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# Proportionality and the Balancing of Rights in the Case-law of European Courts

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## **1. Prologue. Proportionality as a key concept in global constitutionalism**

Even a superficial analysis of the case-law of the European Courts of Rights will unequivocally show the relevance and paramountcy of the proportionality test and the technique of balancing – which is a logical consequence of proportionality – within the proceedings that lead to the Courts' judgments.

Proportionality and balancing, read as a hendiadys, are after all key concepts in global constitutionalism. They are the ripe fruit of the circulation of juridical models and legal reasoning within the multilevel system of human rights protection<sup>1</sup>.

Within the context of Continental European law, we found the first trace of formal expression of the notion of proportionality in the 1794 *Allgemeines Landrecht für die preußischen Staaten*, which cites it as a general criterion for the administration of penalties and police actions. This translated into a ban on punitive measures that restricted personal liberties beyond what was deemed strictly necessary to protect public safety<sup>2</sup>.

After a long process of refining by administrative and later constitutional case-law – the former devising the pertaining judgment criterion since the *Kreuzberg* case of 1882 – the proportionality test has become

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<sup>\*</sup> Peer reviewed.

<sup>1</sup> As noted by T.A. ALEINIKOFF, *Constitutional Law in the Age of Balancing*, in 96 *Yale Law Journal* (1987), p. 943, attributing to the adoption of *balancing* as a key mode of *legal reasoning* in constitutional law the same effect that the theory of relativity had produced on hard sciences. More recently, A. Stone Sweet – J. Mathews, *Proportionality Balancing and Global Constitutionalism*, in 47 *Columbia Journal Transnational Law* (2008), pagg. 72 ss.

<sup>2</sup> The first complete scientific formulation of this notion can be traced back to G.H. Von Berg's *Handbuch des deutschen Polizeirechts*, Berlin, 1799, 88 ss. For a reconstruction of this concept in Germanic civil law, see, above all, the classic by P. Lerche, *Übermaß und Verfassungsrecht. Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit*, Köln, 1961, as well as G. SCACCIA, *Il controllo di proporzionalità della legge in Germania*, in *Annuario di diritto tedesco*, 2002, 379 seq.

a recurring module of reasoning in the case-law of the Luxembourg Court of Justice, of the ECHR and of many constitutional courts all over the world.

The reasons for this widespread success<sup>3</sup> of this veritable *Zauberformel* of current civil law, setting aside the powerful influence of German legal doctrine, are numerous. I will point out the more prominent:

*i.* the idea of proportion is in accordance with the dominant culture of human rights as the foundation and the *τέλειος* of the political community, and therefore with the idea of an internal and immanent limitation of power in favour of the axiologically greater good that is liberty<sup>4</sup>. What Hobbes expressed as *Voluntas, non ratio facit legem*, even in Schmitt's proactive voluntarist actualisation, no longer resonates with the *zeitgeist*. In contemporary liberal constitutionalism, the mere mentioning of a *Voluntas*, even a democratically formed one, will find no moral legitimisation unless it can be reasonably justified. The political command will prevail and be accepted as legitimate, earning the interested parties' support, only when providing a modicum of consistency, adequacy, proportionality, and plausibility, with regard to its case and scope. Proportionality is the expression of a need to contain – and therefore it operates as an internal limitation – any form of power, be it public or private, while at the same time affirming the idea that the space of individual liberties needs to be protected from superfluous or excessive interference, with regard to any specific area of regulation. With this general connotation, it is applied to every area of law, which explains its success. In fact, proportionality: a) is applied within constitutional law as a general principle in the legislative action intended to compress individual rights<sup>5</sup>, as well as a measure of the legitimacy of state legislation impinging upon matters of regional autonomy; b) in administrative law, it prompts an updating of the traditional doctrine of measures' defects, shifting the focus onto the administrative relationship, and incorporating the elements that denote the abuse of power within the comprehensive canon of reasonableness of the administrative action c) in civil law, it contributes to the

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<sup>3</sup> A tangible sign of this success is the XXV volume of the *Annuaire International de Justice Constitutionnelle*, XXV – 2009, Presses Universitaires d'Aix-Marseille, 2010, which contains the debates on proportionality by speakers coming from all corners of the world.

<sup>4</sup> This fundamental notion is implicit and forms the basis of the position expressed by the Italian Constitutional Court, according to which the “principle of proportion [...] represents a direct expression of the precept of rationality (as per art. 3 Const.)” sent. n. 220/1995. In other cases, the principle of proportionality is easier to identify. A textbook example is art. 36 par. 1 of the South African Constitution, in which a test of proportionality is codified with regard to the limitation of rights, affirming that: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including a) the nature of the right; b) the importance of the purpose of the limitation; c) the nature and extent of the limitation; d) the relation between the limitation and its purpose; and e) less restrictive means to achieve the purpose.”

<sup>5</sup> See. Const. Court jdg. 1/1997, stating that “suitability and proportionality (...) constitute general constraints of the legislative action intended to compress individual rights”.

definition of the external limitations to the interpretation of the contractual intention<sup>6</sup>, and it provides a solid basis to the theorisation of the abuse of rights, on the assumption that a subjective position of advantage – save for the external limitations that are expressly imposed upon it – be founded on an idea of proportion, the disregarding of which would, in fact, constitute the aforementioned abuse; d) in international law, it provides the measure for the lawful use of force, with respect to both the States' power to wage war (*jus ad bellum*), and the choice of the ways and instruments of said war (*jus in bello*)<sup>7</sup>.

ii. as the “constitutionalism of rights” aspires to the foundation of a “cosmopolitan justice”<sup>8</sup>, based on the universal foundation of inviolable rights and human dignity, as it projects beyond the boundaries of state sovereignty and national citizenship, it encounters an increasing amount of devastating conflicts of ideals between the members of society. Differing and irreconcilable religious, ethical, and anthropological views clash in the pluralistic and multicultural arena of European Constitutions, with juridical controversies reflecting and conveying ideal ones, seldom placated by the legislator by means of laws that express stable hierarchies of interests. Within a context in which a structural *reasonable disagreement*<sup>9</sup> is vested even in the highest values of the legal system, the proportionality test, by its very formal and procedural nature, offers – or at least it purports to offer – a method for the solution of conflicts that might lessen their power and reduce their systematic impact. A method that appears to be inspired by the Cartesian rule whereby vast and complex problems are better solved by dividing them into a multitude of smaller, more specific, and easier ones. As it happens, the proportionality test, particularly when it is brought to its third stage – the balancing – does not administer rules for resolving individual cases that are suitable to stabilise into solid hierarchies of interests and principles, but rather it offers rulings of prevalence, based on specific circumstances and therefore mutable and inherently precarious, subject to revision. The strict adherence of the judicial ruling to its specific case prevents the universal interpretation of its underlying decision-making; and any conflicts of *Weltanschauungen* that may arise, and that would produce general and permanent effects, were they to be addressed by the legislator, are deconstructed into micro-conflicts, strictly focusing on specific cases. This projection towards the case for proportionality reflects the preeminent relativistic tendency of our pluralistic systems, that do not devise

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<sup>6</sup> On this point see, above all P. PERLINGIERI, *Equilibrio normativo e principio di proporzionalità nei contratti*, in Idem., *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile*, Napoli 2003, 459 seq.

<sup>7</sup> E. CANNIZZARO, *Contextualizing proportionality: jus ad bellum and jus in bello in the Lebanese war*, in *International Review of the Red Cross* (88), 2006, 779 ss. highlights the different methods of scrutiny in the two areas of *jus ad bellum* and *jus in bello*.

<sup>8</sup> On this point see F. CIARAMELLI, *Legislazione e giurisdizione*, Torino, 2007, 96 and G. SCACCIA, *Valori e diritto giurisprudenziale*, in *Dir. soc.* 1/2011, 135 seq.

<sup>9</sup> That *reasonable disagreement* should be acquired as the premise and direct instruction, in the constitutional review of laws in pluralist societies, is maintained by R.H. Fallon, *Implementing the Constitution*, in 111 *Harvard Law Review* (1997), 56 seq.

strict hierarchies of values, but rather mutable orders of interests, and that – in order to integrate seamlessly into a super-national and inherently multicultural political and legislative dimension – tend to be less prescriptive and more open, less strict and more pliable. Philosophically, they pertain to the sphere of relativism, rather than cognitivism. Proportionality – as recently remarked – is in accordance with the predominant “weak” conception of rights<sup>10</sup>, that proceed from their depiction as precepts of optimisation (*Optimierungsgebote*) – according to the well-known Robert Alexy theory – to be actualised in the presence of mutable juridical conditions and circumstances, and to be subjected to balancing and to scrutiny for inherently unstable costs and benefits<sup>11</sup>.

*iii.* the argument based on proportionality is functional to the expansion of the protective purview of rights, and it is therefore compliant with the dominant cultural and hermeneutic positions, blindly devoted to the “religion of rights” almost to the point of idolatry. The pivotal role of factuality within the reasoning structure of proportionality and the inherently specific nature of the subsequent judgments conspire to expand the range of interests protected by rights. Proportionality, therefore leads, almost inevitably, to a politically-correct *rights inflation*<sup>12</sup>.

*iv.* We have already incidentally observed how the crucial influence of German literature in the construction of the judicial systems of the other European Courts of Justice – particularly the European Court of Human Rights and the Court of Justice of the European Union – has proven instrumental in the widespread adoption of the proportionality test, at least within the European context. We should now add that the devising of a shared linguistic code among European judges is paramount, in order to establish a productive dialogue between the Courts. Proportionality is indeed one of the keywords of this “lingua franca”<sup>13</sup>. In this perspective, we can understand why the Italian Constitutional Court, traditionally loath to manifest the legal reasoning and specific standards of its rulings, decided to spell out the logical steps of the proportionality test for sentence n. 1 of 2014, clearly stating that “The proportionality test used by this Court and by many other European constitutional courts, which is often paired with a reasonableness test and is an essential instrument of the Court of Justice of the European

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<sup>10</sup> As described by T.-I. Harbo, *The Function of the Proportionality Principle in EU Law*, in *European Law Journal* 2010, 158, 166-168.

<sup>11</sup> R. Alexy, *Theorie der Grundrechte*, Baden - Baden, 100.

<sup>12</sup> K. Möller, *Proportionality and Rights Inflation*, in G. HUSCROFT - B.W. MILLER - G. WEBBER, *Introduction*, in *Proportionality and the Rule of Law. Rights, Justification, Reasoning*, Cambridge University Press, 2014, 155 seq. According to Möller, the normative importance of rights and their social function should not be overstated. Rather, he suggests we understand rights in a different way: “rights are better understood as endowing us with the right to be treated with a special attitude: an attitude that takes each and every individual seriously as a person with a life to live and that allows government to interfere with our activities only if there are sufficient, and proportionate, reasons to do so”.

<sup>13</sup> As per the effective definition given by G. Pino, *Diritti fondamentali e principio di proporzionalità*, in *Ragion pratica*, December 2014, 541 seq.

Union within the judicial review of the legality of acts of the Union and of the Member States, requires an assessment as to whether the provision under review, along with the arrangements stipulated for its application, is necessary and capable of achieving legitimately pursued objectives by requiring that the measure chosen out of those most appropriate is the least restrictive of the rights in play and imposes burdens that are not disproportionate having regard to the pursuit of those objectives”. It may not be a coincidence, that the author of this renowned pronouncement should be Prof. Giuseppe Tesauro, who has shown the utmost attention to the open dialogue with super-national Courts, if only because he held the post of Advocate General of the Court of Justice, which has, on countless occasions, applied the test of proportionality.

## **2. The proportionality test: general profiles**

Similarly to the test applied in German administrative law, the proportionality test was also developed by the European Courts into three levels or phases of justifiability: suitability, necessity, proportionality (in the strict sense).

