Transnational Legal Theory

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rtlt20

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To cite this article: Alain Zysset & Başak Çalı (2023): Exhausting domestic remedies or exhausting the rule of law? Revisiting the normative basis of procedural subsidiarity in the European Convention on Human Rights, Transnational Legal Theory, DOI: 10.1080/20414005.2023.2232601

To link to this article: https://doi.org/10.1080/20414005.2023.2232601

Published online: 26 Jul 2023.

TRANSNATIONAL LEGAL THEORY
https://doi.org/10.1080/20414005.2023.2232601

Routledge
Taylor & Francis Group

Exhausting domestic remedies or exhausting the rule of law? Revisiting the normative basis of procedural subsidiarity in the European Convention on Human Rights

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ABSTRACT

In recent years, the case law of the European Court of Human Rights has seen a new normative turn in grounding subsidiarity when interpreting the substantive rights in the European Convention on Human Rights. The Court has placed emphasis on subsidiarity considerations when the respondent state can demonstrate the democratic and rule of law pedigree of its rights-interfering actions. The Court's interpretation of the procedural rule of the exhaustion of domestic remedies has not caught up with this new normative turn. This article argues for the 'normative realignment' thesis. Grounds for substantive subsidiarity are normatively defensible on democracy and rule of law considerations, and grounds for procedural subsidiarity can and should be more closely aligned with the same considerations.

KEYWORDS European Court of Human Rights; subsidiarity; exhaustion of domestic remedies; margin of appreciation; democracy and the rule of law

1. Introduction

The case law of the European Court of Human Rights has seen a new *normative* turn in justifying the Court's subsidiary role in interpreting the European Convention on Human Rights (ECHR) in the last decade. In particular, the Court's case law has placed more and more emphasis on its subsidiarity role when the respondent state can demonstrate the democratic pedigree of rights-interfering legislation and/or the Convention-compliant qualities of judicial justifications offered by domestic courts.[1] The Court's approach at

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[1] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) *Human Rights Law Review* 487; Oddný Mjöll Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15(1)

the admissibility stage of its proceedings, when considering the exhaustion of domestic remedies rule, however, has not systematically caught up with this increased emphasis. The exhaustion of domestic remedies continues to be regarded as of highest importance in European human rights law, even when democratic and rule of law credentials of member states are suspect.[2] The now well-documented democratic and rule of law backsliding in many Council of Europe countries in the past decade[3] makes it timely to explore the apparent normative gap with respect to the justifications provided by the Court for grounding substantive and procedural subsidiarity at the admissibility stage. This is because procedural subsidiarity may amount to giving primacy not to independent and Convention compliant domestic courts, but to courts that operate under political instructions and that engage in what some in the literature have called 'abusive constitutionalism' at the expense of democracy and the rule of law,[4] thereby giving rise to an incoherent system of transnational human rights review.

In this article, the central aim is to make the case for defending what the paper calls the 'normative alignment thesis;' that is, the realignment of the rule of law and democracy grounds for subsidiarity for both procedural (ie, with respect to the exhaustion of domestic remedies) and substantive (ie, with respect to the allocation of the margin of appreciation at the merits stage) deliberations by the European Court of Human Rights. The central argument is that the same principled grounds should guide the justifications for why the Court may legitimately interfere with the primacy of state parties in remedying violations of the Convention.

International Journal of Constitutional Law 9; Eva Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2014) 137; Başak Çalı, 'Towards a Responsible Domestic Courts Doctrine? The European Court of Human Rights and the Variable Standard of Judicial Review of Domestic Courts' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection. Rethinking Relations between the ECHR, EU, and National Legal Orders* (Taylor & Francis, 2016) 144.

[2] The European Court of Human Rights, Practical Guide on Admissibility Criteria (updated 31 August 2022), 1, <www.echr.coe.int/documents/admissibility_guide_eng.pdf>.

[3] For an overview of the issue in the context of the Court, see, for example, David Kosař and Katarina Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v Hungary and the Rule of Law' (2018) 10(1) *Hague Journal on the Rule of Law* 83. See also Başak Çalı and Esra Demir-Gürsel, 'The Council of Europe's Responses to the Decay of the Rule of Law and Human Rights Protections: A Comparative Appraisal' (2021) 2(2) *European Convention on Human Rights Law Review* 165. On the specific nexus between populism and the Court, see Jan Petrov, 'The Populist Challenge to the European Court of Human Rights' (2020) 18(2) *International Journal of Constitutional Law* 476 and Alain Zysset, 'Calibrating the Response to Populism at the European Court of Human Rights' (2022) *International Journal of Constitutional Law* <https://academic.oup.com/icon/article/20/3/976/6752918>.

[4] On the general notion of 'abusive constitutionalism', see, for example, Rosalind Dickson and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, 2021). For an overview of the field of 'democracy decay', see, for example, Tom Gerald Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11(1) *Hague Journal on the Rule of Law* 9. On the nexus between human rights institutions and populism specifically, see, for example, Gerald L Neuman (ed), *Human Rights in a Time of Populism: Challenges and Responses* (Cambridge University Press, 2020).

Section 1 outlines the basic features of subsidiarity in European human rights law. In section 2, the new normative turn in the substantive case law of the European Court of Human Rights and why this is justifiable in the domain of human rights subsidiarity is set out. Section 3 demonstrates that drawing on the distinction developed by Dworkin between rules and principles, even though the exhaustion of domestic remedies is called a rule, it is best understood as a *prima facie* rule, having the characteristics of a principle that operates as a 'reason that argues in one direction, but does not necessitate a particular decision'.[5] The paper then makes the case for the normative realignment thesis and contend that rule of law and democracy grounds should apply both to the interpretation of exhaustion of domestic remedies, and whether, as a matter of merits, domestic authorities' interpretation of human rights law shall be respected by the Court. Section 4 turns to two objections to the normative realignment thesis. The first of these objections is that of the lack of fit of the normative realignment thesis with the case law of the Court on the interpretation of exhaustion of domestic remedies. By reviewing the admissibility case law of the European Court of Human Rights, it is demonstrated that this objection is surmountable. The second objection concerns the non-ideal constraints working against the normative realignment thesis, in particular the concerns associated with undue burden to the Convention system as a whole, and the risk of heightened backlash against the Court by member states. The second objection, the undue burden on the system, poses a strong challenge to the normative realignment thesis. Finally, it is argued that the risks of further backlash against the Court from state parties that undermine the rule of law and democracy in Europe is not an adequate reason for compromising the Court's normative justification of subsidiarity on democracy and rule of law grounds when reviewing the admissibility of human rights cases.

