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Human Rights in Relation A Critical Reading of the ECtHR's Approach to Conflicts of Rights

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It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a 'democratic society'.

(ECtHR, *Chassagnou and Others v. France*, App. No. 25088/94, 28331/95, and 28443/95, 29 April 1999, para. 113)

1. Introduction

Human rights practice shows that, in some cases, human rights have to be restricted to further other moral or social interests or, and this is our topic, the rights of others with which they conflict. Thus, free speech may sometimes have to be restricted in the interest of security or by reference to the right to privacy of others. When such restrictions are justified, the right is not deemed as violated.

At the same time, however, we like to think that free speech, like other human rights, is not reducible to other moral interests such as security and cannot simply

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Human Rights in Relation: A Critical Reading of the ECtHR's Approach to Conflicts of Rights. Samantha Besson. © Samantha Besson, 2017. Published 2017 by Oxford University Press.

be weighed and balanced against those interests like any other interest. That resistance to balancing human rights grows even stronger when it is meant to take place against other human rights, as in balancing the right to free speech against the right to privacy in my example. This puzzling position is difficult to define with precision, but it clearly holds a middle ground between the two positions that long prevailed over how to resolve conflicts between moral rights, on the one hand, and between moral rights and other moral considerations, on the other: in short, Kantian absolutism and the derived prioritization of human rights, on the one hand, and utilitarian relativism and the corresponding weighing and balancing of human rights, on the other.

The puzzle that faces human rights theorists is reconciling the specific stringency of human rights for them to be able to protect individuals as ends in themselves with the reality of their conflicts with other moral considerations, including other human rights. It reflects the sheer theoretical difficulty of conceptualizing moral trade-offs that are not quantitative and do not actually imply 'weighing and balancing' human rights. This theoretical puzzle is well reflected in James Griffin's contention that 'human rights are resistant to trade-offs, but not completely so'.² Solving the puzzle requires, as I will explain in this chapter, finding a way between stating the radical incommensurability of human rights (literally, their inability to be compared and ranked to one another) and resorting to pragmatic solutions to settle their conflicts, on the one hand, and emphasizing their commensurability and applying quantitative weighing and balancing to reconcile them in case of conflict, on the other.

Interestingly, this theoretical ambivalence is echoed in human rights practice, and in particular in international and European human rights law.³ Restrictions to human rights are usually hard to justify legally. Moreover, even though trade-offs are common in practice, human rights reasoning is also structured so as to exclude them in some cases. An important part of the practice endorses a form of human rights weighing and balancing (e.g. the paragraphs 2 of Articles 8–11 of the European Convention on Human Rights (ECHR)), while other parts reveal attempts to 'restrict restrictions' of human rights (from the German *Schrankenschränken*) and even to organize hierarchies between human rights with certain rights being deemed as absolute (so-called 'absolute rights'; e.g. the prohibition of torture under Article 3 ECHR)⁴ or with absolute thresholds of protection being established within the

² James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 76.

³ On conflicts of human rights in general, see e.g. Lorenzo Zuca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007); Eva Brems (ed.), *Conflicts between Fundamental Rights* (Antwerpen: Intersentia, 2008); Stijn Smet, *Resolving Conflicts between Human Rights: The Judge's Dilemma* (London: Routledge, 2016).

⁴ See e.g. Steven Greer, 'Is the Prohibition Against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?' (2015) 15 *HRLR* 101; Natasa Mavronicola, 'What is an "Absolute Right"?' Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 *HRLR* 723.

content of certain human rights (so-called 'core duties' or 'inner core'⁵—from the German *Kerngehalt*).

So, the question is: are the categories we use to reason, both theoretically and practically, about conflicts of rights and their resolution adequate? In other words, should we keep trying to both have our cake and eat it,⁶ or should we simply forget about the cake? This question has far-reaching implications, both philosophical and practical. All of them should be addressed together and not in separate but concurrent discussions between human rights theorists, on the one hand, and human rights lawyers, on the other.

My argument in this chapter is that there is a third and principled way between quantitative weighing and balancing, on the one hand, and categorical prioritizing, on the other. One may refer to it as 'qualitative balancing'. It builds upon the egalitarian dimension of human rights and draws implications for reasoning with rights in conflict. Actually, equality does not only provide a common feature shared by all human rights and by reference to which we should organize the qualitative relations between them. It also grounds, I will argue, a democratic requirement bearing on the institutional procedures for the justification of their restrictions in practice. Once the egalitarian dimension of human rights is unpacked, the centrality of human rights conflicts to human rights reasoning⁷ no longer comes as a surprise and their resolution to a puzzling feature of their practice.⁸ On the contrary, human rights are best approached as relational through and through. Resolving conflicts between their corresponding duties becomes, accordingly, part of what they are about, i.e. equal relations between people who all hold rights and owe duties to one another and equal relations that are constitutive of their holders' equal status to one another.⁹

The structure of my argument is three-pronged and addresses these three questions in turn: (1) What are human rights conflicts about? (2) How should we go about resolving them? (3) How should we account for remaining quantitative and categorical elements in human rights reasoning that seem to resist the proposed

⁵ On the 'inner core', see the dissenting opinions of Judge Wildhaber et al. in ECtHR, *Odièvre v. France*, App. no. 42326/98, 13 February 2003.

