can be considered strict review in one case, might be considered intermediate review in the context of another, and this

decision-making authority or rather the individual whose rights are at stake. This rule does not always apply because of a shift in the burden of proof (see Section 6.3.2). For example, in the *SZSSJ* judgment, the AHC required the aliens to establish that they were 'deprived of any opportunity to submit evidence', see AHC 27 July 2016, S75/2016 and S76/2016, [2016] HCA 29 (*Minister for Immigration and Border Protection v. SZSSJ*), para. 92. It found that they had not been deprived of this possibility. The AHC thus applied a low scrutiny of the decision-making procedure of the executive authorities deciding on the expulsion of the individuals, but for the individuals there was a high standard of proof. See in a similar vein, Rivers (2014).

651 See e.g. Barak (2012), pp. 396–399 and Rivers (2006).
652 In relation to the context of the CJEU, see Craig (2012), p. 409.
653 Gerards (2005), p. 81.
654 Ibid.
655 Leijten (2018), p. 114.
656 Gerards (2005), pp. 219 and 357–359.
657 Ibid, pp. 81–84.
658 Leijten (2018), pp. 115–116 and Gerards (2005), pp. 465–467. It is also argued that in relation to fundamental rights all three intensities of review are present in the US context, see Winkler (2006).
659 E.g. Craig (2012), pp. 409–445 and Gerards (2004), p. 148.
660 Indeed, the rigidness with which these categories result in the lack of actual examination of the arguments of justification of a fundamental rights infringement is often considered problematic, see e.g., Nason (2016), p. 195 and Gerards (2005), pp. 511–513.

PROEF 3

is influenced by the default scrutiny. Regardless of some of these challenges, a categorical approach helps to clarify that process-based fundamental rights review may be applied with distinct levels of intensity. Explaining that process-based review can take the form of strict, intermediate, and lenient review, is sufficient from this analytical perspective.

The lowest intensity of process-based review is *(very) deferential or lenient review*. In employing such review, courts only assess whether the decision-making process was not evidently unjustifiable, flagrantly unreasonable, or clearly excessive. Courts then limit their assessment of the case to determining whether there were no obvious shortcomings on the part of the decision-making authority. As a consequence, this lenient review allows decision-making authorities ample room for manoeuvre in making decisions and following decision-making procedures. In other words, courts will only reject those decisions and procedures that clearly do not comply with the applicable fundamental rights standards. As regards procedural reasoning, this superficial or light-touch review, can take the form of courts' assessing whether the decision-making procedure followed was purely arbitrary or showed serious procedural shortcomings. If deferential review is applied, it is thus quite likely that courts will hold the decision-making procedure to meet the required standards, as only severe shortcomings will enable it to draw negative inferences.

The examples of process-based fundamental rights review discussed in Part I generally do not seem to showcase deferential review. This makes sense since a lenient process-based review means that courts only glance over the decision-making process. Nevertheless, the judgment of the GFCC concerning the execution of a European Arrest Warrant[661], reflects the deferential review applied by the lower court. In determining whether the applicant would have an effective legal remedy after his surrender, the lower court 'contented itself with finding that a hearing of evidence in Italy was '"in any case not impossible" ("*jedenfalls nicht ausgeschlossen*")'.[662] The lower courts' scrutiny focused on finding very obvious procedural shortcomings, and in the absence of such, it concluded that the applicant could be extradited.[663]

A *(very) intensive or strict scrutiny* means that courts closely scrutinise the infringement of a fundamental right. Such a review could take the form of courts determining whether, in their view, the decision-making authority made the correct decision or followed the right procedure.[664] Minor deviations from what these courts hold to be the right decision, or the correct procedure, would be enough for them to conclude that the

661 GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf*). See Section 4.2.3.

662 Ibid, para. 109.

663 Instead of this lenient review, the GFCC required the lower court to 'investigate and to establish the facts' as well as to follow up on the applicant's arguments that there would be no hearing of evidence at the Italian Court of Appeal. The GFCC thus required a more intensive scrutiny of the lower court, see ibid.

664 It concerns enforcing a standard of 'optimal legislation', see Messerschmidt (2016), p. 381.

PROEF 3

decision-making authority did not meet the applicable fundamental rights standards. As a consequence, decision-making authorities have no or only limited room for manoeuvre. As regards procedural reasoning, this intensive or strict review can take the form of courts assessing whether the decision-making procedure followed was correct. As this strict review allows courts to probe deeply into the decision-making procedure, it is more likely that they will draw negative inferences from procedural shortcomings, since smaller procedural imperfections may also be noticed which would allow courts to draw negative inferences.

Strict scrutiny was applied, for example, by the GFCC in *Hartz IV*.[665] In that judgment it considered whether legislation on social benefits was in line with the right to a subsistence minimum. In relation to the legislative process, it required the assessment of the benefits by the German legislature to 'be *clearly justifiable* on the basis of reliable figures and plausible methods of calculation'.[666] It thus required the legislature to determine the social benefits on an adequate basis of facts so as to allow for 'a *plausible ascertainment* of consumption' relevant to people's subsistence minimum.[667] The GFCC closely scrutinised the legislative process on its justifiability and plausibility. In the absence of the German legislature's attempt to provide any reasonable estimation of the share of expenditure that would serve as a basis to secure the right to subsistence minimum, the GFCC held the legislation violated the German Constitution.

In between these extremes, there is *intermediate review*. Intermediate process-based review means that courts' scrutiny falls somewhere in between assessing whether the decision-making procedure was obviously unreasonable and assessing whether it was the right procedure. Consequently, there is some leeway for decision-making authorities to make their own decisions and employ their choice of procedure, but this leeway should still be (reasonably) acceptable. In terms of procedural reasoning, courts then check whether the decision-making procedure followed is reasonable in light of the applicable procedural standards. Because this intermediate level of intensity of review captures the grey area between two extremes, in practice it might be applied more intensively in some cases and more superficially in others.[668]

Intermediate review seems to be applied in the majority of the judgments discussed in Part I. A good example is the approach taken by the DSC in the '*Tunisian case*'.[669] In that case the DSC had to decide on the detention of an alien in order to ensure his expulsion to Tunisia. It considered that the lower courts' review, 'a review of the lawfulness of the deprivation of liberty', had to 'include a *certain review* of the factual

[665] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4. At the same time, however, the substance-based review by the GFCC was very deferential, and procedural reasoning was employed to compensate for this, see Messerschmidt (2013), pp. 244–245. On the idea of a 'compensation strategy', see Section 6.3.5A-II.

[666] Ibid, para. 142 [emphasis added].

[667] Ibid, para. 175 [emphasis added].

[668] Gerards (2004), pp. 81–84.

[669] DSC 28 July 2008, no. 157/2008, U2008.2394H ('*Tunisian case*'). See Section 3.2.3.

PROEF 3

basis of the decision to regard the alien as a danger to national security', meaning 'that *it is proven on a balance of probabilities* that such factual basis for the assessment of danger exists'.[670] It concluded that the lower court did not have enough evidence to support its decision to detain the person and referred the case back. Another example of an intermediate review can be found in *Urgenda*.[671] In that judgment the DCTH reviewed the Dutch government's climate policy and considered that 'the State has an *extensive discretionary power* to flesh out the climate policy', but this did not mean that there would be no review at all.[672] Indeed, because of the enormous consequences such a policy might have, it considered that the starting point of its review would be whether the government had carefully considered the various interest at stake and, in particular, whether it had found a solution that 'is *fitting and effective* in the given circumstances'.[673]

6.3.2 BURDEN OF PROOF

Legal adjudication is largely based on the evidence and arguments that parties to a case provide to the court.[674] This means there is a burden on these parties to provide information so as to allow courts to determine whether a fundamental right was violated.[675] This leads to the question of who should carry the burden of proof in a given case. The answer to this is dependent on procedural rules and contextual factors. For example, in civil law proceedings the applicant will generally be the one who has to establish the defendant's failure to meet his civil obligations.[676] The burden of proof then lies with the applicant. In criminal law proceedings, by contrast, the burden of proof lies with the prosecutor, as can be derived from the internationally recognised fundamental rights norm of 'the presumption of innocence'.[677]

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670 Ibid, p. 7 [emphasis added].

671 DCTH 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.

672 Ibid, para. 4.74 [emphasis added].

673 Ibid [emphasis added].

674 The burden of proof discussed here, encompasses both the burden of persuasion and the burden of producing evidence as discussed in Walton (2014), pp. 49–57 and Fleming (1961). While the burden of persuasion relates to the burden a party carries to convince the court of his or her point of view, the burden of producing evidence relates to the kind of evidence (scientific, medical and official investigation reports, documents, witness statements, statistical data, videos and photographs) put forward to the court. It should also be noted that courts may be able to add information and legal arguments on their own motion (*ex officio*).

675 This should be distinguished from the 'burden of persuasion', which is particularly relevant in criminal law cases, and requires that a suspect is treated throughout his or her process as consistently as possible with his or her innocence, see Stumer (2010), pp. xxxviii.

676 See for a comparison of the burden of proof in civil law and criminal cases, Walton (2014), pp. 52 with a reference to Fleming (1961), pp. 53–54.

677 See e.g. Stumer (2010), pp. xxxvii ff.

PROEF 3

Focusing on fundamental rights adjudication, it is further possible to distinguish between the burden of proof at the first and second stages of review. At the first stage of review courts will have to establish that the case falls within the scope of a right and that there was an infringement of that right. At the second stage of review they have to determine whether the infringement of the right could be justified.[678] As a default rule, in the first stage, the burden of proof primarily lies with the applicant, while in the second stage, it lies mainly with the defending decision-making authority.[679] Besides these examples, within many legal systems there are legal rules that allow for a shift of the burden of proof.[680] This means that, although by default the burden of proof is imposed on one party to a case, in certain situations the burden shifts to the other party. Indeed, in argumentation theory it has been argued that the burden of proof constantly shifts backward and forward between the applicant and defendant.[681]

Accordingly, who carries the burden of proof might vary from one case to another and from one part of a case to another. This also relates to the way process-based review is given shape, which can be explained in light of a comparison of two judgments concerning the expulsion of aliens. In the '*Tunisian case*', the DSC held that there should be at least 'a certain review of the factual basis' that an alien poses a threat to national security, which forms the basis for an expulsion decision.[682] The DSC explicitly mentioned that 'the authorities must produce the required information in court' and with appropriate access to adversarial proceedings.[683] The burden of proof therefore lay with the Danish immigration authorities. In the *SZSSJ* judgment, by contrast, the AHC placed the burden of proof on the aliens.[684] They were required to show that they 'were [not] put squarely on notice of the nature and the purpose of the assessment [or that they] were deprived of any opportunity to submit evidence or to make submissions relevant to the subject-matter'.[685] Although both judgments related to a process-based review of the administrative decision-making procedure leading to the expulsion of aliens, in the Australian case the aliens had to provide evidence that they had not been sufficiently informed, while in the Danish case the authorities were to substantiate how they reached the conclusion that the alien posed a threat to national security. It seems then that process-based review can be applied in different ways: either the individual (or group) has the main responsibility to provide relevant information concerning the (lack of) quality of the decision-making process, or the decision-making authority carries the primary burden of proof.

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678 The bifurcation between the interpretation and the application of a right has been held to be relevant to the division of the burden of proof, see e.g., Gerards and Senden (2009), pp. 622–623.

679 See e.g., Harris et al. (2018), pp. 154–156.

680 See Stumer (2010), pp. xxxviv.

681 Walton (2014), p. 49.

682 DSC 28 July 2008, no. 157/2008, U2008.2394H ('*Tunisian case*'). See Section 3.2.3.

683 Ibid, p. 7 [emphasis added].

684 AHC 27 July 2016, [2016] HCA 29 (*Minister for Immigration and Border Protection v. SZSSJ*). See Section 3.2.2.

685 Ibid, para. 84.

PROEF 3

6.3.3 STANDARDS FOR REVIEW

Chapter 5 clarified that process-based fundamental rights review is a method of *review*, meaning that courts assess a decision-making procedure in light of the applicable procedural standards. Process-based review is thus an evaluative argumentation method. The standards on which procedural reasoning relies can be diverse, ranging from rights to a fair trial and the presence of judicial balancing exercises to evidence-based decision-making and the existence of parliamentary and public deliberations. This subsection therefore offers a typology of procedural standards. Section A focuses on the authority that developed these standards (legislative, administrative or judicial authority), which links with the institutional contextual factors discussed in Section 6.2. The second category of standards relates to the type of standards applied. As explained in Section B, process-based review can rely on standards of certainty, rationality, and fairness. Lastly, Section C is devoted to discussing some additional categories that provide different perspectives from which variations of procedural reasoning can be seen.

A. Authority responsible for procedural standards

Different public authorities are competent to establish standards for decision-making procedures. In general, standards can be developed by the legislative, the administrative, and the judicial branches. Within different contexts certain standards may be more relevant for fundamental rights adjudication than others. For example, in contexts in which there is strong precedent-based judicial reasoning, the procedural standards developed in previous judgments (judicially determined standards) might determine the application of process-based review in another judgment. By contrast, in legal systems where there is no tradition of strongly precedent-based reasoning, procedural reasoning is less likely to be based on judicial standards. In such systems, legislative standards may be more important.

Legislative-based standards are often found in legislation, regulations or policy documents adopted by the legislature, whether at the international, national, or local level. An example of this can be found in the *Doctors for Life International* judgment of the SACC.[686] In that judgment, the standard of the facilitation of political participation was based on the South African Constitution, and thus determined by the national legislature.

[686] SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*). See Section 2.2.5.

PROEF 3

Administrative-determined standards can generally be found in policies, guidelines, or even individual decisions. An example of standards developed by the administrative branch can be found in the AHC's *SZSSJ* judgment relating to the principle of non-refoulement.[687] The case concerned the accidental publication online of the identities of almost 10,000 applicants for protection visas. The applicable standard required immigration officers to assess the effects of the data breach in light of the non-refoulement principle separately for each individual concerned.[688] This standard was developed by the Department of Immigration and Border Protection and set out in its Procedures Advice Manual.[689] The procedural standard was therefore based on an administrative authority's decision.

Judicially determined standards are standards that have been developed in the case-law. These standards are at times referred to as the result of judicial law-making, as courts develop standards with which decision-making authorities, private entities, and individuals should comply.[690] An example of judicially determined standards can be found in the *Von Hannover (No. 2)* judgment of the ECtHR, in which the ECtHR discussed the balancing exercise carried out by the national courts.[691] The procedural standard – i.e., national courts ought to carry out a balancing exercise in light of the European Convention on Human Rights and the case-law of the ECtHR[692] – had already been defined in previous ECtHR case-law, in which it had set out a number of factors national courts should take into account in their balancing exercise.[693] Neither the requirements of a balancing exercise nor the factors relevant to such a balancing exercise can be found in the ECHR, but they were developed by the ECtHR in its case-law.

In practice, multiple standards from different decision-making authorities may be used in a case. In fact, standards put forward in legislation are generally supplemented with judicial or administrative guidelines to make them more specific and practical. A combination of standards of different authorities therefore seems to be more often the case than not. An example of process-based review in which a court relies on standards set out by multiple authorities can be found in the case of *Comunidad Indígena Eben Ezer*.[694] In that judgment, the SCA held that the lower courts should have allowed an amparo procedure in order to protect the rights of an indigenous community. As regards the procedural considerations, it relied on standards of effective remedies

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687 AHC 27 July 2016, [2016] HCA 29 (*Minister for Immigration and Border Protection v. SZSSJ*). See Section 3.2.2.

688 Ibid, para. 10.

689 Ibid, para. 9.

690 On the standard-setting functions of courts, see also Section 8.2.2.

691 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*). See Section 4.2.7.

692 Ibid, para. 107.

693 Ibid, paras. 108–113.

694 SCA 30 September 2008, 331:2119 (*Comunidad Indígena Eben Ezer v. Provincia de Salata*). See Section 4.2.1.

PROEF 3

as laid down in the American Convention on Human Rights and the Convention on Indigenous and Tribal Peoples of the International Labour Organisation, as well as case-law from the IACtHR.[695] In its procedural assessment the ASC thus relied on procedural standards following both from international legislation and international case-law.

B. Types of procedural standards

Standards for process-based review can be further categorised in terms of what they aim to advance, protect, or regulate.[696] The classification put forward here is based on the division made by Ittai Bar-Siman-Tov of standards for procedural reasoning as regularity, rationality, and fairness.[697] In this section these three standards are discussed as certainty (Section I), rationality (Section II), and fairness standards (Section III). All three standards seem to fit well with the existing literature on general principles of law, the rule of law or *Rechtsstaat*, and democracy, as well as overlapping with studies from other disciplines, for example, sociological studies into the effects of perceived procedural justice. As these standards are valid within all liberal democracies and international organisations, the distinction put forward in this section may be useful in relation to process-based review in different jurisdictions.

I. Certainty standards

The first type of requirement is 'certainty' standards. This requirement is closely linked to the rule of law and separation of powers, and includes benchmarks such as legality, legal certainty, prevention of abuse (or misuse) of powers, and access to justice.[698] What is essential to this category of standards is that they provide clarity as to what can be expected of decision-making authorities as regards their use of powers and decision-making procedures. The underlying notion therefore is to ensure certainty for individuals, by ensuring that laws are accessible and foreseeable, that laws are abided by, that powers are used for their intended purpose and that they are not implemented

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695 Ibid, paras. 3.1–3.2.

696 This section is partially based on the discussion on procedural requirements in the case-law of the ECtHR in Huijbers (2017a), pp. 188–191.

697 Bar-Siman-Tov presented his categorisation of procedural requirements during the workshop on 'Exploring New Dimensions of Procedural Review' in Edinburgh on 10 March 2017. Bar-Siman-Tov has written extensively on 'semiprocedural review' in relation to legislative procedures, e.g., Bar-Siman-Tov (2016); Bar-Siman-Tov (2012); and, Bar-Siman-Tov (2011). For a different categorisation in the context of the USSC, see Coenen (2001), pp. 1587–1805 (these categories entail: (1) rules of clarity; (2) form-based deliberation rules; (3) proper-findings-and-study rules; (4) representation-reinforcing structural rules; (5) time-driven second-look rules; (6) thoughtful-treatment of the area rules; (7) constitutional common-law and common-law-like rules; (8) proper-purpose rules; and, finally, (9) constitutional 'who' rules).

698 See some of the benchmarks mentioned in Council of Europe, European Commission for Democracy through Law (Venice Commission) (2016), 'Rule of Law Checklist' (18 March 2016), no. 711/2013 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>.

PROEF 3

in an arbitrary manner, and that effective legal proceedings are available that allow for independent and impartial assessments by courts.[699]

Process-based review on the basis of procedural regularity standards can take the form of courts determining whether there are in fact appropriate procedures laid down to allow for proper decision-making.[700] The decision of the CESCR in *I.D.G.*[701], for example, entailed a comparison of the foreclosure proceedings of a house with the standard of an effective judicial remedy, and more particularly the standard of 'suspending the enforcement process'.[702] The CESCR noted that '*the regular procedure would not suffice to guarantee the right to housing*, because the person would not be able to stop the sale of their home and would only be able to obtain compensation or restitution of the property at a later stage, assuming that were even possible'.[703]

Certainty as a basis for process-based reasoning can also take the form of courts reviewing whether the decision-making authorities actually abided by procedural rules, regardless of whether the standards are for internal or external use. An example of internally applicable standards can be found in the *Doctors for Life International* judgment of the SACC.[704] At stake was the constitutional requirement to facilitate public participation in legislative processes. In this particular instance the provincial legislature had determined that 'the appropriate method of facilitating public involvement … was to hold public hearings'.[705] The SACC examined the legislative process against this internal standard, concluding that 'the *express promise* to hold public hearings and the subsequent *failure to hold public hearings* … was, in the circumstances of this case, unreasonable'.[706] In a similar vein, certainty standards were relevant in the *Bayev* judgment of the ECtHR.[707] In that case the ECtHR considered a Russian legislative ban on the promotion of homosexuality among minors in light of the standard of foreseeability. It concluded that '[g]iven the vagueness of the terminology used and the potentially unlimited scope of their application, these provisions *are open to abuse* in individual cases, as is evidenced in the three applications at hand'.[708]

Process-based review in light of certainty standards may also take the form of compliance with the law within a reasonable time. Individuals awaiting a decision are in a state of uncertainty, and therefore timely proceedings and decisions are required. The maxim of 'justice delayed is justice denied' articulates this well. The ECJ explicitly

699 Advisory Council of International Affairs of the Netherlands (2017), 'The Will of the People? The Erosion of Democracy under the Rule of Law in Europe' (June 2017) no. 104 <https://aiv-advies.nl/download/efa5b666–1301–45ef-8702–360939cb4b6a.pdf>.

700 Huijbers (2017a), p. 189.

701 CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*). See Section 4.2.5.

702 Ibid, para. 13.6.

703 Ibid, para. 13.6.

704 SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*). See Section 2.2.5.

705 Ibid, para. 195.

706 Ibid [emphasis added].

707 ECtHR 20 June 2017, app. nos. 67667/09 et al. (*Bayev and Others v. Russia*), para. 76. See Section 2.2.8.

708 Ibid, para. 83 [emphasis added].

PROEF 3

relied upon this standard in *Dynamic Medien*, a judgment relating to the examination procedures by German authorities for the import of DVDs.[709] It considered that these procedures must be 'readily accessible, [and] can be completed within a reasonable period'.[710] Since it concerned a preliminary reference procedure, the national court would have to determine whether the German labelling procedure met these certainty standards, although the ECJ appears to be of the view that it did.[711]

II. Rationality standards

The second type of procedural requirement relates to the rationality of decision-making by national authorities. This is closely linked to the liberal democratic idea that decision-making is a complex task and that public authorities should strive to make decisions in a rational manner, by ensuring 'sufficient knowledge of (1) the scenario which needs to be regulated, (2) the intended impact, and (3) undesirable side effects'.[712] Procedural standards of rationality ensure that the decision-making process enables rational decision-making.[713]

An example of process-based review of rationality standards can be found in the *Hartz IV* judgment of the GFCC.[714] In that judgment the GFCC considered the legislative process for determining the subsistence minimum in light of the standards of 'reliable figures and plausible methods of calculation'.[715] Instead of meeting these standards of rationality, it concluded that the legislature had 'made a *"random" estimate* of a share of expenditure allegedly not serving to secure the subsistence minimum, and *deducted it, without an adequate basis in fact*', therefore there was '*no … plausible ascertainment* of consumption which is relevant to the standard benefit'.[716] Similarly, in *Hatton*, the ECtHR held 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'.[717] It considered that the particular policy scheme had been 'preceded by a series of investigations and studies carried out over a long period of time' and it concluded by stating that 'it does not find that … there have been fundamental procedural flaws'.[718] The CoATH relied on comparable evidence-based standards in the *Urgenda* judgment.[719] This case concerned

[709] ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*). See Section 4.2.6.
[710] ECJ 14 February 2008, C-244/06 (*Dynamic Medien*), para. 50.
[711] Ibid, para. 51.
[712] Messerschmidt (2016a), p. 211.
[713] Popelier (2017); Alemanno (2013); and Mak (2012). Rational decision-making is more extensively addressed in Section 9.3.2
[714] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.
[715] Ibid, para. 142.
[716] Ibid, para. 175 [emphasis added].
[717] ECtHR (GC) 8 July 2008, app. no. 36022/07 (*Hatton and Others v. UK*), para. 128 [emphasis added]. See Section 3.2.6.
[718] Ibid, para. 128–129.
[719] CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.

PROEF 3

the Dutch government's climate change policy, which was amended from targeting a thirty per cent reduction in greenhouse gases by 2020 to a target of twenty per cent. The CoATH required reasons for this policy change and assessed the decision-making process by the Dutch government in light of the requirement of 'substantiation based on climate science' and of 'giv[ing] reasons why a reduction of only 20% by 2020… should currently be regarded as credible'.[720] In the absence of any such substantiation, the CoATH held that the policy change was in violation of fundamental rights.[721]

Another rationality standard relevant to procedural reasoning concerns issues of deliberative decision-making. These standards emphasise the need for decision-making authorities to engage in public and parliamentary debates and to justify their decisions, in order to ensure that all relevant interests are involved.[722] These factors are thought to promote rational decision-making. Examples from the ECtHR will help to illustrate this.[723] In *Hirst (No. 2)*, the ECtHR focused on the UK parliament's decision-making process.[724] The implicit standard in its review seemed to be that of a substantive debate, which should include modern-day interpretations of penal law and fundamental rights and balancing competing interests.[725] The ECtHR found that 'there was *no evidence that Parliament has ever sought to weigh the competing interests* or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote'.[726] In *Winterstein*, the ECtHR was faced with collective expulsions of Roma families from their homes.[727] The ECtHR required the national courts to assess the proportionality of these measures and to 'examine them in detail and provide adequate reasons'.[728] Comparing the judicial proceedings at the national level to these standards of rationality it considered that 'once [the national courts] found that the occupation did not comply with the land-use plan, they gave that aspect paramount importance, *without weighing* it up in any way against the applicant's arguments'.[729] In *Von Hannover (No. 2)*, by contrast, the ECtHR considered that 'the national courts *carefully balanced* the right[s involved]'.[730] In a similar vein, in *Lambert*, the ECtHR emphasised the rational decision-making process concerning an end-of-life decision.[731] The ECtHR had already accepted that the French framework provided for appropriate standards for

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720 Ibid, para. 52.
721 Ibid, para. 76.
722 These deliberative practices are extensively addressed in Section 7.3.
723 For the various parliamentary practices the ECtHR has valued in its judgments, see Popelier and Van de Heyning (2017), pp. 9–11; Saul (2016), pp. 1082–84; Saul (2015), pp. 18–23. Process efficiency – the presumption that good processes lead to good outcomes – seems in particular the reason for the ECtHR to establish these criteria, see Brems (2017), pp. 19–22.
724 ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*). See Section 2.2.8.
725 Ibid, para. 79.
726 Ibid, para. 79 [emphasis added].
727 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*). See Section 4.2.7.
728 Ibid, para. 148.
729 Ibid, para. 156.
730 ECtHR (GC) 7 February 2012, app nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), para. 124. See Section 4.2.7.
731 ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*). See Section 3.2.6.

PROEF 3

such decision-making procedures.[732] In light of this framework the ECtHR noted that the doctor responsible for the care of the patient had consulted six doctors – instead of the required one or two doctors – and had convened a meeting with the entire caring team and two meetings with Lambert's extended family.[733] It concluded that the 'procedure in the present case was *lengthy and meticulous*, exceeding the requirements laid down by the law' and therefore that the public hospital's decision complied with the requirements flowing from the right to life.[734]

Rationality standards can also be found in relation to the proper functioning of the democratic process. Often this concerns standards that enable individuals not only to participate in democratic decision-making but also to do so in a well-informed manner.[735] These rationality standards require egalitarian and participation-driven democratic processes, and often focus on individuals and groups with a disadvantaged position in society.[736] A good example of the application of such standards are the judgments from the CCC.[737] In the *'General Foresting Law case'* the CCC held that the regular deliberative and public process for legislation was not sufficient when a law would affect indigenous communities.[738] In such circumstances indigenous peoples' right to consultation meant the government should have explained 'the project of law through sufficiently representative actors to the communities; illustrated its scope and how it might affect those communities; and given them effective opportunities to debate the project'.[739] Because the government had failed to consult the indigenous and Afro-Colombian communities in this manner, and as the latter groups were deprived of information to enable them to make a rational decision, the CCC held the law to be unconstitutional. On similar lines, in the '*Consultation of Ethnic Communities case*' the CCC declared the constitutional amendment to the right to participation of indigenous peoples unconstitutional, as it had 'verified that in the case of [this amendment] *said consultation was not provided in any way*'.[740]

III. Fairness standards

There is considerable literature and empirical research in the area of procedural justice that demonstrates the intrinsic importance of fair proceedings for individuals[741], as well as for the acceptance of judicial and administrative decisions.[742] Such standards

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[732] Ibid, paras. 150–160.
[733] Ibid, para. 166.
[734] Ibid, para. 168 [emphasis added].
[735] This is particularly in line with the deliberative democratic theories, see Section 7.3.
[736] This relates to a substantive understanding of egalitarianism, that persons should be different when they are in different situations.
[737] Discussed in Section 2.2.6.
[738] CCC 23 January 2008, C-030 ('*General Foresting Law*'), paras. 238b and 238e.
[739] Ibid, para. 239.
[740] CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*'), para. 7.7.4.
[741] For an explanation of both the normative and empirical perspectives on the importance of procedural justice, see Grootelaar (2018), pp. 4–9.
[742] E.g., Folger et al. (1979), p. 2554. This is further discussed in Section 8.3.1A-I.

PROEF 3

can relate to the requirements of participation, neutrality, respect, and trust in decision-making procedures and public authorities.[743] Procedural fairness notions are explicitly codified in the right to a fair trial that requires, inter alia, the impartiality and independence of judges, trials within a reasonable time, and a fair and public hearing.[744]

The examples of procedural reasoning show that process-based review on the basis of fairness standards can take the form of ensuring a fair trial and impartial decision-making. For example, in the '*Melloni case*', the SCC referred to the right to a fair trial and the standards following from the European Convention on Human Rights.[745] In particular it mentioned the standard developed by the ECtHR to the effect that although 'proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, *a denial of justice nevertheless undoubtedly occurs* where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself'.[746] The SCC assessed the Italian proceedings against the applicant in light of these ECHR standards and concluded that 'the lawyers of the applicant had [not] ceased to represent him from 2001; and, secondly, that there was no lack of defense'.[747] Procedural fairness standards also played a decisive role in the CSC's judgment in *Baker*.[748] In that judgment, the CSC reviewed the administrative decision-making procedure that would ultimately lead to the deportation of a woman to Jamaica. It required that this decision was 'made *free from a reasonable apprehension of bias* by an *impartial* decision-maker'.[749] In other words, the decision should not be based on prejudice by the decision-making authority. However, the notes taken, which served as the basis of the rejection of exemption, did show clear signs of bias, leading the CSC to conclude that it did 'not believe that a reasonable and well-informed member of the community would conclude that [the immigration officer] had approached this case with the impartiality appropriate to a decision'.[750]

However, fairness standards do not follow only from procedural rights, such as the right to a fair trial, due process, or effective remedy, but also from substantive rights.[751] For example, the ECtHR has taken into account the neutrality and independence of the investigators who assessed the alleged involvement of State agents in the unlawful killing of a person in relation to the right to life.[752] The ECtHR has also required that individuals whose interests are at stake in a decision should be properly involved in

[743] For a discussion on procedural justice criteria in human rights adjudication, in particular the ECtHR, see Brems and Lavrysen (2013).
[744] Ibid, pp. 189–191.
[745] SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*'). See Section 4.2.2.
[746] ECtHR (GC) 1 March 2006, app. no. 56581/00 (*Sejdovic v. Italy*), para. 82.
[747] SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*'), para. 4.13.
[748] CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.
[749] Ibid, para. 45 [emphasis added].
[750] Ibid, para. 48 [emphasis added].
[751] Huijbers (2017a), pp. 190–191 and Brems and Lavrysen (2013), pp. 193–199.
[752] ECtHR (GC) 7 July 2011, app. no. 55721/07 (*Al-Skeini and Others v United Kingdom*), paras. 168–177.

PROEF 3

the decision-making processes, for example, in cases concerning decisions on the compulsory removal of children from their parents' care.[753]

C. Other categories of standards

Besides categories of standards for process-based review on the basis of the authority imposing the standards and the type of standards relied upon, many other categories exist too. This section addresses some of them in order to show that procedural reasoning can be given shape through courts' reliance on different types of standards.

Standards for process-based fundamental rights review can be distinguished on the basis of whether they are developed prior to the decision-making procedure (*a priori* standards) or afterwards (*a posteriori* standards). Generally, standards for process-based review will fall within the first category, but there are exceptions. In *Baker*, for example, the CSC developed detailed criteria for procedural fairness in the judgment and also clarified that these were applicable to the kind of deportation decisions at stake in the judgment.[754]

Further, standards for decision-making procedures may be written or unwritten. The *Hartz IV* judgment appears to relate to such unwritten standards. Here, the GFCC considered it a matter of custom for the legislature to rely on statistical modelling for its decision-making procedure, and if it wanted to deviate from this procedure some special reasoning would be required.[755] Sometimes standards are meant for internal use only, such as those set out in guidelines and circulars, whilst at other times, they may also be externally binding.[756] The SACC in *Doctors for Life International*, for example, held the provincial legislature accountable for not complying with the political participation procedure it had set out for itself.[757]

Furthermore, standards may relate to *ex ante* or *ex post* procedural obligations.[758] *Ex ante* obligations are procedural obligations that aim to prevent fundamental rights violations. For example, the obligation for decision-making authorities to carry out impact assessments prior to developing policies, as in the ECtHR's *Hatton* judgment[759], and the obligation to hear a defendant prior to deciding on his conviction, as in the Spanish and German cases relating to the European Arrest Warrant.[760] *Ex post* obligations concern procedural obligations that follow a violation and may require

[753] Gerards (2017), pp. 136–37. See for example, ECtHR (GC) 12 July 2001, app. no. 25702/94 (*K. and T. v. Finland*), para. 173.
[754] Ibid, para. 22. See Section 3.2.1.
[755] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*), paras. 173 and 176. See Section 2.2.4.
[756] In relation to informal procedural rules, it has been said that courts appear to be less willing to rely on procedural fairness standards in the area of policymaking, see e.g., Galligan (1996), pp. 511–513.
[757] SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*), para. 195. See Section 2.2.5.
[758] Brems (2013), p. 136.
[759] ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*). See Section 3.2.6.
[760] SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*') and GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf*). See Sections 4.2.2 and 4.2.3.

PROEF 3

investigations into the violation or the availability of judicial remedies. A case in point is the *I.D.G.* case, where the Committee of Economic, Social and Cultural Rights held that the Spanish authorities had violated the right to housing as there was no effective judicial remedy available to stop the auction of the house.[761]

Process-based fundamental rights review can also relate to standards that flow from either procedural rights or substantive rights. In fact, in relation to standards following from procedural rights, a procedural approach is considered the default approach. Procedural standards may, however, also stem from substantive rights, as is clear, for instance, from the ECJ's ruling in *Volker und Markus Schecke*.[762] In the judgment, the ECJ considered that there was a requirement for decision-making authorities to carry out a balancing exercise, which flowed from the rights to privacy and to data protection. Procedural reasoning can also be categorised according to whether the standards follow from civil and political rights, or rather from social, cultural, and economic rights. Several cases discussed in Part I related to the right to political participation, and the judgments of the ECtHR and ECJ related primarily to civil rights.[763] At the same time, the Committee of Economic, Social and Cultural Rights' decision in *I.D.G.*[764], as well as the GFCC's decision in *Hartz IV*[765] related to the right to housing and the right to a subsistence minimum, respectively, rights that are generally considered socio-economic rights.

And finally, on a related note, process-based review may be based on standards that relate to negative or positive obligations. The ECtHR' procedural reasoning in *Winterstein* focused on the negative obligation of national authorities not to interfere with the rights to respect of the home, private and family life, which entailed the obligation to refrain from evicting people from their homes.[766] In *Von Hannover (No. 2)*, the ECtHR emphasised the positive obligation on courts to carry out a balancing exercise in light of the standards set out by the Convention and in its case-law.[767]

6.3.4 RESULT OF PROCEDURAL CONSIDERATIONS

Process-based fundamental rights review is a means for courts to help reason their judgments and decide the case before them in light of legal standards, such as those

761 CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*), para. 13.6. See Section 4.2.5.
762 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.
763 See also the Reflection to Part I.
764 CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*), para. 13.6. See Section 4.2.5.
765 GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*), paras. 173 and 176. See Section 2.2.4.
766 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*). See Sections 3.2.6 and 4.2.7.
767 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), paras. 98–99 and 126.

PROEF 3

discussed in Section 6.3.3. In fact, it is an evaluative method that can provide persuasive arguments for reaching a particular result in a given case. This reasoning is based on an assessment of a certain procedure ('object of review', Section 6.2) in light of a particular procedural standard (Section 6.3.3). The form this assessment takes is determined by the level of scrutiny (Section 6.3.1) and by the party that carries the burden of establishing the quality or deficiency of the procedure (Section 6.3.2). Together, these elements form the basis of the result of courts' procedural consideration: the drawing of positive or negative inferences as regards the assessed procedure.

Courts may draw positive inferences when a decision-making process complies with the applicable procedural fundamental rights standards of quality, fairness, carefulness, or adequateness. If the decision-making procedure under review is, however, considered to be incorrect or of an insufficient quality, negative inferences are drawn. Positive and negative inferences should thus not be regarded as inherently positive or negative for the applicant or for the decision-making authority, but as positive or negative evaluations of the decision-making procedures under review.[768]

From a conceptual point of view, it is possible to argue that neutral inferences can also be drawn. This could be the case when there is insufficient information available for a court to justify arriving at a positive or negative outcome on the basis of procedural assessments. However, given the burden of proof these neutral inferences will inevitably have an implied positive or negative result. Usually, if a decision-making authority fails to adduce sufficient evidence to prove the quality of its procedure, this will lead to a negative inference, albeit implicitly, since it can be seen as proof that the decision-making procedure was flawed. By contrast, if an individual fails to show the deficiency of the procedure, this could imply that the lack of quality is not proven, implying a positive inference. Thus it seems inevitable that process-based review is seen as a binary evaluative method, resulting in either positive or negative inferences.

Two judgments relating to the European Arrest Warrant may serve to illustrate the positive and negative inferences that can be drawn. Both the SCC and the GFCC considered whether the surrender of a person to Italy would be in violation of the right to a fair trial (and the right to human dignity).[769] In the '*Melloni case*', the SCC considered that 'the lawyers of the appellant had *[not] ceased* to represent him from 2001; and secondly, that there was *no lack* of defense'.[770] The result of these two procedural considerations was that the minimum standards of fair trial were met in relation to the defence as well as the representation of the defendant. Whilst the SCC drew positive inferences as regards the decision-making process of the Italian courts,

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768 The positive or negative inferences drawn on the basis of procedural considerations will nevertheless often match with having positive and negative outcomes for the decision-making authority, as, generally speaking, the burden of establishing the justifiability of a fundamental rights infringement is carried by the decision-making authority.

769 SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*') and GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf*). See Sections 4.2.2 and 4.2.3.

770 SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*'), para. 4.13 [emphasis added].

PROEF 3

the GFCC arrived at a different conclusion concerning the German lower court. In *Mr R*, the GFCC considered that the lower court had '*failed* to sufficiently follow up' on the defendant's assertion 'that the Italian procedural law did not provide him with the opportunity to have a new hearing of evidence at the appeals stage'.[771] The GFCC required the lower court to 'investigat[e] whether the national judicial authorities compl[ied] with the requirements under the rule of law guaranteed by the [EU] Charter'.[772] In this judgment, the judicial decision-making procedure did not meet these requirements, leading the GFCC to find a violation of the applicant's rights under the German Constitution.[773]

The positive and negative inferences generally follow logically from the elements discussed in the previous sections. It can therefore be considered that the result of procedural considerations is not a separate element of how process-based review is applied. Indeed, the result of a procedural consideration is only an interim conclusion. The evaluation needed to draw these positive or negative inferences focuses on the micro-level of case-law analysis, so it concerns specific procedural considerations. Hence, for instance, even if negative or positive inferences are drawn on the basis of a procedural assessment, the other (substantive) considerations in the judgment may eventually allow for a different conclusion. In other words, it is only once these procedural considerations are discussed in light of a particular part of a judgment (location of review, Section 6.3.5) and their importance for the overall reasoning for a particular test is known (Section 6.3.6), that it becomes clear what final conclusions can be drawn as regards the particular justification test (Section 6.3.7). Only then can there be a full understanding of the kind of process-based review that is applied.[774]

6.3.5 LOCATION OF REVIEW

Process-based review concerns judicial reasoning by which courts assess public authorities' decision-making processes in light of procedural standards. It has already been indicated that procedural reasoning can be distinguished at different stages of review, and more specifically in the different tests courts apply to determine whether a fundamental right has been violated. Section 5.3.1 clarified that fundamental rights adjudication generally proceeds in two stages: a stage relating to the scope

771 GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf*), para. 109 [emphasis added].
772 Ibid, para. 105.
773 Ibid, para. 109.
774 For the discussion on micro-level and meso-level case-law analysis and the localisation of process-based review, see Section 5.3.1.

PROEF 3

of the right and the establishment of an infringement, and a second stage relating to the justification of an infringement of the right. This book focuses on the latter stage, since it is at that stage when courts assess the compliance of a decision-making process with fundamental rights standards.[775] This stage generally exists of four main requirements, which necessitate the infringement of a right to serve a legitimate aim or proper purpose, to be suitable to achieve that aim, to be necessary, and, finally, to be proportionate (proportionality *stricto sensu*).[776] Exactly how these tests are applied may be determined by preliminary phases such as that of establishing the intensity of review.

Distinguishing these tests at the justification stage allows a more concrete identification of the various aspects of a judgment that allow for procedural reasoning. Process-based fundamental rights review can be applied as part of each and all of these tests. It can thus be part of courts' reasoning in relation to the proportionality of a measure, but it can also be part of determining the suitability of the measure. At the same time, process-based review can be applied as part of the preliminary tests.

It should be noted that the justification stage may encompass more tests than just the four mentioned above. Within the European context, for example, the requirement of 'provided by law' might be mentioned, which requires legality of State authorities' actions.[777] This connects with the certainty standards discussed in Section 6.3.3B-I. Furthermore, depending on the right concerned and the kind of obligation involved, courts may interpret these tests differently or ignore one or more of these tests in their judgments. In particular, absolute rights are not discussed in this section as, in principle[778], interferences with these rights cannot be justified, which means that the

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775 Two models can be distinguished as regards to the meaning of the justification stage, see Barak (2017), p. 325. Within the internal model, when an infringement can be justified, it becomes a definitive right instead of a prima facie right. The prima facie right is thus broader, as it also includes elements that may legitimately be limited. This approach is advocated by Robert Alexy, see Alexy (2002), p. 397ff. By contrast, in the external model, if the limitation can be justified the prima facie character is removed and there is no violation of the right. Barak is proponent of this approach, see Barak (2012).

776 See e.g., Barak (2012), p. 131ff. These justification tests – or proportionality in broad sense – have become central in the system of fundamental rights adjudication in many national and international jurisdictions, see Stone Sweet and Mathews (2008), p. 112. Not all liberal democracies apply such an approach, for example, in the US there is a tiered system of scrutiny being applied with no or only very limited room for proportionality-like assessments. Nevertheless, also within the US there is an emerging debate on whether to introduce the proportionality approach, see Möller (2017), p. 130. It has also been suggested that US courts intermediate or strict scrutiny include a proportionality-like test, see Yowell (2018), pp. 20–24.

777 See for example, Article 52, paragraph 1, EU Charter.

778 This is 'in principle' the situation, as what can be considered absolute rights is up for debate. Some rights that are in principle absolute may, however, be limited in emergency situations. Other rights are absolute in certain ways but have aspects that are not absolute. For example, the right to life appears to be absolute as no one has the right to kill, however, there is room for balancing in relation to situations of abortion, euthanasia and assisted suicide. At the same time, it has been argued in the context of the European Convention on Human Rights, that even the absolute right on the prohibition of torture does not entirely exclude some form of balancing of interests, see Smet (2013) and Battjes (2017).

PROEF 3

finding of an interference constitutes a violation of these rights.[779] Positive obligations as well as social and economic rights[780] might also warrant a different interpretation of the justification tests, since the infringement of the right is then caused by decision-making authorities' (alleged) failure to fulfil their duty.[781] Indeed, since it concerns an inactivity on the part of the decision-making authority, it often makes little sense to establish whether a legitimate aim was pursued by the inactivity and whether the inactivity was suitable or necessary to pursue that aim.

Furthermore, even if we accept that the tests discussed below are generally applied, there might be significant differences in the way this is done in practice. Even though proportionality *stricto sensu* is applied worldwide, or at least by a large part of liberal democracies, the meaning, function and application of this test differs between legal systems.[782] Indeed, more generally, the justification tests can be applied in a number of ways and stand in different relationships to one another. Denise Réaume, for instance, distinguishes between three models of application of the justification tests: first, the justification tests can be regarded as consisting of 'four independent steps, each of which takes us cumulatively closer to establishing a justification'; or, secondly, as a 'top-heavy' model, focused on establishing that a legitimate aim is pursued and the other tests merely serve to indicate 'the existence of conditions that defeat that initial conclusion'; or, thirdly, as a 'bottom-heavy' model, in which the legitimate aim, suitability and necessity requirements are preconditions that provide information about whether an infringement is *not* justified, but the proportionality assessment *stricto sensu* bears the most weight and is used to establish whether the infringement can actually be justified.[783] In addition, it is worth noting that these tests are in practice often not applied in as well-structured a manner as is envisaged in theoretical writings. In fact, courts tend to merge the different tests and consider issues under one test that, at least theoretically, belong to another test.[784]

Regardless of the difficulties that may arise in dissecting the tests in the case-law, the following subsections clarify how procedural reasoning may be used in relation to each of these tests. They address the application of process-based review in relation to the preliminary test of the intensity of justification review (Section A) and the justifications tests of legitimate aim (Section B), suitability (Section C), necessity (Section D), and proportionality in the strict sense (Section E).

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779 The way the relationship between absolute rights and the justification stage is given shape is discussed in Webber (2017), p. 79ff.

780 See Young (2017).

781 The ECtHR, for example, replaces the justification tests in relation to positive obligations with a fair balance test or the test of reasonable knowledge and means, see Gerards (2019), pp. 110–121.

782 E.g., Bomhoff (2012), pp. 290ff, who compares the proportionality analysis of the US and Germany courts, and Stone Sweet and Mathews (2008), pp. 162–163.

783 Réaume (2009), pp. 6–13.

784 Concerning the ECtHR, see Gerards (2019), pp. 229–233.

PROEF 3

A. Preliminary tests: intensity of justification review

Prior to assessing the public authorities' compliance with fundamental rights norms, or more particularly, prior to evaluating whether the infringement of a fundamental right or fundamental rights can be justified, preliminary tests can be applied by courts. These tests determine the manner in which courts will review the four main tests and therefore do not directly contribute to the courts' assessment itself; they only do so in an indirect manner.[785] At times, however, the preliminary tests seem to be almost decisive for courts' final conclusion. This is shown, for example, in the US context in discrimination cases.[786] When US courts determine that strict scrutiny is warranted, the public authorities should show that there is no less intrusive alternative for the measure (necessity test).[787] Although conceptually this intensity of review leaves some room for the justification of a fundamental rights infringement, in practice the courts rarely accept the arguments put forward by the public authority.[788] For that reason, this level of scrutiny has famously been dubbed 'strict in theory, but fatal in fact'.[789] Vice versa, when the US courts apply lenient scrutiny, the so-called "rational-basis test", this has been held to concern 'minimal scrutiny in theory[, but] virtually none in fact'.[790]

Against the background of the impact of preliminary tests on the final judgment of courts, it is worth taking a closer look at the role process-based review can play in these preliminary tests. Two preliminary tests have already been addressed in the previous sections: the burden of proof (Section 6.3.2) and the intensity of review (Section 6.3.1). This section focuses solely on the intensity of justification review since procedural reasoning seems to play a particularly important role in that regard. The discussion in this section addresses a different relationship between procedural reasoning and the intensity of review than that already discussed in Section 6.3.1. In that section, process-based review was itself applied with a certain intensity, conforming to the logical formula 'intensity of review = intensity of procedural reasoning'. Therefore it was also called: 'intensity of *process-based* review'. This section discusses two other relationships between procedural reasoning and the intensity of review.[791] First, it discusses how process-based review may be applied to determine the intensity of review (Section I). The formula 'procedural reasoning → intensity of review' explains this

785 Leijten (2018), pp. 113ff and Rivers (2006), p. 176 ('while there is general agreement that judicial deference plays a part in testing for proportionality, there is much uncertainty as to what exactly that part is'.).

786 Gerards (2004), p. 153 ('The outcome of many equality cases in the US does not seem to be decided on the basis of an actual examination of the arguments advanced in justification of the difference in treatment, but rather on the choice for a certain level of intensity.').

787 Leijten (2018), pp. 115–116.

788 Gerards (2004), pp. 146–147.

789 Gunther (1972), p. 8.

790 Ibid.

791 Despite the different focus of this section, the comments on the distinction between practice and theory as mentioned in Section 6.3.1, are also applicable here.

PROEF 3

practice. Secondly, this section addresses the relationship of procedural reasoning as a consequence of the intensity of review applied (Section II). This is in line with the logical formula of 'intensity of review → procedural reasoning'.

I. Process-based review as an indicator for the intensity of review: justification strategy

As regards the manner in which courts determine the intensity of review in fundamental rights cases, various relevant factors can be mentioned: the right infringed, the severity of the infringement of the right, the type of case, the discretion of the initial decision-making authority, and the general practice of courts.[792] Concerning the latter, in cases concerning non-discrimination, the USSC, for example, generally applies a deferential scrutiny, while the CJEU applies a closer scrutiny when it concerns different treatment based on sex or nationality.[793] Besides the aforementioned factors, procedural considerations may also play a role in determining the intensity of review. This is the case when the quality, reasonableness, or fairness of decision-making procedures would help courts determine how closely they should scrutinise an infringement. This means that courts' 'reliance on process (in drawing either positive or negative inferences) to operate not [only] as a variety of judicial restraint *in itself*, but [also] *within* judicial restraint on institutional grounds, furnishing reasons to amplify (or alternatively, mute) the respect that [courts give] to the decisions of another institution of government'.[794] The ECtHR is said to take such an approach.[795] Indeed, the ECtHR itself has stressed, in relation to the margin of appreciation, that 'the fact that the parliamentary record indicates that there was in-depth consideration of the human rights implications of an enactment can be of significance in certain types of cases'.[796] In this sense, procedural reasoning may be seen as a *justification strategy*, as it either justifies strict(er) scrutiny in the review of the main tests or justifies (more) lenient scrutiny.[797]

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792 See e.g., Craig (2010) and Gerards (2004), p. 143.
793 Gerards (2004), p. 143.
794 Sathanapally (2017), p. 55.
795 E.g., Kleinlein (2019), pp. 92–97; Brems (2017), p. 26; Huijbers (2017a), pp. 199–200; Sathanapally (2017), p. 55; Arnardóttir (2015), p. 7; Saul (2015), p. 9ff; and Kavanagh (2008), p. 192.
796 Council of Europe, ECtHR (2015), 'Contribution to the Brussels Conference' (26 January 2015), para. 6 <https://www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf >.
797 In a similar vein, Eule has argued that the decision-making process used determines the deference that is required from US courts. He argued that courts should show more restraint when a law is adopted by the legislature then when (legislative) decisions are a result of a referendum or plebiscite. He thereby linked the kind of decision-making process to the justification of a particular intensity of review. Despite similarities to the argument made in this section, Eule's account focused on the theoretical reasons as to why courts should show less restrain towards referendum decision (e.g., he held that 'direct democracy bypasses internal safeguards [of the legislative process] designed to filter out or negate factionalism, prejudice, tyranny, and self-interest', p. 1549) and *not* so much on the need for courts to ascertain the quality of those decision-making processes in practice. Therefore his argument does not so much relate to process-based review as that it relates to the relationship between courts and the legislature and between courts and the people – which is expressed in the judicial restraint that is warranted. See Eule (1990).

PROEF 3

In footnote four of *Carolene Products*, the USSC's Justice Stone considered that 'prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry'.[798] This footnote is generally interpreted to mean that when the protection of minorities' participation in the democratic process is affected, closer scrutiny on the substance is warranted.[799] This implicitly requires a process-based review of the political process to establish the intensity of review. Process-based review can also allow for more lenient scrutiny. In the UK context, in the judgment *Miss Behavin' Ltd.*, Lord Neuberger opined that the UKSC should take account of the quality of the administrative decision-making process.[800] He held that '*where a council has properly considered the issue* in relation to a particular application, *the court is inherently less likely* to conclude that the decision ultimately reached infringes the applicant's rights'.[801] Similarly, in *Von Hannover (No. 2)*, the ECtHR stated that, in relation to the principles determining the margin of appreciation (the intensity of review), '*where the balancing exercise has been undertaken by the national authorities* in conformity with the criteria laid down in the Court's case-law, *the Court would require strong reasons* to substitute its view for that of the domestic courts'.[802] These statements indicate a correlation between the quality of the decision-making procedure and the scrutiny the courts will apply in relation to the justification of the infringement. That is, proper decision-making procedures would allow for more leeway for the national authorities, or in terms of intensity of review, a (more) lenient scrutiny by the courts, whereas deficient procedures may result in strict(er) review.

II. Process-based review as a consequence of the intensity of review: avoidance, compensation, and intensification strategies

Procedural reasoning can relate in a second way to the intensity of review. This concerns the use of procedural reasoning in the justification tests as a consequence of the intensity of review chosen. That is, the intensity of review may trigger courts into examining the decision-making procedure instead of, or in addition to, the content of a decision. For example, it has been argued that the ECtHR turns to procedural reasoning when States are offered a wide margin of appreciation and thus a deferential scrutiny is applied.[803] There are three ways in which process-based review may relate to the intensity of review applied by courts.[804]

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798 USSC 25 April 1938, 304 U.S. 144 (*US v. Carolene Products*), p. 152. See Section 2.2.1.

799 Ackerman (1985), p. 718.

800 UKSC 25 April 2007, [2007] UKHL 19 (*Belfast City Council v. Miss Behavin' Ltd.*). See Section 3.2.5.

801 Ibid, para. 91 [emphasis added].

802 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), para. 107. See Section 3.2.5. For a discussion on the relationship between the margin of appreciation and process-based review, see Arnardóttir (2017); Kleinlein (2017); and Anardóttir (2016), p. 48.

803 Gerards (2017), pp. 146–148.

804 Also Popelier somewhat similarly distinguished three models for procedural rationality review: '(i) a substitute for substantive review; (ii) an escape route; or (iii) a tool to strengthen the proportionality

PROEF 3

First, procedural reasoning may be applied in order to avoid substantive reasoning by the ECtHR, as a substantive approach may be considered inappropriate. Deference may be required, for instance, when a case concerns an issue that is best decided by an institution with direct democratic credentials or because the ECtHR lacks expertise in that area.[805] From this perspective, process-based review concerns a lenient approach by the ECtHR and may be considered an *avoidance strategy*. For example, in *Lambert* the ECtHR held that European States have a considerable margin of appreciation 'not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy'.[806] For this reason the ECtHR considers 'that it was *primarily for the domestic authorities* to verify whether the decision to withdraw treatment was compatible with the domestic legislation and the Convention'.[807] In its assessment of the justifiability of the end-of-life decision, the ECtHR left the content of the decision to the national courts, and focused instead on their decision-making procedure. It considered that the present case was subject to an in-depth assessment in which the courts had taken into account all views and medical reports and observations from medical and ethical bodies.[808] It therefore found that the domestic authorities had complied with their positive obligations relating to the right to life.

Secondly, in cases where courts ought to show considerable deference as regards the content of a measure, procedural reasoning may be applied as a safety net. In this sense, procedural reasoning is a *compensation strategy* for a lenient scrutiny of the content of decisions, as it enables courts to provide at least procedural protection of fundamental rights, because they can provide little in the way of substantive protection. Unlike the consideration of procedural reasoning as an avoidance strategy, on this understanding, process-based review is not (necessarily) regarded as a more lenient approach than substance-based review, rather it merely compensates for the lack of (thorough) judicial oversight on the substance of the matter. The ECtHR seems to have taken such an approach in *Hatton*. Because of the wide of margin of appreciation given to States in decisions regarding environmental issues[809], it considered that it '*is required to consider all the procedural aspects*, including the type of policy or decision involved, the extent to which the views of individuals (including applicants) were taken into account

analysis. In what follows, these are labelled, respectively, the substitute model, the escape route model, and the compensatory model.', see Popelier (2019), p. 279ff.

805 Sections 9.2.2 and 9.3.2 explain why courts may be required to avoid substantive reasoning in cases of morally sensitive cases and cases with epistemic uncertainties.

806 ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*), para. 148. See Sections 3.2.6 and 4.2.7.

807 Ibid, para. 181 [emphasis added].

808 Ibid.

809 ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*), paras. 100–101. See Section 3.2.6.

PROEF 3

throughout the decision-making procedure, and the procedural safeguards available'.[810] A similar approach seems to be taken by the GFCC in *Hartz IV*.[811] After establishing that the German legislature had discretion in determining the means of providing for a subsistence minimum, it held that it could still review the decision-making process.[812] The GFCC held that '[t]he protection of the fundamental right therefore *also covers the procedure* to ascertain the subsistence minimum *because a review of results can only be carried out to a restricted degree* by the standard of this fundamental right'.[813] More generally it has been said that '[i]n areas where the legislature has wide discretion [and judicial deference is in place], the [GFCC] has increasingly abstained from reviewing the legislative output, but it *compensates* for this deference by checking the factual bases of statutes and reviewing the decision making process.'[814]

Thirdly, procedural reasoning may also be the result of a more intense scrutiny courts mean to apply. From this perspective, process-based review can be regarded as enhancing the intensity of judicial review. It can thus be said to be an *intensification strategy*. The words of the USSC Justice Stevens in *Fullilove* points in this direction.[815] He stated that where the US legislature 'creates a classification that would be *subject to strict scrutiny* under the Equal Protection Clause … it seems to me that judicial review *should include a consideration of the procedural character of the decisionmaking process*'.[816] In other words, in cases where strict scrutiny is warranted, procedural reasoning should be applied by the USSC in addition to substance-based review, so as to subject legislation to a complete and thorough examination. In the *Winterstein* judgment, a case on the eviction of Roma families from their homes, the ECtHR also seemed to consider procedural reasoning as a strategy of enhanced protection of fundamental rights.[817] In the judgment, the ECtHR held that European States have a wide margin of appreciation in housing policies, nevertheless, the margin of appreciation should be narrower where it concerns so-called 'intimate' rights.[818] It held that '[s]ince the loss of one's home is a most extreme form of interference with the right … to respect for one's home, any person at risk of being a victim thereof should in principle be able to have the proportionality of the measure determined by an independent tribunal'.[819] This meant inter alia that arguments concerning the proportionality of the interference should be examined by courts 'in detail and [they should] provide adequate reasons'.[820] The ECtHR's focus on procedural safeguards thus appears to provide for enhanced scrutiny in relation to eviction orders.

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810 Ibid, para. 104.
811 GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.
812 Ibid, paras. 138–140.
813 Ibid, para. 142.
814 Rose-Ackerman, Egidy and Fowkes (2015), p. 175 [emphasis added].
815 USSC 2 July 1980, 448 U.S. 448 (*Fullilove v. Klutznick*). See Section 2.2.1.
816 Ibid, p. 551 [emphasis added].
817 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*). See Sections 3.2.6 and 4.2.7.
818 Ibid, paras. 147α and β.
819 Ibid, para. 147δ.
820 Ibid.

PROEF 3

In sum, besides the intensity of process-based review, procedural reasoning may be applied to justify the intensity of review in the main tests and it may be a consequence of the intensity of review applied. In the latter application, in cases in which (more) lenient scrutiny is warranted, process-based review can be an avoidance strategy or a compensation strategy, and in cases in which strict(er) scrutiny is warranted it can be an intensification strategy for courts' review.

B. Legitimate aim or proper purpose

Infringements of fundamental rights are generally only accepted if these infringements have a proper purpose.[821] What aims can be considered legitimate may be explicitly set out in legislation. Some international human rights treaties and declarations include general clauses as to the legitimate aims that may be pursued. For example, Article 29, paragraph 2 of the Universal Declaration on Human Rights provides that 'everyone shall be subject only to such limitations … for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society'; Article 30 of the ACHR provides that the restrictions 'may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established'; Article 52, paragraph 1 of the EU Charter provides that 'limitations may be made only if they … genuinely meet objects of general interest recognised by the Union or the need to protect the rights and freedoms of others'; and the ECHR sets out specific legitimate aims separately for several rights. For example, in relation to the right to private and family life (Article 8 ECHR) it specifically mentions the aim of 'economic well-being of the country' and in relation to the right to freedom of expression (Article 10 ECHR) reference is made to the aims of protection of 'territorial integrity', prevention of 'the disclosure of information received in confidence', and maintenance of 'the authority and impartiality of the judiciary'. Besides these explicit legislative codifications of legitimate aims, courts also clarify in their case-law what proper purposes are. For example, in *Dynamic Medien*, the ECJ determined, after reference to multiple international treaties, that the protection of

[821] The wording of *legitimate* aims or *proper* purposes suggest that not all aims pursued may be used to justify a fundamental rights infringement. Indeed, fundamental rights may not be infringed purely for discriminatory reasons. The European Convention of Human Rights makes explicit that inappropriate aims cannot be relied upon by public authorities for justifying fundamental rights infringement. Article 18 ECHR states '[t]he restrictions permitted under this Convention … shall not be applied for any purpose other than those for which they have been prescribed'. This Article is interpreted to protect against limitations serving a 'hidden agenda' and it has been found to be 'a defence against abusive limitations of Convention rights … and thus to prevent resurgence of undemocratic regimes in Europe', see e.g., ECtHR 17 March 2016, app. no. 69981/14 (*Rasul Jafarov v. Azerbaijan*), para. 153 and the Joint Partly Dissenting Opinion of Judges Nicolaou, Keller and Dedov to ECtHR 23 February 2016, app. nos. 46632/13 and 28761/14 (*Navalnyy and Ofitserov v. Russia*), para. 2. For the idea of Article 18 ECHR as an alarm bell for the rule of law backsliding, see Tan (2018).

PROEF 3

the child can be considered a legitimate interest.[822] In *Volker und Markus Schecke*, it accepted transparency of EU decision-making as a legitimate aim.[823]

At first glance, procedural considerations may not seem to play an important role in relation to the legitimate aim test. Indeed, determining whether a measure serves a proper purpose appears to be primarily a substantive assessment. After all, whether a measure has the legitimate aim of protecting national security or health can only be determined on the basis of its content. Nevertheless, the decision-making procedure may help courts to clarify whether decision-making authorities sought to pursue a legitimate aim. This relates to issues such as whether these authorities considered what the purpose of a measure would be, whether they attempted to precisely determine the aim they were pursuing, and whether they ensured that the aim being pursued was a legitimate one.[824] Thus, procedural reasoning primarily plays a role in establishing what the decision-making authorities' aims were, rather than establishing their legitimacy. This use of procedural reasoning is illustrated in the following example.

In the *Bayev* judgment, the ECtHR reviewed the Russian ban on 'propaganda' of homosexual relationships aimed at minors.[825] In relation to the legitimate aims pursued, the ECtHR closely examined the aims served by the prohibition.[826] As regards the alleged aim of protection of the rights of others, in particular, 'to shield minors from information which could convey a positive image of homosexuality'[827], the ECtHR considered 'that the broad scope of these laws, *expressed in terms not susceptible to foreseeable application*, should be taken into account in the assessment of the justification advanced by the Government'.[828] The ECtHR's concern with the broad definition of the law was with the fact that it could lead to abuse of powers by executive authorities, because of the vagueness of the law it could not be guaranteed that these authorities in the process of implementing the law would try to pursue that same legitimate aim. This judgment provides an example of procedural reasoning, as the ECtHR focused on the likelihood that executive authorities in their decision-making process would try to serve the legitimate aim of protection the rights of others, rather than abuse their powers. Indeed, the ECtHR was of the view that the executive authorities in the case at hand had not been pursuing a legitimate aim, holding 'these provisions are open to abuse in individual cases, as evidenced in the three applications at hand'.[829]

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822 ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*), para. 42. See Section 4.2.6.

823 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), para. 68. See Section 2.2.7.

824 In the US context this has been considered the candour of the decision-making process, see Linde (1975), p. 230 ('The response, on the part of proponents of the doctrine of instrumental rationality, is that by insisting on the identification of purposes, whatever they may be, the doctrine promotes candor in the legislative process').

825 ECtHR 20 June 2017, app. nos. 67667/09 (*Bayev and Others v. Russia*). See Section 2.2.8.

826 This case is an exceptional case for the ECtHR as it rarely ever delves into the legitimate aim pursued by measures, see Gerards (2013a), pp. 479–480.

827 ECtHR 20 June 2017, app. nos. 67667/09 (*Bayev and Others v. Russia*), para. 74.

828 Ibid, para. 76.

829 Ibid, para. 83.

PROEF 3

C. *Suitability*

Rights infringements should not only have a proper purpose, but they should, in practice, be able to serve that purpose.[830] What is required is that there is a reasonable correlation, or causal relationship, between the measure and the intended objective pursued.[831] This test is therefore also called the 'rational connection test'. Clearly such a connection is missing when a measure is intended to achieve a certain goal, but in reality it obstructs the realisation of that goal.[832] In addition, if measures do not seem capable of achieving the goal[833], the measure may be considered ill-suited or ineffective, and therefore as not providing a justification of the infringement of a right.[834]

Often the suitability of a means can be determined on the basis of common sense, but there are some cases where the courts' task is more difficult. In complex policy areas, such as environmental or socio-economic policies, it will be difficult for courts to determine whether a measure was suitable to serve a particular aim. For example, in the *Urgenda* judgment, relating to Dutch government's policy on the reduction of greenhouse gases, it proved very difficult for the Dutch courts to establish whether any policy would be suitable (enough) to minimise the impact of climate change and protect fundamental rights.[835] Indeed, the CoATH explicitly held that 'full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking'.[836] Gerards has held that in such situations courts need to rely on 'factual, statistical, or empirical information as to the effectiveness of a certain measure'.[837] More generally, in light of the evidence-based trend, which was briefly mentioned in Section 6.3.3B-II and is elaborated further in Section 9.3.2D, decision-making authorities may be required to include science-based information in their decision-making procedures in order to ensure that their intended measures would be suitable to pursue a legitimate aim. Common-sense reasoning thus seems to be increasingly replaced by knowledge-based decision-making.

Procedural reasoning can play a role in relation to establishing the effectiveness of a measure in two ways in particular. First, it can be used to determine whether the decision-making procedure under review can be regarded as serving the legitimate aim pursued. For example, in *Dynamic Medien*, the ECJ was asked about the compatibility of the German video labelling procedure and the free movement of goods.[838] The ECJ held

[830] Rivers (2007), p. 171.
[831] Gerards (2013a), pp. 473–474 and Stone Sweet and Mathews (2008), p. 75.
[832] This line of reasoning is purported in Alexy (2017a), pp. 14–15.
[833] The kind of suitability required depends on the intensity of review applied by courts. See also Gerards (2013a), pp. 474–476.
[834] Ibid.
[835] CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*) and DCTH 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.
[836] CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*), para. 63.
[837] Gerards (2013a), p. 473.
[838] ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*). See Section 4.2.6. For a discussion see Beijer (2017a), pp. 187–188.

PROEF 3

that the procedure served the legitimate aim of protecting children against inappropriate information. As regards the rational connection of the procedure and that aim, it considered that '[t]here is no doubt that prohibiting the sale and transfer by mail order of image storage media which have not been examined and classified by the competent authority … *constitutes a measure suitable* for protecting children against information and materials injurious to their well-being'.[839] By contrast, the Committee on Economic, Cultural, and Social Rights held in *I.D.G.* that the available procedure could not be considered an effective measure.[840] This case concerned the judicial remedies against mortgage foreclosure proceedings which, according to the CESCR, 'could *not be deemed a potentially adequate alternative* [to guarantee the right to housing] because it gave no possibility of suspending the enforcement process'.[841] The aim of protecting the right to housing could thus not be achieved by means of the regular procedure.

Secondly, the decision-making procedure can provide important information about how much thought the decision-making authority put into finding an effective measure. Procedural reasoning may then be used to signal the probability that the measure would be suitable to pursue the intended aim. A case in point is the *Urgenda* judgment of the CoATH.[842] As regards the choice of the Dutch government to change its climate change policy by lowering its targets of reduction of greenhouse gases, the CoATH was not convinced that the Dutch government had effectively tried to pursue the aim of preventing more than 2 degrees global warming. It noted that the policy change was not substantiated on the basis of climate science and '[m]ore specifically, the State failed to give reasons why a reduction of only 20% by 2020 (at the EU level) should currently be regarded as credible', that is, credible in light of present-day climate science.[843] On the basis of procedural reasoning, the CoATH thus held that the Dutch government, in making its policy change, had not sought a suitable measure for the purpose of reducing the risks of climate change. Another example is provided by the *Bayev* judgment of the ECtHR.[844] The case concerned Russian legislation banning demonstrations for accepting homosexuality in areas where children were present. In that judgment the ECtHR found that the Russian authorities 'were *unable to provide any explanation* of the mechanism by which a minor could be enticed into "[a] homosexual lifestyle", let alone science-based evidence that one's sexual orientation or identity is susceptible to change under external influence'.[845] Furthermore, the ECtHR considered that 'by adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society'.[846] On the one hand, there did not seem to be a scientific basis that

[839] ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*), para. 47 [emphasis added].
[840] CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*). See Section 4.2.5.
[841] Ibid, para. 13.6.
[842] CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.
[843] Ibid, para. 52.
[844] ECtHR 20 June 2017, app. nos. 67667/09 (*Bayev and Others v. Russia*). See Section 2.2.8.
[845] Ibid, para. 78 [emphasis added].
[846] Ibid, para. 83.

PROEF 3

the law was protecting the aims pursued and, on the other hand, the ECtHR found that 'such measures are likely to be *counterproductive in achieving the declared legitimate aims*'.[847] There was thus nothing in the decision-making process to show that the legislative authorities had tried to find a measure suitable for protecting the rights of minors.

D. Necessity

For fundamental rights infringements to be justified they must not go beyond what is necessary. Just like the suitability test, the necessity test is a means-ends test, as it looks into whether the same end can be served without infringing rights[848] or by less rights infringing means.[849] This test is a legal translation of the saying that 'one shall not crack a nut with a sledgehammer'.[850] The necessity test is therefore also known as least-restrictive-means test or minimal-impairment test.[851] It is considered to have more bite than the legitimate aim and suitability tests, as it means that decision-making authorities are not free to choose the means by which they pursue certain aims, instead certain (more) rights-friendly means are preferred.[852] Thus, if the purpose of a measure 'can be achieved while reducing the limitation on a constitutional right without additional expenses, one should conclude that the law is not necessary'.[853]

The necessity requirement leads inevitably to the question of what can be considered a necessary measure. This might be determined on a 'factual and empirical assessment of various alternatives [as] to determine which is more effective and least harmful'.[854] Of course, it is not always easy for courts to establish whether alternatives would serve the aim pursued, or at least whether they do so to the same extent. For example, can means be regarded as alternatives when those measures are (slightly) less effective[855], when their effectiveness is unsure[856], or when they cost more to implement than the measure under review?[857] In addition, as the measure should be the least intrusive

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847 Ibid, para. 83 [emphasis added].
848 Réaume (2009), p. 11.
849 Gerards (2013a), p. 470.
850 Christoffersen (2009), p. 11. This point has also been made by Lord Wilson in *Quila*, as he held that the Secretary of State's legislative amendment of the legal age of marriage from 18 to 21 'is a sledge-hammer but she has not attempted to identify the size of the nut'. See UKSC 12 October 2011, [2011] UKSC 45 (*R (on the application of Quila and another) (FC) v. Secretary of State for the Home Department*), para. 58. Discussed in Section 3.2.5.
851 Réaume (2009), p. 5.
852 Stone Sweet and Mathews (2008), p. 75.
853 Barak (2012), p. 326.
854 Gerards (2013a), p. 483. It has also been held that the requirement of necessity is 'a crude form of cost-benefit balancing', in which courts proceed more impressionistically and costs and benefits are being weighed without exact quantification in metric terms, see Sykes (2003), p. 415.
855 Gerards (2013a), p. 484.
856 Choudhry (2006), pp. 524–525 (putting forward the question who should bear the risk of empirical uncertainty of the necessity of measures).
857 Sykes (2003), p. 403.

PROEF 3

one, the unavoidable question is: less intrusive in comparison to what?[858] Since most fundamental rights infringements – especially if the measures concern legislative and policy decisions – affect a multitude of interests, it matters whose and which interests are taken into account for the necessity of the measure. Different answers may be and, in fact, are given to these questions in judicial practice.

Procedural reasoning may be used by courts to determine whether a measure meets the necessity requirement. Since the necessity of a measure is in itself not a procedural concern, that is to say, a decision-making procedure does not make a measure the least restrictive means, the role of process-based review appears to help courts determine whether the decision-making authority made considerable efforts to opt for the least harmful infringement. In other words, did the decision-making authority investigate whether there were alternatives, and did it sufficiently investigate, explore, and consider the other available means?[859] Depending on the intensity of review, judicial procedural reasoning in the minimal impairment test may constitute emphasising the choice of means as irrational or arbitrary or, instead, well-informed and rational, or something in between these requirements.[860]

A good example of a procedural assessment of the necessity of a measure can be found in the ECJ case of *Volker und Markus Schecke*.[861] The judgment concerned EU Regulations that required the publication of personal information of the beneficiaries of European agricultural funds, which infringed those beneficiaries' right to privacy and the protection of their personal data (Articles 7 and 8 EU Charter). The ECJ considered that the Regulations served the legitimate aim of transparency of EU decision-making, nevertheless, it held that the measure went beyond what was 'strictly necessary'.[862] It considered that 'there was *nothing to show that [the EU legislature] took into consideration* methods of publishing information on the beneficiaries concerned which would be consistent with the objective of such publication while at the same time *causing less interference* with those beneficiaries' right[s]'.[863] It went on to mention less infringing alternatives, and it considered that the EU legislature 'ought thus to have examined … whether the publication by name limited in the manner [as] indicated … would have been sufficient to achieve the objectives of the European Union legislation'.[864] In other words, it found that the EU legislature had not done its preparatory work properly in order to ensure that the rights of the beneficiaries were impaired only to a minimum degree.[865] Likewise, in *Quila*, the UKSC explicitly applied a necessity test. In the judgment it

[858] Gerards (2013a), pp. 485–486.
[859] Ibid, p. 487.
[860] Ibid.
[861] ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7. See also Gerards (2013a), p. 487, footnote 123 and Lenaerts (2012), pp. 11–12.
[862] ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). This requirement is mentioned in para. 77 and the conclusion was reached in para. 86.
[863] Ibid, para. 81.
[864] Ibid, para. 83.
[865] Lenaerts (2012), p. 12.

PROEF 3

concerned a legislative amendment of the legal age of marriage from 18 to 21 with the aim of preventing forced marriages. The UKSC considered that the amendment was 'rationally connected to the objective of deterring forced marriages' – in other words, it was suitable – but the Secretary of State had failed to establish 'that the amendment is no more than is necessary to accomplish her objective'.[866] Indeed the amendment was considered 'a sledge-hammer' without the Secretary of State attempting 'to identify the size of the nut'.[867]

Procedural reasoning may also indirectly provide information about the necessity of the measure. Process-based review may be used by courts to assess the quality of a lower court's decision-making process for establishing whether a legislative or administrative measure was necessary. This use of procedural reasoning can be illustrated by reference to the *Carter* judgment of the CSC.[868] The case was about the prohibition of assisted suicide as laid down in the Canadian Criminal Code. The lower court concluded, in a 323-page judgment, that the blanket ban had violated the constitutional right to life, liberty, and security.[869] As regards the necessity of the ban submitted by the Canadian government, the lower court held that on the basis of evidence provided the measure could not be regarded as the least infringing measure.[870] Indeed, it found the blanket ban to be too extensive, since it was meant to protect vulnerable persons but also prevented well-informed persons, who were free from coercion, from choosing to end their life in a dignified manner.[871] In reviewing the case, the CSC was satisfied with the detailed assessment by the lower court of the necessity of the measure. It held that it was 'the task of the trial judge to determine whether a regime less restrictive … could address the risks associated with physician-assisted dying, or whether Canada was right to say that the risks could not adequately be addressed through the use of safeguards'.[872] The CSC considered that the trial judge 'after an exhaustive review of the evidence' had rejected the view of the government that only a blanket ban could pursue the aim of protecting vulnerable persons.[873] On the basis of the review of the decision-making process of the lower court's necessity assessment, the CSC did not find 'error in the trial's judge's analysis of minimal impairment' and thus concluded that the absolute prohibition of doctor-assisted suicide was not minimally impairing.[874]

E. *Proportionality in the strict sense*

Proportionality in the strict sense relates to a test of determining whether the measure infringing a right can reasonably be considered to outweigh the rights and interests affected

[866] UKSC 12 October 2011, [2011] UKSC 45 (*R (on the application of Quila and another) (FC) v. Secretary of State for the Home Department*), para. 58. See Section 3.2.5.
[867] Ibid.
[868] CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*). See Section 4.2.4.
[869] SCBC 15 June 2012, 2012 BCSC 886 (*Lee Carter v. Canada (Attorney General)*), para. 18.
[870] Ibid, para. 1369.
[871] Ibid, para. 1371.
[872] CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*), para. 103.
[873] Ibid, paras. 118 and 120.
[874] Ibid, para. 121.

PROEF 3

by it. This proportionality test is generally considered to imply a balancing test[875]; that is, a balancing of the benefits gained from the measure in light of the aim pursued, and of the harm caused by the right infringed.[876] The test has been described as a result-oriented test that looks into the relationship between the effect of the measure and the negative effects for the right infringed by its imposition.[877] The comparison is moreover value-laden, meaning that it clarifies whether the relationship can reasonably be considered proper or proportionate.[878] Besides determining which interests should be taken into account in this balancing test, proportionality in the strict sense is commonly understood as requiring courts to attach a certain weight to each of these interests. This is also known as the 'weight formula'.[879] This weight formula – although taking the form of a mathematical formula – is generally not regarded as a mechanical test[880], as the determination of which interests are to be taken into account, as well as what weight should be given to each of them, depends, at least to a certain extent, on intuitive judgments.[881]

At the same time, even though balancing is at the core of proportionality *stricto sensu* and is widely applied, the issue remains hotly debated. Such debates exist not only as to the way in which the test should be given shape in practice – for example, whether it concerns a calculative method or rather 'a metaphor we use to describe a residual category within rights analysis that registers the importance of the various concern at stake'[882] – but also, more fundamentally, as to whether courts should be allowed to carry out such a balancing test. Both proponents and opponents argue their position on the judicial balancing exercise from the perspectives of democracy, separation of powers, the (ir)rationality, and the objectivity or subjectivity of this test.[883] Another line of debate pertains to the question of whether proportionality review does take rights sufficiently seriously, as it is held to devalue the normative validity of fundamental rights.[884] Simultaneously, even though a balancing test appears to be a utilitarian or consequentialist undertaking, it has also been argued that it is not (necessarily) at odds with a deontological understanding of fundamental rights.[885]

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875 For a countering perspective, Schauer (2014), pp. 177–178.

876 Barak (2012), p. 340.

877 Ibid, p. 342.

878 Ibid. This notion seems to be applied in various context, see for example Grimm (2007), p. 383 (the *Oakes* test in Canada) and Gerards (2013a), p. 469 (ECtHR).

879 See Alexy (2017a), pp. 16–18; Alexy (2017b), pp. 37–38; and Alexy (2002), pp. 408–414.

880 Although research into the use of computer analytics and algorithms for judicial review suggest that a mechanical interpretation of the balancing exercise might be possible. See for example, Kopa (2014).

881 Klatt and Meister (2012), pp. 57–58.

882 Kumm and Walen (2014), p. 69 and see also Klatt and Meister (2012), pp. 57–58.

883 Some opponents of proportionality balancing are e.g., Urbina (2017); Habermas (1998), pp. 254–259; and Aleinikoff (1987). And some well-known proponents are e.g., Barak (2012); Möller (2012); and Alexy (2002). For an overview of the various perspective on proportionality review in fundamental rights cases, see Gardbaum (2014), pp. 261–266; in relation to the US context, see Porat (2014); and concerning the ECtHR, see Cariolou (2008), pp. 261–268.

884 E.g. Tsakyrakis (2009). See for a discussion Porat (2014), pp. 401–407.

885 Kumm and Walen (2014), pp. 69–70 (arguing that deontology is structurally pluralist – meaning that it is not captured in one single concept – and explaining, in light of the concept of human dignity, that

PROEF 3

Alternatives to a proportionality test have also been proposed. It has been argued that proportionality should be replaced by a subsumption test, a test of reasonableness, or a test of the protection of minimum positions.[886] Other alternatives relate to tests focusing on core rights or categorisation.[887] Some of these alternatives are reflected in judicial practice. For example, a reasonableness test is considered an alternative to proportionality in the UK.[888] In that context, a reasonableness test was developed in 1948 and is applied generally in administrative law. This test entailed that a decision was not considered reasonable when it was found to comprise 'something so absurd that no sensible person could ever dream that it lay within the powers of the authority'.[889] Such an approach is also taken by South African courts in relation to socio-economic rights when they impose positive obligations on the authorities.[890] Nevertheless, it is unclear whether this is truly an alternative, or rather a way of determining the intensity of review with which the various interests at stake are balanced against one another.[891] In any case, in the UK the reasonableness test is increasingly moving towards a proportionality test in fundamental rights cases.[892]

The use of process-based review for determining proportionality in the strict sense might perhaps be striking, as finding a balance between various interests appears to be a substantive issue. Yet, procedural reasoning plays a particular role where courts want to determine whether decision-making authorities have sought to strike such a fair balance. Process-based review as applied in the proportionality assessment, therefore, takes the form of a consideration of whether the decision-making authorities have identified all relevant interests at stake and carefully weighed those against one another in order to reach a particular outcome. Relevant points of reference for courts may be whether the legislature deliberated on a particular issue and informed itself of available data or studies in developing legislation and policies, whether executive bodies tried to explain the need for a decision or for the adoption of policies, or whether lower courts had taken into account the arguments of the parties or the available medical and expert reports.[893] In the examples provided in Part I, such process-based proportionality review appears to be a central feature.

deontology and proportionality in strict sense do not exclude each other, instead the balancing test is thoroughly deontological).

886 Alexy (2017b), pp. 40–42, discussing and rejecting these three alternatives to the balancing test.

887 Barak (2012), pp. 493–527.

888 See for some variations in judicial practice of this approach, see Bobek (2008).

889 As established by Lord Greene in UKCoA 10 November, [1948] 1KB 223 (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*), p. 229. See also Alexy (2017b), p. 41.

890 Quinot and Liebenberg (2011), p. 653ff.

891 In a similar vein, see Barak (2012), pp. 375–378.

892 Kavanagh (2009), p. 246 ('It has now become commonplace to observe that when reasonableness is intensively applied in the context of human rights, it approximates very closely to proportionality, and when proportionality is applied with a substantial degree of deference, it approximates very closely to Wednesbury. Both tests can be applied with varying degrees of intensity and this, rather than the choice of test, is what makes the difference to the outcome of a case.).

893 Some of these standards have already been addressed in Section 6.3.3A.

PROEF 3

For example, in *Urgenda*, the DCTH held that the starting point of its assessment of the Dutch government's new policy concerning the reduction of the emission of greenhouse gases, was 'that in its decision-making process the State *carefully consider[ed] the various interests*'.[894] In its subsequent assessment, the DCTH nevertheless went on to substantively consider what these interests where and whether the policy struck an appropriate balance, which it concluded it did not. In *Miss Behavin' Ltd.*, the UKSC's Judge Neuberger noted in his separate opinion that 'where a council has properly considered the issue in relation to a particular application [especially if it had expressly taken into account the right to freedom of expression], the court is inherently less likely to conclude that the decision ultimately reached infringes the applicant's rights'.[895] A careful consideration of the rights and interests at stake might thus lead to lesser degree of scrutiny, or at least to an increased chance that the court would accept the decision-making authority's decision.

In the context of the ECtHR it has been argued that the ECtHR's focus lies predominantly on the proportionality assessment.[896] In that light, it may not be surprising that the ECtHR examples provided in Part I seem to relate in particular to the proportionality test. For example, in *Von Hannover (No. 2)*, the ECtHR considered that '[w]here the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts'.[897] After considering that 'the *national courts carefully balanced* the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life' and 'explicitly took account of the Court's relevant case-law', it concluded that the German courts had not failed to meet their positive obligations under the right to privacy.[898] Also in *Hatton*, the ECtHR emphasised 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*'.[899] Aware of the fact that the UK government included scientific studies in the development of its night flight scheme and allowed for a public consultation procedure, the ECtHR concluded that the government had not failed to strike a fair balance, nor were there procedural shortcomings.[900]

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894 DCTH 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda*), para. 4.74. See Section 3.2.4.

895 UKSC 25 April 2007, [2007] UKHL 19 (*Belfast City Council v. Miss Behavin' Ltd.*), para. 91. See Section 3.2.5.

896 Gerards (2013a), p. 469. This is similar to the situation in Germany, where the balancing test is also considered to be the decisive test, while in Canada, the necessity test appears to be the most important one, see Grimm (2007), p. 387–389.

897 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), para. 107. See Section 4.2.7.

898 Ibid, paras. 124–126.

899 ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*), para. 128 [emphasis added]. See Section 3.2.6.

900 Ibid, para. 129.

In these judgments the ECtHR also noted that what the right balance is between the interests at stake 'depends on the relative weight given to each of them'.[901] In *Von Hannover (No. 2)*, it accorded certain weights to the interests at stake, for example, it mentioned that the 'freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment … [and limitations to this right] must, however, be construed strictly'.[902] In *Winterstein*, the ECtHR also applied procedural reasoning in its proportionality analysis and it held as a general principle that 'the Court must examine whether the decision-making process leading to measures of *interference was fair and such as to afford due respect to the interests* safeguarded to the individual by Article 8 [ECHR]'.[903] It continued by explaining that national courts should take the various interests at stake into account when considering whether an eviction measure would be proportionate. The ECtHR seemed to accord weight especially to whether the home was lawfully established ('if the home was lawfully established, this factor would weigh against the legitimacy of requiring the individual to move') and whether alternative accommodation would be available when the applicants were evicted.[904] It further considered that 'the domestic courts ordered the applicant's eviction without having analysed the proportionality of the measure' as they gave paramount importance to the fact that 'the occupation did not comply with the land-use plan'.[905] It concluded that 'that approach is in itself problematic, amounting to a *failure to comply with the principle of proportionality*' and ultimately found a violation of the ECHR.[906] This judgment shows how the ECtHR requires national courts to carry out a balancing exercise and, in doing so, may accord a certain weight to each interest involved.

6.3.6 IMPORTANCE OF PROCEDURAL CONSIDERATIONS

Section 5.3.2B explained that judicial review can be envisaged as a spectrum of review, running from purely procedural review to purely substantive review, with mixed forms in between. Process-based review then covers not only the situations in which procedural considerations are the sole and decisive basis for courts' reasoning in relation to parts of the judgments, but also reasoning that includes both procedural and substantive considerations. The impact of this conceptualisation of process-

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901 Ibid, para. 125.

902 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), para. 101. See Section 4.2.7.

903 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*), para. 148γ. See Section 4.2.7.

904 Ibid, para. 148ε.

905 Ibid, para. 156.

906 Ibid, paras. 156 and 167.

PROEF 3

based review is also relevant for the possible applications of process-based review. In particular, what kind of procedural reasoning is applied becomes truly visible when the inferences drawn at the micro-level ('result', see Section 6.3.4) are linked to the justification tests (Section 6.3.5) and are given a certain weight. This section addresses this last element, namely the importance attached to procedural considerations in light of a particular justification test. For reasons of analytical clarity, the degrees of weight attached to procedural consideration are discussed here in three distinct levels of relevance of importance, instead of an open-ended sliding scale.[907] These three levels can be termed: exclusively, decisively, and supportive process-based review.

First, *exclusively process-based review* concerns process-based review in its purest form, that is, procedural considerations are the sole and decisive elements of courts' reasoning in relation to a particular part of a test of justification. In Section 5.3.2B, this was also called purely procedural review. An example of such use of process-based review can be found in a judgment of the CCC.[908] In the '*Consultation of Ethnic Communities case*', the CCC extensively examined the legislative process of the legislature and held that the legislature had failed to consult ethnic minorities, even though this was required by the Political Constitution of Colombia. For that reason it 'concluded that the failure of the duty to consult ethnic communities during the adoption of amendments to the Constitution *constitutes a procedural defect* that has substantive consequences' and, ultimately, it declared '*the [legislation] unconstitutional on the basis of procedural defects*'.[909] In this judgment the CCC relied exclusively on procedural reasoning for determining that the legislative enactment process was incompatible with the right to political participation of minorities.

Besides this pure form of procedural reasoning, procedural considerations can be decisive in courts' reasoning, even if substantive considerations are also present. This can be called *decisively process-based review*. In this application, procedural considerations seem to be conclusive or critical for courts' conclusion in light of the justification stage. A positive example of decisively process-based review can be found in the *Von Hannover (No. 2)* judgment.[910] In relation to the question of whether national courts had complied with their positive obligations to strike a balance between the right to privacy and the freedom of the press, the ECtHR relied primarily on an assessment of the quality of the national courts' decision-making process. It concluded that 'the national courts *carefully balanced* the right[s involved]' and '*explicitly took account* of the Court's relevant case law'.[911] On the basis of the effort of the German courts to

907 See for an explanation for this reasoning Section 6.3.1.

908 See Section 2.2.6.

909 CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*'), para. 7.7.4 [emphasis added].

910 Section 4.2.7

911 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), para. 124–125. See Section 4.2.7.

