

Straight Human Rights Talk – Why Proportionality does (not) Matter

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1 Introduction

In the following I will present two arguments. First, proportionality *does* matter as it is impossible to disregard proportionality when rights are limited. Second, proportionality *does not* matter when we delimit rights – at least not if we understand proportionality as it is normally understood. We have to revise our understanding of proportionality, before we can really say that proportionality matters.

The starting point of my analysis may be trite, namely that we do not really know when we limit rights. Others before me have observed that the distinction between limitation and delimitation of rights is far from clear. Torkel Opsahl thus rightly observed in the context of the Universal Declaration:

“To define a right is in fact at the same time to limit it: It excludes what it does not cover. What is positively described as its contents indicates its limits. However, limitations are expressed in other ways as well, familiar to anyone with some experience of legal texts. Many alternatives exist, explicitly described as limitations, restrictions, exceptions or in terms such as “shall, however, not include.” The logic is often the same, whatever drafting is adopted.”²

Proportionality is more a matter of interpretation of rights than a matter of limitation of rights. The use of a proportionality-discourse and the focus on limitation of rights bring forward a rights/limitation-dichotomy, which is often without merits. Focusing on the interference in fundamental human rights often creates the impression that the measure affecting the right is of a dubious character and amounts to a *prima facie* violation, but the strength of the *prima facie* violation depends, as we shall see, on the normative value attached to the various interests. The idea of limitations on rights is thus debatable in many contexts.

The rights/limitation-discourse promotes the careless habit of speaking of rights without paying sufficient attention to counter-weighting interests. Frederick Schauer has rightly observed that the failure to arrive at a proper appreciation of exceptions “often leads substantive debates of policy or principle to hide behind pseudo-logical claims that one side has, by urging an exception, taken the low road of ad hoc expedience rather than the high road of principle”.³

Accordingly, proportionality is presented sometimes as a threat to human rights, sometimes as inherent in human rights instruments.⁴ Many legal scholars and activists have pointed to the fuzzy nature of proportionality review⁵⁶⁷ and

2 Opsahl *Articles 29 and 30 - The Other Side of the Coin*, in *The Universal Declaration of Human Rights - A Commentary*, Scandinavian University Press, Stockholm 1992, p. 459.

3 Schauer, *Exceptions*, *University of Chicago Law Review* 1991 871-900 p. 874.

4 *Sporrong and Lönnroth v. Sweden* [PL] (23 September 1982, Series A no. 52) § 69.

5 Viljanen, *The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law - A Study of the Limitation Clauses of the European Convention on Human Rights*, University of Tampere, Tampere 2003, p. 339.

6 Greer, “Balancing” and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate, *Cambridge Law Journal* 2004 412-434 p. 425.

calls are often made for greater clarity. As Lord Lester of Herne Hill has put it in the context of the European Court of Human Rights:

“The problem with the Court’s invocation of the margin of appreciation is that it removes the need for the Court to discern and explain the criteria appropriate to particular problems. What is needed is a careful and skilful application of the principle of proportionality.”⁸

A careful and skilful application of the principle of proportionality requires a sufficiently useful, specific and precise principle of proportionality. Yet, since proportionality is widely misunderstood, much legal doctrine on proportionality is flawed by insufficient analysis of the principle. Human rights adjudication does not need specific tests that purport to circumscribe international legal reasoning. It is nonetheless of significant interest to further analyse the specific content of the principle of proportionality in order to improve our understanding of the nature of rights – and the nature of their limitations.

Accordingly, in the following I will address the use of proportionality in international human rights law (section 1.2), the structure of proportionality (section 1.3), the least onerous means test (section 1.4), the essence of rights (section 1.5), the principle of suitability (section 1.6) and finally discuss what we might hereafter think of proportionality (section 1.7). My analysis will focus on the European Convention on Human Rights.

2 The Principle of Proportionality in International Human Rights Law

Before we head into the analysis, we may pause to reflect on the seemingly ever-expanding role of proportionality in international human rights law.

Proportionality is a fundamental concept of justice as old as organised society. In international law, traces of proportionality, or necessity, date back to the very birth of international law around 1600⁹ and has been recognised in international practice at least since the 19th century.¹⁰ In *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, the ICJ accepted the concept of necessity as part of customary international law.¹¹

7 Jowell, *Of Vires and Vacuums: The Constitutional Context of Judicial Review*, Public Law 1999 448-460 p. 456.

8 Lord Lester of Herne Hill, *Universality versus Subsidiarity: A Reply*, European Human Rights Law Review 1998 73-81 p. 78.

9 Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Cambridge University Press, Cambridge 2002, pp. 182-183 § 13 with footnote 420.

10 Ibid. *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, pp. 179-182.

11 *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)* (ICJ Reports 1997) § 51 (references omitted).

The Universal Declaration of Human Rights of 1948 provides an important stepping stone to a better understanding of the role of proportionality in contemporary human rights law. The Universal Declaration comprises a general limitation clause in Article 29 § 2:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”¹²

The Universal Declaration’s link between the duties of individuals and the limitations on rights was heavily inspired by the American Declaration of the Rights and Duties of Man approved by the International Conference of American States in 1948.¹³

The European Convention of Human Rights (ECHR) do not comprise similar provisions, although the Teitgen Report of 5 September 1949 comprised a limitation clause,¹⁴ which - for reasons undisclosed by the preparatory works - was ultimately not adopted. Nonetheless, proportionality plays a pivotal role in the practice of the European Convention of Human Rights.¹⁵

The International Covenant on Civil and Political Rights (ICCPR) attaches specific limitation clauses to many rights.¹⁶ The limitation clauses are subject to a requirement of either absence of arbitrariness¹⁷ or presence of necessity.¹⁸ Traditionally, the principle of proportionality has not played a prominent role in the interpretation of the ICCPR.¹⁹ However, since the early 1990’s the Human

12 At one stage during the drafting of the Universal Declaration, the words “necessary to secure” were included in the text, but the drafters favoured the words “prescribed by law solely for the purpose of securing ...”, see Daes, *Freedom of the Individual under Law - A Study of the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, United Nations, New York 1990, p. 72 § 40 and p. 74 § 57-62.

13 The Bogotá Declaration highlights the duties of individuals in the preamble, Article 18 (scope of the rights of man) and Articles 29-38 (specific obligations). See also statement of essential human rights of 1945 Article 18, cf, The American Law Institute, *The American Law Institute Seventy Fifth Anniversary 1923-1998*, The American Law Institute, Philadelphia, Pennsylvania 1998, p. 288.

14 Council of Europe, Collected Edition of the "Travaux Préparatoires" 1961 p. 105.

15 Christoffersen, *Fair Balance*, Martinus Nijhoff, Leiden Boston 2009, p. 37.

16 Article 6 § 1, Article 9 § 1, Article 10 § 2, Article 12 § 3, Article 12 § 4, Article 14 § 1, Article 17 § 1, Article 18 § 3, Article 19 § 3, Article 21, Article 22 § 2, and Article 25.

17 Article 6 § 1, Article 9 § 1, Article 12 § 4, and Article 17 § 1.

18 Article 12 § 3, Article 14 § 1, Article 18 § 3, Article 19 § 3, Article 21, and Article 22 § 2.

19 See e.g. Daes, *Freedom of the Individual under Law - A Study of the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, United Nations, New York 1990, pp. 115-118 and 135-136 and Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights - Cases, Materials, and Commentary*, Oxford University Press, Oxford 2004, pp. 32-33.

Rights Committee has introduced references to a requirement of proportionality into General Comment.²⁰ In its General Comment no. 31 the Human Rights Committee considered the obligation pursuant to Article 2 § 1 “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” its starting point for the trite and uncontroversial view that “any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant.” Furthermore the Human Rights Committee made the general observation:

“Where such restrictions are made, *States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims* in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would *impair the essence of a Covenant right.*” (Emphasis added.)²¹

This is not the place to address the appropriateness of the interpretation, which may significantly narrow the scope of permissible limitations, but the Human Rights Committee’s reliance on the proportionality principle makes it clear that the principle is taking on an increasingly important role in the protection of human rights and fundamental freedoms in global human rights law. There is no reason here to go deep into the use of proportionality in the context of other instruments, but it should not be overlooked that proportionality may be spreading to other international human rights instruments.

The International Covenant on Economic, Social and Cultural Rights (CESR) thus comprises a general limitation clause, which does not expressly introduce the principle of proportionality.²² The specific limitation on the right to form and join trade unions in Article 8 comprises a proportionality principle, and reference is made to the principle of proportionality in the General Comments on forced eviction,²⁴

20 Human Rights Committee, *General Comment no. 22, Freedom of Thought, Conscience or Religion*, 1993 § 8, Human Rights Committee, *General Comment no. 25, Participation in Public Affairs and the Right to Vote*, 1996 § 14, Human Rights Committee, *General Comment no. 29, Derogations during a State of Emergency*, 2001 § 4, and Human Rights Committee, *General Comment no. 27, Freedom of Movement*, 1999 §§ 14-16.

21 Human Rights Committee, *General Comment no. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2004 § 6.

22 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966) Article 4.

24 Committee on Economic, Social and Cultural Rights, *General Comment no. 7: The Right to Adequate Housing (art. 11 (1) of the Covenant: Forced Evictions*, 1997 § 14 with reference to Human Rights Committee, *General Comment no. 16, Right to Privacy*, 1988.

economic sanctions,²⁵ the right to water,²⁶ and the enjoyment of the highest attainable standard of physical and mental health.²⁷

The International Convention on the Rights of the Child (CRC) does not contain a general limitation clause, but specific limitation clauses are attached to various rights.²⁸ Despite the prominent role of the limitation clauses, the principle of proportionality does not appear to have played a significant role in the General Comments on the CRC.²⁹

The International Covenant on the Elimination of All Forms of Discrimination against Women (CEDAW) does not contain limitation clauses, but includes the principle of proportionality in the very definition of gender-discriminatory measures.³⁰ Despite the widespread reference to measures having a disproportionate affect on women,³¹ the function of the proportionality principle is not to limit women's rights, but to identify disproportionate differences falling within the scope of prohibition against indirectly discriminatory measures.