The first phase takes into account the relationship between means and goals within the context of natural and juridical causality, the adequacy of the instruments devised by the legislator to reach the desired public-interest objectives. To that end, a reasonable connection is needed between the means and the end, but only insofar as it can identify a “non-manifest unsuitability” of the chosen instruments. A different appraisal, enquiring after the best-suited instrument to achieve a certain political objective (as opposed to the identification of a “non-suitable” one), would result in an invasion of the purview of the democratic legislator. Once the suitability test has been successfully concluded, the necessity test can be applied, with the aim of ascertaining whether the legislative action is the mildest among those theoretically fit to achieve the same practical goal, so as to minimise the sacrifice of individual rights without affecting the public interest. Finally, in its third phase, the proportionality test (in the strict sense) is resolved in a comparative assessment of the goods and constitutional interests sacrificed in the legislative deliberation, to the point of being easily confused with a mere balancing of interests.

The second test is more frequently applied. It is, in fact, rather unlikely that the measures adopted by the legislator prove to be entirely inadequate, on a practical and theoretical level, to the aim they are intended for. More often, it is the case that the instruments chosen by the legislator may not be the least invasive of individual liberties, and therefore may cause a disproportion, an “excessive action” in the attempt of protecting goods or public interest<sup>14</sup>.

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<sup>14</sup> From the vast available literature on proportionality, see, as well as the aforementioned work by P. LERCHE, *Übermaß und Verfassungsrecht*, the monumental opus by A. Barak, *Proportionality. Constitutional Rights and their*

The third level of the test, which in German literature is identified as “proportionality in the strict sense” (*im engeren Sinne*) is residual. It is only needed when, in the presence of deliberations that are equal in terms of suitability, efficacy, and invasiveness, the highest compliance with public interest can only be assured by an action that does not appear to be the lightest among those theoretically applicable. In this case, a weighing of public goals and liberties will be necessary, in order to deliberate on whether, in that specific case, the deliberation should aim to maximise the public benefits or minimise the damage to rights caused by the ruling. In other words, a balancing of interests will be called for.

Each of these phases of the proportionality test leaves ample margins for judiciary discretion. The adequacy test, for instance, could stop on the threshold of a negative finding with regard to non-manifest inadequacy, or it could demand that the author of the legislative or administrative deliberation at hand demonstrate the actual efficacy of their chosen instruments and their adequacy and consistency in the achieving of the set objectives.

When testing for the lightest outcome, the depth of the enquiry will depend on the Court’s creativity in devising alternative measures. It goes without saying that, even when a milder solution is chosen – one that doesn’t needlessly compress the sphere of liberty and rights – it should still ensure the same satisfactory outcome with respect to the public interest. Moreover, this test is still problematic to some extent, because it is based on gradualistic measurements with ample error margins.

Finally, in order to demonstrate the flexibility of the reasoning that the third stage entails, it will suffice to say that, in each weighing and balancing of interests and values (that can be composed in the final deliberation insofar as they can be translated into rules of principle<sup>15</sup>), there is an implicit and inevitable element of discretionality. In the absence of strict, pre-existing constitutional hierarchies, the weighing of such values and their translation into a normative action against opposing values, will always be arbitrary to a high degree. This depends on the very nature of the cognitive act that leads said values to be applied to the deliberation. As Nicolai Hartmann noted, “this is not about ‘knowing’, in the common meaning of that word, nor is it about neutrally acknowledging without being touched by the object of one’s acknowledgment. Rather, it is about being seized. One is seized, captured by that which appears loaded with value and belonging in the sphere of what must be. This is not a contemplative relationship; it is an emotional one, and the acts into which this acknowledgment is shaped are emotional too, they are

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*Limitations*, Cambridge, 2012; B. Schlink, *Abwägung im Verfassungsrecht*, Berlin, 1976; for Italian law, S. COGNETTI, *Il principio di proporzionalità. Profili di teoria generale e di analisi sistematica*, Torino, 2011.

<sup>15</sup> For the thesis that constitutional principles can’t be ontologically discerned from values, in that the former are merely the latter’s normative embodiment, see G. SCACCIA, *Gli ‘strumenti’ della ragionevolezza nel giudizio costituzionale*, Milano, 2000, 313 seq.

standpoints”<sup>16</sup>. Such standpoints, it should be noted, that occasionally balance and subject to a proportionality test rights, interests, and values that are literally incommensurable, whereby incommensurability is defined – in the words of Timothy Endicott – as “*the impossibility of measuring two considerations in the same scales*”<sup>17</sup>.

It would, therefore, appear reasonable to conclude that “*Proportionality between means and ends is more conducive to a principled practice of judicial review, while proportionality as balancing is an invitation to more or less arbitrary judicial decision making*”<sup>18</sup>.

Because of its unquenchable resistance against being forced into strictly deductive decisional schemes, and because of its pronounced permeability to judgments of value, and ethical and cultural preconceptions, the proportionality test can vary in both its intensity and its results, based on the matter in hand, on the considered measure and on the recurring subject. And this is exactly the case with the application by the Court of Justice of the European Union and the European Court of Human Rights, which we will now examine in further depth.

### 3. Proportionality in the case-law of the Court of Justice of the European Union

Proportionality is a general principle of the European system. In the original formulation of the Treaty on the Functioning of the European Union, there was no mention of it, and yet there was a debate on whether it should be considered as implicitly contained in the material notion of Rule of Law<sup>19</sup> and whether an implicit foundation for it could be identified in art. 40. It is stated therein that the common organisation of agricultural markets – in one of the forms described in that same article<sup>20</sup> – “may include all measures required to attain the objectives set out in Article 39” and “shall be limited to pursuit of” such objectives. The mention of the need for the means, in view of the goals, touches on the theoretic

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<sup>16</sup> N. HARTMANN, *Introduzione all'ontologia critica*, Italian translation by R. CANTONI, Napoli, 1972, 149. This book comprises essays contained in *Neue Wege der Ontologie*, Stuttgart, 1943; *Der philosophische Gedanke und seine Geschichte*, Berlin, 1955; *Systematische Selbstdarstellung*, in *Deutsche systematische Philosophie nach Ihren Gestaltern*, Berlin, 1933, 283 seq.

<sup>17</sup> Thus T. ENDICOTT, *Proportionality and Incommensurability*, in G. HUSCROFT - B. W. MILLER - G. WEBBER (CUR.), *Proportionality and the Rule of Law*, cit., 311 ss., 317, which distinguishes between *incommensurability* and *incomparability*, defining the latter as “the impossibility of finding rational grounds for choosing between two alternatives”. A distinguished critic to the incommensurability of “apples and oranges”, can be found in the concurring opinion of Justice Antonin Scalia in the SCOTUS judgment of *Bendix Autolite Co. v. Midwesco Enters* 486 U.S. 888 (1988).

<sup>18</sup> G. HUSCROFT - B.W. MILLER - G. WEBBER, *Introduction*, in *Proportionality*, cit. 4.

<sup>19</sup> According to the conceptology adopted in the German-language debate (e.g. R. Zippelius, *Rechtsphilosophie*, Muenchen, 2011), by *Rechtstaat im materiellen Sinne* we mean that form of State-system that, besides the formal and procedural guarantees that are implicit in the concept of *Rechtstaat im formellen Sinne* (legality, rule of law), acknowledges and ensures the substantial protection of fundamental rights.

<sup>20</sup> Such forms are: a) common rules on competition; b) compulsory co-ordination of the various national market organisations; c) a European market organisation.

idea of proportionality, but there is no clear and formal expression of this principle, such as was arrived at in article 3-b of the Maastricht Treaty<sup>21</sup>, from which it was taken almost verbatim in art. 5 par 4 of the Treaty on European Union, which states that “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” This precept works in accordance with Protocol 2, attached to the TEU, which is specifically dedicated to the application of the principles of subsidiarity and proportionality, in which it is stated by art. 1 that “Each institution shall ensure constant respect for the principles of subsidiarity and proportionality” and by art. 5 that “Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality” and that “Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality”.

Art. 5 of the TEU and the connected Protocol 2 define the profile of a principle that affects two different conceptual areas:

- a) it is a measure of the correct exercise of the Union’s jurisdiction, together with subsidiarity, insofar as it conditions the choice between multiple manners of intervention, expressing a preference for those that grant a higher degree of respect for the Member States’ identities<sup>22</sup>;
- b) it is also a parameter for the validity of national regulations or legislative acts by the Union that have an incidence on the exercise of fundamental rights. Art 52, par 1 of the Charter Of Fundamental Rights Of The European Union, after stating that “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms<sup>23</sup>” goes on to instruct that “Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.

The first, faltering and implicit mentions of this principle in case-law can be found in the judgments *Federation Charbonniere de Belgique* of 1956, in which it is stated that “In accordance with a generally-accepted rule of law an indirect reaction by the high authority to illegal action on the part of undertakings

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<sup>21</sup> On this point, the aforementioned article stated the following: “any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”.

<sup>22</sup> This is also the hermeneutic canon for the laws that attribute powers to the EU, which always demands the “most liberal” interpretation for the Member States (as per the Judgment of the Court of 12 November 1969, in the Case C- 29/69, *Stauder*, in which it is stated for the first time that fundamental human rights are a constituent part of the general principles of community law, whose respect is enforced by the Court itself. Similarly: judgments *Wachauf* in cases C-5/88; *Bostock*, C-2/92; *Karlsson*, C-292/97; *Berlusconi*, C-387/02.

<sup>23</sup> The same principle applies to the liberties guaranteed by the Treaties and by the CFREU and resulting from the common constitutional traditions of the Member States, as is evident by the conjoined operational action of artt. 6, par. 3 TWU and 52, par. 3 CFREU.

must be in proportion to the scale of that action.<sup>24</sup>” and 1962 *Mannesmann*, in which the principle of proportionality integrates the parameter that regulates the authority’s power to establish financial agreements “for safe-guarding the stability of the market.<sup>25</sup>”

With the 1970 judgment *Internationale Handelsgesellschaft*, the Court of Luxembourg was confronted directly with the question of whether proportionality should also constitute a general limitation in the judiciary compression of rights within the Community. After affirming that the protection of human rights should be ensured within the institutions and goals of the Community, the Court – in truth, without expanding the scope of its reasoning as much as the matter demanded – extrapolated the principle of proportionality, as a generalised reduction, from the law of the Member States, holding it to be applicable within the EU in the way of a shared constitutional tradition<sup>26</sup>.

It is only with the judgment *Cassis de Dijon*, however, that the preserving of proportionality was indicated as the parameter for the interdiction on quantitative restrictions on imports. The Court, in this pivotal judgment, which introduces a trend of extensive interpretation of free market, acknowledged that limitations to rights and liberties within the community are only legitimate when they are necessary to achieve goals of general interest or to protect others’ rights and liberties, regardless of the discriminatory nature of such measures<sup>27</sup>. Proportionality was detached from equality and found its own independence as a general guideline for the limitation of liberties, and a necessary one to ensure that the balancing of

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<sup>24</sup> CJEC, Judgment 29 November 1956, C-8/55, *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, §.A-1.

<sup>25</sup> CJEC, Judgment 13 July 1962, C-19/61, *Mannesmann AG v High Authority of the European Coal and Steel Community*, §. I.1.

<sup>26</sup> CJEC, Judgment 17 December 1970, C- 11/70, *Internationale Handelsgesellschaft mbH c. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, § 3- 4.