2. Subsidiarity in European human rights law

The subsidiarity principle has been widely and loudly proclaimed—by the Court itself as well as by scholars and practitioners as having a fundamental importance for the ECHR system as a whole.[6] This importance is not only due to the role subsidiarity principle plays in deciding the merits of human rights complaints and whether states enjoy a margin of appreciation in how they protect fundamental rights. The Court has also directly and explicitly connected the exhaustion of domestic remedies to the very

[5] Ronald Dworkin, 'The Model of Rules' in *Taking Rights Seriously* (Duckworth, 1977) 14–45, 26.
[6] See, representatively, *MA v Denmark*, Application No 6697/18 (Grand Chamber) 9 July 2021, [147], Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473.

notion of subsidiarity.[7] Former Deputy Registrar of the Court, Michael O'Boyle, has for instance argued that 'the exhaustion rule is a jurisdictional norm of the highest importance in the Court's case law and is a central component of the foundational notion that the Court's role is subsidiary to that of the national court'.[8]

These observations on the importance of subsidiarity for both substantive and procedural aspects of European human rights law depart from one basic feature of subsidiarity. Subsidiarity in the broader field of human rights law concerns the implementation of a review mechanism that is external but complementary to the one of the state party. In the words of Besson, subsidiarity concerns 'the introduction of minimal internal institutional, and especially judicial, mechanisms of implementation of those rights and monitoring/review thereof that are complemented by some form, whether judicial or political, of international and hence external human rights monitoring'.[9] This is also reflected in the ECHR. The obligation to secure rights (Article 1 ECHR) is the responsibility of state parties, but the Court has jurisdiction with respect to the interpretation and the application of the Convention (Article 32 ECHR). There is, therefore, a shared duty—or 'shared responsibility' as the 2015 Brussels Declaration emphasises[10]—between the state and the international level for performing that function. The principle of subsidiarity offers normative guidance in allocating authority in the performance of that reviewing function. Of course, this does not say much about *how* this allocation should take place and how the complementarity between the state and the international levels should be understood—what Besson calls the 'sequencing of judicial monitoring or review competence'.[11] This is where the first normative/moral value of subsidiarity can be found: subsidiarity requires that the smaller, lower, or more basic level should have priority in operating the function of review (commonly called 'primarity'). As Carozza seminally pointed out, subsidiarity requires that the higher level should not 'arrogate to itself' the function that the lower level can perform.[12] More precisely, as Føllesdal famously puts it, 'principles of subsidiarity, theorems in normative political theory, urge a rebuttable presumption for the local'.[13] The second normative implication here is that the

[7] *Akdvar and others v Turkey*, Application No 21893/93 (Grand Chamber) 16 September 1996, [65].
[8] Michael O'Boyle, 'Can the ECtHR Provide an Effective Remedy Following the Coup d'état and Declaration of Emergency in Turkey?' *EJIL Talk!* 13 March 2018 <www.ejiltalk.org/can-the-ecthr-provide-an-effective-remedy-following-the-coup-detat-and-declaration-of-emergency-in-turkey/>.
[9] Samantha Besson, 'Subsidiarity in International Human Rights Law—What Is Subsidiary about Human Rights?' (2016) 61(1) *The American Journal of Jurisprudence* 69, 77.
[10] Brussels Declaration, 27 March 2015 <www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf>.
[11] Besson (n 9) 92.
[12] Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 (38) *American Journal of International Law* 38.
[13] Andreas Føllesdal, 'Subsidiarity and International Human Rights Courts: Respecting Self Governance and Protecting Human Rights—or Neither?' (2016) 79(2) *Law and Contemporary Problems* 147, 148.

higher-level authority should be triggered when the smaller, lower, or more basic level does not perform this function satisfactorily (not sufficiently or not sufficiently well). The assumption, therefore, is that the higher authority performs the same function but at least equally better: 'generally, central bodies must offer comparable effectiveness or efficiency when they exercise authority over the constituent bodies (…)'.[14] Clearly, this abstract concept applies to all types of subsidiarity. For instance, when the ECtHR affirms that the respondent state 'has overstepped its margin of appreciation' in its substantive case law,[15] it is asserting that the state did not perform that function sufficiently or sufficiently well when protecting human rights.

With this basic and abstract notion of subsidiarity in mind, let us single out two distinctive features of subsidiarity as it applies to human rights law that matter for the next steps of the article. First, human rights subsidiarity concerns the allocation of authority for the purpose of reviewing and monitoring human rights violations, but with respect to a particular subject-matter, namely the rights of individuals against their state. This is where the first normative component interjects. As Føllesdal explains, 'the normative conception of subsidiarity used here is person-centered rather than state-centered'.[16] Of course, this does not identify which interest(s) of the individual is normatively relevant here—that is a further point of specification. For now, we can say that the concept of subsidiarity in human rights law indeed comprises a 'rebuttal presumption for the local' in the interest of individuals vis-à-vis any public authority of the state party (legislative, executive, judicial).

The second way in which human rights subsidiarity is special lies in how the relationship between the two levels (state and international) is defined—two levels that are commonly called the 'subjects' of subsidiarity.[17] Human rights law is peculiar here: unlike state authorities, the international level—in this case the ECtHR—does not have any other function but to review and monitor the human rights protections afforded by state parties. Unlike other forms of subsidiarity (eg, in theories of federalism), human rights subsidiarity concerns that limited relationship between a public (state) authority and an international court. Therefore, 'the object of subsidiarity is the competence or power (judicial or not) to monitor or review'.[18] The domestic object of subsidiarity can indeed apply to other functions (legislative, executive or judicial)—what Besson calls a 'complete institutional competence'.[19]

[14] *Ibid*, 149.
[15] See, for example, *Khoroshenko v Russia*, Application No 41418/04 (Grand Chamber) 30 June 2015, [148].
[16] Føllesdal (n 13) 149.
[17] See Besson (n 9). See also Gerald L Neuman, 'Subsidiarity' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP, 2013) 360–78.
[18] Besson (n 9) 89.
[19] *Ibid*, 90.

