

CONTENTS

<i>Acknowledgments</i>	v
<i>List of Abbreviations</i>	xix

INTRODUCTION

Chapter 1

Introduction	3
1.1 The rise and controversy of process-based fundamental rights review	3
1.2 The book's objectives and questions	10
1.3 Scope of the book and terminology	12
1.4 Methodology and methods	13
1.5 Roadmap	15

PART I

THE PRACTICE OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

Introduction to Part I	21
Process-based review in the practice of fundamental rights adjudication	21
Methodology and methods of Part I: case selection	22
Roadmap to Part I	25

Chapter 2

Process-based Fundamental Rights Review of Legislative Procedures	27
2.1 Introduction	27
2.2 Examples of review of the legislative process	28
2.2.1 US Supreme Court: <i>Carolene Products</i> and <i>Fullilove</i>	28
2.2.2 Supreme Court of Hawaii: <i>Taomae</i>	29
2.2.3 New Zealand, United Kingdom, and Finland	30
2.2.4 German Federal Constitutional Court: <i>Hartz IV</i>	31
2.2.5 South African Constitutional Court: <i>Doctors for Life International</i>	33
2.2.6 Colombian Constitutional Court: 'General Forestry Law case' and 'Consultation of Ethnic Communities case'	35
2.2.7 European Court of Justice: <i>Volker und Markus Schecke</i>	37

2.2.8	European Court of Human Rights: <i>Hirst (No. 2)</i> and <i>Bayev</i>	39
2.3	Conclusion	42

Chapter 3

Process-based Fundamental Rights Review of Administrative Procedures..... 45

3.1	Introduction	45
3.2	Examples of review of administrative procedures	46
3.2.1	Canadian Supreme Court: <i>Baker</i>	46
3.2.2	Australian High Court: <i>SZSSJ</i>	48
3.2.3	Danish Supreme Court: ‘ <i>Tunisian case</i> ’.....	49
3.2.4	District Court and Court of Appeal of the Netherlands: <i>Urgenda</i>	51
3.2.5	Court of Appeal and Supreme Court of the United Kingdom: <i>Denbigh High School, Miss Behavin’ Ltd., and Quila</i>	54
3.2.6	European Court of Human Rights: <i>Hatton, Winterstein, and Lambert</i> ..	57
3.3	Conclusion	62

Chapter 4

Process-based Fundamental Rights Review of Judicial Procedures..... 65

4.1	Introduction	65
4.2	Examples of review of judicial procedures	66
4.2.1	Supreme Court of Argentina: <i>Comunidad Indígena Eben Ezer</i>	66
4.2.2	Spanish Constitutional Court: ‘ <i>Melloni case</i> ’	68
4.2.3	German Federal Constitutional Court: <i>Mr R</i>	70
4.2.4	Canadian Supreme Court: <i>Carter</i>	71
4.2.5	UN Committee on Economic, Social, and Cultural Rights: <i>I.D.G.</i>	72
4.2.6	European Court of Justice: <i>Dynamic Medien</i>	75
4.2.7	European Court of Human Rights: <i>Winterstein, Lambert, and Von Hannover (No. 2)</i>	77
4.2.8	Inter-American Court of Human Rights: <i>Gelman</i>	80
4.3	Conclusion	82

Reflection on Part I..... 83

PART II

THE CONCEPT OF PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW

Introduction to Part II.....	89
Process-based fundamental rights review: what’s in a name?	89
Methodology and methods of Part II: similarity, difference, and reflective equilibrium.....	89
Roadmap to Part II	91

Chapter 5

Conceptualising Process-based Fundamental Rights Review	93
5.1 Introduction	93
5.2 Defining process-based fundamental rights review	94
5.2.1 Definitions of process-based fundamental rights review in the literature	94
5.2.2 Elements of process-based fundamental rights review in practice	97
5.2.3 Common definitions of process-based fundamental rights review	100
5.3 Process-based fundamental rights review as a method of review	104
5.3.1 Levels of case-law analysis: micro-, meso-, and macro-levels	104
5.3.2 Fundamental rights review: from substance-based to process-based ..	110
A. On the substance-procedure distinction	110
B. Spectrum of fundamental rights review	113
5.4 Conclusion	116