<sup>27</sup> With the trend in case-law set by *Dassonville* (CJEC 11 July 1974, case C- 8/74) - *Cassis de Dijon* (20 February 1979, case 120/78, *Rewe-Zentral-AG*), the laws protecting the free circulation of goods have been considered to be applicable to any national regulations that may create unjustified obstacles to a competition-based free market (CJEU 10 February 2009, case C-110/05, *Commission/Italy*; CJEU, 20 March 2014, case C-639/11, *Commission/Poland*; CJEU, 21 September 2016, case C-221/15, *Établissements Fr. Colruyt NV.*), even when they are free from discriminatory or protectionist effects, and therefore have been extended to national regulations with socially relevant goals, such as environmental protection (CJEU, 7 February 1985, case C- 240/83, *Waste Oils*; CJEU 13 March 2001, case C-379/98, *Preussen Elektra*; CJEU, 7 April 2011, case C- 402/09, *Ioan Tatu.*) or to those that aim at introducing elements of social solidarity (CJEU, 17 February 1993, cases 159/91 and 160/91, *Poucet c. Pistre*; CJEU, 17 June 1997, case C-70/95, *Sodemare*). This hyper-extended interpretation of the free market, which equates any departure from parity, even when reasonably by non-commercial values, with a violation of free competition, has resulted in a pronounced tendency towards deregulation within the Member States (as exhaustively explained by A. Di Martino, *Il territorio: dallo stato-nazione alla globalizzazione. Sfide e prospettive dello stato costituzionale aperto*, Giuffrè, Milano, 2010, 430). When any public regulation, even when it is aimed at the protection of goods, and public and common interests that are not mercantile in nature, is judged on its functional value with respect to the demands of the free market, the margin for national legislative intervention is inevitably going to shrink, and the most liberal discipline in the European system is bound to be adopted as a benchmark for any public regulation.

the different positions that are protected as rights would always preserve said positions' essential content<sup>28</sup>.

After the emancipation from the specific cases of subjective discrimination (and, therefore, from equality), the proportionality test has become the guideline for the general appraisal of any measure that poses limitations on rights.

Among the numerous judgments in which proportionality is used as a parameter to assess the restrictions to fundamental liberties enforced by the Member States, the *Gebhard* Judgment of 1995<sup>29</sup> is particularly perspicuous. It was passed on reference for a preliminary ruling of the Italian Consiglio Nazionale Forense, and it states (point 37) that “national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.”<sup>30</sup>

Daring to venture a synthetic appraisal, regardless of specific cases, and trying to acknowledge any recurrences in the use of the proportionality test, one might observe how the pervasiveness of its scrutiny varies depending on the matter, the objects and the specific nature of the measures being examined. The Court, in particular, fluctuates between granting ample discretionary space to the authority involved in the controversy, and adopting a “quasi-legislative” approach, that “uses the ‘proportionality’ principle to impose measures of legislative nature on Member states, even though formally the Court is only “interpreting” EU law and thus seemingly not invading into legislative competences of Member states”<sup>31</sup>.

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<sup>28</sup> An intervention is deemed disproportionate and unacceptable when it detracts from the substance of the preserved rights (see, among others, the judgments of 8 April 1992, case C-62/90, *Commission v. Germany*, § 23, and 5 October 1994, case C-404/92 P, *X c. Commission*, § 18).

<sup>29</sup> See judgment 30 November 1995, case C-55/94, *Gebhard*; see also judgment 31 March 1993, case C-19/92, *Kraus*, § 32.

<sup>30</sup> Among the many judgments that express the principle of proportionality, see at least CJEU, 10 December 2002, C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, § 122, as well as CJEU, 8 April 2014, C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and others*, and *Kärntner Landesregierung and others*, § 46 and case law mentioned therein. The quote is taken from CJEU judgment, 23 September 2013, C-508/13, *Republic of Estonia v. European Parliament and Council of the European Union*, §28. In literature, ex plurimis, C. Pollak, *Verhältnismäßigkeitsprinzip und Grundrechtsschutz*, in *Der Judikatur des Europäischen Gerichtshofs und des Österreichischen Verfassungsgerichtshofs*, Baden-Baden, 1991, 111 ss.; H. Kutscher, *Zum Grundsatz der Verhältnismäßigkeit im Recht der Europäischen Gemeinschaften*, in H. Kutscher, G. Ress, F. Teitgen, F. Ermacora, G. Ubertazzi, *Der Grundsatz der Verhältnismäßigkeit in europäischen Rechtsordnungen*, Heidelberg, 1985, 89 ss.; E. Pache, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung der Gerichte der Europäischen Gemeinschaften*, NVwZ 1999, 1033; K.-V. Schiller, *Der Verhältnismäßigkeitsgrundsatz im Europäischen Gemeinschaftsrecht nach der Rechtsprechung des EuGH*, in RIW, 1983, 928 seq.

<sup>31</sup> Thus N. Reich, *How proportionate is the proportionality principle? Some critical remarks on the use and methodology of the proportionality principle in the internal market case law of the ECJ*, Oslo conference on “The Reach of Free Movement”, 18-19 May 2011, 14.

The choice between a deferential attitude and a more proactive one – which sometimes conditions the political process of Member States, by prompting them to take specific, corrective legislative action – eventually depends on the object of the regulation and the nature of the measure in hand, in that it can vary based on whether the act being examined is a national one or an EU one.

As for the first profile (the matter itself), in the majority of judgments, by means of the proportionality test, fundamental non-commercial rights are connected to – and end up reinforcing – fundamental liberties granted to individuals *against* their respective Member States<sup>32</sup>. Less frequently, the need to protect said rights authorises the Member States to impose – always subject to the proportionality principle – measures limiting the economic freedoms (the most famous examples, which will be examined below, are *Schmidberger* and *Omega*). Further proof of the European vocation to the expansion of market freedom to the edge of compatibility with the principle of respect for national constitutional identities. And therefore to a hyper-extensive interpretation of the principles of free competition and the free circulation of goods and services, that lead to regarding as “disproportionately” damaging to the free market even those measures that are aimed at the protection of social values, thus limiting legislative discretionality and allowing European law to condition national social systems.

In the second profile (the nature of the act) there appears to be an asymmetric relationship between the enquiry into national legislative acts that may be restrictive of the liberties guaranteed by the Treaties, and the test of compatibility of European law with the principle of proportionality. Specifically, suitability tests are more rigorous when they appraise for proportionality any national acts that affect mercantile liberties, rather than in those cases in which their jurisdictional assessment is applied to acts by Community institutions. In the first case, the Court of Luxembourg states that a national regulation is suitable to grant the achievement of the set goal of imposing restrictions only if the means it employs are consistent and systematic<sup>33</sup>. The Community judicature, specifically, demands that the State provide adequate proof of the effective aptitude of the act under scrutiny to achieve a public interest objective, so that limitations to the freedom of the market can be justified. To this end, it won't be enough to prove the act's non-manifest unsuitability, but rather a positive assessment will be required.

A clear example can be found in the judgment of 18 January 2001<sup>34</sup>, which declared the incompatibility with Union law of those decrees that transferred a substantial share of air traffic from Linate airport to Malpensa, observing that “a postponement of such a transfer or a gradual transfer (...) would be *better*

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<sup>32</sup> See cases CJEU, 26 June 1997, C-368/95, *Vereinigte Familienpress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag*; CJEU, 25 March 2004, C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*.

<sup>33</sup> CJEU, 16 February 2012, cases C-72/10 e C-77/10, *Costa and Cifone*, § 63; *Placanica et al.*, quot., § 48 and 53.

<sup>34</sup> Case C-361/98.

*suit*ed to the objective pursued by the Italian authorities and would reduce the effect on the freedom to provide air services to and from Milan<sup>35</sup>.” Similarly, having found a German law limiting the expiry dates to be printed on pharmaceutical products’ packaging to June 30<sup>th</sup> and December 30<sup>th</sup> to be in violation of art. 30 of the Treaty<sup>36</sup>, the Court of Justice remarked that the German Government had “not shown that the contested measure was the most appropriate means of reducing the risk of consumption of expired products, whilst being the least restrictive of intra-Community trade.” (judgment 1 June 1994)<sup>37</sup>. A similar stance is shown in the judgment of *Costa and Cifone* whereby the Court of Luxembourg has examined the Italian regulation that imposed, exclusively for the new agents in the market, mandatory minimum distances between betting outlets, while leaving the position of pre-existing agents unchanged. After positing that a national regulation is only suitable to achieve its set goal if its means are *consistent and systematic*, the Court of Luxembourg invited the national one to ascertain whether the imposition of mandatory minimum distances exclusively to new licence holders was truly suited to achieve the purported objective (as relied upon by the Italian Government), of ensuring that new betting outlets opened in less populated areas, thereby ensuring nationwide coverage<sup>38</sup>.

The burden of proof, usually, does not lie with Community institutions, whose regulations can pass the first stage of the proportionality test satisfactorily, as long as they are not manifestly unsuitable for their objectives. In judgments pertaining to the validity of legislative acts by the Union, the Court’s discretion “is limited to ascertaining whether a measure adopted in that field is manifestly inappropriate in the light of the objective which the competent institution is seeking to pursue.<sup>39</sup>” Let it also be said that, where the appraisal by the Community legislator is “complex” (an adjective of ineffable definition), the act by the European source is only objectionable as long as it is not “vitiated by a manifest error of assessment or a misuse of powers or whether the legislature has manifestly exceeded the limits of its discretion.<sup>40</sup>”

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<sup>35</sup> Italics added by the author.

<sup>36</sup> Based on the fact that it may have resulted in a restriction of the saleability of imported products, thus producing an equivalent effect to a quantitative restriction.

<sup>37</sup> Case 317/92, *Commission of the European Communities v Federal Republic of Germany*.

<sup>38</sup> Judgment 16.2.2012, cases C-72/10 and C-77/10, *Costa and Cifone*, § 63 e 64.

<sup>39</sup> Judgment. 14.5.2009, causa C-34/08, *Disarò*, on milk quotas, § 76; in terms, see judg. CJEU, C- 508/13, *Republic of Estonia v European Parliament and Council of the European Union*, points 28-29, where it is stated that: “only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue”; judg. 10 December 2002, case C- 491/00, *British American Tobacco (Investments) Limited and Imperial Tobacco Limited v. Secretary of State for Health*, § 123; judg. 8 June 2010, case C-58/08, *Vodafone Ltd. and others v. Secretary of State for Business, Enterprise and Regulatory Reform*, § 52; judg. 5 March 2009, case C-479/07, *French Republic v Council of the European Union*, § 63 and the case-law quoted therein.

<sup>40</sup> Judg. 9 September 2003, C-236/01, *Monsanto*, § 135; as well as *Generics (UK) et al.*, quot., § 67.

In the second phase of the proportionality test – the necessity test – the Court of Justice’s case-law proves more proactive in devising alternative measures, less restrictive than the ones subject to scrutiny, when it comes to national legislative acts.

A perspicuous example is found in the *Gambelli* Judgment<sup>41</sup>. The Court was called upon to decide whether the restrictions imposed by Italian law upon the collection of bets on sporting events posed a legitimate obstacle to the freedom of establishment (such restrictions consisted in the prohibition, enforced by criminal law, for any person from his home in a Member State to connect by internet to a bookmaker established in another Member State). The question, as usual, was relative to the justification of this restrictive measure, in light of the proportionality test as applied in the aforementioned in the aforementioned *Gebhard* judgment. In paragraph 62 of the judgment, the Court of Luxembourg found that “the mere collection of tax revenue” may not “be relied on to justify” the policy and that, in any case, “a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted”.

