



BRILL | NIJHOFF

THE LAW AND PRACTICE OF INTERNATIONAL
COURTS AND TRIBUNALS 22 (2023) 365–383



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Moving Away from Open Judicial Balancing Review

The European Court of Human Rights' Approach as Illustrated by Its Case Law Relevant to the Covid-19 Pandemic

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Received 30 August 2022 | Accepted 22 March 2023 |

Published online 21 July 2023

Abstract

The Covid-19 pandemic truly has been called a global crisis. To fight the spread of the virus, many States have introduced measures that seriously restrict or affect fundamental rights, ranging from procedural rights to the freedom of movement and the right to personal autonomy. In Europe, it is to be expected that many cases concerning such rights infringements eventually will come before the European Court of Human Rights (ECtHR). This contribution aims to give an insight into how the Court will likely give shape to its proportionality test in such cases. It thereby predicts that open balancing review – for which the ECtHR is famous – will play a much less important role than methods of reasoning by analogy and procedural review.

Keywords

Covid-19 – proportionality – balancing – fundamental rights – ECHR – ECtHR – judicial argumentation

1 Introduction

If the Covid-19 pandemic has shown anything, it is this: we may have to accept some limitations and restrictions on our freedom of movement, our personal autonomy, our freedom of assembly and many other fundamental rights in order to protect the right to life of others and the right of access to healthcare. Limitation clauses of human rights treaties such as the European Convention on Human Rights (ECHR) allow for such limitations if they meet certain well-defined conditions. One of the most important of these is the requirement that a restriction be “necessary in a democratic society”.¹ Though famous, this is also one of the most elusive phrases of the European Convention. Over time, the European Court of Human Rights (ECtHR or Court) – tasked with interpreting and applying the Convention in individual cases² – has provided many different definitions and interpretations of the requirement of necessity,³ but in the end, the Court’s approach always seems to boil down to an open, ad hoc balancing test.⁴ In *Soering* the Court even expressly held that “... inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.⁵ This focus on searching for a fair balance suggests that, in each individual case, the Court considers the different rights and interests that are at stake and decides whether the interests pursued by the State (such as protection of fundamental rights of others or protection of public health) can be considered to reasonably outweigh the claimed Convention rights of the applicant.⁶

1 This particular phrase can be found in Articles 8(2), 9(2), 10(2), 11(2) and 2(2) of Protocol No. 4, Article 1 of Protocol No. 1 and Articles 1 and 5 of Protocol 7 also mention that restrictions must be necessary. In addition, Article 2(2) speaks of “absolutely necessary” actions; Article 5(1)(c) requires measures to be “reasonably necessary”.

2 Articles 19, 32 and 34 ECHR.

3 See further, e.g., Janneke Gerards, *General Principles of the European Convention on Human Rights* (2nd Edition, 2023), Chapter 11.

4 The present article leaves aside the instrumentality part of the test of proportionality, which is sometimes applied as part of its “necessity” test; on that test, see more in detail Gerards, *supra* note 3, Chapter 11; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012), 185 et seq.; Janneke Gerards, “How to Improve the Necessity Test of the European Court of Human Rights?”, 11 *International Journal of Constitutional Law* (2013), 466.

5 *Soering v. the United Kingdom*, ECtHR 7 July 1989, 14038/88, para. 89. For the actual foundations of the test, see Alastair Mowbray, “A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights”, 10 *Human Rights Law Review* (2010), 289, 290.

6 E.g., Gerards, *supra* note 3, Sections 6.2.1 and 11.4.1; Stijn Smet, “Conflicts between Human Rights and the ECtHR. Towards a Structured Balancing Test”, in S. Smet and E. Brems (eds.),

This type of balancing review has been criticised by many.⁷ One of the reasons for such criticism is that balancing is a very difficult type of review to undertake for courts. If balancing is taken seriously, many different steps must be taken.⁸ The various interests and rights involved have to be identified and defined on a similar level of generality, their respective weights have to be determined (for which exercise it is difficult to find a suitable yardstick or scale), they have to be compared (which may be an even more difficult exercise because of issues of incommensurability), and eventually, a decision has to be made to have one interest prevail over the other (which necessitates making a normative choice).⁹ Perhaps not surprisingly, most courts that engage in balancing or balancing review, including the ECtHR, tend to skip some if not most of these steps in their reasoning.¹⁰ Moreover, this makes it difficult for courts to translate the image of “balancing” into convincing and transparent reasoning

When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony? (2017), 38, 39; Samantha Besson, “Human Rights in Relation. A Critical Reading of the ECtHR’s Approach to Conflicts of Rights”, in *ibid.*, 23; Laurens Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (2016), 171–184; Mowbray, *supra* note 5; Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009); Başak Çalı, “Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions”, 29 *Human Rights Quarterly* (2007), 251, 256; Steven Greer, “‘Balancing’ and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate”, 63 *Cambridge Law Journal* (2004), 412. For some examples out of many, see *Cordella and Others v. Italy*, ECtHR 24 January 2019, 54414/13 and 54264/15, paras. 161–174; *Gafiu v. Romania*, ECtHR 13 October 2020, 59174/13, paras. 79–82.