It is also worth recalling that the ECtHR, for the most part, only *declares* whether a respondent state has violated one or several articles of the ECHR in a particular case, leaving the measures to remedy the violations to the states under the supervision of the political organ of the Council of Europe, the Committee of Ministers.[20]

3. The new normative turn in grounding substantive subsidiarity

For anyone endorsing the abstract conceptual structure of subsidiarity in the context of human rights law, what the evaluative criteria for effectiveness and efficiency of the local should be, and what thresholds can determine when and why the higher authority gets triggered to protect individual interests, are central normative questions. There can be a plurality of justifications for deciding why and when the higher authority is triggered in transnational human rights law. These justifications can be instrumental/epistemic and/or to instrumental/normative considerations. The court's classic and earlier case law, for example, offered the following overarching justification, 'direct and continuous contact with the vital forces of their countries', when allocating a margin of appreciation to the national authorities.[21] Importantly, this justification can be both understood in epistemic and in normative terms.[22]

The case law of the European Court of Human Rights, in particular, in the recent decade, has furnished a normative understanding to justify what makes national authorities better placed in comparison to the Court. This normative case law systematically highlights the importance of democratic and the Convention-compliant rule of law credentials of domestic authorities as the threshold for maintaining the primacy of state authorities when upholding Convention rights. How the Court combines democratic and rule of law credentials to ground subsidiarity deserves quoting in full. In *M A v Denmark*, for example, the Court held:

> Through their democratic legitimation, the national authorities are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.[23]

Where the legislature enjoys a margin of appreciation, that margin will, in principle, extend both to its decision to intervene in a given subject area and, once it has intervened, to the detailed rules it lays down in order to

[20] Başak Çalı, 'Explaining Variation in the Intrusiveness of Regional Human Rights Remedies in Domestic Orders' (2018) 16(1) *International Journal of Constitutional Law* 214.
[21] *Handyside v the United Kingdom*, Application No 5493/72, Judgment of 7 December 1976, [48].
[22] For an overview of these justifications by the Jurisconsult of the Court, see <www.echr.coe.int/documents/2010_interlaken_follow-up_eng.pdf>.
[23] *M A v Denmark* (n 6) [147]–[149].

ensure that the legislation is Convention-compliant and achieves a balance between any competing public and private interests. However, the Court has repeatedly held that the choices made by the legislature are not beyond its scrutiny and has assessed the quality of the parliamentary and judicial review of the necessity of a particular measure. It has considered it relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess. A general measure has also been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay, as well as of discrimination and arbitrariness. The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality. It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State or the public generally and those directly affected by the legislative choices.

In this connection, the Court also notes that the domestic courts must put forward specific reasons in the light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it. Where the reasoning of domestic decisions is insufficient, and the interests in issue have not been weighed in the balance, there will be a breach of the requirements of Article 8 of the Convention. Where, on the other hand, the domestic courts have carefully examined the facts, applied the relevant human rights standards consistently with the Convention and the Court's case-law, and have adequately weighed up the individual interests against the public interest in a case, the Court would require strong reasons to substitute its own view for that of the domestic courts.[24]

According to these dual normative criteria, the court's presumption for the local is informed broadly by democracy and rule of law-based considerations and include participation, inclusiveness, pluralism, transparency, Convention-compliant reason giving and proportionality qualities of national authorities. In its qualified rights jurisprudence in particular the Court tends to refrain from fully reviewing the balancing performed by domestic authorities between the protected rights and other rights or public interests, or at least assigns greater weight to the quality of the domestic procedure, legislative or judicial, when doing so. The procedural character of this normative turn is noted in the literature: 'the focus is not on if

[24] *Ibid*. Also see, *Lekić v Slovenia* [GC], no 36480/07, § 108, 11 December 2018, *Animal Defenders International v the United Kingdom* [GC], No 48876/08, § 108, ECHR 2013, *I M v Switzerland*, no 23887/16, § 72, 9 April 2019, *Levakovic v Denmark*, no 7841/14, § 45, 23 October 2018, *Ndidi v the United Kingdom*, No 41215/14, § 76, 14 September 2017.

and how procedural elements are made explicit as part of the protective scope of Convention rights, but on their significance among the balance of reasons when the Court pronounces on the substantive merits and assesses the proportionality or reasonableness of a measure'.[25] In *Animals Defender International v UK*, which concerned the general prohibition of political advertising in broadcasting, the Court for instance insisted on the quality of the procedure across both parliamentary and judicial channels:

> The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.[26]

One can better appreciate the implications of this democracy and rule of law informed proceduralism through an overview of the Court's proportionality test. If the respondent state party has duly applied proportionality in its own proceedings, it is much more likely to benefit from a margin of appreciation.[27] The proportionality test therefore closely engages with rule of law and democracy principles. Whether it is the first prong of the Convention test ('prescribed by law'); the second prong ('legitimate aim'), or the third prong ('necessity in a democratic society' or proportionality *stricto sensu*), these various steps each independently and cumulatively make sure that the rights-interfering legislation meets rule of law (in particular the 1st prong) and democratic criteria (in particular the 2nd and 3rd prongs). Further, as recent research has shown, the Court has developed a normatively loaded notion of 'democratic society' and 'rule of law' considerations. In that regard, the Court has developed its own (deliberative) conception of democracy understood as protecting the conditions of equal political participation—not only formally but also substantively via its reference to deliberation, pluralism, and tolerance.[28] In fact, as a matter of practice the Court only rarely affords a margin of appreciation (through proportionality) to states when its account of democracy and the rights that sustain democracy are at stake.[29] In recent case law, the Court has also developed a substantive understanding of the rule of law, via references to its function to prevent

[25] Arnardóttir (n 1).
[26] *Animals Defender International v The United Kingdom* [GC], Application No 48876/08, Judgment of 22 April 2013 [116].
[27] See in particular Janneke Gerards and Eva Brems, *Procedural Review in European Fundamental Rights Cases* (CUP, 2017).
[28] On this point, see for example Alain Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of "Democratic Society"' (2016) 5(1) *Global Constitutionalism* 16; see also Rory O'Connell, *Law, Democracy and the European Court of Human Rights* (CUP, 2020).
[29] *Demirtas v Turkey (No 2)* [GC], Application No 14305/17, Judgment of 22 December 2020.

the exercise of 'unfettered power'[30] and to protect against targeting of specific persons.[31]