In the absence of a reasonable justification for the prohibition, the Court concluded that it could be a disproportionate measure, with respect to the steps that needed to be taken in order to prevent consumer fraud. Hence the decision to refer to the National Court the task of examining the imposed restrictions and determining whether preventing “capital companies quoted on regulated markets of other Member States from obtaining licences to organise sporting bets, especially *where there are other means of checking the accounts and activities of such companies*, may be considered to be a measure which goes beyond what is necessary to check fraud”. The alternative – and lighter – measure to the drastic deliberation of the Italian legislator of administering criminal penalties to any Italian resident placing bets by connecting via internet to a foreign bookmaker, is offered by the Court itself, and it consists of unspecified “other means of checking the accounts and activities of such companies”. Such means – we can’t discount the possibility – may have been discarded by the Italian legislator for their uncertain efficacy, or the financial and organisational cost of the checking process.

Another example of the Court of Justice suggesting alternative measures to the one adopted by the national legislator, claiming that such measure was not the lightest possible option among those theoretically possible, and without establishing the effective financial and administrative feasibility of the proposed alternatives, is the *Peijper* Judgment. In this case, the Court has regarded a national rule that allowed the manufacturer of a pharmaceutical product and his duly appointed representative “simply by

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<sup>41</sup> Judg. 6 November 2003, case C-243/01, *Gambelli*.

refusing to produce the documents relating to the medicinal preparation in general or to a specific batch of that preparation, to enjoy a monopoly of the importing and marketing of the product” as “unnecessarily restrictive”, leaving it to the Member State to prove “that any other rules or practices would obviously be beyond the means which can be reasonably expected of an administration operating in a normal manner.”

This divergent behaviour can be explained in the light of the political will, on the part of the Court of Luxembourg, to encourage European integration in the widest sense, only allowing for exceptions (and therefore for the preservation of national identities, according to art. 4 of the TFEU) in those cases in which a homogenous Community law might compromise the founding principles of the Member States’ constitutional systems. Ultimately, the principle of the primacy of European law – and the subsequent need for uniformity in regulations – prevails over any other conflicting consideration. Just as the *primauté* finds its complete and perfect enactment in the generalised disregard of any internal rule that is incompatible with European law, and occasionally absorbs and conceals the question of the direct effectiveness of Community legislative acts, it also conditions the scrutiny of the application of the proportionality test, making it more intransigent when it is applied to the rules adopted by the Member States.

#### **4. Proportionality in the case-law of the European Court of Human Rights**

Conventional systems, unlike European Union law, do not hold the principle of proportionality as a general, internal, and immanent limitation to the exercise of public power, and therefore such principle does not act as a «self-defence barrier»<sup>42</sup> of all fundamental rights, but rather it is presented as a limitation clause of specific rights granted by the ECHR: those indicated in articles 8 (right to respect for one's private and family life), 10 (freedom of expression) and 11 (freedom of assembly and association); to which shall be added, in accordance to art. 1 Protocol 1, the right of any physical or legal person to the peaceful enjoyment of their possessions. The aforementioned rights can be restricted whenever three conditions occur: 1) the legal provision of the measure restricting the right, ii) the legitimate justification for the restriction, iii) the proportionality of the measure to its objective, specifically in relation to its being “necessary” (“necessary measure in a democratic society”).

Within the context of the ECHR, just like in the EU, the proportionality test is composed of three steps<sup>43</sup>.

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<sup>42</sup> *Selbstverteidigende Schranke*, according to the vocabulary of German law and case-law: see e.g. Z.Yi, *Das Gebot der Verhältnismäßigkeit in der Grundrechtlichen Argumentation*, Frankfurt a.M., 1998, 27.

<sup>43</sup> For insight on the ECHR’s application of the proportionality test, see S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la convention européenne des droits de l’homme*, Bruxelles, Bruylant, 2001; Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Case-law of the ECHR* ,

In the CJEU's case-law, on the matter of the Member State's abiding by the principle of proportionality when passing laws by way of derogation from the Union's rules, the suitability of and necessity for such laws is analysed, and the lack of alternative measures, less restrictive of fundamental liberties, is ascertained. Similarly, the European Court of Human Rights, in interpreting article 15 ECHR, which regulates the possibility of waiving from ECHR obligations in case of war or "other public emergency threatening the life of the nation"<sup>44</sup>, and the clauses that interfere with the liberties guaranteed by the Convention, has not denied that the States enjoy a margin of discretionality in devising measures that are in derogation from or interfere with [such liberties], but it has demanded that such measures be reasonably necessary and only enforced insofar as and for as long as the circumstances require.

The Court has repeatedly stated that, in defining whether a measure is "*necessary in a democratic society*", one should take into account whether, when considering the case in its totality "*the reasons adduced to justify that measure were relevant and sufficient for the purposes*"<sup>45</sup>. Specifically, the notion of necessity demands that any interference in individual liberties be justified by an imperative social need and that it be proportionate to the legitimate objective that it is aimed for, with regard for the achievement of a reasonable balance between conflicting interests on the same matter (consider the example of *A, B and C v. Ireland*, § 229).

The thoroughness of the proportionality test varies in the ECHR's case-law too, based on the type of measure under scrutiny and the matter it pertains to.

The proportionality test has also a relevant impact on the choice of the measure to be adopted, whether it should be a specific and individual measure or a general one.

The adoption of individual measures is considered more suitable for certain policies: the Strasbourg Court, for instance, deems it necessary in matters of economic and social policies<sup>46</sup>, of social security and

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Intersentia, 2002.

<sup>44</sup> Paragraph 2 of the quoted article, incidentally, allows "no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7" and dictates that the States shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor, as well as the date in which such measures will cease to be in force and the dispositions contained in the Convention will once again be applied in full.

<sup>45</sup> *Ex plurimis*, ECHR, 3 November 2011, n. 57813/00, *S.H. and Others v. Austria*, § 91; ECHR, 27 August 2015, *Parrillo v. Italy*, n. 46470/11, § 168, in which the Strasbourg Court was asked whether the right to donate to scientific research embryos conceived through medically assisted reproduction was compatible with the right to respect for one's private and family life guaranteed under Article 8 of the Convention; ECHR, 12 July 2011, n. 25702/94, *K. and T. v. Finland*, § 154; 24 March 1988, *Olsson v. Sweden (n. 1)*, § 68; *Kutzner v. Germany*, n. 46544/99, § 65; *P., C. and S. v. United Kingdom*, n. 56547/00, § 114; and finally, judgment 24 January 2017 by the Grand Chamber, n. 25358/12, *Paradiso and Campanelli v. Italy*, which has regarded as legitimate and proportionate the Italian Court's decision to recognise the existence of the parent-child relationship only in the event of a biological tie or an adoption, and subsequently to separate a child from a couple that satisfied neither requisite.

<sup>46</sup> *Ex multis*, 21 February 1986, n. 8793/79, *James et al. v. United Kingdom*.

pensions<sup>47</sup>, of electoral policies<sup>48</sup>, of the limitation of the eligibility of convicts to vote<sup>49</sup>, of artificial insemination<sup>50</sup>, of the destruction of frozen embryos<sup>51</sup>, of assisted suicide<sup>52</sup>, and of the prohibition of religious propaganda<sup>53</sup>.

According to the judgment form described in the case of *Tierfabriken Schweiz (Vgt) v. Switzerland* and *Murphy v. Ireland*, general measures are subjected to a weak proportionality test. The Strasbourg Court, in fact, does not enquire after the possibility of adopting less restrictive rules, nor does it verify whether the state can prove that, without the restriction, the desired objective could not have been achieved. Rather, it contents itself with determining whether or not the State, upon enforcing a general rule that has been challenged and deemed arbitrary, has operated within its own allowed margin of discretion<sup>54</sup>.

Particularly in those cases that originate from direct individual complaints, the Court does not venture into the territory of abstract control of the relevant legislation, it does not look at the “general context”, but it focuses on examining the specific questions posed by each case. Effectively, it allows the legislator a wider margin of discretion<sup>55</sup>.

In matters of economic and social policies, the *margin of discretion* granted to the States is so vast that the proportionality test is limited to a check of non-manifest unreasonableness of the measure under scrutiny. In matters of restrictions to property rights, for instance, the Court has consistently granted a wide discretion margin to the State, regarding both the means of such restrictions and the general interest objectives that may justify even the total deprivation of the right to peaceful enjoyment of one’s possessions<sup>56</sup>. However, the Strasbourg Court demands, from a procedural point of view, that the interested party be given a “reasonable opportunity” to appeal the measure before an impartial authority<sup>57</sup>. From a substantial point of view, it demands that the proportionality between the adopted means and

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<sup>47</sup> Grand Chamber, 6 July 2005, nn. 65731/01 and 65900/01, *Stec et al. v. United Kingdom*, § 51-52; 4 November 2008, n. 42184/05, *Carson et al. v. United Kingdom*.

<sup>48</sup> Judg. 16 March 2006, n. 58278/00, *Ždanoka v. Latvia*.

<sup>49</sup> Judg. 6 October 2005, n. 74025/01, *Hirst v. United Kingdom*; 22 May 2012, n. 126/05, *Scoppola v. Italy*.

<sup>50</sup> Judg. 4 December 2007, n. 44362/04, *Dickson v. United Kingdom*.

<sup>51</sup> Judg. 10 April 2007, n. 6339/05, *Evans v. United Kingdom*.

<sup>52</sup> Judg. 29 April 2002, n. 2346/2002, *Pretty v. United Kingdom*.

<sup>53</sup> Judg. 3 December 2003, n. 44179/98, *Murphy v. Ireland*.

<sup>54</sup> See also *James et al.* quot., § 51 and *Evans*, quot., § 91.

<sup>55</sup> *Paradiso and Campanelli v. Italy*, point 180 ss.; *S.H. and Others v. Austria*, point 92; *Olsson v. Sweden (n. 1)*, point 54.

<sup>56</sup> See case 12 July 2016, n. 11593/12, *Vrzić v. Croatia*, § 100; 29 April 1999, nn. 25088/94, 28331/95 e 28443/95, *Chassagnou and Others v. France*, § 75; case 28 July 1999, n. 22774/93, *Immobiliare Saffi v. Italy*, § 49; 17 July 2003, *Luordo v. Italy*, n. 32190/96, *v. Italy*. For a case in which it was deliberated that two fiscal measures imposed upon the oil company Yukos were unjust and tantamount to expropriation without compensation, in violation of art. 6 ECHR and art 1, Protocol 1, see 20 September 2011, n. 14902/04, *Yukos v. Russia*.

<sup>57</sup> Case 16 July 2009, n. 20082/02, *Zebentner v. Austria*, § 73; Judg. 25 April 2017, *Vaskersič v. Slovenia*.

the purported objectives be plausibly demonstrated<sup>58</sup>. Which definitely did not occur in the recent case in which the Slovenian State had auctioned a property to collect a debt of 134€, despite the debtor claiming a regular wage and being therefore in a position to satisfy said claim<sup>59</sup>.

Setting aside self-evident cases such as this one, the scrutiny of national measures that restrict rights is generally attuned to some degree of deference toward the Member States. It is somewhat *relaxed*. The States, on the other hand, are allowed a narrower discretion margin when “a particularly important facet of an individual’s existence or identity is at stake<sup>60</sup>”, or when the classification used by the legislator is “suspect”, meaning it concerns individuals or minorities that have been historically subjected to discrimination and social exclusion, or vulnerable groups, even when such vulnerability is due to a contingent circumstance that results in social marginalisation (that is the case, for instance, with people living with AIDS). In such cases, the legislator is required to justify the restriction of rights with “*very weighty reasons*”.

