The Principle of Proportionality
in
European and Comparative Perspective

Natasha Attard

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Department of Law
Faculty of Humanities and Social Sciences
University of Strathclyde

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Abstract

This thesis critically examines the application of the principle of proportionality in fundamental rights judgments of three courts - the Maltese Constitutional Court, the European Court of Human Rights and the Court of Justice of the European Union - in the light of Robert Alexy's theory of proportionality. The thesis begins by defending Alexy's three-stage model of proportionality analysis as the most appropriate and effective method of adjudicating conflicts between fundamental rights, or fundamental rights and general interests. However, close examination of the jurisprudence of the three selected courts reveals that each applies a different – and reduced – version of the principle of proportionality. The thesis seeks to explain these variations in terms of the nature of each of the courts, the judicial authority they have developed throughout the years and the nature of the legal system that they serve, which have influenced their juridical mentality, the external considerations they make, the different values they hold and lastly, the different conceptions of proportionality that they have. Nevertheless, it argues that the courts' deviation from Alexy's model reduces the efficiency and effectiveness of the courts' respective approaches to fundamental rights adjudication and recommends that it is still possible to adhere to this model if they are willing to fine-tuning their conception of the principle of proportionality.

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Gratus sum

Table of Abbreviations

CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EURATOM	European Atomic Energy Community
GFCC	German Federal Constitutional Court
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Charter	Charter of Fundamental Rights of the European Union

Table of Cases

Judgments of the Maltese Constitutional Court and Civil Court (Constitutional Jurisdiction)

Debattista v. Direttur (Servizzi ta' Kummerc – Ministeru ghall-Kompetittivita u l-Komunikazzjoni) et, Civil Court First Hall, 7 April 2011

Bugeja J v. Il-Provinċjal Reverendu Alfred Calleja OFM Conv. et, Constitutional Court, 11 November 2011

Vella v, AG et, Constitutional Court, 25 November 2011

Mifsud D v. Hon. PM et, Civil Court (Const.), 9 February 2012

Mercieca et v. Tabone noe et, Constitutional Court, 27 April 2012

Xerri et v. Tabone noe et, (Constitutional Court), 27 April 2012

Zerafa et v. Cilia et., Civil Court (Constitutional Jurisdiction),9 October 2012

Sanders v. Marshall, Civil Court, 7 January 2013

Perit Michael Falzon et v. l-AG et, Constitututional Court, 11 January 2013

Bonnici S v. AG, Constitutional Court, 28 January 2013

Grech v. AG, Civil Court (Constitutional Jurisdiction), 15 March 2013
Zammit Maempel et v. L-Awtorita' tad-Djar et , Civil Court, 26 March 2013
Busuttil v. Cassar et, First Court (Constitutional Jurisdiction), 3 October 2013

Attard Montalto et v. Prim Ministru et (*National Bank of Malta* case) Civil Court (Constitutional Jurisdiction), 9 January 2014

Mifsud et. v. AG et, Constitutional Court, 31 January 2014

Barbara et v. Onor Prim Ministru, Constitutional Court, 31 January 2014

Cini v. Galea et, Constitutional Court, 31 January 2014

Attard Montalto v. Prim Ministru et, Civil Court (Constitutional Jurisdiction), 7 March 2014.

Briffa v. AG, Constitutional Court, 20 March 2014

Garden of Eden Garage Limited v. Awtorita ghat-Trasport f' Malta, Administrative Review Tribunal, 29 May 2014

Bernard Gauci et v. Il-Kummissarju Tal-Artijiet et., Constitutional Court, 19 April 2016

Frances armla minn Anthony Montanaro et v. vs Avukat Generali et, Civil Court (Consitutional Jurisdiction), 11 May 2017

Agnes Gera de Petri Testaferrata v. Avukat Generali u Lombard Bank Malta p.l.c. (C1607), Constitutional Court, 29 November 2019

Georgina Grima et. v. Antonia Chricop et., Civil Court (Constitutional Jurisdiction) 23/01/2020

Judgments of the European Court of Human Rights (judgment date order)

Handyside v. UK, *(Application no. 5493/72)* ECtHR 7 December 1976

Sunday Times v. UK, (Application no. 6538/74) ECtHR 26 April 1979

Dudgeon v. UK, (Application no. 7525/76) ECtHR 22 October 1981

Ashingdane v. UK (App. No 8225/78) ECtHR, 28 May 1985.

James and Others v. UK, *(Application no. 8793/79)* ECtHR 21 February 1986

Lithgow and others v. UK, *(Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81)* ECtHR 8 July 1986

Rees v. UK, *(Application no. 9532/81)* ECtHR 17 October 1986

Leander v. Sweden, *(Application no. 9248/81)* ECtHR 26 March 1987

Olsson v. Sweden, *(Application no. 10465/83)* ECtHR 24 March 1988

Barfod v. Denmark, *(Application No. 11508/85)* 22 February 1989

Soering v. UK (Application no. 14038/88) ECtHR, 7 July 1989.

Mellacher and others v. Austria, (*Application no. 10522/83; 11011/84; 11070/84*), 19 December 1989

Otto-*Preminger-Institut v. Austria*, *(Application no. 13470/87)* 23 September 1994.

Scollo v. Italy, *(Application no. 19133/91)* ECtHR 28 September 1995

Z v. Finland, (*App. No 22009/93*), ECtHR 25th February 1997

Fressoz and Roire v. France, (Application no. 29183/95) ECtHR 26 May 1997

Halford v. UK, *(Application no. 20605/92)* ECtHR 25 June 1997

Mehemi v. France, (*Application No 85/1996/704/896)* ECtHR 26 September 1997.

Kopp v. Switzerland, (*Application No 3/1997/797/1000)* ECtHR 25 March 1998

Sheffield and Horsham v. UK, (Application nos. (31–32/1997/815–816/1018–1019) ECtHR 30 July 1998
Kudla v. Poland, (Application no. 30210/96) ECtHR 26 October 2000

Kutzner v. Germany, (Application no. 46544/99) ECtHR 26 February 2002

Goodwin v. UK, (Application no. 28957/95) ECtHR 11 July 2002

Peck v. UK, *(Application no. 44647/98)* ECtHR 28 January 2003

Hatton and others v. UK, *(Application no. 36022/97)* ECtHR 8 July 2003

Luordo v. Italy, *(Application no. 32190/96)* ECtHR 17 July 2003

Karner v. Austria (Application no. 40016/98) 24 October 2003

Rivas v. France, (French version only) *(Requête no 59584/00)* ECtHR 1 April 2004

Ismailov v. Russia, *(Application no. 20110/13)* 17 April 2004

Connors v. UK, *(Application no. 66746/01)* ECtHR 27 May 2004.

Bäck v. Finland, *(Application no. 37598/97)* 20 July 2004
Blecic v. Croatia, *(Application no. 59532/00)* ECtHR 29 July 2004

Broniowski v. Poland, (*friendly settlement*), (*Application No. 31443/96)*, ECtHR 28 September 2005

Mizzi v. Malta, (App. No. 26111/02) ECtHR 12 January 2006

Rodrigues Da Silva and Hoogkamer v. The Netherlands (Application no. 50435/99) 31 January 2006

Ramirez Sanchez v. France, (Application no. 59450/00) ECtHR 4 July 2006

Evans v UK, (Application no. 6339/05) ECtHR 10 April 2007

Stoll v. Switzerland, (Application no. 69698/01) ECtHR 10 December 2007

Fleri Soler et v. Malta (Application no. 35349/05) 17 July 2008

Kozaciouğlu v. Turkey (Application no. 2334/03) ECtHR 19 February 2009.

A, B and C v. Ireland, (Application no. 25579/05) 16 December 2010

MSS v. Belgium and Greece, (Application no. 30696/09) ECtHR 21 January 2011

Lautsi and Others v. Italy, (Application no. 30814/06) ECtHR 18 March 2011

Aquilina and Others v. Malta (App. No. 28040/08) 14 June 2011

John Anthony Mizzi v. Malta (App. No. 17320/10) 22 November 2011

*Zammit Maempel v. Malta (*App. No. 24202/10) ECtHR 22 November 2011

Keshmiri v. Turkey (No 2) (Application no. 22426/10) ECtHR 17 January 2012
Austin and others v. UK, (*Applications nos. 39692/09, 40713/09 and 41008/09)* 15 March 2012

Zolotas v. Greece (No. 2), (Application no. 66610/09) ECtHR 29 January 2013

*Azimov v. Russia, (Application no. 67474/11)*18 April 2013

Sabanchiyeva v. Russia, (Application no. 38450/05) ECtHR 6 June 2013

Primov v. Russia, (Application no. 17391/06) ECtHR 12 June 2014

Rakhimov v. Russia, (Application no. 50552/13) ECtHR 10 July 2014

Khoroshenko v. Russia, (Application no. 41418/04) ECtHR 30 June 2015

M D R Duman v. Turkey, (Application no. 15450/03) ECtHR 6 October 2015

Garib v. the Netherlands, 23 February 2016

Zammit Maempel v. Malta, *(Application. no. 3356/15)* ECtHR 15 January 2019

Judgments of the Court of Justice of the EU

Case 1/58 *Stork v. High Authority* [1959] ECR 17

Cases 36-38 and 40/59 *Geirling v. High Authority* [1960] ECR 423

Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 00001

Case 6/64, *Flaminio Costa v. Enel*, [1964] *ECLI identifier: ECLI:EU:C:1964:66*

Case 40/64 Sgarlata and others v. Commission [1965] ECR 215

Case 29/69, *Erich Stauder v City of Ulm - Sozialamt*, ECLI:EU:C:1969:57
Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel.* [1970] ECR 1125

Case 4/73, J. *Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECR 1974 -00491, ECLI:EU:C:1974:51
Case 104/75 *de Peijper* [1976] ECR 613

Case 114/76, *Bela-Mühle Josef Bergman KG v Grows-Farm GmbH & Co. KG* [1977] ECR 1211
Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649

Case 122/78, *Buitoni v Forma* [1979] ECR 677

Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz*, ECR 979 -03727, ECLI:EU:C:1979:290

Case 138/79 *Roquette Frères v. Council* [1977] ECR 1835

Case 155/79 *AM & S Europe Ltd v. Commission* [1982] ECR 1575

Case 222/*84 Johnston v. Chief Constable of the RUC* [1986] ECR 1651

Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others,* [1990], ECR 1990

Case C-56/93 *Belgium v. Commission* [1996] ECR I-723

Case C-280/93 *Germany v Council* [1994] ECR I-4973

Case C-13/94 *P v. S and Cornwall County Council* [1996] ECR I-2143
Case C-44/94 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations and others and Federation of Highlands and Islands Fishermen and others* ECR 1995 I-03115

Case C-104/94, *Cereol Italia v Azienda Agricola Castello* [1995] ECR I-2983

Case C-161/96, *Südzucker Mannheim/Ochsenfurt AG v Hauptzollamt Mannheim* [1998] ECR I-281

Case T-14/98, *Hautala v. Council* [1999] ECR II-2489

Case C-274/99 *P Connolly v Commission* [2001] ECR I-1611

Case C-353/99 *Council of the European Union v Heidi Hautala* [2001] ECR I-09565, ECLI:EU:C:2001:661

Cases C-20 and Joined Cases C-20/00 and C-64/00, *Booker Aquaculture Ltd, trading as Marine Harvest McConnell* (C-20/00), *Hydro Seafood GSP Ltd* (C-64/00)[2003] ECLI:EU:C:2003:397

Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, ECLI:EU:C:2002:434

Case C-94/00, *Roquette Freres Roquette Frères SA and Directeur general de la concurrence, de la consommation et de la répression des fraudes*, ECLI:EU:C:2002:603

Cases C-465/00, 138/01, 139/01 *Rechnungshof v. Österreichischer Rundfunk* [2003] ECR I-5199

Case C-482/01, *Georgios Orfanopoulos and Others* (C-482/01)

Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR 2002 I-11453
Case C-493/01, *Raffaele Oliveri v Land Baden-Württemberg*, ECR 2004 I-05257, ECLI:EU:C:2004:262

Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, ECR 2004 I-09609, ECLI:EU:C:2004:614

Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, [2008] ECR *2008 I-06351*

Case C-465/07 *Elgafaji v. Staatssecretaris van Justitie* [2009] ECR I-921

Case T-85/09, *Yassin Abdullah Kadi v European Commission*, ECLI:EU:C:2008:461

Joined Cases C-92-93/09, *Volker und Markus Schecke GbR* (C-92/09)

Case C-93/09 *Hartmut Eifert v Land Hessen*, [2010] ECR I-11063, ECLI:EU:C:2010:662

Case C-348/09, *P.I. v Oberbürgermeisterin der Stadt Remscheid*, [2012] ECLI:EU:C:2012:300

Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*, [2013] ECLI:EU:C:2013:28

Case C-291/12, *Michael Schwarz v Stadt Bochum*, ECLI:EU:C:2013:670

Joined cases C-293/12, C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, ECLI:EU:C:2014:238

Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*, ECLI:EU:C:2016:970

Case C-524/15, *Menci v. Procura della Republica* [2018] ECLI:EU:C:2018:197

C-73/16 *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky, Kriminálny úrad finančnej správy*, [2017] ECLI:EU:C:2017:725

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Introduction

This thesis proposes to study the application of the principle of proportionality in fundamental rights judgments of three courts: the Maltese Constitutional Court, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

1. The Development of the Proportionality Principle

The principle of proportionality may be traced back to Aristotle in his Nicomachean Ethics, Book V.[1] Aristotle speaks of justice as being 'a proportionate thing […] proportion being an equality of ratios'.[2] Injustice is 'that which violates this proportion'.[3] He speaks of distributive justice as that which apportions shares into equal ratios and corrective justice as that which constitutes 'the mean between loss and gain' where an injustice has occurred.[4] In this case, the judge 'stands between two claimants' and his duty 'is to bring to an equality', taking away 'that portion of it by which the larger section exceeds the half, and adds it to the smaller'.[5] The proportionality principle was later developed as a proposition for the law of self-defence by Cicero, Justinian, Augustine, and Aquinas.[6]

In modern times, the first application of the principle of proportionality in a public law context was in German Administrative law, more precisely, in its Polizeirecht, that is, the law applicable to the police force.[7] The German police force was, in its early stages, 'the necessary apparatus for the establishment of maintaining public peace, security and order and for the deterrence of dangers facing the public or single members thereof'.[8] Its action was to constitute the minimum required to achieve the administrative aim in view. The proportionality principle in German administrative law was initially understood as

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[1] Engle E., 'The History of the General Principle of Proportionality: An Overview', (2012) SSRN <http://papers.ssrn.com/author_id=879868> p. 3, accessed on 20 July 2019; and Schwarze J., *European Administrative Law,* (Sweet & Maxwell 1992), 679, who also accredits Aristotle as laying the first foundations for the development of the legal principle of proportionality.
[2] Aristotle's Nichomachaen Ethics Books V and X, translated by Paley FA., J. Hall & Son (Cambridge 1872), 17.
[3] Ibid 19.
[4] Ibid 22.
[5] Ibid
[6] Engle E. (n 1) 4; See Poole T., 'Proportionality in Perspective', (2010) Law Society and Economy Working Papers 16/2010, <http://eprints.lse.ac.uk/32900/1/WPS2010-16_Poole.pdf> where the author discusses the contributions of Plato and Cicero to the principle of proportionality.
[7] Barak A, *Proportionality: Constitutional Rights and their Limitations*, (Cambridge University Press 2012), 178 *et seq*.
[8] Deflem M., 'International Policing in Nineteenth Century Europe: The Police Union of German States, 1851-1866', International Criminal Justice Review, Vol. 6., (1996), p. 40, quoting the Prussian Landrecht 1794.

involving a prohibition of *disproportionality* (Uebermassverbot). However, by the late 1880s, Prussia's Supreme Administrative Court had developed the principle into a more exacting legal standard by employing the 'necessary measures test' and the 'least restrictive means' test.[9] After the second world war, the principle of proportionality developed into a powerful judicial tool,[10] and has been elevated to the status of a constitutional principle in German law[11] even though there is no explicit provision in the German constitution (basic law) relating to proportionality.[12] Following the second world war, the German constitution was drafted carefully in order to address the failure of the Weimar Republic from preventing the Nazi's rise to power,[13] and the consequences which followed. The German constitution was drafted with a firm commitment to the protection of fundamental rights.[14] In the late fifties the German Federal Constitutional Court delivered a series of judgments which firmly entrenched the principle of proportionality as an underlying constitutional value in the protection of the citizens' basic rights.[15] Today, the principle of proportionality in Germany is synonymous with the protection of fundamental rights.[16]

The principle of proportionality is no longer confined to German law, having been borrowed and adapted by many legal systems around the world, including European countries.[17] Indeed, it is considered to be one of the most widely-applied tools of adjudication in cases involving fundamental rights conflict,[18] owing its popularity, Engle argues, to the fact that it has 'deep, global, common roots'[19] founded on the pursuit of fairness and justice. The supra-national courts of Europe, the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) have both employed the

[9] Schwarze J., (n 1), speaks of the 'necessary principle', 686.
[10] Poole T., (n 6) 2.
[11] Schwarze J., (n 1) 688.
[12] Barak A., (n 7), 179.
[13] Kremnitzer M., *et al, Proportionality in Action*, (Cambridge University Press 2020) 26.
[14] Ibid 26
[15] Ibid 24
[16] Moshe C, & Porat I., 'American balancing and German proportionality: The historical origins', (2010) Vol. 8, No. 2, International Journal of Constitutional Law, 276; See also Yutaka A., 'Proportionality – A German Approach', (1999) Issue 19, Amicus Curiae, 11-13.
[17] For a discussion of these see Barak A., (n 7) 181-202 and for a comparative discussion of the application of the principle in Canada and Germany see Grimm D., in 'Proportionality in Canadian and German Law', (2007) 57 University of Toronto Law Journal.
[18] Harbo T., 'The Function of the Proportionality Principle in EU Law', European Law Journal, (2010) Vol. 16, No. 2, 158; See also Stone Sweet A., & Matthews J., 'Proportionality Balancing and Global Constitutionalism', HeinOnline <https://heinonline.org/HOL/LandingPage?handle=hein.journals/cjtl47&div=8&id=&page=> 47 Colum. J. Transnat'l L. 73 2008-2009.
[19] Engle (n 1) 10, accessed 1 June 2020.

proportionality principle as 'a meta-principle of judicial governance'[20] (in the latter case including, but not limited to fundamental rights law).[21] Influenced by these supra-national legal orders, domestic European courts have also applied the proportionality principle in their domestic judgments.[22]

2. What is Proportionality and How is it Applied?

Although the principle of proportionality is widely used in many legal systems, there seems to be no single universal conception of this principle.[23] It has been interpreted as a state-limiting tool of adjudication,[24] an optimisation tool,[25] and a Janus-faced moral filter which is sometimes applied as a mere means-ends test and other times to curb morally questionable means.[26] It has also been described as a largely unconstrained[27] exercise and an irrational adjudicative tool.[28] This state of affairs is the result of various factors identified by scholars including a confusion of particular elements of the proportionality principle, stemming from an uninformed understanding of the original derivation of the principle.[29] Another factor is the manner in which the proportionality principle is believed to operate as an adjudicative tool within different constitutional systems.[30] This has also led to a debate relating to the perceived nature of fundamental

[20] Ibid.
[21] Schwarze J., (n 1) 677; Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) (n 18) 171 *et seq*.
[22] Barak A., (n 7) 183. But see Sciacca G., 'Proportionality and the Balancing of Rights in the Case-law of European Courts', (2019) Federalismi.it <https://www.sipotra.it/wp-content/uploads/2019/03/Proportionality-and-the-Balancing-of-Rights-in-the-Case-law-of-European-Courts.pdf> p. 20-34, for a critical analysis of the similarities and differences in the application of proportionality to rights cases (in a broad sense) in relation to the ECtHR, the CJEU and national courts, including national constitutional courts resisting judgments of the CJEU.
[23] Stone Sweet A., & Matthews J., 'Proportionality Balancing and Global Constitutionalism' (n 18) and Rivers J., 'Proportionality and Variable Intensity of Review', (2006) Cambridge Law Journal 177 *et seq;* and Luterán M., 'The Lost Meaning of Proportionality*',* in *Proportionality and the Rule of Law*, Huscroft G. et al. (eds) (Cambridge University Press 2014) 22 *et seq;* and Schlink B., 'Proportionality in Constitutional Law: Why Everywhere but Here?*',* (2012) Vol. 22, Duke Journal of Comparative and International Law, 291-302. And see further chapters 1 and 2 of this thesis.
[24] See Rivers J., 'Proportionality and Variable Intensity of Review', (n 23) 174-207.
[25] Alexy R, 'Constitutional Rights, Balancing and Rationality*',* (2003) Vol. 16 Ratio Juris, 131-140, although proportionality, for Alexy, is a series of rules for rational decision-taking. This is discussed further in Chapter 2 and in the Conclusion.
[26] Pavlakos G., 'Between Reason and Strategy: Some Reflections on the normativity of Proportionality*',* in *Proportionality and the Rule of Law*, Huscroft G. et al. (eds) (Cambridge University Press 2014), 90-119
[27] Schauer F, 'Balancing, Subsumption, and the Constraining Role of Legal Text, a Paper prepared for the Symposium on Rights, Law and Morality: Themes from the Legal Philosophy of Robert Alexy', (2009) SSRN http://ssrn.com/abstract=1403343, 7, accessed on 6 March 2013
[28] Habermas J., *Between Facts and Norms*, (trans. Rehg W.,), (Polity Press 1996) 259.
[29] Luterán M. (n 23) 21-42.
[30] Young A., 'Proportionality is Dead: Long Live Proportionality!', in Huscroft G. et al. (eds); *Proportionality and the Rule of Law*, (Cambridge University Press 2014), 43-66; and Michelman F.I., 'Proportionality Outside the Courts with Special Reference to Popular and Political Constitutionalism', in Jackson V.C., Tushnet M. (eds), *Proportionality, New Frontiers*, New Challenges (Cambridge University Press 2014), 31-36.

rights when proportionality analysis is applied in adjudication.[31] There are objections on the basis that by applying the proportionality principle in conflicting fundamental rights cases, the latter are being reduced to defeasible interests.[32] Additionally, there seems to be no single universal conception of the structure and the application of this principle,[33] the component stages that constitute it and what questions need to be examined at which stage.[34] This state of affairs can be seen reflected in the manner in which courts in general apply the proportionality principle, particularly the structure of the proportionality stages they apply. Different courts use different formulations of what is essentially the same test.[35] From a preliminary research conducted it seems that a good number of courts have adopted their own structure of proportionality, oftentimes focusing on one particular stage of the principle, with little or no regard to the other stages.[36]

A definition of the principle of proportionality is quite an arduous task given the various conceptions of proportionality that exist. Various academic literature defines the proportionality principle in terms of the nature of rights and the balancing of rights.[37] In its simplest form, the principle of proportionality conveys the idea that the state of affairs between a particular aim and the means used to achieve the aim is proportionate. In a more complex form, the principle of proportionality conveys the idea that the means used in achieving a particular aim should be suitable, necessary and proportionate. Both definitions of proportionality aim to achieve a fair state of affairs, but, it is submitted that the more complex conception of proportionality incorporates more explicitly the principle of fairness. This is because the aims and means of a particular limiting measure or decision are tested for their suitability, necessity and proportionality in a structured

[31] See Möller K, 'Proportionality and Rights Inflation', in Huscroft G. et al. (eds), *Proportionality and the Rule of Law*, (Cambridge University Press 2014), 155-172.
[32] Webber G., 'On the Loss of Right', in *Proportionality and the Rule of Law*, (Cambridge University Press 2014), 123-154.
[33] Alexy R, 'Proportionality and Rationality' in Jackson V.C., Tushnet M. (eds), *Proportionality, New Frontiers, New Challenges,* (Cambridge University Press 2014), 18-20.
[34] Ibid. 13-29, p. xxxi; Grimm D., (n 17) 387-397; Kumm M., 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement', in Pavlakos George (ed) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy,* (Hart Publishing 2007) 137.
[35] See Möller K., 'The Global Model of Constitutional Rights: Introduction', (2014) LSE Law, Society and Economy Working Papers 4/2013 London School of Economics and Political Science Law Department, (2014)
[36] See Harbo T., *The Function of Proportionality Analysis in European Law*, (Brill Nijhoff 2015) 39-40, on the CJEU and fundamental rights, and 71-101, on the ECtHR; and Rivers J., 'Proportionality and Variable Intensity of Review', (n 23) 177-178.
[37] See e.g., Young A., (n 30) 43-66 and Kumm M. & Walen A.D., 'Human Dignity and Proportionality' in *Proportionality and the Rule of Law*, (eds) Huscroft G. et al, (Cambridge University Press 2014), 67-89.

order making the principle of fairness a constitutive element of the whole exercise. This is quite different from simply weighing the aims and means alone excluding an examination of the suitability and the necessity of the means to achieve the aim in view. Although proportionality has risen from German administrative law, today the debate of proportionality increasingly surrounds fundamental rights. Constitutional courts around the world are adopting the principle of proportionality as their main mode of fundamental rights adjudication.[38] This is because the nature of fundamental rights seems to be more receptive of proportionality due to their flexibility and their ability to compete rather than trump one another.[39] Schauer observes that '[W]here rights are absent, we rarely see the word 'proportionality', nor do we see even the idea that the word represents.'[40] The reason for this is that in fundamental rights adjudication, a legal norm burdening an individual must be demonstrably justified.[41] Thus, 'proportionality is a doctrinal tool used to establish whether an interference with a … right is justified, and this justification succeeds if the interference is proportionate'.[42] In other words, 'where intervention by a public authority is justified by social objectives, such intervention must be limited by its effectiveness and … proportionality in relation to the interest it seeks to defend'.[43]

3. Thesis Aims and Methods

These different conceptions of the principle of proportionality, with regard to both its formal structure and its substantive application gives rise to two questions. The first is whether there is a particular structure of the proportionality principle which seems to be the most logical to apply. The second is whether there is a coherent structure of application of proportionality which allows for a wide examination and analysis which its definition promises to attain. Assuming that these two questions can be answered adequately, and that a preferred model of proportionality can be identified, the next

[38] Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 (2011) AM. J. CRIM. L. 464
[39] Cameron I., "Competing Rights' in de Vries S. et al., *The Protection of Fundamental Rights in the EU after Lisbon,* (Hart Publishing 2015) 181-206.
[40] Schauer F., 'Proportionality and the Question of Weight', in *Proportionality and the Rule of Law*, (eds) Huscroft G. et al, (Cambridge University Press 2014), 176, and Huscroft G. et al (eds) observe, in their introduction, that 'Within the context of fundamental rights law and fundamental rights adjudication, to speak of fundamental rights is to speak of proportionality' in *Proportionality and the Rule of Law* (Cambridge University Press 2014), 1.
[41] Kumm M., 'Is the structure of Human Rights Practice Defensible?*', Proportionality, New Frontiers, New Challenges*; (eds.) Jackson V.C. *et al,* (Cambridge University Press 2017) 52.
[42] Möller K., *'Proportionality and Rights Inflation'* (n 31) 155.
[43] Schwarze J., (n 1) 679.

question which arises is whether this model of proportionality is being followed or not in adjudication. In order to answer this question, I selected three courts, the two European supra-national courts and the Maltese Constitutional Court, in order to discover how they interpret the principle of proportionality and what structure they apply. All three courts purport to apply the principle of proportionality, but upon preliminary research it seems that they do not apply the full proportionality test but rely on one or two of its components. This seems to be an issue worth researching to discover how the Maltese Constitutional Court, the ECtHR and the CJEU interpret and apply the proportionality principle and to compare it to the preferred model of proportionality. This would allow me to discover whether the application of the preferred model of proportionality has the potential of yielding a more integrated and fair decision than the decisions of the selected courts. In studying the selected courts I also try to discover the reasons why they approach the proportionality principle as they do. These considerations are important in order to be able to understand the Courts' perspectives and evaluate all the contributing factors involved.

The Maltese Constitutional Court, the ECtHR and the CJEU have been selected on three basic considerations: (i) the position and the nature of the Courts in the legal system that they serve; (ii) their engagement with the principle of proportionality in their adjudication of fundamental rights cases; (iii) the role that they play in contributing towards European fundamental rights law. The two European supra-national courts may be said to exert considerable influence on the domestic legal systems of the European States and the EU Member States. As such, they could be regarded as setting legal and doctrinal standards for the Courts of the European States. The two courts are linked by particular comparable features. Both courts were established to serve a supra-national organisation, having specific objectives at a European supra-national level. They are composed of judges coming from different European States possessing diverse legal backgrounds. There is also an increasing connection between the two courts since Article 6 of the Treaty on European Union (TEU) declares that fundamental rights, as guaranteed by the European Convention on Human Rights (ECHR), shall constitute general principles of law of the EU.[44] And lastly, both courts apply the principle of proportionality

[44] Treaty on European Union, Article 6.

extensively in their fundamental rights' cases. Alongside the study of the two supra-national courts, it would be desirable to study a European domestic court which is bound by both the ECHR and the Charter of Fundamental Rights of the EU (Charter) and which has fairly recently started applying the proportionality principle in adjudicating fundamental rights cases. Thus, the Maltese Constitutional Court has also been selected for this study. The choice of this court was primarily based on the fact that the principle of proportionality did not traditionally form part of its legal doctrine, given that Maltese public law has partially evolved through English common law. Presently, the Maltese Constitutional Court also applies the principle of proportionality in cases of fundamental rights. It would be therefore interesting to see how it has developed its understanding of proportionality given that at some point it had decided to apply it despite the fact that it had never really formed part of its principles of law.

The choice to engage in a comparative study of the implementation of proportionality in the two supra-national European courts and specifically the Maltese Constitutional Court rests primarily on the unique nature of the Maltese legal system which has oftentimes been labelled as a hybrid or mixed legal system.[45] The Maltese Constitution is modelled on the Westminster model but sovereignty does not lie with the Parliament but with the Maltese written constitution.[46] It also incorporates a bill of rights which is closely modelled on the Constitution of the Federation of Nigeria 1960, itself modelled on the declaration of rights contained in the European Convention on the Protection of Human Rights and Fundamental Freedoms.[47] Maltese Public law is deeply rooted in English common law and whenever Maltese law in this area is silent, English common law is applied.[48] On the other hand, Maltese private law is characterised by a codified system of civil law based on continental law, including the French Code Napoleon. Because of the strong influence of English common law, Maltese adjudication of fundamental rights protected by the Maltese Constitution, though roughly modelled on the ECHR, rested

[45] Aquilina K., 'The Nature and Sources of the Maltese Mixed Legal System: A Strange Case of Dr Jekyll and Mr Hyde?' Comparative Law Review, Vol. 4, No.1 (2013), p. 1-38.
[46] Article 6, Constitution of Malta, https://legislation.mt/eli/const/eng/pdf, accessed 9th Jan. 2020.
[47] Aquilina K., 'The Legislative Development of Human Rights and Fundamental Freedoms in Malta: A Chronological Appraisal' in Martinez Gutiérrez NA (ed) *Serving the Rule of International Law: Essays in Honour of Professor David Joseph Attard,* Mare Nostrum Publications (2009), p. 229.
[48] *Cassar Desain v Forbes*, Court of Appeal (1935) and *Lowell v. Caruana*, Civil Court (1972): two landmark Maltese judgments which laid to rest any doubts that Maltese Public law and Maltese Administrative law had any continental derivative rather than English.

mainly on a borrowed and simplified interpretation of the English doctrine of reasonableness until the incorporation of the European Convention Act 1987 into the Maltese legal system.[49] The Maltese reasonableness approach does not engage in any form of weighing of rights. Rather, the Court examines the facts and decides whether, the decision taken which allegedly violated a fundamental right, was a reasonable one, given the circumstances of the case. With the European Convention Act 1987, a Maltese parliamentary statute, formally ranking below the Constitution,[50] but substantively having the capacity to give rise to the nullification of constitutional procedural rules which violate it,[51] the Maltese Constitutional Court has had to alter its approach to fundamental rights adjudication and incorporate a principle which had never formed part of its traditional adjudication. The English influence of the reasonableness doctrine has had to gradually accommodate the new principle of proportionality. The reasonableness doctrine has not been abandoned by the Maltese judges because various constitutional articles protecting fundamental rights require 'reasonableness' when determining the justification for a limitation of a right. This state of affairs presents a good opportunity to study the manner in which the Maltese Constitutional Court has undertaken the challenge of applying a new principle of law which has long been an established principle of law in the ECHR as well as the EU general principles of law. In this study, it is submitted that the principle of proportionality is not just a *different* test to one of reasonableness. It is a test which provides a more structured analysis of rights balancing exercises which consequentially provides stronger protection. Given that, on the one hand, the European Convention now forms part of Maltese law and, on the other hand, the general principles of EU law also form part of Maltese law (where EU law is applicable, including fundamental rights adjudication), it makes sense to engage in a comparative study of the three courts, which will help identify the similarities and the differences in the approach to proportionality. This comparative study will enable me to identify possible reasons why the similarities and differences in the approach to proportionality exist.

[49] Cases which apply a reasonableness approach discussed further in Chapter 3: Lateo v. Commissioner of Police, Constitutional Court 18/11/1987; Coleiro v. Commissioner of Police, Constitutional Court 15/08/1987; Fenech Adami v. Commissioner of Police, Constitutional Court 29/11/1986.

[50] Aquilina K., 'The Nature and Sources of the Maltese Mixed Legal System: A Strange Case of Dr Jekyll and Mr Hyde?, (n 45), 4.

[51] *Demicoli v. Onor. Speaker*, Constitutional Court, 13/10/1986 where the Maltese Constitutional Court declared the procedure for breach of Parliamentary privilege, set up by the Maltese Parliament, was in violation of ECHR, Article 6(1) on independence and impartiality.

The study of the application of the principle of proportionality in the judgments of the Maltese Constitutional Court is novel. There is no Maltese legal literature which specifically discusses and analyses the adjudicative approach to proportionality in Maltese fundamental rights law. There is some early literature which discusses the historical development of fundamental rights protection in Malta,[52] some later literature which discusses, in a chronological manner, the legislative development of fundamental rights in Malta,[53] literature on the changes made to the interpretation of the articles on fundamental rights in the Maltese constitution by the introduction of the European Convention Act 1987,[54] and some limited literature dealing with specific violations of fundamental rights in Malta.[55] It is safe to say that the literature discussing the problem of fundamental rights limitations in Maltese constitutional law is extremely limited.[56] The study of the principle of proportionality in the Maltese context is not only novel but it is usually thought to impose a more exacting standard than reasonableness.[57] This creates an opportunity to explore whether the proportionality test is (or would, if properly applied) lead to a better standard of human rights adjudication.

It is the aim of this study to contribute further to the contemporary academic debate on proportionality by identifying a preferred model of the principle of proportionality backed up by a theory which is both rational and practical and which I identify as being integrated, capable of yielding the most just decisions. Additionally, I analyse the three courts' application of proportionality analysis and compare these to the application of the preferred model of proportionality. This will enable me to test the judgments against this preferred model in order to reach an informed answer to the overarching question of this study: *Is the full application of the principle of proportionality a necessary and*

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[52] Cremona JJ., *Human Rights Documentation in Malta*, Malta University Press (1966).
[53] Aquilina, K. 'The Legislative Development of Human Rights and Fundamental Freedoms in Malta: a chronological appraisal', (n 47), 225-247
[54] Said Pullicino J., 'The Effect of the EHCR on the Legal and Political Systems of Member States – Malta', in *Fundamental rights in Europe : the ECHR and its member states, 1950-2000, (eds.)* Blackbur R., & Polakiewicz, J., OUP (2001), p. 559-593. The main focus of this article is the generally expanded interpretation which is more in line with the doctrine of the ECtHR, of the articles of the constitution protecting fundamental rights.
[55] Aquilina K., 'The European Court of Human Rights Case Law and Its Impact on Parliamentary Removal of a Judge in Malta', International Human Rights Law Review, 2014-11, Vol.3 (2), p.248-275.
[56] A questionnaire dated January 2005 with the title '*The Criteria of the Limitation of Human Rights in the Practice of Constitutional Justice*' was prepared following the Conference of European Constitutional Courts at the Council of Europe, Strasbourg, held on 5th March 2004. The questionnaire contains brief descriptions regarding the protection of fundamental rights in Malta, the applicability of the ECHR and of the limitations on fundamental rights and the impact of the jurisprudence of, *inter alia,* the ECtHR on the Maltese courts.
[57] R v Home Secretary *ex p Daly* [2001] UKHL 26, par. 27

indispensable adjudicative approach in cases of conflicting fundamental rights and/or interests? This question is important because it serves to provide a number of indicators. It serves to determine whether there are gaps in the application of the principle of proportionality in adjudication. The evaluation of such gaps may indicate whether the missing considerations in proportionality analysis are important enough to warrant a change in the approach to the principle or not. It serves as an indication of the possible consequences of judgments if a full application of proportionality analysis were applied. An answer in the affirmative would serve as an indicator that the Courts are omitting important considerations when they are not applying the full proportionality analysis identified as the preferred method in this study. An answer in the negative would serve as an indicator that the preferred proportionality analysis model is not required to be applied in full because it is capable of reaching the same results as if it were applied in full. This in turn would indicate that the ardent academic debates about the different conceptions, structure and application of the proportionality principle do not have the same effect when applied in the in the practical world. Finally, a conclusion may be reached whether the selected courts, in applying their particular approach to the proportionality principle, address questions which are identified as important in the determination of the case or whether important questions remain unanswered.

With this in view, two exercises will be carried out. The first is a research exercise focused on academic literature discussing the meaning of proportionality, its role as an adjudicative tool, its formal structure and the underlying theory that explains its function. These issues will be discussed in chapter one and chapter two. The second exercise focuses on doctrinal research: the analysis of the judgments of the three courts in terms of the preferred principle of proportionality and my own reflections on the outcome of the analyses. This is included in chapters three, four and five. Finally, in the conclusion I will attempt to synthesise the issues raised and the reflections made with a view to answering my thesis question. A discussion of the limitations of this work and suggestions for possible future research will also take place.

This research is primarily doctrinal and literature based. The approaches in this study are theoretical, conceptual and comparative. The theoretical approach enables a study of the legal theory underlying the proportionality principle which supports the conceptual

understanding of the principle. Both the theoretical and conceptual approach serve to enable a comparative analysis of the doctrines of proportionality applied by the selected courts. The comparative study is two-fold. A comparative analysis of the judgments in the light of the preferred model of proportionality is carried out throughout the study. Additionally, some reflections are made on the doctrines of proportionality applied by the selected courts as they compare to each other, with particular emphasis on the ECtHR and the CJEU.

Thus, the first chapter is dedicated to establishing the structure of the proportionality principle and the meaning of proportionality. 'It is not possible to describe … the dissemination of the idea of proportionality around the world without any assumption about the structure of the proportionality test.'[58] In other words, chapter one asks 'What does proportionality analysis entail?' In this chapter, a definition of the proportionality principle is sought in terms of its structure. The reason for this rests on three aims. The first is to establish whether there are different views of the structure of the proportionality principle in the legal academic world. The second is to be able to identify a structure which makes most rational sense in terms of its definition and objectives and third to enable a subsequent analysis of the proportionality analysis applied by the selected courts in this study.

Two main structures of the proportionality principle are identified in chapter one: a three-stage test and a four-stage test. In their essential aims, the two structures do not present many differences. However, the main difference lies in the application of the structure of the stages of the tests. Both the three-stage and the four-stage test prescribe a set of questions to be raised at every stage, aimed at establishing the aims and the means and the degree of their value and effectiveness respectively in a given case. Each of the stages asks a specific question which has a logical sequence leading to the next stage to establish the value and effectiveness of the aims and means. However, the four-stage test introduces a preliminary test which essentially usurps part of the role which the final stage of both tests prescribes. Its function as a preliminary test is almost illogical given that it raises questions which are more naturally answered at the end of the analysis

[58] Alexy R., 'Proportionality and Rationality', (n 33) 15.

rather than at the beginning. For this reason, in chapter one I subscribe to the three-stage test as the preferred proportionality test, and which I sometimes refer to as the 'traditional proportionality principle'. I justify this preference on the basis that it possesses the most sequentially logical structure of the principle of proportionality as an adjudicative method in fundamental rights cases. This decision is important because it helps to provide a more solid foundation upon which the subsequent analyses of selected judgments is carried out.

A clear definition which prescribes the set of questions to be asked in every stage of the proportionality principle is essential if one is to produce a comparative analysis worth discussing. However, having a clear definition and structure is not enough to enable such an exercise. Underlying the definition and structure of proportionality analysis is a theoretical component which explains, in a logical manner, why a particular structure of the proportionality principle is established. There must be a theoretical component underlying the structure which best explains why such a specific structure is important in the first place. Therefore, after having identified the academically acknowledged structures of the proportionality principle, and after having decided which structure is more coherent and comprehensive, I set out to find a theoretical explanation of the mechanics and objectives of the preferred proportionality principle. This is done in chapter two, where I identify Robert Alexy's theory of principles as the best theory which explains why fundamental rights require an optimization or balancing approach. The optimization approach, as explained by Alexy, can only be exercised by means of proportionality analysis rather than trumping or subsumption. This is because Alexy's theory of principles rests on the nature of fundamental rights as principles. I then explore selected literature which supports Alexy's theory and also examine main objections to this theory. This is an essential exercise as it renders a picture of the current academic debate on the theoretical nature of proportionality analysis, what it seeks to achieve, and how objective an exercise it is regarded in the academic world. It also enables me to voice my support of Alexy's theory to the extent that I use it, in my subsequent chapters, as a basis for my analyses of proportionality analysis applied by the selected courts.

The first two chapters lay the foundational tools with which I proceed in the subsequent three chapters. The three-stage test and the underlying theoretical explanation enable

me to analyse how the selected courts apply the principle of proportionality in their judgments.

There seem to be as many ways in applying the proportionality principle as one can think of. Despite the fact that the three-stage test is a very rational and structured approach, and despite the fact that the selected courts declare they are applying proportionality, they still seem to exclude a full-three stage approach. Chapters three, four and five, deal with the analysis of fundamental rights judgments of the Maltese Constitutional Court, the ECtHR and the CJEU respectively. In each of these chapters I consider how the Court in question applies the proportionality principle, in terms of both the structure and the legal reasoning. This enables me to attempt to draw a picture of the proportionality conceptions of each court and to attempt to identify the underlying reasons for their proportionality analysis.

The judgments selected for discussion in each chapter mainly fall within two categories (a) judgments which may be referred to as leading judgments because the principle of proportionality plays a pivotal role in the determination of the case; and (b) judgments which although are not determined on the basis of the principle of proportionality, nonetheless contribute towards an understanding of the Court's conception and interpretation of the principle.

In the case of Maltese Constitutional Court, the selection is based on a comprehensive reading of all the Maltese fundamental rights judgments wherein the principle of proportionality plays a role, whether minimal or otherwise. The research for the Maltese chapter is based on two separate but consecutive periods: (i) the period between 1961 and 1987, which is the period during which the Blood Constitution was granted to Malta enshrining further protection of fundamental rights and retained into the Independence Constitution of 1974, the signing of the European Convention in 1965 and its adoption as an Act of Parliament in 1987; (ii) the period 1987 till the present day (end of 2019) whereby reference to the doctrine of the ECtHR became more prominent in Maltese judgments on fundamental rights. The research in chapter three is based on judgments delivered by the Maltese Civil Court First Hall in its Constitutional competence, and the Maltese Constitutional Court in its appellate jurisdiction.

With regard to the ECtHR, since it applies the proportionality principle, or the 'fair balance' principle on a broad scale, a further selection is made, based on the various articles of the ECHR, in order to have a fairly balanced exposition of the judgments. Additionally, account is also taken of judgments which apply the margin of appreciation doctrine narrowly and widely. This is because it is argued *inter alia*, in chapter four, that the margin of appreciation doctrine has a weakening effect on the intensity of the application of proportionality analysis.

In the case of the CJEU, the body of judgments on fundamental rights decided on the proportionality principle is quite limited. This is due to two reasons. The first concerns fundamental rights cases where the CJEU declares disproportionality without actively engaging in proportionality analysis. The second is that in a considerable number of cases when the CJEU is delivering a preliminary ruling, it leaves it up to the national court to determine the case by applying the proportionality principle. In the latter instances the Court interprets a provision of EU law required by the national court to determine the case before it, sometimes including the proposition that it is up to the national court to apply the principle of proportionality.[59] In both cases, these judgments do not lend themselves to an analysis of the Court's approach. The cases where the CJEU actively engages in a proportionality analysis are identified and included for discussion. In each case, the judgments which the author believes do not contribute towards further understanding of the Courts' approach to proportionality are not discussed. In all three chapters, the research of case-law is carried out till the end of 2019.

Each chapter begins by introducing the respective court and by discussing its role within the legal system to which it pertains. The judicial system of the Maltese legal system is discussed in order to give a background of the legal forum in which the Maltese Constitutional Court operates. The Maltese court's doctrinal history is also briefly discussed because this has a bearing on the later discussion of the proportionality analysis it applies. With respect to the ECtHR and the CJEU, the history of how they came to be is also recalled. This is particularly important, because later in the discussion, the

[59] Case C-524/15, *Procura della Republica v. Menci* [2018] ECLI:EU:C:2018:197

nature of each respective court is found to affect the manner in which proportionality analysis is carried out.

Each chapter seeks to establish whether the selected court has a single conception of proportionality on the basis of the approach it applies. The analysis in each chapter allows me to group the judgments of each respective court into categories of identified approaches which I suggest reflect distinct conceptions of proportionality. This categorisation done in order to assemble, in a structured manner, a clear enough picture of the considerations deemed to be important by each court when carrying out proportionality analysis. It will also enable me to form an understanding of the courts' conception of proportionality. Such analysis will then assist in determining the extent to which the three courts apply the three-stage proportionality analysis as expounded by Robert Alexy and regarded, in this study, as being the preferred method. This comparative exercise allows me to reach conclusions on the effectiveness of the three courts' application of proportionality.

The analyses carried out in chapters three, four and five serve as a basis for my reflections in my concluding chapter. I will reflect on my original hypothesis, i.e. that Alexy's theory of principles best explains the nature of fundamental rights with the natural consequence that optimisation by means of the three-stage test of proportionality is the natural mode to adjudicate cases of conflicting fundamental rights. I will reflect on the comparative exercises carried out in chapters three, four and five, and then I will draw my conclusions in an attempt to answer the main question posed in this thesis.

4. The choice of Robert Alexy's Theory as Model

The analysis carried out in this thesis is based on Robert Alexy's conception of the nature of fundamental rights and its intimate link with the principle of proportionality in fundamental rights' adjudication. The author views this conception of fundamental rights as that which best explains how, when they conflict with other fundamental rights or interests, they may be adjudicatively resolved by the principle of proportionality.

Robert Alexy puts forward a theory of rights as optimisation principles, which therefore require to be balanced. However, this is not the only way of understanding the nature of

rights and rights adjudication. Two key competitors are Dworkin's theory of rights as trumps and Habermas' theory of rights as legal norms. Neither theories are convincing, in my opinion, because both wrongly suggest that balancing is not required. That being so, Alexy's theory is *prima facie* attractive because he provides a structured means of conducting the balancing exercise.

In order to defend my preference for Alexy, I will discuss the views of Ronald Dworkin, followed by a discussion of the views of Jürgen Habermas who has addressed Alexy's work on various occasions. In Chapter two I explain Alexy's theory in more depth and show why objections to his theory are not convincing.

Ronald Dworkin and Jürgen Habermas have their own theories of how conflicting fundamental rights should be adjudicatively determined.[60] In these two discussions I will explain respectively why I believe that their work, though very insightful, is not as useful as the work of Robert Alexy, for the purposes of this study.

4(a) Dworkin's Theory as Model

In his works, Ronald Dworkin discusses extensively his views on rules and principles *qua* rights,[61] as does Robert Alexy, who has addressed some of Dworkin's discussion in his work *Theory of Constitutional Rights*.[62] For the purposes of this study however, I will discuss four selected points of Dworkin's theory of rights. My intention is to provide support for my choice of Alexy's theory of rights, known as the Principles Theory. This theory claims that the connection between the theory of principles and the principle of proportionality 'is as close as it could possibly be'[63] and that 'the nature of principles

[60] I specifically discuss Dworkin's definition of rights.
[61] In *Taking Rights Seriously,* Ronald Dworkin makes a distinction between rules, principles and policies. He states that 'rules are applicable in an all-or-nothing fashion' whereas principles remain valid even when they are in conflict. In the latter case, one can decide on the principle which carries more weight in the given circumstances. See Dworkin R., *Taking Rights Seriously,* Bloomsbury (1977), 24-28.
[62] Alexy criticizes Dworkin's view of rules and principled standards as a theory based on strong separation. He also disagrees with Dworkin's view of rules and principles as being 'normative measures of a wholly distinguishable logical structure', and as being dependent on his thesis of the enumerability of exceptions, because it implies that 'every rule contains all the possible cases of application in all possible worlds'. Alexy also criticizes Dworkin's view of rules and principles as simplistic because Dworkin states that rules have a definitive character whereas principles always have the same *prima facie* character. He disagrees with Dworkin that rules always have a definitive character and that principles always have the same *prima facie* character because rules may lose their definitive character in a particular case when an exception is incorporated in it which is based on a principle and therefore also unquantifiable. See Alexy R., *Theory of Constitutional Rights,* (transl. by Rivers J.), OUP (2004), 57-58.
[63] Alexy R., *A Theory of Constitutional Rights*, (n 62), 66.

implies the principle of proportionality'[64] and that the principle of proportionality 'logically follows from the nature of principles'.[65] The four key points in Dworkin's theory of rights that I will discuss are: (i) that rights are trumps and they should not be overcome by a collective justification;[66] (ii) that rights may be overcome only when there is a clear and serious danger and only if absolutely necessary, (iii) that some rights are more important than others; (iv) that balancing is an inapt tool for determining conflicting fundamental rights.

For Dworkin, individuals have 'certain fundamental rights against their government, certain moral rights made into legal rights by the Constitution'.[67] Their fundamental nature rests on the person's dignity, right to equality or 'some other personal value of like consequence'.[68] He calls these 'rights in the strong sense' which should not be removed by the Government simply because the majority believe that it would be better to remove such rights. [69] He gives the example of free speech and that despite the fact that the Government may believe that the speech may do more harm than good, it would be wrong to stop them.[70] These moral rights, in the strong sense, are so fundamental that they cannot be sacrificed for the common good.[71] They are understood as appertaining to the human being prior to being incorporated and protected in the Constitution, trumping "over the kind of trade-off argument that normally justifies political action".[72] When such a right is established, society must bear the costs collectively and it cannot be restricted on the basis that the latter will have to bear a great cost otherwise.[73] For such a scenario to be maintained, 'there must be something special about the further cost, or there must be some other feature of the case' which allows this great cost to prevail. Thus, for

[64] Alexy R., *A Theory of Constitutional Rights*, (n 62), 66
[65] Ibid.
[66] He speaks about the right to moral independence which states that although the majority of people may find a particular act as wrong and offensive, the right to moral independence entitles the minority who prefer such acts, to perform them. He gives, *inter alia,* the examples of pornography and sexual preferences, where he states that the majority's preferences are not aligned with these preferences, but the minority who are, are still allowed to perform them on the basis of their right to moral independence. Dworkin discusses these scenarios within the context of the utilitarian background justification for political decisions which, he says, is more prevalent in Western democracies, and which has the political goal of fulfilling as many of the peoples' preferences as possible. See Dworkin R., 'Rights As Trumps', in *Theories of Rights,* (ed) Waldron J., OUP (1984), 153-167.
[67] Dworkin R., *Taking Rights Seriously,* (n 61), 191
[68] Ibid., 199
[69] Ibid., 191
[70] Ibid.
[71] Dworkin R., *Is Democracy Possible Here?* Princeton University Press (2008), 31.
[72] Ibid.
[73] Dworkin R., *Taking Rights Seriously,* (n 61), 198-200.

Dworkin, rights are trumps in a strong sense,[74] which however, may allow exceptions. Yowell reformulates Dworkin's definition as follows: '[R]ights trump a collective goal that lacks sufficient justification'.[75]

Alexy views Dworkin's theory of rights as trumps as being 'the best-known version of a non-positivistic construction, free of balancing [where] the application of constitutional rights is not a matter of striking a balance [but] the very different question of what morality requires'.[76] Dworkin speaks about the right to moral independence which states that although the majority of people may find a particular act as wrong and offensive, the right to moral independence entitles the minority who prefer such acts, to perform them. He gives, *inter alia,* the examples of pornography and sexual preferences, where he states that the majority's preferences are not aligned with these preferences, but the minority who are, are still allowed to perform them on the basis of their right to moral independence.[77] Dworkin qualifies preferences in his discussion on the relationship between liberty and equality, stating that not all types of preferences are to be included in the definition of rights.[78] External preferences which state how goods and opportunities are to be distributed should not form part of a definition of rights. Only personal preferences for the assignment of goods and opportunities are to be counted. This means that a racist preference is not a personal preference but an external preference because it states preferences about the assignment of goods and opportunities about others and not about oneself and therefore should be excluded in the definition of rights.[79] Dworkin acknowledges that separating external preferences from personal preferences is not an easy task to perform.[80]

[74] Costa-Neto J., 'Rights as Trumps and Balancing', Revista Direito GV, São Paulo 11(1), (2015), 161.
[75] Yowell P., 'A Critical Examination of Ronald Dworkin's Theory of Rights', 52 American Journal of Jurisprudence 93 (2007), 95.
[76] Alexy R., 'The Construction of Constitutional Rights' (2010), http://www.clb.ac.il/workshps/2009/articles/alexy.pdf, 3.
[77] Dworkin R., 'Rights as Trumps', (n 66), 153-167. Dworkin discusses these scenarios within the context of the utilitarian background justification for political decisions which, he says, is more prevalent in Western democracies, and which has the political goal of fulfilling as many of the peoples' preferences as possible, at 153-159.
[78] Dworkin R., *Taking Rights Seriously,* (n 61), 274-276. He discusses this within the context of utilitarian arguments of policy which are to be used to justify constraints on liberty.
[79] Ibid., 276, and concludes that democracy, though imperfect, is best equipped to enforce this.
[80] Ibid., but see Yowell P., 'A Critical Examination of Ronald Dworkin's Theory of Rights', (n 75), 116, who states that in later works Dworkin did not discuss external preferences any more.

According to Dworkin, justifications to overriding a right against the government include the government's obligation 'to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit'.[81] However, for rights to be outweighed in this manner, there has to be a clear and serious danger, and even then only so far as is absolutely necessary to prevent it.[82] In his response to Joseph Raz's criticism, Dworkin sums up his theory of rights as follows:

> *[T]he theory of rights I offer does not deny that some rights are more important than others. No alleged right is a right (on my account) unless it overrides at least a marginal case of a general collective justification; but one right is more important than another if some especially dramatic or urgent collective justification, above that threshold, will defeat the latter but not the former'.*[83]

This means that one right may be defeated by another right, if the latter right has as its basis a dramatic or urgent collective justification. In Dworkin's definition, rights as trumps are not subject to being weighed.[84] He does not engage in any in-depth discussion of proportionality. He regards proportionality as an 'inapt' judicial decision-making tool[85] because the crucial question to be asked is not 'whether the benefits of our policy outweigh its costs to us' but 'what morality requires' irrespective of our own interests.[86] He regards '[t]he metaphor of balancing the public interest against personal claims' to be 'a false one' and that 'the metaphor is the heart of its error'.[87] He believes that balancing 'threatens to destroy the concept of individual rights' because a fundamental right cannot simply be overridden by measuring costs.[88] There are only three grounds which he believes can be used to limit the definition of a right:

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[81] Costa-Neto J., 'Rights as Trumps and Balancing', (n 74), 200.
[82] Dworkin R., *Freedom's Law,* OUP (1996), 353.
[83] Dworkin R., *Taking Rights Seriously,* (n 61), 365.
[84] Costa-Neto J., 'Rights as Trumps and Balancing', (n 74), 161. But see Yowell P., 'A Critical Examination of Dworkin's Theory of Rights', (n 75), 95-99, where he claims that Dworkin's theory which states that for a right to be overcome, the utilitarian justifications must have sufficient weight, is actually a balancing test and that this theory only rejects 'sheer balancing' (p. 97) in the sense that not any considerations supporting the general welfare overcome the individual right. Dworkin however
[85] Dworkin R., *Is Democracy Possible Here?* (n 71), 27.
[86] Ibid.
[87] Dworkin R., *Taking Rights Seriously,* (n 61), 198-199.
[88] Ibid., 199-200.

> *First, the Government might show that the values protected by the original right are not really at stake in the marginal case, or are at stake only in some attenuated form. Second, it might show that if the right is defined to include the marginal case, then some competing right, in the strong sense I described earlier, would be abridged. Third, it might show that if the right were so defined, then the cost to society would not be simply incremental, but would be of a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved.*[89]

In Dworkin's view therefore, a limitation to a right is an exception to the rule rather than an essential element of it. I do not agree with this view. Dworkin is not claiming the absoluteness of rights. He claims that there are exceptions. In my view, this would fit in well within the exercise of assigning higher abstract weight *a priori* to a right since Alexy's Principles Theory 'integrates the predominant abstract weight of highly important rights into the balancing scheme'.[90] In my view, the three grounds for limitation listed by Dworkin already incorporate a balancing process, although not an open one,[91] and this demonstrates that there is a need to create exceptions, even when it comes to trumps.[92] This trump model may be placed under the 'Medium Trump Model' explained by Klatt and Meister who believe that this model is effectively based on a balancing approach, contrary to what it asserts.[93] I also agree with their criticism of the Medium Trump Model because in order to determine whether the degree of a cost is great enough, there has to be some form of confrontational weighing. An interest cannot be defined to hold greater importance than a right *in abstract*. In order to do so, the context within which it arises must be analysed, including the circumstances of the particular case.[94] As I will argue in this study, this is best done through a balancing act and therefore the proportionality test.[95] This demonstrates that, as Alexy put it, 'the nature of principles implies the

[89] Dworkin R., *Taking Rights Seriously,* (n 61), 200.
[90] Klatt M., & Meister M., *The Constitutional Structure of Proportionality,* OUP (2012), 32.
[91] Ibid., 22.
[92] Costa-Neto J., 'Rights as Trumps and Balancing', (n 74), 167.
[93] Klatt & Meister, *The Constitutional Structure of Proportionality,* (n 90), 22.
[94] Ibid.
[95] Ibid.

principle of proportionality'[96] because the nature of principles 'demand that something be realised to the greatest extent possible given the legal and factual possibilities.'[97] For the above reasons, I find Dworkin's explanation of rights and his conception of determining conflicting rights and interests much less convincing than Alexy's.

4(b) Habermas' Theory as Model

Jurgen Habermas particularly criticises Alexy's proposition that rights are optimization requirements that can be 'weighed' against each other. He believes that such a conception treats rights as legal values with different degrees of priorities, rather than legal norms.[98] For Habermas, fundamental rights are 'legal norms […] like moral rules, modelled after obligatory norms of action - and not after attractive goods'.[99] He views Alexy's proposition as being fundamentally flawed because it 'lies in the premise that assimilates legal principles to values'.[100] He states that when the principle of legal equality is reduced to 'merely one good among others', then this would mean that a right can be sometimes sacrificed in favour of a collective goal.[101] On the basis of this reasoning, Habermas does 'not see that one right can "yield" to another right, without loss of validity, when the two happen to conflict'.[102] He states:

> *According to Alexy, the fact that in legal discourse rights play the role of reasons that are "weighed" against each other confirms his view that principles may be treated like values. In fact, a statement may be more or less supported by good reasons, but the proposition itself will be either true or false. We assume that the "truth" of true statements is a property that "cannot be lost," even though we can judge such statements only by reasons that, should the need arise, justify our considering them true. The difference between the principles model and the values model is evident by the fact that only the former preserves the binary code of "legal/illegal" as its point of reference - a court presents the general legal norms from*

[96] Alexy, *A Theory of Constitutional Rights*, (n 62), 66.
[97] Alexy R., 'Proportionality and Rationality', (n 33), 14.
[98] Habermas J., 'Reply to Symposium Participants, Benjamin N. Cardozo School of Law', 17 Cardozo L Rev 1477 (1995), 1531.
[99] Habermas J., Between Facts and Norms, (n 28), 256.
[100] Ibid. 255.
[101] Habermas J., 'Reply to Symposium Participants, (n 98),1531.
[102] Ibid.

> *which it derives a singular judgment as reasons that are supposed to justify its ruling on the case. If, however, the justifying norms are viewed as values that have been brought into an ad hoc transitive order for the given occasion, then the judgment is the result of a weighing of values. The court's judgment is then itself a value judgment that more or less adequately reflects a form of life articulating itself in the framework of a concrete order of values.*[103]

Habermas views principles as norms having a 'deontological sense' whereas 'values are teleological'.[104] These two differ considerably from each other, primarily because principles embody an 'obligatory rule-following' structure whereas values 'set down preference relations' where one can 'assent to evaluative sentences to a greater or lesser degree'.[105] Norms embody 'an absolute sense of unconditioned and universal obligation':[106]

> *In the light of norms, I can decide what action is commanded; within the horizon of values, which behaviour is recommended.*[107]

He states that Alexy's conception of rights as being 'optimizable legal values', has the consequence of turning 'ought-statements to evaluation[s]' statements, the intensity of which remains open,[108] giving rise to broad discretionary powers:[109]

> *By insidiously assimilating the first type of statement to the second type, one robs the law of its clear-cut, discursively redeemable claim to normative validity. As a result, the strict requirement to justify decisions also disappears.*[110]

As a consequence, he particularly criticizes Alexy's proposition of balancing conflicting rights as 'modelling legal argumentation on values' instead of principles as norms. This conception of rights allows the definition of their intensity to remain open,

[103] Habermas J., 'Reply to Symposium Participants' (n 98), 1531.
[104] Habermas J., *Between Facts and Norms*, (n 28), 255.
[105] Ibid.
[106] Ibid.
[107] Ibid. 256.
[108] Ibid. 254.
[109] Habermas J., 'Reply to Symposium Participants' (n 98), 1531-2.
[110] Ibid.

accommodating 'the talk of "balancing interests".[111] If rights are optimized and there is no norm which dictates the extent of such optimization, 'then the application of such principles within the limits of what is factually possible makes a goal-oriented weighting necessary'.[112] For him policy goals are 'domesticated' by the law which is 'defined through a system of rights' representing 'obligatory norms of action' rather than simply an attractive preference.[113] Habermas believes that Alexy's conception of rights as values excludes 'the strict priority of normative points of view.'[114] This legal argumentation yields a value judgment and not a judgment which is 'related to the alternatives of a right or wrong decision'.[115] This argumentation is incompatible with correctness, objectivity and justification, which has no place in constitutional law: [a]nyone wanting to equate the constitution with a concrete order of values mistakes its specific legal character' which embodies obligatory norms.[116] He believes that the weighing of values is capable of yielding 'a judgment as to a result but is not able to justify that result.'[117]

Alexy addresses Habermas' criticism:

> *If weighing is only able to produce results, but is unable to justify these results, then weighing would need to be located in a realm outside the region defined by the concepts of truth, correctness, knowledge, justification, and objectivity. The inhabitants of this latter region are judgments or propositions qua entities that lend themselves to assignments of truth or falsity, correctness or incorrectness. These entities, in other words, give expression to what, in fact, is the case, to what can be characterized as actually being known and not merely believed. By the same token, these entities lend themselves to justification rather than to merely rhetorical support. This region might be termed the empire of objectivity.[118]*

[111] Habermas J., *Between Facts and Norms*, (n 28), 254.
[112] Ibid.
[113] Ibid. 256.
[114] Ibid.
[115] Habermas J., 'Reply to Symposium Participants' (n 98), 1531.
[116] Habermas J., Between Facts and Norms, (n 28), 256.
[117] Alexy R., 'Balancing, Constitutional Review and Representation', International Journal of Constitutional Law, Volume 3, Number 4, OUP (2005), 573.
[118] Ibid., 574.

The assignment of weight to the degree of limitation to a right is a valid weighing method which also allows for valid justification. The assignment of such values is based on certain assumptions which must make sense, such as, for example, the assumption that smoking causes serious health risks. 'The assumptions underlying judgments about intensity of interference and degree of importance are not arbitrary. Reasons are given for them, and they are understandable'.[119] The assignment of values together with the implicit inferential system in balancing demonstrate that balancing is 'intrinsically connected with the concept of correctness'.[120] This is because it involves 'theoretically informed practical reasoning, and not just in intuition-based classificatory labelling. At the level of evaluating the relative importance of the general interest in relation to the liberty interest at stake, the weights can be assigned and priorities established.[121] The implicit inferential system in balancing is also based on the logical structure of the reasoning. This means that at the stage of justification for the assignment of values, a logical structure of argumentation is taking place. The justification for these assignments is also based on a further logical structure of argumentation. This demonstrates that Habermas's claim that balancing 'takes one out of the area of justification, correctness, and objectivity' is not correct.[122] The principle of proportionality, contains rational and structural stages of argumentation to reach an outcome.[123] It incorporates a formal structure where a set of premises can be identified and from which the result can be inferred.[124] The justification for these premises evolves from a logical structure of argumentation which is not dependent on the formal structure of the proportionality principle.[125] For these reasons I find that the arguments of Jürgen Habermas are less convincing than Alexy's.

Through the analyses of the judgments of the GFCC, Robert Alexy has been able to build a formula embodying a structured approach to determining conflicting fundamental rights and interests in a very rational manner.[126] It is a formula which targets the most critical issues of a case, confronts them against each other through the 'analytical

[119] Alexy R., 'On Balancing and Subsumption: A Structural Comparison', (2003) Ratio Jurisdiction Vol. 16 No. 4, 439. Alexy particularly addresses Habermas's claim that 'weighing takes place either arbitrarily or unreflectively according to customary standards and hierarchies' in *Between Facts and Norms,* (n 28), 259.
[120] Alexy R., 'Balancing, Constitutional Review and Representation', (n 117), 575.
[121] Klatt & Meister, 'Proportionality *a benefit to human rights? Remarks on the I·CON controversy*', 695.
[122] Alexy R., 'Balancing, Constitutional Review and Representation', (n 117), 577.
[123] Klatt & Meister, *The Constitutional Structure of Proportionality,* (n 90), 42.
[124] Alexy R., 'Balancing, Constitutional Review and Representation', (n 117), 448.
[125] Ibid.
[126] Klatt M. & Meister M., 'Proportionality—a benefit to human rights? Remarks on the I·CON controversy', International Journal of Constitutional Law, July 2012, Volume 10, Issue 3, 708.

distinctions'[127] it requires, while also allowing the attribution of values representative of the values held by a particular community. As such, I agree with Klatt & Meister when they describe proportionality as follows:

> *[…] proportionality is a structured approach to balancing fundamental rights with other rights and interests in the best possible way. It is a necessary means for making analytical distinctions that help identifying the crucial aspects in various cases and ensuring a proper argument. The principle of proportionality "embodies fundamental standards of rationality" and has been described correctly as "a very powerful rational instrument."*[128]

5. A Note on Terminology

In this study I use terms to indicate the application of the principle of proportionality interchangeably, namely, 'proportionality' and 'proportionality analysis'. For the last stage of the principle of proportionality I use the term 'proportionality *stricto sensu*' or 'balancing'. The term 'law of balancing' is also used to refer to the third stage of proportionality when reference is made to Robert Alexy's theories. When referring to the model of proportionality which I believe is the most logical structure for proportionality analysis I sometimes use 'traditional' proportionality, or 'three-stage test'. Sometimes I include the term 'full' to include all three stages of the proportionality principle.