In that sense, the margin of appreciation aims to facilitate and not hinder the democratic specification of human rights norms and rule of law, understood as Convention compliant interpretations provided by domestic courts.[32] This democratic specification echoes the more general deliberative approach to democracy, in which the normative legitimacy of norms is obtained through an open process of offering mutually acceptable reasons among equals. In the words of Forst, the overarching human right the 'right to justification' is governed by the threshold of 'mutual justifiability'.[33] Key to this notion of human rights built into democracy is the rejection of independent and antecedently posited criteria of 'rightness', 'goodness' or 'dignity'. Translated onto the level of the Court's judicial practice, its legitimate role—and the focus of its scrutiny—is to guarantee and foster the right-based conditions of deliberation and justification across domestic proceedings. Accordingly, the Court concentrates on these institutional fora (parliamentary and judiciary in particular) where deliberation takes place. In this regard, theorists in recent years have also highlighted how proportionality testing—in particular, the balancing exercise in which the test culminates—operationalises 'the right to justification'.[34] When the Court's review concentrates on whether domestic authorities conducted proportionality testing as a condition for allocating the margin of appreciation, it reflects this highly procedural (but right-based) approach to human rights adjudication.

This normative reconstruction of the Court's reasoning adds flesh to the argument that rule of law and democratic principles govern the application of substantive subsidiarity—and that help explain, again, when and why the Court can justifiably lift, or not, the primacy of the respondent state party. The Court cannot substitute itself for the democratic forum and domestic courts and a priori determine the outcome of the attached process. As we have seen, subsidiarity in (European) human rights law concerns the allocation of authority between two institutions that are categorically different

[30] *Malone v the United Kingdom*, App. No 8691/79, 2 August 1984, [67], [68] and [79].
[31] *Selahattin Demirtaş v Turkey (No 2)* [GC], No 14305/17, 22 December 2020, [269].
[32] In the words Benhabib, subsidiarity facilitates the democratic 'iteration' of human rights. See Seyla Benhabib, 'The Legitimacy of Human Rights' (2008) 137(3) *Daedalus* 94.
[33] Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120(1) *Ethics* 713.
[34] See in particular Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Bloomsbury: Hart, 2007); Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) *Law & Ethics of Human Rights* 4(2) 142; Mattias Kumm, 'Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution', in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017); Mattias Kumm, 'The Turn to Justification: On the Structure and Domain of Human Rights Practice' in Adam Etinson (ed), *Human Rights: Moral or Political?* (New York: Oxford University Press, 2018).

—the democratic-state community and a supranational judicial body. This is where the pivotal role of democracy and the rule of law can be observed in substantive subsidiarity too: the Court protects the conditions of the democratic and rule of law processes, but also refrains from interfering with conclusions of domestic authorities provided that the proportionality test was duly conducted.[35]

4. The case for normative realignment between substantive and procedural subsidiarity

In the previous two sections, it has been demonstrated that substantive subsidiarity has the same object as procedural subsidiarity, namely allocating the authority to review and monitor. It was also shown that for subsidiarity to meaningfully operate in the context of transnational human right review, it needs an individual-focused justification to explain when and why the higher-level authority—in our case, the Court reviewing and monitoring—gets triggered in European human rights law. A predominantly rule of law- and democracy-based account governs the regime of substantive subsidiarity: the Court rarely accords a margin of appreciation when it identifies breaches to its own account of democracy and the rule of law. What, then, about procedural subsidiarity? Should procedural subsidiarity be triggered by the very same predominantly rule of law and democracy-based accounts or is it founded on a separate set of normative justifications requiring it, in particular to operate as an all or nothing rule?

Although the literature on human rights subsidiarity does not dwell much on the history of the concept, exhaustion of domestic (or local) remedies has a distinct history in international law that one may draw upon at this point. At first sight, the broader use of the concept in public international law points to the utmost respect to the sovereignty of states as the underpinning the exhaustion of domestic remedies in general international law. In the words of Romano, the exhaustion of domestic remedies rule constitutes 'the corollary of the principle of sovereignty'.[36] Interestingly, however, in its original international context of the diplomatic protection of aliens, the exhaustion of domestic remedies already concerned what was then called the 'alleged injury' to an alien. In this context, the exhaustion of domestic remedies was understood to require that 'the host or respondent state must be given the opportunity of redressing the alleged injury'.[37] In other words, the ability of sovereign states to remedy violations of individual

[35] *Baka v Hungary* [GC] Application No 20261/12, Judgment of 23 June 2016.
[36] Cesare PR Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures' in Nerina Boschiero et al (eds), *International Courts and the Development of International Law* (Springer, 2013) 561.
[37] Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (CUP, 2004) 13.

interests rather than a blanket respect for the principle of state sovereignty informs the exhaustion of domestic remedies even in general international law. The exhaustion rule has also not been applied in a large number if situations, including when domestic remedies are not effective, as well as by reasons of objective (such as excessive delays) or objective circumstances (such as the dependence of tribunals on the executive).[38]

How procedural subsidiarity works in the ECHR system further supports the centrality of individual interests rather than state interests in underpinning the logical structure of this rule under the Convention. Procedural subsidiarity chronologically precedes the substantive stage as it consists of an admissibility criterion for an international court such as the ECtHR to examine the merits of a case (Article 35(1) ECHR). Further, the delegation from the state to the international level operates in a particular way in the procedural context. Unlike substantive subsidiarity that generally involves 'zones of discretionary decision-making',[39] Article 35(1) is at first sight is rule-based. The Court, however, subjects the exhaustion of domestic remedies invariably to an assessment of *effectiveness* and *availability* of such remedies.[40] In this context, the Court distinguishes between a rule that finds automatic application and a flexible rule[41] and underlines that exhaustion of domestic remedies is a general rule of international law, but it does not require automatic application. The case law of the Court offers two distinct reasons for not applying the exhaustion rule automatically. The first reason stems from the consensual nature of international law. States can waive the general rule themselves. More importantly, the second reason provided by the Court holds that exhaustion of a particular remedy is required only when that specific domestic remedy is capable of providing a real chance of redress to individuals.[42]

