

Research Handbook on Human Rights and Humanitarian Law

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RESEARCH HANDBOOKS IN HUMAN RIGHTS

Edward Elgar

Cheltenham, UK • Northampton, MA, USA

7. Proportionality in the European Convention on Human Rights

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1. INTRODUCTION

In the classical conception, international human rights law constitutes a set of rules which establish limits to sovereign powers. From this perspective, proportionality has the function of determining a reasonable balance between States' and individuals' interests. A different conception is gradually emerging which tends to regard human rights as part of the basic collective values of the international community. In this conception, proportionality is gradually assuming the function of determining the contents of human rights through a constant process of interests- and values-balancing. In this process, individuals' interests are balanced not only with States' interests but also with other individual and collective values of the international community.

The current chapter will focus on the process of transformation of proportionality, from a tool designed to operate in the State-individual relationship, to one which applies to the overall process of values-balancing underlying the dynamics of human rights in contemporary international law. This process will be observed through a study of proportionality in the European Convention on Human Rights, probably the most integrated system of human rights protection established thus far, and one which can serve as a model for the development of a more comprehensive system of protection.¹

2. PROPORTIONALITY AND DEROGATION IN THE ECHR

Derogation represents the clearest example of how proportionality can be used in order to balance human rights and prerogatives of State sovereignty – in particular, the most evident prerogative, which is typically the power, or even the duty, to safeguard the life of the nation in time of war or of other public emergency.

2.1 European Court of Human Rights' Case Law

Article 15 of the ECHR authorises 'in time of war or other public emergency threatening the life of the nation' any contracting party, to 'take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation'.²

On the basis of purely textual interpretation, the role of proportionality appears very limited indeed. Article 15 establishes a certain threshold of gravity, below which no derogation is allowed and above which any derogation measure is allowed, which is necessary or even indispensable to the threat.

A different approach was taken by the Court. The Court granted to States a wide margin of appreciation in the assessment of the existence of a 'public emergency threatening the life of the nation'.³ In other words, the 'threshold of severity' was lowered⁴ and, as a result, the existence of a public emergency for the purposes of Article 15 was ascertained even in situations in which the 'life of the nation' was not under imminent threat.⁵ So the Court condoned the prolonged derogation in Northern Ireland despite the principle that the emergency must be temporary in nature.⁶ In the more recent case law concerning the aftermath of the 9/11 terrorist emergency, the Court did not consider conclusive the circumstance that only one State among all the parties to the convention decided to derogate the Convention:

While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them.⁷

Such a wide margin of appreciation granted to States was, however, balanced by a strict European supervision in the light of the proportionality test, in which a significant role was played by 'the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation'.⁸

Beginning with the *Lawless* case, the Court established some paradigmatic standards of legitimate measures of derogation, 'reasonably necessary' in democratic societies. Formally using the concept of necessity rather than that of proportionality,⁹ the Court analysed detention without trial measures in depth, taking into account the inadequacy of less intrusive measures to face cross-border terrorism and the effects of other possible measures, such as the sealing of the border, on the whole population.¹⁰ Moreover, the Court considered the establishment of a number of safeguards and quasi-judicial remedies designed to prevent abuses in the operation of the system of administrative detention.¹¹

The proportionality test has been consistently used in the following case law, even though the deferential attitude towards national authorities in ascertaining the existence of a state of emergency was progressively extended also to the nature and scope of the measures adopted to match it.¹² In *Ireland v. United Kingdom*, the Court established a test of proportionality between the gravity of the situation and the measures taken: such a serious derogation from fundamental rights as in, for example, the arrest of innocent persons for the sole purpose of obtaining information about others was justifiable 'only in a very exceptional situation, but the circumstances prevailing in Northern Ireland did fall into such a category'.¹³ It is relevant to note that the proportionality and adequacy test is a retrospective examination, done by the Court *a priori*, on the basis of the knowledge the national authority had at the time of the implementation of the measures, without considering, *a posteriori*, the results actually achieved.¹⁴

In the *Brannigan* case the enlargement of the State discretion seems to be the consequence of the methodology adopted for the proportionality test. Rather than evoking the possibility of adopting different measures which would be less intrusive in respect of fundamental rights, the Court limits itself to reviewing the overall balance

between the State's interest in achieving a reasonable standard of security and the need to comply with the individual rights protected by the ECHR.¹⁵

This approach, combining deference towards national authorities and international control, was maintained and even enhanced in the most recent case law. In *A. and Others v. United Kingdom*, establishing that the detention of foreign nationals under the Anti-terrorism, Crime and Security Act 2001 was a disproportionate limitation of the right granted by Article 5, the Court said:

the domestic courts are part of the 'national authorities' to which the Court affords a wide margin of appreciation under Article 15. In the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable.¹⁶

A stricter approach was taken in the context of grave and reiterated violations of human rights. The existence of an overall context of violations of 'ordinary' obligations of the Convention seems to have been considered as a concurring factor for assessing the proportionality of derogation measures.¹⁷

2.2 The Structure of the Proportionality Argument

From the analysis of the preceding paragraph, a particular structure of the proportionality test seems to emerge. Necessity is a fundamental premise of this test, but by no means exhausts it. A derogation measure is necessary if no other measures are at hand of equivalent efficacy but which impinge to a lesser degree on the Conventional rights. Necessity, however, implies that the State's interests prevail over individual interests, if indispensable to attain the level of security sought. By stressing the importance of international supervision on the proportionality of the derogation measures, the Court seems to have implicitly pointed out that, in the system of the Convention, States' interests do not prevail over individual interests, but the various competing interests must be combined together, using as guidance the test of proportionality.

As a result, this test was articulated into two logically distinct steps. The first concerns the reasonableness of the level of security sought by the State. The second concerns the existence of a link of proportionality between such a level and the degree of curtailment that is entailed for individual rights. Even a reasonable degree of security must be lowered if its attainment entails a disproportionate compression of individual rights. By so doing, the Court seems to have forged a conceptual model based on proportionality. Even if the case law reveals the tendency of the Court to rely on the assessment made by the State concerned to restrain the scope of the international supervision and, correspondingly, to recognise a wide margin of appreciation to the State concerned, this model appears of great theoretical interest, as it seems to apply in every situations in which a balance among competing interests and values is at stake.

3. PROPORTIONALITY AND LIMITATION CLAUSES

3.1 The Early Case Law

The proportionality test was constructed, in its main features, from the case law related to the limitation clauses established by Articles 8 to 11, para. 2, of the Convention, by Article 1, para. 1 of Protocol I, by Article 2, paras 3 and 4 of Protocol IV, and by Articles 1, paras 2 and 5 of Protocol VII.

These provisions have analogous formal structure. They list collective interests capable of interfering with individual rights protected by the Convention and establish conditions of the interference. The collective interests are mostly common, such as public order and security; others refer specifically to the limitation of some rights, as, for example, the interest to maintain the authority and impartiality of the judiciary, listed in Article 10, para. 2. An open set of interests capable of interfering with conventional rights is established by Article 1, para.1, of Protocol I, protecting the peaceful enjoyment of private property.

The existence of limitation clauses makes clear that the individual rights concerned do not enjoy absolute protection. These provisions seem rather to identify a plurality of competing interests, individual and collective, whose appropriate balance must be struck on a case-by-case basis using the guidance offered by the proportionality principle. Theoretically, this structure is of the utmost interest, since it marks off these rules from those which rely on a predetermined balance of interests, designed to remain stable over time. The limitation clauses of the ECHR embody an unresolved conflict between competing interests, none of which takes overall priority over the others. The conflict therefore cannot be solved in the *abstracto*, but rather on the basis of the concrete weight to be given to any of these competing interests in the light of the circumstances of every particular situation. The settlement of the conflict thus entails a sophisticated factual and legal analysis aimed at identifying the most appropriate combination of the various interests at stake.