[127] Klatt & Meister, 'Proportionality *a benefit to human rights?*' (n 126), 708.
[128] Ibid.

Chapter 1
Defining the Principle of Proportionality

Introduction

The proportionality principle attempts to strike a balance between the limitation of fundamental rights and the justifications raised for such limitation. This chapter serves as a basis for the specific study of proportionality analysis in fundamental rights cases, as applied by each of the Courts proposed to be studied in later chapters.

The aim of this chapter is to analyse the mechanism of the principle of proportionality because a clear understanding of what the components of proportionality analysis require is fundamental for an accurate analysis of court judgments applying such principle. The principle of proportionality and proportionality analysis is one method by which adjudicators attempt to solve conflicts between conflicting fundamental rights, whether individual or collective. This principle is a judicial method applied in cases concerning rights and their exceptions. Inevitably, the latter invariably take the form of public good or common interest justifications.[129]

The study carried out in this chapter is specifically aimed to enable the subsequent analysis of the selected courts' approaches to proportionality in their respective judgments by identifying a structure of proportionality analysis. Having a clear definition of what should be examined and what questions should be asked at every stage of the proportionality principle enables better identification of the Courts' respective approaches in terms of the stages they apply and analyse, and the manner in which they carry out such analysis. In other words, this chapter serves as a blueprint against which the Courts' approaches and analyses will be identified and assessed in this study.

Two models of proportionality analysis are identified as typically applied in courts of law. The scope and manner of application of the two models are established, with the aim of presenting a comprehensive understanding of them. Specific aspects that this chapter deals with are the structures of the two models of proportionality analysis. The first

[129] Other theories on judicial approaches towards individual rights-common good conflicts are outside the scope of this thesis.

model incorporates three tests or subtests, also referred to as stages, denominated as the 'three-stage test', and the second model incorporates four stages, referred to as the 'four-stage test'. The main question to be answered in this chapter is whether, in terms of legal requirements and reasoning, the models differ in application, and if so, to establish a preferred model for my later analyses of court judgments. This is done by analysing the specific legal requirements of each stage in the respective models and what inquiry needs to be made in every stage.

It will be argued that although the three-stage and the four-stage test do not seem to offer any *prima facie* fundamental difference in relation to the aims of proportionality analysis as an adjudicative tool, the three-stage test presents a more coherent and logical proportionality analysis than the four-stage test. The main difference identified between the two tests lies in the stages of application and the questions which are asked at each stage.

1. The Components of the Principle of Proportionality

The principle of proportionality embodies a simple formula involving a purpose and the means used to achieve such purpose. This formula requires a state of proportional harmony between the purpose and the means. The traditional legal concept of proportionality involves the evaluation of the aim and the means employed as well as the degree of compatibility between the two; it concerns the relationship, defined in degrees, between purpose and means in a balancing exercise. Balancing connotes 'weighing'. It involves the respective attribution of weight or value to two principles or rights, or a principle and a public interest within a given context.

The principle of proportionality has been defined as 'the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible'.[130] According to Schwarze, 'where intervention by the public is justified by reference to social objectives, such intervention must be limited by its effectiveness and consequently also by its proportionality in relation to the interest it seeks to defend'.[131] The principle of proportionality involves

[130] Barak (n 7) 3.
[131] Schwarze J., (n 1) 679.

the justification put forward for limiting a specific right protected by a constitution or a rights document or statute. Gerrards explains that the principle of proportionality is 'concerned with the relationship between the aims of a measure and the means or instruments that have been chosen to achieve these aims. If an interference with a right proves to be unsuitable or superfluous, either because the aims pursued cannot be achieved by it in any case, or because less intrusive means are available, there is no good reason to sustain such an interference.[132] If the aims can be achieved by such means and they prove to be the less intrusive means, then the interests at stake are examined to determine whether a reasonable balance is achieved 'among the interests served by the measure and the interests that are harmed by introducing it.'[133]

The principle of proportionality is therefore a 'methodological tool'[134] as well as a tool of interpretation,[135] which enables the examination of the relationship between the means used and the aim pursued and which will determine whether there exists a fair proportion between the two. This examination will also determine whether the limitation placed on the fundamental right in order to achieve the aim proposed is justified and that such limitation is proportionate to such aim. Barak explains:

> The means chosen are not only examined in relation to the purpose they were meant to achieve; they are also examined in relation to the constitutional right. Only means that can sustain both examinations are proper means.[136]

2. Proportionality Analysis: the four-stage [137] and three-stage test[138]

According to Barak the principle of proportionality involves four stages of analysis by means of which a limitation placed on a fundamental right is examined in order to determine whether the restriction it imposes is legitimate:

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[132] Gerrards J., 'How to improve the necessity test of the European Court of Human Rights', International Journal of Constitutional Law (2013), Vol. 11 No. 2, 466–490.
[133] Ibid.
[134] Barak A., (n 7) 131.
[135] Schwarze J., (n 1) 690.
[136] Barak A., (n 7) 132.
[137] Barak A., (n 7) 245-370; Grimm D., (n 17); Klatt M. & Meister M., *The Constitutional Structure of Proportionality,* (n 90).
[138] See Craig P., *EU Administrative Law*, (OUP 2012), 591; Alexy R, *A Theory of Constitutional Rights,* (n 62), 66; McBride J, 'Proportionality and the European Convention on Human Rights' in Ellis E. (ed), *Proportionality in the Laws of Europe*, (Hart Publishing 1999), 24; Harbo T., 'The Function of the Proportionality Principle in EU Law' (2010) (n 18) 165.

> A limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ("proportionality *stricto sensu"* or "balancing") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.[139]

This four stage test seems to be predominantly applied in the Canadian, Irish, South African and Israeli legal systems among others.[140] Klatt & Meister also envisage proportionality analysis as including a four-step exercise which incorporates an inquiry into the legitimate ends, suitability, necessity and proportionality in its narrow sense of the limiting law.[141] According to Kumm, Alexy's description of proportionality analysis as applied by the German Federal Constitutional Court (GFCC) has four prongs: suitability, necessity, balancing and legitimate ends,[142] but according to Rivers, it involves three stages: suitability, necessity and proportionality *stricto sensu*.[143] Schwarze agrees and states that there is a unanimous opinion that three factors can be distinguished which govern the applicability of the proportionality principle in German law:[144] (i) suitability, requiring a State measure to be suitable in achieving a given aim; (ii) necessity, which requires that the least restrictive means be adopted in the pursuit of the aim; and (iii) proportionality, whereby the measure may not be disproportionate to the restrictions which it involves.[145] Thus, under the requisites of the three-stage test, a state which limits the enjoyment of a particular fundamental right in favour of another fundamental right

[139] Barak A., (n 7) 3.
[140] For a discussion of these see Barak A., (n 7) 131-174, and for a comparative discussion of the application of the principle in Canada and Germany see Grimm D., (n 17).
[141] Klatt M & Meister M, *The Constitutional Structure of Proportionality*, (n 90), 8.
[142] Kumm M. in 'Political Liberalism and the Structure of Rights' (n 34),137.
[143] Alexy R., *A Theory of Constitutional Rights,* (n 62), xxxi.
[144] But Klatt & Meister describe the test as involving four proportionality rules: legitimacy, necessity, suitability and balancing. See Klatt & Meister, *The Constitutional Structure of Proportionality,* (n 90), 8.
[145] Schwarze J., (n 1) 687.

or in the general public interest, must be able to do so by observing three separate but subsumed stages[146] of the proportionality test. The state must be able to show: (a) that the means or method used in pursuing such aim is suitable, i.e. it is capable of such achievement; (b) that the least restrictive means have been chosen for the pursuit of such aim, and (c) that the means adopted are proportional in relation to the restriction placed on the citizen's right. Each stage has to be tested separately because each step requires a distinct assessment.[147]

An important aspect of the assessment of each of the subtests composing the proportionality principle is what Christoffersen calls the strict-vertical and the flexible horizontal application of these subtests.[148] The strict-vertical application of the three stages of proportionality requires that the legal requirements of each test are satisfied in a hierarchical manner so that if the requirements of the successive sub-test are not fulfilled, the proportionality principle will be deemed to have been violated. In practical terms, when the Court examines the suitability of a particular aim and decides that this first sub-test is satisfied, it then moves on to consider the necessity element and if it determines that the legal requirements for necessity are not satisfied, proportionality analysis is halted on the basis that it has been violated at the necessity stage. This adjudicative approach to the proportionality principle applies equally to all the subtests in the strict-vertical application. On the other hand, the flexible-horizontal approach to proportionality is not as strict and does not require the successive legal fulfilment of the stages or tests. In the flexible-horizontal application, the subtests of the proportionality principle are not regarded as hierarchical but as part of an overall assessment (horizontal) of the stages of proportionality. This approach is quite different from the strict-vertical approach because it allows the Court to choose the degree of importance it intends to give to any of the subtests.

[146] Alexy R., *A Theory of Constitutional Rights* (n 62), 66 at fn. 84 refers to these stages as 'rules' because each of them must be satisfied. Non-satisfaction of any one of them will lead to illegality.
[147] Grimm D., (n 17) 397.
[148] Christoffersen J., *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, (Nijhoff Publishers 2009), 71.

2(a) Proper Purpose or Legitimate Aim

The four-stage test embodying the principle of proportionality begins with the examination of proper purpose also referred to as legitimate aim. This stage does not exist as an independent test in the three-stage test. Proper purpose involves the requirement of a legitimate justification for the restriction of a fundamental or constitutionally protected right. It is an exercise which determines whether the limitation placed on the constitutionally protected right or fundamental right is legitimate and justified, without engaging in a balancing exercise of benefit procured and harm caused. It is an exercise in determining whether the purpose goes beyond the constitutionally permissible minimum below which no limiting law can exist.[149] The question it addresses is therefore whether the restriction of the right falls within the parameters of what is legally acceptable in a democratic society,[150] independently of an assessment of means used. Beyond this line, no considerations should be examined, and the rest of proportionality's components would not be triggered.[151] There has to be a 'reasonable motivation' of the limiting measure.[152] It is submitted that the exercise of proper purpose involves a certain degree of moral evaluation because essentially the adjudicator determines whether the purpose for the limitation is right or wrong in terms of the values which society upholds and which are embodied in its constitution.[153]

The proper purpose test is therefore quite distinct from an examination of whether the limiting rule strikes a balance between the benefit it procures for society and the restriction it places on the individual right. The legitimate aim must have a constitutional value, whether explicitly envisaged by the constitutional or rights document, or indirectly implied. A fundamental right can only be restricted in favour of the public interest if the latter has the same constitutional value as the fundamental right.[154]

[149] Barak A., (n 7) 251.
[150] Barak A., (n 7) 247.
[151] Barak A., (n 7) 248
[152] Andreescu M, 'Principle of Proportionality: Criterion of Legitimacy in the Public Law', Lex et Scientia, (2011), No. XVIII, VOL. 1, 116
[153] The ECHR envisages a number of legitimate aims which justify the restriction of fundamental rights including the prevention of disorder or crime, the protection of health and morals, the protection of the reputation or the rights of others and the protection from disclosure for information received in confidence.
[154] See also Stone Sweet A. & Mathews J., 'Proportionality Balancing and Global Constitutionalism', (n 18) 75.

Barak discusses three tests which may be applied when attempting to determine whether a restriction placed on a fundamental right, which is envisaged by a rule of law or statute, is legitimate or not: the subjective test, the objective test or a combination of both tests.[155] The subjective test focuses on the intention of the legislator at the time that the limiting rule or law was adopted. By means of the objective test, proper purpose may also be determined by interpreting the purpose of the limiting rule as understood at the time it is being interpreted. This may give rise to new fundamental principles being introduced into the legal system.[156] Alternatively, it may be identified by applying both tests. Barak believes that the right approach should be based on a combined test.[157] The combined test would require the purpose to be 'proper' only if it satisfied both tests, i.e. the purpose must have been 'proper' at the moment of adoption or promulgation of the limiting law or rule and it must be 'proper' at the present moment, that is, at the time it is being interpreted. Often, the results of each test will be identical or at least similar;[158] nevertheless, Barak stresses the importance of applying both tests:

> The examination of the subjective intention at the time of the enactment is meant to prevent the legislation of a law that may limit a constitutional right in order to serve an improper purpose. The examination of the purpose at the time of the interpretation is meant to ensure that the human rights in question are protected for the duration of the law's existence and not only at its birth.[159]

2(b) Suitability, Appropriateness, Rational Connection

The suitability inquiry is the first stage of the three-stage proportionality principle. It is the second stage of inquiry in the four-stage test. In both tests the purpose of the suitability inquiry is to determine whether the limiting act is capable of achieving the aim in view: the limiting law must be capable of furthering the pursued goal, otherwise it will fail at the suitability stage. According to Alexy, the suitability test, also referred to as the appropriateness test,[160] has the status of a negative criterion because rather than settling

[155] Barak A., (n 7) 286 *et seq.*
[156] Barak A., (n 7) 288.
[157] Barak A., (n 7) 298.
[158] However, with the passage of time, the original purpose of the legislation may give way to more objective purposes. Barak uses the example of the Sunday laws which prohibited the opening of shops on Sundays. The purpose was originally religious, but later was translated into a social purpose requiring workers to have a day of rest every week.
[159] Barak A., (n 7) 300.
[160] Harbo T., 'The Function of the Proportionality in EU Law' (2010) (n 18) 165.

the issue, it excludes those means which are unsuitable in relation to the aim or purpose.[161] Klatt & Meister believe that the suitability test serves to exclude those means which obstruct a right without promoting another.[162]

In the four-stage test, suitability is usually referred to the 'rational connection' inquiry. Barak believes that the question raised by the rational connection test is not whether the means are proper and correct, or whether there are other, more proper and correct means. Rather, the question is whether the means chosen by the limiting law are capable of advancing the law's underlying purpose.[163] This exercise therefore involves proof of a nexus between the means and the purpose. The means used, whether it is a limiting law or an administrative measure, must be conducive towards the purpose in such a manner as to be able to reach it: 'the use of such means would rationally lead to the realisation of the law's purpose'.[164] Whether the means chosen in the pursuit of the aim is one out of several is not relevant at this stage of the test. Neither is the full realisation of the purpose by the means chosen mandatory. Partial realisation of the aim is considered to constitute a rational connection, even though there may be other proper and correct means.[165] According to Barak, the question to be asked is whether the means chosen by the limiting law is capable of advancing the underlying purpose of such law.[166] The rational connection test fails when the means chosen cannot achieve the aim in view but there is no efficiency requirement.[167] Barak believes that it is not important at this stage to determine if the most adequate means were used to achieve the aim because this will be determined at the subsequent stage, by means of the necessity test,[168] but the means chosen must not be capable of achieving the aim in a negligible or ancillary manner.[169]

> The rational connection test was not designed .... to provide an answer to the questions relating to the probability that if the means are used the fundamental right will be affected, or if the means are not used the public interest will be damaged.[170]

[161] Alexy R., *A Theory of Constitutional Rights* (n 62), 398.
[162] Klatt & Meister, *The Constitutional Structure of Proportionality,* (n 90), 9.
[163] Barak A., (n 7) 305.
[164] Ibid 303.
[165] Ibid 305.
[166] Ibid 305.
[167] Ibid 305.
[168] Ibid 306.
[169] Ibid 314.
[170] Ibid 315.

Barak also believes that it is not required to show that the legislator had complete certainty that the means chosen would advance the purpose.[171] Robert Alexy is in agreement with this. He believes that the requirement of complete certainty on the part of the legislature when adopting the restricting law will undoubtedly paralyse the legislature and views this as being incompatible with the separation of powers and the principle of democracy.[172]

2(c) Necessity

The next stage of proportionality analysis is the necessity test which constitutes the third step under the four-stage test and the second step under the three-stage test. The necessity inquiry involves the determination whether the means chosen were the least restrictive of those available.[173] This is based on the premise that means which are not necessary to reach the objective of the law cannot justify a limitation of fundamental rights[174] because some other means could have been used which would have reached the aim in view without the need to apply such a degree of restriction. Necessity bans unnecessary sacrifices of fundamental rights.[175]

Barak describes necessity as requiring the legislator to choose the law which least restricts the protected right:

> The necessity for the means determined by law stems ..... from the fact that no other hypothetical alternative exists that would be less harmful to the right in question while equally advancing the law's purpose. If a less limiting alternative exists, able to fulfil the law's purpose, then there is no need for the law. If a different law will fulfil the goal with less or no limitation of the human rights, then the legislator should choose this law. The limiting law should not

[171] Barak A., (n 7) 309-310.
[172] Alexy R., *A Theory of Constitutional Rights*, (n 62) 417.
[173] The German Federal Constitutional Court distinguished between the 'least restrictive means' test and the balancing test for the first time in 1958 in the leading case *Apothekenurteil, BVerfG June 11, 1958, 7 BVerfGE 377.* The Court here held that in order to attempt to maximise the demand made by the citizen for the protection of his right and the demand made by the authorities to protect the public, the most effective method would be to carefully balance (Abwägung) the meaning of the two opposed interests. Proportionality became constitutionalised in Germany in the sixties and seventies.
[174] Grimm D., (n 17) 393.
[175] Alexy R., *A Theory of Constitutional Rights* (n 62), 399.

> limit the fundamental right beyond what is required to advance the proper purpose.[176]

It is submitted that the necessity stage requires a higher degree of moral argumentation than does the suitability stage.[177]

2(d) Proportionality *stricto sensu:* The Game is not worth the Candle.

Proportionality *stricto sensu* is the final stage of proportionality analysis in both the three-stage and four-stage test. It is submitted that in Germany, this step in proportionality analysis has become the most decisive part of the proportionality test.[178] Alexy calls this final stage as the Law of Balancing.[179] During this final stage, the Court will enquire into how deeply the fundamental right is limited, how serious the danger for the good protected by the law is, and how likely it is that the danger will materialize. In addition, the degree to which the impugned law will protect the good against the danger must be measured against the degree of intrusion.[180] According to Alexy, proportionality *stricto sensu,* which is identical to the Law of Balancing[181] involves three considerations: (i) establishing the degree of non-satisfaction of or detriment to a first principle or fundamental right;[182] (ii) establishing the importance of satisfying the competing principle or interest; and (iii) establishing whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former.[183] Pulido explains that in order to establish this conditional relation of precedence, three elements which form the structure of proportionality *stricto sensu* must be considered: (i) the rule of balancing; (ii) the weight formula; and (iii) the burden of argumentation.[184] The rule of balancing requires the assignment of weights to the competing principles. Alexy proposes a triadic scale which ranges from light, moderate and serious which may extend

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[176] Barak A., (n 7) 317
[177] Pirker B, *Proportionality Analysis and Models of Judicial Review,* Europa Law Publishing (2013), 30.
[178] Grimm D., (n 17) 383.
[179] Alexy R., *A Theory of Constitutional Rights* (n 62), 102
[180] Grimm D., (n 17) 394.
[181] Alexy R., *A Theory of Constitutional Rights* (n 62), 401
[182] Ibid., 405, states that this could also be defined as 'intensity of interference'.
[183] Klatt M. & Meister M., *The Constitutional Structure of Proportionality* (n 90) 10; Alexy R., *A Theory of Constitutional Rights* (n 62), 401.
[184] Pulido C B, 'The Rationality of Balancing', (Universitat Pompeu Fabra), <http://www.upf.edu/filosofiadeldret/ pdf/bernal rationality of balancing.pdf>, p. 195-208, accessed on 15 May 2013 and Pulido, C. 'The Rationality of Balancing', www.jstor.org/stable/23681588 (2006) *ARSP: Archives for Philosophy of Law and Social Philosophy, 92*(2), accessed 8 June 2020.

to a finer gradation of this triadic scale ranging from 'light light' to 'serious serious' when assigning weights.[185] Pulido explains that the value which each of the weights carries depends on the legal source from which it emanates and whether or not the principle occupies a higher ranked position than a competing principle.[186] The weight is therefore dependent on the value attributed to its source but also to the positive social values attached to it.[187] He illustrates this by arguing that the principle of protection of life is attributed greater weight than liberty since if one is to be free he or she must necessarily be alive.[188] The weight may also be attributed on the basis of the connotations attached to the principle. Thus, the principle of free speech has democratic connotations whereas the principle of the protection of privacy connotes the protection of human dignity.[189] The connotation attached to a principle may result in a higher weight being assigned to it than to the competing principle.

This last stage of proportionality analysis involving the assignment of weights has balancing as its main aim. According to Barak, balancing assumes the existence of conflict and offers a solution to the conflict by attaching a variable weight to each conflicting principle, thus determining which of the two has the greater weight.[190] He explains that balancing allows the upholding of the validity of both conflicting principles rather than upholding the validity of one while denying validity to the other.[191]

It is submitted that the aim and the means used to limit a fundamental right are also involved in a balancing exercise of their own. Once a balance is struck between the aim behind the limitation of the right and the means used to limit such right, then the principle of proportionality is satisfied. This is because the weights attributed to the aim and the means neutralise each other, implying that both aim and means employed are attributed

[185] Alexy R., *A Theory of Constitutional Rights*, (n 62), 412.
[186] Pulido CB, 'The Rationality of Balancing', (n 184), 202 accessed on 8 June 2020.
[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] Barak A., (n 7) 346
[191] Ibid 346-7. This differs from Alexy's opinion. Both Alexy and Barak believe that the outcome of balancing is a new derivative norm which is applicable only in the particular circumstances of the case. However, whereas Alexy believes that the outcome derivate norm is a constitutional derivative norm which reduces the scope of the fundamental right, Barak believes that this derivative norm is at sub-constitutional level (statute and common law) and that the scope of the fundamental right remains unchanged. Barak believes that the outcome does not affect the scope of the right since this is a definite right, unlike Alexy, who believes rights as principles to be *prima facie* rights. See Barak A., *Proportionality,* (n 7) 6 and 39 *et seq,* and Alexy R., *A Theory of Constitutional Rights* (n 62), 57-60.

equal weight. The attribution of equal weight to the aim pursued and the means used may be equated with a perfect balance reflecting proportionality and therefore reflecting legitimacy. Thus, when the perfect balance between aims pursued and means employed is not struck, the principle of proportionality is violated and the limitation placed on the fundamental right is illegitimate because it does not equal the weight attached to the benefit which such limitation will procure.

Therefore, the proportionality test in reality involves a double exercise of weight attribution. This is because weights are not only attached to the constitutional principles in order to determine which is the more important in the given situation, but also to the aims and means used. If the means are excessive with reference to the aims pursued, a violation of proportionality will be established.

A problem which arises at this stage of proportionality analysis is the question of objectively attributing a weight to the respective rights and the limitation being placed. This third stage is probably the most subjective test of all the three stages because there are no established criteria upon which a particular right is to be attributed a greater weight than another right or interest. At this stage of proportionality analysis it is submitted that moral argumentation and subjective argumentation will take place. The fact that moral argumentation is present in proportionality *stricto sensu* may have two opposite claims: either that moral argumentation *per se* is a subjective form of argumentation because it depends on personal values, or that it is objective since there is no disputing what constitutes right from wrong. Another problem which arises concerns the weight which the adjudicator attaches to the restriction on the particular right. Different individuals may evaluate restrictions differently. As Pirker puts it, 'the actual process of assigning weight to values thus necessarily suffers from the vagueness inherent in both the required moral argumentation and in normative and empiric uncertainty, providing yet another open flank for criticism.[192] However, it is claimed that even though there are doubts related to the exercise of ascribing weights, they still do not manage to overthrow proportionality analysis conceptually.[193] This is because in many areas of adjudication, the application of moral reasoning is inevitable, and the attribution

[192] Pirker B, *Proportionality Analysis and Models of Judicial Review*, (n 117), 35.
[193] Ibid., 35.

of weights depends on the moral values of the Court which usually reflects the moral values of the society that it is serving.

3. The Two Tests: Two faces of the Same Coin?

The question which arises at this stage is whether there is any substantive difference between the three-stage and the four-stage proportionality test. It is clear that the main difference between the two lies in the first stage of the four-stage test which requires an examination of proper purpose or legitimacy. The question which must be answered at the proper purpose stage is whether the objective of the limiting rule is justified by the aim it pursues. I believe that this is too early a question to ask at the beginning of the analysis because it delves right into the core of the analysis before examining the suitability of the means, in relation to the aims, and their necessity. The determination of whether the limiting rule is legitimately justified can be more adequately answered when it has been established that it is suitable to achieve the aim in view and that it constitutes the least burdensome means to achieve such aim. This provides the necessary background check which enables an examination of the justification of the limiting rule. This final exercise determines if such justification is legitimate in terms of the proportionality of the benefits acquired by the limiting rule and the disadvantages procured by limiting the right. In the German traditional proportionality analysis, ascertaining the purpose of the limiting or alleged infringing law does not happen in a preliminary stage but is predominantly part of the third stage of the test, that is, proportionality *stricto sensu*. The importance of the objective of the limiting rule does not play a big role in the first two stages, as the objective is initially taken to be lawful, subject to the third step of the test, the proportionality *stricto sensu* stage.[194] This question should be asked at the final stage of proportionality analysis[195] because it is more logical to do so in the legal reasoning prescribed by the aim of proportionality analysis. Raising this question in connection with the purpose would be regarded as a premature anticipation of the final balance.[196]

[194] This is due to the fact that the German Court has always emphasised that the legislature enjoys a certain degree of political discretion in choosing the means to reach a legislative objective in BVerfGE 49, 89 at 130 (1978), excerpts in English translation cited in Kommers D P, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Duke University Press 1997) 139.
[195] Grimm D., (n 17) 388.
[196] Grimm D., (n 17) 388.

The proper purpose stage also requires, according to Barak, a determination of the intention of the legislator, which he describes as a combined test. This requires the adjudicator to determine the intention of the legislator at the time of the promulgation of the law and the interpretation given to that law at the present moment. This part of the proper purpose test does not seem to fall rigidly within the suitability test of the three-stage test. Although the suitability test may involve the consideration of the legislator's intention, there does not seem to be a rigid application of the combined objective and subjective approach as required by the four-stage test. Rather, it focuses on the interpretation of the limiting law at the time of its application and whether it is suitable in relation to the aim it is pursuing in the present case.

In the case of the suitability and necessity stages of the tests, it is safe to argue that these display similar characteristics of inquiry in both the three-stage and the four-stage test. It has been suggested that the suitability stage is subsumed to the necessity stage since any inquiry as to the least restrictive means used necessarily entails the determination of whether the means used are capable of achieving the end in view.[197] However, what is suitable may not necessarily be necessary because the necessity inquiry concerns a choice, from a number of acceptable suitable means, as to which is the least burdensome or restrictive and capable of achieving the same end result.

Conclusion

The principle of proportionality prescribes that action limiting an individual's fundamental right be suitable to achieve the aim in view. There must also be no other mechanism available which is less restrictive of the individual's freedom and the action must not be disproportionate to the restrictions which it imposes.[198] Its mechanism is aimed to determine whether the objective of the limiting rule or action is proportionate to the means applied to exercise such limitation. The four-stage test and the three-stage test of proportionality analysis identified in this chapter embrace this conception of the proportionality principle. The former prescribes that an action limiting a fundamental right must have a proper purpose and a legitimate justification. There must be a rational connection between the limiting rule and its objective. The action must constitute the

[197] Alexy R., *A Theory of Constitutional Rights*, (n 62), xxxii.
[198] Schwarze (n 1) 687.

least form of interference available to achieve the aim in view and such interference or limitation must not be greater than the advantage it procures. Similarly, the three-stage test requires that the means interfering with an individual's fundamental right be suitable for the objective in view. They must constitute the least burdensome means available and the degree of satisfaction procured by the limiting rule must be proportionate to the degree of dissatisfaction procured by limiting the fundamental right.

Thus, it seems that these two tests do not present any difference in the conceptual understanding of the aims of proportionality analysis because both tests are concerned with the suitability of the means. Both tests require the least burdensome means to be adopted when restricting a fundamental right and both tests apply a balancing approach as the final stage of proportionality analysis. However, there is a difference in the application of the structured stages of the two tests which lies mainly in the sequence of the inquiry and at what stage certain questions are asked. It was noted that the proper purpose stage, which is the first stage in the four-stage test, requires an examination of the value of the limiting rule or decision restricting the fundamental right. One has to decide in the first stage whether such limiting rule or decision goes beyond what is constitutionally permissible in relation to the fundamental right alleged to be restricted. One also must decide, at the first stage, whether the motivation behind the limiting rule or decision is reasonable. Thus, this exercise is effectively pre-empting the third stage of proportionality analysis in that it is attributing value to the motivation behind the limiting rule while omitting, at this stage, to attribute value to the limitation placed on the fundamental right. Theoretically, it is causing an imbalance in the evaluation process because of the attribution of weights at the beginning of the proportionality test. An inquiry of proper purpose at the first stage effectively introduces an overlapping factor or an interference with the proportionality *stricto sensu* stage, risking the formal rationality which takes place in this last stage of the principle.[199] Such attribution of weights is more appropriate after having decided the suitability of the aims to the means, and the necessity of the means to the aims. Additionally, requiring the application of proper purpose as the first stage of the proportionality principle 'can be read as saying that there must be some reasons in order to commence a proportionality test at all'.[200]

[199] Alexy R., 'Proportionality and Rationality', (n 33) 19.
[200] Ibid. 20.

The construction of the four-stage test requiring a preliminary examination of proper purpose 'is … already at home on the level of proportionality in the narrower sense' and is thus superfluous.[201] Once it has been established that aims and means are suitable and necessary, the attribution of values and weight can take place. This leads me to conclude that the three-stage test is the preferred model of proportionality analysis that will be applied in this study because the structure of the inquiries presents the most logical sequence of reasoning and the inquiries do not fundamentally interfere with one another.

The three-stage and the four-stage test presuppose that each stage of the inquiry is carried out successively by a court. This is the vertical approach to proportionality. However, it is important to highlight that there seems to be a more liberal approach to the principle of proportionality. This can be seen in the 'horizontal' approach where a court determines that it will only apply the necessity stage or the proportionality *stricto sensu* stage, or any of the stages without observing the formal structure which the principle embodies. The vertical and horizontal approach will be discussed further in chapter four because, as will be seen, the ECtHR does not embrace a strict-vertical approach to proportionality analysis.

So far, it has been established that the preferred model of proportionality analysis is the three-stage test which is also the structure traditionally applied by the German courts.[202] This formal and structural aspect of the principle of proportionality is sustained by a legal theory explaining its role and function in the adjudication of cases of fundamental rights conflicts. This has been the subject of various legal literature involving legal theorists either supporting or objecting to the principle of proportionality as an important adjudicative tool in fundamental rights cases. The following chapter attempts to convey a concise appreciation of the arguments for and against the principle of proportionality as the main adjudicative tool in cases of conflict and limitation of rights.

[201] Alexy R., 'Proportionality and Rationality', (n 33), 19.
[202] Schwarze (n 1) 685-692.

Chapter 2
The Legal Theory underlying the Principle of Proportionality

Introduction

The previous chapter attempted to identify the formal structure of the principle of proportionality, establishing that the preferred proportionality model is the three-stage test incorporating the suitability test, the necessity test and the proportionality *stricto sensu* test. Each of these tests requires a specific type of legal application. As such, the previous chapter followed an analytical approach to the proportionality principle. This chapter approaches the principle of proportionality from a normative perspective attempting to identify the legal theory underlying the principle of proportionality which best explains the workings of this principle in practice. It also discusses the reasons why the proportionality principle is an optimal adjudicative tool to determine cases of conflicting rights and interests. These discussions, together with the previous chapter, set the descriptive and normative contexts for the analyses of the practical application of the proportionality principle by the selected courts.

This chapter identifies Alexy's theory on the principle of proportionality as that which best explains this principle as being an effective tool for adjudication. Although Alexy's theory is based on German constitutional law and application, it is submitted that its highly abstract nature serves very well as the underlying rationale for the application of proportionality as an adjudicative tool generally, in fundamental rights cases.

This chapter specifically discusses Alexy's Principles Theory which distinguishes between constitutional rules and constitutional principles. Alexy argues that fundamental rights are constitutional principles which require a balancing approach when these are in conflict with each other. This is known as the optimisation approach and is distinguished from the subsumptive approach applicable to conflicting rules. The optimisation approach requires that two conflicting principles must each be satisfied to the greatest degree possible. The substantive approach prescribes that where two rules conflict, one of them must necessarily subsume to the other by invalidity. The aim of this definitional discussion is twofold: (i) to establish that most fundamental rights are principles requiring an optimization approach rather than a subsumptive approach, and

(ii) to argue that optimization may only be exercised through the application of the principle of proportionality.

Alexy's Principles Theory has been subject to much debate. Various authors object to the manner in which the Principles Theory conceives the nature of rights and that it prescribes proportionality analysis when determining fundamental rights conflicts. The theory of principles is discussed followed by a discussion of the objections raised with the aim to convey the author's view that the proportionality principle is an efficient tool in the determination of conflicting or competing principles. This chapter concludes by arguing that, despite the various objections to the proportionality principle, they fail to dislodge the proportionality principle as an effective adjudicative technique.

1. Alexy's Principles Theory: Fundamental Rights as Optimisation Requirements.

Alexy's theory of principles concerns a definitional discussion of what constitutes rules and principles from his perspective. This discussion serves to establish the connection which exists between the nature of fundamental rights, as distinguished from other normative rules, and the principle of proportionality.

Alexy regards fundamental rights protected by the German Basic Law as having the nature of constitutional principles (Principles Theory). Such constitutional principles may be limited or restricted in favour of another constitutionally-protected right or public interest. Alexy believes that in such circumstances the determination of fairness and legitimacy of the limitation of a principle is made through the application of the principle of proportionality (Verhältnismäßigkeitsgrundsatz), arguing that there is an intimate connection between the Principles Theory and the application of the principle of proportionality in the adjudication of fundamental rights cases. The practical significance of the Principles Theory is found above all in its equivalence to the principle of proportionality.[203]

Alexy's theory of constitutional rights purports to explain his conviction that the application of the doctrine of proportionality is inevitable in cases of competing

[203] Alexy R., 'On the Structure of Legal Principles', Ratio Juris, Vol. 13 No. 3, (2000), 297.

constitutional principles such as fundamental rights. This is because of the very nature of principles (fundamental rights) which he classifies as 'optimisation requirements' and which need to be fulfilled to the greatest extent possible.[204]

Alexy's theory of principles rests on the distinction between constitutional norms as rules and constitutional norms as principles. However, the theory of principles has been perceived to constitute different legal theories including a legal theory which defines the relationship between legal systems and moral, ethical and political discourse, or alternatively one which delineates the distinction between adjudication through subsumption and adjudication through balancing, or even a theory of legal argumentation and legal reasoning.[205] The theory of principles has been attributed different functions, depending on the particular mode of perception of the theory.

Alexy's distinction between constitutional rules and constitutional principles is based on his conviction that both rules and principles are norms because both state what ought to be done.[206] 'The distinction between rules and principles is thus a distinction between two types of norm.'[207] Alexy believes that fundamental rights as principles 'are norms which require that something be realised to the greatest extent possible given the legal and factual possibilities'[208] and are 'optimisation requirements'.[209]

Rivers describes the main features of this theory:

> Key to the entire theory is the argument that constitutional rights are principles, and that principles are qualitatively factually and legally possible. This feature of constitutional rights explains the logical necessity of the principle of proportionality and exposes constitutional reasoning as the process of identifying the conditions under which one of two or more competing principles takes precedence on the facts of specific cases.[210]

[204] Alexy R., 'Constitutional Rights, Balancing and Rationality', (n 25) 135.
[205] Poscher R., 'Insights, Errors and Self-Misconceptions of the Theory of Principles', (2009) Ratio Juris, Vol. 22 No. 4, 427-8
[206] Alexy R., *A Theory of Constitutional Rights,* (n 62), 45.
[207] Ibid.
[208] Ibid., 47.
[209] Ibid.
[210] Ibid., xviii.

Alexy believes that the nature of constitutional rights is that of a principle as contrasted with that of a rule. The difference between them lies in the norm-theoretic distinction underlying constitutional rules and principles. Whereas rules are deontological in nature and must be satisfied completely through subsumption, principles require 'that something be realised to the greatest extent possible, given the factual and legal possibilities at hand'.[211] Fundamental rights as principles do not constitute definitive commands but they are 'optimisation requirements' which may be satisfied in varying degrees. This is where balancing, which is part of the principle of proportionality, comes in. Balancing determines the degree of satisfaction of a principle which is legally and factually possible. 'Thus, balancing is the specific form of the application of principles.'[212] Alexy includes as constitutional rights norms those norms which are derived from constitutional rules or principles[213] but which are not expressly envisaged by the German Basic Law. These would also be subject to the Law of Balancing if they have the nature of principles.[214]

A problem which arises at this stage is the identification of specific criteria which help the adjudicator determine whether a particular constitutional rights norm is a rule or a principle as distinguished by Alexy and hence whether he is to apply one norm to the exclusion of the other, or if he is to apply the optimisation approach and therefore balancing. Alexy believes that when both fundamental rights as principles are realised to their fullest, the outcome will be that they are mutually exclusive. This will result in conflict and in an inconclusive result indicating that a balancing exercise is required. This is because in the area of conflicting principles such as two competing fundamental rights, both are recognised as valid where one cannot be denied for the other to be upheld. Rather, both rights have to be optimised, in relation to each other, to the greatest extent possible.

An approach which may assist the adjudicator in identifying whether a particular constitutional rights norm is a rule or a principle is to ask whether it is a balancing

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[211] Alexy R., 'The Construction of Constitutional Rights', (n 76), 2, accessed on 27 Feb. 2013 and <https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2012-3-page-465.htm> p. 2, accessed on 8 June 2020.
[212] Ibid., 2.
[213] Alexy R, *A Theory of Constitutional Rights,* (n 62) 56.
[214] Ibid., 61.

norm[215] or to apply the theory based on the notion that principles are of a more generic nature than rules. Thus, for example, the prohibition of inhuman or degrading treatment is of a deontological nature because of its strict prescriptive prohibition. It commands a prohibition giving it the nature of a rule, as distinguished from a principle, because it cannot be partially observed. As a prohibitory rule it requires complete observance rather than optimisation to the greatest degree possible. Balancing is not applicable in such a case. The same may be said to apply to the prohibition of subjecting human beings to torture.

It is submitted that rules tend to be more specific and detailed than principles. However, Ávila opines that the classification of a norm as either a rule or principle depends on the interpretative approach of the adjudicator: it all depends on the connections of value that interpreters stress or not with their argumentation, and on the goals they believe should be met.[216] Ávila believes that it is not the hypothetical structure of rules and principles which determines the distinction between them but their argumentative use.[217]

Pace believes that 'fundamental rights represent for Alexy not "deontological levers", namely categorical rules with a strong normative power, but principles which can always be discussed, opposed, counterbalanced and also ruled out if necessary'.[218] Therefore, whereas rules must be observed and applied in the way in which they are expressed, i.e. they are fixed points along the spectrum of what is factually and legally possible, principles are subject to flexibility of legal approach because fundamental rights as principles are subject to 'balancing and adjustment'.[219]

Therefore, rules are norms which must be satisfied as prescribed, whereas principles are norms which must be satisfied to the greatest degree possible. The degree to which the principle is to be satisfied depends on what is factually possible (necessity and suitability)

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[215] Möller K, 'Balance and the Structure of Constitutional Rights', (2007) 5 International Journal of Constitutional Law, 473.
[216] Ávila H, *Theory of Legal Principles,* Springer (2007), 13.
[217] Ibid., 14.
[218] Pace C., 'Robert Alexy's A Theory of Constitutional Rights critical review: key jurisprudential and political questions', Working Paper 2012/01, 'The Landscape and Isobars of European Values in Relation to Science and New Technology', funded by the "7th Framework Programme " of the European Commission (Refª SiS-CT-2009-230557), <http://repositorio.iscte.pt/bitstream/10071/3883/1/DINAMIA_WP_2012-01.pdf, > p.10, accessed on 8 June 2020.
[219] Ibid., 10.

whereas the extent to which this is legally possible is determined by the proportionality *stricto sensu* test.[220] The latter is determined 'by opposing principles and rules'.[221]

Principles as 'optimisation requirements' always need to be weighed and balanced. Alexy believes that the balancing exercise is a rational exercise. He distinguishes between conflicting rules and competing principles.[222] Conflicting rules concern positive deontological law which require elimination or a tacit exception while competing principles are resolved by weighing. The result will be that one principle will outweigh the other without having recourse to invalidity or to exception.

When two rules conflict, by contrast, the solution may be either one of the following: (a) that an exception to one of the conflicting rules is read or understood as existing (even though not expressly written) and this will give way to the exercise of the other conflicting rule; or (b) that one of the conflicting rules is declared null and void, thus leaving space for the other to be executed or upheld.[223] The possibility of having 'two mutually incompatible … ought-judgments'[224] is completely excluded. 'If the application of two rules results in mutually incompatible outcomes on the facts of any given case, and if an exception cannot be read into one of them, then at least one must be declared invalid.'[225] The problem which arises is this: if there are two incompatible norms, one of which is required to be invalidated in order for the validation of the other, then how is one to go about determining which one of the two norms is invalid? Alexy gives an example of two conflicting rules concerning the prohibition of certain opening times of shops which contradicted each other. The only option which the Federal Court had was to declare one of the rules invalid.[226]

Alexy has been criticised on the basis that he regards rules as highly formalistic, and that the distinction he makes between a rule and a principle is overemphasised.[227] Pirker

[220] Also referred to as 'balancing' or 'the law of balancing'.
[221] Alexy R, *A Theory of Constitutional Rights,* (n 62), 48.
[222] Ibid., 45 *et seq.*
[223] Ibid., 49.
[224] Ibid., 49.
[225] Ibid., 49.
[226] A federal law provided that shops could open between 7am and 7pm whereas a regional law provided that on Wednesdays, shops could not open after 1pm. The latter, being a regional law and therefore inferior to federal law, was declared invalid.
[227] Pirker B, *Proportionality Analysis and Models of Judicial Review,* (n 177), 52.

submits that in practice the clear-cut distinction that Alexy draws between norms applied by subsumption and those applied by balancing does not exist.[228] It is believed that it is more a question of difference of degree rather than a clear-cut distinction since norms can require clarification, can be vague or incomplete.[229] Alexy disagrees: it is a difference in quality and not only one of degree[230] I agree with Alexy because the difference rest primarily on the very nature of rules. Rules require a deontological approach, i.e. a decision determining which one prevails, invalidating the other. Two conflicting fundamental rights as principles, by their very nature, require optimisation, because one does not invalidate the other.

It has been argued that if a principle dictates that it must be decided by balancing, as Alexy maintains, then by its very own nature, a principle is a rule.[231] As a response to such criticism, Alexy further elaborates on the nature of principles arguing that they are 'commands to optimise'.[232] He continues by drawing a distinction between 'commands to optimise' (principles) and 'commands to be optimised'.[233] The latter are the 'objects' of balancing or weighing, that is, the two principles to be weighed. A command to optimise describes the action to be taken with regard to the objects (principles) which are to be optimised, that is, the ultimate result emanating from the balancing exercise. Alexy maintains that '[p]rinciples, therefore, as the subject matter of balancing are not optimisation commands but rather commands to be optimised'.[234]

2. Objections to Alexy's Principles Theory

Alexy's affirmation that there is an intimate connection between the Principles Theory and the application of the proportionality principle in the adjudication of fundamental rights cases has not been free from criticism: both the theory of principles as well as the proportionality principle have been objected to by various scholars, some refuting any proximate link between the two, others regarding proportionality as a 'misguided quest

[228] Pirker B., *Proportionality Analysis and Models of Judicial Review,* (n 177), 52.
[229] Ibid.
[230] Alexy R., 'On the Structure of Legal Principles', (n 203), 295.
[231] Aarnio A, 'Taking Rules Seriously' in Maihofer W & Sprenger G (eds), *Law and the States in Modern Times,* (Franz Steiner Verlag 1990) 181.
[232] Alexy R., 'On the Structure of Legal Principles' (n 203), 300.
[233] Ibid.
[234] Ibid.

for adjudicative precision and objectivity',[235] while others objecting that the application of the proportionality principle may lead to irrationality because it does not offer any solid criteria upon which adjudication is to be effectuated.

2(a) Incommensurability

Alexy believes that the very nature of fundamental rights as principles requires an optimization exercise through the application of the Law of Balancing (proportionality *stricto sensu*) therefore involving a weighing process.[236] This weighing process (the weight formula) is characterised by comparing the degree of satisfaction obtained by restricting a right and the degree of dissatisfaction obtained by limiting the right.[237] The degrees are recorded by Alexy's triadic scale which ranges from 'light' to 'moderate' to 'serious' and applied to his weight formula.[238] This has been the subject of criticism by various academics who believe that fundamental rights cannot be weighed against each other by reference to a common weighing unit concluding that fundamental rights, their underlying values and the competing interests are incommensurable.[239] Raz defines incommensurability as follows:

> *A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.*[240]

Simply put, the objection of incommensurability states that in the adjudication of fundamental rights, 'the interests at stake cannot actually be weighed on any sort of scales' and that 'judges are balancing things that cannot actually be balanced.[241] This objection is founded on the idea that unless there is a common scale on which rights, values and interests can be compared, then it is not possible to apply the Law of Balancing

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[235] Tsakyrakis S., 'Proportionality: An assault on human rights?', International Journal of Constitutional Law, Volume 7, Number 3, p. 468;

[236] The weighing process or the 'law of balancing' involves the interpretation of the limitations placed on the exercise of fundamental rights, such as the limiting clause in Article 2(1) of the European Convention on Human Right envisaging a limitation to the right of life, or Article 2(2) of the German Basic Law which states that the right to life, physical integrity and freedom of the person '…..may be interfered with only pursuant to a law'.

[237] Alexy R., 'Constitutional Rights, Balancing and Rationality', (n 25) p.136

[238] Alexy R., 'On Balancing and Subsumption', (n 119), p. 440-448.

[239] Tsakyrakis S., 'Proportionality: An assault on human rights?', (n 235), 468-493; Endicott T., 'Proportionality and Incommensurability' Legal Research Paper Series, Paper No 40/2012, (Revised 2013), p. 1-34; Urbina F.J., *A Critique of Proportionality and Balancing,* Cambridge University Press (2017), p. 39-74; See also Alder J., 'Incommensurable Values and Judicial Review: the case of local government', Public Law Journal, (2001) Win., p. 717-735, where he discusses the nature of incommensurable values in relation to the judicial review of local government powers.

[240] Raz J., *The Morality of Freedom*, OUP (1986), 328.

[241] Endicott T., 'Proportionality and Incommensurability' (n 239), 1.

to conflicting rights and interests.[242] Each fundamental right, together with their underlying values, and each interest, has different properties which are not reduceable to each other. Consequently, when determining a conflict between a fundamental right and an interest, or between two conflicting fundamental rights, a decision cannot be reached by applying the Law of Balancing since a comparison cannot be made between the two because of their irreducible properties. Urbina states as follows:

> 'What creates the incommensurability is that the criterion or criteria that bear on the decision require the realisation of different irreducible properties. Realising each property is rationally appealing,[243] but the properties are irreducible to each other'.[244]

Similarly, Tsakyrakis objects to the Law of Balancing arguing that the determination of conflict of fundamental rights and interests cannot be reduced to a mathematical formula which assumes such conflict to be determined by issues of intensity or degree, measured by a common metric, and revealing the solution.[245] He argues that the only way that a common metric may be introduced in balancing is by subscribing to a 'moral theory that assumes all interests are ultimately reducible to some shared metric (money or happiness or pleasure), and that, once translated into this common standard, they can be measured against each other'.[246] By 'mathematical formula' Tsakyrakis is referring to Alexy's weight formula which is characterised by numbers representing evaluations based on the triadic scale (light, moderate or serious).[247] Klatt and Meister argue that this model is a 'heuristic tool' whereby the numbers are used in order to 'make explicit the internal structure of balancing'.[248] They add that Alexy's model of balancing 'works fine without any use of numbers'.[249] Klatt and Meister summarise the incommensurability objection to balancing, mainly by reference to Tskyrakis' criticism, as having two variants:

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[242] Möller K., 'Proportionality: Challenging the Critics', *International Journal of Constitutional Law*, Volume 10, Issue 3, July 2012, p. 719, and Urbina F.J., *A Critique of Proportionality and Balancing,* (n 239), 40-45.
[243] By 'rationally appealing' he means that it is a reasonable act in the pursuit of an 'intelligible goal' but the method used in reaching it cannot be attributed to an exercise of commensuration. See p. 46
[244] Urbina F.J., (n 239), 45.
[245] Tsakyrakis S., Proportionality: An assault on human rights?, (n 235), 474.
[246] Ibid., 471; Tsakyrakis also believes that balancing 'obscures the moral considerations that are at the heart of human rights issues' at p. 493. Moral reasoning in balancing is discussed further down in this section.
[247] Klatt and Meister, *The Constitutional Structure of Proportionality,* (n 90), p. 57
[248] Ibid.
[249] Ibid.

> The first points to the fact that 'our moral universe includes ideas not amenable to quantification'. The second challenges the assumption that interests are 'ultimately reducible to some shared metric' and that 'once translated into this common standard, they can be measured against each other.[250]

They address the first variant of the objection by stating that balancing cannot do without moral reasoning, which is a necessary component of all constitutional rights adjudication.[251] Referring to Alexy's Theory of Argumentation, which they state is also applicable to the argumentation involving balancing, they explain that the use of moral reasoning in balancing is not concerned with the formal structure of Alexy's triadic scale (light, moderate, serious) applied in the weight formula.[252] This is referred to as 'internal justification' whereby the attribution of values of the triadic scale, included in the weight formula, is capable of producing the balancing result.[253] The use of moral reasoning, on the other hand, would constitute 'external justification' which has nothing to do with the efficacy of the formal structure of balancing, but with 'giving reasons for the values inserted in the weight formula'.[254] Moral argumentation is concerned with 'the justification of evaluating the intensity of an interference as 'serious' or the weight of a competing principle as 'light'.[255] They conclude that 'balancing does not at all "obscure the moral considerations that are at the heart of human rights issues"'.[256]

Klatt and Meister then address the second variant of the incommensurability objection put forward by Tsakyrakis which challenges 'the assumption of a common metric in the weighing process'[257] and which excludes moral reasoning.[258] Klatt and Meister reiterate that balancing does not pretend to be morally neutral.[259] They conclude that 'proportionality and balancing allow for a common metric *qua* moral reasoning'.[260]

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[250] Ibid., 59.
[251] Ibid., 52
[252] Ibid., 54
[253] Ibid.
[254] Ibid.
[255] Ibid.
[256] Ibid., in reply to Tsakyrakis' argument that 'proportionality […] pretends to balance values while avoiding any moral reasoning' in Tsakyrakis S., 'Proportionality: An Assault on Human Rights?', (n 235), p. 474.
[257] Tsakyrakis S., 'Proportionality: An Assault on Human Rights?', (n 235), p. 471
[258] Ibid.
[259] Klatt and Meister, *The Constitutional Structure of Proportionality*, (n 90), 62.
[260] Ibid.

In challenging the argument that balancing requires 'judicial weighing of incommensurables', Craig argues that incommensurability of values may be detected not only in legal doctrine and in law in general, but is also encapsulated or forms the basis (overt or covert) of certain rules of the law itself.[261]

Craig argues that there are various legal doctrines in different areas of law where balancing incommensurable values, rights and interests takes place.[262] He addresses the incommensurability critique stating that if incommensurability is the rogue which renders the principle of proportionality illegitimate in judicial adjudication, then such incommensurability which is applied in various areas of law must also be abandoned, on the basis of the desire for consistency in approach in the particular discipline.[263] He then speculates that given the recognition that 'the Augean Stables encompass all branches of legal doctrine', 'the doughty critic determined to cleanse legal doctrine of incommensurability' might decide to examine the rules in the law rather than the doctrinal approach.[264] Craig gives four examples of types of rules which are either premised on a 'weighing process of incommensurable values' or express the balancing of values:

(i) A rule which is a result of balancing of incommensurable values;

(ii) A rule which expresses the balancing of values in individual cases (itself being the outcome of the weighing process of incommensurable values carried out judicially ex ante);

(iii) A rule which adopts a presumption for a particular result (itself also being the outcome of the weighing of incommensurable values carried out judicially ex ante);

(iv) A rule qualified by exceptions (itself also being the outcome of the weighing process as above).[265]

[261] Craig P., 'The Nature of Reasonableness', Legal Research Paper Series, Paper No 78/2013, July 2013, p. 19-25
[262] Ibid.
[263] Ibid., 21.
[264] Ibid., 22.
[265] Ibid., 25.

Craig states:

> *The reality is that doctrinal legal rules are commonly underpinned by a plethora of values that inform and shape the content of the legal rule and its interpretation. It is this very heterogeneity of values that partially explains controversies concerning the 'foundations' of legal subjects, whether in public or private law, since these controversies often turn, at one stage removed, on disputes as to the values underlying particular doctrinal rules within the legal system.*[266]

He states that critics claiming that the proportionality principle operates with incommensurable values at its balancing stage often assume that such an exercise can be replaced by an *ad hoc* rule.[267] However, this will still pose the problem that certain rules are themselves based on 'balancing incommensurable variables'.[268] Craig concludes that the belief that removal of proportionality balancing will remove the incommensurable considerations is a mistaken one because it is not 'self-evident' that it is 'worse' to deal with the incommensurability contained in the proportionality balancing than it is to deal with a rule which in itself came about after a consideration of incommensurable values which the rule itself does not explicitly explain.[269] He says that the latter may be 'better' in terms of outcome, but may fare less well in terms of certainty, and it fares as well or better in terms of 'the transparency of the values placed in the balance, since the reality with many doctrinal legal rules is that the mix of values that shaped the rule is hidden, lost or forgotten, with the consequence that it is more difficult to reassess its merit'.[270]

The comparison of intensity of degrees of satisfaction propounded by Alexy has been criticised by Webber and by Urbina. Webber criticises the comparison of the degrees of satisfaction and non-satisfaction of the conflicting principles as constituting an exercise which is conducted from a one-sided perspective, i.e. the perspective of the principle being evaluated, and argues that on the basis of this perspective, it cannot subsequently be assumed that 'a light interference with one principle is of the same measure as a light

[266] Craig P., 'The Nature of Reasonableness', (n 261), 25.
[267] Ibid., 27.
[268] Ibid.
[269] Ibid.
[270] Ibid.

interference with another principle'.[271] Urbina agrees with this criticism. He explains that the balancing exercise is carried out by reference to a property on the basis of which the comparison is carried out and argues that 'whether two things can be commensurated or not depends on the property by reference to which one compares them'.[272] He believes that it is not possible to carry out such comparison by reference to this property because the latter 'is not a property by which (conflicting fundamental rights) can be compared quantitively'.[273] The 'property' which he refers to is the degree of satisfaction and non-satisfaction constituting the basis for comparison of conflicting rights and interests in the Law of Balancing. Urbina concludes that 'that one value could be realised to a great degree and another to a reasonably small degree is no conclusive reasoning for choosing any of the alternatives.[274]

Da Silva, in response to this criticism, and partly as a response to Webber,[275] argues that 'in order to compare goods or values it is not necessary to rank them cardinally. It is enough if we are able to rank them ordinally.[276] He states that incommensurability and incomparability do not imply one another and cannot be regarded as synonymous[277] and gives the example of comparing Bach's and Madonna's music in terms of preference.[278] He argues that although both are 'music', attempting to attribute a measuring unit to measure the quality of their music is 'nonsense' because there exists no unit to measure the quality of music in these terms.[279] However, this does not mean that they cannot be compared.[280] The fact that a context of quality of music is being examined gives rise to the possibility of comparing the two incommensurable things.[281] Similarly, the fact that

[271] Webber G., Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship, 23 Can. J. L. & Jurisprudence 179 (2010), p. 195.
[272] Urbina FJ., *A Critique of Proportionality and Balancing,* (n 239), 40.
[273] Ibid.
[274] Ibid., 63.
[275] Da Silva V., 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision', Oxford Journal of Legal Studies, Vol. 31, No. 2 (2011), see particularly p. 289-292, where Da Silva argues that Webber's discussion of the Canadian case Syndicat Northcrest v. Amselem [2004] SCC 47, is primarily problematic because the case dealt with the freedom of religion on the one hand and contractual obligations on the other. Nevertheless, he hypothesizes that if the freedom of religion was in conflict with the right to equality, and therefore both rights would be constitutional rights each having an abstract value not necessarily equal, then the concrete realization of degrees would still be possible by virtue of the fact that they are constitutional rights. He concludes that Webber's arguments are not convincing.
[276] Ibid., 283.
[277] Ibid.
[278] Ibid.
[279] Ibid.
[280] Ibid.
[281] Ibid. He calls this 'the covering or choice value' (p. 284), and states that the more precisely defined the covering value is, the more precise is the comparison and vice versa (p. 284).

two fundamental or constitutional rights or interests collide and affect each other within a specific set of circumstances gives enough basis for a comparison to take place in the form of balancing. This is because:

> *When one balances between basic constitutional rights, she does not intend to compare the abstract values of, say, freedom of expression and privacy, or of economic development and protection of the environment. What one intends is always to compare the numerous possibilities of protecting and realizing such rights in a concrete situation and to weigh among them.*[282]

Referring to Alexy's scale of degrees of interference, also referred to as the triadic scale (light, moderate, serious), Da Silva explains that the basis for comparison lies in the 'trade-offs' (between the satisfaction of one principle and the non-satisfaction of the other) in the concrete situations rather than in abstract values or rights.[283] Thus, the degree of satisfaction and non-satisfaction can be compared in a rational manner when dealing with a concrete case and its specific circumstances. He states:

> *This possibility of measuring trade-offs allows the comparison of the most basic values and rights in constitutional cases. As soon as we abandon the idea of comparing abstract values and embrace the idea of measuring trade-offs, balancing values and rights turns out to be open to rational choice.*[284]

Alexy, in explaining the triadic scale which he defines as 'the system underlying balancing'[285] addresses the objection of incommensurability by reference to the constitution. Alexy states that commensurability is established by the comparability of the evaluations and their importance for the constitution.[286] Alexy argues that 'the constitution provides a common point of view and thereby indirectly establishes comparability'[287] He adds that 'a scale of whatever kind that represents the classes for

[282] Da Silva V., 'Comparing the Incommensurable', (n 275), 286.
[283] Ibid.
[284] Ibid.
[285] Alexy R., 'On Balancing and Subsumption', (n 119), p. 440
[286] Ibid., 442.
[287] Klatt and Meister, *The Constitutional Structure of Proportionality,* (n 90), 63.

the evaluation of the constitutional gains and losses',[288] and 'used on the basis of a common point of view'[289] are enough to establish commensurability.[290]

2(b) Optimisation and Balancing

Möller disagrees with Alexy that the very nature of fundamental rights as principles requires an optimisation exercise through the Law of Balancing.[291] He does not see any logical or necessary connection between principles and balancing because he believes that it is not possible to optimise fundamental moral rights in the same way that one would optimise a financial profit.[292] In addition, he believes that morality arguments are able to resolve issues of conflicting principles without requiring any balancing exercise.[293] He claims that 'there is no logical, or necessary, connection between principles and balancing'[294] because the resolution of a conflict of constitutional principles lies with the application of 'the correct' extent.[295] This means that in determining whether one principle is to be given priority over another in the given circumstances, a moral argument must take place, that is, resolving the conflict by deciding what is right and legally wrong and 'the outcome of our moral argument then dictates what is possible'.[296] Therefore, Möller claims that Alexy's weighing process is in reality a 'moral' consideration which he calls 'optimisation properly understood'.[297] He specifically criticises Alexy's claim that balancing flows naturally from principles and believes that Alexy's connecting of the principles and balancing does not provide further understanding of constitutional rights and that it does not provide a framework as a matter of structure:

> A more nuanced conclusion — namely, that all constitutional rights, as a matter of structure, are necessarily balancing norms — would still have been substantially innovative and challenging. It could have been the culmination of a reconstructive account, and the point of departure into a substantive moral account, of

[288] Alexy R., 'On Balancing and Subsumption', (n 119), p. 442
[289] Ibid.
[290] Ibid.
[291] Möller K, 'Balance and the Structure of Constitutional Rights', (n 215), 453.
[292] Ibid., 453.
[293] Ibid.
[294] Ibid., 459.
[295] Ibid.
[296] Ibid, 460.
[297] Ibid.

> constitutional rights. The questions it poses are: Why are most constitutional rights balancing norms? What about those which are not? To begin answering these questions, however, one must depart from Alexy's structural theory and examine constitutional rights from the perspective of substantive morality.[298]

Poscher, while rejecting the theory of principles as being a being a doctrinal theory of fundamental rights, nonetheless acknowledges the need to apply the principle of proportionality or balancing in certain cases.[299] He does not connect the theory of principles to the method of applying the proportionality principle in the field of fundamental rights. Rather, he sees the principle of proportionality as one of the many methods of adjudication available.[300] He doubts whether proportionality should be understood only as an optimisation requirement and believes that it could be understood as a guarantee of a minimal position or a minimum guarantee, or as a prohibition of gross disproportionality.[301] The balancing of principles is simply one argumentative structure among many which serves to develop a certain doctrine.[302] Poscher also rejects Alexy's theory of principles as being a theory of fundamental rights which must be doctrinally shaped as optimisation requirements.[303] He states that in this manner the theory of principles misconceives itself as a doctrine when in reality it is merely part of the legal argumentation process or the process of weighing arguments.[304]

Webber also believes that proportionality inevitably requires the use of moral reasoning even though it attempts to present itself as morally neutral.[305] Klatt and Meister agree that '[m]oral reasoning is a necessary component of all constitutional rights adjudication'[306] and this, they argue, is reflected in Alexy's theory of legal argumentation wherein he sheds light on the relationship between moral and legal argumentation. Klatt and Meister maintain that whereas internal justification concerns the formal structure of

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[298] Ibid., 464.
[299] Poscher R., (n 205), 428 and 438-9. Poscher argues that even fundamental rights have the structure of a rule-type norm at 438.
[300] Ibid., 440-1.
[301] Ibid., 442.
[302] Ibid., 446.
[303] Ibid., 449.
[304] Ibid.
[305] Webber G., 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship', (n 271), 191.
[306] Klatt M. & Meister M, *The Constitutional Structure of Proportionality,* (n 90), 52.

balancing and the question of whether or not 'the balancing result can be deduced from the balancing or not',[307] in external justification moral reasoning is applied when giving reasons for the values attached to the weights when applying the balancing formula. They maintain that '[s]ince balancing is dependent upon the evaluation of intensities and weights, it is clear that balancing must entail moral considerations'.[308] According to Klatt and Meister, this disproves Webber's claim that balancing assumes moral neutrality because moral discourse is indispensable in balancing. They explain that proportionality's claim to neutrality relates to its formal structure but not its substantive process which essentially requires moral argumentation and the evaluation of weight and values which varies according to perspective.[309]

2(c) Instability and Irrationality

Other authors criticise the balancing process on the basis that a right afforded by the Constitution will never be 'stable' because it will always be conditional and subject to balancing'[310] and because such process undermines the development of 'knowable principles of law'[311] since in every case a new rule is formulated and different weights are accorded to the same right, depending on the circumstances of the particular case.[312] This means that the element of predictability is missing, making it difficult to establish rules which are to be followed in subsequent cases. Klatt and Meister believe that this is not so because, on the basis of precedent, predictability is possible.[313] They also believe that the flexibility which balancing offers allows the Court to take into account the changes brought with time and to avoid repeated application of jurisprudence which is out of date and not in touch with contemporary reality. They maintain that '[t]his necessary flexibility admittedly relativizes the function of precedence to create a stable and predictable jurisdiction. But it is at the same time the guarantee that every single case is decided within the light of present-day conditions'.[314]

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[307] Ibid., 54
[308] Ibid.
[309] Ibid.
[310] Tsakyrakis S, 'Proportionality: An Assault on Human Rights?', (n 235), 481.
[311] Aleinifkoff TA, 'Constitutional Law in the Age of Balancing', (1987) 96, The Yale Law Journal, 948.
[312] Kahn PW, 'The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell', (1987) Vol. 97 The Yale Law Journal, 10.
[313] Klatt M & Meister M, *The Constitutional Structure of Proportionality,* (n 90), 49 *et seq*.
[314] Klatt M & Meister M, *The Constitutional Structure of Proportionality,* (n 90), 51.