This primarily suggests that the metric of procedural subsidiarity is both normative/moral ('what is effective?', 'what is available'?) and empirical ('is the domestic remedy effective?', 'is it available?'). As far as the former is concerned, one may contend that effectiveness and availability normatively matter to the rule of law. This is where one may identify a relevant individual interest: availability and effectiveness so construed help the right-holder guide her conduct and exercise her autonomy accordingly. In the words of Waldron, the rule of law 'should be a body of norms promulgated as public knowledge so that people can study it, internalize it, figure out what

[38] Robert Kolb, *Good Faith in International Law* (Hart Publishing, 2017) 187.
[39] Andreas von Staden, 'Subsidiarity, Exhaustion of Domestic Remedies, and the Margin of Appreciation in the Human Rights Jurisprudence of African Sub-Regional Courts' (2016) 20(8) *The International Journal of Human Rights* 1113.
[40] *Ringeisan v Austria*, Application No 2614/65, Judgment of 16 July 1971, 89.
[41] *Kozacıoğlu v Turkey* [GC], Application No 2334/03, Judgment of 1 December 2009, 40.
[42] *Gherghina v Romania* [GC], Application No 42219/07, Dec. of 9 July 2015, 87.

it requires of them, and use it as a framework for their plans and expectations and for settling their disputes with others'.[43]

This being said, if the rule of law criterion were the only relevant one, then the allocation of authority under procedural subsidiarity would boil down to which of the two levels (national or supranational) has better rule of law credentials. As we have seen, however, the subjects of subsidiarity are distinct in human rights law: authority attribution cannot be only a competition for which level (national or international) is the most rule of law enhancing. This is because, again, the relation is between a democratic community and an international judge. In (European) human rights law, there is only one democratic community at play here—the community of the state (party). This feature, we argue, makes it that respect for democracy and rule of law credentials equally applies to the procedural dimension of subsidiarity as the individual threshold(s)—the violation of which justifies lifting the primacy of the state party to and authorising the supranational body to review.

Our theoretical investigation thus far lays the groundwork for a clearer alignment between the normative grounds for the use of substantive and procedural subsidiarity. The argument has both a symmetrical and pivotal structure. It is symmetrical in that the rule of law and democracy are the fundamental normative grounds for giving primacy to the state party in reviewing and monitoring alleged violations both at the procedural and substantive levels. The argument is also pivotal: if one contends that primacy of state authorities is grounded in democracy and rule of law considerations, the primacy may be principally lifted if these values are jeopardised—and this pivotal dimension applies equally to both substance and procedure. This exemplifies and specifies the relatively value-neutral character of subsidiarity as a general concept, namely that the higher level of authority is justified when the lower level is not performing its function well or sufficiently well, as we have seen. Our argument injects the principles of democracy and the rule of law as value-laden variables with respect to the European Convention system as a whole.

5. Two objections to the normative realignment of substantive and procedural subsidiarity

This section identifies and reviews two main objections to the normative realignment thesis: that the subsidiarity principle is normatively grounded on democracy and rule of law principles in both procedural and merits stages. The first of these objections is that whilst the Court has indeed embraced

[43] Jeremy Waldron, 'The Rule of Law' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2020).

a new normative turn grounding subsidiarity on democracy and rule of law principles in its substantive case law, it has not done so in its procedural case law concerning the exhaustion of domestic remedies. In the absence of a fit between the normative realignment thesis on democracy and rule of law grounds and the practice of the Court on procedural subsidiarity, it may be held, our normative alignment thesis may be ignoring different grounds of that guide the application of the exhaustion of domestic remedies. The second objection is that realigning the grounds of subsidiarity for procedural and substantive stages would create undue burdens for the Convention system as a whole, effectively paralysing the Court to carry out its much-needed review functions at the merits stage—and indeed, may engender heightened forms of backlash against the Court from its member states,[44] even withdrawals from the Convention.

5.1. Lack of fit with procedural subsidiarity case law

The admissibility case law of the Court offers pluralist justifications for procedural subsidiarity, similar for grounding substantive subsidiarity. The first ground in the case law of the Court for subsidiarity is *pedigree*. Accordingly, the presumption for the exhaustion of domestic remedies flows from general international law of which the European Convention on Human Rights forms part. The Court identifies the exhaustion of domestic remedies rule as a basic principle of international law[45] and an indispensable part of the functioning of the protection system under the Convention.[46] Second, the Court offers instrumental/epistemic justifications for exhaustion of domestic remedies. According to the Court, there is an epistemic value to be gained from the views of domestic courts, even if the Convention provisions are not incorporated into domestic law.[47] This is because domestic courts are in direct and continuous contact with the vital forces of their countries[48] and as such may be epistemically better placed to protect individual interests.

The Court's case law, however, goes beyond pedigree and epistemic justifications and also ventures into the value-laden variable of the rule of law. Specifically, it holds that national courts have primacy in examining a claim of a human rights violation because of their authority in determining the compatibility of domestic law with the Convention.[49] This latter rationale

[44] Mikael Rask Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 *Law and Contemporary Problems* 141.
[45] *Demopoulos and Others v Turkey* [GC], Application Nos 46113/99 et al., Dec of 1 March 2010, 69, 97.
[46] *Vučković and Others v Serbia* [GC], Application Nos 17153/11 et al., Judgment (preliminary objection) of 25 March 2014, 69.
[47] *Eberhard and M v Slovenia*, Application Nos 8673/05 and 9733/05, Judgment of 1 December 2009.
[48] *Burden v the United Kingdom* [GC], Application No 13378/05, Judgment of 29 April 2008, 42.
[49] *A, B and C v Ireland* [GC], Application No 8673/05, Judgment of 1 December 2009, 142.

recognises the importance of domestic courts as the primary actors in ensuring a Convention compliant vision of domestic rule of law. Not offering an opportunity to domestic courts to initially consider a human rights complaint may undermine the authority of domestic courts and in turn, their ability to protect human rights.[50]