The basic elements of such a proportionality test have been identified by the Court in its early case law. In the *Belgian Linguistic case* the Court declared that the Convention 'implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter'; nevertheless the domestic regulation 'must never injure the substance of the right' (in that particular case the right to education granted by Article 2 of Protocol I), 'nor conflict with other rights enshrined in the Convention'.¹⁸

Handyside supplied the Court with the occasion to render the leading case on the principle of proportionality. The Court noted that the adjective 'necessary', within the meaning of Article 10, para. 2, is not synonymous with 'indispensable' or 'strictly necessary', neither has it the flexibility of such expressions as 'useful', 'reasonable', or 'desirable'; the adjective 'necessary' describes something that is in between absolute necessity and reasonableness, and supposes the existence of a 'pressing social need', the assessment of which is in the competence of national authorities.¹⁹ Nevertheless, the margin of appreciation of national authorities is not unlimited; the Court 'is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 ... This means,

amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued'.²⁰

As can be seen in the passages from *Handyside* cited above, in the early case law the proportionality test, based on the concept of necessity in a democratic society, is confused with the analysis concerning the legitimacy of the aim pursued. In the subsequent case law this conceptual ambiguity disappears. The Court has first identified the interests which, in a democratic society, could justify a certain degree of interference and then moved on to determine whether the interference was necessary, appropriate and not excessively impinging upon the individual rights at stake. In this approach, the need to protect collective values, even if set at a reasonable standard according to the model of a democratic society, was not sufficient to conclude the analysis. The proportionality test still requires determining that the satisfaction of collective needs does not entail a disproportionate curtailment in the enjoyment of individual rights. Thus proportionality not only prohibits interference in human rights which are not necessary to protect collective interests in a democratic society, it also determines the level of the protection of these collective interests, taking into account the level of interference they entail upon individual rights.

A clear application of this methodology is the *Sunday Times* case, where the Court observes that

[i]t is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10 §2 which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.²¹

3.2 The Following Case Law

This logical structure also inspired the subsequent case law. A brief account of this case law, covering the main, but not all,²² fields in which proportionality was used in the context of limitation clauses, will be given in the forthcoming sections.

3.2.1 Limitations to the right of respect for private and family life (Article 8, para. 2)

The proportionality test has been used by the Court in a great number of cases concerning limitation to the right of respect for private and family life.

The case law concerning the criminal repression of homosexual activities – and other forms of regulation of private sexual and identity choices – acquires paradigmatic value. In *Dudgeon*, the Court clarifies the scope of the margin of appreciation of States, but also its limits where the protection of morals is at issue. In the absence of a uniform European conception of morals, the Court recognises to States an extremely wide margin of appreciation in defining legitimate aims of restriction;²³ however, this is balanced by a strict evaluation of proportionality when the intimate aspects of private life are at stake;²⁴ the more the restriction impinges on the intimate life of the individual, the less the interference is justified. Conversely, a wider margin of appreciation is recognised to States when the restrictions are aimed at the protection of

health. So the Court considered legitimate the prosecution and convictions for assault and wounding in the course of consensual sadomasochistic activities between adults,²⁵ and the prohibition of assisted suicide.²⁶

A significant progress in the proportionality argument was marked in *Odièvre*, where the Court was confronted with the difficult task of balancing competing individual interests, equally protected by Article 8; namely the right of the child to know his own origins, and the right of the mother to anonymously give birth in appropriate health conditions.²⁷ Even though the French legal order is the only European one providing for anonymous delivery dispositions, the Court considered that

[t]he French legislation ... seeks to strike a balance and to ensure sufficient proportion between the competing interests. The Court observed in that connection that the States must be allowed to determine the means which they consider the best to reconcile those interests. Overall, the Court considers that France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerns the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents.²⁸

The Court also uses the proportionality test under Article 8, para. 2, to syndicate welfare choices of the State. In *Wallova and Walla*, the State's decision to separate five children from their parents and place them under public care because the family was unable to find a convenient place to live was disproportionate. The Court recognised that the measure taken by the State pursued the legitimate aim of protecting children, however

[l]a Cour estime que, pour respecter en l'espèce l'exigence de proportionnalité, les autorités tchèques auraient dû envisager d'autres mesures moins radicales que la prise en charge des enfants. En effet, la Cour considère que le rôle des autorités de la protection sociale est précisément d'aider les personnes en difficultés qui n'ont pas les connaissances nécessaires du système, de les guider dans leurs démarches et de les conseiller, entre autres, quant aux différents types d'allocations sociales, aux possibilités d'obtenir un logement social ou quant aux autres moyens de surmonter leurs difficultés.²⁹

This proportionality test was also applied in a line of cases in which the Court assessed the proportionality of expulsion of aliens in the light of the obligation to respect private and family life guaranteed by Article 8 of the Convention. In these cases the Court proceeded to a case-by-case balance between the relevant interests, namely the individual's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other.³⁰ Moreover, the principle of proportionality as defined in the case law concerning Article 8, para. 2, has been applied for the interpretation of Article 1, para. 2, of Protocol VII.³¹

3.2.2 Proportionality in the case law concerning Article 9 and Article 2, of Protocol I

The case law concerning the freedom of thought, conscience and religion provides other interesting examples of the criteria adopted by the Court to balance conflicting interests. In the *Leyla Şahin* case the Court evaluated the legitimacy of the Turkish regulation prohibiting the wearing of the Islamic headscarf at university. It is interesting

to note that the Court analysed the Turkish context in order to ascertain that secularism in Turkey was the guarantor of democratic values in a country where the majority of the population are Muslims. In that particular context upholding secularism, even by prohibiting the wearing of the Islamic headscarf at university could be considered necessary to protect the democratic system.³² The relevance recognised by the Court to the political and social context in Turkey might give the impression that a different decision might be taken in a different context.

Nevertheless, the case law concerning the Islamic headscarf shows the tendency of the Court to accept limitations to the right to manifest one's own religious beliefs in order to safeguard the secularism of institutions, and particularly of educational institutions.³³ The reasons for this attitude are clearly manifested in the *Dahlab* decision, where the Court considered manifestly ill-founded the complaint of a teacher who had been banned from wearing the headscarf at school, on the basis that 'the interference with the applicant's freedom to manifest her religion was justified by the need, in a democratic society, to protect the right of State school pupils to be taught in a context of denominational neutrality'.³⁴ It appears clear from the case law mentioned above that secularism embodies one of the fundamental principles of democratic societies, as a guarantee for pluralism and equality. The high value afforded to secularism seems to justify ultimately the pre-eminence of this collective interest on the individual right protected by Article 9.

The principle of the neutrality of public education has been also the object of some cases under the second sentence of Article 2, Protocol I, considered by the Court as *lex specialis* in respect of Article 9. In the *Folgerø* case the Court established that compulsory participation in 'Christianity, Religion and Philosophy' classes in public schools in Norway was an infringement of the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions granted by Article 2, Protocol I, and that even the possibility of a partial exoneration was not sufficient to grant the neutrality and pluralism of public teaching.³⁵ In this case the Court applied, in favour of the individual, the principle, previously established in *Young, James and Webster*, according to which 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.³⁶

The same criteria had been applied by the Second Section of the Court in the *Lautsi* case. The Court chamber considered that the 'State has a duty to uphold confessional neutrality in public education'. As a consequence, the display of the crucifix in Italian classrooms infringed the right of parents to educate their children in conformity with their convictions, and the right of schoolchildren to believe or not believe.³⁷ Although this decision was in line with the relevant case law, the Grand Chamber reversed it. It considered that 'a crucifix on a wall is an essentially passive symbol' that 'cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities'.³⁸ Secondly, the Grand Chamber accepted the contextualisation of 'the greater visibility which the presence of the crucifix gives to Christianity in schools'. In particular the Court took into account the circumstance that 'Italy opens up the school environment in parallel to other religions', particularly by authorizing pupils to wear Islamic headscarves or other religious symbols.³⁹

A comprehensive analysis of the most recent case law testifies that, *in the absence of a European consensus* on the question of relationship between States and religion, a wide margin of appreciation is accorded to States concerning the place they accord to religion, the only real limitation being that those decisions do not lead to a form of indoctrination. The proportionality test seems thus replaced by the determination of a fixed limit to the discretion of the State.