Thus, for instance, in the case of *I.B. v. Greece*<sup>61</sup>, the Strasbourg Court found a judgment by the Supreme Civil and Criminal Court of Greece to be discriminatory, in that it had regarded the dismissal of an AIDS patient as legitimate, justifying it with the need to restore peace in the workplace, given how several employees of the firm had expressed their unwillingness to work in the same environment with the AIDS patient, based on erroneous convictions about the risk of contracting the disease. In *Kiyutin v. Russia*, the Court regarded as disproportional the prohibition for an AIDS patient to establish his residence in Russia, on the purported grounds of protection of public health<sup>62</sup>; and in *Alajos Kiss v. Hungary*, it stated that the blanket disenfranchisement of individuals who have been subjected to temporary or permanent guardianship on grounds of mental disabilities, without an evaluation of each individual case, is disproportionate and lacking in balance and it can’t justifiably fall within the State discretionary margin, which is reduced when dealing with matters that concern socially vulnerable groups that have been historically targeted by prejudice<sup>63</sup>.

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<sup>58</sup> *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 55.

<sup>59</sup> *Vaskrsić v. Slovenia*, cit.

<sup>60</sup> *Paradiso e Campanelli*, quot., §182; *Evans*, quot., § 77.

<sup>61</sup> Judg. 3 October 2013, n. 552/10.

<sup>62</sup> Judg. 10 March 2011, n. 17570/15.

<sup>63</sup> ECHR, 20 May 2010, no. 38832/06, *Alajos Kiss v. Hungary*, § 42, in which states that “In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs”.

One circumstance is relevant in the definition of the scope of the discretionary margin, and that is the existence of a generalised consensus, among the Member States of the Council of Europe, on a certain form of juridical protection of rights (the so-called *consensus standard*)<sup>64</sup>. When the agreement is widespread, the legislator's discretionary margin shrinks and the Court pushes for the application of a homogenous standard in rights protection on a conventional level. When, on the other hand, there is no consensus on the relative significance of the interest at stake or on the means best suited to protect it, and particularly when the case poses particularly delicate questions of a moral and ethical nature, the discretionary margin is wider and the judgment tends to be in favour of the Member State. Think, for instance, of the judgment on *Schwizgebel v. Switzerland*<sup>65</sup>, in which the refusal of Swiss authorities to allow the second adoption by a woman who was excessively older than the adoptee was regarded as justified; or the judgment on the case of *Sindicatul "Paștorul cel Bun" v. Romania*<sup>66</sup>, appealing the denied registration of a trade union of priests, justified by the public authorities with the need to preserve state neutrality with respect to religious communities, and to allow the latter to preserve their autonomy. Or the judgment on *Animal Defenders International v. United Kingdom*, in which the Strasbourg Court did not regard the ban on a "pro-animal rights" advert because of its political content – and therefore covered by the pre-existing ban on this kind of adverts – as a disproportional restriction on freedom of expression<sup>67</sup>.

We should add, with regard to the ECHR, that proportionality, in this case, was configured as an internal parameter of the test of non-discrimination as per art. 14, that is, a necessary logical passage to test for the discriminatory nature of any juridical decision. This gives it a wider scope of application than within the CJEU. Several judgments, in fact, mention that art. 14 "*does not prohibit a member State from treating groups differently in order to correct «factual inequalities» between them; indeed, in certain circumstances, a failure to attempt to correct inequality through different treatment may, in the absence of an objective and reasonable justification, give rise to a breach of Article 14*"<sup>68</sup>.

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<sup>64</sup> "The existence of a European consensus is an additional consideration relevant for determining whether the respondent State should be afforded a narrow or a wide margin of appreciation" thus *Dickson v. the United Kingdom* [GC], n. 44362/04, § 81, ECHR 2007 V, and *S.L. v. Austria*, no. 45330/99, § 31, 9 January 2003; *Kiyutin c. Russia*, 10 marzo 2011, § 65.

<sup>65</sup> CJEU, judg. 10 June 2010, ric. n. 5762/07.

<sup>66</sup> CJEU, judg. 9 July 2013, ric. n. 2330/09.

<sup>67</sup> CJEU, sent. 22 April 2013, ric. n. 48876/08. See also judg. 7 July 2011, ric. n. 37452/02, *Stummer v. Austria*, on the subject of compensation in the pension system for labour performed in prison.

<sup>68</sup> See 18 February 2009, n. 55707/00, *Andrejeva v. Latvia*, § 82; 12 April 2006, nn. 65731/01 e 65900/01, *Stec and others v. United Kingdom*, § 51; 6 April 2000, n. 34368/97, *Thlimmenos v. Greece*, § 44; 6 July 2011, n. 37452/02, *Stummer v. Austria*, § 88; 18 March 2010, n. 42184/05; *Carson and Others v. United Kingdom*, § 61; 4 December 2007, n. 44362/04, *Dickson v. United Kingdom*, § 78.

## 5. Proportionality test and balancing on a national and European level: similarities and differences

One could give countless examples and compare different practical applications of the proportionality test to a degree of specificity worthy of a microscopic exam. While this kind of hyper-detailed analysis is of significant interest to a scholar, it appears more useful – within the limited confines of these pages – to reflect in general on the comprehensive reasoning strategy of the Courts and the theoretical premises of this practical balancing, so as to attempt a rational and analytical exam of the fragmented and discontinuous jurisprudential material.

Rather than examining individual instances of alignment or misalignment between European and Constitutional case-law, and the consonances or dissonances – that can also depend on the specific courses of individual appeals, or on the specific formulation of the document instituting the proceedings – it appears more worthwhile to investigate, in general terms, whether the Court of Justice and the ECHR operate the balancing of rights and carry out proportionality tests in the presence of systematic limitations comparable to those that constrain the actions of national constitutional Courts. It appears evident that the Courts' methods of judgment are conditioned by the balances in which their actions are inscribed, even more, that they are a reflection of the comprehensive perception of [the Court's] role, of the position of the body appointed to uphold the Constitution, within the dynamics of the institutional system. Therefore, it proves useful to ponder whether the Courts of Luxembourg and Strasbourg are, in their role as bodies of supranational constitutional justice, in the same position – *mutatis mutandis* – as the national Constitutional Courts. One difference can be detected, as it happens, even between the two European Courts of Rights.

It is often observed how the Court of Justice has, for many years, adopted a strategy that subordinated fundamental rights to market freedom and the needs of competition, on an axiological level. The exterior sign of this axiological pre-conception favouring market freedom was indeed in the application of only two out of the three described stages of the proportionality test: suitability and necessity. The application of the test was conspicuously lacking in its third level of scrutiny: proportionality in the strict sense. The phase in which fundamental market liberties would have had to be pitched against other rights, in order to create the most reasonable balance between conflicting interests at stake, was avoided altogether. Mercantile liberties were preserved from having to be balanced against civil and social rights, the latter being deemed inferior in rank. Moreover, certain juridical positions were confirmed, that would have called for a different analysis, from a different and not merely economic perspective. The case for taxing prostitution – when such activity is not prohibited and is conducted “without any element of procuring at all”, and therefore can be considered as a paid service, falling into the category of “economic

activities”<sup>69</sup> – is paradigmatic of this one-dimensional vision of human society, cut-out around the isomorphic figure of the *homo oeconomicus*.

In recent years, the Court of Luxembourg has started to balance the scales again, by considering the cases of economic liberties against fundamental rights and finding in favour of the latter. Extremely well-known cases, such as *Schmidberger*<sup>70</sup> and *Omega*<sup>71</sup> have seen the Court regarding fundamental rights as not subordinated to the needs of the market, but rather restricting some of the fundamental freedoms around which the single market space revolves<sup>72</sup>.

In the *Schmidberger* case, concerning a strike that purportedly caused a blockage in the Brennero highway, which lasted for approximately thirty hours, the Court was called upon to establish whether the principle of the free circulation of goods, combined with the disposition as per art. 5 of the Treaty, implied the obligation, for a Member State, to guarantee free access to its main routes of transportation, and whether such obligation was to prevail on the right to strike and assembly guaranteed under art. 10 and 11 of the ECHR. The Court of Luxembourg, balancing the two conflicting principles, established that the authorisation of the demonstration in question by the Austrian authorities has struck the correct balance between the protection of the demonstrators’ fundamental rights and the need for the free circulation of goods, clarifying that respect for fundamental rights is required both of the Community and the Member States, and that the protection of such rights constitutes a legitimate interest that justifies, as a general principle, a restriction of the obligations imposed by community law.

The *Omega* case questioned the compatibility with the principles of freedom to provide services and of the free circulation of goods, of the ban – enforced in Germany – on a commercial activity consisting in the management of a game containing simulated murders, on the premise that it encouraged the trivialisation of life and therefore to a negation of the constitutional value of human dignity (art. 1 GG). In acknowledging the axiological primacy of the *Menschenwürde* in the fundamental German law, the Court admitted that such a position did not need to be based on a shared conviction, common among part of the Member States, that such principle needed to be protected; and that such difference in the level of protection – depending on the moral, religious and cultural background of each State – was not sufficient to exclude altogether the necessity and proportionality of the national measures under scrutiny<sup>73</sup>.

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<sup>69</sup> Judg. 20 Novembre 2001, case C-268/99, *Aldona Malgorzata*, § 49, 69.

<sup>70</sup> Judg. 12 June 2003, case C-112/00, *Schmidberger*.

<sup>71</sup> Judg. 14.10.2004, case C-36/02, *Omega*.

<sup>72</sup> See also Just. Court 26 June 1997, case C-368/95, *Familiapress*.

<sup>73</sup> Thus, in point 38 of the *Omega* Judgment: “the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State”; See also Judg. *Läärä et. al.*, cit., point 36, and *Zenatti*, cit., point 34; 11 September 2003, case C-6/01, *Anomar et al.*, point 80.

These cases called into question rights that occupy the highest positions in an ideal scale of constitutional values. Absolute and undeniable rights, that lay the foundation for all other rights and form their necessary condition, such as human dignity. It is, however, a fact that the cases *Schmidberger* and *Omega* were the first instances of non-mercantile rights being accorded primacy over market freedom.

This process of evolution, within the EU context, of a vast constellation of rights, has found its realisation when the Charter of Fundamental Rights of the European Union was granted the same juridical value as the Treaties. The traditional economic liberties are placed side by side with the fundamental civil and political rights included in the Charter, in a formally sanctioned equal position, with no hierarchical order on an axiological level. This trend has led to the idea that the theory of counterlimits to the limitations of sovereignty authorised by art. 11 Const. would now be in contradiction with the concept of integration, such as it emerges from the evolution of the Court of Justice's case-law – which offers a degree of protection of rights at least equal to that of the national Courts – and from the granting of full juridical value to the CFREU. In some judgments of the Italian Court of Cassation it was even postulated that the very possibility of conflicts between community and national law would no longer be conceivable in an integrated European juridical space<sup>74</sup>. These are rash statements, that the recent applications of this doctrine by several Member States' Supreme Courts have effectively discredited<sup>75</sup>.

The Italian Constitutional Court – that had so far simply advanced the idea of the existence of a community counterlimit, while declaring the inadmissibility of the question (judg. 232/1989) – has also

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<sup>74</sup> This statement recurs – identical – in at least eight judgments of the Supreme Court of Cassation (Cass. civ. sez. trib. 19.11.2010 n. 23418, 29.12.2010 n. 26286, 16.5.2012 n. 7659, 7660, 7661, 7663, 23.5.2012 n. 8108, 1.6.2012 n. 8817 e 8818): “The theory of counterlimits, that could find reasonable justifications in the 70s and 80s of the past century, when the process of integration was in its early stages, appears nowadays to be in open contradiction with the concept of integration itself, such as it emerges in the light of the evolution of the Court of Justice's case-law – which has more than proved its [ability to] protect fundamental rights – and of the formulation contained in the Charter Of Fundamental Rights Of The European Union, which is binding to European institution, to the point where a conflict between community and national law is no longer conceivable in an integrated European juridical space”. As a commentary, G. SCACCIA, *Rottamare la teoria dei controlimiti?* in *Quad. cost.*, 1/2013, 141 ss.

