Procedural Rationality: Giving Teeth to the Proportionality Analysis

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Human rights protection – Proportionality – Deference – Procedural rationality – Process-review – Interplay national courts and Strasbourg court

Introduction

Proportionality has become a dominant principle of constitutional adjudication in most legal systems across Europe and the Commonwealth.[1] Nonetheless, the constitutional debate instigated by proportionality review has not yet been settled to a satisfying degree. This debate concerns the role of the court as a constitutional lawmaker in balancing rights and public interests. Opponents argue that courts, when operating a proportionality analysis, cross the line between legal and opportunity review. Proportionality review comes down to a balance of interests and values, which lies at the heart of the political function.[2] As a reaction, courts often display a reserved attitude. This, in turn, is criticized for failing to restrain the legislature from enacting arbitrary legislation.[3]

In order to understand the implications of the proportionality test to constitutional adjudication, it is helpful to start from Stone Sweet and Mathews' description of proportionality analysis as an argumentation framework, i.e., a scheme for reasoning that gives coherence to adjudication by developing stable procedures

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[1] *See* for an overview A. Stone Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism', 47 *Columbia Journal of Transnational Law* (2008) p. 98 or S. Tsakyrakis, 'Proportionality: An Assault on Human Rights', 7 *ICON* (2009) p. 468.

[2] Stone Sweet and Mathews, *supra* n. 1, p. 88 summarize the argument as follows : 'When it comes to constitutional adjudication, balancing can never be dissociated from lawmaking.' *See*, however, J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights* (Martinus Nijhoff Publishers 2009) p. 202-203 on balancing as a typical legal function.

[3] Stone Sweet and Mathews, *supra* n. 1, p. 77.

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for decision making and forcing all relevant actors (law makers, the executive, the courts, litigants) to adopt this scheme.[4] In the UK, the proportionality analysis was welcomed precisely because it provided for a more comprehensive instrument than the traditional 'Wednesbury unreasonable test.'[5] The European argumentation scheme applied in proportionality analysis, rooted in German administrative and constitutional law, generally involves four steps: the contested measure must be 1) put in place to ensure a legitimate objective, 2) suitable, i.e., in a causal relation with the policy objective, 3) necessary, i.e., not curtailing rights more than is necessary given alternative options and 4) proportional, i.e., even in the absence of a valid alternative, the benefits must outweigh the costs incurred by the infringement of the right (proportionate in its strict sense).[6]

The proportionality analysis can only serve as a proper instrument for judicial adjudication with respect to the government's discretionary power, if each step is sufficiently justified and elaborated.[7] It should be clear which circumstances are relevant in the balancing exercise and why certain interests outweigh others in a specific case.[8] In practice, however, these steps are often too vague to settle the litigation in a gratifying way. Therefore, national and European courts developed additional structuring criteria in order to balance private and public interests, e.g., the extent to which both the government and the individual acted in good faith, the foreseeability of the government's action and the legitimacy of the individual's expectations.[9] The most significant flaw in the current approach to the proportionality test, however, concerns the assessment of the discretion left to the public authorities.[10] While such assessment determines the detail in which each step in

[4] Stone Sweet and Mathews, *supra* n. 1, p. 89-90 and 161.

[5] N. Blake, 'Importing Proportionality: Clarification or Confusion', 13 *EHRLR* (2002) p. 19, at p. 26; M. Elliott, 'Proportionality and Deference: The Importance of a Structured Approach', in C. Forsyth et al. (eds.), *Effective Judicial Review. A Cornerstone of Good Governance* (Oxford University Press 2010) p. 266. *See also* A.D.P. Brady, *Proportionality and Deference under the UK Human Rights Act. An Institutionally Sensitive Approach* (Cambridge University Press 2012) p. 11-13 and T. Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010) p. 261.

[6] The ECtHR only states that the measure must 1) pursue a legitimate purpose and 2) be necessary in a democratic society. The latter argument, however, comprises the three last steps in the general argumentation framework. For a similar scheme in the proportionality test by the UK courts, *see* Brady, *supra* n. 5, p. 7 and 53-59.

[7] *See also* R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) p. 100-109.

[8] Van Drooghenbroeck, *La proportionnalité dans le droit de la convention européenne des droits de l'homme* (Brussels, Bruylant 2001) p. 15 and 284.

[9] *See*, e.g., the ECtHR 23 Oct. 1997, Case No. 21319/93; 21449/93; 21675/93, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society* v. *UK,* ECtHR 27 April 2004, Case No. 62543/00, *Gorraiz Lizaragga* v. *Spain* and ECtHR 11 Feb. 2010, Case No. 33704/04, *Sud Parisienne de Construction* v. *France.*

[10] Gerards and Senden remarked that the ECtHR sometimes even includes an appreciation of the member state's margin in the definitional stage. They consider this phenomenon to be a conse-

the argumentation scheme is elaborated, the scope of deference often rests upon vague or incoherent criteria or simply mirrors the margin left by the European Court of Human Rights (ECtHR) to the national authorities.

The question then arises as to how the proportionality analysis can be strengthened in matters in which the ECtHR leaves a wide margin of appreciation for the national authorities, including the courts, which, in turn, seem to defer an equally wide margin to the legislative and executive authorities. For the purpose of this contribution, we mainly focus on the approach of the ECtHR and the practice of the British Supreme Court and the Belgian and German Constitutional Courts. However, other constitutional courts will be referred to as exemplifying the general tendencies. In this paper, we will first provide evidence of the deficiencies in the proportionality review practices: the argumentation framework provided for by the proportionality principle may fail to serve as a tool for constitutional adjudication, due to the deferential stance taken by the court, while at the same time courts do not apply a sufficiently coherent or adequate approach for deciding in which cases or circumstances a wide discretion should or should not be conferred to the government. However, even when courts rightly confer a wide discretion on the national authorities, it is important to draw the line between discretion and arbitrary decision making. Therefore, we will argue that the requirement of procedural safeguards in the decision-making process, denominated here as 'procedural rationality', is a way to deal with constitutional adjudication in cases of wide discretion. In this regard, we take special account of the interplay between the ECtHR's case-law and the constitutional courts' approaches to the intensity of the proportionality test.

The structure of the proportionality test is identical for the review of both legislation and administrative acts. Nevertheless, when applying proportionality and deference, there are arguments for an 'institutionally sensitive' approach, since the underlying assumptions will be affected by the institutional features of the decision-maker whose acts are challenged.[11] For example, the legislature will generally enjoy wider discretion given its democratic credentials.[12] Our argument, however, is that while procedural rationality is more easily applied to executive interference, it should equally constrain the margin of appreciation left to the legislature, for the arguments developed below: the democratic credentials of the legislature rest upon assumptions of expertise and informed debate, which are laid bare by a procedural rationality review.

quence of the Court's tendency towards the bifurcation of the scope of conventional rights and the legitimacy of limitations on these rights. J. Gerards and H. Senden, 'The structure of fundamental rights and the European Court of Human Rights', *ICON* (2009) p. 647-648.

[11] Brady, *supra* n. 5, p. 2.

[12] Brady, *supra* n. 5, p. 109.

One preliminary remark regarding the demarcation of our study needs to be made. While we believe that our argument is applicable to the use of proportionality in general, we limit this study to fundamental rights cases for pragmatic reasons. Therefore, in this contribution, our study is limited to the case-law of the ECtHR and the national courts in human rights issues, leaving aside the case-law of the Court of Justice of the European Union.

Discretion as an obstacle to the proportionality analysis

National and international courts' practices refute the suggestion advanced by critics that the application of a proportionality test necessarily results in a disregard for the legislature's democratic legitimacy. All courts applying the proportionality test have elaborated a conception of deference for reasons of subsidiarity (in the case of international courts) or justified by the democratic legitimacy or expertise of the legislature. The intensity of the proportionality test differs, depending on the interference with rights, the policy area and the weight of the public interest. E.g., the German Constitutional Court contends that very weighty reasons are to be provided when measures infringe upon the essence of a fundamental right. Therefore, Lord Walker of the British House of Lords defined proportionality as a 'flexi-principle'.[13] By adjusting the intensity of scrutiny when applying the proportionality test, courts could combine a control against arbitrary legislation while refraining from impeding on the legislature's domain. However, an analysis of the case-law concerning the proportionality test displays that the general argumentation framework does not compel courts to provide for an elaborated scheme of reasoning when they have decided in favour of a deferential stance. The problem does not so much arise at the first step, where decision-makers usually enjoy deference as to the choice of which goals to pursue, because of the normativity of this choice.[14] Deference may, however, in particular hinder the full assessment of the third and fourth steps in the argumentation scheme which rely on more empirical findings, namely the necessity test and the strict proportionality test.

Does the necessity test imply a least onerous test?

It is disputed whether courts include in the necessity test the requirement to select the least intrusive measure if several options are available, called the *least onerous test*.

[13] *See* House of Lords, *R (ProLife Alliance)* v. *British Broadcasting Corporation* [2004] 1 AC 185, para. 138 (quoting *Fordham's Judicial Review Handbook*).

[14] Brady, *supra* n. 5, at p. 71-73. For this typology of deference (or 'discretion'), *see* R. Alexy, *supra* n. 7, at p. 393-415.

At the European level, the ECtHR in some cases suggests that not choosing the least onerous measure does not necessarily entail a violation of the ECHR[15] or, more bluntly, explicitly rejects the test.[16] In other circumstances the ECtHR does apply a strict necessity test, requiring the least onerous measure to be taken,[17] or demands that less onerous measures should at least be considered, e.g., in the case of general and automatic or other severe restrictions of fundamental rights.[18] The fact that the ECtHR does not always apply the least onerous test might be explained by the fact that the Court only provides for minimum protection.[19] Hence, the Court only ascertains whether the option chosen by the member states is compatible with the Convention, but the scrutiny as to whether less intrusive measures were provided falls within the ambit of the domestic courts. Alternatively, the ECtHR's approach towards the least onerous test might be the result of the Court's margin of appreciation doctrine.[20] The Court might appreciate that domestic courts are better placed to examine the national authorities' choice for a given measure and, hence, provides them with a margin to examine the different options on their own terms. Whichever of the above two reasons underpins the Court's approach, it implies that the scrutiny of the public authorities' selection of a given measure depends on the willingness of domestic courts to apply the least onerous test.

