The Past and the Future of the European Court of Human Rights

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1. The past and the future of the European Court of Human Rights (ECtHR) is the subject allocated to me for today's colloquium. It is a substantial topic! It can be addressed from a political perspective or from a legal perspective. My paper is written from the legal perspective. I do not analyse the politics of how the European Convention on Human Rights (ECHR) or the ECtHR came into existence, how they have developed or what their future might be. Political choices will be made about the future of the ECHR and its institutions, such as the Court, but I do not speculate about what they might be.

2. Instead, I will focus on the trajectory in the Court's jurisprudence towards an increasingly process-based form of review which is noticeable in the past couple of decades. This trend reflects the changing context in which the ECtHR is operating and is likely to remain an important feature of its caselaw moving forwards.

3. My contention is that at the present stage of maturity of the ECtHR's caselaw and in light of tensions between the Court's decision-making and the democratic principles which are fundamental for the societies of the Contracting States, this trend is justified and appropriate. The trend to process-based review reflects a vision of partnership between national institutions and the ECtHR in upholding Convention rights as "practical and effective". It offers the twin benefits of strengthening engagement with, and application of, the Convention at the national level and of mitigating the 'democratic deficit' objection frequently made against the Court.[1]

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[*] Lord Sales, Justice of the UK Supreme Court. I am grateful to my Judicial Assistant, Dana McGibbon, for her excellent assistance in the preparation of this presentation.

[1] See e.g. M Hunt, H Hooper and P Yowell (eds) *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart, 2015).

Theoretical perspectives

4. The ECHR has created the platform for an increasingly articulated and concrete balance between competing traditions in European political and legal philosophy. It provides for a practical juxtaposition of a liberal tradition of individual rights and freedoms with a tradition of democratic self-government.[2] The doctrine of the margin of appreciation is at the heart of the accommodation encapsulated in the case-law of the ECtHR between these traditions.[3]

5. Popular (and populist) democratic politics and ideology always impose pressure on liberal constitutional rights and their application. Precisely because of the abstract formulation of such rights, they leave considerable discretion to judges at the point of application. Judicial action may therefore have to be legitimated to a large degree by appeal to technical expertise and standards of judgment derived from legal tradition and culture, often in opposition to such democratic pressures. This can feel uncomfortable. Where the courts have to resolve disputes which may lie close to the heart of political debate and controversy, where the precise content and characterisation of human rights may themselves be part of the controversy with strong views on both sides, an appeal to the technical expertise of the court in deploying human rights argumentation may provide only a comparatively weak basis to justify the exercise of judicial power. Also, for the ECtHR the legal tradition and culture on which it can draw is fairly abstract and relatively remote from national experience, which can highlight this problem.

6. National courts, particularly apex courts, have a constitutional function and a significant role in making or endorsing public policy. They cannot ignore issues of legitimation of their actions.[4] They are embedded in a specific constitutional environment which at a certain level enables them to be in dialogue with national democratic institutions. This is a stance which is more readily adopted at national level. The ECtHR also has a constitutional function, but it is Europe-wide across all the Contracting States, each with their own

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2 See e.g. Chantal Mouffe, *The Return of the Political* (1993), esp. chs. 7-9; Ramond Geuss, *History and Illusion in Politics* (2001), esp. ch. 3.

3 P Sales, 'Law and Democracy in a Human Rights Framework', ch 15 in D Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, Oxford, 2013).

4 D. Beetham, *The Legitimation of Power* (1991).

constitutional tradition. The idea of dialogue with democratic institutions across all those states in the interests of legitimation is harder to sustain.

