

REFGOV

Reflexive Governance in the Public Interest

Fundamental Rights

Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution

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ABSTRACT

Fundamental rights are usually thought of as rules, which prescribe certain arrangements and exclude others ; and it is the role of courts, in the traditional view, to expound their significance by applying predefined rules to the facts submitted to them. This view, characteristic of the formalistic conception of law, breaks down most clearly in contexts where one set of facts calls for the application of different rules which are not hierarchically ordered. Such situations oblige us to examine the virtues of a pragmatic conception of legal adjudication, and to explore the procedural implications of such a conception, in which the principles guiding the judicial reasoning are permanently reinvented in the course of their implementation. This paper offers such an examination, by studying the different approaches which have been adopted towards situations where fundamental rights conflict with one another. It first sets aside the situations where, because of its source, the ‘conflict between rights’ is in fact more imaginary than real, and can be addressed through classical, hierarchical methods (section II). It then examines where such classical methods fail, whether we seek to rely on the usual ‘necessity’ test generally applied to the restrictions imposed on the rights and freedoms recognized in the Convention, on the metaphor of the ‘balancing of rights’, or on the doctrine of the ‘margin of appreciation’ (section III). It then explores the procedural solution, based on a pragmatic understanding of legal adjudication (section IV). Taking as its departure point the idea of ‘practical concordance’ developed in German constitutional law, it illustrates both the promises and the limitations of this approach. The alternative it offers proposes to examine how the background creating the conflict between rights may have to be affirmatively transformed in order to avoid a repetition of the conflict, and how the failure by the State to thus remove the source of the conflict may engage its international responsibility.

I. INTRODUCTION

‘General propositions do not decide concrete cases’.¹ What was true then is even more true today, at a time when the proliferation of rights has led to a multiplication of situations of conflict, requiring in

* All judgments and decisions of the European Court of Human Rights mentioned in the text are available from the *Hudoc* database accessible via the Court’s website: <http://cmiskp.echr.coe.int/tkp197/default.htm>

** This reflects my personal view, and not that of the Court.

most cases from the courts that they carefully balance the interests involved in the specific situations they are presented with, and leading to the progressive development of a case-law which is highly contextual – the outcome depending on a close examination of the facts and on ever more refined distinctions from precedent, rather than on the mechanical application of rules-based techniques. Such a case-law cannot be put in boxes; it cannot be reduced to sanctified formulations or to systems, however elaborate and detailed.

The alternative, however, should not be to rely on the intuition of the judge, as if the judge were the grand priest of a new religion, possessor of some unspeakable truth invisible to common mankind. We will try to show, instead, that the best approach to the question of conflicting rights is in a *procedural* understanding of the judicial function and of its relationship to certain principles – the ‘democratic society’, the ‘autonomy’ of the individual –, principles which guide the judge although they have no precise definition, and although their meanings are bound to remain contested. In fact, it is precisely the ambiguity inherent in such principles – the fact that they allow for debate instead of offering ready-made solutions – that makes them productive: they are a constraint on the nature of arguments which may be part of the judicial debate, but they do not prejudge the outcome of the debate; and what becomes crucial is not, then, that we apply correctly some predefined arithmetics of judging, or that we invent some architecturally sound structures to guide judicial reasoning: it is that we create the conditions for a debate to be held from which no relevant voice will be excluded, so that all interests can be adequately considered and taken into account in the balance of deliberation. We also insist on the importance of *learning* in this area. We cannot pretend to define authoritatively, and once and for all, what precisely the ‘balance’ between conflicting rights consists in – and indeed, we express serious doubts about the adequacy of this metaphor. What we require therefore is the development of mechanisms which favour the identification of the best solutions to the dilemmas confronting the judge faced with situations of conflict. We must ensure not only that comparative law be relied upon to identify these solutions (and thus, help each jurisdiction to seek inspiration from solutions developed elsewhere), but also that, within each jurisdiction, the learning process may continue, and that the conditions be created for a permanent re-evaluation of the solutions provisionally arrived at in the search for solutions to situations of conflicting rights.

This paper proceeds in three steps. We begin by setting aside three situations where, because of its source, the ‘conflict between rights’ is in fact more imaginary than real, and can be addressed through classical, hierarchical methods. Conflicts between fundamental rights may occur because of conflicting international obligations imposed on a State party to the European Convention on Human Rights (ECHR). They may oppose rights of an ‘absolute’ nature to rights which may be subjected to

¹ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

restrictions. And they may in fact constitute conflicts between an obligation to respect and an obligation to protect imposed on the State. Conflicts between rights occurring in such situations can be solved, without major difficulties, by relying on the existing toolkit of solutions already developed by the European Court of Human Rights. In section II, we present each of these situations, and we recall the solutions which they have seemed to call for.

Section III, on the contrary, examines where such classical methods fail. First, we discuss the risks implied in including the approach to the question of conflicting rights in the usual ‘necessity’ test generally applied to the restrictions imposed on the rights and freedoms recognized in the Convention. While this solution might be adequate where ‘external’ conflicts are concerned – opposing one right or freedom recognized in the Convention and a right recognized only in national law or in another international instrument binding on the State concerned –, it is less useful when the judge is confronted with an ‘internal’ conflict – where the two conflicting rights both are recognized in the Convention –, since the ‘necessity’ requirement recognizes at least an implicit priority of the right which is invoked by the applicant over the interest put forward by the defending State in order to justify the restriction which is challenged. Second, we consider whether the metaphor of the ‘balancing of rights’ may be useful in indicating how to address situations where rights genuinely conflict with one another. Third, we discuss briefly whether the doctrine of the ‘margin of appreciation’ may offer a solution in such situations. For a variety of reasons, some common to all three doctrines, and some specific to each, these classical tools are insufficient. An effort in legal imagination is urgently required.

Section IV explores the procedural solution already alluded to. We take as departure point the idea of ‘practical concordance’ developed in German constitutional law. We attempt to illustrate both the promises and the limitations of this approach. We then offer a reading of the notion of ‘practical concordance’ which is both procedural, since it is based on the recognition of the need to search for adequate solutions in contextualized settings, and constructivist, since it proposes to examine how the background creating the conflict between rights may have to be affirmatively transformed in order to avoid a repetition of the conflict, and how the failure by the State to thus remove the source of the conflict may engage its international responsibility. Our firm belief is that there is no single rule through which all situations of conflicting rights, in their considerable variety, may be satisfactorily addressed. But this calls not for a decisionist attitude, putting all our hopes in the qualities judges are presumed to possess, in particular independence and impartiality: on the contrary, it calls for a procedure which will allow the judge to carefully examine where the conflict of rights originates from, what might be done about it, and whether the State has a responsibility in not acting in order to avoid the emergence of the conflict.

There are two reasons why this debate on how to address situations of conflicting rights has become crucial for the future development of the case-law.² First, due to the development of the case-law of the Court, such situations are bound to arise with an increased frequency. New implications of the set of rights listed in the Convention are identified by the Court on an almost daily basis. Since the early 1980s, States parties are imposed far-reaching obligations to protect rights in the relationships between private parties, while the right of the individual to be protected from violations having their source in the acts of other private parties, typically, will have to be pit against the exercise, by those other private parties, of their own rights – or, at the very least, of their general freedom to act, central to the notion of a free society.³ The link between the imposition of positive obligations and conflicts of rights has been acknowledged in numerous instances by the Court.⁴

² It is perhaps not surprising that the question of conflicts of rights has been given an increased attention by commentators, not only in the writings of specialists of the European Convention on Human Rights, but also among legal theorists. See, e.g., V. SAINT JAMES, *La conciliation des droits de l'homme et des libertés publiques en droit français*, Paris, PUF, 1995; R. ALEXY, 'Balancing Constitutional review and Representation', *International Journal of Constitutional Law*, October 2005, pp. 572-581; S. GREER, 'Balancing and the European Court of Human Rights: a Contribution to the Habermas-Alexy Debate', *Cambridge Law Journal*, 63(2), July 2004, pp. 412-124.

³ Both the literature and the case-law on this issue are overwhelming. See, e.g., D. SPIELMANN, *L'effet potentiel de la Convention européenne des droits de l'homme entre personnes privées*, Bruxelles, Bruylant-Némésis, 1995; A. CLAPHAM, *Human rights in the private sphere*, Oxford, Clarendon Press, 1993; A. CLAPHAM, *Human rights. Obligations of Non-State Actors*, Oxford, Oxford University Press, Collected Courses of the Academy of European Law, 2006, at pp. 349 and ff.; O. DE SCHUTTER, *Fonction de juger et droits fondamentaux*, Bruxelles, Bruylant, 1999, pp. 300-357 (and the references cited on p. 300, fn. 80); S. VAN DROOGHENBROECK, 'L'horizontalisation des droits de l'homme', in H. DUMONT, Fr. OST and S. VAN DROOGHENBROECK (eds), *La responsabilité, face cachée des droits de l'homme*, Bruxelles, Bruylant, 2005, pp. 379-388. Although the notion of positive obligations, used in a broader meaning, pre-dated this judgment, the leading cases in which the Court affirmed that the ECHR may require positive measures to be taken, even in the sphere of relations between individuals, are the judgments delivered in the cases of *Young, James and Webster v. the United Kingdom* (judgment of 13 August 1981, § 49), and of *X and Y v. the Netherlands* (judgment of 26 March 1985, § 23). Among the most significant illustrations in the case-law, are cases where the protection of the right to life was made more difficult by the exercise of individual freedom (Eur. Ct. HR, *Osman v. the United Kingdom*, judgment of 28 October 1998, § 116 (see hereunder, text corresponding to fn. 34)); where the protection of the physical integrity of children required interferences with the right to respect for family life of both the children and their parents (see, e.g., Eur. Ct. HR (GC), *T.P. and K.M. v. the United Kingdom*, judgment of 10 May 2001 (in which the Court, while acknowledging that the measures alleged to result in disproportionate interferences with the right to respect for private and family life were clearly aimed at protecting the 'health or morals' and the 'rights and freedoms' of the child – since a child was removed from his family where it was feared he might be abused and taken into care –, nevertheless concluded that Article 8 ECHR was violated by the adoption of such protective measures); Eur. Ct. HR (GC), *Z. and Others v. United Kingdom*, judgment of 10 May 2001, § 74 (where the Court, while acknowledging 'the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life', considers however that the present case 'leaves no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse')); where the freedom of expression of journalists was in conflict with the right to respect for private life of public figures (see, e.g., Eur. Ct. HR, *von Hannover v. Germany*, judgment of 24 June 2004); where the interests of a private insurance company were seen to justify restrictions to the right to respect for private life of one of its clients (see Eur. Ct. HR, *Verliere v. Switzerland*, (inadmissibility) decision of 28 June 2001); or where the right to private property, protected under Article 1 of the First Additional Protocol to the ECHR, was found to conflict with freedom of expression (Eur. Ct. HR, *Appleby and Others v. United Kingdom*, judgment of 6 May 2003).

⁴ See, e.g., Eur. Ct. HR (GC), *Leyla Şahin v. Turkey*, judgment of 10 November 2005, § 106 ('it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (...). This follows both from paragraph 2 of Article 9 and the State's positive obligation under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention').

Second, in the absence of a clear understanding of the issues involved in situations of conflict, and of a methodology through which such situations could be addressed, there may be a tendency of the Court to obfuscate the reality of these conflicts, and to respond on a purely *ad hoc* fashion, which may result in confusion and does not provide the domestic jurisdictions with the guidance they are entitled to from the part of the European Court.

We see one particularly vivid illustration of this latter risk in the recent case-law relating to the exceptions which may be imposed to the principle of the publicity of hearings under Article 6 § 1 ECHR. According to the case-law of the Court, the right to a ‘public hearing’ in the sense of this provision entails an entitlement to an ‘oral hearing’ unless there are exceptional circumstances that justify dispensing with such a hearing.⁵ In *Göç v. Turkey*, decided by the Grand Chamber on 11 July 2002, the Court confirmed the conclusion previously reached in the same case by a Chamber of the Court according to which Article 6 § 1 was violated on account of the absence of a public hearing which would have provided the applicant the opportunity to explain orally to a court in the context of an adversarial procedure the injustice he complained of. The Court considers ‘that the administration of justice and the accountability of the State would have been better served in the applicant’s case by affording him the right to explain his personal situation in a hearing before the domestic court subject to public scrutiny. In its view, this factor outweighs the considerations of speed and efficiency [put forward by the Government to justify the procedural rules at stake]’.⁶ The right to a hearing ‘within a reasonable time’, also stated in Article 6 § 1 ECHR, is not mentioned; it is, at most, alluded to in the excerpted quote from the judgment. In contrast, in the inadmissibility decision adopted on 2 February 2006 in *Rippe v. Germany*, where the same issue was raised, the Court stated very clearly that whereas the publicity requirement ‘is certainly one of the means whereby confidence in the courts is maintained [...], the Court has also accepted that there are other considerations, including the right to a trial within a reasonable time and the related need for an expeditious handling of the courts’ case-load, which must be taken into account in determining the necessity of public hearings in the proceedings subsequent to the trial at first-instance level’⁷; and it takes note of the fact that ‘the German reform legislation was expressly aimed at facilitating and thus expediting civil proceedings [by clearly defining] the conditions under which an appeal may be disposed of without an oral hearing’.⁸

⁵ See, for instance, the following judgments of the Court: *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, § 64; *Fredin v. Sweden (no. 2)*, judgment of 23 February 1994, §§ 21-22; and *Allan Jacobsson v. Sweden (no. 2)* judgment of 19 February 1998, § 46.

⁶ Eur. Ct. HR (GC), *Göç v. Turkey*, judgment of 11 July 2002, § 51.

⁷ Eur. Ct. HR, *Rippe v. Germany*, (inadmissibility) decision of 2 February 2006. The Court cites in this respect the following cases: *Jan Åke Andersson v. Sweden*, judgment of 29 October 1991, § 27; *Helmers v. Sweden*, judgment of 29 October 1991, § 36; *Fejde v. Sweden*, judgment of 29 October 1991, § 31; *Hoppe v. Germany*, judgment of 5 December 2002, § 63.

⁸ Eur. Ct. HR, *Rippe v. Germany*, decision of 2 February 2006.

Or consider the judgment delivered in the case of *Brasilier v. France* on 11 April 2006.⁹ The Court arrives at the conclusion in this case that the applicant's freedom of expression has been violated, after he was found civilly liable for having made unfounded allegations about the manipulation of elections by the then mayor of Paris, who was a political opponent. The Court mentions almost only in passing the right to the presumption of innocence of the mayor who, according to the French courts, had been victim of defamation,¹⁰ and makes no reference whatsoever to the right to reputation, although this right has been read into Article 8 ECHR. We find a similar obliteration of the conflict of rights in the inadmissibility decision of 4 April 2006 in the *Keller v. Hungary* case, where at stake were attacks against a politician by a political opponent both in Parliament and in the media: while the Court refers to the right to the protection of reputation under Article 10 § 2 ECHR – and, indeed, arrives at the conclusion that the interference with the freedom of expression of the applicant was justified –, it does not mention the right to reputation as an element of Article 8 ECHR, as if it were unwilling to acknowledge the reality of a conflict which the Hungarian courts are commended for refusing to ignore.¹¹ These hesitations are fully understandable. They call for a renewed reflection about how to deal with conflicts of rights within the ECHR.

