2

The Origins of Proportionality and Balancing in the Jurisprudence of the European Court of Human Rights

Bart van der Sloot

I. Introduction

There is quite some controversy over the notion of balancing.[1]

On the one hand, the term is increasingly deployed in legal, political and administrative discourse. It is one of the most frequently used notions by legislators, policymakers and courts. When approaching matters through a balancing lens, the interests of two private parties can be weighed against each other, or the private interest can be weighed against the public interest. Such an approach is intuitive and builds on a layperson's understanding of fairness and approach to moral and legal complexities. It is also grounded in one of the archetypal symbols of law: blindfolded lady justice with a sword in one hand and a weighing scale in the other, suggesting that the ultimate role of law is to ensure that the weightiest of interests prevails.

On the other hand, there are quite a number of problems with deploying the notion of balancing in the legal sphere. Balancing is a metaphor, drawn from the physical realm, where two or more objects can be weighed and balanced against each other. But different from physical objects, interests or rights have no weight; weight can only be (metaphorically) attributed. There is no standard or objective measure for how to assign weight to interests or rights, meaning that it is ultimately a subjective, moral or political decision by judges, legislators or administrators. There is no standardised measure or unit for weight in the legal realm, like a kilogram, and, different from the physical realm, there is no objective device for weighing the different interests or rights at stake, such as a weighing scale. Thus, while concepts like balancing and weighing have an aura of objectivity, when deployed in the legal realm, the effect is the exact opposite; without any standard, unit or scale, it is ultimately a subjective interpretation that prevails.

Because what weight is assigned to a right or interest and how the various rights and interests are balanced against each other is devoid of objective standards, each judge will have to find their own path, leading to legal uncertainty and legal inequality. The lack of objective criteria means that each matter is judged on its own merits, on a case-by-case basis, leading to a highly incident-

---

[1] P Van Dijk, 'Some Reflections on Balancing Conflicting Human Rights' in Y Haeck et al (eds), *The Realisation of Human Rights: When Theory Meets Practice* (Intersentia, 2013) 53–72; B Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 *H.R.Q.* 251; TA Aleinikoff, 'Constitutional Law in the Age of Balancing', (1987) 96 *The Yale Law Journal*. J Habermas, *Between Facts and Norms* (Polity, 1996); S Tsakyrakis, 'Proportionality: An Assault on Human Rights?', Jean Monnet Working Paper 09/08 (2008); B Van der Sloot, The Practical and Theoretical Problems with 'Balancing' Delfi, Coty and the Redundancy of the Human Rights Framework (2016) 23 *Maastricht Journal of European and Comparative Law* 439. **[AQ: please use full journal titles]**

driven body of jurisprudence. This leads to an increase in the number of cases and decisions that focus on the circumstances of a particular case: it is the rights and interests relevant to that specific case that should be weighed. This generally means that when rights or interests are balanced in light of the specific circumstances of a particular case, no legal precedents are developed and the larger, societal questions at stake are left untouched.

Balancing also runs counter to the very idea of law, in particular human rights law. Most modern human rights instruments were adopted in the wake of the Second World War, in which the most basic of human rights were trampled. Law and in particular human rights instruments are introduced to counterbalance acts that normally prevail in moral and political discourse. It sets out minimum standards that such decisions must always accord to; these minimum standards cannot be balanced themselves, but must be respected at all times. Balancing is intrinsic to one of the major ethical theories: utilitarianism.[2] In its most basic form, utilitarianism looks at every particular action and asks: does this action inflict more pain than it brings pleasure? If so, the action is morally wrong and should not be pursued. If the action provides more pleasure than pain, the action should be pursued. It was precisely this philosophy against which post-WWII human rights frameworks, such as the European Convention on Human Rights (ECHR), guarded. A utilitarian approach can easily lead to minorities being suppressed. If an act is to the detriment of a small minority, but to the joy of the majority, it is easy to see how the pleasure of the masses will quickly outweigh the pain of the few. The human rights framework explicitly aims at protecting the rights of minorities; the rule of law sets limits to democratic (majority) decision-making. Hence, the human rights framework distances itself from a utilitarian philosophy and is based on the opposed deontological ethics, which emphasises the respect for absolute prohibitions and minimum requirements.[3] Reintroducing the notion of balancing in the human rights framework might hence defeat its very purpose.

There are consequently serious arguments against using notions of balancing and weighing in legal discourse. Today, their use is so omnipresent that most lawyers and legal scholars can simply not see how one could come to a legal decision without them. When pointing to the fact that human rights instruments are not based on the fluid and relative notions of weighing and balancing, but on the binary tests of necessity and legality (an interference either has a legal basis or it has not; an interference either serves a public interest or it does not; an interference either is necessary in a democratic society or it is not), the counter-argument is that necessity by definition entails a test of proportionality and that a proportionality test requires weighing the different rights and interests at stake. Thus, balancing is engrained in the human rights frameworks and intrinsic to decisions by human rights courts.