3.2.3 Proportionality argument in the application of Article 10, para. 2 and Article 11, para. 2

Equally interesting is the case law which applies proportionality to determine the limits to freedom of thought protected by Article 10. In the reasoning of the Court, freedom of thought emerges as one of the most important articulations of the individual rights protected by the Convention, and as an essential corollary of the model of democratic society underlying it. The search for appropriate limitations aimed at protecting collective rights thus appears to be the most interesting exercise of interests-balancing ever attempted by the Court.⁴⁰ In the context of effective political democracy, freedom of expression is not only important in itself, but also plays a role in the protection of other rights under the Convention.⁴¹ Indeed, the search for appropriate limitation seems to point to a case-by-case assessment of the relative importance of the exercise of the competing rights at stake: the importance for individuals and for the collectivity to exercise their freedom of expression and to receive information on the one hand, and the necessity to limit these activities to protect other interests, on the other.

The fundamental principles of such a case-by-case factual analysis are well established in the case law, and have been summarised by the Grand Chamber in the *Lindon, Otchakovsky-Laurens and July* case;

the supervision is [not] limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' and whether it was 'proportionate to the legitimate aim pursued'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts.⁴²

A case exemplifying this logical exercise is *Barfod*, where the Court found that the interest of the State to maintain the authority and impartiality of the judiciary has to bow to the interest of starting a public debate on the efficiency of certain judicial remedies.⁴³ In *Informationsverein Lentia and Others*, the Court found that the legitimate purpose of controlling broadcasting activities did not justify a complete ban of private broadcasting activities.⁴⁴ In *Piermont*, the Court found that the interest of holding a democratic debate on the French nuclear policy in Polynesia prevailed over the interest of security and public order.⁴⁵ In *Goodwin* the Court found that the interest of a company to stop the dissemination of confidential news prevailed over the interest of a journalist not to disclose their confidential sources.⁴⁶ In the famous *Open Door and Dublin Well Woman* the Court engaged in what was to remain one of the most notable exercises of identification and balancing of the various individual and collective

interests underlying the opposing claims.⁴⁷ The issue of freedom of information concerning abortion and family planning, and the limitations the State could impose with respect to national legislation in that field has also been the object of the recent case *Women On Waves*, in which the Court ascertained that the decision of the administrative authorities to prohibit the ship *Borndiep*, which had been chartered with a view to staging activities promoting the de-criminalisation of abortion, from entering Portuguese territorial waters was in breach of Article 10.⁴⁸ In the last decade of case law, proportionality was also used to establish the duty of the State to adopt positive measures to grant the effective exercise of freedom of expression, even in the sphere of relations between individuals.⁴⁹

Of great interest is the case law in which the Court has attempted to balance the freedom of information with the right to respect for private life, particularly the right to have one's own reputation protected, granted by Article 8. The Court has tended to give priority to the right granted by Article 10 over that granted by Article 8, especially in the context of public debate on matters of general interest.⁵⁰ Conversely, a higher consideration is given to the aim of protecting individuals' privacy and reputation when a verbal attack does not 'form part of an open discussion of matters of public concern'.⁵¹ Moreover, the Court considers that where the sole purpose of a publication is 'to satisfy the curiosity of a particular readership regarding the details of a public figure's private life', such publication 'cannot be deemed to contribute to any debate of general interest to society'; in such cases 'freedom of expression calls for a narrower interpretation', and a fair balance between the public interest in the publication and the need to protect private life should probably give prevalence to the latter.⁵²

Not surprisingly, the question of freedom of expression is often closely related to that of freedom of association. In a number of cases the Court reiterated that the protection of personal opinions, as secured by Article 10, is one of the objectives of freedom of assembly and association, as enshrined in Article 11.⁵³ Even in this context, the Court seems to have frequently reverted to a case-by-case interests analysis. Nevertheless, the Court identified at least one fixed general parameter by establishing that 'freedom of association is of such importance that it cannot be restricted in any way ... so long as the person concerned does not himself commit any reprehensible act by reason of his membership of the association'.⁵⁴

In most cases, the proportionality test was used to pierce the veil separating legal from factual analysis, and to appreciate the proper weight to be given in a democratic society to the exercise of this right. This tendency is well epitomised by the case law concerning the obligation to be part of a trade union,⁵⁵ and by the case law concerning the legality of measures for the dissolution of political parties and associations having aims inconsistent with the values underlying a democratic society.⁵⁶

3.3 Qualitative Proportionality and Quantitative Proportionality: Towards a Unitary Paradigm?

The idea of a European supervision underlying the adoption of a proportionality test is fully consistent with the doctrine of the margin of appreciation developed from the early case law of the Court,⁵⁷ indeed the two doctrines seem rather to constitute two articulations of one and the same conceptual system.⁵⁸ Whereas the margin of

discretion doctrine relates to the freedom of the State Party to determine autonomously the standard of protection of certain collective, indeterminate legal values,⁵⁹ proportionality entails that each of these standards, although reflecting the pressing social needs of each national environment, must be consistent with the notion of democratic society which constitutes, in the view of the Court, the common turf and a pre-legal condition of the partnership to the Convention. Thus, the standard of protection of collective interests cannot be established independently from the concern for human rights: '[s]uch are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'.⁶⁰

In this context, proportionality comes into being in its purely qualitative dimension. Human rights are mainly considered, in this first step, as purely abstract legal values, which must be taken into account in order to determine the standard of reasonableness of State measures, in the light of the pressing social need appropriate to a democratic society.

Once the reasonableness of the collective interests which justify interferences with human rights is determined, however, one must proceed to ascertain whether the interference is proportionate. This logical operation entails the balancing of heterogeneous values such as, on the one hand, collective interests underlying a pressing social need, and, on the other, the individual rights protected by the Convention. In this second phase, proportionality is generally measured in quantitative terms. The Court tends to determine quantitatively the interests of individuals to exercise their rights, and to balance such interests with the competing collective interests. In the words of the Commission in the *Gillow* case: 'the Commission retains a limited review of the legitimacy of the aim of the interference and a fuller review of the proportionality of the actual interference with the applicant's rights'.⁶¹

In this second logical operation, the competing rights and interests are, in other words, not measured by the abstract legal value but rather through the determination of the concrete interest to exercise them in a specific situation. Paradigmatically, in *Young, James and Webster* the Court went so far as to compare the damage caused to the cohesion of a trade union by the lack of adhesion of a few workers with the prejudice suffered by these workers in case of loss of employment. In the cases concerning the consistency of expulsion measures with the right to private and family life, the Court conducted a close scrutiny on the ties of the person concerned and of his family with the social environment which would have been severed in consequence of the expulsion.⁶²

Three further remarks are in order to evidence how proportionality has been applied in the judicial practice to better reflect the specific circumstance of each particular case.

First, as stated above, the Court has consistently tended to consider each of the competing legal values as having a specific weight in the concrete circumstances of the situation in which they collided.

Second, in the case law, individual rights are not considered by themselves, as rights which pertain to a socially isolated monad, but rather as the reflex of the collective interest of a democratic society to their preservation and to their further development. This argumentative technique circumvents the logical apory of combining heterogeneous values such as individual and collective interests.⁶³ Also individual, and not

only collective interests, have been appreciated through the comparative assessment of the social consequences entailed in their exercise.⁶⁴

Lastly, the assessment of proportionality was completed with the consideration of the possible remedies attached to normative measures of interference aimed at minimising the prejudice for individuals and to prevent abuses. In *Klass*, concerning the consistency with the Convention of a system of secret surveillance, the Court said: 'the Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuses'.⁶⁵

4. PROPORTIONALITY AND THE DETERMINATION OF THE SCOPE OF CONVENTIONAL RIGHTS

By no means has the scope of the proportionality test remained confined to the derogation clause and to the limitation clauses. Quite the contrary, it has spilled over its natural fields of application and emerged as a general principle of interests- and values-balancing within the system of the Convention.

