

# THE PRACTICAL AND THEORETICAL PROBLEMS WITH ‘BALANCING’

## *Delfi*, *Coty* and the Redundancy of the Human Rights Framework

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### ABSTRACT:

*In the realm of privacy and data protection – as in the fundamental rights framework in general – balancing has become the standard approach for dealing with legal disputes. It comes, however, with a number of practical and theoretical problems. This article analyses those problems and compares the method of balancing with the original approach of most human rights frameworks, such as the European Convention on Human Rights. It does so by analysing two cases in detail: the European Court of Human Rights’ case Delfi v. Estonia and the Court of Justice of the EU’s judgment Coty v. Stadtsparkasse. From this analysis, it follows that the concept of balancing signals a shift away from the deontological and towards a utilitarian understanding of fundamental rights. This is not only of theoretical importance, as it could also mean that in time, human rights frameworks as such might become redundant.*

**Keywords:** balancing; consequentialism; data protection; privacy; utilitarianism

### §1. INTRODUCTION

Balancing is currently one of the standard ways through which to determine the outcome of a case. The concept is so omnipresent that some authors have even stressed that we live in an ‘age of balancing’.<sup>1</sup> Certainly, under the European Convention on Human Rights (ECHR), weighing one right or interest against the other seems to be the standard approach for dealing with complaints.

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<sup>1</sup> T.A. Aleinikoff, ‘Constitutional Law in the Age of Balancing’, 96 *The Yale Law Journal* (1987).

Establishing that the measure is necessary in a democratic society involves showing that the action taken is in response to a pressing social need, and that the interference with the rights protected is no greater than is necessary to address that pressing social need. The latter requirement is referred to as the test of proportionality. This test requires the Court to balance the severity of the restriction placed on the individual against the importance of the public interest.<sup>2</sup>

Similarly, when the rights of two individuals clash – such as the right to identity and reputation (Article 8 ECHR) and the right to freedom of expression (Article 10 ECHR), the European Court of Human Rights (ECtHR) balances the two rights against each other to determine the outcome of the matter. This is also the case in the realm of data protection, where the interests of the data subject can be balanced against, for example, the commercial interests of a business in processing the data for personalized advertising. This special issue contains a number of contributions on the role of balancing in privacy and data protection regulation and case law. This contribution fundamentally problematizes the very notion of balancing on a number of both practical and theoretical points.

#### A. BEFORE ‘BALANCING’ BECAME FASHIONABLE: THE ‘ORIGINAL’ NECESSITY TEST IN THE ECHR

Despite its increased importance in the ECtHR’s case law, the idea of balancing is not as such contained in the ECHR and seems not to have been envisaged by the authors of the Convention.<sup>3</sup> Rather, the Convention first and foremost provides minimum rules for the conduct of state parties to the Convention (referred to in this contribution simply as ‘states’). The focus is on duties (of care) for states, rather than individual and subjective rights. For example, the respect for life, except in respect of deaths resulting from lawful acts of war (Article 2 ECHR), the commandment that no one shall be subjected to torture or to inhuman or degrading treatment or punishment (Article 3 ECHR), the rule that no one shall be held in slavery or servitude (Article 4) and the prohibition on retrospective legislation (Article 7 ECHR), are principles which may never be violated by states, not even in the state of emergency (Article 15 ECHR).<sup>4</sup> These are all minimum conditions which states need to abide by; if they do not, for example by adopting retrospective legislation, individual rights have not been interfered with per se, but the state is in abuse of its powers.

<sup>2</sup> C. Ovey and R.C.A. White, *European Convention on Human Rights* (Oxford University Press, 2002), p. 209.

<sup>3</sup> A.H. Robertson, *Collected edition of the ‘travaux préparatoires’ of the European Convention on Human Rights – Recueil des travaux préparatoires de la Convention Européenne des Droits de l’Homme. Vols. 1–6* (Nijhoff, 1975). See for more detail about the interpretation of the *Travaux Préparatoires* on in point: B. van der Sloot, ‘How to assess privacy violations in the age of Big Data? Analysing the three different tests developed by the ECtHR and adding for a fourth one’, 1 *Information & Communication Technology Law* (2015).

<sup>4</sup> Besides the prohibition of retrospective legislation, the Convention lays down rules on fair trial (Article 6 ECHR), safeguards against unlawful or arbitrary detention or arrest (Article 5 ECHR) and the right to an effective remedy (Article 13 ECHR).

Even with the four qualified rights in Articles 8 to 11 ECHR (right to privacy, freedom of religion, freedom of speech and freedom of association) the primary focus of the Convention authors seemed to be on curtailing the conduct of states.<sup>5</sup> Article 18 ECHR is aimed at the democratic legislator, which could only use its powers to adopt laws and policies to promote the general welfare of the population and the country. If it used its powers to suppress certain minority groups in society, it simply abused its powers. There is no balancing of different interests: this doctrine functions as an intrinsic test. Democratic power should never be used only to promote the welfare of specific groups in society, period. This also holds true for the prohibition of discrimination contained in Article 14 ECHR.<sup>6</sup>

Arguably, the same logic could be found in the limitation clauses of Articles 8 to 11 ECHR. The administrative power can only curtail these rights if the violation is prescribed by law, if it is aimed at a general interest (such as national security or the protection of the rights and freedoms of citizens) and if it is necessary in a democratic society. It should be noted that this is a binary test: either an infringement is prescribed for by law or it is not, either it is aimed at one of the legitimate interests or it is not, either it is necessary in a democratic society or it is not. Take the sanctity of one's home, as protected under Article 8 ECHR. If the police enter a person's house for a legitimate reason – if it has reason to believe that this person committed a murder and it wanted to search the premises for a murder weapon – this might be considered as necessary for the protection of public order. If the police enter a person's home without a legitimate reason – because the person is a famous football player and police officers were curious to know the living conditions of that person, it is not. Note that no balancing of interests takes place, the test is simply whether an infringement is necessary or not. The same holds true with reference to whether such infringement is prescribed by law: it is a binary test.