Pluralist justifications are also at work when justifying the non-exhaustion of domestic remedies. According to the Court, applicants are only obliged to exhaust domestic remedies that are available in theory and in practice at the relevant time. The Court, for example, holds that remedies that are not required under domestic law do not need to be exhausted before coming to the Court as these domestic remedies are merely theoretical, and therefore, do not amount to disregard for domestic rule of law.[51] A remedy available in practice, on the other hand, requires the remedy to be effective. The latter, according to the Court, means that the remedy to be exhausted should be capable of providing redress in respect of the applicant's complaints and offering reasonable prospects of success.[52] A remedy that has a prospect of success is one that is sufficiently consolidated and foreseeable in the national legal order. For that reason, the Court has held that recourse to a higher court ceases to be 'effective' on account of divergences in that court's case-law, as long as these divergences continue to exist.[53] If domestic courts are not consistently capable of showing that they will address the alleged violation of the Convention, the duty to give an opportunity to domestic courts to consider a case no longer holds from the perspective of the subsidiary role of the ECtHR vis-a-vis domestic courts. The Court's case law further shifts the burden of proof concerning an available and effective remedy to the government in contested cases.[54] In order to benefit from the presumption of primacy and respect, the national authorities must show that an individual remedy is sufficiently certain in domestic law and in practice,[55] and that the remedy is capable of providing redress in respect of the applicant's complaints and of offering reasonable prospects of success.[56] This shifting

[50] Note that the rule of law is usually taken as 'substantive' when respect for human rights is included in its definition, whereas a 'procedural' rule of law focuses on administering legal norms—however, it remains unclear whether the Court understands the 'authority of domestic courts' along one or the other. See the discussion in Waldron (n 43).

[51] *D H and Others v the Czech Republic* [GC], Application No 57325/00, Judgment of 13 November 2007, 116–18.

[52] *Sejdovic v Italy* [GC], Application No 56581/00, Judgment of 1 March 2006, 46.

[53] *Ferreira Alves v Portugal (No 6)*, Application Nos. 46436/06 and 55676/08, Judgment of 13 April 2010, at 27–29.

[54] *Dalia v France*, Application No 26102/95, Judgment of 19 February 1998, 38; *McFarlane v Ireland* [GC], Application No 31333/06, Judgment of 10 September 2010, at 107; *Vučković and Others v Serbia* [GC], Application Nos. 17153/11 et al., Judgment (preliminary objection) of 25 March 2014, at 77.

[55] *Scavuzzo-Hager and Others v Switzerland*, Application No 41773/98, Dec. of 30 November 2004; *Norbert Sikorski v Poland*, Application No 17599/05, Judgment of 22 October 2009, 117; *Sürmeli v Germany* [GC], Application No 75529/01, Judgment of 8 June 2006, 110–12.

[56] *Scoppola v Italy (No 2)* [GC], Application No 10249/03, Judgment of 17 September 2009, at 71; *Magyar Keresztény Mennonita Egyház and Others v Hungary*, Application Nos 70945/11 et al., Judgment of 28

suggests that the Court is receptive towards the limits of its subsidiary role in the procedural domain where the lack of individual remedies may indicate an erosion of rule of law standards internally.

What is more, there is a line of cases where the ECtHR ventures into the general rule of law context in which domestic courts operate in assessing the effectiveness of domestic remedies. The Court's approach to assess structural deficiencies of domestic rule of law in interpreting the exhaustion of domestic remedies rule has been cautious. In *Hasan Altan v Turkey*, for instance, the Court held that 'for another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications runs counter to the fundamental principles of the rule of law and legal certainty'.[57] The Court, however, has also emphasised that systemic rule of law deficiencies may make domestic remedies ineffective in 'special circumstances'.[58] It has held that such special, contextual circumstances become relevant if an administrative practice consisting of a repetition of acts is incompatible with the Convention, or when official tolerance by the State authorities to the ineffectiveness of remedies can be shown to exist.[59] Yet a general pattern of unhealthy domestic practice is not always enough. The applicants are also asked to show that the general pattern of practice renders the domestic proceedings that they should exhaust under ordinary circumstances futile or ineffective with respect to their circumstances.[60]

The Court's recent case law concerning domestic rule of law deficiencies, however, shows that if a deficiency is systemic in nature, individuals may not need to show it affects them individually. In *Reczkowicz v Poland,* when considering whether the Disciplinary Chamber of the Supreme Court was a 'tribunal established by law' under Article 6 of the Convention, following the reorganisation of the Polish judicial system, the Court held that

> interference with a judicial body, aimed at incapacitating it in the exercise of its adjudicatory function in the application and interpretation of the Convention and other international treaties must be characterized as an affront to the rule of law and the independence of the judiciary.[61]

Subsequently, in *Advance Pharma sp. z o.o v Poland*, the Court, held that whether the applicant had to exhaust the domestic remedies before the

June 2016, at 50; *Karácsony and Others v Hungary* [GC], Application Nos 42461/13 and 44357/13, Judgment of 17 May 2016, 75–82.

[57] *Hasan Altan v Turkey*, Application No 13237/17, Judgment of 10 September 2010.

[58] *Sejdovic v Italy* [GC], (n 42), 55.

[59] *Akdivar and Others v Turkey*, Application No 21893/93, Judgment of 1 April 1998, 68–69; *Khashiyev and Akayeva v Russia,* Applications Nos 57942/00 and 57945/00, Judgment of 24 February 2005, 116–17; *Chiragov and Others v Armenia* [GC], Application No 13216/05, Judgment of 16 June 2015, 119; *Sargsyan v Azerbaijan* [GC], Application No 40167/06, Judgment of 16 June 2015, 117–19.

[60] *Aksoy v Turkey*, Application No 21987/93, Judgment of 18 December 1996, 52 and *Georgia v Russia* (I) [GC], Application No 13255/07, Judgment of 31 January 2019, 125–59.

[61] *Reczkowicz v Poland*, No 43447/19, 22 July 2021, [263].

Polish Constitutional Court had to be examined in the light of how the Polish Constitutional Court handled interferences with judicial bodies.[62] The Court held that the effectiveness of the Constitutional Court

> must be seen in conjunction with the general context in which the Constitutional Court has operated since the end of 2015 and its various actions aimed at undermining the finding of the Supreme Court resolution as to the manifest breach of domestic and international law due to the deficient judicial appointment procedure involving the national council of judges.[63]

What this discussion shows is that the way in which the Court assesses whether domestic remedies offer a real chance of redress are not solely justified with respect to either state sovereignty or epistemic grounds. Whether a domestic remedy offers a real chance of success to individuals also incorporates a normative assessment. This focusses not only on whether domestic courts respect individual's right to effective domestic remedies, but also on whether domestic courts have the requisite qualities to act as guardians of domestic rule of law. This aspect of the case law is capable of speaking to the fast-growing literature documenting the instrumental use of constitutional and democratic norms and institutions at the expense of democracy and rule of law.[64] Significantly, the Court's characterisation of the general pattern of deficiencies in domestic remedies as a mark of a disproportionate obstacle to the effective exercise of the right of individual application under Article 34 of the Convention,[65] emphasises that the procedural subsidiarity regime of the Convention is normatively sensitive to whether domestic rule of law is capable of offering protection to individuals in the first place. When this capacity cannot obtain, the Court can make the normative case that the effective protection of human rights—the one that usually justifies deference to national authorities—conversely justifies the lifting of this requirement.