- 7 Mowbray has explained that the recognition of the balancing test by the ECtHR was controversial from the outset; see Mowbray, *supra* note 5, at 291. For more theoretical and conceptual criticism, see famously Alexander Aleinikoff, “Constitutional Law in the Age of Balancing”, 96 *Yale Law Journal* (1987), 943. See further – among many other sources – e.g., Fiona de Londras and Kantsantsin Dzehtsariou, *Great Debates on the European Convention on Human Rights* (2018), 94, 99; Smet, *supra* note 6; Francisco Urbina, *A Critique of Proportionality and Balancing* (CUP, 2017), 197 et seq.; Marko Novak, “Three Models of Balancing (in Constitutional Review)”, 23 *Ratio Juris* (2010), 106; Frederic Schauer, “Balancing, Subsumption, and the Constraining Role of Legal Text”, 4 *Law & Ethics of Human Rights* (2010), 37, 38; Stavros Tsakyrakis, “Proportionality: An assault on human rights?”, 7 *International Journal of Constitutional Law* (2009), 470; Çalı, *supra* note 6.
- 8 Some scholars therefore have proposed more structured versions of the balancing test; see, in particular, Smet, *supra* note 6, and, in more detail, Stijn Smet, *Resolving Conflicts between Human Rights. The Judge’s Dilemma* (2017).
- 9 For this criticism, see, e.g., Aleinikoff, *supra* note 7; Kathleen Sullivan, “Post-Liberal Judging: The Roles of Categorization and Balancing”, 63 *University of Colorado Law Review* (1992), 293, 301; Smet, *supra* note 8.
- 10 See the analysis of the Court’s reasonableness review in Gerards, *supra* note 3, Chapter 11. See also the sources mentioned *supra*, note 9.

that allows the reader to understand on what basis a certain decision has been made.¹¹

Such criticism notwithstanding, the ECtHR still would seem to live in the “age of balancing”.¹² The Court refers to the notion of balancing or a “fair balance” in nearly all cases in which there is a conflict between Convention rights and other fundamental rights or public values.¹³ Below the surface, however, and to the extent that ad hoc balancing plays an actual role in the Court’s argumentation,¹⁴ it appears that significant changes have taken place in the Court’s practice. This article defends the thesis that, for the ECtHR, balancing is not an important method of argumentation. The Court usually relies on other strategies of judicial reasoning, and it is likely to continue to do so also in cases stemming from global crises such as the Covid-19 pandemic.

To support this thesis, and based on earlier writings by the present author and other scholars, the present article first argues that, over time, the Court has shifted from applying open ad hoc balancing review to providing strongly precedent-based and analogy-driven reasoning that primarily relies on case comparison and on the development and use of tests and standards (Section 2.1). In addition, it is recalled that substantive balancing review is often added to or even replaced by forms of procedural review (Section 2.2). These arguments feed into the second part of this article. Using the Covid-19 pandemic as a case study, Section 3 offers an analysis of the argumentative approach taken in two ECtHR judgments that are likely to be of particular importance to the way it will deal with other Covid-19-related cases. Based on this analysis, and in view of the tendencies discussed in Section 2, Section 4 concludes by explaining that the Court probably will stay away from open balancing review also in future Covid-19 cases.

11 Janneke Gerards, “The Age of Balancing Revisited?”, 6 *European Data Protection Law Review* (2020), 14; De Londras and Dzehtsariou, *supra* note 7, at 99 et seq.; Urbina, *supra* note 7; Legg, *supra* note 4; Aleinikoff, *supra* note 7, 972; Tsakyrakis, *supra* note 7, at 475; Smet, *supra* note 8.

12 For this term, see Aleinikoff, *supra* note 7; perhaps it might be more suitable to speak of an “age of proportionality” in the case of the ECtHR; see further, e.g., De Londras and Dzehtsariou, *supra* note 7, at 102 et seq. For an analysis of the Court’s case law from which this can be concluded for the period up until 2010, see Mowbray, *supra* note 7.

13 Gerards, *supra* note 3, Chapter 11.

14 As was discussed above, the Court has always wavered between different readings of the necessity requirement, applying it as an invitation to engage in open balancing review in some cases, yet relying on instrumentality review in other instances. On this, see further the sources mentioned *supra*, note 4.

2 Moving Away from Open, ad hoc Balancing Review

2.1 *Standards-Based Argumentation Informed by Precedent and Reasoning by Analogy*

To explain the shift from open, ad hoc balancing review to a strongly precedent-based, analogy-driven type of argumentation, it is important to note that such a move is not self-evident. The Convention system is not formally a precedent-based system and the Court's work is strongly geared to offering individual justice and individual redress. Consequently, all cases should be decided on their own merits, which could result in a different balance to be struck in each individual case.¹⁵ Nevertheless, the Court has recognised that "it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law".¹⁶ This has resulted in a tendency to re-use factors and considerations thought relevant in deciding earlier cases by means of reasoning by analogy.¹⁷ Eventually, these are redefined in terms of "general principles", in particular by the Court's Grand Chamber.¹⁸ Over time, this has led to the incremental development of many different "tests" consisting of sets of standards, criteria and factors that are then used in deciding on a specific type or category of cases.¹⁹ Indeed, this seems to be a natural development in a maturing legal system with a particular need for dealing consistently and efficiently with a large influx of cases.

As such, the process of defining general principles, tests and standards does not remove the need for ad hoc balancing. Most of the Court's tests do not have an easy rule-like nature, but are catalogues of relevant factors or "topoi" ("viewpoints").²⁰ The relative weight and importance of these topoi

15 See further Gerards, *supra* note 3, Chapter 3.

16 *Cossey v. the United Kingdom*, ECtHR 27 September 1990, 10843/84, para. 35. See also, e.g., *Christine Goodwin v. the United Kingdom*, ECtHR (GC) 11 July 2002, 28957/95, para. 74.

17 On reasoning by analogy, see, e.g., Cass Sunstein, "On Analogical Reasoning", 106 *Harvard Law Review* (1989), 741; Frederic Schauer, *Thinking Like a Lawyer. A New Introduction to Legal Reasoning* (Cambridge, Mass.: Harvard University Press, 2009), Chapter 5.

