
Shaping Legislative Processes from Strasbourg

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Abstract

The European Court of Human Rights (ECtHR) can review the quality of a legislative process. This article calls such review ‘active subsidiarity’ and investigates empirically when and how such subsidiarity shapes legislative processes by tracing implementation of the Court’s decision in one case: Lindheim and Others v. Norway. How did the ECtHR’s criticism of the absence of a balancing exercise shape the corrective legislative process? The article shows that the ECtHR’s reasoning caused the legislative process to include a visible balancing exercise, but that this did not enhance the democratic quality of the parliament’s work on the rights issues. The article analyses these findings from the perspective of the variety of legislative circumstances that come before the ECtHR. It is difficult to anticipate how active subsidiarity will affect legislative processes as a general matter but certain contexts, such as those of minority governments, may be more conducive to democracy enhancing effects. This has implications for how the ECtHR should formulate active subsidiarity.

1 Introduction

The European Court of Human Rights’ (ECtHR or ‘the Court’) role as a facilitator of national protection of human rights is changing, argues Judge Spano.¹ Initially, the Court focused on the substantive embedding of the European Convention on Human Rights (ECHR or ‘the Convention’) in member states. This was through giving meaning to Convention-based rights and obligations.² Recently, the Court entered the ‘age of

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¹ Spano, ‘The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law’, 18 *Human Rights Law Review (HRLR)* (2018) 473; Judge Spano was elected President of the ECtHR in April 2020; he was Vice-President from May 2019.

² *Ibid.*, at 475. See also Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (hereinafter ‘ECHR’).

subsidiarity’, in which its focus is on ‘procedural embedding’.³ By checking the quality of domestic processes, the Court incentivizes domestic institutions to make use of its human rights tools and to become more active in the ECHR system.⁴ This practice extends to legislators.⁵ Judge Spano argues that it will enhance the democratic quality of domestic rights-based practice.⁶ It will motivate fulfilment of the ‘human rights-oriented role of national parliaments in defining the domestic scale of rights protections subject to European supervision’,⁷ engendering ‘democratic debate where reasonable minds may differ on the scope and content of the proposed policy’.⁸ Scholars have addressed the desirability of similar arguments from various perspectives.⁹ Yet the issue remains under examined from an empirical perspective.¹⁰

This article calls the ECtHR’s practice of checking the quality of domestic processes ‘active subsidiarity’ and investigates empirically when and how such subsidiarity shapes legislative processes by tracing implementation of the Court’s decision in one case: *Lindheim and Others v. Norway*.¹¹ In this Article 1 Protocol 1 case, concerning long-term ground-lease agreements, the Court found a violation in part because there was no evidence from the legislative process of an assessment of whether the target provision ‘achieved a “fair balance” between the interests of the lessors and those of the lessees’.¹² How did the ECtHR’s criticism of the absence of a balancing exercise

³ Spano, *supra* note 1, at 485 (developing arguments from Spano, ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’, 14 *HRLR* (2014) 487; drawing on Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’, 19 *European Journal of International Law (EJIL)* (2008) 125). See also Copenhagen Declaration, adopted at the High Level Conference in Copenhagen, 12–13 April 2018, para. 28(c), available at https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf.

⁴ Spano, *supra* note 1, at 488.

⁵ Recent examples include: ECtHR, *Correia de Matos v Portugal*, Appl. no. 56402/12, Judgment of 4 April 2018, paras. 129, 145; ECtHR, *Belcemi and Oussar v. Belgium*, Appl. no. 37798/13, Judgment of 11 July 2017, para. 54; ECtHR, *Dakir v. Belgium*, Appl. no. 4619/12, Judgment of 11 July 2017, para. 57; ECtHR, *Bayev and Others v. Russia*, Appl. no. 67667/09, Judgment of 20 June 2017, para. 63; ECtHR, *Parrillo v. Italy*, Appl. no. 46470/11, Judgment of 27 August 2015, para. 185. For earlier cases, see Saul, ‘The ECtHR’s Margin of Appreciation and the Processes of National Parliaments’, 15 *HRLR* (2015) 745. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

⁶ Spano, *supra* note 1, at 489.

⁷ *Ibid.*, at 490.

⁸ *Ibid.*, at 491.

⁹ See Follesdal, ‘Appreciating the Margin of Appreciation’, in A. Etinson (ed.), *Human Rights: Moral or Political?* (2018) 269, at 273; Kleinlein, ‘Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control’, 28 *EJIL* (2017) 871, at 889; A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (2016), at 143; Lazarus and Simonsen, ‘Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference’, in M. Hunt, H. J. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2015) 385, at 393, 401.

¹⁰ Popelier, ‘Evidence-Based Lawmaking: Influences, Obstacles and the Role of the European Court of Human Rights’, in J. H. Gerards and E. Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 79, at 90; on the general need for empirical study of the global practice of proportionality testing, see Dixon, ‘Proportionality & Comparative Constitutional Law Versus Studies’, 12 *Law & Ethics of Human Rights* (2018) 203.

¹¹ ECtHR, *Lindheim and Others v. Norway*, Appl. nos. 13221/08 and 2139/10, Judgment of 12 June 2012.

¹² *Ibid.*, para. 128.

shape the corrective legislative process? By closely studying whether and how the ECtHR's criticism of the absence of balancing was relevant at key stages in the production of the corrective legislation, this article identifies evidence of active subsidiarity's impact and examines the roles and motives of the actors involved. The article also analyses the case study's findings from the perspective of the variety of legislative circumstances that come before the ECtHR.¹³ This analysis starts to build a general theory of when and how active subsidiarity works, and identifies implications for the ECtHR's practice.

In cases such as *Lindheim*, where active subsidiarity-based reasoning leads the ECtHR to find a violation of the ECHR, the state's response is part of its compliance with the judgment. The literature on compliance with judgments of the ECtHR shows considerable variation in whether, to what extent and the time it takes for states to comply. This variation is explained by factors such as differences in the ways judgments are formulated,¹⁴ in the political contexts in which they are received¹⁵ and in the design features of domestic institutions.¹⁶ Moreover, how a state responds to a judgment is often channelled through multi-faceted domestic political processes, comprising 'a number of actors with diverse capacities, interests and attitudes towards human rights in general'.¹⁷ These insights suggest that active subsidiarity will not produce the same type or level of effects across all Council of Europe states.

How the ECtHR's main compliance partners within states – executives, courts and parliaments¹⁸ – respond to its judgments rests on a combination of the logics of constructivism and rational choice.¹⁹ The logic of constructivism is the pursuit of appropriate action within a normative setting (ideas/appropriateness).²⁰ Rational choice logic is a calculation about the consequences of an action for an actor's interests in a broad sense, including other-regarding interests (interests/consequences).²¹ These logics provide a basis for evaluating domestic circumstances to anticipate the

¹³ Note '[I] legislative changes are needed in about a quarter of all implementation processes following ECtHR judgments': Stiansen 'Delayed But Not Derailed: Legislative Compliance with European Court of Human Rights Judgments', 23 *International Journal of Human Rights* (2019) 1221, at 1222.

¹⁴ Stiansen, 'Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments', *British Journal of Political Science (BJPS)* (2019) 1.

¹⁵ See Grewal and Voeten, 'Are New Democracies Better Human Rights Compliers?', 69 *International Organization* (2015) 497, at 514.

¹⁶ Anagnostou and Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', 25 *EJIL* (2014) 205, at 224; Stiansen, *supra* note 13, at 1241.

¹⁷ Kosař and Petrov, 'Determinants of Compliance Difficulties among "Good Compliers": Implementation of International Human Rights Rulings in the Czech Republic', 29 *EJIL* (2018) 397, at 403; C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals* (2014), at 23, 136.

¹⁸ See K. J. Alter, *The New Terrain of International Law (Courts, Politics, Rights)* (2014), at 53–54.

¹⁹ A. Von Staden, *Strategies of Compliance with the European Court of Human Rights* (2018), at 205–206; Kosař and Petrov, *supra* note 17, at 403; Stubbins Bates, 'Sophisticated Constructivism in Human Rights Compliance Theory', 25 *EJIL* (2014) 1169, at 1176.

²⁰ Schmidt, 'Taking Ideas and Discourse Seriously: Explaining Change through Discursive Institutionalism as the Fourth "New Institutionalism"', 2 *European Political Science Review* (2010) 1, at 3.

²¹ *Ibid.*, at 2.

likelihood and extent of compliance with an ECtHR judgment,²² including active subsidiarity components. However, as active subsidiarity addresses changes in institutional process rather than the achievement of substantive outcomes, there may be additional logics shaping the response of domestic actors.²³ In particular, historical institutionalist theory emphasizes that institutional practices often persist, even when it would be rational to change them, and is alert to path dependency – self-reinforcing processes that are difficult to dislodge.²⁴ The study of when and how active subsidiarity works is thus a particular branch in the general debate on compliance with ECtHR judgments.

This article focuses on *Lindheim v. Norway* as a likely case for active subsidiarity to generate impact in accordance with the democracy-enhancing thesis. Studying a likely case increases the prospects that probing the evidence will uncover active subsidiarity-based updating of the legislative process.²⁵ The choice of *Lindheim* as a likely case is based on two hunches about contextual conditions that will be conducive to active subsidiarity generating democracy-enhancing effects.²⁶ First, Norway consistently complies with the ECtHR's judgments, regardless of how they relate to the domestic circumstances. This is a reason to expect that the state will take notice of and respond in good faith to signals from the ECtHR for updating of the legislative process.²⁷ Secondly, Norway is a model example of the centripetal political system.²⁸ This label is due to the following features: unitarism, parliamentarism and a closed list proportional representation voting system. This combination of political institutions leads to strong party government, conflict mediation and policy coordination, which channel good process and inter-branch cooperation.²⁹ Such conditions should facilitate the executive and parliament working together to improve the quality of engagement on rights issues in the legislative process.

²² Kosař and Petrov, *supra* note 17, at 424.

²³ On debates surrounding the logics of institutional change, see Bell, 'Do We Really Need a New "Constructivist Institutionalism" to Explain Institutional Change?', 41 *BJPS* (2011) 883.

²⁴ See *ibid.*, at 890–891. On path dependency, see Mahoney and Falleti, 'The Comparative Sequential Method', in J. Mahoney and K. A. Thelen (eds), *Advances in Comparative Historical Analysis* (2015) 211, at 220.

