

INTERNATIONAL LEGAL THEORY

Introducing Procedural Proportionality Review in European Law

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Abstract

Proportionality review has emerged as a multi-purpose, best-practice standard for conflict resolution, and has for this reason been embraced by most constitutional systems worldwide. It is, however, difficult to escape the fact that proportionality review opens up room for judicial discretion. In European Union law, as well as European Convention on Human Rights law, this discretion has provided an activist judiciary with a most powerful tool for facilitating European integration through judicial adjudication. In a number of recent cases, this approach has been criticized. The critique raised reaches beyond the application of the proportionality principle in concrete cases. It also encompasses a critique of the proportionality principle as such, at least the conventional interpretation of the proportionality principle. This, in turn, raises questions concerning the concept of European law, its constitutional quest and even its very legitimacy. In this article the author discusses the legal and political implications of these challenges and proposes a revival of political power at the expense of judicial power. To this effect, the author introduces procedural proportionality review. Procedural proportionality review secures judicial deference, although not judicial abdication, in politically controversial and democratically legitimate cases.

Keywords

deliberative decision-making; European courts; legal reasoning; proportionality principle; procedural proportionality review

I. INTRODUCTION

Proportionality review is widely regarded as the preferred judicial adjudication procedure for managing disputes involving not only an alleged conflict between a public and an individual interest but also between individual interests. Proportionality review has emerged as a multi-purpose, best-practice standard for conflict resolution, and has for this reason been embraced by most constitutional systems at all levels; national, European and international.¹

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¹ Cf. A. Stone Sweet and J. Mathews, 'Proportionality, Judicial Review and Global Constitutionalism', in G. Bongiovanni, G. Sartor and C. Valentini (eds.) *Reasonableness and Law* (2009) 173. On the proportionality principle in EU law, see T. Tridimas, *The General Principles of EU Law* (2006). On the proportionality principle in ECHR law see J. Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009).

Regardless what subtest of the proportionality principle judges apply to solve a case at hand – the suitability, the necessity or the *stricto sensu* test² – it is difficult to escape the fact that proportionality review opens up room for judicial discretion. In European Union law as well as European Convention on Human Rights law, an activist judiciary facilitating integration through adjudication has been a crucial driver for European integration. Although the European courts' role in securing legal integration has mostly been celebrated, however, their activist approach has also reaped criticism. The drive towards an ever closer union or a unified understanding of human rights has at many points conflicted with the core constitutional values of member/contracting states.

At the turn of the century, subsequent to the entry into the European Union of many Eastern European countries, a number of cases in which the European Court of Justice decided in favour of the free movement of persons created much political and academic debate.³ In the so-called 'posted workers' cases, the Court of Justice had, on the one hand, to ensure that free movement was complied with and make sure that national protectionism was avoided at all costs while, on the other hand, there were sensitive labour law and social protection issues at stake.

More recently, the Italian *Crucifix* case has created controversy, at least among Southern European countries. The Chamber of the European Court of Human Rights (ECtHR) held, first, that the presence of crucifixes in public schools constituted a violation of rights protected by the European Convention on Human Rights (the Convention, or the ECHR): by displaying crucifixes in public schools, the state gave advantage to the Christian religion and thus breached its duty of neutrality.⁴ The Chamber's judgment was appealed and subsequently reversed by the Court's Grand Chamber. In its reasoning, it held that the primacy of the Christian religion in Italy was justified, given its historical and cultural roots.⁵

Clearly, the respective European courts operated fully within the established methodology of law when they carefully balanced the conflicting interests according to the proportionality principle. The critique raised thus reaches beyond the application of the proportionality principle in concrete cases. It also encompasses a critique of the proportionality principle as such, at least their interpretation of the proportionality principle. This, in turn, raises questions concerning the concept of European law, its constitutional quest and even its very legitimacy.

² The European Court of Human Rights has been less explicit in its application of the proportionality review but it appears clear that when it reviews whether a national measure infringes on one or more individual rights it applies a strict norm. According to Arts. 8–11 of the Convention, exemptions may only be lawful if they are deemed 'necessary in a democratic society'. The Court has, in its judgment of 7 December 1976, *Handyside v. UK* (App. No. 332/57), interpreted this phrase to mean that the measure taken must correspond to a 'pressing social need', which at least from an etymological point of view constitutes a stricter norm than the 'necessary in a democratic society' norm formulated in the Treaty provisions. The determination of the content and scope of the proportionality review in Convention law is made difficult due to the Court's application of the doctrine of margin of appreciation.

³ Case C-438/05 *Viking* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767; Case C-346/06 *Rüffert* [2008] ECR I-1989.

⁴ *Lautsi v. Italy*, Judgment of 3 November 2009, (App. No. 30814/06).

⁵ *Lautsi v. Italy*, Judgment of 18 March 2011, (App. No. 30814/06), para. 70.

One could, for example, question whether the judges, when conducting the proportionality analysis, perceived the two conflicting interests as having *a priori* the same weight.⁶ In other words, did the judges feel free to decide the respective cases ‘either way’, or did they feel somehow obliged to decide the case to the *benefit* of the freedoms/rights and to the *disadvantage* of the collective interest at stake? Whereas an *a priori* prioritization of respectively marked freedoms and human rights may be embraced by a liberal normative conception of the law, the political connotations of this decision will be more difficult to conceal within the frames of legal positivism. The question, which arises in the latter case, is: what makes the judiciary more competent and legitimate than legislators and administrators so as to justify granting them the final decision-making authority concerning the proportionality of a measure?

To answer the questions raised and more I will proceed as follows: in [Section 2](#), I will discuss briefly the judicial branch’s role as ‘guardian’ of individual rights according to normative legal theory. Thereafter, I will discuss the challenges with regard to competences and legitimacy that courts face when they conduct proportionality reviews. In this regard, I will question normative legal theorists’ understanding that courts are better equipped than political institutions to guard individual rights in general and under a proportionality review regime in particular. To this end, I will make, in [Section 3](#), a brief comparison between legal reasoning and political deliberative decision-making processes. Questioning both the assumption that legal reasoning is politically neutral and that legislative processes are inherently prone to being hijacked by special interests, I will argue that a more pragmatic approach is required. In [Section 4](#), I will introduce the concept of procedural proportionality review as an alternative to conventional proportionality review. The conditions for its application will be elaborated in [Sections 5](#) and [6](#). I propose that the institution of procedural proportionality review serves two main functions. First, it secures judicial deference in cases which judges are neither competent nor have the legitimacy to decide. Second, it provides an incentive for deliberative political decision-making processes.

2. LEVIATHAN OR HERCULES AS GUARDIANS OF INDIVIDUAL RIGHTS?

The application of individual rights and freedoms as basic integrative mechanisms in the European economic and political integration project has profoundly influenced how Europeans think about the law. The liberal rights-promoting understanding of law, which establishes the judiciary as a counter majoritarian bulwark, sharply deviates from the more pragmatic conceptualization of law which dominated Europe in the first half of the twentieth century.⁷

⁶ Cf. the principle of *practical concordance* in J. Schwarze, *European Administrative Law* (2006), at 690.

⁷ E.g., Hans Kelsen’s legal positivism: H. Kelsen, *Allgemeine Staatslehre* (1925); H. Kelsen, *Reine Rechtslehre* (1934). Jeremy Bentham’s positivist theory of law: *Principles of Morals and Legislation* (1823). Scandinavian legal realism, e.g., A. Ross, *Om Ret og retfærdighed* (2013).