18 Gerards, *supra* note 3, Chapter 3.

19 *Ibid.* On this process, see also Janneke Gerards, "Dealing with Divergence. Margin of Appreciation and Incrementalism in the Case-Law of the European Court of Human Rights", 18 *Human Rights Law Review* (2018), 495. See similarly Schauer, *supra* note 17, at 751 et seq., 781 et seq; based on his typology, the Court's approach could be seen as located somewhere in between searching for a reflective equilibrium, classification, and pure reasoning by analogy.

20 Gerards, *supra* note 3, Section 11.4.1.e. Popelier and Van de Heyning speak of "structuring criteria"; Patricia Popelier and Catherine Van de Heyning, "Procedural Rationality: Giving

usually are not very clear.²¹ For example, when the Court applies its so-called *Von Hannover* test in deciding in a case on a conflict between the freedom of expression and the right to reputation, the various elements of the test may help it clarify several relevant aspects and structure its judgment in a comprehensible and predictable manner, but the Court still will have to decide which of these rights prevails; this means that it is not clear on the forehand which factors are decisive or at least bear the most weight. In the end, therefore, the Court unavoidably must make a choice or, rather, “strike a balance”, between the interests concerned.²²

Nevertheless, the reasoning in such cases is strongly steered by the particular set of – precedent-driven – standards that have been formulated. Moreover, in applying its tests and standards, the Court makes many references to earlier judgments, comparing them to see how a particular factor has been applied earlier and extending this reasoning to the case before it.²³ When a certain application of a test has been reached in one particular case, it usually will be repeated in the next one because of the similarities between the two cases, with the relevant standards being further clarified and refined in the process.²⁴ Indeed, this test-driven and analogy-based type of reasoning has increasingly come to replace a fully open, ad hoc balancing approach.

2.2 Procedural Review

In most cases in which the Court reviews the reasonableness of a justification, it examines whether and how the various interests have been weighed on the national level and whether this has been done in a fair and equitable manner.²⁵ Such review is “substantive” in nature when the Court mainly looks into factors such as the reasons why little weight was given to a certain right (e.g., personal autonomy) on the national level, or whether it was reasonable and fair to have one interest (e.g., public health) outweigh another (e.g., the

Teeth to the Proportionality Analysis”, 9 *European Constitutional Law Review* (2013), 230, 231. This means that the use of standards by the Court does not strictly amount to a categorisation rather than a balancing approach; on this distinction, see Sullivan, *supra* note 9.

21 Gerards, *supra* note 3, Section 11.4.1.e.

22 For this test, see the case after which it was named: *Von Hannover (No. 2) v. Germany*, ECtHR (GC) 7 February 2012, 40660/08 and 60641/08. The Court expressly acknowledged the relative value of its tests in *Maslov v. Austria*, ECtHR (GC) 23 June 2008, 1638/03, para. 70.

23 For one example out of many of such an application of the *Von Hannover* test, see *Daneş and Others v. Romania*, ECtHR 7 December 2021, 44332/16, paras. 40–64.

24 Gerards, *supra* note 3, Chapter 3.

25 *Ibid.*, Chapter 11.

right to personal autonomy).²⁶ To this traditional form of substantive judicial review, the Court has added another approach, which has been termed “procedural” (or “process-based”) as opposed to “substantive” (or “substance-based”) review.²⁷ Several types of procedural review can be distinguished in the Court’s case law.

First, “purely” procedural review means that the Court will not look into the actual substantive interests involved in a case, but will check only if the infringement of a fundamental right has been surrounded by sufficient procedural safeguards on the national level.²⁸ These include *ex ante* safeguards, such as the application of principles of good governance in decision-making

26 See, e.g., Claire Loven, *Fundamental Rights Violations by Private Actors and the Procedure before the European Court of Human Rights. A Study of Verticalised Cases* (2022), 48; Oddný Mjöll Arnardóttir, “Organised Retreat? The Move from ‘Substantive’ to ‘Procedural’ Review in the ECtHR’s Case Law on the Margin of Appreciation”, European Society of International Law Annual Conference (2015), available at ssrn.com/abstract=2709669. An example of a case where the Court considered such factors is *Jehovah’s Witnesses of Moscow and Others v. Russia*, ECtHR 10 June 2010, 302/02, where a branch of the Jehovah’s Witnesses had dissolved because, under the influence of the religious community, members had refused blood transfusions even in life-threatening circumstances. For the Court’s substantive approach to the conflict between autonomy and public health in this case, see paras. 133–142.

27 See, e.g., Leonie Huijbers, *Process-based Fundamental Rights Review: Practice, Concept and Theory* (2019), 100 et seq. On the tendency to rely on procedural review as such, see further, e.g., Alain Zysset, “A Culture of Justification or a Culture of Presumption? The Turn to Procedural Review and the Normative Function of Proportionality at the European Court of Human Rights”, in Stephanie Schiedermaier, Alexander Schwarz and Dominik Steiger (eds.), *Theory and Practice of the European Convention on Human Rights* (2022), 215; Robert Spano, “The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law”, 18(3) *Human Rights Law Review* (2018), 473–494; J.H. Gerards and E. Brems, *Procedural review in European fundamental rights cases* (Cambridge: Cambridge University Press, 2017); Óddny Mjöll Arnardóttir, “The ‘procedural turn’ under the European Convention on Human Rights and presumptions of Convention compliance”, 15 *International Journal of Constitutional Law* (2017), 9; Popelier and Van de Heyning, *supra* note 20, at 252; Patricia Popelier, “The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights”, in P. Popelier et al., *The Role of Constitutional Courts in Multilevel Government* (Antwerp: Intersentia, 2013), 249.