Moving from the global to the regional level, it is worthwhile observing that the African Charter on Human and Peoples' Rights (ACHPR) attaches limitation clauses to specific rights³² and comprises a general limitation clause.³³ The Inter-American Convention on Human Rights places limitations on specific rights³⁴ and comprises -

25 Committee on Economic, Social and Cultural Rights, *General Comment no. 8: The Relationship between Economic Sanctions and respect for Economic, Social and Cultural Rights*, 1997 § 14.

26 Committee on Economic, Social and Cultural Rights, *General Comment no. 15: The Right to Water*, 2002 § 14, § 16, and § 27.

27 Committee on Economic, Social and Cultural Rights, *General Comment no. 14: The Right to the Highest Attainable Standard of Health*, 2000 § 28-29.

28 Article 9 § 1, Article 9 § 3, Article 9 § 4, Article 10 § 2, Article 13 § 2, Article 14 § 3, Article 15 § 2, Article 16 § 1, and Article 37.

29 Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the context of the Convention on the Rights of the Child*, 2003 § 17.

30 Committee on the Elimination of Racial Discrimination, *General Recommendation no. 19: Violence against Women*, 1992 § 6.

31 Committee on the Elimination of Racial Discrimination, *General recommendation No. 21: Equality in Marriage and Family Relations*, 1994 § 28, Committee on the Elimination of Racial Discrimination, *General Recommendation no. 23: Political and Public Life*, 1997 § 22 and § 23, Committee on the Elimination of Racial Discrimination, *General Recommendation no. 24: Article 12 of the Convention (women and health)*, 1999 § 25.

32 Article 11, Article 12 § 2, and Article 14.

33 Article 27. The proportionality principle does not play a prominent role in the African Charter, see e.g. Umozurike, *The African Charter on Human and People's Rights*, Martinus Nijhoff Publishers, The Hague, Boston, London 1997, pp. 63-65, although it has the potential to do so, see Pityana *The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context*, in *The African Charter on Human and Peoples' Rights - The System of Practice, 1986-2000* Cambridge University Press, Cambridge 2002, in particular p. 228.

34 Article 5 § 4, Article 12 § 3, Article 13 § 2, Article 15, Article 16, Article 21 § 1, and Article 22 § 3.

in addition to the derogation clause³⁵ - a general limitation clause governing the relationship between rights and duties (Article 32). The Inter-American Court of Human Rights (IACHR) has made it clear that the rights of the Convention are generally subject to Article 32 and proportionality.³⁶ The text is not decisive as e.g. Article 7 on the freedom of liberty has been interpreted to comprise a requirement of proportionality.³⁷

I do not propose to draw specific conclusions from this brief survey, except to suggest that the proportionality principle is, or is likely to become, a central interpretative principle in international human rights law. The issues arising under the ECHR are likely to emerge in other contexts as well.

3 The Structure of the Proportionality Principle

Proportionality is often considered in the context of limitations of rights,³⁸ but the principle of proportionality is applied far beyond the confines of limitation clauses. The wide scope of the principle is incompatible with the traditional understanding of the principle of proportionality as a means to test the legitimacy of interferences in human rights.³⁹ In reality, the principle of proportionality is an independent means of interpretation developed alongside other canons of interpretation.

Limitation clauses give textual recognition to conflicts of norms, but conflicts of norms emerge in many contexts and beyond interferences, limitations, restrictions etc. Nonetheless, the starting point for my further analysis can be the structure of proportionality tests. The principle of proportionality is often considered a neatly constructed, very persuasive and hardly objectionable legal principle. The proportionality test may, inspired primarily by German administrative and constitutional law, be divided into three independent, yet intertwined, sub-principles:

- the principle of suitability: the measures affecting individual rights must be suitable for the purpose of facilitating or achieving the pursued aim,
- the principle of necessity: a suitable measure must also be necessary in the sense that there is no other equally suitable measure available, which is less restrictive to the protected right, and

35 Article 27 (“strictly required by the exigencies of the situation”), cf. *Habeas Corpus in Emergency Situations* (Arts. 27 (2) and 7 (6) of the American Convention on Human Rights) (1987, Series A no. 8, OC-8/87) § 22.

36 *Enforceability of the Right to Reply or Corrections* (Arts. 14 (1), 1 (1) and 2) (1986, Series A no. 7) § 23.

37 *Gangaram Panday case* (1994, Series A) § 47.

38 Yourow, *The Margin of Appreciation Doctrine*, Kluwer Law International, The Hague, Boston, London 1996, p. 92 footnote 454.

39 Eissen, *Le principe de proportionnalité dans la jurisprudence de la Cour européenne des Droits de l'homme*, Etudes et documents - Conseil d'Etat 1988 275-284.

- the principle of proportionality in the strict or narrow sense (the principle of balancing) a suitable and necessary measure may not upset the fair balance and/or destroy the essence of the right.⁴⁰

The third element may be seen to comprise two different parts depending on the means whereby the essence of rights are delimited (see section 5 below).

The step-by-step approach is expressed by the European Court of Human Rights in numerous judgments and advocated – or at least not rejected - by a number of legal commentators.⁴¹ However well-founded in legal theory the three step construction of the principle of proportionality may be, the German parallel is not generally accepted⁴² and the principle of proportionality in the ECHR is, in my view, very far from being even remotely similar to the doctrinal description of the proportionality review. It is highly doubtful whether any pre-set, three stage proportionality-test could ever be developed. The principle of proportionality guides the interpretation and application of international and national law in vast fields of highly diverse and tremendously complex areas of society. It is counterintuitive to think that (international human rights) adjudication can be reduced to a simple formula that can be applied to solve each and every dispute.

Looking more specifically at the three - or four - classical elements of the proportionality principle, several questions emerge:

1. Does the European Court of Human Rights apply a test of strict necessity (a least onerous means-test)? If the Court does not, what is then left of proportionality? How can one conceive of proportionality if less onerous means do not need to be applied? Is it proportionate to apply more, rather than less, restrictive measures? And how can the availability of less intensive measures impinge on the overall balancing test (see section 4 below)?
2. How is the very essence and untouchable area of rights delimited? Does the test of the very essence of rights differ from the ordinary balancing test or is an absolute core of rights protected? Can an individual's rights and freedoms of the ECHR be rendered completely ineffective or does a core remain (see section 5 below)?
3. How does one assess the link between the measures adopted by the Contracting Parties and the legitimate aim pursued by them? Is a measure of effectiveness required? How is effectiveness measured? How does effectiveness interact with the underlying normative interest at stake? Can the overall balancing act disregard the more or less well-founded nature of a given means-ends relationship (see section 6 below)?

40 Schwarze, *European Administrative Law*, Sweet and Maxwell and Office for Official Publications of the European Communities, London, Luxembourg 1992, p. 687.

41 Corten, *L'utilisation du "raisonnable" par le juge international - Discours juridique, raison et contradictions*, Bruylant, Bruxelles 1997, p. 571.

42 Rupp-Sweinty, *Die Doktrin von der margin of appreciation in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, Verlag V. Florentz, München 1999, p. 21.

Theoretical analysis going beyond the usual case-by-case examination of the Court's reasoning in specific cases - or in specific areas of case-law - is unlikely to paint a very precise picture of the proportionality principle. Perhaps one cannot get to the bottom of the proportionality principle in all areas of case-law, but I submit that significant improvement can be made by addressing these crucial issues on a general and to some extent abstract level.

In the following, I will therefore address the proportionality principle from the perspective of the least onerous means-test (section 4), the very essence of rights (section 5), the principle of suitability (section 6), before I finally have a go at reframing proportionality (section 7).

4 Least Onerous Means

The least onerous means-test is popular in scholarly circles and highly regarded by human rights activists. Steven Greer, for example, bluntly states:

“The principle of proportionality limits interference with Convention rights to that which is least intrusive in pursuit of a legitimate objective.”⁴³

However, the picture changes dramatically if focus is turned to judicial practice. It would be going too far to say that the Court has never paid tribute to the least onerous means-test, but the ECHR requires the Contracting Parties to apply neither the least restrictive measures, nor less onerous measures. Individual applicants continue to call on the Court to adopt such requirements, but the Court has strenuously rejected such interpretations.⁴⁴

The less onerous means-test was clearly rejected in the leading judgement in *James and Others v. the United Kingdom* concerning the compulsory transfer of property as part of a leasehold reform. The applicants argued that the deprivation of property went too far, *inter alia*, because the legislation could be considered proportionate and legitimate under Article 1 of Protocol no. 1, only “if there was *no other less drastic remedy* for the perceived injustice” available to the authorities (emphasis added).⁴⁵ The Court did not agree, however:

“This amounts to reading a test of strict necessity into the Article, an interpretation which the Court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a “fair balance”. Provided the legislature remained within these

43 Greer, *Constitutionalizing Adjudication under the European Convention on Human Rights*, Oxford Journal of Legal Studies 2003 405-433 p. 409.

44 *Belgian Linguistic case (merits)* [PL] (23 July 1968, Series A no. 6) p. 50 § 13 (question 2).

45 *James and Others v. the United Kingdom* [PL] (21 February 1986, Series A no. 98-B) § 51.

bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.”⁴⁶

The required application of “reasonable and suited” measures, rather than alternative and better solutions, reflects the Court’s over-all balancing test.

Similar rejections of the test of strict necessity, which is an essential part of the traditional three-tier proportionality test, are found in various parts of the Court’s case-law. I cannot document the Court’s practice here,⁴⁸ but a few examples can be given (section 4.1), before I explain why the Court, in my view, had to reject the less/least onerous means-test (section 4.2).

4.1 The Principle of Strict Necessity is Rejected

The phrase “principle of strict necessity” commonly denotes the principle whereby the Contracting Parties, when they interfere with the rights and freedoms of the ECHR, are obligated to use a less restrictive measure before a more restrictive one.

In essence the obligation to adopt a less restrictive means leads to the obligation to use the least restrictive instrument because the least restrictive will be preferred over the second-least onerous one. I use both terms, however, because the Court sometimes indicates that one of more less restrictive means could have been applied.

The European Court of Human Rights in many cases place weight on the possibility of pursuing a less restrictive course of action, but that does not add up to a general obligation to use less restrictive measures. The absence of the principle of necessity emerges e.g. from the Court’s rejection of the applicants’ contention in *Brannigan and McBride v. the United Kingdom* that the authorities should have availed themselves of a less onerous measure than derogation. The Court implicitly recognised that the respondent State might not be in best conformity with the ECHR as it noted that the “validity of the derogation cannot be called into question for the sole reason that the Government had decided to examine whether in the future a way could be found of ensuring *greater conformity* with Convention obligations” (emphasis added).⁴⁹ The State needed not, in other words, adopt means that will be more expedient to secure conformity with the ECHR.

