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# Jurisdictional Immunities *Revisited: An Analysis of the Procedure Substance Distinction in International Law*

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## Abstract

*The International Court of Justice's sclerotic approach to the interaction between substantive and procedural law in the Jurisdictional Immunities case need not and should not be the final word on the relationship between substantive and procedural law. While most lawyers would recognize the categories of substantive and procedural law, relatively few have considered the nature of the distinction between them. This article attempts to address that gap. It seeks to expose the flaws in approaching the distinction between substantive and procedural law in a binary way both as a matter of principle and in practice. In so far as it is helpful to use these labels at all, therefore, they should be the beginning rather than the end of the analysis.*

The decision of the International Court of Justice (ICJ) in the *Jurisdictional Immunities* case<sup>1</sup> was widely regarded as drawing a line under the prospect of creating a further exception to the rule of state immunity in cases alleging serious international crimes.<sup>2</sup> Like several cases before it in domestic<sup>3</sup> as well as international courts,<sup>4</sup>

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<sup>1</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, paras 81–107.

<sup>2</sup> Shah, 'Jurisdictional Immunities of the State: Germany v. Italy', 12 *Human Rights Law Review (HRLR)* (2012) 555, at 555, 568, 571; McGregor, 'State Immunity and Human Rights: Is There a Future after Germany v. Italy?', 11 *Journal of International Criminal Justice* (2013) 125, at 128, 130.

<sup>3</sup> *Jones v. Ministry of the Interior for the Kingdom of Saudi Arabia and Others (Jones 2006)*, [2006] UKHL 26, [2007] 1 AC 270.

<sup>4</sup> ECtHR, *Al-Adsani v. United Kingdom*, Appl. no. 5310/71, Judgment of 21 November 2001; all ECtHR decisions are available online at <http://hudoc.echr.coe.int/>. See also ECtHR, *Jones v. United Kingdom (Jones 2014)*, Appl. nos. 34356/06 and 40528/06, Judgment of 14 January 2014.

attempts to argue that the hierarchically superior status of the substantive norms at stake ‘trumped’ the so-called procedural rules of state immunity failed. The Court concluded that Italy acted unlawfully when it heard the claims of Italian victims of German atrocities that took place during World War II. In doing so, it relied on the now familiar distinction drawn between substantive laws (such as those that prohibit war crimes) and (so-called) procedural laws such as state immunity.<sup>5</sup> It argued that since immunity is concerned purely with the extent of a domestic court’s jurisdiction and not with the question of a state’s liability for the alleged wrongdoing, there could be no conflict between them.<sup>6</sup> Many criticized the formalistic nature of the Court’s assessment and its failure to address the more difficult question of how to accommodate the various interests at stake.<sup>7</sup> However, few have gone beyond this to explore the validity of the distinction on which the decision turned. This article will address that gap. It will begin, in Part 1, by looking at the origins of the distinction between substantive and procedural law. This historical perspective is important in exposing the flaws in treating them as conceptually distinct. It will go on to examine, in Part 2, how the distinction has been applied in practice. It will focus, in particular, on the role it has been attributed in addressing the interaction between state immunity and the right of access to justice (in Article 6 of the European Convention on Human Rights [ECHR]) as well as with *jus cogens* norms.<sup>8</sup> It will examine the difficulties inherent in drawing the distinction, the self-serving ways in which it is used by courts and litigants and the contradictions that ensue. This analysis will expose the flaws inherent in a binary approach to the classification of rules and of state immunity, in particular. It will conclude by arguing that courts and litigants should relinquish their reliance on the distinction between substantive and procedural rules as a means of navigating the relationship between state immunity and individual rights and, instead, acknowledge their synergy. This would facilitate a more principled and coherent application of the law. It would also be consonant with the approach taken in the context of the adjudication of individual rights more broadly, where, in the context of the ECHR, in particular, the ‘proceduralization’ of substantive rights acknowledges their kinship.<sup>9</sup>

<sup>5</sup> *Jurisdictional Immunities*, *supra* note 1, paras 58, 93, 100.

<sup>6</sup> H. Fox, *The Law of State Immunity* (2002), at 524–525; *Jurisdictional Immunities*, *supra* note 1, paras 92–97; cf., a more nuanced approach in H. Fox and P. Webb, *The Law of State Immunity* (3rd edn, 2013), at 44–48.

<sup>7</sup> See *Jurisdictional Immunities*, *supra* note 1, Separate Opinion of Judge Bennouna and Dissenting Opinions of Judges Yusef and Trindade; see also Trapp and Mills, ‘Smooth Runs the Water Where the Brook Is Deep: The Obscured Complexities of Germany v. Italy’, 1 *Cambridge Journal of International and Comparative Law* (2012) 153, at 160; Bianchi, ‘Gazing at the Crystal Ball (Again): State Immunity and Jus Cogens beyond Germany v. Italy’, 4 *Journal of International Dispute Settlement* (2013) 457, at 461; Fox and Webb, *supra* note 6, at 48.

<sup>8</sup> Convention for the Protection of Human Rights and Fundamental freedoms 1950, 213 UNTS 222.

<sup>9</sup> See, generally, J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009).

## 1 Origins of the Distinction between Substantive and Procedural Law

This section will consider the origins of the distinction between substantive and procedural law. This retrospective is of more than merely historic interest. On the contrary, an examination of its provenance exposes the ‘fragility of the dichotomy’, even in its initial conception.<sup>10</sup> Early proponents of a conceptual divergence between substantive and procedural law, therefore, acknowledged their interdependence.<sup>11</sup> In spite of this, what emerged, and was subsequently adopted in practice, was a clear-cut divide between them, the legitimacy of which is largely assumed and enduring.<sup>12</sup> Appreciating this dichotomy as ‘an accident of history’, rather than as the result of an attempt to develop a coherent theory, is essential given the doctrinal importance the distinction has assumed.<sup>13</sup> In particular, in so far as it has become the conceptual framework for the analysis and classification of rules, it is important to examine the structural integrity of its foundations. What emerges from this historical retrospective is that the labels procedural and substantive do little more than describe the structure of law rather than its nature.<sup>14</sup> This observation goes some way towards explaining the contemporary problems of classification that the distinction gives rise to and the need to approach it with care. Indeed, the analysis reveals that ‘the closest thing there is to a developed school of thought concerning the meaning of the procedure-substance dichotomy is really an abdication of analysis, wilfully embraced’.<sup>15</sup>

The origins of the distinction between substantive and procedural law emerged in England in the mid-18th century. There, prior to the merger of the Courts of Law and Equity, there was no clear difference between procedure and substance.<sup>16</sup> Thus, while in the Courts of Law, procedure was ‘inextricably intertwined’<sup>17</sup> with substance such that ‘the substantive law was subsumed within the procedural form’,<sup>18</sup> the Courts of Equity were characterized by its absence.<sup>19</sup> There, procedural formality was antithetical to notions of judicial discretion and the pursuit of fairness.<sup>20</sup> The gradual unification of these two systems of law and equity coincided with the Enlightenment and the desire to classify and categorize the law (perhaps explaining the timing of this emergent distinction).<sup>21</sup> Jeremy Bentham was arguably the first to seek to distinguish

<sup>10</sup> Main, ‘The Procedural Foundation of Substantive Law’, 87 *Washington University Law Review (WULR)* (2010) 801, at 803.

<sup>11</sup> See notes 27–31 below.

<sup>12</sup> Main, *supra* note 10, at 812.

<sup>13</sup> *Ibid.*, at 803.

<sup>14</sup> Risinger, ‘“Substance” and “Procedure” Revisited with Some Afterthoughts on the Constitutional Problems of Irrebuttable Presumptions’, 30 *University of California Los Angeles Law Review* (1982) 189, at 198.

<sup>15</sup> *Ibid.*, at 190.

<sup>16</sup> Main *supra* note 10, at 806–809.

<sup>17</sup> Main, ‘Traditional Equity and Contemporary Procedure’, 78 *WULR* (2003) 429, at 454.

<sup>18</sup> Main, *supra* note 10, at 807.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, at 809.

between substantive and procedural (or adjectival) law,<sup>22</sup> defining the latter as that which is concerned with the execution of substantive laws (the former being everything else).<sup>23</sup> This instrumental vision of procedural law – as the means of realizing the ends envisaged by substantive rules – was shared by John Salmond. In this narrow sense, procedure was regarded as a body of law concerned with the conduct or process of litigation (that is, affairs inside the courtroom), while substantive law was thought to regulate the behaviour of individuals in the outside world.<sup>24</sup>

The simplicity of such classifications no doubt explains their appeal and the ease with which they became embedded in the legal lexicon.<sup>25</sup> Yet there is nothing to indicate that theorists considered that they were doing anything more than describing the law in general terms. Salmond, for example, did not make anything turn on these categories but, rather, conceived of them as ‘a reasonably precise descriptive construct illuminating something important about the structure of law’.<sup>26</sup> That the distinction was intended to be descriptive rather than conceptual is further supported by the fact that the connection between substance and procedure is clear – each being difficult to define without reference to the other.<sup>27</sup> Bentham recognized this, noting that procedural laws ‘can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it’.<sup>28</sup> Salmond too appreciated the difficulty of drawing a clear line between them. He observed that, while the distinction was clear in theory, in practice, many procedural rules ‘are wholly or substantially equivalent to rules of substantive law. In such cases the difference between these two branches of the law is one of form rather than of substance’.<sup>29</sup> Walter Wheeler Cook, too, recognized the limits of a binary classification but stopped short of jettisoning it entirely.<sup>30</sup>

Notwithstanding these observations, the distinction between procedural and substantive law endured. It emerged as the framework for the analysis and classification of rules. Within this framework, procedural and substantive laws are conceived of as ‘conceptual opposites’, as ‘mutually exclusive and mutually exhaustive categories’, with procedure generally regarded as the servant to its superior substantive cousin – an attitude that no doubt licenses courts and scholars to downplay its impact.<sup>31</sup> The extent to which the distinction has become entrenched in the legal psyche is exemplified by the frequency with which it is uncritically adopted in textbooks,<sup>32</sup> court

<sup>22</sup> Kocourek, ‘Substance and Procedure’, 10 *Fordham Law Review* (1941) 157, at 157; Risinger, *supra* note 14, at 191; *cf.*, Main, *supra* note 10, at 459, who attributes this to Blackstone.