28 For the spectrum ranging from purely substantive to purely procedural review, see Huijbers, *supra* note 27, at 15. On pure procedural review, “integrated” procedural review or procedural review “*stricto sensu*”, see, e.g., Zysset, *supra* note 27, at 217; Thomas Kleinlein, “The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution”, 68 *International & Comparative Law Quarterly* (2019), 91; Popelier and Van de Heyning, *supra* note 20, 253.

or proper procedures for good law-making,²⁹ as well as *ex post* safeguards, which may concern matters such as availability of and access to effective legal remedies.³⁰ In its judgments, the Court often defines such procedural standards in terms of procedural positive obligations, and in some cases, it will even restrict its review to considering whether these obligations were met by the respondent State.³¹

Second, the Court's review may be "semi"-procedural in nature.³² This means that it primarily checks if the national authorities have duly applied the substantive Convention standards as developed in the Court's case law.³³ When the national courts have done so, the Court will not readily overturn their findings; in the Court's own words, it then "would require strong reasons to substitute its view for that of the domestic courts ...".³⁴ Conversely, if a case discloses that the domestic courts did not conduct any form of proportionality review or their review was not based on the Court's standards, the Court may draw negative inferences from this in deciding on the overall reasonableness of the interference.³⁵ It may even conclude that, because the applicants have not benefited from a proper proportionality test on the national level, the Convention has been violated.³⁶

29 Janneke Gerards, "Procedural review by the ECtHR – a typology", in J.H. Gerards and E. Brems, *Procedural review in European fundamental rights cases* (Cambridge: Cambridge University Press, 2017), 127, 130 et seq. On the standards developed in this regard, see, in detail, also Mathieu Leloup, *The impact of the fundamental rights case law of the European Court of Human Rights and the European Court of Justice on the domestic separation of powers* (2021).

30 See, e.g., Gerards, *supra* note 3, Section 6.3.4; Lavrysen, *supra* note 6.

31 *Ibid.* For a good example of procedural standard-setting that allows for purely procedural review in later cases, see *Big Brother Watch and Others v. the United Kingdom*, ECtHR (GC) 25 May 2021, 58170/13. Importantly, however, the contrast between procedure and substance is not clear-cut, and some procedural requirements and types of review still may have a substantive flavour; on that matter, see further Huijbers, *supra* note 27, at 115.

32 For this term, see Ittai Bar-Siman-Tov, "Semi-procedural Judicial Review", 6 *Legisprudence* (2012), 271.

33 On this type of procedural review, see further, e.g., Popelier and Van de Heyning, *supra* note 20, 252.

34 *Palomo Sánchez and Others v. Spain*, ECtHR (GC) 12 September 2011, 28955/06, para. 57. See also, e.g., *MGN Limited v. the United Kingdom*, ECtHR 11 January 2011, 39401/04, paras. 150, 155; *Von Hannover (No. 2) v. Germany*, ECtHR (GC) 7 February 2012, 40660/08 and 60641/08, para. 107; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, ECtHR (GC) 27 June 2017, 931/13, para. 198; *A.-M.V. v. Finland*, ECtHR 23 March 2017, 53251/13, para. 87.

35 See further Gerards, *supra* note 29.

36 For an example, see *Mehmet Çiftçi and Suat İncedere v. Turkey*, ECtHR 18 January 2022, 21266/19, para. 21.

Third, the Court may rely on a “mixed” approach. Indeed, in practice, the Court does not often use purely or even semi-procedural arguments as decisive in its review of the reasonableness of a restrictive measure.³⁷ Usually, the Court considers arguments of procedure as one relevant factor next to substantive arguments. It may explain, for example, that there has been a violation of the Convention not only because of a lack of procedural safeguards or a lack of a proper national proportionality analysis, but also because individual interests have been heavily affected without there being a convincing substantive justification for this.³⁸

Especially when mixed review is applied, elements of substantive balancing may play a role in the Court’s reasoning. However, even in such mixed review cases, the Court usually allows its substantive reasoning to be guided by general principles, tests and standards and by analogies drawn from its previous judgments.

Taken together, thus, the methods discussed in this and the previous sub-section reduce the need to resort to fully open, ad hoc balancing review. Indeed, it is submitted here that open balancing review cannot be seen that often anymore in the Court’s reasoning and has been largely replaced by methods of argumentation such as those discussed above.

3 Balancing in Times of Global Pandemic Crisis?

3.1 *Covid-19 Cases before the ECtHR*

In Section 2, it was argued that the Court has developed several strategies of argumentation that do not involve a large degree of open, substantive judicial balancing. In view of this, the question may be considered as to whether the tendency to move away from open balancing review can also be seen in cases stemming from crises such as the Covid-19 pandemic. To show that this is the case, this section presents an analysis of the judgments and decisions that the Court has handed down so far that are relevant for judging national measures taken to deal with the Covid-19 pandemic and its effects.

In the period under review for the present article, which runs from March 2020 (when the first measures were introduced) to August 2022 (the

37 On the terminology, see Huijbers, *supra* note 27, at 162.

38 Huijbers calls these forms – depending on the weight that is given to the procedural arguments – either “decisively” or “supportive” process-based review; see Huijbers, *supra* note 27, at 162–163. For the approach taken by the Court in this respect, see further Gerards, *supra* note 29, at 127.

time of writing of this article), the Court has handed down 13 judgments and decisions in which Covid-19 was mentioned in its substantive reasoning.³⁹ In about half of these judgments and decisions, the Court paid express attention to Covid-19 measures.⁴⁰ The relevant cases relate to the impact of the crisis on the calculation of the six- (now four-)months' time-limit to lodge an application with the Court,⁴¹ to a lack of or delayed access to legal remedies in relation to deprivation of liberty,⁴² to delays in family-law proceedings,⁴³ to the right to demonstrate,⁴⁴ to procedural issues related to the obligation for courts to temporarily close their doors or resort to online hearings,⁴⁵ and to isolation and quarantine obligations for prisoners and refugees and other measures to limit the spread of Covid-19 in detention facilities.^{46,47}