II. CONFLICTS REAL OR IMAGINED

In this section, we identify three situations where, because of the way in which the *apparent* conflict between rights emerges, such a conflict can be resolved fairly easily by relying on the existing case-law of the European Court of Human Rights. A first such situation is where the rights in conflict have their source, respectively, in the Convention itself, and in another international instrument to which the State concerned is a party, or even in domestic legislation. A second situation is where a right of an absolute character is found to be in conflict with a right which may be subject to certain restrictions. A third situation is the much more delicate one where, in the particular setting of the case presented to the Court, the rights in conflict impose on the State, respectively, an obligation to respect and an obligation to protect.

1. Conflicts between a right protected under the Convention and another interest

⁹ Eur. Ct. HR, *Brasilier v. France*, judgment of 11 April 2006.

¹⁰ See § 38 *in fine* of the judgment ('Même si, compte tenu de la présomption d'innocence, qui est garantie par l'article 6 § 2 de la Convention, une personne mise en examen ne saurait être réputée coupable, la base factuelle n'était pas inexistante en l'espèce').

¹¹ Eur. Ct. HR, *Keller v. Hungary*, (inadmissibility) decision of 4 April 2006 (according the Court, the Hungarian courts' decisions show that they 'recognised that the present case involved a conflict between the right to freedom of expression and protection of the reputation of the rights of others, a conflict the Court is satisfied they resolved by weighing the relevant considerations in a manner reconcilable with the principles embodied in Article 10 of the Convention').

In various situations, rather than a conflict between two rights equally recognized by the Convention, the conflict we are facing is between a Convention right and an interest recognized an important weight under international or domestic law, but which does not have the status of a fundamental right guaranteed under the Convention.

Since a number of years, the Court has been confronted repeatedly with situations where States invoke *conflicting international obligations* in order to limit the extent of their undertakings under the European Convention on Human Rights. In order to avoid the risk of national authorities facing conflicting international obligations and, in general, for the sake of consistency, the Court has insisted in a line of cases that the European Convention on Human Rights should be read in accordance with general public international law, and that it should be interpreted, insofar as possible, in order to avoid contradictory obligations being imposed on the States parties.¹² Where the State party to the Convention is obliged, under other international human rights instruments, to guarantee certain rights which might conflict with the rights or freedoms protected under the Convention, the attitude of the European Court of Human Rights is in line with this general approach to the question of conflicting international obligations, which the Court seeks to avoid by defining such international obligations as an interest of the State which it may seek to pursue, if necessary, by restricting rights recognized under the Convention itself. In the early case of *Bladet Tromsø and Stensaas v. Norway*, for instance, the right to reputation protected under Article 17 of the International Covenant on Civil and Political Rights was mentioned, alongside the presumption of innocence of Article 6 § 2 of the Convention, in order to define the ‘duties and responsibilities’ inherent in the exercise of freedom of expression:

‘These “duties and responsibilities” are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the “rights of others”. As pointed out by the Government, the seal hunters’ right to protection of their honour and reputation is itself internationally recognised under Article 17 of the International Covenant on Civil and Political Rights. Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention the seal hunters had a right to be presumed innocent of any criminal offence until proved guilty’.¹³

¹² In conformity with Article 31 § 3, c) of the Vienna Convention on the Law of Treaties of 23 May 1969 and as according to the well-established case-law of the Court: see Eur. Ct. HR (GC), *Beer and Regan v. Germany*, judgment of 18 February 1999, § 53; Eur. Ct. HR (GC), *Waite and Kennedy v. Germany*, judgment of 18 February 1999, § 63; Eur. Ct. HR (GC), *Al-Adsani v. the United Kingdom*, judgment of 21 November 2001, § 55; Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005, § 150 (where, referring to the abovementioned provision of the Vienna Convention on the Law of Treaties, the Court reasons that ‘the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (...), which principles include that of *pacta sunt servanda*’).

¹³ Eur. Ct. HR (GC), *Bladet Tromsø and Stensaas v. Norway*, judgment of 20 May 1999, § 65.

The case of *Jersild v. Denmark* presents us with an even better illustration, since, while Article 4 of the International Convention for the Elimination of All Forms of Racial Discrimination requires that the States parties ‘declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin’, there is no equivalent obligation under the Convention. Although the Court concluded that Article 10 of the Convention had been violated, it also remarked that ‘the object and purpose pursued by the UN Convention are of great weight in determining whether the applicant’s conviction, which (...) was based on a provision enacted in order to ensure Denmark’s compliance with the UN Convention, was “necessary” within the meaning of Article 10 § 2. (...) Denmark’s obligations under Article 10 must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention. In this respect it is not for the Court to interpret the “due regard” clause in Article 4 of the UN Convention, which is open to various constructions. The Court is however of the opinion that its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark’s obligations under the UN Convention’.¹⁴ Similarly, while the European Convention on Human Rights does not as such guarantee a right to enter into a collective agreement,¹⁵ the Court did take into account the fact that the right to collective bargaining is recognised by a number of international instruments, in particular Article 6 of the European Social Charter, Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights and Conventions nos. 87 and 98 of the International Labour Organisation, in order to find justified the failure by Sweden to protect an employer from industrial action by unions in order to pressure him to enter into such a collective agreement, either by joining an employers’ association or by signing a substitute agreement, despite the fact that the first alternative would have involved membership of an association, to which the employer, invoking in this respect Article 11 of the Convention, was firmly opposed.¹⁶

To a certain extent, these cases may be assimilated to situations where an interest is recognized a particularly important weight by the *national authorities*, justifying in the view of these authorities that certain restrictions be imposed on rights or freedoms protected under the ECHR. Whether the interest in question is considered to constitute a ‘fundamental right’ in the domestic legal order does not matter, in principle, to the European Court of Human Rights: the situation will be treated as one in which a state interest is put forward as a means of justifying the restriction to a Convention right, rather than as one in which two fundamental rights clearly are in conflict with one another. Indeed, the

¹⁴ Eur. Ct. HR (GC), *Jersild v. Denmark*, judgment of 23 September 1994, § 30.

¹⁵ See the *Swedish Engine Drivers’ Union v. Sweden*, judgment of 6 February 1976, §§ 39-41.

¹⁶ Eur. Ct. HR, *Gustafsson v. Sweden*, judgment of 25 April 1996, § 53.

Court makes a clear distinction between, on the one hand, ‘external’ conflicts opposing the rights protected under the Convention to any other State interest – including the interest in the protection of the rights and freedoms of others, when such rights and freedoms are not guaranteed under the Convention itself –, and on the other hand, ‘internal’ conflicts between two rights both protected under the Convention. In *Chassagnou and Others*, the Court was faced with a restriction to the negative freedom of association of landowners brought about by the 1964 Verdeille Act. This Act provided for the creation of approved municipal hunters’ associations (*Associations communales de chasse agréées* – ‘ACCAs’) and approved inter-municipality hunters’ associations (*Associations inter-communales de chasse agréées* – ‘AICAs’), and it required the owners of landholdings smaller in area than a certain threshold to become members of any ACCA set up in their municipality and to transfer to it the hunting rights over their land in order to create municipal hunting grounds. The French government sought to justify this system by the need to protect or encourage ‘democratic participation in hunting’, and referred to the possibility of interferences being justified under Article 11 § 2 of the Convention by the ‘protection of the rights and freedoms of others’. The Court answered:

‘Where these “rights and freedoms” are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society”. The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a “pressing social need” capable of justifying interference with one of the rights guaranteed by the Convention.

It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect “rights and freedoms” not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right’.¹⁷

Other cases, such as the famous *Refah Partisi* and *Leyla Şahin* cases concerning Turkey – where the principle of secularism and State neutrality in matters of religion was put forward by the Turkish government – would also fall under this category.¹⁸ The analogy with the previous situation is that, in

¹⁷ Eur. Ct. HR (GC), *Chassagnou and Others v. France*, judgment of 29 April 1999, § 113. See also Eur. Ct. HR, *Schneider v. Luxembourg*, judgment of 10 July 2007.

¹⁸ See Eur. Ct HR (GC), *Refah Partisi (the Welfare Party) and Others v. Turkey*, judgment of 13 February 2003, § 95; Eur. Ct. HR (GC), *Leyla Şahin v. Turkey*, judgment of 10 November 2005, § 107 (where the Court emphasises ‘the State’s role as

both cases, the competing interest – whether its source is in an international agreement binding upon the State or in domestic legislation – will be treated as a State interest, more or less compelling, rather than as placing the State before two rights, both recognized in the Convention and thus, presumptively at least, of equal weight. The limit to the analogy, of course, is that, while international law (as codified in that respect in the Vienna Convention on the Law of Treaties) does provide for the interpretation of international treaties by taking into account any other existing international agreements,¹⁹ it would not be acceptable for a State to invoke its own, domestic legal order, in order to limit the scope of its international obligations.²⁰ But this does not result in a clear-cut opposition. While the international obligations of States parties to the Convention may influence the reading of their undertakings under this instrument, this does not imply that these undertakings may be set aside in order to comply with those other, conflicting obligations:²¹ although the Court does afford an important weight to the need for a State to reconcile its conflicting international commitments, these other commitments are still treated, in the case-law, as aims which a State may legitimately pursue, and which may justify restrictions to the rights and freedoms of the Convention to the extent that such restrictions are necessary and proportionate to the fulfilment of such international obligations. In other terms, far from leading the Court to allow a State to derogate from its obligations under the Convention, any conflicting international obligations of that State are considered within the overall examination of the compliance by the State concerned with the obligations imposed by the Convention itself.

2. Rights of an ‘absolute’ character and rights subject to restrictions

A second situation which may be set apart from ‘real’ conflicts of rights – for which, as we will see, the classical techniques used by the Court may be insufficient –, is where a right of an ‘absolute’ character is in conflict with a right which may be subjected to certain restrictions, provided such restrictions pursue a legitimate aim, and respect the principles of legality and of proportionality. It has occasionally been said that there might exist a hierarchy of rights within the Convention, which would

the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society.’).

¹⁹ Article 31 § 3, c) of the Vienna Convention on the Law of Treaties provides that, in the interpretation of international treaties, ‘[t]here shall be taken into account, together with the context: (...) any relevant rules of international law applicable in the relations between the parties’.

²⁰ Article 27 of the Vienna Convention on the Law of Treaties reads in part: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.

²¹ In accordance with Article 30 of the Vienna Convention on the Law of Treaties, a distinction should be made between preexisting international obligations and any international agreements concluded by a State after that State has become a party to the European Convention on Human Rights.

allow to rank the rights against one another.²² In most cases where this idea is put forward, it is not convincing, and results in policy choices masquerading behind a pretence to formalism.²³ This expression, however, does have some plausibility where it is used with the intent to highlight the fact that certain rights of the Convention (the so-called ‘absolute’ rights) cannot be restricted, even in order to realize legitimate and important objectives.²⁴ ‘Absolute’ rights – such as the right to life, the right not to be subjected to torture or to a degrading or inhuman treatment or punishment, or the right not to be subjected to slavery or forced labour – cannot be restricted, even in the presence of a ‘pressing social need’ or very weighty interests.²⁵ Nowhere else than in its recognition of certain ‘absolute’ rights does it appear more clearly that the Convention is not reducible to a utilitarian calculation, between the rights of the individual and the interests, however important, of the community. The paradigmatic example is that of the terrorist, who is presumed to know where his accomplices are and how they can be stopped from committing a terrorist attack threatening the lives of civilians. Such a terrorist cannot be tortured in order to extract from him this information, even if it were demonstrable that this could save many innocent lives: the European Convention on Human Rights is not a measuring scale of Benthamite inspiration.²⁶

²² A number of authors have recently argued in favour of a hierarchization of human rights, to which, in their view, the principles of interdependence and indivisibility, implying the ‘equal value’ of all human rights, should not constitute an obstacle. See, e.g., D. SHELTON, ‘Mettre en balance les droits : vers une hiérarchie des normes en droit international des droits de l’homme’, in E. BRIBOSIA and L. HENNEBEL (dir.), *Classer les droits de l’homme*, Bruxelles, Bruylant, 2004, pp. 153 and ff.; D. SHELTON, ‘Normative Hierarchy in International Law’, *American Journal of International Law*, avril 2006, vol. 100, no. 2, pp. 291 and ff.; D. BREILLAT, ‘La hiérarchie des droits de l’homme’, in *Droit et politique à la croisée des cultures. Mélanges Philippe Ardant*, Paris, L.G.D.J., 1999, pp. 353 and ff.; F. SUDRE, ‘Droits intangibles et/ou droits fondamentaux : y a-t-il des droits prééminents dans la Convention européenne des droits de l’homme ?’, in *Liber Amicorum Marc-André Eissen*, Bruxelles-Paris, Bruylant / L.G.D.J., 1995, pp. 381 and ff.; O. JACOT-GUILLERMOD, ‘Rapport entre démocratie et droits de l’homme’, in *Démocratie et droits de l’homme*, Actes du colloque organisé par le gouvernement hellénique et le Conseil de l’Europe, Kehl / Strasbourg, N.P. Engel, 1990, pp. 49-72 (referring, at p. 69, to a substantive hierarchy resulting from the body of case-law of the European Court of Human Rights, through the notion of ‘democratic society’); E. LAMBERT-ABDELGAWAD, *Les effets des arrêts de la Cour européenne des droits de l’homme. Contribution à une approche pluraliste du droit européen des droits de l’homme*, Bruxelles, Bruylant, 1999, p. 323.

²³ See in this respect Ph. FRUMER, *La renonciation aux droits et libertés. La Convention européenne à l’épreuve de la volonté individuelle*, Bruxelles, Bruylant, 2001; S. VAN DROOGHENBROECK, ‘L’horizontalisation des droits’, cited above, at pp. 381-382.

²⁴ C. WARBRICK, M. O’BOYLE and D.J. HARRIS, *Law of the European Convention on Human Rights*, London, Butterworths, 1995, pp. 296-297 (‘Only if one of the rights is absolute will it take complete priority over another right, subject to limitations, expressly or impliedly in the text’).

²⁵ See, e.g., Eur. Ct. HR, *Ireland v. United Kingdom*, judgment of 18 January 1978, § 163; Eur. Ct. HR (GC), *Labita v. Italy*, judgment of 6 April 2000, § 119.

²⁶ The absolute nature of the protection afforded by Article 3 ECHR was affirmed on a number of instances, excluding that the infliction of torture or of ill-treatment may be justified by the ends pursued. See, e.g., Eur. Ct. HR, *Ireland v. the United Kingdom* judgment of 18 January 1978, § 163; Eur. Ct. HR, *Tomasi v. France* judgment of 27 August 1992, § 115; Eur. Ct. HR, *Chahal v. the United Kingdom*, judgment of 15 November 1996, § 79. At the time of writing, the case of *Nassim Saadi v. Italy* (application no. 37201/06) is still pending before the Grand Chamber of the European Court of Human Rights where a hearing has been held on 11 July 2007. The United Kingdom government joined as a third party (Art. 36 § 2 ECHR) and was asking the European Court of Human Rights to overrule the *Chahal v. the United Kingdom* judgment it delivered on 15 November 1996, where the Court clearly identified an *absolute* prohibition to expel, extradite, or return a person to a State where he or she would be facing a serious risk of torture or of treatment or punishment contrary to Article 3 ECHR, explicitly dismissing as without relevance the seriousness of the offences committed by that individual and, thus, the question whether the individual facing return is a threat to the national security of the host State.