PROEF 3

try to strike a fair balance and on the basis of some substantive considerations[912], the ECtHR concluded that the national courts had not failed to comply with their positive obligations under the ECHR.[913]

Thirdly, *supportive process-based review* encompasses judicial reasoning in which procedural considerations and substantive considerations complement each other. This use of process-based review means that procedural considerations are relevant for courts' reasoning in relation to a particular justification stage, but they are not decisive. The relevance of procedural considerations in judgments can vary from case to case. In that regard it might be possible to break this level down further into another two categories: procedural considerations that are *more relevant* and procedural considerations that are *less relevant*. This distinction between more and less relevant procedural considerations appears to be particularly apt in judgments in which the inferences drawn on the basis of various considerations are counter-indicative. This occurs when considerations point in a different direction, that is, on the basis of one consideration a negative inference is drawn and on the basis of another consideration a positive inference is drawn. A more relevant procedural consideration may tip the scale in one direction, despite another less relevant substantive or procedural consideration pointing in a different direction. When courts rely on many different considerations, however, it may be difficult to establish the weight of one particular consideration in the overall assessment of a justification test. In such cases the sheer number of considerations pointing in one direction appears to provide the basis for a conclusion. It is then more fruitful to talk about supportive process-based review.

To illustrate, the UKSC seemed to supplement its substantive approach with procedural considerations in *Quila*.[914] In that judgment, the UKSC carefully considered the amendment of the legal age of marriage from 18 to 21, holding that it had been disproportionate on the substance, and that, in addition, '[e]ven had it been correct to say that the scale of the imbalance was a matter of judgement for the Secretary of State rather than for the courts, *it is not a judgement which, on the evidence before the court, she has ever made*'.[915] The procedural considerations therefore seemed to be relevant, but the substantive considerations appear to have been decisive for the conclusion of the UKSC. In *Hatton*, the ECtHR' procedural considerations appear, by contrast, to have been more relevant than, or, at least, just as relevant as the substantive considerations. In that judgment, the ECtHR carefully scrutinised the substance of the UK government's night flight policy at Heathrow Airport, but it also closely reviewed the decision-making process.[916] In light of these considerations it held that it '*does not find that, in substance, the authorities overstepped their margin of appreciation …, nor does it find that there*

[912] Ibid, paras. 118 and 120.
[913] Ibid, para. 126.
[914] UKSC 12 October 2011, [2011] UKSC 45 (*R (on the application of Quila and another) (FC) v. Secretary of State for the Home Department*). See Section 3.2.5.
[915] Ibid, para. 58.
[916] ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*). See Section 3.2.6.

PROEF 3

have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights'.[917] Both procedural and substantive considerations were thus relevant for the ECtHR's eventual finding that the measure was proportionate. Thorough case-law analyses of ECtHR judgments have shown that the ECtHR generally applies supportive process-based review, as its procedural considerations concerning substantive rights 'form part of a 'net of arguments' that, taken in their entirety, support the outcome reached by the Court'.[918]

Although this section has discussed process-based review in three (or even four) levels of importance, when considering it as a sliding scale instead, the possible varieties of relevance of procedural considerations are unlimited. Nevertheless, the wording of the judgment should at least indicate that procedural considerations were part of the courts' examination to be regarded as process-based review.[919] In the context of the ECtHR, it has been argued that procedural considerations may also implicitly play a role in the ECtHR's reasoning, even if that might not be readily apparent from the wording of the judgment.[920] In addition, in the ECtHR context it might very well be that procedural standards are mentioned in the general principles, but are not explicitly addressed in the application of those general principles to the case.[921] In such situations, it could be that procedural considerations have been part of judges' heuristic process and have played a role in their deliberations, but they did not become part of the explicit reasoning in their judgment.[922] However, since process-based review for the purposes of this study is an argumentative tool rather than a heuristic one, procedural considerations should be given *some explicit weight* in the reasoning of courts for it to be considered process-based review.[923]

6.3.7 CONCLUSION OF PROCEDURAL REASONING

917 Ibid, para. 129 [emphasis added].
918 Gerards (2017), p. 159.
919 See Section 5.2
920 Nussberger (2017), pp. 163–164.
921 See, for example, the ECtHR judgment on the prohibition of burqas in the public sphere against, ECtHR (GC) 1 July 2014, app. no. 4385/11 (*S.A.S. v. France*). For a discussion, see Gerards (2017), p. 145.
922 In the French legal system, for instance, deliberation and discussing various considerations happen largely between judges and is not visible from the outside, see De S-O-l'E. Lasser (2004), p. 324 and see also pp. 47–60.
923 For reasons of legal certainty and judicial legitimacy the use of implicit procedural reasoning by courts might furthermore be ill-advised, as well-reasoned judgments are central to the understanding of and acceptance of judgments.

PROEF 3

As was discussed in Section 6.3.4, 'the result of review' represents only an interim conclusion. The effects of the positive or negative inferences drawn on the basis of procedural reasoning only become apparent once the procedural considerations are discussed in light of a particular part of a judgment (location of review, Section 6.3.5) and their importance is known (Section 6.3.6). Put differently, only then can it be analysed at a meso-level what conclusion can be drawn on the basis of procedural considerations. Just like the result of procedural considerations, the 'conclusion of procedural reasoning' is not a separate element of how process-based review is applied. Indeed, the conclusion should follow logically from combining the previous elements of the inferences drawn, the weight attached to procedural considerations, and the location of these considerations in a particular justification test. These conclusions are of a binary nature; either a measure was proportionate or it was not, and either it was necessary or it was not. Concerning the intensity of review a tripartite conclusion can be drawn, since it is possible to distinguish at least three levels of intensity (lenient, intermediate, and strict).[924] Furthermore, courts may sometimes provide indications of what their conclusion would be without it being decisive. For example, the ECJ in the preliminary ruling in *Dynamic Medien* provided relevant guidelines for national courts to determine whether DVD labelling procedures could be said to be proportionate. In particular the ECJ required that labelling procedures needed to be accessible, timely, and challengeable.[925] It hinted that the procedures under review appeared to meet these procedural standards, but it was for the national courts to ascertain whether that was truly the case.[926] In this case the ECJ's conclusion was thus indecisive.

Considering some of the judgments discussed in Part I, it becomes clear what conclusions have been drawn by the various courts on the basis of procedural reasoning. The *Bayev* judgment of the ECtHR can be mentioned with regard to the legitimate aim test.[927] In that judgment the ECtHR considered the Russian ban of 'gay propaganda' aimed at minors. The ECtHR considered various substantive issues, such as the risk of exploitation and corruption of minors through demonstrations[928], but it also focused on the defective decision-making process, referring to the vagueness of the terminology used, which would lead to an unforeseeable and perhaps even arbitrary application of the law in practice.[929] In light of the negative inferences drawn on the basis of both procedural and substantive considerations, the ECtHR concluded that the ban did not serve to advance the legitimate aim of protection of the rights of others.[930] The procedural considerations with regard to the legitimate aim thus appear to have lent support to the ECtHR's conclusion that the ban did not serve a legitimate aim.

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924 For the explanation of this categorical approach, see Section 6.3.1.
925 ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*), para. 50. See Section 4.2.6.
926 Ibid, para. 51.
927 ECtHR 20 June 2017, app. nos. 67667/09 et al. (*Bayev and Others v. Russia*). See Section 2.2.8.
928 Ibid, para. 79.
929 Ibid, para. 83.
930 Ibid, para. 83.

PROEF 3

Concerning the test of suitability[931], the ECJ's judgment in *Dynamic Medien* was discussed.[932] In that judgment the ECJ concluded that the examination procedure concerning the labelling of DVDs could serve the legitimate aim of protecting children against inappropriate information. The ECJ considered that the substantive level of protection offered was for the EU Member States to determine[933], but its procedural consideration concerning the examination procedure established in Germany appeared to be of considerable relevance for the conclusion that the measure was suitable. In particular, it considered that there was no doubt that the particular examination procedure constituted '*a measure suitable* for protecting children against information and material injurious to their well-being'.[934]

In *Carter*, the CSC focused on the minimal impairment requirement.[935] In this judgment the CSC emphasised the quality of the decision-making process of the lower court as regards the compatibility of the prohibition on medically assisted suicide with the rights to life, liberty, and security. It considered that 'the trial judge heard evidence from scientists, medical practitioners, and others who were familiar with end-of-life decision-making in Canada and abroad' and '[s]he also heard extensive evidence from each of the jurisdictions where physician-assisted dying is legal or regulated'.[936] After closely examining the decision-making process of the lower court, the CSC concluded that there had been 'no error in the trial judge's analysis of minimal impairment' and commended her 'exhaustive review of the evidence'.[937] Although the CSC's review was almost completely procedural in nature, the court also had to decide on new evidence submitted by the Canadian government, which related to a slippery slope argument on the basis of several recent Belgian end-of-life cases.[938] On the basis of both procedural and substantive reasoning, the CSC concluded that 'the absolute prohibition [on medically assisted suicide] is not minimally impairing'.[939]

The prisoner voting rights case can be highlighted in the context of proportionality in the strict sense. In *Hirst (No. 2)* the ECtHR had to determine whether the UK law disenfranchising prisoners – some of whom who were convicted of minor offences as well as offences of the utmost gravity – was compatible with the right to vote.[940] In examining the proportionality of the measure the ECtHR turned its attention to the legislative process that led to the adoption of the law and drew the negative inference that there had been no substantive debate in the UK parliament or any serious attempt made to weigh the rights and interest at stake. Besides this procedural consideration, the ECtHR further noted that the national courts had also not carried

931 See Section 6.3.5C.
932 ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*), para. 50. See Section 4.2.6.
933 Ibid, paras. 44–46.
934 Ibid, para. 47 [emphasis added].
935 CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*). See Section 4.2.4.
936 Ibid, para. 104.
937 Ibid, paras. 121 and 120.
938 Ibid, paras. 110–113.
939 Ibid, para. 121.
940 ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*). See Section 2.2.8.

PROEF 3

out a balancing exercise to determine whether disenfranchisement in individual cases was proportionate.[941] For these reasons, the ECtHR concluded that the measure was disproportionate and fell outside the margin of appreciation afforded to States in this area.[942]

Finally, the *Von Hannover (No. 2)* judgment provides a clear example of process-based review in relation to both the intensity of review and the proportionality test.[943] The ECtHR explicitly referred to the importance of national courts undertaking a balancing exercise for the intensity of review employed, or in the context of the ECHR, the margin of appreciation afforded. The ECtHR noted that 'where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts'.[944] In its subsequent assessment of the decision-making procedure, it carried out a proportionality assessment, finding that 'the national courts carefully balanced the right[s involved]' and 'explicitly took account of the Court's relevant case law'.[945] It follows that both the relatively wide margin of appreciation and the finding that the measure was proportionate, were largely determined on the basis of the judicial decision-making procedures of the German courts. Indeed, because of the careful balancing exercise undertaken by these courts, the ECtHR concluded that they had not failed to comply with their positive obligations under the right to privacy.[946]

6.3.8 RÉSUMÉ AND MACRO-LEVEL IMPACT

The foregoing has outlined various elements within which procedural reasoning can be varied. The elements discussed can be summarised as follows:

1. **Intensity of process-based review**: decision-making procedures can be scrutinised in a strict, intermediate, or lenient manner by courts.
2. **Burden of proof**: either the decision-making authority has to provide evidence of the quality of the decision-making process or the individual has to establish that there were procedural shortcomings. The burden of proof can shift within a case.
3. **Standard for review**: decision-making procedures can be assessed in light of a variety of standards. Amongst others, these standards can be provided by the legislative authority, but also by executive bodies or the judiciary. These standards may also relate to certainty, rationality, and fairness standards.

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941 Ibid, para. 80.
942 Ibid, para. 82.
943 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*). See Sections 3.2.6 and 4.2.7.
944 Ibid, para. 107.
945 Ibid, paras. 124–125.
946 Ibid, para. 126.

PROEF 3

4. **Result of procedural considerations**: in light of the intensity of review (1), the burden of proof (2), and the standard for review (3), courts draw positive or negative inferences concerning the procedure under review. This constitutes a micro-level result, at the level of individual considerations.
5. **Location of review**: procedural reasoning can be applied in relation to preliminary tests – e.g., to determine the intensity of review – or in order to determine whether the interference with a right pursued a legitimate aim, was suitable to achieve that aim, was the least infringing measure, and was proportionate.
6. **Importance of procedural considerations**: there are degrees within which procedural considerations may be of relevance for a justification test. Procedural considerations may be exclusive, decisive, or more or less relevant for the justification test. The inferences drawn on the basis of procedural considerations may be supportive or counter-indicative of one another and of substantive considerations.
7. **Conclusion of procedural reasoning**: in light of the negative or positive inferences drawn (4), the location of the procedural considerations (5), and the weight attached to them (6), courts can conclude whether a justification test was passed or failed by the decision-making authority. This constitutes a meso-level result.

As was noted in Sections 6.3.4 and 6.3.7, the result of procedural considerations and the conclusion of procedural reasoning (should) follow logically from the foregoing elements. While the 'result' concerns micro-level considerations of courts, the 'conclusion' relates to meso-level decisions, that is, it indicates whether a court finds a justification test to be passed or not. It should be noted that these results and conclusions also have an impact on the final judgment in a case. Therefore they provide information about the proceduralness of judgments, which concerns a macro-level analysis of fundamental rights cases.[947] The more direct and influential procedural considerations were for the final judgment, the more procedural a case was from a macro-level perspective. In cases where the issue at stake was primarily a procedural one – for instance, whether the legislative process complied with formal procedural requirements or whether the judicial decision-making process was fair – then process-based review is likely to have a more direct impact on the final decision of courts. By contrast, in cases in which the central question is of a substantive nature – for instance, whether the law was reasonable in light of the right to privacy or whether the authorities prohibited a demonstration on good grounds – then procedural reasoning will generally only have an indirect role for courts in reaching their final decision. Clearly, the first judgment is likely to be more procedural than the latter.

Without going into detail on the proceduralness of the overall judgment, for purposes of completeness of the discussion of the diverse applications of process-based review, it is appropriate to explain some decisions that courts might take at a macro-level that are influenced by procedural reasoning. Obviously courts' process-based reviews have resulted in the finding that fundamental rights infringement could (or

[947] For a discussion of the micro-, meso-, and macro-level of case-law analysis, see Section 5.3.1.

PROEF 3

could not) be justified. More specifically, procedural reasoning has played a role in courts' finding that legislation or legislative amendments were unconstitutional (e.g., *Hartz IV*[948] and *'General Foresting Law case'*[949]) or led them to invalidate legislation (e.g., *Doctors for Life International*[950] and *Volker und Markus Schecke*[951]). In other judgments process-based reasoning played a role in courts rejecting extradition decisions (e.g., *Mr R*[952]) or in confirming administrative or judicial extradition decisions (*SZSSJ*[953] and *'Melloni case'*[954]). In other judgments procedural considerations appear to have affected the conclusion of courts that there has been a violation of fundamental rights standards (e.g., *Winterstein*[955], *Urgenda*[956], and *I.D.G.*[957]), or that there had not been such a violation (e.g., *Von Hannover*[958] and *Hatton*[959]). Besides such conclusive findings, courts have also reached conclusions requiring a reassessment by administrative or judicial bodies of previously taken decisions (*Baker*[960], *'Tunisian case'*[961] and *Comunidad Indígena Eben Ezer*[962]) or, in prejudicial question procedures, that a first assessment should be made (*Dynamic Medien*[963]). What these judgments show is that process-based fundamental rights review, in all its guises, may provide a method of review for courts to reason their judgments.

6.4 CONCLUSION

This chapter discussed three elements that provide important contextual features for a judgment and courts' use of process-based review. The institutional position of courts, which is (partially) determined by the relationship between the reviewer and subject of review, their functions, and the object of their review, are factors that may influence

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948 GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.

949 CCC 23 January 2008, C-030 (*'General Foresting Law'*). See Section 2.2.6.

950 SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*). See Section 2.2.5.

951 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.

952 GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf*). See Section 4.2.3.

953 AHC 27 July 2016, [2016] HCA 29 (*Minister for Immigration and Border Protection v. SZSSJ*). See Section 3.2.2.

954 SCC (Pleno) 13 February 2014, STC 26/2014 (*'Melloni case'*). See Section 4.2.2.

955 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*). See Sections 3.2.6 and 4.2.7.

956 CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.

957 CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*). See Section 4.2.5.

958 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*). See Sections 3.2.6 and 4.2.7.

959 ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*). See Section 3.2.6.

960 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.

961 DSC 28 July 2008, no. 157/2008, U2008.2394H (*'Tunisian case'*). See Section 3.2.3.

962 SCA 30 September 2008, 331:2119 (*Comunidad Indígena Eben Ezer v. Provincia de Salata*). See Section 4.2.1.

963 ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*). See Section 4.2.6.

PROEF 3

whether and how courts may review decision-making procedures. The greater part of this chapter discussed the diverse applications of process-based fundamental rights review. It outlined seven elements – intensity of process-based review, burden of proof, standards for review, result of procedural considerations, location of review, importance of procedural considerations, and the conclusion of procedural reasoning – within each of which procedural reasoning may be varied. For example, intense process-based review may be set apart from lenient process-based review, exclusive and decisive process-based review can be distinguished from supportive process-based review, and procedural reasoning on the basis of certainty standards may be differentiated from procedural reasoning on the basis of rationality and fairness standards. Combining all this, it becomes apparent that process-based fundamental rights review can be applied in a myriad of ways. It is clear that procedural reasoning comes in many shapes and forms, and there is no use for a black-and-white approach.

PROEF 3

REFLECTION ON PART II

The discussions in Chapters 5 and 6 have provided a conceptual-theoretical, yet practically informed understanding of process-based fundamental rights review. On the basis of the literature on, and examples of, procedural reasoning, process-based fundamental rights review has been defined as 'judicial reasoning that assesses public authorities' decision-making processes in light of procedural fundamental rights standards'.[964] This definition includes the constitutive elements of the concept of procedural reasoning. First, there needs to be a reviewer, in this book, that is the courts. Secondly, there is a subject whose decision-making procedure is under review. In this book, this is a public authority, who can be positioned in the legislative, executive, or judicial branch. Thirdly, the objects of review of procedural reasoning are decision-making processes. And, fourthly, procedural reasoning is an evaluative method, which means that courts assess decision-making procedures based on applicable procedural standards in order to make a normative decision.

The discussion of the concept of process-based review highlighted some of the complexities surrounding this type of review. Indeed, the object of review itself is not easily determined. Chapter 5 has shown the difficulties with separating procedural and substantive considerations.[965] It explained that the distinction between the concepts of process and substance is a constructed one, and that there is a twilight zone between both concepts.[966] This means that certain fundamental rights standards or judicial considerations can be regarded as both procedural and substantive. The conceptualisation of procedural reasoning becomes even more intricate as the substance/process distinction plays a predominant role at a micro-level of case-law analysis.[967] At this level the conceptual focus is on labelling considerations of courts as 'procedural' or 'substantive'. Yet, at a meso-level, which focuses on the various justification tests courts apply (e.g., legitimate aim, suitability, necessity and proportionality), courts rely on a combination of considerations to determine whether or not a test was met. Because of the combination of various considerations, courts rarely apply purely procedural reasoning, that is, reasoning which entails exclusively procedural considerations. Process-based review is therefore conceptualised as sitting on a spectrum of judicial review.[968] This continuum ranges from purely procedural reasoning to purely substantive reasoning, with mixed forms in between. The concept of

964 See Section 5.2.3.
965 See Section 5.3.2A.
966 Wheeler Cook (1933), p. 334–335.
967 For a discussion of the micro-, meso- and macro-level of case-law analysis, see Section 5.3.1.
968 See Section 5.3.2B.

PROEF 3

process-based review encompasses a broad range of reasoning, from purely procedural reasoning to reasoning which includes only minor procedural considerations. This means that judicial reasoning can be more, or less, procedural. At the macro-level, the proceduralness of a judgment becomes even more gradual. At this level it is only possible to speak of more, or less, procedurally reasoned judgments.

The discussion of the micro-, meso-, and macro-level case-law analysis paved the way for the analytical outline of the various applications of procedural reasoning, which was provided in Chapter 6. That is, it enabled the distinction of micro- and meso-level results and conclusions. At the micro-level analysis of procedural reasoning, courts may vary the intensity of process-based review[969], the burden of proof[970], and the standards of review.[971] In light of these elements courts may draw positive or negative inferences relating to the procedure under review.[972] On the basis of this micro-level result, and considering the location of the procedural considerations (the preliminary tests and justification tests)[973] and the weight attached to them[974], courts conclude at the meso-level whether a justification test was passed or failed by the decision-making authority.[975] Within each of these seven micro- and meso-level elements (intensity of process-based review, burden of proof, standards for review, result of procedural considerations, location of review, importance of procedural considerations, and conclusion of procedural reasoning) process-based review can be varied. For instance, procedural reasoning can be applied with great intensity, or rather leniently, and it can be applied in relation to the proportionality test or, for example, concerning the suitability test. When combining the various applications from each category with each other, it becomes clear that process-based fundamental rights review can applied in a myriad of ways.

In short, while the definitions of process-based review and process-based fundamental rights review indicate that there are considerable similarities in the practice of procedural reasoning, at the same time, it is apparent that there are many differences to be accounted for. In light of the varieties of application of procedural reasoning, the various levels of case-law analysis, and the intricate connection of procedural and substantive reasoning, the conceptualisation of process-based review provided here shows that procedural reasoning is a multifaceted and not a black-and-white approach. This finding provides a first explanation of why there are so many different views on the value, legitimacy, and appropriateness of procedural reasoning. After all, one manner of application of procedural reasoning may raise no or different concerns to a different use of process-based review. Before being able to answer the question of the role

[969] See Section 6.3.1.
[970] See Section 6.3.2.
[971] See Section 6.3.3.
[972] See Section 6.3.4.
[973] See Section 6.3.5.
[974] See Section 6.3.6.
[975] See Section 6.3.7.

PROEF 3

process-based review can play in fundamental rights cases, it is necessary to address the various debates on the pros and cons of procedural reasoning. Part III discusses these debates. More specifically, it discusses the arguments put forward concerning process-based review in light of the institutional position of courts (Chapter 7), their functions (Chapter 8), and the normative and epistemic challenges they face (Chapters 9).

PROEF 3

PART III

THE THEORY ON PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

PROEF 3

PROEF 3

PROEF 3

INTRODUCTION TO PART III

THE CONTROVERSY OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW: SET-UP OF PART III

The previous Parts have clarified that process-based review is applied in fundamental rights cases and they have provided a conceptualisation of what procedural reasoning entails exactly, including the various ways in which it can work in practice. To reach an answer to this book's central question as to the role that process-based review can reasonably play in fundamental rights cases, however, it is important to take account of the debates surrounding this type of review. Indeed, as Section 1.1 indicated, the use of process-based review and its value are strongly debated, not just in scholarly writing, but also amongst judges. The debates concerning procedural reasoning are plenty and diverse, and they discuss the merits of process-based fundamental rights review from a variety of perspectives. Procedural reasoning is supported by philosophers – like Jürgen Habermas and John Hart Ely – and by legal scholars for reasons related to the roles of courts as procedural watchdogs and as institutions that enhance deliberation. Others, such as Laurence Tribe, have opposed the use of process-based review or have rejected the benefits of such an approach arguing that it would lead to reduced substantive protection of fundamental rights and it would foster judicial dishonesty.

This Part takes a closer look at these debates and provides a comprehensive review of the various arguments that have been advanced in favour of and against the use of procedural reasoning in fundamental rights cases. In addition, this Part aims to provide a deeper understanding of these debates by clarifying their complexities and their interconnectedness. In each chapter the underlying issues of the debates are therefore discussed. These debates inevitably have some overlap with traditional debates on judicial review more generally. After all, Chapter 5 showed that procedural and substantive reasoning are connected on a spectrum of judicial review. For that reason, and for reasons of clarity and structure, the following chapters are organised in light of three questions that take centre stage in constitutional debates generally: (1) What should courts *not* do? (2) What should courts do? And (3) What capacities do courts have? These questions overlap with the institutional position, function and expertise of courts. Before delving into the various debates, these three questions warrant a brief discussion.

PROEF 3

Democratic societies are built on and inspired by the idea of separation of powers as put forward by Charles-Louis de Secondat, best-known as Montesquieu. Many have interpreted Montesquieu's *De L'Esprit des Lois*[976] as allocating the three main functions of government – law-making, administration and adjudication – to three different and separate branches. By allowing inter-institutional checks on the exercise of these powers a power balance can be ensured, which should prevent autocracy. In this context courts would take up the *institutional position* of acting as the '*bouche de la loi*'[977], which means that courts merely apply the law to concrete circumstances and in so doing, provide an important check on the exercise of powers by the other two branches of government. Although the theory on the separation of powers may have inspired today's democratic societies, none of them live up to the strict separation of powers as is said to be envisaged by Montesquieu.[978] In addition, courts do not function as mere 'mouthpieces' of the law, but instead they interpret and apply it, thereby cultivating and developing the law (Section 8.2.2 addresses this in more detail).

Nowadays courts perform a wide variety of functions or tasks far beyond the scope envisaged by Montesquieu. These tasks or *functions* may be categorised in various ways. Karen Alter, for example, has distinguished four functions for the courts: dispute settlement, administrative review, law enforcement, and constitutional review.[979] These functions can generally be said to be divided over four different types of courts: civil, administrative, criminal, and constitutional courts. Dinah Shelton's categorisation, by contrast, focuses on the powers international courts may have: whether they have the power to decide on the limits of jurisdiction ('compétence de la compétence'); to decide on admissibility; to judge on the merits; to order interim measures; to reach conclusions on specific consequences of their judgments (imprisonment, size of fine, measures to be taken by any of the parties); to refer cases to other decision-making authorities; to decide on the binding nature of judgments; and, to deliver advisory opinions.[980] Although there is great use for such categorisations based on applicable law or courts' powers, for the purposes of the present book a functional approach is taken. The reason for this is that the focus of this book is neither on national or international courts, nor on courts with a specific civil, administrative, criminal, constitutional, or fundamental rights mandate alone.[981] Hence, this book draws inspiration from the functional approach taken by Patricia Popelier, Armen Mazmanyan, and Werner Vandenbruwaene. They distinguish

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976 Montesquieu (2000).

977 Montesquieu (2000), Book 6, Chapter 6.

978 It has been explained that the theory of Montesquieu has started to live its own life and is now narrated as a separation of powers story, see Witteveen (1991). For a comprehensive overview of various manners democratic societies have been organised in light of the separation of powers, see Lijphart (2012).

979 Alter (2014).

980 Shelton (2009).

981 Functional approaches are considered useful in comparative law contexts, see e.g., Michaels (2006) and Tushnet (1999b), pp. 1238–1269 ('Functional analysis is possible when a few "case studies" are placed in a more general theoretical context. Then, of course, the theory rather than the case studies does the analytic work', p. 1269).

PROEF 3

four judicial functions within which courts can be keepers of the institutional balance between the various authorities (i.e., they ensure the division of tasks in democratic society and uphold the separation of powers) and they can act as regulatory watchdogs (i.e., they ensure that legal rules are complied with), they can be forums of deliberation (i.e., they ensure and engage in legal and normative reason-based dialogue), and, finally, they can act as guardians of fundamental rights (i.e., they provide remedies against rights' infringements and thereby protect fundamental rights).[982] In addition to these four functions, and besides the general judicial functions of applying the law and standard-setting, this Part also takes account of the topic of judicial deference. This is today a central feature of any jurisdiction and is essential for understanding how courts carry out their functions. In part, and especially where it concerns institutional judicial restraint, it can be seen as the internal application of the judicial function of keeping the institutional balance, as courts show deference because of the division of tasks between the courts and the legislative, administrative, and other judicial branches.

To fulfil their judicial functions courts must have certain abilities, means, and resources. This means that they must have certain *capacities*. In particular, courts must be able to derive the elements that are relevant for the application of the law from concrete situations, and judges must be well-trained in the legal interpretation of laws. Furthermore, they are required to be independent and impartial, so as to allow them to make objective decisions in individual cases.

Considering that courts have certain capacities, perform certain functions, and take up certain institutional positions in democratic societies, the question arises as to what the value of process-based review is for each of these elements. This Part consists of three chapters that follow similar lines to these three main constitutional issues; Chapter 7 discusses the use of procedural reasoning in light of courts' institutional position, Chapter 8 in light of their functions, and Chapter 9 in light of their capacities and expertise.

METHODOLOGY AND METHODS OF PART III

Since procedural reasoning is a form of judicial review, it is unsurprising that considerable attention has been paid to the value of this type of review in constitutional, theoretical and philosophical writings. Although there is a significant amount of scholarship available on process-based review in fundamental rights cases, such as the recent works of Ittai Bar-Siman-Tov[983], Susan Rose-Ackerman, Stefanie Egidy, and James Fowkes[984], and an edited volume by Janneke Gerards and Eva Brems[985], this

[982] Popelier, Mazmanyan, and Vandenbruwaene (2013), p. 6.
[983] E.g., Bar-Siman-Tov (2016); Bar-Siman-Tov (2012); and Bar-Siman-Tov (2011).
[984] Rose-Ackerman, Egidy, and Fowkes (2015).
[985] For a quick overview of the various chapters, see the introduction by Gerards and Brems (2017).

PROEF 3

Part adds to the existing literature by providing a broad discussion of process-based fundamental rights review that is not limited to one particular jurisdiction or court. Similar to Part II, the intention of this Part is to provide a more practice-oriented insight into the theoretical debates by explaining how the different arguments relate to the examples of procedural reasoning and by highlighting how some of these examples have actually triggered debate.

To this end, this Part relies mainly on constitutional law, legal theoretical, and philosophical literature within which arguments have been put forward concerning the use of procedural reasoning. Sometimes the arguments are of an abstract nature, sometimes they focus on a particular court or a set of courts instead. In the discussion of these debates this Part does not take sides, rather its goal is to describe and clarify these arguments. Of necessity, this discussion is non-exhaustive and certainly within different contexts and in different legal systems other viewpoints may be defended. Nevertheless, by focusing on the various main arguments, which are often broadly shared within legal systems, many essential positions are clarified.

The discussion of the arguments in three distinct chapters has been done for reasons of clarity and structure. Pulling the different arguments apart allows this Part to explain and highlight the various underlying issues and thereby offer better insight into how courts can use process-based review to address certain issues and concerns. At the same time, however, a discussion in different parts has the disadvantage of overlooking interactions and overlaps between the various debates. Indeed, the categorisations on the positions taken and arguments put forward in favour of or against procedural reasoning generally cross-cut the categorisation made.

More generally, on a theoretical level it is difficult to keep separate the institutional position, functions, and capacities of courts. Certainly, these issues are inherently connected, and they are relative to the functions, positions, and capacities of the legislative and administrative authorities, as well as to those of the judiciary. For example, the discussion as to whether it is the courts' function to engage in moral or empirical reasoning is not just a matter of how courts ought to function, but also relates to their capacity and institutional position. Other public authorities may be in a better institutional position to decide on morally sensitive matters, for example, due to their democratic legitimation. Or they may be better equipped to enter in evidence-based decision-making, due to their experience and resources. To provide an interconnected understanding of the debates on procedural reasoning, the Reflection to Part III addresses several overlaps between the positions taken in these chapters. Through highlighting the interaction between the various arguments it will become even clearer that the idea of process-based review is very complex, and its desirability or otherwise is not a straightforward matter. This underscores that process-based review is not a one-size-fits-all solution for constitutional or fundamental rights challenges, and that its use should be carefully considered.

PROEF 3

ROADMAP TO PART III

The following chapters address the various views on the desirability of process-based fundamental rights review. Chapter 7 discusses the arguments concerning procedural reasoning and the rule of law, deliberative democracy, and institutional judicial restraint. It connects the various arguments on the institutional position of courts with views on key notions in constitutional theory, such as on democracy, separation of powers, the rule of law, and subsidiarity. Chapter 8 considers the debates on procedural reasoning from the functions of courts, more particularly their mandate, their role in (procedural) standard-setting, and their role as guardians of fundamental rights. This chapter concludes by finding that the various and competing views can be explained in light of divergent perspectives on the primacy of procedure as well as on one's focus on either the concrete or the generic fundamental rights impact of a procedurally reasoned judgment. Chapter 9 turns to the more specific discussions, that is, the normative and epistemic challenges courts may face in their work. On the one hand, this chapter addresses the issue of the neutrality, or rather normativity, of procedures and the issue of morally sensitive cases, the so-called 'hard cases'. On the other hand, it focuses on courts' expertise in matters of process and their capacity to enter undertake empirical reasoning. It also connects the debates on procedural reasoning with different views on the relationships between law and morality and between law and empiricism. The Reflection to Part III summarises and reflects on the main findings of these chapters.

PROEF 3

PROEF 3

CHAPTER 7

DEBATES CONCERNING PROCESS-BASED REVIEW AND THE RULE OF LAW, DELIBERATIVE DEMOCRACY, AND INSTITUTIONAL JUDICIAL RESTRAINT

7.1 INTRODUCTION

Chapter 6 demonstrated the various ways in which procedural reasoning can be applied and the various standards that procedural reasoning may protect. Courts may protect certainty, rationality, and fairness standards by looking into the quality of decision-making procedures of public authorities. As was explained in that chapter, these standards are closely linked to central features of constitutional and international legal systems, such as the rule of law, democracy, separation of powers, and subsidiarity. Unsurprisingly then, from these central elements of institutional and constitutional design, process-based review has been the subject of debate.

In general, three main strands of argumentation can be distinguished in relation to the role and institutional position of courts in democratic societies and their use of procedural reasoning. First, process-based review is related to courts' role in upholding the rule of law, including their review of the legal validity of decisions of legislative and administrative authorities (Section 7.2). Secondly, process-based review is connected to courts' role in guaranteeing deliberative decision-making in democratic societies, and thus to theories on deliberative democracy (Section 7.3). Thirdly, process-based review is related to institutional judicial restraint, which may be warranted in light of the separation and division of powers within a State as well as across legal systems (Section 7.4). Section 7.5 connects the various insights of these sections and reflects on what these mean for the application of process-based review. It explains that views on constitutional issues such as democracy, separation of powers, the rule of law, and other central features of the institutional design of a legal system, influence perspectives on the legitimacy and appropriateness of process-based review. Furthermore, it clarifies that the historical and institutional context of courts provides for important settings for the use of procedural reasoning by courts, and that the way procedural reasoning is applied may relate to views on the intrusiveness of this type of review. The chapter closes with a brief conclusion (Section 7.6).

PROEF 3

7.2 PROCESS-BASED REVIEW AND RULE OF LAW

A first argument in favour of process-based fundamental rights review relates to the role courts play in deciding on the legal validity of laws, policies and decisions. The importance of 'universal adherence and implementation of the rule of law at both the national and international levels' is generally accepted.[986] However, although the notions of the 'rule of law', '*Rechtsstaat*', '*Estado de derecho*', and '*État du droit*' are widely used, there is no agreement on the exact meaning of these notions.[987] In a definition provided by the UN Secretary-General, the rule of law was described as

> '… a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'[988]

Often a distinction between substantive and procedural conceptions of the rule of law is made.[989] A substantive understanding of this principle, as put forward by the UN Secretary General, includes views on 'what rights the rule of law should guarantee and/ or how the law is made'.[990] Such a thick understanding of the rule of law comprises elements for protecting democracy and a broad array of fundamental rights.[991] Procedural or formal understandings of the rule of law instead take a thin view of the principle, which (solely) requires that any action of a public official should be authorised by law and that the law meets several formal and institutional criteria.[992]

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[986] United Nations (2005), General Assembly, '2005 World Summit Outcome' (24 October 2005), A/Res/60/1, para. 134 <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf>.

[987] United Nations (2011), *Rule of Law Indicators: Implementation Guide and Project Tools* (1st edn., United Nations Publications), p. v <https://www.un.org/ruleoflaw/files/un_rule_of_law_indicators.pdf>. For an overview of instruments on the rule of law, see Council of Europe (2016), European Commission for Democracy through Law (Venice Commission, 'Rule of Law Checklist' (18 March 2016), no. 711/2013, pp. 8–12 and 57ff <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>.

[988] Report of the United Nations, Secretary-General (2004), 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004), S/2004/616, para. 6 <https://www.un.org/ruleoflaw/files/2004%20report.pdf>.

[989] See Tamanaha (2004), p. 91ff.

[990] Bedner (2018), p. 34.

[991] E.g., May and Winchester (2018), pp. 9–10; Tamanaha (2004), pp. 102; and for some insightful figures on the relationship between the rule of law, democracy, and fundamental rights, see the report of the Advisory Council of International Affairs of the Netherlands (2017), 'The Will of the People? The Erosion of Democracy under the Rule of Law in Europe' (June 2017), no. 104 <https://aiv-advies.nl/download/efa5b666–1301–45ef-8702–360939cb4b6a.pdf>.

[992] Within a formal understandings of the rule of law, thinner and thicker versions can be distinguished, see Tamanaha (2004), p. 91. A formalistic understanding has been criticised by the Council of Europe's

PROEF 3

Legal theorists and philosophers have also engaged in discussing the meaning and merits of the rule of law, and tend to focus on its procedural conception.[993] It is from such a procedural understanding that process-based review has been advanced as a means for courts to uphold the rule of law. Several of these arguments, as well as some counter-arguments, are explored in this section. The section starts by addressing arguments in favour of process-based review to the effect that courts are authorities for ensuring rule of law compliance (Section 7.2.1). This is followed by a discussion of arguments that put into perspective the role of courts in ensuring the rule of law through procedural reasoning (Section 7.2.2). The main findings of this section are summarised in Section 7.2.3.

7.2.1 COURTS AS AUTHORITIES OF RULE OF LAW COMPLIANCE

The use of process-based fundamental rights review is connected with the upholding of the procedural rule of law. The value and content of this procedural conception of the rule of law have been interpreted by various legal scholars and philosophers. This section addresses the meaning of a 'procedural rule of law' (Section A) and then discusses three arguments in favour of process-based review (Section B).

A. *'Procedural rule of law'*

Philosophers have advanced various procedural understandings of the rule of law. Lon L. Fuller is well-known for having formulated eight formal rule of law requirements. According to him laws should be general, promulgated, prospective, constant, and clear, and they should not be contradictory, applied retroactively, or require the impossible.[994] Friedrich Hayek, in turn, has conceptualised the rule of law as meaning that 'government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge'.[995] Based on Hayek's formula, Joseph Raz has distinguished the rule of law from more substantive virtues of democratic societies, such as 'democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man'.[996] Raz interpreted the procedural rule of law as entailing the following eight principles:

> '(1) all laws should be prospective, open and clear …; (2) laws should be relatively stable …; (3) the making of particular laws (particular legal order) should be guided by open, stable,

Venice Commission, see Council of Europe, European Commission for Democracy through Law (Venice Commission) (2016), 'Rule of Law Checklist' (18 March 2016), no. 711/2013, para. 15 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>.

993 E.g., Waldron (2011b), p. 4.

994 Fuller (1969), pp. 46–91.

995 Hayek (1976), p. 54.

996 Raz (2009), p. 211.

PROEF 3

> clear and general rules …; (4) the independency of the judiciary must be guaranteed…; (5) the principles of natural justice must be observed …; (6) the courts should have review powers over the implementation of the other principles…; (7) the courts should be easily accessible…; (8) the discretion of crime-preventing agencies should not be allowed to pervert the law…'[997]

Clearly, in light of the sixth principle, Raz saw a role for courts in upholding the rule of law. This role entails judicial review of legislation – both parliamentary and subordinate – and administrative decisions, yet, he adds, 'it is a very limited review – merely to ensure conformity to the rule of law'.[998] This means that in Raz's theory, courts' review is restricted to ensuring compliance with the other seven principles. In accordance with these other principles, courts are required to assess legislation and administrative action for their compatibility with procedural rules to prevent arbitrariness, ensure clarity of law and law application, and to guarantee effective remedies. Although Raz formulated these principles for legislative and executive bodies, he held that they apply equally to judicial institutions; also courts should not act arbitrarily.[999] It should be noted that even Raz's fifth principle – the observance of natural justice principles – although seemingly broad and substantive, only entails procedural justice values, in particular 'open and fair hearing, absence of bias, and the like'.[1000] Raz's understanding of the rule of law is thus rather a procedural one.

B. *Rule of law and process-based review*

Pursuing the rule of law | It is possible to derive at least three arguments from scholarly literature on how the procedural understanding of the rule of law supports the use of process-based review by courts. First, Ittai Bar-Siman-Tov has considered that Raz's theory requires judicial review of the decision-making process.[1001] His argument goes that if courts are to ensure compliance with rule of law standards – as Raz suggested – and if these standards are related in particular to procedural standards concerning decision-making by public authorities, then this inherently requires process-based review of those decision-making processes. It should be noted here that Raz's interpretation of the procedural rule of law sees it as 'an ideal, as a standard to which the law ought to conform but which it can and sometimes does violate most radically and systematically'.[1002] In line with Ittai's understanding of Raz's theory, therefore, courts should play an important role in showing whether and to what extent a legal system is in accordance with or contrasts with this ideal. Compliance with the rule of law is thus something authorities should strive for.

[997] Ibid, pp. 214–219.
[998] Ibid, p. 217.
[999] Ibid, p. 197.
[1000] Ibid, p. 217.
[1001] Bar-Siman-Tov (2011), pp. 1940–1941.
[1002] Raz (2009), p. 223.

PROEF 3

Courts appear to have embraced this view in practice. The CSC's *Baker* judgment illustrates how Raz's natural justice rules (Raz's fifth principle) can be interpreted as an argument in favour of process-based review.[1003] In that judgment, the CSC acknowledged that there is an obligation on administrative authorities to meet the standards of procedural fairness, including that decisions should be made 'free from a reasonable apprehension of bias by an impartial decision-maker'.[1004] In addition, the CSC discussed the requirement of legitimate expectations of individuals, and considered that 'this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights'.[1005] Like Raz, the CSC interprets the natural justice principles as relating to procedural matters alone and not to generate substantive rights for individuals.[1006] The *Bayev* judgment of the ECtHR also reflects this.[1007] In that case the ECtHR was concerned with the 'vagueness of the terminology used' in the blanket ban on 'propaganda' of homosexual relations aimed at minors, as well as with 'the potentially unlimited scope of their application'.[1008] It considered that in such circumstances the law was 'not susceptible to foreseeable application'.[1009] According to the ECtHR, the blanket ban could lead to arbitrary enforcement by authorities upholding this law, which had in fact already happened in the case at hand. The Russian law thus failed to meet Raz's first and eight principles, that is, the law was insufficiently 'prospective, open and clear' and it left too much discretion to crime-preventing agencies which could lead them 'to pervert the law'.[1010]

CONSTITUTING THE LAW | Secondly, courts are required to review the legislative process in order to determine what *is* law.[1011] On this understanding, compliance with the procedural rule of law determines whether a rule is indeed a (legally) valid rule.[1012] This relates to H.L.A. Hart's theory as explained in his *The Concept of Law*.[1013] According to Hart's theory any legal system requires rules that help to identify the legal rules of that system. This is the rule of recognition, the rule that determines whether a rule is *truly* a rule.[1014] This rule, 'providing the criteria by which the validity of other rules of the

1003 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.
1004 Ibid, para. 45.
1005 Ibid, para. 26.
1006 For a discussion on the relationship between natural justice principles and the procedural fairness standards the CSC has set out in its case-law, including in the *Baker* judgment, see McKee (2016).
1007 ECtHR 20 June 2017, app. nos. 67667/09 et al. (*Bayev and Others v. Russia*). See Section 2.2.8.
1008 Ibid, paras. 83 and 76.
1009 Ibid, para. 76.
1010 See the principles of Raz quoted in Section 7.2.1A.
1011 Although this section focuses on the Anglo-Saxon debate, similar arguments have been put forward in different jurisdictions as well. Especially in Germany there has been a debate and practice in which courts determine what the law is. For (one of) the first arguments in this regard, see e.g., Schmid (1821), p. 125.
1012 See also Waldron (2011b), p. 13 ('[Raz] seems to suggest that [the Rule of Law] is relevant to law only at an evaluative level, not at the conceptual level').
1013 Hart (2012).
1014 Ibid, p. 94.

PROEF 3

system is assessed is in an important sense … an *ultimate* rule', since it determines what is law and what is not.[1015] Courts take up an important role in constituting the law, as Hart explained:

> 'For the most part, the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisors. There is, of course, difference in the use made by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular conclusion on the footing that a particular rule has been correctly identified as law, what they say has a special authoritative status conferred on it by other rules.'[1016]

To a certain extent, thus, courts can be said to have the authority to determine whether legislation actually meets the criteria to be considered valid legislation. This understanding of the role of courts and the rule of recognition has been considered by Bar-Siman-Tov as supporting the point of view that courts have the authority to review the legislative process.[1017] He summarised this point as follows:

> '[Since] adjudication entails the authority to determine whether legislation satisfies the validity criteria provided by the rule of recognition; the rule of recognition's validity criteria are provided, in turn, at least in part, by the rules that specify the procedure for legislating … [t]herefore … courts should be authorized to determine compliance with those rules.'[1018]

In other words, since the rules establishing the validity of law include rules concerning the procedure of legislation, courts, having the authority to assess the validity of laws, necessarily have the authority to assess the legislative enactment procedure. From this point of view, this means not only that process-based review is an inevitable part of legal systems[1019], it also means that courts are authorities that determine whether a rule is actually law. Only those rules that are adopted in accordance with the formal requirements for legislative enactment are considered to constitute 'law'.

Again, such reasoning in legal theory sometimes resonates in practice. An example might be found in the judgment of the SACC in *Doctors for Life International*.[1020] The judgment concerned the interpretation of the right to political participation as laid down in the South African Constitution. In this case the national and provincial legislatures (the NCOP), found that 'the appropriate method of facilitating public involvement in relation to these Bills [was] to hold public hearings'.[1021] Holding public hearings thus can be regarded as an agreed-upon rule, which helped to establish the

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[1015] Ibid, p. 105.
[1016] Ibid, pp. 101–102.
[1017] Bar-Siman-Tov (2011), p. 1946.
[1018] Ibid, p. 1951.
[1019] Ibid, p. 1954.
[1020] SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*). See Section 2.2.5.
[1021] Ibid, para. 195.

PROEF 3

validity of legislation in that particular case. Having found that the NCOP had failed to hold such public hearings, and the national legislature had not compensated for this, the SACC concluded that the bills adopted were invalid.[1022] In other words, these bills did not constitute 'law', because they did not meet the procedural requirements. In a similar vein, the CCC declared unconstitutional the general foresting law in the '*General Foresting Law case*' and the constitutional amendments to the right of consultation of ethnic minorities in the '*Consultation of Ethnic Communities case*'.[1023] It reached these conclusions as in both instances the constitutional requirement of consultation of indigenous peoples and ethnic minorities was not met.[1024] These judgments show that some courts have indeed taken up a constitutive role by dismissing legislation and constitutional amendments for failing to meet the formal requirements for the adoption of laws. By declaring these laws unconstitutional, these courts established that these were not 'laws' at all.

Enhancing the rule of law | Thirdly, procedural reasoning by courts has been held to enhance rule of law principles, including 'predictability in the interpretation and application of legislation'.[1025] By focusing on the decision-making process, courts do not undermine predictability of legislation by overruling the substantive values set out therein[1026], rather, they are carrying out their function as regulatory watchdogs.[1027] In this role, the (democratic) credentials of the other public authorities are accepted and deference is warranted, but courts may review whether these authorities have actually fulfilled their task and complied with the rule of law.[1028]

Upholding the rule of law through procedural reasoning requires the scrutinising of government action, including the process leading to such action, 'in view of a set of review standards regarding regulatory quality' and thereby 'implicitly or explicitly encouraging lawmakers to act within the limits of these standards'.[1029] There are many examples of the ECtHR doing exactly this. By looking into decision-making processes it may distinguish between good faith States that actually protect the rule of law, democracy, and fundamental rights, and bad faith States, which are backsliding from the rule of law and democratic governance.[1030] Whilst the ECtHR shows deference to States that uphold rule of law values, by contrast, '[s]tates that do not respect the rule of

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1022 Ibid, para. 198.

1023 CCC 23 January 2008, C-030 ('*General Foresting Law*') and CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*'). See Section 2.2.6.

1024 CCC 23 January 2008, C-030 ('*General Foresting Law*'), para. 239 and CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*'), para. 7.7.4.

1025 Sales (2018), p. 5.

1026 Ibid, p. 5.

1027 Mazmanyan, Popelier, and Vandenbruwaene (2013), pp. 13–15.

1028 Ibid, p. 13.

1029 Keyaerts (2013), p. 270.

1030 Çali (2018), pp. 257 and 273 ('The Court is seeking to operate more deferentially towards well-established democracies with strong rule of law systems and focus more robustly on serious violations of human rights where domestic health of democracies are under threat', p. 274).

PROEF 3

law, a fundamental principle that permeates the whole of the Convention system, and do not ensure the impartiality and independence of their judicial systems, oppress political opponents or mask prejudice and hostilities towards vulnerable groups or minorities, cannot expect to be afforded deference under process-based review'.[1031] Although this argument bears similarities to that of Raz, unlike Raz's, it does not necessarily regard the rule of law as an ideal, but rather takes the view that the protection of the rule of law can be realised in practice and that courts may encourage compliance with it.

The SCC's '*Melloni case*' and the GFCC's *Mr R* judgment, both pertaining to the right to a fair trial, may be considered practical examples of the relationship between the rule of law and process-based review.[1032] While the SCC and the GFCC reached different conclusions in their judgments, both of them relied on a fair trial standard that, in accordance with the case-law of the ECtHR, entailed that 'a denial of justice … undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself … or that he intended to escape trial'.[1033] To guarantee these standards, the courts examined the decision-making process of other judicial authorities. These courts may therefore be said to encourage compliance with the right to a fair trial, which forms a central aspect of the procedural rule of law.[1034]

7.2.2 COURTS AS IMPERFECT PROTECTORS OF THE RULE OF LAW

Limited role for courts | The previous section discussed arguments within which courts are considered to protect or enhance the procedural rule of law through process-based review. The formal understanding of the rule of law has simultaneously been a reason for scholars to put into perspective courts' role in protecting the rule of law. Fuller has argued that adjudicative proceedings cannot solve complex problems that allow for various solutions, for example, in relation to the allocation and distribution of (economic) resources or in relation to institutional design.[1035] Although Fuller has conceded that the role of courts in protecting the rule of law is to prevent grave abuse of power, he has also submitted that there are serious disadvantages for relying only on courts. For example, whether courts are situated to protect the rule of law

1031 Spano (2018), p. 493.

1032 SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*') and GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf*). See Sections 4.2.2 and 4.2.3.

1033 ECtHR (GC) 1 March 2006, app. no. 56581/00 (*Sejdovic v. Italy*), para. 82.

1034 A fuller understanding of the procedural rule of law, provided by Raz and Hayek, 'also includes the availability of a fair hearing within the judicial process', see Tamanaha (2004), pp. 119 (on Hayek and the right to a fair trial) and 93 (on Raz and the right to a fair trial).

1035 Fuller (1969), p. 178ff.

PROEF 3

often depends on the willingness and ability of individuals to bring a case before the court.[1036] Other actors like a Council of State or Ombudsman may be needed to detect and protect against such rule of law abuses.[1037] Fuller's formal understanding of the rule of law – or what he calls the 'inner morality of the law'[1038] – leads to a situation where courts play only a minor role in protecting and promoting the rule of law. Since the rule of law is, similar to Raz's interpretation, an ideal or a 'morality of aspiration'[1039], 'the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps toward truly significant accomplishment'.[1040] Courts therefore only perform the role of alerting us when powers are abused, they cannot help us to reach the ideal situation wherein 'all eight of the principles of legality are realized to perfection'.[1041] On this understanding, process-based review is an imperfect and incomplete way of promoting the rule of law.

Process ownership | Another argument against process-based review relates to the idea that the decision-making process is the province of the decision-making authority. Dimitrios Kyritsis has explained this point as meaning that 'what the winners will say to the losers to demand their allegiance to the bill, once passed, is not that it is a morally better bill than the alternatives but that it has satisfied a procedural criterion that doesn't necessarily implicate its merits'.[1042] There is, however, no role for courts in reviewing whether this procedural criterion has been met. As legislatures are under institutional pressure to take into account the interests and convictions of citizens, failure to do so would decrease the likelihood of re-election.[1043] In other words, the solution of the protection of the rule of law is not to impart courts with the function of acting as 'regulatory watchdogs', but the rule of law is protected by the democratic process of elections instead.

From this perspective, the ECJ's judgment in *Volker und Markus Schecke* is worth mentioning.[1044] The case concerned the publication of private information of beneficiaries of European agricultural funds. In the judgment the ECJ concluded that the EU legislature aimed to ensure the principle of transparency of decision-making, but had failed to protect individuals' right to privacy and protection of personal data

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1036 Ibid, p. 81ff.
1037 Ibid, pp. 176–177.
1038 Ibid, p. 4.
1039 Ibid, p. 43 ('All of this adds up to the conclusion that the inner morality of law is condemned to remain largely a morality of aspiration and not a duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman.').
1040 Ibid, p. 44.
1041 Ibid, p. 41.
1042 Kyritsis (2017), p. 86. This is an interpretation of the work of Waldron's work in *Law and Disagreement*, see Waldron (1999). However, I believe that Waldron does not focus on process-based review, he focuses on substantive review. Where Waldron discusses 'process-related reasons', he means procedural reasons for favouring substantive reasoning by courts over or besides decision-making by the legislature, see Waldron (2006), p. 1372.
1043 Kyritsis (2017), p. 86.
1044 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.

PROEF 3

by not considering less infringing measures.[1045] While the ECJ recognised that the goal of transparency was a legitimate aim – which may be considered the third principle of Raz's rule of law, which is that the making of particular laws should be guided by open, stable, clear, and general rules – the EU legislature could not pursue this goal as it pleased. The ECJ required the EU legislature to adopt new regulations within which fundamental rights were taken into account.

Courts' compliance with the rule of law | Another concern relates to the question of whether courts are themselves complying with procedural rule of law requirements. This raises particular objections to the use of process-based review from an originalist understanding of the rule of law.[1046] This means that the rule of law requires courts to oversee compliance with the legislation, in accordance with the law. Process-based review itself, however, may be 'subject to judicial abuse' in two ways.[1047] First, courts may enact procedural requirements beyond the explicitly defined requirements, and secondly, courts may apply procedural reasoning in an unpredictable and non-principled manner. If courts applied process-based review in a non-principled manner, they might even be considered to violate the rule of law requirement of predictability of the law.[1048] This argument seems to apply to fundamental rights adjudication more broadly, whether it concerns substantive or procedural reasoning, as courts often do not take a principled approach, but rather, apply concepts, approaches, and interpretation techniques pragmatically and with a certain degree of flexibility. Several of these arguments in relation to process-based review are addressed in Section 9.2.1F, which concerns the debate on the neutrality of procedural reasoning.

The first 'abuse', the issue of process-based review as being incompatible with the rule of law, arises in particular when courts apply procedural reasoning in light of standards that parties to a case could not anticipate. For example, when the review is based on process-based review of substantive rights[1049], or in light of detailed procedural requirements that have no basis in the written text.[1050] Especially in fundamental rights cases, indeterminacy of rights has to be dealt with, and since courts are required to interpret these rights, this could lead to an expansion of the law. Indeed, research into the protection of procedural interests by the ECtHR has indicated that

[1045] Ibid, para. 81.

[1046] On originalism, see more extensively Section 8.2.2A.

[1047] Coenen (2009), p. 2863.

[1048] Ibid, pp. 2864. This is also a primary concern addressed by Neuborne (1982), pp. 2861–2867 ('If a court cannot evolve such a theory to govern its review function, separation of powers based judicial review would degenerate into an elaborate legal shell game, with courts defending substantive values by manipulating rules of process to ensure that the power to act in derogation of favored substantive values is always under the other procedural shell.').

[1049] Coenen (2009), p. 2854 ('[I]f the Constitution's text dictates the use of specialized decision-making structures in impeachment, treaty-ratification, and other distinctive contexts, how can courts demand, the use of similarly specialized, but unenumerated, decision-making structures in other settings?', p. 2856).

[1050] This element is also addressed in Sections 8.2.2B and 9.3.1B.

the ECtHR has provided protection of adequate administrative procedures under substantive rights which otherwise would have fallen outside the scope of procedural rights, such as the right to a fair trial and the right to an effective remedy.[1051] The *Hatton* judgment concerning the right to respect of the private life is a case in point. In the judgment the ECtHR considered compliance with the requirement on administrative authorities to 'involve appropriate investigation and studies' when striking a balance between the various interests at stake.[1052] This procedural requirement would not fall within the scope of protection provided under the right to a fair trial (Article 6 ECHR) nor the right to an effective remedy (Article 13 ECHR), and cannot be found in the text or *travaux préparatoires* of substantive rights either.[1053]

7.2.3 RÉSUMÉ

The role of process-based review in upholding the rule of law is subject to debate. On the one hand, procedural reasoning is connected with a procedural understanding of the rule of law and its various requirements. It has been contended that procedural reasoning can help to achieve the ideal of the rule of law and that it allows courts to take up a constitutive role in determining what the 'law' is. Process-based review has furthermore been held to encourage decision-making authorities to follow rule of law standards. On the other hand, the role of courts in ensuring the rule of law has been put into perspective. It has been argued that courts cannot truly ensure public authorities' compliance with the rule of law. In addition, the separation of powers doctrine may be upset by courts when they delve into the decision-making procedures of other public authorities. And, perhaps most fundamentally, courts may even be said to transgress the boundaries of the rule of law by inconsistently applying the law and by imposing new and unforeseen standards.

7.3 PROCESS-BASED REVIEW AND DELIBERATIVE DEMOCRATIC THEORY

Courts' role in democratic society has received considerable attention in democratic theory.[1054] This section focuses on theories of deliberative democracy as, from that

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[1051] De Jong (2017), p. 261 ('Het Hof lijkt er dus voor te kiezen om extra bescherming te bieden onder de materiële artikelen waar dit onder de procedurele normen uit het EVRM niet mogelijk is' [Seemingly, the Court chooses to provide extra protection [of fundamental rights] under the substantive Articles where this is not possible under procedural norms of the ECHR.]).

[1052] ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*), para. 128. See Section 3.2.6.

[1053] De Jong (2017), pp. 259–261.

[1054] For example, De Morree explains the concept of militant democracies in the context of the ECtHR protecting democracy through Article 17 ECHR, see De Morree (2016), p. 225ff. For an overview of various democratic theories, see Held (2006) and Cunningham (2002).

PROEF 3

perspective, process-based fundamental rights review has been proposed as a way for courts to function as forums of deliberation.[1055] According to Conrado Hübner Mendes, courts may play a role in deliberative democracy in a four ways.[1056] First, they can be considered 'custodians' of public reason. Courts are then guardians and promoters of deliberative process by other – more deliberative – institutions. Secondly, they can be regarded as 'public reasoners' as they represent public discourse in their own judgments. Thirdly, courts may be 'interlocutors' of deliberative democracy in the way in which they interact with other public authorities. Finally, they may be 'deliberators' themselves. In this understanding, the deliberative elements of the internal processes of judicial decision-making are considered at different stages.

This section addresses these four judicial functions and their relation to process-based fundamental rights review. Section 7.3.1 addresses deliberative democratic theories and courts' role in ensuring that other public authorities perform their deliberative functions via process-based review. This section thus entails a discussion of process-based review as part of courts' task as guardians or promoters of deliberative practices in a democratic State (the first role distinguished by Hübner Mendes). Section 7.3.2 discusses how courts themselves can be seen as institutions playing a part in the deliberative processes in democratic societies. This second interpretation considers how process-based review can facilitate the courts' own role in these deliberative processes, either in the sense of 'public reasoners', 'interlocutors', or as 'deliberators' (the second, third, and fourth roles distinguished by Hübner Mendes). Section 7.3.3 goes on to discuss arguments against the use of procedural reasoning from the perspective of deliberative democracies. Finally, Section 7.3.4 summarises the main findings of this section.

7.3.1 COURTS AS GUARDIANS AND PROMOTERS OF DELIBERATIVE PROCESSES

In democratic theory emphasis is generally placed on the role of parliaments as the democratic institutions par excellence. Yet, courts may also play an important role in upholding democratic values. Section A first briefly addresses the meaning of deliberative democracy and the content of deliberative procedures. The discussion then focuses on various arguments put forward concerning the role procedural reasoning may play in safeguarding deliberative values (Section B) as well as in promoting or enhancing these values (Section C).

A. *'Deliberative democracy' and 'deliberative procedures'*

Deliberative democratic theories rely on a procedural conception of democracy, emphasising the importance of the political process rather than focusing on the

[1055] See Mazmanyan, Popelier, and Vandenbruwaene (2013), pp. 11–13.
[1056] Hübner Mendes (2013), pp. 85–91.

PROEF 3

substantive outcome.[1057] As Bernard Manin has argued, legitimacy of decisions 'is not the pre-determined will of individuals, but rather the process of its formation, that is, deliberation itself'.[1058] Joshua Cohen held deliberative democracy to be an interpretation of the ideal democracy, meaning that policies are justifiable because of the deliberative process followed.[1059] Amy Gutmann and Dennis Thompson, in their turn, have taken the view that deliberations are merely the most effective method to reach justifiable outcomes.[1060] This raises the question of what deliberative procedures actually are.

Generally, deliberative democratic theorists agree that deliberative procedures are those that allow for reflection in relation to facts, are future-oriented, and other-regarding.[1061] What is important is that people should be willing to learn from each other and review their preferences as to the content as well as to the process.[1062] Deliberative decision-making is thus dependent on reciprocity of reasonable reflections. Cass Sunstein, for example, has submitted that a '[w]ell-functioning system of democracy rests not on preferences but on reasons'.[1063] Likewise, the goal of the democratic process is that it encourages citizens to search for consensus as regards common goods.[1064]

In relation to institutional practice, various interpretations have been given as to what requirements deliberative procedures ought to meet in order to be qualified as such. James Fishkin has argued that the legitimacy of deliberations depends on five characteristics: access to reasonably accurate information, the substantive balance of different views, representation of diverse positions, the conscientiousness of participants, and equal considerations of arguments.[1065] Cohen described several other features of deliberative procedures.[1066] As summarised by Jürgen Habermas, these entail:

> '(a) processes of deliberation take place in an argumentative form, that is, through the regulated exchange of information and reasons among parties; (b) deliberations are inclusive and public …; (c) deliberations are free of any external coercion …; (d) deliberations are free of any internal coercion that could detract from the equality of the participants …; (e) deliberations aim in general at rationally motivated agreement and can in principle be indefinitely continued or resumed at any time …; (f) political deliberations extend to any matter that can be regulated in the equal interest of all …; (g) political deliberations also

[1057] See for a discussion of substantivism and proceduralism, De Morree (2016), pp. 157–159 and Zurn (2002), pp. 475–476.
[1058] Manin (1987), p. 352.
[1059] Cohen (1989), pp. 21–23.
[1060] Nelson (2000), p. 186.
[1061] Held (2006), p. 232, with a reference to Offe and Preuss (1991), pp. 156–157.
[1062] Held (2006), p. 233.
[1063] Sunstein (1997), p. 94.
[1064] Cunningham (2002), p. 165.
[1065] Fishkin (2011), pp. 251–252.
[1066] Cohen (1989), pp. 22–24.

PROEF 3

> include the interpretation of needs and wants and the change of prepolitical attitudes and preferences.'[1067]

Another set of elements for deliberative procedures has been set out by Carlos Santiago Nino. He has proposed that the value of democratic process depends on the following set of factors:

> 'the breadth of participation in the discussion and decision of those affected by the latter; the freedom of participants to express themselves in the deliberation; the equality of the conditions under which that participation is carried out; the satisfaction of the requirement that the proposals be properly justified; the subsequent concentration of the debate on principles for justifying different balances of interests (not the mere presentation of those interests); the avoidance of majorities frozen around certain interests; the amplitude of the majority supporting the decisions; the time that has passed since the consensus was achieved, and; the reversibility of the decision'.[1068]

It is clear then that deliberative theories have formulated various and extensive norms applicable to political deliberations.[1069] It should also be noted that, although these theories focus primarily on legislative authorities, deliberation and reason-giving are considered essential for executive authorities too. Indeed, there seems to be a trend, at least in American and European courts, to require administrative authorities to demonstrate that they have entered into a process of reason-giving.[1070] Although these developments are mainly addressed in Section 9.3.2D, as part of the evidence-based decision-making trend, this tendency is clearly also linked to issues of democracy and separation of powers. Jerry Mashaw, for example, not only contended that reason-giving by administrative authorities 'affirms the centrality of the individual in a democratic republic', but also that '[a]uthority without reason is literally dehumanizing' and is therefore 'fundamentally at war with the promise of democracy, which is, after all, self-government'.[1071] In relation to American courts, Mashaw, explained that administrative policy-making process 'is made to some degree truly deliberative by demands for persuasive responses to cogent objections by outside parties'.[1072]

B. Process-based review to guard the political process

Without going further into the different understandings of deliberative democratic theory, this section focuses on what this means for the role of courts and their use of process-based review. It has been suggested that courts have a role in guarding and promoting deliberative practices by other more deliberative institutions, and that they

[1067] Habermas (1998), pp. 305–306.
[1068] Nino (1993), p. 832. See also the book review by Menéndez (2000), pp. 418–420.
[1069] See also Zurn (2011), p. viii.
[1070] Mashaw (2016), pp. 15–16.
[1071] Ibid, p. 17.
[1072] Ibid, p. 18.

PROEF 3

can do so through procedural reasoning.[1073] One of the best-known proponents of process-based review from a deliberative democratic perspective is John Hart Ely. He has argued that process-oriented review is applied

> 'not by a desire on the part of the [US Supreme] 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'.[1074]

Thus Ely emphasises the institutional division of tasks between the legislature and the courts. In light of this interpretation of the separation of powers doctrine, Ely believes it is not the task of the USSC to establish fundamental values. Instead, the USSC's objective should be to support representative democracy, especially by protecting the position of minorities and by ensuring that the political channels are open.[1075] Indeed, 'courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials'.[1076]

Ely's argument was influenced by USSC Justice Stone's footnote four in the *Carolene Products* judgment.[1077] The footnote points towards closer scrutiny of legislation when minorities' rights are not sufficiently guaranteed in the political process.[1078] Bruce Ackerman considered that there are actually two insights in this formula: on the one hand, the USSC is regarded 'as a perfecter of pluralist democracy' and, on the other hand, 'as pluralism's ultimate critics'.[1079] The first perspective, on which this section focuses, means that courts should ensure the functioning of the democratic process so as to prevent minorities from being excluded from the political process. The second perspective, discussed in Section 8.3, concerns the standards used by courts, and implies that courts will act as guardians of values that cannot be compromised, not even by the wishes of a majority.

Ely's argument also finds expression in the practice of fundamental rights adjudication, as some examples discussed in Part I can illustrate. For example, the CCC has a far-reaching mandate for process-based review under the Constitution.[1080] It has used this power to determine, in the words of Ely, whether the political channels were sufficiently open to minorities, and thus, it can, in the words of Ackerman, act as a perfecter of pluralist democracy. In the '*Consultation of Ethnic Communities case*' the CCC, for example, emphasised the importance of minority participation in

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[1073] Messerschmidt (2013), p. 240.
[1074] Ely (1980), p. 74.
[1075] Ibid, p. 88.
[1076] Ibid.
[1077] USSC 25 April 1938, 304 U.S. 144 (*US v. Carolene Products*). See Section 2.2.1.
[1078] Ibid, p. 152.
[1079] Ackerman (1985), pp. 740–741.
[1080] It is even limited to check the substance of legislative amendments. See for a short overview Popelier and Patiño Álvarez (2013), p. 228, with a reference to CCC judgments in footnote 148.

PROEF 3

democratic processes.[1081] In the judgment it explicitly concluded that 'the failure of the duty to consult the ethnic communities during the adoption of amendments to the Constitution constitutes a procedural defect that has substantive consequences', resulting in the contested amendments being declared unconstitutional.[1082]

C. *Process-based review to promote deliberative procedures*

Where Ely's theory relies on a rather narrow understanding of the democratic standards courts ought to protect – they can merely *police* the political process – others have taken a broader view of the role of courts in upholding deliberative democratic values. Burt Neuborne, for example, has argued in favour of process-based review in order to uphold the separation of powers doctrine.[1083] He too believes that a procedural approach is less problematic in light of democratic political theory:

> 'To the extent that process-based review requires normative judgments, they are prior judgments about who should make a choice and how it should be made, rather than the *ad hoc* substitution of a judge's substantive choices for those of the majority. Additionally, in many – perhaps most – settings, the impact of process-based review will be merely to remand an issue to one or another democratic forum for reconsideration in a procedurally correct manner. As such it casts a suspensive veto that slows, but does not derail, majority will.'[1084]

Neuborne's understanding of process-based review goes beyond Ely's participation-enforcing conception and extends to courts enforcing rules relating to 'who'[1085] is allowed to make a decision.[1086] In this sense, courts may perform the function of watchdogs over the institutional balance.[1087] At the same time, Neuborne does not argue in favour of a full separation of powers. Instead, he asserts that courts' review should be limited to situations where authorities deviate from main procedural rules.[1088]

Other positions in favour of process-based review allow for an even broader set of democratic standards to be included. Such theories relate to what has been called 'complex proceduralism'[1089] or entail a more substantive understanding of deliberative theory.[1090] Such a theory can be found in the work of Jürgen Habermas, one of the best-known protagonists of discursive theory. He has argued that the legitimacy of legislation

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[1081] CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*'). See Section 2.2.6.
[1082] Ibid, para. 7.7.4.
[1083] Neuborne (1982).
[1084] Ibid, p. 366.
[1085] Coenen (2009), pp. 2842 and 2851–2852.
[1086] Neuborne (1982), pp. 366–367.
[1087] Mazmanyan, Popelier, and Vandenbruwaene (2013), pp. 8–11.
[1088] Neuborne (1982), pp. 376–377.
[1089] See Baynes (2002), p. 16 with a reference to Beitz (1989), p. 23.
[1090] See also Baynes (2002), pp. 16–17.

PROEF 3

depends 'on the procedural conditions for democratic genesis of legal statutes'.[1091] This view of democracy entails 'a conception of democratic politics in which decisions and policies are justified in a process of discussion among free and equal citizens or their accountable representatives'.[1092] Trying to find middle ground between liberal and republican theories, as well as acknowledging the difference between values and norms, Habermas recognises the role for constitutions to set out 'political procedures according to which citizens can, in the exercise of their right to self-determination, successfully pursue the cooperative project of establishing just (i.e., relatively more just) conditions of life'.[1093] Legitimacy of legislation can be secured only through such procedures.[1094]

The role Habermas envisages for (constitutional) courts is to keep watch over that system. Courts should ensure that citizens can 'effectively exercise their communicative and participatory rights' by examining the 'communicative presuppositions and procedural conditions of the legislative process'.[1095] The meaning of the judicial role should be understood in line with Habermas' understanding of procedural democracy:

> 'Deliberative politics acquires its legitimating force from the discursive structure of an opinion- and will-formation that can fulfil its socially integrative function only because citizens expect its results to have a reasonable *quality*'.[1096]

Habermas has connected his discursive understanding of democracy to a 'bold understanding of judicial adjudication'[1097], which not only requires that legislative procedures are followed, but also implies that the prerequisites for discursive deliberations are met. Process-based review therefore also entails a review of far-reaching preconditions for deliberations, such as 'individual civil liberties, membership rights, rights to legal protection, and those social and economic rights necessary for ensuring the equal opportunity of all citizens'.[1098]

In the view of deliberative democratic theorists, courts can thus be considered not just as guardians but even as promoters of the quality of the legislative process, as they can check whether the preconditions for discursive deliberations are met and thereby encourage the legislature to comply with these requirements.[1099] Their function lies

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1091 Habermas (1998), p. 263. See for a short discussion on the link between Habermas and process-based review, Van Malleghem (2016), pp. 287–289.
1092 Gutmann and Thompson (2000), p. 161.
1093 Habermas (1998), p. 263.
1094 Ibid.
1095 Ibid, p. 264.
1096 Ibid, p. 304. For a discussion of the idea of opinion and will-formation, see Zurn (2007), pp. 237–239.
1097 Habermas (1998), pp. 279–280.
1098 Zurn (2007), p. 239.
1099 Nino (1993), p. 831, arguing that pure democracy would be 'self-defeating since, as has been often observed, democracy could eat its own tail if certain conditions were not preserved even by undemocratic means'. See also Sandalow (1977), p. 1186 ('By subjecting [legislative] action to the test of principle … courts can increase the prospects that governmental action will conform to those values. Of course, courts are not the only institutions capable of testing action against principle, but

PROEF 3

in unlocking and supporting, safeguarding and ensuring, nurturing and reinforcing deliberation in the political arena.[1100] In particular, they may check in a concrete case whether the democratic process has sufficiently allowed for participation and whether the procedure followed enabled reasonable decisions to be taken.[1101] In that context, Christopher Zurn has considered that

> 'the function of constitutional review is justified by the need to protect the procedures that grant legitimacy to the outcomes of democracy, and considerations of political distortions in democratic processes and the expanded tasks entailed by deliberative democratic constitutionalism recommend that the function be institutionalized in an independent constitutional court.'[1102]

In this sense, process-based review is not only considered a means to support deliberative democracy, but it can also be regarded as a way to circumvent the counter-majoritarian objections against judicial review, as it does not overrule the content of the decision reviewed.[1103] In other words, even though they are 'warden[s] of democratic deliberative processes'[1104], courts may guarantee 'the adequate procedural channels for rational collective decisions rather than [act as] a paternalistic regent that defines the content of those choices'.[1105] Therefore, as 'deliberative theory assumes that the decision-making process consists of malfunctions, blind sports and burdens of inertia', process-based review is proposed 'to remove these blockages' while addressing majoritarian-based objections.[1106] For these reasons, procedural reasoning may be said to be a 'democracy-enhancing approach'[1107], as it allows courts to ensure 'that the decision-making process is as open and transparent as possible, enabling all relevant arguments to be considered and publicly debated'.[1108]

Again, these theoretical notions find some reflection in the examples set out in Part I. The *Doctors for Life International* judgment of the SACC can be mentioned in this

experience suggests that because of their practices and their place in the governmental system they are more likely than others to do so.').

1100 Nino (1993), p. 831 and Zurn (2007), p. 271.

1101 Messerschmidt (2013), p. 240.

1102 Zurn (2007), p. 264.

1103 Coenen (2009), pp. 2860–2861.

1104 Hübner Mendes (2003), p. 86.

1105 Ibid, p. 85.

1106 Popelier and Patiño Álvarez (2013), p. 201.

1107 Spano (2018), pp. 488–492 and Spano (2014), p. 13.

1108 Harbo (2017), p. 31. See also De Schutter and Tulkens (2008), pp. 208–210 ('[W]e would submit that it is essential that … procedures be set up which allow for such conflicts to be subjected to an open deliberations. … [T]he case-law of the ECtHR is rich of examples where the decision-making procedures were evaluated according to their ability to ensure that all competing interests would be provided an opportunity to be heard and, thus, to influence the identification of the balance to be achieved between them.', p. 208).

PROEF 3

regard.[1109] In the judgment the SACC declared legislation invalid as the national and provincial legislature had failed to ensure public participation in the legislative process, thereby violating the right to political participation as laid down in the South African Constitution. The SACC noted in particular the following:

> 'Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also *serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.*'[1110]

The SACC was clearly of the view that process-based review could contribute not only to the quality of the law-making process itself, by minimising the risks of arbitrary and irrational decision-making, but moreover it would enhance democracy. The SACC's review of the legislative process can therefore be considered an attempt to indirectly enhance deliberative democracy in South Africa.[1111] In a similar vein, in *Hartz IV*, the GFCC relied on the lack of rational decision-making as its main basis for declaring unconstitutional the contested legislation on social benefits.[1112] It considered that even though it was up to the legislature to decide on the scope and ways of providing minimum subsistence, the legislature's assessment should be 'clearly justifiable on the basis of reliable figures and plausible methods of calculation'.[1113] The GFCC required the legislature to rely on statistical information (in the words of Cohen, the legislation should be 'rationally motivated'[1114]), and if the legislature wished to deviate from the standard statistical model of decision-making, it would require 'special reasoning' to do so (in the words of Habermas, 'processes of deliberation take place in an argumentative form'[1115]).[1116] The ECJ's judgment in *Volker und Markus Schecke* also fits with the arguments of deliberative democracy presented above, in that it is in line with Nino's

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[1109] SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*). See Section 2.2.5.

[1110] Ibid, para. 205.

[1111] See also Brian (2011), pp. 113–115 ('Procedural remedies like engagement promote that kind of dialogue and thus give the courts an important role to play while still democratising the process of constitutional development. The result is a collaborative model of constitutional development in which courts, citizens and the political branches each participate in negotiating the meaning of the Constitution.', p. 114).

[1112] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.

[1113] Ibid, para. 142.

[1114] Participants in deliberative procedures should 'aim to defend and criticize institutions and programs in terms of considerations that others have reason to accept, given the fact of reasonable pluralism and the assumption that those others are reasonable', see Cohen (2015), p. 413.

[1115] Habermas (1998), pp. 305–306.

[1116] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*), para. 180.

PROEF 3

and Fiskin's requirement of a proper substantive balancing of interests.[1117] In the judgment, the ECJ held that 'it does not appear that the Council and the Commission sought to strike … a balance between the European Union's interest in guaranteeing the transparency of its acts … and the fundamental rights enshrined in Articles 7 and 8 of the Charter'.[1118] Finally, the ECtHR' *Hirst (No. 2)* judgment may be mentioned.[1119] In that judgment the ECtHR emphasised the importance it attaches to deliberative parliamentary procedures. In particular, it considered that 'it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote'.[1120] It was insufficient for the UK parliament to implicitly affirm such a restriction. What the ECtHR required was a 'substantive debate' within which parliament showed that it tried to 'weigh the competing interests or to assess the proportionality of a blanket ban'.[1121] It may thus be said that the UK parliament, in the ECtHR's opinion, had failed to enter into what Habermas calls a 'discursive structure of opinion- and will-formation', which could have ensured the legislative process' reasonable result.[1122] Indeed, the ECtHR has been said to have taken up the role 'as a guardian of discourse' in this judgment, especially through procedural reasoning.[1123] Put another way, the ECtHR has 'contribute[d] to a national decision-making process seeking a fair balance in solving the problems facing modern societies' and has thereby promoted 'an institutional framework in which well-established human rights standards, practical rationality and truth have better chances of prevailing than without it'.[1124]

7.3.2 COURTS AS PART OF THE DELIBERATIVE DEMOCRATIC ENTERPRISE

As was explained in the previous section, courts may be seen as guardians and even promoters of deliberative processes by other institutions, especially legislative authorities. In addition to this, courts may directly contribute to deliberative democracy,

[1117] ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.
[1118] Ibid, para. 80.
[1119] ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*). See Section 2.2.8.
[1120] Ibid, para. 79.
[1121] Ibid. For an overview of ECtHR's deliberativeness requirements in the legislative process, see Saul (2016), pp. 1082–1084.
[1122] Habermas (1998), p. 304. See also for a discussion Zurn (2007), pp. 237–239.
[1123] E.g., concerning the democratic process and the need for a balancing exercise, Baade (2018), pp. 9–12. According to Baade the ECtHR performs the role as guardian of deliberative discourse by safeguarding compliance with well-established standards, the practical rationality of the decision-making discourse, and by checking the facts. See also Popelier (2013a), pp. 262–265 ('The idea that parliament should act as a forum of rational and informed deliberation has more affinity with a deliberative notion of democracy than with a principled concept of parliamentary sovereignty', pp. 264–265).
[1124] Baade (2018), p. 27.

PROEF 3

in the sense that they are functioning in a way that complies with deliberative values. Hübner Mendes explained that courts may do so in a threefold manner. Courts can be considered 'public reasoners' (Section A), as 'interlocutors' (Section B), or, and this is his main point, as 'deliberators' (Section C).[1125] This section takes a closer look at the different ways in which courts are part of the deliberative democratic enterprise and how process-based review plays a role in this.

A. Courts as public reasoners

Courts as 'public reasoners' can be seen as part of the deliberative democratic process since they reflect the various rational views in society through and in their judgments.[1126] First, this relates to judges' capacity to bring new arguments into the public debate through their judgments. Indirectly this is also true for individuals, as 'the ability to challenge the government in court … provides a new way of participating in political decisions'.[1127] The *Hirst (No. 2)* judgment can help to illustrate this argument.[1128] The UK parliament had not (explicitly) considered the interests of prisoners to be able to vote. By applying to the ECtHR, the ECtHR and indirectly also the individuals concerned, were able to bring their views on voting rights of prisoners into the public debate. For example, the ECtHR seems to add the perspective that 'the length of [prisoners'] sentence and … the nature or gravity of their offence and their individual circumstances' should be taken into account for determining whether an individual prisoner should be stripped of its right to vote.[1129]

Barry Friedman also considered it the primary task of courts to be 'catalyst[s] for debate, fostering a national dialogue about constitutional meaning'.[1130] John Rawls famously coined the term of the USSC as being an 'exemplar of public reasons'.[1131] According to Rawls, courts

> 'must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reasons. These are the values that they believe in good faith, as the duty of civility requires, that all citizens as reasonable and rational might reasonably be expected to endorse.'[1132]

Secondly, besides raising arguments as part of a public debate, as public reasoners, courts perform a role model function in deliberative practice. Courts may express the various positions in society and, thus, show how to reach a consensus that is respectful

[1125] Hübner Mendes (2013), pp. 86–91.
[1126] For other accounts, see ibid, pp. 87–90.
[1127] See Van Bruggen (2019), p. 21.
[1128] ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*), para. 79. See Section 2.2.8.
[1129] Ibid, para. 82. Also the applicant made a similar argument ('It was unrelated to the nature or seriousness of the offence and varied in its effects on prisoners depending on whether their imprisonment coincided with an election.', ibid, para. 45).
[1130] Friedman (1993), p. 251.
[1131] Rawls (1993), p. 231ff.
[1132] Ibid, p. 236.

PROEF 3

of divergent reasonable views. According to Rawls, judicial decisions clarify that public contestation is more than 'a contest for power and position', in that courts' adherence to public reasons 'educates citizens to the use of public reason and its value of political justice by focusing their attention on basic constitutional matters'.[1133]

The role of process-based fundamental rights review seems to be limited in the function of courts as public reasoners. Indeed, since the focus of procedural reasoning is on issues of process, and therefore not primarily on substantive debates, process-based review does not seem to be a way for courts to act as an exemplar of how to deal with various arguments substantively, nor does it enable them to provide substantive input into those debates directly. Indeed, Jeremy Waldron asserts that procedural reasoning may be a way for courts to distract society 'with side-issues about precedent, text and interpretation' instead of providing input into debates 'on the real issues at stake when citizens disagree about rights'.[1134]

This may be different where the debates actually relate to matters of process. This point may be exemplified by the CSC's *Baker* judgment. In that judgment, the CSC clarified what the duty of procedural fairness in administrative decision-making procedures entails.[1135] For the first time it held that this duty also applied to participatory rights in administrative decisions and it set out a number of relevant factors.[1136] Moreover, it explicitly clarified the underlying rationale of this duty, namely 'to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker'.[1137] By explaining what the duty of procedural fairness entailed and why it should be respected, the CSC may be said to have encouraged public discourse on the matter of procedural fairness.

B. *Courts as interlocutors*

The understanding of courts as 'interlocutors' focuses on courts' role in the inter-institutional dialogue, which may be regarded as a deliberative practice.[1138] This aim of dialogue with other institutions is related to debates on weak-form judicial review and constitutional dialogue[1139], as engaged in by courts in Canada and especially also in Latin America.[1140] Armen Mazmanyan has, for example, explained that dialogue between the

[1133] Ibid, pp. 239–240.
[1134] Waldron (2006), p. 1353.
[1135] CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.
[1136] Ibid, para. 22.
[1137] Ibid, and see also para. 28.
[1138] Hübner Mendes (2013), pp. 86–91. See also, Tulis (2003).
[1139] E.g., Gardbaum (2016); Tushnet (2009), pp. 24–33; and Van Hoecke (2001).
[1140] For an overview of the ways courts in Latin America have engaged in dialogical discussions, see Gargarella (2016), pp. 120–121.

PROEF 3

two European Courts (ECtHR and CJEU) and national constitutional courts may provide meaningful public engagement or support and 'can really enhance, the deliberative, [i.e. the] democratic credentials, of both the ECHR system and the EU'.[1141] Some modalities of sanctioning are furthermore regarded as more deliberative than others, especially when they leave room for the other authority to respond or make the final decision.[1142]

Process-based review may be a way for courts to enter into a dialogue. Bar-Siman-Tov has submitted that one of the distinctive features of review of the legislative process is that the 'judicial decision remands the invalidated statute to the legislature, which is entirely free to reenact the exact same legislation, provided that a proper legislative process is followed'.[1143] He submits that this would take the sting out of the counter-majoritarian difficulty, as courts do not have the final say on an issue, but they enter into a deliberative institutional dialogue.[1144] In fact, according to Bar-Siman-Tov, 'a court is neither a speaker nor a shaper [of debates] but rather merely and truly a facilitator of dialogue'.[1145] In a similar vein, Peter Cumper and Tom Lewis explain that 'process-based review, whereby the ECtHR examines the legislative process that led to the offending measure or act, can be seen as an example of dialogue in operation'.[1146]

Several examples of process-based review demonstrate that courts have been willing to refer a substantive decision back to the decision-making authority whose decision they reviewed, which may be considered the ultimate modality of dialogue. They have referred cases back to administrative authorities (e.g., the CSC judgment in *Baker*[1147]) or to lower courts (e.g., the DSC in the '*Tunisian Case*'[1148], the SCA in *Comunidad Indígena Eben Ezer*[1149], the GFCC in *Mr R*[1150], and the ECJ in *Dynamic Median*[1151] as part of the preliminary reference procedure). Furthermore, even in cases in which courts have declared legislation unconstitutional due to procedural shortcomings in the legislative process, legislatures are generally able to re-enact the same or at least a similar law through a new legislative process (e.g., the CCC in '*General Foresting Law case*'[1152] and '*Consultation of Ethnic Communities Case*'[1153], and the ECJ in *Volker und Markus Schecke*[1154]).

1141 Mazmanyan (2013), p. 181.
1142 Popelier and Patiño Álvarez (2013), p. 223. The 'dialogicness' of procedures under the European Convention on Human Rights system is extensively addressed in Glas (2016).
1143 Bar-Siman-Tov (2011), p. 1956.
1144 Ibid.
1145 Ibid, p. 1957.
1146 Cumper and Lewis (2019), p. 626.
1147 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.
1148 DSC 28 July 2008, no. 157/2008, U2008.2394H ('*Tunisian case*'). See Section 3.2.3.
1149 SCA 30 September 2008, 331:2119 (*Comunidad Indígena Eben Ezer v. Provincia de Salata*). See Section 4.2.1.
1150 GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf*). See Section 4.2.3.
1151 ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*). See Section 4.2.6.
1152 CCC 23 January 2008, C-030 ('*General Foresting Law*'). See Section 2.2.6.
1153 CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*'). See Section 2.2.6.
1154 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.

PROEF 3

C. *Courts as deliberators*

The third function of courts described by Hübner Mendes – courts as 'deliberators' – relates to the idea that courts can be deliberative institutions themselves. Through their judgments, courts converse with their peers, with the applicants, and with society in general. According to Hübner Mendes, constitutional courts can enter deliberations at three levels: pre-decisional (or deliberativeness in input), decisional (or deliberativeness in throughput), and post-decisional (or deliberativeness in output).[1155]

Deliberativeness in input | The first phase in which courts can act as deliberators concerns the pre-decisional phase. In this phase courts should allow individuals to raise arguments for public debate that may have been overlooked or neglected during deliberations of legislative decisions.[1156] Public contestation in the input of judgments is thus an aspect of deliberative democracy not only in parliamentary debates, but also in judicial deliberations. Prior to taking a decision, courts should thus collect and consider the arguments put forward by the applicants, by political actors, and in societal debate. Zurn has argued that the legitimacy of judicial review 'depends on [courts'] degree of openness and responsiveness to the people's constitutionally relevant reasons, values and interests'.[1157] In this regard, Laura Henderson has contended that Ely's idea 'that the political outsider (the 'other') is not excluded by political insiders from the democratic decision-making process' must be extended to the judicial decision-making process.[1158] She has argued for courts to promote contestation in the judicial process through explicitly noting what the legislature's conception excludes, by actively entertaining challenges of this conception, and by allowing new arguments to be raised through amicus curiae briefs.[1159]

Although these proposals do not in themselves favour process-based review, via procedural reasoning courts may nonetheless push other courts to allow for public contestation in their decision-making. This means that a court reviewing the judicial process of another court, may assess whether that court actually allowed for the judges' views to be challenged. The *Carter* judgment of the CSC demonstrates this.[1160] The case concerned the question of whether the prohibition of medically assisted suicide was compatible with the right to life, liberty, and security, as set out in the Canadian Charter of Fundamental Rights and Freedoms. The lower court had made great efforts in gathering information from doctors, medical scientists, and ethicists as well as from other jurisdictions in which medically assisted suicide was already permitted.[1161] After a detailed and thorough study of these materials, the lower court had concluded

[1155] Hübner Mendes (2013), 105–113.
[1156] Ibid, pp. 107–108.
[1157] Zurn (2007), p. 272.
[1158] Henderson, (forthcoming).
[1159] Ibid.
[1160] CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*). See Section 4.2.4.
[1161] SCBC 15 June 2012, 2012 BCSC 886 (*Lee Carter v. Canada (Attorney General)*), sections V-VIII.