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- 39 A search of judgments and decisions handed down by the Court's Grand Chamber, Chambers and Committees over the relevant period generated 62 results in total in which "Covid", "Covid-19" or "corona" (as a virus) were mentioned. In by far most of these cases, however, Covid was mainly mentioned to explain that no hearing in Strasbourg but one by video conference had taken place, or that – on the national level – some procedural adaptations had been made. Other cases were in their core about corona measures, but were declared inadmissible for procedural reasons; see in particular *Zambrano v. France*, ECtHR 21 September 2021 (dec.), 41994/21; *Terheş v. Romania*, ECtHR 13 April 2021 (dec.), 49933/20; *Le Mailloux v. France*, ECtHR 5 November 2020 (dec.), 18108/20.
- 40 In several judgments, the Court did mention the Covid-19 situation, but it did not play any role of importance to the outcome of the case. In *Tunikova*, for example, the Court mentioned that the Covid-19 situation had aggravated the structural problem of domestic violence in Russia, but did so mainly in passing (*Tunikova and Others v. Russia*, ECtHR 14 December 2021, 55974/16, para. 150). In another judgment, the Court mentioned that a national court had found it commendable that a procedural solution had been found for a certain issue, without this playing any apparent role to the Court's argumentation as a whole; see *Buş v. Romania*, ECtHR 19 October 2021 (dec.), 46160/29, para. 39. For similar cases in which the Covid-19 situation was mentioned in the reasoning, without having a clear impact on the Court's judgment or decision, see *Banevi v. Bulgaria*, ECtHR 12 October 2021, 25658/19, para. 114; *Mik and Jovanović v. Serbia*, ECtHR 23 March 2021 (dec.), 9291/14 63798/14, paras. 48, 51.
- 41 *Saakashvili v. Georgia*, ECtHR 2 March 2022 (dec.), 6232/20 and 22394/20, paras. 52–58.
- 42 *Fenech v. Malta*, ECtHR 23 March 2021 (dec.), 19090/20.
- 43 *Q and A v. Slovenia*, ECtHR 8 February 2022, 19938/20, paras. 79–80.
- 44 *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, ECtHR 15 March 2022, 21881/20.
- 45 *Bah v. the Netherlands*, ECtHR 22 June 2021 (dec.), 35751/20.
- 46 *Fenech v. Malta*, ECtHR 1 March 2022, 19090/20; *Feilazoo v. Malta*, ECtHR 11 March 2021, 6865/19.
- 47 Thus far, one application related to lockdown measures, but the Court did not deal with the issue of justification in the case; see *Terheş v. Romania*, ECtHR 13 April 2021 (dec.), 49933/20. Other applications concerned an alleged lack of access to medical equipment and the introduction of a "health pass", but these cases were declared inadmissible on

It is clear from these judgments and decisions that the Court regards the spread of Covid-19 as a crisis in which emergency measures may be justifiable, at least in the initial stages of the global pandemic.⁴⁸ Special restrictive measures may be acceptable in particular when an emergency situation has been officially notified to the Secretary General of the Council of Europe under Article 15 ECHR, which several States have done.⁴⁹

In only one of the judgments issued so far – the *CGAS* case on the freedom to demonstrate – the Court has relied on balancing language to consider the reasonableness of such measures.⁵⁰ In the other cases about national restrictions of rights, the Court has applied its general standards and criteria for assessing whether the restrictions were compatible with Articles 3, 5 and 6 and assessed if sufficient procedural safeguards had been available. Although these judgments can be seen to illustrate the tendency towards application of “tests” and procedural review rather than open balancing, they cannot be regarded as “evidence” of the tendencies discussed in Section 2 as they do not evidently deal with competing rights. This will be different for future Covid-19 cases that concern lockdown-related restrictions of the freedom of movement and the right to privacy, obligations to wear mouth-nose masks, curfews, Covid-19-related restrictions of demonstrations, limitations of accessibility of schools, corona or health passports (and related 1G, 2G or 3G policies), or (semi-)compulsory vaccination.⁵¹ The many national societal and political debates and court cases on such measures concentrate on two issues: legality and proportionality.⁵² In

procedural grounds; see *Le Mailloux v. France*, ECtHR 5 November 2020 (dec.), 18108/20; *Zambrano v. France*, ECtHR 21 September 2021 (dec.), 41994/21.

48 See, in particular, *Bah v. the Netherlands*, ECtHR 22 June 2021 (dec.), 35751/20, para. 44.

49 *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, ECtHR 15 March 2022, 21881/20, para. 90. In total, 10 States made such a notification under Article 15 ECHR; see <https://www.coe.int/en/web/conventions/derogations-covid-19> (visited 25 August 2022).

50 The *Fenech* case on measures to prevent the spread of Covid-19 in detention facilities contained some elements of proportionality review, but, this being a case on Articles 2 and 3 ECHR (which do not allow for open justification review), the Court did not formally and expressly rely on a balancing test; see *Fenech v. Malta*, ECtHR 1 March 2022, 19090/20, paras. 95–96.

51 The only case on lockdowns so far only concerned the applicability of Article 5(1) ECHR. Since the Court held that this provision did not apply, it did not have to deal with the matter of justification; see *Terheş v. Romania*, ECtHR 13 April 2021 (dec.), 49933/20. At present (25 August 2022), however, no less than 43 cases on Covid-19 measures had been communicated by the Court, and it is likely that many more will follow once national domestic remedies have been exhausted (as is required by Article 35(1) ECHR).