Jürgen Habermas, a major critic of Alexy's theory of constitutional rights, particularly criticises the application of the balancing exercise to constitutional norms as principles. He believes that Alexy's theory leads to irrationality of judgment and the deprivation of the normative power of fundamental rights.[315] Habermas argues that balancing constitutional rights gives rise to the danger of putting such rights on an equal footing with policies which would be capable of defeat by other policy arguments[316] thus depriving constitutional rights of their 'strict priority' and their normative power.[317] He also criticises Alexy's balancing theory as this could give rise to irrational judgments on the basis that balancing *per se* does not dictate any form of rational standards which are to be applied when applying the balancing exercise.[318] 'Because there are no rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies'.[319] Schauer interprets Habermas's criticism of the balancing process to be irrational as really meaning an 'unconstrained' process.[320] In Alexy's defence, Schauer argues that the structure of proportionality inquiry contains 'a degree of constraint' involving the specification of burdens of justification and the allocation of an order of inquiry.[321] This makes Alexy's proportionality inquiry far from irrational.[322] Schauer argues that decision-making which is open-ended and which involves a degree of variability is not usually regarded as irrational.[323] He believes that 'it is difficult to claim that the basic idea of act-based utilitarian (or any other) calculation is irrational' and rejects the claim that this places an excessive demand on adjudicators which goes beyond their cognitive decision-making capacities.[324] He concludes that Alexy's affirmation that balancing is not irrational is 'substantially correct'[325] and convincingly explains that the process of balancing as put forward by Alexy is based on rationality because the process is structured and not open-ended, leaving the decision-maker free to decide on which factors are relevant and how much weight to attach to

[315] Habermas J., *Between Facts and Norms*, (n 28) 259.
[316] Ibid. 258.
[317] Ibid. 256.
[318] Ibid. 259.
[319] Ibid.
[320] Schauer F, 'Balancing, Subsumption, and the Constraining Role of Legal Text' (n 27) 7.
[321] Ibid. 5.
[322] Ibid. 4.
[323] Ibid. 8.
[324] Ibid. 8.
[325] Ibid. 8.

those factors. He also believes that such a structured process 'reduces the degree of variability' which is often an issue in legal decision-making.[326]

Alexy, while acknowledging that the exercise of balancing excludes the control of norms, defines the process as requiring judicial subjectivism.[327] He argues that this cannot be interpreted as meaning that balancing is a non-rational or irrational procedure.[328] He discusses the implications of the *Lüth* case[329] which according to him, connects three ideas which have served fundamentally to shape German Constitutional Law.[330] He claims that the *Lüth* case, which positioned fundamental rights protection to the rank of the highest values in German law, reflects the idea that constitutional rights have the character not only of rules but also of principles. Secondly, such principles are not applicable only to cases involving the State and the citizen, but they are applicable beyond this sphere, 'to all areas of law':[331] 'Constitutional rights become ubiquitous.'[332] Thirdly, Alexy argues that the balancing of interests is a necessary exercise which emanates from the very structure of values and principles, which in their very nature have a tendency to collide (rather than annihilate one another): 'The nature of principles implies the principle of proportionality and vice versa'.[333]

Habermas, on the other hand, does not conceive of fundamental rights as being principles and subject to balancing, but understands such rights to be subject to subsumption.[334] Schauer, who believes that subsumption, being closely linked to the rule of law, has close

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[326] Ibid. 9.
[327] Alexy R, *A Theory of Constitutional Rights,* (n 62), 100.
[328] Ibid., 100.
[329] BVerfGE 7, 198; 1 BvR 400/51 of January 15, 1958. The Senator of the Free and Hanseatic City of Hamburg and Head of the State Press Office gave a speech in which he called for a boycott of the film directed by Veit Harlan, a German film director who had gained fame during Nazi Germany. The two film production companies succeeded in obtaining an injunction against him. He then made a reference to the German Federal Constitutional Court (GFCC) claiming that the injunctions violated his basic right to free expression of opinion. The GFCC upheld his claim.
For a translation of the judgments see, School of Law, University of Texas at Austin, Institute for Transnational Law at <http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1369,> last accessed 8 June 2020.
[330] Alexy R, 'Constitutional Rights, Balancing, and Rationality', (n 25) 3; Grimm D., (n 17) 387, states that 'In the *Lüth* case, a landmark decision that revolutionised the understanding of fundamental rights in Germany, the Court elevated them to the rank of highest values of the legal system, which are not only individual rights, but also objective principles. The conclusion drawn from this assumption was that they permeate the whole legal order; they are not limited to vertical application but also influence private law relations and function as guidelines for the interpretation of ordinary law.'
[331] Alexy R, 'Constitutional Rights, Balancing, and Rationality', (n 25) 133.
[332] Ibid 133.
[333] Alexy R, *A Theory of Constitutional Rights,* (n 62), 66.
[334] Habermas J, *Between Facts and Norms*, (n 28) 260.

affinity with the formality of law and affords little discretion to the adjudicator,[335] contrasts the two processes as follows:

> The typical proportionality inquiry, as the word 'balancing' suggests, is largely open-ended, and largely non-constraining, even though it is structured, and even though it is not maximally constraining. And the typical subsumption inquiry is largely constrained, largely textually interpretive, and largely characterised by the way in which the constraints of a moderately clear text, when one exists, exclude numerous factors and considerations that would not only otherwise be relevant, but would also typically, be relevant were the methodology to be one of balancing or proportionality rather than subsumption.[336]

Habermas believes that the 'appropriate norm' prevails over the 'inappropriate norm' in constitutional rights-based adjudication and not that one value competes against the other: '[t]he legal validity of the judgment has the deontological character of a command, and not the teleological character of a desirable good that we can achieve to a certain degree under the given circumstances and within the horizon of our preferences'.[337]

Alexy analyses both balancing and subsumption.[338] The balancing approach is applicable to constitutional principles, as distinct from deontological constitutional rules. He explains that the three sub-principles of proportionality (suitability, necessity and proportionality *stricto sensu*) 'are optimisation requirements'[339] which means that they require to be realised to the greatest extent possible, rather than completely. The principle of suitability 'excludes the adoption of means obstructing the realisation of at least one principle without promoting any principle or goal for which they were adopted'[340] because 'interference with one principle must contribute to the realisation of

[335] Schauer F., 'Balancing, Subsumption, and the Constraining Role of Legal Text' (n 27) 16, accessed on 6 March 2013.
[336] Ibid. 15.
[337] Habermas J, *Between Facts and Norms,* (n 28) 261.
[338] Alexy R., 'On Balancing and Subsumption' (n 119), 433–49.
[339] Alexy R., 'Constitutional Rights, Balancing, and Rationality', (n 25) 135.
[340] Ibid.

the other'.[341] The principle of necessity requires the choice of the less intensively interfering and equally suitable means.[342] The last stage in this process is the application of the 'Law of Balancing'. This requires equality in cause and effect in that the violation or infringement committed to a particular constitutional right must reflect the advantage or satisfaction of another particular constitutional right which in the circumstances of the case takes priority: the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other. Alexy believes that a rational process is involved when analysing, 'first, the intensity of interference, second, degrees of importance, and, third, their relationship to each other' because it involves a scale which he labels 'light', 'moderate', and 'serious'.[343]

On the other hand, the subsumption approach is applicable in cases of rules which naturally have deontological content. Alexy argues that there is a certain similarity between the structure of subsumption and balancing because each presents a formal rationality and both are completely formal.[344] However, the similarity ends here: whereas subsumption works according to the rules of logic, balancing works according to the rules of arithmetic,[345] with the ascription of value to each principle being translated into a mathematical value.

Shauer objects to this reasoning arguing that subsumption and balancing cannot be regarded as equivalently constraining on the adjudicator on the basis that both possess formal rationality.[346] The object of Shauer's disagreement is Alexy's claim that both subsumption and balancing 'have a formal argumentative structure that enables balancing as much as subsumption to avoid the charge of irrationality'.[347] Schauer believes that Alexy's argument that the argumentative forms of balancing and subsumption share a lot in common may give rise to encouraging the belief that the legally admissible premises of a subsumption argument are similar to the legally admissible premises of a balancing argument.[348] He maintains that this quasi-conflation

[341] Möller K, 'Balance and the Structure of Constitutional Rights', (n 215), 455.
[342] Alexy R, Constitutional Rights, Balancing, and Rationality', (n 25) 135.
[343] Ibid. 136, and also as already discussed in Chapter 1.
[344] Ibid. 448.
[345] Ibid. 448.
[346] Schauer F., 'Balancing, Subsumption, and the Constraining Role of Legal Text' (n 27) 5, accessed on 6 March 2013.
[347] Ibid. 10.
[348] Ibid.

of the two forms of arguments ignores the constrained process in which subsumption must be made when compared to the balancing approach which although constrained, is less so.[349] Subsumption is constrained by the textual language used in a given provision of law making it impossible to extend legal arguments which go beyond the given provision because they cannot be subsumed under such provision. On the other hand, under the proportionality inquiry, it is usual to take into consideration all relevant factors to the case which are legally admissible.[350] This is very different from subsumption because only the legal arguments which can be slotted under a given provision may be admissible. Accordingly, when courts apply the principle of proportionality 'the set of generally legally permissible considerations and the set of considerations theoretically available' are one and the same[351] but in subsumption this is not so because subsumption requires legal argumentation which is confined to the dictates of a particular legal provision applicable to the particular case. Schauer believes that 'Alexy has served a valuable purpose in showing that the non-formal side of law is not the irrational side of law as Habermas seems to believe. The formal side of law has its purposes as well, purposes that it typically serves with written rules and a process of reasoning by subsumption'.[352]

The theory of principles dictates that one principle will outweigh the other depending on the circumstances of the case. Alexy explains, 'principles have different weights in different cases and that the more important principle on the facts of the case takes precedence'.[353] This also explains the difference which exists between constitutional provisions which are deontological, and which dictate specifically what ought to be done, and constitutional provisions which declare protection of fundamental rights, envisaging legitimate limitations to such rights. The latter are principles requiring maximum optimisation in the particular case. Therefore, while in a conflict of two rules situation the question which arises is one of validity (or exception), in a competing of two principles situation, weighting is what determines the outcome. The latter situation does

[349] Ibid. 11.
[350] Ibid. 10.
[351] Ibid. 14.
[352] Ibid. 17.
[353] Alexy R., *A Theory of Constitutional Rights,* (n 62), 50

not involve invalidity because it could well be that it is given priority over the same conflicting principle in a different situation.

Thus, according to Alexy, in cases of two conflicting principles, the solution lies in establishing a conditional relation of precedence between the two conflicting principles on the basis of the circumstances which surround them. This means that it is the circumstances of the case which determine the conditions on the basis of which one fundamental right is given precedence over the other competing right. The conditions constitute the rules which determine which principle will take precedence over the other. And this is where balancing comes in.

It is submitted that not all fundamental rights are capable of this exercise because some rights are deontological and will never be subject to proportionality due to their absoluteness. Such rights, which include for example the inviolability of human dignity,[354] and the right not to be subjected to inhuman and degrading treatment, will always take precedence over other rights. It is argued that in cases where such absolute rights were to conflict there would be a state of illegality in the very fact of considering them as competing with one another.[355] Thus, a situation where the right to human dignity of one person is being contemplated against the right to human dignity of another would be an illegal situation. However, Alexy does not believe that there are absolute principles. He believes that 'absolute' principles are rather a mixed breed of rule, principle and certainty due to precedents.

2(d) Human Dignity

Alexy has been criticised for failing to explain the *German Passengers* judgment[356] according to his theory of principles.[357] The *German Passengers* case placed the GFCC face

[354] The inviolability of human dignity is found in the German Basic Law, Article 1, and in the Charter of Fundamental Rights of the European Union, Article 1. For a discussion of human dignity as a supreme principle of the German Constitution see Enders C, 'The Right to have Rights: The concept of human dignity', (2010) Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD), 2(1): 1-8 Jan-Jun.

[355] Can the right to life of one person be in conflict with that of another in a normal situation (i.e. excluding emergency situations) or can the right not to be tortured be in conflict with the right to life? It is submitted that the situation is an illegality in and of itself.

[356] BVerfGE 17, 306; for a discussion of the judgment in English see Lepsius O, 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act', German Law Journal, Vol. 7, No. 9, p. 761-776

[357] Möller K, 'Balance and the Structure of Constitutional Rights' (n 215), 466, and Benvindo J Z, *On the Limits of Constitutional Adjudication,* (Springer 2010), 211.

to face with deciding whether or not a provision of German law authorising the shooting down of a hijacked aircraft full of innocent passengers was to be struck down.[358] The provision was directed at preventing a greater human tragedy by eliminating the aeroplane before reaching its target, as had happened in the 11 September attacks in New York City. The GFCC was asked to determine whether public security prevailed over the life of people in the light of the German Basic Law. It decided that such a provision was unconstitutional and struck it down on the basis that it violated the right to life and the inviolability of human dignity. The sacrificing of lives to save the lives of others was declared by the GFCC to be unconstitutional, violating human dignity. The GFCC held that in such a case human dignity was being stripped from the passengers by treating them on the same footing as the aircraft. However, the GFCC also declared that the State would be acting legitimately if it shot down the aeroplane which only held the hijackers because they were acting intentionally. Article 2(2) of the German Basic Law allows a violation of the right to life if such violation observes the principle of proportionality.[359] The question which arises at this stage is as follows. In the light of the inviolability of human dignity, how is one to reconcile the two arguments made by the GFCC, i.e. that it is illegal and unconstitutional to kill innocent passengers while it is not illegal to only kill the hijackers?

Enders explains that the GFCC '… characterises human dignity as the supreme principle of the constitution and every now and then also as a fundamental right.'[360] He explains that as a supreme principle, the inviolability of human dignity is not in itself a legal guarantee but rather a constitutional *a priori* quality that belongs to the human person and that 'cannot be subject to legal regulation'.[361] This is because the inviolability of human dignity embodies the original human right to have rights. Enders emphasises that 'No overall and absolute "super-basic-right" can be derived from Article 1 of the German Basic Law. Normally, human dignity is sufficiently protected by the special fundamental rights'.[362] The function of the inviolability of human dignity serves as the highest form of 'barrier' or threshold beyond which the legislator or the executive cannot normally go.

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[358] Article 14(3) of the Air Transport Security Act, which entered into effect on 15 June 2005.
[359] Article 2(2) of the German Basic Law states: Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law; translated in English by Professor Christian Tomuschat and Professor David P. Currie, at <http://www.gesetze-im-internet.de/englisch_gg/> accessed on 17 March 2015.
[360] Enders C., 'The Right to have Rights: The concept of human dignity', (n. 354) 3.
[361] Ibid., 3.
[362] Ibid., 3.

Under German constitutional law the principle of human dignity seems to embrace all core human rights, ranging from the right to life and physical integrity (personal development) to the right to the inviolability of the home, to the right to a legal remedy for infringement of privacy, to the right of the unborn child.[363] This spectrum of rights incorporated under the inviolability of human dignity may be restricted or limited. For example, in strict circumstances life can be legitimately taken away (as in the case of war)[364] and in those circumstances human dignity is set aside for a greater good (self-defence/defence of the country). The same argument applies to the abortion of the unborn child in strict circumstances envisaged by the law. It could therefore be argued that when the inviolability of human dignity is embodied in the protection of life, it may be subject to balancing, taking into consideration the circumstances of the case. If, on the other hand, the inviolability of human dignity embodies the right to the inviolability of the home,[365] it too will be subject to balancing, in relation to the aim sought relative to public security.

Alexy explains that '…. the principle of human dignity is not an absolute principle. The impression of absoluteness arises from the fact that there are two human dignity norms, a human dignity rule and a human dignity principle, along with the fact that there is a whole host of conditions under which we can say with a high degree of certainty that the human dignity principle takes precedence'.[366] He refers to the Life Imprisonment judgment[367] where a German District Court made a reference to the GFCC on the basis that the provisions on life imprisonment for homicide were incompatible with the German Basic Law because it destroys human beings thus violating human dignity. The GFCC applied a balancing exercise to this case, reviewing on the one hand the alleged violation of human dignity when sentencing a criminal to life imprisonment, and the public security threat which the prisoner presented, and arrived at the conclusion that human dignity would not be infringed in such circumstances.

[363] Ibid., 5.
[364] Limitations to the right to life are envisaged both by the European Convention of Fundamental Rights (Article 2) and the German Basic Law which envisages interference pursuant to a law.
[365] Article 13 of the German Basic Law.
[366] Alexy R., *A Theory of Constitutional Rights,* (n 62), 64.
[367] BVerfGE 45, 187; a translation of this judgment may be found at <http://www.hrcr.org/safrica/dignity/45bverfge187.html> accessed 16 March 2015.

Alexy rejects the proposition that the difference between certain fundamental rights and others is only a question of degree asserting that it is also a question of quality.[368] It is submitted that if it were only a question of degree then even rules having a deontological character would be capable of optimization, but as has been demonstrated by the theory of principles, this cannot be said to be true. An example in this case is the prohibition of torture and degrading treatment. In this case, the right exists by virtue of the deontological nature of the provision since it is a command prohibiting the subjecting of the human person to torture or degrading treatment.[369] In such a situation, proportionality and balancing do not apply because the prohibition of torture is a rule rather than a principle and as such cannot be optimized.

3. The Principle of Proportionality as a Constitutional Adjudicative Tool

In his *Theory of Constitutional Rights*, Alexy claims that his aim is to develop a legal theory of the constitutional rights contained in the German Basic Law but Möller points out that this theory 'presumably wants to make more general claims'.[370] This seems to be confirmed, to a certain extent, by Rivers who translated Alexy's *Theory of Constitutional Rights* as well as other academic writing on Alexy's theory.[371] In the Translator's Introduction, Rivers claims that 'from the Perspective of the *Theorie der Grundrechte* (Theory of Fundamental Rights) many of the distinguishing features of different constitutions are contingent, and transferability between systems is at least plausible'.[372] Rivers continues that transferability and applicability of Alexy's theory depends 'on a detailed conceptual reconstruction of the constitution along these lines'.[373] This is in fact what Rivers does in relation to the British Constitution.[374]

Alexy's theoretical distinction between the nature of rules and principles also seems to suggest that his theory is not exclusively applicable to the German Basic Law but, being of a highly theoretical nature, it seems that such distinction could apply in all cases concerning constitutional rules and constitutional principles, irrespective from which

[368] Alexy R., 'On the Structure of Legal Principles', (n 203), 295.
[369] Alexy R., *A Theory of Constitutional Rights,* (n 62) at p. 45 states that '[b]oth (rules and principles) can be expressed using the basic deontic expressions of command, permission, and prohibition'.
[370] Möller K, 'Balance and the Structure of Constitutional Rights' (n 215), 457.
[371] See Kumm M, 'Political Liberalism and the Structure of Rights' (n 34), 136.
[372] Alexy R., *A theory of Constitutional Rights,* (n 62), xviii.
[373] Ibid., xix.
[374] Ibid., xix *et seq.*

constitutional document they emanate. As Möller suggests, 'his theory must have the potential to be applied fruitfully to different substantive theories of constitutional rights'.[375]

Alexy's Principles Theory and the corresponding application of the principle of proportionality may serve as a model for human rights adjudication. The law of balancing as expounded by Alexy rests on one fundamental presumption: that the attainment of a 'balanced situation' between two constitutional principles of equal value is commended and required by justice. Therefore, the attainment of a legally balanced situation is a form of rationalising decision-making which stems from the need to find an objective standard or neutral means which may be used as a measuring tape in adjudication.

It is submitted that the principle of proportionality is a neutral mode of adjudication because it looks for balance: the degree of satisfaction of one principle must be equal to the degree of dissatisfaction or limitation of the competing principle. This produces a state of equilibrium. It is submitted that neutrality is also present in the method of approach because it necessarily requires an equal degree of adjudicative application to competing principles. The principle of proportionality does exactly this by means of its three stages. Suitability is a neutral principle and determines whether the means adopted to achieve the aim are legal and legitimate. Therefore, even at this first stage there is an objective comparison between the potential of realisation of one principle and the same potential, in terms of equal measures, of non-realisation of the competing principle. This exercise must not be confused with balancing as at this stage it is the potential of realisation which is being determined. The second stage may also be labelled as a neutral principle because the evaluation of the available means and the least burdensome may be determined objectively on the basis of which means would procure the least burden but would achieve the aim in view. The third stage which is the balancing exercise referred to by Alexy requires the attribution of weights by means of the triadic scale which ranges from 'light' to 'serious serious'. According to Alexy, '[p]rinciples have abstract and concrete weights'.[376] The abstract weight of a right is 'the weight that the

[375] Möller K., 'Balance and the Structure of Constitutional Rights' (n 215), 458.
[376] Alexy R., 'Comments and Responses' in *Institutionalized Reason: The Jurisprudence of Robert Alexy,* Klatt M., (ed), OUP (2012), p. 328.

principle has relative to other principles, but independently of the circumstances of any concrete case'.[377] The concrete weight of a right is contingent on the degree of interference with *that* right and plays a central role in the principle of proportionality and the balancing process.[378] The assignment of abstract weights in a constitution or a rights document usually reflect the public morality of that particular society.[379] A constitution may assign different abstract weights to different rights, such as assigning a higher abstract weight to the right to life than to the right to property, or it may assign higher abstract weights to certain liberties which are considered more fundamental than others.[380] According to Klatt & Meister, the assignment of higher abstract weights to some rights than to others acts as a soft trump which explains why certain rights may be perceived as having a higher value than others.[381] In the balancing stage of proportionality, the abstract weight of the competing rights and interests are taken into account. However, this does not mean that rights and interests are assigned the same abstract weight because they are competing against each other.[382] In the balancing process, rights may be assigned a higher abstract weight and can thus be given 'priority' over other competing individual rights or interests.[383] This means that a right being assigned a higher abstract weight than its competitor would initially enjoy 'a sort of winning margin'.[384] However, as Alexy explains, abstract weights are not the decisive weights because '[e]very principle with an authoritatively enacted, higher, abstract weight might be outweighed in a concrete case owing to the greater concrete weight of a colliding principle with a lower abstract weight.[385] Abstract weights serve to explain, to a certain extent, the concept of absolute rights. As already discussed previously, Alexy explains that there is a rule of human dignity and a principle of human dignity and that the absoluteness refers to the rule rather than the principle.[386] Klatt & Meister explain that the absoluteness of a right is only apparent[387] and that human dignity, as a principle and therefore an optimization requirement subject to balancing, expresses 'an absolute

[377] Klatt & Meister, *The Constitutional Structure of Proportionality*, (n 90), 27.
[378] Alexy R., 'Comments and Responses', (n 376), 329.
[379] Klatt & Meister, *The Constitutional Structure of Proportionality*, (n 90), 28
[380] Ibid.
[381] Ibid., 35.
[382] Ibid., 26
[383] Ibid.
[384] Ibid.
[385] Alexy R., 'Comments and Responses', (n 376), 329.
[386] Alexy R, *A Theory of Constitutional Rights,* (n 62), 62-64.
[387] Klatt & Meister, *The Constitutional Structure of Proportionality*, (n 90), 31.

right which is reconstructed as a rule'.[388] The apparent absoluteness of human dignity rests on the fact that in many cases one can say with a high degree of certainty that human dignity takes precedence over competing interests.[389] In this case human dignity is being assigned a much higher abstract weight than other rights.[390] In this way, the balancing process is thus very able to reflect the predominant status of a particular right.[391]

Abstract and concrete weights are incorporated into Alexy's Law of Balancing by means of the weight formula which, as discussed previously, involves the triadic scale of weighing from light to serious. The abstract weight of both colliding principles are included in the weighing process[392] and assigned an abstract weight. This means that higher abstract weights are also included. It also means that when the abstract weight of the competing principles is the same, 'they will cancel each other out'.[393] When the abstract weights cancel each other out, the outcome of the weighing process in the Law of Balancing will depend on the remaining values, i.e. the intensities of interference and epistemic reliabilities.[394]

[388] Ibid.
[389] Ibid.
[390] Ibid., 32.
[391] Ibid., 38
[392] Ibid., 32
[393] Ibid., 39
[394] Ibid., 'Epistemic reliabilities' were a later addition by Alexy to the weight formula. Alexy explains that epistemic reliabilities refer to the empirical and normative assumptions primarily concerning how intensive the interference with a right is and how intensive the interference with the colliding right would be if the interference with the first right were omitted. Reliability refers to the knowledge of things. Thus when normative and empirical reliability are in question, they must be integrated in the weight formula. Alexy introduces another scale ranging from 'reliable or certain', to 'plausible' and 'not evidently false'. This triadic scale can be extended to double-triadic scales if this is required. See Alexy R., *'Formal principles: Some replies to critics',* International Journal of Constitutional Law (2014), Vol. 12 No. 3, 511–524.

Weights ---------- Attached to Constitutional Principles (Abstract)

Principle A	v.	Principle B
(freedom of expression)		(right to privacy)

The weight(abstract) that the principle has relative to other principles, but independently of the circumstances of any concrete case.

AND

Weights ---------- Attached to Aims and Means (Interference) (Concrete)

Aim of limitation of principle	v.	Means used to exercise limitation

The weight (concrete) of a right, contingent on the degree of interference with that right.

Figure 1

The attribution of weight in proportionality *stricto sensu* depends, to a certain extent, on the personal evaluation of the adjudicator. However, this does not mean that the adjudicator's personal is tainted by bias because even in his or her adjudicating exercise personal opinions must be set aside and replaced by values which society upholds together with the application of the law. Moral argumentation is inevitable. However, it is submitted that moral argumentation is applied even in modes of adjudication not applying the principle of proportionality. The principle of proportionality may be said to be a neutral mode of adjudication because it essentially combines factual and legal reasoning with moral argumentation. Whereas suitability and necessity depend on factual appreciation, proportionality depends on what Alexy calls 'judicial subjectivism' in the light of what is legally permissible.[395] Although constitutional principles are balancing norms, it does not mean that they are devoid of their normative power simply because a moral discourse is going on - a discourse of what constitutes right from wrong is in reality a normative exercise involving the precedence of a protected right over another in specifically defined circumstances. Thus, the principle of proportionality may

[395] Alexy R., *A Theory of Constitutional Rights,* (n 62), 100.

claim to be an effective means of adjudication because it is a structured and normative adjudicative approach with an axiological substructure.

3(a) Abstract Weights in this Study

The abstract weights of colliding human rights are often equal and, then, can be disregarded in balancing.[396] Sometimes, however, the abstract weights of the colliding principles are not equal.[397] In this study, six fundamental rights feature in the analysis of the judgments of the three courts: (i) The right to private and family life (including data protection); (ii) the right to freedom of expression; (iii) the right to liberty and security; (iv) the right to property; (v) access to documents; (vi) freedom to conduct a business (including the right to property). Some of these rights compete against each other while others compete against the public interest or good. These six fundamental rights may all be said to have a *prima facie* similar abstract weight. However, as Alexy explains, the abstract weight of a principle is not the decisive weight.[398] The concrete weight of the competing principles consisting of the intensity of the interference within a specific set of circumstances is the decisive factor.[399] Thus, as will be seen in my analysis, for example, in one particular judgment, although the Maltese Constitutional Court assigns to the freedom of expression of journalists writing within a political context, a higher abstract weight than it usually holds in the cases of private persons, the competing principle still tilts the balance due to a greater concrete weight assigned to it.[400]

Conclusion

Alexy's distinction between rules and principles rests on the author's conviction that this theory best explains why a conflict between two constitutional principles is best resolved by the application of the principle of proportionality. This conviction lies essentially in the realisation that the nature of fundamental rights as principles is different from the nature of constitutional rules as norms. Both principles and rules are norms. In an adjudicative setting, when two fundamental rights or principles conflict, one of them will

[396] Alexy R., 'Comments and Responses', (n 376), 513; Klatt & Meister, *The Constitutional Structure of Proportionality*, (n 90), 27.
[397] Klatt & Meister, *The Constitutional Structure of Proportionality*, (n 90), 27.
[398] Alexy R., 'Comments and Responses' (n 376), 329.
[399] Ibid.
[400] See Chapter 3, Section 6(c).

be given greater weight than the other, e.g. where the right to freedom of expression is given greater weight than the right to privacy. In this sense both rights or principles are recognised as valid. Both deserve to be upheld *albeit* to varying degrees. In order to achieve a balanced situation reflecting fairness, the limitation of one right is required to be equivalent to the enjoyment of the other. In this sense, both rights are optimised to the greatest extent possible within the given legal and factual situation. As has been seen, Alexy refers to this adjudicative method as the 'Law of Balancing'. Balancing contrasts with the adjudicative method of subsumption where a prescribed rule sets the parameters within which decision-making is to take place. The nature of constitutional rules is prescriptive and does not allow room for balancing between rights. This is because a constitutional rule, as distinct from a constitutional principle, requires adjudication by subsumption. Subsumption is a rigid process by which a rule prescribes *a priori* the action to be followed in adjudication, disallowing the application of upholding two rights contemporaneously. A constitutional rule prescribes the legal outcome in a particular situation. Constitutional rules prescribe a priori validity or invalidity which by their very nature disallow any comparative weighing process. The author believes that by the very nature of fundamental rights as principles, as contrasted with the nature of constitutional rules, and because constitutional principles admit interference or restriction, adjudication through subsumption would be an inadequate method of adjudication. This is because in applying subsumption to a case of competing constitutional principles, the process of identifying a strict (deontological) rule to apply would in itself constitute an artificial exercise. The author believes that in cases of conflicting constitutional principles, the adjudicative method of balancing is the most efficient.

The importance of having a legal theory which distinguishes between rules and principles is that it provides the basis for a rational construction of legal decisions which do not simply require a deontological determination, that is, determination of what the law commands, prohibits or allows, but rather, legal decisions which require axiological considerations, that is, considerations involving values and value judgments. The Principles Theory serves as justification for the use of the proportionality principle.

The principle of proportionality has been revolutionary in the way constitutional rights adjudication may be approached because it allows the adjudicator flexibility, discretion and the application of moral reasoning when deliberating.[401] It is a means of self-empowerment of the adjudicator,[402] because in applying the principle of proportionality, the adjudicator is less constrained in the choice of examination of elements surrounding the case than he is when engaged in ordinary judicial review. Although the principle of proportionality has a formal structure with three stages each requiring their own particular considerations, it is flexible enough to allow the adjudicator to consider alternative means which could have been adopted in the pursuance of the aim in view. This is contrasted with the exercise of subsumption which does not allow any adjudicative flexibility except that which is envisaged by the particular deontological provision. Schauer describes the adjudicative process which subsumption involves as an inquiry limited to the provision of the law which envisages a particular rule (command, prohibition, permission).[403] This is a different process from that involving the application of proportionality because it is a constrained process, limited to the legal text. In this sense, proportionality analysis is more flexible and less constraining than subsumption. This flexibility is directly linked to the nature of principles which are themselves 'flexible' requiring the application of 'optimisation' rather than subsumption.

Alexy's theory of principles attempts to describe the nature of fundamental rights. He believes they are mainly principles which he describes as 'commands to be optimised' due to their flexible yet fundamental nature. This is directly linked to the notion that fundamental rights are generally not absolute rights and may be limited, in certain defined circumstances, in favour of other fundamental rights, interest or the public good.

In the next chapters, the focus of the discussion will turn towards the application of the proportionality principle to fundamental rights cases by three separate courts selected for this study. The analysis of the selected judgments will include comparative reflections to Alexy's understanding of the function of the proportionality principle as the preferred tool of adjudication in fundamental rights cases.

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[401] This is not to say that other forms of adjudication preclude the use of moral reasoning. Whether or not this is so falls outside the aim of this study.
[402] Pirker B, *Proportionality Analysis and Models of Judicial Review,* (n 177), 15.
[403] Schauer F, ''Balancing, Subsumption, and the Constraining Role of Legal Text' (n 27), accessed on 25 January 2015.

Chapter 3

The Principle of Proportionality in Maltese Fundamental Rights Judgments.

Introduction

This chapter focuses on the interpretation and application of the principle of proportionality by the Maltese courts in leading judgments.[404] The principle of proportionality has found its way into Maltese human rights doctrine mainly from the influence of the doctrine of the European Court of Human Rights. Before the European Convention on Human Rights and Fundamental Freedoms was enacted into domestic law, the Maltese Courts had already been applying the principle of proportionality based on an understanding of 'fair balance' as applied by the ECtHR. Following the promulgation of the European Convention Act (1987) the principle of proportionality became an important legal tool of interpretation applied by the Maltese courts. However, traditionally, Maltese Human Rights law dealt with conflicts of human rights by application of the English principle of reasonableness. This may be explained by the fact that Maltese Constitutional law sprung from English Public law.[405]

The chapter introduces the reader to the Maltese Constitutional system, giving a brief background to the Maltese Constitution, human rights protection, the function of the Maltese Constitutional court, precedent in Maltese law and the declaration of unconstitutionality and nullity by the Maltese courts. This paves the way to the main study which focuses on the approach to proportionality. The Maltese term 'proporzjonalita' is used fairly often by the Maltese courts. However, an in-depth definition of this term never features in Maltese judgments. The term is used to denote 'balance' or 'fair balance'. It is submitted that this is because of the influence of ECtHR doctrine.

This chapter asks whether the Maltese courts apply a single conception or understanding of the principle of proportionality, the manner in which they formulate this principle to

[404] The study focuses on judgments pre-1987, before the European Convention Act (1987) was adopted and on more recent judgments.

[405] *Cassar Desain v Forbes*, Court of Appeal (1935) (n 48) and *Lowell v. Caruana*, Civil Court (1972) (n 48): two landmark Maltese judgments which laid to rest any doubts that Maltese Public law and Maltese Administrative law had any continental derivative rather than English.

the examined cases and what the application of the principle of proportionality specifically serves for in Maltese constitutional cases.

This study identifies four approaches to balancing by the Maltese courts: (i) the excessive burden approach, (ii) the comprehensive approach, (iii) the tilted balance approach, and (iv) the legal logic approach. The term 'approach' is specifically used to denote how the Court decides to deal with the problem. In this study it will be argued that the Court has different points of departure: in the excessive burden approach the Court is more focused on the suffering of the victim; in the comprehensive approach the Court takes full view of the case in order to achieve the common good; in the tilted balance approach the Court appears to be biased *a priori*; and in the legal logic approach, the Court applies proportionality as a tool of logic. Such analysis will assist in determining the extent to which the Maltese courts apply the full proportionality principle as expounded by Alexy. The difference in understanding and the variation in the application of proportionality by the Maltese courts, when compared to Alexy's interpretation, enables further understanding of the flexibility of this principle.

It will be concluded that the Maltese Constitutional Court tends to apply an incomplete test by equating the whole test to a balancing exercise which is very often reduced to a cost-benefit analysis. This is primarily because the Maltese court looks at proportionality as an effects test: the effects of the alleged abuse on individual human rights.

1. The Maltese Constitutional Court

The Judicial system in Malta is composed of the Superior Courts, presided over by judges,[406] and the Inferior Courts, presided over by Magistrates.[407] The Superior Courts comprise the Court of First Instance, the Court of Appeal and the Constitutional Court whereas the Inferior Courts comprise the Court of Magistrates. The system of appeals is based on the hierarchical order of the Courts so that an appeal from judgments delivered by the Court of Magistrates (civil jurisdiction)[408] lies to the Civil Court First Hall, whereas

[406] Article 95 of the Constitution of Malta
[407] Article 99 of the Constitution of Malta
[408] The Court of Magistrates is divided into two separate jurisdictions: civil and criminal jurisdiction. An appeal from the Court of Magistrates in its criminal jurisdiction would lie with the Court of Criminal Appeal presided by one judge, without a jury, as envisaged by Article 418 and Article 497 of the Criminal Code, Chapter 9 of the Laws of Malta.

an appeal from the Civil Court First Hall[409] lies with the Court of Appeal (in its civil jurisdiction) or the Constitutional Court (if the Civil Court was acting in its constitutional jurisdiction). The Maltese appeals system is a one tier system whereby only one appeal is available from a judgment delivered by an inferior court or tribunal.

The Maltese Constitutional Court is established by Article 95 of the Constitution. It is the highest court in the judicial hierarchy and acts as a Constitutional Court with original jurisdiction, a Constitutional Court with an appeals jurisdiction as well as a Civil Court of Appeal.[410] The Maltese Constitutional Court has wide powers which range from the determination of questions relating to *inter alia* the validity of the election of Members of Parliament, questions on the validity of laws and the constitutional compatibility of laws, as well as appeals concerning fundamental human rights violations. The Maltese Constitutional Court is presided over by the Chief Justice and two senior judges.[411]

In the fundamental human rights field, the Constitutional Court acts as an appeals court receiving appeals from judgments delivered by the Civil Court First Hall in its constitutional jurisdiction. The bulk of the workload of the Constitutional Court is prevalently human rights appeals cases.[412]

Lodging a constitutional application alleging a violation of a fundamental human right is limited by the rule that if there are ordinary remedies, as opposed to a constitutional remedy, then the ordinary remedies should be exhausted first.[413] An ordinary remedy may be an action for judicial review of the act or decision taken and which is being alleged to have violated the applicant's right. If the applicant has no means by which he can enforce his right, or receive a remedy, or has exhausted his ordinary remedies then he may lodge an application before the Civil Court First Hall in its constitutional jurisdiction. More often than not, the preliminary plea of non-exhaustion of ordinary remedies is raised by the other party and the party alleging the human rights violation will have to

Alternatively, an appeal from the Criminal Court also lies with the Court of Criminal Appeal, presided by three judges as envisaged by Article 497 of the Criminal Code, Chapter 9 of the Laws of Malta.

[409] Also referred to as the Court of First Instance.

[410] Article 95 of the Constitution of Malta.

[411] Judges and Magistrates in Malta are appointed by the President acting on the advice of the Prime Minister as stated in Article 96(1) of the Constitution of Malta.

[412] The Judiciary of Malta website, http://www.judiciarymalta.gov.mt/constitutional-court, accessed on 9 June 2020.

[413] *Galea v. Kummissarju tal-Pulizija*, Civil Court (Constitutional Jurisdiction), 21/01/2007

prove that he has exhausted the ordinary remedies available before he can put his case forward before the Court. It is entirely within the discretion of the Court to decide whether it should hear the case on the basis of whether or not there factually existed an alternative ordinary remedy.[414]

2. Background to Maltese Constitutional Law

The Maltese Constitution came into effect when Malta became independent in 1964 after almost two hundred years of British rule. It is usually referred to as the 'Independence Constitution' to distinguish it from previous constitutions granted under British rule such as the 1959 Malta (Constitution) Order in Council and the 1961 Malta (Constitution) Order in Council known as the Blood Constitution.

Fundamental Human Rights provisions were introduced in the Maltese Constitution of 1959, the Malta (Constitution) Order in Council (1959) and contained two provisions dealing with religious tolerance and compulsory acquisition of property.[415] The 1961 Blood Constitution[416] added a further ten provisions on the protection of fundamental human rights. The provisions were modelled on the Nigerian Constitution, itself modelled on the European Convention for the Protection of Human Rights and Fundamental Freedoms.[417] These provisions were carried forward into the 1964 Independence Constitution as well as the 1974 Republican Constitution.[418]

The basis of Maltese Constitutional Law lies primarily in the supremacy of the Maltese written Constitution over the Maltese Parliament.[419] Constitutional supremacy is expressly stated in Article 6 of the Maltese Constitution:

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[414] *Vella I v. AG et*, Civil Court (Constitutional Jurisdiction), 23/07/05; *Briffa v. AG, Constitutional Court.*, 20/03/2014 where the Court decided that it would not consider the appellant's appeal because he had not exhausted the ordinary remedies available to him.

[415] Aquilina K., 'The Parliament of Malta versus the Constitution of Malta: parliament's law-making function under section 65(1) of the Constitution', Commonwealth Law Bulletin, (2012) Vol. 38, No. 2, June, , 228; However, it must be pointed out that the first recorded Maltese Human Rights document dates back to 1802 when the Maltese and the Gozitans drew up the 'Declaration of Rights of the Inhabitants of the Islands of Malta and Gozo' which was based on the rule of law. For an in-depth discussion of the development of Fundamental Human Rights in Malta see Aquilina K, 'The Legislative Development of Human Rights and Fundamental Freedoms in Malta: A Chronological Appraisal,' (n 47), 235.

[416] Malta (Constitution) Order in Council (1961).

[417] Aquilina K., 'The Parliament of Malta versus the Constitution of Malta (n 415), 228.

[418] Ibid. 231

[419] Also referred to as House of Representatives.

> *…if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void*[420]

The powers of the Maltese Parliament are established and limited by the Maltese Constitution[421] which being *suprema lex*[422] can never be overruled by any Act of Parliament.[423]

Maltese Constitutional Law protects fundamental human rights in Articles 33-45 of the Maltese Constitution, as well as through the European Convention Act (1987),[424] which incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms and allows individual citizens to petition the European Court of Human Rights in Strasbourg. The supremacy of the constitution in the Maltese legal system means that Parliament is subservient to it.[425] Various articles of the constitution are entrenched provisions which require a two-thirds majority to be altered.[426] The bill of rights incorporated into the Maltese Constitution, Articles 33-45, is also entrenched. Alteration of any one of the constitutional provisions protecting fundamental rights requires a two-thirds majority of the Maltese Parliament.[427]

The European Convention Act (1987) is an Act of Parliament which ranks lower than the Constitution. However, the European Convention Act (1987) cannot be regarded as 'ordinary law of the land' because the Maltese Parliament incorporated into the Act, a supremacy clause, Article 3(2) which states that:

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[420] Also referred to as the *suprema lex* principle.
[421] Cremona JJ., *Selected Papers,* (PEG Ltd 2002), 131.
[422] Ibid., 131, but see Aquilina K, 'The Parliament of Malta versus the Constitution of Malta: parliament's law-making function under section 65(1) of the Constitution', (n 415), 217–249, wherein it is argued that there is a conflict on paper between the constitutional supremacy clause Article 6 of the Constitution and Article 3 of the European Union Act which proclaims EU law to be supreme. However, it is argued that in practice no conflict should arise since the Maltese Parliament must primarily adhere to the EU succession Treaty when adopting domestic law.
[423] Changes to the Maltese Constitution may be affected by the Maltese Parliament either through simple majority and in cases of entrenched provisions, through a two-thirds majority.
[424] Promulgated by means of Act XIV of 1987, Chapter 318 of the Laws of Malta.
[425] Article 65 of the Constitution of Malta authorises the Maltese Parliament 'to make laws for the peace, order and good government of Malta' 'subject to the provisions of this Constitution'.
[426] Article 66 of the Constitution of Malta lists the articles of the constitution which require a two-thirds majority to be amended.
[427] Article 66(2)(b) of the Constitution of Malta.

> *'[W]here any ordinary law is inconsistent with the Human Rights and Fundamental Freedoms, the said Human Rights and Fundamental Freedoms shall prevail, and such ordinary law, shall, to the extent of the inconsistency, be void'.*

Article 2 of the same Act defines ordinary law as 'any instrument having the force of law and any unwritten rule of law, other than the Constitution of Malta'. Thus, it is clear that while the Constitution unquestionably ranks first, the European Convention Act (1987) ranks in a second category and all other acts of Parliament, usually referred to as ordinary primary laws, rank in a third category.[428] By making the European Convention Act (1987) rank higher than ordinary law, the Maltese legal system is granting the highest form of protection it can constitutionally grant to fundamental rights contained in an Act of Parliament. This is also clearly seen in a landmark judgment of the Maltese Constitutional Court which examined the issue of a provision of an ordinary law which was not contrary to the Constitution but was not in conformity with the European Convention Act (1987).[429] In this case, the applicant was accused of wilful homicide and at that time, the Maltese Criminal Code did not grant discretion to the Magistrate to consider whether or not to grant bail in cases of willful homicide entailing life sentences. The applicant relied on Article 5 (Right to Liberty and Security) of the European Convention Act (1987) challenging the provision of the Criminal Code. He argued that the fact that a Magistrate could not grant bail meant that no judicial considerations could be made as to whether or not his continuous detention was required. The Court decided that the provision of the Criminal Code violated Article 5 of the European Convention Act (1987). This judgment introduced a parallel form of protection of fundamental rights which began slowly emerging in the Maltese legal system: the protection emanating from the Constitution and that emanating from the European Convention Act (1987).[430] This parallel protection has now evolved to an established practice by lawyers who will usually invoke both the articles of the Maltese Constitution and those of the European Convention Act (1987) when lodging claims of fundamental rights violations. Thus, the

[428] Aquilina K., 'The Legislative Development of Human Rights and Fundamental Freedoms in Malta: A Chronological Appraisal', (n 47), p. 4.
[429] *Pullicino vs Commander Armed Forces et* Constitutional Court, 12 April 1989.
[430] Borg T., 'The Constitution and the European Convention on Human Rights – Conflicts, Similarities and Contrasts', GHSL Online Law Journal, at http://lawjournal.ghsl.org/viewer/321/download.pdf, accessed 9 January 2020, p. 3.

rights protected by the European Convention Act (1987) are constitutionally protected rights[431]

With the enactment of the European Convention, the safeguard of fundamental rights was extended and strengthened.[432] This strengthening consists of three elements: (i) the introduction of new rights; (ii) more expansive definitions of already recognised rights; and (iii) stronger protection against interference with rights because of the application of the principle of proportionality. The provisions on fundamental rights in the Maltese Constitution are similar to those contained in the European Convention Act (1987) but are interpreted more restrictively than those contained in the Act.[433] Thus, for example, whereas Article 37 of the Maltese Constitution limits its protection to the right to property to a right to claim compensation for expropriated private property, Article 1 of Protocol 1 of the European Convention Act (1987) protects the right to property more widely and is interpreted as including a right to contest the validity of an expropriation order. Another example of extended safeguard is Article 14 (non-discrimination) of the European Convention Act (1987) which contains a broader list of prohibited grounds for discrimination than Article 45 of the Maltese Constitution. The European Convention Act (1987) also contributed to the recognition of the right to marry as a fundamental right in Malta. The right to marry is not a protected fundamental right in the Maltese Constitution and became recognised as a fundamental right by virtue of a landmark judgment applying Article 12 of the European Convention Act (1987).[434] Thus it is clear that the Maltese Constitution and the European Convention Act (1987) offer a double-tiered system of protection of fundamental rights.

When an application alleging a human rights violation is lodged before the Civil Court First Hall in its constitutional jurisdiction, it is customary for the applicant to invoke the protection of both the Constitution and the European Convention Act (1987). It is customary for the Court to base its approach on the European Convention Act (1987) and the case law of the European Court of Human Rights. In some cases, however, the Court

[431] Science and Technique of Democracy: Constitutional Courts and European Integration, Collection 36, Council of Europe Publishing (2005), p. 134
[432] Said Pullicino J., 'The Effect of the EHCR on the Legal and Political Systems of Member States – Malta', (n 54), 8.
[433] Ibid. and Borg. T., 'The Constitution and the European Convention on Human Rights', (n 430), accessed 9 January 2020, p. 3
[434] *Gilford v. Hon. Prim Ministru et al*, Civil Court (Constitutional Jurisdiction) 22nd April 1997.

has adopted a different process wherein it first considers the claims under the Maltese Constitution and then under the European Convention Act (1987).[435]

Any allegation of a violation of a fundamental human right, whether envisaged by the Constitution or the European Convention Act (1987), or both, will be admissible before and decided by the Civil Court First Hall in its constitutional jurisdiction, with an appeal available to the Constitutional Court which is the highest Maltese Court.[436] A constitutional reference to the Civil Court First Hall is also available to any inferior court such as the Court of Magistrates, when a question of fundamental human rights arises before it. The Civil Court First Hall will decide the human rights issue and the case is returned to the inferior court for the full decision on the merits.[437]

An important observation which can be made is the use of the terms 'reasonable' or 'reasonably'[438] in the sub-articles on limitations to fundamental rights in the Maltese Constitution. [439] It may be recalled that in the Introduction I discussed how Maltese Constitutional law and Public law are rooted in English law and that the English doctrine of reasonableness was borrowed as a means of adjudication in fundamental rights. As will be discussed in Section 5 of this chapter, 'reasonableness' was the main approach to constitutional rights adjudication before the European Convention Act (1987) was introduced in Maltese domestic law.

3. Precedent in Maltese law

Maltese law in general does not follow the doctrine of precedent or *stare decisis*.[440] The Constitutional Court has held that the Maltese juridical system does not embrace the doctrine of precedent but the Maltese Courts have always sought to promote legal

[435] *Vella v, AG et*, Constitutional Court, 25/11/11.
[436] Article 46(1), (2) and (4) of the Constitution of Malta and Article 3(4) and Article 4 of the European Convention Act, Chapter 318 of the Laws of Malta.
[437] Article 46(3) of the Constitution of Malta.
[438] Article 33(2) – the right to life and the use of force; Article 34(1)(i) – detention from arbitrary arrenst and the suspicion that the reasonable suspicion that the person is of unsound mind; Article 34(1)(f) – detention from arbitrary arrest and the reasonable suspicion of the commission of a crime; Article 34(5) detention from arbitrary arrest and reasonably justifiable reasons of public emergency; Article 35 – Protection from forced labour and labour reasonably necessary in the interests of hygiene; Article 37 - Protection from deprivation of property without compensation and failure to tend agricultural land without a reasonable excuse; Article 38(2) - Protection for privacy of home or other property and what is reasonably justifiable in a democratic society; Article 38(2)(a) - Protection for privacy of home or other property and what is reasonably required in the interests of defence.
[439] Borg T., 'The Constitution and the European Convention on Human Rights', (n 430), accessed 9 January 2020, p. 4.
[440] *Bonnici S v. AG*, Constitutional Court, 28/01/2013

certainty by following the teachings of preceding judgments, unless serious reasons arose warranting a change in legal thought.[441] Judgments delivered by the higher courts, including the Constitutional Court, do not have binding force over the inferior courts, although they do carry weight and are more often than not are followed on the basis of their persuasive force.[442] The Maltese Constitution does not contain any provision obliging other Maltese courts, including the Constitutional Court itself, to apply previous decisions beyond the merits of the application considered by it. The judgment of the Constitutional Court is binding on the lower court only in so far as it relates to that particular case. The ordinary court is free to decide a fresh case with similar merits differently if it so deems fit.

4. Declaration of Unconstitutionality by the Maltese Constitutional Court

Article 116 of the Maltese Constitution envisages an action for invalidity of laws: 'A right of action for a declaration that any law is invalid on any grounds other than inconsistency with the provisions of articles 33 to 45 of this Constitution shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action'. Juridical interest need not be demonstrated by the person bringing an action for invalidity unless the action concerns an alleged violation of fundamental human rights. In such a case, the party alleging the violation must show that he has juridical interest in lodging the application.[443]

In cases where the Constitutional Court declares a provision of the law invalid or unconstitutional on the basis that it violates fundamental human rights, the effect of such a declaration is not an *erga omnes* effect but the declared invalid provision of the law is such only in relation to the case and the parties involved in the case, that is, *inter partes*.[444]

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[441] Ibid. *Bonnici:* Il-Qorti tosserva li fis-sistema legali taghna ma tezistix id-duttrina tal-precedent li jorbot il-qrati, u ghalhekk ilgurisprudenza taghna tizviluppa matul iz-zminijiet u skont ic-cirkostanzi, ghalkemm il-qrati taghna dejjem fittxew li jippromwovu c-certezza tad-dritt billi, safejn ma jkunx hemm ragunijiet serji li jimmilitaw favur bidla fil-hsieb, isegwu l-insenjament ta' sentenzi precedenti. Dan huwa salutari, u zgur ma jsostnix l-argument tar-rikorrent li, interpretazzjonijiet differenti ta' artikolu tal-ligi minn qrati differenti twassal ghall-incertezza legali li necessarjament tilledi d-dritt ta' smigh xieraq. *Translation: The Court notes that in our legal system the doctrine of precedent which binds the Courts, does not exist. Our jurisprudence has developed during the times and according to the circumstances. Our courts have sought to promote legal certainty by following previous doctrine unless serious reasons not to do so arose. This is preferable and does not support the applicant's argument that different interpretation of a legislative measure, delivered by different chambers of the Court, leads to legal uncertainty violating the right to a fair hearing.*

[442] Questionnaire: '*The Criteria of the Limitation of Human Rights in the Practice of Constitutional Justice*', (n 56), accessed 9 June 2020.

[443] *Mifsud D v. Hon. PM et*, Civil Court (Constitutional Jurisdiction), 09/02/12.

[444] *Bugeja J v. Il-Provinċjal Reverendu Alfred Calleja OFM Conv. et*, Constitutional Court, 11/11/11: Tassew illi dawk is-sentenzi għandhom l-auctoritas rerum similiter iudicatarum, iżda għalihom ukoll igħodd dak li jgħid l-art. 237 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili, illi "s-sentenza ma tista' tkun qatt ta' ħsara għal min, la huwa nnifsu u

This interpretation of the effects of a declared invalid law is based on Article 237 of the Code of Organisation and Civil Procedure which states that 'A judgment shall not operate to the prejudice of any person who neither personally nor through the person under whom he claims nor through his lawful agent was party to the cause determined by such judgment'. Furthermore, Article 6 of the Maltese Constitution declares that if any other law is inconsistent with the Constitution the latter is to prevail. This has been interpreted by the Maltese Constitutional Court as meaning that the unconstitutionality of the declared invalid law is only relative to the parties involved in the case, to the extent of the circumstances of the case. The declared invalid provision will remain valid to the extent that it serves other legal aims not involving the circumstances of the present case.[445] The Constitutional Court has invalidated judgments which have tried to introduce the *erga omnes* doctrine in relation to a declaration of invalidity of a particular provision of law.[446]

The legal situation on the declaration of invalidity of laws in Malta is therefore an accumulated body of judgments invalidating a particular provision of law repeatedly in relation to separate cases, most of which have similar circumstances. This is for example, the case with Article 12 of Chapter 158 of the Laws of Malta which regulates social housing accommodation and which has been repeatedly declared by the Maltese Courts to be in violation of fundamental human rights.[447] The *ratio decidendi* for this interpretation is that not all circumstances will warrant the inapplicability of the particular provision of the law. Nullity therefore depends on the particular

lanqas bil-mezz tal-awturi jew ta' rappreżentant leġittimu tiegħu, ma jkunx parti fil-kawża maqtugħa b'dik is-sentenza". Meta l-art. 6 tal-Kostituzzjoni jgħid illi jekk xi liġi oħra tkun inkonsistenti mal-Kostituzzjoni, il-Kostituzzjoni għandha tipprevali u l-liġi l-oħra għandha, safejn tkun inkonsistenti, tkun bla effett, u meta l-art. 3 (2) tal-Kap. 319 jgħid illi l-liġi ordinarja għandha, sa fejn tkun inkonsistenti mal-Konvenzjoni Ewropeja, ukoll tkun bla effett, dan ifisser illi dik il-liġi inkonsistenti għandha tkun bla effett għallgħanijiet tal-kawża li fiha dik l-inkonsistenza tkun dikjarata iżda tibqa' fis-seħħ għal għanijiet oħra sakemm ma tiġix imħassra b'liġi oħra jew taħt l-art. 242(2) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili. Għalhekk, safejn is-sentenza appellata qalet illi l-art. 12 (4), (5) u (6) tal-Kap. 158 huwa awtomatikament null għall-għanijiet tal-kawża tallum għax ġie dikjarat null f'sentenzi mogħtija f'kawżi oħra, is-sentenza appellata hija ħażina. *Translation: It is true that those decisions have the auctoritas rerum similiter iudicatarum, but article 237 of the Code of Organisation and Civil Procedure (COCP) applies to them as well. [It states] that 'a decision cannot have effect on an individual who is not party to the case'. When Article 6 of the Constitution states that if a legislative measure is inconsistent with the Constitution, the latter prevails and, to the extent of the inconsistency the legislative measure is null, and when art. 3 (2) of Ch. 319 states that an ordinary legislative measure, inconsistent with the European Convention Act, is null to the extent of the inconsistency, this means that the inconsistency applies only to the present case before the Court but the legislative measure remains in force for other purposes unless it is abrogated by subsequent legislation or by art. 242(2) of the COCP. Thus, to the extent that the appeal decision declares art. 12 (4), (5) and (6) of Ch. 158 to be null automatically because other appeal decisions have declared this, the appeal decision is incorrect.*

[445] *Bugeja J v. Il-Provinċjal Reverendu Alfred Calleja OFM Conv. et*, Constitutional Court.

[446] *Bugeja J v. Il-Provinċjal Reverendu Alfred Calleja OFM Conv. et*, Constitutional Court.

[447] Discussed extensively in the coming sections of this chapter.

circumstances of the case and is therefore relative; a subjective interpretation and application of invalidity. The effect of this is that although a particular provision has been invalidated by the Constitutional Court, one still has to lodge a fresh case in Court in order to have the same provision declared null in the particular circumstances of his case.

5. Fundamental Human Rights protection by Maltese Constitutional Law: Where does proportionality stand?

Before the European Convention Act (1987) was enacted as part of Maltese domestic law, the Maltese Courts, in determining human rights issues, had developed their own approach to human rights, largely based on an assimilation of judgments, legal argumentation and doctrine of the European Court of Human Rights[448] as well as a study of judicial decisions originating from other legal systems such as the Supreme Court of India[449] and the Supreme Court of the United States of America.[450] The Maltese Courts also took into account the interpretation, by the Court of origin, of foreign law upon which Maltese law was based.[451] The Maltese Courts were also very attentive (and still are) as to the intention of the Maltese legislator when enacting law, and would declare departure from the principles contained in the European Convention on Human Rights when they identified this intention in the Maltese legislator.[452]

The Court's adjudicative approach pre-1987 was generally based on 'reasonableness' and the 'reasonable necessity' for the limitation of a right,[453] clearly an English public law influence,[454] and occasionally applied proportionality *stricto sensu* in conjunction with 'reasonableness' declaring, for example, that 'there has to be a reasonable relationship of proportionality between the means used and the perceived aim'.[455] Reasonableness has often been interpreted by the Maltese Courts as that which emanates from the dictates of

[448] *Fenech Adami* (n 49), where the Maltese Court referred to a judgment of the European Commission, which was later reversed by the Commission itself, in order to support its argument for correct interpretation.
[449] *Cacopardo v. Ministru tax-Xogholijiet et*, Constitutional Court, 29/01/1986.
[450] *Fenech Adami* (n 49).
[451] *Demicoli v. Onor. Speaker*, Constitutional Court, 13/10/1986 (n 51).
[452] Ibid. *Demicoli,* where the Court noted that the Maltese Parliament, by enacting the procedure for breach of Parliamentary privilege, was clearly departing from the Convention rules.
[453] *Lateo J v. Kummissarju tal-Pulizija*, Constitutional Court, 18/11/1987.
[454] In the landmark Maltese judgments *Cassar Desain v. Forbes* (1935) (n 48) and *Lowell v. Caruana* (1972) (n 48), the Court held in no unequivocal terms that when Maltese Public law had a lacuna, English Common Law was applicable.
[455] *Cacopardo v. Ministru tax-Xogholijiet et,* (n. 449); *Vassallo v. Kummissarju tal-Pulizija*, Constitutional Court, 16/08/1976; *Galea noe. v. Ministru ghax-Xogholijiet*, Constitutional Court, 25/05/1984.

reason and logic, drawing very much on the English interpretation.[456] It is also widely applied in the adjudication of administrative cases.[457] It is also widely applied in the adjudication of administrative cases.[458] This can be seen in the *Unreasonable Requisition* case where the Housing Secretary was found to have exercised his discretion unreasonably when he requisitioned property in the interest of social housing. The owner, alleging a violation of his right to property, argued that the Housing Secretary had abused his discretionary powers because the requisitioned property was structurally unsound and could not be used for social housing purposes. The Housing Secretary argued that any property could be requisitioned in the public interest for social housing. The Court held that it is true that '[n]ecessitas pubblica major est quam privata' but it also held that the discretionary powers of the pubic authority must not only be exercised in the public interest, but must also be exercised, with equal importance, within the parameters of what is just and reasonable.[459] The Court explained that the Constitution represents a balance between public authority and private rights.[460] It held that justice, equity and reasonableness are the principles which animate the interpretation of the Maltese Constitution.[461] It concluded that the Housing Secretary had acted unreasonably when requisitioning a property which could not be used for social housing purposes and stated:

> *[T]he principle of reasonableness should qualify the exercise of any executive discretionary authority even in cases where the law does not expressly state so, with the understanding that the legislator intended that discretion should be exercised reasonably.*[462]

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[456] *Debattista v. Direttur (Servizzi ta' Kummerc – Ministeru ghall-Kompetittivita u l-Komunikazzjoni) et*, Civil Court First Hall, 07/04/2011; *Joseph F. Portelli Noe v. L-Onorevoli Ministru Tax-Xoghlijiet U Sport et*, Civil Court First Hall,15/03/1993; *Reginald Fava f'ismu proprju u ghan-nom ta' Chemimart Ltd kif debitament awtorizzat v. Supretendent tas-Sahha Pubblika bhala Awtorita` dwar il-Licenzjar u l-istess Awtorita` dwar licenzjar u Awtorita` dwar il-Medicini u Kummissarju tal-Artijiet ghal kull interess li jista' jkollu*, Court of Appeal, 11/05/10.

[457] *Garden of Eden Garage Limited v. Awtorita ghat-Trasport f' Malta*, Administrative Review Tribunal, 29/05/14. Moreover, 'reasonableness' is one of the *ultra vires* grounds upon which an administrative act or decision may be declared null by the Court in a judicial review action as envisaged by Article 469A(1)(iii) of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta.

[458] Ibid.

[459] *Joseph F. Portelli Noe v. L-Onorevoli Ministru Tax-Xoghlijiet U Sport et*, Civil Court First Hall, 15/03/1993, 78.

[460] Ibid 79.

[461] Ibid.

[462] Ibid 79-80, Maltese version: *[I]l-koncett ta' ragonevolezza ghandu jikkwalifika l-ezercizzju ta' kwalsiasi diskrezzjoni esekuttiva, b'mod li anke jekk ma jissemmiex espressament fil-ligi li tistabbliixxi tali diskrezzjoni, il-legislatur, f'cirkostanzi normali ikun intenda li d-diskrezzjoni tigi ezercitata "ragonevolment".*

The Court did not provide any further explanation of its conclusion. The reasonableness test was conclusory and the Court did not justify its assessment.

Currently, reasonableness still forms part of Maltese adjudicative legal argumentation when determining human rights issues. This is partly due to the fact that reasonableness features prominently in the Maltese constitutional protection of fundamental human rights. Article 38 on the protection for privacy of home or other property speaks of the requirement of 'reasonableness' when any intrusion on the right to privacy of home is done under any authority of the law. Article 40 of the Maltese Constitution on the protection of freedom of conscience and worship requires that any intrusion be 'reasonably justifiable in a democratic society'. In the case of Article 42 on the protection of freedom of assembly and association, and article 44 on the protection of freedom of movement, any intrusion on these rights by any other law will not be held inconsistent with these articles to the extent that the law makes provision which is reasonably required in the public interest which includes, *inter alia,* public safety, public order and public morality. Such intruding provisions must be reasonably justifiable in a democratic society. The term 'reasonable' also features in various provisions of the European Convention on Fundamental Rights but it does not seem to be linked to the proportionality test or the fair balance test which is usually required in relation to an alleged infringement of a fundamental right and the corresponding public interest.[463]

The extent to which the principle of proportionality featured in Maltese Constitutional law before the European Convention was incorporated into Maltese law may be said to have been quite limited.[464] Except for the occasional judgment which made reference to the term without explaining its effective role in the judgment, the principle of proportionality did not generally serve to support judgments declaring violations of human rights.[465] However, following the introduction of the European Convention Act

[463] Article 5 on the Right to Liberty and Security ('reasonable suspicion of having committed an offence' and 'trial within a reasonable time'); Article 6 on the Right to a Fair Trial ('a fair and public hearing within a reasonable time'); Article 3 Protocol 1 on the Right to Free Elections ('free elections at reasonable intervals') and the Preamble to Protocol 12 which states that 'Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures'.

[464] This affirmation is based on comprehensive research carried out during this study relative to the application of this principle from the years 1960 to 1987.

[465] *Cacopardo v. Ministru tax-Xogholijiet et,* (n 449); *Vassallo v. Kummissarju tal-Pulizija* (n 455).

(1987) there was a clear shift towards embracing the principle of proportionality[466] and the 'fair balance test'[467] by reference to judgments of the European Court of Human Rights.[468] This shift can be seen happening mainly in the protection of property rights, family rights, freedom of expression and the protection of liberty and security.

6. Proportionality as Balancing

This section discusses Maltese judgments which have applied the principle of proportionality. Although the Maltese courts employ the term 'proportionality'[469] in these judgments, it transpires that what the Courts actually intend is 'balance' or 'fair balance' or 'balancing of rights' rather than the strict three stage proportionality principle. Most of the time, proportionality as balancing is interpreted closely as constituting the third test of this principle, i.e. proportionality *stricto sensu*. From the analysis of the forthcoming judgments it will be argued that the Maltese courts do not apply the proportionality principle as expounded in its original state and as explained by Alexy even though they subscribe to it.[470] Instead, they apply the notion of 'balance' which is modelled on the ECtHR's doctrine of 'fair balance'. It will also be argued that proportionality as balancing in Maltese human rights law is in its very infancy because it is underdeveloped in the way the Court explains its application of it. It will also be argued that it is doubtful whether a full application of this principle will ever feature in the Maltese courts' approach given the increasing influence of the ECtHR's doctrine of 'fair balance'.

The Maltese courts have applied proportionality as balancing to declare legal provisions unconstitutional and consequently null and void and to uphold the law's persistent violation of a human right. It has also been used to declare government action or administrative decisions null and it has also been applied to uphold the constitutionality

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[466] *Fleri Soler et. v. Direttur ghall-Akkomodazzjoni Socjali et*, Civil Court (Constitutional Jurisdiction), 26/11/2003; *Vella R et v. Kummissarju tal-Artijiet*, Constitutional Court, 24/05/2004.

[467] *Allied Newspapers Limited v. AG et*, Civil Court (Constitutional Jurisdiction) 11/07/2001; *Gauci J et v. Segretarju Permanenti fl-Ufficcju tal-Prim Ministru et,* Civil Court (Constitutional Jurisdiction), 08/02/2001.

[468] See e.g. *Bedingfield v. Kummissarju tal-Pulizija et*, (Constitutional Court), (2003) where the First Court (Constitutional Jurisdiction) decided the case on proportionality but did not explain the details of this application. On appeal, the Constitutional Court decided on other grounds, mainly frivolity of the suit.

[469] The Maltese term employed in judgments is 'proporzjonalita''

[470] In *Xerri et v. Tabone noe et*, (Constitutional Court), 27/04/2012, the Court specifically discussed Alexy's three stage theory of the principle of proportionality but held that it was being called to decide only the last stage of the test, i.e. balancing. The case is discussed later on in this section.

of legal provisions by reference to the legitimate rights of the State versus the limitation of rights of the private citizen, as well as to deny claims that an inferior court has violated a fundamental human right by its pronunciation.

This study identifies four approaches to balancing by the Maltese courts: (i) the excessive burden approach, (ii) the comprehensive approach, (iii) the tilted balance approach, and (iv) the legal logic approach. In this study the term 'approach' is used specifically to mean the Court's point of departure in its consideration of the case or the Court's point of perception of the case which guides it towards the application of balancing. In other words, the primary consideration made by the Court in the case before it. This must not be understood as bias but strictly as a point of departure which initiates balancing.

When employing the excessive burden approach to balancing, the main focus of the Court is the degree of actual and future suffering by the party alleging a restriction or violation of his fundamental rights. The Court's main consideration when applying this approach is the holder of the right and his suffering, both moral and material. This approach has been very much influenced by the doctrine of the ECtHR, especially in cases alleging a violation of the right to the protection of property under Article 1 of the first protocol to the Convention. On the other hand, the comprehensive approach to balancing sees the Court widening the area of appreciation surrounding the case before it. Its point of departure is not the suffering of the individual alleging a human rights violation but the appreciation of all the circumstances of the case. In such cases the Court takes a more holistic view of the case.

The third approach identified through this study is the 'tilted' balance approach. This approach has been identified only in cases relating to the right to privacy of public persons, such as politicians and the counter right to the freedom of expression of the media and media persons. This approach sees the Maltese courts starting its consideration of the case by stating that the right to privacy, in the case of public figures, is to be interpreted strictly because the right to freedom of expression of journalists and the public carries greater weight. Therefore, it is argued that applying the notion of balancing here is non-sensical because the balance is already tilted in favour of the freedom of expression *a priori*.

The fourth approach identified through the study of Maltese constitutional judgments is the legal logic approach which sees the Maltese courts predominantly applying the proportionality principle as a tool of legal logic.

6(a) The Excessive Burden Approach

When the excessive burden approach is applied by the Maltese courts to balancing, the primary consideration is given to the holder of the right and the degree of his or her actual and future sufferings resulting from such the right restriction. The point of departure for the determination of the case is the individual rather than the circumstances of the situation perceived as a whole. This is not to say that the Courts are already biased at the outset of their determination of the case but that the central focus of their determination is the individual.

The principle of proportionality has served extensively as a ground for annulment of legal provisions originally promulgated in 1959 decontrolling dwelling houses from requisition by the government under the Housing (Decontrol) Ordinance.[471] These provisions had been enacted with the intention of returning government requisitioned dwelling houses to their original owners but limiting their rights from effectively re-possessing such houses, since these were and still are, inhabited by families with housing and other social needs.