A brief account of how proportionality was employed by the Court even outside these two typical fields can be useful to evidence its emerging nature as a general principle. We will thus examine, in turn, two different but logically related fields of application of proportionality, concerning, respectively, the power of States to regulate the exercise of conventional rights, and the power of States to regulate situations occasionally interfering with the exercise of these rights.

4.1 Regulating the Exercise of Conventional Rights

The first, and to an extent still quite obvious, employment of the proportionality test was to gauge the appropriateness of States' measures designed to regulate the exercise of individual rights protected by the Convention for requirements in the public interest.

The best example of this use of proportionality is to be found in the *Belgian Linguistic case*. The Court found that the right to education, unqualifiedly protected by Article 2 Protocol I,

by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of the individuals. ... The Convention therefore implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter.⁶⁶

This scheme was henceforth applied in a number of other situations in which the Court recognised the power of the States to regulate the exercise of conventional rights subject to a condition of proportionality between the aim pursued and the degree of interference with these rights.

In *Golder* the Court pointed out that States can regulate the exercise of non-absolute rights without, however, unduly impairing the very essence of the right.⁶⁷ This negative limit was gradually transformed in a positive limit imposed on the power to regulate, in

a way quite similar to that used for limitation. Indeed regulation must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.⁶⁸

This scheme was subsequently applied in a variety of situations including the power to regulate the right to access to justice,⁶⁹ the right to marry,⁷⁰ and the right to vote established by Article 3, Protocol 1. In *Hirst*, concerning the limitation of the right to vote of detainees, the Court clearly established guidelines for a proportionality test in this matter, and explicitly asserted that the proportionality of the restriction on the exercise of the right must be evaluated case-by-case on factual bases.⁷¹ The Court observed that 'there is no evidence that the legislature in the United Kingdom has ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners'; and on that basis decided that the automatic blanket ban imposed on all convicted prisoners in the United Kingdom violated Article 3 of Protocol 1.⁷²

Particularly interesting is also the case law concerning the balancing of the right of access to court with jurisdictional immunities granted by international law. In every case the Court confirmed the principle that 'a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.⁷³ In applying this principle, in cases in which the jurisdictional immunity of international organizations was at issue, the Court assessed the proportionality of the limitation in the light of the circumstances of the case, taking particularly into account the fact that 'the applicants had available to them reasonable *alternative* means to protect effectively their rights under the Convention'.⁷⁴ Conversely, in cases concerning State immunity, the Court seems to be satisfied by the circumstance that immunity is provided by customary international law; in consequence, the legitimate aim of respecting customary international law also covers the proportionality of the adopted measure.⁷⁵

4.2 Producing Occasional Interference through Regulation of Situations Falling Outside the Scope of the Conventional Rights

Finally, proportionality was employed in a highly interesting line of cases concerning indirect collisions between conventional rights and States' measures regulating situations falling plainly outside the scope of the Convention. In turn, this category of cases can be divided into two subgroups. In the first the Court used proportionality for determining the scope of the States' competence, unaffected by the Convention. In the second, the Court used proportionality for dealing with issues of indirect conflict in the proper sense, flowing from States' measures enacted in the public interest but occasionally colliding with individual rights protected by the Convention.

The case which best epitomises the first subgroup is probably *Van der Mussele*. Here, proportionality was used to delimit the notion of forced labour, prohibited by Article 4, para. 2, of the Convention, and other situations in which a service not exceeding the normal course of affairs might be imposed by the State as a form of social solidarity.

This would be the case, in particular, where the service is required in order to meet a compelling social need and does not amount to an intolerable or disproportionate burden.⁷⁶

The best example of situations belonging to the second subgroup comes from States' measures in social and economic fields designed to meet general interests and only indirectly colliding with the exercise of the individual right to property.

In the case law of the Court, proportionality was paradigmatically used to determine the scope of general measures of the State in the general interest, producing occasional interference with the right to property. This conceptual scheme was first developed in *Sporrong and Lönnroth*,⁷⁷ and was further applied in a variety of other cases concerning, *inter alia*, town planning, protection of the environment⁷⁸ and forested areas,⁷⁹ securing the payment of taxes,⁸⁰ regulation of immigration,⁸¹ controlling illegal trafficking of art objects,⁸² regulating the renting of immovable property,⁸³ forcible eviction for security purposes,⁸⁴ and regulation of time limits in actions to recover property in case of adverse possession.⁸⁵

5. CONCLUDING REMARKS

Both quantitatively and qualitatively, proportionality has played a decisive role in the development of the system of protection set up by the European Convention on Human Rights, and has also represented a model for other conventional systems. The way in which the Court has fashioned the proportionality test has, moreover, a general theoretical significance and constitutes an instrument of general application in the relationship between States' sovereign powers and the limitations entailed in external obligations.

An attempt at categorising the infinite variety of the uses of proportionality falls well beyond the scope of the present chapter and also amounts to a temerarious endeavour. By way of conclusion, a few remarks might be in order.

First, from its original turf of the derogation and limitations clauses, proportionality has expanded to potentially cover the whole field of the conflicts between States' powers and conventional rights, and even between conventional rights themselves and with other individual and collective rights. Thus proportionality can be truly considered as a general technique of conflict-settling throughout the scope of the European Convention.

Second, in this process of expansion, proportionality, while maintaining its general end-means relationship structure, has also adapted its content to the particular features of every single conflict. This is quite evident if one compares proportionality in limitation clauses, in which the Convention determines a *numerus clausus* of the interests capable of interfering with individual rights, with the analogous test in the context of open-ended collisions, in which conventional rights might be interfered with by a potentially infinite variety of States' interests.

In the first group of conflicts, the Court has required the existence of a pressing social need which makes it necessary to interfere with the conventional rights. This quite high standard of necessity was set off by the prohibition to touch upon the 'core content' of the individual right at stake. A logically reversed situation occurs in the

second category, where an interference with conventional rights is permitted by States' measures in the general interest, without regard to the intensity of the social need underlying such measures. However, this quite loose standard of necessity is set off by the requirement that the interference must not touch upon the 'normal' exercise of the individual right.

Third, proportionality also assumes diverse features with regard to the relative importance of the various elements of the balancing test.

In derogation and limitation clauses, the Convention identifies the States' interests capable of interfering with the individual rights protected by the Convention. In this context, proportionality has the classical structure of a limit to a functional power to interfere with legally protected interest for the achievement of pre-determined goals. A different structure features proportionality in conflicts among a plurality of individual or collective rights entitled to equal protection, where there is, normally, not a controlling interest. In situations of this kind, proportionality reveals itself to be more akin to a bilateral test of reasonableness. The Court is requested first to determine the concrete interest underlying the exercise of each competing right, and, second, to balance these various interests against each other.