⁶ For this expression, see Jeremy Waldron, 'Rights in Conflict', in *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993), 220.

⁷ See also ECtHR, *Chassagnou and Others v. France*, App. no. 25088/94, 28331/95, and 28443/95, 29 April 1999, para. 113.

⁸ Two clarifications are in order. First of all, it is not because conflicts of human rights are common in human rights reasoning that some of them are not difficult. Some actually cannot even be resolved reasonably (see e.g. ECtHR, *Pretty v. The United Kingdom*, App. no. 23461/02, 29 April 2002, or ECtHR, *Evans v. The United Kingdom*, App. no. 6339/05, 10 April 2007). On constitutional dilemmas, see e.g. Zuca, *Constitutional Dilemmas* and Lorenzo Zuca, chapter 5 in this volume. Secondly, the routine nature of human rights conflicts does not mean, conversely, that there are no fake conflicts in the first place. On this, see e.g. Peggy Ducoulombier, 'Conflicts between Fundamental Rights and the European Court of Human Rights', in Eva Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008), 217.

⁹ This may actually explain why human rights conflicts are often wrongly associated with the horizontal effect of human rights. Accordingly, this association may in turn explain why human rights conflicts are often looked down upon. For a discussion of the other reasons why authors have resisted the idea of human rights conflicts, see Besson, *Morality of Conflict*.

qualitative reading of their balancing in the case law of the European Court of Human Rights (ECtHR)?

A methodological caveat is in order before the argument can start. This chapter approaches the question from the perspective of human rights theory. And more precisely, from the perspective of a legal theory of human rights whose objects are at once moral and legal human rights and their practice. It considers legal (human rights) reasoning as a special form of moral reasoning and legal theory as participating in that form of reasoning, as a result. The proposed legal theory of human rights conflicts aims at providing the best interpretation and justification of the existing practice of international and European human rights law, i.e. one that puts that practice in its best light.¹⁰ To that extent, the chapter does not merely aim at proposing a moral theory of human rights conflicts and a blueprint that could then be used to criticize and reform the existing judicial practice. Nor, conversely, is it about reconstructing the practice of human rights conflicts as a theory and hence merely about providing a blanket justification thereof.¹¹ The practice of international and European human rights law entails its own immanent justifications and critiques, and those are the justifications and critiques that need to be identified, discussed, and interpreted in the proposed theory of human rights adjudication so as to best fit the practice while justifying and criticizing it at the same time.

This may also be said about human rights reasoning by the ECtHR. That reasoning constitutes the object of the proposed normative argument, and its immanent justifications and critiques will provide the material for the proposed reading of human rights reasoning in case of conflicts of rights. Unlike other authors,¹² I do not consider we should be 'charitable' to judges and ignore the 'metaphors' they use in reasoning on conflicts of rights, such as 'balancing' or 'proportionality', downgrading them as 'vacuous' merely because they do not fit one's best account of the practice, to then resort to first-order moral reasoning and argument about rights. Of course, I am not saying judges should become moral philosophers, but as a special kind of moral reasoners, they have a duty to reason adequately and coherently. And we do too when we discuss their reasoning.

A second, more substantive, caveat is in order, however: the ECtHR is an international human rights court and, according to the principle of subsidiarity,¹³ it does not have the power to specify human rights' duties *ex ante*. Domestic authorities (legislative or executive, but also judicial) have the

¹⁰ See also Samantha Besson, 'Legal Human Rights Theory', in Kimberley Brownlee, Kasper Lippert-Ramussen, and David Coady (eds.), *Blackwell Companion to Applied Philosophy* (Chichester: Wiley-Blackwell, 2016), 328; Samantha Besson, 'The Law in Human Rights Theory' (2013) 7 *Zeitschrift für Menschenrechte [Journal for Human Rights]* 120.

¹¹ See e.g. Robert Alexy, *Theorie der Grundrechte* (Frankfurt: Suhrkamp, 1986); Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2008).

¹² E.g. George Letsas, 'Rescuing Proportionality', in Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015), 316.

¹³ See Samantha Besson, 'Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?' (2016) 61(1) *American Journal of Jurisprudence* 69–107.

competence and discretion to do so. The Court's role then is to review their specifications *ex post* and assess, in a case of alleged violation, first, whether there were human rights' duties in the case and, second, whether those duties were unduly restricted. Of course, the ECtHR's reasoning in case of conflicts of rights emulates domestic reasoning, and vice versa. However, there may be important differences between its reasoning when faced with a given human rights conflicts and that of domestic authorities and even domestic courts pertaining to the same conflict. One of them is the regular mootness of the distinction in the Court's reasoning between the assessment of the scope of human rights' duties and of their comparative stringency in case of conflict; the Court often moves very quickly from the former to the latter or only focuses on the latter.¹⁴ Domestic authorities' and the Court's reasoning in cases of conflicts of rights should not be conflated; therefore, the latter cannot replace the former and needs to be able to rely on it. This explains in turn how the Court's reasoning in conflicts of rights may actually suffer from lack of domestic reasoning on the issue, as confirmed indirectly by the reasoning of the Court in *Eweida*.¹⁵ Conversely, it may also be at fault for not taking it sufficiently seriously and re-doing the whole reasoning from scratch. This was actually one of the arguments made by some of the dissenting judges against the Court's reasoning in *Axel Springer*.¹⁶