52 See the series on “Power and the COVID-19 Pandemic”, at *Verfassungsblog*, which contains contributions on how the pandemic has affected law and legal systems in 64 countries – see <https://verfassungsblog.de/power-and-the-covid-19-pandemic/> (visited

terms of proportionality, many arguments in the national debates relate to the ethical, moral and social acceptability of the different restrictions, the importance of individual autonomy and freedom of choice, solidarity, the weight of guaranteeing equal access to health care, or the need to respect religious and personal opinions.⁵³

A complicating factor for the Court in this respect is that the many Covid-19 measures, conflicts and dilemmas are unprecedented and raise legal issues that hitherto have not reached the Court. Consequently, there are only few directly relevant precedents available, which makes it less easy for the Court to rely on the standards- and analogy-based approaches discussed in Section 2.1. Put differently: since the Court has hardly been able to develop clear tests, standards and lists of factors for many Covid-19 cases as yet, it cannot simply apply and further develop them.

All the same, it is suggested here that the Court is not likely to veer back to its famous fully open balancing approach to deal with these cases. This submission can be supported by two recent judgments that have significant relevance for the Covid-19-related cases. One of them is expressly about Covid-19 measures: the abovementioned case of *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* concerned a full ban on public gatherings that aimed to prevent the spread of the coronavirus.⁵⁴ The other case, *Vavříčka and Others v. the Czech Republic*, led to a Grand Chamber judgment in 2021.⁵⁵ Although the case was not about Covid-19, but concerned compulsory vaccinations against childhood diseases, it contained several elements that can be expected to arise in future Covid-19 cases: it was about a morally sensitive, divisive and hotly debated issue related to public health, individual autonomy and solidarity, and the Court had not yet expressly pronounced itself very clearly on the topic.⁵⁶

25 August 2022), DOI: 10.17176/20210222-154018-0. See also Ewoud Hondius et al. (eds.), *Coronavirus and the Law in Europe* (2021).

53 *Ibid.*

54 *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, ECtHR 15 March 2022, 21881/20. Please note that at the time of writing, a request had been made for the case to be submitted to the Court's Grand Chamber.

55 *Vavříčka and Others v. the Czech Republic*, ECtHR (GC) 8 April 2021, 47621/13.

56 Some earlier judgments related to the matter did not raise the issue of compulsory vaccination in a similarly principled manner; see, e.g., *Solomakhin v. Ukraine*, ECtHR 15 March 2012, 24429/03; *Baytüre v. Turkey*, ECtHR 12 March 2013 (dec.), 3270/09. For an analysis of relevant earlier case law, see in particular Francesca Camilleri, "Compulsory vaccination for children: Balancing the competing human rights at stake", 37 *Netherlands Quarterly of Human Rights* (2019), 245, DOI: 10.1177/0924051919861797. On the relevance of the judgment in *Vavříčka* for future cases on compulsory Covid-19 vaccination, see also, e.g., Aleksandra Alekseenko, "Implications for COVID-19 vaccination

The next sub-sections take a closer look at the Court's reasoning in these two judgments in order to provide a better insight into the Court's approach to cases concerning clear conflicts of rights and interests.

3.2 *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*

The *CGAS* case was brought to the Court by an organisation that aimed to protect workers' interests and often organised collective actions, rallies and demonstrations to that end.⁵⁷ On 13 March 2020, however, the Swiss federal government issued a decree to the effect that all events were prohibited as of that date because of the Covid-19 crisis. On 20 June 2020, the ban on public gatherings was largely lifted, but the prohibition of events and demonstrations in which more than 1,000 people would participate remained in place until the end of August 2020. The various decrees caused *CGAS* to cancel several events and rallies, and the organisation complained before the Court that its right to demonstrate (Article 11 ECHR) had been infringed.

In its judgment in the case, the Court's Chamber paid significant attention to the test of "necessity in a democratic society" as contained in Article 11(2) ECHR. It started its reasoning by noting that the threat caused by Covid-19 was very serious and that, at least initially, there was little knowledge about the coronavirus and its spread.⁵⁸ The national authorities therefore had to act quickly and make decisions in very complex circumstances.⁵⁹ They also had to take account of their positive obligations to protect human life and health arising from Articles 2 and 8 ECHR. Hence – albeit implicitly – the Court acknowledged that the case concerned a conflict of rights.⁶⁰

The Court continued to consider that a complete prohibition of certain behaviour – such as organising or participating in demonstrations – is a drastic measure that substantially affects fundamental rights.⁶¹ In view of this, solid reasons must be put forward to justify such a prohibition.⁶² The Court added that it is up to the States, in particular the national courts, to carefully weigh

following the European Court of Human Rights' decision in *Vavříčka and oths v Czech*, 22 *Medical Law International* (2022), 75; Ignatius Yordan Nugraha, Juncal Montero Regules and Merel Vrancken, "Vavříčka and Others v. The Czech Republic", 116 *American Journal of International Law* (2022), 579, DOI: <https://doi.org/10.1017/ajil.2022.36>.

57 *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, ECtHR 15 March 2022, 21881/20.

58 *Ibid.*, para. 84.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*, para. 85.