Another example of principle interest is *Hatton and Others v. the United Kingdom* concerning noise pollution emanating from Heathrow Airport. The Chamber was preoccupied with the procedural aspect of the case and criticised the absence of research into the contribution of the increased night flights to the

46 Ibid. § 51. See also *Mellacher and Others v. Austria* [PL] (19 December 1989, Series A no. 169) § 53, *Bäck v. Finland* (20 July 2004, ECHR 2004-VIII) § 54, *Blecic v. Croatia* (29 July 2004, Appl. no. 59532/00) § 67, and *Becvár and Becvárová v. the Czech Republic* (14 December 2004, Appl. no. 58358/00) § 66.

48 See Christoffersen, *Fair balance*, Martinus Nijhoff, Leiden Boston 2009, chapter 2.5.

49 *Brannigan and McBride v. the United Kingdom* [PL] (26 May 1993, Series A no. 258-B) § 54.

national economy⁵⁰ as well as the lack of research into the link between noise pollution and sleep.⁵¹ The Chamber did not accept the sufficiency of the steps taken by the Government to mitigate the effects of the noise pollution and implied the applicability of the least onerous means-test:

“In particular, in the absence of any serious attempt to evaluate the extent or impact of the interferences with the applicants’ sleep patterns, and generally in the absence of a prior specific and complete study with the aim of *finding the least onerous solution as regards human rights*, it is not possible to agree that in weighing the interferences against the economic interest of the country – which itself had not been quantified – the Government struck the right balance in setting up the 1993 Scheme.” (Emphasis added).⁵²

In addition to the procedural obligation to conduct studies, the Chamber likewise focused on the test of strict necessity describing the substance of Article 8 in the following terms:

“It considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally *seeking to achieve their aims in the least onerous way as regards human rights*. In order to do that, a proper and complete investigation and study with the aim of *finding the best possible solution* which will, in reality, strike the right balance should precede the relevant project” (emphasis added).⁵³

The case was taken to the Grand Chamber that took a different stance. The Grand Chamber rejected the Chamber’s view and stated that it is “certainly not for ... the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere”.⁵⁴ Reviewing the substance of matters, the Grand Chamber said:

“Whilst the State is required to give due consideration to the particular interests the respect for which it is obliged to secure by virtue of Article 8, *it must in principle be left a choice between different ways and means of meeting this obligation*. The Court’s supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance.”⁵⁵

This is an unequivocal rejection of the Chamber’s interpretation.⁵⁶ While the *minority* recognised an obligation to seek “the least onerous solution” as regards

50 *Hatton and Others v. the United Kingdom* (2 October 2001, Appl. no. 36022/97) §§ 100-102.

51 *Ibid.* § 103.

52 *Ibid.* § 106.

53 *Ibid.* § 97.

54 *Powell and Rayner v. the United Kingdom* (21 February 1990, Series A no. 172) § 100.

55 *Hatton and Others v. the United Kingdom* [GC] (8 July 2003, ECHR 2003-VIII) § 123.

56 For the opposite view, see the joint dissenting opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner in *Ibid.* §§ 12-15.

human rights in order to “ensure as far as possible” the right in issue on the basis of “a prior specific and complete study”, the *majority* stated that the State must “in principle be left a choice between different ways and means” of securing the recognised rights. The majority of the Grand Chamber thus clearly maintained the longstanding practice of the Court by firmly rejecting the test of strict necessity.

What is not so clear, however, is why the Grand Chamber rejected the necessity principle. The majority argued that “the Court’s supervisory function [is] of a subsidiary nature” and that it is “certainly not for ... the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy”. Judge Greve similarly considered the strict necessity-test “incompatible with the wide margin of appreciation left by the European Court to Contracting States in other planning cases”.

The Courts’s interpretation appears to be derived from the Court’s subsidiary position as an international Court, but this argument cannot justify the Court’s position. In my view, the Court’s practice is justified. But by a different line of argument. As we shall see in section 4.2, the Contracting Parties’ discretion extends beyond the confines of strict necessity test not because of the Court’s subsidiary and limited review, but because of the substantive interpretation of the ECHR.

4.2 *The Principle of Strict Necessity Should be Rejected*

The Court is right in rejecting the principle of strict necessity. The substantive norms of the ECHR do not necessarily require the use of the least onerous means. But do we really understand why it is for the State to decide how best to strike the balance between the interests at stake? Why should the use of less restrictive measures not be applied?

In my view, the answer flows logically from the nature of the ECHR. But before I make the case against the least onerous means test, I will address a few arguments that could be invoked to explain the general rejection of the least/less onerous means-test.

In the first place, the proportionality assessment is inherently flexible. The flexibility is witnessed not only by the case-by-case analysis and the common recourse to the margin of appreciation to, as we normally say, regulate the level of scrutiny. The flexibility is based, moreover, on a more fundamental consideration. In the *Belgian Linguistic case*, the Court adopted the “reasonable relationship of proportionality”-requirement, and in *Handyside* it underlined the flexibility inherent in the text of the ECHR observing that the term “necessary” is not as flexible as “admissible”,⁵⁸ “ordinary”,⁵⁹ “useful”,⁶⁰ “reasonable”⁶¹ or “desirable”⁶² and not as strict as “indispensable”. The *Handyside* Court, in other

58 Article 4 § 3.

59 Article 4 § 3.

60 French text of Protocol no. 1 Article 1 § 1.

61 Article 5 § 3 and Article 6 § 1.

62 Not used in the Convention or the Protocols.

words, did not view the proportionality requirement inherent in the term “necessary in a democratic society” as a requirement of indispensability and referred specifically to the terms “absolutely necessary” in Article 2 § 2, “strictly necessary” in Article 6 § 1, and “strictly required” in Article 15 § 1. In the light of the flexible language and the ensuing flexible fair balance test, the least onerous means test can hardly be considered generally inherent in the ECHR.

Secondly, the Court referred in *Mellacher and Others* to the margin of appreciation. The more specific recourse to the subsidiary nature of the Court’s review in *Hatton and Others* gives reason to think that the Court attributes the rejection of the least onerous means-test to the exercise of self-restraint in the application of the principle of proportionality to the particular circumstances of specific cases.⁶³ The self-restraint might thus be seen as a reflection of the uncertainty inherent in determining which measure is in fact the least or less onerous one. In that perspective, the rejection would reflect the institutional limitations on the Court’s fact-finding function.⁶⁴

Thirdly, the principle of necessity hinges on the perception that the available alternatives are equally burdensome on all legally relevant considerations. Yet, the application of what might *prima facie* appear to be a less onerous measure might have repercussions on other legally relevant interests. The multipolar relationship between the interests at stake shows that this *ceteris paribus* assumption is not immediately applicable.

In my view, these three explanations do not convincingly explain the Court’s rejection of the test of strict necessity and the question remains why the Court should not pronounce an opinion on the best or better solution available to the Contracting Parties. In stead, I offer a justification based on the nature of the ECHR.

The nature of the ECHR is of course a difficult concept as the nature of the ECHR depends on its interpretation, and *vice versa*. It could thus be considered circular to argue that the content of the proportionality principle derives from the nature of the proportionality principle; the proportionality principle does not comprise the least onerous means-requirement, because the least onerous means-test is not included in the proportionality principle. However, the circularity disappears, as I shall show, when the minimum nature of the ECHR is taken into account.

The minimum nature of the ECHR justifies the absence of a test of strict necessity. The key to a proper appreciation of the nature of the proportionality assessment is provided by including the Contracting Parties’ implementation freedom in the analysis, i.e. the discretion left to them in choosing between different means available to fulfil their international obligations. I have analysed the implementation freedom of the Contracting Parties in more detail elsewhere and it suffices here to note that the ECHR was always meant to leave the

63 Schokkenbroek, *Toetsing ann de vrijheidsrechten van het europees verdrag tot bescherming van de rechten van de mens*, Leiden 1996, p. 525 (summary in English) notes that the less restrictive means test would “run counter to the Court’s recognition of the States’ margin of appreciation”.

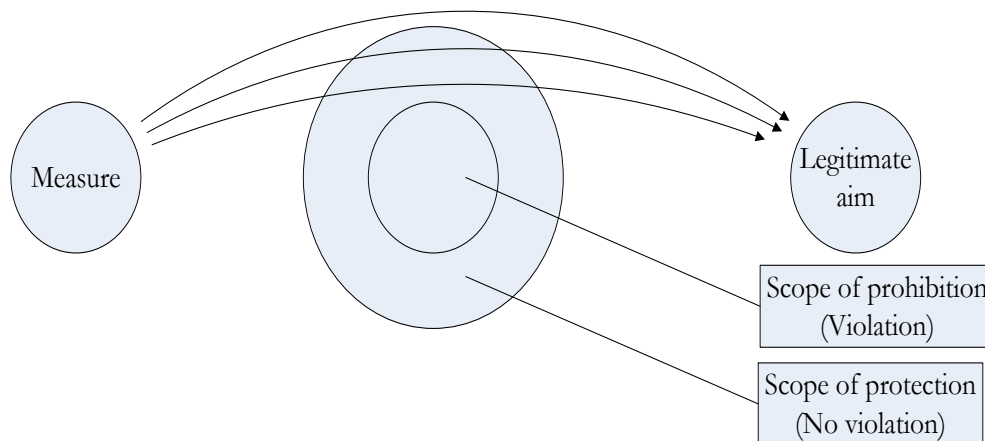
64 See e.g. the minority in *Sunday Times v. the United Kingdom* [PL] (26 April 1979, Series A no. 30).

Contracting Parties a wide measure of discretion in the implementation of the ECHR.⁶⁵

The implementation freedom makes inevitable the rejection of the principle of strict necessity. It is impossible to determine whether the (wide) domestic implementation freedom flows from the lack of a test of strict necessity, or whether the lack of a test of strict necessity flows from the (wide) domestic implementation freedom. The circularity inherent in the fact that the issues reflect two sides of the same coin is unavoidable.