An analysis of the case-law of the national constitutional and supreme courts shows that these courts do not necessarily conduct a stricter test. The examples below reveal an incoherent use of the least onerous test, allowing the court to refrain from scrutiny on account of deference to the legislature.

The UK Supreme Court and formerly the UK House of Lords did not include the least onerous test in its proportionality review. In the first place, the UK courts tend to define the objective of a measure very narrowly, so as to exclude alternative measures.[21] More generally, the House of Lords did not examine whether the measures impairing fundamental rights were the least intrusive measures. Instead,

[15] ECtHR 29 July 2004, Case No. 59532/00, *Blečič* v. *Croatia*, para. 67.

[16] ECtHR 12 Feb. 1985, Case No. 9024/80, *Colozza* v. *Italy*.

[17] *See* Hickman, *supra* n. 5, at p. 122-123: when Art. 2(2), Art. 6(1) and Art. 15(1) are at stake and 'in particular contexts, such as restrictions on the right of defence and the use of force against persons deprived of their liberty.'

[18] ECtHR 6 Oct. 2005, Case No. 74025/01, *Hirst (no 2)* v. *the UK,* ECtHR 24 Nov. 2005, Case No. 49429/99, *Capital Bank AD* v. *Bulgaria,* ECtHR 1 April 2010, Case No. 57813/00, *S.H.* v. *Austria*, ECtHR 12 Feb. 2013, Case No. 29617/07, *Vojnity* v. *Hungary*.

[19] Christoffersen, *supra* n. 2, at p. 132-135.

[20] J. Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', 29 *Netherlands Quarterly of Human Rights* (2011) p. 333 and Van Drooghenbroeck, *supra* n. 8, at p. 192 and 218. Also Hickman, *supra* n. 5, at p. 123-124.

[21] Hickman, *supra* n. 5, at p. 182-184.

these judges only scrutinized whether the measures were rationally connected to the legislative objective and were not more than necessary to accomplish the objective.[22] In the *Marcic* case, Lord Hoffmann implicitly rejected the least onerous case on the grounds of judicial deference towards public bodies.[23]

Several constitutional courts have applied the least onerous test in a number of cases. The German, the Spanish and the Belgian Constitutional Courts provide for examples where they accepted the least onerous test in principle.[24] This for instance has led to the invalidation of legislation concerning the search of cells in the inmate's absence in order to prevent drug trafficking[25] and the dissolution of a social housing lease without prior judicial interference.[26] In other cases, the Courts, while accepting the test, find no evidence that other, less intrusive measures existed that resulted in the desired outcomes.[27] At the same time, the case-law suggests that, depending on the context, the legislature will be provided with a margin to appreciate the necessity of the measures. Moreover, the general acceptance of the least onerous test as part of the necessity principle does not mean that those courts will in each case scrutinize whether other equally effective alternatives were provided or considered.

The Spanish Constitutional Court explicitly limits the use of the least onerous test on the grounds of deference towards the legislature. For example, with regard to the criminalization of certain actions, the Spanish Constitutional Court points out that it should scrutinize such legislation with caution because of the margin reserved for the legislature in penal policies.[28] The observation that less intrusive alternatives are available does not suffice to strike the measure down as disproportionate. The Court maintains that if it would accept that other, less intrusive alternatives exist, this would result in the unconstitutionality of legislation and the Court would risk usurping the competence of the legislature to make political,

[22] These are the *de Freitas* criteria developed by the Privy Council, *de Freitas* v. *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69. *See*, e.g., *House of Lords, R (Daly)* v. *Secretary of State for the Home Department* [2001] 2 AC 532.

[23] *Marcic (Respondent)* v. *Thames Water Utilities Limited (Appellants)* [2003] UKHL 66.

[24] *See*, e.g., Spanish Constitutional Court No. 70/2002, 3 April 2002 or Spanish Constitutional Court No. 55/1996, 28 March 1996; Belgian Constitutional Court, No. 20/93, 4 March 1993; No. 16/2005, 19 Jan. 2005; No. 101/2008, 10 July 2008.

[25] Spanish Constitutional Court, No. 89/2006, 27 March 2006, FJ 5.

[26] Belgian Constitutional Court, No. 101/2008, 10 July 2008. For other examples, *see* No. 20/93, 4 March 1993; No. 16/2005, 19 Jan. 2005.

[27] BVerfGE, 1 BvR 357/05, 15 Feb. 2006. In the *smoking ban* case the BVerG stated that less intrusive measures had already been tried and found not successful, BVerfGE 1 BvR 3262/07, 30 July 2008. In the *game of chances* case the Belgian Constitutional Court expected the applicant to provide evidence of other measures, Belgian Constitutional Court, No. 52/2000, 3 May 2000; No. 100/2001, 13 July 2001.

[28] Spanish Constitutional Court, No. 55/1996, FJ 6.

economic and opportunity considerations.[29] Therefore, the Court maintains that in such cases the existence of alternatives will only result in finding the measure disproportionate if it is clear that those measures are obviously less intrusive and manifestly equivalent to the applied measures.[30] Thus, the existence of less intrusive alternatives will be considered as an additional factor to other elements of necessity and suitability, such as the existence of scientific evidence or policy coherence.[31] Moreover, in several cases the Spanish Constitutional Court will not undertake the least onerous test, but simply scrutinize whether the measures are not unsuitable to attain the objective.

The Belgian Constitutional Court also underlines that the least onerous test is only one factor amongst others in order to assess the proportionality of a measure. In some cases, the Court even states that as long as a measure is proportional *stricto sensu*, it cannot require that the legislature opts for a less onerous alternative.[32] According to the court, it is not the court's responsibility to assess whether the aim could have been attained through other measures,[33] leaving this to the legislature's discretion,[34] because it does not dispose of an appreciation competence equal to the legislature.[35] The court's deferential stance may be due to the immeasurability of alternatives. Also, the application of the necessity test requires some insight into the future effects of each alternative, while the court does not necessarily dispose of sufficient data for this kind of prognosis.[36]

The German Constitutional Court's case-law also shows a diverse application of the least onerous test. The Court emphasized that the legislature has some margin to appreciate whether other measures are equally effective.[37] For example, with regard to criminal law, the Court held that the legislature has a considerable margin of appreciation to decide on the necessity of criminalizing certain behaviour.[38] Concerning the choice of measures to limit aircraft noise, the German Constitutional Court contended that the public authorities should be accorded an organizational margin, enabling them to select the means they consider most

[29] Spanish Constitutional Court, No. 60/2010, 7 Oct. 2010, FJ 14 or Spanish Constitutional Court, No. 332/2005, 13 Sept. 2005, FJ 6.

[30] Spanish Constitutional Court, No. 161/1997, FJ 11.

[31] Spanish Constitutional Court, No. 136/1999, 20 July 1999, FJ 23.

[32] Belgian Constitutional Court, No. 37/98, 1 April 1998; No. 35/2003, 25 March 2003.

[33] Belgian Constitutional Court, No. 23/89, 13 Oct. 1989.

[34] *See also* W. Van Gerven, 'The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe', in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart Publishing 1999) p. 55.

[35] Belgian Constitutional Court, No. 121/2009, 16 July 2009.

[36] Alexy, *supra* n. 7, at p. 399.

[37] E.g., BVerfGE, 2 BvR 2031/92, 9 March 1994, para. 124 (*Cannabis* case) or BVerfGE, 1 BvR 2181/98, 11 Aug. 1999, para. 74 (*Transplantation* case).

[38] BVerfGE, 2 BvR 2031/92, 9 March 1994, para. 126.

fit to tackle the disturbance. In this case, the Constitutional Court did not examine whether a less intrusive measure was provided.

Can the public interest be outweighed by arguments of private interest?

The last step in the proportionality analysis entails a balancing of public and private interests (proportionality in its strict sense). To apply such a test, judges will have to accord relative weight to the conflicting public interest and rights and assess the degree to which the measure infringes the fundamental rights concerned.[39] This implies that where a court considers that the fundamental right in question has been severely impaired, the measure must serve an important objective. Therefore, much depends on the court's assessment of the importance of the public authority's justification for the measure and the seriousness of the infringement.[40] The degree to which courts will be deferential to the views of the legislature on this point will therefore have a considerable impact on the outcome of the proportionality analysis. Clayton remarks in that respect: 'if a court is excessively deferential to the views of a public authority where it overrides fundamental rights, the balancing exercise becomes severely disturbed.'[41]

Many courts display a compliant attitude regarding arguments of public interest. While the ECtHR states that, e.g., financial considerations *as such* do not justify infringements of fundamental rights,[42] the Belgian Constitutional Court readily accepts considerations of this nature, even in matters which, according to the Court, require exceptional circumstances or compelling motives of general interest, for example when the legislature interferes in the outcome of judicial proceedings.[43] A striking example of the deferential approach of the British Supreme Court, even towards authorities other than the legislature, can be seen in cases

[39] Alexy, *supra* n. 7, at p. 50-56.

[40] The assessment of public interest in balancing exercises was among the reasons why Tsakyrakis rejected balancing as an appropriate manner to scrutinize human rights infringement. He argues that balancing obscures the moral assessment which lies at the heart of human rights issues, Tsakyrakis, *supra* n. 1, at p. 468.

[41] R. Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle', *EHRLR* (2001) p. 516.

[42] E.g., ECtHR 28 Oct. 1999, Case No. 24846/94; 34165/96; 34173/96, *Zielinski and Pradal and Gonzalez and Others* v. *France,* para. 59, ECtHR 20 Nov. 1995, Case No. 17849/91, *Pressos Compania Naviera SA* v. *Belgium,* ECtHR 23 Oct. 1997, Case No. 21319/93; 21449/93; 21675/93, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society* v. *UK,* ECtHR 27 April 2004, Case No. 62543/00, *Gorraiz Lizaragga* v. *Spain* and ECtHR 11 Feb. 2010, Case No. 33704/04, *Sud Parisienne de Construction* v. *France*.