## B. THE SHIFT OF THE ECtHR TOWARDS THE BALANCING TEST AND ITS DRAWBACKS

The 'binary test' has been applied less and less often by the European Court of Human Rights. First, the ECtHR has re-shifted the focus from prohibitions for states to abuse their power, to subjective rights by natural persons to protect their individual interests.<sup>7</sup>

Second, it should be stressed that Article 18 ECHR has been of almost no relevance. The ECtHR found a violation of Article 18 ECHR in only five cases, and even in those, it

<sup>5</sup> The ECHR, as opposed to the UDHR on which it is based to a large extent, only contains civil and political rights. Socio-economic rights were rejected from the text or transferred to the First Protocol to the Convention. First generation rights are traditionally seen as negative rights, protecting the citizen from abusive governments, while second generation rights require states to act. See also: <http://unesdoc.unesco.org/images/0007/000748/074816eo.pdf#48063>.

<sup>6</sup> The ECtHR has, without any reference to the *Travaux Préparatoires* to explain its choice, diverged from this approach and has argued otherwise from very early on. See among others: ECtHR, *Airey v. the United Kingdom*, Judgment of 9 October 1979, Application No. 6289/73, para. 30.

<sup>7</sup> B. van der Sloot, 'Privacy in the Post-NSA Era: Time for a Fundamental Revision?', 4 *JIPITEC* (2014).

emphasized that Article 18 ECHR cannot be invoked as a separate doctrine, but only in combination with an individual right as protected under the Convention.<sup>8</sup> Thus, it is first necessary for a claimant to demonstrate that his individual right and personal interests have been harmed and only then is it possible for the Court to hold that a state has abused its powers. Accountability for abuse of power as such is out of the question.<sup>9</sup> In the same way, Article 14 ECHR as interpreted by the Court can only be invoked if an infringement with one of the subjective rights under the Convention has been established by the ECtHR and if individual interests of natural persons are infringed.<sup>10</sup>

Finally, with regard to the qualified rights, the common approach by the ECtHR is not to assess the lawfulness and necessity of certain actions by the state, but to balance different rights or interests against each other, such as the general interest in national security and the particular interest of a claimant to privacy.

Within academic circles, there has been considerable discussion about the concept of balancing, perhaps most famously the Habermas-Alexy debate.<sup>11</sup> While Alexy was not opposed to the idea of balancing,<sup>12</sup> Habermas argued against balancing on two points. Firstly, he suggests that balancing is inappropriate in a fundamental rights framework, or any legal framework for that matter. Such a framework is about a hierarchy of principles, while the idea of balancing is precisely that every interest is relative. He suggests that the legal realm is founded in deontological ethics, which revolve around fundamental duties and restrictions. As has been suggested, this was also the main approach taken by the authors of the ECHR. Habermas suggests that balancing means a shift away from deontological ethics. 'For if in cases of collision all reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses.'<sup>13</sup>

Secondly, Habermas suggests that the idea of balancing is conceptually weak and confusing. Other authors have also made this latter point. They point to the fact that, *inter alia*, moral concepts such as human rights have no weight, that there is no objectively verifiable scale on which to weigh the interests and that there are no universal standards or methods to weigh moral principles with.<sup>14</sup> Habermas adds that: 'Because there are no rational standards here, weighing takes place either arbitrarily or unreflectively,

<sup>8</sup> [Http://hudoc.echr.coe.int/eng#{"article":\["18"\],"documentcollectionid2":\["JUDGMENTS"\]}](http://hudoc.echr.coe.int/eng#{).

<sup>9</sup> P. van Dijk et al. (eds.), *Theory and practice of the European Convention on Human Rights* (Intersentia, 2006), p. 1093–1094.

<sup>10</sup> See further: [www.echr.coe.int/Documents/Handbook\\_non\\_discr\\_law\\_ENG\\_01.pdf](http://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG_01.pdf).

<sup>11</sup> S. Greer, 'Balancing' and the European Court of Human Rights: A contribution to the Habermas-Alexy Debate', 63 *The Cambridge Law Journal* (2004).

<sup>12</sup> R. Alexy, 'Constitutional Rights, Balancing, and Rationality', 16 *Ratio Juris* (2003).

<sup>13</sup> J. Habermas, *Between Facts and Norms* (Polity, 1996). Citation taken from Alexy.

<sup>14</sup> S. Tsakyrakis, 'Proportionality: An Assault on Human Rights?', *Jean Monnet Working Paper* 09/08 (2008), <http://jeanmonnetprogram.org/paper/proportionality-an-assault-on-human-rights-2/>. B. Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions', 29 *Human Rights Quarterly* (2007).

according to customary standards and hierarchies.<sup>15</sup> Balancing, in his view, is thus a hollow metaphor, which provides no fundamentals or principles for judges to base their opinion upon. Rather, judges are incited to make private judgments according to their particular views under the guise of the 'balancing' metaphor.

Proponents of balancing have obviously denied this critique, but perhaps more importantly, many scholars, judges and practitioners have asked about what alternative there is to the metaphor of balancing.

Taking this discussion as a starting point, the aim of this article is twofold. It shows that in the realm of privacy and data protection, balancing has also become a standard approach and contrasts this approach with the 'original' approach, as envisaged by the authors of the ECHR. In order to illustrate this broader point, Section 2 of this article analyses the ECtHR case *Delfi v. Estonia* and Section 3 analyses the judgment of the Court of Justice of the European Union (CJEU) in *Coty v. Stadtparkasse*. Those sections will also suggest what problems might exist in the balancing approach.<sup>16</sup> These two judgements have been chosen because they best illustrate the point this article wants to make. Although they may be 'extremes', and hence serve well to base a practical and theoretical critique of balancing on, they are by no means exceptions; they stand for a vastly growing number of cases in which balancing, in the way as described in this article, is applied and used by Courts in human rights cases.

Section 4 develops a second point, suggesting that both the ECtHR and the CJEU are adopting a new ethical foundation for the human and fundamental rights framework, namely 'utilitarianism' or 'consequentialism', instead of 'deontology'. Not only does this have a significant (negative) impact on the way in which cases are dealt with, more importantly, but this shift could also mean that in time, human rights frameworks as such might become redundant.

## §2. *DELFI v. ESTONIA*

The case of *Delfi v. Estonia* is a relatively simple one. An Estonian digital newspaper published a critical article about a company that provides ferry services and about its sole shareholder, L. The company plans to destroy ice roads for the benefit of the ferry services. The article in itself is nuanced, balanced and the author has adhered to all journalistic principles, such as applying the *audi alteram partem* principle. The site offered users the opportunity to respond to stories on its site: 200 comments were made. After some time, L. asked Delfi to remove 20 of those comments because he felt they were defamatory and asked for compensation for damage to reputation. Delfi complied with

<sup>15</sup> J. Habermas, *Between Facts and Norms*. Citation taken from Alexy.