PROEF 3

that the prohibition on medically assisted suicide was unconstitutional. The CSC affirmed the judgment of the lower court and commended its 'exhaustive review of the evidence'.[1162] In other words, the CSC seemed to have been concerned with the quality of the decision-making of the lower court and it clearly supported the lower court's deliberative engagement in the input phase.

Deliberativeness in throughput | The second phase in which courts may be considered deliberators relates to the actual deliberation aspect between judges. This is the phase in which judges interact and deliberate, considering diverse points of view and coming to the best possible decision.[1163] Through collegial engagement, judges may extend their own horizon, and such discussions can therefore be regarded as deliberative interactions. Process-based review appears to be less relevant to this phase as it relates to the way a decision is reasoned and not so much to the internal deliberations that have taken place.[1164] Especially since the result of the judicial deliberations may not always be visible on paper[1165], procedural reasoning in relation to the deliberative interactions between judges may just be a bridge too far.

Deliberativeness in output | Finally, as regards the post-decisional or output phase, Hübner Mendes has noted that courts can be deliberative if they write their judgments in a well-reasoned, responsive, and readable manner, thereby clarifying that the judgment is 'the product of an effort to deal with all points of view in a thorough manner'.[1166] Relying on Rawls' theory, John Ferejohn and Pasquale Pasquino have explained that courts are expected 'to publish plausible rationales for their holdings: arguments that others can be expected to respect and embrace, whether or not their own interests have been vindicated'.[1167] Reason-giving is especially important in adjudication as it may 'provide indirect *democratic* justifications for public actions' as judgments are meant to work out democratic principles in new and specific cases.[1168] In addition, judicial reason-giving is efficiency-enhancing, as it allows 'others – state officials, other judges, lawyers, ordinary citizens, etc. – to anticipate the implications of the current decision for future cases'.[1169] Concerning the need for deliberative written decisions, Patricia Popelier and Aída Araceli Patiño Álvarez have also argued that

1162 CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*), para. 120.

1163 Hübner Mendes (2013), pp. 108–109.

1164 This book excludes implicit process-based review from the scope of the definitions provided in Chapter 5. This is further explained in Section 6.3.6.

1165 De S-O-l'E. Lasser (2004), p. 324. By way of example, he has demonstrated, that even the rulings of the French *Conseil Constitutionnel*, although formulaic on paper, were preceded by a lengthy and thorough substantive discussions between the judges.

1166 Hübner Mendes (2013), p. 110. More in particular he required judgments to be responsive, clear, and to include a sense of fallibility and provisionality, see pp. 136–139.

1167 Ibid, p. 23.

1168 Ibid, p. 24 [emphasis added].

1169 Ibid. In a similar vein, Lize Glas has explained that reason-giving may also be beneficial to cooperation between interlocutors in the context of the ECtHR, see Glas (2016), p. 162.

PROEF 3

reasoning is an important part of deliberative judicial review. Courts should provide for judgments that are 'based upon arguments which give insight into the reasons why the law is either justified or unconstitutional, considering the rights and interests at stake' and the possibility of adding concurring or dissenting opinions of the judges would enhance 'the deliberative quality of judicial law-making'.[1170]

It can be argued that procedural reasoning is a means for courts to act as deliberators from this perspective, especially where they engage in procedural standard-setting on the basis of a discussion of various views on the issue. The CSC's *Baker* judgment is a case in point, since the CSC there developed procedural fairness standards by entertaining different perspectives put forward in the literature, by public authorities, and in previous case-law.[1171] To a lesser degree, the *I.D.G.* decision of the CESCR can also be considered an example of such an approach.[1172] In that decision the CESCR considered that for the right to an effective remedy to be ensured, judicial proceedings capable of suspending the right to foreclosure would be required.[1173] It therefore provided clarity about what makes a remedy *effective* in practice.

More often, process-based review seems to be an indirect method for courts to encourage other courts to act as deliberators in the post-decisional phase. Through process-based review, courts may provide incentives for other courts to provide well-reasoned judgments.[1174] Examples of this indirect deliberation-enhancing effect of procedural reasoning can be discerned in the judgments of the ECtHR. The ECtHR in *Winterstein*, for example, explicitly required national courts to engage with the arguments of the applicants who had been evicted from their homes. It noted that the French courts had given paramount importance to the fact that the applicants' occupation of land was contrary to the land-use plan and had disregarded the arguments made by the applicants in defence. The ECtHR concluded that such an 'approach is in itself problematic, amounting to a failure to comply with the principle of proportionality'.[1175] The ECtHR thus encouraged domestic courts to examine arguments put forward by the applicant 'in detail and provide adequate reasons'.[1176] In *Von Hannover (No. 2)*, the ECtHR focused on whether the national courts had taken into account its case-law.[1177] It considered that 'the [German] Federal Court of Justice had changed its approach following the *Von Hannover* judgment [(the ECtHR's previous judgment on the matter)]' and it noted that 'the [German] Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a

1170 Popelier and Patiño Álvarez (2013), p. 218.

1171 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*), in particular paras. 35–44 (on the requirement to provide reasons). See Section 3.2.1.

1172 CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*). See Section 4.2.5.

1173 Ibid, para. 13.6.

1174 What has been called the 'responsible courts doctrine', see Çali (2016). In a similar vein, see Glas (2016), pp. 330–335.

1175 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*), para. 156. See Section 4.2.7.

1176 Ibid, para. 155.

1177 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*). See Section 4.2.7.

PROEF 3

detailed analysis of the Court's case-law in response to the applicants' complaints'.[1178] These judgments illustrate how the ECtHR, through process-based review of the externally visible deliberations of national courts, tries to nudge national courts to act as 'deliberators'.[1179] It does so not just as regards the input in public debate (that is, by allowing for public contestation by applicants, institutions, and in public debate) but also as regards the output of their decisions (that is, by providing well-reasoned deliberative judgments).

As explained above, process-based review mainly affects courts' role as deliberators in an indirect manner. Through procedural reasoning courts may stimulate other courts to act in this way. This perception of process-based review is therefore in line with the arguments set forth in Section 7.3.1, but with one significant difference. While that section primarily focused on how courts can employ procedural reasoning to guarantee or encourage other authorities, namely legislative (and administrative) authorities, to take up their deliberative role, the discussion here focused on the deliberative role of judicial authorities.

7.3.3 A LIMITED ROLE FOR COURTS AND PROCESS-BASED REVIEW IN DEMOCRATIC THEORY

The ideas of deliberative democracy and the procedural understanding of democracy are contested. It has been argued that the issues of justice and legitimacy of decisions are not determined by the quality of the process, or at least not primarily so, but instead by the outcome of the process.[1180] Such contestations often touch upon other elements of the debates discussed in Section 8.3.2.[1181] Given the focus of the present chapter, this section only addresses the views from within deliberative democratic theories which reject the idea of courts performing the task of wardens or promoters of deliberative democracy (Section A) or that argue that courts are not themselves part of the deliberative enterprise (Section B). Such criticism still embraces the idea of deliberative democracy, but it questions the role courts should and can play in protecting deliberative practices.

A. *Courts as dangers to the deliberative enterprise*

It has been argued that process-based review by courts not only fails to enhance deliberations, but that it may even be at odds with deliberative democratic ideals. In the words of Alexander Bickel, '[b]esides being a counter-majoritarian check on the

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[1178] Ibid, para. 126.
[1179] E.g., Brems (2019), p. 221 and Huijbers (2017a), pp. 198–199.
[1180] In the context of fundamental rights, see Section 8.3.2A-I.
[1181] For example, Laurence Tribe's objections to Ely's theory, which focus primarily on the idea that process-based review is just as value-laden as substance-based review is, see 9.2.1B.

PROEF 3

legislature and the executive, judicial review may, in a larger sense, have a tendency over time seriously to weaken the democratic process … [as it is] a form of distrust of the legislature'.[1182] For example, if legislative or administrative authorities have been able to make complex political compromises, it may be problematic if courts can still reverse these consensual decisions on the basis of procedural shortcomings.[1183]

It has further been argued that '[i]t is not at all clear how the separation of powers in a democratic society and the strict compartmentalization between law and politics and morality, leads to more democratic debate in society'.[1184] It is thus questionable whether and to what extent courts' focus on deliberative democratic processes ensures the protection of essential elements of democracy. Similarly, it has been contended that a procedural conception of democracy by courts might lead to the negligence of minorities' interests, especially in the balancing-test in which their interests only represent a smaller proportion.[1185]

From a different vantage point, even though it has been admitted that individuals can inject arguments into deliberative democracy through adjudication that may have been overlooked in the political process, it has been argued that judicial review may lead to an overrepresentation of these interests since courts focus on the particular arguments presented before them. Therefore, especially when judicial decisions have *erga omnes* effect or in other ways affect the position of individuals beyond the parties to the case, 'the most suited repositories of constitutional meaning are agents whose *raison d'être* entails incorporating, either directly or representatively, as many individuals and groups as possible'.[1186] Parliaments are therefore considered more appropriate fora for deliberations than courts, even if courts limit their review to procedural reasoning. Also if courts pay attention to the input in their judicial decision-making process, for example, by allowing third party interventions and thereby increasing their deliberativeness, 'the judicial decision cannot rid decision-making of its exclusionary effects altogether … [and] by its very nature [courts take] sides in the political question of who is the people'.[1187]

The *Hirst (No. 2)* judgment can help to illustrate these problems. In that judgment the ECtHR found the UK's blanket ban on prisoner voting rights to be incompatible with the right to vote.[1188] It reached this conclusion primarily on the basis of the lack of parliamentary debate, and the absence of a judicial assessment in individual cases to assess if disenfranchisement would be proportionate.[1189] In the judgment the

1182 Bickel (1986), p. 21.
1183 Popelier and Patiño Álvarez (2013), pp. 204–205.
1184 Ieven (2008), p. 58.
1185 Ibid, p. 59.
1186 Bello Hutt (2018), p. 241.
1187 Henderson (2018), p. 137.
1188 ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*), paras. 82 and 85. See Section 2.2.8.
1189 Ibid, paras. 79–80.

PROEF 3

ECtHR seemed to be of the view that disenfranchisement should always be subject to an individual assessment by a court.[1190] The judgment was met with fierce criticism by the UK government, particularly because the preference for individualised decision-making did not comply with the UK's notion of separation of powers, and the idea of parliamentary supremacy in cases relating to such politically sensitive issues as this.[1191] By emphasising the need for individualised decision-making, the ECtHR may be said to have placed too much emphasis on the views of individual prisoners and even to have upset the balance of powers in the UK.

B. Courts are not part of the deliberative enterprise

Another contested issue is whether courts themselves can really be regarded as deliberative institutions. Gutmann and Thompson, for example, have argued that one should look 'beyond the courtroom' in order to increase deliberative democracy.[1192] Others have emphasised the challenges process-based review may set for encouraging deliberative decision-making in light of courts' restrictions in argumentation. 'Deliberative democrats resist putting too much weight on courts not only due to their elitist character … [but also] because of the supposedly restrictive code that shapes the argumentative abilities of this forum.'[1193] The idea of courts as deliberators is thus debated, since there may be limited scope for proper deliberations, including a collegial discussion by judges on their moral and political perceptions. As Popelier and Patiño Álvarez acknowledge:

> 'If a deliberative approach implies the articulation and weighing of various arguments and opinions, [then] the common law tradition, permitting multiple opinions and allowing for a so-called "publicly argumentative model" is more deliberative than the civil law tradition adopted in most European legal systems, where centralised constitutional courts hold secret deliberations and deliver decisions expressing a single voice, issued in the name of the whole court, without recorded votes or dissenting opinions.'[1194]

Accordingly, the extent to which procedural reasoning can be seen to enhance deliberative democracies may also depend on the legal and judicial setting within which it is employed.[1195]

[1190] This was confirmed in ECtHR 8 April 2010, app. no. 20201/04 (*Frodl v. Austria*), paras. 33–35. Yet, the ECtHR seems to moderate the requirement for individual assessment in later judgments, see Gerards (2013b), pp. 59–62.
[1191] E.g., Gerards (2013b), pp. 56–59.
[1192] Gutmann and Thompson (1996), p. 47.
[1193] Hübner Mendes (2013), p. 84.
[1194] Popelier and Patiño Álvarez (2013), pp. 218–219.
[1195] This is further discussed in Section 7.5.2.

PROEF 3

7.3.4 RÉSUMÉ

According to deliberative democratic theory, courts may perform important roles as guardians and promoters of democratic ideals. Procedural reasoning may be a means for courts to encourage legislative and administrative authorities to engage in deliberative decision-making. In addition, courts themselves may be considered part of the deliberative enterprise. As public reasoners, courts can demonstrate how procedural standards can be developed through a rational and deliberative process. As interlocutors, courts can enter into an inter-institutional dialogue with other public authorities by taking a procedural approach as they leave the substantive decision-making to those authorities. And as deliberators, through procedural reasoning courts can check whether lower courts were open to new arguments, and they may develop procedural standards and provide incentives to judiciaries to ensure well-reasoned decisions. However, regardless of the connection between deliberative democratic values and procedural reasoning, it has been argued that courts play only a limited role in the deliberative democratic enterprise. Courts may even endanger deliberative decision-making by upsetting the constitutional balance and as a result of an overrepresentation of certain views. In addition, not all judicial practices allow courts to truly act as deliberators themselves. Whether and how procedural reasoning contributes to safeguarding and encouraging deliberative decision-making is thus an issue for debate.

7.4 PROCESS-BASED REVIEW AND JUDICIAL RESTRAINT OR ACTIVISM

The debates on the use of process-based fundamental rights review concern not only the question of whether courts ought to intervene in the decision-making process of the legislature (or that of other public authorities), but also to what extent they can legitimately do so. This relates to perspectives of judicial activism versus judicial restraint, and to the question of whether courts should merely apply the law (non-interpretivism) or also develop it (interpretivism).[1196] In international systems, in this regard, reference is often made to the subsidiarity of courts and the discretion of national decision-making authorities.[1197]

The terms, judicial restraint and judicial activism are intended to express the institutional position of courts vis-à-vis the decisions of other decision-making authorities.[1198] Restraint and activism by courts are matters of degree: courts may

[1196] See more extensively Section 8.2.

[1197] For various readings on subsidiarity and deference in international courts, see Gerards (2018b); Iglesias Vila (2017); Besson (2016); and Carozza (2003).

[1198] See also Kavanagh (2008), p. 188 ('Judges owe a degree of deference to the elected branches of government because of "that respect which one great organ of the State owes to another". In other

PROEF 3

be more or less interventionist, or more or less deferential.[1199] There are a number of reasons why courts might show deference to other authorities' decisions, 'ranging from dominant party control of the appointments process and length of term (Japan) to cultural norms, to judicial faith in the legislative review process (Scandinavia), and to the greater expertise of legislatures on the relevant constitutional issue (sometimes under proportionality)'.[1200]

Instead of focusing on the various reasons why judicial restraint or activism is required[1201], this section concentrates on arguments that consider process-based review as a means of showing deference to the other decision-making authority. Indeed, 'the ways in which courts can exercise restraint are many and varied' and courts may show restraint 'in terms of presentational style while nonetheless being robust and "activist" in terms of the legal outcome, and vice versa'.[1202] Section 7.4.1 addresses the positions that regard process-based review as a way of showing judicial (self-)restraint. Section 7.4.2 discusses several arguments rejecting the claims of procedural reasoning as a deferential method of review. Finally, Section 7.4.3 summarises the main findings.

7.4.1 COURTS AS RESTRAINED OR SELF-RESTRAINING INSTITUTIONS

Judicial restraint can relate to different types of deference and it can take different forms. Epistemic deference relates to whether courts are sufficiently well-placed, and have the proper expertise and capacity, to determine the best answer (addressed extensively in Section 9.3.2).[1203] This deference can be distinguished from institutional deference, which denotes the restraint courts exercise to public authorities on the basis of the division of tasks between the various institutions in a legal system.[1204] This section focuses on this institutional or robust deference[1205], which relates to the institutional design, separation of powers and division of tasks in and across legal systems.[1206]

It has been argued that this institutional deference 'inevitably forms an important component of [the courts'] role, since it partly operationalizes the separation of powers between courts and the political branches' and it enables courts to take into account the 'dynamic balance between state institutions and their different contributions to

words, it is a requirement of *interinstitutional comity* – the requirement of mutual respect between the branches of government.').

1199 Kavanagh (2010b), p. 25.
1200 Gardbaum (2016), p. 99.
1201 See Sathanapally (2017), pp. 49–53.
1202 Kavanagh (2010b), p. 26.
1203 Fahner (2018), pp. 195–199 and Sathanapally (2017), p. 53.
1204 Fahner (2018), pp. 194, calling this 'constitutional deference'.
1205 Kyritsis (2017), pp. 161–164.
1206 In the international context, see Brems (2017), p. 25 ('The subsidiarity logic is interested in the division of work between national authorities and the supranational court.').

PROEF 3

rights protection'.[1207] It relates to the role courts may play in their judgments given their position in the legal system as well as their relationship with other decision-making authorities. In the words of Tim Koopmans, there may be 'certain subjects or certain issues that courts leave, or should leave, to the care of the legislature, or the government, or public administration, because their problem is typically outside the scope of their judicial tasks and responsibilities'.[1208] The answer to the question whether judicial restraint is warranted is often a matter of self-restraint, that is, the courts themselves determine if it is appropriate to exercise a particular function or not.[1209]

Just like other means of exercising restraint, such as holding a case non-justiciable[1210], taking a judicial minimalist approach[1211], or showing remedial restraint[1212], process-based review has been regarded as a way for courts to show deference to other decision-making authorities.[1213] Procedural reasoning then is considered a way for courts to avoid substantive intervention in issues that are thought to be the rightful province of the other institutions. Indeed, several of the positions already discussed seem to relate to process-based review as a way of ushering judicial self-restraint. Raz, for example, has argued that review of legislation should be 'a very limited review', which would entail a review 'merely to ensure conformity to the rule of law'.[1214] This has been interpreted to mean that, instead of courts' reviewing the content of legislation, they should focus on the legislative process.[1215] Habermas, in his procedural understanding of democracy, also espouses the view that courts should show restraint when it comes to substantive value judgments, as these should be left to the political institutions.[1216] Process-based review thus seems to be regarded as a deferential form of judicial review. Bar-Siman-Tov, for example, has argued that the legislature should be free to determine the content of the legislation with the courts focusing on the legislative process and possibly invalidating legislation on that ground.[1217] Procedural reasoning therefore would allow for a constitutional dialogue to arise and would be less intrusive than substantive reasoning. In other words, applying procedural reasoning can be regarded as an expression of judicial restraint and as an 'avoidance strategy' (addressed in Section 6.3.5A-II).

These views are countenanced by some of the examples of procedural reasoning provided in Part I. The judgment of the ECtHR in *Lambert* was referred to in order

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1207 Kyritsis (2017), p. 197.
1208 Koopmans (2003), p. 109.
1209 Kavanagh (2008), p. 185.
1210 Also known as the political question doctrine, see e.g., Odermatt (2018); Barak (2008), pp. 177ff; and Koopmans (2003), pp. 98–104.
1211 In the context of the ECtHR, see Gerards (2013b), pp. 62–71, in the context of the US, see Sunstein (1999).
1212 E.g., Bagley (2017) and see also Tushnet (2007), p. 23.
1213 E.g., Sathanapally (2017), p. 52. For literature on avoidance strategies, see Section 9.2.2B.
1214 Raz (2009), pp. 214 and 217.
1215 Bar-Siman-Tov (2011), pp. 1940–1941.
1216 Habermas (1998), p. 265.
1217 Bar-Siman-Tov (2011), p. 1956.

PROEF 3

to demonstrate this point.[1218] The case concerned whether the French authorities had failed to protect the right to life by allowing doctors to make an end-of-life decision. The ECtHR considered that European States have a considerable margin of appreciation over whether the withdrawal of life-sustaining treatment is permitted, the legal framework for such decisions, and the balance to be struck between the patient's rights to life and respect for the other parties' private lives and personal autonomy.[1219] For these reasons the ECtHR held that it was 'primarily for the domestic authorities to verify whether the decision to withdraw treatment was compatible with the domestic legislation and the Convention', and merely reviewed the national courts' decision-making procedure.[1220] Another example can be found in the DCTH's judgment in *Urgenda*.[1221] In that judgment the DCTH considered that although 'the State has an extensive discretionary power to flesh out the climate policy', such power is not unlimited and the DCTH could review whether 'in its decision-making the State carefully consider[ed] the various interests at stake'.[1222] Both judgments indicate that where the decision-making authority has a considerable discretion, process-based review seems to be perceived as a method for courts to show substantive deference to the legislature and policy-making authorities.[1223]

7.4.2 COURTS AS PROCEDURAL ACTIVISTS

Additional procedural protection | While it has been argued that process-based review demonstrates self-restraint on the side of courts, others have rejected this idea. First, it has been submitted that procedural reasoning may not always be a sign of judicial restraint. Jeanrique Fahner, for instance, has argued that procedural reasoning is not necessarily intended to decrease the intensity of review, since 'procedural review replaces the original assessment of … compliance by a different assessment, namely of compliance with democratic norms and due process rules'.[1224] Sathanapally agrees that process-based review is not always an expression of judicial self-restraint.[1225] She contends that a prescriptive, systemic procedural approach may open up the possibility for courts to go beyond the substantive human rights assessment, since, on top of their substance-based review, they may draw conclusions relating to the quality of the decision-making processes of the public authority in question.

1218 ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*). See Section 4.2.7.

1219 Ibid, para. 148.

1220 Ibid, para. 181. The ECtHR also examined whether there were sufficient procedural safeguards in the French legal framework (paras. 150–160) and the medical decision-making process (paras. 161–168 and discussed in this book in Section 3.2.6).

1221 DCTH 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.

1222 Ibid, para. 4.74.

1223 Additional examples are discussed in Section 6.3.5A.

1224 Fahner (2018), p. 188.

1225 Sathanapally (2017), pp. 55–56.

PROEF 3

This argument seems best described as a 'compensation strategy'. As was explained in Section 6.3.5A-II, procedural reasoning may be used to offer procedural protection of fundamental rights where, on the substance, considerable deference is necessary. An example of this approach can be seen in the GFCC's *Hartz IV* judgment.[1226] There, the GFCC acknowledged that it fell within the discretion of the legislature to decide on the exact scope and means of providing minimum subsistence.[1227] Therefore, instead of reviewing the substance, it considered that it could review whether the legislation was based on 'reliable figures and plausible methods of calculation'.[1228] In particular it noted that '[t]he protection of the fundamental right therefore *also covers the procedure* to ascertain the subsistence minimum *because a review of results can only be carried out to a restricted degree* by the standard of this fundamental right'.[1229]

In addition, in practice, procedural reasoning has also been used to scrutinise measures that infringe fundamental rights more intensively. In Section 6.3.5A-II this use of procedural reasoning was called an 'intensification strategy'. For example, in *Fullilove*, the USSC's Justice Stevens argued that where strict scrutiny is warranted, 'judicial review should include a consideration of the procedural character of the decision-making process'.[1230] The ECtHR also seemed to hint at enhanced protection through procedural reasoning in *Winterstein*.[1231] In that judgment it explained that the State's margin of appreciation becomes narrower where it concerns a right that is 'of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community'.[1232] It considered that the loss of one's home constitutes an infringement with such an intimate right. The courts were therefore required to scrutinise the proportionality of the measure more closely, which means that they had to examine arguments of disproportionality 'in detail and to provide adequate reasons'.[1233] These examples indicate that procedural reasoning may complement a substantive reasoning and thereby intensify courts' scrutiny, which may be considered a sign of an active rather than a deferential approach.

Intrusive procedural approaches | The manner in which procedural reasoning is applied may also be considered very intrusive. The potential intrusiveness of process-based review is discussed by Patricia Popelier, who has indicated that a negative inference drawn on the basis of an assessment of the legislative process by the ECtHR may be regarded as very intrusive, especially in legal systems where constitutional

[1226] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.
[1227] Ibid, para. 138.
[1228] Ibid, para. 142.
[1229] Ibid [emphasis added].
[1230] USSC 2 July 1980, 448 U.S. 448 (*Fullilove v. Klutznick*), p. 551. See Section 2.2.1.
[1231] ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*). See Section 4.2.7.
[1232] Ibid, paras. 148α and β.
[1233] Ibid, para. 148δ.

PROEF 3

review is contested.[1234] National procedures, as well as parliamentary debates, are part of a complex institutional design, and differences in the legal systems may lead the ECtHR to misunderstand decision-making styles and issues of quality.[1235] In a different way, the inconsistency and lack of transparency of courts' procedural approaches may also be a reason to consider process-based review a sign of an active approach. In the US context, Neuborne has explained that a principled approach of process-based review is needed to prevent such review from 'degenerat[ing] into an elaborate legal shell game, with courts defending substantive values by manipulating rules of process to ensure that the power to act in derogation of favored substantive values is always under the other procedural shell'.[1236] Furthermore, as was explained in Section 6.3.1A, process-based review can be applied with different levels of intensity, meaning that courts may also probe deeply into the decision-making process, which turns it into an invasive approach. In a similar vein, Martin Shapiro contends that procedural reasoning may be very intrusive in its application. He claims that the 'giving-reasons requirement' has shifted, at least in the US, from self-imposed restraint by US courts to 'a quite severe, judicially enforced set of procedural and substantive restraints'.[1237] Instead of applying the giving-reasons requirement as a formal requirement, US courts assess whether the administrative authority has made well-reasoned decisions, including whether it has listened to the arguments of individuals involved.[1238]

A practical illustration of such a broad application of the giving-reasons requirement may be found in the DSC's '*Tunisian case*'. In that judgment the DSC considered that since 'a review of the lawfulness of the deprivation of liberty must include a certain review of the factual basis of the decision to regard the alien as a danger to national security … [it] requires that it is proven on a balance of probabilities that such factual basis for the assessment of danger exists that the detention cannot be regarded as being unauthorised or unfounded'.[1239] The ECJ in *Volker und Markus Schecke* also seemed to do exactly what Shapiro fears. By requiring the European legislature to balance the interests involved and by finding that it had not considered less intrusive methods[1240], the ECJ mixed reason-giving with proportionality. Arguably, procedural reasoning can be applied in certain ways that mean it can no longer be regarded as a deferential approach.

A SIGN OF JUDICIAL ACTIVISM | A third and more fundamental argument has been raised against procedural reasoning by courts. From this position, process-based review is a sign of judicial activism regardless of how it is applied or whether it is used to provide additional procedural protection. Indeed, on this view, judicial examination

1234 Popelier (2017), p. 88.
1235 Nussberger (2017), p. 169.
1236 Neuborne (1982), pp. 2861–2867.
1237 Shapiro (1992), p. 185.
1238 Ibid, pp. 185–186.
1239 DSC 28 July 2008, no. 157/2008, U2008.2394H ('*Tunisian case*'), p. 7. See Section 3.2.3.
1240 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*), paras. 80–81. See Section 2.2.7.

PROEF 3

of procedures is considered to be a problematic assessment in itself. Review of the legislative process is, for example, rejected in the US. The USSC's Justice Antonio Scalia strongly opposed a review of the legislative process by the USSC.[1241] He argued that, unlike those who claim such a review is 'more respectful of State's rights …, in principle it seems to me to be much more disdainful'.[1242] In other words, process-based review of the legislative process is much more intrusive than substantive judicial review.[1243] Justice Scalia reached this conclusion because he regarded 'the States' legislative processes, [to be at] the heart of their sovereignty'.[1244] Accordingly, the USSC should be constrained to substantive assessments alone. This position can be traced back to the 'Enrolled Bill Doctrine', a doctrine of judicial interpretation that entails that 'an act ratified by the presiding officers of the legislature, approved by the [executive], and enrolled in the proper … office is conclusively presumed to have been properly passed'.[1245] This means that US courts should assume that the legislative enactment procedure was properly followed, and judicial activism and the counter-majoritarian difficulty are considered to be 'at their zenith when courts invalidate the work of the elected branches based on perceived deficiencies in the lawmaking process'.[1246]

Some regard process-based review as an activist approach in other jurisdictions too. In the European Union context, for example, some reject altogether the idea that the European courts can review EU legislation on the basis of the EU Better Regulation Programmes.[1247] These programmes aim to improve good governance and the regulatory quality of EU legislation, including compliance with procedural standards such as due care, balancing, publication and notification, and impact assessments. The self-binding nature of such programmes in general, and the impact assessments in particular have been questioned[1248], and judicial reliance on them has been considered a sign of procedural activism. It has been argued, for example, that courts reviewing compliance with such programmes may lead to rigidity and decrease the likelihood of regulatory innovation.[1249] More importantly, judicial review of procedural requirements of these Better Regulation Programmes, which are primarily public management tools, may be a way for courts to extend their powers beyond the legal arena. The socio-economic objectives of these programmes may be relied upon by

1241 USSC 29 June 1988, 487 U.S. 815 (*Thompson v. Oklahoma*), paras. 876–878.

1242 Ibid, para. 877.

1243 See for a discussion of these concerns Bar-Siman-Tov (2011), p. 1927; Coenen (2009), pp. 2868–2672; and Staszewski (2003), pp. 465–476.

1244 USSC 29 June 1988, 487 U.S. 815 (*Thompson v. Oklahoma*), para. 877.

1245 Coenen (2009), p. 2869, footnote 214. For an explanation of this doctrine, see Bar-Siman-Tov (2009), pp. 327ff ('[the Enrolled Bill Doctrine] amounts to a judicial declaration that the enactment process is completely beyond the reach of courts, that courts may not question the validity of legislation, and that the lawmaking provisions of the Constitution are (judicially) non-enforceable.', p. 375).

1246 Staszewski (2003), p. 468. This doctrine has been criticised as it would lead to unfettered parliamentary supremacy, see Bar-Siman-Tov (2009), pp. 375–378.

1247 See for a short discussion Keyearts (2013), p. 275.

1248 Kartner and Meuwese (2017), pp. 120–122.

1249 Keyaerts (2013), pp. 274–275.

PROEF 3

courts in their legal assessment, 'resulting in judicial activism based upon arguments of economic policy'.[1250]

In short, caution has been advised as to how courts apply process-based review. Procedural requirements may be considered to go beyond courts' mandates, and a very thorough review of the decision-making process may be considered overly intrusive. Besides such concerns, and more fundamentally, procedural reasoning has been considered a sign of procedural activism when decision-making procedures are considered the prerogative of the other decision-making authority.

7.4.3 RÉSUMÉ

This section has addressed the relationship between procedural reasoning and judicial restraint in relation to the institutional position of courts. Procedural reasoning has been considered by various scholars to be an expression of deference. Through reviewing decision-making procedures, courts may leave the substantive decision to other public authorities, which would be in a better position to make this decision. From a different perspective, procedural reasoning can be regarded as complementing substantive deference and thus intensifying courts' review. In addition, it has been argued that the application of procedural reasoning in practice has actually been very intrusive. More fundamentally, process-based review has been considered a sign of judicial activism because decision-making procedures are considered the prerogative of other decision-making authorities. It can be seen then that the connection between judicial restraint and procedural reasoning is not as straightforward as is often thought.

7.5 REFLECTIONS AND CONNECTIONS

The previous sections have outlined three debates concerning the institutional position of courts in legal systems and they have discussed the arguments in favour of and against the use of process-based review. The first debate focused on process-based fundamental rights review as a way for courts to protect the rule of law, or, by contrast, as an ineffective or inappropriate means to that end. The views put forward in the second debate related to the idea that courts could protect and even enhance the aims of deliberative democracies through procedural reasoning, or, by contrast, that courts are relatively unimportant to, or may even endanger, the deliberative democratic enterprise. The third debate looked at whether the use of process-based review is a sign of judicial restraint, or, rather, an indication of judicial activism. The debates have thus been constructed in such a way as to highlight the opposing views taken within a single debate. This section, however, shows that, instead of regarding the various positions

[1250] Ibid, p. 275.

PROEF 3

taken as a mere pros-and-cons debate, it is possible to unravel the core issues of each debate to clarify what is actually underlying the arguments put forward.

To this end, Section 7.5.1 addresses the intertwinement of views on procedural reasoning with core constitutional principles, such as democracy, the rule of law, separation of powers, and courts' institutional positions. Section 7.5.2 subsequently addresses the importance of contextualisation when looking at the debates on procedural reasoning. It focuses on two central factors: the historical and institutional settings of courts. Section 7.5.3 provides insight into the divergent views on the intrusiveness of procedural reasoning.

7.5.1 INTERTWINEMENT OF VIEWS ON PROCESS-BASED REVIEW WITH CORE CONSTITUTIONAL PRINCIPLES

The first noticeable issue in the three debates discussed in this chapter is that they all relate to general values and ideas of justice in democratic societies. They pinpoint the different views on (deliberative) democracy and the rule of law, which are translated into particular perceptions of institutional design that are best able to ensure these values. In other words, all these debates present views on 'which institutions (judicial/non-judicial; national/European [or international]) should be responsible for providing the answer' to the question what a 'right means including its relationship with other rights and collective interests'.[1251] In addition, 'the *limits* of adjudication', that is, the constitutional and institutional design of democratic States and the proper tasks assigned to courts therein, also determines the appropriate '*forms* of adjudication', in this case, the appropriateness of process-based review.[1252] Indeed, it was shown that the choice for one or the other view on constitutional matters may influence the kind of process-based review that is argued for or against. For example Bar-Siman-Tov's interpretation of Raz's and Hart's theories on the rule of law would allow for a process-based review in light of formal requirements.[1253] In deliberative theories, however, the focus lies more on ensuring rational decision-making. According to Messerschmidt, for example, the GFCC should not only review whether the legislative process 'is correct from the formal and legal point of view, but [verify] its intrinsic value, depending on the assessment of empirical data (which must be correct and more or less comprehensive), impact assessment (prognosis), evaluation, and weighing up of interests involved in legislation'.[1254]

A second finding that can be derived from the discussion of the various debates in the previous sections is that the concepts of democracy and the rule of law, as well as

[1251] Greer (2004), p. 417.
[1252] Fuller (1978), pp. 354–355.
[1253] See Section 7.2.1.
[1254] Messerschmidt (2013), p. 238.

PROEF 3

institutional design concepts such as the separation of powers and subsidiarity, are intricate and highly contested topics.[1255] The relationship between these notions is at the heart of many constitutional debates. Inevitably, differences in interpretation of these concepts lead to divergent understandings of the task assigned to courts. More concretely, the different views on substantive issues such as democracy, fundamental rights, and issues relating to the institutional design and separation of powers, appear to influence one's perspective on the desirability of process-based review.[1256] For instance, in relation to the rule of law, the different views on process-based review can be explained on the basis of different ideas on institutional design, especially ideas as to which public authority poses the greatest threat to the rule of law. While the arguments in favour of process-based review focus primarily on courts as protectors against (potential) power abuse by other institutions – whether from the legislative, administrative, or judicial branch – the arguments against procedural reasoning appear to be predominantly concerned with threats courts themselves (potentially) pose for the rule of law.[1257]

Concerning democracy itself, a similar connection can be found. If one is particularly concerned with including as much substantive information or 'voices' as possible in any decision-making process, one will be troubled if courts block these processes through procedural reasoning. In Waldron's view, for example, judicial review, including process-based review, privileges 'majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights'.[1258] If, on the other hand, one is primarily concerned with ensuring that also the small or unintelligible 'voices' are heard, one may be more inclined to favour process checks by courts. Ely, for example, puts his trust in courts precisely because they are political outsiders. According to him, '[c]ourts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out'.[1259]

Likewise, divergent perceptions of deliberative democracy appear to lead to different views on the use of procedural reasoning. Where Habermas' theory focuses on the value of discursive practices and entails a procedural understanding of democracy[1260], other deliberative democratic theorists, such as Gutmann and Thompson, consider

[1255] For a discussion on several different approaches concerning these issues (non-doctrinal, formalist, restrictive institutionalist and contextual institutionalist), see King (2008).

[1256] For example, for a discussion of different views in relation to the role of fundamental rights in judicial review of administrative decisions example, see Poole (2009); and for an alternative approach for judicial review, arguing that instead of the classic-rights-based constitutional theory the alternative framework focused on legitimacy includes second-order considerations for judicial review Poole (2004).

[1257] Section 7.2.

[1258] Waldron (2006), p. 1353.

[1259] Ely (1980), p. 106.

[1260] See Section 7.3.1C.

PROEF 3

deliberations simply as the most effective method to reach a justifiable outcome and they argue for deliberations beyond process.[1261] Habermas' discursive understanding of deliberative democracy leads him to argue for a broad area of judicial oversight, entailing review of the legislative process as well as of the procedural and substantive prerequisite for discursive deliberations.[1262] Gutmann and Thompson, by contrast, put the importance of courts into perspective, as they believe that courts cannot truly promote and ensure the quality of democratic processes.[1263]

Diverging views on the position of courts in a democratic society and the consequences thereof for the desirability of process-based review are also visible in practice. Courts' own ideas of their position in legal systems clearly influences the part process-based review plays in their case-law. For example, the IACtHR rejected a procedural approach in relation to amnesties in the *Gelman* judgment quite explicitly, as it considered that the focus should not be on the formal question but rather on the substantive aspect of such amnesties.[1264] Its European counterpart, by contrast, is considered to have taken a procedural turn in recent years.[1265] The ECtHR frequently finds that national authorities are in a better position to decide on certain issues, and for that reason it may show deference by focusing on the decision-making process.[1266] Likewise, several UKSC judges have considered that the UK courts should focus on matters of substance when dealing with cases under the Human Rights Act.[1267] For instance, in the UKSC judgment in *Miss Behavin' Ltd.*, Lady Hale held that in fundamental rights adjudication 'the court is concerned with whether the human rights of the claimant have in fact

[1261] Gutmann and Thompson (2000), p. 161.

[1262] Habermas (1998), pp. 279–280 and Zurn (2007), p. 239.

[1263] As is discussed by Hübner Mendes (2013), p. 84, with a reference to Gutmann and Thompson (1996), pp. 46–47.

[1264] IACtHR (merits and reparations) 24 February 2011 (*Gelman v. Uruguay*), para. 229. See Section 4.2.8. The IACtHR has, however, recognised procedural obligations under substantive rights, in particular to carry out effective investigations, and affirmed that this is detachable aspect and may on itself lead to a violation of Convention rights. See Le Bonniec (2017), pp. 168–170.

[1265] See e.g., Kleinlein (2019), pp. 92–99; Çali (2018), pp. 256–263; Spano (2018), p. 480ff; Arnardóttir (2017), pp. 13–15; Brems (2017), p. 17; Gerards (2017), p. 127; Huijbers (2017a), pp. 178–179; Nussberger (2017), pp. 172–173; Popelier and Van de Heyning (2017), p. 13; Çali (2016), pp. 257–263; Arnardóttir (2015), pp. 4–7; Le Bonniec (2017), pp. 24–26; Saul (2015), pp. 1–3; Brems (2013), p. 138; Gerards (2013b), pp. 52–56; and Christoffersen (2009), p. 455. Indeed, Nina Le Bonniec has argued that in comparison with the IACtHR (and the UN Committee on Human Rights) the ECtHR's 'proceduralisation' has most fully developed, see Le Bonniec (2017), pp. 183–190.

[1266] E.g., Kleinlein (2019), pp. 99–104; Huijbers (2017a), pp. 196–197; Popelier and Van de Heyning (2017), pp. 8–13; Sathanapally (2017), pp. 54–56; Popelier (2013b), pp. 251–254. In a report prepared by five judges of the ECtHR for the opening of the judicial year, the relationship between the ECtHR's subsidiary role was clarified as it mentioned that '[w]here the procedural requirements are satisfied, the Court will be less inclined to review the substantive issue', but if 'the appropriate procedures are not in place, the Court will not be able to fulfil its subsidiary role', see Council of Europe, ECtHR, Organising Committee (2015), 'Seminar to Mark the Opening of the Judicial Year 2015 – Subsidiarity: A Two Sided Coin?' (30 January 2015), para. 31 <https://www.echr.coe.int/Documents/Seminar_background_paper_2015_ENG.pdf>.

[1267] See Section 3.2.5.

PROEF 3

been infringed, not with whether the administrative decision-maker took them into account'.[1268]

In addition, courts' own perception of core constitutional values seems to influence their application of procedural reasoning. In *Hirst (No. 2)* the ECtHR took a seemingly deliberative account of the notion of democracy.[1269] It considered that 'there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of the blanket ban on the right of a convicted prisoner to vote' nor that 'there was any substantive debate by members of the legislature on the continued justification [of the ban] in light of modern-day penal policy and of current human rights standards'.[1270] According to Popelier this judgment demonstrates that the ECtHR regards public debate at the core of the democracy, and for that reason, it would allow for a review that focuses on the deliberativeness of the legislative process.[1271] This may lead to a more detailed and substantive set of requirements for the deliberative process. The perspective put forward by the USSC's Justice Stone in footnote four of *Carolene Products*, however, was the USSC's focus should lie on a narrow understanding of democracy, in the sense of ensuring voting and participation rights.[1272] The focus from this perspective is therefore more on voice, vote, and participation, rather than on the deliberative quality of the democratic process.

In short, the meaning of procedural reasoning for the institutional design and constitutional division of tasks may vary. Whether courts are regarded as authorities whose main task is protecting the rule of law or whether they are seen as partners in the deliberative enterprise, depends on one's views of the underlying notions of democracy, the rule of law and the separation of powers doctrine.[1273] It is precisely because these underlying notions are part of fundamental and highly complex debates that it is very difficult to find a middle ground on courts' use of procedural reasoning. Minor differences in understanding of the core constitutional concepts might lead to significant differences in the appropriate use of process-based review by courts.[1274] In a way, therefore, justifiability, usefulness, and desirability of process-based review are all in the eye of the beholder, as is the perceived intrusiveness of such an approach.[1275]

1268 UKSC 25 April 2007, [2007] UKHL 19 (*Belfast City Council v. Miss Behavin' Ltd.*), para. 31. See Section 3.2.5.

1269 ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*). See Section 2.2.8.

1270 Ibid, para. 79.

1271 Popelier (2013b), pp. 255–256.

1272 USSC 25 April 1938, 304 U.S. 144 (*US v. Carolene Products*), p. 152. See Section 2.2.1.

1273 See also Staszewski (2003), p. 471 ('While application of the agency model to the initiative process would … be judicially manageable, the normative appeal of this approach depends largely upon whether one accepts the myth of popular sovereignty in direct democracy.').

1274 In a similar vein see, Tomkins (2010), pp. 2–3.

1275 See for a similar view, Coenen (2009), p. 2781.

PROEF 3

7.5.2 CONTEXT OF PROCESS-BASED REVIEW

Besides diverging preferences and understandings of the core concepts of a democratic State and the institutional position of courts therein, the evaluation of process-based review appears to depend on the specific context of each court as well as of each case. For instance, Ferejohn and Pasquino note:

> '… constitutional courts are very differently situated in various political systems. They are asked different kinds of questions by different political actors, and are faced with different expectations, histories and cultural and political constraints. In view of this diversity of circumstances it is to be expected that constitutional courts adopt different kinds of deliberative practices even when treating quite similar issues.'[1276]

Contextualisation and obtaining a sound insight into the settings of courts are thus essential for understanding what institutional design was chosen and which role was assigned to courts.[1277] There is a broad spectrum of contextual factors that may be relevant for the role of courts, and for whether and how they can apply procedural reasoning.[1278] A contextual approach has also been advocated by Aileen Kavanagh. She argues that whether an approach can truly be considered a form of judicial restraint or judicial activism depends on the setting. She states that it 'is too simplistic to equate striking down [legislation] with activism and failure to strike down with deference'.[1279] In her view a (procedural) strike down decision might still allow the legislature to enact or not to enact a replacement provision, while judicial interpretations of legislation in line with fundamental rights could be said to bind the legislature despite the fact that the legislation remains intact. Of course views differ in this regard. Nevertheless, what can be taken from Kavanagh's comments is that whether process-based review is regarded as intrusive or deferential will depend on various contextual factors, and cannot be generalised. This section addresses two contextual factors that scholarly writing deems relevant for understanding the desirability and legitimacy of courts' procedural approaches.[1280] Section A briefly discusses the historical settings that are relevant to understanding the sensitivity of process-based review, and Section B considers the institutional position of courts.

[1276] Ferejohn and Pasquino (2002), p. 22.

[1277] This is not to suggest that there are no similarities and overlap between different legal systems and settings of courts. Indeed, looking for these similarities is an essential part of comparative research, see for a discussion also the Introduction to Part II of this research. Also Ferejohn and Pasquino note that '… despite the diversity, we think there is an important sense in which each of the constitutional courts we examine – the French, German, Italian, Spanish and U.S. courts – have retained the exemplary deliberative character that Rawls describes', see Ferejohn and Pasquino (2002), p. 22.

[1278] The context of courts is influenced by a large variety of factors, which are often categorised or discussed in just as large a variety. For several contextual discussions of courts, see e.g., Alter, Helfer, and Madsen (2015) and Lijphart (2012).

[1279] Kavanagh (2008), p. 213.

[1280] On the importance of human rights research to include contextual issues, see e.g., McInerney-Lankford (2017), p. 47. And for famous contextual approaches, see e.g., Glenn (2014), pp. 361–385 and Delmas-Marty (2009), pp. 1–16.

PROEF 3

A. *Historical context*

The specific interpretation and institutional incorporation of the notions of separation of powers and checks and balances are different for each legal system.[1281] These features have not developed overnight, but are a result of lengthy legal and cultural evolutions.[1282] Moreover, these evolutions do not stop, but continue over time through public and political debate, societal changes, as well as through court judgments.[1283] In relation to the US, France and the European Union, Mitchel de S.-O.-l'E Lasser has argued that courts in these systems should be aware of their own specific 'judicial problematic', which is 'the particular task or work that judges (and others) in a specific time and place must perform in order to be understood (by themselves and others) as acting appropriately – legitimately – in that system, that is, acting in a manner that is in accordance with that system's master narrative'.[1284] Habermas has also pointed this out:

> 'Different legal orders not only represents different ways of realizing the same rights and principles; they can also reflect different paradigms of law. By the latter I mean the exemplary views of a legal community regarding how the system of rights and constitutional principles can be actualized in the *perceived* context of a given society.
>
> A *paradigm of law* draws on a model of contemporary society to explain how constitutional rights and principles must be conceived and implemented if in the given context they are to fulfill the functions normatively ascribed to them.'[1285]

This need for contextualisation and understanding of the '*Zeitgeist*'[1286] or 'spirit of times'[1287], is also relevant for the debate on whether and when courts may or may not apply process-based review. A specific example of the relationship of *Zeitgeist* and process-based review can be found in the discussion of the procedural turn of the ECtHR, which was discussed in Section 1.1. It was shown that the increased use of process-based review by the ECtHR is considered by some scholars to be a result of the changed political setting, which has placed more emphasis on the ECtHR's subsidiary role.[1288]

[1281] For some varieties of organising democratic societies, see Lijphart (2012).

[1282] E.g, Raz (2009), p. 180; Koopmans (2003), p. 127; in relation to the US context, Vile (1967), p. 289ff.

[1283] E.g., Roux (2018), pp. 297 and 299–300 and Koopmans(2003), p. 96.

[1284] De S.-O.-l'E Lasser (2008), p. 38.

[1285] Habermas (1998), p. 194 [emphasis in the original].

[1286] This Hegelian term concerns the dominant ideals and beliefs of one's time that is inherently part of oneself. Such does not mean that there is a 'homogenous state of affairs' but rather that there is a certain culture, language, or conceptual view on how courts ought to work out disputes, see Hegel (2000), par. 344.

[1287] It has for example been argued that the before deciding on landmark cases, judges feel 'the breath of the Zeitgeist' upon their shoulders, Ehrmann (1951), p. 424. In relation to comparative research, the need to focus not only on resemblances between legal systems, but also on differences in 'material, conceptual and cultural parameters' has been emphasised, see De S.-O.-l'E Lasser (2004), p. 242; see also Kelemen (2016), p. 117 and Wisotsky (1978), p. 191.

[1288] E.g., Kleinlein (2019), pp. 99–104; Cram (2018), p. 10; Spano (2018); Huijbers (2017a); Le Bonniec (2017), p. 455ff; Popelier and Van den Heyning (2017); and Spano (2014), pp. 11–13.

PROEF 3

The historical background is also offered as an explanation of the part procedural reasoning plays in a court's assessment.[1289] Popelier and Patiño Álvarez, for example, have shown how the 'fundamental social cleavages' in Belgium (e.g., Catholic minorities in the Wallonian part, and secular minorities in Flanders) have resulted in a delicate role for the Belgian Constitutional Court (BCC) in reviewing the legislative process.[1290] The legislature did not explicitly mandate the BCC to consider the deliberative practices of the legislative process[1291], and although the BCC has nevertheless taken it upon itself to examine the deliberative quality of the parliamentary process – for example, it has assessed whether the legislature relied on advice, sought consultation, and referred to scientific studies – it leaves a wide margin of discretion to the Belgian legislature.[1292]

B. *Institutional context*

The institutional setting of courts concerns the position of courts vis-à-vis other public authorities, which is often visible in the relationship between the reviewing court and the reviewee (or the 'subject of review', see Sections 5.2.3 and 6.2). The institutional context is largely determined by the division of powers and by the mandate of courts, which is generally codified in legislation.[1293] This setting is another relevant element in determining what role there may be for procedural reasoning.[1294] For instance, courts' mandate for process-based review and procedural standard-setting has been held to change the scope of the debate on the legitimacy of procedural reasoning (see more extensively, Section 8.2).[1295] In their discussion concerning courts in South Africa, the United States, and Germany, Rose Ackerman, Stefanie Egidy, and James Fowkes have also signalled that '[c]ourts that insist on "due process of lawmaking" must do so in ways that respect the underlying realities of each nation's constitutional structure and acknowledge the limited competence of the judiciary'.[1296]

1289 More generally on the importance of historical settings for judicial adjudication see e.g., Alter, Helfer, and Madsen (2015), pp. 27–29 and Tushnet (2014), pp. 70–71. Historical settings are indeed an important background for courts' reasoning, see for a discussion of historical interpretation by courts, Uitz (2005), p. 93ff.

1290 Popelier and Patiño Álvarez (2013), pp. 205–206.

1291 Ibid, p. 227.

1292 Ibid, p. 229.

1293 See in that regard Shapiro (1998), p. 7 ('An institutional theory of constitutions argues that institutions like legislatures and courts have certain embedded behaviour patterns that will come out no matter the constitution matrix in which they are inserted although, of course, they will be constrained by whatever constitutional matrix contains them.').

1294 It should be noted that precisely because institutional settings of courts relate to core constitutional concepts of separation of powers, division of tasks, and subsidiarity, there is much debate on what the institutional context exactly requires from courts. And as Section 7.5.1 explained, one's perspective on these matters affect one's views on the desirability and validity of process-based review.

1295 See also Murkens (2018), p. 349.

1296 Rose-Ackerman, Egidy, and Fowkes (2015), p. 3. In a similar vein, see Roux (2018), p. 298 ('theorizations of the judicialization of politics need to be premised on a proper understanding of the contrasting environments in which constitutional courts operate').

PROEF 3

The institutional relationship between courts *inter se* and between courts and legislative and executive authorities may explain why procedural reasoning is generally unproblematic. Indeed, procedural reasoning in relation to decisions of the executive is often a default option, and it is frequently explicitly mandated in the Constitution as part of the constitutional checks and balances.[1297] It is contended that by reviewing administrative decision-making procedures, courts operate 'within the framework of [their] classic role in the separation of powers and in accordance with [their] role of maintaining the rule of law'.[1298] Furthermore, courts simply cannot decide on the substance of every executive decision that is appealed, as this would constitute an unworkable number of cases.[1299] In administrative cases in which fundamental rights are at stake, courts have turned to procedural reasoning as well. This may be self-evident in cases concerning procedural fundamental rights, such as the right to a fair trial, that may also apply to the administrative context.[1300]

The right of appeal, combined with the fundamental right to a fair trial, may also explain why review of the judicial process seems largely uncontested. Review of the judicial decision-making process appears to be inherent in democratic societies in which effective remedies, judicial appeal, judicial independence and impartiality are highly valued. Nevertheless, the relationship between the reviewer and reviewee becomes more complex, when the reviewer is a court outside the legal system. Indeed, even if it concerns review of judicial or administrative processes by the ECtHR or the Committee on Social, Economic and Cultural Rights, this may give rise to controversy. This again comes back to the specific position of a court in relation to the decision-making authority; that is, whether it concerns an international or national court, a lower or superior court, a state or federal court.[1301] Especially in relation to international judicial institutions, the relationship between the international court and national authorities are more complex and even fragmented[1302], and review of the decision-making process may be considered a contentious issue.[1303]

The way the relationship between courts and the legislature is determined in constitutions also helps to explain that in certain legal systems process-based fundamental rights review of legislation is regularly applied (e.g., in Colombia[1304]), while in other contexts, a procedural approach is considered very controversial (e.g.,

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1297 Barak (2008), p. 241.
1298 Ibid, p. 241.
1299 Koopmans (2003), p. 129.
1300 Such may relate to a wide variety of procedural obligations fundamental rights include, see in the context of the ECtHR, De Jong (2017); Gerards (2017), pp. 137–138; and, Le Bonniec (2017), pp. 254–256.
1301 Alter, Helfer, and Madsen (2015), pp. 4 and 20–21. In relation to the relationship between federal and state courts, see the discussions in relation to the US and Germany, Kommers, Miller, and Ginsburg (2012), pp. 88–90; Nourse (1999); and Nagel (1978).
1302 Mazmanyan, Popelier, and Vandenbruwaene (2013), pp. 8–11.
1303 In relation to the ECtHR the relationship with national authorities is regarded as a dynamic distribution of powers, in which each actor is dependent on the other, see Glas (2015), pp. 92–93.
1304 Popelier and Patiño Álvarez, (2013), p. 228.

PROEF 3

in the US[1305] and in States with strong parliamentary supremacy, such as the UK[1306]). In other jurisdictions, like the Netherlands, constitutional review of parliamentary legislation is prohibited by the Dutch Constitution[1307], which also excludes courts from reviewing the legislative process.[1308] Nevertheless, on the basis of international (human rights) treaties, Dutch courts can and have reviewed (the decision-making process of) parliamentary acts.[1309]

In brief, courts' institutional settings – including the relationship between the court and the subject under review – and their historical context play an important role in how courts (may) adjudicate cases. This also affects the kind of cases in which courts can legitimately apply process-based review.

7.5.3 INTRUSIVENESS OF PROCESS-BASED REVIEW

The connection between views on process-based review and perspectives on the core constitutional concepts, as well as the institutional and historical settings of courts, are not just relevant for *whether* courts may apply procedural reasoning, but also for *how* they may legitimately do so. More concretely, these debates influence the scope of process-based review. Generally, these debates are referred to in terms of judicial activism, interventionism or deference, but reference can also be made to notions of discretion, margin of appreciation, and room of manoeuvre.[1310] These conceptions focus on the interrelations of the different institutions, conceptualised in the notion of checks and balances and subsidiarity. Indeed, courts have a 'difficult and multifaceted inquiry into relative institutional competence, bearing in mind all the factors relevant in the context of the individual case'.[1311] Thus, even if it is accepted that courts have a role in protecting the rule of law, democracy, and legal norms more generally, the extent to which and the manner in which they do so is up for debate. As Kavanagh

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[1305] Bar-Siman-Tov (2011), p. 1917. See also Section 2.2.1.

[1306] For example the discussion in relation to the UK, see Murkens (2018), p. 352. See also Section 2.2.3.

[1307] Article 120 of the Dutch Constitution prohibits constitutional review of parliamentary legislation and holds: 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts'. The prohibition extends to the declaring incompatible with the Kingdom Charter and general principles of Law, see e.g., Uzman, Barkhuysen and Van Emmerik (2010), p. 5. Tushnet has argued that the US Constitution should incorporate a similar prohibition of judicial review to that of Article 120 of the Dutch Constitution, see Tushnet (2011).

[1308] SCN 27 January 1961, ECLI:NL:HR:1961:AG2059 (*Prof. Van den Bergh*). For a recent confirmation of this approach, see DCTH 12 April 2017, ECLI:NL:RBDHA:2017:3667 (*Oekraïnereferendum*), para. 4.3.

[1309] In accordance with Articles 93 and 94 of the Dutch Constitution, the Dutch courts have adopted a strong judicial review in light of international (human rights) treaties, many (yet not all) rights are directly enforceable before the Dutch courts and have been a basis for review and the setting aside of legislative acts of parliaments. For a discussion of the role of Dutch courts in fundamental rights cases, see Uzman (2018), pp. 263–269 and Uzman, Barkhuysen, and Van Emmerik (2010), p. 7ff.

[1310] See also Section 7.4.

[1311] Kavanagh (2008), p. 198.

PROEF 3

has clarified, 'the point remains that what deference requires depends on the legal and political context of the individual case.'[1312] Or, in the words of Julian Eule, '[t]he judicial role is thus a relative one', making it impossible to 'talk of judicial deference in a vacuum' rather '[o]ne first has to know who or what demands the deference'.[1313]

Illustrative of this are the debates on whether process-based fundamental rights review is a sign of judicial activism or rather judicial restraint (addressed in Section 7.4). The institutional setting of a court can explain arguments raised in relation to the scope and intensity of the use of process-based review. For example, the adherence to parliamentary supremacy in Australia explains why, according to Jeffrey Goldsworthy, process-based review by Australian courts should be limited to very express and absolute norms relating to democratic decision-making (such as repeal, majority and quorum requirements, and requirements about amendments).[1314] The goal Goldsworthy envisages for process-based review is 'to promote careful consideration and genuine deliberation of proposals within a parliament', and by taking this approach, he means to leave the supremacy of parliament intact.[1315] Process-based review in light of other more far-reaching procedural standards would, according to him, affect the substantive legislative power of the Australian parliament.

In addition, the kind of standards courts impose on authorities as regards their decision-making process may be important. Process-based review in light of standards that fall within the scope of the competences of other decision-making authorities may be considered intrusive. In relation to the GFCC, Messerschmidt notes that because procedural prudence of the legislature is only a responsibility and not a constitutional duty, 'procedural and methodological shortcomings of legislation only matter when the contents of the law may be affected by them'.[1316] The ECtHR is furthermore held to implicitly compel national authorities to apply rationality instruments (e.g., consultations, impact assessment, follow-up evaluations), which may be signs of procedural activism. At the same time, it has been noted that it does not impose a specific method to be employed by the legislature, showing judicial self-restraint concerning the means employed.[1317]

This brief discussion of the intrusiveness of procedural reasoning demonstrates that variations in the application of procedural reasoning may influence the evaluation of procedural reasoning as deferential or intrusive. In other words, whether procedural reasoning is indeed a show of deference or rather, a sign of activism is not only context-specific but also dependent on the manner in which it is applied.[1318] Chapter 10 addresses this point in more detail.

1312 Ibid, p. 214.
1313 Eule (1990), p. 1535.
1314 Goldsworthy (2010), p. 144.
1315 Ibid.
1316 Messerschmidt (2013), p. 243.
1317 Popelier (2013b), pp. 258 and 265–266.
1318 For an overview of the different applications of procedural reasoning, see Section 6.3.

PROEF 3

7.6 CONCLUSION

This chapter has discussed various arguments in favour of and against the use of procedural reasoning from the perspectives of the rule of law, (deliberative) democracy, and judicial restraint. Some scholars have argued that through procedural reasoning, courts may safeguard the rule of law or encourage public authorities to comply with the values of deliberative democratic theories, including by engaging in deliberative and rational decision-making procedures themselves. Meanwhile, others have contended that courts cannot truly contribute to the protection of the rule of law and that they may even endanger the deliberative democratic enterprise. In a similar vein, procedural reasoning has been regarded both as a means for courts to show judicial restraint and as a means to facilitate procedural activism. This chapter has explained that such divergent views on procedural reasoning can be traced back to institutional and historical contextual factors as well as to one's perspectives on core constitutional concepts such as democracy and separation of powers, and on the institutional design of legal systems. These factors and perspectives not only affect (one's view on) whether process-based review may legitimately be applied, but also the manner in which they do so. Indeed, views on the intrusiveness of procedural reasoning seem to be affected by the way this review method works in practice.

PROEF 3

CHAPTER 8

DEBATES CONCERNING PROCESS-BASED REVIEW AND PROCEDURAL MANDATES, JUDICIAL STANDARD-SETTING, AND FUNDAMENTAL RIGHTS PROTECTION

8.1 INTRODUCTION

Courts have an important task when it comes to the protection of fundamental rights. They are asked to interpret and apply fundamental rights in concrete cases. Through fundamental rights adjudication they not only clarify the meaning of these rights but also establish and show when fundamental rights have been violated. As so-called 'guardians of fundamental rights'[1319], courts' function can be said to be threefold: they have a duty to *respect* fundamental rights, to *protect* individuals and groups against interferences by other public authorities (or private entities)[1320], and to *ensure their fulfilment* by the other authorities.[1321, 1322] This function relates to a wide range of fundamental rights, including procedural and substantive rights, economic and civil rights as well as social, economic, and cultural rights, and individual and group rights.

As evidenced by the examples discussed in Part I of this book, in practice courts have relied on process-based review to determine if there was a justified interference with fundamental rights. This chapter addresses the debate on the use of procedural reasoning in light of the function of courts as guardians of fundamental rights. A large part of this chapter (Section 8.3) is therefore dedicated to the debate on whether procedural reasoning is an appropriate means for courts to carry out this task. To provide a basis for that debate, however, the chapter first addresses the broader question concerning courts' overall function in democratic States (Section 8.2).

[1319] Popelier, Mazmanyan, and Vandenbruwaene (2013), pp. 6–8.

[1320] Section 8.3.1C-I addresses the horizontal effect of fundamental rights.

[1321] This terminology has been chosen rather than the more classic notion of 'fulfilling' the underlying obligations of fundamental rights, since generally this seems to be an issue for the other authorities as it requires positive action to facilitate the enjoyment of fundamental rights.

[1322] The respect-protect-fulfil typology is commonly used by UN human rights treaty bodies. In other contexts, similar distinctions can be found as well, particularly between negative obligations and positive obligations. See for a discussion Mégret (2017), para. 3; Fukuda-Parr, Lawsom-Remer, and Randolph (2015), pp. 21–22.

PROEF 3

This discussion covers issues of jurisdiction and of procedural mandate, and it deals with the question of whether and how courts may employ procedural reasoning to protect and develop procedural standards. Section 8.4 then connects and reflects on the various arguments discussed in these sections. In particular it addresses what is called the 'standard review loop', that is, the circular relationship that is thought to exist between courts' reviewing compliance with pre-existing standards and thereby refining and developing new standards that, in turn, inform future review on compliance with these standards. This section also addresses the various ways of perceiving the relationship between procedure and substance, the relevance of one's focus concerning the impact of fundamental rights adjudication, and the context-dependency of the effectiveness of a procedural approach. Section 8.5 concludes this chapter.

8.2 PROCESS-BASED REVIEW AND THE JUDICIAL FUNCTION OF PROTECTING PROCEDURAL STANDARDS

The judicial function is often described as the function of courts in comparison to the authorities of the other branches of government. This function is then translated to, and specified in, courts' mandate or jurisdiction. The mandate of a court therefore corresponds to the power it may legitimately exercise within a constitutional (or international) system. Whether procedural reasoning in fundamental rights cases is considered part of the judiciary's legitimate function therefore is closely related to the courts' procedural mandate, which will be discussed briefly in Section 8.2.1. Nevertheless, as that section also shows, the debate concerning the legitimate exercise of the judicial function is not exhausted by defining a specific judicial mandate. Courts have not only expanded their jurisdiction through their judgments and interpretations – a phenomenon often referred to by the term 'judicialisation' of politics and policy.[1323] They are also faced with circumstances unforeseen by the legislature, which may require them to develop new standards and broaden the scope of the application of fundamental rights in order to protect individuals' rights – this phenomenon has been referred to as the 'proliferation of rights'.[1324] Section 8.2.2 therefore addresses the various arguments that have been put forward in relation to the *standard-setting function* of courts, which helps them to *ensure* that fundamental rights are respected, protected, and fulfilled. In particular, this section addresses whether it falls within the scope of the judicial function to develop (procedural) standards. Section 8.2.3 summarises the main findings.

[1323] This is briefly discussed in Section 9.3.1B.

[1324] For a critical discussion of the proliferation of rights or 'hypertrophy of human rights', see Posner (2014), pp. 91–95.

PROEF 3

8.2.1 COURTS' PROCEDURAL MANDATE

Considering the separation of powers and the specific role of courts therein, the mandate or jurisdiction of courts is obviously a first issue of debate. Positions taken in relation to the judicial function of protecting fundamental rights tend to refer to the presence or absence of a mandate of courts for taking up this task. The extent of this debate should not be underestimated. In the international context, for example, a principled reason 'periodically put forward by states as to why they would be justified in disregarding an IHRC [International Human Rights Court's] judgment' concerns the issue that the court has 'exceeded the limits of its mandates (the "mandate abuse" objection)'.[1325] Likewise, there are ongoing debates on the mandate of national courts. Highly debated is the issue of whether judicial review of legislation should fall within the judicial domain.[1326] In Jeremy Waldron's view, for example, courts should not be mandated to carry out such a review, as '[b]y privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights'.[1327]

The search for a balance of powers is a continuous struggle.[1328] Obviously criticism along the lines of Waldron's may raise questions concerning the mandate of courts more generally, but given the focus of the current study, this section will focus on their procedural mandate. The notion of procedural mandate refers to a variety of procedural issues, such as whether courts can decide on admissibility of the case, order interim measures, decide on the reparations of fundamental rights violations, deliver advisory opinions, and many more.[1329] For present purposes, the notion of procedural mandate is used specifically to refer to the question whether courts are mandated to review decision-making processes of public authorities, that is, whether they may apply process-based review.

[1325] O'Cinneide (2017), p. 308.

[1326] In the context of the US, amongst many others, see Fallon (2008); Waldron (2006); Tushnet (1999a); and Perry (1994).

[1327] Waldron (2006), p. 1353.

[1328] This continuous struggle is evidenced quite clearly by the current struggles of international courts. Various states have withdrawn from the jurisdiction of the IACtHR and the International Criminal Court because, for various reasons, they do not regard these courts as legitimate authorities. Furthermore the ECtHR as well as the CJEU face political backlash. This is not symptomatic for international courts alone, also constitutional courts, supreme courts, just as much as lower courts, regularly face public as well as political criticism, for example, when deciding on highly sensitive cases, such as cases on abortion and euthanasia, or when convicting parliamentarians for hate speech or when releasing a person who was suspected of having committed a murder. It has been argued that the current rise of 'populist' regimes fuels these debates, as populists often tend to argue that courts transgress their mandate and are illegitimately counter-majoritarian. E.g., on the IACtHR, see Soley and Steiniger (2018); on the ICC, see Duerr (2018); on the ECtHR, see Madsen (2016) and the various contributions in Popelier, Lambrecht, and Lemmens (2016); on the CJEU, see Kelemen (2018); and more generally on the influence of populism on the backlash against courts, see Petkova (2017).

[1329] Shelton (2009).

PROEF 3

The mandate of courts to review decision-making procedures may vary depending on the court, according to the legal context, depending on the case, decision-making authority, and issue; moreover, it may develop over time.[1330] In certain contexts, courts have been explicitly mandated to review the decision-making process. Generally, it seems that courts are mandated to review the decision-making procedures of administrative authorities, although they may not always assess the choice of a particular procedure. For example, in *Baker*, the CSC held that the analysis of procedural fairness 'should also take into account and *respect the choices of procedure* made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in circumstances'.[1331] In relation to the review of judgments of lower courts, courts' mandates may also differ. Some higher courts have an explicit mandate to review the facts and merits of a case and overturn a lower court's judgment, yet other courts' mandates may be limited to answering procedural questions, such as whether the lower court's procedure has met the requirements of a fair trial.[1332] For example, on the basis of the Framework Decision of the European Union, national courts reviewing a request for an European Arrest Warrant have no mandate for substantive review in order to determine whether a person should be prosecuted and convicted, but they can – to a very limited degree – consider if the trial in the requesting State has met the minimum requirements of the right to a fair trial.[1333] Looking at the mandate of courts to review the legislative process, there appear to be even more differences between courts. Indeed, in the Netherlands, the Constitution explicitly prohibits constitutional review of parliamentary legislation.[1334] This prohibition excludes not only substantive review, but, as interpreted by the Supreme Court of the Netherlands (SCN), also review of the legislative process.[1335] The CCC, by contrast, has far-reaching powers of review over the decision-making process of the legislature under the Constitution.[1336] In fact, this court has often turned to process-based review to declare legislation

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1330 The fact that courts' procedural mandate are not set in stone becomes clear from considering the historical and institutional context, discussed in Section 7.5.2. But see also the procedural turn by the ECtHR, discussed in Section 1.1. It has also been argued that courts' mandate have been changed in light of the evidence-based trend (Section 9.3.2). Indeed, the emergence of procedural reasoning of the legislative decision-making procedure against 'the diffusion of evidence-based requirements imposed on policymakers across the world' requiring them to 'inter alia consult interested parties and experts, conduct studies and collect evidence as well as engage in deliberation processes', see Alemanno (2013), p. 333.

1331 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*), para. 27 [emphasis added]. See Section 3.2.1.

1332 In certain civil law jurisdictions these courts are called 'cassation courts', see e.g., Mak (2013), pp. 46–47 (France and the Netherlands) and Van Der Haegen (2018) (France, the Netherlands and Belgium). See also briefly Section 4.1 and the references therein.

1333 See the discussion in Section 4.2.2.

1334 Article 120 Dutch Constitution and see the brief discussion in n(1307) to (1309).

1335 SCN 27 January 1961, ECLI:NL:HR:1961:AG2059 (*Prof. Van den Bergh*). For a recent confirmation of this approach, see DCTH 12 April 2017, ECLI:NL:RBDHA:2017:3667 (*Oekraïnereferendum*), para. 4.3.

1336 E.g., Cepeda Espinosa and Landau (2017), p. 327.

PROEF 3

and constitutional amendments unconstitutional.[1337] Various courts have extensive mandates for both substance-based and process-based review. For example, the SACC has been granted jurisdiction to review both law-making procedures, as it did in *Doctors for Life International* judgment, and the substance of legislation.[1338]

Against this background, the next section addresses a particular aspect of the ongoing debate concerning the use of procedural reasoning by courts and procedural standards. This debate is a subset of the broader discussion on the mandate of courts, and focuses on whether courts may cultivate and develop new procedural standards, and on the extent of courts' standard-setting task.

8.2.2 COURTS AND THE DEFINITION AND APPLICATION OF PROCEDURAL STANDARDS

Process-based review and the definition and application of procedural standards seem to go hand-in-hand.[1339] In a way, it may be said that there is a 'circular relationship' between courts' procedural assessment and their activity in applying procedural standards. Courts' review is based on procedural standards, and by interpreting and applying those standards, they further cultivate these standards or develop new ones, which in turn may influence courts' process-based review (this is further addressed in Section 8.4.1).[1340] In this respect, the notion of procedural standards refers to both standards concerning procedural negative obligations and procedural positive obligations.[1341] Negative procedural obligations require decision-making authorities to not unjustifiably infringe fundamental rights. For instance, they should refrain from biased decision-making (e.g., *Baker*[1342]). Positive procedural obligations, by contrast, require public authorities to actively protect and ensure fundamental rights. For instance, they should try to strike a fair balance between various interests and rights at stake (e.g., *Von Hannover (No. 2)*[1343], *Volker und Markus Schecke*[1344] and *Quila*[1345]). Procedural standards do not only flow from procedural rights, but may also relate to

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[1337] Ibid, pp. 327–334. For examples of the use of its process-based review powers, see CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*') and CCC 23 January 2008, C-030 ('*General Foresting Law*'). Discussed in Section 2.2.6.

[1338] See Rose-Ackerman, Egidy, and Fowkes (2015), p. 107.

[1339] See also Gerards (2017), p. 129.

[1340] Concerning circular relationships and judicial review, see Van Hoecke (2013), pp. 188–189.

[1341] On the distinction between procedural and substantive positive obligations, see Beijer (2017b), pp. 54–59 and Lavrysen (2017), p. 45ff.

[1342] CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.

[1343] ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*). See Section 4.2.7.

[1344] ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.

[1345] UKSC 12 October 2011, [2011] UKSC 45 (*R (on the application of Quila and another) (FC) v. Secretary of State for the Home Department*). See Section 3.2.5.

PROEF 3

substantive rights such as the need for effective remedies to stop the sale of one's house, as in the *I.D.G.* decision of the CESCR[1346], or the need for procedural safeguards to protect the right to respect for private and family life, as in the *Winterstein* judgment of the ECtHR.[1347]

Furthermore, the notion of procedural standards is not limited to purely procedural issues, but may also include mixed standards, that is, standards that allow for both process-based review and substantive review, such as the reason-giving requirement.[1348] Susan Rose-Ackerman, Stefanie Egidy, and James Fowkes, for instance, argue that the GFCC's approach to the principle of equality requires reason-giving in order to enable the GFCC to make a well-informed decision.[1349] The equality principle thereby 'obliges the legislature to act consistently and to achieve equality in the resulting statutory order' and '[t]his is a substantive requirement linked to the preservation of individual rights, but the legislature can defend itself against a constitutional challenge by presenting evidence of consistency or by giving reasons why the rights violation is justified in a particular instance'.[1350] Thus the fleshing out of mixed standards may well be possible via process-based review. The GFCC's *Hartz IV* judgment, for example, has been regarded as requiring the German legislature to provide relevant and sufficient reasons when deciding to deviate from the regular statistical model for economic decision-making.[1351]

To clarify the debates on process-based review and the definition and application of procedural standards by courts, this section first addresses the underlying debate on the role of courts when applying the law (Section A). It then goes on to discuss some debates concerning the temporal aspects of standard-setting, that is, the application of *a priori* and *a posteriori* defined standards (Section B), and the substantive aspects of standard-setting, in particular the level of detail of procedural standards (Section C).

A. *Originalism, living instruments, and the role of courts*

One particular aspect of the procedural standards debate concerns the question as to how one should interpret the idea of courts acting as so-called '*bouche de la loi*' in relation to the definition of procedural standards.[1352] To what extent are courts restricted to applying the rights and standards as they are explicitly set out in legislation?[1353] An originalist position considers the function of courts to be limited to

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[1346] CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*). See Section 4.2.5.

[1347] ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*). See Section 4.2.7.

[1348] On mixed forms of standards and concepts, see the discussion on the substance-process distinction in Section 5.3.2A.

[1349] Rose-Ackerman, Egidy, and Fowkes (2015), p. 164.

[1350] Ibid, pp. 178–179.

[1351] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*), paras. 142 and 173–175. See Section 2.2.4.

[1352] See also the Introduction to Part III.

[1353] See for a theory of implied principles that are not set out in legislation but are underlying concepts or 'metaconcepts' for fundamental rights adjudication, see Wheatle (2017), pp. 13–14.

PROEF 3

an assessment in light of standards that have already been developed, and preferably also described in clear and detailed wording.[1354] According to this view what matters is what the drafters intended, and the courts' task is simply to work out what those intentions were.[1355] It is generally accepted that this can be done through textual and historical interpretation or, as laid down in Article 32 of the Vienna Convention on the Law of Treaties, through looking at the preparatory work leading to legislation, constitutions or treaties.[1356] Procedural reasoning may only be applied if the procedural standards are set out in the law, and, as we saw from the previous section, if courts are mandated to review compliance with them.

Others take the view that courts should propose and develop legal standards. Indeed, it is their function to interpret and apply standards in a given case, requiring courts not only to clarify legal requirements in concrete situations but also to develop the law. This standard-setting function is often based on the idea that constitutions, laws, and international instruments are 'living instruments'.[1357] According to Aileen Kavanagh, judicial practice around the globe actually conforms to the idea that '[t]he metaphor of "the living Constitution" (or the "living tree") conjures up this sense of organic and incremental growth: gradual rather than sudden, piecemeal rather than radical'.[1358] Similarly, David A. Strauss has argued that the US Constitution is a living instrument. He regards such a perspective as more workable than that of originalism because it provides a better justification for following precedents, it relates more closely to actual judicial practice, and it is more candid about the fact that contexts and judges' own views influence judicial decision-making.[1359] From this living instrument point of view, progressive, dynamic, or evolutionary interpretation by courts is welcomed, allowing courts to interpret laws in present-day circumstances instead of, or in addition to, opting for originalist interpretation techniques.[1360]

There is, of course, room for a middle-ground between originalism and living instrument approaches, and certainly the ongoing debate focuses primarily on where to draw the line between acceptable judicial law-making – often indicated as

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[1354] In general the idea that the law is fixed at the time of adoption and that courts should restrain themselves to the original meaning of the text of the Constitution are accepted by originalist, see Solum (2011), p. 4. Nevertheless, there is a broad diversity between originalist theories.

[1355] Ibid, pp. 2–3.

[1356] Article 32 VCLT holds: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable'.

[1357] Laws may be outdated for a number of reasons, including 'the costliness, in legislative time and effort, of enacting new legislation; because a powerful interest group is able to block legislative reform that is favored by a majority; or because of jurisdictional boundaries that allow some parts of the country to continue enforcing a practice that a national majority considers unacceptable', see Strauss (2004), p. 762.

[1358] Kavanagh (2003), p. 73.

[1359] Strauss (2010), pp. 43–45.

[1360] Ibid. Also in other contexts a living instrument approach has been suggested, see e.g., Cornell and Friedman (2011) and Sharpe (1999).

PROEF 3

'*Rechtsfindung*', which may be translated as 'finding the law' – and unacceptable uses of judicial powers.[1361] Indeed, those who take a living instrument approach do not argue that courts should have an unlimited power to interpret laws and set standards. Kavanagh, for example, has argued in favour of courts interpreting constitutions as living instruments, but she also notes that '[i]t does not follow that any and all types of judicial constitutional change are acceptable' and courts' 'creativity should take place within certain constraints'.[1362] Joseph Raz has also clarified that '[i]n every case in which the court makes law it also applies laws restricting and guiding its law-creating activities'.[1363] In particular, he has argued that courts may not act arbitrarily and must provide compelling reasons for their judgment, and '[t]he ability of courts radically to reshape a substantial area of the law by a single decision is very limited'.[1364]

In relation to fundamental rights adjudication specifically, the issue of judicial development of standards is hotly debated. Fundamental rights are generally described in rather open and undefined terms, lacking detailed standards. Courts are therefore required to cultivate them in the process of applying them to a case. Moreover, the documents in which these fundamental rights are laid down, such as constitutions and international treaties, are difficult to change and refinement of the standards through a political process would be complex and time-consuming. Courts therefore have considerable room for interpretation and application of fundamental rights. In addition, they will have to apply old standards to new and unforeseen circumstances in order to keep fundamental rights protection effective in the present-day. The ECtHR held that this justifies a living instrument approach:

> 'since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved … It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement …'[1365]

In Canada, former Justice Dickson of the CSC held that the establishment of the Canadian Charter of Rights and Freedoms 'had planted a living tree capable of growth and development over time to meet new social, political and historical realities often

[1361] For a moderate (non-)originalist approach, see, for example, Goldsworthy (2009). For a discussion of several limits of judicial powers, see Koopmans (2003), p. 98ff (e.g., non-justiciable or political questions, areas of discretion of other decision-making authorities and the issue of the counter-majoritarian difficulty).

[1362] Kavanagh (2003), p. 57.

[1363] Raz (2009), p. 195.

[1364] Ibid, pp. 196–197. Discussed in-depth in Section 7.2.1.

[1365] ECtHR (GC) 11 July 2002, app. no. 28947/95 (*Christine Goodwin v. the United Kingdom*), para. 74.

PROEF 3

unimagined by its framers'.[1366] In addition, Brian Walsh, a former judge at the Irish Supreme Court, has stated that the Irish Constitution should be interpreted in the present tense: 'It is but natural that from time to time the prevailing ideas of these virtues [of prudence, justice and charity] may be conditioned by the passage of time; no interpretation of the Constitution is intended to final for all time'.[1367]

The evolutive interpretation of fundamental rights is not without its limits, and debates relate to various issues including temporal and substantive aspects. These are addressed in the following sections.

B. Temporal aspects of standard-setting: consequences of new procedural standards

In light of the function of courts to respect, protect, and ensure the fulfilment of fundamental rights (see Section 8.1), courts are not only tasked with the *protection* of legal standards, including procedural standards, and ensuring these are met, but they are also required to *respect* those standards themselves, such as standards of procedural fairness and reasoned decision-making.[1368] Indeed, as briefly addressed in Section 7.2.2, the rule of law also binds courts to the law. Standards of legal certainty and foreseeable application of the law impose restraints on courts' role of developing new standards. For this reason, it has been argued that the consequences of judicially developed standards should be limited. In particular, the application of newly developed standards should not lead to legal uncertainty, which may arise if parties are held to standards of which they were unaware at the relevant time.[1369] It has been argued therefore that courts should refrain from immediately applying newly developed standards to a given case or, alternatively, that they should limit the consequences thereof. Mark Tushnet, for instance, has suggested that courts may mitigate the effects of applying a standard to a case, overlapping somewhat with 'weak forms' of review of legislation.[1370]

More specifically in the context of procedural standard-setting, it has been argued that reliance upon new (sets) of standards cannot be foreseen by the competent public authority, and, since it could not take these standards into account in its decision-making process, it would be wrong to hold them accountable for violating them.[1371]

[1366] CSC 17 September 1984, 2 S.C.R. 145 (*Hunter et al. v. Southam Inc.*), p. 155.

[1367] ISC 19 December 1973, [1974] I.R. 284 (*McGee v. Attorney General*), p. 319.

[1368] Open standards for adjudication also could lead to legal uncertainty, see Hayek (1955), pp. 39–42 and discussed in Fuller (1978), p. 374.

[1369] For a discussion in relation to evolutive interpretation by the ECtHR, see Gerards (2019), pp. 51–59.

[1370] Tushnet (2009), p. 23 ('Weak-form systems of judicial review hold out the promise of reducing the tension between judicial review and democratic self-governance, while acknowledging that constitutionalism requires that there be some limits on self-governance. The basic idea behind weak-form review is simple: weak-form judicial review provides mechanisms for the people to respond to decisions that they reasonably believe mistaken that can be deployed more rapidly than the constitutional amendment or judicial appointment processes.').

[1371] See also Dworkin (1997), p. 109 ('the familiar story, that adjudication must be subordinated to legislation, is supported by two objections to judicial originiality… The second argues that if a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event').

PROEF 3

Procedural standards therefore should not be applied retroactively to decision-making processes, or at least the consequences of doing so should be mitigated. Klaus Messerschmidt, for example, has stated that:

> 'In general, procedural review refers to due diligence of the legislature. It should be noted, however, that review does not presuppose procedural duties of the legislature (apart from those prescribed in the constitution or in legally binding guidelines). Being a prudent legislator is not a legal duty in the strict sense (*Verfassingspflicht*), but a mere responsibility (*Obliegenheit*). This distinction has an important impact: procedural and methodological shortcomings of legislation only matter when the contents of the law may be affected by them. In this case [i.e., *Hartz IV* of the GFCC[1372]], the legislature has serious difficulty justifying its decision. If on the contrary, the content is obviously reasonable, no procedural review is needed.'[1373]

Other scholars are less concerned about the issue of retroactive application of procedural standards. Ronald Dworkin, for example, has not distinguished between *a priori* or *a posteriori* duties since he considers that whenever a person has a right, another person bears a duty. 'Even if the duty has not been imposed upon him by explicit prior legislation, there is, but for one difference, no more injustice in enforcing the duty than if it had been.'[1374] Whether temporal effects of newly developed standards should be mitigated therefore may be a matter of how 'new' these standards were, and thus how capable they were of being foreseen. The more closely standards relate to realising the core of a right or to the essence of the function of the decision-making authority, the more easily courts may hold the decision-making authority accountable for violations of these new standards.[1375] If they concern an issue at the periphery of a right, on the other hand, courts should arguably show more restraint in the development of standards. Whether process-based review is considered part of the judicial function, therefore, can be said to depend on what grounds this review is taking place and how actively courts may develop new standards through their review[1376], but also, whether these standards are open for revision by other public authorities. Strauss has argued that interpretations of the law in present-day circumstances may directly be applied by courts in a case, but courts should be ready to revise their standards if, after the judgment, the legislature or administrative authority reaffirms the old rule.[1377] This may be considered, in the words

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[1372] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.

[1373] Messerschmidt (2013), p. 243.

[1374] Dworkin (1997), p. 110.

[1375] On core rights, see Leijten (2018), p. 121ff.

[1376] From the core rights case-law of the GFCC, Leijten derived two things: 'First, minimum guarantees can also be used to determine the socio-economic scope of norms that were not designed to ensure individual protection in this field. Second, courts may leave the precise interpretation of this standard to the other branches and resort to procedural type review in order to check for compliance. In other words, the minimum required need not be prescribed in much detail in order to form the starting point for the review of individual cases', see ibid, p. 176.

[1377] Strauss (2004), pp. 775–776. Process-based review seems to be another way for doing this. As Strauss contended: 'In fact, doctrines that address procedural matters generally will require courts to do something that looks like-but is not-backing down in the face of intransigence. A court that reverses

PROEF 3

of Tushnet, to be a 'weak form' of judicial standard-setting, which allows for an inter-institutional dialogue.[1378]

As indicated by Messerschmidt, the *Hartz IV* judgment is a clear example of an *a posteriori* application of procedural standards, that is, of the application of the novel standard of providing adequate reasons for deviations of regular decision-making.[1379] Another case in point is the *Baker* judgment concerning the decision to deport a woman who had been living and working illegally in Canada for over eleven years.[1380] In that judgment the CSC considered the principle of procedural fairness to be applicable to these kinds of decisions, and as part of this duty of procedural fairness, decision-making authorities may be required to provide reasons for their decisions.[1381] The CSC noted that in relation to such decisions, in several judgments, '[t]he Federal Court of Appeal has held that reasons are unnecessary' and it noted that '[m]ore generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions'.[1382] It went on to discuss various positions of courts and commentators in relation to the usefulness of reason-giving for better decision-making, in particular for ensuring fair, careful, and transparent decision-making. It also addressed some concerns raised as regards the inappropriate burden this would place on decision-making authorities.[1383] The CSC then reached the conclusion that 'it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision'.[1384] A new standard was thus developed by the CSC, and it was immediately applied to the case at hand. In its evaluation of the reasons given by the executive authorities, the CSC found that even though reasons were put forward to justify this decision, these did not meet the requirement of 'reasonable apprehension of bias'.[1385] The importance of this judgment can hardly be overstated, and it is still considered to be a turning point in Canadian administrative law.[1386] Precisely because it is a turning point, the competent decision-making authority, arguably, could not foresee the application of this standard. For this reason, the CSC may be said to have limited the consequences of its judgment to the decision at hand, as it sent the decision back

a criminal conviction for trial error will uphold a conviction after a proper retrial. A decision that is overturned because it was made with an improper motive-a discriminatory motive, for example, must be upheld if it is legitimately remade with a proper motive. The modernization approach is in the same category… It is an approach designed to make sure not that certain decisions are made, but that the decisions are made in accordance with current views', p. 776.

1378 Tushnet (2009), pp. 31–33.

1379 GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*), para. 142. See Section 2.2.4.

1380 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.

1381 Ibid, paras. 20–22.

1382 Ibid, paras. 36–37.

1383 Ibid, paras. 38–42.

1384 Ibid, para. 39.

1385 Ibid, paras. 45–48.

1386 It has been called 'the most important decision in Canadian administrative law in twenty years', see Dyzenhaus and Fox-Decent (2001), p. 193.

PROEF 3

for redetermination by a different immigration officer.[1387] It may be customary for the CSC to ask for a redetermination, yet such an approach may also be considered a means for it to recognise the limits of its judicial law-making functions, while at the same time allowing it to develop new procedural standards and apply them to the case at hand.