The case of *McCann and Others v. the United Kingdom* does not contradict this essential proposition. It is true that in this case – which concerned three IRA terrorists who were believed to be planning a terrorist attack in Gibraltar and were shot down by officers of the Special Air Service (SAS) who were led to the conviction that the attack was imminent –, the Court mentions what it calls the ‘fundamental dilemma’ with which the British authorities were confronted: ‘On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law’.²⁷ Moreover, after having carefully distinguished in its reasoning the question whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence and the question whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force,²⁸ the Court arrives at the conclusion that, whereas a violation of the right to life under Article 2 ECHR is found as regards the overall control and organisation of the operation by the authorities, ‘the actions of the soldiers do not, in themselves, give rise to a violation of this provision’, ‘having regard to the dilemma confronting the authorities in the circumstances of the case’.²⁹ But this of course does not imply that, despite its absolute character, the right to life protected under Article 2 ECHR might be restricted where this appears necessary for the fulfilment of certain higher objectives. Rather, the approach of the Court is dictated by the definition of the scope of the right to life under the Convention: while it does offer an absolute protection, Article 2 ECHR explicitly allows for deprivation of life when it results from the use of force which is no more than absolutely necessary, *inter alia*, in defence of any person from unlawful violence.³⁰

The question whether, in a situation of conflict between an ‘absolute’ right on the one hand, and a ‘relative’ right on the other, priority should necessarily and in all cases be recognized to the former, is a delicate one. The Court has occasionally recognized the specific nature of ‘absolute’ rights.³¹ But, from a purely technical point of view, it is one thing to seek to insulate those rights from any form of ‘interference’ purportedly justified by a legitimate general interest objective; it is another, quite distinct, to prioritize any right recognized within the Convention, whether ‘absolute’ or not, over other guarantees also stated in the same instrument. In addition, there would be a risk, in affirming such a prioritization as a matter of principle, to justify any interferences with ‘relative’ rights, provided such

²⁷ Eur. Ct. HR, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, § 192.

²⁸ *Ibid.*, § 194.

²⁹ *Ibid.*, § 201.

³⁰ Article 2 § 2, a) ECHR.

³¹ See, e.g., Eur. Ct. HR (GC), *Streletz, Kessler and Krenz v. Germany*, judgment of 22 March 2001, §§ 72 and 94; Eur. Ct. HR, *Pretty v. the United Kingdom*, judgment of 29 April 2002, § 37.

interferences may be presented as linked – however remotely and indirectly – with the need to protect rights of an absolute character.³² This however leads into another question, that of the relationship between obligations to respect and obligations to protect, which we address in the following paragraph.

3. Obligations to respect and obligations to protect

In many cases where we face what is referred to by the legal doctrine as ‘conflicting rights’, what we will be confronted with will be the conflict between two obligations of the State, which are of a different nature: the obligation to *respect* the rights and freedoms of the Convention on the one hand; and the obligation, on the other hand, to *protect* such rights and freedoms by the adoption of measures which ensure that they will not be violated by the acts of private parties or, more broadly, by circumstances which are not attributable to State organs. The former obligation is the negative obligation not to violate the rights and freedoms recognized under the Convention. The latter obligation is a positive obligation, which is (to borrow, as the Court has done occasionally, from the distinctions of the law of civil obligations) an obligation of means, rather than an obligation of result.³³

If it were water-tight, the distinction between these two categories of obligations would lead to prioritize the obligation of the States parties to respect the European Convention on Human Rights, above their obligation to protect these rights: the obligation of States to protect would justify restrictions being imposed on other rights of the Convention, but only insofar as such restrictions do not go beyond what is strictly necessary for this obligation of protection to be fulfilled; and if the measures adopted go beyond this point, it will be considered that the State has not complied with its obligation to respect. Indeed, the case-law of the Court has occasionally recognized this priority of the obligation to respect on the obligation to protect, although it has done so rather implicitly, by defining the obligation to protect as an obligation which, far from being unlimited in scope, is limited by the obligation to respect the rights and freedoms of the Convention. In *Osman v. the United Kingdom* for

³² The cases cited above in fn. 3, where at issue were measures of protection of the child justified by the need to protect the child from ill-treatment, but resulting potentially in a violation of the right to respect for private and family life, illustrate this. See, for a broader discussion, O. DE SCHUTTER, ‘Les dilemmes de l’État providence’, casenote on the *Johansen v. Norway* judgment of 7 August 1996, *Droit en Quart Monde*, no. 16, September 1997, pp. 3-30; and O. DE SCHUTTER, ‘L’intervention des autorités publiques dans les relations familiales et l’obligation de prévenir les mauvais traitements : vie familiale et droit à la protection de l’enfant dans la jurisprudence de la Cour européenne des droits de l’homme’, *Revue trimestrielle de droit familial*, 3/1999, pp. 427-455.

³³ See Eur. Ct. HR, *Plattform ‘Ärzte für das Leben’ v. Austria*, judgment of 21 June 1988, § 34 (‘While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used (...). In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved’).

instance, where it declined to find a violation of Article 2 ECHR in a case where the British police had failed to effectively protect the Osman family from a harasser who ended up violently entering their home, killing one and severely wounding another, the Court defined thus the scope of the positive obligation to protect imposed in such cases:

‘For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. *Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention*’.³⁴

Insofar as the *Osman* judgment limits the scope of the positive obligations imposed on the States parties to the Convention to the adoption of measures which do not result in disproportionate restrictions being imposed on other protected rights, it is not isolated in the case-law of the Court. *Gustafsson v. Sweden*, which was already referred to above, offers an example. The Court recognized a wide margin of appreciation to the Swedish authorities in that case, since the measures requested from them were positive measures protecting the right of the applicant not to become a member of an employers’ association.³⁵ The main argument in favour of allowing the national authorities a wide margin of appreciation was that protecting the applicant’s rights might have entailed interfering with the exercise, by the unions, of their freedom of association: the Court recalled that, although Article 11 ‘does not secure any particular treatment of the trade unions, or their members, by the State, such as a right to conclude any given collective agreement’, ‘the words “for the protection of [their] interests” in Article 11 § 1 show that the Convention safeguards freedom to protect the occupational interests of trade-union members by trade-union action. In this respect the State has a choice as to the means to be used and the Court has recognised that the concluding of collective agreements may be one of

³⁴ Eur. Ct. HR, *Osman v. the United Kingdom*, judgment of 28 October 1998, § 116 (emphasis added). The Court did find Article 6 ECHR to be violated in this case, because of the application of a rule excluding liability of police for alleged negligence in respect of investigation and suppression of crime which created a disproportionate obstacle to the filing of a civil claim by the applicants against the police.

³⁵ Recall that the applicant in that case was an employer victim of an industrial action launched by unions pressuring him to accept the terms of a collective agreement he has refused to adhere to, invoking his ‘negative’ freedom of association under Article 11 ECHR.

these'.³⁶ Again, the scope of the positive obligation imposed on the State is limited where, in fulfilling its obligation to protect, the State would be led to interfere with other rights recognized under the Convention. Similarly, in *Keenan v. the United Kingdom*, the Court concluded that the right to life of the applicant's son had not been violated, despite the fact that he was able to commit suicide in prison, in a context therefore where, in principle, he was under the protection of the authorities who might be imposed an obligation to ensure that such suicides are not committed. A decisive factor in the reasoning of the Court seems to have been that, by adopting even more restrictive surveillance measures within the prison setting, the prison authorities might have imposed excessive limitations on the prisoners' autonomy: these authorities, said the Court, 'must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing on personal autonomy'.³⁷ Many other examples could be offered.³⁸

This – which may be described as a prioritization of the obligation to respect over the obligation to protect – is particularly relevant in the context of the adoption of measures countering terrorism. It is clear that, as it constitutes a serious violation of human rights – including the right to life –, terrorism should be combated by States by all appropriate means.³⁹ However, as recognized in the early case-law of the Court, we should remain 'aware of the danger [legislation providing for surveillance measures justified by the need to prevent and combat terrorism] poses of undermining or even destroying democracy on the ground of defending it'; 'the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate'.⁴⁰

In a recent, well-argued book on this subject, Stefan Sottiaux writes⁴¹:

³⁶ Eur. Ct. HR, *Gustafsson v. Sweden*, judgment of 25 April 1996, § 45.

³⁷ Eur. Ct. HR, *Keenan v. the United Kingdom*, judgment of 3 April 2001, § 93. While they did not find that the prison authorities could be held responsible for Mark Keenan's death, the Court did conclude in a separate part of the judgment that the infliction of punishment on Mark Keenan in the circumstances of the case was inhuman and degrading, contrary to Article 3 ECHR.

³⁸ A particularly clear illustration is the case of *Enhorn v. Sweden*, where the applicant, an HIV-infected homosexual who had transmitted HIV to persons through sexual contacts, was deprived of his liberty in order to avoid the further spreading of the disease, in circumstances which the Court found incompatible with the requirements of Article 5 ECHR. The decisive question, in the view of the Court, was 'whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest' (Eur. Ct. HR, *Enhorn v. Sweden*, judgment of 25 January 2005, § 44): not any deprivation of liberty will be justified, simply because it serves the purposes of preserving the public health.

³⁹ See COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *Guidelines on Human Rights and the Fight Against Terrorism*, 11 July 2002, Art. I (referring to the obligation of States to 'take measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts').

⁴⁰ Eur. Ct. HR, *Klass and Others v. Germany*, judgment of 6 September 1978, § 49.

⁴¹ S. SOTTIAUX, *Terrorism and the Limitations of Rights. The European Convention on Human Rights and the United States Constitution*, Hart Publ., Oxford – Portland, Oregon, 2007 (in press).

It would be difficult to maintain that the State's positive obligation to *protect* the rights of its citizens is less important than its negative obligation to *respect* those rights. The former duty is as firmly grounded in human rights law as the latter: both stem from the same fundamental legal guarantees. To attach more weight to the State's negative obligation to respect than to its positive obligation to protect would boil down to introducing a hierarchy between the rights occurring on the different sides of the balance, and there is no place in modern human rights law for such a hierarchy. The conflict between liberty and security in the context of terrorism is one between two equally significant human rights values, one of which cannot take precedence over the other. As Richard Posner recently noted, "One is not to ask whether liberty is more or less important than safety. One is to ask whether a particular security measures harms liberty more or less than it promotes safety."⁴²

This position is advanced in alleged contradiction to the position adopted by one of us, about the priority of the obligation to respect over the obligation to protect.⁴³ However, we do not believe there exists a real disagreement between these apparently conflicting views. No one denies that the rights and freedoms recognized by the Convention may be restricted for the sake of combating the threat to life and other human rights which has its source in terrorist activities.⁴⁴ We all agree, at the same time, that any measures adopted for the sake of combating terrorism must comply with the Convention. And we agree, especially, that such measures should not be immune from being scrutinized in this respect simply because they purport to ensure 'security', i.e., to protect the right to life. The crucial point is the latter. Whether this is expressed in terms of a priority of the obligation to respect over the obligation to protect or in terms of a need to 'balance' the requirements of liberty against the requirements of security, is only a matter of exposition. What is truly decisive is that the States may legitimately argue, against the imposition of far-reaching obligations to protect, that the

⁴² The footnotes are omitted. The reference to Richard A. Posner's work is the following: R.A. POSNER, *Not a Suicide Pact. The Constitution in a Time of National Emergency*, Oxford University Press, 2006, at pp. 31-32.

⁴³ Reference is made by S. Sottiaux to O. DE SCHUTTER, 'La Convention européenne des droits de l'homme à l'épreuve de la lutte contre le terrorisme', in E. BRIBOSIA & A. WEYEMBERGH (eds.), *Lutte contre le terrorisme et droits fondamentaux*, Bruxelles, Bruylant, 2002, pp. 85 ff., at pp. 92-93. Reference is also made to R. DWORKIN, 'The Threat to Patriotism', *The New York Review of Books*, Feb. 28, 2002, 44, 47, to whom the same position is attributed.

⁴⁴ This point may of course be generalized beyond counterterrorist measures. The protection of the rights of others, in particular where these are rights guaranteed under the Convention, constitutes a legitimate aim, which the State authorities may seek to pursue even where this may lead to certain interferences with other such rights. See, among many other examples, Eur. Ct. HR, *Bowman v. the United Kingdom*, judgment of 19 February 1998 (where, faced with a prosecution for violation of a regulation prohibiting expenditure in excess of GBP 5 by unauthorised persons on publications etc. during election period, the Court notes that freedom of expression (Art. 10 ECHR) and the right to free elections (Article 3 of Protocol No. 1 to the Convention), while generally complementary, may in certain circumstances 'come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of the legislature"' (§ 43); while recognizing that, 'in striking the balance between these two rights, the Contracting States have a margin of appreciation, as they do generally with regard to the organisation of their electoral systems', the Court nevertheless concludes that the prosecution of the applicant for having distributed pamphlets relating to abortion constitutes a disproportionate restriction on freedom of expression, and thus amounts to a violation of Article 10 ECHR).

adoption of certain measures, even if they would contribute to combating terrorism, would constitute such a threat to civil liberties that they should be excluded; and that, conversely, States may not adopt or maintain counterterrorist measures which do create such a threat, even though these measures might be effective in countering terrorism. Our point is, rather, that the ‘balancing’ metaphor is more confusing than it is helpful, particularly insofar as it suggests that, where the interests in security are very important ones, any restriction to liberty should be in principle allowable. This is not true: there are certain measures which may not be adopted, even if they would almost certainly save lives, if such measures would violate the requirements of the Convention.

The argument may be illustrated by the case of *Süreker and Özdemir v. Turkey*. The Court delivered in that case a judgment on 8 July 1999, in which it concluded that the conviction and sentence under the Turkish Prevention of Terrorism Act 1991 of the applicants, respectively the owner and the editor of a review which had published declarations from leaders of the separatist PKK, resulted in a violation of the freedom of expression protected under Article 10 ECHR. The Court did not question the legitimacy of the aim pursued by the authorities which, the Court stated, needed ‘to be alert to acts capable of fuelling additional violence’, and thus could take measures aiming at the protection of national security and territorial integrity and the prevention of disorder and crime, especially ‘where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence’.⁴⁵ However, in the view of the Court, the measures adopted against the applicants were disproportionate, since the views expressed in the interviews of leaders of the PKK which they published could not be read as an incitement to violence; and could not be construed as liable to incite to violence.

In a partly dissenting opinion, five judges of the Court disagreed with the majority on precisely that point.⁴⁶ In part, their disagreement was based on their interpretation of the statements of the leaders of the PKK who were interviewed, and whether these statements should be construed as incitement to violence. But the disagreement was also based on a more fundamental difference with the majority, concerning the interpretation to be given to the Convention. These judges took the view that:

‘Where there are competing Convention interests the Court will have to engage in a weighing exercise to establish the priority of one interest over the other. Where the opposing interest is the right to life or physical integrity, the scales will tilt away from freedom of expression (see the *Zana v. Turkey* judgment of 25 November 1997, (...), §§ 51, 55 and 61)’.

