How to improve the necessity test of the European Court of Human Rights

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According to the case law of the European Court of Human Rights, interferences with rights protected by the European Convention on Human Rights can only be accepted if there is a proportionate relationship between the interference and its legitimate objectives, that is, if they are "necessary in a democratic society." The Court has given shape to this test by developing standards such as that of the existence of a "pressing social need" and of "relevant and sufficient" reasons. However, these standards appear to be rather vague, and the Court's case law on the test of "necessity" lacks transparence. For that reason, this article proposes the introduction of the more classic three-part test of proportionality in the Court's case law. The article focuses on the use the Court might make of two particular elements of this test, that is, the test of suitability and the least-restrictive-means test. If applied correctly, the systematic application of these tests can contribute to the clarity and persuasiveness of the Court's reasoning.

1. Introduction

The fundamental rights contained in the European Convention on Human Rights (ECHR or the Convention) are not absolute.[1] Interferences with most of the Convention rights are acceptable as long as a reasonable justification can be provided. Best known in this respect are the justification clauses of Articles 8–11 of the Convention, which stipulate that limitations on the rights contained in these Articles are justifiable if they are "necessary in a democratic society" for the protection of one of the enumerated public policy interests. Other provisions of the Convention do not contain such express justification clauses, but in many cases the

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[1] *See, generally,* Aileen McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 Mod. L. Rev. 671, 671 (1999).

European Court of Human Rights (ECtHR or the Court) has read an implicit possibility for justification into these Articles.[2]

The various possibilities for justification have one important element in common—according to the case law of the ECtHR, there must always be a proportionate relationship between the aims pursued by the interference and the Convention right at stake.[3] Indeed, the Court has held that the requirement of proportionality is inherent in the Convention as a whole.[4] Yet, a close analysis of the application of the test of "necessity in a democratic society" by the ECtHR discloses a rather nontransparent use of terminology and a tendency to confuse and mix distinct elements of judicial review.[5] This may not be surprising, given the rather extraordinary definition the Court has given to the notion of "necessity in a democratic society" in the *Sunday Times* case:

> It must . . . be decided whether the "interference" complained of corresponded to a "pressing social need," whether it was "proportionate to the legitimate aim pursued," [and] whether the reasons given by the national authorities to justify it are "relevant and sufficient."[6]

The "pressing social need" requirement mentioned in this formula seems to concern the weight and importance of the aims pursued: it is not sufficient that the interests served by a limitation of a Convention right are legitimate, they should also be "pressing." Next to this, the formula seems to contain some requirement of effectiveness, since a measure or decision has to "correspond" to its aims.[7] Moreover, if a measure does not substantially contribute to the achievement of a certain goal, the reasons for introducing it will probably not be "relevant and sufficient." And finally, the formula mentions a proportionality requirement, although the Court does not explain how this requirement should relate to the test of a pressing social need.

Even though classic elements of proportionality review (suitability, necessity, and a reasonable balance between the interests concerned) might be read into the formula,[8]

2 *See further* Yutaka Arai, *The System of Restrictions*, *in* Theory and Practice of the European Convention on Human Rights 343 (Pieter van Dijk et al. eds., 4th ed. 2006) and Jonas Christoffersen, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights 78 (2009).

3 *Cf.* Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, *in* The European System for the Protection of Human Rights 125, 131 and 145 (R. St. J. Macdonald et al. eds., 1993); *see also* Franz Matscher, *Les contraintes de l'interprétation juridictionnelle—les méthodes d'interprétation de la Convention Européenne* [Constraints of judicial interpretation—methods of interpretation of the European Convention], *in* L'interprétation de la convention Européenne des droits de l'homme [Interpretation of the European Convention of Human Rights] 15, 37 (Frédéric Sudre ed., 1998); Christoffersen, *supra* note 2, at 69.

4 *See*, in particular, Soering v. UK 161 Eur. Ct. H.R. (ser. A) § 89 (1989) and, similarly, Sporrong and Lönnroth v. Sweden 52 Eur. Ct. H.R. (ser. A) § 69 (1982).

5 Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights*, *in* The Legitimacy of Highest Courts' Rulings. Judicial Deliberations and Beyond 407, 422 (Nick Huls, Maurice Adams & Jacco Bomhoff eds., 2009); *see also* McHarg, *supra* note 1, at 672–673 and 687–688, and Steven Greer, *What's Wrong with the European Convention on Human Rights?* 30 Hum. Rts. Q. 680, 696–697 (2008).

6 Sunday Times (I) v. UK 30 Eur. Ct. H.R. (ser. A), § 62.

7 *Cf.* Michael Fordham & Thomas de la Mare, *Identifying the Principles of Proportionality*, *in* Understanding Human Rights Principles 27, 53 (Jeffrey Jowell & Jonathan Cooper eds., 2001).

8 *See, e.g.*, Oliver De Schutter & Françoise Tulkens, *Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution*, *in* Conflicts between Fundamental Rights 169 (Eva Brems ed., 2008).

they are not explicitly mentioned. The reasons for this are not clear. It may be that the Court wanted to give an autonomous definition to the Convention's "necessity" requirement, but it did not explain why it chose precisely this formula and these requirements. Moreover, although the formula seems to be intended as a list of standards to be used in subsequent cases, the Court does not consistently use the formula in its judgments.[9] The requirement of relevant and sufficient reasons is often not apparent, for example, and its concrete meaning has remained obscure.[10] In many other cases, the Court merely reviews the overall balance of interests that has been struck by the national authorities.[11] As a result, the test of necessity in a democratic society seems to be more important as a rhetorical device than as an instrument that can help the Court to structure its argumentation.[12]

The lack of clarity as to the tests and standards used by the Court to examine the reasonableness of a justification is problematic.[13] Within the framework of the Convention, the Court has two important functions. First, it may check national decisions and legislation for mistakes in order to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention," and thus to provide effective protection of Convention rights.[14] Second, the Court may provide interpretative guidance to the national authorities in order to help them carry out their primary task of safeguarding fundamental rights.[15] If the Convention standards are clear, the national courts and decision-making bodies can implement them in order to prevent future violations.[16]

Thus, the Convention system requires close cooperation between the national authorities and the ECtHR.[17] However, national authorities may only be willing and able to mirror the Court's interpretative approach if the Court's reasoning itself is sufficiently clear, transparent, and persuasive.[18] If the Court's tests, criteria, or standards are confused or lack clarity, national courts are less likely to adopt them as their own.[19]

[9] *Cf.* Sébastien Van Drooghenbroeck, La proportionnalité dans le droit de la convention Européenne des droits de l'homme [Proportionality in the Law of the European Convention on Human Rights] 83 (2001).

[10] *See*, more elaborately, J. H. Gerards, Judicial Review in Equal Treatment Cases (2005) 151 n. 207 and Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR 87 (2002). The case of Vörður Ólafsson v. Iceland, 27 April 2010, appl. no. 20161/06, *available at* http://www.echr.coe.int/eng, §§ 77–78, provides some clarification.

[11] *See*, more elaborately, Van Drooghenbroeck, supra note 9, at 85.

[12] *Cf.* Arai-Takahashi, *supra* note 10, at 16; Marina Eudes, La pratique judiciaire interne de la cour Européenne des droits de l'homme. 332–334 (2005).

[13] *See*, in particular, Steven Greer, *"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate*, 63 Cambridge L.J. 412, 416–417 (2004); also McHarg 1999, *supra* note 1, at 673.

[14] ECHR, Art. 19.

[15] *See*, expressly, Article 32 § 1 of the Convention and *cf.* Rantsev v. Cyprus and Russia (7 January 2010, appl. no. 25965/04, *available at* http://www.echr.coe.int/eng), § 197.

[16] *Cf.* Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 Hum. Rts. L.J. 161, 164 (2002).

[17] *Cf.* Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 Eur. J. Int'l L. 125, 134 (2008) at 129.

[18] *Cf.* Helfer, *supra* note 17, at 137. *See also* Conor Gearty, *The European Court of Human Rights and the Protection of Civil Liberties*, 52 Cambridge L.J. 89, 97 (1993).

[19] *Cf.* Lord Lester of Herne Hill, *Universality versus Subsidiarity: A Reply*, Eur. Hum. Rts. L. Rev. 73, 81 (1998).