However, the overarching argument that absolves the circularity problem is the fact that the ECHR was always intended to provide a minimum level of protection. The possibility of providing a higher level of protection therefore does not suffice to establish a violation of the ECHR. Similarly, the availability of better solutions/less onerous means does not *per se* warrant the conclusion that the ECHR is violated. The minimum nature of the ECHR contradicts the less and least onerous means-test. It is the minimum nature of the ECHR that justifies the Court's practice – not the Court's role and institutional capacity.

The following drawing illustrates the link between the minimum nature of the ECHR and the least onerous means test (figure no. 1); the further away from the core of the right (the circles in the middle), the less restrictive the measure and the higher the level of protection.



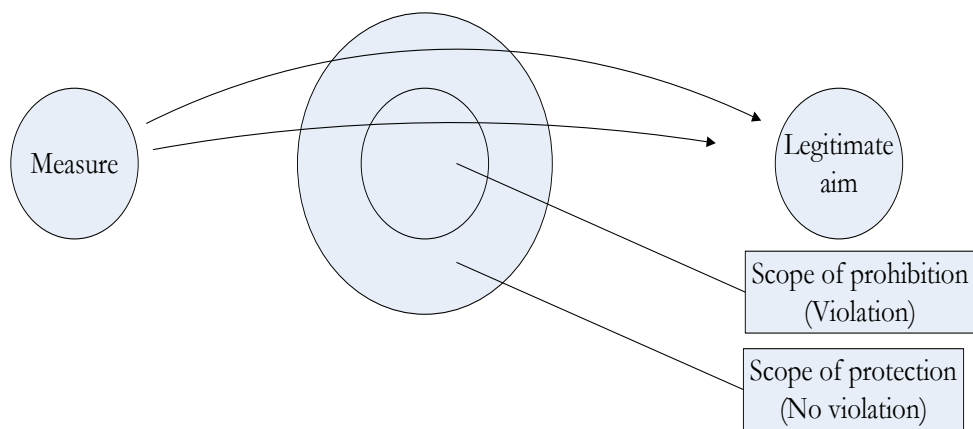
None of the three alternative measures violate the ECHR and the choice between them is accordingly left to the Contracting Party. If it were decisive whether less onerous measures were available, the middle measure falling within the scope of the protected right would have to be applied thus obliging the Contracting Party to grant the individual a higher level of protection.

Yet, the Court sometimes places emphasis on the availability of alternatives, but would that not reflect an obligation to use the least onerous means? After all, how can the Court place emphasis on less restrictive alternatives if it does not

⁶⁵ Christoffersen, *Fair balance*, Martinus Nijhoff, Leiden Boston 2009, pp. 129-135.

require the application of a less onerous means? Would the argument from less restrictive measures not contradict my analysis? Would it not be an either/or?

The answer to this objection lies in the recognition of the distinction between *prima facie* and ultimate violations. The implementation freedom attached to the choice between various measures that do not violate the ECHR is not contradicted by the fact that a less intense measure may at times be relevant. While the availability of a less intense measure is not decisive, provided the international minimum standard is respected, the situation is of course the reverse if the right is *prima facie* violated. If the minimum standard is *prima facie* violated (the arrow in the centre circle), an alternative measure (the top arrow) will have to be adopted in the pursuit of the legitimate aim (figure no. 2).



The *prima facie* violation of a right justifies the Court's placing weight on the availability of less intrusive measures - in particular in cases where the most extreme and far-reaching measures are adopted.⁶⁶

In addition hereto, one should not forget that the relevance of alternative measures is even more general. If the Contracting Parties did not have any alternatives available to meet their objectives, the Contracting Parties would face the choice of sacrificing either the aim or the right. The aim must be sacrificed, if the only means available to achieve the aim cannot be applied because it violates the ECHR, whereas the aim must not be sacrificed, if an alternative is available. This explains why the applicant may bear the burden of proof in respect of the availability of less onerous means.⁶⁷

Moreover, the availability of alternatives plays a much more general, though implicit, role in the Court's practice, because the Court will normally assume that alternative measures are available. The Contracting Parties have a wide measure of discretion not only in respect of the execution of judgments, but also in the implementation of the procedural and substantive rights and freedoms.⁶⁸

⁶⁶ See also *Riener v. Bulgaria* (23 May 2006, Appl. no. 46343/99) § 125.

⁶⁷ *Paeffgen GmbH v. Germany (dec.)* (18 September 2007, Appl. no. 25379/04, 21688/05, 21722/05 and 21770/05) p. 10.

⁶⁸ Christoffersen, *Fair balance*, Martinus Nijhoff, Leiden Boston 2009, chapter 3.6.

The Court is therefore not concerned with the Contracting Parties' choices within the scope of their discretion, and it will generally assume that less restrictive measures are available to the State.

Hence, when the Court points to the possibility of adopting alternatives, the justification derives from the fact that individual human rights do not necessarily stand in the way of the achievement of the legitimate aim.⁶⁹ The Contracting States' general implementation freedom - in respect of the execution of judgments and elsewhere - makes it clear that the States are generally assumed to have alternative means at their disposal.

4.3 *Conclusion on the Least Onerous Means Test*

The Court's general rejection of the least/less onerous means-test in a wide range of different areas of case-law shows that the proportionality principle is not adopted in order to determine what might be considered the better, let alone optimal, legal-technical solution to societal and individual problems.

The availability of alternative measures plays an implicit but important role in the Court's case-law as the Court generally assumes that alternatives are available. Yet, the implementation freedom and ensuing general absence of a test of strict necessity comprising a least/less onerous means-test reflects the nature of the ECHR as an international treaty protecting minimum human rights standards rather than the Court's subsidiary position as an international court. A principle of strict necessity would undermine the nature of the ECHR as it would lead to imposing maximum limits on the implementation freedom of the Contracting Parties.

5 **The Doctrine of the Essence of Rights**

The traditional description of the proportionality principle includes protection of the very essence of the rights of the ECHR. In the *Belgian Linguistic case (merits)* the Court said, *inter alia*, that:

“it goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention”.⁷⁰

The Court thus undoubtedly introduced into the ECHR the notion of protection of the very substance or essence of the rights of the ECHR.⁷¹ While the Court rarely uses the term “core” of rights,⁷² the idea of the essence of rights is that

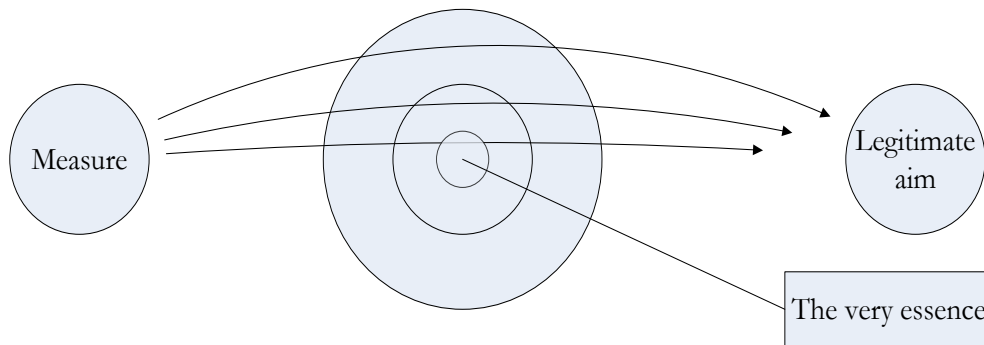
69 E.g. *Ciulla v. Italy* [PL] (22 February 1989, Series A no. 148) § 41.

70 *Belgian Linguistic case (merits)* [PL] (23 July 1968, Series A no. 6) p. 32 § 5.

71 In German Constitutional Law, the concept is known as the “Wesengehaltsgarantie”, see e.g. Klein *Wesengehalt von Menschenrechten - Eine Studie zur Judikatur des Europäischen Gerichtshofs für Menschenrechte*, in *Weltinnenrecht - Liber Amicorum Jost Delbrück* Duncker & Humblot, Berlin 2005.

72 The Court occasionally states that the regulation must never injure the substance of the right or impair the very essence or substance of rights, but the terms are used synonymously, see e.g. *Canea Catholic Church v. Greece* (16 December 1997, Reports 1997-VIII) concerning

rights comprise three different zones, or areas, of protection; the area that can never be trespassed upon, the area of protection against illegitimate inroads on rights, and the zone of permitted limitations on rights (figure no. 3).



In order to understand the proportionality principle, the crucial question is how the very essence is delimited, and how the means of delimitation interact with the other elements inherent in the proportionality assessment.

5.1 Closing in on the Problem

In order to move closer to the problem, we need first to distinguish between absolute and relative concepts of the essence of rights. Second, we need to be clear about the content of the – absolute or relative - essence of the right.

Rights comprise an absolute – or true - essence if, and only if, there is a core to a given right which cannot be limited under any circumstances. Some legal scholars have addressed the essence of rights,⁷³ but the absolute or relative nature of the essence of rights is not addressed. If the very essence of rights is to be meaningful, an absolute theory of rights must be in play.

A relative – or untrue – theory of the essential core of rights is in play, if the essence is equivalent to whatever is left of the right after the balancing test has been carried out.⁷⁴ The relative theory adds nothing but rhetoric to the weighing and balancing of interests and it is therefore essential to clarify the relative or absolute nature of the very essence of the rights and freedoms protected by the ECHR

The greatest obstacle to a proper discussion and analysis of the doctrine of the core of rights is the lack of specificity in the definition or description of the right that may or may not contain an inviolable core. The absolute nature of the core of a right presupposes either a preliminary rejection of the very possibility of admitting inherent limitations or a preliminary assessment of the legitimacy of permitted limitations. Further, the doctrine of the essence of rights presupposes a measure of particularisation that enables the essence of the right to be

access to court § 38 and § 42 and *Sadak and Others v. Turkey (no. 2)* (11 June 2002, ECHR 2002-IV) concerning the right to be elected and sit in parliament § 31 and § 40.

⁷³ van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme - prendre l'idée simple au sérieux*, Bruylant, Bruxelles 2001, pp. 389-406.

⁷⁴ Alexy, *A Theory of Constitutional Rights*, Oxford University Press, Oxford 2002, p. 193.

distinguishable from the rest of the right. A particular aspect of a right does not belong to the core of the right if the aspect of the right is subject to a range of limitations in the light of legitimate aims. If other grounds may limit and outweigh the aspect of the right, the core of the right is not really in play. The same goes to the possibility of limiting the core of a right in other specific circumstances. It is necessary, in other words, to operate on the basis of an exact and strict description of the right claimed not to be subject to limitations in any circumstance.