<sup>16</sup> Less is known about the intentions of the authors of the EU Charter and what their views were on 'balancing'. Still, the general limitation clause contained in the Charter seems to signal a continuum with earlier human rights frameworks. 'Article 52 Scope of guaranteed rights'.

the former request, but refused the second. The subsequent question was whether the site was legally responsible for comments posted by its users.

In national procedural law, there was significant discussion about which regime was applicable to Delfi. On the one hand, Delfi invoked the position of passive hosting provider under Article 14 of the e-Commerce Directive,<sup>17</sup> which would exempt it from liability for actions taken by its users. On the other hand, Delfi could be seen as a journalistic online medium, which would have meant it should be judged under the freedom of expression. Some courts apply the first regime, and acquit Delfi, others apply the second regime, and hold that Delfi should pay damages. Finally, the Estonian Supreme Court judged the case under the freedom of expression framework and Delfi was ordered to pay a small amount to L. Subsequently, both the ECtHR in the first instance<sup>18</sup> and the Grand Chamber<sup>19</sup> held that this judgment was not in violation of Delfi's Article 10 ECHR right to freedom of expression.

#### A. THE POTENTIAL OUTCOME OF *DELFI* UNDER THE 'ORIGINAL' NECESSITY TEST

If the ECtHR had taken the 'original approach' to this case, as envisaged by the authors of the Convention, it would firstly have analyzed whether the website could indeed invoke the right to freedom of expression under Article 10 ECHR. This is far from obvious, because Delfi itself argued that it was a passive internet intermediary, having no involvement with the comments – it only provided a platform for users to post comments on. The government, referring to this fact,

pointed out that according to the applicant company it had been neither the author nor the discloser of the defamatory comments. The Government noted that, if the Court shared that view, the application was incompatible *ratione materiae* with the provisions of the Convention, as the Convention did not protect the freedom of expression of a person who was neither the author nor the discloser.<sup>20</sup>

The question that should have been answered by the Court, if it had applied the original test as envisaged by the authors of the Convention, is: can a website that allows users to post comments invoke an Article 10 ECHR right to freedom of expression although it has neither written nor disclosed them, and if so, under what conditions?<sup>21</sup>

<sup>17</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), [2000] OJ L 178/1.

<sup>18</sup> ECtHR, *Delfi v. Estonia* (first instance), Judgment of 10 October 2013, Application No. 64569/09.

<sup>19</sup> ECtHR, *Delfi v. Estonia* (Grand Chamber), Judgement of 16 June 2015, Application No. 64569/09.

<sup>20</sup> ECtHR, *Delfi v. Estonia* (first instance), para. 48.

<sup>21</sup> To compare, if a person owns five poster boards in a city, and writes on them a short message about the plan of the mayor of the city to close down the red light district and leaves some blank space for passers-

Secondly, if the first question is answered affirmatively, the Court should have assessed whether the limitation on Delfi's freedom of speech was prescribed by law and necessary in a democratic society in relation to one of the goals enlisted in Article 10(2) ECHR. In this case, the government relied on 'the protection of the reputation or rights of others'. It is important to briefly point out one thing. The European Convention on Human Rights is much inspired by the Universal Declaration of Human Right (UDHR). Many articles in the ECHR are based on provisions in the UDHR. This also holds true for the right to privacy. Article 12 of the UDHR, first sentence, holds: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.' Article 8 ECHR, first paragraph, provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' Consequently, all the elements of Article 12 UDHR are reflected in Article 8 ECHR,<sup>22</sup> except for the protection of the honor and reputation, which is contained in paragraph 2 of Article 10 ECHR. This was a deliberate choice by the authors of the Convention, because they felt that the protection of honor and reputation should not be seen as a subjective right of a natural person, but as one of the grounds on the basis of which governments could legitimately curtail the right to freedom of expression.

The Court should thus have assessed the extent to which the comments authored by the users can actually be qualified as defamatory. Of the 20 comments L. asked to be removed at least half seemed childish rather than illegitimate. To cite a few: comment 5 'aha... [I] hardly believe that that happened by accident... assholes fck'; comment 6 'rascal!!!'; comment 10 'If there was an iceroad, [one] could easily save 500 for a full car, fckng [L.] pay for that economy, why does it take 3 [hours] for your ferries if they are such good icebreakers, go and break ice in Pärnu port... instead, fucking monkey, I will cross [the strait] anyway and if I drown, it's your fault'; comment 11 'and can't anyone defy these shits?'; comment 12 'inhabitants of Saaremaa and Hiiumaa islands, do 1:0 to this dope.'; comment 16 'bastards!!!! Ofelia also has an ice class, so this is no excuse why Ola was required!!!!'; comment 17 'Estonian state, led by scum [and] financed by scum, of course does not prevent or punish antisocial acts by scum. But well, every [L.] has his Michaelmas... and this cannot at all be compared to a ram's Michaelmas. Actually sorry for [L.] – a human, after all...:D:D:D'; comment 18 'if after such acts [L.] should all of a sudden happen to be on sick leave and also next time the ice road is destroyed... will he [then] dare to act like a pig for the third time?:)'; comment 19 'fucking bastard, that [L.]... could have gone home with my baby soon... anyway his company cannot guarantee a normal ferry service and the prices are such that... real creep... a question arises whose

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by to write comments on, can the person owning the poster board then invoke a right to freedom of expression with respect to the comments written by the passers-by? Please note, this is not to argue against Delfi's right to freedom of expression, but it is to point out that this is a very important and difficult question, which needs some explanation and careful reasoning by a court of law.

<sup>22</sup> Changing 'privacy' to 'private life' was merely a textual discussion, so that the French (*'vie privée'*) and the English text ('private life') were similar.

pockets and mouths he has filled up with money so that he's acting like a pig from year to year'; and comment 20 'you can't make bread from shit; and paper and internet can stand everything; and just for my own fun (really the state and [L.] do not care about the people's opinion)... just for fun, with no greed for money – I pee into [L.'s] ear and then I also shit onto his head.:)'<sup>23</sup>

Subsequently, the Court should have assessed whether the limitation of Delfi's freedom of expression was prescribed by law and whether the law was accessible and foreseeable. Delfi argued that the violation was not reasonably foreseeable.<sup>24</sup> Delfi referred to the fact that it is not unambiguously clear which legal regime applies to these types of cases: the e-Commerce framework or the freedom of expression. Delfi also pointed out that national courts did not agree on this point. Consequently, the ECtHR should have determined the extent to which Delfi could and should have known that it would be held liable under the freedom of expression for the comments written and posted by its users, instead of being judged under the e-Commerce framework.