This might result in a lower level of protection of fundamental rights on the national level and, consequently, a high number of applications to reach the Court.[20]

Hence, there is good reason to look for improvement in the ECtHR's application of the test of "necessity." Such improvement could be achieved if the Court would make more systematic use of the three-part test of proportionality as it has been developed and used by national courts—such as the German Federal Constitutional Court[21] and the Canadian Supreme Court[22]—as well as by supranational courts such as the Court of Justice of the EU (CJEU).[23,24] The three parts of the "classic" proportionality test are the requirement of *effectiveness* or *suitability*, the requirement of *necessity*, and the requirement of *proportionality in the strict sense*.[25] The first two elements are concerned with the relationship between the aims of a measure and the means or instruments that have been chosen to achieve these aims.[26] If an interference with a right proves to be unsuitable or superfluous, either because the aims pursued cannot be achieved by it in any case, or because less intrusive means were available, there is no good reason to sustain such an interference.[27] The third requirement, that of proportionality in the strict sense, concerns the relationship between the interests at stake. It requires that a reasonable balance should be achieved among the interests served by the measure and the interests that are harmed by introducing it.

The ECtHR tends to focus on the third requirement, stressing consistently that the search for a fair balance is inherent to the Convention.[28] Nevertheless, for the purposes of this article, the Court's balancing review is of lesser interest, especially since national courts will be well acquainted with the requirement of a fair balance. More interesting from the perspective of improving the Court's "necessity test" is the application of a test of means and ends, more specifically: a test of effectiveness and a test of necessity or "least restrictive means." Although these tests are sometimes apparent in the Court's

[20] Lord Lester of Herne Hill, *supra* note 19, at 75.

[21] In more detail, *see, e.g.*, L. Hirschberg, Der Grundsatz der Verhältnismässigkeit [The Principle of Proportionality] (1981); B. Schlink, Abwägung im Verfassungsrecht [Balancing in Constitutional Law] (1976); Robert Alexy, A Theory of Constitutional Rights (Julian Rivers trans., 2002).

[22] *See*, in particular, R v. Oakes [1986] 1 S.C.R. 103, §§ 66–71 (Can). *See further*, *e.g.*, Pamela A. Chapman, *The Politics of Judging: Section 1 of the* Charter of Rights and Freedoms, 24 Osgoode Hall L.J. 867, 883 (1986); Sidney R. Peck, *An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms*, 25 Osgoode Hall L.J. 1, 69–70 (1987); Sujit Choudry, *So What Is the Real Legacy of Oakes? The Decades of Proportionality Analysis under the Canadian Charter's Section 1*, 34 Sup. Ct. L. Rev. 501, 506–507 (2006); Tom Hickman, *Proportionality: Comparative Law Lessons*, 12 Jud. Rev. 31, 35–36 (2007).

[23] *See*, in particular, Takis Tridimas, The General Principles of EC Law (2d ed. 2006) and Oliver Koch, Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäische Gemeinschaften [The Principle of Proportionality in the Case Law of the European Court of Justice] (2003).

[24] *See also* Christoffersen, *supra* note 2, at 32 and, for a more theoretical underpinning, *see* Alexy, *supra* note 21, at 397.

[25] *See, e.g.*, Christoffersen, *supra* note 2, at 69–72.

[26] *Cf. id.* at 164.

[27] *Cf.* Gerards, *supra* note 10, at 49; Denise G. Réaume, *Limitations on Constitutional Rights: The Logic of Proportionality*, University of Oxford Legal Research Paper Series, Paper No. 26/2009, *available at* http://ssrn.com/abstract=1463853 at 10. *See also* Martin Shapiro, *The Giving Reasons Requirement*, U. Chi. Legal F. 179, 189 (1992).

[28] *See supra* note 4.

reasoning,[29] they do not currently form a standard part of the test of justification.[30] The argument made in this article is that the clarity and transparency of the Court's case law could be improved if it would apply a means–ends test on a structural basis.

This article starts by giving some insight into the value and meaning of the means–ends test and its two distinct elements: the test of suitability and the test of necessity (Section 2). It then delves deeper into the way in which the ECtHR might apply these tests in its case law. The two separate elements of the tests are analyzed in Sections 3 and 4, searching for practical difficulties in their application, as well as for workable solutions. For the purposes of this analysis, use is made of legal-theoretical literature and of case law of constitutional and supranational courts that have applied the tests on a more structural basis than the ECtHR. In particular, inspiration is drawn from the German Constitutional Court, the Canadian Supreme Court, and the CJEU. Finally, in Section 5, the findings of the preceding sections are taken together in order to demonstrate the potential importance and applicability of the means–ends test as a structural part of the ECtHR's test of necessity.

2. General introduction to the means–ends test

While balancing review focuses on the interests harmed and the interests served by a certain act, the means–ends test concentrates on the allegedly harmful act itself.[31] Starting from the knowledge that this act has interfered with individual rights and interests to the extent that it has given rise to a case before the ECtHR, the test questions the reasons given for the choice of precisely *this* instrument. National decision-makers (legislators as well as administrative bodies) have a range of means and instruments at their disposal to achieve certain results, regardless of the value and desirableness of the results as such.[32] From this range of possibilities they may choose the instrument they consider the most appropriate and cost-effective. However, the test of means and ends implies that the decision maker may not make *any* choice.[33] He must take account of any negative consequences of a certain choice of means for fundamental rights. It would be clearly unreasonable if an instrument would only harm Convention rights, without actually being able to benefit anyone or to achieve the desired results (test of effectiveness).[34] From the same perspective of reasonableness, it would be difficult to accept that highly intrusive measures were chosen if other, less harmful means were available (test of necessity or least-intrusive-means test).[35]

[29] For some rare examples, *see* Gerhard van der Schyff, Limitation of Rights. A Study of the European Convention and the South African Bill of Rights (2005) 232 and with Van Drooghenbroeck, *supra* note 9, at 179.

[30] *See*, more elaborately, Gerards, *supra* note 10, at 152; Christoffersen, *supra* note 2, at 112 and 185; Van Drooghenbroeck, *supra* note 9, at 175 and 192.

[31] *Cf.* Christoffersen, *supra* note 2, at 164.

[32] *Cf.* Réaume, *supra* note 27, at 21.

[33] *Cf.* Ian Turner, *Judicial Review, Irrationality and the Review of Merits*, 15 Nottingham L.J. 37, 40 (2006).

[34] *See* Christoffersen, *supra* note 2, at 166; Réaume, *supra* note 27, at 10–11; see also Shapiro, *supra* note 27, at 189–191

[35] *Cf.* Alexy, *supra* note 21, at 68.

An example from the ECtHR's case law may serve to illustrate the difference between the means-ends test and balancing review. The case of *Soltsyak v. Russia*[36] concerned a Russian serviceman who had worked with top-secret information. When he retired from his job, his travel documents were taken away and his passport was suspended in order to prevent him from travelling abroad. According to the Russian government, the reason for this interference with Soltsyak's freedom of movement (protected by Article 2 of Protocol No. 4 to the Convention) was the need to protect national security and to prevent the transmission of confidential information. The Court found, however, that the travel ban could hardly be considered an effective or a necessary means to achieve these aims:

> . . . . [T]he confidential information which the applicant possessed could be transmitted in a variety of ways which did not require his presence abroad or even direct contact with anyone. . . . The applicants' status as a military serviceman . . . [does] not alter the conclusion that the restriction failed to achieve the protective function that had been previously assigned to it. . . .[37]

This finding of the Court does not relate to the fairness of the balance struck between the individual interest at stake (the serviceman's freedom of movement) and the interests advanced by the government (the protection of the confidentiality of top-secret information). Instead, it is related to the effectiveness of the chosen means—the travel ban. Imposing the ban simply did not make sense, as there are many more ways of disclosing confidential information than by travelling abroad and telling people, especially in modern times of internet and mobile phones. From the perspective of reasonableness, it is fully understandable that such an ineffective measure is not accepted.

In the *Soltsyak* case, the test of means and ends allowed the ECtHR to examine the justification advanced for a specific element of reasonableness, that is, its suitability.[38] Had the Court only concentrated on the reasonableness of limiting a serviceman's freedom of movement in order to protect top-secret military information, it might well have found that a reasonable balance was struck between these interests. If only for the reason that the test allows for review of particular elements of reasonableness, in addition to the fairness of the balance struck between competing interests,[39] the Court should apply the test in each individual case, instead of only mentioning it in rare cases such as *Soltsyak*.

An additional reason for structural application of a means–ends test may be found in the complexities related to balancing review. Balancing review is often criticized for its risk of subjective and opaque decision making.[40] Arguably, the test of means and

[36] Soltsyak v. Russia (February 10, 2011, appl. no. 466/05, *available at* http://www.echr.coe.int/eng).

[37] *Soltsyak*, §§ 52–53.

[38] *See* Schlink, *supra* note 21, at 194; Francis D. Wormuth and Harris G. Mirkin, *The Doctrine of the Reasonable Alternative*, 9 Utah L. Rev. 254, 255 (1964); Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 Harv. L. Rev. 1463, 1487 (1967); Robert M. Bastress, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 Vand. L. Rev. 971, 1039–1040 (1974); Alexy, *supra* note 21, at 68.