¹⁴ See on the scope of positive duties under Art. 8 ECHR: ECtHR, *Hatton and Others v. The United Kingdom*, App. no. 36022/97, 8 July 2003; ECtHR, *Fernández Martínez v. Spain*, App. no. 56030/07, 12 June 2014, paras. 109–13. See also on the scope of Art. 3 ECHR: ECtHR, *Gäfgen v. Germany*, App. no. 22978/05, 1 June 2010, paras. 88–91. Contra Janneke Gerards and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7 *Int'l J. Const. L.* 619; Stijn Smet, 'The "Absolute" Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?', in Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press, 2014), 273. Contra also George Letsas, 'The Scope and Balancing of Rights: Diagnostic or Constitutive?', in Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press, 2014), 38, who vindicates this mootness albeit for the wrong reasons: for him, proportionality is about identifying what human rights we have in the first place and he does not distinguish between domestic specifications and the ECtHR's *ex post* review of these specifications.

¹⁵ ECtHR, *Eweida and Others v. The United Kingdom*, App. no. 48420/10, 36516/10, 51671/10, and 59842/10, 15 January 2013, para. 95. There had been no individualization of the human rights' duties at stake in the case, and hence no conceptualization of the case as a human rights conflict by the UK's courts in the first place. See the discussion by Dolores Morondo Taramundi, chapter 6 and Russell Sandberg, chapter 7 in this volume.

¹⁶ See the dissenting opinion of Judge Lopez Guerra, joined by Judges Jungwiert, Jaeger, Villiger, and Poalungu, in ECtHR, *Axel Springer AG v. Germany*, App. no. 39954/08, 7 February 2012, last paragraph: 'Analysing the same facts and using the same criteria and shame balancing approach as the domestic courts, the Grand Chamber came to a different conclusion, giving more weight to the protection of the right to freedom of expression than to the protection of the right to privacy. But that is precisely what the case-law of this Court has established is not our task, that is, to set ourselves up as a fourth instance to repeat anew assessments fully performed by the domestic courts'. See the discussion by Dirk Voorhoof, chapter 8 and Leto Cariolou, chapter 9 in this volume.

2. What are Human Rights Conflicts About: Human Rights' Duties

The first question one should address pertains to the object of conflicts of human rights. The common view, and one that can be read in the ECtHR's judgments, is that human rights conflicts are conflicts between the interests these rights protect.¹⁷ As a result, the resolution of human rights conflicts is often approached as the resolution of conflicts between interests.¹⁸

Rather than consider conflicts of human rights as pertaining to rights *stricto sensu*, this section proposes to understand them as conflicts between one or many of the specific duties corresponding to those rights in a given context. This qualification was first made by Jeremy Waldron.¹⁹ Once conflicts of human rights are approached as conflicts of (human rights') duties, it is easy to see that they are best understood as conflicts of reasons and not (only) as conflicts of interests. What this implies in particular is that their resolution cannot be one of weighing and balancing reasons as one would weigh and balance interests, for reasons cannot be measured and compared in a quantitative fashion.²⁰

True, human rights protect individual objective interests that are sufficiently and equally important to give rise to duties: they work as intermediaries, in other words, between these interests and the duties. However, the *content* of human rights, i.e. their corresponding duties to respect, protect, and fulfil, should not be equated normatively with the interests they protect as an *object* and should not be reduced to them. There is much more to the content of a human right and the corresponding duties than the interests they are protecting against a specific threat and in specific circumstances. This additional normative content may enter into conflict too. For instance, the right not to be tortured may give rise to a duty for the State to prevent someone from being tortured, but also to a duty to enquire about such treatment were it to take place; both duties are justified by reference to the protection of the same interest but protect it in requiring different kinds of actions or omissions from State authorities and may not, as a result, conflict in the same way with another moral consideration or another human right like security. To that extent, some conflicts of rights may be traced back to conflicts of interests, of course, but they need not and even if they can, this is only part of what is at stake in the conflict.

¹⁷ See for one example among many others: ECtHR, *Odièvre v. France*, paras. 41–9 identifying rights and interests and balancing interests in case of conflicts of rights.

¹⁸ See e.g. Sébastien Van Drooghenbroeck, 'Conflicts entre droits fondamentaux et pondération des intérêts: fausses pistes (?) et vrais problèmes', in Jean-Louis Renchon (ed.), *Les droits de la personnalité. Actes du Xème Colloque de l'Association « Famille & Droit »*, Louvain-La-Neuve, 30 novembre 2007 (Brussels: Bruylant, 2009), 299; Janneke Gerards, 'Fundamental Rights and Other Interests—Should it Really Make a Difference?', in Eva Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008), 655.