[43] Belgian Constitutional Court, No. 186/2009, 26 Nov. 2009. The Belgian Constitutional Court is, however, not always coherent. *See*, e.g., the different weight given to the public interest in the cases concerning the election district BHV No. 90/94, 22 Dec. 1994 *versus* No. 73/2003, 26 May 2003.

where it scrutinizes the infringement of the right to family life by local authorities' possession orders, i.e., a demotion order by the local community as a result of the anti-social behaviour of a tenant. The Supreme Court agreed with the Secretary of State's argument that the 'local authority's aim in wanting possession should be a "given", which does not have to be explained or justified in court.'[44] The Court accepted that unencumbered property rights enjoyed by a public body or local authority were a 'real weight' in the proportionality test.[45] This contrasts with the even very wide appreciation of 'public interest' in the ECtHR case-law. The Strasbourg Court demands protection against arbitrariness by the public authorities and specifically against 'a legal discretion granted to the executive to be expressed in terms of an unfettered power.'[46]

From this perspective, it is interesting to scrutinize domestic cases where infringements of fundamental rights are justified on the grounds of a security threat to the general public, e.g., terrorist threats or crime prevention. In general, the public interest arguments have a strong moral appeal as the limitations of fundamental rights are based on the protection of other citizens' lives and property. Moreover, the assessment of a threat to national security is difficult to prove and therefore the decision-maker is given some 'empirical deference', i.e., deference as to the estimation of the impact of measures in circumstances of uncertainty, requiring some guesswork.[47] However, at the same time, such infringements regularly touch upon sensitive fundamental rights areas such as the protection of personal data, the right to physical integrity, fair trial and detention or extradition issues. The ECtHR provides in general for a wide margin for member states to balance the public security threat with fundamental rights.[48] Do national constitutional courts apply the same deference, or provide for a closer scrutiny of the legitimacy of such public security claims?

In general, constitutional and supreme courts readily accept public safety and security concerns proposed by public authorities as legitimate objectives with a considerable weight, without scrutinizing the danger that crime or terrorism threats actually pose. For example, the Belgian Constitutional Court easily accepted that infringements upon the right of the confidentiality of mail could be limited in order to fight criminality effectively.[49] Even though mail confidentiality is entrenched in the Belgian Constitution as an absolute right, the Court accepted such a vague policy objective as being sufficient to enable serious limitations to this

[44] UK Supreme Court, *Manchester City Council* v. *Pinnock* [2010] *UKSC* 45, 3 Nov. 2010, para. 53.

[45] Ibid., para. 54.

[46] ECtHR 12 Jan. 2010, Case No. 4158/05, *Gillan and Quinton* v. *United Kingdom*, para. 77.

[47] Brady, *supra* n. 5, p. 69-70.

[48] *See*, e.g., ECtHR 26 March 1987, Case No. 9248/81, *Leander* v. *Sweden*, para. 59.

[49] Belgian Constitutional Court, No. 202/2004, 21 Dec. 2004.

right. The UK Supreme Court was confronted with the question whether the right to equality of arms could be limited in favour of public security concerns resulting from terrorist threats.[50] Lord Hope argued that security threats were a sufficiently legitimate concern without scrutinizing explicitly whether those threats were substantiated in the case in question.[51] In other cases as well, the UK Supreme Court easily accepts the Home Secretary's assessment as to whether a public security threat exists.[52]

The German Constitutional Court, in contrast, takes a less deferential approach towards such public security or safety cases, especially where they touch upon the essence of fundamental rights. The Court argued that the Land North Rhine-Westphalia could not sufficiently substantiate an imminent terrorist threat to justify a preventive police regulation that seriously impaired the constitutional right of self-determination of personal data.[53] The Court dismissed the contention that a general threat after the 9/11 terrorist attacks and consequent foreign policy tensions satisfied the requirement of a clear danger justifying an infringement of fundamental rights.[54] Similarly, in the Data Retention Case, the German Constitutional Court argued that the proportionality principle required that the legal rules concerning data storage should provide for a strong protection of the fundamental rights affected, given the serious interference with the right to the privacy and self-determination of personal data.[55] The Court even provided a strong example of an absolute limitation of fundamental rights' infringements for public safety reasons in the *Hijack* case.[56] The Aviation Security Act allowed that a hijacked aircraft could be shot down if it would pose a risk to safety on the ground. The Constitutional Court made a distinction between aircraft with only hijackers on board, and those with innocent passengers. It refused to enter into a balancing exercise between the public interest argument and fundamental rights in the second case. The Court contended that the public interest to ensure safety on the ground cannot result in treating individuals as mere 'objects of state action'.[57] The interest of the protection of the majority cannot result in sacrificing a minority.

Therefore, while constitutional courts might be highly deferential to public authority's justification of measures, especially in cases concerning the public

[50] UK Supreme Court, *Tariq* v. *Home Office* [2011] *UKSC* 35.

[51] *Ibid.*, Lord Hope, para. 71. In this case the impairment of the right of equality of arms resulted from a refused clearance on the basis that the brother of the defendant was under anti-terrorism scrutiny.

[52] *See* Brady, *supra* n. 5, at p. 177-178 for other case-law.

[53] BVerfGE, 1 BvR 518/02, 4 April 2006, para. 205.

[54] Ibid., para. 147.

[55] BVerfG, 1 BvR 256/08, 2 March 2010, para. 227

[56] BVerfGE, 1 BvR 357/05, 15 Feb. 2006.

[57] Ibid., para. 34.

safety and security of citizens and the country, certain constitutional courts also limit such a deferential position where the interference touches upon the essence of the right or upon human dignity. In the German Hijack case, the Court contended that measures can never touch upon human dignity.[58] Similarly, the Spanish Constitutional Court contends that measures cannot affect rights essential to ensure human dignity. For example, the Spanish Constitutional Court contended that legislative limitations to the rights of foreigners without an authorization of residence are unconstitutional if they affect rights essential to human dignity.[59]

Conclusion

From the analysis above it follows that deference granted to the public authorities impacts on the intensity of the proportionality test. It appears that courts in general do not often apply a stricter proportionality test than the ECtHR. They are generally averse to examining whether less intrusive options were available. As such, there appears to be a wide margin, notwithstanding certain exceptions, for national authorities to select measures. The courts, in principle, limit their scrutiny to the appreciation of whether the chosen option satisfies the proportionality test. Also, with regard to the balancing of the public objectives, they tend to accept the weight that public authorities attach to the public interest. Certain courts even accept financial burdens as justified objectives to limit individual rights. Particularly in the field of public security threats, courts appear to adopt a very deferential stance easily accepting that the policy objectives justify restrictions on individual rights. The deference accepted by the courts to apply in a certain field of policy thus influences the appreciation of the objective of public measures.

Criteria for the extent of the margin of appreciation

As the above indicates, courts apply the proportionality test with differing degrees of deference. Where they provide for a wide deference, the scrutiny of proportionality in the strict sense is marginal. There may be good reasons to apply concepts of deference (e.g., the margin of appreciation, discretion or latitude). However, the courts are not always coherent in conferring discretion on the legislature and fail to control the ultimate boundaries of the discretionary space. This weakens the potential of the proportionality test to function as a bulwark against arbitrary intervention by the legislature.

[58] BVerfGE, 1 BvR 357/05, 15 Feb. 2006.
[59] Spanish Constitutional Court, No. 236/2007, 7 Nov. 2007.

Criteria in the case-law of the ECtHR

Scholars have severely criticized the margin of appreciation for its ambiguous application. Letsas argues that the Court has never decided between two concepts of the margin: namely, on the one hand, the margin as a tool to decide whether in a particular case an interference in a right is justified and, on the other hand, the margin as a justification for saying that it will not review the case substantially and leaves this assessment to the domestic authorities (e.g., in case there is no common consensus among the states).[60] In addition, the application of the margin has been criticized for its casuistic,[61] inconsistent and excessive application.[62] Therefore, the ECtHR has been called upon to establish clear criteria determining in which cases or under which circumstances member states enjoy a wide or narrow margin of appreciation.[63]

In fact, several criteria have already been listed in the ECtHR's case-law. Underlying these criteria are three main reasons to provide for such discretion. First, the margin has been considered a consequence of the subsidiary nature of the ECHR machinery. The margin enables the effectiveness of the ECHR protection to be balanced with the sovereignty of the member states. The deference of the ECtHR towards the domestic level could be considered a 'natural product' of the distribution of powers between the supranational and domestic level.[64] Secondly, pragmatic considerations or added to this principle: domestic authorities are better suited to assess certain elements of the proportionality test. It could be claimed that the domestic legal orders have a comparative advantage[65] as they are in 'direct and continuous contact with the vital forces of their countries.'[66] Finally, the application of the margin follows from the wide diversity of political and social contentions of the good society among the different member states as well as

[60] G. Letsas, 'Two Concepts of the Margin of Appreciation', *Oxford Journal of Legal Studies* (2006) p. 705-706.

[61] Amongst others: J.A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', *Columbia Journal of European Law* (2004-2005) p. 125-147; S. Greer, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights', *Human Rights Files* (2000) p. 5 and p. 32. *See also* Judge Meyer's often quoted dissenting opinion in *Z* v. *Finland* (Appl. No. 22009/93) Reports 1997-I.

[62] Kratochvíl, *supra* n. 20, p. 336-343 and P. Callagher, 'The European Convention on Human Rights and the Margin of Appreciation', *UCD Working Papers in Law* No. 52/2012, p. 11-21.

[63] Kratichvíl, *supra* n. 20, p. 354.

[64] E. Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', *ZAÖRV* (1996) p. 304.

[65] Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law', *European Journal of International Law* (2006) p. 913.

[66] ECtHR 7 Dec. 1976, Case No. 5493/72, *Handyside* v. *United Kingdom*, para. 48; ECtHR 3 April 2012, Case No. 42857/05, *Van der Heijden* v. *the Netherlands*, para. 55.

within member states.[67] As Greer notes, this 'permits different resolutions of the tensions between Convention rights and the collective good in different contexts in different states.'[68]

In what follows, we discern several criteria for deference, without claiming to be exhaustive. A first set of criteria concerns matters in which state parties are given a wide margin of appreciation. This is the case in matters which exceed the core of human rights protection as provided for in the convention. For example, the ECtHR leaves a wide margin of appreciation in the sphere of environmental protection.[69] The ECtHR also refrains from revising domestic policies in difficult technical and social spheres. This relates, again, to environmental issues,[70] but also to other matters (2). For example, in *Budayeva*, the Court stated that 'this consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature.'[71] Next, state parties enjoy a wide margin in matters regarding the protection of public order, such as a public emergency and national security cases,[72] and the institutional order of the state, which must be assessed in the light of the political evolution of the country concerned, and must allow for divergences between the member states.[73] For this reason, the standards to be applied for establishing compliance with Article 3 of Protocol No. 1 are considered to be less stringent than those applied under Article 8-11 ECHR.[74] State parties also enjoy wide discretion when it comes to general measures of economic or social strategy, such as planning and housing:[75] 'because

[67] This follows the suggestion by Koskenniemi that as long as there is no wide agreement on the good life as a concept, statehood remains the best guarantee for citizens against authoritarian impulses. M. Koskenniemi, 'The Future Statehood', *Harvard International Law Journal* (1991) p. 397. *See also* P.G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', *American Journal of International Law* (2003) p. 40, identifying the margin of appreciation as a doctrine which addresses 'the pervasive dialectic between universal human rights norms and legitimate claims to pluralism.'