[39] *See also* Alexy, *supra* note 21, at 397.

[40] *See*, in particular, Jürgen Habermas, Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy 259 and 430 (1996); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 Cambridge L.J. 174, 190 (2006); John Alder, *The Sublime and the Beautiful: Incommensurability and Human Rights*, Public Law 697 (2006).

ends is less normative or subjective in character than a balancing test, and its application can result in neutral and objective judicial argumentation.[41] It is sometimes contended, moreover, that it is relatively easy for courts to establish on the facts of a case if a measure is effective, or if other options were available that might have been less intrusive.[42]

If the means–ends test would offer the ECtHR a strong instrument to demonstrate that its decisions are fact-based and empirical in character, this might improve the persuasiveness of its reasoning, and it might result in more disciplined judgments.[43] At present, the Court frequently resorts to "re-balancing" the interests at stake. It looks at the interests that have been taken into account on the national level, and it then determines for itself which of these interests really should have prevailed.[44] This can be considered a rather intrusive practice by the Court, which interferes heavily with national decision-making processes and with the exercise of discretionary powers. It may also be difficult for the Court to value national sensitivities or discern the problems that have been taken into account by the national decision-making bodies.

To a certain extent, the Court has solved these balancing problems by applying its margin-of-appreciation doctrine, which allows it to show deference toward the national authorities in cases where they are clearly better placed to strike a balance between competing interests.[45] Nevertheless, the difficulties related to balancing review could be avoided entirely if the Court did not need to apply such a test altogether.

In some cases, balancing may be avoided by applying a means–ends test. If the Court found, on the basis of empirical data, that the means chosen were inadequate or unnecessary, there would be no need for it to investigate whether, in the end, the legislature or the administration found a reasonable balance. Only if the chosen means appeared to be both adequate and necessary to achieving the ends pursued, would there be a need for balancing review. This means that the test of means and ends provides an important and valuable complement to proportionality in the strict sense.[46]

41 Christoffersen, *supra* note 2, at 164–165; Hirschberg, *supra* note 21, at 45 and 148; Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 21 (1972); *Note: Legislative Purpose and Federal Constitutional Adjudication*, 83 Harv. L. Rev. 1887, 1893 (1970).

42 *Cf.* R. von Krauss, Der Grundsatz der Verhältnismässigkeit in seiner Bedeutung für die Notwendigkeit des Mittels im Verwaltungsrecht [The Meaning of Proportionality for the Necessity of the Choice of Means in Administrative Law] 63 (1955); *Note, supra* note 41, at 1893; Gunther, *supra* note 41, at 21 and 24; Schlink, *supra* note 21, at 194; Hirschberg, *supra* note 21, at 65; Christoffersen, *supra* note 2, at 164–165. *See also* Rivers, *supra* note 40, at 180.

43 *Cf.* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. Toronto L.J. 383, 397 (2007).

44 *See, e.g.*, Von Hannover v. Germany (2004-VI Eur. Ct. H.R.); *see also* Aagje Ieven, *Privacy Rights in Conflict: In Search of the Theoretical Framework behind the European Court of Human Rights' Balancing of Private Life Against Other Interests*, *in* Conflicts between Fundamental Rights 39, 41 (Eva Brems ed., 2008).

45 *See, e.g.*, Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 Eur. L.J. 80, 102 (2011) and Christoffersen, *supra* note 2, at 233.

46 *See also* Schlink, *supra* note 21, at 194; Wormuth & Mirkin, *supra* note 38, at 255; Miller Struve, *supra* note 38, at 1487; Bastress, *supra* note 38, at 1039/40; Alexy, *supra* note 21, at 68.

The advantages of the test will only be manifest, however, if it is applied in a sound manner, and if sufficient awareness is shown of the difficulties connected to it. These difficulties, as well as possible solutions to overcome them, are analysed in Sections 3 and 4 of this paper. Section 3 is devoted to the test of effectiveness or suitability, while Section 4 focuses on the separate test of necessity or subsidiarity.

3. Test of suitability or effectiveness

3.1. Introduction

The test of suitability or effectiveness implies that, in order to be acceptable, any interference with a Convention right must be constituted by a means that is capable of realizing the aim or end of the interference.[47] To give some practical examples from the ECtHR's case law: the requirement to remove one's headgear (including religious apparel, such as a turban or a headscarf) at an airport security check may be aimed at protecting the safety of the passengers or to combat terrorism;[48] and the seizure of a publication inciting to violence may be regarded as essential to safeguard public order and quiet in a state where relations are already tense.[49] In these cases, the means (requirement to remove headgear; seizure of a publication) stands in a causal relationship to the aims pursued (public or passenger safety; need to combat terrorism; need to safeguard public order and quiet).

The test of effectiveness seems to be rather straightforward; use of common sense enables one to realize that a certain measure simply cannot be effective. In fact, in easy cases, the ECtHR already applies the test of effectiveness.[50] In the case of *Plon*, for example, the Court considered that it would not be reasonable to prohibit the publication of a book in which medical secrets about former president Mitterrand were revealed, since the information in the meantime was also published on the internet.[51] Common sense here could tell the judges on the Court that the prohibition would not be effective to further the aim pursued, that is, maintaining the confidentiality of medical information.

The challenge for the ECtHR does not lie in the application of the test of effectiveness in such obvious cases. The real challenge lies in applying the test in more difficult cases, where it needs to rely on factual, statistical, or empirical information as to the effectiveness of a certain measure. As was argued in Section 2, the test is equally relevant in those cases, even though it might cause difficult issues of burden of proof and evaluation of evidence. Meeting the challenge of the structural application of the effectiveness test means that such difficulties have to be overcome. It is the object of this section to analyze the most pertinent difficulties connected with the test of

[47] *See also* Schlink, *supra* note 21, at 193.

[48] Phull v. France 2005-I Eur. Ct. H.R.

[49] Sürek v. Turkey, 1999-IV Eur. Ct. H.R.

[50] For a further analysis of the case law, *see*, in particular, Van Drooghenbroeck, *supra* note 9, at 179 and Christoffersen, *supra* note 2, at 163.

[51] Plon v. France 2004-IV Eur. Ct. H.R. § 53.

effectiveness and to suggest possible approaches that the ECtHR might adopt to apply the test in a sound manner.

3.2. Level of effectiveness and causal relationships between means and aims

An initial difficulty connected with the test of effectiveness is that it requires an assessment of the causal link between means and ends. Mostly, there will be a complex relationship between the effect of introducing a specific measure and the effects caused by other factors (for example, environmental factors or factors related to the unpredictability of human behavior). It may be almost impossible to say if certain results are truly the effect of a specific choice of instrument or, rather, of the close interaction among a variety of factors.[52] This situation of inherent uncertainty as to a measure's causal relations is especially relevant in policy areas that are in constant flux or where many different factors have to be taken into account when designing policy measures.

A concrete example that may be mentioned here is the fight against social security fraud and the measures adopted in this respect in the Netherlands. A bill has been proposed to allow social security inspectors to visit the homes of people receiving social security benefits in order to ascertain if their living situation actually corresponds to the information provided to the social security bodies. If they refuse such a visit, their benefits will be reduced or even suspended. Such house visits clearly interfere with the beneficiaries' right to respect for their home and private life. The test of means and ends implies that such an interference is only acceptable if the system of house visits is effective. But how should effectiveness be defined in such cases? Even though the measure might contribute to some extent to reducing social security fraud caused by misinformation given to the social security authorities, it is hardly to be expected that the measure would be fully effective, in the sense that social security fraud is reduced to nil. After all, there will be many factors that influence the level of social security fraud other than the possibility of being subjected to a house visit. Thus, the first difficulty that has to be overcome in applying the test of effectiveness, concerns determining the level of effectiveness required as justification for a limitation of rights in relation to the causal consequences of the measure in relation to its intended effects.

In this regard, a spectrum of effectiveness may be defined. At one end of the spectrum, effectiveness may be taken to mean that a measure must be *fully* effective to realize its objectives. In this definition, the test would be a difficult one to meet. Almost no means will be perfectly suited to achieving its ends, and many factors other than the measure itself may determine the extent to which the aims of the decision-making body are realized.[53] This is true even in relatively straightforward cases, such as the example of requiring passengers to remove their headgear at the security check at the airport. Even though such a measure may contribute to the prevention of terrorist

[52] *Cf.* Réaume, *supra* note 27, at 14; A.W.G.H. Buijze, *Effectiviteit in het bestuursrecht* [Effectiveness in Administrative Law], *in* Nederlands Tijdschrift voor Bestuursrecht [Netherlands Journal for Administrative Law] 228, 234 (2009) at 233.