²⁵ See Krommendijk, 'The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies: The Case of the UN Human Rights Treaty Bodies', 10 *Review of International Organisations* (2015) 489, at 496.

²⁶ On hunches as a means of structuring process tracing directed at theory building, see D. Beach and R. B. Pedersen, *Process-Tracing Methods* (2019), at 268.

²⁷ See Krommendijk, *supra* note 25, at 494; on the general standing of the ECHR and ECtHR in Norway, see A. Kierulf, *Judicial Review in Norway* (2018), at 139–164.

²⁸ J. Gerring and S. C. Thacker, *A Centripetal Theory of Democratic Governance* (2008), at 16. Sweden and Denmark are also strong examples of this model; Norway's political system also scores well on Lijphart's model of consensus democracy, which promotes representative qualities of democratic governance, A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (2012), at 246, 295–296.

²⁹ Gerring and Thacker, *supra* note 28, at 16, 19; see also R. K. Weaver and B. A. Rockman, *Do Institutions Matter? Government Capabilities in the United States and Abroad* (1993), at 19–30.

The article proceeds as follows. Section 2 introduces the ECtHR's practice of active subsidiarity and considers how it relates to democratic theory. Section 3 provides the details of the *Lindheim* case and identifies the elements of the ECtHR's reasoning that serve as signals targeting the shape of the corrective legislative process. Section 4 traces the implementation of *Lindheim* from reception by the Ministry of Justice (MoJ) to passing of new legislation by the parliament. Section 5 assesses the impact of the active subsidiarity component in *Lindheim* with a focus on the type of impact and its explanation. Section 6 considers the study's findings in the light of how legislative processes vary across Europe and theorizes more broadly about when and how active subsidiarity works. Section 7 examines implications for how the ECtHR formulates active subsidiarity.

The article shows that the ECtHR's reasoning in *Lindheim* caused the corrective legislative process to include a visible balancing exercise, but that this did not enhance the democratic quality of the parliament's work on the rights issues. The comparative analysis explains why it is difficult to anticipate the type of effects that active subsidiarity will produce as a general matter, but also why certain legislative contexts, such as those of minority governments, may be more conducive to democracy enhancing effects than others. The ECtHR should seek formulations of active subsidiarity that nudge democracy enhancing updates to legislative processes when the conditions are conducive, but that avoid the potential for negative consequences, such as resistance against the ECtHR, at other times.

2 Active Subsidiarity and Democracy

The ECtHR is subsidiary to national mechanisms for the protection of rights and fundamental freedoms. The ECtHR uses the principle of subsidiarity as a reference point for determining when it should exercise more or less restraint in its practices, including the strength of its review and the specification of remedies.³⁰ The core meaning of subsidiarity is theorized as a: 'rebuttable presumption for the local. Local authorities should enjoy as much authority as possible, so long as it is consistent with achieving the particular, normatively permitted or required objectives of the relevant IC [international court]'.³¹ Key considerations that the ECtHR weighs in favour of deference to the domestic level on certain issues include democracy, expertise and the policy environment.³² The ECtHR will often assume that the domestic level has these qualities.³³

³⁰ See Besson, 'Subsidiarity in International Human Rights Law: What Is Subsidiary about Human Rights?', 61 *American Journal of Jurisprudence* (2016) 69, at 78–79.

³¹ Follesdal, 'Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights – or Neither?', 79 *Law & Contemporary Problems* (2016) 147, at 148–149.

³² ECtHR, *S.A.S. v. France*, Appl. No. 43835/11, Judgment of 1 July 2014, para. 129; see also Besson, *supra* note 30, at 95–96.

³³ See Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 17 *European Law Journal* (2011) 80, at 87; Besson, *supra* note 30, at 92.

On other occasions, the ECtHR checks to determine whether and how these qualities are present in the circumstances of the case before it.³⁴

The ECtHR is not always exact on the role that the quality of domestic process plays in its reasoning.³⁵ It appears as part of the explanation for the margin of appreciation, in the sense of the level of deference shown to the respondent state.³⁶ It also appears as a factor that the Court weighs in its assessment of the justifiability of an interference with a right.³⁷ This article proceeds on the basis that whenever the Court makes the quality of a domestic process a factor in its reasoning, the Court offers an incentive for institutions at the domestic level to update their processes.³⁸ This article refers to this practice as ‘active subsidiarity’. The term captures that the Court’s assessment has the potential to make domestic institutions more active in the fulfilment of the objectives of the ECtHR system.³⁹

The Court’s practice of active subsidiarity addresses the processes of national courts, executives and legislators.⁴⁰ Judges at the Court have set out positions on the validity of the practice.⁴¹ The scholarly debate also encompasses a range of positions.⁴²

³⁴ See Arnardóttir, ‘The “Procedural Turn” under the European Convention on Human Rights and Presumptions of Convention Compliance’, 15 *International Journal of Constitutional Law (IJCL)* (2017) 9, at 11; Popelier, ‘The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights’, in P. Popelier *et al.* (eds), *The Role of Constitutional Courts in Multilevel Governance* (2012) 249, at 259–265.

³⁵ See Brems, ‘Positive Subsidiarity and Its Implications for the Margin of Appreciation Doctrine’, 37 *Netherlands Quarterly of Human Rights* (2019) 202, at 222; Saul, ‘Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights’, 20 *The International Journal of Human Rights* (2016) 1077; on contrasting scholarly theories, see Arnardóttir, *supra* note 34, at 10.

³⁶ Saul, *supra* note 5, at 753–759.

³⁷ *Ibid.* For a general overview of the ways in which domestic procedure is relevant at the ECtHR, see Gerards, ‘Procedural Review by the ECtHR: A Typology’, in Gerards and Brems (eds), *supra* note 10, at 127; Kleinlein, ‘The Procedural Approach of The European Court of Human Rights: Between Subsidiarity And Dynamic Evolution’, 68 *International & Comparative Law Quarterly (ICLQ)* (2019) 91, at 92–95; on domestic procedures in the rights jurisprudence of other courts, see Bar-Siman-Tov, ‘Semiprocedural Judicial Review’, 6 *Legisprudence* (2012) 271; more generally, S. Rose-Ackerman, S. Egidy and J. Fowkes, *Due Process of Lawmaking* (2015).

³⁸ Spano, *supra* note 1, at 488; Kavanagh, ‘Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory’, 34 *Oxford Journal of Legal Studies* (2014) 443, at 466; Gerards, *supra* note 33, at 118.

³⁹ The language of positive subsidiarity may also be used, see Huijbers, ‘The European Court of Human Rights’ Procedural Approach in the Age of Subsidiarity’, 6 *Cambridge International Law Journal* (2017) 177, at 186; also Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’, 97 *American Journal of International Law (AJIL)* (2003) 38, at 44 and 76. The term ‘active subsidiarity’ is also preferred in this article in order to avoid confusion with the discussion of positive and negative inferences below.

⁴⁰ See Gerards, *supra* note 37; Arnardóttir, *supra* note 34; Popelier, *supra* note 34.

⁴¹ Cf. Pinto De Albuquerque, ‘3 Steps to Save the European Court of Human Rights’, Middlesex University London (16 January 2018), available at <https://mdxminds.com/2018/01/16/how-to-save-the-european-court-of-human-rights-in-3-steps/>; Nussberger, ‘Procedural Review by the ECHR: View from the Court’, in Gerards and Brems (eds), *supra* note 10, at 161; Spielmann, ‘Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’, 14 *Cambridge Yearbook of European Legal Studies* (2012) 381, at 411.

⁴² On concerns related to the effectiveness of rights protection, see Kleinlein, *supra* note 37, at 99–104; on valuing domestic process as a means to appease states and on problems of expertise, see Popelier and

Active subsidiarity is most controversial in relation to legislatures.⁴³ Certain judges query the strength of the justification for the Court assessing legislative processes.⁴⁴ Proponents point to a doctrinal basis in the explicit and implicit endorsement of the importance of democracy for the ECHR system.⁴⁵ They indicate that the assessment is limited to the circumstances of the particular case, not the political system as a whole.⁴⁶ They also raise the prospect of a virtuous circle, whereby domestic actors receive incentives to work harder in the rights field.⁴⁷ This is often in the context of the debate on how the level and quality of the contribution of parliaments to the ECHR system may be improved.⁴⁸ Which components of legislative processes may active subsidiarity enhance?

A Shaping Legislative Processes

Judge Spano portrays active subsidiarity as democracy-enhancing in that it will foster ‘considered democratic debate where reasonable minds may differ on the scope and content of the proposed policy’.⁴⁹ This is in line with a representative model of democracy: ‘party government in which political parties represent – i.e., respond to people’s preferences – and govern’ and civil liberties are guaranteed to enable competition amongst the parties and alternative sources of information.⁵⁰ The ECtHR has been at the forefront in the promotion of this model, through its work on the

Van de Heyning, ‘Subsidiarity Post Brighton: Procedural Rationality as Answer?’, 30 *Leiden Journal of International Law* (2017) 5, at 21–22; on the view that the level of trust the ECtHR has in the state determines the role it affords domestic process, see Çali, ‘Coping With Crisis: Whither The Variable Geometry in the Jurisprudence of the European Court of Human Rights’, *Wisconsin International Law Journal* (2018) 237, at 261, 275.

⁴³ See Nussberger, *supra* note 41, at 169; for contrasting scholarly perspectives, compare Kleinlein, *supra* note 9 (emphasizing benefits for the quality of democratic dialogues on rights); Cumper and Lewis, ‘Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights’, 68 *ICLQ* (2019) 611, at 627–637 (highlighting problems of legal certainty and the risks for vulnerable minority groups).

⁴⁴ See ECtHR, *Hirst v. UK (no. 2)*, Appl. no. 74025/01, Judgment of 6 October 2005, para. 7 (Wildhaber, Costa, Lorenzen, Kovler and Jebens, JJ., dissenting). See also *ibid.*, Tulkens and Zagrebelsky, JJ. concurring. See also Rose-Ackerman, Egidy and Fowkes, *supra* note 37, at 4 (noting institutional context as a factor that affects the perception of different types of judicial review as more or less intrusive); Popelier, ‘The Role of Courts in Legislative Policy Diffusion and Divergence’, 3 *Theory and Practice of Legislation* (2016) 315, at 327–331 (identifying the benefits of procedural review relative to substantive review).