<sup>23</sup> J. Bentham, *The Works of Jeremy Bentham: Published under the Superintendence of His Executor John Bowring* (1843), vol. 2, at 5–6.

<sup>24</sup> J. Salmond, *Jurisprudence or the Theory of the Law* (1902), at 577.

<sup>25</sup> Main, *supra* note 10, at 812.

<sup>26</sup> Risinger, *supra* note 14, at 198.

<sup>27</sup> Main, *supra* note 10, at 810.

<sup>28</sup> Bentham, *supra* note 23, at 6.

<sup>29</sup> Salmond, *supra* note 24, at 579.

<sup>30</sup> Wheeler Cook, ‘“Substance” and “Procedure” in the Conflicts of Laws’, 42 *Yale Law Journal* (1933) 333; see generally Risinger, *supra* note 14, at 201.

<sup>31</sup> *Ibid.*, at 810, 811.

<sup>32</sup> Nollkaemper, ‘International Adjudication of Global Public Goods: The Intersection of Substance and Procedure’, 23 *European Journal of International Law (EJIL)* (2012) 769, at 771 (footnotes omitted).

rooms<sup>33</sup> and scholarly works.<sup>34</sup> The law of state immunity typifies this trend. There, the prevailing rhetoric is that ‘immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law’.<sup>35</sup> However, it is clear from the case law examined below that, while it may be possible to grasp the distinction in theory, in practice, the boundary between substance and procedure is often ‘vague and unpredictable’,<sup>36</sup> implying that these labels do more to undermine than to facilitate the principled application of rules.<sup>37</sup>

Given this ambiguity, it is surprising how few contemporary international law scholars have examined the distinction between substantive and procedural rules.<sup>38</sup> Indeed, there is disagreement over whether international law recognizes a clear difference between them.<sup>39</sup> Where attempts have been made at such a definition, these have tended to describe rather than to analyse the distinction (the validity of which is assumed) and, in doing so, amplify the confusion. Stefan Talmon, for example, regards procedural rules as those that govern the ‘interpretation, implementation and enforcement of substantive rules’.<sup>40</sup> Substantive law, he argues, resolves the question of whether certain conduct is lawful or not.<sup>41</sup> This definition is problematic. There are difficulties with regarding rules that govern the interpretation of substantive law as procedural. The clearest illustration of this being the European Court of Human Rights’ (ECtHR) ‘living instrument’ approach to interpretation that puts the substantive flesh on abstract ECHR rights. It is a popular refrain of critics of the ECtHR that by doing so it is engaged in illegitimate law-making, a claim that makes sense only if one regards its (evolutive) approach as substantive.<sup>42</sup> Even Talmon concedes that the line between substance and procedure is somewhat ‘hazy’ accepting that some rules ‘straddle the divide’,<sup>43</sup> while others acknowledge their ‘abundant’ connections.<sup>44</sup> However, some scholars question this orthodoxy.<sup>45</sup> The ICJ’s decision in the

<sup>33</sup> See, e.g., *Jones* 2006, *supra* note 3, Judgments of Lord Bingham (para. 24) and Lord Hoffman (para. 44).

<sup>34</sup> See generally Bastin, ‘Case Note: International Law and the International Court of Justice’s Decision in Jurisdictional Immunities of the State’, 13 *Melbourne Journal of International Law (MJIL)* (2012) 1; see generally Talmon, ‘Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished’, 25 *Leiden Journal of International Law (LJIL)* (2012) 979.

<sup>35</sup> Fox, *supra* note 6, at 524–525; Bastin, *supra* note 34, at 16–17; Talmon *supra* note 34, at 986–987.

<sup>36</sup> Motomura, ‘The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights’, 92 *Columbia Law Review* (1992) 1625, at 1703–1704.

<sup>37</sup> Wheeler Cook, *supra* note 30, at 347.

<sup>38</sup> Compare America where the literature on this topic is abundant. See, e.g., Kocourek, *supra* note 22; Alexander, ‘Are Procedural Rights Derivative Substantive Rights?’, 17 *Law and Philosophy* (1998) 19; Solum, ‘Procedural Justice’, 78 *Southern California Law Review* (2004) 181.

<sup>39</sup> Cf. Talmon, *supra* note 34, at 983; A. Orakhelashvili, *Peremptory Norms in International Law* (2008), at 80, 341; Y. Ronen and S. Rosenne, *The Law and Practice of the International Court, 1920–2005* (4th edn, 2006), at 1063.

<sup>40</sup> Talmon, *supra* note 34, at 982.

<sup>41</sup> *Ibid.*, at 981.

<sup>42</sup> See, e.g., Sumption, ‘The Limits of Law: 27th Sultan Azlan Shah Lecture, Kuala Lumpur’ (2013), available at [www.supremecourt.uk/docs/speech-131120.pdf](http://www.supremecourt.uk/docs/speech-131120.pdf).

<sup>43</sup> Talmon, *supra* note 34, at 984, citing *Erie Railroad Co. v. Tompkins*, 304 US 64, at 249 (1938).

<sup>44</sup> Bastin, *supra* note 34, at 16.

<sup>45</sup> See, generally, McGregor, *supra* note 2; Orakhelashvili, ‘State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong?’, 18 *EJIL* (2007) 955; Orakhelashvili, *supra* note 39.

*Jurisdictional Immunities* case has been the catalyst for a number of such challenges, the focus of which is the formalistic nature of the Court's decision and the potential for impunity to which it gives rise.<sup>46</sup> This criticism deserves attention. It is clear from the above that in contemporary legal doctrine the legitimacy of the distinction between procedure and substance is 'largely presumed'.<sup>47</sup> Yet, even a superficial examination of its origins betrays its ambiguity and the extent to which its 'contours remain undefined, if not in outright disarray'.<sup>48</sup>

## 2 Analysis of the Distinction between Procedure and Substance in the Case Law

In spite of the brittle doctrinal foundations upon which the procedure–substance distinction is based, it is frequently relied on by courts and litigants when addressing the interaction between state immunity and the right of access to justice and with *jus cogens* norms. It therefore features prominently in the jurisprudence of the ECtHR in cases concerning the compatibility of immunities (including state immunity) with Article 6 of the ECHR. There, the distinction has emerged as a threshold test for the application of Article 6 in cases where it is alleged that an immunity denies the right of access to a court. This section will begin by tracing the origins and evolution of this approach. While much of the initial case law involves domestic immunities rather than state immunity, it is important to analyse these judgments in circumstances where the application of the procedure–substance distinction to the latter cannot properly be understood without examining the way it has developed in the context of the former. While the picture that emerges is not always clear, these decisions are also important in so far as they may contain the elements of an alternative approach. The section will go on to consider the way in which litigants and courts use the distinction between substantive and procedural rules to mediate the relationship between state immunity and *jus cogens* norms. The case law reveals the contradictions inherent in state immunity and the folly in seeking a binary classification.

### A *The Interaction between State Immunity and Article 6 of the ECHR*

While the origins of the distinction between substantive and procedural bars can arguably be traced back to the decision of the ECtHR in *Golder v. United Kingdom*, litigants have been eager to adopt it.<sup>49</sup> In spite of dismissing the distinction as one of 'little importance in domestic law', parties on both sides of the argument have sought to persuade the Commission and, later, the Court of its significance in resolving the

<sup>46</sup> Trapp and Mills, *supra* note 7, at 159–163; Bianchi, *supra* note 7, at 458–462; McGregor *supra* note 2, at 126.

<sup>47</sup> Main, *supra* note 10, at 812.

<sup>48</sup> *Ibid.*, at 818.

<sup>49</sup> ECtHR, *Golder v. United Kingdom*, Appl. no. 4451/70, Judgment of 21 February 1975, in which the Court stressed that it cannot create substantive rights when it stated: '[T]here is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication' (para. 38).

question of scope in Article 6.<sup>50</sup> Adopting an interpretation of the domestic provision that best serves their interests, governments contend that the limitation in question defines the parameters of the substantive civil law (and, as such, falls outside Article 6), whilst applicants maintain that it merely precludes their enforcement (amounting to a procedural restriction on access to which Article 6 applies).<sup>51</sup> Strasbourg initially reacted to such classifications with ambivalence. When asked to consider whether section 141 of the Mental Health Act 1959<sup>52</sup> modified the substantive rights of mental health patients or restricted their right of access to a court, the Commission concluded that it extinguished the right to sue in tort.<sup>53</sup> As such, the applicant could no longer be said to have a civil right within the meaning of Article 6.<sup>54</sup> However, this did not exhaust the requirements of this provision. Having reached the view that the statutory limitation (in effect) defined the substantive content of the right in domestic law, the Commission went on to ask whether the restriction on the right of access was ‘arbitrary’.<sup>55</sup> For these purposes, its classification as a substantive or procedural bar was ‘immaterial’.<sup>56</sup>

A similar approach was adopted in *Ketterick v. United Kingdom*,<sup>57</sup> *Pinder v. United Kingdom*<sup>58</sup> and *Dyer v. United Kingdom*.<sup>59</sup> *Dyer* concerned the Crown Proceedings Act 1947 (CPA 1947), which reversed the position at common law that the Crown could not be sued in tort.<sup>60</sup> Section 2 of the Act, therefore, provided for a general right to sue the Crown in respect of torts committed by its servants and agents and in respect of duties owed by it as an employer.<sup>61</sup> This right to sue, however, was subject to certain exceptions. In particular, section 10 of the Act removed the right of injured servicemen to bring negligence claims where the secretary of state certified that their injury was attributable to ‘qualifying service’. Certification by the secretary of state to this

<sup>50</sup> See the applicant’s submissions in ECtHR, *Ashingdane v. United Kingdom* (*Ashingdane* 1983), Appl. no. 8225/78, Report of the Commission of 12 May 1983, para. 62, a point reiterated by the government in its submissions (para. 64).