7. The doctrine of proportionality and the margin of appreciation embedded within it are the most important of the mechanisms by which the ECtHR provides in fine detail for the accommodation of liberal human rights and democratic ideology. It is a flexible adjustment mechanism, highly attuned to questions of legitimation. The width of the margin of appreciation narrows or expands depending on the strength of the individual interests at stake and the force of countervailing collective interests. Factors which increase the width of the margin include the sensitivity and complexity of the area governed by legislation,[5] where it relates to matters of social and economic policy,[6] where it is an area of general policy in relation to which opinions may reasonably differ in a democracy,[7] where the case raises sensitive moral or ethical issues,[8] where the legal approach calls for a balancing of interests and rights (including, in particular, Convention rights)[9] – particularly where the domestic authorities have identified the conflicting rights and the need to ensure a fair balance between them[10] - and the absence of a clear common approach across members of the Council of Europe.[11] Conversely, the existence of a common approach across member states[12] or identified common international standards may have the effect of narrowing the margin of appreciation.

8. From one perspective (international law) the margin of appreciation balances the sovereignty of Contracting States with their obligations under the ECHR.[13] But this perspective is increasingly being replaced by (or subsumed within) a view-point more internal to the constitutional position within Contracting States, based more explicitly on

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5 *Odievre v France* (2004) 38 EHRR 43, paras. 47-49.

6 *James v United Kingdom* (1986) 8 EHRR 123, para. 46.

7 *Hatton v United Kingdom* (2003) 37 EHRR 611, para. 97.

8 *Van de Heljden v Netherlands*, ECtHR, GC, judgment of 3 April 2012, paras. 59-60.

9 *Odievre v France; Evans v United Kingdom* (2008) 46 EHRR 34, para. 77; *Dickson v United Kingdom* (2008) 46 EHRR 41, GC, paras. 77-79.

10 *Aksu v Turkey* (2013) 56 EHRR 4, GC, paras. 66-67.

11 *Rasmussen v Denmark* (1984) 7 EHRR 371, paras. 40-41; *Petrovic v Austria* (2001) 33 EHRR 14, para. 38; *Odievre v France*; *Evans v United Kingdom*; cf *A, B, C v Ireland* (2011) 53 EHRR 13, where common standards regarding abortion in other European states tended to narrow the margin of appreciation, but were not decisive because other factors tended to widen it: paras. 222-238.

12 *Kiyutin v Russia* (2011) 53 EHRR 26.

13 Ronald St. J. Macdonald, "The Margin of Appreciation" in Ronald St. J Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (1993), p. 83.

recognition of the importance of democracy (and hence of the importance of legislative and, to some degree, executive choice) within the Convention system.

9. The margin of appreciation operates along three axes, as a mechanism (i) to accommodate the tension between Convention rights with democratic decision-making; (ii) to provide a space for the determinative application of local expertise or superior knowledge of relevant circumstances within the national judicial and regulatory systems; and (iii) to regulate the calls upon the ECtHR's time and attention, in recognition of the role of the Court as, in effect, a constitutional court of the European public order with responsibility for what is now a relatively mature human rights system with good penetration and understanding among national courts. Each axis has different implications for the operation of the proportionality doctrine at the national level.

10. *Draon v France*[14] provides a good example of lower level intensity of application of the proportionality doctrine in the face of recognized social disagreement and democratic resolution (axis (i)), because:

> "the national authorities have direct democratic legitimation and are in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."

11. Axis (ii) is reflected in the notion of subsidiarity applied by the ECtHR;[15] respect for factual decision-making by national authorities in cases requiring sensitive assessment of complex, interacting factual circumstances, such as those involving decisions whether to take children into care;[16] and the "fourth-instance rule", according to which the ECtHR adopts

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14 (2006) 42 EHRR 40, GC, paras. 106-108; also see *Hatton v UK* (2003) 37 EHRR 28, para. 97; *SAS v France* (2015) 60 EHRR 11, GC, para. 129.

15 See e.g. the *Belgian Linguistics* judgment (1979-80) 1 EHRR 252, para. 10 (referring to the "subsidiary nature of the international machinery of collective enforcement established by the Convention"); *Austin v UK* (2012) 55 EHRR 14, GC, para. 61; and the declarations which emerged from the Interlaken conference (2010), the Izmir conference (2011) and the Brighton conference (2012). The Brighton conference led to the promulgation of Protocol No. 15 to insert a new recital into the Preamble of the ECHR to affirm that, "in accordance with the principle of subsidiarity", the Contracting Parties have the primary responsibility to secure Convention rights and freedoms, "and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the [ECtHR]".