NOTES

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- 1. In spite of the importance of the principle of proportionality in the ECtHR case law (Judge Pettiti defined it as 'Règle d'or de la jurisprudence européenne des droits de l'homme', in 'Réflexions sur les principes et les mécanismes de la Convention. De l'idéal de 1950 à l'humble réalité d'aujourd'hui', in L.-E. Pettiti, E. Decaux and P.-H. Imbert (eds) *La convention européenne des droits de l'homme: commentaire article par article* (Paris: Economica, 1995), 33), there are not many studies specifically devoted to this methodology. Among others, see S. van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme: prendre l'idée simple au sérieux* (Brussels: Bruylant, 2001), and J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2009).
- 2. Article 15(3), provides for a procedural guarantee establishing that 'Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.' In the absence of a formal communication, the Court considers that even measures adopted to face emergency situations have to be evaluated according to the parameters of interference and restriction established by single articles of the Convention (see *Brogan and Others v. United Kingdom*, ECtHR, Application Nos 11209/84, 11234/84, 11266/84 and 11386/85, Judgment of 29 November 1988, para. 48). Moreover, the territorial scope of the derogation cannot be extended beyond the territories explicitly named in the notice of derogation: *Sakik and Others v. Turkey*, ECtHR, Application Nos 23878/94, 23879/94 and 23880/94, Judgment of 26 November 1997, para. 39; *Abdulsamet Yaman v. Turkey*, ECtHR, Application No. 32446/96, Judgment of 2 November 2004, para. 69; *Sadak v. Turkey*, ECtHR, Application Nos 25142/94 and 27099/95, Judgment of 8 April 2004, para. 56.
- 3. See R. Higgins, 'Derogations under Human Rights Treaties', *British Yearbook of International Law* 48 (1976-1977): 281ff. The purpose of Article 15 was firstly enlarged to cover almost every severe crisis in a democratic society in *Lawless v. Ireland (No. 3)*, ECtHR, Application No. 332/57, Judgment of 1 July 1961, where the emergency was defined as an 'exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed' (para. 28). The reasons for that enlargement were then clearly established in

Ireland v. United Kingdom and maintained in the following case law: 'By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it' (*Ireland v. United Kingdom*, ECtHR, Application No. 5310/71, Judgment of 18 January 1978, para. 207. See also, *Case of A. and Others v. United Kingdom* [GC], ECtHR, Application No. 3455/05, Judgment of 19 February 2009, para. 173; *Brammigan and McBride v. United Kingdom*, ECtHR, Application Nos 14553/89 and 14554/89, Judgment of 25 May 1993, para. 43; *Aksoy v. Turkey*, ECtHR, Application No. 21987/93, Judgment of 18 December 1996, para. 68; *Demir and Others v. Turkey*, ECtHR, Application Nos 21380/93, 21381/93 and 21383/93, Judgment of 23 September 1998, para. 43; *Marshall v. United Kingdom*, ECtHR, Application No. 41571/98, Decision on Admissibility of 10 July 2001; *Nuray Şen v. Turkey*, ECtHR, Application No. 41478/98, Judgment of 17 June 2003, para. 25).

4. See J. Fitzpatrick, 'Protection Against Abuse of the Concept of "Emergency"', *Studies in Transnational Legal Policy* 26 (1994): 203.
5. R. Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles: étude sur l'article 15 de la Convention européenne des droits de l'homme* (Brussels: Bruylant, 1987), 150ff.
6. Still in 2001, the Court accepted that as there had been 'no return to normality' in Northern Ireland, British authorities were entitled to adopt derogation measures (*Marshall v. United Kingdom*, ECtHR, Application No. 41571/98, Decision on Admissibility of 10 July 2001).
7. *A. and Others*, *supra* note 3, at 180. For a critical analysis of the wide margin of appreciation conceded to States, see O. Gross and F. Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights', *Human Rights Quarterly* 23 (2001): 625–649; J.-P. Loof, 'Crisis Situations, Counter Terrorism and Derogation from the European Convention on Human Rights: a Threat Analysis', in A. Buyse (ed.), *Margins of Conflict: the ECHR and Transitions to and from Armed Conflict* (Antwerp/Portland: Intersentia, 2011), 35–56; see also E. Bates, 'A "Public Emergency Threatening the Life of the Nation"? the United Kingdom's Derogation from the European Convention on Human Rights of 18 December 2001 and the "A" Case', *British Yearbook of International Law* 76 (2005): 245–335, particularly 291–319. So far the only case in which Strasbourg institutions concluded that there was no public emergency has been the Greek case, see the Report of the Commission of 5 November 1969, 124, 125.
8. *A. and Others*, *supra* note 3, at 173; *Ireland*, *supra* note 3, at 207; *Brammigan and McBride*, *supra* note 3, at 43; *Aksoy*, *supra* note 3, at 68.
9. The proportionality principle seems to be inherent to the principle of necessity, as Professor Higgins observed 'derogation to human rights obligations are acceptable only if events make them necessary and if they are proportionate to the danger that those events represent', *supra* note 3, at 282ff.; see also M.M. El Zeidy, 'The ECHR and States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations', *San Diego International Law Journal* No. 4 (2002): 277.
10. *Lawless*, *supra* note 3, at 36. The reference to the freedom of movement of the whole population shows how the Court intended the proportionality test to be not limited to the balance between the particular right in cause and the necessity to face the emergency, but rather as a comprehensive test taking into account the whole system of fundamental rights and the rule of law in the country.
11. *Ibid.*, at 37. The existence of safeguards and remedies plays a very important role in all the following case law (see *Ireland*, *supra* note 3, at 218; *Brammigan and McBride*, *supra* note 3, at 62–64).
12. This attitude has been severely criticized by scholars, see Gross and Ní Aoláin, *supra* note 7, at 628, defining it as 'judicial attitude of undue deference to the concerns of states over individuals', and the doctrine they cite.
13. *Ireland*, *supra* note 3, at 212.
14. *Ibid.*, at 214: 'the Court must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied'.
15. *Brammigan and McBride*, *supra* note 3, at 59: '[i]t is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other'.
16. *A. and Others*, *supra* note 3, at 174, referring to House of Lords, *A and Others v. Secretary of State for the Home Department*, 16 December 2004, [2004] UKHL 56.

17. In *Aksoy*, *supra* note 3, the plaintiff had been detained for 14 days without any judicial control, nor any possibility of contacting a lawyer, a doctor or his family; during that time he was also tortured (see paras 78 and 83 of the Judgment, see also the Commission Decision, para. 181). After the *Aksoy* Judgment, the Court reached the same conclusion in a number of cases: see *Demir and Others v. Turkey*, ECtHR, Application Nos 21380/93, 21381/93 and 21383/93, Judgment of 23 September 1998, para. 57: 'the Court is not convinced that the applicants' incommunicado detention for at least sixteen or twenty-three days, without any possibility of seeing a judge or other judicial officer, was strictly required by the crisis relied on by the Government'; *Bilen v. Turkey*, ECtHR, Application No. 34482/97, Judgment of 21 February 2006, para. 49; *Nuray Şen v. Turkey*, ECtHR, Application No. 41478/98, Judgment of 17 June 2003, para. 28.
18. *Belgian Linguistic case*, ECtHR, Application Nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, Judgment of 23 July 1968, para. B.5. See also *Golder v. United Kingdom*, ECtHR, Application No. 4451/70, Judgment of 21 February 1975, para. 45, concerning the right of a detainee to respect for private correspondence under Article 8.
19. *Handyside v. United Kingdom*, ECtHR, Application No. 5493/72, Judgment of 7 December 1976, para. 48.
20. *Ibid.*, at 49.
21. *The Sunday Times v. United Kingdom*, ECtHR, Application No. 6538/74, Judgment of 26 April 1979, para. 65. The case concerned the injunction restraining publication of an article concerning the thalidomide disaster with the aim of maintaining the authority and impartiality of the judiciary dealing with the case.
22. As clearly illustrated by van Drooghenbroeck, *supra* note 1.
23. *Dudgeon v. United Kingdom*, ECtHR, Application No. 7525/76, Judgment of 22 October 1981, para. 52; *Norris v. Ireland*, ECtHR, Application No. 10581/83, Judgment of 26 October 1988, para. 46. The concept was yet developed in case law concerning Article 10, see *Handyside*, *supra* note 19, at 48.
24. In *Dudgeon*, *supra* note 23, the Court pointed out that: 'not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8' (at 52; see also *Norris*, *supra* note 23, at 46).
25. *Laskey, Jaggard and Brown v. United Kingdom*, ECtHR, Application Nos 21627/93, 21628/93 and 21974/93, Judgment of 19 February 1997, para. 44: 'The determination of the level of harm that should be tolerated by the law in situations where the victim consents is in the first instance a matter for the State concerned since what is at stake is related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law, and, on the other, to the personal autonomy of the individual.'
26. *Pretty v. United Kingdom*, ECtHR, Application No. 2346/02, Judgment of 29 April 2002, paras 68–78.
27. A similar balancing was previously done by the Court in cases concerning the determination of paternity by means of DNA test. In *Mikulić v. Croatia*, ECtHR, Application No. 53176/99, Judgment of 7 February 2002, the Court identified the opposite interests as follows: 'persons in the applicant's situation have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity. On the other hand, it must be borne in mind that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing' (para. 64). In contrast, in *Odièvre*, *infra* note 28, the Court gave precedence to the child's interest (see also, *mutatis mutandis*, *Jäggi v. Switzerland*, ECtHR, Application No. 58757/00, Judgment of 13 July 2006, para. 38).
28. *Odièvre v. France*, ECtHR, Application No. 42326/98, Judgment of 13 February 2003, para. 49. For another example of balancing between conflicting private interests under Article 8, see *Evans v. United Kingdom*, ECtHR, Application No. 6339/05, Judgment of 10 April 2007.
29. *Wallová and Walla v. Czech Republic*, ECtHR, Application No. 23848/04, Judgment of 26 October 2006, para. 74 (only French original published) ('The Court considers that, in this case, to meet the requirement of proportionality, the Czech authorities should have considered other measures, less drastic than public child care. Indeed, the Court considers that the role of social welfare is precisely to help people in need, who do not have the necessary knowledge of the system, guiding them in their efforts and advising them, in particular with regard to the different types of social benefits, opportunities to obtain housing, or other ways to overcome their difficulties'); see also *Havelka and Others v. Czech Republic*, ECtHR, Application No. 23499/06, Judgment of 21 June 2007, paras 52–63.

