
Procedural Review in European Fundamental Rights Cases: Introduction

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1.1 Background

In deciding on cases about infringements of fundamental rights, such as the right to privacy or the freedom of expression, it is generally expected that courts protect the substance of these rights through reasonableness or proportionality review. When confronted with a question to review a legislative measure, an administrative decision or a court ruling which allegedly interferes with a fundamental right, courts should identify which legitimate societal aims are served by the measure or decision, they should assess their effectiveness and necessity to achieve these aims and they should examine whether (overall) the body responsible for the interference has struck a fair balance between the interests concerned. Hence, courts are interested mainly in the content of a decision or measure, not in its coming-into-being.¹ Indeed, substantive reasonableness review in cases on fundamental rights is common to many national and supranational or international courts – it is deeply engrained, for example, in the judicial reasoning of the German Federal Constitutional Court, the US Supreme Court, the Canadian Supreme Court, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).²

¹ I. Bar-Siman-Tov, 'The Puzzling Resistance to Judicial Review of the Legislative Process', 91 *Boston University Law Review* (2011) p. 1915 at p. 1923.

² The prevalence of this particular type of review in fundamental rights cases is well illustrated by the various contributions to A. Jákab, A. Dyevre and G. Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge, Cambridge University Press, forthcoming 2017). See also e.g. D. Law, 'Generic Constitutional Law', 89 *Minnesota Law Review* 652–742 (2005); D. Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence', 57 *University of Toronto Law Journal* (2007) pp. 383–397; T. Hickman, 'Proportionality: Comparative Law Lessons', 12 *Judicial Review* (2007) pp. 31–55.

Scholars have argued, however, that it could be valuable for courts to take a ‘procedural turn’ in their argumentation in fundamental rights cases.³ Instead of (only) reviewing the substantive reasonableness of interferences with a fundamental right, they might (also) expressly take account of the quality of the legislative, administrative or judicial procedure that has led up to the alleged violation.⁴ This idea of procedural review is far from uncontroversial and it has been heavily contested.⁵ Nevertheless, in recent years, the approach increasingly can be seen to have emerged in the case law of European courts dealing with fundamental rights issues, in particular in that of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (ECJ).⁶

³ Classically, such procedural review has been advocated for the Supreme Court of the United States, although it has been contested there, too; see e.g. J.H. Ely, *Democracy and Distrust* (Cambridge, Mass: Harvard University Press 1980); L. Tribe, ‘The Puzzling Persistence of Process-Based Constitutional Theories’, 89 *Yale Law Journal* (1980) p. 1063; L. Lusky, ‘Footnote Redux: A Carolene Products Reminiscence’, 82 *Columbia Law Review* (1982), p. 1093; B. Ackerman, ‘Beyond Carolene Products’, 98 *Harvard Law Review* (1985), p. 713; M.C. Dorf and S. Issacharoff, ‘Can Process Theory Constrain Courts?’, 72 *University of Colorado Law Review* (2001), p. 924; M.V. Tushnet, ‘New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries’, 38 *Wake Forest Law Review* (2003) p. 813; Bar-Siman-Tov, *supra* n. 1; J.S. Schachter, ‘Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate’, 109 *Michigan Law Review* 1363 (2011). More generally, see e.g. A.L. Young, ‘In Defence of Due Deference’, 72 *Modern Law Review* (2009) pp. 554–580; P. Craig, ‘Substance and Procedure in Judicial Review’, in Andenas, M. and Fairgrieve, D. (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (2012) at www.oxfordscholarship.com; J.H. Gerards, ‘The Prism of Fundamental Rights’, 8 *European Constitutional Law Review* 2012 (2) pp. 173–202; I. Bar-Siman-Tov, ‘Semiprocedural Judicial Review’ 6 *Legisprudence* (2012) p. 271; A. Alemanno, ‘The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov’s Semiprocedural Review’, 1 *Theory and Practice of Legislation* (2013) p. 329; E. Jordão and S. Rose-Ackerman, ‘Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review’, 66 *Administrative Law Review* (2014) pp. 1–72. More recently, there is also a debate on the possibilities for procedural review on the level of the national courts in European states; see e.g. Th. Poole, ‘Of Headscarves and Heresies: The Denbigh High School Case and Public Authority Decision-Making under the Human Rights Act’, *Public Law* 2005, p. 685; G. Davies, ‘Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v. Denbigh High School*’, *European Constitutional Law Review* 2005, p. 511. A Kavanagh, ‘Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory’, 34 *Oxford Journal of Legal Studies* (2014) (3) pp. 443–479.