⁴⁵ Spano, *supra* note 1, at 490.

⁴⁶ *Ibid.*, at 491; see also Saul, *supra* note 5, at 771.

⁴⁷ Spano, *supra* note 1, 489; Kleinlein, *supra* note 9, at 873; Follesdal, ‘Tracking Justice Democratically’, 31 *Social Epistemology* (2017) 324, at 332.

⁴⁸ See Donald and Leach, *supra* note 9; Saul, ‘Conclusion: How Does, Could and Should the International Human Rights Judiciary Interact with National Parliaments?’, in M. Saul, A. Follesdal and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (2017) 353.

⁴⁹ Spano, *supra* note 1, at 491.

⁵⁰ Caramani, ‘Will vs. Reason: The Populist and Technocratic Forms of Political Representation and Their Critique to Party Government’, 111 *American Political Science Review* (2017) 54, at 54, 64.

substantive meaning of rights in the ECHR, such as the right to freedom of expression.⁵¹ Amplifying the representative model in the application of rights during legislative processes may include a stronger effort to identify the concerns and interests of affected groups. It may also allow for space for well-reasoned deliberations to generate new ways of resolving complex issues.⁵²

In political theory, a technocratic model of democracy, ‘stressing the prominence of expertise in the identification and implementation of objective solutions to societal problems’,⁵³ is discussed as both a challenge and as a supplement to a traditional model of representative democracy.⁵⁴ The general operation of the ECtHR may encourage decision-making to move away from elected representatives to appointed experts. One way is the need for experts to apply the ECtHR’s extensive body of case law in the law-making process.⁵⁵ Amplifying a technocratic approach to rights issues in the production of legislation may lead to a sharper focus on the details of the rights issues. It may also facilitate the fine-tuning of possible solutions to maximize accommodation of complexities.⁵⁶

Active subsidiarity in the reasoning of the ECtHR might nudge legislative processes to be both more representative and technocratic in nature. For instance, better-quality background reports on rights issues from the executive may stimulate a wider range of better-informed parliamentarians to engage in a legislative process.⁵⁷ What does the way the ECtHR uses and specifies active subsidiarity indicate about its potential to be democracy enhancing?

B Active Subsidiarity: Positive and Negative Inferences

The cases in which the ECtHR has addressed the quality of a legislative process are commonly concerned with rights limitations of a general nature.⁵⁸ The ECtHR’s approach to evaluating the quality of a legislative process varies depending on whether positive or negative inferences are drawn.⁵⁹ For positive inferences, the reader of a judgment must often work to discover the elements of the process that have been valued. A particularly instructive case is *Animal Defenders International v. UK*, which

⁵¹ Franck, ‘The Emerging Right to Democratic Governance’, 86 *AJIL* (1992) 46, at 66; Mowbray, ‘Contemporary Aspects of the Promotion of Democracy by the European Court of Human Rights’, 20 *European Public Law* (2014) 469.

⁵² See G. Webber *et al.*, *Legislated Rights: Securing Human Rights through Legislation* (2017), at 93–99; Lazarus and Simonsen, *supra* note 9, at 394–401.

⁵³ Caramani, *supra* note 50, at 55.

⁵⁴ See Follesdal, *supra* note 47, at 330–331.

⁵⁵ Donald, ‘Parliaments as Compliance Partners in the European Convention on Human Rights System’, in Saul, Follesdal and Ulfstein (eds), *supra* note 48, at 75, 83.

⁵⁶ See Christensen and Holst, ‘Advisory Commissions, Academic Expertise and Democratic Legitimacy: The Case of Norway’, 44 *Science and Policy* (2017) 821, at 830.

⁵⁷ See Roach, ‘The Varied Roles of Courts and Legislatures in Rights Protection’, in Hunt, Hooper and Yowell (eds), *supra* note 9, at 405, 416.

⁵⁸ Saul, *supra* note 5, at 753.

⁵⁹ On the theory surrounding the consequences that should follow for the ECtHR’s reasoning from positive and negative inferences respectively, see Arnardóttir, *supra* note 34, at 15.

concerned the United Kingdom's prohibition on political advertising on television and on radio by the 2003 Communications Act.⁶⁰ The ECtHR valued the representative qualities of the legislative process, such as the number of bodies involved (both within and outside of parliament), and the breadth of issues covered. It also valued technocratic qualities of the legislative process, such as the consultation with experts and the analysis of the relevant case law of the ECtHR.⁶¹ A case with a positive inference and a finding of non-violation may feed into future domestic practice by, for example, a parliamentary human rights committee reminding parliamentarians of the benefits that have accrued previously.⁶² The diffuse nature of this impact will make it harder to identify and to measure.⁶³

In contrast, when a negative inference is drawn and the ECtHR finds a violation, it is easier to know where to look for evidence of the Court's impact on legislative process. To assess the impact of the ECtHR's reasoning, the focus is on the stages and actors involved in changing domestic law to secure compliance with the judgment. The methodological benefits are central to why this article's empirical study of active subsidiarity focuses on the negative inference approach.⁶⁴

The Court tends to use open-ended language when drawing negative inferences, such as '[no] attempt was made to weigh the competing interests or to assess the proportionality [of the measure]'.⁶⁵ This language matches that which the Court uses to introduce its own assessments. However, the structure of the Court's own reasoning can vary considerably from case to case without clear explanation.⁶⁶ It is not often that the ECtHR follows and thoroughly examines each of the four steps of the proportionality test discussed in legal theory.⁶⁷ The Court's reasoning most often concentrates on

⁶⁰ ECtHR, *Animal Defenders International v. United Kingdom*, Appl. no. 48876/08, Judgment of 22 April 2013.

⁶¹ *Ibid.*, para. 114; in recent case law which cites *Animal Defenders*, the ECtHR has not been so thorough in its assessment of the legislative process, see ECtHR, *Correia de Matos v. Portugal*, Appl. no. 56402/12, Judgment of 4 April 2018, para. 42 (Pinto De Albuquerque, J., dissenting; Sajó, J., dissenting).

⁶² See Joint Committee on Human Rights (JCHR), Protocol 15 to the European Convention on Human Rights, Fourth Report, 2014–15, HL Paper 71, HC 837 (2014), para. 3.18, available at www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/71/71.pdf; see also Amos 'The Value of the European Court of Human Rights to the United Kingdom', 28 *EJIL* (2017) 763, at 777.

⁶³ See Hall, 'Judicial Impact', in L. Epstein and S. A. Lindquist (eds), *The Oxford Handbook of US Judicial Behaviour* (2017) 460, at 470.

⁶⁴ On the importance of also studying the impact of cases with positive inferences as part of the broader study of the rationalization of law-making, see Popelier, *supra* note 44, at 324, 331.

⁶⁵ ECtHR, *Anchugov and Gladkov v. Russia*, Appl. nos. 11157/04 and 15162/05, Judgment of 4 July 2013, para. 109; see also Cumper and Lewis, *supra* note 43, at 619–620.

⁶⁶ See J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009), at 71, 73 and 225; Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', 11 *IJCL* (2013) 466, at 469–470. But see M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (2012), at 9.

⁶⁷ See Rivers, 'The Presumption of Proportionality', 77 *Modern Law Review* (2014) 409, at 412. The language of proportionality and balancing is central in the practice of many constitutional courts, but there can be variation in formulations (K. Moller, *Global Model of Constitutional Rights* (2012), at 13), as well as variations across courts as to which stage of the proportionality test cases are likely to be decided (N. Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (2017), at 81, 83); and variation in how well established proportionality analysis is as part of a legal system (Starzhenetsky, 'Property Rights in Russia: Reconsidering the Socialist Legal Tradition', in L. Mälksoo and W. Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (2017) 295, at 323).

the final balancing stage, proportionality in the strict sense, which is often depicted as a cost-benefit analysis.⁶⁸ It is about determining whether a reasonable balance has been ‘achieved among the interests served by the measure and the interests that are harmed by introducing it’.⁶⁹ The details for the substance of the balancing exercise come from the facts of the case and the surrounding context and the normative environment of the Convention.⁷⁰ The Court has considerable discretion as to the considerations that it will deem useful in its evaluation.⁷¹ This suggests that states also have discretion in how they give meaning to the notion of balancing in the legislative context.⁷²

Signals from the ECtHR for a corrective legislative process to include balancing may lead the legislative process to be more like the ECtHR’s own process.⁷³ This may include a move to a structured assessment of the costs and benefits of alternative legislative options for the general and individual interests concerned.⁷⁴ Alternatively, domestic compliance partners may interpret the Court as open to accept a broader concept of balancing, one that encompasses the features of legislative processes that enhance their representative quality;⁷⁵ in particular, participation of a broad range of representative voices in well-reasoned, wide-ranging deliberations about how to proceed.⁷⁶ Domestic actors may also seek, in bad faith, to satisfy the Court with a symbolic balancing exercise, which disguises the real basis for the decision taken.⁷⁷

⁶⁸ Rivers, *supra* note 67; Petersen, *supra* note 67, at 73.

⁶⁹ Gerards, *supra* note 66, at 468.

⁷⁰ See Mowbray, ‘A Study of the Principle of Fair Balance’, 10 *HRLR* (2010) 289, at 312.

⁷¹ Klatt and Meister, *supra* note 66, at 65. See contra Çali, ‘Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions’, 29 *Human Rights Quarterly* (2007) 251, at 254. In certain issues, such as defamation, the ECtHR has been more precise on the criteria that are relevant in the proportionality assessment, see Brems, *supra* note 35, at 222.

⁷² See also Cumper and Lewis, *supra* note 43, at 633–636.

⁷³ See Ekins, ‘Legislating Proportionately’, in G. Huscroft, B. W. Miller and G. Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014), 343, at 366 (‘The doctrine and the corresponding scholarly discourse imply that technical reasoning, whether legal or economic, should be paramount in legislative deliberation’). See also the formal mathematical models of balancing specified by Sieckmann, ‘Legislation as Balancing’, in D. A. Oliver-Lalana (ed.), *Conceptions and Misconceptions of Legislation* (2019) 133, at 139, 147.