Chapter 6

Operationalising of Process-based Fundamental Rights Review	117
6.1 Introduction	117
6.2 Reviewer, subject and object of review	118
6.3 Diverse applications of process-based fundamental rights review	120
6.3.1 Intensity of process-based review	126
6.3.2 Burden of proof	130
6.3.3 Standards for review	132
A. Authority responsible for procedural standards	132
B. Types of procedural standards	134
I. Certainty standards	134
II. Rationality standards	136
III. Fairness standards	138
C. Other categories of standards	140
6.3.4 Result of procedural considerations	141
6.3.5 Location of review	143
A. Preliminary tests: intensity of justification review	146
I. Process-based review as an indicator for the intensity of review: justification strategy	147
II. Process-based review as a consequence of the intensity of review: avoidance, compensation, and intensification strategies	148
B. Legitimate aim or proper purpose	151
C. Suitability	153
D. Necessity	155
E. Proportionality in the strict sense	157

6.3.6	Importance of procedural considerations	161
6.3.7	Conclusion of procedural reasoning	165
6.3.8	Résumé and macro-level impact	167
6.4	Conclusion	170
Reflection on Part II		171
 PART III		
THE THEORY ON PROCESS-BASED FUNDAMENTAL RIGHTS REVIEW		
Introduction to Part III		177
The controversy of process-based fundamental rights review: set-up of Part III		177
Methodology and methods of Part III		179
Roadmap to Part III		181
 Chapter 7		
Debates Concerning Process-based Review and the Rule of Law, Deliberative Democracy, and Institutional Judicial Restraint		183
7.1	Introduction	183
7.2	Process-based review and rule of law	184
7.2.1	Courts as authorities of rule of law compliance	185
	A. 'Procedural rule of law'	185
	B. Rule of law and process-based review	186
7.2.2	Courts as imperfect protectors of the rule of law	190
7.2.3	Résumé	193
7.3	Process-based review and deliberative democratic theory	193
7.3.1	Courts as guardians and promoters of deliberative processes	194
	A. 'Deliberative democracy' and 'deliberative procedures'	194
	B. Process-based review to guard the political process	196
	C. Process-based review to promote deliberative procedures	198
7.3.2	Courts as part of the deliberative democratic enterprise	202
	A. Courts as public reasoners	203
	B. Courts as interlocutors	204
	C. Courts as deliberators	206
7.3.3	A limited role for courts and process-based review in democratic theory	209
	A. Courts as dangers to the deliberative enterprise	209
	B. Courts are not part of the deliberative enterprise	211
7.3.4	Résumé	211
7.4	Process-based review and judicial restraint or activism	212
7.4.1	Courts as restrained or self-restraining institutions	213

7.4.2 Courts as procedural activists..... 215

7.4.3 Résumé 219

7.5 Reflections and connections..... 219

7.5.1 Intertwinement of views on process-based review with core constitutional principles..... 220

7.5.2 Context of process-based review..... 223

 A. Historical context 224

 B. Institutional context..... 226

7.5.3 Intrusiveness of process-based review..... 228

7.6 Conclusion 229

Chapter 8

Debates Concerning Process-based Review and Procedural Mandates, Judicial Standard-setting, and Fundamental Rights Protection 231