⁴ There are different possible variations of this procedural review; see e.g. Bar-Siman-Tov, *supra* n. 1, pp. 1923–1924, who distinguishes between procedural and semi-procedural review.

⁵ See the sources mentioned *supra* n. 3.

⁶ For analyses of this emerging trend, see the various chapters of the current volume. On the ECJ, see further e.g. A. Alemanno, ‘A Meeting of Minds on Impact Assessment. When Ex

The procedural approach that is currently surfacing in the case law of the European Courts appears to have two different guises.⁷ Firstly, the European Courts have formulated a number of procedural obligations for the states. For example, the ECtHR has required that national legislation provide for sufficient opportunity for individualisation and it has consistently asked national courts to take due account of the standards and criteria it has formulated in its case law.⁸ Similarly, the ECJ has set a number of obligations for the national authorities, as well as the EU institutions, to be met when dealing with fundamental rights. They should respect the right to be heard, decisions should be transparent and sufficiently reasoned and there should be access to effective judicial remedies.⁹

Secondly, it appears that European supranational courts, in particular the ECtHR, increasingly take account of procedural shortcomings, but also of procedural quality, when determining whether a substantive right has been violated.¹⁰ Sometimes the ECtHR draws negative

Ante Evaluation meets Ex Post Judicial Control', 17 *European Public Law* (2011) pp. 485–505; P. Van Cleynenbreugel, 'Judge-Made Standards of National Procedure in the Post-Lisbon Constitutional Framework' 37 *European Law Review* (2012) pp. 90–100; K. Lenaerts, 'The European Court of Justice and Process-Oriented Review', *College of Europe*, Research Paper in Law 1/2012 (2012). On the ECtHR's approach, see e.g. O. De Schutter and F. Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in Brems, E. (ed), *Conflicts between Fundamental Rights* (Antwerp: Intersentia 2008) p. 169; P. Popelier, 'The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights', in P. Popelier et al (eds), *The Role of Constitutional Courts in Multilevel Governance* (Antwerp, Intersentia 2012) pp. 249–268; P. Popelier and C. Van de Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis', 9 *European Constitutional Law Review* (2013) pp. 230–262; J.H. Gerards, 'The European Court of Human Rights and the National Courts—Giving Shape to the Notion of 'Shared Responsibility'', in J.H. Gerards and J.W.A. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law. A Comparative Analysis* (Antwerp, Intersentia, 2014), pp. 13–94.

⁷ For more detail, see the chapters by Eva Brems, Janneke Gerards, Malu Beijer, Angelika Nussberger and Fay Karterner and Anne Meuwese.

⁸ For more detail, see the chapter by Janneke Gerards in the present volume; see further e.g. E. Brems & L. Lavrysen (2013), 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights', 35 *Human Rights Quarterly* 2013, p. 176–200 and E. Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights', in E. Brems and J.H. Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013) pp. 137–161.

⁹ For more detail, see the chapter by Malu Beijer in the present volume.

¹⁰ See the chapters by Eva Brems, Angelika Nussberger and Janneke Gerards in the present volume.

inferences from the lack of procedural quality, in that it may more easily find a violation of a fundamental right if it turns out that an interference was not carefully considered by the national authorities. In other cases, the effect may be more positive – when the ECtHR finds that the national authorities have made a great effort to take all relevant interests into account, they have balanced these interests well and they have provided for sound judicial review of the resulting legislation, it ‘would need strong substantive reasons’ to set aside the outcome of such procedures.¹¹

In combination, the two guises of procedural review may be seen to constitute a feedback loop.¹² When national authorities realise that meeting their procedural obligations under the Convention or under EU law helps to improve their record of protection of fundamental rights, this may provide an important incentive for them to pay attention to fundamental rights in national procedures in the first place. In turn, this may increase the level of protection of fundamental rights on the national level, which clearly is a desirable consequence.