[68] S. Greer, *The European Convention of Human Rights. Achievement, Problems and Prospects* (Cambridge University Press 2006) p. 226.

[69] ECtHR 2 Oct. 2001, Case No. 36022/97, *Hatton and Others* v. *United Kingdom* and ECtHR [GC] 8 July 2003, Case No. 36022/97, *Hatton* v. *United Kingdom,* ECtHR 30 Nov. 2005, Case No. 55723/00, *Fadeyeva* v. *Russia*.

[70] ECtHR 21 Feb. 1990, Case No. 9310/81, *Powell and Rayner* v. *United Kingdom*.

[71] ECtHR 20 March 2008, Case No. 15339/02; 11673/02; 15343/02, *Budayeva* v. *Russia*.

[72] ECtHR 6 Sept. 1978, Case No. 5029/71, *Klass* v. *Germany* and ECtHR 19 Feb. 2009, Case No. 3455/05, *A. and Others* v. *United Kingdom*.

[73] ECtHR 2 March 1978, Case No. 9267/81, *Mathieu-Mohin and Clerfayt* v. *Belgium* and ECtHR 16 March 2006, Case No. 58278/00, *Zdanoka* v. *Latvia* and ECtHR 28 March 2006, Case No. 13716/02, *Sukhovetskyy* v. *Ukraine.*

[74] ECtHR 16 March 2006, Case No. 58278/00, *Zdanoka* v. *Latvia*.

[75] ECtHR 25 Sept. 1996, Case No. 20348/92, *Buckley* v. *United Kingdom* and ECtHR 27 May 2004, Case No. 66746/01, *Connors* v. *the United Kingdom*.

of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds.'[76] The same is true if a matter relates to sensitive moral and ethical issues, in particular against a background of fast-moving medical and scientific developments.[77]

A second set of criteria narrows the margin. The margin of appreciation is substantially narrower if the restriction affects a particularly vulnerable group in society[78] or when a difference in treatment is based upon a suspect criterion such as sex.[79] The margin allowed to the state will also be stricter where a particularly important facet of an individual's existence or identity is at stake[80] or when the right at stake is crucial to the individual's effective enjoyment of intimate or key rights.[81] Thirdly and more generally, crucial to the assessment of the margin of appreciation is the existence of a European consensus (a 'common ground factor'). A wide margin can be narrowed where there is a consensus within the member states,[82] while a strict margin can be widened where there is no such consensus.[83] However, when a consensus is lacking regarding the development of new technologies interfering with private life, the ECtHR expects a member state 'claiming a pioneer role', to bear 'special responsibility for striking the right balance.'[84] Finally, according to the ECtHR, 'the extent of the State's margin of appreciation depends on the quality of the decision-making process.'[85] In our opinion, however, this criterion should not determine the margin of appreciation, but rather serves as a tool for scrutiny in case of a broad margin of appreciation. We will come back to this in the last section of this paper, as it confirms our argument for procedural rationality as a key to solving the constitutional debate in matters of constitutional adjudication. The listing of these criteria does not detract from the general criticism, as the width of the margin often remains unclear and the crite-

[76] ECtHR [GC] 12 April 2006, Case No. 65731/01; 65900/01, *Stec and Others* v. *United Kingdom,* ECtHR 10 May 2007, Case No. 42949/98, *Runkee and White* v. *United Kingdom,* ECtHR 16 March 2010, Case No. 42184/05, *Carson and Others* v. *United Kingdom* and ECtHR 3 Nov. 2009, Case No. 27912/02, *Suljagić* v. *Bosnia and Herzegovina.*

[77] ECtHR 1 April 2010, Case No. 57813/00, *S.H.* v. *Austria*.

[78] ECtHR 20 May 2010, Case No. 38832/06, *Alajos Kiss* v. *Hungary*.

[79] ECtHR 9 Nov. 2010, Case No. 664/06, *Losonci Rose and Rose* v. *Switzerland* and ECtHR 10 May 2007, Case No. 42949/98, *Runkee and White* v. *United Kingdom.*

[80] ECtHR [GC] 10 April 2007, Case No. 6339/05, *Evans* v. *United Kingdom* and ECtHR [GC] 16 Dec. 2010, Case No. 25579/05, *A, B and C* v. *Ireland*; ECtHR 3 April 2012, Case No. 42857/05, *Van der Heijden* v. *the Netherlands*.

[81] ECtHR 16 July 2009, Case No. 20082/02, *Zehentner* v. *Austria*.

[82] ECtHR 4 Dec. 2008, Case No. 30562/04; 30566/04, *S and Marper* v. *United Kingdom*.

[83] ECtHR [GC] 16 Dec. 2010, Case No. 25579/05, *A, B and C* v. *Ireland*.

[84] ECtHR 4 Dec. 2008, Case No. 30562/04; 30566/04, *S and Marper* v. *United Kingdom*.

[85] ECtHR 28 March 2006, Case No. 13716/02, *Sukhovetskyy* v. *Ukraine*.

ria are not always used in a consistent way.[86] Greer even claims that the margin of appreciation can hardly be called a doctrine given its lack of minimum theoretical specificity and coherence.[87] Moreover, certain criteria have also been criticized on more substantial grounds, and in particular the 'common ground factor', which is regarded as one of the most important criteria for determining the intensity of the ECtHR's scrutiny.[88]

However, in a recent decision, the Court noted that a consensus does not always decisively narrow a state's margin of appreciation.[89] As Callagher noted, this decision adds to the unpredictability of the margin's application in case-law.[90] In general, it could be observed that the margin of appreciation has been a valuable tool to allow the ECtHR to respect its subsidiary role. However, the lack of coherent application has limited the effectiveness of the proportionality test as a guiding and directive concept for member states' actions.

Criteria in the case-law of the national courts

If subsidiarity explains the ECtHR's use of the margin of appreciation, the question arises as to whether constitutional courts conduct stricter scrutiny of government interference in matters in which a margin of appreciation is left to the member states. This is not to be expected, if the discretion is attributed to the legislature. For example, regarding the implementation of social and economic policies, the court explicitly relies on the *legislature*'s judgment as to what is in the public interest.[91] In general, however, the ECtHR includes courts amongst the national authorities to which a margin of appreciation is granted.[92] One expects, then, the national courts to develop stricter criteria than the EctHR as they are

[86] Brauch, *supra* n. 61, at p. 129-138; J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 17 *ELJ* (2011) p. 106 and Kratochvíl, *supra* n. 20, at p. 340-343.

[87] Greer, *supra* n. 61, at p. 32.

[88] Brauch, *supra* n. 61, at p. 128 and Gerards, *supra* n. 86, at p. 29. *See* for criticism of the 'common ground' doctrine, amongst many others: G. Letsas, *A Theory of Interpretation of the European Convention of Human Rights* (Oxford University Press 2007) p. 124; Gerards, *supra* n. 86, at p. 30.

[89] ECtHR [GC] 16 Dec. 2010, Case No. 25579/05, *A, B and C* v. *Ireland*.

[90] P. Callagher, *supra* n. 62, at p. 11.

[91] ECtHR 19 Dec. 1989, Case No. 10522/83; 11011/84; 11070/84, *Mellacher and Others* v. *Austria,* ECtHR 28 July 1999, Case No. 22774/93, *Immobiliare Saffi* v. *Italy*, ECtHR 27 May 2004, Case No. 66746/01, *Connors* v. *the United Kingdom* and ECtHR 3 Nov. 2009, Case No. 27912/02, *Suljagić* v. *Bosnia and Herzegovina*. *See also* older cases where the ECtHR explicitly notes that a measure is a policy decision falling within the legislature's discretion, ECtHR 6 Sept. 1978, Case No. 5029/71, *Klass* v. *Germany and* ECtHR 21 Feb. 1986, Case No. 8793/79, *James* v. *the UK.*

[92] Hickman, *supra* n. 5, at p. 125: 'This is because the margin of appreciation reflects the ECtHR's appreciation of its limitation not only as a court but also, and more importantly, as an international institution.'

better placed to apply the balancing in a particular national context.[93] As the ECtHR noted in *A. and Others*: 'The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level.'[94]

However, there are several reasons why national courts do not provide for stricter scrutiny. In the literature, 'democratic legitimacy' and 'institutional competence' are named as the two principal institutional reasons for deference.[95] Hence, constitutional courts might show deference to the legislature from a more principled conception of parliamentary primacy and the limits of judicial review. Or they might consider that other authorities are better placed because of their superior expertise, responsibility or capacity.[96] Apart from that, a third reason can be discerned from the embedding of national constitutional courts in the domestic judicial and political structure. Because of that, they might apply constitutional control with a high degree of deference towards the national authorities' policy choices. In so far as constitutional courts act as veto holders outside the political decision-making process,[97] national authorities will try to protect their decisions against censure by the courts. In particular in post-communist countries, dominant executives impose strong constraints upon courts.[98] But also in 'free' political regimes, national authorities try to influence the outcome of judicial adjudication indirectly, for example through politicizing the composition of the constitutional court. The Belgian Constitutional Court is a clear example of such political constraints due to domestic embedding. There are several reasons why this Court shows a rather lenient attitude towards the legislature. First, the members of the Constitutional Court are appointed by the Belgian Parliament and half of them are former politicians. Secondly, the Belgian Constitutional Court was given only very limited powers at the time of its establishment, and has been dependent upon the legislature's goodwill for the gradual extension of its powers. It balanced an expansive reading of its competences with the measure to which it could gain the legislature's confidence. As a result, the Belgian Constitutional Court, in determining the width of the legislature's margin of appreciation, does not necessarily de-

[93] Greer (2006), *supra* n. 68, at p. 226.