Article 12 of the Housing (Decontrol) Ordinance, has been challenged various times on the basis that it violates the right to property under Article 37 of the Maltese Constitution and Article 1 of the first Protocol of the European Convention. Article 12 is a derogation from a general rule contained in the Civil Code regulating the granting and the expiration of a contract of temporary emphyteusis. Emphyteusis is defined as:

> *(…) a contract whereby one of the contracting parties grants to the other, in perpetuity or for a time, a tenement for a stated yearly rent*

[471] Chapter 158 of the Laws of Malta.

or ground-rent which the latter binds himself to pay to the former, either in money or in kind, as an acknowledgment of the tenure.[472]

Under Maltese Civil law, the contract of emphytheusis is fundamentally different from the contract of lease because, contrary to the lessee, the emphyteuta enjoys real rights in relation to the tenement or dwelling house during the tenure of the emphyteutical grant.[473] According to Article 1521(1) of the Civil Code, '[a] temporary emphyteusis ceases on the expiration of the time expressly agreed upon, and the reversion, in favour of the dominus, of the tenement together with the improvements takes place, *ipso jure'*. Article 12 of Chapter 158 effectively derogates from this rule by allowing the emphyteuta to keep occupying the dwelling house under a new title of lease upon the expiration of the emphyteutical contract. The lease would entitle not only the occupier[474] to remain in the house but also other persons residing with the occupier at the time of his or her death. The consequence of this provision is to effectively deny the enjoyment of the property to the owner for perpetuity purportedly in the public interest relative to social housing needs of individuals and families. Article 12 also grants the owner of the dwelling house the right to charge rent which cannot exceed double the ground rent which was payable during the emphyteutical period. The amount of rent chargeable and the limit placed upon it has also been a very contended issue as it has been regularly claimed that the amount of rent payable is too low.[475]

Article 12 of Chapter 158 has been successfully challenged before the Constitutional Court as violating the right to the enjoyment of one's property. The principle of proportionality has served as the main legal argumentative tool for a declaration of annulment of this provision in a case where the owners of a dwelling house were challenging Article 12(2) as unconstitutional. In this case, the owners of the dwelling-house claimed that Article 12(2) was denying them their right to enjoy their property and

[472] Article 1494(1) of the Civil Code, Chapter 16 of the Laws of Malta.
[473] A lessee only enjoys a personal right to the tenement, and as such is restricted in the enjoyment of his lease. An emphyteuta, on the other hand, enjoys a real right which is akin to ownership and can enjoy the emphyteusis of the tenement as an owner, with all the rights that quasi-ownership entails, e.g. building on the emphyteutical land and making modifications to existing buildings.
[474] Referred to as 'utilista' in Maltese Civil Law. The term 'occupier' is not an exact translation of 'utilista' because the 'utilista' has real rights emanating from the emphyteutical grant whether or not he occupies the tenement. However, in the case of the Housing Decontrol Regulations Act, an essential requirement is the occupation of the dwelling house.
[475] *Mifsud et. v. AG et*, Constitutional Court, 31/01/2014.

that the compensation for limiting such enjoyment was disproportionate because the maximum rent payable could not exceed double the ground rent payable during the emphyteutical grant.[476]

The Civil Court First Hall in its constitutional jurisdiction engaged in a balancing exercise analysing the various sufferings that the owner of the dwelling house was enduring. This was confirmed by the Constitutional Court upon appeal. For the purposes of the present exercise, the main focus will be on the judgment delivered by the First Court since the Constitutional Court did not elaborate further on the application of the principle of proportionality.

The First Court held that Article 12(2) placed an excessive burden on the owner because the rent payable was extremely low compared to the rent the dwelling house would get had it been on the open market. The Court did acknowledge that in cases of social housing the amount of rent payable is at the discretion of the authorities but it said that this could not lead to results which are manifestly unreasonable such as allowing a minimum profit. Apart from this, the Court considered other factors which constituted an excessive burden on the owner of the dwelling house: the fact that he would probably never be in a position to know whether the dwelling house will ever revert to him given that the right to inhabit the house can be inherited; the remote possibility that the tenant will vacate the house; the fact that the challenged law did not provide any procedural safeguards to the owner of the dwelling house and the increase in the standard of living throughout the years. On the basis of this the First Court concluded that Article 1 of the first Protocol of the European Convention on the peaceful enjoyment of possessions had in fact been infringed. This was confirmed by the Constitutional Court on appeal. The Court also considered the fact that in 1995 the Maltese Government had liberalised the lease market and that the protectionist laws would no longer apply to new emphyteutical contracts and leases entered into after 1995. It also remarked that the Maltese Government had failed to provide legal remedies and provisions for adequate compensation to owners of dwelling houses caught under the protectionist laws of pre-1995. It therefore declared Article 12(2) as violating the principle of proportionality with the consequence that it

[476] *Mifsud et. v. AG et*, Constitutional Court (n 475).

constituted an infringement on the right to property under the European Convention. It declared the provision to be without effect in relation to the party challenging the provision.

The Constitutional Court emphasised its role when deciding on the basis of the principle of proportionality. It held that it is not the Court's duty to determine how a balance is to be struck between the interests of the private individual and the public interest. It held that this is the duty of the legislator. The duty of the Court is to declare null and without effect a provision of the law which fails to strike such balance.

This remark reflects, to a certain degree, the Court's conception of the method of application of the proportionality principle which it essentially reduces to balancing, the last stage of the whole proportionality test. Such a remark could effectively have a negative consequence on the Court's willingness to apply fully the principle of proportionality by applying the necessity stage. This is because proportionality in its pure form requires the determination of 'necessity' in relation to the aim sought to be achieved. Necessity requires the examination of less burdensome means which could have been adopted by the authorities in this case, to satisfy Maltese social housing needs. What the Court did here was not to look beyond what the government could have done, although it did acknowledge that the government did not provide adequate remedies to the owners of dwelling houses who had their property requisitioned for social housing but to examine the number of burdens that were being shouldered by the owner of the dwelling house. It considered them in their totality to be excessively burdensome. This reflects the state of mind of the Court in relation to the proportionality test: it does not seem to consider it in its three-stage process but rather interprets it closely to 'fair balance' even though the term 'proporzjonalita'' is used. This also reflects the influence of the approach taken by the European Court of Human Rights. As will be seen, the Maltese courts rely heavily on ECtHR judgments as support for their own decisions. Reference to Maltese cases being decided by the ECtHR are regularly made, since cases on compulsory requisition of property have been the subject of ECtHR judgments against Malta on various occasions.[477]

[477] See for example the judgment delivered by the First Hall (Constitutional Jurisdiction) of *Zammit Maempel et v. L-Awtorita' tad-Djar et* (2013) on requisition, whereby it refers to two ECtHR judgments on requisition against Malta

In its application of the proportionality principle the Court seemed to focus on one part of the balancing exercise as it analysed the following elements: (a) the owner's suffering in terms of the physical non-enjoyment of the tenement; the Court considered both the actual and the future suffering; and (b) the actual and future economic suffering of the owner owing to the deprivation. However, the Court failed to consider the following elements which form part of the other side of the balancing consideration: (a) the attribution of value or weight to the 'good' enjoyed relative to the public interest and its relationship with (b) the extent to which the law was restricting the right of enjoyment of the property (Alexy's degree of dissatisfaction) in order to satisfy social housing needs (Alexy's degree of satisfaction) despite the fact that the co-defender, in his appeal application, had raised the plea that the protection granted to him as occupier of the dwelling-house was in the public interest. The Court did measure the owner's degree of dissatisfaction attributable to the legal restriction of his right but it failed to examine this in the light of the degree of satisfaction enjoyed by the persons granted the right to occupy the dwelling house, in the public interest. Such examination would have effectively rendered the balancing exercise complete and wholesome. The Court did however take into consideration the change in policy of the government, and the fact that it had removed the protectionist housing laws and it seems that the Court attributed important weight to this. However, the latter consideration does not fall within the actual equation of what should be considered as forming the relevant facts of the case. The fact that the protectionist laws have now been removed does not affect in any way the owner of the dwelling-house who is still bound by the old laws unless a declaration of nullity is pronounced in his particular case.

With reference to the first stage of the proportionality test, the Court did not go into the suitability or rational connection test between Article 12 and the aim it pursues. Whether suitability is considered by the Maltese Courts as a necessary step before applying the balancing exercise and therefore proportionality *stricto sensu* is doubtful. It seems that

(*Fleri Soler et v. Malta* (App. no. 35349/05) (2008) and *Ghigo v. Malta* (App. no. 31122/05) (2008). See also *Frances armla minn Anthony Montanaro et v. vs Avukat Generali et*, Civil Court (Consitutional Jurisdiction), 11 May 2017, where the Court made extensive references to cases, including Maltese, decided by the ECtHR, in the area of compulsory requisition of property.

an express examination of suitability will only arise where the provision being challenged is manifestly or grossly likely to be unsuitable *prima facie*.

Another approach towards the proportionality test is that which analyses both the suffering of the restricted party as well as the shortcomings of the challenged provisions restricting fundamental rights, stating why these place an excessive burden on the holder of the right. In *Barbara et v. Onor. PM et*, the Court once again was faced with a claim that Articles 12 and 12A of the Housing (Decontrol) Ordinance violated the fundamental right to the enjoyment of one's property and they were therefore null and void. [478]

One of the emphases which the Constitutional Court made in this case was that the emphyteusis had been entered into with the expectation that on its termination, the property would revert to its owner, since the Housing (Decontrol) Ordinance had not yet been promulgated. With the introduction of this Act this expectation was almost completely removed because upon the expiration of the emphyteutical grant, the occupier of the house would have the right to continue residing under the personal title of lease. The owner was therefore deprived from actually deciding how much rent to charge upon expiration of the emphyteusis since it would not revert to him. This resulted in very low rent charges being paid to the owner under these provisions. The Court considered that had the property not been interfered with by the State the owner would have been able to make a reasonable profit. It acknowledged that when the right to property is interfered with by the State for social housing purposes, the rental value of the property cannot be taken as that one obtaining on the free market. However, as regards compensation by the State for restricting the owner's right to property, although the State had a wide margin of discretion in this case, the consequences could not be such as not to adhere to the minimum required by the European Convention.

The Court considered that the interference of the State with the owner's right to property was such as to deprive him from entering into contractual relations with others on the free market. It also noted that the challenged articles did not provide any procedural

[478] *Barbara et v. Onor Prim Ministru*, Appell Civili Numru 65/2007/1, Constitutional Court, 31/01/ 2014. See also *Georgina Grima et. v. Antonia Chricop et., Rikors. Nru. 16/2019 JVC,* Civil Court (Constitutional Jurisdiction) 23/01/2020.

safeguards that allow the impact of this law not to be arbitrary and unforeseeable and that they created legislative and administrative uncertainty.

The focus by the Court on the excessive burden being shouldered by the holder of the right seems to be the predominant consideration when applying the proportionality principle in social housing cases. However, it is submitted that the Court could have reached a more integral decision had it also equally focused on the actual benefit being attributed to the public interest by the restriction of the right of the owner of the dwelling house. The examination of the public interest would essentially amount to an examination of the actual benefit being enjoyed by the occupier of the tenement who is allowed by law to pay a very low rent because of his social needs. Such an exercise would entail an examination of the economic and social circumstances of the occupier in order to determine the extent to which the public interest is effectively being served. One of the problems which are usually encountered here is the lack of focus by the Court on this part of the balancing process, that is, the attribution of weight to the benefit in the public interest. This is partly because evidence relative to the public interest is not usually produced before the Court and the latter, not being an inquisitorial court, cannot independently ask for the production of particular evidence, such as evidence of public interest benefit. The Court seems to focus mainly on the party claiming the violation. In the present case, the Court did not go into the public interest discourse even though the occupier argued that the benefits he was receiving through the impugned provision was in the public interest.

Article 12 has been identified by the Court as constituting a form of State control over private property for social needs and the public interest.[479] However, such control will only be legitimate if it is proportional to the interests of the owner in the enjoyment of his property.[480] Adequate compensation renders deprivation of property in the public interest proportional.[481] If adequate compensation is missing, the right to property as envisaged by Article 1 of the first Protocol will have been infringed.[482] In this case, the

[479] *Busuttil v. Cassar et*, First Court (Constitutional Jurisdiction), 3/10/2013, Constitutional Ref. 33/2007/1. This was a constitutional reference made by the Court of Magistrates to the First Court in its constitutional jurisdiction.
[480] Ibid.
[481] *Busuttil v. Cassar* (n 479).
[482] Ibid.

Court was examining Article 12(4) and (5) of the Housing (Decontrol) Ordinance on a claim that they violated the right to property as protected by the Maltese Constitution and the European Convention.

Article 12(4) grants the occupier the right to convert a temporary emphyteusis, granted to him for a period exceeding 30 years, to perpetual emphyteusis. The conversion consisted of multiplying the amount of yearly ground rent payable by six times. Additionally, this conversion to perpetual emphyteusis made it possible for the residents to capitalise the amount of perpetual ground rent and become full owners of the property. The actual owners (who had inherited the property) claimed that the concession to the occupier to convert from a temporary to perpetual emphyteusis violated their right to property because the compensation envisaged by these articles was not adequate.

The Court held that the effects of a conversion from temporary emphyteusis to perpetual emphyteusis, which in actual fact grants the occupiers the possibility of becoming owners of the property by paying a meagre sum was also disproportionate. The Court considered that the amount of compensation of Euro 279.52 which the occupier would be paying by converting his temporary emphyteusis to a perpetual one was not proportionate to the value of the property. The Court also considered the fact that after 15 years of perpetual emphyteusis the occupier would have a right to become full owner of the property by capitalisation. It held that the amount owed after capitalisation would not be anywhere close to the actual value of the property being acquired and held that the effects of the two articles were such as to violate the right to property of the owners on the basis that the compensation to be paid was not adequate.

The Court here applied the principle of proportionality to the argument on compensation for the control of private property by the State. Despite the fact that proportionality was pivotal in its decision, the Court did not actually engage in a balancing exercise between the need for social housing and therefore the need to uphold the public interest on the one hand and the restriction of the right of the private individual on the other. The focus was on the value of the property and the amount of compensation owed to the owner, as being equivalent and therefore in proportion to, the extent of deprivation the owner had suffered. It is more akin to a cost-benefit analysis rather than a balancing of rights. This

type of approach can also be seen in another case involving the forceful conversion from temporary to perpetual emphyteusis on the basis of Article 12 of the Housing (Decontrol) Ordinance.[483] In this case the Court declared that because the plaintiffs had failed to provide evidence relating to the value of the dwelling house the principle of proportionality could not be applied because it could not engage in a mathematical exercise of comparing the amount of ground rent payable and the capitalisation amount against the market value of the dwelling house. In such cases, the Court seems to perceive the applicability of the proportionality principle as a mathematical exercise involving pecuniary values excluding any consideration of rights limitation and public interest, as viewed by Alexy. The Court's exercise is more of a cost-benefit analysis rather than an intense review of rights and public interest.

In a similar case, where once again Articles 12(4), (5) and (6) of the Housing (Decontrol) Ordinance were being challenged as violating the fundamental right to property, the occupiers of the dwelling house brought an action against the owners to compel them to enter into a contract of conversion from a temporary to a perpetual emphyteusis as envisaged by the challenged provisions.[484] The owners objected on the basis that this constituted a violation of Article 37 of the Constitution and Article 1 of the first Protocol of the European Convention. This case was an appeal from the first court in its constitutional competence. The Constitutional Court, on appeal, confirmed the legal reasoning of the first court.

The First Court in its constitutional jurisdiction applied the principle of proportionality in relation to two issues: (a) the amount of compensation to be received by the owners in the case of conversion and later transfer of ownership and (b) between the public interest and the restriction on the right of the owners. In the first place the Court noted that the amount of compensation upon conversion and capitalisation would not reflect the actual value of the property on the market and therefore there was no proportionality between the two.

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[483] *Zerafa et v. Cilia et.,* Civil Court (Constitutional Jurisdiction), 09/10/2012

[484] *Cini v. Galea et*, Constitutional Court, 31/01/2014, App. Civ. N. 23/2011/1; See also *Sanders v. Marshall*, First Court, 7/01/2013 where the Court held that a balance between the general interest and the private interest may be achieved only by granting adequate compensation to the owner of the property. Only in that way will his restriction on his right to property be justifiable.

In the second place the Court analysed the actual housing needs of society today and held that although the law was promulgated in the past in order to relieve social housing problems of the time, nowadays the problem is not acute anymore as it was at the time of the promulgation of this law. The Court once again looked at the amount of compensation and at the fact that the owners could lose their right to the property completely if the occupiers decided to capitalise the amount of perpetual ground rent payable, in which case they would become full owners of the property, against a very meagre amount of compensation. The Court noted that the owners would not only lose their right that the property will one day revert to them but also their right to decide to go and live in that property. They would also lose their right to dispose of that property in the way they deem most fit. Neither would they be able to plan any development of that property. The Court held that the government could not dispose of private property as if it were its own and this even the more so given that the housing problem in Malta was not acute anymore. The First Court concluded that the rights of the owners were not adequately safeguarded by Article 12 and that it in fact amounted to a *de facto* seizure of private property. On the basis of this the Court concluded that there was no balance between the rights of the owners and the public interest. The Constitutional Court confirmed this line of reasoning.

In this case, the Court seems to have applied Alexy's three stages in what he calls the 'rational process' which the third stage of the proportionality principle (law of balancing) involves: (a) the intensity of interference; (b) the degrees of importance; (c) their relationship to each other.[485] In examining the intensity of interference of Article 12 with the rights of the owners, the Court considers the effects on the owners, including the amount of compensation to be received by them as well as the fact that they might never possess the property as owners again; the degree of importance of this interference is reflected in the Court's discussion of the public interest needs of today relative to social housing and its view that such needs are not prolific anymore; and finally, the Court examines the relationship between the interference with the right and its degree of importance which the Court interprets as constituting a violation of the proportionality

[485] Alexy R, 'Constitutional Rights, Balancing, and Rationality', (n 25) 136.

principle. The weight attributed to the suffering of the owner is more serious than the need for social housing today.

The same approach was used in a constitutional reference made to the First Court and appealed to the Constitutional Court where the latter engaged in a weighing exercise regarding compensation for private housing used for social housing.[486] The amount of compensation calculated on the basis of Article 12 was found by the Court not to be proportional to the value of the property because it did not reflect proportionality between the right of the owner and the public interest. The fact that the occupier would ultimately become full owner of the house is attributed serious weight by the Court and compares it directly to the amount of compensation which on the basis of Article 12 the owner would be entitled to. The amount never reflects the actual value of the house. The Court usually acknowledges the fact that the amount of compensation should not reflect the actual market value of the house since in social housing cases the reduction in value of the property is acceptable. However, even when considering this factor, the Court arrived at the conclusion that the compensation amount was still too low.

In another case challenging the mode of compensation contained in the Housing (Decontrol) Ordinance, the Constitutional Court made specific reference to Alexy's principle of proportionality.[487] This was a constitutional reference whereby the owners of a property claimed that Articles 12(4), (5) and (6) allowing the conversion of a temporary emphyteusis to a perpetual one following a hundred year emphyteutical grant violated their right to property under Article 1 of the first Protocol of the European Convention. The owners were entitled to the capitalisation of the ground rent which amounted to Euros 7.55, by six times, amounting to a ground rent of Euro 45.29. The occupiers would then be able to redeem the perpetual emphyteusis by capitalisation, turning the property freehold with the consequence that they would become full owners.

[486] *Mercieca et v. Tabone noe et*, Constitutional Court, 27/04/2012. The reference was made by the Gozo Court of Magistrates.
[487] *Xerri et v. Tabone noe et*, (n 470). This was a constitutional reference made by the Gozo Court of Magistrates and later appealed before the Constitutional Court. More recently, the Maltese court decided two similar cases without reference to Alexy, but based its proportionality *stricto sensu* examination purely on the disproportionate rent that was being paid in comparison to the value of the property. See Agnes *Gera de Petri Testaferrata v. Avukat Generali u Lombard Bank Malta p.l.c. (C1607)* Constitutional Court, 29 November 2019.

In 1990, when the conversion from temporary to perpetual emphyteusis took place, the property was valued at Euros 126,000. At the time of the judgment (2012), the property was valued at Euro 568,000. The Court held that it was obvious that there was no sense of proportionality in placing upon the owner the burden of not being able to have his property returned to him upon termination of the 100-year emphyteutical grant. The Court also considered other conditions imposed by this law which contributed further to the imbalance of rights featured in this situation: the owner would only get Euro 45.29 for a property valued at Euro 126,000 and the law allowed the revision of ground rent every fifteen years and even here, the occupier had a year within which to redeem the emphyteusis. Every revision would entitle the owner, in the best circumstances, to double the ground rent. The Court then calculated the amounts of ground rent the owner would be entitled to every fifteen-year period upon revision to date (from 1990). If the ground rent were to be redeemed the owner would get a meagre Euros 2,264.33 for a property valued at Euro 568,000. The Court made it clear that even if the right to redeem is excluded from its consideration in relation to proportionality, the ground rent payable violated the principle of proportionality in relation to the value of the property. The Court held that since redemption is one of the consequences of conversion, then it must be taken into consideration when considering proportionality between the compensation the owner is receiving and the limitation on his right in the public interest.

The Court declared Articles 12(4), (5) and (6) to constitute a violation of the owner's right and therefore inapplicable in the case before the referencing inferior court. On appeal, the Constitutional Court agreed with the ruling of the First Court. It referred to Robert Alexy's explanation of the principle of proportionality and its three-pronged test involving suitability, necessity and proportionality *stricto sensu*. The Constitutional Court held that in this particular case it was only being called upon to decide on proportionality *stricto sensu.* It felt that the first two steps in this process were not required and referred to the doctrine of fair balance as applied by the European Court of Human Rights in *Soering v. UK*.[488] It held that Article 12(4), (5) and (6), not only imposed the amount of ground rent payable upon conversion, but also imposed a perpetual restriction on the enjoyment of the owner's rights including the imposition in favour of the occupier to

[488] *Soering v. UK* (*Application no. 14038/88*) ECtHR, 7 July 1989.

redeem the emphyteusis. The Court considered that the owner, under Article 13, cannot refuse the occupier from redeeming the emphyteusis. Although the law will still regard the original owner as owner, upon conversion, the possibility of the property returning to the original owner was very remote under the law. Comparing this situation with the original intention of the owners who had granted the property on temporary emphyteusis for a hundred years expecting it to be returned upon termination, the Court concluded that this constituted a disproportionate burden on the owner even in relation to the social aim of this provision of the law.

The Constitutional Court seems to equate the proportionality principle expounded by Alexy to the fair balance doctrine as applied by the ECtHR. This also reflects the Court's conviction that it was not being asked to examine the suitability and the necessity of the challenged provision but merely to determine whether there was 'fair balance'. The tests of suitability and necessity would have required proof of the suitability of the provisions of the law in relation to the aim it pursues and the restriction placed by such provisions on the individual right to property and an examination of whether or not the legislator should have looked at alternative means which would have been less burdensome on the individual having to bear the right limitation. This would have required an extensive study of what was necessary in today's society in relation to the housing needs in Malta as well as a study of alternative means which would have satisfied the housing needs of the population while being the least invasive of the private right to property. No such evidence was in fact produced by the parties before the Constitutional Court.

The Constitutional Court's declaration that it would focus only on proportionality *stricto sensu* is very significant because it is submitted that it reflects the general approach to proportionality by the Maltese Courts. As has been argued in chapter one of this thesis, the suitability stage of the proportionality principle seems to be incorporated in the proportionality *stricto sensu* test and it is submitted that the suitability test is still being applied *albeit* indirectly. On the other hand, the absence of explanation by the Court why it would not consider examining the second stage, i.e. necessity, leaves a vacuum for a full understanding of how it conceives the proportionality test. It is submitted that since necessity delves into alternative action to determine whether less restrictive means could have been employed, the Courts may feel they are treading on ground which is

outside their competence and into the policy-maker's and consequentially the legislator's competence. This also seems to be confirmed by the Court's statement that it is the duty of the legislator to see that the legislation concerned strikes a balance between the interests of the private individual and the public interest and that the duty of the Court is merely to examine whether such balance has been struck within the law. This judgment clearly demonstrates the Court's perception of the proportionality principle: although it acknowledges that proportionality is a three-stage test and subscribes to Alexy's conception of it, it does not view this test as compulsorily sequential in its application. The Maltese court does not feel bound to apply the first two stages of suitability and necessity but it does so with respect to the third stage and it supports its conviction by reference to the ECtHR's doctrine of 'fair balance' to which it feels bound.

Fair balance has also been applied in the field of the principles of natural justice to establish whether the right to appeal on a point of law only, as opposed to a full appeal, constituted or not a violation of the principles of natural justice.[489] In this case a local council brought an action against the Malta Environment and Planning Authority Board, an administrative body which decides whether or not to grant construction permits to applications submitted. The local council alleged an infringement to their right to a fair hearing when they were not given the opportunity to bring forward their concerns regarding the demolition and reconstruction of part of the recycling plant found in Marsaskala, a coastal village in the southeast of Malta. The plaintiffs claimed that although they had submitted their objection they were not notified of the board sitting which was to take place in order to reach a decision on whether the permit was to be issued or not. They therefore asked the Court to declare the approval of the permit application to be null and void.

This case was a judicial review case based on Article 469A of the COCP which allows the First Court to review administrative acts in the absence of remedies which can be obtained through the relevant or appropriate administrative tribunal or board. In this case, the plaintiffs did not observe the procedure of lodging their appeal to the Planning Appeals Board because their intention was to obtain a declaration from the First Court

[489] *Kunsill Lokali Marsaskala et v. L-Awtorita' ta' Malta dwar L-Ambjent u l-Ippjanar et*, First Court, 29 Nov. 2012

that the administrative decision taken was null on the basis of a violation of the principles of natural justice, also envisaged by Article 469A as a basis for administrative review.[490] The plaintiffs also invoked the protection of Article 39 of the Maltese Constitution which, *inter alia* states 'Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time'.

The Court also discussed the procedure by which an appeal is available on a point of law and applied the proportionality reasoning to this. It held that it cannot be argued (on the basis of Article 39 of the Constitution) that access to a Court of law is denied when a decision of an administrative tribunal is subject to appeal to a higher court on points of law only. This is because it is within the legal rights of the State to limit access to the Courts, so long as the reason for doing so is legitimate, and as long as there is proportionality in the measures adopted so that a balance is struck between the needs of the community and the needs of the citizen. The Court held that it is within the State's competence to restrict a citizen's right to access a Court of Law in cases where an administrative decision is revised by the competent administrative tribunal which performs a review on both points of fact and law. The Court held that this limitation on the right to access a court of appeal in fact creates this balance. It regarded the limitation to appeal on points of law only as establishing the balance required.[491] The Court applied the principle of proportionality to validate an already existing provision of the law and to uphold its legitimacy. The Court did not go into the merit of the case. It did not decide whether the decision of the planning authority was null, stating that the applicants had available to them a judicial remedy which they had not availed themselves of.[492] Article 469A of the COCP is a judicial remedy which is available when there are no other remedies available to the aggrieved party. The Court concluded that it therefore did not have competence to decide on the basis of Article 469A.

[490] The Maltese doctrine of judicial review has its roots in English common law. See landmark judgment *Lowell* v. *Caruana* (n 48).
[491] *Kunsill Lokali Marsaskala et* (n 489) p. 20-21.
[492] *Kunsill Lokali Marsaskala et,* (n 489), p. 22

The principle of proportionality as balancing has also been applied by the Maltese courts to denounce claims of unconstitutionality of particular statutory provisions. In an action challenging the constitutionality of Article 91 of the Social Security Act, the Court concluded that the provision was not unconstitutional by applying the proportionality test.[493] However it failed to explain how it arrived at this conclusion. The plaintiffs, husband and wife, challenged the constitutionality of Article 91 of the Social Security Act[494] claiming that it violated a number of their fundamental rights[495] because it prohibits the payment of the statutory pension to persons undergoing imprisonment for committing an offence but allows payment of half the pension to the wife if the prisoner is married. The husband was effectively undergoing a prison term of twelve months. He claimed that by denying him his statutory pension he was being punished twice for the criminal offence he had committed.

In examining the plaintiff's allegation that the provision violated his right to property under the Constitution and the Convention, the Court acknowledged that a right to a welfare benefit under national law constituted a right under Article 1 of the first Protocol but concluded that Article 91 did not create an excessive burden on the husband and that it did not violate the principle of proportionality. Although the Court applied the proportionality principle to test the constitutionality of Article 91, it failed to explain the considerations it made and the reasoning leading to such conclusion.

In *Vella et v. Kummissarju tal-Artijiet*,[496] the Court applied proportionality to strike down a legal provision which prohibited the challenging of the Commissioner of Land's decision to vacate government agricultural land, on lease to private persons, for the public interest.[497] This amounted to a total restriction on the right of access to a court. The Constitutional Court noted that the affected party had no remedy except the

[493] *Hili et. v. AG et.*, First Court (Const), 13/02/2014.
[494] Chapter 318 of the Laws of Malta
[495] He claimed that Article 91 infringed several articles of the Maltese Constitution including his right to the protection from inhuman treatment (Article 36), his right to the protection from deprivation of property without compensation (Article 37), his right not to be charged twice for the same offence, including his right to a fair hearing (Article 39(9) and (1)). He also alleged that this article infringed various Convention articles including Article 3 on the prohibition of torture, Article 6(1) concerning his right to a fair trial, Article 14 which prohibits discrimination and Article 1 of Protocol 1 which protects one's right to his property.
[496] Constitutional Court, 27/03/2003.
[497] Article 21(2) of Ch. 199 of the Laws of Malta. The provision was amended in 2009 to include a right to challenge the decision of the Commissioner relative to public purpose before the Land Arbitration Board.

extraordinary remedy of challenging the provision before the constitutional court. This violated the principle of proportionality because the government could expropriate agricultural land without limits and under the pretence of public purpose. The Court did not elaborate on its application of the proportionality principle, which here seems to have been applied in its strict form, but it made reference to the ECtHR judgment *Ashingdane v. UK*[498] stating that the restriction on the individual's right cannot be such as to impair 'the very essence of the right'.[499]

Proportionality has also been applied by the Maltese courts to review government action and decisions in various policy areas ranging from illegal immigration to land expropriation and property confiscation in the public interest.

An expropriation order is justified when it is done for a public purpose and a fair compensation is paid by the government to the owners when the acquisition is an absolute purchase.[500] The Court will apply the proportionality principle to establish legitimacy of the expropriation order by weighing on the one hand the particular private interest and the enjoyment of his right, and the collective interest reflected in obtaining social justice and economic development, on the other.[501]

However, in cases where the government delays compensation for several years or does not utilise the property as originally intended, the Court is willing to apply the proportionality test to condemn the government to pay compensation or to declare the expropriation order null and void respectively.

In *Vica Ltd v. Commissioner of Lands et*,[502] the principle of proportionality was applied in relation to the amount of time which it took the Commissioner of Lands to formally notify the plaintiffs that their property was to be expropriated after a presidential declaration of expropriation of the land for public purposes had been published in the Government gazette in 1975. The Commissioner of Lands notified the owners five years later in 1980 and the latter contested the amount being offered by the Commissioner. In such cases,

[498] *Ashingdane v. UK* (*App. No 8225/78*) ECtHR, 28 May 1985.
[499] Vella v. Kummissarju (n 466) p. 12.
[500] Article 5(a) and 13(1) of the Land Acquisition (Public Purposes) Ordinance, Chapter 88 of the Laws of Malta.
[501] *Cutajar v. Kummissarju tal-Artijiet et*, Constitutional Court, 30/11/2001; *Vella et v. Kummissarju tal-Artijiet*, (n 466).
[502] *Vica Ltd v. Kummissarju tal-Artijiet et*, Constitutional Court, 3 Feb 2012. See also *Bernard Gauci et v. Il-Kummissarju Tal-Artijiet et*., Constitutional Court, 19 April 2016, decided on similar merits.

the Commissioner of Lands must lodge the disagreement before the Arbitration Board for a fair price to be established. However, the Commissioner of Lands procrastinated for a further three years before submitting the disagreement before the Land Arbitration Board.[503] The Court refuted the Commissioner's reason that researches to establish the owners of the expropriated land had been long and complicated stating that this procrastination was unreasonable.

The presidential declaration is independent from the notification of the owners. Once there is the presidential declaration, the expropriation takes place and it is the Commissioner of Lands who has the obligation under Art. 9(2) of Ch. 88 of the laws of Malta to notify the owners of the such. The land will be transferred to the government within 14 days from the date of the Presidential declaration (Art. 12). A statutory requirement of 5% to be paid for any delays in the process of expropriation was held by the Court to be insufficiently proportionate to the number of years which the plaintiffs had to endure before they could discuss the amount of compensation owed. The Court held:

> *The fact that the appellant Commissioner is bound to pay interest in respect of delays is not sufficient to satisfy the nexus of proportionality because it is not fair for the owner of a property to be left in limbo and in frustration for tens of years, when he himself could have invested in the best way he thought fit, the amount of compensation owed to him for such expropriation.*[504]

On the basis of this reflection, the Court held that as a consequence of this procrastination, Article 1 of Protocol 1 and Article 6(1) of the European Convention had been breached by the Commissioner of Lands.

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[503] Today, the owners whose property is expropriated have a right under Art. 22(6) to apply to the Land Arbitration Board for the determination of the compensation.

[504] *Vica Ltd v. Kummissarju tal-Artijiet et*, (n 502), p. 40, "Il-fatt li l-Kummissarju appellant irid ihallas l-interessi ossia imghaxijiet ghal kull dewmien mhux sufficjenti biex jissodisfa n-ness ta' proporzjonalita`, ghaliex mhux gust li sid ta' art jithalla fil-limbu u fil-frustrazzjoni ghal ghexieren ta' snin, meta huwa seta jinvesti huwa tess u bl-ahjar mod li jidhirlu huwa, ilkumpens li kien dovut lilu ghall-esproprjazzjoni." (as quoted from the judgment Avukat Dr Rene Frendo Randon et v. Il-Kummissarju tal-Art et, Court of Appeal, 10 July 2009). *Translation: The fact that the Commissioner appellant has to pay interest on every delay is not sufficient to satisfy the nexus of proportionality because it is not fair that the property owner is left in limbo and frustration for tens of years, when he could have invested, in the manner he deemed fit, the compensation money owed to him for the expropriation.*,

The injustice of procrastinating for years and the financial vacuum suffered by the dispossessed owner seem to be the primary consideration by the Court. The Court considered these two elements of the case and decided that these tilted the balance of an otherwise fair situation. It considered the fact that the law envisaged a 5% interest payment for procrastination but it felt that such amount did not suffice to bring back into balance the relationship between the action of the Commissioner for Lands and the suffering of the dispossessed owner.

The Court's application of the proportionality test in this case once again focuses on the third stage, i.e. proportionality *stricto sensu.* As has been mentioned earlier, under the traditional proportionality *stricto sensu* test, balancing takes place by taking into consideration three sub-stages: (i) establishing the degree of non-satisfaction of or detriment to a first principle or constitutional right; (ii) establishing the importance of satisfying the competing principle or interest; and (iii) establishing whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former. In this particular case, the Court essentially applied the first sub-test by establishing the degree of non-satisfaction of the plaintiff's right to property taking into consideration the two main elements suffered by the plaintiff, procrastination and the financial drawback. The Court did not, however, engage in a discussion of the degree of importance of the expropriation as required by the second sub-test. It seems that the fact that it was legitimate in the first place, and accepted as such by the plaintiffs, sufficed for establishing its importance. The Court also applied the third sub-stage by considering the justification raised by the Commissioner of Lands. It is here that the test failed because the Commissioner's justification that the searches to establish ownership and the provenience of the land had taken decades was rejected by the Court.

In this case the Court applies the proportionality *stricto sensu* test as a corrective tool, to put order and balance in what it perceived to be an unbalanced and unjust situation, and also as a measuring instrument enabling it to determine whether a situation is out of proportion or not, in terms of fairness between the parties concerned, within the ambit of human rights protection.

It is important to note that the Court did not make a systematic reference to the three sub-tests as formulated in the traditional proportionality *stricto sensu* test, and it did not apply the three sub-tests in the sequence traditionally listed. The main and initial focus of the Court were the two elements of suffering endured by the plaintiff.

In the case *Xuereb v. Direttur tal-Artijiet*,[505] the plaintiffs owned two portions of property over which an expropriation order had been issued in 1991 to construct a road. The owners never received compensation for the expropriated land. It was also established that subsequent to the declaration of expropriation, part of the land was being used by private parties for their own personal use and not for a public purpose. The owners brought an action against the director of lands claiming that their right to property under the Constitution and the European Convention had been violated. Both the Court of First Instance and on appeal, the Constitutional Court, applied the principle of proportionality.

The First Court considered two facts to decide that the proportionality principle was being violated by this state of affairs: (a) the fact that no compensation for the expropriated land had been given, and (b) the fact that part of the expropriated land was illegally occupied by private parties. It held that it was incumbent upon the government to make sure that the property was being used according to the expropriation purpose. What the government actually did was to declare the occupied part as not required anymore and that it was to be returned to its owner, leaving the latter to deal with squatters on his property. The Court held that this state of affairs was not in the public interest and the owner had been placed by the government in a compromised situation which was contributing towards the lack of balance and the prejudice caused to him.

The Court here is seen to concentrate primarily on the fact that the actual aim of the expropriation order had not been attained. The Court remarks that the state of affairs was causing a lack of balance and prejudice towards the owner. This throws light on the manner in which the Court perceives 'balance'. The lack of balance in this case is equated by the Court to the injustice being caused to the owner. The Court also focused on the burden which the government action had imposed on the owner: (a) the failure to pay

[505] Constitutional Court, (Malta) 19/04/2004.

the compensation owed to the owners, and (b) the effects of returning the portion of the property to the owner as opposed to the whole, including the squatters. The failure by the government to pay the compensation owed to the owners was also interpreted by the Court as contributing towards a lack of balance between the rights of individuals and the needs of society and the public interest. All this was too onerous a burden for the owner of the property. The Court effectively applied Alexy's first sub-stage under proportionality *stricto sensu,* i.e. it established primarily the degree of non-satisfaction of or detriment to the owner's right. The Court could not however establish the importance of satisfying the competing public interest since this aim was never attained and on the basis of this the Court considered that there was a lack of balance and therefore a state of illegality.

The Maltese courts have established that procrastination in payment of compensation infringes the proportionality principle. This was held in *Caruana et v. Commissioner for Lands*, where the Court focused on the government delay to pay compensation to the owners following expropriation.[506] Delay was a determining factor in this case especially since the Court considered that a twenty-five-year waiting period was definitely not a reasonable period.[507] The Court here is seen to reduce the application of balancing to the effects of the government action, in this case delay.

6(b) The Comprehensive approach

A second type of approach to balancing which is identified in the judgments of the Maltese courts is the 'comprehensive' approach to balancing. As has been mentioned earlier, the Court invariably confines its approach to the third stage of the proportionality principle, i.e proportionality *stricto sensu* or balancing and this seems to be very much influenced by the ECtHR's doctrine of 'fair balance'. This approach takes the overall view of the situation as a point of departure for the application of the balancing test rather than the amount of suffering borne by the individual. The latter takes secondary importance.

[506] Civil Court (Constitutional Jurisdiction), 7/03/ 2014.
[507] See also the judgment *Frendo Randon et v. Kummissarju tal-Artijiet et*, (Constitutional Court), 10/07/2004 where procrastination by the authorities after expropriating land was found to have caused a disproportionate burden on the owners of the land.

Balancing has been used to strike down a government decision to appropriate assets of a private bank which was in financial difficulties, even though the government claimed justification on the basis that its decision would avert public economic jeopardy. This was the case in *Attard Montalto et v. Prim Ministru et* (*National Bank of Malta* case) which involved a run on the privately-owned National Bank of Malta in 1973.[508] An agreement was consequently reached between the shareholders of the bank and the Government of Malta to transfer the bank's assets to the Maltese government and later to Bank of Valletta, in which the government was a majority shareholder. The government pressured the shareholders to cede their shares to it without paying compensation. The First Court in its Constitutional jurisdiction declared this action to be disproportionate because the taking of property[509] without the corresponding compensation violated the principle of proportionality, even though such taking had been made in the public interest, to safeguard the interest of those who had moneys deposited in the bank, including the shareholders themselves.

Similarly, in a separate case but involving the same merits, the Court held that failure by the government to pay compensation for privately owned bank shares, which it took on as a rescue measure following the insolvency of such bank, infringed the proportionality principle because such intrusion on the right to property was disproportionate.[510] The Court considered various factors including (a) the fact that although the private bank was insolvent and the ownership shares had no negotiable value, it still held immovable property which would offset any debts which it had; (b) that the new bank in which the government had majority shareholding and which overtook the insolvent private bank had made good use of the property owned by the latter and had also made profit. On the basis of this, the Court concluded that the proportionality principle had been infringed when the government failed to pay compensation for the overtaken shares.

The circumstances of the case lend themselves to an examination of all the three steps of the proportionality principle because the dispossession of the privately-owned bank shares were preceded by a set of questionable circumstances. The stages of suitability

[508] Civil Court (Constitutional Jurisdiction), 9/01/2014
[509] Shares in a bank have been interpreted by the Maltese courts as constituting property in terms of the Constitution.
[510] First Hall Constitutional Jurisdiction, 6 Feb 2014, Rikors Numru 389/1992/1.

and necessity would have served to decide the extent to which the government had violated the right to property. Proportionality *stricto sensu* would then be applied to establish the degree of detriment to the shareholder, the importance of appropriation of the assets of the bank and the importance of satisfying the public interest, in this case, the salvaging of the assets to avoid a public financial crisis.[511]

In this case the government was intent on acquiring all the assets which the National Bank of Malta had in order to establish a new bank which it would have a large controlling interest in. The parties in fact claimed that the new legislation authorising the transfer had been tailor-made to suit the aim of the government and to by-pass the ordinary process in order to take control of the insolvent bank. They alleged that such legislation had been passed hurriedly in Parliament and that the government then appropriated the assets of the bank and transferred them to the newly established bank. The legislation was then reversed to its original status. The Court could have established whether the government decision to appropriate private assets without paying compensation in order to avert an economic crisis was a suitable course of action. If the suitability test was satisfied then it could have moved on to establish whether there were less restrictive means by which the government could have salvaged the National Bank of Malta by, for example, investing in it the public moneys which it in fact invested later in the newly established bank and of which it had full control. It is submitted that a main aim of the government was to have full control of the bank which in itself could have been justified on the basis of public interest at the time that this case occurred. The rights of the shareholders had been effectively annihilated because the government had refused to pay compensation. The Court did consider that the shares had effectively no negotiable value and that there still remained a substantial amount of immovable property within the bank's assets.

A comparison as to what constituted the public interest in this case could have also been of interest. The government claimed that the new temporary legislation and the government's action subsequent to this legislation was carried out to salvage the bank by administering the assets of the bank in the interest of the depositors as well as the

[511] It is important to note that expropriation cases require two balancing exercises, i.e. with and without compensation.

employees. An examination of whether this action was necessary in order to protect the interests of the clients and the employees would have been of interest as by the full application of the proportionality principle the Court would have delved deeper into the legality or otherwise of the government action and its interference with the plaintiffs' right to property. However, it is doubtful whether the Maltese courts would be willing to engage in such intense review of the availability of alternative measures to the Maltese government.

Deportation or removal orders of illegal immigrants in Malta have also been struck down by the application of proportionality *stricto sensu*, especially in cases affecting the rights of children who are not Maltese nationals but who were born in Malta. Maltese law does not grant Maltese nationality and subsequently citizenship on the basis of the doctrine of *ius soli.* The primary consideration for the acquisition of Maltese nationality and citizenship is that of *ius sanguinis* whereby descent and filiation of at least one Maltese parent is required.[512] In *Hamd v. Direttur tac-Cittadinanza u Affarijiet ta' Espatrijazzjoni et*, a deportation order was issued to the plaintiff, a Syrian man who was in Malta and was an 'exempt person' until the age of 21, by which time he would have to return to his home country.[513] He married a Maltese woman and had a child with her but they separated soon afterwards. Subsequently he was served with a removal order on the basis that he had *de facto* separated from his Maltese wife and consequently lost his exempt status by marriage. He brought an action against the Director of Citizenship and Expatriation claiming a violation of his and his son's right to family life, as protected by Article 8 of the European Convention. From the evidence produced, it emerged that the plaintiff had already been married to a Syrian woman and had fathered a child. The marriage was annulled and the woman and child returned to Syria.

The First Court, in its constitutional jurisdiction, concluded that the principle of proportionality would be infringed if he was to be deported to Syria. On appeal the Constitutional Court, agreed with the First Court's argument. The Constitutional Court's major emphasis was on the interests and well-being of the child of the couple. The Court held that although the authorities had the legal authority to deport the plaintiff and

[512] Article 5, Maltese Citizenship Act, Chapter 188 of the Laws of Malta.
[513] *Hamd M v. Direttur tac-Cittadinanza u Affarijiet ta' Espatrijazzjoni et*, Constitutional Court, 26/04/2013

therefore such action would be legitimate, in the particular case, 'the child's interest as a primary consideration outweighs the interest of a State in having an efficient system of immigration control'.[514] In this case the public interest would not outweigh the right of the child to have continuous physical contact with his father. The Court considered various elements including the fact that in Syria conflict was on-going and many Syrians were escaping to neighbouring countries because their lives were in danger. When engaging in balancing, the Court took the following into consideration: (a) the fact that the Syrian man had integrated very well in Maltese society and had learned the Maltese language; (b) that there was no evidence that he constituted a threat to public order and national security; (c) that he had a trade and could support himself financially; (d) that he had severed ties with his family in Syria including those with his daughter from another marriage; (e) that he had been living in Malta for a very long time and had a family including a child; (f) and that his was not a case for the prevention of disorder or crime as the plaintiff did not have a criminal record.

The Court concluded that as a consequence, the public authorities, in issuing the removal order, had failed to strike a fair balance between on the one hand the right of the father and of the child to remain in continuous contact with each other, and on the other, the public interest in relation to immigration control. The Constitutional Court agreed with the First Court and held that the removal order was not in effect a pressing social need.

In this case the First Court was heavily influenced by the European Court's decision in *Rodrigues Da Silva and Hoogkamer v. The Netherlands*,[515] which concerned the expiration of a visa of a Brazilian woman who had subsequently given birth to a child in the Netherlands. The Maltese Court, quoting the ECtHR judgment, held that 'the economic well-being of the country does not outweigh the applicant's rights under article 8'[516] annulling the removal order on the basis that it infringed Article 8 of the European Convention. This was confirmed by the Constitutional Court.

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[514] *Hamd* (n 513) at p.10, 'L-interess tal-minuri bhala konsiderazzjoni primarja jeghleb l-interess li l-pajjiz ikollu sistema efficjenti ta' kontroll ta' immigrazzjoni f'cirkostanzi bhal dan il-kaz'. *Translation: The interests of the minor, as a primary consideration, outweighs the interest of the State to have an efficient system of immigration control in circumstances such as this case.*

[515] *(Application no. 50435/99)* [2006] ECtHR 86.

[516] *Hamd M v. Direttur tac-Cittadinanza u Affarijiet ta' Espatrijazzjoni et* (n 513).

In another case involving the removal of a Moroccan woman from Malta, the Court decided to apply the proportionality principle even though it found that there existed no family life between the Moroccan woman and her Maltese husband.[517] A removal order against her had been issued after it was discovered that she was no longer living in the matrimonial home with her husband. She claimed that the removal order infringed her right to the protection from inhuman and degrading treatment protected by Article 36 of the Maltese Constitution and the protection from the prohibition of torture envisaged by Article 3 of the European Convention. She also alleged a violation of the right to respect for private and family life as protected by Article 8 of the European Convention.[518]

On an evaluation of the evidence produced, the First Court in its constitutional jurisdiction dismissed the plaintiff's claims based on Article 3 of the Convention and Article 36 of the ECHR[519] and furthermore concluded that there had been no family life between her and her husband since she had left the matrimonial home and had gone to live with her sister. However, despite this finding, the Court still decided to apply the principle of proportionality to determine whether a fair balance had been struck between on the one hand, the authorities' obligation to control and enforce the island's immigration policy and her right to respect for private and family life. The Court established that the appellant's marriage had been one of convenience. On the basis of this the Court concluded that Article 8 had not been infringed. On appeal, the Constitutional Court also decided to apply the principle of proportionality even though it established that there had not been any family life between the appellant and her husband. However, it held that in this case proportionality applied only in relation to the appellant's right to her private life and not her right to family life.

The Constitutional Court first established that the public authorities' actions were legitimate because they were based on a provision of domestic law.[520] The Constitutional Court did not accept the appellant's arguments that she had integrated into Maltese

[517] *Chabab v. AG*, Constitutional Court, 29/11/2013
[518] The appellant also claimed a violation of Article 32 of the Constitution. However, the Court held that this was merely a preamble to the provisions on fundamental human rights.
[519] The Court held that for inhuman treatment to subsist there must be 'severe suffering' and 'a minimum level of severity'. Degrading treatment, on the other hand, involves the breaking of physical and moral resistance, including forceful actions against the will.
[520] Art. 5(g) of Ch. 217 of the Laws of Malta.

society since this did not strictly convey her the right to remain on the island. Her right of residence had been granted on the sole basis that she had married a Maltese citizen and was to live with him in the matrimonial home.

In applying the balancing test of the proportionality principle, the Constitutional Court considered whether sending her back to her own home state would cause her physical or psychological suffering. It observed that there were no political or social problems in Morocco which would prejudice her safety. The Court also considered the fact that her parents, with whom she had been living before coming to Malta, were still living in Morocco. A third element which the Court considered was whether she would suffer poverty if she were deported back to Morocco. The Court established that she would not because she was a seamstress and before she came to Malta she had exercised this trade in Morocco. The Court also considered the fact that the appellant would not therefore be new to the working world in Morocco because she was familiar with it and would not therefore suffer any cultural trauma. It concluded that the appellant had had no valid reason for leaving her home country because she had substantial work and had the rest of her family. The Court held that the removal order would not disturb the fair balance which exists between the interests of Maltese society to regulate immigration and residence of aliens, including the removal of illegal immigrants in Malta, and the need to protect the right to private life and family life of persons living in Malta.[521]

The Court's consideration of whether the authorities had acted legitimately in terms of the law is significant because it reflects the Court's application of the suitability test which is the first stage of the proportionality test. Additionally, the considerations which the Court made in determining that the removal order was not disproportionate in relation to the private person's right and the public interest is also significant. The Court here is seen applying the proportionality *stricto sense* stage of the test by evaluating whether the return of the Moroccan woman to her home country would prejudice her fundamental human right while at the same time considering the public interest policy that illegal immigrants should be returned to their home country. The Court attributes weights in

[521] *Chabab* (n 517) at p. 20, 'ma tiddisturbax il-bilanc gust li jezisti bejn l-interess tas-socjeta` tal-iStat Malti li jirregola d-dhul u r-residenza f'Malta ta' persuni barranin, kif ukoll it-tkeccija minn Malta ta' immigranti illegali, mal-htiega li jigu protetti d-dritt tal-hajja privata u tal-familja ta' persuni li jkunu f'Malta.' *Translation: does not disturb the fair balance that exists between the interests of Maltese society that regulates entrance and residence of aliens in Malta as well as the deportation of illegal immigrants from Malta, with the need to protect the fundamental right to privacy and family life of people living in Malta.*

this balancing exercise and after 'weighing' them comes to the conclusion that (a) she had no right to remain in Malta since her marriage no longer existed and therefore no right would be infringed by sending her back, and (b) the public interest prevailed as a consequence of this. In this sense, the Court seemed to attribute more weight to the public interest as a consequence of having found that there actually did not exist any right which was going to be violated. However, the Court's approach towards the public interest is not always consequential as it was in this case. The public interest relative to the preservation of the family nucleus which includes the protection of the child, for example, may be attributed more weight by the Court even in circumstances where there is proof which clearly indicates that the protected family nucleus does not actually exist. This was the case in *Mizzi v. AG* (*Child Repudiation Case*) which concerned the repudiation or disavowal of a child by her non-biological father.[522] In this case, the plaintiff brought an action claiming that his right to respect for private and family life had been violated because the Civil Code did not contain a provision which enabled him to deny paternity to a child at any time. Article 70 of the Civil Code allowed him to repudiate a child if he could prove 'physical impossibility' from cohabiting with his wife at the time the child was conceived. Article 73 of the Civil Code allowed him denial of paternity within strictly prescribed circumstances: he could have impugned the child's paternity within three months of her birth. The father would be allowed to provide scientific proof such as DNA testing results within this period of time and if he proved that the wife had committed adultery and had concealed the birth of the child. Many years later the plaintiff managed to obtain the child's DNA with her consent and which proved that she was not his biological daughter. He claimed that this situation continuously violated his right under Article 8 of the European Convention.

The First Court felt that this state of affairs did violate his right to private and family life but this decision was overturned by the Constitutional Court on appeal. The Court approached this case by admitting that sometimes legal certainty could conflict with factual certainty as happened in this case. The legal presumption under Maltese law is that a child is fathered by the husband if born within wedlock and a small time-window

[522] *Mizzi v. AG,* Constitutional Court, (Malta) 15/01/2002.

is available within which the child may be repudiated, after which the legal presumption becomes *juris et de jure.*

The Constitutional Court identified the interests at stake: on the one hand the interest of the plaintiff to repudiate a child who was not biologically his and the interests of the child herself, the identity of the family nucleus and the stability of society. These interests correspond on the one hand to the factual certainty provided by DNA testing declaring the child not to be the biological offspring of the plaintiff and the legal presumption that the child, having been born in wedlock, was his daughter. The latter presumption has been held to protect the interest of the child, the identity of the family nucleus and the stability of society. The Court attributed more weight to the second interest thus declaring that time-limits imposed by law for repudiating paternity were justified.

The Constitutional Court pointed out that the application before it had not focused on whether the limitations placed on the father's exercise of legal repudiation were necessary in a democratic society for the protection of the rights of others and whether such provision discriminated against persons who could bring an action for repudiation. The present application focused on whether the plaintiff had a fundamental right to produce DNA test results to repudiate a child at any time without having to observe the legal limitations placed on him by the Civil Code. The Court stressed that the plaintiff had not based his application on the argument whether such a law was necessary in a democratic society for the protection of the rights and freedoms of others.

In this case the Court attributed more weight to the protection of the civil status of the child and the interest in having stability in society in this regard by reference to the legal presumption which was enacted in favour of legal certainty. The Court favoured legal certainty more than factual certainty.

The principle of proportionality in the *Child Repudiation* case could have been framed to challenge directly the constitutionality of the Civil Code provision rather than to invoke his right to produce a DNA test at any time. The Court's argument that this challenge had not been made before it gives rise to the question whether the balancing done by the Court would have been different and therefore would have produced a different outcome.

The legal presumption that a child born within wedlock is the husband's biological child is a rule of public interest which is heavily ingrained in Maltese juridical thought. Had the application challenged the Civil Code provision containing the time limitation in relation to when the DNA test results may be produced, the Court would have had to look at whether such a restriction on a husband's right of repudiation was necessary in a democratic society. It would also have had to pronounce on the provision's constitutionality. It is submitted that in such a case, the main consideration of the Court would still have been the legal presumption favouring legal certainty but it would have to take into consideration the changing times and the frequency with which children born in wedlock are actually not fathered by the husband, many times because no legal separation or divorce has taken place.

Interestingly, this case culminated in a human rights application against Malta before the European Court of Human Rights which found a violation of Articles 6(1), 8 and 14.[523] The ECtHR applied the principle of proportionality and focused on the legislation on repudiation which allowed a very small time-frame for the disavowal action to be brought by the husband. In the husband's version of events, the state of affairs obtaining at the time of the birth of his daughter prevented him from repudiating her and this constituted a violation of Article 6(1) since he did not have effective access to a court. The ECtHR agreed. Although it did accept that the time-frame prescribed by the Maltese provision served to ensure 'the proper administration of justice' and 'legal certainty' it held that a fair balance had not been struck. It held that the limitations placed must not impair the very essence of the right sought to be protected. This time-frame had effectively denied the husband the possibility of bringing an action for repudiation, thus constituting an excessive burden on him. A fair balance had not been struck 'between the latter's legitimate interest in obtaining judicial ruling as to his presumed paternity and the protection of legal certainty and of the interest of the other persons involved in his case'.[524] The Court concluded that the articles on repudiation prevented the applicant from bringing a successful claim before the Maltese Courts.

[523] *Mizzi v. Malta*, (App. No. 26111/02) ECtHR 12 January 2006
[524] *Mizzi v. Malta*, (n 523), par. 89

The husband also alleged a violation of Article 8 on the right to respect for private and family life because he was prevented from contesting his paternity as no effective remedy existed. In fact, he had lodged the case before the Constitutional Court with the hope that he would be allowed to demonstrate the absence of his paternity through scientific means. The ECtHR found for the applicant on the basis of a violation of the proportionality principle. It held that 'a fair balance ha[s]d not been struck between the general interest in the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of biological evidence'.[525]

The husband also alleged discrimination on the basis that other interested parties under Article 77 of the Maltese Civil Code could bring an action to impeach the legitimacy of a child if certain circumstances are proven. This action is not time-barred, unlike the articles applicable to the husband. The ECtHR applied the proportionality principle to declare that the state of affairs violated Article 14 on the prohibition of discrimination in the enjoyment of one's rights and freedoms. The Court held that 'a difference in treatment is discriminatory for the purposes of Article 14 if it 'has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[526] The Court held that the husband was in the same analogous situation as the other interested parties envisaged by Article 77 but he had effectively been denied the possibility. This violated Article 14 as read in conjunction with Articles 6(1) and 8.

It is interesting to note the Maltese Constitutional Court's comment on the formulation of the appeal application. The Court seemed to indicate that had the appellant directly attacked the provision of the Civil Code, the outcome would have been different. However, one must point out that the arguments have remained the same. In both the first instance and the appeal stage, the husband alleged a violation of his fundamental human rights due to the state of affairs which had obtained for a very long time. The arguments put forward before the Maltese courts were essentially the same as those put forward before the ECtHR. The husband's argument had always been that the Civil Code

[525] Ibid., par. 114
[526] Ibid., par. 132

was violating his fundamental rights by not allowing him to prove that the child was not his. The judgment of the First Court had agreed that Article 8 was being violated by the state of affairs endured by the husband. However, the Constitutional Court overturned this judgment, placing more weight on the legal presumption which is a *juris et de jure* presumption and which guarantees legal certainty, social stability and the protection of the status of the child (today an adult). On the other hand, the ECtHR placed more weight on the excessive burden the impugned legislation was causing to the applicant. The difference in conclusion may point at two underlying issues: (a) the issue of how the Maltese Court perceives itself in the exercise of its functions and (b) the issue of the importance attributed to the formulation of the appeal application before the Maltese Constitutional Court.

As regards the first issue, it is clear that the Maltese Constitutional Court perceives itself as the keeper or watchdog of stability. This stems from a long tradition of regarding the nucleus of the family as inviolable and the necessity to keep social stability means that rigorous and strict rules such as the right to repudiate one's child be very limited. The Maltese Constitutional Court is perhaps clinging to an old conception of family and is probably not willing to open up to the new reality of today involving extended families. Secondly, the fact that the Maltese Constitutional Court commented on the formulation of the appeal application indicates that it did feel, to a certain degree, that the state of affairs was effectively unfair to the husband, but not sufficient to override the other elements being protected, i.e. the right of the child, the stability of the family nucleus and legal certainty.

This also brings one to reflect on the nature of proportionality. Because proportionality is such a flexible tool, the outcome of the case may differ depending on the weight attributed to each right or interest. The attribution of weight depends very much upon the psychology of the Court, and the values it upholds and which reflect the values of the given society.[527] Divergence in the application of proportionality is not uncommon between a national constitutional court and a supra-national court. In the German case *Internationale Handelsgesellschaft*, a preliminary reference was made to the Court of

[527] Discussed in the previous chapter (Chapter 2) and the Conclusion.

Justice of the European Union which held that the proportionality principle had not been infringed by the Regulation on the Common Organisation of the Market in Cereals.[528] The German Federal Constitutional Court disagreed with the ruling and did not apply it.[529] It held that the proportionality principle had been essentially infringed.[530]

The Maltese Court has applied the law of balancing in cases involving illegal embarkation in Malta claiming unnecessary detention by the Maltese immigration authorities.**[531]** Illegal immigrants who land in Malta allege that they are being detained unnecessarily pending their application for refugee status. In such cases, the Court will apply the comprehensive approach and look at all the circumstances surrounding the immigrant's case. It will weigh his restricted right of free movement against the dangers to public order which illegal immigration brings with it. In Malta illegal immigration is considerable, especially in the summer months. In one such case, the Court applied proportionality by considering two factors: (a) the size of the island and its population, and (b) the big number of illegal immigrants reaching Maltese shores on a continuous basis. The Court considered that this state of affairs causes the processing of applications for refugee status to be slow. It also held that the high influx of illegal immigrants in Malta can constitute a threat to Maltese public order including national security because of their number as well as the fact that all of them must have their identity verified. It also stressed, in this case, the fact that the immigrant had failed to pursue all the legal avenues available to him to obtain his release from detention. It held that the 'fair balance' must be struck between the interests of Maltese society in general and the need to protect the right to liberty and security under Article 5 of the Convention. The Court arrived at the conclusion that his detention had not exceeded that which is unreasonable in the obtaining circumstances and disagreed that Article 5 had been violated by detaining the appellant in the detention centre during the processing of his application.

In *Stivala v. Commissioner of Lands*,[532] the Court is seen applying the second stage of the proportionality test, the necessity test. The application of the necessity test which,

[528] Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel.* [1970] ECR 1125.
[529] BverfGE 37, 279
[530] This disagreement was overturned many years later, in 1986, in the Solange II case.
[531] *Maneh v. Kummissarju tal-Pulizija bhala Ufficcjal Principal tal-Immigrazzjoni et*, Constitutional Court, 29 April 2013.
[532] *Maria Stivala v Kummissarju tal-Artijiet*, Constitutional Court, 11 April 2006.

according to the doctrine of proportionality, requires the Court to determine if less restrictive means could have been employed resulting in less restriction of the alleged violated fundamental right.[533] This case concerned an appeal from a first court judgment whereby the plaintiff alleged a violation of her right to property under Article 1 of the first Protocol of the European Convention when her property was expropriated for the public interest. The expropriated land was originally intended for the construction of a road. However, later, a part of the expropriated land was used to build a small lotto office which was to be leased to a private party to administer it. The plaintiff argued that the aim of the expropriation of the land upon which a lotto office was later built[534] was not in the public interest consequently breaching her fundamental right to property.

The Court analysed the circumstances of the case in three areas: the principle of proportionality, with particular application of the necessity test, the determination of public interest, and the delineation of the obligations of the Constitutional Court as distinct from the duty of the Executive. These were all grounds, *inter alia,* upon which the appellants (Commissioner for Lands and the Attorney General) had based their appeal.

The Court held that it is incumbent on the Executive to prove that a balance was struck between the public interest aim and the protection of the individual human in view of the decision to expropriate. Once the Executive showed, on the basis of probability, that such a balance had been struck, the Court would not delve into the technicality of the way that the project in the public interest was to be executed.[535] The Court emphasised that it would not substitute the decision of the Executive with its own. It also emphasised that to the extent that the decision to expropriate is not found to be unreasonable or taken on the basis of ulterior motives, it would not go into the pure technicalities of such decision

[533] The President of the Constitutional Court at the time this judgment was pronounced was Mr Justice V DeGaetano. The English influence (ultra vires, policy decisions v. legality) and the EctHR influence in this judgment are very pronounced. Today Mr Justice DeGaetano is a judge at the European Court of Human Rights.

[534] The private party to administer the lotto office, which is regulated by statute and by the public lotto authority, had been recommended by the local band club. Local band clubs in Malta are allowed the concession of requesting a lotto office to be built in the locality of the band from where lottery tickets may be legally sold.

[535] The Constitutional Court emphasised this point because of the strict delineation it made between a decision of policy and legality. The Court held that it would not delve into a situation where the original project for the expropriated land is changed so long as the project remained within the public interest. The Court considered the alteration of the particular project to be a matter of policy and not a legal matter. The Court held that things would be different if the project were to be cancelled and the expropriated property held by the government in the event that a new project be planned.

as such an exercise would fall outside its competence to determine whether the alleged fundamental right had been violated or not.

In order to determine whether a fair balance had been struck between the public interest aim on the one hand and the limitation of the right to property of the plaintiff on the other, the Court had to decide primarily whether the expropriation had effectively been done in the public interest.

The Court applied the necessity test even though it did not specifically state that it was doing so. The necessity test featured predominantly as part of the process of judicial evaluation in the determination of the case. The Court applied first the suitability principle by determining if the building of a lotto office by the government was in the public interest. The Court decided that it was since regulating games of hazard is one way of curbing clandestine gambling. The Court then went into its second stage of analysis, the necessity stage, to determine if it was in the public interest to expropriate the plaintiff's land to use for the building of the lotto office, rather than other land which already belonged to the government. The public interest aim was found to have failed this test. The Court considered how the decision to build the lotto office on the part of the plaintiff's expropriated land had been arrived at. The band club which had requested permission for a lotto office could not host the office on its premises because it would be close to another band club in the same area. The second band club already owned a lotto office. Because of this proximity, the decision was taken to modify the government's project for the construction of the road and square, and to take up part of the land for the construction of the lotto office. The Court observed that no other studies had been carried out to determine if the lotto office could be built elsewhere before deciding to build on the plaintiff's property. At this stage, the Court did not continue its analysis further and did not go into the proportionality *stricto sensu* stage. The Court declared that the Commissioner had violated the plaintiff's right to property as protected by the first Protocol to the European Convention.

This is a very clear application of the necessity test which requires consideration of less burdensome means. However, it is important to note that the Court did not go into whether there effectively existed less restrictive means. The mere fact that the Executive

failed to consider other options, according to the Court, failed to satisfy the necessity test. The Court did not in fact pronounce itself on whether it considered the means to be the least restrictive or not. It did not explore the other options which may have been available to the Commissioner of Lands. It merely established a failure on the part of the Commissioner to verify all the options available to him. It could be argued that the Court here applied a restricted form of the necessity stage. However, it could be argued that in order to satisfy the necessity test, the public authority or the government must first be aware of the different options at its disposal in order to make an informed decision on which means are the least restrictive on the right of the individual. It is interesting to note therefore, that the Maltese Constitutional Court considered the situation where an authority fails to consider its different options in terms of means for achieving the aim in view, to be already in violation of the necessity test. It is also worth noting that one cannot definitely state that similar judgments delivered by the Constitutional Court composed differently will be determined in the same manner given that under Maltese law there is no strict requirement to follow precedent. Nonetheless, the Maltese Courts will not usually depart from the Constitutional Court's determination unless there are serious reasons for doing so.

The effect of the application of the proportionality principle was essentially a review of the Commissioner's decision to expropriate the plaintiff's land. In this case, the Constitutional Court confirmed the first judgment in that it annulled the expropriation order and ordered the expropriated property on which the lotto office had been built to be returned to the plaintiffs at the Commissioner's expense.