Accordingly, the absolute nature of the doctrine of the core, essence or substance of rights cannot be recognised, unless the absolute nature of an aspect of a right is established on the basis of a preliminary rejection of limitations and/or on the basis of a sufficiently particularised description of the substantive content of the core, essence or substance of the right. The absolute core of a right can be recognised only on the basis of general reasoning that will prevail in all circumstances.

In the following, I will attempt to determine whether there is any distinction in the Court's practice between the ordinary proportionality assessment and a special core of inviolable rights. I will do this by taking a closer look at the different uses of the discourse of the essence of rights.

5.2 *A Relative Doctrine of the Essence of Rights*

The Court has used the doctrine of the very essence of the right to a fair trial in numerous cases on the access to court. The general interpretation of Article 6 will often separate the essence from the ordinary proportionality assessment and thus pay lip service to the absolute theory,⁷⁵ whereas in the specific review the Court does not strictly divide the proportionality assessment from the delimitation of the essence of Article 6 § 1.⁷⁶ The Court may, moreover, occasionally restrict the general description of the substantive content of Article 6 to a reference to the prohibition against the restriction or reduction of the right to the very essence,⁷⁷ but a violation of the essence may nonetheless normally be based on an ordinary act of weighing and balancing.⁷⁸

Similar means of interpretation are adopted in respect of the protection against self-incrimination,⁷⁹ which does not rule out the use of a degree of compulsion in order to compel the individual to furnish information to the authorities,⁸⁰ subject to protection against the subsequent use of evidence in violation of Article 6.⁸¹ The use of the evidence in violation of Article 6 might

⁷⁵ *Golder v. the United Kingdom* (21 February 1975, Series A no. 18) § 38.

⁷⁶ Particularly clear examples are e.g. *Lithgow and Others v. the United Kingdom* [PL] (24 June 1986, Series A no. 102) §§ 196-197, *Stubbings and Others v. the United Kingdom* (22 October 1996, Reports 1996-IV) §§ 52-57, and *Omar v. France* [GC] (29 July 1998, Reports 1998-V) § 40.

⁷⁷ *Philis case v. Greece* (27 August 1991, Series A no. 209-A) § 59.

⁷⁸ *Ibid.* §§ 59 and 65.

⁷⁹ *John Murray v. the United Kingdom* (8 February 1996, Reports 1996-I) §§ 44-45 and 49.

⁸⁰ *Fayed v. the United Kingdom* (21 September 1994, Series A no. 294-B) § 61.

⁸¹ *Saunders v. the United Kingdom* [GC] (17 December 1996, Reports 1996-VI) § 67.

be said to undermine the very essence of Article 6.⁸² The Court has accepted the use of compulsion to produce evidence, provided the compulsion is not improper and does not strike at the very essence of Article 6.⁸³ The Court has placed emphasis on the existence of “appropriate safeguards” against subsequent use of the evidence in violation of Article 6.⁸⁴

A similar picture is seen in the context of the right to vote,⁸⁵ where it does not appear that the Court pays any attention to the difference between the various aspects of the proportionality assessment.⁸⁶ The same is the case as the right to marry is concerned.⁸⁷ In these and other areas of case-law, there is no distinction between the essence and the area of protection delimited by the ordinary proportionality-assessment. The doctrine of the essence of rights is relative.

5.3 *An Absolute Doctrine of the Essence of Rights*

The relative nature of the doctrine of the very essence of rights generally reflected in the Court’s case-law does not mean, in my view, that the ECHR does not comprise an absolute doctrine of the essence of rights.

The absolute doctrine is, however, not linked directly to the principle of proportionality. Quite on the contrary, the absolute essence of rights sneaks into the proportionality assessment from other rights in a fairly roundabout way: When absolute and relative rights are overlapping, the absolute right provides a measure of absolute protection within the scope of the relative right.

The relationship between relative and absolute rights will often be one of *lex generalis/lex specialis*; the relative provisions provide a general and wider measure of protection at a lower level, whereas the absolute provisions generate more specific and narrow protection at a higher level.

The interaction between absolute and relative rights emerges in negative as well as positive contexts, but I will not at this juncture go deep into the positive and negative nature of obligations and their interaction in respect of relative and absolute rights. The State may accordingly be subject to:

- negative obligations to refrain from interfering with the absolute or relative right in the pursuit of the protection of the various interests,⁸⁸ and
- positive obligations to interfere with the absolute of relative right in the pursuit of the interests outlined.⁸⁹

It is not necessary to demonstrate the multiple combinations that may emerge. One example should suffice to demonstrate the *lex specialis/generalis*

82 See the concurring opinion of Judge Morenilla in *ibid*.

83 *John Murray v. the United Kingdom* (8 February 1996, Reports 1996-I) §§ 47 and 50.

84 *Condron v. the United Kingdom* (2 May 2000, ECHR 2000-V) § 61.

85 *Mathieu-Mohin and Clerfayt v. Belgium* [PL] (2 March 1987, Series A no. 113) § 52.

86 *Aziz v. Cyprus* (22 June 2004, ECHR 2004-V) §§ 28-29.

87 *Rees v. the United Kingdom* (17 October 1986, Series A no. 106) §§ 50-51.

88 *Jalloh v. Germany* [GC] (11 July 2006, ECHR 2006-IX) and *Harutyunyan v. Armenia* (28 June 2007, Appl. no. 36549/03) § 63.

89 *Z. and Others v. the United Kingdom* [GC] (10 May 2001, ECHR 2001-V) §§ 74 and 77.

relationship between relative and absolute rights. In *M.C. v. Bulgaria*, the Court subsumed the failure to provide effective criminal law protection against rape under Article 3 as well as Article 8; Article 3 thus providing the core of Article 8.⁹⁰

5.4 Conclusion on the Essence of Rights

While the Court - in the general description of the proportionality principle - maintains a distinction between the ordinary fair balance-test and the very substance or essence of rights, the Court's practice generally reflects a relative doctrine of the very essence of rights.

An absolute doctrine of the very essence of rights is not expressly recognised, but it is implicit in the partial overlap between relative and enjoy absolute rights. Certain aspects of relative rights may enjoy absolute protection under an absolute right and the relative rights may thereby comprise an absolute core that is not subject to limitation in any circumstances, provided of course that the absolute right is really absolute.

6 The Suitability of Measures

The principle of proportionality is designed to test the justification of interferences, but the legitimacy of measures affecting human rights is linked to the importance of the pursued aims. Many scholars focus on the link in fact between means and ends and some argue that a test of causation should be applied.⁹¹ But how do we measure the link in fact between a given measure and its (future) impact on the pursued aim?

The starting point is that the proportionality principle comprises a normative and a factual limb; the normative limb concerns the weight attached to the counter-weighting interests at stake, whereas the factual limb addresses the link between various alternative measures and the interests at stake.

My analysis of the nature of the means-ends relationship will bring out more clearly the complex interaction between fact and norms inherent in the proportionality assessment and thus improve the understanding of the nature of limitations on rights.

6.1 The Interaction Between Facts and Norms

The traditional description of the principle of proportionality rests on the assumption that States must act rationally; States must act in pursuit of some administrative or political objective, and they must apply suitable and proportionate measures. A requirement of some minimum degree of

90 *M.C. v. Bulgaria* (4 December 2003, ECHR 2003-XII) §§ 148-153. *X. and Y. v. the Netherlands* (26 March 1985, Series A no. 91) §§ 24-30 reviewed the absence of effective criminal law protection against rape and other forms of sexual abuse under Article 8. See also *Moldovan and Others v. Romania (no. 2)* (12 July 2005, ECHR 2005-VII).

91 Ugrehelidze *Causation: Reflection in the Mirror of the European Convention on Human Rights (A Sketch)*, in Liber Amicorum Luzius Wildhaber: Human Rights - Strasbourg Views N.P. Engel, Kehl, Strasbourg, Arlington 2007, p. 469.

effectiveness is important to secure that the protected right is not outweighed in the interest of a counter-weighting aim, which remains unaffected by the applied measure.⁹² If the measure is ineffective, the restriction would benefit no one. If the measure is effective, it benefits the aim. Hence, (in)effective protection of a legitimate aim may support the finding of (dis)proportionality.

Yet, one should not take the requirement of effectiveness too far. Some claim that an “interference will be disproportionate if it does not in fact achieve the aim pursued”.⁹³ Yet, the ECHR does not focus in the first place on the effectiveness of measures, but on the legitimacy of the pursued purpose. Article 18 states that the “restrictions permitted under this Convention ... shall not be applied for any purpose other than those for which they have been prescribed“ and, as the Court stated in *Brogan and Others v. the United Kingdom*, “the existence of ... a purpose must be considered independently of its achievement”.⁹⁴

The primary role of purposes - rather than actual results - does not exclude considerations on efficacy. Inherent in the assessment of problems and possible solutions are complex comparisons between hypothetical scenarios, which make necessary the appreciations of future developments in the light of the assumed impact of different courses of action or non-action. If we think more closely of the factual limb of proportionality, we will see not only that the notion of legitimate aims is an essential element of the proportionality principle,⁹⁵ but also that the principle focuses on two issues; what is the problem, and how is it solved?

The Court rarely makes in-depth analyses of the suitability of measures for the purpose of considering the applied measures ill-fit to advance or achieve the pursued objective, but it takes account, implicitly or expressly, of the varying degrees of effectiveness as one factor in the overall assessment of the proportionality of the impugned measure. The assessment of the two crucial issues – the presence or absence of benefit to the legitimate aim as well as the presence or absence of danger to the legitimate aim – demonstrate that they are two sides of the same coin; in both cases the issue is the relationship between means and ends:

- if there is no benefit to the aim, the relationship between State action and the pursued aim is not established (no good is done by action), and
- if there is no danger to the aim, the relationship between the applied measure and the pursued aim is not established (no harm is done by omission).

92 See the *obiter dictum* in *Van der Musselle v. Belgium* [PL] (23 November 1983, Series A no. 70) § 37.

93 Leach, *Taking a Case to the European Court of Human Rights*, Blackstone Press Limited, London 2001, p. 95.

94 *Brogan and Others v. the United Kingdom* [PL] (29 November 1988, Series A no. 145-B) § 53.