The Court's doctrinal interpretation of the exhaustion of domestic remedies, therefore, show that the Court does not approach it as an all or nothing rule, but as a principle. Whilst, the Court's interpretation of the exhaustion of domestic remedies has glaring inconsistencies,[66] it nevertheless has the doctrinal resources to develop in directions that are capable of addressing the

[62] *Advance Pharma sp z o.o. v Poland,* Application No 490718, Judgment of 7 May 2021, [238].
[63] *Ibid*, [319].
[64] Dickson and Landau (n 4) 36.
[65] *Veriter v France*, Application No 31508/07, Judgment of 14 October 2010, 27; *Gaglione and Others v Italy*, Application Nos 45867/07 et al., Judgment of 21 December 2010, at 22; *M S v Croatia (No2)*, Application No 75450/12, Judgment of 19 February 2015, 123–5.
[66] For example, in *Mendrei v Hungary*, the Court admitted that the remedy system before the Hungarian Constitutional Court was effective, while it has been shown that the procedure cannot result in any form of compensation for the victim. See *Mendrei v Hungary*, Application No 54927/15, judgment of 15 October 2018. For a critical review of the case along the aforementioned lines, see 'Role of the Constitutional Courts in the System of the Effective Domestic Remedies—a New Approach on the Horizon? Criticism of the Mendrei v Hungary Decision', Strasbourg Observers (Blog), 15 October 2018.

abusive practices of the exhaustion of domestic remedies rule by states. Granted that the Court qualifies these circumstances as 'special'. This signals that the evidentiary requirements for meeting such special circumstances require onerous structural and case-specific proof by those arguing that the domestic remedies are ineffective due to the structural deficiencies rendering domestic courts to act as guardians of domestic rule of law. This is not unusual. The Court has also advanced the same view with respect to substantive subsidiarity and the grounds for its revocation. As such, the Court has held that it would require 'strong reasons' to rebut the presumption of substantive subsidiarity to domestic courts, when domestic courts carefully examined the facts, and apply the relevant human rights standards consistently with the Convention and the Court's case-law.[67]

5.2. Undue burden and heightened backlash objections

In the preceding section, it has been argued that the Court has significant doctrinal resources to align its application of procedural subsidiarity under Article 35 of the Convention in accordance with respecting domestic rule of law. The Court's case law has consistently considered Article 35 not as a hard and fast rule. In fact, important exceptions that the Court has carved out to the exhaustion of domestic remedy rule are consistent with a normative understanding of procedural subsidiarity on respect for domestic rule of law and democracy grounds. Pointing to this fit, however, is not sufficient to call for a more principled alignment of the case law with the normative theory discussed in this article. What are the non-ideal constraints that should be considered?

It must be noted at the outset that the flexible application of the exhaustion of the domestic remedies rule to one specific remedy with respect to one applicant has very different practical and political ramifications than not requiring the exhaustion of domestic remedies for potentially large groups of applicants due to their inability to receive effective remedies for reasons of political influence over the judiciary or court packing. First, this latter approach may impose a significant case law burden on the ECtHR system that is already overstretched.[68] If the Court assesses a particular remedy or court practice to be incapable of providing effective remedies because it does not have the requisite rule of law protecting qualities expected from the conduct of domestic courts, the European Court of Human Rights becomes a first instant court for potentially large groups of individuals.

[67] See, in particular, *Van Hannover v Germany (No 2)* [GC], Application Nos. 40660/08 and 60641/08, Judgment of 7 February 2012, 49.

[68] As of 31 December 2022, there have been a total of 74,650 cases pending before the European Court of Human Rights. See, European Court of Human Rights Statistics, <https://echr.coe.int/Documents/Stats_pending_2023_BIL.pdf>.

This, for example, was the case for Turkey with respect to serious violations of human rights in its south-eastern regions in the 1990s, and for Russia with respect to Chechnya in the 2000s[69] and it is now potentially the case with respect to Poland.[70] Admittedly, the Court's case burden is much higher now than it was in the 1990s, and rule of law and democratic decay is a more widespread and systematic problem across Europe. From an undue burden on the system perspective, it is not in the Court's interest to increase the number of admissible cases in its docket from multiple countries all at once. The Court, therefore, does not have any incentive from a case management perspective, to open the floodgate for direct litigation before Strasbourg.

The failure to consider lack of effective remedies on rule of law deficiencies of domestic courts in *Köksal v Turkey* inadmissibility decision in 2017 may speak to this.[71] This case concerned mass dismissals of hundreds of thousands of individuals from civil service following a failed coup attempt in Turkey by way of state of emergency decrees. Despite evidence provided by the applicant that all apex courts of the country had declared that they had no competence to examine the constitutionality of emergency decrees, the Court held that the applicant had to exhaust domestic remedies first. In so doing, it indicated that a state of emergency commission, which was only in the process of being established at the time, is a remedy that needs to be exhausted.[72] This example shows that the sheer volume of cases for which the Court may end up becoming a court of first instance was indeed a strong, non-ideal normative constraint against the normative realignment thesis, leading the Court to adopt a highly formalistic rule like approach to the exhaustion of domestic remedies.

Having said this, it is not clear whether the concern of opening the flood gates of cases before the Court justifies lack of any engagement with the rule of law and democratic deficiencies at the admissibility stage. In such cases, this only results in delaying the caseload burden of the Court, but it does not decrease it. Indeed, the European Court of Human Rights has very recently started a controversial practice of partially reviewing meritorious

[69] Philip Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (2008) 6 *European Human Rights Law Review* 732, 739.