<sup>51</sup> *Ibid.*; see also ECtHR, *Kaplan v. United Kingdom*, Appl. no. 7598/76, Report of the Commission of 17 July 1980, para. 95; ECtHR, *Ashingdane v. United Kingdom* (*Ashingdane* 1985), Appl. no. 8225/78, Judgment of 28 May 1985, paras 53–54; ECtHR, *Fayed v. United Kingdom*, Appl. no. 17101/90, Judgment of 21 September 1990, para. 66; ECtHR, *Roche v. United Kingdom*, Appl. no. 32555/96, Judgment of 19 October 2005; ECtHR, *Markovic v. Italy*, Appl. no. 1398/03, Judgment of 14 December 2006.

<sup>52</sup> Mental Health Act 1959, 1959, c. 72. That excluded the liability of United Kingdom (UK) health authorities in respect of decisions concerning detained patients in the absence of bad faith or lack of reasonable care. *Ashingdane* 1983, *supra* note 50, para. 57.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, paras 93–94.

<sup>55</sup> *Ibid.*, para. 92.

<sup>56</sup> *Ibid.*, para. 93.

<sup>57</sup> ECtHR, *Ketterick v. United Kingdom*, Appl. no. 9803/82, Commission decision of 15 October 1982 (unreported).

<sup>58</sup> ECtHR, *Pinder v. United Kingdom*, Appl. no. 10096/82, Commission decision of 9 October 1984 (unreported).

<sup>59</sup> ECtHR, *Dyer v. United Kingdom*, Appl. no. 10475/83, Commission decision of 9 October 1984 (unreported).

<sup>60</sup> Crown Proceedings Act 1947 (CPA 1947), 1947, c. 44.

<sup>61</sup> *Ibid.*, s. 2(1)(a), (b).

effect substituted a no-fault pension scheme for such individuals. In reaching its decision, the Commission cited its earlier judgment in *K. v. United Kingdom*,<sup>62</sup> concluding that the issue of a certificate under section 10 of the Act extinguished the civil right to sue for the purposes of Article 6.<sup>63</sup> The state did not have to justify, therefore, the limitation with reference to a ‘pressing social need’ as the applicant had maintained.<sup>64</sup> It went on to remark, however, that while it was not competent to review the substantive content of a state’s domestic law, it retained the power to assess whether the provision constituted an arbitrary limitation of the applicant’s substantive civil claims; a power that applied ‘not only in respect of procedural limitations such as the removal of the jurisdiction of the court ... but also in respect of a substantive limitation from liability’.<sup>65</sup>

These decisions reference the normative rationale for Article 6 – namely, the need to avoid the arbitrary exercise of state power and to secure the rule of law, first articulated in *Golder*.<sup>66</sup> If the purpose of Article 6 is to ensure that states cannot remove claims from the jurisdiction of the courts arbitrarily, it makes sense that it applies whether the restriction on the right of access is of a substantive or procedural nature. To make this prerogative turn on whether a provision is drafted as a limitation on liability or an immunity from suit is itself arbitrary. And yet Strasbourg is naturally anxious to avoid creating substantive rights in the domestic law of states that do not otherwise exist. The approach of the Commission, which Tom Hickman characterizes as a ‘constitutional safeguard’, neatly struck this balance.<sup>67</sup> Avoiding anxious scrutiny of limitations that defined the substantive content of the right, but, nevertheless, ensuring that they were not exempt from review entirely, the Commission made certain that civil claims could not be ‘abrogated unlawfully or without reason’.<sup>68</sup>

Subsequent decisions of the Court in *Ashingdane v. United Kingdom*<sup>69</sup> and in *Powell v. Raynor*,<sup>70</sup> however, mark a departure from this position. Thus, in *Ashingdane*, the Court declined to resolve the question of whether the statutory limitation in section 141 amounted to a substantive or a procedural bar and proceeded on the basis that Article 6 applied.<sup>71</sup> It went on to argue that limitations on the right of access must

<sup>62</sup> Decision no. 9803/82, 15 October 1982 (not published).

<sup>63</sup> *Dyer*, *supra* note 59, para. 5.

<sup>64</sup> *Ibid.*, para. 5. The Commission made it ‘perfectly clear that it was impermissible under Article 6 to demand State justification for rules of substantive law’. T. Hickman, *Public Law after the Human Rights Act* (2010), at 305. This implies that other limitations, including procedural limitations, would require such justification.

<sup>65</sup> *Dyer*, *supra* note 59, paras 5, 7. In each case, the Court concluded that the restriction was neither arbitrary nor unreasonable. *Ashingdane* 1983, *supra* note 50, para. 95; *Dyer* (paras 9–11).

<sup>66</sup> *Golder*, *supra* note 49, paras 34–35. See the Commission in *Ashingdane* 1983, *supra* note 50, para. 92; see Commission report in *Kaplan*, *supra* note 51: ‘[T]he jurisdiction of the courts cannot be removed altogether or limited beyond a certain point (para. 162); see also *Dyer*, *supra* note 59, para. 7: ‘[A] real threat to the rule of law could emerge if a state were arbitrarily to remove the jurisdiction of civil courts to determine certain classes of civil claim.’

<sup>67</sup> Hickman, *supra* note 64, at 303–305, 328–329.

<sup>68</sup> *Ibid.*, 305.

<sup>69</sup> *Ashingdane* 1985, *supra* note 51.

<sup>70</sup> ECtHR, *Powell and Raynor v. United Kingdom*, Appl. no. 9310/81, Judgment of 21 February 1990.

<sup>71</sup> On the basis that even if Art. 6 was engaged it had not been violated. *Ashingdane* 1985, *supra* note 51, para. 54.



meet the requirements of legitimacy and proportionality.<sup>72</sup> In doing so, it appeared to open up the possibility that any restriction on access must meet such criteria.<sup>73</sup> In so far as this was the Court's intention, its decision in *Powell v. Raynor* appears to distance itself from this approach.<sup>74</sup> There it concluded that the restriction contained in section 76(1) of the Civil Aviation Act 1982, which prevented nuisance claims from being brought in respect of aircraft noise, provided that the height of the aircraft was reasonable in all of the circumstances, amounted to a limitation on the substantive civil right.<sup>75</sup> As such, Article 6 did not apply. The question of arbitrariness was not addressed.

Seven months later, the Court had the opportunity to consolidate and clarify its bifurcated case law. *Fayed v. United Kingdom* concerned the domestic law defence of qualified privilege available in libel proceedings.<sup>76</sup> In deciding whether this privilege resulted in a denial of the claimant's right of access to a court, several observations were made. The Court began by noting that '[w]hether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court'.<sup>77</sup> This statement is uncontroversial.<sup>78</sup> However, the Court went on to remark that, in the case of procedural bars, Article 6(1) 'may have a degree of applicability'.<sup>79</sup> This appears to imply that Article 6 only applies to procedural bars and that substantive limitations are beyond the scope of its protection.<sup>80</sup> In so far as this was its intention, it amounts to a rejection of the Commission's constitutional safeguard developed in the cases discussed above. And yet the Court is, at best, equivocal. It goes on to note the difficulties inherent in drawing the dividing line between substantive and procedural bars.<sup>81</sup> It also acknowledges the inherent arbitrariness in doing so in circumstances where it may be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy.<sup>82</sup> Furthermore, having implied that substantive bars fall outside the scope of Article 6, the Court appears to

<sup>72</sup> *Ashingdane* 1985, *supra* note 51, para. 57. Like the Commission, the Court observed that the applicant had been given access to the remedies that existed within the domestic legal system but that this did not exhaust the requirements of Art. 6. It was still necessary, therefore, to consider whether the right of access was 'sufficient' having regard to the rule of law. It is here that the Court's approach departs from that of the Commission. It reiterated the point made in *Golder* that Art. 6 is not absolute and, by its very nature, calls for regulation by the state. It follows that states can, within their margin of appreciation, limit the right of access. Instead of subjecting the limitation to a test of arbitrariness, however, the Court indicated that a limitation would only be lawful if it was legitimate and proportionate.

<sup>73</sup> Hickman calls this a 'maximalist' approach. Hickman, *supra* note 64, at 306.

<sup>74</sup> Hickman refers to the approach in *Powell* as a 'minimalist approach'. Hickman *supra* note 64, at 306.

<sup>75</sup> *Powell and Raynor*, *supra* note 70, para. 36. Civil Aviation Act 1982, 1982, c. 16.

<sup>76</sup> *Fayed*, *supra* note 51.

<sup>77</sup> *Ibid.*, para. 65.

<sup>78</sup> Doing little more than restating the difficulty the Court faces in this area.

<sup>79</sup> *Fayed*, *supra* note 51, para. 65.

<sup>80</sup> Cf. the Commission decisions cited above.

<sup>81</sup> *Fayed*, *supra* note 51, para. 67.

<sup>82</sup> *Ibid.*

qualify this by reference to the need to ensure that states cannot ‘remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons’ without restraint.<sup>83</sup> In doing so, it cites *Dyer*, which, as described above, applied the so-called constitutional safeguard to the substantive bar in section 10 of the CPA 1947, suggesting that the Court intended to preserve it.<sup>84</sup>

## B Problems with the Threshold Test

While the intentions of the Court in *Fayed* remain unclear, the way it has been interpreted since is less opaque. Litigants and subsequent compositions of the Court have, for the most part,<sup>85</sup> treated it as elevating the distinction between substantive and procedural bars to a test for the applicability of Article 6 in cases where an immunity is alleged to have interfered with the right of access to a court.<sup>86</sup> According to this analysis, while procedural bars must satisfy the tests of legitimacy and proportionality,<sup>87</sup> substantive limitations fall outside the scope of Article 6 entirely. As the Court anticipated, however, tracing the dividing line between substantive and procedural limitations is not always easy. As a result, the case law is somewhat capricious, and the Court is frequently divided on the question of classification.<sup>88</sup> This is hardly surprising.