95 Gordon, *Legitimate Aim: A Dimly Lit Road*, *European Human Rights Law Review* 2002 421-427.

The principle of suitability is merely one aspect of the more general factual limb of the proportionality principle. The principle of suitability makes it possible to consider a measure disproportionate if it does not produce suitable effects, but the assessment cannot stop there. A full scale proportionality assessment must take account of the means-ends relationship from the perspective of the protected rights as well as from the viewpoint of the pursued aims and all other relevant legal interests.⁹⁶ This is of course utterly unrealistic in practical life, but one should not ignore the following: The weight attached to any argument depends, implicitly or expressly, on an appreciation of the (future) impact of specific as well as hypothetical measures.

6.2 *The Standard and Level of Information*

The interaction between the factual and normative limbs of the proportionality assessment is complicated as the assessment of the factual limb will not normally be an either/or; but a more or less. The means-ends relationship is a matter of degree; a degree of (non-)satisfaction coupled with a degree of uncertainty attached to factual assessments.

The interaction between facts and norms generally takes place in respect of all legally relevant interests, yet it is not uncommon for human rights lawyers to adopt a one-sided rights perspective. Fordham and de la Mare put it as follows:

“Where the evidence tendered to support the existence of a competing interest is slender, the intensity of review will be greater.”⁹⁷

The reverse is, however, also the case; where the information supporting the competing legitimate aim is impressive, the intensity of review will be lower.

The description of the relationship between facts and norms in respect of two factors can go either way; a right may be more or less weighty and supported by more or less weighty information and the same goes for the legitimate aim and any other legally relevant interest. This is why it is too simplistic to say that where “the evidence tendered to support the existence of a competing interest is slender, the intensity of review will be greater”. One should rather recognise that where the information supporting the protection of a legally relevant right, aim or interest is weak respectively strong, its standard of protection will *ceteris paribus* be lower respectively higher.⁹⁸

Moreover, the means-ends relationship is inevitably influenced by the standard of protection of the relevant legal interests. The more important the right and the greater the intensity of the interference, the higher the standard of information required to legitimise the application of a measure pursuing a

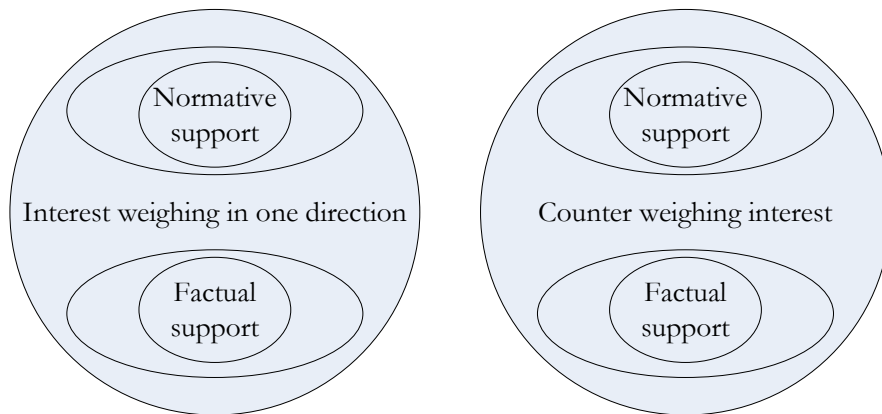
96 A technical explanation is found in Alexy, *A Theory of Constitutional Rights*, Oxford University Press, Oxford 2002, p. 310 and pp. 397-401.

97 Fordham and de la Mare *Identifying the Principles of Proportionality*, in *Understanding Human Rights Principles* Hart Publishing, Oxford and Portland, Oregon 2001, p. 57.

98 Bleckmann and Bothe *General Report on the Theory of Limitations on Human Rights*, in *The Limitation of Human Rights in Comparative Constitutional Law* Les Editions Yvon Blais Inc., Cowansville, Qué. 1986, pp. 108-109.

particular legitimate aim. At the same time, the standard of information will depend on the importance of the legitimate aim pursued; the weightier the aim, the lower the standard of information required to justify a measure pursuing the particular legitimate aim.

The inter-relationship between the importance of various interests and the level of supporting information can be illustrated as follows. The varying size of the circles reflects the greater or lesser degree of normative and factual supporting of the interests (figure no. 4).



The inverse relationship of proportionality between facts and norms cannot be put on formula, in part because the weight of facts and norms are not measured on immediately comparative scales, but also because the assessment of the weight attached to various interests is not equally susceptible to being influenced by normative respectively factual elements. For example, the legitimate aim of the protection of morals e.g. in freedom of expression cases is not particularly concerned with the specific impact of a given measure – however it might be measured - on the moral standing of the population, whereas the assessment of the best interest of the child in cases concerning public care of children depends to a large extent, but not exclusively, on the level of information supporting the conclusion that the child would be much better off in public care.

The complexity of the interrelationship between facts and norms may explain why the Court rarely addresses the standard and burden of information in its application of the principle of subsidiarity (margin of appreciation). The relationship between facts and norms is extremely difficult to describe and the assessment is commonly made intuitively. Even if an attempt were made to describe the interaction in a given case, disagreement would be a likely result. The general lack of description of the standard or level of information - apart from the general references to sufficient, compelling, convincing, weighty, etc. reasons - makes it practically impossible, in particular in the light of extreme factual complexity of the wide variety of judgments and decisions rendered by the Court - to determine whether particular standards of information may be implicitly applied.

The interaction between the level of information required to justify the application of a particular measure and the standard of protection attached to the

rights and freedoms of the ECHR can be illustrated by way of a two judgments that are characterised by the absence of empirical information supporting the Governments decisions, but which received different treatment due to the normative context in which the lack of information operated.

In *Smith and Grady v. the United Kingdom* concerning homosexuals in the armed forces, the Government essentially argued that accepting homosexuals in the armed forces would have “a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces”.⁹⁹ The Court, however, found that the policy disallowing homosexuals was not based on homosexuals’ “physical capability, courage, dependability and skills but on the negative attitudes of heterosexual colleagues towards those of homosexual orientation”.¹⁰⁰ The impact of the negative attitudes of heterosexual servicemen and -women on the cooperation between heterosexuals and homosexuals had not been subjected to empirical survey.

The Court could have disregarded the absence of empirical evidence and left the matter to the Government’s discretion, but it opted for a factual argument observing that “a predisposed bias” cannot be sufficient to justify the interferences with the applicants’ rights any more than similar negative attitudes towards those of a different race, origin or colour.¹⁰¹ The Government further argued that there was a risk of “substantial damage to morale and operational effectiveness” flowing from any change in the policy, but the Court found that the risk was not substantiated by “concrete evidence”.¹⁰² In other words, a strong normative argument in favour of the right could not be outweighed by a normative argument against protection (operative effectiveness) as the argument did not enjoy factual support.

On the other hand, the lack of specific information justifying the inroad on rights does not necessarily lead to a violation. In *Fretté v. France* the Court accepted - in the context of Article 14 - a restriction on the *prima facie* right of homosexual men to adopt. The Court noted that “the scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date”.¹⁰³ The empirical information was undecided and the fair balance was struck on normative grounds. In other words, the normative argument in favour of the right was outweighed by an argument against protection (interests of the child) although the argument did not enjoy factual support.

I do not suggest that the decision in *Smith & Grady* and *Fretté* are wrong, but the Court’s differentiated approach to the absence of empirical evidence

99 *Smith and Grady v. the United Kingdom* (27 September 1999, ECHR 1999-VI) §§ 95, cf. § 76-80.

100 *Ibid.* § 96.

101 *Ibid.* § 97.

102 *Ibid.* § 99.

103 *Fretté v. France* (26 February 2002, ECHR 2002-I) § 42.

confirms the complex interaction between the factual and normative limbs of the proportionality principle.

6.3 *Conclusions*

The least onerous means test and the principle of suitability have a measure of common ground; they are based on a claim of rationality that inevitably reduces the complex and necessarily case-sensitive proportionality appraisal to a technical-empirical assessment of the greater or lesser degree of effectiveness of various measures on the rights and freedoms of the ECHR, the legitimate aims pursued by the Contracting Parties, as well as all other legally relevant interests.

The principle of suitability is, however, merely one aspect of the more general factual limb of the proportionality principle; the principle of suitability makes it possible to consider a measure disproportionate if it does not produce suitable effects, but the assessment cannot stop there. A full scale proportionality assessment must take account of the means-ends relationship from the perspective of the protected rights as well as from the viewpoint of the pursued aims and all other relevant legal interests. The weight attached to any argument depends, implicitly or expressly, on an appreciation of the impact produced by various measures and decisions.

It is very simple to talk of a sufficient level of information, but it is far from easy to get a hold of the Court's case-law, perhaps because of the interaction between the principle of proportionality, the margin of appreciation, the law of evidence, and the Court's fact-finding role.¹⁰⁴ Nonetheless, it is remarkable that the means ends relationship has survived for such a long time without being subjected to thorough theoretical analysis.

7 **What Should we Think of Proportionality?**

The European Court of Human Rights' interpretation and application of the principle of proportionality is better understood if an attempt is made to focus more specifically on the particular elements inherent in the proportionality principle, including the level of information supporting the impact of various acts and omissions.

We should recognise that the level of information applied to establish the necessary and sufficient means-ends relationship is directly proportionate to the standard of protection of the right; the higher the standard of protection (importance) of the right, the higher the standard of information required to justify the application of a particular measure. Conversely, the standard of information is inversely proportionate to the standard of protection (importance) of the legitimate aim pursued; the higher the standard of protection of the aim, the lower the standard of information required to justify the application of a measure in order to achieve the aim. In all this we have an immensely complex balancing of interests, some supported by normative and some by factual arguments.

104 Christoffersen, *Fair balance*, Martinus Nijhoff, Leiden Boston 2009, chapter 3.4.

Legal doctrine has been preoccupied with the doctrine of the margin of appreciation as a tool used to differentiate the Court's level of scrutiny, but it is fruitful to be aware of the various elements inherent in the proportionality assessment before it is concluded that the Court, by reason of its position as an international court, has granted the domestic authorities some kind of enlarged leeway.

The recourse to the margin of appreciation doctrine does not necessarily reflect a deferential review by the Court. The States may simply enjoy a measure of discretion in the determination of the standard of information and protection. Conversely, the Court may, for good reasons, accept a particular measure on the basis of a low standard of information and it is a grave mistake to assume that the burden of information generally rests on the Contracting Parties. The interaction between the empirical and normative elements inherent in the proportionality principle must at all times be taken into account.