---

[2] A Sen and B Williams (eds), *Utilitarianism and beyond* (Cambridge University Press, 2016); B Williams, JJC Smart and B Williams, *A critique of utilitarianism* (Cambridge/UK **[AQ: publisher?]**, 1983); JJC Smart and B Williams, *Utilitarianism: For and against* (Cambridge University Press, 1973); G Scarre, *Utilitarianism*. (Routledge, 2020). T Mulgan, *Understanding utilitarianism* (Routledge, 2014); D Lyons, *Forms and limits of utilitarianism* (Clarendon Press, 1965).

[3] B Hooker (ed), *Developing deontology: New essays in ethical theory* (John Wiley & Sons, 2012); N Naaman-Zauderer, *Descartes' Deontological Turn: Reason, Will, and Virtue in the Later Writings* (Cambridge University Press, 2010); N Rosenstand, *The moral of the story: An introduction to ethics* (Mayfield Publishing, 1997); EV García, *Ethics, Law and Professional Deontology* (ESIC Editorial, 2021); G Wu and Y Li, *Between Deontology and Justice: Chinese and Western Perspectives* (Routledge, 2019).

This chapter will verify to what extent this suggestion is true and does so by studying the jurisprudence of the European Court of Human Rights (ECtHR). Section II will discuss some of the most important aspects of the Convention and the way in which it was designed. Section III will discuss the methodology used for this study. Sections IV and V will discuss the role of the notion of proportionality and balancing in the case law of the Court respectively. The period covered by this research is 1950−2000, which allows for a detailed assessment of whether the two legal metaphors were always part of the Court's legal reasoning and, if not, how these notions entered its jurisprudence and developed over time. Finally, section VI provides an analysis.

II. The Convention

When the European Convention on Human Rights[4] was drafted, the first proposal was to have one article include a list of human rights protections, a second providing ancillary rights and a third laying down a general limitation clause reading:

> The rights specified in Articles 1 and 2 shall be subject only to such limitations as are in conformity with the general principles of law recognized by civilized nations and as are prescribed by law for: (a) Protecting the legal rights of others; (b) Meeting the just requirements of morality, public order (including the safety of the community), and general welfare.[5]

This formula incorporated the prescribed by the law criterion and a reference to public interests and the rights of others; though it did not speak of 'necessity', it did allow only such limitations as were in conformity with the general principles of law recognised by civilised (read democratic) nations. Later, a new proposal was put on the table which, instead of enumerating the rights in one article and working with a general limitation clause provided in another, was based on what was called 'precise definition'; each provision contained one specific right and indicated per right whether, and if so, under which conditions that right could be curtailed. This is the version that ultimately prevailed. Although the notions of proportionality and balancing did not figure in any of the discussions of the authors of the Convention found in the *travaux préparatoires*, the ECHR does make use of the term 'necessity', most prominently in the so-called qualified rights, Articles 8 (right to privacy), Article 9 (freedom of religion), Article 10 (freedom of speech) and Article 11 (freedom of association):

> **Article 8**
>
> …
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

---

[4] Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950

[5] *Collected edition of the 'Travaux préparatoires' of the European Convention on Human Rights / Council of Europe = Recueil des travaux préparatoires de la Convention européenne des droits de l'homme / Conseil de l'Europe* (Martinus Nijhoff, 1975–85) 8 vols.

Article 9

…

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

…

2. 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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others…

Article 11

…

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. …

Besides the qualified rights, there three other articles that have similar formulations. Article 2 (right to life), uses the term 'absolutely necessary', Article 6 (right to a fair trial) speaks of 'strictly necessary' and Article 15 (state of necessity) refers to 'strictly required':

Article 2

…

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a)in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 6

1. … Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 15

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

No explanation is provided in the *travaux préparatoires* on the difference between 'strictly necessary', 'strictly required' and 'absolutely necessary',; rather they all seem to emphasise the same, elevated threshold. Both Article 15 and Article 2 seem to foreshadow a proportionality test when they emphasise 'to the extent strictly required' and 'no more than absolutely necessary', as this refers

to the relation between means and ends. Most provisions in the Convention, however, do not use the notion of necessity. For example:

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article P1-1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article P1-2

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

There are two important to points to make to assist general understanding of the Convention.