Finally, the Court would have assessed whether the restrictions on the freedom of expression as provided for by the law were indeed necessary in a democratic society. Note that what must be necessary in a democratic society are the restrictions as such. Paragraph 2 of Article 10 ECHR specifies: 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society (...) for the protection of the reputation or rights of others (...)' What the ECtHR should have determined is whether it is necessary in a democratic society to limit the freedom of expression of internet intermediaries and its users in general in order to prevent comments such as 'rascal', 'assholes' and 'I pee in your ear and shit on your head'.

## B. THE OUTCOME OF *DELFI* UNDER THE 'BALANCING' TEST

What the ECtHR has actually done, however, is something quite different. It has not assessed in detail whether internet intermediaries can invoke a right to freedom of expression with regard to the comments written and posted by their users. Rather it held that Delfi was required to pay a fine in relation to the user comments meaning it was unnecessary to answer this question in detail.<sup>25</sup> It did not assess whether and if so, which one of the comments could be seen as defamatory. It merely underlined that it was clear that these comments were 'manifestly unlawful'.<sup>26</sup> It has not determined in any detail whether Delfi could and should have foreseen under which regime it would be judged. It only said that Delfi could have foreseen that it was possible that it would be prosecuted

<sup>23</sup> ECtHR, *Delfi v. Estonia* (first instance), para. 14.

<sup>24</sup> *Ibid.*, para. 71–76.

<sup>25</sup> *Ibid.*, para. 50.

<sup>26</sup> ECtHR, *Delfi v. Estonia* (Grand Chamber), para. 117.

under the freedom of expression framework, disregarding the fact that applying another regime could have exempted it from liability.<sup>27</sup> It did not assess whether the restrictions on the freedom of speech were necessary in a democratic society: instead it balanced Delfi's right to freedom of expression with L's right to reputation, which it held (contrary to the intentions of the authors of the ECHR) is protected under Article 8 ECHR.<sup>28</sup>

When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the 'protection of the reputation or rights of others', the Court may be required to ascertain whether domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (...).<sup>29</sup>

The Court has found that, as a matter of principle, the rights guaranteed under Articles 8 and 10 deserve equal respect, and the outcome of an application should not, in principle, vary according to whether it has been lodged with the Court, under Article 10 of the Convention by the publisher of an insulting newspaper article, or under Article 8 of the Convention by the person who has been the subject of that article (...).<sup>30</sup>

The peculiar thing is that the case revolves around Delfi's claim against Estonia; the core question should thus be whether the Estonian government has illegitimately or unlawfully curtailed Delfi's fundamental right. What the ECtHR does, however, is to bring into the equation L., who is not a party to this legal claim, and to focus instead on balancing the interests of two private parties. The actions of the Estonian state are only referred to as an aside when balancing the interests of Delfi and L.

### C. THE CONSEQUENCES OF THE USE OF THE BALANCING TEST

The problem of the balancing test is that, through its use, the Court dodges the questions which have a wider significance. For example, firstly it has a broader significance to know whether internet intermediaries in general can invoke Article 10 ECHR with respect to comments written and posted by users. Secondly, it has broader relevance to know whether comments such as those complained of should actually be qualified as defamatory and if so, on which grounds. It has broader relevance to know whether the limitations of the freedom of speech as provided for in Estonian law are actually necessary in a democratic society, whether they serve a pressing need.

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<sup>27</sup> If Delfi would have gone to the European Court of Justice, it might have been judged under the e-Commerce framework.

<sup>28</sup> The Court made this shift in the case from 2007. ECtHR, *Pfeifer v. Austria*, Judgment of 15 November 2007, Application No. 12556/03.

<sup>29</sup> ECtHR, *Delfi v. Estonia* (Grand Chamber), para. 138.

<sup>30</sup> *Ibid.*, para. 139.

Yet the Court chooses to bring down all these questions to the specificities of this case and to balance the specific interests of Delfi against the specific interests of L. This means, however, that the value of this judgment is also limited to this specific case. Neither internet intermediaries, nor users, nor third parties such as L., nor national courts know, on the basis of this decision, what legal principles there are for determining another case like this one. They only know how the specific interests of L. and the specific interests of Delfi are weighed by the ECtHR in the light of the particular circumstances of this case. Consequently, while the ECHR was meant to provide minimum standards for the conduct of states, it has been transformed into a system in which the particular interests of two parties are weighed and balanced against each other. Bringing down cases to its particulars means that no general standards are developed. This means that every subsequent and similar case must again be determined on the basis of its particulars. Not only does this mean that there is little to no legal certainty, but a case-by-case approach also adds to the ECtHR's caseload.

The main problem is thus that the concept of balancing does not provide any legal certainty. The starting point of the ECtHR Grand Chamber in this case is that there is a conflict of two rights brought along by two private parties which are principally equal in weight, neither one has priority over the other. Since the metaphor of balancing provides no standards or principles as such, the Court must assess the circumstances of the case to determine the outcome of the matter. In order to do so, it develops four criteria:

- (1) the context of the statements;
- (2) the liability of the actual authors of the comments;
- (3) the measures taken by Delfi to prevent unlawful statements; and
- (4) the impact of the decision by the Estonian Supreme Court on Delfi.

While these criteria are not blatantly unreasonable, they are unfounded and gratuitous. The choice of these criteria instead of others remains unclear and is not justified in any way by the ECtHR.<sup>31</sup>

Consequently, it seems that if another court or other judges were to assess the same case, the chances would be high that other criteria would have been chosen. And indeed, even the ECtHR in the first instance did not come up with these four particular criteria. Consequently, these criteria are undoubtedly the fruits of some very bright minds, but they reflect no greater value than the particular opinions of the specific judges in this court of law. Furthermore, with each of the four criteria, the Court chooses to interpret them in one way, while with as much force, they could be interpreted in another way. It is beyond the purpose of this contribution to discuss all the criteria in details, but in order to make the point, reference can be made to criterion 3, that is, measures taken by Delfi to prevent illegal comments on its site.

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<sup>31</sup> Ibid., para. 140–143.