However, legal pragmatists' characterisation of individual rights as 'nonsense upon stilts' may not be read as a rejection of individual freedom and liberty. Rather, one could argue that the phrase expresses rejection of an understanding of individual interests (argument of principle) as *trumps*, which in conflict with the public interest (arguments of policy) (in principle) always prevail.⁸ Thus, the phrase suggests a rejection of a particular (liberal) understanding of a constitution, which in a dogmatic way subordinates the democratic majority to individual (or minority) rights and interests.

In line with his liberal concept of the law, Ronald Dworkin has even suggested that the enactment of a bill of rights in the UK (which eventually became the Human Rights Act of 1998) would not only force the British courts 'to take rights seriously', but would promote the enhancement of a 'culture of liberty beyond the courtroom'.⁹ But, how is it possible to suggest that a country which is the very cradle of individual freedom, liberty and democracy in Europe and beyond, should have to undergo a constitutional revolution in order to secure these very same individual freedoms and liberties? On the contrary, one could hold that the culture of individual freedoms and liberties in the UK has not been *created* in the courtroom, as Dworkin appears to suggest, but has rather been *reflected* in courtrooms as it has been reflected in Parliament. The British culture of individual liberty has its origin in the non-institutionalized political culture of British society; in the interaction between independent individuals, i.e., beyond the courtrooms.¹⁰

The British conceptualization of the law, which has been explained in detail by the positivist legal theorist Hart,¹¹ may not be read as prescribing the subordination of the individual to the collective. Hart's separation thesis is about institutions, not substantial law; it is about the *who* and not the *what*. According to Hart's rule of recognition, it is the democratically elected legislature, not the judiciary, which is the prime exponent of the validity of the law.¹² In 'hard' cases, Hart admits, courts will have to make new law in order to close the gaps.¹³ However, when closing legal gaps, the judiciary may not draw on extra-legal norms, such as Dworkin's principles of law. Rather, the judiciary shall solve cases according to principles or underlying reasons recognized as already having footing in the existing law:

... judges do not just push away their law books and start to legislate without further guidance from the law. Very often, in deciding such cases, they cite some general

⁸ R.M. Dworkin, *Taking Rights Seriously* (1977).

⁹ R.M. Dworkin, *A Bill of Rights for Britain: Why British Liberty Needs Protection* (1990), 1.

¹⁰ It depends, of course, whether the European Court of Human Rights has a monopoly on defining what individual rights in Europe are; Dworkin may be right, see H. Fenwick et al., *Judicial Reasoning under the UK Human Rights Act* (2007).

¹¹ H.L.A. Hart, *The Concept of Law* (1994).

¹² *Ibid.*, at 106.

¹³ 'hard case', i.e., cases which cannot be solved according to a clear rule of law laid down by some institution in advance. R.M. Dworkin, *Taking Rights Seriously* (1977), Ch. 4; H.L.A. Hart, *The Concept of Law* (1994), 136 ff. The so-called Hart–Dworkin debate concerns the question as to how the judges should go about when deciding a case where there is no rule of law, which may be applied to solve a case at hand. According to Hart, the judges must in these cases act as 'deputy legislators' and fill the 'legal gap' in the way he believes the legislator would. According to Dworkin there really are no 'legal gaps' since judges are bound to solve these cases according to the non-positivist concept of 'arguments of principle'.

principle or some general aim or purpose which some considerable relevant area of the existing law can be understood as exemplifying or advancing and which points towards a determinate answer for the instant hard case.¹⁴

Even in European countries where a bill of rights and judicial review are proscribed in the constitution – such as in Germany – rights are not regarded as Dworkian trumps guarded vigorously by the courts. Rather, rights are perceived as optimizing requirements, which must be balanced against the interests of society, reflected in legislative and administrative measures as well as against other rights.¹⁵ One could argue that this more nuanced conceptualization of rights is an unavoidable side effect of introducing an American-style liberal rights-promoting rationality, which Dworkin is a proponent of, into European welfare states.

3. THE PARLIAMENT OR THE JUDICIARY AS EXEMPLARY OF PUBLIC REASON?

If rights are not conceptualized as trumps, but rather as optimization requirements, what you have in the capacity of having a right is no more than a procedural right: a right to have the courts ‘second guess’ whether a legislative (or administrative) measure or individual interest is proportionate. Whether you have a right is not determined in the abstract, but in the concrete case: an individual interest is an individual right in the event that it prevails when balanced against the conflicting public or individual interest.

If judges cannot justify their discretionary powers with reference to normative legal theory, they have to find other ways to do so. Judges may, in the capacity of deputy legislators, pursue the ‘public reason –argument’ in order to justify their decision.¹⁶ According to Rawls, the idea of public reason specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic government’s relation to its citizens and their relation to one another. In short, Rawls states, it concerns how the political relation is to be understood.¹⁷

Rawls’ ideal of public reason has *procedural* as well as *substantial* aspects:

The ideal is realized, or satisfied, whenever judges, legislators, chief executives, and other governmental officials, as well as candidates for public office, act from and follow the *idea* of public reason and explain to other citizens their *reasons* for supporting fundamental political positions in terms of the political conception of justice they regard as the most reasonable.¹⁸

¹⁴ Ibid., at 274.

¹⁵ R. Alexy, *A Theory of Constitutional Rights* (2002). Alexy’s theory of constitutional rights is based on an analysis of the rights adjudication conducted by the German Constitutional Court.

¹⁶ J. Rawls, *Political Liberalism* (1996), at 231 ff. John Rawls also suggests that political institutions may be expressers of ‘public reason’: ‘This ideal is realized, or satisfied, whenever judges, legislators, chief executives, and other governmental officials, as well as candidates for public office, act from and follow the idea of public reason and explain to other citizens their reasons for supporting fundamental political positions in terms of the political conception of justice that they regard as the most reasonable’, in J. Rawls, *The Laws of Peoples* (1999), at 135.

¹⁷ Ibid. Rawls, *Law of Peoples*, at 132.

¹⁸ Ibid., at 135 (emphasis added). The substantial aspect of public reason may, in the abovementioned citation, be read into the phrase: ‘... act from and follow the *idea* of public reason ...’ (emphasis added), whereas

Whereas citizens and legislators, Rawls holds, ‘need not justify by public reason why they vote as they do or make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions’¹⁹, courts do. Thus, Rawls proposes the Supreme Court as an exemplar of public reason.²⁰ In their role as ‘exemplary of public reason’ judges are guardians of a political liberal morality.²¹ Apparently then, they are not able to escape the deontological frames of liberal constitutionalism. Nevertheless, Rawls admits that a particular morality cannot be fixed but has to develop over time. In any case, he accepts Habermas’s discourse conception of legitimacy as well as catholic views of the common good and solidarity when they are expressed in terms of political values.²²

Rawls’ perception of the judiciary as exemplary of public reason is informed by a great trust in the judiciary as guardians of liberal individual rights promoting morality and in the same way, a strong belief that legal reasoning will necessarily be informed by this rationality. Thus, his conceptualisation of courts as exemplaries of ‘public reason’, one could argue, has many parallels with the Dworkian *Hercules’s* obligation to apply arguments of principle rather than arguments of policy. Conversely, one could assume that Rawls’s suggestion that the legislators are not exemplary of public reason is based on mistrust in the legislator’s ability to fend off special interests, which again tend to inform the decision-making processes – a mistrust which he shares with the founding fathers of the US Constitution.²³ Informed by liberal political philosophy, his mistrust also has a substantial side: he suspects that the legislator will not pay due regard to individual rights.