[53] *Cf.* Réaume, *supra* note 27, at 14.

attacks on board airplanes to a certain extent, such measures will not, in all probability, be *fully* effective. After all, there are many ways to bring weapons or bombs on board an aircraft other than carrying them under one's turban or headscarf. This means that a requirement of full effectiveness would be paralyzing for almost all policy measures and regulations. Surely, it would be highly counterproductive for the ECtHR to adopt such an approach. If the Court does not want to intrude on national policy choices, and if it wants to leave a certain margin of discretion to national authorities, it should not immediately dismiss a measure if it only partly achieves the intended results, or if it only contributes to realizing its objectives in the long run or in a step-by-step manner.[54]

At the other end of the spectrum, a negative formulation of the test may be located. This means that the test is defined as one of inappropriateness or ineffectiveness.[55] The most radical version of this approach is that a certain measure will only be considered ineffective if its application does not in any way have the desired effects, or if it even has results that are contrary to the aims pursued.[56] The result of this is an extremely deferential review of national measures or decisions and a high burden of proof on the applicants—they will have to demonstrate, for example, that the level of social security fraud has not changed significantly as a result of the introduction of house visits. Both ends of the spectrum are, to a certain extent, unattractive. Whereas the requirement of full effectiveness is unrealistic and requires overly intrusive judicial review, the negative test of ineffectiveness may not always fit in well with the protection of Convention rights at a sufficiently high level.

This problem might be solved by finding some middle way between both ends of the spectrum, varying the required "level of effectiveness" according to the circumstances of the case.[57] Both in legal theory and in the case law practice of other courts, solutions to the problem of establishing the proper "level" of effectiveness have been found in notions of deference and in applying the test on a case-by-case basis.[58] A deferential test may be applied, for example, if the Court is confronted with a case in which difficult socioeconomic or factual evaluations have been made, and in which there is no particularly good reason to intensify judicial review.[59] For the ECtHR, this means that a superficial or deferential test of effectiveness may be used when it has left the states a wide margin of appreciation.[60] When such restraint is chosen, the Court may accept

[54] *Cf.* Koch, *supra* note 23, at 56; Joseph Tussman & Jacobus TenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 348 and 351 (1949); Gerards, *supra* note 10, at 48.

[55] *Cf.* Koch, *supra* note 23, at 207.

[56] Koch, *supra* note 23, at 56; Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 Cal. L. Rev. 1049, 1065–1066 (1979).

[57] Mindia Ugrekhelidze, *Causation: Reflection in the Mirror of the European Convention on Human Rights (A Sketch)*, *in* Human Rights—Strasbourg Views; Droits de l'Homme—Regards de Strasbourg. Liber Amicorum Luzius Wildhaber 469 (Lucius Caflish et al. eds., 2007) 477.

[58] *See also* Walter van Gerven, *The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe*, in The Principle of Proportionality in the Laws of Europe 37 (Evelyn Ellis ed., 1999) 61.

[59] Gerards, *supra* note 45; Christoffersen, *supra* note 2, at 191.

[60] For some suggestions to improve the margin-of-appreciation doctrine's function as an instrument to determine the level of intensity of review, *see* Gerards, *supra* note 45.

that a measure is only partially effective, or even that it is not entirely ineffective. In addition, it may allow for a step-by-step approach in such cases, for example when the government argues that a larger societal problem is being solved in a piecemeal fashion.[61]

In other cases, higher demands may be placed on the level of effectiveness. Jonas Christoffersen has convincingly argued that the requirement to establish a sufficient means–ends relationship should be directly proportionate to the standard of protection of the right—the greater the importance of the individual right concerned, the more evidence is required to justify the choice for a particular measure.[62] Similarly, Mindia Ugrekhelidze has submitted that some cases justify the requirement of a causal relationship in the form of a *conditio sine qua non*.[63] In other words, the more important the interest that is harmed (or the more serious the interference with the interest), the less deferential the judicial test should be and the greater the demands that may be placed on the causal relation between means and ends.[64]

3.3. Temporal issues—*ex tunc* or *ex nunc* assessment of effectiveness?

When assessing the effectiveness of a measure, the question inevitably arises as to the relevant moment of reference. Does the Court have to direct its attention to the expected effectiveness at the moment the measure was designed (*ex tunc* review), or should it consider the effectiveness as it has appeared from the practical application of the measure (*ex nunc* review)?[65] Or, to take up the example of the Dutch proposal for house visits again: Would the Court have to assess whether the authorities could have reasonably expected this measure to be effective at the time they adopted it, even if it has turned out not to have achieved any reduction in the level of social security fraud at the point in time when the case reaches the Court?

Ex nunc review is easier to apply and more protective for the individual rights concerned.[66] Only if a legislative measure has entered into force can its practical effects really be determined, and only with the passage of time is it possible to see its impact on individual interests.[67] Indeed, it may be precisely because of unintended or unexpected consequences that individuals bring a case before a court.[68] If *ex tunc* review is applied, the Court could only look at expectations that had existed at the time of adoption as to how the measure would function in practice—but these are merely

[61] For examples of a test of partial effectiveness, *see* Case C-434/04, Ahokainen and Leppik, 2006 E.C.R. I-9171, para. 39 and the judgment of the Canadian Supreme Court in McKinney v. University of Guelph, [1990] 3 S.C.R. 229 (Can.), at 317/318 (critically on this approach: Choudry, *supra* note 22, at 514).

[62] Christoffersen, *supra* note 2, at 191; *see also* Rivers, *supra* note 40, at 205.

[63] Ugrekhelidze, *supra* note 57, at 478.

[64] *See also* Rivers, *supra* note 40, at 203.

[65] *Cf.* Van Drooghenbroeck, *supra* note 9, at 186; *see also* Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 176, 215 (1976).

[66] *Cf.* Choudry, *supra* note 22, at 524, and Alexy, *supra* note 21, at 416; *see also* Hirschberg, *supra* note 21, at 50–51; Von Krauss, *supra* note 42, at 63.

[67] *Cf.* Bennett, *supra* note 56, at 1065–1066; Buijze, *supra* note 52, at 233.

[68] *Cf.* Bennett, *supra* note 56, at 1066.

predictions *ex ante*.[69] It can be considered desirable, therefore, that the ECtHR takes the actual effects and results of a measure into account and compares them with the aims and intended results as formulated at the moment of decision making.[70] It may do so on the basis of factual evidence as presented by the parties to the case or by one of the intervening parties, which may reveal relevant information for estimating the efficacy of the contested measure. This approach will be especially workable if legislative decisions have been taken on the basis of impact assessments or other types of *ex ante* evaluations, which make it easier to compare the factual consequences of the measure with the intended results.[71]

Nevertheless, strong objections can be made against *ex nunc* review of effectiveness. In particular, it can be argued that such review would put the ECtHR in a rather powerful position, since the Court would always be in a position to correct national political decisions with hindsight.[72] Especially if a national authority has undertaken a measure in good faith and on the basis of reasonable impact assessments, and, even more so, if it has wide discretionary powers of decision making, it could be considered overly intrusive if a supranational body such as the ECtHR were to declare a measure contrary to the Convention as soon as it turns out that a measure failed of the predicted or expected effects.[73] In addition, it is questionable if the Court would really be able to make the assessment of the factual and empirical evidence that is required to underpin a sound *ex nunc* judgment, as it has less access to the relevant information than national courts and, in particular, national legislators and policy makers.[74] Finally, it is important to note that the temporal issues discussed in this section result from the fact that the world is in constant flux. Even highly probable results may not be brought about as a result of unexpected societal or economic change, and any actual effects and results may easily and quickly change.[75] This makes it difficult to determine the precise point in time at which the effects of the measure should be assessed, the moment of the proceedings before the Court being no less an arbitrary point of reference than any other moment.