[94] ECtHR 19 Feb. 2009, Case No. 3455/05, *A. and Others* v. *United Kingdom*.

[95] Brady, *supra* n. 5, at p. 106.

[96] Hickman, *supra* n. 5, at p. 125 and 129. *See* for this 'due deference' approach, Brady *supra* n. 5, at p. 24-26.

[97] S. Brouard and C. Hönnige, 'Constitutional Courts as veto players. Lessons from Germany, France and the US', paper presented at the Annual Midwest Political Science Association Conference, Chicago 2010.

[98] *See* A. Mazmanyan, 'Constrained, Pragmatic Pro-Democratic Appraising Constitutional Review Courts in Post-Soviet Politics', *Communist and Post-Communist Studies* (2010) p. 413.

velop more specific criteria than the ECtHR. The Court is in particular reserved in matters related to the financial organization of the state,[99] fiscal matters[100] or when important economic interests are in play. For example, when answering questions regarding aircraft noise, the Court provides for a considerable margin for the legislature to set the maximum level of noise.[101]

The domestic pedigree of constitutional courts might also mean that they show more deference towards the domestic legislature because they are susceptive to arguments that legislation is the outcome of a compromise that balances diverse and conflicting attitudes within the democratic state. Once again, Belgium exemplifies such a position. The Belgian Constitutional Court takes a restrictive attitude towards laws based upon delicate political compromises resulting from the construction of the Belgian state as a dyadic consensus democracy.[102] The composition of the Belgian Constitutional Court, consisting of six 'judges-politicians'[103] out of twelve, and of six Dutch- and six French-speaking judges, is designed to create an understanding of the political compromises in Belgian legislation.

In several member states, a reserved position towards the legislature follows from a principled construction of parliamentary sovereignty or the courts' lack of democratic legitimacy. The the UK Supreme Court, previously the British House of Lords, exemplifies this position.[104] The introduction of the Human Rights Act implied that UK judges now engage in a proportionality review with regard to fundamental rights limitations.[105] Lord Bingham argued in a decision of the British House of Lords that 'courts are not effectively precluded by any doctrine of deference from scrutinizing the issues raised.'[106] However, they apply the proportionality test with sufficient deference when scrutinizing measures of public authorities. Lord Steyn argued 'national courts will accept that there are some

[99] Belgian Constitutional Court, No. 93/2000, 13 July 2000 and Belgian Constitutional Court, No. 21/2004, 4 Feb. 2004.

[100] Belgian Constitutional Court, No. 39/2002, 20 February 2002; Belgian Constitutional Court, 69/2004, 5 May 2004 and Belgian Constitutional Court, 145/2009, 17 Sept. 2009.

[101] Belgian Constitutional Court, No. 51/2003, 30 April 2003. *See as* well Belgian Constitutional Court, 189/2005, 14 Dec. 2005.

[102] About consociational politics in the Belgian consensus democracy, *see* G.B. Peeters, 'Consociationalism, Corruption and Chocolate: Belgian Exceptionalism', *West European Politics* (2006) p. 1079-1092.

[103] Art. 34, para. 1, 2° Special Law on the Constitutional Court: a requirement is that the candidate was a member of the federal parliament or a parliament of a Community or Region for a period of at least five years.

[104] *See also* Hickman, *supra* n. 5, at p. 156, referring to the 'ballot box argument'.

[105] Before the introduction of the HRA 1998, British judges would apply the Wednesbury principle. The courts would only intervene in case of legislation's manifest unreasonable interference with individual rights.

[106] Cited in ECtHR 19 Feb. 2009, Case No. 3455/05, *A. and Others* v. *United Kingdom*, para. 19.

circumstances in which the legislature and the executive are better placed to perform those functions', in a similar way as international courts decide that member states might be better positioned.[107] Therefore, the application of the proportionality test is counterbalanced at the national level with a margin of appreciation (deference or latitude) for the public bodies.[108]

The intensity of scrutiny and deference will change with regard to the context and subject-matter. The proportionality test is flexible and adaptable to the specific circumstances.[109] Where the House of Lords considers that courts can make a better judgment than the legislature, e.g., with regard to procedural rights such as the right of access to a court or measures concerning the deprivation of liberty,[110] the scrutiny will be more intense than in those circumstances where it judges the issues at hand to be of a more political nature. The application of deference is meant to avoid the Court becoming 'the primary decision-maker on matters of policy, judgment and discretion, so that public authorities should be left with room to make legitimate choices.'[111] Therefore, the scrutiny will only be more intense at the domestic level if the House of Lords finds that the context and subject-matter necessitate such an approach and parliamentary sovereignty remains respected.

Constitutional courts are, however, more likely to provide for a stricter scrutiny than the ECtHR where the constitutional system has already established a more intensive and comprehensive protection of fundamental rights on the basis of their own constitution or constitutional principles. For example, with respect to the protection of personal mail and communication, the German Constitutional Court takes only minimal account of the ECtHR case-law in this field as the Constitutional Court had already elaborated a far more intensive protection on the basis of the German Constitution (Article 10, paragraph 1). The German Constitutional Court considers the protection of personal communication a highly sensitive right requiring positive action by the state. The storage of personal data gathered from private communications is only permitted where the interference does not touch upon the essence of the right and serves a very weighty objective.[112]

[107] UK House of Lords, *Brown* v. *Stott* [2003] 1 AC 681, paras. 710-711.

[108] UK House of Lords, Judgments – *Tweed* (Appellant) v. *Parades Commission for Northern Ireland* (Respondents) (Northern Ireland) [2006] UKHL 53, para. 36. *See also* Hickman, *supra* n. 5, at p. 125 for the better-placed argument.

[109] Lord Walker considered that the proportionality test is a 'flexi-principle', thereby quoting Fordham, *Judicial Review Handbook*, 3rd edn. (2001). *See* House of Lords, *R (ProLife Alliance)* v. *British Broadcasting Corporation* [2004] 1 AC 185, para. 138.

[110] UK House of Lords, *R* v. *A* (No. 2) [2002] 1 AC 45, para. 36 and UK House of Lords, *R* v. *Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 381.

[111] UK House of Lords, *R* (*ProLife Alliance*) v. *British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185, para. 138.

[112] BVerfGE 1 BvR 1811/99, 27 Oct. 2006.

A similar conclusion can be drawn from the British House of Lord's case-law on the protection of privileged correspondence between a lawyer and his or her client. It was argued that the protection under Article 8 ECHR and corresponding Strasbourg case-law did not provide for more elaborate protection than would be given under common law, which recognizes the protection of privileged legal correspondence as a fundamental principle.[113] Such closer scrutiny on the basis of an existing higher level of protection is in line with the Convention, which states that nothing in the ECHR can be relied upon to limit the existing protection accorded by other sources. The Czech Constitutional Court noted that there is no reason to decrease the level of procedural protection of fundamental rights guaranteed by the Czech Charter of Fundamental Rights and Basic Freedoms only because the Convention regulates the same manner differently.[114] Therefore, it is all the more regrettable that the Belgian Constitutional Court referred to the ECtHR case-law to downsize the absolute character of mail confidentiality in the Belgian Constitution.[115]

Conclusion

As section 2 revealed that deference granted to the public authorities impacts on the intensity of the proportionality test, it is important to draw clear criteria demarcating the width of the margin of appreciation. Three conclusions can be drawn from the analysis of the case-law of the ECtHR and the national courts. First, although the courts are expected to allow for a narrower margin of appreciation as they are not concerned with the subsidiarity argument and are in a better position to assess the balancing exercise in the national context, they do not generally seem to adopt stricter criteria than those developed by the ECtHR. Secondly, we have discerned good reasons for both the ECtHR and national courts to grant a margin of appreciation to the public authorities. For the ECtHR, good reasons relate to the subsidiarity nature of the ECtHR, the diversity of visions on the good society between member states, and the better-suited argument. For the national courts, deference may follow from strategic reasons, the constraints of consociational decision making, a principled conception of parliamentary sovereignty or the consideration that other authorities have superior expertise or democratic credentials. Thirdly, neither the ECtHR nor the national courts provide for reasoned, predictable and uncontested criteria for the granting of deference.

From these conclusions it follows that while, on the one hand, the margin of appreciation is a valuable tool, courts, on the other hand, fail to shape it into a

[113] House of Lords, Ex parte Daly [2001] *UKHL* 26.
[114] Czech Constitutional Court, Pl. ÚS 26/07, 9 Dec. 2008, para. 41.
[115] Belgian Constitutional Court, No. 202/2004, 21 Dec. 2004.

predictable and coherent instrument, risking the shift of the proportionality analysis into a toothless principle. Therefore, in the next section, we will examine whether the scrutiny by the courts can be intensified in the case of a wide margin of appreciation, while respecting the reasons underlying the granting of this margin.

Constitutional adjudication and procedural rationality

Given the fact that the argumentation framework provided for by the proportionality analysis is often thwarted by incoherent and unlimited concepts of judicial deference conferred upon the national authorities, it is crucial to develop a tool to thicken the argumentation framework where national authorities enjoy a wide discretion. Only in such a case must legitimate reasons to allow some margin for national authorities, in particular the legislature, not hinder the courts' tasks to prevent arbitrary infringements of fundamental rights. In this section, we will support the procedural rationality review arising in recent European and national case-law. To that end, we will first argue that the rationality argument underlies the proportionality principle and is therefore imposing even when the authorities enjoy a wide margin of appreciation (section 4.1). Next, we will display how the courts use arguments of procedural rationality (section 4.2). Finally, we will touch upon the interaction between national authorities, national courts and the ECtHR in this respect (section 4.3). The more national authorities provide evidence of a rational decision-making procedure, the more deferential a stance the Constitutional Court will take. Also, the more national authorities and national courts provide evidence of a rational decision-making procedure, the more deferential the ECtHR will act.

Rationality as a rationale underlying the proportionality principle

The proportionality principle is based on the idea that individuals should be protected against arbitrary government intervention, implying that government must act in a rational way.[116] The principle gained significance in the wake of the social welfare state, leading to an important extension of government action. It originated as a principle of administrative law, protecting persons against the executive by limiting policy discretion. According to Blake 'judicial review is not a lawyer's paradise but a constitutional safeguard against an active and intrusive executive.'[117]

[116] Christoffersen, *supra* n. 2, p. 166. *See also* N. Emiliou, *The Principle of Proportionality in European Law* (Kluwer Law International 1996) p. 37-40 on the relation between proportionality and rationality. *Also* K. Meßerschmidt, *Gesetzgebungsermessen* (Berlin Verlag 2000) p. 792: the prohibition of arbitrariness implies a duty of rationality.