⁷⁴ The ECtHR, when drawing positive inferences, has valued practices that are in line with a technocratic approach, such as the provision of evidence to committees by experts: see, e.g., ECtHR, *Animal Defenders International v. United Kingdom*, Appl. no. 48876/08, Judgment of 22 April 2013, para. 43.

⁷⁵ See Webber *et al.*, *supra* note 52, at 13; Ekins, *supra* note 73, at 349; also Kumm and Walen, ‘Human Dignity and Proportionality: Deontic Pluralism in Balancing’, in Huscroft, Miller and Webber (eds), *supra* note 73, at 67, 69; Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’, 4 *Law & Ethics of Human Rights* (2010) 141, at 174; Evans and Evans, ‘Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights’, 2006 *Public Law* 785, at 806; also Roach, *supra* note 57, at 411.

⁷⁶ The Court, when drawing positive inferences from legislative processes, has valued representative practices such as the intensity and focus of plenary parliamentary debates, ECtHR, *Parrillo v. Italy*, Appl. no. 46470/11, Judgment of 27 August 2015, para. 184; see also Follesdal, *supra* note 47, at 331; Kumm, *supra* note 75, at 172.

⁷⁷ See Donald and Leach, ‘The Role of Parliaments Following Judgments of the European Court of Human Rights’, in Hunt, Hooper and Yowell (eds), *supra* note 9, at 59, 84.

3 *Lindheim v. Norway* as an Example of Active Subsidiarity

Lindheim v. Norway is an Article 1 Protocol 1 case concerning legislative changes made in 2004 to the law on ground lease agreements ('tomtefesteloven'/Ground Lease Act 1996).⁷⁸ The ground-lease arrangement has its roots in post-war Norway in which there were limited resources for the purchase of real estate. Long-term ground-lease agreements – 50–99 years – offered lessees a means to a permanent home. They offered landowners a steady income from their land. Thus, they were popular, and today there are between 300,000 and 350,000 ground-lease contracts in Norway (60% for permanent homes and 40% for holiday homes).⁷⁹ The agreements did not anticipate the dramatic changes in Norway's property market since the 1980s. This has made general regulation of the agreements, on matters such as rent adjustment over time and the procedure at the end of the agreement, both necessary and controversial. In such legislation, the interests of the lessees have often weighed heavily.⁸⁰ This is because the lessees have often invested in the development of the property and were traditionally less well off. However, the circumstances of the six applicants (lessors) in the *Lindheim* case indicate that in some instances circumstances have significantly changed.⁸¹

The applicants in *Lindheim* were landowners with ground lease arrangements on their plots of land for either permanent or holiday homes. Under earlier legislative provisions from 1975 and 1996, the lessee was entitled to have the ground lease contract extended but the lessor had the right to introduce new conditions into the contract. The applicants in *Lindheim* complained that under section 33 of the Ground Lease Act 1996 as amended in 2004,⁸² the lessees, on expiration of the agreed term of lease, had been able to demand an unlimited extension on the same conditions as applied previously.

A *The ECtHR's Analysis*

The parties to the case accepted that there had been an interference with the applicants' rights under Article 1 Protocol 1, but disagreed on which rules were relevant and whether the interference could be justified.⁸³ The ECtHR found that as the applicants continued to receive rent and were free to sell the land (albeit subject to the lease attached), there was not expropriation or de facto expropriation.⁸⁴ The ECtHR assessed the case under Article 1 Protocol 1's rule on control of the use of property in accordance with the general interest.⁸⁵

⁷⁸ Ground Lease Act, 20 December 1996, no. 106 (LOV-1996-12-20-106); which replaced Ground Lease Act, 30 May 1975, no. 20 (LOV-1975-05-30-20).

⁷⁹ ECtHR, *Lindheim and Others v. Norway*, Appl. nos. 13221/08 and 2139/10, Judgment of 12 June 2012, para. 12.

⁸⁰ *Ibid.*, paras. 11 and 47.

⁸¹ *Ibid.*, paras. 17–37.

⁸² Amendment to the Ground Lease Act 1996, 2 July 2004, no. 63 (LOV-2004-07-02-63).

⁸³ *Lindheim and Others v. Norway*, *supra* note 79, at para. 59.

⁸⁴ *Ibid.*, para. 77.

⁸⁵ *Ibid.*, para. 78.

In the course of assessing the proportionality of the interference with the applicant's rights, the Court identified the interests of the lessors as having to deal with a rent that had lost touch with increases in the value of property.⁸⁶ It identified the lessees' interest as seeking the maintenance of the status quo in light of the investments that they have made in the immovable property on the land.⁸⁷ The Court recognized that the Norwegian parliament faced a complex socio-economic issue that was difficult to resolve. It also acknowledged that in light of the large number of individuals affected there was 'the need emphasised in the national legislative process for clear and foreseeable solutions and the need to avoid costly and time-consuming litigation on a massive scale before the national courts'.⁸⁸

In explaining the finding of a violation, the Court first placed significance in the absence of a balancing exercise from the legislative process:

[T]he Court has not been made aware, nor does it appear from the material submitted, that any specific assessment was made of whether the amendment to section 33 regulating the extension of the type of ground lease contracts at issue in the applicants' case achieved a 'fair balance' between the interests of the lessors, on the one hand, and those of the lessees, on the other hand.⁸⁹

In addition, the particularly low level of the rent struck the Court as 'bearing no relation to the actual value of the land'.⁹⁰ The Court also identified as significant that 'the extension was for an indefinite duration without any possibility of upward adjustment in the light of factors other than the consumer price index (section 15(2)(1) [Ground Lease Act 1996]), which excluded the possibility of taking account of the value of the land as a relevant factor'.⁹¹

By presenting its concern about the absence of a balancing exercise as part of its explanation for the finding of a violation, the ECtHR sent Norway a strong signal to

⁸⁶ *Ibid.*, para. 123.

⁸⁷ *Ibid.*, para. 124.

⁸⁸ *Ibid.*, para. 125.

⁸⁹ *Ibid.*, para. 128. Note that at the national level, the Norwegian Supreme Court may check, in the course of determining its level of deference, that the parliament has evaluated the consistency of a legislative provision with the Constitution: see Norwegian Supreme Court, Rt. 1976 s. 1 (*Kløfta*), Judgment of 21 January 1976, at 5–6. In the leading Norwegian Supreme Court case which preceded *Lindheim v. Norway*, it was sufficient for the Norwegian Supreme Court that there were statements from the justice committee and from members of parliament (MPs) in a plenary session endorsing the position taken by the relevant governmental department on the consistency of the legislative provision with the Constitution, HR 2007-1593-P, (*Øvre Ullern*), Judgment of 21 September 2007, paras. 79–81.

⁹⁰ ECtHR, *Lindheim and Others v. Norway*, Appl. nos. 13221/08 and 2139/10, Judgment of 12 June 2012, para. 129.

⁹¹ *Ibid.*, para. 131. Note that the ECtHR concluded that:

[T]he respondent State should take appropriate legislative and/or other general measures to secure in its domestic legal order a mechanism which will ensure a fair balance between the interests of lessors on the one hand, and the general interests of the community on the other hand, in accordance with the principles of protection of property rights under the Convention. It is not for the Court to specify how lessors' interests should be balanced against the other interests at stake.

Ibid., para. 137.

include a balancing exercise in the production of corrective legislation.⁹² The Court did not specify the form that this balancing exercise should take.⁹³ There were, though, some possible indicators.

B Indicators as to the Form of Balancing Exercise

The applicant and the respondent state both raised matters of process in their submissions. The applicant argued that, based on *Hirst v. UK (no. 2)*,⁹⁴ there should be a narrower margin of appreciation afforded to the state as 'Parliament had not analysed and carefully weighed the competing interests or assessed the proportionality of blanket rules. Nor had Parliament assessed section 33 in the light of the European Convention'.⁹⁵ In contrast, the state is reported by the Court to have argued that:

The issue of what should be done with the expiry of ground lease contracts established long ago had been the subject of at least eleven proposed amendments to the 1996 Ground Lease Act. There had been heated debate for many years among the leading political parties. In 2004, however, all but one of the parties represented in Parliament finally found a middle ground. Section 33 of the Ground Lease Act was one important part of that middle ground, the democratic bargain made in the Norwegian Parliament in 2004. In the Government's submission, this significant political compromise should be taken into account by the Court, it being *an example of democratic deliberation* wholly in line with the ideal of an effective political democracy.⁹⁶

The state's democratic deliberation argument did not persuade the Court. This may be a sign that the Court was looking for evidence of a more transparent, systematic balancing exercise. This finds support in the Court's favourable outlook on the preparatory materials made available to the parliament when changing section 15 of the Ground Lease Act 1996.⁹⁷ In this instance, the preparatory work included an extensive assessment by an expert committee of how eight different models balanced the interests of the lessor and lessee.⁹⁸ This was absent in relation to section 33 of the same legislation.

⁹² The extent to which the ECtHR treated the absence of a balancing exercise as a factor pertaining to the margin of appreciation or as a factor weighed in the ECtHR's own balancing exercise is open to discussion: see Saul, *supra* note 5, 758. But this does not affect the strength of the signal that was sent at paragraph 128 of the judgment for an updating of the legislative process to include a balancing exercise. For an alternative reading that places less significance in the quality of the legislative process for the Court's finding, see Gerards, *supra* note 37, at 143.

⁹³ As a general matter, views differ at the ECtHR on whether its remedial practice should be more specific and prescriptive: see Donald and Speck, 'The European Court of Human Rights' Remedial Practice and Its Impact on the Execution of Judgments', 19 *HRLR* (2019) 33, at 103–109.

⁹⁴ ECtHR, *Hirst v. UK (no. 2)*, Appl. no. 74025/01, Judgment of 6 October 2005, para. 79: 'no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote . . . it cannot be said that there was any substantive debate by members of the legislature'. See also Saul, *supra* note 5, at 755; Cumper and Lewis, *supra* note 43, at 633.

⁹⁵ ECtHR, *Lindheim and Others v. Norway*, Appl. nos. 13221/08 and 2139/10, Judgment of 12 June 2012, para. 85.

⁹⁶ *Ibid.*, para. 118 (emphasis added).

⁹⁷ *Ibid.*, para. 127.

⁹⁸ *Ibid.*, paras. 41–46.