<sup>75</sup> It's worth mentioning the judgment of 15 December 2015 (BVR 2735/1) whereby the Federal Constitutional Court of Germany has, for the first time, applied the constitutional identity check to the application of a community legislative act; the judgment of the same Court on 18 July 2005 (2 BVR 2236/04) and the judgment of the Polish Court P1/05 of 27 April 2005 on the European arrest warrant; the judgments of the Court of the Czech Republic *Sugar Quota III* and *Eaw* of 2006, as well as the judgments by the same court on the Treaty of Lisbon (*Lisbon I* of 2008 and *Lisbon II* of 2009); the judgment of the England and Wales High Court (Administrative Court) in the case of *Thoburn v. Sunderland City Council* of 18 February 2002. Sentence of the Supreme Court of Denmark, 6 December 2016, appeal 15/2014. While technically not constituting the application of a counterlimit, it is also worth mentioning the judgment of the Portuguese Constitutional Court 5 April 2013, n. 187 (*Acórdão 187/2013*), declaring the illegitimacy – based on the principles of equality and proportionality – of the draconian cuts to the wages of public employees included in the budget law, despite their inclusion within a package of measures agreed upon in 2011 with the so-called Troika (EU Commission, ECB and IMF) as a counterpart for significant financial aid (on this point, see R. ORRÙ, *Crisi economica e responsabilità dei giudici costituzionali: riflessioni sul caso portoghese*, in *Dir.pubb.comp.eur.* 2014, 1015 seq.).

twice countered obligations deriving from international sources (agreements or customary law) with supreme principles of the Constitutions, in judgments n. 264/2012 (concerning the admissibility in Italy of pension entitlements accumulated in Switzerland – the so-called “Swiss pensions”)<sup>76</sup> and 238/2014 concerning customary law constituting *jus cogens*<sup>77</sup> which excludes the jurisdiction for crimes of war committed by the States *jure imperii*.

Lastly, in the crucial order n.24/2017, in referring to the Court of Justice of the European Union the question of interpreting of art. 325, paragraphs 1 and 2 of the TEU, the Constitutional Court has effectively portended a counterlimit, in the eventuality that the Court of Luxembourg didn’t change course with respect to the *Taricco* case<sup>78</sup>.

The rekindling of conflicts between the Courts is not surprising, rather, it is a physiological reflection of the thickening of the process of supranational integration, and of the expansion of European law into areas that used to be the exclusive purview of sovereign national governances. The sudden reviving of the theory of counterlimits, which isolated commentators thought ready to be abandoned to a forgotten past<sup>79</sup>, prompts the question of whether – beyond the conflicts on value and merit – there might be some

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<sup>76</sup> Specifically, the Constitutional Court regarded as legitimate – in that it served the purposes of fiscal solidarity and substantial equality – the recourse to authentic interpretation of the law (specifically law n.296 27 December 2006 – budget law 2007), that had retroactively modified the parameters for the calculation of the “Swiss pensions”, in a way that was disadvantageous for the policy holders), thus disobeying the CJEU judgment of 31 May 2011, case *Maggio et. al. v. Italy*, that had found that same decision not to be justifiable by imperative reasons of public interest.

<sup>77</sup> As interpreted by the International Court of Justice, specifically in the judgment of 3 February 2012, *Germany v. Italy*. The Constitutional Court identified the conflict between the customary international law in question and the supreme principle of the “right to appear and to be defended before a court of law” to protect one’s fundamental rights violated by war crimes, as per art. 24 and 2 Const., insofar as the “right to a judge” is a manifestation of the guarantee of human dignity as per art. 2 Const. at the centre of the constitutional order (point 3.4 of the quoted judgment).

<sup>78</sup> This is explained clearly in the paragraph of the judgment in which the Court explains the interpretation it supports, on the national Court being prevented from directly applying the rule enunciated by the judgment of the Grand Chamber of the CJEU, 8 September 2015, case C-105/14, *Taricco*, “whilst the aim of the interpretation set out above is to preserve the constitutional identity of the Republic of Italy, it does not, however, compromise the requirements of uniform application of EU law and is thus a solution that complies with the principle of loyal cooperation and proportionality”. The crucial theoretical and practical relevance of this order is evident in the multitude of comments it prompted: see, among others, R.MASTROIANNI, *La Corte costituzionale si rivolge alla Corte di giustizia in tema di ‘controlimiti’ costituzionali: è un vero dialogo?*, Federalismi.it, 5.4.2017; G. PICCIRILLI, *L’unica possibilità per evitare il ricorso immediato ai controlimiti: un rinvio pregiudiziale che assomiglia a una diffida*, Con-sultaonline, Studi2017/1, 16 March 2017; F. BAILO, *Il principio di legalità in materia penale quale controlimite all’ordinamento eurounitario: una decisione interlocutoria (ma non troppo!) della Corte costituzionale dopo il caso Taricco*, Consultaonline, Studi 2017/1, 9 March 2017; M. Luciani, *Intelligenti panca*, in *Oss. AIC*, 1/2017, 21 April 2017; A. Anzon, *La Corte costituzionale è ferma sui ‘controlimiti’, ma rovescia sulla Corte europea di Giustizia l’onere di farne applicazione bilanciando esigenze europee e istanze identitarie degli Stati membri*, in *Oss. AIC*, 2/2017, 15 May 2017.

<sup>79</sup> Insofar as the doctrine of counterlimits suggests the idea of precise boundaries and separations, rather than an overlapping of systems, it has been maintained that such doctrine is now obsolete, since it does not align with the accomplished emancipation of EU law from its original, exclusively economic, foundation. Thus L. Torchia, *I vincoli derivanti dall’ordinamento comunitario nel nuovo Titolo V della Costituzione*, in *Le Regioni* 6/2011, 127 ss.; as well as

level of disagreement, between European and national Courts, in matters of method, with respect to the means of balancing, and the application of the parameter of proportionality.

The author finds such differences pronounced and evident on a number of levels:

**a.** To begin with, there is a structural difference between the nature of jurisdictional control operated by the Courts. The control exerted by the Constitutional Court in the case of judgment of a preliminary issue is a scrutiny aimed at the objective protection of the Constitution (it falls under the jurisdiction of objective law). While being prompted by a specific case, by virtue of the tie between the preliminary ruling of constitutionality and the concrete juridical application in question, the constitutional judgment transcends the judgment *a quo* and it simply uses it as a starting point for a testing of the soundness and consistency of the general-abstract regulatory principle contained within the law. The Court's judgment never overlaps with, nor is it resolved in the individual question at hand, but it assumes it in its potentially universal value.

On the other hand, the judgment of the Court of Strasbourg, even when it involves a law, is never “abstract”, but always intended exclusively with respect to the practical consequences and effective application of its pertaining discipline, with the aim to test its exact conformity to European regulations or the ECHR. Such judgment is concrete and subjective<sup>80</sup>.

When discussing the substance of the rights that are the object of balancing, it is also worth noting how – while the conflict of civil interests and economic liberties was occasionally resolved in favour of the former – subjecting social rights to the judgments of the Court of Luxembourg – rights that, strictly speaking, are not under the Union's jurisdiction, and many feel it was arbitrary to subject them to judgment in the first place – was not functional to those rights gaining wider recognition, but rather it balanced them out according to a *pro-market* political and ideal pre-conception, and ultimately it resulted in their relativisation in a way that would hardly have been so easily attained within a national context.

Consider, in this respect, the cases *Viking*<sup>81</sup>, *Laval*,<sup>82</sup> and *Ruffert*<sup>83</sup>.

The first case concerned the request, by an important Finnish shipping company, operating a fleet of ferries (*Viking*), to register its vessels in Estonia, with the deliberate intention of benefitting from the looser labour regulations under Estonian collective agreements. The Court judged workers protection to

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D.U. Galetta, *La previsione di cui all'art. 3, comma 1, cpv. 1 della legge di revisione del Titolo V della Costituzione come definitivo superamento della teoria dualista degli ordinamenti*, in *Problemi del federalismo* 2011, 293 seq.

<sup>80</sup> Plenary Court, *James and Others v. United Kingdom*, Judgment 21 February 1986, § 36.

<sup>81</sup> CJEU, 11 December 2007, C- 438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*.

<sup>82</sup> CJEU, 18 December 2007, C-341/05; *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*.

<sup>83</sup> CJEU, 3 April 2008, C – 346/06, *Dirk Ruffert v. Land Niedersachsen*.

be a legitimate interest, sufficient to justify, in principle, the restriction of a fundamental freedom, and that it, together with an improvement of the labour conditions for maritime workers, constitutes a worthy objective and an imperative reason of public interest. It also regarded any trade union action as legitimate, insofar as it is finalised to the protection of jobs and the improvement of working conditions, reiterating that the right to strike is protected under Community law.

In *Laval*, where a Latvian construction company carrying out a contract in Sweden insisted, in open conflict with the national unions, in paying minimum wages and applying working conditions regulated under a collective agreement regularly concluded in Latvia, the Luxembourg Court judged that, in the absence of a collective negotiation that agreed on consistent minimal conditions for construction workers, individual negotiations between employers and employees could not be imposed upon foreign companies, “both because this would make it virtually impossible to predict the costs, and because, in this specific case, the unions wanted to impose conditions that were higher even than the respective Swedish standards on the matters as per art 3, n. 1 subs. 1, lett. a)-g) of the order”. Despite art. 3.7 of the order containing an instruction that seems to protect the most favourable conditions, the Court has excluded any interpretation that would allow the hosting Member State to subordinate the freedom to provide services on the national territory to the observance of working and employment conditions that exceed the minimum imperative requirements.

In summary, in this judgment, the proportionality *test* has prevented an application of the order in favour of an extension of the trade union protection by means of collective negotiation<sup>84</sup>. As it has been observed<sup>85</sup>, the Court seems to have wanted to preserve the competitive advantage of the service providers registered in the Countries with the lowest labour costs.

Lastly, in the *Rüffert* case, the Court of Luxembourg has declared that the obligation, set by the *Land Niedersachsen*'s legislation, to respect the minimum wage guaranteed by a locally applicable collective

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<sup>84</sup> Among the commentaries to these judgments, it is of particular interest for the purpose of this paper the one by N. Hörs, *The principle of proportionality in the Viking and Laval cases: An appropriate standard of judicial review?* EUI Working Papers Law 2009/06; for often critical commentaries to the Viking and Laval judgments: R. REBHANN, *Grundfreiheiten und Arbeitskämpfe*, in *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, 2008, 109; A.C. L. Davies, *One Step Forward, Two Steps back? The Viking and Laval cases in the ECJ*, *Industrial Law Journal* 2008, 126; B. Caruso *I diritti sociali nello spazio sociale sovranazionale e nazionale: indifferenza, conflitto o integrazione? (prime riflessioni a ridosso dei casi Laval e Viking)* in *Rass. Dir. Pubbl. Eur.*, 2008, 2, 11 ss.; M. PALLINI, *Law shopping e autotutela sindacale nell'Unione europea*, in *Riv. giur. lav.*, 2011, I, pp. 4 ss.; F. VECCHIO, *Dopo Viking, Laval e Rüffert: verso una nuova composizione tra libertà economiche europee e diritti sociali fondamentali?*, in [www.europeanrights.eu](http://www.europeanrights.eu), 3 November 2010; E. LONGO, *Viking, Laval e la costruzione dell' economia sociale di mercato in Europa*, in M.CARTABIA (EDS.), *Dieci casi sui diritti in Europa*, Bologna, 2011, 209 ss.; M. COLUCCI, *L'Unione Europea in un delicato equilibrio tra libertà economiche e diritti sindacali nei casi Laval e Viking: quando il fine non giustifica i mezzi* in *Dir. Rel. Ind.*, 2008, 1, 239 ss.