In the US, however, where juristocracy²⁴ has arguably developed the furthest, the judiciary is highly politicized. Judges are, for example, politically appointed (Supreme Court) or democratically elected (federal state judges), and although they are not openly flagging their party-political preferences in their reasoning, the school of interpretation they are explicitly following is often reflective of a party-political preference.²⁵ This politicization of the judiciary has developed so far that prominent US constitutional scholars have called for the dethronement of the judiciary and the strengthening of political institutions.²⁶

Moreover, although it is clear that parts of legal reasoning – typically deductive reasoning – could be referred to as intrinsically logical, one should recall that deductive reasoning is not an exclusive feature of legal reasoning. Rather, deductive reasoning is an inherent feature of all practical reasoning.²⁷ Furthermore, deduct-

the procedural aspect of public reason may be read into the phrase: ‘... and explain to other citizens their reasons ...’ (emphasis added).

¹⁹ See Rawls, *Political Liberalism*, *supra* note 16, at 235.

²⁰ *Ibid.*, at 231.

²¹ See Rawls, *Law of Peoples*, *supra* note 16, §2. The Content of Public Reason, at 140 ff.

²² *Ibid.*, at 142.

²³ A. Hamilton et al., *The Federalist Papers* (1787–88). Efforts to curb factionalism through externally imposed checks and balances on political institutions are, arguably, what the US Constitution is all about.

²⁴ R. Hirschl, *Towards Juristocracy* (2007).

²⁵ Cf. A. Scalia, *A Matter of Interpretation* (1997).

²⁶ E.g., L.D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); M. Tushnet, *Taking the Constitution away from the Courts* (1999).

²⁷ N. MacCormick, *Legal Reasoning and Legal Theory* (1978), at 21.

ive reasoning is only one of many elements of legal reasoning. The application of law involves more than a logical subsumption into abstract major premises,²⁸ and both legal reasoning and practical reasoning may be tied up with arguments of a deontological nature.

According to Habermas, the deliberative democratic process is governed by universal principles of justice.²⁹ These principles include the idea of individual rights, in the sense of equality between individuals in the political discourse situation.³⁰ Habermas's all-inclusive concept of rights includes not only civil (republican) rights (Dworkian arguments of policy), but also private (liberal) rights (Dworkian arguments of principle) in what he refers to as the 'co-originality principle'.³¹

If legislators are expected to justify their argumentation with reference to 'public reason' within the framework of a coherent constitutional view, one could argue that legislators may be perceived as 'exemplary of public reason' in the same way as the judiciary. In that case, other factors have to be decisive in the determination of the scope and intensity of judicial review. If public reason is not of a Rawlsian deontological nature – which may be detected by each one of us under a veil of ignorance – but rather is formed through democratic deliberation, one could argue that the institution which best facilitates and realizes democratic deliberation is also the institution best suited to grasp public reason.

The issue then becomes a question of making sure that the decision-making process is as open and transparent as possible, enabling all relevant arguments to be considered and publicly debated (reasoned). The question as to who is best suited to conduct a proportionality analysis may then turn into a question of, for example, *capacity*. Which branch of power – the legislature or the judiciary – has the most resources available to conduct a thorough elaboration and evaluation of the web of crisscrossing interests and opinions, which is required to make decisions in strongly value-infected cases? Given this presupposition, it must be clear that the legislative branch has an advantage over the judicial branch in its capacity of possessing a more extensive toolbox – in particular a bureaucratic apparatus to elaborate on the factual foundations of the decision – to facilitate this task.

4. INTRODUCING PROCEDURAL PROPORTIONALITY REVIEW

Conventional proportionality review (substantial proportionality review) implies that the court conducts merits control. This means it will, where appropriate, potentially overrule the proportionality analysis conducted by the legislator or administrator. The role of the court in these cases thus has much in common with that proposed by normative legal theorists, such as Dworkin. According to normative theory, courts function as the counter majoritarian 'guardians' of (constitutionally enshrined) rights, which means that they can potentially overrule any legislative act

²⁸ R. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (2010), at 1.

²⁹ J. Habermas, *Between Facts and Norms* (1996), at 306.

³⁰ *Ibid.*, at 122.

³¹ *Ibid.*, at 127.

infringing on these rights. Accordingly, European judges act as guardians of the respective European constitutions (i.e., the Human Rights Convention and EU treaties) and will in this capacity overrule measures infringing on the four freedoms/human rights.

In the discussion above, I argued that an activist European judiciary operating within a positivist or a normative conception of law can legitimately decide cases implying values of a national constitutional nature. Consequently, ways must be found to secure judicial deference in cases of this nature. The courts could, for example, respect the member state/contracting party's margin of appreciation and limit judicial review to certain aspects of the case, for example, making sure that the administrative discretion is within the 'four corners' of the act.³² In cases in which the ECtHR has respected the contracting party's margin of appreciation, it has nevertheless stated that this approach must 'go hand in hand with European supervision'.³³ This implies that the Court reviews whether the measure is 'necessary in a democratic society', i.e., whether it is proportional.

Although conventional proportionality review is a flexible instrument of judicial review, meaning that it encompasses a great variety of different tests, the existing European adjudication regime of the European courts does not, in a satisfactory manner, take into account the implications of the critique referred to in the preceding sections. Therefore, I have also questioned the legitimacy of judicial review and called for judicial deference. However, deference in this case does not mean that the court should abstain from reviewing the proportionality of, for example, legislative or administrative measures altogether. I propose that the European courts should abstain from reviewing the merits of the proportionality analysis in cases of constitutional nature. In these cases, the courts should, rather, review whether the legislator has conducted a proportionality analysis.

Procedural proportionality review, as opposed to conventional (substantial) proportionality review, implies that courts do not review the *merits* of legislative and administrative measures. Rather, procedural proportionality review implies that courts review whether, for example, the legislature or the administration has conducted a proportionality assessment. In practical terms, this means that judicial review would be limited to assessing whether the *reasons* for the decision, provided by the appropriate decision-making body, contain proof of proportionality analysis. Moreover, procedural proportionality review implies that courts do go beyond the so-called 'four corners review'. Four corners review implies that courts limit themselves to reviewing whether irrelevant considerations have been taken into account, whether the measure is arbitrary, discriminatory or *manifestly unreasonable*.

When the court examines whether the appropriate body has conducted a proportionality analysis it has to take into account that proportionality analysis is a flexible instrument of judicial review. This means that there may be disagreement between the European Court and, for example, the national body which has enacted the

³² The Court of Justice has taken this approach in cases concerning the Community agriculture policies, cf. Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, para. 14.

³³ *Handyside v. UK*, Judgment of 7 December 1976, (App. No. 332/57).

measure, as to what norm should be applied. Such a disagreement cannot legitimize an overruling by the European Court *per se* since that would implicitly imply merits review. On the other side, if it is clear that the body which has issued the measure has not assessed the proportionality of the measure for reasons of negligence, or has only partly assessed the proportionality of the measure, the European court may, according to procedural proportionality review, annul the decision and refer the case back to the decision-making authority.

I do not suggest that the European courts should replace substantial proportionality review with procedural proportionality review on a general basis. Rather, I suggest that procedural proportionality review should constitute an alternative to substantial proportionality review (as well as an alternative to the invocation of the doctrine of margin of appreciation, if appropriate). More concretely, I suggest that courts should apply procedural proportionality review when the respective community/national legislative (or administrative) measure concerns deeply-embedded social and cultural norms (of an explicit or implicit constitutional nature) *and* when a measure is decided through democratic deliberative decision-making processes. Whereas the former condition is of a substantial nature, the latter is of a procedural nature. I propose that the two conditions are cumulative, meaning that both the procedural and the substantial condition have to be fulfilled in order to justify the application of procedural proportionality review, however, this latter requirement is not absolute. In case, for example, a measure does not fulfil the substantial condition, a close to unanimous vote in favour of a measure in a democratically elected assembly (parliament) may, under certain circumstances, compensate for the substantial deficit, and *vice versa*. The procedural condition consists in turn of two conditions, deliberation and representativeness. In the next two sections, I will discuss the different conditions.