The ECtHR, when discussing this point, admits that the article published by Delfi was nuanced and balanced, that the terms and conditions under which the users could post comments explicitly prohibited unlawful and defamatory content, that Delfi had a notice and take down system in place, that Delfi had an automatic filter system, which blocked certain words and phrases, and that it had active moderators, screening the content posted by users. Although the ECtHR acknowledges these efforts, it also stresses that Delfi had failed to prevent the comments from being published.<sup>32</sup> Likewise, moderators did not filter the 20 comments nor did the notice and takedown system prevent damage to L. Consequently, according to the ECtHR, Delfi did not do enough to prevent damage to L.

However, using the same criterion, a different argument could also be made. Firstly, it is pointed out that Delfi did actually much more to prevent reputation damage than most online news sites. Secondly, the automatic filter did presumably already filter quite a few comments (which were not shown online and were thus not contested), which could also hold true for the moderators active on Delfi's website. Thirdly, blocking more content would be undesirable; for example, automatically blocking words like 'pig' or 'Nazi' would render impossible a rational debate about farming or even comments like 'calling L. a Nazi because he destroys ice roads is wrong and hurtful'. Fourthly and finally, the ECtHR could have held that the Estonian Supreme Court convicted Delfi on wrong grounds. The Supreme Court stressed '[on] account of the obligation arising from law to avoid causing harm, the defendant should have prevented the publication of comments with clearly unlawful contents. The defendant did not do so'.<sup>33</sup> If Delfi had to avoid causing any harm to L., or anyone else mentioned in any of the comments on Delfi's site, it would have engaged in a very restrictive form of private censorship, which in itself would be incompatible with Article 10 ECHR.<sup>34</sup>

Finally, legal uncertainty is increased by the fact that neither the Estonian Supreme Court nor the ECtHR specified what Delfi should have done in order to avoid liability. Internet intermediaries like Delfi often find themselves between a rock and a hard place. They have to implement measures to prevent damage to third parties like L., but if they are too restrictive, they might curtail the freedom of speech of their users and infringe their fundamental human rights. Consequently, they often call for more clarity on which measures they ought to implement. If having terms and conditions prohibiting defamatory comments, an effective notice and takedown system, active moderators on the site and an automatic filtering system is not enough, then what would be enough? The Estonian Court and the ECtHR, however, remain silent. The ECtHR, in first instance, even lauds the Estonian Court for not having provided any clarity on this point, as it

<sup>32</sup> Ibid., para. 156.

<sup>33</sup> Ibid., para. 31.

<sup>34</sup> Please note that this is not to say that this is a better interpretation, but it is to say that the criterion itself provides no legal certainty.

leaves Delfi at liberty to take the measures it sees fit.<sup>35</sup> Consequently, it seems that the whole judgment provides very little certainty with respect to important legal questions.

### §3. *COTY v. STADTSPARKASSE*

Like the case of *Delfi v. Estonia*, the case of *Coty v. Stadtsparkasse* is rather straightforward. Coty's perfume brand was sold illegally by B via website C to person D. Person D was actually Coty using a pseudonym, and so discovered B's violation of its trademark. Coty obtained the identity of B, who had used a false name from the website. B denied having sold the perfume. Coty asked the Stadtsparkasse bank to reveal the holder of the account into which the money was deposited. The bank refused, referring to the legal principle of bank secrecy. Coty won its claim at court but was unsuccessful at the appeal stage. The German Federal Supreme Court sent a preliminary question to the CJEU:

Must Article 8(3)(e) of Directive 2004/48 be interpreted as precluding a national provision which, in a case such as that in the main proceedings, allows a banking institution to refuse, by invoking banking secrecy, to provide information pursuant to Article 8(1)(c) of that directive concerning the name and address of an account holder?

The Court of Justice responded in a fairly brief statement. Article 8(3)(e) of Directive 2004/48 on the protection of confidentiality of information sources and the processing of personal data must be so interpreted that it precludes a national provision under which a banking institution may, in an unlimited and unconditional manner, invoke its banking secrecy in order to refuse to provide information concerning the name and address of an account holder.

#### A. THE POTENTIAL OUTCOME OF *COTY* UNDER THE NECESSITY TEST

How should the CJEU have determined the outcome of this case? First, it should have started with the observation that what is at stake here is bank secrecy. The central question here is whether Coty can rely on the banking secrecy and if so, to what extent. It is important to point out that in many ways, banking secrecy is comparable to legal privilege or doctor-patient confidentiality. If patients are not able to trust that the information they disclose to their doctor will be treated confidentially, some research shows that people simply do not go to the doctor as often and if they do, disclose less information than they would normally.<sup>36</sup> Essentially the same holds true for the confidentiality between a lawyer and a client. Therefore, many Western democracies

<sup>35</sup> ECtHR, *Delfi v. Estonia* (first instance), para. 90.

<sup>36</sup> A.L. Allen, *Unpopular privacy: what must we hide?* (Oxford University Press, 2011).

have special rules for these types of relationships; there are privileges for doctors and lawyers and they have the duty to keep the information they receive from their clients or patients confidential. If they break this duty, they may be relieved from their profession or be subjected to disciplinary sanctions.

It is important to emphasize that these kinds of principles do not protect the interests of individual patients or clients.<sup>37</sup> Of course, patients and clients have an individual right to privacy, which they can invoke if it is violated. The additional value of the privileges discussed transcends the individual interest and protects the functioning of the profession as such. Professional secrecy is a necessary condition, a prerequisite for the functioning of the medical and legal sectors; without it the medical and legal sector would not be able to function adequately.

Only in exceptional cases professional secrecy can be relieved; for example, if a client tells his lawyer in detail that and how he plans to commit a murder. The banking secrecy is of the same blood type. It protects the functioning of the banking sector as such, a general interest. If citizens cannot trust that their financial situation will remain confidential, they will avoid banks or try to mask their assets, especially in cases of extreme wealth or poverty. It is therefore important to distinguish between the right to privacy and protection of personal banking data individual interests and the banking secret, that protects a general interest and which is a precondition for the functioning of the banking sector as such.

The second issue the CJEU should have discussed is whether and if so under what circumstances the secrecy of banks can be curtailed and in particular, whether the right to information by third parties, such as Coty, is one of such circumstances. Article 8 of the Directive 2004/48 states:

1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who: (...) (c) was found to be providing on a commercial scale services used in infringing activities (...). 3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which: (...) or (e) govern the protection of confidentiality of information sources or the processing of personal data.