30. In *Boutif v. Switzerland*, ECtHR, Application No. 54273/00, Judgment of 2 August 2001, para. 48, the Court laid down some 'guiding principles' in order to examine whether a measure of expulsion was necessary in a democratic society: 'In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion.' What seems particularly interesting in this passage is the fact that the Court explicitly took into account the situation of the wife who was not an applicant in the case. See also *Moustaquim v. Belgium*, ECtHR, Application No. 12313/86, Judgment of 18 February 1991; *Beldjoudi v. France*, ECtHR, Application No. 12083/86, Judgment of 26 March 1992; *Amrollahi v. Denmark*, ECtHR, Application No. 56811/00, Judgment of 11 July 2002; *Yilmaz v. Germany*, ECtHR, Application No. 52853/99, Judgment of 17 April 2003, where the Court considered that the expulsion was not disproportionate in itself, but that the indefinite exclusion from German territory was (para. 48); *Keles v. Germany*, ECtHR, Application No. 32231/02, Judgment of 27 October 2005; *Üner v. Netherlands*, ECtHR, Application No. 46410/99, Judgment of 18 October 2006. In some recent cases the Court balanced the interest of the State to control immigration and the family links developed by an irregular migrant in the territory and considered that in exceptional cases, characterised by a particularly strong family link such as the parental relationship, the interest of individuals prevails over the sovereign right of the State to control the entry of aliens into its territory and their residence there (*Şen v. Netherlands*, ECtHR, Application No. 31465/96, Judgment of 21 December 2001; *Rodrigues da Silva and Hoogkamer v. Netherlands*, ECtHR, Application No. 50435/99, Judgment of 31 January 2006; *Nunez v. Norway*, ECtHR, Application No. 55597/09, Judgment of 28 June 2011).
31. See Explanatory Report to Protocol No. 7 (ETS No. 117), para. 15; *C.G. and Others v. Bulgaria*, ECtHR, Application No. 1365/07, Judgment of 24 April 2008, para. 78.
32. *Leyla Şahin v. Turkey* [GC], ECtHR, Application No. 44774/98, Judgment of 10 November 2005, para. 114 (the Grand Chamber confirmed the Conclusion reached by the Chamber on 29 June 2004); see also *Köse and 93 Others v. Turkey*, ECtHR, Application No. 26625/02, Decision on Admissibility of 24 January 2006.
33. The prohibition on wearing the Islamic headscarf for secondary students has been considered legitimate also in respect of the French secular model (*Dogru v. France*, ECtHR, Application No. 27058/05, Judgment of 4 December 2008; in that case the restriction was limited to PE classes, but the motivation of the Judgment would probably be applicable also against a more general measure). Among cases in which the individual right has been considered pre-eminent and the interference not proportionate, see *Kokkinakis v. Greece*, ECtHR, Application No. 14307/88, Judgment of 25 May 1993, concerning repression of proselytism.
34. *Dahlab v. Switzerland*, ECtHR, Application No. 42393/98, Decision on Admissibility of 15 February 2001 (emphasis added).
35. *Folgerø and Others v. Norway*, ECtHR, Application No. 15472/02, Judgment of 29 June 2007. See also *Zengin v. Turkey*, ECtHR, Application No. 1448/04, Judgment of 9 October 2007.
36. *Folgerø*, *supra* note 35, at 84; *Young, James and Webster v. United Kingdom*, ECtHR, Application Nos 7601/76 and 7806/77, Judgment of 13 August 1981, para. 63 (the case concerned the right not to be compelled to join a union under Article 11).
37. *Lautsi v. Italy* [Second Section], ECtHR, Application No. 30814/06, Judgment of 3 November 2009, paras 56 and 57.
38. *Lautsi v. Italy* [GC], ECtHR, Application No. 30814/06, Judgment of 18 March 2011, para. 72.
39. *Ibid.*, at 74.
40. The characteristic of domain is the fact that concepts and issues are reciprocally defined. This is the reason why in freedom of expression cases the concepts of necessity in a democratic society and of proportionality tend to overlap. See the leading cases *Handyside*, *supra* note 19, and *The Sunday Times*, *supra* note 21, but also, among numerous Judgments, *Barthold v. Germany*, ECtHR, Application No. 8734/79, Judgment of 25 March 1985, *The Observer and The Guardian v. United*