5. PROCEDURAL CONDITION: DELIBERATION AND REPRESENTATION

5.1. Deliberation

According to Joshua Cohen, the discourse conception of legitimacy is a process wherein preferences are formed through public debates and reasoning among equal citizens. Processes of deliberation take place in argumentative form, i.e., through the regulated exchange of information and reasons among parties who introduce and critically test proposals. They are inclusive and public, free of any external and internal coercion and they are solely motivated by the unforced force of the 'better argument'.³⁴ What the better argument may be is to be decided upon by the parties participating in the deliberation on a case-by-case basis.

Reaching consensus through deliberation requires, firstly, that the participants raise their perspectives beyond their narrow self-interest; that they formulate their positions in a way which may be perceived as beneficial for all parties. In order to

³⁴ J. Cohen, 'Deliberation and Democratic Legitimacy', in A. Hamil and B. Pettit (eds.), *The Good Polity* (1989), 17.

be able to do so, they have to take into account the positions and interests of the different parties involved. Secondly, deliberation implies that the parties involved have to be prepared to be persuaded by the 'better argument'; they have to be prepared to change their opinion.

The aim of the deliberative decision-making mode is to establish a *consensus*. This aim contrasts with decision-making according to the bargaining mode, the aim of which is to secure democratic legitimate decisions by way of a *compromise*. A compromise, as opposed to a consensus, does not require that the parties embrace it for the same reasons.³⁵ The parties may in fact be indifferent and even reject the outcome of the decision-making process. They are, nevertheless, willing to accept it, as long as it is part of a deal (horse-trading and logrolling), from which they also benefit. The decision-making mode of bargaining does not, in contrast to the deliberative mode, necessarily resolve the underlying differences between the decision-making parties.

As noted above, deliberation and bargaining differ not only with regard to the form of the outcome – compromise and consensus. There are also differences with regard to their decision-making process – and this is perhaps the more important difference to focus on in our context. The proposition is that in a decision-making process in which deliberation serves as a means to reach a consensus, the debate is – at least ideally – more *inclusive* and *nuanced* and therefore more legitimate than in the case of the decision being reached through bargaining and majority voting. Bargaining processes may even (implicitly) contain reasoning which does not concern the ongoing debate, typically arguments securing the trading of votes.

To be sure, all decision-making processes contain elements of bargaining and deliberation. Moreover, the fact that most parliamentary decisions are decided by a simple majority vote, clearly limits the scope of deliberation. When representatives participating in the deliberation know beforehand that the question discussed will eventually be subject to a simple majority vote, this could undermine their efforts to deliberate, not least because the goal of consensus becomes secondary. On the other hand, one could argue that this fact could underpin the efforts of the participants to deliberate in order to secure the involvement and support for the compromise from as many as possible before the voting takes place. In the real world, then, decision-making processes and modes contain aspects of both deliberation and bargaining. Thus, for our purpose, it makes sense to refer to elements, feature or degrees of deliberation. The challenge is then to determine its scope.

However, as a condition for procedural proportionality review, I argue that it does not suffice that a measure is decided according to a deliberative decision-making mode. If that was the case, the European Court of Justice would have had to resort to procedural proportionality review in reviewing all Commission decisions (including Comitology) and arguably also Council decisions, since these decisions

³⁵ On the difference between compromise and consensus, see Habermas, *Between Facts and Norms*, *supra* note 29, Ch. 7.

are presumptively decided according to a deliberative decision-making mode.³⁶ According to conventional wisdom, administrative decisions – in the EU as in the member states – lack democratic legitimacy. Thus, one could argue that there are indeed weighty reasons for proposing that these measures should be subject to judicial merits control.

5.2. Representation

Thus, the deliberative decision-making mode should be complemented by democratic representativeness in order to escape substantial proportionality review. The most conventional way of conceptualizing democratic representativeness is in terms of electoral democracy, as it is typically expressed in a national parliamentary body. One could argue that democratic representativeness may also be channelled through other institutions as well.

In a pluralistic democratic society – what Robert Dahl labelled ‘polyarchy’ – interest groups cutting across people’s lives and connecting them in complex ways to a variety of types of institutions could also claim to represent the people, notably, groups of people.³⁷ Interest groups in this context have to be defined broadly, ranging from the spontaneous establishment of a group with the aim of influencing one particular decision to more permanently established groups, with a longer time horizon and broader political agenda. Characteristic of interest groups in lobby-democracy is their narrow focus. They are established and operate to promote one particular interest with no consideration for other interests, and even less so for the common good.

Corporatism works according to a somewhat different rationality. In contrast with interest groups, neo-corporatist organizations do not merely function as intermediaries between citizens and the democratically elected assembly. Rather, they may be perceived as the extension of the legislative branch with independent decision-making authority. Philip Schmitter has described corporatism as a system of interest representation in which constituent units are organized into a limited number of non-competitive, functionally differentiated categories recognized by the state and granted a deliberative representational monopoly within their respective categories. Neo-corporatist or liberal-corporatism strikes a balance between pluralism and corporatism with regard to the acceptance of co-operation rather than conflict between the groups involved. This, in turn, rests on their acceptance of the existence of a high degree of interdependence between the interests of conflicting social groups in a capitalist economy.³⁸

Both the corporatist and the neo-corporatist arrangement ensure that the societal actors’ perspectives reach beyond that of their narrow interests. From its capacity as an extended hand of the legislature, follow responsibilities, notably to take into consideration the interests of all groups of society. The neo-corporatist incentive to

³⁶ Cf. C. Joerges and J. Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes’, (1997) 3 *European Law Journal* 273–99; C. Joerges, ‘Transnationale deliberative Demokratie oder deliberativer Supranationalismus?’, (2000) 7 *Zeitschrift für Internationale Beziehungen* 145–61.

³⁷ R. Dahl, *A Preface to Democratic Theory* (1956).

³⁸ P. Schmitter and G. Lehmbruch (eds.), *Trends towards Corporatist Intermediation* (1979).

co-operate ensures, in a similar way, that decisions are reflective of a multitude of different interests.

In the Scandinavian countries, neo-corporatism has found its manifestation in, for example, permanent co-operation between employers and employees' organisations over working conditions and wages. From the beginning, the arrangement between the parties is of a strictly contractual nature, binding the parties involved, however, in many cases the agreement between the parties is made applicable to all employers and employees within an area of enterprise. In this case, clearly, the contract may be characterized as a legislative act.³⁹ The Court of Justice has recognized the parties' function as quasi-legislators. In the *Laval* case, mentioned above, the Court decided to approach a collective action initiated by the Swedish labour union pursuant to a corporatist agreement as a legislative act, which was capable of infringing on the four freedoms under EU law, thus granting the four freedoms horizontal effect.⁴⁰

5.3. Assessment

How, then, does a court determine that the criteria of deliberation and democratic legitimacy are fulfilled? If the decisive criterion for the application of procedural proportionality review is democratic representativeness, one could hold that all national legislative acts adopted by the respective national assemblies should be reviewed accordingly. If, however, the main criterion is democratic deliberation, the decision may prove more difficult to make: How do courts determine whether genuine deliberation has taken place, or more concretely, how do courts determine whether the degree of deliberation contained in a decision-making process has passed a threshold which may justify the application of procedural proportionality review rather than substantial proportionality review?