⁴⁵ Eur. Ct. HR (GC), *Süreker and Özdemir v. Turkey*, judgment of 8 July 1999, § 51.

⁴⁶ The finding of a violation of Article 10 ECHR was adopted by eleven votes to six; the sixth vote in the minority was that of judge Gölcüklü, who wrote a separate dissenting opinion.

But the *Zana* case, which these judges refer to, does not support such an interpretation. Quite to the contrary: although the Court does explicitly acknowledge in that case that ‘the support given to the PKK – described as a “national liberation movement” – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region’,⁴⁷ the conclusion that Article 10 ECHR is not violated does not immediately follow – as if the concern for the protection of the right to life could justify any kind of restriction to freedom of expression to the extent the challenged measure does pursue that aim –: rather, that conclusion is arrived at only because, in the circumstances of the case, the measure complained of (the conviction to a prison sentence of the mayor of Diyarbakır for statements made before the media) could be considered to be ‘necessary in a democratic society’ and, in particular, proportionate to that aim. Again, even where freedom of expression is pit against the right to life, the measures adopted by the national authorities in order to implement their obligation to protect should not go beyond what the other rights protected allow.

4. Conclusion

This section described a number of solutions which, where applicable, constitute relatively uncontroversial ways to answer the question of conflicts between fundamental rights. In that sense, the conflicts which call for such solutions may be said to be more imaginary than real – or at least, to be comparatively easy to handle. But how are the ‘real’ conflicts to be dealt with? Reliance on the classical test of ‘necessity’, or of proportionality, may appear a first option. The ‘balancing’ of rights, an idea as mysterious as it has become popular, also constitutes one of the classical techniques by which courts – including the European Court of Human Rights – strive to solve situations of conflicts between rights, when none of the classical solutions outlined above may be relied upon. Finally, a third possibility is to rely on the equally classical doctrine of the ‘margin of appreciation’ in order to leave it to the national authorities to address the conflict of rights which, due to the necessarily sensitive character of trading a right against another, might be better resolved at the local level, rather than left to an international court to pass judgment upon. The next section reviews these techniques, and explains how they fail.

III. THE CLASSICAL SOLUTIONS TO SITUATIONS OF REAL CONFLICTS

1. The ‘necessity’ test

⁴⁷ Eur. Ct. HR, *Zana v. Turkey*, judgment of 25 November 1997, § 60.

The most classical solution to the question of conflicting rights is suggested by the very structure of a number of provisions of the European Convention on Human Rights, which state the right or freedom first, and then add that restrictions to the right or the freedom may be justified if they are provided for by law, seek to fulfil a legitimate objective, and are ‘necessary, in a democratic society’, for the realization of the said objective.⁴⁸ The case-law of the European Court of Human Rights has extended this approach to certain rights and freedoms whose formulation in the Convention does not follow this two-tiered structure, progressively developing what might be called a general theory of restrictions to the guarantees of the European Convention on Human Rights.⁴⁹ What this general theory suggests is that, where a limitation is brought to a right, the limitation should only be allowed if it is the least restrictive possible, i.e., if there are no other means available through which the same objective could be achieved, with a lesser cost to the right or the freedom which is infringed upon.⁵⁰ Now, since the protection of the rights of others may constitute a legitimate aim justifying that restrictions be imposed on the rights and freedoms of the Convention, it would be tempting to consider that, in such a circumstance, the conflict between the right asserted by the alleged victim before the Court, on the one hand, and the right which the national authorities have sought to protect by the adoption of measures, on the other hand, should be resolved through the classical application of the necessity test: only where the protection of the rights of others by the Legislator or by the Executive – or, indeed, by the courts – strictly requires that a limitation be brought to rights and freedoms guaranteed under the

⁴⁸ This is the case of Articles 8 to 11 ECHR, as well as of Article 2 of Protocol no. 4 ECHR (freedom of movement and free choice of residence).

⁴⁹ The clearest examples concern the right of access to a court, which has been read as an implication of the right to a fair trial of Article 6 ECHR (Eur. Ct. HR, *Golder v. the United Kingdom*, judgment of 21 February 1975, §§ 28-36); and the right to liberty and security guaranteed under Article 5 ECHR. For instance, despite the absence of any reference to the ‘necessity’ of the deprivation of liberty for one of the grounds listed in Article 5 § 1 ECHR, the Court has taken the view that the detention of an individual is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained: this results in integrating the principle of proportionality within Article 5 ECHR (see Eur. Ct. HR, *Witold Litwa v. Poland*, judgment of 4 April 2000, § 78; and especially Eur. Ct. HR, *Enhorn v. Sweden*, judgment of 25 January 2005, § 42). Similarly, the right of access to a court is not absolute, in the view of the Court, but may be subject to limitations, insofar as these do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired, and provided such limitations pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see Eur. Ct. HR (GC), *Waite and Kennedy v. Germany*, judgment of 18 February 1999, § 59; Eur. Ct. HR (GC), *Al-Adsani v. the United Kingdom*, judgment of 21 November 2001, § 53; Eur. Ct. HR, *A. v. the United Kingdom*, judgment of 17 December 2002, § 74). This, it should be emphasized, does not extend to rights which are absolute in nature, such as the right to life, the right not to be subjected to torture or to inhuman or degrading treatment or punishment, or not to be subjected to slavery or forced labour. See in this regard J. CALLEWAERT, ‘Is There a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?’, in *The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice*, H.R.L.J., 1998, pp. 6-10.

⁵⁰ This is largely implicit in the formulations used by the Court, which traditionally states that the test of ‘necessity in a democratic society’ requires it to determine whether the ‘interference’ complained of corresponded to a ‘pressing social need’, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see the *Handyside v. the United Kingdom* judgment of 7 December 1976, §§ 48-50; *Sunday Times (no. 1) v. the United Kingdom* judgment of 26 April 1979, § 62). In fact however, the question whether a particular measure is ‘necessary in a democratic society’ has generally been treated by the Court as requiring a balancing of all the interests involved, rather than imposing a choice of the least restrictive option. We return to the question of balancing hereunder.

Convention, should such limitations be allowed. This, in practice, has been the preferred way to solve situations of conflict.⁵¹ It is, moreover, a practice clearly encouraged by the reference, in the ‘limitation clauses’ contained in the second paragraphs of Articles 8 to 11 of the Convention or in paragraph 3 of Article 2 of Protocol no. 4 ECHR, to the ‘rights and freedoms of others’ among the legitimate aims which may justify certain restrictions being brought to the rights concerned. And it presents two significant advantages: it dispenses the Court from explicitly acknowledging the existence of a conflict⁵²; and it ensures that the conflict will be addressed by reliance on a well-established technique which both the Court and the commentators are familiar with.

Obvious as it may seem, however, this solution is problematic. By its very structure, this test is based on the idea that the right is the rule, and the measure interfering with the right the exception: thus, far from ensuring that both rights be effectively balanced against one another (as required, for instance, in the *Chassagnou and Others* judgment), it results in one right being recognized a priority over the other, simply because it has been invoked by the applicant before the Court, when the competing right is invoked by the government in defence of the measure which is alleged to constitute a violation of the Convention. As noted by Eva Brems, the result is that ‘[a]lthough both human rights are equally fundamental and *a priori* carry equal weight, they do not come before the judge in an equal manner. The right that is invoked by the applicant receives most attention, because the question to be answered by the judge is whether or not this right was violated. The arguments of the defendant may advance the theory that granting the applicant’s claim would violate an additional human right. Through these arguments, the protection of that secondary right may find its way to the judge’s reasoning, but it is not among the legal questions to be directly addressed’.⁵³ In other terms, the framing of the conflict between rights through the ‘necessity’ test leads to prioritize one right above the other, which results in obfuscating the reality of the conflict itself. This, we believe, is the real difficulty intuited by Stefan Sottiaux in the excerpt quoted above⁵⁴: where a choice is to be made between the application of the ‘necessity’ test and an approach focused on ‘balancing’ two rights against one another – that is, when the interest invoked by the State is in the protection of the rights of others –, the latter approach

⁵¹ Many of the cases considered above may serve to illustration: see, *inter alia*, Eur. Ct. HR, *Enhorn v. Sweden*, judgment of 25 January 2005, § 42 (restriction to the right to liberty purportedly justified by the need to protect public health); Eur. Ct. HR (GC), *Süreç and Özdemir v. Turkey*, judgment of 8 July 1999 (restriction to freedom of expression in the name of the prevention of terrorist violence and the preservation of the right to life); Eur. Ct. HR, *Zana v. Turkey*, judgment of 25 November 1997 (same); Eur. Ct. HR, *Bowman v. the United Kingdom*, judgment of 19 February 1998 (restriction to freedom of expression in the name of the right to hold free elections, undistorted by a disproportionate use of certain financial resources).

⁵² On the tendency not to acknowledge explicitly situations of conflicting rights and the associated risks, see above, text corresponding to fn. 5-11.

⁵³ E. BREMS, ‘Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms’, *Human Rights Quarterly*, vol. 27 (2005), pp. 294-326, atp. 305.

⁵⁴ See above, text corresponding to fn. 41-43.

would be preferable, in order to avoid the risk that the claim of the individual right-holder, which the State seeks to restrict, will be automatically preferred.⁵⁵

It is therefore legitimate to ask, either whether the conflict between rights should not be confronted more directly – as an approach focused on ‘balancing’ the rights at stake against one another offers to do –, or whether such a task should not be left to the national authorities, perhaps better situated than an international court to evaluate the respective claims of the right-holders. It is no surprise therefore that both these techniques have been relied on extensively by the European Court of Human Rights, particularly in situations where rights recognized under the European Convention on Human Rights were in conflict with one another.

2. *Balancing*

Seductive as it may seem, ‘balancing’ may be closer to a slogan than to a methodology. It consists in weighing the rights in conflict against one another, and affording a priority to the right which is considered to be of greater ‘value’. But the problems with this metaphor are well documented. The very image of having to ‘weigh’ one right against another presupposes that there would exist some common scale according to which their respective importance (or ‘weight’) could be measured, which we know is not available in fact. Balancing the right to privacy, say, against freedom of expression, or the freedom of religion of a church against the freedom of expression of its employees, it has been said, ‘is more like judging whether a particular line is longer than a particular rock is heavy’.⁵⁶ This is the problem known among legal theorists as the problem of incommensurability.⁵⁷

⁵⁵ Of course, a ‘balancing’ approach will result, *a contrario*, in making it easier for the State to justify the said restriction, since, in principle, it will not be similarly constrained by the requirements (legitimacy, legality, and necessity or proportionality) that are imposed under the second paragraphs of Articles 8 to 11 of the Convention or the third paragraph of Article 2 of Protocol no. 4 ECHR, or under the case-law of the Court in situations where it has allowed for the imposition of restrictions to fundamental rights. See in this respect the reservations expressed by François Rigaux to the introduction of a ‘balancing’ element where a State seeks to justify a restriction to a right protected under the ECHR by invoking the protection of another, competing right: Fr. RIGAUX, *La protection de la vie privée et les autres biens de la personnalité*, Bruxelles, Bruylant, 1990, p. 214, no. 151; Fr. RIGAUX, ‘Introduction générale’, *La liberté d’expression et ses limites*, Rev. trim. dr. h., special issue, 1993, pp. 3-22; Fr. RIGAUX, *La loi des juges*, Paris, O. Jacob, 1997, p. 46; Fr. RIGAUX, ‘Logique et droits de l’homme’, in P. MAHONEY, F. MATSCHER, H. PETZOLD, L. WILDHABER (eds.), *Protecting Human Rights: The European Perspective, Studies in memory of Rolv Ryssdal*, Köln-Berlin-Bonn-München, Carl Heymanns Verlag KG, 2000, pp. 1197-1211. Comp. with S. VAN DROOGHENBROECK, ‘Conflits entre droits fondamentaux et marge nationale d’appréciation. Autour de l’arrêt *Chassagnou c. France* du 29 avril 1999’, *Journal des tribunaux. Droit européen*, 1999, pp. 62 and ff.; or S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la Convention européenne des droits de l’homme. Prendre l’idée simple au sérieux*, Bruxelles, F.U.S.L. / Bruylant, 2001, p. 113.

⁵⁶ *Bendix Autolite Cort. V. Midwesco Enterprises, Inc., et al.*, 486 U.S. 888, 897 (1988) (Scalia, J., diss.).

⁵⁷ See, *inter alia*, R. CHANG (ed), *Incommensurability, Incomparability and Practical Reason*, Cambridge, Harvard University Press, 1997; and B. FRYDMAN, *Le sens des Lois*, Bruxelles, Bruylant / L.G.D.J., 2005, p. 436; as well as the authors cited in the remainder of this section.

In this sense, the ‘balancing’ metaphor to describe the act of judging may be profoundly misleading, hardly masking what is, in fact, a decisionist position, one leaving to the judge a considerable degree of freedom in the balancing process, and making the outcome of this process, in the final instance, dependent on his or her intuition: ‘All too commonly in judicial opinions, lip service in being paid to balancing, a cursory mention of opposing interests is made, and, presto, the “balance” is arrived at through some unrevealed legerdemain’.⁵⁸ And to the extent the ‘balancing’ metaphor is more than a cloak disguising subjectivity or intuitionism, its effects on judicial reasoning may be even more redoubtable. Three potential effects may be singled out.

First, there might be the temptation for the judge, in his or her eagerness to proceed with such a balancing objectively – to the point even of striving towards mathematical exactitude –, to confuse the balancing of fundamental rights with the cost-benefit analysis in use in the evaluation of public policies.⁵⁹ This in turn may lead to undervalue the ‘worth’ of rights which are not susceptible of economic measurement or which the right-holders, due to their vulnerable position, may be ready to waive against a relatively modest compensation, while, in contrast, rights to which economic value can be attached, or which are invoked by actors who can demonstrate the ‘worth’ the rights present to them or to the collectivity, will be overvalued.⁶⁰

Hatton and Others v. the United Kingdom provides an example. In this case, the applicants were complaining that the adoption by the United Kingdom government of new regulations on the night flights above Heathrow airport resulted in a violation of their right to private and family life because of the disturbances caused to their sleep – which had obliged some of them to move to another

⁵⁸ F.M. COFFIN, ‘Judicial Balancing: The Protean Scales of Justice’, *New York University Law Review*, vol. 63 (1988), p. 16, at p. 22.

⁵⁹ For a detailed examination of the risks associated with the importation of cost-benefit analysis in the area of fundamental rights, see O. DE SCHUTTER, ‘Mainstreaming Human Rights in the European Union’, in Ph. ALSTON and O. DE SCHUTTER (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, Hart Publ., 2005, pp. 37-72.