<sup>83</sup> *Ibid.*, para. 65.

<sup>84</sup> This is Hickman’s view, who argues that *Fayed* marks a return to the constitutional safeguard. Hickman, *supra* note 64, at 308–309.

<sup>85</sup> There are, of course, exceptions where the Court has either ignored the distinction (see, e.g., ECtHR, *Stubbings and Others v. United Kingdom*, Appl. no. 22083/93 and 22095/93, Judgment of 22 October 1996) as well as cases in which it appears to adopt a different threshold test (see further below).

<sup>86</sup> See, e.g., *Markovic*, *supra* note 51, para. 94: ‘The distinction between substantive limitations and procedural bars determines the applicability and, as the case may be, the scope of the guarantees under Article 6’; see also para. 2, Concurring Opinion of Judge Bratza joined by Judge Rozakis: ‘The distinction between provisions of domestic law and practice which bar or restrict access to a judicial remedy to determine the merits of claims relating to “rights” of a civil nature recognised in domestic law and which will, unless justified, contravene Article 6 and those which delimit the substantive content of the “right” itself and to which in principle Article 6 has no application, is well-established in the Court’s case-law.’ ECtHR, *Fogarty v. United Kingdom*, Appl. no. 37112/97, Judgment of 21 November 2001, para. 25; ECtHR, *McElhinney v. Ireland*, Appl. no. 31253/96, Judgment of 21 November 2001, para. 24; *Al-Adsani*, *supra* note 4, para. 47; *Roche*, *supra* note 51, para. 119.

<sup>87</sup> The so-called *Ashingdane* criteria after the Court in that case noted that limitations on the right of access should satisfy the tests of legitimacy and proportionality.

<sup>88</sup> Cf. ECtHR, *Osman v. United Kingdom*, Appl. no. 87/1997/871/1083, Judgment of 28 October 1998; ECtHR, *Z. v. United Kingdom*, Appl. no. 29392/95, Judgment of 10 May 2001 (albeit this difference in approach can be explained by the fact that the decision in *Osman* appears to have been based on a misunderstanding of the way the English tort of negligence is framed); see also *Roche*, *supra* note 51, where the Court was divided on the question of whether section 10 of the CPA 1947, *supra* note 60, was a substantive bar or a procedural restriction on access, with the majority concluding that it was substantive. Cf. ECtHR, *Tinnelly & Sons Ltd and Others and McElduff and Others v. United Kingdom*, Appl. nos 62/1997/846/1052 and 62/1997/846/1052/1053, Judgment of 10 July 1998, in which the Court treated an analogous certification procedure (that excluded liability in respect of employment discrimination) as a procedural bar leading Lord Walker in *Matthews v. Ministry of Defence*, [2003] UKHL 4, at 127, to remark that ‘the cases do not speak with a single clear voice’.

The distinction encourages, indeed demands, the sort of rhetorical dancing on pin heads that does more to serve the interests of the parties than it does the interests of justice. This can be seen clearly in *Roche v. United Kingdom*. There, the ECtHR cites, with approval, the decision of the House of Lords in *Matthews v. Ministry of Defence*,<sup>89</sup> in which it sought to draw a meaningful distinction between the exclusion of a right to sue and the preservation of its absence. In *Matthews*, the House of Lords pursued a detailed examination of the drafting history of section 10 of the CPA 1946 in order to argue that because, prior to that Act, one could not sue the Crown in tort, section 10 did not amount to a limitation of a civil right to which Article 6 applied.

On the contrary, since no such right previously existed, section 10 did no more than preserve that position. In doing so, it defined the content of the right and was beyond the Court's oversight.<sup>90</sup> The fact that section 2 enacted a comprehensive right to sue the Crown in tort, albeit one from which there were exceptions (of which section 10 was an example) was never adequately addressed. That the application of Article 6 should turn on whether, due entirely to an accident of legislative history, a statutory provision reflects a state of affairs that existed before it was drafted or whether it enacts a novel limitation is at best absurd.<sup>91</sup> The exclusion in section 10 was substantive not because it preserved the absence of a right but, rather, because it defined the scope of a newly created right to sue in tort. It was 'an integral part of the overall scheme of liability'.<sup>92</sup> The scope of that right was constrained the way it was because, while it is appropriate that the Crown should be accountable for its wrongdoing, it was wrong that military personnel should have to pursue an unpredictable tort claim through the courts in order to obtain redress. The substitution of a no-fault pension scheme that would ensure a more equitable distribution of compensation hardly amounts to the arbitrary exercise of state power with which Article 6 is concerned.<sup>93</sup>

Perhaps it was the contrived nature of the majority's reasoning that led eight of the seventeen judges in the case to dissent. And, yet, in concluding that the limitation was procedural rather than substantive, their argument is no less laboured. It hinges on the fact that the exception in section 10 was conditional upon certification. The dissenting judges therefore emphasized that if the secretary of state had elected not to issue a certificate, a tort claim could have been brought against the Crown. The limitation did not, therefore, extinguish the right; it merely removed the remedy.<sup>94</sup> It follows from this, however, that if the exemption from liability had not been conditional on certification the dissenting judges would have had to concede that it was

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, paras 15, 16, 19, per Lord Bingham.

<sup>91</sup> Hickman too considers this analysis problematic. Hickman, *supra* note 64, at 317, n. 99.

<sup>92</sup> *Matthews*, *supra* note 88, para. 72, per Lord Hoffman, is cited with approval in *Roche*, *supra* note 51.

<sup>93</sup> See also Lord Walker in *Matthews*, *supra* note 88, para. 142, in which he argues that the introduction of a no-fault compensation scheme for injuries that would otherwise lead to tort claims was 'not inimical to Article 6'.

<sup>94</sup> *Roche*, *supra* note 51, at 40, Dissenting Opinion of Judge Loucaides joined by Judges Rozakis, Zupancic, Straznicka, Casadevall, Thomassen, Maruste and Traja.

substantive.<sup>95</sup> The application of Article 6, therefore, far from not being ‘unduly influenced by legislative techniques’,<sup>96</sup> appears destined to be at their mercy. A more compelling approach would have been to recognize that the certification procedure existed in order to enable servicemen to establish their eligibility for the pension scheme. In particular, it was designed to ensure they did not fall between two stools by being denied both damages and a pension.<sup>97</sup> Once again, however, the inflexible nature of the procedure substance distinction as a threshold test perpetuates further unwarranted taxonomy.

In other cases, we see the Court treating novel exclusions of substantive liability differently to existing ones. Thus, in *Z. v. United Kingdom*,<sup>98</sup> proceedings were brought in the English courts to decide whether a local authority owed a duty of care in negligence in respect of abuse suffered by the claimants as children at the hands of their parents. This was an issue on which the common law was silent at the time the claim was brought. The House of Lords, however, held that no duty of care was owed in the circumstances, and the claim was struck out without a further hearing on the merits. As the absence of a duty of care means an essential component of the tort is missing, the decision of the House of Lords amounted to a substantive limitation on the scope of the domestic civil law to which Article 6 did not apply. The Court, however, decided that Article 6 was applicable. It did so on the basis that, at the time the domestic proceedings were initiated, it was unclear whether there was a right to sue. The Court reasoned that the applicants therefore had an arguable civil right under domestic law sufficient to engage Article 6.<sup>99</sup> Having decided that Article 6 was engaged, the Court then examined whether the limitation was substantive or procedural, concluding that it was the former.<sup>100</sup> It went on to make an oblique reference to the fact that it did not regard the limitation as arbitrary and concluded by saying that Article 6 had not been violated, without explaining how or whether these conclusions related to each other.<sup>101</sup>

The same approach was adopted in *Markovic v. Italy*.<sup>102</sup> In this case, claims brought against Italy were held to be non-justiciable by the domestic courts.<sup>103</sup> While the rule that, for public policy reasons, states do not incur liability for acts performed in the conduct of foreign relations is common amongst the countries of the Council of Europe, *Markovic* raised novel issues in this regard.<sup>104</sup> In such circumstances,

<sup>95</sup> This point is openly acknowledged by Counsel in *Matthews*, *supra* note 88, para. 27, per Lord Hoffman. It is also remarked on by Hickman, *supra* note 64, at 315.

<sup>96</sup> *Markovic*, *supra* note 51, para. 96.

<sup>97</sup> See *Matthews*, *supra* note 88, para. 35, per Lord Hoffman.

<sup>98</sup> *Z.*, *supra* note 88.

<sup>99</sup> *Ibid.*, paras 87–90.

<sup>100</sup> *Ibid.*, paras 94–97.

<sup>101</sup> *Ibid.*, paras 98, 104.

<sup>102</sup> *Markovic*, *supra* note 51.

<sup>103</sup> These claims arose from civilian deaths caused during the North Atlantic Treaty Association bombings of Kosovo in 1999.