As a starting point, courts may examine the reasons provided for the measure. In case we are dealing with a legislative measure, an examination of the debate which has taken place in the national assembly implies reading the minutes from the debate or the more extensive *travail préparatoire* to the measure, etc. What the court should be searching for is, among other things, proof of participation by representatives in the decision-making process. This has to do not only with physical presence, but also active participation in the deliberation. The underlying premise is that the number of views reflected in the debate increases proportionately with the number of representatives taking an active part. Furthermore, the court must look for proof of the building of consensuses rather than compromises. It has to detect evidence of interaction between the parties in the sense that they listen and actively respond to each other's views in the search for the 'better argument'.

Now, Habermas's deliberation theory is, first of all, a normative concept, e.g., his reference to the 'ideal speech situation'. In light of his ideal, most real efforts to deliberate are flawed. Thus, what a court will be looking for when assessing whether a decision can be characterized as deliberative or not are elements and degrees of deliberation. It is, for example, clear that most deliberative processes in

³⁹ E.g., Norwegian *lov om allmenngjøring av tariffavtaler m.v. (allmenngjøringsloven)*, Lov 6. April 1993 Nr 58.

⁴⁰ Case C-341/05 *Laval* [2007] ECR I-11767.

parliament are driven by majority voting. This fact implies that it is difficult to refer to the outcome of the decision as a consensus. One could argue that majority voting undermines the deliberative decision-making process itself. Why should one engage in deliberation when one knows that simple majority voting will make the decision anyway?

Considering this, one could argue that it is more likely that a deliberative decision-making mode is pursued in decisions concerning constitutional law than in cases concerning ordinary law, since the former requires *qualified* majority voting. When the parties know that a qualified majority is needed, they have to formulate themselves in a way that secures broader support for the measure. This necessarily implies that they have to take a variety of different interests and opinions into account in their effort to formulate an argument which is reflective of the will of all.

6. SUBSTANTIAL CONDITION: DEEPLY EMBEDDED SOCIAL AND CULTURAL NORMS

As noted above, it does not suffice that the procedural condition is fulfilled in order for the court to invoke procedural proportionality review. A substantial condition also has to be present. I have suggested that the European courts should perform procedural proportionality review in cases which are concerned with deeply embedded values of historical/cultural and societal nature. What could be considered a deeply embedded value is difficult to establish on a general basis. The very concept of procedural proportionality review rests on the presumption that common European values do not exist. One could, for example, take a formal approach and hold that measures which are laid down in a member state's constitution would *per se* constitute such a value.

In the German constitution, there are references to the welfare state in several places, for example, in Article 20(1): '*sozialer Bundesstaat*'. However, although not all constitutions of the respective European countries have this reference enshrined in their constitution, this does not mean that they are not welfare states. Thus, the reference does not have to be explicit in order to be regarded as a value of a constitutional nature. On the other hand, the references in the relevant provisions in the European constitutions do not tell us much about the scope of the German welfare regime and what should be considered its core or periphery.⁴¹ In any case, the point to be made here is that core welfare state elements must constitute legitimate reasons for derogating from, for example, the EU free movement provisions.

The substantial conditions, which I suggest should trigger procedural proportionality review, correspond at least partially with the list of legitimate reasons laid down in the EU Treaty and the ECHR, justifying derogation from EU free movement and ECHR rights respectively.⁴² According to, for example, Articles 34 and 36 of the Treaty on the Functioning of the European Union (TFEU), quantitative restrictions

⁴¹ G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990).

⁴² In EU law, the list of legitimate reasons for derogation laid down in treaty provisions has been supplemented by so-called mandatory requirements foreseen in Case 120/78 *Cassis de Dijon* [1979] ECR 649.

and measures having equivalent effect on imports of goods may be justified on grounds of morality, public policy or public security, etc. as long as they are not discriminatory. The same justification may be invoked for the free movement of services and the freedom of establishment. A number of provisions of the ECHR include similar grounds of derogation. Accordingly, derogation from rights laid down in Articles 8–11 of the Convention may only be legitimate if it is necessary in the interest of national security, public safety or the economic well-being of the country, for the protection of health and morals, etc.

Rüffert dealt with the lawfulness of a German federal state law which limited contractors for public works contracts to those undertakings, which, within their tender submission, agreed to pay their employees at least the rate set by collective agreements.⁴³ The law aimed at counteracting distortions of competition within the construction and transport sectors that could arise from using cheap labour. One of the questions raised before the Court of Justice was whether, if the law was an interference with the freedom of services, the rates of workers' salaries constituted a legitimate and proportionate means to secure the objective of ensuring the financial balance of the German social security system.

The Court found that Directive 96/71/EC on posted workers would apply to the case. Since the Directive did not cover all legal aspects, the Court had to fall back on the free movement provision laid down in Article 49 of the TFEU. The Court recognized that the objective could be regarded as a potential overriding reason in the general interest. However, with reference to the case-file submitted to the Court by the German Government, the Court found that the measure in question was not *necessary* in order to avoid the risk of seriously undermining the financial balance of the social security system.⁴⁴

Although German workers may be outperformed by low wage East-Europeans in the short run, this would, according to the liberal marked template of the Court, increase the competitiveness of the German labour force in the long run, since the latter would have to adjust or create new jobs. Accordingly, competition on wages would provide important incentives for long-due adjustments to the over-burdened and inefficient European welfare states and a vehicle to revitalize the European economy and thus secure Europe's long-term survival in an ever more competitive world market. Thus, economic growth would be secured and the financial balance of the social security system upheld. The critics were not convinced by this line of thought. What if, for example, lowering wages does not create growth because a low wage class delays the automation and streamlining of labour tasks?⁴⁵ From a global perspective manual labour on East-European wages is not competitive. Such a development would most likely affect the financial balance in the social security system because low paid jobs create less revenue.

⁴³ Case C-346/06 *Rüffert* [2008] ECR I-1989.

⁴⁴ *Ibid.*, para. 42.

⁴⁵ A Swedish 'futureeconomist'(!) (fremtidsøkonom) has suggested that the large number of refugees that came to Sweden in 2015 would constitute a low wage class which should shovel snow and pack bags in supermarkets. See www.aftenposten.no/okonomi/-Flyktningene-som-kommer-til-Norden_-kommer-med-entreprenørskap-og-en-smarttelefon-12925b.html.

The approach taken by the Court of Justice in the *Rüffert* case arguably does contain elements of procedural proportionality review. The Court of Justice stated, for example, that it was not convinced by the *reasons* provided by the German government regarding the necessity of the measure.⁴⁶ Limiting judicial review to assessing the reasons for the measure allegedly restricting free movement is, as noted above, the gist of procedural proportionality review. However, one could argue that the Court is making the task of convincing it impossible for the German Government by imposing on it a burden of proof. This argument can be combined with the fact that economic predictions may be as many in number as there are economists. Moreover, by concluding that the measure is unnecessary *because* it lacks reasons, the Court nevertheless ends up applying a substantial proportionality norm without conducting substantial proportionality review.⁴⁷

One could argue that a recent ruling, in which the Court of Justice accepted the public finance argument, vindicates the critique of the Court of Justice's aggressive approach in *Rüffert*. The case concerned the UK's right to deny economically inactive EU nationals child benefit and tax credits if they failed to meet the UK's right to residency test.⁴⁸ The British government argued that this condition was necessary to prevent the overburdening of the welfare system. The Court held that the difference in treatment of UK and EU nationals did constitute indirect discrimination, since EU nationals, in order to be eligible, had to be economically active or have sufficient financial resources, whereas British citizens were eligible by default. In order to be justified, the Court held, 'such indirect discrimination must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective'.⁴⁹