<sup>85</sup> M. V. BALLESTRERO, *Le sentenze Viking e Laval: la Corte di Giustizia “bilancia” il diritto di sciopero*, in *Lavoro e diritto*, 2/2008, 389-391.

agreement constitutes a restriction to the freedom to provide services, and that it is in specific conflict with the directive on the posting of workers, that imposes a minimum wage set by collective agreements only if it is generally applied in the Country of posting.

Economic integration and social policies were, in the original structure of the Treaties, independent dimensions; the first did not prevent the national diversification of labour policies. But, ever since the aforementioned judgments *Viking*, *Laval* and *Rüffert*, even labour regulations, being liable to restrict equal access to the market, are subject to a proportionality test that tends to favour national governances that guarantee the maximum distributive efficiency. In this judgments, in fact, the entrepreneur's contractual freedom is granted the status of a fundamental right and public policies in general, and labour policies in particular (including collective negotiation), are regarded as private means that restrict the freedom of enterprise. Subsequently, the starker the restriction imposed on the market by national regulation, the more onerous the justification will have to be, in order to pass the proportionality test. And therefore, the higher the risk of conflict with market logic and with Union law. The effect on our governance, as noted by accurate studies, is that "the collective action of workers is subjected by the Court of Justice to a strict proportionality assessment, in order to protect the entrepreneur's fundamental economic freedom, which is therefore protected well beyond its essential content", defined in the Court of Cassation's case-law in relation to the conflicting right to strike, which finds its only absolute limitation in the prohibition of damaging productivity<sup>86</sup>.

In summary, applying an entrepreneur's freedom of agreement within horizontal relationships among individuals, and balancing it against the collective rights of trade unions, means interfering in the dynamics of labour conflict, strengthening the private employer's position. The system of social relationships is thus partially subtracted to the logic of self-regulation through the debate between enterprises and unions, and drawn into the sphere of legislative discretionality, confirmed *ab extremo* by the case-law of the European courts.

**b.** The proportionality test is meant to examine the restrictions of rights mostly on a factual, material level, giving less attention to the formal aspects of protection, which are the institutional guarantees of freedom. One problem that stands out, in particular, is the coordination between the procedural provisions appointed to preserve and limit fundamental rights. The proportionality test, applied to the regulatory content of the law and its potential to impact individual rights, absorbs and exhausts the

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<sup>86</sup> S. GIUBBONI, *Libertà d'impresa e diritto del lavoro nell'Unione europea*, in *costituzionalismo.it*, 3/2016, 113. The distinction between damage to production (allowed) and damage to productivity (forbidden) was introduced by Cass. 30 January 1980, n. 711.



required national guarantees (rule of law, principle of legality). But the absolute equivalence and interchangeability between the need for a legal foundation and the preservation of the rule of law, with its corollaries of imperativeness and limitation of rights, is doubtful. The question was presented with absolute clarity after the *Taricco* judgment of the CJEU<sup>87</sup> and the review of constitutionality that followed, in which the Constitutional Court was asked to determine whether it was compatible with the supreme principle of legality and necessity in criminal law, as per art. 25, second subsection, Const., that within our constitutional system a source other than the State law – and specifically a measure of European Union primary law with direct effect (art. 325, §§ 1 and 2, TFEU), according to the interpretation of the EU Court of Justice<sup>88</sup> – can affect *in malam partem* the determination of those prerequisites that condition the application of the penalty in a specific case, thus extending the scope of the penalty beyond what is established by the State legislation. The negative response that the Constitutional Court gave with the aforementioned order 24 of 2017 confirms that the problem of procedural guarantees for the restriction of rights is far from being solved within the system of multilevel rights protection.

On the contrary, such problem, in turn, calls into question the practical efficacy of the rule to which the Constitutional Court has entrusted the integration between different levels of protection and therefore, ultimately, the regulation of conflicts between Courts: the rule – expressed by the Constitutional Court in judgment n. 317 of 2009 – that dictates the application of that of the two conflicting regulations (national and European), which guarantees the highest level of protection. Determining the point at which that “protection plus” is achieved, in fact, is impossible unless systematic consideration is given not only to the material guarantees of rights, but to the institutional guarantees that constitute their foundation. A preview was provided by the Constitutional Court judgment n. 230 of 2012, in which it was determined that a change in case-law, such as to lead to the conclusion that an act that has incurred in a conviction having the force of *res judicata* is in fact “not considered a crime by law”, is not enough to lead to an “*abolitio criminis*”, because the rule of law in matters of criminal justice prevents it<sup>89</sup>; and this

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<sup>87</sup> The Court of Justice affirmed the Italian Court’s obligation to disapply the provisions as per artt. 160 and 161 crim. law, in the part that sets an absolute limitation period, even in the presence of acts that interrupt it, in cases of tax fraud (specifically, infringements relating to VAT) that threaten the financial interest of the European Union.

<sup>88</sup> An interpretation, it is worth reminding, according to which art. 325, §§ 1 and 2 TFEU dictate that the Criminal Court disapplies a national legislation on limitation “which precludes, in a significant number of cases, the punishment of serious fraud affecting the financial interests of the European Union, or which imposes shorter limitation periods for fraud affecting the financial interests of the European Union than for fraud affecting the financial interests of the State”, even when – as is the case in Italy – within the legislation of the Member State prescription is an integral part of criminal law and subject to the principle of legality

<sup>89</sup> An institution – the Court reminds us – that refers the normative power in matters of criminal law – since it touches upon fundamental individual rights and specifically upon personal freedom – to the institution that represents the entire national community, expressing its determinations on the outcome of a proceeding in which debate is ensured between all political forces and, albeit indirectly, with the public opinion.

was reaffirmed in judgment n. 264 of 2012, in which the Court has differentiated between the systemic protection it provides and the fractioned and specific one provided by the European Court of Human Rights<sup>90</sup>. Lastly, it was confirmed in the most authoritative and complete manner by order 24 of 2017 on the *Taricco* case, when the court, given that “The primacy of EU law does not express a mere technical configuration of the system of national and supranational sources of law” and that rather it implies and assumes the respect of the “minimum level of diversity that is necessary in order to preserve the national identity inherent within the fundamental structure of the Member State (Article 4(2) TEU)”, defended its right to oppose a “procedural” counterlimit to the Union law, following the violation of the principle of strict formal legality in matters of criminal justice, so as to preserve the Constitutional identity of Italy.

**c.** As noted by Norbert Reich, the European Court of Justice, in taking a stance, by means of the proportionality test, for or against State measures that, from the point of view of the Member States “*are usually justified by a public interest test, which have undergone a political bargaining process subject to their constitutional requirements, and which first will be subject to scrutiny by the national jurisdictions including their EU conformity (...) necessarily becomes involved in Member state policies*”<sup>91</sup>.

This is by no means a new issue. Constitutional Courts too, in fact, need to reject the recurring accusation of lacking democratic legitimation while interfering in the political process. We could go one step further and say that the opportunity of counting on the deliberations of European courts overruling national legislation, and liable to impose, in force of severe financial penalties, the adjustment of the legislative system in order to remove structural faults that can't be fixed by case-law (such is the effect of *pilot judgments*), leads isolated minorities, with no significant financial resources nor a relevant media presence (such as, for instance, convicts), to resort to judicial means as an alternative to more onerous forms of political mobilisation, in order to achieve legislative and administrative goals that serve their political interest. Thus expanding and integrating the traditional forms of political struggle.

Not wanting to further explore the “classical” theoretical question, that far exceeds the ambitions of this paper, it will suffice to observe that, between the balancing operations carried out by the national Constitutional Courts (or rather, the judgment on balancing operations enacted by the legislator) and those composed by the Court of Justice and the ECHR, there is a substantial difference. Only the National Courts, and not the super-national ones, operate in a space that is conditioned by the immanence

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<sup>90</sup> See point 4.1 of the same judgment, where it is stated that “The reference to the national “margin of appreciation” – a principle adopted by the Strasbourg Court itself and which is of relevance when toning down the rigidity of the principles formulated on European level – must at all times be included within the assessments of this Court, which is not unaware that the protection of fundamental rights must be systemic and not piecemeal across a series of uncoordinated provisions in potential conflict with one another”

<sup>91</sup> N. REICH, *op.cit.*, 10.

of the form of government, and therefore are subject to systemic limitations deriving from their position within the institutional balance. European Courts, on the other hand, operate in a space that is relatively free of political conditioning. The Court of Justice and above all the ECHR seem to embody the pure form of the ideal of a neutral jurisdiction, emancipated from any systemic or political conditioning, in that it is not tied to a State system and to a source of ordinary lawmaking. In short, a jurisdiction with no legislation and no State. In such a context, the dialogue between political and jurisdictional agents is practically inexistent, which negates the most decisive constraint to the Courts' creative interpretation. The debate with the political agents, specifically with the legislator, is, in fact, the starting point of the circular process of *duplex interpretatio* from which Courts draw normative definitions, hermeneutic parameters, and applications of texts, thus inherently limiting their own discretionality. Moreover, the dialogue with bodies representative of the will of the people – which is so clearly discernible in the motivations of the Constitutional Court, which always stem from the accurate reconstruction of the *ratio legis*<sup>92</sup> – defines the environmental framework within which their decisions are inscribed, and it allows the legislator to share in the responsibility of politically unpopular choices. A Court that did not walk the path set by the legislator, updating and rationalising its intention, but rather argued on the basis of independently constructed concepts, in fact, would be left alone in bearing the weight of decisions opposed to the generalised consensus, which could potentially lead to its delegitimation<sup>93</sup>.

The very manner of articulation of political decisions conditions balancing techniques. When said process is open, transparent, and inclusive – such as the case with national parliamentary lawmaking – the legislator's privilege is stronger; that means the Courts encounter more obstacles in – or possibly are more cautious about – overturning the balance of interests struck by a legislative decision supported by wide consensus and which has been the object of widespread and accessible public debate. *Judicial modesty*, in these cases, is an advisable choice and a matter of political opportunity<sup>94</sup>. When on the other hand, such as is the case within the European judicial system, the prevailing modes of normative construction are technocratic, opaque, and impermeable to instruments of democratic participation (there are no

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<sup>92</sup> We should add that the Court takes the *ratio legis* to its most consistent and subtle consequences, to the point of occasionally going “*praeter legislatorem*”, that is, rationalising the will of the historic legislator in ways that are not always clearly explained.

<sup>93</sup> Thus M. Dawson, *The political face of judicial activism: Europe's law-politics imbalance*, in M. Dawson, B. De Witte, E. Muir (eds.), *Judicial activism at the European Court of Justice: causes, responses and solutions*, Edward Elgar, 2013, 28: “Rather than anchor its execution of misplaced laws in the legitimacy of the legislature, and ultimately, the popular will itself, a court relying on ‘autonomous concepts’ rather than legislation must itself shoulder the burden in the case of politically unpopular decisions”.

<sup>94</sup> By *judicial modesty*, as described by R. A. Posner in *The Rise and Fall of Judicial Self-Restraint*, in *California Law Review*, 3/2012, 521, we mean the deferential attitude towards the legislator that inspires the so-called “*deferential review of legislation*”, as opposed to a *strict scrutiny*.

European referenda), there are fewer political deterrents to prevent the Courts from reshaping the balances achieved by the legislator. It is easier to be cavalier about altering a law that is “faceless” – in that it can’t be traced back to a proper “European popular will” – without paying any price in terms of political legitimation.

The dialogue with political agents is not encouraged, but rather hindered, by the fact that the courts reconstruct conflicts between laws as conflicts between concepts and constitutional values that are entirely judge-made, and that offer limited scope for political elaboration. By their very nature, in fact, fundamental rights can’t be contained in their legal definition; they eschew the reduction to pure legality, rather they exist – particularly on a super-national plane – in the form that was bestowed upon them by case-law. Hence Mark Dawson’s question: “*Where Courts choose to discuss balancing through concepts and values of their own making, to what extent do they leave room for political actors to engage in a proactive dialogue?*”<sup>95</sup>.