C. Substantive aspects of standard-setting: level of detail of procedural standards

Another debate on process-based fundamental rights review concerns the standards courts may impose on decision-making authorities based on this review. This debate has substantive aspects, relating to various issues. First, there are debates on the types of procedural standards courts may develop. Section 6.3.3B explained that it is possible to distinguish between certainty, rationality, and fairness standards. There are divergent views on whether courts may develop such standards in their judgments and several arguments that relate to this are addressed in different chapters of this book. Section 7.2 addressed the use of process-based review for upholding the rule of law, which is closely linked to certainty standards. Rationality standards are predominantly addressed in Section 9.3.2D, in which the connection between evidence-based decision-making and process-based review is explained. Finally, Section 7.3 clarified the relationship between deliberative democratic decision-making and procedural reasoning. Individual fairness standards are particularly addressed at various points of Section 8.3 of this chapter.

Secondly, there are debates concerning the kind of decision-making procedures for which courts may develop standards. Courts have reviewed legislative, administrative, and judicial procedures through process-based review (as also evidenced by the examples in Part I and discussed in Section 6.3.3A). These concerned procedures of international, national and local authorities. The appropriateness for courts to review and impose procedural standards for such different kinds of decision-making procedures is also addressed in different places in this book. In particular, Section 9.3.1 explains the debate on judicial expertise on matters of process and whether courts can review and develop standards for decision-making procedures of other decision-making authorities. Indirectly, Section 7.4, which discussed the relationship between judicial restraint and procedural reasoning, also addressed the issue. It clarified that the intrusiveness of a procedural approach is up for debate, especially where procedural standard-setting goes beyond courts' explicit mandate and the decision-making procedure is considered to be the prerogative of the other decision-making authority.

Since these two substantive aspects of the debates on procedural standard-setting are examined comprehensively elsewhere in this book, this section focuses on another aspect of the debate: the detail with which courts formulate procedural standards. May courts set out general or very concrete standards? This debate relates closely to the broader debate on where to draw the line between acceptable judicial law-making and unacceptable use of judicial powers (see Section 8.2.2A).

[1387] CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*), paras. 76–77.

PROEF 3

Various philosophers have argued that the essence of the rule of law is that '[c]ourts can be counted on to make a reasoned disposition of controversies, either by the application of statutes or treaties, or in the absence of these sources, by the development of rules appropriate to the cases before them and derived from general principles of fairness and equity'.[1388] On this understanding, courts may develop standards when this is necessary to ensure that justice is done. In his more recent work, Friederich A. Hayek has also defended this view.[1389] Hayek has argued that the law should be clear, determinate and predictable, so as, in Waldron's words, '[to] allow people to know in advance where they stand and to have some advance security in their understanding of the demands that law is likely to impose upon them'.[1390] According to Hayek, in deciding cases, courts should be guided not just by the law but also by the function of the whole system of rules they serve, which entail general views on liberty and justice.[1391] Although he recognised that legislation can indeed increase the certainty of the law, he considered it erroneous to think that all that was required of courts was for them to logically deduce their decisions from the law: 'What has been promulgated or announced beforehand will often be only a very imperfect formulation of principles which people can better honour in action than express in words.'[1392] Indeed, according to Hayek, there is an 'increasing use of vague provisions in codes, such as those requiring "good faith" and "fair practice" without further specification of the kind of behavior intended'.[1393] In this regard, he stated that:

> 'the judge must [not merely] fill in such gaps by appeal to yet unarticulated principles, but also that, even when those rules which have been articulated seem to give an unambiguous answer, if they are in conflict with the general sense of justice he should be free to modify his conclusions when he can find some unwritten rule which justifies such modification and which, when articulated, is likely to receive general assent.'[1394]

On this understanding, courts have an important role in upholding the predictability of the law by means of putting forward more detailed standards. A similar approach has been advocated by Lon L. Fuller, who considers that courts should set standards which are sufficiently precise to guide actions, but which are also not too detailed:

> 'If, on the one hand, [a court] lays down standards that are too exacting and comprehensive, it will stifle the indispensable preliminary processes of adjustment and compromise. If its standards are too loose, these processes are no likely to produce solution acceptable to the Court.'[1395]

1388 Fuller (1978), p. 372.
1389 See for the change of the views of Hayek in his earlier and later work, Waldron (2016), para. 3.5.
1390 Waldron (2011b), p. 20.
1391 Hayek (1982), p. 117.
1392 Ibid, p. 118.
1393 As explained by Fuller (1978), p. 374 with a reference to Hayek (1955), pp. 39–42.
1394 Hayek (1982), p. 118.
1395 Fuller (1969), pp. 177–178. Previously Hayek used to reject such a case-by-case approach, he found 'the case-by-case methods of the common law are inconsistent with the ideal of the rule of law', see Fuller (1982), p. 374.

PROEF 3

From Fuller's point of view, it may sometimes be 'possible to initiate adjudication effectively without definite rules; in this situation a case-by-case evolution of legal principle does often take place'.[1396] Accordingly, an incremental approach by courts would be preferred, meaning that courts would develop standards gradually in their case-law, both in scope as well as detail.[1397] That way, courts could undertake the task of protecting fundamental rights, while being prevented from upsetting the rule of law by retroactively imposing unforeseeable standards.

A similar debate can be distinguished in relation to the ECtHR and its use of procedural reasoning. Even if we accept that the ECtHR has a role in clarifying the law, scholars have argued that it should be careful not to develop standards that are too detailed. As the German ECtHR Judge Angelika Nussberger noted:

> 'But in advocating individual justice, issues of legal security and equality should not be underestimated. The more exceptions and the more discretion in deciding concrete cases, the less the results are foreseeable, the more they depend on those called upon to decide. For the Court, it is hardly recommendable to favour one model of justice over another one, especially when questions of separation of powers and definition of competences are involved.'[1398]

In a similar vein, I have elsewhere argued that 'too precisely-defined requirements of procedural rationality and procedural fairness … [may] be considered very intrusive, as the [ECtHR] will impose obligations of the quality and fairness of decision-making procedures without being able to take into account the States' political and legal traditions and cultures'.[1399] Furthermore, as discussed more comprehensively in Section 9.3.1B, the way courts set standards could amount to 'judicialised' versions of decision-making procedures. Against this background, too detailed or intrusive standards set by courts may at times result in unsatisfactory procedural standards.

These concerns about overly detailed procedural standards may explain the negative responses to the *Hirst (No. 2)* judgment.[1400] The case concerned the blanket ban of prisoner voting rights in the UK. The ECtHR concluded that the absolute and general ban was in violation of the right to vote. It arrived at this conclusion because the UK parliament had not sought to weigh the various interests involved and because the national courts had not looked into the proportionality of the measure.[1401] More systematically, the ECtHR 'rejected the very idea of adopting blanket rules in this type of case', which was clarified further in the *Frodl* judgment a few years later.[1402] The *Hirst* judgment was met with fierce criticism from the UK government, particularly because

[1396] Fuller (1978), p. 374.
[1397] In relation to the ECtHR, see Gerards (2018b), p. 512.
[1398] Nussberger (2017), p. 170.
[1399] Huijbers (2017a), p. 197 [emphasis added].
[1400] ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*). See Section 2.2.8.
[1401] Ibid, paras. 79–82.
[1402] ECtHR 8 April 2010, app. no. 20201/04 (*Frodl v. Austria*), paras. 34–35. See for a discussion Gerards (2013b), p. 57.

PROEF 3

of the ECtHR's preference for individualised decision-making, which did not comply with the UK's ideas of the separation of powers, and parliamentary supremacy in cases concerning such politically sensitive matters.[1403] This may have been one of the reasons why the ECtHR seems to have abandoned the need for individualised decision-making in later judgments.[1404]

8.2.3 RÉSUMÉ

Courts play an important role in democratic societies. Their role is often explicitly determined by their judicial mandate. This mandate also determines whether courts can review decision-making procedures and, if so, which procedures they may review and how they may do so. These mandates vary by court and by issue, and they may change over time. In their function as guardians of fundamental rights and in line with their mandate, courts interpret and apply fundamental rights to concrete cases. In this process they explain the scope of these rights and cultivate and develop rights standards. There is an ongoing discussion as to whether courts should have a standard-setting function and if they do, what the scope and nature of this function should be. This debate is also present where it concerns courts' use of procedural reasoning to develop procedural standards. In particular, different views can be discerned as to the appropriateness of courts applying newly developed standards immediately to the case at hand (temporal aspect). There is also a debate on the level of detail with which courts may set out procedural standards (substantive aspect). This section has demonstrated that the debates on procedural reasoning concern not only the use of this type of reasoning, but also the standards underlying this type of review and courts' procedural standard-setting role.

8.3 PROCESS-BASED REVIEW AND THE JUDICIAL FUNCTION OF PROTECTING FUNDAMENTAL RIGHTS

Several scholars have cautioned against the use of process-based fundamental rights review, because they worry that procedural reasoning may lead to mere window-dressing and courts may inadvertently favour procedural protection of fundamental rights over outcome-oriented protection of fundamental rights (Section 8.3.2). However, others regard procedural reasoning as an effective means of protecting fundamental rights. They are of the view that process-based review may encourage other decision-making authorities to take account of fundamental rights in their decision-making or,

[1403] E.g., Gerards (2013b), pp. 56–59.
[1404] Ibid, pp. 59–61.

PROEF 3

where courts operate in an unfavourable context, procedural reasoning may allow for at least a minimum protection of rights (Section 8.3.1). Various views and arguments in this regard are set out below, focusing specifically on the judicial function of protecting fundamental rights and ensuring that fundamental rights are respected and protected by other authorities.

8.3.1 COURTS OFFERING PROTECTION OF FUNDAMENTAL RIGHTS THROUGH PROCESS-BASED REVIEW

Process-based review has been held to enable protection of fundamental rights in a way that review of the substance of a decision or legislation cannot provide. First, it has been argued that process-based review may enable courts to provide at least a minimum protection of fundamental rights in situations in which they could not otherwise provide any at all (Section A). Secondly, it has been posited that procedural reasoning may lead to more or better protection of fundamental rights (Section B), in particular through incentivising other authorities to respect fundamental rights or by adding a procedural layer to substantive fundamental rights. Thirdly, procedural reasoning has been considered to constitute a means to enforce positive obligations through which courts have extended their jurisdiction (Section C). They have done so in particular in the areas of horizontal disputes and socio-economic rights.

For clarity and structure-related reasons, these three types of arguments are distinguished in the current section. Nevertheless, there is considerable overlap between them. After all, providing minimum protection in cases where substantive protection cannot be provided also enhances protection of fundamental rights; and extending the scope of application of fundamental rights to horizontal disputes equally leads to enhanced protection of fundamental rights as these rights are also enforced in areas that were once thought to fall outside the scope of application. Yet, the difference between the three types of arguments relates to their rationale. From the first perspective, procedural reasoning provides at least some protection of the most essential aspects of fundamental rights – even if it is a '*second-best option*' for doing this. From the second perspective, procedural reasoning is considered to lead to more or even *better protection* of fundamental rights than a substantive approach could. And, finally, from the third perspective, process-based review extends the *jurisdiction* of courts in fundamental right cases beyond conventional contexts. Thus while all three types of arguments are connected, they are sufficiently different to allow for a separate discussion of each.

A. Minimum protection of fundamental rights

It has been argued from various perspectives that procedural reasoning may enable courts to offer minimum protection of fundamental rights. These perspectives can be

PROEF 3

divided into an intrinsic and an instrumental or pragmatic approach.[1405] First, scholars have valued procedures for their own sake (Section I). From such an intrinsic approach courts are said to protect procedural aspects of fundamental rights by means of process-based review, which means that they provide protection of the core of fundamental rights. Secondly, protecting procedures is considered a useful means to ensure the protection of fundamental rights (Section II). An instrumental approach regards process-based review as a method to encourage better protection of fundamental rights by other decision-making authorities, which would lead to at least a minimum protection of fundamental rights.

I. Intrinsic approaches to the value of procedures for fundamental rights protection

As noted above, the intrinsic approach takes the perspective that good decision-making procedures are important for their own sake, a position which Eva Brems has named the argument from 'autonomous process value'.[1406] This argument means that fair, careful, and diligent decision-making procedures are an important and inherent part of fundamental rights. Through process-based review, courts may help to ensure that the decision-making authorities comply with these essential aspects of fundamental rights, not just of procedural rights but also of substantive rights.

Procedural rights | Unsurprisingly, from this perspective, procedural rights take on a special role. These rights pertain to both the judicial and the administrative process and are considered to constitute the core of fundamental rights. The protection of these rights is considered to form the essence of the judicial function.[1407] Indeed, procedural rights are widely valued, as is apparent from the fact that fair trial, due process, and effective remedy rights appear to be included in all constitutions and highest laws in democratic societies as well as in international treaties.[1408] Process-based review is then a logical next step, at least in systems where courts may review authorities' compliance with fundamental rights (for a discussion on the procedural mandate of courts, see Section 8.2.1). Indeed, Brems has argued that the review of courts should focus on 'procedural features in the strict sense', that is, the most essential aspects of these procedural rights.[1409]

The examples discussed in Part I in relation to the European Arrest Warrant may help to illustrate how this argument translates to judicial practice. The central question

[1405] See also Brems (2013), pp. 158–59.
[1406] Brems (2017), p. 27–29.
[1407] Ibid, pp. 27–28.
[1408] Even in the Netherlands where no right to a fair trial is laid down in Dutch Constitution an amendment is pending to include this right. For the proposed text of this provision and updates on the progress made, see 'Recht op een Eerlijk Proces', *De Nederlandse Grondwet* <https://www.denederlandsegrondwet.nl/id/vklqnbat9rrv/recht_op_een_eerlijk_proces>. Yet, also in the Netherlands this right has been laid down in legislation and in international treaties that are directly enforceable before the Dutch courts (e.g., Article 6 ECHR). For a discussion of the proposed amendment, see Julicher (2018).
[1409] Brems (2017), p. 28.

PROEF 3

in both the GFCC's *Mr R*[1410] judgment and the SCC's '*Melloni case*'[1411], was whether the surrendering of a person to a State that had convicted this person in absentia would be in violation of the right to a fair trial as set out in Article 6 of the European Convention on Human Rights. The ECtHR has consistently noted 'the prominent place held in a democratic society by the right to a fair trial'[1412] and therefore it has held, amongst others, that 'there can be no justification for interpreting Article 6 (1) ECHR restrictively'.[1413] And even though trials in absence of the accused are not necessarily incompatible with the right to a fair trial, the ECtHR found that 'a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself'.[1414] Against this background (and taking into account the preliminary judgment of the ECJ[1415]), the SCC concluded that the foreign proceedings had not violated the minimum guarantees of a fair trial.[1416] Further, it ensured that the right to a fair process was respected by the courts of the requesting State. The GFCC, by contrast, only indirectly touched upon the proceedings of the requesting State and focused on the proceedings before the lower German court. It held that the Higher Regional Court had failed to follow up on the individual's claim that his right to a fair process was violated in the foreign proceedings, and required a redetermination of the case by this court.[1417] In doing so, the GFCC protected the fair trial rights of the individual concerned in relation to the lower court, and it also ensured that this lower court would provide protection of the right to a fair trial in the requesting State.

The argument of the intrinsic value of procedures is not limited to procedural rights in judicial proceedings. Although procedural fundamental rights clearly relate primarily to judicial and administrative procedures, they may also be relevant in relation to parliamentary processes. Matthew Saul, for example, considers that it matters how parliaments exercise their competences and not just whether they reach a right result: 'Improvements in the participation, representation and deliberation practices of parliaments can be argued for on the basis of the values of political equality, human autonomy, human dignity and procedural justice'.[1418] The discussion

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[1410] GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf*). See Section 4.2.3.

[1411] SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*'). See Section 4.2.2.

[1412] ECtHR 9 October 1979, app. no. 6289/73 (*Airey v. Ireland*), para. 24. In relation to the guarantees underlying Article 6 ECHR, see ECtHR (GC) 29 March 2006, app. no. 36813/97 (*Scordino v. Italy (No. 1)*), para. 192.

[1413] ECtHR (GC) 12 February 2004, app. no. 47287/99 (*Perez v. France*), para. 64.

[1414] ECtHR (GC) 1 March 2006, app. no. 56581/00 (*Sejdovic v. Italy*), para. 82.

[1415] ECJ (GC) 26 February 2013, ECLI:EU:C:2013:107 (*Melloni*).

[1416] SCC (Pleno) 13 February 2014, STC 26/2014 ('*Melloni case*'), pp. 16–17.

[1417] GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf*), para. 109.

[1418] Saul (2017), p. 143.

PROEF 3

of deliberative democratic theories in Section 7.3 also shows that process-based review may be relevant for upholding the democratic process, which is often valued for its own sake. Again, it can argued, as Brems has done, that review of parliamentary processes from this intrinsic value of procedures is limited to core components of democracy.[1419] Participation, representation, and deliberation, as mentioned by Saul, may be regarded as such core components. And courts may protect these values through process-based review.

Substantive rights | It has furthermore been argued that there is an inherent connection between the substantive and procedural aspects of fundamental rights. In international law, Kasey McCall-Smith has submitted that a procedural approach by UN Treaty Bodies is 'a recognition of the invaluable role played by the procedural underpinnings of substantive rights'.[1420] From this perspective, courts should also protect the procedural aspects of substantive rights in order for these rights to be effectively protected.

The decision of the CESCR in *I.D.G.* may help to clarify McCall-Smith's point of view. Through procedural reasoning, the CESCR aimed to protect the right to housing.[1421] The CESCR recalled in particular that '*appropriate procedural protection and due process are essential aspects of all human rights* but are especially pertinent in relation to a matter such as forced evictions; and … is equally applicable and appropriate in other similar situations, such as mortgage foreclosure proceedings, which can seriously affect the right to housing'.[1422] In the case at hand, the CESCR concluded that the Spanish judicial procedure against mortgage foreclosure could not be considered an effective remedy because it could not prevent the sale of the home.[1423] Through procedural reasoning, the CESCR thus protected what it regards as one of the core aspects of fundamental rights, including of substantive rights such as the right to housing. Similarly, the judgment of the SCA in *Comunidad Indígena Eben Ezer* indicates how decision-making processes may be valued for their own sake in relation to the protection of substantive rights.[1424] The case concerned the Civil Court of First Instance and the High Court of Argentina's refusal of a request for an *amparo*: an indigenous group had claimed that their right to life and right to property had been violated by the decision of the Province administration to change the zoning plans of two patches of land that used to be part of a natural reserve.[1425] The ASC held that 'the relevance and importance of the aforementioned property should guide the judiciary not only in clarifying and deciding the points of substantive law, *but also and especially in deciding*

1419 Brems (2017), pp. 28–29.
1420 McCall-Smith (2015), p. 12.
1421 CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*). See Section 4.2.5.
1422 Ibid, para. 12.1 [emphasis added].
1423 Ibid, para. 13.6.
1424 SCA 30 September 2008, 331:2119 (*Comunidad Indígena Eben Ezer v. Provincia de Salata*). See Section 4.2.1.
1425 Ibid, para. 1.1.

PROEF 3

on the so-called amparo remedies'.[1426] In other words, in order for fundamental rights to be ensured, the Argentinian lower courts were required to provide protection and fulfilment of these rights; if they did not do so, this would 'result in legal protection that is "illusory or ineffective"'.[1427]

II. Instrumental approaches to the value of procedures for fundamental rights protection

The second, instrumental perspective on the value of procedures for fundamental rights protection takes the view that courts can provide at least some rights protection through procedural reasoning. On this understanding, the 'procedures are means, not ends [and] they are no substitutes for compliance itself'.[1428] This perspective is closely related to what may be called second-order concerns or prudential reasons related to judicial review[1429], which may require institutional, normative, or epistemic judicial restraint from courts (see Sections 7.4, 9.2.2, and 9.3.2). Especially when substance-based review is not possible or warranted for prudential reasons, process-based review is considered a useful review method for courts to provide minimum protection of rights. The rationale seems to be that it is better to have at least some protection than no protection at all. In scholarly literature, this point of view primarily relates to two types of arguments, namely arguments concerning the (complex) political and institutional context of fundamental rights adjudication and arguments concerning the complexities of the issues before the court.

(Complex) political and institutional context | In relation to UN human rights treaty bodies, McCall-Smith has argued that 'using more creative procedural methods to frame states' violations [will enable the UN Treaty Bodies] to deliver a final view on a breach without having to delve too deeply into the substance of the allegations for those states that are often reticent to engage with the system'.[1430] Accordingly, 'a more

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[1426] Ibid, para. 3.2.

[1427] Ibid.

[1428] De Schutter and Tulkens (2008), p. 212.

[1429] Second-order reasons are, in the words of Joseph Raz, 'reasons for action, the actions concerned being acting for a [first-order] reason and not acting for a [first-order] reason', Raz (2009), p. 17. In relation to the task of courts, these second-order reasons often emphasise the institutional position of courts to (refrain from) carrying out their function in a particular way, for example, because other authorities are considered to be in a better position to take a decision because of their expertise and capacities. Thus while on the basis of balancing the fundamental rights at stake may require courts to overrule a decision or to find a violation, on the basis of second-order reasons, such as 'the limits of the judicial role, the propriety of judicial intervention in certain contexts, and the degree to which an innovative judicial decision will be accepted either by politicians or the populace at large', courts may decide to refrain from doing so or to adjust its decision in a particular way, Kavanagh (2010b), pp. 31–32. Second-order reasons are distinct from first-order reasons, which pertain to the legitimate function of courts in fundamental rights cases, and entail 'reasons for action that have been drawn directly from considerations of interest, desire or morality', Perry (1989), p. 913. On second-order reasons, see also Sunstein (2007); Poole (2005), pp. 709–714; and Sunstein and Ullmann-Margalit (1999).

[1430] McCall-Smith (2015), p. 13.

PROEF 3

procedural approach to fundamental rights adjudication may allow a more universal baseline for rights protection to emerge in pursuit of a common law of human rights'.[1431] This understanding regards process-based review as a means for courts to show (substantive) deference, yet, at the same time the court is providing at least some (procedural) protection of fundamental rights.[1432]

In other words, procedural reasoning is used as a safety net, which has been called a 'compensation strategy' (see Section 6.3.5A-II). In the words of McCall-Smith, through 'emphasising the procedural requirement outlined by the treaty obligations … [UN Treaty Bodies are enabled] to point to the most basic elements necessary to ensure the more substantive obligations under the treaties'.[1433] Brems has also argued that the ECtHR seems to ensure efficacy of the protection of substantive rights through procedural reasoning.[1434] She notes that process-based review can be 'instrumental, in the sense that the identification and scope of procedural obligations are designed to improve protection of substantive rights'.[1435] This improvement does not mean better or more protection of fundamental rights, rather it is in the absence of substantive protection that procedural protection is a 'second-best option'. In a similar vein, Gareth Davies has considered that procedural reasoning of the right to freedom of religion 'gives an extra weapon to individuals who think their rights have been violated' as '[e]ven if the action they experienced could have been objectively justified, they can attempt to bring a challenge on the grounds that in fact the actor did not think properly about those justifications'.[1436] Again, procedural reasoning seems to be considered a good second-best alternative.

This can be explained by referring to the case-law of the ECtHR under Article 3 ECHR, which prohibits torture and inhuman or degrading treatment and punishment.[1437] In this case-law the ECtHR recognised an obligation for national authorities to instigate effective investigations in cases relating to an arguable claim of ill-treatment or torture (*ex post* procedural obligation).[1438] The ECtHR acknowledged that such a procedural duty is required because, without it, the prohibition on torture enshrined in the European Convention on Human Rights 'would be ineffective in practice' and could lead to 'virtual impunity'.[1439] Especially in contexts where it is difficult or even impossible to provide proof of a substantive violation of a right – for

1431 Ibid, p. 12.
1432 See also Poole (2009), p. 154, who explains that Tom Hickman has argued that the Human Rights Act in the UK 'set minimum requirements for decision making in human rights cases that require basic procedural steps to be taken and, where reasons for a decision are appropriate, that show that the decision maker has considered the impact of the decision on the affected person'.
1433 McCall-Smith (2015), p. 13.
1434 Brems (2013), pp. 158–159.
1435 Ibid, p. 159.
1436 Davies (2005), p. 515.
1437 See e.g., Harris et al. (2018), pp. 276–279.
1438 ECtHR (GC) 1 June 2010, app. no. 22978/05 (*Gäfgen v. Germany*), para. 117.
1439 E.g., ECtHR 28 October 1998, app. no. 24760/94 (*Assenov and Others v. Bulgaria*), para. 102. Brems (2013), p. 142.

PROEF 3

example, when it is impossible to prove that State officials are responsible for the killing of a person because the body is missing – procedural reasoning may provide a way to prevent complainants being left empty-handed.[1440] Procedural protection through process-based review is then a second-best option.[1441]

On a different but related note, it has been argued that through procedural reasoning courts can require other decision-making authorities to offer protection of fundamental rights, which these courts themselves would be unable to provide. In the context of the ECtHR, Matthieu Leloup has submitted that although the ECtHR rarely hears applicants, by reviewing whether the national authorities did hear the individuals concerned in their decision-making process, the ECtHR may indirectly enforce the right to be heard.[1442] In this way, procedural reasoning may enable judicial protection of fundamental rights that otherwise could not have been provided. Again, this protection is a compensation strategy, as the ECtHR could provide better protection of this right if it were to hear the individuals concerned itself.

The DSC's '*Tunisian case*' provides an example of the use of procedural reasoning as a safety net.[1443] In that case an alien, suspected of planning a terroristic attack on a Danish newspaper, was detained for posing a danger to national security. The detention decision was based on a Danish law that formed an implementation of a UN Security Council Resolution. Although the DSC accepted that 'the lawfulness of these decisions cannot be reviewed in a case dealing with deprivation of liberty', that is, on the substantive decision for detention, it found that evidence should be provided by the National Head of Police to prove 'on a balance of probabilities' that the alien posed a danger to national security, which formed the basis for the detention.[1444] Regardless of whether the Danish authorities considered the DSC's approach appropriate, it can be argued that the procedural approach taken enabled the DSC to provide at least some protection of the individual's fundamental rights, one that could not otherwise have been provided for institutional and jurisdictional reasons.

Complex issues | Procedural reasoning can also be a means to ensure minimum protection of fundamental rights when courts have to decide on complex cases. This second argument, like the argument concerning the political and institutional context of courts, relates to the increasingly challenging context of international fundamental rights adjudication. The more acts and omissions the jurisdiction of a court covers, the more cultural, political, religious, sociological, and historical differences may be present. Nevertheless, even in less diverse contexts, people's views on important issues can differ considerably. This is especially so in relation to morally sensitive issues, such as abortion, religious dress in public spaces, and euthanasia, and in relation to socio-

[1440] Brems (2013), p. 159.

[1441] In a similar vein, O'Boyle and Brady called the finding of a procedural violation 'the "next best" finding', see O'Boyle and Brady (2013), p. 382.

[1442] Leloup (2019), p. 65.

[1443] DSC 28 July 2008, no. 157/2008, U2008.2394H ('*Tunisian case*'). See Section 3.2.3.

[1444] Ibid.

PROEF 3

economic issues that impact the distribution and allocation of (scarce) resources, such as environmental policies and social benefits policies.[1445] Indeed, in healthy democratic societies, there is disagreement and discussion between citizens, and pluralism is highly valued.[1446] Unsurprisingly then, the role to be played by the courts in deciding such complex cases is a perennial issue for debate.[1447]

Discussions on normatively sensitive issues and procedural reasoning will be addressed in Section 9.2.2. In the current section, however, it is useful to address the argument that process-based review is a means for courts to provide minimum protection of rights in cases where economic, social, and cultural rights are at stake. The use of process-based review may, for example, be a means for courts to ensure that these socio-economic and cultural rights are protected, while avoiding a substantive judgment on the fairness of the distribution of resources. Janneke Gerards has found that the ECtHR pays considerable attention to the decision-making process of the national legislative, administrative, and judicial bodies in cases relating to socio-economic rights (as well as morally sensitive cases, discussed in Section 9.2.2.).[1448] According to her, this can be explained by the wide margin of appreciation the ECtHR generally leaves to States in such cases. Procedural reasoning then enables it to provide a minimum protection of these rights while still showing deference to the substantive decision of the national authorities.[1449] Again, process-based fundamental rights review is then functioning as a compensation strategy (see Section 6.3.5A-II).

The GFCC's judgment in *Hartz IV* illustrates this. The case concerned the level of social benefits needed in order to guarantee the right to a subsistence minimum, a matter which clearly involved a difficult issue of resource allocation.[1450] The GFCC considered that the right to a subsistence minimum could be derived from the principle of human dignity in combination with the concept of the social welfare State.[1451] Because of the complex socio-economic issue at hand, the GFCC considered that '*it is fundamentally left up to the legislature* to determine whether it ensures the subsistence minimum by means of monetary benefits, benefits in kind or services [and it] also has a margin of appreciation in determining the scope of the benefits to secure one's livelihood'.[1452] Nevertheless, the GFCC provided minimum protection of the right to a subsistence minimum as it required the legislature to take a rational decision on the basis of 'reliable figures and plausible methods of calculation'.[1453] In particular, it considered:

1445 See in this context also Section 9.2.2A.
1446 Sathanapally (2017), p. 46 with a reference to democratic deliberative theory, see in that regard Section 7.3.
1447 See e.g., Koopmans (2003), pp. 273–274.
1448 Gerards (2017), pp. 146–147, 153, and 158.
1449 Ibid, p. 147.
1450 GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.
1451 Ibid, para. 133.
1452 Ibid, para. 138 [emphasis added].
1453 Ibid, para. 142.

PROEF 3

> 'To make it possible to examine whether the valuations and decisions taken by the legislature correspond to the constitutional guarantee of a subsistence minimum that is in line with human dignity, the legislature handing down the provision is subject to *the obligation to reason them in a comprehensible manner; this is to be demanded above all if the legislature deviates from a method which it has selected itself.*'[1454]

The German legislature thus had to explain in a comprehensible manner how it reached a certain result. This is a general requirement, but it applies *above all* where it concerns a deviation from the regular method for decision-making.[1455] Even though deviation from the regular legislative model may be allowed, doing so seems to lead to procedural scrutiny by the GFCC. In this case, the GFCC concluded that the legislature had not calculated the subsistence minimum in conformity with the German Constitution, as it had deviated from the standard statistical model in its calculation, without a sound factual and empirical justification for doing so.[1456] Through process-based review the GFCC thus provided minimum protection of the right to subsistence minimum, which, because of the legislature's wide discretion on the exact scope and ways of providing a subsistence minimum, it could not have offered on substantive grounds.[1457]

B. Enhanced protection of fundamental rights

In addition to arguing in favour of process-based fundamental rights review as a means to ensure minimum protection of rights, scholars have submitted that this kind of review may even enhance the protection of fundamental rights. It has been posited that procedural reasoning may, first, lead to better decision-making procedures (Section I), and, secondly, to less substantive rights violations (Section II).

I. Enhanced procedural fundamental rights protection

It has been argued that procedural reasoning may help to improve the quality of decision-making procedures, as courts encourage decision-making authorities to comply with procedural standards. This perspective considers procedural standards and procedural rights as self-standing, intrinsic norms (see in a similar vein Section 8.3.1A-I). These arguments stem from the idea that it matters how decisions are made,

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1454 Ibid, para. 171 [emphasis added].

1455 It has been noted that when there is a deviation from regular decision-making procedures, and courts cannot review the issue on its substance, process-based review may enable courts to provide some protection of fundamental rights. Ittai Bar-Siman-Tov referred to empirical research that had demonstrated 'that deviation from the regular rules that govern the legislative process can, and does, distort policy outcomes away from the policy preferences of [parliament's] median and toward the preferences of majority party caucus'. From this point of view deviations in decision-making procedures may be said to affect the protection of fundamental rights protection, which could to a minimum degree be redressed through process-based review. See Bar-Siman-Tov (2011), pp. 1928–1929.

1456 GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*), paras. 173, 171 and 175.

1457 Ibid, para. 138.

PROEF 3

and indeed, socio-legal research supports this point.[1458] In particular, several studies have shown that fair procedures may positively affect individuals' willingness to comply with the law, as well as influence their acceptance of authority and their perceptions of the legitimacy of a decision-making body.[1459] The use of procedural reasoning in fundamental rights cases has been said to stimulate such procedural fairness.[1460] Process-based review by courts may then be considered an acknowledgement that procedures matter to individuals.[1461] In addition, process-based review may not only enable courts to check whether authorities complied with procedural standards[1462] but it may also encourage decision-making authorities to improve their decision-making procedures.[1463] Procedural reasoning may thus allow courts to put right a procedural injustice suffered, while simultaneously creating incentives for future compliance with procedural standards. From the point of view that fundamental rights are mainly, or at least partially, about procedures, this can be said to enhance the protection of fundamental rights.

This view can be illustrated by the CSC's *Baker* judgment. According to the CSC, the decision to deport a mother who had been living in Canada illegally for over eleven years, affected 'the rights, privileges or interests of an individual', and as a result 'is sufficient to trigger the application of the duty of fairness'.[1464] Although the duty of procedural fairness was flexible and variable depending on the underlying circumstances[1465], the CSC listed five elements that are particularly relevant for determining the scope of this duty: 1) the nature of the decision and the process underlying it; 2) the nature of the statutory scheme; 3) the importance of the decision for the individual(s); 4) the legitimate expectations of the applicant; and 5) the procedural discretion of the decision-making authority.[1466] This judgment therefore demonstrates that courts may value procedural fairness and procedures for their own sake. The CSC's explanation of the fourth element (legitimate expectations), illustrates this further. Referring to its earlier case-law, the CSC emphasised that legitimate expectations do not create substantive rights, meaning that legitimate expectations of individuals would not provide them with a right to a certain outcome.[1467] However, 'if a claimant has a legitimate expectation that a certain

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[1458] E.g., Lind and Tyler (1988). For an overview of several empirical perspectives on the importance of procedural justice, see Grootelaar (2018), pp. 7–9.

[1459] A term often used to express the relationship between fairness of decision-making procedures and positive effects that follow from it. This has been called the 'fair process effect' for the first time in Folger et al. (1979), p. 2554.

[1460] Brems (2017), p. 32 and Bar-Siman-Tov (2011), pp. 1930–1931.

[1461] Bar-Siman-Tov (2011), pp. 1930–1931.

[1462] In relation to the ECtHR this has been considered the 'a watchdog role concerning procedural fairness at the domestic level', see Brems (2017), p. 31 and Brems and Lavrysen (2013), pp. 176–200.

[1463] E.g., Brems (2019), pp. 221–222; Huijbers (2017a), pp. 198–199; and Popelier and Van de Heyning (2017), p. 11.

[1464] CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*), para. 20. See Section 3.2.1.

[1465] Ibid, paras. 21 and 22.

[1466] Ibid, paras. 23–27.

[1467] Ibid, para. 26.

PROEF 3

result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded'.[1468] Furthermore, the *Baker* judgment is a prime example of how process-based fundamental rights review may be a way for courts to encourage better decision-making processes, as is evidenced by the fact that the CSC required a reassessment of the decision because it did not meet the standards of impartiality.[1469] Regardless of the eventual outcome then the CSC protected the fairness of the decision-making procedure.

II. Enhanced substantive fundamental rights protection

A second and related argument holds process-based review to lead to better fundamental rights protection in substance. This perspective shifts the focus from procedural to substantive protection, and considers the protection provided across the board, that is, it goes beyond the particular judgment in which procedural reasoning has been employed. As such, according to Thomas Kleinlein, procedural reasoning contributes to a so-called 'culture of justification', as it encourages rational decision-making by public authorities.[1470] Aruna Sathanapally has explained this position as follows:

> 'The advantage of a court having reference to the manner in which a decision-maker has in fact acted is that this helps to give the decision-maker's conclusion the weight it deserves, rather than assuming the strengths of the particular decision-maker based on formal or abstract attributes alone. *It helps courts identify circumstances where judicial restraint is appropriate, not simply on the basis that other institutions may theoretically have strengths that judges lack, but on the basis that those institutions have in fact employed those strengths.*'[1471]

Instead of automatically deserving judicial deference, through process-based review courts can make sure that decision-making authorities have 'earned' deference.[1472] By rewarding or reprimanding public authorities for the quality of their decision-making process, the argument goes, courts may encourage them to take better account of fundamental rights in their decision-making process, which would result in decisions that are fundamental rights-compliant in substance.[1473] Brems has called this perspective the rationale of 'good process for good outcomes'.[1474] In a similar vein, others have argued that bad procedures – in which rights are not taken into account –

[1468] Ibid, para. 26.
[1469] Ibid, paras. 48–49 and 76–77.
[1470] Kleinlein (2017), pp. 889–890.
[1471] Sathanapally (2017), p. 55 [emphasis added].
[1472] Kavanagh (2008), p. 192.
[1473] Bar-Siman-Tov (2011), pp. 1928–1929.
[1474] Brems (2017), p. 19ff.

PROEF 3

increase the risk of bad outcomes, that is, decisions that disregard fundamental rights in substance.[1475] This process-based review helps to avoid this risk.

From this point of view, procedural reasoning is regarded as an instrument, 'in the sense that the identification and scope of procedural obligations are designed to improve protection of substantive rights'.[1476] By sharing responsibilities between various authorities in the protection of fundamental rights, a procedural approach may be found to enhance fundamental rights protection.[1477] It seems that the motto underlying this instrumental understanding of procedural reasoning is: 'many hands make for light work'. And, together with the idea of effective protection of fundamental rights, it becomes the motto: 'many hands make for better work'.[1478]

In the literature, an explicit connection has been made between the focus of courts on the decision-making process of the legislature and the compatibility of decisions with fundamental rights. Indeed, scholars have advanced the idea that review of the parliamentary process may help to ensure that fundamental rights are seriously taken into consideration during that process.[1479] Davies explains this as follows: by '[f]orcing lawmakers and rule-makers to consider factors in the right way, explain themselves, and show evidence for specific claims [it] makes it harder for them to disregard rights while minimising the transfer of substantive value judgments to the judiciary'.[1480] If we accept that parliaments are one of the 'cornerstones of national human rights protection systems'[1481], it makes sense for courts to review whether fundamental rights were sufficiently considered during the decision-making process.[1482] As clarified by Matthew Saul:

> 'The idea of the IHRJ [i.e., International Human Rights Judiciary] serving as a promoter of the human rights role of parliaments is especially attractive when the high caseload of an IHRJ institution challenges the premise that it operates as a complement to and not a replacement for domestic protection of human rights. The development of a promotional role for the IHRJ is consistent with the call for a greater focus on how to maximise the overall usefulness of the IHRJ for the realisation of rights, whilst working within its existing infrastructure and resources.'[1483]

1475 E.g., Huijbers (2018a) and Bar-Siman-Tov (2011), pp. 1928–1929.
1476 Brems (2013), p. 159.
1477 E.g., Brems (2019), pp. 221–223 and Gerards (2013b), p. 56.
1478 As mentioned in the case note to ECtHR 19 December 2017, app. nos. 60087/10, 12461/11 and 48219/11 (*Öğrü and Others v. Turkey*) in Huijbers (2018d), para. 8.
1479 E.g., Bar-Siman-Tov (2015), pp. 301–309; Popelier and Van de Heyning (2013), p. 251; and Lenaerts (2012), p. 3.
1480 Davies (2005), p. 517.
1481 United Nations, General Assembly, Annual Report of the OHCHR (2018), 'Contribution of Parliaments to the Work of the Human Rights Council and Its Universal Periodic Review' (17 May 2018), A/HRC/38/25, para. 18 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/135/75/PDF/G1813575.pdf?OpenElement>.
1482 See also Poole (2009), p. 154.
1483 Saul (2017), p. 137.

PROEF 3

And, concerning the incentivising effects procedural reasoning may have, Saul notes:

> 'The more debates on human rights issues are representative, in the sense of the number of members participating representing different interests, the more scope there is for outcomes to be reached that take account of the different interests of society. The more debates are participatory, in the sense of drawing on the views of particularly interested groups through consultations, the greater the understanding of the issues at stake can be; in addition the sense of awareness and ownership of the outcomes can also be enhanced. The better the deliberative quality, in terms of the information available and the tone of the debate, the more scope there is for new insights and understandings to be generated.'[1484]

The judgments discussed in Chapter 2, on the review of legislation, may all serve to illustrate this point. Each in their own way shows how courts have aimed to contribute to better legislation through focusing on the legislative process. Several judgments focus on whether the general public or a specific group were able to participate in the legislative process, often via consultations (by the SACC, the USSC, the CCC, and the SCH). In other judgments emphasis was placed on the need for legislative authorities to try to seek a fair balance between the various interests and rights at stake (by the ECJ and the ECtHR), or incentives were provided for legislative authorities to take account of scientific studies when deviating from the statistical model for determining the daily expenditure (by the GFCC).

The argument that procedural reasoning may improve decision-making processes, which would result in more fundamental rights proof outcomes, is also employed in relation to review of judicial decision-making processes. In the context of the ECtHR the focus has been on how the ECtHR can contribute to embedding the Convention rights in the law of the European States.[1485] Various scholars have contended that process-based review could be a useful means to this end, since the ECtHR can apply it to make the national authorities aware of the need to take fundamental rights into account in their decision-making processes, instruct them about the applicable standards, and even encourage them to comply with them.[1486] National courts are often regarded as the ECtHR's most important 'partners' in this regard, as they can and should already provide substantive redress of fundamental rights violations at the national level.[1487] If they do their job well, this could lead to better protection of fundamental rights across

1484 Ibid, pp. 143–144.

1485 Helfer (2008).

1486 E.g., Kleinlein (2019), pp. 106–107; Huijbers (2017a), pp. 198–199; Popelier and Van de Heyning (2017), p. 11; Arnardóttir (2017), p. 15; and Çali (2016), p. 160. To make the procedural approach of the ECtHR more robust, Reiertsen has argued that the ECtHR should connect it with a primary role for Article 13 ECHR, which lays down the right to an effective remedy. According to him the major problem with the current approaches of the ECtHR, that is, enforcing procedural aspects of substantive rights and specific procedural guarantees as laid down under the right to a fair trial, is that these 'are less obligatory, and provide less guidance to domestic remedial authorities' then procedural reasoning under Article 13 ECHR would provide, see Reiertsen (2016), p. 14.

1487 E.g., Gerards (2017), pp. 149–158 and Van de Heyning (2013), p. 48.

PROEF 3

Europe. This would ensure not only faster protection of fundamental rights – which, within the maxim 'justice delayed, is justice denied', would already mean enhanced protection of fundamental rights – but also that protection is provided to as many individuals as possible. After all, more courts can provide redress to more individuals. Indeed as the backlog of cases at the ECtHR painfully illustrates, the ECtHR alone simply cannot remedy all fundamental rights violations in Europe.[1488]

The *Von Hannover (No. 2)* judgment, discussed above, may be regarded as an example of this use of procedural reasoning.[1489] The ECtHR took note of the fact that the German Federal Court of Justice had explicitly changed its approach following the ECtHR's judgment in the first *Von Hannover* judgment, and that the GFCC had confirmed this approach.[1490] In *Von Hannover (No. 1)*, the ECtHR found a violation of Article 8 of the European Convention on Human Right as it concluded that the German courts had not struck a fair balance between the competing interests.[1491] The ECtHR noted in that judgment that 'the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and [the applicant] should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life'.[1492] In the *Von Hannover (No. 2)* judgment, because the German courts had undertaken a balancing exercise in light of the standards set out by the ECtHR[1493], there was no need for the ECtHR to substitute its assessment for that of the national courts. The instructions the ECtHR provided in the first judgment thus seemed to have paid off, since the national courts had provided substantive protection of the right to privacy accordingly.[1494]

C. *Extending courts' jurisdiction through (procedural) positive obligations*

Besides considering procedural reasoning as a means to provide minimum or even enhanced protection of fundamental rights, this type of review has been regarded as an indirect way for courts to extend their jurisdiction. More specifically, procedural reasoning has been used to enforce (procedural) positive obligations[1495], which require

[1488] In addition, as Section 8.4.3 clarifies, courts only have a limited role in ensuring fundamental rights in practice.

[1489] For a short discussion of the three *Von Hannover* judgments and procedural reasoning by the ECtHR, see Popelier and Van de Heyning (2017), pp. 16–17.

[1490] ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), paras. 114–115 and 125. See Section 4.2.7.

[1491] Ibid, para. 78.

[1492] Ibid.

[1493] Ibid, paras. 116–123; and for a discussion of the elements that should be taken into account by the national courts in their balancing exercise, see paras. 95–113.

[1494] Even though it did not directly lead to the result that no new cases would arise – indeed a third *Von Hannover* judgment case was decided a few years later, see ECtHR 19 September 2013, app. no. 8772/10 (*Von Hannover v. Germany (No. 3)*). A fourth case was petitioned by the husband of Princess Caroline von Hannover, see ECtHR 19 February 2015, app. no. 53649/09 (*Ernst August von Hannover v. Germany*).

[1495] There is a debate on whether courts' task is to solely (or primarily) protect negative obligations, that is, the obligation for states to refrain from interfered with fundamental rights, or whether it also

PROEF 3

public authorities to take active measures to ensure effective protection of fundamental rights.[1496] And through this, courts are said to have extended their jurisdiction beyond their explicit mandate.[1497] This is particularly visible in relation to the horizontal application of fundamental rights, which means that fundamental rights are applied in disputes between two private entities (so-called horizontal situations, Section I), as well as in relation to the judicial enforcement of social, economic, and cultural rights (Section II).

I. Enforcing fundamental rights in horizontal disputes

Arguments have been made in favour of procedural reasoning in the context of the horizontal application of fundamental rights, or so-called '*Drittwirkung*'.[1498] While fundamental rights have generally been developed and defined as claims against the State, they are (increasingly) also applied in situations in which individuals, groups, or private companies rely on fundamental rights in relation to other private entities.[1499] The application of fundamental rights in horizontal disputes may be direct, in the sense that individuals can ask courts to enforce their rights against other individuals, or indirect, in the sense that courts should protect individuals' rights by taking them into account in the dispute between private parties.[1500] In the first situation ('direct horizontal effect'), the challenged private party has a duty to comply with the right in question. In the second situation ('indirect horizontal effect'), public authorities and especially courts have the positive obligation to protect this right.

In the international arena, direct horizontal effect of fundamental rights is often difficult, because fundamental rights obligations are usually only directed at States.[1501] Indirect horizontal application, in which public authorities have a positive obligation to

encompasses positive obligations, see Beijer (2017b), pp. 73–76. Positive obligations can and have been enforced through substantive reasoning, however, courts have at times also turned to procedural reasoning.

1496 In the context of the European courts, see Beijer (2017b), p. 5 and Lavrysen (2017), p. 1; and in the context of the ICCPR, see e.g., United Nations, Human Rights Committee (2004), 'General Comment No. 31: The Nature of General legal Obligation Imposed on States Parties to the Covenant' (29 March 2004), CCPR/C/21/Rev.1/Add. 1326, paras. 6–8 <https://www.refworld.org/docid/478b26ae2.html>.

1497 See the discussions in Sections 8.3.1C-I and 8.3.1C-II. Beijer has, for example, contended that the recognition of positive obligations in the context of the EU would lead to an (over)expansion of EU competences, see Beijer (2017b), pp. 314–317.

1498 Lewan (1968), p. 572. See also Frantziou (2015), p. 670 and Van der Walt (2014), p. 367.

1499 E.g., Walkila (2016); Frantziou (2015); Van der Walt (2014); and Gardbaum (2003). Yet, horizontal effect of fundamental rights is not accepted in all contexts, in relation to the US context, see Tushnet (2009), pp. 197–226; concerning Sweden, see Lebeck (2009); and a decline of horizontal effect of fundamental rights has been noted in the context of South African courts, see Friedman (2014).

1500 E.g., Gerards (2019), p. 144ff and Lane (2018).

1501 Nevertheless, in the context of the EU, the CJEU has acknowledged the direct effect of the general principle and of the right to non-discrimination, in ECJ (GC) 15 January 2014, ECLI:EU:C:2014:2 (*Association de Médiation Sociale*), para. 47; the right to an effective remedy, in ECJ (GC) 17 April 2018, ECLI:EU:C:2018:257 (*Vera Egenberger v. Evangelische Werk für Diakonie und Entwicklung e.V.*,), para. 78; and of the right to paid leave, in ECJ (GC) 6 November 2018, ECLI:EU:C:2018:871 (*Bauer*), paras. 72–73. For discussions of the recent judgments of the ECtHR, see Fontanelli (2018) and Sarmiento (2018).

PROEF 3

protect a certain right, is more common.[1502] In that situation courts may also turn to process-based review. Procedural reasoning enables international courts to determine whether national authorities have indeed tried to provide protection of the particular right in a horizontal situation.[1503] It seems that procedural reasoning in such contexts may be 'highly prescriptive' and lead to 'expansive supervision' by courts over other judicial institutions.[1504]

The *Von Hannover (No. 2)* judgment of the ECtHR may help to illustrate this point.[1505] In the national dispute, Princess Caroline of Monaco and her husband had turned to the German courts to try to prevent a tabloid newspaper from publishing photos of their private life. At the national level the dispute was between two individuals and the tabloid, and it was therefore a horizontal dispute. After the highest national court had rejected the individuals' claims, the case came before the ECtHR. However, only States are parties to the European Convention on Human Rights and only complaints in relation to State Parties are admissible before the ECtHR.[1506] The case therefore had to be 'verticalised', in the sense that it had to be translated into a claim against the German authorities. The following approach was taken by the ECtHR:

> 'In cases of the type being examined here what is in issue is *not an act by the State but the alleged inadequacy of the protection afforded by the domestic courts* to the applicants' private life. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be *positive obligations* inherent in effective respect for private or family life…'[1507]

The claim was thus rephrased to make it turn on the alleged inadequacy of the protection afforded by domestic courts. In its review of the German courts' compliance with the ECHR, the ECtHR was particularly concerned with whether they had sought to strike a fair balance between the various interests at stake in line with the criteria laid down by the ECtHR.[1508] After a thorough assessment of the judicial decision-making process by the various national courts, the ECtHR concluded that they had indeed tried to carefully balance the rights at stake and therefore had not failed to comply with their positive obligations under Article 8 ECHR.[1509] In light of the wide margin of

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1502 In the ECtHR context it has been explained that '[i]nsofar the Convention imposes obligations upon states in respect of private acts …, it does so only indirectly through the medium of positive obligations', see Harris et al. (2018), p. 26.

1503 In a similar vein, see the discussion in Section 7.4.1.

1504 Sathanapally (2017), pp. 55–56.

1505 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*). See Section 4.2.7. The three *Von Hannover* judgments have also been discussed in the context of indirect horizontal effect in Gerards (2019), pp. 157–159.

1506 Article 34 ECHR.

1507 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), para. 98, [emphasis added].

1508 Ibid, para. 107.

1509 Ibid, paras. 124–126.

PROEF 3

appreciation afforded in this case, process-based review enabled the ECtHR to carefully assess whether the national courts had made sufficient efforts to strike a fair balance in the case.[1510] In other words, through procedural reasoning, the ECtHR examined the national courts' compliance with positive obligations, and in so doing, indirectly extended its judicial oversight into the area of horizontal disputes.

II. Enforcing socio-economic rights

The extension of courts' jurisdiction through positive fundamental rights obligations can also be seen in the context of socio-economic and cultural rights.[1511] In relation to these rights, there is an ongoing debate on the normative status and legitimacy of their judicial enforcement.[1512] From the perspective of (Western) liberal democratic theories, it has been argued that judicial enforcement of these rights 'would be counter-democratic in that it would impose potentially wide-ranging constraint on the free flow of political contestation that form the life-blood of a healthy democracy'.[1513] The problem with judicial oversight would be that decisions relating to these rights often impact on the distribution and resource allocation in a State, which is considered to be the prerogative of democratically elected authorities.[1514] In addition, judicial enforcement of these rights has been rejected as these rights are considered not to entail fully fledged rights but rather, aspirations that are not judicially enforceable but impose the obligation of progressive realisation or non-regression on States.[1515]

While much can be said about whether, and to what extent, socio-economic rights may be enforced by courts, it can be noted that process-based review has been a means for courts to extend their jurisdiction into this domain. Indeed, procedural reasoning seems particularly useful when it concerns the enforcement of positive obligations that

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1510 See also Popelier and Van de Heyning (2017), pp. 16–17.

1511 This argument bears some resemblance to the argument that has already been put forward in Section 8.3.1A-II, since both relate to socio-economic rights. The argument in favour of procedural reasoning in that section, however, focused on second-order reasons that required courts to show substantive deference. In that understanding, procedural reasoning was regarded as an instrument to provide minimum protection of socio-economic rights. In this section, however, the argument is that a procedural approach should be taken as through it courts can ensure compliance positive obligations, and thereby they extend their jurisdiction into the domain of socio-economic rights. This argument thus takes the view that courts have broadened their function of guardians of fundamental rights, and concern an argument relating to the first-order reasons. The difference between second-order and first-order arguments has been explained in Section 8.3.1A-II, and see in particular n(1429).

1512 For an overview of some of the arguments on the legitimacy of judicial enforcement of socio-economic rights, see O'Cinneide (2015), and in the context of the ECtHR, see Leijten (2018), pp. 59ff.

1513 Ibid, p. 259.

1514 E.g., Fukuda-Parr, Lawson-Remer, and Randolph (2015), p. 28.

1515 E.g., ibid, p. 23ff; Sachs (2016), p. 27. The General Comment of the OHCHR, which explains the meaning of notions such as 'to the maximum of available resources', 'achieving progressively the full realisation of the rights', and 'all appropriate means', see United Nations, OHCHR, 'General Comment No. 3: The Nature of States Parties' Obligations (Article 2, Para. 1 of the Covenant)' (14 December 1990), E/1991/23, paras. 4 and 9 <https://www.refworld.org/pdfid/4538838e10.pdf>.

PROEF 3

impose an obligation of means[1516], something socio-economic rights often do. Through focusing on the decision-making process, courts can establish whether decision-making authorities have truly made an effort to ensure the protection and fulfilment of those rights.[1517] For instance, procedural reasoning may assist courts in examining whether public authorities have sought to make use of the means available to them and whether they have tried to ensure that their measures were achieving the purpose pursued (this correlates with *ex ante* and *ex post* obligations discussed in Section 6.3.3C).

A reference to the case-law of the European Convention on Human Rights may illustrate the role of procedural reasoning in enforcing socio-economic rights through positive obligations. The European Convention on Human Rights deals (primarily) with civil and political rights, and therefore the ECtHR has no (or at least limited) formal jurisdiction over economic, social, and cultural rights.[1518] Through positive obligations, however, the ECtHR has been able to include socio-economic and cultural rights in its case-law[1519], and has at times enforced these rights through process-based review.[1520] In *Winterstein*, for instance, the ECtHR protected the cultural aspects of the lifestyle of Roma and travellers through the right to respect for the home, private and family life, as laid down in Article 8 ECHR.[1521] It held that 'there is … a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the way of life of the Roma and travellers'.[1522] In enforcing this obligation, however, the ECtHR turned to procedural reasoning. It noted that their wide margin of appreciation in this area allowed States to enjoy 'the choice and implementation of planning policies'.[1523] For that reason it found it was 'appropriate to look at the procedural safeguards available to the individual to determine whether the respondent State has not exceeded its margin of appreciation'.[1524] Based on procedural considerations, including the absence of a proportionality assessment relating to the eviction decision of the Roma families as well as on the lack of follow-up on the relocation of several families, the ECtHR concluded that France had violated Article 8 ECHR.[1525] Thus through process-based review of compliance with positive obligations, the ECtHR may be said to have expanded its judicial oversight of a civil right to encompass also cultural rights.

1516 For a distinction of the obligations of result and of means, see Fukuda-Parr, Lawsom-Remer, and Randolph (2015), p. 22.

1517 This is also clear from the various applications of procedural reasoning in the justification tests, see in particular Sections 6.3.5B (on the legitimate aim test), 6.3.5C (on the suitability test), 6.3.5D (on the necessity test), and 6.3.5E (on the proportionality test).

1518 E.g., Leijten (2018), p. 25ff and Beijer (2017b), p. 21.

1519 E.g., Leijten (2018), pp. 40–41 and 47–54.

1520 See Gerards (2017), pp. 146–147 and 152–153.

1521 ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*). See Sections 3.2.6 and 4.2.7.

1522 Ibid, para. 148 (ζ).

1523 Ibid, para. 148 (α).

1524 Ibid, para. 148 (γ).

1525 Ibid, para. 167.

PROEF 3

D. Résumé

Process-based review has been put forward as a means for courts to provide protection of fundamental rights. A first argument considers procedural reasoning as a 'second-best review method' to substantive review, because it allows courts to offer at least some protection of fundamental rights in institutionally or politically challenging situations or in cases concerning complex issues. Secondly, procedural reasoning enables courts to emphasise the importance of procedures for individuals and encourage decision-making authorities to protect procedural rights. Indirectly, moreover, better procedures could eventually lead to improved substantive protection of fundamental rights. A third argument entails that procedural reasoning may allow courts to review positive obligations, with which they have extended their fundamental rights mandates. In particular, courts may be said to have done so in relation to the enforcement of socio-economic rights and of fundamental rights more generally in horizontal disputes.

8.3.2 COURTS FAILING TO PROTECT FUNDAMENTAL RIGHTS BY APPLYING PROCESS-BASED REVIEW

In the previous section, three main arguments in favour of procedural reasoning in fundamental rights cases were discussed. These arguments revolve around the idea that process-based review can lead to minimum or enhanced protection of fundamental rights, or that they help courts to extend their area of judicial oversight. Others, by contrast, have submitted that process-based review has no such (positive) effects and may even lead to a decline in the protection of fundamental rights.[1526] Two main strands of arguments can be distinguished here. First, it has been submitted that procedural reasoning by courts would insufficiently protect fundamental rights (Section A); secondly, process-based review is regarded as a form of unwarranted judicial restraint, which could lead to an unwarranted lowering of the level of judicial protection of fundamental rights (Section B). Clearly, the second argument has some overlap with the discussion of procedural reasoning as a sign of judicial restraint, discussed in Section 7.4. However, that discussion focused on whether process-based fundamental rights review could be regarded as a form of institutional judicial deference, while in the current section, emphasis is placed on the implications this may have for courts in fulfilling their role as guardians of fundamental rights.

[1526] Arguments against the judicial enforcement of positive obligations, which would extend courts' jurisdiction into the realm of horizontal disputes and socio-economic rights are not addressed in this section. These arguments primarily argue against courts extending their jurisdiction in general and therefore do not focus on procedural reasoning and fall outside the scope of this research. Insofar as they do focus on process-based review and courts' procedural mandates and standard-setting powers, they have already been addressed in Sections 8.2.1 and 8.2.2.

PROEF 3

A. *Unsuccessful protection of fundamental rights*

Process-based review has been criticised from a human rights perspective on the grounds that it would lower the protection of fundamental rights and would cause courts to pay insufficient attention to their function as guardians of fundamental rights. This line of argument focuses either on the direct protection provided by the court that applies procedural reasoning (Section I), or on the indirect consequences of such an approach, meaning that process-based review does not help to ensure the respect for, the protection of, or the fulfilment of, these rights by other authorities (Section II).

I. Inadequate protection of fundamental rights

First, it has been argued that courts provide inadequate protection of fundamental rights if they employ process-based review. In the US context, Dan T. Coenen, for example, has noted the concern that if process-based review is 'available, judges will use [it] too much, use substantive rules too little, and thus underenforce important constitutional norms'.[1527] In a similar vein, in the context of the ECtHR, issues have been raised where procedural reasoning replaces substance-based review.[1528] In particular, by focusing on the decision-making procedure of the national authorities, the ECtHR has been said to weaken substantive rights, especially if it does not sufficiently develop substantive standards.[1529] Jonas Christoffersen has submitted that if procedural reasoning is not complemented by a substantive assessment by the ECtHR, this would indeed lower the protection of substantive rights.[1530] Furthermore, in relation to the provision of redress of a substantive right violation, the ECtHR's focus on decision-making processes has been held to provide only non-optimal protection. Fundamental rights cannot be protected effectively if the ECtHR focuses solely on procedural reasoning, '[o]therwise even decisions blatantly in violation of the Convention could be taken'.[1531] In addition, where the ECtHR limits its review to the quality of the national parliamentary debates, it is said to not adequately protect the rights of the unpopular and vulnerable minorities 'whose voices may struggle to be heard in the democratic forums of States parties, no matter how rigorous those institutions' processes are'.[1532]

[1527] Coenen (2009), p. 2883.

[1528] E.g., Brems (2013), p. 159.

[1529] Brems (2019), p. 222, who requires a procedural review, for example, on the basis of a substantive checklist already put forward by the ECtHR, which she has called 'substance-flavoured procedural review'. See also Christofferson, p. 455 and for a discussion of how this issue can be addressed, see Huijbers (2017a), p. 198.

[1530] Christoffersen (2009), pp. 455, 460 and 462. In a similar vein, Brems has considered the *Belcacemi* judgment of the ECtHR a 'worst practice', precisely because the ECtHR did not closely scrutinise the legislative process for the ban on face covering in Belgium, in which it would have taken account also of a more substantive quality of the decision-making process, see Brems (2019), pp. 222–223. For the ECtHR's procedural approach, see ECtHR 11 July 2017, appl. no. 37798/13 (*Belcacemi and Oussar v. Belgium*), para. 54.

[1531] Baade (2018), p. 4.

[1532] Cumper and Lewis (2019), p. 613, and see also, 636–638.

PROEF 3

These authors thus reject the idea that process-based review may provide a similar level of protection of fundamental rights as substance-based review, although they do not generally dismiss the concept of procedural reasoning in relation to procedural rights. At their core, these arguments are based on the idea that fundamental rights cases are all about outcomes. Davies has phrased this concern most clearly: 'focus on substantive outcomes seems in the spirit of human rights – of all areas of law, should this one not focus on whether there are real justifications for actual human experiences?'[1533]

The understanding that fundamental rights are (primarily) about substance finds its basis in the influential theory of Ronald Dworkin. He regarded rights as 'trumps' that defeat any other non-rights interests.[1534] Therefore, unlike policies, rights 'should not be vulnerable to routine changes in social utility'[1535], meaning that second-order considerations, such as the institutional relationship between the court and the decision-making authority, do not put constraints on adjudication.[1536] Instead, for Dworkin, '[t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness'.[1537] In the words of Juliano Zaiden Benvindo:

> 'In the realm of adjudication, in turn, the focus is on arguments of principles, for now the focus is not on satisfying the collectivity, but rather on making a decision that indicates and justifies whether the legal right claimed by an individual is appropriate to the case based on a comprehensive and exhaustive interpretation of the legal norms and precedents. The judge's constraints, therefore, reside in the observance of the democratic procedure of legal rights development and in the claim to coherently improve it by applying the best interpretation possible to the case at issue.'[1538]

Accordingly, courts' task is to interpret and protect fundamental rights and thereby do justice to the substantive rights claims of individuals. Dworkin's theory has therefore been interpreted as meaning that, even though the importance of procedures is not completely rejected, procedural concerns are of a secondary nature.[1539] What matters in the end is whether the decision-making procedures led to the best possible outcome. For Dworkin this has been the reason to argue for substance-based review, which requires

[1533] Davies (2005), p. 517.
[1534] Dworkin (1998).
[1535] Kavanagh (2010b), p. 31.
[1536] Dworkin (1997), pp. 111–112.
[1537] Dworkin (1998), p. 225.
[1538] Benvindo (2010), pp. 268–269 ('From these words, we can immediately conclude that Dworkin seeks to investigate the realm of adjudication as founded upon a deontological standpoint by, first, assuming beforehand the existence of valid norms originated from a political community and, second, rationally reconstructing them *as a means to provide the right answer.*', p. 266).
[1539] As discussed in Kyritsis (2017), p. 124.

PROEF 3

courts to make substantive, value-laden decisions, even in hard cases where there is no absolute right answer.[1540]

In judicial practice too, fundamental rights are considered by some judges to be about outcomes rather than procedure. In *Denbigh High School*, for example, the issue of whether rights are about procedure or substance arose.[1541] The case concerned a school's refusal to allow a student to deviate from their uniform code in order to comply with the strict dress code of her religion. Although the school allowed students a choice of clothing, including an option of wearing loose trousers and a long tunic-like top, the student wanted to wear a Jilbab. As a result of the ongoing dispute, the student did not attend school for almost two years. The issue before the UK courts was whether the school's decision violated the student's right to freedom of religion. The UKCoA, on the basis of a procedural approach to the right to freedom of religion and belief, had ruled that the school's decision-making process was defective and had violated the student's freedom of religion.[1542] The UKSC, however, arrived at a different conclusion on the basis of the ECtHR's substantive approach. Lord Bingham considered that the focus should not be on procedure but on substance, because the unlawfulness of an act should be determined on the result of the act, and applications may only be brought by a victim of an unlawful act, that is, an act that is violating fundamental rights in its substance.[1543] Lord Hoffmann more directly criticised the procedural approach taken by the UKCoA:

> 'Quite apart from the fact that in my opinion the Court of Appeal would have failed the examination for giving the wrong answer to question 2, the whole approach seems to me a mistaken construction of article 9 [Human Rights Act; the right to freedom of religion and belief]. In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is concerned with substance, not procedure. *It confers no right to have a decision made in any particular way. What matters is the result*: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2?'[1544]

In Lord Hoffmann's view, the question of whether the right to freedom of religion was unjustifiably infringed should not be answered by looking at the manner in which legislation, decisions, or judgments were reached, but rather by judging their content.[1545] The UKSC's Lady Hale in *Miss Behavin' Ltd.*, a case concerning the

1540 Discussed further in Section 9.2.2B.
1541 UKSC 22 March 2006, [2006] UKHL 15, (*R (on the application of Begum) v. Denbigh High School*). See Section 3.2.5.
1542 UKCoA 2 March 2005, [2005] EWCA Civ 199 (*The Queen on the application of SB v. Headteacher and Governors of Denbigh High School*), paras. 76–78.
1543 UKSC 22 March 2006, [2006] UKHL 15, (*R (on the application of Begum) v. Denbigh High School*), para. 29.
1544 Ibid, para. 68 [emphasis added].
1545 Poole (2009), pp. 149–150.

PROEF 3

right to freedom of expression, also considered that in fundamental rights cases 'the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account'.[1546] A similar stand seems to be taken by the IACtHR in *Gelman*. There, it held that '[t]he incompatibility of amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect'.[1547] In this context, especially where there have been systemic violations of such core rights, a procedural approach to the protection of substantive rights seems to be rejected. What matters is substance, not process. And process-based review would only provide an inadequate substantive protection of fundamental rights, if it could provide any at all.

II. Reduced protection of fundamental rights

On top of the arguments set out in the previous section to the effect that procedural reasoning is an inadequate means of fundamental rights protection, scholars have argued that process-based review leads, or may lead, to a reduced protection of fundamental rights. Procedural reasoning is found to be counter-productive to (substantive) fundamental rights protection for various reasons: it may lead to incorrect results, delays in justice, denials of justice, and, more structurally, procedural window-dressing by decision-making authorities.

Incorrect results | First, on the basis of procedural reasoning, courts may reject decisions and legislation that in their outcomes are compatible with fundamental rights, but were reached in an incorrect manner. Hans Linde has argued in relation to the US courts that procedural reasoning may 'deny validity to some excellent enactments while sustaining deplorable ones that have been faultlessly made'.[1548] Also in the UK context, scholars have noticed that procedural reasoning 'produces the perverse outcome of wins for rights-claiming applicants even where the rights-based arguments they adduce are, as a matter of substance, transparently weak'.[1549] If fundamental rights are about substance, then rejecting a decision on procedural grounds despite its substantive quality, would not contribute to fundamental rights protection. Instead, it may even be contrary to it.

Justice delayed | Secondly, and closely related to this, is the argument that courts cannot determine whether a fundamental right has been violated in substance through process-based review. Indeed, ECtHR Judge Nussberger has noted that a procedural

[1546] UKSC 25 April 2007, [2007] UKHL 19 (*Belfast City Council v. Miss Behavin' Ltd.*), para. 31. See Section 3.2.5.
[1547] IACtHR (merits and reparations) 24 February 2011 (*Gelman v. Uruguay*), para. 229. See Section 4.2.8.
[1548] Linde (1975), p. 254. In a similar vein, in the context of the UK, see Davies (2005), p. 516.
[1549] As discussed by Poole (2009), p. 155.

PROEF 3

violation of a substantive right is often unsatisfactory for the applicant(s).[1550] What matters to individuals whose rights have been violated is that justice is done, that is, the injustice suffered is redressed in substance. Even if courts can provide some justice by finding procedural shortcomings, it may take a while before redress is then offered on the substance. After all, if courts limit their judgment to finding procedural shortcomings this may require a reassessment or renewed decision of the content (e.g., *Baker*[1551], *'Tunisian case'*[1552] and *Comunidad Indígena Eben Ezer*[1553], and *Dynamic Medien*[1554]). Instead of offering redress immediately, procedural reasoning would have the effect of extending the period of time before justice is done, because another decision-making authority has to make a new substantive decision.

Justice denied | Thirdly, procedurally reasoned judgments may not only lead to a delay in justice being done, but it does not even ensure that justice will ever be done. Applicants may face considerable difficulties in ensuring the follow-up of procedurally reasoned judgments.[1555] In the strongest terms, process-based review has even been considered 'futile' in the enforcement of substantive rights, as decision-making authorities may re-enact the same legislation, remake the same decision, or arrive at the same judgment as before the review.[1556] For example, in response to the *Comunidad Indígena Eben Ezer* judgment, it is not certain that the property rights claim of indigenous people will be granted after the SCA has referred the case back to the High Court of Argentina on procedural grounds only.[1557] Although one may argue that this is a result of the inconclusiveness of the judgment, one could also argue that the ASC would have provided more protection by setting out substantive limits for the new decisions to be made.

Procedural window-dressing | In Section 8.3.1B-II it was explained that scholars have argued that procedural reasoning would contribute to decisions that are more respectful of fundamental rights. However, one of the main arguments advanced against these positive effects of procedural reasoning is the idea of 'procedural window-dressing'. Several scholars have raised the concern that process-based review may only change the decision-making procedure of public authorities on the surface, without truly leading to better procedures resulting in improved fundamental rights protection. Such views not only reject the idea that procedural reasoning enhances substantive

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1550 Nussberger (2017), pp. 166–167. See also Huijbers (2017a), p. 198 and Sathanapally (2017), p. 73.

1551 CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.

1552 DSC 28 July 2008, no. 157/2008, U2008.2394H ('*Tunisian case*'). See Section 3.2.3.

1553 SCA 30 September 2008, 331:2119 (*Comunidad Indígena Eben Ezer v. Provincia de Salata*). See Section 4.2.1.

1554 ECJ 14 February 2008, ECLI:EU:C:2008:85 (*Dynamic Medien*). See Section 4.2.6.

1555 Huijbers (2018a).

1556 See for a discussion of this account, Coenen (2009), pp. 2880–2881.

1557 SCA 30 September 2008, 331:2119 (*Comunidad Indígena Eben Ezer v. Provincia de Salata*), para. 4.

PROEF 3

protection of fundamental rights, but also that it enhances procedural protection of fundamental rights (see, for this difference, Section 8.3.1B).

Thomas Poole, for example, has said that procedural reasoning in fundamental rights cases 'at best induce[s] a box-ticking mentality among decision-makers and at worst the ossification of public administration'.[1558] Also others have raised concerns about procedural window-dressing.[1559] Alice Donald and Philip Leach, for example, have warned that 'executives or parliaments may orchestrate proceedings to create the appearance of democratic deliberation in order to seek to earn judicial deference which is not, in fact, warranted'.[1560]

Furthermore, and related to this, empirical research indicates that the effectiveness of procedural standard-setting in improving the decision-making process is not self-evident. In particular, the effectiveness of process-based review is dependent on whether public authorities are aware of the standards that will be applied to their decision-making processes. If these authorities know that they are required to explain their decisions, they 'may engage in a systematic, effortful, deliberate process of seeking, weighing, and assessing evidence, and reaching a conclusion supported by the evidence'.[1561] If, however, they are only asked to justify their decision afterwards, this may lead to a window-dressing mentality.[1562] *A posteriori* procedural standard-setting therefore does not seem to lead to any real improvement in decision-making procedures.[1563]

The examples of process-based review cannot, of course, indicate whether these judgments have resulted in window-dressing responses. Nevertheless, a comparison of the standards mentioned in the judgments may help to demonstrate the risk of procedural cover-up. For example, the judgments of the SACC and the SCH both mentioned the requirement of public participation in legislative procedures. Whilst the SCH in *Taomae* was satisfied with the fact that the legislature had '*contemplated* public participation in the legislative procedure'[1564], in the *Doctors for Life International* judgment, the SACC adopted a more substantive understanding of public

1558 Poole (2009), pp. 154–155.

1559 See Huijbers (2018b) and Popelier and Van de Heyning (2013), p. 261.

1560 Donald and Leach (2016), p. 84.

1561 Fraidin (2013), p. 955ff.

1562 Ibid, p. 955.

1563 From a different vantage point, ECtHR Judge Spano also seems to require *a priori* substantive guidance before using procedural reasoning, He explained at length how the ECtHR first 'needed to build an elaborate *edifice of human rights*, both at the substantive as well as the methodological levels', Spano (2018), p. 477. Only after this it has turned to '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 the Convention rights to peoples within their jurisdictions', Spano (2018), pp. 480–481. Indeed, the ECtHR seems to mainly apply a procedural approach in cases in which it has provided for an elaborate list of standards and factors that are relevant for the substantive protection of the right concerned, see Gerards (2017), p. 152.

1564 SCH 1 September 2005, no. 26962 (*Taomae v. Lingle*), Section VII and XII, Part A [emphasis added]. See Section 2.2.2.

PROEF 3

participation.[1565] According to the SACC, citizens should be able to engage in 'public debate and dialogue with elected representatives at public hearings' and the legislature should ensure 'that citizens have the necessary information and effective opportunity to exercise the right'.[1566] It is not a stretch to think that the SCH's understanding of public participation would more easily lead to window-dressing, as the legislature is only required to indicate that it *contemplated* public participation, while in the South African context the legislature should indicate that it *enabled effective* public participation.

In a similar vein, as regards the need for decision-making authorities to carry out a balancing exercise taking into account the various rights at stake (e.g., *Volker und Markus Schecke*[1567], *Hirst (No. 2)*[1568], and *Von Hannover (No. 2)*[1569]), it seems that substantive considerations are needed to see whether a real balancing exercise was undertaken. Mathieu Leloup – who favours a procedural approach by the ECtHR – underlines this when he considers that the ECtHR prevents national authorities from paying mere 'lip service' to these interests by supplementing its procedural approach with a more substantive assessment.[1570] Arguably, a purely procedural approach is unable to distinguish an imitation of a balancing exercise from a genuine one.

B. *Weakened judicial protection of fundamental rights*

Procedural reasoning has furthermore been criticised for being a form of unwarranted judicial restraint, which could imply that courts disregard their role as guardians of fundamental rights. Section 7.4 has already addressed the idea that process-based review may be considered a means of showing institutional judicial restraint. Some scholars, however, argue that judicial restraint, especially in fundamental rights cases, is contrary to the judicial task of courts. Trevor Allan, for example, has argued that when protecting rights under the Human Rights Act 1998, the UK courts should not show deference to executive and legislative authorities on their presumed expertise, their procedural competence, or the procedural quality of their decision-making process.[1571] Instead, they should be persuaded by substantive reasons. According to Allan, due deference on procedural grounds involves

> '*an abdication of judicial responsibility for the protection of rights*, [and] is marked precisely by reliance on the expertise or experience or public visibility of the decision-maker as opposed to the apparent quality of the decision itself. Here the judges' reliance on the

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1565 SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*). See Section 2.2.5.

1566 Ibid, para. 105.

1567 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.

1568 ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*). See Section 2.2.8.

1569 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*). See Section 4.2.7.

1570 Leloup (2019), p. 66.

1571 Allan (2006), p. 689.

PROEF 3

> supposedly superior qualifications of the decision-maker effectively divests the court of its role as independent scrutineer. An experienced and well-qualified public official can always make an error of judgment as regards the balance of private rights and public interest; and a similar error can be made by a body accountable to Parliament or the electorate. Yet a form of deference that deflects attention from the legislative or administrative act, in order to evaluate the merits of the actor, is ill-suited to the identification of error.'[1572]

From that perspective, and taking the view that procedural reasoning is a deferential method of review, process-based review leads to a weakened judicial protection of fundamental rights. Indeed, Sébastian van Drooghenbroeck has argued that the ECtHR' move towards procedural reasoning 'in reality, … serves the European judge with an "escape route" to avoid having to express itself on the substance of delicate and controversial matters, thus abdicating the role that is normally his'.[1573] In this sense, through process-based fundamental rights review, the ECtHR is failing to do what it should do, that is, protecting fundamental rights and providing individual redress. Similar concerns were also voiced in a dissenting opinion to *Animal Defenders International*, which is a famous procedurally reasoned ECtHR judgment concerning a general ban on political advertising on television:

> 'The fact that a general measure was enacted in *a fair and careful manner by Parliament does not alter the duty incumbent upon the Court to apply the established standards that serve for the protection of fundamental human rights*. Nor does the fact that a particular topic is debated (possibly repeatedly) by the legislature necessarily mean that the conclusion reached by that legislature is Convention compliant; and nor does such (repeated) debate alter the margin of appreciation accorded to the State. Of course, a thorough parliamentary debate may help the Court to understand the pressing social need for the interference in a given society. In the spirit of subsidiarity, such explanation is a matter for honest consideration.'[1574]

In other words, the judges reasoned that quality of parliamentary debate may be informative to the ECtHR, but it is still the duty of the ECtHR to protect fundamental rights in a substantive manner.

In the US context, Coenen has considered that where courts focused primarily or solely on procedures, they do not provide sufficient direction as to the substantive protection of fundamental rights.[1575] Instead, procedural reasoning may be used to avoid conflicts between different branches to the detriment of fundamental rights and allow for 'free-wheeling' by the decision-making authorities in their renewed

[1572] Ibid, p. 689 [emphasis added].

[1573] Van Drooghenbroeck (2001), pp. 339–340 [author's translation] ('ne serve en réalité au juge européen de "voie de fuite" pour éviter de se prononcer sur le fond de questions délicates et controversées, abdiquant par là-même le rôle qui est normalement le sien').

[1574] Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić, and De Gaetano to ECtHR (GC) 22 April 2013, app. no. 48876/08 (*Animal Defenders International v. UK*), para. 9 [emphasis added]. Briefly addressed in Section 1.1.

[1575] Coenen (2009), pp. 2877–2880.

PROEF 3

decision-making process.[1576] Likewise, Gerald Gunther has argued that procedural reasoning would foster judicial dishonesty and abdication of their function.[1577] If one takes the view that fundamental rights are about outcomes, results, and consequences (as was discussed in Section 8.3.2A-I), courts can be said to have abandoned their task as guardians of fundamental rights if they fail to engage with the legislation, administrative decisions, and judgments on their merits.

From this perspective, it could be argued, for example, that the GFCC, in its *Hartz IV* judgment, did not sufficiently protect the right to dignity and subsistence minimum by finding only procedural shortcomings.[1578] Even though it did mention several aspects that the new legislation should be taken into account in substance – for example, that the subsistence minimum should meet the requirement of protecting persons with special and differentiated needs[1579] – in its strongest incarnation, the perspective discussed here would have required the GFCC to address the content of the law. Only in that way would the GFCC have truly fulfilled its function as guardian of fundamental rights.

C. *Résumé*

This section has discussed various arguments to the effect that courts fail to protect fundamental rights if they rely on process-based fundamental rights review. First, procedural reasoning is considered an unsuccessful and inadequate method for the protection of fundamental rights by those who regard fundamental rights to be solely about substance. Secondly, it has been contended that procedural reasoning would lead to reduced protection of fundamental rights, as it can lead to incorrect results, unnecessary delays in justice, the denial of justice, and, more systematically, procedural window-dressing by public authorities. Thirdly, it has been posited that process-based review means a weakened judicial protection in that, by focusing on decision-making procedures, courts abdicate their function as guardians of fundamental rights.

8.4 REFLECTIONS AND CONNECTIONS

The previous sections have outlined several debates concerning the function of courts as guardians of fundamental rights as well as their standard-setting task. These sections discussed the various arguments in favour of, and against, courts' use of process-based review in order to ensure respect for, and protection and fulfilment of fundamental rights. This section connects the previous debates and reflects on the underlying

[1576] Ibid, p. 2877 and Gunther (1964), pp. 5–9 and 25.

[1577] Gunther (1964), p. 25. Gunther's comment concerning judicial dishonesty is addressed in Section 9.2.1F as he rejected the idea that procedural reasoning is less normative sensitive as it is rather a camouflage for normative choices.

[1578] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*), para. 173. See Section 2.2.4.

[1579] Ibid, paras. 204–209.

PROEF 3

arguments informing these debates. As courts in practice operate in different jurisdictions and settings, the reflection in this section is necessarily general and rather abstract. Its main objective is to provide an overall understanding of the relationship between courts role as guardians of fundamental rights and the use of process-based review.

The following sections explain, first, how process-based review and procedural standard-setting relate and interact in 'a standard review loop' (Section 8.4.1). It also clarifies that the debate on whether procedural reasoning can assist courts in protecting fundamental rights depends on views on the primacy of procedural or rather substantive fundamental rights protection (Section 8.4.2), as well as on one's focus on the concrete or the generic impact process-based review may have on fundamental rights protection (Section 8.4.3). Lastly, it considers the context-dependency of the effectiveness of procedural reasoning in ensuring fundamental rights protection (Section 8.4.4).

8.4.1 A STANDARD REVIEW LOOP

Section 8.2 addressed the legal-theoretical aspect of the debate on the functions of courts. It discussed courts' mandate to use process-based review in adjudication and it addressed the various views on the role of courts to respect, protect, and ensure the fulfilment of procedural standards in fundamental rights cases. Indeed, there seems to be a connection between the standards courts protect and the review method they employ, which can be defined as a 'standard review loop'.[1580] This loop can be explained as follows.

The jurisdiction and competences of courts determine their role in any given context. As was explained in the Introduction to Part III, this role can be described in terms of a court's functions, such as being a guardian of fundamental rights, a regulatory watchdog, a forum for deliberation, or a keeper of the institutional balance.[1581] When courts decide on the merits of a case, they fulfil these functions by assessing if a particular case meets certain standards. Indeed, the essence of adjudication is reviewing cases in light of legal standards. By doing so, that is, by interpreting and applying standards to concrete situations, courts clarify and cultivate these standards, and at times, they even develop new ones. These more detailed or new standards may then provide a basis for future adjudication.[1582] Standards and

[1580] E.g., Gerards (2017), p. 129 and Van Hoecke (2013), pp. 188–189. This has already been briefly addressed in Section 8.2.2.

[1581] As discussed in the Introduction to Part III and see Patricia Popelier, Mazmanyan, and Vandenbruwaene (2013), p. 6.

[1582] This does not mean, however, that procedural reasoning and the standards flowing from it necessarily extend the scope of the (substantive) right in question. Such would require that, as the ECtHR has done in relation to the right to life (Article 2 ECHR) and the prohibition of torture and degrading and inhuman treatment (Article 3 ECHR), procedural limbs are attached to substantive rights (see on this O'Boyle and Brady (2013), pp. 382–384). Instead, it means that the these procedural standards

PROEF 3

review are thus interacting in a continuous loop, in which 'standards' are connected to 'review' through questions of *what* standards may be the basis for review, and 'review' is connected with 'standards' through questions of *how* courts should fulfil their function of protecting these standards. The mandate of courts often provides answers to these questions, but never exhaustively.

In light of the inconclusiveness of courts' mandates, it is unsurprising that the way this standard review loop is and should be given shape is subject to debate. An originalist will take a different view on how this loop should be given shape[1583], than a proponent of the living instrument approach.[1584] Whereas the first would focus on textual and historical interpretations of pre-existing standards, the second would recommend that courts develop new standards if these were necessary to ensure protection in present-day circumstances. What these opposite perspectives mean for fundamental rights protection and procedural reasoning can be explained by reference to (procedural) positive obligations under fundamental rights (see Section 8.3.1C). From an originalist perspective, when the law does not set out procedural positive obligations under fundamental rights, courts may not base their review on such standards. By contrast, if one takes the view that courts ought to ensure effective protection of fundamental rights, one may find that courts ought to develop procedural positive obligations to prevent fundamental rights protection from being merely theoretical and illusory. To give full effect to these procedural standards, courts would then also be required to enter into procedural reasoning on the basis of these standards and, through this assessment, to clarify the content and scope of the procedural positive obligations further.

8.4.2 PRIMACY OF PROCEDURAL OR SUBSTANTIVE FUNDAMENTAL RIGHTS PROTECTION

At the heart of the debates on the role of procedural reasoning lies the debate on the primacy of either procedure or substance, or, in the specific context of fundamental rights adjudication, the primacy of either procedural or substantive fundamental rights

are factors to be taken into account in assessing the compliance with substantive rights. See for this distinction, Arnardóttir (2017), pp. 18–19 ('There is indeed a conceptual difference between the two elements of the procedural turn and the margin of appreciation when applied in relation to each. Under the procedural rights approach, the Court has interpreted procedural obligations into the Convention right in question … Such obligations have, thus, become part of the scope of the right in question, which means that review on the merits of the relevant right may also include review on the procedural merits. In contrast, under procedural review *stricto sensu*, consideration of the quality of national decision-making processes is a factor "external" to the merits of the right in question.').

[1583] Pure originalism may even reject the idea of the 'standard-review loop' as courts are merely performing the function of applying the law as is. Nevertheless, pure originalism is hardly defended these days. For more recent originalist approaches and the development of this theory, see Solum (2011), p. 5ff.

[1584] See more specifically Section 8.2.2A.

PROEF 3

protection. This debate relates not just to *why* procedural protection is to be valued but also to *how much* value should be accorded to it. As José Luis Martí Mármol notes, it is possible to distinguish between two radical conceptions on the primacy of procedure or substance:

> 'On the one hand …, we have "radical proceduralism", holding that the legitimacy of political decisions depends purely on the procedure by which they have been made, since we have no independent substantive standards of rightness to be applied. "Radical substantivism", on the other …, claims precisely the opposite. That is, as we have independent substantive standards of rightness (and we know them), a political decision is legitimate if and only if it meets such standards, the procedure of decision-making being irrelevant.'[1585]

Although Martí Mármol's comment relates to political theory, it also applies to fundamental rights adjudication. The previous sections have shown that views can be distinguished that regard the function of courts in protecting fundamental rights as a purely procedural enterprise (considering procedural fairness as the essence of fundamental rights[1586]), or, by contrast, solely a matter of providing substantive protection (as expressed by Lord Hoffmann in *Denbigh High School* and Lady Hale in *Miss Behavin' Ltd.*[1587]). Such diverging views on the primacy of procedural or substantive fundamental rights protection also influence views on how to value courts' efforts to review decision-making processes as part of their task as guardians of fundamental rights. Obviously, from the perspective of *procedural* fundamental rights protection, process-based review seems to be the core function of courts, from the perspective of *substantive* fundamental rights protection, substance-based review is required instead.

Indeed, even if no radical position is taken in this regard, scholars frequently prioritise procedural fundamental rights protection over substantive protection on principled grounds.[1588] This influences the evaluation of whether courts are properly fulfilling their function as guardians of fundamental rights when applying procedural reasoning.[1589] If one takes the view that procedural protection is the priority, for

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1585 Martí Mármol (2005), p. 263.

1586 See Section 8.3.1A-I.

1587 Ibid.

1588 On the issue of justification priority of procedural or substantive standards, see Malcai and Levine-Schnur (2017) and Malcai and Levine-Schnur (2014).

1589 In this regard John Rawls distinguished three categories of how procedures have been valued in democratic theories, see Rawls (1997), p. 83ff. Firstly, Rawls mentioned 'perfect procedural justice' theories, which are theories that regard procedures relevant as they justify the outcomes. 'The essential thing is that there is an independent standard for deciding which outcome is just and a procedure guaranteed to lead to it'. Secondly, Rawls distinguished 'imperfect procedural justice' theories, which regard procedures as means to increase the likeliness of just outcomes. 'The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it'. The third category concerns 'pure procedural justice' theories, which value procedures for their intrinsic merits to decide an outcome, thereby making that outcome fair. These theories do not consider that there is an independent manner to determine whether an outcome is fair, what is considered a 'fair outcome' is determined by the fact

PROEF 3

example, one may point out that there is an intrinsic value to the manner in which decisions are made. Brems has called this the 'autonomous process value'.[1590] From this point of view, by reviewing the decision-making process, courts may be said to be doing their job, or at least the most essential part of it. Although the connection between procedural reasoning and procedural protection seems obvious, it does seem to matter how procedural reasoning is applied. As Section 6.3 explained, process-based review may be applied in many different ways. If courts want to show that they value procedural reasoning, it seems that a very intense and exclusively process-based review would be the most appropriate approach.[1591] By closely scrutinising decision-making procedures, courts can show that they mean business, and by exclusively focusing on procedural considerations, courts can make clear that (minor) procedural shortcomings are enough to find a fundamental rights violation.