16 E.g. *K and T v Finland* (2003) 36 EHRR 18, GC, para. 154; also see e.g. *Chapman v UK* (2001) 33 EHRR 18, para. 92 (exercise of planning discretion); *Eweida v UK* (2013) 57 EHRR 8, para. 99 (assessment of clinical safety); cf *Jeunesse v Netherlands* (2015) 60 EHRR 17, GC, para. 120 (domestic authorities failed to consider and assess evidence as to the situation of children in an immigration case). As part of the proportionality doctrine and in exercise of its supervisory role, the ECtHR requires there to be "relevant and sufficient" reasons adduced by the national authorities,

a very limited role when checking whether domestic law has been correctly interpreted and applied and facts correctly found by national courts,[17] looking only to see whether the decisions of those courts are flawed by arbitrariness or are manifestly unreasonable.[18] This aspect of the margin of appreciation seems to leave domestic courts to follow their established roles under domestic law.

12. Axis (iii) has assumed growing significance. Where superior national courts or legislatures have directly applied Convention rights as part of their own national legal order, e.g. to balance Article 8 and Article 10, the ECtHR will generally respect the decisions they come to.

13. All three axes underlie the shift by the ECtHR towards procedural review. Assessments along the three axes may overlap and reinforce each other. For example, the ECtHR will respect the legislature's judgment as to what is in the public interest unless manifestly without reasonable foundation, which reflects both democratic principle (axis (i)) and the legislature's being better placed than the court to identify the public interest in the national context (axis (ii)); and the wide margin of appreciation allowed may be further supported if the legislature has acted in the context of a policy assessment informed by the ECtHR's case-law (axis (iii)).

14. On the other hand, it may be that the ECtHR will not regard it as appropriate to defer to the national authorities' assessment on all the elements inherent in an overall analysis of compliance with a Convention right. For example, it will make its own assessment of whether the quality of the relevant national "law" is satisfactory for the purposes of Article 8(2) or Article 10(2). Further, indications in favour of a wide margin of appreciation along one or more of these axes do not necessarily have determinative impact; they may be

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including in relation to the evidence of any factual basis relied upon as a foundation for a measure which impinges on Convention rights: see e.g. *Vogt v Germany* (1996) 21 EHRR 205, para. 52(iii); and *Smith and Grady v UK* (1999) 29 EHRR 493, paras. 135-138; *Parti-nationaliste Basque v France*, ECHR 2007-II, para. 46. However, the fourth-instance rule has been applied where complaints are made under Article 6 (right to a fair hearing) regarding the assessment of evidence by national courts: e.g. *Koval v Ukraine*, no. 65550/01, judgment of 19 October 2006, para. 115.

17 An issue of importance in relation to a number of Convention rights which depend upon action of national authorities being lawful or taken in accordance with the law: see e.g. *SW v UK* (1996) 21 EHRR 363.

18 See e.g. *Anheuser-Busch Inc. v Portugal*, no. 73049/01, judgment of 11 October 2005, para. 83; *Garcia Ruiz v Spain* (2001) 31 EHRR 22, GC, para. 28; *Beganovic v Croatia*, no. 46423/069, judgment of 26 June 2009, paras. 78 and 85; *Austin v UK* (2012) 55 EHRR 14, GC, para. 61 (regarding findings of fact by the domestic courts).

counter-balanced by other factors tending to narrow the margin to be accorded, such as where the Contracting State has interfered in a direct way with the core of an especially important Convention right.