Moreover, the supranational dimension is entirely lacking in that extreme limitation of jurisprudential elaboration of constitutional law that lies in the power of constitutional revision. This is the power, after all, that closes the circuit of political legitimation of constitutional justice, leaving it to the politics to sanction, by amending the Constitution, evolutionary interpretations in misalignment with the general social conscience, or at least with the interpretation offered by the leading political forces. Just as the legislator, through authentic interpretation, states the primacy of the *voluntas legislatoris* over the “living law”, of political direction over jurisprudential hermeneutics, thus constitutional revision marks the outer limits of creative interpretation of the fundamental Pact on the part of the Constitutional Judges, and therefore of *judicial activism*. Such limits – incidentally – are more evident, the lighter the procedural burden of revision, and therefore the easier the reform (such as is the case in Italy, where the absolute majority of votes in the Chambers is sufficient). The obvious reference would be to F.D. Roosevelt’s *Court-packing plan*, but speaking of the present and of a context closer to home, we could mention the amendment to art. 111 of the Italian Constitution, which has integrated, into the constitutional text, regulations regarding the evaluation of evidence introduced by law n. 267 of 7 August 1997 that the Court had deemed invalid<sup>96</sup>. The “nuclear deterrence” embodied by the power of amendment is powerless with respect to the Courts of Luxembourg and Strasbourg. European treaties and the ECHR can only be amended with a unanimous vote, which is highly unrealistic, given the high number of Member States. As a consequence, the Courts of Europe, “(...) *lacking a credible threat of being censured by political institutions, have no real incentive to*

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<sup>95</sup> M. Dawson, *The political face of judicial activism: EuropÈs law-politics imbalance*, in M. Dawson, B. De Witte, E. Muir (eds.), *Judicial activism at the European Court of Justice: causes, responses and solutions*, Edward Elgar, 2013, 11 seq.

<sup>96</sup> Const. Court., judg. n. 361/1998.

be politically responsive”<sup>97</sup>. The interpretation supported by the “European constitutional jurisdictions” is therefore practically impossible to counter, other than by an upsurge of nationalism, with the threat of leaving the system, that is, revoking a Country’s membership of the Union (the Brexit wound is still open) or of the ECHR<sup>98</sup>. Within the tension between the – equally disagreeable – alternatives of either a slavish “assimilation and obedience” or a radical dispute of the treaties, the only possible answer to European *judicial activism* is to establish a “dialogue” between Courts, or rather, to free the national Courts from the super-nationally-imposed interpretive constraint.

The absence of the aforementioned systemic limitations is also not balanced by normative texts phrased in a “strictly perceptive” way or by the tests of judgments that adequately constrain judicial discretionality. Quite the contrary. On one hand, the Convention’s and the Charter of Right of the European Union’s provisions, because of the need to represent widely different juridical traditions, are so generic as to appear often to be “statements of political conflict pretending to be resolutions of it”<sup>99</sup>; on the other, the proportionality test, as mentioned above, is extremely susceptible to manipulation, whereby the legal reasoning deviates from the scientific path of strictly juridically falsifiable and controllable argumentation, and it follows instead reasons of *policy* and opportunity, that put the judgments’ justifications on the same level as the argumentative modules of moral philosophy<sup>100</sup>.

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<sup>97</sup> M. Dawson, *op.cit.*, 23; V. Hatzopoulos, *Actively talking to each other: the Court and the political institutions*, in M. Dawson, B. De Witte, E. Muir (cur.), *op.cit.*, 102 ss. See also C. CARRUBBA, M. GABELLE C. HANKLA, *Judicial Behavior under Political Constraints* (2008), *American Political Science Review* 102, 435 seq.

<sup>98</sup> How relevant the absence of an external and final check on the Courts can be, is evident when we consider that the progressive extension of the powers of the Court of Strasbourg happened without any amendment to the Convention: such was the case, for instance, with the extension of the direct effect of its decisions (from *inter pares* to *erga omnes*), or the self-attribution of precautionary powers in the absence of a normative basis, or the introduction of *pilot-judgments*, whose systemic importance is however obvious. On one hand, they have caused an overlapping in the competences of the Court of Strasbourg and of the Committee of Ministers, with the latter exclusively concerned with the measures that put the Court’s decisions into execution, and therefore with suggesting possible solutions to the structural violations of fundamental rights. On the other hand, they altered the vertical relationship between the States and the system of the ECHR, going beyond the confines of *individual justice* that belong within the ECHR jurisdiction. That the basis for pilot-judgments was uncertain to say the least, when the Court introduced them with the judgment *Broniowski v. Poland* (n. 31443/96, §§189-194), is after all evident, if we consider that the Court of Strasbourg itself had requested a specific amendment in the convention, in order to be given this very power, which it obviously thought it could not wield within the existing normative framework. *Pilot judgments*, as we know, have later been “institutionalised” by art. 62 of the Rules of the ECHR.

<sup>99</sup> thus J.A.G. GRIFFITH, *The Political Constitution* (1979), 42 *Mod. L.R.* 1, 14, on the formulation of freedom of expression in the ECHR.

<sup>100</sup> This, famously, is the criticism made by J. HABERMAS, *Recht und Moral (Tanner Lectures)*, then referenced and developed in *Id.*, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates, Subkamp, Frankfurt am Main 1992*; for a more specific analysis on the Court of Justice of the EU, see F. Fontanelli, *The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights*, in *Oxford Journal of Legal Studies*, Vol. 36, No. 3 (2016), pp. 630 seq., where it is stated that “The language of proportionality has become a Mythology, a short-hand for legitimacy (631)”; and it is concluded, after analysing

## Conclusions

This rather synthetic analysis shows how the European Courts, which are unconditioned and unconditional jurisdictions in that they have “no State or sovereignty”, are in an ideal position to act as the highest instance of neutralisation on the continent.

When confronted with such jurisdictions, which have indisputably managed to expand the scope and raise the level of human rights protection, it is almost impossible not to be tempted to do away with any and all constitutional barriers. Why not entrust the highest European magistrates with writing the continental *Bill of Rights*, overruling any national Constitution’s provisions and harmonically into a form of government – coincides with their *depoliticisation*. It would seem that, contrary to the basis of unconditionally favourable opinions encountered by the supranational Constitutional Courts, there’s an underlying theory that entrusts the evolutionary and autotelic implementation of fundamental rights almost exclusively to jurisdictional instances, and regards it necessary and indispensable, to that end, to bestow a pronounced creative power upon case-law, making it the ultimate decoder of social conscience, outranking even the democratic legislator.

A concept that is inscribed into the tradition of *legal constitutionalism* and that dissociates, at least partly, the rights from their political-discourse dimension, opposing a “republican” conception (or a “political constitutionalist” one), aimed at keeping the primacy of the democratic and representative elements within the juridical conformation of freedom, for instance by setting down the insurmountable barrier of “*constitutional settlement*” as designed by the Founding Fathers<sup>101</sup>, as the logical premise for any act of balancing.

In truth, it is also on a national level that *legal constitutionalism* and *political constitutionalism*<sup>102</sup> clash on the theoretical field of the very institution of the systems of constitutional justice. *Nil in sole novum*. If not for the fact that, within the national juridical context – unlike the context of the European Union and its

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the application of the test in matters of rights violations occurring on the internet, that “The proportionality test, in this field, is not a heuristic device to reach the right decision. Indeed, the outcome of this contrived proportionality calculus is not falsifiable, but only opinable or contestable” (645).

<sup>101</sup> G. HUSCROFT, *Proportionality and the Relevance of Interpretation*, in *Proportionality and the Rule of Law*, cit. 186 seq.

<sup>102</sup> Specifically, by *political constitutionalism* we mean the one that insists on the central position of Parliaments and political institutions in order to apply and implement the Constitution; by *legal constitutionalism*, we mean the one that trust prevalently in the juridical (rather than political) *accountability* of government institutions and in the predominantly judicial conformation of fundamental rights. The former relies on the transparency of the decision process, on democratic participation, on social control, and on the power of the media to strengthen the democratic quality of the system, thus implicitly applying the constitution; the latter focuses on the Courts’ higher inclination to protect minorities, to extend the protection of fundamental rights, to match public action to principles of reason through an intense use of tests of reasonableness, albeit at the cost of a shrinking of the scope of the democratic legislator’s action and choice.

Conventions – there are better conditions to reach a practical compromise between these two theoretical positions. On one hand, the Constitutional Courts can act as instruments for the enactment and application of the *political constitution*, every time they grease the democratic machine instead of replacing it in a tutoring capacity, reducing its bottlenecks, expanding the right to participation, ensuring the therefore deserving to prevail and be applied to all internal conflicting parties, with no exception?

Before enthusiastically embracing this perspective, however, one should wonder whether the European Court's *neutrality* – intended as indifference to conditioning aimed at integrating transparency and manageability of public decisions, reacting to any attempt at oligopoly or obstacles in the free *marketplace of ideas*. In this perspective, even activism is not a sign judicial interference into spaces that are destined to the democratic legislator, because the latter does not reject the superior moral value of the democratic decision in defining the balancing of rights and constitutional interests, but rather it assumes it as a premise and is functional to a balanced and aware formation of political will<sup>103</sup>.

On the other hand, the constant debate between Constitutional Courts and political institutions creates a *democratic dialogue*<sup>104</sup>, that results in alternating phases of deference and activism, while avoiding two equally extreme outcomes: respect for the legislator turning into submission, and judicial protagonism escalating into prevarication.

Within the European juridical context, both objective conditions are lacking that would allow the oscillation of the pendulum between *activism* and *deference*, so that everything is entrusted to the Courts' voluntary *self-restraint*, which is a rather unrealistic expectation.

The only feasible form of constitutionalism seems therefore to be the “legal” one, intended – precisely because its lacking in effective internal counterlimits – in its extreme form, which could be summed up by the adage according to which no constitutional problem or conflict is outside the purview of the Courts or can be considered truly solved until the Courts have resolved it.

This neo-constitutionalism, focusing on the dominant role of the jurisdictions, results, ultimately, in some degree of de-politicisation of rights, a departing from their historical and concrete dimension, because it places their protection within a virtual, rather than real<sup>105</sup>, political community, nor does it originate from the debate with political and representative institutions.

It was in face the depoliticisation of rights, their partial subtraction from the ideal and social conflict, that could explain the success of the proportionality test, that – because of its procedural nature and case-by-

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<sup>103</sup> Thus J.H. Ely, *Democracy and Distrust*, Cambridge, Ma, 1980.

<sup>104</sup> On which A. YOUNG reflected recently, *Deference, Dialogue and the Search for legitimacy*, in *Oxford Journal of Legal Studies*, Vol. 30, No. 4 (2010), pp. 815 seq.

<sup>105</sup> L. AZOULAI, *Judicial activism at the European Court of Justice*, in M.DAWSON – B. DE WITTE – E.MUIR (EDS.), *Elgar*, Cheltenham, UK, Northampton, MA, 2013, 167 seq.



case vocation – is well placed to encourage the emancipation of rights from opinion-shaping, deliberative discourses and processes, and their attraction to the jurisdictional dimension (even at the cost of a decreased judicial predictability and a devaluation of the formal-institutional guarantees that protect them, like the rule of law).

The grand political project that started with the creation of a supranational space of rights protection above and *against* State sovereignty, in view of the Kantian Perpetual Peace – a historical and indissoluble merit of the European continent – could therefore happen at the cost of a divorce between rights and Politics. To the point of making forms of *Jurisdiktionsstaat*, whose realisation depends more on jurisdictional institutions than democratic ones a not unlikely outcome.