If one takes the view that fundamental rights are primarily about substantive protection, however, one will contend that a process-based approach by courts does not necessarily contribute to safeguarding these substantive aspects. For example, Dworkin's work is concerned with value-laden and substantive protection of fundamental rights offered by courts, in which procedural quality is only of secondary importance.[1592] From that perspective, procedural reasoning is only valued when it (indirectly) helps to respect, protect, or ensure fulfilment of these rights in substance. In this regard, arguments can made to the effect that procedural reasoning could encourage better decision-making procedures, which would produce good results (discussed in Sections 8.3.1B-II). This rationale, which Brems has called 'good process for good outcomes', means that procedures may indirectly help to advance substantive protection of fundamental rights.[1593] By contrast, as addressed in Section 8.3.2A, if process-based review does not lead to substantive protection in practice or would result in overturning decisions that in their outcome did protect fundamental rights, procedural reasoning becomes problematic.

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that it is the result of following a fair procedure. See also Miller (2017), para. 2.3 and Rawls (1995), p. 170. These theories may be translated to the fundamental rights context. The first two theories are instrumental theories, which means that substantive protection of fundamental rights has primacy over procedural protection, yet, they acknowledge that good procedures may lead to 'good' outcomes (perfect procedural theories) or at least 'better' outcomes (imperfect procedural theories). The notions 'good' and 'better' are meant to refer to fundamental rights conforming outcomes. The third category of theories, pure procedural justice theories, value procedural protection of fundamental rights for their own sake. From these kind of theories procedural protection is as important as, or even more important than, substantive protection of fundamental rights.

[1590] Brems (2017), p. 27ff.

[1591] The argument presented here is a clean argument following from the autonomous process rationale. A different approach is taken by Brems, who argued that the ECtHR may not draw strong negative or positive inferences on the basis of this rationale when it concerns substantive rights. This argument pays attention to the procedural mandate of the ECtHR. See Brems (2017), p. 29. By contrast, elsewhere I have argued that in certain cases or in certain justification tests, the ECtHR should be able to rely on exclusive process-based review, see Huijbers (2017a), pp. 198–200.

[1592] As discussed in Kyritsis (2017), p. 124.

[1593] Brems (2017), p. 19ff.

PROEF 3

Surely it is possible to value both procedural and substantive protection to an equal degree. Many fundamental rights lawyers do take that perspective, but most of them will readily admit that in an imperfect world, it will be necessary to prioritise one over the other in concrete cases. Indeed, both in theory and in practice such prioritising seems to be done for pragmatic reasons. First, an example of a pragmatic prioritisation of procedural protection can be found in the argument that procedural reasoning should be chosen in the context of administrative cases, because substance-based review of every appealed executive decision would result in an unworkable number of cases.[1594] Secondly, courts may focus on procedural protection because of the complexity of the case at stake or their institutional or politically sensitive position (see Section 8.3.1A-II). They may give effect to such prioritisation by deciding to determine cases solely on procedural grounds and by dismissing the substantive claims. Although, mostly, such prioritisation will be case-based, courts even may develop systematic procedural approaches to take account of these particular difficulties. The ECtHR' procedural turn may be considered to entail such a systematic prioritisation approach. Nina Le Bonniec has argued that by focusing more and more on procedural matters the ECtHR has prioritised procedural protection over substantive protection on a rather structural basis.[1595] In a similar vein, according to Ray Brian, the SACC has emphasised the need for 'participatory democracy and the ability of procedural remedies' in the context of socio-economic rights, and has been able 'to democratise the rights-enforcement process'.[1596] The SACC's structural focus on participation procedures may be regarded as a sign of prioritisation of procedural protection of socio-economic rights.

8.4.3 CONCRETE AND GENERIC IMPACT OF PROCEDURAL APPROACHES

The discussion of the primacy of procedure and substance relates closely to how one evaluates the impact of process-based review. Whether it is accepted that procedural reasoning can contribute to substantive protection of fundamental rights seems dependent on the focus on the *concrete* protection provided in a judgment, or rather on the *generic* protection a procedural approach may lead to. While the first perspective emphasises the *direct* protection a court has provided in a judgment to a concrete individual or group, the second perspective emphasises the *indirect* protection provided through the judgment (or a line of case-law) and extends to a generic group of individuals. The second perspective thus focuses on the influence a judgment may have on the overall protection of fundamental rights, in particular it places the emphasis

1594 Koopmans (2003), p. 129.

1595 Le Bonniec argued that '[l]e juge strasbourgeois est, à ce titre, le seul qui applique une procéduralisation que l'on pourrait qualifiée de "prioritaire", alors que dans les autres ordres juridiques, il s'agit au contraire d'une procéduralisation "subsidiaire" à laquelle le juge aura recours en dernier lieu si aucun droit procédural textuel ne s'applique au cas d'espèce', see Le Bonniec (2017), p. 188.

1596 Brian (2011), p. 109. See also Van der Berg (2013), p. 382 and Liebenberg (2012), p. 20.

PROEF 3

on whether a procedural approach may encourage, or has encouraged, other public authorities (or even private entities) to comply with fundamental rights.

Indeed, the various positions taken on whether process-based fundamental rights review strengthens or weakens substantive protection of fundamental rights may be explained in this way. On the one hand, it has been considered that process-based review constitutes an abdication of the judicial function (Section 8.3.2B) or that it is unsuccessful as a means of ensuring substantive protection of fundamental rights (Section 8.3.2A). These perspectives seem to focus primarily on the concrete impact of a procedurally reasoned judgment, because they emphasise the lack of substantive protection of the individuals whose rights are at stake in a given case. On the other hand, procedural reasoning has been considered a reasonable or appropriate delegation by courts of substantive protection of fundamental rights (Section 8.3.1B-II). These perspectives take a broader view on the impact of judgments on fundamental rights protection and focus on the indirect methods that courts may use to provide substantive protection of fundamental rights across the board. From such perceptions, fundamental rights protection is thus not (just) about the substantive protection courts provide in their judgment, but also about whether, and to what extent, their judgments are effectively contributing to substantive protection by other decision-making authorities. If procedural reasoning by courts would lead to an overall better substantive protection than substantive reasoning would, then the former is to be preferred. Quite obviously, such positive effects have also been challenged (see particularly Section 8.3.2A-II).

The difference in concrete and generic perspectives on fundamental rights impacts of judgments may help to provide insight into the debates concerning the procedural approaches of the ECtHR and the SACC. Regarding the ECtHR's procedural turn (explained in Section 1.1), it has been argued that the ECtHR is prioritising procedural protection of the rights of the European Convention on Human Rights (see Section 8.4.2). If one focuses solely on the concrete impact of ECtHR case-law in individual cases, then the ECtHR's procedural approach may be criticised for its lack of substantive protection of ECHR rights (see Section 8.3.2A). More fundamentally, the ECtHR may even be said to be abdicating its function as guardian of fundamental rights (see Section 8.3.2B). By contrast, if one looks into the generic and indirect impact of a line of judgments – or at least the intended impact of the ECtHR's procedural turn[1597] – the picture may be different. Indeed, as discussed in Section 8.3.1B-II, it has been argued that through process-based review, the ECtHR may encourage better decision-making procedures at the national level and thereby be indirectly contributing to enhanced substantive protection of fundamental rights.[1598] The impact of both the concrete and generic perspectives on one's evaluation of the procedural approach of the ECtHR is perfectly captured in the following statement from Christoffersen:

[1597] After all, empirical research would be needed to make strong claims about the actual impact of the ECtHR. See also Popelier (2017), p. 80.

[1598] E.g., Spano (2018), p. 481ff; Huijbers (2017a), pp. 180–181; and Saul (2017), p. 137.

PROEF 3

> 'Moreover, and this is perhaps the most important lesson to be learned from proceduralization [of substantive rights], procedural rights may weaken as well as strengthen substantive rights. The reason is that procedures can strengthen the ECHR at the national level and at the same time prompt the Court to relax its review and hence weaken the [substantive protection of the] ECHR at the international level.'[1599]

The SACC has also been said to have turned to procedural protection in cases relating to socio-economic rights (see Section 8.4.2). This has been criticised on the basis that the SACC has restricted the transformative potential of these rights and that its procedural approach has worked as 'a mechanism to obfuscate and even replace the need to give content to socio-economic rights'.[1600] Sandra Liebenberg, for instance, has taken the view that 'a substantively-reasoned interpretation of the obligations imposed by socio-economic rights' is 'important for ensuring the protection of the rights of marginalised communities'.[1601] From such a perspective, the focus seems to be primarily on the direct and concrete impact of the SACC's judgments. However, if the focus is shifted to the broader impact of the SACC's decisions a different picture may arise. Brian expresses the two divergent approaches as follows:

> 'Taken together, these cases are the culmination of a strong trend towards the proceduralisation of socio-economic rights that many commentators have argued fails to fulfil their original promise. This triumph of proceduralisation undeniably restricts the direct transformative potential of these rights. But there is another aspect to this trend – an aspect reflected in the Court's emphasis on participatory democracy and the ability of procedural remedies to democratise the rights-enforcement process…
>
> [It can be argued] that, properly developed engagement can give poor people and their advocates an important and powerful enforcement tool… [E]ngagement can help strengthen and promote consistent attention to the constitutional values these rights protect.'[1602]

In short, from a generic perspective on the impact of the ECtHR's and SACC's procedural approaches, these courts have not necessarily forsaken substantive fundamental rights protection by increasingly focusing on procedural reasoning. Instead, these courts may be said to be pursuing substantive protection in a broader, if less direct, manner.

Such a generic approach appears to fit well with views that fundamental rights are not just about legal rights but rather, they are most fundamentally about real-life interests.[1603] Therefore true fundamental rights protection can only be achieved through the political, social and economic embedding of rights at the local, national,

[1599] Christoffersen (2009), p. 455.

[1600] As explained by Van der Berg (2013), p. 382.

[1601] Liebenberg (2012), p. 20.

[1602] Brian (2011), p. 109.

[1603] E.g., Hopgood (2013), p. 173 ('Everyday discrimination and violence, that which constitutes 99 percent of the oppression people suffer, and where the need is greatest, comes a distant second. No one is building a universal court for that'.).

PROEF 3

and international levels.[1604] Indeed, 'courts are only the starting point … [f]or engagement to truly success, government must develop comprehensive engagement policies and institutionalise those policies at all levels'.[1605] From a truly generic perspective on the impact of procedural reasoning on fundamental rights protection, the focus thus extends to fundamental rights protection beyond the legal context. The effectiveness of a procedural approach to ensure protection of these real-life interests is an important area for debate.

8.4.4 CONTEXT-DEPENDENT EFFECTIVENESS OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

The effectiveness of procedural reasoning in incentivising better decision-making procedures is not undisputed. Compliance with court judgments also depends on views about the legitimacy of courts' functioning.[1606] The issues of courts' procedural mandate and reliance on pre-existing procedural standards may therefore influence the effectiveness of process-based fundamental rights. Also, the position of courts as regards the public authority whose decision is under review may be relevant. It has, for example, been argued that the focus by the ECtHR on the national courts' decision-making procedure would be more successful than that it would be if it focused on national parliamentary decision-making.[1607] Section 8.3.2A-II, on the reduced protection of fundamental rights, also addressed several arguments questioning the effectiveness of a procedural approach for fundamental rights protection. Process-based review was said to lead to window-dressing, and to delays or even denials of justice.

This can be explained by reference to discussions about the ECtHR. While Laurence Helfer has suggested that the ECtHR may bolster protection of fundamental rights by other authorities[1608], Catherine van de Heyning has considered that if constitutional courts blindly follow the minimum standards developed by the ECtHR, this may eventually 'freeze or slow down a more swift improvement in human rights protection' or '[i]n exceptional cases it might even result in downgrading better constitutional protection'.[1609] These issues do not solely relate to the positive effects of the substantive protection of fundamental rights, but also to the effectiveness of procedural reasoning

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1604 Duffy (2018), pp. 39–45 and 242–250.

1605 Brian (2011), pp. 109–110 and 116–120.

1606 For some views on legitimacy of (judicial) authorities and compliance, Webert (1978), pp. 3–5; Fallon (2005); and for a discussion in relation to fundamental rights adjudication, see Føllesdal (2013), p. 342.

1607 Huijbers (2017a), p. 199; Popelier (2017), pp. 91–93; and Gerards (2013b), p. 56.

1608 Helfer (2008), p. 130 ('bolster the remedies that domestic judges and legislatures provide to individuals whose rights have been violated'). See more explicitly on procedural reasoning and embeddedness, Spano (2018), p. 481ff.

1609 Van de Heyning (2013), p. 35. In a similar vein, it has been explained that in the absence of ECtHR case-law Finnish courts have not provided fundamental rights protection. If the ECtHR therefore no longer focuses on developing substantive standards such may affect the protection of rights in Finland. See Lavapuro, Ojanen, and Scheinin (2011), p. 523.

PROEF 3

to encourage better decision-making processes, that is, procedural protection of fundamental rights. Popelier, for example, has written about the incentivising effects procedural reasoning by the ECtHR may have on national authorities. Although she acknowledges that national authorities, especially national courts, may be persuaded to change their decision-making process in accordance with the ECtHR's case-law[1610], this is not an absolute certainty:

> 'given our finding that the adoption of or resistance against [an evidence-based legislative] policy model also depends on legal, administrative and political culture, as well as institutional design and constitutional values, we can expect that the Court's impact in this regard is relatively low. By contrast, legal systems that already have an evidence-based legislative policy programme in place benefit from procedural rationality review by the Strasbourg Court. … If the Court nevertheless finds fault with the way a particular decision was established, national authorities will not easily accept critique of an otherwise well-functioning legislative policy. This is especially so if the Court's grievances touch the very heart of constitutional values, such as the sovereignty of Parliament, as the UK reactions after the *Hirst* decision illustrate.'[1611]

Accordingly, the effectiveness of the ECtHR's approach for ensuring fundamental rights protection is strongly influenced by contextual factors external to the ECHR system. In particular, process-based review may not be as politically or institutionally neutral as is sometimes assumed (as is further addressed in Section 9.2.1), which may significantly decrease the positive influence of this review for the protection of fundamental rights across the board. Indeed, Nussberger argued that procedural reasoning may be ineffective as it may create a political backlash instead of goodwill with the decision-making authorities to comply with procedural standards.[1612] Popelier has underpinned this critique by referring to the UK's adverse reaction to the *Hirst (No. 2)* judgment (discussed in Section 8.2.2C).[1613] Furthermore, Section 8.3.2A-I noted that the UKSC regards fundamental rights to be about substance and outcomes, which stands in the way of (exclusive[1614]) procedural reasoning by UK courts in fundamental rights cases.[1615] These contextual settings may explain not only why the UK courts appear unwilling to contribute to incentivising better national parliaments' decision-making processes[1616], but also why the ECtHR approach in this case was controversial and, seemingly, less effective. Indeed, Saul has noted that whether or not parliaments, and

1610 See Popelier (2017), pp. 91–92.
1611 Ibid, p. 90.
1612 Nussberger (2017), pp. 162–163.
1613 Popelier (2017), p. 90. The judgment is discussed in Section 2.2.8 and see ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*).
1614 Masterman (2017), pp. 265–270. Also others have noted that the UK courts increasingly seem to take account of the quality of the legislative process, see e.g., Sathanapally (2017), pp. 64–72 and Kavanagh (2014), pp. 463–472.
1615 Kavanagh (2014), pp. 447–453.
1616 Masterman (2017), pp. 264–265.

PROEF 3

possibly other public authorities, are susceptible to procedural encouragement depends on the contextual setting of these authorities, as well as those of the competent court.[1617] Thus process-based review may not (always) be the most effective means for ensuring substantive protection of fundamental rights, and, consequently, courts employing such review may fail to fulfil their function as guardians of fundamental rights.

8.5 CONCLUSION

Process-based review and the function of courts are closely linked to their mandates and their standard-setting tasks, as well as to their specific role as guardians of fundamental rights. One of their tasks is to interpret and apply legal norms and standards, which almost inevitably leads to a further development of such standards. The questions of whether courts ought to be able to develop procedural standards through procedural reasoning, with what level of detail, and what the consequences of these new standards may be, have all been subject to debate. In addition, it has been debated whether fundamental rights protection by courts is primarily about procedural or rather substantive protection. From the first perspective, procedural reasoning is a rather evident approach. Yet, from the perspective of substantive protection too, procedural reasoning has been advanced as a means to ensure minimum protection of fundamental rights in challenging cases and contexts, and it has even been said to enhance substantive fundamental rights protection across the board. At the same time, it has been argued that a procedural approach would lead to reduced protection of fundamental rights and that by taking such an approach courts would abdicate their function as guardians of fundamental rights. This chapter has shown that the evaluation of courts' functioning as guardians of fundamental rights largely depends on views relating to the primacy of procedure or substance. Furthermore the desirability of a procedural approach seems to depend on whether one focuses on the concrete or generic fundamental rights protection offered through procedural reasoning. Similarly, the effectiveness of process-based fundamental rights review depends on various contextual factors surrounding judicial adjudication. In light of the scholarly debates on process-based review, it can be concluded that no one-size-fits-all answer can be given to the question of whether process-based review should be favoured over substantive reasoning in the light of the courts' function as guardians of fundamental rights.

[1617] Saul (2017), p. 147 ('Practical concerns stem from the level of variation in the nature of the legislative and accountability roles of parliaments. There can be variation from state to state and within states from issue to issue. Given that just one IHRJ institution can have jurisdiction over more than 100 states, it is possible that attempts to promote the human rights role of parliaments might encourage practices that do not suit the domestic context. This indicates the importance of the IHRJ institutions avoiding a 'one size fits all' approach in promotional efforts. Instead, they should work to accommodate the contextual demands of a particular state.').

PROEF 3

CHAPTER 9

DEBATES CONCERNING PROCESS-BASED REVIEW AND NEUTRALITY, HARD CASES, JUDICIAL EXPERTISE, AND EPISTEMIC UNCERTAINTIES

9.1 INTRODUCTION

Courts face various challenges in fundamental rights adjudication. These may result from the issue at stake, for example, where cases concern morally sensitive matters, such as abortion, euthanasia, and assisted suicide, or where they relate to the allocation of limited resources, such as cases on a subsistence minimum and (social) housing policies. Challenges may also stem from uncertainties surrounding the facts of a case or the possible consequences of a judgment. For instance, epistemic uncertainties as to the facts, causes, and results may arise in fundamental rights cases relating to climate change, noise pollution, and health risks due to problematic working conditions. This chapter addresses the issue of how courts as guardians of fundamental rights address these challenges, and what role process-based review plays in this regard. In the words of Paul Yowell: '[d]o courts and judges have the institutional capacity needed to settle the kinds of morally and politically controversial issues that arise in constitutional rights cases?'[1618]

This chapter addresses Yowell's question from the perspective of what role there is for process-based review in addressing normative and epistemic difficulties. First, Section 9.2 addresses the issue of courts dealing with normative controversies in fundamental rights adjudication. It discusses whether process-based review may be a way for courts to decide on fundamental rights cases in a (relatively) neutral manner (Section 9.2.1) and avoid having to take a definitive normative decision in morally sensitive cases (Section 9.2.2). Secondly, Section 9.3 deals with the issue of judicial expertise in fundamental rights adjudication. On the one hand, courts may be said to be experts on process and therefore process-based review matches their capacities (Section 9.3.1). On the other hand, courts are generally held to lack expertise in using empirical reasoning in order to deal with epistemic uncertainties (Section 9.3.2). From this perspective, process-based review has been advanced as a means for courts to avoid empirical reasoning, and it has

1618 Yowell (2018), p.1.

PROEF 3

been argued that procedural reasoning may even strengthen the trend of evidence-based decision-making by legislative and administrative authorities. In the following sections arguments against the use of procedural reasoning are also discussed. Section 9.4 connects the various debates on normative and epistemic challenges and process-based review, and reflects on the discussed arguments and positions taken by lawyers, legal theorists, and philosophers. A brief conclusion to the chapter is provided in Section 9.5.

9.2 PROCESS-BASED REVIEW AND NORMATIVE DIFFICULTIES IN ADJUDICATION

Courts face many difficult normative choices in reviewing fundamental rights infringements. One such issue follows from perceptions and theories on the role of courts in democratic society. It concerns the fundamental question of whether unelected judges may assess legislation and policies developed by democratically elected bodies. Although this question has considerable overlap with the issues addressed in Chapter 7, the discussion in the current section focuses on the idea that process-based review can be considered a (relatively) neutral approach of adjudication. It has been argued, most prominently by John Hart Ely, that since procedural reasoning is value-free, this approach would legitimise courts' intervention with decisions of democratic authorities. Another issue regarding the difficult choices courts face in fundamental rights adjudication concerns the question how courts should deal with difficult and controversial normative issues that may arise in cases they adjudicate. In these so-called 'hard cases', such as cases on issues of abortion and euthanasia, there are very different and contradictory views within societies on what would be the desirable outcome and the law does not always provide a clear and settled answer to the matter. If one takes the view that courts should not decide these issues, then the question becomes how courts can avoid taking decisions on these sensitive matters. In this light, process-based review has been proposed by scholars as an avoidance strategy, allowing courts to circumvent taking a normative decision on the morally sensitive issue at stake.

In relation to both aspects of normative difficulties in adjudication then, process-based fundamental rights review has been proposed as a solution. Others have rejected this view however, and have occasionally voiced strong objections to the use of procedural reasoning. The sections below address the debates in relation to both issues: neutrality of process-based review (Section 9.2.1) and process-based as an avoidance strategy (Section 9.2.2).

9.2.1 NORMATIVITY OR NEUTRALITY OF PROCEDURES AND PROCEDURAL REASONING

Process-based review as described in Chapter 5 concerns the judicial assessment of decision-making processes. This definition presupposes a distinction between process-

PROEF 3

based and substance-based review as regards the objects of both types of review; one focuses on process, the other on substance. In that chapter, however, the procedure–substance distinction was nuanced by clarifying that, as with most classifications, there is a twilight zone or a grey area between clearly procedural issues and clearly substantive ones. It was also explained that, consequently, the context within which the distinction is made determines how the line is drawn between procedure and substance, and, as such, the distinction between procedure and substance is ultimately a constructed one. Nevertheless, it remains common to distinguish process-based and substance-based review and, in fact, the distinction is an important feature of arguments in favour of process-based review. Indeed, process theorists commonly presuppose the existence of a procedure–substance dichotomy when they argue in favour of procedural reasoning, especially where they argue that procedural reasoning is a neutral approach, or at least one that is more neutral than substantive reasoning.

There is an ongoing discussion on the exact content and meaning of 'neutrality', as well as on the reasons whether and why neutrality matters. The need for neutrality in judicial review is understood in this section as meaning that judicial assessments should 'be value-free, or non-normative, or morally neutral'.[1619] This means that judges are not imposing their personal, normative views on the parties to the case or on society in general.[1620] For the purposes of this chapter, it suffices to explain that reasonable claims can be made about the importance of neutrality in fundamental rights adjudication. John Hart Ely and most deliberative democratic theorists, for example, regard neutrality of judicial review as important because substantive decisions and deliberations should be limited to the political process, in which everyone can participate and voice their opinions.[1621] In other words, in their view, adjudicative neutrality is participation-oriented.[1622] Others hold that neutrality in fundamental rights adjudication could ensure effectiveness of adjudication since societal perceptions of impartial judicial decisions may increase the acceptance of judgments and even positively influence fundamental rights protection.[1623] Neutrality in fundamental rights adjudication has furthermore been valued as an end in itself: 'if human rights are considered to be universal and affirm the worthiness of all human beings, any subjective or biased interpretation by [courts] would be at odds with this idea'.[1624]

The remainder of this section does not address why neutrality should be valued. Instead, it focuses on views that consider procedural reasoning a neutral or value-free

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[1619] Celano (2013), p. 176.

[1620] See for a discussion on neutrality, Ackerman (1980), pp. 10–12 ('*Neutrality*. No reason is a good reason if it requires the power holder to assert: a) that his conception of the good is better than that asserted by any of his fellow citizens, or b) that regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens', p. 11). See also the view of the former Chief Justice of the CSC, McLachlin (2001), quoted in Section 9.2.2B.

[1621] For a broader discussion of deliberative democratic theories, see Section 7.3.

[1622] See Section 9.2.1A.

[1623] Kahan (2011), p. 6.

[1624] Huijbers (2017b), p. 6. See also Weil (1983), p. 420 and on the importance of impartiality and neutrality of courts, Raz (2010), p. 43; Shany (2014), p. 98; and MacCormick (2003), p. 17.

PROEF 3

approach as well as those that reject such an understanding. This section addresses the following topics.[1625] First, it provides a brief account of Ely's theory and of his views on the neutrality of process-based review (Section A). This is followed by a discussion of several critiques and nuances of Ely's theory. Laurence Tribe's rejection of procedures as value-free is discussed (Section B), as are Jürgen Habermas' and Christopher Zurn's understanding of procedural reasoning as a neutral enforcement of (legislative) entrenched substantive values (Section C). This section then turns to positions taken on the possible limitations of procedural reasoning for the substantive choices decision-making of authorities can make (Section D), on the degree to which procedural reasoning may be said to be more neutral than substantive reasoning (Section E), and on the lack of transparency of the application of process-based review (Section F). This section is concluded by a short summary of the main findings (Section G).

A. *John Hart Ely's process-oriented system of review and neutrality*

John Hart Ely has argued in favour of procedural reasoning by the USSC, or what he calls a 'participation-oriented, representation-reinforcing approach to judicial review'[1626] or 'process-oriented system of review'.[1627] At the core of Ely's theory lies the idea that substantive and procedural values can be distinguished and that procedural principles are the main values underlying the US Constitution. For him, the US Constitution is overwhelmingly concerned with procedural fairness and 'process writ large – with ensuring broad participation in the process and distributions'.[1628] Because the USSC is supposed to oversee compliance with the US Constitution, the USSC is evidently and predominantly empowered to employ procedural reasoning. This implies that the USSC is to ensure that the political channels are open for all in order to allow the democratic legal community to organise itself. In the words of Ely, 'unblocking stoppages in the democratic process is what judicial review ought pre-eminently to be about'.[1629] For Ely, and in accordance with USSC's Justice Stone's footnote four in *Carole Products*[1630], which served as an important inspiration for Ely's theory, this means that the USSC should ensure in particular that insular minorities have been part of the opinion- and will-formation processes.[1631]

Ely thus regards process-based review as a means for the USSC to exercise judicial self-restraint, meaning that the USSC merely interprets the US Constitution, without

1625 This section is losely based on Huijbers (2017b).
1626 Ely (1980), p. 87.
1627 Ibid, p. 136.
1628 Ibid, pp. 87 and 92.
1629 Ely (1980), p. 117.
1630 See the discussion in Chapter 2.
1631 Ely (1980), pp. 75–77; and more generally on the role of courts in facilitating the representation of minorities, see Chapter 6. A recent and reversed position takes the view that process-based review should be used not to protect the politically powerless, instead it should be used to disadvantage politically powerful groups, see Tang (2017). In that sense courts should defer 'to a democratically-enacted outcome that disfavors the politically powerful', see Seligman (2017), p. 311.

PROEF 3

constructing substantive values.[1632] In this sense, Ely's theory may be interpreted as contending that process-based review is a form of 'value-free adjudication'[1633], that is, by enforcing participational goals, the USSC is not imposing substantive values.[1634] Indeed, Ely finds that the USSC judgments concerning the right to vote, including the 'one person, one vote' standard and the need of convincing reasons for disenfranchisement[1635]:

> 'were certainly interventionist decisions, but the interventionism was 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'.[1636]

Since process-based review concerns the enforcement of already adopted standards, it is considered to be normatively neutral, or value-free. Ely thus relies on a distinction between substantive reasoning, which entails 'value imposition [that] refers to the designation of certain goods (rights or whatever) as so important that they must be insulated from whatever inhibition the political process might impose', and procedural reasoning, which 'denotes a form of review that concerns itself with how decisions effecting value choices and distributing the resultant costs and benefits are made'.[1637]

The judgments of the CCC in the '*General Foresting Law case*' and '*Consultation of Ethnic Communities case*' share some similarities with Ely's theory.[1638] The first case concerned the right to participation of indigenous and Afro-Colombian communities in the legislative process of the Foresting Law. The CCC acknowledged that the Foresting Law had been debated in Congress and that, in addition to the already deliberative process, interested sectors had broadly participated in the process as well.[1639] Nevertheless, the CCC held that the right to consultation of indigenous peoples had specific characteristics, which could not be substituted by a general participatory

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1632 Ely's procedural understanding of the US Constitution and his sceptical attitude towards judicial activism led him to favour a procedural approach by the USSC, see the discussion by Habermas (1998), p. 264–265 ('Ely uses this proceduralist understanding of the Constitution to justify "judicial self-restraint". In his view the Supreme Court can retain its impartiality only if it resists the temptation to fill out its interpretive latitude with moral value judgments. Ely's scepticism is directed as much against value jurisprudence as against an interpretation oriented by principles, in the sense of Dworkin's constructive interpretation.'). For an explanation between interpretation and construction, see Solum (2010).

1633 For this notion see Tushnet (1980), p. 1980.

1634 See e.g., Seligman (2017), pp. 301–313; Solum (2010), p. 104; and Baker (1980), p. 103.

1635 Ely (1980), pp. 120–125.

1636 Ibid, p. 74.

1637 Ibid, p. 75, footnote.

1638 CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*') and CCC 23 January 2008, C-030 ('*General Foresting Law*'). See Section 2.2.6.

1639 CCC 23 January 2008, C-030 ('*General Foresting Law*'), para. 238b.

PROEF 3

process.[1640] On the basis that no such special consultation had taken place, the CCC declared the law unconstitutional. The second judgment concerned the constitutional amendment of the right to access to the political process of ethnic minorities.[1641] The CCC considered that this right pertained to a procedural guarantee to the protection of minorities' right to subsistence and the right to cultural integrity.[1642] After assessing the legislative process, it concluded that the Colombian legislature had failed to comply with its obligation to consult the ethnic communities and that this procedural defect had the substantive consequence of making the amendments unconstitutional.[1643] In both judgments the CCC seemed to protect the indigenous and ethnic minorities' political participation rights without taking a normative stance on the matter. In the '*General Foresting Law case*' in particular, the CCC showed itself willing to provide more extensive protection of the participation process for – in Ely's terms – insular minorities. It may be said that it merely policed the borders of the democratic process in line with Ely's theory.

B. *Normativity of procedures and process-based review*

The neutrality of process-based review is based on the assumption that there are settled or 'relatively uncontested'[1644] procedural standards on which courts may rely in their review. Indeed, Ely takes the view that the USSC is merely enforcing constitutionally entrenched procedural standards, and therefore it is a neutral method of review. Amy Gutmann and Dennis Thompson have, however, rejected this idea. They argue that procedural values, just like substantive values, are consistently open to revision in an ongoing social, political, and moral process of deliberation.[1645] Process-based review therefore cannot be said to help enforce predetermined procedural standards in a value-free manner. Ittai Bar-Siman-Tov, too, has argued that process theories face the fundamental problem that there are different and potentially contradictory views on the nature of the standards that should guide the legislative process.[1646] Without *a priori* established procedural principles courts are enforcing more than agreed upon procedural standards, and, consequently, process-based review seems to lose much of the neutrality Ely attributes to it.

This touches upon a more fundamental critique of Ely's work. Laurence Tribe has consistently argued against Ely's understanding of the neutrality of procedural reasoning. Process theories, he contends, are 'radically indeterminate and fundamentally incomplete' as '[t]he process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of

[1640] Ibid, paras. 238e and 239.
[1641] CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*').
[1642] Ibid, paras. 7.3.1–7.3.3 and 7.5.2.
[1643] Ibid, para. 7.7.4.
[1644] Bar-Siman-Tov (2011), p. 1961.
[1645] Gutmann and Thompson (2009), pp. 96–97.
[1646] Bar-Siman-Tov (2015), p. 249.

PROEF 3

substantive rights and values – the very sort of theory the process-perfecters are at such pains to avoid'.[1647] Tribe has taken issue not just with Ely's procedural understanding of the US Constitution[1648], but also, and more fundamentally, with the idea that procedures can be considered to be value-free. Indeed, if procedures were neutral, they would be valued 'not only as a means to some independent end, but for [their] intrinsic characteristics'.[1649] However, according to Tribe, Ely values certain procedures to a certain end, that is, to the end of democracy or, more specifically, political participation.[1650] Consequently, procedural reasoning still reflects views regarding the decision-making procedures that should be followed as well as regarding the design of such procedures, and these views are based on controversial and subjective substantive choices.[1651] In other words, '[j]udges can't avoid philosophic responsibilities through noncontroversial inferences from the Constitution's democratic structure, for they have to decide whether to conceive that structure as constitutionalist or majoritarian and, if constitutionalist, whether positive or negative'.[1652]

Tribe's conclusion that a normative set of values underlies process-based review warrants further exploration. On the one hand, his conclusion is based on the open-ended or indeterminate phrasing of procedural principles such as due process, fairness, carefulness, and adequacy.[1653] Deciding what these principles mean 'requires analysis not only of the efficacy of alternative processes but also of the character and importance of the interest at stake'.[1654] 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'.[1655] Furthermore, in relation to Ely's work, Tribe considers procedures to be about inclusion and exclusion of groups, which he explains in light of the right to vote – a procedural right.[1656] According to him,

[1647] Tribe (1985), p. 10.
[1648] Ibid, pp. 10–11.
[1649] Ibid, p. 13.
[1650] Indeed, Ely himself acknowledged that participation can be regarded as a value, although he argued that this does not make procedural reasoning value-laden as it leaves the value choices to the decision-making authorities, see Ely (1980), p. 75, footnote.
[1651] Tribe (1980), pp. 1067 and 1069.
[1652] Barber and Fleming (2007), p. 132.
[1653] Tribe (1985), pp. 12–13. See also Koskenniemi (2011), p. 164.
[1654] Tribe (1985), p. 12.
[1655] Huijbers (2017b), p. 19. The examples of procedural reasoning also illustrate Tribe's concerns that courts use procedural reasoning to flesh out the meaning of open-ended notions and do so on the basis of rather more substantive values. Examples can be found in the meaning given to the notion of a 'fair trial' by the ECtHR and the European Arrest Warrant judgments of the SCC and the GFCC, see ECtHR (GC) 1 March 2006, app. No. 56581/00 (*Sejdovic v. Italy*), para. 82; SCC (Pleno) 13 February 2014, STC 26/2014 (*'Melloni case'*); and GFCC 15 December 2015, 2 BvR 2735/14 (*Mr Rv. Order of the Oberlandesgericht Düsseldorf*) discussed in Sections 4.2.2 and 4.2.3. Also the CESCR clarified the notion of 'effective remedy' in *I.D.G. v. Spain*, see CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*), discussed in Section 4.2.5. In doing so, these courts relied on substantive ideas on human dignity and justice, in the words of Tribe, 'being heard is part of what it means to be a person', and on views on privacy and justice, in the sense that one's home is a central aspect of the right to private and family life, therefore individuals should be able to stop the foreclosure of one's home, see Tribe (1985), p. 13.
[1656] Tribe (1985), pp. 13–17.

PROEF 3

an assessment of compliance with this right inherently requires an underlying notion of *who* may legitimately be excluded from suffrage. Can (ex-)prisoners be excluded?[1657] How about teenagers? Or mentally disabled persons? To answer these questions and thus to determine what procedure is appropriate, Tribe argues that courts necessarily have to rely on notions of inclusion or exclusion of certain groups, which are inherently substantive and value-laden rather than purely procedural or neutral.[1658]

The central problem Tribe highlights in Ely's theory is that it cannot support the claim that process-based review is value-free. As summarised by Laura Henderson:

> 'This brings us to the original dilemma of constitutional review that Ely tried to solve: How to justify that, in a democracy, an unelected judiciary can use its interpretation of the constitution to overrule democratically adopted legislation. Ely argued that process-based review is the only way to legitimate this role for the judge, because with it, the judge avoids substantive decisions and instead focuses only on the democratic procedure – something that courts are particularly qualified to do. Yet, if substantive, political decisions are inherent even in process-based review, Ely's argument seems to miss its mark. It is no longer clear that process-based review can be promoted only because of its supposed value-free adjudication.'[1659]

Tribe's position as regards the inclusion and exclusion of groups or situations also relates to the procedural judgments discussed in Part I of this book. For instance, the judgments of the CCC on the right to political participation of indigenous and ethnic minorities, discussed above, clearly raise the question of inclusion.[1660] Which groups are to be counted as 'minorities' that have a special right to political participation?[1661] And who is to decide who is a member of such group? There has been a similar debate in Europe on whether prisoners may be excluded from the right to vote. In *Hirst (No. 2)* the ECtHR held the blanket ban in the UK on prisoner voting rights to be incompatible with the European Convention on Human Rights.[1662] The ECtHR decided the case on the basis of an absence of serious deliberation within the UK parliament on the law and the fact that judges did not review the proportionality of the disenfranchisement in individual cases.[1663] Indeed, in *Frodl*, the ECtHR clarified that no blanket ban may be imposed, but that there should be an individual judicial assessment for disenfranchising a prisoner from his right to vote.[1664] These judgments were met with criticism by the

1657 This debate is still ongoing in the US with considerable differences between States, see e.g., 'Voting Rights for Ex-Offenders by State' (updated 20 November 2018) *Nonprofitvote* <https://www.nonprofitvote.org/voting-in-your-state/special-circumstances/voting-as-an-ex-offender/>. Recently the Florida restored the voting rights for former felons, see Mazzei (2019).

1658 Tribe (1985), pp. 13–17.

1659 Henderson (forthcoming), para. C.I.2.

1660 CCC 6 September 2010, C-702 ('*Consultation of Ethnic Communities case*') and CCC 23 January 2008, C-030 ('*General Foresting Law*'). See Section 2.2.6.

1661 Tribe (1985), p. 15.

1662 ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*). See Section 2.2.8.

1663 Ibid, paras. 79–80.

1664 ECtHR 8 April 2010, app. no. 20201/04 (*Frodl v. Austria*), paras. 34–35. See for a discussion Gerards (2013b), pp. 56–59.

PROEF 3

UK government, on the one hand because it felt that prisoners were rightfully excluded from the right to vote, and on the other, because it found the need for individual judicial assessment to be at odds with national values and legal traditions of parliamentary supremacy, which favour democratic decision-making, legal certainty, and transparency over individual balancing.[1665] The UK believes that the ECtHR should not be permitted to impose its own views on who should have the right to vote, nor on the procedures to be followed to determine who should be excluded.[1666] The ECtHR judgment in *Winterstein* raises similar issues.[1667] In that case it focused on the local administrative and national judicial processes, an approach that seemed to be inspired by the idea that Roma need special protection. Indeed, the ECtHR explicitly held that Roma are a vulnerable group and therefore special attention should be given to their specific needs and interests.[1668] This applied also, perhaps especially, to eviction procedures. The ECtHR considered that local authorities should have paid special attention to the risk that these Roma families would become homeless after the eviction and that they should have provided alternative housing for those families in need of it.[1669] Thus, there seemed to be a heightened procedural protection required for this group, because it was regarded by the ECtHR as a vulnerable group. In line with Tribe's account, however, the ECtHR's procedural approach was not just based on procedural principles, but was inspired by substantive values on which group should be given special protection.[1670]

C. *Neutral enforcement of (legislative) entrenched substantive values*

Ely's work has been criticised not only by opponents of process-based review, but also by other procedural theorists. Jürgen Habermas, for example, has criticised Ely for being inconsistent 'insofar as he must presuppose the validity of principles for his own theory; those procedural and organizational principles that should guide the Court definitely have a normative content', and '[t]he concept of democratic procedure itself relies on a principle of justice entailing equal respect for all'.[1671] Nevertheless, Habermas rejects Tribe's view that

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[1665] The fierce criticism of the UK on these judgments, seems to have contributed to the UK government's stance in the reform debates of the ECtHR. See for a discussion of the criticism, Von Staden (2018), pp. 135–141 and Bates (2014), p. 515. More broadly on the political backlash the ECtHR has received in light of its case-law on prisoner voting rights, see De Londras and Dzehtsiarou (2018), pp. 29–33.

[1666] The ECtHR seems to have come back to this stance in later case-law (e.g., ECtHR (GC) 22 May 2012, app. no. 126/05 (*Scoppola v. Italy (No. 3)*) and see the discussion in De Londras and Dzehtsiarou (2018), p. 31 and Gerards (2013), p. 62.

[1667] For a thorough and critical discussion on the case-law of the ECtHR on Roma and traveller cases, see David (2018), pp. 97–100.

[1668] ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*), para. 148. See Section 3.2.6 and 4.2.7.

[1669] Ibid, para. 159–160.

[1670] David (2018), pp. 107–108 and Peroni and Timmer (2013), pp. 1072–1073.

[1671] Habermas (1998), pp. 265–266. Also Tushnet noted this contradiction in Ely's work, see Tushnet (1980), p. 1047 ('Ely thinks that the society agrees that participation is the primary value; he criticizes natural law on the basis that society does not agree about anything to a degree substantial enough to enable one to rely upon social agreement as the basis for a theory. The empirical claim implicit in Ely's critique contradicts the one implicit in his theory…').

PROEF 3

'democratic organization and procedure are, because of their merely formal nature, in need of supplementation by a substantive theory of rights'.[1672] In this sense, Habermas' theory can be regarded as a nuanced version of Ely's position. Unlike Ely's, Habermas' procedural understanding of democracy presupposes the constitutional entrenchment of individual liberties.[1673] On Habermas' understanding, deliberative democracy requires individuals to freely and reasonably deliberate and to give their consent for the adoption of legislation. As explained by Christopher Zurn, this is only possible if '(1) maximal equal subjective liberty rights, (2) equal membership rights, and (3) equal rights to the legal protection and action ability of those rights' are secured.[1674] The substantive values surrounding procedures are thus presupposed, and, consequently, courts are not tasked with developing these norms themselves, but are 'seeking an impartial application of already justified higher level constitutional norms to those legal norms justified through ordinary legislative procedures'.[1675] Courts' main concern is to ensure that procedural 'rationality-enhancing and autonomy-ensuring conditions' are met.[1676] Hence, Habermas' theory should be understood as rejecting the idea that the simple application of substantive standards makes the constitutional review inherently normative, as argued by Tribe. In Zurn's words:

> 'A procedural understanding of the system of rights will not in fact lead to judicial paternalism, as judges reviewing the constitutionality of statutes need not have recourse to any substantive political or moral ideals justifiable apart from those already contained in constitutional provisions and legislatively enacted statutes. Although the rights specified in the constitution are to be understood as having substantive, deontic content, they are designed to be exactly (and no more than) those rights procedurally required for realizing the principle of popular sovereignty in a legal form, and so, exactly those rights individuals would have to grant each other if they intend to regulate their interactions as free and equal consociates under law. Because the system of rights is procedurally justified in the first place, whatever governmental organ is charged with interpreting that system does not need to rely on metaphysically secured theories of natural rights or objective value hierarchies. The basic idea is that the process of *constitutional review does not itself require the justification of the normative content of the system of rights, but only requires the rational application of normative content already embodied in constitutional provisions*; provisions that are already justified in terms of the legal and normative requirements of an association of free and equal citizens engaged in the process of ruling themselves.'[1677]

Process-based review can thus be used to protect substantive rights without becoming value-laden itself; it merely helps courts to enforce what has already been set out to be

[1672] Habermas (1998), p. 266.
[1673] Thereby Habermas overcomes the difficulties identified of process theories 'that immediately confronts process theories is the stubbornly substantive character of so many of the Constitution's most crucial commitments', see Tribe (1980), p. 1065.
[1674] Zurn (2007), p. 235.
[1675] Ibid, pp. 237–238.
[1676] Ibid.
[1677] Ibid, p. 244 [emphasis added].

PROEF 3

protected.[1678] In a similar vein, I have discussed elsewhere the idea that process-based review by the ECtHR may be considered less normative and therefore less value-laden than a substantive approach to substantive rights[1679]:

> '[when] the [ECtHR] 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 the balancing of different interests to the national authorities*. In 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… A procedural approach can therefore be considered a relatively neutral method towards the political choices of States.'[1680]

The 'neutrality' of the ECtHR's procedural approach is thus based on the absence of a normative decision concerning the substance of the matter.[1681] As Başak Çali has submitted, there is therefore 'a much larger substantive interpretive space carved for domestic judiciaries and parliaments based on the procedural qualities of their decision-making processes.'[1682] Likewise, in relation to the ECtHR's abortion case-law, Daniel Fenwick has argued that the ECtHR 'has treated the matter of access to abortion largely as one of effective delivery of healthcare, allowing it to adopt a normatively neutral stance and to confine its analysis to a procedural one'.[1683]

The examples of process-based review discussed in Part I of this book do not explicitly indicate whether courts have adopted a procedural approach because they consider it to be a neutral alternative to substance-based review. Nevertheless, this rationale may be said to surface in judgments where courts take a procedural approach because they consider a substantive approach to impinge on the normative choices of other decision-making authorities. For example, in *Von Hannover (No. 2)*, the ECtHR noted that States have a margin of appreciation in balancing privacy and freedom of expression rights.[1684] It explicitly acknowledged that '[t]here are different ways of ensuring respect for private life' and various interpretations may be given of 'whether and to what extent an interference with the freedom of expression … is necessary'.[1685] Against that

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1678 Also Wilfrid Waluchow argued that fundamental rights adjudication can be relatively neutral. When courts base their decision not on their own normative convictions, but in terms of 'the community's own fundamental moral commitments' to which a community has committed itself, see Waluchow (2013).

1679 Huijbers (2017b), p. 18ff.

1680 Ibid, p. 18–19 [emphasis added]. See also Koskenniemi (2011), pp. 147–148.

1681 Admittedly, the notion of 'neutrality' is a controversial one as there is no analytical cohesion to the understanding of this concept in adjudication. See in this regard, Kahan (2011), p. 9.

1682 Çali (2018), p. 263.

1683 Fenwick (2014), pp. 215 and 229.

1684 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), paras. 104–107. See Section 4.2.7.

1685 Ibid, para. 104.

PROEF 3

background, it considered that it 'would require strong reasons to substitute its views for that of the domestic courts' as regards the balance to be struck.[1686] After reviewing the national judicial decision-making process in detail, the ECtHR was satisfied that the national courts had complied with their obligations under the Convention.[1687] In light of the margin of appreciation left to the authorities to protect the right to privacy, it seems that the ECtHR found a procedural approach more appropriate, leaving the normative balancing between the rights involved to the national courts. Such an approach was even more explicit in the *Lambert* judgment.[1688] In that judgment, the ECtHR considered that in cases concerning 'extremely complex medical, legal and ethical matters … it was *primarily for the domestic authorities* to verify whether the decision to withdraw treatment was compatible with the domestic legislation and the Convention'.[1689] The ECtHR thus regarded the substantive issue to be primarily for the national courts to assess, and limited its approach to the decision-making process of these courts. On the basis of the in-depth examination of the French courts it concluded that these authorities had fulfilled their positive obligations under the right to life.[1690]

D. Procedural reasoning limiting substantive decision-making

Standards are never value-free | Although Habermas' and Zurn's refinements of Ely's theory may help to mitigate Tribe's criticism, even in this refined version, procedural reasoning has been considered to limit decision-making authorities' normative choices. On that ground, it has been considered to lack the contended neutrality. Most fundamentally, Martti Koskeniemmi has rejected the assumption that there are any standards, whether substantive or procedural, that can be considered neutral, or, in his definition, 'non-political'.[1691] There is simply no 'autonomous and stable set of demands over a political reality'.[1692] International and fundamental rights law therefore is pure politics, and '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'.[1693] Process-based review therefore cannot concern a 'rational application of normative content already embodied in constitutional provisions', as suggested by Zurn, but it unavoidably concerns a hegemonic imposition of judges' views on the parties to the case.[1694]

Combining procedural with substantive reasoning | Secondly, it has been argued that applying process-based review in practice causes it to lose much of

[1686] Ibid, para. 107.
[1687] Ibid, paras. 124–136.
[1688] ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*). See Section 4.2.7.
[1689] Ibid, para. 181 [emphasis added].
[1690] Ibid.
[1691] E.g., Koskenniemi (2012) and Koskeniemmi (1990).
[1692] Koskenniemi (2004), p. 3.
[1693] Koskenniemi (1990), p. 31.
[1694] See for a discussion Huijbers (2017b), pp. 9–13.

PROEF 3

its neutral potential. In reality, procedural reasoning is often supplemented by substantive review. Many process theories, such as Dan T. Coenen's 'semisubstantive review'[1695] and Bar-Siman-Tov's 'semiprocedural judicial review'[1696], primarily regard procedural reasoning as a means for courts to determine whether substance-based review is justified.[1697] In this sense, such theories consider procedural reasoning a means to protect substantive values, and although procedural reasoning itself may still be regarded as relatively neutral, its consequences may be normative as it enables substance-based review.[1698] Illustrative of this are judgments in which procedural reasoning is used to determine the intensity of review in a judgment.[1699] In footnote four of *Carolene Products*, for instance, USSC Justice Stone indicated that curtailment of the participation of minorities in the political process may call for more searching scrutiny as to the substance of the matter.[1700]

Limiting substantive choices | Even if procedural reasoning is not followed by substance-based review, it may still be argued that through procedural reasoning and via procedural standards, courts inherently limit the scope of the substantive choices that decision-making authorities can legitimately make.[1701] This concerns a third understanding of process-based review as imposing substantive limitations.

In relation to the case-law of the ECtHR on abortion cases, Fenwick has concluded that the ECtHR 'did *not* take a stance consonant with accepting that foetal life is protected under the ECHR, or with accepting an unfettered national discretion as to the level of protection for the unborn; therefore, the stance taken was not a purely procedural one'.[1702] As a result, national authorities do not have unlimited freedom in determining their policy choices concerning access to abortion. In a similar vein, Nelleke Koffeman has noted that the ECtHR indirectly limited national decision-making in morally sensitive issues through its procedural reasoning. In line with Gerards, she described the procedural approach of the ECtHR as an 'in for a penny, in for a pound approach'.[1703] This means that once a European State recognises a right at the national level, the ECtHR requires it to ensure that procedural safeguards are in place in order to ensure effective (and equal) protection of the right.[1704] Thereby, Koffeman argues, the ECtHR 'effectively limits States' room for manoeuvre; either they

[1695] Coenen (2009), p. 2837.
[1696] Bar-Siman-Tov (2011), p. 1917.
[1697] Ibid, p. 1960. In the context of the ECtHR, Gerards has made a similar argument, see Gerards (2012), pp. 197–198 ('If there is a suspicion of procedural incorrectness, the court should act, since it is then not possible to trust the reasonableness of the outcomes of the procedure. … In such cases, the substantive content of the decision should further be examined.', p. 198).
[1698] Ibid, p. 1961.
[1699] See Section 6.3.5A-I.
[1700] USSC 25 April 1938, 304 U.S. 144 (*US v. Carolene Products*), p. 152. See Section 2.2.1.
[1701] Huijbers (2017b), p. 20 and Huijbers (2018c), pp. 80–82.
[1702] Fenwick (2014), p. 229.
[1703] Gerards (2013b), pp. 49–50.
[1704] Koffeman (2015), pp. 637–638.

PROEF 3

take no steps at all or they take the first step, which often, although not necessarily, results in an obligation to take even more steps or many steps at once'.[1705]

Through procedural reasoning courts may thus indirectly guide substantive decision-making, and therefore procedural reasoning may be considered to lose much of its seeming neutrality.[1706] Aligning this position with the insight that procedural reasoning may be very intrusive – that is, procedural standards may have a broad, issue-transcending impact on the legislative, administrative, or judicial decision-making processes[1707] – it becomes apparent that process-based review may seriously affect the substantive choices of decision-making authorities in relation to a large variety of issues.

These concerns can further be explained with a reference to *Hatton*.[1708] In that judgment, the ECtHR required scientific studies to be taken into account in relation to complex policies. The UK authorities had already included such studies in their decision-making process concerning the night flight scheme for the Heathrow airport. By means of its positive evaluation of the UK authorities' reliance on such studies[1709], the ECtHR seemed to indicate that the UK authorities should continue to rely on such studies in the future. In particular it noted that 'it is relevant that the authorities have consistently monitored the situation'.[1710] Therewith the ECtHR steered the UK authorities' policy choices to a certain extent, in that they are no longer free to adopt policies concerning night flights that are not clearly evidence-based. Another, quite different example can be found in *Volker und Markus Schecke*.[1711] In this judgment, the ECJ required the EU legislature to carry out a balancing exercise in adopting EU Regulations on the online publication of information of beneficiaries of European agricultural funds. It appreciated the intention of the EU legislature to ensure transparency of EU decisions, yet it also required the EU legislature to take into account the privacy of the individuals whose information would be published online.[1712] Even though the ECJ's review was procedural and it did not provide an indication of how the various interests should be balanced in future legislation[1713], it is clear that the requirement of undertaking a balancing exercise guides future policy choices of the EU legislature: the EU legislature may not choose to protect the principle of transparency above other interests and rights.[1714]

[1705] Ibid, p. 644.

[1706] See in this sense also Brems (2019), pp. 221–223.

[1707] Huijbers (2017b), pp. 11–12.

[1708] ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*), para. 128. See Section 3.2.6.

[1709] Ibid.

[1710] Ibid.

[1711] ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.

[1712] Ibid, paras. 80–81.

[1713] In the judgment the ECJ provides also substantive indications, such as to possible less infringing ways for the EU legislature to organise the matter, see ibid, para. 77.

[1714] Indeed, the ECJ held that 'No automatic priority can be conferred on the objective of transparency over the right to protection of personal data …, even if important economic interests are at stake', see ibid, para. 85.

PROEF 3

E. *Neutrality in degrees: more and less value-laden review*

Although courts may be said to limit the substantive choices of decision-making authorities through procedural reasoning, it has been argued that this indirect substantive influence does not entirely destroy the neutrality of process-based review. This is possible if notions of 'neutrality' and 'normativity' are not considered in absolute terms or in a binary fashion, but are considered to exist in different nuances or degrees.[1715] As Neil MacCormick noted, courts 'do not settle what decision is in the end *completely* justified', but, instead, '[w]ithin them there may arise many issues of speculative disagreement which can in principle be resolved, but there is an inexhaustibly residual area of pure practical disagreement'.[1716] In other words, judgments that allow for normative disagreement may be considered more neutral than judgments that definitively settle these disagreements. If procedural reasoning allowed for more substantive disagreement, such an approach may be considered more neutral than a conclusive substantive approach.

In this respect, in relation to the neutrality of procedural standards developed by the ECtHR, I have argued elsewhere that there is a minimum consensus concerning the applicable principles, at least temporarily, when parties have committed themselves to certain procedural and substantive standards.[1717] In that sense, procedural reasoning based on standards that are closely related to a pre-existing consensus, or, in Zurn's words, that are 'already justified higher level constitutional norms'[1718], may be considered relatively neutral, whereas the enforcement of standards that are only at the periphery of this consensus may be regarded as reflecting normative choices of judges.[1719] Therefore, even though process-based review limits public authorities' room of manoeuvre (see the previous section), it is more neutral than substantive reasoning. In the end, courts merely review whether decision-making authorities took account of both the pre-existing procedural and substantive standards in their decision-making process instead of substituting their own substantive views for that of the decision-making authorities.

An example of this more nuanced, consensus-based procedural approach may be found in the judgment of the SACC. In *Doctors for Life International* it upheld the requirement of the legislature to facilitate public participation in legislative processes.[1720] In determining what this procedural right would entail in the given practice, the SACC noted that the legislative authorities had considerable discretion and it accepted the

[1715] Huijbers (2017b), pp. 8–9.
[1716] MacCormick (2003), p. 251.
[1717] Huijbers (2017b), p. 18 and Waluchow (2013).
[1718] Quoted above, see Section 9.2.1C.
[1719] Huijbers (2017b), p. 20.
[1720] SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*). See Section 2.2.5.

PROEF 3

internal choice of the legislative authorities to hold public hearings in the provinces.[1721] However, the legislative authorities failed to hold such hearings in relation to two bills. This failure was considered by the SACC to be unreasonable in the circumstances of the case and the two bills were therefore invalidated.[1722] Even if the SACC's decision can be said to limit substantive political choices of the legislative authorities, it did so in a less intrusive manner than a substantive assessment would have done. After all, the procedural failure did not prevent the substantive re-enactment of the legislation after a new legislative procedure. Furthermore, the SACC respected the legislatures' choices for the means to ensure political participation, since it only required that they put it into practice.

F. *Transparency and risks of corruption, dishonesty, and inconsistency*

CORRUPTION OF JUDICIAL POWER | Even if we accept that procedural reasoning is more neutral than substantive reasoning, there are still concerns relating to the application of process-based review. First, on a theoretical and fundamental note it has been argued that procedural reasoning may lead to corruption of judicial power. Tribe's concern with process-based review and neutrality is not just that procedures are shaped by their underlying substantive values. In addition, he argues, by pretending that procedural reasoning is neutral, process theorists wrongly create the impression that the application of procedural reasoning needs no further legitimation.[1723] However, in his view, since adjudication means the wielding of power by judges, the questions of which procedures should be followed and how courts should review them, ought to remain subject to debate and contestation. After all, in Tribe's view, 'in matters of power, the end of doubt and distrust is the beginning of tyranny'.[1724] Holding that procedural standards are beyond discussion, means that one particular perspective is elevated to a universal standard, and doing so would be, in the words of Koskenniemi, pure hegemony and thus a corrupted use of judicial power.[1725]

JUDICIAL DISHONESTY | A second and related issue, concerns the rather broad and open-ended definition of 'process' adopted by procedural theorists. It has been argued that 'virtually every constitutional issue can be phrased in procedural terms that justify judicial review'.[1726] Indeed, as Michael Dorf has suggested, issues that Ely considers substantive, such as abortion, can also be rephrased in matters of equal political participation.[1727] For some, therefore, procedural reasoning would 'not so

[1721] Ibid, paras. 123–124, 180, and 187.
[1722] Ibid, paras. 180, 187–188, and 198.
[1723] Tribe (1985), pp. 6–8.
[1724] Ibid, p. 7.
[1725] Koskenniemi (2009), p. 9 and Koskenniemi (2011), p. 164. See also Tribe (1980), p. 1064.
[1726] Chemerinsky (1984), p. 1222.
[1727] Dorf (2003), p. 896.

PROEF 3

much encourage judicial restraint as foster judicial dishonesty'.[1728] Mark Tushnet, for example, argues that Ely's theory leads to judicial arbitrariness as there are no restraints imposed on courts for determining in which cases procedural scrutiny would be warranted.[1729] Although Ely includes a classification of suspect cases that would require process-based review – that is, cases where minorities face challenges to political participation – this would still require an interpretation of who is a minority and who is majority.[1730] Since this interpretation of who is included or excluded is open for debate and procedures themselves provide no direction, courts would have almost unfettered powers. Therefore, Tushnet concludes, 'we are left with only indeterminacy, manipulability and lack of constraint'.[1731] From this perspective, the use of process-based review is nothing more than courts aiming to cover up their substantive choices under the guise of 'value-free' procedural principles.[1732]

As regards the reason-giving requirement, Martin Shapiro has made a similar argument. He contends that this requirement 'cast in the form of procedural, rather than substantive, review' is 'an ideal cover'.[1733] Courts can dismiss decisions on the ground of failure to provide reasons, yet, upon revision, courts maintain the right to reject a decision if the reasons provided in the second decision-making process were no better than the first.[1734] Shapiro finds that decision-making authorities 'will recognize the need to change the substance of their rule than simply change the rhetoric of the reasons'.[1735] Procedural reasoning may thus be regarded as substantive instructions in a neutral, procedural disguise.

To provide for a middle ground to solve these problems, Bar-Siman-Tov proposed semi-procedural review, whereby procedural reasoning is used to protect substantive values. Arguably, such approaches are open about the fact that they mean to safeguard certain normative values and because of this transparency, they enable open discussions on which values courts should rely on.[1736]

Lack of transparency and consistency | Thirdly, it has been argued that judicial practice reveals how procedural approaches lack transparency. In relation to the ECtHR, Janneke Gerards has shown that there is no standard application of this approach.[1737]

[1728] Coenen (2009), p. 2877, with a reference to Gunther (1964), p. 25.
[1729] Tushnet (1980), p. 1053.
[1730] Ibid, pp. 1051–1053.
[1731] Ibid, p. 1055.
[1732] Bar-Siman-Tov (2011), p. 1961.
[1733] Shapiro (1992), p. 187.
[1734] Ibid, p.188.
[1735] Ibid.
[1736] Bar-Siman-Tov (2011), pp. 1961–1962.
[1737] Also Popelier noted that the ECtHR currently does not apply procedural rationality review in a consistent manner. She holds that consistency is, however, of utmost important and provides four thumb rules to guide the ECtHR's procedural approach, see Popelier (2019), p. 283 ('(1) The Court should turn to procedural rationality review when it is unable to substantively assess the merits of a case. (2) Consequently, substantive arguments should prevail if there are serious grounds to argue either conformity or violation of the challenged Act. Procedural rationality review can play a more

PROEF 3

She notes that 'it seems impossible to find a rational explanation for the Court's choice to either rely on procedural arguments, to a greater or lesser degree, or to leave them completely out of consideration'.[1738] This inconsistency extends not only to when process-based review is applied, but also, as noted by Cumper and Lewis, to what the procedural standards actually require.[1739] The ECtHR's 'pick and choose' approach may be typical for the argumentation style of the ECtHR, yet this may result in problems of ensuring clarity and consistency in its case-law, and thus it provides little guidance to authorities in how to adopt appropriate procedural policies and for individuals in adjusting their conduct.[1740] In Koskenniemi's view, this is particularly problematic as fundamental rights are always about how to distribute scarce resources and whom to privilege.[1741] Against this background and to avoid hegemony, it is imperative that courts explain in a structural, transparent, and comprehensive manner in which cases and in what manner they will use procedural reasoning. In other words, if the ECtHR explained more openly and in more detail its procedural approach, this would enable the revelation of the systematic bias at the core of its decisions.[1742] This would not only be commendable for reasons of transparency, but would also enable decision-making authorities and individuals to contest these strategic choices.

G. Résumé

This section has shown that process-based fundamental rights review has been subject to a debate on the neutrality and normativity of this kind of review. It has been explained that John Hart Ely views procedural reasoning as a means for courts to ensure that the political process is open to participation by all. He considers this to be a value-free and neutral approach since, through this approach, courts would merely enforce the already agreed upon and legally entrenched procedural principles. Laurence Tribe rejects Ely's claims of value-free adjudication, holding that procedural principles are indeterminate and require a substantive value system to provide direction as to their interpretation. By enforcing procedural standards, courts are thus relying on underlying normative ideas. It has also been noted that of Jürgen Habermas' theory could address Tribe's concern, since Habermas acknowledges that there are indeed substantive values in the Constitution and procedural reasoning is meant to protect these values, but these substantive values are settled standards. Through reviewing whether they were taken into account in the decision-making process, adjudication may be considered relatively neutral. Nevertheless,

important role when there are doubts, i.e. so-called hard cases. (3) Evidence used by Parliament should only be questioned if there are serious reasons to doubt its quality. (4) If the Court praises the quality of Parliamentary debate as a means of justifying a questionable measure, it should, in particular, make sure that there was not only extensive debate on the subject in general but that there was also an informed discussion of the relevant legal questions in particular.').

1738 Gerards (2017), pp. 159–160.
1739 Cumper and Lewis (2019), pp. 23–26.
1740 Gerards (2017), pp. 159–160.
1741 Koskenniemi (2011), p. 164.
1742 Huijbers (2017b), p. 22.

PROEF 3

other scholars have argued that Habermas' theory does not fully counter courts' inclination to direct substantive decision-making of decision-making authorities, and thereby procedural reasoning limits substantive choices to greater or lesser degrees. This perspective has furthermore been nuanced through considering neutrality as a matter of degree. On this understanding, procedural reasoning was found to be more neutral than substantive reasoning. Finally, it has been explained that procedural reasoning has been criticised for lack of transparency. It has been inconsistently applied in case-law, and it has been held to constitute a risk for corruption and dishonesty of judges trying to hide their substantive decisions behind a veil of seemingly neutral procedural principles. These discussions indicate that, overall, procedural reasoning is difficult to reconcile with the notion of value-free adjudication, yet arguments may still be made that procedural reasoning, to a certain degree, may be less value-laden than fully substantive approaches.

9.2.2 AVOIDING MORALLY SENSITIVE OR 'HARD' CASES

This section focuses on the use of procedural reasoning as a means for courts to avoid having to decide on morally sensitive issues. This does not necessarily require that procedural reasoning is neutral in the sense that it leads to value-free decision-making, as was discussed in the previous section, but it considers whether procedural reasoning can be regarded as a way for courts to circumvent morally sensitive issues. The following sections address the notion of 'hard cases' (Section A), the role of courts in hard cases and various kinds of avoidance strategies used by them (Section B), and, finally, whether process-based review can be considered an avoidance strategy (Section C and D). Section E briefly summarises the findings.

A. 'Hard cases'

Ronald Dworkin's notion of 'hard cases' may be considered a first indication of what can be understood as morally sensitive issues that may warrant a special approach by courts. In his view, hard cases are cases in which 'no settled rule dictates a decision either way', that is, neither statute nor precedent dictates the result of the case.[1743] This means that 'there are decent arguments for each of two competing interpretations'.[1744] Dworkin's work has been interpreted to mean that hard cases may arise in three situations: 'lawyerly disagreement; absence of a clearly applicable proposition of law; and lack of determinate guidance from the legal record'.[1745] Hard cases can be contrasted with 'easy cases'[1746] or 'regulated cases'.[1747] In accordance with Neil MacCormick's theory,

[1743] Dworkin (1997), p. 108.
[1744] Dworkin (1998), p. 252.
[1745] Lucy (2004), p. 214.
[1746] Ibid, pp. 208–221.
[1747] Raz (2009), p. 181 ('Regulated cases are those which fall under a common law or statutory rule which does not require judicial discretion for the determination of the dispute …').

PROEF 3

these are cases where the law is clear and the relevant facts are unambiguous, and where a decision in a case is in principle possible on the basis of deductive justification (most simply explained by the syllogism: if *p* then *q*).[1748] Where to draw the line between easy cases and hard cases remains an issue for debate.[1749]

In the context of human rights adjudication, hard cases are often said to concern 'conflicts of rights'. A true conflict of rights is present when equally valid but incommensurable claims can be made in light of fundamental rights and various outcomes may be justified.[1750] In essence, notions such as 'hard cases', 'normatively sensitive cases', 'socially sensitive cases'[1751], and 'dilemma-cases'[1752] are used to refer to cases that touch on incommensurable values and in which a decision 'can hardly be made on the basis of purely rational, legal and neutral criteria'.[1753] As Joseph Raz explains, '[w]here considerations for and against two alternatives are incommensurate, reason is indeterminate [as it does not provide a] better case for one alternative than for the other'.[1754] According to Lorenzo Zucca this means that 'adjudication in these matters necessarily imposes sacrifices and losses on the part of one or both right-holders, or on the state as a party to the conflict'.[1755] The moral, religious, and political considerations of judges unavoidably influence the decision-making in such cases. Hard cases in light of the theory on conflicts of rights therefore present a more specific subset of Dworkin's understanding of the concept as it not only accepts that there are a plurality of values possible, but also that these values may conflict, and that this conflict cannot be resolved.[1756] Because this is more concrete and connects with what are considered to be hard cases in the practice of fundamental rights adjudication, this understanding of hard cases as incommensurable conflicts of values is taken as the starting point for this section.

Cases on the right to abortion and assisted suicide, on compensation for wrongful birth, on gender inequality, or on sexual orientation discrimination have been regarded as examples of hard cases.[1757] In all these cases, ethical claims can be made to justify

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1748 MacCormick (2003), p. 37 ('To summarize …: given that courts do make "findings of fact" and that these, whether actually correct or not, do count for legal purposes as being true; given that legal rules can (at least can sometimes) be expressed in the form "if *p* then *q*"; and given that it is, at least sometimes, the case that the "facts" found are unequivocal instances of "*p*"; it is therefore sometimes the case that a legal conclusion can be validly derived by deductive logic from the proposition of law and the proposition of fact which serve as premises; and accordingly a legal decision which gives effect to that legal conclusion is justified by reference to that argument'). See also the discussion in Lucy (2004), p. 209ff.

1749 Lucy (2004), pp. 212–213.

1750 E.g., Smet (2014), p. 101 and Zucca (2007), p. 56 ('Conflict of rights arise because their corresponding duties are incompatible').

1751 Kloppenberg (2001), p. 1.

1752 Gerards (2017), p. 147 and Zucca (2007).

1753 Gerards (2007), p. 124.

1754 Raz (1986), pp. 333–334. The fact that incommensurability of values eludes reason, 'is to say that the reasons one has for a choice one way or another do not completely determine that choice: one has reasons for choosing both options', see Lucy (2004), p. 236.

1755 Zucca (2007), p. x, and see also pp. 4–5.

1756 Lucy (2004), pp. 234–235.

1757 Gerards (2017), p. 147; Gerards (2007); and Kloppenberg (2001), p. 1.

PROEF 3

opposite outcomes and there is a general disagreement on what outcome should prevail.[1758] A particularly illustrative example of a hard case is the *Conjoined Twins* case.[1759] This concerned the conjoined twins Jodie and Mary, who were attached at the thorax and abdomen. Jodie had a full-functioning bodily system, but Mary did not; she was completely dependent on Jodie for the supply of oxygen and the circulation of blood. It became clear that the twins would not be able to survive as Jodie's heart and lungs were unable to stand the strain of supporting not only her own growing body but also that of Mary. Medical experts were convinced that if they separated the twins, Jodie would be able to live a reasonably normal life. This operation would, however, mean that Mary would immediately die from lack of oxygenated blood. The twins' parents, who were devout Catholics, refused to give permission for the operation as they considered that it was God's will that the twins were destined for a short life. Medical experts, however, were strongly in favour of separating the twins in order to save Jodie's life. The case reached the UKCoA, which had to decide whether the separation of the twins should be ordered. The UKCoA thus had to decide on the moral issue of whether Mary should be sacrificed to save Jodie's life, or whether Mary's sanctity of life should be protected, which would inevitably lead to the death of both girls. The claims of both girls to life were surely incommensurable, and, arguably, both outcomes – ordering the operation or not – could be considered reasonable and morally justifiable. In the end, the UKCoA, noting the intense difficulties and showing understanding for the parents' point of view, concluded that the operation to separate the twins should go ahead.

B. Normative avoidance strategies

Courts may not be confronted with hard cases on a daily basis, but at times, and some more often than others, they will. As hard cases concern ethical dilemmas at the heart of democratic society and human life, it is unsurprising that they have drawn the attention of many philosophical, legal theoretical, and legal scholars, who have defended various views on how courts ought to deal with such cases.

Ronald Dworkin most famously defended the position that courts should decide in hard cases.[1760] He argued that hard cases should be decided on arguments of

[1758] It may be noted that what exactly constitutes hard cases may be situational. For example, Michael Perry in the context of the US asks the question 'what role should we want the courts to play, if any, in determining public policy with respect to capital punishment, abortion, same-sex unions, and other morally controversial practices', see Perry (2007), p. 87. In the European context, however, capital punishment is prohibited and therefore there is rather little discussion as to what role courts have in relation to such policies. Only Russia has not ratified the relevant Protocols of the ECHR and Belarus, as a non-member of the Council of Europe, still has a death penalty.

[1759] UKCoA 22 September 2000, [2000] EWCA Civ 254 (*Conjoined Twins*). Discussed in MacCormick (2008), pp. 173–181.

[1760] Dworkin (1998), pp. 255–257. This Dworkian view is also defended in relation to the European Convention on Human Rights, see Letsas (2007), and in relation to courts in Europe and the US, see Zucca (2007).

PROEF 3

principle.[1761] Arguments of principle justify a decision as they secure or respect fundamental rights, and these arguments should be distinguished from arguments of policy, which justify a decision as they ensure, further, or protect collective goals.[1762] As courts are the decision-making authorities par excellence that reason from principle[1763], they are to decide such hard cases despite the fact judges may reach different decisions on arguments of principle.[1764] According to Dworkin, when judges are confronted with hard cases, they 'must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions – its public standards as a whole – in a better light from the standpoint of political morality'.[1765] Judges' personal, moral, and political convictions are thus engaged to find the best possible interpretation of the law in conformity with the most coherent account of the political morality of a community.[1766] Others have taken the opposite view that courts should refrain from making decisions regarding ethical dilemmas. They consider such issues to be the prerogative of moral, political, and public debate. Ely's approach, discussed in Section 9.2.1, is a good example of this. Richard Bellamy also objects to constitutional adjudication, on the basis that it would imply normative domination by judges. For him, if judges decided hard cases this would ultimately mean that 'the view of some citizens may count for less than those of others in the actual decision because some people hold the "right" view and others the "wrong" one'.[1767] An in-between position has been taken by Michael Perry. He argues that courts should not make a final decision on normatively sensitive issues.[1768] In situations where they have the power of 'judicial ultimacy', as is the case for the USSC, courts should refuse to take a decision.[1769] However, in constitutional systems such as that of Canada, where decisions of the CSC may be overridden by parliament – what he called 'judicial penultimacy' – courts may infuse their views in the political debate by making a decision.[1770] Therefore, Perry does not in principle reject courts' input in morally sensitive issues, rather he argues that they should not have the sole or final say on these matters.

1761 Dworkin (1997), p. 108.

1762 Ibid, pp. 107 and 115.

1763 Dworkin (1998), p. 244 ('Judges must make their common-law decisions on grounds of principle, not policy').

1764 Ibid, pp. 250, 256–257.

1765 Ibid, pp. 255–256. See also Dworkin (1999), p. 74 ('But that means that judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement. It means that the rest of us must accept the deliverances of a majority of the justices, whose insight into these great issues is not particularly special.').

1766 Dworkin (1998), pp. 255–256 ('Law as integrity, then requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole.', p. 245). See also a discussion of Dworkin's theory in Lucy (2004), p. 219.

1767 Bellamy (2007), p. 164.

1768 Perry (2007), p. 102.

1769 Ibid, pp. 138–139.

1770 Ibid, pp. 99–102.

PROEF 3

Based on the divergent views on courts' role in relation to hard cases, various suggestions have been made as to how courts can deal with these cases. These are becoming increasingly important as courts are expected more and more to decide on morally sensitive cases. Speaking extrajudicially, Beverley McLachlin the former Chief Justice of the CSC, considers that courts are increasingly required to deal with hard cases and that this requires them to adjust to their new modern role:

> 'To perform their modern role well, judges must be sensitive to a broad range of social concerns. They must possess a keen appreciation of the importance of individual and group interests and rights. And they must be in touch with the society in which they work, understanding its values and its tensions. The ivory tower no longer suffices as the residence of choice for judges. The new role of judges in social policy also demands new efforts of objectivity. Often the judge will have strong personal views on questions which a judge is asked to decide: questions like abortion, capital punishment or euthanasia. But the task of judging is not accomplished simply by plugging one's personal views into the legal equation. The judge must strive for objectivity. This requires an act of imagination. And it requires an attitude of "active humility", which enables the judge to set aside preconceptions and prejudices and look at the issue afresh in the light of the evidence and submissions. The judge must seek to see and appreciate the point of view of each of the protagonists. She must struggle to enunciate the values at issue. Then she must attempt to strike the balance between the conflicting values which most closely conforms to justice as society, taken as a whole, sees it. It is impossible to eliminate the judge's personal views. But by a conscious act of considering the other side of the matter, the judge can attain a level of detachment which enables him or her to make decisions which are in the broader interests of society. In the end, the judge can know no other master than the law, in its most objective sense.'[1771]

Others have advanced means for courts to face these morally sensitive cases head-on. For example, the balancing of rights is often mentioned as a means to resolve conflicts of rights.[1772] At the same time, questions have been raised as to whether a balancing exercise is an appropriate and sufficient means to deal with hard cases.[1773] This approach has been criticised for the same reasons as utilitarian theories have been subjected to criticism. Is it really possible to 'weigh' various rights against one another? Also, what principles should guide this balancing exercise?[1774]

Another way of dealing with conflicts of rights is the search for practical concordance, which means that courts should strive to find a compromise between competing and equally valid claims.[1775] Yet, again, this approach has been criticised, since it supposes that the judge is in a position to find such a compromise, which

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[1771] McLachlin (2001).
[1772] Smet (2014), p. 201, arguing for a structured balancing tests in conflicts between relative rights.
[1773] Zucca (2007), p. 84ff and for a more general criticism of balancing, see Aleinikoff (1987).
[1774] Urbina (2017), Chapter 3 (rejecting proportionality on the basis of its failure to comply with the commensurability thesis of moral values expressed by fundamental rights); De Schutter and Tulkens (2008), pp. 196–197; and Zucca (2007), pp. 85–86.
[1775] See e.g., Marauhn and Ruppel (2008).

PROEF 3

may not always be a valid presumption. Furthermore, it has been held that this is not a constructive approach as it does not help to resolve conflicts in similar cases in the future.[1776]

Yet others have advanced 'avoidance strategies'[1777], which allow courts to circumvent decision-making on morally sensitive matters.[1778] These include strategies concerning judicial procedure, such as courts declaring cases with morally sensitive issues inadmissible; this may be done by using a political question doctrine or by limiting the standing of applicants.[1779] Other pragmatic strategies have been advanced as well. These focus on ways for courts to provide at least some protection of fundamental rights whilst still allowing judges to avoid taking a decision on the normative issue at stake. Such avoidance strategies do not require a full withdrawal of judicial oversight, but require a partial abstention, which can best be described as 'normative judicial restraint'.[1780] Gerards, for example, has distinguished a number of methods and techniques of reasoning that allow the ECtHR to prevent its having to embark on substantive decision-making on morally sensitive issues.[1781] She has explained that the ECtHR has been able to do so, for example, through the use of narrow or shallow forms of reasoning.[1782] Furthermore, and most relevant for this book, she regards process-based review as another way for the ECtHR to avoid delving fully into the morally sensitive issue at stake.[1783] It is this latter approach that is addressed in the next section.

1776 De Schutter and Tulkens (2008), p. 204.

1777 See also Kloppenberg (2001), p. 1.

1778 Whether such strategies are desirable and useful depends on the position one takes concerning the role courts should take up in relation to hard cases. See e.g. for a criticism of using avoidance strategies, Kloppenberg (2001). She argued that the USSC has been avoiding taking decisions in 'socially sensitive' cases by various means and that it has done so in an inconsistent manner favouring states' rights under federalism instead of rights of individuals. Also from a Dworkian perspective, avoiding such cases would be strongly objectionable, and arguments may be made, as discussed in Chapter 8, that by using such strategies, courts would forsake their role as guardians of fundamental rights, see Section 8.3.2A-I.

1779 Goezelhauser (2011); Kloppenberg (2001), Chapter 3; and Garrity-Rokous and Brescia (1993), p. 560. This would, however, mean that courts do not provide any protection of these rights on the merits and that courts may not always be able to avoid having to dealing with a case, since not all courts have *writ of certiorari* and courts may precisely be assigned the task to take such decisions. For the second point, see the discussion at the end of Section 9.2.2C.

1780 See also the notion of 'substantial judicial deference' mentioned in Kavanagh (2008), pp. 194–195. Normative judicial restraint is distinct from institutional judicial restraint, discussed in Section 7.4.1, as courts show deference not because a topic is considered part and parcel of the decision-making domain of the other authority, but because the core of the case concerns ethical and moral dilemmas relating to incommensurable values and the judges feel that they cannot make a decisive decision on the issue. At the same time there is a considerable overlap between two types of restraint. Where judges may not feel themselves well-placed to take a final decision on the issue, they may find other public authorities – often political bodies – in a better position due to their institutional capacities and democratic credentials.

1781 Gerards (2013b), pp. 52–71.

1782 Ibid, pp. 62–70. See also on 'measured rulings' or 'minimalism', Kloppenberg (2001), pp. 271 and 274.

1783 Gerards (2017), pp. 146–148 and Gerards (2013b), pp. 52–62. See also Fenwick (2014), p. 240.

PROEF 3

C. *Process-based review as an avoidance strategy*

Process-based review has been held by some scholars to be a strategy for courts to (partially) avoid having to deal with morally sensitive issues (procedural reasoning as an avoidance strategy was already briefly addressed in Section 6.3.5A-II). According to Tribe, for example, the USSC Justices adopt a procedural approach as a means to avoid 'controversial judgments about substantive issues left open by the Constitution's text and history and safeguards the representative character of the political process'.[1784] Like many other structuralists, Ely considers that 'judges can avoid or minimize the need for philosophic methods, attitudes, and choices in hard cases by reasoning from the Constitution's structural principles'.[1785] Judge Robert Spano of the ECtHR has also noted that 'parliamentary processes will be particularly important in cases where the Convention right in question involves the assessment of complex and novel issues falling within societal and moral democratic discourse, … or in areas where individual rights are clearly in tension with strong public interests'.[1786] Gerards, too, has argued that the ECtHR's primary task is 'to supervise and control the quality of national procedures', and if the national procedure has met the applicable procedural standards, then 'the Court generally has to accept the outcome of such a procedure', even if it would have reached a different outcome itself.[1787] On the basis of a thorough case-law analysis, she also explains why procedural reasoning has proven to be a useful strategy for the ECtHR in avoiding substantive decision-making in hard cases:

> 'it is not surprising that positive arguments of a procedural nature surface in particular in this category of "dilemma-cases". Unavoidably, they are hard cases, in which conflicting rights and interests play a role and in which it is very difficult to arrive at one rational or legal conclusion. Cases involving moral dilemmas inherently ask for value judgments to be made, and the Court usually does not regard it as its task to replace national value judgments for its own. For that reason, it tends to leave a very wide margin of appreciation to the States in these cases. Again, however, probably because of the importance of what is at stake in these cases, the Court may pay special attention to the care taken at the national level to arrive at certain choices. Especially in dilemma-cases, it is apparent that the Court places great value on the existence of societal and legislative debates, which preferably involve a large number of stakeholders and are very open in nature, and only after due deliberation in Parliament lead to the adoption of legislation.'[1788]

Accordingly, procedural reasoning allows the ECtHR to avoid having to decide on ethically delicate matters, but at the same time it may help it to ascertain that the national authorities' way of dealing with the issue was based on thorough and open

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[1784] According to Tribe this is how the USSC Justices present a procedural approach, see Tribe (1985), p. 9.
[1785] Barber and Fleming (2007), p. 120, with a reference to Ely's work.
[1786] Spano (2018), p. 491.
[1787] Gerards (2012), p. 198.
[1788] Gerards (2017), pp. 147–148.

PROEF 3

deliberations and in line with careful decision-making procedures.[1789] Even though the issue remains whether the procedural qualities of deliberations may be considered value-laden[1790], the argument is that process-based decision-making leaves the specific morally sensitive issue untouched. Similarly, in relation to conflicting rights, Stijn Smet has argued that procedural reasoning may be used by the ECtHR to substitute substantive considerations on the resolution of such conflicts. In cases in which a violation of a fundamental right was found on purely procedural grounds, he finds, 'the Court did not substantively resolve the conflict'.[1791]

In many morally sensitive cases, such as *Hirst (No. 2)* on the blanket ban on prisoner voting rights[1792], *R.R.* on access to abortion[1793], and *Evans* on access to one's embryos[1794], the ECtHR has indeed relied (heavily) on procedural reasoning to determine whether the ECHR rights were violated. In *Maurice*, a case on compensation for wrongful birth, the ECtHR appreciated the 'stormy nation-wide debate' held in France, in which all relevant ethical, social, and legal considerations on the issue were taken into account and in which not only politicians but also individuals and interest groups participated.[1795] Against that background it did not find a violation of the European Convention on Human Rights.[1796] According to Gerards, the ECtHR 'thus hardly addressed the substantive issue of necessity and proportionality of the legislation, seemingly implicitly accepting that a sound national decision-making procedure, in a sphere where the margin of appreciation is wide, can be supposed to deliver reasonable outcomes.'[1797]

In *Lambert*, the ECtHR was asked to assess the decision to end the life-sustaining treatment of a man who was in a chronic vegetative state after having sustained serious

[1789] Concerning the case-law of the ECtHR on abortion, it has also been argued that 'while the ECtHR does not rule on the substantive choices of principle made by States with regard to abortion, it does require that when there is a legal option to have an abortion at the domestic level, the pregnant woman at least has a possibility to be heard in person and to have her views considered; that the competent body or person issues written grounds for its decision and that the pregnant woman has effective access to relevant information on her and the foetus' health', see Koffeman (2015), p. 323. Accordingly, the ECtHR does not provide substantive redress but it does require certain procedural guarantees. In this light, process-based review may be considered not just an avoidance strategy but also a compensation technique for substantive deference, see Messerschmidt (2016b), p. 387.

[1790] By contrast, see Section 9.2.1. Koffeman seems to indicate that the ECtHR in its procedural approach in relation to abortion case-law is 'pressing for *relatively value-neutral* aspects such as consistency [and that thereby it] can impose certain common standards on States without touching upon the true difficulties', see Koffeman, p. 638 [emphasis added].

[1791] Smet (2014), p. 263.

[1792] ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. UK (No. 2)*), paras. 79–80. See Section 2.2.8.

[1793] ECtHR 26 May 2011, app. no. 27617/04 (*R.R. v. Poland*), para. 190–191; discussed in Koffeman (2015), pp. 41–42.

[1794] ECtHR (GC) 10 April 2007, app. no. 6339/05 (*Evans v. UK*), paras. 90–92.

[1795] ECtHR (GC) 6 October 2005, app. no. 11810/03 (*Maurice v. France*), para. 121; discussed in Gerards (2019), p. 259.

[1796] ECtHR (GC) 6 October 2005, app. no. 11810/03 (*Maurice v. France*), paras. 124–125.

[1797] Gerards (2019), p. 259.

PROEF 3

head injuries in a road-traffic accident.[1798] In its judgment, the ECtHR relied solely on the decision-making process with regard to both the medical decision and the judicial remedies available. As regards the medical decision to withdraw Lambert's life-sustaining treatment, it noted the absence of European consensus on the topic and emphasised States' margin of appreciation.[1799] Therefore it examined solely the decision-making procedure, finding that the 'lengthy and meticulous' process satisfied the requirements of Article 2 ECHR.[1800] In relation to the national courts' review of the end-of-life decision, the ECtHR highlighted that the case concerned 'extremely complex medical, legal and ethical matters' and it reiterated that 'it was primarily for the domestic authorities to verify whether the decision to withdraw treatment was compatible with the domestic legislation and the Convention'.[1801] For these reasons, instead of reviewing the substance of the matter, the ECtHR examined the national courts' decision-making procedures. It concluded that these were 'in-depth' and that 'all points of view could be expressed and all aspects were carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies'.[1802] The ECtHR concluded that France had complied with its positive obligations under the right to life. Just as in *Maurice*, the ECtHR thus seemed to avoid having to deal with the substantive issue at stake, which went to the very core of the question as to how and to what extent the right to life ought to be protected.[1803] Indeed, the ECtHR explicitly considered that 'in this sphere concerning the end of life, as in that concerning the beginning of life, States must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy'.[1804] The ECtHR therefore seems to have had no intention of resolving the issue on the withdrawal of life-sustaining treatment on normative grounds, neither in general nor in the specific case at hand.

Acknowledging the specificity of the ECtHR's situation, that is, its status as a supranational court setting standards for forty-seven highly diverse European States[1805],

[1798] ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*), paras. 161–181. See Sections 3.2.6 and 4.2.7.
[1799] Ibid, para. 168.
[1800] Ibid.
[1801] Ibid, para. 181.
[1802] Ibid, para. 181.
[1803] Ibid, para. 142, with a reference to ECtHR 29 April 2002, app. no. 2346/02 (*Pretty v. UK*), para. 65 ('The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.').
[1804] ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*), para. 148.
[1805] See for the ECtHR and hard cases, e.g., Gerards (2019), p. 259; Gerards (2011), p. 119; and Gerards (2007), p. 129ff.

PROEF 3

it can be noted that national courts also try to circumvent decision-making in hard cases.[1806] At least occasionally, national courts have turned to procedural reasoning as an avoidance strategy. Similar to the ECtHR's approach in *Lambert*, the CSC relied on process-based review in *Carter*.[1807] Without engaging in a normative discussion itself, it reviewed the quality of the decision-making process of the lower courts and confirmed the lower courts' judgment that the legislative blanket ban on assisted suicide was not the minimum impairing infringement with the right to life, liberty, and security of the person.[1808] The *Denbigh High School* judgment of the UKCoA on the decision to prohibit a student from wearing a Jilbab to school was also reasoned on procedural grounds.[1809] The UKCoA was not satisfied that the infringement of the right to freedom of religion was justified, as the school had not thoroughly assessed the case and taken the student's viewpoint into account.[1810] Gareth Davies has noted in this regard that '[t]he retreat to procedure is of course a way of avoiding difficult questions' and that 'the court will have been pleased that it could avoid second-guessing the policy maker in this case'.[1811] Similarly, the *Doctors for Life International* judgment of the SACC may be considered a case in point.[1812] In that judgment the SACC had to deal with the constitutionality of various acts of parliament and bills, including those on sensitive issues such as abortion and traditional healers. The issue presented to the SACC was whether the adoption of these acts and bills complied with the constitutional obligation to facilitate public participation in the legislative process.[1813] Even though a procedural approach may be said to follow logically from the procedural formulation of the issue, this judgment still indicates that through procedural reasoning, the SACC avoided having to deal with the issue of whether access to abortion or traditional healers were fundamental rights issues and were compatible with the South African Constitution.