[70] *Advance Pharma sp z o.o. v Poland* (n 62), *Grzęda v Poland* [GC], App No 43447/19, 15 March 2022, *Juszczysnyn v Poland, App. No. 35599/20, 6 October 2022*. In addition, there are many communicated cases before the European Court of Human Rights arguing for lack of effective remedies under Article 13 of the Convention due to the lack of independence of the judiciary in Poland. See, for example, *Sobczyńska and others v Poland*, App nos 62765/14, 62769/14, 62772/14 and 11708/18, 14 May 2020, *Tuleya v Poland*, App No 21181/19, 1 September 2020, *Pająk and others v Poland*, Application nos 25226/18, 25805/18 and 8378/19, 7 September 2020, *Pionka v Poland*, Application No 26004/20, 30 April 2021, *Jezierska v Poland*, App No 43949/19, 24 June 2021.

[71] *Koksal v Turkey*, Application No 70478/16, Inadmissibility decision of 12 June 2017.

[72] Demir notes that the Council of Europe played an active role in establishing this Commission. See Esra Demir-Gursel, 'The Former Secretary General of the Council of Europe Confronting Russia's Annexation of the Crimea and Turkey's State of Emergency' (2021) 2(2) *ECHR Law Review* 303.

cases before it with respect to Turkey because it does not have time to review all aspects of the violations suffered by the applicants; such as cases where violations are widespread, systematic and are due to the failure of domestic courts upholding the rule of law.[73] If the Court, as a matter of practice, is able to carry out substantive partial assessments of cases that have exhausted all domestic remedies (effective or not), it is not clear why it should not carry out such partial assessments already at the admissibility stage. In other words, if, due to case load problems, applicants will receive no justice domestically and only partial justice from the European Court of Human Rights, it would be preferable that they receive it sooner rather than later. Importantly, the Court has taken the second path with respect to Poland, and asked the national authorities to take rapid remedial action, 'in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary'.[74]

Indicating that domestic remedies need not be exhausted because they are structurally deficient also has political ramifications. The first political ramification is negative political reactions from member states. These reactions may range from openly criticising the Court as biased, lobbying other states who may have similar rule of law problems to put pressure on the Court, withdrawal of financial contributions from the Council of Europe, or withdrawal from the European Convention. It may therefore be argued that the Court has to weigh normative coherency against threats to its authority and survival. It may, therefore, be preferable not to antagonise select states at the procedural stage in order to maintain the Court's ability to deliver substantive judgments with respect to all states of the Council of Europe. The recent strand of literature on 'backlash' against international courts[75]—and the five high level conferences organised between 2010 and 2018 culminating in the adoption of Protocol 15[76]—highlights the growing importance of subsidiarity at the interpretive, rather than procedural, level. The difficulty with this argument, however, is its slippery slope nature. Every time there is a potential risk to the system due to backlash by one or a group of states that undermine the Convention values, should the Court respond by compromising the normative point of the ECHR? In addition, any decision, procedural, substantive or remedial, is capable of

[73] *Turan and others v Turkey*, Applications nos 75805/16 and 426 others, 23 November 2021, [98].
[74] *Advance Pharma sp z o.o. v Poland* (n 62) [364].
[75] See eg, Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14(2) *International Journal of Law in Context* 197. See also Erik Voeten, 'Populism and Backlashes against International Courts' (2020) 18(2) *Perspectives on Politics* 407. In the European context, see eg, Andrea Pin, 'The Transnational Drivers of Populist Backlash in Europe: The Role of Courts' (2021) 20(2) *German Law Journal* 225.
[76] Protocol 15 amends the preamble to the Convention by including an explicit reference to the margin of appreciation <www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf>.

attracting strong reactions from both authoritarian and democratic governments.[77] Avoiding political reactions of states that have domestically abandoned a commitment to rule of law and democracy risks the Court becoming an appeaser for practices it has been established to identify and review.

6. Conclusion

This article is a first attempt at critically reflecting on the normative basis of procedural subsidiarity in the ECHR system. The starting point was that, while the principle of subsidiarity is loudly proclaimed as being fundamentally important to the structure and effectiveness of the system, it remains unclear what its normative foundations are, and whether there is an overarching justification of subsidiarity that would also extend to its procedural dimension. The first step in this direction was to show that democracy and the rule of law constitute the foundations of subsidiarity across the procedural and substantive dimensions—and that they provide the background for evaluating, and possibly revisiting, the theoretical foundations of the procedural dimension.

Second, it was explained that the Court has significant doctrinal resources to align its application of procedural subsidiarity under Article 35 of the Convention in accordance with the normative point of respecting domestic rule of law in a democratic state. It has also placed an important emphasis on such doctrinal resources with respect to cases that concern the independence of judiciary in Poland. The Court's case law has consistently considered Article 35 as not merely as a rule. In fact, the normative considerations concerning the effectiveness of domestic remedies that the Court has carved out are consistent with a normative understanding of procedural subsidiarity on domestic rule of law grounds.

The third step was to discuss the implications for revisiting the current regime along broadly non-ideal lines. The evaluation here is mixed. On the one hand, undue burden on the Court is a central concern. On the other hand, refraining from normative realignment of procedural and substantive subsidiarity does not solve, but merely delay undue burden concerns. There are of course also risks of backlash against the normative alignment thesis, but again, these risks are present at all stages of proceedings. In addition, despite significant non-ideal constraints counting against realigning the Court's case law on procedural and normative subsidiarity, the Court has been willing to address the decay in rule of law of its

[77] Patricia Popelier, Sarah Lambrecht and Koen Lemmens, *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia, 2016).

member states in its substantive,[78] and more recently, even in its traditionally conservative remedial, case law.[79] A principled defence of subsidiarity on rule of law and democracy grounds, which the Court has embraced in its case law, requires this extension not only in substantive case law, but in the domain of procedural admissibility as well.

Acknowledgement

The authors would like to extend their gratitude to Alex Green and Alexandra Hearne for coordinating this special issue, the associated symposium and for offering extremely valuable feedback on drafts of this article. The authors would also like to thank the two anonymous reviewers for their comments and remarks.

Disclosure statement

No potential conflict of interest was reported by the author(s).

[78] Floris Tan, 'The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?' (2018) 9(1) *Göttingen Journal of International Law* 109.

[79] See in particular, *Aliyev v Azerbaijan* 68762/14 and 71200/14 (ECtHR, 20 September 2018) [227], *Kavala v Turkey* 28749/18 (ECtHR, 10 December 2019) [240]; *Selahattin Demirtaş v Turkey* (No 2) [GC] 14305/17 (ECtHR, 22 December 2020) [442].