Chapter 2  The principle of proportionality

2.1 Introduction

The principle of proportionality has roots way back in legal history and is widely used in international law in general as well in the more specific field of international human rights law. It may be going too far to say that one does not understand the ECHR, unless one obtains a proper appreciation of the nature, origins and widespread application of the principle of proportionality, but the principle of proportionality is certainly one of the most important legal principles under the ECHR as the search for a fair balance is “inherent in the whole of the Convention”.¹

One would think that the longstanding use of the principle of proportionality and the overwhelming mass of legal doctrine would have provided sufficiently substantial insight into the nature of the proportionality principle. But there is room for improvement. The various analyses of the Court’s case-law in different fields and of the factors affecting the margin of appreciation may be inspiring, but the different elements traditionally linked to the principle of proportionality have not been thoroughly addressed just as the distinction and interaction between proportionality and the margin of appreciation remains at best blurred.

The Court’s case-law is highly casuistic and case sensitive. The Court’s inductive reasoning has been criticised and the lack of clarity is often blamed on the interaction between the margin of appreciation and the principle of proportionality. For example, Jukka Viljanen is sceptical of the margin of appreciation on account of its vagueness that makes the outcome of cases “hard to predict” but the same view is taken on the proportionality principle, which is said to have a “fairly small deductive value as a general principle”².

It is, moreover, generally assumed that the proper implementation of the ECHR in domestic law is hampered by the absence of clear and general reasoning. As lord

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Lester of Herne Hill has put it, “If the trumpet gives an uncertain sound out of Stras-
bourg, who in the Contracting States shall prepare himself or herself for Battle?”.
Steven Greer likewise considers the absence of a clear and coherent rationale in the
Court’s reasoning attributable to “the loose and unprincipled use of the margin of
appreciation doctrine”, and Jowell finds that the proportionality principle “stretches
the rule of law to breaking point”.
Yet, the alternative to casuistic review is commonly
thought to be found in the principle of proportionality. Lord Lester said this:

The problem with the Court’s invocation of the margin of appreciation is that it removes
the need for the Court to discern and explain the criteria appropriate to particular prob-
lems. What is needed is a careful and skilful application of the principle of proportional-
ity.

It is true that a careful and skilful application of the principle of proportionality will
improve the clarity of the Court’s reasoning, provided a sufficiently useful, specific
and precise principle of proportionality is available.

Yet, there is little reason to think that recourse to the principle of proportionality
remedies anything, unless the Court’s freedom of adjudication is reduced to an extent
making the principle of proportionality inappropriate for practical purposes by de-
priving it of the required flexibility. Jukka Viljanen observes that “the spectrum of the
proportionality test is so broad that it is difficult to fit the cases into the same picture”
and the margin of appreciation is likewise not easily classified into certain categories
without disregarding the variety of reasons behind the different types of scrutiny. An
attempt to develop a general doctrine, an “Allgemeine Lehre”, of limitation clauses
seems bound to fail:

Although the proportionality principle has been the subject of fairly extensive research in
recent years, not all relevant questions have been answered. Maybe it is not even possible
to find one definite answer to the proportionality test, because the test is so multi-shaped
and related to the context under which the examination is undertaken. The assessment
leads to different results in different context, because the weight of factors is different in
different contexts.

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4 Greer: “Balancing” and the European Court of Human Rights: A Contribution to the


7 Viljanen: *The European Court of Human Rights as a Developer of the General Doctrines
of Human Rights Law – A Study of the Limitation Clauses of the European Convention on