D. *Nuancing process-based review's potential*

Justification strategy | The potential of process-based review in helping courts to avoid normative decision-making in hard cases has been discussed in the literature.

[1806] For an analysis of the USSC, see Kloppenberg (2001).

[1807] CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*). See Section 4.2.4. Yowell mentions that the CSC took a deferential review to the lower court, leaving the trial judge to carry 'the responsibility of making determinations on questions regarding the moral permissibility of causing death, other end-of-life ethical questions, and all relevant questions of morality and policy', see Yowell (2018), p. 19.

[1808] CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*).

[1809] UKCoA 2 March 2005, [2005] EWCA Civ 199 (*The Queen on the application of SB v. Headteacher and Governors of Denbigh High School*), para. 75. See Section 3.2.5. See also the discussion in De Schutter and Tulkens (2008), pp. 210–212.

[1810] UKCoA 2 March 2005, [2005] EWCA Civ 199 (*The Queen on the application of SB v. Headteacher and Governors of Denbigh High School*), paras. 76–78.

[1811] Davies (2005), p. 517.

[1812] SACC 17 August 2006, CCT 12/05 (*Doctors for Life International v. Speaker of National Assembly*). See Section 2.2.5.

[1813] Ibid, para. 11(d).

PROEF 3

Several scholars have considered that the extent to which courts actually circumvent decisions on substantive issues depends on the way process-based review is employed. It has been argued that procedural reasoning cannot be regarded as an avoidance strategy if it is followed by substantive reasoning.[1814] Such an application was suggested by USSC Justice Stone in footnote four of *Caroline Products*, as he considered that if there were serious obstacles in the legislative process for minorities, this would allow for strict scrutiny of the substance of the legislation.[1815] Instead of an avoidance strategy, the procedural approach suggested by Justice Stone is better described as a 'justification strategy', that is, as a strategy that helps to justify the courts' normative engagement with a particular issue (as was explained in Section 6.3.5A-I).[1816] An example of this approach can be found in *Hartz IV*.[1817] In that judgment, the GFCC considered that it was for the German legislature to determine the exact scope and ways for providing minimum subsistence in line with the principle of human dignity.[1818] It explicitly held the German legislature's considerations in this regard concerned 'normative valuations'.[1819] The GFCC nevertheless found that it could review the decision-making process.[1820] After finding serious procedural shortcomings in the legislative process[1821], it went on to define several substantive standards that would be relevant for future legislation on the matter, including that the legislation should create a possibility for exemptions to the fixed level of benefits.[1822] It appears then that the GFCC did not completely avoid a substantive assessment, instead it regarded the procedural failures as justifying a normative assessment of the morally sensitive issue at stake.

No possibility for avoidance | It has furthermore been argued that in some types of cases, courts cannot avoid morally sensitive questions. This is particularly the case when a court does not need to review a decision taken by another authority, but bears the primary responsibility for making such a decision. An illustration of this is the *Conjoined Twins* case, where the UKCoA had to take the decision itself on whether conjoined twins ought to be separated (discussed in detail in Section 9.2.2A). Indeed, UKCoA's Justice Ward noted that 'as the law says I must, it is I who must now make the decision, then whatever the parents' grief, I must strike a balance between the twins

[1814] E.g., Gerards (2012), pp. 197–198; Bar-Siman-Tov (2011), p. 1959; and Daly (2016a), p. 36. See also Section 9.2.1A.

[1815] USSC 25 April 1938, 304 U.S. 144 (*US v. Carolene Products*). See Section 2.2.1.

[1816] The notion of 'justification strategy' draws similarities to Mark Tushnet's 'justification principle', which he defines as a principle asserting 'that there are occasions when judicial displacement of legislative decisions – judicial review – is justified', see Tushnet (1980), p. 1037.

[1817] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.

[1818] Ibid, paras. 138–140.

[1819] Ibid, para. 182.

[1820] This element in the judgment can be regarded as a compensation strategy, as the GFCC seems to make up for the lack of judicial oversight as to the substance by procedural reasoning. This has been explained in Section 6.3.5A-II.

[1821] Ibid, paras. 173–175.

[1822] Ibid, paras. 204–209.

PROEF 3

and do what is best for them'.[1823] Hence, if legislation appoints judges as the primary decision-makers, procedural reasoning may not offer them a useful avoidance strategy in hard cases.[1824] This is also the case in proceedings where courts are expressly required to provide substantive guidance, such as in the preliminary reference procedure before the ECJ, the advisory opinions procedure before the ECtHR[1825], and similar procedures before various constitutional courts. There, courts seem to have limited room to avoid substantive decision-making in hard cases.

No substantive avoidance | More fundamentally, even in cases where a substantive decision has been made prior to judicial proceedings, it may be argued that courts implicitly endorse a certain moral stance when they evaluate the decision-making process.[1826] After all, as the *Maurice* judgment illustrated, through procedural reasoning, the ECtHR accepted that the national law was at least not unreasonable.[1827] Here, Tribe's assertion remains on point: process-based fundamental rights review does not truly allow courts to avoid controversial substantive choices.[1828] Process-based review requires courts to make decisions that indirectly support or reject inherently value-laden decisions of other decision-making authorities. From this perspective, courts cannot fully avoid taking normative stances through procedural reasoning.

E. Résumé

Courts sometimes face normatively challenging cases, such as cases on abortion and euthanasia. From a Dworkian perspective courts should make final decisions in such hard cases, which in the field of fundamental rights are cases concerning incommensurable conflicts of values in which either outcome may be reasonably justified. Others, however, take the view that courts should avoid moral reasoning in such cases because they do not regard courts as the appropriate authorities for making such decisions. From that perspective, various avoidance strategies have been advanced, one of which is process-based review. The idea has been defended that procedural reasoning allows courts not to decide on morally sensitive issues and limit their review to the quality of the process of other decision-making authorities. The success of this strategy is nevertheless not a given, as others have pointed out that it depends on the manner in which it is applied, as well as on the circumstances of the case and

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[1823] UKCoA 22 September 2000, [2000] EWCA Civ 254 (*Conjoined Twins*). Discussed in Section 9.2.2A.

[1824] See also Section 5.2.3.

[1825] With the entry into force of Protocol No. 16 ECHR the ECtHR has been provided with an additional function as the Protocol allows national highest courts to ask for an advisory opinion of the ECtHR. The first advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother has been provided in ECtHR 10 April 2019, req. no. P16–2018–001 ('*Gestational Surrogacy case*').

[1826] Huijbers (2017b), p. 22. See also the discussion in Section 9.2.1D.

[1827] See e.g., Koffeman (2015), pp. 637–638 and 644.

[1828] Tribe (1980), p. 1067. See Section 9.2.1B.

PROEF 3

the applicable institutional arrangements. Whether process-based review is truly a successful avoidance strategy thus remains open to debate.

9.3 PROCESS-BASED REVIEW, JUDICIAL EXPERTISE AND EPISTEMIC UNCERTAINTIES

Courts have been assigned important functions at the national and international level. In particular, courts have shown themselves to be guardians of fundamental rights, regulatory watchdogs, forums for deliberation, and protectors of the institutional balance.[1829] In order to properly carry out these functions properly, courts are expected to have certain capacities. For instance, they must have certain expertise; an expertise that other decision-making authorities lack or do not have to the same degree. For that purpose, judges receive extensive training and education as to ensure their legal qualities as well as their impartiality, and courts as institutions are positioned in a democratic State in such a way as to assure judicial independency. This alleged special judicial expertise has been the basis for scholars to argue in favour of or against the use of process-based review in relation to two distinct but related issues. First, courts have been held to be experts on process, because of their training and focus on procedural fairness (Section 9.3.1). At the same time, this expertise has been subject to some scepticism, with scholars arguing that judicial proceedings are distinct from legislative and executive decision-making and that courts lack the ability to properly assess these other kinds of processes and set procedural standards. Secondly, courts are found to be ill-suited to provide substantive empirical reasoning or deal with epistemic uncertainties, as may be relevant in cases relating to socio-economic rights or to climate change (Section 9.3.2). Procedural reasoning has been considered a means for courts to avoid empirical reasoning and limit their assessment of how the relevant public authority dealt with the particular epistemic uncertainties in its decision-making process.

9.3.1 JUDICIAL EXPERTISE ON DECISION-MAKING PROCEDURES

Courts deal with procedural questions on a daily basis, since they need to decide if the parties to a case have met the applicable procedural requirements, such as timely and adequate submission of pleadings and evidence. In addition, courts themselves are bound by procedural rules that shape their judicial proceedings, such as rules regarding the hearing of the parties to a case or rules of evidence. These procedural requirements are intended to protect the rights of the parties in a case and they are often considered part of the overall fair trial or due process rights.

[1829] Mazmanyan, Popelier, and Vandenbruwaene(2013), p. 6ff.

PROEF 3

The importance of the procedural standards for judicial proceedings may support the position that courts have expertise in procedural matters, and that, therefore, they are well-suited to evaluate decision-making procedures of other public authorities. In other words, it is often argued that the courts' expertise on procedural matters justifies their turn to process-based review. Nevertheless, it is useful to discuss these arguments in-depth. To that end, this section first addresses the assumption of judicial expertise on matters of process as well as how this assumption has become a basis for arguing that courts should turn to procedural reasoning (Section A). It then explains that the expertise of courts in all such matters of process has been questioned (Section B). This is followed by a short summary (Section C).

A. *Judicial expertise on matters of process and process-based review*

Because of considerations of the rule of law and the need for countervailing powers, it is expected that courts exercise their powers in a responsible way. Indeed, many debates on the judicial role in fundamental rights and constitutional adjudication relate to the legitimacy of courts and their judgments.[1830] Judicial legitimacy has been considered by some to be an independent value, which determines whether a court is functioning in a just, valuable, or proper manner.[1831] Others take the view that legitimacy is necessary in order to ensure respect for courts.[1832] Reference is often made to the fact that courts "have no influence over either the sword or the purse" and that they are therefore dependent on their (perceived) legitimacy in order to secure people's and authorities' cooperation and compliance with their judgments.[1833] For courts' exercise of authority to be considered legitimate, many elements are considered essential, such as their independence and impartiality, but also the quality of their reasoning and whether they remain within the remit of their mandate.

The discussion on the legitimacy of courts and their judgments gives rise to the questions as to the content and limitations of the judicial role. As was discussed in Section 8.2.1, these questions can be answered by reference to judicial mandates. Another perspective can be taken as well, namely the perspective of what courts are good at, or at least, what they can be expected to be good at. This perspective emphasises the specific capacities of courts as compared to other decision-making authorities. In this context, several scholars have argued in favour of a certain role for courts. Alexander Bickel, for example, argues that courts should have the power of judicial review, asserting that:

1830 On legitimacy of courts, see e.g., Fallon (2005); Beetham (1991); and Wisotsky (1978), pp. 174–175.

1831 E.g., Valkeapää (2014), p. 21; Suchmann (1995), p. 574; Abel (1980), p. 824; and Meyer and Rowan (1977), p. 350.

1832 For a sociological perspectives, see e.g., Caldeira, Gibson and Baird (1998); Caldeira and Gibson (1995); Tyler (1990), p. 3; Hyde (1983), p. 417; and Weber (1978), pp. 53 and 212–215. For a legal perspective, see e.g., Føllesdal (2013), p. 342ff; Lupu (2013); Voeten (2013); De S.-O.-l'E Lasser (2008), p. 38; and Fisch and Kay (1994).

1833 As expressed by Hamilton (2014), p. 379.

> 'courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating from the most part with a different set of gears. It calls for a habit of mind, and for undeviating institutional customs.'[1834]

Courts may thus be good at something that other public authorities may be less capable of doing. The question then becomes, what are courts good at? Various answers have been provided. Generally, from a democratic theory and a fundamental rights perspective, courts are considered well-placed to check decision-making authorities' compliance with central principles of democracy, to uphold separation of powers requirements, and to ensure the openness of the political process[1835], as well as to protect fundamental rights by providing a counter-majoritarian check in light of the rights of individuals and minorities.[1836] Many of these issues have already been touched upon in the previous chapters and sections.

Another answer can be found in the work of John Hart Ely, who regards courts as experts in matters of process. A process-based review of the political process, in comparison to a straightforward substantive approach[1837], 'involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials'.[1838] Burt Neuborne has equally maintained the view that courts are procedural experts and he has explained the relation with procedural reasoning further. He argues that the assumption that courts should protect and secure procedural standards

> 'is less questionable in the context of process-based review. When judges merely identify those areas in which scrupulous regard for procedural regularity is most appropriate, their functional superiority would not be seriously questioned. The task of identifying the areas of governmental activity that should be held to strict separation of powers standards because they are most vulnerable to majoritarian excess is one for which judges seem admirably suited. Similarly, if the question is which organ should make a decision affecting a fundamental value, rather than what the decision should be, the functional benefits of using judges to resolve disputes would, I think, be widely conceded.'[1839]

Neuborne thus believes courts to be well-placed and trained to enforce regularity standards in matters concerning the separation of powers doctrine.

1834 Bickel (1986), pp. 25–26.
1835 See Section 7.3. See also Barber and Fleming (2007), p. 117.
1836 See Section 8.3.1.
1837 As explained by Ittai Bar-Siman-Tov, Ely did not argue for a pure procedural approach, instead he considered that in cases where a political process was untrustworthy a substantive approach would be legitimate. See Ittai Bar-Siman-Tov (2011), p. 1959.
1838 Ely (1980), p. 88.
1839 Neuborne (1982), pp. 368–369 [emphasis added].

PROEF 3

Similar arguments have been made comparing courts' expertise to that of other decision-making authorities. In the context of US and European courts, several scholars have favoured a procedural approach to the reason-giving requirement for administrative decision-making bodies.[1840] The argument is that these courts 'demand more careful attention to articulation of the reasons for decisions where they are most within the technical expertise of administrators'.[1841] Doing so, courts would remain within their appropriate, procedural domains and show respect for the (relative) expertise of other decision-making authorities on the merits.

Courts have also been considered experts on process in a broader context. In relation to the UK courts, Adam Tomkins has advocated for process-based review precisely because courts are experts on matters of process – including procedural fairness standards:

> 'What is it about process issues (such as the right to a fair trial) or about tightly defined, absolute rights (such as the prohibition on torture) that makes judicial enforcement appropriate, whereas questions of reasonableness or proportionality, in the model defended here, should be reserved for the political process? No doubt a full answer to this question is more complex than I have space for here, but I can at least sketch the beginnings of an answer. That answer is twofold. *Part of it draws on a sense of what judges ought to be good at, given their training, their professional experience, and the modes and forms of argument with which they are most familiar.* … There are reasons to suppose that courts ought to be quite good at process questions, whereas I find it hard to see why courts ought necessarily to be better judges than (say) Parliament of what is acceptable, reasonable, or proportionate policy making. *Judges are experts at process.* They are themselves responsible for ensuring the fairness of the proceedings before them. As former advocates, they will have had decades of experience in dealing with hard and contested questions of procedural fairness. [Secondly, t]he judicial record in this regard, while not perfect, is generally good. … *The norm is that, whether they are thinking about fairness in public inquiries, fairness in local authorities, fairness in the government's consultation processes, or fairness in the court-room itself, judges have manifested considerable talent for being able to rule effectively and persuasively in this area, difficult though it undoubtedly is.*'[1842]

Courts have thus been considered well-placed to assess procedural matters, and, consequently, process-based review is often supported from that perspective. They are considered good at assessing procedural matters because of their legal education, training, and experience.[1843]

These presumptions are also reflected in some of the examples set out in Part I. The CSC's *Baker* judgment may be regarded as an indication that the CSC considered itself

[1840] See e.g., Shapiro (1992), p. 184ff.
[1841] Mashaw (2016), p. 16.
[1842] Tomkins (2010), p. 6 [emphasis added].
[1843] In a similar vein, Vermeule has contended that courts have special qualities to ensure the equality of input and therefore can ensure equality between parties, see Vermeule (2008), p. 86.

PROEF 3

to have the expertise to set out detailed procedural fairness standards concerning executive decisions that affect individual rights.[1844] In particular this required administrative decisions to include a written assurance that they are 'made free from reasonable apprehension of bias by and impartial decision-maker'.[1845] In addition, the European Arrest Warrant cases may illustrate the assumption that courts are able to assess the fairness of trials by other courts. *Mr R* is a case in point, as the GFCC expressed its trust in the regional court's capacity to evaluate applicants' arguments relating to the fairness of the trial by referring the case back to that court.[1846]

B. *Limitations on judicial expertise*

Although many assume that courts have certain specific capabilities that make them good at assessing procedural issues, and therefore at developing procedural standards, this assumption is open to debate. Judicial expertise on matters of process has been questioned. Concerns have been raised especially regarding courts' capacity to review and set standards for the legislative process. Similar concerns have been expressed in relation to administrative and judicial proceedings. Several arguments raised in relation to each of these three procedures are addressed in this section.

Legislative processes | First, concerns have been raised regarding the capacity of courts to assess the quality of legislative processes. The main point here is that because the legislative process is fundamentally different from the judicial process, courts employing a judicial method are not able to properly analyse and assess legislative procedures. For example, parliaments balance rights in an open manner, choose to pursue the objectives that they want to pursue (of course within the bounds of the law), and may consider any suitable option, while judicial decision-making is restricted to the application and interpretation of legal rules and principles and judges may not simply follow their own preferences.[1847] Daniel Oliver-Lalana has argued that courts do not apply a proper method of assessing the quality of legislative procedures:

> 'Operative, working criteria would thus be needed which courts can use to analyse and evaluate the quality of parliamentary deliberation as a process. Concrete theoretical proposals in this respect are, however, few and far between, and those that exist confront at least two difficulties. On the one hand, such criteria cannot be fully detached from the substantive analysis of the arguments advanced by the MPs. On the other, they cannot be confined to legislative sittings, since the justificatory potential of debates is normally

[1844] CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*), paras. 23–27. See Section 3.2.1.
[1845] Ibid, paras. 43–45.
[1846] GFCC 15 December 2015, 2 BvR 2735/14 (*Mr R v. Order of the Oberlandesgericht Düsseldorf*), para. 109. See Section 4.2.3.
[1847] Sieckmann (2016), p. 367.

PROEF 3

> constrained by the rules of speech laid down in standing orders. It may not be possible even in a whole series of debates (on the floor and in the committees of two houses) to examine thoroughly all the potential constitutional implications of a bill. So the analysis and assessment of parliamentary deliberations must be connected with the rest of legislative works and materials, which makes the issue more difficult.'[1848]

The lack of a proper method for analysing legislative processes thus touches on another issue relevant for courts: if they are no experts on parliamentary processes, courts' standard-setting powers in this field must be limited too. Courts' limited capacities as regards legislative processes are particularly worrying in light of the worldwide trend of 'judicialisation', which refers to the increasing influence of courts on legal matters that previously were considered the domain of politics or administration.[1849] In the Latin American context – which is characterised by recurrent episodes of political instability, institutionally weak States and challenges by organised crime[1850]– it has frequently been observed 'that social and political struggles that in the past would have unfolded in the realm of the political branches, or would have been otherwise funnelled through non-State channels, now present themselves as legal struggles'.[1851] This means that claims of social justice are litigated before courts on the basis of social, economic, and cultural rights, and, consequently, the courts have to develop appropriate standards for this. In relation to European constitutional courts, Alec Stone Sweet has considered judicialisation of law-making a phenomenon of courts producing a normative discourse aimed at clarifying the constitutional rules applicable to the legislature.[1852] However, he warns of the consequences of this development: 'governing by judges means governing like judges'.[1853]

Arguably, the standards courts develop through their judgments to deal with these new cases often are judicialised versions of procedural requirements, and, most importantly, they may not always fit the legislative context. In relation to German courts, Klaus Messerschmidt has put the problem as follows:

> 'It is a truism that judicial procedures and techniques do not intend to constitute a framework for legislation but mean to resolve conflicts by way of case-by-case assessment, though spillover effects may occur. Thus, novel procedural review refers to a sort of deliberative rationality beyond judicial expertise. Therefore, a cautious and balanced approach both to procedural and to substantive review is imperative.'[1854]

[1848] Oliver-Lalana (2016), p. 151.
[1849] E.g., Sands (2018); Koopmans (2003), pp. 268–276 (on the growth of judicial power); and Vallinder (1994) and see the other contributions to that special issue.
[1850] Huneeus, Couso, and Sieder (2010), p. 5.
[1851] Ibid, pp. 9–10.
[1852] Stone Sweet (2000), p. 195.
[1853] Ibid, p. 204.
[1854] Messerschmidt (2016b), p. 387.

PROEF 3

Similar arguments have been raised in relation to courts in the UK[1855], the US[1856], and the ECtHR.[1857] Coenen, for example, has noted that many of the procedural rules developed by US courts 'rest on simplistic or contrived notions about the nature of lawmaking processes'.[1858] Courts' lack of expertise on legislative processes may be explained by their limited understanding of the legislative process and their own judicialised perceptions of what procedures should look like. These limitations have served as a basis for rejecting process-based review of the legislative process.

Administrative processes | Limitations of courts' procedural expertise have also been noted in relation to courts' assessment of administrative procedures. Tim Koopmans has emphasised the important role courts have played in defining procedural standards in the administrative context. Yet, he also raises the issue that 'courts can, and do, sometimes take momentous decisions affecting the life of society without having to face up to the human or financial consequences'.[1859] Thus courts may not always foresee that their standard-setting can lead to complex, expensive or time-sensitive procedures, and they may not always be aware of how this influences the allocation of resources and finances within a State. Indeed, the enforcement of individual procedural rights may be at odds with considerations of good administration; for instance, the requirement to provide reasons may lead to an increase in costs and delayed decisions by administrative authorities.[1860] From a similar perspective, when administrative agencies are entrusted with legislative functions, the USSC has warned courts 'against engrafting their own notions of proper procedures upon [such] agencies'.[1861] Were they to act differently, they might go beyond their procedural expertise.

In the UK context, Tomkins has noted that courts have struggled to adapt the rules of natural justice, such as the need for impartiality of decision-makers and the requirement to hear the parties to a case, to the administrative context.[1862] The application of these requirements to a different context is, in his view, extremely difficult in practice and is, moreover, context-dependent. Policy-makers may be elected and can be held accountable and they are therefore not required to be unbiased. According to Tomkins, practical difficulties might arise if they are required to hear the

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1855 Kavanagh (2014), pp. 447–453.

1856 Coenen (2009), p. 2884.

1857 E.g., Leloup (2019), p. 65 ('the question could rightfully be posed if judges – and by extension the Court – actually have the expertise and the necessary knowledge to assess the quality of administrative and legislative decisions. Indeed, the judges at the Strasbourg Court as well as the people in the registry have a background in law, not in sciences. Interpreting technical reports and engaging in methodological disputes is far from self-evident.'); Popelier and Van De Heyning (2017), p. 21; and Huijbers (2017a), p. 197.

1858 Coenen (2009), p. 2884.

1859 Koopmans (2003), p. 271.

1860 Daly (2016a), p. 34.

1861 USSC 3 April 1978, 435 U.S. 519 (*Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc.*), p. 525.

1862 Tomkins (2003), pp. 174–176.

PROEF 3

other party, especially in relation to public inquiries where there are literally hundreds of witnesses.[1863] This raises a problem for courts in enforcing procedural standards:

> 'If they are overly rigid in their insistence on the observation of the rules of natural justice they will stand accused of inappropriately imposing their own trial-based conception of procedural fairness on range of administrative procedures that on a proper analysis require different procedures … On the other hand, however, if the courts are overly flexible in reviewing the compatibility of administrative procedures with the requirements of natural justice, then they risk diluting the protection which the law can afford to the individual.'[1864]

Tomkins' first concern – that courts may impose their own judicial conception of procedural fairness on the executive process – has been expressed in particular in relation to the *Denbigh High School* judgment of the UKCoA.[1865] This case concerned a school's decision to the wearing of a Jilbab by a female student. According to Lord Justice Brooke of the UKCoA, the school's decision-making process should have taken into account the following questions:

> '1) Has the claimant established that she has a relevant Convention right which qualifies for protection under Article 9(1) [the right to freedom of religion and belief]?
> 2) Subject to any justification that is established under Article 9(2), has that Convention right been violated?
> 3) Was the interference with her Convention right prescribed by law in the Convention sense of that expression?
> 4) Did the interference have a legitimate aim?
> 5) What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?
> 6) Was the interference justified under Article 9(2)?'[1866]

This structure matches that of the reasoning courts standardly adopt in fundamental rights cases.[1867] Applying these standards to the case in hand, the UKCoA concluded that the school had not taken its decision in such a manner and therefore found that the school had not complied with the applicable fundamental rights standards.[1868] The UKSC – then the House of Lords – rejected this procedural approach. Lord Hoffmann noted that the decision-making process of executive authorities is significantly different from that of courts, and that we cannot expect head teachers and governors to make

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[1863] Ibid, pp. 174–175.
[1864] Ibid, p. 176.
[1865] The second concern about the reduced protection procedural reasoning may lead to, see Section 8.3.2A-II.
[1866] UKCoA 2 March 2005, [2005] EWCA Civ 199 (*The Queen on the application of SB v. Headteacher and Governors of Denbigh High School*), para. 75. See Section 3.2.5.
[1867] See for the structure of fundamental rights adjudication, Section 6.3.
[1868] UKCoA 2 March 2005, [2005] EWCA Civ 199 (*The Queen on the application of SB v. Headteacher and Governors of Denbigh High School*), paras. 76–78.

PROEF 3

such decisions 'with textbooks on human rights law at their elbows'.[1869] Gareth Davies has also wondered whether the UKCoA should have set out a six-step approach for the school to determine whether they could decide to limit the freedom of religion of their students.[1870] He considered in particular that such an approach would lead to a considerable and perhaps even unwarranted juridification of the policy-making process.[1871]

Another concern raised in relation to process-based review of the administrative process relates to the entanglement of process and substance. The *Baker* judgment can be mentioned in this context, where the CSC set specific procedural fairness requirements for executive decisions affecting fundamental rights.[1872] David Dyzenhaus and Evan Fox-Decent have noted that this shows that Canadian courts regard procedure as their domain and therefore leave substance to the legislative and executive authorities.[1873] Yet, and in line with Tribe's view[1874], such requirements of procedural fairness inherently have a substantive content in that they determine the form and content as well as define procedural fairness standards that may have substantive implications.[1875] For example, '[f]or any procedure to exist, it must assume a particular form, such as submission of written documents, a hearing, or an ongoing consultative process'.[1876] Given the intertwining of procedure and substance it is difficult to uphold the argument that courts are the experts on process par excellence. Indeed, as the CSC acknowledged in *Baker*, administrative agencies may have 'an expertise in determining what procedures are appropriate in the circumstances' and their expertise should be given considerable weight.[1877]

Judicial processes | Courts' expertise on judicial procedures seems more easy to accept than that on administrative procedure. In the US context, for example, Robert Bone has stated that the courts' primary function is, or is limited to, the judicial process. He argues in favour of 'a view of court rulemaking that sees its central function as developing and maintaining a system of rules that reflects the best principled account of procedural practice' and, as such, the judicial process 'is well suited for making general constitutive rules that define the basic framework of a civil procedure system and more detailed rules that control particularly costly forms of strategic behavior'.[1878]

[1869] UKSC 22 March 2006, [2006] UKHL 15, (*R (on the application of Begum) v. Denbigh High School*), para. 68. See Section 3.2.5.
[1870] For this approach, see Davies (2005), pp. 514–515.
[1871] Ibid, p. 516.
[1872] CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*). See Section 3.2.1.
[1873] Dyzenhaus and Fox-Decent (2001), p. 195.
[1874] Section 9.2.1B.
[1875] Dyzenhaus and Fox-Decent (2001), pp. 195–196.
[1876] Ibid, p. 195.
[1877] CSC 9 July 1999, 2. R.C.S. 817 (*Baker v. Canada (Minister of Citizenship and Immigration)*), para. 27. See Section 3.2.1.
[1878] Bone (1999), p. 890.

PROEF 3

Nevertheless, even in relation to judicial processes, courts' expertise has been questioned, especially where it concerns international courts and tribunals that evaluate national judicial proceedings. A first issue concerns the capacity of international courts to set out procedural standards for national judicial decision-making, specifically when they themselves are known for either not upholding such standards in their own proceedings, or doing so only to a minimal degree. Eva Brems and Laurens Lavrysen have indicated that for the ECtHR to be able to promote procedural justice principles, 'it should first consistently pay attention to the requirements of participation, neutrality, respect, and trustworthiness in its own proceedings and judgments'.[1879] Besides several limitations in the institutional setting of the ECtHR doing this – for example, it does not standardly hear the parties to a case[1880] – the authors show that the ECtHR's practice does not always meet with the ideals of procedural justice. If the ECtHR itself does not act as a role model in ensuring procedural justice standards, the question may be raised whether it is in a proper position to impose such standards on national courts. After all, since it has little experience of applying these standards in its own practice, it may not have the practical expertise to cultivate procedural justice standards for other decision-making authorities.

Moreover, international courts deal with a large variety of legal systems and legal cultures, each with their own specific judicial procedures, systems, and traditions. Against this background, the ECtHR' capacity to assess the decision-making process of national courts has been questioned. In *Von Hannover (No. 2)* the ECtHR noted the requirement for national courts to carry out a balancing exercise in line with the Convention and the ECtHR's case-law.[1881] It then turned to a thorough assessment of the judgments of the German courts and concluded that these courts had fulfilled the balancing exercise requirement.[1882] The explicit and argumentative style of reasoning of the German courts seems to have been an important element for the ECtHR in reaching this conclusion. However, not all courts provide for such detailed reasoning and their way of balancing interests may not always be visible in the final judgment. As Mitchel de S.-O.-l'E. Lasser has explained, for example, the French judicial model 'generates major judicial debate and deliberation', yet it 'occurs overwhelmingly … *within* the French judicial institutions and is thus protected from general public view'.[1883] The judgments of the French courts may thus not be very helpful for the ECtHR in ascertaining whether they have complied with the balancing exercise requirement.[1884] In order for a

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1879 Brems and Lavrysen (2013), p. 186.

1880 See also Leloup (2019), p. 65.

1881 ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*), para. 107. See Section 4.2.7.

1882 Ibid, paras. 114–126.

1883 De S.-O.-l'E. Lasser (2004), pp. 324 [emphasis added], see also pp. 47–60.

1884 Although this does not mean that the conclusions of the ECtHR in *Winterstein* in relation to the French judicial process was flawed. In that judgment the ECtHR found fault with the fact that the French courts had not carried out a balancing exercise, instead once the French courts had concluded that the settlement of Roma families on a location were illegal, they approved the request for eviction. Indeed, in such a scenario it seems that there were no debates between the judiciaries, but it was

PROEF 3

procedural approach in the context of national courts to be feasible then, it is necessary for the ECtHR to be aware of the particular legal context within which national courts function.[1885] Otherwise, the ECtHR's expertise to review the national courts procedures cannot be guaranteed.

Another example is the CESCR's position in the *I.D.G.* case.[1886] In the CESCR's view the judicial remedies available under Spanish law were ill-suited to protect the right to housing. The case concerned mortgage foreclosure proceedings and the CESCR considered it essential that judicial remedies against such proceedings 'permit suspensions of the enforcement process and of the auction of the property, since otherwise, … the person would not be able to stop the sale of their home'.[1887] This decision was criticised for the CESCR's lack of understanding of the Spanish judicial system. Juan Carlos Benito Sánchez notes that the CESCR overlooked another judicial avenue available to the individual concerned, that is, the potential for nullity together with the amparo procedure.[1888] A combination of these procedures would have allowed the applicant to raise a fundamental rights claim at the SCC and, arguably, given SCC precedents, this claim would have had a fair chance of success.[1889] International courts and treaty bodies may thus lack the expertise on the procedural situation in the State concerned, which can lead to questionable conclusions in their judgments and decisions.

C. *Résumé*

According to Ely, courts are experts on matters of process and are, therefore, particularly capable of process-based review. Judges are considered experts on matters of process because of their training and experience, but also because of courts' institutional position in the legal system. At the same time, their special procedural expertise has been questioned and sometimes rejected by scholars. It has been argued to the contrary that courts' lack of expertise means they should not assess legislative, administrative, and judicial processes from a procedural perspective and they should refrain from developing procedural standards. These arguments focus in particular on the differences between judicial procedures and the processes under review. It is argued that courts

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merely dealt with as a formal matter. See ECtHR 17 October 2013, app. no. 27013/07 (*Winterstein v. France*), paras. 155–156. See Section 4.2.7.

1885 I have made a similar argument in a case note, see Huijbers (2018d), paras. 12–13 in relation to case ECtHR 19 December 2017, app. nos. 60087/10, 12461/11 and 48219/11 (*Ögrü and Others v. Turkey*). In this case the ECtHR found a violation of Article 11 ECHR due to a failure of the Turkish courts to carry out a balancing exercise. In its assessment the ECtHR explicitly referred to a judgment in which a Turkish court carried out a balancing exercise in line with the case-law of the ECtHR (see para. 69 of the judgment). I contended that this is a good strategy for the ECtHR as it shows *that* and *how* Turkish courts could balance fundamental rights in their own legal context.

1886 CESCR 1–19 June 2015, 2/2014 (*I.D.G. v. Spain*). See Section 4.2.5.

1887 Ibid, para. 13.6.

1888 Benito Sánchez (2016), p. 137. For a brief explanation on what amparo proceedings are, see Section 4.2.1.

1889 Ibid, p. 338.

PROEF 3

do not to have a proper understanding of the legislative process or a proper method of assessing such parliamentary debates. Procedural assessments of executive decisions, in turn, may result in unworkable or very costly and time-consuming procedures, and international courts' assessment of national courts procedures may be based on misunderstandings of the specific procedural context. Some scholars have gone further and argued that courts are not always experts on judicial process either, in particular if it concerns supranational or international assessment of national judicial processes. Given the difficulties for courts in comprehending other authorities' decision-making processes, procedural standard-setting becomes problematic as well. In particular, there are concerns that such standards lead to judicialised versions of procedural requirements that are ill-suited for other contexts. In sum, courts' expertise on process matters is not a given, and, consequently, their use of process-based review is open to debate.

9.3.2 EPISTEMIC UNCERTAINTIES AND DECISION-MAKING PROCEDURES

Decision-making is always performed with a certain level of uncertainty. The effects of a decision may be unknown (aleatory uncertainty) or there can be a lack of knowledge concerning a fact that forms the basis for a decision (epistemic uncertainty).[1890] This latter form of uncertainty is addressed in this section, as some consider procedural reasoning to be a means for courts to deal with such epistemic uncertainties. The section opens with a brief description of 'epistemic uncertainty' and how this may necessitate courts engaging in empirical reasoning (Section A). It then turns to concerns about empirical reasoning by courts, in particular, the various proposals by scholars to deal with such concerns (Section B). As is explained in Section C, a procedural approach has been considered an indication of epistemic deference by courts to avoid their engaging in empirical reasoning. Such procedural reasoning is also part of a broader trend of evidence-based decision-making, which requires transparent, science-based, and data-driven decisions (Section D). Again, process-based review is not considered to be a magical solution and various concerns have been expressed concerning its use (Section E). The section concludes with a brief summary (Section F).

A. *Epistemic uncertainties and empirical reasoning*

The presence of 'epistemic uncertainties' in adjudication means that, in assessing the reasonableness of decisions and norms, judges will have to assess evidence that can only prove to a certain degree of probability or plausibility that a situation would occur, that there is a causality between two occurrences, or that certain policies or regulatory

[1890] Aleatory and epistemic uncertainty are generally distinguished in social sciences, see Hester (2012), p. 2. For a discussion of uncertainty in relation to the compliance with international courts' judgments, see Dyevre (2019).

PROEF 3

measures would be effective. In regard to the latter, the point of reference for courts to determine the effectiveness of a measure is relevant.[1891] *Ex tunc* review means that courts rely on the information available at the moment at which the measure was designed. By contrast, *ex nunc* review allows courts to take account of the facts and data available at the date of the judgment, which often provides more insight into the actual effectiveness of a measure.[1892] However, even when *ex nunc* review is conducted, epistemic uncertainties may remain. In *Urgenda*, for example, the CoATH included new scientific evidence in its reasoning, yet it still noted that 'full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking'.[1893] Regardless of the moment of reference, therefore, courts deal with epistemic uncertainty. According to Adrian Vermeule, this entails 'judges' lack of information (whether or not that information is actually available)', as well as their '*bounded rationality*[, which] includes limits on the information-processing capacity of otherwise rational agents' and the fact that they can fall prey to 'cognitive failings, including the use of heuristics that misfire in particular cases, producing cognitive biases'.[1894]

The law generally provides legal rules on evidence that courts may take into account and on how courts may determine 'legal facts'.[1895] If epistemic uncertainties are a fact of judicial life, the courts' task may not be limited to moral or legal reasoning alone, but may also require empirical reasoning. Yowell notes, '[i]n cases involving a rights-based challenge to the constitutionality of legislation, courts regularly assess the results of research in economics, psychology, sociology, medicine, and other fields, especially when assessing the strength of the state's interests in legislation but also for other aspects of the proportionality tests'.[1896] Various fundamental rights cases in which courts were faced with epistemic uncertainties and in which they turned to empirical reasoning can be mentioned. For example, to establish the possible discriminatory effects of algorithms underlying automatic decision-making by public authorities, courts may turn to statistical information on these algorithms.[1897] To deal with

[1891] Gerards (2013a), pp. 476–478.

[1892] Such may be said to be more protective of fundamental rights, see Ismer and Von Hesler (2016), p. 282; Gerards (2013a), p. 476; and Linde (1975), p. 215–219, who argued that courts should limit their review to *ex tunc* review.

[1893] CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*), para. 63. See Section 3.2.4.

[1894] Vermeule (2006), p. 155.

[1895] E.g., Wilson (2007), p. 363. Depending on one's position in the scientific realism and scientific scepticism debate we can either know the reality outside us or we cannot. A scientific realist position takes the view that: 'the world exists in particular ways and science more or less – or with greater or lesser precision – endeavors to describe that world. But science is a human enterprise and a community effort. The real truth, therefore, might be known only rarely, but its existence largely makes the scientific effort worthwhile.', see Faigman (2008), p. 23–24. In constitutional scholarship and fundamental rights literature, a scientific realist position is generally taken to explain that public authorities, including courts, can increase their knowledge about the world or effects of decision-making through reliance on scientific studies, see Faigman (2008), Chapter 2.

[1896] Yowell (2018), p. 35.

[1897] Vetzo, Gerards, and Nehmelman (2018), pp. 139–146]. More generally it is argued that social sciences play an important role in cases concerning indirect discrimination, as it is necessary to indicate the consequences of a potentially discriminating measure, see Petersen (2013), pp. 298 and 300–302.

PROEF 3

uncertainty about the (in)effectiveness of policies to improve the standard of living in designated areas, courts may rely on scientific studies.[1898] And to establish to a certain degree of probability that there is causality between a person's illness and unhealthy working conditions, courts can resort to statistical evidence and medical reports.[1899] Epistemic uncertainty is therefore also a reality in fundamental rights adjudication.

B. Courts and empirical reasoning

It has been argued that courts are increasingly required to engage in empirical reasoning. For example, in strategic climate litigation, parties often rely on science-based evidence.[1900] In this context, the only way for parties to provide sufficient evidence of the need for urgent action seems to be reliance on scientific studies.[1901] After all, the impact of climate change is not yet (fully) known.[1902] The *Urgenda* case provides a good illustration of this since, in their judgments, both the DCTH and the CoATH engaged in an assessment of scientific evidence and thus turned to empirical reasoning.[1903] Furthermore, the accessibility of scientific research and the increasingly interdisciplinary approaches to scientific studies, including issues of law, enable parties in court proceedings to include empirical data and scientific studies in their pleadings. Courts may therefore not only have access to all sorts of non-legal information, but they are also expected to rely on it in their reasoning.[1904]

Some scholars have advocated empirical reasoning in adjudication. Judge Richard Posner has stated that 'one thing that we may hope for through the application of the methods of scientific theory and empirical inquiry to constitutional law is the eventual accumulation of enough knowledge to enable judges at least to deal sensibly with their uncertainty about the consequences of their decisions'.[1905] Similarly, Niels Petersen has argued that constitutional review relies on assumptions that require backing by social sciences and so empirical reasoning should be included to provide support to

[1898] E.g., ECtHR (GC) 6 November 2017, app. no. 43494/09, (*Garib v. Netherlands*), paras. 50–76 (on the reports), paras. 123 and 132 (on the submission of the applicant), and 145–149 (on the view of the Grand Chamber of the ECtHR). Although in the judgment the ECtHR did not decide on this matter, for it fell outside the temporary scope of the judgment, the Grand Chamber did indicate that there were controversies to the effectiveness of the policy as was demonstrated by various scientific evaluation reports, see in particular para. 148.

[1899] E.g., AHC 3 March 2010, [2010] HCA 5 (*Amaca Ltd. v. Ellis*). For a discussion, see Bitas (2011).

[1900] On climate litigation, see e.g., Leijten (2019), pp. 2–3 and Lambooy and Palm (2016). On the increase of strategic litigation, see Duffy (2018), pp. 9–22.

[1901] See in this regard also Flückiger (2016).

[1902] E.g., CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*), para. 53 ('full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking'). See Section 3.2.4. See also Klatt and Moritz (2012), p. 114.

[1903] CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*) and DCTH 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.

[1904] E.g., Mak (2012), p. 310ff.

[1905] Posner (1998), p. 22.

PROEF 3

constitutional adjudication.[1906] Indeed, it has been argued that courts can be assisted in assessing complex issues by reports of independent experts, via hearings, and through information submitted in amicus curiae letters.[1907]

There is an ongoing debate, however, on whether courts are sufficiently skilled in gathering and interpreting empirical evidence, and whether they have the capacity to apply empirical reasoning well. As noted by Vermeule, as rational agents, judges 'have limited capacity to understand and use even the information they have'.[1908] Petersen has acknowledged that courts are 'not trained in empirical research, [and] they may not be aware of its potential pitfalls'.[1909] Yowell has gone even further by contending that constitutional courts are ill-suited for empirical reasoning due to their lack of experience both in interpreting empirical evidence and in carrying out empirical research themselves[1910]:

> 'In order to understand even basic findings in numbers-driven social sciences, one must have some knowledge of statistics. More complex social science may require a higher level of statistical competence as well as acquaintance with specialised techniques and terminology native to economics, psychology, or other relevant fields…
>
> [Consequently,] Judges who approach social science with little or no training in statistics wander into a minefield.'[1911]

Yowell supports his view with references to various examples of flawed empirical reasoning in judgments, including courts' reliance on Wikipedia sources and their misunderstanding of social scientific studies and expert reports.[1912] Even though he recognises that certain courts may be better suited for empirical reasoning than others, in his view, they are still lacking certain important qualities for properly doing so in comparison to legislative authorities.[1913]

Dworkin also considers that courts lack the capacity to interpret statistical information and carry out social scientific research. He argues that they should focus on normative reasoning in fundamental rights adjudication (see Section 9.2.2B): 'Controversial causal judgments based on statistical theory lie outside the normal competence of courts, because these judgments are anchored in models that contain arbitrary and transient elements'.[1914] In Dworkin's view, empirical judicial reasoning is arbitrary in the sense that a subjective choice is made about the elements between which a correlation is sought and it is transient in the sense that data may change very quickly.[1915] In a similar vein, Jeanrique Fahner argues that when courts decide in cases of scientific

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1906 Petersen (2013), p. 306.
1907 This argument has also been put forward in the Indian context, see Dhital and Satpute (2014), p. 173.
1908 Vermeule (2006), p. 155.
1909 Petersen (2013), p. 306.
1910 Yowell (2018), pp. 65–72.
1911 Ibid, pp. 70 and 72.
1912 Ibid, pp. 65–72, and for the case studies, see pp. 73–87.
1913 Ibid, pp. 4 and 152–154.
1914 Dworkin (1977), p. 11.
1915 Ibid, pp. 5–6.

PROEF 3

uncertainty, that is, in relation to matters on which experts disagree, their decision 'still produce an epistemically arbitrary result'.[1916] From a psychological perspective too, concerns have been expressed about courts falling victim to cognitive illusions (anchoring, framing, hindsight bias, representativeness heuristic, and egocentric biases), which may distort the manner in which they assess empirical evidence.[1917] The structure of judicial procedure, which is argumentative in nature, is another reason why courts may be ill-equipped to assess the quality of empirical evidence.[1918]

The (alleged) lack of expertise of courts in employing empirical reasoning does not change the fact that courts have to deal with cases of epistemic uncertainty. The dilemma is, in Vermeule's words: 'Where choice is inescapable, but empirical uncertainty is irresolvable and information-processing capacity is limited, what are judges to do?'[1919] This question has been answered in various ways. According to Richard Posner, an interdisciplinary approach to the law is needed, requiring lawyers to collaborate with economists and social scientists in order to overcome empirical uncertainties in fundamental rights adjudication.[1920] He considers the lack of empirical support in certain judgments of the USSC to be the fault, at least partially, of 'constitutional theory, which claims to offer the courts a data-free method of deciding cases, rather than helping the discovery and analysis of the relevant data'.[1921] Yowell, too, has remarked that *if* courts are to carry out evidence-based inquiries in their decision-making, their capacities should be upgraded to match this challenge.[1922] His suggestion is to support judges with a research service or department.

Other solutions for dealing with the empirical challenge have been sought in the way in which courts employ empirical reasoning. Vermeule has discussed a range of judicial techniques in this regard, including 'allocating burdens of proof, cost-benefit analysis, the principle of insufficient reason, maximin, satisficing, picking or nondeliberative choice, fast and frugal heuristics'.[1923] Solutions for epistemic uncertainty have also been sought in the way courts apply proportionality tests, with Robert Alexy including it in the weight formula that is used to rationalise balancing review.[1924]

In practice, process-based review is used as another way forward.[1925] Indeed, the various judgments discussed in Part I of this book indicate that procedural reasoning

[1916] Fahner (2018), p. 198.
[1917] E.g., Derksen (2016) and Guthrie, Rachlinski, and Wistrich (2001).
[1918] Mak (2012), p. 318.
[1919] Vermeule (2006), p. 149.
[1920] Posner (1998), p. 18. On a different yet related note, Mak has argued that interdisciplinary education of law students is relevant to ensure that future lawyers (and thus also future judges) are ready for the challenges modern society pose, see Mak (2017), p. 18ff.
[1921] Posner (1998), p. 18.
[1922] Yowell (2018), pp. 152–154.
[1923] Vermeule (2006), pp. 150 and 168–180.
[1924] Alexy (2017b), pp. 37–38 and Klatt and Meister (2012), Chapter 6.
[1925] See also Petersen (2013), pp. 314–315.

PROEF 3

has been at least a (modest) element of cases relating to empirical uncertainties. In *Urgenda*, the CoATH relied on the absence of evidence-based reasoning to criticise the policy change of the Dutch government concerning the lowering of the reduction target of greenhouse gasses[1926]; in *Carter*, the CSC and lower courts relied on extensive and detailed, expert reports and testimonies in order to decide on the blanket ban on assisted suicide[1927]; and in *Hartz IV*, the GFCC considered that it was imperative for the legislature to take a statistical-based decision-making approach for determining the level of the subsistence minimum.[1928] In all these cases epistemic uncertainties played a role in one way or another, and these four judgements indicate that courts may take a procedural approach, at least partially, in such cases to deal with the challenges posed.

C. Process-based review as epistemic avoidance strategy

It is possible to discern at least two types of arguments in the literature in support of a procedural approach in fundamental rights cases involving empirical uncertainties. On the one hand, as is discussed in this section, the claim is that courts themselves may rely on procedural reasoning to avoid having to deal with these empirical uncertainties. This concerns an empirical avoidance strategy (the use of procedural reasoning as an avoidance strategy has been explained in Section 6.3.5A-II). On the other hand, process-based review may be part of a broader project of evidence-based decision-making and it has been argued that it may help to promote the underlying values. This account is addressed in the next section (Section 9.3.2D).

To understand the role of procedural reasoning as an avoidance strategy it is necessary to first look into the broader idea of epistemic deference. If one accepts that courts are ill-equipped to employ empirical reasoning, and if one acknowledges that courts are inevitably faced with epistemic uncertainties when deciding fundamental rights cases, the question arises 'whether, by reason of its particular institutional features, a court is the most capable institution to weigh up the available choices'.[1929] In the literature, it has been argued that courts should show epistemic deference towards other decision-making authorities that are (allegedly) better capable of empirical reasoning than courts are.

Epistemic deference is based on 'the assumption that the question at issue has a right answer as a matter of empirical truth, but that … [a] court or tribunal is not well qualified to find that answer'.[1930] Courts may show such epistemic deference towards different authorities. First, they may grant a margin of discretion to the decision-making authority to evaluate empirical data, and, secondly, they may rely on expert witnesses'

[1926] CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.
[1927] CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*). See Section 4.2.4.
[1928] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.
[1929] Sathanapally (2017), p. 50.
[1930] Fahner (2018), p. 194.

PROEF 3

assessment of empirical information.[1931] The deference courts show in relation to public authorities may be absolute or partial.[1932] Absolute deference entails a complete deferral of empirical reasoning to other authorities, on their basis of institutional capacities, and leads to a decline of courts' own involvement. From the perspective of fundamental rights protection, absolute withdrawal of judicial review may raise serious questions and may be considered an abdication of the judicial function.[1933]

Partial epistemic deference, by contrast, means that empirical reasoning of another decision-making authority is considered persuasive without precluding courts' own assessment of the empirical evidence. Procedural reasoning may have the aim of showing partial deference without completely surrendering judicial oversight. In Sathanapally's words, it may provide a way for courts to determine whether public authorities have made use of their institutional capacities for reasoning, which would justify a deferential stance by courts.[1934] Although the discussion of judicial restraint in previous sections concerned institutional deference (Section 7.4)[1935] normative deference (Section 9.2.2C), similar arguments have been advanced from the perspective of empirical deference.

Legislature's capacities | In terms of the legislature's capacity for empirical reasoning, legislative authorities may be in a relatively better position than courts are to apply empirical reasoning and deal with empirical uncertainty. Vermeule has noted that 'legislators are connected to constituents and thus have better information about the factual components and causal consequences of their constitutional decisions than do judges'.[1936] Yowell has considered that legislatures have access to a wide range of information beyond individual cases, they are better equipped to gather and assess this information from various perspectives as a result of the diversity of backgrounds, education and professional expertise of its employees, and they tend to gather and rely on information provided by citizens, interest groups, researchers and experts.[1937] At the same time, Yowell acknowledges that legislatures may not always use their capacities to the fullest extent:

> 'Legislatures may not always fully develop fact-finding resources or use them wisely, and, like any other political process, an empirical investigation is subject to misuse or corruption. Nonetheless, legislatures in general have institutional structures and decision-making processes that facilitate broad empirical investigation.'[1938]

[1931] Petersen (2013), p. 306.
[1932] Kavanagh (2010a), pp. 223–226 and Kavanagh (2008), p. 186.
[1933] See Section 7.4.
[1934] Sathanapally (2017), p. 55. For the discussion of decision-making authorities 'earning' deference, including a quote of Sathanapally, see Section 8.3.1B-II.
[1935] See in this regard Fahner (2018), p. 194.
[1936] Vermeule (2008), p. 86.
[1937] Yowell (2018), pp. 98–104.
[1938] Ibid, p. 64.

PROEF 3

And Vermeule further considered:

> 'There is, of course, a price to be paid for legislators' superior information, in that the need to secure re-election can cause a distortion of legislators' true views… The main tradeoff, then is, between bias and information. Judicial procedures are designed to ensure equality of inputs, a form of evenhandedness… Moreover, the lack of any electoral connection on the part of judges gives them a remoteness from current politics and thus a kind of impartiality. The price of this evendhandedness and remoteness, however, is a relative dearth of facts and tacit knowledge.'[1939]

Legislative authorities may well be in a better position to gather all sorts of information and to evaluate empirical data, but they may not always use that capacity to the best of their abilities.[1940] This can have serious implications for the protection of individual rights. As Vermeule notes, '[t]he fairest conclusion is that legislators acquire more information, but process and use it in a more biased fashion at an individual level'.[1941]

In line with Sathanapally's view, procedural reasoning has been regarded as a way for courts to ascertain whether legislative authorities have used their capacities to the best of their abilities, which would warrant epistemic deference. Messerschmidt has argued, for example, that the GFCC can provide a rights check through procedural reasoning, while acknowledging and respecting the legislature's capacities. Via process-based review, the GFCC can demonstrate that it does not want to take over the role of the legislature to evaluate facts and balance competing interests.[1942] Indeed, 'the Court should refrain from evaluating the legislative facts on his own or even with the help of experts', not just because 'it is ill-prepared for this kind of job, [but] it must [also] be cautious not to act as a legislator'.[1943] However, by acting as a check on the legislative process, the GFCC can ascertain whether deference is actually warranted.

The GFCC's *Hartz IV* judgment provides an example of procedural reasoning in relation to the legislative authorities' empirical reasoning.[1944] The GFCC considered that the legislature had discretion as regards the exact scope and ways of providing a subsistence minimum, but that it was the task of the GFCC to review the decision-making procedure. It held that 'to ensure the traceability of the extent of the statutory assistance as commensurate with the significance of the fundamental right, as well as to ensure the review of the benefits by the courts, the assessment of the benefits must be clearly justifiable on the basis of reliable figures and plausible methods of calculation'.[1945] On finding that the legislature had made a random estimate in its legislative process, it concluded that the legislature had failed to base the level of

[1939] Vermeule (2008), p. 86.
[1940] See also Messerschmidt (2012), pp. 373–378.
[1941] Vermeule (2008), p. 87.
[1942] Messerschmidt (2016b), p. 388.
[1943] Ibid.
[1944] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*). See Section 2.2.4.
[1945] Ibid, para. 142.

PROEF 3

subsistence minimum on empirical evidence[1946] and for that reason, it declared the legislation unconstitutional.[1947] In *Bayev*, the ECtHR also seemed to emphasise the importance of evidence-based reasoning in the legislative process.[1948] That is, where it concerns controversial legislation – in this case the prohibition of 'gay propaganda' aimed at minors – legislative authorities should be able to explain how the measure was suitable to serve the legitimate aim, and preferably provide 'science-based evidence'.[1949]

Executive's capacities | In relation to judicial review of administrative decisions, the institutional capacity of executive authorities to provide for an adequate empirical basis for decision-making is generally accepted. As Faigman notes,

> '[i]n deciding case-specific facts, [administrative agencies] are generally not bridled by rules of evidence and have all of the structural advantages that arguably attend to observing witnesses firsthand. In deciding reviewable facts, administrative agencies have specialized technical expertise that legislatures lack. Hence, if there is any institutional context that would appear to call for judicial deference, it would be the administrative agency.'[1950]

Although executive authorities have certain capacities that may mean they are better placed than courts to decide on fact finding, for Faigman this does not mean that absolute deference is necessarily warranted.[1951] Instead some judicial oversight is defensible. According to Elaine Mak, the shift of legislative powers to the executive branch in the second half of the twentieth century has in fact resulted in courts identifying principles of good governance and more recently also in courts engaging with instruments intended to achieve rational decision-making, both as to the content and process.[1952] Jerry Mashaw has also argued that executive authorities' '"[e]xpertise" is no longer a protective shield to be worn like a sacred vestment', instead, '[i]t is a capacity to be demonstrated by persuasive reason giving'.[1953] Process-based review of administrative acts may thus be regarded as indicative of deference, while at the same time allowing for judicial oversight.

Courts themselves seem to accept their competence to examine the quality of the process of empirical reasoning by administrative bodies. A case in point is the judgment in the '*Tunisian case*' of the DSC.[1954] In that judgment the DSC required the relevant decision-making authority to substantiate its claim that an individual posed a threat to society, which would justify his detention prior to his expulsion from Denmark.

1946 Ibid, para. 175.
1947 Ibid, para. 173.
1948 ECtHR 20 June 2017, app. nos. 67667/09 et al. (*Bayev and Others v. Russia*). See Section 2.2.8.
1949 Ibid, para. 78.
1950 Faigman (2008), p. 134.
1951 In fact, Faigman seems to argue for quite intense review of administrative acts, see Faigman (2008), p. 137.
1952 Mak (2012), pp. 309–310.
1953 Mashaw (2016), p. 19.
1954 DSC 28 July 2008, no. 157/2008, U2008.2394H ('*Tunisian case*'). See Section 3.2.3.

PROEF 3

The DSC considered in particular 'that a review of the lawfulness of the deprivation of liberty must include a certain review of the factual basis of the decision to regard the alien as a danger to national security'.[1955] Its aim in this judgment was not to gather evidence as to whether the alien should be detained nor really to assess the detention on the substance. Instead, its goal was merely to ascertain that evidence was properly adduced by decision-making authorities in order to allow for a reasonable decision to be taken. *Hatton* also provides an illustration of deference to empirical reasoning by administrative authorities.[1956] In this judgment, the ECtHR concluded that the UK authorities had a wide margin of appreciation in determining the policy for night flights over London Heathrow airport. It considered nonetheless '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 [the UK authorities] to strike a fair balance between the various conflicting interests at stake'.[1957] Clearly, the ECtHR required empirical evidence to form the basis for the contested decisions. However, it did not mean to gather this evidence itself, nor did it intend to review it, but it deferred to the UK authorities' empirical reasoning. In other words, it limited its review to the quality of the decision-making procedure noting that the authorities had consistently monitored the situation and that each five-year scheme was preceded by various investigations and studies that were carried out over a longer period of time.[1958]

Lower judiciaries' capacities | Advantages of process-based review in relation to empirical uncertainties are further highlighted in cases in which courts defer to other courts' empirical reasoning. This is true in particular for the relationship between lower courts and constitutional courts, since the institutional capacities of lower courts often place them in a better position to gather and assess evidence, including for collecting and evaluating empirical proof, than higher courts.[1959] In relation to the US, Faigman notes that '[o]ne of the inveterate principles of modern evidence law is that appellate courts owe deference to the fact-finding of lower courts because triers of facts have the opportunity to observe witnesses and thereby evaluate the credibility of their testimony'.[1960] In the international arena, similar arguments can be found. Matthieu Leloup has considered that process-based review may be a useful strategy for the ECtHR in light of its limited capacities to hold hearings and to adduce evidence.[1961] He made this point in relation to case-law on the deportation of children, where the right for these children to be heard

1955 Ibid, [emphasis added].
1956 ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*). See Section 3.2.6.
1957 Ibid, para. 128.
1958 Ibid.
1959 Yowell (2018), p. 152. He noted that it depends on the institutional settings of a court whether it has the capacity of engaging with experts and of receiving new evidence. While generally lower courts are designed to do so, Yowell also mentions that the GFCC has the capacity to interact directly with experts.
1960 Faigman (2008), p. 125.
1961 Leloup (2019), p. 65.

PROEF 3

is a central feature.[1962] Because of its institutional setting, the ECtHR very rarely holds hearings in its cases and in fact it never hears children.[1963] Through process-based review, the ECtHR can at least ascertain whether the national authorities did hear the child, and so can still enforce the right of children to be heard.[1964]

The *Carter* judgment on the right to medically assisted suicide provides another example of this deferential procedural approach. The lower Canadian court had made a great effort to gather information from medical doctors, scientists, and ethics, as well as carrying out a comparative analysis of States within which medically assisted suicide is legal.[1965] The evidence included a total of 100 affidavits and thirty-six binders of written submissions.[1966] In a judgment of well over 300 pages, the lower court concluded that the prohibition on medically assisted suicide was contrary to the constitutional right to life, liberty, and security of the person.[1967] After the Court of Appeal had overturned this judgment, the CSC had to decide on the issue. In reviewing the decision of the lower court, the CSC took a deferential stance[1968], not just to the evidence gathered by it, but also to its analysis of the evidence. In fact, it seems to defer the assessment of the evidence almost entirely to the lower court.

> 'In *Bedford*, this Court affirmed that a trial judge's findings on social and legislative facts are entitled to the same degree of deference as any other factual findings … In our view, Canada has not established that the trial judge's conclusion on this point is unsupported, arbitrary, insufficiently precise or otherwise in error. At most, Canada's criticisms amount to "pointing out conflicting evidence", which is not sufficient to establish a palpable and overriding error … We see no reason to reject the conclusions drawn by the trial judge. They were reasonable and open to her on the record.'[1969]

This epistemic deference towards the trial judge can be further illustrated by a reference to the CSC's discussion of the slippery slope arguments the Canadian government had presented.[1970] At different parts of their analysis, the CSC judges held that they 'accept[ed] the trial judge's conclusion'[1971], 'agree[d] with the trial judge'[1972], and,

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1962 In accordance with Article 12(2) International Convention on the Rights of the Child and the explanation of this right in UN Committee of Children's Rights, CRC/C/GC/12, General Comment No. 2, *The Right of the Child to be Heard* (20 July 2009).

1963 Smyth (2015), p. 91.

1964 Leloup referred to the judgment *M. and M.* as an example of this, see ECtHR 3 September 2015, app. no. 10161/13 (*M. and M. v. Croatia*), paras. 167–189. See Leloup (2019), p. 65, footnote 140.

1965 SCBC 15 June 2012, 2012 BCSC 886 (*Lee Carter v. Canada (Attorney General)*), Sections V-VIII. See also CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*), para. 104. See Section 4.2.4.

1966 Yowell (2018), p. 13.

1967 SCBC 15 June 2012, 2012 BCSC 886 (*Lee Carter v. Canada (Attorney General)*), para. 18.

1968 CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*), para. 103.

1969 Ibid, para. 109.

1970 This argument relates to the idea that by accepting assisted suicide by medical interference, this would give rise to the risk that Canada will descend into practices of euthanasia and condoned murder, see ibid, para. 120.

1971 Ibid, para. 116.

1972 Ibid, para. 117.

PROEF 3

finally, found 'no error in the trial judge's analysis of minimal impairment'.[1973] The CSC thus seems to have been content with the extensive gathering and exhaustive review of the evidence by the trial judge, and almost completely deferred to her findings without reviewing the evidence itself or gathering new information.[1974] For these reasons, it may be said that the CSC avoided empirical reasoning.

D. *Evidence-based decision-making and procedural reasoning*

Since the start of this century, attention has increasingly been paid to rational, open, transparent, and informed decision-making by public authorities. This development has been dubbed an 'evidence-based trend'. Various scholars have emphasised the developments in Europe, both at the regional and national level, which are aimed at improving legal, political, and policy decision-making by including information stemming from (scientific) research.[1975] In particular, they mention the efforts of the European Commission in developing EU Better Regulation and Smart Regulation Programmes.[1976] They also point to the efforts to improve the quality of legislative decision-making by the Organisation for Economic Co-operation and Development (OECD), an organisation with thirty-six Member States from all across the world.[1977] In the US, the delegation of regulatory powers to external agents and the resulting loss of democratic control has been a reason for compensation through consultation and impact assessment requirements and judicial review.[1978] In Latin and Central America too, where evidence-based decision-making is not yet fully developed[1979], various examples can be mentioned in which policy-makers have relied on biomedical research in improving health care policies.[1980]

Scholars have linked the development of such evidence-based decision-making and regulation to developments in judicial review.[1981] Popelier has noted that 'courts

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1973 Ibid, para. 121.

1974 Yowell criticises the CSC for this deferential stance, see Yowell (2018), pp. 18–19.

1975 See e.g., Popelier (2017); Kartner and Meuwese (2017); Bar-Siman-Tov (2016); Flückiger (2016); Van Gestel and De Poorter (2016); and Alemanno (2013).

1976 For an overview and explanation of these Regulations, see European Union, European Commission, 'Better Regulation: Why and How' <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en>.

1977 Organisation for Economic Co-operation and Development (2012), 'Recommendation of the Council on Regulatory Policy and Governance' <https://www.oecd.org/governance/regulatory-policy/49990817.pdf>.

1978 As mentioned by Popelier (2013a), p. 263; see also Popelier (2017), p. 79.

1979 It should be noted, however, that there are large differences between states as to whether and to what extent they have turned to evidence-based decision-making. Not all states have been susceptible to this development, see e.g., Popelier (2015). For example, there is no real trend towards evidence-based decision-making in Argentina as a result of various contextual settings, including strict limitations of judicial powers and economic crises, see Carrillo and Cordeiro (2016), 250ff. Nor is there such a trend in Belgium, see Popelier and De Jaegere (2016).

1980 Rabadán-Diehl (2017).

1981 Bar-Siman-Tov considered that the review of evidence-based decision-making is part of a broader trend of procedural reasoning, see Bar-Siman-Tov (2016) and see also Alemanno (2013). Yet, not all states and courts are susceptible to this evidence-based trend, see n(1979).

PROEF 3

[are] sometimes given an explicit mandate to review procedural safeguards [of evidence-based decision-making]' and '[m]oreover, efficiency and efficacy standards underpinning regulatory reform programs converge with the criteria operationalizing the legal proportionality principle'.[1982] Process-based review of empirical reasoning by public authorities may also have its roots elsewhere, for example, it has been suggested that procedural evidence-based review has its origins in the proportionality analysis and even in the principles of equality and non-discrimination.[1983] The relationship between procedural reasoning and the evidence-based trend has given rise to new arguments in favour of process-based review. In particular, it is argued that procedural reasoning promotes and legally enforces transparent and evidence-based decision-making. This section addresses these arguments.

Bar-Siman-Tov has identified two aspects of the discussion on evidence-based decision-making and the role of courts.[1984] First, courts themselves increasingly engage in evidence-based decision-making. For example, as noted by Mak, courts frequently consider non-legal parameters of economic, social, and psychological research in the fact-finding in individual cases.[1985] This aspect raises the questions regarding the competence of courts to engage in empirical reasoning that have already been addressed in Section 9.3.2B and may be considered a substantive approach rather than a procedural one. After all, courts engage in a substantive assessment of the quality, validity, and rationality of the empirical evidence and the decision taken.[1986]

Secondly, according to Bar-Siman-Tov, the relationship between evidence-based decision-making and judicial review can relate to courts' review of whether a decision-making authority relied on (sufficient) evidence for its decision. This aspect is discussed in more detail here as it concerns a procedural assessment of the extent to which public authorities' decisions are evidence-based.[1987] In the words of Alberto Alemanno, 'what is central to this new form of scrutiny is the instrumental use of the evidence gathered during the decision-making process in order to verify the adequacy and quality of that process'.[1988] Such an assessment may entail a review of *ex ante* evidence-based obligations, including impact assessments, consultations with citizens and stakeholders, comprehensive and rational establishment of facts, and so on. It may also entail the imposition of *ex post* evidence-based obligations on decision-making authorities that require them to monitor the effectiveness of policies and legislation, to assess the impact (on fundamental rights), and even to make corrections in light of new information.[1989]

1982 Popelier (2013a), p. 269.
1983 Messerschmidt (2016a), pp. 218–220 and Yowell (2018), pp. 34–35.
1984 Bar-Siman-Tov (2016), p. 110ff.
1985 Mak (2012), p. 311.
1986 See also Bar-Siman-Tov (2016), pp. 119–121.
1987 This can both be pure procedural review as semiprocedural review, see Bar-Siman-Tov (2016), pp. 13–17.
1988 Alemanno (2013), pp. 334–335.
1989 Flückiger (2016), p. 277. This is something else than *ex nunc* judicial review, which entails a review of the legislation or policy in light of the current information available; information that was not available at the time of the decision being taken, see also Ismer and Von Hesler (2016), pp. 279–301.

PROEF 3

Alemanno has qualified the turn to process-based review by courts as an 'evidence-based judicial reflex'.[1990] This means that the greater use of process-based review is a logical consequence of the rationality trend in legislative and administrative decision-making.[1991] For Alemanno, because evidence-based review concerns a mirroring of policies adopted by administrative and legislative authorities, it is 'not only less controversial … but also opportune'.[1992] He goes on:

> 'While it is clear that the legislator is better placed than courts to conduct in-depth inquiries into social, economic or political assessments required by these general principles, courts also need – in order to discharge their judicial duty – a degree of evidence-based policymaking with respect to the substantiation of the same principles…
>
> Moreover, one must observe that virtually all the procedural requirements, despite their formal legal status, tend to be contained in guidelines, circulars, and documents that are well known due to their vast publicity and, as a result, trigger legitimate expectations. This suggests that … one may expect that courts would do justice to the expectations that these procedural rules generate in interested parties.'[1993]

Arguably then, process-based review fits with the role of courts in protecting legitimate expectations, without requiring them to replace the evaluations of policy-makers of complex socio-economic issues. Instead, Alemanno contends, 'a more evidence-based approach to judicial review seems [to be] capable of promoting a broader culture of proof, evidence and rationality in policymaking'; a culture that has already been created by the development of evidence-based regulatory tools.[1994] Thus procedural reasoning is considered a legal enforcement of the evidence-based commitments of legislative and administrative authorities, which requires them to justify their decisions.[1995] From a governance perspective too, it has been argued that courts could act as a catalyst for procedural standards. In relation to the CJEU, Mark Dawson submits:

> 'The Court … could promote legal values like transparency, accountability and reasoned decision-making in new governance through four possible Channels: (i) through the expansion of participation rights; (ii) through demanding an improved information basis for decisions under new governance; (iii) through a general duty to give reasons for decisions; and (iv) through the creation of requirements for transparency and access to documents.'[1996]

[1990] Alemanno (2013), p. 329.

[1991] Ibid, at pp. 335 and 334. I agree with Bar-Siman-Tov, that Alemanno's approach is focused on process-based review of the 'evidence-basedness' of the legislative process, see Bar-Siman-Tov (2016), pp. 129–130.

[1992] Alemanno (2013), p. 336.

[1993] Ibid, p. 337.

[1994] Ibid, p. 338. See also Popelier (2013a), p. 263 ('When courts thus promote deliberative values such as participation, transparency, reasoning and accountability, they assume a role as "catalysts", inviting actors within the process to refine governance procedures').

[1995] Kartner and Meuwese (2017), p. 121.

[1996] Dawson (2011), p. 256.

PROEF 3

At the same time, Patricia Popelier has questioned the evidence-based judicial reflex. She has explained that there is probably a connection between both trends.[1997] Yet, procedural reasoning in judgments may also have caused regulatory programmes to be set up and has meant that other factors, such as institutional design and political settings, are now considered important in determining whether procedural reasoning is favourable or not. Despite the various explanations of the background to procedural reasoning, Popelier thinks that the ECtHR, through adopting a procedural approach, may stimulate national courts and national legislatures to an evidence-based decision-making process, although the effectiveness appears to be context-dependent.[1998] More generally, in her view, 'the courts take up a role as "regulatory watchdog", giving legal teeth to regulatory reform programs which are shaped as public management tools in the service of economic goals'.[1999]

Besides courts supporting or even enhancing the evidence-based trend through procedural reasoning, process-based review has been deemed a means for courts to avoid pitfalls that a substantive review of evidence would have. Indeed, process-based review has been considered to help counter problems of judicialisation of regulatory tools for evidence-based decision-making, which could create excessive procedural rigidity. As Popelier has noted, 'when conducting procedural rationality review, courts merely search for evidence in support of government's assumptions and choices, but do not impose the observance of precise procedural requirements'.[2000] Furthermore, from a fundamental rights perspective, it has been argued that 'procedural rationality review might moderate the business-driven orientation of legislative policy' and as such it can help to ensure that fundamental rights protection is part of the equation of evidence-based decision-making.[2001] Process-based review may thus provide an extra, fundamental rights-oriented layer to the evidence-based trend.

Various examples of procedural reasoning in relation to evidence-based decision-making can be mentioned. The lack of rationality of decision-making was the basis for the ECJ's dismissal of EU Regulations in the *Volker and Markus Schecke* judgment.[2002] At stake was the right to privacy of beneficiaries of EU agricultural funds, as their personal information was published online with the aim of promoting transparency in EU decisions. While the ECJ agreed that transparency is a legitimate interest for restricting fundamental rights, it was concerned that the EU legislature had not sought to strike a balance between that interest and the right to privacy of the respective beneficiaries.[2003] This illustrates, as Alemanno indicated, that the ECJ interpreted 'the lack of substantiation of the reasons underpinning the chosen policy option … as a proof that the contested legal decision was not proportionate and therefore interfered

1997 Popelier (2017), p. 84ff.
1998 Ibid, p. 92.
1999 Popelier (2013b), p. 251.
2000 Popelier (2015), p. 328.
2001 Ibid, p. 327.
2002 ECJ (GC) 9 November 2010, ECLI:EU:C:2010:662 (*Volker und Markus Schecke*). See Section 2.2.7.
2003 Ibid, paras. 67 and 80–81.

PROEF 3

with the right to privacy'.[2004] The *Hartz IV* case demonstrates that the GFCC also promotes evidence-based decision-making by means of procedural reasoning.[2005] The absence of proof that the legislature had sought to base the level of the German subsistence minimum on empirical data and facts, constituted the main ground for the GFCC's conclusion that the legislature had made a random estimate and its declaration that the law was unconstitutional. The CoATH in the *Urgenda* case made its judgement along the same lines.[2006] It considered that the Dutch government had not considered climate science in its decision to lower the reduction target of greenhouse gases.[2007] Finally, an evidence-based approach may be found in the *Hatton* judgment of the ECtHR.[2008] In that judgment the ECtHR not only validated the reliance of the UK authorities on studies and research for developing a night flight scheme for London Heathrow airport, but it also valued the fact that the authorities continued to monitor the situation and correct the scheme accordingly.[2009] This judgment may therefore be considered an example of a process-based review of both *ex ante* and *ex post* obligations of evidence-based decision-making.[2010]

E. Problems with process-based review of empirical reasoning

Although the above has shown that process-based review is advocated as it would allow courts to avoid empirical reasoning and to enforce evidence-based standards, at the same time, various concerns have been expressed. This section limits itself to a discussion of three main concerns that specifically target the use of procedural reasoning in the context of empirical uncertainties and evidence-based decision-making. Other concerns, such as whether the procedural approach constitutes a coherent and consistent method[2011], whether it leads to an overly formal type of review[2012], and whether procedural reasoning of empirical evidence sufficiently protects fundamental rights, are part of different debates and are addressed in Sections 9.2.1F, 7.2.2, and 8.3 respectively.

No avoidance | First, while some regard process-based fundamental rights review as a useful strategy for courts to avoid decision-making in relation to issues of empirical uncertainties, this does not mean that they regard it as a magical solution. In particular

2004 Alemanno (2013), pp. 335–336. See also Lenearts (2012), p. 12 and Kartner and Meuwese, p. 121.
2005 Also discussed in relation to evidence-based decision-making, see Bar-Siman-Tov (2016), pp. 116–117.
2006 CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4. DCTH 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.
2007 Ibid, para. 52.
2008 ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*). See Section 3.2.6.
2009 Ibid, para. 128.
2010 See also Section 6.3.3C.
2011 For example, Faigman considered that inconsistency in the application of review of fact-finding by legislative authorities can be seen 'as rhetorical devices, to be used or withheld as the normative circumstances dictate', see Faigman (2008), pp. 167 and 180.
2012 Mentioned in Organisation for Economic Co-operation and Development (2018), 'Regulatory Policy Outlook 2018, Summary in English' <https://www.oecd.org/gov/regulatory-policy/oecd-regulatory-policy-outlook-2018–9789264303072-en.htm>.

PROEF 3

it should be noted that process-based review does not necessarily exclude substantive, empirical reasoning altogether. Indeed, as was noted in Section 9.3.2C, some arguments propose procedural reasoning as a justification or compensation strategy, which would justify or complement courts' substantive engagement with empirical evidence.[2013] In both strategies, courts rely not just on procedural considerations but also on substantive considerations. For example, in *Hartz IV* the GFCC applied not only process-based review, but also engaged in a substantive assessment of several requirements a new law should meet.[2014] Alternatively, procedural reasoning may be just one element of the proportionality assessment. For example, in *Hatton*, besides the procedural considerations, the ECtHR thoroughly assessed the substantive proportionality of the night flight scheme.[2015] If procedural reasoning is supplemented or followed by substantive reasoning, courts will enter into empirical reasoning after all. On balance, then, procedural reasoning is not really an avoidance strategy.

The judgment of the CoATH in *Urgenda* may provide another example of this. This case concerned the downward adjustment of the reduction target of the Dutch climate change policy. The CoATH looked into the decision-making procedure that had informed this policy change, and considered that the Dutch government had failed to give scientific reasons as to why the lower reduction target could be considered credible.[2016] Although its reasoning was largely procedural, the CoATH also included substantive, empirical considerations in its judgment concerning the applicable standards. Even though the CoATH noted that 'full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking'[2017] and that the international climate agreements did not establish a legal standard, it held that it 'believe[d] that [the IPCC report] confirms *the fact* that at least a 25–40% reduction of CO2 emissions as of 2020 is required to prevent dangerous climate change'.[2018] That is, the CoATH reasoned substantively to establish the 'facts', which then formed the background against which it held that the Dutch government had failed to include evidence-based reasoning in the process of its policy change.[2019]

Problems with standard-setting | A second issue relates to the standard-setting for process-based review. Petersen has raised the following issue in this regard:

> 'The procedural approach acknowledges that the questions of uncertainty and risk preference cannot be as neatly separated as the inconclusive evidence approach suggests. There is no

[2013] For an explanation of both strategies, see Sections 6.3.5A-I (on process-based review as an justification strategy) and 6.3.5A-II (on process-based review as an compensation strategy).
[2014] GFCC 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 (*Hartz IV*), paras. 204–209. See Section 2.2.4.
[2015] ECtHR (GC) 8 July 2003, app. no. 36022/97 (*Hatton and Others v. UK*), paras. 122–127. See Section 3.2.6.
[2016] CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*), para. 52. See Section 3.2.4.
[2017] Ibid para. 63.
[2018] Ibid, para. 51.
[2019] This is not to deny the validity of the IPCC reports, yet it does mean that by setting aside the views of the authorities, the CoATH determined itself, on the basis of scientific evidence, what were the facts.

PROEF 3

> objective way to determine whether we have a "true" situation of uncertainty. Therefore, the procedural approach seems to be conceptually the more coherent perspective. *However, its effectiveness depends on determining good standards for evaluating legislative fact-finding procedures. And this might be a difficult task.* How do we know whether parliament has done a proper job of legislative factfinding? Do we require expert hearings or scientific studies? How do we determine whether parliament heard the "right" experts, and whether it can be expected that the studies it consulted were methodologically sound?'[2020]

Here, Petersen emphasises that for courts to adopt a methodologically sound procedural approach, it is important that there are clear and coherent positive procedural standards available for courts to engage in as well as to review empirical decision-making. Two issues may be mentioned in this regard. First, if courts were to scrutinise evidence-based decision-making procedures adduced by public authorities more closely, they might explicitly or implicitly develop standards for empirical reasoning by other decision-making authorities. Besides the problems discussed in judicial expertise of other types of decision-making procedures addressed in Section 9.3.1B, Section 9.3.2B discussed that serious concerns have been expressed about the capacity of courts to employ empirical reasoning themselves. If that is the case, the question may arise as to whether courts are sufficiently well-equipped to guide empirical reasoning of other decision-making authorities. This concern finds support in the examples of procedural reasoning discussed in this section. It has been argued that the statistical approach suggested by the GFCC in *Hartz IV* would not lead to the intended result. According to Messerschmidt, not only does the GFCC request 'a degree of consistency of lawmaking, which the legislator struggles to match' but, moreover, it fails to see 'that even a perfect calculation of the material and cultural minimum of social benefits will lead to an unfair result because the uniform calculation of the remuneration – as prescribed in German law – neglects the real costs of living, which differ among regions'.[2021] In this sense, the concerns expressed in Section 9.3.2B seem hardly to be addressed by procedural standard-setting by courts.

Secondly, even when evidence-based standards are written standards, they can mostly be found in soft law instruments, such as guidelines, circulars, and strategies.[2022] It may be controversial for courts to use such soft law instruments as a basis for review, as they may not provide a solid legal basis.[2023] For example, in the European Union, the judicial application of EU Better Regulation soft law standards is argued to hinder regulatory innovation and lead to judicial activism on the basis of policy arguments.[2024]

Against the background of these two issues, some have argued that courts should limit their review to establishing whether there were (obvious) procedural errors.[2025]

2020 Petersen (2013), p. 306 [emphasis added].
2021 Messerschmidt (2016b), pp. 388–389.
2022 E.g., Alemanno (2012), p. 337.
2023 Mak (2012), p. 316. See also Keyaerts (2013), pp. 274–277.
2024 As discussed by Keyaerts (2012), pp. 274–275.
2025 Messerschmidt (2013), pp. 357–358.

PROEF 3

Popelier has noted, for example, that 'if restricted to the requirement of minimum guarantees for evidence-based decision-making, process review does not intrude upon the legislator's procedural autonomy by imposing the duty to follow a well-defined optimal procedure'.[2026] Such a minimum level of scrutiny might help to prevent juridification of 'soft' evidence-based standards in a way that 'could reduce or rigidify the very features of adaptability, and the flexible "tailoring" of political procedures to the needs of specific fields'.[2027]

Enforcing empirical mistakes | Others have argued that a minimalist approach to evidence-based decision-making, as suggested by Popelier, might mean that courts rely on wrong facts or ill-interpreted evidence. After all, other decision-making authorities may also make mistakes. In this regard, Rob van Gestel and Jurgen de Poorter have argued that the CJEU should take a stricter approach to the empirical decision-making processes of public authorities.[2028] In their view, when the CJEU does not scrutinise the data underlying a decision, but only considers whether the decision was based on the scientific evidence, it could easily rely on wrong information, poor quality data, or even corrupted evidence: 'in cases where ex ante evaluations are of poor quality, because the underlying data or scientific evidence are corrupted, this will negatively affect the CJEU's judgment and support the idea that prelegislative scrutiny is a matter of box ticking'.[2029] By taking a procedural approach such flaws may be overlooked, since it does not contain an assessment of the scientific evidence itself.[2030] Instead, Van Gestel and De Poorter advocate for an approach, such as that taken by USSC in *Daubert*, arguing that this may provide a better quality review of the evidence available.[2031] In that judgment the USSC explained that in order for it to determine the reliability of expert evidence 1) it would apply the falsification test (can a theory or technique be tested and has it been tested?); 2) it would assess whether the theory has been subjected to peer review and whether it is published; 3) it would consider the rate of error; and 4) it would take into account whether the theory has been widely accepted within the relevant scientific community.[2032]

Epistemic deference through procedural reasoning may thus give rise to concerns about the empirical validity and quality of judicial decision-making. For example, in relation to *Carter*[2033], it has been questioned whether the deference the

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2026 Popelier (2015), p. 330 and Popelier (2013a), pp. 267–268.
2027 Dawson (2011), p. 240 and concerning the EU Charter, pp. 247–248.
2028 Van Gestel and De Poorter (2016), pp. 183–184.
2029 Ibid, p. 183.
2030 Popelier also noted that the ECtHR had positively valued the UK authorities' reliance on studies in the Hatton judgment (discussed in Section 3.2.6), yet that the dissenting judges in that case reproached the majority 'for statin that the law was based on appropriate research even though the studies had not covered the relevant issue', see Popelier (2019), p. 292.
2031 Van Gestel and De Poorter (2016), p. 184 and for the *Daubert* test, pp. 178–183.
2032 USSC 28 June 1993, 509 US 579 (1993), (*Daubert v. Merrell Dow Pharmaceuticals, Inc*), pp. 593–594.
2033 CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*). See Section 4.2.4.

PROEF 3

CSC shown to the lower court's assessment of the testimonies and reports led to the best possible evidence-based decision. As Yowell noted, '[t]he task of assessing the momentous and complex factual questions surrounding the question of the legality of assisted suicide thus falls not to the Canadian Parliament, and not even to the Supreme Court, but to a single trial judge'.[2034] He then extensively addressed the flaws in the empirical reasoning of the lower court, holding that 'the evidence relied on is scanty, with large gaps, and [the judge's] conclusions were both hesitant and questionable'.[2035] Arguably, the procedural and deferential approach taken by the CSC, however, did not allow it to find and address the empirical flaws in the lower court's approach.[2036]

F. *Résumé*

Empirical uncertainty is a fact of judicial life. Courts may turn to empirical data to deal with this uncertainty, for instance, by referring to expert reports or scientific studies. This section has shown, however, that there are constraints on the capacity of courts to gather relevant information and properly engage in empirical reasoning. In addition, other decision-making authorities may be in a better position to do so. For example, legislative authorities are able to interact with a large variety of interest groups and, owing to a wide variety of professional expertise of their employees, they are, in principle, better equipped to assess non-legal information. One of the suggestions made in the literature on dealing with courts' limited capacities of empirical decision-making is the use of process-based review. It has been argued that procedural reasoning can be a means to show epistemic deference to decision-making authorities. In addition, a procedural approach has been defended on the basis that it allows courts to encourage evidence-based decision-making. Nevertheless, procedural reasoning is not without its flaws. It has been argued that a procedural approach is not necessarily deferential, especially where it concerns the enforcement of soft law standards or where procedural reasoning is followed by substantive reasoning. Procedural reasoning may also be problematic if courts base their judgments on flawed or even corrupted data regarding the decision-making processes. Finally, in light of their limited empirical capacities, it is questionable to what extent courts may be considered the appropriate authorities to set procedural standards for evidence-based decision-making. In short, procedural reasoning may have its benefits for courts to avoid empirical reasoning and it may enable courts to support the evidence-based trend for decision-making, yet questions remain on how courts should do so comprehensively and consistently, without running into the problems of their own limited empirical capacities.

[2034] Yowell (2018), p. 19.
[2035] Ibid, p. 84.
[2036] Ibid, pp. 86–87.

PROEF 3

9.4 REFLECTIONS AND CONNECTIONS

This chapter has addressed two different challenges courts face in fundamental rights adjudication. First, normative challenges arise when courts are required to engage in neutral or value-free decision-making. There may be specific normative challenges when they are faced with hard cases, in which there is an incommensurable conflict between rights and multiple outcomes may be justifiable. Secondly, epistemic challenges arise when courts lack expertise to deal with a matter. Their expertise on matters of process has been questioned in legal scholarship, and courts have been considered to lack the empirical capacities required to properly address epistemic uncertainties. Although normative and epistemic challenges concern very different issues, in relation to the discussions of these challenges and the role process-based review can play therein, these debates bear similarities. Indeed, in discussions on fundamental rights adjudication, both normative and empirical arguments have been put forward for determining how process-based review works in practice. For instance, Gerards has argued that both normative and empirical concerns may constitute reasons for lowering the intensity of scrutiny for the CJEU and the ECtHR:

> 'If a case concerns *sensitive moral or ethical issues* on which opinions may well differ; … or if a case is difficult to decide since it requires *highly technical or scientific assessments* to be made, some degree of deference is almost unavoidable – especially if the measures are taken in the exercise of (wide) discretionary powers. It is in these cases that the intermediate level of review can be used, which … requires the validity and trustworthiness of the national decision-making process to be tested on a procedural plane, and on a substantive plane it may be a bit more demanding than a purely marginal test in terms of the required quality and convincingness of the arguments underlying the decision.'[2037]

The relationship between the normative and epistemic challenges and process-based review will be further explained in this section. Section 9.4.1 addresses the different views on the relationships between law and morality and between law and empiricism. It also explains that these views may determine one's perspective on the desirability of procedural reasoning. Section 9.4.2 goes on to discuss the inherent and irresolvable tension of neutrality–normativity that is at the heart of these debates on fundamental rights adjudication, and it explains how empirical reasoning relates to this. The section further clarifies the suggestion that procedural reasoning may help to mitigate this tension, although it can hardly do so completely. In light of these findings, Section 9.4.3 suggests possible avenues for understanding the role process-based review may play in fundamental rights cases. It explains that it can be useful to consider normativity and neutrality as matters of degree, and it is argued that, on such a scale, procedural reasoning may be considered relatively neutral. In addition, it clarifies that contextual factors will influence the appropriateness of process-based review and its neutral potential.

[2037] Gerards (2011), p. 119 [emphasis added].

9.4.1 LAW, MORALITY, EMPIRICISM, AND PROCESS-BASED REVIEW

The previous sections have made clear that there are diverging views on the role and capacities of courts in fundamental rights cases and on the appropriateness of procedural reasoning by them. The different positions taken can be clarified in light of diverging views on issues at the heart of fundamental rights adjudication, that is, the relationship between law and morality and the relationship between law and empiricism. This section first briefly sets out the different viewpoints on these relationships (Section A) and then discusses how one's perspective on these relationships appears to influence one's views on the value of process-based review (Section B).