8.1 Introduction 231

8.2 Process-based review and the judicial function of protecting procedural standards..... 232

 8.2.1 Courts' procedural mandate 233

 8.2.2 Courts and the definition and application of procedural standards.... 235

 A. Originalism, living instruments, and the role of courts..... 236

 B. Temporal aspects of standard-setting: consequences of new procedural standards 239

 C. Substantive aspects of standard-setting: level of detail of procedural standards 242

 8.2.3 Résumé 245

8.3 Process-based review and the judicial function of protecting fundamental rights 245

 8.3.1 Courts offering protection of fundamental rights through process-based review..... 246

 A. Minimum protection of fundamental rights..... 246

 I. Intrinsic approaches to the value of procedures for fundamental rights protection..... 247

 II. Instrumental approaches to the value of procedures for fundamental rights protection..... 250

 B. Enhanced protection of fundamental rights 254

 I. Enhanced procedural fundamental rights protection..... 254

 II. Enhanced substantive fundamental rights protection..... 256

 C. Extending courts' jurisdiction through (procedural) positive obligations 259

 I. Enforcing fundamental rights in horizontal disputes 260

 II. Enforcing socio-economic rights 262

 D. Résumé..... 264

8.3.2	Courts failing to protect fundamental rights by applying process-based review	264
A.	Unsuccessful protection of fundamental rights	265
I.	Inadequate protection of fundamental rights	265
II.	Reduced protection of fundamental rights	268
B.	Weakened judicial protection of fundamental rights	271
C.	Résumé	273
8.4	Reflections and connections	273
8.4.1	A standard review loop	274
8.4.2	Primacy of procedural or substantive fundamental rights protection . .	275
8.4.3	Concrete and generic impact of procedural approaches	278
8.4.4	Context-dependent effectiveness of process-based fundamental rights review	281
8.5	Conclusion	283

Chapter 9

Debates Concerning Process-based Review and Neutrality, Hard Cases, Judicial Expertise, and Epistemic Uncertainties 285

9.1	Introduction	285
9.2	Process-based review and normative difficulties in adjudication	286
9.2.1	Normativity or neutrality of procedures and procedural reasoning . . .	286
A.	John Hart Ely’s process-oriented system of review and neutrality .	288
B.	Normativity of procedures and process-based review	290
C.	Neutral enforcement of (legislative) entrenched substantive values	293
D.	Procedural reasoning limiting substantive decision-making	296
E.	Neutrality in degrees: more and less value-laden review	299
F.	Transparency and risks of corruption, dishonesty, and inconsistency	300
G.	Résumé	302
9.2.2	Avoiding morally sensitive or ‘hard’ cases	303
A.	‘Hard cases’	303
B.	Normative avoidance strategies	305
C.	Process-based review as an avoidance strategy	308
D.	Nuancing process-based review’s potential	312
E.	Résumé	314
9.3	Process-based review, judicial expertise and epistemic uncertainties	315
9.3.1	Judicial expertise on decision-making procedures	315
A.	Judicial expertise on matters of process and process-based review	316
B.	Limitations on judicial expertise	319
C.	Résumé	325

9.3.2	Epistemic uncertainties and decision-making procedures.	326
A.	Epistemic uncertainties and empirical reasoning.	326
B.	Courts and empirical reasoning.	328
C.	Process-based review as epistemic avoidance strategy.	331
D.	Evidence-based decision-making and procedural reasoning	337
E.	Problems with process-based review of empirical reasoning	341
F.	Résumé.	345
9.4	Reflections and connections.	346
9.4.1	Law, morality, empiricism, and process-based review	347
A.	Relationships between law and morality, and law and empiricism	347
B.	Moral, empirical, and procedural reasoning	348
9.4.2	Neutrality, normativity, factuality, and process-based review.	350
A.	Neutrality–normativity tension and procedural reasoning.	351
B.	Empirical reasoning to resolve the neutrality–normative tension?	353
9.4.3	Normativity in degrees.	356
9.5	Conclusion	357
	Reflection on Part III	359
	Overlap and conflicts between debates on process-based review	359
	Conclusion: process-based review is not a one-size-fits-all approach.	361
	CONCLUSION	
	Chapter 10	
	Conclusion	365
10.1	Introduction	365
10.2	Building blocks for process-based fundamental rights review	367
10.2.1	Intensity of process-based review.	368
10.2.2	Burden of proof	370
10.2.3	Standards for review	372
A.	Authority responsible for setting procedural standards	372
B.	Types of procedural standards	374
C.	Other categories of standards.	376
10.2.4	Result of procedural considerations.	378
10.2.5	Location of review	380
A.	Preliminary tests: intensity of justification review	382
B.	Justification tests: legitimate aim, suitability, necessity, and proportionality	384
10.2.6	Importance of procedural considerations	386
10.2.7	Conclusion of procedural reasoning	390
10.2.8	Résumé	392
10.3	Conclusion	395

<i>Addendum: Questions for ECtHR Judges</i>	397
<i>Summary</i>	401
<i>Samenvatting</i>	409
<i>Bibliography</i>	419
<i>Official Documents</i>	447
<i>Case-Law (by Jurisdiction)</i>	449
<i>Case-Law (by Name)</i>	453
<i>Curriculum vitae</i>	457
<i>Index</i>	459