62 *Ibid.*

the interests involved.⁶³ It found it striking that the national courts did not carry out a thorough review of the relevant decrees.⁶⁴ It held this to be problematic for several reasons. First, the full ban had been in place for a relatively long time and therefore had a strong impact.⁶⁵ Second, the claim made by CGAS that less infringing measures had been conceivable had not been specifically addressed.⁶⁶ Third, in view of the serious and acute threat that the Covid-19 pandemic posed, there had been very little time and opportunity to have extensive discussions at the national level in which Parliament could be involved.⁶⁷ In such circumstances, the Court emphasised, full, independent and effective judicial review of executive action is imperative.⁶⁸ Finally, the Court reasoned that the measure at issue was particularly problematic because of the seriousness of the sanctions that could be imposed, which included custodial sentences. The Court considered the maximum term of imprisonment of three years a very far-reaching punishment that could have a chilling effect on people who wanted to organise or participate in an event, demonstration or gathering.⁶⁹ The Court concluded from all this that the far-reaching interference with the freedom of demonstration could not be considered proportionate to the aims pursued.⁷⁰

It can be seen in the Court's argumentation in *CGAS* that it does not entail any real balancing of rights or interests, even though its reasoning was framed in terms of a proportionality review. In particular, the Court did not expressly weigh the chilling effect of the sanctions and the impact of the full ban on public gatherings to the objective of preventing the spread of Covid-19. Instead, the Court's review was primarily procedural in nature; the main reason for its finding of a violation seems to be that the national courts did not sufficiently review the proportionality and reasonableness of the executive decree, which had not been the object of a full democratic debate in the first place. Although the Court included several substantive arguments related to the seriousness of the interference in its reasoning, its approach therefore can be typified as rather strongly process-based in nature and as setting mainly procedural standards of judicial review to be met on the domestic level.

63 *Ibid.*

64 *Ibid.*, para. 86.

65 *Ibid.*

66 *Ibid.*, para. 87.

67 *Ibid.*, para. 88.

68 *Ibid.*

69 *Ibid.*, para. 89.

70 *Ibid.*, para. 91.

3.3 *Vavříčka and Others v. the Czech Republic*

The *Vavříčka* case concerned an obligation for all children in the Czech Republic to be vaccinated against common but dangerous diseases such as measles and hepatitis B.⁷¹ Non-compliance with the obligation would result in children being excluded from preschool facilities or the imposition of a fine on the parents. The Court recognised that this resulted in a clear interference with the right to respect for one's private life (Article 8 ECHR), for which a justification needed to be provided.⁷² As mentioned, this was the first such case to reach the Court, so it had few specific precedents available that could inform its decision as to whether the obligation could be held to be compatible with Article 8 ECHR.⁷³ Consequently, the analogy-based approach, which Section 2 has argued to be a much-favoured type of reasoning with the Court, could not readily be used in the case. Instead, the Grand Chamber chose to create a new set of principles in giving shape to its proportionality test.⁷⁴ In the Court's own words, this test should not come down to conducting an ad hoc balancing exercise of its own, but should be about reviewing "whether, in striking the particular balance that they did, the Czech authorities remained within their wide margin of appreciation in this area".⁷⁵ It identified several factors that were relevant to this review.

First, the Court held that the Czech model did not constitute a very far-reaching interference in individuals' private lives, since it provided for

71 *Vavříčka and Others v. the Czech Republic*, ECtHR (GC) 8 April 2021, 47621/13.

72 *Ibid.*, paras. 261, 263.

73 See, however, *Solomakhin v. Ukraine*, ECtHR 15 March 2012, 24429/03; *Baytüre v. Turkey*, ECtHR 12 March 2013 (dec.), 3270/09; see also the earlier analysis of potentially relevant precedents by Camilleri, *supra* note 56.

74 The judgment has many more interesting elements. First, referring to several relevant precedents, the Court decided that the margin of appreciation for States to adopt a compulsory child vaccination programme should be wide (*Vavříčka and Others v. the Czech Republic*, ECtHR (GC) 8 April 2021, 47621/13, paras. 274–280). In addition, the case clearly entailed questions regarding the effectiveness and necessity of such a compulsory system to achieve the objective of protecting individual and public health against a number of dangerous contagious diseases. At this point, the Court deferred to the national government and did not assess the available empirical evidence. It merely held that it was reasonable for the government to rely on such evidence and use it as a basis for its interpretation of what protection of "the best interests of the child" entailed (*ibid.*, paras. 281–289, in particular, para. 283). In its conclusion, the Court also expressly mentioned that "ultimately, the issue to be determined is not whether a different, less prescriptive policy might have been adopted, as has been done in some other European States" (para. 310). Hence, the aspect of the measure's necessity was clearly not decisive.

75 *Ibid.*, para. 310.

exemptions and the sanctions were moderate.⁷⁶ The Court noted that individuals could contest the consequences of non-compliance by using various legal remedies.⁷⁷ Furthermore, it observed that the applicable rules could flexibly be adapted to new epidemiological and medical insights, based on a policy-making process informed by expert knowledge and offering guarantees for integrity.⁷⁸ The Court further pointed at the existence of safeguards for checking the effectiveness and safety of the vaccinations and highlighted the States' leeway regarding the choice of vaccine.⁷⁹

Second, after having listed these mostly procedural considerations, the Court assessed the intensity of the interference with the right to respect for one's private life. It reasoned that non-vaccinated children's exclusion from school meant the loss of an important opportunity for them to develop their personalities and to begin to acquire important social and learning skills in a formative pedagogical environment.⁸⁰ However, it then nuanced this by stating that there would still be other possibilities to develop their personal, social and intellectual competences.⁸¹ It also noted that this loss of developmental opportunities was the direct consequence of a choice made by the parents to decline to comply with a legal duty.⁸² According to the Court, it was not disproportionate for a State to require individuals to accept a universally practised protective measure in the name of social solidarity and in light of the important objectives served by it.⁸³ In conclusion, the Court held that the Czech authorities had not exceeded their margin of appreciation and Article 8 ECHR had not been violated.⁸⁴

In the first part of its proportionality argumentation, the Court's Grand Chamber thus essentially defined two sets of procedural standards. First, it held that whether the measure provided for exemptions and the sanctions provided are not overly heavy and punitive must be assessed. Second, sufficient procedural safeguards must be provided, both in terms of the procedure leading up to adopting restrictive measures and in terms of offering legal remedies

76 *Ibid.*, paras. 291–294.