The ECtHR's past: from substantive review towards increasingly procedural review

15. The shift in the ECtHR's jurisprudence from substantive review towards a more procedural approach has been discernible for some time.[19] By 'procedural approach' I mean that the ECtHR has increasingly focused its review on whether national institutions (both judicial and legislative) have directed themselves by reference to the provisions of the Convention and, in particular, by reference to the ECtHR's judgments interpreting and giving guidance about the application of the Convention rights. Where the Court can see evidence of genuine engagement with the Convention at the national decision-making level, it is willing to afford the Contracting State a broader margin of appreciation. This, in turn, gives a Contracting State, acting through its relevant institutions, an incentive to refer to and apply the Court's caselaw, in order to 'buy' for itself greater scope for the decisions made by those institutions to be upheld and respected by the Court.

16. The political theorist Jan-Werner Müller pithily characterises the essence of liberal democracy as that the majority gets their way after the minority have their say.[20] This means that under the democratic principle equality of voting in making decisions is reflected in a rule that a majority vote is determinative, but the principle of deliberation in a democracy and the equal rights of all to participate means that the majority should proceed (indeed, might only be identified) after listening to the arguments of those who eventually are found to be in the minority. Perhaps one could adapt this to say that the ECtHR's developing procedural approach reflects a principle that the Court will accept that the majority gets its way after considering the Convention rights in play.

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19 See P Sales, 'Proportionality and the Margin of Appreciation: Strasbourg and London', in S Vogenauer and S Weatherill (eds) *General Principles of Law: European and Comparative Perspectives* (Hart, 2017)179-194.

20 J-W. Müller, *Democracy Rules* (2021), 65, 72.

17. The move towards a more procedural approach has also been identified by Robert Spano, former President of the Court.[21] He identifies the aim of the shift as being to "*secure a higher and more sustainable level of Convention protections within the Member States."*[22]

18. The primary way in which the shift has manifested itself is in the explicit willingness of the court to grant a wider margin of appreciation in applying the proportionality doctrine, where there has been proper engagement at the national level with the Convention requirements and the ECtHR's jurisprudence. An example is the Court's approach to defamation cases which involve issues of free speech and protection of reputation and hence simultaneously engage Articles 8 and 10. The ECtHR's position is that "*where the balancing exercise between* [Article 8 and 10] *has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court will require strong reasons to substitute its view for that of the national courts."*[23]

19. Linked to this, a second way in which the procedural shift has manifested itself is the ECtHR's formulation of criteria that can be used and applied by national decision-makers at the domestic level. To return to the example of defamation cases which engage both Article 8 and Article 10, domestic courts are now well-supported to make a Convention-compliant assessment because the Strasbourg court has, in its own judgments, crystallised clear principles relevant to that balancing assessment.[24] Domestic courts therefore have increasingly clear and determinate guidance to apply; so they are more likely to get it right in a way which is difficult for an applicant to challenge in the ECtHR.

20. A third way in which we see the increasing shift towards proceduralism is in the growing tendency of the ECtHR to consider domestic legislative processes when assessing whether legislative measures are compliant with the state's Convention obligations. This feature of the Strasbourg jurisprudence is illustrated by three significant cases in which the ECtHR

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21 Robert Spano, 'The Future of the European Court of Human Rights- Subsidiarity, Process-Based Review and the Rule of Law' (2018) HRLR Vol 18 No.3, 473-494; Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', (2014) HRLR Vol 14 no.3, 473-494.

22 Robert Spano, 'The Future of the European Court of Human Rights- Subsidiarity, Process-Based Review and the Rule of Law' (2018) HRLR Vol 18 No.3, 474.

23 See e.g. *Tamiz v United Kingdom* [2018] EMLR 6 at §79.

24 E.g. in *Von Hannover v Germany (No.2)* Applications Nos 40660/08 and 60641/08, Merits and Just Satisfaction, 7 February 2012. See the discussion at p.487 of Robert Spano, 'The Future of the European Court of Human Rights- Subsidiarity, Process-Based Review and the Rule of Law,' (Human Rights Law Review, Vol.18 No.3 (2018) 473).

ruled on alleged violations by the United Kingdom of Article 3 of Protocol 1 (right to free elections).