Are there any solutions to these temporal issues? The CJEU, the Canadian Supreme Court, and the German Constitutional Court appear to have found solutions by varying the focus of their tests, depending on the circumstances of the case. Once again, the intensity of judicial review plays a crucial role. If, for example, these courts have to decide on measures requiring complex socioeconomic assessments and predictions, they will usually opt for a "hands off" approach.[76] This means that they will only look at the intended effects at the time of decision making (*ex tunc* review), accepting it to be sufficient if the decision-making authority can show that, at the time, the measure

[69] *Cf.* Choudry, *supra* note 22, at 524.
[70] *See also* Linde, *supra* note 65, at 217.
[71] Buijze, *supra* note 52, at 233.
[72] *See* Linde, *supra* note 65, at 216; *cf.* Choudry, *supra* note 22, at 524–525.
[73] *E.g.*, Buijze, *supra* note 52, at 235; *see also* Grimm, *supra* note 43, at 390–391.
[74] *See* Hirschberg, *supra* note 21, at 207.
[75] Ugrekhelidze, *supra* note 57, at 477.
[76] Gerards, *supra* note 45.

appeared to be an appropriate and suitable one, and that there was some factual basis on which a reasonable expectation of effectiveness could be founded.[77] The German Constitutional Court as well as the CJEU mostly only examine whether the legislature's prognostications were evidently wrong or clearly unreasonable at the time they were made.[78] In these cases, the applicant party will bear the burden of demonstrating on the basis of persuasive evidence that the measure was manifestly inappropriate and the decision-making body could have known that at the moment the measure was adopted.[79]

By contrast, in cases where intensive scrutiny is applied (for instance, cases in which important fundamental rights have been infringed), the Court might look at the actual and manifest effects of the measure (*ex nunc* review), or, alternatively, it may set high standards for the level of certainty or predictability of its underlying premises.[80] This is the approach already used fairly often by the ECtHR in deciding cases about the expulsion of aliens to states where they might be subjected to inhuman treatment or where their lives might be at risk. Given the importance of what is at stake in such cases, the Court finds it essential to assemble as much information as possible on the situation in the country of destination as it was at the time of the procedure before the ECtHR.[81] The approach taken by the Court in these cases shows that the Court has sufficient capacity to collect facts on its own behalf and to assess the actual effectiveness of a measure in cases of intensified scrutiny. There is no reason why it should not also use this capacity in cases where it has left a narrow margin of appreciation to the states, in order to look for the actual effectiveness of the measure at hand.

3.4. The "locus" of effectiveness review—The aims or intended results of a measure

The test of effectiveness is based on the notion that all measures are drafted with certain aims or results in mind, to which the measure should stand in a causal or instrumental relationship.[82] If the legislator or an administrative body has clearly formulated such an aim or intended result, it will be relatively easy to assess whether the selected measure is, indeed, a suitable, appropriate, and effective means to achieve these results, even if the problems discussed above are taken into account.[83] In practice, however, such clarity as to the aims pursued is not always (or even rarely)

[77] *Cf.* Buijze, *supra* note 52, at 235; for Germany, *see* Schlink, *supra* note 21, at 208; Hirschberg, *supra* note 21, at 52; Alexy, *supra* note 21, at 399; for Canada, *see* Choudry, *supra* note 22, at 525.

[78] For Germany, *see* Grimm, *supra* note 43, at 391 and Hirschberg, *supra* note 21, at 52–53. For the ECJ, *see* Tridimas, *supra* note 23, at 144.

[79] *Cf.* Tridimas, *supra* note 23, at 147; Buijze, *supra* note 52, at 235.

[80] Alexy, *supra* note 21, at 418. The CJEU also sometimes appears to act in this manner; *see, e.g.*, Case C-350/96, Clean Car Autoservice, 1998 E.C.R. I-2521 § 35, and Case C-309/02, Radlberger Getränkegesellschaft mbH & Co., 2004 E.C.R. I-11763 § 78.

[81] *See*, in particular, Salah Sheekh v. the Netherlands, January 11, 2007, appl. no. 1948/04, *available at* http://www.echr.coe.int/eng, § 136 and *cf.*, *e.g.*, Neulinger and Shuruk v. Switzerland, July 6, 2010 (Grand Chamber), appl. no. 41615/07, § 145.

[82] *Cf.* Linde, *supra* note 65, at 223.

[83] *Cf.* Hirschberg, *supra* note 21, at 158.

provided or available. Most measures are taken for a variety of (often) rather vaguely indicated reasons, and many measures aim to achieve a multitude of results—some of which are rather clear and concrete, while others may be very general and abstract.[84] The more aims and goals are formulated, or the more vaguely the legislature or decision-making body have stated their aims, the more difficult it will be for the Court to determine the precise aim that constitutes the relevant point of reference or "locus" for measuring the suitability of the chosen instrument.[85]

A specific problem concerns the question what will be the outcome of the case if there is a plurality of aims. This problem may take different forms. First, the same measure may pursue very abstractly defined aims as well as more concrete ones. One may think again of the example of the requirement of removing one's headgear at an airport security check. Such requirements may have the concrete aim of preventing people from bringing weapons on board an airplane, but they may simultaneously have the more abstract aim of combating terrorism.[86] Second, one might think of a situation that has been described as "killing two birds with the same stone," meaning that a measure pursues different aims which are roughly equally important.[87] Here, the example of the *Plon* case may be recalled, which concerned the prohibition of the publication of medical information about former president Mitterrand. This prohibition served two aims at the same time, namely, the aim of protecting medical confidentiality, as well as the aim of protecting the private life and reputation of his family against unwarranted disclosures of sensitive information.

In both situations, the decision as to the effectiveness of the means, or lack thereof, is theoretically a complicated one, since it has to be determined if the requirement of effectiveness is met if not all of the aims pursued are actually achieved.[88] In practice, these problems do not seem to be of real importance to the ECtHR. It usually solves this by accepting very general and abstract aims, such as the protection of national security or respecting the rights and freedoms of others, as the basis for its examination of the justifiability of interferences with fundamental rights.[89] As a result, there is hardly any opportunity for the Court to distinguish between various (more specific) aims.[90] Nevertheless, this solution is not a really desirable one. The easy

[84] This problem has been mentioned and analyzed by many scholars. *See, e.g.*, John Hart Ely, Democracy and Distrust (1980) 125; J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 San Diego L. Rev. 953, 975 (1978); Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 Harv. L. Rev. 755, 758 (1963); Antonin Scalia, A Matter of Interpretation. Federal Courts and the Law (1997) 30; Ronald Dworkin, A Matter of Principle (1985) 322.

[85] *Cf.*, *e.g.*, Bennett, *supra* note 56, at 1059; Linde, *supra* note 65, at 208; see also Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1962) 62–63 and 214–215.

[86] *See* Roger Craig Green, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 Yale L.J. 439, 445 (1998). In addition, the means themselves can be formulated as ends—*see* Linde, *supra* note 65, at 232 and Schlink, *supra* note 21, at 203. *See also* Hirschberg, *supra* note 21, at 163 and Britta Sundberg-Weitman, *Legal tests for applying the European Convention on Human Rights and Freedoms in adjudicating on alleged discrimination*, Nordisk Tidsskrift for International Ret 31, 49 (1980).

[87] For this terminology, see Sundberg-Weitman, *supra* note 86, at 51.

[88] *Cf.* Green, *supra* note 86, at 447.

[89] *Cf.* Arai, *supra* note 2, at 340 and Gerards, *supra* note 5, at 422.

acceptance of very broad aims, which are mostly rather empty and meaningless in character, has the result that the requirement of a legitimate aim does not add anything substantial to the judicial reasoning in cases of conflicts between rights or interests.[91] It is difficult to apply any sound proportionality test on basis of such broad aims as the "general interest."[92] From that perspective, it may be considered desirable if the Court would pay more attention to the determination of the actual aims pursued by rights-restricting measures and decisions, especially in cases where there is only a limited margin of appreciation. If the Court were to take such an approach, however, there would be a greater need for it to solve the issue of having to test the effectiveness of the measure against a plurality of aims.

One possible solution that may become relevant, then, is the application of a "double test" of effectiveness.[93] Such a test may be applied, in particular, in a scenario of aims that find themselves on different levels of generality. The test of effectiveness, then, not only focuses on the suitability of a measure to meet the most concrete and nearby aims (such as the prevention of carrying weapons on board an airplane in the headgear example) but also at the contribution of the resulting situation to the achievement of superior, more general aims (in the headgear example, the prevention of terrorism that is achieved by limiting the possibility of bringing weapons). It may be argued that a measure is not justifiable if it does not sufficiently serve more abstract interests, even though it would meet more concrete ones. As already pointed out, however, there is reason to distinguish more carefully between the various aims pursued in those cases only where a narrow margin of appreciation is granted to the state. The same is true, by consequence, for the application of this double test of effectiveness.[94]

3.5. Conclusion: How to apply the test of effectiveness?

It is both feasible and desirable for the ECtHR to apply a test of effectiveness on a structural basis. The test has the advantage of being an empirical test, rather than a normative one. Moreover, it questions a specific aspect of the reasonableness of interferences with Convention rights that will not be addressed by a balancing test. Even if it is reasonable to pursue certain goals, it does not make sense to do so with an instrument that is obviously unsuited or ineffective.

Unfortunately, the test of effectiveness is not a straightforward and easy-to-use instrument. Application of the test requires at least three determinations to be made by the ECtHR in each individual case. First, the Court has to determine which aim (or

[90] *Cf.* Robert F. Nagel, *Note: Legislative Purpose, Rationality, and Equal Protection*, 82 Yale L.J. 123, 126–127 (1972).

[91] *Cf.* Gerards, *supra* note 10, at 137–140, and Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 309 (1997).