The CJEU should have investigated whether Coty can actually invoke the right to information. The question is in particular whether Article 8(1)(c) of Directive 2004/48 applies, namely whether the bank 'was found to be providing on a commercial scale services used in infringing activities'. This is highly questionable because it is unclear whether the bank account is an intrinsic part of B's violations. For example, is the manufacturer of the computer B used to create the account through which the deal was

<sup>37</sup> See also Article 9 of Quebec's Charter of Human rights and freedoms.

made also providing products on a commercial scale that are used to infringe intellectual property?<sup>38</sup>

Finally, the CJEU should have assessed whether a limitation on the bank secrecy would be necessary at all. It seems that Coty already knew B's identity and that it had evidence to support that B was the holder of the account through which the trademark infringement was made. It could have gone to court on this basis and it would have been for B to prove that although he is the holder of the Internet account through which the trademark infringement was made, he was not the person who engaged in illegal activities.

## B. THE OUTCOME OF *COTY* UNDER THE BALANCING TEST

What the CJEU in fact does, however, is something very different. As with the ECtHR in *Delfi* the CJEU avoided questions with a broader significance. It did not assess the value of the banking secret but merely pointed to the value of trademark protection; it did not assess whether the bank indeed provides services on a commercial scale for trademark infringements – it held only that it is 'common ground that a banking institution, such as that at issue in the main proceedings, is capable of falling within the scope of Article 8(1)(c) of Directive 2004/48';<sup>39</sup> it did not assess whether the right to information of a trademark holder is one of the grounds on which the banking secret can be curtailed; and it did not in any way assess whether such a limitation would at all be necessary.

Rather, it engaged in a balancing activity, but the peculiar thing is that, as with *Delfi*, a third party, not being an official party to the case, was brought into the equation, namely the interests of B relating to his privacy and data protection. Consequently, instead of analysing the general interest with respect to the banking secret and assessing in how far a right to information might limit that, it balanced the specific interests of Coty against the specific interests of B. Interestingly, the banking secret is not even a part of this equation – it was totally ignored by the CJEU.

Article 8(1)(c) of Directive 2004/48 and Article 8(3)(e) thereof, read together, require that various rights be complied with. First, the right to information and, second, the right to protection of personal data must be complied with.<sup>40</sup> It is also evident that the CJEU interprets the matter under the right to protection of personal data instead of the secrecy of banks when it states: 'It is also common ground that the communication, by such a banking institution, of the name and address of one of its customers constitutes processing of personal data, as defined in Article 2(a) and (b) of Directive 95/46.'<sup>41</sup>

<sup>38</sup> Again, this is not to argue for or against one interpretation or the other, but it is to suggest that this is a very important but difficult question, which would benefit from a careful judgment by a court of law.

<sup>39</sup> Case C-580/13 *Coty Germany GmbH v. Stadtparkasse Magdeburg*, EU:C:2015:485, para. 26.

<sup>40</sup> *Ibid.*, para. 28.

<sup>41</sup> *Ibid.*, para. 26.

Subsequently, it transcends the right to information of Coty and the interests of B to a fundamental rights discourse. The interests of Coty are coined in terms of the fundamental right to intellectual property, as provided protection in Article 17(2) of the Charter of Fundamental Rights of the European Union, and the interests of B are understood as connected to his fundamental right to data protection, as contained in Article 8 of the Charter.

The right to information which is intended to benefit the applicant in the context of proceedings concerning an infringement of his right to property thus seeks, in the field concerned, to apply and implement the fundamental right to an effective remedy guaranteed in Article 47 of the Charter, and thereby to ensure the effective exercise of the fundamental right to property, which includes the intellectual property right protected in Article 17(2) of the Charter. As noted by the Advocate General in point 31 of his Opinion, the first of those fundamental rights is a necessary instrument for the purpose of protecting the second. The right to protection of personal data, granted to the persons referred to in Article 8(1) of Directive 2004/48, is part of the fundamental right of every person to the protection of personal data concerning him, as guaranteed by Article 8 of the Charter and by Directive 95/46. As regards those rights, it is clear from recital 32 in the preamble to Directive 2004/48 that the directive respects the fundamental rights and observes the principles recognized by the Charter. In particular, that directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of the Charter. At the same time, as is clear from Article 2(3)(a) of Directive 2004/48 and from recitals 2 and 15 in the preamble thereto, the protection of intellectual property is not to hamper, inter alia, the protection of personal data, so that Directive 2004/48 cannot, in particular, affect Directive 95/46. The present request for a preliminary ruling thus raises the question of the need to reconcile the requirements of the protection of different fundamental rights, namely the right to an effective remedy and the right to intellectual property, on the one hand, and the right to protection of personal data, on the other.<sup>42</sup>

### C. THE CONSEQUENCES OF THE USE OF THE BALANCING TEST

The CJEU has thus transformed the *Coty* case into a conflict of two fundamental right of two private parties, namely the right to intellectual property as protected by Article 17(2) of the Charter of Fundamental Rights of the European Union, on the one hand and the fundamental right to data protection, as contained in Article 8 of the Charter, by B on the other hand. By doing so, as with the *Delfi* case, the CJEU avoids answering the questions that have broader significance.

It has broader significance to know, for example, what the Court's view is on the banking secrecy as such: should it be protected and to what extent? Under which conditions can it be curtailed? Is the right to information of a trademark holder one of these conditions? What does it mean to provide services on a commercial scale that are used for infringements? Is it necessary to curtail the banking secret if there are other

<sup>42</sup> Ibid., para. 29–33.

options open to a trademark holder? And so on. Again, what the Court does is to assess the very specific circumstances of the case and the particular interests of Coty and B. Again, the value of the judgment does not transcend the parties directly involved in the case. The only statement with a broader scope the CJEU makes is so general and so obvious that it provides no new information. Namely, it holds that *if* the provision under German law protecting banking secrecy would have been interpreted in a way that could under no circumstances be curtailed, it would not be in accordance with EU law.<sup>43</sup> Obviously, however, no doctrine protecting professional secrecy is absolute. Consequently, the judgment seems again to provide no or very little certainty on any of the many important and difficult legal questions triggered by the case.

In addition, it is again unclear how the weighing process is actually performed. What criteria are used remains unspecified by the CJEU. No account is taken of the fact, for example, that socio-economic rights were traditionally not seen as human rights, which is also the reason that the right to property is not contained in the ECHR. Moreover, the CJEU could have stressed that even if a right to property should be seen as a fundamental right having the same weight as, for example, the right to freedom of expression or the freedom from discrimination, that the right to intellectual property seems to represent a very different value. While physical property may be directly connected to personal interests, one of the core rationales behind the right to intellectual property is an economic one, namely the exploitation of ideas and works.