Alternatively, it may be that the government's argument on democratic deliberation was of an overly general nature, not pinpointing any specific, substantive debate including discussion of the competing interests. A more specific argument may have persuaded the Court. The Court indicates that it is interested in the views of the parliament, by drawing on positions from the parliament at several points in its analysis.⁹⁹

In sum, the Court's reasoning indicates the need for a balancing exercise in the production of corrective legislation, but does not offer explicit direction on the form this should take. There are indicators in the judgment that support a systematic, transparent balancing exercise undertaken by experts, but also indicators that point towards a representative and deliberative process. The ideal may be to view balancing in the legislative process as combining both these elements. The Court's lack of specificity left room for the domestic authorities implementing the judgment to determine the type of balancing exercise that should be included in the corrective legislative process.¹⁰⁰

4 Tracing the Implementation of *Lindheim v. Norway*

This section identifies and studies closely the key stages in the implementation of *Lindheim v. Norway*.¹⁰¹ The account draws on the available documentation from the legislative process, including preparatory material and written records of debate in parliament, and a small number of semi-structured interviews with individuals involved in the judgment's implementation.¹⁰² The analysis is attentive to evidence of active subsidiarity's impact. In particular, the analysis seeks unique evidence of active subsidiarity's fingerprint; actions that only active subsidiarity could have caused.¹⁰³ Attention is also given to the roles and motives of the actors involved in transmitting and conditioning active subsidiarity's causal force.¹⁰⁴ Section 5 below pulls these strands of analysis together.

Before proceeding, it is important to note that there were significant changes in the political landscape from 2004, when the offending legislation was passed, to 2012, when the ECtHR's judgement was received. In 2004, the government was a minority

⁹⁹ See *ibid.*, paras. 100, 125–126.

¹⁰⁰ Note that *Lindheim v. Norway* is the only Norwegian case at the ECtHR in which, along with a finding of violation, there has been a negative inference based on the quality of the legislative process and a clear signal for new legislation.

¹⁰¹ The account is based on the process tracing method, which is the examination of intermediate steps in a process to make inferences about the causes of an outcome of interest: see Bennet and Checkel, 'Process Tracing: From Philosophical Roots to Best Practices', in A. Bennet and J. T. Checkel (eds), *Process Tracing: From Metaphor to Analytical Tool* (2015) 3. Process tracing is used in this article to develop, rather than to test, theory on how active subsidiarity works, see Beach and Pedersen, *supra* note 26, at 271.

¹⁰² Specifically, individuals from the Ministry of Justice, the ad hoc expert committee and the justice committee in parliament. All interviews were conducted on the basis that interviewees will remain anonymous.

¹⁰³ See Beach and Pedersen, *supra* note 26, at 272.

¹⁰⁴ This is what theory on the process tracing method often refers to as the causal mechanism, see *ibid.*, at 69, 268–273.

government on the centre right of the political spectrum. It needed to secure the agreement of the main opposition on the left side of the spectrum. The political parties came together to negotiate the provision behind closed doors. In 2012, the right side of the political spectrum operated essentially as a majority government (based on standing agreements with two smaller parties that were not formally in government). The government of 2012 had more reason than the opposition parties to be favourably disposed to the ECtHR's judgment as a general matter.¹⁰⁵ The ECtHR's finding of a violation of Article 1 Protocol 1 offered the government of 2012 an opportunity to open up the legislative compromise from 2004 and to make its greater political majority count in the drafting of the new legislation. The government of 2012 had less reason to be positively disposed towards the ECtHR's signal for there to be a balancing exercise, as it offered a potential route for the opposition to exert influence in the construction of new legislation.

A Reception of the Judgment in the Executive and the Parliament

The Ministry of Justice received the judgment and appealed to the ECtHR to have it heard in the Grand Chamber (11 September 2012). This appeal was rejected (22 October 2012). In the meantime, the MoJ proposed a temporary change to the law in order to resolve legal uncertainty created by the judgment. This proposal was passed to the parliament's justice committee. The justice committee agreed unanimously and the parliament sitting in plenary session passed the temporary law. At each of these institutional stages, the need for compliance with the judgment was treated as self-evident and the high level of discretion the state had to find a new provision to rectify the economic imbalance between lessors and lessees was recognized.¹⁰⁶ The ECtHR's critique of the absence of a balancing exercise was not addressed directly, but it was pointed out that alternative approaches for striking a new balance would need to be identified and evaluated.¹⁰⁷

The political parties all agreed that to remove legal uncertainty the process needed to move at a good pace. The justice committee proposed that an ad hoc committee of experts be established to identify and investigate the alternative models available for a new section 33. The justice committee emphasized that the ECtHR's reasoning should be the basis for the expert committee's proposals. They called for representation of both sides (lessees and lessors) on the expert committee and this was supported in the plenary session.¹⁰⁸ The establishment of an expert committee to initiate a legislative

¹⁰⁵ See Storberget, '17. mai og alle de andre dagene', in A. Follesdal, M. Ruud and G. Ulfstein (eds), *Menneskerettighetene og Norge* (2017) 91, at 101.

¹⁰⁶ See Midlertidig lov om rett til forlengelse av feste til bolighus og fritidshus [Temporary Act on the Right to an Extension of Ground Lease for Residential and Holiday Homes], Prop. 148 L (2011–2012) [Proposition to the Parliament (bill)], 14 September 2012; Innst. 115 L (2012–2013) [Recommendation of the Parliament's Standing Committee on Justice], 29 November 2012; Plenary Debate in Parliament, 4 December 2012: Case no. 4 Recommendation of the Parliament's Standing Committee on Justice on Temporary Act on the Right to an Extension of Ground Lease for Residential and Holiday Homes.

¹⁰⁷ See, e.g., Plenary Debate in Parliament, *supra* note 106, 1:45 PM (Hagebakken, MP).

¹⁰⁸ *Ibid.*

process with a report and set of proposals is a common occurrence in Norway.¹⁰⁹ The controversial nature of the subject matter strengthened the impetus for this approach. Still, the executive was able to exercise influence through determining the mandate, composition and resources of the expert committee.

B Establishing the Ad Hoc Expert Committee

The government established the ad hoc expert committee in February 2013.¹¹⁰ The MoJ's instructions required the committee to adhere to the guidance from the ECtHR in its preparation of proposals as to how the legislation should be changed. The expert committee was asked to provide practical solutions that produce a fair balance whilst also satisfying the relevant legal requirements. This is strong evidence in favour of the impact of the ECtHR's reasoning on the shape of the legislative process.

The committee consisted of five members and a secretary. The three members that were not affiliated with one of the interested sides, including the chair, were all lawyers.¹¹¹ The representative for the landowners (lessors) was also a lawyer.¹¹² The only non-lawyer was the representative for the renters (the lessees).¹¹³ The expert committee was given a timeframe – February to October 2013 – which is a shorter period than many other ad hoc expert committees have been given. It was also given limited financial and administrative resources.¹¹⁴ Thus, there were executive-driven constraints on the type of balancing exercise that was achievable within the committee.

C Treatment of the Judgment in the Ad Hoc Expert Committee

The committee did not open for the participation of interested groups through hearings, as may occur with the work of ad hoc expert committees. Thus, little external input could affect how the committee interpreted and implemented its mandate over the course of its six full-day meetings.¹¹⁵ One external input was the report that the committee commissioned, which assessed the ECHR issues considered relevant for bringing Norwegian law in line with Article 1 Protocol 1.¹¹⁶ This report reviews developments in the ECtHR's case law with regard to considerations the ECtHR finds relevant when applying the control of use component of Article 1 Protocol 1.¹¹⁷ It also

¹⁰⁹ Christensen and Holst, *supra* note 56.

¹¹⁰ Details are provided in Tomtefestelovutvalget [Ground Lease Act Committee], *Festekontrakter og folkerett* [Ground Lease Contracts and International Law], Report, NOU 2013:11, 1 October 2013, www.regjeringen.no/no/dokumenter/nou-2013-11/id742432/ (in Norwegian) (hereinafter 'Expert Committee Report').

¹¹¹ Professor Kåre Lilleholt, chairperson; Associate Professor Stig Harald Solheim; Lawyer John Egil Bergem.

¹¹² Sissel Fykse.

¹¹³ Grethe Gjertsen, Leader of Tomtefesterforbundet.

¹¹⁴ Expert Committee Report, *supra* note 110, at 16.

¹¹⁵ *Ibid.*, at 14.

¹¹⁶ Bjørge, 'Utredning av utviklingen i EMD-praksis over P1-1', in Expert Committee Report, *supra* note 110, Attachment 2. The work of the committee was also supplemented by the results of a questionnaire with up to date information on the extent and nature of ground lease arrangements in Norway.

¹¹⁷ Noting, for example, that social housing considerations are now given less weight: Expert Committee Report, *supra* note 110, at 136.

highlights the active subsidiarity components of case law such as *Animal Defenders International v. UK*.¹¹⁸ Notably, the report does not refer to the aspects of legislative processes that the Court has valued in such cases.¹¹⁹ Consequently, the report strengthened the committee's own view that there should be a balancing exercise, but it did not encourage the committee to reflect over the form a balancing exercise should take in a legislative context.¹²⁰

The expert committee's own report provides five models, and for each one identifies the ways in which the interests are balanced. The analysis of each model is in line with a systematic, transparent approach that the Court itself could have taken. The committee was split, two against two, as to which model to recommend.¹²¹ This even split was possible because the one non-lawyer member, representing the lessees, withdrew support for the work of the committee at a late stage.¹²² One objection was to the composition of the committee, which had led to a process overly focused on legal technicalities and not sufficiently alert to economic considerations. Objections were also raised about the way the work was structured. In particular, that the committee was too quick to start evaluating alternatives. Instead, more time should have been spent examining the approaches and findings of earlier legislative initiatives in this area, and gathering more statistics and information to provide the basis for the formation of alternatives and their evaluation.¹²³ These objections were raised when the committee was moving towards proposals that would worsen the position of the lessees. Nonetheless, they shine a spotlight on the significance of the lawyerly backgrounds of the other members of the committee. These members came to the process with a prior understanding of how the ECtHR undertakes balancing and received no direct prompt to challenge or modify it for the legislative context. The approach taken was also achievable within the available time and with the limited resources that had been allocated.