An interesting case which was decided upon the proportionality principle and which was confirmed by the ECtHR is *Zammit Maempel v. Kummissarju tal-Pulizija*, whereby an action was brought against the Commissioner of Police for violation of Article 8 and 14 of the European Convention. The complainant owned a house in a secluded rural area. Twice yearly the fields nearby would be used by the local pyrotechnic enthusiasts to make fireworks display in honour of the village patron saint feast. Fireworks are traditional in Maltese village feasts and have been displayed for many years. Malta has various fireworks factories where the locals volunteer countless hours during the year preparing for displays to be made during the village feast. There have been quite a

number of tragedies in Malta where fireworks factories blew up killing all those inside. They are considered to be a very high-risk zone and are usually built in rural areas, outside building zones. Fireworks displayed for the village feast usually last for a few days. The complainant argued that every year his family had to endure the dangers which the fireworks display posed due to the proximity of their home. The Maltese Constitutional Court considered the situation holistically. It examined the legislation regulating the display of fireworks during village feasts as well as the dangers imposed by such display, the measures taken to reduce the dangers to a minimum and the suffering endured by the complainant and his family. It noted that the law prescribes rules regarding the area from where the fireworks display is to take place and the distances which must be observed; it noted that these rules are monitored by the police and that during the display there is a continuous presence of the police and of a fire engine. It also noted that the law prescribes compulsory insurance when displaying fireworks. The Maltese Court also examined the cultural and traditional aspects of Maltese society in this context. It noted that when the complainant bought the house, fireworks had been displayed in the area for over 70 years. Fireworks form an integral part of Maltese religious celebrations. The Court also considered the fact that Malta is densely populated and is limited in space. It also noted that the complaint did not involve the proximity to the complainant's house of a fireworks factory but merely the fireworks display which lasted a short period of time and only twice annually. On the basis of these considerations, the Constitutional Court held that the legislation being challenged essentially struck a balance between on the one hand, the right to the protection of family life and on the other, the cultural, traditional, religious and touristic exigencies of Maltese society. The ECtHR confirmed the Maltese Constitutional Court's reasoning.[536]

6(c) Tilted Balance Approach

The Maltese Court has established that in cases relating to freedom of expression involving politicians, the right to freedom of expression must be tolerated to a greater and higher degree than usual.[537] This immediately tilts the balancing approach to favour

[536] *Zammit Maempel v. Malta (*App. No. 24202/10) ECtHR 22 November 2011. In this case the EctHR held that there was no violation of Article 14 on discrimination, read in conjunction with Article 8 on the right to respect for family life because a fair balance had been struck between the right of the applicants under Article 8 and the cultural, religious and economic interests of Malta.

[537] *Brincat v. Schiavone et*, Civil Court (Constitutional Jurisdiction), 23 June 1994, where the Court held 'fi grad aktar mis-solitu u minn normal'; Translation: *at a higher degree than normal*.

the freedom of expression in cases involving politics and politicians, with the result that the competing right belonging to politicians is at a disadvantage because tolerance, in such cases, is higher than in usual cases. If the approach by the Court to this right in the field of politics has a pre-destined higher value than any competing right, the Court is assigning a higher abstract weight to the freedom of expression within this set of given circumstances.[538]

Value judgments about politicians seem to lie within a grey area since although the Court has held that these judgments are not justiciable, it has nonetheless applied the proportionality principle to determine whether these have violated fundamental rights. This is what happened in a libel case where an anonymous letter received by the deputy leader of the Labour Party was reported to the Commissioner of Police who immediately took action.[539] An article was written about this incident by a politician from the opposing party, whereby it was alleged that the Commissioner of Police had acted under the influence and pressure of the Labour Party's deputy leader.[540] Both the Court of Magistrates and the Court of Appeal, in its inferior jurisdiction, found that the article had been libellous against the co-defendant deputy leader and damages were awarded to the latter. A constitutional review of the judgments was lodged on the basis that they constituted, *inter alia, a* violation of the freedom of expression. Neither the First Court nor the Constitutional Court upheld the claim.

The Constitutional Court approached this case by primarily discussing the rights and duties which the media have in communicating information and ideas which are of general public interest. Media information may include offensive information or ideas which could also provoke, shock or worry. It held that the freedom of expression of the media may also be exaggerated or contain provocative elements but it cannot exceed certain limits especially when this impinges on the reputation and rights of individuals. The Court pointed out that the restriction upon the freedom of expression on the media is to be interpreted even more restrictively in relation to politicians as opposed to private parties because the former are public figures who are subject to public scrutiny when

[538] Discussed in Chapter 2, Section 3.
[539] *Perit Michael Falzon et v. l-AG et*, Constitutional Court, 11 Jan 2013.
[540] Both plaintiff and defendant have the same name and surname, i.e. Michael Falzon but plaintiff is an architect and a politician for the Nationalist Party, whereas the defendant is a lawyer and was the deputy leader of the Labour Party.

acting in their public capacity. However, public figures such as politicians also have a right to the protection of their reputation even when they are acting in their political capacity. This right restricts the right of others to their freedom of expression and the extension of this restriction is based primarily on the dictates of reasonableness and proportionality. It then stated that the protection granted to the freedom of expression must be balanced with the interests in an open discussion of a political nature.[541] In such a case the restrictions upon the freedom of expression are to be interpreted in a restrictive manner. At this point therefore, the Constitutional Court is balancing between on the one hand the right of the media to freely express opinion in relation to politics and political issues, and on the other, the interests in the political debate itself, which presumably pertain to the general public.

In applying this balancing exercise, the Court made a distinction between mere opinion and established facts: in order to determine whether the interference by the Courts' judgment with the freedom of expression was a necessary one in a democratic society, a distinction must be made between on the one hand, established facts, and on the other mere opinions, comments or value judgments. The Court held that in a democratic society a person cannot be penalised because he or she is expressing an opinion or a value judgment, since the latter type do not impinge on whether they are true or not.[542] At this stage, one does not expect the Court to enter into a balancing exercise in relation to a value judgment since it clearly declared that value judgments are not to be considered as being susceptible of proof. However, the Court continued that a declaration which has the nature of a value judgment may still be considered to be excessive when it is not based on truthful facts when the Court is engaged in an exercise of proportionality which determines the interference of a public authority on the freedom of expression of the media. The Court here is applying the proportionality principle in relation to the restriction imposed by the public authority upon the freedom of expression of the plaintiff. So, the question which arises here is whether a value judgment is actually

[541] The Court here states 'the freedom of expression of a politician'. It is not clear if it is referring to the co-defendant on whom the article was written (which would not make sense since it is not his freedom of expression that is being debated here) or the writer of the article himself (who used to be a politician but is no longer in politics) and whose freedom of expression is being debated.

[542] *Perit Michael Falzon*, (n 539) p. 22'… ma humiex passibbli ta' apprezzament biex jigu ritenuti veritjeri o meno.' *Translation: they are not capable of analysis which may establish the truth or otherwise.*

subject to proportionality analysis or not, since the Court seems to be transmitting contradicting statements in this regard.[543]

The Court then engaged in a fact analysis exercise to determine whether the article contained proven facts about the politician upon which value judgments and opinions had been forwarded in the same article. The Constitutional Court, agreeing with the First Court held that the article contained affirmations which alleged certain facts about the politician which had not actually been proven in the civil case. It held that the writer in fact assumed certain facts to be true and based his opinion on them[544] and confirmed the appealed judgment stating that neither article 41 of the Maltese constitution, nor article 10 of the European Convention had been infringed by the Court's judgment.

The Court did not conclude the balancing exercise it had started but merely declared that in view of these findings, the appellants' freedom of expression had not been violated (because the writer had essentially based himself on false facts). The Court fell short of reconciling this argument with its initial intention proposition to apply the principle of proportionality. At this stage, one is left perplexed as to the system applied by the Court as to how it came to this conclusion especially in relation to the manner in which the Constitutional Court applied the proportionality principle. Was the Constitutional Court applying proportionality between the freedom of expression and the right to the preservation of one's reputation? Or was it applying proportionality to the freedom of expression and the right of the general public to be engaged and informed in debates of public interest? Or yet again, was the Constitutional Court considering the benefit that the general public would receive from allowing such articles to be published and the

[543] My contention here is that the Constitutional court in one instance states that a value judgment is not subject to scrutiny because it is a mere opinion or comment, while at the same time, makes a distinction between a value judgment based on true facts and one not based on true facts.

[544] The Court at this stage made reference to questions which the writer put forward in his article and which were in fact a series of affirmations which would negatively affect the reputation of the politician in question, for e.g. 'Has not MLP Deputy Leader Michael Falzon successfully used the Police Force to control the freedom of an innocent, law abiding private citizen whom he suspected could be a political enemy?' and 'Does the MLP Deputy Leader who happens to be my namesake carry more weight and influence with the Commissioner of Police than the Deputy Prime Minister who is politically responsible for the Police Force?' The Constitutional Court interpreted these questions as an affirmation of a fact rather than a question inducing an affirmative answer. (In my opinion this exercise amounts to an examination of the merits of the case dealt with in the civil case before the Court of Magistrates and the Court of Appeal). In my opinion, what the Court should have examined was the relationship between the judgment of the Court of Appeal, i.e. the restriction it placed upon the freedom of expression of Architect Falzon and the restriction upon the freedom of expression and whether this was necessary in a democratic society. What the Court did here was to balance between on the one hand the right to freely express one's opinion in relation to politics and political issues, and on the other, the interests in the political debate itself, which presumably pertain to the general public).

damage this would have on the reputation of the individual in question, such as a cost-benefit analysis? In other words, what was the freedom of expression being balanced against? These are all questions which the Constitutional Court leaves largely unanswered.

The Court's interpretation of 'balance' when attributing weights to the right to freedom of expression and any other competing right, seems to rest on its conviction that freedom of expression should be attributed a generally greater weight *a priori.* The Constitutional Court declared this in a case involving a journalist working for the Times of Malta who reported that a lawyer had been held in contempt of court because he had failed to appear for the accused on the appointed day.[545] The journalist claimed she had been present at the Court sitting. However, the acts of the proceedings had not recorded any such occurrence and the lawyer sued the journalist who was condemned to pay libel damages. A constitutional case was lodged before the First Court in its constitutional jurisdiction wherein the editor of the Times of Malta claimed that by the decision of the Court of Appeal which confirmed the First Court's judgment, his right to the freedom of expression had been violated. The Constitutional Court did not uphold this claim.

The Court held that the balance which had to be struck in this case was between on the one hand the freedom of expression and on the other hand the right to one's reputation, honour and good name. However, these two competing rights did not depart from the same platform because they did not carry the same weight.[546] The Court held that the term 'balance' does not mean that the two rights carry equal weights but that the freedom of expression is 'most probably' attributed more weight and that therefore the applicable criterion here would be that of proportionality rather than equal measures.[547] It continued that the 'balance' that is expected to be achieved between the right to the freedom of expression and the right to the preservation of the reputation of private

[545] *Aquilina et v. AG et*, First Court (Constitutional Jurisdiction), 24 May 2007, Rikors Numru 15/2004/1
[546] Ibid. at p. 15, the Court, referring to the ECtHR judgment *Barfod v. Denmark*, *(Application No. 11508/85)* 22 Feb. 1989, stated 'Il-Qorti thoss li ghandha zzid ukoll li l-"bilanc" li huwa mistenni li jinzamm bejn il-jedd ta' espressjoni hielsa u l-harsien tar-reputazzjoni tal-persuni privati ma jfissirx qies indaqs bejn dawn iz-zewg interessi opposti. X'aktarx tal-ewwel jinghata piz aqwa ghas-siwi tieghu, u ghalhekk il-kriterju huwa dak tal-proporzjonalita' aktar milli tal-kejl indaqs'. Translation: *The 'balance' to be maintained between the freedom of expression and the protection of the reputation of private persons does not mean equal weight between these two opposing points. Most probably a higher weight is first attributed for its value, and that is why we apply the criterion of proportionality, rather than equal weights.*
[547] Ibid.

individuals does not translate itself into equal measures between these two opposing rights. It stated that the 'probability'[548] is that more weight is given to the right to freedom of expression and that therefore the criterion would be that of proportionality rather than equal measures. The Court did not explain this further[549] and did not decide the case on this ground.[550] In this case, it is not clear whether the Court is attributing a higher value to the freedom of expression as an abstract weight, or if it is attributing the same value to freedom of expression as its competing principle, but then attributes a greater concrete weight to it when engaged in the stage of the intensity of the interference in the balancing exercise.

Although the balancing processes in the two judgments are unclear and incomplete respectively, the tilted balance approach that the Court took in the first judgment may be explained by reference to Alexy's abstract weight contained in his weight formula. Alexy's weight formula includes, *inter alia,* the consideration of abstract weights when these are not equal in the respective colliding principles.[551] It may be recalled that Alexy has explained that abstract weights are not decisive in the weighing process and if a principle is assigned a higher abstract weight than its competing principle, the first principle might still be outweighed in the concrete case because the competing principle, although having less abstract weight, has greater concrete weight.[552] In the first judgment discussed in this section, the freedom of expression, though assigned a higher abstract weight by the Maltese Court than its competing principle, was still held not to have been violated, indicating clearly Alexy's claim.

[548] This is the term used by the Court as it translates into the English language. It is noted that the Maltese Court is not actually engaged in a normative argument that one would expect. This also contributes to the lack of clarity in relation to the analytical distinction of the attribution of weights.
[549] In *John Anthony Mizzi v. Malta* (App. No. 17320/10) 22 November 2011, the ECtHR observed that the Maltese Constitutional Court had failed to explain why it considered the right to reputation of a deceased person to have more weight than the right to the freedom of expression of the journalist it had found guilty of defamation. The case before the Maltese Court was a libel case and not a human rights case. When the case was lodged before the EctHR, the latter found that the Maltese Constitutional Court's decision against Mizzi violated Article 10 on freedom of expression.
[550] The Maltese Court decided that the Court records were reliable and consequently penalised the jounalists, The latter lodged a lawsuit against Malta before the EctHR (*Aquilina and Others v. Malta* (App. No. 28040/08) 14 June 2011). The EctHR found that Article 10 on freedom of expression had been violated by the domestic courts because they had failed to take into account reliable evidence other than the record of the proceedings. In this respect the domestic courts went beyond their margin of appreciation with the consequence that the judgments against the journalist ordering her to pay damages were disproportionate to the aim pursued.
[551] Alexy R., 'On Balancing and Subsumption', (n 119), 441.
[552] Discussed in Chapter 2, Section 3.

In the second case discussed in this section, the Maltese Court, in attributing a higher abstract weight to the freedom of expression uses the Maltese term '[x']aktarx' translated as 'probably' or 'most probably'.[553] Thus, the Maltese Court is not using a clear normative argument to establish the higher abstract weight that it is attributing to freedom of expression in this case, despite its clear declaration that the case required a balancing approach. The absence, in this judgment, of a clear analytical distinction of the attribution of weights in the balancing exercise, and the inertia it leaves in the balancing process, prohibits one from definitively asserting that the Maltese Court apply a higher abstract weight to the freedom of expression generally.

6(d) Legal Logic Approach

Another way in which the Maltese Court has applied the proportionality principle is as a tool of legal logic in order to determine whether a law in force is adequate in today's times, given the circumstances. In the area of freedom of expression, the principle of proportionality has been invoked by the aggrieved parties in order to impugn a particular law or to impugn a judgment of an inferior court through constitutional review.

In *Grech v. AG et*,[554] the principle of proportionality has been used as a tool for attacking legal provisions prohibiting advertisements on gaming on pain of criminal prosecution.[555] In this case the plaintiff was editor of the Sunday Times of Malta and in separate (criminal) proceedings was being accused of having published advertisements on illegal gambling. Pending the proceedings, the plaintiff brought a constitutional action to attack the domestic law[556] upon which criminal proceedings were being taken against him, claiming that these violated, *inter alia*, his freedom of expression as envisaged by Article 41 of the Constitution of Malta and Article 10 of the European Convention. The plaintiff asked the Court in its constitutional capacity to declare such law null and void, with the consequence that the criminal proceedings against him would be null and void and the charges dropped.

[553] The term in the Maltese language does not have a distinctive superlative and it can be translated either way.
[554] Civil Court (Constitutional Jurisdiction), 15 March 2013
[555] Article 49 (1)(a) and (b) of Chapter 400 of the Laws of Malta on Gaming.
[556] Ibid.

The Court analysed the justification put forward by the authorities in enforcing Article 49 (1) (a) and (b) of the Gaming Regulations to the effect that absence of advertisements on gaming and casinos is in the interest of public order and upholds values which Maltese society defends. The defendants claimed that such adverts encouraged the forming of gambling habits. The Court noted (on the plaintiff's instance) that the proviso to Article 49 contains an exception to the rule that such advertising is prohibited on the general prohibition of gaming advertisement. The exception states gaming adverts may be published abroad or in touristic areas in Malta such as airports, harbours, hotels and holiday complexes. On the basis of this, the plaintiffs argued that the purpose of Article 49 could not be the protection of the interests in the public order because the Maltese population could still be exposed to such adverts, especially in the areas mentioned in the proviso. The Court agreed with the plaintiffs and held that the restriction on the editor not to publish advertisements of casinos and other gambling places was not justified. It agreed that the plaintiff's freedom of expression had been restricted without it being necessary in a democratic society. The provision constituted an unnecessary interference with the plaintiff's freedom of expression and was not actually protecting any fundamental Maltese value and was not effectively protecting the Maltese population from forming gambling habits.[557]

The application of the principle of proportionality in this case served primarily as an argumentative tool of legal logic: if in certain areas of Malta advertisements are permissible in order to lure tourists to gamble, then it is not possible to claim that the prohibition or restriction upholds a Maltese value in the interests of public order since the Maltese population would still be exposed to such adverts in the tourist areas. It would have been interesting to see, in the absence of this legal contradiction, whether the Court would have found the prohibition to be an unnecessary limitation on the right to the freedom of expression, and the considerations it would have made in its balancing exercise.

[557] '… ma hemmx valur fundamentali ghas-socjeta' li qed jigi difiz b'din il-ligi u inoltre lanqas ma hija 'mod effettiv tipprotegi lis-socjeta' Maltija mill-vizzju tal-loghob tal-azzard'. In effett hu aktar minn possibbli li jintlahqu l-Maltin b'dawn ir-reklami u allura xorta l-Maltin se jigu esposti ghal dan it-tip ta' reklamizzar', p. 22. *Translation: there is no fundamental value of society that is being protected by this law. Additionally [this law] does not contain effective protection to Maltese society against the addiction to gambling. In fact, it is more than possible that such adverts reach the Maltese people and therefore Maltese society is still being exposed to such adverts.*

Conclusion

The Maltese Courts do not apply the full proportionality test. No consideration of suitability and necessity seems to feature in the judgments of the Maltese Courts which seem to equate the principle of proportionality to the balancing exercise, the final stage of the test. The approach to balancing tends to rest on the last stage of the proportionality test, i.e. proportionality *stricto sensu*, close to Alexy's law of balancing and sometimes this is reduced to a cost-benefit analysis. The Maltese Courts are influenced by the doctrine of 'fair balance' of the ECtHR which probably explains why priority is given to the balancing exercise. Very rarely do the Maltese courts apply the suitability and the necessity test even if certain cases would have benefited greatly from the application of these steps as discussed above.[558]

Four approaches to proportionality have been identified. However, it is safe to say that the predominant approach is the excessive burden approach whereby the Maltese courts tend to consider in detail the actual and sometimes the future negative effects on the victim. Lack of balance is usually equated with the injustice being suffered by the individual. This is probably the 'fair balance' influence which the ECtHR has exerted on the Maltese courts over time.[559]

What emerges from this study is that the Maltese courts very rarely consider the public interest when examining cases of excessive burden on the victim. As has been argued earlier, the Maltese courts persistently fail to consider the public benefit, if any, being attained through the restriction of the right of the private individual, even though the public interest is invariably raised by the opposing party. Under the excessive burden approach, when a provision is being impugned, the Maltese courts sometimes also focus on the shortcomings of the legal provision in addition to the suffering of the restricted party. It is submitted that one reason for this type of approach by the Maltese court is that the application lodged before it requires the Court to declare or otherwise whether the party's right has been violated and therefore the Court feels compelled to examine the suffering of the complaining party to determine if his right is actually being violated. If

[558] *Attard Montalto v. Prim Ministru et*, First Court (Constitutional Jurisdiction), 7/03/ 2014.
[559] In *Xerri et v. Tabone noe et*, (n 470), the Court explicitly stated that it relies on the doctrine of fair balance as developed by the ECtHR when applying the principle of proportionality.

the Maltese court decides that the suffering has been excessive then it would apply the law of balancing to annul legal provisions or to declare government action illegal.

In the comprehensive approach to balancing the Maltese court's approach does not depart from the amount of suffering endured by the alleged victim but takes a more holistic approach to the situation. Public interest seems to feature more in such cases. However, the Maltese court does not go into great detail when examining the public interest. A definition of public interest in the case examined would be beneficial for a deeper understanding of the Maltese court's balancing approach because it would throw light on the elements constituting public interest which the Court considers as more important. In cases where there is a strong Maltese sentiment, such as illegal immigration, the Maltese court also seems to take a more comprehensive approach to the situation. In such cases the Court will apply proportionality as balancing by assigning weights to the suffering of the illegal immigrant on the one hand, and the burden this places on Maltese society on the other.

The tilted balance approach is probably the most controversial because it may be interpreted as 'bias *a priori'.* The fact that the Maltese court has declared that when applying the balancing doctrine to cases of defamation of public figures, particularly politicians, the approach has to tilt towards favouring the freedom of expression, seems to contradict and even exclude the very application of proportionality. The principle of proportionality has also been used by the Maltese court to support logical arguments. In such cases, there is no real balancing taking place and there is no real attribution of weight.

Whether the Maltese courts will eventually start applying the full proportionality test is a moot point. This is because, as we have seen, the Courts are aware that they are not applying the full proportionality doctrine. They have declared in various cases that what they were being called upon to decide was merely the 'balancing' decision. However, this is a misnomer because the principle of proportionality, in order to be fully effective, requires the application of all the three stages, i.e. suitability, necessity and finally proportionality *stricto* sensu. As Harbo puts it 'whereas a necessity assessment presupposes that the measure is suitable, a suitability assessment does not presuppose

that the measure is necessary. Likewise, whereas a proportionality assessment must imply a suitability assessment, it does not have to imply a necessity assessment (or for that sake a *stricto sensu* assessment)'.[560] This clearly indicates the importance of applying all three subtests in proportionality analysis.

[560] Harbo T., *The Function of Proportionality Analysis in European Law* (2015) (n 36), 73.

Chapter 4

The Principle of Proportionality in the Judgments of the European Court of Human Rights

Introduction

This chapter discusses the principle of proportionality applied by the European Court of Human Rights (ECtHR) in its interpretation and application of the European Convention on Human Rights and Fundamental Freedoms (ECHR). In its judgments, the predominant term used by the ECtHR, when referring to proportionality analysis, is 'fair balance' connoting a balancing exercise reminiscent of the third stage of the traditional proportionality principle, i.e. proportionality *stricto sensu.* On other occasions, the ECtHR has used the terms 'balancing' or 'reasonable relationship of proportionality'. It will be submitted that the use of these terms do not indicate a differentiation of approach to proportionality analysis. This is because the approach taken by the Court is a pragmatic one. No real structured approach can be identified when the Court is engaged in proportionality analysis.

The court's application of the principle of proportionality is shaped by a number of factors: that it perceives itself to be a supranational court, its subsidiary role to that of domestic courts and the consequent development by the court of the margin of appreciation doctrine. This approach has led the court to adopt a pragmatic approach which contrasts with the more structured approach required by the traditional proportionality analysis. This type of approach demonstrates that elements which may lead to a finding of a violation of fundamental rights under the traditional approach are regarded by the ECtHR as merely one of the factors to be taken into account when applying proportionality analysis.

In this chapter it will be argued that the judgments of the ECtHR lack the analytical depth expected in the application of proportionality analysis. It is submitted that three main factors contribute to this lack of analytical depth. First, the nature of the ECtHR limits the extent of intrusion it can apply in its judgments. This is because by its very nature it requires recognition and support of the parties to the ECHR. A second contributing factor

is the margin of appreciation doctrine which the ECtHR applies. The third is the abridged manner in which it applies the proportionality principle. It is submitted that the position of the ECtHR as an international court, and its lack of coercive authority over the States for the enforcement of its judgments, play a highly influential role in the level of scrutiny that the ECtHR is prepared to apply. The Court's application of the margin of appreciation doctrine to its judgments has considerably undermined an effective proportionality analysis of the cases brought before it. This in turn has resulted in a weak application of the proportionality principle and an overall weak judgment in terms of human rights protection. Its approach seems to be an 'overall' pragmatic approach where the stages of proportionality analysis are not adhered to and where failure at one stage does not automatically signify that there has been a violation of human rights. It is submitted that this is not a thorough application of the proportionality principle because of the lack of observance of the requirements of the three-stage test. It is also submitted that the weakness in this approach lies in the fact that the ECtHR usually applies the third stage of the proportionality principle omitting an analysis under the previous two stages. The Court makes a clear differentiation between necessity and balancing but only occasionally does it apply the necessity stage. It is submitted that the appropriate approach to the application of proportionality should be a structured one, incorporating all three stages in a successive manner, where failure at one stage connotes a violation of the proportionality principle. A partial application of the proportionality principle results in an under-enforcement of Convention rights[561] and has led to criticism that judgments are too lenient or have even failed to deliver a fair judgment based on an appropriate appreciation of the conflicting rights and interests involved.[562] Additionally, the interpretative approach to proportionality analysis by the ECtHR is not sufficiently clear and transparent, making it more difficult for national authorities and national courts to adopt the ECtHR's interpretation as their own.[563]

[561] Tsarapatsanis D., 'The Margin of Appreciation doctrine: a low-level institutional view', (2015) Legal Studies, Vol. 35 No. 4, 679.

[562] In *Z v. Finland*, (*App. No 22009/93*), ECtHR 25th February 1997**,** Judge De Meyer, in his partly dissenting opinion, described the margin of appreciation as a 'hackneyed phrase ….. recanting the relativism it implies'.

[563] Gerards J., 'How to improve the necessity test of the European Court of Human Rights', International Journal of Constitutional Law (2013), Vol. 11 No. 2, 466–490.

1. The European Court of Human Rights

The ECtHR was set up to ensure observance of the obligations which the respondent States undertook when signing and ratifying the ECHR. However, viewing the role of this Court only from this perspective would be to overlook its less obvious underlying characteristics which make it a forum for international diplomatic interaction. At the time when the ECtHR was established '[e]uropean integration through law' versus national sovereignty was hardly a settled issued.[564] As Madsen points out, the main aim of the setting up of the ECHR was 'hardly to alter substantially the protection of human rights in the Member States but collectively to guarantee against a return to totalitarianism in Western Europe'.[565] The Commission, and later the ECtHR, were faced with reticent Member States which embraced, at an international level, the idea of an integrated Europe through the observance of fundamental human rights, but held on tightly to their idea of no interference with their national sovereignty.[566] This had the consequence of placing the ECtHR in a position where, on the one hand, it had to develop a jurisprudence reflecting its serious engagement with claims of fundamental human rights violations against the Contracting States, while at the same time, having the delicate task of bringing the latter on board with it to ensure the observance of its judgments. This mission required particular skills within the judiciary of the ECtHR, mainly expertise in academic law but also, and not less importantly, diplomatic skills and experience in international politics.[567] It is of no surprise therefore, that in being a diplomatic adjudicator, the ECtHR was not intended to possess the coercive authority which a domestic constitutional court normally would have.[568] As Costa points out, the primary role within the Convention system is that of the States parties, whereas the ECtHR's role is a subsidiary one.[569]

The ECtHR reviews alleged breaches of fundamental human rights in cases where national remedies are inadequate. Specifically, it reviews actions, decisions and

[564] Madsen R. M., 'The Protracted Institutionalisation of the Strasbourg Court: Legal Diplomacy to Integrationalist Jurisprudence', in Christoffersen J & Madsen R M, *The European Court of Human Rights between Law and Politics,* OUP (2011), p. 46

[565] Madsen R. M., 44, and Bates E., 'The Birth of the European Convention on Human Rights,' in Christoffersen J & Madsen R M, *The European Court of Human Rights between Law and Politics,* OUP (2011), p. 21.

[566] Ibid. Madsen, 22.

[567] Ibid. Madsen 47.

[568] Bates E., 'The Birth of the European Convention on Human Rights,' (n 565) 39.

[569] Costa J.P., 'On the Legitimacy of the European Court of Human Rights' Judgments', (2011) European Constitutional Law Review 7, 179.

legislation adopted by the State allegedly causing a violation under the Convention. It also reviews national judicial decisions which are alleged to be in breach or go counter to the interpretation of the Convention or which violate fundamental human rights protected by the Convention. It also monitors whether the remedies provided at national level are effective[570] and whether the action taken by the superior courts of the signatory states provide an effective remedy.[571]

The enforcement of the ECtHR's judgments rests entirely on the States parties' shoulders. Thus, the ECtHR's primary function is supervisory. This function emanates directly from its subsidiary nature which the Court has identified and reflected in the adoption of doctrine which delimits its domain.[572]

2. Subsidiarity in the European Convention

There are various aspects of the principle of subsidiarity within the Convention. One important aspect is that the role of the Court is subsidiary to that of the States parties and is limited to considering Convention-compliance rather than acting as final court of appeal or fourth instance.[573] Since it does not form part of a domestic judicial hierarchy, it continuously seeks the cooperation of national authorities and in doing so attempts to convince them to execute its judgments in an effective manner.[574]

The Court has defined its role as an international court by reference to Article 19 ECHR which establishes it, linking its function to the subsidiarity principle:

> Subsidiarity is at the very basis of the Convention, stemming as it does from a joint reading of Articles 1 and 19. The Court must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them. Though the Court

[570] Article 13 ECHR.
[571] *Zammit Maempel v. Malta,* ECtHR, (n 536).
[572] Costa JP, 'On the Legitimacy of the European Court of Human Rights' Judgments', (n 569), 179 – 180.
[573] Greer S., 'Constitutionalizing Adjudication under the European Convention on Human Rights', (Autumn, 2003), Oxford Journal of Legal Studies, Vol. 23, No. 3, 409.
[574] Tsarapatsanis D., 'The Margin of Appreciation doctrine' (n 561) 684.

> is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic court.[575]

By virtue of the principle of subsidiarity, the Court has, on various occasions, exercised self-restraint when reviewing a case in favour of the respondent State, by applying the margin of appreciation doctrine. In many cases, the Court has felt that the national courts or national authority or the respondent State were 'better placed' to determine the measures required in the given circumstances. This has resulted in the granting of a degree (wide or narrow) of appreciation to the respondent State with the consequence that the principle of proportionality is weakened considerably. This means that the principle of subsidiarity discourse has allowed the Court to diminish its degree of scrutiny in certain cases by allowing a margin of appreciation to the respondent State or its component institutions. In *Hatton* the Court held:

> ….. the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions …. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight…'[576]

Although the principle of subsidiarity does not expressly appear in the text of the Convention, it underpins the whole treaty.[577] More recently, it has been incorporated into Protocol 15 annexed to the ECHR.[578] Subsidiarity entails recognition of the State's 'space', but equally of the boundaries that delimit it.'[579] However, such 'space' is relative

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[575] *Austin and others v. UK*, (*Applications nos. 39692/09, 40713/09 and 41008/09)* 15 March 2012, par. 61.
[576] *Hatton and others v. UK*, *(Application no. 36022/97)* ECtHR 8 July 2003, par. 97.
[577] Costa J., 'On the Legitimacy of the European Court of Human Rights' Judgments', (n 569), 173-182.
[578] It introduces this principle as follows: Affirming that the High Respondent Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.
[579] Costa J. ''On the Legitimacy of the European Court of Human Rights' Judgments', (n 569), 173-182.

to the national systems safeguarding human rights and not to the political will or policy of national authorities.[580]

The principle of subsidiarity has been defined as 'a long-standing and fundamental jurisprudential tool in the decision-making of the Court'[581] because the mechanism of human rights protection at this level has often been termed by the Court to have a 'subsidiary character'.[582] Subsidiarity is an inherent part of the system of protection within the Convention and rests on the direct obligation placed on the Respondent States to provide human rights' protection. This State responsibility is envisaged by Article 1 (ECHR) which states that '[t]he High Respondent Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[583] The ECtHR has also acknowledged the subsidiary character of human rights' protection within the Convention system by providing that 'the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities'.[584] The ECtHR has also referred to Article 13 (ECHR) embodying the right to an effective remedy, and Article 35(1) concerning the principle of prior exhaustion of domestic remedies to remind the Respondent States of the subsidiary nature of the Convention and of the States' obligation to decide on the necessary measure to provide protection to Convention rights within their jurisdiction.[585]

3. Review Function and the Application of Proportionality

When reviewing a case lodged before it, the ECtHR is effectively engaged in two exercises, (i) the consideration of the vertical power between international review and national autonomy; and (ii) the weighing of rights and interests.[586] The first exercise involves the Court making a comparative test of abilities of the national authorities and institutions

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[580] Spielmann D., "Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?", (2013) at <http://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf,> (Speech), accessed on 12 June 2020, p. 2.

[581] Mowbray A., 'Subsidiarity and the European Convention on Human Rights' (June 2015) *Human Rights Law Review*, Volume 15, Issue 2, 339.

[582] *Broniowski v. Poland*, (*friendly settlement*), (*Application No. 31443/96)*, ECtHR 28 September 2005 in Information Note on the Court's case-law No. 79, October 2005 at < file:///Users/natashabuontempo/Downloads/002-3696%20(1).pdf> accessed 12 June 2020; *De Souza Ribeiro v. France*, *(Application no. 22689/07)*, ECtHR 13 December 2012, par. 77.

[583] Article 1 ECHR.

[584] *MSS v. Belgium and Greece*, *(Application no. 30696/09)* ECtHR 21 January 2011, par. 287.

[585] *Kudla v. Poland*, *(Application no. 30210/96)* ECtHR 26 October 2000, par. 152.

[586] Christoffersen J., *Fair Balance* (n 148), 235.

against its own ability.[587] This exercise will determine whether a wide or narrow margin of appreciation is to be allowed to the respondent State. If the Court decides that a wide margin is to be allowed, it usually declares that the respondent State is better placed in assessing the domestic situation and in deciding on the best measures to be adopted.[588] A narrow margin of appreciation will entail an in-depth review.

The second exercise involves the application of the principle of proportionality. Depending on whether the Court affords a wide or narrow margin of appreciation, the proportionality analysis will be lax, in the first place, or deeper in the second. There is a significant correlation between a wide margin of appreciation and a lax standard of review, and a narrow margin of appreciation and an intense proportionality appraisal.[589] A wide margin of appreciation afforded to the respondent State entails a weak application of the proportionality principle. These two exercises are generally fused into each other and the judgments do not reflect any clear indication of the considerations made by the Court. Several authors have discussed the various considerations which they believe the Court makes when deciding whether or not to apply an in-depth review and it has been submitted that there is truth in each of these.[590] These considerations will be discussed in the next section examining the margin of appreciation doctrine and the proportionality principle.

The degree of scrutiny exercised by the Court when reviewing a case varies between intense and light scrutiny.[591] The margin of appreciation influences the type of scrutiny the Court will carry out. A lighter scrutiny is applied by the Court in relation to certain public interests, e.g. public morals. The level of scrutiny is deeper when the case concerns the most intimate aspects of the right to private life,[592] in cases of freedom of expression and freedom of association and assembly where the democratic process is threatened.[593]

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[587] Tsarapatsanis D., 'The Margin of Appreciation (n 561) 675-679.
[588] The *Handyside* Case is a classic example (Handyside v. UK, *(Application no. 5493/72)* ECtHR 7 December 1976). See also *Hatton and others v. UK* (n 383); *Lithgow and others v. UK*, *(Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81)* ECtHR 8 July 1986; *Zolotas v. Greece (No. 2), (Application no. 66610/09)* ECtHR 29 January 2013.
[589] Arai-Takahashi Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* Intersentia (2002), p. 2
[590] Spielmann D., 'Allowing the Right Margin' (n 580), 2.
[591] Foster S., *Human Rights and Civil Liberties,* (Pearson 2011) 65-68; Pirker B., *Proportionality Analysis and Models of Judicial Review,* (n 177), 203-204.
[592] *Dudgeon v. UK*, *(Application no. 7525/76)* ECtHR 22 October 1981.
[593] *Leander v. Sweden*, *(Application no. 9248/81)* ECtHR 26 March 1987.

In such cases 'the Court thus feels justified to claim authority for judicial review both as protector of rights against intrusions into intimate aspects of individuals as well as a setter of common European standards'.[594]

Protocol 15 reflects the clear connection existing between the margin of appreciation doctrine of the ECtHR and the principle of subsidiarity identified in the Convention:

> 'Affirming that the High Respondent Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.[595]

This connection was first identified by Petzold when he affirmed that the 'margin of appreciation thus stems directly from the principle of subsidiarity as it applies within the Convention system'[596] and that '[t]he doctrine of the margin of appreciation is a natural product of the principle of subsidiarity; it is a technique developed to allocate decision-making authority to the proper body in the Convention scheme, to delineate in concrete cases the boundary between "primary" national discretion and the "subsidiary" international supervision'.[597]

Attempting to define the margin of appreciation doctrine as interpreted by the ECtHR is not an easy task. This doctrine points towards the degree of intrusiveness exercised by the Court when reviewing alleged violations of human rights by a particular respondent State. Alternatively, it may be defined as the degree of judicial self-restraint in reviewing a particular case, establishing the limits of the Court's assessment. When the Court applies the margin of appreciation doctrine, it will accept the Respondent State's decision and will not engage in a 'total' review of the substance of the case.[598]

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[594] Pirker B., *Proportionality Analysis and Models of Judicial Review,* (n 177), 204
[595] Protocol 15 (ECHR).
[596] Petzold H., 'The Convention and the Principle of Subsidiarity' in Macdonald, Matscher & Petzold (eds) in *The European System for the Protection of Human Rights,* (Martinus Nijhoff 1993), 59.
[597] Ibid., Petzold H., and see also Mowbray A., 'Subsidiarity and the European Convention on Human Rights', (n 581), 313-341.
[598] Spielmann D., 'Allowing the Right Margin' (n 580), 2.

Thus, the margin of appreciation doctrine determines the degree of judicial scrutiny to be applied. Depending on the circumstances of the case, the degree of appreciation afforded to the State may be either wide or narrow. A wide margin of appreciation will allow the respondent State a wide degree of discretion in terms of the measures employed at national level and their effects, and vice versa.

Spielmann summarises the reasons for the application of the margin of appreciation doctrine, stating that each contain a degree of truth. He states that the doctrine (a) is the natural product of the Court's subsidiary jurisdiction; (b) that it signifies respect for pluralism and State sovereignty (Sir Humphry Waldock explained it as the means by which Strasbourg reconciles the international protection of human rights with the sovereign powers and responsibilities of democratic government);[599] (c) that it signals recognition by the Court of the inevitable limits to its institutional capacity, i.e. acceptance that it cannot consider every case in every detail; (d) that a court, and *a fortiori* an international court, is not the ideal forum for arbitrating difficult choices of socio-economic policy; and (e) that the European Court is too distant (from the national forum) to rule on cases of great sensitivity. [600]

The principle of subsidiarity has enabled the doctrine of the margin of appreciation to flourish resulting in a decrease in the degree of intensity with which proportionality analysis is conducted. This has been criticised widely.[601] It has also been suggested that the application of the margin of appreciation doctrine could substantively mean a modification of the proportionality principle.[602] Arai-Takahashi identifies a corresponding relativeness between the Court's decision to allow a margin of appreciation to the respondent State and its unwillingness to carry out a detailed

[599] Waldock H., 'The Effectiveness of the System set up by the European Convention on Human Rights', (1980), Human Rights Journal 1, 9.
[600] Spielmann D., 'Allowing the Right Margin', (n 580) 2.
[601] *In Z v. Finland*, (n. 562), Judge De Meyer, in his partly dissenting opinion, referred to the margin of appreciation as a 'hackneyed phrase' stating it was high time that this doctrine be banished. For a discussion of the controversy within the ECtHR on the application of the margin of appreciation doctrine see Spielmann D., 'Allowing the Right Margin' (n 580).
[602] Stelzer R J., *The Prospects for 'Proportionality' as a Generic and Universal Legal Principle in Public International Law,* (2011), GVO printers & designers Ede NL, at <https://www.academia.edu/37600894/The Prospects for Proportionality as a Generic and Universal Legal Principle in Public International Law>, accessed 12 June 2020, p. 327-328.

examination of the facts of the case and the legitimate aim pursued, leading to a complete absence of any meaningful proportionality appraisal.[603] The margin of appreciation doctrine seems to serve as a safety valve when the Court is reluctant to decide the issue before it conclusively.

4. The Relationship between the Margin of Appreciation Doctrine and Proportionality Analysis.

An intrinsic link exists between the margin of appreciation doctrine and the principle of proportionality in ECtHR judgments. As explained by Letsas, the margin of appreciation doctrine may be said to have two functions embodying two concepts: (i) the substantive concept and, (ii) the structural concept.[604] He explains that the substantive understanding of the margin of appreciation doctrine involves the relationship between individual freedoms and collective goals, whereas the structural concept of the doctrine concerns the degree of scrutiny the Court is prepared to apply in its review as an international court.[605] Letsas believes that the Court's use of the margin of appreciation doctrine, sometimes as a substantive concept and other times as a structural concept, 'explains why the doctrine is described as "the other side of the principle of proportionality" by some, and as enabling "the Court to balance the sovereignty of Respondent Parties with their obligations under the Convention" by others'.[606]

The margin of appreciation doctrine is usually applied to provisions which allow the restriction of a right if certain conditions are satisfied.[607] Spielmann believes that rights which may be justifiably restricted such as the right to private and family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association (Articles 8-11 ECHR) call "naturally" for the application of the margin of appreciation doctrine.[608] Where the rights are more fundamentally core rights, such as

[603] Arai-Takahashi Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* (n 589), 16.
[604] Letsas G., *A Theory of Interpretation of the European Convention on Human Rights,* OUP (2007) 80-98.
[605] Ibid., 81.
[606] Ibid.
[607] Articles 8 -11 of the Convention, Article 14 and all three articles of the first Protocol; this is also true in relation to the applicability of the proportionality principle which will be discussed later in this chapter.
[608] Spielmann D., 'Allowing the Right Margin' (n 580), 3.

the right to life, the prohibition of torture, slavery and forced labour, and the double jeopardy rule, the margin of appreciation doctrine is not applied.[609]

The margin of appreciation doctrine determines the degree of judicial scrutiny the ECtHR is ready to apply in any given case. The Court has held that '… the breadth of the margin of appreciation to be accorded to the State is crucial to its conclusion as to whether the impugned prohibition struck that fair balance'.[610] The degree of application of the doctrine varies from narrow to wide. A wide margin of appreciation will allow the respondent State a wide degree of discretion in terms of the measures employed at national level and their effects on the claimed right. The effect of such doctrine on proportionality analysis has resulted in a weak application when the margin of appreciation is wide, and a less weak one, when the margin is narrow. It will be submitted that even in cases where the margin of appreciation afforded is narrow, the Court has no real structured approach to proportionality analysis.

The breadth of the margin of appreciation rests on various considerations[611] including the existence of common ground among the laws of Respondent States, the sensitivity of the area being considered and the variety in customs, policies and practices across Respondent States.[612] Spielmann has summed up the various considerations identified by legal writers as follows: i. the provision invoked; ii. the interests at stake; iii. the aim pursued by the impugned interference; iv. the context of the interference; v. the impact of a possible consensus in such matters; vi. the degree of proportionality of the interference, and vii. the comprehensive analysis by superior national courts.[613] The consideration of public morals also plays an influential role on the Court. Where there is no uniform European conception of morals,[614] the Court will leave a margin of appreciation. If, on the other hand, there exists 'a fairly substantial measure of common ground' the Court will allow the respondent State 'a less discretionary power of appreciation', which in turn will result in 'a more extensive European supervision'.[615]

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[609] Ibid., 11.
[610] *A, B and C v. Ireland*, *(Application no. 25579/05)* 16 December 2010, par. 231.
[611] Ibid.
[612] Kilkelly U., 'The Right to Respect for Private and Family Life', (2001) Human Rights Handbooks, No. 1, 33.
[613] Spielmann D., "Allowing the Right Margin' (n 580), 11.
[614] *Handyside* (n 588).
[615] *Sunday Times v. UK*, *(Application no. 6538/74)* ECtHR 26 April 1979, par. 59.

Cases involving political sensitivities will also be found by the Court to warrant the application of the margin of appreciation doctrine. In addition, institutional considerations weaken further the Court's scrutiny of the substantive elements of the case. Tsarapatsanis believes that when the ECtHR allows a margin of appreciation, it is not engaged in a deep normative theory about the substantive right but is engaged in a comparative institutional study.[616] He believes that in such cases the Court will look at the national institutions' competence to take the decision and once it decides that the latter is more suited for the job, the Court will relax its standard of review in favour of a margin of appreciation to the relevant national authority.[617] Such an exercise would impact greatly upon the Court's choice of facts to be considered and also its exercise of proportionality. When the margin afforded is wide, the Court's power of review is limited to ascertaining whether the respondent State exceeded the parameters of such a margin. The application of a wide margin of appreciation leaves no room for a proportionality analysis because this is left up to the national authorities as part of the wide margin afforded.[618]

The margin will usually be narrower 'where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights' and '[w]here a particularly important facet of an individual's existence or identity is at stake'.[619] Where, on the other hand, there is no consensus within the laws of the respondent States, 'either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider'.[620] Thus, in relation to Article 10 on freedom of expression, the Court affords a wide margin if the freedom impinges on morals or religion[621] and if the Court cannot identify common grounds among the States.[622] If, on the other hand, the freedom of expression imperils the democratic foundations of a society, such as requiring journalists to divulge their sources, then the margin afforded is narrow.

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[616] Tsarapatsanis D., 'The Margin of Appreciation Doctrine' (n 561) 675-676.
[617] Ibid., 675-676.
[618] *Mellacher and others v. Austria*, (*Application no. 10522/83; 11011/84; 11070/84*), 19 December 1989; *Zolotas v. Greece (No 2)* (n 588).
[619] *Sabanchiyeva v. Russia*, *(Application no. 38450/05)* ECtHR 6 June 2013, par. 134, and A,B and C v. Ireland (n 426), par. 232. See also, *Evans v UK*, *(Application no. 6339/05)* ECtHR 10 April 2007 and *Connors v. UK*, *(Application no. 66746/01)* ECtHR 27 May 2004.
[620] *A, B and C v. Ireland* (n 610), par. 232.
[621] See for e.g. *Lautsi and Others v. Italy*, (Application no. 30814/06) ECtHR 18 March 2011.
[622] Spielmann D., "Allowing the Right Margin' (n 580), 13.

The margin of appreciation doctrine allows the respondent State decision-making space. The effects of its application is the finding that the respondent State has not overstepped its margin of appreciation and that there was therefore no violation of the claimed right. In such cases, there is usually an automatic finding that the principle of proportionality has not been violated by the respondent State. Conversely, when proportionality is found to have been violated, the Court declares that the State has overstepped its margin of appreciation as an expression of its final conclusion.[623] This was seen in *Slivenko* where the Court considered whether the removal from Latvia of the applicants who were descendants of Russian military officers posed a danger to national security as claimed by the Latvian government. Having found that there was no danger, the Court concluded as follows: 'Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Respondent Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been "necessary in a democratic society". Accordingly, there has been a violation of Article 8 of the Convention.'[624] In such cases the Court does not effectively rely on the margin of appreciation doctrine but makes use of it 'to make a very general and simple point about the limitability or non-absoluteness of the Convention rights'.[625] In such cases, the margin of appreciation doctrine does not serve as a main tool of determination.

It is interesting to note that when the Court takes into account matters such as institutional considerations and the impact of a possible consensus in the case before it, it is effectively considering matters falling outside the substantive issues of the case. This seems to be intrinsically linked to the Court's failure to scrutinise the facts of the case before it. Its 'failure to carry out a detailed examination on the merits has often corresponded to [its] willingness to recognise the overriding importance of the legitimate

[623] Letsas G., *A Theory of Interpretation of the European Convention on Human Rights,* (n 604), 87.
[624] *Slivenko v. Latvia*, *(Application no. 48321/99)*, 9 October 2003, par. 128.
[625] Letsas G., *A Theory of Interpretation of the European Convention on Human Rights,* (n 604), 89.

aim and the margin of appreciation pleaded by a respondent State'.[626] The absence of such detailed examination and the application of the margin of appreciation doctrine has often led to the justification of the complete absence of 'any meaningful proportionality appraisal'.[627]

The effects of the margin of appreciation doctrine on proportionality assessment can be clearly seen in the evolutive judgments on the official recognition of gender of transsexuals who undergo a sex change. The initial judgments of the Court allowed quite a wide margin of appreciation to the States to refuse such recognition, stating that fundamental changes in the national system regulating birth and civil statuses were required:

> In order to overcome these difficulties, there would have to be detailed legislation as to the effects of the change in various contexts and as to the circumstances in which secrecy should yield to the public interest. Having regard to the wide margin of appreciation to be afforded the State in this area and to the relevance of protecting the interests of others in striking the requisite balance, the positive obligations arising from Article 8 cannot be held to extend that far.[628]

The application of such a wide margin of appreciation effectively resulted in the non-application of an effective proportionality analysis. The 'fair balance' term was used in the judgment simply to state that proportionality had been struck since the State did not have any positive obligation to change its system of birth registration.[629] The margin of appreciation was narrowed in a subsequent similar case following considerations that internationally there is an increase of social acceptance of transsexuals as well as legal recognition of their new identity.[630] The Court also considered that the registration system had been modified to take into account legitimisation and adoption. It held that

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[626] Arai-Takahashi Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* (n 589), 16.
[627] Ibid., 24.
[628] *Rees v. UK*, *(Application no. 9532/81)* ECtHR 17 October 1986, par. 44, and *Sheffield and Horsham v. UK*, *(Application nos. (31–32/1997/815–816/1018–1019)* ECtHR 30 July 1998, par. 51-59.
[629] Ibid. *Sheffield and Horsham v. UK*, par. 76
[630] *Goodwin v. UK*, *(Application no. 28957/95)* ECtHR 11 July 2002.

the government could no longer claim that the matter fell within its margin of appreciation and applied a proportionality test weighing the interest of the applicant in obtaining legal recognition of her gender reassignment and the public interest claimed by the respondent State. The Court held that 'the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant' and that a violation of Article 8 on her right to private life had occurred.[631] This change in attitude reflects the State of affairs which subsists between the margin of appreciation doctrine and the application of the principle of proportionality. With the narrowing of the margin of appreciation afforded to the respondent State, the opportunity for proportionality analysis arises.[632] However, it remains to be discussed whether, once the Court has recognised that no margin of appreciation exists, or a narrow one exists, it applies a structured and in-depth analysis of proportionality to the case before.

5. Proportionality Approach by the ECtHR

This section attempts to define the approach taken by the Court to the application of the principle of proportionality. The Court has acknowledged on various occasions that the principle of proportionality forms part of its doctrine, stating that 'inherent in the whole Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[633] However, its approach to the proportionality principle, when compared to the traditional application of suitability, necessity and proportionality *stricto sensu,* has not been a structured one but rather, a more pragmatic one. Consequently, it has not been possible to identify any of the three tests to which the Court seems to give considerable weight when applying proportionality. Moreover, the use of the terms 'fair balance' or 'reasonable relationship of proportionality' or even the term 'proportionality' seems to be used by the Court sometimes in a generic sense to connote reasonableness, other times to connote the proportionality principle and other times to connote the balancing stage of proportionality. These terms do not seem to be used in a consistent way, nor in a way

[631] *Goodwin v. UK*, (n 630), par. 93.
[632] See also Arai-Takahashi Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* (n 589), who believes that this is the result of the application by the ECtHR of the evolutive approach to proportionality, p. 199
[633] *Soering v. UK*, (n 488) par. 89.

which would indicate the stage at which the case has, or has not failed, under the principle.

At times, it is evident from the Court's judgments that the principle of proportionality is applied as the balancing test only. According to Pirker, the ECtHR applies 'a somewhat worrying over-emphasis on the ultimate prong of proportionality *stricto sensu* which is not clearly warranted' in his view.[634] Pirker believes that the main reason for this is because it provides individual remedies based on their individual circumstances instead of constitutional justice which focuses on providing principles as general guidelines.[635] Pirker interprets 'fair balance' as applied by the ECtHR as the whole proportionality analysis 'encompassing … all the various stages of proportionality analysis'.[636] He believes that the Court's main emphasis when applying proportionality analysis is the final stage, i.e. proportionality *stricto sensu*, while refusing to apply a strict necessity test.[637] Pirker believes that with such an approach 'the Court seems to unduly change the structure of proportionality analysis'.[638] He believes that the fair balance test is 'a very open-ended weighing exercise' allowing for interests and arguments to be weighed but also allowing for unpredictability.[639]

Harbo, on the other hand, believes that the Court applies two tests which are inherent in the principle of proportionality.[640] The first is a means-end test and this is applied in cases where public morality, public policy or public security infringes a human right.[641] Harbo believes that the means-ends test is applied by the Court when reviewing national measures. The second test is the 'fair balance' test, which Harbo believes balances two colliding human rights.[642] He also identifies a third approach within the balancing stage which is the 'excessive burden exercise' and which directly tests the actual burden carried by the individual.[643] Harbo believes that the suitability and the necessity test are means-

[634] Pirker B., *Proportionality Analysis and Models of Judicial Review,* (n 177), 188.
[635] Ibid., 199.
[636] Ibid., 222.
[637] Ibid., 216.
[638] Ibid.
[639] Ibid., 228.
[640] Harbo T., *The Function of Proportionality Analysis in European Law* (2015) (n 36) 75.
[641] Ibid. 76.
[642] Ibid. 76.
[643] Ibid. 76.

ends tests.[644] When the Court uses the terminology 'reasonable relationship of proportionality' it seems to be applying a means-ends test because it compares the proportionality between the legitimate aim pursued and the means employed. According to Harbo this would fall within the necessity and suitability stage. However, it seems more likely that this is closer to balancing between aim and means, given that the Court does not really observe any strict suitability and necessity stage.

5(a) The Legitimate Aims Test

The four-stage proportionality test requires examination of whether or not the aim being pursued by the respondent State is legitimate. This may include an examination of proper purpose or the subjective intention behind the measure.[645] Certain Convention articles protecting non-absolute rights list the legitimate aims by which the State may claim to have limited or restricted the right protected by the Convention.[646] National security, public safety, the economic well-being of the State, the prevention of disorder or crime, the protection of health or morals, or protection of the rights and freedoms of others are all legitimate aims under the Convention which are capable of restricting the protected right.[647] These aims do not seem to be exhaustive in the case of particular articles.[648] In addition, in certain cases the Court will also engage in an 'improper purpose' examination to determine whether the claimed violation was the result of State action based on improper purpose or ulterior motive.[649]

The standard of examination of the aim is usually not controversial and once the Court is satisfied that the domestic law being impugned is compatible with the rule of law, it will not delve into legitimacy any further at this initial stage.[650] However, as has already been

[644] Ibid. 75.
[645] Barak A., (n 7) 298.
[646] Such as articles 8, 9, 10, 11 and Article 1 of the first Protocol
[647] Although Article 8 lists specific legitimate aims which the contracting state may raise as defence for interfering with the rights protected, it seems that such a list is not strictly exhaustive because the Court has considered aims not strictly envisaged by the Article 8 legitimate aims.
[648] It is also worth noting that the Court treats certain rights as non-absolute rights even where this is not expressly stated in the text of the Convention, e.g. Article 6 ECHR, 'Right to a Fair Trial'.
[649] See *Rakhimov v. Russia*, *(Application no. 50552/13)* ECtHR10 July 2014 where the Court engaged in an analysis to determine whether the Russian authorities had acted on the basis of improper purpose when detaining the applicant pending expulsion for illegal immigration; see also *Khoroshenko v. Russia*, , *(Application no. 41418/04)* ECtHR 30 June 2015, where the real aim behind the measure restricting prison visits to a very low minimum, was to isolate the prisoner rather that to re-integrate him with society and especially his family.
[650] *Olsson v. Sweden*, *(Application no. 10465/83)* ECtHR 24 March 1988; If there is no domestic law which allows the interference to a protected right the Court may find a violation, as in *Halford v. UK*, *(Application no. 20605/92)* ECtHR

argued in chapter one, a legitimacy examination also takes place when the proportionality principle is applied, particularly in the balancing stage which, it is submitted, is incorporated in the Convention under the requirement that restrictions be 'necessary in a democratic society'.[651]

5(b) The Suitability Test

The traditional suitability test requires a *prima facie* examination of whether the limiting measure or decision is capable of furthering the aim pursued. Moreover, it requires the exclusion of those means which obstruct a right without promoting another.[652] According to Alexy, this test is a negative one because it requires the elimination of aims which are not capable of furthering the aim in view.[653]

The ECtHR does not engage in a formal first stage suitability test as required under the traditional proportionality assessment. Neither does it engage in the prescribed exclusionary exercise. However, it will be argued later in this chapter that when the Court requires the interference to be 'relevant and sufficient' it is effectively engaging in a suitability test, examining the suitability of the means used. This exercise is carried out by the Court at a later stage, when examining proportionality *stricto sensu*. Pirker argues that although the Court does not use the word 'suitable' in its judgments, nonetheless it is applying the suitability test when applying the means-ends test in proportionality.[654] He argues that it is a test of causation, suggesting that means must be suitable to achieve the proposed aim.[655] Referring to Jonas Christoffersen's discussion on suitability, Pirker argues that the Court has not adopted one single suitability test determining the relationship between ends and means.[656] In this respect, the Court does not display a single, determinate approach.

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25 June 1997 and *Kopp v. Switzerland*, (*Application No 3/1997/797/1000)* ECtHR 25 March 1998; see also *Mehemi v. France*, (*Application No 85/1996/704/896)* ECtHR 26 September 1997.

[651] Arai-Takahashi Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* (n 589), is also of the same opinion at p. 11.

[652] Klatt & Meister, *The Constitutional Structure of Proportionality,* (n 90), 9.

[653] Alexy R., *A Theory of Constitutional Rights,* (n 62), 398.

[654] Harbo T., *The Function of Proportionality Analysis in European Law* (2015) (n 36) 72.

[655] Ibid. 72.

[656] Pirker B., *Proportionality Analysis and Models of Judicial Review,* (n 177), 225

Although the Court does not make explicit reference to 'suitability' of means or measures, nonetheless it does engage in a suitability test which is very subtle and interwoven in its overall considerations. Christoffersen states that 'the principle of suitability makes it possible to consider a measure disproportionate if it does not produce suitable effects'.[657] This was the subtle intention of the Court in *Dudgeon* when, after deciding that maintaining criminal liability for private homosexual acts between consenting adults was excessive, it acknowledged the need for suitable means to control homosexual acts in certain circumstances:

> The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are especially vulnerable by reason, for example, of their youth ….[658]

The examination under the traditional suitability stage is not an in-depth one. Any measure which is capable of achieving the aim is suitable. Whether it is necessary or excessive is the subject of the next examination under the necessity test within the Convention phrase 'necessary in a democratic society'.

5(c) The Interpretation of 'Necessary in a democratic society' by the ECtHR

Under the Convention the State may legitimately interfere by way of restriction or limitation with the fundamental rights protected in so far as such interference is 'necessary in a democratic society'. This phrase is contained in various Convention articles such as Articles 8, 9, 10, 11, 15 and Article 1 of Protocol 1 and Article 2 of Protocol 4.[659] The Court has defined 'necessity' within the phrase 'necessary in a democratic society' as 'not being synonymous with indispensable but neither as flexible as reasonable, useful or desirable'.[660] This indicates that necessity within the meaning of this phrase lies somewhere along the spectrum separating indispensable and reasonable.

[657] Christoffersen J., *Fair Balance* (n 148), 190.
[658] *Dudgeon v. UK* (n 592) par. 62. One of the claims was that the age for homosexual consent should be the same age as for heterosexuals.
[659] Right to respect for private and family life; Freedom of thought, conscience and religion; Freedom of Expression; Freedom of assembly and association; Derogation in time of emergency; Right to property; Right to Free Movement.
[660] *Handyside* (n 588), par. 48

The phrase 'necessary in a democratic society' as used in the Convention does not refer to the traditional 'necessity' test. Šušnjar, seems to be of the same opinion.[661] A look at the formulation of the phrase within the Convention articles discloses a broader test which includes, in some cases, the traditional necessity test, but mostly applies the proportionality *stricto sensu* test. In various judgments, the Court has held that 'the notion of necessity implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued'.[662] This seems to incorporate the second and third stage in proportionality analysis, namely the necessity and proportionality *stricto sensu* tests. With regard to the traditional necessity test, the least burdensome means test cannot be said to form an integral part of the Court's approach when applying proportionality. However, the Court has not been consistent in this area because it has rejected the test on various occasions but has required it in some. A selection of these cases will be discussed in the next section.

The Court has also interpreted 'necessity' within the phrase 'necessary in a democratic society' as a 'pressing social need'.[663] A pressing social need is the measuring tape by which the justification for the intrusion on the protected right is determined as legitimate or not. The satisfaction of a pressing social need seems to be the alternative to the traditional necessity stage in proportionality analysis by the ECtHR.

The manner in which the Court approaches the stages of proportionality analysis is not cumulative or 'vertical', as Christoffersen describes it, but 'horizontal' or latitudinal. There is no structured application of the proportionality tests and no one test usually constitutes the determinant factor of the case. Thus, it is not always very clear at what stage a case has failed to satisfy the proportionality test.

5(d) The Necessity Test

Both Pirker and Tsakyrakis agree that the traditional necessity test involving a determination of whether the measure impugned is necessary to achieve the aim plays a

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[661] Susnjar D., *Proportionality, Fundamental Rights and Balance of Powers, (*Martinus Nijhoff Publishers 2010), p. 89
[662] *Olsson v. Sweden* (n 650), par. 67
[663] According to Harbo T., 'The Function of the Proportionality Principle in EU Law' (2010), (n 18), 75, there is evidence that 'pressing social need' requires the application of the proportionality principle, e.g. in the Lentia and Handyside judgments where the Court applied the margin of appreciation doctrine (to necessity) but applied the proportionality *stricto sensu* stage by testing if the seizure of the books was proportionate to the legitimate aim pursued.

rather subordinate role in the case law of the ECtHR,[664] unlike that of the CJEU. At this stage, it is imperative to point out that the traditional necessity test is distinct from the test carried out under the requirement of 'necessary in a democratic society'.[665] The aim of the necessity test is to determine that 'no other hypothetical alternative exists that would be less harmful to the right in question while equally advancing the law's purpose'.[666] Christoffersen argues that when the ECtHR applies such a test, one must consider it as an exception to the rule.[667] However, it will be argued that the least onerous means test constitutes one of the many factors which the Court decides to take into account in certain cases. Additionally, the ECtHR does not generally regard the test as a main determining factor but 'constitutes one factor, among others, that is relevant for determining whether the means chosen may be regarded as reasonable and suited to achieving the legitimate aim being pursued'.[668] At other times, the least onerous means test has been completely rejected by the Court indicating 'a relaxed approach, with greater deference to the national appreciation'.[669] What follows is a discussion of judgments which broadly exemplify these two main approaches to the least onerous means test.

In *James and Others v. UK*, the Court refused to apply a least onerous means interpretation to Article 1 of the First Protocol on the right to property. In this case, the applicants were owners of land leased to third parties who, under the Leasehold Reform Act 1967 had a statutory right to purchase the land where they lived. The applicants claimed that this violated their right to property under the Convention. and argued that expropriation of their property could be justified 'only if there was no other less drastic remedy for the perceived injustice'.[670] The Court rejected this argument stating:

> This amounts to a reading of strict necessity into the Article, an interpretation which the Court does not find warranted. The availability of alternative

[664] Pirker B., *Proportionality Analysis and Models of Judicial Review,* (n 177), 225 and Tsakyrakis S., 'Proportionality: An Assault on Human Rights?', (n 235), 474.
[665] Articles 8-11 ECHR
[666] Barak A., (n 7) 317.
[667] Christoffersen J., *Fair Balance* (n 148), 111.
[668] *Blecic v. Croatia*, *(Application no. 59532/00)* ECtHR 29 July 2004 par. 67, and *Garib v. the Netherlands*, 23 February 2016, par. 128.
[669] Arai-Takahashi Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* (n 589), 88.
[670] *James and Others v. UK*, *(Application no. 8793/79)* ECtHR 21 February 1986, par. 51.

> 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 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.[671]

Secondly, what also emerges is the fact that by not addressing the least burdensome means in terms of the applicants' right to property, it is effectively undermining the proportionality principle, with the consequence that the judgment is weak in terms of fundamental rights' protection. The Court chose not to delve into the actual conflict between the public interest claimed by the UK and the violated rights claimed by the applicants and held that the national legislature had acted within its limits in terms of implementation of social policy. [672]

The Court, referring to the *James and others case*, has reiterated this stance also in relation to Article 8 on the right to respect for private and family life. In *Blecic* the Court held:

> Turning to the applicant's and the third party's suggestion … that the national authorities imposed an excessive burden on the applicant when terminating her tenancy right, rather than merely allocating the flat temporarily to another person, the Court finds that this suggestion amounts to reading a test of strict necessity into Article 8, an interpretation which the Court does not find warranted in the circumstances. The availability of alternative solutions does not in itself render the termination of a tenancy unjustified; it constitutes one factor, among others, that is relevant for determining whether the means chosen may be regarded as reasonable and suited to achieving the legitimate

[671] *James and Others v. UK*, (n 670), par. 51.

[672] This reflects a fundamental difference between the nature of the ECtHR and the CJEU where the latter perceives itself as empowered to interfere with a State's legislature discretion if this results in acts contrary to EU law, even in cases where derogations are claimed. The CJEU will review any derogation found to be justifiable against the principle of proportionality and the respect for fundamental rights. See for example, the direction given by the CJEU to the national Court in Case C-348/09, P.I. v Oberbürgermeisterin der Stadt Remscheid, [2012] ECLI:EU:C:2012:300

> aim being pursued. Provided the interference remained within these bounds –which, in view of its above considerations .., the Court is satisfied that it did – it is not for the Court to say whether the measure complained of represented the best solution for dealing with the problem or whether the State's discretion should have been exercised in another way.[673]

Christoffersen cites one judgment where he identifies the least onerous means test applied by the Court as a requirement for a fair balance to be struck.[674] The case concerned the reopening of a criminal case under Article 6 ECHR relative to the right to a fair trial. Christoffersen reads into this judgment the following:

> The obligation to "strike, to the maximum extent possible, a fair balance" comprises a least onerous means-test, because the optimal balance is not struck, unless less restrictive measures are applied".[675]

One question which inevitably arises at this stage is the circumstances under which the Court is prepared to take into account the availability of alternative solutions to the State. It seems that in many cases the Court applies the necessity rule where it gives major importance to the right protected or where it believes that the State adopted a radical measure.