Furthermore, what is at stake in *Coty* is a trademark right by a company. The right of legal persons to invoke fundamental rights is already quite disputed, but in any case, it seems that a trademark right of a company is something very different to a fundamental human right of an individual.<sup>44</sup> Similarly, the status of data protection as a fundamental right is quite contested, *inter alia* because the concept of ‘personal data’ is so broad and because it is necessary for states to process personal data.<sup>45</sup> Consequently, even if the method of balancing is embraced, the CJEU could at least have differentiated between different doctrines and the types of values they protect and possibly, could have suggested a hierarchy of principles and values. However, the CJEU chooses to remain silent on this point as well.

#### §4. ANALYSIS

From the analysis of these two cases, a number of considerations emerge. The traditional, deontological (‘deon’ means ‘duty’) human rights framework was focused on duties. It lays down absolute obligations for states, for example, ‘do not torture’, ‘do not enact retroactive legislation’, ‘do not discriminate against minority groups’, and so on. In

<sup>43</sup> Ibid., para. 44.

<sup>44</sup> Ibid., para. 20. The fact that trademarks do not fall under the scope of the directive is also dismissed by the Court without any reasoning.

<sup>45</sup> See also the two rationales as specified in Article 1 of the Data Protection Directive.

addition, it lays down relative restrictions, such as, 'do not interfere with citizens' right to privacy or freedom of expression' unless it is 'prescribed for by law, necessary in a democratic society and aimed at a general interest, such as the protection of national security or the rights of others'. The question whether such a relative obligation has been breached is answered in a fivefold manner: (1) does a party have a right to privacy or freedom of expression, (2) is this right curtailed, (3) is this restriction prescribed for by law, (4) is the restriction aimed at a societal interests and (5) is the limitation necessary in a democratic society.

#### A. THE NECESSITY TEST

Following this approach, the *Delfi v. Estonia* case should thus have answered the following questions:

- (1) can Delfi invoke a right to freedom of expression?
- (2) is the fine it had to pay a limitation of this right?
- (3) is this limitation prescribed for by law and foreseeable?
- (4) does it serve a legitimate interests? and
- (5) is the limitation as such necessary in a democratic society, that is, does it serve a pressing social need?

The CJEU is obviously not bound by the initial thought behind the ECHR, but the point is to provide an alternative to the balancing method. If the CJEU would have adopted this approach in the *Coty v. Stadtsparkasse* case, it would have assessed whether:

- (1) Stadtsparkasse could invoke the banking secrecy;
- (2) giving the name of a client imposes a limitation on this principle;
- (3) this limitation was prescribed for by law, more in particular whether the bank provided on a commercial scale services used to infringe intellectual property;
- (4) this limitation served a legitimate aim; and
- (5) the limitation was necessary in a democratic society, given that Coty already had evidence against B.

In this approach, the starting point is a legal principle, either the protection of the freedom of expression, banking secrecy or something else. Subsequently, it is assessed whether (and if so under what conditions) this principle may be curtailed.

#### B. THE BALANCING TEST

What both the ECtHR and the CJEU have done, however, is something quite different. They both bring into play a private party not part of the legal conflict, either L in the

case of Delfi or B in the case of Coty. What follows from this, is that the cases are not judged with a legal principle as starting point; rather, they are treated as a conflict of two equal rights by two equal parties. This also entails that what is not assessed – or only marginally – are the actions of the Estonian state and the banking secret of Stadtparkasse. Interestingly, both courts also transcend the rather ordinary interests of the parties involved to a human and fundamental rights framework. In the case of Delfi, its liability for user comments is seen as a breach of the fundamental right to freedom of speech and the interests of L with respect to his reputation are treated as an issue falling under the right to privacy. In the case of Coty, its trademark is framed as a fundamental right to intellectual property and the interests of B are seen as linked to his fundamental right to data protection. Finally, in order to determine the outcome of the cases, the courts engage in a balancing activity, wherewith they weigh the respective interests of the different parties involved.

The consequence of this approach is that all general questions with a broader significance are ignored by courts. Rather, the cases are brought down to the particular circumstances of the matters and the specific interests of the parties involved. The main problem is that the cases do little to provide legal certainty, not only because the broader questions are ignored, not only because the only real value of the decisions lies in balancing the specific interests involved with the case, but also because the balancing method as such is rather vague. It seems unclear on the basis of which criteria the balancing exercise is performed. In the case of Delfi, four criteria are established/identified by the ECtHR Grand Chamber, but it is unclear why it chooses these criteria and not others. Likewise, the application of these criteria in this particular case is not infallible. Similar, the CJEU does nothing to further clarify how it weighs and balances the different interests involved, it does not prioritize any interest over the other.

Although these are only two cases they seem to represent a broader trend,<sup>46</sup> to broaden the material scope of human and fundamental rights. Article 8 ECHR, for instance, has been interpreted by the ECtHR to protect not only one's home, communication and private and family life, but also the right to reputation, property, education, a minority identity, a legalized stay for immigrants, to marry and found a family, to data protection, a fair trial, a clean living environment and even being made redundant.<sup>47</sup>

More generally, the realm of human rights has broadened significantly over the past few decades. This also relates to another shift, namely from a focus on duties and obligations for states toward an understanding of fundamental rights as instruments of citizens for the realization of their particular interests. A third shift is, as already signalled, that the broader questions with a wider significance are avoided by the courts. For example, even

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<sup>46</sup> This, obviously, has not been proven within the scope of this contribution. These suggestions are thus tentative.

<sup>47</sup> B. van der Sloot, 'Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data"', 80 *Utrecht Journal of International and European Law* (2015).

if it is unclear whether a particular interest falls under the material scope of a human right, the courts often avoid answering this principled question by stating something like 'even if this interest would fall under the material scope of fundamental right, it is in any case outweighed by another interest in this particular matter'.<sup>48</sup> The same holds true for the question whether a limitation of a human right is prescribed for by law and whether there has been an infringement of a fundamental right, as evidenced among others by the Court's attitude towards the presumed defamatory comments in *Delfi*. The final shift, related to the former, is that there is a trend to bring matters down to the particular circumstances of the case and the specific interests of the parties involved. Fifth and finally, even using the balancing method, the courts try to avoid determining legal matters on the basis of norms and principles or even a hierarchy of interests.