D Preparation of the Legislation by the Executive

Once complete, the expert committee report was submitted to the MoJ. The report is ambiguous on what is required from the executive and the parliament in terms of further balancing. Of particular significance are the commentaries on how the five alternative models stand in relation to the ECtHR's requirements in *Lindheim*. In the commentary for the first model, a one-off model, the committee's report notes that if, 'following a thorough and conscientious assessment, the legislator should find that the one-off model provides a fair balance of the interests of the parties', the first

¹¹⁸ *Ibid.*, at 143.

¹¹⁹ See Section 3 above.

¹²⁰ The committee refer directly to Bjørge's report as part of the explanation for why there should be a balancing exercise to comply with the *Lindheim v. Norway* judgment: Expert Committee Report, *supra* note 110, at 41.

¹²¹ The fifth member (objecting to the work of the committee) submitted a sixth model that was not taken up in the main report: *ibid.*, at 21.

¹²² *Ibid.*, at 146.

¹²³ *Ibid.*

requirement from *Lindheim* will be met.¹²⁴ This suggests that the committee thought there was still a need for an additional/extended balancing exercise. However, the report also notes that, in *Lindheim*, the ECtHR had referred favourably to the process by which section 15 of the Ground Lease Act 1996 had been amended.¹²⁵ This was based on a balancing exercise that was similar to the expert committee's own approach. Moreover, subsequently, for each of the other models, the committee's report notes that if the government chooses the model, the requirement for there to be a balancing exercise as the basis for the provision will be satisfied.¹²⁶ The contrast with the remarks after the first model introduces uncertainty as to how necessary the expert committee considered it to be for the legislator to undertake further examination of the balance struck. Was the committee's own balancing exercise sufficient or was there a requirement from the ECtHR for further balancing by the legislator?

The MoJ received the report and sent it out for hearing: opening for written responses from interested groups. The MoJ chose to recommend changing the law based upon a slightly modified version of one of the expert committee's models. The MoJ transmitted its proposal to the justice committee in parliament. The MoJ's communication with the justice committee gives no indication that there should be a further balancing exercise to secure compliance with the ECtHR's judgment.¹²⁷

E Scrutiny and Acceptance of the Legislation by the Parliament¹²⁸

On receiving the MoJ's report, the justice committee in parliament held its own hearings with interest groups.¹²⁹ The justice committee gained insight into the divergent interests and a basis for scrutiny and potential development of the alternatives put forward by the ad hoc expert committee. Still, the written record of the justice committee's proceedings reads largely as an endorsement of the MoJ's recommendation.¹³⁰ The central exception is the position of the main opposition party, which provided and explained an alternative model for changing the legislation.¹³¹ The plenary session at which the new law was adopted was largely an occasion for the individual members of the justice committee to publicize their views.¹³² There was little evidence of a

¹²⁴ *Ibid.*, at 62 (author's own translation).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, at 62–71.

¹²⁷ Endringer i tomtefesteloven [Amendment of the Ground Lease Act], Prop. 73 L (2014–2015), [Proposition to the Parliament (bill)], 27 March 2015, at 75.

¹²⁸ The role of parliament in Norway is centred largely on activity within standing committees. The parliamentary committees are matched to the relevant ministries. The plenary sessions within the main chamber are often an opportunity for members of the committees to publicize the positions they have taken, rather than a site for differences to be worked out, before a vote is taken, Heidar and Rasch, 'Political Representation and Parliamentarism', in O. Knutsen (ed.), *The Nordic Models in Political Science: Challenged, But Still Viable?* (2017) 105, at 112.

¹²⁹ Open hearing of the Parliament's Standing Committee on Justice, 7 May 2015, available at www.stortinget.no/no/Hva-skjer-pa-Stortinget/Horing/Horingsprogram/?dateid=10003785 (in Norwegian).

¹³⁰ Innst. 349 L (2014–2015) [Recommendation of the Parliament's Standing Committee on Justice], 4 June 2015, at 4.

¹³¹ *Ibid.*, at 5, 7.

¹³² Plenary Debate in Parliament, 10 June 2015: Case no. 6 Recommendation of the Parliament's Standing Committee on Justice on Amendment of the Ground Lease Act.

collaborative, deliberative approach either in the justice committee or in the plenary session. The members of parliament from the parties supporting the government accepted with minor adjustments the proposal from the government.¹³³ The opposition opposed the government's proposal and favoured their own model.¹³⁴ This approach is understandable in the light of the tradition for strong party loyalty amongst committee members,¹³⁵ combined with the politically controversial nature of the issue.¹³⁶ More standardly, the Norwegian parliament is not polarized, and committees may produce cross-partisan changes to legislative proposals – usually with the support of the relevant minister.¹³⁷

The members of the justice committee from opposition parties could have called on the ECtHR's critique of the absence of balancing in *Lindheim*, to try to gain the executive's support for a more collaborative, deliberative discussion in parliament on the merits of different options and potential alternatives. Yet it is standard for legal advice to the parliament in Norway to come from the executive.¹³⁸ This well-established practice appears difficult to dislodge. With the impression that balancing was a legal concept and that its meaning had been addressed in the ad hoc expert committee, there was little prospect of the parliament invoking this line of argumentation.¹³⁹

5 Assessing the Impact of Active Subsidiarity on the Legislative Process

A Was There Any Impact?

Tracing the implementation of *Lindheim v. Norway* shows recognition across the main actors – executive, ad hoc expert committee and parliament – that Norway should comply with the judgment and that this would require a change to the relevant legislation. It also shows recognition that Norway had discretion to determine how to change the law, but that there needed to be consideration of alternatives with regard to how they balanced the competing interests. Norway may have changed primary legislation without the active subsidiarity component in the judgment, but it may simply have specified a modification that made the law less burdensome for the landowners. The active subsidiarity component in *Lindheim* directed that visible balancing

¹³³ See, e.g., Plenary Debate in Parliament, *supra* note 132, 15:07 PM (Frølich, MP).

¹³⁴ See, e.g., Plenary Debate in Parliament, *supra* note 132, 15:01 PM (Vågslid, MP).

¹³⁵ J. Andenæs and A. Fliflet, *Statsforfatningen i Norge* (2017) 212; the majority of members in the justice committee were from the parties that formed or had pledged to support the executive.

¹³⁶ Heidar and Rasch, *supra* note 128, at 112.

¹³⁷ *Ibid.*

¹³⁸ The Norwegian parliament does not have a human rights committee; on the role of human rights committees in parliaments, see Parliamentary Assembly (PACE), Res. 1823 (23 June 2011). See also Drzemczewski and Lewis, 'The Work of the Parliamentary Assembly of the Council of Europe', in Hunt, Hooper and Yowell (eds), *supra* note 9, at 309, 318–319.

¹³⁹ The view that human rights are the work of experts is also found in other parliaments: see, e.g., findings from interviews in Germany: Donald and Leach, *supra* note 9, at 296.

of interests should be included in the legislative process. The ECtHR made it difficult for the state to overlook its concern about this component of the legislative process, by clearly making it part of its explanation for the finding of violation.

B What Type of Impact?

The main site for the balancing exercise was within the ad hoc expert committee. It took the form of an assessment that the ECtHR itself may have undertaken. The committee analysed in detail the costs and benefits of several different models with specific reference to the impact on the rights of the two main sides. The production and public release of this report was an improvement on how the earlier section 33 was agreed upon in 2004, which was between the political parties behind closed doors. The committee's report provided a better basis for political decision-making. The report could also have stimulated and provided material for a collaborative, deliberative approach within the parliament. However, the parliament's role in the event was to check, or oppose in the case of the opposition, the executive's proposal. The active subsidiarity in *Lindheim* led the legislative process to be enhanced, but more from the perspective of a technocratic than a representative model of democracy.

In this respect, it is interesting that in reporting on implementation of the case to the Committee of Ministers, Norway described implementation in a way that was suggestive of a broader concept of balancing. Norway highlighted that the law had been changed after 'careful deliberation' in parliament and how parliament had weighed the issues.¹⁴⁰ This contrast between the practice described above and the report to the Committee of Ministers is consistent with the view that the ECtHR's reasoning left room for uncertainty about the form of balancing exercise that was required.¹⁴¹

C What Explains the Type of Impact?

The decision of the justice committee to call for an ad hoc expert committee to initiate the production of legislation is a well-established practice in Norway, especially with respect to significant and controversial issues. It would have been politically difficult for the executive to commence the process in another way. Nonetheless, there was room for the executive to exert influence on how the ECtHR's signal would shape the legislative process. The executive made the key choices on the mandate, composition and resources of the ad hoc expert committee. In particular, by selecting only lawyers (except for one) to sit on the expert committee, the executive facilitated the committee arriving at an understanding of balancing that reflected the ECtHR's own, technical reasoning approach.

The expert committee's report was ambiguous as to whether there needed to be an extended balancing exercise involving the parliament. The executive took no specific steps to enable such an exercise. This was consistent with the executive's interests in

¹⁴⁰ Committee of Ministers, 1243 meeting (8–10 December 2015) (DH), Communication from Norway concerning the case of Lindheim and others against Norway, Revised action report (08/10/2015), at 3, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2015\)1127E](http://hudoc.exec.coe.int/eng?i=DH-DD(2015)1127E).

¹⁴¹ See also Cumper and Lewis, *supra* note 43, at 633.

not opening up additional space for the opposition to exert influence on the formulation of the new, politically sensitive provision. In this respect, the standard practice for the parliament to receive its legal analyses from the executive was also significant. It meant that the parliament did not receive an independent interpretation of the ECtHR's requirement for a balancing exercise that it may have leveraged in support of a call for a more collaborative approach. It is noteworthy that the executive had the support of the parties with a majority of the seats in parliament. If the parties supporting the executive had been in the minority, the executive's calculations may have been different.¹⁴²

In sum, the main actors involved in the implementation of *Lindheim* did not query whether Norway should comply with the judgment. Still, the ECtHR's reasoning alone does not explain the shape that the corrective legislative process took. The ECtHR's active subsidiarity-based reasoning was given meaning in the light of the interests of the main domestic actors, especially the executive, and the constraints of the institutional environment.