21. In *Hirst v UK (No 2)* the ECtHR found that legislation which imposed a blanket ban on prisoner voting in the UK amounted to a disproportionate interference with Article 3 of Protocol 1.[25] A key aspect of the ECtHR's decision was its finding 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."*[26] The Court also noted that the domestic courts had regarded the nature of the restrictions as essentially a matter for Parliament and had not themselves undertaken a proportionality assessment of the measure.[27] In that context, precisely because the national decision-makers had not assessed the Convention balance for themselves, the margin of appreciation narrowed and the measure was found to be disproportionate.[28]

22. A different decision was reached in *Shindler v UK*.[29] In that case, the complaint concerned the compatibility of legislation on non-resident voting rights with Article 3 of Protocol 1. Essentially, the relevant legislation meant that if a British citizen were to reside abroad for more than 15 years, they would cease to enjoy the right to vote in UK parliamentary elections. The Court observed that "*whether the impugned measure has been subjected to parliamentary scrutiny is* […] *relevant, albeit not necessarily decisive, to the Court's proportionality assessment."*[30] In the context of the specific legislation invoked by the applicant, the Court found that there was extensive evidence to demonstrate that "*Parliament has sought to weigh the competing interests and to address the proportionality of the fifteen-year rule."*[31] The Court referred to the fact that the question of non-residents' voting rights had been examined twice by the Home Affairs Select Committee in the past 30 years, with a report being produced on both occasions, and that the question had been debated in Parliament on several occasions since 2000. The Court made it clear that it does not *necessarily* follow from the fact that there have been repeated legislative debates on an

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25 (2006) 42 EHRR 41.

26 Ibid, §79. The Court continued by observing 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 current human rights standards."*

27 Ibid, §80.

28 Ibid, §82.

29 (2014) 58 EHRR 5.

30 Ibid, §102.

31 Ibid, §117.

issue that the relevant legislation is Convention-compliant.[32] Nevertheless, engagement at the national level with Convention criteria did clearly inform the ECtHR's approach to the proportionality assessment. Ultimately, the Court concluded that, having regard to the margin of appreciation, the restriction imposed by the UK could be regarded as proportionate to the legitimate aim pursued: there was therefore no violation of Article 3 Protocol 1.[33]

23. More recently, a wide margin of appreciation was accorded in *Hora v UK*,[34] again informed by a level of engagement with Convention rights by the national authorities to produce an administrative practice to accommodate those rights, albeit in the absence of legislative change.

24. Other cases appear harder to reconcile with the shift towards a procedural approach. The judgment in *Verein KlimaSeniorinnen Schweiz v Switzerland*[35] appears to be a prominent example. The complaint was that Switzerland had breached its obligations under Article 8[36] by failing to take measures to combat climate change. The applicant complained that Switzerland had breached its positive obligation of protection under Article 8 by failing to put in place appropriate and sufficient legislative measures in order to attain targets it had chosen itself for combating climate change. The majority found that there had been such a breach.

25. In his partly dissenting judgment, Judge Eicke made two points. First, the ECHR does not contain a right to a clean and healthy environment, and nor does it give the ECtHR explicit jurisdiction over environmental issues. In line with the Court's case law, it cannot by means of evolutionary interpretation derive from international treaties or obligations other than the Convention a right that is not included in the Convention itself.[37] This is particularly the case where the omission to include a specific right is deliberate. Given that there has been a consistent refusal by the Contracting Parties to adopt an additional protocol providing for the right to a clean and healthy environment (despite calls to do so by the

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32 Ibid.
33 Ibid, §118.
34 Judgment of 23 September 2025.
35 (2024) 70 EHRR 1.
36 The judgment also addressed other complaints.
37 Ibid, per Judge Eicke at §18(b) of his partly dissenting judgment, referring to *Johnston and Others v Ireland,* 18 December 1986 §53 Series A no.112; *Austin and Others v United Kingdom* [GC], nos.39692/09 at §54; *Ferrazzini v Italy* [GC], no.44759/98 §30 ECHR 2001-VII.