¹⁹ Waldron, 'Rights in Conflict'.

²⁰ See also Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *J. Pol. Phil.* 191, 196.

Nor, and this is a second distinction,²¹ should the *content* of human rights, i.e. their duties, be conflated with what makes them of *value*, i.e. their justifications. This is particularly important for it prevents conflating the stringency of human rights' duties with that of their value(s). For instance, the stringency of different human rights' duties arising from the same human right, or from different ones, may vary, even though that human right, or all human rights, is or are justified by reference to one single value whose stringency is the same (e.g. dignity). As we will see, the resolution of conflicts of rights should not therefore necessarily be guided by the stringency of the value(s) of human rights.²²

Reducing human rights conflicts to conflicts of either interests or values does not only approach the content of human rights erroneously as *unique* and *stable* over time: all the duties corresponding to a human right would have the same stringency (either that of the interest(s) they protect or of their value(s)) and, as we know from practice, the same human rights may not always give rise to the same conflicts in different circumstances depending on the duties they give rise to in various circumstances. It also makes them completely *unrelated* to other human rights' content and to that of their corresponding duties: all the duties corresponding to a human right would always conflict with all the duties corresponding to another human right merely because they conflict with them in one case, thereby cutting human rights' duties off from their relational dimension. After all, if as we will see, human rights protect our basic equal status, they constitute our equal relations, and those relations cannot be of the same kind all the time.

Considering conflicts of rights from the perspective of the supply-side of human rights, i.e. from their duty-side, is actually the only way to explain some of the variations in the *occurrence* of conflicts, on the one hand, and in their *scope*, on the other, even when they are pertaining to the same human rights.

First of all, by contrast to the rights themselves, human rights' duties are concrete and can only be specified in context. Focusing on conflicts of human rights' duties accounts therefore for how there can be actual conflicts of rights in the first place. They are not merely conflicts of *prima facie* or *pro tanto* rights as this would not account for the moral residue in the conflict and its resolution. This argument also accounts, secondly, for how those conflicts of rights can vary depending on the context (or even be non-existent in some cases) despite pertaining to the same human rights. Human rights' duties have variable and relative stringency by reference to the type and degree of threat posed to the (same) protected interest. There are different duties corresponding to each right depending on the context and the threats to the protected interest. Focusing on conflicts of human rights' duties accounts therefore for how conflicts between the same human rights may give rise to different moral issues in each case and deserve in turn different resolutions.

²¹ On the distinctions between the object, the content, and the value of human rights, see Samantha Besson, 'Justifications', in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds.), *International Human Rights Law*, 2nd edn (Oxford: Oxford University Press, 2013), 34.

²² Contra ECtHR, *Axel Springer AG v. Germany*, para. 84.

No wonder then that understanding the object of conflicts of rights in this way has consequences for their resolution, as we will see in the next section. One may already mention the following implication, however: each of the duties at stake in a conflict need to be 'individualized' or specified in the concrete circumstances of the case before turning to their relations. That individualization has to take place on both sides of the conflict, however, and all conflicting duties ought to be individualized for the conflict to be well identified. Otherwise the individualization would, as a paradoxical result, cut off the duties at stake from their context and from the other human rights and duties in relation to which they need to be specified.²³ Moreover, the individualization of the human rights' duties in conflict should not be domain-specific only as this may direct the reasoning into a single direction that pertains to one of the human rights' duties in conflict and not to the others.²⁴

3. How Should We Resolve Conflicts of Rights: Qualitative Balancing

The next question is how we should go about resolving conflicts of human rights' duties. As I explained before, the practice is ambivalent. An important part of the ECtHR's case law endorses human rights 'weighing and balancing' or, at least, what seems to amount to it (e.g. under the paragraphs 2 of Articles 8–11 ECHR), while other parts reveal attempts to 'restrict restrictions' of human rights and even to organize hierarchies between human rights with certain rights being deemed as absolute (so-called 'absolute rights'; e.g. Article 3 ECHR)²⁵ or with absolute thresholds of protection being established within the content of certain human rights (so-called 'core duties' or 'inner core').²⁶ While the former leads to weighing one right against the other and, usually, one protected interest or set of interests against another, the latter grants categorical and abstract priority to all or some of the duties corresponding to one right over the other's.

Rather than choosing between these two extremes or perpetuating their uneasy coexistence, this section proposes a third method of resolution of conflicts of

²³ Contra e.g. ECtHR, *Fernández Martínez v. Spain*, paras. 123ff; ECtHR, *Eweida and Others v. The United Kingdom*, para. 94. In both cases, the Court discusses the individuation and specification of the duties on one side of the conflict only and considers those on the other side only in passing and in a very abstract fashion. See Javier Martínez-Torrón, chapter 10 and Ian Leigh, chapter 11 in this volume, on *Fernández Martínez v. Spain* and Dolores Morondo Taramundi, chapter 6 and Russell Sandberg, chapter 7 in this volume, on *Eweida and Others v. The United Kingdom*.