The Court has applied the necessity stage as one of the factors contributing to a violation under the Convention to cases involving the deprivation of liberty, the custody of minors, the right of access to court, a complete ban from assembly, the divulging of personal

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[673] *Blecic v. Croatia*, (n 668) par. 67, and in *Bäck v. Finland*, *(Application no. 37598/97)* 20 July 2004, the Court held that 'The possible existence of alternative solutions does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, 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, and in Garib v. the Netherlands,23 February 2016, the Court held that The availability of alternative solutions does not in itself render the measure in issue unjustified; it constitutes one factor, among others, that is relevant for determining whether the means chosen may be regarded as reasonable and suited to achieving the legitimate aim being pursued. Provided the interference remained within these bounds – which the Court, in view of its above considerations, is satisfied it did – it is not for the Court to say whether the measure complained of represented the best solution for dealing with the problem or whether the State's discretion should have been exercised in another way', par. 54.

[674] *Nikitin v. Russia*, 20 July 2004, in Christoffersen J., *Fair Balance,* (n 148) 112.

[675] Ibid.

information relative to a fatal disease, the use of lethal force and in derogation cases under Article 15 of the Convention.[676]

Within the context of Article 8, which protects the right to respect for private and family life, the Court has applied the necessity test as the least onerous means test and considered the alternative means available to the State in certain cases. In *Peck v. UK*, the Court examined the alternative courses of action which were available to a local council other than to expose the applicant's image via CCTV in order to advertise the efficiency of their monitoring system aimed at crime detection and prevention.[677] The applicant had been recorded with a knife in his hand. He was about to commit suicide but was intercepted by the Police through the Council's CCTV system. The applicant was not charged but was treated for mental illness. This footage was used in a particular programme where the applicant's image was inadequately masked as many of his friends and relatives recognised him on the programme. He complained *inter alia* that his private life had been violated. In assessing whether the disclosure was necessary in a democratic society, the Court considered whether 'the reasons adduced to justify the disclosure were "relevant and sufficient" and whether the measures were proportionate to the legitimate aims pursued'.[678] In doing so, the Court noted that the local council 'had other options available to it to allow it to achieve the same objectives'.[679] The Court made explicit reference to each of the options that the council could have considered, or could have considered more adequately.[680] On the basis of this, the Court concluded that the 'disclosure constituted a disproportionate and therefore unjustified interference with his private life and a violation of Article 8'.[681] In this case, the fact that the council failed to adequately consider other available options seems to have tilted the balance towards a violation of proportionality.

[676] Each discussed later in this section.
[677] *Peck v. UK*, *(Application no. 44647/98)* ECtHR 28 January 2003.
[678] Ibid., par. 76.
[679] Ibid., par. 80.
[680] The Court held 'In the first place, it could have identified the applicant through enquiries with the police and thereby obtained his consent prior to disclosure. Alternatively, the Council could have masked the relevant images itself. A further alternative would have been to take the utmost care in ensuring that the media, to which the disclosure was made, masked those images. The Court notes that the Council did not explore the first and second options and considers that the steps taken by the Council in respect of the third were inadequate', par. 80.
[681] *Peck v. UK* (n 677) par. 87.

The Court has also applied the necessity test in cases of child custody. It is submitted that the attribution allocation of primary importance to the best interests of the child coupled with the fact that the Court views the separation of children from their parents as the most extreme measure is conducive to an application of the necessity test as formulated by the traditional proportionality principle.

A full severance of parental rights to parents considered intellectually incapable of taking care of their children with special needs has triggered the application of the necessity test by the ECtHR.[682] In its examination, the Court considered how the parents had been deprived by the local authorities from visiting their daughters for some months and how the latter had never been heard by the domestic judges. The Court held that it was 'questionable whether the domestic administrative and judicial authorities have given sufficient consideration to additional measures of support as an alternative to what is by far the most extreme measure, namely separating the children from their parents'.[683] Although the Court considered that the reasons relied on by the authorities were relevant, they were not sufficient to justify the serious interference in the applicants' family life, thus violating Article 8. In this case, the Court considered a number of factors which contributed to the violation, one of which was that less severe measures could have been applied in this case. This points to Christoffersen's theory in which he believes that the necessity stage is but one of the many horizontal considerations which the Court makes.[684] However, this cannot be said to be a general rule. In cases concerning expulsion orders, detention and the right to liberty, there seems to be an emerging 'less onerous means' test. In such cases the necessity test seems to have a more fundamental and determining role in the Court's judgments. This reflects the fact that the Court places higher value on particular rights. Failure by the State to consider adopting less onerous measures than the ones taken weighs heavily against the respondent State:

> The Court reiterates that a necessary element of the "lawfulness" of the detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness. The detention of an individual is such a serious measure that it

[682] *Kutzner v. Germany*, *(Application no. 46544/99)* ECtHR 26 February 2002.
[683] Ibid., par. 75
[684] Christoffersen J., *Fair Balance* (n 148), 69.

> is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances.[685]

In this case, a partially blind man was detained in a sobering-up centre for allegedly being intoxicated. He contested this and also claimed that he had been deprived of his liberty arbitrarily. The Court had serious doubts as to whether the applicant had behaved in such a way as to pose a threat to the public. In considering this, the Court held that Polish law 'provides for several different measures which may be applied to an intoxicated person, among which detention in a sobering-up centre is the most extreme. Indeed, under that section, an intoxicated person does not necessarily have to be deprived of his liberty since he may just as well be taken by the police to a public health-care establishment or to his place of residence'.[686] The obligation on the State to find alternative solutions to secure the enforcement of an expulsion order instead of unreasonable and prolonged detention seems to weigh heavily against the respondent State, especially when the domestic legislation envisages varying degrees of measures which can be applied by the authorities.

In *Rakhimov v. Russia* the ECtHR had, under Rule 39 of the Convention, ordered the temporary suspension of the applicant's extradition to Uzbekistan from Russia.[687] The Court held that 'the suspension of domestic proceedings should not result in a situation where the applicant languishes in prison for an unreasonably long period'.[688] The Court noted that no specific time limit for the detention had been established by the domestic court and that the authorities had not considered less onerous solutions to an unreasonably long period of detention of the applicant, pending the domestic process for

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[685] *Witold Litwa v. Poland*, *(Application no. 26629/95)* ECtHR 4 April 2000, par. 78.
[686] *Ibid.,* par. 79.
[687] *Rakhimov v. Russia*, (n 649); for a similar approach taken by the Court see *Keshmiri v. Turkey (No 2) (Application no. 22426/10)* ECtHR 17 January 2012, where the Court considered that the applicant had been detained for more than one year and nine months after the interim measure had been lifted and during such time no steps had been taken to find alternative solutions. The Court considered such a period to have been in violation of the guarantees of Article 5 § 1 (f) of the Convention; and *Ismailov v. Russia*, *(Application no. 20110/13)* 17 April 2004, *Azimov v. Russia*, *(Application no. 67474/11)*18 April 2013.
[688] *Rakhimov v. Russia* (n 649).

extradition once the Court's interim measure was lifted. In another case however, where extradition could have resulted in the placing of the applicant on death row in the United States, the Court did not attribute a definitive determining factor to alternative less burdensome measures. Rather, it held that this consideration was 'a circumstance of relevance for the overall assessment' in the application of the proportionality principle.[689]

In other cases, the necessity test was a determining factor leading to a finding of a violation of Article 11 on the freedom of assembly. The Court considered that "instead of considering measures which could have allowed the ... assembly to proceed peacefully, the authorities imposed a ban on it. They resorted to the most radical measure denying the applicant the possibility of exercising his rights to freedom of ... assembly".[690] The Court considered that it was the authorities' duty to reflect on the possible alternative solutions and propose another venue to the organisers. However, the head of the district administration decided to take the "most radical measure". Thus, a fair balance between the legitimate aim and the means for attaining it was not attained. The ban was the most important factor enabling the Court to decide that proportionality between the aim and the means used had not been struck. This was also the case in relation to the imposition of solitary confinement, of over eight years, upon a dangerous prisoner where the Court was prepared to consider 'whether the measures taken were necessary and proportionate compared to the available alternatives'.[691] In *Rivas v. France*,[692] the Court was not convinced that the action taken by the Police was necessary in order to avert the alleged threat presented by the applicant who was in the police depot and who was not armed. The Court held that the police could have used other methods to control the applicant, and declared a violation of Article 3.

The foregoing discussion reflects a certain ambivalence in the ECtHR's use of the least onerous means test as the necessity test traditionally applied. From the above, it is quite evident that it would be incorrect to state that the necessity stage as prescribed by the traditional proportionality principle is completely non-existent in the Court's

[689] *Soering v. UK* (n 488) par. 110.
[690] *Primov v. Russia*, *(Application no. 17391/06)* ECtHR 12 June 2014, par. 131.
[691] *Ramirez Sanchez v. France*, *(Application no. 59450/00)* ECtHR 4 July 2006, par. 136.
[692] *Rivas v. France,* (French version only) *(Requête no 59584/00)* ECtHR 1 April 2004, par. 41.

examination of proportionality. In fact, in some cases the Court has required the application of necessity as a main determining factor. Although this is an observation which can be easily made upon an analysis of the case law, the main problem with the application of the least onerous means test seems to lie with its sporadic application. Although it is quite correct to state that generally this test is a determining factor in cases where the Court particularly feels that the very essence of the Convention right was infringed or would have been infringed, it still cannot be established that this is always the case. In other cases, the necessity test is applied but is only one of the determining factors and not a *sine qua non* condition.

5(e) Proportionality *stricto sensu*

As has already been pointed out above, terms such as 'proportionate', 'reasonable relationship of proportionality'[693] and 'fair balance' have been used by the Court to connote the principle of proportionality generally but also proportionality *stricto sensu,* i.e. the balancing stage. The term 'disproportionate'[694] has also been used by the ECtHR to connote a violation of the principle as a whole. Thus, this part of the chapter proposes to give more weight to *the manner in which* proportionality *stricto sensu* or balancing is applied than to the terminology applied by the Court. The traditional balancing stage propounded by Alexy involves a comparison of the degree of compatibility between purpose and means, taking into account the degree of satisfaction obtained by restricting a right and the degree of dissatisfaction obtained by limiting the right. This is usually carried out after the first two stages, i.e. suitability and necessity, have been satisfied. As has already been discussed above, the ECtHR does not follow any strict sequence of the stages of the principle.

In what follows, it will be submitted that the ECtHR's approach to proportionality *stricto sensu* is varied in the way it approaches this last stage of the proportionality exercise. It will be noted that the ECtHR does not always directly consider the degree of claimed intrusion, violation or limitation of a right. There seems to be, at times, a deviation from the primary focus of the proportionality *stricto sensu* exercise which requires the

[693] A usual statement reiterated by the ECtHR is as follows: 'a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State' in *Kozaciouğlu v. Turkey (Application no. 2334/03)* ECtHR 19 February 2009, par. 63; *Karner v. Austria (Application no. 40016/98)* 24 October 2003 par. 37.
[694] 'to the aims pursued', see for e.g. *MDR Duman v. Turkey*, *(Application no. 15450/03)* ECtHR 6 October 2015, par. 37.

application of comparison of degrees in relation to the violation of the right suffered and the protection of the State's interest through the means used. Since the main aim of the ECHR is to safeguard a protected right within the limits of State and community interest, it is submitted that consideration of whether the degree of violation of the right is proportionate to the degree of interest acquired through the measures being impugned, is imperative. However, it will be noted that this is not always the case when the Court decides not to consider such degrees. In certain cases, the approach to the third stage of proportionality analysis has been one of means-ends test carried out through a balancing exercise. This balancing seems to take two forms: (i) comparing the interest with the interference of the protected right, or (ii) comparing the legitimate aim with the protection of the right.

A classic example of the means-ends test applied by the Court is the *Dudgeon v. UK* case. In this case, the applicant complained about the maintenance of criminal laws in Northern Ireland against consenting adult homosexuals engaged in homosexual acts. The Court applied proportionality in relation to the justifications put forward by the respondent State, based on public morality, and the 'detrimental effects' which retention of such law has on the life of a homosexual. The Court held:

> On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.[695]

The weighing exercise involved here was on the one hand, the aim for retaining the limiting laws which was essentially alleged to be a reflection of public morality, against the effect that such a law had on the life of a homosexual. The aims were not

[695] *Dudgeon v UK* (n 592), par. 60; par. 62.

proportionate to the means but rather were excessive. In other words, the means were inadequate and weighed heavily on the individual.

The Court further held:

> The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth (…). However, it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law (…).499

In *Olsson v. Sweden*[696] and in *Stoll v. Switzerland*,[697] one can identify a means-ends approach on the basis of the justifications put forward by the State for the measures taken. However, in Dudgeon, the Court takes a more direct approach by applying a balancing exercise between measures used by the State and the right affected.[698] The balancing approach seems to be more prevalent in Articles 8-11 than in any other articles.

The *Olsson* case applies proportionality *stricto sensu* as the aims and means test. The case concerned mainly two siblings out of three, taken in care and placed in separate accommodation at long distance from each other, and from their parents and their other sibling. The parents were initially certified as mentally retarded and later as being of average intelligence. They relied on various social help provided by the authorities. The third sibling had special needs. The parents had been uncooperative in relation to the placement of the children, the foster parents and the social authorities. They challenged the local authority's refusal to grant their children removal from public care. The parents complained *inter alia* of a violation of Article 8 of the Convention. The primary

[696] *Olsson v. Sweden* (n 650).
[697] *Stoll v. Switzerland*, *(Application no. 69698/01)* ECtHR 10 December 2007.
[698] *Dudgeon v. UK* (n 592).

consideration made by the Court was the fact that obstacles had been placed, relative to the distance to be travelled to visit the children, and to right of access granted to the parents to see the child. The main emphasis by the Court was that the ultimate aim was to reunite the family since the parents were not considering giving the children up for adoption. In this case, the Court determined that 'the measures taken in implementation of the care decision were not supported by "sufficient" reasons justifying them as proportionate to the legitimate aim pursued'.[699] The legitimate aim pursued was that of protecting the children and to safeguard their development. The means by which this was done was, according to the Court, unnecessary because rather than contributing towards the ultimate reunification of the family, it constituted an obstacle to it.

The weighing process was a general one between the aims of the measures taken by the State in relation to the children, and the means by which such measures were pursued. There was no specific weighing of the rights of the children in relation to their well-being in custody, their well-being with their parents and therefore the relation of this to the child custody order and their well-being with the foster parents. In other words, there was no direct weighing by the Court between the weights attributed to the rights of the children versus the State's obligation to provide a healthy environment in which the children were to be raised, whether with their parents or with foster parents, even though the main contestation concerned the public care order of the children.

In its means-end approach to proportionality, where the Court searches for the lawfulness of the means, given the cost and value of the end pursued, it may tend to lean towards appreciating certain facts of the case while disregarding others which would render the examination a more complete one. The *Stoll* judgment seems to be a case in point. This case first appeared before a Chamber of the Court but ended before the Grand Chamber for its consideration.[700] The case concerned a journalist convicted and sentenced to pay a fine for publishing a confidential strategy paper drawn up by the Swiss ambassador to the United States. The Court examined whether the imposition of the fine violated Article 10 § 2. The Court, stating that it was weighing the interests at stake against each other, and in the light of all the relevant evidence, decided that the conviction

[699] *Olsson v. Sweden* (n 650), par. 83.
[700] *Stoll v. Switzerland* (n 697).

had been proportionate to the legitimate aim pursued. The Court's main assessment related to whether or not the Swiss government was justified in taking criminal action entailing penalties against the journalist for having disclosed confidential information. The main elements which the Court considered in determining that the principle of proportionality had not been violated were (i) the intention behind the writing of the article which was not genuine but rather intended to create 'needless scandal'; (ii) the articles written were inaccurate and liable to mislead the reader, and therefore detracted from the importance of their contribution under Article 10 ; (iii) the fact that there is consensus among the European States parties to the Convention that acts of such kind are to be regulated by appropriate criminal sanctions; and (iv) the fact the penalty imposed on the applicant was relatively small and he still could express himself as a journalist.

It is interesting to note that the Chamber which first considered the case had decided that the applicant's conviction had not been reasonably proportionate to the legitimate aim pursued. It had considered that the margin of appreciation left to the States in such cases was limited, that it concerned the media coverage of the issue of unclaimed assets, that the document disclosed constituted a relatively low level of classification ('confidential') and the fact that disclosure of the document in question was not likely to undermine the foundations of the State. The Chamber also seemed to uphold the journalist's freedom of expression despite the fact that his opinion may have been defamatory. This seems to be in line with previous judgments on freedom of expression where only overriding requirements in the public interest are permitted to interfere with such freedom.

On the other hand, in its approach to proportionality, the Grand Chamber focused mainly on the act of the journalist, and not so much on the consequences in terms of the damage caused to the State's international relations if any, when applying proportionality *stricto sensu*. This was a consideration which the Chamber, in the first judgment, had made in a substantive way. It is submitted that the means-end approach to proportionality in both cases seem to have been tilted to either end of the spectrum, i.e. either the damage to the State or the nature of the journalist's act. In my opinion, in such a balancing exercise, weight should have been attributed to both the damages which were suffered by the State in terms of the divulgence of the document as well as the requirement for criminal

conviction of the journalist for such act. This would have led to establishing how proportionate it was to award a penalty for such an act. This type of examination was carried out by the Court in *Fressoz and Roire v. France*.[701] This case concerned two journalists who had anonymously received tax assessment information about the chairman of a major automobile company, in turn obtained by breach of professional confidentiality. At the time there was a dispute between the company and its workers regarding salary rises which the chairman was refusing to entertain. The Court made it clear that 'an interference with the exercise of press freedom cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest'.[702] Great weight is usually attached *ab initio* to press freedom under Article 10 indicating that the balance is already tilted in favour of such right. The balance continued to tilt in favour of this right when the Court found that although tax assessments could not be disseminated, they were readily available to the public upon inquiry to the local tax authorities and inquirees could easily pass the information on. Therefore, the Court here is taking into account the effect of the measure. It is questioning the need for the criminal sanction for dissemination of information in breach of professional confidence, since such information may still be obtained by the public. In other words, the Court is asking how suitable and necessary was the means to achieve the aim. The Court also took into account the reason behind the publishing of the actual documents by the journalists and held that this was to corroborate the contents of the article, which was not only relevant to the subject matter of the article but also to their credibility as journalists. On the basis of these considerations, the Court held that 'there was not …. a reasonable relationship of proportionality between the legitimate aim pursued by the journalists'[703] conviction and the means deployed to achieve that aim, given the interest a democratic society has in ensuring and preserving freedom of the press'.[704] In this case the freedom of expression of the journalists was weighed against the criminal conviction awarded to them. The Court questioned the proportionality of criminal conviction in relation to the documents divulged in the public interest. Unlike *Stoll* it did not go into whether or not the conviction was a small one and that the journalists could still express themselves. One main difference in the approach by the

[701] *Fressoz and Roire v. France, (Application no. 29183/95)* ECtHR 26 May 1997.
[702] Ibid., par. 51.
[703] Ibid., par. 56.
[704] Ibid.

Court could be that, whereas in *Stoll* the documents had not been published in full and the journalist's opinion may have been defamatory, in *Fressoz*, the press published all the documents. However, in the latter case, there was an allegation of misappropriation of public tax documents and breach of confidentiality. The Court did not attribute any weight to these allegations which had formed part of the domestic proceedings. It is not very clear to what the Court, in any given case, will attribute its weights when applying proportionality analysis, despite having before it similar cases with similar facts. One cannot speak of a clear and coherent line of argumentation of proportionality analysis in relation to a given Convention article. This type of inconsistency of approach to weighing, within proportionality analysis, may be seen in relation to other Convention articles. In *M v. Switzerland*, within the context of Article 8 on the right to respect for private and family life, the Court held that a fair balance had been struck between the legitimate aim of bringing a person to justice and the right of the individual to respect for private and family life. The case concerned a refusal by Switzerland to renew the passport of a Swiss national living with his partner and children in Thailand in order to coerce him to return to Switzerland to collaborate on criminal investigations against him. The Court considered the fact that a laissez-passer had been issued to him so that he could return to Switzerland directly and that no international arrest warrant had been issued. The Court considered that this was a less harsh action than the arrest warrant, for which the Swiss authorities could have legitimately opted. The Court also considered the importance of bringing criminals to justice and held that a fair balance had been struck.

In this case, the means used consisted of the deprivation of the renewal of the applicant's passport. The aim was to coerce him to return to Switzerland for criminal investigations against him. In this case, it is submitted, that since the applicant was claiming a violation of his respect for private and family life, a preferable approach would have been the weighing of the two interests at stake. This would have involved the consideration whether the coercive act (means) to induce the applicant back to Switzerland (aim) was proportionate to the degree of intrusion on his private and family life. What the Court did was, however, to give considerable weight to the fact that an international arrest warrant for the applicant had not been issued, even though this was possible. However, the latter was not part of the issue in question. The Court was looking at *more* burdensome means which had not actually been used. This is quite different from

examining whether *less* burdensome means existed, since this directly impacts the examination of proportionality, whereas applauding the authorities for not acting more harshly when they could have done so does not have any effect on proportionality because as the facts stand, a claim of violation of fundamental rights has been made. The Court also considered the fact that a laissez-passer had been issued instead.

In *von Hannover v. Germany,* the Court had to weigh the right to private life of a public figure (member of the royal family) who does not hold public office against the freedom of expression of the press to freely distribute photos of the private life of the public figure. The Court gave weight to the fact that the public figure did not hold a public office and that, because of this, any photos distributed would not benefit the public to engage in a general debate but would merely satisfy curiosity. The Court gave weight to what it felt was harassment of the public figures by taking photos of them without their consent. The right to private life was given more weight in the circumstances than the freedom of expression. Pirker believes that the Court performed 'a proportionality assessment on one side of the balance',[705] observing that the Court effectively looked only at the side of the public figures in terms of their status in society and their suffering. However, the Court also looked at the benefit which the general public would get from the press' exercise of freedom of expression and determined that the right to private life outweighed the freedom of expression serving to satisfy public curiosity. The Court decided that the balance tilted in favour of the right to private life.[706]

During its means-end analysis, the Court will also consider any suspected ulterior motives, especially in cases of penitentiary policy. When the Court feels that such motives are illegitimate, it will find the measures to be disproportionate to the aims. The case *Khoroshenko v. Russia* is a case in point.[707] It concerned the applicant's allegation, *inter alia,* that the various restrictions on family visits while in prison for a life sentence violated his right to private and family life under Article 8 of the Convention. In this case, the Court examined whether the aims of the prison measure were actually those of 'rectification of an injustice, reform of a convicted person and prevention of new

[705] Pirker B., *Proportionality Analysis and Models of Judicial Review,* (n 177), 213-214.
[706] This is in contrast to the GFCC's interpretation which held that since they were public figures 'par excellence' the applicant could not rely on her right to privacy in public places.
[707] *Khoroshenko v. Russia* (n 649).

crimes'.[708] However, further examination divulged that the real intention behind the low frequency in family visits was to isolate such persons from society. The Court held that it was arguable whether such aim was legitimate under Article 8 §2.[709] It held that 'the approach to assessment of proportionality of State measures taken with reference to "punitive aims" has evolved over recent years, with a heavier emphasis now having to be placed on the need to strike a proper balance between the punishment and rehabilitation of prisoners'.[710] The fact that the Court was already doubting the legitimacy of the aim of the measure seems to have weighed very heavily in its balancing exercise. It also considered the fact that the prisoner had not been allowed to bond with his son on the basis of this measure and the fact that a guard was present during the visits and was within hearing distance. It was not surprising that the Court found the interference to be disproportionate to the aim. It held that 'the interference with the applicant's private and family life resulting from such a low frequency of authorised visits, solely on account of the gravity of a prisoner's sentence was, as such, disproportionate to the aims invoked by the Government'.[711] The Court further noted that the measure had been applied over a very long period of time thus intensifying its effects on the applicant. The Court attributed considerable weight mainly to two elements of the case: (i) the fact that the measure had the main aim of being completely punitive and devoid of re-integration into society; and (ii) the intensified effects of the measure on the prisoner.

On the basis of these considerations the Court concluded:

> Having regard to the combination of various long-lasting and severe restrictions on the applicant's ability to receive prison visits and the failure of the impugned regime on prison visits to give due consideration to the principle of proportionality and to the need for rehabilitation and reintegration of life-sentence prisoners, … the measure in question did not strike a fair balance between the applicant's right to the protection of private and family life, on the one hand, and the aims referred to by the respondent

[708] *Khoroshenko v. Russia*, (n 649), par. 99.
[709] It is interesting to note that the Court, although maintaining that the aim was arguably illegitimate, did not enter in further detail. It continued with its considerations.
[710] *Khoroshenko v. Russia* (n 649), par. 121.
[711] Ibid., par. 146.

> Government on the other, and that the respondent State has overstepped its margin of appreciation in this regard.[712]

In *Scollo v. Italy*, within the context of the right to property (Article 1 Protocol 1) the Court considered the Italian measure of disallowing evictions between 1982 and 1988 because many leases had been expiring during that period.[713] The measure was established so that the affected tenants might find new homes. The Court considered that if this measure had not been put in place there was the risk of having simultaneous evictions which would jeopardise the public order. The Court therefore found this measure to have a legitimate aim. It then went on to consider whether a fair balance had been struck between the aims and the means. The applicant argued that the interference was disproportionate, since he had waited for 11 years for the tenant to be evicted. The Court considered that the owner had informed the authorities that he needed the flat for himself because he was unemployed and disabled. The authorities did not take any action. He had to buy another flat, had satisfied the conditions for the eviction order, and had to take legal action to recover rent from his tenant. The Court found this to be disproportionate and violated article 1 of the first Protocol. The weight attributed in this case was entirely related to the hardships suffered by the applicant. In this case, the hardships suffered by the applicant were quite extreme and therefore it would have been quite unreasonable not to give this considerable weight.

In *Mehemi v. France,* the Court stated that its task was to ascertain whether the measure had struck a fair balance between the applicant's right to respect for his private and family life and the public interest, namely the prevention of disorder or crime.[714] The applicant was of Algerian nationality but had always lived in France. All his family, including his wife and children, lived in France. The expulsion order was made on the basis that he was involved in drug trafficking with other Algerians and Tunisians. The Court made a number of considerations including the fact that the government's claim that the drug traffickers were all of North African nationality was unfounded since the eight members of the group included four French nationals. The Court also considered

[712] *Khoroshenko v. Russia* (n 649), par. 148.
[713] *Scollo v. Italy*, *(Application no. 19133/91)* ECtHR 28 September 1995.
[714] *Mehemi v. France* (n 650), par. 35.

the argument that the applicant had the option of going to live in Italy since his wife was Italian. The Court considered the effect that such a move would have on the couple's children and the fact that the applicant had a criminal record and that there would be legal obstacles to his establishment in Italy. The Court also considered the strict firmness by which authorities act in relation to drug traffickers and the fact that the applicant had been involved in the importation of a large quantity of hashish counted 'heavily' against him. However, the major weight which the Court attributed to was the 'lack of links' that the applicant had with Algeria and the 'strength of his links with France'.[715] This weight tilted the balance in favour of a violation of Article 8. The Court in this case had to decide if the expulsion order to send the applicant to live in Algeria violated his right to respect for private and family life. The Court did not weigh the importance of this right in relation to the importance of the public interest, i.e. the benefit of the public interest in relation to his deportation to Algeria. It weighed the effects which the measure in the public interest would have on the limitation of this right. This type of approach to proportionality *stricto sensu* based directly on the effects on the alleged violated fundamental right seems to be quite predominant in the Court's approach to the proportionality principle.

In *Luordo v. Italy*, the applicant claimed, *inter alia*, that his right to private correspondence under Article 8 and his right to free movement under Article 2 of Protocol 4 were violated following his bankruptcy proceedings.[716] In this case, all the applicant's correspondence was handed over to the trustee in bankruptcy and he was prevented from moving away from his residence. In both claims, the Court found that the interference with the claimant's right had been disproportionate to the aim pursued. The aim of the interference with the claimant's private correspondence was 'to enable information relating to the bankrupt's financial situation to be obtained in order to prevent him from diverting his assets to the creditors' detriment'.[717] The interference with his right of free movement had the aim of ensuring contact with the applicant to facilitate the bankruptcy proceedings. In both cases, the Court found the aims to be legitimate. When it came to determining whether the interference was proportionate, the Court took into consideration the protraction of the domestic proceedings, which had taken fourteen

[715] *Mehemi v. France*, (n 650), par. 37.
[716] *Luordo v. Italy*, *(Application no. 32190/96)* ECtHR 17 July 2003.
[717] Ibid., par. 76

years. The Court, having been satisfied that the delay in proceedings was not attributable to the applicant, held that 'the length of the proceedings thus upset the balance that had to be struck between the general interest in securing the payment of the bankrupt's creditors and the applicant's personal interest in securing respect for his correspondence'.[718] The Court found the interference with his right to be disproportionate to the aim. In relation to the alleged violation of his freedom of movement, the Court reasoned on the same lines stating that the length of the proceedings upset the balance which was to be struck between the general interest of securing payment to creditors and the applicant's right to move freely. The Court's focus was on the effects of the protraction. It did not engage in a comparative proportionality *stricto sensu* exercise of weight attribution and degrees of satisfaction/dissatisfaction.

6. Comparative Proportionality *stricto sensu* exercise of degrees

As already discussed above, in *Stoll*, the Court focused heavily on the journalist's act and did not compare the relative degrees of damage caused to the journalist and the State's protected interest through conviction. The same may be said in the case of *M v. Switzerland*, where the Court did not specifically consider the degree of protection of the State's interest in the coercion of the means used and the degree of intrusion on the private and family life of the applicant. Similarly, in Olsson, the Court did not specifically weigh the rights of the children versus the State's obligation to raise the children in a healthy environment, and the proportionality or otherwise that existed between them. Thus, the exercise of the attribution of weights made by the ECtHR may be said to be incomplete in the light of Alexy's weight formula which 'expresses the essence of balancing'.[719] It may be recalled that Alexy's weight formula embodies the three laws of balancing in fundamental rights conflict: (i) establishing the degree of non-satisfaction of or detriment to a right; (ii) establishing the importance of satisfying the competing interest; and (iii) establishing whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former. The weight formula lays down how the concrete weight of one principle is balanced against the concrete weight of the colliding principle.[720] Three factors, on each side of the balance are confronted: (i) the

[718] Ibid. *Luordo,* par. 70.
[719] Alexy R., 'Formal Principles: Some replies to critics', (n 394), 513.
[720] Ibid.

attribution of weight to the intensity of the interference with the first principle and the corresponding weight attribution to the importance of satisfying the colliding principle; (ii) the abstract weights attributed to each of the competing principles; and (iii) the attribution of weights to epistemic reliability or unreliability, i.e. the extent to which knowledge-related discretion in the attribution of weights in (i) and (ii) are reliable or not.[721] This is the most optimal exercise to determine whether the violation of a particular right reflects (or not) the advantage or satisfaction obtained by the other (interest), resting on the doctrine that the greater the degree of non-satisfaction of, or detriment to, a particular fundamental right, the greater the importance of satisfying the other right or interest. It is submitted that when the approach by the Court is merely a consideration of the excessive effects of the means on only one of the competing rights or interest, without the same consideration of the competing interest, the approach is tilted or one-sided which may result, in some cases, in an unfair decision.

Conclusion

Two factors contribute towards the ECtHR's horizontal approach to the principle of proportionality. First, the manner in which the ECtHR views itself and second, the manner in which the Convention articles are formulated. The nature of the ECtHR as a supervisory Court embracing the principle of subsidiarity places it in a rather weak position when it comes to the enforcement of its judgments at national level. Rather than coercive power, the ECtHR has to depend on its persuasive role as a supervisory Court (reinforced by the role of the other Council of Europe institutions in monitoring compliance) seeking national cooperation for the execution of its judgments. It is no surprise therefore that the Court's considerations in any given judgment, though not explicitly stated, are not merely limited to the facts of the case. Other 'behind the scene' considerations, external to the actual case before it, are taken into account. These considerations range from an appreciation of the political climate obtaining in the respondent State, the latter's attitude to the Convention and its willingness to enforce the rights contained therein, as well as its track record of enforcement of Convention rights. This also explains the Court's frequent recourse to the margin of appreciation doctrine

[721] For an explanation and the addressing of concerns in relation to Alexy's 'epistemic discretion', see Klatt & Meister, *The Constitutional Structure of Proportionality*, (n 90), 109-148. In his later work, Alexy refines his weight formula by including a refined explanation of normative and empirical premises. See Alexy R., 'Formal Principles: Some replies to critics', (n 394), 511-524.

which allows it to ease its scrutiny in favour of a margin of appreciation to the respondent State. On the basis of this, it is submitted that the Court has allowed itself wide freedom of application of the principle of proportionality and the doctrine of the margin of appreciation. This flexibility allows it to take into consideration the reaction of the respondent State, the political state of affairs taking place in the State (without actually mentioning them) and what it believes is acceptable by both the State, the action of which is being challenged, and by the parties bringing the challenge. A rigid application of the proportionality principle would limit the ECtHR in its consideration and appreciation of these external factors, which although they should not, legally speaking, be taken into account, are well-known to the Court to constitute important elements which will ultimately determine whether its judgment will be observed and enforced at national level or not.

The ECHR does not expressly prescribe the application of the principle of proportionality. Perhaps, the articles closer to requiring the application of this principle are the ones containing the phrase 'necessary in a democratic society' which may be perceived as providing a more discernible requirement for the application of the principle of proportionality than other Convention articles.[722] The phrase 'necessary in a democratic society'[723] seems to incorporate a number of tests, for the justifications put forward by the State, in terms of (i) appropriateness of measures and whether a margin of appreciation is to be afforded, and if so, to what degree; (ii) whether the restriction or interference was necessary, at times applying the least onerous test and at other times completely renouncing it; and (iii) the balancing test where the Court applies a somewhat one-sided approach to determine whether a fair balance has been struck. In addition, it does not seem that the Court relies on one of these tests more heavily than the others. Rather, it considers them together, as components contributing to the overall assessment leading to the final decision.

[722] For example, Articles 8-11

[723] The examination of 'legitimate aim' does not seem to form part of the examination under the phrase 'necessary in a democratic society'. The interpretation of legitimate aim seems to be equivalent to 'legality', i.e. the requirement that the measure be based on some legal or legislative authority. This is a rather formal requirement about which the Court does not go into much detail. However, the Court will then examine the substantive aim of the measure when determining if it was 'necessary in a democratic society'.

Chapter 5

The Principle of Proportionality in EU Fundamental Rights Judgments

Introduction

This chapter discusses the interpretation and application of the principle of proportionality by the Court of Justice of the EU (CJEU) in fundamental rights cases. Although the CJEU today applies the principle of proportionality as a general principle of law in fundamental rights cases, it must be noted that for a long time it did not regard the protection of fundamental rights as part of its adjudicative competences. As we shall see, the CJEU was established to decide disputes arising within the common market, and was not initially geared to consider claims of violations of fundamental rights arising from EU (then Community) policies. This attitude towards fundamental rights changed gradually. Today fundamental rights play a very important role in the adoption of legislation of the EU and also in the CJEU's judgments. This is reflected in Article 6 of the Treaty on European Union which requires the EU to accede to the ECHR. Once this happens, it is expected that a convergence of the approaches to fundamental rights adjudication by the CJEU and the ECtHR will occur, including the application of proportionality analysis.[724] Such a convergence can already be witnessed in various judgments of the CJEU connected with international law and international obligations incorporated in EU legislation.[725] Terms such as 'fair balance' have been used by the CJEU indicating the influence of the ECtHR doctrine.[726] Moreover, Article 52(3) of the EU Charter obliges the Court to apply the same meaning and scope of those rights under the Charter which correspond to the rights protected by the ECHR.

Specific issues dealt with in this chapter concern the manner in which the CJEU has developed into the authoritative Court it is today through its teleological interpretation

[724] Although Opinion 2/13 of the CJEU of 18 December 2014 seemed to have stalled the negotiations to accession being carried out by the European Commission (Steering Committee for Human Rights) and the Committee of Ministers of the Council of Europe, on 31 October 2019 the President and the Vice-President of the European Commission sent a letter to the Secretary General of the Council of Europe proposing a series of arrangements for the continuation of the negotiations. On 15 January 2020, the Ministers' Deputies of the Council of Europe approved the proposed continuation of negotiations. See < https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights> EU Accession to the ECHR, containing the aforementioned documents, accessed 26 June 2020.

[725] See e.g. the Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 2008 *I-06351*, and Kadi II, Case T-85/09, *Yassin Abdullah Kadi v European Commission*, ECLI:EU:C:2008:461.

[726] See e.g. Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, ECLI:EU:C:2002:434

of the Treaties of the EU. A discussion of the authority of the CJEU as a supranational court will enable me to carry out a comparative analysis with the nature of the ECtHR with a view to identifying possible reasons for their differences in approach to proportionality analysis. This will be done in the conclusion. It also serves to establish the role that the CJEU occupies today in the EU. This is followed by a discussion of the Court's relationship with fundamental rights adjudication focusing mainly on the evolution of the Court's involvement in determining fundamental rights conflicts, and a general overview of the role that the principle of proportionality plays in areas of EU law other than fundamental rights law. This discussion is intended to give a comparative backdrop for the main study of this chapter concerning proportionality analysis in the Court's judgments in fundamental rights cases.

The importance of the study carried out in this chapter lies in its specific focus on fundamental rights judgments of the CJEU within the context of proportionality analysis. In various academic literature, the principle of proportionality in the CJEU's judgments is discussed with reference to its general application in EU law, and references to fundamental rights judgments are made within this general discussion.[727] In this chapter, the main focus is fundamental rights judgments. To this effect, a limited number of judgments could be identified in which the Court engages actively in proportionality analysis enabling me to form a set of categories of approaches by means of analysis. Five types of approaches are identified as broadly capable of categorising the Court's approach to proportionality in fundamental rights and freedoms cases. The first is the full three-stage test approach where the Court attributes equal analytical importance to all the three stages constituting the proportionality principle. The second is the proportionality *stricto sensu* approach where the Court relies on the last stage of proportionality, largely disregarding the first two stages. The third approach identified is the legitimate aims approach, where the Court determines the case by scrutinising it under the first stage only. The fourth approach is the least restrictive means approach where scrutiny is carried out mainly under the necessity stage. The final approach

[727] See e.g. Harbo T., *The Function of Proportionality Analysis in European Law* (2015) (n 36); De Burca G., 'The Principle of Proportionality in EC Law' (1993) 13 YBEL; Craig P. & De Burca G., *EU Law: Text, Cases and Materials,* (OUP 2012); Ellis E., (ed), *The Principle of Proportionality in the Laws of Europe*, Hart (1999); Schwarze J., (n 1) 726-864; Arai-Takahashi Y., Sauter, W., 'Proportionality in EU Law: A Balancing Act?' *Cambridge Yearbook of European Legal Studies 15,* (2013), 439-466.

identified is the reasonableness approach, similar to the French *bilan coût-avantage,* translated as cost-benefit, *and closely* to the pragmatic fair balance approach taken by the ECtHR. Each approach will be discussed in turn. The choice of this sequence is intentional as it allows a coherent continuation of the argument in this chapter. The categorisation of the approaches will serve as a basis for my comparative exercise of the Court's proportionality analysis as endorsed by Robert Alexy and as the preferred model chosen in this study as that which best constitutes the principle of proportionality.

In this chapter it will be argued that although the CJEU does not generally apply a full proportionality analysis in fundamental rights cases, it is nonetheless quite consistent in its approach to the specific stages of proportionality that it chooses to apply.

1. The Nature and Role of the CJEU

The Court of Justice of the European Union, which started as a small Court, was established in the European Coal and Steel Community Treaty (ECSC) of 1952, to ensure correct interpretation and implementation of the Treaty.[728] In 1957 the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) were established. Each of the Communities had a Court of Justice but the Convention on Certain Institutions Common to the European Communities (1957) provided that a single Court of Justice was to have jurisdiction over all three Communities.[729] Thus the Court of Justice of the European Communities was born and its supranational jurisdiction was more firmly established, given its increased jurisdiction within the EEC Treaty and EURATOM. The Court of Justice had the task of ensuring that the instruments of the European institutions and of Member State governments were compatible with the Treaties and also to give rulings, at the request of national courts, on the interpretation or validity of Community law provisions. Thus, the role of the Court in general is to safeguard the objectives of the Treaties and to ensure that EU law is interpreted and applied uniformly throughout the Member States' legal systems.

[728] <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11951K/TXT&from=EN>(in French), accessed 17th November 2018.
[729]<https://publications.europa.eu/en/publication-detail/-/publication/7e723b19-1ead-4cf5-bc0b-498ecbcf1ecc> accessed 17th November 2018.

Article 19 of the TEU states that the Court of Justice of the European Union 'shall ensure that in the interpretation and application of the Treaties the law is observed'. Article 19 TEU endows the CJEU with an inherent power of control over the application of EU law, the interpretation of which it developed very skilfully into a body of teleologically-based jurisprudence, resulting in the acceptance of its judgments by the Member States. This acceptance can be witnessed in the manner in which the Member States have preferred to circumvent the Court where they wished to exclude its jurisdiction rather than curb its judicial and jurisdictional powers. For example, in cases where the Member States preferred not to have judicial intrusion, certain policy areas would not be governed by legislation but by soft law, such as the open method of coordination. Additionally, newly-introduced policy areas upon Treaty revision would exclude judicial scrutiny because they would fall outside the community method of decision-making.[730] Court curbing has not played any major role in the life of the CJEU.[731] This can be explained primarily by reference to the infringement proceedings contained in Article 258 TFEU which empower the Commission to bring an action against any Member State for its alleged failure to observe the Treaties or its obligations under the Treaties. A judgment by the CJEU would authorise the Commission to monitor closely the Member State required to re-align itself with EU law against a second procedure, this time for the fixing of a fine, for failure to comply.[732] The infringement process envisaged by the Treaty is a powerful tool for the Commission but an even greater tool for the CJEU which can impose a hefty fine on the Member State for its failure to comply with EU law. This monitoring and penalising mechanism has served as a deterrent but also as a motivator to Member States to respect the authority of the CJEU.

The Court's inherent authority was strengthened over time.[733] Its rulings were pivotal in the development of its authority and European integration, reminding the Member States, early on in the life of the EEC that they had transferred from the domestic legal system, to the Community legal system, rights and obligations arising under the Treaty,

[730] Saurugger S & Terpan F., *The Court of Justice of the European Union and the Politics of Law,* (Palgrave 2017), p. 101.
[731] Although there have been resistances to the doctrine of supremacy by certain national courts such as the French Conseil d'Etat, the Italian Constitutional Court and the German Federal Constitutional Court. See Kumm M. & Comella V F., 'The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union', (2005) International Journal of Constitutional Law, Volume 3, Issue 2-3, 473–492.
[732] Article 260 TFEU
[733] Saurugger S & Terpan F., *The Court of Justice of the European Union and the Politics of Law,* (n 730) 10.

which carried with it a 'permanent limitation of their sovereign rights'.[734] Such an affirmation was nowhere to be found in the treaties. However, on the basis of a teleological approach, the Court affirmed this statement, demonstrating not only that the Member States had entered into an agreement which was different from an international agreement which merely bound States, but also affirming its sole right of interpreting the Treaties and not shying away from doing so. The emphasis on sole jurisdiction was founded on the now Article 267 TFEU which states that the CJEU 'shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; and (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'. The Court proclaimed that it had sole jurisdiction to interpret EU law and to invalidate any subsidiary legislation and that any doubts which national courts had on the interpretation of EU law were to be referred to it.[735] It also made it quite clear that EEC law was 'a new legal order of international law for the benefit of which the States have limited their sovereign rights',[736] emphasising the fact that EEC law could not be interpreted in the same manner as international law and also reflecting the Court's intention that it would not be applying certain rules of international law such as the principle of reciprocity.[737] It established early on that the Member States were bound by the Treaties irrespective of whether other Member States were also in breach of the Treaties, thus setting aside the traditional application of the reciprocity principle prevalent in international law.[738]

The CJEU has been able to assert its authority on the basis of certain Treaty provisions interpreted as empowering it to exert its authority. Thus, Article 19 TEU authorises it to 'ensure that the law is observed', Article 258 TFEU authorises it to declare a Member State, *inter alia,* that it has failed to fulfil its obligations under EU law, and Article 263 TFEU gives it the constitutional power to declare null and void any acts of the institutions which violate Treaty objectives. These provisions have placed the CJEU in a powerful position which has allowed it to develop doctrines which not only regulate the relationship amongst the Member States themselves within an EU context, but also the

[734] Case 6/64, *Flaminio Costa v. Enel*, [1964] *ECLI identifier: ECLI:EU:C:1964:66*
[735] Case 11/70, *Internationale Handelsgesellschaft* (n 528)
[736] *Costa v. Enel* (n 734).
[737] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 00001.
[738] Craig P. & De Burca G., (n 727) 452.

relationship between the Member States and the EU and most importantly, the relationship between EU citizens, Member States and the EU.

The doctrine of supremacy of EU law, which the Court inferred through its interpretation of certain articles in the Treaty, such as Article 4(3) TEU (the good faith or fidelity clause requiring Member States to ensure fulfilment of obligations under EU Law), Article 18 TFEU (prescribing the general prohibition of discrimination on the grounds of nationality), Article 288 TFEU (prescribing the direct applicability of Regulations), Article 344 TFEU (prescribing the obligation of Member States to submit only to Treaty dispute resolution), and Article 260 TFEU (prescribing the compulsory requirement to comply with the rulings of the Court of Justice), has consolidated its position as a powerful and coercive Court. Similarly, the doctrines of direct effect and state liability in damages have been invaluable tools for the exertion of the Court's authority in cases where a Member State had failed to fulfil its obligations under EU law, as they granted the individual the right to rely on EU law, despite its absence in national law, and to demand reparative damages. The doctrines of direct effect and state liability in damages were an avenue for the Court to maximise the impact of EU law on the Member States. This indicates the degree to which the Court was prepared to allow the actualisation of EU objectives. The recognition of rights to the individual were subsidiary and served as a means of ensuring active applicability of EU law at national level. This can also be seen from the evolutive relationship of the Court with its adjudicative competences in fundamental rights claims which is discussed in the next section.

2. Fundamental Rights Protection in the EU

The CJEU was not always a fundamental rights protector. In fact, in the early years of the European Economic Community (EEC), the main concern was the common market. The EEC was an economic engine focused on gradually liberating the European market. At the time, it was inconceivable that in order to advance the common market, protection of fundamental rights was an essential requirement.[739] Hence it is not surprising that in these early years the CJEU would refuse to give rulings involving fundamental rights

[739] With the abandonment of the European Defence Treaty in 1954, the European Political Community Treaty was automatically abandoned. The latter would have made the European Convention on Human Rights part of the law of the new Communities. Subsequently the EEC Treaty and EURATOM were carefully drafted to leave out any reference to human rights protection.

protection.[740] A subtle change in approach is seen in the *Stauder* case where the Court held that the protection of fundamental human rights 'were enshrined in the general principles of Community law' *albeit* rejecting the claim that a Regulation requiring the divulgence of personal information of beneficiaries of subsidised butter as violating such general principles.[741] The development of a human rights discourse by the Court may be said to have been an exercise in institutional authentication and legitimacy.[742] The protection of fundamental human rights constituted one way in which the action of the Community would be perceived as an authentic and legitimate institution of governance having a new legal order of international law likened to a State's constitutional legal status.[743] Moreover, the Court was well aware of the increasing degree of protection being afforded to fundamental rights by Member State national courts after the war, and that it would have been far more difficult to convince national courts of the legitimacy of its decisions if it failed to extend protection of fundamental rights.[744]

In the absence of a rights document, the Court started gradually developing the general principles of law, including protection of fundamental rights and freedoms. It drew its inspiration from the traditional constitutional principles of the Member States and the international treaties to which the Member States were signatories.[745] The development of fundamental rights protection may be said to have been a sporadic one, very much dependent on the preliminary references reaching the Court. There was no systematic development in terms of the substantive rights that the Court was ready to afford protection to. Thus, there is a considerable body of case law where this sporadic recognition of rights occurred, such as the right to access to a court and the right to a fair

[740] See Case 1/58 *Stork v. High Authority* [1959] ECR 17; Cases 36-38 and 40/59 *Geirling v. High Authority* [1960] ECR 423; Case 40/64 *Sgarlata and others v. Commission* [1965] ECR 215.
[741] Case 29/69 *Erich Stauder v City of Ulm - Sozialamt*, , ECLI:EU:C:1969:57
[742] Williams A, 'EU Human Rights Policies: A Study in Irony', OUP (2012), p. 128-163.
[743] Zetterquist O., 'The Charter of Fundamental Rights and the European Res Pubblica' in di Federico G., (ed), *The EU Charter of Fundamental Rights - From Declaration to Binding Instrument,* Springer (2011), p.3
[744] In the German Case known as Solange I (Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel, BVerfGE 37, 271; 1974), (n 528), the German Federal Constitutional Court (GFCC) held that as long as the EEC did not have codified fundamental rights' protection, the German courts would continue to recognise the fundamental rights of Germany as supreme. The GFCC also retained its right to review EEC legislation to ensure it did not conflict with fundamental rights protected by the German Basic Law. In Germany there was fear that the EEC would stifle democracy and the fact that the European Parliament, at the time was not popularly elected, backed this argument further. This case reached the CJEU approximately a year later, following the *Stauder* ruling. However, the sentiments of the GFCC in this respect were quite known by the CJEU during that period.
[745] Case 4-73, J. *Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECR 1974 -00491, ECLI:EU:C:1974:51

hearing,[746] non-discrimination rights,[747] the right to privacy and data protection,[748] protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities,[749] the right to family life,[750] the right to economic liberty and free disposition of property,[751] the right of civil servants to freedom of expression,[752] the right to lawyer-client confidentiality,[753] the rights of refugees,[754] and respect for human dignity.[755]

The Lisbon Treaty brought concrete changes in the protection of fundamental rights in the Union, primarily by transforming the Charter of Fundamental Rights which until then had constituted a political declaration,[756] to a legally binding fundamental rights document, having the same status as the Treaties.[757] Its status prior to the coming into force of the Lisbon Treaty may explain why the Charter is regarded as affording a wider protection of fundamental rights than its ECHR counterpart. The Charter affords protection and respect to core fundamental rights such as respect for human dignity,[758] the right to life,[759] the prohibition of torture and inhuman and degrading treatment,[760] and to other rights which may not necessarily be labelled as 'fundamental' when viewing it from an ECHR point of view. Some of these protected rights are economic and social rights,[761] the right of collective bargaining and action, including the right to strike,[762] and the right to good administration.[763] The Charter therefore incorporates also a broad range of political, civil and social rights.[764] Its range of protection, however, only extends

[746] Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651 [line 18]
[747] Case C-13/94 *P v. S and Cornwall County Council* [1996] ECR I-2143 [line 18]
[748] Cases C-465/00, 138/01, 139/01 *Rechnungshof v. Österreichischer Rundfunk* [2003] ECR I-5199 [lines 21-23]
[749] Case C-94/00, *Roquette Freres Roquette Frères SA and Directeur general de la concurrence, de la consommation et de la répression des fraudes*, ECLI:EU:C:2002:603
[750] Case C-482/01, *Georgios Orfanopoulos and Others* (C-482/01) and Case C-493/01, *Raffaele Oliveri v Land Baden-Württemberg*, ECR 2004 I-05257, ECLI:EU:C:2004:262
[751] Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz*, ECR 979 -03727, ECLI:EU:C:1979:290
[752] Case C-274/99 *P Connolly v Commission* [2001] ECR I-1611
[753] Case 155/79 *AM & S Europe Ltd v. Commission* [1982] ECR 1575
[754] Case C-465/07 *Elgafaji v. Staatssecretaris van Justitie* [2009] ECR I-921
[755] Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, ECR 2004 I-09609, ECLI:EU:C:2004:614
[756] It was adopted in the year 2000 but did not have legally binding status.
[757] Article 6 TEU
[758] Article 1 of the Charter
[759] Article 2 of the Charter
[760] Article 4 of the Charter
[761] Title IV of the Charter
[762] Article 28 of the Charter
[763] Article 41 of the Charter.
[764] Zetterquist O., (n 743) 3.

to measures falling within EU law and EU competence and to Member State action within the ambit of the EU.[765]

Presently there exist two parallel bodies of case law produced by the CJEU in fundamental rights protection. The first concern judgments which are based on the general principles of EU law and the second are based on the Charter. The two areas are intimately connected and the rights protected by the Charter constitute a continuation of court doctrine developed as general principles of law.

Today fundamental rights protection within the EU has developed considerably. From a Community with a purely economic aim, the EU has as one of its primary aims the protection of fundamental rights, both internally and externally.[766] The connection between the protection of fundamental rights and freedoms within the EU and the principle of proportionality is a tight one. Measures taken within the EU by the EU institutions are bound to respect the principle of proportionality and cannot exceed what is necessary to achieve the EU objective.[767]

3. Proportionality Analysis in EU Law

The CJEU reviews acts of the institutions as well as national measures of the Member States affecting one of the fundamental freedoms (goods, persons, services and capital), market integration and other EU objectives.[768] Its power of scrutiny can be said to emanate from three distinct avenues. First, the Treaty provisions themselves. Second, the Court's ability to interpret Treaty provisions resulting in a consolidation of its judicial authority over national courts. And third, the general willingness of the Member States to observe the CJEU's judgments. The Court exercises its power of scrutiny in varying degrees of intensity, depending mainly on the reason for the challenge of a particular act or measure. It has become clear, from its review judgments that the Court is more inclined to apply a high level of scrutiny when reviewing national measures having an effect on EU objectives, with the aim of preserving such objectives.[769] On the other hand,

[765] Article 51 of the Charter.
[766] Article 2 TEU.
[767] Article 5(4) TEU and Article 52(1) EU Charter.
[768] Article 263 TFEU and case law of the CJEU.
[769] Craig P., *EU Administrative Law,* (n 138), 590-592.

a lower degree of scrutiny is applied when it is reviewing acts of the institutions.[770] As will be discussed, the intensity of scrutiny applied by the Court is reflected in the intensity of the proportionality analysis applied by the Court.

The proportionality principle plays a central role in the jurisprudence of the CJEU. It constitutes a general principle of EU law. General principles of EU law are a set of unwritten rules, developed by the Court, as an aid in the interpretation and determination of a case.[771] The principle of proportionality was later enshrined in the Amsterdam Treaty (1999) and is now contained in Article 5(4) of the Treaty on European Union (TEU).[772] The EU institutions are obliged to observe the principle of proportionality when adopting legislative and administrative measures. Thus, failure to observe the proportionality principle may serve as a basis for action against Union measures and decisions.[773] Schwarze sums the proportionality principle as 'applicable virtually in every area of Community law 'as a criterion in the assessment of the legality of actions of the Community institutions of the national authorities, which has often had a decisive effect in relation to both legislative and executive action'.[774] It serves the purpose of achieving a proper balance and of furthering the principle of justice.[775] As a general principle of EU law, the principle of proportionality may be said to enjoy 'constitutional status' because it is an overriding principle of law capable of nullifying EU legislative measures in cases of violation. It is applied as an adjudicative tool when reviewing national measures which may be in breach of EU law, most notably the four freedoms,[776] and when reviewing challenged EU measures.[777] Areas of EU law in which the principle of proportionality is applied include the four freedoms as well as the organisation of the agricultural markets and the system of deposits, foreign trade, and competition law.[778] It

[770] Craig P., *EU Administrative Law,* (n 138), 590-592.
[771] See Tridimas T, *General Principles of EU Law,* (OUP 2007).
[772] Article 5(4) TEU states: Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.
[773] See e.g. Case T-14/98, *Hautala v. Council* [1999] ECR II-2489 where the Council's decision refusing Ms Hautala divulgence of a report on conventional arms was annulled by the Court. The Council appeal was dismissed, confirming the first judgment.
[774] Schwarze J., (n 1) 853.
[775] Schwarze J., (n 1) 679.
[776] Harbo T., *The Function of Proportionality Analysis in European Law* (2015) (n 36) 20.
[777] Jacobs F.G., Recent Developments in the Principle of Proportionality in European Community Law in Ellis E., (ed), *The Principle of Proportionality in the Laws of Europe*, Hart (1999), p.2, and Craig P., *EU Administrative Law,* (n 138), 590.
[778] Schwarze J., (n 1) 726-864.

is also increasingly applied in fundamental rights cases before the CJEU (whether in preliminary references or direct actions).

Craig identifies three types of scenarios where proportionality is considered by the Court: (i) cases which involve discretionary policy choices (social, economic, and political); (ii) cases involving penalties; and (iii) cases involving the infringement of a right.[779] In the first scenario, which usually involves EU market regulation measures entailing choices of economic policy, and involving wide discretion corresponding to political responsibilities, the Court will apply the manifestly disproportionate test.[780] Tridimas explains that the expression 'manifestly inappropriate' or 'manifestly disproportionate' delineates what the Court perceives to be the limits of judicial function with regard to the review of measures involving choices of economic policy'.[781] Craig agrees. He believes that discretion and policy choice fall within the realm of the administration and as such the Court will not apply an intensive proportionality test but rather a less intensive one where the challenged policy will be overturned only if it is shown to be manifestly disproportionate.[782]

In cases involving penalties, the Court will apply the proportionality principle with more rigour than in cases involving discretionary choices, but will keep in mind the objectives of the Union.[783] Cases involving penalties, whether they constitute a financial penalty or a forfeiture of deposits, do not usually attack the Union administrative objective, but rather, the financial burden placed on the individual for failure to comply with such objective.[784] This may explain why the Court usually applies a rigorous proportionality test in such cases.

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[779] Craig P., *EU Administrative Law,* (n 138), 590. Jacobs F.G., 'Recent Developments', (n 777) 9, on the other hand identifies five.
[780] Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others,* [1990], ECR 1990 I-04023, ECLI identifier: ECLI:EU:C:1990:391.
[781] Tridimas T., 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny', in Ellis E., (ed), *The Principle of Proportionality in the Laws of Europe*, (Hart 1999), p. 71.
[782] Craig P., *EU Administrative Law,* (n 138), 592.
[783] Ibid., 683-684.
[784] See for e.g., Case 122/78, *Buitoni v Forma* [1979] ECR 677; Case C-104/94, *Cereol Italia v Azienda Agricola Castello* [1995] ECR I-2983; Case C-161/96, *Südzucker Mannheim/Ochsenfurt AG v Hauptzollamt Mannheim* [1998] ECR I-281, but see also Case 114/76, *Bela-Mühle Josef Bergman KG v Grows-Farm GmbH & Co. KG* [1977] ECR 1211 where the Court struck down a scheme imposing the use of skimmed milk instead of soya, on the basis that the former cost almost three times as much as the latter.

In cases involving the infringement of a right, the CJEU will usually consider whether the restrictions imposed by the measure correspond to objectives of general interest pursued by the Union and whether they constitute a disproportionate and intolerable interference, which impairs the very substance of the rights guaranteed.[785] In such cases the Court does not engage in any significant exercise of disproportionality because it decides the cases on the basis of a declaration that fundamental rights are not absolute and can be restricted in the general interest of the Union.[786] According to Craig, Union measures that limit rights will almost always be designed to attain some general interest pursued by the EU.[787] However, he believes that the Court's proportionality analysis applied in such cases is vigorous.[788]

There is an intimate connection between the intensity of review of measures by the CJEU and its application of the principle of proportionality. The CJEU varies its intensity of scrutiny by adapting the intensity of the proportionality analysis it performs. When reviewing EU measures it requires 'manifest inappropriateness'[789] or 'manifest disproportionality'[790] whereas when reviewing national measures the requirement is 'disproportionality' which is tested through the 'least restrictive means test'.[791] The manifestly inappropriate test, also referred to as the manifestly disproportionate test, involves judicial testing of the legality of a Union measure against the objective it is aimed to pursue.[792] The main basis of this testing is usually the suitability test of the proportionality principle,[793] which is the first stage of proportionality analysis. According to Tridimas, the manifestly inappropriate test allows wide discretion to the institutions and applies to both the suitability and necessity stages of proportionality analysis.[794] Thus, when the Court applies this test, it keeps in mind the wide discretionary

[785] Craig P., *EU Administrative Law.,* (n 138), 606.
[786] See for e.g., Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd [2002] ECR 2002 I-11453, Cases C-20 and Joined Cases C-20/00 and C-64/00, Booker Aquaculture Ltd, trading as Marine Harvest McConnell (C-20/00),Hydro Seafood GSP Ltd (C-64/00)[2003] ECLI:EU:C:2003:397, Cases C-184 and 223/02 Spain and Finland v. EP and Council and Yassin Abdullah [2004] 2004 I-07789, Joined cases C-402/05 P and C-415/05 P, Kadi* (n 725).
[787] Craig P., *EU Administrative Law.,* (n 138), 609.
[788]Ibid., 554.
[789] Tridimas T., 'Proportionality in Community Law' (n 781) 66.
[790] Craig P. & De Burca G., *EU Law,* (n 727) 552.
[791] For an in-depth discussion see Arai-Takahashi Y., Sauter, W., 'Proportionality in EU Law: A Balancing Act?' (n 727), 439-466.
[792] F*edesa* (n 780)
[793] Harbo T., *The Function of Proportionality Analysis in European Law* (2015) (n 36) 25.
[794] Tridimas T., 'Proportionality in Community Law' (n 781) 71.

political and economic powers of the institutions as well as the complexity of the case entailing policy and economic considerations.[795] The Court is not prepared to interfere with such powers and considerations and to test their validity except marginally.[796] This results in a low intensity scrutiny by the Court reflecting its unwillingness to apply the test in depth in such cases. Indeed, it is a test which is difficult to fail.[797]

The CJEU's reluctance to interfere with the wide discretionary powers of the EU institutions also explains why when reviewing a national measure, the intensity of review seems to be stronger. In such cases, the principle of proportionality 'is applied as a market integration mechanism'[798] where the Court keeps the EU objectives well in its view. Where it is alleged that a national measure interferes or violates one of the four freedoms protected by the Treaties on the domestic level, the least restrictive means test is applied.[799] This test forms the second stage of proportionality analysis where an examination of the necessity of the means takes place. The test requires that the measures having the least drastic implications are adopted,[800] resting on the premise that if there are various means to choose from which equally achieve the objective in view, the least restrictive which produces the least burden is to be chosen. To give an example, a ban on imports based on public health claims, whether genuinely claimed or not, inevitably fail the least restrictive means test since an alternative to the protection of public health is usually identified by the Court as being less restrictive and reaching the same ends.[801] Thus the necessity aspect entails that a measure is permissible only if no less restrictive measure exists to achieve the objective pursued,[802] and if this fails the CJEU will declare the measure to violate the principle of proportionality.[803] In cases such as these, the Court is aware that the Member State may be circumventing treaty objectives to protect its economic and commercial well-being.

[795] Harbo T., *The Function of Proportionality Analysis in European Law* (2015) (n 36) 24.
[796] See for e.g. Case 138/79 *Roquette Frères v. Council* (n 749) and Case C-56/93 *Belgium v. Commission* [1996] ECR I-723
[797] Arai-Takahashi Y., Sauter W. 'Proportionality in EU Law: A Balancing Act?', (n 727) 13.
[798] Tridimas T., 'Proportionality in Community Law' (n 781) 66.
[799] Harbo T., *The Function of Proportionality Analysis in European Law* (2015) (n 36) 34
[800] Schwarze J., (n 1) 857.
[801] See Case 40/82 *Commission v. UK* [1984] ECR 2793 and Case 104/75 *de Peijper* [1976] ECR 613.
[802] Schwarze J., (n 1) 857.
[803] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649

It is well worth noting that the proportionality analysis applied by the Court, whether it is reviewing EU measures or national measures, places an emphasis on the first two stages of the principle of proportionality, i.e. suitability and necessity.[804] In the case of the review of EU measures involving wide discretionary powers, the Court applies a weak form of the first stage in proportionality analysis by requiring manifest inappropriateness whereas in the case of the review of national measures it applies the necessity test as the least restrictive means test which is the test applied in the traditional proportionality principle. One obvious reason why the necessity stage takes centre stage in the CJEU's application of proportionality may be the wording contained in Article 5(4) TEU, which stresses that, by observing the principle of proportionality, Union action is not to exceed what is necessary for the achievement of the aim pursued.[805] This is also stressed in Article 52(1) of the Charter.[806] Within the context of fundamental rights judgments, it is yet not very clear what the Court means by a 'disproportionate and intolerable interference which impairs the very substance of the rights guaranteed'.[807] This is because, as explained above, the Court will declare that there is no disproportionality on the basis that fundamental rights are not absolute and thus can be limited in the general interest and objectives of the Union. No significant proportionality analysis takes place in such cases. However, later in this chapter, a number of fundamental rights judgments are identified where the Court actively engages in proportionality analysis. However, before this can take place, a discussion of the Court's relationship with fundamental rights adjudication is necessary since the original constitution of the Court was not particularly geared to address fundamental rights conflicts arising between individuals and EU measures.

[804] Craig P., *EU Administrative Law,* (n 138), 591.
[805] Article 5(4) TEU states 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality'.
[806] Article 52(1) of the Charter states 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.
[807] Various judgments adopt this phrase. See e.g. Case C-44/94 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations and others and Federation of Highlands and Islands Fishermen and others* ECR 1995 I-03115 [line 55]; Case C-280/93 *Germany v Council* [1994] ECR I-4973, [line 78]; and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture* (n 599), [line 68].

What follows is an attempt to portray identified approaches to proportionality in selected fundamental rights judgments of the CJEU, with a view to analysing each approach against the traditional approach as expounded by Alexy. The latter's description of proportionality analysis will serve as the comparator against which the principle applied by the Court is analysed. The discussion will then focus on whether or not it is desirable that the Court should adopt Alexy's approach or not.

4. Analysis of the CJEU's approach to proportionality in Fundamental Rights Judgments

The CJEU does not always opt to apply the principle of proportionality in preliminary references. Sometimes it leaves it up to the national court making the reference to apply the principle of proportionality in the given case.[808] In fewer instances, the CJEU, in preliminary references, opts to apply the proportionality principle itself to the facts of the case. It is outside the purpose of this study to inquire into the reasons why the CJEU sometimes leaves it up to the national court to apply the principle of proportionality because the purpose of this study is to analyse how it applies the proportionality principle when it does so in terms of its structure and the reasoning behind such application. What follows is an analysis of such judgments. I have attempted to group them into categories which I believe best indicate the type of approach to proportionality by the CJEU. Five categories have been identified.

4(a) The Three-Stage Test Approach

The first clear application by the CJEU of the proportionality principle concerned the freedom of action, of disposition and of economic liberty, originating from a German preliminary reference alleging *inter alia* that an EU Regulation violated the German constitutional principle of proportionality.[809] This case is primarily a landmark judgment in that the Court makes it amply clear that '... the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles

[808] Case C-524/15 *Menci v. Procura della Republica* [2018] ECLI:EU:C: 2018:197

[809] Case 11/70 *Internationale Handelsgesellschaft mbH* (n 528). Authors such as Schwarze J. and Craig P. indicate an earlier reference to proportionality under the ECSC Treaty but the reference was undeveloped and concerned reasonableness rather than the structured principle which the Court seems to apply today.

of its constitutional structure'.[810] The allegations made in this case were that the Regulations 120/67/EEC[811] and 473/67/EEC[812] violated the German constitutional principles of freedom of action and of disposition and of economic liberty, and of proportionality. It was claimed that the obligation to import or export cereals on the basis of the granting of an import or export licence, and that of depositing an amount of money which could be forfeited in case of non-performance, constituted an excessive intervention in relation to the protected rights under the German Basic Law. The Court examined proportionality by applying all three stages of the principle.