First, Articles P1-1 and P1-2, quoted above, are Articles 1 and 2 of the First Protocol to the Convention.[6] The First Protocol was adopted at the same time as the Convention, yet the right to property and the right to education were left outside of the Convention mechanism itself. Being adopted against the backdrop of the Second World War, the ECHR was predominantly concerned with

[6] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Paris, 20.III.1952.

providing negative rights to citizens and imposing negative obligations on states. The Convention sets limits to the powers of the state: it can never use its powers to torture citizens; it can only deploy emergency measures to the extent strictly required; and it can only enter the home of a citizen in accordance with the law and when necessary in a democratic society.

The rights contained in the Convention are so-called civil and political rights, or first-generation human rights, while the rights to property and education are so called socio-economic rights, or second-generation human rights. The essential difference is that these are positive rights of citizens, namely to enjoy property and education, and that it requires positive action by the state, namely to lay down a regime for property ownership and to facilitate or organise an educational system.[7] What was required from the state in light of these positive obligations was deemed vague by the authors of the Convention and ultimately a political, rather than a legal, question. Thus, these rights were moved to an optional protocol.

Second, the authority of the Court was under discussion when setting up the Convention mechanism.[8] Many countries felt that having a Commission (the European Commission of Human Rights, which did the majority of the work until the end of the twentieth century, when its tasks were transferred to a separate branch of the ECtHR)[9] was sufficient. The Commission had the authority to assess cases and decide on their admissibility; the Court could give an ultimate substantive decision on the matter. Many states felt that if the Commission declared a case admissible, that would signal to the state against which the case was brought that it should reconsider its stance and enter into negotiations with the claimant. Many authors of the Convention believed that the embarrassment of the Commission declaring a case admissible would be enough to put the state to action. This was so, because the number of cases was expected to be low (each case that was declared admissible would thus get due media coverage and political attention) and this in turn was so because the ECHR was set up not to provide protection to incidental problems for individual claimants, but to structural and systemic problems, such as those that had emerged during the Second World War.

Ultimately, the Court was set up as a matter of compromise. But to emphasise that the Convention mechanism should not be used by natural persons to pursue their particular interests, individual applicants were denied the right to petition to the ECtHR. Thus, though they could bring a case to the Commission, even if the Commission declared their case admissible, they could not put their case before Court. Only the Commission itself or a Member State could do so. And they would only do so, it was believed, when the case had a significance that went beyond its particularities, if the case exemplified a wider, societal problem, or revealed a structural injustice in the legal system of the state.

---

[7] K Vasak, 'A 30 Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' (2021) *Law J. Soc. & Lab. Rel.* 20.

[8] B Van der Sloot, *Privacy as Virtue: Moving beyond the Individual in the Age of Big Data* (Intersentia Ltd, 2017).

[9] See for several important changes to the Convention mechanism: 'Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (1990), available at www.echr.coe.int/documents/d/echr/Library_Collection_P9_ETS140E_ENG; 'Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby' (1994), available at rm.coe.int/168007cda9; 'Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention' (2004), available at www.echr.coe.int/documents/d/echr/library_collection_p14_ets194e_eng.

III. Methodology

This chapter is based on empirical research. The Hudoc database was consulted to find the relevant documents.[10] All judgments, decisions, advisory opinions, reports and resolutions until the year 2000 are included; legal summaries and communicated cases are not, because they have no legal effect. For finding the relevant documents on proportionality, the following search was used: 'proportionate OR proportionality OR proportion OR disproportionat'. For finding the relevant cases on balancing, the following search query was used: 'balance OR balancing OR balanced OR weighing'. For proportionality, this resulted in 2,035 hits, for balancing, 1,551. These documents were subsequently assessed on their relevance. The following caveats apply to the selection:

1. Not all cases and reports have been published on Hudoc. Some are not published or are published in the Yearbook and have not been digitised. These have consequently not been included.
2. The search terms used are in English, although there are two official languages in the Council of Europe: English and French. Though most cases and reports are published in both languages, some appear only in French. These are consequently not included in this research.
3. It may well be that the Court balances interests or rights or uses a proportionality test, without making that explicit or without using the terms used for the query as indicated above. These cases and reports are consequently not included.
4. Not all results for the words 'proportionality' or 'balancing', or variations thereof, were used, for the following reasons:

   a. Sometimes, the terms are not used in the judgment of the Court, but in a dissenting or concurring opinion. These were outside the scope of this research because they have no legal effect.
   b. Sometimes, the terms are used when discussing the facts of the case or the relevant laws at domestic level. Thus, it may appear that an Austrian court has balanced several rights and interest at domestic level; if the Commission or Court has not adopted this language itself, such cases have been left outside the scope of this research.
   c. Sometimes, the terms are not used by the Commission or Court itself, but by either one of the parties, or both. These have been mostly left outside the scope of this research, unless it is clear that the Court agrees with the reasoning of one of the parties when using the terms. An assessment of this point is not a matter of exact science; other researchers may come to different conclusions when making their own evaluation.
   d. Sometimes, the terms are used, but in a non-legal way. For example, 'balance sheet' is a term commonly used in cases on Article 1 Protocol 1; or the Court could say that, on the balance, it is convinced that the house that was entered by the police was owned by the claimant. These have not been included in this research. Again, a decision on this point is not a matter of exact science − there are many grey areas – and again, other researchers may come to different conclusions when making their own evaluation.