<sup>104</sup> The domestic courts had been called upon to decide for the first time whether the applicant’s case came within Art. 2043 of the Italian Civil Code. *Markovic*, *supra* note 51, para. 100.

the Court held that the applicant had ‘on at least arguable grounds, a claim under domestic law’ and that Article 6 was engaged.<sup>105</sup> It then went on to conclude that the decision of the Italian Constitutional Court nevertheless amounted to a substantive limitation on the applicants’ civil rights that was not arbitrary and that Article 6 was not violated. These cases are a curious hybrid of the constitutional safeguard adopted by the Commission in *Ashingdane* and in subsequent cases, and of the procedure–substance distinction articulated in *Fayed*.<sup>106</sup> There is no obvious reason for treating emergent substantive limitations differently from existing ones. Both define the substantive scope of the domestic civil law. One explanation is that the Court in *Z. v. United Kingdom* was anxious to review a limitation that prevented the victims of childhood abuse that breached Article 3 from obtaining redress, while, in *Markovic*, it was concerned to ensure that the potentially far-reaching doctrine of act of state was not being abused.<sup>107</sup> Having tied itself to a binary threshold test that turned on the classification of a rule as either procedural or substantive, however, the only way the Court could bring such (substantive) limitations within the scope of Article 6 was to sidestep it. A simpler solution would have been to openly acknowledge the need to assess whether a limitation is arbitrary and that, for these purposes, its classification as a substantive or procedural bar is irrelevant.<sup>108</sup>

### C State Immunity, Article 6 and the Procedure–Substance Distinction

Cases concerning the classification of state immunity, however, have been spared these difficulties. While litigants continue to argue over classification, the Court has consistently endorsed applicants’ arguments that this limitation ‘is to be seen not as qualifying a substantive right but as a procedural bar on the national courts’ power to determine the right’.<sup>109</sup> As such, it engages Article 6. States, seeking to narrow the scope of the right of access, take the opposite view. In *McElhinney v. Ireland*, the Irish government did so by explicitly engaging with the procedure substance distinction arguing that there is no “right” to sue in respect of torts allegedly committed by the armed forces of another sovereign power’.<sup>110</sup> Sovereign immunity, therefore, should be regarded as a substantive limitation on the content of the right claimed and ‘not merely a procedural bar’.<sup>111</sup> The UK government, however, frames its argument slightly differently.<sup>112</sup> In doing so, it exposes the nature of the problem the Court faces in classifying immunities as either procedural or substantive. State immunity does not address the question of a foreign state’s liability for its alleged

<sup>105</sup> *Ibid.*, para. 101.

<sup>106</sup> Which applies to both substantive and procedural bars.

<sup>107</sup> In circumstances where the context was also very sensitive.

<sup>108</sup> As the Commission did in *Ashingdane* 1983, *supra* note 50; *Ashingdane* 1985, *supra* note 51; *Pinder*, *supra* note 58; *Ketterick*, *supra* note 57; *Dyer*, *supra* note 59.

<sup>109</sup> *McElhinney*, *supra* note 86, para. 2; *Fogarty*, *supra* note 86, para. 26; *Al-Adsani*, *supra* note 4, para. 48.

<sup>110</sup> *McElhinney*, *supra* note 86, para. 21.

<sup>111</sup> *Ibid.*, para. 21.

<sup>112</sup> Albeit in substance the arguments of the UK and Irish governments are the same.

wrongdoing. That is central to its purpose. Unlike section 10 of the CPA 1946, therefore, section 1(1) of the State Immunity Act 1978 (SIA 1978) does not establish (a substantive) immunity from liability.<sup>113</sup> In *Al Adsani v. United Kingdom* and *Fogarty v. United Kingdom*, therefore, the government focused instead on its effect on the jurisdiction of the court. It argued that the SIA 1978 removes the domestic court's powers of adjudication where the defendant is a foreign state. As a result, Article 6 is not engaged.<sup>114</sup>

The approach of the United Kingdom in these cases appears to jettison the procedure–substance distinction. It conceives of the substantive content of the right and the mechanism for its enforcement as being inextricably bound together. The ECHR simply does not apply where the applicant has no actionable claim.<sup>115</sup> In short, there is no distinction between immunities that limit the liability of the defendant (substantive bars) and those that amount to an immunity from suit (procedural bars). Both define the substantive content of the right. This argument draws on the approach taken by the English courts in such cases. There, the prevailing view is that courts cannot be said to deny access if they have no access to give. These words of Lord Millett in *Holland v. Lampen-Woolfe* have become the United Kingdom's axiom in this context.<sup>116</sup> While state immunity no more removes the jurisdiction of the English courts than its waiver confers it,<sup>117</sup> the approach has merit in so far as the English judges are suggesting that the right and the procedural mechanism for its enforcement are 'consubstantial'.<sup>118</sup> Judge Zupancic in his dissenting opinion in *Roche v. United Kingdom* also recognizes this, pointing out that the distinction between what is procedural and what is substantive is 'fictional'.<sup>119</sup> He remarks that immunity from liability and immunity from suit are so interdependent that distinguishing between them is virtually impossible. This leads him to conclude that

<sup>113</sup> State Immunity Act 1978, 1978, c. 33.

<sup>114</sup> *Fogarty*, *supra* note 86, para. 22; *Al-Adsani*, *supra* note 4, para. 44.

<sup>115</sup> *Roche*, *supra* note 51, at 44, Dissenting Opinion of Judge Zupancic, remarks on this when he says: 'It is ironic that we should, particularly in British cases, build on a distinction between what is procedural and what is substantive ... it is precisely the common-law systems which have always considered the right and the remedy to be interdependent.'

<sup>116</sup> *Holland v. Lampen-Woolfe*, [2000] 3 All ER 833, paras 846–947; see also *Jones* 2006, *supra* note 3, paras 14, 64, per Lord Bingham and Lord Hoffman.

<sup>117</sup> Since the question of jurisdiction logically precedes the question of whether a state is immune from that jurisdiction, and the Court, in granting immunity, is merely agreeing not to exercise it. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3, para. 59, Joint Separate Opinion of Higgins, Kooijmans and Buergenthal, who observe that 'immunity ... is an exception to jurisdiction which normally can be exercised and it can only be invoked when the latter exists' (para. 71); O'Keefe, 'Decisions of British Courts during 2006 Involving Questions of Public International Law', 77 *British Yearbook of International Law (BYIL)* (2006) 458, at 516; Yang, 'State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions', 74 *BYIL* (2003) 333, at 340; Sanger, 'State Immunity and the Right of Access to a Court under the EU Charter of Fundamental Rights', 65 *International and Comparative Law Quarterly* (2016) 213.

<sup>118</sup> *Roche*, *supra* note 51, at 45, Dissenting Opinion of Judge Zupancic.

<sup>119</sup> *Ibid.*, at 44.

[i]f the remedy does not exist a right is not a right; if the remedy is not procedurally pursued the right will not be vindicated. The right and its remedy are not only interdependent. They are consubstantial. To speak of rights as if they existed apart from the procedural context is to separate artificially ... what in practical terms is inseparable. A substantive right is not a mirror image of its procedural remedy. A substantive right is its remedy.<sup>120</sup>

The above analysis exposes the flaws in seeking to resolve the question of the scope of Article 6 by reference to the distinction between procedural and substantive limitations. While, at the extremes, the distinction may be simple to grasp, at the boundaries, it becomes elusive, inviting litigants and courts to contrive arguments that do more to obfuscate than to illuminate the law.<sup>121</sup> Part of the difficulty in seeking to classify immunities as either substantive or procedural is that they are seldom either one or the other but more often combine elements of both. State immunity is a good illustration of this fact. It is clearly distinct from a substantive rule. It does not touch on the merits of the claim but, rather, diverts the question of legal responsibility of a state away from the municipal courts of other states and is, in this sense, procedural. At the same time, however, state immunity operates as a substantive limitation on the right of the forum state to exercise jurisdiction within its territory.<sup>122</sup> It does this in order to accommodate the conflicting sovereignty claims of other states. However, sovereign equality is not valued for its own sake but, rather, because it secures the peaceful functioning of the international community. Stable interstate relations, in turn, create the conditions in which personhood may flourish. Thus, while it operates as a procedural device, state immunity has normative underpinnings.<sup>123</sup> To seek to define it exclusively in terms of its procedural dimension, therefore, is only part of the picture. It is also important not to lose sight of the fact that Article 6, though characterized as a procedural right, substantively gives effect to the rule of law and the need to avoid the arbitrary exercise of power.<sup>124</sup> It does so in a particular context – namely, the determination of rights. And it does so in a particular way – by ensuring that such determinations comply with certain procedural safeguards. However, we value these procedures not as ends in themselves but, rather, for the normative values they seek to realize.<sup>125</sup> Due process is more than ‘merely a formal virtue’.<sup>126</sup>

<sup>120</sup> *Ibid.*, at 45. Gearty too describes the distinction as ‘wrong-headed’. Gearty, ‘Unravelling Osman’, 64 *Modern Law Review* (2001) 159, at 176.

<sup>121</sup> Lord Sumption argues that ‘even when the distinction is clear, it is frequently arbitrary’ in the context of considering time bars and comparing limitation periods in England that are classified as procedural bars and prescription periods in Scotland that are regarded as substantive. See Sumption, ‘The Right to a Court: Article 6 of the Human Rights Convention’, James Wood Lecture, University of Glasgow, 13 November 2015, available at [www.supremecourt.uk/docs/speech-151113.pdf](http://www.supremecourt.uk/docs/speech-151113.pdf).

<sup>122</sup> *Ibid.*

<sup>123</sup> See also Hickman, *supra* note 64, at 300.

<sup>124</sup> *Ibid.*, at 301.

<sup>125</sup> T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1994), at 24–25; Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’, *Public Law* (1997) 467, at 481–482; see generally Waldron, ‘The Rule of Law and the Importance of Procedure’, in J. Fleming, *Getting to the Rule of Law* (2011) 3.

<sup>126</sup> J. Jowell and D. Oliver (eds), *The Changing Constitution* (7th edn, 2011), at 20.

It ‘embodies a crucial dignitarian idea’.<sup>127</sup> By articulating a right to be treated fairly in the adjudication of rights, the rule of law, to which Article 6 gives effect, acknowledges the individual’s status as a ‘moral agent’.<sup>128</sup> It is more accurate, therefore, to regard Article 6 as the procedural expression of substantive values:<sup>129</sup> ‘The ECtHR jurisprudence is blighted by a frequent failure to recognise, or at least observe this crucial point.’<sup>130</sup>

Rather than argue over labels, courts and litigants should relinquish the procedure–substance distinction as a means of addressing the complex interaction between state immunity and the right of access to a court in Article 6. The ECtHR should instead focus on the need to secure the rule of law and avoid the arbitrary exercise of state power. For the purposes of this assessment, it should not matter how the law is framed.<sup>131</sup> Any limitation – whether from liability (substantive) or from suit (procedural) – would amount, therefore, to a denial of the right of access to which Article 6 applies. Such limitations, however, would be lawful in the event that they did not amount to an arbitrary exercise of state power and were consistent with the rule of law. This approach has the advantage of simplicity. It also means that the question of whether a limitation is arbitrary is no longer simply a threshold question but rightly regarded as the key substantive question at stake in such cases. Meanwhile, though states may be concerned about the apparent broadening of the scope of Article 6 to which this approach appears to give rise, because the test is one of arbitrariness, limitations that reflect the reasoned policy choices of democratically elected legislatures should not fall foul of this standard. The outcome of most of the cases determined to date would, it is predicted, be the same. A significant difference, however, would be that the reasoning in such cases would be more transparent and the arguments less capricious.