⁶⁰ More specifically, there are three difficulties involved with such an approach. First, both ‘revealed preference’ and ‘hypothetical markets’ methods, which are used in cost-benefit analysis in order to value interests (or rights), fail to take into account that the willingness of the individual to pay for a certain advantage is a function, not only of the importance of that advantage to that individual (the extent to which that advantage may contribute to the self-fulfilment of that individual), but also to his or her ability to pay (or the economic necessities and other priorities for the individual with limited resources). On the difference between actual consent and hypothetical consent and the resulting critique of the willingness-to-pay approaches in cost-benefit analysis, see H. M. HURD, ‘Justifiably Punishing the Justified’, *Michigan L. Rev.*, vol. 90 (1992), pp. 2203 ff., at p. 2305; and M. ADLER, ‘Incommensurability and Cost-Benefit Analysis’, *University of Pennsylvania L. Rev.*, vol. 146 (1998), pp. 1371 and ff. Second, such valuations, whether they are ‘contingent valuations’ based on surveys of the ‘willingness to pay’ in the absence of markets or whether they are based on the preferences exhibited by economic agents through the choices they make in the market, have been demonstrated to be strongly baseline-dependent, in the sense that the position already occupied by any individual will shape his or her estimation of the value of any regulatory benefits or sacrifices: see E. HOFFMAN and M. L. SPITZER, ‘Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications’, *Washington University Law Quarterly*, vol. 71 (1993), pp. 59 and ff.; M. ADLER, ‘Incommensurability and Cost-Benefit Analysis’, cited above, at pp. 1396-1398. A third, related, difficulty is that we value not only our position in absolute terms, but also relative to the position of others: see R. H. FRANK and C. R. SUNSTEIN, ‘Cost-Benefit Analysis and Relative Position’, *Univ. of Chicago L. Rev.*, vol. 68 (2001), pp. 323 and ff.

location –. In response, the European Court of Human Rights reiterated that ‘in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight’.⁶¹ While this reference to the margin of appreciation of national authorities was predictable,⁶² the Court also noted in its judgment that ‘house prices in the areas in which [the applicants] live have not been adversely affected by the night noise. The Court considers it reasonable, in determining the impact of a general policy on individuals in a particular area, to take into account the individuals’ ability to leave the area. Where a limited number of people in an area (2 to 3% of the affected population, according to the 1992 sleep study [commissioned by the UK authorities before the adoption of the new legislation]) are particularly affected by a general measure, the fact that they can, if they choose, move elsewhere without financial loss must be significant to the overall reasonableness of the general measure’.⁶³ It is difficult to escape a sense of uneasiness where such a price tag is being attached to encroachments upon rights.⁶⁴ And we should be hesitant, too, to attach too much weight to the argument that the applicants were free to leave the area affected by the night noise. What about the poor who cannot afford to leave? What about those who would be obliged to live in places more distant from their employment, or who would be cut off from their relatives?

Second, even if the ‘balancing’ metaphor does not lead us to fall into the traps of cost-benefit analysis, another danger is that, where the respective right-holders are not symmetrically situated, the weight recognized to each of the rights in conflict will depend on their respective positions, and therefore, on the way the conflict is framed before the judge. Consider, for example, the situation which occurred in *Otto-Preminger-Institut* where an artistic event (in that case, the projection of a movie in a theatre) was considered by the Austrian authorities to impinge upon the freedom of religion guaranteed by Article 14 of the Austrian Constitution and Article 9 of the European Convention on Human Rights. In

⁶¹ Eur. Ct. HR (GC), *Hatton and Others v. the United Kingdom*, judgment of 8 July 2003, § 97.

⁶² See also, eg, Eur. Ct. HR, *James and Others v. the United Kingdom*, judgment of 21 February 1986, § 46, where the Court found that the margin of appreciation ‘available to the legislature in implementing social and economic policies should be a wide one’; Eur. Ct. HR, *Buckley v. the United Kingdom* judgment of 25 September 1996, §§ 75 (‘It is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation’).

⁶³ See Eur. Ct. HR (GC), *Hatton and Others v. the United Kingdom*, judgment of 8 July 2003, § 127.

⁶⁴ On the difficulties raised by such valuation in the context of the right to life, see, e.g., J. BROOME, ‘Trying to Value a Life’, *Journal of Pub. Econ.*, vol. 9 (1978), pp. 91 and ff. (arguing specifically that contingent valuation approaches – in which, in the absence of a market for human lives, the valuation of human life (or the ‘price’ we attach to it) depends on non-contextual estimations, per definition relating to unknown persons – will lead to grossly underestimate the importance of human life: projects in which only unknown persons will die will go forward even where the loss of life is compensated for by ridiculously low economic compensations, because neither the persons surveyed, nor the authorities, know who in particular will be dying as a result of that project). While this study addresses specifically the valuation of life, the problems identified are not limited to that instance. See, e.g., F. ACKERMAN and L. HEINZERLING, ‘Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection’, *Univ. of Pennsylvania L. Rev.*, vol. 150 (1998), pp. 1553 and ff.; and C. R. SUNSTEIN, ‘Incommensurability and Valuation in Law’, *Michigan L. Rev.*, vol. 92 (1994), pp. 779 and ff.

such a circumstance, whereas freedom of expression is invoked by one private association, the freedom of religion with which it was considered to conflict with was that of all persons of Catholic belief, who could feel offended by the proposed screening of the film which they considered to be blasphemous. We have one private person on one side, a community of believers, on the other; and it cannot be excluded that, whether the judge is conscious of that risk or not, the ‘balance’ of these interests will be influenced by the impression this creates that this is a case of the liberty of an individual to be weighed against the interest of all Catholics in the Austrian province of Tyrol in having their religion respected. The Court frames the question thus:

‘The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand. In so doing, regard must be had to the margin of appreciation left to the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole’.⁶⁵

It arrives at the conclusion that, by seizing the film which had sparked the controversy, the Austrian authorities had not violated Article 10 of the Convention, since

‘The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner’.⁶⁶

Unsurprisingly, the legal commentators were critical of this approach.⁶⁷ The motive for their uneasiness is, we believe, that the *Otto-Preminger-Institut* judgment⁶⁸ may illustrate precisely the

⁶⁵ Eur. Ct. HR, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, § 55.

⁶⁶ *Ibid.*, § 56.

⁶⁷ See, among others, P. WACHSMANN, ‘La religion contre la liberté d’expression : sur un arrêt regrettable de la Cour européenne des droits de l’homme’, *R.U.D.H.*, 1994, no. 12, pp. 441-449; Fr. RIGAUX, ‘La liberté d’expression et ses limites’, *Rev. trim. dr. h.*, 1995, pp. 401-415; G. HAARSCHER, ‘Le blasphémateur et le raciste’, *Rev. trim. dr. h.*, 1995, pp. 417-422.

⁶⁸ But *Otto-Preminger-Institut* is not an entirely isolated case: see also *Wingrove v. the United Kingdom*, judgment of 25 November 1996 (where at issue was the distribution of a video, allegedly blasphemous against the Christian faith) and, especially, the case of *I.A. v. Turkey*. This latter case follows essentially the same reasoning than in *Otto-Preminger-Institut*. A publisher was imposed a fine for having published and distributed a book which was considered disrespectful of the Prophet of Islam. The Court considered that the issue before it ‘involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine, on the one hand, and the right of others to respect for their freedom of thought, conscience and religion, on the other hand’; it found

danger which Ch. Fried and L. Frantz first pointed at when, in 1959, the balancing test first made its appearance in the First Amendment case law of the United States Supreme Court⁶⁹: the danger that, as R. Pound had already anticipated in 1921, ‘If [in weighing two competing interests,] we put one as an individual interest and the other as a social interest we may decide the question in advance of our very way of putting it’.⁷⁰ The danger of course, clearly implicated by the ‘balancing’ metaphor, is especially real where the conflict between two fundamental rights occurs – as is always the case before the European Court of Human Rights – in a procedural setting in which one of the rights in conflict is endorsed by an entity such as the State, who is presumed to embody a broad collective interest whose weight, in comparison to that of the individual right-holder, will necessarily appear considerable, at least until we realize that this individual might well be representative, in his claims, of far wider societal interests, which the State may have paid insufficient consideration to.⁷¹

Both of these two traps may of course be avoided, even while remaining within the metaphor of ‘balancing’. A third difficulty, however, seems more difficult to overcome, since, rather than resulting from the grip the metaphor may have on the judge’s mind, it is of a logical nature. This difficulty is in the obligation for the judge to circulate, uncomfortably, between purely *ad hoc* balancing, seeking to define, in the specific circumstances of each case, which of the two rights in conflict should be recognized more weight in the balance, on the one hand; and ‘definitional’ balancing on the other hand, according to which the judge provides certain reasons for choosing one right over the other and, therefore, imports into his or her reasoning considerations not limited to the specific case at hand, but including anticipated future cases where the same conflict might recur.⁷² At the most superficial level,

that, since the impugned measure was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims, it could reasonably be held to have met a ‘pressing social need’ as required under Article 10 § 2 ECHR. See Eur. Ct. HR, *I.A. v. Turkey*, judgment of 13 September 2005, §§ 27 and 30. In their joint dissenting opinion to this case, judges Costa, Cabral Barreto and Jungwiert note that the *Otto-Preminger-Institut* and *Wingrove* judgments ‘were the subject of much controversy at the time (and the European Commission of Human Rights, for its part, had expressed the opinion by a large majority that there had been a violation of Article 10 in both cases)’ and state their view that ‘the time has perhaps come to “revisit” this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press’.

⁶⁹ *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (‘Whether First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown’). See Ch. FRIED, ‘Two Concepts of Interests: Some Reflections on the Supreme Court’s Balancing Test’, *Harv. L. Rev.*, vol. 76 (1963), pp. 755 and ff.; L. FRANTZ, ‘Is the First Amendment Law? A Reply to Professor Mendelson’, *California L. Rev.*, vol. 51 (1963), pp. 729 and ff., at pp. 747-749.

⁷⁰ R. POUND, ‘A Survey of Social Interests’, *Harv. L. Rev.*, vol. 57 (1943), pp. 1 ff., at p. 2 (study initially written in 1921). The full citation is the following: ‘When it comes to weighing or valuing claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance of our very way of putting it’.

⁷¹ See, for other examples, O. DE SCHUTTER, ‘La souveraineté de l’Etat et les droits de la personne immigrée’, *Revue du droit des étrangers*, 1995, no. 84, pp. 261-270.

⁷² This dilemma has been discussed by a number of authors, including in particular (in chronological order) M. NIMMER, ‘The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy’, *California L. Rev.*, vol. 56 (1968), pp. 935 and ff., at p. 942; J.H. ELY, ‘Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis’, 88 *Harv. L. Rev.* 1482, 1500-1502 (1975); L. HENKIN, ‘Infallibility Under Law: Constitutional Balancing’, 78 *Columbia L. Rev.* 1022, 1027-1028 (1978); T. A. ALEINIKOFF, ‘Constitutional Law in the

the dilemma between *ad hoc* and definitional balancing is between two judicial attitudes, one in which the judge seeks to identify the solution most adequate for the case at hand and the equity of which the parties will recognize – the judge as arbitrator –; and another in which the judge is to clarify the requirements of the law, thus contributing for the future to legal certainty and to developing principles for the solution of future like cases – the judge as law-giver, or at least, as *expositor* of the law –.⁷³ At a deeper level, the dilemma relates to the fundamental question whether the act of balancing really may be reconciled with the definition of the judicial function itself, as consisting in the application, to certain facts, of certain pre-existing rules and principles, in order to arrive at a conclusion justified on the basis of such rules and principles. Which rules or principles guide the act of balancing itself? If such rules or principles exist, why should they not be expressed and made explicit? If they cannot be made explicit, what is the nature of the constraints facing the judge having to provide a reasoning justifying his or her conclusions?

Balancing, in sum, raises more questions than it provides answers. Our position, however, is not that it should be abandoned altogether. Its merit is that it recognizes the reality of conflicting rights, and that we have no ready-made solution to such instances of conflict. Its infirmity is that it provides no convincing alternative to the other, more formalistic methods for which it claims to be a substitute, and that, at worse, it may degrade into a mechanistic process, such as in cost-benefit analysis. We retain the departure point, while we reject the pretense of balancing to constitute a panacea for the ills of all other, rules-based, solutions. We posit, first, that in order to be effective – in order to effectively guide judicial-making –, principles need not take the form of explicit rules or preestablished criteria: they may remain unstated, or, like the principles of the ‘democratic society’ or of the ‘autonomy’ of the individual, stated only at a very general level, and their content progressively clarified in the very process of their application to specific instances. In its purest form, after all, this is what common law is all about: ‘the genius of the common law’, O.W. Holmes wrote in an oft-quoted statement, is that ‘it decides cases first, and discovers the principles afterwards’. Principles may constrain the judge, lead him or her to recognize the respective weight of different arguments he or she is presented with,

Age of Balancing’, 96 *Yale L.J.* 943, 948 (1987); K. M. SULLIVAN, ‘Post-Liberal Judging: The Roles of Categorization and Balancing’, 63 *U. Colo. L. Rev.* 293 (1992). See also FR. RIGAUX, *La protection de la vie privée et des autres biens de la personnalité*, Bruxelles, Bruylant, 1990, pp. 666-668; FR. RIGAUX, *La loi des juges*, cited above, pp. 224-225.

⁷³ This has been a recurring dilemma in all doctrinal discussions concerned with the balancing of interests performed by courts. See, in particular, P. MCFADDEN, ‘The Balancing Test’, *Boston College L. Rev.*, vol. 29 (1988), pp. 585 ff., esp. pp. 642-651. It has sometimes been argued that ‘balancing’ should simply be seen as any other rule applied by courts: as has been remarked by V. Luizzi, ‘[w]hen courts balance interests, they are, in effect, bringing their activity under a rule – that in certain cases, courts are to resolve the dispute by balancing the interests of the parties’ (V. LUZZI, ‘Balancing of Interests in Courts’, *Jurimetrics Journal*, Summer 1980, p. 373, at p. 402). But this argument – that ‘balancing’ is, after, a mode of decision-making like any other, a ‘rule’ followed by the judge – does not answer the concern that such a ‘rule’ may be unpredictable in its outcome, and thus does not allow those affected to plan their activities accordingly. A richer explication of the criteria used in balancing would not only favor such predictability, and thus contribute to legal certainty; it would also, perhaps more importantly, improve the accountability of judicial decision-making, by the control exercised on the justifications put forward for placing one of the competing interests above the others.

without necessarily for that reason being reducible to a rule operating in an all-or-nothing fashion.⁷⁴ Second, we emphasize the need to draw all the procedural consequences from this mode of decision-making under uncertainty: organizing a confrontation of all relevant viewpoints, opening up the judicial forum to comparative law, is all the more important where the judge is asked to decide in the absence of well-established legal standards, such as in situations of conflicts of rights. Before developing this idea, however, we turn our attention to a third device relied upon by the judge in such situations.

3. *The national margin of appreciation*

Situations of conflicts of rights are typically highly controversial. They seem to call, therefore, for a contextualized appreciation taking into account the sensitivities present in the specific setting in which they arise. Thus, it should come as no surprise that the doctrine of the national margin of appreciation has been regularly invoked by the European Court of Human Rights in the cases referred to in the above discussion.⁷⁵ Indeed, as we have seen, the Court suggested in *Chassagnou and Others v. France* that it would as a matter of principle allow a wide margin of appreciation to be enjoyed by States in situations of conflicting rights.⁷⁶ In addition, States are generally considered to enjoy a broader margin of appreciation where their positive obligations are concerned – since they are to choose the means through which achieve the result prescribed by the Convention – than in the area of negative obligations; and cases implying the imposition of positive obligations, i.e., requiring that States intervene in relationships between private parties, are typically cases in which situations of

⁷⁴ R. DWORKIN, *Taking Rights Seriously*, Cambridge, Harvard University Press, 1977, p. 26 ('[A principle] states a reason that argues in one direction, but does not necessitate a particular decision').