[92] Hirschberg, *supra* note 21, at 47 and 158; *see also* Schlink, *supra* note 21, at 205.

[93] Hirschberg, *supra* note 21, speaks of a "Mittel-Mittel-Relation" ("means-means-relationship") (at 148). *See also* Schlink, *supra* note 21, at 206–207.

[94] Theoretically, after all, such test could be carried out almost endlessly for other means and ends, in an ever-more abstract fashion; Schlink has argued convincingly that it only should be carried out if the defendant party provides good arguments to do so (*supra* note 21, at 207).

aims) is (or are) pursued with a certain instrument, and whether this aim (or set of aims) will be considered in isolation or in relation to different or more generally formulated aims. In this respect, in those cases where only a narrow margin of appreciation is left to the states, the Court should be more precise than it currently appears to be in determining the interests served by the measure. Second, the Court has to decide if it will assess the anticipated effectiveness at the moment the measure was drafted (*ex tunc* review) or at the time the case was presented to it (*ex nunc* review). And third, the Court has to decide the level of effectiveness it thinks is required. Is it essential that the measure fully achieves the aims set at the time of decision making, or is it sufficient that the measure only partly or gradually contributes to their realization?

To meet the challenges presented by the test of effectiveness, it is essential to recognize the possibility for flexibility in its application, which means that the test should be applied in accordance with the scope of the margin of appreciation that is left to the state. If the Court leaves a wide margin of appreciation to the state, it should not demand full effectiveness, and it should limit itself to determining whether the decision-making body, at the time of decision making, could reasonably have expected the chosen measures or instruments to be suitable or effective. If it applies strict review, the demands on the level of effectiveness should be higher. Effectiveness then can be established at the time the Court has to decide on the case.

Similarly, the burden of proof may differ, depending on the level of intensity of review. In cases where the margin is wide, it may be up to the applicant parties to demonstrate on the basis of persuasive evidence that the measure does not have the desired effects, for example, by advancing empirical data or specialist reports from which this is apparent. Where the margin is a narrow one, by contrast, it may be up to the state to demonstrate that the measure is as effective as can be expected in the circumstances of the case.

4. The least-intrusive-means test

4.1. Introduction—The difference between necessity and least intrusive means

The second important element of means–ends review is the test of necessity. Interestingly, the Court has expressly acknowledged the importance of this test, which is not surprising given the explicit requirement in many Convention provisions that an interference with a fundamental right should be "necessary in a democratic society" in order to be acceptable. In its famous *Handyside* case, however, the Court had already made clear that the notion of necessity is rather vague, and that it may have different meanings according to the context in which it is used:

> The Court notes . . . that, whilst the adjective "necessary", within the meaning of Article 10 para. 2, is not synonymous with "indispensable" (cf., in Articles 2 para. 2 and 6 para. 1, the words "absolutely necessary" and "strictly necessary" and, in Article 15 para. 1, the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (cf. Article 4 para. 3), "useful" (cf. the French

> text of the first paragraph of Article 1 of Protocol No. 1), "reasonable" (cf. Articles 5 para. 3 and 6 para. 1) or "desirable". Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context. . . . [95]

According to the Court's *Handyside* test, "necessary" means that a measure or decision should correspond to a "pressing social need." As was concluded in Section 1, this notion is highly confusing. First, it already involves an element of weighing and balancing, since the social need served must be a "pressing" one. Second, the Court's definition does not correspond to what is usually meant by the test of necessity. In the application that is given to the test by the German Bundesverfassungsgericht, the Canadian Supreme Court, and the CJEU, as well as in the theoretical literature, the test is mostly defined as a "least intrusive means" test. In this definition, the test requires that, of all the instruments that could be chosen to achieve the aims pursued, that instrument must be selected which is least problematic from the perspective of the individual rights at stake.[96]

Although the test of necessity is often equated with the least-intrusive-means test, there is a difference between the two tests. In essence, necessity can also be determined on its own, that is, by examining if—were it not for the chosen instrument—the intended results could not or could less easily have been achieved.[97] One might think of the hypothetical example of a prohibition of headscarves during gym classes at primary and secondary schools in order to protect the safety of the pupils. It might be said in this case that, generally speaking, the prohibition is, indeed, a necessary one, since some headscarves do not allow the pupils to move freely, and there is a risk that the children may be harmed by their headscarves if they trip or fall. In that reading, necessity means that the instrument must generally be shown to be useful or worthwhile, rather than being the "least intrusive" means. If a real least-intrusive-means test were applied in this example, the school authorities would have to show that there were no alternatives to a complete prohibition that would be equally well suited to protecting the safety of the pupils—one might think of requiring the pupils wear elastic sports headscarves that do not hamper their movements and that are no danger to their safety.

In its current practice, the ECtHR applies the test of necessity usually in this general fashion, as may be illustrated by the case of *Daróczy v. Hungary*.[98] This case concerned the registration of the applicant's name in her act of marriage and her identity card as Tiborné Daróczy. After the death of her husband, it was discovered that the registration was mistaken—her actual name was Tibor Ipolyné Daróczcy—and it was decided that this should officially be corrected. Although the applicant wanted to keep the

[95] Handyside v. UK, 24 Eur. Ct. H.R. (ser. A) § 48 (1976).

[96] Schlink, *supra* note 21, at 193; in the same vein, *see* Alexy, *supra* note 21, at 68.

[97] In some cases, the ECtHR has expressly dismissed the applicability of such a test of subsidiarity, as in the cases of *James* and *Hatton* (James and Others v. the United Kingdom, 98 Eur. Ct. H.R. (ser. A) § 51 (1986) and Hatton and Others v. the United Kingdom, 2003-VIII Eur. Ct. H.R. §§ 100 and 123); *see also* Christoffersen, *supra* note 2, at at 112, and Gerards, *supra* note 10, at 155.

[98] Daróczy v. Hungary, 1 July 2008, appl. no. 44378/05, http://www.echr.coe.int/eng.

name she had used for fifty years, she was not permitted to do so. The Court accepted that, in general, there may be a good reason to protect the accuracy and authenticity of official name registers. Nevertheless, regarding the circumstances of the case, it found that it was not necessary to change the applicant's wrongly registered name:

> In the present case, the Government did not put forward any convincing argument showing that the genuineness of the system of the State registries or the rights of the applicant's late husband were at real risk. The restriction imposed on the applicant was therefore unacceptably rigid and completely disregarded her interests, in that she has been forced to alter a name which she has used for more than 50 years and which, beyond its relevance in self-identification and self-determination as mentioned above, also gave her a strong personal link to her husband.[99]

This example serves to show that the test of necessity is more general in character than the least-intrusive-means test. It also reveals that it contains a rather strong normative or evaluative element. The general test of necessity, in the sense of "relevancy" or "pertinency," requires an evaluative judgment to be made about the usefulness or the reasonableness of the instrument. The general necessity test, as applied by the Court in *Daróczy*, for example, comes very close to a balancing test, implicitly weighing the interests of both the correctness of the official registers and the consequences for the applicant. As a result, its application adds to the argumentative confusion that is so often detected in the Court's test of justification.

By contrast, the least-intrusive-means test allows for a factual and empirical assessment of various alternatives to determine which is most effective and least harmful; if such alternatives are available, they ought to be chosen. In rare cases, the Court does indeed apply such a test of least restrictive means.[100] One of these exceptional cases may serve to illustrate the difference between the necessity test and the least-restrictive-means test. The case of *Ürper* concerned a complete prohibition on newspapers in which articles had been published in support of the activities of the PKK, the primary Kurdish independence movement.[101] The Court did not consider such a ban acceptable from the perspective of protection of the freedom of expression:

> The Court finds . . . the preventive effect of the suspension orders entailed implicit sanctions on the applicants to dissuade them from publishing similar articles or news reports in the future, and hinder their professional activities. . . . However, the Court considers that less draconian measures could have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles.[102]

Since the chosen means was unnecessarily burdensome, the Court did not accept the government's justification. In this case, the Court's judgment on the necessity of the measure was not so much based on a general and normative notion of pertinency, as on the concrete and demonstrable existence of alternatives, which would have been less onerous yet equally effective. From the perspective of the need for clear, objective,

[99] Daróczy, § 33.

[100] For further examples, *see* Van Drooghenbroeck, *supra* note 9, at 197.

[101] Ürper and Others v. Turkey, 20 October 2009, appl. nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, *available at* http://www.echr.coe.int/eng.

[102] Ürper, § 43.

and fact-based judicial reasoning, the application of such a least-restrictive-means test may be preferred over the Court's general test of necessity.[103]

Nevertheless, it must be acknowledged that the least-restrictive-means test brings some difficulties of its own. In the remainder of this section, the most important of these will be discussed in order to clarify the employability of the test for the ECtHR.