A. Relationships between law and morality, and law and empiricism

In philosophical and legal theoretical discourse there is an ongoing debate on how law and morality relate to one another.[2038] One perspective is that law and morality are intertwined[2039], because law is fundamentally and inherently moral. Courts' task therefore is to ensure morality, that is, they have to decide cases in light of principles of justice and fairness. From another, positivist point of view, law and morality are two distinct areas.[2040] Therefore, essentially, neither law nor adjudication is about justice. From this perspective, courts' task is to apply legal norms, not because of their moral qualifications or validity, but because courts ought to fulfil their legal task as interpreters and defenders of the law. However, even though law and morality on this view are distinct, this does not mean that there is no connection between them at all. For instance, Neil MacCormick has argued that judgments and public authorities' decisions do not affect the moral judgment of individuals as moral agents. Indeed, every person is an autonomous moral agent and may (or should) thus develop their own views on what is good or bad.[2041] Nevertheless, '[a]s a generality, it is always true, where legal authorities must reach a decision on a morally significant matter, that the practical

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[2038] For a discussion of four avenues for questions and debate, see Hart (1963), pp. 1–6.

[2039] E.g., Dworkin (1997), pp. 29–30 ('A general theory of law must be normative as well as conceptual… The normative theory will be embedded in a more general political and moral philosophy …'). And for a procedural account, see Fuller (1969), pp. 95ff ('What I have tried to do is to discern and articulate the natural laws of a particular kind of human undertaking, which I have described as "the enterprise of subjecting human conduct to the governance of rules"', p. 96).

[2040] E.g., Kelsen (2006), pp. 66–67 ('From the circumstance that something is cannot follow that something ought to be; and that something ought to be, cannot be the reason that something is. The reason for the validity of a norm can only be the validity of another norm', p. 193); and Austin (1832), p. 278 ('The *existence* of law is one thing; its *merit or demerit* another'). Other legal positivists consider that there is a minimum connection between morality and law, see e.g., Hart (2012), pp. 200–212 ('My aim in this book has been to further the understanding of law, coercion, and morality as different but relate social phenomena', p. vi) and Raz (1986), pp. 147–159 ('it is admitted that whether or not the law is in fact justified, if it is in force it is held to be so by some of its subjects, and they are ready to make fully committed statements', p. 158).

[2041] MacCormick (2008), p. 181.

PROEF 3

implementation of the legal decision may render the [individuals'] moral decision inoperative in terms of immediate action'.[2042] MacCormick's theory illustrates how legal judgments interact with morality, without legal decisions necessarily becoming a specific subset of morality.[2043]

The relationship between law and empiricism has also been subject to debate. This debate concerns the issue of whether empirical findings should influence the law. After all, an 'is' does not mean that it 'ought' to be that way, nor that it should be legally enforced.[2044] More fundamentally this debate comes back to an epistemological debate that raises the issue of whether observations made about the world are real and mind-independent, or are humanly constructed accounts.[2045] The meaning and influence of diverse views on empiricism is summarised by Faigman:

> 'From the law's perspective – and, more particularly, from the perspective of constitutional adjudication – the matter comes down to *either believing that science can describe the empirical world largely free of bias or it cannot.* If facts having relevance to constitutional lawmaking do not exist – or cannot be described – separately from the values endemic in that lawmaking, then it is incumbent on courts not to pretend that they are. Facts and values (or biases), under this view, may not be one, but they are inextricably bound. If this is so, antirealism is the more rational choice to provide the philosophical basis for constitutional adjudication. But if facts can exist independently of biasing influences … then courts, like realists, should fully account for them in their decisions. In short, scientific realism obligates courts to take facts seriously.'[2046]

B. Moral, empirical, and procedural reasoning

These debates show that one's view on the relationship between law and morality, and that between law and empiricism, may influence one's stance as regards the proper role of courts in fundamental rights adjudication in relation to normative and epistemological challenges. More specifically, one's views on the appropriateness of moral and empirical reasoning by courts affect one's views on the appropriate application of procedural reasoning.

The connection between one's views concerning courts' role in relation to normative and epistemic challenges and the way process-based review is applied is particularly

[2042] Ibid, p. 180.
[2043] Waldron (2011a), pp. 108–111.
[2044] Faigman (2008), p. 26.
[2045] Most famously David Hume rejected the idea that humans can know the world outside their minds. In Hume's words, in matters of facts we discover the laws by experience (for example, the law of motion and the law of causality), 'and all the abstract reasonings in the world could never lead us one step towards the knowledge of [them]. When we reason *a priori*, and consider merely any object or cause, as it appears to the mind, independent of all observation, it never could suggest to us the notion of any distinct object, such as its effects; much less show us the inseparable and inviolable connexion between them', see Hume (1975), p. 31, and for the summary of his views, see p. 159.
[2046] Faigman (2008), p. 24.

pertinent in the discussion of procedural reasoning as an avoidance strategy. Sections 9.2.2C and 9.3.2C discussed arguments within which procedural reasoning is proposed as a means for courts to circumvent moral and empirical reasoning. Throughout this chapter several principled reasons have been advanced as to why courts should avoid moral reasoning. Courts are required to adjudicate cases in a (relatively) value-free manner[2047] or, to put it another way, they are required to leave moral decision-making to the political and public domain[2048], therefore they must avoid moral reasoning. On practical grounds, courts are required to avoid empirical reasoning in particular, because they lack the capacities, training, and resources for properly doing so.[2049] These views stem from the conception that law, morality, and empiricism are distinct areas of reasoning and courts' task can and should be limited to legal reasoning alone, or at least as much as possible. Procedural reasoning is advocated because it allows courts not only to circumvent moral and empirical reasoning, but it also allows them to do what they are best-suited to doing. Indeed, courts are seen as experts on process (Section 9.3.1), and the use procedural reasoning falls within their legal capacities and proper functions.

By contrast, scholars favouring moral reasoning and empirical engagement by courts will reject the idea that courts ought to limit themselves to purely legal reasoning. On principled grounds courts are required to face normative challenges head-on as they are the decision-making authorities on such matters par excellence.[2050] Furthermore, they should provide important checks on the empirical decision-making of public authorities.[2051] On a more practical account, courts are also considered capable of engaging in moral and empirical reasoning.[2052] Thus the use of procedural reasoning as an avoidance strategy is rejected by these scholars, because courts can and should engage with the normative or epistemic challenges at stake. More fundamentally, from the view that law and morality, and law and empiricism, are inherently intertwined, it is not possible for courts to avoid moral or empirical reasoning. Pretending that procedural reasoning is an avoidance strategy is then just a means of judicial dishonesty[2053], corruption[2054], and 'pure hegemony'.[2055, 2056]

At the same time, from the perspective that law, morality, and empiricism are inherently connected, courts' use of procedural reasoning is not necessarily rejected.

[2047] Ely's, Habermas' and Zurn's theories all rely on this idea that it is important that courts reason cases in a neutral manner, see Sections 9.2.1A and 9.2.1C.
[2048] Bellamy (2007), p. 164. See Section 9.2.2B.
[2049] E.g., Yowell (2018), pp. 65–72; Petersen (2013), p. 306; and Vermeule (2006), p. 155. Discussed in Section 9.3.2B.
[2050] E.g., Dworkin (1998), pp. 244, 250, and 256–257. See Section 9.2.2B.
[2051] Van Gestel and De Poorter (2016), pp. 183–184. On the need for courts to correct empirical mistakes, see briefly Section 9.3.2E.
[2052] See Sections 9.2.2B (on normative reasoning) and 9.3.2B (on empirical reasoning, including suggestions to improve the capacities of courts to enter into such reasoning).
[2053] E.g., Tushnet (1980), p. 1053.
[2054] Tribe (1985), pp. 6–8.
[2055] Koskenniemi (2011), p. 164 and Koskenniemi (2009), p. 9. See also Tribe (1980), p. 1064.
[2056] See Section 9.2.1F.

PROEF 3

Rather, instead of an avoidance strategy, procedural considerations may be used alongside substantive ones. The use of procedural reasoning as a justification or compensation strategy would then be less problematic (these strategies have been discussed in Sections 9.2.2D, 9.3.2C and 9.3.2E)[2057], because courts are still also engaging in moral and empirical reasoning. Yet, from the vantage point that law, morality, and empiricism are distinct areas of reasoning and that courts should limit themselves to legal reasoning, procedural reasoning as a justification or compensation strategy is of little use.[2058] After all, courts are then doing something they should not be doing or which they are incapable of doing properly.

Furthermore, even if courts were to limit their review to procedural matters alone, the problem of standard-setting may arise. We saw earlier that courts have developed decision-making standards for moral and empirical reasoning by other decision-making authorities through procedural reasoning.[2059] Indirectly then, courts have limited normative choices of decision-making authorities[2060] and provided procedural guidance for empirical decision-making.[2061] From the viewpoint that law, morality, and empiricism are and should remain distinct areas of reasoning, judicial standard-setting would mean that courts transgress the domain of legal reasoning and go beyond their competences and expertise.[2062] From the opposite viewpoint that law, morality, and empiricism are intertwined and courts may engage in legal, moral, and empirical reasoning, however, standard-setting would not, in principle, raise concerns.[2063]

9.4.2 NEUTRALITY, NORMATIVITY, FACTUALITY, AND PROCESS-BASED REVIEW

Another issue that requires further discussion is why procedural reasoning has been proposed in relation to morally or empirically challenging cases. It is submitted that these challenging cases bring the central neutrality–normativity tension in fundamental rights adjudication to the fore, and that procedural reasoning is considered a way for

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2057 The use of procedural reasoning as a justification strategy means that it is used to determine how strictly courts will review the moral or empirical reasoning on its merits, and as a compensation strategy it is used to compensate for the deferential review of the substantive issue. See for a discussion of both strategies, Sections 6.3.5A-I and 6.3.5A-II.

2058 This point has been made in relation to using procedural reasoning as an avoidance strategy both for moral reasoning, see Section 9.2.2D (nuancing process-based review's potential), and for empirical reasoning, see Section 9.3.2E (problems with process-based review of empirical reasoning).

2059 See Section 9.3.2E.

2060 E.g., Huijbers (2018c), pp. 80–82 and Huijbers (2017b), p. 20. See Section 9.2.1D.

2061 See Section 9.3.2D (evidence-based decision-making and procedural reasoning).

2062 Concerning courts' lack of expertise to set out decision-making standards for other decision-making authorities, see in general Section 9.3.1B, and concerning standards for empirical reasoning, see Section 9.3.2E.

2063 This is *in principle* the case, because problems may arise when courts are lacking capacities and expertise for properly setting out standards, as has also been discussed in Sections 9.3.1B (limitations to judicial expertise) and 9.3.2E (problems with process-based review of empirical reasoning).

courts to deal with or even resolve this tension. This section explains what this tension entails and what role there is for process-based review (Section A), as well as how empirical reasoning seems to be an attempt to resolve this tension (Section B).

A. Neutrality–normativity tension and procedural reasoning

The neutrality–normativity tension concerns the fact that courts, especially in fundamental rights cases, deal with issues that have a normative or value-laden content. Indeed, many of the cases discussed in Part I show that courts can be faced with normatively challenging questions. For example, is there a right to medically assisted suicide (*Carter*[2064] and *Lambert*[2065])? Should the right to privacy or the right to freedom of expression prevail (*Von Hannover (No. 2)*?[2066] Are amnesty laws compatible with fundamental rights (*Gelman*[2067])? The inherent tension between neutrality and normativity contained in such cases has been explained well by Joseph William Singer:

> 'Arguments based on rights and duties (deontological approaches) are, in one sense, based on normative considerations. By definition, they rest on values, or assertions about good and bad, right and wrong, justice and injustice, freedom and oppression, and autonomy and servitude. They distinguish legitimate from illegitimate interests, and they judge preferences rather than merely defer to them. Similarly, arguments that start from the idea of liberty need to define the scope and meaning of liberty. Freedom of action is limited by the duty not to harm others, and some normative framework is needed to define what constitutes a legally cognizable harm.
>
> At the same time, most rights theorists seek to avoid or to contain normative argument by trying to step above it in some way through decision procedures intended to develop determinate answers to controversial questions by reference to noncontroversial premises or foundational nonmoral facts. Some scholars do this by creating presumptions against regulation (as in libertarian approaches to rights) and others do this by explicit reference to idealized preferences filtered through a suitable decisionmaking setting like a hypothetical bargain, constitutional convention, or social contract.
>
> As a practical matter, these efforts are unlikely to be successful. One need only observe the division of the country between Republicans and Democrats, religious groups and secularists, as well as the division among academics on moral, legal, and political theory, to conclude that it is unlikely to be the case that we have identified a noncontroversial, determinate method for adjudicating normative disagreement. *Rights arguments wind up being either indeterminate or controversial*, no matter what form one adopts – separation of the right and the good (classical liberalism), derivation from foundational human interests (foundationalism) or the requirements of reason (Kantianism), elaboration of a suitable setting for creating a social contract (contractualism) or mutual entailment of principles in a

[2064] CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*). See Section 4.2.4.

[2065] ECtHR (GC) 5 June 2015, app. no. 46043/14 (*Lambert and Others v. France*). See Sections 3.2.6 and 4.2.7.

[2066] ECtHR (GC) 7 February 2012, app. nos. 40660/08 and 60641/08 (*Von Hannover v. Germany (No. 2)*). See Section 4.2.7.

[2067] IACtHR (merits and reparations) 24 February 2011 (*Gelman v. Uruguay*). See Section 4.2.8.

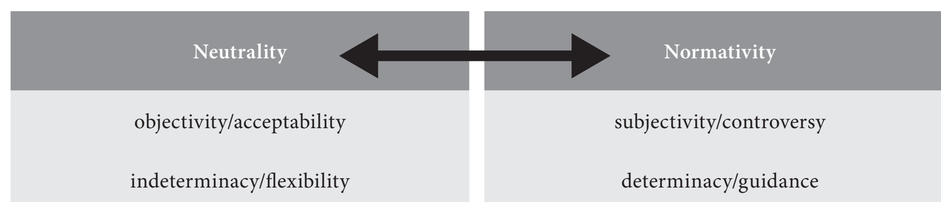
PROEF 3

coherent whole (coherentism), or reflective equilibrium between intuitions about particular cases and governing principles. *Again and again, we face the problem of the tension between determinacy and neutrality.*'[2068]

What Singer points at is the idea that neutrality and normativity are mutually exclusive, but at the same time, they require each other. In fundamental rights adjudication, this means that courts are expected to remain neutral, and as outlined above, they should not impose their personal normative views on the parties to a case or on society at large.[2069] This neutrality concerns the enforcement of accepted legal standards and ensures the objectivity of fundamental rights adjudication. However, pure objectivity or acceptability may lead to indeterminacy, in that rights are defined in open-ended, shallow, and vague terms in order to allow for agreement. In turn, according to William Lucy, such 'doctrinal indeterminacy (doctrine does not provide good reasons for a decision one way or another) produces indeterminacy in the decision (judges are not successful in producing good reasons for the decision they reach)'.[2070] In order to decide a case, courts therefore unavoidably have to provide normative reasons while sacrificing some of their initial neutrality.

In the fundamental rights context, Mattias Kumm has explained that '[a]ssessing the justification of rights infringement is, at least in the many cases where the constitution provides no specific further guidance, largely an exercise of general practical reasoning, without many of the constraining features that otherwise characterise legal reasoning'.[2071] Especially in relation to the test of proportionality in the strict sense[2072], it has been held that either specific guidance for adjudication is provided in the law but not all moral norms are included, or there is flexibility as to the norms included but there is no restraint or guidance for adjudication.[2073] Thus, Singer's points that '[r]ights arguments wind up being either indeterminate or controversial' and '[a]gain and again, we face the problem of the tension between determinacy and neutrality' also apply to fundamental rights adjudication.[2074] This inherent tension can be schematically portrayed as follows (Figure 5):

Figure 5. Neutrality-normativity tension in fundamental rights adjudication



[2068] Singer (2009), pp. 921–922 [emphasis added]. Singer refers to several other authors in this text.
[2069] See Section 9.2.1.
[2070] Lucy (2004), p. 227.
[2071] Kumm (2007), p. 140.
[2072] Explained in Section 6.3.5E.
[2073] Urbina (2017), pp. 131–136.
[2074] See also the discussion by Yowell (2018), pp. 33–34.

PROEF 3

Many debates on judicial review of fundamental rights can be explained from this particular tension.[2075] It seems that scholars have proposed process-based fundamental rights review as a way for courts to deal with this tension or alleviate it altogether. Ely's view that procedural reasoning is neutral stems from the idea that because procedures are laid down in the US Constitution, it is uncontroversial for courts to enforce procedural standards, which provide sufficient guidance for courts' review (see Section 9.2.1A).[2076] Furthermore, as a neutral approach, procedural reasoning can place constraints on judicial reasoning. After all, courts may intervene only when there are blockages to the political channels for minorities. Nevertheless, according to Singer, '[i]t is also unlikely that we can identify theoretically satisfying decision procedures that will avoid the need to make normative arguments or to engage in persuasion'.[2077] Indeed, as discussed in Section 9.2.1B, Tribe has clarified that there needs to be a substantive theory underlying these procedural standards in order to help determine inter alia which procedures should be followed and how they should be given shape. In the absence of such a theory, procedures would lead to subjectivity and controversy just as much as substantive, moral standards would. By contrast, substantive principles concerning justice, equality, dignity, and democracy provide direction to judicial behaviour, as Habermas and Zurn note, but they are not value-free; instead, they impose certain substantive values (see Section 9.2.1C). One way or the other, they require someone's interpretation of such values to be imposed, whether this is majority rule or the views of judges, as suggested by Dworkin in relation to hard cases (see Section 9.2.2B). Process-based review therefore seem unable to resolve the fundamental tension between neutrality and normativity.

B. *Empirical reasoning to resolve the neutrality–normative tension?*

Theories on evidence-based decision-making can be regarded as trying to mitigate the normativity–neutrality tension.[2078] Arguably, from a realist perspective, by reference to science and data, normativity can be taken out of decision-making.[2079] The *Carter* judgment can help to illustrate this. In that case the Canadian lower court relied on empirical reasoning of evidence to determine whether the law prohibiting medically assisted suicide was compatible with the Canadian Charter.[2080] By means of such empirical reasoning, courts may be said to circumvent moral reasoning, or at least to support their judgments by scientific evidence. In other words, principles

[2075] In this sense the debate is given shape as on the one hand, 'judicial review is needed to avoid the tyranny of the majority', and on the other hand, 'constraints on judges are needed to avoid the tyranny of the judiciary', see Tushnet (1980), p. 1061.

[2076] Ely (1980).

[2077] Singer (2009), p. 222.

[2078] See Yowell (2018), p. 6, and the references therein.

[2079] For a normative argument to this effect Faigman (2008), p. 25 and Tanford (1990), p. 137.

[2080] SCBC 15 June 2012, 2012 BCSC 886 (*Lee Carter v. Canada (Attorney General)*), see Sections V-VIII. See the discussion in Section 9.3.2C and more extensively addressed in Section 4.2.4.

PROEF 3

of evidence-based review give direction to adjudication and, unlike restraints on the basis of normative considerations, reliance on research and data is often considered neutral, objective, and purely factual. In other words, from this point of view, 'subjectivity/controversy' of normative reasoning is replaced by 'factuality/objectivity', and 'indeterminacy/flexibility' of neutral reasoning is replaced by 'evidence-based guidance', as is shown by Figure 6.

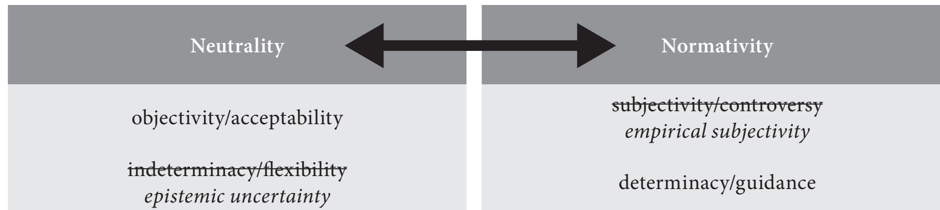
Figure 6. Empiricism and neutrality-normativity tension

The turn to review of evidence-based decision-making nevertheless does not truly resolve the neutrality–normativity tension, however. Most critically, from an anti-realist perspective, empirical reasoning should not enter the domain of legal adjudication as 'facts' are socially constructed and therefore cannot replace normative disagreement.[2081] Indeed, empirical reasoning is not as objective as is often thought. There are many aspects of choice involved in designing, conducting, and evaluating research. For example, 'there is an element of arbitrariness involved when the researcher chooses the categories between which correlation is taken to be significant'.[2082] Add to this the sometimes questionable use of courts of empirical evidence and data[2083], and it becomes clear that 'normative subjective' is not replaced by 'empirical objectivity', but by 'empirical subjectivity' instead. Besides the relative subjectivity of courts' empirical reasoning, 'normative indeterminacy' appears to be replaced by 'epistemic uncertainties'. After all, it is never possible to make a once-and-for-all assessment of reality, rendering decisions based on empirical data at least subject to change.[2084] That is, judges will have to assess evidence that can only prove to a certain degree of probability or plausibility that a situation would occur, that there is a causality between two occurrences, or that certain policies or regulatory measures would be effective.[2085] Of course, this is only a brief and perhaps blunt discussion of the issue and there is certainly much more that can be said in this regard, however, it can be concluded that empirical reasoning does not necessarily mitigate the tension between neutrality and normativity, but rather, replaces it with different kinds of challenges. This is summarised in Figure 7.

[2081] Faigman (2008), pp. 24–25.
[2082] Yowell (2018), p. 48 and Dworkin (1977), p. 5.
[2083] See in this regard Section 9.3.2B and the references therein.
[2084] See also Dworkin (1977), pp. 6 and 12.
[2085] See Section 9.3.2A.

PROEF 3

Figure 7. Empiricism and neutrality-normativity tension 2.0



One may wonder whether the turn to empirical reasoning from the perspective of this neutrality–normativity tension is worthwhile. Indeed, as the previous sections have shown, courts may not have the institutional capacity to properly interpret available data, and they may need to determine whether they decide a case *ex tunc* or *ex nunc*.[2086] Judicial assessment of scientific data is furthermore fraught with complexities, as the *Urgenda* judgment illustrated.[2087] In particular, Petersen has shown that when empirical reasoning in adjudication fails to comply with the rules of social sciences, it may lead to courts basing 'normative conclusions on questionable factual assumptions'.[2088] Yowell's research further shows that, in practice, judges have also erred in their empirical assessment.[2089] The turn to empirical reasoning may raise important issues of the capacities of courts. Moreover, while courts' use of moral reasoning is at least openly normative, empirical reasoning allegedly does so under a cover of factuality, and as such bolsters the concern that 'reference to social science approaches carries a hidden normative agenda'.[2090]

Again, process-based review has been suggested as a way to mitigate this renewed tension, as a way to avoid the subjectivity and uncertainty pitfalls of empirical reasoning.[2091] In particular, procedural reasoning has been advanced as a means to resolve the practical problem that courts are ill-equipped for empirical reasoning. This would allow courts to stick to reviewing whether other decision-making authorities, which are better capable of such reasoning, have actually tried to do their job properly.[2092] Nevertheless, procedural reasoning cannot fully address the subjectivity and uncertainty problems. After all, courts may impose their (judicialised) views on the relevant standards for evidence-based decision-making and, through procedural reasoning, they may enforce flawed empirical conclusions of decision-making

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2086 See Sections 9.3.2A and 9.3.2B.

2087 Discussed in Section 9.3.2E. CoATH 9 October 2018, ECLI:NL:RBDHA:2015:7196 (*Urgenda*) and DCTH 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda*). See Section 3.2.4.

2088 Petersen (2013), p. 309.

2089 Yowell (2018), pp. 65–89. He is also critical about the trial judge's and the CSC's approach taken in the *Carter* judgment (pp. 84–87), which is addressed in this book in Section 4.2.4. See BCCoA 10 October 2013, 2013 BCCA 435 (*Carter v. Canada (Attorney General)*) and CSC 6 February 2015, 1 R.C.S. 331 (*Lee Carter v. Canada (Attorney General)*).

2090 Petersen (2013), p. 295.

2091 See Section 9.3.2C.

2092 See Sections 9.3.2B, 9.3.2C, and 9.3.2D

PROEF 3

authorities, which does not assist the quest for factually reasoned decisions.[2093] Once again, this points to the finding that neither substance-based, nor process-based, evidence-based review can completely resolve the neutrality–normativity tension.

9.4.3 NORMATIVITY IN DEGREES

Although the unavoidable neutrality–normativity tension in fundamental rights adjudication may not be resolved by turning to process-based review (or empirical reasoning), this does not mean that there is no use for process-based fundamental rights review. Singer has argued in favour of a realistic view on how to deal with rights debates:

> 'This does not mean that analysis of rights, liberties, and duties should not be part of the answer to the normative problem. Nor does it mean that we should not be concerned with trying to find approaches to justifying legal rules that could be accepted by people who adhere to very different and reasonable comprehensive moral theories. *It does mean that we need to be realistic about our ability to reason about the nature of rights in a manner that avoids, settles, or sets aside debates about morality and justice.* We need other methods to elaborate reasons that can justify rule choices and institutional settings for a free and democratic society characterized by widespread disagreement about morality. We are unlikely to find a rigid decision procedure that will be decisive in answering questions about what the law should be; we are also unlikely to develop methods of analysis that eschew all moral considerations. Both our procedures for answering normative questions and the reasons we give to justify the rules we enforce are likely to involve controversial premises and a reasoning process that is far from a mechanical one. *We need a form of normative argument that recognizes the complexity and plurality of our values and that allows for forms of moral reasoning and justification that are based on argument, persuasion, and rhetoric – not just logic.*'[2094]

Singer's suggestions are relevant to the use of procedural reasoning in two respects. First, it is important to be sensible about the fact that normativity cannot be removed from fundamental rights adjudication. On this understanding, it makes sense to move away from a binary logic of normativity and neutrality. This means that instead of regarding neutrality–normativity as an either-or-debate[2095], it may be possible to regard these concepts as being situated on a spectrum, which would entail that there are different degrees of neutrality and normativity. Connected to this understanding of substantive and procedural reasoning as forming a continuum of judicial review, it is possible to argue that in some cases, procedural reasoning is *more* neutral than substantive reasoning (for an argument along these lines, see Section 9.2.1E). Such arguments may require further exploration.

[2093] Van Gestel and De Poorter (2016), pp. 183–184. See Section 9.3.2E.
[2094] Singer (2009), p. 924.
[2095] See for a similar argument Section 9.2.1E.

PROEF 3

Secondly, taking account of Singer's comment that we need to recognise the complexity and plurality of our values, it should be accepted that there *is* a plurality of procedural values. In this context it is important to heed Tribe's concern that it would be wrong to suggest that procedures are necessarily settled.[2096] Indeed, since procedures are not completely value-free, it is relevant to continue the debate on the value of procedures for fundamental rights protection. As explained in Section 8.4.1, there are various reasons why procedures can be valued. The discussion on prisoner voting rights, for instance, illustrated that there may be a normative dispute as to who is to be included in certain procedures and what constitutes a good procedure in any given context.[2097] Again, also in this regard it is fruitful to continue the debate on the value of procedures and procedural reasoning.

These two issues may be said to determine the desirability of applying process-based review. Both invite a contextualised understanding of procedural reasoning. While in one context procedural reasoning and enforcing certain procedural standards may be considered relatively neutral, in other contexts this may be different. If a court sets out highly debatable standards for procedures, these may in fact be considered more controversial than substantive reasoning would be, but if there is a strong consensus on the procedural norms, they may be rather more neutral and acceptable (see also the discussion in Sections 8.2.2C and 9.2.1C). Clearly, various contextual factors are relevant for determining whether procedural reasoning is appropriate and on the basis of which standards such review may be conducted. From both the previous chapters, and the current one, it is clear that these include the institutional context of courts (e.g., what does their mandate entail and how is the separation of powers doctrine specifically given shape?), the issues at stake (e.g., which morally sensitive issues are regarded as being outside the purview of judicial decision-making, and which issues are particularly the prerogative of other decision-making authorities?), and the expertise and capacities of courts (e.g., are courts experts on process, and are other decision-making authorities better-equipped for empirical and moral reasoning?). Chapter 10 will discuss how these contextual factors may be of relevance to the practical operation of process-based fundamental rights review as a relatively neutral and objective enterprise.

9.5 CONCLUSION

This chapter discussed several proposals for the role of procedural reasoning in cases in which courts face normative or epistemic challenges. Process-based fundamental rights review may be used to ensure neutrality of judicial review or assist courts in circumventing hard cases. It has also been suggested that procedural reasoning fits well

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[2096] Tribe (1985), p. 7. See the discussion in Section 9.2.1F.

[2097] See the discussion in Section 9.2.1B, ECtHR (GC) 6 October 2005, app. no. 74025/01 (*Hirst v. the UK (No. 2)*). See Section 2.2.8.

PROEF 3

with the expertise of courts, as it enables them to support the evidence-based trend in public authorities' decision-making, and allows them to avoid empirical reasoning. At the same time, others have rejected such premises. Procedural standards are considered just as normative as substantive norms and therefore process-based review does not enable courts to avoid normative decision-making by taking a procedural approach. In addition, courts are not always experts on matters of process, and reviewing and setting procedural standards for evidence-based decision-making may be more complex than is often thought. At the core of these debates lie various perspectives on the relationship between law and morality, and between law and empiricism. Furthermore, the normativity–neutrality tension is an inherent part of fundamental rights adjudication and this tension cannot be resolved by purely procedural reasoning, nor by empirical reasoning. However, this does not mean that procedural reasoning should be forsaken. Instead, it is important to understand neutrality as variable and to take into account the context within which procedural reasoning is applied.

REFLECTION ON PART III

The previous chapters have shown the breadth, depth, and complexity of the debates on the application of process-based review in fundamental rights cases. Procedural reasoning has been advocated from various perspectives on the basis that it may contribute to the rule of law, deliberativeness in public decision-making, and the enhancement of fundamental rights protection. Process-based fundamental rights review has also been considered a means for showing institutional, normative, and epistemic judicial restraint, and for allowing courts to stay within their areas of expertise and mandate. However, others have expressed concerns about the application of procedural reasoning. The deferential nature of procedural reasoning has been questioned, as procedures have been considered the prerogative of other public authorities, and because the focus on procedures is held to cover up underlying normative decisions of courts. It has also been suggested that review of the deliberativeness of decision-making procedures endangers the deliberative democratic project and leads to reduced fundamental rights protection, as it may lead to window-dressing and delays in, and even denials of, (substantive) justice.

For reasons of clarity and structure the various debates have been addressed in separate sections and chapters. This has a downside, however, as was acknowledged in the Introduction to Part III. Certainly, the strands of the debate on the value of procedural reasoning are not as separate as the discussions in this Part suggest. Indeed, the arguments made by scholars often cross-cut the boundaries of institutional, functional, normative, and empirical discussions. This reflection therefore begins by highlighting the various ways in which the debates overlap as well as by signalling conflicts between these arguments. It closes with a summary of the main findings and conclusions of this Part.

OVERLAP AND CONFLICTS BETWEEN DEBATES ON PROCESS-BASED REVIEW

The debates on procedural reasoning have been addressed in debates concerning the institutional position (Chapter 7), function (Chapter 8), and capacities of courts (Chapter 9). Within these debates, more specific debates have been distinguished, including arguments for and against procedural reasoning in the context of the rule of law, deliberative democratic theory, and institutional restraint, as well as in the context of procedural mandates, procedural standard-setting, and substantive and procedural

PROEF 3

fundamental rights protection. Debates on process-based review also related to the neutrality of procedures, hard cases, and courts' expertise in procedural matters and the lack thereof for dealing with epistemic uncertainties. Clearly, all these debates interact and overlap.

For instance, John Hart Ely regards the protection of procedures as a neutral way for courts to guard the political process (Section 9.2.1A), arguing that courts can still contribute to upholding the values of deliberative democracy without upsetting the separation of powers doctrine (Section 7.3.1B). This idea relates closely to views that consider procedural reasoning as institutional judicial restraint (Section 7.4.1).[2098] Such restraint may be warranted as courts should pay attention to their institutional position and the politically complex context in which they operate (e.g., Section 8.3.1A-II). Indeed, many have contended that the legislature, as an authority with direct democratic legitimacy, is the most appropriate public authority for balancing interests. The debate on procedural reasoning as a normative avoidance strategy also relies on the idea that the legislature is generally in an institutionally better position to decide morally sensitive issues (Sections 9.2.2B and 9.2.2C). In addition, other authorities may be considered to be the appropriate authorities for substantive decision-making because of their institutional position in democratic society, as well as their expertise and capacities for dealing with such matters. In this sense then, epistemic deference may also be a consequence of the capacities of other public authorities (Sections 9.3.2B and 9.3.2C), and by focusing on decision-making procedures, courts remain within their own area of expertise (Section 9.3.1A). At the same time, the discussion that procedural reasoning may lead to enhanced fundamental rights protection stems from the idea that the application of process-based review allows courts to encourage better decision-making by other authorities. It may thus lead to better procedural protection by the legislature, and may therefore advance the values of a deliberative democracy (Sections 8.3.1A-I and 8.3.1B-I, and Section 7.3.1C). In addition, if other authorities are indeed better at normative and empirical reasoning in comparison to courts, then the argument that process-based review may encourage better decision-making would also positively influence substantive protection of fundamental rights since these other institutions are in the right position and have the required expertise to decide these normative and epistemic challenging issues (e.g., Section 8.3.1B-II).[2099]

In a similar vein, the arguments rejecting the desirability of process-based review are interconnected. Laurence Tribe has rejected Ely's view that procedural reasoning is

[2098] Sathanapally also argued that process-based review theories relate to judicial restraint and incentivising democratic deliberation, see Sathanapally (2017), pp. 48–60.

[2099] In a similar vein, see Harbo (2018), p. 31 ('The issue then becomes a question of making sure that the decision-making process is as open and transparent as possible, enabling all relevant arguments to be considered and publicly debated (reasoned). The question as to who is best suited to conduct a proportionality analysis may then turn into a question of, for example, capacity. Which branch of power – the legislature or the judiciary – has the most resources available to conduct a thorough elaboration and evaluation of the web of crisscrossing interests and opinions, which is required to make decisions in strongly value-infected cases?').

PROEF 3

a more neutral approach than substantive reasoning, because procedures are not value-free and only serve to hide the imposition of normative views of courts (Section 9.2.1B). This interacts with views that procedural reasoning may not be a way of avoiding morally sensitive issues (Section 9.2.2D) and therefore connects with the arguments that procedural reasoning does not help to show institutional restraint (Section 7.4.2). In addition, procedures have been considered the province of other authorities. This may also explain the position that courts lack expertise on procedures and should therefore refrain from developing procedural standards (Sections 9.3.1B and 8.2.2). Instead, with regard to courts' role of guardians of fundamental rights, it has been argued that they should offer substantive protection of fundamental rights (Section 8.3.2A-I). If courts focus only on procedures then not only are they doing what they are incapable of, but moreover they weaken the judicial protection of fundamental rights, as only substantive reasoning could provide the required rights' protection (Section 8.3.2B). In addition, when courts do not normatively engage with arguments raised they fail to fulfil their role as public reasoners and thus fail to contribute adequately to the deliberative democratic project (Sections 7.3.2A and 7.3.3A).

To complicate matters further, the same or similar arguments may be used from different perspectives to either favour or dismiss procedural approaches. For example, it has been posited that more detailed standard-setting may avoid procedural window-dressing (Section 8.3.2A-II). From such a perspective, the reason-giving requirement may be said to require courts to provide detailed reasoning and set clear and comprehensive standards.[2100] This argument has been put forward in light of the evidence-based trend, deliberative democratic theory, and enhanced fundamental rights protection (e.g., Sections 9.3.2C, 7.3.1A and 7.3.2C, and 8.3.1B). However, detailed procedural standard-setting may raise concerns about courts' capacities to set standards for decision-making procedures (Sections 8.2.2C and 9.3.1B), as well as giving rise to claims that it falls outside their procedural mandate and thereby upsets the rule of law (Sections 8.2.1 and 7.2.2). In addition, imposing restrictions on decision-making procedures may be held to restrict open and deliberative processes (Section 7.3.3A). The same argument then, may lead to divergent views on the desirability and value of process-based review.

CONCLUSION: PROCESS-BASED REVIEW IS NOT A ONE-SIZE-FITS-ALL APPROACH

This Part has shown that for each argument in favour of process-based fundamental rights review, just as many reasonable arguments can be made against it. Furthermore, while an argument from one perspective may be used to advocate for procedural reasoning, the same (or at least a similar) argument may be used from a different viewpoint to reject a procedural approach. These complexities do not mean, however,

[2100] For an explanation of the reason-giving requirement as a procedural standard, see the introduction to Section 8.2.2.

PROEF 3

that courts should give up on procedural reasoning altogether. After all, similar debates can be found in relation to substance-based review. Nevertheless, two important conclusions can be drawn from this Part.

First, all three chapters showed the importance of context for procedural reasoning. Indeed, whether procedural reasoning is a controversial method of review seems to depend on numerous contextual factors. In particular, the institutional and historical settings of courts are relevant to determine whether they can apply process-based review (Section 7.5.2). Courts' procedural mandate (Section 8.2.1), their presumed procedural expertise (Section 9.3.1), and the normatively or epistemically challenging issues raised in cases they adjudicate, are also of importance for the appropriateness of procedural reasoning (Sections 9.2.2 and 9.3.2). In addition, a variety of factors may determine the perceived intrusiveness of a procedural approach (Section 7.5.3). Likewise, the effectiveness of procedural reasoning in ensuring concrete or generic fundamental rights protection appears to depend on a variety of contextual settings (Sections 8.4.3 and 8.4.4). It is, therefore, impossible to provide a general answer as to whether a procedural approach by courts would contribute to a 'culture of justification'[2101], resulting in fundamental rights-compliant decision-making, or whether it would instead lead to procedural window-dressing, resulting in reduced procedural and/or substantive protection of fundamental rights (compare Sections 8.3.1B and 8.3.2A).

Secondly, connecting the discussions in the current Part with the findings of Parts I and II, it can be concluded that a nuanced understanding of process-based review is needed. Some of the debates in this Part are strongly black-and-white, that is, scholars argue strongly in favour of, or against, procedural reasoning. However, this does not fully do justice to the practice of process-based fundamental rights review. Indeed, as Chapter 6 explained and as is evidenced by the examples of procedural reasoning of Part I, process-based fundamental rights review can be applied in a myriad of ways. Furthermore, the views presented in this Part often concerned arguments made in relation to a particular type of procedural reasoning or in relation to a specific debate on fundamental rights adjudication. Consequently, they may not favour or reject procedural reasoning as a general approach, but they often focus on a particular use of it.

These two conclusions show that the acceptability of process-based review depends greatly on how procedural reasoning is applied and in which context. For each court and, most likely, also for each type of case, there may be a different conclusion as to whether, when, and how procedural reasoning can (best) be applied.

In short, process-based review cannot be a one-size-fits-all approach in fundamental rights adjudication. A nuanced and context-sensitive approach is required, and Chapter 10 will now provide this. The chapter provides insight into the debates that are at the forefront of particular applications of procedural reasoning. In particular, it sets out guidelines that may assist courts in determining whether procedural reasoning is warranted and the manner in which it can best be applied.

2101 Kleinlein (2017), p. 873.

CONCLUSION

PROEF 3

PROEF 3

CHAPTER 10
CONCLUSION

10.1 INTRODUCTION

Process-based fundamental rights review concerns judicial reasoning that assesses public authorities' decision-making processes in light of procedural fundamental rights standards. This type of review raises various challenges. There are broad and fundamental theoretical debates relating to the use of process-based review in fundamental rights cases, as has been explained in Chapters 7–9. These debates concern, inter alia, courts' expertise, their function as guardians of fundamental rights, their place in deliberative democratic societies, and their role in deciding specific kinds of cases, such as cases that require moral or empirical reasoning due to normative indeterminacy and epistemic uncertainties. Underlying the positions taken in these debates, there are diverging views on, and conceptions of, the appropriate role of courts in democratic societies, the relationship between law, morality, and empiricism, and the importance of procedures in fundamental rights protection. Based on contextual factors surrounding courts and judicial decision-making, together with legal traditions and individual viewpoints, these debates have at times turned to an almost black-and-white discussion concerning the value of procedural reasoning in fundamental rights cases. Some wholeheartedly embrace process-based fundamental rights review; others dismiss it in principle.

The submission in this last chapter is that such a black-and-white debate is based on an erroneous conceptualisation of process-based review. As the findings of Part II of this book evidence, it is difficult, if not impossible, to make a sharp distinction between procedural reasoning and substantive reasoning. As was explained in Chapter 5, both are extremes placed at opposite ends of the judicial review spectrum. For that reason, fundamental rights review is best perceived as less or more procedural or substantive in nature. Furthermore, Chapter 6 has shown that process-based review can be applied in a myriad of ways. Courts can assess compliance with procedural standards as part of the proportionality test, as part of determining the intensity of review, as part of their review of the legitimacy of the aim(s) pursued, or as part of the suitability or necessity of a measure. Their process-based assessment can be strict and thorough, or more deferential and lenient. In addition, the procedural standards against which procedures are tested may stem from different authorities and they may be of a different nature, for example relating to the certainty, rationality, or fairness of procedures. Indeed, the

PROEF 3

various examples discussed in Part I illustrate that, in practice, procedural fundamental rights review is highly diverse (Chapters 2–4).

In light of these findings, the central questions of this book – how is process-based review conceptualised and what role does it play in fundamental rights cases? – cannot be answered in a straightforward manner. Indeed, part of the answer lies in acknowledging that there are various possible uses of process-based fundamental rights review. As Part III concluded, process-based review cannot be a one-size-fits-all approach, nor can it be a quick fix for any of the challenges at the heart of the different debates. To answer the central questions of this study, it is therefore necessary to take a more nuanced view of the role of process-based review in fundamental rights cases. To that end, this final chapter will explore how procedural reasoning can work in practice, taking into account the institutional, functional, normative, and epistemic debates, the conceptual characteristics of procedural reasoning, and the various examples of its application in practice. In so doing, it aims to provide a list of factors that courts can take into account when they apply procedural reasoning, and scholars can use when they study procedural approaches in fundamental rights adjudication.[2102]

For this purpose, this chapter connects the various views expressed in Part III of the book with the different applications and conceptualisations of procedural reasoning put forward in Part II (Section 10.2).[2103] Following similar lines to Chapter 6, it distinguishes the various elements of fundamental rights adjudication – intensity of process-based review, burden of proof, standards for review, result of procedural considerations, location of review, importance of procedural considerations, and conclusion of procedural reasoning – and clarifies how the institutional, functional, normative, and epistemic debates relate to each of them. The objective of identifying such building blocks is to concretise and translate the theoretical debates to the practice of adjudicating fundamental rights cases. This allows us to conclude the chapter with a summary of the main findings and a brief reflection on what they mean for the procedural turn of the ECtHR in particular, which was the book's starting point (Section 10.3).

[2102] This chapter thereby also avoids one of the problems with universalist comparative studies, see Jackson (2012), p. 70. These studies generally require a description of a normatively preferable 'best practice', which would require a notion of the normative good. Since this chapter does not mean to provide exactly how courts should act, it suffices to solely identify the debates that are part of the research without arguing that courts should avoid, engage in, or dismiss a debate. Indeed, various factors may influence courts decisions on how they want to deal with certain procedural debates. In that regard literature on judicial behaviour may provide more insight, see e.g., Howard and Randazzo (2017), including the other contributions to the volume, and Westerland (2017), pp. 253–256.

[2103] Also Eva Brems has made a connection between various rationales for procedural reasoning with how it would best be applied, or in her words, 'type of review', see Brems (2017), p. 18ff.

PROEF 3

10.2 BUILDING BLOCKS FOR PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

Part III of this study has demonstrated that there are opposing views on the usefulness, appropriateness, and desirability of process-based fundamental rights review. At the same time, it has become clear that process-based review is not an either/or issue, but can be applied in a myriad of ways, as noted in Chapter 6. The examples from Part I also show that there is considerable variety in the procedural approaches taken by courts to adjudicate fundamental rights cases. Quite possibly, therefore, courts may be able to accommodate various theoretical concerns on the use of process-based review by carefully selecting not just when to apply procedural reasoning, but moreover *how* to apply it.

This section therefore examines how the debates on procedural reasoning connect with the myriad of ways in which procedural reasoning can be applied. Since the discussions in Chapters 7–9 are wide-ranging, the references to the various arguments made and positions taken are necessarily impressionistic and general. Furthermore, as the sections on 'Reflections and connections' of each of those chapters show (Sections 7.5, 8.4, and 9.4), there may be important differences in the contexts in which courts decide their cases, and this may affect the presence or absence of these arguments in courts' judicial reasoning. This means that the various conclusions drawn in this section can only be broad, tentative, and open.[2104] Nevertheless, this section can provide some clues on how the various arguments in favour of, and against, the use of procedural reasoning may be present in a particular application of process-based fundamental rights review. The objective is to offer building blocks that are both sufficiently universal as to be relevant for courts in various jurisdictions, and sufficiently concrete to provide them with practical guidance. For the purpose of clarity, this section is structured along similar lines as Section 6.3. That is, it discusses the intensity of process-based review (Section 10.2.1), the burden of proof (Section 10.2.2), the standards for review (Section 10.2.3), the result of procedural considerations (Section 10.2.4), the location of review (Section 10.2.5), the importance of review (Section 10.2.6), and the conclusion of procedural reasoning (Section 10.2.7). It is concluded by a brief summary of the main findings (Section 10.2.8).

10.2.1 INTENSITY OF PROCESS-BASED REVIEW

[2104] See also Singer, p. 977 ('The result may not be a set of principles that can be applied deductively because attention to social context, historical settlement of issues, as well as considerations of judicial role, all matter enormously').

PROEF 3

The intensity of process-based review can vary according to various contextual factors.[2105] Three levels of scrutiny in relation to process-based review have been distinguished: strict, intermediate, and lenient scrutiny. Strict procedural reasoning means that courts closely examine the quality, fairness, and diligence of decision-making procedures. Lenient procedural scrutiny entails a deferential approach by courts, meaning that they only superficially review the decision-making procedure in order to assess whether it was not evidently unjustifiable, flagrantly unreasonable, or clearly arbitrary. An intermediate procedural scrutiny is placed in between these extremes, leaving some leeway for decision-making authorities but still requiring a (reasonably) acceptable procedure.

In light of the various debates surrounding process-based review, the first general principle that can be discerned is that **the more intensively courts scrutinise decision-making procedures, the stronger their institutional and procedural position ought to be**. Their institutional position can be strong on the basis of the role assigned to them in democratic societies. For example, constitutional courts generally have wide-ranging powers and may therefore be expected to delve into the decision-making process more deeply than lower courts.[2106] Intense scrutiny of procedures seems appropriate, moreover, when courts have a specific procedural mandate.[2107] For example, courts generally have a strong mandate for procedural reasoning in relation to reviewing compliance with procedural fairness of judicial proceedings, and in administrative law cases.[2108] Explicit procedural mandates may also strengthen the position of courts to review the legislative process. For example, very thorough review of the legislative process appears to be less controversial when courts have extensive review powers in relation to both the substance of legislation and the legislative process.[2109] By contrast, lenient scrutiny may be useful in situations where courts are in a relatively weak position. Especially in systems with parliamentary supremacy, judicial review of the legislative process seems to require extensive procedural deference – if process-based review can be applied at all.[2110] This institutional argument is also related to judicial expertise. In situations where courts are considered to have expertise on matters of process, they can be considered capable of assessing the quality of decision-making procedures, but if their expertise is limited, a more lenient process-based review seems more appropriate.[2111] Various other factors may determine the appropriate intensity of review in a case, and they may influence and offset each other. For example, even in cases where courts have a far-reaching procedural mandate, if they only have limited

2105 Discussed in Section 6.3.1 (intensity of review).
2106 Section 7.5.2 (context of process-based review).
2107 Section 8.2.1 (courts' procedural mandate).
2108 Ibid.
2109 Ibid.
2110 Section 7.5.2B (historical context of process-based review) and 7.5.3 (intrusiveness of process-based review).
2111 For the debates on judicial expertise, see Section 9.3.1.

PROEF 3

expertise to assess the quality of decision-making procedures, then an intermediate or lenient approach may be more appropriate.

The book's second conclusion is that **the intensity of process-based review can be influenced by the legitimate expectations courts may have of public authorities' decision-making procedures**. This means that the applicable procedural standards may raise certain expectations concerning the quality, diligence, and fairness of decision-making procedures. Courts may scrutinise decision-making procedures more closely when legislation or a constitution defines strict procedural standards. Similarly, where procedural standards form the core of procedural or substantive rights, courts may be required to thoroughly review the decision-making procedures, possibly in addition to intensive substantive reasoning.[2112] Further, the evidence-based decision-making trend has given rise to specific procedural rules for legislators and policy-makers, which require their decisions to be based on available studies and scientific research.[2113] Such procedural rules may set high and quite detailed standards for decision-making. The question then becomes the extent to which courts may be expected to respond to this, especially since some of these procedural rules are contained in soft law instruments, which may not lend themselves to close judicial review.[2114] Again, by varying the intensity of their process-based review, courts can accommodate the nature of the procedural standards on which they rely. In general, when the standards are vague or non-binding, when the stakes are less high, or when the expectations for the quality, diligence, or fairness of procedures are lower, courts can be expected to show more leniency in their assessment of the decision-making procedure.

The third general finding of this book is that **in cases where courts deviate from the ordinary intensity of review of procedures, debates on procedural activism or deference necessarily arise, and courts need to address these by firmly establishing the grounds for such deviations**.[2115] If the standard approach in a particular situation would typically be one of procedural deference, courts may point to the nature and importance of the right at stake to justify a more intense scrutiny in a case.[2116] This would mean that in decisions on socio-economic and environmental matters, which generally warrant institutional, normative, or empirical deference, courts may decide to deviate from this general rule if they have strong grounds for doing so, for instance,

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2112 It has for example been argued that when it concerns core rights, courts have broader standard-setting powers, see Section 8.2.2B (temporal aspects of standard-setting through process-based review). Procedural reasoning has also been said to protect the core of fundamental rights, Sections 8.3.1A-I (intrinsic approaches to the value of procedures for fundamental rights protection) and 8.3.1B-I (enhanced procedural fundamental rights protection). At the same time, procedural reasoning may be considered insufficient to protect substantive rights, see Section 8.3.2A-I (inadequate protection of fundamental rights). On a general note, Section 6.3.5A explained that the kind of right at stake may be of interest for the intensity of review courts employ. The ECtHR, for example, narrows the margin of appreciation when it concerns a core right, see Gerards (2019), pp. 188–193.

2113 For an explanation of the evidence-based trend, see Section 9.3.2D.

2114 Section 9.3.2E (problems with process-based review of empirical reasoning).

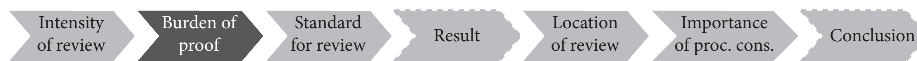
2115 For the debates on procedural judicial restraint or activism, see Section 7.4.

2116 See n(2112).

PROEF 3

by clarifying that this would be necessary to safeguard the essence of a right.[2117] Courts can also justify a more intense procedural approach when there are good reasons to suspect that there is procedural window-dressing involved.[2118] At the same time, in cases where strict scrutiny may be warranted, courts may justify a more relaxed scrutiny by explaining that applying a correctness standard to the decision-making procedure would hamper parliamentary deliberations.[2119] In light of the discussions on procedural activism and procedural restraint, the circumstances in which, when, and how deviations from procedural scrutiny may be supported remain issues for debate.[2120] Indeed, where there are institutional reasons for lenient scrutiny, for example due to the democratic credentials of the decision-making authority, an intense procedural scrutiny requires firm and convincing reasons from courts justifying that intensity in order to address concerns about judicial activism.

10.2.2 BURDEN OF PROOF



In determining the outcome of their review, courts obviously rely on evidence and arguments put forward by parties of a case.[2121] Rules of procedure generally determine who carries the burden of proof. Such evidentiary rules may differ between jurisdictions, from one case to another, and between different stages of a case. It has been argued in legal scholarship that, within a case, the burden of proof continuously shifts forward and backward between the parties.[2122] From that perspective, a discussion of the relationship between the arguments in favour of, and against, procedural reasoning and the burden of proof is particularly relevant.

The first conclusion to be drawn about the relationship between the debates on procedural reasoning and the burden of proof, is that **the effective protection of fundamental rights may require courts to shift the burden of proof from one party to the other or to change the nature of evidence that is required**. It has been argued that there may be reasons for courts to shift the burden of proof when it is very difficult, if not impossible, for victims of fundamental rights interferences to provide the required evidence. It may be difficult for an individual to prove that a

2117 On judicial restraint see Sections 7.4.1 (institutional), 9.2.2B (normative), and 9.3.2B (empirical).
2118 See for concerns about procedural window-dressing, Section 8.3.2A-II.
2119 Möller argued that a reasonableness standard should be adopted in relation to deliberations, see Möller (2014), p. 384.
2120 Sections 7.4 (process-based review and judicial restraint), 7.5.2B (institutional context of process-based review), and 7.5.3 (intrusiveness of process-based review).
2121 See Section 6.3.2.
2122 Walton (2014), p. 49.

PROEF 3

decision-making procedure was flawed if he has no access to information on the decision-making process.[2123] If the burden of proof lies solely with the individual, purely procedural reasoning therefore may have the effect of lowering the protection of fundamental rights.[2124] By contrast, if the decision-making authorities are required to provide proof of the quality of their own procedures, this problem may not arise. In that situation, a shift from a requirement of substantive evidence to a procedural one may even help to guarantee the protection of fundamental rights.[2125] By way of illustration, it has been shown, for example, that it can be difficult for individuals to prove on substantive grounds that a person has been murdered by State officials in the absence of a body. In such cases, procedural evidence to be provided by the authorities may be a useful complement. Here, the authorities are asked to supply evidence related to, for example, the diligence of the investigations following a missing person report. If such information cannot be satisfactorily produced, this may lead to negative inferences and may even provide grounds for a court to find a violation of the relevant fundamental right. Such a shift in the burden of proof and the nature of the required evidence is only possible, however, if it is recognised that there are procedural requirements to be met in relation to substantive rights and if the rules of procedure allow for this.

The question of who carries the burden of proving the (lack of) quality of the decision-making procedure is usually answered on the basis of default rules of procedure. However, as with the intensity of review, there may be reasons for courts to deviate from the standard approach. The second conclusion to be draw therefore is that **when courts deviate from the default rules on the burden of proof, they must state (strong) reasons for doing so, in order to address debates on procedural activism and deference**. Such explanations may help to prevent arbitrariness in judicial decision-making and ensure that in future cases, parties know what is expected from them.[2126]

On a related note, it can be concluded that **when decision-making authorities deviate from their standard decision-making processes, courts may shift the (procedural) burden of proof may to them**. For instance, where there is a default procedure to be followed by authorities, but they decide to depart from it, it will be up to the authorities to show sufficient proof and arguments as to justify this deviation.[2127]

2123 In a similar vein, Section 8.2.2C indicated that a lower burden of proof for decision-making authorities may lead to a reduced protection of individuals' rights.

2124 Section 8.3.2A-II (reduced protection of fundamental rights).

2125 Section 8.3.1A-II (instrumental approaches to the value of procedures for fundamental rights protection).

2126 In relation to intensity of process-based review, see also Section 10.2.1.

2127 E.g., Neuborne, pp. 376–377, who argued that courts should intervene when authorities deviate from their regular decision-making procedures. See Sections 7.3.1C (process-based review to promote deliberative procedures) and 8.3.1A-II (instrumental approaches to the value of procedures for fundamental rights protection).

PROEF 3

10.2.3 STANDARDS FOR REVIEW

As was explained in Chapter 5, process-based fundamental rights review is essentially an evaluative method of review. It is used by courts to evaluate whether decision-making procedures have complied with fundamental rights standards.[2128] Courts may rely on different standards for this evaluation, which can be categorised in various ways (see Section 6.3.3). Based on the categories defined there, the following sections draw conclusions about and discuss the connection between various standards with the debates on procedural reasoning. They focus on the authority responsible for procedural standards (Section A), the kind of standard relied on (Section B), and some of the other categorisations of procedural standards (Section C).

A. Authority responsible for setting procedural standards

Fundamental rights standards may be set by legislative, administrative, and judicial authorities.[2129] The first observation to make is that **courts are generally in a strong position to apply process-based review when clear legal procedural standards are available**, regardless of whether these are contained in national law or international treaties. Together with an explicit mandate for courts to apply these standards, there is little debate on their role in upholding such standards, since this implies that they do no more than perform their task of applying the law.[2130] It has been argued further that the closer courts stay to applying the explicit standards set out in legislation, the more value-neutral their process-based review is conceived to be.[2131] However, the need for neutrality in procedural reasoning clearly means that courts are still required to apply these standards in a consistent and coherent manner.[2132]

This brings us to the development of standards by courts, which may seem to stray away from a strict or originalist understanding of courts as '*bouche de la loi*'.[2133] The second conclusion is therefore that **when courts cultivate or develop procedural standards, debates on judicial activism and separation of powers may arise, requiring stronger justification for why these standards are acceptable and fitting, and why courts may define and impose these standards**. Setting out new procedural standards

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2128 Section 5.2.3 (common definition of process-based fundamental rights review).

2129 Section 6.3.3A (authority responsible for procedural standards).

2130 Sections 8.2.1 (courts' procedural mandate) and 8.2.2 (courts and the definition and application of procedural standards).

2131 Sections 9.2.1C to E (on the normativity or neutrality of procedures).

2132 Sections 9.2.1F (transparency and risks of corruption, dishonesty, and inconsistency) and 7.2.2 (courts as imperfect protectors of the rule of law).

2133 On the idea of courts as '*bouche de la loi*' see the Introduction to Part I and Section 8.2.2A (originalism, living instruments, and the role of courts).

PROEF 3

or refining existing ones may be interpreted as courts overstepping the boundaries of their function and violating the separation of powers doctrine.[2134] Accordingly, it may be appropriate for courts to develop standards that closely relate to the essence of the function of a decision-making authority, as the resulting standards can be traced back to legislative standards.[2135] Courts may also justify their development of new or detailed standards by submitting that they are necessary to ensure the protection of the (core of the) fundamental right at stake.[2136] For example, courts may argue that certain standards are needed to ensure effective protection of substantive rights[2137], especially in relation to the rights of vulnerable persons.[2138] Courts may also argue that the development of new standards, or refining of existing standards, for decision-making processes is necessary to uphold the core values of democratic society, such as the rule of law, separation of powers, and deliberative democratic principles.[2139] At the same time, courts should be aware that it may be difficult to determine good and appropriate standards for procedures of other decision-making authorities. Indeed, standards developed by courts that relate closely to their procedural expertise – for example, standards in relation to judicial proceedings – may be convincing, as courts are expected to understand how such procedures work and the form they should take.[2140] By contrast, when a case concerns parliamentary deliberative procedures or judicial proceedings of courts in different legal systems, it may be difficult for a court to fully do justice to the intricacies of such procedures. Standard-setting then becomes fraught with complexities.[2141] To ensure that these standards fit the bill, courts may find guidance in soft law instruments developed by the respective authorities, as these are more likely to match the kind of procedures at issue. Nevertheless, this may still raise issues of judicialisation of procedural standards.[2142] As was shown above, soft law instruments may not always provide sufficient ground for legally enforceable procedural standards.[2143] Courts should therefore tread very carefully and perhaps even refrain from (far-reaching) procedural standard-setting and procedural reasoning in light of soft law standards.

2134 Section 7.4.2 (courts as procedural activists). This overlaps with the topic of *a priori* and *a posteriori* standards, see Sections 6.3.3C (other categorisations of standards) and 8.2.2B (temporal asepcts of standard-setting through process-based review).

2135 Sections 8.2.2 (courts and the definition and application of procedural standards), 9.2.1C (neutral enforcement of (legislative) entrenched substantive values), and 9.2.1E (neutrality in degrees: more and less value-laden review).

2136 Sections 8.3.1A (minimum protection of fundamental rights) and 8.3.1B (enhanced protection of fundamental rights).

2137 See Section 8.3.1A-I (intrinsic approaches to the value of procedures for fundamental rights protection).

2138 Section 9.2.1B (normativity of procedures and process-based review).

2139 Sections 7.2.1B (rule of law and process-based review) and 7.3.1B (process-based review to guard the political process).

2140 Section 9.3.1A (judicial expertise on matters of process and process-based review).

2141 Section 9.3.1B (limitations to judicial expertise). See also Section 9.3.2E (problems with process-based review of empirical reasoning).

2142 Ibid and Section 9.3.2 (evidence-based decision-making and procedural reasoning).

2143 See Section 10.2.1, particularly at n(2114).

PROEF 3

B. Types of procedural standards

Chapter 6 distinguished three types of procedural standards: certainty, rationality, and fairness standards.[2144] Each of these types of standards appears to connect with specific aspects of the general debates on procedural reasoning, as will be briefly explained in this section.

A general conclusion can be drawn that **process-based review should be based on standards that can justifiably form the basis for courts' judgments**. Such a justification can stem from, inter alia, the courts' mandate, the issue at hand, and the arguments raised by parties. Indeed, it seems more legitimate for courts to rely on certainty standards if they are explicitly mandated to review compliance with them; it seems more appropriate for courts to rely on rationality standards if the central issue at stake revolves around epistemic uncertainty; and it seems more fitting for courts to rely on fairness standards if parties have submitted arguments to that effect.

Standards of certainty, such as standards relating to legality, legal certainty, prevention of abuse of powers, and access to justice, relate in particular to debates on the rule of law.[2145] Some have argued that, by means of procedural reasoning, courts can help to enforce the rule of law standards, yet others contend that courts' role in this regard is very limited.[2146] It can be concluded that **when courts enforce certainty standards through procedural reasoning, they should ensure that they are not themselves transgressing the boundaries set by these standards**. Indeed, it has been argued that courts may upset the rule of law by process-based review, firstly, if procedural reasoning falls outside their mandate, and, secondly, if they develop and impose new procedural standards in their judgments.[2147]

Rationality standards[2148] are particularly visible in the debate on evidence-based decision-making and on the role of courts in improving the protection of fundamental rights by other public authorities.[2149] These debates focus primarily on whether procedural reasoning in light of rationality standards can incentivise rational, evidence-based decision-making. This is possible according to some, but others reject this idea and raise concerns, referring for instance, to the risk of procedural window-dressing by

[2144] Section 6.3.3B (types of procedural standards).

[2145] Section 6.3.3B-I (certainty standards).

[2146] Section 7.2.1 (courts as authorities of rule of law compliance) and 7.2.2 (courts as imperfect protectors of the rule of law).

[2147] Both arguments are addressed in Section 7.2.2 (courts as imperfect protectors of fundamental rights). Restrictions to the procedural mandate of courts are addressed in Section 8.2.1 and various problems with standard-setting are addressed in Section 8.2.2. That courts have indeed expanded their jurisdictions through procedural reasoning is evidenced by the discussion in Section 8.3.1C (extending courts' jurisdiction through (procedural) positive obligations).

[2148] Section 6.3.3B-II (rationality standards).

[2149] Sections 9.3.2D (evidence-based decision-making and procedural reasoning), 9.3.2E (problems with process-based review of empirical reasoning), and 8.3.1B (enhanced protection of fundamental rights).

PROEF 3

decision-making authorities.[2150] Rationality standards are also apparent in cases where deliberative democratic theories play a role.[2151] Through procedural reasoning, courts can contribute to the ideal of deliberative and rational decision-making by showcasing how public reasoning should be given shape, by encouraging inter-institutional dialogue, and by incentivising other public authorities to act more deliberatively.[2152] Others, by contrast, consider that such an approach would be ineffective or would even restrict the deliberative enterprise.[2153] On the basis of these debates the following observation can be made: **when courts enforce rationality standards through procedural reasoning, they should ensure that their procedural approach is sound and consistent, and that they rely on or impose a set of comprehensive procedural standards**. After all, rational decision-making seems to be stimulated best by rational decision-making by courts.[2154]

Fairness standards[2155] are part of debates on courts' procedural mandate and judicial expertise.[2156] The adjudication of fairness standards related to the right to a fair trial and the right to an effective remedy are generally held to be the prerogative of courts. They are therefore generally expected to have a mandate as well as the capacity to assess compliance with such standards.[2157] At the same time, since decision-making procedures may be diverse, this has given rise to concerns about the capability of courts to assess the fairness of such procedures and about their abilities to refine fairness standards.[2158] It may thus be concluded that **when courts enforce fairness standards, they should ensure that they have the capacity to review and set such standards**.

C. *Other categories of standards*

Finally, as noted in Chapter 6, there are many other categorisations of standards. Without addressing each possible other categorisation separately, several conclusions are set out below.[2159]

2150 Sections 9.3.2D and E (on evidence-based decision-making), and 8.3.2A-II (reduced protection of fundamental rights).

2151 Section 7.3 (process-based review and deliberative democratic theory). In accordance with Ely's interpretation procedural reasoning is a particular successful approach as it is a neutral manner for upholding these democracy standards, see Section 9.2.1A (on John Hart Ely's process-oriented system of review and neutrality).

2152 Sections 7.3.1C (process-based review to promote deliberative procedures) and 7.3.2 (courts as part of the deliberative enterprise).

2153 Section 7.3.3 (a limited role for courts and process-based review in deliberative democratic theory).

2154 Section 9.3.2E (problems with process-based review of empirical reasoning).

2155 Section 6.3.3B-III (fairness standards).

2156 Sections 8.2.1 (courts' procedural mandate) and 9.3.1 (judicial expertise about decision-making procedures).

2157 Sections 8.2.1 (courts' procedural mandate) and 9.3.1A (judicial expertise on matters of process and process-based review).

2158 Sections 8.2.1 (courts' procedural mandate) and 9.3.1B (limitations on judicial expertise).

2159 For the various categorisations, see Section 6.3.3C.

PROEF 3

The first conclusion that can be drawn is that **procedural reasoning is generally controversial if it is based on standards meant for internal use by decision-making authorities, that are unwritten, or that are non-legal. However, judicial reliance on such standards may still be permitted if it concerns a specification of external, legally binding standards**. For example, evidence-based standards are often developed in circulars or guidelines and they are therefore said to concern soft law standards meant to improve the internal decision-making process, without being legally enforceable.[2160] Such standards may be considered an inappropriate basis for judicial review. However, if decision-making authorities have interpreted certain legal standards in such a way that they have become externally accepted and enforceable standards, it may be easier and more appropriate for courts to uphold them.[2161] In that situation, legitimate expectations may be created, and in upholding these standards, courts can ensure that the relevant decision-making authority complies with the legal standards it has set for itself, while respecting its discretion in the interpretation of the standards.[2162] This connects with the rule of law principles such as legal certainty, legitimate expectations, and the prohibition of arbitrariness.

Another topic relates to the temporal aspect of procedural standards.[2163] **Procedural reasoning may be controversial if it is based on standards that are developed after a decision was made or on the basis of new information**. This conclusion pertains to the debate on *a priori* and *a posteriori* standards and *ex tunc* or *ex nunc* review.[2164] From the perspective of fundamental rights protection, the inclusion of new information or the development and application of new standards may be regarded as enhancing the protection of fundamental rights. Especially in the context of epistemic uncertainties, new studies and data may have become available at the time of the judgment, and if so, *ex nunc* review may be fitting.[2165] Courts then take account of whether this new information has in the meantime been considered by the decision-making authority. At the same time, the imposition of *a posteriori* standards and *ex nunc* review in a judgment may raise concerns under the rule of law and about the competences of courts.[2166] New information may be said to fall outside the scope of the dispute, and new standards generally cannot be anticipated by the parties to the case. In the case at hand, courts may be able to avoid controversy by lowering the importance they attach to the positive or negative inferences they draw on the basis of their *ex nunc* process-based

[2160] Section 9.3.2E (problems with process-based review of empirical reasoning).
[2161] Section 9.2.1E (neutrality in degrees).
[2162] Section 7.2.1B (rule of law and process-based review).
[2163] See Section 8.2.2B (temporal aspects of standard-setting).
[2164] Sections 6.3.3C (on *a priori* and *a posteriori* and *ex ante* and *ex post* obligations), 8.2.2B (on *a priori* and *a posteriori* standards), 8.3.2A-II (on *a posteriori* standards leading to reduced protection of fundamental rights), 9.3.2A (on *ex tunc* and *ex nunc* review), 9.3.2D (on *ex ante* and *ex post* evidence-based obligations), and 9.3.2E (on problems with poor quality of *ex ante* evaluations).
[2165] Section 9.3.2A (epistemic uncertainties and empirical reasoning).
[2166] Sections 7.2.2 (courts as imperfect protectors of the rule of law), 8.2.1 (courts' procedural mandate), and 8.2.2B (temporal aspects of standard-setting: consequences of new procedural standards).

PROEF 3

review and on the basis of the application of the new procedural standards.[2167] More structurally, courts may be able to address some of these concerns by clarifying that rationality standards apply in certain types of cases, and that these standards impose not just *ex ante* obligations, such as the requirement for decision-making authorities to make an impact assessment prior to developing a policy, but also *ex post* obligations, such as the requirement for decision-making authorities to follow up and monitor the situation.[2168]

A third observation is that **procedural reasoning in relation to procedural rights is accepted in principle, but procedural reasoning in relation to substantive rights may require specific justification**.[2169] Not only can procedural standard-setting and review in relation to substantive rights raise concerns about the judicial function, as addressed above in Section A, but there are also debates on whether procedural standards and process-based review can actually help to protect substantive rights.[2170] Courts should therefore be aware that while procedural reasoning may sometimes complement substantive protection of fundamental rights[2171], when it has the effect of completely replacing substantive reasoning, it may be considered to lower the level of fundamental rights protection.[2172] For example, from one perspective, courts may provide some protection through procedural reasoning if the political environment is reluctant to embrace judicial review[2173], yet, from another perspective, this may be seen as an abdication of the judicial function.[2174] This is a serious challenge indeed for courts, and one that may require special attention in their procedural approach.

Finally, it can be concluded that **procedural reasoning may give rise to different concerns in cases about civil and political rights than in cases about socio-economic rights**. Of course, there is a certain overlap between the debates, procedural reasoning is presented as a normative avoidance strategy both in relation to civil rights cases and to socio-economic cases.[2175] As regards civil and political rights, courts are more often expected to ensure that the right to a fair trial is upheld as well as to police the political process, especially in relation to free elections and political participation.[2176] Even then,

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2167 Section 8.2.2B (temporal aspects of standard-setting: consequences of new procedural standards). See also Section 10.2.6.
2168 Section 9.3.2D (evidence-based decision-making and procedural reasoning).
2169 Although it may be noted that the application and interpretation of procedural reasoning may give rise to debates, see Section 9.2.1F (transparency and risks of corruption, dishonesty, and inconsistency).
2170 Section 8.3.2A-I (inadequate protection of fundamental rights).
2171 Section 8.3.1A-II (instrumental approaches to the value of procedures for fundamental rights protection).
2172 Sections 8.3.2A-I (inadequate protection of fundamental rights) and 8.3.2A-II (reduced protection of fundamental rights).
2173 Section 8.3.1A-II (instrumental approaches to the value of procedures for fundamental rights protection).
2174 Section 8.3.2B (weakened judicial protection of fundamental rights).
2175 Section 9.2.2A ('hard cases') and 9.2.2C (process-based review as an avoidance strategy).
2176 Section 7.3.1B (process-based review to guard the political process), 8.2.1 (courts' procedural mandate), and 8.3.1A-I (intrinsic approaches to the value of procedures for fundamental rights protection).

PROEF 3

however, this is not uncontroversial. If courts have no explicit mandate for such review, it may be regarded as a sign of procedural activism and of unwarranted interference with the powers of democratically legitimised authorities.[2177] Also on a practical note, procedural reasoning in light of deliberative democracy principles may be complicated. For example, if procedural reasoning is used to overturn a carefully deliberated decision, it may be regarded as hampering deliberative decision-making.[2178] In relation to socio-economic rights the use of procedural reasoning has primarily been discussed as a way for courts to offer at least some judicial protection of these rights.[2179] Process-based review may even be a way for courts to provide protection to rights that would normally lack judicial enforcement[2180], while, simultaneously, avoiding normative and empirical engagement with certain issues, including on the distribution and allocation of resources, which fall outside their expertise.[2181] Quite obviously, however, the expansion of courts' jurisdiction to socio-economic matters, even if it relates to the procedural aspects of these rights, brings concerns about judicial activism to the fore.

10.2.4 RESULT OF PROCEDURAL CONSIDERATIONS

By means of process-based review courts can assess the quality, diligence, and fairness of decision-making procedures.[2182] Courts draw positive or negative inferences from this assessment, whether explicitly or implicitly, from the compliance of decision-making procedures with procedural standards.

The first finding in relation to the result of process-based review is that **when courts draw inferences from their procedural evaluation, their reasoning is expected to be consistent and coherent**. That is, the result is required to follow logically from the procedural assessment given the intensity of review, the burden of proof, and the comparison of the decision-making procedure with the applicable standard for review (as discussed above). Only those results are considered to be legitimate and convincing evaluative results. If the inference drawn does not match these, the neutrality in

2177 Section 7.4.2 (courts as procedural activists).
2178 Popelier and Patiño Álvarez (2013), pp. 204–205. See Section 7.3.3A (courts as dangers to the deliberative enterprise).
2179 See Section 8.3.1A-II (instrumental approaches to the value of procedures for fundamental rights protection).
2180 Ibid.
2181 See Sections 9.2.2C (process-based review an avoidance strategy – avoiding morally sensitive or 'hard' cases) and 9.3.2C (process-based review as epistemic avoidance strategy). On judicial expertise see Section 9.3.1.
2182 Section 6.3.4 (result of procedural reasoning).

PROEF 3

application of procedural reasoning may be at stake, and concerns of dishonesty, lack of transparency, or corruption may rise.[2183]

The second conclusion entails that **courts can only draw positive or negative inferences based on process-based review if the particular case offers sufficient factual basis for doing so**. This requires courts to have a good understanding of the decision-making procedures under review. After all, if their understanding of the process is limited, then the inferences drawn may also be subject to debate.[2184] This conclusion also relates to the debate on whether courts have sufficient capacity to fully grasp the specificities of parliamentary debates or national decision-making procedures.[2185]

The third observation is that **it may be controversial for courts to draw positive or negative inferences on the basis of procedural reasoning in relation to substantive rights**. This may be the case for reasons of their function as guardians of fundamental rights and their institutional position. It has been argued quite strongly that positive inferences drawn from the basis of procedural reasoning would lead to reduced fundamental rights protection since the quality of procedures has no bearing on substantive fundamental rights compliance. Therefore, such an approach would stimulate procedural window-dressing by public authorities.[2186] Drawing negative inferences, by contrast, raises concerns about courts' institutional position. For instance, it has been argued that substantive rights are solely about substance, and that this does not mean there is a right to have a decision taken in a certain manner.[2187] It may be said then that the decision-making procedure is the prerogative of decision-making authorities and not of courts, and drawing negative inferences goes beyond the judicial mandate.[2188] Even though procedural reasoning may be the only way for courts to provide at least some substantive fundamental rights protection, it is clearly still controversial in these contexts.[2189]

10.2.5 LOCATION OF REVIEW

Fundamental rights adjudication is often separated into two (or three) separate stages of review: a determination of the scope (and interference) and a test of justification.[2190]

[2183] Section 9.2.1F (transparency and risks of corruption, dishonesty, and inconsistency).
[2184] Section 9.3.1B (limitations to judicial expertise).
[2185] Ibid.
[2186] Section 8.3.2A-II (reduced protection of fundamental rights).
[2187] Section 8.3.2A-I (inadequate protection of fundamental rights).
[2188] Section 8.2.1 (courts' procedural mandate).
[2189] Section 8.3.1A-II (instrumental approaches to the value of procedures for fundamental rights protection).
[2190] Sections 5.3.1 (levels of case-law analysis: micro-, meso-, and macro-levels) and 6.3.5 (location of review).

PROEF 3

The justification stage, on which this book focuses, is often further divided into four main tests: proper purpose, suitability, necessity, and proportionality *stricto sensu*.[2191] Prior to these four tests, several preliminary tests may be distinguished, in particular one concerning the intensity of the justification review.[2192]

Several conclusions may be drawn here. **Generally, when procedural considerations and substantive considerations are used alongside one another, procedural reasoning is not an issue for debate**. There is, however, an important exception to this rule, namely that **if substantive reasoning is the default or expected approach, the use of process-based review may require special justification**. The debates on courts' substantive mandate and on whether process-based review can actually help to protect fundamental rights, play an important role in this respect.[2193] For example, it has been argued that fundamental rights are about outcomes and therefore courts should engage in reviewing decisions on their substance.[2194] From this perspective, procedural reasoning means unwarranted judicial restraint and an abdication of the judicial function.[2195] Furthermore, because courts are trained in substantive reasoning and judicial procedure, a procedural approach may raise concerns about the expertise of courts to assess administrative and legislative decision-making procedures.[2196] Accordingly, how controversial process-based fundamental rights review is depends on various factors, such as the expertise of courts, the arguments put forward by parties, and the importance of a particular argument in the judgment of a court.[2197]

At a macro-level, that is, from the perspective of the entire judgment, the second exception to the main rule is that **if the test in which procedural reasoning is applied is decisive for the finding of a (fundamental rights) violation, procedural reasoning may raise more concerns**.[2198] For instance, if the proportionality test is usually the decisive test, the review method used by courts in that test will be particularly important for the outcome of the judgment. If procedural reasoning is a controversial method for review, its application in the proportionality test may be even more problematic. By contrast, if a procedural approach to one particular justification test is of lesser importance and is subsequently followed by another test which is substantively reasoned, then the deviation from the default rule of substantive reasoning seems to have less serious consequences and will, therefore, be less controversial. Within different jurisdictions,

[2191] Sections 6.3.5B (legitimate aim and proper purpose), 6.3.5C (suitability), 6.3.5D (necessity), and 6.3.5E (proportionality in strict sense).

[2192] Section 6.3.5A (preliminary tests).

[2193] Sections 8.2.1 (courts' procedural mandate) and 8.3 (process-based review and the judicial function of protecting fundamental rights).

[2194] Section 8.3.2A-I (inadequate protection of fundamental rights).

[2195] Section 8.3.2B (weakened judicial protection of fundamental rights).

[2196] Section 9.3.1B (limitations on judicial expertise).

[2197] Moreover, when great importance is attached to procedural considerations, as is discussed in Section 10.2.6, it may in particular be subject to debate.

[2198] This conclusion is closely related to views that consider procedural reasoning as a reduced protection of fundamental rights, see Section 8.3.2A-II (reduced protection of fundamental rights).

PROEF 3

different justification tests are regarded as being more or less important. In many European jurisdictions, for example, courts seem to focus on the test of proportionality in the strict sense, whereas in Canada, courts often emphasise the necessity requirement.[2199] Procedural reasoning in relation to the necessity test may thus be less influential in Europe than in Canada, and therefore it may be less controversial in Europe.[2200] In a similar vein, generally, it may be said that procedural reasoning in relation to the preliminary tests (such as determining the intensity of review) is less controversial, since it is always followed by other tests. This may not always be the case, however. In the US, for example, in many cases, the intensity of justification review is almost directly decisive for the outcome of the case, in that strict scrutiny is found to be 'fatal' in fact, and the outcome of lenient scrutiny usually means that no violation is found.[2201] In such cases, if procedural reasoning is used for deciding on the intensity of justification review, it may still give rise to similar concerns as those expressed in relation to decisive justification tests.

Because the discussion in Chapters 7–9 focused on arguments in favour of, and against, procedural reasoning in general, the arguments in relation to one particular type of procedural reasoning – for example, process-based proportionality review or procedural reasoning concerning the necessity of the measure – were not taken into account. In that context, it is difficult to draw specific conclusions for each test separately. The following sections therefore address the discussions concerning procedural reasoning in the justification test together (Section B). The intensity of justification review is addressed separately first, however, because of its different nature as a preliminary test (Section A).

A. *Preliminary tests: intensity of justification review*

As explained in Section 10.2.1, courts may review cases with different levels of intensity. While that section discussed the various intensities with which procedural reasoning is applied, here the role of procedural reasoning for determining the intensity of the review of the justification of an interference is addressed.[2202] The first conclusion to be drawn is that **procedural reasoning can play an important role in determining the intensity of justification review ('justification strategy'[2203]), especially in cases**

[2199] See Gerards (2013a), p. 469; Réaume (2009), pp. 6–13; and Grimm (2007), pp. 387–389.

[2200] Gerards (2013a), p. 469, who discusses the limited role of the necessity test in the ECtHR case-law; Bomhoff (2012), pp. 290ff, who compares the proportionality analysis of the US and Germany; Stone Sweet and Mathews (2008), pp. 162–163, who compare the justification approaches of the Canadian, US, CJEU, ECtHR, German and Israeli courts; and Grimm (2007), pp. 387–389, who discusses the approach of the Canada courts.

[2201] Concerning the functioning of the intensity of review in the US context, see e.g., Leijten (2018), p. 113ff; Rivers (2006), p. 176; Gerards (2004), pp. 146–147 and 153; and Gunther (1972), p. 8.

[2202] Section 6.3.5A (preliminary tests: intensity of review).

[2203] This strategy is explained in Section 6.3.5A-I (process-based review as an indicator for the intensity of review: justification strategy).

PROEF 3

that usually require institutional, normative, or epistemic deference.[2204] Procedural reasoning may be a means to determine whether such judicial restraint is appropriate; in other words, process-based review may be used to determine whether the decision-making authorities are entitled to the deference that is generally given to them.[2205] For example, when authorities have followed a very diligent and careful decision-making procedure, courts may show substantive deference in relation to the actual justification test.[2206] By contrast, when courts find that the political process is compromised, for instance, this may warrant a closer scrutiny of the legislation on its substance.[2207] This use of process-based review is also said to encourage decision-making authorities to improve their decision-making procedures, as they can 'earn' deference.[2208] As such, it can be regarded as a pedagogical method for courts to reward or reprimand public authorities for the levels of diligence, carefulness, and fairness they have shown. Whether this method encourages better decision-making in practice, however, is open to debate, and seems to be influenced by how much deference can be earned and how transparently and consistently courts apply procedural reasoning as a justification strategy.[2209]

Another observation relates to the use of procedural reasoning as a consequence of the intensity of review adopted, which means that the strictness or leniency of the justification review determines whether courts apply procedural reasoning.[2210] It can be concluded that **the choice of procedural reasoning as an avoidance, compensation, or intensification strategy, should inform how process-based review is applied in the justification tests**. As an avoidance strategy, procedural reasoning is used by courts to circumvent substantive engagement, and should thus be applied in cases that warrant (broad) substantive deference. Such an approach would require courts to limit their review to the quality of the decision-making procedure (purely procedural review).[2211] Furthermore, in this use, perceptions of neutrality of the process-based review play an important role. The neutrality of procedures and process-based review is of course strongly contested, but it seems that if courts rely on clear, written, and legal procedural

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2204 Sections 7.4.1 (on institutional deference), 9.2.2C (on normative deference), and 9.3.2C (on epistemic deference).

2205 Sections 6.3.5A (preliminary tests: intensity of review) and 9.3.2C (process-based review as epistemic avoidance strategy).

2206 See Section 9.3.2C (process-based review as epistemic avoidance strategy).

2207 Section 7.3.1B (process-based review to guard the political process).

2208 On earning deference, see Section 8.3.1B-II (enhanced substantive fundamental rights protection).

2209 Section 9.2.1F (transparency and risks of corruption, dishonesty, and inconsistency).

2210 Section 6.3.5B-II (process-based review as a consequence of the intensity of review: avoidance, compensation, and intensification strategies).

2211 Indeed, if procedural reasoning would be supplemented with substantive considerations, such an approach cannot be regarded as a complete avoidance strategy, see Sections 9.2.2D (on procedural reasoning being a strategy of justification instead of avoidance in normative cases) and 9.3.2E (on the problems with procedural reasoning as a strategy to avoid empirical reasoning). This point is also clarified in Section 10.2.6.

PROEF 3

standards then process-based review is more likely to be considered a relatively neutral way of fundamental rights review, and thus a better substantive avoidance technique.[2212]

As a compensation strategy, courts turn to process-based review because of the broad deference decision-making authorities are given, or have earned, on the substance of the matter. Procedural reasoning is employed to provide at least some protection of fundamental rights, even though it may be a 'second-best option'.[2213] Whether process-based review is a means to ensure at least a minimum protection of fundamental rights, or whether it can do little to protect substantive rights, is nevertheless subject to debate.[2214] To accommodate concerns that process-based review leads to weakened judicial protection[2215], courts should still include substantive considerations in their review of the justification of the interference. This means they should still employ lenient substantive scrutiny and complement it with more intensive process-based review. Of course, this may give rise to concerns about the intrusiveness of this approach and even on judicial activism.[2216] To address such concerns, courts could provide reasons for the necessity of this procedural compensation strategy.

Courts can also turn to procedural reasoning in cases where strict scrutiny is warranted. Process-based review should then be used as an intensification strategy, which allows them to provide procedural scrutiny in addition to the intensive substantive reasoning. In this sense, process-based review may enhance the protection of fundamental rights, and the additional focus on the quality of procedures can be considered an acknowledgement of the importance of procedural justice for individuals.[2217] For this strategy to work, however, it is important that procedural considerations do not replace substantive ones, and, moreover, that positive inferences drawn on the basis of procedural reasoning do not overrule negative inferences drawn on the basis of substantive reasoning. Otherwise, instead of leading to intensified scrutiny, the use of process-based review may lead to inadequate or reduced protection of fundamental rights.[2218]

B. *Justification tests: legitimate aim, suitability, necessity, and proportionality*

As was mentioned above, in fundamental rights adjudication, four different tests are generally distinguished, namely: the tests of a legitimate aim, suitability, necessity, and

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2212 On the neutrality and normativity debate of procedures and process-based review, see Sections 9.2.1 and 9.4.2 (neutrality, normativity, and factuality).

2213 See Section 8.3.1A-II (instrumental approaches to the value of procedures for fundamental rights protection).

2214 Sections 8.3.1A (minimum protection of fundamental rights) and 8.3.2A-I (inadequate protection of fundamental rights).

2215 Section 8.3.2B (weakened judicial protection of fundamental rights).

2216 Sections 7.4.2 (courts as procedural activists) and 7.5.3 (intrusiveness of process-based review).

2217 It may be said to enhance both procedural as substantive protection of fundamental rights, see Sections 8.3.1B-I (also including the argument that procedural reasoning can be considered an acknowledgment of the importance of procedures for individuals) and 8.3.1B-II.

2218 See Sections 8.3.2A-I (inadequate protection of fundamental rights) and 8.3.2A-II (reduced protection of fundamental rights).

PROEF 3

proportionality in the strict sense. The first test concerns the assessment of whether the interference with a right served a proper purpose.[2219] The second is about the suitability of a measure, that is, whether the infringing means is actually capable of achieving the legitimate aim pursued.[2220] Thirdly, courts may assess whether a measure was necessary for achieving the proper purpose.[2221] This test is often regarded as a requirement for authorities to use the least intrusive alternative to serve their purpose. Finally, a proportionality test in the strict sense can be applied.[2222] This test is generally conceived of as a balancing test, by which courts weigh the various opposing interests against one another. These four tests are not always explicitly present in judgments and sometimes they are merged together. It is less crucial then to carefully distinguish between the four different tests in order to determine the proper role of procedural reasoning.

The first conclusion that can be drawn in relation to the justification test is that **process-based review can only have a *direct* role in relation to determining the justifiability of an interference with fundamental rights if it is based on proper procedural standards**. In this respect, a direct role means that the objective of the justification test is to determine whether the procedure itself had a proper purpose and was suitable, necessary, and proportionate. Such an approach is self-evident in relation to procedural rights, such as the right to a fair trial and the right to an effective remedy.[2223] In relation to substantive rights, such self-evidence is lacking. Whether a procedure has been diligently applied does not determine whether, from a substantive perspective, the outcome is justifiable.[2224] Many substantive rights do, however, have a procedural aspect, such as the duty to investigate under the right to life[2225], or substantive rights may be combined with a procedural rights claim.[2226] In such cases, procedural standards are inherently connected with substantive rights, and as such they may allow for a direct role for procedural reasoning. It should be noted nevertheless that this shifts the focus from the substantive to the procedural protection of fundamental rights. As was noted earlier, this may be controversial and worthy of additional judicial reasoning.

[2219] Section 6.3.5B (legitimate aim or proper purpose).

[2220] Section 6.3.5C (suitability).

[2221] Section 6.3.5D (necessity).

[2222] Section 6.3.5E (proportionality).

[2223] Especially in such rights procedural standards are self-evident since the quality of procedures is valued for their own sake, see Section 8.3.1A-I (intrinsic approaches to the value of procedures for fundamental rights protection).

[2224] This hinges on the idea that substantive rights are about substance, as addressed in Section 8.3.2A-I (inadequate protection of fundamental rights). Yet, the argument here does not reject the idea that procedures may be relevant for the protection of substantive rights, rather it relies on the idea that procedure and substance are distinct and that the procedural (lack of) quality does not mean that the substance also infringes the right. Therefore, procedural standards are not self-evident for the finding of a substantive violation of a substantive right.