The above analysis of the Court's interpretation and application of the fair balance-test shows that the traditional three tiered perception of the principle of proportionality is inadequate; the fair balance-test does not focus strongly on the principle of suitability, it does not entail a principle of strict necessity, and it does not comprise an absolute doctrine of the very essence of rights. The inadequacy of the traditional description of the principle of proportionality begs the question how the fair balance-test can be properly understood.

The Court's use of the fair balance-test in widely different areas of case-law calls for a new approach to the analysis of the Court's case-law. We need to adjust our thinking on the basis of an abstract analysis of the weighing and balancing of counter-weighing considerations in the context of the ECHR.

7.1 *Could we do Without Balancing?*

The crux of the theoretical explanation proposed is as simple as it is complex. Proportionality involves the weighing and balancing of a wide range of conflicting considerations. The legal weighing and balancing of counter-vailing interests presuppose or reflect legal norms that protect the various interests subject to being weighed and balanced.

Proportionality is essentially a rule of reason. The role of reasonableness in general international law cannot be discussed here,¹⁰⁵ but it may be worthwhile observing that while the principle of proportionality may be a general principle of international law;¹⁰⁶ it is certainly applied in a wide variety of fields of international law.¹⁰⁷

The fair balance doctrine was far from alien to international law when the Court introduced it to the ECHR in the 1960's. Bin Cheng's classic book on general principles of international law provides, in my view, a crucial stepping-

105 Corten, *L'utilisation du "raisonnable" par le juge international - Discours juridique, raison et contradictions*, Bruylant, Bruxelles 1997,.

106 Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale*, Dott. A. Giuffrè Editore, Milano 2000, pp. 435-43.

107 Koskeniemi *The Politics of International Law*, in *Dialectic of Law and Reality*, University of Helsinki, Helsinki 1999, p. 139.

stone to a more sophisticated appreciation of the role of the fair balance-test in the ECHR. Bin Cheng's description of the principle of good faith in the context of the interdependence between the international rights and obligations of States in the context of the right to legislate vis-à-vis international obligations runs as follows:

Good faith in the exercise of rights, in this connection, means that a State's rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must be reasonably exercised. The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law. The exact line dividing the right from obligation, or, in other words, the line delimiting the rights of both parties is traced at a point where there is a reasonable balance between the conflicting interests involved.¹⁰⁸

The principle of good faith as outlined by Bin Cheng thus delineates the exercise of discretionary powers of States to legislate in fields governed by international law by means of a requirement of the fair and equitable respect of international law in an honest, sincere, reasonable and moderate manner.¹⁰⁹ I do not claim a causal relationship between Bin Cheng's book and the Court's practice, but the functional similarity is striking as Bin Cheng's focus on the conflicting rights and obligations of States is not unlike the Court's perspective on the State's regulatory powers in the *Belgian Linguistic case*.

An even wider and more general perspective confirms that recourse to the search for a fair balance is an inevitable consequence of the departure from strictly textbound adjudication. The often expressed scepticism against the fair balance-test, as a credible means of adjudication and legal reasoning, makes it particularly instructive to resort to the view expressed by H.L.A. Hart, who is considered one of the strongest proponents of legal positivism.

Hart explained that reasonableness is sought by "weighing up and striking a reasonable balance between the social claims which arise in various unanticipatable forms".¹¹⁰ Hart recognised the inherent limitation of textual guidance¹¹¹ and drew a distinction between plain cases, in which the application of law is "unproblematic" or "automatic",¹¹² and hard cases, in which there are "reasons both for and against our use of a general term, and no firm convention or general agreement dictates its use".¹¹³ Hart moreover recognised that "open

108 Cheng, *General Principles of Law as applied by International Courts and Tribunals*, Stevens & Sons Limited, London 1953, pp. 131-32.

109 Ibid. *General Principles of Law as applied by International Courts and Tribunals*, pp. 123-136 and pp. 114-119.

110 Hart, *The Concept of Law*, Clarendon Press, Oxford 1961, p. 128-129. See also p. 132.

111 Ibid. *The Concept of Law*, p. 123.

112 Ibid. *The Concept of Law*, p. 123.

113 Ibid. *The Concept of Law*, pp. 123-124.

alternatives” entail “something in the nature of a choice”¹¹⁴ and that the discretion left to the decision-maker “may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice”.¹¹⁵

The “open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of the circumstances between competing interests which vary in weight from case to case”.¹¹⁶ The need to strike a balance arises where the text is not sufficiently clearly worded to allow a legal conclusion to be drawn. As we have seen, this is the case in many areas of the ECHR. Hart’s observations tell us that a realistic study of the judicial resolution of competing interest in hard cases of high importance involves a weighing and balancing of different values in an effort to do justice. The weighing and balancing of conflicting interests is neither arbitrary nor legislative, but a reasoned product of impartial choice.¹¹⁷

The criticism against the openness of the international protection of human rights to the wide variety of considerations that impinge on the judicial determination of the threshold of protection to be afforded in individual cases is wide-spread, but based on different concerns. The human rights lobby, including a large number of human rights scholars, is concerned that the balancing act leaves States too much leeway to undermine human rights, whereas others think that judges are granted too much leeway in the exercise of their power to strike the balance between the interests concerned.

The fair balance-test is, however, inherent in the need to resolve the conflict of interests and hence to adjudicate cases that do not lend themselves to simple deductions. The experience from 50 years of international human rights adjudication in Strasbourg shows that it is impossible to take account of the various arguments presented by the parties to the proceedings without recognising the openness of law and the need to balance multiple interests. The legal profession imposes on its members a demand of transparent reasoning, honest communication, and ultimate justification of the exercise of power. Regardless of the outcome of the balancing exercise in particular cases, extensive and elaborate reasoning is preferable to an elitist or positivistic claim to downplay the openness of law in favour of a higher degree of deduction from pre-established positions, which in any event are subject to reasoning.

Clarity, transparency, consistency, predictability etc. are important legal virtues, but there are practical constraints to the obtainable level of coherence in the voluminous practice produced over five decades by a large number of judges from all parts of Europe. It is in my view remarkable that the Court’s practice is characterised by a fairly high degree of consistency. Leaving the quality of the Court’s decision-making and reasoning aside, a choice will have to be made by the Court in every case.

114 Ibid. *The Concept of Law*, p. 124.

115 Ibid. *The Concept of Law*, p. 124.

116 Ibid. *The Concept of Law*, p. 132. Dworkin’s principles owe a great deal to Hart’s balancing of interests, see Dworkin, *Taking Rights Seriously*, Duckworth, London 1987, p. 25.

117 Hart, *The Concept of Law*, Clarendon Press, Oxford 1961, p. 200.

The point here is simple: We cannot adjudicate without balancing. Proportionality is inherent in adjudication, unless adjudication were to be reduced to a formalistic and unrealistic exercise. Nonetheless, the theoretical implications of the Court's widespread use of the fair balance-test remain to be considered.

7.2 *Could we Explain Limitations more Theoretically?*

The proportionality principle is, in my view, much better understood in the light of various elements of the principle theories developed by Ronald Dworkin and Robert Alexy. Those theories need to be slightly amended, however, to fit the ECHR. A proper theoretical analysis of the nature of norms provides a proper platform for the understanding of proportionality.

The principle theory defines rules as norms that are applicable in an "all-or-nothing" fashion,¹¹⁸ whereas principles are said to have "a dimension that rules do not - the dimension of weight or importance".¹¹⁹ A legal principle provides "a reason that argues in one direction, but does not necessitate a particular decision".¹²⁰

The limitation of rights in the light of countervailing considerations presupposes norms that have principle character. Rights (rules) that are applicable in the "all-or-nothing" sense described by Dworkin cannot be subject to weighing and balancing. The more-or-less character of principles creates a logical connection between norms that are principles and the principle of proportionality.¹²¹ Hence, the principle of proportionality can be deduced or inferred from norms' character of principles, and norms' character of principles can be deduced or inferred from the principle of proportionality;¹²² the dimension of weight leads to balancing and balancing indicates a dimension of weight.

The principle character of many norms of the ECHR means that a two-dimensional perception of norms must be abandoned. It is not uncommon for lawyers to illustrate legal norms by drawing circles, and I have already done so in a number of figures above. When norms having principle character are illustrated, the illustration should, however, include the dimension of weight, i.e. the increasing weight attached to the norm as the intensity of the impact on the protected interest increases. The dimension of weight means that the norms of the ECHR ought not to be imagined as two-dimensional circles that are either applicable or inapplicable, but as three dimensional structures; the closer to the centre of the legally protected interest, the higher the standard of protection.

118 Dworkin, *Taking Rights Seriously*, Duckworth, London 1987, p. 24 and Alexy, *A Theory of Constitutional Rights*, Oxford University Press, Oxford 2002, p. 48 and p. 57 ("rules insist that one does exactly as required").

119 Ibid, *Taking Rights Seriously*, p. 26 and *ibid*, *A Theory of Constitutional Rights*, p. 50.

120 Ibid, *Taking Rights Seriously*, p. 26 and *ibid*, *A Theory of Constitutional Rights*, p. 59.

121 Ibid, *A Theory of Constitutional Rights*, pp. 66-69 and p. 397.

122 Ibid, *Taking Rights Seriously*, p. 269 rejects the model of balancing as a means to limit rights.

The two dimensional appreciation of norms is relevant as a vision of the delimitation of the scope of protection of a particular right; if a measure does not fall within the scope of protection of a legal norm, no weight can be attached to the norm and the interest it protects. The three dimensional comprehension reflects - in addition to the applicability of a norm - the varying weight attached to the right within its scope of protection; the greater the interference in the scope of protection, the greater the weight attached to the norm as a consequence of the higher level of protection. The same goes of course to the legitimate aim pursued; the higher degree of satisfaction of the aim, the greater weight can be attached to the aim. The horizontal scope reflects the scope of application, whereas the vertical scope reflects the standard of protection.

Within the scope of protection, norms having principle character may be outbalanced depending on the weight of other legally relevant considerations. The protection ultimately depends on the weight of all legally protected interests, unless one interest is granted such a great weight that its absolute protection is never subject to being outweighed. It accordingly emerges that relative rights have principle character, and that absolute rights have rule character.