Focusing on procedural quality may have some other advantages. Firstly, procedural review has since long been advocated by proponents of democratic deliberative theories.¹³ Rather than looking into the substance of the matter, courts should analyse whether procedural requirements related to transparency, accountability, participation and fact-finding were met in the legislative or executive decision-making procedures. The advantage of such procedural review is that courts are not seen as substantively intervening in matters on which (national) governments, parliaments or administrative bodies have particular legitimacy or expertise.¹⁴ Instead, they are regarded as regulatory watchdogs that will intervene only, and for good reason, if the legislative or administrative decision-making reveals important shortcomings.¹⁵

Secondly, a high level of procedural quality may bolster procedural fairness, which in itself is of great importance to the legitimacy of

¹¹ For more detail, see the chapters by Janneke Gerards and Angelika Nussberger in the present volume.

¹² This feedback loop is mainly discussed in relation to EU law, in relation to cases where impact assessments have been made in preparation of legislation; the judicial response to this is discussed in more detail in the chapter of Fay Kartner and Anne Meuwese in the current volume. See also e.g. Alemanno, *supra* n. 6.

¹³ See in particular Ely, *supra* n. 3 and C.R. Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press 1993).

¹⁴ cf. Bar-Siman-Tov, *supra* n. 1, p. 1940.

¹⁵ cf. also Van de Heyning and Popelier, *supra* n. 3.

(supranational) judicial decisions.¹⁶ Social psychology research on procedural justice has established that when it comes to institutional legitimacy in the eyes of individuals, the perception of procedural justice (was the case dealt with in a fair manner?) is more significant than the perception of distributive justice (was the outcome of the case fair?).¹⁷ The same research suggests a strong autonomous value of procedural justice, as it provides individuals status recognition and hence is related to their feeling of self-worth. Among the crucial components of procedural justice for courts are participation ('voice'), neutrality and accuracy. A recent study has argued that procedural justice is of particular relevance for the ECtHR, albeit as a complement rather than as an alternative to substantive justice.¹⁸

Thirdly, procedural review may have institutional and pragmatic value. It may help supranational courts to avoid the need to get deeply involved in debates on sensitive and delicate topics, which the national authorities may be better placed to deal with.¹⁹ In line with principles of primarity and subsidiarity, it should be up to the national authorities, including the national courts, to ensure that fundamental rights are protected in an appropriate manner.²⁰ If a supranational court is seen to restrict its assessment to looking at the quality of the procedure and the extent to which national authorities have taken account of the standards the court has set in earlier cases, this could enhance its legitimacy in the eyes of national authorities, to the extent that it is not actually seen to interfere with the substantive policy choices made.

Including (aspects of) procedural review in fundamental rights cases by supranational courts thus may be commended. Nevertheless, a range of questions and points for debate arise as soon as the notion of procedural review is looked at in more detail.²¹ Such undesirable effects may

¹⁶ See further the contributions by Eva Brems and Aruna Sathanapally to the current volume. See also e.g. Bar-Siman-Tov, *supra* n. 1, p. 1931.

¹⁷ In more detail and with references, see E. Brems and L. Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights', 35 *Human Rights Quarterly* (2013) pp. 176–200.

¹⁸ Brems and Lavrysen, *supra* n. 17. ¹⁹ See in particular Popelier, *supra* n. 6.

²⁰ See further, with references, J.H. Gerards, 'The European Court of Human Rights and the National Courts – Giving Shape to the Notion of 'Shared Responsibility'', in Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law. A Comparative Analysis* (Antwerp, Intersentia, 2014), pp. 13–94.

²¹ For a more complete discussion of arguments, objections and questions, see Bar-Siman-Tov, *supra* n. 1; see also the other sources mentioned *supra*, n. 3. See also hereafter, in particular the chapters by Angelika Nussberger, Aruna Sathanapally and Roger Masterman.

present themselves in particular when procedural review is used to replace substantive review, rather than as a supplementary type of review. In this regard, it has been mentioned, for example, that a lack of substantive review may lead to reduced standard-setting, since the courts would in many cases no longer indicate what kind of outcomes are considered reasonable. Moreover, even highly sophisticated procedures may lead to unfair outcomes, which procedural review may be unable to redress. A stronger focus on procedure arguably could result in an unwarranted increase of formalism and window-dressing on the national level, instead of an increase in substantive protection of fundamental rights. Finally, there is still a lack of clarity as to what ‘procedural review’ really means. A wide range of variations can be conceived, such as ‘full’ procedural review (where the content or outcome of the decision-making process does not play any role at all), semi-procedural review (where elements of procedural and substantive review are combined), strategies where negative or positive inferences are drawn from the existence or lack of procedural quality and fairness or ‘evidence-based review’, where a court mainly assesses whether the legislator or administrative body based its decisions and measures on a sufficient set of facts.