⁷⁵ The literature, on this point also, is overwhelming. We owe the most extensive studies of the subject to H.C. YOUROW, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, London/The Hague/Boston, Martinus Nijhoff Publ., 1996; J.G.C. SCHOKKENBROEK, *Toetsing aan de vrijheidsrechten van het Europees Verdrag tot bescherming van de Rechten van de Mens*, WEJ Tjeenk Willink, Zwolle, 1996 (pp. 11-241); and E. KASTANAS, *Unité et diversité. Notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant, 1996. Significant early studies of the subject were made by R. HIGGINS, 'Derogations under Human Rights Treaties', *British Yearbook of International Law*, vol. 48 (1976-1977), pp. 281-320, at pp. 296-30; R. St. J. MACDONALD, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights', in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, Milan, Giuffrè, t. III, 1987, pp. 187-208; and from the same author, 'The Margin of Appreciation', in F. MATSCHER, R. St. J. MACDONALD and H. PETZOLD (dir.), *The European System for the Protection of Human Rights*, London/The Hague/Boston, Martinus Nijhoff Publ., 1993, pp. 83-124. Among the more recent contributions see, *inter alia*, in addition to the special issue dedicated to this issue by the *Human Rights Law Journal* in 1998 under the title 'The Doctrine of the Margin of Appreciation Under the European Convention on Human Rights: its Legitimacy in Theory and Application in Practice', Y. ARAI, 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights', *N.Q.H.R.*, 1998, pp. 41-61; E. BREMS, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', (56) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1996, pp. 240-314; T.H. JONES, 'The Devaluation of Human Rights Under the European Convention', *Public Law*, 1995, pp. 430-449; P. Mahoney, 'Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments', *E.H.R.L.R.*, 1997, pp. 364-379; J. CALLEWAERT, 'Quel avenir pour la marge d'appréciation?', in P. MAHONEY, H. PETZOLD, F. MATSCHER and L. WILDHABER (dir.), *Protection des droits de l'homme : la perspective européenne. Mélanges en hommage à R. Ryssdal*, Köln, Carl Heymanns, 2000, pp. 147-167.

⁷⁶ Eur. Ct. HR (GC), *Chassagnou and Others v. France*, judgment of 29 April 1999, § 113. See above, text corresponding to fn. 17.

conflicts of rights occur. Finally, the margin of appreciation will be particularly wide in areas – such as, for instance, where the protection of the rights of others in relation to attacks on the religious convictions of a segment of the population lead to restrictions being imposed on freedom of expression;⁷⁷ where different aspects of freedom of association conflict with one another⁷⁸; or where restrictions to freedom of expression are justified by the need to protect the rights of others⁷⁹ – where, in the absence of a uniform European conception of the implications of the Convention, the solutions adopted at national level are widely divergent.

All three rationales of the doctrine were present in *Odièvre v. France*, where the Court was confronted with a conflict between the child’s right to know its origins and the mother’s interest in keeping her identity secret. The Court arrived at the conclusion that the right of the applicant to have access to her mother’s identity, which she derived from Article 8 ECHR, was not violated. The judgment was based, in part, on the recognition that the State should be recognized a wide margin of appreciation since, in the words of the Court, ‘the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States’ margin of appreciation’; since there existed a ‘diversity of practice [...] among the legal systems and traditions’ and ‘various means are being resorted to for abandoning children [in the member States of the Council of Europe]’; and since, finally, the French authorities had to ‘strike a balance and [...] ensure sufficient proportion between the competing interests’.⁸⁰ Similar considerations may be found, for instance, in *Gorzelik and Others v. Poland*, where a conflict arose between the ability of the applicants to establish a legal entity, as an aspect of freedom of association, and the rights of other persons or entities participating in parliamentary elections, who could have been infringed by an abusive invocation by the applicants of the privileges of the 1993 Elections Act.⁸¹ Many other examples could be provided. This by no means implies that, wherever conflicts of rights occur, or wherever States are to intervene within private relationships (implying that they will have to choose the means through which to intervene), a broad margin of appreciation

⁷⁷ Eur. Ct. HR, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, § 49, and Eur. Ct. HR, *Murphy v. Ireland*, judgment of 10 July 2003, § 67; Eur. Ct. HR, *Wingrove v. the United Kingdom*, judgment of 25 November 1996, § 53.

⁷⁸ See, e.g., Eur. Ct. HR, *Gustafsson v. Sweden*, judgment of 25 April 1996, § 45 (‘In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and, in particular, in assessing the appropriateness of State intervention to restrict union action aimed at extending a system of collective bargaining, and the wide degree of divergence between the domestic systems in the particular area under consideration, the Contracting States should enjoy a wide margin of appreciation in their choice of the means to be employed’).

⁷⁹ P. LAMBERT, ‘Les restrictions à la liberté de la presse et la marge d’appréciation des Etats au sens de la jurisprudence de Strasbourg’, *Rev. trim. dr. h.*, 1996, p. 155.

⁸⁰ Eur. Ct. HR (GC), *Odièvre v. France*, judgment of 13 February 2003, §§ 46, 47 and 49 respectively.

⁸¹ Eur. Ct. HR (GC), *Gorzelik and Others v. Poland*, judgment of 17 February 2004. The argument of the Polish authorities was that their refusal to register the association was justified in order to preempt any of the applicants to claim that, under the 1993 Elections Act, they should be exempted from the threshold of 5% of the votes normally required to obtain seats in Parliament and certain advantages in respect of the registration of electoral lists.

necessarily will be recognized to the national authorities: the Court may find that the area concerned is not one on which opinions within a democratic society may reasonably differ widely and in which the role of the domestic policy-maker should be given special weight.⁸²

The ‘national margin of appreciation’ doctrine would be highly contestable if it really did what it says. But, in most cases, it does not. Whenever the Court invokes the doctrine, it hastily adds that the choices made at national level remain to be monitored, for their compliance with the Convention, at the international level. In addition, the doctrine applies to the evaluation of facts (of what is required in a particular situation); it does not extend to the interpretation of the requirements of the Convention (which it is the role of the European Court of Human Rights to supervise).⁸³ We should therefore not denounce the doctrine as resulting in the Court abdicating its role. On the contrary, if it is channelled in the right direction, the doctrine could become productive, in two ways.

First, the doctrine could evolve into a mechanism allocating decision-making, in matters pertaining to the Convention, to the national authorities, to the extent that the procedures followed at national level may be presumed to ensure an adequate compliance with the Convention. Thus understood, the doctrine of the national margin of appreciation could create an incentive for legislative and executive authorities to better take the Convention into account in their law- and policymaking procedures, and for the domestic courts to pay a greater attention to the requirements of the Convention and the evolving international case-law providing it with an authoritative interpretation. In accordance with the principle of subsidiarity of international judicial supervision, the ‘wide margin of appreciation’ could benefit national authorities where, for instance, human rights impact assessments have been performed prior to the adoption of legislation or the implementation of certain policies, or where decisions were preceded by consultations of stakeholders; or where the Convention is directly applied by national jurisdictions, taking into account the relevant case-law of the European Court of Human Rights. Far from deferring to the evaluations of the domestic authorities, the Court would thus put more pressure on those authorities to implement fully the requirements of the Convention in the decisions they adopt.

Second, the doctrine of the margin of appreciation could be seen as an encouragement to national authorities to develop innovative solutions to questions raised by the application of the Convention for which the member States of the Council of Europe have not defined a common solution. Indeed, one

⁸² Eur. Ct. HR, *Associated Society of Locomotive Engineers & Firemen v. the United Kingdom*, judgment of 27 February 2007, § 46. In this case, the Court explicitly denied that a wide margin of appreciation should be recognized to the United Kingdom authorities, although it did acknowledge the existence of a conflict between the right of trade unions to set up their own rules concerning conditions of membership, as an element of their freedom of association under Article 11 ECHR, and the freedom of expression, under Article 10 ECHR, of one union member who had been denied membership from the applicant trade union because of his membership in a right wing organisation, whose values contradicted those defended by the union.

⁸³ See in particular J. CALLEWAERT, ‘Quel avenir pour la marge d’appréciation?’, cited above, at p. 163.

of the main justifications of the doctrine is that it avoids imposing uniform solutions throughout the member States, at least where no single solution is imposed by the requirements of the Convention.⁸⁴ In the context of conflicts of rights, thus, the doctrine may both promote diversity, and encourage the search for the best techniques through which to reconcile conflicting claims made on the national authorities: by deferring to the appreciation of the national authorities about what responses are required by the situations they are confronted with, the reliance by the Court on the ‘margin of appreciation’ may encourage the search for solutions which, once they are identified and found to be compatible with the requirements of the Convention, may benefit other States, who may seek inspiration from local experiments.

We will return to this latter argument in the third section of the paper. Here, we close by noting one potentially important argument in favor of allowing a broad margin of appreciation to the national authorities of the States parties to the Convention in weighing the respective rights against one another in situations of conflict, although this argument has been hitherto neglected. This argument is that the *framing* of these situations will generally be different before those authorities than before an international court. Before the European Court of Human Rights, the right is invoked by the individual against the State; the State itself is presumed to embody the public interest, which includes – although it may not be reduced to – the protection of the (potentially conflicting) rights of others. Two distortions may result from this architecture, as we have seen. Where the ‘necessity’ test is relied upon, the risk is that the right invoked by the individual applicant will be given priority, for the sole reason that the question presented to the Court is whether that right has been unduly restricted, or not. Where a ‘balancing’ test is introduced, the risk is that the issue will be decided, in favour of a finding of non-violation, by the sheer weight of the ‘collective’ interest put forward by the State (who is presumed to represent all the right-holders whose claims might weigh against the solitary claim of the individual applicant). Of course, neither of these ‘framing effects’⁸⁵ are unavoidable; and, since some element of ‘balancing’ is in any case frequently included within the ‘necessity’ test itself, both effects can in practice compensate for one another, with the ‘balancing’ counterweighing the presumption favourable to the right invoked by the individual applicant within the ‘necessity’ test. It is a fact,

⁸⁴ See the references cited in that respect by S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la Convention européenne des droits de l’homme. Prendre l’idée simple au sérieux*, cited above, pp. 497-503.

⁸⁵ This expression refers loosely to the work of social psychologists and political scientists who have insisted on the importance both of the background assumptions held by the participants in a controversy, and of the impact the framing of the issue (i.e., the way the issue is presented) may have on the position held by such participants. The resolution of controversies therefore requires to make those different background assumptions explicit, and to test them against competing assumptions, as well as to neutralize the ‘framing effects’ by contrasting different possible framings of a situation in order to exhibit the possible resulting biases. See, e.g., D. SCHÖN and M. REIN, *Frame Reflection. Toward the Resolution of Intractable Policy Controversies*, New York, Basic Books, 1994 ; A. TVERSKY and D. KAHNEMAN, ‘The framing of decisions and the psychology of choice’, *Science*, vol. 211 (1981), pp. 453-458; A. TVERSKY and D. KAHNEMAN, ‘Rational choice and the framing of decisions’, in R.M. HOGARTH and M.W. REDER (eds), *Rational Choice*, Chicago, Chicago University Press, 1987.

however, that the less rigorous the judicial methodology used – the more the judicial decision depends on elements of intuition or ‘hunch’ –, and the more these ‘framing effects’ may have a real impact on judicial decision-making.

It is therefore noteworthy that, in certain respects, national authorities may be more immune from this risk than the European Court itself. Of course, the national authorities are less insulated from political pressure – per necessity as regards national courts, per definition as regards national governments or legislative assemblies. And their views of what the adjudication of the conflict of rights calls for may be biased, by the very fact that they are confronted with threats, or emergencies, which they may perceive as more immediate and real than would the international judge, who decides from a comparatively more detached position. But both national courts and national lawmakers may be less subject to the framing effects we have identified as a potential obstacle to be overcome by the international court. Before national courts, at least in private law adjudication,⁸⁶ conflicts between rights held by different right-holders are confronted directly, instead of one of the rights in conflict having to be endorsed (and presented as an element of the public interest) by the State. Before national legislative bodies or national governments, conflicts of rights are examined as questions calling for general regulations, or for administrative decisions implementing these regulations: the issue is not artificially presented as one individual right-holder claiming his right against those of the collectivity of individuals represented, *parens patriae*, by the State. It is clear that no framing is immune from being criticized, and that, in a sense, none is totally ‘neutral’ since, per definition, other framings would be possible. But it is nevertheless a powerful argument in favour of the doctrine of the margin of appreciation that it places confidence in decision-making procedures at national level which confront the issue of conflicting rights as it is: as an opposition between competing claims to protection from the State, which both deserve equal attention.

In our view, the only acceptable use of the doctrine of the margin of appreciation of the national authorities is one thus conceived. The Court should resist the temptation to lower the level of scrutiny it performs in order to defer to the evaluation made by the national authorities of the requirements of the situation they seek to respond to. What it might do, however, is to transform the kind of scrutiny it exercises in two ways: first, by strengthening its procedural dimensions – requiring the national authorities to better take into account the Convention in the domestic legal order –; second, by systematically comparing the measures adopted within one State with those adopted in other States confronted with similar dilemmas, in order to progressively identify – and perhaps, in time,

⁸⁶ Administrative courts and constitutional courts are positioned similarly to the international court, since an individual litigant typically is opposed to the State, represented by the Executive.

generalize – the solutions which have proven to comply most fully with the requirements of the Convention. The third section of this paper explores the significance of this procedural turn.

IV. THE PROCEDURAL TURN

1. Practical concordance

We take as our departure point the idea according to which, in situations of conflicting rights, we should aim at realizing a ‘practical concordance’ between the rights in conflict. Reliance on the principle of ‘practical concordance’ in situations of conflicting fundamental rights was theorized most explicitly in the work of the German constitutional lawyer Konrad Hesse,⁸⁷ and appears in a number of decisions of the *Bundesverfassungsgericht*. Its aim in situations of conflicting rights is to avoid, to the fullest extent possible, sacrificing one right against the other, and instead seeking a compromise between the rights in conflict which will respect their respective claims, by ‘optimizing’ each of the rights against the other.

The idea of a ‘practical concordance’ to be sought may seem banale at first sight. That it is highly consensual can hardly be doubted: after all, who would favour ‘sacrificing’ one right in favour of another, competing right, where both claims can in some way be reconciled? It will be noted however – and this is already an achievement not to be underestimated – that it represents a significant progress from the metaphor of ‘balancing: whereas the ‘balancing’ of one right against another should lead to prefer the right with the highest ‘value’, or the most important ‘weight’, above the other, the principle of ‘practical concordance’ instead rejects the very idea that this may be a desirable outcome: it is not right, it insists in substance, to set aside one claim simply because a competing claim appears, in the particular circumstances of a case, to deserve to be recognized more weight.