Parliamentary Assembly of the Council of Europe), there are limits to how far the Court can legitimately venture in inferring such a right from existing Convention rights.

26. Secondly, the judgment raises in a particularly striking fashion the 'democratic deficit' issue which continues to confront the ECtHR. The basis upon which the majority found that Switzerland had breached its positive obligation under Article 8 was that there were shortcomings in Switzerland's domestic regulatory framework for the reduction of emissions. To a significant degree, however, these shortcomings followed from a referendum in which the Swiss electorate rejected an amendment to the 2011 CO2 Act, pursuant to which there would have been legislative provision for an overall reduction of 50% of greenhouse gas emissions by 2030 compared with 1990 levels. This context produced the risk that the ECtHR would be perceived as relying on the expression of the democratic will of the Swiss electorate as a basis for finding a violation of Article 8.[38]

27. However, I contend that the majority judgment displays distinct elements of a procedural approach. The specific obligation which the majority found had been engaged and breached was a positive obligation, implied within Article 8, to undertake measures for the substantial and progressive reduction of greenhouse gas levels, with a view to reaching net neutrality within the next three decades.[39] In the context of this obligation, the majority held that "*in order for measures to be effective, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner."*[40] The ECtHR did not specify in more detail itself what measures should be taken.

28. Central to the Court's assessment was that the Swiss authorities had failed to act in a consistent manner, because Switzerland had simultaneously recognised the need to reduce its greenhouse gas emissions and made specific commitments to making those reductions,[41] while producing a legislative / regulatory framework which was incapable of achieving the reductions it had committed to. This inconsistency in Switzerland's position meant that the Court could point to and rely upon a formal (as opposed to substantive) deficiency in the measures it had adopted. Against that backdrop, the margin of appreciation narrowed.

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38 Ibid, per Judge Eicke at §21 of his partly dissenting judgment.

39 Ibid, per the majority at §548.

40 Ibid.

41 Ibid at e.g. §92: "*by ratifying the Paris Agreement, Switzerland had made a definite commitment to halve its GHG emissions by 2030 and reduce them by on average 35% per year over the period from 2021 to 2030 compared to 1990."*

29. It is true that one of the reasons for the regulatory lacuna which lay at the heart of the deficiency identified by the majority was the June 2021 referendum which had rejected the proposed revision of the 2011 CO2 Act. However, the Government had accepted in the course of the litigation that the outcome of that referendum did not suggest that citizens had rejected the necessity of combating global warming or reducing national greenhouse gas emissions.[42] The implication of the referendum result was merely that the Swiss electorate had rejected the proposed *means* for doing so.[43] The position of the electorate and their elected representatives therefore remained that there was a need to reduce greenhouse gas emissions. It was in that context that the effectiveness (and the consistency) of the measures taken by the Swiss authorities fell to be assessed. The majority found that the existence of the regulatory lacuna demonstrated a failure to act in good time and in an "*appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework,"* and thus that Switzerland had exceeded its margin of appreciation and failed to comply with its positive obligations.[44]

30. On this reading, the majority judgment has a significant procedural angle. The defect it centred upon could be described as a formal, rather than substantive, deficiency in the legislative framework. The ECtHR did not specify what measures Switzerland should take as a substantive matter. Rather, the position arrived at by Switzerland was insufficient because it was inconsistent for the state simultaneously to commit itself to the reduction of greenhouse gas emissions in accordance with a net neutrality timeline, while rejecting and failing to replace a legislative framework capable of achieving that aim.