<sup>127</sup> Waldron, ‘The Rule of Law and the Importance of Procedure’, in J. Fleming, *Getting to the Rule of Law* (2011) 3, at 16.

<sup>128</sup> Allan, *supra* note 125, at 32–33; Waldron, ‘How Law Protects Dignity’, 71 *Cambridge Law Journal* (2012) 200, at 210; Jowell and Oliver, *supra* note 126, at 20–21.

<sup>129</sup> Talmon, *supra* note 35, at 982, concedes procedural rights are ‘substantive in nature’; Orakhelashvili, *supra* note 39, at 94, calls Art. 6 a ‘substantive obligation’.

<sup>130</sup> Hickman, *supra* note 64, at 300.

<sup>131</sup> See also *Matthews*, *supra* note 88, para. 43, per Lord Hoffman: ‘[P]rovided one holds on to the underlying principle, which is to maintain the rule of law and the separation of powers, it should not matter how the law is framed’; see also the submissions made by Counsel on behalf of the government in *Benkharbouche & Anor v. Embassy of the Republic of Sudan*, [2017] UKSC 62, in which it was argued that ‘concern to avoid access being denied arbitrarily has been reduced to a rather mechanical distinction between substantive rights and procedural bars and what matters is that the grant of State immunity is not arbitrary and does not undermine the rule of law’ (oral submissions of Counsel for the government), albeit, in both cases, this analysis ultimately leads them to conclude that Art. 6 does not apply.



### D The Interaction between State Immunity and *Jus Cogens*

Several attempts have been made by scholars,<sup>132</sup> litigants<sup>133</sup> and judges<sup>134</sup> to argue that recognizing the hierarchically superior status of a *jus cogens* norm entails accepting that such norms override any conflicting rules that do not have the same status, including the (procedural) rule of state immunity. While the argument is framed differently in different cases, broadly speaking, it is asserted that *jus cogens* sit at the pinnacle of a hierarchy of norms and, as such, ‘trump’ any rule that denies their utility.<sup>135</sup> Courts and states have sought to deflect such arguments by reference to the distinction between rules that define the substantive content of rights and those that prescribe the procedural powers of states to secure their enforcement.<sup>136</sup> The simplicity of this approach is beguiling. State immunity is undoubtedly distinct from the substantive prohibition against international crimes. Self-evidently, in granting immunity with respect to a civil claim arising from allegations of torture, a state is not proposing to torture anyone. Nor, in claiming immunity in such circumstances, does the defendant state justify its use.<sup>137</sup> And yet such arguments amount to little more than sophistry. It is clear from the case law in which such issues are canvassed that litigants and courts adopt the classification of immunity that best serves their interests. Indeed, at times, parties and judges adopt contrary classifications in the same case for different purposes. No doubt inadvertently, in doing so, they expose the flaws in a binary approach to the classification of rules and of state immunity, in particular.

<sup>132</sup> E.g., Byers, ‘Public International Law’, 67 *BYIL* (1997) 537, at 540; Bianchi, ‘Immunity versus Human Rights: The Pinochet Case’, 10 *EJIL* (1999) 237, at 265; Bianchi, *supra* note 7, at 458–462; Orakhelashvili, ‘State Immunity in National and International Law: Three Recent Cases before the European Court of Human Rights’, 15 *LJIL* (2002) 703, at 712–713; Orakhelashvili, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah’, 22 *EJIL* (2011) 849, at 851–852; McGregor, ‘Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty’, 18 *EJIL* (2007) 903, at 905, 912, 916.

<sup>133</sup> See, e.g., *Al-Adsani*, *supra* note 4; *Jones* 2014, *supra* note 4. More recently in *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176.

<sup>134</sup> See, e.g., *Al-Adsani*, *supra* note 4, Dissenting Opinion of Judges Rozakis and Caflisch, Wildhaber, Costa, Cabral Barreto and Vajic; Corte di Cassazione (Sezioni Unite), *Ferrini v. Federal Republic of Germany*, Judgment no. 5044, 6 November 2003, translated in de Sena and de Vittor, ‘State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case’, and cited in Bianchi, ‘Ferrini v. Federal Republic of Germany’, 99 *American Journal of International Law (AJIL)* (2005) 242; Hellenic Supreme Court (Areios Pagos), *Prefecture of Voiotia v. Federal Republic of Germany*, Case no. 11/2000, 4 May 2000, at 95, translated in Gavouneli and Bantekas, ‘International Decision: *Prefecture of Voiotia v. Federal Republic of Germany*, Case no. 11/2000, Areios Pagos (Hellenic Supreme Court), 4 May 2000’, 95 *AJIL* (2001) 198 (*jus cogens* violations result in an implied waiver of immunity).

<sup>135</sup> There are several flaws in the norm hierarchy argument that are rehearsed at length elsewhere and will not, therefore, be revisited here. See, e.g., Zimmermann, ‘Sovereign Immunity and Violations of International *Jus Cogens*: Some Critical Remarks’, 16 *Michigan Journal of International Law (MIJL)* (1995) 433, at 438–439; Akande and Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’, 21 *EJIL* (2010) 815, at 832–839; Shah, *supra* note 2, at 568–570; see generally Talmon, *supra* note 35; de Wet, ‘*Jus Cogens* and Obligations *Erga Omnes*’, in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013) 542, at 549; Cannizzaro, ‘*Jus Cogens* beyond the Vienna Convention’, in Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011) 425.

<sup>136</sup> E.g., *Jurisdictional Immunities*, *supra* note 1, paras 92–97.

<sup>137</sup> *Jones* 2006, *supra* note 3, para. 44, per Lord Hoffmann.

The *Jurisdictional Immunities* case is a striking example of this scenario. The norm hierarchy argument was central to Italy's pleadings in the case. Thus, it argued that the *jus cogens* status of the prohibition of torture 'trumped' the (inferior) rules of state immunity, depriving them of any legal effect.<sup>138</sup> Germany denied any conflict between the substantive primary rules that prohibit war crimes and the secondary (procedural) rules regarding the consequences that flow from alleged breaches of such norms. It did so on the basis that they were entirely distinct, remarking that '[t]here is no mechanical link between the two.'<sup>139</sup> In short, while it did not do so explicitly, it treated the limitation on the jurisdiction of the court represented by state immunity as procedural and separate from the substantive rules of responsibility. No conflict between them could therefore arise. The ICJ echoed this view in its judgment, remarking that *jus cogens* rules and the rules of state immunity 'address different matters'.<sup>140</sup> It went on to classify state immunity rules as procedural in character on the basis that they are 'confined to determining whether or not the courts of one state may exercise jurisdiction in respect of another state. They do not bear upon the question of whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful'.<sup>141</sup> This approach was consistent with its own case law<sup>142</sup> as well as with the case law of several domestic courts. For example, the House of Lords in *Jones v. Saudi Arabia*<sup>143</sup> rejected the argument that '[t]he acceptance of the *jus cogens* nature of the prohibition of torture means that a state allegedly violating it cannot invoke hierarchically lower rules (including state immunity) to avoid the consequences of the illegality of its actions'.<sup>144</sup> Citing with approval the view of Hazel Fox that '[s]tate immunity is a procedural rule going to the jurisdiction of a national court' that simply diverts any breach of it to a different method of settlement, it concluded that there was, therefore, no conflict between them.<sup>145</sup>

<sup>138</sup> *Jurisdictional Immunities*, *supra* note 1, paras 4.67–4.77, Counter-Memorial of Italy.

<sup>139</sup> *Ibid.*, para. 89, Memorial of the Federal Republic of Germany.

<sup>140</sup> *Ibid.*, para. 93.

<sup>141</sup> *Ibid.* Webb characterizes the International Court of Justice's approach as a form of conflict avoidance through formalistic interpretation. Webb, 'Human Rights and the Immunity of State Officials', in E. de Wet and J. Vidmar (eds), *Hierarchy in International Law the Place of Human Rights* (2012) 114, at 140, 147.

<sup>142</sup> E.g., in *Arrest Warrant*, *supra* note 117, para. 60, the immunity accorded to a serving minister of foreign affairs was 'procedural in nature'. *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility Judgment, 3 February 2006, ICJ Reports (2006) 6, para. 67, where the Court treated the substantive character of the norm and the procedural question of its jurisdiction as entirely separate; *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Reports (1995) 90, para. 29; de Wet, *supra* note 135, at 549–550.

<sup>143</sup> *Jones 2006*, *supra* note 3.

<sup>144</sup> *Ibid.*, para. 20(c), skeleton argument of the appellant.

<sup>145</sup> Fox, *supra* note 6, at 525, para. 44; *Jones 2006*, *supra* note 3, Judgments of Lord Hoffmann, and para. 24, Lord Bingham. Lords Hope and Browne Wilkinson in *R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)*, UKHL 17 [2000] 1 AC 147, also implicitly draw on the distinction. In circumstances where sections 5 and 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85, created a treaty-based (universal) jurisdiction, it was this procedural dimension of the *jus cogens* prohibition against torture that conflicted with (the procedural rule of) state immunity. Webb, *supra* note 141, at 124.