[117] Blake, *supra* n. 5, p. 26.

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However, where it forces the government to take into account individual interests when regulating a matter of public interest, the proportionality principle is as relevant in the individual's relationship *vis-à-vis* the executive as it is in its relationship *vis-à-vis* the legislature.

In reverse, the proportionality principle allows the government to intervene in fundamental rights, even those couched in a stipulation which does not contain a limitation clause. In this way, the proportionality principle offers government a legal ground for intervention in the case of conflicting rights.[118] For example, the Belgian Constitutional Court weighed the confidentiality of letters against other rights, although the inviolability of the confidentiality of letters is protected by Article 29 of the Belgian Constitution in an absolute way.[119]

Hence, the proportionality principle takes into account both the public interest and individual interests. It implies a balance of rights and interests without putting them in a strict *a priori* hierarchical order.[120] The proportionality analysis concretizes the requirement that government intervention is reasonable, as being contrary to arbitrary. The argumentation framework provided by the proportionality analysis enables government to justify its actions in the light of the interests of the community as well as autonomous individuals. The argumentation underlying the balance of rights and interests, however, should be taken seriously, so that the public interest does not automatically legitimize government intervention.

Even if the legislature enjoys wide discretionary power, it has to use this in a rational way. Discretion does not mean that the lawmaker is dispensed from the duty to give reasons.[121] Or, as has been stated, there is nothing to suggest 'that individual rights should be any less secure against interferences for which the public officials responsible are accountable to the electorate.'[122] Today, rationality is conceived as an ongoing *process of rationalization,*[123] context-bound and of a relative nature, characterized by a readiness to think in alternatives and self-correction.[124] This rationality concept is mirrored in modern regulatory management, centred on evidence-based law-making and evaluation. Regulatory management programmes developed in several states following OECD recommendations, for-

[118] *See* Christoffersen *supra* n. 2, at p. 198-200: a balance of rights and interests as implied in the proportionality analysis is inevitable in order to solve conflicting rights.

[119] Belgian Constitutional Court, No. 202/2004, 21 Dec. 2004.

[120] Clayton *supra* n. 41, p. 516; Christoffersen, *supra* n. 2, at p. 75-76.

[121] This is also the position of the German Constitutional Court, as explained in Meßerschmidt, *supra* n. 116, at p. 741.

[122] Hickman *supra* n. 5, at p. 160, adding other arguments.

[123] *See also* K. Popper, *The Open Society and Its Enemies II* (Routledge & Kegan Paul 1969) p. 225, who defined rationalism as an attitude of willingness to listen to critical arguments and to learn from experiences.

[124] *See* more elaborately P. Popelier, 'Legislation in the 21th Century: Legitimate and Rational Law Making in the Context of Multilevel Governance', *Legislaçao* (2009) p. 357-370.

mulating principles of better law-making such as necessity, efficacy and efficiency, which are also present in the procedural steps which make up the proportionality analysis. In that respect, the application of procedural rationality might actually justify the use of the proportionality analysis, in the sense that this analysis requires justification for any actions taken. Cohen-Eliya and Porat argue that the crucial component to determine whether public authority measures are legitimate depends on their capacity to persuade judges of their rationality and reasonableness.[125] Therefore, every action must be the outcome of a proper balance between conflicting considerations and reflect a means-end rationality.

The proportionality analysis is used by the courts as a mechanism to call the legislature to account, thus enabling the legislature to present itself as a rational power. In this way, the proportionality principle connects with a democratic concept of decision-making,[126] stressing accountability and output legitimacy. At the same time, the procedural conception of rationality enables the courts to assess the rationality of government action, even when the government enjoys wide discretion. Evidence thereof is given in the next section. In so doing, the Court avoids operating a substantive balancing of interests, instead verifying whether the lawmaker has based its decision on a solid and wide balance of interests, or whether the conditions for this exercise were present. In other words, where deference is granted because the public authorities are better placed than the courts to determine issues relevant to the balancing test,[127] these authorities are still required to provide evidence that they have in fact decided on the basis of their superior expertise or democratic credentials. This does not impose upon the government the duty to follow a well-defined optimal procedure, intruding on the legislature's procedural autonomy and leading to formalism,[128] but merely requires minimum guarantees for rational, evidence-based decision making.[129]

Procedural rationality and the national government: the requirement of evidence-based decision making

Even where the government enjoys a wide margin of appreciation, when fundamental rights are at stake, the courts will have to see to it that a fair balance has

[125] M. Cohen-Eliya and I. Porat, 'Proportionality and the Culture of Justification', *American Journal of Comparative Law* (2010) p. 466-467.

[126] *See* Christoffersen *supra* n. 2, at p. 195-197 on the proportionality analysis as a democratic mechanism of accountability in the case-law of the ECtHR.

[127] As held by Hickman, *supra* n. 5, at p. 140.

[128] *See*, in the UK debate regarding administrative decisions, Lord Bingham in *Denbigh* [2006] UKHL 15 at 29-31 for this argument and David Mead, 'Outcomes Aren't All: Defending Process-Based Review of Public Authority Decisions under the Human Rights Act', *Public Law* (2011) p. 73-75 for a reply.

[129] Meßerschmidt, *supra* n. 116, p. 875-877.

been struck. Instead of performing its own adjudication of rights and interests, the courts assess whether the legislature has operated a sufficiently profound and inclusive balance of interests and whether sufficient guarantees have been built into the decision-making process to that end.

The ECtHR

The ECtHR turns to process-review especially in cases where wide deference is granted to the national authorities. In recent case-law, the Court seems to find it, in any case, attractive when legislative choices are at stake. Hence, in the *Animal Defenders International* case the Court took refuge in a procedural rationality review although it considered the margin of appreciation to be a narrow one.[130] However, it did not merely refer to the general nature of the decision at issue, but also noted, first, that the case at hand required a 'country-specific and complex assessment which is of central relevance to the legislative choices at issue in the present case', which the legislative and judicial authorities were 'best placed' to conduct, and, second, that the lack of European consensus on how to regulate paid political advertising in broadcasting broadened the margin of appreciation.[131]

The case-law of the ECtHR shows that an infringement of a fundamental right is disproportional if there is no evidence that a careful balancing of interests has been carried out.[132] In the *Hatton* cases, the ECtHR considered that in decisions affecting environmental issues, the Court may 'scrutinize the decision-making process to ensure that due weight has been accorded to the interests of the individual.'[133] To that end, it is 'required to consider all the procedural aspects.' The Court stresses that the lawmaker must act with due care, relying on appropriate investigation and study, guaranteeing a proportionate decision through permanent evaluation and monitoring, based on an integral balance of interests through transparency and participatory procedures. In doing so, it guards the rationality of the decision-making procedure, with specific consideration for participation and consultation procedures[134] and evidence-based law making.

[130] Critical for this reason: Joint dissenting opinion of judges Ziemele, Sajó, Kalaydjieva, Vučininć and De Gaetano, ECtHR [GC] 22 April 2013, Case No. 48876/08, *Animal Defenders International* v. *the United Kingdom*, para. 3.

[131] ECtHR [GC] 22 April 2013, Case No. 48876/08, *Animal Defenders International* v. *the United Kingdom*, paras. 104, 111, 123.

[132] For a more elaborate analysis, *see* P. Popelier, 'The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights', in P. Popelier et al., *The Role of Constitutional Courts in Multilevel Government* (Intersentia 2013) p. 249-267.

[133] ECtHR 2 Oct. 2001, Case No. 36022/97, *Hatton and Others* v. *United Kingdom* and ECtHR [GC] 8 July 2003, Case No. 36022/97, *Hatton* v. *United Kingdom*.

[134] R. O'Connell, 'Towards a Stronger Concept of Democracy in the Strasbourg Convention', *EHRLR* (2006) p. 291.

A rational decision-making process guaranteeing an inclusive balance of interests provides evidence that a measure is proportional, whereas doubts are cast in the absence of procedural guarantees. In the *Evans* cases, the Court upheld a law allowing the biological father to withdraw his legally required consent at any time before the frozen embryos were implanted into the applicant's uterus. As a justification, the Court referred to the decision-making process. According to the Court, the law was 'the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology.' This examination involved a commission of experts, a Green Book for public consultation and representations from interested parties included in a White Paper.[135]

An infringement is disproportional if there has been no debate or motivation at all. For example, in *Hirst*, the ECtHR dealt with a general and automatic disenfranchisement of convicted prisoners. Although Article 3 of the First Protocol leaves a wide margin of appreciation to the member states, the ECtHR reproached the legislature for not having 'sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote' and for not having carried out 'any substantive debate' in Parliament on the continued justification of this ban.[136] In the *Animal Defenders International* case, judge Braza in his concurring opinion pointed out that it was exactly the extent of prelegislative examination and substantive parliamentary debate that distinguished the case from *Hirst* and justified respect for the legislator's decision.[137]

The ECtHR is sensitive to the use of consultation procedures or other means which allow the public and interested parties to make representations, allowing for an informed weighing of interests. Hence, the European Court referred to consultations and public reflection procedures as elements in the proportionality analysis in cases such as *Evans*[138] and *A.B. and C.* v. *Ireland*.[139] In that regard, it is satisfied when interested parties give opportunities for other interested parties to make representations or address complaints.[140]

[135] ECtHR [GC] 10 April 2007, Case No. 6339/05, *Evans* v. *United Kingdom*.

[136] ECtHR 30 March 2004, Case No. 74025/01, *Hirst (no. 2)* v. *the UK* and ECtHR [GC] 6 Oct. 2005, Case No. 74025/01, *Hirst (no. 2)* v. *the UK*. *See*, similar, ECtHR 20 May 2010, Case No. 38832/06, *Alajos Kiss* v. *Hungary*.

[137] ECtHR [GC] 22 April 2013, Case No. 48876/08, *Animal Defenders International* v. *the United Kingdom*, Concurring Opinion of Judge Bratza, para. 12.