The Court found that the infringement on the freedom of movement could be justified by a legitimate objective such as the need to protect public finances. Since this was a Treaty breach case, the Court could not leave the application of the proportionality norm on the facts of the case to the national court, but had to conduct this itself. Nevertheless, one could argue that the proportionality analysis is not very elaborate. The Court did discuss some important aspects of the UK authorities' enforcement of the relevant Directive, in particular the checking of compliance with the conditions for right of residency. And it did find that the Commission had not provided evidence showing that, 'such checking did not satisfy the conditions of proportionality, that it is not appropriate for securing the attainment of the objective of protection public finances or that it goes beyond what is necessary to attain that objective'.⁵⁰

In my opinion, the Court of Justice is conducting a procedural proportionality review in the case, references have been made to its statements that it is satisfied with the *reasons* provided by the UK authorities and at the same time unsatisfied with the lack of evidence underpinning the argument of the Commission. Considering this,

⁴⁶ See *Rüffert* case, *supra* note 43, para. 42.

⁴⁷ *Ibid.*

⁴⁸ Case C-308/14, *Commission v. UK*, 14 June 2016.

⁴⁹ *Ibid.*, para. 79.

⁵⁰ *Ibid.*, para. 85.

I find it difficult to explain the different approaches taken by the Court of Justice in *Rüffert* and the child benefit case. Although I will not attempt to assess the effect the two policies – child benefit and low wages – may have on public finances, I believe that these cases are somehow comparable, i.e., that they have more in common than the different outcomes suggest. With reference to the Court's reasoning in *Rüffert*, one could hold that child benefit is an important prerequisite for the free movement of workers, because it makes it more attractive for families to move. Moreover, in case the family stays behind, child benefit clearly constitutes an economic gain, which one may perceive as a compensation for being apart from the family.

Thus, one could suspect that the Court, when it decided to review procedures rather than merits in the latter case, was led by the Eurosceptic sentiment in the British population.⁵¹ It is a fact that the comprehensive welfare rights for EU nationals, which have been established through the case law of the Court of Justice, constitute one of the reasons for the resentment among the British public over the EU. This resentment, voiced by a large part of the Conservative Party in the British Parliament, has led to Prime Minister David Cameron's call for a referendum over British EU membership.⁵² If nothing else, the sentiment suggests that this issue is of such importance that it justifies applying procedural rather than merits review.

Laval concerned collective action taken by a Swedish trade union as a means to force a Latvian undertaking into negotiations concerning working conditions, including minimum wage rates payable to their posted workers. The trade union had established a blockade effectively banning the workers from the worksite. The Court recognized the right to take collective action as a fundamental right and thus a legitimate interest, which, in principle, justified a restriction of the obligations imposed by Community law.⁵³ Rather than balancing the freedom of movement against the right to take collective action on *a priori* equal terms, the Court structured the question of proportionality as a question of infringement. The Court elaborated in detail on the proportionality norm to be applied and found that the blockade could not be justified because it reached beyond what could be considered necessary in order to force the undertaking to sign the collective agreement.⁵⁴

The relatively strict norm applied in *Laval* contrasts with the approach taken in previous cases concerning conflicts between human rights and EU freedom of movement.⁵⁵ In these types of cases, the Court has often applied a proportionality norm, which implies that it has balanced, on equal terms, the conflicting right/freedom. The balancing has mostly favoured the human rights argument. Although the ap-

⁵¹ The ruling was regarded as important because it strengthens the argument of Remain campaigners that the future reforms to free movement and welfare rules – as agreed in the EU renegotiation – will not be rolled back by the EU Court: see O. Wright, 'EU court backs UK Government's right to restrict migrant benefits', *Independent*, 14 June 2016, available at www.independent.co.uk/news/uk/politics/eu-court-backs-uks-ability-to-restrict-child-benefits-for-migrants-a7081046.html.

⁵² The British people voted on 23 June 2016 in favour of leaving the EU. It is, however, likely that they will in the future continue to have a close economic relationship with the EU, which would imply participation in the common market.

⁵³ Case C-341/05, *Laval*, [2007] ECR I-11767, paras. 93–4.

⁵⁴ *Ibid.*, para. 108.

⁵⁵ E.g., Case C-36/02, *Omega*, [2004] ECR I-6969; Case C-112/00, *Schmidberger*, [2003] ECR I-5659.

plication of the balancing norm and connected outcomes may have created less controversy, one could, from a principal point of view, argue that the Court should limit itself to reviewing the posted workers' cases according to the procedural proportionality norm, since they concerned important elements of respective member states' welfare regimes.

Morality has been invoked as justification for infringing EU freedoms as well as Convention rights in a number of cases. It could be argued that the moral argument was the implicit reason applied by the proponents of the protection of the unborn child to justify derogation from both the free movement provisions of the EU Treaty (*Grogan*)⁵⁶ and the derogation from the freedom of speech laid down in the ECHR (*Open Door Counselling*).⁵⁷

The question raised in *Grogan* was whether prohibiting dissemination of information about abortion clinics by Irish student unions infringed the free movement of services. The Court of Justice concluded that it did not since the relationship between the abortion clinics and the student organisations was too 'tenuous'. Thus, the Court was able to circumvent the controversial moral question and at the same time conclude in a way which did not compromise the protection of the unborn child enshrined in the Irish constitution. Taking the moral question head on, Advocate General (AG) van Gerven argued that a derogation from the freedom of services could be justified under the public policy exception because the protection of the unborn child formed part of 'the basic principles of society' and the 'aim is intended to effectuate a value judgment, enshrined in its Constitution, attaching high priority to the protection of unborn life'.⁵⁸

Open Door Counselling concerned an injunction by the Irish Supreme Court restraining two non-profit organizations from assisting pregnant women to travel abroad to obtain abortions. The ECtHR noted that the protection afforded under Irish law to the right to life for the unborn child was based on profound moral values concerning the nature of life (and was reflected in the stance of the majority of the Irish people against abortion, as expressed in a referendum in 1983). Thus, the Court held that the restriction pursued the legitimate aim of the protection of morals. However, the Court found that the measure taken was disproportionate and thus the injunction constituted a breach of Article 10 of the Convention because, among other issues, the measure also banned providing information to women who, according to Irish law, had the right to have an abortion.

In my opinion, the right to life clearly constitutes a value of a nature which would justify the application of procedural proportionality review. In addition, the democratic condition is also fulfilled as the constitutional provision was adopted after a referendum. (However, since the constitutional provision rests on a referendum, it is, of course, difficult to assess the reasons for the decision.) In *Grogan*, the Court of Justice avoids proportionality review, pointing to the fact that the provision

⁵⁶ Case C-159/90, *SPUC v. Grogan*, [1991] ECR I-4685.

⁵⁷ *Open Door Counselling Ltd and Dublin Well Women Centre v. Ireland*, Judgment of 29 October 1992, (App. No. 14235/88).

⁵⁸ See *SPUC v. Grogan*, *supra* note 56, Opinion AG van Gerven, para. 26.

on services does not apply. In his Opinion, AG van Gerven discusses, extensively, whether restricting distribution of information about abortion clinics in the UK is necessary to secure the right to life. One could also question the frame and content of the ECtHR's proportionality analysis.