The Court dealt with the first allegation that the requirement of forfeiture of the amount deposited in the eventuality of non-exportation, constituted a disproportionate measure. The way it approached this allegation was primarily by declaring that, on the basis that respect for fundamental rights formed an integral part of EU law, it would examine whether the requirement for a deposit violated such rights. It first sought to establish whether the impugned provision requiring the deposit was legitimate. It determined that such a system was effective because the Community would gain precise knowledge of the intended transactions in exports. It went further in justifying why the aim was a legitimate one. It held that knowledge of transactions and knowledge of the state of the market was essential for the Community to be able to guarantee the functioning of the system of prices within the implementation of the Common Agricultural Policy. The Court determined that the precise data, including statistical information and precise forecast on future imports and exports, were therefore necessary. The Court did not so much as state that it was engaging in the first step of proportionality analysis, i.e. suitability. However, it did precisely this. The system of deposits as envisaged by the regulations was therefore legitimate.[813]

[810] Case 11/70 *Internationale Handelsgesellschaft mbH*, (n 528).
[811] On the Common Organisation of the Market in Cereals.
[812] On Import and Export Licenses for Cereals and Processed Cereal Products, rice, broken rice and processed rice products.
[813] It is important to point out that 'legitimacy' or 'legitimate aim' as applied here by the CJEU in the proportionality principle is not connected to the legitimate aims test performed by the ECrHR, which is a very superficial test usually intended to establish that the measure being impugned has its foundations in national law and that the latter is compatible with the rule of law. See e.g. *Olsson v. Sweden*, (n 650). If there is no domestic law which allows the interference to a protected right, the Court may find a violation, as in *Halford v. UK*, (n 466) and *Kopp v. Switzerland*, (n 650); see also *Mehemi v. France* (n 650).

It is important to note here that although the Court, in this judgment, made use of the term 'legitimate', it is actually applying the 'suitability' test under the traditional first stage of the proportionality principle. The CJEU analysed the reasons why such a measure was suitable, relative to the aim it was intended for. According to Alexy, the suitability test is a negative test which serves to exclude measures which do not further the aim to be achieved. The Court examined the reasons and determined that they effectively furthered the aim pursued.

The second exercise undertaken by the Court within proportionality analysis was to determine whether this system could have been overridden by a less burdensome one. The Court considered two alternative modes of action proposed by the complainants: (i) a system of mere declaration of exports excluding forfeiture, and (ii) a system of fines applied *a posteriori*. In the first instance the Court held that a system of mere declaration of exports and of unused licences would not allow the Community the precision of knowledge on trends in the movement of goods. This is because the application for the licences was voluntary and if subsequently the trader decided not to affect the exports originally agreed to, the Community would not have such precise data. In relation to the second proposition, the Court held that fines imposed *a posteriori* would entail considerable administrative and legal complications at the stage of decision and execution, since the traders involved may not be reachable by reason of their residence within the Community territory. The Court noted that the Regulation specifically imposed the obligation on all applicant traders irrespective of their place of establishment in the Community. In this case the Court examined the proposed alternative methods and found that they lacked the efficacy required to reach the aim in view even though they constituted a less burdensome measure on the traders.

The third allegation brought forward by the complainants was that the forfeiture of the deposits was excessively burdensome on them and that such forfeiture did not yield the usefulness of the information claimed by the Commission. In considering the claim of excessive burden, the Court engaged in a weighing exercise, akin to the proportionality *stricto sensu* stage, but different in a few ways, as will be discussed. It is acknowledged that the Court did examine whether the measure constituted an excessive burden on the traders but it did so in a strange way. The Court primarily held that in reviewing whether

the forfeiture was excessively burdensome, it would not take into account the actual deposit but it would only consider the costs and charges involved when placing the deposit. The reason for excluding the amount of the actual deposit was that applicant traders were adequately protected under the provisions of *force majeure*, i.e. in case of failure to export not owed to the fault of the trader (wide interpretation). It then examined whether the burden suffered by the traders would be excessive in relation to the value of the goods in question and determined that it was not. The Court does not give any further details as to why this was not so. The Court only took the value of the goods to weigh whether the forfeiture was burdensome. It did consider the allegation that the data collected was not effectively useful to the Commission, but it did not include it in this weighing examination. The Court held that this allegation was irrelevant, without further explanation. It must be noted however, that the aim for the collection of data was held by the Court as being imperative in the initial stage of the test. The main question which arises here is whether or not the Court should have considered the burden placed on the traders in relation to the aim to be pursued. In such a case, an examination of the usefulness of the data collected would have been pivotal since this would have challenged the practical aspect of the effectiveness of the aim. In theory the aim was both suitable and necessary, but how effective was the achievement of this aim in practice? Was the benefit alleged by the Commission, relative to the collection of precise data, a tangible one? And if so, would this actual benefit have outweighed the burden placed on the trader in case of fault-based forfeiture?

It is submitted that the examination made by the Court of the suitability and necessity of the measures imposed was modelled on Alexy's explanation of the traditional proportionality principle. The final examination regarding the excessive burden claim leaves unanswered questions in terms of explanatory discourse which led the Court to arrive at the conclusion that it did. Not only that, but the elements which the Court considered in order to determine whether the burden was excessive or not, also leave much to be desired. The last test is effectively a weighing exercise, but the weighing does not involve the rights and interests of the parties involved, i.e. the limitation on the rights of the traders, versus the benefits derived by the Community for the common good or public interest, in this case. Therefore, it is quite safe to say that in this case, although the third stage of the proportionality enquiry was engaged in by the Court, the manner of

application was a weak one when compared to the application of the third stage under the traditional principle.

In *Sky Österreich*, the Court once again applied a three-stage test approach to proportionality. In this case, the Court was faced with a challenge to Article 15(6) of Directive 2010/13 on Audio Visual Media Services.[814] Article 15 obliges Member States to allow broadcasters to broadcast short news reports which they can take from broadcasters who have the exclusive rights over such broadcasts. The nature of the short broadcast must be of high interest to the public. The Directive requires that such access be fair, reasonable and non-discriminatory. The article also provides that Member States are to ensure the modalities and conditions to be defined with regard to compensation arrangements. It also requires that compensation is not to exceed the additional costs directly incurred in providing the access.

The dispute which arose in this case regarded the payment of compensation of 700 Euros per minute by ORF to Sky for broadcasting short news reports in relation to the Europa League matches between 2009 and 2012. KommAustria, the Austrian communications regulator, had decided, on the basis of Article 15(6) of the Directive, that SKY was not entitled to demand compensation greater than the additional costs incurred for granting the short broadcast to ORF. This decision was challenged before the *Bundeskommunikationssenat* which had jurisdiction to decide whether the right to broadcast short news taken from the exclusive broadcaster should be granted, and the conditions in relation to this. The competence of the *Bundeskommunikationssenat* was envisaged by Article 5 of the Federal Law on Exclusive Television Broadcasting Rights, until the amendments which took place to Directive 2010/13, particularly Article 15(6), requiring compensation to be granted only in relation to the costs effectively incurred. ORF claimed that no costs were effectively incurred by SKY to grant them short broadcasting rights. The *Bundeskommunikationssenat* was doubtful whether Article 15(6) prohibiting any additional compensation for the granting of short news broadcasts infringed the right to property on the basis of the proportionality principle. The *Bundeskommunikationssenat* reasoned that it was unfair not to require the payment of

[814] Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*, [2013] ECLI:EU:C:2013:28

compensation to SKY, who were the exclusive right holders, when such exclusive rights had been acquired before the Directive was amended, and when ORF had applied for an interference of such rights after the new amendments to the Directive had come into force. The *Bundeskommunikationssenat* stayed the proceedings and asked the CJEU whether Article 15(6) was compatible with Articles 16 (Freedom to Conduct a Business) and 17 (Right to Property) of the Charter of Fundamental Rights and Article 1 (Right to Property) of the First Protocol of the ECHR.

The CJEU primarily held that Article 17 of the Charter on the right to property did not afford any protection to SKY because the Directive prevailed over any acquired legal position by SKY prior to its enactment. This is reflective of the supremacy of EU law whereby any conflicting positions are to be set aside and EU law is to be applied.

The Court then considered Article 16 of the Charter which affords the freedom to conduct business and the freedom to exercise an economic or commercial activity. The Court first established that the requirement of Article 15(6) of the Directive prohibiting compensation in relation to the costs that the exclusive broadcaster had incurred in acquiring exclusive rights amounted to an interference with the right to freely conduct a business under Article 16 of the Charter. It reminded that this right, however, is not an absolute right, and can be interfered with when such interference is made in the public interest. The Court referred to the principle of proportionality as enshrined in Article 52(1) of the Charter which allows the restriction of fundamental rights in pursuit of the general interest or the need to protect the rights and freedoms of others.

The Court first established whether the requirement in Article 15(6) of the Directive affected the core right protected by Article 16 of the Charter, and held that the core of such a protected right remained unaffected because it did not prevent the exclusive broadcaster from exercising its business activity, including payment for its own broadcasting services or to another operator. It then went on to consider the proportionality infringement argument raised by the *Bundeskommunikationssenat*, referring to past decisions where the Court emphasised the least restrictive means for the attainment of Union objectives, as a main component of the proportionality principle.

The Court first engaged in a suitability and legitimate aims test. As it had done in the *Internationale Handelsgesellschaft* Case, the Court focused on the importance of the right being protected. In this case it was the dissemination of high interest news to the public. It particularly emphasised the importance of the right of the general public to receive information as protected by Article 11(1) of the Charter. It also held that the fact that there was an increase in the marketing of exclusive broadcasting rights in the EU gave rise to a restriction on the access of the general public to receive information of high importance. Such exclusive broadcasting contracts also affected pluralism of the media, itself protected under Article 11(2) of the Charter. The Court then looked at the legitimate aim of Article 15(6) which effectively aims to protect pluralism of the media and the right to receive information by the public. It held that the aim in Article 15 was legitimate. On this basis, it then discussed the reasons why Article 15(6) was also, consequently legitimate. It held that Article 15(6) allows any broadcaster to broadcast important news to the general public by allowing them access to such news, whether or not held by exclusive broadcasters. This ensured the dissemination of important news, which is not incumbent on the commercial power or the financial capacity of the broadcasting entity. This is a very objective observation. The Court considered the receiving of news by the general public, as an imperative right, and that the dissemination of news should not be subject to commercial strength. Here one may notice that the right to receive information had already been ascribed a greater value by the Court than the freedom to conduct business, which essentially entails financial considerations. The guarantee of the receiving of news trumped any other considerations. At this initial stage of legitimate aims testing, the Court is already seen to be engaged in a comparative (but not a fully-fledged balancing) exercise of conflicting rights. The right of the general public to receive information is being weighed against the right to freely conduct a business, in terms of the negative impact which the former right would suffer if the latter is upheld. Thus, it must be noted that in the first stage of the proportionality test (suitability), the Court already applied a certain degree of rights weighing, which essentially paved the way to the balancing exercise in the third stage.

The Court then analysed the necessity of Article 15(6) and considered an alternative less restrictive measure: that of allowing the payment to exclusive broadcasters for providing the broadcast to the non-exclusive rights holders. In examining this, the Court noted that

such measure could give rise to obstacles preventing the broadcasters from actually acquiring the news: (a) the method adopted for compensation to be paid; and (b) the financial capacity of the broadcasters. The method adopted could be in such a way as to deter the broadcasters from actually being able to acquire the news, and if the calculated compensation was too high, the broadcasters might not be able to afford such payments. This would result in a considerable decrease in the access to information by the general public. After considering this alternative, the Court turned to the efficacy of Article 15(6) stating that it guarantees the right to receive and disseminate news on the basis of equality irrespective of any limiting circumstances, whether financial or otherwise. Under the traditional necessity stage test, the aim of the exercise is to determine whether the decision-maker has chosen the less intensively interfering means.[815] This means that the measure itself is to be examined and compared to alternative measures. The exercise involves an examination of the hypothetical alternative measures (whether proposed by the parties themselves, or of the Court's own motion) and decides whether to discard them or not. Thus, the Court does not analyse the impugned measure itself in terms of restriction to the right by comparing it to hypothetical alternatives but examines alternatives and decides how effective they would be in reaching the legitimate aim.

In its last stage of the analysis, the Court discussed the allegation of disproportionality contained in Article 15(6) and looked at the two competing rights: the freedom to conduct a business and the right of the general public to receive information and the pluralism of the media. The Court engaged in a balancing exercise between the two rights. It did so by considering several requirements imposed by Article 15(6) of the Directive. It primarily noted how the article places limitations on the non-exclusive broadcasters. It noted that the Directive requires short extracts of news to be broadcast reflecting the confined parameters within which non-exclusive rights holders may broadcast from the signal belonging to the exclusive broadcaster. This meant that the non-exclusive broadcasters may only broadcast within strict limits. The Court also noted that the news could only be broadcast during a news programme and not during any television programme. The broadcast allowed to them could not exceed ninety minutes, and the time limits for transmission are also defined. It also noted that the non-exclusive

[815] Möller K, 'Balance and the Structure of Constitutional Rights', (n 215), 445.

broadcasters were obliged to identify the source of the information they were broadcasting which benefited the exclusive broadcasters in terms of publicity. The Court then went on to consider the position of the exclusive rights holders under this article. It noted that the exclusive broadcasters are not prohibited from charging for the use of their rights and that when entering into a contract of exclusivity, the exclusive broadcasters could set-off any eventual payments due to them for the re-transmission of news by non-exclusive broadcasters. Whether such set-off is easily identifiable and quantifiable by the exclusive broadcaster *a priori* was not discussed by the Court. Perhaps this could have been delved into more by the Court to determine whether this set-off was practical and effective. At this stage of the analysis it is already clear where the Court stands. The Court noted once again that the increased marketing of exclusive broadcasting rights has the effect of reducing access by the public to high interest news. On the basis of this final exercise, the Court decided that the measure was not disproportionate in the light of the aims pursued but it effectively ensured a fair balance between the various rights and freedoms at issue.

In this case, the Court engaged in the full three-stage test identifying each stage in the process in a systematic manner. The Court's approach to the first stage of suitability and legitimate aim is a positive approach type, rather than the negative approach type propounded by Alexy. This is because the Court does not engage in an exclusionary exercise. Rather it upholds the importance of the rights being protected, as viewed in relation to the competing rights being claimed. The second stage of necessity may be said to be close to the traditional necessity stage test in that the Court essentially examines the effects and impact of the measure by considering alternative means and their impact in terms of the aim pursued. The final balancing stage test, in this case, amounted to a weighing of the costs and the benefits in relation to the rights being claimed. It is submitted that the *Sky Österreich* ruling is a good example of a thorough application of the traditional proportionality principle by the Court.

The comparison of the effects of article 15(6) on the exclusive and non-exclusive rights holders respectively is a very systematic and thorough exercise which the Court engaged in, in order to determine whether the situation tilted the balance on one side unjustly. However, Craig doubts whether the proportionality *stricto* sensu stage forms part of the

Court's proportionality test.[816] A case in point is the *Hautala* Case, where Craig believes that the decision, although based on the principle of proportionality, was decided on the first two prongs, suitability and necessity.[817] He does not elucidate further on the subject. A close look at *Hautala*, however, reveals that the Court effectively relied heavily on the third stage of proportionality analysis, completely forgoing the first two stages, to determine the case.

4(b) The Proportionality *Stricto Sensu* Approach

The *Hautala* case concerned Heidi Hautala, a MEP who had requested access to Working Party Council documents in relation to the exportation of arms by the EU.[818] The Council refused access on the basis that the documents contained sensitive information which would undermine the public interest as regards public security. Ms Hautala challenged the Council's decision on the basis of the Union's commitment to grant the widest possible access to documents held by the Council and the Commission. The Court, considering the Council's argument that the principle of access to documents applied only to documents as such and not to the information contained within them, considered whether partial access to the information could be granted. The Court noted that access to documents is a general principle of law. Today, it is enshrined in Article 42 of the Charter. The Court noted that where a general principle is established, any exceptions are to be construed strictly. It then went on to consider the plea based on the principle of proportionality, noting that it required that 'derogations remain within the limits of what is appropriate and necessary for achieving the aim in view'. At this stage, the Court did not go into a consideration of appropriateness and necessity but immediately engaged in a brief balancing exercise, which at appeal stage, the ECJ also endorsed fully:

> …. the principle of proportionality would allow the Council in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work, to balance the interest in public access to those fragmentary parts against

[816] Craig P., *EU Administrative Law,* (n 138), 591.
[817] Craig P., *EU Administrative Law,* (n 138), 604.
[818] Case C-353/99 *Council of the European Union v Heidi Hautala* [2001] ECR I-09565, ECLI:EU:C:2001:661.

> the burden of work so caused. The Council could thus, in those particular cases, safeguard the interests of good administration.[819]

The Court engaged in a weighing exercise. It weighed the pros and cons for the consideration of partial access to documents. The Court looked at the two main conflicting rights. First, the right of the Council not to divulge sensitive information which could threaten public security. Second, the right of the general public to access institutional documents. The Court seems to have applied a balancing by apportionment method, awarding a degree of the right to each of the contenders. The Council was allowed to retain information which it deemed sensitive and the MEP (also the general public) was allowed partial access to the information contained in the document.

In this case, there does not seem to be any specific treatment of the three stages of proportionality, particularly the first two stages of suitability and necessity. The Court did not engage in these two stages in any way but focused directly on the application of the proportionality *stricto sensu* stage.

One question which arises is whether the Court engaged in a balancing exercise because there was no requirement for the first two stages of the test. It did not enquire into whether the decision taken not to divulge was appropriate and necessary. It did not question the contents of the documents in any way to decide the appropriateness and the necessity of the decision. One explanation would be that the contents were to that day still a Union secret and therefore such an exercise could not have practically been made. However, the Court could have examined the appropriateness of the provision serving as an exception to the principle of transparency, but again this examination would have required a context which, at the time was almost completely absent except the knowledge that the documents contained sensitive information on the exportation of arms. The Court did not really have any other option than to apply the proportionality balancing stage to determine the costs and benefits of divulging the information contained in the secret documents. This indicates that the Court is willing to apply merely one stage of

[819] Case C-353/99 *Council of the European Union v Heidi Hautala* (n 818), [line 86].

the proportionality principle to determine a case. In the next case, the Court once again relies particularly on one stage of the principle, namely suitability.

4(c) The Legitimate Aim Approach

In the *Hauer case,* Ms Hauer was the owner of a piece of land and had applied to plant vines.[820] The Community at the time was adopting a new policy for wine production with the aim of reducing surplus wine and increasing wine quality affordable for both the manufacturer and the consumer. A Regulation was adopted prohibiting the new planting of vines, which came into force after Ms Hauer had submitted her application for the planting of vines.[821] Two of her pleas rested on the fact that under German law the Regulation violated her right to property and her right to freely conduct a business.

The Court, *inter alia*, considered her pleas by primarily determining whether the Regulation pursued legitimate aims. It did so by extensively considering two facts. First, that all Constitutional traditions of the nine Member States at the time envisaged as legitimate the restriction on the right to property for the public interest. Second, the broader aims of the common organisation of the market in wine which included a structural improvement in the wine-producing sector.

The Court held that the restriction contained in the Regulation was lawful in the constitutional structure of all the Member States. In its second consideration it identified a double objective in the public interest: (i) that the aim of the Community was to establish a lasting balance on the wine market at a price level which was profitable for producers and fair to consumers, and (ii) to obtain an improvement in the quality of wines marketed. The Court noted that the policy planned to enable Member States to forecast planting of vines and production of wine and for this purpose certain measures, including the restriction contained in the present Regulation, were required. The Court then went on to consider the situation as it would stand, had there not been any such measures. It noted that the cultivation of new vineyards in a situation of continuous over-production would not have any effect, from the economic point of view, apart from

[820] Case 44/79 *Hauer* (n 751).
[821] Council Regulation 1162/76 of 17 May 1976 on measures designed to adjust wine-growing potential to market requirements

increasing the volume of the surpluses. It also considered the effect of allowing Hauer to plant her vines on the basis that her application had been submitted prior to the coming into force of the Regulation. It held that if this were to be allowed, the implementation of the policy would be at risk as it would be more difficult for the Community to implement such policy, if the national legislation were to be considered. The Court held that the infringement was justified on the basis of objectives of general interest.

It is interesting to note that the Court decided this case primarily by extensively examining the legitimate aim of the Regulation, as well as the main policy upon which it rested. Even when it considered an alternative situation, that which pertained at that specific moment, it did so by reference to the aim which the policy pursued. It did not address alternative means which might be less restrictive of Hauer's right while still achieving the aim in view. Instead, it applied a negative test ruling out alternative means which would not be capable of achieving the aim. However, it is submitted that such a test would still not have prevented the Court from considering Ms Hauer's right to property, especially when she had submitted her application to plant vines before the Regulation came into force. The Court had initially declared that it would examine whether the provisions 'constitute a disproportionate and intolerable interference with the rights of the owner'[822] but the Court never really examined her right because it placed heavy emphasis on the legitimacy of the aim which made Ms Hauer's right seem petty in comparison. It may well have been the case. However, had the Court examined Ms Hauer's right and established that there were no less restrictive means, it would have been able to confront the objectives of the wine policy and the benefits it procured with the restriction placed on Ms Hauer's property right.

In my opinion, the process of determining this case reflects an imbalanced inquiry. It must also be noted that this case reflects the state of affairs of EU politics of the seventies and the eighties. During this time, the CJEU was actively engaged in extending and strengthening the EU policy on market integration.[823] The protection of fundamental rights, although already having been declared by the CJEU as forming part of the general

[822] Ibid. *Hauer*, (n 751), [line 23].
[823] Saurugger S., & Terpan F., *The Court of Justice of the European Union and the Politics of Law,* (n 730), 28-30.

principles of EU law,[824] was subordinated to the greater aim of EU market integration.[825] The policy on the common organisation of the wine market was one of the main objectives at the time, forming part of the market integration aim. The strengthening of fundamental rights protection started emerging in the 1990s with the adoption of the Treaty of Maastricht and the Treaty of Amsterdam and with the drafting of the Charter of Fundamental Rights.[826]

4(d) The Least Restrictive Means Approach

The *Digital Irish* case may be said to be representative of a standard formula applied by the CJEU in cases of derogations to a given rule in different areas of EU law.[827] Where a derogation from a given general rule is adopted by the EU legislature and a claim that it violates fundamental rights is put forward, the standard approach by the Court is two-fold. First, it examines whether the impugned legislation constitutes an interference with the right being claimed. Then, it decides whether the interference is justified according to the principle of proportionality. In such a case, the Court seems to apply the first two stages of the proportionality principle, based on the familiar phrase that the measures 'be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives'.[828]

The *Digital Irish* case may be said to be a very good example of a very thorough scrutiny within the least restrictive means test, by the Court. In this case the Court leaves no stone unturned to determine whether the impugned Directive violates a fundamental right protected by the Charter. This case essentially concerned the compatibility of Directive 2006/24[829] with Article 7 of the Charter on the right to respect for private life. The main objective of the Directive was to retain data provided by providers of publicly available electronic communications services for the purpose of crime prevention, investigation,

[824] Case 29/69, *Stauder* (n 741), par. 7, and spelled out in Case 11/70 *Internationale Handelsgesellschaft mbH* (n 528), par. 3-4.
[825] Craig P. & De Burca G, (n 727), p. 364.
[826] Ibid.
[827] See also Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*, ECLI:EU:C:2016:970
[828] Joined cases C-293/12, C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, ECLI:EU:C:2014:238
[829] Directive of the European Parliament and the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC

detection and prosecution including organised crime and terrorism. The Directive allowed national authorities to access such data for this purpose. The question was raised whether this was compatible with Article 7 on the right to respect for private life. Such access allowed, *inter alia*, the national authorities to identify the identity of the subscriber, their location, time of the communication and the place from which the communication took place.

The Court started by making certain preliminary observations. It noted that the nature of the data retained allowed very precise conclusions to be drawn concerning the private lives of persons including their daily habits, residence, the activities carried out, their social relationships and social environments. It noted that although the Directive did not allow for the retention of the content of the communication, it might affect the exercise of the freedom of expression of the subscribers and registered users. At this first examination, the Court concluded that the Directive affected the private life of the subscribers. It then went on to determine whether this constituted an interference with the right to private life protected by Article 7 of the Charter.

The Court established that by requiring such retention of data, whether or not the information was sensitive or whether the persons concerned had been inconvenienced in any way, the requirements of the Directive constituted an interference with the right to private life. In addition, the access of the competent authorities to such data constituted a further interference with such right. The Court also considered the fact that since such retention of data was unknown to the subscriber, it would have the effect of generating in the minds of the persons concerned the feeling that their private lives were the subject of constant surveillance.

The Court first started by examining the appropriateness of the requirement for the retention of data. It noted that such data is a valuable tool to national authorities in relation to criminal prosecutions. The Court established that this requirement was therefore appropriate. The Court also shed light on its approach to appropriateness by stating that the argument that there are several methods of electronic communication which do not fall within the scope of the Directive or which allow anonymous communication does not make such a measure inappropriate.

The Court then went on to consider the necessity for the retention of data and it was here where the measure fell. The Court held that such an objective of general interest, however fundamental it was, did not, in itself, justify a retention measure such as that established by the Directive. This was because the fundamental right to the respect for private life could only be interfered with to the extent that this was strictly necessary. The Court held that the legislation envisaging such an interference must lay down clear and precise rules governing the scope and application of the measure in question and must impose minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data. The Court noted that the Directive required the retention of all traffic data concerning fixed telephony, mobile telephony, internet access, internet e-mail and internet telephony. It considered that such requirement applied to all means of electronic communication, the use of which is very widespread and of growing importance in people's everyday lives. The Directive also covered all subscribers, thus affecting the entire European population. It also noted that the Directive covered, in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime. It also considered that all persons were liable to having their data accessed including those against whom there was no evidence of criminal involvement. It also noted that the Directive did not contain exceptions and that even persons bound by professional secrecy were affected.

The Court noted how the Directive did not provide any limitations whatsoever. It was not restricted to a retention in relation (i) to data pertaining to a particular time period, a particular geographical zone, a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences. The Directive did not provide for the relationship between the data and the threat to public security. This lack of limitation was also reflected in the fact that there was no objective criterion which was sufficiently serious and by which to determine

the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of crime prevention, detection or criminal prosecutions.

The Directive did not contain substantive and procedural conditions relating to the access of the competent national authorities to the data and to their subsequent use. It did not provide that that access and the subsequent use of the data in question must be strictly restricted to the purpose of preventing and detecting precisely defined serious offences or of conducting criminal prosecutions relating thereto; it merely provided that each Member State was to define the procedures to be followed and the conditions to be fulfilled in order to gain access to the retained data in accordance with necessity and proportionality requirements. Moreover, it did not provide any objective criterion by which the number of persons authorised to access and subsequently use the data retained was limited to what was strictly necessary in the light of the objective pursued. Above all, the access by the competent national authorities to the data retained was not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary. Nor did it lay down a specific obligation on Member States designed to establish such limits.

The Court also noted that the Directive permitted the data to be retained for at least six months and a maximum of 24 months, but it did not distinguish between categories of data based on their possible usefulness in relation to the aim pursued. Neither did it establish objective criteria upon which to retain such data during this period.

The Court concluded that the Directive did not lay down clear and precise rules governing the extent of the interference with the fundamental rights particularly enshrined in Articles 7 of the Charter. Consequently, it constituted a particularly serious interference with those fundamental rights. In relation to the retention of data, the Court noted that the Directive did not provide for sufficient safeguards which ensure the protection of the data retained and it did not state that the data was to be retained within the European Union. This meant that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security was threatened. The Court concluded that the Directive was invalid because the EU

legislature had exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter.

The Court decided this case purely on the suitability and necessity stage with heavy emphasis being placed on the latter stage. The necessity test in this case is characterised by a thorough scrutiny of the failures and shortcomings of the Directive in relation to what the Court considered to be strictly necessary. The Court is engaged in an indirect comparative exercise between the requirements of the Directive and what it considers to be the least restrictive provisions which would allow for an interference with the right to private life and retention and access of data by national authorities for the prevention and detection of crime. The main weakness of the Directive was that it was too general and consequently any member of the population could be affected, irrespective of whether or not they contributed in any way to crime prevention, investigation and prosecution. One may say that this stage was perfectly executed by the Court.

In another data protection judgment *Schecke*, two farmers brought an action against local authorities to prevent them from publishing on the internet their personal data in relation to benefits received from the European Agricultural Guarantee Fund.[830] They alleged that such publication infringed their right to privacy. The obligation to publish such details emanated from Article 44a of Council Regulation No. 1290/2005. In assessing whether the principle of proportionality had been observed, the Court briefly examined the appropriateness and the necessity of the requirement for publication in the Regulation. The Court held that such requirement helped increase transparency in relation to the use of public funds. It then went on to consider the necessity of the measure. It held that at this stage it was necessary to determine whether the Council of the European Union and the Commission had 'balanced the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds against the interference with the right of the beneficiaries concerned to respect for their private life in general and to the protection of their personal data in particular'.[831] However, although the Court seemingly purported to engage directly into the proportionality

[830] Joined Cases C-92-93/09, *Volker und Markus Schecke GbR* (C-92/09) and Case C-93/09 *Hartmut Eifert v Land Hessen,* [2010] ECR I-11063, ECLI:EU:C:2010:662
[831] Ibid *Volker und Markus Schecke GbR* [line 77].

stricto sensu stage, it did not do so in reality. It performed a necessity test, to determine whether less restrictive means were available. The Court stated that when it came to interference with the private life of the individual, the standard by which it would scrutinise the interference would be based on the 'strict necessity' principle. The Court noted that the Union institutions should have sought to strike a proper balance between the interests involved primarily by ascertaining whether publication via a single freely consultable website in each Member State of data by name relating to all the beneficiaries concerned and the precise amounts received by each of them from the respective funds, with no distinction being drawn according to the duration, frequency or nature and amount of the aid received, did not go beyond what was necessary for achieving the legitimate aims pursued. The Court determined that this had not been done and if it had been done, the interference with the applicants' right to private life would have been less. The Court noted that the EU institutions had not considered methods of publishing information on the beneficiaries which would, on the one hand, satisfy the public interest in relation to transparency of public funds, and at the same time, cause less interference with the beneficiaries' right to respect for their private life in general and the protection of their personal data in particular. The Court gave examples of how this could be achieved, by suggesting limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received. The Court here is considering other less restrictive means which could have aided in lowering the interference with the right and which would have achieved the aim in view equally well. This is a perfect example of the traditional application of the necessity test, in my opinion. On the basis of this, the Court concluded that the EU institutions had not 'properly balanced, on the one hand, the objectives of Article 44a of Regulation No 1290/2005 and of Regulation No 259/2008 against, on the other, the rights which natural persons are recognised as having under Articles 7 and 8 of the Charter'.[832] As happened in the *Digital Irish* case, this case failed at the necessity stage therefore forfeiting the need to move to the third stage.

Another case which focuses on an examination of the least restrictive means by the Court is *Schwarz* which concerned a German citizen applying for a passport but refusing to

[832] Ibid *Scheke* [line 86].

grant consent for the taking of his fingerprints as required by Council Regulation 2252/2004.[833] He alleged, *inter alia,* interference with his right to private life and his right to data protection. The Court's first step was to consider whether the requirement for fingerprinting in Article 1(2) of the Regulation constituted an objective general interest of the Union. It established that the article had two objectives, that of preventing the falsification of passports and of the fraudulent use thereof. The general aim of this article is the prevention of illegal entry into the Union. It is interesting to note that the Court engaged in a legitimate aims exercise, similar to the one the ECrHR engages in, as a preliminary exercise to the proportionality principle.

The Court then engaged in a consideration of the suitability of the means used, i.e. the use of digital technology for the compilation of fingerprints. Schwarz claimed that such use was inappropriate because it was not wholly reliable and errors could be made. The Court held that this was not decisive because its use still reduces the likelihood of unauthorised persons being accepted. The Court also held that if a mismatch of an authorised person occurred in error, it would not automatically mean that the individual would be refused entry but that further checks into the case would be carried out. The Court concluded that the means (fingerprinting) were appropriate to reach the aim pursued.

The Court then engaged into the second limb of necessity and considered other means by which identification of an individual is made possible and the degree of interference with their right to data protection. The Court considered that the taking of two fingerprints is not an intimate act and that it can be equated to the act of taking a facial image. It determined that this did not give rise to a higher interference with the individual's rights. It also considered the alternative means of iris-recognition technology as part of its examination of least restrictive measures. It noted that this technology is not as yet as advanced as fingerprinting and that it is far more expensive. The Court also pointed out that Article 1(2) of the Regulation could not be interpreted as providing a legal basis for the centralised storage of data collected thereunder or for the use of such data for purposes other than that of preventing illegal entry into the European Union. The Court

[833] Case C-291/12, *Michael Schwarz v Stadt Bochum*, ECLI:EU:C:2013:670

concluded that fingerprinting as a means for pursuing the objective of general interest did not go beyond what was necessary. The Court did not engage in the third limb of the test, i.e. proportionality *stricto sensu.* It is submitted that the facts of this case were ideal for the application of the law of balancing as expounded by Alexy. According to Alexy, the law of balancing (proportionality *stricto* sensu) requires an examination whether the limitation of the applicant's right was equivalent to the degree of enjoyment, in this case, public security, so that both rights were optimised to the greatest extent possible.[834] However, on closer scrutiny, it is possible to detect a subtle application of the law of balancing performed by the Court under the necessity stage. When the Court was considering the alternative method of iris-recognition technology, it concluded that this technology was still in its developing stages and that it would be costly to apply at this time. This would have sufficed to conclude the examination under this stage. However, the Court chose to examine the degree of interference with the applicant's body when being fingerprinted, stating that this was not an intimate act, likening it to facial imaging. This type of examination constitutes a part of the proportionality *stricto sensu* stage in the traditional application. Had the Court confronted the degree of interference of the applicant's right, with the degree of public security benefited, it would have applied the full proportionality principle and scrutinised the case from all possible perspectives.

This examination seems to be more of a spontaneous one done by the Court. It is submitted that this is because the facts of the case lent themselves perfectly to an evaluation of this type, i.e. the application of the third stage.

4(e) Fair Balance Approach

So far, the discussion of the selected judgments has portrayed a certain structured analytical approach to proportionality. In what follows, two judgments have been identified where the Court does not seem to engage in the structured approach to proportionality as in the cases discussed previously. Rather, it seems to engage in a more pragmatic approach, applying 'fair balance' and reasonableness. It is submitted that this was the approach taken in *Carpenter*. The applicant, from the Philippines, was married to a British national. She had overstayed in the UK and was going to be deported by the

[834] Alexy R, *A Theory of Constitutional Rights*, (n 62), 102 et seq and 436 et seq.

British authorities to her home country where she would have to obtain a new visa. She argued that if this were to be permitted, her husband's freedom to provide services would be violated. In addition, the family unit would be separated or her husband would have to join her in the Philippines. She also claimed that this requirement violated her husband's right to family life. In this case, the Court seems to have modelled its approach on that of the ECrHR when applying fair balance.

The Court held that a public interest plea made by the State may only be justified if it respects fundamental rights. It held that the decision to deport Mrs Carpenter constituted an interference with the exercise of her husband's right to respect for his family life. Referring to Article 8 of the ECHR and the ECtHR's case law, the Court stated that such interference would infringe the Convention if it did not meet the requirements of Article 8(2) ECHR.[835] Quoting the article, it held that unless the interference was 'in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued', it would consist of a violation of the applicant's right.[836] Despite its reference to the proportionality principle contained in Article 8(2) of the ECHR, the Court did not engage in a proportionality analysis. It merely concluded the case by stating that the decision to deport Mrs Carpenter did 'not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety'.[837] The Court did not explain how it had reached this conclusion. It is submitted that by virtue of the Court's choice to apply the ECHR and by referring to ECtHR's case law, it automatically modelled its approach on the latter Court. In my previous chapter I argued that although the ECtHR invariably makes reference to the principle of proportionality and uses the terms 'fair balance', it leaves many questions unanswered as to the manner in which it analyses its cases permitting it to arrive to the conclusions that it does. The Carpenter case is a perfect replica of the ECtHR's approach, and as such leaves many questions unanswered in terms of analytical discourse.

[835] Right to respect for private and family life.
[836] Case C-60/00 *Mary Carpenter* (n 726) [line 42].
[837] Ibid [line 43].

This pragmatic approach can also be seen in *Schmidberger*, where the Court was asked whether the Austrian authorities had violated the free movement of goods when they allowed a demonstration to take place on the Brenner motorway, closing it to the use of heavy vehicles for 30 hours. The freedom of movement of goods, as a fundamental freedom was being confronted with the fundamental right of freedom of expression and assembly. Once again, the Court opted not to apply a structured proportionality analysis. It considered that the object of the demonstration was legitimate, and that the authorities took all the necessary precautions such as informing the public beforehand. It noted that alternative routes were designated and that economic operators were informed of the traffic restrictions and had enough time to plan for the obstructions. It also noted that the authorities had ensured a smooth running of the demonstration and that a total ban by the authorities would have resulted in violation of fundamental freedom of assembly and expression. It noted that the imposition of stricter rules would have resulted in excessive restriction of these freedoms. The Court allowed a margin of discretion to the Austrian authorities in deciding that this was the best solution in relation to the organisation of the demonstration in their choice of restriction on the free movement of goods. The approach in *Schmidberger* is very reminiscent of the manner in which the ECrHR approaches its cases. Two points stand out: (i) its pragmatic approach consisting of an overall appreciation of the case, and (ii) its application of a margin of discretion in favour of the Austrian authorities. It made no systematic analysis of proportionality, despite the fact that, given that this case concerned a conflict of rights, it lent itself very well to a proportionality analysis.

Conclusion

The CJEU has firmly established its authority in the EU today especially through its judicial activism in the first few decades of its establishment. It has introduced doctrines such as the primacy of EU law, the principles of direct and indirect effect and the doctrine of state liability in damages. This has firmly grounded the Court as a powerful judicial authority within the EU. Unlike the ECtHR, its judgments are enforced through an established mechanism in the TFEU granting powers to the European Commission to demand penalties against Member States in cases of violations of the treaties. This legal forum also authorises the CJEU to review Member State measures against EU law for

inconsistencies or violations. Today there is a considerable body of case law and literature which enable one to understand how proportionality analysis is applied in such cases. Two differing applications of the proportionality principle were identified when the Court reviews Member State measures against EU law, notably when this affects one of the fundamental freedoms,[838] and when it reviews challenged EU measures respectively.[839] In cases where Member State measures are being reviewed against EU law, the least restrictive means test is most prevalent. This is a rigorous form of review based on proportionality analysis, primarily focusing on an examination of the notion of necessity, the second stage of the traditional proportionality principle. On the other hand, when the Court is reviewing EU measures, it applies a less rigorous proportionality test, namely 'manifest disproportionality'. This is also referred to as manifest inappropriateness. Jacobs explains that the scrutiny is more rigorous probably because national measures might undermine the full effectiveness of Community measures.[840] Tridimas is in agreement with Jacobs and explains that in reviewing Community measures the Court is required to 'balance a private against a public interest' whereas in the review of national measures the Court 'is called upon to balance a Community against a national interest'.[841] He explains that when reviewing Community measures, because there is broad legislative discretion involved on the part of the Union, the Court will limit its review of policy measures to the 'manifestly inappropriate' test, i.e. the measure in question must be manifestly inappropriate to achieve its objectives.[842] When reviewing a national measure the intensity of review is much stronger than when reviewing a Community measure because the principle 'is applied as a market integration mechanism', in most cases based on the least restrictive means test.[843] When it comes to fundamental rights judgments, the picture is not as clear. As was discussed in this chapter, fundamental rights cases did not initially occupy a prominent adjudicative concern within the CJEU. This may explain why there does not seem to be a clear pattern by which the Court applies the principle of proportionality to fundamental rights cases. However, a number of observations may be made. From the above study, it appears that the highest level of scrutiny when applying the proportionality principle is the least

[838] Tridimas T., 'Proportionality in Community Law' (n 781) 65.
[839] Arai-Takahashi Y., Sauter W., 'Proportionality in EU Law: A Balancing Act?', (n 727) 6.
[840] Jacobs F.G., 'Recent Developments', (n 586) 21.
[841] Tridimas T., 'Proportionality in Community Law' (n 781) 66.
[842] Ibid., 66.
[843] Ibid., 66.

restrictive means approach. This is because the Court scrutinises with intensity the necessity of the means chosen for the fulfilment of the objective. In all the other approaches, whether it is the full three stage approach, the legitimate aims approach, the proportionality *stricto sensu* approach or the fair balance approach, the Court applies a lower level of scrutiny. The latter may be perceived in the Court's argument where it is quite clear that, in the Court's view, the measure being impugned trumps the restriction of the right being claimed. One reason which may explain this is that the Court seems influenced by whether or not a fundamental right is at risk of being severely undermined and it seems that it is this conviction which determines the level of scrutiny. This seems to indicate that the Court ascribes a value to the right *a priori* when confronting it to the restricting right or interest. The Court seems to ascribe different degrees of value to different fundamental rights. This can be noticed in the strict scrutiny of application of the least restrictive means test to the cases on the right to data privacy. On the other hand, it seems that the Court does not ascribe such a high value to rights such as the right to freely conduct a business or the right to access institutional documents. Because of the limited pronouncements on proportionality by the Court in relation to the protection of other fundamental rights, it remains to be seen whether this is so.[844] The ascribing of values *a priori* seems to indicate that the Court's approach to proportionality does not always have at its basis an optimisation of conflicting rights as explained by Alexy. The latter explains that the three stages of the principle of proportionality 'are optimisation requirements'[845] whereby the means used are to be the most efficient and least restrictive but capable of efficiently and effectively achieving the objective. The principle of suitability 'excludes the adoption of means obstructing the realisation of at least one principle without promoting any principle or goal for which they were adopted'[846] because 'interference with one principle must contribute to the realisation of the other'.[847] The necessity stage requires the choice of the less intensively interfering and equally suitable means and proportionality *stricto sensu* requires equality in cause and effect in that the violation of the right must reflect the same degree of advantage to

[844] In certain cases of fundamental rights, the Court does not engage in a proportionality principle but indicates to the national court to carry out such exercise. See e.g., C-73/16 *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky, Kriminálny úrad finančnej správy,* [2017] ECLI:EU:C:2017:725
[845] Alexy R, 'Constitutional Rights, Balancing, and Rationality', (n 25) 135.
[846] Ibid. 135.
[847] Möller K, 'Balance and the Structure of Constitutional Rights', (n 215), 455.

another right or interest: the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.

In *Internationale Handelsgesellschaft*, the Court applied a full three-stage proportionality analyses. However, the proportionality *stricto sensu* stage analysis was weak because the Court did not balance the burden placed on the traders in relation to the aim to be pursued. It considered the suitability of the measures by positively appraising the benefits that these were intended to yield. It then proceeded to examine the alternative means by which the aim could allegedly be achieved and decided that the alternate measures were not as efficient as the one contained in the Regulation. In the final stage, it did not determine whether the burden of forfeiture was excessive in relation to the aim but examined whether the burden suffered by the traders would be excessive in relation to the value of the goods. According to Alexy, proportionality *stricto sensu* asks whether the end is worth pursuing given what it necessarily costs. The costs, of course, refer to the limitations placed on the rights of the traders, in *Internationale Handelsgesellschaft* and those of the broadcasters (with a consequential effect on the general public) in *Sky Österreich*. The exercise would entail an examination of the 'suffering' or 'inconvenience' placed, by the restriction on the right, in relation to the benefits achieved by the aim. One needs to remember that the traders in *Internationale Handelsgesellschaft* alleged that the means were 'excessively burdensome' causing them to carry an excessively burdensome weight. The benefit which would be reaped by the Community would be the effective collection of data for (effective) use. The Court, however, did not consider such benefit when applying the proportionality *stricto sensu* test. The comparison carried out was between the alleged burden and the value of the goods. Although the suitability, necessity and benefits were established earlier on, the Court failed to confront such benefit with the limitation claimed. It did not engage in the attribution of weights to costs and benefit, as required by the proportionality *stricto sensu* stage. The same cannot be said for the *Sky Österreich* case where one witnesses a full balancing exercise between the two competing rights. In this case, the Court did attribute weights to the competing rights determining that there was no disproportion between the costs and the benefits. This indicates that in certain cases the Court is focused on the optimisation of the conflicting rights. However, it is difficult to determine the reason why the Court applies optimisation to one case and not to another. There does not seem to be an underlying common

denominator which identifies *a* priori the type of approach the Court will take to proportionality analysis. One observation that may be submitted and that seems to be quite common in the Court's approach is that even here, the Court had an *a priori* opinion about which of the two competing rights trumped. However, this does not seem to indicate which approach the Court will take.

Optimisation of rights was also applied by the Court in the *Hautala* case, but here it did so by applying the last stage of proportionality only. The Court did not delve into the suitability and necessity of the decision. Proportionality *stricto sensu* seems to have been applied by the Court in order to advance its belief that partial access to the Council documents was the fairer way for both involved. It did so by relying on proportionality *stricto sensu* which allowed apportionment of an equal degree of cost and benefit to the parties respectively. This seems to fit quite well with Alexy's understanding of this balancing exercise, where optimisation is of utmost importance: the greater the degree of non-satisfaction of one party should reflect the greater degree of satisfaction of the other.

On the other hand, there seems to have been no concern for the optimisation of conflicting rights in the *Hauer* case. In this case, although the proportionality principle was applied by the Court, one notices a major emphasis on the legitimate aims test which seems to have sealed the judgment from the beginning. This, once again, reflects an *a priori* conviction by the Court of which right or interest trumps the other. This is because the Court's main emphasis was on the importance of the aim pursued by the Commission: that of ameliorating the wine market of the EEC. One may also argue that this could very well not have been a proportionality case but a deontological case where the public interest right reflected in the Common Organisation of the market in wine would always prevail in such circumstances. In this case, the Court did not examine alternative means which were capable of achieving the aim in view and which would be less burdensome than the impugned measures. Neither did it address the claim of disproportionality. It seems that when the Court is convinced that a Union policy is to be advanced, the optimisation exercise is not carried out and proportionality analysis is weak. In the *Internationale Handelsgesellschaf*t case, it was quite clear that the Court's consideration that Community law, as a separate legal system, could not be challenged on the basis of

domestic law, in this case, the German basic law. Although the Court still took into account the fact that under German Constitutional law, the Regulation requiring forfeiture of the deposits, could constitute a violation of the domestic constitutional principles, it looked at the situation primarily from the perspective of the Union as a whole, taking into consideration the policy aims that obtained at the time. This was also the case with the *Hauer* judgment, where the Court clearly showed a preference towards pushing forward the Community's policy on ameliorating the wine market, which had a direct impact on the common market. The principle of proportionality was applied in both cases with these considerations kept well in mind. In later cases, one then witnesses an increase in concern for fundamental rights.

In the *Digital Irish* case and the *Schecke* cases, the Court made a very thorough examination of the Directives being impugned. In both cases the Court found the directives to be appropriate in relation to the aim pursued but not necessary due to their lack of observance of the 'strict necessity' rule required for the fundamental right to respect for private life. By finding such failure at the necessity stage, the Court did not go into the proportionality *stricto sensu* stage. Alexy describes fundamental rights as principles being norms which must be satisfied to the greatest degree possible since interference with such principles is necessary in defined cases. The degree to which the fundamental right as principle is to be satisfied depends on what is factually possible (necessity and suitability). This means that when this theory is applied to the *Digital Irish* case there is an alternative 'factual possibility' of specific provisions delimiting specifically the circumstances in which data retention was possible to cause less interference with the right than the Directive actually did. The same may be said for the *Schecke* cases. At this stage, because there were less burdensome means, the Directives were found to be invalid. In these cases, the focal point of the Court was effectively the optimisation of the conflicting rights which resulted in the Directives being declared null. It seems that the Court ascribes a very high value to the data protection of individuals and that is why its proportionality analysis was thorough.

The manner in which the CJEU treats each of the three stages within the principle of proportionality seems to be quite consistent, whether or not it applies all three of them. The inconsistency which is identified in this study lies in which one of the approaches the

Court will undertake to decide the case in hand. It seems that the Court, in certain cases, ascribes an *a priori* value to a Union policy or to a right. This is then followed by either a weak proportionality analysis or a strong one, depending on whether or not the Court is determined to optimise the conflicting rights. What determines this is not clear from the cases studied above. It remains to be seen, in future fundamental rights cases where proportionality is applied, whether the Court is adopting a particular approach or not.

Conclusion

As I noted in the introduction, there does not seem to be a single universal conception of the proportionality principle, nor of its structure and application. It therefore comes as no surprise that the Maltese Constitutional Court, the ECtHR and the CJEU have been found to have formed their own particular conceptions of proportionality and invariably seem to adopt a partial application of this principle. In this conclusion I will attempt to answer the overarching question of this study: *is the full application of the principle of proportionality, as expounded by Alexy, a necessary and indispensable adjudicative approach in cases of conflicting fundamental rights and/or interests?* In what follows, I will first highlight the challenges that proportionality analysis is facing and include a summary of the reasons why the three-stage proportionality principle seems to be an effective tool of adjudication in fundamental rights cases. I will then briefly synthesise the observations carried out in the analyses of the application of the principle of proportionality in the light of Alexy's model of proportionality analysis. In order to do so, I will first summarise my findings to give an integrated picture of my observations regarding the approach to proportionality by the selected courts. I will then attempt to give some answers as to why the Courts take the approach observed. This is followed by my reflections on whether the full application of the three-stage proportionality principle yields the best results in adjudication and I will discuss the reasons for my answer. Finally, I will identify areas of limitations of this study and areas which I believe could form the basis for further research.

1. Challenges that Proportionality Analysis is Facing

The research carried out in the first two chapters of this study indicate that proportionality analysis is facing two main challenges. First, that there is no universally accepted structure and application of the proportionality principle, although there seems to be a commonly shared understanding of its function. Second, that there is debate about the nature of the proportionality principle itself and how effective and objective it is as an adjudicative tool in fundamental rights cases. Additionally, there seems to be disagreement about the nature of fundamental rights and the manner in which cases of conflicting fundamental rights should be dealt with. The main contenders in this discussion are those who favour a trumping approach to conflicting rights and those who

favour an optimization or balancing approach. In the first two chapters I conclude that the optimisation approach seems to be the best approach to cases of conflicting fundamental rights and interests, based on my support of Alexy's explanation of his theory of principles and his explanation of the application of the proportionality principle. With this information I proceeded to the analytical part of my research. By selecting a number of judgments of the Maltese Constitutional Court, the ECtHR, and the CJEU courts I attempted to find out whether this model of proportionality is observed or not; whether the selected courts tend to rely on a particular test and why this is so, and whether such approach may have an effect on the efficacy of the proportionality principle in the determination of fundamental rights cases. The analyses of the judgments of the selected courts took place in chapters three, four and five respectively.

In chapters one and two I started out with the intent to establish whether a preferred model of the structure of proportionality could be identified. The three-stage test, as opposed to the four-stage test proved to be the construction which best 'animate[s] rationality to the greatest extent possible'.[848] In chapter one I noted how the three-stage test and the four-stage test do not present any fundamental conceptual differences in terms of defining the principle of proportionality. Both tests are aimed at establishing whether the means applied in relation to the aims being pursued are legitimate, suitable, necessary and proportionate. However, the manner in which these tests are applied is different. Whereas the three-stage test requires an examination of suitability, necessity and proportionality in this order, with the latter including a test of legitimacy, the four-stage test applies a test of legitimacy, also referred to as 'proper purpose', before the aforementioned three stages. This initial test in the four-stage test of proportionality requires an examination of the legitimacy of the limiting rule, usually in the public interest, which is alleged to restrict the fundamental right. It requires an examination of the importance of the motivation for the limiting rule. In this chapter it was argued that this exercise, not only pre-empts the inquiry which is to take place in the last stage of proportionality, i.e. proportionality *stricto sensu,* but also introduces prematurely an inquiry which is best left after the suitability and the necessity inquiry have taken place. The reason for this lies in the fact that the final stage, i.e. proportionality *stricto sensu*,

[848] Alexy R., 'Proportionality and Rationality' (n 33), 13.

allows for the balancing exercise, where, *inter alia,* a confrontation between the benefits gained in pursuit of the limiting rule or decision, usually in the public interest, and the burden carried by the individual due to the restricted right. The proper purpose test does not carry out this confrontation. In this sense, the inquiry that it makes at this initial stage of proportionality analysis creates an imbalance in the analytical process because no parallel consideration is made in relation to the restricted right. However, this is not to state that if this confrontation were to take place at this initial stage, it would not give rise to problems in the analytical process. It is submitted that even if such balancing were to take place at the beginning of proportionality analysis, it would still be premature. Addressing the suitability and the necessity stages respectively allows the adjudicator to make determinations about the nature of the means, independently of the effects, which are considered in the final stage of the analysis. Thus, the proper purpose inquiry seems to be serving as a threshold condition to be satisfied before proportionality analysis can actually take place.

In support of this conclusion, I then proceeded to discuss Robert Alexy's theory of principles. This is the theory which underlies the principle of proportionality and which I subscribe to in chapter two. His theory of principles which rests on the premise that fundamental rights in conflict with other rights or with the public interest require adjudication through optimisation rather than subsumption or trumping. 'As optimisation requirements, principles are norms requiring that something be realized to the greatest extent possible, given the legal and factual possibilities.[849] Alexy's definition and explanation of the proportionality principle serves as my main reference to how this principle is applied. Alexy explains that the structured application of the principle of proportionality includes three stages or sub-principles: of suitability, necessity and proportionality in the narrow sense.[850] He explains that the suitability test involves establishing that a measure is capable of achieving the aim in view. This is a *prima facie* test which examines whether the measure applied by the legislator is suitable to achieve or promote the aim.[851] This is followed by the necessity test which examines whether less burdensome means exist to achieve the same aim. Finally, the proportionality *stricto*

[849] Alexy R., 'Constitutional Rights, Balancing and Rationality', (n 25) 135.
[850] Alexy R., 'Proportionality and Rationality', (n 33) 14-16. He refers to these principles as being an expression of Pareto-optimality.
[851] Ibid. 15.

sensu test is applied by means of weight attribution. Alexy splits this stage into three separate but related considerations which he also refers to as the weight formula.[852] The first consideration under proportionality *stricto sensu* is to establish the degree of non-satisfaction of, or detriment to the violated fundamental right. The second consideration is to establish the importance of satisfying the competing fundamental right. The third consideration is to establish whether the importance of satisfying the competing fundamental right justifies the detriment to the violated fundamental right.[853] With reference to the proper purpose inquiry required by the four-stage proportionality test, Alexy states that the importance of the motivation behind a limiting rule, for example, in the public interest, must be considered in the final stage of the proportionality principle (proportionality *stricto sensu)*. During the proportionality *stricto sensu* stage, values ranging from low to high are attributed to three considerations. A value must first be attributed to the detriment caused to the restricted fundamental right,[854] then to the importance of satisfying the competing right and finally to the justification for the restriction of the right.[855] These weights are then considered and 'weighed' against each other. For these reasons, I concluded that the proportionality principle, as constructed by Alexy, provides the most logical and coherent explanation of its application.

2. Synthesis of the Courts' Approaches to Proportionality Analysis

Generally, none of the judgments of the courts studied applies the full proportionality test in a consistent manner. The Maltese court seems to apply only the third stage of the principle, proportionality *stricto sensu*. The ECtHR does not seem to regard proportionality analysis as an exercise requiring the observation of prescribed progressive stages, with each stage having the force of declaring the proportionality principle violated. And the CJEU is more systematic in that it applies the first two stages of the proportionality principle in a consistent manner and, on certain occasions, also examines proportionality *stricto sensu.*

[852] Ibid. 19-20.
[853] Alexy R., 'Constitutional Rights, Balancing, and Rationality' (n 25) 136.
[854] Alexy R., *A Theory of Constitutional Rights,* (n 62), 405, states that this could also be defined as 'intensity of interference'.
[855] Klatt M & Meister M, *The Constitutional Structure of Proportionality,* (n 90), 10; and Alexy R., *A Theory of Constitutional Rights* (n 62), 401.

What follows is a synthesised discussion of the observations made in the earlier chapters on the approach and application of the principle of proportionality by the Maltese Constitutional Court, the ECtHR and the CJEU.

2(a) The Maltese Constitutional Court

The Maltese court did not have a tradition of applying proportionality in fundamental rights cases until the European Convention on Human Rights became part of the Maltese legal system and the principle emerged with the increasing references to ECtHR judgments. Additionally, the increasing adoption of external legislation into the Maltese legal system namely, EU legislation, today sees the proportionality principle being applied in various areas of law. In this study, four main approaches to proportionality by the Maltese court were identified: (i) the excessive burden approach, (ii) the comprehensive approach, (iii) the tilted balance approach, and (iv) the legal logic approach. These four approaches have one thing in common, namely, the identification of the proportionality principle as solely consisting of the balancing exercise which is the third stage in the application of the traditional proportionality principle (proportionality *stricto* sensu). The Maltese court seems to understand the proportionality principle in terms of striking a fair balance, excluding examination in terms of suitability and necessity, the first two tests of the principle. Thus, the Maltese court seems to have four approaches to proportionality *stricto sensu*. The first approach identified, the excessive burden approach, relies markedly on the degree of actual and future suffering shouldered by the party alleging a fundamental right violation. This approach is prevalent in cases of alleged violations of property and ownership rights and it is safe to say that this seems to be the dominant approach in most of the Court's judgments. In the comprehensive approach, as its name denotes, the Court makes a thorough appreciation of all the facts before it when applying proportionality *stricto sensu.* This means that the Court focuses on the balance which exists or otherwise, between the detriment suffered on the one hand, and the advantage obtained by the restriction or violation of the fundamental right. Unlike the excessive burden approach, the comprehensive approach attributes equal importance to the detriment incurred on the one hand, and the advantage procured on the other. In the tilted balance approach, applied mainly in cases relating to the right to privacy and the freedom of expression of public persons, the Maltese court declares to be applying the fair balance approach but it is actually applying a trumping approach

because it departs from the premise that generally the freedom of expression is to be attributed greater weight than any competing right, within the context of journalism and journalistic opinions.[856] The fourth approach identified in this study is the legal logic approach where the Maltese court applies the balancing test as a tool of legal logic where a logical deduction is made on the basis of the present state of affairs allowed by law .[857]

2(b) The ECtHR

The ECtHR does not apply the traditional three stage approach to proportionality. The tests of suitability and necessity do not form an integral part of its approach to the principle of proportionality. Generally, in its judgments, it concentrates only on the third stage of proportionality, i.e. proportionality *stricto sensu* or balancing. It usually uses the terms 'fair balance', 'proportionality' and the phrase 'reasonable relationship of proportionality' to denote this third stage of application of the principle.

The traditional necessity test requires an examination of whether or not less burdensome means could have been used in order to diminish or neutralise the violation or restriction of a fundamental right. The ECtHR has repeatedly declared that this interpretation of necessity, which it sometimes refers to as 'strict necessity', does not constitute a compulsory exercise which it will follow. It has declared various times that such an examination constitutes one of the many factors which enables it to determine whether the means used were reasonable and capable of achieving the legitimate aims in striking a fair balance. It has also declared in various cases that the circumstances of the case did not warrant the application of the least onerous means test, allowing itself to apply it in cases where the Court deemed fit.[858] In a few cases, the ECtHR did apply the necessity test as a determining factor for the declaration of a violation of a fundamental right. However, it is still unclear when the Court may deem warranted an examination of the least onerous means test. The cases where the ECtHR has applied this test are sporadic and far between. It seems safe to state that, generally, the ECtHR determines the application of the necessity test as warranted in cases where the very essence of the Convention rights is threatened and when the law of the State itself envisages alternate

[856] *Aquilina et v. AG* et, First Court (Constitutional Jurisdiction), (Malta) (n 545). 1
[857] *Grech v. AG.,* Civil Court (Const) (Malta) (n 554).
[858] *Blecic v. Croatia*, (n 668).

means of dealing with particular circumstances. In the cases where the Court has refused to apply the least onerous means test, the Court reasoned that the fact that a law does not constitute the least onerous means available, does not make it an unjustified law. In other words, the ECtHR believes that a law or decision which does not constitute the least onerous means may still be legal and justifiable. This may also indicate that where the Court suspects the justifiability of a legal provision, it may determine that the least onerous means test is warranted. However, even in such cases, it is difficult to draw a clear picture since there were instances where the case before it warranted the necessity test because there was a clear possibility of danger to life.[859]

Various Convention articles contain the phrase 'necessary in a democratic society'. However, it was established that this phrase is generally not interpreted by the Court as necessity in the proportionality principle. Most of the time, this phrase prompts the Court to make an examination under the proportionality *stricto sensu* test and sometimes it also includes a test of suitability of means. The interpretation of this phrase lies in between that which is not indispensable but reasonable.

The ECtHR's approach to the third stage of proportionality is not a consistent one. However, it is safe to say that the Court employs on a regular basis two forms of balancing which essentially incorporate the ECtHR's approach to proportionality *stricto sensu*: (i) cases in which it compares the interest with the interference of the protected right, and (ii) cases in which it compares the legitimate aim with the protection of the right. These two tests are a form of means-ends tests. In other cases, it was established that the ECtHR does not always undertake the exercise of comparing the degree of detriment to the alleged violated fundamental right with the claimed advantage pursued by the impugned legislation or decision. It does not always consider the degree of claimed intrusion upon the protected right.

[859] *Soering v. UK* (n 488) *and J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. UK, (Application no. 44302/02)*.

2(c) The CJEU

The CJEU's approach to the principle of proportionality does not present any significant inconsistencies in the manner in which it treats each of the stages of the principle. However, when it applies the principle of proportionality it applies various approaches with the consequence that a clear pattern of the approach to proportionality could not be identified in the selected judgments.

To begin with, the CJEU does not apply the full three-stage test to its fundamental rights judgments generally. It tends to apply a partial proportionality analysis. The full-three stage test is one of the approaches it may elect to apply in a particular case. Five approaches to proportionality by the CJEU have been identified in this study: (i) the legitimate aims approach; (ii) the least restrictive means approach; (iii) the proportionality *stricto sensu* approach; (iv) the fair balance approach and (v) the full three-stage test approach. The reason for the choice of approach to any one of these could not be fully identified. However certain observations could be made. The legitimate aims approach was identified in the *Hauer* case which dealt with the legitimacy of a Regulation allegedly violating the right to property. The Court determined that the Regulation contained a Community policy which had legitimate aims justified in the objectives of the general interest. The right to property which was allegedly being infringed was hardly considered by the Court. The least restrictive means approach is probably the most thorough approaches of the partial proportionality analyses conducted by the CJEU. In this approach, the Court scrutinises the necessity of the measure being challenged as restricting a fundamental right, including a thorough examination of whether least restrictive means existed which could equally well achieve the aim. In the proportionality *stricto sensu* approach the CJEU does not consider the suitability and the necessity of the means but engages directly in a balancing exercise where it confronts the rights in conflict and considers how each right should be optimised. In the fair balance approach, which may be described as a reasonableness approach, the CJEU carries out a pragmatic rather than structured exercise, very similar to the ECtHR's application of the fair balance doctrine. Indeed, this approach seems to be adopted by the CJEU when in its judgment it considers the ECHR and the ECtHR's judgments. The manner in which the CJEU conducts the fair balance approach is by making an overall appreciation of the case, rather than a systematic analysis and by allowing a margin of appreciation to the national authorities.

The CJEU's fair balance approach may be said to constitute the least analytical discourse in terms of the proportionality principle, and as such leaves various questions unanswered. The fifth approach identified in this study is the full three-stage approach to proportionality analysis. The CJEU application of the three-stage approach may be said to be modelled on the traditional proportionality principle as expounded by Alexy. All three stages of the analysis are addressed by the Court, but it was noted that some questions remain unanswered in relation to the examination of excessive burdens claims at the necessity stage, as well as in its balancing exercise, in the proportionality *stricto sensu* stage, because the Court does not weigh the advantages procured by the limiting interest with the burden carried by the limited right.

The above synthesis paves the way for a more specific discussion of the Courts' partial approach to proportionality in the next section. In this discussion I will also attempt to identify the reasons underlying this fragmented approach.

3. Partial Application of Proportionality: Considerations and Reasons

All the three courts selected in this study tend to attribute importance to one element of the proportionality principle. The Maltese Court and the ECtHR tend to focus on the last stage of the principle, i.e. proportionality *stricto sensu.* The same cannot be said for the CJEU, because although some of its approaches apply a partial test of proportionality, it has applied the three-stage proportionality principle in a few cases, markedly closely modelled on the traditional proportionality principle. Additionally, the CJEU seems to engage with the stages of the proportionality principle more intensively than the other two courts, especially in its least restrictive means approach.

Conspicuous in the Maltese judgments is the general absence of any reference to the stages of suitability and necessity.[860] In one judgment, the Maltese Court made reference to Alexy's explanation of the principle of proportionality but declared that it was only being called upon to decide on proportionality *stricto sensu*.[861] It stated that the first two

[860] E.g., in the social housing cases relative to the right to property discussed in Chapter 3, the Court did not apply a suitability test to question whether the housing decontrol provision was suitable in relation to the social housing aims it pursued. Neither did the Court apply the necessity test in order to verify whether less burdensome means could have been applicable in the case before it.

[861] *Xerri et v. Tabone noe et*, (Constitutional Court), (Malta) (n 470).

tests were unnecessary and that it would apply only the doctrine of fair balance as applied by the ECtHR. This is indicative of the Court's conception of proportionality. It does not equate it with the three-stage conception at all. Rather, it conceives proportionality analysis as limited to the third stage of proportionality *stricto* sensu. This seems to be supported by the comment that it will follow the ECtHR's fair balance doctrine. In its interpretation of proportionality *stricto sensu,* it was also noted that the Maltese Court repeatedly fails to make an appreciation of the benefit being acquired in the public interest by the restriction of the alleged violated fundamental right. The Court does not take this part of the balancing equation into account. Only in two recent cases did the Court follow the optimisation exercise expounded by Alexy. In these two cases, the Court applied what Alexy calls the 'rational process' of proportionality *stricto sensu*, taking into consideration (a) the intensity of the interference with the alleged violated right; (b) the degrees of importance of the interference; and (c) their relationship to each other. An incomplete form of the necessity test is seen to be applied in only one case.[862] Very rarely does the Maltese court apply the suitability and the necessity test even if certain cases would have benefited greatly from the application of these steps as we shall see.