5. A judgment can contain several parts on different aspects of the case. When the Court has used the terms with respect to a decision on two different rights, eg, Article 3 and Article 8 ECHR, these have been counted twice, as one of the goals of this study was to see under which doctrines the terms were introduced and subsequently used most. When there were two different claims under the same right, for example one regarding the secrecy of correspondence and the other on the

[10] ECHR, 'HUDOC–- European Court of Human Rights', available at hudoc.echr.coe.int/eng.

inviolability of the home, both provided protection under Article 8 ECHR, and the Court used the terminology with respect to both parts, this has only been counted once.
6. When a decision, judgment or report uses both 'proportionality' and 'balancing', it has been included both under the calculations with respect to the first and with respect to the second term. This means that there is overlap between the numbers.

Given these and other limitations, the numbers presented in this study should be taken to be indicative rather than exact.

IV. Proportionality

Proportionality as a legal concept was not deployed in the first years after the Convention was adopted (1950), although it was sometimes referred to by applicants. It was only in the famous *Belgian Linguistic* case (1968) that the Court used that notion itself.[11] Belgium has two main languages (Dutch and French) and is divided in two main regions (Flanders and Walloon). Brussels, the capital, is bilingual and was surrounded by Flemish municipalities, while the main language in the capital increasingly tilted towards French. The school system was roughly divided along these linguistic lines, with Dutch education being offered in the Flemish region, French education in the Walloon and education in both languages in the metropolitan area of Brussels. The complaints concerned the inequality in treatment between parents with a different tongue in the Flemish region, and the interference with the family life of French-speaking parents when their children were taught in a different language than they spoke at home.

The provisions that played a role were Article 2 of the First Protocol (the right to education), Article 8 ECHR (the right to privacy) and Article 14 ECHR (the prohibition on discrimination). Article 14 ECHR, it should be remembered, cannot be invoked in isolation, but only in relation to another material provision in the Convention. Thus, discriminatory policies as such cannot lead to a violation of the Convention, but only when they have an impact on one of the rights provided protection under the ECHR.

Right at the start of the judgment, at [5], the Court made a general reference in relation to the right to education in which it mentions the notion of balancing.

> The right to education guaranteed by the first sentence of Article 2 of the Protocol (P1-2) by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention. The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights, and this, without doubt not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.

[11] ECtHR, *Case 'Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium'*, application no 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968.

This reference to the notion of balancing should be understood as a general consideration on the approach taken by the Court rather than a concept that it deployed to determine the outcome of a legal question *in concreto*.

Subsequently, it found at [7] that although the right to education had explicitly been moved to the First Protocol by the authors of the Convention because this is a socio-economic right, it could

> not to be excluded that measures taken in the field of education may affect the right to respect for private and family life or derogate from it; this would be the case, for instance, if their aim or result were to disturb private or family life in an unjustifiable manner, inter alia by separating children from their parents in an arbitrary way.

Thus, the strict separation envisaged by the authors of the Convention between civil and political rights on the one hand and socio-economic rights on the other was nuanced by the Court, stressing that educational matters could also be relevant to the right to privacy, Article 8 ECHR.

The Court found a violation with respect to the policies by the state on the ground that they were discriminatory (Article 14 ECHR) in relation to the right to education (Article P1-2). It was when considering the criteria for assessing whether there had been a violation of Article 14 ECHR when the Court first used the notion of proportionality.

> It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[12]

After the *Belgian Linguistic* case, the proportionality test was regularly used with respect to Article 14 ECHR.[13] It was only in 1976, more than 25 years after the Convention was adopted, that the notion of proportionality was first linked to the necessity test of Articles 8–11, namely in the case of *Handyside*.[14] The case regarded restrictions posed to the freedom of expression in light of the 'protection of morals'. The Court noted first that by

> reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. The Court notes at this juncture that, whilst the adjective 'necessary', within the meaning of Article 10 para. 2, is not synonymous with 'indispensable' (cf., in Articles 2 para. 2 and 6 para. 1, the words 'absolutely necessary' and 'strictly necessary' and, in Article 15 para. 1, the phrase 'to the extent strictly required by the

[12] ibid [10].