Comparing the two courts' approaches, one could hold that the distribution of information conducted by the students in *Grogan* was of a political and activist nature, whereas the information provided by Open Door Counselling was respectable and balanced. One could argue that a blanket ban on the distribution of information in the latter case was not only disproportionate, but *unreasonable*, since it also included women who had a right to have an abortion. In order to come to this conclusion, the Court could thus limit itself to reviewing the four corners of the measure.⁵⁹ Moreover, in light of procedural proportionality review, one could question whether the Irish court, which issued the injunction, would uphold it for this group of women if it was aware of this effect.⁶⁰

The *Crucifix* case concerned the conformity with the ECHR of the presence of crucifixes in Italian public school classrooms. A Finnish citizen living in Italy, having two children attending Italian public school, argued that the crucifix offended her children's freedom of religion (or rather from religion) and her right to raise her children in accordance with her own beliefs.⁶¹ The ECtHR (Chamber) held, first, that the presence of crucifixes in public schools involved a violation of the rights protected by the Convention. In its reasons, the Court stated that by displaying a religious symbol like the crucifix in public schools, the Italian state appeared, in the eyes of the student, to be indirectly supporting the Christian religion, which constituted a breach of its duty of neutrality.⁶²

The decision created major protests, particularly in South European Catholic countries.⁶³ In the appeal case, the Grand Chamber reversed the Chamber's judgment holding, firstly, that the decision as to whether crucifixes should be present in state-school classrooms was, in principle, a matter falling within the margin of appreciation.⁶⁴ Referring to its previous case law, the Court stated that the fact that

⁵⁹ I noted in the introduction that reviewing whether a measure is (manifestly) unreasonable is one element in the limited mode of judicial review referred to as 'the four corners' review. This is a mode of judicial review which is compatible with legal positivism and implies judicial deference in the context of proportionality review.

⁶⁰ One cannot expect, as also argued above, that the judiciary elaborates on all effects of an injunction in the same way as the legislator would do when preparing a legislative Act.

⁶¹ As laid down in Art. 9 and Art. 2 of Protocol No. 1 to the Convention.

⁶² *Lautsi v. Italy*, Judgment 3 November 2009, (App. No. 30814/06).

⁶³ It was argued that the decision did not respect the established case law of the Court itself, whereby, in a case like this, where there is no European consensus on the matter, the states should be granted a wide margin of appreciation since the national bodies are the ones which can best determine how to settle the principle of secularity and neutrality of the state. Furthermore, it was argued that removing the crucifixes and thus settling for the principle of secularism did not constitute a neutral approach but a priority of non-believers. Finally, it was argued that the Chamber's judgment was based on an individualistic understanding of the fundamental rights, forgetting the necessary complementarity of rights and duties and that they can only be exercised in a well-ordered political community. Accordingly, the judgment was inconsistent with the very objectives of the Council of Europe itself, whose *raison d'être* is to protect human rights, democracy and the rule of law. Removing crucifixes from public schools in Italy, which affects the identity of the Italian people, is equivalent to building a democracy without demos, i.e., without a people capable of making culturally determined political decisions by themselves.

⁶⁴ *Lautsi v. Italy*, Judgment 18 March 2011, (App. No. 30814/06), para. 70.

a symbol of the Christian religion was displayed in public school classrooms did not constitute discrimination against other worldviews given the historical and cultural position of Christianity in Italy and the fact that it is the majority religion and major identity carrier of Italians.⁶⁵ The Grand Chamber held that the crucifix was essentially a passive symbol and thus could not have an influence on pupils comparable to that of didactic speech or participation in religious activities.⁶⁶

Judges Rozaki and Vajic conceptualized the conflict in the case as one of proportionality, i.e., proportionality between the right of parents to ensure their children's education in conformity with their own convictions read in light of the freedom from religion, and the right of a large segment of society to display religious symbols as a manifestation of religion or belief. Whereas weighing to the advantage of the former would imply that neutrality is defined as secularism, weighing to the advantage of the latter would imply neutrality in the meaning of religious pluralism.

One could also conceptualize the proportionality analysis as a more intense means–end test, i.e., one in which the measure – the prohibition of crucifixes on the walls of Italian classrooms – infringes on the right of parents to educate their children in conformity with their beliefs in light of Article 9 of the Convention. In that case the issue would be concerned with whether there are any legitimate grounds for exemption and in turn whether the measure could be considered to be necessary, in a democratic society, to the protection of, for example, the 'rights and freedoms of others', i.e., religious pluralism. Whereas the Chamber apparently did not believe the presence of crucifixes in this case was necessary in order to secure religious pluralism, the opposite conclusion must be read out of the Grand Chamber's judgment.

In any case, one could argue that the fact that the Grand Chamber overruled the Chamber's judgment clearly reveals the legal uncertainty that the case poses. What constitutes an infringement of religious freedom (and the same for the right for parents to raise their children according to their own beliefs) cannot be generalized in the form of a universal norm bias to religious secularism, as the Chamber suggested. Rather, the norm may also be interpreted in a way that secures religious pluralism in different shapes. Religious pluralism does not mean that all religions have to be treated equally. It may also be interpreted to mean that the Christian religion could be granted a privileged position given its historical and cultural roots in Europe. How the freedom of religion shall be interpreted depends then on the context. In countries with strong secular traditions, such as France, religious freedom may be interpreted in a way which grants priority to secularism. In most other European countries religious pluralism prioritizing the Christian religion would be more correct. Whether the one or the other interpretation applies, the ECtHR should leave it to the contracting state to decide according to the margin of appreciation.

At most, the Court should limit itself to reviewing national measures allegedly infringing the right to religious freedom according to the mode of procedural proportionality review. True, assessing the explicit reasoning underlying a decree issued

⁶⁵ *Ibid.*, para. 71.

⁶⁶ *Ibid.*, para. 72.

by Mussolini's fascist regime may be challenging. Nevertheless, although the decree was issued by a regime that constitutes the very negation of the idea upon which the ECHR is based, this does not mean that it is not relevant and correct today. Since Italy is a democratic country and has been for the last 70 years, the Court has to take into account the fact that there has been no motion to revise the decree. Thus, the Court, when it conducts procedural proportionality, has to search for the underlying reasons for the state of the art, or at least, as the Grand Chamber – contrary to the Chamber – did, make an effort to this effect.

Another question, which has created much controversy in the UK, is that of voting rights for prisoners. Hirsh was sentenced to life imprisonment for manslaughter and was disenfranchised during his period of detention and after he was released from prison on licence.⁶⁷ The question raised before the ECtHR was whether the act implied a violation of Article 3 (right to vote) of Protocol No.1. The Court noted that the right to vote was not absolute, that there was room for limitations and that the UK must be allowed a margin of appreciation in this sphere.⁶⁸ Nevertheless, the Court also stated that it is for the Court in the last resort to oversee that the limitations do not impair the very essence of the right, that the limitation imposed pursues a legitimate aim and that the means employed are not disproportionate.⁶⁹ The Court found that the aim of the act was legitimate but that it was disproportionate since it imposed a blanket restriction on all convicted prisoners in prison, irrespective of the length of their sentence and the nature or gravity of their offence and their individual circumstances.⁷⁰

The ECtHR discussed, in line with the rationale of the procedural proportionality review, the absence of Parliamentary assessment of 'the proportionality of a blanket ban on the right of convicted prisoners to vote' and the lack of 'any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote'.⁷¹

The ECtHR's focus on the legislator's deficient proportionality assessment must be viewed in light of the fact that the domestic court had not reviewed the proportionality of the legislative measure.⁷² However, the British court handling the cases had suggested that the question as to whether a blanket ban on voting rights for prisoners was proportionate was for Parliament to decide.⁷³ Moreover, when the British

⁶⁷ *Hirsh v. The United Kingdom*, Judgment 6 October 2005, (No. 2, the case was first handled by the Chamber) (App. No. 74025/01)

⁶⁸ *Ibid.*, para. 60.