### C. THE MOVE AWAY FROM 'DEONTOLOGY' AND THE EMERGENCE OF A NEW ETHICAL FOUNDATION FOR THE HUMAN AND FUNDAMENTAL RIGHTS FRAMEWORK

What follows from an analysis of these two rulings is that there seems to be a shift away from a deontological framework and towards a utilitarian (or consequentialist) understanding of human rights.<sup>49</sup> While deontology relies on a hierarchy of principles and on fundamental obligations for parties, whether relative or absolute,<sup>50</sup> utilitarianism approaches moral decisions on the basis that every principle is relative and can be measured.<sup>51</sup> In its most basic form, this means that if an act causes more good than harm, it is considered a good act. If an act, however, does more harm than good, it must be avoided.<sup>52</sup> In this realm, every interest, however weak, is taken into the equation, although its relative weight may vary. Thus, even a person's interests in, say, having clean socks, is an interest that should be taken into account, although it has less weight than, for example, having access to adequate medical care. Furthermore, there are in principle no absolute prohibitions, even with as extreme an example as torture. A deontologist's ethics would prohibit torture because it is morally wrong (like it would hold that murder is wrong or stealing is wrong, whatever the context);<sup>53</sup> a state engaging in torture is abusive of its powers.

A utilitarian, however, would assess how much pain torture does to the person in question, and what good it might bring if he is tortured. For example, in a ticking time bomb scenario, in which a terrorist places a bomb in a city and is caught, a utilitarian

<sup>48</sup> See for example: ECtHR, *Pretty v. The United Kingdom*, 29 April 2002, Application No. 2346/02.

<sup>49</sup> See further: J. Waldron, 'Fake Incommensurability: A Response to Professor Schauer', 45 *Hastings Law Journal* (1994).

<sup>50</sup> Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/ethics-deontological/>.

<sup>51</sup> Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/utilitarianism-history/>.

<sup>52</sup> This is a description of act-utilitarianism, rather than rule-utilitarianism.

<sup>53</sup> I. Kant, *The metaphysics of morals* (Cambridge University Press, 1996).

would not per se be against torturing this terrorist in order to find out where the bomb is hidden and how to dismantle it.<sup>54</sup> The only arguments that may convince a utilitarian otherwise do not lie in the moral realm, but in the practical reality, such as the fact that information received through torture is often weak and unreliable. This also shows that for utilitarians, legal rules and juridical doctrines are judged merely on the basis of their instrumentality towards the good.<sup>55</sup>

Consequently, embracing the method of balancing seems to shift towards a utilitarian or consequentialist understanding of human rights.

The most effective critique of balancing concerns the assumption of a common metric in the weighing process. The metaphor says nothing about how various interests are supposed to be weighted and this silence reflects the impossibility of measuring incommensurable values by introducing a mechanistic, quantitative common metric. The only way to attempt the introduction of a common metric is to subscribe to some form of utilitarianism, that is, to a moral theory which assumes that all interests are ultimately reducible to some common metric (money or happiness or pleasure) and that, once translated into this common metric, they can be measured against each other.<sup>56</sup>

The problem is that the very essence of legal doctrines and especially of human and fundamental rights frameworks is that they form a barrier against instrumentalist and consequentialist approaches, as are often dominant in the political realm.

Human rights protections precisely aim to act as constraints on consequentialist forms of reasoning. Acts of balancing require identification of interests, assigning values to them and ultimately to deciding which interest yields the net benefit. This leads to a contradicting position of subjecting the constraint itself (human rights protections) to a test of consequentialism.<sup>57</sup>

Human rights aim to provide a barrier for consequentialist or utilitarian reasoning. The width of these rules and obligations is small, because the essential goal is to protect the absolute minimum conditions of a democratic society. It aims at providing a hierarchy of principles. It provides special protection to certain principles and interests which are seen as fundamental to human life, such as a form of privacy and freedom of expression. Building on a deontologist ethics, human rights provide minimum rules and obligations, which must be respected. It sets limits to a utilitarian understanding of rights and interests, in which the greatest good for the greatest number of people is pursued. It

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<sup>54</sup> See among others: F. Allhoff, *Terrorism, Ticking Time-Bombs, and Torture: A Philosophical Analysis* (Chicago, 2012).

<sup>55</sup> What the perceived highest good is may vary from theory to theory, but mostly it is something like, the most happiness for the most people.

<sup>56</sup> S. Tsakyrakis, 'Proportionality: An Assault on Human Rights?', *Jean Monnet Working Paper 09/08* (2008), <http://jeanmonnetprogram.org/paper/proportionality-an-assault-on-human-rights-2/>, p. 5.

<sup>57</sup> B. Çalı, 29 *Human Rights Quarterly* (2007), p. 259.

provides prohibitions on actions, even if they would promote the greatest happiness for the greatest number of people, if the action in question is intrinsically wrong.

A utilitarian understanding of human rights, however, includes most if not all interests, imposes no principled hierarchy of interests and tries to balance and weigh cases on the basis of whether they promote human happiness.<sup>58</sup> It seems that there is a trend under both the ECHR and the Charter of Fundamental Rights of the European Union to move towards such an understanding. Many minor interests, such as not being called a rascal or the trademark protection of a commercial business, are elevated to human and fundamental rights discourse.<sup>59</sup> Cases are treated not as an assessment of absolute or relative obligations, but as a conflict of equal interests of two equal parties. Accepting utilitarianism as the underlying philosophy for the human rights framework is contradictory because utilitarianism has traditionally been opposed to the very idea of human rights<sup>60</sup> and because the very aim of human rights is to place limits on a consequentialist form of reasoning. Moreover, if almost every interest is protected under the human rights framework, it has no added value over the normal legal framework. If all cases are determined on their particulars, the judgments have no or very little added value. If the very fundamental restrictions human rights aimed to impose on consequentialist reasoning is transformed in an interpretation in which the restriction are themselves consequentialist in nature, then the very essence of the human rights framework is lost. Consequently, if the trend signalled in this article is continued, it might mean that in time, the human rights framework as such might become redundant.

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<sup>58</sup> See further on this topic: W.J. Talbott, 'Consequentialism and Human Rights', 8 *Philosophy Compass* (2013).

<sup>59</sup> See further: M. Rosenfeld and A. Arato, *Habermas on law and democracy: critical exchanges* (University of California Press, 1998).

<sup>60</sup> J. Bentham, 'Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution', [http://english.duke.edu/uploads/media\\_items/bentham-anarchical-fallacies.original.pdf](http://english.duke.edu/uploads/media_items/bentham-anarchical-fallacies.original.pdf).