[13] For example, in *Svenska v Sweden*, regarding a claim on the discriminatory restrictions on the right to association (Art 11 ECHR), the Court devoted a separate section to the question of proportionality under Art 14 ECmHR, *Svenska Lokmannaförbundet v Sweden*, application no 5614/72, 27 May 1974.

[14] ECtHR, *Handyside v The United Kingdom*, application no 5493/72, 7 December 1976.

> exigencies of the situation'), neither has it the flexibility of such expressions as 'admissible'' 'ordinary' (cf. Article 4 para. 3), 'useful' (cf. the French text of the first paragraph of Article 1 of Protocol No. 1), 'reasonable' (cf. Articles 5 para. 3 and 6 para. 1) or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.[15]

It continued to stress the importance of plurality in a democratic society and attached to this the possibility for citizens to receive and impart information and ideas that went beyond those generally deemed favourable, including those that shock, offend and disturb. It was in this light that it introduced the proportionality test. 'This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.'[16] The same approach was later taken by the Commission with respect to the same provision, Article 10 ECHR, in the *Sunday Times* case.[17] Later, it extended this approach to other qualified rights, such as Article 8 and 11 ECHR.

Finally, both in *X v Austria* (1978)[18] and *Sporrong* (1979), the notion of proportionality was introduced with respect to Article 1 of the First Protocol. For example, in the latter case, the Commission observed that

> while the necessity for such legislation seems to be left to the discretion of the State, Article 1 appears to provide for a limited supervision of the enforcement measures as regards their lawfulness and purpose. Even where their lawfulness is beyond doubt and the purpose at the outset appears legitimate, the question may arise whether the prolonged existence of restrictions amounts to an interference which could become unjustified as going beyond or being disproportionate to their legitimate purpose.[19]

All in all, the use of the term 'proportionality' or variations thereof by the Commission and the Court in the first 30 years of the Convention was very limited. Only Article 14, under which the concept is part of the standard approach by the Court, had significance. This is evidenced in Figure 2.1 below, showing the number of cases in which the term 'proportionality' was used, diversified per provision it was deployed under.

FIGURE 2.1 GOES HERE

Figure 2.1 Use of proportionality or variations thereof, 1950–1980

It was only in the next decade that the role of proportionality gained more prominence, though the numbers stayed low, as evidenced in Figure 2.2. Interestingly, although the notion of proportionality is still commonly deployed with respect to Article 14 ECHR, in fact, it is used more often in cases on the right to property (Article P1-1) and in particular the right to privacy (Article 8 ECHR). It is interesting to see that the use of the proportionality test as part of the necessity test in Article 8 ECHR also overshadows its application with respect to Article 10 ECHR, under which

---

[15] ibid [48].

[16] ibid [49].

[17] ECmHR, *The Sunday Times v the United Kingdom*, application no 6538/74, 18 May 1977.

[18] ECmHR, *X v Austria*, application no 7287/75, 3 March 1978.

[19] ECmHR, *Sporrong and Lonnroth v Sweden*, application nos 7151/75 and 7152/75, 5 March 1979.

provision the notion of proportionality was first linked to the concept of necessity. In fact, Article 10 ECHR is only fourth in line when it comes to the frequency in use of the term 'proportionality'.

FIGURE 2.2 GOES HERE

Figure 2.2 Use of 'proportionality' or variations thereof, 1958–1990

Finally, it is clear that the notion of proportionality is used more frequently over the years. It is only in the 1990s that proportionality is finally predominantly linked to the necessity tests, as the notion or proportionality is used most often in cases relating to Article 8 ECHR and subsequently to cases concerning Article 10 ECHR. Only then, it is used most in Article 1 of the First Protocol, followed by a fair number of cases with respect to Articles 6 and 14 ECHR.

FIGURE 2.3 GOES HERE

Figure 2.3 Use of 'proportionality' or variations thereof, 1990–2000

The notion of 'strict proportionality' arrived only late in the jurisprudence of the Court. As might be expected, it was first deployed with respect to a claim under Article 2 ECHR, which indeed seems to suggest a strict test of scrutiny, in the case of Stewart from 1974.[20] Again, the first, and in this case only, other provision under which this concept was also applied was Article 8 ECHR, recorded for the first time in 1991.[21]