²⁴ See e.g. ECtHR, *Axel Springer AG v. Germany*, paras. 89–95, where the criteria of assessment of the justification of the restriction are Art. 10 ECHR-specific only and where the reasoning of the Court is one-sided, as a result. See the discussion in Dirk Voorhoof, chapter 8 and Leto Cariolou, chapter 9 in this volume.

²⁵ See e.g. Greer, 'Is the Prohibition'; Smet, 'The "Absolute" Prohibition of Torture'; and Mavronicola, 'What is an "Absolute Right"?'.

²⁶ See e.g. the dissenting opinions of Judge Wildhaber et al. in ECtHR, *Odièvre*, para. 11.

human rights. It is best captured as 'qualitative balancing'.²⁷ It aims at reconciling the reasons underpinning the conflicting duties in case of conflict. It may therefore be described as 'balancing' by lack of a better term for the comparison and mutual restriction of reasons, on the one hand, and as 'qualitative' to distinguish it from quantitative balancing, on the other. One should indeed consider that human rights' duties do not have 'weight' strictly speaking, but 'stringency'.

Qualitative balancing, so defined, is justified and operates by reference to the relational and egalitarian nature of human rights. To understand this claim, a brief reminder about the egalitarian and hence relational dimension of human rights is in order.²⁸ First of all, *qua* (moral and legal) rights, human rights are best understood, I propose, as normative relations between a right-holder and a duty-bearer (a right gives rise to duties). Secondly, human rights are equal rights that protect general individual interests that are deemed socio-comparatively equally important and under equal standard threats, on the one hand, and that can all be equally and reasonably protected against those standard threats, on the other. Thirdly, *qua* equal rights, human rights are rights that are constitutive of our basic equal moral (and accordingly political) status that is a relational status. As a result of the three relational dimensions of human rights, one may regard them as normative relations between all of us as equal right-holders and equal duty-bearers. From an institutional perspective, this explains in turn why human rights are deemed as the equal normative relations between any one of us under the jurisdiction of the State, on the one hand, and the State as collective duty-bearer (as confirmed by Article 1 ECHR), on the other.²⁹ In turn, our equality as human rights-holders also accounts for why ECHR rights are deemed to require that the State's political regime be democratic and hence respectful of our equality in granting and specifying our rights.³⁰

The proposed egalitarian reading of human rights has crucial implications for the resolution of human rights' conflicts. Qualitative balancing differs indeed from the other two alternative methods to resolve conflicts of rights. It is clearly distinct, first of all, from the identification of formal and abstract hierarchies of rights. Such hierarchies do not correspond to the egalitarian dimension of human rights: all human rights and rights-holders are equal and neither should be deemed abstractly prior to others. Nor do they fit the duty to reconcile reasons as far as possible rather than abide by one only. Human rights' duties should be related to one another

²⁷ See on the idea in general Waldron, 'Rights in Conflict'; Waldron, 'Security and Liberty', 199–200; Jeremy Waldron, 'Security as a Basic Right (After 9/11)', in Charles R. Beitz and Robert E. Goodin (eds.), *Global Basic Rights* (Oxford: Oxford University Press, 2009), 207.

²⁸ I argue for those features of the nature and the structure of human rights in Besson, *Human Rights as Law*. See also Samantha Besson, 'La structure et la nature de droits de l'homme', in Michel Hottelier and Maya Hertig Randall (eds.), *Introduction aux droits de l'homme* (Brussels: Bruylant, 2014), 19; Besson, 'Justifications'; Samantha Besson, 'The Egalitarian Dimension of Human Rights' (2013) 136 *Archiv. für Sozial- und Rechtsphilosophie* 19.

²⁹ See Samantha Besson, 'The Extra-territoriality of the European Convention on Human Rights. Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden J. Int'l L.* 857; Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights—A Quiet (R)Evolution?' (2015) 32 *Soc. Phil. & Pol'y* 244.

³⁰ ECtHR, *Zdanoka v. Latvia*, App. no. 58278/00, 16 March 2006, para. 98.

and balanced in case of conflict and cannot merely be ranked. This does not mean, however, that we should resort to a quantitative balancing of rights, and this is my second distinction. The consequentialist or even utilitarian take on human rights and their relations implied by quantitative balancing does not correspond to their egalitarian dimension either. It enables one of the rights and right-holders to be sacrificed to another right or to the right of another right-holder.