Despite the advance it represents, the principle of practical concordance shares with the idea of ‘balancing’ two characteristics which seem to us potentially contestable. First, it shares with the methodology of ‘weighing the scales’ the idea that the judge has a privileged access to where the equilibrium is to be found: in the final instance, it will be for the judge to decide whether or not the rights in conflict have been reconciled to the fullest extent possible, without any of the two rights in

⁸⁷ See, on this ‘*Prinzip der praktischen Konkordanz*’, K. HESSE, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th ed., Heidelberg, C.F. Müller, 1995, § 172. See also F. MÜLLER, *Discours de la méthode juridique*, trans. from German by O. JOUANJAN, Paris, PUF, 1996, pp. 285-287, and S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la Convention européenne des droits de l’homme. Prendre l’idée simple au sérieux*, cited above, p. 212 and pp. 709-710.

conflict having been completely sacrificed to the other.⁸⁸ Second, and more importantly, it lacks any constructivist dimension: just like the process of ‘balancing’ does not include the need to search for ways to transform the context in which the conflict has arisen, the idea of a ‘practical concordance’ does not take into account the need to develop imaginative solutions to limit the conflict and to avoid its recurrence in the future. But it is precisely the development of such solutions which we require: the identification of adequate solutions on an *ad hoc* basis, where conflicts emerge which are presented to the judge, needs to be complemented by the establishment of mechanisms which will allow for a permanent search for devices which will contribute to avoid the repetition of the conflict in the future. It is this proposal, both procedural and constructivist, which we seek to explore.

The case of *Öllinger v. Austria* may serve to illustrate what we intend.⁸⁹ The applicant had notified the Austrian police that he intended to hold a meeting at the Salzburg municipal cemetery in front of the war memorial, on All Saints Day, in order to commemorate the Salzburg Jews killed by the SS during the Second World War. The meeting coincided with the assembly of a group commemorating the SS soldiers killed in the Second World War which was to be held at the same time and place. While aware of that other assembly, the applicant had refused to give an undertaking that the proposed meeting in memory of the murdered Salzburg Jews would not disturb that gathering, which he considered illegal. Thus, on the basis that the disturbances which would predictably occur on the site were likely to offend the religious feelings of members of the public visiting the cemetery, the applicant was denied the authorization to hold the commemorative meeting he intended.⁹⁰ When the case arrived before it, the European Court of Human Rights clearly recognized that the case is ‘concerned with competing fundamental rights. The applicant’s right to freedom of peaceful assembly and his right to freedom of expression have to be balanced against the other association’s right to protection against disturbance of its assembly and the cemetery-goers’ right to protection of their freedom to manifest their religion’.⁹¹ The question for the Court, therefore, was whether the domestic authorities had achieved a fair balance between these competing Convention rights.⁹² The reaction of the police authorities, subsequently approved by the Austrian, had been radical: they had prohibited one assembly from taking place, in order to ensure that the other assembly could take place peacefully and that the cemetery-goers would not be disturbed by the clash between opposed groups. This led the Court to remark:

⁸⁸ Although, of course, the principle of practical concordance will impose on the judge to provide a richer justification for his or her choice when seeking to achieve an adequate balance between the competing interests. In this sense too, the notion of practical concordance represents a step forward in comparison with the classical idea of ‘balancing’. Comp. fn. 73 above.

⁸⁹ Eur. Ct. HR, *Öllinger v. Austria*, judgment of 29 June 2006.

⁹⁰ The commemoration meeting held for the SS soldiers during the Second World War was considered by the Salzburg Federal Police Authority to be a popular ceremony not requiring authorisation under the Austrian Assembly Act.

⁹¹ Eur. Ct. HR, *Öllinger v. Austria*, judgment of 29 June 2006, § 34.

⁹² *Ibid.*, § 42.

‘In these circumstances, the Court is not convinced by the Government’s argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant’s right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery’s visitors.

Instead, the domestic authorities imposed an unconditional prohibition on the applicant’s assembly. The Court therefore finds that they gave too little weight to the applicant’s interest in holding the intended assembly and expressing his protest against the meeting of Comradeship IV [commemorating the SS soldiers], while giving too much weight to the interest of cemetery-goers in being protected against some rather limited disturbances’.⁹³

Despite the language used in the latter paragraph, the main problem in the eyes of the Court, we would submit, is not solely that the diverse interests at stake were not recognized an adequate ‘weight’.⁹⁴ It is also that, instead of identifying how the conflict could be avoided – by organizing the separation of the two groups on the premises, by deploying a police force –, the police authorities simply chose to prioritize certain interests above the others, *without seeking to modify the background conditions which may create the conflict in the first place*. They took the conflict they were faced with as ‘necessary’, where in fact it might have been construed as ‘accidental’ and as having its source, in part, in the unwillingness of the local authorities to deploy the police forces which would have been required to ensure that the competing claims at stake could have been satisfied simultaneously.⁹⁵ Practical concordance, we would submit, is most useful not as a rule helping us to identify where, on a scale going from the total sacrifice of one right to the total sacrifice of a competing right, we should locate ourselves. Rather, it should be seen as an objective to be achieved by an exercise in institutional imagination. We must ask, not only how the conflict should best be solved where the objective is to minimize the negative impacts on any of the competing rights, but also how the conflict can be avoided altogether, or lessened, by transforming the background conditions which made the conflict possible. Our proposal, then, is institutional and procedural in nature. It has four components.

⁹³ *Ibid.* §§ 48-49.

⁹⁴ Although this certainly was one of the concerns of the Court: whereas the applicant, a member of parliament, essentially had imagined to organize a meeting in order to protest against the gathering in commemoration of SS soldiers and intended, thus, to express an opinion on a issue of public interest, ‘the domestic authorities attached no weight to this aspect of the case’, which the Court finds ‘striking’ (*ibid.*, § 44).

⁹⁵ On this distinction between ‘necessary’ and ‘accidental’ conflicts, see J. RAZ, *Practical Reason and Norms*, Princeton, Princeton University Press, 1990 (1st ed., Hutchinson, London, 1975), p. 183. Ruth Marcus in particular has emphasized the need, where an ‘accidental’ conflict occurs, not only to find a solution to the said conflict, but also to transform the context in order to ensure that the conflict will not recur: see R.B. MARCUS, ‘Moral Dilemmas and Consistency’, *Journal of Philosophy*, 1980, pp. 121-136.

2. Transforming the background conditions

As already mentioned, our proposal seeks to take into account the fact that, in a number of situations, the conflict between rights has its source in the existence of certain background conditions which create the conflict. Such conflict seems inevitable, until we see what these conditions are, and until we identify ways in which such conditions might be removed. The role of the Court, in this context, is twofold: it is, first, to identify the responsibility of the State authorities in creating and maintaining the background conditions which made the conflict of rights ‘inevitable’ – or, as in *Öllinger*, in not transforming those conditions so as to ensure that all competing rights can be exercised without any one right having to be sacrificed to the other –; second, it is to progressively formulate rules which may serve to guide the States parties in the future, where certain regimes are proven to allow for this ‘practical concordance’ between competing rights to be effective.⁹⁶ Moreover, in order to identify which background conditions may explain the conflict between rights, and what it would mean, therefore, to modify such conditions, it may be crucial to compare the situation of conflict emerging in one jurisdiction with similar situations which have occurred in other jurisdictions, and how they were solved in such cases. Such comparisons may help identifying which conditions might be created to either lessen the conflict between rights, or even to remove it altogether, by making the appropriate institutional changes, which will allow these conflicting rights to be reconciled with one another’s requirements.

The case of *Chahal v. the United Kingdom* and its progeny offer an illustration. Articles 5 § 4 and 13 of the Convention were invoked in that case since the domestic courts were not in a position to review whether the decisions to detain Mr Chahal and to remove him from the territory were justified on national security grounds: in the view of the British authorities, the information justifying the detention and deportation of Mr Chahal concerned matters which, due to their sensitive character, could not be discussed in a public judicial procedure. However, relying on information it was provided with by non-governmental organizations acting as intervenors,⁹⁷ the Court took into account the fact

⁹⁶ In addressing situations of conflicting rights, we believe, the Court should pay explicit attention to the impact on future cases of the solutions it arrives at, in particular in order to provide guidance to the national authorities as to how best maximize (or ‘optimize’, in the language of the German constitutional doctrine) the competing claims it is presented with. This however is not to say that such quest for maximizing solutions should aim at efficiency understood in the economic sense. See in this regard the controversy between F. Easterbrook (advocating for an *ex ante* perspective whereby the Court takes into account the incentives the rules it lays down may create in the future) and L. Tribe (criticizing the development of a case-law aiming at maximizing economic efficiency), in the pages of the *Harvard Law Review*: F. EASTERBROOK, ‘The Supreme Court, 1983 Term – Foreword: The Court and the Economic System’, *Harv. L. Rev.*, vol. 98 (1985), p. 4; L. TRIBE, ‘Constitutional Calculus: Equal Justice or Economic Efficiency?’, *Harv. L. Rev.*, vol. 98 (1985), p. 592; F. EASTERBROOK, ‘Method, Result and Authority: A Reply’, *Harv. L. Rev.*, vol. 98 (1985), p. 622.

⁹⁷ These were Amnesty International, Justice and Liberty in conjunction with the Centre for Advice on Individual Rights in Europe (the AIRE Centre) and the Joint Council for the Welfare of Immigrants (JCWI).

that in Canada a more effective form of judicial control has been developed in cases of this type.⁹⁸ This example, said the Court, ‘illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice’.⁹⁹ Although *Chahal* does not, strictly speaking, concern a situation where two fundamental rights were seen to conflict with another,¹⁰⁰ it is easy to see how such an approach might help addressing situations where such conflicts do emerge. In this search for adequate alternatives to sacrificing one right against the other, comparisons between national experiences, in order to identifying which procedures achieve the most satisfactory balance between the conflicting rights at stake, have a potentially crucial role to fulfil.

3. Encouraging deliberative processes

As a second element of our proposal, we would submit that it is essential that – especially where real conflicts between rights exist which cannot be removed or alleviated by changing the background conditions which lead to the conflict in the first place – procedures be set up which allow for such conflicts to be subjected to an open deliberation. While it is important that States identify solutions to conflicts of rights which minimize the risks involved in such conflicts, it is equally important that the search continues, by avoiding solutions which would result in systematically prioritizing one right over the other.

What such procedures may consist in will of course vary according to the subject matter concerned. But the case-law of the European Court of Human Rights is rich of examples where the decision-making procedures were evaluated according to their ability to ensure that all competing interests would be provided an opportunity to be heard and, thus, to influence the identification of the balance to be achieved between them. In the case of *Giacomelli v. Italy*,¹⁰¹ the Court confirmed that, in cases involving environmental issues, where it is alleged that a particular pollution has interfered with

⁹⁸ This consisted in the use of sworn attorneys who would be authorized to look at the sensitive evidence, without communicating that evidence to their clients.

⁹⁹ Eur. Ct. HR, *Chahal v. the United Kingdom*, judgment of 15 November 1996, § 131 (as regards Article 5 § 4 ECHR); and see, as regards Article 13 ECHR, § 144. Following this judgment and the judgment delivered in *Tinnelly v. the United Kingdom* (judgment of 10 July 1998), the United Kingdom introduced legislation making provision for the appointment of a ‘special counsel’ in certain cases involving national security (Special Immigration Appeals Commission Act 1997, and the Northern Ireland Act 1998): see Eur. Ct. HR (GC), *Jasper v. the United Kingdom*, judgment of 16 February 2000. In addition, the suggestion made in *Chahal* that alternatives could be found to imposing limits to the judicial review of detention based on national security grounds also influenced the Court in situations involving other countries: see Eur. Ct. HR, *Al-Nashif v. Bulgaria*, judgment of 20 June 2002, §§ 95-98.

¹⁰⁰ Although, arguably, the national security imperatives put forward by the United Kingdom government in the *Chahal* litigation could have been phrased in terms emphasizing the right to life of the population, as was done in the case of *Nassim Saadi v. Italy* (application no. 37201/06) which is pending before the Grand Chamber. See above, text corresponding to fn. 26.

¹⁰¹ Eur. Ct. HR, *Giacomelli v. Italy*, judgment of 2 November 2006.

the rights recognized under Article 8 ECHR, it would not only examine the substantive aspect (whether the attitude of the State organs was justified in the light of that provision), but also the procedural dimension. The Court shall scrutinise the decision-making process to ‘ensure that due weight has been accorded to the interests of the individual’:

‘A governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals’ rights may be predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake [*Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 96, ECHR 2003-VIII, § 128]. The importance of public access to the conclusions of such studies and to information enabling members of the public to assess the danger to which they are exposed is beyond question (see, *mutatis mutandis*, [*Guerra and Others v. Italy*, judgment of 19 February 1998, § 60], and *McGinley and Egan v. the United Kingdom*, judgment of 9 June 1998, § 97). Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process (see, *mutatis mutandis*, [*Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 96, ECHR 2003-VIII, § 128], and *Taşkın and Others v. Turkey*, no. 46117/99, ECHR 2004-X, §§ 118-19)’.¹⁰²

This development is by no means limited to environmental cases. In *Gaskin v. the United Kingdom* and in *M.G. v. the United Kingdom*, procedures were in place in order to ensure that the interest of each individual in having access to information concerning his or her childhood or early development would be taken into account, in order to be weighed against other, competing interests, in particular the interest in maintaining the confidentiality of public records in order to allow the authorities to receive objective and reliable information and to protect the rights of third parties.¹⁰³ The dissent of seven judges in the abovementioned judgment of *Odièvre v. France*, where the right of the applicant to have access to information about her origins was to be balanced against the mother’s right to keep her identity as the child’s mother secret, was based essentially on the fact that, in the French system which the application was challenging, any deliberation had essentially been foreclosed:

¹⁰² *Ibid.*, § 83.

¹⁰³ Eur. Ct. HR, *Gaskin v. the United Kingdom*, judgment of 7 July 1989 (where the Court found that the absence of any independent authority finally deciding on access to records in cases where the contributor was not available, or improperly withheld consent, constituted a violation of the State’s obligation under Article 8 of the Convention); Eur. Ct. HR, *M.G. v. the United Kingdom*, judgment of 24 September 2002 (same).

‘As a result of the domestic law and practice, no balancing of interests was possible in the instant case, either in practice or in law. In practice, French law accepted that the mother’s decision constituted an absolute defence to any requests for information by the applicant, irrespective of the reasons for or legitimacy of that decision. In all circumstances, the mother’s refusal is definitively binding on the child, who has no legal means at its disposal to challenge the mother’s unilateral decision. The mother thus has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance. This, therefore, is not a multilateral system that ensures any balance between the competing rights. The effect of the mother’s absolute “right of veto” is that the rights of the child (...) are entirely neglected and forgotten’.¹⁰⁴

Such procedures, in our view, are not only required in order to minimize the risks of conflict, in accordance with the general requirement of proportionality. They are also searching devices: they encourage a permanent re-evaluation of provisional arrangements through which rights are combined with one another in a necessarily fragile and contestable way. In addition, they are not (and should not be treated as) substitutes for substantive standards guiding decision-making. The two following elements of our proposal follow from this conviction that, no more than *ad hoc* balancing or a deference to the margin of appreciation of the national authorities should replace the development of rules by the Court and the exercise of its supervisory function, compliance with certain procedures should exclude the verification of compliance with substantive standards: rather, balancing, local experimentation by national authorities, and the establishment of procedures allowing all competing interests to be considered, should all serve the purpose of clarifying the requirements of the Convention, in order to provide further guidance to the States parties as to how they should comply with their international obligations.