[2225] Section 8.3.1A-II (instrumental approaches to the value of procedures for fundamental rights protection).

[2226] Indeed, in this sense procedural quality seems to be valued for its own sake, see Section 8.3.1A-I (intrinsic approaches to the value of procedures for fundamental rights protection).

PROEF 3

The second conclusion is that **process-based review can play an *indirect* role in providing a positive or negative indication of decision-making authorities' compliance with the relevant standards of justification**. This means that procedural reasoning is employed to determine whether decision-making authorities took into account whether their measure pursued a legitimate aim, was suitable to achieve that aim, and constituted both a necessary and proportionate means. Such a procedural approach does not address the question of whether the decision or the effects of a decision actually meet these requirements. Instead, it provides an indication as to whether this may be the case.[2227] For example, where decision-making authorities have not sought to balance the rights at stake, it can be inferred from this that the outcome is not likely to be proportionate. It should be noted, however, that in this sense, process-based review does not provide for a fully conclusive argument, since even if no specific attention has been paid to the requirement of necessity, from a substantive perspective, it may still be found that this requirement is met. Indeed, procedural reasoning then can do no more than raise concerns about substantive fundamental rights protection.[2228]

Related to this, the third conclusion is that **an *indirect* role for procedural reasoning may be especially useful in cases where substantive reasoning is difficult**.[2229] Just like the previous building block, procedural reasoning can provide information about the likelihood that the infringing measure is also acceptable from a substantive perspective. This may be a useful approach in cases when the use of substantive reasoning is challenged, for example, because of the complexity and sensitivity of the issue at stake or because of the institutional or political setting of the court and the case.[2230] A procedural approach has been considered less problematic in such circumstances in comparison to a substantive approach ('normative avoidance strategy'[2231]), inter alia because it is found to fit the institutional context of courts better, because it is a (relatively) neutral approach, and because courts are expected to be better at procedural than at substantive reasoning.[2232] However, Chapters 7–9 have also shown that each of these three arguments have been criticised and found to be based on misconceptions of

[2227] In line with the idea that courts may earn deference through the quality of their procedures, see Section 9.3.2C (process-based review as epistemic avoidance strategy).

[2228] Most fundamentally it has been argued that substantive rights are about substance and procedural reasoning cannot protect these rights, see Section 8.3.2A-I (inadequate protection of fundamental rights).

[2229] This draws some overlap with the conclusion put forward as regards the use of procedural reasoning to determine the intensity of review. Yet contrary to that context, here procedural reasoning is not a justification strategy for normative engagement, but rather an avoidance strategy. For a discussion of both strategies concerning normative engagement, Section 9.2.2D (on procedural reasoning as a justification strategy for normative engagement) and Sections 9.2.2C (on procedural reasoning as a normative avoidance strategy).

[2230] Section 8.3.1A-II (instrumental approaches to the value of procedures for fundamental rights protection).

[2231] Process-based review as an avoidance strategy has been explained in Section 6.3.5A-II.

[2232] Sections 7.4.1 (on institutional restraint), 9.2.2B (on avoidance strategies for hard cases), 9.2.1A, 9.2.1C, and 9.2.1E, (on neutrality of procedures and process-based review), and 9.3.1A (on procedural expertise).

PROEF 3

procedural reasoning.[2233] Thus, in applying process-based review in this context, courts should be aware that any positive assumptions about procedural reasoning are subject to debate, and procedural reasoning does not provide a magical avoidance strategy.

Courts may also want to avoid substantive engagement through procedural reasoning for practical reasons. For example, it may be difficult for courts to determine on the basis of empirical evidence whether a measure was suitable.[2234] The procedural finding that the decision-making authorities relied on carefully identified studies and reports in developing their policy or legislation may be an indication that the measure is probably suitable for achieving the legitimate aim.[2235] However, the notion that procedural reasoning is truly a successful avoidance strategy for empirical reasoning, is also disputed.[2236] After all, courts will have to check compliance with procedural empirical standards, for which they may not be well-equipped.[2237] In other words, procedural reasoning in cases in which substantive reasoning is difficult may not always be a useful method of review.

10.2.6 IMPORTANCE OF PROCEDURAL CONSIDERATIONS

Process-based review has been conceptualised as a review method that can be placed on a spectrum of judicial review, which ranges from purely procedural reasoning to purely substantive reasoning.[2238] This means that the notion of 'process-based review' not only refers to reasoning that is exclusively procedural, but also to reasoning that entails both procedural and substantive considerations.[2239] Consequently, procedural considerations may have relatively little importance for the courts' overall reasoning, yet continue to fall within the wider concept of process-based review. Hence, at a meso-level of review – that is, at the level of the justification tests discussed above – different weights can be attached to procedural considerations in courts' decisions on one of the justification tests. For reasons of usability, three levels of importance of procedural considerations

2233 Sections 7.4.2 (courts as procedural activists), 9.2.1B, 9.2.1D and 9.2.1F (on normativity of procedures and procedural reasoning), and 9.3.1B (on courts' limited procedural expertise).

2234 Section 9.3.2A (epistemic uncertainties and empirical reasoning) and 9.3.2B (courts and empirical reasoning).

2235 It has been argued that procedural reasoning may both be a way for courts to avoid empirical reasoning but also to encourage evidence-based decision-making. Together these arguments indicate that procedural reasoning may be used to indicate the appropriateness of a measure, while courts refrain from delving into the merits. See Sections 9.3.2C (process-based review as epistemic avoidance strategy) and 9.3.2D (evidence-based decision-making and procedural reasoning).

2236 Section 9.3.2E (problems with process-based review of empirical reasoning).

2237 Section 9.3.1B (limitations to judicial expertise).

2238 Section 5.3.2B (spectrum of fundamental rights review).

2239 Section 6.3.6 (importance of procedural considerations).

PROEF 3

have been distinguished: procedural reasoning that is exclusive, procedural reasoning that is decisive, and procedural reasoning that is supportive.

As a general conclusion, it may be said that **if procedural reasoning is used as a strategy to show institutional, normative, or epistemic deference, exclusive or decisive importance may be attached to procedural considerations.**[2240] If courts mean to show complete deference, for example, in hard cases that it considers are best addressed by other decision-making authorities, exclusive procedural reasoning can be appropriate.[2241] That way, the court can completely avoid having to decide on the issue on normative and substantive grounds and it can leave the decision entirely to the institution that it considers best-placed to make it.[2242] At the same time, it is clear that procedural reasoning may not be completely neutral, and even exclusively procedural reasoning may not be the best way to show deference.[2243] From a different vantage point, moreover, it has been argued that exclusive procedural reasoning bears the risk of courts' completely disregarding substantive arguments. In particular, the view that the quality of decision-making procedures does not, or at least does not completely, determine the quality of the actual decision, has raised problems under an exclusive procedural approach.[2244] On this understanding courts provide insufficient protection of fundamental rights when turning to purely procedural review. To address these concerns, it may be necessary to add substantive elements to courts' process-based review, but this would come at the price of showing less institutional, normative, and epistemic deference on the substance.[2245]

On a related account, it may be concluded that **courts can determine the emphasis placed on procedural considerations by increasing or decreasing the importance of procedural considerations in their reasoning concerning a justification test**. Sometimes courts may want to emphasise the importance of certain procedural standards, and in such cases, they may want to attach great weight to procedural considerations in their judgments. For example, in a case that concerns central tenets of procedural fairness, courts may extensively or almost decisively rely on procedural considerations to emphasise the importance of fairness standards in such contexts.[2246] From a fundamental rights implementation perspective, too, where procedural

[2240] Sections 7.4.1 (on institutional restraint), 9.2.2C (on normative restraint), and 9.3.2C (on epistemic restraint).

[2241] Sections 7.3.3 (a limited role for courts and process-based review in deliberative democratic theory) and 9.2.2C (process-based review a normative avoidance strategy). On absolute and partial deference, see the brief discussion in Section 9.3.2C.

[2242] Section 10.2.5A also discussed this in light of procedural reasoning as an avoidance strategy.

[2243] Sections 9.2.1B (normativity of procedures and process-based review) and 9.2.1D (procedural reasoning limiting substantive decision-making). See also for problems with normative deference, Section 9.2.2D (nuancing process-based review's potential).

[2244] Section 8.3.2A-I (inadequate protection of fundamental rights).

[2245] This is not to say that deference cannot be shown in different ways, as indeed, deference may be shown also by lenient procedural scrutiny, see Section 10.2.1.

[2246] Section 8.3.1A-I (intrinsic approach to the value of procedures for fundamental rights protection).

PROEF 3

reasoning is considered to improve fundamental rights protection across the board[2247], relying on procedural considerations may help to emphasise the importance of good decision-making procedures.[2248] Indirectly, this may lead to better substantive fundamental rights protection.[2249] At the same time, and similar to the first conclusion, exclusive or decisive use of procedural reasoning may raise concerns about the substantive protection of fundamental rights. Instead of increasing the importance of procedural reasoning, courts may therefore also decide to pay less attention to procedural considerations, and focus more on substantive issues. Particularly when courts mean to cultivate or develop new substantive standards for fundamental rights protection[2250], or when they are not in a strong position to draw conclusions on the basis of a procedural assessment[2251], decreasing the importance of procedural considerations (and thereby increasing the importance of substantive considerations) may be a useful strategy.

This relates to a third observation: **the more important the procedural considerations are in a justification test, the stronger the procedural position of courts ought to be**. Courts' procedural position may be stronger if they have a clear procedural mandate, which may be the case, for example, for administrative courts deciding on administrative law cases.[2252] The power of a court to decide a case may also be connected to the amount of evidence available on the quality of the decision-making procedure.[2253] For example, in the context of common law courts, it will generally be clear from the reasoning of the judgments whether deliberations between judges were held and whether certain rights and interest were taken into account.[2254] In other contexts, such as in French courts, deliberations happen behind closed doors and the text of the judgment may not provide evidence of the deliberative reasoning behind it.[2255] For international courts, the judgments of the UK courts may thus provide evidence of their deliberativeness, while this may not be the case for the French courts. By varying the importance attached to procedural considerations, courts may show awareness of the different legal traditions and it allows them to deal convincingly with the availability or absence of information on the quality of the procedure.

On a different account, in light of the debate on whether process-based review sufficiently protects fundamental rights[2256], **a strong emphasis on procedural considerations appears to require at least a thorough review of the decision-making**

[2247] Section 8.3.1B (enhanced protection of fundamental rights).
[2248] Section 8.3.1B-I (enhanced procedural protection of fundamental rights).
[2249] Section 8.3.1B-II (enhanced substantive protection of fundamental rights).
[2250] On the debates of standard-setting by courts, see Section 8.2.2.
[2251] See the discussion of the position of courts in Sections 10.2.1 and the next conclusion.
[2252] Section 8.2.1 (courts' procedural mandate).
[2253] The availability of information on the process directly relates to judicial expertise. When there is less information available courts may not have the capacity in that context to decide on the procedural quality. For views on procedural expertise, see Section 9.3.1B (limitations on judicial expertise).
[2254] See also the discussion of deliberativeness of judicial decision-making in Section 7.3.2C.
[2255] De S.-O.-l'E. Lasser (2004), pp. 324 and 47–60.
[2256] Section 8.3 (process-based review and the judicial function of protecting fundamental rights).

PROEF 3

procedure. When great importance is attached to procedural inferences drawn from a light-touch review, concerns will arise about unsuccessful or weakened judicial protection of fundamental rights.[2257] Especially if positive inferences are drawn on the basis of a deferential process-based review, it may be said that courts provide inadequate protection of the procedural or substantive rights. Accordingly, the intensity of process-based review (Section 10.2.1) is connected with the importance that may be attached to procedural considerations.

The fifth and final conclusion is that **courts may use procedural reasoning to support substantive considerations, especially in cases where the substantive arguments are weak or inconclusive (and *vice versa*)**.[2258] Weakness of substantive considerations can be a result of a lack of evidence, an absence of enforceable substantive standards, or lack of judicial expertise to reason morally or empirically.[2259] Supportive procedural reasoning may help to reach a final conclusion on the issue or to strengthen the substantive findings. From a fundamental rights perspective, this may be regarded as a way for courts to enhance the protection of fundamental rights, since substantive protection is then merely strengthened by a procedural layer.[2260] Procedural considerations may also be supportive when substantive considerations are inconclusive, for example, because they point in different directions (so-called 'counter-indicative inferences'[2261]). Nonetheless, if courts do not coherently or convincingly incorporate procedural considerations in their overall decisions, the sudden inclusion of procedural considerations to resolve inconclusive substantive reasoning seems rather arbitrary, and as such it is prone to criticism.[2262]

10.2.7 CONCLUSION OF PROCEDURAL REASONING

Similar to the result of review, addressed in Section 10.2.4, the conclusion of procedural reasoning is not a separate part of the judicial assessment, since it should follow logically from the foregoing elements. This means that on the basis of negative or positive

2257 Sections 8.3.2A (unsuccessful protection of fundamental rights) and 8.3.2B (weakened judicial protection of fundamental rights).

2258 Here the relevance of procedural considerations for weak and inconclusive substantive considerations is discussed. In a similar vein, substantive considerations may be supportive of procedural reasoning too, and as such strengthen the procedural conclusions where those are weak or inconclusive.

2259 On the lack of expertise for courts to engage in moral or empirical reasoning, see Sections 9.2.2B and 9.3.2B.

2260 On additional procedural protection, see Section 7.4.2.

2261 Section 6.3.6 (importance of procedural considerations).

2262 On the transparency and consistency of courts procedural approaches, see Section 9.2.1F, and on convincingness of the procedural approach the debate on the limitations of judicial expertise is particularly relevant, see Section 9.3.1B.

PROEF 3

inferences that courts draw, together with the location and the weight of the procedural considerations, courts may reach a conclusion in relation to a particular justification test.[2263] This is a meso-level conclusion, which includes decisions on whether a measure served a legitimate aim, was suitable and necessary, and whether it was proportionate to the aims pursued.

In turn, the meso-level conclusions influence the judgment on the macro-level, that is, the overall finding of whether there has been a violation of a right.[2264] The connection between meso-level and macro-level conclusions is particularly strong where a meso-level conclusion entails the failure of one of these cumulative requirements[2265], or where the meso-level conclusion relates to a test which is the predominant test in that jurisdiction or in that type of cases (as explained in the introduction of Section 10.2.5).

In light of the debates discussed in Part III and the result of procedural considerations discussed in Section 10.2.4, it may be observed that **when courts draw conclusions from their procedural evaluation in light of a certain justification test, then their reasoning must be consistent and coherent**. What is required is that the meso-level conclusion follows logically from the combination of various considerations as well as the negative and/or positive inferences drawn, the location of these considerations, and the importance attached to each of these considerations. Such legitimate evaluative results may be lacking, for instance, when courts rely on procedural considerations to determine the necessity of the measure and then conclude that the measure was not proportionate[2266], or when courts state that they attach decisive importance to the quality of the decision-making procedure, but the conclusion does not align with the inferences drawn on the basis of the procedural considerations. Indeed, concerns about judicial dishonesty, lack of transparency, and corruption may arise if the conclusions do not follow logically from the procedural considerations in light of their weight and location in the judgment.[2267]

The second conclusion relates to the controversy of procedural reasoning in fundamental rights adjudication more generally. **If process-based review is an issue for debate, then reaching an outcome on the basis of procedural considerations can be controversial**. Procedural reasoning concerning procedural rights is hardly controversial and attaching far-reaching conclusions to the quality of decision-making procedures is quite acceptable. Not hearing a suspect in criminal proceedings,

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[2263] Section 6.3.7 (conclusion of procedural reasoning).

[2264] For an explanation of the terms meso-level and macro-level in fundamental rights adjudication, see Section 5.3.1.

[2265] It should be noted, however, that not in every jurisdiction these tests are considered cumulative, in those contexts, this argument appears to be irrelevant. See Réaume (2009), pp. 6–13 and the explanation in the introduction of Section 6.3.5 (on location of review).

[2266] Courts have not always been applying the justification tests as well-structured as is envisaged in theoretical writings. Concerning the ECtHR, see Gerards (2019), pp. 229–233.

[2267] Section 9.2.1F (transparency and risks of corruption, dishonesty, and inconsistency). Of course, this argument is not limited to procedural reasoning alone, but is applicable to courts reasoning more generally.

PROEF 3

for example, may indeed mean that the trial was not fair. By contrast, in relation to substantive rights, the relationship is more complex (see Section 10.2.5B). It has been claimed there that no conclusions may be drawn on the basis of purely procedural considerations relating to substantive rights, since the quality or lack of quality of a procedure does not mean that the decision itself was justified or not. Indeed, from the perspective that fundamental rights are mainly about substance, the quality of the decision-making procedure does determine or influence whether the infringing measure passed or failed a justification test on its substance.[2268] From that view, courts that draw positive meso-level conclusions solely on procedural grounds reduce the protection of substantive rights and weaken their judicial oversight of these rights.[2269] Even if negative inferences are drawn, procedurally based conclusions may be incorrect or may be unsatisfactory for individuals whose rights are at stake.[2270] These concerns may be mitigated if courts reach conclusions on the basis of both procedural and substantive considerations. At the same time, when courts are required to show deference, procedural reasoning may be a means to allow for at least some assessment of the issue.[2271] From this perspective, procedural conclusions are signs of a minimum of fundamental rights protection. Moreover, procedural conclusions are said to contribute indirectly to better fundamental rights protection across the board, as the incentives for improving decision-making procedures increase when authorities may be complimented or reproached on the basis of their procedures.[2272] However, considerable care also needs to be taken in this respect, since unbridled positive feedback may also invite accusations of procedural window-dressing.[2273]

The final conclusion may be drawn on the relationship between meso-level and macro-level conclusions. **The more directly procedurally reasoned conclusions at the meso-level affect the judgment at the macro-level, the stronger the support of those meso-level conclusions ought to be**. Courts' procedural mandate and expertise may be relevant in this regard, but the manner in which procedural meso-level conclusions are reached may also have some relevance here. A process-based judgment seems generally more convincing when it is well-reasoned on the basis of a thorough discussion of the decision-making procedure[2274], and this may also address concerns of window-dressing. In cases where deference is required, however, such a thorough process-based review may not always be possible. Judgments that are decided on the basis of procedurally reasoned conclusions may require additional explanation of both why

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2268 Section 8.3.2A-I (inadequate protection of fundamental rights).
2269 Sections 8.3.2A-II (reduced protection of fundamental rights) and 8.3.2B (weakened judicial protection of fundamental rights).
2270 For the argument of incorrect results, see Section 8.3.2A-II.
2271 Section 8.3.1A-II (instrumental approaches to the value of procedures for fundamental rights protection).
2272 Section 8.3.1B (enhanced protection of fundamental rights).
2273 On window-dressing, see Section 8.3.2A-II (reduced protection of fundamental rights).
2274 On the importance of well-reasoned decision-making, see Section 7.3.2C (courts as deliberators).

PROEF 3

deference is warranted and why a procedural approach is needed. The explanation of why deference is needed may help to counter claims of courts abdicating their judicial function as guardians of fundamental rights.[2275] An explanation clarifying why deference requires a procedural approach may help to address concerns that procedural reasoning is not deferential at all.[2276]

10.2.8 RÉSUMÉ

This section has highlighted that the debates on procedural reasoning discussed in Part III relate in various ways to different applications of process-based fundamental rights review discussed in Part II. The manner in which courts apply procedural reasoning therefore also influences the (degree of) relevance of the various debates on process-based review. It may be possible for courts to accommodate certain concerns by choosing a particular use of process-based review while taking into account contextual factors, including their institutional position, the nature of the case in hand, and the social and political circumstances. Thus, this section provided a list of factors that inform courts about the use of specific types of procedural reasoning in any given context, which may also be of use to scholars studying and commenting on process-based fundamental rights review. In summary, these building blocks are the following:

Intensity of process-based review

- The more intensively courts scrutinise decision-making procedures, the stronger their institutional and procedural position ought to be.
- The intensity of process-based review can be influenced by the legitimate expectations courts may have of public authorities' decision-making procedures.
- In cases where courts deviate from the ordinary intensity of review of procedures, debates on procedural activism or deference necessarily arise, and courts need to address these by firmly establishing the grounds for such deviations.

Burden of proof

- The effective protection of fundamental rights may require courts to shift the burden of proof from one party to the other or to change the nature of evidence that is required.
- When courts deviate from the default rules on the burden of proof, they must state (strong) reasons for doing so, in order to address debates on procedural activism and deference.

[2275] Section 8.3.2B (weakened judicial protection of fundamental rights).
[2276] Sections 9.2.1F (transparancy and risks of corruption, dishonesty, and inconsistency) and 7.4.2 (courts as procedural activists).

PROEF 3

- When decision-making authorities deviate from their standard decision-making processes, courts may shift the (procedural) burden of proof may to them.

Standards for review

Authority responsible for setting procedural standards

- Courts are generally in a strong position to apply process-based review when clear legal procedural standards are available.
- When courts cultivate or develop procedural standards, debates on judicial activism and separation of powers may arise, requiring stronger justification for why these standards are acceptable and fitting, and why courts may define and impose these standards.

Types of procedural standards

- Process-based review should be based on standards that can justifiably form the basis for courts' judgments.
- When courts enforce certainty standards through procedural reasoning, they should ensure that they are not themselves transgressing the boundaries set by these standards.
- When courts enforce rationality standards through procedural reasoning, they should ensure that their procedural approach is sound and consistent, and that they rely on and impose a set of comprehensive procedural standards.
- When courts enforce fairness standards, they should ensure that they have the capacity to review and set such standards.

Other categories of standards

- Procedural reasoning is generally controversial if it is based on standards meant for internal use by decision-making authorities, that are unwritten, or that are non-legal. However, judicial reliance on such standards may still be permitted if it concerns a specification of external, legally binding standards.
- Procedural reasoning may be controversial if it is based on standards that are developed after a decision was made or on the basis of new information.
- Procedural reasoning in relation to procedural rights is accepted in principle, but when it concerns procedural reasoning in relation to substantive rights, it may require specific justification.
- Procedural reasoning may give rise to different concerns in cases about civil and political rights than in cases about socio-economic rights.

Result of procedural considerations

- When courts draw inferences from their procedural evaluation, their reasoning is expected to be consistent and coherent.

PROEF 3

- Courts can only draw positive or negative inferences based on process-based review if the particular case offers sufficient factual basis for doing so.
- It may be controversial for courts to draw positive or negative inferences on the basis of procedural reasoning in relation to substantive rights.

Location of review

- Generally, when procedural considerations and substantive considerations are used alongside one another, procedural reasoning is generally not an issue for debate.
  - First exception: if substantive reasoning is the default or expected approach, the use of process-based review may require special justification.
  - Second exception: if the test in which procedural reasoning is applied is decisive for the finding of a (fundamental rights) violation, procedural reasoning may raise more concerns.

Preliminary tests: intensity of review
- Procedural reasoning can play an important role in determining the intensity of justification review ('justification strategy'), especially in cases that usually require institutional, normative, or epistemic deference.
- The choice of procedural reasoning as an avoidance, compensation, or intensification strategy, should inform how process-based review is applied in the justification tests.

Justification tests
- Process-based review can only have a *direct* role in relation to determining the justifiability of an interference with fundamental rights if it is based on proper procedural standards.
- Process-based review can play an *indirect* role in providing a positive or negative indication of decision-making authorities' compliance with the relevant standards of justification.
- An *indirect* role for procedural reasoning may be especially useful in cases where substantive reasoning is difficult.

Importance of review

- If procedural reasoning is used as a strategy to show institutional, normative, or epistemic deference, exclusive or decisive importance may be attached to procedural considerations.
- Courts can determine the emphasis placed on procedural considerations by increasing or decreasing the importance of procedural considerations in their reasoning concerning a justification test.
- The more important the procedural considerations are in a justification test, the stronger the procedural position of courts ought to be.

PROEF 3

- A strong emphasis on procedural considerations appears to require at least a thorough review of the decision-making procedure.
- Courts may use procedural reasoning to support substantive considerations, especially in cases where the substantive arguments are weak or inconclusive (and *vice versa*).

Conclusion of procedural reasoning

- When courts draw conclusions from their procedural evaluation in light of a certain justification test, then their reasoning must be consistent and coherent.
- If process-based review is an issue for debate, then reaching an outcome on the basis of procedural considerations can be controversial.
- The more directly procedurally reasoned conclusions at the meso-level affect the judgment at the macro-level, the stronger the support of those meso-level conclusions ought to be.

10.3 CONCLUSION

This book has clarified the myriad of applications of procedural reasoning, both in practice and in theory. It has also explored the various possible conceptualisations of process-based review as well as the broad range of arguments and positions both for and against it. One of the book's main conclusions is that procedural reasoning is conceptually difficult to define and that it is a multifaceted method of judicial review. What role there is for process-based review in fundamental rights cases is therefore dependent on a variety of factors, such as the institutional and constitutional design of a State, the functions assigned to the court, and the issue at stake.[2277] Another main conclusion is that there is no one-size-fits-all approach for applying and discussing procedural reasoning in fundamental rights cases. This final chapter aimed to offer some guidance to courts that have to decide if and how they want to engage in procedural reasoning. A list of relevant factors and considerations has been provided, based on the conceptualisations of process based-review discussed in Chapters 5 and 6 and the debates related to certain applications of process-based fundamental rights review analysed in Chapters 7, 8, and 9. These factors and considerations may help courts to determine whether and how to engage with procedural debates and they may increase courts' awareness of the fact that, behind their procedural approaches, there lies a complex web of arguments in favour of, and against, process-based review. Therefore, the book also offers scholars a useful framework for studying process-based fundamental rights review by various courts. This may help them to understand the

[2277] For a discussion of the contextual factors, see the Reflection to Part III and Sections 7.5.2 (context of process-based review), 8.4.4 (context-dependent effectiveness of process-based fundamental rights review), and 9.4.3 (normativity in degrees).

PROEF 3

many uses of process-based review and to engage in a critical and constructive manner with debates on process-based fundamental rights review. In addition, since the building blocks in this book are developed independently from particular courts, it may provide a useful starting point for comparative research on process-based fundamental rights review.

It is now time to return to the book's starting point: the procedural trend in the case-law of the ECtHR.[2278] In light of the book's findings, it is clear that the value of a procedural approach cannot be evaluated in a straightforward manner. Procedural reasoning may be considered an incentivising method for better fundamental rights protection at the national level and as a sign of normative, institutional, and empirical deference by the ECtHR in line with its subsidiary position. At the same time, concerns such as the reduced or inadequate protection of individual rights and challenges in understanding the nature and quality of national decision-making procedures should be taken seriously. If the ECtHR wishes to continue its procedural turn, it ought to take a clear, overall position with regard to the various debates set out in this study, even if this is only formulated internally. In particular, if procedural reasoning is intended to assist the ECtHR in cases where it has to show considerable deference, as is suggested by various scholars, procedural reasoning can be used to circumvent substantive scrutiny or it can supplement a deferential substantive assessment (e.g., so-called avoidance and compensation strategies). Another possibility is that procedural reasoning is used as a justification strategy. The quality of national decision-making procedures may help to determine the intensity of justification review in order to avoid a loss of substantive protection of rights. In deciding on its future approach, the ECtHR should also be aware that different applications of procedural reasoning may have different rationales. It should therefore use the strategy that provides the best possible fit with its aims. In any case, a relatively consistent approach and clear procedural criteria for whether or not a procedural approach is adopted are warranted. However, caution is advised, since process-based fundamental rights review, regardless of how it is applied, is not a magical solution for the issues of a backlog of cases and criticism currently being faced by the ECtHR. Procedural reasoning may be considered very intrusive and it may not stimulate national authorities to truthfully and structurally improve their decision-making processes. This does not mean, however, that procedural reasoning should be forsaken. Instead, it means that the procedural turn raises new challenges for fundamental rights adjudication, and the ECtHR should be ready to face these.

[2278] See Section 1.1.

PROEF 3

ADDENDUM: QUESTIONS FOR ECTHR JUDGES

In October 2017, the author met with nine judges of the ECtHR. In line with the judges' wishes, these talks were anonymous, were not recorded, and have been used as background information only for the research underlying this book. In preparation for these meetings the author provided the judges with a list of questions that formed the background for the discussions. These questions are listed below.

A PROCEDURAL APPROACH

The ECtHR's use of process-based review has been noted by scholars and a procedural trend has been identified. Academics claim that the ECtHR is increasingly applying procedural reasoning, meaning that it focuses on the national decision-making procedures in its judgments, and looks increasingly into the quality, fairness or regulation of procedures of the national legislative, executive or judicial authorities.

a. In your view, what does process-based review mean?

b. Do you agree that there is a procedural trend in the case-law of the ECtHR?

c. If there is a procedural trend in the case-law of the ECtHR, in your view, in what manner does this procedural trend of the ECtHR manifest itself?

d. *When* do you think the ECtHR could fruitfully apply process-based review? E.g., in what kind of cases (e.g., politically sensitive cases, cases concerning legislative decision-making, cases about judicial decision-making)? Does it matter who the respondent State is (e.g., democratically well-developed States versus 'illiberal democracies')? Is it a prerequisite that parties to a case rely explicitly on the quality or lack of quality of the national decision-making procedure in their arguments?

e. *How* do you think the ECtHR should apply process-based review? E.g., in relation to what part of the judgment (e.g., margin of appreciation or proportionality)? Do you feel that the ECtHR can draw both positive and negative conclusions on the basis of process-based review and if so, to what extent? I.e., what weight do you think should be given to procedural arguments (e.g., decisive or merely supportive)?

PROEF 3

f. In your view, what are important standards in judging the national decision-making process?

g. Do you think the standards that can be used in process-based review should be considered procedural requirements, i.e., requirements that are applicable to all national authorities in Europe?

KNOWLEDGE OF THE NATIONAL DECISION-MAKING PROCESSES

Process-based review means that the ECtHR looks into the national decision-making procedures. Procedural legislation and regulations, however, vary greatly between States and decision-making bodies (legislative, executive, and judicial). It might therefore be essential for the ECtHR to have a thorough understanding of the national decision-making process and the context in which it is carried out.

a. How do you obtain knowledge on national decision-making processes? Does the research division look into the national regulation and practice of such processes?

b. In your view, must parties to a case put forward information about the quality or lack of quality of the national decision-making procedure? Does the ECtHR ever ask questions about this when a case is communicated to the parties?

c. What obstacles could there be for the ECtHR in judging on national decision-making procedures? Do you see particular problems for the ECtHR in developing procedural requirements for national processes (e.g., competence and diversity of procedural regulations in States)?

THE CONTEXT OF THE ECTHR AND PROCEDURAL REASONING

Over recent decades, there have been continuous debates on the future of the Convention system. Amongst others, these have resulted in Protocol No. 15. This Protocol will amend the preamble of the Convention so as to include references to the principle of subsidiarity and the margin of appreciation. Some scholars indicate, and ECtHR's documents appear to suggest, that there is a connection between the emphasis that has been put on subsidiarity during the reform process and the ECtHR's increased application of process-based review.

PROEF 3

a. Do you think that in recent years more emphasis has been placed on subsidiarity within the Convention system? If so, what does subsidiarity mean to you? E.g., what does it mean, in light of…

- … the function of the ECtHR (e.g., individual relief and constitutional functions)
- … the relationship between the ECtHR and national authorities
- … the legitimacy of the ECtHR (e.g., perception of legitimacy and competence of the ECtHR)
- …

b. If there is indeed an emphasis on subsidiarity, do you think this requires a change in attitude, decision-making or any other form of action of the ECtHR? In other words, what should the ECtHR do, or not do, in its case-law to show awareness of the current emphasis on subsidiarity?

c. Do you think there is a connection between this procedural trend and the emphasis on subsidiarity? Are other explanations for the use of procedural reasoning possible?

d. If there is such a connection between procedural reasoning and subsidiarity, in your view, is procedural reasoning a valuable or desirable method? I.e., do you think procedural reasoning could help the ECtHR ensure the subsidiarity of the Convention system?

PROEF 3

SUMMARY

PROCESS-BASED REVIEW IN THE PRACTICE OF FUNDAMENTAL RIGHTS ADJUDICATION

Process-based review can be found in fundamental rights adjudication from all around the world. This type of review means that courts scrutinise the fairness, diligence, and quality of decision-making procedures of legislative, executive, and judicial authorities in order to determine if a fundamental right has been violated. This review is generally contrasted with substance-based review, which means that courts look into the substantive reasonableness of measures affecting fundamental rights. Although procedural reasoning is applied in fundamental rights cases, it has given rise to considerable controversy. In the US, John Hart Ely's call for a process-oriented, participation-reinforcing type of judicial review – which was inspired by the famous footnote four of former US Supreme Court Justice Stone in *Carolene Products* of 1938 – attracted serious criticism in the 1980s. For instance, it was argued that procedural reasoning cannot circumvent the counter-majoritarian difficulty and that courts are trying to hide their normative assessment under the guise of a 'neutral', procedure-focused review.

Today, a debate is ongoing concerning the use of procedural reasoning by the European Court of Human Rights. Mention has been made of a procedural turn by the ECtHR, by which is meant its increasing focus on the national decision-making process when determining whether States have violated one of the substantive rights in the European Convention on Human Rights. Current legal scholarship focuses on understanding what this procedural turn means, on explaining the reasons for this procedural trend, and on arguing whether it is a positive or negative development. On one hand, for example, procedural reasoning is considered to sit well with the subsidiary position of the ECtHR and to encourage national authorities to secure Convention rights. On the other hand, procedural reasoning is considered to lower the protection of fundamental rights standards and to be unsatisfactory for applicants searching for substantive justice in Strasbourg. To add to the complexity of these scholarly debates, it is clear from case-law analyses that the ECtHR applies procedural reasoning in various ways. Sometimes it is used in relation to the proportionality test and sometimes in relation to States' margin of appreciation; sometimes the ECtHR relies exclusively on procedural reasoning, but more often, it applies procedural reasoning and substantive reasoning simultaneously.

PROEF 3

Against the background of procedural reasoning being applied by various courts in diverse ways and of opposing views on the desirability of such an approach in fundamental rights cases, this book explores the meaning of process-based review and the role it can play in fundamental rights adjudication.

A PRACTICE-ORIENTED, CONCEPTUAL-THEORETICAL UNDERSTANDING OF PROCESS-BASED REVIEW

The book starts from the position that there is a need for conceptual clarity of procedural reasoning. It develops a general and context-independent conceptualisation of this type of review to facilitate the cross-fertilisation of insights and arguments from case-law and literature on procedural reasoning from different jurisdictions. Such a conceptualisation acknowledges and respects the various practices of process-based fundamental rights review. In so doing, it may help to overcome the idea that process-based review requires an all-or-nothing approach, that is, either a fundamental rights case is entirely decided on procedural grounds or the quality of procedures does not matter at all.

In addition, the book considers that a better and in-depth understanding of the debates on procedural reasoning is needed in order to provide practical guidelines on what role process-based review can play in fundamental rights cases. It therefore provides an analysis of the procedural debates, concentrating on the institutional position of courts in democratic societies, their function as guardians of fundamental rights, and the normative and epistemic difficulties they face in fundamental rights cases. The resulting insight into the various arguments favouring and rejecting procedural reasoning, and their interconnectedness, will promote greater understanding and an appreciation of the complexities surrounding the use of process-based fundamental rights review.

Taken together, the analyses and insights offered by this study may assist courts in developing coherent and well-balanced procedural approaches. This is relevant not just for the ECtHR, but for any court dealing with fundamental rights cases and using procedural reasoning. Furthermore, it may provide scholars with the necessary tools for studying process-based review as it develops in fundamental rights practice and for countering black-and-white arguments on procedural reasoning.

PRACTICE, CONCEPT, AND THEORY OF PROCESS-BASED REVIEW

The book proceeds in three Parts. The application of process-based review in the practice of fundamental rights adjudication is addressed in Part I. This Part outlines and discusses in detail twenty-eight examples of procedural reasoning in fundamental

PROEF 3

rights cases. It shows that procedural reasoning is applied by a large number of different courts, in different ways, and in relation to very different cases and rights. Without attempting to prove the existence of a world-wide procedural trend, reference to these examples of procedural reasoning evidences that procedural reasoning is, at least occasionally, used by courts. Chapter 2 focuses on the use of procedural reasoning by courts in relation to legislative processes, Chapter 3 discusses procedural reasoning in relation to administrative processes, and Chapter 4 addresses the application of procedural reasoning in relation to judicial procedures.

A conceptual-theoretical understanding of process-based fundamental rights review is developed in Part II. The conceptualisation of this type of review is phrased in general and universal terms to ensure its applicability to fundamental rights cases regardless of the specific context in which procedural reasoning is applied. This Part explains what procedural reasoning entails and how it can be applied in fundamental rights adjudication.

Chapter 5 defines process-based review as 'judicial reasoning that assesses public authorities' decision-making processes in light of procedural standards'. This definition is based on common elements that can be discerned from the definitions provided in the literature and in the examples of procedural reasoning given in Part I, which allow us to arrive at an overarching definition of procedural reasoning. The chapter furthermore clarifies that, from a conceptual perspective, it is impossible to distinguish strictly between procedural reasoning and substantive reasoning. Instead, both types of review are connected on a spectrum of judicial review, ranging from purely procedural reasoning to purely substantive reasoning.

The possible applications of procedural reasoning in fundamental rights adjudication are discussed in Chapter 6 where it is noted that courts may vary their use of process-based review in light of seven different elements of fundamental rights adjudication. First, as regards the intensity of review, procedural reasoning can be applied with a (very) strict, a (very) lenient, or an intermediate level of scrutiny. Intensive or strict process-based review can take the form of courts assessing whether the decision-making procedure followed was correct; a lenient procedural approach can take the form of courts assessing whether the decision-making procedure followed was not purely arbitrary and did not show serious procedural shortcomings; and, an intermediate approach falls somewhere in between these extremes. Secondly, there may be differences as to who carries the burden of proof. Sometimes individuals carry the burden of proving that the decision-making procedure was of insufficient quality, at other times public authorities have to provide evidence that their procedure met the applicable procedural standards. Thirdly, process-based review can be based on different types of procedural standards. It can relate to standards developed by legislative, executive, or judicial authorities and it can concern standards of certainty, rationality, and fairness. Procedural reasoning can furthermore be based on positive or negative obligations, on *a priori* or *a posteriori* standards, on *ex ante* or *ex post*

PROEF 3

obligations, and so on. Fourthly, in light of the burden of proof and the intensity of review, courts can draw positive and negative inferences on the basis of procedural reasoning, that is, they may find that a decision-making procedure complied with, or failed to comply with, the applicable procedural standard. Fifthly, procedural reasoning can be applied in the different justification stages. It can be used to determine whether measures pursued a legitimate aim and whether measures were suitable and necessary to achieve that aim. Process-based review may also be applied in order to decide on the proportionately of fundamental rights infringements. For example, procedural reasoning may take the form of courts considering whether the decision-making authorities have identified all relevant interests at stake and carefully weighed those interests against one another to reach a rational outcome. Relevant points of reference may be whether the legislature deliberated on a particular issue and informed itself of available data or studies for developing legislation and policies, whether executive bodies tried to explain the need for a decision or a policy, or whether lower courts took into account the arguments of the parties or information provided in expert reports. Sixthly, procedural reasoning may vary in light of the importance attached to procedural considerations in a justification stage. Courts may rely exclusively on procedural considerations to determine the outcome of a particular test, but procedural considerations may also be used to support courts' substantive considerations. Finally, the seventh element in which procedural reasoning can vary, concerns the impact of the procedural findings for the conclusion that a justification test was passed or failed.

Part III brings the wide-ranging debates on procedural reasoning together and reflects on the considerations and concepts underlying these debates. It clarifies the broad scope of the debates surrounding process-based review, which relate not only to the institutional position of courts and their function as guardians of fundamental rights, but also to hard cases and to cases involving epistemic uncertainties. It also explains that black-and-white and one-size-fits-all arguments often provide inadequate descriptions of the varied and complex practice of process-based fundamental rights review. A more practice-oriented insight into the theoretical debates is provided by explaining how the different arguments relate to the examples of procedural reasoning and how some of these judgments actually triggered certain debates.

Chapter 7 addresses the institutional debates relating to process-based review. It discusses the role of courts and of procedural reasoning in upholding the rule of law and deliberative democratic values. It also addresses the topic of institutional deference, highlighting the opposing views on procedural reasoning as a means of showing judicial restraint or as indicating judicial activism. The chapter connects the various arguments on the institutional position of courts with views on key notions of constitutional theory, such as democracy, the separation of powers doctrine, the rule of law, and subsidiarity. It argues that the views on procedural reasoning are (directly) influenced by views on these underlying and highly intricate constitutional issues. This means that

PROEF 3

minor differences in institutional design and in perceptions of the institutional position of courts may affect conceptions of the value, appropriateness, and intrusiveness of process-based review.

Chapter 8 addresses the role procedural reasoning can play given courts' function as guardians of fundamental rights. It starts by discussing the procedural mandate of courts and their standard-setting task. Different positions have been taken on whether courts should be able to develop standards for decision-making procedures, particularly in relation to legislative processes. This chapter's main focus, however, is on the debates concerning the question of whether procedural reasoning can assist courts in providing protection of fundamental rights. From one perspective, it has been argued that procedural reasoning provides minimum or even enhanced protection of fundamental rights; from another, process-based review is regarded as an unsuccessful method for protecting fundamental rights leading to weakened judicial protection. The chapter concludes by finding that the various and competing views can be explained in light of divergent perspectives on the primacy of procedure or substance as well as the concrete or the generic fundamental rights impact of procedural reasoning. How we value process-based approaches, therefore, depends on whether we emphasise the protection provided to individual's rights in a case or rather the protection provided across the board. In any case, from both the concrete and generic perspective, the effectiveness of procedural reasoning will depend on various contextual factors.

Chapter 9 looks at two different debates relating to challenges that may arise in fundamental rights adjudication. These concern challenges that arise as a result of normative indeterminacy of fundamental rights and epistemic uncertainties concerning the facts and the effects of measures. First, the chapter addresses the normative difficulties that courts may face. It addresses the neutrality–normativity debate of process-based review, starting from John Hart Ely's perception of procedural reasoning as a neutral and value-free judicial review method. The chapter also discusses arguments regarding procedural reasoning as an avoidance strategy for courts in relation to cases where there is an incommensurable conflict between rights ('hard cases'). Secondly, it studies the role of procedural reasoning in cases with epistemic uncertainties. These are cases in which evidence is indecisive and effects of authorities' measures are not entirely known. The chapter outlines various views on the procedural expertise of courts, the use of procedural reasoning to circumvent empirical reasoning, and whether procedural reasoning advances or hinders the evidence-based trend in decision-making. It concludes by connecting the debates on procedural reasoning with different views on the relationships between law and morality, and between law and empiricism. It also explains that procedural reasoning will not be able to resolve the fundamental neutrality–normativity tension in fundamental rights adjudication. Therefore, it argues, the desirability of procedural reasoning is strongly dependent on the specific normative or epistemic context in which it is applied.

PROEF 3

CONCLUSIONS

This book concludes that no one-size-fits-all approach to procedural reasoning should be taken, as the reality of process-based fundamental rights review is highly complex and varied. Instead, on the basis of the main findings in Parts II and III, Chapter 10 sets out broad, tentative, and general conclusions for applying procedural reasoning in fundamental rights cases. These building blocks indicate how the various arguments for and against the use of procedural reasoning may be present in a particular application of process-based review.

Concerning the *intensity of process-based review*, it is concluded that the more intensively courts scrutinise decision-making procedures, the stronger their institutional and procedural position ought to be; that the intensity of process-based review can be influenced by the legitimate expectations courts may have of public authorities' decision-making procedures; and, that in cases where courts deviate from the ordinary intensity of review of procedures, debates on procedural activism or deference can arise, and courts need to address these by firmly establishing the grounds for such deviations.

As regards the *burden of proof* for establishing the quality of the procedure, it is found that the effective protection of fundamental rights may require courts to shift the burden of proof from one party to the other or to change the nature of evidence that is required; that when courts deviate from the default rules on the burden of proof, they must state strong reasons for doing so, in order to address debates on procedural activism and deference; and, that when decision-making authorities deviate from their standard decision-making process, courts may shift the procedural burden of proof to them.

Concerning the various *standards for review*, it is submitted that courts are generally in a strong position to apply process-based review when clear legal procedural standards are available; and when courts cultivate or develop procedural standards, debates on judicial activism and separation of powers may arise, requiring stronger justification for why these standards are acceptable and fitting, and why courts may define and impose these standards. As regards the certainty, rationality, and fairness standards that may form the basis of courts' reasoning it is observed that process-based review should be based on standards that can justifiably form the basis for courts' judgments; that when courts enforce certainty standards through procedural reasoning, they should ensure that they are not themselves transgressing the boundaries set by these standards; that when they enforce rationality standards through procedural reasoning, they should ensure their procedural approach is sound and consistent, and that they rely on or impose a set of comprehensive procedural standards; and lastly, when courts enforce fairness standards, they should ensure they have the capacity to review and set such standards. It is further noted that procedural reasoning is generally controversial if it is based on standards meant for internal use by decision-making authorities, that are unwritten, or that are non-legal. Nonetheless, judicial reliance on such standards may

PROEF 3

still be permitted if it concerns a specification of external, legally binding standards. Finally, it is concluded that procedural reasoning is controversial if it is based on standards that are developed after a decision was made or on the basis of new information; that procedural reasoning in relation to procedural rights is accepted in principle, but when it concerns procedural reasoning in relation to substantive rights, it may require specific justification; and that procedural reasoning may give rise to different concerns in cases about civil and political rights than in cases about socio-economic rights.

Concerning the *result of procedural considerations*, that is, the negative and positive inferences courts draw (micro-level interim conclusion), three guidelines are discussed. First, when courts draw inferences from their procedural evaluation, their reasoning is expected to be consistent and coherent. Secondly, courts can only draw positive or negative inferences based on process-based review if the particular case offers sufficient factual basis for doing so. And thirdly, it may be controversial for courts to draw positive or negative inferences on the basis of procedural reasoning in relation to substantive rights.

It is further argued that the *location of process-based review* in a judgment may be varied. As a general rule it can be concluded that when procedural considerations and substantive considerations are used alongside one another, then the use procedural reasoning is generally not an issue for debate. There are two exceptions to this rule. First, if substantive reasoning is the default or expected approach, process-based review may require special justification. Secondly, if the test in which procedural reasoning is applied is decisive for the finding of a (fundamental rights) violation, procedural reasoning may raise more concerns. In addition, it is observed that procedural reasoning can play an important role in determining the intensity of justification review ('justification strategy'), especially in cases that usually require institutional, normative, or epistemic deference; that the choice of procedural reasoning as an avoidance, compensation, or intensification strategy, should inform how process-based review is applied in the justification tests; that process-based review can only have a *direct* role in relation to determining the justifiability of an interference with fundamental rights if it is based on proper procedural standards; that process-based review can play an *indirect* role in providing a positive or negative indication of decision-making authorities' compliance with the relevant standards of justification; and, finally, that an *indirect* role for procedural reasoning may be especially useful in cases where substantive reasoning is difficult.

Concerning the *importance of procedural considerations*, it is concluded that if procedural reasoning is used as a strategy to show institutional, normative, or epistemic deference, exclusive or decisive importance may be attached to procedural considerations; that courts can determine the emphasis placed on procedural considerations by increasing or decreasing the importance of procedural considerations in their reasoning concerning a justification test; that the more important procedural considerations are in a justification test, the stronger the procedural position of courts

PROEF 3

ought to be; that a strong emphasis on procedural considerations appears to require at least a thorough review of the decision-making procedure; and, that courts may use procedural reasoning to support substantive considerations, especially in cases where the substantive arguments are weak or inconclusive (and *vice versa*).

Finally, two building blocks are put forward as regards the *conclusion* courts can draw on the basis of procedural reasoning, that is, their finding of whether or not a test has been met (meso-level conclusion). First, when courts draw conclusions from their procedural evaluation in light of a certain justification test, then their reasoning must be consistent and coherent. Secondly, if process-based review is an issue for debate, then reaching an outcome on the basis of procedural considerations can be controversial. Another observation is put forward that relates to the connection between meso-level conclusions and the macro-level conclusion courts draw, that is, for instance, the finding of a violation of a right, the referral for redetermination to another decision-making authority, or a decision on the (un)constitutionality of a law. It is submitted that the more directly procedurally reasoned conclusions at the meso-level affect the judgment at the macro-level, the stronger the support of those meso-level conclusions ought to be.

By setting out these general guidelines or building blocks the book's theoretical findings are made more concrete. This enables scholars and the courts themselves to use these findings to study and apply procedural reasoning in the practice of fundamental rights adjudication, which may help process-based fundamental rights review to achieve its potential.

PROEF 3

SAMENVATTING

PROCESGEBASEERDE TOETSING IN RECHTSPRAAK OVER FUNDAMENTELE RECHTEN

Procesgebaseerde toetsing komt in de hele wereld voor in rechtspraak over fundamentele rechten. Dit type rechterlijke toetsing houdt in dat de rechter de eerlijkheid, grondigheid en kwaliteit toetst van de besluitvormingsprocedures van wetgevende, bestuurlijke en rechterlijke autoriteiten om zo te kunnen bepalen of fundamentele rechten zijn geschonden. Deze toetsing wordt over het algemeen gecontrasteerd met materiële toetsing, wat betekent dat de rechter kijkt naar de inhoudelijke redelijkheid van maatregelen die fundamentele rechten raken. Ondanks dat procedurele toetsing wordt toegepast in rechtszaken waarin fundamentele rechten spelen, is het gebruik ervan controversieel. In de Verenigde Staten is de oproep van John Hart Ely voor een procesgeoriënteerde, participatieversterkende rechterlijke toetsing – geïnspireerd door de fameuze *footnote four* van voormalige rechter Stone van het Supreme Court van de VS in *Carole Products* uit 1938 – ontvangen met aanzienlijke kritiek in de jaren '80. Zo werd bijvoorbeeld beargumenteerd dat procedurele toetsing niet de '*counter-majoritarian difficulty*' kan omzeilen en dat de rechter het toepast om zijn normatieve beoordeling te verhullen, onder het mom van een 'neutrale', procesgebaseerde toetsing.

Vandaag de dag is een debat gaande over het gebruik van procedurele toetsing door het Europese Hof voor de Rechten van de Mens (EHRM). Er wordt gesproken over een procedurele omwenteling bij het EHRM. Wanneer het bepaalt of staten een van de materiële rechten uit het Europees Verdrag van de Rechten voor de Mens hebben geschonden, lijkt het EHRM zich in toenemende mate te richten op de nationale besluitvormingsprocedures. Huidig juridisch onderzoek concentreert zich op het begrijpen van deze procedurele omwenteling, op het uitleggen van de redenen voor deze procedurele trend en op argumenten die deze ontwikkeling duiden als positief of negatief. Een voorbeeld: enerzijds wordt procedurele toetsing beschouwd als passend bij de subsidiaire positie van het EHRM en nuttig om nationale overheden aan te moedigen om de EVRM-rechten te beschermen. Anderzijds wordt gesteld dat procedurele toetsing kan leiden tot verminderde bescherming van fundamentele rechten en dat het onbevredigend kan zijn voor klagers die in Straatsburg op zoek zijn naar materiële rechtvaardigheid. Aan de complexiteit van deze wetenschappelijke debatten kan worden toegevoegd dat het EHRM procedurele toetsing op verschillende manieren toepast. Soms maakt het EHRM gebruik van procedurele toetsing met betrekking tot de proportionaliteitstoets en soms met betrekking tot de beoordelingsmarge van staten; soms beroept het

PROEF 3

zich exclusief op procedurele toetsing, maar veel vaker past het procedurele toetsing en materiële toetsing gezamenlijk toe in dezelfde zaak.

Dit onderzoek verkent de betekenis van procesgebaseerde toetsing en de rol die het kan spelen in rechtspraak over fundamentele rechten in het licht van de hierboven geschetste achtergrond.

EEN PRAKTIJKGEORIËNTEERD, CONCEPTUEEL-THEORETISCH BEGRIP VAN PROCESGEBASEERDE TOETSING

Dit onderzoek vertrekt vanuit het gezichtspunt dat er nood is aan conceptuele duidelijkheid over het fenomeen van procedurele toetsing. Het ontwikkelt een algemene en contextonafhankelijke conceptualisering van deze toetsing. Op die manier probeert het kruisbestuiving tussen inzichten en argumenten over procedurele toetsing uit de jurisprudentie en de literatuur vanuit verschillende juridische contexten te faciliteren. Met een dergelijke conceptualisering erkent en respecteert het de verschillende praktijken van procesgebaseerde toetsing en overstijgt het de idee dat procesgebaseerde toetsing een alles-of-niets benadering is – dat wil zeggen dat een zaak waarin fundamentele rechten spelen ofwel volledig besloten wordt op procedurele gronden, ofwel dat de kwaliteit van de procedure er niet toe doet.

Daarnaast wordt er in dit onderzoek van uitgegaan dat een beter en diepgravender begrip van de discussies over procedurele toetsing noodzakelijk is om praktische richtlijnen te kunnen bieden voor de rol die procesgebaseerde toetsing kan spelen in zaken over fundamentele rechten. Daarom analyseert het onderzoek de procedurele debatten die zich concentreren op de institutionele positie van de rechter in een democratische samenleving, de rechter zijn functie als hoeder van fundamentele rechten en de normatieve en epistemische moeilijkheden waarmee hij wordt geconfronteerd. Het verkregen inzicht in de verschillende argumenten voor en tegen procedurele toetsing en hun onderlinge verbinding zal helpen de complexiteiten rondom het gebruik van procesgebaseerde fundamentele rechtentoetsing volledig te begrijpen en te waarderen.

Tezamen kunnen de in deze studie geboden analyses en inzichten de rechter helpen bij het ontwikkelen van coherente en uitgebalanceerde procedurele benaderingen. Dat is niet alleen relevant voor het EHRM, maar voor elke rechter die zich bezighoudt met fundamentele rechten en die gebruikmaakt van procedurele toetsing. Eveneens kan het onderzoekers de noodzakelijke hulpmiddelen bieden voor het bestuderen van procesgebaseerde toetsing zoals het zich voordoet in de rechtspraktijk en voor het tegengaan van zwart-wit argumenten over procedurele toetsing. Door het bieden van een genuanceerd begrip van procesgebaseerde toetsing poogt dit conceptueel-theoretisch onderzoek de potentie van procedurele toetsing in de praktijk van rechtspraak over fundamentele rechten naar voren te brengen.

PROEF 3

PROCESGEBASEERDE TOETSING IN DE PRAKTIJK, ALS CONCEPT EN IN DE THEORIE

Dit onderzoek bestaat uit drie delen. De toepassing van procedurele toetsing in de praktijk van rechtspraak komt aan bod in Deel I. In dit deel worden achtentwintig voorbeelden van procedurele toetsing in zaken over fundamentele rechten uiteengezet en besproken. Het geeft weer dat procedurele toetsing wordt toegepast door een grote variëteit aan rechters, op verschillende manieren en ten aanzien van heel verschillende zaken en rechten. Zonder bewijs te willen leveren van een wereldwijde procedurele trend, tonen de verwijzingen naar de voorbeelden van procedurele toetsing aan dat procedurele toetsing in de praktijk wordt toegepast door rechters. Hoofdstuk 2 gaat in op het gebruik van procedurele toetsing door de rechter ten aanzien van het wetgevingsproces, Hoofdstuk 3 op het gebruik ervan ten aanzien van het administratieve proces en Hoofdstuk 4 op het gebruik ervan ten aanzien van de juridische procedure.

Een conceptueel-theoretisch begrip van procesgebaseerde fundamentele rechtentoetsing wordt ontwikkeld in Deel II. De conceptualisering van deze vorm van toetsing is verwoord in algemene en universele termen om de toepasselijkheid ervan te verzekeren voor de rechtspraak onafhankelijk van de specifieke context waarin procedurele toetsing wordt toegepast. Dit deel legt ook uit wat procedurele toetsing inhoudt en op welke manier het kan worden toegepast in rechtspraak over fundamentele rechten. Hoofdstuk 5 definieert procesgebaseerde toetsing als een ‘rechterlijke redenering waarmee de besluitvormingsprocedure van overheidsinstanties wordt beoordeeld in het licht van procedurele standaarden’. Deze definitie is gebaseerd op de gemeenschappelijke elementen die voortvloeien uit de in de literatuur gehanteerde definities en uit de voorbeelden van procedurele toetsing uit Deel 1, die concrete input leveren voor het bereiken van een overkoepelende definitie. Dit hoofdstuk verduidelijkt bovendien dat het vanuit een conceptueel perspectief onmogelijk is om een strikt onderscheid te maken tussen procedurele en materiële toetsing. In plaats daarvan zijn beide toetsingsvormen onderdeel van een spectrum van rechterlijke toetsing, reikend van puur procedurele toetsing tot puur materiële toetsing.

De mogelijke toepassingen van procedurele toetsing in rechtspraak over fundamentele rechten worden in Hoofdstuk 6 besproken. Daarin wordt uitgelegd dat de rechter kan variëren in het gebruik van procesgebaseerde toetsing ten aanzien van zeven verschillende onderdelen in de rechtspraak. Ten eerste, wat betreft de toetsingsintensiteit, kan procedurele toetsing (zeer) streng, (zeer) terughoudend, of met een tussenliggende intensiteit worden toegepast. Intensieve of strenge procesgebaseerde toetsing kan de vorm aannemen waarbij de rechter beoordeelt of het besluitvormingsprocedure correct was; een terughoudende procedurele benadering kan de vorm aannemen waarbij de rechter beoordeelt of de besluitvormingsprocedure niet volledig arbitrair was en geen ernstige tekortkomingen laat zien; en een tussenliggende benadering komt ergens tussen deze twee extremen uit. Ten tweede kunnen er verschillen zijn wat betreft de drager

PROEF 3

van de bewijslast. Soms draagt het individu de last om aan te tonen dat de besluitvormingsprocedure van onvoldoende kwaliteit was, op andere momenten moeten de overheidsinstanties bewijzen dat hun procedures voldeden aan de toepasselijke procedurele standaarden. Ten derde kan procedurele toetsing gebaseerd zijn op verschillende procedurele standaarden. Het kan betrekking hebben op standaarden die ontwikkeld zijn door wetgevende, administratieve of rechterlijke autoriteiten en het kan gaan om zekerheids-, rationaliteits- en eerlijkheidsstandaarden. Procedurele toetsing kan bovendien gebaseerd zijn op positieve en negatieve verplichtingen, op *a priori* en *a posteriori* standaarden, op *ex ante* en *ex post* verplichtingen enzovoorts. Ten vierde, in het licht van de bewijslast en de toetsingsintensiteit kan de rechter zowel positieve als negatieve conclusies trekken. Dat wil zeggen, hij kan oordelen dat een besluitvormingsprocedure heeft voldaan aan de toepasselijke procedurele standaarden of dat deze daar juist *niet* aan heeft voldaan. Ten vijfde kan procedurele toetsing worden toegepast in de verschillende rechtvaardigingstoetsen. Het kan worden toegepast om te bepalen of maatregelen een legitiem doel dienden en of maatregelen geschikt en noodzakelijk waren om dat doel te bereiken. Procesgebaseerde toetsing kan ook worden toegepast om te beslissen over de proportionaliteit van een inmenging met fundamentele rechten. Procedurele toetsing kan bijvoorbeeld een vorm aannemen waarbij de rechter in overweging neemt of de besluitvormingsorganen alle relevante belangen hebben geïdentificeerd en deze zorgvuldig tegen elkaar hebben afgewogen om tot een redelijke uitkomst te komen. Relevante ijkpunten kunnen daarbij zijn of de wetgever over een bepaald probleem gedelibereerd heeft en kennisgenomen heeft van beschikbare data en studies voorafgaand aan het ontwikkelen van wetgeving en beleid, of de uitvoerende instantie geprobeerd heeft om de noodzaak van een besluit of beleid toe te lichten en of de lagere rechter de verschillende argumenten van partijen en de informatie in de rapporten van experts in overwegingen heeft genomen. Ten zesde kan procedurele toetsing verschillen in het licht van het belang dat wordt gehecht aan procedurele overwegingen in een rechtvaardigingstoets. De rechter kan zich uitsluitend baseren op procedurele overwegingen om de uitkomst van een rechtvaardigingstoets te bepalen, maar procedurele overwegingen kunnen ook gebruikt worden om materiële overwegingen te ondersteunen. Ten zevende en ten slotte kan procedurele toetsing variëren waar het de impact van procedurele bevindingen betreft, dat wil zeggen voor de conclusie of aan een rechtvaardigingstest voldaan is of niet.

Deel III brengt de uiteenlopende debatten over procedurele toetsing bijeen en reflecteert op de overwegingen en de concepten die achter deze debatten schuilgaan. Het verheldert de omvang van de discussies omtrent procesgebaseerde toetsing door te laten zien dat ze niet alleen zien niet op de institutionele positie van de rechter en zijn functie als hoeder van fundamentele rechten, maar ook op moreelgevoelige zaken en zaken met epistemische onzekerheden. Verduidelijkt wordt ook dat zwart-wit en alles-of-niets benaderingen vaak ongeschikte beschrijvingen geven van de variabele en complexe praktijk van procesgebaseerde fundamentele rechtentoetsing. Een meer praktijkgeori-

PROEF 3

enteerd inzicht in de theoretische debatten wordt geboden door uit te leggen hoe de verschillende argumenten zich verhouden tot de voorbeelden van procedurele toetsing en hoe sommige van deze uitspraken discussies op gang hebben gebracht. Hoofdstuk 7 bespreekt de institutionele debatten omtrent procedurele toetsing. Het gaat in op de rol van de rechter en van procedurele toetsing in het handhaven van de rechtsstaat en van deliberatieve democratische waarden. Eveneens wordt het onderwerp van institutionele terughoudendheid uiteengezet door te onderstrepen dat er tegenovergestelde visies zijn op procedurele toetsing. Enerzijds zien sommigen deze toetsingsvorm als een manier om rechterlijke terughoudendheid te tonen, anderen zien het veeleer als teken van rechterlijk activisme. Het hoofdstuk verbindt de verschillende argumenten ten aanzien van de institutionele positie van de rechter met opvattingen over sleutelbegrippen uit de constitutionele theorie, zoals democratie, machtenscheiding, rechtsstaat en subsidiairiteit. Het beargumenteerd dat opvattingen over procedurele toetsing (direct) worden beïnvloed door ideeën over deze onderliggende en zeer ingewikkelde constitutionele kwesties. Dat betekent dat kleine verschillen in de institutionele vormgeving en in de percepties van de institutionele positie van de rechter invloed hebben op de opvatting over de waarde, geschiktheid en indringendheid van procesgebaseerde toetsing.

Hoofdstuk 8 staat stil bij de rol die procedurele toetsing heeft, gelet op de functie van de rechter als hoeder van fundamentele rechten. Het hoofdstuk begint met een uiteenzetting van de debatten over het procedurele mandaat van de rechter en zijn taak om standaarden te ontwikkelen. Over de vraag of de rechter in staat gesteld zou moeten worden om standaarden voor besluitvormingsprocedures te ontwikkelen, vooral voor wetgevingsprocessen, zijn verschillende posities ingenomen. De voornaamste focus van het hoofdstuk ligt bij de discussies omtrent de vraag of procedurele toetsing de rechter kan ondersteunen in het bieden van bescherming van fundamentele rechten. Vanuit het ene perspectief wordt beargumenteerd dat procedurele toetsing een minimum of zelfs een verbeterende bescherming biedt van fundamentele rechten; vanuit een ander perspectief wordt procesgebaseerde toetsing gezien als een misplaatste methode voor de bescherming van fundamentele rechten die leidt tot verminderde rechterlijke bescherming. Het hoofdstuk verklaart ten slotte de verschillende wedijverende gedachtenstromingen in het licht van verschillende perspectieven over het primaat van de procedure evenals de focus op de concrete of juist de algemene impact van procedurele toetsing op de bescherming van fundamentele rechten. Hoe procesgebaseerde benaderingen gewaardeerd moeten worden, is dus afhankelijk van waar men de nadruk legt: op de bescherming die geboden wordt aan de rechten van het individu alleen in die specifieke zaak, of juist over de hele linie. Van zowel het concrete als het algemene perspectief zal de effectiviteit van procedurele toetsing in elk geval afhankelijk zijn van verschillende contextuele factoren.

Hoofdstuk 9 bespreekt twee verschillende discussies betreffende potentiële uitdagingen die voorkomen in rechtspraak over fundamentele rechten. Het gaat hier om de uitdaging die ontstaat als gevolg van normatieve onbepaaldheid van fundamentele rechten en als gevolg van epistemische onzekerheden over de feiten en de effecten van maatre-

PROEF 3

gelen. Ten eerste gaat dit hoofdstuk in op de normatieve moeilijkheden. Het bespreekt het neutraliteit-normativiteitsdebat over procedurele toetsing, waarbij het begint vanuit John Hart Ely's opvatting over procedurele toetsing als een neutrale en waardevrije rechterlijke toetsingsmethode. Het hoofdstuk behandelt ook argumenten met betrekking tot procedurele toetsing als een ontwijkingsstrategie voor de rechter in zaken waar er een incommensurabel conflict is tussen rechten (zogenaamde 'hard cases'). Ten tweede wordt de rol van procedurele toetsing in zaken met epistemische onzekerheden bestudeerd. Dat zijn zaken waarin bewijs niet beslissend is en de effecten van overheidsmaatregelen nog niet (volledig) bekend zijn. Het hoofdstuk bespreekt verschillende opvattingen over de procedurele expertise van de rechter, het gebruik van procedurele toetsing om empirische redenering te vermijden en procedurele toetsing voor het bevorderen of het hinderen van de 'evidence-based trend' in besluitvorming. Deze discussies over procedurele toetsing worden in het hoofdstuk verbonden met de diverse opvattingen over de relatie tussen recht en moraliteit en tussen recht en empirisme. Het hoofdstuk legt ook uit dat procedurele toetsing niet de fundamentele neutraliteit-normativiteitsspanning in rechtspraak over fundamentele rechten kan oplossen. Om die reden wordt beargumenteerd dat de wenselijkheid van procedurele toetsing sterk afhankelijk is van de specifieke normatieve en epistemische context waarin het wordt toegepast.

CONCLUSIE

Dit onderzoek concludeert dat ten aanzien van procedurele toetsing geen 'one-size-fits-all' benadering gekozen moet worden. De realiteit van procesgebaseerde fundamentele rechtentoetsing is namelijk uiterst complex en gevarieerd. In plaats daarvan trekt Hoofdstuk 10, op basis van de hoofdbevindingen in Delen II en III, voorlopige en algemene conclusies voor de toepassing van procedurele toetsing. Deze 'bouwstenen' geven weer hoe de verschillende argumenten voor en tegen het gebruik van procedurele toetsing een rol kunnen spelen zijn bij specifieke toepassingen van procesgebaseerde toetsing.

Met betrekking tot de *intensiteit van procesgebaseerde toetsing* geldt dat hoe intensiever de rechter besluitvormingsprocedures onderzoekt, hoe sterker zijn institutionele en procedurele positie zou moeten zijn; dat de toetsingsintensiteit van procedures kan worden beïnvloed door de legitieme verwachting die de rechter heeft van de besluitvormingsprocedures van overheidsinstanties; en dat in zaken waarin de rechter afwijkt van de standaard toetsingsintensiteit, discussies over procedureel activisme en terughoudendheid kunnen ontstaan en dat de rechter deze moet adresseren door de gronden voor deze verschillen duidelijk uit te dragen.

Wat betreft de *bewijslast* voor het staven van (het gebrek aan) kwaliteit van procedures, draagt het hoofdstuk uit dat de effectieve bescherming van fundamentele rechten van de rechter kan vergen dat de bewijslast van de ene naar de andere partij wordt verplaatst of dat de aard van het benodigde bewijs wordt veranderd; dat wanneer de

PROEF 3

rechter afwijkt van de standaardregels voor de bewijslast, hij daarvoor (zwaarwegende) redenen moet aandragen om zo de discussies over procedureel activisme en terughoudendheid te adresseren; en dat wanneer besluitvormingsautoriteiten afwijken van de normale besluitvormingsprocessen, de rechter de (procedurele) bewijslast naar hen kan verplaatsen.

Met betrekking tot de verschillende *toetsingsstandaarden* legt dit onderzoek uit dat de rechter in het algemeen in een sterke positie is om procesgebaseerde toetsing toe te passen wanneer duidelijke juridische procedurele standaarden beschikbaar zijn en dat wanneer de rechter procedurele standaarden cultiveert of ontwikkelt, discussies over rechterlijk activisme en de machtenscheiding kunnen ontstaan, die sterke argumenten vereisen over waarom deze standaarden acceptabel en passend zijn en waarom de rechter deze mag definiëren en opleggen. Wat betreft de zekerheids-, rationaliteits- en eerlijkheidsstandaarden die de basis kunnen vormen van rechterlijke toetsing, wordt opgemerkt dat procesgebaseerde toetsing gebaseerd moet zijn op standaarden die een rechtvaardiging kunnen vormen voor de uitspraken van de rechter; dat wanneer de rechter bepaalde zekerheidsstandaarden afdwingt door het gebruik van procedurele toetsing, hij zich ervan moet verzekeren dat hij daarmee niet zelf de door deze standaarden gestelde grenzen overschrijdt; dat wanneer de rechter bepaalde rationaliteitsstandaarden afdwingt door het gebruik van procedurele toetsing, hij zich ervan moet verzekeren dat de procedurele benadering solide en consistent is en dat hij daarbij terugvalt op een uitgebreide set van procedurele standaarden of deze oplegt; en dat wanneer de rechter eerlijkheidsstandaarden afdwingt, hij zich ervan moet verzekeren dat hij de benodigde capaciteit heeft voor het toetsen aan en het ontwikkelen van zulke standaarden. Eveneens kan opgemerkt worden dat procedurele toetsing over het algemeen controversieel is als het gebaseerd is op standaarden die alleen voor intern gebruik van de besluitvormingsinstanties zijn bedoeld, die ongeschreven zijn of die niet-juridisch zijn. Toch kan de rechter teruggrijpen op zulke standaarden waar het gaat om een specificatie van externe juridisch bindende standaarden. Ten slotte wordt geconcludeerd dat procedurele toetsing controversieel is als het gebaseerd is op standaarden die pas na het besluit zijn ontwikkeld of die zien op nieuwe informatie; dat procedurele toetsing van procedurele rechten in beginsel geaccepteerd wordt, maar dat wanneer het gaat om procedurele toetsing van materiële rechten, een speciale rechtvaardiging voor deze benadering noodzakelijk kan zijn; en dat procedurele toetsing aanleiding kan geven tot andere zorgen in zaken over civiele en politieke rechten dan in zaken over sociaaleconomische rechten.

Waar het gaat om het *resultaat van procedurele overwegingen*, dat wil zeggen de negatieve en positieve gevolgtrekkingen die de rechters maken (de interim conclusie op microniveau), zet dit hoofdstuk drie richtlijnen uiteen. Ten eerste, wanneer de rechter inferenties afleidt uit zijn procedurele evaluatie, dan wordt verwacht dat zijn redenering consistent en coherent is. Ten tweede, de rechter kan alleen positieve of negatieve conclusies trekken op basis van procesgebaseerde toetsing als de onderhavige zaak een voldoende feitelijke basis daarvoor biedt. Ten derde kan het controversieel zijn voor de

PROEF 3

rechter om positieve of negatieve conclusies te trekken op basis van procedurele toetsing waar het gaat om materiele rechten.

Verder beargumenteert dit hoofdstuk dat de *locatie van procesgebaseerde toetsing* in een uitspraak kan worden gevarieerd. Als algemene regel geldt dat wanneer procedurele en materiële overwegingen naast elkaar worden gebruikt, procedurele toetsing over het algemeen geen reden voor discussie is. Hierop zijn er twee uitzonderingen. Ten eerste, als materiële toetsing de standaard of de verwachte benadering is, dan kan rechtvaardiging voor het gebruik van procedurele toetsing toch noodzakelijk zijn. Ten tweede, als de toets waarin procedurele toetsing wordt toegepast beslissend is voor het vinden van een (fundamentele rechten)schending, dan kan procedurele toetsing meer zorgen leiden. Daarnaast wordt waargenomen dat procedurele toetsing een belangrijke rol kan spelen in het bepalen van de toetsingsintensiteit ('rechtvaardigingsstrategie') vooral in zaken waarbij normaliter een institutionele, normatieve of empirische terughoudendheid van de rechter wordt verlangd; dat toepassing van procesgebaseerde toetsing in een rechtvaardigingstoets zou moeten worden geïnformeerd door de keuze van het gebruik van procedurele toetsing als een ontwijkings-, compensatie- of intensiveringsstrategie; dat procedurele toetsing alleen een *directe* rol kan spelen in relatie tot het bepalen van de rechtvaardiging van een inmenging met fundamentele rechten als het gebaseerd is op geschikte procedurele normen; dat procesgebaseerde toetsing een *indirecte* rol kan spelen door het geven van een positieve of negatieve indicatie over de naleving van relevante rechtvaardigingsstandaarden door besluitvormingsinstanties; en, als laatste, dat een *indirecte* rol voor procedurele toetsing vooral nuttig is in zaken waar materiële toetsing moeilijk is.

Wat betreft het *belang van de procedurele overwegingen*, concludeert dit onderzoek dat als procedurele toetsing gebruikt wordt als een strategie om institutionele, normatieve of empirische terughoudendheid te laten zien, exclusief of beslissend belang kan worden gehecht aan procedurele overwegingen; dat de rechter de nadruk op procedurele overwegingen kan variëren door het belang van procedurele overwegingen in zijn beoordeling ten aanzien van een rechtvaardigingstoets te laten toe- of afnemen; dat hoe belangrijker procedurele overwegingen in een rechtvaardigingstoets zijn, hoe sterker de procedurele positie van de rechter zou moeten zijn; dat een sterke nadruk op procedurele overwegingen een grondige beoordeling van de besluitvormingsprocedure nodig lijkt te hebben; en dat de rechter gebruik mag maken van procedurele toetsing om materiële overwegingen te ondersteunen, vooral in zaken waar de materiële argumenten zwak of niet eenduidig zijn (en *vice versa*).

Ten slotte, twee bouwstenen worden naar voren gebracht ten aanzien van de *conclusie* die de rechter kan trekken op basis van procedurele toetsing, dat wil zeggen, zijn bevinding of aan een toets is doorstaan of niet (mesoniveau conclusie). Ten eerste, wanneer de rechter conclusies trekt uit zijn procedurele beoordeling in het kader van een specifieke rechtvaardigingstoets, dan moet zijn redenering consistent en coherent zijn. Ten tweede, als procesgebaseerde toetsing een punt van discussie is, dan kan het controversieel zijn om een bepaalde conclusie te trekken op basis van procedurele over-

PROEF 3

wegingen. Een andere observatie betreft de connectie die de rechter maakt tussen de conclusies op het mesoniveau en de conclusie op macroniveau (bijvoorbeeld de bevinding van een schending van een recht, de verwijzing voor een heroverweging naar een besluitvormingsinstantie of een besluit over de (on)grondwettelijkheid van een wet). Hoe directer de procedureel geredeneerde conclusies op het mesoniveau invloed hebben op de uitspraak op macroniveau, hoe sterker de ondersteuning van die mesoniveau conclusies zouden moeten zijn.

Het uiteenzetten van deze algemene richtlijnen of 'bouwstenen' concretiseert de theoretische bevindingen van dit onderzoek. Het stelt onderzoekers en rechters in staat om de bevindingen van dit onderzoek te gebruiken om procedurele toetsing in rechtspraak over fundamentele rechten te bestuderen en toe te passen. Dit kan eraan bijdragen het potentieel van procesgebaseerde toetsing te verwerkelijken.

PROEF 3

PROEF 3

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PROEF 3

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PROEF 3

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PROEF 3

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Leonie Huijbers LLM MA (b. 1989) studied at the Radboud University Nijmegen and as an exchange student at the University of Strasbourg. During her stay in Strasbourg she also interned at the Permanent Representation of the Netherlands to the Council of Europe and at the criminal law department of the Secretariat of the Council of Europe. Leonie graduated in 2015 with a specialisation in human rights law and philosophical ethics. After graduation, she began her PhD research at the Radboud University Nijmegen, transferring to Utrecht University in June 2016. This research was supervised by Prof. Dr. J.H. Gerards, and later also by Dr. P.E. de Morree.

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PROEF 3

PROEF 3

INDEX

A

Amparo procedure 66-67, 82, 135, 327
Analysis
  macro-level of case-law analysis 104-108, 128, 169-170, 173-174, 382-383, 391-394
  meso-level of case-law analysis; 104-108, 123, 126-128, 170, 173-174, 388, 391-394
  micro-level of case-law analysis; 104-108, 123, 125, 170, 173-174, 381-382
Approach
  black-and-white approach; 172, 174, 364, 367, 404
  one-size-fits-all approach; 119, 363-364, 368, 397
  procedural approach (*see process-based review*)

B

Balancing (*see Proportionality in the Strict Sense*)
Burden of Proof 123-124, 128-129, 132-133, 169-170, 174, 372-373, 380, 394-395

C

Capacities 7, 179, 181-182, 252, 287, 310, 317-319, 322, 326, 331-332, 334-339, 348-349, 351-352, 357, 361-363, 377, 381
Concept Formation 13-14, 22, 24, 97-100
Conflict of Rights (*see Hard Cases*)
Consistency 31-33, 194, 219, 238, 303-304, 343-346, 374, 377, 380, 384, 391
Context
  contextualisation; 12, 33, 84-85, 91, 93, 113, 116, 120-122, 129, 132, 222, 226-231, 236, 248, 252-253, 283-285, 322-323, 327-328, 342, 348, 359, 364, 367, 394, 397
  historical context; 225-228, 230, 240-241, 254, 364
  institutional context; 120-122, 134, 179-181, 206, 226, 228-231, 252-254, 326, 336-337, 359, 364, 370-371, 387, 394, 397
  political context 5-7, 91, 231
Corruption 167, 302, 305, 334, 351, 374, 379, 381, 384, 392

D

Deference 6, 46, 72, 80, 129, 148-149, 151-152, 161, 181, 191-192, 214-218, 221, 224, 226, 230-231, 253, 255, 258, 264, 266, 272-273, 310, 312, 328, 333-338, 346-348, 362, 370-371, 373, 384-385, 387, 389, 393-394, 396, 398
Deliberative
  deliberative democracy 183, 185, 195-197, 202-204, 208, 211-213, 223-224, 296, 362, 380
  deliberative democratic theory 195, 198, 214, 361, 363, 377, 389
  deliberative procedures 196-198, 200, 203, 373, 375, 377
Deliberativeness 27, 204, 208-209, 212, 225, 361, 390
Deliberators 196, 205, 208-211, 213-214, 393
Dichotomy 93, 111-114, 289
Discretion 5, 31-32, 34, 45, 47, 51, 129, 149, 152, 188-189, 214, 217-218, 228, 230, 240, 246, 256-257, 299, 301, 305, 333, 335, 378
Drittwirkung (*see Horizontal Effect*)

PROEF 3

E

Effectiveness 68, 155, 157, 234, 272, 276, 283-285, 289, 329-330, 340, 342, 345, 364, 397, 407
Empirical
  empirical mistakes 346, 351
  empirical reasoning 182-183, 287, 317, 328-337, 339-340, 343-345, 347-348, 350-353, 355-358, 360, 362, 367, 371, 375-376, 378, 384, 388, 391
Empiricism 183, 348-352, 360, 367
Epistemic Uncertainties 151, 287, 317, 328-329, 333, 348, 356, 362, 367, 378, 388
European Arrest Warrant 68, 70, 83, 98, 122, 130, 142, 144, 236, 249, 293, 321
Euthanasia (*see Medically Assisted Suicide*)
Evidence-based 9, 11, 27, 63, 83, 93, 134, 138, 155, 182, 198, 236, 244, 284, 288, 300, 328, 332-333, 336, 339-347, 352, 355-358, 360, 363, 371, 375-379, 388
  evidence-based judicial reflex 341-342
  evidence-basedness; 27, 341
  evidence-based trend; 9, 11, 155, 236, 339-340, 342, 347, 360, 363, 371
Expulsion 46, 49-50, 59, 104, 129, 131, 133, 336

F

Footnote Four 9, 22, 28-29, 150, 199, 225, 290, 299, 315
Functions 65, 84, 120, 122, 135, 171, 175, 180-183, 196, 227, 244, 276, 317, 323, 351, 397
Fundamental Rights
  fundamental Rights Impact 17, 183, 407
  fundamental Rights Protection 68, 70, 75, 85, 233, 240, 249, 252, 256, 258-259, 270-271, 276-278, 281-285, 289, 334, 342, 359, 361-364, 367, 371, 373, 375, 377-381, 384-387, 389-390, 393, 398
  procedural fundamental rights protection 256, 278, 361, 371
  substantive fundamental rights protection 258, 276-278, 282, 285, 381, 384, 387, 390

G

Guardians of Fundamental Rights 181, 183, 233, 247, 264, 266, 273, 275, 278, 285, 287, 310, 317, 363, 367, 381, 394

H

Hard Cases 183, 268, 287-288, 304-311, 313-314, 316, 348, 355, 359, 362, 379, 387, 389
Horizontal Effect 233, 262-263
Housing 53, 59-60, 73-75, 82-83, 98, 137, 143, 152, 156, 251, 287, 295, 327
Human Dignity 32, 70, 144, 160, 250, 255-256, 293, 313, 315

I

Input (*see Deliberativeness*)
Institutional Design 185, 192, 215, 219, 222-223, 225-226, 232, 284, 342
Interlocutors; 196, 205-206, 209, 214
Intrusiveness 185, 218, 222, 225, 230-232, 244, 364, 370, 372, 385
  intrusiveness of process-based review; 17, 218, 230, 370, 372, 385, 407
  judicial intrusiveness (*see judicial activism*)
  intrusive procedural approaches 218-219

J

Judicial
  judicial activism 214, 219-221, 226, 230-231, 291, 345, 372, 374, 380, 385, 395
  judicial dishonesty 179, 274, 302-303, 351, 392
  judicial expertise 244, 287, 317-318, 321-322, 345, 352, 370, 375, 377, 380-382, 388, 390-391
  judicial functions 181, 196
  judicial law-making 135, 210, 239, 244
Judicialisation 234, 322, 342, 375
Justice
  justice delayed 137, 260, 270
  justice denied 137, 260, 271
  procedural justice 31, 111, 136, 140-141, 188, 250, 256, 278, 326, 385
  substantive justice 111

PROEF 3

L

Legal Certainty 136, 166, 186, 241, 295, 376, 378
Legitimacy 7, 23, 29, 38, 81, 94, 122, 154, 163, 166, 174, 185, 197, 200-203, 208, 211, 223, 226, 228, 257, 264, 277, 283, 318, 362, 367
Legitimate Aim 38, 42, 54, 106, 146-147, 153-158, 167-168, 170, 173, 194, 265, 324, 336, 382, 385-388, 392
Living Instrument 239-240, 277

M

Margin of Appreciation 5-6, 8, 11, 40-42, 58, 61, 79, 149-152, 165, 169, 217-218, 230, 255, 263, 265, 274, 276, 297-298, 311-313, 337, 371
Medically Assisted Suicide 168, 208-209, 338, 353, 355
Minorities 8-9, 22, 27-29, 36-37, 41, 43, 97, 99, 150, 164, 191-192, 199, 212, 228, 267, 290, 292, 294, 299, 303, 315, 319, 355
Morality 153, 183, 193, 212, 252, 308, 314, 348-352, 358, 360, 367
Multiple Descriptions 13-14, 22, 24, 85

N

Necessity 38, 110, 124-127, 129, 147-148, 157-159, 162, 173, 182, 265, 312, 367, 382-383, 385-387, 392
Neutrality 9, 141, 183, 194, 287-290, 292, 297-298, 300-302, 304-305, 326, 348, 352-360, 362, 374-375, 377-378, 380, 384-385, 387
Normative Indeterminacy 17, 356, 367, 407

O

Object of Review 100, 102, 119-122, 144, 173
Obligations
- negative obligations 83, 98, 100, 233, 237, 261, 405
- positive obligations 54, 61, 78-80, 83, 143, 147, 151, 161-162, 164-165, 169, 233, 237, 248, 261-266, 277, 298, 313, 376
- procedural obligations 4, 48, 142, 224, 229, 237, 253, 258, 276

Originalism 194, 238-239, 277, 374
Outcome (*see Substance*)
Output 152, 208-209, 211

P

Participation 303
Procedural
- procedural limb (*see Procedural Obligations*)
- procedural mandate 17, 234-236, 249, 279, 283, 363-364, 370, 374, 376-379, 381-382, 390, 393
- procedural standards (*see Standards for Review*)
- procedural turn 3, 5, 7, 10, 21, 224, 227, 236, 276, 280-281, 368, 398

Proceduralisation 12, 21, 103, 224, 282
Proceduralness 108, 110, 114, 128, 170, 174
Procedure 101-103, 111-113
Process 101-103, 111-113, 121-122
- administrative process 45, 57, 249, 325
- definition of process-based review 85, 93-94, 104, 107, 110, 123
- distinction of process and substance (*see Dichotomy*)
- judicial process 29, 60, 62, 97, 192, 208, 229, 321, 325-326, 328
- legislative process 3, 8, 11, 21, 27-30, 33-34, 36, 39, 96-97, 121, 131, 137-138, 149, 154, 164, 168, 170, 189-190, 201, 203-204, 207, 216, 218, 220, 222, 224-225, 228, 230, 236, 256, 260, 267, 284, 291-292, 314-315, 321, 323, 328, 335-336, 341, 370
- process ownership 193

Process-based Review 3, 100
Proper purpose (*see Legitimate Aim*)
Proportionality in the Strict Sense 147, 159-161, 168, 354, 383, 386
Public reasoners; 196, 205-206, 214, 363

R

Reflective Equilibrium 14-15, 89-91, 354
Regulatory Watchdogs 181, 191, 193, 317
Review
- Ex nunc review 329, 346, 357, 378-379

PROEF 3

intensity of review 106, 128-132, 146, 148-153, 169, 174, 217, 299, 369-372, 383-384, 394
procedural review 10, 94-95, 101
spectrum of fundamental rights review 113, 388
Reviewer 100, 119-121, 171, 173, 229
Rule of Law 6, 13, 23, 66, 70, 80, 136-137, 145, 153, 183, 185-189, 191-195, 216, 221-223, 225, 229-230, 232, 241, 244-246, 318, 361, 363, 374-376, 378
constituting the law 189-190
enhancing the rule of law 191
procedural rule of law 187-189, 192, 194
pursuing the rule of law 188

S

Separation of Powers 13, 22-23, 25, 121, 136, 160, 180-181, 183, 185-186, 194-195, 198-200, 212-213, 215, 222-223, 225, 227-229, 232, 235, 246-247, 319, 359, 362, 374-375, 395
Small-N Study 15, 23
Socio-economic Rights 24, 83, 143, 161, 248, 255, 264-266, 280, 282, 317, 379-380
Standard Review Loop 234, 275-277
Standard-setting 65, 121, 135, 181, 183, 210, 228, 233-234, 237-239, 241, 243-244, 247, 266, 272, 275, 285, 322-323, 328, 344-345, 352, 361, 363, 371, 375-376, 378-379, 390
Standards
standards for Review 119, 123, 128, 134, 172, 174, 368-369, 374, 395
a posteriori standards 142, 375, 378
a priori standards 142
fairness standards 136, 140-142, 169, 172, 185, 189, 210, 244, 320-321, 325, 376-377, 389, 395
Strategy
avoidance strategy 151, 153, 216, 288, 305, 311-312, 314-317, 333, 344, 351-352, 362, 379-380, 384, 387-389
compensation strategy 131, 151, 153, 218, 253-255, 315, 344, 352, 385
intensification strategy 152-153, 218, 384-385, 396, 409
justification strategy; 149, 314-315, 344, 352, 383-384, 387, 396, 398, 409
Subject of Review 100-101, 119-120, 171, 228
Subsidiarity 6-8, 13, 17, 183, 185, 214-215, 223-224, 228, 230, 274
Substance 54-57, 96, 101, 111-113, 150-152, 173, 218, 224, 258-259, 268-271, 277-280, 289, 325, 381-382, 384-385, 393
distinction of substance and procedure/ process (*see Dichotomy*)
Suitability 41-42, 146-147, 155, 157, 168, 173-174, 265, 367, 382, 385-386

T

Throughput (*see Deliberativeness*)
Transparency 38-39, 95, 104, 110, 125-126, 154, 158, 186, 193-194, 204, 219, 290, 295, 300, 302-305, 341-342, 374, 379, 381, 384, 391-392

V

Voting 40, 168, 205, 212, 223, 225, 235, 246, 294-295, 312, 359

W

Window-dressing 247, 270-272, 275, 283, 361, 363-364, 372, 376, 381, 393

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