- Kingdom*, ECtHR, Application No. 13585/88, Judgment of 26 November 1991, *Women On Waves and Others v. Portugal*, ECtHR, Application No. 31276/05, Judgment of 3 February 2009.
41. Defined as the 'public-watchdog' of democracy since the *Goodwin v. United Kingdom* case (ECtHR, Application No. 17488/90, Judgment of 27 March 1996, para. 39), the press and other media contributing to public information and debate have been given a privileged status and enjoy a high level of protection (for a quite extreme example, see *Jersild v. Denmark*, ECtHR, Application No. 15890/89, Judgment of 23 September 1994). Not surprisingly, artistic and commercial expression receives a lower level of protection (*Otto-Preminger-Institut v. Austria*, ECtHR, Application No. 13470/87, Judgment of 20 September 1994; *Wingrove v. United Kingdom*, ECtHR, Application No. 17419/90, Judgment of 25 November 1996, para. 58; *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, ECtHR, Application No. 10572/83, Judgment of 20 November 1989. For an overview of categories of expression in the Court case law, see D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, 2nd edn (London: Butterworths, 2009), 455–465.
 42. *Lindon, Otchakovsky-Laurens and July v. France*, ECtHR, Application Nos 21279/02 and 36448/02, Judgment of 22 October 2007, para. 45.
 43. *Barfod v. Denmark*, ECtHR, Application No. 11508/85, Judgment of 22 February 1989, para. 31: 'the general interest in allowing public debate about the functioning of the judiciary weighed more heavily than the interest of the two lay judges in being protected against criticism'. Nevertheless, in the circumstance of the case, the Court finds no violation of Article 10. See also *Worm v. Austria*, ECtHR, Application No. 22714/93, Judgment of 29 August 1997.
 44. *Informationsverein Lentia and Others v. Austria*, ECtHR, Application Nos 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, Judgment of 24 November 1993.
 45. *Piermont v. France*, ECtHR, Application Nos 15773/89 and 15774/89, Judgment of 27 April 1995.
 46. *Goodwin v. United Kingdom*, ECtHR, Application No. 17488/90, Judgment of 27 March 1996, para. 45: 'the Court cannot find that Tetre's interests in eliminating ... the residual threat of damage through dissemination of confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source'.
 47. *Open Door and Dublin Well Woman v. Ireland*, ECtHR, Application Nos 14234/88 and 14235/88, Judgment of 29 October 1992.
 48. *Women On Waves*, *supra* note 40. It is interesting to note that the Court considered that, in seeking to prevent disorder and protect health, the Portuguese authorities could have resorted to other means, less restrictive of the applicants' freedom of expression (para. 41).
 49. *Özgür Gündem v. Turkey*, ECtHR, Application No. 23144/93, Judgment of 16 March 2000, para. 43; *Fuentes Bobo v. Spain*, ECtHR, Application No. 39293/98, Judgment of 29 February 2000, para. 38. See also *Khurshid Mustafa and Tarzibachi v. Sweden*, ECtHR, Application No. 23883/06, Judgment of 16 December 2008, where the Court established that the right to receive information included the right of an Iraqi family living in Stockholm to have a satellite dish in order to receive television programmes in Arabic and Farsi, which were otherwise unavailable, even though it was forbidden by the tenancy agreement.
 50. See *Mamère v. France*, ECtHR, Application No. 12697/03, Judgment of 7 November 2006, paras 27–30. Nevertheless, freedom of expression is not above any limit, journalists have indeed 'duties and responsibilities' and are expected to act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see *Radio France and Others v. France*, ECtHR, Application No. 53984/00, Judgment of 30 March 2004, paras 37–39).
 51. *Janowski v. Poland*, ECtHR, Application No. 25716/94, Judgment of 21 January 1999, para. 32.
 52. See, among the most recent cases, *MGN Limited v. United Kingdom*, ECtHR, Application No. 39401/04, Judgment of 18 January 2011, paras 142, 143.
 53. See *Ezelin v. France*, ECtHR, Application No. 11800/85, Judgment of 26 April 1991, para. 37; *Djavit An v. Turkey*, ECtHR, Application No. 20652/92, Judgment of 20 February 2003, para. 39; *Barraco v. France*, ECtHR, Application No. 31684/05, Judgment of 5 March 2009, para. 27. In *Palomo Sánchez and Others v. Spain* [GC], ECtHR, Application Nos 28955/06, 28957/06, 28959/06 and 28964/06, Judgment of 12 September 2011, the Court examined the facts under Article 10, interpreting it in the light of Article 11 (para. 52; see also *Women On Waves*, *supra* note 40, at 28).
 54. *Ezelin v. France*, *supra* note 53, at 53; *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, ECtHR, Application No. 35972/97, Judgment of 2 August 2001, para. 26; *Ashughyan v. Armenia*, ECtHR, Application No. 33268/03, Judgment of 17 July 2008, para. 90; *Galstyan v. Armenia*, ECtHR, Application No. 26986/03, Judgment of 15 November 2007, para. 115.

55. *Young, James and Webster*, *supra* note 36, at 65: 'the detriment suffered by Mr. Young, Mr. James and Mr. Webster went further than was required to achieve a proper balance between the conflicting interests of those involved and cannot be regarded as proportionate to the aims being pursued'. See also *Sigurður A. Sigurjónsson v. Iceland*, ECtHR, Application No. 16130/90, Judgment of 30 June 1993. In *Sørensen and Rasmussen v. Denmark*, ECtHR, Application Nos 52562/99 and 52620/99, Judgment of 11 January 2006, para. 58, the Court reiterates that 'in the area of trade union freedom and in view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation'.
56. See *Refah Partisi (The Welfare Party) and Others v. Turkey*, ECtHR, Application Nos 41340/98, 41342/98, 41343/98 and 41344/98, Judgment of 13 February 2003, in which the court considered that the dissolution of a party whose purpose was to establish Sharia may be regarded as 'necessary in a democratic society'. This conclusion followed 'a rigorous review to verify that there were convincing and compelling reasons justifying Refah's dissolution and the temporary forfeiture of certain political rights imposed on the other applicants' (para. 135).
57. See R. Sapienza, 'Sul margine di apprezzamento nel sistema della Convenzione europea dei diritti dell'uomo', *Rivista di Diritto Internazionale* (1991): 571ff., specifically 611ff.; L. Adamovich, 'Marge d'appréciation du législateur et principe de proportionnalité dans l'appréciation des "restrictions prévues par la loi" au regard de la Convention européenne des droits de l'homme', *R.T.D.H.* (1991): 291ff.; P. Lambert, 'Marge nationale d'appréciation et contrôle de proportionnalité', in F. Sudre (ed.), *L'interprétation de la Convention européenne des droits de l'homme* (Brussels: Bruylant, 1998), 63ff.; E. Brems, 'The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe', in D.P. Forsythe and P.C. McMahon (eds), *Human Rights and Diversity* (Lincoln: University of Nebraska Press, 2003), 81–110.
58. Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Intersentia, 2002), 14, defines the proportionality principle as 'the other side of the margin of appreciation'.
59. On the application of the margin of appreciation doctrine in limitation clauses issues see, among a number of scholars, C. Morrison, 'Margin of Appreciation in European Human Rights Law', *R.D.H.* (1973): 263ff.; A. Bleckmann, 'Der Beurteilungsspielraum im Europa – und im Völkerrecht', *E.G.Z.* (1979): 485ff.; R. Bernhardt, 'Internationaler Menschenrechtsschutz und nationaler Gestaltungsspielraum', in *Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte. Festschrift für Hermann Mosler* (Berlin, Heidelberg and New York: Springer, 1983), 75ff.; W.J. Ganshof van der Meersch, 'Réflexions sur les restrictions à l'exercice des droits de l'homme dans la jurisprudence de la Cour européenne de Strasbourg', *ibid.*, 263ff.; Heilbronner, 'Die Einschränkung von Grundrechten in einer demokratischen Gesellschaft', *ibid.*, 359ff.; MacDonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights', in *Il diritto internazionale al tempo della sua codificazione. Studi in onore di Roberto Ago* (Milan: Giuffrè, 1987), III, 187ff.; Sapienza, *supra* note 57, at 571ff.; H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague, Boston and London: Martinus Nijhoff Publisher, 1996); Rasilla del Moral, 'The Increasingly Marginal Appreciation of the Margin-of-Appreciation', *German Law Journal* 7 (2006).
60. See, among cases already cited, *Handyside*, *supra* note 19, at 49; *Open Door*, *supra* note 47, at 71; *Palomo Sánchez*, *supra* note 53, at 53.
61. *Gillow v. United Kingdom*, ECtHR, Application No. 9063/80, Report of the Commission of 3 October 1984, para. 147.
62. See cases under note 30 above.
63. As pointed out by Judge Lagergren in his Dissenting Opinion in *Margareta and Roger Andersson v. Sweden*, ECtHR, Application No. 12963/87, Judgment of 25 February 1992: '[a]nother difficulty is to balance conflicting private interests and public obligations'.
64. In *Handyside*, *supra* note 19, the Court said that 'the freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress'. In *The Sunday Times*, *supra* note 21, the assessment of proportionality was conducted taking into account 'any public interest aspect of the case' (para. 65). In *Barford*, *supra* note 43, the Court pointed out that 'the pursuit of the aims mentioned in Article 10(2) must be weighed against the value of open discussion of topics of public concern', and concluded that 'the public interests in allowing public debate about the functioning of the judiciary weighed more heavily than the interest of the two lay

judges in being protected against criticism'. Conversely, in *MGN Limited*, *supra* note 52, the Court considered that when a publication 'cannot be deemed to contribute to any debate of general interest to society', 'freedom of expression calls for a narrower interpretation'.