7.3 *Where does this Leave us in Terms of Rights and Limitations?*

The Court's use of the fair balance-test far beyond the limitation clauses challenges the distinction between limitations as exceptions to rights, on the one hand, and delimitations as definitions of rights, on the other. The principle character of a wide range of rights makes it necessary to view the weighing and balancing of rights vis-à-vis other considerations in a non-hierarchical perspective that does not in itself place particular weight on, or gives priority to, any norm. The principle of proportionality cannot appropriately be viewed as an instrument to carve out protection of the rights and freedoms.

The traditional focus on limitation clauses continuously reconstructs the notion of *prima facie* violations on the basis of a presumed hierarchy between rights and limitations. The perception is embedded in the view e.g. that limitations and exceptions should be interpreted narrowly and that the margin of appreciation works to increase domestic sovereignty to the detriment of the protection of rights. It transpires, however, from analysis of the Court's use of the fair balance-test that the scope of the test does not depend on the distinction between limitations and delimitations of rights. Moreover, the Court's use of the fair balance-test in the context of implied limitations shows that substantive arguments of sufficient weight may override the protection otherwise indicated by the text of the ECHR.¹²³

Whether the norm protecting the right will prevail over counter-weighting norms depends exclusively on the weight attached, directly or indirectly, to the various considerations in the circumstances of particular cases. Of course, the standard of protection of a particular right may be very high and thus place very significant *prima facie* weight on the norm protecting the right, but the standard may also be very low and leave a wide room for outweighing due to the weight attached to the other considerations.

123 Christoffersen, *Fair Balance*, Martinus Nijhoff, Leiden Boston 2009, Chapter 2.4.3.

The dichotomy between rights and limitations is assumed to grant *prima facie* priority to individual human rights over State limitations, but in practice this perspective runs counter to the dichotomy between national sovereignty and international review, which is assumed to grant *prima facie* priority to State limitations over individual human rights. Depending on the proportionality or subsidiarity perspective, the opposite interests are granted *prima facie* priority and the decision-maker will have to decide whether to balance in one direction or the other. The ultimate choice is in principle subject to reasoning and rules of priority are thus of little avail in particular due to the existence of conflicting rights that break down the rights/limitation dichotomy.

However, the relationship between rights and limitations cannot be adequately understood if the focus is limited to the nature of the norm protecting the right in issue. The text of the ECHR is normally approached from the individual's point of view. From the perspective of the individual, it has been clear from the outset that the ECHR has the object of securing "to everyone ... the rights and freedoms" of the ECHR (Article 1). Hence, the ECHR talks of "the rights and freedoms", not only in the title and the preamble, but also in the accessory¹²⁴ and substantive provisions.¹²⁵

If the text of the ECHR is read from the bottom up, the *prima facie* nature of many rights will be recognised more clearly. The ECHR grants States the right to limit rights. Article 1 § 2 of Protocol no. 1 (protection of property) talks of "the right of a State" to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties, and Article 15 § 3 talks of any High Contracting Party availing itself of its "right of derogation". Similarly, a number of provisions say that the Contracting Parties "may" do something that otherwise runs counter to a right.¹²⁶ The same dilemma is brought out by rights that do not "prevent" a Contracting Party from undermining what would otherwise be protected,¹²⁷ that allow "limitations", "restrictions" etc. to be placed on the right,¹²⁸ or that subject rights to "exceptions".¹²⁹

Insofar as the Contracting Parties have a right or a duty to limit the right of the individual, the individual cannot be said to have a right. On the basis of

124 Article 13, Article 14, Article 17, and Article 18.

125 Article 2 § 1, first sentence, Article 5 § 1, first sentence, Article 8 §§ 1 and 2, Article 9 §§ 1 and 2, Article 10 §§ 1 and 2, Article 11 §§ 1 and 2, Article 12, Article 2, first sentence, of Protocol no. 1, Article 2 §§ 1, 3 and 4 of Protocol no. 4, Article 3 § 2 of Protocol no. 4, Article 1 § 2, cf. § 1 of Protocol no. 7, and Article 2 §§ 1 and 2 of Protocol no. 7.

126 Article 6 § 1, second sentence, Article 2 of Protocol no. 6, Article 1 § 2 of Protocol no. 7, and Article 15.

127 Article 10 § 1, third sentence, Article 11 § 2, second sentence, Article 16, Article 1 § 2 of Protocol no. 1, Article 4 § 2 of Protocol no. 7, Article 5, second sentence of Protocol no. 7, Preamble to Protocol no. 12.

128 Article 9 § 2, Article 10 § 2, Article 11 § 2, Article 2 § 3 of Protocol no. 4, and Article 2 § 4 of Protocol no. 4.

129 Article 2 § 1, Article 2 § 2, Article 5 § 1, Article 8 § 2, Article 1 § 1, first sentence of Protocol no. 1, Article 3 of Protocol no. 7, and Article 2 § 2 of Protocol no. 7.

Hohfeld's terminology it can be said that the correlative to a legal right is a legal duty and that the opposite of a right is a no-right.¹³⁰ Transmitting the view to the ECHR one could say the following:

If a Contracting Party has a right against an individual to limit e.g. the freedom of expression, then the correlative (and equivalent) is that the individual is under a duty to respect the limitation.

More importantly, the Contracting Parties do not merely enjoy the right to limit rights; the States may enjoy the privilege of limiting the right of an individual. To enjoy a privilege means that it is left to the discretion of Contracting Party whether or not to limit a right. The Court implicitly recognised the Contracting Parties' privilege in *Handyside v. the United Kingdom*:

[T]he Convention, as is shown especially by its Article 60, never puts the various organs of the Contracting States under an obligation to limit the rights and freedoms it guarantees. In particular, in no case does Article 10 para. 2 compel them to impose "restrictions" or "penalties" in the field of freedom of expression; it in no way prevents them from not availing themselves of the expedients it provides for them (cf. the words "may be subject").¹³¹

The recognition of the Contracting Parties' privilege is of very significant importance in the context of the ECHR, because individuals may enjoy rights under domestic law on the basis of the Contracting Parties' exercise of their discretion under international law not to limit a right. The mere fact that a Contracting Party has decided not to limit a particular right does not mean that the Contracting Party has no right to limit it.

The Court's express acceptance in *Handyside* of the Contracting Parties' privilege shows, moreover, that a right may be limited, even if the Contracting Party might as well have chosen not to limit the right in the circumstances of a particular case.¹³² A Contracting Party may also be justified in limiting a right, even if other Contracting Parties choose not to limit a given right.

It is of course not entirely adequate to state that "the Convention, as is shown especially by its Article 60, never puts the various organs of the Contracting States under an obligation to limit the rights and freedoms it guarantees". As the Court has previously said in the *Belgian Linguistic case*, the State's exercise of discretion in the regulation of the right to education must not "conflict with other rights enshrined in the Convention"¹³³ and the doctrine of positive obligations puts - to paraphrase *Handyside* - "the various organs of the Contracting States under an obligation to limit the rights and freedoms it guarantees".

130 Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Dartmouth, Aldershot 2001, p. 12-13.

131 *Handyside v. the United Kingdom* [PL] (7 December 1976, Series A no. 24) § 54.

132 Frowein *The European Convention on Human Rights as the Public Order of Europe*, in *Collected Courses of the Academy of European Law*, Vol. I, book 2 1990, p. 347.

133 *Belgian Linguistic case (merits)* [PL] (23 July 1968, Series A no. 6) p. 32 § 5.

7.4 Conclusions

The Contracting Parties have the privilege to restrict rights, even if the limitation is not necessary. The Contracting Parties simply have a right under international law to strike a less than optimal balance, to refrain from interfering in rights even if it could be justified as “necessary in a democratic society”, and to restrict rights even if it is not, strictly speaking, necessary. Put more directly, the States may have a right to do wrong.¹³⁴ This flows from the minimum nature of the international standards protected by the ECHR.

8 Straight Human Rights Talk

Lawyers’ love of limitation of rights has prevented a straight human rights talk. European human rights scholars have spend forty years talking about limitations and the States’ margin of appreciation without realising that proportionality is more a matter of interpretation of rights than a matter of limitation of rights. The focus on the limitation of rights brings forward a rights/limitation-dichotomy, which is often without merits.

We need to understand and respect that international human rights standards are minimum standards. Therefore, the availability of better solutions/less onerous means does not *per se* warrant the conclusion that international human rights are violated. States’ have a general implementation freedom flowing from the minimum nature of international standards, and this freedom contradicts the least onerous means-test, which is inapplicable in the vast majority of cases.

Moreover, doctrine of the core, essence or substance of rights is generally overarched as a relative right cannot enjoy absolute protection. This flows from the very definition of relative rights. The absolute protection of an aspect of relative rights flows from overlapping absolute rights. In any event, before we engage in a discussion of absolute protection of rights, we need to first provide a sufficiently particularised description of the substantive content of the core, essence or substance of the right.

The complexity of proportionality appraisals is further enriched by the interaction between normative and factual arguments supporting or undermining protection of legally relevant interests. In theory, a full appreciation of normative and factual elements is possible, but in practice much is left to intuition and common sense.

From a technical-legal perspective, human rights are often but legal principles guiding decision-makers. Limitations on (*prima facie*) rights are wrong neither in principle nor in practice. It is our misconception of limitations that is wrong in principle and in practice. The protection of rights flows not only from the right it self, but from the weight attached to the legally protected interests. Human rights lawyers’ evaluations of facts and norms cannot necessarily claim precedence over the assessments of others.

While the proportionality principle is of much less avail than we commonly think and would like to believe, we cannot live without a measure of weighing

134 Waldron, *A Right to do Wrong*, Ethics 1981 21-39.

pand balancing of counter-vailing interests. In a sense, Sebastian van Drooghenbroeck is right in saying that where there is interpretation, there is proportionality (*ubi interpretatio, ibi proportionalitas*).¹³⁵ The process of limiting rights is inherent in the construction of rights. But activists have unfortunately for too long regarded limitations on rights as dubious. Yet, rights and their limits are two sides of the same coin.

The complexity of adjudication and the nature of legal norms explain why proportionality – as we commonly (mis)understand it – does not matter. At the same time, the complexity of adjudication and the nature of legal norms explain why proportionality, properly understood, does matter. Our professional ethics requires transparency, honesty and consistency: We have to engage in straight human rights talk.

135 van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme - prendre l'idée simple au sérieux*, Bruylant, Bruxelles 2001, p. 148.