FIGURE 2.4 GOES HERE

Figure 2.4 Use of 'strict proportionality', 1950–2000

V. Balancing

The history of the notion of balancing under the ECHR is largely similar to that of proportionality. It was first used, as discussed above, in the *Belgian Linguistic* case from 1968, where it was used as a general caveat. Then, in *Kjeldsen et al* (1975), the Commission expanded on that doctrine, again in relation to Article P1-2:

> Here it becomes necessary to balance the right of the State to regulate education 'according to the needs and resources of the community and. of (the) individuals' (Belgian Linguistic Case), and its obligations to respect the right of the parents protected in the same Article. Two considerations seem to be of importance in order to achieve this balance. The first is that the State must have good reasons for the introduction of a subject in the public schools which may interfere with the religious or philosophical convictions of some parents. Secondly, and most important, the State must show respect for these convictions in the way in which the subject is taught. Respect must therefore mean tolerance towards the different religious and philosophical convictions which are involved in a particular subject.[22]

---

[20] ECmHR, *Stewart v the United Kingdom*, application no 10044/82, 10 July 1984.

[21] ECmHR, *Chave nee Jullien v France*, application no 14461/88, 9 July 1991.

[22] ECmHR, *Kjeldsen, Madsen Pedersen v Denmark*, application nos 5095/71, 5920/72 and 5926/72, 211975, [159]–[160].

The Commission also copied that language to its discussion on Article 8 ECHR.

> The Commission considers unanimously that there has been no violation of Art. 8 in this case. As the Court has pointed out in the Belgian Linguistic Case, measures in the field of education may come into conflict with this Article 'if their aim or result were to disturb private or family life in an unjustifiable manner, inter alia ; by separating children from their parents in an arbitrary way'. If sex education is handled with all due respect for the different convictions of parents, the danger of such a disturbance will be greatly diminished. If in specific cases that disturbance would still result, and it cannot be completely avoided, sex education would not be unjustifiable or arbitrary for the reasons given above. It would be the unavoidable result of the difficult balancing between the interests of the community and the individual in the sphere of education which is implied in the Convention.[23]

It is interesting that in this case, there was an objection to the use of the notion of balancing by one of the judges voiced in a separate opinion. Judge Opsahl warned explicitly for the consequences of minority rights when the notion of balancing would be used, stressing that for

> the task of interpreting P1-2 and applying it in this case, it is, in my opinion, unnecessary and, indeed, inadvisable or incorrect for the Commission to enter into the balancing of needs. Nor should it consider such controversial distinctions as that between 'information' and 'indoctrination' or make its findings dependent on the conclusion that the purpose of the legislation in question is not to impose a certain view of life. The emphasis should be placed elsewhere. As I understand Art. 2 and its reference to the right of parents, the purported objectives of State education are not in themselves decisive. Parents may feel that their convictions, within the meaning of Art . 2, could nevertheless be infringed. An assessment of whether or not the necessary respect had been shown must ultimately be left to the parents themselves. Neither the opinion of the State nor that of a majority of parents, nor even that of the Commission can claim precedence here. To decide otherwise would make the position of minorities much too precarious.[24]

Subsequently, the notion of balancing was used in the previously discussed *Sunday Times* and *Handyside* cases, with respect to Article 10 ECHR in both. In doing so, the Commission explicitly referred to the ethical theory of utilitarianism.

> The questions which then fall to be considered are the needs or objectives of a democratic society in relation to freedom of expression; for without a notion of such needs the limitations essential to support them cannot be evaluated. The Commission agrees with the applicant who stated that freedom of expression is based on the need of a democratic- ' society to promote the individual self-fulfilment of its members, the attainment of truth, participation in decision-making and the striking of a balance between stability and change . The aim is to have a pluralistic, open and tolerant society. Of necessity this involves a delicate balance between the wishes of the individual and the utilitarian 'greater good of the majority'. Bat democratic societies approach the problem from the standpoint of the importance of the individual and the undesirability of restrictions on the individual's freedom. The Commission accepts, however, that in striking the balance, certain controls on the individual's freedom of expression may, in appropriate circumstances, be acceptable in order to respect the sensibilities of others. It notes, in this context, that 'freedom of expression is commonly subject in a democratic society' to

[23] ibid [169].

[24] ibid, Separate opinion of Mr Opsahl [2]–[3].