65. *Klass and Others v. Germany*, ECtHR, Application No. 5029/71, Judgment of 6 September 1978, para. 50; the Court added: 'This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.' This principle is constantly applied in the following case law (see among numerous examples, *Lambert v. France*, ECtHR, Application No. 23618/94, Judgment of 24 August 1998, *Weber and Saravia v. Germany*, ECtHR, Application No. 54934/00, Decision on Admissibility of 29 June 2006). The same principle is also applied in cases concerning the storage of personal information such as fingerprints, photographs or DNA, see *S. and Marper v. United Kingdom*, ECtHR, Application Nos 30562/04 and 30566/04, Judgment of 4 December 2008.
66. *Belgian Linguistic case*, *supra* note 18, at B.5.
67. *Golder*, *supra* note 18, at 38. See also *Winterwerp v. Netherlands*, ECtHR, Application No. 6301/73, Judgment of 24 October 1979, concerning the application of Article 5, para. 4, at 60, the Court said: '[m]ental illness may entail restricting or modifying the manner of exercise of such a right ... but it cannot justify impairing the very essence of the right'; moreover, in relation to Article 6, para. 1, at 76, the Court reiterated that '[w]hile mental illness may render legitimate certain limitations upon the exercise of the "right to a court", it cannot warrant the total absence of that right'.
68. This requirement was firstly established in *Ashingdane v. United Kingdom*, ECtHR, Application No. 8225/78, Judgment of 28 May 1985, para. 57, and maintained in subsequent case law.
69. In the particular field of the right of access to court, see, among the most famous or recent cases, *Waite and Kennedy v. Germany* [GC], ECtHR, Application No. 26083/94, Judgment of 18 February 1999, para. 59; *Fogarty v. United Kingdom* [GC], ECtHR, Application No. 37112/97, Judgment of 21 November 2001, para. 33; *Cudak v. Lithuania*, ECtHR, Application No. 15869/02, Judgment of 23 March 2010, para. 55; *Sabeh El Leil v. France*, ECtHR, Application No. 34869/05, Judgment of 29 June 2011; *Wos v. Poland*, ECtHR, Application No. 22860/02, Judgment of 8 June 2006, para. 98. See also, concerning the immunity of members of Parliament, *A. v. United Kingdom*, ECtHR, Application No. 35373/97, Judgment of 17 December 2002, para. 74.
70. Particularly interesting is the case law concerning the regulation of marriage with foreign migrants. In that case the Court balanced the right of the couple to get married and the State's interest to prevent marriages of convenience. In *O'Donoghue and Others v. United Kingdom*, ECtHR, Application No. 34848/07, Judgment of 14 December 2010, the Court pointed out that 'in examining a case under Article 12 the Court would not apply the tests of "necessity" or "pressing social need" which are used in the context of Article 8 but would have to determine whether, regard being had to the State's margin of appreciation, the impugned interference has been arbitrary or disproportionate' (para. 84; see also *Frasik v. Poland*, ECtHR, Application No. 22933/02, para. 90, and *Jaremwicz v. Poland*, ECtHR, Application No. 24023/03, para. 50, Judgments of 5 January 2010 concerning the right to marriage of detainees).
71. *Hirst v. United Kingdom (No. 2)*, ECtHR, Application No. 74025/01, Fourth Section's Judgment of 30 March 2004, para. 50: 'The Court accepts that this is an area in which a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners' right to vote can still be justified in modern times and if so how a fair balance is to be struck. In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether, for instance, the sentencing court should be left with an overriding discretion to deprive a convicted person of his right to vote.'
72. The Judgment of the Fourth Section in *Hirst*, *ibid.*, has been confirmed by the Grand Chamber of the Court, on 6 October 2005. Previously, proportionality text was used in *Mathieu-Mohin and Clerfayt v. Belgium*, ECtHR, Application No. 9267/81, Judgment of 2 March 1987, *Matthews v. United Kingdom*, ECtHR, Application No. 24833/94, Judgment of 18 February 1999, paras 63–64.
73. *Waite and Kennedy*, *supra* note 69, at 59; *Al-Adsani v. United Kingdom* [GC], ECtHR, Application No. 35763/97, Judgment of 21 November 2001, para. 53; *McElhinney v. Ireland*, ECtHR, Application No. 31253/96, Judgment of 21 November 2001, para. 34; *Fogarty*, *supra* note 69, at 33; *Cudak*, *supra* note 69, at 55; *Sabeh El Leil*, *supra* note 69.
74. *Waite and Kennedy*, *supra* note 69, at 68–70, emphasis added; *Beer and Regan v. Germany*, ECtHR, Application No. 28934/95, Judgment of 18 February 1999, para. 55.

75. See *Al-Adsani*, *supra* note 73; *McElhinney*, *supra* note 73; *Fogarty*, *supra* note 69; *Cudak*, *supra* note 69; *Sabeh El Leil*, *supra* note 69.
76. *Van der Mussele v. Belgium*, ECtHR, Application No. 8919/80, Judgment of 23 November 1983. The Court observed that '[t]he structure of Article 4 is informative on this point. Paragraph 3 is not intended to "limit" the exercise of the right guaranteed by paragraph 2, but to "delimit" the very content of this right' (para. 38); then the Court noted that 'the obligation ... constituted a means of securing ... the benefit of Article 6(3)(c) of the Convention. To this extent, it was founded on a conception of social solidarity and cannot be regarded as unreasonable. ... Finally, the burden imposed on the applicant was not disproportionate' (para. 39). See also *Zarb Adami v. Malta*, ECtHR, Application No. 17209/02, Judgment of 20 June 2006, para. 47; *Steindl v. Germany*, ECtHR, Application No. 29878/07, Decision on Admissibility of 14 September 2010.
77. *Sporrong and Lönnroth v. Sweden*, ECtHR, Application Nos 7151/75 and 7152/75, Judgment of 23 September 1982, para. 69: 'The fact that the permits fell within the ambit neither of the second sentence of the first paragraph nor of the second paragraph does not mean that the interference with the said right violated the rule contained in the first sentence of the first paragraph. For the purposes of the latter provision, the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ... The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1-1).'
78. See *Matos e Silva, LDA., and Others v. Portugal*, ECtHR, Application No. 15777/89, Judgment of 16 September 1996.
79. *Hamer v. Belgium*, ECtHR, Application No. 21861/03, Judgment of 27 November 2007. In this case, the Court specifically considered that no measure other than restoration of the site – by demolition of the applicant's house – 'appeared appropriate in the particular circumstances of the case, which concerned an undeniable interference with the integrity of a forested area in which no building was permitted' (para. 86). Consequently, the Court concluded that the applicant had not suffered disproportionate interference with her property rights (para. 88).
80. See *Gasus Dosier- und Fördertechnik GmbH v. Netherlands*, ECtHR, Application No. 15375/89, Judgment of 23 February 1995.
81. See the Commission's Report in *Gillow*, *supra* note 61, specifically at para. 154ff.
82. See *Beyeler v. Italy*, ECtHR, Application No. 33202/96, Judgment of 5 January 2000.
83. See *Immobiliare Saffi v. Italy*, ECtHR, Application No. 22774/93, Judgment of 28 July 1999.
84. *Doğan and Others v. Turkey*, ECtHR, Application Nos 8803–8811/02, 8813/02 and 8815–8819/02, Judgment of 29 June 2004, paras 153–156.
85. *J.A. Pye (Oxford) Ltd v. United Kingdom*, ECtHR, Application No. 44302/02, Judgment of 30 August 2007.