31. Looked at in this way, the judgment reflects what is a general tendency in constitutional and administrative law in many jurisdictions to turn to procedural critique in order to deflect to some degree the counter-majoritarian difficulty.[45] This is the tendency whereby a court rules against some decision taken by democratic institutions on the basis that they have not gone about the decision-making process in the right way, rather than by holding that the substantive measure chosen is necessarily to be regarded as out of bounds and

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42 Ibid, §561.
43 Ibid.
44 Ibid, §573.
45 The point raised by Alexander Bickel in his study of the US Supreme Court, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

impermissible in all circumstances. This approach minimises the conflict between the democratic principle and the application of law in a particular case.

The future of the ECtHR: towards increased partnership and shared responsibility

32. Looking towards the future, it is likely that this process-based orientation will continue. The value of the procedural approach lies in its ability simultaneously to strengthen compliance with ECHR obligations whilst addressing the democratic deficit and overreach criticisms which are often made against the Court. This flows from two principal features of the procedural approach.

33. First, the procedural approach strengthens engagement by Contracting States with the ECHR by giving national institutions a meaningful role in the development and enforcement of the Convention system. This aligns with the expressed desire of the Council of Europe states to see a framework of 'shared responsibility' for the Convention system, with the ECtHR operating as a subsidiary, supervisory court. That desire is manifest, for example, in Protocol 15, which represents the culmination of a series of political attempts to promote a 'shared responsibility for the framework'. The goal of this shared responsibility approach is not to weaken the ECHR regime, but to enhance it by embedding Convention compliance into the domestic order.[46]

34. Secondly, the procedural approach increases the democratic legitimacy of the Convention system. The role which the approach affords to national parliaments is particularly important. National parliaments lie at the heart of constitutional democracy and have a vital role in upholding and protecting human rights norms. There has been a push in recent years by the UN human rights bodies towards greater parliamentary engagement.[47] The UN High Commissioner for Human Rights describes national parliaments as "*cornerstones of national human rights protection systems."*[48] By coupling parliamentary engagement in human rights with a supervisory judicial jurisdiction, the procedural approach increases the

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46 See the Copenhagen Declaration of 2018, which refers to the concept of shared responsibility and declares that the "*strengthening of the principle of subsidiarity is not intended to limit or weaken human rights protection, but to underline the responsibility of national authorities to guarantee the rights and freedoms set out in the Convention."*

47 For example by the publication by the Office of the UN High Commissioner for Human Rights in 2018 of 'Draft Principles on Parliaments and Human Rights': Report of the Office of the United Nations High Commissioner for Human Rights, 'Contribution of Parliaments to the work of the Human Rights Council and its universal periodic review' (17 May 2018).

48 Ibid, para 18.

democratic legitimacy of the Convention system without sacrificing commitment to the Convention rights.

35. The arc towards process-based review seems, therefore, to be justified. In terms of the development of the ECtHR's role and approach, the trajectory is capable of being extended towards a more firmly established 'partnership' and 'shared responsibility' approach. The core of that approach already exists in the Convention framework, but has acquired increased emphasis.

36. In the United Kingdom, a partnership approach is what was envisaged when the Human Rights Act 1998 was enacted in order to 'bring rights home.'[49] The White Paper 'Rights Brought Home', which set out the policy behind the Human Rights Bill, was clear in its premise: the intention was that the Convention rights should be adjudicated upon and applied primarily by the domestic courts.[50] The paper also clearly explained that the intention behind this was not to undermine or weaken the ECtHR's authority. Rather, the hope was that "*enabling courts in the United Kingdom to rule on the application of the Convention will also help to influence the development of the case law on the Convention on the basis of familiarity with our laws and customs and sensitivity or practices and procedures in the UK. Our courts' decisions will provide the European Court with a useful source of information and reasoning for its own decisions."*[51]

37. True partnerships are greater than the sum of their constituent parts. In the context of the ECHR, a partnership approach is perhaps the best way to strengthen and uphold the Convention system in the future.

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49 Home Office, *Rights Brought Home: The Human Rights Bill* (CM 3782, October 1997).
50 Ibid, paras 1.18-1.19.
51 Ibid, para 1.18.