6 Towards a General Theory of When and How Active Subsidiarity Works

The preceding sections have focused on the implementation of one adverse judgment against Norway. By considering the findings in the light of how the legislative circumstances of states vary across Europe, this section begins to develop a general theory of when and how active subsidiarity – in the context of an adverse judgment requiring legislative changes – works.¹⁴³

A *The Role of Domestic Actors*

The case study has uncovered in detail how the active subsidiarity component in *Lindheim* led to adjustment of the corrective legislative process. By lifting the level of abstraction in the presentation of the process, we can increase the scope for generalizations.¹⁴⁴ For an active subsidiarity component in a future adverse judgment against Norway to lead to significant improvements in the legislative process, we would expect a process along the following lines:

ECtHR judgment with active subsidiarity

- (a) Executive has sufficient motivation to comply, interprets 'balancing exercise' critique broadly
- (b) Executive undertakes/commissions initial balancing exercise
- (c) Executive enables and parliament undertakes/continues balancing exercise
- (d) New legislation adopted.

¹⁴² Norway has had more minority than majority cabinets, Heidar and Rasch, *supra* note 128, at 114. This point is returned to in Section 6.B below.

¹⁴³ For a comparative account of Norway's political and legal system, see Langford and Berge, 'Norway's Constitution in a Comparative Perspective', 6 *Oslo Law Review* (2019) 198; see also Hirschl, 'The Nordic Counternarrative: Democracy, Human Development, and Judicial Review', 11 *IJCL* (2011) 449.

¹⁴⁴ Beach and Pedersen, *supra* note 26, at 74.

To what extent may we expect the process that transmits and conditions active subsidiarity's impact to have a similar structure in other Council of Europe states?

It is common across Europe for the executive to receive and make the initial decisions about ECtHR judgment implementation.¹⁴⁵ Still, the extent to which the executive will be the decisive actor giving meaning to active subsidiarity throughout the implementation of the judgment may vary. One thing that may affect this is the capacity of the parliament for independent action on ECtHR judgments.

To date, there has been little empirical study of the role of parliaments in the ECHR system. There is one recent, pioneering study of the capacity and political will of five parliaments – the Ukraine, Romania, the United Kingdom, Germany and the Netherlands – to engage with adverse judgments of the ECtHR.¹⁴⁶ The studies flag examples of good practice on capacity, such as the provision of reports on ECtHR case law from the executive to the parliament (e.g. the Netherlands); and the establishment of standing parliamentary human rights mechanisms (e.g. the United Kingdom).¹⁴⁷ Such practices may increase the prospects of the parliament developing an independent position on the meaning of active subsidiarity in a judgment. However, the overall image is of a set of parliaments that leave ECHR matters to domestic courts and executives. The spread of institutional and political contexts covered in Donald and Leach's study suggests that the image is not likely to be much better in any of the other member states of the Council of Europe – it may though be worse.¹⁴⁸ There is, then, a low starting point for expectations as to how involved parliaments may be in determining the meaning of an active subsidiarity component in an ECtHR judgment. The contribution of a parliament will often require specific enabling actions from the executive.¹⁴⁹ In certain circumstances, other actors, such as courts and civil society, may also be in a position to boost the contribution of a parliament and/or to provide input on the meaning of an active subsidiarity component in an ECtHR judgment.

In Norway, the Supreme Court takes account of the jurisprudence of the ECtHR and has the power to set aside legislation that is in conflict with the ECHR.¹⁵⁰ Such judicial powers help to motivate political interest in the content of the ECtHR's judgments, as a means of ensuring that legislation is not set aside at a future date.¹⁵¹ Following the implementation of *Lindheim*, the Norwegian Supreme Court recently judged both the balancing exercise from the corrective legislative process and the new substantive

¹⁴⁵ See Anagnostou and Mungiu-Pippidi, *supra* note 16, at 210; Keller and Stone-Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008).

¹⁴⁶ Donald and Leach, *supra* note 9.

¹⁴⁷ See also Anagnostou and Mungiu-Pippidi, *supra* note 16, at 221–222.

¹⁴⁸ See also *ibid.*, at 223.

¹⁴⁹ See Donald, *supra* note 55, at 84; Roach, *supra* note 57, at 416.

¹⁵⁰ The ECHR is incorporated into Norwegian law through the 1999 Human Rights Act and takes precedence over all other Norwegian law except for the Constitution; see Kierulf, *supra* note 27, at 160.

¹⁵¹ Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000) at 61, 73; see also Stiansen, *supra* note 13, at 1241–1242 (finding that the absence of strong domestic judicial review is associated with an increase in the time it takes for states to comply with judgments of the ECtHR that require legislation).

outcome as consistent with the requirements of the ECHR.¹⁵² The domestic judiciary as a source of political motivation for engagement with the ECtHR's reasoning may be greater in states where it is possible that there will be abstract judicial review in the course of the production of legislation, such as in France, Germany, Italy and Spain.¹⁵³ Stone-Sweet's study of the impact of the introduction of constitutional rights review in these states highlights a change in behaviour in the form of parliamentary self-limitation in anticipation of a judicial verdict as well as examples of enriched deliberation.¹⁵⁴ Abstract judicial review is also a means for an apex court to give its own view on the meaning of an active subsidiarity component from an ECtHR judgment. This function may be used by members of parliament as part of a political strategy in a corrective legislative process,¹⁵⁵ with the pronouncement of an apex court potentially reducing the significance of the executive as the decisive actor giving meaning to the ECtHR's reasoning.¹⁵⁶

Theories of compliance with international human rights law also highlight the importance of civil society actors that use international instruments and outputs from monitoring mechanisms as part of campaigns for change in domestic policies.¹⁵⁷ The legislative process in the Norwegian case study opened for direct involvement of civil society actors. This was through the contributions of the representatives of the two interests groups on the ad hoc expert committee. It was also through submissions to the executive and the justice committee in the course of their open hearings. Norwegian civil society did not promote a particular reading of the active subsidiarity component within the judgment. The level of civil society involvement and influence will vary across states based on the possibilities made available by domestic

¹⁵² Norwegian Supreme Court, HR-2019-1206-A (*Øvre Ullern II*), Judgment of 24 June 2019, para. 117; the losing party (the lessors) have appealed to the ECtHR, which has accepted the application, Application no. 2317/20, *The Karibu Foundation v. Norway* lodged on 27 December 2019. The Norwegian Supreme Court has also incorporated the active subsidiarity component in *Lindheim v. Norway* in its reasoning in other recent cases based on ECHR Article 1 Protocol 1. The Supreme Court has sought evidence from the legislative process of the identification and weighing of the interests that are relevant in the context of the focus provision, see Norwegian Supreme Court, HR-2016-00304-S (*Guldberg*), Judgment of 10 February 2016, paras. 70, 90–91; Norwegian Supreme Court, HR-2016-02195-S (*Hegdahl*), Judgment of 21 November 2016, paras. 112–120; Norwegian Supreme Court, Rt. 2015-421 (*Grimstvedt*), Judgment of 22 April 2015, paras. 79–80. See also Eriksen and Nørgaard, 'Høyesteretts dom i Rt. 2015 s. 421 (*Grimstvedt*) – Regulering av festeavgift og forholdet til eiendomsvernet i EMK TP 1-1', 11 *Tidsskrift for eiendomsrett* (2015) 183, at 202.

¹⁵³ Martinez, 'Horizontal Structuring', in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 548, at 571.

¹⁵⁴ Stone-Sweet, *supra* note 151, at 73–74.

¹⁵⁵ See Martinez, *supra* note 153.

¹⁵⁶ Many courts are reluctant to interfere in the internal workings of the legislature: see Martinez *supra* note 153, at 564; although the input from the ECtHR may lead them to be more intrusive: see Popelier *supra* note 44, at 331. On the role of constitutional courts in the ECtHR system generally, see Petrov, 'Unpacking the Partnership: Typology of Constitutional Courts' Roles in Implementation of the European Court of Human Rights', 14 *European Constitutional Review* (2018) 499.

¹⁵⁷ Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009), at 139. See also Alter, *supra* note 18, at 65–66.

institutions.¹⁵⁸ It will also vary from case to case based on how the subject matter sits with national debates.¹⁵⁹ Civil society actors that engage with the ECtHR frequently will be better placed to recognize the significance of an active subsidiarity component within a judgment. It is also possible that civil society, through third party submissions, will bring failings in a legislative process to the attention of the ECtHR.¹⁶⁰

More actors in the implementation of a judgment will make it harder to anticipate the type of effects that an active subsidiarity component will generate. This is because one must account for how each actor is likely to engage with and give meaning to the ECtHR's reasoning. In this respect, the logic of active subsidiarity-based behaviour is also important.

B The Logic of Active Subsidiarity-Based Behaviour

What can we infer from the Norwegian case study about how actors in other states are likely to respond to the ECtHR's practice of active subsidiarity?

Norway's status as a good and consistent complier with the ECtHR's judgments suggests support for the outputs of the ECtHR as important in their own right.¹⁶¹ In contrast, states with low and/or unpredictable judgment compliance levels may place less value in the ECtHR outputs as important in their own right.¹⁶² Thus in a situation of attempted compliance they may be more likely to overlook or read active subsidiarity in a manner that is distant from the intention of the ECtHR. The Norwegian case study does not challenge the view that Norway treats the ECtHR's judgments as important in their own right. However, the case study shows that the interests of the main actors and the constraints of the institutional environment also informed the meaning given to the active subsidiarity component.¹⁶³ This suggests that we are unlikely to find a situation in which the ECtHR's formulation of active subsidiarity is the only determinant of its impact on the legislative process.¹⁶⁴

The centripetal nature of Norway's political system promotes inter-branch cooperation in the achievement of policy goals.¹⁶⁵ This gave reason to believe that the

¹⁵⁸ See Checkel, 'International Norms and Domestic Politics: Bridging the Rationalist–Constructivist Divide', 3 *European Journal of International Relations* (1997) 473, at 479.

¹⁵⁹ See Krommendijk, *supra* note 25, at 504–506.

¹⁶⁰ See, e.g., ECtHR, *Fouzia Dakir v. Belgium*, Appl. no. 4619/12, Written Submission by the Human Rights Centre of Ghent University, at 5–6, available at https://hrc.ugent.be/wp-content/uploads/2019/10/Dakir_hrc.pdf.

¹⁶¹ This explanation can operate in tandem with a concern for international and domestic reputation, see Hillebrecht, *supra* note 17, at 144, 155.