So how does qualitative balancing work? It is equality that provides the internal ground common to all human rights on the basis of which they can relate qualitatively to one another and on the basis of which they may be compared and mutually restricted in the balancing exercise. This implies resorting to the socio-comparative and hence collective dimension of all human rights as equal rights *qua* internal basis of comparison and restriction between them. Importantly, the egalitarian dimension of human rights dispenses with identifying a meta-value or principle external to the rights themselves as a basis for the comparison and restriction. It avoids thereby undermining the specificity of rights, and especially their incommensurability and special stringency.³¹

In terms of scope, qualitative balancing so defined does not only apply to democracy-related rights, like free-speech or political rights,³² but extends to all human rights due to their egalitarian dimension. An interesting question is what this implies for conflicts between antidiscrimination rights, that are strongly related to equality,³³ and other human rights. Those conflicts are best approached, I suggest, as single restriction cases, i.e. as cases where one human right's duty is restricted by reference to another moral consideration (e.g. the principle of non-discrimination) and not as conflicts of rights. This actually accounts for the ancillary function of Article 14 ECHR in the ECtHR's non-discrimination case law and the latter's approach to its relationship to other human rights.³⁴ This ancillary feature may be recognized in human rights conflicts pertaining to Article 14 ECHR too, which are not usually approached as such by the ECtHR.³⁵

Of course, the role of equality in qualitative balancing also implies the existence of inherent egalitarian limitations on the justifiable restrictions to every human right: the ultimate egalitarian limit to restriction is the erosion of the right itself, as this would threaten the basic moral equality of its right-holder. This is how one could interpret the role played by the so-called 'inner core' of every right among the limitations to justifiable restrictions to that right in the reasoning of the ECtHR.³⁶

³¹ See also Waldron, 'Rights in Conflict'.

³² Contra Philippe Gérard, *L'esprit des droits—Philosophie des droits de l'homme* (Brussels: Publication des Facultés universitaires Saint-Louis, 2007).

³³ On antidiscrimination (human) rights and equality, see Besson, 'Egalitarian Dimension'.

³⁴ See e.g. Samantha Besson, 'Evolutions in Anti-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe', in Grainne de Burca and Ruth Rubio Marin (eds.), 'Evolutions in Anti-Discrimination Law in Europe and North America', Special issue (2012) 60 *Am. J. Comp. L.* 147.

³⁵ See e.g. ECtHR, *Eweida and Others v. The United Kingdom*, paras. 85–8 where the conflict with Art. 14 ECHR was not approached as a conflict of rights.

³⁶ See e.g. the dissenting opinions of Judge Wildhaber et al. in ECtHR, *Odièvre*, para. 11.

Another related egalitarian limit to qualitative balancing is the 'abuse of right' one finds under Article 17 ECHR.³⁷ Human rights' restrictions may not be justified when they undermine the human rights of others in such a way as to deprive them of their basic equal status to that of the right-holder. Yet another egalitarian limit is that while the right of the right-holder herself may always be invoked as a justification of the restriction to another of her rights,³⁸ exercising a right excludes exercising it in a way that undermines it entirely and undermines the right-holder's equal moral status.³⁹ This is exemplified in cases where the prohibition of racial or sex discrimination or of torture have been recognized as limits to human rights' waivers by the ECtHR.⁴⁰

Last but not least, the egalitarian dimension of human rights and their relations has institutional implications for the procedure through which their mutual restrictions are justified in case of conflict (and not only for their mutual recognition in the first place).⁴¹ These procedures themselves should protect public equality and hence be democratic.⁴² The democratic condition for the justification of restrictions does not only pertain to legislative and executive procedures, but also to judicial ones and requires that the distinct democratic legitimacy of the judicial institution be secured. This also applies *mutatis mutandis* to international human rights courts, and the ECtHR in particular. It actually justifies (democratic) States' authorities and their tribunals' margin of appreciation in both the implementation and restriction of human rights.⁴³ This is confirmed by the reference to the test of 'democratic necessity' in the restriction test under paragraphs 2 of Articles 8–11 ECHR, as I will explain further in the next section, and to its requirement of a (democratic) legal basis for any restriction.

³⁷ See also Gérard, *L'esprit des droits*.

³⁸ See ECtHR, *S.A.S. v. France*, App. no. 43835/11, 1 July 2014, para. 119. Contra ECtHR, *Evans v. The United Kingdom*, para. 89; ECtHR, *S.H. and Others v. Austria*, App. no. 57813/00, 3 November 2011, para. 113, by reference to 'dignity'.

³⁹ See also Samantha Besson, 'Human Rights Waivers and the Right to Do Wrong under the European Convention on Human Rights', in Josep Casadevall et al. (eds.), *Mélanges en l'honneur de Dean Spielmann* (Nijmegen: Wolf Legal Publishers, 2015), 23.

⁴⁰ See on the egalitarian limits to the waiver of one's rights: ECtHR, *Pauger v. Austria*, App. no. 16717/90, 28 May 1997, paras. 58ff; ECtHR, *Jehovah's Witnesses of Moscow and Others v. Russia*, App. no. 302/02, 10 June 2010, para. 119. See also the discussion in Sébastien Van Drooghenbroeck, chapter 3 in this volume.

⁴¹ Importantly, equality plays a central role at different steps in human rights reasoning: in the recognition of human rights, in the specification of the corresponding duties and their allocation to the duty-bearers, and, finally, in the mutual restriction of those duties in case of conflict: see also Besson, 'Egalitarian Dimension'. Unlike others (e.g. Hillel Steiner, 'Working Rights', in Matthew H. Kramer, N.E. Simmonds, and Hillel Steiner (eds.), *A Debate over Rights* (Oxford: Oxford University Press, 1998), 233), therefore, I do not approach human rights conflicts as conflicts of *prima facie* rights only: see also Besson, *Morality of Conflict*.