Having in effect argued that the procedural rule of state immunity operates in a different domain to the substantive rules prohibiting war crimes, Germany then went on to address its temporal application. In particular, it argued that not only should the Italian courts have granted Germany immunity but also that the immunity to be applied was the absolute doctrine rather than (Italy's erroneous version of) the restrictive doctrine. To apply the latter to the events of 1945, it was claimed, would be contrary to the international law rule that conduct must be appraised by the standards in force at the time the alleged offences took place.<sup>146</sup> In this regard, however, Germany sought a substantive classification of immunity. Noting that state immunity 'determines the substantive relationship between sovereign states, ensuring that good order will prevail in the international community', it concluded that this had 'little, if anything to do with procedure'. Indeed, it emphasized that state immunity could not be 'downgraded to a simple procedural rule'.<sup>147</sup>

The Court's response to this issue also reveals the ambiguity inherent in state immunity. Thus, having recognized that immunity is underpinned by the normative idea that states enjoy sovereign equality – a principle it regarded as 'fundamental' to the international legal order – it went on to classify it as procedural for the purposes of its inter-temporal application.<sup>148</sup> It is difficult to see, however, how this argument can be sustained.<sup>149</sup> While, at the domestic level, the question of whether Germany should have been granted immunity was more plausibly a procedural matter (to which the applicable law, therefore, was that which applied at the time the proceedings were brought), the same cannot be said of the dispute between Italy and Germany at the international level. Indeed, it 'trivializes the issue' to regard the question of whether Germany should have been granted immunity in respect of claims arising from the atrocities of World War II as an argument about procedure.<sup>150</sup> This conclusion, together with the arguments put forward by Germany, nevertheless highlight the fact that state immunity fits uneasily into either a substantive or procedural classification.

<sup>146</sup> *Jurisdictional Immunities*, *supra* note 1, paras 85, 91, 93, 102, Memorial of the Federal Republic of Germany, 12 June 2009. The International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc A/56/83, 10 August 2001, Art. 13, states that the compatibility of an act with international law is to be determined by reference to the law in force at the time when the act occurred.

<sup>147</sup> *Jurisdictional Immunities*, *supra* note 1, paras 92, 95, Memorial of the Federal Republic of Germany, 12 June 2009. In response, Italy argued in favour of a procedural classification in order to sustain the argument that the applicable rule was the restrictive doctrine of immunity developed since 1945 (paras 1.16, 4.44, Counter Memorial of Italy, 22 December 2009). Greece, however, argued that the distinction had 'no logical or still less, legal relevance' (para. 54, Written Statement of the Hellenic Republic, 3 August 2011). Bianchi makes a similar observation regarding the different classifications. Bianchi, *supra* note 7, at 460.

<sup>148</sup> *Jurisdictional Immunities*, *supra* note 1, para. 58.

<sup>149</sup> Albeit the Court was right to conclude that the applicable law was the law of state immunity as it applied at the time the proceedings were brought since the contested conduct was the refusal of immunity (which took place in 2004) rather than the events giving rise to the claims which happened during World War II.

<sup>150</sup> See similar remarks by Lord Bingham in *A. v. Secretary of State for the Home Department* (No. 2), [2005] UKHL 71, [2005] 3 WLR 1249, para. 51, challenging the view that questions regarding the admissibility of evidence obtained by torture was no more than 'an argument about the law of evidence'.

It is both. Thus, while at the international level, it determines the substantive relationship between sovereign states and the territorial reach of their adjudicative powers, at the domestic level, it operates principally as a procedural device. Even there, however, it is misleading to think of immunity as exclusively procedural in circumstances where it also defines the substantive right of the forum state to exercise its territorial jurisdiction.<sup>151</sup>

Domestic courts too explicitly and implicitly recognize the contradictions inherent in state immunity and the difficulties in attempting to define it as either procedural or substantive. Thus, the Supreme Court of Canada in *Kazemi v. Iran* observed that '[f]unctionally speaking, state immunity is a "procedural bar" which stops domestic courts from exercising jurisdiction over foreign states ... [while] ... [c]onceptually, ... state immunity remains one of the organizing principles between independent states'.<sup>152</sup> Meanwhile, as explained above, the House of Lords in *Jones v. Saudi Arabia* characterized state immunity as procedural for the purpose of rejecting the norm hierarchy argument put forward by the appellants, whilst eliding the distinction entirely when addressing its interaction with Article 6. Again, what is striking is not that the Court makes such apparently contradictory arguments in the same case but, rather, that by characterizing immunity differently for different purposes, it highlights its inherent complexity and the flaws in seeking to classify it in a binary way.

Courts and states should revisit their assumption that state immunity and *jus cogens* cannot conflict as they are entirely separate. Such characterizations overlook the composite nature of state immunity. However, they also fail to recognize that, in the broader context of individual rights adjudication beyond immunities, the relationship between procedure and substance is symbiotic rather than dichotomous. Positive procedural obligations read into international human rights treaties exemplify this. While such duties have been read into the 1969 American Convention on Human Rights,<sup>153</sup> the 1966 International Covenant on Civil and Political Rights,<sup>154</sup> the 1966 International Covenant on Economic, Social and Cultural Rights<sup>155</sup> as well as under the 1981 African Charter,<sup>156</sup> the jurisprudence of the ECtHR is the most developed. There, in

<sup>151</sup> Sumption, *supra* note 121, at 16–17. Akande and Shah argue that functional immunity also embodies both a substantive and a procedural dimension. Thus, it operates as a substantive limit on the liability of the state official (whose acts are attributable to the state) and as a procedural 'mechanism for diverting responsibility to the state'. Akande and Shah, *supra* note 135, 826–827 (footnotes omitted).

<sup>152</sup> *Kazemi*, *supra* note 133, paras 34–35.

<sup>153</sup> American Convention on Human Rights 1969, 1144 UNTS 123; IACtHR, *Velasquez Rodriguez v. Honduras*, Judgment, 29 July 1988, paras 166, 176–177; all IACtHR decisions are available online at [www.corteidh.or.cr/index.php/en/jurisprudencia](http://www.corteidh.or.cr/index.php/en/jurisprudencia). Shelton and Gould, 'Positive and Negative Obligations', in D. Shelton (ed.), *Oxford Handbook of International Human Rights Law* (2013) 563, at 573–574.

<sup>154</sup> 1966, 999 UNTS 171; United Nations Human Rights Committee (UNHRC), *General Comment no: 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15; Shelton and Gould, *supra* note 153, at 565–566.

<sup>155</sup> 1966, 993 UNTS 3; United Nations Committee on Economic, Social and Cultural Rights, *General Comment no: 3: The Nature of States Parties' Obligations*, Doc. E/1991/23, 14 December 1990, paras 1, 9; Shelton and Gould, *supra* note 153, at 565.

<sup>156</sup> 1986, UNTS 363, F. Viljoen, *International Human Rights Law in Africa* (2nd edn, 2012), at 216–217.

spite of what appears to be its substantive focus, some authors have argued that the ECHR has an overwhelmingly ‘procedural orientation’.<sup>157</sup> Positive procedural obligations, therefore, have been derived from almost all of its substantive provisions.<sup>158</sup> At one level, the rationale for what Jonas Christoffersen calls the ‘proceduralisation’<sup>159</sup> of substantive rights is undoubtedly instrumental.<sup>160</sup> The explicit justification for reading in such duties, therefore, is expressed in terms of the need to secure the ‘effectiveness’ of ECHR rights.<sup>161</sup> However, the instrumental role played by procedural duties in ensuring the effective implementation of substantive rights, whilst important, is only one dimension of the relationship between them. The investigative duty read into Article 2 of the ECHR clearly illustrates this. The ECtHR’s treatment of this procedural duty as ‘autonomous’<sup>162</sup> has exposed its substantive foundations.

A failure to conduct an effective investigation, therefore, can give rise to a violation of the procedural limb of Article 2, whether or not there is an actionable substantive claim.<sup>163</sup> Thus, in cases where the events giving rise to the Article 2 claim take place prior to a state’s ratification of the ECHR,<sup>164</sup> notwithstanding the fact that the limits of the Court’s temporal jurisdiction preclude consideration of the substantive allegations,<sup>165</sup> the Court has assumed jurisdiction over compliance with the investigative duty (albeit subject to certain limitations).<sup>166</sup> While, on the one hand, it has achieved this by construing a (somewhat artificial) temporal nexus between the death

<sup>157</sup> Strasser, ‘The Relationship between Substantive Rights and Procedural Rights Guaranteed by the European Convention on Human Rights’, in F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension: Studies in Honour of Gerard J. Wiarda* (1988) 595, at 596; F. Akandji-Kombe, *Human Rights Handbooks no. 7: Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (2007), at 58; see generally Christoffersen, *supra* note 9; Brems, ‘Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights’, in E. Brems and J. Gerard (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013) 137, at 137–140; G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (2013), at 174.

<sup>158</sup> See generally A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004); Brems, *supra* note 157, at 138, 143–144.

<sup>159</sup> Christoffersen, *supra* note 9, at 467.

<sup>160</sup> Brems, *supra* note 157, at 159.

<sup>161</sup> See, e.g., ECtHR, *McCann and Others v. United Kingdom*, Appl. no. 18984/91, Judgment of 27 September 1995, para. 161; ECtHR, *Kelly and Others v. United Kingdom*, Appl. no. 30054/96, Judgment of 4 August 2001, para. 94; Akandji-Kombe, *supra* note 157, at 5, 9. It is also tied to the notion of subsidiarity. See generally Christoffersen, *supra* note 9.

<sup>162</sup> ECtHR, *Silih v. Slovenia*, Appl. no. 71463/01, Judgment of 9 April 2009, para. 159; ECtHR, *Janowiec and Others v. Russia*, Appl. nos 55508/07 and 29520/09, Judgment of 21 October 2013, para. 14; Akandji-Kombe, *supra* note 157, at 9.

<sup>163</sup> Brems, *supra* note 157, at 141; see, e.g., *Kelly and Others*, *supra* note 161, paras 105–110; *Silih*, *supra* note 162, paras 158–159. It is also independent of the duty to provide a remedy (Art. 13 of the European Convention on Human Rights [ECHR]). Brems, *supra* note 157, at 155, suggesting it is about more than punishment and compensation.

<sup>164</sup> E.g., *Silih*, *supra* note 162; *Janowiec*, *supra* note 162.