4.2. How to determine "equally effective" alternatives?

The theoretical point of departure of the least-restrictive-means test is the existence of a range of means and instruments to realize any possible aim. If fundamental rights are at stake, the decision maker may not freely choose between these different alternatives but must select the means that are least harmful to the fundamental right. For the Court, this signifies that it must establish whether any alternative means were available to the national authorities. It can do so, for example, by basing itself on the information provided by the parties to the case or even on common sense, which may help one to conceive of hypothetical alternatives.[104] If no such alternatives can be found, the national authorities cannot be blamed for having chosen the one suitable instrument at their disposal. However, if the Court has found that alternative measures could be conceived, it will have to determine whether it could reasonably require the state to adopt these measures. After all, if the alternatives are clearly less suited or less effective to achieving the aims concerned than the measure that has been selected, the Court might disrupt the national legislative or policy system by compelling the state to take such measures.

In this respect, an important question arises if any alternative measures should be equally effective as the means chosen, particularly if such alternatives are evidently less intrusive. This may be illustrated by returning to the example of the prohibition on wearing headscarves during gym classes for the sake of safety. An alternative measure might be the prescription of elastic sports headscarves, although this alternative probably will not be as effective as a full prohibition, since even a gym headscarf could still pose some risk during exercises. Nonetheless, it may be preferable over a complete prohibition on headscarves from the perspective of the protection of freedom of religion.[105]

Thus, if the Court is to decide on the availability of least restrictive means, it will need to consider the reasonableness of the national authorities' choice between a slightly more effective measure that is more detrimental to individual interests and a rather less effective, but also less restrictive provision.[106] Such a decision necessitates a judgment regarding the value of the choice of the decision-making body, as well as a rather complicated assessment of the effectiveness of alternative means.[107] If taken seriously, moreover, this would mean that the test of effectiveness should be applied to all the available alternatives.[108]

[103] *See also* Schlink, *supra* note 21, at 209–210.
[104] *Cf.* Van Drooghenbroeck, *supra* note 9, at 206.
[105] Wormuth & Mirkin, *supra* note 38, at 299.
[106] *Cf.* Bastress, *supra* note 38, at 1029–1030.
[107] *See also* Grimm, *supra* note 43, at 394–395 and Van Drooghenbroeck, *supra* note 9, at 209.
[108] *See* Christoffersen, *supra* note 2, at 167; Koch, *supra* note 23, at 213–214; Wormuth & Mirkin, *supra* note 38, at 297.

To illustrate the problems created by such an application of the least-restrictive-means test, one may recall the case of *Hatton and others v. the United Kingdom*.[109] This case concerned the noise created by airplanes taking off and landing at Heathrow Airport, which caused serious sleep disturbance for people living close to the airport. From the perspective of these people, it might be important to know if any alternative measures could be conceived that might limit the noise pollution created by the aircraft. However, from the perspective of both the airport and the government, such alternative measures should not be harmful to the other interests served by the flights, such as economic and employment interests. It will be very difficult for the Court to assess the availability of less harmful yet equally effective means in such a case. Application of the test demands an examination to be made of the existence and effectiveness of a wide range of measures, varying from reducing the number of takeoffs and landings to improving the insulation of the houses nearest to the airport. Not only would it be time-consuming to make such examinations but also the ECtHR seems ill-equipped to do so. It does not have many instruments at its disposal to search for possible alternatives, and, perhaps even more importantly, it may find it hard to determine the prospective effects of the alternatives in order to ascertain if they would be at least as effective as the chosen means.[110] Finally, the Court would have a difficult task in determining if a choice should have been made for measures that might have been slightly less effective from the perspective of economic well-being yet greatly beneficial in reducing sleep disturbance. In general, courts will not be very well placed to assess such normative policy decisions. For the Court, this is even more pertinent, since it finds itself at an even greater distance from the decision making authorities than are the national courts.[111]

Sensible application of the least-restrictive-means test is highly important in overcoming these difficulties. In Section 4.4, some instances of the acceptable and useful judicial application of the least-restrictive-means test will be addressed. Before doing so, however, it is important to analyze yet another problem that is related to the test, that is, the problem of defining what "least intrusive" or "least restrictive" truly means.

4.3. What does "least intrusive" mean?

Theoretically, if the Court has determined that alternative measures were available, which could have been considered (more or less) equally effective, it then has to find out whether these alternatives actually might have been less detrimental or intrusive. The question to be addressed in this respect is a rather obvious one: less detrimental or intrusive compared with what? Given the fact that the least-restrictive-means test will mostly be applied by the Court in proceedings brought by an individual applicant, this question will usually be answered from the perspective of this individual.[112]

[109] Hatton and others v. the United Kingdom, 2003-VIII Eur. Ct. H.R.

[110] *Cf.* Tridimas, *supra* note 23, at 216.

[111] Indeed, the ECtHR has expressly acknowledged this in the case of James and others v. the United Kingdom (98 Eur. Ct. H.R. (ser. A) (1986)), § 51).

[112] *See* Hirschberg, *supra* note 21, at 214.

A measure might be considered less intrusive if it is less harmful to the individual applicant's Convention rights. In the *Hatton* case, for example, the individual interest not to be disturbed by aircraft noise should be taken as a point of departure to determine whether any less intrusive means should have been selected. However, it would not be reasonable to state that the only acceptable means were those that would interfere with the individual applicant's rights and interests as minimally as possible.[113] After all, a measure that pays greater respect to the interests of one particular individual or group of individuals might be more intrusive to the interests of others (for example, airline companies) or to general interests (for example, economic and employment interests).[114] Decisions, such as those taken with respect to reducing aircraft noise, are multidimensional, meaning that a multitude of interests will have to be taken into account when deciding on certain measures rather than others. Thus, even if less intrusive measures are available, they may have been rejected for good reason.[115]

If the Court were to compel legislative or administrative bodies in all cases to adopt the measure that would be least intrusive for the particular individual interests of the applicant that has brought his case before the Court,[116] this would deeply intervene in legislative or administrative discretion.[117] The Court hardly appears to have the legitimacy needed to involve itself to this extent, nor does it have the requisite institutional capacity and equipment to do so.[118]

4.4. Toward a pragmatic and procedural application of the least-restrictive-means test

To some extent, the problems discussed in the previous sections seem insurmountable, which might explain why the ECtHR is reluctant to apply the test on a structural basis.[119] It is all the more interesting, then, to note that other courts do not appear to be very much bothered by the difficulties in establishing equally effective alternatives and in determining what "least restrictive" really means. The CJEU, for example, has frequently found that a measure fails the least-restrictive-means test if there is a clear indication that less restrictive alternatives were available, for example, because the applicant party has shown this on the basis of persuasive evidence.[120] An explanation for this can be found in the way in which other courts apply the test, which appears to be far more pragmatic and less detailed than the theoretical version of the test would

[113] Initially, this seemed the approach that was chosen by the Canadian Supreme Court in *Oakes*, but which has acquired nuances in later case law (*e.g.*, Newfoundland (Treasury Board) v. NAPE, [2002] 221 D.L.R. (4th) 513 (Can.)); further on this, *see* Hickman, *supra* note 22, at 43–45.

[114] *Cf.* Hirschberg, *supra* note 21, at 65–67; Schlink, *supra* note 21, at 210; Alexy, *supra* note 21, at 400.

[115] *Cf.* Miller Struve, *supra* note 38, at 1465–1466; Bhagwat, *supra* note 91, at 322; Hirschberg, *supra* note 21, at 71. *See also Note: Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 468 (1969).

[116] For this requirement, *see*, *e.g.*, Hirschberg, *supra* note 21, at 58.

[117] *Cf.* Hickman, *supra* note 22, at 40–41.

[118] Rivers, *supra* note 40, at 199; *Note*, *supra* note 115, at 472; Bhagwat, *supra* note 91, at 322.

[119] *See*, expressly, James and others v. the United Kingdom (98 Eur. Ct. H.R. (ser. A) § 51 (1986)); *see also* Christoffersen, *supra* note 2, at 113.