As has been stated in Chapter three, the Maltese court may feel that by examining suitability and necessity it is intruding on the competence of the policy-maker or the Executive and on the legislator, especially when the Court states that it is the competence of the legislator to make sure that the promulgated legislation strikes a balance between fundamental rights and public interests. Testing suitability and necessity may be perceived by the Maltese court as separate exercises which require express challenge in the application to the Court. This may also explain why the Maltese court interprets the principle of proportionality as a 'fair balance' approach, similar to the doctrine developed by the ECtHR. Additionally, it is not excluded that the Maltese court follows faithfully the 'fair balance' approach of the ECtHR.[863] Neither the Maltese Court nor the ECtHR views the three stages of proportionality as compulsorily sequential in their application, but generally apply only the third test. Additionally, the Maltese court's frequent references

[862] *Maria Stivala v Kummissarju tal-Artijiet*, (Constitutional Court), (Malta) (n 532).
[863] In *Xerri et v. Tabone noe et*, (Constitutional Court), (Malta) (n 470), the Court explicitly stated that it relies on the doctrine of fair balance as developed by the ECtHR when applying the principle of proportionality.

to the ECtHR's judgments also indicate its support of the ECtHR's approach to the proportionality principle as a doctrine of 'fair balance' and to which it feels bound.

Generally, it is quite clear that the Maltese court follows the doctrine of fair balance as applied by the ECtHR.[864] However, it is important to note that this faithful following stalls where the Court attributes considerable abstract weight to certain values such as the legitimacy of a child born in wedlock.[865] This was seen in chapter three which discussed, *inter alia,* the case of a father who could not repudiate his paternity to a child where it was proven by DNA tests that she was not biologically his daughter.[866] The Maltese court attributes such high value to the legitimacy status of a child born in wedlock that it rejected the claim that the father's rights had been violated when he could not provide the DNA proof outside the prescribed period for repudiation. However, the ECtHR, upon pronouncement on the same merits of the case, decided that such state of affairs was effectively violating the father's rights. This state of affairs shows that although there is much influence in relation to the general doctrine of fair balance of the ECtHR on the Maltese court, there is at play also the 'juridical mentality' of the Maltese court which may differ from that of the ECtHR judges. In this case, the Maltese court could not abandon the ingrained doctrine of legal certainty in relation to the legitimacy of children born in wedlock. Such doctrine, one may say, verges on the values that the Maltese society has, despite the fact that now the times are changing and legitimacy is gradually decreasing in importance as a family value in Maltese society. This also indicates a reason why, in applying the proportionality principle, in this case the third stage, the juridical mentality and the attribution of weights may yield a conflicting result for the same merits of the case. The attribution of weight depends very much upon the psychology of the Court, and the values it upholds and which reflect the values of the given society.[867]

In the ECtHR's approach to the principle of proportionality, two weaknesses were identified: first, the level of scrutiny that the Court is prepared to apply; second, the unstructured application of the principle of proportionality. As discussed in chapter four,

[864] *Zammit Maempel v. Malta,* ECtHR, (n 536).
[865] *Mizzi v. Malta*, ECtHR, (n 523).
[866] Mizzi v. AG, Maltese (Constitutional Court), (Malta) (n 522).
[867] See also Huscroft G., 'Proportionality and the Relevance of Interpretation' in *Proportionality and the Rule of Law,* Cambridge University Press (2014), p. 186-202.

the ECtHR perceives itself as a subsidiary court to the domestic court. This means that it invariably engages in an exercise to decide whether it will allow a wide or narrow margin of discretion to the respondent State in its judgments (margin of appreciation doctrine). Such determination has an effect on the level of scrutiny it is prepared to exercise when applying the principle of proportionality. Thus, the allowance to the respondent State of a wide margin of appreciation invariably results in a low intensity proportionality appraisal in the resulting judgment. In other cases, discussed in chapter four, affording a wide margin of appreciation effectively resulted in a very superficial application of the proportionality principle (transsexual cases). This doctrine has considerably undermined the application of a structured proportionality analysis because the ECtHR allows itself to pick and choose which tests of the proportionality analysis it will apply to determine the case and which tests to regard as non-conclusive for the judgment at hand. This type of approach indicates that the ECtHR takes into account external considerations when determining the case, such as its competence in the related matter, whether it wants to intrude or interfere in the matter, and to what extent. The ECtHR determines *a priori* what type of scrutiny it will apply to the given case. Thus, the ECtHR's approach to proportionality may be said to range from intense to light application depending on the degree of scrutiny it has decided to apply *a priori*. A term which could generally describe the ECtHR's approach to the principle of proportionality is the horizontal approach. This is because the ECtHR does not apply the principle of proportionality in any structured way. It does not specify or actually divulge much details as to which test it is making its considerations upon. Although it uses the term 'fair balance' or 'reasonable relationship of proportionality', it does not actually engage in any form of definition or detail as to its mode of legal reasoning when applying proportionality. Disconcerting is also the manner in which the Court, at times, declares that the principle of proportionality has not been violated by reference to the margin of appreciation of the State.[868] Equating a non-violation of the principle of proportionality with the recognition that a State has not overstepped its margin of appreciation leaves one wondering, many times, as to the reasoning leading to such decision. The ECtHR does not engage in a thorough explanation of why it arrives at this decision.

[868] See also Klatt M. & Meister M., 'Proportionality—a benefit to human rights?', (n 126), 706, who state the 'The margin of appreciation is thus used as an argument in order to forgo any substantiated balancing', referring to the case Otto-*Preminger-Institut v. Austria*, *(Application no. 13470/87)* 23 September 1994.

The ECtHR states that the examination of the second stage of the proportionality principle, i.e. necessity, interpreted as the least onerous means test, is not a compulsory test, but merely an optional test constituting one of the many factors which allow a determination of whether a fair balance has been struck. However, its declaration that its obligation as a court is to review whether the impugned legislation or decision 'strikes, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the criminal justice system'[869] reflects a serious contradiction. In order to strike a fair balance, it is not possible to exclude the examination of whether or not the legislation or decision alleged to violate the fundamental right constituted the least onerous means capable of pursuing the aim in view. Christoffersen also puts forward this argument.[870] Is it possible to reach a decision that a fair balance has been struck when the necessity of the provisions being challenged is not examined? The ECtHR's attitude towards the least onerous means test reflects, once again, the manner in which it perceives itself as a subsidiary court which will not overly intrude into a State's affairs by declaring its legislation as too burdensome. This is clearly reflected in various judgments where it has held 'it is not for the Court to say whether the measure complained of represented the best solution for dealing with the problem or whether the State's discretion should have been exercised in another way'.[871]

The CJEU, on the other hand, seems to be very aware of the integral application of the proportionality principle, as witnessed in a few cases, where it applied the full three-stage test. However, it seems that it does not generally feel bound to apply the full three-stage test in every case in which it applies the proportionality principle. This can be seen in the different approaches that it takes to proportionality, identified in this study.

Of the five approaches to proportionality by the CJEU which have been identified, it was noted that the CJEU seems to apply the highest level of scrutiny in its least restrictive means approach. The necessity of the means limiting the fundamental right is scrutinised with intensity. This indicates the degree of importance which the CJEU attributes to the necessity stage of the principle of proportionality. In comparison, a lower level of

[869] *Nikita v. Russia*, 20 July 2004 ECHR 2004 – VIII, par. 57.
[870] Christoffersen J., *Fair Balance* (n 148), 112.
[871] *Blecic v. Croatia*, (n 668) par. 67

scrutiny seems to be applied in the rest of the approaches identified. A reason which has been identified as potentially prompting the Court to exercise a high level of scrutiny lies in the argumentation of the Court which reflects the latter's conviction that the measure being impugned trumps the restriction of the right being claimed. Alternatively, it will also take a trumping approach when the Court anticipates that the fundamental right risks to be severely undermined. Another interesting observation is that by means of this approach the Court seems to have ascribed a high abstract value to the fundamental right *a priori,* when confronting it to the restricting right or interest. It was also noted that the ascribing of values to particular fundamental rights is a fairly common occurrence in the least restrictive means approach. Thus, a high abstract value is ascribed to the right of data privacy but not so high a value is ascribed to rights such as the right to freely conduct a business or the right to access EU institutional documents, envisaged by the Charter of Fundamental Rights of the EU and protected as general principles of EU law. It was also noted that in its legitimate aims approach, where the objective in the public interest of Union policy is high, the Court will also take a trumping approach by emphasising the legitimacy of the measure and the fact that it is justified. This in turn indicates, that although *prima facie* it may be perceived as if the CJEU is applying the method of optimisation as explained by Alexy, on a closer look it is not. This is because although it ascribes higher abstract values *a priori,* it does not engage in the final stage of proportionality analysis and does not confront the degree of satisfaction of the right or interest with the degree of dissatisfaction obtained by the conflicting or restricted right.

Although the Courts tend to rely on one test, they do so for different reasons. The Maltese Constitutional Court is influenced by the ECtHR and interprets proportionality as proportionality *stricto sensu,* but may also depart from the ECtHR's attribution of abstract weights were the Maltese court considers a particular element as highly valued in Maltese society. The ECtHR does not want to be bound by the rigid three-stage test because it has various considerations to do, one of which seems to predominate in its determination, i.e. whether or not it is to interfere with the decisions of a State or whether it is to allow discretion to that State, and to what degree. The ECtHR's considerations verge on competence and appropriate interference. The CJEU, on the other hand, seems to be motivated by whether the case before it merits a high level of scrutiny. This high level of scrutiny is seen to be applied in cases where there is real risk of a fundamental right being

seriously undermined or when it considers that the Union objectives trump any restriction placed on a fundamental right claimed.

The above conclusion allows me to identify some reasons why the application of the proportionality principle may differ so much in the judgments of the selected courts. Four elements can be identified which may indicate why this difference exists. First, each court has developed its own juridical mentality, mostly based on the role that the Court plays in upholding fundamental rights within the legal system that they serve. Second, each court has its own unique external considerations which it makes before applying the principle of proportionality. Third, each court attributes different degrees to the values it upholds. And, last, each of the Courts perceives the principle of proportionality differently in terms of its function as an adjudicative tool.

Thus the Maltese juridical mentality differs from the supranational counterparts on the basis of its juridical history, the values that the Maltese society upholds and the aims which the law strives to achieve by providing legal certainty above all. This may be seen, for example, in the value that the Maltese court places on excessive burdens imposed on the party claiming a violation of a fundamental right. The ECtHR, on the other hand, places considerable importance on whether or not it should interfere with State affairs. This has developed from the manner it perceives itself as a court and on the basis of the ECHR and the role of the Council of Europe and its history on the international forum. The ECtHR is very well aware that it has to rely on the voluntariness of the States to observe the ECHR because its coercive powers are limited. The CJEU, on the other hand, developed from a small court whose original objective was to advance the Community's objective according to the rule of law. In fact, for some years, it refused to adjudicate fundamental rights cases stating that this was entirely within the Member State's competence. However, when it seemed clear that the Community was growing into a greater organisation than just merely a trading platform, it reconsidered its initial stance and declared that fundamental rights formed an integral part of the general principles of community law. This demonstrates that the CJEU has developed a juridical mentality based primarily on the integration of the European Community, later the European Union. Perhaps this may also explain why the CJEU rarely opts to apply the proportionality *stricto sensu* stage. If, on the examination of the necessity stage, the CJEU

finds that least restrictive means were not available or would not reach the original EU objectives in full, or that the means used actually constituted the least restrictive means available, it would stop there without balancing the degree of satisfaction of the EU interest with the degree of dissatisfaction procured by limiting the fundamental right. In this way it would still preserve the EU objective which would be at risk when confronting the benefits procured by it with the burden of the limitation placed on the right. However, determining that a measure is necessary may still violate the principle of proportionality if it is found, at the proportionality *stricto sensu* stage, that it is disproportionate.

Closely linked to the different juridical mentalities of the Courts are the external considerations they take into account when applying the principle of proportionality. It is submitted that the juridical mentality of each Court will dictate the external factors it will consider in the determination of cases. The external considerations which each of the Courts take into account before making their decision are very different from each other. Primarily it is because of the juridical mentality involved, which reminds them of the role that the Court plays within the greater context of the organisation to which it belongs to. The Courts' awareness of this leads them to attribute degrees of importance to certain values rather than to others. Thus, for example, the Maltese court attributes a high value to the principle that excessive burdens should be avoided as far as legally possible. It also values highly the legal certainty which the dictates of Maltese law attempt to provide, in the interest, many a time, of the moral values of the Maltese society. The CJEU attributes a high value to the protection, as far as legally possible, to the four fundamental freedoms which are foundational to the EU as an organised supranational entity. It also values highly, for example, fundamental rights such as data privacy, for which it is prepared to annul EU legislation, if it considers that the right is at risk of being severely abused. This may also explain why these courts apply the proportionality principle as they do.

Institutional factors connected with discretion and control play an important role in the judicial review for proportionality because they affect the extent and intensity of scrutiny by the Courts when applying the principle of proportionality. Alexy describes these as

"formal" or procedural principles in his theory of discretion.[872] He elaborates the weight formula further by including formal principles which, being principles, are also subject to optimisation and therefore to the law of balancing:[873]

> *[…] the optimization objects of formal principles are legal decisions regardless of their content. Formal principles require that the authority of duly issued and socially efficacious norms is optimized. Authoritative issuance and social efficacy are the defining elements of legal positivism. This implies that formal principles refer to the real or factual dimension of law.*[874]

Whereas in rights as principles, rights are optimised to the greatest degree possible in terms of their substantive content such as freedom of speech, property etc, in formal principles, optimisation takes place in relation to legal decisions independently of content.[875] Formal principles establish the authority which determines the substantive content as well as the process and procedure,[876] and refer to the real or factual dimension of law.[877] They address the relation between discretion and control. They include principles of law, such as the principle of legal certainty.[878]

The principle of democracy, according to Alexy is a formal principle which refers to the process of decision-making by the legislature representing the majority and which is the most rational and legitimate procedure of law-making.[879] The principle of democracy requires that 'the democratically legitimated legislature should take as many important decisions for society as possible'.[880] Consequently, the formal principle of democracy grants considerable weight to the decisions taken by parliament but also requires the broader scope of the authority of decisions to 'be as broad as possible' reflecting the special relationship between constitutional rights and democracy.[881]

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[872] Alexy R., 'Formal Principles: Some Replies to Critics,' (n 394), 511-524.
[873] Ibid., 513.
[874] Ibid., 516.
[875] Ibid., 515-516.
[876] Klatt & Meister, *The Constitutional Structure of Proportionality,* (n 90), 136.
[877] Alexy R., 'Formal Principles: Some Replies to Critics,' (n 394), 516.
[878] Ibid., 517.
[879] Ibid., 516.
[880] Ibid.
[881] Ibid.

External considerations represent underlying premises upon which the courts seem to habitually rely. Such underlying premises have been referred to by Alexy as 'normative' and 'empirical' premises.[882] 'The question of epistemic discretion arises whenever knowledge of what is definitively prohibited, commanded, or left free by constitutional norms is uncertain.'[883] The legislature has epistemic discretion to decide these cases.[884] Alexy explains that the Courts, in turn, do 'not establish the truth or falsity of the legislature's empirical premises'.[885] They establish the extent of their uncertainty[886] and when they decide to permit the interference with the constitutional right, the Courts are 'giving the legislature discretion with respect to the knowledge of relevant facts, in other words an empirical epistemic discretion', and identifying the legislature's empirical assumptions.[887] Julian Rivers explains that discretion is an 'inevitable component' of proportionality in the case law of the ECtHR and the CJEU.[888] However, it is a variable component which takes 'the court from one extreme of correctness-review through to the effective abandonment of the two most intensive parts of proportionality, namely the tests of necessity and balancing'.[889] This can be seen, for example in the ECtHR's case law discussed in this study where necessity rarely plays a role in the application of the proportionality principle, or is collapsed into the balancing process.[890] Rivers argues that the discretion component in proportionality is different, depending on the institution applying it. Thus, the discretion exercised by the legislature is different from that exercised by the courts and this shows that proportionality 'admits of a wide range of answers'[891] allowing the primary decision-takers and the courts to exercise their own discretion which is implied by their relative roles.[892] This is referred to by Alexy as

[882] Alexy R., 'Formal Principles: Some Replies to Critics,' (n 394), 514.
[883] Ibid., 519.
[884] Ibid.
[885] Ibid., 516.
[886] Ibid., 520.
[887] Ibid. In view of this Alexy has refined his weight formula to include the epistemic aspect in the balancing process of proportionality. This element prescribes that '[t]he more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises'. For the attribution of weights to epistemic discretion, he applies a triadic scale of 'reliable' or 'certain', to 'plausible' to 'not evidently false'. See Alexy R., 'Formal Principles: Some Replies to Critics,' (n 394), 514-515.
[888] Rivers J., 'Proportionality and discretion in international and European law' in Tsagourias N. (ed) *Transnational Constitutionalism,* Cambridge University Press (2007), p. 108.
[889] Ibid.
[890] Ibid., 111.
[891] Ibid., 109.
[892] Ibid., 108.

structural discretion where 'proportionality does not deliver one right answer to any problem involving two or more competing principles'.[893]

Rivers discusses three types of discretion: (i) policy-choice discretion; (ii) cultural discretion and (iii) empirical discretion.[894] Policy-choice discretion is structural because the decision-takers choose from a range of possible policy options which are necessary and balanced.[895] Cultural and empirical discretion pertain to the epistemic element in proportionality where the attribution of values takes place in the balancing process of proportionality.[896] '[T]he problem is that we disagree amongst ourselves about the relative abstract values'.[897] Another problem is that 'costs and gains are not always certain'.[898]

In the balancing process the need for empirical certainty arises, which is established by (a) determining the probability that any given outcome will happen, and (b) by determining the extent of reliability of the factual judgment being made.[899] This process of evaluating gains and costs lies at the heart of the application of epistemic discretion in the balancing process of proportionality. Rivers states that the court must be able to form a view of the reliability of the processes adopted by other state organs[900] such as the legislature. He states:

> *Judges have to be able to test whether claims of expertise are made out. The deference that the court shows to primary decision-takers is thus not intrinsic and uniform, but it is a willingness to believe the decision-taker's assessment of the likelihood of gains, a willingness which should reduce with the seriousness of the limitation of the right in question and increase with the demonstration that the decision-taker adopted processes more likely to reach right answers to the relevant empirical questions.*[901]

[893] Rivers J., 'Proportionality and discretion in international and European law', (n 888), 114.
[894] Ibid.
[895] Ibid.
[896] Ibid., 118.
[897] Ibid., 119.
[898] Ibid., 120.
[899] Ibid.
[900] Ibid. 121.
[901] Ibid., 121-122.

This whole process is based on the formal principle of respect for the democratic legislature, as explained by Alexy.[902] Rivers explains that the ECtHR can be seen applying discretion, for example, when it allows a margin of appreciation to the State. He points out that the margin of appreciation functions 'as a general doctrine of discretion' and that the apparent incoherence of the margin of appreciation doctrine is due to the fact that it conflates the three different types of discretion.[903] Within the Maltese context, from the results of this study, it is not possible to determine whether the Maltese Constitutional Court exercises deference to other organs of the State, such as, the legislature or the Executive. In the *National Bank of Malta* case, although the Court found that the seizing of the assets of the bank was disproportionate, it did not pronounce itself on the suitability and necessity of the seizing legislation. This *may* be interpreted as an exercise of deference but can in no way be conclusive because the Maltese Court very rarely engages with the first and second stage of the proportionality principle. In a few other judgments concerning the right to property in cases where private property was seized by the government for social housing purposes, the Maltese Court has stated that it was the legislator's obligation to see that a fair balance is struck in legislation limiting rights and that *its* duty was to oversee that such fair balance is struck.[904] In a similar case, the Maltese Court held that it was the Executive's duty to show that a balance had been struck between the public interest aim and the protection of the individual. It held that it would not delve into the manner in which the public project is executed by the government and neither would it substitute the government's decision with its own.[905] This may also indicate that there may be a form of subtle deference that the Court might be exercising when applying proportionality. However, the Maltese Constitutional Court has also declared social housing provisions, which reflect the Executive's controversial social housing policy, as violating fundamental rights. Thus, it remains unclear whether or not the Maltese Constitutional Court exercises this kind of discretion.

[902] Alexy R., 'Balancing, Constitutional Review and Representation', (n 117), 572–581, where Alexy explains that there is an intimate connection among, *inter alia,* balancing in proportionality, constitutional review and democratic representation.
[903] Rivers J., 'Proportionality and discretion in international and European law', (n 888), 126.
[904] In *Mifsud et v. AG et*, Constitutional Court, (n 475), discussed in Chapter 3, Section 4 and *Xerri et. v. Tabone noe. et.* Constitutional Court, (n 470), discussed in Chapter 3, Section 6(a).
[905] In *Stivala v. Commissioner of Lands,* Constitutional Court, (n 532), discussed in Chapter 3, Section 6(b).

The Maltese Constitutional Court seems to be very aware of the role it plays as guardian of the Constitution and of constitutional rights. It highly values the principle that excessive burdens should, as far as legally possible, be avoided. This can be seen in the rent laws cases discussed in chapter 3 where in most cases it declared disproportionate the deprivation of private property for the purposes of social housing. It also values highly the principle of legal certainty, and the letter of the law, as was seen in the *Child Repudiation* case, deciding in favour of the law on the legitimacy of children born in wedlock despite scientific evidence to the contrary.

Rivers explains that the CJEU applies its evidential discretion when it is assessing the 'relative expertise, position and overall competence of the Court' and when it decides to search for less restrictive means in cases where a right or Union interest is very important and the impact of its restriction is very high.[906] *Digital Irish* and *Scheke* are good examples of the court's application of evidential discretion when it decides to search for the less restrictive means where the individual right is seriously impacted by Union legislation. The use of cultural discretion of the CJEU may also be seen when its aim is primarily to preserve Union objectives and to protect any one of the four freedoms, as in the case of *Hauer*. Rivers explains that 'the Court wants to conceive of the European Union (EU) as single political community, committed to a particular scheme of values.[907]

Cultural discretion may also be seen in the judgements of the Maltese Constitutional Court which 'reflect its own scheme of abstract values'.[908] Thus in the *Child Repudiation Case,* it was seen that the Maltese Court attributes a high value to the moral principle of legitimacy of children born in wedlock, also incorporated into Maltese Civil law. The latter may be categorized as cultural discretion, in terms of Rivers' explanation. It is also interesting to note how, as Rivers explains, different courts attribute different abstract weights. The ECtHR, when deciding the Maltese *Child Repudiation Case,* disagreed with the Maltese Constitutional Court, attributing a higher abstract weight to the reliability of the scientific evidence of the DNA test provided by the applicant. Another form of cultural discretion may be seen in the cases concerning illegal immigration, where despite the fact

[906] Rivers J., 'Proportionality and discretion in international and European law' (n 888), 126.
[907] Ibid., 127.
[908] Ibid., 129.

that the status of the applicant as being illegal is proven, an overriding principle of the highest interest of the child outweighs the dictates of the law on illegal immigration. The Maltese Court also seems to attribute a high abstract weight to the freedom of expression when this concerns information about politicians.

It is the tension which exists between, on the one hand, the formal principle of deciding questions of law, and on the other, of exercising epistemic discretion, which forms the structure of discretion in proportionality.[909] The application of discretion as an external consideration and the subsequent attribution of values by the three courts are very intimately linked. It is not very easy, at times, to identify what external considerations the courts are making when applying the proportionality principle. External considerations may also explain why there is a range of possible outcomes when applying the principle of proportionality.

With this in mind, in what follows I will discuss specific weaknesses which I identify in some of the judgments studied in order to give a clear enough picture of the type of questions encountered when a partial approach to proportionality analysis takes place instead of the full approach. I will then be able to evaluate whether Alexy's full three stage test would actually make a difference in the determination of the judgments. This will lead me to re-evaluate and reconsider my original hypothesis that the full three-stage proportionality analysis is the most efficient adjudicative tool, necessary and indispensable, to determine fundamental rights conflicts.

4. Is Alexy's Proportionality Analysis an indispensable Adjudicative Tool?

In this section I will look at the consequences of partial application of proportionality analysis applied by the three courts. This will allow me re-evaluate my original proposition that a full proportionality analysis as expounded by Alexy is an indispensable adjudicative tool in the determination of fundamental rights conflicts.

Beginning with the Maltese Constitutional Court, its judgments in the protected rent laws cases generally tend to focus on the burden carried by property owners when their property is rented out to third parties under protected rent legislation. In the case *Mifsud*

[909] Rivers J., 'Proportionality and discretion in international and European law' (n 888), 131.

et v. AG, the Maltese Court, in applying the proportionality *stricto sensu* stage only, focused on one part of the balancing exercise.[910] It only analysed the owner's suffering in terms of his non-enjoyment of his property. The Court also considered the owner's actual and future suffering arising from such deprivation. It did not however, consider the other side of the balancing process which would have required an attribution of weight to the 'good' enjoyed in the public interest (social housing) by the protected rent laws and confronted it with an attribution of weight to the degree of restriction of the owner's right. It may be recalled that the co-defender had actually raised this plea before the Court. This confrontation of weights would have, at least, rendered the balancing exercise complete and holistic in terms of the factual considerations which proportionality analysis requires, despite the fact that suitability and necessity were never examined. The lack of consideration of the degree of benefit in the public interest, in the application of the proportionality *stricto sensu* stage, may be seen to be prevalent in almost all the judgments of the Maltese Court when dealing with protected rent cases.[911] This is also seen in expropriation cases where it establishes the degree of non-satisfaction procured to the property owner when an expropriation order is issued in favour of his land.[912] It does not engage in a discussion of the degree of importance, in the public interest, of the expropriation of the land. Neither does it confront the two in a balancing exercise.

Another Maltese case which in my opinion, would have benefited greatly from a full application of the proportionality principle was the *National Bank of Malta* case. The circumstances of that case called for such an exercise because a set of questionable circumstances had occurred before the Maltese government decided to seize all the assets of the bank. Recall that the Maltese court did not examine the suitability of the government's measures for the aim in view. Nor did it examine the necessity of such measures. Rather it proceeded directly to the balancing stage. The examination of suitability and necessity would have established whether the legislation of the seizing of assets was suitable and necessary in relation to the aim of establishing a new bank in order to avert an economic crisis and in which the government would have had a large

[910] Discussed in Chapter 3, Section 6(a).
[911] As discussed in Chapter 3, Section 6(a).
[912] As discussed in Chapter 3, Section 6(a).

controlling interest. If the suitability and necessity stage were cleared, proportionality *stricto sensu* would then be applied to establish the degree of detriment to the shareholder and the appropriation of the bank's assets in the public interest to avoid a public financial crisis. In this case the Court applied the proportionality *stricto sensu* directly, finding that the shareholders' right to property had been infringed since they were not given compensation for the assets seized by the government. It is true that the Court did declare this act to be disproportionate by stating that the shareholders were entitled to compensation, but it never pronounced itself on the process of the means pursued by the government to achieve its aim. Such an examination would have conclusively determined whether the acts of the government were legitimate or not. As the case stands, although the Court found in favour of the shareholders, we have no direct pronouncement about the government's acts. It is doubtful how legitimate the government's course of action was and whether alternative means had been available to avoid the disproportion that the Court finally declared had occurred.[913]

In one exceptional case, the Maltese Court is seen to apply proportionality *stricto sensu* closely modelled on Alexy's balancing model.[914] It examines the intensity of the interference of the limiting law with the right of the property owners and considers its effects. It attributes degrees of importance to the interference with the right and the need for social housing in the public interest and finally, it examines the relationship between the interference with the right and its degree of importance, concluding that a violation of proportionality had occurred. This judgment provided a clear explanation of the Court's factual considerations of the case, a clear explanation of the manner in which it confronted the degree of dissatisfaction procured to the property right, the degree of satisfaction procured in the public interest, and finally, the manner in which it confronted the two, giving its legal reasoning for this. However, as has been seen, this judgment is quite exceptional and as such, it cannot be relied on as a definitive guide to the approach the Maltese Court will take in future similar cases.

[913] As has already been discussed in Chapter 3, Section 6, the Maltese Constitutional court generally seems reluctant to decide on the suitability and necessity of the complained act as part of the proportionality principle especially if such an act is incorporated or envisaged by an Act of Parliament, because it does not perceive itself as being called upon to perform a constitutional review of a particular legislation, unless it is specifically stated in the filed application.
[914] *Vica Ltd v. Commissioner of Lands*, (n 502), as discussed in Chapter 3, Section 6(a).

The ECtHR applies a sporadic type of proportionality and because there are no real fixed guidelines as to the reasoning behind the approach it chooses, one is unable to develop a relatively clear expectation of how a case will be dealt with by the ECtHR. Additionally, by limiting the proportionality principle to one of the three tests only, certain considerations are left out resulting in a less integrated judgment.

The ECtHR rarely applies the suitability and the necessity tests (least restrictive means test). In relation to the application of the least restrictive means test which the ECtHR sometimes refers to as 'strict necessity', it has held that 'it is not for the Court to say whether the measure complained of represented the best solution for dealing with the problem or whether the State's discretion should have been exercised in another way.[915] It has also referred to the least restrictive means test as being merely one of the many factors which it will consider in deciding whether a fair balance has been struck.[916] The ECtHR has also applied the least restrictive means test in some cases stating it was not possible to reach the optimal balance unless less restrictive measures are applied.[917] This clearly shows that the ECtHR does not have a fixed opinion about the application of the least restrictive means test and when to apply it, if at all. This adds further to the lack of clarity in terms of the Court's reasoning and which declaration is applicable in which circumstances and to which fundamental rights. One indication where the least restrictive means test might be applied by the ECtHR is where it considers that the very essence of the fundamental right claimed to have been violated is at risk. In *Peck,* the ECtHR examined whether there were less burdensome means which could have been adopted when airing a filming of an attempted suicide as part of a documentary.[918] By doing so, information was available as to how the Court developed its reasoning.

Lack of in-depth reasoning may be seen in the ECtHR's application of fair balance, the third stage of the proportionality principle. In the *Stoll* case, for example, the Court did not consider the damage that the journalist's act had caused to the State by divulging confidential documents in relation to the punishment he had been awarded. The Court

[915] *Blecic v. Croatia*, (n 668) and in *Bäck v. Finland*, (n 489), as discussed in Chapter 4, Section 5(d).
[916] *Soering v. UK*, (n 488); *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. UK,* (n 649), par. 110; *Blecic v. Croatia*, (n 668).
[917] Christoffersen J (n 148), 112.
[918] *Peck v. UK*, (n 677).

focused mainly on whether the State was justified in awarding the penalty to the journalist. A proper balancing exercise would have required that weight would have been attributed to the damages which were suffered by the State in terms of the divulgence of the confidential documents on the one hand, and the requirement for criminal conviction of the journalist for such act on the other. This would have led to establishing how proportionate it was to award a penalty for such an act. In *Fressoz,* on the other hand, the Court did take into account the effect of the measure taken in relation to the applicant. In this case the freedom of expression of the journalists was weighed against the criminal conviction awarded to them for divulging documents obtained by breach of professional confidentiality. The Court questioned the proportionality of the criminal conviction in relation to the documents divulged in the public interest. Indeed, the circumstances in *Fressoz* were slightly different from the *Stoll* case, and this was highlighted in my discussion of it but the question which always arises is when is the ECtHR prepared to take certain facts into account and when not? Would the outcome have been different had the ECtHR taken into account the criminal sanction placed on Stoll and how this weighed against the damage caused to the State? As was noted in the discussion of this case in chapter four, the Grand Chamber had effectively overturned the first Chamber's decision which had found that the proportionality principle had been violated. The first Chamber had carried out a more faithful application of the proportionality principle, in my opinion.

With regard to the proportionality analysis applied by the CJEU, it was noted that the CJEU does not often apply the third stage of proportionality analysis and consequently it does not confront the burden caused by the limitation placed on the right with the advantage procured in the public interest. Because this confrontation rarely takes place, one wonders how the Court attributes the values in order to determine that the limitation of a right is justified on the basis of the good that it procures, or if the limitation placed constitutes a disproportionate state of affairs. This reasoning is often absent in the CJEU's judgments. Thus, the question which is most prevalent in relation to the CJEU's partial application of proportionality analysis concerns mainly the attribution of values by the Court to competing rights and interests.

Even where the CJEU has modelled its proportionality analysis closely on Alexy's traditional proportionality principle, some questions are still left unanswered because the balancing stage carried out is not completely faithful to Alexy's optimization exercises. In *Internationale Handelsgesellschaft* the CJEU engaged in proportionality analysis which is very reminiscent of Alexy's traditional proportionality. It commenced by examining the suitability and necessity of the impugned measures of forfeiture of the guarantee deposits which the company had made on the agreement that it would import and export cereals within a prescribed time. The Court was satisfied that the measures were suitable and necessary to achieve the aim in view, stating that the system of deposits guaranteed information about exports and market conditions to the Community. It then applied the *proportionality stricto sensu* test by examining whether the burden suffered by the traders was disproportionate. It did so by comparing the burden caused by the forfeiture to the losses they suffered in relation to the actual costs. However, this balancing exercise does not reflect a precise exercise of comparing burdens. The Court did not compare the 'degree of satisfaction' procured by the measures in the Community's interest and the 'degree of dissatisfaction' procured to the traders. It did not attribute weight to each burden and decide whether a state of proportionality or otherwise existed. Such an examination would have entailed an inquiry into the factual benefits that the system of deposits procured to the Community. What type of benefit was it? Was its importance greater or smaller than the burden of loss of money suffered by the traders? A look at the system of deposits indicates that it served to control imports and exports that had considerable influence on the market and market prices of cereals. Since the market in cereals was totally regulated through a pricing policy which changed every year in view of the fluctuations of both the EEC market and non-EEC markets,[919] a mechanism was required for control. The system of guarantee deposits was put in place to ascertain that the levies on cereals would be collected by the Community where intervention agencies agreed to take surplus cereal. This mechanism was set up to keep the market of cereals balanced, including the prices.[920] Taking this into account, the Court would then have to balance between on the one hand, the damage caused to the traders in terms of monetary loss and the advantages that the Community reaped by keeping

[919] Debatisse M., 'EEC Organisation of the Cereal Market: Principles and Consequences', (1981), Centre for European Agricultural Studies, Occasional Paper No. 10, WYE College, p. 4.
[920] Harrison B. et al, Introductory Economics, (Macmillan 1992), p. 327.

such a system running. In the balancing process weights are attributed to each side in order to determine whether there existed a state of proportionality. Sometimes, in order to verify a value to be attributed, it is necessary to inquire into the effects if it were removed. In this case, what would have been the consequences if the system of guarantee deposits were to be removed and traders would be able to decide at will whether or not to import or export, despite the import or export agreement entered into? A discussion similar to this one was held by the Court in the *Hauer* case, where it considered the effects of not having vine planting restrictions in the common organisation of the wine market. This consideration of consequences would be indicative of the values one would have to attribute in terms of the degree of satisfaction of the interest of the Community. In relation to the restriction of the rights of the traders to freely dispose of their property, the Court would also have to attribute a value. Since the burden consisted of loss of money, the Court would necessarily have to consider the amount. This gives rise to the question: what difference does it make in this case, to apply the third stage of proportionality as prescribed by Alexy's theory since the resulting judgment would be the same? Is this exercise merely carried out for the sake of observing the prescribed proper process? Partly yes, because the comparison taking place is a comparison of likes with likes. Partly no, because in another judgment with different circumstances, it may result that the burden having to be carried by the individual is greater than the benefit the Community may reap.

The *Hauer* case was decided on the basis that the prohibition of planting new vines was a legitimate aim because it pursued broader legitimate aims of the Community intended to control the production and quality of the wine market. Mrs Hauer's right to property, and the fact that she had already submitted her application before the prohibition came into force were not considered by the Court. The Court did not consider whether there existed less restrictive means to attain the objective of the common organisation of the wine market while not restricting Ms Hauer's right to property. It did not consider whether she had acquired legitimate expectations when she submitted her application to plant new vines. And if there were no less restrictive measures, how would the degree of burden placed on Ms Hauer compare to the degree of benefit obtained in the general interest?

The *Schwarz* case also raises questions which the Court did not answer. It may be recalled that Schwarz objected to giving his fingerprints for the issue of his passport. He claimed that this violated his right to private life and his right to data protection. The CJEU applied the first two stages of proportionality analysis, i.e. suitability and necessity. The Court established that the measure was suitable for the prevention of unauthorised persons in the EU. At the necessity stage it considered the alternative means of iris-recognition and determined that fingerprinting was less invasive on the person than iris-recognition. On the basis of this it concluded that the proportionality principle had not been violated. The Court did not engage in the proportionality *stricto sensu* stage. It did not confront the degree of interference of the applicant's right with the degree of benefit in public security and thus failed to scrutinised the case from all possible perspectives. What is the degree of benefit in public security for taking the fingerprint of the individual in relation to the burden of the right?

In *Carpenter*, the CJEU concluded 'A decision to deport Mrs Carpenter, taken in circumstances such as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety'.[921] The CJEU applied the fair balance approach doctrine, modelled on the ECtHR's approach, and did not engage in a proportionality analysis. Questions were left unanswered. Is the UK immigration measure under which Mrs Carpenter was deported, suitable to reach the aim of preventing illegal stays in the UK? I believe that there would not have been any question about the suitability of the measures. The next stage would be to examine the necessity of the means applied to reach the aim. Does deporting Mrs Carpenter to her country constitute the least restrictive means to prevent such illegal stay? In this case, the Court would have looked at the means available which would have achieved the aim of prevention of illegal stay which were less drastic for Mrs Carpenter in the circumstances, given that she was married to a British man and was raising his children. When there is an examination of alternate means which could be less burdensome, this would open avenues for the authorities to apply proportionality in their decisions because the Court would have indicated this. If the Court would find that there

[921] Case C-60/00 *Mary Carpenter* (n 726), par. 43

existed no less burdensome means, it would still have to decide how proportionate it was to deport Mrs Carpenter and separate her from her British family in relation to the protection which the immigration laws provide in the public interest. The weighing would have been in terms of the damage procured in the public interest if Mrs Carpenter were allowed to stay. Such proportionality analysis would have provided information about the reasoning of the Court. Additionally, it would also have assisted in understanding how the comparison of degree of satisfaction to the public interest and the degree of dissatisfaction to Mrs Carpenter's right would have been confronted. In other words, the weights attributed to the right and the interest involved would have been more apparent from the Court's proportionality analysis.

These observations lead me to reflect on a few questions which still remain outstanding: where does substantive justice stand when proportionality analysis is not applied in full? And what difference does it make if proportionality analysis were to be applied in full on the basis of Alexy's explanation of the nature of rights being optimisation requirements?

It is my opinion that the manner in which proportionality analysis is being applied presently by the three courts studied is incomplete, leaving unanswered questions and 'black-holes'[922] in the considerations made by these courts. Lack of consideration of facts may lead to substantive justice not being completely carried out. Thus, for example, the National Bank of Malta case does not tell us whether the Maltese government's legislation on the seizing of the assets of the bank had been suitable, and more importantly, necessary, to achieve its dual aim of averting an economic crisis and of having a large controlling interest in the newly constituted bank. If for the sake of hypothesis, the Court had found that the necessity stage had been violated by the government because the means were excessive, we would have a clear pronouncement that the government's legislation was consequently illegal. As it stands today, the silence of the Court may be interpreted that there was nothing illegitimate about promulgating legislation to seize assets belonging to the individual shareholders. One may argue that although the Court did not pronounce itself on this, the outcome of the judgment would still have remained the same, i.e. the Court finding disproportionality and awarding compensation to the

[922] Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, (n 38) 467.

shareholders. However, my point is that lack of information, as in this case, may lead to assumptions which may be incorrect and even illegal. The fact that the necessity stage in proportionality analysis allows for such questions to be answered, but is deliberately forfeited as a process, is, in my opinion, a wasted opportunity in legal argumentation.

I do not claim that in all cases, where proportionality analysis is not applied in full, the outcome of a judgment could have been the opposite or that a partial application of proportionality analysis leads in all cases to injustice. The outcome of a judgment does not only incorporate the final decision, but it also includes the legal reasoning which gives a clear message about aims and means, throughout the whole judgment. It includes more transparency made available by the exposition of the reasoning of the Court. Transparent reasoning is desirable because it enhances the legitimacy of the Court and attracts loyalty irrespective of whether or not one agrees with its judgments.[923] More importantly however, transparent judgments containing doctrinal clarity and a consistent structured approach would improve the efficacy of the law in guiding behaviour, providing a sharper focus of argumentation and greater predictability for future cases.[924] As the *National Bank of Malta* case shows, important considerations are left out when a full proportionality analysis is not carried out. Important considerations have also been left out in the judgments of the ECtHR. Thus, in *Stoll,* although the ECtHR applied its fair balance approach, one still wonders whether the outcome would have been different had the Court taken into account the criminal sanction placed on Stoll and how this weighed against the damage caused to the State. One can speculate either way because we have no attribution of weight in this regard. This also applies to cases where the ECtHR declares that the principle of proportionality has not been violated because the State has not overstepped its margin of appreciation. Legal reasoning is very much lacking in such cases. The same may be said about the judgments of the CJEU, which rarely see the application of the proportionality *stricto sensu* stage. In many cases, there is no balancing exercise taking place between, on the one hand, the degree of limitation placed on the right and the degree of benefit acquired in the public interest through such limitation. In Carpenter a hidden form of balancing was applied. Thus, we do not know why the UK's

[923] McHarg A., 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999), The Modern Law Review, Vol. 62, No. 5, p. 696.
[924] Ibid.

government decision to deport Mrs Carpenter did not strike a fair balance. What were the considerations made by the Court? What did the Court consider as important in this case which tilted the favour of the right to private life of Mr Carpenter? No such balancing occurred. As discussed above, optimisation requires confrontation. How difficult is it to determine the degree of satisfaction with the degree of dissatisfaction in such cases and how realistic is it to attribute values in order to determine importance? I believe that this is a matter of evidence, research on that evidence and applied reasoning, which may include moral reasoning if the circumstances of the case require this. I think that a thorough research into the public interest and what it precisely means in the given circumstances of the case can be carried out through thorough research. This information will enable a proper balancing exercise where all aspects can be analysed well. I also believe that this is a very possible exercise that can be carried out. The principle of proportionality is a structured approach to balancing fundamental rights with other rights and interests in the best possible way.[925] [It] is a necessary means for making analytical distinctions that help identifying the crucial aspects in various cases and ensuring a proper argument,[926] which will leave no stone unturned in terms of legal reasoning.

5. Fine-tuning the Approach to Proportionality Analysis

Throughout this study Robert Alexy's view served as a measuring ruler against which I could analyse the approach to proportionality by the three courts. It may be recalled that Alexy's Principles Theory establishes the connection which exists between the nature of fundamental rights and the principle of proportionality. He defines fundamental rights as 'principles' and distinguishes them from other normative rules.

Whereas normative rules constitute definitive commands which require to be fully satisfied, fundamental rights are 'optimisation requirements' which require to be satisfied to the greatest extent possible.[927] The difference between principles and rules is that whereas rules are deontological in nature and must be satisfied completely through subsumption, principles are not, because they require 'that something be

[925] Rivers J., 'Proportionality and Variable Intensity of Review', (n 23) 176.
[926] Klatt M. & Meister M., 'Proportionality—a benefit to human rights?' (n 126), 708.
[927] Alexy R, *A Theory of Constitutional Rights,* (n 62), 47.

realised to the greatest extent possible, given the factual and legal possibilities at hand'.[928] In other words, optimisation is what distinguishes fundamental rights from rules in order to be satisfied. The only manner in which optimisation can be achieved is through the application of the principle of proportionality, which incorporates a balancing process capable of satisfying fundamental rights to the greatest extent possible within the existing circumstances they happen. To test such a proposition, sometimes it may be useful to test if the opposite may be true. Is it possible to state that fundamental rights possess such a high status as rights that they naturally trump any other right or interest? If we believe that fundamental rights are trumps, then what do we do when confronted with two fundamental rights which are clashing, since both of them occupy the same high status and both of them have the nature of commands? This theory cannot hold because it does not observe the dictates of logic. If fundamental rights had the nature of trumps, they would have to be formulated differently in any of the rights documents presently in existence. The formulation of the legal provisions of any rights document, whether it is ECHR or the EU Charter, incorporate permissible limitations to the protected rights, reflecting the very nature of fundamental rights.[929] Their very nature requires an approach other than trumping when in conflict. They require optimisation.

Alexy's proportionality model which includes the tests of suitability, necessity and proportionality *stricto sensu.*[930] express the idea of optimisation.[931] The tests of suitability and necessity require optimisation to what is factually possible whereas proportionality *stricto sensu* requires optimisation to what is legally possible. This, in my opinion, is the full three-stage proportionality analysis which is the best model for the adjudication of fundamental rights cases. The importance of applying a full proportionality analysis lies in the provision of information which it procures to the Court to enable a full appreciation of fact and law. This in turn enables an understanding of the Court's reasoning behind the attribution of values to competing rights and interest in the circumstances of the case which is being determined. As Klatt and Meister state '… the

[928] Alexy R, 'The Construction of Constitutional Rights', (n 76) 2.
[929] But see Webber G, 'Proportionality and Absolute Rights', in Jackson V., & Tushnet M., (eds), *Proportionality, New Frontiers, New Challenges*, (Cambridge University Press 2017) 88-99, where he disagrees with this concept of rights as allowing limitations but perceives them as incomplete or underdefined rights requiring completion and aspiring to be absolute.
[930] Alexy R., 'Proportionality and Rationality', (n 33) 14-20
[931] Ibid. 14.

clear structure of the proportionality test, followed properly, may enhance the rationality of the legal reasoning, since it ensures that all relevant premises are dealt with in due depth'.[932]

This brings me to address the four reasons which I identified earlier as underlying influences leading the Maltese Constitutional Court, the ECtHR and the CJEU to apply a partial proportionality analysis. It may be recalled that I had observed that each of these courts has its own juridical mentality developed within an awareness of the constitutional system they apply. Each court makes external considerations when applying proportionality analysis. Each court has different values and lastly, each court's conception of proportionality as an adjudicative tool is different. Thus, given this state of affairs, how realistic is it to expect these three courts to apply Alexy's full proportionality analysis?

I believe that the application of a full proportionality analysis is possible in all the three courts if they are willing to fine-tune their existing approach, rather than change or abandon their juridical mentality, considerations and values. Perhaps where a change is required is in the conception of proportionality analysis as an adjudicative tool which requires the Maltese Constitutional court and the ECtHR to recognise that an examination of the suitability of the measures and the necessity of the means is an important step in the consideration of the facts of the case before them. The same goes for the CJEU where an acknowledgment that balancing renders a complete picture behind the reasoning of the Court. In all cases, what is generally lacking is a clear and structured explanation of the rationale of a decision. The full application of proportionality analysis allows just that. The values to be assigned by any court depend on the juridical mentality of *that* court. The values it subscribes to, usually reflect the values held within its constitutional system. This is not a hindrance to the actual application of proportionality. As discussed earlier, a judgment may yield different outcomes depending on the Court making the decision. This depends on the values attributed by the Court. Values differ and proportionality analysis allows for this difference. What is required is that a judgment contain a clearly structured examination of whether a state of proportionality exists or

[932] Klatt M. & Meister M., 'Proportionality—a benefit to human rights?' (n 126) 707.

not between a given aim and the means pursuing such aim. Judgments where external considerations are made, especially by the ECtHR, should forfeit the use of the term proportionality because in reality no real evaluation on the basis of proportionality is being made. A declaration that a State has not overstepped its margin of appreciation, thus not having violated proportionality, is not a decision based on proportionality analysis and therefore this rhetoric should be abandoned so as to avoid confusion. The Courts are simply required to examine the case before them from the three aspects (suitability, necessity and Proportionality *stricto sensu*) when they purport to be applying the principle of proportionality. They are free not to apply proportionality when they deem fit. On the basis of these considerations, I conclude that the proportionality principle as expounded by Alexy as a full three-stage test is 'the most sophisticated means to solve the very complex and intricate collision of human rights with competing principles'.[933]

6. Limitations of this study and Suggestions for further Research

A potential weakness in this study is the fact that no specific academic literature on the application of the principle of proportionality in fundamental rights cases by the Maltese Constitutional court is available. Having been unable to draw from literature on the subject, I was limited to my own understanding and interpretation of the judgments analysed in this study. On the other hand, it was quite exciting to be able to tread unexplored waters and be able to contribute to a first discussion on proportionality analysis in fundamental rights judgments of the Maltese courts.

Originally, I had intended to study the application of the proportionality principle in English and French fundamental rights judgments in addition to those of the Maltese Constitutional court, the ECtHR and the CJEU. My main aim had been to study the two European supranational courts and three domestic courts which did not consider the principle of proportionality as a general principle of law. I aimed to test their application of proportionality against Alexy's traditional proportionality principle and study the implications of any differences in application which my research would yield. However, I realised that due to the volume of research that I had to carry out in relation to all five

[933] Ibid. Klatt M. & Meister M., 'Proportionality—a benefit to human rights?', (n 126), 708.

courts, I decided to reduce this to three, retaining the two supranational courts because they exert considerable influence on the fundamental rights laws of European countries, and focus on the Maltese system, which, apart from other reasons outlined above, is also the legal system which I have studied. I had chosen to include the English legal system because, similarly to the Maltese legal system, proportionality is an adopted principle. Traditionally the English courts apply the doctrine of reasonableness (also 'unreasonableness') in administrative law, whereby the Court will interfere with the decision of an authority affecting the right of an individual 'to enforce the boundaries of conferred power in accordance with what Parliament was taken to have intended'.[934] If the authority has acted within the boundaries of its discretion, the Court will not interfere with its decision.[935] However it seems that the reasonableness doctrine is being recognised as insufficient in protecting fundamental rights, following criticism by the ECtHR in *Smith & Grady* where it stated that the English court had not considered whether 'the interference with the applicants' rights answered a pressing social need or was proportionate to the ... aims pursued'.[936] Today the contemporary debate in English academic circles is whether proportionality should replace reasonableness and be applied in all cases, whether or not they concern fundamental rights,[937] or whether proportionality should be reserved for fundamental rights adjudication only,[938] or whether both principles should be retained but kept distinct.[939] Similarly, the French legal system has also had to adopt the principle of proportionality, which did not form part of its general principles of law.[940] Traditionally the principle has been applied in police laws and in the law on expropriation (known as *bilan coût-avantages*, translated as 'balance between the costs and the advantages).[941] More recently, the French Constitutional Council started applying the principle of proportionality following German constitutional case law and EU case law.[942] However, the French courts do not apply the

[934] Hickman T.R., 'The Reasonableness Principle: Reassessing Its Place in the Public Sphere', (March 2004), The Cambridge Law Journal, Vol. 63, No. 1 p. 170.
[935] Ibid.
[936] *Smith & Grady v. United Kingdom* (1999)29 E.H.R.R.439, par. 138
[937] Craig P., 'Proportionality, Rationality and Review', (2010), New Zealand Law Review, p. 265.
[938] Tuggart M., 'Proportionality, Deference, Wednesbury', (2008), New Zealand Law Review p. 423 - 482
[939] Daly P., *A Theory of Deference in Administrative Law,* (Cambridge University Press 2012), p. 186-219.
[940] See Schwarze J., (n 1) 680, who states that 'The proportionality principle has never been fully recognised as a general legal principle in French legal circles'.
[941] Conseil d'Etat 28 May 1971, (JN 78825).
[942] French Constitutional Council website, Cahier du Conseil Constitutionnel No. 22 (Dossier: Le Réalisme en Droit Constitutionnel), June 2007, at https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-controle-de-proportionnalite-exerce-par-le-conseil-constitutionnel, accessed on 28th May 2020.

principle of proportionality in its full three-stage application. [943] The first two stages of suitability and necessity are usually the main two limbs applied.[944]

A study of the conceptions of the proportionality principle as applied in the English and French courts in fundamental rights cases would contribute further to the debate whether Alexy's full three stage test is the most efficient adjudicative tool. Additionally, a study about the nature of the respective domestic courts and the manner in which they perceive themselves would yield a better understanding as to whether or not, the conception and application of the proportionality principle is linked with such perception. To give an example, in this study, I discovered that the manner in which the Maltese court perceives itself leans towards it being a protector of rights and striking down excessive burdens. On the other hand, the English courts seem to be more concerned with the boundaries of competence and whether or not to interfere with a decision of the government or other public authority alleged to violate a fundamental right. It would be interesting to discover whether this judicial attitude is changing in the field of fundamental rights and whether this has a bearing on the Courts' conception of proportionality, whether it is realistic to expect them to apply Alexy's proportionality principle and whether I would have retained my original hypothesis at the end of my research.

In this study I looked at proportionality purely as an adjudicative tool in fundamental rights judgments. A parallel study of proportionality analysis applied in quasi-judicial settings would contribute to a clearer understanding of the conception of proportionality in the respective legal systems. For example, within the Maltese legal system, the Ombudsman's recommendations following complaints of fundamental rights violations against the Maltese government would have thrown further light on the conception of proportionality in the Maltese legal system. This is also true of the EU Ombudsman who receives, *inter alia,* complaints regarding violations of fundamental rights allegedly committed by the EU administration. It would have been interesting to discover whether the principle of proportionality plays an important role in the opinions and

[943] Ibid French Constitutional Council website.
[944] Ibid French Constitutional Council website.

recommendations of the Maltese and the EU ombudsman in the area of fundamental rights.

Bibliography

(alphabetical)

Aarnio A., 'Taking Rules Seriously' in Maihofer W & Sprenger G (eds), Law and the States in Modern Times, Franz Steiner Verlag (1990)

Aleinifkoff T.A., 'Constitutional Law in the Age of Balancing', 96, The Yale Law Journal, (1987)

Alder J., 'Incommensurable Values and Judicial Review: the case of local government', Public Law Journal, (2001)

Alexy R., *A Theory of Constitutional Rights*, (transl. by Rivers J.), OUP (2004)

Alexy R., 'Balancing, Constitutional Review and Representation', International Journal of Constitutional Law, Volume 3, Number 4, OUP (2005)

Alexy R., 'Comments and Responses' in *Institutionalized Reason: The Jurisprudence of Robert Alexy,* Klatt M., (ed), OUP (2012)

Alexy R., 'Constitutional Rights, Balancing and Rationality', Vol. 16 Ratio Juris, (2003)

Alexy R., *'Formal principles: Some replies to critics',* International Journal of Constitutional Law (2014), Vol. 12 No. 3.

Alexy R., 'On Balancing and Subsumption: A Structural Comparison', Ratio Juris. Vol. 16 No. 4 (2003)

Alexy R., 'On the Structure of Legal Principles', Ratio Juris, Vol. 13 No. 3, (2000)

Alexy R., 'Proportionality and Rationality' in Jackson V.C., Tushnet M. (eds), *Proportionality, New Frontiers, New Challenges,* Cambridge University Press (2014)

Alexy R., 'The Construction of Constitutional Rights', (2010), <http://www.clb.ac.il/workshops/2009/articles/alexy.pdf>

Andreescu M., 'Principle of Proportionality: Criterion of Legitimacy in the Public Law', Lex et Scientia, No. XVIII, VOL. 1, 116, (2011).

Aquilina K., 'The European Court of Human Rights Case Law and Its Impact on Parliamentary Removal of a Judge in Malta', International Human Rights Law Review, 2014-11, Vol.3 (2).

Aquilina K., 'The Legislative Development of Human Rights and Fundamental Freedoms in Malta: A Chronological Appraisal,' in Martinez Gutiérrez NA (ed) *Serving the Rule of International Law: Essays in Honour of Professor David Joseph Attard,* Mare Nostrum Publications (2009).

Aquilina K., 'The Nature and Sources of the Maltese Mixed Legal System: A Strange Case of Dr Jekyll and Mr Hyde?, Comparative Law Review, Vol. 4, No.1 (2013).

Aquilina K., 'The Parliament of Malta versus the Constitution of Malta: parliament's law-making function under section 65(1) of the Constitution', Commonwealth Law Bulletin, (2012) Vol. 38, No. 2, June.

Arai-Takahashi Y., Sauter, W., 'Proportionality in EU Law: A Balancing Act?' *Cambridge Yearbook of European Legal Studies 15,* (2013)

Arai-Takahashi Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* Intersentia (2002)

Ávila H, *Theory of Legal Principles,* Springer (2007)

Barak A, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press (2012)

Bates E., 'The Birth of the European Convention on Human Rights,' in Christoffersen J & Madsen R M, *The European Court of Human Rights between Law and Politics,* OUP (2011)

Benvindo J Z, *On the Limits of Constitutional Adjudication,* (Springer 2010)

Borg. T., 'The Constitution and the European Convention on Human Rights – Conflicts, Similarities and Contrasts', GHSL Online Law Journal, at http://lawjournal.ghsl.org/viewer/321/download.pdf

Cameron I., "Competing Rights' in de Vries S. et al., *The Protection of Fundamental Rights in the EU after Lisbon,* Hart Publishing (2015)

Christoffersen J., *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Nijhoff Publishers (2009)

Cremona JJ., *Human Rights Documentation in Malta*, Malta University Press (1966).

Cremona JJ., *Selected Papers,* PEG Ltd (2002).

Costa JP, "On the Legitimacy of the European Court of Human Rights' Judgments", European Constitutional Law Review 7 (2011)

Costa-Neto J., 'Rights as Trumps and Balancing', Revista Direito GV, São Paulo 11(1), (2015)

Craig P., 'Proportionality, Rationality and Review', New Zealand Law Review (2010)

Craig P. & De Burca G., *EU Law: Text, Cases and Materials,* (OUP 2012)

Daly P., *A Theory of Deference in Administrative Law,* Cambridge University Press (2012)

Debatisse M., 'EEC Organisation of the Cereal Market: Principles and Consequences', (1981), Centre for European Agricultural Studies, Occasional Paper No. 10, WYE College

De Burca G., 'The Principle of Proportionality in EC Law', Yearbook of European Law 13 (1993)

Deflem M., 'International Policing in Nineteenth Century Europe: The Police Union of German States, 1851-1866', International Criminal Justice Review, Vol. 6., (1996).

Dworkin R., *Is Democracy Possible Here?* Princeton University Press (2008)

Dworkin R., *Freedom's Law,* OUP (1996)

Dworkin R., *Taking Rights Seriously,* Bloomsbury (1977)

Dworkin R., 'Rights As Trumps', in *Theories of Rights,* (ed) Waldron J., OUP (1984)

Ellis E., (ed), *The Principle of Proportionality in the Laws of Europe*, Hart (1999)

Enders C, 'The Right to have Rights: The concept of human dignity', Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD), 2(1): 1-8 Jan-Jun (2010)

Endicott T., 'Proportionality and Incommensurability' Legal Research Paper Series, Paper No 40/2012, (Revised 2013)

Engle E., 'The History of the General Principle of Proportionality: An Overview', (2012) SSRN <http://papers.ssrn.com/author_id=879868>

Foster S., *Human Rights and Civil Liberties,* Pearson (2011)

Gerrards J., 'How to improve the necessity test of the European Court of Human Rights', International Journal of Constitutional Law Vol. 11 No. 2, (2013)

Greer S., 'Constitutionalizing Adjudication under the European Convention on Human Rights', Oxford Journal of Legal Studies, Vol. 23, No. 3 (Autumn, 2003)

Grimm D., in 'Proportionality in Canadian and German Law', 57 University of Toronto Law Journal, (2007)

Habermas J., *Between Facts and Norms*, (trans. Rehg W.,), Polity Press (1996)

Habermas J., 'Reply to Symposium Participants, Reply to Symposium Participants, Benjamin N. Cardozo School of Law', 17 Cardozo L Rev 1477 (1995)

Harbo T., *The Function of Proportionality Analysis in European Law*, Brill Nijhoff (2015)

Harbo T, 'The Function of the Proportionality Principle in EU Law' European Law Journal, Vol. 16, No. 2, (2010)

Harrison B. et al, Introductory Economics, (Macmillan 1992),

Hickman T.R., 'The Reasonableness Principle: Reassessing Its Place in the Public Sphere', The Cambridge Law Journal, Vol. 63, No. 1, (March 2004)

Jacobs FG., Recent Developments in the Principle of Proportionality in European Community Law in Ellis E., (ed), *The Principle of Proportionality in the Laws of Europe*, Hart (1999)

Kahn PW, 'The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell', (1987) Vol. 97 The Yale Law Journal

Klatt M. & Meister M., 'Proportionality—a benefit to human rights? Remarks on the I·CON controversy', *International Journal of Constitutional Law*, Volume 10, Issue 3 (July 2012)

Klatt M. & Meister M., *The Constitutional Structure of Proportionality,* OUP (2012)

Kommers D P, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press (1997)

Kremnitzer M., *et al, Proportionality in Action*, Cambridge University Press (2020)

Kumm M., 'Is the structure of Human Rights Practice Defensible?*', Proportionality, New Frontiers, New Challenges*; (eds.) Jackson V.C. *et al,* Cambridge University Press (2017)

Kumm M., 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement', in Pavlakos George (ed) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy,* Hart Publishing (2007)

Kumm M. & Comella V F., 'The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union', International Journal of Constitutional Law, Volume 3, Issue 2-3, (2005)

Kumm M. & Walen A.D., 'Human Dignity and Proportionality' in *Proportionality and the Rule of Law*, (eds) Huscroft G. et al, Cambridge University Press (2014)

Lepsius O, 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act', German Law Journal, Vol. 7, No. 9

Letsas G., *A Theory of Interpretation of the European Convention on Human Rights,* OUP (2007)

Luterán M., 'The Lost Meaning of Proportionality*',* in *Proportionality and the Rule of Law*, Huscroft G. et al. (eds), Cambridge University Press (2014)

Madsen R M, 'The Protracted Institutionalisation of the Strasbourg Court: Legal Diplomacy to Integrationalist Jurisprudence', in Christoffersen J & Madsen R M, *The European Court of Human Rights between Law and Politics,* OUP (2011)

McBride J, 'Proportionality and the European Convention on Human Rights' in Ellis E. (ed), *Proportionality in the Laws of Europe*, Hart Publishing (1999)

McHarg A., 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', The Modern Law Review, Vol. 62, No. 5 (1999)

Möller K, 'Balance and the Structure of Constitutional Rights', 5 International Journal of Constitutional Law, (2007)

Möller K, 'Proportionality and Rights Inflation', in Huscroft G. et al. (eds), *Proportionality and the Rule of Law*, Cambridge University Press (2014)

Möller K., 'The Global Model of Constitutional Rights: Introduction', LSE Law, Society and Economy Working Papers 4/2013 London School of Economics and Political Science Law Department (2014)

Moshe C, & Porat I., 'American balancing and German proportionality: The historical origins', Vol. 8, No. 2, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, (2010)

Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59, American Journal of Criminal Justice (2011)

Mowbray A., 'Subsidiarity and the European Convention on Human Rights' *Human Rights Law Review*, Volume 15, Issue 2 (June 2015)

Pace C, 'Robert Alexy's A Theory of Constitutional Rights critical review: key jurisprudential and political questions', Working Paper 2012/01, 'The Landscape and Isobars of European Values in Relation to Science and New Technology', funded by the "7th Framework Programme " of the European Commission (Refª SiS-CT-2009-230557), <http://repositorio.iscte.pt/bitstream/10071/3883/1/DINAMIA_WP_2012-01.pdf, >

Pavlakos G., 'Between Reason and Strategy: Some Reflections on the normativity of Proportionality', in *Proportionality and the Rule of Law*, Huscroft G. et al. (eds) Cambridge University Press (2014)

Petzold, 'The Convention and the Principle of Subsidiarity' in Macdonald, Matscher & Petzold (eds) in *The European System for the Protection of Human Rights,* Martinus Nijhoff (1993)

Pirker B, *Proportionality Analysis and Models of Judicial Review,* Europa Law Publishing (2013)

Poscher R., 'Insights, Errors and Self-Misconceptions of the Theory of Principles', Ratio Juris, Vol. 22 No. 4, (2009)

Pulido C B, 'The Rationality of Balancing', (Universitat Pompeu Fabra), http://www.upf.edu/filosofiadeldret/_pdf/bernal_rationality_of_balancing.pdf

Rivers J., 'Proportionality and discretion in international and European law' in Tsagourias N. (ed) *Transnational Constitutionalism,* Cambridge University Press (2007)

Rivers J., 'Proportionality and Variable Intensity of Review', Cambridge Law Journal 177, (2006)

Said Pullicino J., 'The Effect of the EHCR on the Legal and Political Systems of Member States – Malta', in *Fundamental rights in Europe : the ECHR and its member states, 1950-2000, (eds.)* Blackbur R., & Polakiewicz, J., OUP (2001).

Saurugger S & Terpan F., *The Court of Justice of the European Union and the Politics of Law,* Palgrave (2017)

Sauter, W., 'Proportionality in EU Law: A Balancing Act?' Cambridge Yearbook of European Legal Studies 15 (2013)

Schauer F, 'Balancing, Subsumption, and the Constraining Role of Legal Text, a Paper prepared for the Symposium on Rights, Law and Morality: Themes from the Legal Philosophy of Robert Alexy', SSRN http://ssrn.com/abstract=1403343, (2009)

Schauer F., 'Proportionality and the Question of Weight', in *Proportionality and the Rule of Law*, (eds) Huscroft G. et al, Cambridge University Press (2014)

Schlink B., 'Proportionality in Constitutional Law: Why Everywhere but Here?', Vol. 22, Duke Journal of Comparative and International Law (2012)

Spielmann D., "Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?", (2013) at <http://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf,> (Speech)

Stelzer R J., *The Prospects for 'Proportionality' as a Generic and Universal Legal Principle in Public International Law,* GVO printers & designers Ede NL (2011)

Stone Sweet A., & Matthews J., 'Proportionality Balancing and Global Constitutionalism', 47 Columbia Journal of Transnational Law, 73 (2008-2009)

Tridimas T, *General Principles of EU Law,* OUP (2007)

Tridimas T., 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny', in Ellis E., (ed), *The Principle of Proportionality in the Laws of Europe*, (Hart 1999)

Tsakyrakis S, 'Proportionality: An Assault on Human Rights?',7 International Journal of Constitutional Law (2010)

Tsarapatsanis D., 'The Margin of Appreciation doctrine: a low-level institutional view', Legal Studies, Vol. 35 No. 4 (2015)

Tuggart M., 'Proportionality, Deference, Wednesbury', New Zealand Law Review (2008)

Urbina F.J., *A Critique of Proportionality and Balancing,* Cambridge University Press (2017)

Waldock H., 'The Effectiveness of the System set up by the European Convention on Human Rights', Human Rights Journal (1980)

Webber G., 'On the Loss of Right', in *Proportionality and the Rule of Law*, Cambridge University Press (2014)

Webber G, 'Proportionality and Absolute Rights', in Jackson V., & Tushnet M., (eds), *Proportionality, New Frontiers, New Challenges*, Cambridge University Press (2017)

Webber G., 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship', (2010) 23 Canadian Journal of Law & Jurisprudence

Williams A, 'EU Human Rights Policies: A Study in Irony', OUP (2012)

Yowell P., 'A Critical Examination of Ronald Dworkin's Theory of Rights', 52 American Journal of Jurisprudence 93 (2007)

Zetterquist O., 'The Charter of Fundamental Rights and the European Res Pubblica' in di Federico G., (ed), *The EU Charter of Fundamental Rights - From Declaration to Binding Instrument,* Springer (2011)

Collections

Kilkelly U., 'The Right to Respect for Private and Family Life', Human Rights Handbooks, No. 1, (2001)

Science and Technique of Democracy: Constitutional Courts and European Integration, Collection 36, Council of Europe Publishing (2005)

Questionnaire

'*The Criteria of the Limitation of Human Rights in the Practice of Constitutional Justice*' prepared following the Conference of European Constitutional Courts at the Council of Europe, Strasbourg, held on 5th March 2004