[138] ECtHR 7 March 2006, Case No. 6339/05, *Evans* v. *the UK* and ECtHR [GC] 10 April 2007, Case No. 6339/05, *Evans* v. *United Kingdom*.

[139] ECtHR [GC] 16 Dec. 2010, Case No. 25579/05, *A, B and C* v. *Ireland*.

[140] ECtHR [GC] 8 July 2003, Case No. 36022/97, *Hatton* v. *United Kingdom* and ECtHR 22 Nov. 2011, Case No. 24202/10, *Zammit Maempel* v. *Malta*.

Further, the ECtHR requires evidence of arguments used in the balancing process. For example, in *Lecarpentier*, the French lawmaker referred to motives of general economic interest to justify retroactive intervention to counter the effects of a judicial decision concerning a mortgage loan. The Court stated that there was no indication that the decision would have an impact on the financial sector and endanger economic activities. It condemned the lack of reliable evaluations of the virtual costs of pending and future judicial disputes in similar matters and disapproved of the fact that the Members of Parliament had not obtained precise information.[141] In *Konstantin Markin*, the Court criticized the government's assertion that the legislation which did not confer the right to parental leave for military servicemen (in contrast to military servicewomen and to civil servicemen) was necessary for national security, as the taking of parental leave on a large scale would have a negative effect on the fighting power and operational effectiveness of the armed forces. It noted that there was 'no indication that any expert study or statistical research was made to assess the number of servicemen who would be in a position to take three years' parental leave at any given time and would be willing to do so.'[142] In *X and Others* the Court criticized the Austrian government for prohibiting second-parent adoption by same-sex couples without adducing any scientific study or other evidence to provide evidence of the assumption that two parents of the same sex could not adequately provide for a child's needs.[143] The same applies in the case of implementation or executive measures. In *Fadeyeva*, the Court stated that the state should justify, 'using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community.' Regarding the environmental problem caused by a steel plant, the Court assessed whether the Government had approached the problem 'with due diligence' and gave 'consideration to all the competing interests.'[144] In *Tătar*, the Court stated that the decision-making process regarding dangerous activities should not only involve appropriate studies and investigations to prevent and evaluate certain harmful effects to the environment and the rights of individuals, but also required that the public has access to the results of these studies and that every individual is able to challenge before a court any decision or omission claimed to disregard his personal interests.[145]

It follows from this short overview that the ECtHR regards a rationalization of the decision-making process as a safeguard against arbitrary governance interfer-

[141] ECtHR 14 Feb. 2006, Case No. 67847/01, *Lecarpentier* v. *France*.

[142] ECtHR 7 Oct. 2010, Case No. 30078/06, *Konstantin Markin* v. *Russia* and [GC] 22 March 2012

[143] ECtHR 19 Feb. 2013, Case No. 19010/07, *X and Others* v. *Austria.*

[144] ECtHR 30 Nov. 2005,Case No. 55723/00, *Fadeyeva* v. *Russia*.

[145] ECtHR 27 Jan. 2009, Case No. 67021/01, *Tătar* v. *Romania*.

ence, especially where a wide margin of appreciation is left to the authorities. Consultation procedures and stakeholders' representations, judicial overview and scientific evidence are taken into account as indicators of the proportionality of interference by the executive as well as the legislature.

National Courts: procedural requirements and deference

Process review is well known in administrative law as a principle of good decision-making. The question is whether national courts are also receptive to such arguments of procedural rationality in cases in which acts of parliament are to be judged. This seems not to be the case where this would lead to invalidity on procedural grounds only, when the act is likely to pass a substantive test.[146] However, do national courts take procedural requirements into account as an element in the proportionality test, in particular when broad deference hinders a substantive assessment of the outcome?

In answering this question, it is interesting to compare the domestic approach to the *Hatton* judgments, where the ECtHR applies a degree of procedural rationality. Several national constitutional courts were confronted with the question of whether legislative authorizations of the development of industries, such as airport exploitations, violated the fundamental rights of citizens in surrounding areas, *inter alia* the right to property, the right to physical integrity and the right to family life. The ECtHR considered in the *Hatton* case that the national legislature was left with a margin to appreciate the balance of the public interest of economic development and job creation with the fundamental rights of neighbours at stake.[147] The Strasbourg Court added, however, that this margin was confined by certain procedural guarantees.[148] Dealing with similar cases, several constitutional courts refer to the *Hatton* case-law. However, they provide for different levels of deference for the legislature, suggesting a different reading of what such a margin entails at the domestic level.

In performing the proportionality test, the Belgian Constitutional Court takes the prudence displayed by the legislature in the law-making procedure into consideration. The existence of scientific studies and *ex ante* evaluations play a role in this respect.[149] The Belgian Constitutional Court refers to studies and other

[146] For the UK, *see* Hickman, *supra* n. 5, at p. 226-228.

[147] ECtHR 2 Oct. 2001, Case No. 36022/97, *Hatton and Others* v. *United Kingdom* and ECtHR [GC] 8 July 2003, Case No. 36022/97, *Hatton* v. *United Kingdom*.

[148] *Infra.*

[149] For more examples, *see* P. Popelier and V. Verlinden, 'The Context of the Rise of Ex Ante Evaluation', in J. Verschuuren (ed.), *The Impact of Legislation* (Martinus Nijhoff Publishers 2009) p. 31-32.

preparatory documents,[150] and to advice and consultations,[151] especially when this serves to underline the reasonability of a law, based upon prudent balancing.[152] The Court referred explicitly to the *Hatton* case when scrutinizing the proportionality of legislation concerning airport noise. The Court deduced from *Hatton* the obligation for the legislature to ensure a correct balance between private and public interests. It referred to the consideration taken of the private interests when elaborating legislation, measures taken to limit aircraft noise and the referral to scientific research to justify the maximum levels of noise chosen.

A procedural approach can also be discerned in the case-law of other national courts, such as the German *Bundesverfassungsgericht*.[153] In the airport cases, the German Constitutional Court considered on the basis of the circumstances whether all interests had been taken into account and had been weighed in a comprehensive manner.[154] The Court held that in the appreciation of the proportionality of the balance struck, special attention should be paid to the measures taken to limit airport noise and the procedural safeguards for individuals put in place by the national authorities.[155] These measures taken are not only important to assess whether the essence of the right has been violated, but also for the general balancing of the right to physical integrity and protection of property.

Equally, the UK House of Lords has been receptive to the procedural rationality argument where it gave specific weight to the rigorous decision-making process.[156] This also seems to apply to primary laws. The House of Lords has given indications that deference is given to Parliament because of its institutional capacity, including deliberative and consultative mechanisms, rather than its mere quality as an elected body.[157] In *Marcic,* the House scrutinized damages due to flooding under the Human Rights Act 1998, specifically the protection of the

[150] Belgian Constitutional Court, No. 134/98, 16 Dec. 1998, No. 23/2009, 18 Feb. 2009 and No. 53/2009, 19 March 2009.

[151] E.g., Belgian Constitutional Court, No. 143/2007, 22 Nov. 2007; No. 53/2009, 19 March 2009.

[152] For example, the Court stated that a sick leave scheme was justified, referring to statistics on which the legislature had based its regulation. *See* Belgian Constitutional Court, No. 134/98, 16 Dec. 1998.

[153] *See* C. Gusy, 'Das Grundgesetz als normative Gesetzgebungslehre?'*, Zeitschrift für Rechtspolitik* (1985) p. 292-299; Meßerschmidt, *supra* n. 116, at p. 820-877; C. Morand, 'Les exigences de la méthode législative et du droit constitutionnel portent sur la formation de la législation'*, Revue Droit et Société* (1988) p. 394-407.

[154] BVerfGE, 1 BvR 3474/08, 15 Oct. 2009 and BVerfGE, 1 BvR 2722/06, 20 Feb. 2008.

[155] BVerfGE, 1 BvR 3474/08, 15 Oct. 2009.

[156] Hickman, *supra* n. 5, p. 150. *See also*, elaborating on Hickman's views, Mead, *supra* n. 128, at p. 61-84.

[157] Hickman, *supra* n. 5, p. 162. *See also* Mead, *supra* n. 128, at p. 75 for decisions (in administrative cases) which 'include elements of process.'

home and family life.[158] Lord Nicholls relied on *Hatton* to conclude that Parliament had to balance the interests of customers of a company whose properties are prone to sewer flooding and all the other customers of the company whose properties are drained through the company's sewers. The House of Lords remarked that such interests had been taken into account. Moreover, the House noted that an additional protection of those rights and interests had been provided by the appointment of an independent regulator to deal with complaints regarding the priorities of sewer placement, as well as a possibility to judicially review the measures taken by the director who plays a central role in the development of the measures.

While these courts all appear receptive to the idea of procedural rationality, the intensity of such a procedural approach depends on the willingness of domestic courts to examine the effectiveness of the procedural guarantees in place. For example, the UK House of Lords provided for a wide deference for the national legislature in *Marcic.* Lord Nicholls considered the *Hatton* requirement of procedural guarantees to have been satisfied by the fact that the legislature had appointed an independent regulator to deal with complaints regarding the priorities of sewer placement without examining the effectiveness of this procedure. The Court did not scrutinize in depth whether these procedural guarantees were capable of resulting in different outcomes. This follows from a general policy to provide for a wide deference where social and economic policies are in play,[159] reflecting the idea that Parliament, because of its representative character providing a cross-section of opinion, is better placed to judge matters where questions of public opinion and confidence are relevant.[160]

In the airport cases, the Belgian Constitutional Court noted that there remains a margin of appreciation for the national authorities to strike this balance and to assess the legitimacy of the objective of the airport's function. The Court is satisfied if the private interests have been mentioned, a re-evaluation of the aircraft noise measures is provided,[161] or adaptations to individual situations are possible.[162] The Court did not assess whether such an adaptation process was capable of successfully altering the plan provided; neither did the Court take notice of instruments of regulatory management, such as an impact assessment.

The German Constitutional Court's case-law suggests a closer scrutiny of the procedural rationality. The Court agrees that it is left to the legislature to consider, evaluate and organize the measures to protect interests, leaving a margin to

[158] *Marcic* (Respondent) v. *Thames Water Utilities Limited* (Appellants) [2003] *UKHL* 66.

[159] *See*, e.g., the remark by Lord Hope in the UK House of Lords, *R* v. *Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, para. 381.

[160] Hickman, *supra* n. 5, at p. 163.