<sup>165</sup> By operation of Art. 28 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331. See ECtHR, *Blecic v. Croatia*, Appl. no. 59532/00, Judgment of 8 March 2006, paras 45–48, 63–69.

<sup>166</sup> *Silih*, *supra* note 162, paras 162–163; *Janowiec*, *supra* note 162, paras 142, 146–147.

and the procedural failings,<sup>167</sup> it has also suggested that it may do so by appealing to the ‘underlying values of the Convention’.<sup>168</sup> This approach implies that the rationale for the procedural duty extends beyond the need to secure evidence or even to ensure accountability for substantive violations. The link between the substantive and the procedural is also evidenced by the fact that failing to conduct an adequate investigation can, in addition to breaching Article 2, also give rise to a substantive violation of Article 3 where this has caused significant suffering to the surviving relatives.<sup>169</sup> In each of these circumstances, the procedural duty to investigate may be understood to respond to the profound and perhaps universal human need to have the truth regarding the loss of life exposed and acknowledged.<sup>170</sup> The procedural duty may in this sense be seen as part of the nascent ‘right to the truth’, which conceives of truth as valued not simply because of the instrumental benefits it brings but also as a good in and of itself.<sup>171</sup>

Such investigations express a certain attitude towards the victims of alleged human rights abuses as well as towards their grieving relatives – namely, that each are human beings of inherent worth ‘whose dignity fundamentally matters’.<sup>172</sup> Thus, where there is a loss of life in suspicious circumstances or in situations that suggest a certain magnitude of crime has taken place,<sup>173</sup> conducting an investigation is integral to what

<sup>167</sup> *Silih*, *supra* note 162, paras 162–163, the ‘genuine connection’ test.

<sup>168</sup> *Ibid.*, para. 163 (emphasis added). See the ‘humanitarian clause’. *Janowic*, *supra* note 162, paras 30–35, Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller.

<sup>169</sup> See, e.g., ECtHR, *Taş v. Turkey*, Appl. no. 24396/94, Judgment of 14 November 2000, paras 68–72, 80 (the ‘indifference and callousness’ of the state authorities to the concerns raised by the individual’s father and the ‘acute anguish’ suffered as a result, gave rise to a violation of Art. 3); ECtHR, *Timurtas v. Turkey*, Appl. no. 23531/94, Judgment of 13 June 2000, paras 97–98 (the state’s ‘disregard’ of the deceased father’s concerns and the suffering this caused amounted to inhuman treatment); ECtHR, *Kurt v. Turkey*, Appl. no. 15/1997/799/1002, Judgment of 25 May 1998, paras 130–134; Akandji-Kombe, *supra* note 157, at 17; UNHRC, *Quinteros v. Uruguay*, Judgment of 21 July 1983, para. 14; IACtHR, *Blake v. Guatemala*, *Chapman Blake v. Guatemala*, Judgment (Preliminary Objections), 2 July 1996. Credible claims that an individual has suffered ill-treatment in breach of Art. 3 of the ECHR also gives rise to a duty to investigate. A. Reidy, *A Guide to the Implementation of Article 3 of the European Convention on Human Rights: Human Rights Handbooks*, No. 6 (2003), at 36, 39; Mowbray, *supra* note 158, at 59–65, and a failure to do so can amount to a procedural violation of Art. 3 or a substantive violation to the extent that it causes acute suffering to those seeking a remedy.

<sup>170</sup> P. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2002), at 24–25. The procedural duty may in this sense be seen as part of the nascent ‘right to the truth’, which conceives of truth as valued not simply because of the instrumental benefits it brings but also as a good in and of itself. See Antkowiak, ‘Truth as Right and Remedy in International Human Rights Experience’, 23 *MJJL* (2001) 977, at 1012; M. Lynch, *True to Life: Why Truth Matters* (2004), at 15–20.

<sup>171</sup> The emerging trend in international law towards recognizing such a right is exemplified by the growing number of Truth and Reconciliation Commissions in, for example, Chile, Guatemala, El Salvador and South Africa, to name only some. Groome, ‘The Right to Truth in the Fight against Impunity’, 29 *Berkeley Journal of International Law* (2011) 175, at 175; Hayner, *supra* note 170, at 9. Evidence of it can also be found in the case law of the Inter-American Court of Human Rights. *Velasquez Rodriguez*, *supra* note 153; IACtHR, *Ellacuria v. El Salvador*, Decision, 22 December 1999, para. 221 as well as the UNHRC (albeit with some equivocation). *Quinteros*, *supra* note 169, para. 14.

<sup>172</sup> R. Dworkin, *Justice for Hedgehogs* (2011), at 335.

<sup>173</sup> *Janowic*, *supra* note 162, para. 150.

it means to treat the individuals affected as if their life is valued (whether or not, in the final analysis, that life was taken lawfully or unlawfully).<sup>174</sup> It is the ‘vehicle for the vindication of the personhood of the victim’.<sup>175</sup> As such, it forms part of the substance of the right to life without which that right is not fully articulated<sup>176</sup> exposing the way in which procedure and substance are intimately bound together where the physical integrity of the person is at stake. Similar trends are evident in the context of Article 8. In several cases involving the removal of children from their parents, procedural challenges have successfully been brought within the scope of this provision, in spite of the fact that it ‘contains no explicit procedural requirements’.<sup>177</sup> The justification for doing so is that ‘effective respect’ for family life demands that parents’ views are heard.<sup>178</sup> The Court has reasoned that the absence of a procedural obligation in Article 8 is ‘not conclusive of the matter’.<sup>179</sup> Recognizing the link between procedural issues and the substance of the decision, the Court has concluded that it is ‘entitled’ to review the state’s procedures in order to ensure that they afford ‘due respect to the interests protected by Article 8’.<sup>180</sup>

The Court’s development of positive procedural duties has also led to an expansion of the substantive right to receive information in Article 10 of the ECHR, which the Court has consistently held only guarantees the (negative) right to receive information that others are prepared to disclose.<sup>181</sup> Thus, in *Guerra v. Italy*, the state’s refusal to disclose information concerning the risks posed to those living close to a hazardous chemical plant was held not to breach Article 10. However, the Court went on to re-characterize the claim as a procedural violation of Article 8. It did so on the basis that the denial of information undermined individuals’ ability to make a meaningful choice regarding an important decision in their life – a key aspect of their autonomy.<sup>182</sup> By articulating these positive procedural duties of disclosure in the context of Article 8, the Court amplified the substantive scope of the right to information beyond the textual limits of Article 10 in order to fill a gap in the protection offered by this provision,<sup>183</sup> drawing on the value of autonomy as a defining feature of the right to

<sup>174</sup> To be treated with ‘equal concern and respect’. Dworkin, *supra* note 172, at 330; J. Griffin, *On Human Rights* (2013), at 219.

<sup>175</sup> Terry, ‘Taking Filártiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction over Actions Involving Torture Committed Abroad’, in C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), at 113.

<sup>176</sup> See similar arguments by Alexander, *supra* note 38, at 19, regarding procedural rights generally.

<sup>177</sup> ECtHR, *B. v. United Kingdom*, Appl. no. 9840/82, Judgment of 8 July 1987, para. 63; Akandji-Kombe, *supra* note 157, at 44.

<sup>178</sup> ECtHR, *H. v. United Kingdom*, Appl. no. 9580/81, Judgment of 8 July 1987, para. 90.

<sup>179</sup> ECtHR, *W. v. United Kingdom*, Appl. no. 9749/82, Judgment of 8 July 1987, para. 62.

<sup>180</sup> *Ibid.*, paras 66–70; ECtHR, *McMichael v. United Kingdom*, Appl. no. 16424/90, Judgment of 24 February 1995, paras 92–93.

<sup>181</sup> See, e.g., ECtHR, *Leander v. Sweden*, Appl. no. 9248/81, Judgment of 26 March 1987, para. 74; Shelton and Gould, *supra* note 153, at 572.

<sup>182</sup> ECtHR, *Guerra and Others v. Italy*, Appl. nos 116/1996/735/932, Judgment of 19 February 1998, para. 53; see also ECtHR, *McGinley and Egan v. United Kingdom*, Appl. nos 21825/93 and 23414/94, Judgment of 28 January 2000.

<sup>183</sup> Shelton and Gould, *supra* note 153, at 572.

private and family life to do so.<sup>184</sup> This procedural augmentation of substantive rights further exposes the dynamic interaction between the substantive and the procedural in the human rights context and the folly in treating them as distinct.<sup>185</sup>

### 3 Conclusion

Litigants and courts continue to rely on the rudimentary distinction between substantive and procedural rules in order to navigate the relationship between state immunity and individual rights. This article has sought to expose the difficulties with this approach in principle and the problems it gives rise to in practice. It is clear from the above that while the labels procedural and substantive may describe something interesting about the structure of the law, they tell us little about its nature. They invite disingenuous arguments and allow the challenging questions of substance that confront the international community to be sidestepped.<sup>186</sup> The uncompromising nature of the distinction is predicated on a false premise – namely, that procedural rules are merely ancillary to substantive one. This description, however, ignores the fact that procedural rules are more than simply the means by which substantive norms are realized and vindicated; they have their own normative underpinnings. Failing to recognize the kinship between substance and procedure also fails to situate state immunity in the wider context of human rights jurisprudence where their co-dependence is acknowledged. Litigants and courts should abandon their reliance on the distinction between substantive and procedural rules as a means of mediating the interactions between state immunity and access to justice and *jus cogens* norms. Doing so will bring greater clarity and integrity to the case law, which will, in turn, facilitate a more intellectually honest debate about how to accommodate the competing values of the international community.

<sup>184</sup> Note, however, a shift in the approach to the right to receive information. See McDonagh, 'The Right to Information in International Human Rights Law', 13 *HRLR* (2013) 25, at 36–37 as examples.

<sup>185</sup> Shelton and Gould, *supra* note 153, at 572; McDonagh, *supra* note 184, at 25, 40–41.

<sup>186</sup> Bianchi, *supra* note 7, at 461–462.