4. *Developing standards through adjudication*

That the imposition of procedural safeguards, such as were prescribed in the cases of *Hatton and Others* or *Gaskin* and their progeny, should not be separated from the obligation to comply with the substantive requirements of the Convention, is well illustrated by the controversy having surrounded the *Denbigh High School* case in the United Kingdom.¹⁰⁵ Shabina Begum, a Muslim girl, who was 14 years old at the material time, was excluded from the Denbigh High School in Luton after she insisted on wearing a long coat-like garment known as a *jilbab*, in violation of the dress codes imposed by the

¹⁰⁴ Eur. Ct. HR (GC), *Odièvre v. France*, judgment of 13 February 2003, joint dissenting opinion of Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää, at § 7.

¹⁰⁵ We are grateful to Janneke Gerards for having referred us to this case. See J.H. Gerards, *Belangenafweging bij rechterlijke toetsing aan fundamentele rechten*, Meijers Instituut, Kluwer, 2006, at pp. 24-25.

school. She felt that this was in violation of her freedom of religion, as recognized under Article 9 ECHR, and that it violated her right not to be denied education under Article 2 of the First Additional Protocol to the Convention. While her contentions were initially rejected by the Administrative Court, they were upheld on appeal.¹⁰⁶ The Court of Appeal's decision, however, was based on the consideration that the decision-making procedure by the direction of the school had been inadequate. The leading judgment by Brooke LJ took the view that, since the premiss of the decision by the school should be that freedom of religion and the right to education should allow Shabina Begum access to the school, the school authorities should have explained why the exclusion was justified in the light of those principles. Remarkably, the judgment emphasized that it should not be taken to mean that it would be impossible for the school to justify its stance if it were to reconsider its uniform policy in the light of the judgment and decide not to alter it in any significant respect; and indeed, in paragraph 81 of the judgment, the Court of Appeal explicitly provides guidance on the matters the school would need to consider. This approach was criticized by legal commentators as introducing a new kind of formalism, signifying a retreat of the courts from substance to procedure and an abandonment of the kind of scrutiny required by the principle of proportionality prescribed under the Convention.¹⁰⁷ The House of Lords agreed with these critiques.

In his leading judgment for the House of Lords, Lord Bingham of Cornhill put forward three reasons why the Court of Appeal had erred in adopting a purely procedural approach to the issue it was presented with. First, in his view, 'the focus at [the European Court of Human Rights in] Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated. In considering the exercise of discretion by a national authority the court may consider whether the applicant had a fair opportunity to put his case, and to challenge an adverse decision. [But there has been] no case in which the Strasbourg Court has found a violation of Convention right on the strength of failure by a national authority to follow the sort of reasoning process laid down by the Court of Appeal'. Second, under the Human Rights Act 1998 allowing the British courts to apply directly the Convention, the kind of proportionality review should go 'beyond that traditionally adopted to judicial review in a domestic setting', i.e., a mere rationality review:

¹⁰⁶ See [2004] EWHC 1389 (Admin) (Bennett J); [2004] *ELR* 374; followed by the decision of the Court of Appeal (Brooke, Mummery and Scott Baker LJ), [2005] EWCA Civ 199; [2005] 1 WLR 3372 (judgment of 2 March 2005).

¹⁰⁷ G. DAVIES, 'Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v Denbigh High School*', *European Constitutional Law Review*, vol. 1-3 (2005), p. 511. Other commentators too have been critical of the procedural approach adopted by the Court of Appeal: see R.J. POOLE, 'Of headscarves and heresies: The *Denbigh High School* case and public authority decision making under the Human Rights Act', [2005] *Public Law* 685; T. LINDEN and T. HETHERINGTON, 'Schools and Human Rights', [2005] *Educational Law Journal* 229. See also A. BLAIR, '*R (SB) v Headteacher and Governors of Denbigh High School* human rights and religious dress in schools', *Child and Family Law Quarterly*, Vol. 17, No. 3. (July 2005), pp. 399-414

proportionality, he stated, ‘must be judged objectively, by the court (...). As Davies observed¹⁰⁸], “The retreat to procedure is of course a way of avoiding difficult questions”. But [...] the court must confront these questions, however difficult. The school’s action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action could very well be maintained and properly so’. Finally, it is inappropriate for the Court of Appeal to request that the school authorities follow its prescriptions in order to identify all the human rights aspects of their decisions and ensure that they are compatible with the requirements of the Convention, for this is a task for the Courts to perform and what matters is substance, not form: the Court of Appeal’s decision-making prescription, Lord Bingham of Cornhill remarked, ‘would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger’s task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it’.¹⁰⁹

The approach we are proposing is procedural rather than substantial. It is aimed at the identification and permanent re-evaluation of solutions rather than at formulating rules which will define, once and for all and for a generality of cases, where the adequate ‘balance’ is to be struck between conflicting rights. In this view moreover, not only is it important to identify solutions to immediate problems: the search process itself, and the need for the search to continue, are equally crucial. But no search can be without direction. The aim should be to progressively arrive at an improved understanding of the requirements of the Convention, and thus, by the elucidation of the standards applicable, to provide guidance to the national authorities in order to improve their ability to comply with those requirements. The establishment of deliberative procedures is important, since they may facilitate the task of complying with the prescriptions of the Convention. But these procedures are means, not ends. They are no substitutes for compliance itself.

It follows that we should not oppose the necessarily contextualized search for solutions to situations of conflicting rights, to the development of standards applicable beyond the individual case. As rightly emphasized in the work of Peggy Ducoulombier,¹¹⁰ it is an unavoidable duty of the Court to develop criteria which could serve, in particular, domestic policy-makers, but which could also improve the predictability of the Court’s case-law itself. For instance, the distinction between the ‘core’ of one right and its ‘periphery’, is one which could be developed in the future, and serve to guide the future

¹⁰⁸ Reference is made to the article by G. DAVIES cited above, fn. 107.

¹⁰⁹ *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants)*, [2006] UKHL 15 (Lord Bingham of Cornhill, §§ 29-31) (judgment of 22 March 2006).

¹¹⁰ See P. DUCOULOMBIER, ‘Conflicts between Fundamental Rights and the European Court of Human Rights: An Overview’, on file with the authors (December 2006).

attempts to reconcile competing interests in ways which comply with the requirements of the Convention. Similarly, in the field of freedom of expression, the distinction between speech which contributes to a debate of general interest and speech which does not bear on matters of general importance – although it may respond to the curiosity of the public – is one which may become of central importance in the case-law, especially where freedom of expression competes with the right to respect for private life.¹¹¹ Unless we adhere to a rigid notion of rule, the development of such standards through adjudication should not be seen as incompatible with an insistence on the need for contextualized solutions. Such standards, we believe, should be treated as tools for decision-makers (and for the courts supervising the choices made by decision-makers), but they should not become sacred talismans: if they fail to convince in any particular setting, they should be revised, and replaced by other, perhaps more adequately framed standards. Reference has been made above to the controversies concerning the respective roles of balancing and categorization in constitutional adjudication.¹¹² It is our firm conviction that this apparent dilemma can be overcome if we adopt a pragmatic understanding of rules, in which these should be conceived as tools aimed at facilitating decision-making: tools which work are to be retained, those which do not should be replaced.

5. Two guiding principles

If we adopt such a perspective, one question remains, however, which is that of the principles guiding our search both for solutions in specific settings and for standards, conceived of as tools to help us arrive at adequate answers. We have emphasized the usefulness of procedures involving all the interests involved, and the role of comparative law, because both devices may facilitate the search for the most adequate solutions, just like reliance on certain standards may contribute to such a search, as long as they remain open to revision in the light of experience. But *why* – in the name of which understanding, more or less explicit, of the values underlying the Convention – should any one solution be considered preferable to any other? Which are those values in the name of which certain standards ought to be developed, and by reference to which those involved in identifying those solutions, and in developing those standards, should justify the positions they take? Neither the adequacy of the solutions adopted in specific cases, nor the normative validity of the standards

¹¹¹ Indeed, in the cases in which the Court has had to balance the protection of private life against freedom of expression, it has always stressed the contribution made by photos or articles in the press to a debate of general interest (see, e.g., *News Verlags GmbH & Co. KG v. Austria*, judgment of 11 January 2000, §§ 52 et seq.; *Krone Verlag GmbH & Co. KG v. Austria*, judgment of 26 February 2002, §§ 33 and ff. (where the Court appears to attach particular importance to the fact that the subject in question was a news item of ‘major public concern’ and that the published photographs ‘did not disclose any details of [the] private life’ of the person in question, leading it to find a violation of Article 10 ECHR); comp. with *Tammer v. Estonia*, judgment of 6 February 2001, §§ 59-63). In *von Hannover v. Germany*, which has been referred to above, the Court goes so far as to state that ‘the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest’ (Eur. Ct. HR, *von Hannover v. Germany*, judgment of 24 June 2004, § 76).

¹¹² See above, text corresponding to fn. 72.

developed and revised in the process of deciding such cases, may be evaluated without some reference to background principles.

Two principles, we suggest, should be guiding our search. One is the notion of personal autonomy. The other is the notion of democratic society. While the former principle will be invoked, typically, where the two conflicting rights are both rights of the same individual, one granting him a freedom to choose, and the other a right to protection, the latter principle will be invoked where the rights of different individuals are in conflict, requiring that their coexistence be organized.

The principle of autonomy has been referred to by the European Court of Human Rights as a principle underlying the interpretation of Article 8 ECHR, in the case of *Pretty v. the United Kingdom* where, significantly, the applicant argued that she should be allowed to be aided to commit suicide without being encumbered by the obstacle created by the criminal law which she considered paternalistic and premised on the idea that she might not be capable of entirely exercising her right to self-determination.¹¹³ In that case, the reference to the principle of autonomy allowed the Court to consider Article 8 ECHR applicable to the situation of the applicant, whose request to be aided in ending her life could be treated as an expression of her right to ‘autonomy’ or to ‘self-determination’. But the principle of autonomy may be expanded beyond that narrow understanding. It refers to the effective freedom of the individual, to which a set of material, informational and institutional conditions may contribute. Because it has strong philosophical foundations, it may serve as a guide where a balance needs to be achieved between the liberty of the individual, and the imposition on that individual of certain constraints, which the State seeks to justify by referring to the welfare of the individual concerned.¹¹⁴

The principle of a ‘democratic society’ is more traditional in the case-law of the Court. In its view, the ‘democratic society’ is not simply one guided by the majoritarian principle of democracy. As the Court has repeatedly emphasized, ‘democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities

¹¹³ See Eur. Ct. HR, *Pretty v. the United Kingdom*, judgment of 29 April 2002, § 61 (‘Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees’). For a comment, see O. DE SCHUTTER, ‘L’aide au suicide devant la Cour européenne des droits de l’homme’, *Revue trimestrielle des droits de l’homme*, 2003, n°52, pp. 71-112.

¹¹⁴ For a discussion of the question of waiver of rights in the context of the ECHR based on this understanding of the requirements of autonomy, see O. DE SCHUTTER and J. RINGELHEIM, ‘La renonciation aux droits fondamentaux. La libre disposition de soi et le règne de l’échange’, in H. DUMONT, F. OST & S. VAN DROOGHENBROECK (dir.), *La responsabilité, face cachée des droits de l’homme*, Bruxelles, Bruylant, 2005, pp. 441-482.

and avoids any abuse of a dominant position'.¹¹⁵ The democratic society in this sense, is necessarily deliberative: it requires that all decisions, even those adopted according to democratic procedures, be justified in regard of the public interest they pursue, and that they only impose restrictions on the rights of individuals to the extent strictly necessary for the pursuance of that interest.

But the content of these principles is less interesting than the position they occupy in these debates. What both principles have in common is that, while their meaning remains contested, and while different persons would draw from them, in any particular case, different implications, their centrality as a reference in justification discourses is uncontested. It is precisely thanks to the ambiguity of these principles that they are productive semantically: while they do not close the deliberation, they allow a structured deliberation to take place where the respective merits of different solutions to the conflicts of rights are compared.

V. CONCLUSION

We do not believe that conflicts of rights allow for easy solutions, or that there exists any magical formula which could provide an answer to all such situations which, with an increased frequency, come before the Court. But neither do we believe that efforts in building frameworks for solutions are vain. This paper has suggested that, in the absence of such a magic formula, we should draw the procedural implications from our uncertainty as to how to deal with these situations.

First, in order to balance competing interests against one another, and in the absence of clear-cut standards in the case-law of the European Court of Human Rights, national authorities should ensure that all these interests are adequately represented in the decision-making process, and can have their claims heard. The deliberations thus organized should be conceived as having to provide an opportunity to identify solutions which, addressing the background conditions which result in a situation of conflicting rights and transforming these background conditions, may eliminate the conflict without prioritizing one right against the other. This idea borrows from the principle of practical concordance, in refusing the all-or-nothing approach which the 'balancing of rights' consists in; but it emphasizes the need for the domestic authorities, wherever possible, to modify the context in which the conflict of rights has its source.

¹¹⁵ Eur. Ct. HR, *Handyside v. the United Kingdom*, judgment of 7 December 1976, § 49; Eur. Ct. HR, *Young, James and Webster v. the United Kingdom* judgment of 13 August 1981, § 63; Eur. Ct. HR (GC), *Chassagnou and Others v. France*, judgment of 29 April 1999, § 112; Eur. Ct. HR, *Associated Society of Locomotive Engineers & Firemen v. the United Kingdom*, judgment of 27 February 2007, § 43.

Second, as comparable situations of conflicting rights develop, and as a pattern emerges from their repetition, certain standards will develop as to how to address them. It is one of the roles of the European Court of Human Rights to progressively identify such standards as they emerge from local experiences, since a purely *ad hoc* approach addressing situations of conflict on a case-to-case basis provides too little guidance to the national authorities, and since the risk would be, in the absence of such a search for standards, to fall into a pure proceduralism – to replace the requirement that the substantive guarantees of the Convention be complied with, with a requirement that certain decision-making procedures be set up, which provide an opportunity for all interests involved to be taken into account. Such standards, however, should not rigidify into rules, closed to revision. They are mere attempts to guide the identification of the solutions which will best respect the contradictory claims made by different rights-holders in situations of conflict. Just like scientific hypotheses may be tested against physical phenomena, such standards should be tested against the reality of conflicts which occur.

Third, neither the search for solutions which, in situations of conflicting rights, minimize the degree of interference with each of the rights at stake, nor the search for standards embodying such solutions and progressively extending their scope of application beyond the set of situations for which these solutions were originally conceived, would be conceivable without a reference to certain overarching principles, or guiding values, directing this process made both of invention and of discovery. The principles of ‘individual autonomy’ and of the ‘democratic society’ are not remarkable for their ambition. They are remarkable for their modesty: these are frugal principles, which, while do they impose constraints on the nature of arguments which will be put forward in favour of, or against, the adoption of certain solutions or the development of certain standards, do not prescribe specifically any solution or any standard, leaving it to us, rather, to invent them, and to validate them as we discover that they correspond to our shared intuition about what those overarching principles require.