¹⁶² Though reasons for low compliance vary, see Voeten, 'Domestic Implementation of European Court of Human Rights Judgments: Legal Infrastructure and Government Effectiveness Matter: A Reply to Dia Anagnostou and Alina Mungiu-Pippidi', 25 *EJIL* (2014) 229, at 230.

¹⁶³ See Section 5.C above. See also Von Staden, *supra* note 19, at 205 (arguing that in well-established, liberal democracies normative reasons explain the strive for compliance with ECtHR judgments, but preferences of the respondent government explain how the state complies).

¹⁶⁴ Though certain states may want to receive direction from the ECtHR, as leaving space for their own contribution makes it harder to determine what should be done, see Donald and Leach *supra* note 9, at 292.

¹⁶⁵ Gerring and Thacker, *supra* note 28.

Norwegian executive and parliament would be relatively well suited to work together to give effect to the ECtHR's active subsidiarity in a way that was democracy enhancing. The Norwegian case study shows, however, that the executive did not take opportunities to read the ECtHR's criticism of the absence of a balancing exercise as a reason to facilitate a greater role for the parliament. This was consistent with the executive's interests in securing compliance with the judgment while not complicating achievement of its preferred legislative outcome.¹⁶⁶ On this basis, we may hypothesize that open-ended specifications of active subsidiarity are, as a general matter, not likely to be read by executives in ways that prioritize greater and better-quality parliamentary involvement. However, the extent to which parliaments can complicate the achievement of legislative outcomes is not constant across Europe, and the extent to which an executive will be wary of such complications may depend on the issue at stake.

Norway's parliament is unicameral and sits in the middle of Martin and Vanberg's classification of the authority of parliamentary committees relative to the executive.¹⁶⁷ In such circumstances, the potential for a parliament with a strong tradition of party loyalty to complicate the pursuit of a majority government's preferences would be relatively limited. It would be more in terms of what scrutiny could reveal about the adequacy of the legislative proposal than about blocking its passage into law. The long-term ground-lease issue in the case study was politically sensitive. This heightened the executive's interests in maintaining control. On a less sensitive issue, the same Norwegian executive may have been more open to enabling greater and better-quality parliamentary involvement.¹⁶⁸ In contrast, we may expect a more consistent tendency for executive-driven minimalist readings of active subsidiarity in states where the parliament is strong, such as Germany, where there are strong legislative committees and a genuine bicameral chamber.¹⁶⁹

In the Norwegian case, the parties with the majority of seats in the parliament supported the executive. If the parties supporting the executive had been in the minority, which often occurs in Norway, the executive's calculation may have changed.¹⁷⁰ In such circumstances, the executive must cooperate with the opposition parties to secure passage of its legislative proposals. This could generate a reason for the executive to adopt a broader reading of the ECtHR's active subsidiarity specification. In circumstances of minority government, the executive may view the active subsidiarity component as a means to structure and thereby exert influence over the cooperation with the opposition parties in parliament.

¹⁶⁶ See also Von Staden *supra* note 19, at 205–206 (arguing from empirical study of the general patterns of compliance with judgments in Germany and the United Kingdom, that the interests of executives lead them towards minimalist interpretations of the requirements of judgments that reduce the consequences for the substance of domestic law and policy).

¹⁶⁷ L. W. Martin and G. Vanberg, *Parliaments and Coalitions: The Role of Legislative Institutions in Multiparty Governance* (2011), at 50; Heidar and Rasch, *supra* note 128, at 119–120.

¹⁶⁸ On the relative authority of the executive and parliament as an indicator of prospects of cooperation, see Weaver and Rockman, *supra* note 29, at 7–10.

¹⁶⁹ Martin and Vanberg, *supra* note 167; Martinez, *supra* note 153, at 561.

¹⁷⁰ See Heidar and Rasch, *supra* note 128, at 114, and at 116 on other states with significant experience of minority governments.

Still, the case of Norway also indicates that executives do not have a free hand to determine what the effects of the active subsidiarity component look like on the legislative process. The institutional environment also conditions behaviour. In Norway, for example, the practice of initiating significant legislative processes with an ad hoc expert committee is well established. A routine that is taken for granted will be difficult to dislodge.¹⁷¹ Other states will also have firmly entrenched routines that the executive branch will not contemplate changing or that it is not able to change without costs.

We may also examine how the opposition parties involved in the implementation of *Lindheim* would have responded to attempts from the executive to proceed in a collaborative, deliberative manner. Hiebert and Kelly's study offers potential insights. They argue that in the United Kingdom and New Zealand the introduction of weak judicial review (constrained remedial powers) and a ministerial obligation to report to parliament on the consistency of a bill with rights have done little to increase the rights pressure on the government or the number of reasoned deliberations on rights.¹⁷² The authors explain this by the continued power imbalance between the executive and the parliament and the dynamics of the parliamentary context that does not promote an interest 'in seeking the best way to ensure that legislation is compliant with protected rights'.¹⁷³ It is possible that the opposition parties in Norway would have calculated that it was not in their interests to cooperate with an attempt from the executive to proceed collaboratively – perhaps in order to signal to the electorate their distance from the government on a politically sensitive issue.¹⁷⁴ However, it may be that other features of the Norwegian context – such as the extent, on both sides of the political spectrum, of experience with minority government – would have led the opposition to respond positively.

This assessment of the Norwegian case study from a comparative perspective allows for the following generalizations. Active subsidiarity generates effects on legislative processes through a range of actors.¹⁷⁵ Executives will often be the central actor, but the number and type of additional actors involved, such as apex courts and civil society, will vary across states. The interest-based calculations of the actors involved in judgment implementation are likely to condition active subsidiarity's impact. An executive's interests may often point towards readings of active subsidiarity that do not directly advance the level of parliamentary involvement in the legislative process. Yet there are contextual conditions, such as the relative authority of the executive to the parliament, which may alter this calculation. Moreover, what an executive can achieve in terms of updating the legislative process is constrained by the dynamics of

¹⁷¹ See Mahoney and Falleti, *supra* note 24, at 220.

¹⁷² J. L. Hiebert and J. B. Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (2015), at 411.

¹⁷³ *Ibid.*

¹⁷⁴ On the prospects of the government remaining in office after the next election as a factor determining cooperation in the legislative process, see Weaver and Rockman, *supra* note 29, at 29.

¹⁷⁵ In contrast, judicial-focused active subsidiarity will often only involve two actors, the ECtHR and a domestic court: see, e.g., Müller, 'Oslo – Strasbourg – Back to Oslo and/or Into Wider Europe? The ECtHR's Engagement with the Decisions of Norwegian Courts for Strengthening the Convention System as a Cooperative System', 33 *Nordic Journal of Human Rights* (2015) 1, at 21.

the institutional environment in which it operates. The importance of contextual conditions and the extent to which these vary across Council of Europe states means that it is difficult to anticipate as a general matter how active subsidiarity will affect legislative processes. Still, certain contextual conditions, such as minority governments, may increase the prospects that active subsidiarity signals will be democracy enhancing.

7 Implications for the ECtHR's Practice of Active Subsidiarity

The preceding analysis spotlights the benefits of the ECtHR using the open-ended specification of 'balancing exercise' in its active subsidiarity practice. This terminology signals the need for a thorough treatment of rights issues in the production of legislation, but also allows its form to be steered in the light of domestic circumstances within the bounds of the interests of the main actors and entrenched institutional practices. It is also in line with the underlying logic of subsidiarity that calls for the local level to enjoy as much authority as possible in the context of achieving shared normative objectives across levels of governance.¹⁷⁶ There is good reason to be cautious about the prospect of more specific signals on legislative process leading to productive outcomes. To the extent that they contradict the interests of the main actors or are contrary to established practices, such signals may generate resistance against the ECtHR or lead to bad faith adjustments of the process to satisfy the ECtHR.

Yet, the ECtHR is more specific in its active subsidiarity practice when it draws positive inferences from the examination of legislative processes. It has valued, for example, the thoroughness by which issues have been debated in plenary sessions of parliament.¹⁷⁷ There is less pressure on the Court's assessment of legislative process in cases of positive inferences, as the Court is praising the state rather than giving a direct signal for its legislative process to be updated. Nonetheless, in circumstances of positive inferences, the Court learns about the specific legislative traditions of a state; it finds out about what is viable in terms of a good treatment of rights. Referring back to such instances in cases where the attention to rights in a legislative process is considered insufficient could be a route for the ECtHR to construct negative inference-type active subsidiarity in a way that gives a more specific signal for action that is also sensitive to the domestic context. This occurred to some extent at points in the *Lindheim* judgment, with the ECtHR praising the actions surrounding another provision in the same legislation. Including this type of assessment in the operative paragraphs of a judgment would be a means for the ECtHR to sharpen its signal for the type of process updating it considers appropriate. This could also facilitate the Committee of Ministers' role in checking whether the corrective legislative process represents a sufficient improvement. Cooperation with the Committee of Ministers could strengthen the incentive for states more generally to be responsive to the ECtHR's active subsidiarity practice.¹⁷⁸

¹⁷⁶ See Follesdal, *supra* note 31.

¹⁷⁷ See Section 2.B above.

¹⁷⁸ See generally Çali and Koch, 'Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe', 14 *HRLR* (2014) 301, at 312. See also Donald and Speck, *supra* note 93, at 116.

8 Conclusion

The ECtHR should seek formulations of active subsidiarity that foster democracy-enhancing updates to legislative processes when the conditions are favourable, but that avoid the potential for negative consequences, such as resistance against the ECtHR, at other times. The Norwegian case has shown that the language of balancing, which the ECtHR often uses when it draws negative inferences from the quality of a legislative process, can promote a more thorough treatment of rights issues. The language of balancing also allows for the exact nature of the adjustment to the legislative process to be determined in the light of the interests of the main actors and the established practices within the institutional environment. The cost of this flexibility is that an active subsidiarity component in a judgment that refers simply to the absence of balancing may not prompt decision-makers to extend updating of the legislative process to the level and quality of parliamentary engagement.

To aid the discussion of how the ECtHR uses and formulates active subsidiarity, further empirical study may utilize the theoretical framework this article has provided to examine the impact of negative inferences across a wider range of institutional and political contexts. It will also be important, as a part of a complete empirical study of the ECtHR's active subsidiarity practice, to develop and deploy strategies to measure the impact of ECtHR case law in which assessment of legislative processes leads to positive inferences and no finding of violation.