[120] For an example, *see* Joined Cases T-125 & 152/96, Boehringer, 1999 E.C.R. II-33427 § 27.

seem to require.[121] The CJEU and the Supreme Court of Canada hardly ever undertake extensive investigations of all possible hypothetical alternatives. Instead, they mostly limit themselves to mentioning a few examples of conceivable measures, which preferably have been advanced by one of the parties to the case.[122] In addition, these courts rarely examine the potential effectiveness of such measures, preferring to conclude that these possibilities seem to have been insufficiently investigated or considered by the decision-making body.[123]

Such a pragmatic approach may provide a very interesting and important solution for the ECtHR, too. This is true, in particular, for the specific solution of "procedural" review. In this approach, the government should demonstrate that the competent bodies have made a considerable effort to explore and evaluate various alternatives and to obtain sufficient information as to their hypothetical effects.[124] The government can do so, for example, by pointing to relevant legislative materials or the reasoning of a decision.[125] The Court may then restrict its review to assessing the care that has been taken to consider the various possibilities and to make a well-informed choice between them, rather than having to delve deeply into a factual assessment of hypothetical alternatives and their possible effects.[126]

If the decision-making body has duly respected the obligation to make a reasoned and well-informed choice for a certain means, there is no reason for the Court to question the reasonableness of the resulting choice, except for a situation in which it appears to be genuinely arbitrary or irrational.[127] The applicant may try to demonstrate that such irrationality or arbitrariness is apparent from the existence of sufficiently effective alternatives available that have not been (adequately) addressed or studied in the decision-making process, and that would be likely to produce less problematic effects.[128] In addition, the Court may place higher demands on the seriousness of the national attempts to find the most reasonable and least onerous means if the Court has left the state only a narrow margin of appreciation.

If it has become clear that the decision-making procedure lacked care or that the choice was insufficiently reasoned, the measure may be declared unreasonable without a further need to go into the substantive question of its necessity.[129] Such

[121] *Cf.* also Schlink, *supra* note 21, at 69.

[122] For some examples from the case law of the CJEU, see Case C-350/97, Monsees, 1999 E.C.R. I-2921 § 30 and Joined Cases C-369 & 376/96, Arblade, 1999 E.C.R. I-8453 § 78. For the Canadian Supreme Court, *see, e.g.*, R v. Edwards Books & Art Ltd, [1986] 2 S.C.R. 713, 772–773 (Can.).

[123] For some good examples, *see* Tridimas, *supra* note 23, at 210; a more recent application of this approach is visible in Joined Cases C-92 & 93/09, Völker und Markus Schecke GbR and Eifert, *available at* http://curia.europa.int).

[124] *Cf.* Koch, *supra* note 23, at 57; Ben Schueler, *Methods of Application of the Proportionality Principle in Environmental Law*, 35 Legal Issues of European Integration 231, 237 (2008).

[125] *Cf.* Hickman, *supra* note 22, at 55; Shapiro, *supra* note 27, at 179; *see also* Buijze, *supra* note 52, at 235.

[126] *But see* Shapiro, *supra* note 27, at 179.

[127] *See, e.g.*, Hatton and Others v. the United Kingdom (2 October 2001, appl. no. 36022/97, *available at* http://www.echr.coe.int/eng, § 106); see also the joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič, and Steiner to the Grand Chamber judgment in this case (2003-VIII Eur. Ct. H.R.), § 15.

[128] Christoffersen, *supra* note 2, at 170; *see also* Koch, *supra* note 23, at 284.

[129] *Cf.* Schueler, *supra* note 124, at 238.

a procedural approach does justice to the legitimacy and equipment of the national legislator and administrative bodies to assemble information on the range of possible instruments and their predicted effects, as well as to their ability to make a well-informed choice between such alternatives.[130] For that reason, the ECtHR might well use this procedural version of the test to review the reasonableness of restrictive measures in conformity with its subsidiary position and its position as a court.

5. Conclusion—How to improve the ECtHR's necessity test?

In the introduction to this paper, it was argued that the necessity test of the ECtHR is currently confused and lacking in transparency. Having regard for the importance of persuasive judicial reasoning, especially for a supranational court that finds itself in the difficult position of having to convince the national states of the reasonableness of its judgments on the protection of fundamental rights, it is of great value to improve the Court's necessity test. It would be helpful in this respect if the Court would systematically and clearly apply a test that is more comparable with the "classic" three-part test of proportionality. That would indicate that it would not only apply a fair balance test, as is current practice in most cases, but that this test would be systematically preceded by a means–ends test. The advantage of doing so is twofold. First, the test of means and ends would allow the ECtHR to examine the justification of the reasonableness of the choice of means, which constitutes a distinct and important element of the reasonableness of an interference with fundamental rights. Second, the application of a means–ends test might help the Court avoid some of the difficulties related to balancing review. After all, if the Court would find, on the basis of empirical data, that the means chosen were inadequate or unnecessary, there would be no further need for it to investigate whether, in the end, the legislature or the administration did strike a reasonable balance.

In order to determine effectiveness, the Court would have to decide on the "level" of effectiveness required (full effectiveness or partial effectiveness); it would have to decide on an *ex tunc* or an *ex nunc* evaluation of effectiveness; and it would have to determine the aim or set of aims for the realization of which the measure represents a suitable means (the "locus" of the test of effectiveness). In making these choices, the intensity of the Court's review is of crucial importance. Before assessing the reasonableness of the choice of means, the Court would have to determine, in each individual case, whether this assessment is to be made with great care and strictness; whether deferential review is to be applied; or whether an intermediate level of scrutiny is to

[130] They are also those with the greatest legitimacy in making such choices; *see* Ely, *supra* note 84; Habermas, *supra* note 40, at 264–265; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1386 (2006); Alison L. Young, *In Defence of Due Deference*, 72 Mod. L. Rev. 554, 566 (2009); Gerards, *supra* note 45, at section V. "Giving reasons" in most legal systems is required for both the legislature and the administrative body; *see, e.g.*, Shapiro, *supra* note 27, at 180; Buijze, *supra* note 52, at 235; Gareth Davies, *Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in SB v. Denbigh High School*, Eur. Const. L. Rev. 511, 516 (2005).

be adopted. The Court might do so by making good use of its margin-of-appreciation doctrine—if applied well, this is a solid instrument to determine the appropriate level of intensity of review.[131]

When deferential review is opted for, a "negative" standard of effectiveness may be used. This means that the Court should merely examine whether the measure at hand is not manifestly ineffective or ill-suited to achieving the ends pursued. In the case of deferential review, furthermore, it is appropriate to apply *ex tunc* review; thus, the Court might limit itself to establishing whether the national authorities, at the time of introducing the contested measure or decision, could reasonably have expected the measure to be effective. And finally, in such cases of marginal review, the Court would not need to find out too exactly which one of a plurality of aims the measure could be (or could not be) effective in achieving, as long as the measure would seem to answer to the complex of objectives taken as a whole.

By contrast, if a narrow margin of appreciation were left to the states, corresponding to intensive review by the Court, the effectiveness test would be a different one. The government might then be asked to show whether the contested measure really, under *ex nunc* examination, proved to have the effects it was intended to have. If not, the government must provide a proper reason for that. In addition, in cases of strict review, the Court might pay close attention to the different objectives of the measure. Even if a measure may have some positive effects from the perspective of concrete subgoals that have been set, it will not be acceptable if it is clear that the main objectives are not being served.

With regard to the second prong of the means–ends test—the test of necessity—a distinction was made between the general test of necessity and the more specific least-restrictive-means test. It was submitted that, in general, the least-restrictive-means test is to be preferred over application of the necessity test. Nevertheless, it was demonstrated that even the least-restrictive-means test, if applied correctly, requires a complex empirical assessment to be made by the Court. First, it would be necessary, but also very difficult, to determine whether any reasonable alternatives might exist. Also, the test requires that an assessment be made of the effectiveness of such alternative means and of the possible impact of such measures on the various interests concerned. Finally, the least-restrictive-means test would still imply an element of valuation, since the choice must sometimes be made between a slightly less effective, yet also less restrictive means, or between means that are both effective and less intrusive but which are very costly or problematic for practical reasons. For these reasons, it was argued that it is generally preferable to opt for a "procedural" version of the test. In this version of the test, the Court would look mainly at the care with which national authorities have established the relevant interests. If (democratic) procedures of decision making and policy making have functioned well, and if there has been the possibility for judicial review to correct mistakes, there would generally be no reason to suspect that the state has not selected the least restrictive means. However, if the margin of appreciation were narrow, or if the applicant had advanced information so as

[131] *Cf.* Gerards, *supra* note 45.

to prove that relevant alternatives have not been sufficiently considered, the Court should be more critical, demanding from the states a reasonable explanation of the choice that it has made between different (hypothetical) alternatives.

If the Court were to show sufficient awareness of the risks of the means–ends test, and of the possibilities in applying it in a sound manner, the test might form an important complement to the Court's balancing review; all the more so, since the test of means and ends will enable the Court to clarify the interests that really are at stake. The test of means and ends requires an express determination be made of the various interests involved in the case, and of the reasons why the decision-making body considered it valuable to adopt the contested measure in order to reach its goals. These steps are often omitted when only a balancing test is applied. If the test of instrumentality has been duly applied, this might, therefore, also enhance the transparency and clarity of the final balancing test.[132]

[132] Miller Struve, *supra* note 38, at 1488. *See also* Réaume, *supra* note 27, at 22.