> laws importing restrictions considered 'necessary to prevent seditious, libellous, blasphemous and obscene publications' (de Becker case). [25]**[AQ: please check highlighted text]**

In the case of *Klass and others v Germany* (1978), the notion was applied to Article 8 ECHR, where the Commission found: 'As regards the duty to inform the persons concerned, a balance must be struck between the State's interest in its security and the individual's interest in being informed.'[26] And in the case of *Sporrong*, discussed earlier, the notion of balancing was used with respect to a discussion of Article P1-1:

> In considering this question, the Commission will have to balance the applicants' individual interest in protection of their right to peaceful enjoyment of possessions and the interest of the State or, as in the present cases, the City of Stockholm, of being able effectively to realise their town plans.[27]

All in all, the notion of balancing was applied in just eight cases until 1980. It was only after 1980 that the notion of balancing became a more standard way of approaching legal questions. The notion was applied regularly to determine the outcome of cases only with respect to two provisions, Article 8 ECHR and P1-1. The notions of balancing and weighing are used less frequently than terms related to proportionality. When the term 'balancing' is used, it is mostly in relation to a proportionality test, while the proportionality test is also deployed without reference to the notion of balancing.

FIGURE 2.5 GOES HERE

Figure 2.5 Use of 'balancing' or variations thereof, 1950–1990

Between 1990 and 2000, the notion of balancing was used more frequently. It continues to be used primarily in relation to Articles 8 ECHR and P1-1, but it is also deployed regularly with respect to Articles 6 and 10 ECHR.

FIGURE 2.6 GOES HERE

Figure 2.6 Use of 'balancing' or variations thereof, 1990–2000

VI. Conclusion

From the previous two sections, the following picture emerges.

1. The notion of proportionality is not intrinsic to the necessity test. It was introduced first under provisions in which the concept of necessity is absent.
2. Neither was the proportionality test developed under the provisions that foreshadow such an approach, namely Articles 2 and 15 ECHR.
3. The history of the notion of balancing by and large runs along the same path as the notion of proportionality. When balancing is used, most often, it is in light of the proportionality test, though the reverse does not hold true. Thus, there is a strong link, but no intrinsic connection, between the notions of balancing and proportionality.

---

[25] *Handyside* (n 14) [146]–[148].

[26] ECmHR, *Klass and others v Germany*, application no 5029/71, 18 December 1974.

[27] *Sporrong and Lonnroth* (n 19).

4. Proportionality or the variations thereof where more popular than the notion of balancing or variations thereof.

FIGURE 2.7 GOES HERE

Figure 2.7 Frequency of the use of 'proportionality' and 'balancing'

5. The frequency in which the terms are used, even in the last decade included for this study, relative to the total number of cases, is not high.[28] For the first period, proportionality is used in about five per cent of the case and balancing in about one per cent. For the period 1980−1990, the ratio is around 13 per cent and eight per cent respectively. Finally, although used more frequently, the ratio to the total number of cases declines in the period 1990–2000, namely to about 10 per cent and 5.5 per cent respectively. One the one hand, the relatively low percentage might be explained by the fact that many decisions, concerning the admissibility of the case, are taken on the basis of formalities (was the application submitted on time; were the domestic remedies exhausted; etc) and the question whether the claim falls to be considered under the Convention at all (*ratione personae; ratione materiae*; *ratione loci*; *ratione temporis*), which do not normally entail either a test of necessity, proportionality or balancing. On the other hand, the following points must be underlined:

a. In most cases in which either the term 'proportionality' or 'balancing', or both, were used, they did not play a role of significance. Rather, the Court would mention the concept once, as a side note or in its general approach to the case. These cases are nevertheless included in the numbers presented in Figure 2.8.
b. Also, it must be stressed that the fact that the terms 'proportionality' or 'balancing' are used with respect to one part of the claim means that the case is included in the Figure 2.8, while may not have used the term with respect to the legal assessment of claims under other provisions invoked in the same case.
c. In most cases in which 'proportionality' was used, the term 'balancing' was also used, so that these two figures cannot be added up to arrive at a total number.
d. As explained in the methodology section, when 'proportionality' or 'balancing' is used in two different parts of a judgment or report, on two different provisions, these have been counted twice.

FIGURE 2.8 GOES HERE

Figure 2.8 Frequency of the use of 'proportionality' and 'balancing', and the total number of documents

6. There are some articles under which both notions seem to have played a more prominent role, in particular Articles 8, 10 and 14 ECHR and Article P1-1. Figures 2.9–2.12 below show the extent to which the use of the notions of proportionality and balancing are significant in relation to the total number of cases on these provisions. The following should be taken into account when interpreting the figures:

a. Cases may concern more articles, eg both a claim with respect to Article 8, with respect to Article 10 and with respect to a violation of Articles 6 and 14 ECHR. These cases have consequently be counted in each relevant category.

[28] For the total number of cases, only the English documents have been included, to allow for a better comparison to the documents found through the use of English search queries in Hudoc (section III).

b. Although applicants may invoke a provision, the Court does not always discuss the arguments concerning that right in detail, for example merely stating that the provision is not relevant to the case or that all questions have already been dealt with under another provision. This is especially so for Article 14 ECHR.
c. For the selection of the relevant documents, the Hudoc database allows the selection of cases that were issued per provision in the Convention. However, cases are not always categorised accurately and consistently in this respect.