1.2 Foundations and Rationales, Practical Value and Judicial Application

Against the background sketched above, the current volume aims to provide for an analysis of the possibilities for the use of procedural review by the European supranational courts in fundamental rights cases, looking into the foundations and rationales for such review, as well as the practice of its application. The main question thereby is to what extent and how the ‘argument from procedure’ could be used in fundamental rights case law of the European courts in a legitimate and practical manner. To answer this question, this volume centres around three central themes that merit in-depth exploration. Read in their entirety, the chapters relating to these three themes provide a broad and deep insight into the meaning and potential of procedural review for European supranational courts deciding in fundamental rights cases.

1.2.1 Foundations and Rationales for Procedural Review by Supranational Courts Deciding Fundamental Rights Cases

To be able to answer the main question of the current book, it is important to provide for a better understanding of what ‘procedural review’ could entail, as well as explain the theoretical basis of this type of review and the normative value of its use in judicial reasoning. The issues to be addressed in Part I of this volume therefore are of a normative and theoretical nature, investigating the foundations and rationales for procedural review.

To this end, Eva Brems in her chapter seeks to identify several potential motivations for the ECtHR’s recent turn to a quality assessment of domestic procedures and processes. In addition to assessing the merits of each of these motivations, her chapter investigates their respective implications as concerns the desirability and modalities of such an assessment. Brems thereby critically assesses four different ‘logics’, intuitions or rationales underlying procedural-type review: the notion of process efficacy, i.e. the reliance on obligations for procedural due care as a proxy for reaching reasonable outcomes; institutional reasons for relying on procedural arguments; the right to be treated fairly and procedurally correctly as a value of its own; and the notion of procedural fairness as a means to bolster legitimacy, compliance and social cohesion. Although these four rationales are derived from the ECtHR’s approach, they have a wider theoretical relevance. This means this chapter, in fact, provides for a general overview of the possible theoretical rationales for procedural review, thereby offering important starting points for distinguishing between different types of use of procedural arguments in judicial reasoning.

The chapter by Aruna Sathanapally continues to critically examine the procedural turn in fundamental rights jurisprudence from a theoretical standpoint. Sathanapally draws on scholarship on the role of courts in relation to constitutional rights, as well as deliberative democratic theory, to examine the normative case for a particular variety of procedural review, or semi-procedural review, but also asks whether this is a type of review that a court – and specifically, a supranational court – can effectively develop through its jurisprudence. She explores this question by reference to an illustrative case study, concluding that the promise of procedural review in a fundamental rights context is a modest one. A court that takes into account the deliberative process leading to the decision under challenge is likely to do a better job of deciding when to

exercise restraint, and this is likely to provide some incentives for better deliberation at the national level. However, given the difficulties in applying uniform standards to deliberation, procedural review of this kind may need to be impressionistic, rather than systematic, and ought to be understood as a secondary, rather than primary, consideration in fundamental rights review.

1.2.2 The (Potential) Value of Procedural Review for Supranational Courts Deciding Fundamental Rights Cases – Political Science Perspectives

Procedural review is often associated with notions of ‘better regulation’ and quality and legitimacy of legislation. As was explained above, there is an assumption (sometimes implicit) that procedural review is part of a continuous ‘feedback loop’. The express judicial approval or disapproval of the process of decision-making may provide an incentive to legislators, administrative bodies or (national) courts to improve the quality and legitimacy of that process. Eventually, this may be beneficial to the quality of legislation and judicial and administrative decisions, presuming that better procedures contribute to better decision-making. If inclusive, transparent and open procedures for decision-making lead to better outcomes and to stronger protection of fundamental rights, it may indeed be desirable for the European courts to pay attention to procedure in addition to substance. At the same time, the question arises whether the assumptions and presumptions mentioned above are correct. Over the past years, for example, many efforts have been made in States and in the European Union to improve the quality of regulation, for example through fundamental rights impact assessments, public consultations based on greenbooks or internet consultations. The question remains, however, whether such improvements actually help to enhance compatibility with fundamental rights standards, or whether compliance with such standards is mainly due to other factors. Moreover, an important empirical question is whether and how such approaches can be transposed to the reality of supranational adjudication, so whether it is feasible for supranational courts to create incentives to raise attention for fundamental rights in national procedures. These questions are addressed in Part II of the current volume.