⁴² See also Olivier de Schutter and Françoise Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in Eva Brems (ed.), *Conflicts between Fundamental Rights* (Antwerp: Intersentia, 2008), 169.

⁴³ See ECtHR, *S.A.S. v. France*, para. 129. See also Besson, 'Subsidiarity in International Human Rights Law'.

4. How Should We Account for the ECtHR's Reasoning: Proportionality and Absolute Rights

The third and final question addressed in this chapter pertains to the remaining elements in the ECtHR's reasoning about conflicts of human rights that resist the proposed argument on qualitative balancing. There are indeed both quantitative and categorical residual elements in the ECtHR's reasoning about rights in conflict that seem to contradict a qualitative reading of human rights balancing.

The two remaining sources of puzzlement are 'proportionality' as a *prima facie* example of quantitative weighing and balancing of rights, on the one hand, and 'absolute rights' as a *prima facie* example of the categorical prioritizing of rights, on the other.

The first difficulty pertains to the proportionality test. That test brings, with its cost-benefit or means-ends analysis, a quantitative and consequentialist flavour and seems to assume the commensurability of human rights and duties. It risks watering down the equality of rights, therefore. This is because, as I explained before, its quantitative implications may lead to sacrificing the rights of some to protect those of others, but also to do so in a way that always burdens the same right-holders and thereby singles them into a minority.⁴⁴

There is a way, however, to understand 'proportionality' *qua* co-relation between equal human rights-holders or between them and duty-bearers (by reference to the relational and egalitarian dimension of human rights). This conception of proportionality is distinct from proportionality *qua* instrumental rationality test or *qua* cost-benefit test as it is used in the mainstream proportionality test (and especially its 'suitability' and 'necessity' prongs).⁴⁵ Conceived in this way, proportionality analysis is compatible with the egalitarian dimension of human rights and is actually required by their equality.

This understanding actually fits the 'necessity in a democratic society' test that is the sole test mentioned by Articles 8–11 paragraphs 2 ECHR, but also elsewhere in the Convention and its Protocols, and that is usually interpreted to refer to proportionality.⁴⁶ Importantly, then, the Convention does not expressly mention a proportionality test *stricto sensu* and certainly not as an instrumental rationality test. As a matter of fact, there is no reason such a test should be equated with the cost-benefit or means-ends tests used in other proportionality understandings one encounters elsewhere, e.g. in European Union (EU) law⁴⁷ or in domestic law. The

⁴⁴ See Waldron, 'Security and Liberty', 200–4. See also Aeyal M. Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18(1) *Eur J. Int. Law* 1; Martti Koskeniemi, 'Occupied Zone: A Zone of Reasonableness' (2008) 41 *Israel Law Review* 13.

⁴⁵ Contra Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights?' (2013) 11 *Int'l J. Const. L.* 466.

⁴⁶ ECtHR, *Chassagnou and Others v. France*, para. 113.

⁴⁷ See, however, CJEU, *Sky Österreich* [2013] ECLI:EU:C:2013:28, for a distinction between the usual proportionality test and the proportionality test that applies to EU fundamental rights.

proposed reading of proportionality is a way to account for the omnipresence of proportionality in the reasoning of the ECtHR, but to do so in a relational way,⁴⁸ and without endorsing the quantitative interpretation that is often propounded (albeit in many different and nuanced ways) in ECHR scholarship.⁴⁹ It is, moreover, certainly possible to do so without endorsing some of its consequentialist implications.⁵⁰ I am following George Letsas in this respect, albeit with a slight nuance: proportionality is conceived here as a co-relation principle between existing equal human rights' duties, and not as a full 'right to equal respect and concern' that is identified separately.⁵¹

The second remaining difficulty is that of 'absolute rights'. The idea of absolute rights brings with it a categorical flavour and seems to consider abstract rights as prior to any other moral consideration, and some rights as more important than others. Again, this risks undermining the equality of human rights. This is because, as I explained before, the rights of some may not be regarded as abstractly prior to those of others as this runs the risk of treating some people as being more important than others or even as not important at all.⁵²

There is a way, however, to understand 'absolute rights' *qua* highly stringent concrete duties abstracted from prior human rights reasoning (whether they are core duties corresponding to any human right or absolute duties corresponding to a so-called 'absolute' right such as Article 3 ECHR).⁵³ This means that their absolute character does not imply that there should be formal and abstract hierarchies between those 'absolute rights' and others. What they amount to are merely high constraints placed on specific judicial reasoning by the corresponding concrete duties identified in precedents. This interpretation is compatible with the egalitarian dimension of human rights. Those concrete limitations on the qualitative balancing of rights are actually inherent to the equality of rights and required by it. As I explained before, the ultimate egalitarian limit to human rights' restrictions, including in case of conflict, is the erosion of the equal right itself, hence the need to protect each right's 'inner core'⁵⁴—even indeed against the right-holder's own will.⁵⁵

⁴⁸ On a similar idea of the 'relationship of proportionality', see also ECtHR, *Axel Springer AG v. Germany*, para. 110.