[161] Belgian Constitutional Court, No. 189/2005, 14 Dec. 2005.

[162] Belgian Constitutional Court, No. 51/2003, 30 April 2003.

balance the competitive public and private interests. The Court defines this as the organizational freedom of the public bodies. However, the methods used to assess the reasonableness of the noise levels of aircraft cannot be evidently unsuitable.[163] The Court considers that close scrutiny should be applied to the procedural safeguards accompanying the measures.[164] Effective judicial review is considered elementary to justify infringements upon such rights. While the German Constitutional Court appears to be less deferential to the public authorities and considers procedural guarantees as to their availability and effectiveness, the German Constitutional Court does not rely on regulatory management instruments either. In contrast, in the European Union, the Court of Justice appears to have taken impact assessments into consideration in recent decisions.[165] The realization of such regulatory instruments and the rule maker's reliance on, or consideration of, such instruments might render decision-making processes less arbitrary. However, Constitutional Courts do not appear to imply impact assessments in the proportionality test, even though they might be obligatory (e.g., in the Flemish Community), or provide evidence of poor preparatory work.[166]

Hence, while certain elements of procedural rationality might be considered by these courts, the strength and effectiveness is downsized by a wide deference given to the legislature to assess the effectiveness of these measures. This is regrettable because excessive deference to the views of the legislature sometimes hinders constitutional courts in being able to act as guardians of constitutional rights. For example, in Case No. 186/2009, the Belgian Constitutional Court accepted that the legislature validated, with retroactive effect, irregular fiscal regulations of municipalities, referring to justifications given in the course of the parliamentary debate regarding forthcoming elections and difficult coalition negotiations. It did not require any clarification concerning the relationship between these circumstances and the necessity to validate the regulations, nor did it ask for data regarding the financial consequences for the municipalities if the regulations would not have been validated, despite the fact that the right to a fair trial requires strict scrutiny.[167]

[163] BVerfGE, 1 BvR 2722/06, 20 Feb. 2008.

[164] BVerfGE, 1 BvR 3474/08, 15 Oct. 2009.

[165] Case C-310/04, *Spain* v. *Council* [2006] *ECR* I-7285; Case C-58/08 *Vodafone Ltd and Others* v. *Secretary of State for Business, Enterprise and Regulatory Reform* [2010] *ECR* I-4999 at [55] and [58]; Case C-176/09, *Grand Duchy of Luxembourg* v. *European Parliament and Council of the European Union* [2011] *OJ* C204/11 at [65].

[166] E.g., Belgian Constitutional Court, No. 105/2008, 17 July 2008; No. 121/2008, 1 Sept. 2008. Such impact assessments are also not considered by the UK House of Lords when applying the proportionality test.

[167] Belgian Constitutional Court, No. 186/2009, 26 Nov. 2009.

Receptiveness to arguments of procedural rationality would enable the Court to scrutinize the rationality of government action while still respecting the wide discretion conferred upon the legislature. It would enable, in the wording of Cohen-Eliya and Porat,[168] the transition from a culture of authority based on the public authority's authority to exercise power to a culture of justification, where legitimacy follows from the degree to which government interference can be justified by objective, rational reasons and procedural safeguards.

Procedural rationality and the courts: the requirement of evidence-based judicial adjudication

The reluctance of constitutional courts to require procedural safeguards in the decision-making process not only disturbs the balancing exercise, it also weakens the national adjudication process against scrutiny by the ECtHR. Recent ECtHR case-law reveals that the intensity of the proportionality test operated by the Court partially depends upon the scrutiny operated by the national authorities. The Strasbourg Court will more readily accept that an infringement is justified if the authorities followed a strict procedure guaranteeing an inclusive balancing of interests.

In the case of a wide margin of appreciation, the ECtHR will nevertheless accept that the national authorities have violated the Convention if this had already been assessed by a national court.[169] In reverse, it can be argued that the ECtHR will be more willing to accept that an infringement is justified if the national authorities, including the national court, have considerably scrutinized compliance with the Convention. For example, in *Sukhovetskyy* the Court was satisfied that the impugned measure on electoral deposits had been the subject of considerable parliamentary scrutiny, weighing up the competing interests, as well as judicial scrutiny.[170]

Undeniably, domestic courts are part of the 'national authorities' to which the ECtHR may afford a wide margin of appreciation. In general, in the case of a wide margin, the ECtHR will accept the national court's jurisprudence unless this jurisprudence appears to be manifestly unreasonable.[171] However, the ECtHR also extends its procedural approach regarding the attitude of the national courts. For example, in *Sahin* the Court stated that a custody measure did not violate Article 8 ECHR, considering that: 'Having regard to the foregoing and to the respondent

[168] Cohen-Eliya and Porat, *supra* n. 125, at p. 466.

[169] *See* ECtHR 19 Feb. 2009, Case No. 3455/05, *A. and Others* v. *United Kingdom*.

[170] ECtHR 28 March 2006, Case No. 13716/02, *Sukhovetskyy* v. *Ukraine.*

[171] ECtHR 19 Feb. 2009, Case No. 3455/05, *A. and Others* v. *United Kingdom*. In this case, despite the wide margin conferred to the national authorities, the Court found that the government's action violated the Convention, thereby supported by the reasoning of the House of Lords.

state's margin of appreciation, the Court is satisfied that the German courts' procedural approach was reasonable in the circumstances and provided sufficient material to reach a reasoned decision on the question of access in the particular case.'[172] Moreover, in recent case-law, the ECtHR requires that the balance in the national court's judgment is evidence-based, thus imposing requirements of procedural rationality. For example, in *Kryvitska and Kryvitskyy* it stated that

> (t)o protect a person against arbitrariness it is not sufficient to provide a formal possibility of bringing adversarial proceedings to contest the application of a legal provision to his or her case. Where a resulting judicial decision lacks reasoning or an evidentiary basis, ensuing interference with a Convention right may become unforeseeable and consequently fall short of the lawfulness requirement.[173]

Conversely, in *Animal Defenders International*, the ECtHR was satisfied that the courts had shown a degree of deference considering 'the particular competence of Parliament and the extensive pre-legislative consultation on the Convention compatibility of the prohibition' and had, nonetheless, 'debated in detail' the case against the relevant Convention case-law and principles.[174] It follows from this case-law that courts, when scrutinizing government action, are expected to check arguments and assumptions forwarded by government, against scientific or other evidence. In other words: the subsidiary nature of the ECtHR does not imply that the ECtHR will accept the reasoning of a constitutional court, validating the balance operated by the national legislature, if the court has not checked the rationality of the procedure followed by the government.

Conclusion

In this paper, we argued that the argumentation framework included in the proportionality analysis is flawed if wide deference is left to the national authorities. Where subsidiarity arguments explain the margin of appreciation granted by the ECtHR, national courts often abstain from stricter scrutiny precisely because they are embedded in the domestic judicial and political structure. While a broad margin of appreciation is granted for criteria which are not always coherent or adequate, its impact on the effectiveness of the proportionality test as a structured argumentation framework is considerable. As a consequence, it becomes difficult for the courts to draw the line between discretion and arbitrary decision making.

[172] ECtHR [GC] 8 July 2003, Case No. 30943/96, *Sahin* v. *Germany*.

[173] ECtHR 2 Dec. 2010, Case No. 30856/03, *Krivitska and Kryvitskyy* v. *Ukraine*. For other examples, *see* ECtHR 7 Oct. 2010, Case No. 30078/06, *Konstantin Markin* v. *Russia.*

[174] ECtHR [GC] 22 April 2013, Case No. 48876/08, *Animal Defenders International* v. *the United Kingdom*, para. 115.

Therefore, we argued that procedural rationality is a guarantee for proper human rights protection in case of deference to the national authorities. A process-based review of administrative law is well known in various legal systems under common law or under the tenet of principles of good administration. Procedural requirements, however, also play a role in constitutional adjudication as part of the proportionality principle. In that regard, they apply to administrative decisions as well as primary legislation, with this distinction that administrative decisions can be invalidated for procedural reasons only, while in the case of acts of parliament, process review only becomes relevant when due to broad discretion the court is not in a position to give a substantial assessment.[175] We have argued that human rights in general, and the proportionality test in particular, protect individuals against arbitrary government intervention. As rationality in modern-day concepts is conceived as a process of rationalization, it is desirable to operationalize the protection against arbitrary government decisions in terms of procedural requirements. Our starting point is that deference is granted because public authorities are better placed than courts to determine issues on the basis of their superior expertise or democratic credentials, but this assumption is not irrefutable. Public authorities are expected to follow what has been called 'an internalized, prospective process-driven model of human rights.'[176] This does not imply that they follow a uniform and well-defined procedure, which would lead to 'overprotective proceduralism'[177] and a risk of formal window-dressing. Instead, it requires minimum procedural guarantees for an informed and inclusive balancing of interests.

We have demonstrated that there are indications in the case-law of the ECtHR and the national courts to include procedural rationalism as part of the proportionality test. Procedural review in constitutional adjudication, however, is often implicit and incoherent. It is important to note that in particular the national courts are hesitant in this respect. Of course, procedural review raises several questions, for example regarding the expertise of judges to judge empirical evidence.[178] This, again, calls for minimum requirements rather than a well-defined procedure, but also for more interdisciplinary training in law schools. Meanwhile, the interaction between the legislature, the national courts and the ECtHR proves to be an important factor. National measures which are clearly evidence-based are in a

[175] Which distinguishes procedural rationality review or so-called 'semi-procedural' review from purely procedural review, *see* I. Bar-Siman-Tov, 'Semi-Procedural Judicial Review', *Legisprudence* (2012) p. 278.

[176] Mead, *supra* n. 128, at p. 76.

[177] *See* C. Meßerschmidt, 'The Good Shepherd of Karlsruhe', in Popelier et al., *supra* n. 132, at p. 242.

[178] *See* the special issue on this subject, P. Popelier et al., *Courts as Regulatory Watchdogs*, *Legisprudence* (2012; special issue) and in particular Meßerschmidt *supra* n. 116, at p. 375.

better position to withstand judicial scrutiny by national courts, while reasoning on an evidentiary basis places both political and judicial decision making in a better position to withstand scrutiny by the ECtHR. We therefore advocate a stronger use of procedural review by the national courts and more explicit practice in the case-law of the ECtHR.

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