In her chapter, Patricia Popelier aims to answer these empirical questions by closely investigating the relationship between the recent surge of evidence-based legislative models worldwide, and the trend

towards procedural or evidence-based judicial review. She concludes that these trends may indeed reinforce each other, but she also points out that other factors may be important in determining the degree of mutual influence. In particular, she finds that the legal, administrative and political context, as well as institutional design and constitutional values, may either stimulate or discourage the adoption of evidence-based policies. Based on her research, she also recommends that the ECtHR will most probably be more effective if it appeals to national courts rather than national legislators and policy-makers. Moreover, instructions to take an evidence-based approach must take into account political context and constitutional values to be most effective, if only in awareness raising on the national level.

The analysis made by Patricia Popelier is complemented by an empirical study of the European Union's better regulation programme by Fay Kartner and Anne Meuwese. After an analysis of fundamental rights aspects in impact assessments and scrutiny thereof by the newly established Regulatory Scrutiny Board, they note that the ECJ sometimes draws positive inferences from the fact that EU legislation has been prepared with particular care. The authors also signal that the legitimacy of such positive inferences may be connected to the question of whether indeed there is a clear link between quality of legislation and quality of preparation. Their chapter mainly aims to answer the questions as to which fundamental requirements of regulation are set in the European Union, what barriers exist to making legislation responsive towards judicial review and how the preparation of EU legislation affects judicial review. To this end, by using the case study of the Data Retention Directive, as well as some other examples, Kartner and Meuwese analyse the different 'Better Regulation' instruments available to the EU legislative bodies, and they examine the extent to which these instruments can enhance the awareness of (intended and unintended) impact on especially fundamental rights. They also identify certain aspects of the EU legislative process that seem to hinder the effective collection of information on fundamental rights impacts, and the appropriate use of this data. Finally, they make an assessment of the consequences the degree of fundamental rights-responsiveness can have for judicial review, in particular by the ECJ. Their analysis shows that indeed there is room for procedural review when EU legislation has been prepared properly, and also that there is scope for incentivising EU legislative bodies to be more responsive to fundamental rights impacts.

1.2.3 *Application of Procedural Review – Supranational and Comparative Perspectives*

Procedural review evidently has normative value for supranational courts deciding in fundamental rights cases, as well as practical potential. In addition, it often has been observed that courts increasingly rely on this type of review in their argumentation. Nevertheless, a close analysis of the various ways in which procedural review may play a role in judicial decision-making and judicial reasoning has long been missing. For that reason, Part III of this volume presents a number of critical analyses of the approach currently taken by the European courts, supplemented by two analyses of other legal systems in which procedural review increasingly plays a role.

Firstly, Janneke Gerards' chapter aims to provide for a typology of procedural review in the case law of the ECtHR. The typology presented is based on a distinction between the two main aspects of the Court's 'procedural turn', i.e. (1) setting procedural positive obligations and (2) relying on the quality of national decision-making in reasonableness review. Next to providing a brief review of the different types of procedural positive obligations the Court has developed in its case law, the chapter looks into the ways in which the Court has woven procedural elements into its judicial reasoning, with the objective of clarifying in which types of cases and to what effect the Court already uses elements of procedural review. Gerards concludes that it is possible indeed to distinguish some general lines in the Court's case law, yet overall, it appears that the Court uses a 'pick and choose' approach, selecting only those arguments that it considers useful in reasoning its judgments. These arguments sometimes may be of a procedural nature, for instance, if a procedural flaw or quality is particularly striking, but sometimes they may not.

Angelika Nussberger, the present judge for Germany in the ECtHR, makes an assessment of the usefulness and legitimacy of the different uses of procedural review from the perspective of the ECtHR, drawing on the typology presented in Gerards' chapter, as well as on her own practical experience. She both clarifies the reasons why the ECtHR relies on procedural review in some cases, but not in others, and critically reviews whether the ECtHR's practice actually achieves its aims. She also places the use of procedural review in the context of the ECtHR's work and thereby provides more depth to the possibilities and risks for relying on the 'argument from procedure'.