⁴⁹ E.g. Van Drooghenbroeck, 'Conflicts entre droits fondamentaux'; Gerards, 'How to Improve'.

⁵⁰ Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *Int'l J. Const. L.* 468; Luc B. Tremblay, 'An Egalitarian Defense of Proportionality-Based Balancing' (2014) 12 *Int'l J. Const. L.* 864. Contra Matthias Klatt and Moritz Meister, 'Proportionality: A Benefit to Human Rights?' (2012) 10 *Int'l J. Const. L.* 687.

⁵¹ See Letsas, 'Rescuing Proportionality'.

⁵² See Waldron, 'Security as a Basic Right', 223–6.

⁵³ Absolute rights should be distinguished from non-derogable rights, i.e. rights whose application may not be suspended under Art. 15 ECHR. On the difference, see Catherine Maia, 'De la signification des clauses de non-dérogation en matière d'identification des droits de l'homme impératifs', in Rafea Ben Achour and Slim Laghmani (eds.), *Les droits de l'homme: Une nouvelle cohérence pour le droit international?*, Colloque de Tunis (Paris: Pedone, 2008), 39.

⁵⁴ See the dissenting opinions of Judge Wildhaber et al. in ECtHR, *Odièvre*, para. 11.

⁵⁵ See ECtHR, *Jehovah's Witnesses of Moscow and Others v. Russia*, para. 119.

The proposed reading fits the way the ECtHR reasons with so-called 'absolute rights' in practice.⁵⁶ What its case law shows, indeed, is that the Court rarely recognizes absolute duties in cases where rights such as those in Article 3 ECHR are invoked and only does so when the right-holder's basic equality is threatened or undermined concretely. Importantly, absolute concrete duties of this kind are only justified when they correspond to the 'European consensus', i.e. derive from some form of European customary law (or, at least, an emerging one) based on both States' (political, but mostly judicial) subsequent practice and *opinio juris* (evidenced by domestic judicial law, but also by reference to international law norms)⁵⁷—including consensus on the degree of stringency of the duties. Of course, that consensus may change again and so will the 'absolute rights' therein. This also explains in turn why there is so much reluctance about entrenching such 'absolute rights' in an abstract fashion in domestic constitutional texts or international treaties.

5. Conclusions

Human rights conflicts are not an exception in human rights reasoning. This is best explained, this chapter has argued, by the egalitarian and hence relational nature of human rights. Human rights are part of what claiming one's equal moral and political status amounts to. Approaching human rights' relations and conflicts as exceptional may itself be questioned, therefore. This also applies to how the ECtHR frames its human rights reasoning in case of conflicts. Understanding how 'constant' and 'foundational' human rights conflicts are was arguably the promise the ECtHR made in its *Chassagnou* decision, as confirmed by this chapter's opening quote.⁵⁸ The time has come to remember that promise.

In reaction to the puzzle I started this chapter with, my main claim has been that the characteristics of judicial reasoning in case of human rights conflict should not be confused with quantitative weighing and balancing of human rights, on the one hand, or with categorical prioritizing of human rights, on the other. Instead, the best interpretation of what is at stake in that reasoning is qualitative balancing. It is based on the internal justification and relational dimension of all human rights, i.e. their equality. The way to deal with human rights conflicts and to justify restrictions may be found, in other words, in the very equal moral and political status of their right-holders. This explains the role of equality in relating human rights' duties from the inside and setting internal limits to each right on what their

⁵⁶ ECtHR, *N. v. The United Kingdom*, App. no. 26565/05, 27 May 2008, para. 42. See also Greer, 'Is the Prohibition'.

⁵⁷ ECtHR, *Demir and Baykara v. Turkey*, App. no. 34503/97, 12 November 2008, para. 85. See also Ineta Ziemele, 'Customary International Law in the Case Law of the European Court of Human Rights—The Method', Conference on 'The Judge and International Custom' (2012) 12 *The Law and Practice of International Courts and Tribunals* 243; Samantha Besson, 'Human Rights as Transnational Constitutional Law', in Anthony Lang and Antje Wiener (eds.), *Handbook on Global Constitutionalism* (London: Elgar, 2017), forthcoming.

⁵⁸ See ECtHR, *Chassagnou and Others v. France*, para. 113.

mutual restrictions may be. Hence also the importance of resolving conflicts of rights through democratic, and hence egalitarian, procedures and the relevance of the margin of appreciation of democratic States in this respect.

The proposed reasoning in human rights conflicts fits and justifies the practice of international human rights law, and in particular the ECtHR's egalitarian approach to human rights. It may actually also be used to criticize it and improve it from the inside. There may be scope in particular for a more cautious use of the terms 'weight', 'interests', and 'balancing' by the Court in future decisions. The same may be said about residual examples of both quantitative weighing and balancing and categorical prioritization, and in particular about the reference to both 'proportionality' and 'absolute rights' in the Court's future case law.