Hence, it should be underlined again that the numbers below are indicative only.

FIGURE 2.9 GOES HERE

Figure 2.9 Frequency of the use of 'proportionality' and 'balancing', and the total number of documents in relation to matters on Article 8 ECHR

FIGURE 2.10 GOES HERE

Figure 2.10 Frequency of the use of 'proportionality' and 'balancing', and the total number of documents in relation to matters on Article 10 ECHR

FIGURE 2.11 GOES HERE

Figure 2.11 Frequency of the use of 'proportionality' and 'balancing', and the total number of documents in relation to matters on Article 14 ECHR

FIGURE 2.12 GOES HERE

Figure 2.12 Frequency of the use of 'proportionality' and 'balancing', and the total number of documents in relation to matters on P1-1

From Figures 2.9–2.12, it appears that the use of the terms proportionality and balancing is low compared to the total number of matters, even though it are these provisions under which the two terms have played the most prominent role. There is a marked difference between Articles 10 and 14 ECHR, under which the notion of balancing is seldom used, and Article 8 ECHR and Article P1-1, under which the ratio is more equal (353-248 for Article 8 ECHR; 221-199 for P1-1).

7. The terms 'proportionality' and 'balancing' were introduced via the Protocol, in particular with respect to Article 2 of the First Protocol, and have gained prominence under Article 1 of the First Protocol. As explained, this should not come as a surprise, as the precise reason for putting these provisions in a separate Protocol instead of the Convention was that they are socio-economic or second generation rights which require positive action by states. Positive obligations, different from negative obligations, entail financial costs. Generally speaking, all states would want the most perfect educational system, as they would want the best healthcare with universal coverage, the most effective police force and the cleanest living environment, and so on. But the budget is limited and so choices have to be made. Economic issues are typically discussed in terms of balance, costs and benefits, and weighing. There is a scale, there is a standardised unit (monetary value such as the euro) and there is an objective way for arriving at a calculation of the costs and benefits. It seems more intuitive to apply a utilitarian than a deontological approach to economic and financial matters.
8. From this perspective it also becomes clear why the notion of 'proportionality' may have been introduced in respect to Article 14 ECHR. The term was used first in the *Belgian Linguistic* case, in which the Court also explicitly rejected the distinction between negative and positive rights and obligations, both by blurring the lines between the rights in the Convention and those in the Protocol, and by stressing that the provisions in the Convention also entail positive rights by citizens and

positive obligations by states. 'No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations, and for instance as to whether the respect due to the right concerned implies positive action or mere abstention.'[29] Obviously, the reason why the Belgian state did not offer education in two (or three, when German is also included) languages throughout Belgium was for reasons of costs. It is also from this perspective that proportionality and balancing have their background in economic and financial considerations.

9. Article 8 ECHR seems to have functioned as the perfect vehicle for popularising both the notion of proportionality and balancing, for the following reasons:

a. The high number of cases with respect to this provision.
b. As seen in the *Belgian Linguistic* case, it is this provision that the Court uses to include rights and interests that were left outside the scope of the Convention by the authors, most often entailing positive obligations by states.[30]
c. The Court also prefers to refer to Article 8 ECHR rather than other provisions in the Convention or its protocols; the right to privacy has become a super-right of sorts that encompasses almost all aspects of life.
d. This also means that many economic interests are provided protection under the right to privacy, and that many cases under Article 8 ECHR haa an economic angle to it,[31] such as compensation for being fired at work, for destruction of property, or for reputational harm, matters concerning inheritance and the fair distribution of family property.
e. Article 8 tends to overshadow Article 14 ECHR as, again, the Court prefers to discuss questions only under the former provision, especially when they include discriminatory aspects, such as against homosexual, transgender or queer people.

10. The Court explicitly linked the introduction of balancing to utilitarian philosophy and it ignored criticism by judges warning for the consequences for minorities.[32]

[29] *Case 'Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium'* (n 11) [9].

[30] 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' (2015) 80 *Utrecht Journal of International and European Law* 25.

[31] This trend is described up to 2010 in B van der Sloot, 'Where is the harm in a privacy violation? Calculating the damages afforded in privacy cases by the European Court of Human Rights'(2017) 4 *JIPITEC*.

[32] For more recent criticism, see the opinion of Pinto De Albuquerque, inter alia in ECtHR, *Muhammad and Muhammad v Romania*, application no 80982/12, 15 October 2020.