77 *Ibid.*, para. 295.

78 *Ibid.*, paras. 297–298.

79 *Ibid.*, paras. 300–301. On the obligation to take precautions in this regard, some precedents were available; the Court pointed, in particular, at *Solomakhin v. Ukraine*, ECtHR 15 March 2012, 24429/03 and *Baytüre v. Turkey*, ECtHR 12 March 2013 (dec.), 3270/09.

80 *Vavříčka and Others v. the Czech Republic*, ECtHR (GC) 8 April 2021, 47621/13, para. 306.

81 *Ibid.*, para. 307.

82 *Ibid.*, para. 306.

83 *Ibid.*

84 *Ibid.*, para. 310.

to individuals. These standards open the door to procedural review in later cases, in line with what has been discussed in Section 2.2.

The second part of the Court's proportionality argumentation contains a substantive line of reasoning, which concentrates on the choice the national authorities had made between, on the one hand, protecting public health and social solidarity and, on the other hand, individual autonomy and possibilities for children to develop themselves socially and intellectually. In the end, however, the Court did not actually balance these interests. In light of the wide margin of appreciation granted to the State, it merely assessed if the balance struck on the national level was not unreasonable.

4 Conclusion

Undoubtedly, many cases on Covid-19-related (emergency) measures will come before the ECtHR in the coming years. In light of the Court's famous "fair balance" test, it is tempting to assume that it will solve such cases – which nearly all concern conflicts between rights or conflicts between rights and public values – by applying a traditional balancing approach, in which it weighs the relevant substantive interests at stake or in which it reviews the fairness of the balance struck by the national authorities. However, it has been argued in the present article that this is highly unlikely considering the developments in the Court's argumentation strategies. Over the past decades, the Court has moved away from actual judicial balancing review. Nowadays it relies mostly on analogy-based and precedent-based application of substantive tests and standards. In addition, the Court often reviews national decisions and choices in a procedural manner. This entails the definition of and review against procedural standards as well as review of whether the national authorities have duly applied the Court's substantive tests and standards. When applying these methods of procedural review the Court does not always have to get deeply involved with the substantive reasons underlying a national decision, or can shape its reasoning by combining process- and substance-based arguments without having to rely on open balancing review.

Section 3 has argued that, initially, it may be difficult for the Court to avoid open balancing in some Covid-19-related cases, if only because there are few precedents available in which it can find relevant analogies. However, in response to the first Covid-19 case that related to a true conflict of rights – the *CGAS* case on a Swiss ban of public gatherings to prevent the spread of the coronavirus – the Court dealt with this by opting for a strongly procedural approach. It mainly found a violation of the Convention because the national

courts had not sufficiently reviewed the proportionality and reasonableness of an executive decree, which had not been the object of sound and extensive democratic deliberations. A full balancing approach was missing in the case and the Court's Chamber did not develop detailed substantive standards and tests that can readily be applied by national courts and in its own future cases. Nevertheless, the Chamber's judgment in *CGAS* contains some general indications as to what type of factors must be taken into account in such cases, including the duration of a ban, the extent of the prohibition, and the seriousness of the sanctions involved. These factors have the potential of developing into a fuller test in subsequent judgments, perhaps to be handed down by the Grand Chamber.

The *Vavříčka* case on compulsory child vaccination showed a clearer element of substantive judicial review of a national balancing exercise. It was demonstrated in Section 3.3, however, that the Court's reasoning in the case contained many elements that are in line with the developments shown in Section 2, such as process-based considerations. Moreover, the Court's judgment in *Vavříčka* has now set a benchmark that is easy to use as a basis for analogy-based reasoning in later cases on different, yet related topics. Also considering the wide margin of appreciation the Court leaves to the States in this type of case, in such cases the Court probably will not conduct many balancing exercises of its own, but will merely assess the overall reasonableness of the choices made on the national level, based on standards similar to those defined in *Vavříčka*. For instance, if a case on a health or corona "passport" would come before it, the Court could compare the relevant policy to the compulsory child vaccination policy in the Czech Republic. Depending on the circumstances of the case, it could conclude that such a policy is less intrusive than imposing a full obligation to be vaccinated, while it is just as much informed by solidarity and public health considerations. Reasoning by analogy, the Court then might hold that – considering the conclusions reached in *Vavříčka* – a corona passport policy is not out of bounds, provided that the various procedural requirements are met. By contrast, in other cases, the Court might arrive at a different conclusion, depending on the application of the *Vavříčka* criteria.

This procedural substantive standard-setting approach has several benefits. Most importantly, it offers concrete instruments and tools that can be used on the domestic level. It thus makes the Court's future judgments more predictable and less of the "black box" that open judicial balancing is often considered to constitute. Furthermore, it allows national lawyers, representatives and agents to bring arguments that are directly relevant to the different factors identified by the Court and to search for potentially relevant precedents, or to show that procedural safeguards and solid national judicial review

were lacking – or, by contrast, readily available – on the national level. Hence, though it may be surprising for some to hear that the Court really is no longer the champion of balancing review that it has always been supposed to be, its move away from fully open balancing hardly can be regarded as problematic – indeed, it may be hailed as a positive development from a perspective of clarity and predictability of judicial argumentation.

Acknowledgements

This paper was written for and presented at the conference “The Balancing of Rights, General Interests and Science in International Litigation in Times of Global Crises” that took place in February 2022 at the Brussels Campus of Maastricht University and was organised by Giulia Gentile and Mariolina Eliantono. The insightful discussions during that conference were very helpful in writing the present article. Special thanks go to Giulia and Mariolina, as well as to the anonymous peer reviewers, for their valuable comments.