⁶⁹ *Ibid.*, para. 62.

⁷⁰ *Ibid.*, para. 82.

⁷¹ *Ibid.*, para. 79.

⁷² *Ibid.*, para. 80.

⁷³ 'The European Court also requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this Court to defer to the legislature. It is easy to be critical of a law which operates against a wide spectrum (e.g., in relation to its effect on post-tariff discretionary life prisoners, and those detained under some provision of the Mental Health Act 1983), but, as is clear from the authorities, those States which disenfranchise following conviction do not all limit the period of disenfranchisement to the period in custody. Parliament in this country could have provided differently in order to meet the objectives, which it discerned, and like *McLachlin J* in Canada,

government proposed replacing the act with a selective ban on certain categories of prisoners, in line with the judgment of the ECtHR, the Commons voted against by 234 to 22.

Prime Minister David Cameron defended this stand recently:

Our own law has been tested recently and our Supreme Court opined that our law was right and that prisoners shouldn't have the vote, and that's my view. I'm very clear. Prisoners shouldn't get the vote. It is a matter for the British parliament. The British parliament has spoken. The Supreme Court in Britain has spoken. So I'm content to leave it there.⁷⁴

The *Hirsh* case, and subsequent decisions concerning the same legislative Act,⁷⁵ is widely regarded as one of the reasons for the proposal put forward by the Conservative Party to change Britain's human rights law, which would replace the ECHR with a national Bill of Rights.⁷⁶

The measure on voting rights may, in my opinion, qualify as procedural proportionality review, because of its clear democratic legitimacy and its fundamental value in a democratic society, as noted by Lord Justice Kennedy: 'Removal from society means removal from the privileges of society, amongst which is the right to vote for one's representative.' In any case, the overwhelming majority voting against the implications of the ECtHR decision would trigger procedural proportionality review although the substantial condition is not fully fulfilled.

The ECtHR decision as to whether the measure is in breach of the Convention implies, in my opinion, an implicit merits control. For clearly, Parliament cannot have been unaware of the judgment of the ECtHR when it cast its vote. On the contrary, the judgment triggered the Government's proposal to review the relevant Act. Parliament considered the proportionality of the measure, but clearly applied a different proportionality norm than the ECtHR.⁷⁷ As noted above, proportionality review is a flexible instrument of judicial review, which in principle may encompass a great variety of different norms, arguably also the *reasonableness test*, applied by British courts.⁷⁸

I would accept that the tailoring process seldom admits of perfection, so the courts must afford some leeway to the legislator. As [counsel for the Secretary of State] submits, there is a broad spectrum of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum. In course of time this position may move, either by way of further fine tuning, as was recently done in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament not for the courts. That applies even to the "hard cases" of post-tariff discretionary life sentence prisoners . . . They have all been convicted and if, for example, Parliament were to have said that all those sentenced to life imprisonment lose the franchise for life the apparent anomaly of their position would disappear . . .', Lord Justice Kennedy cited in *ibid.* *Hirsh v. UK*

⁷⁴ A. Travis, 'Voting ban on prisoners convicted of serious crimes is lawful, EU court rules', *Guardian*, 6 October 2015, available at www.theguardian.com/politics/2015/oct/06/uk-ban-on-prisoner-voting-is-lawful-eus-highest-court-rules.

⁷⁵ E.g., *Greens and M.T. v. the UK*, Judgment of 23 November 2010; *Firth and Others v. the UK*, Judgment of 12 August 2014; *McHugh and Others v. the UK*, Judgment of 10 February 2015.

⁷⁶ s3.amazonaws.com/s3.documentcloud.org/documents/1308198/protecting-human-rights-in-the-uk.pdf.

⁷⁷ It is widely acknowledged that the UK courts (at least traditionally) are reviewing the reasonableness rather than the proportionality of legislative and administrative measures, e.g., P. Craig, *Administrative Law* (2003).

⁷⁸ E.g., P. Craig, 'Unreasonableness and Proportionality in UK Law', in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (1999), 85–106.

7. CONCLUSIONS: TAKING PLURALISM SERIOUSLY

Having provided a normative as well as an empirical account of the procedural proportionality review, I would like to conclude this elaboration with some reflections on the concept's legal and constitutional implications. Is, for example, procedural proportionality review compatible with the aim of establishing and sustaining a European legal order? For, clearly, this mode of review opens up the possibility of acceptance of a greater degree of diversity and could, thus, be perceived as a potential threat to the attempt to create and sustain a coherent European legal system.⁷⁹

The underlying presupposition is that if the law is not applied in the same way all over Europe, this would constitute a breach of the idea of equality before the law. True, equality before the law is an important element of the rule of law, intrinsic in the very institution of law. However, one must not forget that the idea of equality before the law may be interpreted differently, depending, among other issues, on the conceptualization of the law. In the classical liberal meaning, equality before the law means that the law should be applied equally to all in a formalistic way. However, there are also other understandings of equality before the law, which take into consideration the existence of differences between individuals. Whereas the former liberal understanding could be referred to as a formal understanding, the latter could be referred to as a contextual conceptualization of the doctrine. For, one could clearly argue that a statute forbidding the poor and rich alike to sleep under bridges and to beg on the streets, while equal in formal terms, certainly is not equal in real terms.⁸⁰ According to theories of social justice, the doctrine of equality before the law thus emphasizes that the doctrine has a formal and a contextual side to it, suggesting first, that like cases should be treated equally and second, that unequal cases should be treated unequally.

In light of this latter conceptualization of equality before the law, there is clearly room for real divergences, more precisely, divergences in facts are to be reflected in divergences in outcome, provided that this may be justified as suggested above. In our case, this means that if one accepts that Europe consists of a plurality of entities with distinct historical/cultural/societal characters and that the institution of law must necessarily reflect the societal context in which it is embedded, then one should also accept that in the effort to establish law on a supranational (European) level it is important to take these differences seriously. Thus, one should be ready to accept another '*Finalitaet der europaeischen Integration*'⁸¹ rather than that of a quasi-European (federal) state with a Kelsenian style hierarchical legal (including judicial) order.⁸²

Thus, instead of letting oneself be seduced by the simplicity of the idea of universalism, one should take the realism of confederalism seriously and realize that the

⁷⁹ One could argue that this telos has been more present in the European integration debate than in the debate concerning the European Convention on Human Rights or for that sake the EEA.

⁸⁰ The example was formulated by A. France, *Le Lys Rouge* (1894).

⁸¹ J. Fischer, *Vom Staatenverbund zur Foederation: Gedanken ueber die Finalitaet der europaeischen Integration* (2000). With this speech he had, first of all, the EU in mind.

⁸² See Kelsen, *Allgemeine Staatslehre*, *supra* note 7. See Kelsen, *Reine Rechtslehre*, *supra* note 7.

relationship between the supranational and the national level is one of permanent tension. This is not only an accurate description of the facts on the ground, but is also characteristic of how the relationship should be.⁸³ The underpinning reason for the normative position is, first, about checks and balances. In the absence of sufficient horizontal checks and balances on the supranational level, the vertical checks and balances become more important. In addition, the fact that democratic legitimacy on the supranational level is deficient, combined with the existence of strong democratic institutions on the national level, clearly makes the institution of vertical checks and balances even more important.

⁸³ E.g., C. Schoenberger, 'Die Europäische Union als Bund: Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas', (2004) 129 *Archiv des Öffentlichen Rechts* 81–120.